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The European Union, Poland and authoritarianism

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With president Andrzej Duda's 2020 reelection, Poland continues its march towards authoritarianism. Duda supports the Law and Justice ('PiS') party, which has been leading Poland down the illiberal route since 2015. After Duda's victory, one can expect the intensification of the country democratic backsliding and a confrontation between the Polish government and the European Court of Justice ('ECJ'). Sadly, this confrontation is likely to be successful for the Polish side. The key factors contributing to such an outcome are the judgment of the German Bundesverfassungsgericht ('BVG') from the 5th of May 2020, and the practical fact that the European Union is preoccupied with matters more essential to its existence than Poland's authoritarian future.

[The judgment of the BVG from the 5th of May 2020](#) evolved around the Public Sector Purchase Programme ('PSPP') of the European Central Bank ('ECB'). The programme, introduced by the ECB to stimulate the European economy, faced fundamental challenges regarding its legality. The BVG submitted a request for a preliminary ruling to the ECJ, expressing its justified doubts regarding the PSPP Programme. However, these doubts were dismissed by the [ECJ in its judgment from the 11th of December 2018](#). This lack of judicial foresight on the side of the ECJ led to an equally shortsighted response by the BVG. The BVG rejected the preliminary ruling and issued a judgment in which it declared the ruling by the ECJ to be ultra vires. According to the BVG:

The Court of Justice of the European Union exceeds its judicial mandate, as determined by the functions conferred upon it in Article 19(1) second sentence of the Treaty on European Union, where an interpretation of the Treaties is not comprehensible and must thus be considered arbitrary from an objective perspective. If the Court of Justice of the European Union crosses that limit, its

decisions are no longer covered by Article 19(1) second sentence of the Treaty on European Union in conjunction with the domestic Act of Approval.

The BVG judgment has fundamental importance for the future of the rule of law in the EU. [Art. 7 TEU](#), which should safeguard the rule of law in the EU, is inoperative. The procedure requires unanimity of the EU member states which the Hungarian-Polish alliance effectively blocks, not to mention other countries wishing to avoid directly challenging the Polish government. Thus, the ECJ proceedings initiated by the Commission were the remaining hope for an effective mechanism challenging Poland's authoritarian backsliding. However, the procedure leads to an inevitable clash between the ECJ and the Polish Constitutional Tribunal.

The Polish Constitutional Tribunal has been successfully captured by PiS. Its president is a friend of Jaroslaw Kaczynski (the leader of PiS), while the majority of the Tribunal's 15 judges have or had clear links to PiS. Thus, the Tribunal is more a political body than a court; as I have discussed [here](#). Consequently, the Tribunal will defend the line set by the Polish government in its upcoming clash with the ECJ.

The PSPP judgment of the BVG offered Poland's government an unexpected and invaluable weapon for this fight. The Polish Ministry of Justice already stated on its [website](#) that 'The ruling of the German Constitutional Court shows that in the dispute regarding the judiciary system the Polish Government, the Polish Constitution and Member States of the European Union are right.' Clearly, the Polish Constitutional Tribunal will declare any final judgment threatening the Polish capture of the judiciary to be *ultra vires*. Such a declaration will no longer be shocking to the EU – it will just follow the BVG's footsteps.

Should this not be enough, one has to consider that the rule of law is relatively insignificant compared to the COVID19 crisis, the economic crisis, Brexit or the immigration crisis. The unanimous budgetary consensus of the EU from the 21st of July shows it plainly. Despite original ambitious announcements regarding a rule-of-law conditionality of the new EU budget and stimulus package, the final [statement](#) contained merely a watered-down and vague remark about the importance of this principle.

With Duda reelected, PiS is sure to continue consolidating its power. The BVG PSPP judgment and the multiple crises faced by the EU make his task easier. The cogs of the European Union will keep turning, albeit with authoritarianism being more present than ever.

Bio: Dr Robert Mezyk is an international lawyer and philosopher lecturing at Australian Catholic University and the University of Technology Sydney. Robert holds a PhD title from Humboldt University in Berlin, master of laws and a master of philosophy from Jagiellonian University in Cracow, as well as a Magister Legum (LL.M) from Johannes Gutenberg Universität Mainz. His research interests cover international law and economic governance, European Law, human rights and the rule of law. In 2019 Robert published his book 'Die EU und die Finanzkrise' ('The EU and the Financial Crisis').

The opinions expressed in this blog are solely those of the author and not necessarily those of ESAANZ.

