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PLAYING WITH FIRE: THE EU-POLAND LEGAL CRISIS

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Summary

Poland has been in the spotlight of European media and public opinion in recent weeks. The country's Constitutional Tribunal ruled on the 7th of October that some parts of EU law are inconsistent with the country's constitution. This decision flared up the already existing political and legal tug-of-war between the EU and Poland.

Key points

- The EU-POLAND dispute is about the future of the EU and its federalisation.
- The support for the EU is coupled with a sense of indifference in Polish society.
- The quality of Polish EU membership is at stake, and the current dispute can lead to fundamental changes in the country's perception of the EU.
- The EU has the upper hand with powerful financial tools at its disposal.

Introduction

Since 2015, when the current government of the Law and Justice (PiS) Party assumed power in Poland, the European Union (EU) has expressed strong criticism over several areas. These include human rights, independence of the judiciary, and media freedom. The government has embarked on a process of judiciary reforms, which, according to the EU, are aimed to strengthen political control over the courts. Most criticisms were directed towards the Disciplinary Chamber of the Polish Supreme Court, which can start disciplinary proceedings against judges based on the content of their rulings (Easton, 2021). This carries the risk of politicising the judiciary, as the chamber is stacked with government loyalists (Davies & Rankin, 2020). Accordingly, the European Court of Justice (ECJ) ruled in July 2021 that the Disciplinary Chamber is not compatible with the EU law, and thus, must cease its operations (European Parliament, 2021). However, the Polish government failed to suspend the body, resulting in the Commission's new¹ infringement procedure against the country. The EU stated that Poland's decision is unprecedented, poses a risk to the unity of the European legal order, and endangers the rights of EU citizens.

The Polish Constitutional Tribunal decided that the national constitution has primacy over EU law in certain issues. This justified that the country does not need to comply with the ECJ's earlier rulings. The Polish government confirmed the judgement and argued that the EU founding treaties did not include provisions about the supremacy of EU law, as this practice is established by the case law² of the ECJ (Zsoldos, 2021). Notably, it should be underlined that EU law takes precedence only where EU nations have delegated sovereignty to the EU ("Primacy of EU law", n.d.). The PiS government claims that in the case of its national judiciary reforms, the EU has no competence; thus, the ECJ is overstepping its mandate and extending the powers of EU bodies compared to the treaties (Zsoldos, 2021). Indeed, the EU is often criticised for going beyond the boundaries of written law. According to Dr. Attila Vincze, an expert in EU law, the ECJ tends to interpret the often-ambiguous founding treaties in the direction of deepening the integration (Zsoldos, 2021).

Another argument often put forward by the PiS government is that other constitutional courts, including Germany's, have already questioned the primacy of EU law and that the EU is biased and acts unfairly in the Polish case. However, according to a Member of the European Parliament, Guy Verhofstadt, there is a substantial difference between these cases. The other EU member states countries never ruled that Articles 1 and 19 of the Treaty on the European Union are not applicable within their countries (Verhofstadt, 2021). It is also important that the Polish Constitutional Court ruled to respond to the government's request (Van Dorpe, 2021).

Whereas there is a precedent for disregarding the ECJ rulings, there is none for finding articles from the founding treaties inconsistent with the national constitution. According to Guy Verhofstadt, this has only happened in the UK, which also decided on leaving the EU afterwards (2021).

After Brexit, Polexit?

Following the October 7th ruling of the Polish Constitutional Tribunal, the media was flooded with articles and politicians asserting that the legislation is a clear step towards Poland's exit from the EU.

¹ Overall, the Commission has four active infringement procedures against Poland in the area of Justice, Fundamental Rights and Citizenship (European Commission, n.d.).

² The case law of the ECJ is established by the outcome of former cases, based on judicial decisions.

However, the PiS government has firmly rejected these assumptions and stated that the future of their country is inside the European Union. Indeed, it is hard to compare Poland to the UK, as in the former, 90% of the population supports the EU membership (Sas, 2021). Therefore, in case of a referendum about the EU, there is no question about the outcome in Poland. Besides this, in contrast with the UK, Poland is one of the biggest monetary benefactors from the EU (Buchholz, 2020), and the Polish economy has seen rapid development since its EU accession, producing one of the fastest growth rates among Central and Eastern European economies since 2005 (Zsoldos, 2021). As there is no social or economic good in leaving the EU, politicians in Poland do not have any motivation to pursue it. So, why is the legal war taking place in Poland so fiercely? To answer this question, it is necessary to examine the society's in-depth perceptions and uncover underlying factors behind its approach towards the EU.

The real attitude towards the EU in Poland

Although on the surface, the Poles are seen as EU supporters, their case is not this simple. Their attitude towards the EU became more pragmatic after Poland's accession (Cichocki, 2011). The overwhelming support for the EU can be seen in the population's strong European identity and historical and cultural roots. However, there is no real engagement or involvement in European matters within the society at the same time. This can be seen in the very low voter turnout in the European Parliamentary elections before 2019³ (Cichocki, 2011). While the Polish society is largely Euro-enthusiast, it is also indifferent towards some European matters.

A 2020-2021 survey assessing public opinion in eight EU countries, including Poland, showed that the Poles tend to be less interested in strengthening the common EU policies. For instance, the survey found that there are issues about which the Poles were the least supportive out of all eight countries. Those included European involvement in strategic areas, such as food and health, defence of the Union's values, control of the external border, tools to fight against foreign interference, control over strategic infrastructures, tax resources, or control of digital infrastructure (Vacas, Lama, & Boisson, 2021).

Even though the country has benefitted from being an EU member in various ways, and the population sees Poland's place within the EU, the Europeanisation process is often seen as a threat to the country's national sovereignty and identity (Kania-Lundholm & Lindgren, 2015).

The government's narrative

The PiS is a right-wing populist party with nationalist and Eurosceptic tendencies. Since it took power in 2015, it has developed the narrative that it represents the authentic Polish nation against liberal cosmopolitanism and portrays itself as the protector of the Polish national identity (Gosling, 2019). Regarding its stance on the European Union, it is no secret that the party opposes the deepening of EU integration and the expansion of its competencies.⁴ On the other hand, it also favours Poland's EU membership.

³ In the 2019 EP elections, there was a sudden surge in electoral participation, but the reason for this is more likely the fact that the elections coincided with the national parliamentary elections, and not in the increased interest in the European Union (Briatte, Kelbel, & Navarro, 2020).

⁴ The lower house of the Polish Parliament (the Sejm) passed a resolution that the EU should be reshaped into a loosely bound association of strong sovereign states (Balcer, Buras, Gromadzki, & Smolar, 2017).

According to Politico's reporter, Zosia Wanat, the current fight with the EU was not intended from the PiS side, as the efforts to exert control over the judicial system had domestic political motives (Wanat, 2021).

Now, the debate is not only about the rule of law in Poland but also about the EU's future and its federalisation. The Polish government has underlined that it sees the EU as a union of strong, sovereign states and Poland fears that the EU could assume powers, which would allow it to interfere with the internal affairs of the member states. The PiS dismisses the accusations of intended Polesxit and asserts that it is only defending national sovereignty and interests against an increasingly power-hungry EU. This narrative seems appealing to Polish citizens, as the polls indicate continuous strong support for PiS ("Poland — National parliament voting intention", n.d.).

There is undoubtedly a stalemate between the EU and Poland now. On one hand, the PiS cannot give up its narrative that it is the "unrelenting defender of Poland's national interest"; otherwise, it would risk losing a considerable number of supporters. That of which it cannot let happen since the 2023 elections are coming up (Wanat, 2021). On the other hand, if the EU were to give up its stance and withdraw its rulings, it would mean giving up one of its fundamental values enshrined in the treaties – seeking an ever-closer union among its members. Consequently, the EU cannot withdraw from its position on the issue, as that would signal its powerlessness in a world that already sees the Union's decreasing geopolitical importance.

Future implications

It is essential to consider the EU's perception of Poland as well. Whereas fears of Polesxit are often seen as coming from the side of Poland and not the EU, the latter can also push Poland further away. Although there is no mechanism to expel a member state from the EU, the Article 7 procedure enables the Union to deprive its members of certain rights. In the most serious case, this would be the right of voting. Of course, it is not in the interest of the EU to push Poland away with this legal path.

Nonetheless, the Article 7 procedure had already been initiated in 2017. As long as unanimity is required in the European Council for concrete actions in this procedure, Poland need not worry, as its ally Hungary can block the decision. Besides the Article 7 procedure, there are financial tools at the Commission's disposal. The most important is the European Rule of Law Mechanism, which allows the Commission to delay the funds to protect the Union's budget against breaches to the rule of law.

Another is infringement procedures, which can lead to imposing fines on the country. These are already employed by the EU: the ECJ recently ruled that Poland must pay €1 million daily fine until it complies with its earlier ruling regarding the suspension of the disciplinary chamber for judges. This fine is coming on top of an already imposed daily fine of €500 000 ("Top EU court fines Poland 1m euros a day over judicial reform", 2021). Additionally, the Commission is delaying the approval of Poland's national recovery and resilience plan, which holds up the transfer of the agreed COVID recovery funds to the country. This means that the Commission is deploying every tool to prevent Poland from questioning the Union's foundations.

As the Poles are rather pragmatic towards the EU, the potential lack of financial gains can question the beneficial nature of Polish membership. Still, the EU can send the money directly to the Polish

society, leaving the government out of the process and keeping the European public dissent on the PiS rather than the whole country.

Conclusion

It seems that Polish EU membership is not in question, as Poles are not in the interest of neither disputing party. However, this can change in the future if the situation escalates. What is rather at stake is the quality of the country's membership (Balcer, Buras, Gromadzki, & Smolar, 2017).

Despite the fact that the Poles are not explicit supporters of deeper European integration, according to a recent survey, almost three-quarters of the population believe that the government should accept some or all EU demands ("Most Poles think Warsaw should give ground in EU dispute: Survey", 2021). One of the reasons for this is that a massive amount of money is at stake, which is increasingly important to the country amidst struggles to recover from the pandemic. Although PiS claims it would not pay the imposed fines, these can be directly subtracted from the EU's budget payments to the country (Van Dorpe, 2021). Additionally, until the EU confirms the national recovery plan of Poland, the government cannot access the €36 billion recovery package of grants and loans.

Thus, the EU seems to have the upper hand in the dispute, as it has powerful financial tools and legal pathways at its disposal. However, it cannot let Polish society down at such challenging times if it wants to preserve its positive image and prevent its alienation in the long run. Now, maintaining dialogue between Poland and the EU is of utmost importance as the current hardline approach from both sides cannot lead to a pragmatic solution. In the end, one side needs to give space to a compromise; the question is who will make the first step.

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