



Policy Brief

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Restoring the Rule of Law in Poland: An Assessment of the New Government's Progress

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Summary

Poland's new government since December 2023 has made progress in restoring the rule of law—but the process is slow. It is constrained by political factors, such as the president's veto power. The government has presented an Action Plan containing several laws intended to end the rule-of-law crisis that has been ongoing since 2015, to bring Poland in compliance with the judgments of European courts, and to achieve genuine reforms in the judiciary and prosecution services. The reform is set to encompass laws concerning the National Council for the Judiciary, the Supreme Court, common courts, and the prosecution services.

Although none of these laws has been enacted and signed by the president yet, the European Commission has unblocked EU funds for Poland that had been withheld over the crisis. The EU has also ended the Article 7 procedure against Poland that had been in place since 2017 because it judged there is no longer a serious risk of the breach of the rule of law in the country.

The process of holding previous officials criminally accountable for abuse of office and corruption is beginning. An extensive misuse of the public Justice Fund in the Ministry of Justice to finance initiatives promoting politicians from the former minister of justice and prosecutor general was unveiled. There is a proposal in parliament to waive the immunity of the former deputy minister of justice in connection with the use of the Justice Fund to purchase of the controversial Pegasus surveillance software for the authorities. Important figures associated with the previous government ran on the Law and Justice list for the European Parliament in order to obtain immunity in this way and were elected.

The ideologically diverse parties in the governing coalition agree on the need to restore the rule of law and increase Poland's democratic resilience. Prime Minister Donald Tusk must increasingly confront the impatience of his coalition's voters demanding accountability for abuses of office and other crimes by official during the previous government, resolving the rule of law crisis, and improving the efficiency of the courts. Meanwhile, the whole electorate expects assurances regarding security and social protections. Failure to meet these expectations would likely pave the way for the return of the populist, anti-rule of law right.

Introduction

Since taking office in December 2023, Poland's coalition government led by Prime Minister Donald Tusk has started to work on solving the country's complex, systemic rule-of-law problems that were caused by its predecessor between 2015 and 2023. Slow progress so far is partly due to the possibility that President Andrzej Duda, who supports the former governing populist right-wing Law and Justice (PiS) party, might veto related bills. His second and last term in office will end in August 2025. Another reason is that the government has chosen the slower path of expert deliberations and consultations with stakeholders, including judges and social organizations, in the process to reform the justice system. Nonetheless, the government has achieved considerable successes by enhancing Poland's credibility as a rule-of-law-respecting member of the EU, the Council of Europe, and NATO—as a country committed to upholding its international obligations and respecting the constitution as well as EU and international law.

This is a significant change from the situation under the previous government, which used institutions such as the Constitutional Tribunal to challenge EU law and the European Convention on Human Rights on judicial independence issues. This led to prolonged conflicts with the EU institutions over the rule of law that revealed deeper issues concerning European integration and EU oversight of member states that do not respect basic democratic values. In contrast, the Tusk government wants Poland to have a strong position within European and transatlantic structures, and to build its relations with partners through constructive dialogue, while assertively defending the country's interests.

Unblocking EU Funds

Warsaw and Brussels are experiencing a honeymoon period, which has seen tangible changes. The greatest success of the Tusk government so far has been unblocking billions of euros for Poland from the EU post-pandemic Recovery and Resilience Facility (RRF), which the European Commission had linked to conditions regarding judicial independence. Moreover, the European Commission has closed the procedure of political dialogue with Poland's government under Article 7 of the Treaty on European Union, which had been launched over concerns about judicial independence.

In February, Minister of Justice Adam Bodnar unveiled the government's Action Plan¹ to restore the rule of law in Poland, and the country joined the European Public Prosecutor's Office, which is charged with combatting crimes affecting the financial interests of the EU. The Action Plan is a roadmap for enhancing democratic resilience by reinstating constitutional order and ensuring compliance with EU and international law through several bills. In the long term, it promises to comprehensively reform the justice system to enhance its efficiency and make it more citizen-centered. However, implementing the promised solutions is challenging.

Following the presentation of the action plan, the European Commission decided that under the current government, judicial independence and therefore the protection of EU financial interests, would not be jeopardized, and agreed to release the RRF funds. Poland's Recovery and Resilience Plan amounts to €34.5 billion in low-interest loans and €25.3 billion in grants, and it will be used to speed up the green energy transition, digitization, and improvements to healthcare services, education, and the labor market.

Additionally, the European Commission will not withhold the disbursement to Poland of €76.5 billion EU funds for 2021–2027, which is conditional on respecting the Charter of Fundamental Rights of the European Union.²

The National Council for Judiciary

Poland's previous government implemented changes in the judiciary that the Supreme Court and international bodies such as the European Court of Human Rights and the Court of Justice of the EU in numerous rulings deemed inconsistent with the constitution and EU law. PiS misrepresented these changes as aiming to expedite court proceedings. In fact, the time taken for adjudicating cases in courts increased between 2015 and 2023.³ In reality, the goal was to replace judges with appointees close to PiS.

At the heart of this was changing the rules on selecting the 15 judges to the National Council of the Judiciary, which recommends candidates to the president for judgeships. Whereas they used to be selected by other judges, since the law was changed in 2017 by the previous governing majority the 15 judges are selected by the Sejm, the lower house of parliament.

There are about 10,000 judges in Poland, with approximately 2,400 appointed and promoted based on the council's recommendations since 2018. Commonly referred to in Poland as "neo-judges", they have been deemed by the Supreme Court and the European courts to lack independence due to the involvement of the politicized council in their appointment.

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Judges appointed under the old rules were actively involved in defending the rule of law and expressed disapproval of changes weakening judicial independence during the PiS government. For example, they refused to adjudicate cases alongside the "neo-judges", for which they faced disciplinary reprisals.⁴ Moreover, judges' associations have encouraged their members not to participate in competitions for promotions so as not to legitimize the system created by PiS.

Under the leadership of Bodnar, a law professor and former commissioner for human rights, the Ministry of Justice plans to reform the system for appointing judges. The first element of the Action Plan is to ensure that the National Council of the Judiciary is appointed in accordance with the constitution, meaning that the majority of its members are chosen by other judges, not politicians.

In April, the lower house of parliament, the Sejm, passed the bill on the National Council of the Judiciary.⁵ In May, the Senate also passed it with amendments,⁶ the most notable of which was that neo-judges are not prohibited from running for the council, in line with a recommendation of the Council of Europe's Venice Commission.⁷ However, this change infuriated part of civil society, including a prominent

association of judges, *Iustitia*, whose members pressured the governing majority to reverse it. At the time of writing, the relevant committee in the Sejm was considering the amended bill. The Sejm can reject the Senate's amendments with an absolute majority vote.

On May 20, in a televised interview Tusk supported Bodnar, who was attacked by opponents of the Senate's amendments. The prime minister emphasized that the controversial amendment aimed to circumvent a presidential veto. The minister of justice has also held talks with the president about the bill. The government wants to show the EU that the bills promised in the Action Plan will soon come into effect.

The Ministry of Justice is working on separate bills on what to do with the neo-judges, most likely one each for those on the Supreme Court and those on lower courts. The ideas are being discussed with representatives of judges, nongovernmental organizations, and academics. The discussion began based on draft bills presented by the judges' associations *Iustitia* and THEMIS after the parliamentary elections, when a heated public debate erupted on the issue of the neo-judges, with experts presenting various concepts to address it.⁸

The proposals that have been developed by civil society are based on two models.⁹ The first assumes that the competitions for judicial positions during the PiS government are invalid and need to be rerun, with the neo-judges able to participate. The second suggests that the neo-judges should undergo an individual verification process, taking into consideration the nature of the competition they participated in and their performance since taking office. So far, the government has not presented its own project addressing the issue.

The Constitutional Tribunal

The first element of the rule-of-law crisis that unfolded after PiS came to power in 2015 was the appointment of three persons to the Constitutional Tribunal to positions already legally filled by judges selected by the previous parliament. In 2015 and 2016, the PiS government then passed laws limiting the competence of the tribunal, and the PiS-friendly Julia Przyłębska was elected its president. Since then, the tribunal has not fulfilled its role as an independent body tasked with centralized judicial review. Instead, it effectively became an arm of the government, confirming the latter's judiciary policies and issuing controversial rulings, including in October 2020 the one restricting legal abortion that sparked the biggest nationwide protests in Poland since 1989.

The Constitutional Tribunal consists of 15 judges, currently all of whom were appointed by PiS. This includes three known "doubles" because they occupy seats already assigned by the Sejm before PiS came to power in 2015. In 2021, the European Court of Human Rights ruled that judgments by these improperly appointed "doubles" violated the European Convention on Human Rights. The PiS government not only failed to comply with this judgment but also used the Constitutional Tribunal to challenge other judgments of the court. It also utilized the tribunal to challenge the interpretation of EU treaties by the Court of Justice of the European Union in cases concerning judicial independence and to attack the fundamental principle of primacy of EU law over national law. This led to an escalation of the crisis

between Poland and the EU. The European Commission brought a case against Poland to the Court of Justice of the European Union regarding the Constitutional Tribunal, which is still pending.¹⁰

In the public debate in Poland, various concepts have emerged regarding what to do with the Constitutional Tribunal, including even ideas of “zeroing out”¹¹ an institution that many perceive as stained, compromised, and lacking legitimacy after PiS’s two terms in power. This would involve disbanding the tribunal and establishing a new institution with all 15 judges appointed afresh. However, the tribunal is an institution provided for in the constitution and it cannot simply be eliminated. Legal experts have developed proposals to reform it, which have gained support from many civil society organizations and have become the basis for the new government’s draft laws.¹²

In March, the government embarked on a package of solutions aimed at reforming the Constitutional Tribunal. First, the Sejm adopted a nonbinding, and thus symbolic, resolution condemning the rule-of-law crisis that took place from 2015 to 2023, including the issue of the tribunal, and affirmed that it should be resolved in accordance with the constitution and international law. The resolution has symbolic significance and demonstrates the direction of change. It states that “doubles” were appointed to the tribunal unlawfully and calls for their resignation. It also declares the election of Przyłębska as the tribunal’s president to be irregular. On May 28, the Constitutional Tribunal ruled the resolution unconstitutional. The government has disregarded this ruling.

The government has introduced two bills in parliament. The Act on the Constitutional Tribunal¹³ includes new rules for appointing judges to the tribunal, who would be selected by the Sejm with a three-fifths majority, instead of the simple majority required under the current system. This should ensure that the majority and the opposition agree on the choice of judges. This bill also introduces a new requirement that candidates for the tribunal’s judges only be eligible if they have not been active politicians for at least four years. The Act on Provisions Implementing the Act on the Tribunal¹⁴ gives the judges (but not the “doubles”) a nudge to retire before the end of their term once the new law is enacted by offering them to do so with 75% of their salary. Normally, the tribunal’s judges may retire prematurely and keep their benefits only due to serious illness. This nudge could accelerate the turnover of the tribunal judges and allow the current governing majority to appoint new ones.

Two judges who are high-profile former PiS members of parliament will end their terms in December 2028, and another who was national prosecutor and the right-hand man of the former PiS minister of justice will conclude his term in 2031.

According to the current end-of-term schedule for judges of the Constitutional Tribunal, and if none of them retires or ceases to perform their duties due to death or health reasons, the Sejm in its term till 2027 will be able to elect eight judges, and thus a majority. Three seats will become vacant in December 2024, including that of the tribunal’s president. However, two judges who are high-profile former PiS members of parliament will end their terms in December 2028, and another who was national prosecutor and the right-hand man of the former PiS minister of justice will conclude his term in 2031.

Under the Act on Provisions Implementing the Act on the Tribunal, the “doubles” would not be allowed to adjudicate and would have to vacate their positions for properly appointed judges. Moreover, judgments of the tribunal rendered with the participation of unauthorized individuals—85 between 2017 and 2022, according to one study¹⁵—would become null and void. All procedural actions in which “the doubles” participated would have to be repeated, with the tribunal required to pass new judgments in those cases. However, to protect the rights of individuals, the decisions—such as common courts’ rulings and administrative decisions of state bodies—made on the basis of judgments rendered with the participation of unauthorized individuals before the Act’s enactment will remain in force, so as to prevent chaos in the legal system.

The government has also introduced in parliament a constitutional amendment that entails “resetting” the Constitutional Tribunal and appointing its 15 judges anew.¹⁶ According to this, the Sejm would elect the judges with a three-fifths majority vote, and by a simple majority if it is not able to do so within two months of the amendment coming into force. The judges would be elected for terms of varying lengths, with five serving terms of three, six, and nine years respectively. The president and vice-president of the tribunal would be elected for a three-year term. The proposed amendment would also change the model of judicial review by allowing courts to refer legal questions to the tribunal in cases under consideration.

Given the current composition of parliament, the likelihood of amending the constitution is exceedingly low, however. This requires a majority of at least two-thirds in the Sejm, in the presence of at least half of the statutory number of deputies, and an absolute majority in the Senate, in the presence of at least half of the statutory number of senators. Assuming full participation of all Sejm members in such a crucial vote, a two-thirds majority would require 307 votes. The governing coalition currently holds 247 seats and the far-right Konfederacja, which has expressed support for a “resetting”, has 18. It is highly improbable that the PiS members would endorse a proposal put forward by Tusk’s government.

In the current political landscape, and especially with the possibility of vetoes by President Duda, who actively supported the judiciary policy of the PiS government, the enactment of laws concerning the Constitutional Tribunal hinges on the outcome of the presidential election in 2025. Until then, it is likely that the government will simply ignore the tribunal rulings. In that case, it is possible that the tribunal will continue to exist in its current form only formally with its impact on the Polish and EU legal system limited. For years, it has issued few judgments;¹⁷ for example, 14 in 2022. There are also personal conflicts among the tribunal’s judges, which exacerbates the situation, preventing a quorum in significant cases, and hearings are routinely postponed.

The Prosecution Services

The PiS government amended regulations so that the roles of minister of justice and prosecutor general are held by a single individual. This consolidated power in the hands of the influential Zbigniew Ziobro, who held both offices and was the architect of the assault on the rule of law. In January, the government proposed to separate the two functions again, in line with recommendations of the Council of Europe’s Venice Commission and the European Commission.¹⁸ However, a bill has not yet been introduced in parliament and there is to date only the outline of one.

The PiS government also politicized the prosecution services, which led to the failure to effectively investigate high-level corruption and to instances of show proceedings against government critics. Before the parliamentary elections, it transferred a significant portion of the extensive competencies of the prosecutor general to the national prosecutor, Dariusz Barski, who is a trusted friend of Ziobro. In January, the minister of justice removed Barski from the position, based on legal opinions that the latter's reinstatement to service from retirement in 2022 violated regulations and had no legal consequences—a creative exploitation of a legal loophole by the government. President Duda and the Constitutional Tribunal did not recognize this decision. However, this did not have much practical significance.

Breaking with the practices of previous years, in which the national prosecutor was arbitrarily appointed, an open competition was held for the new one. The choice was Dariusz Korneluk, a prosecutor with 30 years' experience, who advocates deep reforms in the prosecutor's office. And, as noted above, Poland has also joined the European Prosecutor's Office.

Accountability for Rule-of-Law Violations

One of the electoral promises of the parties in the governing coalition, especially Tusk's Civic Platform, was to hold officials accountable for violations of the rule of law during the previous government's time in office. In March, the prime minister stated on social media that "accountability is underway, the prosecution and courts are free from partisan directives."¹⁹ As a form of accountability for violations of the rule of law, including abuses of office and harassment of judges and prosecutors defending independent courts and apolitical prosecution, dozens of presidents of courts and dozens of heads of prosecutors who had been promoted under the previous government and executed its policies.

In May, it was announced that the National Prosecutor's Office is reviewing 63 proceedings from 2016–2023 where errors may have occurred. According to the office, these proceedings may have been conducted in a manner indicating a lack of determination by the national prosecutor in seeking to clarify all circumstances, to identify the perpetrator, and to hold them accountable. The cases include, for example, police actions against protesters or entrepreneurs.

One of the most important objects of scrutiny is the expenditures of the Justice Fund.

The Ministry of Justice and the Prosecutor General's Office are also conducting audits of the activities of the previous government. One of the most important objects of scrutiny is the expenditures of the Justice Fund. The purpose of the fund is to support crime victims and to prevent crime. However, it became a partisan body promoting Ziobro's Solidarna Polska party and favoring its initiatives and electoral campaigns. The misuse of the Justice Fund is one of the most glaring examples of the abuse of public funds for partisan purposes under the previous government.²⁰ According to Tomasz Mraz, a former director of the fund who recorded dozens of hours of conversations involving the Ministry of Justice's leadership, the fund was arbitrarily managed by the then heads of the ministry.²¹ In March, four ministry officials responsible for the fund, two members of its grant programs selection committees, and the president of one of the foundations that benefited from the fund were arrested and charged

with granting financial support to the Profeto foundation, despite the foundation not meeting eligibility conditions.²² The foundation received a grant of PLN 98 million, of which PLN 66 million has been disbursed for the construction of a center for crime victims in a prestigious district of Warsaw. The center includes a recording studio, likely intended to be a media base for Ziobro's party.²³

The Sejm has also established three investigative commissions. One deals with the organization of the presidential election in 2020 at the height of the Covid-19 pandemic and the unauthorized spending of millions of zlotys on the plan to hold the vote by post. Another commission deals with alleged visa trading in countries of Asia and Africa, which was purportedly organized by employees of the Ministry of Foreign Affairs. A third one deals with the alleged mass use of surveillance, including with the Pegasus software, from 2015 to 2023. On May 28, the minister of justice asked the speaker of the Sejm to waive the immunity of Michał Woś, the former government's deputy minister of justice, in relation to the abuse of power that occurred with the use of the Justice Fund to purchase of the controversial Pegasus surveillance software for the authorities.²⁴ Tusk commented on Bodnar's move on social media, saying "There is a first request to waive the immunity of a member of Ziobro's organized group", and thus hinting that more such actions are to come.²⁵ Important figures associated with the previous government—such as Daniel Obajtek, the former head of the state-controlled oil and gas company PKN ORLEN—ran for seats in the European Parliaments on the PiS list in order to obtain immunity through this status and were elected.

Moreover, on May 21, the government established an expert commission to investigate Russian and Belarussian influence on the internal security and the interests of Poland between 2004 and 2024. It will not hold public hearings and its first report should be ready within two months of the start of its work. The commission is composed of 11 experts, including historians, social science researchers, political scientists, a former ombudsperson, military personnel, and former diplomats.

All these actions aim to satisfy the hunger of supporters of the governing coalitions for PiS to be held accountable.

In 2023, PiS government established a parliamentary commission to investigate Russian influence, which raised alarm domestically and internationally, and led to massive demonstrations against this decision. That commission was perceived as targeting the then-opposition parties.²⁶ After the elections, in November 2023, its members were dismissed by the new Sejm.

All these actions aim to satisfy the hunger of supporters of the governing coalitions for PiS to be held accountable. However, bringing leading members of the previous government before the State Tribunal or conducting criminal proceedings against them will be difficult. Holding politicians accountable in such a way would be a significant breakthrough in the history of democracy in Poland, which, after 1989, chose a model of soft accountability for individuals who had held public office under communist rule, and later followed the unwritten rule of transferring power without serious accountability for previous rulers. Since the early 1990s, members of PiS leader Jarosław Kaczyński's circle have consistently called for decisive accountability and the party has built its platform on this stance. It remains to be seen whether this promise will be fulfilled, paradoxically, by Tusk, who is Kaczyński's arch-rival.

In May, a group of parliamentarians from the governing Civic Coalition submitted a proposal to the Sejm to bring Maciej Świrski, the president of the National Broadcasting Council since 2022, before the State Tribunal for exceeding his powers. This concerns, among other things, allegations of blocking the transfer of approximately PLN 300 million in national subscription fees from the state budget to public radio and television, as well as blocking concessions for private broadcasters.²⁷ Bringing him before the State Tribunal would require a simple majority in the Sejm.²⁸

EU Procedures Against Poland

In May, the EU closed its procedure against Poland under Article 7 of the Treaty on European Union, which had been launched in 2017 over concerns about judicial independence and threats to the rule of law.²⁹ In February, Vice-President of the European Commission Věra Jourová had said that the government's Action Plan was a step that could lead to the termination of the procedure. In May, Minister of Justice Bodnar presented before EU member states the elements of the implementation of the Action Plan, including the law on the National Council of the Judiciary. Jourová then stated that the European Commission considered that there was no longer a clear risk to the breach of the rule of law in Poland.³⁰

The governing coalition has emphasized the international and EU law obligations binding Poland, and it has declared its willingness to implement the judgments of the European Court of Human Rights and the Court of Justice of the European Union regarding rule-of-law issues. These judgments are guiding the planned reforms of the justice system. Poland has presented new positions in some of ongoing cases before the Court of Justice of the European Union and the European Court of Human Rights concerning various elements of the rule-of-law crisis between 2015 and 2023. The government is also organizing an open and transparent competition for the position of the judge representing Poland on the European Court of Human Rights. The candidates previously proposed by the PiS government were rejected three times by the Parliamentary Assembly of the Council of Europe.

Successes and Constraints

Supporters of the Tusk government continue to patiently await changes regarding the restoration of the rule of law. They seem to understand the political constraints, such as the president's veto. They perhaps also appreciate the calmer pace of change and deliberations, which contrasts with the populist lawmaking style that Poles became tired of under PiS.

In a March survey, 61.3% of respondents said the unblocking of the RFF funds was a success for the government.³¹ Additionally, 39% said changes in the judiciary were successful and 43.7% said so about improvements in the public media. Meanwhile, PiS accuses the government of undermining democracy and the rule of law, and of violating the law, among other things, through changes in the public media and the replacement of the national prosecutor. In February, it submitted a motion of no confidence in the minister of justice to the Sejm, which was rejected.

It appears that supporters of the governing coalition understand that the process of emerging from the rule-of-law crisis of the recent past will take many months, if not years. The members of the governing

coalition largely agree about the direction of this process. However, the government will be evaluated, perhaps primarily, on other key reforms: liberalization of the abortion law, on which there is no consensus within the coalition, accelerating economic development while respecting social solidarity, modernization of the army, energy transition, improvement of public transportation outside of cities, enhancement of healthcare services, acceleration of court proceedings, and ensuring development not only in metropolitan areas but also in small towns and rural areas.

The experience of PiS's time in power showed that governing is not just about administration, as previous Civic Platform governments seemed to think, but also about implementing a vision. With the Third Republic now 35 years old, Poles expect a Transition 2.0³² that will not only increase the rule of law's resilience but also make the country a more comfortable and fairer place to live for various social groups. If the current governing coalition is not credible in these areas, this will pave the way for PiS and its likes to come to power again.

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