

Anna Wójcik
February 2025

Rebuilding the Rule of Law in Poland

*The Slow and Arduous Process
towards Judicial Independence*



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1. Introduction

After one year of Donald Tusk's government, the key take-away is clear: rebuilding the rule of law is a long journey fraught with unique challenges, but the government must urgently deliver concrete solutions without waiting for the presidential election to set the course. This analysis examines the process of rebuilding the rule of law in Poland following eight years (2015–2023) of the United Right coalition government, led by the nationalist-conservative Law and Justice Party (Prawo i Sprawiedliwość, PiS). The analysis focuses on judicial independence, a foundation of the rule of law. It covers the first year of governance under a coalition led by Civic Platform, Polska2050, the Polish People's Party (PSL), and the Left, headed by Prime Minister Donald Tusk, up to December 2024.

Under PiS, Poland surpassed Viktor Orbán's Hungary in dismantling judicial independence. The constitutional crisis began with an assault on the Constitutional Tribunal in 2015. Subsequently, the PiS government adopted—and President Andrzej Duda signed into law—a package of judicial reform bills in 2017, despite nationwide protests. These reforms came into effect in 2018. Key state institutions, including the Constitutional Tribunal, the Supreme Court, the National Council of the Judiciary, and ordinary courts (including appellate courts), were systematically packed with loyalists and politicised.

PiS steered Poland away from a consolidated democracy

Unlike Orbán's Fidesz in Hungary, the PiS government did not have the supermajority required to amend the 1997 Constitution. Instead, it violated and circumvented it through ordinary legislation and formal and informal practices, altering Poland's political system and steering the country away from consolidated democracy. This process elicited responses from the European Union (EU) and the Council of Europe (CoE), though these were often criticised as belated and inadequate. In 2016 the EU initiated the Rule of Law Framework procedure against Poland for the first time in its history, followed by a political dialogue procedure under Article 7(1) of the Treaty on European Union. From 2018, the European Commission employed EU law infringement proceedings, bringing complaints before the Court of Justice of the European Union (CJEU). Between 2021 and 2024, it also withheld Poland's access

to funds from the Recovery and Resilience Facility, making disbursement conditional on meeting milestones related to judicial independence. Later, Poland's access to European funds was further restricted under the Common Provisions Regulation, which tied funding to compliance with the EU Charter of Fundamental Rights.

Following the parliamentary elections in October 2023, a standard democratic transfer of power did not occur due to systemic factors and institutional changes. The new government, led by Tusk and sworn in on 13 December 2023, operates in cohabitation with President Andrzej Duda, a figure aligned with PiS. Moreover, it also operates within a system where many key state institutions remain under the control of PiS loyalists appointed to long-term positions. These include the Constitutional Tribunal, the Supreme Court, the National Council of the Judiciary, the National Broadcasting Council, and the National Bank of Poland. Moreover, PiS remains the largest opposition party in parliament, enabling it to easily refer matters to the Constitutional Tribunal, which continues to advance PiS's agenda.

Restoring the rule of law, particularly judicial independence, is both a commitment to voters and a priority for Donald Tusk's government. Key figures tasked with this mission include Minister of Justice and Prosecutor General Adam Bodnar (the Commissioner for Human Rights from 2015 to 2021) and Maciej Berek, Chairman of the Standing Committee of the Council of Ministers, who oversees legislation.

The restoration of the rule of law is both a legal and a political challenge

The restoration of the rule of law is not only a complex legal challenge but also a political one, given Poland's deeply divided political landscape and society. Politicians from PiS and public officials who benefited from the previous coalition's tenure staunchly defend the system established under PiS, seeking to block or delay reforms through legal and extralegal means. This resistance has sparked discussions about the emergence of a dual legal system in Poland, where institutions fail to recognise each other's authority. However, this term does not fully encapsulate the issue, which is more accurately described as

the entrenched influence of the previous government in state institutions—a situation that has violated the Polish constitution, EU law, and the European Convention on Human Rights, as confirmed by independent chambers of the Supreme Court, the Court of Justice of the European Union (CJEU), and the European Court of Human Rights (ECtHR).

The subsequent sections of this report analyse developments concerning the Constitutional Tribunal, the regulation of improperly appointed judges in ordinary courts, and other policies affecting judicial independence. The final part concludes.

2. The Constitutional Tribunal

The Situation Following the PiS Government

The constitutional crisis surrounding the Constitutional Tribunal has persisted since 2015. In that year, the outgoing Civic Platform (PO)–Polish People’s Party (PSL) coalition elected five judges to fill forthcoming vacancies in the Tribunal. However, the coalition was entitled to appoint only three, leaving the other two appointments to the incoming parliamentary majority. When Andrzej Duda won the presidency, and PiS secured a majority in parliament, the new government elected five judges of its own. President Duda accepted oaths from these five individuals while refusing to swear in the three judges lawfully appointed by the outgoing parliament.

The individuals improperly occupying seats in the Tribunal are often referred to as ‘duplicate judges’ (doubles, stand-ins) or, in Polish, ‘dublerzy.’ The controversy surrounding these appointments prompted the European Commission to initiate the Rule of Law Framework procedure against Poland in 2016, followed by proceedings under Article 7(1) of the Treaty on European Union.

In May 2021, the European Court of Human Rights ruled in *Xero Flor Sp. z o.o. v. Poland* (application no. 4907/18) case that the panels of the Constitutional Tribunal including improperly appointed judges failed to meet the criteria of an independent court under Article 6(1) of the European Convention on Human Rights (ECHR). The ECtHR reiterated this finding in December 2023 in the case of *M.L. v. Poland* (application no. 40119/21), which concerned abortion law in Poland. The ECtHR deemed the Tribunal’s 2020 ruling restricting legal abortion in Poland as issued by a flawed judicial panel. The ECtHR’s rulings require Poland to reform its Constitutional Tribunal, which, as of January 2025, has issued more than 100 judgments with improperly constituted panels.

Changes and Decline in the Constitutional Tribunal Operations

Between 2015 and 2016, PiS curtailed the scope of the Constitutional Tribunal’s activities. From December 2016 to December 2024, the Tribunal was led by PiS loyalist Julia Przyłębska, whom PiS leader Jarosław Kaczyński referred to as his ‘social discovery.’ Kaczyński maintained close personal ties with Przyłębska and her husband, Andrzej Przyłębski, who served as Poland’s ambassador to Germany from 2016 to 2022.

Under Przyłębska’s leadership, the Constitutional Tribunal’s efficiency plummeted. It handled fewer cases annually than in previous years, even as the number of new cases declined. This decrease in activity reflects the perception of the Tribunal as a politicised body that no longer conducts independent constitutional review. For instance, Adam Bodnar, the Commissioner for Human Rights from 2015 to 2021, withdrew cases from the Tribunal, citing concerns over its legality and impartiality. His successor, Marcin Wiącek, serving since 2021, following the Sejm’s resolution on the constitutional crisis in Poland adopted in March 2024, has refused to participate in proceedings before the Constitutional Tribunal involving ‘the doubles’.

The Constitutional Tribunal as a politicised body

The politicisation of the Constitutional Tribunal under PiS has not only undermined its legitimacy but also further weakened the rule of law in Poland. The lack of independent centralized constitutional review has eroded public confidence in the judicial system and deepened the constitutional crisis. Any future reforms must address both the Constitutional Tribunal’s composition and its independence to restore its credibility as a guardian of the Constitution of 1997.

After 2016, the Constitutional Tribunal was not merely a subject of the constitutional crisis but also an active participant in undermining the rule of law. It engaged in actions aimed at obstructing the efforts of the few remaining independent institutions, such as chambers of the Supreme Court, to safeguard the rule of law. The Constitutional Tribunal handled cases selectively and at a pace aligned with the policy objectives of the PiS ruling majority.

The Constitutional Tribunal actively supported the PiS agenda, not only in domestic constitutional matters but also in areas such as historical policy and abortion law. Notably, in 2021, the Tribunal ruled in line with the PiS government’s stance that interpretations of judicial independence standards under EU law and ECHR by the Court of Justice of the European Union (CJEU) and the European Court of Human Rights (ECtHR), respectively, were incompatible with the Polish Constitution. This case law of the partisan Polish

constitutional court marked a dramatic break from the pro-European jurisprudence upheld by the independent Constitutional Tribunal before 2016. By declaring the interpretation of article 19.1 TEU and Article 6.1 of the European Convention on Human Rights (the right to a fair trial) unconstitutional, the Constitutional Tribunal took a radical stance. No other constitutional court in the EU has issued such extreme judgments that not only rejected dialogue with the CJEU and the ECtHR, but exhibited open hostility towards these supranational courts and the European legal system altogether.

EU Response

The European Commission initiated several EU law infringement proceedings under Article 256 of the Treaty on the Functioning of the European Union (TFEU), followed by cases lodged at the CJEU against Poland, concerning various aspects of judicial changes implemented by the PiS government. Following the Constitutional Tribunal's anti-EU rulings on the CJEU's interim measures and judgments, the European Commission launched an EU law infringement procedure, citing the improper appointment of judges to the Tribunal and its decisions that undermine the primacy of EU law. Subsequently, in 2023, the Commission referred Poland to the CJEU, arguing that the Constitutional Tribunal no longer meets the criteria of an independent court under Article 19.1 TEU. At the time of writing, case C-448/23 is pending before the CJEU.

The Constitutional Tribunal's consistent alignment with PiS policies and its confrontational stance towards EU law and ECHR represent a sharp departure from established Polish constitutional court's case law. This shift signaled either a complete break from, or at best selective adherence to, the principles, standards, and mechanisms of the European legal order. In an April 2023 CBOS public opinion poll, 41% of respondents viewed the work of the Constitutional Tribunal's negatively, and 25% had a positive opinion.

Challenges for the Current Government

Restoring the rule of law requires addressing the unlawful composition and extreme politicisation of the current Constitutional Tribunal.

The Constitutional Tribunal consists of 15 judges, each serving a nine-year term, elected by the Sejm with a simple majority. As of January 2025, all current members were appointed during PiS's parliamentary majority, including persons unauthorized to adjudicate ('doubles'). In December 2024, the terms of two judges Julia Przyłębska and Piotr Pszczółkowski, and a 'double' Mariusz Muszyński expired. Two additional seats will become vacant in April and December 2025. At the time of writing, none

of the political parties nominated a candidate for the Constitutional Tribunal judge position.

The term of Constitutional Tribunal President Julia Przyłębska ended, and on December 9, 2024, Bogdan Świączkowski was appointed as the new president. Świączkowski is a former Deputy Minister of Justice in the PiS government (2015–2016) and served as the National Prosecutor (2016–2022). He was appointed to the Constitutional Tribunal in 2022, with his term set to end in 2031. Although he had personal conflicts with the previous president of the Tribunal, his leadership is designed to ensure that the Constitutional Tribunal remains an arm of the PiS. Even if the composition of judges changes, the president of the Constitutional Tribunal will retain the power to determine the panels that hear politically significant cases.

Poland is legally obliged to implement the judgments of the ECtHR concerning the Constitutional Tribunal, which require systemic changes to ensure that cases are not heard by improperly constituted panels. Moreover, Poland is obliged to address the status of decisions adopted with the participation or irregularly appointed judges.

In February 2024, Minister of Justice Adam Bodnar announced plans to amend laws governing the Constitutional Tribunal as part of the 'Action Plan,' a legislative package presented in Brussels to the European Commission and EU member states.

Addressing the situation in the Constitutional Tribunal is also politically critical for the government. It represents a key step in fulfilling its promise to restore the rule of law in Poland. Moreover, the Tribunal remains an obstacle to introduce judicial reforms, as it continues to rule in alignment with the priorities of PiS, now the largest opposition party. PiS MPs and President Andrzej Duda frequently refer legal provisions to the Constitutional Tribunal for review, using it as a tool to halt Tusk's government's reforms.

Resolution of the Sejm

In March 2024, the Sejm (lower chamber of parliament) adopted a resolution addressing the consequences of the constitutional crisis of 2015–2023 concerning the activities of the Constitutional Tribunal. While the resolution constitutes soft law, it sets the direction for the actions of state authorities. The Sejm affirmed in the resolution that three individuals back then sitting on the Constitutional Tribunal—Mariusz Muszyński, Justyn Piskorski, and Jarosław Wyrembak (as well as Henryk Cioch and Lech Morawski, both deceased) — were improperly appointed and that their participation in rulings renders those decisions defective.

The Sejm's resolution highlighted instances of manipulation in the composition of adjudicating panels within the Constitutional Tribunal, as evidenced by letters from seven Tribunal judges dated 28 June 2018 and 5 December 2018. Furthermore, the resolution stated that the current functioning of the Constitutional Tribunal prevents it from fulfilling its constitutional duties, including independent constitutional review and the protection of human rights. Consequently, the Sejm called for the re-establishment of the Constitutional Tribunal in accordance with constitutional principles and with the inclusion of all political forces. The resolution also declared that Julia Przyłębska was improperly appointed as the President of the Constitutional Tribunal. In May 2024, the Constitutional Tribunal ruled in a case brought by PiS MPs that the Sejm's resolution concerning the Tribunal was unconstitutional (judgment U 5/24).

The Constitutional Tribunal does not fulfil its constitutional duties

The Sejm's resolution, although a form of soft law, has had immediate tangible effects. Following the resolution, the Commissioner for Human Rights Marian Wiącek ceased participating in proceedings before the Constitutional Tribunal involving improperly constituted panels with the involvement of 'doubles'.

The Polish Constitution states that the Constitutional Tribunal rulings are universally binding and final, taking effect upon their publication in the official journal. The Prime Minister is responsible for their publication. Under PiS administration in 2015–2016, Prime Minister Beata Szydło employed an unlawful legal maneuver to prevent rulings issued by the still-independent Constitutional Tribunal from taking effect by refusing to publish them in the official journal.

During its initial months in office in December 2023–March 2024, Donald Tusk's government published the Constitutional Tribunal's judgments. However, for those issued by improperly constituted panels with 'doubles', annotations referencing ECtHR rulings concerning the Constitutional Tribunal were added. Following the Sejm resolution, the current government stopped publishing Constitutional Tribunal judgments altogether. The Council of Europe's Venice Commission criticized this practice in its opinion.

From the adoption of the resolution in March to December 2024, the Constitutional Tribunal issued nine rulings (the most recent on 23 August 2023, K 13/20), some of which involved improperly appointed judges (Mariusz Muszyński, Jarosław Wyrembak, or Justyn Piskorski).

Two Adopted Acts Concerning the Constitutional Tribunal

In September 2024, the parliament passed two acts: the Constitutional Tribunal Act and the act introducing its provisions. The bills were based on drafts prepared by legal experts from the Stefan Batory Foundation, in consultation with academia and civil society organizations before the 2023 parliamentary elections. President Duda referred both bills to the Constitutional Tribunal, preventing them from entering into force.

Additionally, a draft bill proposing a constitutional amendment to 'reset' the Constitutional Tribunal by reappointing all 15 members from scratch was presented. However, the current governing majority lacks the constitutional majority needed to pass the amendment.

The Constitutional Tribunal Act introduces an additional safeguard in the process of selecting judges for the Constitutional Tribunal. They will be chosen by the Sejm with a qualified majority of 3/5 votes instead of a simple majority. This is intended to encourage the selection of compromise candidates, requiring opposition support. Moreover, the bill prohibits active politicians and members of political parties from running for the position of judge of the Constitutional Tribunal for four years prior to seeking the office. This follows controversies over PiS's selection of its former MPs as judges of the constitutional court (Krystyna Pawłowicz, Stanisław Piotrowicz). Additionally, the Constitutional Tribunal Act reforms disciplinary rules for Tribunal judges. It allows retired judges of the Constitutional Tribunal to initiate and conduct disciplinary proceedings, including imposing penalties such as dismissal from office or revocation of judge status.

The Act Introducing the Provisions stipulates that the 'doubles' are not judges of the Constitutional Tribunal and declares them 'persons unauthorized to adjudicate.' It also nullifies and removes legal effect from the Constitutional Tribunal rulings issued by improperly constituted panels. The bill further allows current judges to resign before the end of their term while retaining lucrative retirement privileges. Prior to that, judges of the Constitutional Tribunal could not resign for any reason while maintaining such privileges. This provision likely aims to encourage current judges to vacate their positions sooner. In addition to three current vacancies and two seats occupied by persons unauthorized to adjudicate, two vacancies will arise annually from 2024 to 2026.

The OSCE Office for Democratic Institutions and Human Rights (ODIHR) issued an opinion supporting the main directions of the Constitutional Tribunal reform. The Venice Commission in its opinion welcomed the authorities' determination to reform the Constitutional Tribunal. The Venice Commission urged Polish authorities to ensure on the legislative level that the 'doubles' in the Constitutional Tribunal should be required to immediately withdraw from

all pending cases, with no new cases being allocated to them. Moreover, the Venice Commission strongly opposed the proposed „reset“ of the Constitutional Tribunal, an idea included in the constitutional amendment that has yet to be voted on.

In October 2024, President Duda referred both bills concerning the Constitutional Tribunal to the Constitutional Tribunal for prior constitutional review (case Kp 3/24). Regarding the act introducing provisions, the President challenged the regulations concerning the ‘doubles’. Duda also argued that recognizing judgments issued by improperly constituted panels risks creating ‘constitutional chaos on an unforeseeable scale.’ The President raised additional objections to certain aspects of the Constitutional Tribunal Act, including the participation of retired judges in disciplinary proceedings against judges.

Actions of the Government, President, and Opposition

In its first year in office, in 2024, the government of Donald Tusk adopted a strategy of ignoring the Constitutional Tribunal. The enacted laws offer a moderate solution, addressing only the removal of the ‘doubles’ rather than the more radical proposals, such as ‘resetting’ the Constitutional Tribunal, which had been suggested in public debates. President Duda has actively defended PiS’s actions and his own, including his early decision as president to swear in persons unauthorized to adjudicate to the Tribunal. While Duda did not veto the Constitutional Tribunal bills, he referred them to the Tribunal for constitutional review. At the time of writing, the hearing on this matter has yet to take place.

A strategy of ignoring the Constitutional Tribunal

PiS MPs have also submitted motions to the Constitutional Tribunal to block various government actions, including efforts to hold PiS politicians accountable. For example, motions were filed concerning provisions that allow for the prosecution of the chair of the National Broadcasting Council (Krajowa Rada Radiofonii i Telewizji, KRRiT) (case K 24/24) and the President of the National Bank of Poland (NBP) before the State Tribunal (case K 8/24). Such proceedings require only a simple majority in the Sejm. Members of the current ruling majority have called for the State Tribunal to prosecute KRRiT Chairman Maciej Świrski (appointed in 2022 for a six-year term) and NBP President Adam Glapiński (re-elected in 2022 for another six-year term).

In October, the Constitutional Tribunal announced that it had issued ‘interim measures’ to protect Świrski until the case was resolved. However, unlike the ECtHR or CJEU,

the Polish Constitutional Tribunal lacks the power to issue interim measures in cases under review. According to Tusk’s government, such actions by the Constitutional Tribunal have no legal effect and are disregarded.

Although the Constitutional Tribunal bills have not come into force, the composition of the body is gradually changing. In early December, Julia Przyłębska, who had led the Constitutional Tribunal as president since December 2016, stepped down from her role. The terms of judges Przyłębska and Piotr Pszczołkowski, as well as the ‘term’ of the ‘double’ Mariusz Muszyński, have ended. Despite three vacancies in the Tribunal, no political party has nominated a candidate for the position of Constitutional Tribunal judge. On December 9, 2024, Bogdan Świączkowski was appointed as the new president of the Constitutional Tribunal.

The influential Chairman of the Committee on Permanent Affairs of the Council of Ministers, Maciej Berek, believed that since the Sejm has declared that the Constitutional Tribunal is not functioning properly, it should not be financed. In the 2025 budget, the government reduced funding for 14 institutions, including the Constitutional Tribunal. The government also cut the budgets for the Supreme Court, the National Council of the Judiciary (KRS), the National Broadcasting Council (KRRiT), and the Institute of National Remembrance (IPN), all of which are managed by individuals aligned with the PiS party. The savings are intended to be directed towards science, healthcare, and flood prevention in southwestern Poland. The budget for the Constitutional Tribunal has been doubled over the past decade: from 31 million PLN (approx. 7.2 million EUR) in 2015 to requested 63.4 million PLN (approx. 14.9 million EUR) in 2025. However, the approved 2025 budget was 10.8 million PLN lower than requested, with 10.2 million PLN of the shortfall directly impacting salaries of the judges. President Duda signed the budget bill into law, bringing it into effect. However, he referred its provisions regarding the reduction of funding for the Constitutional Tribunal and the National Council of the Judiciary to the Constitutional Tribunal for subsequent constitutional review.

Changes to the Tribunal only after presidential elections 2025

The government aims to delay changes to the Constitutional Tribunal until after the presidential elections, assuming it might be won by the front-runner candidate of the Civic Platform (PO), Rafał Trzaskowski, currently the President of Warsaw. The elections are scheduled for May 2025. President Duda’s term ends on August 6, 2025, and his successor will be sworn in. A president favorable to the current coalition would likely sign the Constitutional Tribunal bills and other laws comprising of judicial reform into effect.

President Duda is highly unlikely to sign the laws reforming judiciary presented by the governing majority. In April 2024, Duda sharply criticized the Minister of Justice and Prosecutor General Adam Bodnar, stating that ‘what we now have is the complete breakdown of the rule of law — true lawlessness,’ in the context of the dismissal of the National Prosecutor and the arrest of PiS politicians, whom Duda later pardoned.

The implementation of the bills on the Constitutional Tribunal would remove two remaining ‘doubles’ sitting on the Tribunal (otherwise, Justyn Piskorski would sit until September 2023, and Jarosław Wyrembak until January 2027). It would also enable the establishment of a disciplinary commission that could (hypothetically) decide to remove a judge from the Constitutional Tribunal. Additionally, judges would gain the option of retiring before the end of their term while retaining lucrative benefits. Hypothetically, this could accelerate the appointment of new judges for vacant positions. New judges would be selected by a 3/5 majority in the Sejm, with the participation of the opposition. This could lead to the resolution of the constitutional crisis and the renewal of the Constitutional Tribunal, although rebuilding public trust in the institution would take much longer.

3.

Defectively Appointed Judges of Common Courts

The biggest challenge for the current government is resolving the issue of defectively appointed judges to the Supreme Court, the Supreme Administrative Court, and the common courts of lower instances, including appellate courts. Poland is legally required, following the pilot judgment of the European Court of Human Rights (ECtHR) in the case of *Wałęsa v. Poland* (application no. 50849/21), to systematically regulate the status of judges appointed or promoted through a defective procedure, so-called ‘neo-judges’

National Council of the Judiciary (Krajowa Rada Sądownictwa, KRS)

The reason for the defective appointments of judges is the involvement of the politicized National Council of the Judiciary (KRS) in the process. KRS is a constitutional body designed to safeguard the independence of courts and the autonomy of judges. Under the previous system, at least 15 judges were elected by their peers, but since the 2017 amendments to the KRS law by the PiS government, they are now chosen by the Sejm, i.e., politicians. Numerous rulings by the Court of Justice of the European Union (CJEU) and the European Court of Human Rights (ECtHR) have pointed to the politicization of KRS as a reason for the lack of independence in the judicial panels of the Supreme Court, in violation of Article 19(1) of the EU Treaty and Article 6(1) of the European Convention on Human Rights. The KRS was selected on these amended terms for a four-year term in 2018 and again in 2022. The current chairperson of KRS is Dagmara Pawelczyk-Woicka, a close associate of former Minister of Justice Zbigniew Ziobro.

Election of KRS judges by judges not politicians

In July 2024, the new bill on the KRS was passed, reinstating the model of selecting 15 judges to sit on the council through elections by judges themselves. This aligns with rulings by the ECtHR and the CJEU. The new law broadens the range of entities that can nominate candidates to KRS, including bar associations and legal counsellors. It also establishes a public advisory council to KRS, which would assist in recommending individuals for judicial positions. The law prohibits ‘neo-judges’ from running for the newly

structured KRS, which contradicts the recommendation of the Venice Commission. During the legislative process, the Senate voted for an amendment in line with the Venice Commission’s opinion. However, influential judicial associations opposed this change, and it was ultimately withdrawn.

In August, President Duda referred the law on KRS to the Constitutional Tribunal (case Kp 2/24). The President has argued that, among other things, it was unconstitutional to interrupt the terms of judges selected to the KRS in 2022 under the 2017 law and that the law prohibits neo-judges from running for the KRS. At the time of writing, the case is ongoing. Without reforming the KRS, it will not be possible to resolve the issue of past improper judicial appointments or ensure that future judicial appointments are made through a proper procedure.

Regulation of the Status of Defectively Appointed Judges

The issue of defective judicial appointments is systemic. Since 2018, the National Council of the Judiciary (KRS) has been involved in the appointment process for over 3,000 judges. Poland has 10,000 judicial positions, of which more than 9,000 are filled. After the 2023 parliamentary elections, both the KRS and President Duda continued to appoint ‘neo-judges.’ Minister of Justice Adam Bodnar halted judicial competitions until the removal of the politicized KRS and the appointment of a new one.

The group of neo-judges is diverse. It includes assessors, i.e., graduates of the judicial training school, where the role of the politicized KRS in their appointment process was marginal, acting more as a formality. The next group consists of individuals who had already been appointed as judges and were promoted in a procedure under the KRS. The third group includes those who had not previously been judges but had worked in other legal professions or as scholars, which applies, for example, to judges of the Supreme Court. Since 2018, many neo-judges have been appointed to the Supreme Court, especially since two new chambers were added to the court: the Disciplinary Chamber, dissolved in 2022 (a point of contention between the PiS government and the EU, a key element in a system that allowed the misuse of disciplinary procedures against judges for harassment purposes), and the Chamber of Extraordinary Control and Public Affairs. The Disciplinary Chamber was replaced by

the Chamber of Professional Liability, which includes both judges and neo-judges. Since 2020, Małgorzata Manowska, a neo-judge, has served as the President of the Supreme Court.

The neo-judges of the Supreme Court seek to halt reforms and issue resolutions that the government ignores. They also refer preliminary questions to the CJEU. In March 2022, the CJEU responded to questions from a single-judge bench of the Civil Chamber (Case C-132/20). However, in December 2023 the CJEU ruled that it would not consider questions raised by benches of the Supreme Court that include neo-judges, as the preliminary procedure is reserved only for courts that meet the standards of judicial independence under EU law (Case C-718/21). The CJEU repeated this assessment of the Chamber of Extraordinary Control and Public Affairs in judgments presented in May 2024 (Case C-390/23, Case C-720/21). Moreover, the CJEU ruled this also in the case concerning the Civil Chamber in the Supreme Court (Case C-326/23).

The majority of judges have courageously opposed the destruction of judicial independence

The need to regulate the status of neo-judges is urgent not only due to the rulings of the ECtHR, the CJEU, or the Polish Supreme Court. The justice system is based on mutual trust, not only between EU member states, but also among judges themselves.

The majority of judges have courageously opposed and protested against the changes in judiciary pushed by the ruling PiS party. These judges refrained from participating in competitions under the KRS selected on rules from 2017, did not receive promotions, and were subjected to harassment.

Today, among some judges, there is a sense of frustration that the changes in the judiciary following the change of government in 2023 are happening too slowly. The influential judicial association, *Iustitia*, prepared a draft proposal for judicial reforms, which suggested the mass invalidation of KRS resolutions appointing neo-judges and the reinstatement of those neo-judges to their previously held positions. There were also voices suggesting that no neo-judges were ever properly appointed.

On the other, human rights organizations, most notably the Helsinki Foundation for Human Rights, argued that such a solution would be unconstitutional, as judges cannot be mass-dismissed by law. They also warned that the lack of individual verification and assessment of the neo-judges poses a risk that they could successfully sue Poland at the ECtHR for violations of their rights protected under the European Convention on Human Rights.

Supporters of the *Iustitia* proposal pointed out that conducting an individual assessment would take too long. The Helsinki Foundation considered the practical consequences of removing potentially hundreds of judges from the judicial system. However, most voices in the expert debate advocated for maintaining the rulings of neo-judges, emphasizing the need to protect the rights of individuals.

The option of mass dismissal of neo-judges, maintaining their rulings

Various bodies within the Ministry of Justice are working on solutions for the issue of neo-judges. The responsibility for drafting the legislation lies not only with Minister of Justice Adam Bodnar but also with Deputy Minister Dariusz Mazur (prior to his current appointment, a judge affiliated with the *Themis* judicial association) and Marta Kożuchowska-Warywoda, the Director of the Department of Personnel and Organization of Common and Military Courts in the Ministry of Justice (a judge affiliated with the *Iustitia* judicial association).

Additionally, in April 2024, Minister of Justice established an expert commission on the judiciary and prosecution system, led by the influential president of the *Iustitia* association, judge Krystian Markiewicz. It is a long-standing practice in the Polish legal system to create codification committees composed of distinguished scholars and practitioners to propose directions for reform in specific branches or areas of law. However, under the PiS government, this tradition was disrupted. Minister Bodnar also set up commissions for criminal law, civil law (led by former CJEU judge Marek Safjan), and family law. Within the Ministry of Justice, meetings of the Rule of Law Restoration Team are held, where representatives from the ministry, civil society organizations, and academics discuss various models regarding, among others, the regulation of the status of neo-judges and their rulings. Moreover, the Minister of Justice has consulted various ideas to address this problem with the Venice Commission and the OSCE Office for Democratic Institutions and Human Rights (ODIHR).

Venice Commission's Opinion

The government has not yet presented public drafts of the laws aimed at regulating the status of neo-judges, and it remains unclear how many such laws will be proposed. There have been suggestions that separate laws may be created for the Supreme Court, lower courts, and a general introductory law. Communication from the Ministry of Justice regarding this issue has been unclear.

Draft laws are expected to be ready for ministerial and public consultations in the first quarter of 2025. According to

official communications, the work has been delayed due to the need to align mechanisms with the opinion of the Venice Commission presented in October 2023.

Venice Commission: Poland has to regulate the status of neo-judges

The Venice Commission assessed that the problem Poland is facing is unique, especially considering the scale of the flawed appointments. While issues with judicial appointments have occurred in other Council of Europe countries before, they have affected only a small group of judges. An example of such a case is the 2018 ruling by the ECtHR in the *Ástráðsson v. Iceland* case (Application no. 26374/18), which dealt with Icelandic judges.

The Venice Commission confirmed that Poland is obligated under the ECtHR rulings to regulate the status of neo-judges. Poland has the freedom to choose the means, but these must comply with the standards of the European Convention on Human Rights. The chosen solutions must regulate the status of all judges appointed through flawed procedures, and the evaluation of these appointments must be carried out by an independent body. There must be the possibility of an appeal to the court regarding the results of this evaluation. The evaluation must be based on pre-established criteria and procedures, conducted individually, and done quickly.

According to the Venice Commission, it is not acceptable to declare all resolutions of the flawed KRS regarding the appointment or promotion of judges as null and void, nor to return neo-judges to their previously held positions. This concept was supported by the influential *Iustitia* association, which was actively involved in defending the rule of law, including calling on judges to boycott competitions before the KRS. Under the PiS government, many members of *Iustitia* were victims of reprisals, including disciplinary and criminal proceedings, suspension from performing their judicial duties, and defamatory, hateful campaigns organized by the state apparatus, including state-run media.

Disciplinary proceedings against judges who have violated the law

The Venice Commission assessed that, according to the Ministry of Justice's proposal, it is possible to group the flawed appointed judges. The procedure for their verification must take place before an independent body. The ministry is now working on the criteria for dividing judges into groups and the evaluation procedure. The verification will be carried out by the independent, reformed KRS. It is likely that assessors would retain their appointments.

In addition to verification, disciplinary proceedings will also need to be conducted against judges who have violated the law, participated in undermining the rule of law, or harassed their colleagues. The Ministry of Justice has assessed this group to number in the hundreds. Some judges most involved in these disgraceful actions are not neo-judges; they were appointed by the legal KRS but advanced during the PiS government. For example, they were promoted to court president positions, which carry power and financial rewards. Court presidents made decisions about case allocations for judges and could discipline them, including suspending them from their duties.

Improving the Legal System and Judiciary

Against political limitations, such as the president's veto and referring laws to the Constitutional Tribunal, in the first year of his tenure, Minister of Justice Bodnar took actions that did not require legislative changes.

In February 2024, the European Commission and the governments of EU member states decided to lift the suspension of EU funds for Poland from the Resilience and Recovery Fund and other European funds, including cohesion funding. However, this decision was criticized as purely political, as no laws from the promised 'Action Plan' had been passed at that point. The package included laws on the KRS, the Supreme Court, common courts, the Constitutional Tribunal, the separation of the functions of the Minister of Justice and the Prosecutor General, the prosecution service, court employees, and the execution of ECtHR judgments.

Nonetheless, Minister Bodnar introduced significant reforms in the judicial system. He ended the misuse of the disciplinary system as a tool to target judges who upheld the rule of law. Additionally, Bodnar dismissed and appointed dozens of court presidents across Poland in accordance with established procedures, in contrast to the arbitrary and expedited dismissals and appointments that occurred under his predecessor, Minister of Justice Zbigniew Ziobro.

These actions of the Minister of Justice faced criticism from the opposition party, PiS. In addition to a motion of no confidence against Bodnar, which was rejected on 22 February 2024 by the ruling majority, PiS MPs submitted petitions to the Constitutional Tribunal regarding the changes introduced by the minister. For example, these concerns related to the minister's powers in disciplinary proceedings for judges and the procedure for dismissing court presidents. In April, the Constitutional Tribunal issued interim measures (which it had no legal basis for), stating that the Minister of Justice could not dismiss court presidents and vice-presidents without the consent of the KRS. In October 2024, the Constitutional Tribunal ruled that this was unconstitutional (Case K 2/24). However, the authorities ignored this ruling.

Minister Bodnar also unveiled plans for organizational and managerial improvements within the judiciary. He appointed several representatives responsible for streamlining the justice system, including reforming the expert witness system, shortening the time required to resolve cases, improving the quality of judicial services for citizens, and overseeing constitutional education in schools. For example, Jarosław Gwizdak, the Commissioner for the Openness of the Judiciary (a former judge and social activist), presented recommendations for court managers on improving communication with citizens using clearer, more natural language. Meanwhile, Aneta Wiewiórowska, the Commissioner for Consumer Rights Protection, proposed reforms aimed at speeding up the resolution of 200,000 cases related to mortgages denominated in Swiss francs (so-called Swiss Franc mortgages), which have been clogging Polish courts. The proposed solution involves encouraging settlements between clients and banks, as well as the digitization of courts.

In November, Minister Bodnar presented a 10-point plan for judicial changes scheduled for 2025-2026: reform of the expert witness system, digitization of court registers and files, facilitating the submission of complaints about excessive delays in proceedings, expanding mediation, increasing the number of judicial assistants, speeding up the handling of 'Swiss Franc mortgage' cases, new modules on the Information Portal for Courts, more judicial inspectors making rulings, development of an executive code in family law, and management training for court presidents, vice presidents, and heads of court divisions.

Transparent Competitions

An interministerial team selected three candidates for the position of judge at the European Court of Human Rights (ECtHR) on behalf of Poland through an open, multi-stage competition, which included a public hearing of candidates in parliament. In September, the Parliamentary Assembly of the Council of Europe selected Anna Adamska-Gallant from the list of candidates, and she started her nine-year term as a judge at the Strasbourg court in December 2024. Her predecessor, Judge Krzysztof Wojtyczek, served on the ECtHR for 12 years, as the Parliamentary Assembly of the Council of Europe rejected the candidate lists submitted by the PiS government three times after his term ended.

No candidate has yet been nominated for the position of judge at the Court of Justice of the European Union (CJEU). In August 2023, at the end of PiS's rule, a new law concerning the powers of the President of Poland was introduced. Under this law, the government must present candidates for certain EU positions to the President for approval. Tusk's government has not amended these regulations, as Duda would most likely veto any changes. It is also waiting to propose a candidate for the CJEU judge until the outcome of the presidential election is clear.

Consultations of Draft Laws

Since November 2023, draft laws submitted by members of parliament (MPs) have undergone mandatory monthly consultations in the Sejm (the lower house of parliament). Previously, draft bills submitted by MPs were exempt from consultation requirements. This loophole allowed the PiS government to bypass the obligation to consult government bills, which were presented in the Sejm as bills from MPs. As a result, laws were passed hastily, sometimes overnight, without consulting the opposition. This practice, which was common during PiS's first term from 2015 to 2019, when PiS had a majority in both the Sejm and the Senate and a supportive president who signed the laws, had a devastating effect on the quality of the law and the parliamentary process.

Accountability

The process of holding the previous government accountable for legal violations, corruption, and abuse of power is progressing slowly. Its pace is sometimes criticized by voters of the ruling coalition and even by Prime Minister Tusk himself. In September, the Prime Minister Tusk and Minister Bodnar met with legal professionals, including bar associations, legal counsel groups, and judges. Beforehand, organizations like 'Iustitia' and Themis associations of judges and human rights organizations active in the rule of law defense such as Free Courts Foundation issued a joint statement criticizing the slow progress in restoring the rule of law. Tusk promised to restore the rule of law while maintaining the highest possible standards. The Minister of Justice stated that, in addition to presenting an account of his actions, he hopes for a constructive discussion. Many representatives of the aforementioned organizations are involved in conceptual work on judicial reforms.

In November, the Prime Minister sharply reprimanded ministers, stating that 'without accountability, there will be no restoration of the Republic.'

Legal violations and corruption under the PiS government

In the first year of the current coalition's rule, much of the time of state bodies, including the Supreme Chamber of Control, has been spent analysing the scale of legal violations during the PiS government. Many of these violations were reported by the media, but now the scale of corruption is becoming apparent. A prime example is the scandal surrounding the management of the Justice Fund under the Ministry of Justice. The fund's purpose is to help crime victims, for which it allocates grants to civil society organizations. Under the PiS government,

the Justice Fund effectively became a party fund for the Minister of Justice, Zbigniew Ziobro's political party. The minister and his deputies arbitrarily allocated public funds to friendly organizations. In the first year after the change of government, the prosecutor's office brought charges against several people in connection with the Justice Fund, including PiS-era Deputy Ministers of Justice Michał Woś and Michał Romanowski, ministry officials, and individuals from organizations that were arbitrarily granted tens of millions of euros in public funding for activities unrelated to the fund's stated goals.

Michał Romanowski, after being stripped of his immunity by the Sejm and the Parliamentary Assembly of the Council of Europe, avoided arrest by fleeing to Hungary. The Orban government granted him political asylum, claiming that under Tusk's leadership, Poland could not guarantee him a fair trial. This further strained the already difficult Polish-Hungarian relations, which had been deteriorating due to differing stances on Russia following its full-scale invasion of Ukraine in 2022.

Changes have been introduced to the Justice Fund to limit arbitrary decisions by the Minister of Justice, which were allowed under PiS rule. These include restrictions on awarding funds to entities, canceling grant competitions, or refusing to disburse grants.

4.

Conclusions

The process of rebuilding the rule of law in terms of judicial independence is progressing slowly in Poland, within the bounds of the law. It is limited by institutional factors, such as the presidential veto and the possibility for the president and PiS MPs to submit requests to the Constitutional Tribunal, which attempts to block reforms. Despite the adoption by parliament of key laws on the National Council of the Judiciary (KRS) and the Constitutional Tribunal, they have not come into force because President Duda referred them to the Constitutional Tribunal. Work on some key laws promised in the 'Action Plan' is moving slowly. One particularly difficult task is developing mechanisms to regulate the status of 3,000 judges appointed through flawed procedures, ensuring it complies with the rule of law and meets the expectations of various stakeholders, including judges involved in defending the rule of law during the PiS government.

In such conditions, the Minister of Justice is taking various actions that do not require the passage of laws but are bringing real changes to the judiciary and ensuring that Poland is no longer at serious risk of breaching the rule of law regarding judicial independence. Expectations are growing within the government and society for the reform process to accelerate. This would be helped if, after the end of President Duda's second and final term, his successor were someone who supports the current government's reforms in the rule of law area. For example, the candidate from the Civic Coalition, Rafał Trzaskowski, who is currently the frontrunner in the election. The presidential election is scheduled for May 2025. The electoral campaign coincides with Poland's presidency in the EU Council, which started in January 2025. The priority of the presidency will be security, a topic that will surely dominate the presidential campaign in Poland as well. The presidential elections will be a test for the Tusk government, determining whether the government will be able to effectively implement its policies in the second half of its term, including in the area of the rule of law.

About the Author

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Rebuilding the Rule of Law in Poland.

The Slow and Arduous Process towards Judicial Independence



The PiS-government has done severe damage to Poland's political system and steered the country away from a consolidated democracy, it has violated and circumvented the Constitution of Poland through both ordinary legislation and various formal and informal practices. Many judges have bravely opposed and protested against these judicial changes and have faced harassment as a result of their resistance.



In December 2023, Donald Tusk formed a new government in Poland with a clear mission to restore the rule of law in Poland. After one year, the key takeaway is clear: rebuilding the rule of law is a lengthy journey full of unique challenges. Progress in restoring judicial independence is being made slowly and within the framework of the law. It is constrained by institutional factors, such as the Presidential veto and the ability of the President Andrzej Duda and the PiS MPs to submit requests to the Constitutional Tribunal.



The outcome of the Presidential elections in May and June 2025 will be crucial, particularly if the new President supports the government's ongoing reforms in the area of the rule of law. These Presidential elections will serve as a test for the government, determining whether it will be able to effectively implement its policies in the second half of its term, including those related to the rule of law.

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