

# How will the latest judicial reform controversy affect Poland's presidential election?



*New disciplinary procedures for Polish judges have moved a controversial judicial reform programme to the top of the political agenda in the run-up to Poland's presidential election in May. **Aleks Szczerbiak** writes that although the issue could mobilise and consolidate the right-wing vote, thereby helping incumbent President Andrzej Duda, the potential for political instability and legal chaos means it could also damage his re-election prospects.*

A radical but fiercely contested overhaul of the judicial system has been one of the main sources of political controversy in Poland since it was introduced two-and-a-half years ago by the right-wing Law and Justice (PiS) party, the country's ruling grouping since autumn 2015. One of the most important and contentious elements of the reform programme was the establishment of a new supreme court chamber to conduct disciplinary actions against judges. The new chamber was appointed by an overhauled national judicial council (KRS), the body that nominates judges and decides how the courts are run, in which the majority of members were selected mainly by parliament, rather than the legal profession, as had previously been the case.

The government's supporters argued that the reforms were sorely needed because Polish courts were too slow, deeply inefficient and tolerated frequent irregularities and corrupt practices. Overhauling the courts is one of the most important elements of Law and Justice's programme because the party believes that, following the country's flawed transition to democracy in 1989, the judiciary, like many key Polish institutions, was expropriated by an extremely well-entrenched, and often deeply corrupt, post-communist elite, which then co-opted a new legal establishment that perpetuated its legacy. The judicial elite, they said, viewed itself as a superior grouping out of touch with ordinary citizens, and operated as a 'state within a state' that was incapable of reforming itself. In these circumstances, they argued, making judges and their supervisory organs more accountable to elected bodies was both justifiable and in line with practices in other established democracies.

The liberal-centrist and left-wing opposition, and Poland's legal establishment, on the other hand, strongly criticised the reforms as an attack on the rule of law and infringement of the key democratic principle of constitutional separation of powers. Warning of a drift towards authoritarian rule, the government's opponents argued that, by putting judicial appointments under political control, these reforms allowed Law and Justice to pack the courts with its own, hand-picked nominees, and thereby undermined their independence. Following mass protests in the summer of 2017, Law and Justice-backed President Andrzej Duda vetoed some of the reforms, but his revised version finally approved by parliament was actually very close to the government's original proposals; the main change being a guarantee that parliamentary nominees to the national judicial council would be elected by a qualified three-fifths supermajority, forcing the ruling party to negotiate appointments with opposition deputies.

## Clashing with the EU political establishment

The reforms also triggered a series of clashes between Poland and the EU political establishment. During the last four years, the government has been in an ongoing dispute with the European Commission over so-called 'rule of law' issues. Initially, this was over the membership and functioning of the country's constitutional tribunal, but the stand-off escalated in 2017 to include Law and Justice's judicial reforms. The Commission took the unprecedented step of initiating an action against Poland under Article 7 of the European treaties, which can be invoked against any EU member state when it is felt there is a 'systemic threat' to democracy and the rule of law, threatening Warsaw with sanctions including the suspension of its European Council voting rights. However, the Commission was unable to secure the qualified majority required among EU member states to move beyond the initial stage of the procedure.

Consequently, at the same time the Commission initiated infringement procedures against Poland in the EU Court of Justice, while Polish judges also submitted a number of 'prejudicial questions' regarding various aspects of the reforms. Last November, the Court made a ruling in one such case brought by Polish supreme court judges who questioned the independence of the new disciplinary chamber to handle appeals against early retirement on the grounds that it was appointed by the new national judicial council. Although the Court stopped short of declaring the new chamber illegal, it referred the case back to the Polish supreme court to determine whether the former was sufficiently independent from political influence. In doing so, it set out criteria to determine whether judicial appointments met EU standards, paying particular attention to how a body was appointed.

Law and Justice welcomed the fact that the EU Court left it up to Polish judicial bodies to decide on the independence of the disciplinary chamber. However, the government's opponents felt the Court provided them with a tool for challenging and dismantling the reforms. Some Polish judges interpreted the ruling as a judgment that the new national judicial council was not a legitimate body, and questioned the verdicts of judges appointed by it. Moreover, last December the supreme court itself ruled that, in its current composition, the council was neither impartial nor politically independent, so the judges appointed by it and their verdicts, including the new disciplinary chamber, were not legal according to EU law.

### **Intimidating judges or preventing legal chaos?**

In response, Law and Justice introduced sweeping new disciplinary procedures – with penalties including fines, movement to another court, and removal from office – against judges who: prevented or significantly impeded the functioning of the justice system; refused to recognise the legitimacy of other judges; or participated in public activities that undermined the functioning of the state's governing organs, or were incompatible with the principles of judicial independence and impartiality.

The government's opponents argued that the new measures, which they dubbed a 'gagging law' (*ustawa kagańcowa*), further undermined judicial independence by attempting to intimidate critical judges so that they ruled in line with the ruling party's expectations. They also warned that the law could lead to Poland being excluded from the EU, so-called 'Polexit', as its provisions violated the terms of the European treaties by undermining the primacy of Union law. For its part, the Commission called upon the Polish authorities to suspend passage of the law until it could be scrutinised by the Venice Commission, an advisory body on constitutional matters to the Council of Europe human rights watchdog. Earlier this month, the opposition-controlled Senate, Poland's less powerful second chamber, invited the Venice Commission to review the legislation.

However, Law and Justice dismissed the Venice Commission's negative evaluation, arguing that the watchdog was not impartial and was too closely aligned with the Polish legal establishment. Accusing the legal establishment and opposition of wanting Poland to be a 'judge-ocracy' (*sędziokracja*), the government's supporters said that the new regulations were necessary for society to feel that the judiciary was impartial and apolitical, and an essential response to those judges who, by questioning their colleagues' legitimacy, threatened to engulf the Polish legal system in chaos.

To date, nearly 500 judges have been nominated by the new national judicial council and all their rulings could be challenged. Law and Justice argued that the new regulations were based on similar provisions in other countries, notably France and Germany; although the government's critics said that the party was distorting how these laws worked in practice.

### **Alienating moderate voters or consolidating the base?**

In some ways, the revival of the judicial reform controversy is highly problematic for Law and Justice, with a crucial presidential election due in May. The party lacks the three-fifths parliamentary majority required to over-turn a presidential veto, so Duda's defeat would seriously hamper its ability to govern effectively. Given his high popularity ratings, Duda remains the clear favourite, but last October's parliamentary election showed how polarised and evenly balanced support between the government and opposition camps is, and the presidential poll will be much closer if it turns into another plebiscite on the Law and Justice government.



Andrzej Duda, Credit: [Chairman of the Joint Chiefs of Staff / Dominique A. Pineiro \(CC BY 2.0\)](#)

Moreover, in order to win, a successful candidate has to craft a unifying and consensual appeal that can secure more than 50% of the votes, so Law and Justice should be avoiding divisive and polarising issues that could alienate more moderate centrist voters. A sense that the ruling party is associated with political instability and social conflict could, therefore, rebound on Duda. There are also concerns that, by re-igniting Law and Justice's conflict with the EU political establishment, the issue could allow the opposition to revive its 'Polexit' narrative which, given Poles' overwhelming support for membership of the Union, is a toxic slogan for any mainstream Polish politician to be associated with.

Nonetheless, Law and Justice seems determined to push through the new disciplinary regulations because it believes the risk of legal chaos if judges start questioning the status of their colleagues' rulings is even greater. For his part, Duda has taken a clear stance in support of the government on this issue. Law and Justice was also hoping that the European Commission under its new President Ursula von der Leyen would be more accommodating towards Poland and put 'rule of law' issues on the back-burner in order to improve strategic co-operation with Warsaw, particularly as the party played a key role in her appointment. However, in a major setback, earlier this month the Commission decided to ask the EU Court to impose emergency interim measures suspending the functioning of the disciplinary chamber.

In fact, for the moment at least, Law and Justice appears to have sustained only minimal political damage, as the issue has not yet developed the momentum that it had a couple of years ago. Although there have been anti-government protests, the scale of these is not comparable to the summer 2017 groundswell which helped persuade Duda to veto and amend some of the original proposals. Even if Poles have misgiving about whether the government's specific reforms will significantly improve the functioning of the judicial system, Law and Justice has been effective at convincing many of them that, for all its faults, it is at least trying to tackle a problem which previous administrations appeared content to ignore.

Moreover, opinion polls suggest that there is actually considerable uncertainty about the government's latest proposals. For example, a December survey carried out for the 'Rzeczpospolita' newspaper by the IBRiS agency found that, while Poles opposed a ban on judges questioning the appointment or legality of their colleagues by 40% to 36%, 27% responded that they did not know. A Kantar survey for 'TVN/TVN24' also found that, by a 53% to 40% margin, Poles disagreed that Law and Justice's policies could lead to 'Polexit'. Indeed, some commentators argue that Law and Justice is using judicial reform as a so-called 'wedge issue' to boost turnout among its core electorate in the presidential election, as well as trying to secure the support of the one million Poles who voted for the radical right Eurosceptic 'Confederation' (*Konfederacja*) grouping in last October's poll.

### Who gets the blame?

For the moment, therefore, the latest judicial reform controversy appears to be having relatively few damaging effects on Law and Justice and may even help to mobilise and consolidate the core right-wing vote. However, if it contributes to a sense of endless political instability and societal conflict this could harm Duda's re-election prospects.

The key risk here is that the new disciplinary regulations actually radicalise rather than pacify the government's opponents in the judiciary, and lead to precisely the mass rejection of rulings by 'new' judges that the legislation was designed to avoid, particularly if the EU Court throws the government's opponents a lifeline by calling for the suspension of the disciplinary chamber. The issue then becomes how quickly such legal chaos starts to affect ordinary citizens on a large scale, and who gets the blame for this: the government and Duda or the opposition and the legal establishment?

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*Note: This article originally appeared at Aleks Szczerbiak's [personal blog](#). The article gives the views of the author, not the position of EUROPP – European Politics and Policy or the London School of Economics.*

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