

How is the conflict over judicial reforms affecting Polish politics?



Controversy surrounding the Polish government's judicial reform programme has undermined its strategy of pivoting to the centre in the run-up to the country's next parliamentary and presidential elections. But as [Aleks Szczerbiak](#) writes, in spite of misgivings about the reforms, the ruling party is in tune with Poles on the social and economic issues they care most about, and the opposition has so far offered little alternative beyond the defence of an unpopular judicial status quo.



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There are three key elements to the judicial reform programme introduced by the right-wing Law and Justice (PiS) party, Poland's governing party since autumn 2015. Firstly, ending the terms of office of the majority of the National Judicial Council (KRS), a body that selects judges and decides how the courts are run, and selecting their successors by a qualified three-fifths parliamentary supermajority rather than the legal profession as had previously been the case. Secondly, giving the justice minister broad powers to replace the heads of lower courts. Thirdly, lowering the retirement age for supreme court judges from 70 to 65, except for those re-instated by Law and Justice-backed President Andrzej Duda based on recommendations from the National Judicial Council.

Most of the opposition – led by the liberal-centrist Civic Platform (PO), the country's governing party between 2007-15 – and the legal establishment strongly criticised the reforms, arguing that they undermined the independence of the courts and infringed the key democratic principle of constitutional separation of powers. Warning of a drift towards authoritarian rule, the government's opponents said that, by putting judicial appointments under political control, these reforms allowed Law and Justice to pack the courts with its own, hand-picked nominees; pointing out that the supreme court rules on the validity of national election and referendum results.

The judicial reforms were also heavily criticised by the EU political establishment and Western opinion-forming media, with whom the opposition enjoys close links and many of whom share their dislike of Law and Justice. The European Commission has been involved in an ongoing 'rule of law' dispute with the Law and Justice government since January 2016, initially over the membership and functioning of the country's constitutional tribunal. At the end of last year, in a major escalation of the conflict, in response to the judicial reforms the Commission initiated an action against Poland under Article 7 of the European treaties which it can invoke against EU member states where it feels there is a 'systemic threat' to democracy and the rule of law; threatening Warsaw with sanctions, including possibly suspending its European Council voting rights.

The government's supporters, on the other hand, argued that the reforms were in line with the Constitution and 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 'special caste' out of touch with ordinary citizens, and operated as a 'state within a state' incapable of reforming itself. In these circumstances, they argued, making judges and their supervisory bodies more accountable to elected bodies was justifiable and in line with practices in other established democracies.

Conflict over supreme court retirements

The new supreme court early retirement provisions, which came into effect at midnight on 4 July and affected 27 of its 73 members, have proved particularly contentious. Nine of these justices requested an extension to their terms of office and submitted the required formal documentation to the President, four did so by simply stating that they could not be dismissed, and a further three cited the provisions of the Constitution. There were 11 supreme court justices who did not seek an extension, including first president Małgorzata Gersdorf who argued that her six-year term of office, which ends in 2020, could not be shortened because it was constitutionally guaranteed.

The government and Duda responded that the Constitution also says that parliament determines the retirement age of supreme court judges and, as she did not submit a request to prolong her term, Gersdorf officially retired and could not continue as first president. They also said that one of her deputies, Józef Iwulski, was acting president until the post could be filled permanently. Gersdorf, on the other hand, argued that Iwulski was merely deputising for her as a temporary replacement in cases of her absence; she went on vacation shortly after the new provisions came into effect (Iwulski shared this interpretation of his role).

At the same time, the European Commission launched the first stage of a legal action against Poland, arguing that the new early retirement provisions threatened the principle of judicial independence enshrined in the EU's charter of fundamental rights, giving Warsaw one month to respond. The case could end up in an infringement procedure against Poland before the European Court of Justice; which could, in turn, issue an injunction ordering Warsaw to suspend the supreme court judge replacement process until it has determined its verdict.

Law and Justice responded by introducing legislation to accelerate the process of appointing a new, permanent supreme court head. The amendments, approved swiftly by parliament (without proper debate, according to the opposition), make it easier to appoint new supreme court judges and reduced (from 110 to 80) the number required in the court's general assembly to nominate candidates from which Duda will choose the new first president. The government said that the amendments were needed to end the state of uncertainty in the supreme court and prevent the threat of obstruction of new appointments. However, some commentators argued that Law and Justice wants the new supreme court judges and leadership to be in place as soon as possible to make the judicial reforms irreversible by the time the European Court of Justice comes to examine the case.

Undermining Law and Justice's pivot to the centre

Law and Justice argues that it was elected to office with a mandate to overhaul the judiciary. For sure, an August 2017 survey conducted by the CBOS agency found that 81% of respondents (including 74% of Civic Platform voters) felt that judicial reform was necessary while only 10% were against.

However, while Poles certainly have many misgivings about the functioning of their country's judicial system, they are also wary of the government's specific reforms. For example, a July survey conducted by the IBRiS agency for the 'Rzeczpospolita' newspaper found that 54% of respondents evaluated them negatively and only 39% positively. Only 18% said they would increase trust in Polish courts (25% reduce trust, 15% make no difference); 25% that they would increase the independence of the courts (48% reduce independence, 14% no difference); and 28% said they would make them more efficient (43% reduce efficiency, 14% no difference).

Moreover, some commentators argue that, by polarising the political scene around such a sharp conflict, the judicial reform controversy has undermined Law and Justice's strategic objective of calming social protests and shifting the focus of debate in the second half of the government's parliamentary term away from more controversial issues to broaden the ruling party's appeal to more centrist voters. With the passage of the judicial reform laws at the end of last year, many of the key elements of the government's radical state re-construction programme were felt to be in place. One of the main objectives of the change of prime minister last December and government reshuffle in January was, therefore, to stabilise and consolidate Law and Justice's position ahead of a series of key elections: local government in the autumn, European Parliament in May 2019, parliamentary in autumn 2019, culminating in the summer 2020 presidential poll.

Why no backlash?

Nonetheless, opinion poll support for Law and Justice is holding up well, averaging around 40%, roughly the level that the party achieved in the 2015 parliamentary election and at least 10 percentage points ahead of Civic Platform. At the same time, protests against the government's judicial reforms – which last year were held in dozens of towns and cities and attracted thousands of Poles – were much smaller this time around and appeared to mobilise a less diverse cross-section of the public, with notably fewer young people involved.

So why has there not been more of a political backlash against the government's reforms? Although many Poles have misgivings about Law and Justice's approach to constitutional questions, they also find these kinds of issues rather abstract. For sure, the July IBRIS/'Rzeczpospolita' survey found that 70% of respondents said that they were interested in the supreme court reforms (33% very interested) and 63% that they 'affected them directly' (31% to a significant extent). However, it is questionable whether they have detailed knowledge of the dispute, and they often tend to view it as a political conflict rather than through a legal-constitutional lens.

Indeed, the opposition have not been able to convince ordinary Poles that anything really extraordinary is happening in the country as far as the state of democracy is concerned because their rhetoric often does not accord with the latter's everyday experiences. For many Poles, for example, the anti-Law and Justice privately-owned media still appears to provide a powerful counter-weight to pro-government public broadcasting. At the same time, Law and Justice is more in tune with public opinion, and appears to have delivered on the social and economic issues which Poles care most about.

Moreover, although they are not necessarily convinced by the government's reforms, most Poles are very critical of the way that the courts currently function so the judicial establishment does not have a bank of goodwill that the opposition can draw on to mobilise support. For example, a February 2017 CBOS survey found that 51% of respondents said that they evaluated the Polish judicial system negatively compared with 36% who viewed it positively (only 2% very positively). Among the most commonly cited problems were: the protracted nature of trials (48%), court proceedings being too complicated (33%), and judicial corruption (30%).

Moreover, while focusing on Gersdorf as the visible symbol of resistance to the reforms gave the opposition an opportunity to 'personalise' the dispute in a way that could make it intelligible for Poles unfamiliar with the intricacies of how the supreme court works, she does not have the personality of a 'political fighter'. Indeed, her often-inconsistent behaviour – declaring that she would not comply with the new law but then going on holiday at a crucial moment during the anti-reform protests – confused and demobilised the government's opponents. At the same time, Law and Justice's argument that the reforms were aimed at freeing the court system from the country's non-democratic past were reinforced when it emerged that Iwulski had participated in seven political trials involving sixteen anti-regime oppositionists and was a reserve officer of the military counter-intelligence service (WSW) during the communist period.

Flawed reforms better than the status quo?

Perhaps most importantly, the opposition has not really offered any credible alternative to the government's judicial reforms other than defending a status quo that most Poles feel is deeply flawed. An August 2017 CBOS survey, for example, found that while only 23% of respondents trusted Law and Justice on this issue (64% distrusted) only 6% trusted Civic Platform (79% distrusted). Even if Poles are dubious as to whether the government's 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, that it is at least trying to tackle a problem which previous administrations appeared content to ignore.

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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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