

# Will Poland's Law and Justice government respond to international pressure?

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*Poland is currently experiencing a constitutional crisis, as the ruling Law and Justice party has come under international pressure over its actions in relation to the country's constitutional tribunal. There is little indication that the government will back down, but, as [Aleks Szczerbiak](#) points out, the crisis is forcing it to expend valuable time and political capital defending its position on the international stage.*



As a political grouping committed to carving out a more independent and assertive foreign policy and re-calibrating the country's relationship with the major EU powers, especially Germany, Poland's right-wing [Law and Justice](#) (PiS) party was expecting to clash with the EU political establishment following its decisive victory in last October's parliamentary election. However, it did not foresee that the cause of such a sharp conflict with the EU's institutions would be a bitter domestic dispute over the membership and functioning of the country's constitutional tribunal, a powerful body that rules on the constitutionality of laws.

The crisis began last November almost immediately after Law and Justice took office when the new government decided to annul the appointment of five judges elected by the previous parliament to the 15-member tribunal, to replace those whose terms of office were due to expire that month and in December. However, the tribunal itself ruled that while the appointment of the two judges replacing those whose terms expired in December was unconstitutional, the other three were nominated legally.

The government argued that the tribunal did not have the right to make judgments about the constitutionality of parliamentary appointments, and Law and Justice-backed President Andrzej Duda swore in five judges nominated by the new parliament instead. Tribunal president Andrzej Rzepliński responded by declaring that the five would not participate in its work, although he subsequently allowed two of them to assume their duties.

Law and Justice tried to break this impasse in December by amending the constitutional tribunal law to increase the number of judges required to make rulings in the most important cases from nine to thirteen, thereby hoping to oblige Mr Rzepliński to accept the five judges appointed by the new parliament. The so-called 'repair law' also increased the threshold for tribunal rulings to a two-thirds majority and stipulated that cases would be considered in the order they were received rather than at the tribunal's discretion.

However, in March, ignoring the December amendments and ruling on the basis of the old procedural rules, the tribunal declared the 'repair law' unconstitutional. The government, in turn, said that the tribunal had no constitutional power to review the law, which had come into effect as soon as it was passed, and refused to publish the judgment in the official journal, a necessary step for tribunal rulings to become legally binding.



President of the Constitutional Tribunal Andrzej Rzepliński. Credits: [Senate of the Republic of Poland](#)

Most of the opposition and legal establishment claim that Law and Justice's actions violate judicial independence and would paralyse the tribunal, making it more difficult to challenge the government's legislation. They have bundled up the dispute over the tribunal's membership and competencies with a number of other government measures – notably new laws which they claim politicise the civil service and public broadcasting – to accuse Law and Justice of undermining the fundamentals of Polish democracy and the rule of law. As a consequence, thousands of Poles have participated in demonstrations organised by the Committee for the Defence of Democracy (KOD), a new anti-government civic movement.

The government's supporters, however, argue that the previous administration, led by the centrist [Civic Platform](#) (PO) party, tried to appoint five judges illegally just before the October election to pack the tribunal with Law and Justice opponents. They point out that had these appointments not been challenged, all but one of the tribunal's fifteen members would have been elected by Civic Platform-dominated parliaments, and argue that the 'repair law' increases the legitimacy of tribunal judgments and prevents the timing of cases being manipulated. More broadly, they claim that opposition to the government is being orchestrated by well-entrenched, and often deeply corrupt, post-communist elites and vested interests hostile to its plans to restore pluralism and balance to state institutions.

### **International pressure intensifies**

In April, international pressure on the Law and Justice government intensified when the European Parliament (EP) passed a resolution by 513 votes to 142 (with 30 abstentions) saying that the 'effective paralysis' of the tribunal posed a threat to democracy, human rights and the rule of law in Poland. The EP called upon the government to publish the tribunal's March ruling and fully implement the recommendations of the Venice Commission, an advisory body on constitutional matters to the Council of Europe human rights watchdog. The Law and Justice government actually invited the Commission to Poland earlier this year hoping that it could help end the controversy, but it raised similar concerns to those expressed by the EP and also supported the appointment of the three judges elected by the previous parliament.

The EP vote was prompted by a decision by Civic Platform – now the main opposition grouping and a member of the European People's Party, the EP's largest political grouping which prepared the resolution – to attack the ruling party more openly in European forums. The government's opponents enjoy close links with the EU political establishment and western opinion-forming media, many of whom share their dislike of Law and Justice.

The vote came in the wake of the European Commission's January decision to initiate a preliminary investigation under an EU monitoring mechanism to establish whether the rule of law in Poland was under 'systemic threat'. So far the Commission has taken the first step which involves discussions with the member state concerned, but the EP resolution said that it should move to the next stage and issue a 'rule of law recommendation' giving Poland a specific time period to address the problems that it has identified.

Some commentators have also argued that the constitutional crisis is having a negative impact on Polish-US relations, suggesting that could lead to the July NATO summit in Warsaw being downgraded or ending in humiliation for Poland. Law and Justice has made the summit a crucial test of its effectiveness in ensuring national security, and is hoping that it will agree to strengthen the Alliance's eastern flank to deter Russian aggression, ideally stationing permanent NATO forces on Polish territory.

A number of articles extremely critical of Law and Justice have appeared in the US opinion-forming media and American officials have expressed concerns about how the constitutional crisis is developing. Law and Justice supporters argue that many US commentators and officials are either ideologically un-sympathetic to the party or have been misinformed by well-placed individuals in American foreign policy-making circles who are hostile to the government.

The government's opponents, for example, made much of the fact that, during his March visit to Washington for a three-day nuclear summit, Mr Duda did not have any formal discussions with US administration officials. Law and

Justice supporters responded that only three of the 60 world leaders attending the summit secured bi-lateral meetings with US President Barack Obama, and that Mr Duda held 'brief but substantive' informal discussions with him on the side-lines.

### **Law and Justice stands its ground**

At the moment, Law and Justice is clearly willing to pay a high political price for actions which it says are both constitutional – arguing that swearing in the three judges elected by the previous parliament and publishing the tribunal's March verdict would be illegal – and necessary to ensure that its legislative programme is not de-railed. The government's supporters say that the constitutional crisis is a political rather than legal dispute and, therefore, a matter to be resolved internally. With the stakes so high, agreeing to the tribunal's demands would also represent a huge political climb-down and the government currently shows no sign of bowing to what it considers to be opposition-initiated European and international pressure.

At the same time, the ruling party is also signalling that it is trying to engage in dialogue with the opposition and find a compromise. For example, the Law and Justice-dominated Sejm, the more powerful lower house of the Polish parliament, has convened a group of legal experts to consider the Venice Commission report and work on recommendations to resolve the crisis, if necessary by changing the law; although most opposition parties argue that the government is simply playing for time to appease the international community.

Moreover, the EP resolution has no legal consequences and the Commission, which is currently awaiting a report on Poland from its Vice-President Frans Timmermans, cannot impose sanctions such as suspending a country's voting rights. The 'rule of law' framework constitutes a political dialogue and sanctions can only arise if the Commission invokes Article 7 of the EU treaties and recommends them to the European Council. Here sanctions require unanimity in one of the three stages of voting, and at least one country, Hungary, has made it clear that it will veto any attempt to introduce them against Poland.

The Commission also needs to be wary about escalating the dispute. For sure, opinion surveys suggest that most Poles agree with the constitutional tribunal rather than Law and Justice. A March-April poll conducted by the CBOS agency, for example, found that 45% of respondents supported the tribunal while only 29% agreed with the government (29% were undecided). However, while Poles support their country's EU membership overwhelmingly, they are much more divided about the idea of European institutions becoming involved in Polish domestic political disputes.

The same CBOS survey found respondents evenly split on whether EU politicians and institutions were motivated by genuine concern for the state of democracy in Poland (47%) or instinctively hostile to Law and Justice and biased towards the opposition (45%). Moreover, while Law and Justice has a significant number of vocal and well-organised opponents, it also retains widespread support among a large segment of the electorate, and other polls show that the ruling party has a clear lead over the divided opposition.

Law and Justice is more sensitive to influence from the US, which it considers Poland's most important foreign policy ally. However, Polish-US relations are strongly rooted and the ruling party is hoping that Washington will be pragmatic and de-couple whatever concerns it has about the constitutional crisis from security issues. In fact, the Warsaw summit appears likely to confirm an ongoing process of strengthening NATO's eastern flank, while there is a lack of political will for permanent US military bases in Poland anyway, regardless of the constitutional crisis. It also seems very unlikely that Washington will escalate its concerns about the Polish political situation into a public conflict by, for example, using the summit as an occasion to show its disapproval of the Law and Justice government.

### **Will playing for time work?**

In spite of the involvement of international actors, Poland's constitutional crisis is no nearer to being resolved and, if

anything, becoming more intractable. As the tribunal starts to issue rulings in other cases on the basis of the old procedural rules, while the government continues to refuse to recognise these judgments by not publishing them, this could lead to legal paralysis with courts forced to decide whether or not to apply the challenged legislation.

Moreover, the longer the crisis continues the harder it will be for the ruling party to back down without losing face and it is certainly unlikely to take any action that appears to be giving in to opposition-initiated international pressure. Law and Justice is hoping that sooner or later the international community will grow tired of Poland's complicated political-legal dispute and move on to other issues. However, in the meantime it is being forced to devote valuable time and political capital to defending its position in the European and international arena.

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*Note: A version of this article appears at Aleks Szczerbiak's [personal blog](#). The article gives the views of the author, and not the position of EUROPP – European Politics and Policy, nor of the London School of Economics.*

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