

RESILIO

Country Report

Poland



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RESILIO Country Report – Poland

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1. Introduction

During Poland's rule of law crisis from 2015 to 2023, the government led by the Law and Justice party (Prawo i Sprawiedliwość, PiS) removed effective checks and balances and introduced changes that undermined judicial independence, media freedom, and effective and independent investigations by the Prosecution Office. If resilience is understood as a system's ability to undergo shocks or disruptions while retaining its basic function, structure, and purpose, we may conclude that the Polish system was not resilient to the political attack on the rule of law. However, other factors, notably the civil society response and push to Europeanise the rule of law crisis in Poland, proved decisive for slowing down the rule of law backsliding, and give rise to hopes of its restoration in the medium term.

2. Analysis of the country along RESILIO model

2.1 Most important systemic factor: constitutional resilience

In Poland, the constitutional and institutional factors did not prevent the rule of law backsliding¹ in 2015-2023. Major constitutional revisions did not take place because the PiS governing majority lacked a sufficient parliamentary majority to amend the Constitution of 2 April 1997, or enact a new one.

However, political subordination of the Constitutional Tribunal enabled the PiS government to influence constitutional interpretation.² In December 2016, the Constitutional Tribunal (CT) ceased to perform its function of independent centralised constitutional review, and instead became the government's enabler when the PiS ruling majority appointed all 15 judges of the CT.³ In 2021, the European Court of Human Rights (ECtHR) held that participation in the examination of constitutional complaints by three people unlawfully elected as CT judges lead to a breach of applicants' rights guaranteed in the European Convention on Human Rights (ECHR).⁴ And according to a study prepared by the Helsinki Foundation of Human Rights in Warsaw, between 2017 and 2022, the Constitutional Tribunal passed 159 judgments, 85 of which were passed in illegal panels.⁵ The Tribunal further confirmed changes in the judiciary⁶ and, following the independent Supreme Court's decision that these changes were inconsistent with the Polish constitution, the Tribunal declared this decision null and void.⁷ Moreover, the CT helped the government and President mitigate the negative political fallout of some of their policies. For example, the CT invalidated a memory law provisions adopted by PiS ruling majority and signed by the President when the political fallout proved too high. The ruling majority did not want to remove the provisions in a legislative procedure in the parliament.⁸ The CT also helped introduce highly unpopular policies, such as restricting the right to abortion.⁹ In recent years, the Court of Justice of the European Union

(CJEU)¹⁰ and the ECtHR¹¹ have considerably enhanced and clarified European legal standards on judicial independence. In 2021-2022, the Constitutional Tribunal radically departed from case law established before 2015 and, in a series of judgments, ruled that most recent interpretation of EU treaties by CJEU¹² and of the ECHR by ECtHR¹³ on judicial independence were inconsistent with Poland's constitution. Meanwhile, EU institutions have used various rule of law protection mechanisms with regard to the Constitutional Tribunal. Since December 2017, the CT has been subject to the political dialogue procedure envisaged in Article 7(1) Treaty of the European Union (TEU). The CT's anti-EU turn prompted the European Commission to refer Poland to the CJEU in 2023 (case C-448/23, pending).¹⁴

The PiS governing majority encountered considerable resistance from judges and civil society in its efforts to take control of the common courts system. On the institutional level, one of the last independent institutions, the Commissioner for Human Rights (Prof. Adam Bodnar in 2015-2021) joined proceedings before the Constitutional Tribunal, the Supreme Court, the CJEU and the ECtHR concerning diverse elements of the rule of law crisis.

In 2017, the PiS government unveiled three 'judicial bills' aimed at changing the method of appointing 15 judges to the National Council of the Judiciary (NCJ), and which led to the removal of a significant number of judges from the Supreme Court and common courts by lowering the retirement age. These laws sparked massive nationwide protests in July 2017. Under public pressure, President Duda signed the law on common courts and vetoed the other two. However, in December 2017, the President ultimately approved slightly modified versions of the laws concerning the NCJ and the Supreme Court. The Council of Europe's Commission on Democracy through Law (Venice Commission) found that the bills endanger judicial independence.¹⁵

Since 2018, the 15 judges on the NCJ have been nominated by the governing majority in the Sejm (lower chamber of parliament), instead of by other judges. The judges are now appointed by the President of Poland on the NCJ's recommendation. From 2018-2023, the new NCJ was involved in the appointment or promotion of an estimated 2,000 judges, including to the Supreme Court. In 2018,

two new chambers were added to the Supreme Court in Poland: the Disciplinary Chamber¹⁶ (dissolved in 2022 and replaced by the Chamber of Professional Responsibility¹⁷), and the Chamber of Extraordinary Control and Public Affairs,¹⁸ all of whose judges were appointed under the new procedure. The Criminal, Civil, and Social Security chambers of the Supreme Court have been gradually filled by government appointees, who are often referred to as 'neo-judges.' Over the years, the CJEU,¹⁹ the ECtHR²⁰ and the Polish Supreme Court²¹ have ruled that the politicisation of selecting NCJ members taints the procedure of appointing judges to both the Supreme Court and common courts. Therefore, judges appointed by the NCJ do not constitute an independent court established by law according to EU law, the ECHR, and the Polish Constitution.

Moreover, since 2016, the offices of the Minister of Justice and the Prosecutor General were merged, which was criticised by the Venice Commission²² and the CJEU advocate general.²³ The Minister of Justice conducted a widespread replacement of presidents and vice-presidents of common courts, and as the Attorney General, he also demoted many prosecutors. The politicisation of the Prosecution Office has helped undermine the proper functioning of investigation and public prosecution services.²⁴

2.2. Most important subsidiary factor: civic resilience

Sine 2015, the grassroots social movement The Committee to Defend Democracy (Komitet Obrony Demokracji, KOD) has been active in defending the rule of law, mostly through protests. In June 2018, several civil society organisations, including associations of judges, prosecutors, and attorneys-at-law, formed the Committee for the Defence of the Judiciary (Komitet Obrony Sądownictwa, KOS) to monitor and analyse changes pertaining to the rule of law as well as coordinating the defence of judges harassed by abusive disciplinary and criminal proceedings.²⁵

The first major civil society success was to prevent the shortening of the term of the First President of the Supreme Court, Małgorzata Gersdorf.²⁶ According to the new law on the Supreme Court, she was supposed to retire in July 2018, yet she stayed on until the end of her term in April 2020, supported by protesters, NGOs, and media.

Civil society groups, most notably the judges' associations Iustitia and Themis, have played a crucial role in Europeanising the rule of law crisis in Poland,²⁷ including through cooperation with the European Network for the Councils of Judiciary (which suspended the Polish NCJ in 2021), MEDEL - European Magistrates for Democracy and Freedoms, Judges for Judges, the European Association of Judges, and the Association of European Administrative Judges.²⁸ They also sought advice from the transnational academic network Good Lobby Profs.²⁹

Polish judges, prosecutors, and civil society groups also reached out to the European Commission and the European Parliament.³⁰ The Commission initiated five EU law infringement proceedings (Article 258 Treaty on the Functioning of the EU) against Poland concerning the bills on the common courts and the Supreme Court,³¹ the disciplinary system for judges,³² the muzzle law³³ (which made the disciplinary system even harsher),³⁴ and the Constitutional Tribunal.³⁵ Polish civil society also contributed to Annual Rule of Law Report (ARoLR) introduced in 2020.³⁶

Moreover, Polish judges posed dozens of preliminary reference questions to the CJEU (Article 267 TFEU) regarding changes to court systems, and applied CJEU and ECtHR case law in Poland, for which they faced reprisals in the form of disciplinary proceedings and other sanctions, including smear campaigns in government-controlled public media.³⁷ Prosecutors defending the rule of law were harassed and sanctioned through forced secondment and transfers to lower-level units.

Additionally, judges in other EU Member States have also posed preliminary references to the CJEU regarding the rule of law crisis in Poland. Notably, courts from the Netherlands posed such questions in respect of European Arrest Warrants issued by Polish courts.³⁸

Transnational solidarity was also manifested in the March of One Thousand Robes, which took place in January 2020 in Warsaw, where hundreds of judges, attorneys, and prosecutors from Poland and other states called for better protection of judicial independence and the rule of law.³⁹

Furthermore, Polish judges and the other private citizens lodged hundreds of applications to the ECtHR regarding various elements of the rule of law crisis. Since 2021, the

ECtHR has passed several judgements pertaining to the Constitutional Tribunal, the NCJ's judicial appointments to the Supreme Court and common courts, the premature end of legal NCJ membership terms,⁴⁰ the dismissal of presidents and vice-presidents of courts by the Minister of Justice, and the system of harassing independent judges, among others.⁴¹ As of 6 July 2023, 397 applications were pending before the ECtHR relating to Poland's rule of law crisis.⁴²

Moreover, private media independent of government, both for-profit and non-profit, have covered the rule of law crisis and provided counter-narratives to the government's propaganda techniques of smearing the judiciary and other critics of PiS majority rule of law policies.

2.3 Most important contextual factor: economic resilience

Poland's economic situation has had an impact on the rule of law crisis. In 2015-2020, the PiS government benefited from strong economic performance and introduced generous welfare spending, including the popular direct transfers that boosted its electoral outcomes in 2019.⁴³ After comfortably winning its second term, the PiS governing majority increased its rhetorical, political, and legal confrontation with EU institutions, by ostentatiously failing to implement the CJEU's rulings as well as abusing the Constitutional Tribunal to pass anti-EU and anti-ECHR rulings. The Polish government also stepped up its repression of judges and prosecutors who sought to defend the rule of law. However, the Covid-19 pandemic and especially Russia's full-scale war in Ukraine in 2022 have drastically worsened Poland's economic health, provoking record-high inflation rates and a serious cost of living crisis.⁴⁴ Opinion polls taken in mid 2023 indicated that Poles considered unlocking European funds a priority after fighting inflation.⁴⁵ Given the need to strengthen the currency and improve the economic outlook, the PiS government could not risk the loss of EU funds.

3. Impact of crises on the rule of law: rule of law dispute with the EU

The EU has expanded its set of financial sanctions for violations of the rule of law. In December 2020, the EU adopted Regulation 2020/2092 on the Rule of Law Conditionality,

which aimed to protect the EU budget. The EU activated this mechanism against Hungary in 2022, but not against Poland, even though there were reasonable grounds to do so.⁴⁶ However, the EU has also used the 2021 Recovery and Resilience Facility (RRF Regulation) or NextGenerationEU to foster compliance with the rule of law in both Hungary and Poland. The disbursement of funds is conditional upon meeting the milestones negotiated with EU member state governments. Furthermore, the Commission negotiated super-milestones regarding the disciplinary system for judges with the Polish government.⁴⁷ The PiS government could not meet these milestones for internal political reasons, however, it did make some concessions, notably by dissolving the Disciplinary Chamber and creating a new Chamber of Professional Liability in 2022. Moreover, in 2023, the European Commission cited the ‘horizontal enabling condition on the Charter of Fundamental Rights’ as one of the EU’s rule of law tools,⁴⁸ which means that programmes supported by the Common Provisions Regulation and their implementation must comply with the EU Charter of Fundamental Rights.⁴⁹ Not fulfilling the conditions results in the freezing of EU funds.⁵⁰

Poland’s rule of law conflict with the EU and the risk of losing critically needed EU funds played a significant role in the campaigns running up to the October 2023 parliamentary election, at which opposition parties emerged victorious. The combination of global crises (Covid-19 and the consequences of Russia’s full-scale invasion of Ukraine) along with the EU’s renewed determination to defend its funds against countries violating the rule of law contributed to a marked political shift. This shift appears to pave the way for the reconstruction and strengthening of the rule of law in Poland under the new coalition government.

4. Conclusions

From 2015 to 2023, Polish institutional structures and its constitution proved insufficient for the effective protection of the rule of law. The decisive role was played by local civil society, including the stance taken by judges and prosecutors to defend rule of law standards. Civil society groups also worked together with European partners, including judges in other EU member states, various judicial associations, and legal scholars’ organisations. Jointly, their efforts led to the Europeanisation of the rule of law

crisis in Poland, which elicited robust responses from European political institutions (the Commission and Parliament), the CJEU, and the ECtHR. The rule of law crisis in Poland has been inherently political and its resolution is conditional upon electoral outcomes, which have been shaped significantly by the broader geopolitical, security, and economic context. The combination of these various factors in 2023 led to the creation of political conditions that enable the reconstruction and strengthening of the rule of law in Poland in the medium term.

Sources

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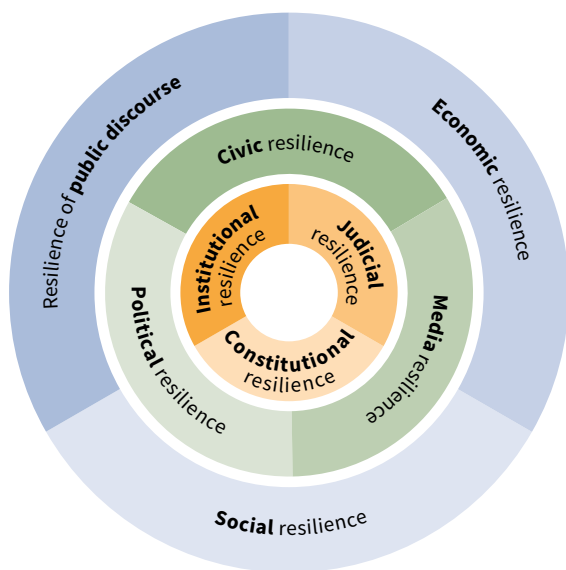
About the project

RESILIO aims to identify institutional and societal factors that make the rule of law more resilient, thus adding a constructive contribution to academic and policy debates. It draws on a ‘thick’ definition of the rule of law, understood as closely connected to democracy and fundamental rights. The resilience of the rule of law means that the rule of law can experience hazardous events or incremental threats without losing its core function, structure and purpose.

About the analysis

This paper is part of **RESILIO Country Reports series**. It is a collection of compact analyses that assess the source of rule of law resilience in each EU member state by examining the most prominent resilience factors, using the analytical framework of the RESILIO model.

RESILIENCE FACTORS



RESILIO offers a multi-layered model of rule of law resilience. Systemic dimension (orange) reflects upon the resilience of the legal setup; subsidiary dimension (green) looks at the phenomena and tendencies present in societies as possible facilitators; and contextual dimension (blue) analyses the broader habitat, determined by structural and systemic variables like economic growth, social cohesion, and general political climate. RESILIO also takes into account the horizontal effects of unpredicted and unprecedented crises that can affect all dimensions of rule of law resilience with different intensity. While each factor is necessary for a resilient rule of law, they are only sufficient in combination.

The considerations in this paper are compatible with the developed conceptual model of the resilience of the rule of law. They focus on **social resilience** as a contextual factor strengthening the rule of law.

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