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Who gets to judge?

Poland's government faces a dilemma: how to undo years of lawlessness without losing the court of public opinion

Dramatic scenes are playing out at Poland's Constitutional Tribunal amid a wave of speculation about whether Prime Minister Donald Tusk's government and the Tribunal judges elected by its liberal parliamentary majority are acting lawfully. Many will ask whether democrats must break the law to restore institutions sabotaged by populist authoritarians. In the Polish case, it's the wrong question.

Legally, the matter is straightforward and supports Tusk's actions. Eleven years ago, the right-wing Law and Justice (PiS) party illegally seated three judges on the Constitutional Tribunal. Two years later, PiS passed legislation illegally cutting short the terms of the judicial members of the National Council of the Judiciary, the constitutional body responsible for nominating judges to all the country's courts except the Tribunal. It replaced them with PiS appointees, creating a politically controlled body outside the bounds of Poland's constitution.

By the time the democratic opposition led by Tusk returned to power in 2023, more than 2 000 people had been appointed or promoted to judicial posts through an unconstitutional procedure repeatedly condemned by Polish and European courts and by scores of constitutional scholars around the world.

The law is on Tusk's side

The legal consequences should be clear. The three PiS-appointed members of the Constitutional Tribunal were never judges. Decisions in which they participated should be treated as invalid.

Imagine United States President Donald Trump issuing an executive order to appoint two MAGA podcasters as the 10th and 11th justices of the US Supreme Court. Nobody would be surprised if an incoming Democratic administration treated all decisions involving these illegally-seated justices as null and void and prosecuted the impostors, along with

those who helped them.

Enforcing the law in a sharply divided country carried too high a political cost.

That is precisely the situation in Poland. It is why describing the latest events as the 'removal of the Tribunal's president' is misleading. Bogdan Święczkowski, a former deputy to PiS's justice minister, was never the court's lawful president. The General Assembly that nominated him included people who were not judges and had no right to participate.

Judge Anna Korwin-Piotrowska, who has now assumed the duties of president, is fully entitled to act. She was duly elected to the Tribunal. The Tribunal's procedural law, enacted under PiS itself, identifies the judge who takes over when the presidency is vacant, or the president's duties cannot otherwise be performed. The criterion takes previous judicial service into account, and Korwin-Piotrowska, who has had a long career as a judge, clearly qualifies.

The people illegally seated on the Tribunal should have been removed from its premises long ago, sued by state authorities to recover pay they were not entitled to receive, and criminally charged. As non-judges, they have no claim to judicial immunity. Poland's Criminal Code specifically prohibits performing official acts while impersonating a public official.

When the law becomes a political liability

None of this happened, because enforcing the law in a sharply divided country carried too high a political cost. Tusk received an early warning near the start of his current term when his government forcibly took control of public television, which PiS had unlawfully turned into a party propaganda machine. Numerous commentators at home and abroad accused the new government of heavy-handed tactics.

But the risks extended beyond the court of public opinion. What if the prosecution of a pseudo-judge from the Tribunal came before a fellow unlawful appointee in an ordinary court? These neo-judges' willingness to protect their far-right bedfellows is not a secret.

The proceedings involving former PiS justice minister Zbigniew Ziobro and his former deputy Marcin Romanowski – both of whom fled Poland and face charges including misappropriation of public funds and abuse of office – are a case in point. Prosecutors secured a judge's recusal from

Ziobro's European arrest warrant proceedings, citing her irregular appointment and professional ties to Ziobro. But in September, another irregularly appointed judge ruled that Romanowski should receive conditional protection against pretrial detention.

To be sure, strict enforcement of the law would require the removal and prosecution of every one of the thousands of unlawful judicial appointees. But that would unleash political pandemonium. How would voters react if removing a substantial part of the judiciary brought the courts to a standstill? How would the lawfully appointed 'old' judges respond? Would the police continue to carry out judicial orders?

Acting lawfully will not protect anyone from the wrath of a future far-right government.

These are not abstract questions. Poland's right-wing parties insist that their own unlawful position is the only lawful one, and that anyone helping to restore the rule of law is participating in a coup punishable by life imprisonment. Speaking outside the Tribunal, PiS leader Jarosław Kaczyński once again threatened retribution against those involved, invoking the 'Nuremberg principles'.

For a judge, police officer or civil servant, the threat is concrete, as lawyers around the world are learning from the Trump administration's campaign of retribution. US officials who participated in the entirely legal investigations and prosecutions of Trump for his role in the attack on the US Capitol on 6 January 6 2021, are now hounded and prosecuted. So acting lawfully will not protect anyone from the wrath of a future far-right government. Current opinion polls suggest that next year's general election could bring PiS back to power.

The most dramatic episode of the current escalation – the burly President Karol Nawrocki's night-time physical bullying of the diminutive Korwin-Piotrowska at the Tribunal's entrance – may well signal that law-enforcement agencies are wavering. The president's actions were demonstrably unlawful. He has no authority to decide who runs a court by forcing his way into it. Yet the police and the State Protection Service, which answer to Tusk's government rather than the president, did not prevent Nawrocki's raid.

These are formidable problems. Calling them a paradox of the rule of law makes them harder to solve because it rewards the populists' tactics. The more thoroughly they capture the state, and the more brazenly they bully public officials, the more credibility we lend to their pretence of legality. Tusk's government is not short of legal arguments. It is struggling to

build the political authority to act on them.

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