

# When Democrats Govern Undemocratically: The Case of Poland

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## Executive Summary

A specter continues to haunt Europe, one that many thought was long resolved: the debate over what constitutes democratic government and acceptable behavior in twenty-first-century democracies. These questions apply to several European Union member states but have been particularly contested with regard to Poland. The debate is nasty and deep as the governing center-left Citizens Coalition (KO)—led by its largest party (Civic Platform [PO]) and Prime Minister Donald Tusk—charges the right of center Law and Justice (PiS) with violating key tenets of democracy, the rule of law (ROL), and media freedom. PiS, led by former Prime Minister Jaroslaw Kaczynski, responds that these charges have been misleading or false and that the current government itself is guilty of excesses on these very issues.

What is this all about, and who is right? Weren't these questions settled long ago? No, not really. There is more than one valid view on this nexus of issues, both regarding the period Law and Justice governed Poland (2015–23) and since Civic Coalition took office in December 2023. These issues are more complex and nuanced than prevailing narratives about “democrats” and “illiberal, far-right” politicians.

One year after returning to power, the KO-led coalition government continues to argue that its victory in the October 2023 parliamentary elections resolved these debates, indeed that it “saved democracy” by defeating the “far right” Law and Justice.<sup>1</sup> Since then, the KO government has taken strong steps

to “restore the rule of law,” “reestablish the constitutional order,” and reverse other changes PiS made during its terms in office that, it argues, were turning Poland into an autocracy, or authoritarian populist state.<sup>2</sup> The government even goes as far as to float formal delegitimation of PiS and compares the current situation with post-Nazi Germany or post-war Yugoslavia.<sup>3</sup> KO charges PiS with continuing to block its noble efforts and perpetuating “illiberalism” via the presidency and judiciary.<sup>4</sup>

The Biden administration, including former United States Ambassador to Poland Mark Brzezinski, the European Commission, as well as most journalists, think tanks, and pundits accepted the KO narrative uncritically and adopted its language.

This debate is valuable because it has flushed into the open important questions that have major political ramifications. For example, how much control does the EU have over how member states organize their societies? Is only the European Commission's interpretation of “democracy” acceptable, or are variations permitted that stay within certain boundaries? Where and to what extent does EU law have primacy over national law? Where exactly is the line between what the European Union treaties prescribe and member state sovereignty? Can the treaties supersede national constitutions—a question raised not only in Poland, but also in other EU countries?<sup>5</sup> Can a government seek to have media in its country owned by firms from its own country without being accused of be-

ing “nationalist”? Does the EU have jurisdiction over member state judiciaries such that it can prescribe exactly how each is organized? How are the European treaties being applied elsewhere across the bloc?

KO has framed this debate according to its interpretation while PiS has a different one. This difference introduced friction into Poland’s relations with the Obama and Biden administrations, both of which held PiS politicians at arm’s length, even as bilateral ties remained strong. It also harmed Poland’s relationship with the EU, as the European Commission, European Court of Justice, and the European Court of Human Rights named and shamed the Szydło and Morawiecki governments (2015–23) and launched Article 7 proceedings, going so far as to withhold some 137 billion euros from the Covid-related Recovery and Resilience Facility and the Cohesion Fund because of concerns over the judiciary and ROL. This reinforced euro-skepticism in Poland and other EU member states as politicians took notice and some challenged EU interpretations, feeding a reaction—a.k.a. “populism,” “illiberalism,” or worse.

There is not only one valid position on these differences. For example, if PiS attempts to bring media under Polish ownership violate media freedom, does the same not apply to other democracies like Canada and France, which allow no more than 20–25 percent of media to be foreign-owned?<sup>6</sup> Can Warsaw not try to “re-Polonize” media in the country, most of which were sold to foreign firms after 1989 when its economy was unusually weak? If KO accuses PiS of politicizing state media, what are observers to make of the fact that Polish media throughout the post-1989 period were made to reflect the views of the government in power—and do so now under PO as well—on the principle *cuius regio, eius televisia*?<sup>7</sup>

If KO argues that it must “restore the constitutional order” because PiS-appointed judges in the Constitutional Tribunal are aligned with its views, would that not also require restoring the rule of law in the United States, where judges have been appointed politically since the early years of the republic? If Polish judges are unfit for office because of their association with a political party, what are we to think about the president of the German Constitutional Court, who was vice chair of the Christian Democratic Union Caucus in the Bundestag until just before his appointment to the court in 2018?

These issues can be very technical, are not widely understood, and bear further examination and debate.<sup>8</sup> Honest answers are key for the future of freedom and democracy in Poland and beyond.

Our analysis leads to several conclusions:

1. Fears about the demise of Polish democracy during 2015–23 have long been exaggerated.<sup>9</sup> The 2023 election outcome would have been very different if the state had become an “autocracy,” was “authoritarian,” or was “captured” as critics asserted.<sup>10</sup> Poland was hardly an autocracy then, and the democracy gene has been alive and well in the vibrant Polish polity throughout the entire post-1989 period. However, since taking office, the KO government has been taking dubious, if not illegal, steps under the guise of “restoring democracy,” many of which bear close resemblance to those of which it accused the PiS government.
2. Not all the charges leveled against the Szydło and Morawiecki governments are incorrect, but they are selective and inconsistent and paint with far too broad a brush. There was cronyism, but this has applied to earlier Polish governments, including those PO-led in 2007–15. PiS governments deployed Pegasus spyware, but the Tusk government has so far been unable to prove that it did so without due process, and the surveillance happened in other EU member states. PiS governments did seek to return foreign-owned media to Polish control, but other democracies (e.g., France and Canada) also are “nationalistic” about who owns media companies in their countries. PiS governments did discriminate against TVN, now owned by the US firm Warner Bros. Discovery—but the dispute was resolved via quiet diplomacy. Even staunch PiS critics admit TVP (Telewizja Polska S.A.) under KO leadership has not escaped political interference and is entangled with its politics.<sup>11</sup> Poland’s media landscape is vibrant and dynamic, but its public TV has tended to follow the *cuius regio, eius televisia* principle since 1989. PiS governments were hardly alone in how they approached EU-related issues, as observers can now see with KO opposing EU asylum policy.<sup>12</sup> Major institutions like the Venice Commission have sided *against* PiS on actions that KO asserts violate ROL and also *with* PiS on other issues.<sup>13</sup> This is not to dismiss these issues, but the narrative that the KO government consists of democrats and PiS of would-be autocrats is simplistic and inaccurate.
3. To examine the context, complexity, and contradictions in these issues is not whataboutism. The EU was selective in singling out PiS for particular opprobrium and punishment, and has not often pursued similar issues with other member states to the same degree.<sup>14</sup> The Obama and Biden administrations judged PiS governments more harshly because of their more traditional and conservative approach to pub-

lic policy (e.g., migration and abortion) and insistence on maintaining control over issues where the EU treaties leave some room to member states (e.g., judiciary). It is difficult to avoid the conclusion that critics judge Polish politics by progressive standards and a government's willingness unquestioningly to implement every EU initiative, including those about which there are valid differences of opinion.

4. Since taking office in December 2023, the KO-led coalition government has embarked upon a campaign of lawfare and criminalization of political differences, the goal of which is to ensure PiS never again represents a serious challenge to its power. KO has crossed the line with its “iron broom” approach to addressing these issues.<sup>15</sup> The term PM Tusk has coined for this effort—“*demokracja walczaca*” (militant democracy)—recalls a Solidarity-era anti-communist group headed by former PiS PM Mateusz Morawiecki's father and justifies using almost any means to go after opponents.<sup>16</sup> Some Polish commentators link the term to the 1930s German concept of *streitbare Demokratie* used by Karl Loewenstein to describe actions deemed necessary to oppose the Nazi Party, suggesting that members of the current government see PiS as no better than Nazis and that the situation in Poland can be compared to the Nuremberg Trials.<sup>17</sup> Some in KO advocated for “*depisizacja*,”<sup>18</sup> which recalls the term *dekommunizacja*, a concept by which all communists would have been removed from their positions and not allowed to take positions of influence had it been carried out after 1989. Still other KO leaders have used the term *dezintegracja* to mean they would break apart PiS in an effort to neutralize it. KO politicians say publicly that Poland is at a special moment that justifies extraordinary measures to restore the constitutional order. This has led even critics of the government to question whether Tusk will “be an autocrat in order to reform the country.”<sup>19</sup> It has also led to serious and undemocratic abuses of power.
5. The case of Poland can help us to decide how issues like media freedom, the rule of law, and democratic governance

should be understood in the twenty-first century. Framing them simply as “a struggle for democracy” is unsatisfactory given policy and legal disagreements—and a lack of consensus over what the term *democracy* means in the first place.<sup>20</sup> One camp defines the term essentially as *liberal democracy*, arguing that only a country that checks all the progressive boxes is really a democracy. The other camp tends to use terms like *liberty*, *ordered liberty*, *freedom*, *republic*, or *democratic sovereignty*, reflecting a conservative or traditionalist understanding. Meanwhile, Vladimir Putin's Russia and Communist China are working overtime to undermine the concept and practice of democracy. This requires more debate to resolve differences between the two interpretations, which may involve accepting variations from the progressive understanding that—if these differences continue—will damage EU member state governments' relations with voters and will harm the transatlantic relationship.

6. The decisive Republican victory in the November 2024 US elections and PM Tusk's long-held critical views of President Donald Trump raise the stakes for the KO-led government on the US-Polish relationship.<sup>21</sup> KO leaders are correct when they say US-Polish relations are and will remain strong, regardless of who is in power in both capitals, but the Trump administration is aware of KO's clear preference for the Democratic Party and criticism of the president in the latest election cycle. President Andrzej Duda's outstanding ties with the US president and PiS's close ties with the Republican Party are a major asset for Polish foreign policy and the bilateral relationship. Further attempts by the KO-led government to try to destroy PiS will be noticed, which could cause it to lose influence in Washington to the detriment of Poland's national interests and prestige as well as the bilateral relationship. Poland benefits from a strong opposition, and PiS represents a very substantial part of the electorate that buttresses the country's national security goals and the North Atlantic Treaty Organization at a time of unprecedented challenges to the European security order and intensifying great power competition.

## I. The Current Situation

The bitter divide between Law and Justice (PiS) and Civic Coalition (KO), the two largest political parties in Poland, is not strictly about what many have called a “crisis of democracy.”<sup>22</sup> Questions about which party governs democratically, supports media freedom, and observes the independence of the judiciary and rule of law (ROL) are important but not as simple as many have said. The questions also have major ideological, political, and personal dimensions. This is a battle between democrats within the 40-yard lines over worldview, political philosophy, tradition/modernity, values, the degree of sovereignty within the European Union context, and relations with Germany. These competing visions over Poland’s future also reflect personal rivalries that go back decades.<sup>23</sup>

In one corner is the KO, a strongly pro-EU, pro-Germany, economically liberal center-left coalition, whose largest constituent party (Civic Platform, PO, founded in 2001) is led by Prime Minister Donald Tusk, the former European Council president and a major EU-level politician. In the other is PiS, a socially traditional/conservative, economically more statist, very anti-Russia, Germany-skeptic party that seeks to retain as much sovereignty as possible within the context of the EU treaties. It is led by former PM Jaroslaw Kaczynski, a more traditional politician whose life’s work has focused almost exclusively on Poland.

This divide did not start after the PiS government took office in December 2015 and suddenly began to “dismantle democracy” and the Polish constitutional order, as its critics argue.<sup>24</sup> The Tusk-Kaczynski relationship changed fundamentally in 2005, when it went from merely having differences between still cooperating former Solidarity leaders to becoming an irrevocable rivalry after PiS beat PO in the September 2005 parliamentary elections. Both parties changed as a result of their decision not to enter a coalition together, but the change in PO was more profound. Before 2005, conservative politicians like Jan Maria Rokita still played a prominent role in PO. It was a center-right party, largely anti-post-communist, that partly challenged the post-communist establishment and status quo. After that, it drifted toward absorbing the post-communist oligarchy to the point where post-communists now reside both within the KO and its affiliated parties. Instead of the expected coalition with PO, PiS formed a coalition with the populist Self-Defense (Samobrona) and ultra-conservative League of Polish Families (LPR). Moreover, in October 2005 Lech Kaczynski (Jaroslaw’s

twin brother) handily defeated Tusk by an over 8 percent margin to win the Polish presidency. PO created the “democracy” narrative after it returned to government to lead two coalition governments (2007–15).<sup>25</sup> The April 2010 Smolensk air disaster, which killed President Lech Kaczynski and 95 others (including PO co-founder and former Sejm Speaker Maciej Plazynski), deepened the divide between Kaczynski and Tusk.

However, policy also divided PO and PiS. During the PO-led coalition governments of 2007–15, the sides clashed repeatedly over the division of powers between the Sejm and the presidency. Tusk’s PO advocated quite radical constitutional reforms to reduce the powers of the presidency and ease its ability to pass laws and govern; PiS defended its prerogatives anchored in the constitution. PO efforts at that time to “streamline” Polish democracy and make it “more efficient” failed, but they signaled that the party’s goal was to reinterpret the constitutional order to favor its agenda. And, to top off those years of rancor, just before the 2015 elections, PO added more judges to the Constitutional Tribunal than was legal at the time, which caused an uproar and led PiS to respond in kind when it took power shortly thereafter. In 2021, the European Court of Human Rights ruled that PO had acted unlawfully.<sup>26</sup>

These differences remained at the center of the PO-PiS divide after PiS defeated PO in 2015 and won the first parliamentary majority of any party since 1989. In power, PiS then sought to reform the judiciary, whose functioning had and still has a very negative reputation in the polity, in part because it had seen relatively few changes since 1989 and because many of the same structures and judges were still in place. In fact, less than 1 percent of the judges who served the communist regime—most of whom were party members—were dismissed after 1989. While most of these judges have retired, they have been shaping Poland’s justice system and new generations of lawyers for almost three decades. PiS sought to fix these problems and make a clean break with the pre-1989 communist order, including by appointing new judges, seeking to retire judges who had remained in their positions, and establishing a disciplinary chamber. KO called all these steps egregious violations of the rule of law, pressing this narrative so vigorously that EU institutions and other outside observers, most of whom did not understand Polish legal complexities, accepted it completely.

## II. There are Other Views

There is not only one legitimate view on this nexus of issues. They are complicated, the reality is more nuanced, and Poland was neither an autocracy nor becoming one. Moreover, the current government has taken its “iron broom” policy,<sup>27</sup> announced well in advance of the 2023 elections, to clean out the “Augean stables,”<sup>28</sup> so far that it has itself crossed the line from democratic to undemocratic behavior, as some predicted it would.<sup>29</sup>

The European Commission and nongovernmental organizations rightly monitor the state of democratic institutions, the rule of law, and governance in EU member states and globally. They should be careful, however, to apply the same standards to all member states equally and not selectively for what looks very much like political reasons. Brussels should recognize lawfare where it is taking place and call out attempts by member state governments to criminalize political differences, including by friendly political parties, as is happening in Poland today.

It is important to stress that there *were* issues during the PiS governments regarding ROL, such as the introduction of a disciplinary chamber for the Supreme Court. PiS, however, has a point when it highlights that the Lisbon Treaty respects the national identity of member states and was founded on the principle of constitutional pluralism, which guarantees that member states can shape their judicial systems in a sovereign manner as long as judicial independence is guaranteed. This has raised legitimate questions about the extent of EU control, especially over constitutional matters. Other EU member states, including Romania and Germany, have raised questions about where the line runs between state sovereignty and Brussels’ role.<sup>30</sup> The EU interprets Warsaw’s questions as a challenge to its primacy and has taken strong steps to quash it. This included massive penalties, including the so-called nuclear option of Article 7 proceedings that led to the withholding of some 36 billion euros from the Covid Recovery and Resilience Facility and 76 billion euros from the Cohesion Fund because of ROL and other concerns.

The Morawiecki government argued that it had met EU concerns over the disciplinary chamber when the Sejm adopted a law proposed in July 2022 that replaced it with a new professional responsibility chamber.<sup>31</sup> However, the European Commission did not accept this, arguing it was not in itself sufficient to fully meet its rule-of-law “milestones” for releasing the funds.<sup>32</sup> The law—like all of Poland’s other judiciary-relat-

ed laws—remains in place. When the commission in February announced that it would release 137 billion euros before KO finalized changes to Poland’s judiciary, this left the impression that the EU rewarded the pro-EU KO for having done nothing other than promise reforms it had not implemented, while Brussels punished PiS for daring to challenge its interpretation of EU law.<sup>33</sup> With the exception of Hungary, other EU member states have not received the same scrutiny or face the same consequences. This has been noticed and has added to Euroscepticism in other member states as voters increasingly realized the commission was applying double standards to governments that pursued more traditional, conservative policies and sought to retain as much sovereignty as possible within the EU context while observing the EU treaties.

### Rankings

The politicians and institutions that since the mid-2010s have been at the forefront of making charges against PiS governments enjoyed strong support from the most important international NGOs that rank or rate countries on their performance in democracy, rule of law, and human rights. These institutions, the oldest of which is Freedom House (founded in 1941), now number about 15 and are located primarily in the United States or Western Europe. They publish influential reports annually or every other year on which countries are and which are not democracies, or what kinds of democracies they are, as well as whose trajectories are improving, whose are worsening (“backsliding”), which have weaknesses, and what they are. These institutions consider themselves, and most outside observers consider them, *the* authoritative arbiters of whether a country is a democracy or what kind of democracy it is, whether media are free, and whether it observes the rule of law or not.

Some of these institutions focus primarily on democracy (e.g., Freedom House with its Freedom in the World and Nations in Transit, Varieties of Democracy [V-Dem], Economist Intelligence Unit [EIU], Democracy Perception Index), others on the rule of law (e.g., the European Commission Annual ROL Report, EU Justice Scoreboard, Civil Liberties Union for Europe, World Justice Project, International IDEA), others on media freedom (Reporters Sans Frontières), and still others on governance (Transparency International with its Corruption Perceptions Index). The Bertelsmann Foundation’s Transformation Index tries to cover all these issues.

An examination of these institutions’ reports on Central European (CE) countries dating back to the mid to late 2010s

reveals that Poland ranked in the middle tier of CE states. It usually placed higher than Romania and Bulgaria, which did not receive nearly the degree of criticism that Poland did from the EU or the Obama and Biden administrations. Rankings show an overall downward trend, except for the Economist Intelligence Unit, which increased its score for Poland at a time when many were criticizing its government.<sup>34</sup> The EIU report for 2022 observed that the country showed one of the largest increases in the EU over the previous year.<sup>35</sup> Each Freedom House ranking—Nations in Transit and Freedom in the World—regularly ranked Poland differently, and the gap between the Freedom House and V-Dem rankings has often been significant. In 2022, Freedom in the World ranked Poland (83) three places below the United States (80). Rankings also used quite different terms to categorize Poland, ranging from “free,” to “semi-consolidated democracy,” “electoral democracy,” “flawed democracy,” and “defective democracy.” The EU Justice Report for the years 2016–21 showed Poland at a similar level with a number of other member states in the areas of judicial independence.

There is no question that rankings provide useful insights into national and international trends. One can only speculate about the reasons for the disparities: one includes the methodologies, which range from complicated to impenetrable for the non-scientist. An analysis of these comparisons shows the rankings differ and are often not always based on transparent, objective domestic sources. They also judge governments that pursue liberal or progressive domestic policies and accept broad interpretations of EU competencies more favorably than those that do not. In other words, an EU member state that pursues conservative or traditional social policies or seeks to retain as much sovereignty as possible within the EU context will generally not score as well as those that adopt progressive

“Brussels is always right” policies. Indeed, the studies show clearly that the issues the rankings cover are complex, scores can vary significantly and be arbitrary, and political factors can play a role in how a country performs. Nevertheless, the Obama and Biden administrations, the European Commission, and the punditry treated these rankings’ conclusions as unassailable.

Scholars at respected academic institutions have also raised questions about this nexus of democracy issues. Some have observed that use of the terms *democratic backsliding*, *autocracy*, and *neo-authoritarianism* can be problematic. In a 2021 review of more than 100 academic articles on democratic backsliding, Stanford scholars Haemin Jee and Hans Lueders and Duke scholar Rachel Myrick argued that inattention to the measurement of backsliding drives disagreement over when, where, and why it occurs and that inconsistent definitions of democracy drive conceptual confusion.<sup>36</sup> In 2022, Darin Self in the Oxford Bibliographies noted considerable variation in how to conceptualize and measure “illiberalism” and a lack of consensus in academic literature over what constitutes “illiberal democracy” or even if there is such a thing.<sup>37</sup>

Senior practitioners also note that rankings are not scientific. Not long after PiS took office in 2015, former Freedom House President Adrian Karatnycky publicly disagreed with pundits’ conclusions that PiS was moving toward dictatorship, arguing that the world should “give PiS a chance” and that the party was mainstream conservative with various wings.<sup>38</sup> In 2020, after years of accusations against Polish governments of being “illiberal,” former senior scholar at Freedom House Arch Puddington took the issue back to its semantic roots, arguing inter alia that there is “no such thing as illiberal democracy” and that Poland enjoyed political pluralism and especially media pluralism.<sup>39</sup>



### III. How Did We Get Here?

The parties comprising the current KO-led governing coalition have been attacking PiS for years on an array of transgressions ranging from corruption, abuse of power, and illegal surveillance to restricting freedom of the media and violating ROL. The former are fairly straightforward, while the latter are quite technical, often depend on specific knowledge of context, history, laws, and legal systems, and are not widely understood. The charges have stuck, however, as many governments, media outlets, and commentators treat them as gospel. In some cases, major institutions like the European Court of Justice, and European Court of Human Rights have ruled against Poland. The closer one looks at these cases, however, it becomes apparent that some are in fact very debatable, double standards are being applied, and there is selective prosecution for what looks like political reasons.

#### Corruption and Surveillance

There has been corruption and cronyism in all post-1989 Polish governments, and there should be consequences for criminality and other transgressions. Some KO charges of corruption are valid. The Ministry of Foreign Affairs' (MFA's) cash-for-visas case,<sup>40</sup> in which Polish consulates in some developing countries may have issued as many as several hundred visas—not, as some media reported, several hundred thousand—in exchange for bribes, was perhaps the most visible, which led then PM Morawiecki to fire a senior MFA official.<sup>41</sup> The wheels of justice have been turning on cases like this, and although this incident reflects poorly on the relevant officials, all Polish governments have had to deal with corruption to varying degrees. Time will tell whether the PiS period was worse than others, but Transparency International's Corruption Perceptions Index annual reports between 2018 and 2022 ranked Poland toward the top of Central European countries.

The details surrounding the PiS government's deployment of Pegasus spyware against more than 500 Polish targets remain murky, but the fact that it used the technology is clear. PiS defends its actions, claiming that all cases were subject to judicial oversight, and the Tusk government at least partly has confirmed it.<sup>42</sup> The case has devolved into charges and countercharges about the legality of a parliamentary commission established to investigate the matter. A European Parliament committee of inquiry in 2022 found that the government committed abuses and that other EU member states have also deployed this technology.<sup>43</sup> It is not clear that PiS actions were much different from similar cases in other EU member states.

#### Media

Criticism of PiS media policy has revolved primarily around three issues: politicization of the regulator, politicization of state media broadcasts, and the purchase of media by state-owned companies. The first concerns the regulator, the National Broadcasting Council (KRRiT), which allegedly violated an EU directive and the European Media Freedom Act because its members were close to PiS. Critics claimed this infringed on free speech and thus media freedom.<sup>44</sup> These appointments, however, were not illegal and differ little from appointments made to other regulators or state-funded media councils in other democracies (e.g., FCC, PBS, CBC, BBC, ARD/ZDF).

Critics are correct that reportage on the main state television TVP (Telewizja Polska S.A.) was pro-government, often crudely so, as Organization for Security and Co-operation in Europe monitors concluded.<sup>45</sup> However, if KO charges that PiS politicized state media, what are observers to make of the fact that state media during all post-1989 governments reflected the views of the government in power—and do so now under PO as well under the principle *cuius regio, eius televisija*?<sup>46</sup>

The holes in KO's criticism of PiS began once PM Tusk retook power in December 2023. While out of power, he and his allies decried the PiS government's influence over state-owned television and radio broadcasters. Fresh off of their election win, they professed a determination to “depoliticize” the public airwaves. Instead, they set off a firestorm.

On the authority of the new minister of culture and national heritage, Bartłomiej Sienkiewicz, and backed by a parliamentary resolution, the KO-led government sent baton-wielding police into the headquarters of TVP. Officials cut the feeds for two public television channels, shut down their websites, froze their YouTube accounts, and cut their live streams mid-broadcast. Across the country, Polish televisions abruptly went blank without an obvious explanation to viewers. The tactics were heavy-handed and transformed what should have been a mundane rotation of political appointees into a highly politicized drama with supercharged accusations of illegality.

These steps caused even the Helsinki Foundation for Human Rights, which regularly criticized PiS, to raise “serious doubts,” while the Left Together party expressed concerns that taking control of state media is “legally risky” as the move adds to the “partisanization” of public institutions.<sup>47</sup> Even Justice Minister Adam Bodnar has been quoted as saying, “We are

restoring this constitutionality and looking for some legal basis,” after being challenged on the takeover of public media.<sup>48</sup> One of the participants in the raid on TVP was later quoted as saying, “What we are doing smells like martial law, but a scream of 50 is better than proof of the weakness of the authorities.”<sup>49</sup>

Meanwhile, Reporters Sans Frontières (RSF) press freedom rankings since 2018 show Poland largely stable but with a slight decline in 2021. The country scores just below Romania and just higher than Bulgaria, even as RSF declared a “press freedom state of emergency” in Poland and nowhere else in the EU.<sup>50</sup> Contradictions like this have prompted comment that the KO-led and some other CE governments are being held to different standards than PiS.<sup>51</sup> Moreover, reports show that if TVP was biased toward PiS during its governments, the situation is no better now, with pro-government politicians enjoying over 85 percent screen time in state media.<sup>52</sup>

The root of the problem was not only politicization but also the state’s role in the economy. Successive Polish governments—including both PO and PiS—expanded state influence in or control of the gross domestic product over many years to the point that the government owns or controls nearly half of Poland’s 20-largest companies and employs more than 50 percent of all workers in this category.

Elections have major consequences for state-owned enterprises. To the victor go the spoils, promotions, and financial benefits. The ousting of a ruling party at the ballot box regularly reshuffles the economic winners and losers. This includes the public airwaves, which reach between 30 and 40 percent of Polish households.

When PiS won office in 2015, it expanded the state’s control over the public-broadcast sector. It passed legislation to put all public broadcasters like TVP’s network of nationwide television stations under the Treasury Ministry. It also granted officials the authority to hire and fire journalists and station directors. While in opposition, Tusk’s party denounced this move. Once it returned to power, it inherited the same sweeping authorities that it disparaged—and used them against PiS.

The changing of the guard in state-owned broadcasters after the 2023 election should have been a mundane process, like transitions at the Voice of America following US presidential transitions. Instead, however, of using established procedures to adjust the editorial tone of state-owned broadcasters and appointing new KRRiT board members (who oversee state-

owned media), managers, and producers, the KO-led government opted for a public scorched earth policy. This was the first sign of the iron broom process of *demokracja walczaca* that the government has since employed against its political opponents.<sup>53</sup>

These steps undercut the government’s otherwise laudable aim of depoliticizing the public airwaves. Instead of dismantling state ownership and influence over the media, the government proceeded as before. After sweeping out its political opponents from the broadcasters and the bodies that oversee them, the KO-led government placed its appointees in the same posts.

If it was wrong for the PiS government to appoint people to state-owned media, why has it been justifiable for KO to do the same? The Tusk government has not adequately answered this question. Instead, it has appointed new supervisory board members to oversee state-owned media, including multiple Polish television channels, Polish Radio, and the Polish Press Agency. In turn, the new supervisory boards appointed new management boards to oversee their respective broadcasters.

The cycle continues as PM Tusk has doubled down on the iron brooming. “Today’s action,” he asserted, “is aimed . . . at restoring legal order and common decency in public life. You can count on our determination and iron consistency in this matter.” His new guard replaced the old guard.

Despite the Tusk government’s previous protestations about the politicization of public media under PiS leadership, it has not fundamentally altered the state’s ownership of media or the political appointment of overseers and managers at public broadcasters. KO merely swapped the political oversight of state media for another. It has kept the system largely intact.

The situation is even more striking when considering the broader media landscape in Poland. The overwhelming majority of major outlets represents left-liberal, pro-EU views and was strongly critical of PiS during its governments. This imbalance has become more perceptible over time. Repeated attempts to establish a major broadcaster that served a more conservative audience failed. PiS defended its changes in TVP during 2015–23 as attempts to restore a sense of balance to the media spectrum. Those attempts have been overturned, and left-liberal media dominate the narrative again. In recent years, conservatives have succeeded in establishing a foothold in the TV and radio sectors under the *Republika* brand, both of which have grown fast. A deputy prime minister (DPM),



Krzysztof Gawkowski, recently suggested that its broadcast license be withdrawn on the grounds that it had incited violence.<sup>54</sup> But this has not come to pass after another DPM considered such a move to be illegal.

Once reestablished in power, KO charges of media manipulation against the PiS government also deflated. One of the largest of these arose over foreign ownership of media. While in opposition, KO asserted that PiS governments had limited media freedom by backing the purchase of the German-owned Polish Press Group by Orlen, the parastatal oil company.

The controversy arose over PiS governments' support for the purchase of media that foreign firms had purchased in the 1990s. This was at a time when the Polish economy was in a dismal state. Decades later, the private owners of these assets sought to sell them. KO objected to these attempts to return media to Polish ownership because PiS retained major influence in Orlen. If other democracies like Canada and France allow no more than 20–25 percent of media to be foreign-owned,<sup>55</sup> Tusk and others were applying a selective standard to their political opponents when objecting to the sale of privately held media assets. Was it also wrong for the Polish government to encourage the purchase of media assets in its country by Polish firms? PM Tusk and his allies argued against.

In 2020 and 2021, there was an issue with TVN, a major television station owned by the US media firm Discovery (now Warner Bros. Discovery) when the PiS government dealt in a discriminatory manner with the company. Discovery had registered TVN in the Netherlands to get around a ban on non-European firms from owning more than 49 percent of Polish media companies. The Morawiecki government first attempted to squeeze TVN by slow rolling its license renewals, and later the Sejm passed a bill that critics said was aimed at silencing TVN24, a news channel that was critical of the PiS government. In both cases, the disputes were resolved by quiet diplomacy between the US government, the PiS government, and Discovery. Tusk's December 2024 decision to put TVN on its list of strategic assets will limit the US owner's ability to sell its asset and is aimed at influencing the possible change of the station's center-left political line.<sup>56</sup>

### Judiciary

The judicial and ROL charges are the most serious, as they form the basis of the EU Article 7 proceedings, and both the European Court of Justice and European Court of Human Rights have ruled against PiS governments. These courts, however, never directly declared that all judicial appointments were illegal;

they only pointed to irregularities that Polish national courts could redress. The KO-led government and other critics have used very strong language to describe the alleged transgressions, using terms like “destruction,” “violent breach,” and “almost devastation” of the constitution, and calling Poland “lawless” because its judiciary had been “destroyed.”<sup>57</sup> Critics argued that the constitutional order needed to be “restored,” suggesting it had ceased to exist. These are fighting words. The most important charges concerned the following:

- “Packing” of Constitutional Court with “loyal judges”
- Appointment and vetting of newly appointed judges
- Attempts to dismiss judges
- “Illegal” judicial reforms
- Establishment of a disciplinary chamber
- Merger of the justice minister and prosecutor general positions

### PiS Was Justified in Seeking Reforms

The charges and countercharges regarding the judiciary are legalistic and technical. PiS made many arguments about why it took these steps and set them forth in great detail.<sup>58</sup> Given the firestorm that resulted from these efforts to reform the courts, it is useful to review the context and understand the reasoning behind them.

Perhaps the most important reason was that no previous government had seriously reformed the judiciary since 1989. The Polish judiciary enjoyed low public trust for decades, making it a legitimate area for reform. In 2015, when PiS took office, the conventional wisdom consensus was that the courts were ineffective at delivering justice and needed to be reformed. This became the PiS government's prime justification for embarking on its ambitious judicial reforms: to address systemic issues that had plagued its legal system since the end of communism. These reforms came amid mounting frustration with the country's judiciary, marked by a significant erosion of public trust, dissatisfaction within the judicial community, and a major backlog of court cases that undermined the efficiency and fairness of the judicial process. The impetus for reform, therefore, stemmed from both long-standing structural problems and a broader disillusionment with the judiciary's perceived ability to function effectively and impartially.

At the heart of the reforms was a crisis of trust in the Polish judicial system, and a lack of public faith in the independence of the courts. Backing this claim, the PiS government cited a

2017 survey by the World Justice Project, which revealed that Poland ranked poorly compared to other developed countries, especially in areas such as judicial accountability and the protection of fundamental civic rights.<sup>59</sup> Indeed, Poland was ranked twenty-fourth out of 35 nations, with its judicial system receiving especially low marks for judicial constraints on government power and safeguarding basic rights.

The lack of trust in the courts was widespread. Only 24 percent of Polish citizens believed judges acted independently “always” or “in the majority of cases,” with 61 percent of respondents indicating they perceived judges to be either sometimes or never independent. What is more, these sentiments were consistent as far back as 2012, when a similarly low percentage, just 22 percent, expressed confidence in judicial impartiality, while 66 percent felt judges were influenced by external factors. In attempting to address the public’s growing disillusionment with the legal system, the PiS government intended to bolster the long-term legitimacy of the judiciary in Poland.

Equally concerning was the perspective of the judges themselves. Once again, the PiS government had a point when it cited public opinion: in 2015, for example, only 35 percent of judges believed that promotions within the judiciary were based solely on merit—such as performance and experience—suggesting widespread concerns about nepotism and favoritism within the system.

The PiS government also had a point that public perceptions of unfair practices undermined the credibility of the judiciary, not just with the public but also with the very professionals tasked with upholding the law. In a 2017 survey, the PiS government noted how Polish judges identified the issue of judicial workload as a pressing concern, ranking it as the second-most critical challenge facing the system, with the first being the need for merit-based promotion processes. Judges in Poland have long cited the excessive volume of cases that they handled as a major contributor to the system’s perceived dysfunction. These factors have contributed to a pervasive sense of frustration and a belief that the judiciary was not functioning as it should, thus necessitating reforms.

A second driver for the judicial reform effort was the excessive length of legal proceedings, which undermined public confidence in the system’s ability to deliver timely justice and led to concerns of “justice delayed is justice denied.” While Poland has a relatively large number of judges—around 10,000 during the time of the reforms—that did not translate into the swift resolution of cases. In fact, Poland ranked seventh among EU

member states in terms of judges per capita. For comparison, the PiS government pointed to France which, while almost twice as large as Poland, had fewer than 7,000 judges. Despite the large number of judges, court cases in Poland took an inordinate amount of time to adjudicate. The PiS government believed the issue was not due to a lack of personnel, but to inefficiencies in the judicial process itself. Additionally, Poland’s investment in the judicial system was high, with 1.77 percent of the central state budget allocated to the courts—the highest percentage in the EU. While public funding was not a limiting factor, this high level of investment was nevertheless not enough to prevent delays, according to the government.

The inefficiency of the judicial system has consequences for both the public and the economy. Prolonged legal proceedings discouraged individuals and businesses from pursuing litigation, while also creating uncertainty in the enforcement of legal rights. This state of affairs is detrimental to the rule of law and to Poland’s reputation as having a fair and reliable judicial system. The PiS government’s decision to pursue judicial reform, therefore, was not only a reaction to public dissatisfaction but also a necessary step in restoring the system’s credibility and efficiency. These reforms aimed to address both the underlying issues of judicial independence and the practical concerns of case delays, ensuring that Poland’s legal system can operate more fairly and effectively for all citizens.

Finally, it is not widely known that almost all judges appointed during the communist era remained in their positions after 1989.<sup>60</sup> The most recent list of judges on the Supreme Court shows 17, including some who sentenced Solidarity activists to prison terms in communist courts.<sup>61</sup> Lower courts were not decommunized at all, and many of its judges were promoted. Other reports suggest at least 10 percent of all judges in the country date to the pre-1989 period and continue to adjudicate cases.<sup>62</sup>

While these may seem like low numbers, they are larger than they should be given the importance of the judiciary, especially in a country like Poland that has experienced such brutality from dictatorships over the decades. These numbers are decreasing as judges retire, but they do not tell the full story. After 1989, judges have been appointed and promoted by other communist-era judges, in a closed and incestuous system that allows judges who stayed on after 1989 to vet, mentor, and promote new judges. Many of its members saw themselves as an “exceptional caste” standing above the state. Not only does this allow little input from outside for balance, but it also had no effective disciplinary function for judges who on occasion

broke the law. While many former communists have become democrats, it is not surprising that this practice grates on the large numbers of Poles who suffered under the communist legal system. Other cases, such as when the Supreme Court in December 2007 (i.e., during the PO government) adopted a resolution that essentially absolved all judges from responsibility for their actions during martial law, also grate heavily. For PiS to appoint judges was entirely within its rights, and the Polish constitution does not require that they be elected by members of the National Council of the Judiciary. Against this background, it is unclear why PiS is wrong for seeking to complete the task of shedding judges with a communist background or vetting more closely those appointed, promoted, and shaped by them.

### **Alleged Court Packing**

The appointment of judges, including to the Constitutional Court, is at the root of the ROL debate. It is political in Poland, as it is in the United States. PiS did appoint many judges to the bench who are presumably generally aligned with its views, but it is not well-known that new judges have ruled against PiS governments in many cases. Once appointed, they are not removable, and it is difficult to influence their decisions. But did it pack the court? The numbers are large, but all post-1989 governments have appointed judges. Polish judges have been aligned politically for years. In 1995, the first president of the Supreme Court, Adam Strzembosz, put forward his name as a candidate in the presidential elections. Many politicians like Zdzisław Czeszejko-Sochacki, Jerzy Ciemniewski, Marek Kotlinowski, or Adam Jamróz were judges on the Constitutional Tribunal before 2015—and another politician, Jerzy Stępień, even became its president. Other judges have been very vocal in support of KO, some openly taking part in political conventions.<sup>63</sup> PO acted politically as it was leaving power in 2015 when in an aggressively partisan way it passed a law allowing the outgoing parliament to choose five judges on the Constitutional Court.<sup>64</sup> The EU did not criticize PO for that. The PiS response was controversial, but KO can hardly claim to be blameless in appointing judges in a partisan—and in this case illegal—manner. Even some of PiS’s sharpest critics say Poland does not have a “dual legal system.”<sup>65</sup>

If Polish judges are unfit for office because of their association with a political party, what are observers to think about the president of the German Constitutional Court in Karlsruhe, who was vice chair of the Christian Democratic Union Caucus in the Bundestag until just before his appointment in 2018? Or about other judges in Germany who are backed by polit-

ical parties or appointed by commissions whose members include politically connected persons? Would a process that nominates judges who are aligned with or supported by the party in power not also require restoring the rule of law in the United States, where judges have been appointed politically since the early years of the republic, or as happens in Germany and elsewhere?

### **Disciplinary Chamber**

PiS’s establishment of a disciplinary chamber to review the work of judges served a legitimate purpose. After all, trust in the judiciary was lacking, and there was little accountability for judges who were active during the communist era and ruled against the Polish people or who committed transgressions in free Poland. After 1989, only one judge was removed from the profession in disciplinary proceedings for a political sentence.<sup>66</sup> Did PiS misuse the Disciplinary Chamber? Critics say it did, but it is difficult for anyone not deeply versed in the minutiae of these institutions to separate critics’ arguments from political antipathies and self-interest. In terms of numbers, while more judges were subject to disciplinary proceedings than in previous years, not one has been dismissed by the Disciplinary Chamber. This was subject to criticism during the PiS governments, as some deemed the new body ineffective. PiS was correct that there should be an institution to hold judges accountable for misdeeds that included crimes.<sup>67</sup> Following several years of debate and controversy, PiS accepted the EU argument to close the chamber, which it did in 2022, to be replaced by a Chamber of Professional Responsibility. The KO government has now advanced a plan that foresees canceling promotions of certain judges and forcing those who wish to keep their jobs to commit an act of “active remorse,” a form of public apology last done during the communist regime.<sup>68</sup>

### **Justice Minister and Prosecutor Genera**

Did PiS weaken the system of checks and balances by joining the Justice Minister and Prosecutor General roles into one position? International best practice does not favor this approach, even if countries like Canada combine the positions and Poland has continued this practice after 1989.<sup>69</sup> PO disaggregated the two positions during its time in power (2007–15). PiS reconnected them to accommodate Zbigniew Ziobro, who headed the difficult coalition partner *Solidarna Polska*. Since winning the October 2023 election, KO has continued the practice it so vocally criticized; one year into the KO government, Justice Minister Bodnar remains prosecutor general, although legislation has reportedly been drafted to separate the functions.<sup>70</sup> If this is such a major transgression, why is the Tusk government continuing the practice?

### **EU Rewards KO before It Delivers**

It is not difficult to understand why the European Commission clearly preferred a KO victory in the 2023 elections and was delighted with the return of former European Council President Tusk as PM. The PiS government's focus on retaining as much sovereignty as possible within the context of the EU treaties clashed with EU officials' obvious preference for member states that did not question EU priorities. There were numerous areas of friction, but concerns related to the judiciary were the most important and formed the basis of the Article 7 proceedings. The EU froze some 137 billion euros due to Warsaw under various EU transfer programs as punishment. That the commission had put its thumb on the electoral scale to favor

KO was manifest when it signaled its readiness to unfreeze Recovery and Resilience Facility funds shortly after the KO-led government took office in December 2023 and paved the way for ROL-related funds in February. This greenlighted the transfer of a large part of the funds before KO had made virtually any of the necessary changes for which PiS was punished.<sup>71</sup> The move also indicates that politics played a prominent role in the EU approach to Polish domestic politics: KO was able to pledge to voters it would deliver the funds if it won the election.<sup>72</sup> The fact that the KO government has taken a hardline stance on issues for which the European Commission had previously criticized PiS—such as illegal migration—is now no longer a problem for the EU.<sup>73</sup>

## IV. Crossing the Line: Lawfare and Criminalizing Political Differences

Government transitions in Poland since 1989 have generally proceeded smoothly. New coalitions came to power, political appointees departed, new ones arrived, and policies changed as per the outcome of the elections. Incoming governments slammed previous governments for an array of errors, which sometimes included criminal behavior on the part of some officials. But officials were often allowed to serve out their contracts, and bygones were bygones, except in the most egregious cases. Even post-Solidarity governments that followed post-communist governments, where historical divides were huge, pursued relatively mild forms of transition.

### Campaign Pledges

The Morawiecki-Tusk transition has been different. Prior to the 2023 election, while KO politicians were speaking in apocalyptic terms that democracy was at stake in the most important election since 1989, they were also signaling an intention to go after PiS politicians to an unprecedented extent.<sup>74</sup> KO ran on a platform pledging to *prosecute* President Duda, PM Morawiecki, Central Bank President Adam Glapiński, and others, asserting they were guilty of serious crimes.<sup>75</sup> The platform pledge to prosecute persons for “breaking the Constitution and rule of law” has exacerbated domestic divisions as it could put PiS ministers and other senior politicians, including even former PM Morawiecki and Kaczynski, before the courts for actions that are not, strictly speaking, crimes.

Since then, the KO-led government has accused PiS officials of a range of actions for which it has pledged to hold them criminally accountable. KO politicians have used histrionic language, like “holding evil to account,” condemning predecessors as “thieves, scoundrels, people without conscience,” and threatening that they must be removed from public life.<sup>76</sup>

Rhetoric in Polish election campaigns is intense, given the sides’ significantly differing visions for the country’s future and personal animosity between the top leaders. However, was PiS so far from the mainstream, and did it differ so much from the past that it required much more drastic action than in other transitions? Or did KO and its foreign allies succeed in closing the Overton window so much that political differences that used to be acceptable no longer were? Or were critics deploying double standards against PiS because they preferred progressive or centrist parties that do not question EU policy? Were Polish commentators justified in saying it was fine to break eggs to make an omelet?<sup>77</sup> Was Tusk correct to argue that his *demokracja walczaca* concept (militant democracy)

allowed him to attack PiS was justified “even if it included actions some legal authorities would consider beyond the letter of the law”?<sup>78</sup> The KO government has been implementing its campaign pledge, employing a broad range of measures to punish the opposition—which has raised legitimate concerns that KO has crossed the line.

### Lawfare

Since the KO government took office in December 2023, the Polish public has been treated to a steady stream of media reports of alleged criminal behavior surrounding PiS politicians and officials. Some reports tell of investigations conducted by agencies such as military counterintelligence. Many of these stories appear based on controlled leaks from state sources. The leaks are often followed soon after by statements from government or law enforcement officials, which leaves the impression of a coordinated effort. The term *criminal* appears regularly in the media in connection with PiS. Reports are often preliminary and not detailed, but they surround persons—who are, after all, innocent until proven guilty—with an aura of wrongdoing when they have often not been charged with, let alone convicted of, a crime. The effects of such “civil death sentences” linger, and cases are not concluded. But reputations are damaged, and people are saddled with legal expenses and other consequences while the whiff of criminality remains. This is classic lawfare, and the large number of such cases leads to no other conclusion than that it is a conscious government strategy. KO has been raising criminal charges against PiS officials so regularly that it creates the impression it is pursuing a lawfare policy. Some of those charged may be guilty of crimes, but the tiny number of convictions against a large number of allegations raises questions.

### Purges

KO is entirely justified in replacing senior officials and other key appointees who serve at the pleasure of the elected government. Every democratic government replaces personnel, but KO has taken this practice further than in the past. KO violated the law that authorizes the president to appoint and dismiss ambassadors when it published a list of 50 Polish ambassadors to be recalled.<sup>79</sup> Some were assigned minor jobs at MFA headquarters until they quit. Others were offered nothing and quit, and a few were allowed to continue. In some cases, *chargés d’affaires* were dispatched, in essence downgrading relations with host governments that are unable to treat them as full ambassadors. This standoff between the KO-led government and the president’s office is likely to continue until at



least the May 2025 presidential election, or about 18 months into the new government. KO also fired prominent respected professionals who worked for government-funded institutions, were not overtly partisan, and had survived many transitions.<sup>80</sup> The KO pledge to prosecute Central Bank President Glapiński before the State Tribunal—which would be contrary to EU law—prompted European Central Bank President Christine Lagarde publicly to pledge to defend him. These cases look like purges rather than the normal and healthy replacement of personnel. Or, as some KO politicians have said, it looks like “*depisizacja*,” which recalls the term *dekommunizacja*, a concept that would have removed all communists from their positions and not let them take positions of influence had it been seriously carried out after 1989.<sup>81</sup>

### **Cutting Electoral Support to PiS**

The National Electoral Commission (NEC) ruling in August 2024 that PiS could lose millions of zloty in state funds to which it was entitled because it allegedly misused public money during the 2023 election campaign as well as some 10 million zlotys per year until 2027 looks very much like an attempt to starve PiS of funds so that it cannot fairly compete in, let alone win, the 2025 presidential election.<sup>82</sup> The NEC is controlled by a pro-KO majority appointed by the Sejm, which has an incentive to cut PiS’s funding as the party gains in the polls, popular dissatisfaction with the Tusk government increases, pressure on the PM to show results grows, and Justice Minister Bodnar fails to convict PiS-affiliated persons.

In November 2024, the NEC went further and decided that PiS would completely lose annual funding. The NEC also declared that if the Supreme Court were to reverse the August 2024 ruling, the verdict would not be recognized.<sup>83</sup> The head of the NEC criticized the decision, but was outvoted by the pro-government majority in the NEC.<sup>84</sup> When the Supreme Court in December 2024 annulled the NEC decision and ordered it to restore funding to PiS, KO politicians called for the ruling not to be observed on the grounds that it had been issued by so-called neo-judges, judges appointed after 2018. Later that month, the NEC escalated the matter further by refusing to accept a ruling by a chamber of the Supreme Court that restored PiS’s funding. This puts a question mark over tens of millions of zloty that would be granted to PiS in the coming years and could cause problems with the 2025 presidential election.

The NEC is not only trying to starve PiS of funding; it is also applying different standards to the party. The commission recognized another ruling issued by a virtually identical chamber of the Supreme Court, which restored funding to Konfederac-

ja, a right-wing opposition party.<sup>85</sup> PM Tusk responded, “PiS is learning the true meaning of law and justice.”<sup>86</sup> He also recently reminded the country that, without holding PiS to account, there would be no recovery in Poland.<sup>87</sup>

### **Refusal to Accept Court Verdicts**

The NEC case is the latest example of a broader phenomenon in Poland’s legal system: the government’s refusal to acknowledge unfavorable court rulings. The first high-profile case occurred in January 2024, when the government dismissed Dariusz Barski as national prosecutor, declaring that he had not been named legally (he was appointed in 2022). Barski was physically barred from entering his office and replaced by Dariusz Korneluk, a prosecutor loyal to the government who could be relied upon to coordinate criminal proceedings against former PiS officials. In September 2024, the Supreme Court ruled the dismissal was illegal and that Barski remains the national prosecutor,<sup>88</sup> a decision the Constitutional Court confirmed in November.<sup>89</sup> The government refused to comply, and Justice Minister Bodnar openly declared that he did not recognize the Supreme Court ruling.<sup>90</sup> He claimed the ruling was issued by neo-judges, although the panel was composed of three judges with many years of experience, eminent legal scholars, and practitioners.<sup>91</sup> PM Tusk and other government ministers openly state that they refuse to recognize the rulings.<sup>92</sup> The government has also not published rulings of the Constitutional Tribunal for several months. This has become a subject of criticism from the Venice Commission.<sup>93</sup>

### **Attempts to Dismiss Judges En Masse**

Another significant development concerns the government’s attempt to reverse *all* judicial appointments made since 2018. The government claims that every judge appointed or promoted since the PiS reforms (approximately 30 percent) is a “non-judge” or “neo-judge” and that their verdicts may be invalidated. Here, however, the government is inconsistent, as it tends to recognize verdicts in its favor and disregard unfavorable rulings.<sup>94</sup>

In September 2024, Justice Minister Bodnar announced that judges who wished to remain in their positions would be required to deliver a communist-style self-critical statement by declaring they had committed a “lifetime mistake” by accepting their appointments. Only if they made such a public statement would they be allowed to continue in their jobs, although some might still be demoted or subject to disciplinary proceedings.

This announcement sparked a strong response, even outrage, including among liberal commentators and legal scholars. A

Venice Commission opinion concluded:

**It cannot be declared through a law that all the appointments made . . . are null and void, that neither the existing judgments of the ECtHR [European Court of Human Rights] and of the CJEU [Court of Justice of the European Union], nor the decisions of the Polish Supreme Court and of the Supreme Administrative Court have produced *ex tunc* invalidation of the appointment decisions and that a wholesale invalidation *ex tunc* of all the resolutions of the Polish NCJ [National Council of the Judiciary] does not fit into the rule of law concept.<sup>95</sup>**

The justice minister has since announced that he intends to respect this opinion and has dropped the “voluntary remorse” idea, but it is unclear what steps will be taken as the government has also doubled down on questioning the validity of judicial appointments.

#### **Crackdown on Conservative Civil Society**

One of the government’s first announcements in December 2023 was that it would audit all state funding made available to NGOs and other entities during the PiS period. The Ministry of Culture drafted a “black list” of conservative and Christian organizations whose projects—financed between 2015 and 2023—would be audited.<sup>96</sup> This was widely understood as a signal that organizations that received public funding during the PiS governments would be subject to special scrutiny and be excluded from future funding. These actions continue and have been repeated in other government institutions. In March 2024, the president of the National Freedom Institute (the main agency responsible for financing NGOs) was replaced by Michal Braun, a KO politician.<sup>97</sup> The institute then demanded that some NGOs return funds from previous years, commenting on its website that this was only the beginning.<sup>98</sup> When the review of US Agency for International Development (USAID) projects launched by the Trump administration is completed, it may well show that funds went to organizations that supported KO priorities.

#### **Arrests**

There have also been dramatic arrests of PiS politicians and persons with connections to the party. It is difficult to discern who is correct in these cases, with dueling courts offering different rulings while the government calls the detentions justified and PiS says the opposite. The cases generally involve public accusations of criminality, and/or suspensions of parliamentary immunity, detention, and often no trial or a very delayed trial.

The most spectacular case was when police entered the Presidential Palace in January 2024 to arrest members of parliament Mariusz Kamiński and Maciej Wąsik for alleged abuse of power while they led the Central Anti-Corruption Bureau in 2007. The matter was diffused after President Duda pardoned them again, and both are now members of the European Parliament. However, because the new government pursued them with such zeal, speed, and drama, the question arises whether they were being targeted for other reasons. The government also stripped MP Marcin Romanowski of immunity so he could be charged for participating in an “organized criminal group.” Parliamentary Assembly of the Council of Europe (PACE) Chair Theodoros Rousopoulos had to remind Sejm Speaker Simon Hołownia that Romanowski enjoys immunity as a PACE member and that proceedings against him should be suspended.<sup>99</sup> The government also sought to strip MP and former Justice Minister Michal Wos of immunity while it investigates an array of charges related to the alleged abuse of power.<sup>100</sup> The government even detained a Warsaw priest, Father Michal Olszewski, on suspicion of corruption related to a charitable undertaking and kept him in pre-trial detention for almost seven months before recently releasing him. These cases may or may not have merit, but the methods are similar and include guilt before it has been proven.

#### **Investigations**

KO continues to investigate many politicians and officials from the PiS governments. To name just a few:

- It established a commission in May 2024 to investigate Russian and Belarusian influence. This includes assessing whether former Defense Minister Antoni Macierewicz was guilty of “diplomatic treason.”<sup>101</sup> The commission looks very much like a response to one PiS established in May 2023 (i.e., payback).
- Its preliminary findings, released in October 2024, included unsubstantiated allegations of financing of Russian influence operations in the United States, undermining of security services’ capabilities, and failing to prepare Poland for Russia’s 2022 invasion of Ukraine. Macierewicz is a controversial politician with a long anti-communist track record. Was he a Russian asset?
- The Defense Ministry filed 41 cases of alleged misconduct against a special PiS parliamentary subcommittee formed in 2016 to investigate the 2010 Smolensk air crash. Jaroslaw Kaczynski has long maintained that Russia shot down the plane with Tusk’s involvement. That tragedy will probably never be resolved to the satisfaction of all interested par-

ties, but the investigations and counter-investigations are not getting any closer to a definitive answer.

All these actions, taken together, indicate that KO has crossed the line and is engaging in practices that look very much like those of which it once accused PiS. Its actions go beyond normal practice and policy differences. They resemble vendettas, the settling of scores and grudges. Indeed, they look like revenge and retribution for PiS defeating KO for years, for personal attacks such as Kaczynski's claims that Tusk is a

“German agent” and a “traitor to Poland,” and for criticisms of the former Tusk government's flawed “reset” of relations with the Kremlin in the period 2007–14.<sup>102</sup> It is unfortunate that two democratic, pro-Western, Atlanticist political camps have devolved into such poisonous rhetoric and excessive actions. These suggest the KO government will have difficulty restoring trust in institutions as it polarizes Polish politics further, with little care about the country's common good. When KO is no longer in power, it may face similar action once the shoe is on the other foot.

## V. What Next and Implications for the United States

Rhetoric on “restoring democracy,” and “restoring the constitutional order” in Poland reflected an assessment either that Poland was not a democracy and the constitutional order was no longer operating—or that such comments were exaggerations. During the 2015–23 PiS era, Poland was neither an autocracy nor an authoritarian state, nor were its institutions “captured.” Otherwise, the outcome of the October 2023 elections would have been different. The democracy gene remains alive and well in the Polish polity, as it has been since 1989. Some PiS actions during its time in office may have been dubious, even illegal, but so also have been KO actions since returning to office in 2023—and yet Poland remains a democracy.

The technical and legalistic nature of these issues makes them difficult for all but the most well-informed outsiders to understand, let alone judge, and even they have blind spots and political biases. Discussion has been extensive but has often lacked context and nuance. There are sound legal and political arguments on both sides of many of these differences and answers are not always clear and definitive. Critics have magnified the democracy and ROL issue, taking it from quite technical, country-specific cases to the international level and making them high-profile EU issues. This magnification has contributed to a backlash in some member states—often called illiberalism, populism, or worse—which has put the EU under ever more strain and provided fertile ground for adversaries to exploit differences, recruit allies, and undermine transatlantic ties. Applying double standards or deploying them selectively exacerbates Euroscepticism. KO’s responses to the 2015–23 PiS governments have been excessive, so KO has lost the high ground it has claimed, even if many continue to believe KO saved Poland from autocracy. If PiS was not perfect, KO has not been either, even as it claims to embody truth, justice, and the Polish way.

Is only the KO camp democratic while PiS is not? No. The KO camp interprets *democracy* as *liberal democracy* while the PiS camp defines it more as *democratic sovereignty* with a traditionalist and conservative vibe. Democracy does not apply only when voters vote “the proper way,” and it is not populism when they vote differently. Polish voters are not necessarily “far right” if they sympathize with non-KO parties. Yet this is the narrative in much of the EU and the United States, and Poland is no exception to this trend.

As long as Polish society remains deeply divided between PiS and KO, and as long as the leaders of both camps consider

each other threats to the nation, there will be major differences in how the terms democracy and ROL are understood. It is difficult to avoid the conclusion that payback or revenge plays a major role in this conflict, as PM Tusk will not forget his electoral defeats or being labeled a “stooge” of Russia and Germany who must be excluded from the political scene and the personification of evil in Poland.<sup>103</sup> PiS leaders will long remember being denounced as evil threats to Polish families and Poland’s place in Europe. Both camps will continue political warfare as they pursue different visions of Poland’s future.

The stakes are high as the one-year mark of the Tusk government has passed, especially as the 2025 presidential election approaches and polls indicate that a majority of Poles view his government negatively. Many Poles, especially women and younger people, consider their lives to have worsened since the government took office. For example, just more than half of the population, 51.8 percent, view the government’s work negatively, while 39.3 percent see it positively.<sup>104</sup>

The KO prosecution of persons for breaking the Constitution and rule of law is exacerbating the divide further, as it brings charges against PiS politicians for actions that are not necessarily, legally speaking, crimes. While KO continues to call PiS “far right” or “illiberal,” it practices an illiberalism of the Left, which weakens Poland as it faces the challenges of great power competition. The EU also has behaved very much as though its goal in Poland was regime change. It did not want PiS to win the 2023 election and visibly put its thumb on the scale during a member state election. This was noticed, and while the European Commission had many supporters, it had many opponents who saw it as interference in the internal affairs of a sovereign member state. This perception has fed resistance to what is seen as the heavy hand of Brussels’ unelected bureaucrats.

There used to be a principle in post-1989 Poland to let bygones be bygones after transitions in power, summarized imperfectly by the phrase *gruba kreska* after 1989 that drew a thick line between the pre-1989 communist regimes and free Poland. That practice was very controversial and wrong in retrospect because crimes committed by communist officials during the Soviet period went largely unpunished. Post-1989 governments should treat crimes as crimes. However, transitions since then have been between varying versions of democratic coalitions, and transgressions are nothing like the crimes committed be-

fore 1989. KO is pursuing retribution in the guise of accountability and should be careful before it proceeds further down this road, not only because it, too, will be in the opposition in the future and should think of what its politicians could face when the shoe is on the other foot.

The clear Republican victory in the November 2024 elections and PM Tusk's long-held critical views of President Donald Trump raise the stakes for the KO government on the US-Polish relationship.<sup>105</sup> KO leaders are correct when they say US-Polish relations are strong, regardless of who is in power in both capitals, but the Trump administration is aware of KO's clear preference for the Democratic Party and its criticism of President Trump in the most recent election cycle. President Duda

has outstanding ties with President Trump, and close PiS ties with the Republican Party are a major asset for Polish foreign policy and the bilateral relationship.

What should Poland do to ensure a positive outcome? Further attempts by the government to try to destroy PiS will be noticed, and KO may lose influence in Washington if it pursues this approach further against a friendly political party. Poland needs PiS, which represents a very substantial percentage of the electorate, to buttress its national security goals and the North Atlantic Treaty Organization at a time of unprecedented challenges to the European security order and intensifying great power competition. The United States also benefits from PiS as an important player in Poland.



## VI. Recommendations

Acknowledge Poland's Resilience as a Democracy. The narrative that Polish democracy was on the brink of collapse between 2015 and 2023 has been overstated. Had Poland truly become an autocracy or fallen into authoritarianism as critics maintain, the 2023 election outcome would have been different. Poland has consistently demonstrated a strong democratic ethos, rooted in its post-1989 political framework, and the democratic gene remains vibrant and intact. Moving forward, it is essential to focus on strengthening democratic practices and institutions rather than embracing baseless fears of its demise.

### Don't Exaggerate Criticisms of PiS Governments

While there were concerns regarding some practices under the Szydło and Morawiecki governments, such as cronyism and the deployment of Pegasus spyware, these issues were hardly unique to PiS and should not be exaggerated. They certainly do not merit the apocalyptic language deployed by the current government. Previous governments, including those led by PO as well as by other EU states, took similar actions. Efforts by PiS to have media under national control mirror practices in other democracies such as France and Canada. These concerns should not be dismissed, but oversimplified, broad-brush characterizations of PiS government actions should be avoided. The political and legal actions PiS took were far more complex than typically portrayed, particularly when compared with the recent anti-democratic actions of the KO-led government.

### Understand the Context of EU Criticism and Polish Politics

Criticism of Poland's legal and political decisions, particularly by the EU, has been selective and inconsistent. The EU has not applied the same scrutiny to other member states on issues like media and the judiciary. The harsh judgment by the Obama and Biden administrations and the EU of PiS reflected ideological differences as much as anything else. Critics tend to view PiS government attempts to maintain as much control over certain domestic issues as possible within the framework of the EU treaties through a progressive lens. Differing interpretations of what constitutes democracy and the rule of law in the twenty-first century should be recognized, and differences should be addressed with more transparency and dialogue.

### Reinforce Commitment to Constitutional Order amid KO's Militant Democracy Campaign.

Since taking office in December 2023, the KO-led government has pursued a campaign of lawfare and criminalizing political differences to neutralize, if not destroy, PiS. This approach, which government politicians have termed *militant democra-*

*cy (demokracja walczaca)*, reflects a dangerous precedent for political conflict. Drawing parallels to anti-communist groups from the Solidarity era, KO efforts to delegitimize PiS through extraordinary measures undermine the integrity of constitutional governance. Efforts at *depisizacja* (eradicating PiS) and *dezintegracja* (disintegrating PiS) risk destabilizing the political system and further polarizing the electorate. The KO-led government should respect democratic principles and avoid authoritarian tactics in its pursuit of long-term political power.

### Reframe Democracy, Rule of Law, and Governance for the Twenty-First Century.

The debate over media freedom, the rule of law, and governance in Poland is part of a broader international debate about the evolving nature of these concepts. Their current binary framing as the "struggle for democracy" is inadequate, as it fails to capture the diversity of legitimate views on what democracy entails in the twenty-first century. The divide between liberal and conservative interpretations of democracy—liberal democracy vs. *ordered liberty* and *democratic sovereignty*—requires deeper engagement and dialogue. As dictatorships like Russia and China work to undermine democratic values globally, Europe and the United States should reconsider their approach to addressing these tensions, particularly as they relate to EU member states. A more nuanced debate is needed to bridge the gap between progressive and conservative views, ensuring that democracy remains strong and adaptable in the face of evolving challenges.

### Prioritize Strategic Relations with Washington amid Global Tensions.

While the KO-led government is very pro-EU and pro-Germany, the victory of the Republican Party in November 2024, coupled with PM Tusk's public criticism of President Trump, increases the stakes for Poland's foreign policy. While US-Polish relations are likely to remain strong regardless of who is in the White House, the Trump administration is very aware of KO politicians' sympathy for, if not alignment with, the Democratic Party. The strong ties PiS has built with the Republican Party benefit the bilateral relationship. Further efforts by the KO government to destroy PiS could jeopardize these important connections, weakening Poland's position in the United States and harming broader strategic interests. The KO government should work harder to ensure bipartisan support in Washington to safeguard its security and continue advancing NATO objectives, especially in light of ongoing global security challenges and geopolitical tensions.

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