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## Anti-Constitutional Transformation in Poland: Dimensions, Sources, and Prospects\*

### I. Introduction

Dramatic changes which have taken place in Poland after 2015 presidential and parliamentary elections took many by surprise, both because of the speed and the depth of the changes. The constitutional Tribunal has been paralysed and transformed into a positive enabler of the government;<sup>1</sup> regular courts have been subjected to a tighter control by the Minister of Justice, mainly by his enhanced power of dismissing and appointing new court presidents; the disciplinary regime for judges has been restructured in such a way as to give the Minister of Justice a real power to persecute and harass judges; the National Council of Judiciary (KRS) has been subjected to the ruling party by making the judges-members of the Council elected by the parliament; the system of the prosecution (*prokuratura*) has been merged with the Ministry of Justice and reorganized in a military-like fashion; the Supreme Court has been packed with the new judges, loyal to the ruling party; the electoral commissions have been completely restructured and subjected to the executive; the entire civil service has been thoroughly politicised and the principles of professionalism and neutrality of the service abandoned... All this, and more, has happened over less than three years.

In this article, I will reflect upon the structural characteristics of this revolutionary transformation, focusing first on the structural characteristics of the change (Part 1) and the anti-constitutional dimensions of the transformation (Part 2). I will then offer some hypotheses about the causes of this worrying phenomenon (Part 3) and in the end, I will consider the resources that liberal democracy still has in Poland which may support some optimism about the future (Part 4). Unfortunately, Part 4 will be very short, which reflects the scarcity of such resources.

### II. Structural Characteristics of Polish Post-2015 Transformation

The year 2015 witnessed the beginning of a fundamental authoritarian transformation: the abandonment of various dogmas of liberal democracy, constitutionalism and the rule of law that had been taken for granted so far. With the suffocating command of *Jarosław Kaczyński*, the leader of Law and Justice party (Polish acronym: *PiS*) over

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\* This article tracks and often replicates some themes from my forthcoming book *Poland's Constitutional Breakdown* (OUP 2019, forthcoming).

1 For a detailed analysis, see *W. Sadurski*, Polish Constitutional Tribunal Under PiS: From an Activist Court, to a Paralysed Tribunal, to a Governmental Enabler, *Hague Journal on the Rule of Law*, DOI: 10.1007/s40803-018-0078-1.

all centres of political power, these principles were abandoned in 2015, ostensibly in the name of a purely majoritarian democracy, and of the “sovereign” people having a right to rule as it wishes. The “will of the sovereign”, expressed allegedly through an electoral choice (“winner takes all”), was declared a fundamental legitimation for a general transformation of the state (even if many of its aspects had not been announced in the electoral campaign) and as a reason to downplay checks and controls upon the executive and legislative. *PiS*’ campaigns against first the Constitutional Tribunal [CT], and later the regular courts, have rested upon the idea that any restraints upon the political majority are by their nature anti-democratic.

*Victor Orbán*’s Hungary was declared as a model to emulate, with *Kaczyński* promising “Budapest in Warsaw” as its goal, and the copycat effect is not to be underestimated. The sequence of the main “reforms” in Poland in many respects closely parallels that in Hungary a few years earlier: fast-tracking of radical legislative changes; attacks on NGOs; new media legislation; disempowering and capturing the Constitutional Court; removal of the “old” judges (of ordinary courts) by lowering the retirement age; specific attacks on the Chief Justices of the respective Supreme Courts; restructuring of the National Judiciary Council through the politicisation of its selection; altering the membership rules of the electoral commission with the effect of giving the ruling party control of the commission; identifying the EU as a foreign, hostile entity which illegitimately interferes in the internal affairs of its member state...

There are also, however, important differences between the two cases. Most importantly, thanks to *Fidesz* winning a constitutional majority, there was a formal constitutional change in Hungary, which made it possible “to transform the constitutional order and slide into some form of authoritarianism entirely through legal means”,<sup>2</sup> with no such change or amendment available to *Kaczyński*. There are also other differences: compared with Poland, political power in Hungary is much more embedded than in Poland in the economic power of ultra-rich oligarchs; *Orbán* is pro-Russian while *PiS* is ostentatiously anti-Russian; *Orbán* acts more pragmatically in EU fora than *PiS*; Polish centrist opposition is much stronger than the Hungarian opposition, and in Poland there is no strong party alternative any further to the right (like *Jobbik* in Hungary) which exerts right-wing pressure on the ruling party; the dominant Church has a strong political influence in Poland, but not in Hungary; commercial independent media are strong in Poland but weak in Hungary, etc.

While particular, individual aspects of Polish backsliding may have their counterpart in this or that democratic state, what makes Poland such a troublesome case is *the comprehensiveness and the cumulative effect* of the ways in which liberal democracy is being undone. Rather than carefully sequencing the changes and applying them seriatim, thus giving the system an opportunity to neutralise their effects, “reforms” have been enforced more or less simultaneously, or at least through incremental changes where the timing of one change overlapped with another, and yet another. A single illiberal change does not provoke a major breakdown if it takes place in the environment of a general liberal constitutional context. In Poland, however, it is a popu-

2 *G. Skąpska*, *The Decline of Liberal Constitutionalism in East Central Europe*, in: P. Vihailem/A. Masso/S. Opermann (eds.), *The Routledge International Handbook of European Social Transformations*, London 2017, p. 134.

list offensive *tous azimuts*: an all-out assault on liberal constitutionalism. And it is systemic: individual elements are functionally connected with the others. For instance, the paralysis of the Constitutional Tribunal was a prerequisite for the adoption of illiberal laws made immune from effective constitutional scrutiny. These illiberal laws, for instance on the right of assembly, further make it difficult to protest against capture of the CT, etc. In this way, the sum is more than its parts.

The change is *incremental* even if it occurs quickly. So, it is often difficult to identify the tipping point during the events: no single new law, decision or transformation seems sufficient to cry wolf. Only ex-post we do realise that the line dividing liberal democracy from a fake one has been crossed: threshold moments are not seen as such when we live in them. In Poland, warnings about the fall of democracy have been often received with incredulity, or with objections of being hysterical and exaggerated. The language of democratic collapse has been seen by some as inflated, disproportionate, and counterproductively eroding the emotional content which may be warranted in some unspecified future. As *Nancy Bermeo* puts it well, “slow slides towards authoritarianism often lack both the bright spark that ignites an effective call to action and the opposition and movement leaders who can voice that clarion call”.<sup>3</sup> But the effect of these multiple “slow slides”, rather than a clarion call, might render an obituary in order.

Many changes which are part of democratic backsliding occur without a formal change of institutions and procedures, so they are invisible to a purely legal account. As *Gábor Attila Tóth* remarks: “many such regimes ostensibly behave as if they were constitutional democracies, but, in fact, they are majoritarian rather than consensual, populist instead of elitist; nationalist as opposed to cosmopolitan; or religious rather than secular”.<sup>4</sup> Institutions and procedures remain the same but their substance is radically changed by practice; they are “hollowed out”. For instance: parliamentary legislative procedures remain, formally, the same as before. But by adopting a scheme whereby all important governmental initiatives are proposed as private members’ bills, the requirements of consultations, expert opinions and impact audits are dispensed with. There *is* a discussion in the parliamentary legislative committee, but with PiS having an absolute majority, and where opposition MPs are given e.g. one or two minutes for their speeches, the discussion is turned into a sham. In this way, the intended meaning of many procedures and institutions is eroded, and are converted into façades only. Institutions become hollow. As a result, for an external observer the radical shift in the meaning of institutions, procedures and roles may be invisible because they often remain, *legally speaking*, the same as before. As *Martin Krygier* observes, “One striking novelty of these new populisms is that, while like most populists they undermine constitutionalism, they do so with often striking attention to the forms of law”.<sup>5</sup> But these “forms of law” are used, in practice, to undermine the underlying values of the rule of law, which are to constrain arbitrary use of unlimited power.

3 *N. Bermeo*, On Democratic Backsliding, *Journal of Democracy* 1/27, p. 14.

4 *G. A. Tóth*, The Authoritarian’s New Clothes: Tendencies Away from Constitutional Democracy, Policy Brief, The Foundation for Law, Justice and Society (2017), p. 2, <http://www.flj.s.org/content/authoritarians-new-clothes-tendencies-away-constitutional-democracy>.

5 *M. Krygier*, Institutionalisation and Its Discontents: Constitutionalism versus (Anti-) Constitutional Populism in East Central Europe, lecture delivered to Transnational Legal Institute,

To describe this phenomenon, *Ozan Varol* uses the concept of “stealth authoritarianism”, i.e., a genre of authoritarianism which faithfully uses various democratic structures for non-democratic purposes: “Stealth authoritarianism refers to the use of legal mechanisms that exist in regimes with favorable democratic credentials for anti-democratic ends”.<sup>6</sup> For instance, representatives of stealth authoritarianism “employ seemingly legitimate and neutral electoral laws, frequently enacted for the purported purpose of eliminating electoral fraud or promoting political stability, to create systemic advantages for themselves and raise the costs to the opposition of dethroning them”.<sup>7</sup> Another example applicable to the Polish case is that stealth authoritarians “rely on judicial review, not as a check on their power, but to consolidate power”.<sup>8</sup> Formally speaking, judicial review *is there*, and unless one ascertains the actual substance and arguments of the decisions taken, as our Martian is unlikely to do, one will not see a difference between democracy and “stealth authoritarianism”, even though there was no stealth, naturally, in the ways the CT was taken over. As *Varol* puts it, “Stealth authoritarianism creates a significant discordance between appearance and reality by concealing anti-democratic practices under the mask of law”.<sup>9</sup>

Backsliding is all the more difficult to discern since many “reforms” are presented as a *defence* of democracy rather than its undermining. The rulers claim a democratic legitimacy for dismantling the counter-majoritarian checks and balances in the system. By subjecting the election of judges to parliamentary control, PiS alleges that it actually is introducing *more democratic* mechanisms than those that were in place so far, or by electing CT judges known for their pro-PiS political views, PiS alleges that it is infusing the Tribunal with better representation of actual societal preferences.

The other dimension of Poland’s post-2015 transformations is the active, deliberate, ideological and cultural “counter-revolution” which is displayed not only in official declarations but also in actual governmental acts. While it does not amount to any comprehensive ideological platform for PiS rule, it is nevertheless quite clear that the elected authoritarians have an agenda that is anti-modernist, anti-progressivist and anti-liberal. A number of offices and programs to combat discrimination were discontinued as soon as PiS came to power. For instance in June 2016, just over six months after its electoral victory, PiS extinguished the governmental Council for Counteracting Racial Discrimination, Xenophobia and Intolerance. Significantly, this happened at a time when there had been a clear rise in acts of violence – verbal and physical – against non-whites in Poland. Public schools ceased to accept visitors from NGOs running workshops against intolerance and xenophobia while also opening their doors to radical nationalistic groups such as the openly neo-Nazi *ONR* (The National-Radical Front). The government stopped subsidies for civil society activities such as the so-called Blue Line, a phone-in for young persons in desperate psychological situations, often on the verge of committing suicide. In turn, governmental subsidies were generously conferred upon religious and right-wing groups, such as the network of or-

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King’s College, London, Signature Lecture Series, November 17, 2017; on file with the author, p. 4.

6 *O. O. Varol*, *Stealth Authoritarianism*, *Iowa Law Review* 2015, p. 1684.

7 *Varol*, fn. 6, p. 1679.

8 *Varol*, fn. 6, p. 1679.

9 *Varol*, fn. 6, p. 1685.

ganisations connected with Catholic-fundamentalist *Radio Maryja*. In their public, official statements, leading PiS politicians appealed to traditional and conservative values while distancing themselves from liberal and progressive ideologies.

### III. Anti-constitutional dimensions of the transformation

The anti-constitutional character of the current regime has many facets. First of all, the real centre of power is elsewhere than constitutionally decreed. It is centred in one person, *Jarosław Kaczyński*, who is commanding the country without constitutional responsibility and accountability (his only state function is being a member of parliament) which makes it a significantly different case from that of *Orbán*’s Hungary. The constitutionally described central institutions of executive power are the President and the Prime Minister who wield negligible power, except for that which is delegated to them by *Kaczyński*, and which can be withdrawn at any time. Occasional manifestations of a very limited “independence” of the President are generally considered by advocates of *Kaczyński* as breaches of an unwritten compact and as irritating cases of disloyalty.

The everyday politics of PiS Poland provides constant, multiple proofs as to who wields the real power. When President *Duda* vetoed two of three laws on the judiciary by the government in July 2017, to the surprise and irritation of *Kaczyński*, this mini-crisis within the ruling elite was followed by a series of face-to-face meetings between *Kaczyński* and *Duda*, aimed at forging a “compromise”. In these meetings, neither the Prime Minister nor the Minister of Justice, who nominally drafted the laws, took part. In another striking episode, when the newly formed Council of National Media tried to fire the Chairman of public TV, *Jacek Kurski* (whose rivalry with the head of the Council *Krzysztof Czabański* is well-known), all three PiS members on the Council were urgently summoned to see *Kaczyński* and then immediately, and humiliatingly, they cancelled the decision dismissing *Kurski*, who remains the Chairman of public TV up to now.

This pattern has settled for good: “*Nowogrodzka*” (the Warsaw street address of the PiS headquarters, where *Kaczyński* has his office) has become synonymous with the true locus of power. When ministers need a strategic decision to guide their action, they “go to *Nowogrodzka Street*”. All major “reforms” are initially foreshadowed by *Kaczyński* in his public statements. Ministers obediently consider their role as that of turning *Kaczyński*’s announcements into policies within their portfolio, and if they publicly come up with their own initiative, it is only if *Kaczyński* has decided to leave them a specified scope of discretion in a given sphere.

The second dimension of the anti-constitutional character of PiS power is governance through multiple breaches of the Constitution. The Constitution has been routinely violated in a number of ways. The takeover of the CT is one, though not the only, arena in which breaches of the Constitution have been committed: the parliamentary resolution of 25 November 2015 (with a PiS majority, of course) about removing “legal effects” of the election of judges at the end of previous parliamentary term, violates the Constitution because the Constitution provides for an exhaustive number of instances in which a term of a judge can be extinguished, and the Parlia-

ment has no such power. The refusal by the President to swear-in correctly elected judges violates the Constitution which does not give the President any such role in designing the composition of the CT. It also unilaterally (by the President) changes the constitutional system for the appointment of judges of the CT because it assumes that the President has the prerogative of refusing to swear in some judges, hence to veto the election by the Parliament – a prerogative unknown to the Constitution. The governmental refusal to publish some of the CT judgments is another usurpation by the government of powers that it does not have. These are just a few examples related to the dismantling of the CT. Put together, they confirm *Mark Tushnet's* observation (based on other cases, not Poland) that an authoritarian regime “faces no constraints on abandoning law, courts, and constitutionalism when doing what would serve the regime’s interests – or, perhaps more interestingly, when law, courts, and constitutionalism appear to be interfering with the regime’s (other) goals”.<sup>10</sup> That is precisely what has been going on in Poland.

The third dimension of the anti-constitutional character of *PiS* rule are the series of de facto “amendments” to the Constitution via statutes that significantly alter constitutional dispensations. As former Constitutional Tribunal judge, *Miroslaw Wyrzykowski* wrote about one particular example of such an “amendment” (namely that of the law on the CT of 22 December 2015):<sup>11</sup> “For the first time in the thirty-year history of Polish constitutional judiciary, the [Constitutional] Tribunal was confronted with a statutory regulation which changed the constitutional order of the state”.<sup>12</sup> The distinction between this and the previous category (outright breaches of the Constitution) is of course blurred: “changing” the constitution through statutory means is in itself a breach of the constitution. But I am separating this category from the previous one in order to focus on those statutory actions which were meant to circumvent the Constitution, and to highlight an important characteristic of the *PiS* regime, namely that it has engineered fundamental “constitutional changes” without having an electoral mandate to do so. In the absence of the super-majority necessary for a constitutional change, it proceeded by adopting statutes which in fact contravened constitutional provisions. Several statutory provisions concerning the CT were meant to circumvent other constitutional provisions. For instance, in order to sideline Professor *Stanislaw Biernat*, the Vice-President of the CT (a constitutionally-designated office), a statute of 13 December 2015<sup>13</sup> invented the position of “acting President” who performed the actions normally falling upon the Vice-President, with the difference that they fully met the expectations of *PiS*. To give another example: the statute on the National

10 *M. Tushnet*, *Authoritarian Constitutionalism: Some Conceptual Issues*, in: T. Ginsburg/A. Simpser (eds.), *Constitutions in Authoritarian Regimes*, Cambridge 2014, p. 40.

11 Act of the 22 December 2015 amending the Act on the Constitutional Tribunal.

12 *M. Wyrzykowski*, *Antigone in Warsaw*, in: M. Zubik (ed.), *Human Rights in Contemporary World: Essays in Honour of Professor Leszek Garlicki*, Warsaw 2017, p. 380.

13 Provisions on Introduction of the Act on the Organisation and Proceedings before the Constitutional Tribunal and the Judges of the Constitutional Tribunal Status Act. (After Sejm had passed the statute and the Senate had not submitted amendments, the President signed the statute on 19 December 2016.)

Council of Judiciary (KRS)<sup>14</sup> introduced a number of unconstitutional provisions fundamentally changing the composition and structure of that body compared to its constitutional design: it extinguished the constitutionally-settled terms of office of the KRS judges-members, and introduced, contrary to the Constitution, a system of electing KRS judges-members by the parliament rather than by their peers.<sup>15</sup>

The process of amending the Constitution by statute marks the main difference between *Orbán's* Hungary and *Kaczyński's* Poland: what *Kaczyński* occasioned by statutes, *Orbán* had brought about by a brand-new Constitution followed by a number of constitutional amendments. As *Grażyna Skąpska* puts it:

The Hungarian case presents an example of an intelligent play with constitutional system as an instrument of political majority, and a hypocritical conformity with the requirements of constitutional democracy and civil rights protection – expressed in the constitution, but changed in the amendments to the constitution.<sup>16</sup>

One may ponder over which of these two situations is “worse”: worse, that is, from the point of view of the standards of liberal constitutionalism. On the one hand, one may claim that the Hungarian style of illiberalism via constitutional changes is more damaging in the long term, because illiberal changes are being entrenched well into the future: a future non-*Fidesz* government may lack a constitutional majority and be straitjacketed in its conduct by the illiberal Fundamental Law. On the other hand, however, one may speculate that “constitutional amendments” via statutes and also simple breaches of the constitution, Polish-style, are more destructive of the principles of constitutionalism and the rule of law. In Hungary, the disempowerment of the Constitutional Court was done *lege artis*; in Poland, it was more a demolition job than the restructuring of an institution.

In any event, there is no doubt that for the *Kaczyński* regime, the absence of a capacity to introduce formal constitutional amendments, or even bring about a new constitution, is seen as a burden and liability; something to overcome in the next elections. Having formal constitutional tools at its disposal is important for populist and authoritarian leaders. As *David Landau* shows, constitutional change often works in tandem with packing institutions such as the courts: formal constitutional amendments make changes in personnel and policies more durable, and render populist incumbents more difficult to dislodge.<sup>17</sup> Venezuela and Hungary provide two examples used by *Landau* to make this point, while Poland is an example of a country where “governing populists have not yet carried out changes at this level”,<sup>18</sup> i.e., at the level of formal constitutional change.

14 Act of 8 December 2017 on the amendment of the Act on the National Council of the Judiciary and some other acts.

15 See more: *M. Matczak*, President Duda is Destroying the Rule of Law instead of Fixing it, *VerfBlog* 29.9.2017, <http://verfassungsblog.de/president-duda-is-destroying-the-rule-of-law-instead-of-fixing-it/>; *W. Sadurski*, Judicial ‘Reform’ in Poland: The President’s Bills Are as Unconstitutional as the Ones He Vetoed, *VerfBlog* 28.11.2017, <http://verfassungsblog.de/judicial-reform-in-poland-the-presidents-bills-are-as-unconstitutional-as-the-ones-he-vetoed/>.

16 *Skąpska*, fn. 2, p. 134.

17 *D. Landau*, Populist Constitutions, *University of Chicago Law Review* 2018, p. 532-537.

18 *Landau*, fn. 17, p. 536.

Finally, and to state the obvious, perhaps the most striking aspect of the unconstitutional character of the post-2015 developments in Poland is the fact that changes have been preceded and facilitated by the incapacitation of the main device of constitutional maintenance in Poland after the fall of Communism, namely the Constitutional Tribunal. Disabling the CT as an effective and robust interpreter and enforcer of the Constitution must be seen as an *instrumental* step leading to a situation in which the Constitution, while formally valid, does not matter when it conflicts with the government's designs for rearranging the boundary between its own targets and the sphere protected by constitutional principles and rights as interpreted so far. Sham judicial review supports the government in emasculating constitutional constraints upon its action. As a consequence, the Constitution stops being "self-executing" because it lacks an internal legal instrument of assuring its self-binding character; its domination is eliminated by a politically dominant force.

#### IV. Sources of Polish anti-constitutional transformation

The rise of populism, such as in Poland, usually has a large number of causes, and reducing these causes to one or two main "sources" is almost always an error. However, some causes are more important than others. In the case of Poland, I claim that four sources are particularly important in paving the way to *PiS* victory and its persistent societal support.

The first is the power of xenophobic attitudes which were skilfully stimulated by *PiS* in the wake of the refugee crisis in Europe: the influx of migrants and refugees from Africa and the Middle East in 2015 was a God-given gift for *Kaczyński* who could stir up anti-migrant (often racist) attitudes in an ethnically and religiously homogenous Poland.<sup>19</sup> Anti-immigrant impulses were inextricably related to racially-tinged and anti-Muslim concerns.<sup>20</sup> The sense of self-esteem and dignity became somewhat perversely founded on the sense of superiority to those over whom we can for once exercise power, even if only by saying "No" to their desperate pleas for admission to a safe place. Drawing national, cultural and religious boundaries between "Us" and "Them" helped to exploit the fear of otherness and sustain a sense of self-esteem.

This is not an unusual combination. As *Noam Gidron* and *Peter Hall* report, there is some evidence that, for instance, "men in the French and American working classes sustain their sense of dignity or status, in part, by drawing sharp boundaries between themselves and North African migrants or African Americans".<sup>21</sup> How the inhumane resistance to accepting even a limited number of children and women from war-stric-

19 For emphasis on this factor as decisive for *PiS* victory, see *J. Rupnik*, *Surging Illiberalism in the East*, *Journal of Democracy* 4/27 p. 82.

20 Opinion polls in the late 2015 showed that an average of two-thirds of Poles were against receiving refugees from the Middle East and Africa, and that "[t]his reluctance is linked to the fact that the vast majority of refugees are Muslim and/or non-whites", *A. Balcer/P. Buras/G. Gromadzki/E. Smolar*, *Polish views of the EU: The illusion of consensus*, *Stefan Batory Foundation*, Warsaw 2017, p. 10.

21 *N. Gidron/P. A. Hall*, *The Politics of Social Status: Economic and Cultural Roots of the Populist Right*, *British Journal of Sociology* 2017, Suppl. 1, p. 63.

cken Syria could have, in Poland, been squared with Christian benevolence and love in a nation where over 90 percent identify themselves as Christians is an intriguing question, which is outside the bounds of this article. But it worked, partly thanks to the connection successfully drawn by government propaganda between being Muslim and being a terrorist; opinion polls found that “The overwhelming majority of Poles connect Muslims with terrorism”.<sup>22</sup> As sociologist *Maciej Gdula*, reporting on his interviews with *PiS* supporters said, “When it applies to strangers, the impulses of empathy are suspended and the language used unpleasantly resembles a liberal *laissez-faire* philosophy”.<sup>23</sup> He further explains that one of *Kaczyński’s* sources of success is that he gave many people of lower ranks a sense of importance based on their superiority and strength by comparison with vulnerable Others, as well as a sense of community “the members of which are equal in their distinction from elites and from strangers”.<sup>24</sup> This is combined with a sense that one’s group (and not only oneself individually) is threatened in its dignity and self-respect by allegedly excessive concern for traditionally-despised groups or, what comes to the same in this constellation of concerns, immigrants.

The second source was the force of anti-establishment sentiments facilitated by a certain fatigue displayed by *Platforma Obywatelska (PO)* by the end of its second term, by some embarrassing though not too odious corruption or quasi-corruption scandals, by *PO’s* ecumenical approach to ideology (stretching from left liberalism to traditionalist conservatism) which was initially its strength, but eventually came to be seen (correctly) as unprincipled pragmatism, and by a particularly inept, lethargic and arrogant electoral campaign by President *Komorowski* in 2015. What is more, there is a clear, even if somewhat ironic (because the two target groups seem at the antipodes of social status) link between anti-elite and anti-immigrant passions. The incumbent elites are seen not only as arrogant and corrupt, but at the same time so cosmopolitan and anti-national that they are willing, for whatever reasons (to allay their own sense of guilt?) to let in masses of migrants and thus dilute the sense of nation-based unity and community. In the end, both groups are strangers to the common folk; they are “Them” rather than “Us”.

The third source, which explains well the persistence of support for *PiS*, is the delivery of new welfare benefits. The program known as “500+” (providing each family a monthly stipend of PLN 500, or EUR 120, per month for each child over and above the first one), with two million families as its beneficiaries, was ingenious in its simplicity. This is a typical instance of pork-barrel politics, employed with great shrewdness by *PiS*. While various benefits “in kind” may be much more economically rational (free preschool facilities; improvement of public schools; public transport and infrastructure aimed at disadvantaged regions and groups, and in particular improvement in health services), their effects are delayed in time and less tangible. In contrast, giving cash to every family with more than one child, no conditions attached, is instantly attractive; e.g. in a low-income family of 3 children or more, it may translate

22 *Balcer/Buras/Gromadzki/Smolar*, fn. 20, p. 10.

23 *M. Gdula*, *Nowy Autorytaryzm [New Authoritarianism]*, Wydawnictwo Krytyki Politycznej, Warsaw 2018, p. 71.

24 *Gdula*, fn. 23, p. 71.

into a doubling of the family income. For many poorer families, it is a very significant injection of cash, and the prospect that *PiS*'s electoral defeat may mean the end to this influx of money gives *PiS* a huge edge over the opposition (especially since *PO*'s promises to maintain and even increase the program after its future victory do not sound credible).

These big social transfers are presented by *PiS*, and seen by its supporters, as a huge act of social justice and as recognition of the legitimate claims of people who felt harmed and humiliated by the post-1989 transformation – either in reality, or as an effect of skilful *PiS* anti-elite propaganda. Early criticism of the programme by the opposition and the liberal media who represented it as a massive bribe only helped to strengthen the perception that it is only *PiS* that understands, empathises with, and helps ordinary people. The carefully cultivated image of *PiS* as a “socially sensitive” party was partly shattered in April-May 2018 when the party demonstrated a cruel insensitivity to a strike, held on the premises of the Sejm, by carers of persons with disabilities: the government steadfastly refused to give in to most of their demands, and some officials even used offensive language to describe the protesters. The contrast between the manifest “generosity” of child subsidies and insensitivity towards persons with disabilities may have been due to the fact that the latter – and their carers – offered a negligible dividend in terms of votes.

Finally, the fourth source of *PiS* popularity is the fact that it is viewed, partly rightly, as a party which fulfils its promises, and in the social sphere it indeed does: “500+”, the lowering of the retirement age (thus undoing a major, politically costly though economically justified *PO* reform, and winning a sizeable group of voters in the pre-retirement age); energetic and spectacular actions to protect tenants in recently “reprivatized” buildings; legislative action aimed at a ban on Sunday trading presented by governmental propaganda less as religiously driven and more as a protection for underpaid personnel in the commerce industry – these and similar actions show the electorate that *PiS* is on the side of “ordinary people”. Even if some reforms are clearly misplaced and hugely controversial (secondary education reform, or health service changes), they all tend to support *PiS*'s image as a “can do” party, the perception of which is facilitated by a general economic boom, which has been largely externally driven. Much of the malaise in the society under the former ruling elite was not about the *democratic* qualities of the state (which largely matched the European standards) but rather about its relative inefficiency in delivering important public goods, such as affordable housing, public health, labour rights (a notorious privileging of short-term contracts virtually with no guarantees for the employees), quality public schools, and quality media. As a result of Tusk's antipathy to a tax aimed at supporting public media, the main source of financing came from advertising which led to competition with commercial media in pursuit of ratings, and the drastic lowering of standards.

That is why *PiS*'s positioning to address these problems, even if wasteful and economically irrational in the long term, positively contrasts with the record of *PO* in

these fields in the short-term,<sup>25</sup> all the more so since it is being rationalised by the government and its supporters in “dignitarian” terms. Many non-ideological supporters of *PO* became disgruntled by the end of its second term in office, and had good reasons to turn away from the party which promised modernity but failed to deliver quality public goods such as just listed. The accompanying assault on institutional checks and balances, and in particular on the CT and the judiciary, is seen as an abstract issue, one that does not affect individuals directly, especially if the ostensible targets of the assaults are often viewed with scepticism and distrust. “The institutions of a healthy democracy [...] feel remote and false, geared for the benefit of those who run them”.<sup>26</sup> Propaganda depicts anti-*PiS* protesters as beneficiaries of the former ruling system, frustrated by the loss of undeserved advantages. As *Jarosław Kaczyński* said, signalling this line of argument: “In short, we are seeing a revolt against the fact that we are simply taking away the money that the elites had looted and divided up somehow”.<sup>27</sup>

## V. Conclusions: Resources of Liberal Democracy

The hegemonic party in Poland controls much of the media, courts, law enforcement, agencies such as the electoral commission, media boards, national bank, the military, and civil society grant-dispensing institution, and deploys the machinery of government in its favour. There is a firm stranglehold by the ruling elite on nearly all public institutions with the elite’s effective capacity to suppress dissent, to enrich itself, and to further consolidate its power. *PiS* circumvents democratic norms and the rule of law, and relies upon a centralised authority which can be traced to decisions by one man and the narrow group of his closest collaborators if he wishes to consult them or delegate the decision, in a way invisible to the constitutional design. All senior positions are occupied by party loyalists whose main pattern of accountability is to the party leader, not to the parliament or the electorate.

But there is no inevitability in further backsliding for Polish democracy, and perhaps even in maintenance of populist authoritarianism as is the case now. Poland has the strong societal and political resources necessary to arrest and reverse the trends described above, and then unravel all the nefarious institutional changes brought

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- 25 For an argument that the legitimacy of states, especially of new democracies, depends less on their democratic qualities and more on their ability to deliver good quality governance, see *F. Fukuyama*, *Why Is Democracy Performing So Poorly?*, *Journal of Democracy* 26, p. 11-20. See also *S. Issacharoff*, “Democracy’s Deficits”, *University of Chicago Law Review* 2018, pp. 513-516.
- 26 Quote from *G. Packer*, *Hillary Clinton and the Populist Revolt*, *New Yorker* 31 October 2016, <https://www.newyorker.com/magazine/2016/10/31/hillary-clinton-and-the-populist-revolt>. Packer describes a perception by various members of white working class whom he interviewed for the article during the US presidential campaign in 2016, but they fit the *PiS* electorate well.
- 27 [http://www.reuters.com/article/us-poland-politics-kaczynski-democracy/polands-kaczynski-calls-eu-democracy-inquiry-an-absolute-comedy-idUSKBN14B1U5?utm\\_campaign=trueAnthem:+Trending+Content&utm\\_content=585c5c2204d30126992cd8d9&utm\\_medium=trueAnthem&utm\\_source=twitter](http://www.reuters.com/article/us-poland-politics-kaczynski-democracy/polands-kaczynski-calls-eu-democracy-inquiry-an-absolute-comedy-idUSKBN14B1U5?utm_campaign=trueAnthem:+Trending+Content&utm_content=585c5c2204d30126992cd8d9&utm_medium=trueAnthem&utm_source=twitter), 7.11.2017.

about by *PiS* rule, difficult though it will be. There is still a vibrant and resilient civil society (with notable examples including the demonstrations held in more than 200 Polish towns in July 2017 to protest against the law on the judiciary), there are strong even if rather ephemeral social protest movements, there is an independent body of commercial media, both electronic and print, and there are passionate debates in social media. Universities are politically free, and the only censorship, when it occurs in the academia, is self-imposed. Cultural institutions – theatres, film industry, museums – articulate a rich diversity of political views, and although the state makes occasional and rather awkward attempts at censorship, Polish culture maintains an independent spirit. The opposition parties, while divided along many lines, have a combined electorate not far below the electorate of *PiS*. There is a courageous, tenacious and intelligent Commissioner for Human Rights (Ombudsman) *Dr. Adam Bodnar*, who enjoys a degree of constitutional protection against dismissal, even though *PiS* media and individual politicians (as well as a comically aggressive quasi-judge of the Constitutional Tribunal, *Mariusz Muszyński*) occasionally suggest terminating his tenure prior to the end of his term.

Populisms, such as *PiS*'s, often carry a seed of self-destruction: they are, in the long run, ineffective and counter-productive, relying upon the knowledge (imperfect) and charisma (doubtful) of a single person. With its paranoid excesses and narrow epistemic base, populism has a low capacity for effective governance. By disconnecting the real centre of political power from constitutionally-established institutions and procedures, the regime reduces the likelihood of self-correction facilitated by inter-institutional accountability. There may be some grounds for optimism in *Stephen Holmes*' observations (not formulated specifically with regard to Poland) about populist leaders' propensities: "populist leaders almost always prefer a personally loyal to a professionally competent staff. This makes it somewhat less likely that a cornered populist president will be able to design and implement a truly shrewd and effective survival strategy."<sup>28</sup>

The main legitimating ground of populism, that it effectively delivers the goods to its electorate, seems to have a long-term tendency to decline. A major instrument by which *PiS* maintains its popularity – mass clientelism – may become increasingly costly, especially if the externally-driven economic boom ends. But even a dramatic worsening of the economic situation (something which should not be wished, even by *PiS* critics) may not lead to a political reversal. As *Leszek Balcerowicz* observes, "the worsening economy may not be sufficient to stop and reverse a bad transition if forces of intimidation are already strong".<sup>29</sup> And yet, a traditional "remedy" used by elected authoritarians in such circumstances, namely strengthening of intimidation against political opponents (as in Russia after the economic situation deteriorated due to lowered oil prices), may be in Poland counterproductive: compliance with authoritarians and acceptance of an apodictic strongman goes hand-in-hand, in a strange way, with a spirit of freedom in the Polish collective psyche.

28 *S. Holmes*, *How Democracies Perish*, in: C. R. Sunstein (ed.), *Can It Happen Here? Authoritarianism in America*, New York 2018, p. 422-423.

29 *L. Balcerowicz*, *Recent attacks against freedom*, April 2015, unpublished manuscript on file with the author, p. 2.

Further, populism in power runs into a universal paradox: how to reconcile *being* the establishment with the anti-establishmentarian appeal which fuels populism's popularity? As *Ben Stanley* notes, populist parties "often fell victim to the same public scepticism they had sought to cultivate when attacking established parties".<sup>30</sup> There is no reason to believe that, in the longer run, PiS will escape the force of this scepticism espoused by its most faithful electorate which is, at the same time, the most conducive to anti-establishment attitudes. Finally, splits within the ruling elite cannot be excluded, especially due to *Kaczyński's* eventual departure from politics for age or health reasons. In such circumstances, *PiS* may simply lose elections: contemporary authoritarianism has some examples in store where a ruling group with autocratic tendencies has conceded loss in elections (as in Macedonia in 2016 or in Sri Lanka in 2015). Whether *PiS* will try to avoid such a result by resorting to electoral fraud, remains to be seen.

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30 *B. Stanley*, Populism in Central and Eastern Europe, in C. Rovira Kaltwasser/P. Taggart/P. Ochoa-Espejo/P. Ostiguy (eds.), *The Oxford Handbook of Populism*, Oxford 2017, pp. 157-158.