

Between Fear and Hope: Poland's Democratic Lessons for Europe (and Beyond)

Tom Gerald Daly*

Wojciech SADURSKI, *Poland's Constitutional Breakdown* (Oxford University Press 2019) 304 pp. English.

The European Solidarity Centre in the northern Polish city of Gdańsk is a striking rust-red hull towering over the city's shipyards. Inside, you can sit in a police carrier from the 1980s, giving you some faint sense of what it was like for protesters in Poland struggling against the late-era Communist state under its most repressive period: martial law from December 1981 to July 1983. Footage plays continuously of a protester mown down by one of these hulking vehicles. The message is clear: the society-wide *Solidarność* (Solidarity) movement, which began with the Communist world's first non-party labour union in Gdańsk's Lenin Shipyard in 1980, was fighting for the most basic freedoms and the hope for a better future, and managed to seemingly cement a true democratic transition after 1989 in the face of stark odds, including (albeit later than neighbouring states) a liberal democratic constitution featuring all the trappings of a European *Rechtsstaat*: a clear separation of powers; guarantee of full, free, and fair elections; a raft of civil and political rights; and key accountability mechanisms including a German-style constitutional court – the latter established before the democratic transition, in 1986.

Yet, as Wojciech Sadurski's landmark new book recounts, 30 years after 1989 Poland is effectively being run at the whims of one person and his inner circle: Jarosław Kaczyński, who is neither president nor prime minister, but rather head of the ruling Law and Justice party (*Prawo i Sprawiedliwość*; PiS is the Polish acronym). Kaczyński now wields dominant power in Poland's political system, having achieved a sweeping subversion of the constitutional order since PiS entered government in late 2015, by subordinating accountability institutions

*Director, Democratic Decay & Renewal (DEM-DEC); (www.democratic-decay.org); Assistant Director, Melbourne School of Government.

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such as the courts and prosecution service, and rendering the separation of powers a dead letter.

Although a significant literature now exists on this development,¹ Sadurski's work is the first book-length account analysing how this has happened in such a short space of time and the precise legal and institutional means by which it was achieved. Setting out a lucid account of what has brought Poland from one type of undemocratic rule to another in the space of just three decades, he emphasises that this is no reversion to Communist-era rule: it is the construction of a form of bespoke authoritarianism that echoes Communist rule in some respects, but which also departs from it in highly significant respects, not least in its central aversion to the Communist state, its focus on Catholicism and nationalism, its relative subtlety, and the rather successful maintenance of a democratic facade.

That facade can be beguiling, even for the informed observer. On 13 July 2017, at the end of a research trip concerning the declining health of Polish democracy, I happened to be travelling from Gdańsk to Warsaw on the day the government unveiled its law empowering the Minister of Justice to purge Supreme Court judges. It was difficult, despite a relatively nuanced understanding of threats to Poland's democratic system, to reconcile the sunny, relaxed vista before me in each city with the front page of the leading daily *Gazeta Wyborcza*: 'Demokracja Umiera w Ciszy' ('Democracy Dies in Silence'). Sadurski's account, which ends in November 2018, makes clear that in the following 15 months the facade became ever thinner, although even a year after his account ends, in the world's eyes the government's democratic mask has not yet fully slipped.

In setting out this tale with such clarity and verve, Sadurski has provided a real service to Poland's democratic community, and to an international audience eager not only to understand what has transpired in Poland since PiS gained power but also how the Polish experience fits in the wider perception of a trend toward deterioration of democratic rule across Europe and beyond. Both empirically detailed and theoretically rich, this book is set to form part of the central canon in the developing 'democratic decay' or 'democratic backsliding' research field, alongside other recent books including Tom Ginsburg and Aziz Huq's *How to Save a Constitutional Democracy* (2018), András Sajó and Renáta Uitz's *The Constitution of Freedom: An Introduction to Legal Constitutionalism* (2017), and Yascha Mounk's *The People Versus Democracy* (2018). More specifically, the

¹In the English language *see*, for instance, a collection of chapters by Lech Garlicki, Mirosław Granat and Andrzej Szmyt in the edited collection A. Szmyt and B. Banaszak (eds.), *Transformation of Law Systems in Central, Eastern and Southern Europe in 1989–2015* (Gdańsk University Press 2016). *See also* M. Bernatt and M. Ziółkowski, 'Statutory Anti-Constitutionalism', 28 *Washington International Law Journal* (2019) p. 487.

account also builds on, and provides a new centre of gravity for, a rapidly expanding literature on the travails of Polish democracy since 2015, from constitutional law scholars including Tomasz Tadeusz Koncewicz, Anna Śledzińska-Simon and Agnieszka Bień-Kacała, EU scholars such as Maciej Bernatt, Kim Scheppele, Dimitry Kochenov and Laurent Pech, and international judges such as Lech Garlicki and Marek Safjan, as well as political scientists including Kate Korycki, Radosław Markowski, and Jan Kubik, sociologists such as Marta Bucholc, and a range of comparative work (especially comparing Poland and Hungary) from Gábor Halmai, Tímea Drinóczy, and Paul Blokker, among others.

The sheer pace of the events the book narrates, and Sadurski's clear admission that he is not a neutral observer, lends this work a crackling urgency quite different to his other milestone works in the field of constitutional law and theory, including *Rights Before Courts* (2005), *Constitutionalism and the Enlargement of Europe* (2012), and *Freedom of Speech and Its Limits* (2014). In fact, to write this work Sadurski interrupted another book project which was close to completion; an attempt to apply the Rawlsian theory of public reason to comparative constitutional study, tentatively titled *Constitutional Public Reason*.²

This review focuses on three aspects of the book: the core argument and structure; the conceptual framework; and constitutional resilience and design. Given that the book's account stops at November 2018, and this review was finalised in November 2019, the concluding remarks address key developments in the past 12 months and the enduring – indeed, intensifying – relevance of this book.

CAPTURING A RELENTLESS ASSAULT

Poland's Constitutional Breakdown aims to address three key questions: What, exactly, has happened since PiS came to power in 2015? Why did it happen? What are the prospects for a return to liberal democracy? These questions are contemplated against the background of a perceived global trend toward the rise of populist authoritarianism and so-called 'illiberal democracy'. It is a relatively short text, the substantive content comprising nine succinct chapters and 271 pages in total. The first two chapters ('Anti-constitutional populist backsliding' and 'Before the Breakdown: 1989–2015') set out the conceptual background and historical context respectively. Chapters 3–6 set out in forensic detail the legal and institutional means employed by the PiS government to diminish accountability organs and centralise its power: 'Dismantling Checks and Balances (I): The Remaking of the Constitutional Tribunal'; 'Dismantling

²See 'Author Interview: *Poland's Constitutional Breakdown*' IACL-AIDC Blog (17 May 2019) (blog-iacl-aidc.org/just-published/2019/4/15/author-interview-the-united-kingdom-and-the-federal-idea-dhw4r) last visited 17 November 2019.

Checks and Balances (II): Judges and Prosecutors'; 'Undoing Institutions of the Democratic State'; and 'An Assault on Individual Rights'. The final three chapters broaden out to wider questions: the fundamental explanations for why this has happened in Poland ('Why Did It Happen?'); intervention by European institutions ('Europe to the Rescue'); and a return to conceptual reflections in the final chapter ('Illiberal Democracy or Populist Authoritarianism?').

The context of the book is that Poland was once a poster child for democracy in the post-Communist sphere. By the time of its entry into the European Union in 2004 it was widely viewed as a securely consolidated democratic system (although Sadurski eyes the term 'consolidation' with suspicion), especially having met the EU's 'Copenhagen criteria', the political dimension of which required that aspirant members prove the 'stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities'. However, question marks about the 'consolidation' of Polish democracy started to arise shortly after EU accession, with the entry of the new ultra-conservative, Catholic and nationalist Law and Justice (PiS) party into government after the 2005 elections (in coalition with two other minor parties). PiS attacks on the judiciary, media, independent Central Bank, and rights of sexual minorities meant that by 2007 the scholar Ivan Krastev was calling Poland 'the capital of Central European illiberalism today'.³ That PiS-led coalition only lasted until 2007 and many of its manoeuvres were thwarted by the Constitutional Tribunal. Fears concerning illiberalism receded somewhat during an eight-year interlude of government under the liberal Civic Platform (PO) party (in coalition with smaller parties).

The core argument and narrative might be summarised as follows. PiS returned to government in October 2015 with both the first outright parliamentary majority since the fall of Communism and the presidency, handing it the opportunity to remake the political system according to its worldview. The government quickly launched an assault on liberal democratic structures through a raft of measures aimed at *de facto* constitutional change.

The sheer pace, relentlessness, and diversity of manoeuvres employed to bring democratic institutions under the PiS party's control is impossible to appreciate without reading the book, which makes for stark reading. The core of the book, recounting the PiS capture of the justice system, emphasises that the sequence of capture began with assaults on the Constitutional Tribunal, starting with laws in November 2015 – mere weeks after PiS entered power – and expanded to the Supreme Court, and common courts over the following two years. In the case of the Constitutional Tribunal, Sadurski sets out how gambits have ranged across constitutional, legal, procedural, and administrative means. Constitutional

³I. Krastev, 'The Strange Death of the Liberal Consensus', 18(4) *Journal of Democracy* (2007) p. 56 at p. 56.

manoeuvres to install new judges in contravention of established procedures have effected a sea-change in jurisprudence and introduced a new court president willing to use internal administrative power to sideline non-compliant judges (e.g. forcing one judge to take months of holiday leave) and who supports the government in extra-curial pronouncements. In the common courts, measures have ranged from replacement of virtually all court presidents, to initiation of criminal prosecutions against judges for the content of their judgments. Similar measures have been taken against prosecutors, including involuntary transfers of non-compliant prosecutors far from their home.

Sadurski repeatedly emphasises that it is the *accumulation* and *mutually reinforcing effects* of these measures that truly matter. For example, concerning changes made to the operation and composition of the Supreme Court (SC) and the National Council of the Judiciary (KRS), he offers at p. 124:

the lowering of the age of retirement in the statute on the [Supreme Court] combined with the new composition of the KRS allows for a large influx of politically dependent and vulnerable judges to the SC; the creation of two new chambers of the SC entrusted with politically sensitive matters (including election results) is compounded by the participation of lay judges in those cases, elected by a simple majority of the Senate. A possible measure for controlling the executive in one act is disarmed by a measure in another act; for instance, the power of the KRS to control the ministerial dismissal of a court's president is weakened by the political composition of the KRS and the requirement of two-thirds majority of votes for such a decision, which is highly unlikely to be obtained.

Sadurski also makes clear that the changes range far beyond the courts. In the parliament (*Sejm*), the opposition's role in the legislative process has been greatly diminished through a variety of measures, not least: reducing opposition scrutiny and circumventing expert analysis by fast-tracking legislation and presenting government-drafted bills as private member bills (40 per cent of all bills in 2016 alone); limits on opposition MPs' speeches (to a minute or even 30 seconds); punishing vocal MPs by blocking their participation in international activities; or even the simple expedient of turning MPs' microphones off in the chamber. The parliament has been transformed from a site for deliberation and inclusive law-making to a 'voting machine' that churns out laws at a frantic pace.

Changes to the civil service have been dramatic, again achieved through a suite of legal, administrative, and personnel changes, including a December 2015 law on the civil service. Additional 'personnel statutes' terminated the statutory terms of office of a range of incumbents (foreshadowing later moves against the judiciary). Leadership has been altered dramatically. Whole upper echelons of some agencies have changed. 31 of 32 CEOs of state-controlled companies were

replaced. Rules for entering the civil service, especially for high-level positions, have been changed from merit-based procedures to simple political appointments, often leading to appointees with little relevant experience. In each case, the new leaders are viewed as PiS loyalists.

In the media sphere, the December 2015 law facilitated equally wide-ranging transformations, including rapid replacement of all 118 senior management posts in public broadcasters (radio and TV). A new five-member regulatory agency, the Council of National Media, overseeing all public and private television and radio services, was established in contravention of the Constitution (under which a National Council of Radio and TV Broadcasting had already been established). Elected by the president and containing three PiS members, it is said to take its instructions directly from Kaczyński – reflected, Sadurski argues on p. 15, in an odd episode where, after the new Council sought to remove the head of public TV, the three PiS members were summoned to see Kaczyński and immediately rescinded their decision. Other indications of PiS control of the Council offered include a heavy fine on a private TV news channel for reporting demonstrations before Parliament in 2016. Finally, the establishment of two new bodies has centralised government control over all state grants for NGOs.

As Sadurski makes clear, then, this is not simply a story of the PiS government transgressing constitutional boundaries or tripwires. It is about a government that has transformed the state apparatus entirely, leaving the form of the democratic structures in place but rendering them meaningless by constructing an edifice of supra-constitutional– or rather, extra-constitutional – power, dominated by one individual: Jarosław Kaczyński. The mocking simulacra of previously robust institutional checks subsist as a useful democratic facade. As to why PiS has so energetically brought virtually all independent powers to heel, Rafał Matyja, an independent conservative intellectual, is quoted on p. 162 as decrying the paranoid style of PiS politics: ‘a logic of total distrust towards institutional rules and willingness to replace them by mechanisms based on personal trust’. Indeed, as discussed further below, trust is perhaps a meta-theme across Sadurski’s account.

ANTI-CONSTITUTIONAL POPULIST BACKSLIDING

Sadurski’s book makes a substantial contribution to a cross-disciplinary literature that has rapidly mushroomed in recent years, focused on understanding the newly dominant mode by which liberal democracy is threatened. Instead of yesterday’s common ‘quick death’ of democracy through, for instance, a coup d’état, today’s democracies suffer a subtler ‘slow death’, primarily through the cumulative actions of a democratically elected government that outwardly professes adherence to democratic rule. There are no tanks in the streets, no overt assaults on the

opposition or rights protection; rather, the democratic system is chipped at, often through measures masked as reforms. In a recent article mapping the rapidly expanding literature on the creeping deterioration of liberal democracy worldwide,⁴ the present author offered a summary definition of this perceived phenomenon of ‘democratic decay’ as the *incremental degradation of the structures and substance of liberal constitutional democracy*.

‘Incremental’ refers to the subtle hollowing out of democratic governance. Huq and Ginsburg use the ‘boiling frog’ analogy: like a frog sitting in boiling water does not recognise that it is in danger until it is too late, contemporary threats to democracy are often not obvious until they are well advanced.⁵ Liberal constitutional democracy is distorted into a non-democratic form without any one flash point that galvanises remedial action. ‘Degradation of structures’ in this short definition refers to the dominant institutionalist characterisation of today’s democratic threats as ‘executive aggrandisement’, suggesting that its core feature is ‘the (at least initially) incremental but systemic dismantling of checking mechanisms that liberal democratic constitutions typically put in place to ensure the accountability of the political executive’.⁶ Sadurski himself offers on p. 14 that ‘the emphasis in this book is on the structural institutional transformation away from democracy’. Certainly, his account resonates strongly with those of key analysts who perceive a clear ‘playbook’ sequence of manoeuvres followed in other states such as Venezuela, Turkey, and Hungary, involving attacks on both the liberal and democratic dimensions of the system: the key accountability institutions as well as the electoral process. There is now a panoply of conceptual innovations to convey this process, including Huq and Ginsburg’s ‘constitutional retrogression’, Scheppele’s ‘autocratic legalism’, David Landau’s ‘abusive constitutionalism’, Jan-Werner Müller’s ‘constitutional capture’, Bermeo’s ‘democratic backsliding’, or even Fared Zakaria’s ‘illiberal democracy’.

However, despite this embarrassment of conceptual riches, Sadurski eschews any one existing framework. ‘Illiberal democracy’ is considered too charitable to a system based on subverting even the core of democracy: the integrity of elections (including changes made to the chambers of the Supreme Court and to the Election Commission, discussed below). ‘Abusive constitutionalism’ is deemed inapposite due to its focus on formal changes to the constitutional order, as compared to the transformation of the constitutional order in Poland through sub-, extra-, and simply un-constitutional measures (albeit often portrayed as within the

⁴T.G. Daly, ‘Democratic Decay: Conceptualising an Emerging Research Field’, 11 *Hague Journal on the Rule of Law* (2019) p. 9.

⁵A.Z. Huq and T. Ginsburg, *How to Save a Constitutional Democracy* (University of Chicago Press 2018) p. 77.

⁶T. Khaitan, ‘Executive aggrandizement in established democracies: A crisis of liberal democratic constitutionalism’, 17(1) *International Journal of Constitutional Law* (2019) p. 342 at p. 343.

limits of the law). ‘Hybrid regime’ is viewed as lacking any meaningful content as to what the indicated mixture comprises. ‘Constitutional coup’ is deemed inapt on the basis that it normally connotes a move by one group against a different group in power (although this overlooks the well-known concept of ‘self-coup’ or *autogolpe* in Latin America, where a sitting leader assumes extraordinary powers, shifting the basis of his power from democratically legitimate to democratically illegitimate: think Fujimori in 1990s Peru).

Sadurski instead frames the Polish experience as ‘anti-constitutional populist backsliding’, conjoining three elements. ‘Anti-constitutional’ denotes the wrenching dislocation of power from its constitutionally-mandated locus, with Kaczyński’s concentration of power recasting him as a sort of exalted magisterium, outside and above the formal constitutional structures, ruling through repeated violation of the Constitution, and blurring the lines of what counts as a violation. ‘Populist’, for Sadurski, should be focused more on the mode of political organisation than of political messaging, and is authoritarian in Poland owing to its linkage of ‘the usual populist repertoire (nationalism, plebiscitary style of politics, xenophobia, and fear of others) with dismantlement of the institutional mechanisms that are essential to political democracy’.⁷ It also speaks, in his view, to the PiS government’s preoccupation with popular support and measures employed to maintain sufficient support (e.g. generous welfare benefits). ‘Backsliding’ captures temporality and a focus on the trajectory of Poland’s system after reaching a very significant level of liberal democratic development since 1989, while emphasising that this is not an ‘impersonal’ or ‘haphazard’ process, nor a simple return to the pre-1989 *status quo ante*.

Sadurski’s account reinforces key insights from the existing literature, such as the cumulative effect of seemingly disparate measures and the fact that institutions (such as courts, parliament and the civil service), not rights, are the central target – although his short chapter 6 addresses curtailment of the rights to freedom of assembly, free speech, and privacy. His account will be deeply recognisable to any scholar of Hungary, given that PiS’s actions strongly echo the path taken by the illiberal Fidesz party government since 2010. However, Sadurski usefully distinguishes between the Hungarian and Polish experiences, often stressing areas where the latter context is less negative: for instance, in Poland independent media and robust civil society remain active (whereas Radio Free Europe has recently returned to Hungary); and corruption is not a central feature (although the massive statewide purge of institutions under PiS, including state companies, has served to feed a clientelist form of governance through access to lucrative posts). However, Sadurski also emphasises that the speed of change has been more rapid compared to Hungary; and although transformation through formal

⁷At p. 26.

constitutional amendment (or a new constitution) has not been possible due to the government's lower majority, PiS has nevertheless managed a total constitutional revolution through alternative means, which may be harder to reverse.

Wider comparisons to other states are not made but key points will be of significance to democratic decay scholars. The silencing and disabling of the opposition in parliament not only resonates with other European states such as Hungary, but also developments in India under the Modi government since 2014. The wholesale purge of leadership across the courts and the civil service brings to mind Turkey under President Erdoğan – the latter having received much more attention internationally. The use of personnel transfers as an instrument of control is also familiar to me from past experience of working with judges and prosecutors in Turkey. That a constitutional court can be, not just disabled, but transformed into an active enabler of the government invites comparison with the activity of the Venezuelan Supreme Court under Chávez and Maduro since 2000. Other dimensions are more peculiarly Polish. Bernatt and Ziółkowski have coined the term 'statutory anti-constitutionalism' to capture the extent to which constitutional revolution has been achieved through ordinary law, and how law has been employed to establish new heads of constitutionally-established bodies as well as 'mirror bodies' to take over the functions of such bodies (e.g. the Council National of National Media, discussed above).⁸

More than anything, the Polish experience proves the proverb 'where there's a will, there's a way'. The PiS assault on democratic structures is arresting in its energy, perverse inventiveness, and determination to clear all obstacles. This assault is remarkable in producing not just such an acute personalisation of power in Kaczyński, but also in how the overall perversion project mixes the momentous and the utterly petty in its multi-stranded advance. The Polish experience also highlights the construction of frameworks (e.g. for manipulating elections) without immediately pressing them into service. The structure for greater government control over the electoral system – striking directly at free and fair elections as the core of any conception of democratic rule – has been put in place. A new law adopted in September 2018, and approved by the 'packed' Constitutional Tribunal in 2019, has paved the way for government control of the National Electoral Commission (which deals with election management as well as political party funding) by completely restructuring the Commission, concentrating control over appointment of its head to the Minister for Interior, and empowering government officials to make the final decision on drawing and redrawing electoral boundaries.

Returning to the thumbnail definition of 'democratic decay' above – incremental degradation of the structures and substance of liberal constitutional democracy – Sadurski's account, despite a central focus on structures, also has much to say

⁸See Bernatt and Ziółkowski, *supra* n. 1.

on the 'substance' of democratic rule. In the wider literature this refers to the norms of democratic governance, which can deteriorate in multiple ways, including: the declining willingness of political actors to 'play by the rules of the game' and to act (and be seen as acting) in the public interest ('public interest' here meaning more than the interests of political actors' electoral base); a rise in hyper-partisanship and 'constitutional hardball' (more aggressive brinkmanship tactics in government-opposition dealings, discarding established norms); denial of the fundamental legitimacy of the political opposition; a decline in shared principles of political discourse and democratic values (e.g. of civility); and fading public faith in democratic institutions and democratic rule itself. This dimension of democratic decay is covered in the existing literature by concepts including Jack Balkin's 'constitutional rot', which is remarkably similar to what political scientists call 'democratic deconsolidation'.⁹

Sadurski touches on this wider democratic deterioration in multiple ways. He emphasises, for example, the willingness of the PiS government and party to engage in 'mass deception'. As with other PiS measures, falsehoods propagated by PiS have run the gamut from big-ticket issues to trivial lies. Alongside claims that past elections have been rigged, that the opposition is endemically corrupt, that the media is dominated by enemies of Poland, and that Communists permeate the state apparatus, Sadurski refers to Prime Minister Morawiecki's odd claim that he had been personally responsible for Poland's accession negotiations with the EU when he was merely a low-ranking delegation member. More broadly, he points to the 'moral and political weaknesses' of Polish officials and lack of common understanding about what constitutes a norm violation; the shallow socialisation and internalisation within Poland's political class of democratic norms, which were exposed, especially after EU accession, as often based on external messaging (with Polish political actors eager to convey an image of democratic 'normalcy' to the EU and others); and the 'normalisation' of political aberrations due to the public's limited ability to grasp and fully appreciate continuous breaches of norms as the PiS transformation project was rolled out.

The latter point underscores why Sadurski also explicitly eschews the use of rubrics such as 'constitutional rot' or 'democratic decay' on the basis that this is not akin to an organic, natural process of degeneration and 'does not do justice to the energy, enthusiasm, and designs' of the PiS government¹⁰ – what Scheppele calls 'constitutional malice'.¹¹ However, in the latter portions of the book he does appear to veer close to this terminology, speaking of the Polish democratic system as 'degenerating' (p. 249) and the manner in which institutions

⁹See Daly, *supra* n. 4, p. 28 ff.

¹⁰At p. 12.

¹¹K.L. Scheppele, 'Autocratic Legalism', 85 *University of Chicago Law Review* (2018) p. 545 at p. 547.

are not being dismantled or destroyed or demolished, but instead are being *hollowed out*, eroded, and emptied: their sense and meaning, which confer value on them, are all but lost, but their shells remain.

Returning to trust as a meta-theme of the book, Sadurski's account also appears to speak to a wider decay of Polish democracy, preceding 2015 but hastened by PiS's retrieval and rehabilitation of the 'darker self in the people . . . as an ultimate victory of true democracy over the liberal, cosmopolitan elite' (p. 245). Sadurski also refers to the 'catastrophic' level of political distrust in Polish society with individuals' trust starkly eroded, not only in government and the political class, but in anyone who disagrees with their views – a feature capitalised on and fed by, but not created by, the PiS government.

CONSTITUTIONAL DESIGN, RESILIENCE AND RESISTANCE

While a very significant literature now exists on anatomising the subtler threats faced by liberal democracy in a variety of states worldwide, a focus on resilience to, or resistance against, constitutional damage has been a somewhat secondary concern.¹² Sadurski's book makes valuable contributions in this respect. Three key lessons might be highlighted.

First, faith in courts as central democratic bulwarks can be easily misplaced. Resonating with trust as a form of meta-theme across the book, the Tribunal itself was established partly due to the constitution-drafters' distrust of ordinary courts as guardians of the Constitution under a US-style system of diffuse review, but this choice, by accruing review power at one site, perversely rendered it easier for PiS to 'capture' the system quickly, with the result that, he argues, it now cannot be trusted to adjudicate fairly. Some scholars, such as Tomasz Koncewicz, have argued that ordinary courts must step into the breach by exercising the power to refuse to apply a statute deemed incompatible with the Constitution, thereby re-making themselves as 'quasi-constitutional courts'.¹³ However, Sadurski's account suggests a systematic shift of this nature has not occurred and we are left with a wilderness of single instances of resistance based on individual courage or principle; such as Judge Waldemar Żurek, spokesperson of the Cracow Regional Court (and the judicial council before it was packed), whose outspoken criticism

¹²See e.g. R. Albert and M. Pal, 'The Democratic Resilience of the Canadian Constitution', in M. Graber et al. (eds.), *Constitutional Democracy in Crisis?* (Oxford University Press 2018).

¹³See T. Koncewicz, 'The Capture of the Polish Constitutional Tribunal and Beyond: Of Institution(s), Fidelities and the Rule of Law in Flux', 43 *Review of Central and East European Law* (2018) p. 116; and 'Polish Judiciary and the Constitutional Fidelity. "In Judges We Trust"?', in J. Giezka et al. (eds.), *Nowa Kodyfikacja Prawa Karnego Tom XLIII: Księga Jubileuszowa Profesora Tomasza Kaczmarka* (Wydawnictwo Uniwersytetu Wrocławskiego 2017).

of PiS measures led to significant State harassment through the tax and prosecution authorities. As regards constitutional design lessons, at a book panel in Santiago in July 2019 Sadurski further suggested that Poland shows the danger of concentrating constitutional control in one body.

Second, pushback can come from unlikely heroes: in the domestic context it is surely the steadfast resistance of the Ombudsman, Adam Bodnar – ‘*bête noir* of the PiS’ – to capture or co-optation, persistently holding a mirror up to the government and offering a principled north star for those ground down by its normalisation of the abnormal. Unlikely heroes have also arisen at the European level. In chapter 8 Sadurski, having written widely on the deep and multi-stranded imbrication of national and European law and politics in the past, proves an expert guide through what he calls the ‘thick tapestry’ of complex and multi-layered responses to developments in Poland, across the European Union and Council of Europe system. These responses – perhaps with some simplification – have involved much ineffectual barking (albeit often highly principled and well-intended) punctuated by occasional sharp bites from European institutions.

Reflecting yet again the meta-theme of trust, it was ultimately a lack of trust in Poland’s system that brought the crisis before the Court of Justice of the European Union when an Irish High Court judge refused to extradite a Polish national under the EU’s European Arrest Warrant due to rule-of-law concerns centred, in particular, on the government’s attacks on courts. In landmark rulings representing setbacks for the government, the Court ruled in July 2018 that other national courts in Europe may consider the rule-of-law concerns raised regarding Poland when deciding on extradition requests, in an interim relief order of December 2018 (followed by a judgment of June 2019) that highly dubious reforms concerning the Supreme Court must be halted, and in November 2019 that provisions of a law on the organisation of ordinary courts – lowering the retirement age of judges whilst allowing the Minister of Justice to decide on the prolongation of their active service – are contrary to EU law.¹⁴ A further case, taken against the Polish government by the European Commission regarding the disciplinary regime for judges, will be heard in November 2019. However, Sadurski seems to suggest that undue trust in EU institutions (especially political organs) may be unwarranted: while he hopes for a more robust approach, he cites Gráinne de Búrca’s characterisation of the main EU Treaty (Article 7) procedure for addressing breaches of the EU’s fundamental values – including democracy and the rule of law – as a form of ‘virtue signalling’ rather than practical defence.

¹⁴ECJ 25 July 2018, Case C-216/18 PPU, *Minister for Justice and Equality v LM*, ECLI:EU:C:2018:586; ECJ 24 June 2019, Case C-619/18, *Commission v Poland*, ECLI:EU:C:2018:910; and ECJ 5 November 2019, Case C-192/18, *Commission v Poland*, ECLI:EU:C:2019:924.

Third, regarding constitutional design more broadly, Sadurski's conclusion is that the precise institutional structure itself is not determinative. Rather, linking with the discussion of the 'substance' of democratic rule above, it is the socio-political context in which the Constitution and institutions are couched. As he puts it on p. 185:

ultimately it is a matter of culture and ethics, and when they are missing, even the best designed institutions will be rendered hollow; in contrast, when they are strongly engrained in the professional group staffing the institutions, they are likely to prevail over determined populists.

This suggests that various constraints, such as supermajority rules for constitutional amendment and replacement are not as significant a protection as some may have thought. Yet, Sadurski strikes against the view that the success of the PiS party's hollowing out of the democratic system is due to any particular weakness in the design of the 1997 Constitution itself, suggesting that there are at least two ways of viewing the Polish experience: a negative view laments that it took merely two years to subvert the constitutional system; whereas a positive view emphasises that it took two full years of relentless legislative and political activity, from a party bent on maximising its power, to achieve this hollowing out. Perhaps an alternative message from his account is that, while we cannot design individual institutions to play a robust defensive role, the prospect of constitutional defence is improved with a broad-based system that puts multiple defensive sites in place, any one of which may be activated.

In his conclusion Sadurski cites with approval Bojan Bugarič's observation that the survival of constitutional democracy ultimately rests on 'democratic political parties and social movements with credible political ideas and programs'.¹⁵ This links to two dimensions that are not explored in much depth in the book: namely, the party system and the public. As regards resilience, key dimensions of the party system to analyse might include: focusing more intently on the political party than the executive as the incubator and source of 'constitutional malice'; addressing internal democratic party structures that could cut across dominance of the PiS party by a single individual; and a greater focus on the prospect of enhancing opposition rights in parliament, to prevent undue domination of the legislature by the governing party.¹⁶

¹⁵At p. 186, citing B. Bugarič, 'Central Europe's Descent into Autocracy: On Authoritarian Populism', CES Harvard Open Forum Paper Series 2018–2019, p. 6; now also published in 17 *ICON* (2019) p. 597.

¹⁶For discussion of these issues, see T.G. Daly and B.C. Jones, 'Parties versus Democracy: Addressing Today's Political-Party Threats to Democratic Rule', *International Journal of Constitutional Law*, forthcoming.

The public remains perhaps the most marginal presence in the book, and it would be useful in future work to reflect more systematically on the public's role in the past three years: not just as voters or onlookers, but as protesters, activists, litigants, participants in the democratic system, and possibly as participants in – or, in some cases, opponents of – the repair and renewal of democratic politics in the future. A fuller portrait of civil society reactions to the PiS government, such as the *Konstytucja* movement, would add even more context and colour to Sadurski's gripping institutionalist account. A more fine-grained picture of the electorate as a whole would also be illuminating, as regards the extent to which PiS voters may be disaggregated regarding support for its social welfare programmes and support for its ideology, as well as the nature of opposition voters, and – perhaps even more importantly – those who do not vote at all. After all, as Sadurski recounts, PiS won the 2015 elections with just 37.6% of the vote and an electoral turnout of under 51% (although these numbers have risen to some 44% and over 60%, respectively, in the October 2019 elections, this point remains valid).

More broadly, Sadurski's account does not fully grapple with why PiS was able to tap into what he calls the Polish electorate's 'darker self' and what this means for the societal entrenchment of liberal democratic values in Poland after 1989. At the book panel in Santiago in July 2019, mentioned above, Sadurski indicated strong resistance against a tendency towards 'liberal self-flagellation' faced with the rise of populist authoritarianism. However, there is at least a need for more extensive reflection and introspection among liberal democrats on how the value of core aspects of liberal democracy, often treated as self-evident, does not resonate with significant swathes of the population in a range of states.

Of course, this is ultimately a lawyer's account, focused on the institutions of democratic rule from a constitutional perspective. That is not a criticism, as the book is an exemplar of the central contribution the committed lawyer can make to this debate. It will be for others to flesh out his account, especially from a sociological perspective. Key additional questions include: How did Kaczyński accrue so much power within his party and how does he maintain his dominance? Why have some actors (such as the Ombudsman) taken such a strong stand when others have not? What was the effect of international judicial 'soft power', such as the suspension of the National Council of the Judiciary from the European Network of Councils for the Judiciary, or the German Constitutional Court's hosting of Supreme Court President Małgorzata Gersdorf for a speech in Karlsruhe on 21 July 2018 – a mere 17 days after her show of defiance, returning to work surrounded by colleagues and a throng of protesters after the Minister of Justice had attempted to dismiss her? Other tantalising observations made, but not pursued, in the book suggest much more remains to be said – including that the new Vice-President of the 'captured' Constitutional Tribunal was formerly an intelligence agent, stationed in Berlin alongside the new court President in the

1980s. Returning to the law itself, constitutional lawyers will also seek, in time, more analysis of the jurisprudence of the ‘packed’ Constitutional Tribunal and other courts, to assess more clearly the extent to which they have been transformed by PiS.

CONCLUSION: SUSPENDED BETWEEN FEAR AND HOPE

For anyone concerned about the health of liberal democracy, in Poland and elsewhere, Sadurski’s account is indispensable. Its evidence-based approach provides a retort to those who would continue to cast recent developments as merely a bout of political distemper that fits within the rough-and-tumble of ‘normal’ democratic politics. In his forensic analysis, Sadurski has shifted the onus of proof from those seeking to raise the alarm about these developments to those denying the charges – including the government itself. That is important. In the year since Sadurski’s account ended, concerns have intensified. Increasing harassment of the judiciary was revealed in the resignation of the deputy justice minister in August 2019 after an investigative report revealed his use of an internet troll to wage a smear campaign against judges opposed to ongoing judicial ‘reforms’. Prosecutor Krzysztof Parchimowicz, leading criticism of attacks on prosecutorial independence, has faced a barrage of disciplinary proceedings. Academic freedom has taken a hit, with suits against academics criticising criminal law bills, and Sadurski himself subjected to extensive legal harassment by the Polish government, involving no less than four lawsuits. Vilification of minorities has intensified, including the spread of legally meaningless but rhetorically powerful ‘LGBT-free’ zones across Poland.

This review was finalised right after the 13 October parliamentary elections, in which PiS won 43.59% of the vote. Shortly before the elections, Sadurski said that, if PiS were to win, the prospects would be bleak, echoing Hungary’s path: PiS would complete its capture of the courts, of private media (probably through ownership requirements, given the dominance of foreign-owned media), replace the Chief Justice of the Supreme Court and the Ombudsman (who departs office in mid-2020) with PiS loyalists, and emigration would increase (as has happened in Hungary).¹⁷ However, many observers in the immediate aftermath of the elections see reasons to be positive: even though it has increased its share of the vote PiS has not increased its parliamentary majority, despite an all-out propaganda campaign; it has lost the Senate (which ends PiS domination of virtually all institutions and will likely slow down its capacity to rush through legislation and dominate nominations to public institutions); leftist parties have enjoyed a resurgence and more parties have entered parliament, which means PiS will face

¹⁷What happens after the Polish Elections? An Interview with Wojciech Sadurski’, *Verfassungsblog* 18 August 2019.

more challenges from multiple angles; looming economic constraints suggest PiS cannot easily expand welfare to shore up support; and EU intervention may yet present additional challenges. That said, there is little time for complacency: the entry of the ultra-nationalist Confederation party into parliament with almost 7% of the vote is a concerning development; and political sights have also fixed on the next electoral battle, with President Duda's five-year term expiring in 2020.¹⁸ How PiS will react to greater challenge is an open question, but Sadurski observes in his final remarks that populist authoritarianism often contains the seeds of its own destruction in the longer term.

That Poland's democrats are suspended between fear and hope reflects the European landscape as a whole, and the global landscape more broadly. I write this conclusion on a train from Prague to Germany, after attending Forum 2000's global conference on 'Recovering the Promise of 1989', where delegates – including Poland's former President and leader of *Solidarność*, Lech Wałęsa – interrogated the dominant pessimistic narrative regarding the health of liberal democracy, but emphasised that there are also signs of hope. Recent developments include: local elections in Hungary and Turkey, in which the ruling authoritarian parties lost control of Budapest and Istanbul; the ignominious departure of the far-right Freedom Party from government in Austria; Zuzana Čaputová's victory in Slovakia's presidential elections; and mass protests against the corruption of Prime Minister Babiš in the Czech Republic, organised by the Million Moments for Democracy group. Perhaps most interesting, especially for constitutional lawyers, is the renewed spirit of institutional experimentation with participatory mechanisms, aimed at enhancing the public's voice in government; including the *Grand Débat* in France, permanent Citizen's Council in Belgium, citizens' assemblies in Ireland and the UK, and municipal citizens' assemblies in Madrid and Poland, and outside Europe, everywhere from Mongolia to Australia. In sum, the dominant mood can obscure a complex reality, featuring both negative and positive developments.

We cannot tell the future, but Sadurski's compelling book underscores that fear is not the same as fatalism, and accurate anatomisation of constitutional breakdown is the surest foundation for contemplating remedial action. He has shown the real value of providing a book-length country case-study in a research field dominated by theoretical and comparative accounts. This landmark work will itself spur further theoretical and comparative enquiry, and will assist in the formulation of practical policy solutions. It is a quick read but will stay with you long after you have reached the last page. Read it. Reflect on it. Respond to it.



¹⁸See J. Cienski and Z. Wanat, '5 takeaways from the Polish election', *Politico* 15 October 2019.