

## The Challenge of Institutionalisation: Post-Communist ‘Transitions’, Populism, and the Rule of Law

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Institutionalisation – Populism – Rule of law – Poland – Hungary – Post-communist reformers more given to emulation, adoption and installation, than institutionalisation – Institutionalised traditions as resources and sources of recalcitrance – New populists as institutionalisers of anti-rule of law values, de-institutionalisers of independent institutions – ‘Abusive constitutionalists’, who erode and subvert the kinds of institutionalisation necessary to temper power

In 1991, Samuel Huntington published *The Third Wave*, about what he called ‘an important – perhaps the most important – global political development of the late twentieth century: the transition of some thirty countries from nondemocratic to democratic political systems’.<sup>1</sup> In the same year, the wave peaked with the collapse of the Soviet Union. A slew of post-communist states emerged, many new, all

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<sup>1</sup>S. Huntington, *The Third Wave. Democratization in the Late Twentieth Century* (University of Oklahoma Press 1991) p. 8.

encouraged to commence 'transition to democracy, a market economy, and the rule of law'.

They were heady times. And the collapse of European communism was not merely a local event. It represented the end of the 'short twentieth century' that Eric Hobsbawm identified as beginning in 1914 and ending in 1991<sup>2</sup>. What had marked that century was the peculiar 'conceptual geography'<sup>3</sup> in terms of which the world was mapped as occupied by competing socio-economic-political-ideological *systems* with global, indeed world historical, pretensions. From the end of World War II, there were only two competitors with global ambition in that contest, and when the short century came to an end, only one of them was left standing. At that time, it looked in pretty good shape, obviously compared with its benighted ex-competitor but also in its own right.

As subjects of communism had often lamented, unlike their own region, the West was full of 'normal' countries. Successful models were all over the place – (West) Germany, Sweden, France, Britain, the US, etc. Of course details differed from country to country but this ill-defined but 'I know it when I see it' sort of 'normality', apart from being very attractive, had the apparent advantage that it *existed* (in the West) and did not need to be invented. The slogans of the recently liberated abnormals were 'no experiments' and 'no adjectives'. For people whose lives had been scarred by overweening experiments and adjectives, normality seemed a no-brainer. And pretty soon several countries, particularly in the western parts of Central and Eastern Europe, seemed to be emulating their models with some success. Integral to their emulations, as Grażyna Skapska points out, was that 'the democratic transformations that started in the symbolic year of 1989 were once called not only "peaceful" revolutions, but also "lawful" ones'.<sup>4</sup> For some time that seemed appropriate. Moreover, whatever might have been true of the *citizens* of states in putative 'transition to . . .', they had very enthusiastic international suitors happy to guide them on how to reach western-style 'normality'.

So successful were post-communist transitions presumed to be (or perhaps more soberly, nudged to become), that already by 2004, ten countries were certified (implausibly and perhaps prematurely) as having shown that they had

<sup>2</sup>E. Hobsbawm, *The Age of Extremes. The Short Twentieth Century 1914-1991* (Michael Joseph 1994).

<sup>3</sup>T. Judt, 'The Rediscovery of Central Europe', 119 *Daedalus* (1990) p. 1 at p. 25. I expand on this point in 'The Rule of Law after the Short Twentieth Century: Launching a Global Career', in R. Nobles and D. Schiff (eds.), *Law, Society and Community: Essays in Honour of Roger Cotterrell* (Ashgate 2014) p. 327.

<sup>4</sup>G. Skapska, 'The decline of liberal constitutionalism in East Central Europe', in P. Vhalem et al. (eds.), *The Routledge International Handbook of European Social Transformation* (Routledge Taylor & Francis 2018) p.130.

‘achieved stability of institutions guaranteeing democracy, the rule of law, human rights, respect for and protection of minorities’, and so could be welcomed into the European Union. Now it seems that, in a parody of Groucho Marx, some of them seem reluctant to be part of a club that would have them as members. For things look different now.

According to Freedom House, for the first time since 1995, in Central and Eastern Europe and Eurasia there were more consolidated authoritarian regimes in 2017 than consolidated democracies. In 2018, the general trend continued.<sup>5</sup> Some of these regimes look like regressions or repetitions of earlier historical patterns. However, in Central and Eastern Europe, rule of law reversals have occurred in novel forms, most surprisingly and deeply in Hungary and Poland, which are the primary focus of this article. These two states were arguably the two most likely success stories, vanguard states, of ‘transition’ and liberal constitutional democratic reform of the ‘90s. Today they appear to be counter-vanguards, of post-transition anti-constitutionalist ‘populism’. Moreover, while new populist parties have arisen in several other European countries, as Wojciech Sadurski rightly points out, ‘the Polish and Hungarian cases are different. Nowhere else in Europe did populist parties manage to dismantle the institutional system of checks and balances. . . . The Hungarian-Polish assault upon constitutional checks and balances is special, and more specifically, Poland is unique in its ostentatious disregard for its own formal constitutional rules’.<sup>6</sup>

In the Freedom House survey of 2017, Hungary had the lowest ranking in Central Europe, and Poland had its lowest score in the history of the survey. In 2018, Hungary registered the largest cumulative decline (over ten years) in the survey’s history and Poland recorded ‘the largest category declines and the second-largest Democracy Score decline in the history of the report’.<sup>7</sup> Both now have populist and popular governments of explicitly illiberal ambition, and considerable illiberal achievement. In Hungary those ambitions have been more thickly realised than in Poland, but in both there has been not simply erosion or backsliding of many of the independent institutions that seemed to blossom after ‘89, but explicit, incremental and systematic rejection of the values that underlay them. 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 and rhetoric of law. And so far it has been pretty easy in Hungary, and only somewhat harder in Poland. In Hungary the government’s constitutional majority has allowed the

<sup>5</sup>N. Schenkkan, *The False Promise of Populism, Nations in Transit Report 2017* (Freedom House 2017) <[freedomhouse.org/report/nations-transit/nations-transit-2017](https://freedomhouse.org/report/nations-transit/nations-transit-2017)>; <[freedomhouse.org/report/nations-transit/nations-transit-2018](https://freedomhouse.org/report/nations-transit/nations-transit-2018)>, both visited 12 August 2019.

<sup>6</sup>W. Sadurski, *Poland’s Constitutional Breakdown* (Oxford University Press 2019) p. 2.

<sup>7</sup>See <[freedomhouse.org/report/nations-transit/nations-transit-2018](https://freedomhouse.org/report/nations-transit/nations-transit-2018)>.

values underlying the rule of law to be systematically subverted according to law, the Constitution to be amended 12 times and then replaced, judges to be ousted, the jurisdiction and powers of the Court radically curtailed, governmental control over hitherto-independent institutions extended, but mostly by means which could be argued to be strictly *lege artis*.

The Polish government does not have the luxury of a constitutional majority in parliament, and has caught more flak both domestically and in Europe, but it has copied much of the Hungarian playlist, in some considerable legalistic anti-constitutionalist detail. In the past three years, the Polish government has violated the Constitution multiple times, though of course without acknowledging that fact. It has, most visibly, emasculated and then taken over the Constitutional Court, repeatedly ignoring the Constitution and decisions of the Court itself (several of which it simply refused to publish), and barely raising a sweat or much of a protest. It has done so, not by discarding the Court, but by upturning its central function: from being a source of check and balance on the government, it has been converted into an instrument of legitimation. The government sends petitions to the Tribunal so that it can lend legal legitimacy to purely political inroads on the system of justice and the Constitution.<sup>8</sup>

Aside from the Tribunal, the government, in less than three years, has attacked and in many cases already destroyed the independence of a host of other key legal institutions that it then seeks to take over: Procuracy, National Council of the Judiciary, and ordinary courts. It has established two new chambers in the Supreme Court, one to discipline other judges, the other to oversee elections, appointments to both of which the government's other 'reforms' will enable it to control. It tried to force through a law allowing it to sack and pack over 40% of the Supreme Court, by lowering the retirement age for all existing Supreme Court judges. The job only failed because of interventions by the European Commission and Court of Justice.<sup>9</sup> All this has happened with very little popular outcry, at least from outside the scorned 'elites' and 'caste' of lawyers, and at the time of writing (June 2019), notwithstanding a slew of scandals, PiS has just received an electoral boost in the European elections. A lot will depend on the parliamentary elections of October 2019, but the present government shows no signs of entertaining, unless forced, any more than tactical concessions. The relentlessly authoritarian Minister of Justice (Zbigniew Ziobro) is also the Chief Procurator, and he has been authorised to purge the crucially important

<sup>8</sup>See P Castillo-Ortiz, 'The Illiberal Abuse of Constitutional Courts in Europe', 15 *EuConst* (2019) p. 48, and for a comprehensive account of the Polish assault on constitutionalism, see W Sadurski, *Poland's Constitutional Breakdown* (Oxford University Press 2019) and ([www.rpo.gov.pl/pl/content/informacja-o-dzialalnosci-rzeczniaka-praw-obywatelskich-oraz-o-stanie-przestrzegania-wolnosci-i-praw](http://www.rpo.gov.pl/pl/content/informacja-o-dzialalnosci-rzeczniaka-praw-obywatelskich-oraz-o-stanie-przestrzegania-wolnosci-i-praw)), visited 12 August 2019.

<sup>9</sup>See ([europa.eu/rapid/press-release\\_STATEMENT-19-3376\\_en.htm](http://europa.eu/rapid/press-release_STATEMENT-19-3376_en.htm)).

presidents of ordinary courts, to interfere in judicial proceedings, to investigate judges for the substance of their judgments, and much more. Most recently, it has been revealed that senior staff in his office have been leaking information for hate campaigns against judges who have opposed the assault on the courts.

Apart from the systematic assault on courts, public television in Poland has become a pure propaganda arm of government, civil service merit criteria have been set aside and a raft of 37 'personnel' laws has authorised replacement of 11,000 civil servants with party nominees. A large array of hitherto independent organs have suffered cannibalistic encroachment, weakening or take-over; Sadurski terms it 'colonisation'.<sup>10</sup> Party nepotism is rife, moves against non-governmental organisations and the private media are on the list, and critics of all kind are finding themselves sued for defamation, civil, criminal and 'disciplinary', by members of the ruling party and organs of state. Parliamentary 'debate' has been reduced to a grotesque parody, a sham. In Hungary, the changes have gone in the same direction (many Hungarian innovations have been copied in Poland), but deeper. They have had more time, more legal licence and even less domestic opposition.

In sum, the governments of both Hungary and Poland have expressed, by word and action, complete disdain for the notion that their power should be constrained by independent institutions or social sources. But once upon a time, it was just precisely such constraint that was a marker of the difference between 'normal' countries and the benighted countries of 'the region'. Having been vanguards of 'transition', they now seem vanguards of new forms of populism that have come to contend for power in recent years in many parts of the world.

I am not going to try to explain the rise of the contemporary populist epidemic in the world, not even in one country. Other countries have other trajectories, which are affected by deep currents as well as by contingent waves which might well not have occurred but had effects when they did. The tendencies of which I write are only some among many various contending forces, which play out differently in different places and circumstances. Even where those tendencies are significant, they never are all-determining in their consequences. I see them less as speaking to why populism has arisen in the many places it has, than to why some populist anti-constitutional initiatives have gone further among the two vanguards of the post-communist world than in many other countries, also challenged by contemporary populism in power.

My question is roughly: why has it been so easy for *populist subversion of constitutionalist and rule of law values and institutions* to occur where, only 30 years ago, they seemed to have been welcomed as indispensable ingredients of the normality so many citizens of the region professed to admire? Another way of asking the question is: why have Kaczyński and Orbán found so apparently easy what

<sup>10</sup>See Sadurski, *supra* n. 8.

Donald Trump, whose power is not small and whose motivations and ambitions appear to tend in similar directions, finds so hard: to overwhelm and take over ostensibly (and relatively) independent institutions that were intended to temper power?

To explore that question, I introduce and deploy a concept developed over 60 years ago, for different purposes, and not to my knowledge today much discussed, in this context or any. Nevertheless, I believe it can illuminate current tribulations. That concept is *institutionalisation*, in the specific sense outlined in the first section of this article. In the second section, I discuss the salience of this notion in the context of post-communist Europe, where dramatic populist transformations of public institutions have occurred. In the third section, I examine two different populist ambitions in relation to institutionalisation, one positive – to draw upon it as a resource, the other negative – to subvert it where it might stand in the way. Finally, in the fourth section, I examine the implications of this combination of re- and de-institutionalisation in the domain for what began the post-communist era as a central ambition: the rule of law.

## INSTITUTIONALISATION

I begin with institutionalisation, in a specific sense of that term outlined by the great sociologist Philip Selznick. In a long life, he had many subjects, but his earliest was the dynamics of organisations, and particularly of organisational leadership. One of his early works is *Leadership in Administration*,<sup>11</sup> which sought to generalise and theorise findings that he had reached in his first two works, *TVA and the Grass Roots*,<sup>12</sup> and *The Organizational Weapon*.<sup>13</sup> In the former, he traced what he took to be a failure by well-motivated leaders of the New Deal's innovative Tennessee Valley Authority, to imbue their organisation with the values they sought to promote; and so had lost control of the direction and values of their enterprise. *The Organizational Weapon* dealt with a very different type of organisation, Communist Parties that sought to gain power in hostile and difficult conditions. To do that they had to develop an institution that managed, on a regular and systematic basis, to convert 'recruits into deployable agents'. The task was not easy, but it had been successfully accomplished in many places by the time (1952) that *The Organizational Weapon* was published.

<sup>11</sup>P. Selznick, *Leadership in Administration. A Sociological Interpretation* (first published 1957; University of California Press 1984).

<sup>12</sup>P. Selznick, *TVA and the Grass Roots. A Study in Politics and Organization* (first published 1949; Quid Pro Quo Books 2011).

<sup>13</sup>P. Selznick, *The Organizational Weapon. A Study of Bolshevik Strategy and Tactics* (first published 1952; Quid Pro Quo Books 2011).

To put it (too) briefly, Selznick found that the difference between the two kinds of leaderships he discussed lay in the failure of the TVA and the success of communist parties, to understand the imperatives of *institutionalisation*.

In opposition to then reigning organisation and management theories of a highly formalistic cast, Selznick introduced a distinction between organisations and institutions.<sup>14</sup> Organisations might look like the impersonal bureaucracies of which Weber wrote, but many of them tend to become *institutionalised*, that is ‘infuse[d] with value beyond the technical requirements of the task at hand’.<sup>15</sup> One might approve of such values or condemn them; either way Selznick’s point is that institutionalisation involves an observable process of ‘envaluation’ that occurs to and within organisations, and has significant consequences.

There are two ways in which organisations come to be ‘infused with value’, that is, institutionalisation develops: one as what I call *process*, the other as *project*. The most prevalent and pervasive form occurs as a spontaneous social process over time, as people develop particular habits, relationships, networks, ties, loyalties, attachments, in the course of living and working together, participating in activities, sharing and learning values, symbols, identities and so on. Selznick’s focus was on places where this might not be expected – formal organisations – but his insights can be generalised. Processes of institutionalisation are rife in the world.

Such processes happen over time, typically undesigned by anyone in particular. They well up from below in social and organisational life, as persons come to develop group and institutional connections, identities, and rivalries; adopt and promote institutional values; create and adapt to an ‘internal social world’<sup>16</sup> in organisations and more generally in life itself. They are the way we do things here, the way things are, maybe even the way things have to be. Such attachments, commitments and connections, typically not formalised, become entwined even around what appear to be impersonal, formal organisations and they shape and mould the patterns of everyday life, what is done and also what is thought possible and desirable to do. They become ‘second natures’, affecting pretty well everything, but often passed over by pretty well everyone, including scholars seeking to explain their consequences. Institutionalisation goes deeper in some sorts of organisations, say churches or the marines, than others, say the post office or

<sup>14</sup>This distinction is quite different from Douglass North’s later one, expressed in the same terms. For North, institutions are the basic rules of the game, both formal and informal; organisations are outfits that play the game (see D.C. North, *Institutions, Institutional Change and Economic Performance* (Cambridge University Press 1990) p. 7). Selznick uses the terms to distinguish two sorts of outfits.

<sup>15</sup>Selznick, *supra* n. 11, p. 17.

<sup>16</sup>Selznick, *supra* n. 11, p. 7.

sanitation department, but it happens a great deal. Institutionalisation in this sense is pervasive, so pervasive that we don't even notice it.

As a result, whereas organisations might be conceived as 'technical instruments, designed as means to definite goals... judged on engineering premises... expendable, [i]nstitutions, whether conceived as groups or practices, may be partly engineered, but they have also a "natural" dimension. They are products of interaction and adaptation; they become the receptacles of group idealism; they are less readily expendable'.<sup>17</sup>

This 'natural' dimension makes the *history* of institutions, their customs and traditions, important. Not only are they the way things are, but they are the way things *have been* or are thought to have been. They are subject to:

natural tendencies... [and] to the extent that they are natural communities, organizations have a history; and this history is compounded of discernible and repetitive modes of responding to internal and external pressures. As these responses crystallize into definite patterns, a social structure emerges. The more fully developed its social structure, the more will the organization become valued for itself, not as a tool but as an institutional fulfillment of group identity and aspiration.<sup>18</sup>

These are general tendencies of social and organisational life. They do not supersede formal structure, do not render it irrelevant. But they complicate it, intervene in its operations, shape what can be done with it. They are not merely inconvenient contingencies; one must expect them and think about what to do about them if one wants to change them. One must *work with* them.

And this brings us to *projects* of institutionalisation, for more rarely and with more difficulty than in spontaneous processes, there can be a deliberate project to institutionalise an organisation, to encourage particular loyalties and attachments to develop, to 'infuse value' into organisations, to transform 'an engineered, technical arrangement of building blocks into a social organism'.<sup>19</sup> That requires more than routine management. It depends upon *leadership* in a specific sense of the term: 'leadership has the job of guiding the transition from organization to institution so that the ultimate result effectively embodies desired aims and standards'.<sup>20</sup>

One thing that makes deliberate institutionalisation so difficult is the presence of always-already-existing institutionalised practices and structures that confront any leader, and that result in 'the recalcitrance of the tools of action. We are

<sup>17</sup>Selznick, *supra* n. 11, p. 21–22.

<sup>18</sup>Selznick, *supra* n. 11, p. 15–16.

<sup>19</sup>Selznick, *supra* n. 11, p. 139.

<sup>20</sup>Selznick, *supra* n. 11, p. 139–140.



inescapably committed to the mediation of human structures which are at once indispensable to our goals and at the same time stand between them and ourselves'.<sup>21</sup> This sort of mediation, then, is at once both 'recalcitrant' and crucial to the character even of enthusiastic innovation.

Selznick was concerned with individual organisations, but I believe his insights can be extended more broadly. To presage our theme: many innovative projects have been attempted, and much has occurred, after the collapse of communism, but they never drew on a blank slate, or one that could be readily rendered blank, as many reformers and their advisers imagined. Even when reformers began with some identikit portrait of communism (to be dismantled) and constitutionalism, capitalism etc (to be erected) It always involved *bricolage*, 'recombination' in David Stark's language,<sup>22</sup> of existing, often heavily institutionalised, practices, attachments, loyalties and ways of being and behaving. No one starts from nowhere.

And so *projects* of reform will typically encounter expectations, practices, and modes of interaction, many likely already to be strongly institutionalised, and that might be precisely the problem for would-be legal reformers. These will include such obvious institutions as the Church, the Nation, the group, the party, but they also extend to familiar ways of behaving, old attachments, networks, values and expectations, or what are taken to be such. Moreover, it is not only *positive* relationships and attitudes that are liable to be insititutionalised; negative ones too – such as engrained antipathies, distrust of states and laws, hostility to strangers, differentiated patterns of behaviour and interaction among social strata and classes – come to be ingrained and transmitted. The ostensibly new is always heavy with the past, some of it real, some as it is today imagined or mythologised, but therefore no less real in its consequences. However much Washington clamours to be received, Warsaw and Budapest do a lot to frame and shape the reception.

Citizens may consider the new laws and institutions irrelevant to, or in conflict with 'how we do things here'. This may be deeper than a specific objection to particular laws, but rather what might be called an ontological indifference or hostility to *any* new laws, or a disposition to ignore or evade, or for the ambitious a determination to conquer the law.

Supplanting or enlisting such informal practices is not always easy or quick to contrive. For, as Selznick observed elsewhere and later:

The starting mechanism [of institutionalisation] is often a formal act, such as the adoption of a rule or statute. To be effective, however, the enactment must build upon preexisting resources of regularity and legitimacy and must lead to a new

<sup>21</sup>Selznick, *supra* n. 11, p. 32.

<sup>22</sup>D. Stark, 'Recombinant Property in East European Capitalism', 101 *American Journal of Sociology* (1996) p. 993.

history of consistent conduct and supportive belief. Institutions are established, not by decree alone, but as a result of being bound into the fabric of social life. Even so weighty an enactment as the United States Constitution cannot be understood apart from the legal and political history that preceded it, the interpretive gloss given it by the courts, and the role it has played in American history and consciousness. The formal acts of adoption and ratification were only part of a more complex, more open-ended process of institution-building.<sup>23</sup>

That process can be affected by deliberate action, but it is rarely *determined* by such action, for – with constitutions as much as with more prosaic administrative institutions – we need to study:

the social and cultural conditions (class structure, traditional patterns of loyalty, educational level, etc.) that affect its viability . . . We see how the formal charter is given life and meaning by the informal ‘social constitution’ in which it is imbedded. When the latter is absent, the constitution is likely to be weak and ineffective. Giving life to a constitution is partly a matter of achieving general consensus regarding proper ways of winning power and making laws. But much more is also involved.<sup>24</sup>

Infusion with value can be a conscious, deliberate task of moulding, fashioning; not just a spontaneous process of adaptation, fitting in. Not only can it be, but at crucial, character-forming, and transforming moments in an institution’s development it must be. It is the leader’s task to embody new purpose in the life of the institution, and that will involve both fitting ‘the aims of the organization to the spontaneous interests of the group within it, and conversely to bind parochial group egotism to larger loyalties and aspirations’.<sup>25</sup> Indeed where a leader is adept, the two senses of institutionalisation merge, for ‘the leader is an agent of institutionalization, offering a guiding hand to a process that would otherwise occur more haphazardly, more readily subject to the accidents of circumstance and history’.<sup>26</sup>

Leaders intent on innovation, then, need to deal with loyalties, attachments and networks, to bring them in line with the ends they seek. They might try to change them and this can be done, but it is an art and does not follow automatically from a change of leadership, installation of new rules or organisations, or exhortation, or ‘international best practice’. If it is not done skilfully and well, old attachments and patterns will not give way quickly and new ones, or at least the

<sup>23</sup>P. Selznick, *The Moral Commonwealth* (University of California Press 1992) p. 232.

<sup>24</sup>Selznick, *supra* n. 11, p. 6–7.

<sup>25</sup>Selznick, *supra* n. 11, p. 93–94.

<sup>26</sup>Selznick, *supra* n. 11, p. 27.

ones leaders intend, will not grow quickly; perhaps not at all. In any event, the new will rarely fail to run up with or against the old, and it may not be as new as reforming enthusiasts imagine. Indeed the old might turn, and be mobilised to turn, on the new. A system of rules can be invented overnight, but history matters *in principle* with institutions. They take time and they must take account of time. As another scholar has observed from another context (Myanmar): ‘tectonic shifts in political power can be dramatic and exciting. Shifts in institutional behaviour are protracted and wearisome’.<sup>27</sup>

The two aspects of institutionalisation – process and project, figure and ground – are thus inevitably intertwined. Leaders need to be aware of the socially embedded, value-infused character of the materials with which they deal. A leader of an institution who treats it as a mere mechanical instrument or a simple bunch of rules to be followed or changed will flounder, both oblivious of sources of institutional recalcitrance, and unable to summon potential sources of institutional energies. Such a leader may know heaps about techniques, methods and ‘international best practice’, but if she is not attuned to existing, local, goals and values, and thoughtful about how to bed them in with existing attachments, she is likely to be disappointed. A leader who seeks to innovate must strive to infuse existing institutions with new attachments, loyalties, and engagements. But s/he will not be able to do this successfully without taking account of existing institutional ways of life and thought; ‘[a] wise leader faces up to the character of his organization, although he may do so only as a prelude to designing a strategy that will alter it’.<sup>28</sup>

## PROCESSES AND PROJECTS

In most post-communist societies and indeed in many national and international agencies’ efforts to promote constitutionalism, the rule of law, and other good things, many of those responsible for introducing transformation did not adequately understand them to be *necessarily* complicated in these ways. To put it in Selznick’s terms, they did not reckon sufficiently either with the significance of existing institutionalisations of and within the contexts they sought to transform, or that there might be special demands involved – involving the recognition of existing institutions and how they might animate but also complicate, change. I begin with process and move to project.

<sup>27</sup>N. Cheesman, *Opposing the Rule of Law. How Myanmar’s Courts Make Law and Order* (Cambridge University Press 2012) p. 173.

<sup>28</sup>Selznick, *supra* n. 11, p. 70.

## Processes

One reason we often fail to take sufficient account of the effects of processes of institutionalisation within our or others' lifeworlds, is that the dimension of *tradition*, the normative presence of real or imagined pasts, in these processes is crucial, but we don't have much of a handle on that. Modernity has a poor language for traditions; many of its most influential grand narratives had them on the way out. Post-moderns keep finding them coming back in.

Traditions are complicated phenomena and their workings far from pellucid. I won't go far into them here, though I have tried elsewhere.<sup>29</sup> We all know they're around, but we're not great at dealing with them, or even knowing quite what might be involved in acknowledging them. Forced to choose between Hartley's 'the past is a foreign country: they do things differently there',<sup>30</sup> and Faulkner's 'the past is never dead. It's not even past',<sup>31</sup> impatient reformers and indeed most modern social scientists go for Hartley. That has particular significance in regions where pasts remain seriously present, where so much change has been imposed over generations, and where proposed futures really *are* from foreign countries. It is easy to overlook the present significances of what went before but might not have gone away. Thus, in relation to east central Europe, Ekiert and Ziblatt point out that:

Today's political cleavages, political discourses, patterns of partisan affiliation, institutional choice, and the quality of democracy itself all appear to correlate to a remarkable degree with patterns from the 'deep past'. To date, social scientists, however, have not sufficiently reflected on what might explain this finding and

<sup>29</sup>See for example, M. Krygier, 'Law as Tradition', 5 *Law and Philosophy* (1986) p. 237; 'The Traditionality of Statutes', 1 *Ratio Juris* (1988) p. 20; 'Tradition' *Dictionnaire Encyclopédique de Théorie et de Sociologie du Droit* (Librairie Générale de Droit et de Jurisprudence 1988) p. 423; 'Thinking Like a Lawyer', in W. Sadurski (ed.), *Ethical Dimensions of Legal Theory* (Rodopi 1991) p. 67; M. Krygier and A. Czarnota, 'Revolutions and the Continuity of European Law', in Z. Bańkowski (ed.), *Revolutions in Law and Legal Thought* (Aberdeen University Press 1991) p. 90; M. Krygier, 'Legal Traditions and their Virtue', in G. Skąpska and K. Paącki (eds.), *Prawo w Zmieniającym Się Społeczeństwie [Law in a Changing Society]* (Adam Marszałek 1992) p. 243; M. Krygier and A. Czarnota, 'From State to Legal Traditions? Prospects for the Law after Communism', in J. Frenzel-Zagórska (ed.), *A One-Party State to Democracy: Transition in Eastern Europe* (Rodopi 1993) p. 91; M. Krygier, 'Tradycja' 4 *Encyklopedia Sociologii* (Oficyna Naukowa 2002). I revisit some themes in a somewhat more distanced fashion in 'Institutional Optimism, Cultural Pessimism and the Rule of Law', in M. Krygier and A. Czarnota (eds.), *The Rule of Law after Communism* (Dartmouth 1999) p. 77, and 'Too Much Information' in H. Dedek (ed), *Sustainable Diversity in Law. Essays in Honor of H. Patrick Glenn* (Cambridge University Press forthcoming).

<sup>30</sup>L.P. Hartley, *The Go-Between* (first published Hamish Hamilton 1953; New York Review Books Classic 2002) p. 17.

<sup>31</sup>W. Faulkner, *Requiem for a Nun* (Penguin Books 1960) p. 81.

how to study the impact of the general phenomenon of the long-run in the region.<sup>32</sup>

Added to the power of the past, they suggest, is a specific finding of profound relevance to institutional reformers: ‘legacies of the *longue durée* may ironically be more important precisely in situations of discontinuous institutional changes . . . paradoxically, discontinuous changes may open large chasms between formal and informal institutions, preventing gradual adjustments’.<sup>33</sup>

To move from generalities to specifics, most of the values and institutions welcomed so heartily in the early 1990s did not have much of a foothold in the region, both because these values were not any part of strong living traditions there, in the terms I have introduced here they were little institutionalised, and because other values, often contradictory to these, had significant resonance and grip; they *were* institutionalised. So, one can get at this point in two ways: in terms of *absences* and *presences*. On the one hand, liberalism and values associated with it was weak throughout the region. As one Polish lawyer puts it, ‘[f]or decades Polish liberalism was a weak trend, a secondary, if not an outright marginal one’.<sup>34</sup> This was not an accidental or incidental absence. Rather, as Jerzy Szacki observes:

In the socio-economic conditions that prevailed in Eastern Europe during the period of the rapid development of liberalism in the West, liberalism, if anyone in Eastern Europe had even heard of it, was the outlook of a relatively small number of individuals, of persons who had read a lot about it in books and newspapers published in Western countries and who believed that liberalism provided the best blueprint for achievement of the liberty and prosperity of mankind. Most of these individuals, it should be added, were intellectuals who had little influence on practical affairs.<sup>35</sup>

What is true of liberalism is true also of associated traditions of individual rights, interactive and tolerant pluralism as a normal – even welcome – condition, tolerance as a positive value, or law as a constraint on power. Szacki discerns ‘fragments’, ‘elements’ of liberal values and institutions scattered in time and place,<sup>36</sup> but ‘neither in Poland nor in any of the other countries of Eastern Europe did liberalism become a popular way of thinking, a widely accepted practical

<sup>32</sup>G. Ekiert and D. Ziblatt, ‘Democracy in Central and Eastern Europe One Hundred Years On’, 27 *East European Politics and Societies* (2013) p. 90.

<sup>33</sup>Ekiert and Ziblatt, *supra* n. 32, p. 96.

<sup>34</sup>P. Winczorek, preface to W. Sadurski, *Racje Liberata. Eseje o państwie liberalno-dmokratycznym* (Presspublica 1992) p. 5. See also J. Dawson and S. Hanley, ‘What’s wrong with East-Central Europe? The fading Mirage of the “Liberal Consensus”’, 27 *Journal of Democracy* (2016) p. 20 at p. 21.

<sup>35</sup>J. Szacki, *Liberalism after Communism* (Central European Press 1995) p. 52.

<sup>36</sup>Szacki, *supra* n. 35, p. 59.

programme for modernization of the country, either in the nineteenth century or later'.<sup>37</sup> Moreover, these were values held by – even known to – small elites in countries characterised then and perhaps now, as Grażyna Skąpska observes, by:

The exclusion of the 'lower' classes from the public space and political process – which also seems to be of great importance nowadays. The deep structural division is characteristic, and even symptomatic, of the traditional East Central European society and is represented in the social consciousness or even language. This is the gap between 'us' – the common folk united by informal networks, and perceiving itself as virtuous – but exploited by the distant 'them' – the authorities and upper classes who possess significant capital (financial or intellectual) and are always profiting. These historical divisions contribute strongly to feelings of exclusion or even humiliation present in the consciousness of large sectors of Eastern European societies. Hypothetically, they also account today for the public passivity of a large part of the population, its disregard for democratic procedures, and a recurring popularity of populist parties and ideas.<sup>38</sup>

The absence of liberal values was *not*, however, the absence of values. It was not just a 'hollow core',<sup>39</sup> an empty space. On the contrary, the region is full of long and strong traditions *hostile* to liberal values at their core. Thus even freedom itself was conceived in a non-liberal form. As Andrzej Walicki notes of Poland's much vaunted tradition of noble freedom, this was 'freedom conceived as participation in group sovereignty and not as a defence of the rights of individuals to pursue his life goals'.<sup>40</sup> There were strong values inhospitable to liberal constitutionalism as well: a strong anti-individualist nationalism, all the more collectivist, anti-statist, indeed anti-institutionalist (in the conventional sense) in a 'nation without a state' as Poland was for the whole of the nineteenth century, and again oppressed by alien imposition from 1939–45 and, under new auspices, until 1989. This led to a curious ambivalence about the state. On the one hand, any existing state was an object of suspicion. On the other, the need was seen to be a *strong Polish, and strongly Polish*, state to replace and withstand all those enemies who had and would deny Polish independent statehood. In these conditions, as Szacki again wisely notes, Poles':

existence [as Poles] depended on whether they could establish a community of values outside and in opposition to the existing political institutions. Thus, divisions and conflicts within society were treated as threats to the most vital national

<sup>37</sup>Szacki, *supra* n. 35, p. 58.

<sup>38</sup>G. Skąpska, *From 'Civil Society' to 'Europe'. A Sociological Study on Constitutionalism after Communism* (Brill 2011) p. 123.

<sup>39</sup>B. Greskovits, 'The Hollowing and Backsliding of Democracy in East Central Europe', 6 Supplement 1 *Global Policy* (2015) p. 28 at p. 30.

<sup>40</sup>A. Walicki, 'Trzy patriotyzmy', *Res Publica* (1991) p. 32.

interests, not as something normal that one had to get used to and to which political solutions had to be adapted. In other words, until very recent times there was little space in Polish thought for the kinds of problems which political liberalism addresses.<sup>41</sup>

It might be noted that I have not yet said anything about the experience of communism in the region. There is a huge literature on the legacies of that, which I will not revisit here.<sup>42</sup> Whatever else it did, in terms of social, political, economic, and legal devastation, it did not inoculate citizens against the attitudes sketched above. On the contrary, in all the countries of the region, citizens tended over very long periods to learn hostile dependence on the monopoly state, and to see the law as an instrument, but of purposes other than their own. So much other, indeed, that the normativity of law was dramatically low. Law was imposed, and one might have to deal with it and with legal institutions, even take them seriously as elements in, or hurdles in the way of, one's aims – but not as a normative resource or morally reinforced constraint.<sup>43</sup> What Jane Curry described as the Polish propensity to 'live around the law' was not first invented under communism, nor did it die with it. Nor the Bulgarian observation that 'law is like a door in the middle of an open field. Of course, one could go through the door, but who would bother?' Contemporary evidence suggests that these are inheritances which have not vanished.

Many people were aware of such legacies at the time<sup>44</sup> but ambitious reformers found them easier to ignore than they might otherwise have, in light of two facts already mentioned. For one thing, there were all those 'normal' societies that had democracy, legality, and so on. Why not us, once the oppressive carapace of communism was sloughed off? Secondly, the region had endured a century, even if short, of ideological conflict between three and then two ways of viewing and acting in the world. Hostility to communism and then its collapse made western forms of 'normality' seem to many the only game left in town, and it was easy to forget – or if not to forget, not to think about how to deal with the fact – that it had not been a game ever much played in many eastern hometowns. None of this is to suggest – what is untrue – that sensitivity to institutionalisation implies any sort of pessimistic (or optimistic, for that matter) cultural determinism. But

<sup>41</sup>Szacki, *supra* n. 35, p. 203, and *see* Skapska, *supra* n. 38, p. 107.

<sup>42</sup>*See* M. Krygier and A. Czarnota, 'After Postcommunism. The Next Phase', 2 *Annual Review of Law and Social Science* (2006) p. 299 at p. 300–304.

<sup>43</sup>*See* M. Kurkchian, 'The Illegitimacy of Law in Post-Communist Societies', in B. Galligan and M. Kurkchian (eds.), *Law and Informal Practices. The Post-Communist Experience* (Oxford University Press 2003) p. 25.

<sup>44</sup>*See* for example J. Gray, 'From Post-Communism to Civil Society: The Reemergence of the Western Model' 10(2) *Social Philosophy and Policy* (1993) p. 26.

institutionalised values, attachments, expectations, and sense of what is 'natural' and 'right' do require a response, particularly if one is hoping to change them.

### *Project*

This is a lot for an ambitious reformer to appreciate, let alone deal with. For if we lack an adequate understanding of the workings of informal practices, even more do we lack a theory of how they might be changed. We have much more to say about 'international best practice' in institutional *design* than we do about how to generate local institutional *attachment*, and yet without the latter, the former is unlikely to matter much. In the circumstances of post-communist East Central Europe, and indeed in many circumstances given over to 'transition', it is precisely because of the lack of organic growth of proposed reforms, that such societies embark upon, or are exhorted to embark upon programmes never tried before. Not never tried anywhere, but not tried here. And here appears to count.

Post-communist democratic, legal, and constitutional transformations were much more given to *emulation, adoption and installation*, than to *institutionalisation*. Often this was deliberate, as for example when local executives sought to by-pass local legislatures in the rush to formally implement the 80,000 pages of the EU *acquis*. As Ervin Hladnik Milharcic, a Slovenian journalist whom I interviewed in 2012, characterised the EU accession process there:

very quickly the goal was defined as the EU. That meant you didn't have to work out a vision of the future of the country: Catholic, Ottoman, or whatever. We defined the development in acronyms: NATO, EU, SCHENGEN, EURO. Which in legal terms meant we had to change the constitutional order. The consensus was that this is the way to go. The goal also defined the way: change the constitutional order by downloading it from the servers in Brussels, done in stages defined by the EU itself. It happened gradually and practically automatically. Parliament, which was a zoo of political parties, changed the constitutional order by consensus, without any discussion of what the laws mean. It should have been hard work, but it just meant you needed to hire an IT webmaster. There was no really political discussion. Political differences formed on the fringes of political debate: re the past, guilt, etc. And they were vicious. For example, gypsies. This went on for 15 years. This went on for all post-communist countries which wanted to join the EU: discussion moved to these marginal issues.<sup>45</sup>

Similar observations could be made about reforms in many post-communist countries, not just to do with what I have elsewhere described as the 'elite driven, instrumentalist, technocratic, undemocratic, and formalistic' process of allowing

<sup>45</sup>Notes of interview on file with the author.



and gaining entry to EU.<sup>46</sup> It is also true of internal economic policy, constitutional changes, democratic reforms, and many other novelties introduced into the region. Indeed, striking in this collection of independently written contributions is the extent to which such points are stressed.<sup>47</sup> And whether or not one thinks that the subjects Milharic mentions are 'marginal' (which I take to be a resistance to taking institutionalised attachments sufficiently seriously), the fact is that they deal with strongly institutionalised products of the past, not the weakly institutionalised projects for the future. Moreover, as Stark and Bruszt have emphasised in their *Postsocialist Pathways*, scepticism is warranted about:

analyses that begin with blueprints . . . they often take the collapse of communism to indicate the existence of an institutional void. . . . But the devastation and destruction wreaked by communism and the explosive rapidity of the demise of its party-states have not left an institutional vacuum.<sup>48</sup>

It is not obvious to me that such complexities have guided much of the thinking of even the most perceptive of observers. There were many reasons for such misreadings and disappointments, of course, not simply Panglossian ignorance. Communism had never been 'post' before. There were no guidebooks. To seek to institutionalise radically novel forms and practices, not to mention ways of life and thought, in the unprecedented world of post-communism was to enter unexplored territory. Moreover many sorts of institutionalised practices, values, and attachments are very old, very strong, and in post-communist conditions were often in great tension with the aims of what was introduced, the practices it required, and the values it depends on, and we do not really know how to think about them. There was wisdom in the slogan 'no experiments', given the tragic failure of previous local experiments, but less in forgetting that it might be as much an experiment to do things once done elsewhere in contexts where they had not been done before, as it would be for the first time at all.

In the first flush of post-communist enthusiasms, however, though it was not true that everyone believed history had ended, few reformers at the time were persuaded that there were alternatives to the 'transitional' recipes proposed. So much of the liberal agenda seemed self-evident, particularly in light of the collapse of its world historical opponent. Intractabilities were not much thought about. Transformations were not something to be negotiated but installed, like new, efficient plumbing: something no home should be without, that those who

<sup>46</sup>M. Krygier, 'Introduction', in W. Sadurski et al. (eds.), *Spreading Democracy and the Rule of Law? The Impact of EU Enlargement on the Rule of Law, Democracy and Constitutionalism in Post-Communist Europe* (Springer Verlag 2006) p. 13.

<sup>47</sup>See in particular the articles by Blokker, Corso, and Kosař et al.

<sup>48</sup>D. Stark and L. Bruszt, *Post-Socialist Pathways* (Cambridge University Press 1998) p. 81.

had never had it wanted, but which only specialists would care to, indeed be able to, examine in detail.

This might account for the extent to which post-communist reformers adopted what Grażyna Skąpska calls ‘instrumentalist’ rather than ‘reflexive’ styles of approaching their task. The instrumentalist is given to importing constitutional frameworks and designs from international ‘best practice’ and seeking to implant them on local societies. These latter are assumed to have little to offer reformers, other than the problems that generate the need for reform. Since they do need such help, one can work on the assumption that in terms of constitutional values and valuable institutions they are ‘empty spaces’, about whose particulars little need be known except that they are populated by humans and that, together with our purported capacity for rational action, as any economist will tell you, is something we all have in common. But the *particularities* of those humans are thought of little account, because knowing that they are capable of rational choice as we all are assumed to be is all that we need to know. And we certainly don’t need to know it *from them*. Indeed, since the locals are assumed likely to hinder needed reforms, there is a strongly anti-democratic bias to instrumentalist, ‘top-down’ reforms, as well as a lack of thought about how one might engage in *institutionalising* such practices among their potential victim/beneficiaries.

At the extreme, the instrumentalist conceit does not take account of the specifics of either the region or the moment and is liable to generate a backlash and with it a rejection of imposed reforms when they fail or at least come at a price, as is more than likely. More generally, ‘there is no “empty space” in a society and . . . cost-benefits calculations alone cannot produce results which determine the future of half the European continent’.<sup>49</sup> This is not merely communitarian idealism, for a properly *reflexive* approach to constitutionalism is ‘based on a quite pragmatic observation that, to be non-fictive [sic], the constitution needs to reflect extra-legal rules, ideas, and world-views of the society within which it functions . . . all these are changing and adapting themselves to the changing circumstances’.<sup>50</sup>

On the other hand, reflexive approaches cannot be *purely* ‘bottom-up’, for if so they will have no criteria to distinguish what is aromatic and what odorous that comes out of the bottoms with which it deals: it would all be just ‘how we do things here’. Some combination of universal and particular must be attempted. Reform must be grounded in local realities, particularities and contexts if constitutions are to become anything more than ‘parchment documents’, on the one hand, and if they are to help institutionalise values that are held by, and can benefit, the people who are supposed, after all, to be their beneficiaries.

<sup>49</sup>Skąpska, *supra* n. 38, p. 80.

<sup>50</sup>Skąpska, *supra* n. 38, p. 66.

Without that grounding and reflexive response to it, one is likelier involved in imposition, at times repression, not institutionalisation. The extraordinary campaigns to defend and explain the importance of the courts, that Polish lawyers have been waging in recent years, when they are under attack, might have been even more useful when they were not. The first Ombudsman, Ewa Łętowska, understood that from the beginning, but not all lawyers did.

## POPULISM

### *Populists as institutionalisers*

For a range of reasons, then, many of the institutions, conventions, beliefs, and practices of constitutional democracy have not been thickly institutionalised in the region. Once 'transplanted' into soil that was shallow and often unforgiving, not much thought was given to what might be needed to bed them down. And often disturbing themselves, the consensus they assumed itself soon came to be deeply disturbed: by 11 September 2001, by the recession of 2008, by what are at least perceived by many to be unfair and systematic distributional consequences of imposed post-communist economic policies, in many places by the alien character of the imports, the novel uncertainties and precariousnesses introduced by these strange importations into their lives, the clash between post-modern Europe and not always modern east Europe, more recently by much-inflamed fears of immigrant hordes, the disappointments, frustrations and discontents of imitation,<sup>51</sup> and more.

So perhaps we should skip talking of institutionalisation and just speak of the revenge of the repressed. I think there is something in that, particularly with the resurrection of historical prejudices and animosities, but also religious and national attachments and values in many countries, which many have come to believe are assaulted by the forces of globalisation, Europeanisation, and secularisation. However, even if we talk of revenge, it is a mistake to see it as purely a spontaneous welling up of resistance, an autonomous process. The repressed does not necessarily take its revenge unaided. It has helpers, indeed shapers and nurturers, deliberate institutionalisers, in the form of the populist leaders who have arisen in many countries in the world and come to power in some, including Hungary and Poland. It is their project. Some of these are cynics, some fanatics, some clowns, some perhaps none (or all) of the above. They draw on institutionalised sources of attachment, resentment, and attitudes to public institutions and reforms of them, but they also seek to revive, develop, shape, distort, and exploit

<sup>51</sup> See I. Krastev and S. Holmes, 'Imitation and its Discontents', 9(3) *Journal of Democracy* (2018) p. 117.

them. As Kim Scheppelle puts it, ‘buried in the story of [democratic] decline, . . . there is a story of constitutional malice’.<sup>52</sup>

New populists deliberately draw on locally hallowed pasts – mixing reality, myth, and often fantasy – to revive and then cement loyalties and attachments among the faithful: to the nation, the faith, the ‘true’ people; against the foreign, the cosmopolitan, the unbelievers or other-believers, elites, the new, the unfamiliar, the ‘worse’, the ‘other’. They speak of revolution but it is to be restorative; the past, bullied away by the ‘elites’, the ‘oligarchs’, the ‘aristocrats’, will return. National unity, forged by opposition to outsiders, among them refugees, and to insider ‘elites’ and others of a ‘worse sort’, who though citizens are by some strange sort of reckoning, not calculated among the true people of the nation. The devotion of insiders is enhanced by invoking threatening outsiders; populist *inclusions* always draw on the existence of distasteful, often dangerous people who must be excluded, from the movement, from the country, in the worst cases, and thankfully not yet again in Europe, from the world. The values, loyalties, attachments, and their parallel anti-values and enemies are cultivated in order to strengthen the institutionalisation of new movements by linking them to old, uniquely authentically ‘our’ values, or what are represented as such, that have been, or are alleged to have been, sloughed aside by alien elites. As the song has it, ‘everything old is new again’.

However, new populist opinion shapers (maybe not every member of the genus, but a significant contemporary species)<sup>53</sup> do not merely seek to institutionalise values they support; they seek, by novel combinations of de-institutionalising and then occupying to harness the support of institutions that might have stood in their way.

### *Populists as de-institutionalisers*

I have argued that the new populists are talented institutionalisers in Selznick’s sense of the term. However, their aim is pervasively *anti*-institutional in a specific sense: hostile to independent institutions, and determined to de-institutionalise their hold on citizens. For the political logic of their view of politics and government involves, as Kaczyński and Orbán make plain, unity of power, unrestrained by institutional tempering or constraint. That shines through their rhetoric and the attacks on the independence of not just the Constitutional Court but all courts, media, civil service,

<sup>52</sup>K.L. Scheppelle, ‘The End of the End of History’, text of lecture at the University of Toronto (on file with the author).

<sup>53</sup>See B. Bugarič, ‘Could Populism be Good for Constitutional Democracy?’, *Annual Review of Law and Social Science* (forthcoming); D. Fontana, ‘Unbundling Populism’, 65 *UCLA Law Review* (2018) p. 1482.

non-governmental organisations, independent organisations, etc. It is also evident in the extraordinary degree that major public institutions, like courts, the civil service etc. are filled, addressed and abused in purely *personal* terms.

This works for enemies, and also for friends. As to the former, it is striking how, in the whole campaign against the eminent academic institution known to its members and the wider world as the Central European University, its enemies never refer to it as that; it is the Soros University. Again, in the assault on the Polish Constitutional Tribunal, the talk was not of the institution and its judicial officers, delivering legal judgments, but rather a gang of tricky mates (*kolesiów*), who don't deliver legally binding decisions, but just mouth off, in ways there is no need to make public, though that is required by law. In the current attacks on lawyers and the whole court system, it is the arrogance of this closed 'caste', contemptuous of and uninterested in the welfare of citizens.

As for friends, Kaczyński owes his extraordinary dominance in Polish politics to no public institutional office, and no one pretends otherwise, or even seems too puzzled that it should be otherwise. Indeed, as a Polish commentator has observed, and the point can be generalised:

The changes which are being introduced in the judiciary are part of a . . . logic which constitutes a serious danger for the state: a logic of total distrust towards institutional rules and willingness to replace them by mechanisms based on personal trust. At first sight, such logic may seem innocuous but in practice it means the creation of a model in which all important functions are filled by persons obedient to the will of the Chairman or at least those who are incapable of resisting him.<sup>54</sup>

Poles are notorious, in any event, for not having much time for institutions, and Kaczyński is in this respect archetypal. He sees people rather than institutions, many bad and a few good people. PiS deliberately undermines hopes of *institutionalising* public institutions by belittling them with constant salvos of hostile propaganda and proposals for drastic 'reform'. The assault on the courts, for example, which do have serious institutional deficiencies, is not an attempt to repair and strengthen the institutions (and appears to have exacerbated existing difficulties as to time taken, etc.) but above all to change the cadres. The bad have to be taken down, and replaced with the good, and the good are those we select, for the time being.

However, in Poland and Hungary, determination to de-institutionalise anything out of their control needs to be distinguished from hostility to every form of institution. On the contrary, the new populists are distinctive for

<sup>54</sup>R. Matyja, 'Wrogowie ludu', *Tygodnik Powszechny* (Kracow, 30 July 2017) 20, quoted in Sadurski, *supra* n. 8, p. 163.

their determination, having hollowed-out the independence (from them) of such institutions, to use and manipulate them for their purposes, purposes alien to the intentions that lay behind the generation of those institutions. And they are not embarrassed to do so, but insist that this is the true way in which constitutionalism and the rule of law should be understood. For one thing that seems distinctive about several populist avatars is their designs on constitutionalism and law, and the apparently paradoxical ways legal and constitutional means are deployed to subvert constitutionalist ends. More broadly, lands once awash with the third wave are being inundated by what has variously been called 'abusive constitutionalism', 'stealth constitutionalism', 'constitutional coups', 'autocratic legalism', 'legal and constitutional hypocrisy'.<sup>55</sup> These forms of legal uses and abuses slip under the radar of much conventional rule of law promotion scrutiny, since rather than simply rejecting law, as Lenin for a time boasted of doing, they bend legal devices designed for liberal, or at least 'rule of law' purposes, to authoritarian ends. The new populist regimes in the region are much given to such legal tactics and strategies, to techniques that as Kim Scheppele observes, show 'careful attention to constitutional form while hollowing out liberal constitutional content'. This broken-backed legalism distinguishes what she calls 'democratorships as a special category among competitive authoritarian regimes'.<sup>56</sup> When they can, as in Hungary, they indulge in 'abusive constitutionalism' in the sense outlined by Landau. When they cannot, as in several contexts in Poland, they resort instead to often illegal 'abuse of the constitution', to use a distinction of Grażyna Skąpska's.<sup>57</sup> It is thus possible to be a rule of law success story in formal terms, while systematically violating the underlying values of the rule of law.

#### POLITICS AND THE RULE OF LAW

Where does this populist logic of coupling institutionalisation with de-institutionalisation lead? In my view, to a sustained and profoundly damaging assault on values at the heart of the rule of law. These values, which

<sup>55</sup>D. Landau, 'Abusive Constitutionalism', 47 *University of California, Davis, Law Review* (2013) p. 189; O.O. Varol, 'Stealth Authoritarianism', 100 *Iowa Law Review* (2015) p. 1673; K.L. Scheppele, 'Constitutional Coups in EU Law', in M. Adams et al. (eds.), *Constitutionalism and the Rule of Law: Bridging Idealism and Realism* (Cambridge University Press 2017) p. 446; K.L. Scheppele, 'Autocratic Legalism', *University of Chicago Law Review* (2019) p. 545; Skąpska, *supra* n. 4, p. 140.

<sup>56</sup>Sheppele, *supra* n. 52.

<sup>57</sup>G Skąpska, 'Znieważający konstytucjonalizm i konstytucjonalizm znieważony. Refleksja socjologiczna na temat kryzysu liberalno-demokratycznego konstytucjonalizmu w Europie pokomunistycznej', Tom 7, Numer 1, Art. #12 *Filozofia Publiczna i Edukacja Demokratyczna* (2018) p. 276.

I will only assert here but have argued at length elsewhere, start with ‘the obvious point’, upon which E.P. Thompson has insisted, that:

there is a difference between arbitrary power and the rule of law. We ought to expose the shams and inequities which may be concealed beneath this law. But the rule of law itself, the imposing of effective inhibitions upon power and the defence of the citizen from power’s all-intrusive claims seems to me to be an unqualified human good.<sup>58</sup>

It seems so to me too. There is more to be said about whether that is enough or too much, how it is to be realised, and many other things but the notion that, however it is institutionalised and whatever else we might hope from it, central to the rule of law is hostility to arbitrary power, is pretty core. Anyway it is core enough for me.<sup>59</sup>

Since the collapse of European communism, rhetorical commitment to the rule of law has been well-nigh universal. No one these days comes out to ‘destroy the rule of law’ or proudly to admit, with Lenin, that their government is to be ‘based directly upon force and unrestricted by any laws’.<sup>60</sup> On the contrary, we all profess to be for it. This is certainly true of liberal defenders of it, but it is also common among modern post-communist populists. The official legal order is castigated for eroding the rule of law, denying its benefits to the people, while the law is used to hamstringing democracy besides. The populist task is allegedly to revive the true rule of law, build it anew, after retrieving it from the ‘caste’ of lawyers and their shady networks. And often even intelligent observers think what they are watching is a contest over competing ideas of the rule of law (between which, we keep being told, there are too many to adjudicate), rather than between the rule of law and its enemies. In the cases I have been discussing, however, I think that is a deep mistake about the nature of many challenges to the rule of law, even if a common and understandable one. It is a very widespread mistake, found among rule of law promoters around the globe.

Rule of law promoters, international agencies, governments, who have spent billions of dollars on ‘promoting’ it in the last 30 years, spurred considerably by

<sup>58</sup>E.P. Thompson, *Whigs and Hunters. The Origin of the Black Act* (Penguin 1975) p. 266.

<sup>59</sup>See e.g. M. Krygier, ‘Four Puzzles about the Rule of Law: Why, What, Where? And Who Cares?’, in J.E. Fleming (ed.), *Getting to the Rule of Law* Nomos no. 50 (New York University Press 2011) p. 64; M. Krygier, ‘The Rule of Law. Pasts, Present and two possible futures’, 12 *Annual Review of Law and Social Science* (2016) p. 199, and M. Krygier, ‘What’s the Point of the Rule of Law’, *Buffalo Law Review* (forthcoming special issue on ‘tempering power’).

<sup>60</sup>V.I. Lenin, ‘The Proletarian Revolution and Renegade Kautsky’ (1918) in *Selected Works*, vol. II (Foreign Languages Publishing House 1951) p. 41.

the collapse of communism,<sup>61</sup> have a problem: they have often been disappointed with the results of their efforts. There are few success stories. Why? In what rule of law professionals call first generation promotion, the problem was conceived of as a technical one, to be addressed by legal experts with technical, legal, means. If things didn't work, recipients of our largesse were seen to have an epistemological problem: *they don't know* what the rule of law is, or what it requires; we do, and the job is to educate them and provide technical legal and institutional training and models to follow.

There are many reasons why this is easier said than done, some of which have been canvassed above, and some reformers came to believe it was not the whole story. So some promoters, among them the World Bank, started to talk about moving from 'best practice' to 'best fit', but again conceived in primarily epistemological ways. This time in a partial *mea culpa*, reformers admitted that the problem was that *we*, proto-reformers, need to know more than the earlier generation did of recipients' culture, social relationships, ways of dealing with disputes and so on. And doubtless, that was often also true. But while each generation found a different locus of epistemological limitation, what pervaded orthodox approaches<sup>62</sup> is the belief that it was primarily technical epistemological gaps, gaps in knowledge and understanding that accounted for the difficulties in promoting the rule of law.

This epistemological assumption meshed with another feature of common approaches to 'building' the rule of law, reflected in some of the language often used. Where the rule of law was to be 'built' one often found oneself plagued with 'absences' and 'lacks': they lack the rule of law and understanding of the legal arrangements the rule of law depends upon, and/or we don't understand what they have, lack and need.

However, what is involved when the rule of law does not do well is often not a *lack*, an *absence* of understanding of the rule of law, or not merely or primarily that, but rather the *presence* of something else, contradictory agendas, often anchored in quite different and often hostile clusters of ambitions or *Weltanschauungen*. Typically, those in pursuit of such agendas are not at all epistemologically challenged. They know what they want and they don't want the rule of law in any plausible sense of the ideal, even though they might use the term because they need the halo it bestows, the money it draws, and the sanctions it might block. So they might mimic the techniques, pick out existing 'worst

<sup>61</sup>Krygier, *supra* n. 3.

<sup>62</sup>Not the only approaches by the way. See works by S Golub, 'A House Without Foundations', in T. Carothers (ed.), *Promoting the Rule of Law Abroad* (Carnegie Endowment for International Peace, 2006) p. 105; R. Kleinfeld, *Advancing the Rule of Law Abroad* (Carnegie Endowment 2012); T. Carothers and D. De Gramont (eds.), *Development Aid Confronts Politics, The Almost Revolution* (Carnegie Endowment, 2013).



constitutional practices' to follow, to shield them from legalistic international and national criticism.<sup>63</sup> But they have other ideals and interests. So populists' failure to honour what we might take to be fundamental principles of the rule of law is commonly not primarily a technical problem but an institutional one, in the sense I have outlined, and also, relatedly, a profoundly political one.<sup>64</sup>

The point about politics is worth stressing, because often too much attention is focused on legal/institutional specifications and alleged technical breaches of law, much less on the ends which those who control them use the law (and other instruments) for. We engage with technical, thin, rule of law advice, which democrats are often happy to accommodate and abuse, at the expense of evaluating the existence of the rule of law in terms of the fundamental values we need it to serve.

Populist social transformation is in service not of the ideals of the rule of law but of other ends, with an institutional logic systematically at odds with the tempering ambitions of the rule of law, even while allegiance is mouthed to it. And Poland is a prime example. In public controversies in Poland, when the opposition denounces what it sees as governmental subversion of constitutional constraints, the government denies this and says it is simply cleaning out the Augean stables, for the first time and at last, so as to establish the 'true' rule of law. Indeed it is more committed to the rule of law, to a more authentic rule of law, than its opponents, who simply use the law and courts for facilitation and camouflage of their pursuit of their networks' interests. And it's a hard job to turn things round. Or PiS affirms commitment to the rule of law, while charging its opponents with being 'political' in opposing it, a charge they resentfully deny. This is the one place I would agree with Kaczyński against his opponents: it *is* all about politics, because PiS's strategy demands elimination or subordination of institutions it does not control. But as a charge, it is absurd. As the sign in the Paris zoo has it, when a creature is attacked, it customarily defends itself. And when it is a species – an institutionalised way of tempering the power of the powerful – under threat of extinction or at least emasculation that is what it *should* do as well.

We actually know something of what the rule of law means to PiS, because its ruler – not merely leader – has told us, in party programmes and in various interviews and writings, well before the party's transformative activities since 2015.<sup>65</sup>

<sup>63</sup>K.L. Scheppele, 'Worst Practices in the Transnational Legal Order', in T. Ginsburg et al. (eds), *Constitution-Making as Transnational Legal Practice* (Cambridge University Press forthcoming).

<sup>64</sup>This is a central theme of Nick Cheesman's *Opposing the Rule of Law. How Myanmar's Courts make Law and Order* (Cambridge University Press 2012). See symposium on this book in 9(1) *Hague Journal on the Rule of Law* (2017).

<sup>65</sup>I am indebted to Karol Muszyński, both for access to such materials and to his unpublished paper, 'Socjologia prawa a kryzys konstytucyjny w Polsce. Między „imposybilistycznymi” rządami prawa a „silnym” systemem politycznym' (copy on file with the author).

Polish post-communist ‘democracy’, we learn, is a façade for hidden interests, many of them manipulating affairs since communist times. Polish ‘rule of law’ is *their* rule through, by and within the structures and practices of the unreformed legal order, the legal formalism and proceduralism of which facilitate and obfuscate their shady deals and practices. They also block any attempt to introduce a truly *just* rule of law, *praworządność*, the older term he prefers or even *państwo prawa*, the newer term of which he is suspicious since it was introduced by post-communist manipulators and elevates strict obedience to procedures and protection of (often illegitimately) acquired rights<sup>66</sup> (and perhaps because it sounds like a German idea), but which in any real understanding is not served by present institutions, in thrall as they are to ruling networks, ‘*układy*’. The formalism of the law ‘invisibilises’ the informal power of the networks, while at the same time it blocks effective action against them.

In a lecture at the Jagiellonian University while his opponents were in power, he argued that there was no rule of law in Poland because the conditions for it were absent.<sup>67</sup> Above all was state weakness, and in particular a reluctance to allow what he calls the *repressive* functions of the state to operate as they should. This and allied factors have led to ‘the completely perverse character of public life after 1989’<sup>68</sup> and what Kaczyński calls, following Marek Jurek, ‘impossibilism’: a ‘programmed state incapacity to take many steps necessary for the defence of its own interests and the good of citizens’.<sup>69</sup> The state simply can’t push through its will. This not only blocks the state, but it denies the democratic will of the people, as expressed in the decisions of its representatives.

All of this has happened under the name and with the connivance of the caste that pretends to be committed to the rule of law. Instead PiS has inherited a ‘juridified’ politics from the last years of communism, never effectively cleansed or reformed, where lawyers speak only to judges, and they to each other, the citizen is left alienated and unsupported, and the state is impotent. It has ended up, Kaczyński says, in a predicament in which ‘without a legal ground no decision can be taken. In this way rational freedom of decision making by various state functionaries is limited’.<sup>70</sup> Fittingly, and without any apparent sense of the irony in the statement, when both the Constitutional Tribunal and the Supreme Court sought to resist the unconstitutional measures taken against them, Kaczyński,

<sup>66</sup>‘Czy Polska jest państwem prawa?’ *Wykład na Uniwersytecie Jagiellońskim* Presje Teka XXIV Klubu Jagiellońskiego (2011) pp. 223–224.

<sup>67</sup>*Supra* n. 67.

<sup>68</sup>*Supra* n. 67, p. 227.

<sup>69</sup>PiS *Program 2011 r. Nowoczesna, Solidarna, Bezpieczna Polska*, Warsaw 2011, 17, quoted in Muszynski, ‘Socjologia prawa a kryzys konstytucyjny w Polsce’, 5.

<sup>70</sup>*Supra* n. 67, p. 227.

himself a doctor of laws, is reported to have said, '[W]e will not permit anarchy in Poland, even if it is promoted by the courts'.<sup>71</sup>

Lying (often in several senses) behind this specifically state-oriented discourse there is a view of Polish history, traditions, and values to be protected against many dangers, including those of ex-Communist networks, secular western-minded elites, the 'caste' interest of lawyers' 'corporations', loose-moralled Europeans. Within all this a conception of the role of law and the rule of law as devices to temper power, particularly state power have little space. The *logic* of the enterprise excludes it.

If you conceive the problems Poland faces in such categories, and if you are of an impatient, indeed revolutionary, temper and cast of mind, it is not surprising that a commitment to the ideal of the rule of law as a way of constraining possibilities of arbitrary power will be not be merely absent but the opposite of what you seek to make present, whatever you (or your courtiers) say about it. In the 2011 essay, Kaczyński does not spell out how, were he to regain the power he lost in 2007, he might counter impossibilism, but tackling the Constitutional Court as soon as you get into office, taking control of the Procurator's office, planning to take over the selection of judges, turning the public media into propaganda outfits, filling jobs with PiS acolytes and families, denouncing any opponents as 'Poles of a worse sort', and most recently attacking support for a group of effective and popular mayors as threatening to 'liquidate Poland',<sup>72</sup> might seem to be sensible ways of shaking things up, and in particular shaking off the dominating impossibilism of the previous regime. In all this, we are not facing an assault so much or merely on the *technical* organisational features of constitutionalism and the rule of law, but on the fundamental values that underlie them. So technical evaluations and advice, in an age of abusive constitutionalism, are less likely to solve the problems than to hide them. These are matters of *value*.

And this returns us to politics. What we are seeing in Poland and Hungary is a very specific sort of politics, politics in a Schmittian sense, defined as a war between friend and enemy. The views of politics of Orbán, Kaczyński and Schmitt are remarkably similar, whether that be through influence (Kaczyński has certainly read Schmitt, though a more immediate source of his political outlook was his teacher, Stanisław Ehrlich<sup>73</sup>) or deep family resemblance.<sup>74</sup> The power

<sup>71</sup>Kaczyński Announces Aim to Change Polish Constitution', Radio Poland, 2 May 2016, cited in Bugarič, 'Populists at the Gates', p. 7.

<sup>72</sup>See 'Kaczyński straszy: Oni chcą zlikwidować Polskę' *Gazeta Wyborcza*, 17 June 2019.

<sup>73</sup>See K. Mazur, 'Jarosław Kaczyński – ostatni rewolucjonista III RP', 18 January 2016, (klubjagiellonski.pl/2016/01/18/jaroslaw-kaczynski-ostatni-rewolucjonista-iii-rp/), visited 12 August 2019.

<sup>74</sup>D. Bunikowski, 'The Constitutional Crisis in Poland, Schmittian Questions, and Kaczyński's Political and Legal Philosophy', 26 *Journal of Contemporary European Studies* (2018) p. 1, ([www.tandfonline.com/action/showAxArticles?journalCode=cjea20](http://www.tandfonline.com/action/showAxArticles?journalCode=cjea20)), visited 12 August 2019.

of the Schmittian leader, and Schmitt soon got one, was personal authority tempered by no independent institutions at all. It is not clear where Kaczyński would disagree, though so far, while his world too is populated by friends and enemies and nothing in between, he has not yet done anything to suggest that the terms of that distinction 'refer to the real possibility of physical killing'.<sup>75</sup> That is also true of Orbán, though Erdogan and quite a few other anti-constitutional populists, in Latin America and South East Asia, have taken the distinction more Schmitterally.

Even blessedly without killing this rhetoric is deeply disturbing in its Schmittian determination to see, and actually to foment, the division of society (not to mention, Poles (or Hungarians) and refugees, Poles and OTHERS, Hungarians and Soros), between friend and enemy, the true 'sovereign' (those who voted for PiS), on the one hand, and elites, 'corporations', 'networks', and Poles 'of a worse sort', on the other. No space in between, no complex differences of view or problems to deal with, but just hostilities, malignant versus pure motives, and only one winner allowed to be left standing. Any opposition to PiS 'good changes' comes from Poles of a 'second category', amounts to 'rebellion' etc, etc, not to mention left-wing Germans, self-interested imperialistic Europeans, etc.

One might say, however, and some have, that this all misses the point. If the PiS analysis of the Polish legal order is accurate, then it truly does need shaking up. And if, on the argument in this article, introduced reforms are so uninstitutionalised, we need to – and PiS is committed to – introducing a truly *Polish* rule of law, adapted to the particularities of Polish traditions, values, practices and beliefs. Perhaps. But first the diagnosis would have to be proved. Unqualified allegations are easier to make than refute, and while nothing is perfect in Poland or anywhere in the region (or anywhere indeed) and the legal system is deeply flawed, it would take a lot to show that the condition of the existing legal order is as dire as PiS suggests. Secondly, it is true that we do not have a universal specification of institutions necessary in every time and place for the rule of law nor institutional recipes that work everywhere for generating it. That has been a theme in my writing on the rule of law for a long time.<sup>76</sup> But we do have a very widely accepted ideal, or central element of such an ideal, developed over centuries in many legal and political traditions, and eloquently defended by opponents of despotism and communism, some of the most eloquent of whom were Polish, a few of them from PiS. That, to repeat, is hostility to arbitrary power. The point of the rule of law, however it is to be reached and whatever one wants to add to it, is to constrain or temper power.

<sup>75</sup>C. Schmitt, *The Concept of the Political*, trans. George Schwab (University of Chicago Press 1996) p. 32.

<sup>76</sup>See Krygier, *supra* n. 59.

By contrast, the Polish government over nearly three years, and the Hungarian over eight, have attacked and in many cases already destroyed the independence of a host of key institutions that might temper their power, and that it then seeks to take over. It has defamed legal officials, refused to publish legal decisions, ignored others. These governments have expressed disdain for the notion that their power should be constrained. After all they represent the sovereign people, or at least in the Polish case the 18% who voted for it. In these circumstances of centralised amassing of power and destruction of opposition, the point is simple and has little to do with particular canonical institutions. It has to do with the point of the enterprise. The idea that we are witnessing the birth of a ‘Polish [or Hungarian] rule of law’, advanced by various local and foreign sympathisers, is simply absurd when the whole point of the enterprise is to undermine constraint on power. Not because some particular, imported, universal or introduced western institution is lacking, but because by their actions these governments are subverting the very ideals that the rule of law is to serve. Perhaps Polish circles are square, and Polish squares are circular, but that’s not my experience or expectation. Nor is it that the rule of law is being built in Poland (or Hungary) today.

An assault on the institutional integrity of major institutions that might temper power, whether they be constitutional courts or civil society organisations, attacks the central values of the rule of law. Those values need champions, defenders, when they are subverted. And hopefully they might get them, since cynics, fanatics and clowns often overreach, and ‘the people’ get restless. At the time of writing this article there are a few signs of this in Poland at least, and to a lesser extent in Hungary, and signs too of an awareness among opponents of the subversions of rule of law values, that they need not merely to be asserted but institutionalised.

Paradoxically, the present situation gives a special significance to lawyers that they rarely have when authoritarians move to consolidate their power. I mentioned earlier that a peculiarity of modern populism, and its ‘abusive constitutionalism’ is that it seeks to *use* the law for its purposes, by abusing that law’s original (and proper) purposes, rather than openly override it or ignore it. Law is at once a central implement and target. That gives struggles over the law a strategic significance they do not often have. Moreover, in the Polish context it is helpful (to lawyer partisans of the rule of law) that the government does not have the constitutional majority enjoyed by the Hungarian government, and so is forced to keep committing illegalities; in Skąpska’s distinction, not just ‘abusive constitutionalism’ as in Hungary, but ‘abuse of the constitution’.<sup>77</sup> That is a hook for

<sup>77</sup>G. Skąpska, ‘Znieważający konstytucjonalizm i konstytucjonalizm znieważony. Refleksja socjologiczna na temat kryzysu liberalno-demokratycznego konstytucjonalizmu w Europie pokomunistycznej’, Tom 7, Numer 1, Art. #12 *Filozofia Publiczna i Edukacja Demokratyczna* (2018) p. 276.

local opposition and also for Europe. This combination makes so important *legal* and *lawyers'* opposition to the government's grabs for more power, lawyers' public explanations of what matters about the law, why tempering power is so crucial, so important. Indeed, it might be a moment for more widespread institutionalisation of the law and rule of law values. There are not too many times when lawyers have an opportunity and a need to be heroes, but this might be just such a time.

However, they won't do it on their own, and it is unlikely that they will persuade huge multitudes with purely legal arguments, which in any event often won't be there, since 'abusive constitutionalists' often find ways of subverting the law from within, by legally valid means. In these circumstances, legal punctiliousness is no sufficient answer to these highly legalistic tactics.

But will successors have any stronger political, a stronger *institutional*, vision than the one today on offer? And what if, because it will be tempting, they decide to stick with the eroded institutions left to them, either because it is too hard to repair them, for it will be hard, or because they will find it convenient just to reap the party benefits of the delicts of their predecessors. In any event, who knows when PiS will go.

Rule of law values have never had too strong a hold on power in east central Europe, I have argued. They have never been thickly institutionalised, and need all the help they can get, from everyone prepared to give it. Reformers committed to these values, many clever, committed and honourable in intention, appear not to have managed to institutionalise them deeply yet. The modern anti-constitutional populists, fully conscious of the consequences of what they do, are giving them no help at all. Those who seek to institutionalise constitutional values will need to do more than object to their legal manoeuvres. They will have to return to institutions and to politics, in serious and deep senses of both words, and certainly opponents of populist intemperance will need to do more than object to (il)-legal tactics and manoeuvres. Just as *Solidarność* once brought people together by expanding their understandings of what underlay the arbitrary indecencies of communist power, so today opponents of arbitrary power will need, above all and in every (non-arbitrary) way they can, to expose what is at stake, what is the *point* of the rule of law, and to 'infuse' that realisation '*with value* beyond the technical requirements of the task at hand'.

