

Is Democracy in Poland in Danger?

6pm to 7:30pm, February 24, 2016 at the Philosophy Room, Quadrangle, Sydney University

Paper by Professor Jan Pakulski, Professor Emeritus at the University of Tasmania and Collegium Civitas, Warsaw. Co-presented with the Sydney Democracy Network and the Australian Institute of Polish Affairs through Professor John Keane. Discussant: Martin Krygier, Gordon Samuels Professor of Law and Social Theory at the University of New South Wales, co-director of its Network for Interdisciplinary Studies of Law, and Honorary Professor at the Regnet School of Regulations and Global Governance, Australian National University.

John Keane

We have him from Tasmania, Professor Jan Pakulski, he is retired, but not retired, he is probably much more active now than he has ever been; he is Professor emeritus of the University of Tasmania; he has held visiting positions in many universities, in many famous universities, Oxford, Harvard, Stanford, the Central European University for instance. I came across his work many years ago, he has published, many books, and many fine books recently including *Toward Leader Democracy*, a book on the decline of the political leadership in Australia, which I highly recommend, which has what seems to me even more precepts than when it was published; and he is interested in topics such as violence, which are, about which probably he will say something tonight. Thank you very much first of all for coming and witam to the University of Sydney. In a few minutes after Professor Pakulski speaks we will hear from Martin Krygier who will comment for maybe ten minutes or so, on the subject of Poland; its present dynamics; and its future and its wider significance. Professor Krygier is very well known for his works. He is based at the University of NSW; he is Professor, Gordon Samuels Professor of Law and Social Theory there. I know him for best for two sets of works; one is a book called "*Civil Passions*", which is something of an autobiography and I think a very great book which if you want to learn something about post 1945 Australia, one learns a great deal from this book, written in a passionate way and with great intelligence; and the other area is "*The Rule of Law*". I have often referred to him behind his back as "The" Professor of the Rule of Law" globally because of his work; his work is globally known and revered for its originality; its thoroughness as you will hear in a few minutes. I think it's enough from me. Jan Pakulski, we look forward very much to hearing from you and warmly welcome you to the University of Sydney.

Jan Pakulski

Thank you very much John; thank you to, thanks to Sydney Network for Democracy and the Australian Institute of Polish Affairs (AIPA) for organising it and for hosting this event.

Thank you above all to all of you, ladies and gentlemen for deciding to spend such a wonderful Sydney evening, listening to my comments about a very distant country but a country close to my heart, and I presume also to the hearts of many of you.

In November 2015, a survey was conducted in Poland in which 55% of respondents agreed that democracy is in danger in Poland, so I feel like speaking for this majority of people who are concerned about democracy and concerned about democracy in Poland. I think that the first answer to the question which is the topic of my paper is that perhaps that democracy is in real danger when people don't care about it, not when people are concerned; so it's in the sense a theme you will find in my comments, that concerns about democracy does not mean that in Poland democracy collapsed. Poland is not Belarus and Russia and the evidence for it is a very vibrant pro democratic movement which is in Poland as well as strong public opinion, very strong opposition, including oppositional media which are the symptoms of good democracy; but above all concerns about this democracy is to me the sign that things in Poland may not be very bad. It's not a situation in which democracy is dying but a situation in which many people are concerned about its health.

In order to answer the question, which is not a straight forward answer, I will have to move to the, ur, my presentation which I will need help with. If you can move to the slides, I will show a few slides; if you can open page one of the presentation I will continue because it presents the argument that the controversial moves of the Law and Justice government weaken liberal democracy in Poland by undermining the Rule of Law and by deepening the rift within the political class. This rift –division - its depth and acrimony is something I would like to focus on because one of the most important findings in contemporary social science is that liberal democracy needs a high degree of consensus among the ruling strata. Not consensus about the ideology or political program, but consensus about the rules of the game; the rules of engagement on which democratic, liberal democracy rests the foundation.

The controversial policies represent not so much reversal from democracy as anti-liberal back lash in Poland. Democracy is not the target of the backlash; the attacks are directed rather against liberal policies, values and cultural standards, as well as against the liberal urban intelligentsia cultivating these values. Democracy, so to speak is a collateral damage. Not intended target, but collateral damage.

This backlash resembles "Orbanisation". There is the process of illiberal shift which Hungary experiences under the leadership of Viktor Orban. It is not Putinisation, but the Polish illiberal shift has also distinctive characteristics about which I would like to talk. And I would like to mention not only the nature of this illiberal shift, but also importantly the

causes and some consequences. It will take me probably five minutes so I apologise that it has to be done in such a short hand way.

The best thing to start this argument is to go to the beginning. Poland after 1989 experienced a very successful transformation; transformation which has been described by its architects as return to Europe. It had four major directions. First, the command economy was transformed into a market economy, a competitive market economy. Secondly, and perhaps most importantly, the dictatorship of communist party was replaced by liberal plural democracy; thirdly the State stopped to be a party State, and became the Constitutional State; and fourthly, Polish culture which was heavily censored and controlled under the Communist rule, became a free culture. Open to global European influence. This was above all a very successful economic transformation, although initially quite painful, Poland's Gross National Income, the GDP grew four times, within this period. It's unprecedented growth, and it has been the fastest growth in Central Eastern Europe and in Europe in general. It continues, still Poland growing at the level of between three and a half and three point eight per cent per year which at the time of slow growth everywhere in the world is a mark.

The same successful shift occurred in the political domain. All the measures of good governance showed an increase, especially from about 2005; and not only control of corruption but also government effectiveness, political stability, regulatory quality, violence and accountability and the rule of law. All of them showed this increase which is the envy of not only Eastern Europe but also the entire Europe; and also a benefit from it because not all countries experiencing transformation were going through such upward turn. Some of them did follow this transformation, but successful transformations - others like Hungary started to show certain signs of troubles, governance troubles. And this is important to remember because as I argue, Poland's new government is promising to take Poland to Budapest, the Hungarian model, the same way as Viktor Orban tries to move Hungary and that is a very dangerous policy as I would like to argue.

This transformation return to Europe, formed a very strong basis of the so-called Solidarity consensus in Poland. All the ruling groups, all the ruling ur, all the governments shared the major direction of this return to Europe. And it became a form of ideology of transformation, together with consensus among all the rulers regardless of the ideological or political colouring. This was also a vision shared by the Catholic Church and the immensely popular Pope, Polish Pope, John Paul II. In his booklet "Europe of the Spirit" written at the turn of the 21st Century, the Pope outlined the vision, his vision of the 'new order'; social and political order in Europe and in Poland which included not only ideological neutrality but also, I am quoting – "the dignity of the human person" as the source of rights, respect for democratically agreed juridical norms, especially the constitutional norms and human rights and pluralism of the organisation, in the

organisation of society. So it wasn't just political consensus among the Polish political class, but very widely shared in the population. And this consensus, ruling consensus seemed to start to unravel following the last year's election, government made certain very controversial steps, which caused concerns among everyone and which caused even a reaction in the European Union, in the Council of Europe as well as among Poland's most important friend and ally the United States whose three senior senators, representing the Republicans and the Democrats, sent an open letter in February this year to the Polish Prime Minister, Mrs Beata Szydlo, in which they state: "We are writing to express concerns about recent actions taken by the Polish government that threaten the independence of state media and the country's highest court and undermine Poland's role as a democratic model for other countries in the region still going through difficult transition. We urge your government to recommit to the core principle of the OECD and the European Union, including the respect for democracy, human rights and the rule of law that has made Poland such a strong and vibrant member of the community of democracies and the stalwart ally of the United States in the heart of Europe."

So this is serious concerns with such strong allies, friends of Poland, write those words, why? Probably the two reasons mentioned by Senator McCain, Durbin and Senator Cardin is the two pieces of legislation passed in Poland, one concerning the role of the Constitutional Tribunal and the role of the independent public prosecutor, weaken the role of the Tribunal and the independent judiciary in balancing the power of the government of the top leaders and politicians. And second concerns the appointment of the media, public media supervisor, who is known for his very strongly partisan view and who committed himself to making the media national, not free, but national; and hence the concern. There were other also steps which increased the majority of Poles concerns about the state of democracy is the, ur, extending the surveillance rights to the Police without the court agreement as well as cancelling the merit criteria in appointment to the top position in the civil service, thus endangering the effectiveness of the State.

Why these pieces of legislation caused such a wave of concerns. In order to better explain that I have to make a small digression about the nature of modern democracy, for which I apologise because we have here experts who know democracy much better, but which will be very short. So, you can doze off John and Martin for five minutes while I am doing a bit of social science 1, which is nevertheless important as a part of the argument I think.

The history of democracy can be seen with great simplification, as a way of restraining and constraining the powers of the top political rulers, the monarchs or presidents, from two sides. On the one side, constraining it, preventing it from being tyranny by constitutional and other laws, Bills, Charters of Rights, therefore we read the history of modern democracy, usually starting with the role of the Magna Charta, the role of the Bill of Rights, American Constitution and all those legal constraints which are essential in

balancing political power with also judicial power and the power of the legislature. The second way of constraining the power of political leaders is through creating representative bodies; parliaments, and forms of public bodies which enforce on governments the responsibility to the sovereign, to the people.

Such groups of course started as very narrow representative bodies, usually of the states but evolved, especially in the nineteenth century, into broadly representative bodies with the expansion of franchise with enfranchising new and new categories of people, to the extent that today very few people are excluded from having voice in public matters. So these two containing and constraining forces, the laws, the Constitutional Bills, including human rights, civil rights, political rights, social rights and which safeguard those rights against possible erosion by political leaders, as the founding fathers of the American Constitution mentioned, the Constitution is the defence against the possibility of a tyranny of majority. There are certain principles, certain rights which no political authority can touch. And it's safeguarded by juridical bodies including High Courts, Constitutional Tribunals, Supreme Courts in the United States. It's unthinkable that political rulers might do something which those bodies safeguarding rights, Constitutional Rights, judge as illegal or anti-Constitutional, or unconstitutional. Of course, Constitutions can be changed too, and therefore, Americans add every time and again the amendments to their Constitution, but those amendments are done by the book. By the book, in line with the Constitutions, and all democratic nations surrounded their constitutions their basic bills of rights and Charters with certain conditions under which they can be amended or changed. They require usually a constitutional majority, period of discussion and referenda or plebiscites which approve. It's quite obvious in Australia, in a country where we got used to it, so what I am saying is an obvious thing to anyone living in Australia but it's very often, very frequently misunderstood in Europe, especially in places where democracy took roots only recently. Because partly, because, the communist authorities in particular also called their regimes democratic insisting that it's People's Democracy and they used majorities and minorities in order to erode their Constitutional laws. The Bolsheviks and the Fascists in Europe did not dissolve parliaments; the German Parliament remained operating in 1945. What they changed was the Constitution. They destroyed the Rule of Law. They ignore Constitutions and change them in an arbitrary way. The end of my social science 1 and now to an important consequence and parallel of this fact that democracy grew and has been growing as a system of constraining political authority by Constitutional laws which cannot be changed in an arbitrary manner and on the other hand by representative bodies and the balance between the three of political power, the executive the judiciary and the legislature is essential for good function. It's essential because it results in a form of ruling consensus among the most powerful people, lets call them power elites, in all democratic societies.

All societies, including democracies, liberal democracies, have their power elites, people who are powerful and groups of those most powerful people can function in a democratic way when they share the ruling consensus, about the balance of power, about the way of conducting politics. Politics can become and remain democratic only as long as there is a consensus about the democratic rules of the game. It's like a game of cricket or rugby; which remains the game in which the differences between teams can be resolved, but only as long as they respect the umpire and the decisions that chucking is not on, the under arm bowling is not on. It's not an accident that Rugby is the most frequently mentioned game as a metaphor for democratic politics. It's tough. It's tough. Politics anywhere is always like Rugby; very tough. The players are down and dirty as Americans would say, but they never dismiss the umpire. They play by the rules of the game and as long as they agree about those rules of the game, it is a game it's not a tough brawl. The game in the sense that it's normatively regulated, by not only constitutional laws which respect all those citizenship rights but also by unwritten political conventions which are respected by all players. If they agree about the rules of the game they can differ in their political views, you can have communists on the left hand side and the conservatives on the right; you can have all forms of political ideology playing with each other because it's not a fight but a game. It's not a brawl, but it's a competition, it's a competition for votes because they have to assure a consent of people in election every three, four years, and because they treat each other as rivals; rivals – not enemies.

This brings us to the key concern, that in Poland those controversial measures created a very deep rift; a rift which endangers the ruling consensus. It's not a rift about ideology, about the programs; everyone agrees in democracy that government which wins election has a right to pursue policies that this government presented during electoral campaigns. There is no doubt about that, everyone agrees that this is absolutely essential condition of democratic function. But when the constitutional rules of engagement become questioned, the game starts to be different and ceases to be the game.

So this ruling consensus includes not only respect for civil, political, social and cultural rights which all constitutions spell out, but also the norm of restrained partisanship. That no party attacks enemies, the rivals, in the way which damages the game; there is no chucking. There is no forbidden real acrimony, like in Rugby. An umpire has always the right; so the umpire can hand red or yellow cards, to governments. This makes democracy a form of a political game which is also compatible with monarchies. We are a constitutional monarchy, but we are a democracy because it's a constitutional monarchy. In Australia we have an impeccably neutral Head of State; the Queen; we've got fiercely independent courts open handing red cards to government; we've got the ABC and SBS [Audience interjection] which safeguard their independence, which safeguard their independence by having boards and having policy of balanced information. If we worry about it, this is something which we can subject to public debates, and we've got those

debates going all the time; a sign of vibrant democracy. And we've got professional public service. It's not that professional public service, the arm of government, is always non-partisan; they are. And we know that governments have tried to appoint loyalists to the top position of bureaucracy, but never by waiving meritocratic review. Ok; so they can be loyalists but they have to fulfil also the criteria of professional excellence which are safeguarded by the Board; and robust civil society.

Robust civil society in which the issues of democracy are discussed is the sign that democracy is liberal and vibrant. But when the norms, rules of political engagement become questioned; when the umpire is dismissed, we have to start worrying about the state of liberal democracy; not necessarily electoral part of the democracy, but this first way of constraining political rulers by constitutional laws, because this constraint rests on the capacity of the highest court to hand government a red card. When this highest court, Constitutional Tribunal, High Court in Australia, Supreme Court in the United States is in any way restrained or incapacitated there are genuine worries about the state of liberal democracy.

In Poland these controversial moves of the government and the debates to me look very much like a repetition of very similar moves by Hungarian, Viktor Orban, but there are some differences and generally those departures from liberal democracy are enormously varied and political scientists, social scientists coined even a name for the democracies which start to depart from some aspects of liberal democracies, 'illiberal democracies'. Illiberal democracies which have elections, they might have also electoral competition, they might have representative bodies but some aspects of liberties, constitutional rights, are ignored, waived or weakened. And there are many types to paraphrase the famous first sentence from Tolstoy's Anna Karenina, while liberal democracies are all similar to each other, the illiberal democracies are illiberal each in its specific way. And those departure vary from restraining, constraining, paralysing the highest courts, from constraining democratic reflection of public views of civil society to various forms of intimidation of the opposition.

Russia is not a democracy. Russia departed from democracy in all its fronts. When? When is difficult to judge, because democracy, liberal democracy includes so many factors; rule of law, free expression, as well as parliamentary representation of all views or people; full representation. It's very difficult to say at what point Putin took Russia away from democracy but there is an agreement that by 2005 - 08, Russia ceased to be listed by various international agencies as a democratic society. Not Hungary.

In Hungary it happened in a different way because it's worth spending a few minutes to highlight the difference. First, Orban and Kaczynski, Jaroslaw Kaczynski is the leader of the Polish victorious party, Law and Justice, which is sometimes referred by its acronym

PIS, 'P', 'I', 'S'; they are different in many respects, Orban is a Calvinist, Jaroslaw Kaczynski in Poland is a Roman Catholic; Orban loves Putin; Kaczynski hates Putin; and accuses him of plotting to kill his twin brother in the plane crash in 2010; Orban, and this is a very important difference, opposes any form of political moves which may result in economic sanctions towards Russia; Kaczynski sees Russia as a major danger in Europe. But above all, Orban in 2010 election in Hungary gained a constitutional majority; it's very important, because as I mentioned previously, constitutions are not cast in iron; they evolve; they change, but they change by the book. And in Hungary, in Poland constitutional change, especially in role of courts and tribunals as well as the operation of politics requires two thirds majority on the floor of parliament as well as majority in the Senate, Upper House, with minimum of fifty per cent presence as well as confirmatory public plebiscites which approve. And Orban did his changes to the constitution with parliamentary majority and by the book. They were illiberal changes; nevertheless, neither European Union nor Council of Europe, nor American friends and allies could in any way intervene; because he did it partly by the book. I say partly by the book because there are views what constitutes breaches and what doesn't constitute breaches. It's very important because many people think that Poland has been treated very badly by EU, European Council, Americans, while Hungary got away with similar changes; they are important differences I am not Orban, Viktor Orban's big friends, nevertheless in fairness one may say that his sins were much more obvious.

While these sort of introductory rules took me a lot of time, I'll make my main comments about the causes and consequences very very short. Why this illiberal turn in Poland? The sociological explanation points to two particular constituencies which were mobilised by Law and Justice during the Presidential and during the Parliamentary elections in Poland. They are both very anti-liberal social categories and the way of appealing to those groups created this syndrome of liberalism being if not attacked at least seriously eroded. During the Presidential elections in May/June 2015 the candidates of the Law and Justice party made appeals which got him a support of a youthful group which I would like to call "Precariat". Precariat, young people who experience very high unemployment and experience very bad labour market conditions. And that points to dark sides of the Polish transformation. That although it was successful in providing growing income, at the same time it alienated the whole generation of young people who experienced not only general unemployment but catastrophic youth unemployment in Poland. The red line shows the level of youth unemployment. Remember, in the first four years under mostly left wing SLD government in Poland, in spite of the very rapid economic growth of economy functioning very very well, over forty per cent of young people couldn't find a job. That was catastrophic.

The consequence of it was not only the alienation of young people from society, which did not provide them opportunities for them to start their lives, but also alienation from the left,

the left evaporated in Poland, never regained public trust because young people remembered; and young people are so to speak, natural constituents of left of centre parties. They felt betrayed by the left. Ceased voting for them and wiped out the parties of the left from the political spectrum. And they experienced a rebound of youth unemployment not only after the great recession as it is called in Europe, Poland avoided mostly the worst ravages of this 2009 great recession, but the rebound coincided also with the spread of the so called unsecured labour contract; in Poland they are known as rubbish contracts; *Smiecowe contracty*, which did not provide people with social security, which gave them only salaries. People from China would not, because the same happens in China, many people have terrible labour contracts leaving them in insecurity hence the name precariat refers to the sense of insecurity – precarious life. Dissenting voice in Poland was of course migration. Nearly 3 million young Poles migrated all over Europe. The fastest and most frequent moves were around in and in 2004 and 2008, and they had less to do with the political party in government at that time and more to do with the opening of the European market. Just before the 2008 great crisis, economies in Europe were hungry for young workers and Polish young people experiencing unemployment and rubbish contracts at home moved en mass to Britain, France, Germany, Belgium, forming a huge migrant labour force there. And they also voted very strongly against the Civic Union people government in 2015. They voted against the establishment which they associated with the deprivation, the deprivation values of life. The most successful political leader who mobilised these young people against the establishment was Pawel Kukiz, a very new political leader who entered the Presidential contest and managed to get twenty per cent of vote, predominantly from young unskilled people who were feeling left behind and who were left behind in Poland. It was angry political vote. Vote of protest, anti-establishment. Kukiz lured the sentiments of those young people by attacking the establishment as corrupt and unresponsive to social needs. But they also were attracted to the Law and Justice candidate, Mr Duda, who presented a similar message; Poland is in ruins; you are being victims, so he lured them and in the second round, the decisive round of election, round 2, candidates were competing, sixty per cent of Kukiz votes moved to Duda. Kukiz is a product of popular culture more than politics. He is a punk rocker whose songs are after those corrupt powers that be and politicians, but he doesn't provide any solutions. Unfortunately he is one of those extreme snake oil sellers like (garbled) in Italy, like Pauline Hanson in Australia; very right wing in his policies, and pointing to all sorts of conspiracies. Recently, he accused the pro democratic protesters of being on the take of Jewish financiers. And to recognise the extreme right and left because they are moving to the conspiracy theories, the left has its Kulaks, the right has its Jewish financiers; they are standard targets of mobilisation. And second electorate, who also was deeply illiberal - illiberal. Revolutionary illiberal; were the old people; religious, attending church regularly, without skills, who also felt left behind, but not so much by the Polish communists as the Polish culture. They were alienated culturally. They felt that the liberal secular culture coming to Poland by the media from the west is not their

culture, that they are marginalised in this culture. The evidence, if you look at the differences in seeking valuables in elections, they provide the best evidence that those electorates were crucial for the victory of Law and Justice.

In Presidential election the most important difference seeking valuable, that is the characteristic of people's who voted for the Law and Justice candidate was the low age young people with low skill and low education, these were the important audience; a people who felt the losers, left behind. In the Parliamentary election it was the attendance of the church; among people who attended the church at least once a week, 62 per cent voted for Law and Justice. And the average vote was slightly below 38 per cent.

So greatest proportion indicating the effective political mobilisation of those audiences, audiences which include people with low education, low level of skills and also who were very frequent church attenders; and I think I should conclude by saying what are the consequences of such illiberal mobilisation; obviously illiberal policies. The mobilisation means that the government elected by such specific groups is obliged to pursue policies which those groups favour. Which are not liberal, and which bring this return to Europe consensus and create a very deep rift. The rift within elites which makes the pursuit of politics in this liberal regulated way extremely difficult; and it's also associated with terrible acrimony, people call each other traitors, that the variance between the two sides is poisoned by toxic passions as James Madison used to call them. Passions which are incompatible with politics understood as rivals, as competition, but with it appears it's associated with politics as a fight and struggle in which many constitutional point falls; the right of people to the presumption of innocence, except when sentenced, when found guilty by courts, and very often widened a victim of this acrimonious debate.

If Poland is moving towards Hungary, south, it also should look at the performance of Hungary. This role model is not very good. The Hungarian policies, strongly nationalistic, strongly illiberal, strongly accused of dictatorial intents do not point in the same direction as return to Europe, the European consensus. Hungary is also doing badly economically; it had recessions not only in 2009, but also 2012, and Poland now exceeded the GDP per person of Hungary in its national way. So it's not a very optimistic conclusion but I would like to return to my first sentence in conclusion. Mainly that democracy is in danger in real danger when people don't care. When people do care, when people discuss it. When they consider people with different views as their rivals, not enemies, democracy is still in relatively good shape. And this worry about democracy in Poland is above all the positive factor in my perception of the overall state of democracy in Poland. Thank you.

John Keane

Thank you very much Professor Pakulski, indeed and I will be happy now to call Professor Martin Krygier who will, who has been given a licence to carry on the discussion.

Martin Krygier

Thank you very much John and as the time I will follow your guide and I will say something about that now that Jan has given you a magisterial survey of what has happened and arguments about why it's happened and a pessimistic, almost completely, but not wholly, pessimistic projection of the potential consequences of that. I don't, - I do endorse all of it, and I don't have anything in terms of details to add to it, perhaps I should stop here but I won't because I would like to deepen a couple of implications or at least delve into a couple of implications of terms, distinctions that were in Jan's talk; in particular, liberal democracy and illiberal democracies. Institutions in settled political systems have a logic; they are not just a random grab bag of a bit of this, a court here and a party there; there is a logic. If you want liberal democracy, certain functions will need to be satisfactorily fulfilled. If you want illiberal democracy, which is not simply the absence of liberal; it is another game; it's another architecture; then you will look at institutions in a different way. In liberal democracy you have to simplify greatly and embarrassingly because if I am a rule of law guy, this is the democracy guy, nevertheless I am here and I have to keep talking, in liberal democracy for it to function successfully you need at least two jobs to be done. One is the governors; you have to have a system for choosing governments. And the second is you have to have a system of Institutions for taming the power, all of which centrally includes governments, but not only government. Now we use elections to choose governments and they are good at that but they do something to tame governments as well but they do it rather weakly and wholesale. They can't get into the details, they can't get into day by day affairs, they happen rarely, every four years in Poland, so if you are interested in taming, in containing power then you have to look at what John has extensively written about, monitoring institutions. Institutions which if elections are horizontal if you want to characterise them you would think of institutions of horizontal accountability.

Other governmental institutions like courts, like an independent prosecutor; non-governmental institutions like the press; social institutions like a strong civil society you need all of that stuff to be in good shape for your democracy to be in good shape; because if you don't have the second lot of institutions you have a tendency and a danger of at least three things. Monopoly of power, the people who have the power have all the power and that is dangerous for very obvious reasons. The famous English liberal of the nineteenth century talked about the tendency of power to corrupt and for absolute power to corrupt absolutely, he didn't invent the notion, people had noticed it before. Secondly, while an arbitrary power, a terrible thing, everybody who knows something about Eastern Europe, but you don't only have to know about Eastern Europe, knows the people there over generations and centuries have been victims of one or other arbitrary power and it's a terrible, terrible thing. So you want to institutionalise some way to constrain to make that not a routine possibility. And thirdly you want to avoid stupid power; governments which

don't have to defend themselves which don't have to provide reasons for something that is done out of reasons. They do what the governing body wants them to do and suddenly they don't have to defend themselves they don't have to worry if they make mistakes they are unlikely to worry if they made a mistake. So, as John has written in his splendid book, since he has plugged me so much I will plug him in return because he deserves it on "The Life and Death of Democracy", democracy is a powerful remedy for insolence, its purpose is to stop people getting screwed. That is a technical political science term, people can understand it. So you need these two sorts of institutions to do the jobs that need to be done. No one, in my second point, is complaining that in Poland there is something wrong with the elections. The elections were held, they were fair, they were free and PIS in league with Kukiz's party won a majority fairly and they are entitled to govern. The problem is at the second horizontal level. This government has been in power not quite four months, in that period as Jan has told us there has been an extraordinary sustained and unconstitutional attack on the constitutional court. There have been reformation of media laws to make the public media, (garbled) and have been sacked and replaceable under the direction of the government the Treasury. There have been amendments to the civil service laws to allow the top of the echelon to be appointed by the government, not according to meritocratic criteria, thank you, English is a problem, that independence of the prosecutor has been eliminated, the government's chief head kicker, Zbigniew Ziobro, will become the chief prosecutor, that is again unprecedented, not unprecedented, sorry, [interjection: in Austria it's the same, Austria] no, it's not, the public prosecutor is a separate office in Austria, but I am glad you interrupted, but I hope you don't do it too often because, my point here is not that there is one institutional foible or another institutional foible, but what we are looking at is something which is a systematic assault on institutions; an assault which seeks to degrade them in one of two ways. Either by capture they become ours, the widening of power; or by subversion which is what is happening with the Constitutional Court which was no longer going to be able to for the foreseeable future even to decide issues on issues of what constitutional challenges to the government.

Now Jan has talked about illiberal democracies. In July of 2014, Viktor Orban (garbled) proudly said Hungary is an 'illiberal State', but he didn't invent the concept. A Pakistani American journalist (garbled)(garbled), wrote an article in 1997, when he took the surprise of a lot of readers in coining this term 'illiberal' democracy. He said look you have been fighting for democracy for centuries, now we have got democracies all over the place, democracy he said is flourishing, but liberalism is not flourishing because the second order institutions in Belorussia, in Hungary, and maybe threatened in Poland is subverted by people who are happy to get votes and can engineer to get votes; particularly if they can nobble the media and independent institutions etc, but are not happy to share power with institutions which can ask the questions to which they can be appealed which can review their decision, which can publicise, criticise and so on.

Now it's not just a matter of a particular difference of ideology. There is an enormous difference in ideology between PIS and between PO and other parties, what I am talking about is something which distresses me a great deal and it's not a matter of particulars it is a matter of a lack of a sense or a hostility to institutions per se, unless they are our institutions. So if you attack the head of the Constitutional Court as a person you are ignoring (garbled) it is the death of the Constitutional Court. If you attack all sorts of offices by simply saying that there are people who are corrupted and you will have to get rid of, if you have the former head of your anti-corruption commission, who is found in a court of law a few months ago to be guilty of various offences and sentenced to three years in gaol and you then the first thing you do is appoint him to be head of [garbled with interjection] I am sure I am missing every point but one point is civility of discussion, I am trying to stick to that, what happened, the court decision, maybe it is reviewable and the court decision may be false for all I know and there are some allegations of this, the court decision may even have been corrupt, it's not the job of the government to say I don't care about the appeal, I don't wait for the review, I simply appoint [garbled with interjection]. Now civility is an important concept to which I will come and I would like to hear some, maybe less of its opposite, hence I come to my conclusion.

One of the indexes of that of institutional sense, or hostility to institutional sense, is the presence of the leader of the most powerful man in Poland himself, Mr Kaczynski. Because he was such a controversial figure he did not run for President, a young attractive man was brought to run for President. A lot of the popular talk was this was a different PIS. This was a more civilised more attractive person. This was not the man who leads to hostilities, who calls his opponent the worst sort of Pole, it was a different PIS. Then, when the parliamentary elections a few months later came the party was led by, the party that was won, was led by another public non entity Beata Szydlo. As soon the elections were over it was evident to everybody there was one man in Poland running the show, Kaczynski. He had not been elected to that position he had none of the constraints of that position, he met with Orban for a six hour meeting, the Prime Minister was not invited, in fact the President was not invited to that. Now that might be wonderful, they are nice guys, I am sure they enjoy each other's company but it was a complete rejection of the significance of institutions. This is an insistence on the personalisation of rules. I mean rules are personalised to that extent that the notion, the difficult, difficult, harmony, orchestration of a liberal democracy where a lot of things have to play off against each other, and you can't rely on having all the right people in office so you rely on your officers all of this comes under (garbled).

Two more things and to complete; it is not a PIS innovation, it's common in Eastern Europe and it's common in Poland, but PIS accelerated it with single minded determination and ruthlessness, and that is that sense of a politicised – politicised

institutions, there is no sense, and nor was there under communism, that there needs to be some independent roots and integrity of institutions rather it's out of (garbled) so we need this, and that drives a great deal of the changes that we have been talking about.

Let me conclude with one last reflection, which is both historical or biographical and present oriented, it is almost the end so if we have an hour I will be talking about it. Jan mentioned, it's a wonderful phrase I hadn't heard, the notion of toxic passions. I wrote a book called '*Civil Passions*' which John mentioned, largely inspired by my romantic attachment to the Poland of the Ages. To the birth of, to the utilisation of the notion of civil society, to the birth a notion that there were us, who trusted each other, against them, whom we didn't trust; us being the society, them being the polity. I wrote about that some time, I said look, this is lovely but I am not this side but it's unsustainable, because the only thing which makes us one unity is the sense of an opponent. Now I thought this was a good opponent to have so I applauded it but I worried about what the future would be, I hoped that when as inevitably happened the unity against communism disintegrated it would disintegrate into patterns based on interests, based on ideologies, support for institutions, civil society organisations able to interact and here was a peaceful movement in civil interaction where my rival is not my enemy. Where the parliament doesn't hear people in a country which where these words have weight, not like in Australia, where people are accused of treason, no one, Mr Shorten doesn't accuse Mr Turnbull of treason, but if he did (garbled) the word doesn't have the weight here which it has in a country where treason has been a very very serious word, indeed a serious fact of life. So when this happens toxic passions come to rule when they are inflamed as I believe they have been in Poland by the present government in power, it seems to me something tragic to the spirit of the country where is occurring and quite apart from the institutional, perhaps I am boring you but I love to be boring, now Jan has been talking about, this spiritual degradation seems to be a very very prevalent thing. (garbled)

John Keane Closing and explaining Q&A procedure.

Thank you very much Martin for a passionate discussion, a forceful commentary on Professor Pakulski' lecture. We do not have a roaming mike and it is not because we don't own one, it's that such are the nineteenth century wirings of this room, you may know it's a room of great historical importance, you have probably been looking on the graffiti which is carved on your desks, so my job is to appeal to you please to the best of your passions, let's have a good debate, let's not interrupt, lets listen to each other, and because we don't have a roaming mike my job is faithfully to translate the questions. I would rather not, for reason of time to have long statements. I want crisp questions please. And could you please announce your name and please let's have the questions in very pithy form. And they are interactive, it's being recorded, the speakers are being recorded and I am being recorded here so I will repeat your question. There is a question up the very back.

Adam Gajkowski, President of “Nasza Polonia” and vice President of Federation of Polish Organisations in NSW, also member of Polish organisation, chamber of Polish organisation in Australia.

It wouldn't be a question, because there is nothing to ask these people. Their statements were full of lies, but to prove it one small thing, if you will take a simple internet on the phone and to Mr Pakulski, with his stories about who supported Prawo I Sprawiedliwosc who supported Law and Justice and he stated mostly only the people which were poorly educated on the lower class of Poland. Prawo I Sprawiedliwosc, Law and Justice, won in every single group in Poland and if you bother to listen you would find out that the people with high education also supported, majority of those people supported PIS.

John Keane

We will take that as a comment question.

Jan Pakulski

I will show a slide which is profiles of supporters of Law and Justice, based on an exit poll in October and it shows that the highest percentage of people who voted for Law and Justice were with lower secondary and vocational education. Who were farmers and who were older rather than younger. Younger educated people and business classes tended to vote for other parties for (garbled)

John Keane

I would add that I don't think Professor Pakulski said that it is the ignorant and the stupid. He did say the disaffected and its kind a different window of experience.

John Wilson

It's to Professor Jan, might I suggest to you that democracy in Poland is not in danger, because Poland has never experienced democracy. At best it is a bureaucracy; a democracy is where sovereignty is with the people, and to quote Thomas Jefferson, he said that trial by jury is the only anchor yet imagined by man that can hold a government to the principles of a constitution. So I would suggest to you that unless Poland and all these so called democracies realise that they are being conned. It is a con, they are using that word, but it is not democracy. Democracy means that the sovereignty is with the people, and it means common law, not statute law, and we are being brainwashed in this country to think that statute law made by bureaucracy overrules the law of the people, and the only place you get the law of the people is in court, where you have juries of ordinary people exercising their conscience, judging the facts and the law and delivering justice. So until Poland wakes up to the fact that they are being conned; it is not democracy they are living through at the moment, it is bureaucracy where they have rival powers, and invested

in interest groups so that if you really want democracy you've got to get back the Magna Charta, and Magna Charta spells it out very very clearly. We've got a wonderful monument in Canberra; no one knows it's there. And Magna Charta says very very clearly that no free man, we are talking about free men as opposed to slaves, no free man should be taken or indeed imprisoned or exiled or outlawed or dispossessed or destroyed in any way, nor shall we pass over him or stand over him unless by the lawful judgement of his equals, which is the law of the land.

John Keane.

This will have at least a half a dozen questions, but perhaps a comment.

Martin Krygier.

Only just that Magna Charta also said that you can't have fish traps on the Thames, and it also had particular provisions about Jews and debts, that the wife couldn't testify. Magna Charta is part of the important tradition which has certain liberal input into an ongoing development of liberalism and ultimately the development of democracy in English speaking countries, but may I would just briefly and quickly say, something dramatic and remarkable happened in Poland and Eastern Europe in 1989, and democracy is as good a word for it as I could find; it was a breaking of an evil and pervasive system by an engaged people, particularly in Poland; there are later books which suggest that in other countries, it was simply as it truly was as well, the exhaustion of self-belief in the ruling powers in the Soviet Union and various others. In Poland it was much more than that, it was a mobilised population, mobilised not simply for economic and other reasons but for reasons to do with civil rights (garbled), with union rights, rights of association, of a free press, all of which were not perfectly, not without corruption, not without backsliding, achieved from 89, it was a historic monumental achievement and I am sad that it had been spat on, not by you, but in current political groupings in Poland and elsewhere.

John Keane

There is a question there

Robert Czernkowski

I am at UTS and a few Polish organisations (garbled) priests. Step back from the institutions that you discussed, I address this to Mr Pakulski, one thing that we see at the moment not just in Eastern Europe but in other places it is a bifurcation of the media where if I talk to some of my friends across the political divide, they are reading totally different output that gives them not only different opinions but different facts, and more importantly they aren't challenged by my views and by reading my stuff, and I am not challenged by their views, so society is essentially bifurcated where as we see today we have a real problem talking to each other. What do you see as the prognosis for that, is

that going to be an environment that persists or do you expect that at some stage in the future, that Polish society in particular, will find a way to talk to itself again.

Jan Pakulski

In the long run I am optimistic, in the short run, I am pessimistic. I think that such debates full of acrimony, such deep divisions, which as you rightly noticed, go through not only political cracks but also the media, they grow through civil society, they go through entire society, such debates weaken democracy, prevent, end this marvellous twenty odd years of return to Europe but in all societies which experience such acrimony, they ended very quickly when people started to realise the damage such a division does to the body politic and social bonds. Social bonds; Solidarity, was not accidentally made Solidarity, it created this short moment of unity and the communists used before that very effectively *divida et imperator* principle, of dividing society, splitting it, and making fight with each other. But that comes, sovereign comes out of the crisis. In the long run I believe that no society can tolerate for a long time such acrimony, and that there will be a return to the consensus, ruling consensus within the elites as well as a form of social solidarity within society. But well it doesn't look like it's happening tomorrow.

John Keane

There is a woman at the back. Nice and loud please, otherwise I have interpret you.

Liz (garbled)

Naturally, I am quite used to speaking loudly and I have no problem as I am a teacher. Liz (garbled). I have read that one of the reasons that is put forward for its policies regarding the relations to the media on the surface, is at present the lustration hasn't been carried out adequately I have (garbled) reasons for knowing to the background that all kinds of justifications might have (garbled) but I haven't heard it mentioned here?

John Keane

Lustration

Jan Pakulski

Lustration it is a very important title and I agree entirely that it wasn't done in Poland. It didn't satisfy those who wanted it like in the Czech Republic, punishing the authorities for the abuses of live power and it didn't do what the German solution, The G(garbled) Institute, mainly a sort of reconciliation of confessions. It was neither fish nor fowl and ended up leaving almost everyone with the sense that justice perhaps wasn't done very well. So I agree with your conclusion that it could have been done much better, not to leave this sense that things are hidden, that things are not straightened up. On the other hand I point to the difficulties in conducting Lustration in Poland. It's very difficult. Lustration followed the long process of, in the absence of a better word, national

reconciliation. The agreements reached in the 1989/90 breakthrough period did not, were not conducive to any process of a Czech type and not very conducive to the process of the German. They were not conducive to the Czech type because the guiding assumption was that there will be no punishment, just confession, like in South Africa, The Commission of Justice and Reconciliation. It wasn't a German Institution because as we now know, the secret services in Poland, the Communist secret services, hid many documents, and these documents are still coming out and produce a great amount of passions, both good passions and toxic passions. So it's probably way of saying that although we would like to have a good Lustration, you will find two Poles who have the same vision of what this Lustration should have been.

Martin Krygier

Just to add to that, because I agree with everything what Jan said, Lustration has been in all of the countries of Eastern Europe, one of this kind of gnawing, unavoidable, unsolvable problems. I know of no one, except the Germans, who did it in a way which you could say after the event it's satisfactory, but the Germans had the Germans. We didn't have Western Poland which could simply force a solution on to Eastern, not the (garbled) In Germany it could not have happened as it happened if Western Poland – if Western Germany had not been able to enforce it in Eastern Germany. In Poland the two factors that Jan mentioned, the hope for national reconciliation, Communism was not an occupying army, it was the party of (garbled) and as we know more and more, lots of people and open and not open, cooperation since it was the system (garbled). I think it was a noble impulse in 1989 to say we will insist on the rules of the game so long as you play by the rules of the game. But it didn't work ultimately, partly because of the resentments which it fostered, partly because I suspect it can't work properly, but the good news is that PIS has come to terms with Lustration since their head of the property (garbled) is a former Communist Prosecutor in the early 80's and their head of Media Reform is also a serious party (garbled) of the eighties So even PIS has come to terms with the existing presence of post Communist (garbled)

John Keane

May I share, before we carry on, may I push both of you, it would seem to me to be understandably, more than a touch nostalgic for 1980, for the Solidarnosc experience which was a cause of universal significance in Europe, but perhaps that should not be the measure of things that were going on, and here is the question, what is the relationship between these processes that you have been analysing, and the wider process of European disintegration. There are hopes in Poland that the European Union will find against the present government, will decry its lawlessness and so on, but meanwhile, within the wider space of Europe, there is a multiple crisis deeper, stagnation, populism, disaffection of peoples with structures, a migration crisis, the size of lawlessness, the ignoring of directives and rules, all of this combined, Europe has not seen since probably

the 1920's and 1930's. I wonder how both of you see this wider crisis in which Poland is now so to say trapped, or is it that Poland is actually contributing to the deepening of this crisis? Might not this Kaczynski phenomenon be part of a wider experience that is actually racking 60 years of its (garbled). What do you think about this?

Jan Pakulski

I think it's a very good remark and I should have mentioned it, this surrounding circumstances; Europe is in deep problems. It's not only migration crisis but also the persisting Greek recession which is particularly painful in the southern belt, not in Poland, therefore very often we forget in Poland that the southern Europe is experiencing a very damaging deep economic recession, which in many respects is similar to the Great Depression. What Poland experienced only for four years at the beginning of the century, Spain, Italy, Greece, have been experiencing for more than a decade. The youth unemployment between forty and sixty per cent and Europe is split now. This enthusiasm for creating unified Europe ended; it evaporated. It probably ran into three big problems, first, the Solidarity which in Europe, can Europe survive the redistribution of means and good will to its weaker, slower, members? Secondly, its vision of the future, what sort of Europe, is it Europe which will become a Federation or Europe of independent nations? First ten years after unification, it looked like there is consensus in Europe about deepening, not only widening, but also deepening the Europe integration. This consensus has disappeared. And third, a very important problem is what to do with the future, especially the very very dangerous process of aging; Europe is going through a demographic crisis, all European societies are very rapidly aging, which creates a problem of inter-generational justice. Who carries the burden of pensions, future pensions, who carries the burden of environmental repairs which are necessary, who carries the burden of increasing medical costs, and the tendency for the current generation in Poland, let's call them Polish baby boomers, is still shift these costs, these burdens on the new generation, and that is unsustainable, not sustainable more. So there are multiple problems which are becoming the European splinters and the sort of lack of enthusiasm. So the disappearance of this consensus about returning to Europe in Poland is parallel in at least what happens in Europe.

John Keane

There is a gentleman here who has already spoken, may I ask you to be very brief

[Felix Molski: Andrzej Kozek was always first with his hand up, from opening to end of Q&A. John Keane, at every opportunity, found someone else to choose, even though that someone else's hand went up later than Andrzej's. With only one hand up Professor Kozek was chosen by default but I noticed that he is the only questioner who was constantly interrupted and who had his inquiry rushed and truncated. The contrast

between the way Professor Kozek was treated compared to John Wilson is stark. I wonder why?]

Andrzej Kozek

Me? My name is Andrzej Kozek, I am statistician for forty five years in USA, Germany and in Australia I work in Macquarie University and now retired academic. And two days ago on ABC 24, Richard di Natale the new Greens leader, he expressed his concerns about distribution of votes in Senate which differs significantly from distribution of polls at the election. Let me remind ---

John Keane

Polls not Poles?

Andrzej Kozek

Here in Australia. In Poland, in Poland, so first I should say for this presentation, unfortunately I find it was full of this poisonous passion.

John Keane interjecting

Could we have a question?

Andrzej Kozek

Question? Question is mainly you missed the point where the problem - legal problem in Poland -started. The old government lead the legal power. They selected in their last five days, five judges of the Tribunal Court so they lift proportion 14 to 1, losing party in the election, left Constitutional Tribunal with 14 to 1, breaking Constitution [Keane several interjections]. Question is how would you like the Constitution caretaker, Constitution Court which is breaking itself the Constitution? [Keane attempts to stop the question here, but Kozek is able to continue] These are problems which are at the core of the problems, of the legal problems now in Poland. Not Constitution is in danger; there are legal problems they are solving, they turned to the International Constitutional Tribunal (and) waiting for a solution. And not, just I would say that, a solution should be found on the streets by [Keane cuts off the question here]

Martin Krygier

Just quickly because there are important issues to do with the Constitutional Tribunal; The outgoing government tried to pull a swift trick over its incoming rivals, by appointing five constitutional judges, three whose time was coming up during the period when the first government was still in power and two whose period of appointment would come only after they were already out. There was a Constitutional challenge to that shifty measure, I am not talking Angels and Villains here, if we had a discussion of the vices and difficulties of the PO government there would be a lot to say. But what happened was, they

appointed five judges, a challenge was taken to the Constitutional Court, the new government came into power, without waiting for this challenge to be heard, on the contrary, knowing that the Constitutional Tribunal's decision on that challenge was to happen on the next morning, they forced through an appointment of five judges of their own, the night before. Now if the institution, as it happened when the court gave its decision the next morning, it was that three of those earlier appointments were valid, two were not valid. [Kozek seeks clarification] - Sorry, I am talking, I'm talking - there was an institutional process, the institutional process was subverted by the forcing through of these new appointments. Now we had this impasse in the court, then there were extra laws, which had nothing to do with what we are talking about, which have made it impossible for the court to come to a decision because it has to have thirteen out of fifteen, I think, for any decisions required, various other procedural measures which have stymied the court making it impossible to deal with ongoing political constitutional challenges. What I am saying is if you had any sense of institutions you would have backed an institution resolution period, instead the present government tried to undercut and then has ignored the court's decision.

John Keane

People are looking at (garbled) we are actually way over time so I think what we should do is soon, very soon end, you can of course come to Professor Pakulski and Martin Krygier for questions, I want to put one on the table about the wider significance of these events in Poland that we have been discussing and arguing about, both of you are agreed, and this is a sort of Central European principle, the problem with concentrated power which (garbled) power, is that it can be stupid, foolish power, stupid power, but it can also as every Pole knows from his or her history can do great evils. You both a warned against these present trends, in defence against liberal democracy, if I wasn't a liberal democrat, I wouldn't be much moved by what you have had to say, because I would ask you as I am going to do now, what evils do you fear, what would be in the possible future scenarios that are now evolving in Poland, what would be the wider evils or stupidities that Poland, so to say gives to the rest of Europe and the world, from these dynamics. Looking - we don't know the future - but looking into your crystal ball what do you feel.

Jan Pakulski

Three only but I will just list them because I am conscious of the time constrain. First, that Poland will alienate its friends – its allies in Europe - become a sort of like Hungary, an odd man out. Second is that all illiberal democracies, which undermine the rule of law suffer also economically; it's universally known that business can be done well, only if you have conditions of relative stability and certainty, no one will invest in the business when the governments can arbitrarily amend constitutions, change the rules of the game, introduce preferences for national industry or national capital as in Hungary. And Hungary is in the categories of economic performance and government performance are going

south. Third danger is that it might accelerate the process of European disintegration (garbled) We know on the 21st of June, Britain will run the referendum and this referendum will be in many ways a test of European unity, while the end of consensus about return of Poland in Europe will be a significant factor in deciding this future of now fractious European Union.

Martin Krygier

Can I just make one

John Keane

Please note, please Martin you've written extensively on wild power, as it's called in Latin and in courts of law, the Arbitrium, the dangers of arbitrary power, what is it that you see in the Polish case that worries you?

Martin Krygier

Well, what worries me is this general worry, there are many particulars, I don't want to – I don't have time to go into them – on this I will just make one point because it is a different principle from Jan's, I accept completely and am persuaded by his list of external consequences which might flow from not having strongly institutionalised liberal democracy, consequences, the economy, external relations and so on, I just want to float what seems to be an important idea, it's not mine, but I own it for the moment, that liberal democracy, and the rule of law and the constraints, the reliable constraint on arbitrary power is a thing that is a good in itself, the sort of thing you want to have whatever else the consequences are because having it means that people have some reliable confidence that power will not sue them, it may not sue them. I am not saying, I don't know, whether Kaczynski is out to mangle people's civil liberties, I am not sure, I have no idea, I don't know what it is, I know he is after consolidation of power, I am saying, whatever his motives, and whatever the motives of so many people who have felt their ideas are strong, right and therefore people shouldn't get in the way, that's the wrong way to go because arbitrary power so easily becomes wild power, it doesn't have to be exercised for it to be threatening. All sorts of journalists who live under the possibility that it might be exercised, will start to think in terms of internal censorship, even if the motivations of Mr Kaczynski now that he has become a democrat, are different from those when he was a communist. We don't know.

John Keane

May I thank you both, Professor Pakulski, Martin Krygier, can we show our appreciation.