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THE SEPARATION OF POWERS IN THE GLOBAL ARENA: PROMISES AND BETRAYALS

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The Dismantling of Power-Sharing in Hungary and Poland - Two Boards to the Same Destination?

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An Introduction

These working papers were borne from the collaboration between The Jean Monnet Center at NYU School of Law and the IRPA (Istituto di ricerche sulla pubblica amministrazione - Institute for research on public administration). IRPA is a nonprofit organization, founded in 2004 by Sabino Cassese and other professors of administrative law, which promotes advanced studies and research in the fields of public law and public administration.

This paper serves as Introduction to the seminar on *The Separation of Powers in the Global Arena: Promises and Betrayals* that was held on December 16th, 2022 at the LUISS Guido Carli University in Rome.

The seminar's purpose has been to collect the contributions by international legal scholars to the study of the principle of the separation of powers and its transformations in a global context, and namely when adopted international and supranational institutions and challenged by global crises.

The seminar has gathered scholars with different legal backgrounds -history of institutions, international law, administrative law, environmental law- and with expertise at various levels, i.e. international, supranational and domestic.

The presentations discussed during seminar have resulted in seven papers, in addition to the present Introduction.

The principle of separation of powers, as theorized by Montesquieu, has been at the basis of modern democracies. With the evolution of democratic governance, however, it seems to have gained more a formal and normative value than a heuristic capacity as a principle capable of providing an interpretative key of the existing reality. Gradually that model, explicitly or implicitly adopted by democratic Constitutions, has suffered exceptions and deviations which the Covid-19 pandemic has even worsened.

In Western democracies the executive branch has often vested itself with legislating powers through decree-laws or equivalent. Parliaments have allowed this invasion, at the same time adding subsequent lengthy changes to these laws to meet local, sectorial, or corporate needs. In other instances, Parliaments have aimed at making the rules and applying them, through "self-executive" laws which are so detailed that they leave no room for any exercise of discretion by the administrations. The judicial branch has exercised regulatory powers in many sectors, expanding or shrinking principles or creating new rights and duties.

Exceptions and deviations are such as to make some scholars observe that the separation of powers no longer exists and has been replaced by different balances. Already in 1984 Lijphart argued, for example, that majoritarian democracies have been characterized by the concentration of powers on the executive, by the fusion of legislative and executive powers, and by the cabinet dominance over the legislative branch[1].

Although the literature on the separation of powers and on its crisis is very rich, the perspective from which this symposium intends to delve into the phenomenon is relatively novel as it aims to combine four elements.

First, the objective of the symposium is to analyse the phenomenon mainly through the lens of administrative law and from the point of view of public administrations. The articles deal with the principle of separation of powers and include the analysis of all the three branches and investigate the relationships among them. However, the focus of the symposium is mainly on exploring the *transformations in the exercise of administrative power* as a result of the intrusion by

[1] A. Lijphart, *Democracies: Patterns of Majoritarian and Consensus Government in Twenty-One Countries*, New Haven / London: Yale University Press, 1984, *passim*.

the other branches into the administrative arena or, on the contrary, as a result of the appropriation by the executive branch of functions that are typically attributed to the other branches.

Second, the chosen perspective combines *different time planes*. The symposium looks, on one hand, at the origins of the principle of separation of powers, by identifying the "good promises" that through the principle were intended to be fulfilled. On the other hand, it should try to grasp the current trends, long-term o short-term, which militate in the direction of "betraying" the principle of separation of powers in its original meaning.

Third, in the analysis of "betrayals", the perspective will focus on the interaction between the principle of separation of powers and the direct and indirect *impact of globalization on this principle*. This interaction is examined under two respects: the first is that of the application of the principle by international and supranational organizations, established and operating to deal with global problems; the second is that of the impact that international and supranational bodies (and the regulation dictated by these bodies to address global problems) have had on the interpretation of the principle of separation of powers by the States. In this regard, without claiming to be exhaustive, three sectors have been chosen in which globalization, and the crises connected to it, have induced an alteration of the principle of separation of powers, determining a concentration of powers in the executive branch to the detriment of the legislative and the judiciary branch or, vice-versa, a subtraction of these powers from the executive branch by the judiciary. These sectors are democracy (and the democratic crisis, taking as case studies Poland and Hungary), health (and the consequences of the health crisis), and environment (and the consequences of the environmental crisis).

Finally, the perspective is mainly focused on the experience of American and European democracies.

More in detail, the first part on the promises and, thus, on the history of the principle of separation of powers includes two articles. *La constitution de l'Angleterre": Montesquieu and the reasons for separating the powers* by Pasquale Pasquino explores the historical evolution and interpretations of the separation of powers, from Montesquieu's influential work to contemporary political-constitutional systems. It examines Montesquieu's trinity of powers—legislative, executive, and judicial —and its role in shaping modern constitutionalism. The American

Constitution's system of checks and balances is analysed as a refinement of Montesquieu's doctrine. Challenges to this system, such as political party control and the growing power of executives, are discussed, along with the evolving role of constitutional courts. The article concludes by highlighting the need for a re-evaluation of the separation of powers in the 21st century, considering the dispersal of power among elected and non-elected entities in modern political systems.

Along these lines, the following article entitled *Montesquieu's legacy in the construction of American democracy* by Noah A. Rosenblum stems from the observation the most recent evolution of American constitutional law. While Montesquieu's ideas on separating government powers were central to late 18th-century American constitutional debates, the current Supreme Court majority, despite claiming fidelity to the Founders, largely overlooks his influence, opting instead for a selective and formalist interpretation of history.

This absence of Montesquieu prompts inquiries into the original meaning of separation of powers and its alignment with the Court's recent rulings. Thus, the article reconstructs the Supreme Court's evolving formalism on the separation of powers, tracing its roots back to opposition to the New Deal in the 1930s. It explores how this doctrine has reshaped American administrative law, particularly in recent years.

It, then, examines the Court's reliance on historical practices in recent cases but points out its selective disregard for historical evidence contradicting its formalistic interpretation of the separation of powers.

Finally, it delves into the pragmatic approach of the Founding Fathers towards separation of powers, suggesting they prioritized governance outcomes over rigid doctrinal adherence. It argues that Montesquieu's influence on American democracy lies in his understanding of how institutions shape political practices, a concept embraced by the Framers but overlooked by the modern Supreme Court.

The second part of the symposium, then, moves to analyse the role that the principle of separation of powers has in international and supranational organizations. The article entitled *Of Cheques and Balances: Separation of Powers in International Organizations Law* by Jan Klabbers explores the application of separation of powers principles within international organizations, a topic notably absent in current literature, especially if one excludes the European Union.

While international organizations are traditionally viewed as entities delegated tasks by member states, the paradigm of separation of powers, common in domestic governance, does not easily align with their collaborative nature. Unlike states, international organizations pursue specific goals outlined in their constitutive instruments, fostering cooperation among organs rather than checks and balances. Despite this, examining international organizations through the prism of separation of powers may offer insights into their evolving governance structures. The paper argues that while the autonomy of international organizations from member states is increasing, the development of a separation of powers doctrine remains limited, with recent funding practices further complicating the prospect. By exploring the impact of market-based funding on separation of powers, the paper underscores the challenges in controlling international organizations' activities, ultimately questioning the feasibility of implementing separation of powers within their governance frameworks. The analysis intentionally excludes the European Union and financial institutions due to their unique funding mechanisms and evolving roles beyond traditional international organization frameworks.

Indeed, a specific article of the symposium deals with the European Union. *The separation of powers and the administrative branch in the European Union* by Marta Simoncini explores the application of the principle of separation of powers to EU institutions. It examines how the EU's interpretation of this principle by the Court of Justice of the EU shapes the functioning of its administrative arm and argues that the principle has not contributed to framing the accountability of the EU administrative branch.

The analysis focuses on the limitations of the current framework in ensuring accountability within the administrative sphere, with specific attention to the non-delegation doctrine as interpreted by the Court of Justice. Despite efforts to uphold the principle of separation of powers, challenges remain in framing administrative accountability effectively within the EU context.

The third part of the symposium aims to provide a selective overview of the areas -democracy, environment, health- in which the principle of separation of powers has been especially challenged by global crises and it does so by focusing on some case studies.

With reference to democracy, the proliferation of democratic backsliding in many countries has been characterised *inter alia* precisely by the torsion of the principle of separation of powers. The decline of democracy globally has reverberated within the traditional structures of separation of powers, with authoritarian transitions notably emerging within the European Union, particularly in Hungary and Poland. The article entitled *The Dismantling of Power Sharing in Hungary and Poland. Two Roads to the Same Destination?* by Zoltán Szente and Wojciech Brzozowski shows that, despite their constitutional systems being labeled as "abusive constitutionalism", "illiberal democracy", or "populist constitutionalism", these countries share characteristics of anti-democratic transformations that undermine the system of checks and balances. This article delves into the nuanced constitutional changes in Hungary and Poland, examining how these regimes, while maintaining the facade of constitutional democracy, have weakened the division of power. It explores the methods employed by these governments to consolidate power while ostensibly adhering to democratic norms. Furthermore, the study investigates how contemporary challenges to separation of powers, such as the expansion of judicial power and multi-level constitutionalism, are addressed in these contexts. Through a comparative analysis, it seeks to discern whether the paths taken by Hungary and Poland represent distinct trajectories or share fundamental similarities. Ultimately, the paper aims to draw lessons from these experiences and their implications for the future of democratic governance.

Alongside with the democratic crisis, the climate change crisis has impacted the principle of separation of powers. *Climate Change, Narrative, and Public Law Imagination* by Liz Fisher argues that the interaction between climate change and public law presents a complex narrative landscape, shaping the imagination of legal frameworks and responses. Current narratives predominantly emphasize strategic litigation as a means to achieve low carbon futures, yet these narratives oversimplify the role of public law and often lead to narratives of promises and betrayals. By taking the separation of powers as an example of narrative in action, the article explores alternative narratives that present law as offering institutional and reasoning capacities necessary for the large-scale transformations demanded by climate change. It argues for a broader engagement with the substance of public law in addressing climate change and highlights the importance of understanding narrative dynamics in shaping public law imagination. It examines the prevailing narrative surrounding

public law and climate change, and proposes an alternative narrative. It concludes by considering the implications of these narratives for administrative law imagination. While primarily focusing on examples from administrative law in the US, UK, and Commonwealth, the insights presented resonate across legal cultures and public law contexts.

The impact that the global health crisis, following the Covid pandemic, has had on the principle of separation of powers is analysed in the last article of the symposium. *Following in the footsteps of Ginsburg &Versteeg. The bound executive during the pandemic: Italy as a case study* by Elisabetta Lamarque examines the impact of the COVID-19 pandemic on constitutional guarantees by comparing the findings of a recent comparative law study with developments in the Italian legal system. The study largely confirms the hypothesis that despite the pandemic's centrality to policymaking, the Italian Executive faced democratic constraints from an independent judiciary and efficient parliamentary oversight. However, contrary to expectations, regional and local authorities did not significantly constrain the national Executive due to Italy's small size and the global nature of the health threat. The article argues that Italy lacked democratic safeguards against technical-scientific power, emphasizing the need to integrate such powers into checks and balances for safeguarding individual rights.

Sabino Cassese

Elisabetta Morlino

THE DISMANTLING OF POWER-SHARING IN HUNGARY AND POLAND – TWO ROADS TO THE SAME DESTINATION?

Zoltán Szente[*] and ***Wojciech Brzozowski***[**]

Abstract

While there is a substantial volume of scholarship on democratic backsliding in Hungary and Poland, one aspect of this process which remains curiously understudied is the dismantling of power-sharing. In these two countries, nationalist populist parties have been in power for quite a long time now and have undertaken profound constitutional changes, a development which has deeply affected the separation of powers. This is easy to understand, for the very essence of this principle is to prevent autocracy—and autocracy is exactly what nationalist-populist forces seek to achieve.

In this article, we ask how it has been possible for the governments of Hungary and Poland to strengthen and consolidate their power to the present extent without abolishing the constitutional principle of separation of powers or the existence of neutral controlling bodies. We also examine whether and how the typical challenges to the separation of powers in modern democracies—such as the rise of the administrative state, the expansion of judicial power vis-à-vis democratically elected representative bodies, and the development of multi-level constitutionalism—are being addressed in these countries.

We argue that despite a number of similarities that often prompt legal scholars to put Hungary and Poland into the same basket, their paths to a common destination have not been identical. The most significant difference between Hungary and Poland appears to

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be the manner in which the constitutional change has been delivered, owing to the number of parliamentary seats secured by the winning party. In Hungary, the constitution-making majority enabled Fidesz to transform the system of government in the desired direction, thus accelerating the process of departing from constitutional democracy. In Poland, where Law and Justice has never even come close to securing a constitutional majority in parliament, the authoritarian drift only became possible through tricks and subterfuge, biased legal interpretations, and unconstitutional amendments to ordinary laws. Another important difference is that while the Hungarian parliament has been effectively disabled and put at the service of the government, there has been no similar shift in Poland.

We also believe that these two countries are not primarily facing the same challenges that emerge in consolidated democracies. Some of the latter are also present here, but perhaps in different contexts and together with some other issues. It may also be that the developments in Poland and Hungary have been driven precisely by the fear of such challenges, even before these countries were actually confronted with them.

Introduction

There is a widespread view that democracy has declined worldwide in recent years, and these trends have not left the traditional structures of separation of powers unchanged. In this process, it is striking that some examples of authoritarian transitions can even be found in the European Union, notably in Hungary and Poland. In these two countries, nationalist populist parties have been in power for a long time and have achieved profound constitutional changes, which have led to a significant breakdown in the system of the rule of law.

Although these regimes or their constitutional systems are called by different names, including 'abusive constitutionalism',[1] 'illiberal democracy',[2] 'populist constitutionalism,' and 'constitutional populism',[3] they have in common that they characterise the transformation as anti-democratic; a process that dismantles the system of checks and balances. However, if this is really the case, the political and constitutional changes have surely led to a situation which inevitably affects the system of separation of powers since the very essence of this principle is to prevent autocracy.

Thus, whatever one thinks about the state of democracy in these two countries, it is clear that they are not traditional twentieth-century-like autocracies but modern (semi)authoritarian systems that have not destroyed the constitutional institutions that characterise democracies but have at most transformed their functioning. They may not use open violence against political opposition or specific social groups, but they maintain the appearance of constitutional democracy and the rule of law. The constitutional transformations in Hungary and Poland may be worth studying precisely because if the division of power is still a recognised constitutional principle in these countries, and the

[1] David Landau, *Abusive Constitutionalism*, 47(1) UC DAVIS LAW REVIEW (2013) 189.
[2] Cesare Pinelli, *Populism and Illiberal Democracies: The Case of Hungary*, in Zoltán Szente, Fanni Mandák, Zsuzsanna Fejes (eds.), CHALLENGES AND PITFALLS IN THE RECENT HUNGARIAN CONSTITUTIONAL DEVELOPMENT: DISCUSSING THE NEW FUNDAMENTAL LAW OF HUNGARY (L'Harmattan: Paris, 2015) 209, 211–9; Tímea Drinóczi and Agnieszka Bień-Kacała, *Illiberal Constitutionalism: The Case of Hungary and Poland*, 20(8) GERMAN LAW JOURNAL (2019) 1140; Renata Uitz, *Can You Tell When an Illiberal Democracy Is in the Making?*, 13(1) INTERNATIONAL JOURNAL OF CONSTITUTIONAL LAW (2015) 279.
[3] Paul Blokker, *Populist Constitutionalism*, VerfBlog, 4 May 2017, <https://verfassungsblog.de/populist-constitutionalism> accessed 2 August 2023; David Landau, *Populist Constitutions*, 85(2) THE UNIVERSITY OF CHICAGO LAW REVIEW (2018) 521.

public institutions—above all, the neutral, controlling bodies whose function is to prevent the concentration of power—have not been abolished, the question arises as to what means these governments have employed to strengthen and consolidate their own power. In addition, studying the recent constitutional changes in these two countries may be of interest not only because Hungary and Poland have gone disturbingly far in dismantling the system of checks and balances but also because the constitutional development of these two countries may serve as an example for other states in the region, of which there are some indications. Thus, this paper's first research question is how the power-sharing system was dismantled while maintaining the principle of separation of powers. Nevertheless, it is important to note that, despite the similarities, the dismantling of the system of the separation of powers has not been and is not being carried out in a completely similar way in Hungary and Poland, and it is, therefore, worth exploring these processes separately. This is the subject of Parts 1 and 2.

It may also be interesting to examine how the challenges to the separation of powers in modern democracies, such as the rise of the administrative state, the expansion of judicial power vis-à-vis democratically elected representative bodies, and the development of multi-level constitutionalism, are manifested and addressed in these countries. This will be briefly discussed in Part 3.

The last part summarises the similarities and differences between the changes in the separation of powers in Hungary and Poland, trying to identify whether they represent completely separate paths of development or are substantially similar. In addition, it considers the potential lessons from the experience of these countries.

1. Constitutional omnipotence in action: Hungary

After the collapse of the Central and Eastern European communist regimes, Hungary was long seen as a front-runner in the post-communist transition. This was based not only on the peaceful, negotiated democratization process, the successful building of democratic institutions and the clear commitment to European integration but also on the practice of pluralist democracy and the functioning of constitutional institutions during the 1990s and 2000s.

During and after the regime change in Hungary, the major political parties did not consider it risky to preserve the tradition of a flexible constitution. Given the flexibility of the emerging constitutional order, it seemed reasonable that Parliament should remain the exclusive constitution-making power, and, given the deep divisions between political parties, the two-thirds majority requirement seemed sufficient to protect the integrity of the constitution. The polarization between political parties was so strong in the two decades after the regime change that all attempts to adopt a new constitution failed, even when the left-liberal coalition government had a two-thirds parliamentary majority between 1994 and 1998. Notwithstanding, the coalition of Fidesz and its satellite party, the Christian Democratic People's Party, needed to win a supermajority only once to create a legal and political environment in which it could secure its long-term stay in power.[4] The 2010 parliamentary elections marked a turning point in the country's recent constitutional development, as the former parties, owing to the disproportional election system, acquired a constitution-making majority in Parliament.

1.1. Unbridled constitution-making and legislative power

The new government coalition considered its electoral success an unlimited mandate to adopt a new constitution and radically overhaul the entire legal system without the need for cooperation with opposition parties.[5] In fact, it immediately started to change the constitutional landscape of the country and has unscrupulously exploited its supermajority. Within less than a year of coming into power, it amended the old Constitution of 1949/89[6] 12 times. Subsequently, Parliament, after a rapid and non-

[4] The aspiration to exclusive power was not a sudden idea following an unexpected electoral success. As Viktor Orbán, the leader of the opposition at the time, said before the 2010 elections: '*There is a realistic possibility that the next fifteen to twenty years of Hungarian politics will not be defined by a dual power structure, which generates divisive, petty and unnecessary social consequences with constant disputes over values. Instead, a major governing party, a central political force will soon be created, which will be able to articulate national issues – and not in [...] constant debate, but by representing them in their own natural way*.' <http://2010-2015.miniszterelnok.hu/cikk/megorizni_a_letezes_magyar_minoseget> accessed 2 August 2023.

[5] See the political manifesto of the National Assembly adopted by the votes of the government parties' MPs. '[In t]he spring of 2010 [*the date of the parliamentary elections*] the Hungarian nation once again summoned its vitality and brought about another revolution in the voting booths'—Declaration on National Cooperation, 1/2010. (VI. 16.) OGY Politikai Nyilatkozat.

[6] Hungary was the only post-communist country in Central and Eastern Europe where, following the defeat of communist rule, no new constitution was adopted. However, during the period of democratic transition,

transparent preparatory phase, adopted a new constitution in April 2011, named the 'Fundamental Law', with the votes of the government party MPs. However, the era of constitution-making was not finished; in recent years, the government majority has amended the Fundamental Law no less than 11 times due to the fact that the government parties obtained a two-thirds majority in the parliamentary elections in 2014, 2018 and 2022, and with a short interruption between 2015 and 2018, preserved their constitution-making majority throughout the whole period. The permanent constitutional changes that have always served the government's current political interests without consultation with the opposition show a lack of consideration for the need for the separation of powers.

At first glance, this was not self-evident. The Fundamental Law of 2011 has not brought about significant changes in the institutional system of public power. The major constitutional rules governing the branches of power remained almost unchanged. In addition, while the principle of the separation of powers was not explicitly mentioned in the previous constitutional text, it was included in the 2011 Fundamental Law.[7] Nevertheless, the subsequent laws governing the legal status of power institutions resulted in increasingly minor changes, which, together with the informal practice of their management, have greatly influenced and reshaped their functioning.

1.2. Moderate institutional changes

When examining the whole process of authoritarian transition in Hungary, despite the government's parliamentary supermajority and its unscrupulous application, it is impossible to find a single concrete constitutional change, law or other measure that could be considered a decisive step in the dismantling of the rule of law and establishment of a monolithic exercise of power. The process has been a long one, and the cumulative effect of a number of individual measures has created a system in which there is no longer any institutional counterweight to the central political will. However, these small changes have affected all branches of power.

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the communist constitution, originally adopted as Act XX of 1949, was substantially revised by a constitutional amendment (Act XXXI of 1989).

[7] 'The functioning of the Hungarian State shall be based on the principle of the division of powers.'—2011 Fundamental Law of Hungary, Article C) (1).

In essence, the centralization and acceleration of government decision-making have been accomplished without hindrance, which can hardly be challenged from a constitutional point of view, as the executive power has a broad constitutional mandate to determine its own organizational structure.[8]

Given the overwhelming parliamentary majority of the governing parties and the traditionally strong factional discipline in right-wing parties, there was no problem in neutralising the unicameral National Assembly. As a result, the legislature has become an obedient tool of the government.[9] While this has been achieved primarily through political means, the successive amendments of parliamentary standing orders have sped up parliamentary decision-making. Thus, the newly established Legislative Committee has become a key player in the legislative process and a watchdog for the parliamentary majority. The National Assembly is now largely unable to hold second readings of bills (which are debated in detail only in the designated committees) and may only instigate 'block voting', i.e. can only pass or reject whole bills.[10]

As for the politically neutral, countervailing institutions, the first target of the reforms was the Constitutional Court, which in the past had considerable authority as the primary counterweight to the legislative and executive powers. The abolition of the body would obviously have caused a significant international debacle, so it was more expedient to occupy it. There were several means of doing this.[11]

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[8] 'The Government shall be the principal organ of public administration; it may establish organs of state administration as provided for by an Act.'—Art. 15 (2) of the Fundamental Law.

[9] The central government's attitude towards the separation of powers is well illustrated by a 2019 speech given by László Kövér, Speaker of the National Assembly at the National University of Public Service founded by the Orbán government, during which he explained that '*The system of checks and balances, I don't know what you're learning, but it's nonsense, forget it, it has nothing to do with the rule of law or democracy (...) the problem is that some people take seriously the need to put the brakes on a government that has emerged from the democratic expression of will.*' <https://index.hu/belfold/2019/10/23/kover_laszlo_valasztas_ellenzek_rendszervaltas> accessed 2 August 2023.

[10] See in detail Zoltán Szente, *The Twilight of Parliament: Parliamentary Law and Practice in Hungary in Populist Times*, 1 INTERNATIONAL JOURNAL OF PARLIAMENTARY STUDIES (2021) 127.

[11] From the vast literature of this process, see Zoltán Szente, *The Decline of Constitutional Review in Hungary – Towards a Partisan Constitutional Court?*, in CHALLENGES AND PITFALLS, supra note 2; Nóra Chronowski, *The post-2010 'Democratic Rule of Law' practice of the Hungarian Constitutional Court under a rule by law governance*, 61(2) HUNGARIAN JOURNAL OF LEGAL STUDIES (2020) 136, 140–5; Fruzsina Gárdos-Orosz and Kinga Zakariás, *Organisational, functional and procedural changes of the Hungarian Constitutional Court 1990–2020*, in Fruzsina Gárdos-Orosz and Kinga Zakariás (eds.), THE MAIN LINES OF

Shortly after the coalition of Fidesz and KDNP came to power, one of the first important measures of the new majority was to change the way constitutional judges are nominated. Whereas previously the parliamentary committee that nominated judges was formed on a parity basis and could only nominate on a consensual basis, under the new rules, the composition of the committee came to reflect the power balance of the parliament as a whole, leading to a two-thirds majority of the governing parties in the committee, allowing the government to nominate candidates without the opposition's consent. As a result, since 2010, only candidates from the governing parties have been elected as constitutional judges. The government majority, however, did not wait until the term of the old judges expired; it created a majority within the body by increasing the number of judges on the Court from 11 to 15 and naturally elected its own loyalists to fill the new seats.

In addition, the new constitution has suspended constitutional review of all public finance legislation unless the right to life and human dignity, to the protection of personal data, freedom of thought, conscience and religion, and rights related to Hungarian citizenship are violated by such laws.[12] A further means of neutralising the once vigorously activist Constitutional Court was to shift the focus of its activities from the review of legislation to the control of final judicial decisions: while engagement in the constitutional review of laws was restricted (e.g. by abolishing the so-called *actio popularis*), a German-style individual constitutional complaint was introduced, and today most decisions of the Court are made through such a procedure.[13]

Gaining influence over the judiciary was a more complex and lengthier process for the government. Although judicial independence is also recognised in the 2011 Fundamental Law, sub-constitutional legislation has created a regulatory framework that has given the executive considerable influence over the functioning of the courts. Significant attempts to achieve this took place soon after the change of government in 2010. For example, on

THE JURISPRUDENCE OF THE HUNGARIAN CONSTITUTIONAL COURT: 30 CASE STUDIES FROM THE 30 YEARS OF THE CONSTITUTIONAL COURT (1990 TO 2020) (Nomos: Baden-Baden, 2022) 17.

[12] For details, see Nóra Chronowski and Fruzsina Gárdos-Orosz, *The Hungarian Constitutional Court and the Financial Crisis*, 58(2) HUNGARIAN JOURNAL OF LEGAL STUDIES (2017) 139, 143–7.

[13] Fruzsina Gárdos-Orosz, *The Hungarian Constitutional Court in Transition – from Actio Popularis to Constitutional Complaint*, 53(4) HUNGARIAN JOURNAL OF LEGAL STUDIES (2012) 302.

the pretext of renaming the Supreme Court the *Kúria* (an old name for the highest judicial body), the mandate of the Chief Justice, who had criticised the government's judicial reform, was prematurely terminated, and although this move was later declared by the European Court of Human Rights as violating the European Convention on Human Rights,[14] the former Chief Justice did not regain his position. Another important step was the lowering of the mandatory retirement age for judges from 70 to 62.[15] In a single year – 2012 – 274 judges, almost ten per cent of the judiciary, were removed from their posts. The turnover of senior judicial positions was even greater, as they were mainly occupied by older judges. Despite the fact that the law was later deemed to be incompatible with EU law by the European Court of Justice[16] and even the Hungarian Constitutional Court declared it unconstitutional,[17] these judges have not been reinstated but were compensated through individual agreements. In 2012, the central administration of the courts was also changed. In fact, all administrative powers were concentrated in the hands of the president of the newly established National Office of the Judiciary (NOJ), who is elected from among the judges by the National Assembly for nine years.

There were also apparently no significant changes to the status of ombudsmen. Whereas previously there were four parliamentary ombudsmen (in addition to a general commissioner, there were three specialised ombudsmen responsible for data protection and freedom of information, minority rights, and the rights of future generations), since 2011 the Commissioner for Fundamental Rights has carried out the functions of the three former ombudsmen, while the issues of data protection and freedom of information have come under the mandate of a so-called autonomous administrative agency. The latter restructuring also provided an opportunity for the government to prematurely replace the former independent data protection ombudsman with a politically loyal person appointed to an extended (nine-year) term of office.

The 2011 Fundamental Law also changed the legal status of the so-called Budget Council. This body, which has been in operation since 2009, was initially set up as an advisory

[14] ECtHR, 23 June 2016, *Baka v. Hungary*, App no 20261/12.
[15] Act CLXII of 2011 on the Legal Status and Remuneration of Judges.
[16] ECJ, 6 November 2012, *European Commission v. Hungary*, Case C-286/12.
[17] Decision 33/2012. (VII. 17.) of the Constitutional Court.

body to Parliament on budgetary matters, but under the new rules, it has been given absolute veto power over the Budget Law. Under the new regulation, if the Budget Council does not approve the annual budget adopted by Parliament by 31 March of the respective year, the head of state can dissolve the National Assembly. The three-member Council has been composed exclusively of Fidesz politicians and candidates since 2011 (its president is appointed by the President of the Republic for a six-year term; the other two members are the incumbent governors of the National Bank of Hungary and the President of the State Audit Office), so that the Council can, in theory, counterbalance the National Assembly with an opposing majority in relation to one of the most important legislative matters, budgetary power.[18]

It is also important to note that the long-standing supermajority has constantly allowed the government to amend any legislation in line with the interests of the day (the legal status of constitutional bodies is governed by so-called 'cardinal laws' whose adoption or modification require a two-thirds majority of MPs).

1.3. Informal and indirect instruments

Informal processes and personal dependencies have been more important than formal institutional changes[19] in the arrangement of the division of power through which the executive has been able to maintain continuous political control over political institutions and non-political public bodies.

The Hungarian right-wing parties are highly centralised and have traditionally had very strong factional discipline. Hence, the Parliament is the 'legitimation machine' of the government without any political will of its own or any real control over the executive.

Since the President of the Republic is elected by Parliament, the office of Head of State is part of the political spoils system, despite the fact that this should be a neutral institution above the political parties in constitutional terms. Since 2010, Fidesz has chosen a head

[18] Zoltán Szente, CONSTITUTIONAL LAW IN HUNGARY (Wolters Kluwer: Alphen aan den Rijn, 2022) 227–8.
[19] For a general overview on the informal elements of constitutional changes in Hungary, see András Jakab, *Informal Institutional Elements as Both Preconditions and Consequences of Effective Formal Legal Rules: The Failure of Constitutional Institution Building in Hungary*, 68(4) THE AMERICAN JOURNAL OF COMPARATIVE LAW (2020) 760.

of state from among its own leading politicians, who proved to be politically partisan figures in this post.[20]

Notwithstanding this, the capture of neutral, controlling institutions was most important in terms of the centralization and monopolization of governmental power. The continuous two-thirds majority in Parliament has given the government the opportunity to appoint loyalists to the Constitutional Court, the National Election Commission, the Media Council, the *Kúria* (the supreme court), the National Office of the Judiciary, the Prosecutor Service, the State Audit Office, the National Bank of Hungary and supposedly autonomous state administration bodies (such as the Economic Competition Authority, the National Media and Telecommunications Authority and the Data Protection Authority), and to choose its own candidates for the Commissioner for Fundamental Rights.

Occupying independent institutions with its own people to counterbalance the legislature and the executive was so important to the ruling coalition that it often used so-called 'personalised laws' (statutes tailored to individuals) or, as the example of the removal of the president of the Supreme Court and the data protection ombudsman shows, openly illegal solutions.

It is particularly worrying from the perspective of the separation of powers that there are frequent movements of personnel between the leading positions of the different branches of power. Thus, for example, an omnibus law of 2019 made it possible for members of the Constitutional Court to be appointed as judges by the President of the Republic at their request, regardless of whether they fulfil the conditions for appointment as judges.[21] This rule paved the way for the election in December 2020 of a former constitutional judge loyal to the governing parties (András Varga Zs.) who had never served as an ordinary

[20] The incumbent President of the Republic, Katalin Novák was Minister without Portfolio for Families (2020–2021) and one of the vice-presidents of Fidesz (2017-2021), her predecessor, János Áder (2012-2022) was a founding member of the party, while Pál Schmitt (2010-2012) was previously a MEP for the party.
[21] Act CXXVII of 2019.

judge before as the chief justice.[22] After 2019, the legislation also allowed several former senior government officials to become (administrative) judges. In particular, the Constitutional Court has absorbed former senior officials from other branches of government, resulting in a number of former MPs, ministers and senior civil servants of the successive Orbán governments entering the body.

These personnel changes have had the expected effect. As several empirical analyses have shown, the bodies' practices have changed significantly, and the government has been the main beneficiary of these changes.[23]

1.4. The final blow to the separation of powers: the perpetuated and exceptional power of the government

The process of dismantling the system of separation of powers culminated in the introduction of the exceptional power of the government. Due to the Covid-19 pandemic, a special legal order (a so-called 'state of danger') was first introduced in March 2020 and extended twice after. In the meantime, a quasi state of emergency was institutionalised at the sub-constitutional level, which allows the government to grant itself almost the same exceptional powers in a health emergency as it can exercise in a constitutional state of danger without parliamentary authorization. When the pandemic-related situation no longer justified the maintenance of exceptional powers, the government majority, through a constitutional amendment, extended the possibility of declaring a state of danger to include the existence of 'armed conflict, state of war or humanitarian situation in a neighbouring country'.[24] As a result, a state of exception has been in place in Hungary for over three and a half years.

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[22] Hungarian Helsinki Committee, The New President of the Kúria: A Potential Transmission Belt of the Executive Within the Hungarian Judiciary, <https://helsinki.hu/wp-content/uploads/The_New_President_of_the_Kuria_20201022.pdf> accessed 2 August 2023.
[23] See e.g. Gábor Halmai, *A Coup Against Constitutional Democracy: The Case of Hungary*, in Mark A. Graber, Sanford Levinson and Mark Tushnet (eds.), CONSTITUTIONAL DEMOCRACY IN CRISIS? (Oxford University Press: New York, 2018) 243; Zoltán Szente, *The Political Orientation of the Members of the Hungarian Constitutional Court between 2010 and 2014*, 1(1) CONSTITUTIONAL STUDIES (2016) 123; Nóra Chronowski, Ágnes Kovács, Zsolt Körtvélyesi, Gábor Mészáros, *The Hungarian Constitutional Court and the Abusive Constitutionalism*, 9(7) MTA LAW WORKING PAPERS (2022) 1, <https://jog.tk.hu/mtalwp/the-hungarian-constitutional-court-and-the-abusive-constitutionalism> accessed 2 August 2023.
[24] Eleventh Amendment to the Fundamental Law of Hungary (24 May 2022).

Although, according to the Fundamental Law, the operation of the Constitutional Court cannot be suspended in times of special legal order, and the National Assembly should supervise the emergency decrees of the government, the Court has shown substantial deference, while Parliament has relinquished control of the government and, through successive acts of authorization, approved not only all emergency decrees already enacted but given prior consent to any future government decree.[25] The government has boldly exercised this essentially unlimited authority and unchecked power: it has implemented several different policies, made a number of decisions that have nothing to do with the fight against the pandemic or the war between Russia and Ukraine, and has repeatedly amended the budget law by decree. Using more than 600 emergency decrees and several budget provisions since the declaration of the state of emergency in March 2020, the government has taken over many of the functions of parliament and, by neutralising the Constitutional Court and other controlling bodies, exercises essentially unlimited power.

2. Hacking the constitutional system: Poland

Much like Hungary, Poland was once a champion of democratic transition. Often defined as a benchmark for other countries in the region, Poland picked up democratic mores at an impressive pace: its path was marked by joining the Council of Europe and ratifying the European Convention on Human Rights in the early 1990s, adopting a modern and democratic constitution in 1997, and becoming a Member State of the European Union by 2004. But sometimes well-behaved children grow into rebellious adolescents, especially when their role models are more experienced mischief-makers. By the mid-2010s, Hungary was certainly one such character.

In the parliamentary elections in Poland in October 2015, the right-wing party named Law and Justice (PiS) obtained 37.58% of the vote, which unexpectedly translated into 235 seats in the 460-member Sejm (lower house of parliament) and brought an abrupt end to eight years of a coalition between the moderately conservative Civil Platform (PO)

[25] Csaba Győry, Nyasha Weinberg, Em*ergency powers in a hybrid regime: the case of Hungary*, 8(3) THEORY AND PRACTICE OF LEGISLATION (2020) 329; Fruzsina Gárdos-Orosz and Zoltán Szente, *Using Emergency Powers in Hungary: Against the Pandemic and/or Democracy?*, in Matthias C. Ketteman and Konrad Lachmayer (eds.), PANDEMOCRACY IN EUROPE: POWER, PARLIAMENTS AND PEOPLE IN TIMES OF COVID-19 (Hart Publishing: Oxford, New York, 2021) 155.

and the Polish Peasant Party (PSL). The magnitude of this victory came as a surprise as PiS owed it, at least to some degree, to coincidence; above all to the failure of the United Left, which missed the electoral threshold by a hair (it received 7.55%, while the required threshold for party coalitions was 8%) and a significant increase in the number of wasted votes.[26] As a result, the winning party managed to secure an absolute majority and form a single-party government, an unprecedented event in Polish history after the fall of communism. For the first time, the winner did not have to share power with a junior coalition partner. And it was soon to become clear that it had no intention of sharing power at all.

As in Hungary, the new government immediately started to dismantle the principles of liberal democracy as soon as it came to power. In the first weeks after the elections, the Constitutional Tribunal was packed with new members, in breach of the constitution, and its operating rules were then changed in such a way as to prevent it from exercising effective constitutional review. This was soon followed by the takeover of public radio and television, the hijacking of the judicial selection process, the politicization of the judiciary, and the legal battle over the Supreme Court.

The writing had been on the wall. As early as 2004, the year Poland joined the European Union, the leader of a recently formed right-wing party gave a press interview in which he shared his criticism of the principle of the division of powers. That leader was Jarosław Kaczyński, the party's name was Law and Justice, and his words were as follows: 'There are more important things than the division of power. Today there is a doctrine in Poland that even if terrorists take over Warsaw, we will not violate the division of power. This way of thinking must finally be done away with.'[27]

No terrorists have been seen in Warsaw, yet in a nationwide poll conducted in 2018, when people were asked whether power-sharing was still in force in Poland, as many as 40%

[26] For a more detailed discussion, see Radosław Markowski, *The Polish parliamentary election of 2015: a free and fair election that results in unfair political consequences*, 39(6) WEST EUROPEAN POLITICS (2016) 1311.

[27] <https://www.polityka.pl/tygodnikpolityka/klasykipolityki/1786058,1,prawo-i-piesc.read> accessed 2 August 2023.

answered in the negative.[28] The new government has brought about radical change in the power-sharing system, cemented by another victory in the 2019 parliamentary elections, in which it received as much as 43.59% of the vote. In 2020, at the onset of the pandemic, it secured re-election for President Andrzej Duda. Interestingly, what has been changed is indeed the 'way of thinking' and not the body of the constitution, for the ruling party did not have enough seats in parliament to pass a single constitutional amendment. The Polish Constitution of 1997 still assumes—from the current perspective, with a pinch of excessive optimism—that '[t]he system of government of the Republic of Poland shall be based on the separation of and balance between the legislative, executive, and judicial powers' (Article 10.1). The dismantling of power-sharing thus had to be carried out without formal constitutional change.

2.1. Rapid advances in an unconstitutional revolution

As early as the first weeks after the 2015 elections, the winner successfully packed the Constitutional Tribunal by replacing five members elected by the former Sejm with its own candidates. The controversy over the previously elected members was not entirely unfounded: a few days after the replacement, the Constitutional Tribunal decided that two out of five judges named at the very end of the previous parliamentary term were indeed elected to seats that should only be filled by the new Sejm, but the election of other three was legitimate.[29] Thus, the new majority was entitled to fill two seats, not five. The three persons who effectively assumed seats which had been taken at the time of their election are often referred to as 'duplicate judges' in public debate, and their status, as well as the legitimacy of any judicial decision in which they are involved, is strongly disputed.[30] Then, as the Tribunal sought to resist the attack from the parliamentary

[28] <https://www.rp.pl/polityka/art1828721-sondaz-prezes-pis-sprawuje-wladze-absolutna-i-totalitarna> accessed 2 August 2023.

[29] Accordingly, Wojciech Sadurski called it 'a two-fifths breach'; Wojciech Sadurski, POLAND'S CONSTITUTIONAL BREAKDOWN (Oxford University Press: Oxford, 2019) 62.

[30] The European Court of Human Rights found that their election had been 'vitiated by grave irregularities' (ECtHR, 7 May 2021, *Xero Flor w Polsce sp. z o.o. v. Poland*, App no. 4907/18), which made the Constitutional Tribunal respond by declaring Article 6 ECHR unconstitutional insofar as it allowed for the assessment of the correctness of appointments to the Tribunal; see Adam Ploszka, *It Never Rains but it Pours. The Polish Constitutional Tribunal Declares the European Convention on Human Rights Unconstitutional*, 15(1) HAGUE JOURNAL ON THE RULE OF LAW (2022) 51. Moreover, since 2015, two of three duplicate judges have deceased and the parliamentary majority has elected new members to their seats, thus further complicating what was already complicated.

majority, a number of amendments to its operating rules were introduced. The amendments were clearly aimed at obstructing constitutional review and disempowering the Tribunal,[31] even though the official argument was that they were designed to remedy obvious procedural deficiencies. But when the 'new' judges became the majority in the Tribunal and its new president—entirely deferential to the will of the government—was elected, the previous procedures were smoothly reinstated, as if they had never been criticised.[32]

The attack on the judicial branch did not end with that on the Constitutional Court. Soon, under a weak pretext, the term of office of the National Council of the Judiciary (KRS), the body requesting the President to appoint ordinary judges and charged with the constitutional task of safeguarding judicial independence, was terminated. Then a law was passed through Parliament that changed how members of the Council are appointed: judges still have a majority on the Council, as required by the constitution, but they are now elected directly by parliamentary majority. This new selection process was generally boycotted by the judicial branch, yet just about enough applicants agreed to join the renewed Council. Since then, the Council has been involved in appointing so many new judges that it is difficult to imagine that all of these appointments will one day be considered invalid.

The protests from the recalcitrant judiciary were well remembered by the parliamentary majority. The judicial (anti-)reform launched in 2017 has significantly limited judicial independence through the premature replacement of some members of the Supreme Court, the packing of the Court with judges appointed at the request of the new National

[31] They included, inter alia: the referral of cases to the full bench upon request of three judges without enabling the other judges to refuse such a transfer; the requirement that the Prosecutor General be present in all cases decided in full bench, with the effect of blocking the proceedings in case of absence; the rule that the hearing of cases should be scheduled in the order in which cases are received by the Tribunal, thus depriving the Tribunal of the power to quickly decide urgent matters; the obligation to hold a hearing no earlier than 30 days after notification; the obligatory postponement of cases at the request of four judges. For further details, see the opinion 860/2016 of the Venice Commission, 14–15 October 2016, CDL-AD(2016)026.

[32] Lech Garlicki argued that two basic techniques were used against the Tribunal: 'absorption' and 'neutralisation', or 'disablement'; see Lech Garlicki, *Constitutional Court and Politics: The Polish Crisis*, in Christine Landfried (ed.), JUDICIAL POWER: HOW CONSTITUTIONAL COURTS AFFECT POLITICAL TRANSFORMATIONS (Cambridge University Press: Cambridge, 2019) 141, 159.

Council of the Judiciary, and the new system of disciplinary sanctions for judges.[33] This last development sparked perhaps the greatest outcry, as it undermined the very core of judicial independence: a judge cannot be held accountable for the content of their judicial decisions.[34]

In 2016, some of the competences of the National Broadcasting Council (KRRiT), the national media authority, were taken away and assigned to the newly established National Media Council (RMN). The parliamentary majority enables the government to directly influence the Council, which has the power to appoint and dismiss the management and supervisory bodies of public media.[35] This has led to the extreme politicization of the sector.[36]

2.2. Distrust of independent bodies

Sometimes a good metaphor may be worth more than a thousand words. Late Ludwik Dorn, former Deputy Prime Minister in the Law and Justice government and a former member of the party leadership—often regarded as one of the leading intellectuals of the right and with a well-deserved reputation for his sharp insight—quit the party after an

[33] For details see, for example, Fryderyk Zoll & Leah Wortham, *Judicial Independence and Accountability: Withstanding Political Stress in Poland*, 42(3) FORDHAM INTERNATIONAL LAW JOURNAL (2019) 875; Małgorzata Gersdorf and Mateusz Pilich, *Judges and Representatives of the People: a Polish Perspective*, 16(3) EUROPEAN CONSTITUTIONAL LAW REVIEW (2020) 345; Jakub Kościerzyński (ed.), JUSTICE UNDER PRESSURE – REPRESSIONS AS A MEANS OF ATTEMPTING TO TAKE CONTROL OVER THE JUDICIARY AND THE PROSECUTION IN POLAND. YEARS 2015–2019, <https://www.iustitia.pl/en/activity/informations/3724-report-justice-under-pressure-years-2015-2019> accessed 2 August 2023. For a comparison of the Hungarian and Polish judicial reforms, see Zoltán Szente, *Subverting Judicial Independence in the New Authoritarian Regimes: Comparing Polish and Hungarian Judicial Reforms*, in Martin Belov (ed.), THE ROLE OF COURTS IN CONTEMPORARY LEGAL ORDERS (Eleven International Publishing: Den Haag, 2019) 341.

[34] See notably ECJ, 15 July 2021, *European Commission v. Republic of Poland*, Case C-791/19, ECLI:EU:C:2021:596.

[35] Adam Bodnar, *Protection of Human Rights after the Constitutional Crisis in Poland*, in Susanne Baer *et al.* (eds.), JAHRBUCH DES ÖFFENTLICHEN RECHTS DER GEGEGNWART, Neue Folge, Band 66 (Mohr Siebeck: Tübingen, 2018) 645; European Commission, *2020 Rule of Law Report Country Chapter on the rule of law situation in Poland*, 13, <https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1602579986149&uri=CELEX%3A52020SC0320> accessed 2 August 2023.

[36] Szymon Ananicz, *The politicisation of the Polish National Broadcasting Council (KRRiT): a new front in Poland's rule-of-law conflict with the European Union? Commentary*, Stefan Batory Foundation, 29 July 2021, <https://www.batory.org.pl/publikacja/the-politicisation-of-the-polish-national-broadcasting-council-krrit-a-new-front-in-polands-rule-of-law-conflict-with-the-eu> accessed 2 August 2023; Paweł Surowiec, Magdalena Kania-Lundholm, Małgorzata Winiarska-Brodowska, *Towards illiberal conditioning? New politics of media regulations in Poland (2015–2018)*, 36(1) EAST EUROPEAN POLITICS (2020) 27.

open conflict with Jarosław Kaczyński. In 2019, when asked about the tactics of Polish populism, Dorn compared his ex-party to a protozoan. This is how he explained this rather unexpected association: '[A protozoan] pounces on and absorbs everything it encounters, but it has no structure beyond the cell nucleus, which is Jarosław Kaczyński. A protozoan is driven by a single internal imperative: to spill, to grow, to destroy everything that impedes its spilling. And from this perspective, the abolition of the division of power is completely understandable, because these were the barriers that stopped the slimy creature from spilling over.' In the same interview, Dorn added that therein lay the difference between Hungary and Poland: the former dismantled the separation of powers in order to create a new oligarchy and a new media order, whereas the latter did it for no reason.[37]

This characterization, which paints the winning party as a *blob* animated by automatism but ultimately lacking any tactics or purpose, is only partially accurate. It is true that the expansion of party influence has undermined the division of power. It is also true that this new system of government remains much less consolidated than in Hungary, mainly because of a relatively powerful opposition and independent media, which tend to be critical of the government. But it would be misguided to assume that power-sharing was being dismantled in a disorderly or spontaneous manner. The targets were selected in a premeditated manner, and the driving force behind the developments is populist distrust of a hostile environment.

The primary target was the Constitutional Tribunal. As early as under the first Law and Justice government (2005–2007), an episode too easily forgotten, a draft law was drawn up to constrain the Tribunal by amending its operating rules. Back then, these intentions never became reality, as Kaczyński's government eventually collapsed, and snap elections were called. But the party leadership remembered. In that period, the Constitutional Tribunal proved that it would not back down from impeding reforms that were of particular importance to Law and Justice, including the process of exposing secret police agents from the communist era who remained in public service. It was then that the Law

[37] *Ludwik Dorn: Widzę PiS jako pierwotniaka. Ma parzydełka, nibynóżki, ale kąsać nie potrafi*, 5 August 2019, <https://wiadomosci.gazeta.pl/wiadomosci/7,53222,25058923,dorn-widze-pis-jako-pierwotniaka-ma-parzydelka-nibynozki.html> accessed 2 August 2023.

and Justice leadership coined the previously unknown word 'impossibilism' (or 'legal impossibilism'), a term used to denote a situation in which policymakers are unable to deliver even the most necessary legal reforms due to formal constraints imposed by constitutional case law, cumbersome procedures, and annoying objections from independent bodies. In Poland affected by impossibilism, they argued, the will of the democratic majority becomes less relevant than the imaginary obstacles multiplied by those who seek to usurp political power.[38] This criticism is only one step away from questioning the very essence of the division of powers: indeed, it is a vision that brings to mind Rousseau's general will rather than the legacy of Montesquieu.[39] And if one believes that no constitutional court is ever genuinely independent—that it is, in fact, the third chamber of parliament rather than a politically neutral court of law—it becomes clear that the *conditio sine qua non* for successful governance is that this chamber be brought under strict political supervision.[40]

Quite ironically, the prolonged battle with the Constitutional Tribunal in 2015 and 2016 only reaffirmed the parliamentary majority of their suspicion: any independent constitutional review would pose an unrelenting threat to the new government. And while the risk that the Tribunal could use its power to strike down new welfare benefits—a menace that the ruling party would use to mobilise its voters against the Tribunal—was never real, what was actually systematically struck down in that period were unconstitutional changes to laws concerning state bodies, including the operating rules

[38] On the roots, meaning and career of the concept of impossibilism, see Martin Krygier, *The Challenge of Institutionalisation: Post-Communist 'Transitions', Populism, and the Rule of Law*, 15(3) EUROPEAN CONSTITUTIONAL LAW REVIEW (2019) 544, 569–70; Paul Blokker, *Populist Counter-Constitutionalism, Conservatism, and Legal Fundamentalism*, 15(3) EUROPEAN CONSTITUTIONAL LAW REVIEW (2019), 519, 537–38; Sadurski, *supra* note 29, 172–73; Michał Krotoszyński, *From Legal Impossibilism to the Rule of Law Crisis: Transitional Justice and Polish Counter-Constitutionalism*, 2022, forthcoming in IMAGINE Paper No. 25 Workshop (*How Polish Constitutionalism Imagines Itself in Europe?*, iCourts Working Paper Series No. 304, dx.doi.org/10.2139/ssrn.4220914; Grzegorz Pożarlik, *(Momentarily) drifting into ideocracy in Central Europe: The case of Law and Justice and Fidesz*, in Joanna Sondel-Cedarmas and Francesco Berti (eds.), THE RIGHT-WING CRITIQUE OF EUROPE: NATIONALIST, SOVEREIGNIST AND RIGHT-WING POPULIST ATTITUDES TO THE EU (Routledge: Abingdon, New York, 2022) 202, 207; Ben Stanley and Mikołaj Cześnik, *Populism in Poland*, in Daniel Stockemer (ed.), POPULISM AROUND THE WORLD: A COMPARATIVE PERSPECTIVE (Springer: Cham, 2019) 67, 79; Zoll and Wortham, *supra* note 33, 902–3.

[39] Jacques Rupnik, *Surging Illiberalism in the East*, 27(4) JOURNAL OF DEMOCRACY (2016) 77, 80.

[40] See e.g. <https://kresy.pl/wydarzenia/kaczynski-trybunal-to-organ-partyjny-trzecia-izba-parlamentu-ktora-miala-blokowac-nasze-reformy> accessed 2 August 2023; <https://naszdziennik.pl/polska-kraj/147695,trybunal-konstytucyjny-to-trzecia-izba-parlamentu.html> accessed 2 August 2023.

of the Tribunal. This led to a particularly sharp crisis when the Tribunal refused to apply the new operating rules in proceedings that were to bring about an assessment of their constitutionality. In response, the government refused to publish the Tribunal's judgment, which had struck down the new rules as unconstitutional and argued that it was not even a judgment, but a ruling issued 'over coffee and cookies'.[41] In such circumstances, power-sharing would be a case of political naivety.

It was also for good reason that the public media were taken over at the very outset of populist rule. The relationship between Law and Justice and the media has never been an easy one: like many populists, the party leaders strongly believed that their image in the media was being distorted. The media is power, and the public broadcaster is supported with public money: why would anyone share power with their enemy and, on top of that, pay for slander? The decline of power-sharing in this area has similar roots to those found in the case of constitutional review: it is based on the belief that those who share power with their existential enemy in the name of abstract principles, such as the division of power, bring misfortune upon themselves for the sake of delusion. And let us not forget that the alternative is very tempting: a deferential Constitutional Tribunal can be used to rubber-stamp unconstitutional laws,[42] such as the new law on assemblies or the premature dissolution of the National Council of the Judiciary, and a subservient public media can shield the government from public criticism.

The attempts at neutralizing the Supreme Court and the ordinary courts were not as urgent because these organs do not have the tools to thwart the political agenda of the parliamentary majority immediately. Nevertheless, waiting too long would have come at a cost, for the courts proved that they can hinder the ability of the political branch to pursue their agenda: they can attempt to curb the President's power to pardon his political allies, challenge the validity of the appointment of the president of the Constitutional

[41] Mirosław Granat, *A Weapon the Government Can Control: Non-Final Final Judgments of the Polish Constitutional Court*, VerfBlog, 25 January 2021, <https://verfassungsblog.de/a-weapon-the-government-can-control> accessed 2 August 2023.

[42] On the idea of a rubber-stamp court, see Rosalind Dixon and David Landau, ABUSIVE CONSTITUTIONAL BORROWING: LEGAL GLOBALIZATION AND THE SUBVERSION OF LIBERAL DEMOCRACY (Oxford University Press: Oxford, 2021) 94–6; Michal Kovalčík, *The instrumental abuse of constitutional courts: how populists can use constitutional courts against the opposition*, 26(7) THE INTERNATIONAL JOURNAL OF HUMAN RIGHTS (2022) 1160, 1168–9.

Tribunal, and even resort to preliminary references to seek help from the Court of Justice of the European Union.

The refusal to share power with the parliamentary opposition had a somewhat different purpose. In the Polish constitutional system, the opposition has rather few legal tools at its disposal, especially in the absence of an independent Constitutional Tribunal and with the President siding openly with the government. The opposition, as long as its rights are respected, can initiate debates or delay the adoption of laws, but it does not have the last word on key issues. The ostentatious disregard for its rights in parliament is a way of communicating superiority and contempt rather than fighting a real threat to the rule of the parliamentary majority.

2.3. Backdoor constitutional amendments

The profoundness of the changes to the constitutional system introduced in Poland in recent years stands in stark contrast to the rather modest majority in Parliament secured by the populist party. Neither in 2015 nor in 2019 did Law and Justice even come close to having a constitution-making majority.[43] Having won an absolute majority in the Sejm, it had only ordinary legislation at its disposal and took advantage of this opportunity wherever it could.

Ordinary laws have been used to change the meaning of the Constitution, which was aptly labelled 'statutory anti-constitutionalism',[44] while the so-called 'constitutional-hostile interpretation'[45] has been applied for the same purpose. The latter is a kind of

[43] Nevertheless, there is circumstantial evidence that if the PiS-led government could have done so, it would have used the option of constitution-making. In 2010, the PiS updated its draft constitution intending 'to replace the liberal regime with a more authoritarian and community-oriented state'. See Przemysław Tacik, *Polish Constitutionalism under Populist Rule: A Revolution without a Revolution*, in Martin Belov (ed.), POPULIST CONSTITUTIONALISM AND ILLIBERAL DEMOCRACIES: BETWEEN CONSTITUTIONAL IMAGINATION, NORMATIVE ENTRENCHMENT AND POLITICAL REALITY (Intersentia: Cambridge, 2021) 188. In May 2016, President Andrzej Duda called for a thorough review of the Constitution of 1997, which he described as 'the constitution of a transitional period'; <https://m.prezydent.pl/en/news/art,155,the-225th-anniversary-of-the-may-3-constitution.html> accessed 2 August 2023. However, there has been no follow-up to this proposal.

[44] Maciej Bernatt and Michał Ziółkowski, *Statutory Anti-Constitutionalism*, 28(2) WASHINGTON INTERNATIONAL LAW JOURNAL (2019) 487–526.

[45] Monika Florczak-Wątor, *Constitutional change through unconstitutional interpretation*, in Martin Belov and Antoni Abat i Ninet (eds.), REVOLUTION, TRANSITION, MEMORY AND OBLIVION: REFLECTIONS ON CONSTITUTIONAL CHANGE (Edward Elgar Publishing: Cheltenham, Northampton, 2020) 211. See also Marcin

interpretation which 'aims to find a meaning of the constitution that is consistent with a statute. In this way, the understanding of the constitution is adapted to the needs of current policy', and it is 'intended to legitimise the policy of the parliamentary majority'.[46] It does not take long to realise that this openly reverses the logic that should underpin any constitutional democracy: it is ordinary legislation that is supposed to comply with the Constitution, not vice versa.

As a result of this logic, the constitutional change has been delivered through the backdoor. A profound constitutional transformation has been achieved not by way of traditional amendments but by hacking the system: through unauthorised and indirect access to the source code of checks and balances beyond the original programmer's control, which effectively removes the barriers between powers and thoroughly reconfigures the entire script.

Are there any positive sides to the Polish constitutional developments of recent years? There is a good deal of truth in the popular saying that necessity is the mother of invention. With a bit of irony, it might be fair to acknowledge the remarkable flourishing of risky legal interpretations that have stretched the textual meaning of the Constitution to its limits and thus revitalised the debate on the limits of constitutional interpretation.[47] After many years of business-as-usual scholarship, constitutional law has become exciting again!

But this unusual wake-up call is probably the only bright side of the decline of power sharing. The lack of mutual control of powers, the erosion of public trust in the courts and the Constitutional Tribunal, a number of bad precedents set for the future, and the politicization of constitutional interpretation—all of this will be extremely difficult to overcome.

Matczak, *The Clash of Powers in Poland's Rule of Law Crisis: Tools of Attack and Self-Defense,* 12(3) HAGUE JOURNAL ON THE RULE OF LAW (2020) 421, 434–5.

[46] Florczak-Wątor, *supra* note 45, 226.

[47] For examples, see Wojciech Brzozowski, *Whatever works: Constitutional interpretation in Poland in times of populism*, in Fruzsina Gárdos-Orosz and Zoltán Szente (eds.), POPULIST CHALLENGES TO CONSTITUTIONAL INTERPRETATION IN EUROPE AND BEYOND (Routledge: Abingdon, New York, 2021) 174.

3. Common challenges

Consolidated democracies face some shared challenges to the classical approach of the separation of powers, such as the rise of the administrative state, the emergence of judicial supremacy, and multilevel constitutionalism. Are these also present on the trajectory towards authoritarianism? We believe that Hungary and Poland are not primarily facing the same challenges that emerge in consolidated democracies. Some of them are also present, but in different contexts and together with some other problems.

The rise of the administrative state as a modern threat to the separation of powers is not really typical of these countries. If one accepts that the role of the legislature and the independent, controlling institutions have decreased in both countries, then it could be concluded that the executive power has been strengthened. However, the administrative state mechanism implements the political will of the parties in government just like the other branches of power. In other words, just because the Hungarian National Assembly and the Polish Sejm do not exercise real and effective control over the government, it does not follow that the central executive bodies have acquired significant independent power, for the power has not simply shifted from one branch to another. Instead, both the parliamentary majority and executive agencies are playing on the same team, remain in the hands of the same political party, and serve to push through its agenda. This makes them act as if they formed a single branch.[48] By way of example, if government bills are tabled by individual MPs, this is not done to humiliate Parliament and demonstrate the supremacy of the government but simply to avoid compulsory consultations that could delay the adoption of new laws. Only the parliamentary opposition could be a counterbalance, but it has been marginalized in both countries.

As for the threat of judicial supremacy, the main problem in Hungary and Poland is not to the government by the judiciary but the inability of the constitutional courts and the higher courts to keep public power under legal control. If the so-called juristocracy[49] is an

[48] Ryszard Piotrowski, *Separation of Powers, Checks and Balances, and the Limits of Popular Sovereignty: Rethinking the Polish Experience*, 79 STUDIA IURIDICA (2019) 78, 86.
[49] See in general Ran Hirschl, *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism* (Harvard University Press: Cambridge, London, 2007); for Hungary: Béla Pokol, *Juristocracy: Trends and Version* (Századvég: Budapest, 2021).

issue at all, it is due to the occasional abuse of power by the captured constitutional courts: both the Hungarian Constitutional Court and the Polish Constitutional Tribunal are so keen to help the government that they often reinterpret specific substantive constitutional concepts, or act beyond their powers.[50] The judicial reforms that were introduced just recently in both countries to strengthen the independence of the courts in response to the demands of the European Union point to the same thing, showing that the main problem is not the predominance of judicial power but its excessive limitation.

Multilevel constitutionalism has brought about many conflicts in these countries. Clearly, reliance on the idea of national sovereignty is the key to understanding what has happened in Budapest and Warsaw. It is very typical for populists in Hungary and Poland, and across Europe[51], to fear the loss of sovereignty. The advancement of European integration represents an existential threat to the world of those who fear any transfer of power abroad, as it implies a gradual loss of control over the process of governance. This is why the EU is being cast in this play as a looming peril to the rule of the people.[52]

This can be illustrated by a number of examples in both countries. In Hungary, the captured Constitutional Court discovered the concept of 'constitutional identity'[53] in 2016 to support the government's anti-migrant and anti-EU campaign, which sharply opposed the refugee policy of the European Union. This revelation was necessary because the government lost its constitution-making majority for a short time, and an attempt to adopt a constitutional amendment on constitutional identity was defeated and a national referendum on it was invalidated. In this decision, the Court, interpreting the so-called EU clause of the Fundamental Law,[54] reserved the power to consider whether the joint

[50] See, e.g. for Hungary, Fruzsina Gárdos-Orosz, *Constitutional Interpretation Under the New Fundamental Law of Hungary*, in POPULIST CHALLENGES, *supra* note 47. For Poland, see Wojciech Brzozowski, *Can the Constitutional Court Accelerate Democratic Backsliding? Lessons from the Polish Experience*, in Martin Belov (ed.), THE ROLE OF COURTS IN CONTEMPORARY LEGAL ORDERS (Eleven International Publishing: Den Haag, 2019) 371.

[51] See e.g. Arthur Borriello and Nathalie Brack, *'I want my sovereignty back!' A comparative analysis of the populist discourses of Podemos, the 5 Star Movement, the FN and UKIP during the economic and migration crises*, 41(7) JOURNAL OF EUROPEAN INTEGRATION (2019) 833.

[52] Robert Csehi and Edit Zgut, *'We won't let Brussels dictate us': Eurosceptic populism in Hungary and Poland*, 22(1) EUROPEAN POLITICS AND SOCIETY (2021) 53.

[53] Decision 22/2016. (XII. 5.) of the Constitutional Court. <http://public.mkab.hu/dev/dontesek.nsf/0/1361afa3cea26b84c1257f10005dd958/$FILE/EN_22_2016.pdf> accessed 2 August 2023.

[54] Art. E of the Fundamental Law.

exercise of powers between Hungary and the EU institutions violates Hungary's sovereignty and self-identity based on its 'historical constitution' (the unwritten constitution in force before the Second World War). The Court said that for this purpose, it may carry out so-called 'sovereignty control' on the one hand and 'identity control' on the other. It is to be noted that when the government regained the two-thirds majority, constitutional identity was built into the text of the Fundamental Law by the Seventh Amendment in 2018.

Constitutional identity is just one tool in the legal and political war Hungary has been waging with the European Union since 2018. In that year, at the initiative of the European Parliament, a procedure under Article 7 of the Treaty on the European Union was launched to investigate the clear risk of a serious breach of EU values contained in Article 2. The European Commission has painted a negative picture of the state of the rule of law in its consecutive annual reports under the European Rule of Law mechanism, which was introduced in 2020. Then, under the so-called conditionality procedure, in 2022, the EU suspended part of the recovery fund payments to Hungary and made them subject to certain conditions. However, the fulfilment of these conditions seems instead to be contributing to the preservation of the institutional relations already in place. Overall, these procedures have not brought about any positive change.

In respect of Poland, the EU bodies have acted similarly: a procedure under Article 7 of the Treaty on European Union was launched, and the payment of recovery funds was made contingent upon meeting several 'milestones' agreed between the European Commission and the Polish government. These milestones, which are necessary for the funds to be unlocked, include dismantling the infamous Disciplinary Chamber of the Supreme Court, reforming the broader disciplinary system for judges, and reinstating unlawfully dismissed judges.[55] The financial incentive has put the Polish government in a very uncomfortable position: the alternatives now seem to be between saving the national economy or keeping a grip on the judiciary, and in an election year, it is no easy matter to justify the latter choice at the expense of the former. So far, the government's

[55] *Poland and EU have agreed "milestones" to unblock funds, says Polish government*, Notes from Poland, 13 May 2022, <https://notesfrompoland.com/2022/05/13/poland-and-eu-have-agreed-milestones-to-unblock-funds-says-polish-government> accessed 2 August 2023.

strategy has been to navigate between a declared willingness to cooperate, as evidenced by the dismantling of the Disciplinary Chamber,[56] and an actual unwillingness to roll back the reforms. The situation of the government is further complicated by the reluctance of the president, who has recently complained that 'too much goodwill' is being shown towards the EU in this respect.[57]

Overall, this European oversight, when combined with the financial argument, is proving to be a surprisingly effective barrier to the further hijacking of the Polish judiciary. While it may not have been possible to undo most of the damage, the takeover of the judiciary and the dismantling of power-sharing have clearly been halted or at least slowed down.

All of this is sometimes prompting the ruling party, perhaps in despair, to frame the dispute over the rule of law as a dispute over the right to decide one's own affairs in one's own home. In this regard, the government can rely on its faithful ally: the captured Constitutional Tribunal. The Tribunal, which went as far as to declare unconstitutional certain articles of the European treaties[58] and even the European Convention on Human Rights,[59] defends its monopoly with particular ferocity. In the case of the former, the

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[56] This particular development, however, appears to be more about rebranding than actual reform. See Jakub Jaraczewski, *Just a Feint? President Duda's bill on the Polish Supreme Court and the Brussels-Warsaw deal on the rule of law*, VerfBlog, 1 June 2022, <https://verfassungsblog.de/just-a-feint> accessed 2 August 2023; Paweł Marcisz, *A Chamber of Certain Liability: A Story of Latest Reforms in the Polish Supreme Court*, VerfBlog, 31 October 2022, <https://verfassungsblog.de/a-chamber-of-certain-liability> accessed 2 August 2023.

[57] "*We've shown too much goodwill to EU" and further compromise is futile, says Polish president*, Notes from Poland, 7 November 2022, <https://notesfrompoland.com/2022/11/07/weve-shown-too-much-goodwill-to-eu-and-further-compromise-is-futile-says-polish-president> accessed 2 August 2023.

[58] CT, 7 October 2021, K 3/21, English version available at <https://trybunal.gov.pl/en/hearings/judgments/art/11662-ocena-zgodnosci-z-konstytucja-rp-wybranych-przepisow-traktatu-o-unii-europejskiej> accessed 2 August 2023. See Jakub Jaraczewski, *Gazing into the Abyss: The K 3/21 decision of the Polish Constitutional Tribunal*, VerfBlog, 12 October 2021, <https://verfassungsblog.de/gazing-into-the-abyss> accessed 2 August 2023; Antonia Baraggia and Giada Ragone, *Symposium — Introduction: The Polish Constitutional Tribunal Decision on the Primacy of EU Law: Alea Iacta Est. Now what?*, Int'l J. Const. L. Blog, 15 October 2021, <http://www.iconnectblog.com/2021/10/symposium–introduction–the-polish-constitutional-tribunal-decision-on-the-primacy-of-eu-law-alea-iacta-est-now-what> accessed 2 August 2023 (see also the contributions to the Symposium by Agnieszka Bień-Kacała, Julian Scholtes, Matteo Bonelli, and Maciej Krogel).

[59] CT, 24 November 2021, K 6/21, English version available at <https://trybunal.gov.pl/en/hearings/judgments/art/11709-art-6-ust-1-zd-1-konwencji-o-ochronie-praw-czlowieka-i-podstawowych-wolnosci-w-zakresie-w-jakim-pojeciem-sad-obejmuje-trybunal-konstytucyjny> accessed 2 August 2023; CT, 10 March 2022, K 7/21, English version available at <https://trybunal.gov.pl/en/hearings/judgments/art/11820-dokonywanie-na-podstawie-art-6-ust-1-zd-1-ekpcz-przez-sady-krajowe-lub-miedzynarodowe-oceny-zgodnosci-z-konstytucja-i-ekpcz-ustaw-

ruling ends with an explicit rebuke addressed to the Court of Justice of the EU: 'If the practice of progressive activism of the CJEU, consisting in particular in encroaching on the exclusive competences of the organs of the Polish state, in undermining the position of the Constitution as the highest-ranking legal act in the Polish legal system, in questioning the universal validity and finality of the judgments of the Tribunal, and finally in casting doubt on the status of the judges of the Tribunal, is not abandoned, the Tribunal does not rule out that (...) it will directly assess the constitutionality of the judgments of the CJEU, including their removal from the Polish legal order.' Indeed, it would be difficult to find a more outspoken manifesto on the rejection of multi-level constitutionalism.

The centralization of power has also deeply affected the functioning of parliaments in Hungary and Poland, creating rubber-stamp legislatures that automatically translate the political will of the government majority into formalised law. In both countries, there has been a tendency to shorten or speed up the legislative process, to have important bills tabled by individual MPs to avoid mandatory consultation, etc.[60] In Poland, however, the situation shifted substantially after the 2019 parliamentary elections, when the populist party lost its grip on the Senate. The technological chain for the manufacturing of laws was then disrupted: this made it impossible to push through new legislation in a matter of days, something very common between 2015 and 2019 when the Sejm could count on a complicit Senate and a deferential President.

Apart from the issues mentioned above, there are some specific challenges to the system of separation of powers in these two countries. For example, the extreme centralization of power has significantly reduced the importance of the territorial division of power in Hungary, where local governments are now in a position of complete vulnerability vis-à-

dotyczacych-ustroju-sadownictwa-wlasciwosci-sadow-oraz-ustawy-dotyczacej-krajowej-rady-sadownictwa> accessed 2 August 2023. See Ewa Łętowska, *The Honest (though Embarrassing) Coming-out of the Polish Constitutional Tribunal*, VerfBlog, 29 November 2021, <https://verfassungsblog.de/the-honest-though-embarrassing-coming-out-of-the-polish-constitutional-tribunal> accessed 2 August 2023.

[60] Kamil Joński and Wojciech Rogowski, *Legislative Practice and the 'Judiciary Reforms' in Post-2015 Poland – Analysis of the Law-Making Process*, 11(3) INTERNATIONAL JOURNAL FOR COURT ADMINISTRATION 3 (2020) 1; Piotr Mikuli, *The Façade of State Organs in Contemporary Autocratic Regimes: The Case of the Polish Parliament*, in Tom Gerald Daly, Wojciech Sadurski (eds.), DEMOCRACY 2020: ASSESSING CONSTITUTIONAL DECAY, BREAKDOWN & RENEWAL WORLDWIDE (International Association of Constitutional Law: Uppsala, 2020) 180–3. See also the report of the Venice Commission, CDL-AD(2020)017, para 18.

vis the central government. In Poland, by contrast, a strong local government has been an effective counterweight to the ruling party, which fares somewhat less well in regional elections, especially in big cities.[61]

Another problem in Hungary is the outsourcing of many state functions. There is a clear trend towards transferring public functions and resources to historical churches. Since 2010, the number of church-run institutions has doubled, accounting for a third of secondary and a fifth of primary schools. A significant proportion of public assets and the vast majority of higher education institutions have been brought under the control of so-called 'public interest foundations', which are located in the grey zone between the public and private sectors. All this has profound implications for the separation of powers because public institutions lose control over these activities of public interest, and political responsibility for them is formally removed, while Fidesz exercises political influence through political appointees on the boards of trustees of foundations. By contrast, in Poland, the public functions are not being outsourced to a similar degree, for the political branch wishes to keep a tight grip on the governance structure. Funds and resources might be transferred to friends and allies, and sometimes even new fortunes can be made,[62] but the real power must remain at the centre of political decision-making.

4. Conclusions

When studying the recent constitutional changes in Hungary and Poland concerning the system of separation of powers, one can find many similarities but also substantial differences. This is important not only for assessing the situation in the two countries but also because the future restoration of power-sharing may be achieved in partly different ways.

The most salient difference between Hungary and Poland appears to be the manner in which the constitutional change has been delivered, owing to the fundamental difference

[61] The most recent regional elections confirmed this pattern, see Wojciech Gagatek and Karolina Tybuchowska-Hartlińska, *The 2018 regional elections in Poland*, 30(3) REGIONAL & FEDERAL STUDIES (2020) 475.

[62] See Anne Applebaum, *The Disturbing New Hybrid of Democracy and Autocracy*, The Atlantic, 9 June 2021, <https://www.theatlantic.com/ideas/archive/2021/06/oligarchs-democracy-autocracy-daniel-obajtek-poland/619135> accessed 2 August 2023.

in the number of parliamentary seats secured. While in Hungary, achieving the constitution-making majority enabled the winning party to unfetteringly transform the system of government in the desired direction, the Polish experience is substantially different: the authoritarian drift only became possible through tricks and subterfuge, biased legal interpretations, and unconstitutional amendments to ordinary laws. It is difficult to say which of these paths is ultimately worse. Hungary has become a highway to authoritarianism, and the damage inflicted to constitutional democracy is devastating, but at least much of the change has been carried out *lege artis*. Poland has failed to embark on the same highway, despite Jarosław Kaczyński's boastful declaration in 2011 that 'the day will come when we will have a Budapest in Warsaw.'[63] A decade later, there is still no Budapest in Warsaw.[64] As a result, constitutional democracy in Poland has been dismantled to a lesser degree, but at the price of the rapid erosion of the commonly recognised rules of the game. The Polish constitution, as such, may have remained intact, but the Polish constitutional culture understood as a set of shared principles and values, has fallen to pieces.

It is important to note, however, that while this is indeed a significant difference, its importance is often overestimated. In fact, practice shows that in Hungary, the unscrupulous use of the parliamentary supermajority and the instrumentalization of law have often led to the scholarly misconception that the Fidesz government has done everything in a formally legal way. But this is far from reality. For example, the state of exception was introduced because of the Covid-19 pandemic but continuously maintained for more than two years in an unconstitutional manner, and, just like in Poland, the Constitutional Court had to change its previous practice in several cases in order to legitimise specific laws of Parliament important to the government.

[63] See <https://tvn24.pl/polska/przyjdzie-dzien-ze-w-warszawie-bedzie-budapeszt-ra186922-3535336> accessed 2 August 2023.

[64] The following impediments to achieving this symbolic goal were listed: the constitution, business elites, the media, the degree of urbanization and local government, political opposition, unamended electoral laws; Tomasz Sawczuk, *Dlaczego nie ma Budapesztu w Warszawie? 6 problemów Kaczyńskiego*, Kultura Liberalna, 7 November 2022, <https://kulturaliberalna.pl/2022/11/07/sawczuk-dlaczego-nie-ma-budapesztu-w-warszawie-6-problemow-kaczynskiego> accessed 2 August 2023.

Another important difference is that while in Poland the parliamentary opposition represents a significant political force and has a real chance of replacing the government through elections, in Hungary, the parliamentary opposition is weak, fragmented, and frustrated, with parties unable to put up any resistance to the government and unlikely to win parliamentary elections under the current circumstances.

The extent and speed of the transformation also vary. Attacks on judicial independence have been stronger and faster in Poland, while in Hungary, government influence is arguably more extensive, covering the areas of culture, higher education, and many sectors of the economy.

Notwithstanding this, in many respects, the two countries share similar trends of the dismantling of the power-sharing system. The capture of public institutions is perhaps the most striking similarity, as well as the transformation of public media into a government propaganda tool. Another important similarity is that in both countries, nationalist populist parties have implemented, or at least attempted to, an authoritarian transformation of the constitutional system. In sum, Hungary and Poland are two examples of specific constitutional developments in Central and Eastern Europe, which, while plausibly comparable in many respects, exemplify two different ways of dismantling the system of the separation of powers.

It is to be noted, finally, that while whatever formal and informal constitutional changes the Fidesz- and the PiS-led governments have made to the power-sharing system, they have always tried to maintain the appearance of democracy.[65] It can be concluded from this that although institutional and procedural guarantees are indispensable for modern constitutionalism, they are not in themselves sufficient to ensure the democratic exercise of power. This also requires a constitutional culture that includes a consensus among political actors about respect for constitutional values, including the principle of the separation of powers.

[65] As PM Viktor Orbán said in a famous speech in 2014, '[w]e needed to state that a democracy is not necessarily liberal. Just because something is not liberal, it still can be a democracy.' <https://budapestbeacon.com/full-text-of-viktor-orbans-speech-at-baile-tusnad-tusnadfurdo-of-26-july-2014> accessed 2 August 2023.