

Return to Power: The Illiberal Playbook from Hungary, Poland and the United States

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Abstract: *This article examines how illiberal leaders' behaviour towards the judiciary changes when they have a second chance in power. Drawing on Varieties of Democracy indicators for populist rhetoric and constitutional change, we identify several OECD worst performers and focus on two – Poland and Hungary – whose illiberal leaders ascended to power for a second time. For Hungary, we examine PM Orbán's first time in office, time in opposition and second time in office, when he undertook reforms of the Constitutional Court, Supreme Court and other courts. For Poland, we examine the Kaczyńskis' party's first time in office, opposition and return to power, when it undertook campaigns against a variety of constitutional institutions. We find the first mandate of such leaders is characterised by strong rhetoric and chaos, they consolidate control of their party while out of power, and in their second mandates they are much more effective and extreme in undermining judicial independence and the rule of law. The experiences of Poland and Hungary have important implications for the United States. In his first term, Donald Trump undertook various actions that undermined the judiciary, and his actions while out of office align with those of Orbán and Kaczyński, such that Trump's second term might well pose a significant threat to the US judiciary.*

Keywords: *populism, Orbán, Kaczyński, Trump, judiciary*

Introduction

The rise of conservative populist or illiberal leaders in western democracies has been one of the most prominent political developments in the early twenty-first century. From Europe to North America and elsewhere, numerous countries have seen a conservative populist leader attract wide popular support, often with a political programme that seeks to enhance the power of the executive and erode some aspects of liberal democracy. In her well-known account of democratic backsliding, Nancy Bermeo describes how ‘executive aggrandisement’ threatens to displace democratic institutional arrangements while employing ostensibly democratic rhetoric:

Executive aggrandizement... occurs when elected executives weaken checks on executive power one by one, undertaking a series of institutional changes that hamper the power of opposition forces to challenge executive preferences. The disassembling of institutions that might challenge the executive is done through legal channels... the defining feature of executive aggrandizement is that institutional change is either put to some sort of vote or legally decreed by a freely elected official—meaning that the change can be framed as having resulted from a democratic mandate. (Bermeo 2016: 10–11)

Following Enyedi’s recent work (2024), we define illiberalism in this study as the rejection of three core liberal democratic principles: the limitation of power, the neutrality of the state and the openness of society. Illiberal leaders pose a variety of threats to democratic practices and institutions, but the independence and institutional efficacy of the judiciary is a frequent target. As Jan-Werner Müller explains, ‘Those populists who have enough power will seek to establish a new populist constitution—in both the sense of a new sociopolitical settlement and a new set of rules for the political game (what some scholars of constitutionalism have called the “operating manual” of politics)’ (Müller 2016: 60–68).

This article explores a particular aspect of the illiberal leaders’ threats to the judiciary, as it examines how their policies regarding the judiciary develop in instances in which they return to power after a time away from national leadership; it analyses the learning curve of illiberal leaders, or how they act with regard to the judiciary when given a second chance at national leadership. It considers several cases, which were selected drawing on *Varieties of Democracy* (V-Dem) indicators describing executive-judiciary relations, and it identifies OECD worst performers. Based on these criteria, the paper examines the cases of Poland and Hungary in some detail, and it considers implications for the United States, given the reelection of Donald Trump. In each of the cases, the paper is attentive to warning signs from the first term, developments in the interregnum period and outcomes in the second term. The analysis here indicates

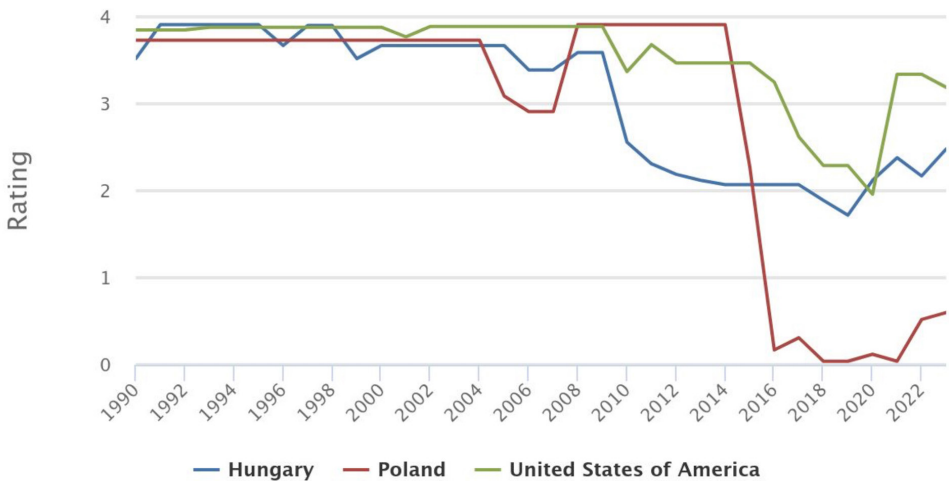
that while the first mandate of such leaders may be characterised by circus-like chaos and bluster, they remain active while out of power, and they can be much more effective and extreme in their second mandates, especially with regard to legal changes that may undermine the rule of law and the democratic nature of their polities.

Case selection

As recently observed in various countries, the so-called ‘third wave of autocratization’ is generally characterised by ‘gradual setbacks under a legal façade’ (Lührmann & Lindberg 2019: 1095). To maintain the appearance of legality, would-be-illiberals require control over judicial decision-making, so judicial independence is among their first targets. Describing the clashes between contemporary populists and independent courts, two distinct (but sometimes connected) threats have to be examined.

The first threat involves the populist’s communication practices, rhetoric and propaganda. Such practices aim at circumventing judicial institutions by direct appeals to the *vox populi* – as personified by the populist himself. Such efforts can affect the *de facto* operation of the court system (for example via a chilling effect), but they have no lasting *de jure* consequences, as the institutional setup does not change (Sadurski 2022: 510). An empirical measure of such clashes, suitable for cross-country analysis, is provided by the *Varieties of Democracy* (V-Dem) project’s ‘Government attacks on judiciary’ indicator.

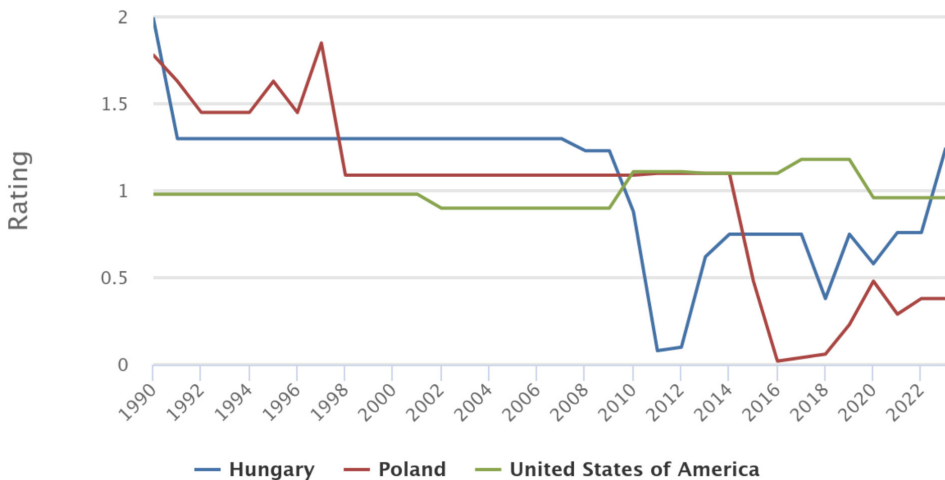
Figure 1: Government attacks on judiciary in Hungary, Poland, and the United States between 1990 and 2023



Source: V-Dem database v14 (Coppedge et al. 2024a)

The second threat involves direct legal and institutional changes. They are implemented to alter the constitutional framework according to the populist's wishes, typically in the direction described by The Economist's phrase 'entanglement of powers'.¹ Contrary to mere propaganda, this has a direct and lasting *de jure* impact on the operation of the court system (although it may also provoke *de facto* resistance by the judicial community).² In a sense, they institutionalise the populist's assault on the judiciary, creating a lasting legacy in the legal system. An empirical measure of such clashes – suitable for cross-country analysis – is provided by the *Varieties of Democracy (V-Dem)* project's '*Judicial reform*' indicator. Both variables were produced using a Bayesian item response theory measurement model and expert input (Coppedge et al. 2024b).

Figure 2: Judicial reforms in Hungary, Poland, and the United States between 1990 and 2023



Source: V-Dem database v14 (Coppedge et al. 2024a)

In the light of the V-Dem database (Coppedge et al. 2024a), we see substantial differences across OECD countries between 1990 and 2023 in terms of '*Government attacks on judiciary*'. In countries like Colombia, Israel, Italy or Turkey, governmental verbal attacks on the judiciary have been common over the last three decades. However, once the '*Judicial reform*' indicator is taken into account, it turns out that in only four OECD countries – Hungary, Poland, Slovakia and Turkey – 'the judiciary's ability to control arbitrary power was reduced via insti-

1 'The entanglement of powers,' briefing, *The Economist*, 29 August 2019.

2 For Polish examples see: J. Koscierzynski, J. 'Judges under pressure – report on the methods of harassment of independent judges by the authorities,' IUSTITIA Association of Polish Judges, 2019. Report available at https://www.iustitia.pl/images/pliki/Judges_under_pressure_Raport_2019.pdf

tutional reform'. Moreover, in three cases – Hungary, Poland and Turkey – such 'reform' coincided with numerous verbal 'government attacks on judiciary'.

Perhaps unsurprisingly, these episodes denote the governance practices of Viktor Orbán, Jarosław Kaczyński and Recep Erdogan – paragons of the European 'third wave of autocratization'.³ And two of them – Orbán post-2010 and J. Kaczyński post-2015 – exemplify a populist's return to power. That offers what we think to be the most promising case studies to examine how illiberal politicians behave once elected for the first time, how they deal with electoral failure and the period in opposition, and how their second time compares with the first, as far as relations with the independent judiciary are concerned. The following three sections describe the leaders' relevant actions in Hungary, Poland and the United States.

Hungary

Orbán's First Cabinet (1998–2002): A 'chancellor-democracy'

In Hungary, the rise of right-wing populism centred on Viktor Orbán and the Fidesz political party. Fidesz first came to power via the 1998 elections, and it dominated the coalition government until 2002. The new PM, Orbán, who was only 35, appeared to be a centrist, pro-European, democratic politician. At that time Hungary was widely considered to be a consolidated liberal democracy, it was a new member of NATO, and it was about to begin negotiations to join the European Union. Voters wanted 'Europeanization' to complete the regime change and to move past the decade of post-communist 'wild capitalism'.

With Orbán, political discourse changed from macroeconomic structures to personalist, action-oriented narratives. At the beginning it was refreshing that Orbán's moderate populist-republican style of talk made politics more understandable for ordinary people. But ten years later, this republican understanding of politics was replaced by centralised propaganda. Orbán wanted to fill the vacuum of anti-politics in his first government, but he hollowed out democratic discourse in his second government. While the first Orbán government was part of the democratic era, it can also be seen retrospectively as a precursor to the Orbán regime. These two interpretations are not mutually exclusive, as the behaviour of the elite already showed certain authoritarian tendencies. Bueno de Mesquita and Smith (2011) argue that the difference between democracy and autocracy does not depend on the characteristics and commitments of politicians, but on the constitutional and political constraints that different political

3 Each of them, together with D. Trump, deserved a chapter in Gideon Rachman, 'The Age of the Strongman,' Other Press, 2022; the respective chapters were titled: Ch. 2 'Erdogan – from liberal reformator to authoritarian strongman (2003)'; Ch. 5 'Orban, Kaczynski and the rise of illiberal Europe (2015)'; Ch. 7 'Donald Trump – American Strongman (2016).'

actors follow in the same way. Politicians are likely to have the same intentions in democracy and non-democracy – to come to power and stay in power as long as possible – even if the two regimes are different. According to Bueno de Mesquita and Smith, democrats can easily become autocrats if circumstances change.

In 1998, citizens preferred to vote for the only political player who had a clean slate. The emerging new right, led by Fidesz, had to satisfy the need for change and security at the same time. Orbán defined the period after the regime change as a period of disorder that had to be changed for the sake of order and security. Voters wanted growth within the confines of law, wealth and consumption, and they wanted to develop civic consciousness. They yearned for a form of capitalist modernisation that was not top-down or externally imposed, and which benefited more than just a select few: if not everyone, then at least those who ‘deserved’ it. The concept of ‘popular capitalism’ – a republican ideal that gained prominence following the austerity measures introduced in 1995 – appeared to align with these expectations. To meet these demands, Orbán presented himself as radical and conservative at the same time. However, he responded to these expectations with a rhetoric of radical elite change, favouring ‘friend- and kinship-based business circles’ and marginalising and sometimes criminalising those outside the preferred middle class. The biggest outcry was sparked by the appointment of party treasurer Lajos Simicska to the post of president of the Hungarian tax authority.

Following the 1998 elections, Orbán began to see himself not only as party leader but as a ‘chancellor’, and Hungarian parliamentary democracy as a chancellor democracy (*Kanzler-demokratie*) (Bozóki 2008: 200). As an aspiring, charismatic politician, he thought that a leader’s job was not to manoeuvre between interest groups but to shape the course of events. He should not follow but be a sovereign shaper of the political situation. His followers attributed charismatic traits to him, and his leadership style was broadly seen as transformative rather than transactional.

However, the 1998 government programme contained a fairly short passage about how Orbán envisaged the state under his control.⁴ According to it, the government ‘will realize a new type of government’, and effective governance depended on the prime minister’s strengthened office as chancellery. The goal of this restructuring was to control the coalition partner and the government and to maximise the prime minister’s room for manoeuvre. It was not a government that had a prime minister, but a prime minister who had a government. Strengthening the chancellery did not result in a less expansive state, because it meant doubling the functions. Rather than interpreting these developments as clear signs of autocratisation, contemporary observers at the time characterised the shift as the ‘presidentialization’ of the Hungarian parliamentary

4 Available at <https://www.parlament.hu/irom36/0021/0021.htm> (accessed on 9 October 2024).

system (Körösényi 2001). Another line of interpretation suggested that these transformations aimed at a shift from consensual democracy to majoritarian democracy (Ágh 2000).

It soon became evident that Orbán's strategic plan was to change the elite. According to his logic, regime change could not be considered complete as long as the former communist networks remained active. In 1998, Fidesz only spoke of the marginalisation of the former communists, but after 2010 it put the whole post-regime change era into the brackets of the 'messy decades' of post-communist politics. In terms of rhetoric, Orbán used similar arguments in 2010 when he returned to power: he described the previous 20 years as 'troubled times' and he claimed that Hungarians deserved strong leadership, majoritarian democracy, order and security.

Retrospectively, one can identify further warning signals in the functioning of the first Orbán government. Between 1998 and 2022, Orbán forced the chief prosecutor to resign, made his party occupy the public media boards, and compromised the leader of his ally and forced him to resign. Moreover, political friends, loyalists and family members started to play a greater role in the decision-making processes. This led to the rise of favouritism, clientelism and increasingly closed governance, in which the prime minister's office became powerful and isolated. Corruption scandals erupted, which also reflected tensions between Fidesz and its junior coalition partner, the Independent Smallholder's Party (FKGP). By the end of the term, Orbán effectively used these corruption cases to compromise the leader of FKGP and destroy his coalition party. This move backfired in the 2002 elections, because it was more important for Orbán to monopolise power than to win the elections together with his coalition partner.

Orbán also displayed autocratic attitudes toward media pluralism. The 1996 media law allowed political parties to send representatives to the board of public radio and television (Bajomi-Lázár 2017: 88). He cooperated in the media with a far right, semi-loyal opposition party, MIÉP, in order to control public radio and television channels (Bozóki & Kriza 2003: 22). Although it was more difficult for him under liberal democratic circumstances, he soon directed public media towards a pro-government direction. His stance on supposedly impartial public media was most vividly illustrated in his parting words at the end of the first term. In a speech in front of the television headquarters in August 2002, he proposed the creation of two public television channels, each to be managed by one side of the political spectrum.⁵

Autocratic attitudes toward media pluralism, cannibalisation of the party's coalition partners, uniting the right-wing bloc of party system and similar

5 Available at <https://magyarnemzet.hu/archivum-archivum/2002/08/szabadsag-az-amit-nem-vehetnek-el> (accessed on 9 October 2024).

political steps made clear that Orbán did not tolerate different voices on the right. After the lost elections of 2002, Orbán famously identified his own party with the nation and declared that the ‘nation cannot be in opposition’⁶ All his steps indicated that he was an enemy of political pluralism. His political philosophy was always simple: Once you have power you will be right.

In opposition 2002–2010

After an unexpected electoral defeat following an extremely polarising campaign (Bozóki 2008: 209–13), Orbán practically left the Parliament for almost a year to reorganise his party. He realised that the party still had its own liberal roots with conservative-bourgeois colours, and largely the same old membership. He changed his advisors, his strategy and his political ideology. After the turn from liberalism to conservatism (1993–4), he initiated another turn – from conservatism to nationalist populism. He repainted himself as a country boy who returns to his village, Felcsút, to reset his life closer to his family roots. He started to behave and to dress as one of them, presenting himself as the voice of the countryside.

In 2003, Orbán changed the legal structure and the sociological character of his party. He announced the ‘civic circles’ movement to be composed of largely rural, less educated, religious, non-partisan elements whose loyalty belonged to Orbán, personally, and not to Fidesz. He wanted to have no party outside himself. Previously it was difficult to be a party member because the party elite did not open the gate for newcomers. It was a party for 1989 veterans who knew themselves well. In 2003, Orbán let members of civic circles enter the party in a wave-like manner, which led to tensions between old-timers and newcomers. Orbán created high positions for the newcomers and by doing so he effectively purged Fidesz within a few years.

Secondly, Orbán reorganised Fidesz on the basis of electoral districts instead of geographical units. Previously, Fidesz had been based on village, urban and county organisations which were organised bottom-up. Formerly autonomous local leaders suddenly lost their positions, and the new leaders of electoral districts were pushed for candidates of the party. Orbán, as party president, successfully claimed veto power in the decision on candidates, both in individual districts and on the party-list (Political Capital 2003).

This internal restructuring helped Orbán survive his second consecutive electoral defeat in 2006. While party members became passive, some politicians in the party elite wanted to take over the party. However, they soon realised that all the sources of power belonged to Orbán. He took full control over Fidesz. Practically, Fidesz as a political party ceased to exist in 2006: It became a central-

6 Orbán Viktor Dísz téren tartott beszéde [Speech of Viktor Orbán at Dísz Square]. *Ma.hu*. Available at <https://www.ma.hu/tart/rcikk/a/0/3774/1> (accessed on 9 October 2024).

ised, top-down constructed, hierarchical political machine without autonomy, ideology and internal pluralism.

Meanwhile, the left-liberal Prime Minister Ferenc Gyurcsány's speech⁷ – which was delivered in a closed circle in May 2006 and was leaked a few months later – sparked a political crisis by exposing the country's economic situation as far grimmer than the re-elected Gyurcsány had portrayed in the run-up to the elections for the sake of securing a victory. This revelation shattered the brief period of polarisation equilibrium in the mid-2000s, fuelled by a 'competing populism' (Palonen 2009), propelling Orbán to initiate a feverish campaign against the second Gyurcsány government. Thus, Hungary was already in the midst of serious political turbulence with significant political polarisation, even before the emerging social discontent caused by the Great Recession in 2008 (Bozóki & Benedek 2024).

Orbán's populism was the catalyst for the crisis of post-1989 liberal democracy and the transformation of fragile elite consensus to overheated political polarisation. Orbán also emerged as the greatest beneficiary of this 'Cold Civil War', spearheading the creation of a new populist radical right. This also led to the rise of the far right party Jobbik and its paramilitary organisation, the Hungarian Guard (Magyar Gárda), and it even created a social atmosphere in which paramilitary groups executed racist killings against members of Hungary's minority Roma population. Together with the contradictory policies of the socialist-liberal government, the economic crisis of 2008, the toxic level of polarisation and the deconsolidation of liberal democracy (Bozóki & Fleck 2024) led to Orbán's constitutional majority in April 2010.

The rise of the Orbán regime

One might argue that the dynamics within the party from 2002 to 2010 were extended to the state and nation after 2010. The recipe was clear: having validated its success internally, the aim was to replicate it on a broader canvas. Thus, the authoritarian practices observed within Fidesz became a blueprint for authoritarianism at the national level and the concentration of power within the party laid the groundwork for the subsequent expansion of executive power across the state.

A year before the elections, Orbán emphasised the historical opportunity of the end of the polarised 'field of dual power' (i.e. the 'two-block' party system) with its constant value debates, and outlined the emergence of an era of a 'central field of political power' in which a large governing party is able to formulate and represent 'the national concerns... in their naturalness'.⁸ By obtaining 53%

7 A teljes balatonőszödi szöveg (The whole text from the Balatonőszöd speech. In Hungarian): <http://nol.hu/cikk/417593/> (accessed on 9 October 2024).

8 Available at https://2010-2015.miniszterelnok.hu/cikk/megorizni_a_letezes_magyar_minoseget (accessed on 9 October 2024).

of the party-list vote on a 64% turnout, and capturing a single-party constitutional supermajority (263 seats out of 386), this vision became a reality on the evening of 25 April 2010. This constitutional supermajority, which was absent in all of the cases or periods we examine in this study, played a critical role in shaping the distinct outcome of Hungary's illiberal leadership during its second time in power, even compared to Poland's experience between 2015 and 2023.

As a normative starting point of the subsequent institutional changes, Fidesz adopted a parliamentary resolution ('Declaration of National Cooperation'), framing its win as a 'revolution in the voting booths' and a mandate to establish a new political regime, the 'System of National Cooperation', calling the parliament a 'constituent national assembly and system-founding parliament'.⁹ This signaled a shift towards the primacy of politics and the instrumentalisation of law, where legal and political institutions served the government's agenda. Orbán, who had been familiar with Antonio Gramsci's writings since his university thesis, sought explicitly to build a new political, economic and cultural hegemony, replacing the *rule of law* with *rule by law*, and fostering extreme institutional and informal centralisation (Bohle, Greskovits & Naczyk 2023).

Indeed, following the electoral victory, the new governing party unexpectedly initiated a constitutional process, despite having no constitutional agenda in its previous campaign programme ('Politics of National Affairs'),¹⁰ and only sporadic references made prior to the election. Confident in the legitimacy provided by their two-thirds parliamentary majority, the government proceeded without seeking opposition support. Criticism of this unilateral constitutional approach came not primarily from opposition parties but from the Constitutional Court, legal scholars and international organisations like the Venice Commission and the European Union (Körösényi 2015: 92). The impacts of external actors, especially the European Union, on the hybridisation of Hungary's political system were weak (Bozóki & Hegedűs 2018), while Orbán's 'peacock dance' in the international stage was successful in the 2010s. These critical voices, though influential, were only able to delay the government's efforts, rather than significantly altering the outcome of the constitutional changes, first and foremost, the new constitution: the so-called Fundamental Law (FL).

The institutional developments can be grasped through the lens of 'populist constitutionalism' (Müller 2016: 60–68) and 'executive aggrandizement' (Bermeo 2016). The first term refers to a significant change in Fidesz's populist attitude towards the allegedly singular and transparent will of the homogenous people. While the party emphasised the importance of the unconstrained popular will in opposition, after it came to power, Fidesz started to use consti-

9 Available at <https://www.parlament.hu/irom39/00047/00047.pdf> (accessed on 9 October 2024).

10 Available at https://www.langzsolt.hu/upl/files/nemzeti_ugyek_politikaja_8481.pdf (accessed on 9 October 2024).

tutionalism as a tool to perpetuate political power by creating constraints on the popular will, formulated solely by the new governing party (Müller 2016: 62–63). Twelve amendments of the old constitution and the removal of the constitutional rule requiring a four-fifths vote to approve the cornerstones of a new Constitution opened the door to the unilateral constitutional process and the adoption of the new FL in April 2011, which came into effect in 2012. Citizens were involved only through nonbinding ‘national consultation’, instead of a genuine and transparent dialogue with civil society organisations, opposition parties and the general public (Tóth 2017: 399). This plebiscitary tool with vague questions lacking formal rules and transparency was designed with the aim of arbitrarily articulating the popular will, hence legitimising the steps of the government, as well as mobilising supporters (Körösényi, Illés & Gyulai 2020: 58). By capitalising on the high level of social polarisation (Coppedge et al. 2024a), autocratisation was effectively complemented by the populist discourse of Fidesz. The latter antagonistically contrasts the homogeneous camps of ‘we, Hungarians’ with ‘them, the globalists’, embedding these categories in an overarching narrative on the fight for the nation’s sovereignty (Batory 2016).

The other term – ‘executive aggrandizement’ – refers to a series of gradual institutional changes of democratic backsliding aimed at weakening checks on executive power (Bermeo 2016: 10), which typically target independent state organs, constitutional courts and the judiciary in general, the media, state companies and agencies, the cultural sphere and electoral rules (Hanley & Vachudova 2018). If we take stock of Orbán’s second term in power, we find numerous examples of attacks against these targets by changing everything from the civil code and constitutional court to media, elections and public administration, which makes the Orbán regime a quintessential example of democratic backsliding (Scheppele 2013: 561; Bánkuti, Halmai & Scheppele 2012: 140–44; Bozóki 2015; Kornai 2015; Tóth 2017).

Furthermore, the new government used its two-thirds parliamentary majority to implement significant changes to Hungary’s electoral system, aiming to consolidate its political dominance. Key reforms included reducing the size of Parliament, shifting to a one-round electoral system and introducing ‘winner compensation’, which allocated excess votes from winning candidates to their party’s national list. Additionally, the proportion of seats allocated through individual constituencies increased from 46% to 53%, further disadvantaging smaller parties. The redrawing of constituency boundaries, criticised as gerrymandering, also benefited Fidesz by concentrating its support in smaller constituencies.¹¹ These reforms, along with new party financing rules and provisions allowing ethnic Hungarians abroad to vote, further solidified Fidesz’s ad-

11 László Róbert (2015): *The new Hungarian election system’s beneficiaries*. Available at https://political-capital.hu/news.php?article_read=1&article_id=288 (accessed on 9 October 2024).

vantage, enabling it to retain its two-thirds majority in the 2014 elections (Tóth 2015: 246).

Alongside constitutional process and electoral changes, it is essential to highlight the media as a key area in the Orbán regime's consolidation of power. Benedek's (2024b) study provides a comprehensive analysis of the anti-pluralist transformation of Hungary's political public sphere after 2010. It traces the regime's growing influence over the media, revealing how economic and political interests merged through institutional changes, media ownership shifts, third-party campaigns and biased state advertising (Bátorfy & Urbán 2020). By the late 2010s, pro-government media had achieved significant dominance (Benedek 2024b: 477–79), distorting public discourse and promoting a growing level of self-censorship through autocratic innovations such as 'collaborative journalism', 'subsidized speech' and 'asymmetric parallelism' (Polyák 2015).

This growing control over the media reinforced Orbán's autocratic resilience, as a highly partisan public sphere limited citizens' ability to hold the government accountable and helped secure electoral victories. Crises like COVID-19 and divisive issues such as migration were effectively used to shape public opinion, though recent challenges, such as economic strain and political scandals, could threaten the regime's long-term stability. While in the Polish case, the rollback of media pluralism primarily affected public media, in Hungary, the changes impacted the entire media landscape. Alongside the one-party constitutional supermajority, this broad media transformation appears to be a key factor in shaping the outcome of illiberalism's second rise to power.

Furthermore, given the highly visible conflicts with the government's parliamentary majority and the sweeping nature of the changes, we focus in more detail on the Constitutional Court (CC), which underwent the most significant constitutional transformations. Following the Fidesz government's 2010 two-thirds majority, the CC frequently vetoed the government's legislative and constitutional initiatives. In response, the government systematically undermined the Court's powers, incorporating laws deemed unconstitutional directly into the constitution to bypass the Court's rulings. To choose candidates alone, the governing party reformed the nomination and election process of the CC,¹² and enlarged its membership from eleven to fifteen. Instead of the previous consensual rule, constitutional judges would be nominated by a nominating committee proportional to the size of parliamentary groups. As a result, due to vacancies, seven new Fidesz-close justices were elected within one year.¹³ The term length for judges was increased from 9 to 12 years, while the upper age

12 Act LXV of 2010 on amendment to the Act XXXII of 1989 on the Constitutional Court, 28 June 2010.

13 Hungarian Helsinki Committee – Eötvös Károly Policy Institute – Hungarian Civil Liberties Union (2015): *Analysis of the Performance of Hungary's 'One-Party Elected' Constitutional Court Judges between 2011 and 2014*. Available at https://helsinki.hu/wp-content/uploads/2015/04/EKINT-HCLU-HHC_Analysing_CC_judges_performances_2015.pdf (accessed on 9 October 2024).

limit for judges was abolished, and the parliamentary majority gained control over appointing the CC president.

Initial clashes arose when the CC annulled¹⁴ retroactive legislation,¹⁵ prompting the government to limit the Court's ability to review financial and tax matters, particularly while public debt exceeded 50% of GDP.¹⁶ Despite these restrictions, the CC continued to strike down Fidesz's legislation, including attempts to transfer cases between courts (Batory 2016). The breaking point in the confrontation occurred after the judges elected as one-party nominees and who took decisions in line with the interests of the government became a majority by April 2013.¹⁷ In May 2013, the government adopted the Fourth Amendment to the FL.¹⁸ This step of government was triggered by a decision of the CC in late 2012, which found that the government's Transitional Provisions relating to electoral registration, the notion of family and the legal status of a church were invalid. In response, Fidesz incorporated these provisions directly into the constitution, creating the dilemma of whether the CC could also examine the amendments of the constitutions, or if it should only consider the current version of constitution. Although the CC demonstrated its in-merit complaints, it refused to review this amendment (Pócza 2015: 175–79). This is particularly important since this amendment excluded the in-merit constitutional review in general, in addition to invalidating the judicial precedents of the CC. Furthermore, the new constitution also limited access to the CC by abolishing *actio popularis*, while constitutional complaint, introduced as a compensation for the former, has been an ineffective remedy for a violation of a fundamental right because of the high rejection rate by the refurbished CC (Chronowski 2014: 91–92).

Regarding judicial independence, the mandates of the Supreme Court president (elected in 2009) and the National Council of Justice president and members were terminated by 2012.¹⁹ The administrative powers of the Council were transferred to the newly created position of president of the National Judicial Office (NJO), headed by the spouse of a Fidesz MEP (Tóth 2017). Since 2012, the NJO President has had authority over the selection, promotion, demotion and discipline of judges, powers previously held by fellow judges (Bánkuti, Halmai & Scheppele 2012: 143). Additionally, the retirement age for judges was

14 Hungarian Constitutional Court, Decision 184/2010 (X. 28).

15 Act XC of 2010 on the Establishment and Amendment of certain Acts with an Economic and Financial Nature.

16 Law CXIX of 2010 on the Amendment to Law XX of 1949 on the Constitution of the Republic of Hungary.

17 Hungarian Helsinki Committee – Eötvös Károly Policy Institute – Hungarian Civil Liberties Union (2015): *Analysis of the Performance of Hungary's 'One-Party Elected' Constitutional Court Judges between 2011 and 2014*. Available at https://helsinki.hu/wp-content/uploads/EKINT-HCLU-HHC_Analysing_CC_judges_performances_2015.pdf (accessed on 9 October 2024). p. 5.

18 Fourth amendment to the Fundamental Law of Hungary, 25 March 2013.

19 Act CLXI of 2011 on the Organization and Administration of the Courts; Act CLXII of 2011 on the Legal Status and Remuneration of Judges.

lowered from 70 to 62, forcing nearly 10% of judges, including a significant proportion of senior judges, into retirement (Tóth 2017: 411). These changes were accompanied by political pressure and public criticism from ruling party politicians.²⁰ Despite these moves, like the case of L & J in Poland, Fidesz did not fully subjugate the judiciary as it did in other sectors.

The attacks on constitutionalism and judicial independence were reinforced by the passing of numerous ‘cardinal laws’, requiring a two-thirds majority to amend. Fidesz loyalists were also entrenched across key state institutions, including the Prosecution Service, Budget Council, State Audit Office and Central Bank. Furthermore, with its two-thirds majority, the governing party was able to extend its focus beyond ‘authoritarian institutionalism’ (Kim 2021) to specific fiscal and social policies, cementing these in the new FL, thereby constraining future governments on issues like pensions, taxation and budget management. These changes imposed significant limitations on future administrations, particularly those without a constitutional majority, as demonstrated by the Budget Council’s veto power, which could potentially lead to governmental crises. The complex, strategic and highly dynamic changes enabled the two-thirds parliamentary majority to swiftly seize control over all significant domestic political institutions (Kis 2019). Thus, between 2010 and 2014, Hungary’s constitutional framework was significantly altered through continuous amendments, creating a permanent state of exceptional politics (Körösényi 2015: 93; Magyar 2016; Bozóki & Fleck 2024) with a ‘semi-revolutionary’ constitution (Sárközy 2014: 165).

In sum, by the ‘free and unfair’ parliamentary elections in 2014 (Bozóki 2015: 30–33), the illiberal legal monster ‘Frankenstate’ (Scheppele 2013: 560) was born during Hungary’s U-turn in the early 2010s (Kornai 2015), which is characterised by a reverse state capture, the lack of institutional checks on the executive and an increasingly uneven playing field in party politics. In a changed electoral framework including party funding and campaigning regulation, and with the help of a popular new overhead cost reduction programme for households introduced in 2013 (similar to the post-2015 welfare transfers in Poland), the governing party was able to secure its single-party constitutional supermajority, which has opened the door to the completion of the autocratic transition during the next government cycle.

20 Hungarian Helsinki Committee (2020): *Ruling Party Politicians Exerting Undue Influence on the Judiciary in Hungary 2010–2020*. Available at https://helsinki.hu/wp-content/uploads/HHC_Hun_Gov_undue_influence_judiciary_29072020.pdf (accessed on 9 October 2024).

Poland

The origins (pre-2005)

The right-wing populist *Law & Justice Party* (L & J, or PiS in Polish) was established by the twin brothers Lech and Jarosław Kaczyński. The history of L & J can be traced back to Lech Kaczyński's tenure as minister of justice (2000–2001), when he vigorously peddled a tough-on-crime agenda. Although his activities were firmly opposed by criminal law and human rights luminaries, they resonated with the demands of voters, who were fearful of a post-transition growth in crime and violence. In early 2001,²¹ Jarosław Kaczyński capitalised on his twin brother's skyrocketing approval,²² and established L & J (which explains the party's name).

The exposition of corruption scandals involving the post-communist cabinet (2001–2005) fueled a moral panic (on this phenomenon in the CEE region, see Krastev 2004), propelling the double electoral victory of L & J. It also allowed the Kaczyńskis to refine their earlier critique of the democratic transition, joining together: (i) post-communist conspiracy in state apparatus and business, (ii) violent organised crime and (iii) all-encompassing corruption. To break down the alleged conspiracy that L & J referred to as 'the system' (Polish '*układ*'), the Kaczyńskis advocated a 'moral revolution' establishing a 'Fourth Polish Republic'. Similarly to Orbán, the Kaczyńskis thereby rejected the period of democratic transition as 'post-communist', preached an 'elite replacement' project²³ and demanded a fresh start. Importantly, the political project of the *Fourth Republic* seemed to unite two parties established by a younger generation of anticommunists – L & J and D. Tusk's Civic Platform (Polish abbreviation PO). At that point, both parties presented themselves (and had been widely perceived) as responsible, republican forces seeking to strengthen and rationalise the state, and to free the country from its alleged post-communist malaise (although L & J had a national-conservative and CP neoliberal flavour).

First Cabinet: 'Circuses' rather than bread (2005–2007)

In 2005, L & J won the parliamentary elections in September (26.99 per cent of votes, 155 seats out of 460 in the lower chamber), and the presidential election

21 <https://pis.org.pl/partia/historia-partii#2001> (accessed on 9 April 2024).

22 In a July 2001 poll (when the PM dismissed him from the office) L. Kaczyński was 'trusted' by 68 per cent of the respondents, and distrusted by just 15 per cent (with 11 per cent neutral and 2 per cent non recognising). For survey communique see: https://www.cbos.pl/SPISKOM.POL/2001/K_098_01.PDF (Accessed on 9 April 2024), raw respondent-level data available at: <https://doi.org/10.18150/HWC0BJ>.

23 View presented as far back as in 1991, see (Kaczyński 1991). In his 2016 book, J. Kaczyński explained 'the building of the new state and the new social stratification is nothing else than the practical anticommunism' (Kaczyński 2016: 114).

in October (L. Kaczyński scored 54.04 perc. of votes in the runoff).²⁴ Despite widespread expectations, L & J and CP failed to form a coalition government establishing a *Fourth Polish Republic*. Instead, Kaczyński mounted a majority (and later on, a fully-fledged government coalition) with the agrarian-populist *Self Defense* (56 seats) and nationalist-catholic-EU-sceptic *League of Polish Families* (34 seats). It is noteworthy that, in a move similar to Orbán's handling of FKGP, Kaczyński allegedly attempted to cannibalise the junior partner – *Self Defense* – using an undercover anti-corruption operation aimed at its leader. As a consequence, the fragile majority broke down, leading to the snap elections of 2007, which L & J lost. Back in 2005, J. Kaczyński designated a lower-profile politician (K. Marcinkiewicz) as a 'compromise' prime minister, capable of handling coalition negotiations with CP. However, given his failure (and pressure from his twin brother – the President²⁵), in July 2006, J. Kaczyński for the first (and only) time assumed the office of the prime minister.

To examine the relations of the first L & J cabinet with the justice system, it is useful to distinguish between (i) top-tier 'separation of powers' issues (especially the Constitutional Tribunal, hereafter CT) and (ii) 'ordinary' criminal law policies. As for the CT, the Kaczyński brothers denounced it as a guardian of the 'impossibilist' approach to statutory interpretation (Kaczyński & Kaczyński 2006: 11) allegedly hampering necessarily reforms, in particular lustration (on this in CEE region, see Nalepa 2010) and tough-on-crime policies. Thereby, L & J politicians embarked on a mix of propaganda (including critiques of specific verdicts and claiming that some judges represented a post-communist political party) and outlandish gestures.²⁶ The intensity of the clashes is best illustrated by CT case K 2/07 (new lustration law).²⁷ In a bid to push two judges to recuse themselves, L & J's MP representing the parliament accused them of clandestine cooperation with communist-era security apparatus.²⁸ Former CT President M. Safjan labelled these tactics 'political mobbing' (Safjan 2008).

Moreover, L & J politicians undertook two attempts to interfere with the process of appointing the CT president.²⁹ The first was initiated in 2006 by

24 For detailed results see: <https://wybory2005.pkw.gov.pl/> (accessed on 9 April 2024).

25 L. Kaczyński even complained about the 'deep reluctance to take state offices' on the side of his twin brother (Warzecha & Kaczyński 2011: 65).

26 E.g. boycotting the annual 'gala' CT meetings, previously attended by highest level authorities.

27 The verdict of the full bench (11 judges) with 9 separate opinions had been issued on 11 May 2007.

28 Presenting – obtained day earlier from L & J controlled 'Institute of National Remembrance' – archival pieces of documentation. See (Dudek 2011: 302–303).

29 According to the article 194 of the Constitution of 1997, the CT president is selected in a two-step procedure. The first involves the 15 CT Judges voting during the General Assembly. In the second step, candidates selected by the Assembly (two, as specified in the law on Constitutional Tribunal) are submitted to the president of the Republic, who selects the CT president. The logic of both attempts included (i) amendment of the law on CT to introduce a third candidate (supposedly backed by the six judges appointed by the L & J majority, as Polish CT judges are appointed to a single 9-year tenure by

submitting a draft amendment to the CT law;³⁰ however, it failed as President Kaczyński finally selected one of the lawfully submitted candidates. The second, marked with another draft law,³¹ failed as L & J lost the snap elections in 2007. Additionally, there were legislative activities aimed at some judicial independence guarantees in ordinary courts, like the ‘accelerated procedure’ of obtaining consent to arrest a judge, which was declared unconstitutional in the CT verdict of 28 November 2007 (K 39/07).

As for ordinary criminal law policies, it is important to see them within the framework of propaganda pillars, namely the ‘post-communist conspiracy’ and anticorruption moral panic. They included the creation of a brand-new secret service (Central Anti-Corruption Bureau, CBA), eager to rely on wiretapping and undercover operations³² (crossing the tiny line that separates documenting crimes and initiating them, thereby leading to the first criminal conviction of CBA chief M. Kaminski³³). Also, the practice of so-called ‘extractory arrests’ was popularised as a tool of obtaining testimonies by detaining potential witnesses. All in all, a so-called ‘technological line’ was established, linking the L & J politicians, secret services, public prosecution and the media (Janicki & Władyka 2016). Leaks from investigations, TV reporting with handcuffed people and inquisitorial L & J politicians’ press conferences became commonplace.

Three emblematic examples can be offered. First, in April 2007 the post-communist politician and former minister B. Blida allegedly shot herself during an arrest attempt, with a camera team waiting at the doorstep. Strikingly, later reportage and parliamentary hearings (SKBB 2011: 174) revealed that the *de facto* decision whether to handcuff her or not had been made personally by Prime Minister Kaczyński (he opted not to). Second, in August 2007, when CBA’s undercover provocation aimed at corrupting Deputy Prime Minister A. Lepper of *Self Defense* (allegedly in an attempt to break down and cannibalise his parliamentary club), former L & J Minister of Interior J. Kaczmarek was arrested (for allegedly leaking information on a CBA covert operation, see SKSS, 2011:32–67). Television stations aired the press conference of one of the top prosecutors presenting evidence against Kaczmarek, including wiretapped

the ordinary majority in the lower chamber of the Parliament), and (ii) selecting this candidate by the L & J president of the Republic L. Kaczyński. The Kaczyński’s plot to control CT had been described by former deputy Prime Minister A. Lepper in an interview with J. Żakowski, ‘W niektórych przypadkach udawałem głupiego’, *Polityka* weekly, no 32, 11 August 2007.

30 Ref. no. 765, Fifth parliamentary term.

31 Ref. no. 2030, Fifth parliamentary term.

32 Personified by Tomasz Kaczmarek – so-called ‘agent Tommy’, CBA officer turned L & J MP and anti-L & J convert.

33 He was pardoned by President A. Duda in 2015 and joined the new cabinet. After the Supreme Court declared his pardon ineffective, his first conviction was upheld and Kaminski was jailed, but then he received a second pardon. <https://www.reuters.com/world/europe/who-are-ex-ministers-jailed-poland-why-were-they-convicted-2024-01-10/> (accessed on 9 April 2024).

phone calls, geolocation data and CCTV recordings. A court declared the arrest excessive, and Kaczmarek was acquitted. Third, amid a snap elections campaign, Civic Platform MP B. Sawicka was caught receiving a bribe from a CBA undercover agent (in an alleged attempt to prove that the electoral victory of CP would lead to the corrupt privatisation of public hospitals, see SKSS 2011: 74–80). She was later acquitted.

To interpret these events, one could refer to another deputy prime minister in the L & J cabinet – the minister of interior and long-time confidante of the Kaczyński brothers, L. Dorn – and what he dubbed ‘moral-cognitive shock doctrine’. In his account, J. Kaczyński believed that ‘post-communist conspiracy’ can be ‘shown’ to the public, and that the resulting ‘cognitive revolution’ will propel ‘political revolution’ (Dorn 2013: 186–187).³⁴

L & J in opposition (2007–2015)

Given the scope of this article, two aspects of L & J’s opposition period should be noted. The first is regarding the internal organisation of the party; the second is regarding the radicalisation of its language and embracing conspiracy theories about the 2010 plane crash that killed President L. Kaczyński. The drift of L & J into what is referred to as a ‘*leader’s party*’ (Rymarz 2012)³⁵ began as early as 2003, when L & J chairmen were granted the authority to suspend other party members.³⁶ After losing the snap election of 2007, tensions mounted within L & J, leading Kaczyński to suspend three vice-chairmen of the party.³⁷ In 2009 a new L & J statute was adopted³⁸ (the same was true in 2016, as L & J headed for electoral victory³⁹), strengthening the chairmen’s grip on statutory bodies. Moreover, in 2006–2007 the overall image of L & J changed – from urban, republican and anticommunist (although with some clerical and nationalist

34 To put it in less poetic terms than Mr. Dorn – propaganda portraying Kaczynski’s political opponents as corrupted criminals would secure him multiple terms in office.

35 On the other hand, D. Tusk’s Civic Platform had also been referred to as a ‘*leader’s party*’, the trend worrying even former constitutional judges (Rymarz 2012).

36 The pre-2003 L & J statute can be accessed at: <https://web.archive.org/web/20020528061056/http://www.pis.org.pl/> (accessed on 9 April 2024), while its amended version is at https://web.archive.org/web/20060720185223/http://www.bip.ires.pl/gfx/pis/images/statut_pis.pdf (accessed on 9 April 2024). Key changes had been introduced in articles 28–29 (formerly 34–35). The consequences of this change had been described by (Dorn 2013: 168–169) as a creation of a ‘brand-new’ party that is ‘a projection of political will of the brothers’.

37 See for example reporting: W. Szacki, Kaczyński na ostro z reformatorami, *Gazeta Wyborcza* daily, 16 November 2007; A. Sopińska, B. Waszkielewicz, Trzech krytykuje Kaczyńskiego, *Rzeczpospolita* daily, 6 December 2007.

38 Available at https://www.politicalpartydb.org/wp-content/uploads/Statutes/Poland/POLAND_Law-and-Justice-PiS_2009.pdf (accessed on 9 April 2024).

39 Available at https://www.politicalpartydb.org/wp-content/uploads/Statutes/Poland/Poland_PiS_2016.pdf (accessed on 9 April 2024). See A. Machowski, Księga zapowiedzianej dyktatury, *Gazeta Wyborcza* daily, 10 November 2020.

flavour), it morphed toward rural, less educated, manifestly religious⁴⁰ – the evolution similar to post 2002 Fidesz.

As for the conspiracy theorising, J. Kaczyński's initial reaction to the Smoleńsk plane crash was remarkably dovish.⁴¹ Kaczyński, running for president in 2010, had been surrounded by staffers who sought to run his late brother's re-election campaign. They envisioned a moderate candidate – the script that Kaczyński dutifully followed, only to debunk it (ejecting these 'liberals' from L & J⁴²) after losing elections as a mere effect of his medications. Instead, he embraced a quasi-religious cult and outright conspiracy theory of the president's assassination (Bilewicz et al. 2018), amplifying earlier changes to the party image.

Second cabinet: 'Bread' and constitutional crisis (2015–2023)

Just like in 2005, when L & J took power for the first time, the presidential and parliamentary elections happened to coincide again in 2015.⁴³ In the 2015 presidential race,⁴⁴ J. Kaczyński's strategy involved lowering his own media presence, and instead promoting young member of the European Parliament A. Duda. Due to a weak campaign by the incumbent and the rise of a protest vote,⁴⁵ Duda scored a 51.55 percent victory in the runoff.⁴⁶

Propelled by the unexpected presidential victory and a scandal with secret recordings of private conversations between incumbent Civic Platform politicians (like F. Gyurcsány's tapes, which provoked a public outcry even though it didn't expose criminal conduct), L & J's parliamentary campaign followed a similar strategy. Duda's campaign manager B. Szydło was designated as would-be prime minister. Thanks to strategic mismanagement of the left, which produced a high D'Hondt premium for the electoral winner, L & J managed to

40 Referring to the clerical-nationalistic broadcasting station 'Radio Mary' – the clearest example of politicised religion in Polish political landscape, Kaczyński himself acknowledged back in 2006: 'It is impossible to win elections without the Radio Mary. I wanted to do this differently. [my previous party] had been an attempt to build upon the centrist electorate', see (Kaczynski & Kaczynski 2006: 292).

41 See for example reporting on his Youtube speech to Russians on WW II victory anniversary, see Jarosław Kaczyński do przyjaciół Moskali, *Gazeta Wyborcza* daily, 9 May 2010.

42 See for example A. Nowakowska, D. Wielowieyska, Ani nie zwariował, ani nie na proszkach, *Gazeta Wyborcza* daily, 2 March 2011.

43 The presidential term in office lasts five years, while the parliamentary term lasts four years.

44 Widely believed to be an easy win for the incumbent B. Komorowski from Civic Platform – to quote A. Michnik, losing the election would require a drunk-driving Komorowski to hit a pregnant nun on a pedestrian crossing, <https://www.tygodnikpowszechny.pl/tajemnica-adama-michnika-181252> (accessed on 9 April 2024).

45 P. Kukiz, ageing-rock-star-turned-politician scored 20.8 percent of votes in the first vote.

46 8.63 million to 8.11 million votes, see the Electoral Commission Communiqué Dz.U. 2015 poz. 725, detailed electoral results available at: https://prezydent2015.pkw.gov.pl/319_Polska.html (accessed on 9 April 2024).

secure the first single-party parliamentary majority. Short of Orbán's constitutional supermajority, it was nevertheless the first single-party majority since the 1989 democratic transition.⁴⁷ Although it had not allowed proper constitutional changes, it could (and was) used as a tool of *de facto* constitutional change via ordinary legislation – the strategy requiring the dismantling of the constitutional court and increasing L & J vulnerability to the actions of the European Commission (especially as Kaczyński turned unable and/or unwilling to replicate Orbán's 'peacock dance' on the international stage, and L & J was not aligned with any key Euro-parliament party as was Fidesz with European People's Party).

As Szydło's cabinet formed, it turned out far more right-wing than some campaign commentators had expected. In particular, Smoleńsk-conspiracy peddler A. Macierewicz became the minister of defense (he retained the office until Jan 2018), Z. Ziobro returned to his 2005–2007 post as a minister of justice-prosecutor general, and the 2006–2009 CBA Chief M. Kamiński – pardoned by President Duda – became the coordinator for the security services (and, since August 2019, the minister of interior).

Despite that, the undercover operations and widely televised spectacular arrests of 2006–2007 did not return. However, evidence of Pegasus spying software deployment against opposition politicians and activists strongly suggests that, beneath the surface, secret services were indeed weaponised to political ends (PEGA Committee 2023). Although some of the spied text messages had been presented in the TV news, the bottom line is that the 2005–2007 'technological line' (Janicki & Władyka 2016) had been generally abandoned (which is likely the result of their questionable effectiveness back in 2007). Instead, more ordinary TV propaganda was employed (for example portraying Civic Platform's D. Tusk as a pro-Russian German agent) and massive social spending had been launched in order to secure electoral support. Only shortly before the 2023 elections, the so-called *lex Tusk* (Piccirilli 2023) had been adopted to create a McCarthy-style committee to investigate 'Russian influence' among Polish politicians – although it failed to produce a single public hearing, it managed to publish a partial report after the elections.⁴⁸

As there is detailed English-language literature on the L & J governance practices in general, and its assaults on the judiciary in particular (Wyrzykowski 2019; Sadurski 2019a; Sadurski 2019b; Duncan & Macy 2020; Pech et al. 2021), we will focus on just a few emblematic points. The first one involves taking

47 37.58 percent of L & J votes translated into 235 out of 460 lower chamber seats, see the Electoral Commission Communiqué Dz.U. 2015 poz. 1731 and detailed electoral results available at: https://parlament2015.pkw.gov.pl/349_Wyniki_Sejm.html (accessed on 9 April 2024). Technically, the majority was referred to as a United Right, composed of L & J and two junior partners (one of them expelled from the coalition and cannibalised in 2021).

48 www.gov.pl/attachment//4a451d44-74bd-4d3c-99b1-ce0de61af630 (accessed on 9 April 2024).

control and hollowing-out the CT. Admittedly, it was preceded by the Civic Platform's majority unconstitutional attempt to nominate five (instead of three) Constitutional Tribunal justices.⁴⁹ However, instead of following the constitutional path to resolve such a crisis,⁵⁰ the L & J majority declared all five appointments 'nullified' and appointed five of their own justices (creating a problem of three so-called 'doubles').⁵¹ Furthermore, over the subsequent years, L & J embarked on what retired CT judge M. Wyrzykowski dubbed a 'war against the Constitution' (Wyrzykowski 2019), attempting to block CT and finally promote one of the L & J appointees to its presidency. As this effort succeeded, CT underwent a transition 'from an activist court' through 'a paralysed tribunal' of 2016, 'to a governmental enabler' of 2017 onwards (Sadurski 2019b).

Second, with the Kelsenian Constitutional Court out of the way, subsequent 'reforms' were aimed at (i) public prosecution,⁵² (ii) the common court system,⁵³ (iii) The National Council of the Judiciary⁵⁴ (appointing so called 'neo-judges'⁵⁵) and (iv) The Supreme Court.⁵⁶ In an apparent flashback to 2006–2007, 'reform' aimed at courts had been followed by outdoor campaign targeting judges as

49 While J. Kaczynski claimed that his actions were just a response to that unconstitutional behaviour, see interview in *Rzeczpospolita* daily, 18 January 2016, "Nie chcę większości w TK," comparison of the subsequent L & J actions with abovementioned 2006–2007 attempts to nominate CT president seems to debunk this claim.

50 CT finally declared appointment of the three justices valid, and subsequently two invalid, see CT verdict of 3 December 2015, K 34/15.

51 On this problem, see for example ECHR 7 May 2021 judgment in *Xero Flor v. Poland*, application no. 4907/18.

52 see Law of 28 January 2016 (Dz.U.2016.177) – undoing 2010 separation of the office of prosecutor general from the minister of justice, introduced by law on 9 October 2009 (Dz.U.2009.178.1375) – and strengthening hierarchical control of PG-MoJ.

53 See, for example, the amendment of 12 July 2017 (Dz.U. poz. 1452), allowing for the replacement of the Court presidents and strengthening MoJ supervision. According to the *Iustitia* Association of Judges, 130 Court presidents and their deputies had been replaced on the basis of the abovementioned amendment, see <https://iustitia.pl/ostatecznie-130-prezesow-i-wiceprezesow-zostalo-odwolanych-przez-ministra-sprawiedliwosci/> (accessed on 9 April 2024).

54 The original law adopted by the parliament (doc. no. 1423, VIII term) had been vetoed by L & J President Duda. The 'reform' had been introduced in a subsequent draft, submitted by the president and later on corrected by L & J MPs (doc. no. 2002, VIII term) and adopted as law on 8 December 2018 (Dz.U. 2018 poz. 3). Among other changes, it replaced the majority of the Council members – the representatives of the judicial community elected by the judges – with representatives of the judicial community appointed by the lower chamber majority. See ECHR judgment of 15 March 2022, *Grzęda v. Poland* (application no. 43572/18).

55 On this problem, see for example ECHR 23 November 2023 judgment in *Wałęsa v. Poland*, application no. 50849/21.

56 The original law adopted by the parliament (doc. no. 1727, VIII term) had been vetoed by L & J President Duda. The 'reform' had been introduced in a subsequent draft, submitted by the president and later on corrected by L & J MPs (doc. no. 2003, VIII term) and adopted as law on 28 December 2018 (Dz.U. z 2018 r. poz. 5). Among other changes, it aimed at purging judges via lowered retirement age – however, it was abandoned due to the Order of the CJEU Vice-President in Case C-619/18 – nevertheless, two additional chambers of the SC had been created and appointed via 'new' NCJ – one for disciplinary matters – see CJEU verdict of 15 July 2021 C-791/19 and ECHR 22 July 2021 judgment in *Reczkowicz v.*

a rotten ‘caste’⁵⁷ and supported by what turned out to be a clandestine troll-farm run at the Ministry of Justice, and involving L & J-friendly judges working therein (Applebaum 2020).⁵⁸

Third, the actions mentioned above triggered substantial resistance from the judicial community (Borkowski 2016),⁵⁹ firmly rooted in the multicentric EU legal order (thereby backed by CJEU and ECHR jurisprudence). As a consequence, another set of activities focused on safeguarding previous ‘de-forms’. This included L & J-controlled-CT verdicts aimed at ‘blocking’ the Supreme Court,⁶⁰ ECJ⁶¹ and ECHR,⁶² as well as yet another legislation targeting judges examining the legality of ‘new’ NCJ appointments with disciplinary measures.⁶³

Fourth, the L & J-controlled-CT (or just a CT packed by L & J with ultraconservatives, as their inner dynamics in this case remain unclear) issued what became the most contested CT verdict ever, removing severe (including lethal) fetal defects from the already restrictive list of circumstances allowing for legal abortion (Gliszczyńska-Grabias & Sadurski 2021).

Last but not least, the L & J cabinet initiated changes in the Polish political scene. In particular, it shifted the *Overton’s window* to the right, paving the way for the emergence of even more radical political vehicles of nationalists and economic libertarians (Konfederacja) that entered the Parliament in the 2019 elections (and contemporarily is largely viewed as a plausible L & J coalition partner after the next elections).

Poland, Application no. 43447/19 – another for so-called ‘extraordinary cassations’ aimed at reviewing legally binding verdicts

57 As reported by *The Economist*, ‘Its campaign to paint the judiciary as a corrupt clique—complete with billboards depicting a drunk-driving judge—doubtless contributed to falling confidence in the justice system, down from 41% in 2015 to 32%, according to a Eurobarometer poll’, *The Economist*, ‘Change of state’, 21 April 2018. For archived website of the campaign dubbed ‘Just Courts’ (PL: ‘Sprawiedliwie Sądy’) see <https://web.archive.org/web/20170908170908/http://www.sprawiedliwesady.pl/> (accessed on 9 April 2024).

58 One of the judges involved in that activity, T. Szymdt, went public in 2022 to expose what he said was unethical behaviour by pro-government judges. On 6 May 2024, he asked for political asylum in Belarus, see <https://www.politico.eu/article/polish-judge-asks-for-asylum-in-belarus-protest-against-unjust-policy-towards-russia/> (accessed on 9 April 2024). It is unclear whether he spied for Belarus and/or Russia, and whether his hating activities were his own or externally inspired.

59 For example, in a ‘referendum’ of judges organised by Iustitia association, 3346 out of 3690 participating judges (over one in three judges in Poland) claimed ‘new’ NCJ fail to properly execute its constitutional tasks, and 3191 out of 3680 urged ‘new’ NCJ judges to resign, see: <https://iustitia.pl/juz-prawie-3700-sedziow-ze-154-sadow-ocenilo-krs-w-referendum-zorganizowanym-przez-forum-wspolpracy-sedziow/> (accessed on 9 April 2024).

60 See decisions of 28 January 2020 and 21 April 2020 (Kpt 1/20).

61 See verdicts of 14 July 2021 (P 7/20), 7 Oct 2021 (K 3/21), 10 March 2022 (K 7/21).

62 See verdict of 24 November 2021 (K 6/21).

63 The so-called ‘muzzle law’ of 20 December 2019 (Dz.U.2020.190) amending law on common courts. The provisions had been further amended (‘liberalised’) by law on 9 June 2022 (Dz.U.2022.1259), as a failed attempt to coin the ‘compromise’ with the European Commission).

L & J in opposition (2023–)

Given the depth and length of illiberal actions undertaken during L & J's second term in power, one might expect that any clean-up would not be a straightforward process. The extent of the challenge became apparent after the 2023 parliamentary election⁶⁴ that paved the way for the coalition cabinet of D. Tusk. As of 1 January 2025, neither the CT nor NCJ had been reformed to ensure conformity with the constitution. The moves aimed at the so-called 'restoration of the rule-of-law', carried out by new ministers, including Minister of Justice-Prosecutor General A. Bodnar (former Ombudsman), got mixed reviews even from some constitutional law scholars with a firm record of criticising L & J activities,⁶⁵ reviving the older debate of hawks and doves.⁶⁶ The Venice Commission⁶⁷ also took a rather cautious stand on legislation proposals aimed at resolving the problem of so called 'neo-judges' appointed by the L & J-packed NCJ. Nevertheless, in May 2024, the European Commission determined that there was no longer a clear risk of a serious breach of the rule of law in Poland, closing Article 7(1) of the Treaty on European Union procedure for Poland.⁶⁸

Contrary to some expectations, J. Kaczyński maintained a relatively firm grip on L & J and enjoyed considerable support, as expressed in the 2023 parliamentary elections and the 2024 local and European Parliament elections.⁶⁹ The Smoleńsk conspiracy theory was not dropped. Interestingly, L & J borrowed CP's 2015–2023 'defending rule of law' narrative, claiming Tusk's cabinet was breaching the constitution and public prosecution was being weaponised against L & J politicians. L & J went as far as to declare M. Kamiński – serving

64 L & J won with 7.64 million votes (194 seats), but the coalition government of D. Tusk was backed by a Civic Coalition (6.63 mln votes, 157 seats), PL2050 (3.11 mln votes, 65 seats), and the Left (1.86 mln votes, 26 seats), see the Electoral Commission Communiqué Dz.U. 2023 poz. 2234, detailed electoral results available at: <https://sejmsenat2023.pkw.gov.pl/sejmsenat2023/en/sejm/wynik/pl> (accessed on 9 April 2024).

65 An example of such debate is offered by two long interviews with eminent constitutional law scholars published by *Gazeta Wyborcza* daily: a rather critical one, by constitutionalist R. Piotrowski (*Mamy prawo DO PRAWA*, 15 April 2024) and the response from the retired CT judge E. Łętowska (*Postami nie są i być nie mogą*, 29 April 2024).

66 See for example W. Sadurski, *Konstytucja to nie pakt samobójczy*, *Gazeta Wyborcza* daily, 13 November 2023.

67 CDL-AD(2024)029-e, Poland – Joint Opinion of the Venice Commission and the Directorate General Human Rights and Rule of Law on European standards regulating the status of judges, adopted by the Venice Commission at its 140th Plenary Session (Venice, 11–12 October 2024).

68 https://ec.europa.eu/commission/presscorner/detail/en/ip_24_2461 and https://ec.europa.eu/commission/presscorner/detail/en/mex_24_2986 (accessed on 5 November 2024).

69 For the detailed data on the results, see respectively: <https://sejmsenat2023.pkw.gov.pl/sejmsenat2023/>; <https://samorzad2024.pkw.gov.pl/samorząd2024/>; <https://wybory.gov.pl/pe2024/> (accessed 5 November 2024).

his prison sentence for 15 days before a second presidential pardon⁷⁰ – a political prisoner.

The United States

The Hungarian and Polish cases demonstrate how illiberal leaders can endanger the judiciary, especially when they return to power. They may therefore constitute a cautionary lesson for other countries, such as the United States, given Donald Trump's victory in the November 2024 presidential election. For many observers of American politics, Trump's first term as a conservative populist president amounted to a serious challenge not just to established political expectations and practices but to the stability of the American constitutional regime. Trump arguably posed a threat to a variety of basic democratic institutions and norms, including an independent judiciary.

Multiple challenges to judicial authority

There are multiple respects in which Trump undermined the authority of the judicial branch during his first term. For example, his irregular use of presidential pardons, which he often issued after celebrity appeals and outside established procedures, arguably undercut the judiciary by reversing its determinations without providing a persuasive justification. Trump's nomination of ideologically extreme candidates for judicial openings might constitute another threat to judicial independence, by reducing constitutional differences to mere partisan and ideological positioning. Beyond those two considerations, the following pages briefly note Trump's actions against the judiciary's jurisdiction and its role as authoritative constitutional interpreter, as well as his voluminous attacks against individual judges.

Judicial jurisdiction

The Trump administration sought to limit the ability of federal courts to consider legal challenges to its actions. In other words, the executive branch endeavoured to curtail the judiciary's range of authority. Disputes over judicial jurisdiction occasionally arise in the US, but Trump arguably took the issue to a new level during legal arguments about his January 2017 executive order limiting immigration. Lawyers for the Trump administration claimed that the courts lacked jurisdiction to review its order and indeed claimed it was unreviewable. On 7 February 2017, in the course of oral arguments before a three-judge panel of the Ninth Circuit, August E. Flentje, the lawyer for the Department of Justice (DOJ), said, 'This is a traditional national security judgment that is assigned to

70 See footnote 33

the political branches and the president', apparently meaning that the judiciary could not second guess the president's determinations regarding national security. Judge Michelle T. Friedland then asked him, 'Are you arguing, then, that the president's decision in that regard is unreviewable?' Flentje replied, 'Yes' (Liptak 2017).

In its decision in *State of Washington v. Trump*, No. 17-35105 (9 February 2017), the Ninth Circuit explained the Trump administration's argument about reviewability this way:

The Government has taken the position that the President's decisions about immigration policy, particularly when motivated by national security concerns, are *unreviewable*, even if those actions potentially contravene constitutional rights and protections. The Government indeed asserts that it violates separation of powers for the judiciary to entertain a constitutional challenge to executive actions such as this one.

The court was not persuaded by this radical claim, and its per curiam decision declared, 'There is no precedent to support this claimed unreviewability, which runs contrary to the fundamental structure of our constitutional democracy.'

Judicial supremacy

Trump also challenged the doctrine of judicial supremacy, which holds that while other political actors may have their own views about constitutional meaning, only the judiciary's view (and, in particular, that of the Supreme Court) is authoritative. The idea of judicial supremacy is a bedrock principle of American constitutional law, and even minor rhetorical challenges to it tend to incur significant political costs. Nevertheless, in several respects the Trump administration challenged the norm of judicial supremacy and sought to assert its own constitutional views. This may be seen in terms of declarations by one of its top aides and also its presidential signing statements.

In February 2017, senior advisor to the president Stephen Miller made comments that seemed to challenge the ability of judges to curtail the president, after court decisions against Trump's executive order on immigration. Miller was then interviewed on two television programmes, on which he explicitly disparaged the idea of judicial supremacy. He said, 'we've heard a lot of talk about how all the branches of government are equal. That's the point. They are equal. There's no such thing as judicial supremacy. What the judges did, both at the ninth and at the district level was to take power for themselves that belongs squarely in the hands of the president of the United States.' He also said, 'we don't have judicial supremacy in this country. We have three coequal branches of government.' In short, Miller appeared to reject the idea that the judiciary's opinions about constitutionality should matter any more than the president's opinions.

Some of Trump's presidential signing statements also asserted that his own views of constitutionality should be binding. For example, in his first signing statement in May 2017, Trump said that he was reserving the right to disregard 89 parts of the bill that he had just signed into law. Trump's signing statement listed dozens of provisions of the law that in his view infringed on his own constitutional prerogatives and which he therefore intended to treat as merely 'advisory and non-binding'. Thus, Trump announced that his own constitutional interpretations would supersede those of Congress, with no allowance at all for the judiciary's supposedly authoritative role in determining such matters.

Similarly, when Congress passed a Russia sanctions bill in August 2017, Trump issued two signing statements, both of which challenged Congress on constitutional grounds. The first statement declared, 'in its haste to pass this legislation the Congress included a number of clearly unconstitutional provisions'. The second statement said the bill 'encroaches on the executive branch's authority'. Thus, Trump asserted that his own views about constitutionality should carry significant weight.

In December 2017, after signing into law a \$ 700 billion defence bill, Trump claimed 'the bill includes several provisions that raise constitutional concerns', and therefore 'my Administration will treat these provisions consistent with the President's constitutional authority to withhold information'. And in March 2020, Trump issued a signing statement after signing the Coronavirus Aid, Relief, and Economic Security (CARES) Act. Trump's statement claimed 'the Act includes several provisions that raise constitutional concerns.' It further said that aspects of the act were unconstitutionally 'intruding upon the President's power'.

As the several signing statements noted above indicate, Trump maintained that the president's constitutional interpretations mattered, at least as much as those of the legislative branch, if not also the judicial branch. Thus, Trump appeared to reject the standard view of judicial supremacy, according to which only the Supreme Court's constitutional judgments are determinative.

Criticising the judiciary's personnel

While the abovementioned actions constituted significant respects in which Trump sought to lessen the federal judiciary's power, the main way in which Trump undercut the independence of the judiciary was arguably via his criticisms of individual judges and justices. Trump launched numerous personal attacks against a variety of judges. Presidential criticism of judges is not unprecedented in the US, but it is not the norm, and it is usually restrained. Trump's judicial criticisms were far more numerous and caustic than those of his predecessors.

Trump's criticisms of individual judges began shortly after he effectively secured the republican nomination. In May 2016, Trump criticised District

Judge Gonzalo P. Curiel and also Magistrate Judge William V. Gallo, both of the United States District Court for the Southern District of California, due to his frustrations with a legal suit against Trump University. During a political rally in San Diego, Trump criticised Judge Curiel in a lengthy rant. Trump said, 'I have a judge who is a hater of Donald Trump...' Trump continued, 'We're in front of a very hostile judge...' Trump complained, 'I'm telling you... they ought to look into Judge Curiel... because what Judge Curiel is doing is a total disgrace, OK?' He then said, 'I think Judge Curiel should be ashamed of himself.' Trump also told the crowd, 'We have a Magistrate named William Gallo who totally hates us' (Brennan Center 2020).

While the above remarks amounted to a hodgepodge of personal and political attacks, Trump also employed some racially tinged invective. Trump told the crowd in San Diego that Curiel 'happens to be, we believe, Mexican'. Trump's point appeared to be that the judge's racial heritage rendered him unable to fairly adjudicate some matters, such as immigration and border security (Epps 2020). Days later, Trump repeated his racial criticisms of Curiel during interviews with CNN and the Wall Street Journal, saying 'he's a Mexican. We're building a wall between here and Mexico'. According to a journalistic report, 'an aide in Judge Curiel's chambers... said the judicial code of conduct prevents him from responding to Mr. Trump' (Epstein 2016). After numerous politicians objected that Trump's criticisms of Judge Curiel were racist, Trump issued a lengthy response, in which he defended his criticisms.

In February 2017, just weeks into his presidency, Trump criticised US District Judge James Robart after a decision against his immigration order. Trump tweeted, 'The opinion of this so-called judge, which essentially takes law-enforcement away from our country, is ridiculous and will be overturned!' Trump also tweeted that the judge was 'a known liberal sympathizer' and had 'just opened the door to terrorists!' Trump even suggested the judge should be held responsible for a future terrorist attack: 'If something happens, blame him' (Levitz 2017).

The day after the 9th US Circuit Court of Appeals heard oral arguments about his travel ban, Trump lashed out at the judges. Trump said, 'A bad high school student would understand this.' Trump then said, 'I don't ever want to call a court biased and we haven't had a decision yet. But courts seem to be so political, and it would be so great for our justice system if they would be able to read a statement and do what's right.' Trump further said, 'I have to be honest that if these judges wanted to, in my opinion, help the court in terms of respect for the court, they'd do what they should be doing. It's so sad.' The next day, White House spokesman Sean Spicer said Trump had 'no regrets' about his criticism of judges (Bellisle 2017).

The next month, Trump criticised US District Court Judge Derrick K. Watson of the District of Hawaii. Watson stayed a revised version of Trump's immigration ban, and he suggested that the policy was motivated by animus towards

Muslims. In response, Trump sarcastically asked the crowd at one of his rallies, 'You don't think this was done by a judge for political reasons, do you?' (Epps 2020; Burns 2017).

In April 2017, Judge William H. Orrick of the Northern California Circuit blocked Trump's immigration order. Orrick's decision was the third time in two months that Trump's order had been struck down by a federal judge, and Trump indicated his displeasure via a formal White House statement, which said 'an unelected judge unilaterally rewrote immigration policy for our nation' and gave a 'gift to the criminal gang and cartel element in our country' (Friedman 2019).

Later that month, Trump criticised the entire Ninth Circuit, after the court blocked his effort to de-fund sanctuary cities. Trump tweeted, 'First the Ninth Circuit rules against the ban & now it hits again on sanctuary cities – both ridiculous rulings. See you in the Supreme Court!' Trump then said that he was considering breaking up the Ninth Circuit. Nine months later, Trump again criticised the Ninth Circuit. In February 2018, when it was announced that a case regarding amnesty for DACA deportations would be heard in the 9th US Circuit Court of Appeals, Trump told a group of governors at the White House, 'We lose, we lose, we lose, and then we do fine in the Supreme Court. But what does that tell you about our court system? It's a very, very sad thing' (Judd & Waters 2018).

In November 2018, after Judge Jon S. Tigar of the Northern District of California stayed new rules on asylum applications, Trump complained, 'That's not law. This was an Obama judge', as if the partisan orientation of the individual who had nominated the judge rendered him incapable of rendering fair legal decisions. In addition to criticising Judge Tigar personally, Trump also took the occasion to criticise the entire Ninth Circuit court, apparently confusing it with the district court on which Judge Tigar sat (Reilly 2018). On Twitter, Trump said 'It would be great if the 9th Circuit was indeed an "independent judiciary," but if it is why are so many opposing view (on Border and Safety) cases filed there, and why are a vast number of those cases overturned.' Trump also called the circuit court's rulings a 'terrible, costly and dangerous disgrace'.

Four months later, in March 2019, Trump directed his ire at Judge Richard Seeborg of the District Court for the Northern District of California, after Seeborg determined that the administration's programme to make asylum seekers at the southern border wait in Mexico while they are processed violated existing laws. Trump re-tweeted Fox News host Laura Ingraham's characterisation of the decision as the 'tyranny of the judiciary'.

In February 2020, Trump criticised US District Judge Amy Berman Jackson, as she was about to sentence his former aide Roger Stone for lying to Congress (Buchanan 2020). Trump tweeted, 'Is this the Judge that put Paul Manafort in SOLITARY CONFINEMENT, something that not even mobster Al Capone had to endure? How did she treat Crooked Hillary Clinton? Just asking!' (Epps 2020). Trump also criticised the foreperson of the jury: 'There has rarely been a juror

so tainted as the forewoman in the Roger Stone case. Look at her background. She never revealed her hatred of “Trump” and Stone. She was totally biased, as is the judge... Miscarriage of justice. Sad to watch!’ When Jackson defended the jurors, Stone’s lawyers immediately demanded that Jackson take herself off the case because of ‘bias’, and Trump echoed the demand via Twitter (Epps 2020).

Trump and the Supreme Court

Trump’s criticism of federal judges was not limited to the lower levels of the judiciary, as half-way through his third year in office it extended to justices of the Supreme Court. In June 2019, Trump criticised the Supreme Court’s decision in *Department of Commerce v. New York*, No. 18-966, 588 U.S. (2019), against incorporating a citizenship question into the national census. Trump tweeted that the Court’s decision ‘seems totally ridiculous’ (Epps 2020). When Trump was asked about the Court’s decision, he said, ‘It was a very strange decision. It was a very, very sad decision. Not in terms of voting. Not in terms of—just a very sad because it was so convoluted. It was—to get to that decision, had to be very, very hard.’

In February 2020, Justice Sonia Sotomayor issued a dissent in *Wolf v. Cook County*, 589 U.S. (2020), in which the Court’s majority permitted the administration to make it more difficult for people who entered the country lawfully to become citizens (Epps 2020). In a pair of tweets, Trump complained about Justices Sonia Sotomayor and Ruth Bader Ginsberg. He said, ‘Both should recuse themselves on all Trump, or Trump related, matters! While “elections have consequences”, I only ask for fairness, especially when it comes to decisions made by the United States Supreme Court!’ (Dwyer 2020). Trump followed up in a news conference, saying that the reasons for having Ginsburg and Sotomayor not participate in such cases are ‘very obvious’.

In the summer of 2020, Trump launched more complaints against the Supreme Court. He said, ‘These horrible & politically charged decisions coming out of the Supreme Court are shotgun blasts into the face of people that are proud to call themselves Republicans or Conservatives.’ Trump asked, ‘Do you get the impression that the Supreme Court doesn’t like me?’ (Coglianese 2020).

Trump’s criticisms of the Supreme Court arguably increased several months later, after his failed legal attempts to overturn his loss in the 2020 presidential election. Trump denounced the Court’s refusal in *Texas v. Pennsylvania*, 592 U.S. (2020) to delay the state certification of the election results as a ‘disgraceful miscarriage of justice’. On Twitter he said, ‘The Supreme Court really let us down.’ In a tweet responding to Sean Hannity of Fox News, Trump wrote, ‘This is a great and disgraceful miscarriage of justice. The people of the United States were cheated, and our Country disgraced. Never even given our day in Court!’ (Jenkins 2020, Collins & Eshbaugh-Soha 2020).

The Significance of Trump's Criticisms of Judges

Trump's criticisms of members of the judiciary were far more numerous and derisive than those of any previous president and constituted a serious threat to judicial independence. Altogether, in his first term Trump criticised some eight federal judges, the entire 9th Circuit and two Supreme Court justices. Trump's many criticisms did not fall on deaf ears but rather were met with a variety of counter-criticisms. Prominent politicians and judges who criticised Trump's attacks on judges included House Speaker Paul Ryan, Senate Majority Leader Chuck Schumer, Judge Neil Gorsuch (during the time of his nomination to the Supreme Court), Judge Jay Bybee of the Ninth Circuit, Chief Justice John Roberts, Judge Carlton Wayne Reeves of the District Court for the Southern District of Mississippi, Judge Paul Friedman of the US District Court for the District of Columbia and Judge Amy Berman Jackson.

Clearly, many people saw Trump's judicial criticisms as out of bounds, and for some they were not just inappropriate but dangerous. As law professor David Post warned, 'This is how authoritarianism starts, with a president who does not respect the judiciary' (Liptak 2016). Journalist Aaron Blake suggested that Trump's criticisms were part of a broader trend towards politicisation:

Comments like the ones Trump made... at the very least seem geared toward "working the refs" — i.e., sending a message that judges, who are supposed to be apolitical, won't be immune from his political wrath. And when they issue a decision he doesn't like, Trump is saying, they're going to pay the same price as a senator who votes the wrong way on a bill. This is something that's troubling to those who would prefer to keep politics out of the judiciary. (Blake 2017)

And as journalist Peter Beinart notes, greater politicisation of the judiciary might well decrease the public's sense of its legitimacy and respectability, which would lessen its ability to serve as a check on the more overtly political branches: 'The more he convinces his supporters that judges, like reporters, are corrupt and self-interested, the less public legitimacy they enjoy. And the less public legitimacy they enjoy, the less they can check Trump's power' (Beinart 2016).

Post-presidency

Trump falsely claimed that he won the 2020 presidential election, and on 6 January 2021 he encouraged a violent assault on Congress as it sought to officially certify Joe Biden as the winner of the election. After Trump grudgingly left the White House, the former president continued to proclaim his disdain for the American judiciary and regular legal proceedings. Many of Trump's complaints involved the various civil and criminal court cases he faced after his presidency

(Goudswaard 2023). For example, in February 2023, Trump criticised the investigation in Georgia about potential illegal election meddling, saying on social media that it was ‘ridiculous, a strictly political continuation of the greatest Witch Hunt of all time’.

In April 2023, Trump levelled various accusations at Manhattan District Attorney Alvin Bragg for prosecuting him for fraud, calling Bragg ‘corrupt’ and warning of ‘death and destruction’. Trump also criticised the judge in the case, Juan Merchan, calling him ‘a Trump hating judge’. That same month, Trump was publicly critical of the civil lawsuit against him for allegedly defaming a woman he had sexually assaulted, leading the judge in that case to issue an admonition ‘to please refrain from making any statements that are likely to incite violence or civil unrest’.

On 25 March 2023, at the first large rally of his re-election campaign, Trump claimed that Democrats were unfairly persecuting him and said the various legal cases against him were a ‘witch hunt’ that risked turning the US into a ‘banana republic’. Trump also told the crowd that ‘the weaponization of our judicial system’ is the ‘central issue of our time’ and said, ‘The abuses of power that we’re currently witnessing at all levels of government will go down as among the most shameful, corrupt and depraved chapters in all of American history.’

Beyond criticising officials involved in legal cases against him, Trump also criticised other aspects of the American constitutional and legal order. For example, in December 2022, Trump claimed on social media that the allegedly stolen 2020 election meant that he could simply cancel regular democratic rules and procedures: ‘A Massive Fraud of this type and magnitude allows for the termination of all rules, regulations, and articles, even those found in the Constitution’ (Olander 2022).

Apart from Trump’s various post-presidential criticisms of the judiciary and the rule of law, he managed to enhance his control of the Republican Party while out of power. For example, in early 2024 Trump asked Senate Republicans to scuttle a popular bipartisan border security bill so that he could still have the issue to campaign on, and they readily complied. Trump initially faced several high-profile challengers for the 2024 Republican presidential nomination, including some who were sharply critical of him and his politics, but he quickly vanquished them all, and most subsequently pledged their fealty to him. Trump emerged from the nomination process with a greater degree of control over his political party than any president in recent memory. And he emerged from the November 2024 presidential election with a strong political mandate and a party eager to do whatever he wants.

Discussion

This article has examined the threat that illiberal leaders pose toward the judiciary in instances in which they return to power for a second time. It found striking similarities between the Hungarian and Polish cases, with serious potential implications for the United States, given Trump's return to power.

In each case, the leaders said and did various things in their first term that were worrying or even destructive from the standpoint of democratic norms. During the first term, institutional issues were often downplayed, with faith that immediate propaganda activities would be sufficient. In terms of actual policies and institutional change, each leader in their first term engaged in significant bullying and encountered various practical difficulties in advancing their positions. The leaders also arguably exhibited striking similarities once they were out of power, including stoking conspiracy theories, promoting nationalism and purging potential rivals to consolidate party leadership. The summary of main findings from the key studies are shown in Table 1.

After returning to power, in the cases of Poland and Hungary, the leaders sought to take over judicial institutions and alter their structure. In Hungary, the reduction of judicial autonomy and the dismantling of constitutional review during the second time of illiberal leadership signify more than a mere shift from strong judicial review to weak, or from legal to political constitutionalism (Halmai 2019; Körösényi 2015: 94). It represents the complete lack of effective institutional checks on executive power and the absolutised sovereignty of parliament, coupled with significant electoral support. The latter is fueled by 'populist autocratization' (Benedek 2024a), forging a profound emotional and identity-based bond between the illiberal leader and its followers. However, this entrenched political identity faces vulnerabilities when confronting short-term crises that challenge the deeply ingrained identity narratives, as demonstrated by the scandal in February 2024 involving a presidential pardon related to a pedophilia case. This incident precipitated considerable fallout, including the resignation of the head of state and a significant erosion of Fidesz's popularity. Despite this, the Orbán regime's stability has still remained ostensibly strong but is susceptible to internal fissures within the ruling power bloc, indicating that its resilience may be more fragile than it appears.

In Poland, L & J – lacking a constitutional supermajority – decided to incapacitate the Constitutional Tribunal (Wyrzykowski, 2019; Sadurski 2019b) to free its hands and implement subsequent 'reforms' of (i) public prosecution, (ii) the common court system, (iii) the National Council of the Judiciary and (iv) the Supreme Court. These activities led to initialisation of the procedure envisioned in Article 7 of the Treaty on the European Union for the first time in EU history. Although the 2023 parliamentary elections ended the eight-year period of L & J rule, the party managed to score the highest percentage of votes.

Table 1: Summary of the key findings from case study analysis

Leaders Analytical dimensions	Viktor Orbán (Hungary)	Jarosław Kaczyński (Poland)	Donald Trump (USA)
First time in national leadership	1998-2002	2005-2007	2017-2021
Single-party majority	No (coalition)	No (coalition)	n/a
Constitutional supermajority	No	No	n/a
Government engaged in propaganda against the judiciary	No	Yes	Yes
Successful initiatives (including legislative) interfering with judicial branch	No (pressure on the judiciary through budgetary constraints, but the judicial reform was left incomplete)	No (draft laws submitted to the Parliament, some passed laws nullified by the Constitutional Tribunal)	No
Law enforcement deployed to achieve political goals	Yes (acquisition of media oversight against the will of the CC and the Prosecutor General, later securing the latter's position, and covering up corruption cases)	Yes (undercover "anticorruption" operations and wiretapping leading to highly publicized arrests - later on successfully challenged before courts)	Yes (National Guard deployed to the southern border)
Out of national leadership	2002-2010	2007-2015	2021-2025
Expelling moderates from the political party	Yes (influx of individuals personally linked to Orbán into the party)	Yes	Yes
Radicalizing political base by peddling conspiracy theories	~Yes Populist shift and triggering polarization	Yes (Smolensk plane crash)	Yes (stolen elections)
Second time in national leadership	2010-	2015-2023	2024-
Single-party majority	Yes	Yes	Yes
Constitutional supermajority	Yes	No (attempts to circumvent the Constitution by statutory legislation and capturing the institutions)	No
Government engaged in propaganda against the judiciary	Yes	Yes	n/a
Successful initiatives (including legislative) interfering with judicial branch	Yes (CC, National Office for the Judiciary, Supreme Court, National Council of Justice, lower-court judges)	Yes (CT, National Council of the Judiciary, partially the Supreme Court and common courts)	n/a
Law enforcement deployed to achieve political goals	Deployment of intelligence tools (e.g., Black Cube, PEGASUS); absence of investigations against government-affiliated politicians; unlawful and intimidating police actions against protesters, including minors	No publicized arrests, deployment of sophisticated invigilation toolkit against political opponents (PEGASUS), relatively aggressive riot policing after abortion ban (2020), obstruction of investigations against government loyalists in minor and major corruption scandals	n/a

Source: Author

Also, predictions of its eminent breakup or voter base erosion – as of May 2024 – turned out premature, making L & J (and the values it represents) a looming danger on the Polish political landscape.

In short, there was a shift from circus-like politics to real political change. All in all, the illiberal leaders' second time in leadership proved far more dangerous to judicial independence and the rule of law. The experience of Hungary and Poland in this regard thus may serve as a warning for the United States. As the discussion here indicates, Trump clearly seems to fit the pattern. And he has even explicitly invoked and praised Orbán as a sort of compatriot and perhaps even a role model. For example, in April 2024 Trump said, 'I look forward to working closely with Prime Minister Orbán again when I take the oath of office', and he called the controversial Hungarian leader a 'great man'. And in the September 2024 presidential debate, Trump responded to the claim that world leaders were laughing at him by invoking Orbán and his praise for Trump: 'Let me just say about world leaders: Viktor Orbán. One of the most respected men. They call him a strong man. He's a tough person. Smart. Prime minister of Hungary. They said, "Why is the whole world blowing up? Three years it wasn't. Why is it blowing up?" He said, "Because you need Trump back as president. They were afraid of him."' For Trump, the notion of learning from Orbán is not just an academic possibility, it is a political reality.

Future Trump threats to the judiciary

Trump will likely continue to undermine a variety of democratic practices and institutions in his second term, much as he did when he was president from 2017 to 2021. This will likely include the independence and efficacy of the federal judiciary. As worrisome as that prospect might be, it might not just be more of the same, it might be even worse. By most accounts, Trump's first term as president was marked by confusion, chaos and near constant change, all of which undermined its ability to get things done (Whipple 2023). However, there is reason to think that in a second term Trump's efforts might be more effective than they were during his first term. Trump's bluster, unusual personal comportment and disdain for long held norms are no longer a novelty but rather are now established features of American politics. In other words, politicians, political parties, jurists and voters all know well what another Trump presidency would be like. Insofar as his radical differences from previous presidents led to some administrative difficulties, a second Trump presidency would be less novel and therefore perhaps less difficult. Put differently, having broken down so many norms in his first term, a second term will face fewer hurdles.

Furthermore, Trump's allies have had several years during his post-presidency to plan for how they might do better if given a second chance. Such plans include *Agenda47* and the Heritage Foundation's *Project 2025*, a nearly 900-page

detailed scheme that would dramatically expand presidential power and impose a variety of very conservative policies. Conservative groups have also carefully planned how Trump might revive and implement his short-lived ‘Schedule F’ plan (Swan 2022). Enacted late in his presidency and then reversed by his successor, Schedule F would help Trump battle bureaucratic intransigence in the administrative state by removing the job protections enjoyed by thousands of government employees and making them subject to termination at the whim of the president. This would likely enable the president to ensure the administrative state did his bidding without delay or complaint.

In terms of what Trump’s second term might mean for the judiciary and the rule of law, he and his aides have made clear what to expect. In May 2023, Trump said at a CNN town hall event that if re-elected he would ‘most likely’ pardon ‘a large portion’ of the hundreds of his supporters who were convicted for various federal crimes during the deadly attack on the US Capitol on 6 January 2021 (Goldmacher et al. 2023). For Trump, those people were not criminals subverting democracy, they were patriots fighting for their country.

Perhaps prompted by the federal government’s prosecution of the rioters, Trump also indicated that he intends to eliminate the traditional independence of the DoJ, including its head, the attorney general. Instead, Trump wants to bring the federal government’s law enforcement entities firmly within the president’s personal control. Trump has said that he would then order the DoJ to stop prosecuting him and to prosecute his political opponents instead.

By the end of his second term, Trump will likely have appointed roughly half of all federal judges. And he will reportedly pick judges who are even more politically extreme than those whom the conservative Federalist Society vetted in his first term. As a result of some of the dramatic decisions by the politically extreme judges whom Trump put in place in his first term, public faith in the federal judiciary has declined, and a majority of Americans now disapproves of the Supreme Court. Further judicial extremism would likely worsen that situation.

Whether or how Trump attempts to alter the judiciary in a more radical or institutional fashion may well depend on how it responds to his actions in his second term. If it issues decisions that go against Trump, then it may well incur his wrath. But it might be the case that the judiciary can avoid angering Trump, as its landmark July 2024 decision in *Trump vs. United States* said that the president is immune from criminal prosecution for official acts while in office. Although the practical details of that decision are not yet clear, it seems to remove a significant judicial constraint on the president.

The American judiciary survived Trump’s first term, but it emerged in 2021 weakened from Trump’s many assaults, and it has not altogether regained its pre-Trump strength during Biden’s interregnum. It will likely face even greater threats in Trump’s second term, and its inclination and capacity to resist them are uncertain.

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