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Don't Judge Me: Declining Judicial Independence
in Hungary and Poland

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Abstract

What can the Hungarian and Polish experiences teach us about the processes of decreasing judicial independence, and how does a decrease in judicial independence affect judicial trust and quality of governance? This paper process-traces the erosion of judicial independence in Hungary and Poland from 1989-2021, highlighting different mechanisms that lead to decreases in judicial autonomy. The cases show that formal reforms and informal changes to the membership of the judiciary are both effective at decreasing the independence of the judiciary. The data does not support that these changes lead to significant changes in judicial independence or quality of governance. The popularity of the governments enacting these reforms is a potential explanation for this lack of a significant relationship.

Introduction

Hungary and Poland have both experienced major changes in the structure and power of their judiciaries over the past two decades. Independence and judicial review have both been substantially reduced by the Hungarian Fidesz party and the Polish Law and Justice party, which has in turn reduced the separation of powers in each government. Both these countries possessed strong judiciaries that were seen as a model for other burgeoning democracies, and both experienced rapid declines from 2010-2020. What can be learned from the Hungarian and Polish experience regarding judicial independence, and have these experiences led to substantial impacts on institutional trust and separation of powers? This will be done through careful review of

significant events in the modern histories of each country, coupled with analysis of data about the countries.

Judicial independence and trust in the judiciary are the primary variables of concern in this paper. Judicial independence is a hotly debated topic, since at first glance it may appear less democratic than a judiciary completely responsive to popular support and elected officials for its decision-making. However, a judiciary must be able to make decisions independently of elected officials if it is to regulate and check the power of those elected officials (Kaufman 1980, Cameron 2010). When a judiciary has this independence reduced, as will be shown has happened in Hungary and Poland, then the government loses a primary check on its power.

The quality and independence of judicial institutions should be a concern for all citizens of democratic countries. As demonstrated by Hungary and Poland, the institutions of a democracy can erode fairly quickly without any violent regime changes. As an important check on the power of legislative and executive authority, judicial branches are central to preventing government overreach. As concerns grow in other nations, including the United States, about the independence and power of their judiciaries, Hungary and Poland are interesting case studies to see how these institutions fail. Beyond that, the importance of strong governments in Eastern Europe has recently come to the forefront with the Russian invasion of Ukraine. As countries that border Ukraine, the actions and rhetoric taken by the governments of Hungary and Poland are under increased scrutiny.

Trust in the judiciary is one of the many different types of trust that a citizen can possess. These include generalized social trust, specific social trust, specific

institutional trust, political trust, and more. When discussing institutional trust, citizens can have different degrees of trust for the Parliament, judicial branch, executive branch, bureaucracies, and more. While all of these different types of trust are different and can exist independently from one another, they share some connections and correlations. Trust in the judiciary may be the type of trust this inquiry is primarily focused on, but it is by no means the only one. Trust in the judiciary can have significant effects on the rule of law in a country, economic efficiency, political stability, and trust in other governmental institutions.

Next, an overview of Hungary and Poland's 20th and 21st century histories will be provided. Parallels are clear, as both countries share many common experiences from the end of World War I until the modern day. Both countries spent their interwar years ruled by an authoritarian regime of a military leader. Both nations were occupied by the Nazi government and later the Soviets. Both countries shared a long period of communist rule from the end of World War II until the fall of the Soviet Union, when both countries established democracies and later joined the EU. Later, both nations saw the rise of populist right-wing political parties that began eroding democratic institutions. The different political tools utilized by each party, along with the similarities in the final outcomes, provides a unique look at how democratic institutions like the judiciary can erode.

Notably, these countries differed in how formal the erosion of the judiciary was. Hungary decreased the independence of their judiciary through formal constitutional reform. This was possible because the Fidesz party controlled over two-thirds of the seats in parliament. In Poland, the Law and Justice party had a simple majority and so

could not amend the constitution without support from the opposition. The alternative used in Poland was through statutory changes, court packing, and refusal to comply with the court's orders. Although the methods were substantially different, the end result of a court that simply approves laws passed by the government was the same.

Lastly, political data will be used to observe objective changes in the quality of democracy in these countries. The differences in these outcomes over time allow us to see how political and social shifts have real outcomes in the data, and compare the countries. Significantly, the judicial independence and quality of government both began sharply declining after Fidesz took power in Hungary and Law and Justice took power in Poland. Although judicial autonomy cannot be directly tied to these changes, it is clear that the policies of these governments are having an effect. Notably, trust in the government has been rising during this period, perhaps as a result of the populist nature of these regimes. This section will include data analysis of judicial independence and governmental trust, which will show a weakly significant negative correlation. This correlation is barely significant with a small amount of data, which does not lead to a confident conclusion. Also included will be an analysis of political corruption and governmental trust, but a relationship will not be found at all.

Overall, the erosion of judicial independence in Hungary and Poland offers an opportunity to learn about how democratic institutions can deteriorate over time. In an era of increasing populism around the globe and conflict in Eastern Europe, learning about significant political and institutional changes can help us understand changes in the future.

Literature Review

What is Judicial Independence?

When discussing judicial independence, we are not talking about a court with absolutely no constraints. A completely independent court that could decide whatever it wanted based on the whims of the judge would be antithetical to our beliefs about rule of law (Burbank 2003, Ferejohn 1999). Most courts are meant to limit their decisions to ones firmly grounded in the constitution or statutes created by the legislature (Burbank 2003). Although these courts are not independent to decide laws without justification, they can still be independent.

Judicial independence can be defined as the ability of judges to make their decisions without interference or fear of retribution by other powers (Burbank 2003, Burbank 1999). This is important, because it allows for “judges free of congressional and executive control [to] be in a position to determine whether the assertion of power against the citizen is consistent with law” (Bator 1990, p.268). For a country to have effective separation of powers, judges must be free from worrying about the short term desires of elected officials (Kaufman 1980, Cameron 2010).

Later on in this paper, we will discuss how Poland and Hungary have changed the structure of the court to force judges to comply with the current officeholders. This erosion of the separation of powers means the ruling parties have fewer checks on their power, and can pass laws that would have been struck down with an independent court.

What is trust?

The definitions of trust are as broad as the scholarship regarding it, but there are several definitions that have risen to the forefront. Distinctions must also be made between the different types of trust in order to ensure precision in discussions. In this

literature review I will begin by discussing different definitions of trust, followed by an examination of the importance of judicial trust, and end with a discussion of theories about the origin and contributing factors toward judicial trust.

One of the most popular ways to define trust is the *encapsulated interest* model. This model is championed by scholars like Russell Hardin, Margaret Levi, and Susan Rose-Ackerman. Russell Hardin defines encapsulated interest as when “you... have your own interests in taking my interests into account” (Hardin 2002 p.1). Essentially, if it is in the trustee’s self-interest to fulfill the truster’s interest, then they have encapsulated the truster’s interest into their own. This is considered a relational model of trust, because it deals with the way people interact with each other and depends on the specific context of the relationship.

Encapsulated interest is tied not only to trust but also trustworthiness. Trust is the amount the truster believes the trustee to be trustworthy. Trustworthiness is tied not only to how much the trustee has encapsulated the interest of the truster, but also to the perceived competence of the trustee in fulfilling that interest (Levi and Stoker 2000). It is possible for an institution or individual to be generally trustworthy but not trusted, and vice versa. This is because trust does not actually depend on the trustworthiness of the trustee, but the *perceptions* of trustworthiness as well as the specifics of the relationship.

Another common way of looking at trust is the dispositional approach. The central idea of dispositional trust is that some people are simply more inclined to trust than others, due primarily to differences in upbringing and institutional environments. This theory of trust does not rely on finding context in each relationship, but rather on

assessing whether someone believes most people are trustworthy (Hardin 2002).

Dispositional trust is not mutually exclusive with encapsulated interest, since it could simply reflect someone's tendency to believe others have encapsulated their interest.

Next, there is a difference between interpersonal and institutional trust.

Interpersonal trust is the amount an individual trusts other members of society (Rahn and Transue 1998). Within interpersonal trust, there are two important types. These are bonding and bridging trust (Putnam 2000). Bonding trust is the type of trust that occurs when people have high degrees of trust for those they know and share similar characteristics with. Bridging trust is the level of trust people have for members of society outside their social group. For an extremely simplified example, if a softball team only trusted members of its own team and no one else, then this team would have high bonding trust and low bridging trust. But if a fruit stand owner felt confident leaving their stand unattended and trusted people to pay for any fruit they took, this owner would have high bridging trust. Bridging trust is typically seen as a positive thing, while bonding trust is typically seen as negative (Putnam 2000).

Institutional trust is the level of trust individuals have in institutions to encapsulate their own interests. When it is referred to as political trust it is in reference to the degree of trust individuals have for the entirety of government. However, institutional trust allows for the disaggregation of institutions. There is some evidence that shows that building trust in one institution impacts opinions of other institutions (Montinola 2009, Caldeira 1986, Rohrschneider 2005). However, there is also evidence showing that people are able to disaggregate institutions from one another (Grimmelikhuijsen and Klijn 2015, Gibson et al. 1998).

It should be noted that bonding interpersonal trust, bridging interpersonal trust, political trust, and specific institutional trust are often found to be heavily entangled (Mizrahi et al. 2020, Zmerli and van der Meer 2017, Liu and Stolle 2017). So while it is important to understand the differences between all the different types of trust, it would be incorrect to view them all as completely separate entities. Understanding any of these types of trust requires some understanding of all of them.

Why Does Trust Matter?

Trust is a popular area of study in political science research because it affects so many different areas of citizenship. It is necessary to form large organizations, maintain peace of mind, and participate politically (Zmerli and van der Meer 2017). Different types of trust impact nations in different ways.

First, the question must be asked whether high levels of trust is even a desirable characteristic. Russell Hardin explains that classical liberalism argues for a general distrust of government and government officials in order to keep a handle on tyranny (Hardin 1999). However, it is possible to design a government that is trustworthy even if every official in it is a “knave” (Hume 1742). This can be done by designing systems and incentives for officials to encapsulate the interests of the public. Democracy is adopted primarily because of a distrust of government and desire to keep political power in the hands of the general citizenry (Warren 2017). This is why it is important to separate trust in *institutions* from trust in *individuals*. For example, it is possible to trust the idea of Congress and the checks and balances it employs without trusting the individual members of Congress. While these are often entangled with each other, they are separate ideas (Norris 2017).

So what does trusting the institutions actually accomplish? Levi, Stoker, and Tyler all find that individuals who trust the government are more likely to comply with regulations and laws (Levi and Stoker 2000, Tyler 1990). This is tied primarily to belief in the legitimacy of legal institutions and laws rather than fear of coercion. When people do not break the law, the state can spend less on law enforcement and legal systems. This allows legal institutions to be smaller than in societies where compliance is low.

Those who are distrusting of the government are also less likely to support incumbents, and more likely to support anti-governmental policies such as lower taxes and lower regulation (Levi and Stoker 2000). It is debatable whether this finding is positive, negative, or neutral, but it is potentially useful for analyzing political trends in a country.

Trusting the courts is necessary for enforcing contracts and maintaining efficient market transactions. Examples of succeeding without strong courts do exist, but they are generally less efficient and come with a host of other problems (McMillan and Woodruff 1999). When citizens trust the courts to fairly and predictably settle disputes, they are more likely to self-mediate these disputes. This increases efficiency and lessens the cost of enforcement and dispute resolution.

What Influences Trust in the Judiciary?

The first theory of institutional trust is that it depends primarily on corruption in the government. This is advocated strongly by Susan Rose-Ackerman and Bo Rothstein. Empirical evidence shows a clear connection between perceptions of corruption and institutional trust (Cleary and Stokes 2009, Levi and Stoker 2000). From an encapsulated interest model perspective, evidence of corruption would cause

citizens to question whether the government has truly encapsulated the interests of the citizenry. If someone is using their political position for personal gain *outside the accepted mechanisms* then they would appear to be acting in their own interest in a way potentially at odds with the interests of their supporters. An accepted mechanism of using a political position for personal gain would be advocating for policies that increase the likelihood of re-election by increasing popularity among the citizenry. While this will help the politician by continuing their career, a good system is designed to coordinate this incentive with the desires of the citizenry.

Beyond corruption at the elite levels of government, low-level everyday corruption can reduce political trust as well. Bo Rothstein explains how corruption leads to reductions in generalized social trust with a three-part causal mechanism (Rothstein 2004). First, if public officials are known for being corrupt, then citizens will conclude that other people cannot be trusted either. Second, if citizens see that most people in society engage in corruption, they will conclude that most people cannot be trusted. Third, if citizens engage in corruption themselves they will conclude that others cannot be trusted either. Although this framework is applied to social trust by Rothstein, it could also be applicable to institutional trust. If corruption is seen as a part of everyday life, including low level officials, citizens are more likely to conclude that higher officials are corrupt as well. This would theoretically reduce trust in the impartiality and fairness of the courts.

Several common theories for institutional trust fall under the umbrella I will call “process-based theories”. These theories deal with substantive ways the judiciary’s processes are followed and perceived as fair. The relevant factors in the processes of

the courts are procedural justice, fairness, and transparency. Procedural justice is the idea that the courts should follow certain processes correctly, and if these processes are just then the outcome will be just. Fairness relies on the courts treating people with dignity and respect, and not showing clear biases toward an outcome. Transparency is when the reasons for a court's decision are communicated clearly and understandable by all involved. Lack of transparency makes decisions seem arbitrary.

Process-based theories of judicial trust are popular in the literature. Tom Tyler argues that the processes followed and the respect shown in an interaction are far more relevant for public perception than the outcomes of cases (Tyler 2001). The outcome of a case in this instance is whether the final decision was favorable to the respondent or not. The theoretical grounds for why procedural justice and fairness are important is because frequent interactions with fair institutions will increase trust in them (Tyler 1990, Tyler 2001). This reflects an argument put forward by Bo Rothstein and Dietland Stolle, who argue that frequent interaction with impartial government institutions increases interpersonal trust as well (Rothstein and Stolle 2008). The reason the fairness of courts is so important is because to many people they are one of the most frequently interacted with sectors of government (Montinola 2008). Transparency has also been shown to be a significant contributing factor to public trust of the judiciary (Grimmelikhuijsen and Klijn 2015). Presumably, an opaque court would lead to less understanding of the reasoning for decisions. So if there is a controversial or confusing case, there would be little evidence to fight the notion that the court's decision was biased.

Another significant determining factor of public trust in the courts is the awareness of the court in the general populace. In general, when citizens are more aware of the functions and processes of the judiciary, they are more trusting of the courts (Gibson et al 1998, Jamieson and Hardy 2008). This could be because learning about the courts involves learning about the processes and motivations of judges. It could also be because those who trust the courts are more likely to learn about them. Either way, there is clear empirical evidence to show that awareness of the judiciary has a significant correlation with trust in the judiciary.

One potential factor that could decrease public trust in the judiciary is the partisanship of judges. Although public elections of judges are popular in the United States, there is evidence to suggest that the presence of judicial elections harms the public's trust of the judiciary (Geyh 2003, Jamieson and Hardy 2008). This relationship could be because of the significant presence of campaign ads in areas that directly elect judges (Champagne 2001). These ads, especially attack ads, are often designed to lower the credibility of candidates. So when candidates are elected, the campaign will have lowered their public credibility. Partisan elections also lead voters to believe that judges will have partisan biases, and not reflect the neutral values that are important for building trust in the courts (Geyh 2003).

Caldeira argues that some of the most significant factors for public support of the United States Supreme Court are actually largely external to the court's behavior (Caldeira 1986). For example, the Watergate scandal heavily increased public support for the court, despite Congress being the primary responding actor in the scandal. This is largely due to the increased visibility of the court, which he finds is generally

correlated with public support for the courts. Some other external factors that affect public opinion of the court include inflation and presidential popularity. Judicial activism was also found to be negatively correlated with public support for the judiciary, perhaps as a result of activism signaling greater partisanship in the courts.

Djankov, La Porta, Lopez-de-Silanes, and Shleifer (2002) find that legal formalism is highly significant in reducing judicial trust. Formalism can be defined as the amount of hoops and formal rules one must jump through and satisfy when dealing with the courts. Their cross-national study found that increased formalism led to increased corruption and decreased fairness, access to justice, and honesty. However, high levels of formalism in a society may be a chicken-or-the-egg scenario. When there is a high level of judicial trust, informal relationships in the legal sphere are possible. However, when judicial trust is low, highly formal and official processes are required to ensure accountability. Due to the uncertain causal direction of formalism, it is unwise to view it as a causal factor of judicial trust.

Roussey and Deffains (2012) found that the justice budget was highly significant in determining judicial trust. This is theorized to be caused by a large justice budget functioning as a signal to the public that the government is committed to securing adequate justice. If the public believes there is a strong commitment toward justice, it will be more likely to believe justice is being achieved.

Something apparently unique about the judiciary is that the nature of public trust reacts differently toward it than other areas of government. For most institutions, positive events and decisions increase the public's trust in them while negative events and decisions decrease trust. However, judiciaries do not seem to experience

decreases in trust when they do something unpopular (Gibson et al 1998, Grimmelikhuijsen and Klijn 2015). This phenomenon gives support for the finding that the age of the court is a small but statistically significant factor in public trust of the courts (Gibson et al 1998). This finding could also be due to the courts learning how to make publicly satisfactory decisions over time.

To conclude, trust in the judiciary has a multitude of possible causal factors. These include corruption at high and low levels of government and society, procedural justice and perceptions of fairness, justice budget, awareness of the courts, the partisanship of judges, and external political factors that tie perceptions of the court with perceptions of government. The primary focuses of this paper moving forward will be corruption, judicial independence, and judicial activism.

As will be shown in the following paragraphs, Hungary and Poland have experienced sharp declines in judicial independence and the ability of judges to check the powers of other government entities, but have not experienced large changes in governmental trust. This suggests that trust in the government is based on more than the procedure based separation of powers and quality of government.

Research Method

This paper uses a process-based research method to compare Hungary and Poland's experiences from the end of communism until the modern day. This method includes careful exploration of political and structural changes related to the courts and ruling government parties in an attempt to understand how judicial independence erodes over time. This is done by comparing the different methods utilized by the

Hungarian government run by the Fidesz party with the Polish government run by Law and Justice, or PiS.

Historical process tracing will be utilized to view the broad historical context of each nation, as well as specific aspects of their experiences under communist rule and the subsequent transition to democracy. Special attention will be paid to the legislation and rhetoric surrounding the judiciary during the transition to democracy. The substance of the reforms and legislation, as well as who advocated for them and why they supported them will also be studied.

After a discussion of each respective court's establishment and structure is concluded, a thorough analysis of the judiciary's history up to the present will be presented. This includes the elections of Fidesz and PiS and the changes that have resulted in the court's structure following these elections. Namely, the increased role of Parliament in Hungary in selecting judges, as well as the decreased scope of judicial review. In Poland, this includes the illegal and much decried court-packing by the Sejm, as well as the frequent breach of constitutional rules by the Sejm.

Next, quantitative data will be compiled for multiple variables. These variables will include the judicial framework and independence scores from Freedom House's Nations in Transit, composite quality of governance score from the World Bank's World Governance Indicators, Control of Corruption from the World Governance Indicators, and trust in the government scores from the Eurobarometer. Changes in variables will be considered and compared to events in the timeline of qualitative judicial changes.

Notably, trust in government will act as a substitute for trust in the judiciary. This is due to the inconsistent nature of the Eurobarometer questionnaire regarding trust in

the judiciary, which resulted in missing data for several crucial years. Although clearly not ideal, there is support in the literature for the belief that citizens often aggregate government institutions together. The hope is that by looking at general trust in the government, valuable information can still be gleaned regarding public trust in the judiciary.

To offer a frame of reference to compare Hungarian and Polish data with, a compound called “EU NiT Average” was created. This composite score is a simple average of Bulgaria, Croatia, the Czech Republic, Estonia, Latvia, Lithuania, Romania, Slovakia, and Slovenia’s scores. These nations are all post-communist and included in the Eurobarometer Nations in Transit dataset. Importantly, all of these nations are also members of the EU. This allows for the EU’s membership requirements to be controlled for, since all of these nations must satisfy all of the same requirements to remain members.

History

Pre-Democratic History

Poland and Hungary shared a number of historical similarities before their transition to democracy. Both nations were large European powers before the 20th century, occupied by Germany in World War II, and then liberated by the Soviet Union. Both countries became Communist after this liberation and remained Communist until the collapse of communism in 1989. Both nations formed republics in the years that followed, and rewrote their constitutions to form democracies.

Prior to World War I, Hungary was part of the powerful Austro-Hungarian Empire. One of the great powers of Europe, it had a pivotal role as the spark that ignited the flame of war when Archduke Franz Ferdinand, heir to the throne, was assassinated (Clark 2014). Austria-Hungary was allied with Germany in the war, and dissolved into smaller nations in the aftermath (Cornelius 2011). During the interwar period, the Kingdom of Hungary was ruled by Miklos Horthy. Horthy was a former admiral, and promoted generally conservative and nationalist principles (Sakmyster 1994). The Kingdom of Hungary was close with Germany, and sided with the Axis during World War II. When they considered leaving the war, Germany occupied Hungary and backed a more Axis-sympathetic leader (Cornelius 2011). At the end of the war, a Soviet-backed communist government was installed, and Hungary was declared a republic (Cornelius 2011).

The Hungarian People's Republic was dominated by the Hungarian Socialist Worker's Party, which essentially acted as an extension of the Communist Party of the Soviet Union. The dominance of this party means that Hungary was essentially a one-party state. Despite the domination of the Hungarian Socialist Worker's Party, regular parliamentary elections were held (Pogony 1993). Communism was never especially popular in the Hungarian People's Republic, with large protests and revolutions occurring throughout the communist regime (Matthews 2007). However, the country was still dominated by the Hungarian Socialist Worker's Party.

Hungary was more connected to the West than other Soviet nations through trade and membership in international organizations such as the IMF (International Monetary Fund). Hungary also had less central planning than other Soviet nations, and

actually had some movement toward neoliberal reforms as early as the 1960s (Fabry 2019). The transition to democracy was gradual but concluded with a new constitution in 1989 that included a Constitutional Court, president, and elections.

Poland's history shares many similarities with Hungary's. Once one of the largest powers in Europe, the Commonwealth of Poland was first partitioned between Austria, Russia, and Prussia in 1772, and by 1795 it no longer existed on the map (US Department of State). Poland became an independent nation again after World War I, and its borders were defined by the Treaty of Versailles (US Department of State). Interwar Poland was characterized by infant institutions struggling to establish legitimacy. It began with the temporary dictatorship of Jozef Pilsudski, a military leader from World War I (Bernhard 1998). There was a brief period of democracy before Pilsudski seized power again with a coup d'etat in 1926 (Bernhard 1998). The invasion of Poland by Germany in 1939 was the spark that caused the Allies to declare war against Germany (Nolan 2011). Many Polish citizens were killed by the Nazi government during the Holocaust, leaving Poland with little ethnic diversity (Prazmowska 2010). Poland was eventually liberated by the Soviet Union, which adopted Poland as a satellite state and supported a communist government.

The communist government of Poland lasted for a number of years. In the beginning, the government showed many Stalinist tendencies politically and economically (Pogany 1993, Fabry 2019). Despite the communist rule of Poland, the Catholic church remained a major power in the country throughout the Soviet era and generally advocated for policies contrary to the communist ideology (Mach 2007). Polish Catholics rejoiced when Pope John Paul II was chosen, as he was the first Pole to

become Pope (Ash 2002). Poland's economy was largely focused on heavy industry such as shipbuilding, and the Solidarity movement would eventually arise from the large shipyards in Gdańsk (Sachs 1990, Kubow 2013).

Solidarity was a labor movement opposing communism that began in the shipyards of Poland in the early 1980s (Kubow 2013, Ash 2002). It quickly grew to become a major force for change in Poland, eventually convincing communist leaders to compromise and legalize the Solidarity Party in the late 1980s through a series of round table talks (Prazmowska 2010). Poland held democratic elections in 1989, and began rapidly transitioning away from communism in 1990 through a set of reforms called "shock therapy".

Modern History

Hungary adopted a constitution in 1989 that was meant to remain in effect "until the new Constitution is adopted" (Preamble, Act XX of 1949 Amended 1989: The Constitution of the Republic of Hungary). This constitution was not entirely new, but was instead a series of revisions to the Constitution adopted in 1949. While this was clearly meant to be a transitional document, a new Constitution was not adopted until 2011 with the Basic Law of Hungary. The Constitution of the Republic of Hungary, hereafter referred to as the 1989 Constitution, intended to establish a "multi-party system, parliamentary democracy, and social market economy" (Preamble, Act XX of 1949 Amended 1989: The Constitution of the Republic of Hungary). It also outlined a separate Constitutional Court with powers of judicial review.

The Constitutional Court outlined in the 1989 Constitution is officially nonpartisan, has a broad jurisdiction over "any laws and other statutes it finds to be unconstitutional",

and allows anyone to bring cases before it (Chapter IV, Act XX of 1949: The Constitution of the Republic of Hungary). The selection of justices came from a multi-partisan nominating committee and required two-thirds support in the Parliament, which normally led to opposition parties needing to support the candidate as well (Rose-Ackerman 2007).

In the early years of the court's existence, the reality of the court matched up with the picture drawn by the 1989 Constitution. The Constitutional Court frequently struck down laws and statutes, and their rulings were usually accepted by all parties (Boulanger 2005; Scheppele 2003). This suggests general respect for the independence and power of the Constitutional Court. The Court became less activist as the 1990s continued, but remained an important part of Hungary's government structure (Scheppele 2003).

In 2010, Viktor Orban's Fidesz party won a dominant victory in the election, giving them a supermajority in the Parliament. This was enough to introduce a new Constitution, the Fundamental Law of Hungary, in 2011. This constitution featured strongly partisan, nationalistic, and religious rhetoric in addition to giving distinct advantages to Fidesz in future elections (Bozoki 2011). In the new Fundamental Law, the committee in charge of nominating judges was made proportional to the party shares in Parliament instead of multi-partisan, which allowed Fidesz to nominate exclusively their own judges (Szente 2015). This has led to the Constitutional Court filling up with pro-Fidesz judges. The size of the court was also increased, which led to an even greater proportion of Fidesz-appointed judges (Szente 2015).

When Parliament passed a law in 2010 imposing a severe tax on severances given out by the previous institution, the Constitutional Court declared the law unconstitutional. In response, Parliament amended the Fundamental Law of Hungary to remove the Constitutional Court's power of judicial review of financial laws (Halmai 2019). This was possible because Fidesz controls over two-thirds of the seats in Parliament, which is over the limit required to amend the constitution. This effectively gives Fidesz complete control over the Fundamental Law of Hungary.

Removing the ability of the Constitutional Court to practice judicial review is a clear departure from the early days of the Court, and a large shift in the balance of government powers. In 2013, Parliament passed a constitutional amendment that invalidated all decisions of the court made before 2012 (Szente 2015, Zeldin 2013). This serves as another clear sign that Parliament has taken power away from the court.

Shifting the lens to Poland, the Sejm established an interim constitution in 1992 called the Small Constitution that would last until the ratification of The Constitution of the Republic of Poland in 1997. The Small Constitution made frequent references to a Constitutional Tribunal, but it did not define the Tribunal's structure, powers, or responsibilities (Poland: Constitution of 1992). In fact, the tribunal had been established in 1986 by the communist leadership of Poland, and this institution was maintained during the transition to democracy (Rose-Ackermann 2007). The 15 justices were elected to fixed terms by a simple majority of the House of Representatives, or Sejm (Rose-Ackerman 2007). The fact they were elected by a simple majority made this institution vulnerable to partisanship. The Tribunal frequently constrained the

government and found statutes to be unconstitutional during this time (Rose-Ackermann 2007).

In 1997, a new Constitution was ratified that formally established the powers and responsibilities of the Constitutional Tribunal. The Tribunal would be separate from the Supreme Court and focused exclusively on reviewing government statutes and issues of separation of powers with respect to constitutionality (The Constitution of the Republic of Poland: As adopted by the National Assembly on 2nd April 1997). The Tribunal was officially nonpartisan and its rulings were declared supreme and final. Only government officials and those whose “constitutional rights have been infringed” are eligible to bring cases before the Constitutional Court (Article 79, The Constitution of the Republic of Poland: As adopted by the National Assembly on 2nd April 1997). This means that the Tribunal’s effectiveness will largely be determined by how aggressive political actors are in bringing cases before the court, as well as how willing they are to hear cases originating from citizens who believe their rights have been violated (Rose-Ackerman 2007). In the late 1990s and early 2000s, the courts still appeared to be actively constraining the government on constitutional grounds (Rose-Ackerman 2007, Sadurski 2018).

This state of judicial checks on other forms of government first showed its cracks when the right-wing Law and Justice Party (PiS) was elected in 2015 (Sadurski 2018). According to Sadurski, PiS gained control over the Constitutional Tribunal in two stages; paralysis, and transformation into an enabler of government power (Sadurski 2018). This was initially done by refusing to acknowledge three judges appointed by the previous administration and appointing PiS friendly judges instead, effectively packing

the court in favor of PiS (Sadurski 2018, Kovacs and Scheppele 2018). The method and justifications used for this packing of the court are complex, but it resulted in increased legislative power over the appointment of judges and a de facto presidential veto that is not stated in the Constitution (Sadurski 2018). There were also significant irregularities in the election of the new president of the Constitutional Tribunal that have caused some to question whether they were properly elected (Sadurski 2018, EU P8_TA(2017)0442). However, the principal parties that could stop the improper election of a judge to the Constitutional Tribunal are the Sejm and Constitutional Tribunal, both of which at this point were controlled by PiS. These changes radically shifted the balance of power between the Constitutional Tribunal and the rest of the government.

The Sejm then began passing a number of laws meant to restrict the powers of the Constitutional Tribunal. While these were often struck down, it is emblematic of a legislative effort to limit judicial powers. These efforts ceased once PiS was fully in control of the Constitutional Tribunal (Sadurski 2018).

Changes to the judiciary were not limited to the Constitutional Tribunal. In 2017, judicial reforms were passed with the intention to “enhance the democratic accountability of the Polish judiciary” (Venice Commission Opinion No.977/2020). These reforms included giving the Sejm complete control over the election of judges, the Minister of Justice (a partisan position) the power to appoint and dismiss court presidents at will, and the creation of two new court chambers with supremacy over the rest of the Supreme Court (Venice Commission Opinion No.977/2020). Reforms were later added that prohibited the right of judges to speak about political issues, required judges to disclose any judicial organizations they are in, and prohibited criticizing a

judge or questioning the legitimacy of the judiciary (Venice Commission Opinion No.977/2020). Implementing a gag rule against criticizing recent reforms is not typically a sign that those reforms are popular. As it stands, the independence of the Polish judiciary is a serious concern for Polish and European legal scholars.

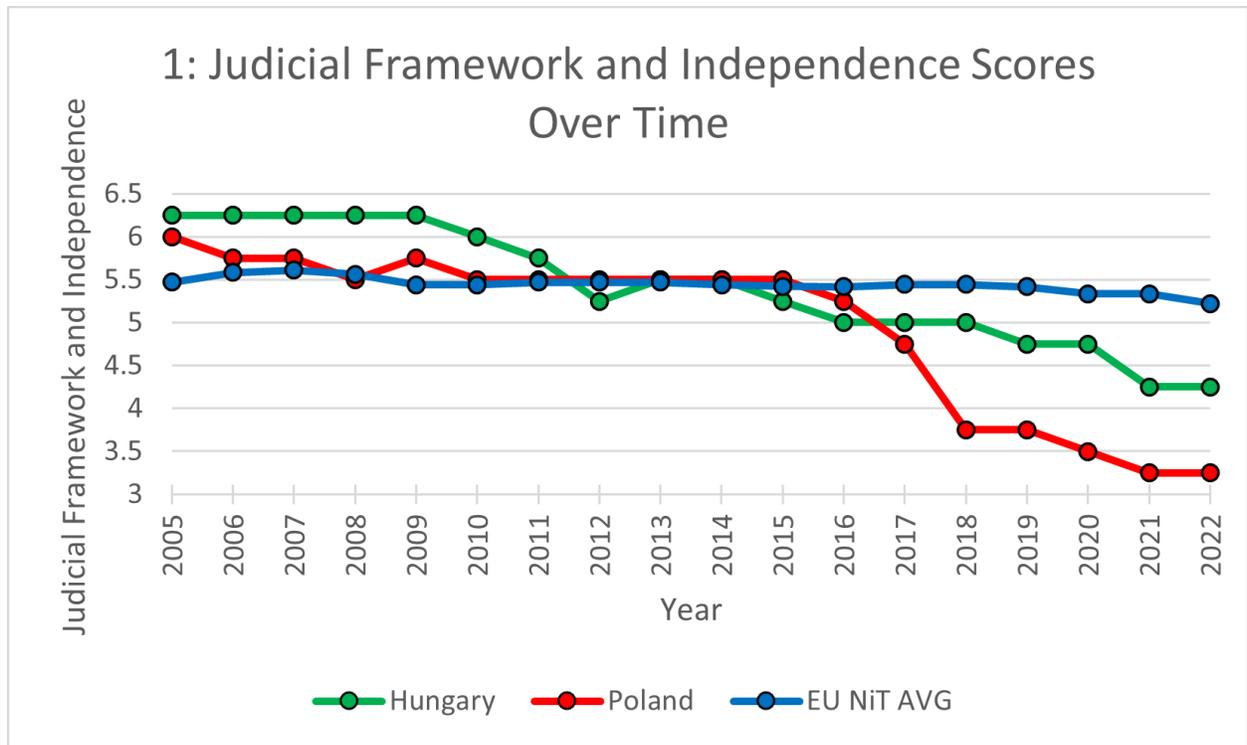
When comparing Hungary and Poland, it is interesting to note the different methods employed by Fidesz and PiS. In Hungary, Fidesz altered the structure and powers of the judicial branch through constitutional amendments that were legally passed by Parliament. Making changes through formal channels such as constitutional amendments was possible because Fidesz had such a strong majority of Parliament. In Poland, legally appointed judges were rejected by the PiS government and unconstitutional actions were taken to put PiS friendly judges in place. The contrast between these two methods of judicial reform highlights the multiple ways governments can erode the separation of powers. The differences also highlight that although PiS did not have as strong a majority in the government as Fidesz, they were able to accomplish a similar degradation of the judiciary's independence. The case of Poland makes clear that changes to the constitution are not necessary to reduce constitutional powers.

Quantitative Analysis

It is clear from following the substantial developments in the judiciaries of Hungary and Poland that the status of their judiciaries has changed over the past 20 years. Both nations have experienced substantial shifts to the structure and powers of

their judiciaries. The processes for these changes are understood, so now it is time to see if these shifts have led to changes in objective data.

Using the Freedom House Judicial Framework and Independence scores, the change in the perceived independence of the judiciary over time can be tracked. The “EU NiT Average” score is a composite of other post-communist countries in the “Nations in Transit” dataset that are members of the EU. It includes Bulgaria, Croatia, the Czech Republic, Estonia, Latvia, Lithuania, Romania, Slovakia, and Slovenia. Although Hungary and Poland are both NiT countries and EU members, they are excluded from the “EU NiT Average” series. The series was restricted to EU members in order to account for the fact that EU members have unique guidelines and requirements of their judiciary put in place by the EU. By restricting it to only EU members, the difference in supranational requirements is eliminated. On the dataset, a score of 0 is the lowest, while a score of 7 indicates the highest score for judicial framework and independence.



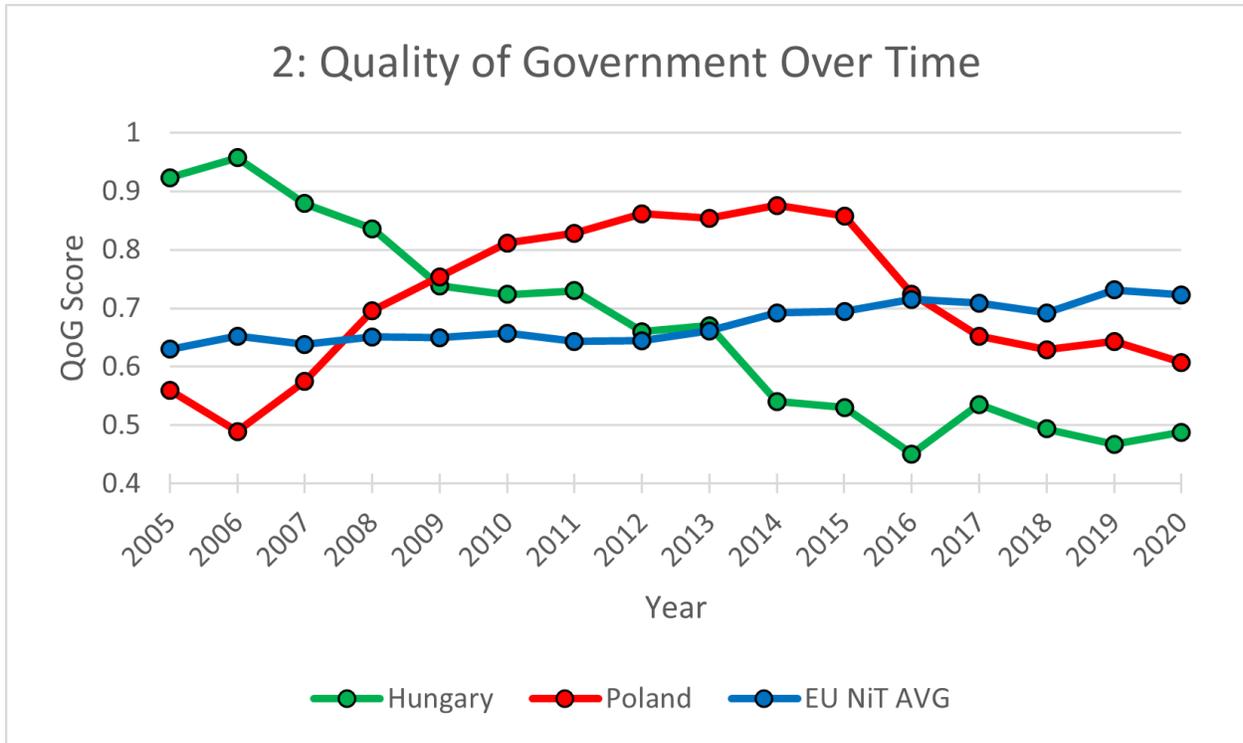
*Data collected from Freedom House, Nations in Transit Dataset 2005-2021. <https://freedomhouse.org/report/nations-transit>

As this chart shows, the average score for post-communist EU members has hovered around 5.5 since 2005. Hungary was above the average for EU member Nations in Transit, but experienced a decline beginning in 2009, just before Fidesz was elected. The decline continued until Hungary was scoring 4.25, well below the EU average. Poland's scores for judicial framework and independence matched the EU NiT average until 2016, when it began experiencing a sharp decline. Poland scored a 3.25 in 2022, compared to its 6.00 in 2005; This decline coincides with the election of the PiS government, which gained control in 2015.

This data shows clear support for the idea that the independence of the judiciary has uniquely declined in Poland and Hungary over the last decade. Both nations were remarkably consistent until the elections of the populist governments, before declining dramatically. Other post-communist EU members have, on average, maintained

relatively constant scores of judicial framework and independence. This suggests that the changes shown in the case studies are being clearly reflected in the Freedom House data. The sharper decline in Poland than Hungary perhaps suggests that the informal and illegal methods employed by the PiS government are more alarming for international scholars than the formally correct methods used by Fidesz.

Moving on to the quality of governance, there is a less noticeable decline. The data for this was taken from the World Bank's World Governance Indicators, a group of data used to track the quality of government of many nations around the world. The data ranges from 2.5, indicating the highest score possible, to -2.5, indicating the lowest. Shown here is the average score of several metrics, including Control of Corruption, Government Effectiveness, Political Stability and Absence of Violence/Terrorism, Regulatory Quality, Rule of Law, and Voice and Accountability. The Control of Corruption, Political Stability, Regulatory Quality, and especially the Rule of Law measures are all connected to the effectiveness of the court system. The EU NiT average series contains the same countries as the previous dataset.



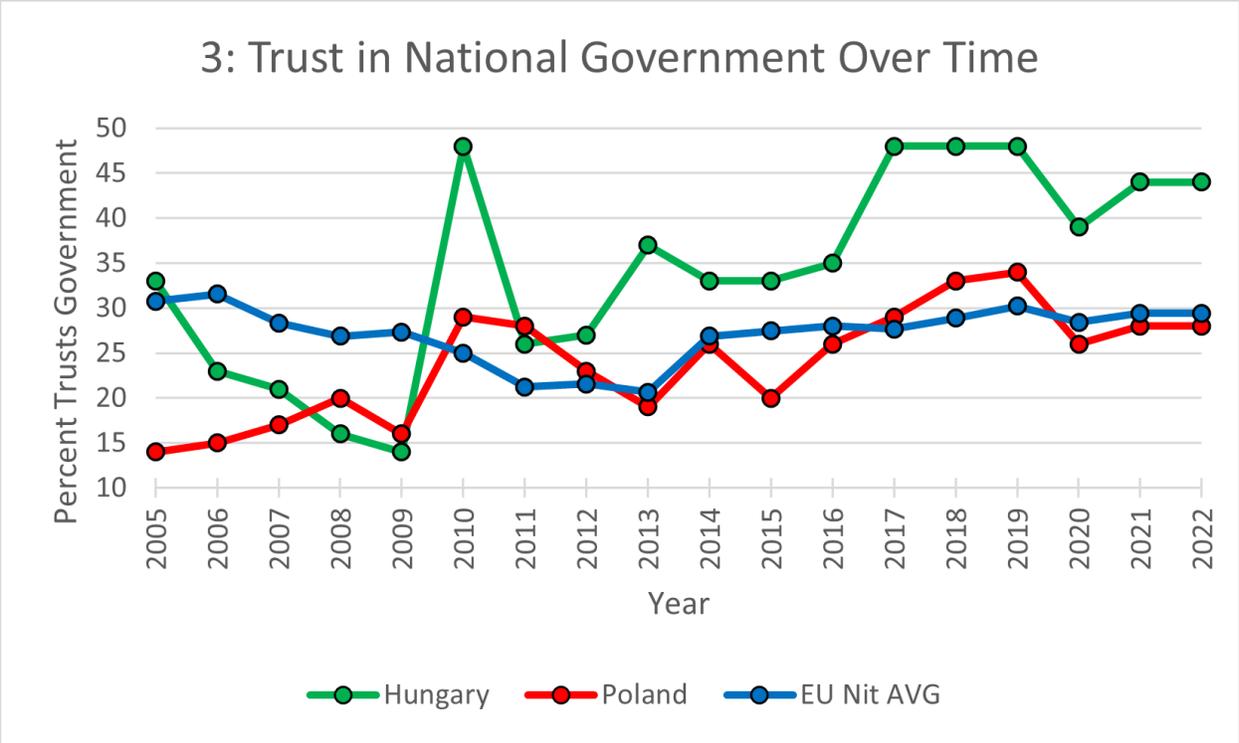
*Data collected from World Bank, World Governance Indicators 2005-2020.

<https://databank.worldbank.org/source/worldwide-governance-indicators>

This data is far more volatile than the Freedom House data. The EU NiT average has increased slightly over time. Hungary's scores have declined steadily since 2006, perhaps as part of the volatile years preceding the election of Fidesz. Since the election of Fidesz, Hungary's scores have continued to drop with very few exceptions. Poland actually had QoG scores rising significantly faster than the EU NiT average until 2015. Between 2015 and 2016, there was a sharp drop in scores that has continued until 2020. Now Poland's QoG scores are lower than the EU NiT average by a small amount, although they remain higher than Hungary's. This data shows that although the quality of government has been steadily increasing in other post-communist EU countries, Poland and Hungary have been seeing the opposite effect. Despite the popularity of the newly elected governments, objective indicators do not suggest that they are making

their countries better off as a whole. Hungary's scores seem to have leveled off over time, but Poland's descent is more recent and still likely ongoing. It will be interesting to see if Poland is able to control its' quality of government in the near future.

Trust in the national government over time was taken from the Eurobarometer dataset from 2005-2022. The EU NiT Average is composed of the same nations as previous datasets.



*Data from Eurobarometer Standard Survey, 2005-2022, <https://europa.eu/eurobarometer/surveys/browse/all/series/4961>

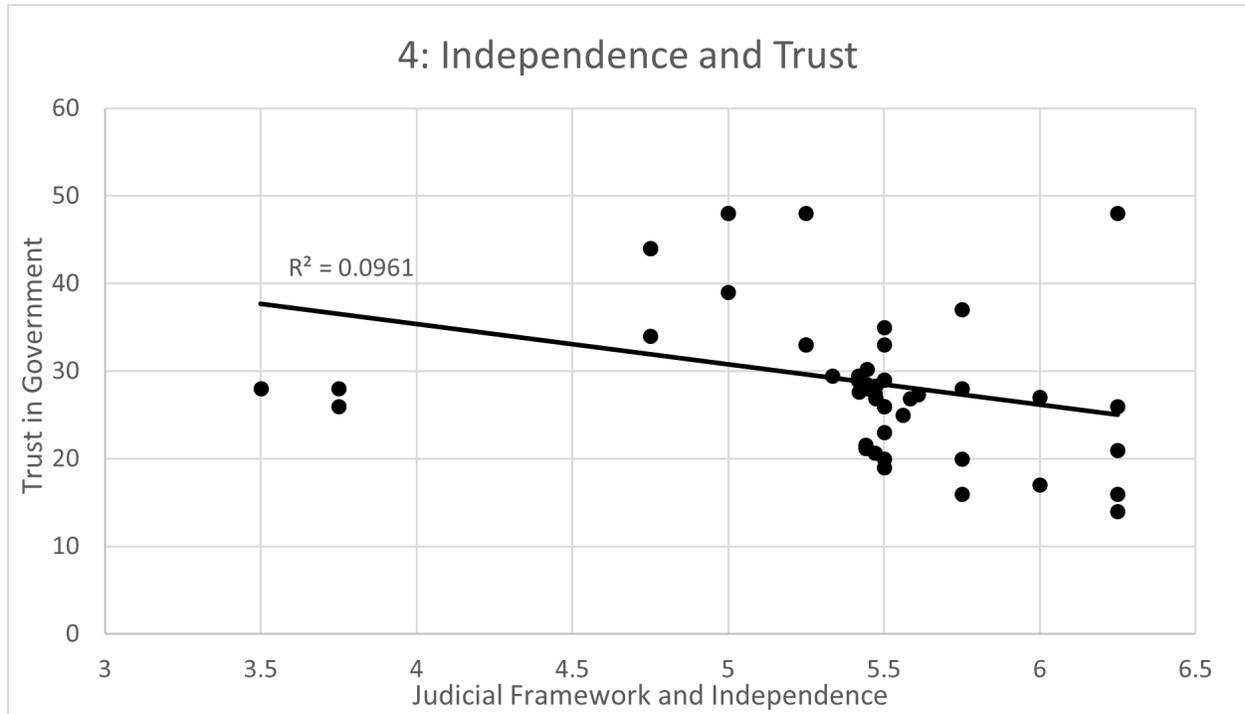
The data here is not what one would expect from previous discussions of these nations. Hungary's trust in the government has been progressively growing, despite increasing partisanship and the erosion of institutions. In the years prior to the 2010 election, the ruling party of Hungary was racked by numerous scandals, which precipitated that overwhelming electoral victory of the Fidesz party. This could potentially explain the decline in governmental trust, followed by the large spike when a

populist party swept to victory. Trust declined in the first year of the party, but has steadily grown since then. Perhaps this is a sign of Viktor Orbán's continuing popularity among Hungarians, as Orbán and the Fidesz party have consistently received the majority of votes.

In Poland, trust in the government has followed the EU NiT standard more closely, but remains low at 28%. It does not seem as if the changes to Poland's Constitutional Court have had significant impacts on the citizenry's trust in the government, despite EU leadership and legal scholars sounding major alarms.

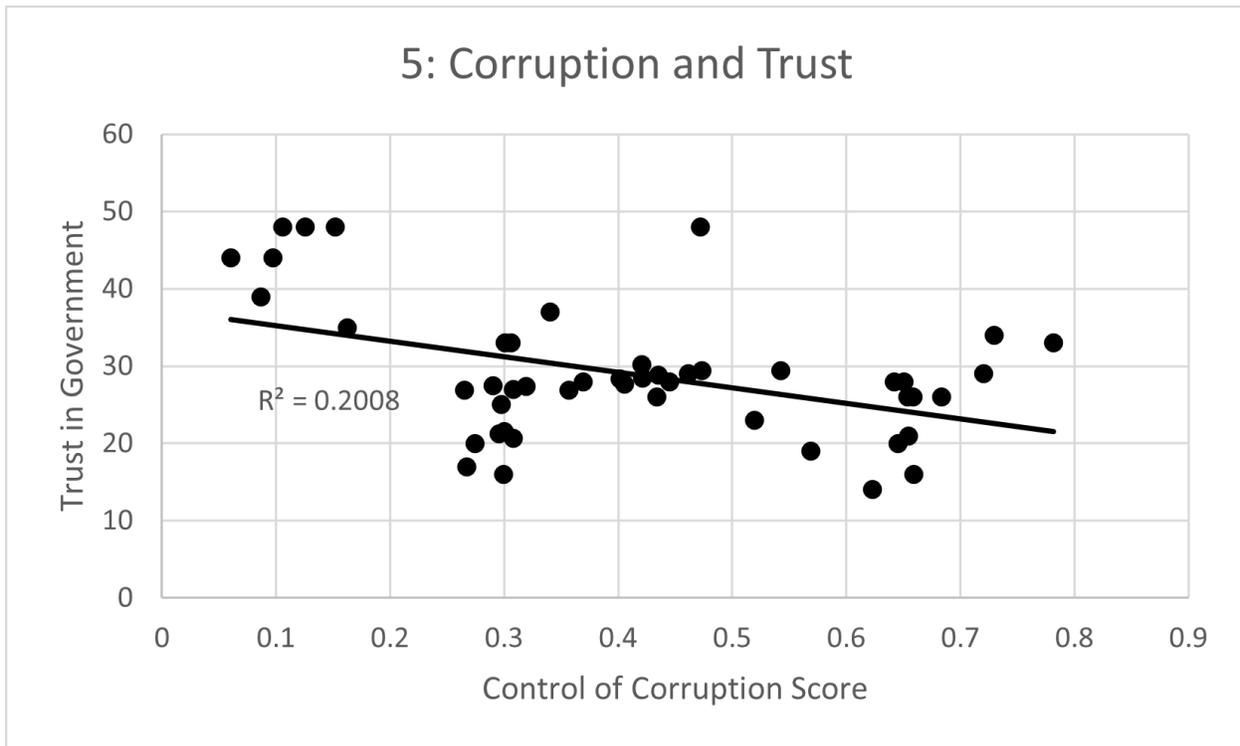
Both Fidesz and PiS may exhibit authoritarian tendencies, but as populist parties, they are by definition popular. Both parties won enough of the vote to receive controlling stakes in the government, and have continued to enjoy broad popular support among the electorate. It would be reasonable to guess that many citizens are associating their trust in the government with their approval of the ruling party, which helps explain the rising levels of trust in the government under these populist regimes.

When analyzing the connection between judicial independence and governmental trust, there appears to be a weakly significant negative correlation between judicial independence and trust in the government. Chart 4 uses Freedom House's Judicial Framework and Independence scores compared to the Eurobarometer's Trust in Government with a 2 year lag. This lag was to account for the fact that changes to judicial framework would likely take some time to affect the public consciousness.



*Data from Freedom House Nations in Transit Dataset 2005-2020 <https://freedomhouse.org/report/nations-transit> and Eurobarometer Standard Survey 2007-2022 <https://europa.eu/eurobarometer/surveys/browse/all/series/4961>

As shown in chart 4, there is a weak negative correlation between judicial independence and trust in the government. This runs contrary to the literature, which tends to claim that independent institutions are perceived as more trustworthy than partisan ones. Once again, the connection between the popularity of the ruling party and the reduction of judicial independence may play a role in this finding. The elected officials that are reducing the independence of the judiciary are not unpopular dictators, they are popularly elected politicians with broad public support.



*Data from World Governance Indicators 2005-2020 <https://databank.worldbank.org/source/worldwide-governance-indicators> and Eurobarometer Standard Survey 2007-2022 <https://europa.eu/eurobarometer/surveys/browse/all/series/4961>

Chart 5 compares the World Governance Indicators Control of Corruption scores with the Eurobarometer Trust in Government results, with a two year lag in the trust data. The analysis finds no significant relationship between the two. This runs contrary to popular literature, which claims that perceptions of corruption are one of the most significant factors in determining government trust. Once again, the popular nature of the ruling parties may be significant in this result. Citizens may be willing to trust the current ruling parties to do the right thing, and be happy that their popularly elected officials are the ones in charge. It is significant that no data points in this set rise above the 50% mark, meaning at no point did the majority of citizens in Hungary, Poland, or the EU NiT average trust their government.

Conclusion

In this paper, I asked what could be learned from the Hungarian and Polish experiences regarding judicial independence. A process-tracing research method was utilized to track changes and significant developments in the power of the Hungarian and Polish judiciaries. This showed the various methods governments can use to erode the power and independence of their judiciaries, with Hungary utilizing formal constitutional amendments while Poland's other branches engaged in unconstitutional behavior to pack the courts with supporting justices. These changes resulted in significant decreases to the judicial independence and quality of government scores of Hungary and Poland, but did not lead to large shifts in the trust in government.

In both these countries, it is perhaps notable that the institutions were incredibly young when attacks from other branches began. Neither Poland nor Hungary had strong democratic institutions at any point in their history until 1989, when communism collapsed in Eastern Europe. Given the citizenry's familiarity with authoritarian governments before and during the Soviet occupation, perhaps both governments were more vulnerable to populist authoritarian regimes. This familiarity in the Hungarian and Polish people may help explain why trust in the government has been steadily rising despite the decreasing strength of democratic institutions.

Most significantly, Poland and Hungary were both able to drastically reduce the power and independence of their judiciaries despite their different methods and situations. The Fidesz party in Hungary controlled over two-thirds of Parliament, and so was able to write a new constitution and amend it without any input from the opposition.

This meant they were able to change the structure and independence of the judiciary through official changes to the constitution. In contrast, the Law and Justice party had a simple majority in the legislative branch, which was not enough to amend the constitution. Therefore, Law and Justice had to pass statutes, pack the court with friendly judges, and directly disobey the judiciary. Although these methods are less official than the ones undertaken in Hungary, they were no less effective. In both countries, the judiciaries quickly became a legitimizing institution for the government that stopped effectively challenging laws it may have challenged before the shift. In both countries, this change was remarkably quick, happening within three years of the election of the respective parties. This demonstrates that significant shifts in the power and independence of judiciaries can happen through a variety of processes and with startling speed.

A surprising weak negative correlation was found between judicial independence and trust in government. This runs contrary to most literature, and is perhaps a result of the populist nature of the ruling governments. Citizens may have also disaggregated the judicial branch from the rest of government in their mind, as suggested by various scholars in the literature review. The correlation was incredibly weak, which suggests that more data is necessary to make this result more robust. As it stands, it would not be wise to place too much significance in the finding. Lastly, no correlation was found between Control of Corruption and trust in government. A possible error in this result is that estimated Control of Corruption is different from the citizen's perceptions of corruption, which would be more relevant for trust. Further research is needed on this topic.

Given the structure of this project, it is naturally limited in scope. There are a number of areas that deserve further research where this paper falls short. First, looking at more countries would offer greater understanding of the methods and processes of judicial reform. Hungary reduced the power of its judiciary through constitutional change, while Poland limited its power through political maneuvering. Looking at other nations would offer insight into other ways countries can strengthen or weaken their judiciaries. The most obvious first candidate to look at is the Czech Republic. The Czech Republic shares many historical similarities with Poland and Hungary, but its judiciary has remained strong since its inception. Analysis of how and why this has happened would be beneficial for legal scholars.

Second, greater exploration of the EU's role in regulating the judiciaries of its member countries is needed. This paper touched on the Venice Commission and European Council decrying the changes in Hungary and Poland, but did not offer a thorough examination of the EU's power in either situation. The EU created new tools after observing Hungary's changing judicial powers, and implemented them when Poland began reforming its judicial branch. Further research into the nature of these tools, how effective they are, and the process for getting them passed is warranted.

Thirdly, the research in this paper was hindered by the inconsistent data of the Eurobarometer Standard Survey series. Data exists regarding trust in the judiciary from 2005-2010, 2014, and 2016-2022. This required substituting Trust in Government data into the analysis instead. While they are related, trust in the government and trust in the judiciary are separate variables and may produce separate results. There are other

datasets that track trust in the judiciary with varying degrees of consistency, which could prove useful in further research.

Poland and Hungary present fascinating case studies for any researcher interested in judicial independence and separation of powers, largely due to the significant changes that have occurred in the past decade. The future trajectory of both these nations is unknown, but with undoubtedly present political scientists with valuable information about the durability of democracy.

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