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## As in Hungary now in Poland?

Assessing the states of democracy in Hungary and Poland as ‘lands in-between’ democracy and autocracy

### Bachelor-Arbeit

**Erstprüfer\*in:** Aline Grünewald

**Zweitprüfer\*in:** Prof. Dr. Heiko Pleines

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Name: Jessica Nuske

Matrikel-Nr: 4015492

Adresse: Hildesheimer Straße 27  
28205 Bremen

E-Mail: [jessica\\_nuske@yahoo.de](mailto:jessica_nuske@yahoo.de)

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## 1. Introduction

On July 28<sup>th</sup>, the European Commission filed an infringement procedure against its member state the Republic of Poland (European Commission Press Release 2017c). Poland is the first of its member states the EU commission has filed an infringement procedure against to investigate the rule of law (Pech/Steinbeis 2017). The exact subject of this procedure is the judiciary reform and the EU started threatening to trigger Article 7 (1) if the Polish government were to pursue undermining the independence of its judiciary (European Commission Press Release 2017b). This comes in addition to the ongoing ‘Rule of Law Dialogues’ initiated by the Commission in January 2016 and the three complementary ‘Rule of Law Recommendations’ filed in July 2016, December 2016 and July 2017 (European Commission Press Release 2017c). Poland however is not the only member state of the European Union that is causing the commission to voice concerns and take legal action: The Commission opened an infringement procedure against Hungary due to its asylum law in December 2015, including a follow-up in 2017 and another one concerning Hungary’s law on foreign-funded NGOs in July 2017 (European Commission Press Release 2017a). The Vice-President of the European Commission, Frans Timmermans, was asked: “How dangerous are these men [Viktor Orbán and Jarosław Kaczyński] to Europe, Mr. Timmermans?” during an interview with *Die Zeit* on May 4<sup>th</sup>, 2017. Timmermans argued that both countries try to undermine the rule of law in their respective countries in order to strengthen their own positions. These reforms are accompanied by strong nationalistic identities and idealistic sentiments building what Timmerman called an illiberal democracy. He argued that both Poland’s and Hungary’s democratic institutions are being simmered down to hybrid regimes between democracy and autocracy (Die Zeit 2017).

Since the party of Victor Orbán, the FIDESZ-KDNP party<sup>1</sup>, came into power in 2010 with a two-thirds majority, the government started to regress the country’s judicial system and deprived the press of its rights to control it (Pech/Steinbeis 2017). Orbán even proudly labelled himself as an illiberal democrat and recently triggered a public outcry by trying to shut down Budapest’s Central European University which is funded by an international NGO that champions the rule of law and human rights (Bremmer 2017). Today, many newspapers name both countries, Hungary and Poland, and the erosion of their democracies in one sentence and try to distinguish a pattern of autocratic behaviour. Laurent Pech, who is a Professor for European Law, further

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<sup>1</sup> Since 2008, both Hungarian parties FIDESZ – Magyar Polgári Szövetség (Hungarian Civic Alliance) and KDNP – Kereszténydemokrata Néppárt (Christian Democratic People’s Party) formed an electoral alliance and later a political party alliance. The significantly larger FIDESZ party uses the name of the much smaller party as suffix. In this thesis, the party will be called FIDESZ.

argues that Poland is taking similar steps to change the state's institutional architecture to those Hungary has taken. With its judicial reforms, Poland was aiming to get control over the Constitutional Court in order to maximise their influence on judicial decisions. The Hungarian government under Victor Orbán did just that – he subjugated the constitution to party politics. Next to the judiciary system, the media is another institution which is being undermined, suppressed and controlled by Hungary and this process has already started in Poland, too. Pech predicts, that Poland will continue following Orbán footsteps away from democracy towards autocracy (Pech/Steinbeis 2017).

This development is, however, not a local phenomenon only to be observed in Hungary and Poland. A decline of former democratic states is evident all over the world. After the third wave of democracy, which began 1974 with about 30% of states meeting the criteria of an electoral democracy and ended 2006 with about 60% meeting the criteria, the amount of electoral democracies has since declined (Diamond 2015: 140-141, 144). According to the director of Stanford's Center on Democracy, Larry Diamond, since 2000, 25 democracy breakdowns occurred in the world not only to due coups (eight of these democracies came down due to military interventions, two due to other non-democratic forces) but rather through "subtle and incremental degradations of democratic rights and procedures that finally push a democratic system over the threshold into competitive authoritarianism" (Diamond 2015: 144).

In order to assess the 'grey zone' between democracy and autocracy, the political scientist Prof. Dr. Wolfgang Merkel, together with Aurel Croissant, Peter Thiery and others, elaborated the concept of 'defective democracies' as regimes between democracy and autocracy. Defective democracies are sub-types of liberal democracies. Liberal democracies are defined by an extended democracy definition called 'embedded democracy'. The theorists argue that liberal democracies, in contrast to electoral democracies<sup>2</sup>, consist of the following three dimensions: the dimension of vertical legitimacy, the dimension of liberal constitutionalism and rule of law and the dimension of effective agenda control. If at least one of this dimension cannot be fully guaranteed by the state, a defective democracy is in place. In compliance with the concept of embedded democracy, four sub-types of defective democracies can be distinguished, namely exclusive democracy, domain democracy, illiberal democracy and delegative democracy.

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<sup>2</sup> Freedom House declares electoral regimes as countries who are able to provide a) a competitive and multipolar system, b) universal suffrage for all adult citizens (including exceptions implemented as sanctions) c) fair elections that are contested on a regular basis and d) significant public access of major political parties to the electorate through campaigning and media. For more information see: <https://freedomhouse.org/report/freedom-world-2012/methodology>.

The aim of this thesis is to assess the states of democracy in Hungary and Poland, whereby Hungary, due to the advanced progress of approximately seven years, offers a more detailed assessment and categorisation of its democracy, than Poland does. This is due to the fact that the reforms addressing Poland's institutional architecture were initiated by the Prawo i Sprawiedliwość (PiS) (Law and Justice) party, which initially gained its absolute majority in October 2015. This reduced insight thus only allows me to formulate tendencies and thus no definite categorisation as defective democracy. Furthermore, I will analyse and assess the status quo in the respective democracies rather than the process of democratic backsliding. The ambition to fully scrutinise the process will go beyond the length and format of this thesis. Rather, this thesis will analyse structural changes at hand within the institutional landscape in both countries in accordance with the scheme of embedded democracies elaborated by Merkel, which thus grants an amplified assessment of the current states of democracy. The intention of this thesis is to provide an extensive and well-documented diagnosis and does not dare to explain neither the causes that initiated the processes nor ways to overcome the illiberal tendencies. Diagnosis, treatment as well as determining social, political and cultural conditions that triggered the system transformations are three different fields of scientific research (Kornai 2015: 46) and cannot be subsumed under the umbrella of one thesis. Such a diagnosis is nevertheless crucial to fully understand the Hungarian and Polish case and helps identifying a certain strategy or pattern of illiberal turns within the transformation of both countries. I will further give a prognosis on how PiS and FIDESZ might continue with their aspiration towards reforming their country's polity.

This thesis will first introduce the theoretical background which will be based on Merkel's concept of embedded democracy and the correlating sub-types of a defective democracy. Then, I will scrutinise whether Hungary can be described as defective democracy and determine what kind of defective democracy Hungary can be described as. As comparative research, I will scrutinise the recent developments in Poland since the elections in Poland in 2015 when the PiS party came into power with an absolute majority. I will conclude this thesis by categorising the states of democracy and distinguish a certain strategy of system transformation both countries pursued. Then, I will give a final prognosis on the future of Hungary's and Poland's democracy.

## 2. Conceptual uncertainties due to an emerging 'grey zone' between democracy and autocracy

Aurel Croissant and Peter Thiery distinguish two main questions to be discussed by researchers and theorists in terms of analysing and categorising the 'grey zone' between democracy and autocracy. The first question that needs to be addressed is how to conceptualise and categorise

the new types of hybrid regimes between democracy and autocracy, and whether the existing categories are already applicable to discern these regime types, or not. The second question asks which theories can be applied in order to demark between different regimes within the grey zone and between them and liberal democracies (Croissant/Thiery 2001: 10). Several theorists have argued either to distinguish stringently between autocracy and electoral democracies, thus minimising the requirements for a regime to be declared democratic (Linz 2000), or to declare all regimes within the grey zone to hybrid regimes (Karl 1995; Rüb 2001) or ‘Anocracies’ (Jagers/Gurr 1995) as unique regime type. Larry Diamond proposed to categorise electoral democracies either as liberal, semi-liberal or illiberal depending on scores measuring civil rights. Freedom House is measuring civil rights on a scale from one to seven whereby the higher score indicates less protection and promotion of civil rights by the state. According to Diamond, democracies scoring a three on this scale are semi-liberal democracies and regimes with a four or higher are declared illiberal democracies (Diamond 2000: 95). However, these approaches do not justify the heterogeneous group that assembles the ‘grey zone’ because they do not establish a basic concept of democracy or autocracy in order to sufficiently distinguish between different regimes within the grey zone as well as between them and democracies or autocracies. That is why this thesis will peruse the approach established by Wolfgang Merkel. Merkel presents an expanded definition of a liberal democracy, called embedded democracy based on which sub-types of defective democracies can be distinguished. It has to be noted that this theory was elaborated in conjunction with Aurel Croissant and Peter Thiery (Merkel/Croissant 2000; Croissant/Thiery 2000; Merkel/Puhle/Croissant/Thiery et al. 2003; Croissant 2010).

### 2.1. The concept of embedded democracies

To sufficiently investigate system transformations, a clear categorisation of different types of regimes ought to be established first. They need to be accurately defined in order to be distinguishable from each other. Only then, the verification and assessment of a system transformation is possible (Merkel 2010: 22). Based on this consideration, Merkel introduced the root concept of embedded democracies and further declared that regimes within the ‘grey zone’ are defective subtypes of embedded democracies (Merkel 2010: 37). Hence, democracies which fall short on one or more aspects of embedded democracies are not automatically autocracies, but rather ‘defective’ subtypes of democracies as long as they uphold the rudimentary and system-immanent concept of freedom, equality and control (Merkel/Puhle et al. 2003: 65). To accurately distinguish between multiple sub-types of democracies within the

grey zone and autocracies, the concept of embedded democracy formulates a basis onto which a clear demarcation between different types of regimes can evolve.

An embedded democracy is a three-dimensional regime composed of five sub-regimes, which secure a functioning democracy. These dimensions and the respective sub-regimes only work as a set in consistency. These dimensions control, determine and complement each other and thereby create a balanced and functioning democracy. The structure of these dimensions and sub-regimes can be described with the following scheme:

- I. Dimension of vertical legitimacy
  - 1) Electoral regime
    - a. Elected officials
    - b. Inclusive suffrage
    - c. Right to candidacy
    - d. Correctly organised, free and fair elections
  - 2) Political rights
    - e. Press freedom
    - f. Freedom of association
- II. Dimensions of liberal constitutionalism and rule of law
  - 3) Civil rights
    - g. The protection of individual liberties from violations of rights by state/ private agents
    - h. Equality before the law
  - 4) Horizontal accountability
    - i. Horizontal separation of powers
- III. Dimension of effective agenda control
  - 5) Effective power to rule
    - j. Elected officials with the effective right to rule (Merkel 2004: 42)

#### *The dimension of vertical legitimacy*

This dimension addresses the role and the rights of the public within a democracy – it promotes citizen's involvement and therefore responsive governing. The first aspect contains the most basic prerequisites of democracy: electoral rights. Granting every citizen the right to participate in regular, free, general, equal and fair elections accompanied with an open and pluralistic competition formulates the first pillar of a democracy. Yet of course the electoral regime is necessary but not sufficient to a democracy. Elections grant citizens a significant influence on

the political landscape yet this right is only granted every few years. Between elections, citizens must be able to create an “independent political sphere of action” (Merkel 2004: 38) to organise pluralistic public interests through political communication and organisation protected by and anchored in the freedom of speech, rights of association, demonstration and petition as well as an independent public media. This sphere of action consists of interest groups who advocate their preferences, opinions and demands to the government in order to achieve responsive governing. This dimension constitutes the ‘positive rights of freedom’, thus to participate democratically in numerous ways (Merkel 2004: 38-39).

#### *Dimensions of liberal constitutionalism and rule of law*

Civil rights are crucial to the rule of law since they protect the individual from the state and other private agents. The rule of law “is the principle that the state is bound to uphold its laws effectively and to act according to clear and defined prerogatives” (Merkel 2004: 39). Therefore, the rule of law protects the public from arbitrary actions by the government through checks and balances like the division of power, and the individual from unlawful acts infringing on an individual’s freedom both by the government – including the executive and legislative – and other individuals. Furthermore, the law ought to protect from the tyranny of the majority with interest groups like the opposition and minority groups being oppressed by majority decisions. Therefore, independent courts are inevitable for a liberal democracy. This dimension further includes equal access to the law and equal treatment by the law. This dimension formulates the ‘negative rights of freedom’ against external constraints and is, according to Merkel, the basic condition of citizenship (Merkel 2004: 39-40). In order for a liberal democracy to fully guarantee the rule of law, all three branches of a state need to be in balance with each other guaranteeing a division of power. Civil liberties protect the individual from unlawful acts by the state but not from abuse of power towards other democratic institutions. That is why all three branches must keep each other in check to prevent unilateral aggrandisement. The horizontal responsibility of powers entails a reciprocal control of autonomous institutions (Merkel 2004: 40-41).

#### *Dimension of effective agenda control*

This dimension ensures that no veto-powers like the military, oligarchs or other powerful, extra-constitutional actors with no legitimate democratic agenda interfere with democratic institutions. The core concept is that only democratically elected actors hold the effective power to govern. Insufficiencies can occur both due to ineffective power over the military and the police as well as ‘reserved policy domains’ over which the state holds no effective power.

A liberal democracy guarantees, protects and upholds all aspects of these dimensions. They have to be mutually embedded in interdependency and in independence, since “[i]t is the mutual embeddedness of the different institutions of democracy in a network of institutional partial regimes that guarantees a functioning and resilient democracy” (Merkel 2004: 43). Such reciprocal control prevents actors from abusing their power by infringing either on the public, individuals, other democratic institutions or on other branches of the regime. Furthermore, this extended definition of liberal democracies allows a differentiated and precise scrutiny of a democracy with all its dimensions. Insufficiencies and malfunctions can be located to an exact sub-regime and thus enable researchers to formulate a precise diagnosis which is applicable to comparative studies amongst different democratic regimes (Merkel 2004: 43). Therefore, the comparative research of assessing the states of democracy in Hungary and Poland will be based upon this scheme of dimensions and sub-regimes. I will scrutinise Hungary’s and Poland’s performances in the respective sub-regimes in order to specifically locate insufficiencies and malfunctions within the regimes of both nations.

## 2.2. Defective democracies and their sub-types

Evolving from the scheme of dimensions and sub-regimes, Merkel, as well as Croissant and Thiery, elaborated the concept of ‘defective democracy’. The concept of defective democracy aims to close the gap of uncertainty regarding regimes in the grey zone between democracy and autocracy. A democracy is defective or ‘disembedded’ when at least one of the sub-regimes cannot be guaranteed by the regime due to insufficient institutions or institutions being (temporarily) undermined or misused by powerful actors (Croissant/Thiery 2001: 23). Defective democracies can therefore be defined as regimes with a widely functioning electoral system but with one or more malfunctioning or absent sub-regime(s) of liberal democracy, which are imperative to sufficiently ensure freedom, equality and control. Depending on which sub-regime is malfunctioning, a certain subtype of a defective democracy can be distinguished. With this concept, regimes between democracy and autocracy can be clearly demarked from different regimes within the grey zone and from liberal democracies. Based on the three-dimensional democracy concept with its five respective sub-regimes, four sub-types of defective democracies can be established, namely an exclusive democracy, a domain democracy, an illiberal democracy or a delegative democracy (Merkel 2010: 37-38).

### *Exclusive democracy*

With an insufficient or malfunctioning vertical dimension of legitimacy, the defective democracy can be described as an exclusive democracy. This is the case, if for example segments of the adult population were not allowed to exercise their active and passive right to

vote and/or elections were not regular, free, general, equal and fair (Merkel 2004: 49). This was the case in Switzerland until 1971 with women not being granted the right to vote. An exclusive democracy is also evident when civil liberties like freedom of press and freedom of association were to be restricted and/or the regime were to intervene within the independent political sphere of action and/or by manipulating the public opinion through (partially) controlled media outlets (Croissant/Thiery 2001: 28).

#### *Domain democracy*

Without extensive de facto power to govern due to veto powers like the military or oligarchs undermining and determining the nation's politics, the regime is to be called a domain democracy. One can speak of a domain democracy even if only parts of the regime are not under the full control of elected democrats and in balance with the rule of law but under the control of such veto-powers. The most common type of domain democracies are military regimes which occurred most commonly in Latin America, Africa and Asia in the 70s and 80s (Merkel/Puhle et al. 2003: 249-250). The establishment of such domains takes places either through non-constitutional (Paraguay) or constitutional means (Chile) (Croissant/Thiery 2001: 28).

#### *Illiberal democracy*

An illiberal democracy can reveal one to three of the following characteristics: First, the regime cannot sufficiently and comprehensively enforce civil liberties and constitutional human rights. This entails restricted participation rights and a malfunctioning or absent independent political sphere of action. Freedom of press, freedom of speech and freedom of association are not guaranteed to a sufficient extent by the state. Second, a malfunctioning judiciary fails to guarantee access to and equality before the law, the judiciary's control over the executive and legislative branches is weak and constitutional norms are not being followed by the government. Third, the state's politics' and bureaucracy's efficiency, accountability and transparency are jeopardised by corruption. Violated civil rights, a weak judiciary or a corrupted regime lead to an erosion of the country's rule of law and undermine the public's trust in the regime and its institutions in a severe way (Merkel/Puhle et al. 2003: 262-263). According to Merkel, this is the most common type of defective democracy and it can be examined worldwide (Merkel 2004: 49).

#### *Delegative democracy*

The absence of the division of power is central to a delegative democracy. Due to an executive aggrandisement, the legislative and the judicative are weakened and do not possess significant

influence on the executive and the system of checks and balances is dismantled. This is the case for example, if the government (or president) were to overrule the parliament and/or intervene with the judiciary in order to pursue its own agenda with an (presidential) executive aggrandisement. Such an aggrandisement tends to be pursued by charismatic leaders within a democratic system. Delegative democracies most commonly occur in presidential democratic systems. An illiberal democracy can evolve into a delegative democracy. Overall, regimes in the grey zone tend to be amalgams of two or all four of them (Merkel 2004: 49-50).

In conclusion, the general rule of classification is the following: In an exclusive democracy, the defects predominantly occur in sub-regime one (electoral regime) and two (political rights). In an illiberal democracy, the defects predominantly occur in sub-regime three (civil rights) and in a delegative democracy, the defects mostly occur in sub-regime four (horizontal accountability). Defects in sub-regime five (effective power to rule) result in a domain democracy (Merkel 2004: 172-173). Nevertheless, the line between autocracies and severely defective democracies can be quite thin, though the main demarcation between severely defective democracies and autocracies is that, whilst severely defective democracies do violate several aspects of an embedded democracy, they uphold the principle of democratic elections – even if only to some extent as with exclusive democracies, whereas autocracies suppress democratic interactions and thereby suspend the concept of democratic elections (Merkel 2010: 23).

### 3. Assessing the states of democracy in Hungary and Poland

The assessment of the states of democracy in Hungary and Poland will base upon the scheme elaborated by Merkel, Thiery, Croissant et al. as described in chapter two. In this chapter, I will investigate Hungary's and Poland's performances within the sub-regimes of an embedded democracy. Based on the research, I will argue whether and what type of defective democracy(ies) are to be distinguished. Since this qualitative empirical research will ground on the theory background established above, the method is deductive.

#### 3.1. Research method and case selection

The applied research strategy is comparative and uses the approach of the Most-Similar-Systems Design (MSSD). Both countries demonstrate similar crucial basic parameters: Both are members in the European Union, both acceded in 2004 as part of the eastern EU enlargement. Both are post-socialist countries and have detached themselves from communism: Poland established the Third Republic and implemented a new constitution in 1989 (CIA Factbook 2017b) whilst in 1989 the Third Hungarian Republic was declared, the constitution

rewritten and the first elections were held in 1990 (CIA Factbook 2017a). Hence, both democratic and capitalistic regimes were established as parliamentary constitutional republics within a similar time-frame. Furthermore, both countries have similar economic performances. The GDPs per capita (PPP) is in Hungary 27,200\$ and in Poland 27,700\$. The GINI indices<sup>3</sup> describing the distribution of family incomes amongst the population are also quite alike: Hungary: 28,2 (country in comparison to the world: 133) and Poland 30,8 (country in comparison to the world: 120) (CIA Factbook 2017a/b). Furthermore, both governing parties, PiS and FIDESZ, demonstrate several similarities in terms of ideology and normative alignments and more accurately, an ideology-driven willingness for an institutional change, a specific view on legitimacy and the aim of a sovereignty centric strengthening of the state (Lang 2016: 75). These similarities are more significant to this thesis since the performances of both parties as governmental powers are being compared. Both want to consolidate their countries in the spirit of a neo-traditionalist modernisation and they affiliate themselves with a transformative agenda derived from a democratic majority mandate. Additionally, they are striving for an extensive and effective marking of national sovereignty within the EU. PiS and FIDESZ anchor the aberration of their countries in the opaque transformation process from communism to a new order in which ex-communist insiders, oligarchs, and liberal-cosmopolitan elites implanted themselves into the state, the administration, the financial world and large companies, as well as into the most important media and cultural institutions, resulting in a dysfunctional regime (Bielik-Robson 2017: 90-91; Fehr 2016: 81-82; Koenen 2015: 40-41). Both parties promote a similar understanding of executive governance: Democracy is to be seen as rule of the majority and the division of powers merely as contradiction to the mission received by the electorate. Members of PiS regard FIDESZ party-leader Orbán as role-model and the FIDESZ government is being openly adored. Thus, all eyes looked attentively to Hungary (Lang 2016: 61-63, 75; Vetter 2017b: 67). Party affiliates often refer to Hungary as one of Poland's closest allies within the EU. After PiS lost the parliamentary elections in 2011, the party leader, Jarosław Kaczyński, declared that he is “deeply convinced that the day will come when we will have Budapest in Warsaw” (Chapman 2017: 15).

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<sup>3</sup> The GINI index measures the equal distribution of a country's income with a scale ranging from 0 to 100. High numbers indicate a more unequal distribution of income whereas low numbers indicate a more equal distribution of wealth. The CIA World Factbook ranks 140 countries in accordance with their scores ranged from low (high inequality) to high (low inequality). For more information see: <https://www.cia.gov/library/publications/the-world-factbook/rankorder/2172rank.html>.

In recent history, both Hungary and Poland have been certified as embedded democracies. Hungary and Poland (along with Slovenia and the Czech Republic) were perceived as post-communist success stories and were both considered as fully consolidated democracies (Herman 2016: 252; Merkel 2004: 143, 147, 161). However, with FIDESZ' victory in 2010, Hungary was the first post-communist country in East-Central Europe to make an illiberal U-turn away from democracy (Kornai 2015: 34; Herman 2016: 258), and was followed by Poland (Vetter 2017b: 67).

The method of Most-Similar-Systems-Design attempts to investigate whether in two or more cases with similar independent variables – the effect-producing variables (X) lead to observed outcomes (Y) or not (Caramani 2011: 57). The independent variables (X) are the two governing parties PiS and FIDESZ who both have congruent normative sentiments and world views whilst both diagnose their countries with similar, distinct dysfunctions. Both advocate a similar solution process and hence are aiming to address this dysfunction with similar approaches. The dependent variable (Y) is the outcome produced by governing parties FRIDEZ and PiS, which are the states of democracy in accordance to Merkel's theory. The question to be answered is whether both governing parties have led their countries down a similar path towards defective democracy.

Based on the scheme elaborated by Merkel, I can now analyse possible shortcomings, violations or malfunctions within the five sub-regimes in Hungary's and Poland's democracy. Yet, since the starting points of the analysis are quite different – Victor Orbán's FIDESZ party came into power with a two-thirds majority in 2010 and Jarosław Kaczyński's PiS party gained its absolute majority in 2015 – I will be able to investigate Hungary's 'illiberal turn' more detailed and accurately than Poland's. A definite categorisation as defective democracy may only be in order for Hungary. Therefore, I will first examine Hungary's performances within different sub-regimes and then investigate whether Poland shows congruous changes within its institutional architecture.

Subjects to these debates will be the changes within the institutional architecture of both states and therefore the polity and not the policy results, since policy outputs are not defining characteristics of the democracy-concept this thesis is based upon (Merkel 2004: 36). Neither will the countries' economies be objects of investigation. Legislation, which had been formally implemented but was then revoked due to criticism from either the EU, the respective Constitutional Courts or due to public protests will not be considered either. The analytical subjects will be acquired from legislative and judicative decisions, declarations by the governments as well as press releases together with official reports issued by the European- and

Venice Commission. Moreover, I will examine country reports issued by several think tanks and foundations like the opinions and recommendations published by the OSCE, the Nations in Transit Country Reports (NiT) and the Bertelsmann Stiftung's Transformation Index (BTI). Since 1999, this index analyses strategies and results of political transformation processes in 129 countries. The assessments are based upon Merkel's concept of embedded democracy and he himself was one of the founding scientists of this project, together with Aurel Croissant and Peter Thiery. These evaluations of different polity-fields conclude with a rating between one and ten with ten representing a well-embedded polity (Mohr 2016). Since this index is based upon Merkel's concept of embedded democracy, its evaluation of the current state of Hungary's democracy is highly valuable to this thesis. However, the latest BTI assessment of Poland does not include the polity changes under the PIS-government and therefore can only be used as reference material regarding the state of democracy under the previous government. In addition to the subjects that have already been mentioned, the chronic of events provided by *Polen-Analysen* as well as the issue 66 (1-2) of the *Osteuropa* magazine, which was dedicated to the 'conservative revolution' in Poland, will be central for the assessment of Poland's democracy. Nevertheless, it has to be clarified that the assessment of both Hungary's and Poland's state of democracy will base upon official and public acts by the governments as facts, which are not subjects to debates questioning their existence.

### 3.2. Changes regarding the electoral regime in Hungary

The dimension of vertical legitimacy includes a functioning electoral regime guaranteeing elected officials, inclusive suffrage, right to candidacy and correctly organised and fair elections (see chapter 2.1.). In 2010, FIDESZ reached a qualified majority (a qualified majority will in this thesis constitute a two-thirds majority) of parliament and had been able to continue on this path by defending its qualified majority of parliament in the election in 2014. However, in 2015, the party lost two seats and thereby its qualified majority (Hegedüs 2017: 5). With their newly gained majority of parliament in 2010, FIDESZ introduced a myriad of reforms to the state's democratic architecture, amongst them several reforms concerning the electoral regime. Right in the beginning of their first legislative term, the party passed the 'Law on Elections of Members of Parliament' (Act CCIII), which was amended four times between 2011 and 2013 and was supplemented with the 'Law on Election Procedures' (Act XXXVI) in 2013, which itself was amended three times. Both legislations are cardinal acts and require a two-thirds majority to be changed or withdrawn. The reforms adjusted the electoral regime in the following ways: Within the majoritarian, unicameral election system, voters elect direct candidates in single-seat constituencies as well as party lists in a multi-seat constituency within the

proportional electoral system. Previous to the reforms, a second poll was needed if the compulsory absolute majority in single-seated constituencies had not been reached or the necessary turn-out of 50% had not been accomplished in the first round (Renwick 2012: 4-5). The absence of a second poll weakened the opposition by withdrawing the possibility of an opponent proposed by a multi-partisan opposition after the first round (BTI 2016a: 6). Further changes included the reduction of seats in parliament from 386 to 199 (CCIII, §3 (1)). Many experts considered this change valid since with a population of just ten million the parliament was considered oversized. Even several opposition parties argued in favour of this reform (Renwick 2012: 8-10). Nevertheless, this change does intensify the negative effect of other reforms: The ratio between single-member constituencies and national lists was shifted in favour of the first. The mandates allocated through single-member constituencies used to compose 46% of all mandates in comparison to 53% after the reforms (CCIII, §3 (2)). The mandates for single-member consistencies used to emerge from surplus votes, that used to be defined as votes of defeated candidates – today surplus votes are all votes allocated from defeated candidates as well as votes of successful candidates that go beyond the necessary minimum number of votes (CCIII, §15, 16). These enormous overcompensations favour the winning party and increase the disproportion of the Hungarian electoral system (Bozóki 2011: 77, 80-81; Tóka 2014: 315). In combination with a downscaled parliament, this effect increases even further. In 2010, 53,1% of votes (172 of 176 direct mandates, 90 of 210 mandates through the regional and national party-list) for FIDESZ translated into 68,1% of seats (total: 262) and therefore into a three-third majority (National Election Office 2010). Whereas in 2014, the FIDESZ party only acquired 96 out of 106 single-member constituencies and 37 out of 93 mandates via national list and therefore only 44,9% of all votes and 133 [131 in 2015] seats respectively (National Election Office 2014) whilst FIDESZ acquired six mandates only due to the re-written definition of surplus votes (BTI 2016a: 7; Tóka 2014: 319-320). Therefore, significantly less votes were necessary to gain a three-thirds majority. The shift of the weighting of the votes to the benefit of the governing party is illustrated in the following figure:

Parliamentary Election	FIDESZ voters as a share of...		FIDESZ' share of parliamentary seats
	All people entitled to vote	All voters	
2010	41,5%	53,1%	68,1%
2014	26,6%	44,9%	66,8%

*Figure one: Comparison of election results of 2010 and 2014 parliamentary elections in Hungary (Kornai 2015: 42).*

These implicit advantages were accompanied by several explicit ones: CCIII §4 (1-9) introduced ‘gerrymandering’ by rearranging electoral constituencies to the effect that areas favouring opposition parties were enlarged, thereby reducing the actual influence of votes within these areas. The size of five out of 106 constituencies varied to an extent of over 15% in comparison to the national average thus undermining the principle of equal votes as declared in Act CCIII (BTI 2016a: 6; CCIII §4 (4)). Furthermore, an exact procedure for calculating the constituency boundaries was not specified and thus ignored the necessity of an independent commission drawing the lines as demanded by the Venice Commission (OSCE 2014: 7). The evident lack of transparency becomes even more significant since this law, amongst many others, was declared a ‘cardinal law’ and therefore requires a two-thirds majority to be changed (OSCE 2014: 8). Renwick declares that none of these reforms were in line with public interest yet they all favoured the interests of the governing party. The existing majority rule, which already favoured bigger parties, was expanded even further whilst the government was not able to explain the need of an expanded majority principle (Renwick 2012: 15-16), thereby widening rather than counterbalancing the distance between governing and opposition parties. Although the downsizing of parliament was a very popular decision, the current electoral system distorts the expression of the popular vote and thereby triggers cynicism towards democratic institutions and, according to Tóka, perceived political legitimacy will diminish (Tóka 2014: 321).

In accordance to Merkel’s scheme of embedded democracy, the electoral regime has to be free and fair. The fairness of this system can be questioned since there is a clear bias towards the governing party due to electoral reforms in 2010 and 2013. As to the question whether the electoral regime guarantees that only elected officials hold power, no violations can be found since all members of parliament gained their position based on election results. Yet the aspect of inclusive suffrage deserves a closer look. On the one hand, the reforms increased the number of possible voters by including foreign ethnic Hungarians and the access to Hungarian citizenship was eased (CCIII §12 (3)). However, it can be argued that this reform was based on political interest, due to the fact that in 2014, Hungarians from abroad voted with 95,5% in favour of FIDESZ. Yet, on the other hand, non-Hungarian voters with permanent residency were only able to vote personally at diplomatic missions (BTI 2016a: 7). Furthermore, according to the OSCE Election Observer Report, the government deprived 57,000 citizens with mental disabilities and 38,000 prisoners, some 26,000 of them had completed their sentences, of their right to vote, thereby breaching the 2006 UN Convention on the Rights of Persons with Disabilities (CRPD), the 1990 OSCE Copenhagen Document and the International Covenant on Civil and Political Rights (OSCE 2014: 5).

These reforms led the OSCE to confirm that the restrictive campaign regulations, together with biased media coverage (see chapter 3.3.) and an opaque differentiation between political parties and the state in media (see chapter 3.3.), the main governing party benefitted from an undue advantage. The OSCE concluded that “a number of key amendments negatively affected the electoral process, including the removal of important checks and balances” (OSCE 2014: 1). The Bertelsmann Stiftung Transformation Index (BTI) declared that the “governing political parties, Fidesz-KDNP, won all three elections [parliamentary, European Parliament and subnational elections] [in 2014] by tweaking electoral rules to their benefit and misusing state resources. The reforms increased the disproportionality of the electoral system.” (BTI 2016a: 6). In conclusion, the electoral regime does not fulfil all requirements necessary to the first sub-regime of an embedded democracy. Whilst elected officials do hold the mandate of power within the parliament, the parliament consists of elected officials and all Hungarian citizens do have the right to candidacy, the other aspects to the sub-regime do display several malfunctions and shortcomings. The inclusive suffrage is not guaranteed due to (former) prisoners and people with mental illnesses being excluded from voting. The reforms between 2011 and 2013 to the election procedure are detrimental to fair elections as a consequence of numerous changes favouring either big parties in general or the governing party itself. The Bertelsmann Stiftung’s Transformation Index rates the electoral regime with 7. Of course, the malfunctions of the electoral regime do correlate with reforms concerning political rights and therefore a final evaluation of the first dimension of vertical legitimacy can only be given in conjunction with changes regarding political rights.

### 3.2.1. Outlook: Changes regarding the electoral regime in Poland

In 2015, the populist Law and Justice (Prawo i Sprawiedliwość, PiS) party won both parliamentary elections and the presidential election. In May 2015, the PiS MEP Andrzej Duda won the Presidency in two electoral rounds. The Polish bicameralism legislation consists of the national assembly (Sejm) as lower house and the Senate as upper house and in October 2015, with 37% of all votes, PiS achieved a slight absolute majority in the Sejm and a clear absolute majority in the Senate. Thereby PiS controls the executive and the legislative, yet a required qualified majority to change the constitution was clearly missed. Nevertheless, the presidency and an absolute majority in both chambers held by one party is a precedential case in democratic Poland. Andrzej Duda as President of the Republic and Beata Szydło as Prime Minister officially hold power, yet it is no secret that PiS party-leader and former Prime Minister (2006-2007) Jarosław Kaczyński, who does not hold an official office, controls both the President and the Prime Minister and is the real leader in Polish politics (Arak/Bobiński 2017: 4; Vetter 2016:

33-34; Łazowski 2016: 1). PiS came into power before by winning the elections in 2005 with Jarosław Kaczyński as Prime Minister and his twin brother Lech Kaczyński as President. This period of time will however not be considered in the current assessment of Polish democracy.

Kaczyński as informal Head of State is not controlled by the division of power yet influences both the legislative and executive as a 'power behind the throne', constitutes a first breach to Merkels concept of an embedded electoral system. His power is not legitimised by a mandate given through democratic elections, yet he is the *de facto* leader in Polish politics and is also perceived as such: 65% of Poles view him as Poland's effective ruler whereas only 14% view Duda and 18% view Szydło as such (Arak/Bobiński 2017: 4). Hence, the elected officials do not hold sufficient power due to an informal Head of State.

The current government has so far not changed the electoral regime. According to the Bertelsmann Stiftung's Transformation Index (BTI) 2016 report on Poland, there haven't been any notable violations on free and fair elections since 1990. Furthermore, there are no constraints on inclusive suffrage and on the right to candidacy. The BTI rates Poland's election regime with 10 (BTI 2016b: 6). However, the Nations in Transit Report did observe PiS' research on possible election reforms which would deny independent single-candidates to run in single-member districts and would empower the party-leader to decide on the candidacies' order on party lists. The opposition denounced these reform plans since they would foster a wide-ranging gerrymandering favouring the ruling party (Arak/Bobiński 2017: 5). Since they are not in place yet, the electoral regime is only slightly damaged due to an informal Head of State holding power.

### 3.3. Changes regarding political rights in Hungary

Political rights include the freedom of press, freedom of speech and an intact, independent political sphere of action (see chapter 2.1.) and strongly correlate with the electoral regime. First, I will scrutinise the freedom of press and media, then the freedom of speech and association to conclude whether an independent political sphere of action is present. The re-written Hungarian constitution of 2011 including all four amendments is crucial not only to this analysis, but to the analysis of all sub-regimes. This analysis will further regard two media laws – 'Act CIV of 2010 on the Freedom of the Press and the Fundamental Rules of Media Content' and 'Act CLXXXV of 2010 on Media Services and Mass Communication'.

The new constitution protects the freedom of opinion, thought and conscience (Art. VII (1)), the freedom of association and assembly, to join trade unions (Article VIII (1-5)) as well as freedom of expression and press (Art. IX (1-3)). Human dignity shall not be harmed through

freedom of expression (Art. IX (4)). However, the constitution provides significant limitations to some of these principles. First, the freedom of expression shall not be exercised “with the aim of violating the dignity of the Hungarian nation” and persons inflicted by such violence may enforce their claims in court (Art. IX (5)). This vaguely written prohibition against hate speech towards the Hungarian nations would, according to the Venice Commission, enable authorities to widely apply this prohibition and therefore protect Hungarian institutions and office holders from criticism, thereby limiting freedom of speech (Venice Commission 2013: 14). Similar blurred restrictions can be found in the “Act CIV on Freedom of Press and Fundamental Rules of Media Content” which limits the freedom of press to an extent that the exercising of this freedom shall “not constitute or encourage any acts of crime, violate public morals or the moral rights of others” (CIV Art. 4 (3)) whilst demanding linear media services to provide a balanced coverage to ensure proportionality and democratic public opinion (CIV Art. 13). These vague verbalisations caused the Council of Europe to criticise that these requirements “pose the risk [...] of granting excessive discretion to authorities to punish information providers who give particular relevance or coverage to issues that are not in line with the majority political mainstream” (Council of Europe Experts 2012: 16). These opaque and extensive restrictions lead to self-censorship of media outlets in order to avoid fines and/or prosecution (Küpper 2012a: 16; Kornai 2015: 40). In order to supervise the private and public media services, press products and the communication market and to ensure ‘balanced’ coverage, the constitution established the “National Media and Info-communications Authority” (Nemzeti Média- és Hírközlési Hatóság, NMHH) as cardinal law (Art. IX (6), CLXXXV Art. 109-110A)). The law provides the body with almost unlimited power: The NMHH allocates radio- and television frequencies, decides on mandates and cost efficiency of public media services and their programs. They further supervise the ownership on print media and the extent of freedom of speech in these outlets (CLXXXV Art. 109-110; Vásárhelyi 2011: 162). The NMHH includes the “Media Council of the National Media and Info-communications Authority” (CLXXXV Art. 109 (4)). The members of this Council (the president and four members) are appointed by a majority of parliament and their terms last nine years. The President of the National Media and Info-communications Authority is automatically nominated for President of the Media Council by the President of Hungary (CLXXXV Art. 124 (1)). The President’s term lasts nine years, hence two legislation periods, and thereby anchors the influence of FIDESZ on media for many years to come (Vásárhelyi 2011: 161). The Council can repeal the protection of information and editorial secrets via decree – which is further increasing the vulnerability to power abuse. Furthermore, they are entitled to impose heavy fines on non-compliant outlets, which further strengthen the effect of self-censorship

(Vásárhelyi 2011: 162; Council of Europe 2012: 40-42). The Media Council even has police powers and can for example issue search warrants and confiscate materials. Vásárhelyi argues that the governing party centralised all aspects of public media outlets to achieve an all-embracing monopoly on decision making regarding public media. In one and a half years, the governing party achieved a complete occupation on all public media outlets, which were dilapidated to propagandistic mouthpieces to the governing party (Vásárhelyi 2011: 162-163, 165). Reporters Without Borders strongly condemns this media legislation by arguing that the media law deprived Hungarians of their fundamental and legitimate freedom to receive and impart news and information. The concept of a correct news balance is so vaguely defined that a biased misuse of the mandate is almost certain (Reporters Without Borders 2011). Vetter developed a similar diagnose: These vaguely defined premises enable the institutions to interfere with media outlets and sanction them with existence-threatening fines, if the institutions were under the impression that distinctive media outlets harmed the government or FIDESZ in any way (Vetter 2017b: 76).

This dilapidation includes private media as well. The Hungarian constitution restricts political campaign advertisements to only be published by private media outlets free of charge to guarantee equal opportunities to all political parties, which was laid down as cardinal act (Art. IX (3)). Yet what at first seems to be an equalisation of party advertisement in media outlets, one can identify an unfair advantage for the FIDESZ party: Party-affiliated businesses expanded their ownership of private media-outlets by purchasing the popular TV2 channel and thereby causing unbalanced, pro-government media and collective mouthpieces for the government and especially the governing party (Kornai 2015: 40; Vásárhelyi 2011: 164; European Commission Press Release 2016). In October 2016, the oligarch Lőrinc Mészáros, who is the mayor of Orbán's hometown, successfully bought Mediaworks, a company that owns several newspapers and publishes eight regional papers and is thus as key player in the Hungarian media market, with his company Opimus Press (Hegedüs 2017: 7). The ties between the major and the FIDESZ leadership, especially Orbán, are close (Hegedüs 2017:7; Koenen 2015: 34). The mayor for example perpetually profits in auctions of land organised by the state and he once received a football stadium from Orbán as a gift (Koenen 2015:34). Also in October 2016, the leading leftist newspaper *Népszabadság*, which is owned by Mediaworks, was closed down. According to Mediaworks, the shut-down was due to financial reasons, yet just shortly before the shut-down the newspaper published several articles and investigations on corruption schemes involving several of Orbán's close political allies (Hegedüs 2017:7; Reporters Without Borders 2017a). According to Human Rights Watch, this incident constitutes another segment

in the history of contempt for media freedom (Gall 2016). In conclusion, the requirement that private media outlets shall only publish political campaign advertisements free of charge favours FIDESZ since it controls most of the private media outlets. The party has established itself a large media platform through which it has the influence on running its advertisements for free, whilst denying opposition parties just that. Therefore, Reporters Without Borders (RWB) declared this act politically motivated. With Opimus Press dominating over 50% of the market, FIDESZ controls a dozen newspapers and other, private media outlets and the “rapacious appetite” of the ruling party seems unlimited (Reporters Without Borders 2017a). The European Commission initiated investigation procedures against this law, which led Hungary to introduce an amendment to it. Yet the European Commission still requires Hungary “to remove the unjustified discrimination between companies under the 2014 Advertisement Tax Act and/or the amended version and restore equal treatment in the market” (European Commission Press Release 2016).

The Center for Media Pluralism and Media Freedom (CMPF) scrutinized media pluralism in Hungary by measuring four types of risks to media pluralism – basic protection, market plurality, political independence and social inclusiveness. The research confirmed the political control over media outlets and with that, the lack of political independence causes the highest risk to Hungarian media pluralism (medium risk: basic protection, market plurality and social inclusiveness)<sup>4</sup> (CMPF 2016: 1). Concerning political independence, the report concludes that the private media sector is dominated by oligarchs with close ties to the government, causing media outlets to actively promote the governmental line. The public media service (PMS) featured output heavily biased towards the government and thereby dramatically reduced media pluralism and the diversity of news available to the public (CMPF 2016: 11). A figure that further illustrates the consequences the Constitution and the New Media Laws have had on media pluralism is displayed in the annex as figure two.

To summarise, the Authority (NMHH) and its Media Council, as well as political parties and politicians imposed numerous limitations and restrictions onto the media landscape. Their influence results in biased media outlets which concludes in unfair advantages for the leading political parties during election campaigns. Due to guidelines and strong state regulations demanding balanced coverage, thereby protecting Hungarian institutions and office holders

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<sup>4</sup> The results for each area and indicator are presented on a scale from 0% to 100%. Scores between 67 and 100% are high risk, 34 to 66% are medium risk, while those between 0 and 33% are considered low risk. In order to avoid an assessment of total absence or certainty of risk, scores of 0 were rated 3% and scores of 100 were rated 97% by default. For more information see: <http://cmpf.eu.eu/media-pluralism-monitor/>.

from criticism as illustrated above, the editorial autonomy is heavily restricted as is the PMS independence from governance and funding (CMPF 2016: 8-9). The World Press Freedom Index illustrates the downward trend in press freedom in Hungary since FIDESZ took office in 2010. The Index gets published every year by Reporters Without Borders and illustrates the freedom of press worldwide. The score<sup>5</sup> evaluates the level of freedom of press with 0 being the best and 100 being the worst possible outcome and thus determines the ranking of scores of 180 countries. In Hungary, the freedom of press perpetually worsened (Reporters Without Borders 2017b):

	2009	2010	2011/12	2013	2014	2015	2016	2017
<b>Score</b>	5.50	7.50	10.00	26.09	26.73	27.44	28.17	29.01
<b>Ranking</b>	25	23	40	56	64	65	67	71

*Figure three: World Press Freedom Index Hungary – Scores and Ranking 2009 – 2017 (Reporters Without Borders 2017b)*

Merkel declared freedom of press as fundamental to the dimension of vertical legitimacy. Considering the illustrated research, one can only conclude that this pillar of vertical legitimacy is damaged both in view of the electoral regime as of press freedom. To extensively assess political rights in Hungary I will now examine the freedom of association.

The constitution protects and guarantees the right to peaceful assemble and to form organisations, political parties and trade unions (Art. VIII (1-5)). However, the executive is perpetually increasing the influence of Civil Society Organisations (CSOs) and Non-Governmental Organisations (NGOs) by withdrawing financial support and by dominating leading positions within these institutions with its own supporters (BTI 2016a: 7). NGOs and ‘political enemies’ face constant smear campaigns and the governmental rhetoric towards NGOs has become increasingly intimidating (Hegedüs 2017: 6-7). The main allegation pursued by the government is labelling NGOs as advocates of foreign interests and organisations. Members linked to the ‘EEA/Norway Grants NGO Fund’ were subjects to criminal procedures since the Norwegian Fund allegedly supported Hungarian opposition parties. NGOs distributing the fund and organisations supported by the NGO Fund ceased to exist or were terminated (The Hungarian Helsinki Committee 2017: 1). The Ökotárs Foundation and DemNet, both managing the Norwegian Fund, were suspects of police investigations and raids (Herman 2016: 259; BTI

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<sup>5</sup> The indicators that were used to determine the ratings are: pluralism, media independence, environment and self-censorship, legislative framework, transparency, infrastructure and abuses. For more information see: <https://rsf.org/en/detailed-methodology>.

2016a: 8). In 2017, the ‘Law on the Transparency of Organisations Receiving Support from Abroad’ was under scrutiny of the European Commission. The Hungarian law on foreign-funded NGOs established new prerequisites on NGOs receiving more than 24,000€ on foreign funds, demanding them to register and labelling themselves as organisations supported from abroad and to report information regarding funding and donors from abroad to the authorities. If NGOs failed to comply, sanctions would have to be faced. According to the Commission, the right to freedom of association and the rights to protection of private life and of personal data are being violated and disproportionate restrictions to the free movement of capital have been implemented. In the opinion of the Venice Commission, this legislation “will cause a disproportionate and unnecessary interference with the freedoms of association and expression, the right to privacy, and the prohibition of discrimination” (Venice Commission 2017: 17). Despite a preliminary opinion on the draft by the Venice Commission, the Hungarian Parliament passed an amended version which, however, did not address all of the Venice Commission’s recommendations (International Justice Resource Center 2017) causing the European Commission to implement an infringement procedure on the same day (European Commission Press Release 2017d). Amnesty International calls this law a “vicious and calculated assault on civil society”, further arguing that “[a]ttempts to disguise this law as being necessary to protect national security cannot hide its real purpose: to stigmatize, discredit and intimidate critical NGOs and hamper their vital work” (Amnesty International 2017a). Several institutions and NGOs like Reporters Without Borders, Amnesty International, Human Rights Watch and others issued a letter to the Members of the European Parliament demanding them to adopt a resolution on the situation in Hungary. They highlight the stigmatization and obstruction of the work of NGOs and the civil society by intimidating and discrediting civil society groups. This law would merely be an instrument to silence Hungarian NGOs since this probation limits the space for independent organisations, which is only worsening the already weakened state of checks and balances. The letter declares that “the severity of the current situation and the breadth of the measures recently introduced [...] add to an already grim picture where democratic checks and balances have been severely undermined and the rule of law is under serious threat” (Majerczak/Raemdonck/Guibert/ McGowan/Kazatchkine/Dam 2017).

Another aspect on the government’s increasing influence on the political sphere is an amendment to the constitution granting the parliament the power to recognise certain religious communities as churches with entailed benefits, without determining criteria guiding this procedure (Constitution Art. VII (4)). The European Court of Human Rights (ECtHR) declared this law illegal since it violated freedom of religion and freedom of association by making the

status of religious groups depended on parliamentary decision (ECtHR 2014: 31). This ruling however has so far been ignored by the Hungarian Government (Forum for Religious Freedom 2016: 1).

To summarise, the Bertelsmann Stiftung's Transformations Index rates association and assembly rights with 7 and the freedom of expression with 6. Therefore, the analysis revealed violations both in view of the electoral regime and press freedom but also in view of freedom of association. Having finalised the assessment of the dimension of vertical legitimacy, one can conclude both sub-regimes do display several defects. The leading party used numerous tools to twist the legislation to its favour – not only granting them an unfair advantage in the election procedure due to the election reforms but also due to an immense influence on media outputs. Thus, the elections are consequently fairly free, yet not fair. Furthermore, critical voices of individuals, groups and associations (CSOs, NGOs and religious groups) are being restricted and interfered with to an alarming extent.

### 3.3.1. Outlook: Changes regarding political rights in Poland

Shortly after the election in 2015, the majority of parliament passed a bill which *de facto* paralysed the Constitutional Court (see chapter 3.5.1.). With this blockade installed, the governing party was able to initiate several reforms that would normally have been stopped by the Constitutional Court: In December 2015, the Sejm passed the 'Act of 30 December 2015 amending the Broadcasting Act' as so called 'small media law package'. The Act deprived the constitutionally embedded 'National Broadcasting Council' (Krajowa Rada Radiofonii I Telewizji, KRRiT) of its power by granting the Minister of Treasury core competences previously held by the KRRiT. The KRRiT was established in 1992 and had the competence to appoint the Directors of public media outlets TVP (Polish TV) and PR (Polish Radio) as well as supervising the fulfilment of the information- culture- and education mandate of public media outlets. With the amendment, the Minister of Treasury has the mandate to appoint the members and directors of the Board of Managements in public media outlets (Art. 1 (2b)) as well as the members and directors of the Supervisory Boards of public media outlets (Art. 1 (3c)). Furthermore, regional branches will be managed by directors appointed by the Board of Management and due to the amendments, the consent of the KRRiT is no longer required (Art. 1 (5)). The former members of the Management and Supervisory Boards were laid off (Art. 2). The OSCE media freedom representative Dunja Mijatović voiced strong concerns regarding this Act, arguing that "[i]t is vital that public service broadcasters are guarded against any attempts of political or commercial influence. I fear the hastily introduced changes will

endanger the basic conditions of independence, objectivity and impartiality of public service broadcasters.” (OSCE/Mijatović 2015).

The small media package law was however just an interim solution and was to be superseded by the so called ‘big media law package’ in April 2016, which had been introduced to the parliament in April 2016. The draft bill included an extensive revision of regulation on public media outlets (Polish TV - TVP, Polish Radio - PR and Polish Press Agency - PAP), television fees and the financing of public media services. Yet, according to the Polish Press Agency, the Polish Culture Minister Czapanski said that the implementation of the big media law must be postponed since such extensive changes require not only the notification of the EU but the remarks by the Council of the European Union shall be included as well, which takes time (PAP 2016).

That is why a ‘bridge media law package’ on the ‘Council on National Media’ has been introduced in June 2016, as the only element of the ‘big media law package’ that came into force so far. The ‘Act of 22 June 2016 on the Council on National Media’ was passed by the Senate on July 24<sup>th</sup> without adjustments. This bridging law implemented the Council on National Media (Rada Mediów Narodowych, RMN) which replaced the above-mentioned tasks of the Minister of Treasury ergo mirroring the competences of the KRRiT. Therefore, the direct control over public media services was transferred from government to Council (Art. 17-19). The Council on National Media appoints and dismisses members of governing bodies of public radio, public television broadcasting and the Polish Press Agency, over which it has supervising powers (Art. 2). The Council consists of five members, two of which are appointed by the President of the Republic and three by the Sejm (Art. 3) with the term of six years (Art. 4). The President can choose his or her nominees out of a pool of candidacies nominated by the opposition (Art. 6 (3-5)). The Council decides with a two-thirds majority (Art. 11 (2)).

According to Reporters Without Borders, the Act “gives the CNM [Council on National Media, RMN] disproportionate prerogatives, allowing it to influence the editorial decisions of these media and put pressure on their directors” (Reporters Without Borders 2016). By spring 2016, RWP estimated that around 150 journalists had been fired, forced to resign or forced to take less senior positions (Reporters Without Borders 2016). The Helsinki Foundation for Human Rights and Article 19, a British human rights organisation specialised on freedom of expression and freedom of information, published a country report on the independence of public media service in Poland in January 2017 and was thus investigating the ‘Act on the Council on National Media’. They concluded that first, the governing party falls short on explaining the necessity of such a Council given the fact that the National Broadcasting Agency is in place

and anchored in the Constitution. The process of establishing this law is therefore unjustified and opaque. Second, the independence of the RMN is highly questionable. Three of its members are members of PiS and MPs. Third, the financial control over this body is managed by the Chief Officer of the Chancellery of Sejm and the body is therefore lacking financial autonomy and independence. Fourth, with the extensive competence to suppress or create high-level managerial positions within the public media service, the RMN *de facto* controls broadcasters and undermines their independence (Article 19/HFHR 2017: 16-17).

In January 2017, the PiS politician Jacek Kurski was appointed to Director of TVP. Thenceforward, the news-programmes have been filled with propagandistic sentiments, praising the government's actions. Kurski headhunted several journalists from conservative and right wing private media outlets who repeatedly praised the PiS party during the election campaign in 2015. Hence, public media services are no longer the 'fourth power' to supervise the government. Instead, they will praise the 'good change' (*dobra zmiana*) pursued by the governing party (Kublik 2016: 155, 159). According to Bader and Zapart, the Polish media is highly polarized by dividing outlets and journalists into two groups arguing in favour or against the PiS government and its media reforms. Public media's news programmes have turned into mouthpieces for the PiS government and private outlets are strongly divided on the government's performances. The governing party keeps finding ways to damp criticism coming from private media outlets with, for example, the act of 'repolonisation'. Three quarters of media outlets are owned by foreigners, predominantly Germans. The government frames these 'foreign' media outlet as puppets of foreign states who deliberately try to undermine and weaken the Polish government (Bader/Zapart 2016: 134, 141, 145).

Today, the private media sector remains diverse but public media outlets nevertheless reveal a strong bias towards the governing party and the control over public media could result in an uneven playing field in the upcoming elections (Chapman 2017: 6-8, 16), just like in Hungary. In the first quarter of 2016 the airtime for political parties was split unevenly: PiS was provided with 52% airtime and the opposition party PO with 23%. In the second quarter, the gap widened with 59% and 16% respectively (Arak/Bobiński 2017: 8). Furthermore, the influence of PiS on media outlets might 'just' be limited to public media services, yet it has to be noted that in 2015, 15,9 million recipients have had access to terrestrial television, yet 11,5 million of them were only able to receive public television. Additionally, public television news programs dominate the sector since most private news channels are subject to a change. Hence, millions of Polish viewers only have access to propagandistic news provided by the state (Krzemiński 2017a: 4). In conclusion, the independence and freedom of press is continuously being limited by the

governing party. This process is mirrored in the World Press Freedom Index (see chapter 3.3. and footnote 7):

	2014	2015	2016	2017
<b>Score</b>	11.03	12.71	23.89	26.47
<b>Ranking</b>	19	18	47	54

*Figure four: World Press Freedom Index Poland – Scores and Ranking 2014 – 2017 (Reporters Without Borders 2017b)*

The Freedom House Report on Press Freedom in Poland reveals several similarities between PiS’ and FIDESZ’ media strategies:

Indeed, developments in Poland underscore a worrying trend toward illiberalism in the region, epitomized by Hungary since Viktor Orbán became prime minister in 2010. PiS’s changes to the public media and other institutions echo moves by Orbán over the past few years. Unlike Hungary, Poland still has a pluralistic private media, with outlets that are vocally critical of the government. As political pressure exacerbates their existing economic troubles, the question is how long these outlets will survive. (Chapman 2017: 2).

Thus, the first pillar to the sub-regime of political rights, the freedom of press, is damaged. To fully assess the sub-regime of political rights, I will now investigate the freedom of association and the independent political sphere of action in accordance to Merkel. Currently, there are some limitations to the right of free assembly. In November 2016, the government adopted a bill illegalising counter-demonstrations and favouring assemblies organised by state or church over demonstrations organised by civil society. At first, President Duda did not sign this bill but rather referred it to the Constitutional Court (Arak/Bobiński 2017: 6). In March 2017, the Constitutional Court approved this draft to be constitutional and it came into force on April 2<sup>nd</sup>. According to Amnesty International, these restrictions have the potential to restrict the freedom of assembly in certain cases: On April 10<sup>th</sup>, 2017, the informal association ‘Citizens of the Republic of Poland’ (Obywatele RP) announced an assembly on a public place in Warsaw. Yet, every 10<sup>th</sup> of a month, another group of citizens, amongst them several politicians including Jarosław Kaczyński, commemorate the Smolensk plane crash, in which a former Polish President and the twin brother of Jarosław Kaczyński, Lech Kaczyński, died, in the same area. Hence, the association organised by (Obywatele RP) was banned by governmental officials (Amnesty International 2017b: 2).

According to the Freedom House Report, Non-Governmental Organisations (NGOs) have been facing numerous smear campaigns against them under the PiS government. The public broadcaster TVP-1 accused several NGOs of maintaining close links with the opposition parties and further claims that a large share of NGO budgets is allotted to board members' salaries (Arak/Bobiński 2017: 8). Furthermore, and just like Hungary (see chapter 3.3.), Poland is keen on decreasing foreign support for Polish NGOs resulting from the EEA/Norway Grants NGO Fund by demanding the money to be channelled through a governmental body. Poland is the largest beneficiary of the Norwegian Fund, followed by Romania and Hungary. Norwegian Prime Minister Solberg warned against these 'illiberal' powers stating that "we [Norway] cannot allow Poland and Hungary to control the money to civil society. We must have independent organisations that assign them" (Eriksson 2017).

Overall, the Polish government is keen on strengthening traditionalistic, nationalistic and catholic values. That is why magazines promoting such values get more funding under the PiS government than more liberal magazines do. The Ministry of Culture allocates around 3,5 million Złoty (approx. 850,000€) to non-profit organisations publishing cultural and political magazines. In 2016, this founding was predominantly allocated to right-wing magazines since the Ministry wants to strengthen national identity (Arak/Bobiński 2017: 7).

In conclusion, the governing party in several ways tries to increase their influence on civil society in order to strengthen their ideological sentiments within the public sphere. In this process, the independence of the political sphere is undermined and weakened. Thus, in combination with the violations on the freedom of press, the sub-regime of political rights is to some extent damaged and constitutionally anchored political rights are not being protected but rather violated by the governing party.

#### 3.4. Changes regarding civil rights in Hungary

The constitution protects individuals from unjustified restraint as well as false imprisonment, and it grants the right to privacy, the right to own property as well as the freedom of religion (Art. IV, V, VI, VII). However, the BTI registered instances of violence, intimidation and hate speech against minorities, especially Roma, as well as xenophobic acts of discrimination against asylum seekers and refugees (BTI 2016a: 13). Orbán and other FIDESZ politicians frequently express the necessity of 'ethnic homogeneity' to the prosperity of the Hungarian nation and regarding its history, Orbán declared: "That history did not bury us [after World War One] is down to a few exceptional statesmen [like] Governor Miklos Horthy. That fact cannot be negated by Hungary's mournful role in World War Two." (Reuters 2017a), thereby rehabilitating a regime known for its collaboration with the Nazi-Regime.

Addressing the severe discriminations against Roma, the European Commission targeted school segregation of Roma children with the launch of an infringement procedure (European Commission Press Release Database 2016):

The Commission has a number of concerns in relation to both Hungarian legislation and administrative practices which lead to the result that Roma children are disproportionately over-represented in special schools for mentally disabled children and also subject to a considerable degree of segregated education in mainstream schools.

The school segregation results from a loophole in Hungarian legislation allowing segregation for ‘Roma evangelization’ (Hegedüs 2017: 8). Clearly this is violating the principle of civil liberties in embedded democracies. Another problematic constitutional legislation is written in Art. XXII. Whilst the state is obligated to provide shelter and public services to its citizens, the legislation includes a separate passage for homeless persons: “In order to protect public order, public security, public health and cultural values, an Act or a local government decree may, with respect to a specific part of public space, provide that staying in public space as a habitual dwelling shall be illegal.” (Art. XXII (3)). This sub-constitutional legislation had been annulled by the Constitutional Court due to its infringement upon human dignity. It was therefore declared as constitutional thus protecting it from annulment by the Constitutional Court (Tóth 2013: 25) (this tactic will be further elaborated on in chapter 3.5.). Addressing a social problem like homelessness with sanctions instead of welfare state measures can be seen as violation of human dignity – as declared by the Hungarian Constitutional Court (Zeller 2013: 318-319). To summarise, the constitution may declare to protect civil liberties yet violations against this principle are evident. Before reaching a final conclusion, the second pillar to civil rights, namely equality before the law, shall be investigated.

The constitution guarantees equality before the law regardless of gender, skin colour, social status, financial status, political party, parentage, origin, race, language, religion and equality for persons with disabilities (Art. XV (1-5)). Yet again, to some extent, restrictions to this principle can be found. The Hungarian constitution bears a strong ideological bias towards sentiments shared by the governing party. According to Küpper, the Hungarian constitution is one of the most ideologically charged constitutions in Europe (Küpper 2011: 138). Overall, the constitution declares the Christian-nationalistic worldview as the basic principle to the Hungarian nation and determines a specific, ethno-nationalistic, conservative way of live, thereby ignoring other normative and political concepts held by different parties, societies and individuals. The constitution further excludes a clear equalisation of different ways of life by advocating the nation as a Christian community. Worldviews that differ from Christian

traditions are deprived of an equal status (Küpper 2011: 138-139; Halmai 2011: 146-148). The preamble of the constitution itself suggests an ethno-cultural understanding of the nation. The preamble, as “national avowal”, declares:

WE, THE MEMBERS OF THE HUNGARIAN NATION, at the beginning of the new millennium, with a sense of responsibility for every Hungarian, hereby proclaim the following: [...] We promise to preserve the intellectual and spiritual unity of our nation torn apart in the storms of the last century. We proclaim that the nationalities living with us form part of the Hungarian political community and are constituent parts of the State.” (Constitution, Preamble).

Hence, the creator of the constitution is the Hungarian ethnic community not a political community. The pronoun ‘we’ includes ethno-Hungarians living outside of Hungary, yet excludes ethnic minorities with Hungarian citizenship. The minorities are addressed with ‘they’ and the integration of minor ethnic communities only refers to a ‘political community’. This nationalistic preamble fails to provide a neutral framework and falls short on inclusiveness. According to Tóth and Halmai, the basic pattern of values encourages a logic of friend and foe whereby the ‘foe’ is not only outside but also inside Hungarian borders. The preamble and the constitution aim to unify the country on the basis of ethnic and historic affiliations instead of constitutional patriotism (Tóth 2013: 24; Halmai 2011: 146). Furthermore, the preamble not only has a propagandistic but also a legal impact since Art. R (3) of the Constitution declares that “[t]he provisions of the Fundamental Law shall be interpreted in accordance with their purposes, the National Avowal contained therein and the achievements of our historical constitution” and according to Art. I (3), “[a] fundamental right may only be restricted to allow the effective use of another fundamental right or to protect a constitutional value [...]”. Hence, the preamble does have the potential to foster a *de facto* division between national and non-national exercise of fundamental rights (Küpper 2012b: 185) granting the government the possibility to declare any unwanted exercise of fundamental rights as ‘unnational’ and thereby restrict such actions. This ideology might only be shared by a portion of the population yet it gains a binding character to all citizens and to the state (Küpper 2011: 144; Halmai 2011: 148). Such a distinction translates into strong xenophobic and nationalistic sentiments spread by politicians, authorities, media outlets etc. The high intolerance towards refugees and immigrants dominates the political field. According to the Nations in Transit Report, xenophobia and intolerance have become mainstream and turned into key aspects of Hungarian politics (Hegedüs 2017: 4).

In conclusion, the constitution protects individual liberties from violation of rights by state and private agents and promotes the equality before the law. Yet the constitution also fosters an ethno-nationalistic understanding of nation thereby excluding ethnic minorities in several, more or less subtle ways. Additionally, the discourse in Hungary is shaped by racist, xenophobic, and anti-Semitic nationalistic beliefs causing structural discrimination towards minorities that is culminating, for example, in school segregation of Roma. Therefore, the sub-regime of civil rights can be considered damaged. The Bertelsmann Stiftung's Transformation Index rates civil rights with 8.

#### 3.4.1. Outlook: Changes regarding civil rights in Poland

In 2015, shortly after the PiS government took power, President Duda vetoed 'The Amendment on the Law on National, Ethnic Minorities, and Regional Languages', which had been passed by the previous parliament and would have given minorities the right to use their mother tongue as 'supportive language' on regional level. Yet, according to Duda, implementing this law allegedly cost too much money and would have created a high burden on local government's budget. However, according to Ryszard Galla who represents the German minority in the Sejm, the costs are minimal if they even existed at all (Nijakowski 2016: 9).

In November 2016, the 'International Covenant on Civil and Political Rights' published its concluding observations on Poland, highlighting, next to a few positive remarks, many concerns and recommendations. Amongst these concerns is the increase of violence, hate speech and discrimination based on race, nationality, ethnicity, religion and sexual orientation especially in light of insufficient response by the authorities (International Covenant on Civil and Political Rights 2016: 2-7). Due to the fact that numerous governmental officials adopted such discriminatory speech, Vetter declares PiS as spearhead of xenophobia (Vetter 2016: 32). Furthermore, the Convent criticises that the abolishment of the 'Council for Prevention of Racial Discrimination, Xenophobia and Related Intolerance' in April 2016 was executed whilst failing to implement a substitute institution. Additionally, the Convent reports undue delays in court proceedings, difficulties in accessing legal assistance during arrests and instances of insufficient respect for the confidentiality of communication between counsel and clients and questions the fairness of trials due to the lack of independence of judges, and judicial reforms (see chapter 3.5.1.). Juveniles have reportedly faced sanctions without presumption of innocence and without their guilt being proven, in that they have temporarily been placed in isolation rooms as a form of disciplinary and pretrial detention which reportedly exceeded three months (International Covenant on Civil and Political Rights 2016: 7). The Report of the Office of the United Nations High Commissioner for Human Rights published in May 2017 echoed

all concerns issued by the Convent (Human Rights Council 2017: 2-5). Additionally, the ‘Act of 10 June 2016 on Anti-terrorist Activities and on Amendments to other Acts’ passed by Sejm and the Senate is being criticised for its wide definition of terrorist crimes as “overly broad [which] does not adequately define the nature and consequences of the acts concerned”, thereby giving authorities excessive discretion in cases of ‘events of terrorist nature’ (Art. 14, 17, 21) (International Covenant on Civil and Political Rights 2016: 2). Amnesty International points out, that the extended mandate of the Internal Security Agency (Agencja Bezpieczeństwa Wewnętrznego, ABW) regarding the surveillance powers is highly problematic. The Head of the ABW, who is also the Minister of Justice, has sole competences in all questions concerning surveillance, security and intelligence operations and is granted access to virtually every government agency (Art. 4). The risk of abuses of power is thus severely increased and the bill “helps set the stage for unprecedented access -- since the collapse of the Soviet Union -- by state authorities to the personal data and other information of Polish citizens and others present or residing on Polish territory” (Amnesty International 2016: 1). The Venice Commission criticised that the bill failed to install sufficient procedural safeguards to prevent excessive use of surveillance powers and thus eased unjustified interference with the privacy of individuals (Venice Commission 2016a: 32). The right to privacy and thus the protection of individuals from violations by the state as pillar to the third sub-regime is not fully protected, especially since a member of the executive, namely the Minister of Justice, has been granted with extensive authority and thus security operations and surveillance are in the hands of the executive.

In conclusion, the efforts to prevent discrimination against minorities are unsatisfactory, since the state is not capable to fully guarantee individual liberties from violations by private agents. As in Hungary, the highly problematic discriminatory rhetoric by authorities implies a lack of protection of such violations by the state. The equality before the law cannot be fully guaranteed by the state either. The right to privacy and the protection of violations to unjustified interventions on individuals is not guaranteed. The sub-regime of civil rights thus displays some violations. In order to evaluate the dimension of liberal constitutionalism and the rule of law, I will now investigate the horizontal accountability in both countries.

### 3.5. [Changes regarding horizontal accountability in Hungary](#)

The dimension of liberal constitutionalism and rule of law both addresses the sub-regimes civil rights and horizontal accountability. In order to now investigate on the latter, I will examine the division of power, the level of independence of the judiciary as well as possible power abuse

and its prosecution. Yet due to the quantity and complexity of these polity changes, I will only highlight the most significant and problematic institutional changes.

One of the main subjects of this debate will be the most recent constitution including its amendments. Shortly after the elections in 2010, the new government decided to implement a new constitution. The aim to have it implemented within the next year was fulfilled, yet to the detriment of an inclusive, deliberative and sufficient debate amongst the civil society, legal experts or even the opposition. A debate within the parliament was just a formal procedure since, due to the tight schedule, the constitution had to be voted upon merely one month after its introduction. The new constitution was *de facto* a product of discourse only amongst FIDESZ politicians (Küpper 2011: 137; Rupnik 2012: 133; Kornai 2015: 35). The constitution was voted upon on April 18<sup>th</sup>, 2011, signed by the President on April 25<sup>th</sup> and came into power on January 1<sup>st</sup>, 2012.

The constitution declares the division of powers as basic principle (Art. C (1)). Yet, not only does the constitution debilitate fundamental principles of civil and political rights (see chapter 3.3. and 3.4.), but also to the judiciary, especially of the Constitutional Court and therefore to the balance of power itself. The structure of the Constitutional Court has been changed in several ways: Article 24 (8) of the constitution declares that the number of members increased from eleven to 15 and their terms were prolonged from nine to twelve years. The president of the court is to be elected with a two-thirds majority of parliament and not by the court itself as before (Art. 24 (8)), which might be a widely accepted practise but still can be seen as a minor backlash in the independence of the Constitutional Court (Venice Commission 2011: 20). Yet this reform granted FIDESZ the opportunity to appoint several judges to the Constitutional Court within three years of governance, thereby limiting the independence of the judiciary (Scheppele 2015: 115). Today, the Constitutional Court is strongly biased towards the government with eleven out of 15 judges having been elected by the FIDESZ fraction of the parliament (Hegedüs 2017: 9; Küpper 2011: 140). This personal conformity within the Constitutional Courts strongly endangers the court's independence and shapes the jurisdiction for years since the judges' terms of office lasts twelve years which corresponds with three legislative periods (Halmai 2011: 150).

What's most important for this assessment is the reduction of competences of the Constitutional Court under FIDESZ. First, the court can no longer litigate amendments to Constitutional Law due to Article 24 (5): "The Constitutional Court may review the Fundamental Law or the amendment of the Fundamental Law only in relation to the procedural requirements laid down in the Fundamental Law for its making and promulgation." Using the two-thirds majority in

parliament, the leading party declared legislations on sub-constitutional level as constitutional, when the court tended towards annulment (e.g. as happened with Art. XXII (3), see chapter 3.4.), thus avoiding the review (Sólyom 2013: 7). Eventually, this mechanism became a routine and an embedded parliamentary practice since the parliament claimed the right to have superiority over the Constitutional Court regarding the question of constitutionality of legislation (Sólyom 2013: 8). The qualified majority in parliament thus obtains the possibility of adopting any provision in the form of an amendment to the constitutional law, even if they diametrically oppose other constitutional provisions (Sólyom 2013: 10). According to the Venice Commission, this mechanism “threatens to deprive the Constitutional Court of its main function as the guardian of constitutionality and as a control organ in the democratic system of checks and balances” (Venice Commission 2013: 32). Second, the Constitutional Court can no longer base their jurisdiction on case-law previous to the Constitution of 2011 and its amendments, which interrupts the court’s case-law. This constitutes a severe drawback to the constitutional development of the past 20 years and can be seen as the symbolic ‘beginning’ of a new Hungary (Sólyom 2013: 10-11). Third, the court is only required to review taxes, duties and contributions, customs duties as well as the central conditions for local taxes for conformity with the Fundamental Law in regard to the rights to life and human dignity, to the protection of personal data, to freedom of thought, conscience and religion, or the rights related to Hungarian citizenship. The Court can annul these Acts exclusively for the violation of these rights. This constraint applies when the state debt exceeds half of the Gross Domestic Product (Art. 37 (4)). This effect clearly degenerates the Constitutional Court’s competences due to political motives, since most budgetary laws do not even address, let alone violate these fundamental rights (Halmai 2011: 149).

With the new constitution, complaints regarding fundamental law and amendments of fundamental law can only be submitted to the Constitutional Court by the President of the Republic, the Government, one-fourth of the Members of the National Assembly, the President of the Curia [the Supreme Court], the Prosecutor General or the Commissioner for Fundamental Rights (Ombudsperson) within thirty days of promulgation (Art. 24 5b). Hence, the spectre of different types of procedures was also changed. The ‘actio popularis’, the popular action against the state based on normative judicial review in front of the Constitutional Court was annulled. It was replaced with a ‘constitutional complaint’ as review of conformity with the Fundamental Law of any legal regulation applied in a particular case or of any judicial decision (Art. 24, (2c, d)). But if the Constitutional Court can only review popular complaints based on individual concernment, the court will barely be able to rule in cases addressing the division of power or

institutional architecture which endangers the protection of the constitution by “[m]aking it difficult for this Court to reach all constitutional violations [which] creates blind spots in which unconstrained political discretion can override constitutional values” (Scheppelle 2015: 116; Bánkuti/Halmai/Scheppelle 2012: 142-143). Halmai agrees by declaring that the constitutional complaint is by no means a sufficient replacement for the ‘actio popularis’ (Halmai 2011: 150).

The effect of disempowerment of the Constitutional Court is worsened by the high number of cardinal laws (sarkalatos törvény). These laws have been mentioned several times before in this thesis (see chapters 3.2., 3.3.). Cardinal laws are adopted by a qualified majority and can therefore only be changed with such a majority. Whilst regular and cardinal laws are formally of equal ranks, cardinal laws *de facto* rank between constitutional laws and regular laws. Cardinal laws were part of the former constitution and are therefore not a new instrument implemented by the current governing party. Yet, the current as well as the former constitution do not specify which laws can be declared cardinal. Even though the government under FIDESZ did not pass significantly more cardinal laws, they exploited the existing institutional structures by declaring not only crucial and lasting legislations on fundamental issues to cardinal laws but rather legislations addressing areas of economic and social ‘day-to-day’ policies (Sonnevend/Jakab/Csink 2015: 78-79). As the parliament used this instrument to cement the economic, social, fiscal, family, educational etc. policies of the governing party, this misuse of cardinal laws contradicts with the principle of parliamentarianism and the temporal division of power (Halmai 2011: 152). Future parliaments will most likely not be able to revise cardinal laws, even if FIDESZ were to be in the opposition (Lang 2015: 3). The Venice Commission criticised: “The more policy issues are transferred beyond the powers of simple majority, the less significance will future elections have and the more possibilities does a two-thirds majority have of cementing its political preferences and the country’s legal order.” (Venice Commission 2013: 29).

Not only did the governing party reduce the influence of the judiciary but also that of the parliament. In practise, the legislative and the executive are no longer separate powers since both are controlled by the executive’s dominance with Orbán “at the very pinnacle of power” (Kornai 2015: 35). The parliament had been down-sized to a ‘law factory’ with no preparatory work on the bills themselves. According to Kornai, between 2010 and 2014, 88 legislations were introduced and voted upon within a week and in 13 cases this procedure happened only within one or two days. The parliament had *de facto* been revoked its power to create legislation (Kornai 2015: 35). Furthermore, the parliament was *de jure* deprived of its most crucial veto-power available, namely the decision over the budget. Whilst the constitution declares in Article

N (1-2) that parliament and government have primary responsibility for the observance of the principle of balanced, transparent and sustainable budget management, Article 44 confirms that the parliament only passes the budget when the newly implemented Budget Council, which consists of three members (the President of the Budget Council, the Governor of the National Bank of Hungary and the President of the State Audit Office), has given its consent to the parliamentary draft. The members of the Budget Council are however closely linked to FIDESZ. Both the President of the Budget Council and the Governor of the National Bank of Hungary are appointed by the President of the Republic for six years (Art. 41 (3); Art. 44 (4)). The President of the Republic, János Áder, as a founding member of FIDESZ, is a loyal politician who refrains from criticising major bills (BTI 2016a: 10). The President of the State Audit Office is appointed by the parliament for twelve years. Hence, FIDESZ established a veto-player position for itself: If the parliament fails to adopt the central budget for the year in question by March 31<sup>st</sup>, possibly due to failed consensus or blockade, the President can dissolve the parliament and schedule new elections (Art. 3 (3)) (Küpper 2011: 139). The strong influence on this institution gives FIDESZ “dead-hand control” over future elected governments since the veto-position “will hang like the Sword of Damocles” over their terms of office (Bánkuti/Halmi/Scheppele 2012: 144). Depriving the Parliament of its budgetary sovereignty dismantles the parliamentary character of the regime (Küpper 2011: 139) and eradicates it of one of its core control mechanisms can only be called “kupierter Parlamentarismus” (Küpper 2012b: 83). In conclusion, the balance of power is severely damaged since the Constitutional Court is extremely limited in their mandate of power, and the judges are not independent thus the jurisdiction is biased towards favouring the government’s interest. Checks and balances are therefore dismantled due to harsh restriction on both the courts and the parliament which have been implemented by the executive. In order to fully assess the sub-regime of horizontal accountability, I will now investigate on possible abuse of power.

In autumn 2014, the U.S. government refused to issue visas for six governmental officials due to corruption allegations. According to the ‘Sustainable Governance Indicators Report 2016’, corruption has been a “widespread systemic feature” with government officials and the FIDESZ elite having been involved in several corruption scandals whilst accumulating fast-growing wealth. Victor Orbán’s son-in-law triggered public suspicion since he became a multi-billionaire in a suspiciously short period of time. Hence, pervasive corruption fostered a clientele system with thousands of loyal supporters (Ágh/Dieringer 2016: 4, 18). The director of the anti-corruption agency, the Prosecution Service, who is the main prosecutor, has been elected by the parliament after the executive had appointed him. Thus, most corruption scandals involving

governmental officials or individuals enjoying close ties with such officials, have not been investigated upon. However, corruption scandals involving opposition politicians have been intensively scrutinised upon and were accompanied by great media coverage (Kornai 2015: 35-36). Furthermore, the government installed its own supporters within the leadership of several supervisory, watchdog and whistle-blower institutions, such as the Public Prosecutor's Office, the State Audit Office, the Monetary Council, the Competition Authority, the Central Statistical Office and the Hungarian National Bank (BTI 2016a: 10; Kornai 2015: 35). According to Transparency International, the 'corruption perceptions score'<sup>6</sup> of Hungary perpetually worsened since FIDESZ took over the government. In 2012 Hungary scored 55 whereas in 2016 it decreased to 48, with Hungary being ranked 57<sup>th</sup> out of 176 nations (Transparency International 2017a). To summarise, Freedom House diagnosed a "reverse state capture" due to politicians using the state institutions to establish corruption networks to reward loyal oligarchs (Hegedüs 2016: 9). Non-transparent policymaking and the misuse of public funds established high-level corruption "as organic part of the regime's functioning" whilst the government increased prosecution capacity on fighting low-level corruption (Hegedüs 2016: 9). These concerns were echoed by the perpetually increasing level of opaque policy making and misuse of funds in the '2017 Nations in Transit Report on Hungary' (Hegedüs 2017: 10). Around 70% of public procurement comprise corruption, with costs rising to up to 25%. Taking into consideration that the total sum of public procurement constitutes 6% of the annual GDP in 2014, the fiscal damage caused by corruption accumulates to 1% of GDP (Hegedüs 2016:10).

In conclusion, the Constitution is a conglomerate of democratic and anti-democratic rules and principles and is perfectly tailored to a one-party system. The rule of law does no longer sufficiently limit and control the executive and the legislative, rather does the executive rule through the law (Tóth 2013: 26). The division of power is severely damaged due to the deprivation of power from the judiciary, especially the Constitutional Court. The Court no longer has the right to review and annul constitutional legislation, thus depriving it of one of its core mechanisms. The veto capacity of the Court is thereby reduced to an alarming extent. The level of independence of the judiciary is low since crucial supervision institutions are infiltrated with government supporters. The Venice Commission proves that the Constitution, including the amendments "is the result of an instrumental view of the Constitution as a political

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<sup>6</sup> Transparency International allocates data on how corrupt the countries' public sectors are seen to be with 0 (highly corrupt) to 100 (very clean). The scores of 176 countries are then ranked from low corruption perceptions scores to high corruption perceptions scores. For more information see: [https://www.transparency.org/news/feature/corruption\\_perceptions\\_index\\_2016](https://www.transparency.org/news/feature/corruption_perceptions_index_2016).

means of the governmental majority and is a sign of the abolition of the essential difference between constitution-making and ordinary politics” and causes a threat to the constitutional system of checks and balances (Venice Commission 2013: 32). Corruption assists the government by expanding the group of loyal supporters as well as by accumulating the wealth of the loyal governmental elite. The Bertelsmann Stiftung’s Transformation Index rates Hungary’s separation of powers with 5, the judiciary independence with 6 and the prosecution of power abuse with 7. Bearing in mind the violations to civil liberties as illustrated in chapter 3.4., the dimension of liberal constitutionalism and the rule of law is severely damaged. The judicative and the legislative do not have sufficient control over an aggrandised executive which can be seen as the most ‘disembedded’ institution observed through Merkels concept of embedded democracy.

### 3.5.1. Outlook: Changes regarding horizontal accountability in Poland

In contrast to FIDESZ, PiS does not possess a two-thirds majority in neither the Sejm nor the Senate. Therefore, the Polish government has not not able to change the constitution as easily as the Hungarian government has been able to do. Nevertheless, the PiS party did pass numerous bills undermining and blocking the Constitutional Court in several ways in order to pass controversial laws that would otherwise have been rejected by the Constitutional Tribunal. Furthermore, leading PiS politicians and the Polish president voiced their willingness to change the Constitution via referendum (Polen-Analysen 2016b: 17; 2017a: 9; Vetter 2017c: 13) although no respective actions have been taken so far. In this chapter, I will illustrate major reforms passed by the government which led to an extensive dismantlement and disempowerment of the Constitutional Court, its Tribunal as well as the Ordinary Courts.

At the end of June 2015, the liberal coalition of PO and PSL had passed a new law regarding Constitutional Court’s matters. This law allowed the Sejm to elect successors to all constitutional judges, whose term of office expired in the second half of 2015. Some constitutional judges had ended their term just shortly after the change of the parliamentary majority. This affected two out of five judges who had been elected by PO and PSL a few weeks before the end of their reign. Although the terms of office had expired for three judges, the newly elected president, Andrzej Duda, refused to swear in their successors, who had been elected by the previous government. On November 19<sup>th</sup>, 2015, at an unprecedented rate, the parliament ignored the amendment to the constitutional law passed by the previous parliament by adopting an amendment law, which declared the election of all five constitutional judges as invalid. Within two days, this amendment was voted upon by both chambers of parliament, was signed by the President and was published in the Journal of Laws. One day before the meeting

of the Constitutional Court at December 12<sup>th</sup>, the Sejm elected five other judges who were immediately sworn in by the President during the same night (Bucholc/Komornik 2016: 80). However, the refusal of President Duda to swear in judges who had been appointed by the parliament constitutes an abuse of power. The act of swearing-in is supposed to be merely symbolic. Yet, by imposing such a blockade, the president misused his power by influencing the process of the appointment of judges. Furthermore, by appointing five new judges, he broke with a verdict of the Constitutional Court, which, on December 3<sup>rd</sup>, had declared that the ‘abortive’ appointment of two judges was unconstitutional, but the choice of the other three judges was valid and thus they had to be sworn in. The President himself argued that he was merely guided by the will of the newly elected parliament. The President however is an independent supervisory authority as guardian of the constitution and should not subordinate himself to the parliament. One can agree with Bucholc and Komornik when pointing out that equalising the rule of law with the will of Parliament is at least a questionable step (Bucholc/Komornik 2016: 81-82).

On December 5<sup>th</sup>, the Sejm voted in favour of a resolution removing the President and the Vice-President of the Constitutional Tribunal (Trybunał Konstytucyjny, TK). Later that month, the Sejm passed the ‘Law of 22 December 2015 on Amending the Constitutional Tribunal Law’, which was confirmed by the Senate on December 24<sup>th</sup>. This amendment was aimed to paralyse the Tribunal’s adjudicating activity so that the Sejm was free to pass further amendments, and of course this amendment itself, without them being immediately reviewed and possibly rejected by the court (as illustrated in chapter 3.3.1. regarding the Media Laws) (Łączkowski 2016: 51-52). This amendment, according to Łączkowski, who is a professor of law and a former judge to the TK, entails three main elements preventing the TK from sufficiently performing its duties. First, the minimum number of judges composing a full bench was increased from nine to 13 (Art. 1 (3)). The president of the TK was therefore obligated to recognise all five newly appointed judges in order to reach a full bench despite the fact that this recognition would breach the December 3<sup>rd</sup> verdict on the unconstitutional nature of the appointment of three judges. Furthermore, the Tribunal must decide with absolute instead of a simple majority (Art. 1 (3)). Second, the TK is now committed to hear cases in order of submission and not relevance (Art. 10)). Therefore, the Court can only review such crucial amendments when proceedings of all previous cases have ended, which causes a major delay to the TK’s work. Third, the amendment failed to provide a *vacation legis* and came into power immediately, causing the TK to be blocked instantly (Art. 5). *Vacation legis* describes the period between the announcement of a law and the time the law takes legal effect. By

eliminating this period, the parliament prevented the TK from reviewing this Act on its constitutionality (Łączkowski 2016: 54-55). Łączkowski regards these changes as a “serious concern as to the future of the democratic State ruled by law” and urges that “the CT [Constitutional Tribunal, TK] must be allowed to perform its principal functions even if this were to hinder the achievement of particular aims of some political fractions in power. For there is no guarantee that these aims are, or will be, identical with the true common good.” (Łączkowski 2016: 56). The Helsinki Foundation for Human Rights (HFHR) highlights additional, crucial changes initiated with the December 22<sup>nd</sup> Amendment: Hearings cannot be considered earlier than three or six<sup>7</sup> months after notification (Art. 1 (12a)). In particularly serious cases, a judge can be removed from office by the Sejm and disciplinary proceedings against a judge can be initiated by the Minister of Justice or the President of Poland (Art 1 (5)). The HFHR as well as the Venice Commission in its ‘Opinion on the Act on the Constitutional Tribunal’ consider all these vital changes to the TK as violations to the judicial independence, the independent and separate character of the judicial power and the separation of powers and thus as causing the TK to be paralysed. The procedure of passing this Amendment infringed upon the rules of the legislative procedure, due to the fact that this legislation was passed in a very short period of time as well as the lack of consultation with experts and civil society (Venice Commission 2016b: 23-24; Szuleka/Wolny/Szwed 2016: 28-30).

Despite the newly established practise to review cases in order of submission and not relevance, the Constitutional Court decided to nevertheless review the amendments to the Constitutional Tribunal, which further escalated the conflict (Gostyńska-Jakubowska 2016). On March 9<sup>th</sup>, 2016, the judgement ruled that ‘Law of 22 December 2015 on Amending the Constitutional Tribunal Law’ (case K 47/15), is unconstitutional due to the following reasons: First, the pace of legislation procedure made it impossible to have an actual consideration of the draft, even though many concerns had been voiced. The parliament failed to provide sufficient reading of all amendments and it did not consult the draft with relevant bodies. These violations in the legislative procedure deprived the amendment of a democratic mandate and substantive legitimacy. All the above-mentioned reforms were declared unconstitutional because they deliberately aimed at blocking and paralyzing the Constitutional Court. The amendments made it impossible for the TK to act thoroughly and effectively. According to the Tribunal, the principle of the rule of law is violated since the amendment interferes with the Tribunal’s independence and jeopardises the separation from other powers (Szuleka/ Wolny/ Szwed 2016: 33). Yet, on March 10<sup>th</sup>, the Head of the Chancellery of the Prime Minister, Beata Kempa,

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<sup>7</sup> In the case of proceedings which require a full bench

declared that the verdict will not be published in the Journal of Laws and thereby will not be acknowledged and will be considered non-binding since the Court did not decide according to applicable law (Polen-Analysen 2016a: 12). The Venice Commission addressed this issue by strongly recommending the publication of the judgement urging the Polish authorities to avoid a deepening of the constitutional crisis. The Venice Commission's 'Opinion on the Amendments to the Act of 25 June 2015 on the Constitutional Tribunal of Poland' declares that "[a] refusal to publish judgment 47/15 of 9 March 2016 would not only be contrary to the rule of law, such an unprecedented move would further deepen the constitutional crisis triggered by the election of judges in autumn 2015 and the Amendments of 22 December 2015" (Venice Commission 2016c: 25).

In June 2016, the European Commission adopted an 'Opinion on the Rule of Law' in Poland since, despite extensive dialogue between the Commission and the Polish government, the constitutional crisis, in the eyes of the Commission, had not been resolved and no concrete steps had been taken by the Polish government to address the Commission's concerns. The concerns are threefold: First, the Commission addresses the appointment of judges to the Constitutional Tribunal and points out that the composition of the Tribunal remains disputed between the Court and the State, which raises concerns regarding the rule of law. Second, the functioning of the Constitutional Tribunal, next to the evident incompatibility with the rule of law, has led to a high level of uncertainty regarding constitutional justice, because the Court has decided to rule in accordance with the rules applicable before 22 December 2015. Since March 9<sup>th</sup>, none of the verdicts had been published in the Journal of Law and all future rulings will face continuous controversy. Third, highly controversial legislations, like the Media Laws (see chapter 3.3.) cannot be sufficiently and effectively reviewed by the Constitutional Court due to its blockade resulting in (possibly) unconstitutional legislation being exercised (European Commission Fact Sheet 2016: 1-3). Thus, the governing party is able to enforce arbitrary reforms without checks and balances due to the reduced authority of the Constitutional Court and the paralysis of the pronouncement of verdicts. The review of constitutionality by the Constitutional Court is no longer a safety valve, hence the division of power is to some extent disabled (Buchloc/Komornik 2016: 82). The 'Third Recommendation on the Rule of Law in Poland' by the European Commission echoes this evaluation and also criticises the lack of a legitimate and independent constitutional review due to a *de facto* decomposition of the Constitutional Tribunal resulting in the fact that the constitutionality of Polish laws can no longer be guaranteed (European Commission 2017: 8).

The argument advocated by PiS politicians regarding the replacement and early retirement of judges was the need for a 'de-communisation'. Allegedly, the judiciary has been a pinnacle of disempowered communists for 28 years and that is why, according to Kaczyński, the judiciary ought to have a new beginning (Vetter 2017a: 3; Buchloc; Komornik 2016: 92). Hence, not only was the Constitutional Court affected by numerous reforms, but Ordinary Courts as well. That is why, after undermining the capability and the independence of the Constitutional Tribunal, the governing party limited the independence of judges in other courts of justice. In July 2017, the Sejm and the Senate passed three significant bills: The 'Law amending the Law on the Ordinary Courts Organisation', the 'Law amending the Law on the National Council for the Judiciary and certain other Laws' and the 'Law on the Supreme Court'. The last two of these bills were vetoed by President Duda which caused major tensions within the party as well as between party members and President Duda. Party officials are determined to overrule the President's veto with a three-fifths majority in the Sejm. Duda himself is going to present different versions of these bills to the Sejm. That is why, even though the two laws were vetoed and are thus not subject to the assessment on the status quo of the state of democracy, I will still provide an analysis on the content of both of them in the annex.

On July 25<sup>th</sup>, President Duda signed the 'Law amending the Law on the Ordinary Courts Organisation'. Right after the bill had been signed, it came into power and significantly extended the mandate of the Minister of Justice. The minister Zbigniew Ziobr can recall all Presidents and Vice-Presidents of Ordinary Courts as well as the Directors of chambers, without having to give reason and he can replace this personnel with judges of his own choosing (Vetter 2017c: 8). The amendment further changes the procedure of the promotion of judges without specifying the criteria for promotion, which can lead to arbitrariness in the procedure. The influence on the judiciary further increases by the fact that, due to a legislation passed in January 2016, the Minister of Justice is also the Attorney General. Therefore, not only does the Minister of Justice appoint the judges in court but he is also directly involved in proceedings as a party. This Amendment clearly violates not only the independence of judges but also Article 45 of the Constitution of Poland on the independence of the Polish judiciary (Amnesty International 2017c). Furthermore, the Amendment transfers all judges on the Supreme Court into retirement, except for those who are explicitly allowed to stay by the Minister of Justice. The ages of retirement were changed as well: Female judges retire with 60, male judges with 65 (Machińska 2017: 5), which clearly constitutes a discrimination based on gender (European Commission Press Release 2017c). The Minister of Justice can grant judges an extension of their mandates (male judges: up to ten years, female judges: up to five years). The influence of the Minister of

Justice is not limited by clear criteria, regulations or time frame on the prolongation of judges' mandates, which violates the principle of the irremovability of judges. This discretionary power harshly undermines the principle of division of power. Based on these violations, the European Commission initiated an infringement procedure addressing the rule of law in Poland (European Commission Press Release 2017c). Machińska further points out that the reorganisation of the formal procedures in Ordinary Courts has had negative consequences on the proceedings which implies that the reorganisation is merely based on political motives. The Presidents of the reorganised chambers are to be appointed by the President of the Republic based on recommendations of the Minister of Justice. This reorganisation further inhibits the separation of powers as well as the independence of the Judiciary from other powers (Machińska 2017: 5). Vetter echoes her concerns and argues that one might consider these reforms as a politically motivated cleansing of the judiciary in order to infiltrate PiS ideological, political and moral sentiments into all aspects of government. Thereby, the judiciary is reduced to a subordinate status to the more dominant executive and hence the PiS party (Vetter 2017c: 8).

In conclusion, Adam Łazowski, who is a professor at Westminster Law School, summarises that the boundaries between the judicative, legislative and executive are blurred and the trust in the judiciary system is gone. No institution in Poland is capable to protect the constitution thoroughly and sufficiently. The Constitutional Tribunal largely consist of PiS loyalists while the independence of courts all over the country is dismantled. Recommendations given by the European Commission, the European Parliament, the Venice Commission, the OSCE and many other institutions, individuals and especially recommendations, concerns and amendments given by the opposition have been ignored. If all proposed laws had come into force, the tripartite division of power would have ended (Łazowski 2017: 1-3). Whether or in what way the vetoed bills will come into power after all remains to be seen. Several PiS politicians, including Jarosław Kaczyński, have publicly declared that the vetoes by President Duda were a mistake and the reforms in the judiciary will come into power eventually (Polen-Analysen 2017c: 16-17; Polen-Analysen 2017d: 12).

As in Hungary, the judicative is not the only branch of government being deprived of its rights, but also is the parliament. In December 2016, the Sejm's speaker excluded the opposition MP Michal Szczerba (PO) from parliamentary debate on the 2017 national budget, which led to protests being sparked by the opposition. In order to object to this exclusion but also to a temporary regulation on excluding journalists from the parliamentary building, the opposition blocked the Podium. The Sejm's speaker then moved the session into a different room. The voting procedure, for the first time in Polish politics since 1989, wasn't conducted in the Sejm's

plenary room and with only a handful of members of the opposition and without media. The opposition opposed the procedure and declared the voting invalid and the budget plan illegitimate. The so-called 'Sejm-Crisis' continued until mid-January, because the opposition continued to block the plenary room and protesters organised demonstrations in front of the parliamentary building (Arak/Bobiński 2017: 4). On January 13<sup>th</sup>, President Duda signed the budget plan for 2017. Almost all opposition parties refused to acknowledge the voting procedure as legal arguing that not enough law-makers were present during the vote. The required number of deputies is 230 and according to the summary of votes published by the Sejm, 236 MPs were present with 234 MPs voting in favour of the budget plan. However, individual voting results have so far not been published which is unusual (Reuters 2017b). The Polish ombudsman for civil rights and former judge on the Constitutional Tribunal, Adam Bodnar, argued that the Sejm-crisis is another factette on the blockade of the Constitutional Court. In an interview with the *EUobserver* he commented (Eriksson 2016):

The constitutional tribunal could determine whether the budget was passed in breach of law, but in the lack of a functioning court, we are left with the arguments of the political parties and the protesters. This is another example of the absence of rule of law creating tensions, which are completely unnecessary and very dangerous.

In order to finalise the assessment on the horizontal separation of power, I will now investigate possible abuses of power. The Polish government faces several accusations regarding corruption and nepotism in state-owned enterprises (SOE). The opposition was able to publish names and affiliations of members of PiS and their largely unqualified appointments to SOE positions. One of the most notable cases is Bartłomiej Misiewicz, who is a spokesperson and advisor to the Ministry of Defence and was selected for the supervisory board as direct representative of the Ministry of Defence despite not having the required university degree (Arak/Bobiński 2017: 11-12). Yet, according to the Nations in Transit Report, the intensity of corruption did not increase under the PiS government with a steady rating on corruption since 2014 (Arak/Bobiński 2017: 11). The BTI rates the 2016 Polish anti-corruption policy with 8 arguing that the government implemented several anti-corruption policies which decreased the level of corruption over the past years (BTI 2016b: 23). According to Transparency International, Poland's score on perceived corruption (see chapter 3.5.) perpetually improved over the years from 58 out of 100 in 2012 and 62 in 2015 and 2016 with Poland ranking at place 30 out of 176 countries in 2015 and rank at place 29 in 2016 (Transparency International 2017b; Wiśniewska 2016).

In conclusion, both chambers of parliament were able to pass several laws and amendments to disempower and dismantle the Constitutional Court as well as Ordinary Courts. The Constitutional Court was brought in line with the governing party and their policies. Verdicts that are contrary to the party's wishes were not published in the Journal of Law. The Minister of Justice, who is also Attorney General, was granted an excessive mandate of power. By that, the independence of the judiciary was severely undermined and the division of power dismantled. The parliament's mandate was reduced to a 'law factory', which is missing inclusive and sufficient debates. The aggrandisement of the executive virtually abolished the division of power and the system of checks and balances.

### 3.6. Changes regarding the effective power to rule in Hungary

The dimension of effective power control measures the effective power to rule held by elected officials. The regime holds the state's monopoly on the use of force throughout the country without meaningful competition. There are two small para-military groups; 'The New Hungarian Guard' with 200 members and the 'Civil Guard Association for a Better Future' with 100-150 members. Both are aligned with the right-wing extremist Jobbik party as biggest opposition and provoke violent clashes against the Roma population (BTI 2016a: 5).

As mentioned in chapter 3.2., all official members gained their power through a democratic election process and they occupy a sufficient scope of political action. Under the FIDESZ government, the state's administration infrastructure and governmental administration have been centralised. Schools and hospitals are now run by the central government and not by local authorities. Kornai points out that this 'obsessive' centralisation is intertwined with nationalistic tendencies and the aim to spread the party's ideology (Kornai 2015: 36). In 2013, the Hungarian government established a new supervisory institution for schools. According to their website, the 'Klebensberg Institution Maintenance Centre' (Klebensberg Intezmenyfenntarto Kozpont, KLIK) has "the aim of replacing uncertain local government funding to guarantee the stable operation of schools, orderly conditions for teaching and training, and the uninterrupted teaching of students" (Ministry of Human Capacities 2016). Yet, the institution supervises and controls all public schools in the country, including 120.000 teachers and thus is in charge of personnel and maintenance. Most significantly, the school's curricula were subordinated to FIDESZ' ideology (Vetter 2017b: 100; Kornai 2015: 45).

The result is a monopolistic system of hierarchical power with evident centralization tendencies and pronounced executive domination (Lang 2015: 3). Therefore, the main obstacle to the principle of the effective power to rule is in fact an overpowered and aggrandised executive as illustrated in chapter 3.5. Nevertheless, no veto-powers like the military, business elites or

multinationals are inhibiting on the effective power to govern. In conclusion, the dimension of effective agenda control is intact. The Bertelsmann Stiftung's Transformation Index rates the monopoly on the use of force, basic administration and the effective power to govern with 10 (BTI 2016a: 5-7).

### 3.6.1. Outlook: Changes regarding the effective power to rule in Poland

The Bertelsmann Stiftung Transformation Index 2016 testifies, that the Polish government's monopoly of power is not infringed upon by other forces and public order and security are fully guaranteed throughout Poland. The BTI rates the monopoly on the use of force in Poland with 10. Since the report, no further competition on the monopoly has emerged and the effective power to govern lies in the hand of the executive. Yet, under the PiS government, the influence of the catholic church increased significantly. The BTI Poland 2016 did notice that the catholic church does possess some influence on social and educational issues (BTI 2016b: 6) but Krzemiński illustrates a more current view on the extent the catholic church and the PiS are interconnected. In Poland, the main branch of Catholicism and its Bishops support the PiS party. Pater Rydzyk, who is a prominent figure in the Polish-Catholic church, plays a central role in this reciprocal support scheme. Shortly after the election, the PiS government supplied Pater Rydzyk with millions of Zloty for his PiS-supportive, political campaigns through his numerous media outlets including radio stations, newspapers, TV channels and religious foundations (Krzemiński 2017a: 9). Most predominant is the radio station Radio Maryja, with Pater Rydzyk as its director. This station is one of the few media outlets available in rural areas (see chapter 3.3.1.) (Krzemiński 2017b: 4). Not only do these media outlets openly support the governing party, but its religious preaching constitutes the ideological basis for the PiS party, its members and the state itself. The ideology is based on a national-catholic vision of Poland, as indicated in chapter 3.1. The national discourse enjoys absolute priority as does the good reputation of the nation. Therefore, freedom of speech and other civil rights are limited in order to protect the country's reputation from national and international criticism. National minorities should only be included and enjoy civil rights when they are fully assimilated, which, in practice, is the identification with Catholicism (Krzemiński 2017b: 2). The main enemy to this ideal is liberalism, which Jews and the Polish nobility are constantly accused and blamed for, causing anti-Semitic elements to constantly appear in the discourse of Radio Maryja. Such anti-Semitic hostility is combined with hatred towards communism leading to the old pattern of 'Jewish communism'. Nation and Catholicism strongly correlate and the church is seen as one of the greatest authorities for the preservation of the national spirit. Hence, the church must protect national interest and the nation the interest of the church. Krzemiński argues, that Pater Rydzyk

and his organisations (especially the radio station Maryja) triggered a social movement that is to a significant extent responsible for the rise and victory of PiS (Krzemiński 2017a: 9-11). The official support by the church appeals to a large segment of the Polish society and is therefore used by PiS as an instrument to stabilise and increase its political support (Krzemiński 2017b: 1). On July 9<sup>th</sup>, 2017, the 26<sup>th</sup> pilgrimage was celebrated with over 1000 participants, including several PiS politicians like the Minister of Justice, the Minister of Defence, the Minister of Internal Affairs and the Prime Minister Beata Szydło. During her speech, she highlighted and advocated the common values the government and Radio Maryja share, namely the compassion for the fatherland, the conservation of the Polish culture and the catholic church. She emphasised that Pater Rydzyk deserved great respect and gratitude (Polen-Analysen 2017c: 14).

In conclusion, the church holds significant power in Poland and influences the political decisions of the government. The church provides and helps fostering the ideology not only PiS but also the state is currently build upon. Whether the church holds a veto power cannot be determined since it's unclear what would happen in a case of disagreement. However, according to Krzemiński, politicians who are especially close to Pater Rydzyk and are frequent guests at his radio station do enjoy, to some extent, immunity towards party-internal criticism (Krzemiński 2017a: 8). The monopoly of power is therefore to a some extent limited due to a somewhat lacking secularism. Nevertheless, the main problem, just like in Hungary but to a lesser extent, is the executive possessing too much power due to a disproportionate aggrandisement of the executive branch. The autonomy and the mandate of the Constitutional Court, the Judiciary, the Polish National Bank and the public media outlets were reduced and dismantled for the benefit of the executive (Vetter 2017a: 2).

#### 4. Conclusive categorisation

The examination of Hungary's and Poland's performances within the five sub-regimes of an embedded democracy has been finalised. The next step will be to assess the respective performances in light of the requirements to an embedded, liberal democracy in accordance to Merkel. As illustrated, many aspects of an embedded democracy could not be fulfilled by both states and therefore a conclusive categorisation of what sub-type of defective democracy Hungary qualifies as, is in order. In light of this evaluation, I will formulate an outlook regarding Poland's path away from democracy and debate what kind of assessment, in light of the brief legislative period of the PiS party, can already be made.

#### 4.1. Hungary as a defective democracy

The assessment of Hungary's democracy revealed several shortcomings, malfunctions and misuses of aspects of an embedded democracy that can be summarised in three aspects. First, the dimension of vertical legitimacy is not fully intact. The government failed to guarantee a comprehensive and inclusive suffrage. The reforms addressing the electoral system initiated by the governing party strengthened the bias towards bigger parties, due to gerrymandering and a revised calculation process on how to translate votes into seats, to such a significant extent that the election of 2014 cannot be declared fair. The reforms encompass mechanisms that twist the will of the electorate into an extended number of seats in parliament for the majoritarian party (see chapter 3.2.). This is especially true in light of the excessive propagandistic use of public and private media outlets. The 'fourth power of democracy' was brought into line with the governing party and their ideology. Critical media outlets are rare and are forced to face a myriad of smear campaigns, structural discriminations and administrative, political and cultural barriers. The independent political sphere is severely weakened and subverted by party loyalists. Critical voices of individuals, groups and associations like CSOs, NGOs and religious groups are being restricted and interfered with to an alarming extent.

Next to a restricted independent political sphere, I would argue that the ethnocultural understanding of the nation actively promoted by the current government and thus the entailed consequences constitute the second significant threat to an embedded democracy. The anchorage of an ethnocultural ideology begins in the preamble, which *de jure* possesses legal impact (see chapter 3.4.). The party promotes an ethno-cultural understanding of the Hungarian nation to such an extent that ethno-Hungarians living outside the country do belong to the Hungarian nation whereas minorities living in Hungary do not. Hence, all three branches of government aim to represent, enforce and protect the wellbeing of the Hungarian nation and not the wellbeing of the people, the *demos*. The country's sovereign are not the citizens, or *demos*, as it is supposed to be in a democracy, but the nation. This entails the promotion of conservative values like family, tradition, the 'völkisch' movement, the homeland and the Christian faith (Küpper 2011: 138; Halmai 2011: 146; Lang 2015: 2; Vetter 2017b: 96). This understanding is underpinned with strong nationalistic rhetoric advocated and financially as well as institutionally supported by the governing party including its entire sphere of influence. Thus, the discourse in Hungary is shaped by racist, xenophobic, and anti-Semitic nationalistic beliefs causing structural discrimination towards minorities, culminating, for example, in school segregation of Roma. Civil rights predominantly apply to ethno-Hungarians and not to all Hungarian citizens.

The third, and most crucial, extensive and vital violation to an embedded democracy is the virtual, *de facto* and *de jure* abolishment of the division of power. An extensive executive aggrandisement significantly limited the power of the Constitutional Court and the Parliament. The Constitutional Court was perpetually deprived of almost all of its powers. The court can no longer review constitutional amendments for their constitutionality, it cannot sufficiently review the budget and the number of actors that can initiate a constitutional review was reduced to mostly FIDESZ-loyal individuals. The veto capacity of the Court is thereby reduced to an alarming extent. The level of independence of the Constitutional Tribunal is low since nine out of eleven judges were hand-picked by the executive and crucial supervision institutions are infiltrated with government supporters. The participation rights of the parliament are undermined since the process of legislation-making lies in the hand of FIDESZ politicians and legislation drafts are debated upon, passed and signed in an unprecedented pace. The high number of cardinal laws addressing social, cultural and economic policies manifest the governing party's policies for an unknown period of time, since even if FIDESZ were to become an opposition party, the future government would still have troubles achieving a qualified majority to change these laws. Corruption assists the government by expanding the group of loyal supporters as well as by accumulating the wealth of the loyal governmental elite. FIDESZ was able to implement its loyalist into countless institutions, organisations, companies and media outlets. The loyalists will ensure to stop anything that might contradict FIDESZ's interests. Thus, it has been assured that any other party will significantly struggle to overcome their position of power (Bánkuti/Halmay/Scheppele 2013: 145). In conclusion, given the aspects two and three, the dimension of liberal constitutionalism and the rule of law is also severely damaged and cannot be considered intact. These conclusions are strong indicators for a defective democracy and, more precisely, an illiberal democracy with delegative tendencies as described in chapter 2.2. Hungary displays all three characteristics of an illiberal democracy, namely: The lack of enforcement of civil and political rights and freedoms, restricted functionality of the judiciary and systematic corruption within politics and administration. The strong political influence of the judiciary is a crucial factor in this assessment. Merkel points out that the politically motivated deformation of the judiciary, which is usually accompanied with a disempowered legislature, is the main aspect of a delegative democracy. The rule of law is being replaced by the rule of men through law. Leading political actors do not feel obligated to apply to constitutional norms but rather the norm and political aim they established themselves (Merkel 2003: 268-269). Thus, the diagnosis of an illiberal democracy with delegative tendencies is substantiated.

This approach towards governing is again a result of the party's ideology. It is of their understanding that the election gave them the mandate to represent the whole nation, without considering the opposition and their voters, minorities or people who think differently. Consent and compromises do not exist in Orbán's concept of democracy and the Constitutional Court and the parliament are just mere obstacles on their path towards a new Hungary. The executive, in their eyes, is the dominant branch of government and the other branches shall merely assist it (as indicated in chapter 3.1.). This phenomenon, which is commonly known as 'tyranny of the majority', is further reflected in the extensive centralisation of power towards the executive (Vetter 2017b: 96-97; Lang 2015: 3). Orbán advocated this type of governing even before his election as Prime Minister: During a speech held by Orbán in September 2009, he predicted that there was "a real chance that politics in Hungary will no longer be defined by a dualist power space [...]. Instead, a large governing party will emerge in the centre of the political stage [that] will be able to formulate national polity, not through constant debate but through a natural representation of interests" (Bánkuti/Halmi/Scheppele 2012: 145). This approach towards governing is now firmly established into the country's fundamental law.

In conclusion, the aggrandisement of the executive based on ideological sentiments constitutes the most severe violation on an embedded democracy. As illustrated, the disempowerment and exploitation affecting the judiciary is not the only significant factor to this assessment. The massive degradation and disfranchisement of media outlets to propaganda machineries, the lack of civil-rights' protection and enforcement and the extensive corruption constitute severe violations to the Hungarian democracy as well. That is why Hungary can be described as an illiberal democracy with delegative tendencies. However, this is not a process the Hungarian leaders would want to hide or a progress that is undesired by the leadership since Orbán himself openly declared that the transformation of the Hungarian state to an illiberal democracy was his primary goal (Vetter 2017b: 71).

#### 4.2. Poland's aspirations towards a defective democracy

Since the current legislative term of the PiS party, with less than two years, is quite young, I will abstain from declaring Poland a defective democracy. In their recent legislative term from 2005 to 2007, Kaczyński as prime minister and his party pursued similar policies and polity changes like they do today. Yet, the coalition failed to last more than two years and the succeeding party was able to reverse the reforms enforced by the PiS government. For the time being, it remains to be seen for how long the PiS party will be able to hold onto power and whether the current and future reforms will be further cemented into the country's institutional architecture.

However, the similarities between the approaches of both parties, PiS and FIDESZ, have been made evident and Kaczyński's aspiration to build a Budapest in Warsaw indicates a strong will to further dismantle the Polish democracy and especially the division of power. The similarities are manifold, since, again, the democratic architecture faces three main obstacles, just like in Hungary. First, the independent political sphere of action has been disrupted, weakened and infiltrated with the party's ideology. The public media sector reveals a strong bias towards the governing party. Although the private media sector remains reverse, it has to be noted that most Polish households receive only public television. Therefore, millions of Polish viewers only have access to the propagandistic news provided by the state. Civil society groups and NGOs face several obstacles like smear campaigns, raids and legal barriers. Both freedom of press and freedom of association are weakened and face several obstacles and the dimension of vertical legitimacy is damaged, yet to a lesser extent than in Hungary.

Second, the ethno-nationalistic sentiments promoted by the government foster a sphere of hatred towards minorities and the state is not able (or possibly willing) to fully guarantee individual liberties from violations by private and public agents. The church occupies a crucial role in promoting such an ethno-nationalistic approach with strong catholic influence. The church assists the governing party in their aim to spread the ideology of a new Poland through numerous channels including popular media outlets. The prosperity and the wellbeing of the Polish nation is viewed as the greatest good and the reputation of Poland must be protected. This constitutes the basis for both internal as well as external politics. International cooperation, compromises and treaties are just seen as possible threats to Polish sovereignty. The nationalistic and conservative norms that are being promoted advocate the nation, family values, catholic faith, traditions and the Polish culture. This results in the demand for a united, Polish nation with a uniform, catholic lifestyle and a common cultural and historic memory as shared identity. Rights of minorities should only then be protected and promoted when minorities fully assimilated themselves (as illustrated in chapter 3.1., this means assimilation to catholicism) (Buchloc/Komornik 2016: 85-87). As in Hungary, the sovereign in Poland are not the citizens, the *demos*, but ethno-Polish people, the nation. The nation is defined by common catholic faith, common conservative and traditional norms and a common history and culture. Minorities which do not belong to this entity do not belong to the nation and are not going to be represented by the Polish government (Buchloc/Komornik 2016: 85). This understanding is, just like in Hungary, underpinned with strong nationalistic, xenophobic and anti-Semitic sentiments advocated by the governing political party, the church and their respective media outlets.

Third, the executive aggrandisement and the disempowerment of the judiciary: The three branches of government are no longer equal nor independent. The executive significantly enhanced its influence on the other two branches. The judiciary was brought in line with the government and the parliament was discredited to a law factory. The inflated mandate of power of the Minister of Justice demolishes the independence of the judiciary, including the Constitutional Court and Ordinary Courts. The division of power and the mechanism of checks and balances are no longer intact in Poland.

Again, this approach is mirrored in the party's ideology. As in Hungary, the tyranny of the majority is upheld as the best and most effective way of governance. The party is supposed to have received a mandate from the electorate to represent the whole nation. In their understanding, this mandate entails a non-compromising and rigorous approach towards governing. Checks and balances as well as the division of power constitute mere obstacles to the prosperity of the nation and therefore have to be subordinated to the executive (Buchloc/Komornik 2016: 86-87). In conclusion, Poland has and is taking similar steps in comparison to Hungary and thus Poland is on the fast-track to an illiberal democracy with delegative tendencies, following the example of the FIDESZ party. Łazowski diagnosed Poland with an “‘anti-democratic blitz’ [...] drawn from an autocrat's textbook [on] ‘how to dismantle democracy in 80 days’” (Łazowski 2016: 3) and several theorists see all of Kaczyński's actions mirrored in those of Orbán (Łazowski 2016: 4; Sapper/Weichsel 2016: 4; Lang 2016). Thus, the governing party will continue following the path towards illiberal democracy as displayed by FIDESZ by further centralising the power towards the executive, especially by weakening local governments (Nations in Transit Poland 2017: 3). Poland will likely continue weakening the independent political sphere by targeting, harassing and discrediting NGOs. Furthermore, the governing party will assumedly dismantle the independence of private media outlets as well (Łazowski 2016: 4). For 2018, the Minister of Justice announced extensive structural reforms addressing the whole judiciary system and its personnel (Vetter 2017a: 3) which will most likely include at least parts of the vetoed bills. Furthermore, as illustrated during the assessment, the party has announced several reforms to come addressing the electoral regime, media outlets (big media package) and maybe even a referendum addressing the constitution (see chapters 3.2.1., 3.3.1., 3.4.1).

The systematic restructuring of important political, socio-political and cultural institutions as well as the political propaganda campaign generate the concern that the shift towards nationalistic and conservative values within the Polish population could be further enhanced, strengthened and cemented so that different or critical opinions in politics and civil society are

permanently marginalized and discredited (Vetter 2017b: 66). Nevertheless, the prognosis is less certain, in comparison to Hungary, since PiS is not as embedded into the political system as FIDESZ is and the upcoming elections are more likely to change existing majorities both to the advantage or disadvantage of PiS, in comparison to Hungary. The reforms addressing the country's institutional architecture can be reversed more easily in Poland than in Hungary due to their reduced extent and significance as well as their recency. That is why Poland only displays strong tendencies towards an illiberal democracy with delegative tendencies.

Nevertheless, the similarities between both parties as well as their strategies on system transformation are overwhelming: Their state-credo is to distance themselves from western liberalism and liberal democracy is a western-elite concept that was imposed onto Poland and Hungary. Both governing parties in Poland and Hungary anchor the perceived stagnation of their countries in the triad of liberalism, globalism and pluralism which were forcefully implanted within their countries' regimes by western and European elites as well as ex-communist insiders which settled down in several branches of the state after an opaque and allegedly unfair transformation process from communism to capitalism (see chapter 3.1.) (Bielik-Robson 2017: 90-91; Fehr 2016: 81-82; Koenen 2015: 40-41). Hence, the parties view pluralism, tolerance and compromises as indicators for a weak, liberal state. The liberal state as an elite, European project must be overcome to the benefit of a strong state dedicated to anti-liberalism and anti-pluralism (Fehr: 2016: 82-83). Thus, as indicated in chapter 3.1., the similar ideologies and the concluding approaches towards governing do indeed lead to similar polity changes. The focus on the judiciary and the media as first and primary targets of both parties is evident as is their similar goal of an illiberal and centralised government with strong focus on ethno-nationalistic prosperity, conservative values and anti-liberal sentiments. Both advocate a nationalistic restructuring of the state and the society in which faith, patriotism, and the heroization of the respective country's history play central roles. The ethnic Polish and Hungarian societies shall be unified under the umbrellas of strong nations with unilateral leaderships (Sapper/Weichsel 2016: 4; Lang 2016: 61-65; Fehr 2016: 80-82). In the next chapter, I will further scrutinise the strategy towards system transformation that has become evident in both Hungary and Poland.

#### 4.3. The executive aggrandisement in Hungary and Poland

It has now become evident, that an executive aggrandisement is the common strategy pursued by both Hungary (Bermeo 2016: 12) and Poland in order to subordinate polity institution to the party's aspirations. According to Bermeo, such an executive aggrandisement takes place 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. [...] Such changes are usually framed as having resulted from democratic mandate.” (Bermeo 2016: 10-11). Bermeo portrays such an aggrandisement as one variety of a democratic backsliding towards autocracy. The primary targets of this strategy are the restriction of media freedoms as well as the judiciary’s independence and autonomy (Bermeo 2016: 11). It goes without saying that popular approval is central for illiberal governments because changes in the electoral regime and within the judiciary do not guarantee a safe win during the next election. That is why sufficient influence and control over media outlets, as first part of an executive aggrandisement, is crucial to these regimes. The evident assertiveness of governmental influence on public media outlets is given and, as illustrated in chapters 3.3. and 3.3.1., the influence on private media can be achieved through opportunities provided by the free market: Private media outlets can simply be bought by loyalists of the government. The control over the judiciary is the second aspect to an executive aggrandisement, since it serves the purpose of centralising the power towards the executive. Since both party’s *de facto* control the respective parliaments, the judiciary is the only branch of government that holds significant control over the executive. In order to pass controversial and possibly unconstitutional legislation that will favour the leading party’s interests, the judiciary, and especially the Constitutional Court, must be subordinated to the executive. Such an aggrandisement is usually pursued through the country’s constitution, either by implementing a new one, as happened in Hungary, or by issuing a referendum, as it has been announced in Poland (Bermeo 2016: 11).

Today, democracies are less likely to be overthrown by open-ended coups d’état, as it was common during the Cold War years, or election day vote frauds. Rather, democracies face backsliding through more subtle ways, usually through the manipulation of democratic institutions themselves and under the umbrella of democratic legitimacy (Bermeo 2016: 7-8). Hence, de-democratization tends to be incremental rather than sudden and violent. Coups d’état are rarely successful and cause massive international attention<sup>8</sup>. Plain vote fraud on election day has declined due to the rise of international election monitoring<sup>9</sup>. The reason why the new form of de-democratisation is advocating more subtle and discrete ways is evident: A sudden shatter of democracy causes not only international attention but also triggers domestic protests and movements of resistance. Yet, changing certain mechanisms within the electoral regime through alterations in the allocation of votes, voter-registration and district boundaries seem to be arcane and opaque to trigger any significant resistance. The disempowerment of the judiciary

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<sup>8</sup> See figure five in annex

<sup>9</sup> See figure six in annex

and media restrictions might be more evident threats towards democracy, but, as happened in Hungary and Poland, protests by affected journalists and judges can be counter-framed as special interest or as agents of an old and discredited world order, hence as communist elite. Critical voices coming from civil society organisations and NGOs can be discredited as agents of foreign interest, as it happened in Poland and Hungary. The fact that many NGOs are foreign-funded only supports this claim and adds credibility to the regime (Bermeo 2016: 14). Extensive criticism from Brussels is being declared as foreign, liberal and pluralistic interests that threaten to undermine the country's sovereignty. Hungary and Poland shall at no cost become a colony to Brussels and the so-called 'orders' coming from Brussels are being compared with pre-1989 dictates from Moscow (Lang 2015: 5; Kornai 2015: 44). In conclusion, as proclaimed by Diamond, democratic breakdowns predominantly occur through subtle and incremental degradations of rights and procedures (Diamond 2015: 144; see chapter 1) because "piecemeal erosions of autonomy may thus provoke only fragment resistance" (Bermeo 2016: 14). Of course, it cannot be denied that the initiated reforms triggered protests and resistance in both Hungary and Poland whilst the extensive criticism coming from the European Union and its institutions supports and empowers the protesters. But despite these protests, both parties do enjoy very positive popularity ratings in several polls<sup>10</sup>.

##### 5. Already a lost case? – Conclusive remarks

Given the assessment of the states of democracy in Hungary and Poland, one might question whether we can already speak of Hungary as a lost case with Poland closely behind. During the assessment of Hungary's state of democracy, it became evident that FIDESZ installed numerous mechanisms to the country's polity that sustainably cement the party's influence on the government even if the party were to lose its majority in parliament. Countless party loyalists and party-friendly oligarchs are installed in key institutions like the Constitutional Court, the NMHH and its Media Council, the Hungarian National Bank, the Public Prosecutor's Office, the State Audit Office, the Monetary Council, the Competition Authority, the Central Statistical Office, etc (Bánkuti/Halmai/Scheppele 2013: 145). Schools and the school's curriculums are supervised and determined by party affiliates. Moreover, FIDESZ loyalists control several private media outlets. The cardinal laws, which cemented the party's social, economic and fiscal policies, are very difficult to revoke. Kornai stresses the fact that the

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<sup>10</sup> Two selected ratings are illustrated in the annex (figure seven and eight) and whilst their independence has been reviewed, it cannot be fully guaranteed. Yet, it has to be noted that the digits exposed in these ratings are mirrored in scientific literature (Lang 2015: 3; Vetter 2017b: 59, 100).

Hungarian transformation is not just a mere succession of isolated acts but rather “a strongly forged system, whose essential properties cannot be altered by partial modification” (Kornai 2015: 41). A change of government has been made extremely difficult, especially in light of the biased electoral system and the wide-spread propaganda, which is praising the current system (Vetter 2017b: 96; Nations in Transit 2017: 3; BTI 2016a: 35; Kornai 2015: 47).

Such a pessimistic prognosis calls for precise and effective intervention measures pursued by the European Union, especially in regard to Hungary. It is the first time that the European Union faces such an illiberal system transformation towards autocracy within its borders. Of course, there have been several right-wing radical parties, politicians, institutions and associations within the civil society which promoted similar ideologies. Yet, Hungary and Poland have rebuilt their whole political systems to bring it in accordance with their ideology. Such an extensive interference with basic, liberal principles of the rule of law is unprecedented. Hence, the EU ought to consider new strategies to successfully address this issue in order to prevent the rise of autocracies within its Union (Vetter 2017b: 174-175). As illustrated in this thesis, the European Union and its Commissions not only issued numerous opinions and recommendations on the reforms implemented in Hungary in Poland, the EU also initiated infringement procedures against both member states. While Poland and Hungary may have integrated some recommendations, they did not address the EU’s core concerns. The European Commission is keen on maintaining the dialogue with both countries yet there are two additional options available to the EU: First, the EU could use its ‘nuclear option’ and trigger Article 7 TEU. Article 7<sup>11</sup> is a mechanism aiming to respond to clear risks of a serious breach of a member state’s rule of law. They already openly declared to consider this option (see chapter 1) but the actual use of this option is highly unlikely, since sanctions, like revoked voting rights, require unanimity (excluding the affected member state). During an official meeting between Orbán and Kaczyński, it was assured to Kaczyński that the unanimity will not be reached due to Hungary’s veto (Vetter 2017b: 190). Both nations entered an alliance of convenience, unified in anti-liberal sovereignism (Lang 2016: 78). Second, the European Court could further initiate proceedings against both nations addressing the illegitimate legislations enforced by the governments. The effectiveness of such rulings is again limited: In September

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<sup>11</sup> This process can be initiated by the European Parliament, the Commission, the Council or by one third of the member states. The Council then engages into dialogues with the respective member state and may send recommendations and submit observations. The Council may then decide to implement sanctions and/or suspend certain rights, like the right to vote. At any time, the Council may decide to vary or revoke such measures (Lisbon-treaty.org. 2013).

2015, the European Council adopted a decision declaring that in an emergency situation triggered by “a sudden inflow of national of third countries”, the Commission may adopt provisional measures (Court of Justice of the European Union Press Release 2017). Hungary, Slovakia, the Czech Republic and Romania voted against this resolution and Hungary and Slovakia requested the European Court of Justice to annul the decision. On September 9<sup>th</sup>, 2017, the Court rejected the claims that were officially supported by Poland and “dismiss[e]d in their entirety the actions brought by Slovakia and Hungary” (Court of Justice of the European Union Press Release 2017). Hence, the decision of the European Commission, which for example obligates Hungary to take 1,294 refugees, is fully legal. Poland and Hungary, in contrast to Slovakia, declared this verdict appalling and commented that they will continue to refuse to accept refugees into their countries for security reasons (Polen-Analysen 2017d: 12; Kottoor 2017). The Hungarian Foreign Minister dismissed the ruling as "outrageous and irresponsible" and as "a political ruling which rapes European law and European values" (Kottoor 2017).

In conclusion, the most effective tool against a state’s breach of the rule of law cannot be applied against either Hungary or Poland because of the lack of unanimity and the rulings of the European Court are being ignored by both countries. The EU could have had a better chance at addressing Hungary’s illiberal term much earlier. However, since 2004, FIDESZ is part of the ‘European People’s Party’ (EPP) which is holding the largest single bloc of seats in the European Parliament. Orbán is a prominent figure and has many allies in Brussels. Therefore, the reaction of the EU has been rather mild, due to this “almost perfect shield” (Rupnik 2012: 136). Today, the EPP only has 25 seats more than the ‘Progressive Alliance of Socialists and Democrats’ (S&D) and therefore needs to secure the 12 votes of FIDESZ. PiS on the other hand, is a member in the European Conservatives and Reformists Group (ECR) and does not enjoy such leverage (Gostyńska-Jakubowska 2016). Combined with the rather pessimistic prognosis regarding a domestic change of power in Hungary and the limited and rather ineffective options the EU has on protecting European norms and values in Hungary and Poland, theorists argue that an end of Hungary’s illiberal turn is not in sight as the situation is nearly irreversible (Koenen 2015: 44; Kornai 2015: 47; Vetter 2017b 176-177). Given this prognosis, it is appropriate to declare Hungary a lost case, at least for the near future. If all goes well for Kaczyński’s PiS party, Poland might just be right behind.

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## 8. List of figures

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Figure three: World Press Freedom Index Hungary – Scores and Ranking 2009 – 2017. (Reporters Without Borders (2017b): World Press Freedom Index. Rankings. Available at: <https://rsf.org/en/ranking> (Last access: 16.09.2017).

Figure four: World Press Freedom Index Poland – Scores and Ranking 2014 – 2017 (Reporters Without Borders (2017b): World Press Freedom Index. Rankings. Available at: <https://rsf.org/en/ranking> (Last access: 16.09.2017).

Figure five: Coup frequency in democracies, 1950 – 2014. Bermeo, Nancy (2016): On democratic backsliding. In: *Journal of Democracy*, 27 (1), 5-19.

Figure six: Vote-fraud allegations by western monitors in post-1975 democracies, 1991 – 2012. Bermeo, Nancy (2016): On democratic backsliding. In: *Journal of Democracy*, 27 (1), 5-19.

Figure seven: Support for parties among decided voters, July 2017. Századvég Foundation (2017): Recent Research Results. Available at: <https://szazadveg.hu/en/homepage> (Last access: 14.09.2017).

Figure eighth: Opinion poll: Who would you vote for in the next Sejm election? Pacewicz, Piotr (2017): PiS z 40 proc. najsilniejszy od wyborów. Opozycja najsłabsza. Zamach na sądy nie zaszkodził władzy. In: oko.press at 08.08.2017. Available at: <https://oko.press/pis-40-proc-najsilniejszy-wyborow-opozycja-najsłabsza-zamach-sady-zaszkodził-władzy/> (Last access: 14.09.2017).

9. Annex

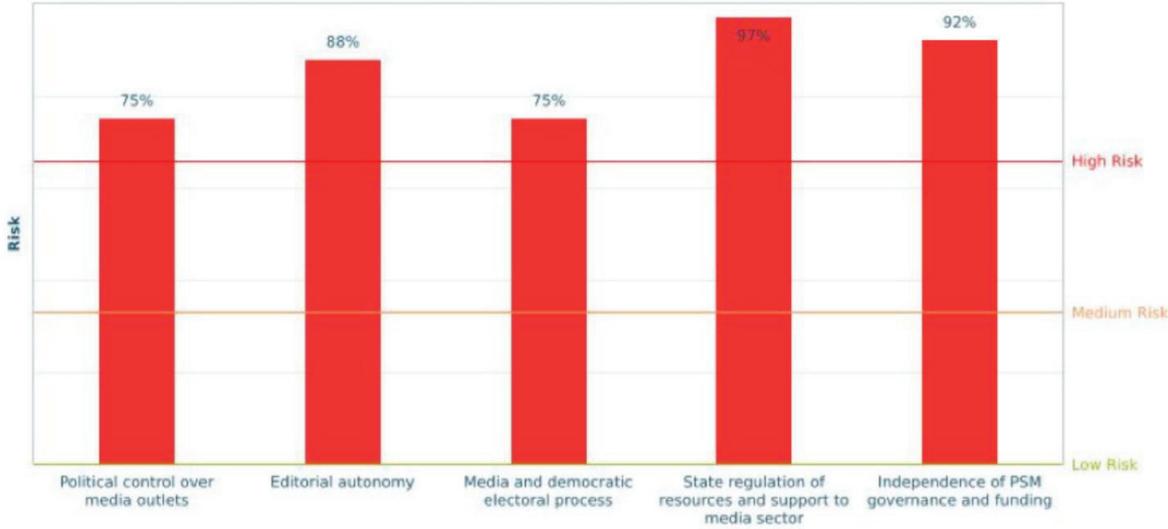


Figure two: Hungary: Political Independence Area and exposed risks (CMPF 2016: 4)

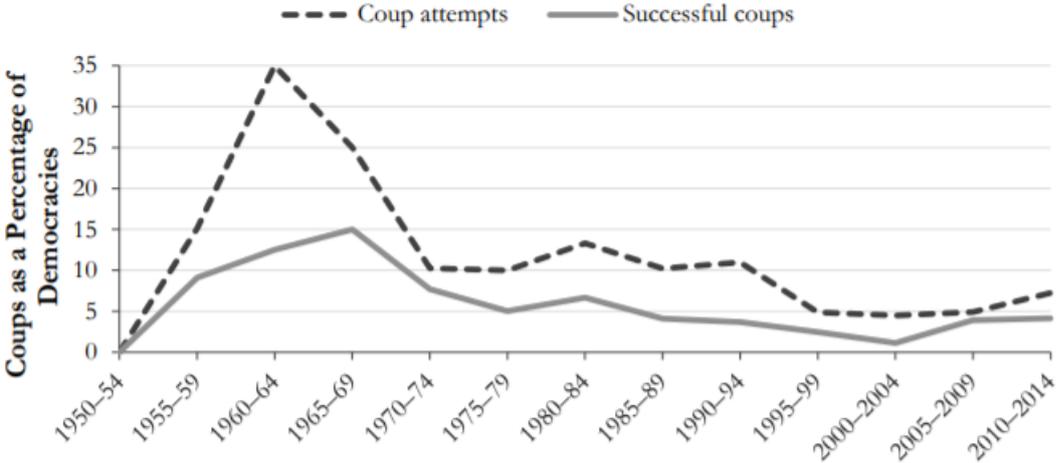


Figure five: Coup frequency in democracies, 1950 – 2014 (Bermeo 2016: 7)

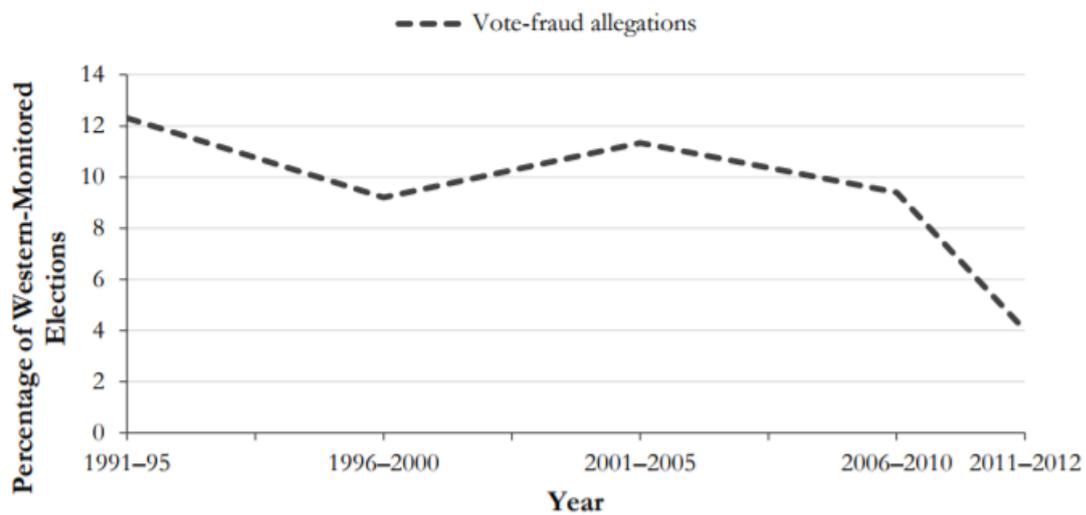


Figure six: *Vote-fraud allegations by western monitors in post-1975 democracies, 1991 – 2012* (Bermeo 2016: 8)

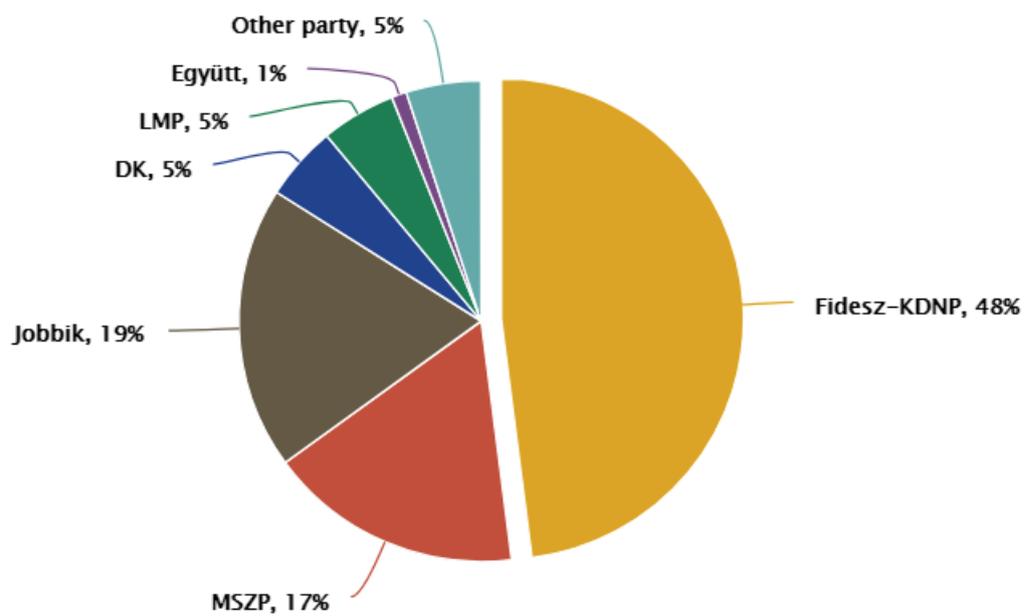
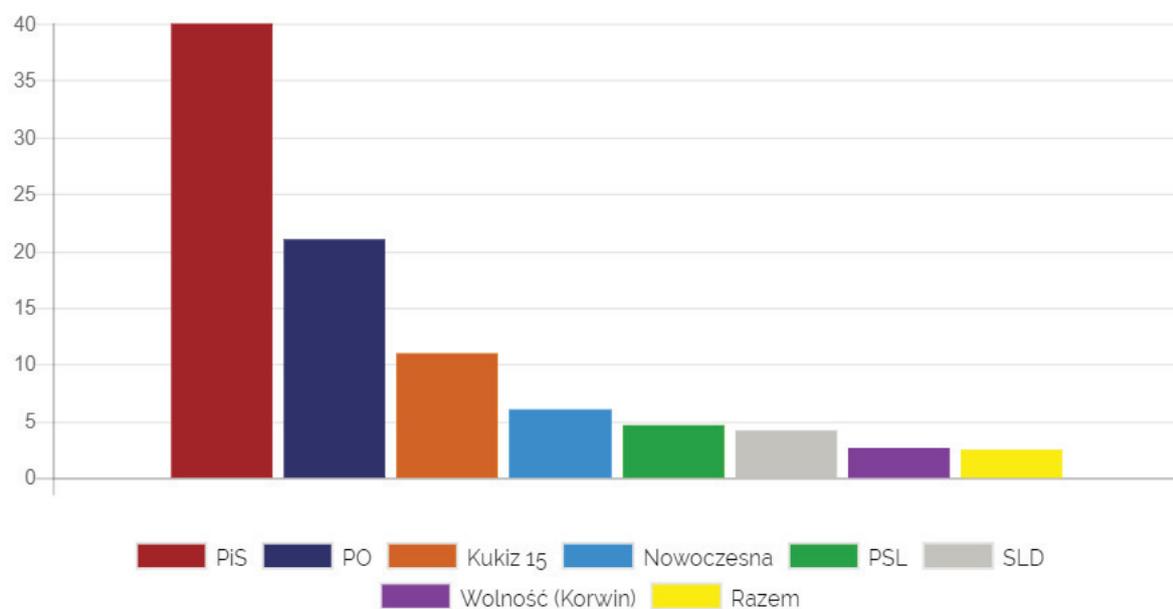


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*Figure eight: Opinion poll: Who would you vote for in the next Sejm election? (Pacewicz 2017)*

*Assessment of the 'Law on the National Council for the Judiciary' and certain other Laws and the 'Law on the Supreme Court'*

The European Commission considers both laws as a significant threat to the rule of law by undermining the judicial independence (European Commission 2017: 6). Since the future of the laws vetoed by President Duda is still unclear, I will give a short overview on the content of both laws. 'The Law on the National Council for the Judiciary and certain other Laws' was approved by Senate on July 15<sup>th</sup> and referred back to the Sejm on July 24<sup>th</sup> by President Duda. The National Council for the Judiciary (Krajowa Rada Sądownictwa, KRS) is a constitutional organ which is supposed to supervise the independence of judges. The Council consists of 25 members and 15 of them were previously elected by judges of the Supreme Court, Ordinary Courts, Administrative Courts and Military Courts. The amendment would have declared that these 15 members will be elected by the Sejm with a three-fifths majority and the terms of office of the current members are going to be terminated 30 days after the amendment comes into power. Furthermore, the amendment would have established two assemblies whereby the First Assembly would have consisted of 15 judges and the Second Assembly of ten members from the executive and the legislative. It has been the Council's task to appoint new judges to courts. The amendment would have declared that such a decision would have required unanimity, which would have been hard to reach (Machińska 2017: 5-6). Furthermore, the parliament would have had the power to recall members of the KRS at any time (Vetter 2017c: 8). Therefore, the decision process would have been easy to block, resulting in the opportunity for the executive and/or the legislative to block unwanted decisions. Thus, the mandate of the KRS, which results from the constitution, would to a large extent be deprived by this legislation (Machińska 2017: 6). According to the OSCE, the "legislative and executive powers would be allowed to exercise decisive influence over the process of selecting judges. This would jeopardize the independence of a body whose main purpose is to guarantee judicial independence in Poland" (OSCE 2017: 4).

The second vetoed bill, the 'Law on the Supreme Court' was approved by the Senate on July 22<sup>nd</sup> and referred back to the Sejm on July 24<sup>th</sup> by President Duda. The 'Law on the Supreme Court' included an additional aggrandisement of the Minister of Justice's mandate. The current composition of judges in the Supreme Court would have been dissolved and replaced with judges that would have been previously appointed by the parliament (Vetter 2017c: 8). The Supreme Court would have been deprived of its right to nullification. The minister would be in charge of appointing the Director of the Supreme Court and would have full discretion over the extension of mandates past the retirement age (Machińska 2017: 5). A disciplinary body, which

would have been operating under a severe influence of the Minister of Justice, would have been established. The minister then could have used this body as an instrument to control all judges in the country (Vetter 2017c: 8). Especially the new rules on disciplinary hearings would have had the potential to entail an aura of paralysation to judges and therefore would have violated the fundamental principle of independent judges and courts and thereby the Polish constitution. The European Commission points out that the “mere threat” of disciplinary proceedings can cause judges to feel pressured into following the position of the executive (European Commission 2017: 16-17). In conclusion, the possible extension of the Minister’s mandate would have further violated the principle of division of power, the independence of the judiciary as well as international standards (Machińska 2017: 5; Vetter 2017c: 8; European Commission 2017: 18).