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**Choice Illusions:
Through 'Rule by Law'
to 'Electoral Capture' in
Hungary and Poland?**

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Abstract

National populist leaders across the EU, and in particular governments in backsliding Member States such as Hungary under Fidesz and Poland under PiS, like to proclaim themselves as true representatives of the people. They pit the principle of popular choice against the demands of the rule of law, defined among others as protection against abuses of majority rule. Their claims are often repudiated with normative arguments about democratic checks and balances and the separation of powers. The question whether populists in government actually command majorities has been surprisingly secondary. This exploratory research examines how 'strongmen' in office undermine the rule of law to not only advance their illiberal agendas, but also lower the risk of losing future ballots. Across key aspects of the process, it considers how the pair had laid foundations to game if not capture electoral competition. Even when their interventions did not produce dramatic results, cumulatively they removed crucial safeguards for democratic elections. As such, these populists' assault on liberal democracy is a misnomer: by crippling the rule of law, they also undermine the very essence of democracy proper, or the freedom to choose.

Keywords: election integrity, democracy, popular choice, rule of law, rule by law, institutional capture

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Choice Illusions:

Through 'Rule by Law' to 'Electoral Capture' in Hungary and Poland?

Stefan Szwed¹

Introduction

National populists across Europe, especially the likes of Hungary's Victor Orbán and Poland's Jarosław Kaczyński who were elected to office, champion themselves as 'men of the people'. They front as defenders of democratic majorities, which they claim are falling victim to expansive 'liberal' qualifiers of democracy proper. They purport to have the wind of *vox populi* beneath their wings. This support, they argue, is not merely an endorsement to govern, but a ticket to reverse the supposed progressivist tide that has swept democratic polities to not only drown out crude majoritarianism, but as they contend, to neutralise the people's will.

The two parties' relationship with the presumed political majority has a symbiotic quality. They claim input legitimacy from the mandate they receive at the ballot, but also pivot their output legitimacy in distinctly majoritarian ways. Theirs is a quest for a different kind of a state, a 'true' democracy, freed from schemes to empower minority positions at the cost of the people whose spokesperson role they assume. Both parties treat *liberal* democracy where constitutional separation of powers and the rule of law constrain – but as Martin Krygier reminds us, also enable power to flourish in all the right places – with suspicion and contempt (2016). They see it as a foreign import, ill-suited to the realities of East Central Europe, and more universally, a bankrupt ideology that has robbed the people everywhere of their rightful voice in government.²

Pitting the rule of law against democracy is a clever ideational but also rhetorical tool that has allowed the two governments to incrementally dismantle the former whilst claiming output legitimacy in the name of popular choice (Jakab 2022). But while narratives that accompanied attacks on the Hungarian *jogállam* and Polish *państwo prawa* promised a more democratic future, they also served the (input legitimacy) end of securing continued successes at the ballot.³ This was achieved not merely thanks to the virtuous circle of democracy – making output attractive to voters – but also by gaming the system to the incumbents' convincing advantage. The pair have tinkered with rules for elections and curated their respective political environments in ways that helped to entrench their dominance. Aided by lessons from earlier

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² Decrying progressivism at the time of Russia's invasion of Ukraine, PiS intellectual guru Zdzisław Krasnodębski argued that it is the 'west [that] presents greater danger to Poland's sovereignty than the east' (Domański 2022).

³ Hungarian and Polish terms for the 'rule of law' connote a constitutionalist tradition and translate more readily into the German *Rechtsstaatlichkeit*. See e.g. Merdzanović and Nicolaidis 2021.

defeats, they swiftly took charge of key institutions and entered an *ad perpetuum* campaign mode. And while the ways in which they tilted the playing field are generally well known, elections in Hungary and Poland have not simply become less fair: they became decidedly unfair and there are good reasons to question whether they should be described as fully free.⁴

This Working Paper proceeds to first briefly reflect on and position its arguments in the existing literature, and then advances to examine the democracy backsliders' legitimacy predilection. It subsequently outlines some of the key challenges to election integrity posed by Fidesz and PiS, and later places them in the wider context of democratic elections across the EU. Before concluding, it turns to explore the question whether tinkering with the ballots in Hungary since 2010 and in Poland between 2015 and 2023 has ultimately constituted a form of capture.

1. State of the art

Although the literature on democratic and rule of law backsliding in East Central Europe is vast, questions about the veracity of the Hungarian and Polish national populists' majority claims are not at its forefront. Many authors take popular support for the two parties for granted.⁵ They acknowledge the role of output and input legitimation: the illiberal future painted to woo core voters (Sadurski 2019, Levitsky and Way 2020, Holesch and Kyriazi 2021). They belabour the reasons behind the 'strongmen' allure. But while their ascendance and longevity in office are studied with a view to their electoral appeal across time and space, puzzlingly little attention is paid to the difference between populists who *seek* and those who *are in* office: the distinction between aspirants standing to be elected and incumbents vying to hold on to power.⁶

Many scholars of backsliding across the region naturally point to variables such as institutional fragility and weak political culture as explanans – if not historical determinants – of both the *rise* and *persistence* of Fidesz and PiS. The literature on political capture dissects the dismantlement of independent institutions in both countries. But it scarcely zeroes in on its effects on the ballot. Some authors have even contrasted the 'indirect' or 'less visible' attacks on democracy in Hungary and Poland with more overt or 'crude' attempts to jail oppositionists in Turkey or 'steal elections' in the United States (Way 2022).⁷

Many of the texts on democratic backsliding in Hungary and Poland remain mired in normative considerations. They bemoan the decline in rule of law standards, with their focus firmly fixed on capture of the judiciary and other state institutions, rather than elections, which are often benignly dismissed as 'competitive but unfair' (Levitsky and Way 2010, 2020). They look to the

⁴ PiS won the plurality of votes in the 2023 parliamentary elections, but failed to form government.

⁵ While this claim pertains mainly to the literature that focuses on Hungary and Poland, treatment of election integrity in writings that advance 'mid-range' conceptions of democracy is sparse: e.g. the comparative authoritarianism turn broadly describes elections as 'competitive but unfair', paying little attention to their quality and/or the differences among the backsliding regimes (Levitsky and Way 2010, 2020).

⁶ Both parties won their first ballots on more moderate platforms than they espoused in office (Sadurski 2019).

⁷ The belief that majorities are firm compelled some authors to blame the people for the decline of democracy in the two countries, rather than the power abusers in office (see e.g. Weiler 2020).

exigencies of separation of powers, checks and balances or protection of minority positions, but seldom ask whether majority claims made by Fidesz and PiS in actuality hold water.

These blind spots are the more surprising seeing that autocracy-creep is broadly acknowledged (Cianetti and Hanley 2021, Szelényi 2022, Tilles 2021). Many authors enumerate some of the re-election violations, especially in Hungary (Scheppelle 2022b, Mares and Young 2019a, Magyar and Madlovics 2022), but rarely address them as a matter analytically distinct from the *rise* of autocratic populism. The question of election integrity in the context of the global ‘strongmen’ moment is treated defensively: while irregularities are recognised, the tacit acceptance of the supposed Fidesz and PiS majorities is puzzlingly persistent.

Several factors can help explain this state of affairs. First, the two parties *are* indeed popular with voters, owing to both ideational proclivities and their effectiveness. Naturally, the ability to make and deliver on their promises is partly facilitated by institutional capture (Scheppelle 2022a). Programmatic appeal apart, this attractiveness is also down to clientelism and even diffuse forms of vote-buying through welfare programmes such as Workfare in Hungary and the 500+ child benefits in Poland. Regardless, many authors matter-of-factly assume that voter support encompasses majorities.

Second, the (strong-) *men of the people* self-claim is not merely a rhetorical hoax. Fidesz and PiS are gifted campaigners. They have been successful because they articulate their messages aptly and address voters who have felt forgotten during the age of socio-economic transition. They target their audiences over time and woo the non-urban electorate whose language the liberals never learned to speak. Many observers see this as the populists’ natural advantage that is merely amplified by some of the transgressions examined in this paper (Krastev and Holmes 2019, Ost 2005, Pappas 2019).

Third, the opposition has often appeared feeble, which has hurt its chances at the ballot (Tilles and Junes 2018). Liberals unseated by Fidesz and PiS have struggled to acknowledge the epochal change. They have been slow to adjust programmes or offer alternatives beyond their gloomy warnings of democracy’s imminent demise. The absence of a meaningful generational turnover in their ranks has helped to solidify the view of *anciens* elites as establishment that remains out-of-touch (Grzymala-Busse 2017, Ilonszki and Dudzińska 2021, Kelemen 2017, Solska 2020). This too has made it easier for scholars to overlook the substantive obstacles they face.

Fourth, scholars and practitioners alike have at times underappreciated the role of institutional capture in shaping the dominant political narrative. Decrying the absence of ‘internal balance’ in the two public broadcasters’ programming, some observers have naively looked to ‘external balance’ as a saving grace. Some have even bought into the argument that national conservative viewpoints are underserved by private media, said to exhibit a naturally occurring (neo)liberal bias. Finally, many see the Internet as a counterweight to traditional outlets that spread government propaganda. While apologists are more common in the Polish context, many authors have been oddly unphased by if not forgiving of the extent to which captured state media have been able to manipulate the hearts and minds.

Finally, when it comes to election integrity in the age of populism, it is ‘election denialism’, or allegations of fraud waged by sore populist losers, that stole the show from real challenges to

free and fair ballots in backsliding regimes (Norris 2017). Indeed, unevidenced charges of electoral malpractice have become a page from the national populist playbook at least since Donald Trump's lost re-election bid in 2020 (Fiedler 2021). Accordingly, it is the populist attempts to question the credibility of sound contests that have often preoccupied scholarly and public attention, rather than the foggy irregularities witnessed at Fidesz and PiS's re-elections.

In sum, there is recognition of something rotten in the Hungarian and Polish national populists' repeated victories. But few call the bluff, or go past the axiom of 'competitive but unfair'. The fact that voting is peaceful and relatively well organised has helped to prop up the foundational myth of 'illiberal revolutions': that majorities stand behind them. This may be in part because students of populism fall into the analytical trap of treating elections as a provenance of democracy, rather than as rule of law exercises. Unwittingly, some have lent credence to the populist trick of pitting the two against one another, thus further propagating the majoritarian legitimacy fallacy. But as democracy's diligent students must surely know, government by the people needs the rule of law for majorities to form and express their will *credibly*. And rule of law needs democracy to ensure the legitimacy of legislation, lest it deteriorate into rule *by* law.

We turn to examine the majoritarian prerogative in more detail below, but first address another important puzzle: why do *backsliding* regimes continue to pursue legitimacy through the ballot?

2. Legitimacy matters: why bother with elections?

Although most scholars classify Hungary under Fidesz and Poland under PiS as 'midrange' regimes, neither case is an ideal-type stand-in for an 'electoral democracy', 'electoral autocracy' or 'hybrid regime'.⁸ Differences between them notwithstanding, they are a category of their own on at least three counts.⁹ First, both countries were until recently recognised as consolidated democracies: i.e. they are *backsliders*, as evidenced by their tumble across the leading indices.¹⁰ Second, unlike some other national populists in power, Orbán and Kaczyński have successfully *captured* key institutions. Finally, third, they not only made it to office, but scored *repeated* victories over several cycles, continuing to pursue legitimacy through the ballot.¹¹ Why?

Orbán and Kaczyński's penchant for 'ballot legitimacy' has received limited attention in the literature. Authors generally ask why *autocrats* rather than *backsliders* bother holding elections (Gerschewski 2018, Higashijima 2022, Geddes et al. 2018, Seeberg 2018). In the context of democracy renegades, however, it is important to ask: to what extent and how do they

⁸ For an overview of the concepts, see Bogaards (2009).

⁹ There were considerable differences between the two regimes: in Hungary, Fidesz controls a constitutional majority; there is an established oligarchy that draws direct benefits from the regime; the opposition is weak and largely ineffective; and independent media are considerably marginalized. In Poland, PiS was structurally restricted by its inability to govern alone and relied on coalition partners to maintain a majority; although some PiS loyalists were enriching themselves thanks to public spending, oligarchy was not thought to be a feature of the system; opposition was constrained, but not powerless; despite the capture of the public broadcaster and dominance of pro-government outlets, external balance remained in place on the Polish media market.

¹⁰ See Freedom House Democracy Index reports and rankings and Varieties of Democracy reports.

¹¹ How much value they attach to legitimacy can be derived from the fact that in 2022 'fake' Polish election observers were deployed in Hungary to counter the findings of OSCE/ODIHR monitors (Mężyński 2022).

manufacture the majorities behind their dual legitimacy claims? Before answering, we must first examine why legitimacy matters to them and probe its relationship to rule of law backsliding.

First, there is the ‘geopolitics of democracy’: the international context demands adherence to democratic norms. Both countries are members of the EU and NATO, where democracy is a prerequisite. Ideational motivations apart, material legacies of their (institutional) ‘return to Europe’ are obvious: structural funds, access to the single market and the security of the U.S. nuclear umbrella. While the literature expects western ‘linkage’ and its potential ‘leverage’ to encourage a pro-democratic drift, they could also be expected to shed light on why the pair *fake* democracy rather than consolidate its slide (Levitsky and Way 2010, 2020). Both governments have continued to project an external identity of modern European democracies: indeed, of more *wholesome* democracies of an unqualified or illiberal kind.

Second, overtly parting with democracy would be costly domestically.¹² Although western liberalism has numerous critics, neither Hungarians nor Poles want to part with the freedom to choose. Their modern national identity was borne out of a struggle for *self-determination* at the intersection of sovereignty and democracy. Equally, they espouse continued membership in and soberly understand the risks of falling foul of NATO and the EU (Clancy 2022). Moreover, many loyalists and party rank-and-file genuinely believe that the two forces represent the true face of democracy, untainted by the virus of progressivism. They reject liberalism and cherry-pick from constitutionalism, but embrace the idea of government by the people. They do not so much seek legitimacy as contend that they inadvertently possess it.¹³

Finally, there is the ‘political economy of autocratisation’. Unlike in the past, midrange regimes today can tighten their power grip whilst keeping the veneer of democracy. They are pragmatic and understand the high price of eliciting compliance by force. Instead, they invest generously in capturing institutions and shaping the public sentiment to maintain legitimacy without overt repression. Whether or when the Rubicon may be crossed, as costs of the mirage become untenable, is another matter (Jakab 2020).¹⁴

In sum, the national populists’ craving for legitimacy is multicausal and may be overdetermined. But an important paradox emerges from the above: elections can obfuscate autocratisation. Unrepented majoritarianism ritualises procedural moments, such as voting, to sanction political action whilst ensuring accumulation of power (Schleifer 2000). So although we normally treat elections as master cogs in ‘virtuous circles’ of output/input legitimation, they are no less central to the ‘vicious cycle’ logic of *tacit* backsliding. While we expect them to facilitate the social choice of democratic governance, they can equally serve to legitimise autocratic slide.

¹² See e.g. the Latana *Democracy Perceptions Index* (DPI) for 2022.

¹³ Ambiguity about the ultimate intentions of ‘backsliding’ governments has been identified as a strategic tool, alongside polarisation efforts, to foster public support for incumbents (Chiopris et al. 2021).

¹⁴ The third causal factor advanced by Levitsky and Way, organisational capacity, among others to command force, remains untested and may be conceptually underexplored.

3. Elections in Hungary and Poland

To understand Fidesz and PiS's repeated electoral successes, we turn to examine the methods they used to sway the processes in their favour during their terms in power.¹⁵ We focus on elections held after they arrived in office, specifically the national level polls for their respective legislatures and the head of the Polish state. This is because these ballots are ultimately the key sources of legitimacy for the two governments and are most intimately linked to backsliding.

Challenges to the integrity of elections that took place on Fidesz and PiS's watch are grouped below into five different areas – campaigning; media; political and campaign finance; election law and administration; and electoral justice. This is preceded by a brief discussion of the context, or general background within which voting takes place. It is not an exhaustive list, but includes the most significant parts of the process that also subsume several key ancillary aspects.

3.1 The context

Before listing the tools that the two parties used to remain in power, we must illuminate the context within which the successive ballots were held. This can be understood as (1) baseline conditions, which have at times been favourable to incumbent entrenchment, or (2) periods in the cycle between elections, but outside the (legally defined) election period proper.

With regard to the first understanding of context, topical social science debates have been dominated by the question whether strongmen popularity is better explained by socio-economic or cultural factors. As we can see in Hungary and Poland, both types of prerequisites were in place and can help to at least in part illuminate what brought and *kept* populists in power.

Although both countries are recognised as economic success stories, the uneven distribution of growing wealth and mounting resentment nursed by the 'losers' of post-Communist transitions are widely recognised in the literature (Ghodsee and Orenstein 2021, Stanley 2017). Coupled with unequal regional preconditions – e.g. poor state of infrastructure in eastern as compared to western Poland – these factors are said to have fed societal dissatisfaction with the dominant (neo)liberal approach to economic governance, and ultimately also fuelled polarization.

On the cultural front, the 2015 migration crisis gave rise to concerns previously unknown in the region (Bernhard 2021). Whether fears of a prospective influx of foreigners can be treated as strictly cultural rather than economic is debatable. But voters took the populist bait. Germany's supposed *Willkommenskultur* and role in shaping the EU system of 'solidarity' and burden-sharing were viewed with suspicion, especially because migration was an integral part of the *acquis communautaire* adopted wholesale by the new Member States (Krastev 2017). The sense that as recent entrants neither country was at the table when the Dublin regime was crafted allowed the increasingly EU-sceptic populists to hijack the topic for their own electoral benefit.

Other factors contributed to fertilising the East Central European terrain for populism. The region's postwar societies are homogenous, with a strong sense of ethnonational or cultural identity, which in light of the 'shock' of socioeconomic transformation and growing inequalities

¹⁵ On Fidesz's watch, parliamentary elections were held in 2014, 2018 and 2022. Since PiS came to power, legislative ballots were held in 2019 and 2023, and a presidential in 2020. Local elections were held in Hungary in 2010, 2014 and 2019, and in Poland in 2018. European elections took place in 2014 and 2019.

has hardly had the opportunity to give way to a more civic kind of a ‘we-feeling’. Visa-free travel and experience of living in the west afforded the Hungarians and Poles a taste of western multiculturalism, but rather than bask in its ideational appeal, many discovered segregation and inequality first hand (Kelemen 2020). Given that most East Central Europeans working abroad compete for jobs and benefits with other migrant groups, their experiences may have at times resulted in attitudes less embracing of multiculturalism (Fox 2013, Blachnicka-Ciacek and Budginaite-Mackine 2022, Sime et al. 2022).

After they arrived in office, several exogenous factors helped the two parties’ popularity. The Covid-19 pandemic forged an environment susceptible to executive aggrandisement under the conditions of exceptional situation regimes (Petrov 2020, Guasti 2020). Poland’s PiS initially benefitted from the war in Ukraine, which provided it an opportune *laissez-passer* internationally. While Orbán has been a spoiler when it came to sanctioning Russia, Fidesz was able to skilfully narrate the crisis to look the part of an able manager. Although galloping inflation and cost-of-living crisis gave the opposition hope that pro-regime voters could soon begin feeling short-changed, many Hungarians and Poles preferred to stick with the devil they know.¹⁶

In sum, stars have aligned for national populists in the region. This is not to second-guess their agency, but acknowledge the import of factors that Orbán and Kaczyński could instrumentalise to ascend to and then also *remain* in office. With a view to the second understanding of context, we now turn to examine the ways in which Fidesz and PiS exploited their power to curate reality and take advantage of weak institutions to entrench their rule: both during election periods and between election cycles more broadly (Carothers and Hartnett 2024).

3.2 The campaign

The line between context and campaigning is thin in both cases. The two parties entered a permanent campaign mode as soon as they came into office. They became master narrators of the general environment. They set agendas and enjoyed greater opportunities to get their ‘truths’ across. They co-constitutively shaped and benefited from the political ecosystem.

But rhetoric was only one part of their strategies. In their quest to game the process, they took advantage of weak institutions, including campaign regulations, tinkering with the rules to their particular benefit. They deployed tactics that maximise their strengths, but also abused their incumbency positions. They mixed measures that break domestic laws, go against international election standards, are unethical or merely objectionable, with those that are acceptable and commonplace in a democratic process. It is this potent *mélange* that served to obscure the totality of their challenge to the integrity of Hungarian and Polish election campaigns.

In both countries, access to fundamental freedoms necessary for political campaigning is constitutionally protected and given expression through law. But the latter includes shortcomings that facilitated the abuses – deficiencies that predate the national populists’ ascendance. For instance, neither country had robust safeguards in place against the misuse of administrative resources by incumbents, despite long-standing recommendations by

¹⁶ While Fidesz continued to increase its support with each consecutive election, PiS lost some voters in 2023.

international bodies.¹⁷ Neither third-party campaigning nor political issue advertising are addressed in the law, with both actors unashamedly exploiting these loopholes.¹⁸

Poor equal rights and anti-discrimination protections allowed the pair and their cohorts to greatly increase the temperature of the rhetoric aimed at more radical voters. Where provisions are on the books, weak enforcement has helped to normalise intolerant speech, directed first against migrants, then also other minorities, including the LGBT community.¹⁹ At different junctions, the two parties moved against women that do not conform to traditional roles. Unsurprisingly, in both Hungary and Poland, election campaigns have become akin to festivals of anti-liberalism.

The rhetoric they deployed before elections has been carefully segmented, with messaging tailored to optimise appeal to particular social subgroups.²⁰ More extreme speech was directed at hard-core supporters. But it also aimed at maximising hyper-partisanship, leaving no room for a compromise. In a ‘you are with us or against us’ fashion, both parties dubbed the opposition as ‘total’, thus fanning fiery polarisation. Rather than see them as competitors, they treated their opponents as enemies to be delegitimised or better yet destroyed.²¹

Mainstream electorate has been mostly addressed in a more temperate tone. Rhetoric is often moderated before elections, even if radical messages continued to be sent to placate the core voters.²² But even when less extreme, the narratives aggravate existing cleavages, such as the urban-rural divide.²³ Similarly, the church-state or religious-secular cleft has been manipulated to evoke pro-government sentiments among voters – both with a view to the clergy’s role in the campaign and a skilful instrumentalization of social agendas such as reproductive rights (Minkenberg 2018). Political discourse has been reduced to a zero-sum game, facilitating a winner-takes-all gambit that became the new norm when Fidesz and PiS rose to power.

¹⁷ See OSCE/ODIHR final reports from elections in Hungary and Poland. See also OSCE/ODIHR and Council of Europe, Venice Commission 2017.

¹⁸ PiS amended the law in 2018 to remove sanctions for non-compliance with existing rules for third-party campaigning, thus creating a legal limbo that deterred from certainty and opened the space to abuse.

¹⁹ PiS’s 2015 and Fidesz’s 2018 campaigns were directed against migrants, whereas in 2022 in Hungary and 2019 and 2020 in Poland focus fell on sexual minorities and education.

²⁰ Shortcomings in data protection legislation and enforcement enabled the targeting of voters, as reported by OSCE/ODIHR from respective elections. See also Human Rights Watch 2022. During the 2015 presidential election in Poland, concerns were raised about use of bots by PiS candidate Andrzej Duda’ (Hern 2018).

²¹ See for instance Victor Orbán’s insistence that for true patriots ‘homeland cannot be in opposition’, or his musings about ‘one party state’ and ‘central field of power’ (Bánkuti and Halmai 2012, Seongcheol 2021). In Poland, PiS deployed a *Sanacja*-inspired language to allege a tacit agreement or *układ* between the postcommunist *nomenklatura* and liberals, to the detriment of the common man (Grzymala-Busse 2018). The opposition were regularly presented as traitors. PiS purported the existence of a ‘*ulica I zagranica*’ unholy alliance between the allegedly violence-prone opposition activists and international bodies, whilst at other times making references to the historical experience of *Targowica* as an example of domestic elements’ co-option by foreign powers.

²² Before they entered office in 2010 and 2015 respectively, both parties used electoral messaging to vilify those in power: liberal establishment said to have unjustly benefited from the transition.

²³ During the past thirty-five years, Hungarian and Polish urban areas advanced economically more rapidly than the periphery, especially the small towns. Exploiting resentments felt in secondary cities has served to aggravate domestic antagonisms (O’Dwyer and Stenberg 2022, Bill and Stanley 2020, Scoggins 2020, Pisciotta 2016).

Anti-liberal messages morphed easily into socioeconomic populism. After returning to office, both parties broke with neoliberalism. From welfare schemes, such as the Hungarian Workfare programme and Polish 500+ child benefits, through housing for young families, to tax breaks or pension rises, Fidesz and PiS cultivated reputations for social generosity (Sierakowski 2019, Becker 2019, *The Economist* 2018). Whether these programmes are sustainable should be a matter of informed policy debates, even if some were highly successful, e.g. eradicating child poverty in Poland. Yet, their *direct* (benefit) nature raises the question whether voter support for them can be treated in strictly programmatic or also clientelistic terms (Sata and Karolewski 2020, Markowski 2019).

Beyond substance, procedural aspects of these schemes also raised concerns. Against standards, schemes have often been announced during election campaigns. Though Fidesz normalised the practice of hand-outs known as *rezsicsökkentés* since 2014, it went further during the 2022 campaign to fix prices on utilities and many basic goods. In Poland, infrastructure projects and benefit hikes have been regularly announced shortly before election day.²⁴ The state-owned energy giant Orlen lowered fuel prices ahead of the 2023 ballot. Both governments eagerly advertised their generosity, using state broadcasters to narrate these processes.

Examples of blurring of the line between party and state are aplenty, with well substantiated cases of misuse of public resources.²⁵ Fidesz and PiS government officials used their offices to campaign. They have been particularly creative reaching small and remote communities during campaigns, often with the help of state assets. Government sponsored campaigns, such as the anti-Soros billboards in Hungary or anti-abortion, anti-‘LGBT ideology’ and pro-judicial reform ads in Poland, were launched before elections. Similar state-funded campaigns were conducted ahead of dubious referenda held alongside elections in Hungary in 2022 and Poland in 2023.²⁶

State resources have been used to not only entice, but also to pressure or even threaten groups and/or individual voters. The Hungarian Workfare programme provides low-wage but stable jobs through communal authorities. Eligibility testing is conducted by local officials, with evidence that in some instances the latter have used their leverage to secure votes (Mares and Young 2019b). Vulnerable groups such as the Roma community have been approached with *quid pro quo* promises ahead of elections. Similarly, allegations of outright vote-buying proliferated in Hungary, with national minority voters again serving as prime targets. While in Poland inducements and coercion took more diffuse forms, their operational logic was not dissimilar.

Both Fidesz and PiS also made the campaign environments hostile to other contestants. In 2018, rural voters in Hungary were less likely to attend opposition events, fearing the loss of employment or benefits controlled by local chieftains (Scheppele 2022b, OSCE/ODIHR 2018). In 2019, observers of the Office for Democratic Institutions and Human Rights (ODIHR) of the Organization for Security and Cooperation in Europe (OSCE) learned that some small businesses

²⁴ For instance, PiS politicians inaugurated the construction of a strategic waterway to the Baltic Sea on the eve of local elections in 2018 (Nowy Dwór Gdański 2018). See also OSCE/ODIHR 2023.

²⁵ See OSCE/ODIHR election observation missions report from respective elections in Hungary and Poland.

²⁶ In 2022, the Hungarian government ran a lavish campaign in support of the dubious referendum it organised alongside the elections, which ubiquitously overlapped with Fidesz materials (Magyar and Madlovics 2022).

in Poland were unwilling to display opposition posters for similar reasons (2022).²⁷ In both countries, some parties reported difficulties renting venues for events or purchasing spaces for ads (OSCE/ODIHR 2019, 2022). The disparity in the number of billboards displayed before the 2022 Hungarian elections reached a comical proportion. What was less a laughing matter is that some providers made spaces available only to Fidesz. In 2021, a foreign NGO revealed that PiS used state-procured software to eavesdrop on opposition politicians, including during elections (Woźniak 2021). With a probe ongoing, it is clear that these violations went beyond the tilting of the playing field.

In sum, there can be no doubt that both parties are strong campaigners. At the same time, the law has not always been conducive to fair contests and abuse of office, down to documented cases of direct vote-buying in Hungary. The disparity between the means and visibility of the ruling and opposition parties' campaigns posed a fundamental question about the equality of opportunity for candidates. But the rise of the fear factor, complete with evidenced cases of pressure and intimidation, has cast a much longer shadow over recent campaigns, suggesting that at stakes were not merely the principle of equality, but also of liberty.

3.3 Media

The story of a tilted playing field is incomplete without illuminating the role of the media. After 1989, both Hungary and Poland developed pluralistic media environments, with an abundance of outlets offering diverse viewpoints. Naturally, the Hungarian market, though initially vibrant, is much smaller and was less diverse than the Polish, which has been largely viewed as a transformation success story. It may be unsurprising, therefore, that the capture of the Hungarian media landscape proceeded more linearly and was more far-reaching than the Polish.

Those differences notwithstanding, the process by which Fidesz and PiS conquered the respective media terrains was similar, confirming their playbook-like efforts to capture the political narrative. First, they moved against the public broadcasters, as the supposed hotbeds of liberal bias. They reigned in *Magyar Televízió* (MTV) and *Telewizja Polska* (TVP) respectively, transforming them into propaganda mouthpieces.²⁸ As Orbán before, Kaczyński installed a loyalist and notorious propagandist as TVP chairperson, in direct violation of the Council of Europe Parliamentary Assembly's resolution that stipulates that senior management positions in public media be held by professionals without a clear political affiliation.²⁹ The state broadcasters' volatile funding situations and government largesse helped ease the takeovers.³⁰

The crudeness of the national outlets' news and political programming speaks for itself. Both entered a perpetual state of *politicking*, elaborating winning narratives well in advance of the next election. The ruling parties received the bulk of their attention: invariably praise with no critical commentary. The opposition, meanwhile, has been vilified or humiliated at every turn.

²⁷ Compromising recordings of private conversations among PO-government figureheads leaked to the media a year before the 2015 elections. Some commentators alleged PiS and foreign interference (Rzeczkowski 2019).

²⁸ Similar fate awaited the respective public radio broadcasters.

²⁹ See Paragraph 8.20 of the 2008 Parliamentary Assembly of the Council of Europe (PACE) Resolution 1636.

³⁰ The PiS-led government rewarded TVP with a budget of PLN 2 billion (EUR 425 million) in 2020, increased to PLN 2.7 billion (EUR 575 million) for election year 2023.

The capture of oversight institutions has been no less comprehensive. In Hungary, the National Media and Info-Communications Authority (NMHH) was founded and packed with loyalists within months of Fidesz's 2010 victory (Bankuti et al. 2015). In Poland, where PiS campaigned ahead of the 2015 elections on a promise to reshape the media landscape, the incoming government amended the Broadcasting Act to create a new National Media Council comprising hyper-partisan yea-sayers. Shadowing the existing National Broadcasting Council, the new body was tasked with appointing new managers across all national and regional outlets – a decision the Constitutional Court struck down as unconstitutional before it too was captured.

The story of subordination of private outlets is not dissimilar. Growing media market polarisation was apparent in both countries even before the two parties arrived in office. In Hungary, Orbán practically blackmailed the liberal private media, which he blamed for his defeat in 2002, to either adopt pro-government agendas or be subsumed by competition (Bátorfy and Urbán 2020). And indeed, by mid-2017 some 90 percent of outlets were in pro-Fidesz' hands. The government took control of remaining local print outlets ahead of the 2018 elections. Most independent media have either closed down or been significantly weakened since.³¹

The situation in Poland was less extreme, but the pace of capture similarly steadfast. Apart from TVP, two private outlets enjoyed considerable viewership, including the liberal-leaning U.S.-owned TVN and more neutral Polsat owned by Polish interests. In 2021, PiS moved to limit ownership of electronic media by entities from outside the European Economic Area. Although the plan was ultimately foiled by a presidential veto when Duda came under international pressure, the debacle did ultimately precipitate the collapse of the ruling coalition.³²

PiS has been no less attentive to the print media market. In early 2021, Orlen bought – or 'liberated', as the state giant's PiS-appointed CEO put it – Polska Press group from its German owner, thus taking control of some 20 regional dailies, 50 weeklies and Internet portals totalling some 16 million users. These papers have limited circulation, but remain a vital source of information for older voters, especially outside the urban areas. Meanwhile, independent titles faced growing obstacles obtaining and reporting information, which further challenged their public service relevance (OSCE/ODIHR 2019, 2020).³³

Effects of the above on Hungarian outlets' independence was significant, as reflected in several indices.³⁴ Private media were barred from selling political ads before the 2014 ballot, which deprived them of a revenue stream and the opposition of opportunities to make up for limited airtime. Taking advantage of print media's struggles in the Internet age, Fidesz made going even tougher by distorting the advertising market: first, by turning the state into the main customer

³¹ By 2020, the most popular independent website *Index* was taken over by an Orbán ally who fired the chief editor, with most of its journalists resigning in protest. In 2021, oppositional *Klubradio* was taken off air.

³² TVN's 24-hour news channel later faced obstacles renewing its license. In both countries, authorities also used technological change (pertaining to terrestrial reception) to marginalise independent channels.

³³ Although Agora Group, PiS's favourite enemy, continued to print the second most widely-read paper, *Gazeta Wyborcza*, the closing media space gave rise to concerns about its ability to maintain readership (Kalan 2021).

³⁴ In 2010, Freedom House's press freedom index ranked Hungary's media as the world's 40th most free. In 2021, it dropped to 92nd place. See the Freedom House media freedom reports.

and then by taking business to pro-Fidesz outlets (Bátorfy and Urbán 2020). Those that dared not to toe the line soon learned that dissent has no place on the Hungarian media market.³⁵

State institutions and companies also became important ad market customers in Poland. Their purchases have been vital to sustaining most of the leading right-wing titles. According to one study, state enterprises spent PLN 5.8 billion on advertising between 2016 and 2020, with most of this sum benefiting pro-government media (Kowalski 2022). Loyal outlets were rewarded with subscriptions from state entities. While some private electronic and print media remained competitive, they were greatly weakened by the state's uneven hand on the ad market.

The consequences of extreme media polarisation have been crippling for democracy in both countries. Although airtime and coverage tone rarely translate into political support 1:1, the level of bias displayed by public and private outlets has been confounding, especially during elections.³⁶ Before the 2022 ballot, Hungarian media dedicated a vast amount of airtime and editorial effort to trumping up support for the referendum taking place alongside the 3 April vote. Legal uncertainty surrounding campaigning rules allowed Fidesz to exploit the media space for its own benefit.³⁷ Poland's PiS took the cue and organised a similar effort in 2023.

3.4 Political and campaign finance

The party and campaign financing model adopted across the region prioritises state funds. Intended as mixed systems, in the absence of private donors, they resulted in political parties highly dependent on state support. While this is thought to normally inhibit civic engagement through giving, the formula has admittedly helped stabilise East Central Europe's party systems. But under the conditions of state capture, it also enabled unequal political competition.

Beyond subsidies, the two governments have also exploited loopholes and neutralised their respective regulatory systems, including by subverting oversight. Both countries enjoy weak protections against the misuse of resources, thus enabling a tilted playing field. Although income must be disclosed, this is not timely and other aspects remain opaque. There are no interim reporting obligations, i.e. no light is shone on the role of money in elections *before* voters head to the polls. Crucially, third-party and political issue campaigning remain largely unregulated.

The capture of the Hungarian State Audit Office allowed Fidesz to further instrumentalise the system for its particular ends.³⁸ New political parties mushroomed before elections, either with

³⁵ Lajos Simciska, media owner ranked by Influence Barometer the third most influential person in Hungary in 2014, was excluded from public contracts after he insulted PM Orbán on air in 2015 (Pethő and Szabó 2019).

³⁶ Ahead of the 2022 vote in Hungary, the united opposition candidate Péter Márki-Zay received the legal minimum five minutes of airtime on MTV. Meanwhile, Orbán's 15 March speech was broadcast nine times within 24-hours. Shortly after the (first) presidential debate before Poland's 2020 election, the incumbent President Duda was interviewed at length by TVP, while his opponent was accorded only ridicule. The (second) debate disintegrated into a farce, whereby the two contestants appeared separately next to empty lecterns: the incumbent on the state TVP and his challenger on the independent TVN. See OSCE/ODIHR final reports from election activities for detailed media monitoring data.

³⁷ The Supreme Court has ruled that state-paid ads depicting suggestive consequences of a referendum 'no' vote did not constitute political advertising. Meanwhile, the NEC barred Amnesty International from disseminating messages inviting voters to invalidate their referendum ballots.

³⁸ Headed by the former deputy leader of the Fidesz faction, the SAO identified irregularities in the financing of three oppositional entities in its 2014 audit; the 2018 audit revealed issues in the financing of four parties.

the aim of siphoning state support or diluting the pro-opposition vote. Rules on repayment by parties that do not reach the threshold have not been diligently applied. Meanwhile, the opposition were penalised for relatively minor errors in their reports. Lack of independent oversight and biased enforcement have further narrowed the opportunities for redress.³⁹

The effects of the above have been dramatic: Fidesz spent eight times more than the opposition on the 2022 campaign.⁴⁰ The disparity in visibility was colossal, with the ruling party putting up some 12,171 and the opposition a mere 1,564 billboards. Third-party outfits such as Megafon, an NGO that popularises conservative viewpoints, ran pro-Fidesz campaigns worth HUF 1 billion (EUR 2.7 million) since it was launched in 2020 – thanks to recent amendments, most of these funds came from public subsidies. Meanwhile, state support for political parties was halved as part of cuts necessitated by the Covid pandemic – a move that hit the opposition hardest.

The situation in Poland was similarly concerning. OSCE/ODIHR observers praised Warsaw for implementing several recommendations by Group of States Against Corruption (GRECO) during the cycle before 2015, but some shortcomings remained, e.g. the non-monetisation of in-kind donations. Crucially, ‘draconian’ penalties were kept on the books, with perpetrators of relatively minor errors liable to lose state funding (Stankiewicz 2016). Enforcement has been uneven, detracting from certainty and giving rise to allegations of politicisation.⁴¹ As in Hungary, those seeking justice were left wanting.⁴²

More recently, the legal framework was amended to tilt the playing field yet more steeply. Before the 2020 presidential election, *Sejm* passed a law establishing different expenditure limits for election committees formed before and after the foreseen 10 May vote that never took place. This occurred when the opposition coalition, which refused to participate in the sham postal ballot, announced that it will stand after all. In effect, the incumbent President Duda could spend twice as much as the opposition candidate Rafał Trzaskowski. Ahead of the 2023 elections, large sums of money were channelled through the state Justice Fund (*Fundusz Sprawiedliwości*) to be spent on shadow campaigns and handouts to voters in select constituencies.⁴³

3.5 Election law and administration

The legal framework and election administration, including the processes of voter and candidate registration, are the most complex areas where the two parties removed important safeguards for fair and free ballots, thus granting themselves undue and most insidious advantage.

³⁹ For instance, the Constitutional Court overturned the Supreme Court’s decision that government notices sent to voters, which criticised the opposition’s views on the war in Ukraine, were a breach of the neutrality principle.

⁴⁰ The total sum spent by the state on the referendum and by Fidesz on its campaign ads was severalfold over the spending limit (Transparency International Hungary 2022, *Hungary Today* 2022).

⁴¹ For instance, after the 2015 elections, the liberal *Nowoczesna* lost its state subsidy because of an administrative error when transferring funds. Meanwhile, the hard-right *Konfederacja* was never sanctioned after it was found to have submitted erroneous reports in 2020.

⁴² The NEC lacks competence and could only forward grievances to enforcement agencies to address them after the elections, to the detriment of the voter who was not able to make an informed choice on election day.

⁴³ The extent of misuse of resources by PiS during the 2023 campaign was coming to light during this drafting. The packing of the Supreme Court with loyalists allowed the party to avoid some of the consequences.

Before Fidesz and PiS came to power, electoral legal frameworks were deemed to be conducive to the conduct of democratic processes.⁴⁴ But observers had identified some shortcomings. In order to stabilise the party system and ensure governability, the Hungarian Constitution foresaw redistribution of ‘lost votes’ among the winners, which could distort representation. Delimitation was neither established in the law nor its review mandated at regular intervals. The election administration appointment procedure provided for a political party cross-check under the conditions of pluralism, but given Fidesz’s supermajority, it soon facilitated capture.

Poland’s PiS won in 2015 at a time when both the election system and election administration were becoming topics of a national debate. Some factions had championed a move to a majoritarian or mixed system, with the incumbent government holding a topical referendum two weeks before election day.⁴⁵ Election administration on both the national and constituency levels were drawn from the judiciary, but while they generally enjoyed public confidence, their professionalism was tainted by a series of tabulation blunders during the 2014 local ballot.⁴⁶

The situation in Hungary deteriorated soon after Fidesz came to power. With its considerable majority, the government moved to amend the Constitution and legal framework overnight. The size of parliament was cut in half and a new method put in place for seat allocation. The ‘governability’ bonus was embellished to give the winning party a greater share of the ‘lost vote’.⁴⁷ The new system would help Fidesz obtain constitutional majority time and again.

Rather than appoint independent experts, the 2013 boundary delimitation was conducted by parliament without respect for voter equality. Described as gerrymandering, the process diluted the voting power of more progressive urban centres by joining them with conservative strongholds in the rural areas (Kovács and Vid 2015). Rules for delimiting were also revised to require a two-thirds majority, thus potentially precluding future governments from resetting the system. Beyond substance, Fidesz bypassed the wider consultation procedure – necessary when bills are proposed by a party faction – because amendments were tabled by individual members.

Orbán packed the election administration with loyalists without having to revise the system of appointments. Unsurprisingly, the new National Election Commission (NEC) was widely viewed with suspicion both at home and abroad. The fact that the crosscheck-safeguard only comes into play after elections were called, gave the ruling party a gratuitous advantage in the process.⁴⁸

But changes went further. Voter lists for Hungarians abroad were not published, raising doubts about their integrity. In fact, starting in 2014, out-of-country voters were divided into two groups, with special privileges bestowed upon national minority Hungarians living in the

⁴⁴ See OSCE/ODIHR election observation reports from Hungary (up to 2010) and Poland (up to 2015).

⁴⁵ Admittedly, few concerns were raised about the government’s use state funds on a referendum campaign that in part overlapped with the liberal-conservative Civic Platform’s (PO) bid for re-election.

⁴⁶ OSCE/ODIHR observed the October parliamentary but not the May presidential elections (OSCE/ODIHR 2015).

⁴⁷ Fidesz obtained two-thirds of seats despite receiving less than half the vote in 2014 and 2018 (45% and 49% respectively). The party got 53% of the vote in 2022 (Notz 2018).

⁴⁸ The practice of taking decisions unanimously, with no visible discussion or dissent, including in controversial cases, caught the attention of international observers already in 2014.

neighbouring countries, but not those ‘who voted with their feet’ or were abroad temporarily.⁴⁹ Lack of appropriate safeguards has meant that the out-of-country vote has been misused since.

In 2018, OSCE/ODIHR observers had concluded that the general environment was having an adverse effect on the process. Laws were passed with no consultation, whilst stakeholders questioned the independence and integrity of lower-level election commissions. Questions were also being raised about the electronic tabulation system, which lacked transparency (Budapest Beacon 2018). The system supposedly aimed at empowering national minorities did not meet equality of the vote norms (Unger 2022). Independent civil society came under pressure and in the absence of provisions for observation, stood helpless despite mounting irregularities.

By 2022, standards were violated in unprecedented ways. Election administration became increasingly inefficient and lacked a clear division of competences. Parties that wanted to contest proportional representation seats were obliged to field a higher number of majoritarian candidates – a measure intended to derail the opposition’s unity plans. Relaxed civil registration requirements removed an important safeguard against manipulation of the voter rolls.⁵⁰ A ban on holding referenda alongside elections was lifted shortly before the vote.⁵¹ The referendum law’s shortcomings were so numerous that OSCE/ODIHR observers took the rare step of concluding outright that it would not suffice for the conduct of a democratic process (2022).

As in the past, the out-of-country vote was not subject to meaningful safeguards and predictably handed Fidesz a sizeable bonus. Ballots were delivered to voters in Serbia not by post, but by partisans of the Alliance of Vojvodina Hungarians, once described by Fidesz as a ‘strategic partner’ (Press Office of the Prime Minister 2017). Some opposition voters claimed not to have received their ballots, while allegations of fraud, ‘dead souls’ and fictitious addresses were raised by other stakeholders. Stashes of burned postal ballots were found in Romania, leading some to draw comparisons to the 1947 ‘blue ballot’ vote that sealed Hungary’s Communist takeover.

The situation in Poland was only marginally less alarming. In 2019, the PiS government disbanded the election management body drawn from the judiciary and switched to a political crosscheck model starting with the 2020 presidential vote. The new system, which is recommended in settings that lack mutual trust, signalled low confidence and gave the parliamentary majority and office of the President an advantage in appointing commissioners. Furthermore, concerns were raised that new rules for the appointment of precinct commissions could be abused for political favour. As in Hungary, these and other reforms, were neither consulted nor debated, in violation of the spirit of democratic parliamentarism.

There was no review of delimitation before the 2019 or 2023 polls, despite an existing legal obligation and the fact that the previous decade saw an exodus of Poles from rural to urban areas. Given the changes in the structure of the diaspora vote, provisions for the out-of-country

⁴⁹ National minority Hungarians can vote by post, while other out-of-country voters vote at Hungarian consulates.

⁵⁰ Delimitation continued to challenge equality of the vote, with critics calling it plainly of gerrymandering. Fidesz’s overwhelming majority is based on very strong results in the majoritarian races: e.g. in 2022, it won 53% of the vote overall but 83% of the SMC districts (88 of the 106), including 98% of those outside Budapest.

⁵¹ The move aimed to fire-up public opinion with a controversial issue of sexual education in schools, but also to allow the government to run a parallel state-funded campaign.

vote started to prove contentious.⁵² Despite a growing interest in participation, no effort was made to facilitate a wider franchise. Meanwhile, eligibility criteria for postal voting were made more stringent, thus leading to a greater uptake of proxy voting, with fewer safeguards in place.

The 2020 presidential election proved a backsliding watershed, with PiS attempting to unlawfully hold the vote effectively without oversight. In response to Covid-19, the government declared an extra-constitutional ‘state of epidemic’ that gave it special powers to change the election law swiftly and without debate. Amendments foresaw extending the postal ballot to all voters over 60 and another bill set out to conduct the 10 May election by mail only. While the opposition cried foul, the government moved forward with preparations, among others shifting organisational responsibility from the formally independent NEC to the Minister of State Assets. The vote was finally called off in light of rising dissent, with a new date only set a month later.⁵³

In the run up to the 2023 parliamentary vote, PiS formed the State Committee for Examination of Russian Influence on Poland’s internal security, as a thinly veiled attempt to publicly discredit the opposition leader Donald Tusk and potentially bar him from standing for office – the latter provisions were only amended owing to external pressure.⁵⁴ The number of voters per election precinct was lowered, resulting in the formation of close to 4,000 new polling stations, mostly in rural areas that generally favour the ruling party. Meanwhile, centralisation of the voter register eliminated the possibility of public scrutiny, thus greatly diminishing transparency.

In sum, tinkering with the legal frameworks and electoral architecture has been a subtle but steady practice in both countries. As a rule, amendments were made ‘in the name of democracy’ and in the interest of ‘the people’. They were introduced incrementally, in response to the governing parties’ needs and opportunities at hand, optimising the benefits ahead of each ballot.

3.6 Judiciary

Capture of the judiciary has been at the heart of concerns about rule of law backsliding in Hungary and Poland. Key in this context is the courts’ role in adjudicating electoral disputes. Arrangements in place in the two countries had their shortcomings before Fidesz and PiS arrived in office. Some aspects of elections were not subject to judicial review, and many decisions, be it on the level of the election commissions or the courts, were driven by formalistic rather than substantive considerations. But the last decade marked a considerable regress.

In the case of Hungary, OSCE/ODIHR observers noted in 2014, 2018 and 2022 that complaints were overwhelmingly rejected on technical grounds without consideration. In 2018, amendments were introduced to limit standing to only those directly affected, thus narrowing access to remedy. The Supreme Court argued that fictitious allegations made by Fidesz about the opposition during the campaign were opinions rather than libel. In 2022, meanwhile, the Constitutional Court overturned the Supreme Court’s decision that the government overstepped its mandate when it sent campaign flyers slating the opposition to households across Hungary.

⁵² In the past, Polish diaspora, especially in the U.S., espoused conservative viewpoints. There was now a sizeable community of recent EU freedom of movement migrants who displayed more progressive leanings.

⁵³ The government caved in only after ‘election day’ had passed with no consequence. Legal uncertainty persisted for a month until new date was set for 28 June. The ordeal cost the state some PLN 17 million (EUR 3.6 million).

⁵⁴ On 8 June 2023 the European Commission launched an infringement procedure for violating EU law.

Paradoxically, access to electoral justice in Poland saw a minor improvement after PiS came to power: standing was extended and appeals permitted against the NEC's normative decisions. But positive momentum did not last. Grievances alleging PiS's misuse of state resources in 2019 were never properly investigated. While the assault on judicial independence detracted from effective remedy overall, complaints were regularly dismissed on technicalities.⁵⁵ Finally, the creation of a new Supreme Court chamber charged with validating results gave rise to solemn concerns about the viability of future power transfers (Taborowski and Filipek 2023).⁵⁶

In 2020, observers noted that the Polish system of election dispute resolution had become overly complex, with too many different actors, procedures and deadlines. The 2 June act, which changed the election date following the 10 May fiasco, shortened deadlines, further limiting options for redress. Complaints were binned on technicalities without due consideration – astonishingly, including those lodged before the second round of voting, on grounds that the final results had not yet been announced. As in Hungary, lack of provisions for public hearings at the Supreme Court did not allow for shining much light onto the (mal)functioning of the system.

In neither country has the system of dispute resolution delivered electoral justice. While given other shortcomings, backsliding in this area may seem less dramatic, the imperfect provisions of the yesteryear were further crippled by judicial capture. Compliance with ECtHR and ECJ rulings with electoral relevance had declined in both countries. Key parts of the system have been either weakened or even neutralised, which boded particularly poorly for the eventuality that support for the two parties dwindles: in case of graver violations in the future, some stakeholders feared that existing arrangements would not suffice to safeguard the process. Indeed, topical debates in Poland ahead of the 2023 vote testify to the public's sinking confidence in the election process.

3.7 In synthesis

In light of the above, the Hungarian and Polish national populists' successive electoral victories cannot be taken at face value. The two parties' ability to muster majorities rested on a mix of genuine support, if partly manufactured, and gamed contests. Indeed, Fidesz and PiS have remained popular with the electorate. They are good at selling their ideas and achievements. Rhetorical talents, audience segmentation and skilful manoeuvring across cleavages helped them win over diverse groups of voters. Their successes hinged on their ability to retain the radical core and gain more moderate electors supportive of their welfarist orientation. It is this odd-couple pairing that best explains their continued electoral traction (Halikiopoulou and Vlandas 2022).

Both parties also excelled at devising clientelistic strategies to woo the apolitical voter. The said welfare programming provided recipients with tangible and immediate benefits. Going further, evidence shows that participation in the Hungarian Workfare programme in some cases hinges on reciprocity, with local power brokers determining individual eligibility. These measures have

⁵⁵ This included those filed by PiS loyalists against the opposition, thus showcasing the absence of remedy.

⁵⁶ The new Chamber on Extraordinary Control and Public Affairs was established in December 2017. The Venice Commission expressed concerns that “judges appointed by the [body] dominated by the current political majority would decide on issues of particular importance, including the regularity of elections” (Council of Europe, Venice Commission 2017). OSCE/ODIHR also issued a number of similar opinions (OSCE/ODIHR 2017a, 2017b).

been deployed to target vulnerable groups, including national minorities. While such relationships were more diffuse in Poland, their operational logic is similar.

Furthermore, they curated their respective political environments beyond the ordinary benefits of incumbency. The capture of public media and exercise of informal power to align private outlets – all in the interest of ‘diversifying the landscape’ – are cases in point. Control of the political discourse allowed both governments to benefit from the co-constitution that exists between the power to set agendas and ‘get things done’. Meanwhile, the opposition were pushed into a perpetual defensive. The pair had turned up the heat under social and political cleavages, feeding polarisation and extreme partisanship that dependably mobilise their bases.

Finally and crucially, the two governments moved to incrementally capture the rules of the game and institutionalise their advantages. Among others, changes included electoral system reform in Hungary – some twenty amendments and counting – especially the bonus that assures constitutional majorities; packed commissions; and poor enforcement of political financing rules. State resources were deployed with impunity ahead of every ballot. And finally, the judiciary was subordinated, thus perverting the courts’ role as arbiters, raising grave questions about the credibility of Polish elections’ results certification.⁵⁷

4. Shades of grey: election integrity in the EU

Although they may be the leading transgressors, governments in Hungary and Poland are not the only ones to fiddle with elections. While challenges to ballot integrity are more common among some of the candidate and partner countries, shortcomings prevail across the EU. Distressingly, they may appear to be tolerated in part because they favour the more established political formations.

Among the most common issues is the inadequacy of political finance regulation and oversight. Even in countries hailed for transparency and low perceptions of corruption, legal frameworks and their implementation lag behind international and regional standards. In Germany, party financing is subject to disclosure, but reports are published with considerable delay and oversight is vested with the politicians in parliament. Campaigns are largely financed through industry *Sponsoring* that is exempted from transparency measures. While the stakeholders’ passive consent suggests that the practice is rooted in a warped understanding of corporatism, it leaves voters in the dark and naturally stands to skew the playing field for contestants.

Third-party and political issue campaigning are unregulated in most Member States, with a growing number of actors exploiting these loopholes. In some countries, patronage helps the leading formations maintain their dominance. Allegations of misuse of EU funds to feed the webs of local benefaction are not uncommon in the south, especially rural areas in Spain, Portugal and Greece (Jalali et al. 2012, Gómez and Verge 2012). High rates of employment by municipal governments further facilitate networks of political clientelism (Hopkin 2001, Veenendaal 2019).

⁵⁷ NEC certifies the results in Hungary, thus potentially presenting a similar problem.

Media is another area prone to abuses. Several public broadcasters display partisan bias (Esmark 2014). Concentration of ownership is widespread, with Italy often cited as the original culprit (Richeri et al. 2016). In Malta, political parties own the two main broadsheets outright. Reporters Without Borders found that media pluralism is under attack in several EU Member States, including Greece, Slovakia and the Netherlands (2022). This is not to mention freedom of speech concerns, especially online, and measures that may stifle political commentary, e.g. NETZ.DG legislation in Germany (Canaan 2022). Especially worrying is the sharing and even uploading onto the EU level of some of the poor national practices (Mchangama et al. 2022).⁵⁸

Most routine shortcomings are found in the area of women's and minority participation. Deficits are common across the EU, especially where no special measures exist to support women leaders (Ceciarini 2019). The situation is worse for minority populations, especially immigrants in the first generation (OSCE/ODIHR 2017, Morales and Giugni 2011, Kozłowska 2018).

Finally, many Member States have no provisions for independent election observation by domestic or international observers.⁵⁹ Where the independence of election commissions is not protected through political crosscheck, what happens at a village polling station on voting day, may well stay in that polling station. This obscurity not only flies counter to standards, but suggests shortcomings relative to partners such as Ukraine or Georgia. Importantly, the stability of some political party systems may correlate positively with the leading formations' ability to reproduce their dominance through imperfect election processes or other institutional biases.

Recognising that challenges to the quality of elections in the EU are less uncommon than is often believed raises the question whether Fidesz and PiS are outliers, that is backsliding champions, or merely worse offenders than others? Is election integrity a question of black and white, with transgressors on one side and democrats on the other, or of greyscale continuum?

5. Same but different

Challenges to election integrity have been grave in Hungary and only marginally less so in Poland. But even if we treat the region's former democratic frontrunners as cases apart from the rest of their EU brethren, how do we best categorise their offences? Are they examples of incumbent entrenchment that exploits advantages in systems that ultimately remain open to contestation? After all, the opposition can and do compete – and indeed win elections, as evidenced in Poland in October 2023. Or do they reflect institutional capture-creep: incremental yet unmistakable push to ensure dependable outcomes despite the semblance of a democratic choice?

The literature has termed elections in the two countries 'competitive but unfair'. As seen above, however, this does not accurately depict the ballots held in Hungary under Fidesz and Poland under PiS. Access to freedoms was curtailed, with the opposition enjoying fewer voice opportunities, which in turn diminished the voters' right to make informed, autonomous and

⁵⁸ Long standing issues such as criminalisation of defamation and/or insult persist in most Member States (Griffen 2015, 2017). Among the worst offenders, Germany sends close to a thousand people to prison on insult or defamation charges annually. See detailed figures from the *Statistisches Bundesamt*.

⁵⁹ OSCE participating States committed themselves a peer review of election processes (OSCE 1990).

ultimately free decisions. Nor have irregularities been limited to pre-election periods alone. Although to differing degrees, electorates in both countries have been largely living in ‘rigged realities’ between election cycles too, where organic social cleavages were mobilised to serve as crude tribal divides. The winner-takes-all heists reduced democracy to majoritarian claims that treated opponents not as competitors, but as traitors or outcasts from the political community.

In neither country have national populists parted with legality to game elections. But their legalism is better described as autocratic: the law was used to neutralise democratic institutions, including election processes (Scheppelle 2018). They preserved the veneer of the rule of law, respect for fundamental freedoms and democracy, but stripped them of their meaning. Rather than genuine rule of law – where law limits arbitrary power, treats all equally and its passage respects parliamentarism – what we saw in Hungary and Poland under Fidesz and PiS is more akin to rule *by* law: a system in which rules and norms bind unevenly and without legitimacy.

Despite the similarities, it is no less important to take note of differences between the two cases. Ultimately, challenges were more profound in Hungary than in Poland. If ‘uncertainty of outcome’ is the basic test of their credibility, elections in Poland saw a more genuine opportunity for the opposition to eject PiS from office. In Hungary, more complete capture and thorough control of the political environment diminished the likelihood of political change through the ballot. In other words, on the axis between ‘democratic governance’ and ‘autocratic legitimation’, elections in Poland edged slightly towards the former and in Hungary the latter.

Conclusion: entrenchment or capture?

With a view to the above, three factors can help us establish whether capture-creep appropriately describes elections under Fidesz in Hungary and PiS in Poland. They include: the cumulative rather than particular effects of the incremental steps enumerated above; their moderate and non-spectacular yet decisive impact; and elimination of safeguards that stands to leave the process disempowered against bolder attempts to steal the ballot in the future.

None of the individual factors above constitute capture. But selective borrowing of practices from other contexts or committing isolated misdeeds belies a grander totality of challenges. Together and over time, measures deployed by the two parties afforded them unparalleled advantages, drastically lowering the opposition’s chances of electoral success. The fact that the latter did well in some contests obscures the fact that these were gamed. The playing field was tilted to the incumbency’s crushing advantage. While elections in the two countries have been described as *unfair*, the level of pernicious manipulation and use of intimidation suggest that we must also ask if they were not *unfree*. Yet, there was no single crossing of the Rubicon, only the collective bleeding out from many small stabs, as in democracy’s death by a thousand cuts.

Nor were the immediate effects of these measures dramatic or at times even obvious. There has been little in the way of crude fraud to point to. While Fidesz’s majorities are arresting, they have been primarily the products of a constitutional design flaw, cleverly further perverted by Orbán’s machinations. In Poland, PiS’s victories were significant but not confounding, reflecting

the logic of a stealth assault on democracy.⁶⁰ As Nancy Bermeo put it, “slow slides towards authoritarianism often lack both the bright spark that ignites an effective call to action and the opposition and movement leaders who can voice a clarion call” (2016). No post-Soviet style wins upwards of the eightieth percentile have been necessary for populist winners to take it all.

Finally, the removal of safeguards for democratic elections after Fidesz and PiS took charge has been a cause for concern for the future. Although held at regular intervals, elections, like other democratic institutions, have become increasingly devoid of honest competition. Systems designed to protect the vote, safeguard equal opportunity for contestants, ensure access to fundamental freedoms and counter coercion or undue enticements, were neutralised, thus opening the space for further creeping institutional takeovers.

Assuming Jan-Werner Müller’s definition of capture, we can conclude that because national populists like Orbán and Kaczyński targeted the weak institutional elements of the process that stood in the way of their victory, their efforts constituted more than attempts to entrench their incumbency (2014). The consistent trajectory of challenges they posed to the integrity of elections suggests they represented a concerted capture-creep. Sceptics may quote observer reports that deem ballots in Hungary and Poland efficiently administered and inclusive of a plurality of political options. They may claim that they failed to meet some standards but passed an imperfect, or indeed, a mere ‘electoral’ democracy litmus test. But this view is illusory.

The Hungarian and Polish opposition faced election processes that were not only deeply unfair, but also not fully free. They have been pushed on the defensive and onto the margins of the political space. Rather than contest power through ideas, the liberal have been cornered into focusing on democracy proper. But the national populist ‘backsliders’ perverted its understanding, framing the central struggle as one between the people’s will and elite attempts to stymie majority decisions. While good democrats pushed back against these efforts to legitimise illiberal projects through the ballot (Abrams 2022), they too have at times unwittingly conceded that the two parties command majorities. But as seen above, the latter’s repeated victories were a red herring. What we witnessed in both countries was ultimately not only a successful instrumentalization of ‘unqualified’ democracy to placate the rule of law, but also the deployment of bastardised rule *by law* to hollow democracy of its very core: the popular choice.

⁶⁰ In 2015, PiS won 37% of the vote (on a 51% turnout); in 2019, 44% (62% turnout) and in 2023, 34% (74% turnout). Presidential election results were much tighter: in the second round in 2015 Duda took 52% and Komorowski 48%. In the second round of the 2020 race, Duda scored 51% and Trzaskowski 49%.

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