**Study Group - The Democracy Crisis in Europe and the US: A Comparative Perspective**

**“Illiberal Governance” and the Attack on Judicial Independence**

An independent judiciary is one of the most important institutions of liberal democracy. An independent, impartial judiciary recognizes and protects democratic freedoms and rights including rights to freedom of expression and freedom of assembly, as well as rights to nondiscrimination on the basis of race or ethnicity. It also acts as a check on executive and legislative power. Undermining the independence and authority of the judiciary was a key tactic used by political leaders in Hungary, Poland, Russia, and Turkey to consolidate centralized power and build an illiberal state. In particular, governments in these countries have sought to gain political control of the highest courts responsible for legislative review in order to push forward their legislative agendas and undermine liberal democratic institutions.

**Hungary**

In Hungary, Viktor Orban’s government has weakened the independence of the judiciary through constitutional changes. Orban’s Fidesz party won a two-thirds majority in the 2010 general elections, enabling it to form the first non-coalition government in Hungary’s post-communist history with sufficient power in parliament to unilaterally amend the constitution. Fidesz has used its parliamentary supermajority to make structural changes undermining the independence of the Constitutional Court.

The new “Fidesz” constitution that came into effect in 2012 made several important changes to Hungary’s judicial system that weakened the political independence of the Constitutional Court and lower courts. The amended constitution proclaimed Hungary’s 1949 constitution “invalid”, and annulled all acts of state made under the old constitution prior to January 1, 2012. In a 2013 opinion on Hungary’s amended constitution, the Venice Commission of the Council of Europe expressed concern that this amendment posed a threat to the rule of law in Hungary, noting the annulment “may also be used as an argument for ignoring the rich case law of the Hungarian Constitutional Court which...has played an important role in Hungary’s development towards a democratic state governed by the rule of law.”[[1]](#footnote-1)

The new Hungarian constitution increased the number of judges on the Constitutional Court from 11 to 15, lowered the mandatory retirement age of judges sitting on the court, and changed the rules for appointing judges. Under the amended constitution, Constitutional Court judges are nominated by a committee of parliamentarians with the number of members from each party proportionate to the party’s total number of members of parliament, and elected by a two-thirds majority of parliament. Previously, the nominating committee consisted of an equal number of members from each party represented in parliament. Under the amended constitution Fidesz, as the governing party, is now able to nominate and elect judges to the Constitutional Court without any support from opposition parties. Furthermore, the Chief Justice of the Constitutional Court is now elected by a two-thirds majority of Parliament rather than by the Constitutional Court justices themselves. Fidesz has used these constitutional changes to appoint 11 new judges to the Constitutional Court. A study by Eotvos Karoly Institute found the new appointees voted in favor of the government in a majority of high-profile cases.[[2]](#footnote-2) In 2015 Fidesz lawmakers appointed a Fidesz-loyalist, Barnabás Lenkovics, to serve as the next Chief Justice.[[3]](#footnote-3)

A 2012 constitutional amendment lowered the mandatory retirement age of all judges from 70 to 62 years, enabling Fidesz to replace a significant number of judges. According to the Hungarian secretary of state for justice, 236 judges were forced to retire under this amendment, including eight out of 20 county court presidents, two of five appeals court presidents, and 20 of the 80 justices on Hungary’s Supreme Court.[[4]](#footnote-4) In 2011, Fidesz passed a law establishing a National Judicial Office (NJO) responsible for the central administration of courts, including managing court budgets and the nomination of judges, subject to presidential review, to serve on all courts except for the Constitutional Court. The president of the National Judicial Office is elected to a nine-year term by a two-thirds majority of parliament. The European Commission and the Council of Europe’s Venice Commission both criticized the establishment of the NJO and other reforms to Hungary’s court system as having the potential to compromise judicial independence. A 2012 report by the Venice Commission found that the reforms gave the President of the NJO “extensive”--and often discretionary--powers and insufficient accountability.[[5]](#footnote-5) Among the wide powers criticized by the Venice Commission was the NJO President’s ability to transfer cases between courts. This power was officially described as necessary to improve the efficiency of the judicial process by preventing busier courts from becoming overloaded; however, in practice it has been used to influence the outcome of politically sensitive cases. Princeton University law professor Kim Lane Scheppele pointed out that the president of the NJO first exercised the transfer power to move several high-profile corruption cases involving political party members or public officials out of the Metropolitan Court of Budapest to less-crowded courts in the countryside with judges supportive of the Fidesz government.[[6]](#footnote-6) Following the Venice Commission’s initial report, the Hungarian government announced it would cease the transfer of cases at the constitutional and legislative level beginning in June 2013. The government also amended the process of appointment of judges to require consent of a National Judicial Council, an elected panel of judges, to the candidates proposed by the NJO President.

**Russia**

The relationship between the judicial and political branches of government in Russia has been close since Soviet times, when judges were considered defenders of the interest of the state and functioned more like political officials than neutral arbiters. Under Putin’s presidency, the Russian government has attacked the independence of the judiciary further through legislation undermining the judicial branch’s autonomy and legal authority, in addition to continuing to interfere politically in court decisions and to use criminal and civil courts as a means to suppress critics and opponents of the regime.

As in Hungary, the Russian government has undermined judicial independence by centralizing executive control over the Constitutional Court and key leadership positions in the judiciary. Putin’s government has succeeded to an even greater extent than Orban in transforming the role of the judiciary from a check on executive and legislative power into a tool of political influence. In 2014, the government passed a constitutional amendment that abolished the Supreme Arbitration Court (which handles commercial cases) and transferred its functions to the Supreme Court (which handles criminal and civil cases). The Arbitration Court was generally considered to operate more closely in line with international standards compared with the Supreme Court, which is more susceptible to political pressure.[[7]](#footnote-7) In the process of selecting staff for the new unified Supreme Court, the state agency responsible for confirming recommended candidates rejected those who were known to be allies of the former Supreme Arbitration Court chairman.[[8]](#footnote-8) The amended constitutional law on the Supreme Court also relocated the new unified body from Moscow to St. Petersburg.

A report by the International Commission of Jurists on Russia’s judicial system found that court presidents had “excessive powers” and significant indirect influence over the actions and decisions of judges through their control over distribution of cases, hiring and promotions, allocation of career benefits, and disciplinary systems.[[9]](#footnote-9) Court presidents, including the president of the Constitutional Court since a legal change in 2009, are appointed by the Russian president, and therefore act as a channel of executive influence over the judiciary. In a paper on on legal dualism in Russia, a researcher at the University of Wisconsin-Madison found that a majority of Russians prefer to avoid the law and solve their problems outside of formal channels, both because they expect significant costs and delays when pursuing claims in court and because they perceive the judicial system to be politicized, with judges manipulating or selectively enforcing laws to suit political ends.[[10]](#footnote-10)

One of the most prominent examples of a politically-motivated case under Putin’s leadership is the arrest and imprisonment of Mikhail Khodorkovsky, an oil tycoon who was sentenced to thirteen years in prison in 2003 for stealing oil from his own company and evading taxes after he accused the government of corruption and began funding opposition political parties.

**Turkey**

The Turkish government has undermined the independence of the judiciary and the principle of separation of powers since 2014, with judges and prosecutors subject to ongoing political pressures. The move towards executive control over the judiciary is based on the ruling Justice and Development Party’s (AKP) battle with the Gülen movement, a religious-based organization led by Fethullah Gülen that Erdogan believes to be behind the attempted coup of July 2016. Erdogan has initiated a series of measures that affect the judicial system, including increased executive control in the governing institutions of the judiciary and prosecution service, and the dismissal, arbitrary transfer, and arrest of judges and prosecutors. There have also been recurring incidents of violence and threats against lawyers.[[11]](#footnote-11)

Immediately following the 2016 coup attempt, the Turkish High Council for Judges and Prosecutors suspended a reported 2,745 judges and prosecutors. Hundreds of arrest warrants were issued, which resulted in the arrest of an estimated 755 judges and prosecutors, including two judges of the Constitutional Court.[[12]](#footnote-12) The decisions to arrest and detain judges and prosecutors pending investigation appear to have been made because their names appear on a list of alleged suspects compiled by the government, or based on alleged associations with a terrorist organization and “national security threats.” The Turkish authorities have failed to present evidence in courts to substantiate alleged criminal conduct by the judges and prosecutors who were arrested. A court decision also froze the assets of 3,048 judges and prosecutors under investigation.[[13]](#footnote-13)

Turkey’s parliament has approved a constitutional reform package that would greatly increase the power of the Turkish presidency and erode checks and balances on the executive. It was submitted to the public for a referendum on April 16. The government claimed victory after the “Yes” camp won slightly over 51 percent of votes. The political opposition and a Council of Europe election observation mission have charged that there was electoral misconduct, including voter intimidation and an uneven media playing field for the “No” camp.[[14]](#footnote-14) The constitutional changes will increase executive control over judicial appointments and allow Erdogan to control judicial appointments both from the presidency and from parliament. The existing stipulation that the president must cut links with a political party will be removed, thus providing that the president can be leader of the ruling party in parliament.[[15]](#footnote-15) Billed by the government as a safeguard against political chaos, the constitutional changes would be the most comprehensive overhaul of the state apparatus since the beginning of the Turkish republic. The changes empower Erdogan to handpick his own cabinet, other senior officials and the party’s members of Parliament. They also leave him free to rule uncontested for up to two five-year terms, and under some circumstances beyond that.[[16]](#footnote-16)

**Poland**

Since President Andrzej Duda’s election in 2015, there has been a deepening crisis with regard to the Constitutional Tribunal in Poland. The ruling Law and Justice (PiS) party has appointed five additional judges to the constitutional court and has threatened the head judge with prosecution.[[17]](#footnote-17) As a result, the European Commission has made recommendations urging the Polish government to respect the judgments of the constitutional court, which so far it has refused to implement.[[18]](#footnote-18)

President Duda has routinely refused to swear in lawfully appointed Constitutional Tribunal judges and to publish and implement the Tribunal’s rulings.[[19]](#footnote-19) In response, the European Commission triggered its Rule of Law Framework in January 2016, when the Polish government began to impede the independence of the court. Polish authorities have since refused to take up the Commission’s recommendations, prompting many in the international community to urge the Commission to take enforcement action under Article 7 of the EU treaty.

In December 2016, the PiS effectively took control of the constitutional tribunal. It also brought the end of the term of Andrzej Rzepliński, who was president of the tribunal and strongly resisted the Law and Justice Party’s allegedly unconstitutional moves.[[20]](#footnote-20) Controlled by a PiS majority, the Polish Parliament has adopted a series of legislative changes that affect fundamental aspects of the Constitutional Tribunal’s functioning. These eight pieces of legislation target the role and functioning of the constitutional tribunal, and appear designed to diminish the ability of the court to hold the government to account, and to increase the influence of the government’s own appointees.[[21]](#footnote-21)The European Commission will seek the views of EU member states on whether to take further action against Poland in a dispute over the rule of law that has lasted more than a year.[[22]](#footnote-22)

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