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Constitutional Courts Vulnerability and Resilience

Using examples from the history of constitutional courts to this day, the article categorizes types of attacks aimed at politically streamlining constitutional courts and preventing them from working as obstacles to the accumulation of political power. Insights to be gained from that overview include an awareness that constitutional fortification alone will not do to make constitutional courts resilient, that it takes time for such courts to gain the respect and loyalty which are their safest shields against efforts to make them ineffective in their function as guardian of the constitution, that rushing liberal transformation is likely to result in setbacks, and that in all these respects, institutional design matters.

Keywords: *authentic interpretation – binding force of judgments – constitutional courts – constitutional fortification – court design – court-downsizing – court-packing – invalidation of precedent – majority requirements – masked assaults – resignation – resilience – scope of jurisdiction – systemic impartiality – termination of functions*

I. Introduction

If we look at the history of constitutional courts (including the non-specialised Supreme Courts with the power to review legislation), it appears that for them to be, or to have at some point in their history been, in some way or other, assaulted by political rulers in reaction to or in anticipation of unwelcome decisions is the rule rather than the exception.

In the first part of my article I will present examples of such assaults.¹ In the second part, I will identify – and, partly, answer – some of the questions to which these examples give rise.

II. Assaulting Constitutional Courts

For the most-researched constitutional court in the world, the US Supreme Court, an article published sixty years ago counted 165 “instances of bills designed to curb” it, nine of which made it into law.² To capture the broad spectrum of attacks to which constitutional courts have been or are being exposed, however, we need to look beyond a single country.

¹ This article is not exhaustive, nor is the collection of examples in every respect representative. Examples from Africa, for instance, seem underrepresented. But the research had to stop at some point – there is not even room for all the examples already collected –, and I am not aware of any bias in my selection beyond biases, such as insufficient coverage of certain regions, inherent in the sources of information I have been able to examine.

² NAGEL, Court-Curbing 925f.

1. Terminating a constitutional court's functions

The most effective way to get rid of policy restrictions imposed by an annoying constitutional court is to just terminate its functions.

Assaults on the US Supreme Court, for instance, have included threats to abolish it – altogether or in its capacity as a constitutional court. From 1802 on, various congressional proposals aimed to take away from the Supreme Court its power to review legislation.

In 1933, the Austrian Dollfuss government successfully pressured several members of the Constitutional Court to resign. In combination with a regulation concerning the summons of members to hearings and other sittings (*Besetzungsverordnung*), this brought the court below the quorum of summonable judges required for a decision to be made in most types of cases. As intended, this prevented the court from stopping the dismantling of democracy and the rule of law.³ With Austria's authoritarian corporatist Constitution of 1934, the Court was formally replaced by a Federal Supreme Court, with a constitutional senate competent to review legislative acts and regulations, but not authorized to review the pre-1934 regulations that had effected the transition to authoritarianism.⁴

A similar move – convincing a sufficient number of conservative members of the German Federal Constitutional Court (abbreviated FCC from here on) to resign in order to paralyse the court – was contemplated by the Adenauer government in the early 1950s as one of the options that might prevent a judicial veto against the German ratification of the Treaty on the European Defense Community. This

option was not pursued further when it became clear that the court was united in its resolve to withstand any government pressure.⁵

In the 1990s, constitutional courts were dissolved or suspended or incapacitated by way of removal of all of their judges, for instance, in Peru (dissolution of the Constitutional Guarantees Court for the political purposes of Alberto Fujimori, 1992), in Guatemala (removal of the judges of the Supreme Court and the Constitutional Court decreed by President Jorge Serrano Elías, 1993, but the Constitutional Court ultimately prevailed), in the Russian Federation (suspension in order to terminate interference with Boris Yeltsin's policies, 1993), in Venezuela (dissolution of the Supreme Court in the context of a more general institutional overhaul initiated by the government of Hugo Chavez, 1999), in Côte d'Ivoire in the wake of Robert Guei's 1999 military coup, and in Kazakhstan, where a Constitutional Court that had repeatedly dared to rule against the government of President Nazarbayew was replaced by a Constitutional Chamber of the Supreme Court with reduced competences (1995). The same replacement later occurred with the Constitutional Court of Kyrgyzstan (2010) and, on the basis of a referendum, with the Constitutional Court of the Comoros (2018).⁶ The (self-)incapacitation of the Constitutional Court of Moldova by way of resignation of all of its judges in 2019 and the underlying political pressure for such resignation have a complex background; they may have been self-inflicted in a more than just formal sense, considering the absurdity of preceding behaviour of the court.⁷ In Tunisia, the Provisional Instance competent to review legislation – a body set up according to the Constitution of 2014 for the period until the Constitutional Court to be institutionalized according to that Constitution becomes

³ For the history of this paralysation of the court see HELLER, *Verfassungsgerichtshof* 259ff.; OLECHOWSKI, *Ausschaltung*; PAUSER, *Incapacitation*. The government had promised that those who resigned would later be reappointed to a reformed court; that promise, however, was not kept, see HELLER, *Verfassungsgerichtshof* 261ff.

⁴ PAUSER, *Incapacitation* 12.

⁵ VANBERG, *Politics of Constitutional Review* 72. For an excellent account of the conflict between government and FCC concerning the Treaty cf. also COLLINGS, *Democracy's Guardians* 14ff. (mentioning also a government bulletin insinuating that a ruling against the government in that matter might result in the FCC's end as an institution, *ibid.* 19).

⁶ For all of these cases, sources can easily be found online.

⁷ See TÓTH, *Most Dangerous Branch*.

operative (which never happened) – was dissolved by presidential decree in 2021.⁸ The Provisional Instance seems to have cautiously avoided major political confrontation,⁹ so its dissolution cannot be interpreted as an act of court-curbing in reaction to unwelcome decisions; it took place as part of a more general unconstitutional arrogation of powers by President Kais Saied. When a delegation of the German FCC of which I was part visited the Constitutional Court of Croatia in 2010, our hosts were upset by demands popping up in reaction to one of their judgments (a most plausible one, to my mind) that their court be converted into a chamber of the Supreme Court. In this case, however, the legislature did not follow suit. In Kuwait, members of parliament unsuccessfully called for abolishing the Constitutional Court in 2019, “arguing – *inter alia* – that Parliament was the only institution that reflected the popular will.”¹⁰

2. Making rulings appealable, subjecting them to parliamentary rejection or “authentic” parliamentary interpretation, or reduce their binding force

A means to promote caution in a constitutional court, and a “sanction” that often comes to politicians’ minds when they see a constitutional court as possibly or actually overreaching, is to make its decisions appealable, i.e. to terminate its function as the decisive arbiter of last resort. From the early 19th century on, there have been many proposals to this effect concerning the US Supreme Court.¹¹ In 1821, for instance, Senator R.M. Johnson of Kentucky, probably in reaction to the Supreme Court’s declaring some Kentu-

cky land policy legislation unconstitutional, suggested that the Senate should have “appellate Jurisdiction” in such cases.¹²

Some of the congressional proposals, allowing Congress to simply “repass” legislation declared unconstitutional by the Supreme Court (without having to amend the constitution for that purpose), look like a template for the weaker forms of judicial review known as the “New Commonwealth model of Constitutionalism” introduced more recently in Canada, Australia, New Zealand and the United Kingdom – not as a court-curbing restriction, but as a progression towards some form of judicial control of parliamentary legislation that does not completely abandon the tradition of parliamentary sovereignty.¹³

Elsewhere, by contrast, the parliamentary overriding of constitutional court decisions has been introduced and/or practiced or suggested as a flagrant court-curbing measure in reaction to unwelcome judgments. In Israel, a clause that would have empowered the Knesset to override any decision of the Supreme Court by a simple majority of Knesset members passed a first reading in 2023.¹⁴ Due to mass protests, in combination with the intervening Hamas terror and Gaza conflict, this part of a larger package aiming to control the Supreme Court apparently has not advanced further, so far.

The technical instrument for parliament to overcome or preempt a constitutional court’s case law can be a parliamentary power, either arrogated or explicitly established by the constitution, to interpret the constitution.

This was repeatedly used, for instance, in Tajikistan to void decisions of the Constitutional Court.¹⁵ In Peru, a “Law on the Authentic Interpretation of Article 112 of the Constitution”

⁸ International Commission of Jurists, Attacks on Judges and Prosecutors in Tunisia 17.

⁹ BEN ABDA, Provisional Instance of Tunisia.

¹⁰ For the motion see BIAGI, Constitution-Building 186. The court is in function and active, so far, in spite of political controversy over its decisions, see e.g. CHIHA, ELSHEMY, Dissolution Power 421ff. (a motion to restrict its competences was rejected, 424f.).

¹¹ CULP, A Survey 387ff.

¹² Ibid. 388. For a similar suggestion four years later *ibid.* 389.

¹³ GARDBAUM, New Commonwealth Model.

¹⁴ ROZNAL, SCHNITZER, Navigating the judicial ship 193; SCHMAHL, Erosion 133.

¹⁵ NAZAROVA, Vicious circle 158; TROCHEV, JUZGENBAYEV, Instrumentalization 156.

was enacted in 1996 in order to make sure that the new constitution would not be used to deny President Alberto Fujimori another term as president four years later.¹⁶ When the Constitutional Court declared this statute inapplicable, the responsible members were dismissed.¹⁷ Draft amendments to the constitution of Honduras introduced in 2002 would have given Congress unlimited power to determine the constitutionality of its laws by way of interpretation, had not the Supreme Court ruled these amendments unconstitutional, and had not Congress backed down as a consequence.¹⁸

Restrictions of the binding force of rulings, such as switching from an *erga omnes* to a mere *inter partes* effect, has also been mentioned as a court-curbing instrument,¹⁹ and further research might well produce examples of its use.²⁰

3. Changing the scope of jurisdiction

A frequently suggested, and frequently applied technique to prevent constitutional courts from making politically unpleasant decisions is to change the scope of their jurisdiction (in the narrow sense of removing their authority to hear certain kinds of cases).

The US Supreme Court has throughout its history – from 1815 on – been the object of congressional proposals to strip it of parts of its jurisdiction. Most of these proposals ultimately failed.²¹ Some, however, made it into law. Just one of the examples from the Reconstruction Era following the American Civil war: Congress repealed a provision of the Habeas Corpus Act of 1867 which had granted the Supreme Court appellate jurisdiction to review habeas corpus decisions of federal circuit courts. This was to bar the Supreme Court from deciding an already argued case (*Ex parte McCordle*) and finding, as expected, certain military reconstruction legislation unconstitutional.²² Now that there is a 6:3 majority nominated by Republican presidents on the Supreme Court, initiatives to limit Supreme Court jurisdiction come from the other side of the political spectrum. For instance, Senator Elizabeth Warren has, in 2024, introduced a bill aiming to limit judicial competence to review agency regulations.

¹⁶ BERNALES BALLESTEROS, El artículo 112^o, 103; for the absurdity of such “authentic interpretation” *ibid.* 110ff.

¹⁷ GARCÍA MONTERO, La década de Fujimori 75f.

¹⁸ US Department of State, Honduras; International Commission of Jurists, Attacks on Justice 2005: Honduras 4.

¹⁹ See reference to this instrument in HAGGARD, TIEDE, Judicial backsliding 516.

²⁰ HAGGARD and TIEDE, *ibid.*, mention this type of restriction, but do not mention any examples; they refer to RÍOS-FIGUEROA, Institutions 43, who does not produce an example, either. In Mexico, findings of unconstitutionality of statutory legislation in *amparo* (individual constitutional complaint) proceedings have *inter partes* effect only, and become binding precedent for lower courts only with the fifth ruling to the same effect (DÍAZ et al., Developments in Mexican Constitutional Law 131), but I see no evidence that this was introduced as a measure to curb a non-deferent court.

²¹ LAMPE, Congressional Control 32ff., with further references.

²² CULP, A Survey 484ff.; VLADECK, *Ex parte McCordle*. The Court itself approved the new legislation in that very pending case, and accordingly found that it had no jurisdiction to hear the case, *Ex parte McCordle*, 74 U.S. (7 Wall.) 506 (1869) [<https://supreme.justia.com/cases/federal/us/74/506/#tab-opinion-1966233>] (29. 12. 2025). For another case, in which the SCt found the restriction of its jurisdiction unconstitutional, see *United States v. Klein*, 80 U.S. 128 (1871); BROWN, Jurisdiction Stripping 1ff.; LAMPE, Congressional Control 4ff.

India,²³ Malaysia,²⁴ Hungary,²⁵ Israel,²⁶ Pakistan and Mexico are among the countries that have seen narrowed jurisdiction more recently. If narrowing jurisdiction is understood in a somewhat broader sense, including barring a CCt from addressing certain kinds of constitutional problems, the Polish Ct, too, has been subject to such a restriction.²⁷

Even extending the jurisdiction of a court may serve court-curbing purposes, for instance by providing a pretext to pack the court with reference to its increased workload.²⁸

4. Changing the number of judges: Packing and downsizing courts

Court packing is a means frequently contemplated in conflicts between constitutional courts and the political branches of government. I use the term “court packing” in a narrow sense, covering only increases in the number of justices in order to get at a majority

on the respective court. Many Constitutional Courts have worked with varying numbers of justices in the course of their history, and there may be good reasons, such as adaptation to caseload, for such a change. Often, however, the intention behind court or bench enlargements clearly was to make the respective court serve the political will of parliamentary majorities or incumbent heads of state.

Roosevelt’s court-packing plan, directed against the Supreme Court’s obstruction of his “New Deal”, is one of many similar plans in the world that remained a mere threat.²⁹ More recently, plans for a liberal packing of the US Supreme Court have been discussed in view of the increasingly unbalanced composition of the court.

Victims of real court-packing (in the narrow sense explained above) have been, e.g. the High Court of Australia in 1906 and in 1913,³⁰ the Supreme Court of Argentina in 1960 and in 1990,³¹ the Constitutional Court of the Russian

²³ For the Indian attempt (constitutional amendment invalidated under the basic structure doctrine) see Supreme Court of India, *SMT. Indira Nehru Gandhi v. Shri Raj Narain*, judgment of November 7, 1975 [<https://indiankanoon.org/doc/936707/>] (29. 12. 2025); CHAKRABORTY, Case Comment.

²⁴ NAZ, SHAMSUDDIN, Malaysian Preventive Detention Laws (72f.: substantive review – i.e. review beyond procedural questions – no longer permitted); NEUDORF, *The dynamics* 2017, 81 (concerning restriction of judicial review of detention orders).

²⁵ In Hungary, the *actio popularis* was abolished in 2011; restrictions were also introduced and made permanent by the Fourth amendment to the constitution in 2013 concerning the review of tax and budget legislation. The amendment also excluded substantive CCt review of constitutional amendments. See CHRONOWSKI et al., *Hungarian Constitutional Court* 8, 12ff., 25f.; DIXON, LANDAU, *Abusive Constitutional Borrowing* 91, Fn. 46; HALMAI, *Coping Strategies*; SCHEPPELE, *Understanding Hungary’s Constitutional Revolution* 115ff. For the case law preceding the amendment concerning review of constitutional amendments see HALMAI, *Unconstitutional Constitutional Amendments* 191f.

²⁶ On a reform package tabled in 2023 aiming, inter alia, to bar the SCt from reviewing constitutional amendments (this part of the package was not enacted, due to fierce public opposition) ROZNAI, SCHNITZER, *Navigating the judicial ship* 193.

²⁷ On Art. 43 of the Polish Law of 7. 7. 2016, barring the Ct from declaring normative acts unconstitutional for lack of competence, KONCEWICZ, *Farewell to the Polish Constitutional Court*. This broader definition makes it difficult to distinguish between narrowing jurisdiction and the type of intervention dealt with under 1.9. below.

²⁸ With examples from Hungary and Turkey: SCHEPPELE, *Autocratic legalism* 551f.

²⁹ BAKER, *Back to Back* 8f.; BLUMM, FLANAGAN, WHITE, *Right-Sizing the Supreme Court* 35ff.; SHAW, *Introduction*, and other chapters in the same volume. Devised, but not implemented court-packing plans elsewhere include recent ones in Brazil during the Bolsonaro presidency, see DALY, *Constitutional Repair* 25.

³⁰ LYNCH, *Judicial dissent* 63f. For a different account, attributing the 1906 increase to an overwhelming workload, and mentioning no suspect motive for the 1913 one, either, see GALLIGAN, *Politics of the High Court* 81f., 84.

³¹ CASTAGNOLA, *A trampa de la manipulación judicial* 67, 70f.; KOSAŘ, ŠÍPULOVÁ, *How to Fight Court-Packing* 140f.

Federation in the 1990s,³² the Supreme Courts of Honduras³³ and Venezuela³⁴ and the Supreme Constitutional Court of Egypt in the early 2000s,³⁵ the Constitutional Courts of Hungary³⁶ and Turkey in 2010,³⁷ and, arguably, the Supreme Court of Pakistan in 2024.³⁸

Instead of enlarging the bench, downsizing it can be a means to change its composition in favor of political rulers. The US Judiciary Act, adopted in 1866 by a Republican majority, reduced the number of seats on the Supreme Court from ten to seven in order to prevent appointments by President Andrew Johnson.³⁹ Downsizing instances in Argentina and Brazil in the 1950s and -60s, and later in Ecuador (2004), and Mexico (1994 and 2004) have also been classified as court-curbing.⁴⁰

5. Thwarting and protracting appointments

Thwarting or protracting appointments will produce effects at least temporarily equivalent to downsizing the bench or altogether suspending a court.

The Constitutional Court of the Czechoslovak Republic – the first specialized constitutional court ever to be institutionalized by a country's constitution, and the second one to start operating, not long after the Austrian one⁴¹ – was inactivated for seven years by thwarting reappointments in the 1930s, for most of the time because power-holders feared that a reactivated court would put an end to their extensive use of enabling laws.⁴² In Austria, following the resignation of members of the Constitutional Court incited by the Dollfuss government in 1933, reappointments were thwarted, too, because politicians were not interested in restoring the court's ability to act.⁴³ Later instances of deliberately thwarted or protracted appointments affected, for instance, the apex court of South Africa in 1980,⁴⁴ and, more recently, the Constitutional Courts of Poland and Slovakia,⁴⁵ to mention only some obviously illegitimate ones. The refusal of the US Senate in 2016 to hold confirmation hearings and vote on Obama's nominee Merrick Garland is a case in point, too.

³² With a new constitution and a new law on the Constitutional Court, the number of judges on the constitutional court was raised to 19; on the genesis of this number and the underlying intention to secure a pro-Yeltsin majority on the Court see TROCHEV, *Judging Russia* 76.

³³ KOSAŘ, ŠIPULOVÁ, *How to Fight Court-Packing* 140; International Commission of Jurists, *Attacks on Justice 2005: Honduras* 4f.

³⁴ LEVITSKY, ZIBLATT, *How Democracies Die* 81; SÁNCHEZ URRIBARRÍ, *Populism* 206f.

³⁵ BIAGI, *Constitution-Building* 147, 153; EL-GHOBASHY, *Dissidence and Deference*.

³⁶ CHRONOWSKI et al., *Hungarian Constitutional Court* 8, 10; HALMAI, *Coping Strategies*; UITZ, *Can you tell* 292.

³⁷ VAROL, DALLA PELLEGRINA, GAROUPA, *An empirical analysis* 190, 197ff., 213ff.

³⁸ The "Supreme Court (Number of Judges) (Amendment) Act, 2024", [https://na.gov.pk/uploads/documents/6728f854d6018_593.pdf] (29. 12. 2025), doubled the maximum number of justices. It is controversial whether this is an instance of court-packing or just, as the government claimed, a necessary reaction to the court's caseload. For context which makes political court-packing intentions plausible see KURESHI, *Constitutionally Capturing Pakistan's Constitutional Courts*.

³⁹ BLUMM, FLANAGAN, WHITE, *Right-Sizing the Supreme Court* 33f.; short mention in LEVITSKY, ZIBLATT, *How Democracies Die* 123.

⁴⁰ KOSAŘ, ŠIPULOVÁ, *Comparative court packing* 89, 93f.

⁴¹ KOSAŘ, VYHNÁNEK, *Constitutional Court of Czechia* 122; OSTERKAMP, *Verfassungsgerichtsbarkeit in der Tschechoslowakei* 1.

⁴² LANGÁŠEK, *Constitutional court of the Czechoslovak Republic* 7; OSTERKAMP, *Verfassungsgerichtsbarkeit in der Tschechoslowakei* 84ff., 151.

⁴³ For the government's unwillingness to have the vacant seats refilled see HELLER, *Verfassungsgerichtshof* 266f.

⁴⁴ GAUNTLETT, *Duty* 5.

⁴⁵ KOSAŘ, ŠIPULOVÁ, *How to Fight Court-Packing* 135; for the Polish case see below, text with Fn. 40f.; for the Slovak one OVÁDEK, *Drama or Serenity*.

6. (Other) Violations and changes of appointment rules

Appointment rules can be violated for court-curbing-purposes in ways other than by thwarting appointments. The internationally most notorious, but by far not the only violations of appointment rules occurred in Poland in 2015. The outgoing liberal/conservative coalition (7th Sejm) had elected five judges for the Constitutional Tribunal on 8th October 2015 – two of them prematurely, because the terms of their predecessors were not to end during the current electoral period. After the general election of 25th October 2015, the 8th Sejm, notwithstanding the correct election of three judges by the previous Sejm, elected five new ones, and President Duda appointed all of them; none of those correctly elected by the previous Sejm were appointed. The judgment of the Constitutional Court in the matter⁴⁶ was disregarded.⁴⁷

The violated rules may be informal ones, such as, for instance, the convention according to which the Chief Justice of India is appointed from among the associate justices based on seniority – a rule that was violated for party-political reasons in 1973.⁴⁸

Changes in the appointment rules have also been used to streamline apex courts (or the judiciary as a whole). In Hungary, for instance, right after the sweeping electoral victory of the Fidesz alliance in 2010, an amendment to the constitution modified the rules for the

composition of the nominating committee, so as to terminate the pluralizing and moderating effect of the previous rule.⁴⁹

Israel has reformed its Judicial Selection Committee. When the reform takes effect following the next general election, there will be no more veto power for the members representing the Supreme Court.⁵⁰ Abolishing such an element of self-recruitment may, in principle, be justifiable, but what we see here is nevertheless an objectionable instance of court-curbing, because it is part of a larger court-curbing package and no precautions whatsoever have been taken to secure pluralism on the court. This makes it clear that the abolition of the court's veto position is not driven by a concern for pluralism but by an intention to control the court.

Transferring the power to elect court presidents from the court itself to the political branches of government, as in Russia in 2009⁵¹ and in Hungary a year later,⁵² will help to control a court particularly in countries where court presidents are traditionally powerful, as in Eastern Europe.⁵³

⁴⁶ Constitutional Tribunal, Judgment of 3/12/2015, Ref. Nr. K 34/15, par. 6.16, [<https://trybunal.gov.pl/en/hearings/judgments/art/8866-ustawa-o-trybunale-konstytucyjnym>] (29. 12. 2025).

⁴⁷ For more detail see SADURSKI, Poland's Constitutional Breakdown 61ff.

⁴⁸ GAGRAT, Examination 16; NAYAR, 13th Chief Justice 28ff.; for "countrywide resentment which the act of supersession of 25 April 1973 aroused" SHELAT, Explanations 42.

⁴⁹ CHRONOWSKI et al., Hungarian Constitutional Court 10f.; KAZAI, Constitutional Dignitary; URTZ, Can you tell 285 with Fn. 37.

⁵⁰ SOKOL, Knesset passes law. For the reform plan set up in 2023 see SCHMAL, Erosion 133f.

⁵¹ TROCHEV, SOLOMON, Authoritarian constitutionalism 205; VON GALL, Regime Adaptation.

⁵² CHRONOWSKI et al., Hungarian Constitutional Court 8; KAZAI, Constitutional Dignitary.

⁵³ KOSAŘ, Perils of Judicial Self-Government 390ff. (Chapter "Court Presidents: Invisible Masters of Central and Eastern European Judiciaries").

7. Modifying judicial terms

Modification of term limits or age limits may serve the same purpose, particularly if the modification applies to both newly elected and incumbent justices.

Shortening judicial terms – as suggested, e.g., for the US Supreme Court by various congressional proposals with a court-curbing intent from the 1840s on⁵⁴ –, and as practiced in many countries since⁵⁵, is the device to neutralise non-deferent judges or presidents. With respect to the “friendly” ones, by contrast, prolongation is the choice. Accordingly, the president of the Constitutional court of the Russian Federation was exempted from the age limit of 70 which applies to judges of that court when Valery Zorkin, a reliable supporter of Putin’s regime and president of the court to this day, was soon to reach that limit.⁵⁶ The same prolongation technique was used for all the justices in Hungary (in connection with the court-packing of 2011),⁵⁷ and in Brazil, where the age limit for the justices of the Supremo Tribunal Federal and other Brazilian high court judges was raised from 70 to 75 in 2015 in order to prevent President Dilma Rousseff from making appointments for the successors of several justices bound to turn 70 in the course of her presidential term.⁵⁸ Jair Bolsonaro later (unsuccessfully) planned “to remove Supreme Court judges by lowering the retirement age”.⁵⁹

8. Removing judges

Ruling autocrats or ruling majorities can get rid of “obstructive” justices and change the balance on a court in favour of their own political goals by removing either individual judges, or all of them at once. Partisan removal of justices, be it by way of existing procedures such as impeachment, or on the basis of ad hoc creation of new ones, or in irregular ways (for the special case of removal by violence and the like, see section 9 below) and attempts or mere threats to that effect are among the most frequently used techniques to curb a constitutional court.

In 1805, US SCt Justice Samuel Chase was impeached, but the Senate failed to convict him. Members of the House of Representatives, eager “to curb the ‘Federalist’ Supreme Court”, introduced various motions for constitutional amendments facilitating the removal of justices.⁶⁰ If nothing else came of it, such motions could still serve as a reminder to the justices that their powers and positions were not uncheckable.

In Austria, all the judges of the Constitutional Court were removed in 1929/1930. The reform was announced as a means to “de-politicise” the court, but what it brought about and was intended to bring about was but a change in the dominant colour of politicization (“*Umpolitisierung*”, in a word brought up by contemporary critics). Christoph Grabenwarter, the current president of the Constitutional Court,

⁵⁴ CULP, A Survey 477ff.

⁵⁵ In some of these cases, as in Hungary in 2011 and in Poland in 2017, the changes applied to courts other than the respective Constitutional Courts, see for the Hungarian Case ECJ (First Chamber) Judgment of 6. 11. 2012, Case C-286/12, par. 16 (the Court found that this was age discrimination in terms of the Framework Directive for Equal Treatment in Employment and Occupation [Directive 2000/78/EG], par. 48ff., 81f.); for the Polish case ECJ (Grand Chamber), Judgment of 24. 6. 2019, Case C-619/18, par. 9ff. (in this case, the ECJ found the change incompatible with Art. 19(1) TEU, see par. 71ff., 126).

⁵⁶ TROCHEV, SOLOMON, Authoritarian constitutionalism 205; VON GALL, Regime Adaptation.

⁵⁷ The term was extended from 9 to 12 years and the retirement age of 70 abolished, see CHRONOWSKI et al., Hungarian Constitutional Court 11; URTZ, Can you tell 292f.

⁵⁸ SARAIVA DE OLIVEIRA, A revogação; cf. mention in KOSAŘ, LEISURE, Judicial Overstay.

⁵⁹ DALY, Constitutional Repair 25.

⁶⁰ CULP, A Survey 474ff. (verbatim quote: 475).

has qualified the “So-Called Depoliticization” as “A first Attack on the Independence of the Constitutional Court”⁶¹.

Of the 86 judges who retired from the Supreme Court of Argentina between 1930 and 2014, 60 % were forced or otherwise induced to retire.⁶² My extensive list of further examples ranges from Egypt in 1969 to Mexico in 2024.

Governments can also try to lure away judges in order to be able to replace them by more compliant ones (so-called “golden parachute”-strategy, applied, for instance, in Argentina in 1958).⁶³ Angela Merkel’s offer, in 2012, to FCC president Andreas Voßkuhle to make him candidate for the presidency of the Federal Republic may have been an attempt to parachute him into a function where he would cause less damage to her European policy. The attempt, if it was one, failed because Voßkuhle declined.

9. Violence and similar criminal assaults

Violence, threats, bribing and the like are also in the arsenal and too numerous to be reported.

Just some mentions: Benedicto Kiwanuka, Chief Justice of Uganda during the regime of Idi Amin, was assassinated by henchmen of that regime in 1972.⁶⁴ In 2004, President

Museveni probably alluded to that incident in the country’s past when, commenting an adverse Constitutional Court ruling, he remarked that the court would not be allowed to usurp the people’s power, and that “there were times when, if a judge made such a ruling, he would not live to see tomorrow”.⁶⁵ In Senegal, Babacar Sèye, Vice president of the Constitutional Council, was shot in 1993.⁶⁶ In 2007, one Fiji justice’s home was burned down and another’s car sabotaged in a way that might have caused fatalities.⁶⁷ In Burundi, judges of the Constitutional Court received death threats in 2015 before waving through, as requested by the government, a relaxation of term limits for the country’s president.⁶⁸ Allegedly, there have also been military plans to assassinate Brazilian Justice Alexandre de Moraes, along with President-elect Luiz Inácio Lula da Silva, in the context of a plot aiming to prevent the inauguration of the latter.⁶⁹

10. Invalidating precedent, outlawing (other) standards of review, and overriding case law by constitutional amendment

Invalidating constitutional court precedent has been part of the strategy to bring the Constitutional Court of Hungary in line.⁷⁰ Poland recently attempted to invalidate Constitutional Tribunal precedent insofar as the judges

⁶¹ GRABENWARTER, Austrian Constitutional Court 32 (section heading). On the reform of 1929 and its purported aim to “depoliticise” the court cf. also HELLER, *Verfassungsgerichtshof* 198ff.; OLECHOWSKI, *Ausschaltung* 156; TECHET, „Reine Rechtslehre“ 321ff.; ZAVADIL, *Parteienvereinbarungen*. With a focus on Kelsen’s role in the 1929 court reform: OLECHOWSKI, Hans Kelsen 470f., 472ff. With respect to the Constitutional Court and its 1929 reform, the term „Umpolitisierung“ was apparently first used by Adolf Merkl (MERKL, *Der „entpolitisierte“ Verfassungsgerichtshof* 510).

⁶² For details see CASTAGNOLA, *A trampa de la manipulación judicial* 57ff.

⁶³ Ibid. 67, concerning benefits for early retirement; for another case of legislation rewarding early retirement ibid. 68.

⁶⁴ KOSAŘ, ŠIPULOVÁ, *How to Fight Court-Packing* 141, with further references.

⁶⁵ Quote from International Commission of Jurists, *Attacks on Justice – Uganda* 5.

⁶⁶ Commission Internationale Des Juristes, *Rapport sur le procès* 3, 7; on this assassination cf. also Amnesty International, *Senegal. The Murder of Maître Babacar Sèye*.

⁶⁷ International Bar Association, *Dire Straits* 44.

⁶⁸ DIXON, LANDAU, *Abusive Constitutional Borrowing* 88.

⁶⁹ ROGERO, *Brazilian Police arrest five over plot to assassinate Lula*.

⁷⁰ CHRONOWSKI et al., *Hungarian Constitutional Court* 16f.; HALMAI, *Coping Strategies* (Fn. 25); SCHEPPELE, *Understanding Hungary’s Constitutional Revolution* 112, 117.

illegally appointed under PiS party rule were involved.⁷¹ The aim here was not constitutional demolition but constitutional repair. The repair failed because president Duda, instead of signing the bill, referred it to the Tribunal, which declared it unconstitutional.⁷²

Invalidating precedent aims to get rid of standards of review established by previous case law. Such standards can also be targeted more directly, as in Israel in 2023 with an amendment to the *Basic Law: The Judiciary* forbidding judicial review of governmental decisions on the basis of the Supreme Court's reasonableness doctrine.⁷³

11. Overriding case law by constitutional amendment

A frequently applied means to get by unwelcome judicial findings of unconstitutionality is override by constitutional amendment, i.e. a change in the constitutional rules on which the court's findings were based. Constitutional override is in no way per se to be criticized. It may even be required to bring to bear fundamentals of democracy and the rule of law, as in the case of the constitutional amendments overriding the US SCt findings in *Dred Scott v. Sandford* (1857) according to which former slaves lacked citizenship and federal legislation could not abolish slavery in US

territories.⁷⁴ In some cases, however, as in Czechoslovakia in 1938⁷⁵ and, extensively, in Hungary in 2013,⁷⁶ it has been used to overcome barriers to the deterioration of democracy and the rule of law.

12. Changing procedures

A Court's function can also be impaired by various procedural means. Supermajority requirements are one of them. Concerning the US Supreme Court, an article lists more than 60 congressional proposals, from 1823 on, to introduce supermajority requirements for the invalidation of statutory legislation, most of them in reaction to decisions which the reform proponents thought wrong.⁷⁷ In Poland and in Georgia, supermajority requirements – in Poland even a symmetrical one, applying irrespective of decisional outcome – in combination with an enhanced quorum were indeed introduced as a tool “to erode judicial review”.⁷⁸

Narrow time limits for the production of constitutional court decisions are part of the legal tradition in many countries, particularly in francophone ones.⁷⁹ They can, however, also be imposed as a means aiming to prevent a Constitutional Court from carrying out its duties properly, as with the Fourth Amendment to the Constitution of Hungary.⁸⁰

⁷¹ TILLES, Polish Parliament approves constitutional court overhaul.

⁷² WĄDOŁOWSKA, Polish constitutional court rejects government bills.

⁷³ This amendment was struck down as unconstitutional by the Supreme Court: *Movement for Quality Government v. Knesset*, judgment of v 1. 1. 2024, HCJ 5658/23; for an English translation of the official abstract see [https://versa.cardozo.yu.edu/viewpoints/translation-official-abstract-movement-quality-government-v-knesset] (8. 1. 2024 / 29. 12. 2025); ROZNAI, SCHNITZER, Navigating the judicial ship 196ff. The SCt's decision in turn resulted in a bill aiming to control the court via changes in the composition and decisionmaking procedure of the Judicial Selection Committee (see above, 1.6).

⁷⁴ XIIIth and XIVth Amendments to the US Constitution.

⁷⁵ On the amendment overriding a doctrine which the CCt of Czechoslovakia had developed concerning limits to the delegation of legislative power see LANGÁŠEK, Constitutional court of the Czechoslovak Republic 19.

⁷⁶ CHRONOWSKI et al., Hungarian Constitutional Court 16; KONCEWICZ, Farewell to the Polish Constitutional Court; SCHEPPELE, Understanding Hungary's Constitutional Revolution 17.

⁷⁷ CAMINKER, Thayerian Deference 88 (cf. also list of proposals 117ff.). Early examples also in CULP, A Survey 392ff. For a discussion of congressional power to enact such rules see GERHARDT, Constitutional Limits; LAMPE, Congressional Control 36f.

⁷⁸ For Georgia see RIVERA LEÓN, Supermajorities 132 (literal quote), 136ff.; for Poland BRICKER, Political Dissent 1593f.; GRABENWARTER, Constitutional Resilience; KONCEWICZ, Farewell to the Polish Constitutional Court; SADURSKI, Poland's Constitutional Breakdown 73.

⁷⁹ For an overview see LÜBBE-WOLFF, Beratungskulturen 492ff.

⁸⁰ VENICE COMMISSION, Opinion on the Fourth Amendment 27.

Requiring a court to process cases in order of filing, as in Poland by law of July 2017,⁸¹ is a particularly insidious way of preventing a court from working as a check against degradations of democracy and the rule of law. Based on a rule for the sequence of processing applications which is likely to sound plausible to most people, it forces a court to work off its entire backlog, which may take years, before it can stop the most outrageous attacks on the democratic system.

13. Insufficient funding

Occasionally, governments (including legislatures) resort to defunding, i.e. to reductions in the court budget or judicial salaries in order to frighten constitutional courts into greater deference,⁸² or to insufficient funding from the outset in order to keep a court low-profile.⁸³

14. Depopularising

Efforts to make a Constitutional Court unpopular almost invariably precede and accompany other types of assaults, so as to make these appear less offensive.

Verbal attacks are the most common instrument.⁸⁴ For the United States, Charles Warren diagnosed in 1922: “No functioning body under our Government has been more subjected

to continuous assault than the Supreme Court. Throughout its history, whenever an important decision has run counter to the views of a particular class, section or party in the United States, that class, section or party has denounced the Court, as an institution.”⁸⁵ Cases in other countries abound.

An interesting instrument threatening the Constitutional Court as well as the European Court of Justice with depopularisation was devised in Hungary: In 2013, the Constitution was amended to the effect that as long as state debt exceeds half of the GDP, if payment obligations exceeding the budgeted amounts arise from a decision of the said courts or other authorities, a special tax would be levied to cover the relevant costs.⁸⁶ The idea – which did not quite work out – was to create an automatism that would take away from the Constitutional Court the advantage of being able to make popular decisions at considerable cost while leaving it to the government to make the unpopular decision on raising the necessary funds. The strategy of changing the institutional incentive structure in favour of more judicial restraint by a kind of automatism that would make people feel the financial consequences of constitutional court decisions was admittedly quite ingenious, but also laden with problems. The Venice Commission has addressed them.⁸⁷

⁸¹ European Commission, Commission Recommendation of 27 July 2016 regarding the rule of law in Poland, OJ L 217/53, par. 4.1.3; KONCEWICZ, Farewell to the Polish Constitutional Court.

⁸² For an example from Taiwan see CHUANG, Judiciary ‘disappointed’ (“The lawmakers said the grand justices are not carrying out the job of a ‘judge’, so they should not enjoy the ‘professional bonus’ of regular judges.”); International Commission of Jurists, Attacks on Justice 2005: Taiwan 4. The CCT found the deletion of the relevant budget running counter to constitutional guarantees of judicial independence, Interpretation No. 601, 22. 7. 2005 [<https://cons.judicial.gov.tw/en/docdata.aspx?fid=100&id=310782>] (22. 7. 2005 / 29. 12. 2025).

⁸³ For the Constitutional Court of Czechoslovakia see LANGÁŠEK, Constitutional court of the Czechoslovak Republic 8.

⁸⁴ For verbal attacks as a court-curbing instrument see AYDIN-CAKIR, İLTER, When do governments attack 1 and passim; AYDIN-CAKIR, DRISCOLL, On motives and means 939. On verbal attacks and their function cf. also KÖKER, Delegitimierung als Strategie.

⁸⁵ WARREN, Early History 1.

⁸⁶ Art. 37 par. 6 of the Constitution of Hungary as amended in 2013; see Venice Commission, Opinion on the Fourth Amendment 28f.

⁸⁷ Venice Commission, Opinion on the Fourth Amendment 28f.

15. Court-curbing from within

Once a constitutional court has been captured by one part of the political spectrum, illegal or illegitimate manipulation for political purposes is likely to also come from within the court.

In Poland, for instance, Constitutional Tribunal President Julia Przyłębska kicked her colleague Stanisław Biernat off the bench in 2017, several months before the end of his term, alleging that he must, instead of may, take all his unused vacation time. She also suspended three properly elected judges for most of the year. That same year, the court changed its rules of procedure to the effect that dissents may not address the question whether the court was correctly composed in making the relevant decision. In other words, the illegal appointment of several judges and the ensuing faulty composition of the Tribunal were not to be mentioned. Przyłębska is also reported to have manipulated bench compositions – a frequent problem in courts with strong presidents.⁸⁸

16. Internationalisation

Recently, we have seen an internationalization of court-curbing pressure with the sanctions imposed by the US on Brazilian Justice de Moraes, inter alia for allegedly politicised action against former President Jair Bolsonaro,⁸⁹ as well as on several judges of the International Criminal Court,⁹⁰ and with Russian arrest warrants, also issued against judges of the ICC.⁹¹

17. Disobeying or otherwise defying a court

Where strategies acting upon the behaviour of a displeasing court seem unavailable, inopportune or insufficient, or in addition to such strategies, there is always the option of simple disobedience or other types of illegal defiance.

The US Supreme Court experienced this on several occasions. One striking case is the reaction of the state of Georgia to the Supreme Court judgment in *Worcester v. Georgia* (of 1832). The Court had decided that the state of Georgia could not legislate on Cherokee territory, and that, as a consequence, Claimant Worcester had unlawfully been sentenced under a statute that did legislate on Cherokee territory. Georgia retorted by passing a law according to which any individual coming to Georgia to enforce that ruling would be hanged.⁹² Even the German FCC, to which many foreign delegations have made a pilgrimage in order to find out how to secure obedience to a constitutional court, have not been altogether spared bad experiences of noncompliance.⁹³ Of the countless instances of – definitive or temporary – contempt of constitutional court decisions in other countries and vis-à-vis supranational and international courts, let me just mention the case of Poland, where the PiS government took to defying decisions of the Constitutional Tribunal by refusing to publish them,⁹⁴ and, for a case of temporary defiance worth bringing up for its exceptionality, a recent case in Austria which the President of the Republic has qualified as unprecedented: The Constitutional Court had confirmed an order for evidence issued by the parliamentary committee

⁸⁸ For all of that see SADURSKI, Poland's Constitutional Breakdown 68f.

⁸⁹ US Department of The Treasury, Treasury Sanctions Alexandre de Moraes; recently confirmed in reaction to protective judicial action by one of the Justice's colleagues, see ALVIM, O duro recado.

⁹⁰ United Nations, International Criminal Court: New US sanctions; International Bar Association, IBA condemns the imposition of additional US sanctions.

⁹¹ FORNUSEK, Moscow court issues arrest warrants for ICC judges; STEINKE, Recht der Stärkeren.

⁹² BREYER, Reflections 9; SUNDQUIST, *Worcester v. Georgia* 246.

⁹³ See, e.g., for the Bavarian reaction to the FCC ruling according to which mandatory affixation of crucifixes in schoolrooms violate the fundamental right to religious freedom (BVerfGE 93, 1), VANBERG, The Politics of Constitutional Review, 2 ff.; for an example of failure to meet deadlines set by the court for the accommodation of legislation to a court ruling BVerfGE 155, 378 (401 par. 53); for examples of resistance on the part of ordinary courts GAWRON, ROGOWSKI, Die Wirkung des Bundesverfassungsgerichts 329.

⁹⁴ SADURSKI, Poland's Constitutional Breakdown 75ff.

investigating a governmental corruption affair (“Ibiza affair”) and found the secretary of the treasury obliged to produce the requested evidence. Facing noncompliance, the court had to ask the President for the execution of its ruling.⁹⁵

III. Questions and Observations

What do all those instances of court-curbing and court-curbing attempts and their histories tell us, what questions do they raise, what hypotheses do they suggest?

In the first place they remind us of the inherent weakness of the judiciary addressed by Hamilton’s famous remark in No. 78 of the Federalist Papers: The judiciary “has no influence over either the sword or the purse”. This creates a specific vulnerability for constitutional courts, whose conflict-prone job it is to activate the constitutional limits to political power.

1. Historical frequency of attacks, the ascent of masked assaults, and the importance of educated citizens

The listed examples show that assaults have accompanied the history of constitutional courts all along, and in increasing varieties. Open assaults have a long tradition, whereas other, more subtle interventions, such as procedural and institutional reforms that are not per se illegitimate and harmful, or not so easily identifiable as such, have been increasingly frequent more recently – obviously because they lend themselves to mask destructive intentions.

The ascent of masked assaults and abusive legal borrowing may seem promising, in a way, as a kind of hypocrisy. The interesting thing about hypocrisy is that it shows an awareness of the norm which it pretends to respect. In the same vein, transitions from open to masked assaults on constitutional courts indicate a rise in public awareness of

the importance of constitutional courts and in loyalty to them: As politicians become aware of that public awareness and loyalty, and of the associated political costs of open assaults, they must resort to more subtle interventions. Often, however, it is just international and supranational institutions (rather than a national population woke to the rule of law) that power-holders try to mislead by masked assaults. And the problem remains that masked assaults must be identified as such if they are to be politically sanctioned. This points to the importance of citizens educated to some degree of what I call “*Institutionenverstand*”, i.e. of understanding the importance of institutions, in contrast to mere moralizing and personalizing attitudes. Constitutional resilience needs educated citizens.

2. Difficulties of normative assessment

Even upon closer scrutiny, it is not always easy to draw the line between legitimate and illegitimate practices. Many of the instruments mentioned above – such as constitutional override, changes in bench size or term length – can be used in abusive ways, but are in no way per se unacceptable. The problem is to distinguish between acceptable and abusive interventions. This distinguishing requires knowledge of contexts which are often not easily accessible to citizens, or even experts, foreign or domestic. And it requires value judgments and political assessments which are likely to be controversial.

The most tricky questions arise when, in a given constitutional framework, courts are to be reformed which are not up to the standards of independence and impartiality because they have been captured or deformed for one-sided political purposes.⁹⁶ Is there such a thing as benevolent court-curbing, legitimate court-curbing? Do the constitutional, supranational and international standards against court-curbing that have been developed to protect courts against such capturing or deformation fully apply to the repair of courts that have already been captured or deformed?

⁹⁵ ULBING, Judikative versus Exekutive, with links to the relevant decisions.

⁹⁶ See, e.g., for the problems of constitutional repair faced by Poland, BIAGI, Constitutional Repair in Poland; LÜBBE-WOLFF, One-sidedly Staffed Courts. On constitutional repair more generally see DALY, Constitutional Repair.

International institutions have been willing to accept some modifications, i.e. to judge court-curbing measures more mildly when they are used to rectify a state of affairs that is incompatible with the requirements of an independent and impartial judiciary. For instance: Changes of term limits will usually be unacceptable if applied retroactively, to judges appointed under the previous rule. However, the retroactive term limits introduced for members of the Armenian Constitutional Court following the Velvet Revolution of 2018 have met with approval by the Venice Commission and the European Court of Human Rights – in an overly sweeping manner, to my mind, but the underlying idea that the direction of change – towards or away from independence and impartiality – matters is certainly right,⁹⁷ and corroborated by ECJ case law.⁹⁸

3. Relevance of integrity, stage of democratic development, and time

It is obvious from the above examples that effective court-curbing more often occurs in countries with high levels of corruption than in countries with low ones, more often in non-democratic or incipient democratic states than in consolidated democracies under a firmly established rule of law, and with special frequency under the rule of populist parties and leaders. There is a tautological element to all of these assertions, because court-curbing activities often *are* instances of corruption; they indicate that democracy and the rule of law are not consolidated, and the absence of loyalty to institutions is characteristic of populist movements and the resulting more or less authoritarian regimes, where, instead, loyalty to individual persons and their networks is what counts (which is why such regimes always go along with high levels of corruption). There are, however, some non-tautological insights to be gained from the above correlations. The issue of consolidation, for instance, points to the relevance of time.

Democracy and the rule of law need time to consolidate. People need time to not only value democracy and the rule of law, but also develop the mindsets and adapt to the behavioural patterns needed to make them work: abandon ideas of supremacy or inferiority of particular groups of people, be they defined by sex, color of skin, indigeneity or whatever, value discussion over physical fight and compromise over victory and defeat, and internalize loyalties to rules and institutions which must in certain respects take precedence over personal loyalties to kin, clan, tribe, political party and other social bonds.

Building acceptance for a constitutional court, trust in it, and a loyalty to it that will deter attacks and make it resilient, also takes time. Historically, constitutional courts have not been an indispensable element of democracy and the rule of law. Several democracies and their respect for the rule of law have flourished without constitutional courts able to overturn national legislation and get along without one to this day – just think of Switzerland, the Netherlands, the United Kingdom or New Zealand. It is not a self-evident truth that a constitutional court will enhance democracy rather than detract from it.

It was therefore wise of the US Supreme Court and probably an essential prerequisite to the acceptance of its competence to review federal legislation that it proceeded most cautiously and took time in asserting and exercising this competence. Contrary to a common narrative, *Madison v. Marbury* was not the first decision to assume this competence. The court had already held itself authorised to review federal legislation seven years before, in *Hylton v. United States* (1796) – a wisely chosen case, because the reviewed piece of tax legislation, levying a tax on carriages, did not give rise to any objection. Thus, when *Marbury v. Madison* was decided in 1803, although *Hylton* was not explicitly referenced in the opinion, judicial review of federal legislation was already established as a doctrine. The Supreme Court then allowed more than

⁹⁷ LÜBBE-WOLFF, One-sidedly Staffed Courts, with links to the relevant opinion of the Venice Commission and the decision of the ECtHR in the case of *Alvinia Gyulumyan and Others v. Armenia*, Appl. No. 25240/20.

⁹⁸ See LÜBBE-WOLFF, One-sidedly Staffed Courts, with links to ECJ case law.

50 years to pass before it once again declared a federal statute unconstitutional in *Dred Scott v. Sandford* (1857).

By contrast, the Constitutional Court of Hungary, when it started to operate in 1990, tried to get from scratch to an equivalent of German FCC jurisprudence in just a few years. I heard the court's first president, László Sólyom, say so in a conference in 2011. In an article published in German in 2016, Sólyom affirmatively described his court's approach as activism and explained it as an effort to establish standards for all areas of public authority as quickly as possible in order to secure a democracy based on the rule of law. The greatest achievement of his court, according to Sólyom, was the establishment of a democratic constitutional culture based on the rule of law in Hungary.⁹⁹ Well, at the time of publication, that culture, and the Constitutional Court along with it, had already turned out not to be resilient, and most likely, insufficient time for the country's culture to evolve and adapt probably had a relevant share in the backlash.

4. Questions of court design

4.1. Range of competences

The relevance of time to consolidate for a commitment to democracy and the rule of law, and of time for the development of trust in a constitutional court, produces a dilemma when it comes to designing a resilient constitutional court.

On the one hand, for a constitutional court to be resilient, civic loyalty and support is of the essence, and to attain this loyalty and support, a court needs some salience, people must read or hear about what it does.

Salience increases with the range of competences, and particularly with the generosity of individual access to the court. The German FCC, for instance, would certainly not have acquired the exceptional degree of popularity and trust it commands, were it not for its extensive authority to hear individual constitutional complaints. This competence enables citizens to challenge not only legislative acts

and governmental executive orders, but any act of a public authority, including decisions of other courts, after exhausting other remedies. Besides its relevance for the visibility and popularity of the court, an important advantage of this broad competence is that the court can produce significant constitutional jurisprudence that matters to people without getting into conflict with high politics, i.e. with the legislative branch or with the government (in the narrow sense), every time it finds constitutional fault.

However, this broad competence and the popularity to be gained from it have a downside. They may encourage an activism that will sooner or later produce adverse political reactions. Broad competences may even force a constitutional court to produce liberal case law in greater quantities per unit of time than the society in question can digest. I remember a conversation with a member of the Constitutional Court of Morocco. The greatest problem of his court, he said, is that worldviews in the citizenry are so extremely far apart, with urban elites hardly different from those in western democracies on the one hand, and a deeply patriarchal and conservative-religious rural population on the other, so that it is close to impossible, particularly in matters of individual rights and parity of men and women, not to alienate either one or the other side beyond their limits of tolerance. In such a situation, where important parts of the citizenry need time to accommodate to the liberal values embodied in a constitution, it may be wise not to have great numbers of controversial decisions issued within short periods of time, and a more restricted allocation of competences may be an appropriate way to achieve that.

In this dilemma between advantages and disadvantages of generous individual access to a constitutional court, particularly for countries in a process of transition, the most unfortunate path was probably taken for the Constitutional Court of the new Hungarian democracy, with individual access being, on the one hand, granted quite restrictively, limiting it to legislative acts and governmental regulations, and on the other hand most generously by way of the *actio popularis*. This combined an exclusi-

⁹⁹ SÓLYOM, Das ungarische Verfassungsgericht 776 par. 153, 793 par. 190.

ve focus on conflict with government as a whole (no way to target individual administrative or judicial decisions) with the instrument that would activate precisely that type of conflict most effectively, in greatest possible numbers in the shortest possible time-span.

4.2. Other aspects, and the importance of systemic impartiality

There are many other ways in which institutional design may affect a court's ability to play an integrative role and thus to become resilient: institutional guarantees of judicial independence, the role of presidents and chief justices, respectively, the organization of clerking, majority requirements and their scope (application to the dispositive part of judgments only, or to the reasoning, as well), individual or collegial powers of text production, and many more. I have dealt with these subjects elsewhere,¹⁰⁰ and there is no room for repetition here, but I would like to point out one aspect which is often neglected or not properly distinguished from questions of independence and *individual* impartiality (impartiality of individual judges) in this context, and which is badly or not at all secured for the majority of constitutional courts: To work in an integrative manner and build up broad trust and the resilience that comes from it, a constitutional court needs *systemic* impartiality, i.e. a balanced composition – one that adequately represents important political forces without granting any one of them a preponderance allowing it to dominate the court one-sidedly.¹⁰¹ There is a most interesting article on the Constitutional Court of the Czech Republic identifying a balanced composition and the framework securing it (though imperfectly) as an important reason why that court, as opposed to others in the group of Visegrád countries, has, so far, proved resilient against capture or defiance. The second important reason identified by the authors is what they call a “selective activism”, i.e. concentration on the defense of the organizational framework of democracy

and the rule of law, combined with restraint in matters of individual rights prone to trigger or intensify cultural wars.¹⁰²

5. The role of external oversight and pressure

Does external oversight and/or pressure make constitutions, and in particular constitutional courts, more resilient? There is no simple answer to this question.

Andras Jakab has argued in the affirmative in an excellent paper on the deterioration of the Hungarian legal system since 2010, pointing to examples such as post-war Germany, and, on the other hand, to experiences with new EU member states, where often backsliding with respect to democracy and the rule of law in new member states occurred when the external pressure of pre-accession conditionalities was gone.¹⁰³ In Romania, he argues, such backsliding was averted precisely by keeping EU pressure high in the post-accession period.¹⁰⁴

Germany is indeed a case where external pressure was certainly an important factor in stabilizing its post-war democratic order. The country was under allied occupation when the Basic Law was drafted and during the early years of its operation. This helped to keep the country on track concerning the rule of law and, in particular, the respect for its Constitutional Court. But Germany was a special case. The monstrosity of the crimes committed by and under the Nazi regime was so exceptional and undeniable that widespread defiance against the ensuing occupation regime and the rule-of-law-based democratic order it imposed – while leaving the country great freedom with respect to the details of that order – could not thrive.

¹⁰⁰ LÜBBE-WOLFF, *Beratungskulturen*.

¹⁰¹ LÜBBE-WOLFF, *One-sidedly Staffed Courts*.

¹⁰² SMEKAL, BENÁK, VYHNÁNEK, *Through selective activism* 1237ff.

¹⁰³ JAKAB, *What is Wrong*.

¹⁰⁴ *Ibid.* 8.

It is also true that, as Jakab observes, the EU is much better placed to influence (prospective) members in the period before their accession than afterwards.¹⁰⁵ This is indeed one of the reasons why we often see post-accession backsliding with respect to democracy, the rule of law, and – relevant to both – the fight against corruption. The Cooperation and Verification Mechanism (CVM) for Romania (and for Bulgaria, too), which until 2023 provided for special technical and financial support and for an unusual degree of EU oversight over these two member states, has therefore indeed fostered some progress in the legislation of these countries, particularly in Romania, including with respect to the judiciary.¹⁰⁶ It must be conceded, too, that no small number of the assaults on constitutional courts in the more recent EU member states reported above were redressed under pressure from the EU, including the ECJ, and/or Council of Europe institutions.¹⁰⁷ And most likely, things would look even worse than they do if there was not the preventive effect of these European institutions.

All too often, however, European pressure failed – just look at Hungary and Poland. And where court-curbing interventions which had met with objections from the EU and Council of Europe institutions were indeed rescinded, this cannot throughout be attributed to those European objections. The Polish quorum and supermajority requirements for instance were abolished mainly because they hampered the decisionmaking process and were no longer needed once the Constitutional Tribunal had been staffed by a sufficient number of deferent judges.¹⁰⁸ And with respect to the Eastern European EU members and accession candidates, it must also be considered that overstrain of societies with deep-rooted religious, patriarchal and/or authoritarian traditions by the pace of transition to liberal democracy with its

underlying EU incentives and enforcements is likely to be one of the reasons of the right-wing populist backlash that we see in some of these countries.

6. Resilience by constitutional fortification?

The last question I would like to address: Can, and should, resilience of Constitutional Courts be secured by transferring the provisions on which the proper functioning of a Constitutional Court depends to the constitutional level?

Germany has tried to shield its FCC against court-curbing attacks in this way. In 2024, important rules for the organization and procedure through which appointment rules for the members of the FCC were upgraded to the constitutional level, and one important change in content was made in order to prevent blockage that may result from the two-thirds majority requirement for the election of justices: The rule that half of the justices are to be elected by the Bundestag (the house of representatives) and the other half by the Bundesrat (the federal chamber, representing the Länder governments) has been changed to the effect that if no successor to a judge is elected in (specified) due time by the competent organ, its right to elect may be exercised by the other organ.¹⁰⁹ To the dismay of many critics, the two-thirds majority requirement was not upgraded, which testifies to apprehension that the new competence-swapping mechanism may turn out insufficient to prevent blockage.

The reform as a whole was flagged as designed to adequately express the status of the FCC on the level of the constitution, make the FCC resilient against “endeavours

¹⁰⁵ LÜBBE-WOLFF, *Der ehrliche Deutsche* 84ff., with an analysis of EU enforcement instruments and their shortcomings.

¹⁰⁶ European Parliament, Policy Department for Budgetary Affairs, *Assessment* 9 ff. and *passim*; VERESS, *Cooperation and Verification Mechanism*.

¹⁰⁷ See, e.g., examples for Hungary in CHRONOWSKI et al., *Hungarian Constitutional Court* 17f.

¹⁰⁸ RIVERA LEÓN, *Supermajorities* 135.

¹⁰⁹ Art. 93 Abs. 2 Basic Law, as amended by Act of 20 December 2024 (Federal Law Gazette 2024 I No. 439), and Sect. 7a Act on the Federal Constitutional Court, as amended by Article 1 of the Act of 20 December 2024 (Federal Law Gazette 2024 I No. 440).

to call into question” its independence or functionality,¹¹⁰ and solve the problem of possible blockage of appointments by a lock-up minority.¹¹¹ A not so explicitly declared purpose was to avoid having to cooperate with the AfD in the appointment process, should it command a more-than-one-third majority in one of the legislative chambers. In that respect, the reform is part of the firewall-policy against the AfD, which, of course, the AfD and its adherents see as an illegitimate exclusionary manoeuvre. The wisdom of that manoeuvre is indeed debatable, because the consequence is that as a result of the 2025 election, which showed a move of the electorate to the right, with 20.8 % voting AfD (and big losses for the left), FCC appointments are bound to move leftwards sooner or later if the AfD is excluded from any say in them, as the consent of Die Linke, the leftest of the parties represented in the Bundestag, will be needed to attain the required two-thirds majority. Preferring cooperation with Die Linke to cooperation with the AfD seems a reasonable choice at first sight because unlike in the AfD, there are no relevant extremist movements in Die Linke. On the other hand: Voters moving to the right, FCC bench moving to the left – this is not a recipe that will help preserve the authority of the court in the long run.

As to the more general question whether “constitutional fortification” can secure resilience: There is of course nothing to say against constitutionalizing important frameworks for the proper operation of a constitutional court which are not likely to need reform. Constitutionalisation will not help where parties hostile to judicial limitations of their power command a majority that enables them to change the constitution, as was the case in Hungary, due to a highly distorting electoral system, but in most countries, this is extremely unlikely to happen. The more important reservation is that, however detailed the constitutional prescriptions, there is no sure-fire constitutional precaution against disobedience to a Constitutional Court, and therefore no sure-fire precaution against violations of the constitution, either – not even against violations which a

Constitutional Court has identified as such. This is why quite extensive provisions on the Constitutional Tribunal in the Constitution of Poland (Art. 188ff.) have not been able to prevent this tribunal from being captured.

We must face that constitutional courts are, as noted by Hamilton, inherently vulnerable. This is certainly not an argument against constitutional fortifications. But the best protection for a constitutional court is the trust and loyalty of the citizens, and their determination to defend it against serious assaults. And we should not be unhappy with that, nor should we waste our energies trying to close *any* possible gap in the fortifications surrounding our constitutional courts.

It is dangerous to clog even the smallest opening through which steam may escape from a boiling pot. And even constitutional courts do need checks keeping them at bay. The political scientist Philipp Manow has recently pointed out the importance of judicial “auto-limitation” – of a self-restraint of apex courts flowing from the awareness of their being subject to adverse reactions if they step out of their judicial role. According to Manow, the populist uprising against liberal constitutionalism is mainly a result of non-majoritarian institutions such as constitutional courts (including European Courts) restricting the democratic process.¹¹²

I do not agree with Manow’s analysis insofar as it identifies constitutional courts as the central cause for the current crises of liberal democracy, but I do think he has an important point in stressing that constitutional courts need autolimitation, that autolimitation has institutional prerequisites, and that it will not work where constitutional courts have *nothing* to fear. So let us not regret the vulnerability of constitutional courts and rely mainly on legal fortification, but work to conserve and rebuild trust in them.

¹¹⁰ Draft bill for the reform of the Basic Law, BTDrucks. 20/12977, p. 5 (my translation).

¹¹¹ Draft bill for the reform of the Act on the Federal Constitutional Court, BT-Drucks. 20/12978, 1f.

¹¹² MANOW, Unter Beobachtung 125ff.

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Abbreviations

AfD	Alternative für Deutschland
Appl.	Application
CCt	Constitutional Court
cf.	confer
Ct	Court
CVM	Cooperation and Verification Mechanism
e.g.	exempli gratia
ECJ	European Court of Justice
ECtHR	European Court of Human Rights
EU	European Union
FCC	Federal Constitutional Court
GDP	Gross Domestic Product
i.e.	id est
IBA	International Bar Association
ICC	International Criminal Court
No.	Number
par.	paragraph
PiS	Prawo i Sprawiedliwość
SCt	Supreme Court
Sect.	Section
TEU	Treaty on European Union
US	United States
v.	versus

cf. the list of common abbreviations:
[<https://www.oeaw.ac.at/fileadmin/kommissionen/rechtsgeschichte/pdf/abk.pdf>]

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