JUSTIN

Working Paper Series

No. 4/2022

(DE)JUDICIALIZATION OF POLITICS IN THE ERA OF POPULISM: LESSONS FROM CENTRAL AND EASTERN EUROPE

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JUSTIN Working Paper Series

David Kosař & Katarína Šipulová, Co-Editors in Chief

ISSN 2336-4785 (online)

Copy Editor: Lukáš Hamřík

2022

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The revised Version of Record of this manuscript has been published and is available in the *International Journal of Human Rights* Vol. 26, No. 7, pp. 1181–1206 (2022), available at: https://www.tandfonline.com/doi/abs/10.1080/13642987.2021.1931138.

Abstract

Law and politics scholarship has been preoccupied with the phenomena of judicialization of politics, often treated as a linear, intensifying trend. This article, however, argues that the rise of populism, particularly East-Central European authoritarian populism, has brought new dialectical dynamics to the judicialization narrative. I analyse the relationship between the populist rule and the judicialized structure of governance, revisit and update the judicialization theories by providing a conceptual toolkit for the analysis of the populist backlash against judicialization. The populist ideology suggests that populists should seek de-judicialization. Drawing on Hungarian and Polish cases, however, this article shows that reality is much more complex. Subject to the scope of populists' power and developments in time, populists combine different short- and long-term strategies seeking de-judicialization of politics and extreme politicization of the judiciary. Consequently, constitutional courts captured by populists are not always muted; they can be actively exploited for legitimization of the government, as swords against opponents, and for preservation of the populists' eventually diminishing hegemony. These measures affect the judicialized triadic structure of governance, normally consisting of the government, the opposition, and an impartial constitutional court. Depending on the techniques employed, the populist court-curbing can lead to (1) partial return to the dyadic structure where the court is prevented from reviewing laws, (2) deformed triadic structure skewed toward the populists' preferences, and (3) in the long-term, the emergence of 'charade' triadic structure turning the constitutional court into an inferior actor with a swinging ideological position according to its principals' preferences.

Keywords

Populism, judicialization, democratic backsliding, constitutional court, Hungary, Poland

Suggested citation:

Petrov, Jan. (De)Judicialization of Politics in the Era of Populism: Lessons from Central and Eastern Europe. *International Journal of Human Rights* Vol. 26, No. 7, pp. 1181–1206 (2022).

(DE)JUDICIALIZATION OF POLITICS IN THE ERA OF POPULISM: LESSONS FROM CENTRAL AND EASTERN EUROPE

Jan Petrov*

1. Introduction

In the last three decades, law and politics scholars have been preoccupied with the theme of judicialization of politics.[1] They have argued that legislators' zone for political decisions has been significantly curtailed by courts, especially those with the power of judicial review of legislation – constitutional courts. Consequently, they have spoken about the 'global expansion of judicial power', 'governing with judges', and the rise of 'juristocracy'.[2] Judicialization was conceived mostly as a linear, intensifying trend. However, the recent rise of authoritarian populism has brought new dialectical dynamics to the judicialization narrative. Backed by an ideology resenting technocratic tendencies and seeking unmediated enforcement of the popular will, populist rulers targeted constitutional courts which had allegedly constrained the will of the real people.

The aim of this article is to analyse the relation between the populist rule and the judicialized structure of governance. The ideological underpinnings of populism suggest that populists should seek de-judicialization.[3] However, the analysis of Central and Eastern Europe (CEE)–a 'real-world laboratory' of checks and balances limitations[4]–shows a different experience. Drawing on the study of Hungary and Poland, this article argues that the relation between the (authoritarian) populist rule and judicialization is much more complex. Populists resort to a mixture of techniques targeting different components of judicial power, aiming for de-judicialization of politics or extreme politicization of the constitutional court, depending on the scope of populists' political power and developments in time, particularly on the level of consolidation of the populist regime. Accordingly, marginalizing constitutional courts is not the only strategy employed by populists. They also seek to take advantage of the judicialized structure of governance, tame and coopt constitutional courts for achieving their own goals.

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* This is the Author's Original Manuscript ('preprint'). The revised Version of Record of this manuscript has been published and is available in the 26 INTERNATIONAL JOURNAL OF HUMAN RIGHTS 1181 (2022), https://www.tandfonline.com/doi/abs/10.1080/13642987.2021.1931138. The research leading to this article has received funding from the European Research Council (ERC) under the European Union's Horizon 2020 research and innovation programme (grant no. 678375 JUDI-ARCH ERC-2015-STG).

[1] See Christoph Hönnige. 'Beyond Judicialization: Why We Need More Comparative Research about Constitutional Courts' . 10 EUROPEAN POLITICAL SCIENCE 346 (2011).

[2] Neil Tate and Torbjörn Vallinder eds. THE GLOBAL EXPANSION OF JUDICIAL POWER (1995); Alec Stone Sweet. GOVERNING WITH JUDGES (2000); Ran Hirschl, TOWARDS JURISTOCRACY (2004).

[3] I understand de-judicialization as a process aimed at preventing a court from reviewing a policy and from intervening in political issues which were previously judicialized.

[4] David Kosař, Jiří Baroš and Pavel Dufek. 'The Twin Challenges to Separation of Powers in Central Europe: Technocratic Governance and Populism'. 15 EUROPEAN CONSTITUTIONAL LAW REVIEW 429 (2019).

A pattern emerges where the early unconsolidated populist regime first tries to prevent constitutional courts from blocking their early policies. Different de-judicialization techniques ranging from jurisdiction stripping and access restrictions to paralysis of the court facilitate this goal. Yet, complete de-judicialization is too costly to achieve and, moreover, unnecessary since courts can serve illiberal regimes as legitimizing devices. Accordingly, populists then seek to tame the constitutional court – strip it of autonomous veto status by harmonizing the court's ideological position with the government's preferences. The crucial technique is extreme politicization of the bench through large-scale personnel changes. Consequently, constitutional courts captured by populists are not 'muted' all the time; they can also be actively exploited for legitimization of the government's policies and as swords against political opponents.

Populism does not invent brand new court-curbing techniques. Compared to earlier authoritarian regimes, however, it provides a different context and justification for court-curbing – one disguised in democratic parlance. This results in important novelties regarding the framing of court-curbing, its resonance within the public and long-term consequences. I argue that these features of populist court-curbing increase the likelihood of the charade triadic structure emergence (see below) and of gradual erosion of the public demand for judicial independence. Populist court-curbing also differs from politicization of the judiciary that regularly occurs in established democracies. Although the line may be blurred, sequencing, scope and combination of the court-curbing measures taken by populists make them tools of *extreme* politicization. Populists seem to denounce the established rules of the game and seek to twist or even change appointment mechanisms in order to make possible the capture of a court by a single faction, which significantly compromises the standard functions of judicial review.

The novel contribution of this article is conceptual and theoretical. Several authors have already demonstrated curtailing and weaponizing of courts by populists (see below). This article, however, analyses these trends in the context of judicialization of politics – a highly influential umbrella theory of judicial politics. The theory claims that the introduction of judicial review of legislation shifted the previously dyadic structure of politics (government v. opposition) toward a triadic structure headed by a third impartial actor – the constitutional court. This article revisits these theories and takes into account the momentary and long-term challenges the populist rule poses to judicialization. Specifically, I distinguish several possible transformations of the judicialized triadic structure of governance. De-judicialization techniques weaken the triad and (partially) return the system to a dyadic structure. Extreme politicization techniques produce a deformed triadic structure skewed toward the populist camp's preferences. In the long-term, these practices can lead to a 'charade' triadic structure, where the constitutional court turns into an inferior actor with a shifting ideological position depending on the preferences of its principals. In sum, the article revisits the judicialization of politics theories and updates them by providing a conceptual toolkit for the analysis of the populist backlash against judicialization and for constitutional courts' behavior in populist-governed polities, which acknowledges the dynamic element in the lives of populist regimes.

The article proceeds in six parts. Part 2 summarizes the judicialization of politics scholarship. Part 3 explains the ideological underpinnings of populism and the populist irritation with judicialized politics. Part 4 examines the various court-curbing techniques employed in

Hungary and Poland. Building on these two cases, Part 5 (the core part of this article) provides a generalized account of the dynamics of populist court-curbing strategies, their rationale and effects on the structure of governance. Part 6 concludes.

2. Judicialization of Politics

Hirschl defines judicialization of politics as 'the reliance on courts and judicial means for addressing core moral predicaments, public policy questions, and political controversies.'[5] According to Vallinder, judicialization of politics denotes 'the expansion of the province of the courts or the judges at the expense of the politicians and/or the administrators, that is, the transfer of decision-making rights from the legislature, the cabinet, or the civil service to the courts or, at least, the spread of judicial decision-making methods outside the judicial province proper.'[6] Judicialization of politics is a broad phenomenon encompassing the operation of various courts to various extents. This article focuses on constitutional courts for the following reasons. First, the most influential judicialization theories are centered around constitutional courts due to their direct interventions in the legislative process based on their power to strike down legislation (see below). Second, constitutional courts belong among the first targets of populist court-curbing. Third and related, attacks on constitutional courts are particularly detrimental to constitutional resilience since they make the subsequent capture of other institutions easier.[7]

Judicialization of politics by constitutional courts notably affects the politics of lawmaking and shifts it from a dyadic to a triadic structure.[8] Before the introduction of judicial review of legislation, lawmaking took place within a dyadic environment. It would be characterized by mutual negotiations among political parties. Although bills of rights may have existed even then, they were mostly viewed as political declarations lacking legally enforceable status. However, the introduction of written constitutions and judicially enforceable fundamental rights gradually shifted the lawmaking environment toward a triadic structure.[9] It was complemented with a third actor – a court with the power of judicial review of legislation. Once new legislation is adopted, several actors – such as the parliamentary opposition or individual citizens – can challenge the law in court on the grounds of its alleged unconstitutionality. Courts can strike down an unconstitutional statute, but they can also provide guidelines of constitutionally conform interpretation binding on other state authorities. Some courts even formulate directives ordering the lawmakers how the unconstitutionality shall be remedied.[10]

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[5] Ran Hirschl. 'Judicialization of Politics'. In THE OXFORD HANDBOOK OF LAW AND POLITICS 119 (Gregory A. Caldeira, R. Daniel Kelemen and Keith E. Whittington eds., 2008).

[6] Torbjörn Vallinder. 'When the Courts Go Marching In'. In THE GLOBAL EXPANSION OF JUDICIAL POWER 13 (Neil Tate and Torbjörn Vallinder eds., 1995).

[7] Yaniv Roznai and Tamar Hostovsky Brandes. 'Democratic Erosion, Populist Constitutionalism and the Unconstitutional Constitutional Amendments Doctrine'. 14 LAW AND ETHICS OF HUMAN RIGHTS 19 (2020).

[8] Alec Stone Sweet. 'Judicialization and the Construction of Government'. 32 COMPARATIVE POLITICAL STUDIES 148 (1999).

[9] *Ibid.*; Martin Shapiro. COURTS 1–2 (1981).

[10] Allan Brewer-Carías, ed. CONSTITUTIONAL COURTS AS POSITIVE LEGISLATORS 153–164 (2013).

Thus, when a weaker political actor (usually the opposition party)[11] loses the battle over new legislation in the parliament, it can still achieve its goal through judicial means. A pre-condition is the ability to transform the political issue into legal terms. With respect to the current state of constitutionalization across the world, this task does not seem too difficult.[12] Aharon Barak, the former Chief Justice of the Israeli Supreme Court, even argued that 'nothing falls beyond the purview of judicial review; the world is filled with law; anything and everything is justiciable.'[13]

The possibility of continuing a political battle by legal means has further consequences. Since the costs of transferring the policy issue to a court are usually low and the gains potentially high, the losing group of lawmakers has the incentive to activate a court frequently. That tends to intensify the level of judicialization. According to several authors, judicialization is somewhat of a one-way street, 'an inescapable fact'[14] – the triadic dispute resolution mechanism 'appears, stabilizes, and develops authority over the normative structure.'[15] In some countries, political actors start taking preventive account of the constitutional court's case law when drafting new legislation and try to anticipate how the court will respond to it. Stone Sweet speaks about the pedagogical function of constitutional adjudication,[16] and conceives judicialization of politics as a process 'by which triadic lawmaking progressively shapes the strategic behavior of political actors engaged in interactions with one another.'[17] As a result, the purely political dyadic structure of lawmaking is 'inevitably placed in the shadow of triadic rule making.'[18]

In sum, judicialization affects the politics of lawmaking in the following ways. First, it imposes substantive constraints on lawmakers as constitutional courts rule out certain policies as unconstitutional. Second, in the long-term perspective judicialization reinforces de-politicization of certain constitutionalized spheres of law. This feature may be stronger in jurisdictions where courts apply the unconstitutional constitutional amendment doctrine and reserve the right to assess the constitutionality of constitutional amendments.[19] Third, through the pedagogical effect constitutional courts' judgments affect lawmaking also prospectively when political actors anticipate the courts' reaction when drafting new legislation. Fourth, the rhetoric of lawmaking tends to change. One can witness the influence of constitutional language on parliamentary debates and the spread of human rights vocabulary.

[11] Other political actors, however, may have their interest in using judicial review of legislation too. See Lubomír Kopeček and Jan Petrov. 'From Parliament to Courtroom: Judicial Review of Legislation as a Political Tool in the Czech Republic'. 30 EAST EUROPEAN POLITICS AND SOCIETIES 140 (2016).

[12] Ran Hirschl. 'The New Constitutionalism and the Judicialization of Pure Politics'. 75 FORDHAM LAW REVIEW 721 (2006-2007).

[13] *Ibid.*

[14] Luís Roberto Barroso. 'Countermajoritarian, Representative, and Enlightened: The Roles of Constitutional Courts in Democracies'. 67 AMERICAN JOURNAL OF COMPARATIVE LAW 114 (2019).

[15] Stone Sweet, *supra* n. 8, at 164.

[16] Alec Stone Sweet, *supra* n. 2, at 194-204.

[17] Stone Sweet, *supra* n. 8, at 164.

[18] *Ibid.*, at 158.

[19] See Yaniv Roznai. UNCONSTITUTIONAL CONSTITUTIONAL AMENDMENTS (2017).

According to many scholars, these effects tend to intensify throughout time – the more constitutional case law exists, the more constraints arise and the more opportunities emerge to transfer the political dispute to a court. As a result, the mainstream theories of judicialization of politics are construed as linear narratives of progress and continuing judicialization.[20] Altohugh several authors have warned that extreme judicialization can lead to politicization of the judiciary,[21] many approaches to judicialization of politics do not acknowledge that there may emerge social and political processes, which lead to pushbacks or backlashes against judicialization, or, at least, do not provide conceptual space for analyzing effects of such processes. Additionally, they are largely uni-dimensional and fail to fully recognize that judicial power is a composite of several institutional and political features.[22]

This article argues that populism disrupts the judicialization teleology, and brings about a dialectical dynamic to the judicialization narrative. In some jurisdictions, the populist rule manifested, *inter alia*, as a backlash against excessive technocratization and judicialization of democracy.[23] Part 3 further explains that the populist ideology suggests that populism in practice should lead to de-judicialization efforts and re-politicization of the public sphere.

3. Populist irritation with judicialization of politics: Ideational dimension

The listed effects of judicialization of politics are at odds with the ideological underpinnings of populism. Populism is a thin political ideology which explains how democracy should work and how the political leaders should relate to the people.[24] Mudde introduced an influential definition of populism as 'an ideology that considers society to be ultimately separated into two homogeneous and antagonistic groups, 'the pure people' versus 'the corrupt elite', and which argues that politics should be an expression of the volonté générale (general will) of the people.'[25]

The idea of a united ordinary people implies that there is one united popular will.[26] The goal of populist politics is to enforce such a popular will in an *authentic* way, without the compromising effects of non-majoritarian checks on the popular will.[27] Populists criticize the endless litigiousness stemming from the rule of law constraints on majoritarian democracy

[20] See, critically, Daniel Abebe and Tom Ginsburg. 'The Dejudicialization of International Politics?'63 INTERNATIONAL STUDIES QUARTERLY 524 (2019); Karen Alter, Emily Hafner-Burton and Laurence Helfer. 'Theorizing the Judicialization of International Relations'. 63 INTERNATIONAL STUDIES QUARTERLY 458 (2019); Doreen Lustig and Joseph Weiler. 'Judicial review in the contemporary world—Retrospective and prospective'. 16 ICON 369 (2018).
[21] E.g. John Ferejohn .'Judicializing Politics, Politicizing Law'. 65 LAW AND CONTEMPORARY PROBLEMS 42 (2002); Stephen Gardbaum, 'Are Strong Constitutional Courts Always a Good Thing for New Democracies?' 53 COLUM.J.TRANSNAT'L L. 306 (2015).
[22] See the critique by Daniel Brinks and Abby Blass. 'Rethinking judicial empowerment: The new foundations of constitutional justice'. 15 ICON 298 (2017); and Björn Dressel. 'Courts and Governance in Asia'. 42 HONG KONG LAW JOURNAL 95 (2012).
[23] Andrea Pin. 'The transnational drivers of populist backlash in Europe: The role of courts'. 20 GERMAN LAW JOURNAL 225 (2019); Yascha Mounk. THE PEOPLE VS. DEMOCRACY 73 (2018).
[24] Aziz Huq. 'The people against the constitution'. 116 MICHIGAN LAW REVIEW 1132 (2017).
[25] Cas Mudde. 'The Populist Zeitgeist'. 39 GOVERNMENT AND OPPOSITION 543 (2004).
[26] Luigi Corrias. 'Populism in a Constitutional Key: Constituent Power, Popular Sovereignty and Constitutional Identity'. 12 EUROPEAN CONSTITUTIONAL LAW REVIEW 11 (2016).
[27] Ben Stanley. 'The Thin Ideology of Populism'. 13 JOURNAL OF POLITICAL IDEOLOGIES 101 (2008).

and aim to repoliticize the public sphere.[28] Accordingly, populists hold the position that the people's constituent power is still present to be exercised, which means that constitutional law is not necessarily supreme to politics.[29] In addition, populist leaders claim direct and unmediated connection with and support from the people.[30]

Müller adds that populists are also anti-pluralist and claim exclusive representation of the 'real' people.[31] Yet, there is a debate whether the anti-pluralist features are attributable to all varieties of populism. Nowadays, authoritarian versions of populism dominate.[32] And some authors argue that the authoritarian consequences are inherent in populism as such.[33] Others claim that some kinds of populism are not authoritarian and can be squared with constitutional democracy: 'The antiestablishment part of populism can be empirically and logically unbundled from its authoritarian and xenophobic dimensions.'[34] Since this article is more narrowly focused, I cannot do justice to this big question. I leave it aside and concentrate on the the type of populism that currently dominates politics in CEE, specifically in Hungary and Poland, i.e. populism tied with significant ethnonationalist, anti-pluralist, and illiberal elements.[35] Accordingly, my conclusions apply to this type of populism. More empirical work needs to be done to find out to what extent the patterns identified in this article are applicable beyond CEE authoritarian populism.

4. Populist irritation with judicialization of politics: Practical politics dimension

Müller points out that authoritarian populists in government use three main strategies of governing: occupation (or colonization) of the state, mass clientelism and discriminatory legalism, and repression of civil society.[36] The first feature is crucial for the focus of this article – populists tend to 'occupy' the state by perpetuating their power through centralization and capturing state instituions.[37] Employment of the state colonization strategy in populist-governed polities can be very broad and include institutions of civil society, electoral institutions, free media, parliamentary platforms for the expression of opposition, civil service, educational and cultural institutions.[38] Yet, the judiciary with constitutional courts in the first line often belongs among the early targets.

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[28] Mudde, *supra* n. 25, at 555; Heike Krieger. 'Populist Governments and International Law'. 30 EJIL 971 (2019); Nadia Urbinati. 'The Populist Phenomenon'. 51 RAISONS POLITIQUES 147 (2013).

[29] Oran Doyle. 'Populist constitutionalism and constituent power'. 20 GERMAN LAW JOURNAL 162 (2019).

[30] Kurt Weyland. 'Clarifying a Contested Concept: Populism in the Study of Latin American Politics'. 34 COMPARATIVE POLITICS 14 (2001).

[31] Jan-Werner Müller. WHAT IS POPULISM? 20 (2016).

[32] Pippa Norris and Roger Inglehart. CULTURAL BACKLASH: TRUMP, BREXIT AND THE RISE OF AUTHORITARIAN POPULISM (2018).

[33] Andrew Arato. 'Socialism and Populism'. 26 CONSTELLATIONS 469 (2019). In the empirical scholarship, see Robert Huber and Christian Schimpf. 'On the Distinct Effects of Left-Wing and Right-Wing Populism on Democratic Quality'. 5 POLITICS AND GOVERNANCE 146 (2017).

[34] David Fontana. 'Unbundling Populism'. 65 UCLA LAW REVIEW 1482 (2018).

[35] See Bojan Bugarič. 'Central Europe's descent into autocracy: A constitutional analysis of authoritarian populism'. 17 ICON 597 (2019); Tímea Drinóczi and Agnieszka Bień-Kacała. 'Illiberal Constitutionalism: The Case of Hungary and Poland'. 20 GERMAN LAW JOURNAL 1140 (2019).

[36] Jan-Werner Müller. 'Populism and Constitutionalism'. In THE OXFORD HANDBOOK OF POPULISM 596 (Cristóbal Rovira Kaltwasser et al. eds., 2017).

[37] *Ibid.*

[38] Wojciech Sadurski. POLAND'S CONSTITUTIONAL BREAKDOWN 132 (2019).

The operation of constitutional courts tends to bring about high levels of judicialization and its constraining effects, which are at odds with the populist ideology. According to the populist ideology, judicialized politics does not authentically represent the will of the ordinary people. Autonomous constitutional courts create a major obstacle for the realization of the people's political sovereignty, since they possess significant veto capacity.[39] This part examines the populist assaults on constitutional courts in Hungary and Poland. The aim is not to retell all the details of the story of dismantling these two courts,[40] but rather to focus on the major points which help to understand the populist resentment against judicialization of politics in context.

4.1. Hungary

In 2010, the Fidesz party won the Hungarian parliamentary election, gaining a constitutional majority. Since then, the populist regime led by Viktor Orbán has thoroughly consolidated its power, using, *inter alia*, the state occupation strategy.[41] One of the first targets was the Hungarian Constitutional Court (HCC). Although a poster child among post-communist constitutional courts in the past,[42] the HCC was circumscribed in competences, packed and disciplined to a large extent. Initially, the new government's idea was to abolish the HCC and merge it with the Supreme Court.[43] Although the HCC maintained its existence in the end, the government took several steps to gradually weaken it and essentially 'tame' its veto capacity. First, mechanisms affecting the HCC's composition were addressed. The system for electing the HCC's judges was changed in 2010. Originally, Hungary had relied on a parliamentary model of appointing HCC judges, which aimed at a consensual selection of the candidates by political parties, similarly to the German system. The selection was made by a two-third majority in an *ad hoc* parliamentary committee composed of one representative of each parliamentary party, irrespectively of its number of seats in the parliament. Since 2010, however, the committee's composition has had to respect the parties' weight in the parliament, which gives the government a dominance in the selection process.[44] With a two-thirds majority in the parliament, the new government got an opportunity to select its own preferred candidates without cooperating with the opposition.[45] Moreover, the government enlarged the number of vacancies by implementing a court-packing plan. The number of judges was increased from eleven to fifteen, and their term was extended from nine to twelve years. And since there were two vacancies at the time of court-packing, the government had the freedom to fill six seats.[46] During its first three years, the government managed to select nine HCC judges in total.[47]

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[39] See Ben Stanley. 'Confrontation by default and confrontation by design: strategic and institutional responses to Poland's populist coalition government'. 23 DEMOCRATIZATION 263, 273–274 (2016).
[40] In this respect, see writings of the Hungarian and Polish authors cited below.
[41] Müller, *supra* n. 31.
[42] László Sólyom. 'The Rise and Decline of Constitutional Culture in Hungary'. In CONSTITUTIONAL CRISIS IN THE EUROPEAN CONSTITUTIONAL AREA 24 (Armin von Bogdandy and Pál Sonnevend eds., 2015).
[43] *Ibid.*, at 23.
[44] Katalin Kelemen. 'Appointment of Constitutional Judges in a Comparative Perspective – with a Proposal for a New Model for Hungary'. 54 ACTA JURIDICA HUNGARICA 16 (2013).
[45] Kim Lane Scheppele. 'Understanding Hungary's Constitutional Revolution'. In CONSTITUTIONAL CRISIS IN THE EUROPEAN CONSTITUTIONAL AREA 111 (Armin von Bogdandy and Pál Sonnevend eds., 2015).
[46] Gábor Halmai. 'Dismantling Constitutional Review in Hungary'. 3 RIVISTA DI DIRITTI COMPARATI 35 (2019).
[47] Scheppele, *supra* n. 45, at 115.

These personnel changes affected the HCC's case law. Sólyom reported that the HCC got into a 'survival mode', facing a division between the new and the old judges: 'A clearly identifiable block of the new judges has never voted for unconstitutionality of a law issued by the present majority or the government.'[48] This was augmented by shuffling with the composition of HCC's panels. Scheppele reported that the panels were composed so that 'each panel of judges ha[d] a predictable post-2010 Fidesz majority.'[49]

Second, the government restricted access to the HCC. Most importantly, it quashed the Hugarian constitutional law's signature (and, admittedly, extraordinary) feature – *actio popularis*. Under this mechanism, anybody was entitled to file a motion for constitutional review of legislation, which assisted the HCC in developing its case law and involved the people in constitutional interpretation.[50] Instead, the government introduced a system of more traditional constitutional complaints, including the German type (*Verfassungsbeschwerde*), which allowed the HCC to review the constitutionality of ordinary courts' decisions in individual cases.[51] Thus, although access by an individual was preserved, the HCC's activation channels were restricted.[52] Although other channels of initiating review of legislation remained in place, state officials are not active in initiating review of legislation, probably because most of the offices are held by the government's nominees.[53]

Third, the Fidesz government resorted to jurisdiction stripping. The HCC was barred from reviewing financial laws.[54] Furthermore, the so-called Fourth Amendment to the new constitution restricted review of constitutional amendments exclusively to the procedural issues. The substance of constitutional amendments was immunized from judicial review.[55] That does not sound too controversial, as the unconstitutional consitutitonal amendment doctrine is not universally accepted. However, for the Fidesz government, which possessed the constitutional majority in the Parliament, constitutional amendment became a routine means of lawmaking used to override the HCC's rulings.[56]

Fourth, the Fourth Amendment also voided all the HCC's pre-2012 case law. That was a major blow to the HCC's authority as even the 'packed' HCC declared continuity with the previous case law. Yet, the Fourth Amendment stated that case law made before the coming into effect of the new constitution ceases to be in force. That meant a setback for the twenty years of constitutional developments in Hungary and, moreover, it erased the mandatory force of the

[48] Sólyom, *supra* n. 42, at 23. See also Zoltán Szente. 'The Political Orientation of the Members of the Hungarian Constitutional Court between 2010 and 2014'. 1 CONSTITUTIONAL STUDIES 123 (2016).
[49] Kim Lane Scheppele. 'Constitutional Coups and Judicial Review: How Transnational Institutions Can Strengthen Peak Courts at Times of Crisis'. 23 TRANSNATIONAL LAW AND CONTEMPORARY PROBLEMS 72 (2014).
[50] Scheppele, *supra* n. 45, at 116.
[51] Article 24 (2) d) of the Fundamental Law of Hungary.
[52] Fruzsina Gárdos-Orosz. 'The Hungarian Constitutional Court in Transition – from Actio Popularis to Constitutional Complaint'. 53 ACTA JURIDICA HUNGARICA 302 (2012).
[53] Halmai, *supra* n. 46*,* at 33–34.
[54] Scheppele, *supra* n. 45, at 117.
[55] *Ibid*.
[56] Sólyom (*supra* n. 42, at 27) described the practice as 'permanent constitution-making.'

judge-made constitutional law of Hungary.[57] This step effectively removed even the limitations on the government's will 'inherited' from the pre-Fidesz times.

In sum, these measures have had far-reaching consequences for the HCC and the rule of law in Hungary. Although the HCC fought back for about three years,[58] the constraints on lawmaking resulting from judicialization by the HCC were largely eliminated. An essential part of the government policies was entirely exempted from the HCC's review.[59] The remaining parts were strengthened by the possibility of constitutional override of the HCC's decisions. Moreover, the discontinuity with the previous constitutional jurisprudence implies that the populist government managed to get rid even of the HCC's previous jurisprudence. Finally, the installation of new judges through court packing and replacement of old judges led to the 'taming' of the HCC. Overall, as Bugarič and Ginsburg put it, 'the Fidesz government drastically revised the Hungarian constitutional and political order by systematically dismantling checks and balances, thereby undermining the rule of law and transforming the country from a postcommunist democratic success story into an illiberal regime.'[60]

4.2. Poland

Orbán's illiberalism provoked international reaction. Beside a lot of criticism, a supportive voice came from Poland. In 2011, Jarosław Kaczyński (Poland's former Prime Minister) admired Orbán's governance strategy: 'The day will come when we will succeed, and we will have Budapest in Warsaw.'[61] Kaczyński's prediction was right. In 2015, his Law and Justice party (PiS) won the parliamentary elections and gained the absolute majority of seats, yet was short of a constitutional majority.

PiS started governing the country in a manner which showed they did not want to repeat the scenario from 2005-2007. In that period, Kaczyński's populist government was quite successfully countered by independent actors, especially the Polish Constitutional Tribunal (PCT).[62] This time, the PiS government did not want to make the same mistake and attacked the PCT soon after taking office. Kaczyński was very open about his motives. He described the Tribunal as a potential obstacle to the realization of PiS's electoral promises,[63] and stated he wanted to break up the 'band of cronies' who allegedly made up the Tribunal.[64]

The first phase of dismantling led to the PCT's paralysis.[65] The initial step was the battle over the former parliament's appointees to the Tribunal. Shortly before the end of its term, the

[57] *Ibid.*, at 29.
[58] See Scheppele, *supra* n. 49, at 72 ff.
[59] Sólyom, *supra* n. 42, at 24.
[60] Bojan Bugarič and Tom Ginsburg. 'The Assault on Postcommunist Courts'. 27 *Journal of Democracy* 73 (2016).
[61] Neil Buckley and Henry Foy. 'Poland's new government finds a model in Orban's Hungary'. FINANCIAL TIMES (Jan. 6, 2016), https://www.ft.com/content/0a3c7d44-b48e-11e5-8358-9a82b43f6b2f.
[62] Stanley, *supra* n. 39.
[63] R. Daniel Kelemen and Mitchell Orenstein. 'Europe's Autocracy Problem: Polish Democracy's Final Days?' FOREIGN AFFAIRS (Jan. 7, 2016), https://www.foreignaffairs.com/articles/poland/2016-01-07/europes-autocracy-problem.
[64] The Guardian. 'Poland's government carries through on threat to constitutional court'. THE GUARDIAN (Dec. 23, 2015), https://www.theguardian.com/world/2015/dec/23/polands-government-carries-through-on-threat-to-constitutional-court.
[65] Sadurski, *supra* n. 38, at 61–79.

prior parliament filled three vacancies with new judges. Yet, the MPs took a controversial step when they also elected two more appointees in the place of judges whose mandate would run out two months later, i.e. after the end of the parliament's term. Apparently, this was done deliberately to prevent the incoming parliament from choosing the judges.[66] Accordingly, the PCT declared these two appointments unconstitutional but confirmed the previous three.[67] Nevertheless, the PiS-backed President refused to swear in the three judges. The new PiS government declared all five appointments invalid and installed its own nominees at the PCT. However, the 'old' judges refused to hear cases with these new PiS-elected judges.[68] Yet, the PiS government later managed to instal one of the 'new' judges to the position of the PCT's acting and later regular President. One of her first steps was to include all the new controversial appointees in the PCT's panels.[69]

Soon after, the Parliament adopted several amendments to the Constitutional Tribunal Act, among them the so-called repair bill. Sadurski points out that these amendments had three main goals and effects – to exempt the new PiS legislation from effective constitutional review, to paralyze the court, and to enhance the powers of the political branches *vis-à-vis* the PCT.[70] To name but a few examples, the new legislation introduced a requirement of strictly respecting the sequence of judgments according to the time of the motion, a requirement of considering a case no earlier than 3 months (6 months in cases decided by the full bench) after notification of the parties about the proceedings. As for the paralyzing provisions, the major change was the increase of the quorum – 13 out of 15 judges had to be present for the case to be heard. Regarding the third group of changes, the most striking was that the amendments increased the political branches' disciplinary powers over the PCT's judges.[71]

Although the repair bill seemed to be 'custom-made to paralyze the court' and left the Tribunal 'largely impotent,'[72] the PCT managed to strike back in a series of judgments which Koncewicz labels as 'existential judicial review'.[73] The PCT declared the repair bill unconstitutional as it prevented the court from carrying out reliable and efficient work. Nevertheless, the government refused to implement or even publish several of these judgments.[74]

Meanwhile, by mid-2016, the PiS government had managed to appoint a majority of its judges to the bench. According to Sadurski, the judges nominated by PiS – except one – have so far

[66] Wojciech Sadurski. 'How Democracy Dies (in Poland): A Case Study of Anti-Constitutional Populist Backsliding'. 10 REVISTA FORUMUL JUDECATORILOR 122 (2018).
[67] Kelemen and Orenstein, *supra* n. 63.
[68] The battle over the appointments was actually even more complicated. For details see Lech Garlicki. 'Constitutional Court and Politics: The Polish Crisis'. In JUDICIAL POWER 146 (Christine Landfried ed., 2019).
[69] Wojciech Sadurski. 'Polish Constitutional Tribunal Under PiS: From an Activist Court, to a Paralysed Tribunal, to a Governmental Enabler'. 11 HAGUE JOURNAL ON THE RULE OF LAW 68 (2019).
[70] *Ibid.*, at 71.
[71] *Ibid.*, at 72–3.
[72] Bugarič and Ginsburg, *supra* n. 60, at 73–74.
[73] Tomasz Tadeusz Koncewicz. 'Understanding the Politics of Resentment'. 26 *Indiana Journal of Global Legal Studies* 501 (2019).
[74] Tomasz Tadeusz Koncewicz. 'Of institutions, democracy, constitutional self-defence and the rule of law'. 53 COMMON MARKET LAW REVIEW 1785 (2016); R. Daniel Kelemen. 'Europe's Other Democratic Deficit: National Authoritariansim in Europe's Democratic Union'. 52 GOVERNMENT AND OPPOSITION 228 (2017).

shown themselves to be loyal to the government in all cases.[75] This effect was even augmented as the new PCT President reshuffled the composition of the panels and removed the 'old' judges from judge rapporteur positions.[76] By that time, the government had abandonded most of the changes in the procedure before the PCT as they had become unnecessary. New laws on the PCT more or less resemble the pre-crisis legislation. In Sadurski's interpretation, '[t]he earlier rules which seemed so defective to PiS when it did not have a majority on the Tribunal turned out to be perfectly satisfactory once it captured the majority.'[77]

5. Populist court-curbing: de-judicialization *and* extreme politicization

The Hungarian and Polish examples have many similarities, but also important differences. Both Orbán and Kaczyński had previous governmental experience within a judicialized framework of politics. In the 1990s, Orbán was a member of the parliament and the Prime Minister (1998-2002). Accordingly, he experienced the very activist 1990s' HCC. Especially under Sólyom's presidency, the HCC was labeled as 'the most powerful constitutional court in Eastern Europe' and beyond.[78] The HCC became the leader of democratic transition and was virtually rewriting the constitutional theory of the country.[79] During the first six years of its existence alone, it quashed about two hundred statutes.[80] Kaczyński has also been a stable figure on the Polish political scene. PiS won the 2005 parliamentary election and he became a Prime Minister in 2006. In this period, the PCT was one of the major opponents of Kaczyński's reforms and, for example, annulled a statute altering media oversight, and the government's efforts to toughen lustration mechanisms.[81] Nevertheless, both Orbán and Kaczyński failed to win the subsequent election and were forced to retreat into opposition.

Some authors have argued that the activism and bold approach of CEE constitutional courts in the 1990s and 2000s leading to extensive judicialization of politics have been a part of the current problems.[82] Kosař, Baroš and Dufek even argued that 'super-strong constitutional courts' emerged in CEE that were 'not responsive to the electorate and unreflective of the views of the majority of the population.'[83] Accordingly, they depict the recent populist attacks on CEE constitutional courts as an 'overreaction to an overreaction' since populists shifted technocratic judicialized governance to another extreme by removing most checks on their government.[84] No matter if one accepts this narrative or not, it seems that the constitutional courts' past trajectory and the populist leaders' hands-on experience with their veto capacity – combined with many more socio-economic and political causes – form a part of the story.

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[75] Sadurski, *supra* n. 69, at 71.
[76] *Ibid*.
[77] *Ibid.*, at 74.
[78] Herman Schwartz. THE STRUGGLE FOR CONSTITUTIONAL JUSTICE IN POST-COMMUNIST EUROPE 75, 106 (2000).
[79] Radoslav Procházka. MISSION ACCOMPLISHED: ON FOUNDING CONSTITUTIONAL ADJUDICATION IN CENTRAL EUROPE 118–119 (2002).
[80] Schwartz, *supra* n. 78, at 106.
[81] Wojciech Sadurski. RIGHTS BEFORE COURTS 360 (2014).
[82] Wen-Chen Chang. 'Back into the political? Rethinking judicial, legal, and transnational constitutionalism'. 17 ICON 455 (2019); Gardbaum, *supra* n. 21. See also *supra* n. 23.
[83] Kosař et al., *supra* n. 4, at 444.
[84] *Ibid.*, at 430.

After getting their second chance in the 2010s, Orbán and Kaczyński seemed to be determined to implement their political projects without the restraints resulting from strong and independent constitutional courts. Using the underpinnings of the populist ideology, both Orbán and Kaczyński were rather open about their efforts and targeted the respective constitutional courts. Yet, the techniques differed, mostly due to the different political backing of Orbán's and Kaczyński's governments. Whereas Orbán gained a constitutional majority in the parliament, Kaczyński had to operate with a 'mere' legislative majority.

Hungary and Poland represent two recent examples of illiberal turns and rule-of-law backsliding.[85] They have attracted a lot of attention as the backsliding is particularly shocking within the EU. However, they are not isolated cases and populist attacks against courts have taken place all over the world and have included both domestic and international courts.[86] Therefore, analysis of the Hungarian and Polish cases provide important insights regarding more general strategies of populist court-curbing with important repercussions for the theories of judicialization of politics. This part shows that the relation between (authoritarian) populist rule and judicialization of politics is much more complex than usually assumed. Court-curbing techniques employed by populists combine strategies of de-judicialization of politics *and* extreme politicization of the judiciary, and target different components of judicial power depending on the scope of populists' political power and developments in time, particularly on the level of consolidation of the populist regime.

The following sections proceed according to the phases of the populist regimes. These phases constitute an analytical simplification as there are no clear lines separating them. In fact, there can be significant overlaps between the first (de-judicialization) and second (extreme politicization) phases, especially if the ruling populists quickly gain an opportunity to appoint a considerable number of new constitutional court judges. Accordingly, there was a notable overlap between the de-judicialization and extreme politicization phases in the Hungarian case. Still, I keep the two phases separate since changing judicial personnel usually takes time and, therefore, less time-consuming de-judicialization techniques play a separate role even in regimes that can start staffing constitutional courts with loyalists soon after coming to power.

5.1. Initial phase: De-judicialization

Generalizing from the two cases, the populist court-curbing includes various aims, depending on the phase and consolidation of the populist regime. In the short-term perspective, populist governments need to exclude the constitutional court's power to block the initial reforms

[85] Some court-curbing advocates argue that the actions taken against the HCC and the PCT merely mark a shift from legal to political constitutionalism, which stresses the parliamentary rule at the expense of strong judicial review. Others, such as Castillo-Ortiz and Halmai, however, have persuasively shown that the concept of political constitutionalism was simply hijacked to legitimize the populist attacks on constitutional courts. See Pablo Castillo-Ortiz. 'The Illiberal Abuse of Constitutional Courts in Europe'. 15 EUROPEAN CONSTITUTIONAL LAW REVIEW 63 (2019); Gábor Halmai. 'Populism, authoritarianism and constitutionalism'. 20 GERMAN LAW JOURNAL 302 (2019).

[86] See Andrew Arato. 'Populism, Constitutional Courts, and Civil Society'. In JUDICIAL POWER 318 (Christine Landfried ed., 2019); Erik Voeten. 'Populism and backlashes against international courts'. 18 PERSPECTIVES ON POLITICS 407 (2020).

necessary to consolidate the regime.[87] The goal is de-judicializing politics.[88] This can be achieved by different ways, depending on the political power of the populist party.[89] If the party is powerful enough, it can employ hard de-judicialization techniques. The hardest one is the abolition of the constitutional court. This option was considered but not implemented in Hungary.[90] A less intensive option is restricting the channels used for transferring political issues to a court. This can be done through jurisdiction stripping and access restrictions. If the court is not competent to decide about certain types of issues, it will not be able to judicialize them. In this respect, the HCC was stripped of the competence to review financial laws and constitutional amendments. In those areas, therefore, politics became largely de-judicialized and returned to the dyadic logic. However, even if the court has the competence, it is difficult to judicialize the area if it is seldom (or never) activated by other actors. In this vein, the Hungarian government abolished *actio popularis*, which had previously represented a crucial activation mechanism for constitutional review of legislation.[91]

Techniques of hard de-judicialization are nonetheless very costly and demanding since they often require constitutional changes and likely result in higher reputational costs due to their tension with the principle of judicial independence.[92] The Polish scenario, however, exemplifies that less powerful and less consolidated populist regimes[93] can achieve de-judicialization too. The Polish playbook is a prime example of achieving de-judicialization through paralysis.[94] A combination of several subtle procedural and organizational changes led to de facto de-judicialization since it made it impossible for the PCT to effectively block the populist reforms. Deciding cases strictly according to when they reached the PCT, increasing the quorum, introducing a qualified majority requirement for quashing statutes and not publishing the court's decisions belong among the most effective techniques, the combination of which secures that the court will not be able to block the new legislation, at least for some time.[95] That is why these measures lead to provisional de-judicialization.[96]

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[87] Theoretically, constitutional courts can also decide to 'voluntarily' leave the field clear for populists and self-impose a self-restraint approach. However, I do not hypothesize if this would avoid populist court-curbing since both analysed courts initially fought against the populist regimes (see above). On courts' strategic considerations when facing a populist backlash see Yaniv Roznai. 'Who will Save the Redheads? Towards an Anti-Bully Theory of Judicial Review and Protection of Democracy'. SSRN (2019).

[88] For my understanding of de-judicialization see *supra* n. 3.

[89] Such power includes not only the number of seats in the parliament, but also the level of public support, and the government's concern over international reputation.

[90] *Supra* n. 43.

[91] Katalin Kelemen. 'Access to Constitutional Justice in the New Hungarian Constitutional Framework: Life after the Actio Popularis?' in LAW, POLITICS, AND THE CONSTITUTION: NEW PERSPECTIVES FROM LEGAL AND POLITICAL THEORY 64 (Antonia Geisler, Michael Hein and Siri Hummel eds., 2014).

[92] See the critical reactions of international actors summarized in Scheppele, *supra* n. 49*,* at 87–114.

[93] I consider the Polish regime less consolidated than the Hungarian one since PiS possesses 'merely' a legislative majority. Moreover, there is a greater political and social plurality in Poland, and greater public support for the EU, therefore a greater concern for reputational costs. See Wojciech Sadurski. 'So, it's the end of liberal democracy? Think again'. EURONEWS (Apr. 16, 2019), https://www.euronews.com/2019/04/16/so-it-s-the-end-of-liberal-democracy-think-again-view.

[94] A legislative majority is sufficient for the paralysis technique if the procedural and organizational rules are enshrined in an ordinary statute and have not been constitutionalized.

[95] Some of these measures, of course, can remain permanent.

[96] For the sake of completeness, it should be noted that other techniques exist which might eventually lead to provisional de-judicialization, e.g. starving the court out by budgetary constraints. Effects of courts' interventions

The employment of de-judicialization techniques has grave consequences for the structure of governance. It implies weakening of the triad and a (partial)[97] shift to the dyadic structure. Hard de-judicialization techniques disrupt the links between the constitutional court and the opposition actors that are not able to initiate constitutional review due to access restrictions or jurisdiction stripping. Provisional de-judicialization techniques disrupt the link between the constitutional court and the government since they (partially) block the constitutional court from issuing consequential decisions through different paralaysis techniques.

5.2. Advanced phase: Extreme politicization

Provisional de-judicialization is arguably less costly than hard de-judicialization techniques. Still, its effects have limited durability since the court cannot be held in paralysis forever. Even hard de-judicialization techniques do not completely eliminate the constraints stemming from judicialization. Jurisdiction stripping and access restrictions are unlikely to completely block the court's activities. De-judicialization efforts in an early stage of a populist regime are thus not an endgame. In the more advanced stages of populist regimes, de-judicialization techniques are regularly coupled with extreme politicization of the constitutional court,[98] which reflects a long-term aim of harmonizing the ideological position of the court's majority with the government. Thereby, the government can effectively get rid of limitations stemming from the judicialized structures by absorbing the court's veto capacity.

That can be achieved by ideological approximation of the court to the government's preferences through large-scale personnel changes, in particular by hand-picking nominees who are likely to remain loyal to the government. Such measures crucially affect the court's power, which is a compound of several features including the court's autonomy. As Brinks and Blass put it, a consequential court 'must be capable of (i) developing and (ii) expressing preferences that are substantially distinct […] from those of a single dominant outside actor [...].'[99] The following scenarios demonstrate how personnel changes can affect the court's autonomy and veto capacity.[100]

Immediately after the populists' electoral victory, the court will likely be ideologically distant from the populist government. Imagine a scenario where an (authoritarian) populist political party (P) wins the election for the first time and takes over the government. Judges of the constitutional court (CC) were originally (t_0) appointed by the previous, non-populist political

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can also be evaded by serial non-compliance with their decisions or, alternatively, with overriding case law with constitutional amendments.

[97] Depending on the scope and intensity of the techniques employed.

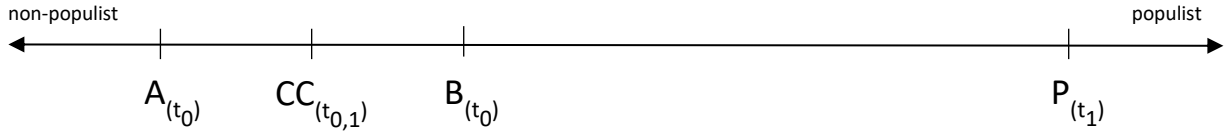
[98] I understand politicization as a process of parties capturing a state institution by party patronage (Petr Kopecký et al. PARTY PATRONAGE AND PARTY GOVERNMENT IN EUROPEAN DEMOCRACIES 7 (2012). The result of high politicization is that 'judicial decision-making tends to become politics carried on by other means' (Ferejohn, *supra* n. 21, at 64). For me, the crucial element leading to politicization is *unilateral* control of judicial appointments by a particular faction outside the court (see also Brinks and Blass, *supra* n. 22, at 307).

[99] Brinks and Blass, '*supra* n. 22, at 299.

[100] Following Brinks and Blass (*ibid.*, at 299), I understand autonomy as 'the extent to which a court is designed to be free from control by an identifiable faction or interest outside the court, both before the judges are seated, through the formal process of appointment […], and after the judges have been seated, by formal means of punishing or rewarding judges.'

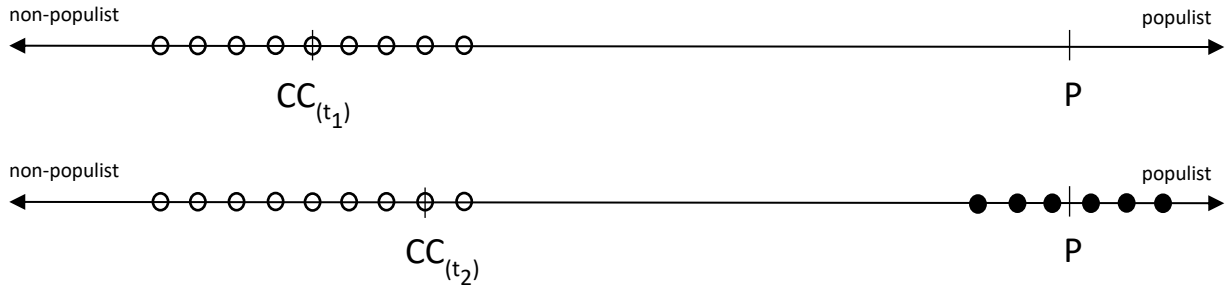
actors (A and B). Accordingly, the court's preferences and visions of proper constitutional interpretation should be on the non-populist side of the spectrum (CC in t_0 and t_1). Figure no. 1 illustrates the situation when two political actors (e.g. the government and the opposition party) have to agree on appointees for a constitutional judgeship. If the populist party subsequently forms the government, the ideological distance between the court and the government is likely to be great, which results in a strong veto position of the constitutional court.

Figure no. 1: Government alteration and ideological distance of the constitutional court



Since the populist government aims to prevent the court from blocking its policies, it seeks to absorb the veto status of the court. The main aim is to bring the court's ideological position closer to that of the populist government. Several steps can be taken – separately or in combination – to do that. First, populists can pack the court – increase the size of the constitutional court and appoint loyal judges to the bench. The size of the constitutional court's bench is usually entrenched in the constitution. Therefore, this technique is often available only to the actors who control constitutional amendment, i.e. possess a constitutional majority. Packing the court with loyalists shifts the ideological position of the court. Figure no. 2 shows a hypothetical scenario where a nine-member court is packed and the number of judges is increased to fifteen.[101] It shows that the median judge will be closer to the position of the populist government in such a case.

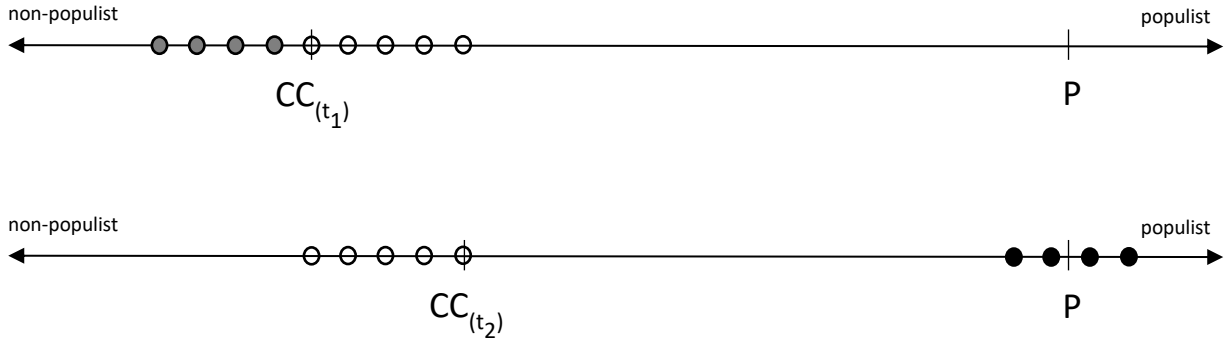
Figure no. 2: Shifting the ideological position of a court through court-packing



Another technique is the replacement of incumbent judges with loyalists or nominating new loyal judges to vacant positions. Depending on the number of judges replaced, the effect is the approximation of the court to the position of the government. The median judge will, again, be closer to the populist position. Figure no. 3 exemplifies a scenario where four incumbent judges of a nine-member court are replaced by four judges nominated by the populists.

[101] Scenarios in figures No. 2–4 presuppose that the populist party has enough power to choose the new judges on its own, without the necessity to seek agreement with another actor.

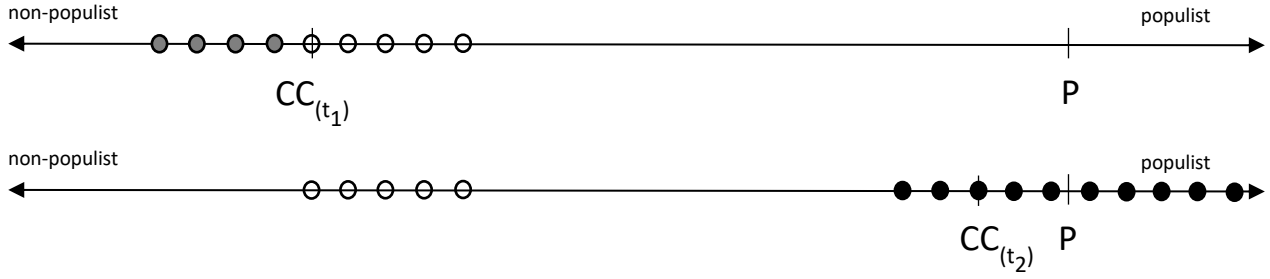
Figure no. 3: Shifting the ideological position of a court through replacement



- replaced judges
- t_1 judges staying in their positions in t_2
- t_2 judges nominated by P replacing t_1 judges

If the number of new judges appointed by the populists is too low, the ideological distance may remain considerable. The combination of court-packing and replacement thus seems to be the most effective.[102] Figure no. 4 illustrates a scenario where four incumbent judges are replaced by populist-appointed judges and, moreover, the court's size is increased from nine to fifteen members. The median judge of the 'new' court will be ideologically considerably closer to the populist government.[103] Furthermore, the situation is more complex since constitutional courts often decide in smaller panels. Consequently, the engineering of the panels' composition can be particularly important for the absorption techniques.[104]

Figure no. 4: Combining court-packing and replacement



- t_1 judges replaced in t_2
- t_1 judges staying in their positions in t_2
- t_2 judges nominated by P (replacement and court-packing)

Finally, all the listed techniques can be accompanied by the populists' efforts to reduce the court's long-term ability to defend itself and to defend liberal democratic values. An important

[102] See the Hungarian scenario above.
[103] See Sólyom's (*supra* n. 42, at 23) and Sadurski's (*supra* n. 69, at 71) assessements of the loyal judicial behavior of the new judges appointed to HCC and PCT.
[104] See above the reshuffling of the PCT's and HCC's chambers.

technique is reducing the constitutional court's authority through rhetorical attacks delegitimizing it. The instruments of populist ideology and style can be particularly useful here as they provide the basis for justifying the anti-court behavior.[105]

These models are crucial for understanding the populist attitude to judicialization of politics. Although the populist ideology seeks re-politicization of the public sphere by reducing judicialization and technocratization in general, the populist actual rule shows that extreme politicization of constitutional courts can be less costly and more profitable than complete de-judicializiation of politics. Acknowledging that the court's power consists of jurisdictional reach[106] *and* autonomy helps to understand this. A court with broad jurisdictional reach and high autonomy is a major obstacle for the populist reform. But a court with low autonomy, which is unlikely to impose major restrictions on the governing actors, can serve a valuable legitimization role. The populist regimes therefore preserve the constitutional courts' existence but aim to politicize the bench through nominating loyalists. That results in the legitimization of the regime without the danger of the costly limits stemming from the judicialization of lawmaking because the court's veto status is absorbed. Due to large-scale personnel changes driven by extreme politicization and unilateral control over judicial appointments, it is unlikely that the court will 'speak with a different voice than its legislative and executive counterparts (either because the judges are hand-picked ideological allies of the regime or because they fear the consequences of challenging powerful interests).'[107] The government's control over the constitutional court is rarely total, thus the court may sometimes counter the majority. Still, it is unlikely in the case of the government's major interests.

Depending on the court-curbing techniques employed, the court can be (partially) muted – either through hard de-judicialization, or temporarily through provisional de-judicialization techniques – or turned into a 'regime ally court' through extremely politicized large-scale personnel change.[108] The latter option seems to be attractive across populist regimes, but it is particularly important for the less powerful populist regimes which lack alternative instruments to achieve their constitutional goals.[109] Accordingly, the PCT is extensively exploited in this manner as the government lacks a constitutional majority in *Sejm*. Sadurski thus titled the PCT in its current composition as a 'governmental enabler' and a 'protector of the legislative majority'.[110] After PiS gained a majority on the PCT, the ruling party itself brought several cases to the PCT seeking justification for its reforms.[111] Koncewicz argued that the PCT's rulings reach beyond mere rubber-stamping of the government's policies, and

[105] See Jan Petrov. 'The Populist Challenge to the European Court of Human Rights'. 18 ICON 499 (2020).
[106] I have in mind *de facto* jurisdictional reach comprising the range of competences, access rules and factual operability of the court (capacity to reach a decision).
[107] Brinks and Blass, '*supra* n. 22, at 299.
[108] *Ibid.*, at 301; Dressel, *supra* n. 22, at 6.
[109] See similarly David Landau and Rosalind Dixon. 'Abusive Judicial Review: Courts against Democracy'. 53 UC DAVIS LAW REVIEW 1313 (2020).
[110] Sadurski, *supra* n. 69.
[111] Stanisław Biernat and Monika Kawczyńska. 'Though this be Madness, yet there's Method in't: Pitting the Polish Constitutional Tribunal against the Luxembourg Court'. VERFASSUNGSBLOG (Oct. 26, 2018), https://verfassungsblog.de/though-this-be-madness-yet-theres-method-int-the-application-of-the-prosecutor-general-to-the-polish-constitutional-tribunal-to-declare-the-preliminary-ruling-procedure-unconstitut/.

amount to 'weaponizing judicial review' to be used against the opposition.[112] Some authors coin this phenomenon as 'abusive judicial review'.[113] Castillo-Ortiz speaks about 'inverted courts' that become devices used by illiberal actors, rather than checks on their power.[114] The PCT's rulings on the Polish National Council of the Judiciary (NCJ) and on abortion policy illustrate this.

The NCJ was established as a crucial actor of court administration in Poland, a guardian of judicial independence, playing an important role in appointing judges of ordinary courts.[115] Accordingly, the NCJ became a strategic target of the PiS government. The Minister of Justice (acting as the Prosecutor General) challenged the NCJ before the PCT on the grounds of the NCJ's unrepresentative composition and individual mandates of the NCJ members. The PCT sided with the government's view and concluded that the existing system discriminates against lower court judges and that the Constitution requires a collective term of office for all the NCJ members.[116] Polish commentators argued that the PCT's judgment was designed to 'pave the way'[117] for the NCJ's reform by PiS, which significantly increased political control over the NCJ at the expense of judicial self-governance.

In 2019, Polish MPs – mostly PiS parlamentarians who had previously called for abortion restrictions – asked the PCT to assess constitutionality of abortion laws. The Tribunal delivered a controversial ruling claiming that abortion due to foetal defects is unconstitutional. Thereby, the PCT critically limited abortion in Poland, rejecting the most frequent ground for pregnancy termination as unconstitutional.[118] These two cases show that ideological approximation of the court by extreme politicization might be more effective for the populists than de-judicialization efforts.

The governmental-enabler function of captured constitutional courts has a supranational dimension too. Even populists possessing a constitutional majority have trouble setting aside supranational legal constraints. Both the Hungarian and Polish governments used their constitutional courts to water down constraints stemming from EU law. In Hungary, the HCC (mis)used the concept of constitutional identity to legitimize the government's resistance against the EU's refugee policy.[119] In Poland, the Prosecutor General submitted a motion arguing that the preliminary reference procedure at the Court of Justice is unconstitutional to the extent it allows domestic courts to question domestic judicial design. Although the

[112] Tomasz Tadeusz Koncewicz. '"Existential Judicial Review" in Retrospect, "Subversive Jurisprudence" in Prospect'. RECONNECT, (Oct. 17, 2018), https://reconnect-europe.eu/blog/existential-judicial-review-in-retrospect/.

[113] Landau and Dixon, *supra* n. 109. See also Raul Sanchez Urribarri. 'Courts between Democracy and Hybrid Authoritarianism: Evidence from the Venezuelan Supreme Court'. 63 LAW AND SOCIAL INQUIRY 855 (2011) (referring to 'courts as instruments of political domination').

[114] Castillo-Ortiz, *supra* n. 85, at 67.

[115] Anna Śledzińska-Simon. 'The Rise and Fall of Judicial Self-Government in Poland'. 19 GERMAN LAW JOURNAL 1848 (2018).

[116] PCT, judgment of Jun., 20, 2017, no. K 5/17.

[117] Sadurski, *supra* n. 69, at 78.

[118] Aleksandra Kustra-Rogatka. 'Populist but not Popular: The abortion judgment of the Polish Constitutional Tribunal'. VERFASSUNGSBLOG, (Nov. 3, 2020), https://verfassungsblog.de/populist-but-not-popular/.

[119] HCC, judgment of Dec. 5, 2016, No. 22/2016. See Gábor Halmai. 'Abuse of Constitutional Identity. The Hungarian Constitutional Court on Interpretation of Article E) (2) of the Fundamental Law'. 43 REVIEW OF CEE LAW 23 (2018).

proceedings are pending, according to several commentators, it is not totally unlikely that the PCT will declare the unconstitutionality of Article 267 TFEU in the given scope.[120] These cases suggest that captured constitutional courts can be used not only against domestic opposition, but also against populists' supranational opponents.

The described strategy of consolidating populist regimes has implications for the structure of governance. The constitutional court nominally exists and the triadic structure remains. Given the ideological approximation of the court through extreme politicization, however, the triad is skewed toward the governmental camp. In such a setting, it is also hard to defend that the constitutional court retains its superior position within the triad. The government's increased control over the court through the nomination process and disciplinary measures casts doubt on the court's position of the *superior* third actor.

5.3. Declining phase: Strategic defection or hegemony preservation through courts?

The time factor begs a question about the future scenario. Given the average length of constitutional judges' mandates, the duration of an extremely politicized court can be quite long. It may happen that a court ideologically attuned to the populist constitutionalism 'survives' longer than the populist government. Even if the populists eventually lose the election, the new majority will face the populist-picked constitutional judiciary. Since this has not happened (yet) neither in Hungary or Poland, we can only hypothesize how the court would behave. Experiences from the Latin America suggest there are two main options. Judges may 'strategically defect' from their populist nominators once they begin losing power.[121] But they can also keep on fighting for the populists' interests and counter the non-populist actors' policies.[122] In the latter case, the populist politicization strategy might eventually lead to the preservation of the deformed triadic structure of governance and the populists' power even after their electoral demise.[123]

Figure no. 5 summarizes the previous scenarios and graphically expresses the court-curbing strategies and their effects on governance in different phases of the populist rule.

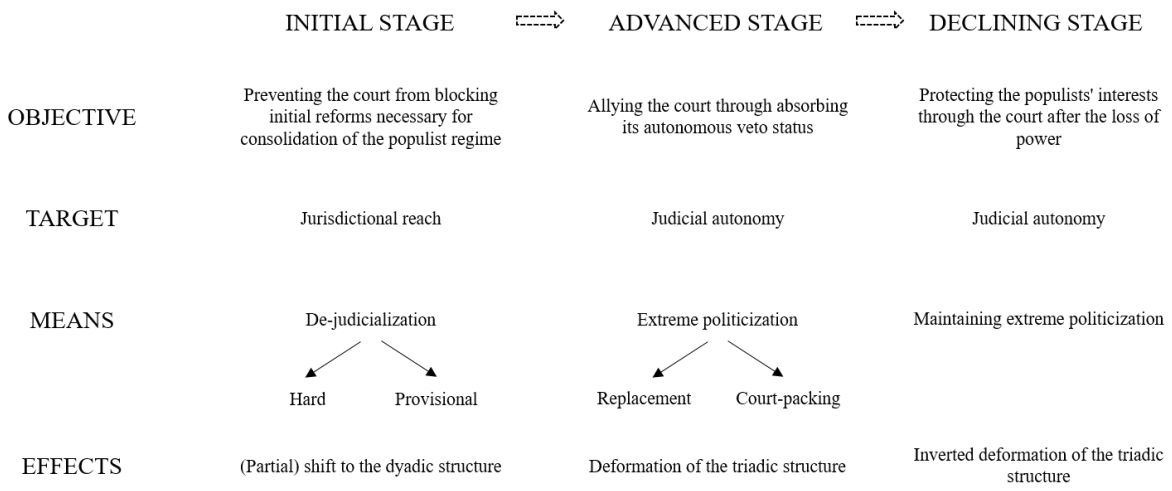
Figure no. 5: Populist court-curbing and (de-)judicialization

[120] Kacper Majewski. 'Will Poland, With Its Own Constitution Ablaze, Now Set Fire to EU Law?' VERFASSUNGSBLOG (Oct. 17, 2018), https://verfassungsblog.de/will-poland-with-its-own-constitution-ablaze-now-set-fire-to-eu-law/; Biernat and Kawczyńska, *supra* n. 111.

[121] Gretchen Helmke. 'The Logic of Strategic Defection: Court-Executive Relations in Argentina under Dictatorship and Democracy'. 96 AMERICAN POLITICAL SCIENCE REVIEW 291 (2002).

[122] The Venezuelan Supreme Tribunal, for instance, has guarded the populist president Maduro against the oppositional majority in the National Assembly. See Landau and Dixon, *supra* n. 109.

[123] See Hirschl's hegemonic preservation theory, *supra* n. 2.



5.4. Long-term peril: 'Charade' triadic structure

From the long-term perspective, however, the employment of de-judicialization and extreme politicization techniques is likely to have detrimental effects for the constitutional courts' social legitimacy and their perceived independence. The deformation of the triadic structure in the phase of populists' decline may encourage further interferences in the constitutional courts' design or personnel even by the newly elected actors. Efforts to bring the situation back to normal can extend to a cycle of retribution, which is extremely troublesome for the stability of a constitutional order and for confidence in the constitutional structure. From the long-term perspective, such repeated interferences imply a threat of inverting the triadic structure upside-down and turn the constitutional court – originally thought of as a third superior impartial actor – into an inferior actor with a shifting ideological position subject to the preferences of the ruling majority. Hence, there is a risk of creating a 'charade' triadic structure, where the constitutional court nominally retains the position of a third actor, but is largely subordinate to the preferences of one or another political faction.

The 'charade' triadic structure is a consequence of eroding political norms of non-interference with the judiciary. In general, judicial independence has two major sources – legal safeguards and shared political culture of non-interference.[124] As suggested above, many of the legal safeguards can be twisted, deformed or eliminated. Still, the political norms of non-interference with judicial independence create 'soft guardrails'[125] and a critical precaution for the healthy functioning of checks and balances. The abovementioned court-curbing suggests that populists do not accept these norms and view judicial independence as an obstacle to their political projects that should be minimized by taming the judges of constitutional courts. The practice leading to the charade triadic structure endangers the social perceptions of judicial independence and may reduce the respect for judicial independence even further in the long term. Low decisional independence of courts (i.e. judicial ouput that systematically reflects the preferences of a particular political faction) leads to loss of their social legitimacy.[126] And if the general public loses confidence in the independence of the constitutional court, a vicious circle begins. Lower legitimacy of a court implies lower political

[124] R. Daniel Kelemen. 'The political foundations of judicial independence in the European Union'. 19 JOURNAL OF EUROPEAN PUBLIC POLICY 43, 43–44 (2012).
[125] Steven Levitsky and Daniel Ziblatt. HOW DEMOCRACIES DIE 101 (2018).
[126] Maria Popova. POLITICIZED JUSTICE IN EMERGING DEMOCRACIES 23–24 (2012).

costs of eventual court-curbing and of using courts for political domination, which increases the likelihood of further court-curbing and destruction of norms of non-interference with judicial independence. This effect can even be multiplied as populists regularly couple court-curbing with campaigns denigrating the judiciary.[127] As the next section argues, these features make the populist challenge distinctive.

5.5. Populism as a specific challenge to judicialization?

Is there anything specific about court-curbing *by populists*? After all, courts have been attacked by various actors, not just populists. The Nazis, Communists, military and other authoritarian regimes[128] have all interfered heavily with the independence of their judiciaries. The previous part showed that populists use similar techniques to the earlier authoritarians, such as jurisdiction stripping, court-packing and the replacement of judges. These techniques are not distinctively populist. They can be employed by actors of any political affiliation.

Still, there seem to be important specifics underlying populist court-curbing. Military coups or other forms of fast authoritarian reversion were typical methods of power-grabbing by the 20th century totalitarian and authoritarian leaders.[129] Also the subsequent endurance of these regimes was based on physical and/or psychological violence. The 20th century totalitarian and authoritarian ideologies were openly anti-democratic.[130] The current populist regimes are different.[131] Populist attacks on the rule of law and the separation of powers are more subtle and incremental.[132] Moreover, rather than relying on violence, populists use legal means of gaining power (or at least try to create such impressions).[133] Populist regimes are based on some form of democratic legitimacy, derived from popular sovereignty and elections. As Barber put it, '[p]opulists subvert constitutional government, but do so in a manner that brings much of the people along with them, and which allows—and requires—the basic structures of a democratic state to remain in place.'[134]

At the same time, populist ideology is built on a specific understanding of the vocabulary of constitutional democracy. Terms such as democracy, constituent power, popular will, and popular sovereignty are crucial for populists' political claims. Yet, as Part 3 showed, the populist constitutional vision gives a specific reading to these concepts, which also affects the context of populist court-curbing. Populist understanding of the named constitutional concepts allows for significant contempt for prior institutional boundaries while maintaining the appearance of democracy. In the realm of the judiciary, this translates to populists' skill in

[127] Fryderyk Zoll and Leah Wortham. 'Judicial Independence and Accountability: Withstanding Political Stress in Poland'. 42 FORDHAM INTERNATIONAL LAW JOURNAL 875, 904 –907 (2019).
[128] Tom Ginsburg and Tamir Moustafa eds. RULE BY LAW: THE POLITICS OF COURTS IN AUTHORITARIAN REGIMES (2008).
[129] Aziz Huq and Tom Ginsburg. 'How to Lose a Constitutional Democracy'. 65 UCLA LAW REVIEW 93 (2018).
[130] Adam Przeworski. CRISES OF DEMOCRACY 134 (2019).
[131] Kim Lane Scheppele. 'The opportunism of populists and the defense of constitutional liberalism'. 20 GERMAN LAW JOURNAL 314 (2019).
[132] Tom Ginsburg and Aziz Huq. *How to Save a Constitutional Democracy* 43 (2019).
[133] Accordingly, scholars refer to abusive constitutionalism [David Landau. 'Abusive Constitutionalism'. 47 UC DAVIS LAW REVIEW 189 (2013)], legal instrumentalism [Paul Blokker. 'Populism as a Constitutional Project'. 17 ICON 535 (2019)], and autocratic legalism [Kim Lane Scheppele. 'Autocratic Legalism'. 85 UNIVERSITY OF CHICAGO LAW REVIEW 545 (2018)] as typical features of populist constitutionalism.
[134] Nicholas W. Barber. 'Populist leaders and political parties'. 20 GERMAN LAW JOURNAL 129, 130 (2019).

depicting judicial independence not as a means to ensure effective government, to protect the rule of law and fundamental rights, but rather as a bulwark allowing elitist judges to deform the genuine will of the real people.

Populists are thus able to explain their court-curbing under cover of constitutional-democratic vocabulary. Surely, the democratic parlance may be just a cloak covering authoritarian tendencies.[135] But it still allows populists to argue that breaking the existing formal boundaries and rejecting the hitherto 'soft guardrails' is justifiable or even necessary for achieving true democracy and popular sovereignty. Indeed, Viktor Orbán saw the constitutional reform as a part of Hungary's shift toward illiberal democracy.[136] Kaczynski even titled the pre-capture PCT as 'the bastion of everything in Poland that is bad.'[137] These quotes illustrate that the combination of the ideological basis of populism and populists leaders' aggressive communication style implies a powerful challenge to judicialization and to (constitutional) courts' social legitimacy.

As mentioned, populism does not invent brand new court-curbing techniques. Compared to earlier authoritarian regimes, however, the populist ideology and practice provide a very different context and justification for court-curbing – one disguised in democratic parlance. In sum, differences thus rest in the framing of court-curbing, its resonance within the public and long-term consequences. Although these may seem subtle details, they may increase the likelihood of the charade triadic structure emerging and the gradual erosion of public demand for judicial independence. Ignoring these specifics and treating contemporary populist court-curbing identically to earlier authoritarian attacks on judicial independence would miss the most critical point of the current populist challenge.

On the other hand, the democratic parlance seems to have a constraining effect too. The harshest de-judicialization techniques attacking the court's core competences (such as abolishing a court, severe jurisdiction stripping, etc.) might be hard to justify. The democratic disguise may limit the populists in how far they can go since the expectations of their voters and other actors are somewhat based on the liberal democratic past.[138] This even increases the likelihood of quickly advancing to the second phase seeking the capture of a court through personnel politics. Indeed, the de-judicialization phase in Poland was quite a short transitional period of provisional paralysis, which ended once PiS managed to gain a majority within the PCT. Even in Hungary, the government dropped the harshest de-judicialization plans (abolishing the HCC) and replaced them with partial jurisdiction stripping. Even the access restrictions (abolishing *actio popularis*) were compensated for by introducing new access mechanisms to the HCC (constitutional complaints). This constraining effect of using the constitutional democratic vocabulary, however, is no victory for the rule of law advocates. On the contrary, it increases the significance of the extreme politicization strategy and, thereby, the likelihood of the deformed or even charade triadic structure emerging.

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[135] Halmai, *supra* n. 85.

[136] 'Full text of Viktor Orbán's speech at Băile Tuşnad (Tusnádfürdő) of 26 July 2014'. BUDAPEST BEACON (Jul. 29, 2014), https://budapestbeacon.com/full-text-of-viktor-orbans-speech-at-baile-tusnad-tusnadfurdo-of-26-july-2014/.

[137] Christian Davies. 'Poland is 'on road to autocracy', says constitutional court president'. THE GUARDIAN (Dec. 18, 2016), https://www.theguardian.com/world/2016/dec/18/poland-is-on-road-to-autocracy-says-high-court-president.

[138] See Urribarri, *supra* n. 113, at 858.

One may also ask whether there is anything specific about the populist court-curbing as compared to the situation in standard democracies. After all, some degree of politicization of the judiciary is natural, even in established democracies. Similarly, court-curbing measures are also proposed in established democracies.[139] The line between legitimate measures aimed at making the judiciary more responsive and undesirable measures seeking unchecked power is blurred. Political actors are regularly involved in the procedure of selecting constitutional courts' judges, which is desirable from the viewpoint of constitutional courts' democratic accountability. Yet, it also implies that political considerations are regularly taken into account during the selection process. Accordingly, judicial appointments tend to reflect the balance of political power at the given time. As a result, the composition and orientation of constitutional courts shift in established democracies too.[140] These processes, however, should not regularly translate into *extreme* politicization of constitutional courts. Institutional safeguards are supposed to prevent a unilateral take-over of a court. A plurality of actors is usually necessary for agreeing on the appointment and/or the appointments are diffused in time so that no single faction can capture the court. Yet, the court-curbing that took place in Hungary and Poland is qualitatively different from the instances of regular politicization. Whereas the latter takes place within the established rules of the game, the populists sought to twist[141] or even change[142] the rules in order to make the capture by a single faction possible. Not only the timing, but also the combination of various amendments to the laws on constitutional courts suggests the bad faith of these measures. In sum, although some of the measures taken by populists can be justifiable under certain conditions, it is the sequencing, scope and combination of the court-curbing measures that make them tools of *extreme* politicization.[143] Moreover, authoritarian populists' attacks on constitutional courts are often just an initial step in broader reforms seeking to get rid of institutional checks.[144]

6. Conclusion

Judicialization of politics represents one of the major recent developments in the system of democratic governance. This trend is not an unqualified good. Constitutional courts have been criticized from many positions for decades – for their counter-majoritarian logic and an uneasy relationship with democracy,[145] for promoting excessive individualism and flattening the collective identity necessary for a democratic polity,[146] and for lacking institutional capacity to decide complicated moral and empirical issues.[147] Yet, this article demonstrated the actual fragility of constitutional courts, especially in new democracies where the endurance of a

[139] Tom S. Clark. 'The Separation of Powers: Court Curbing, and Judicial Legitimacy'. AMERICAN JOURNAL OF POLITICAL SCIENCE 971 (2009); David Kosař and Katarína Šipulová. 'How to Fight Court-Packing?' 6 CONSTITUTIONAL STUDIES 133 (2020).

[140] See Mark Tushnet. 'After the Heroes Have Left the Scene: Temporality in the Study of Constitutional Court Judges'. In JUDICIAL POWER 300 (Christine Landfried ed., 2019).

[141] See Part 4 (describing the messy personnel situation at the PCT in late 2015 and 2016).

[142] See Part 4 (describing the change of the appointment procedure to the HCC).

[143] See Renáta Uitz. 'Can You Tell When an Illiberal Democracy Is in the Making? An Appeal to Comparative Constitutional Scholarship from Hungary'. 13 ICON 279 (2015).

[144] Arato, *supra* n. 86, at 322.

[145] Jeremy Waldron. 'The Core of the Case Against Judicial Review'. 115 YALE LAW JOURNAL 1346 (2006).

[146] See Lustig and Weiler, *supra* n. 20, at 339–341.

[147] Paul Yowell. CONSTITUTIONAL RIGHTS AND CONSTITUTIONAL DESIGN (2018).

sincere commitment to judicial independence and constitutionalism cannot be taken for granted.

Populism is a major challenger of the judicialized triadic structure of governance in such polities. The examination of Hungary and Poland, however, showed that CEE authoritarian populism does not seek principled de-judicialization for the sake of giving voice to the people. Authoritarian populists rather instrumentally mix court-curbing techniques targeting different components of judicial power, aiming for de-judicialization of politics or extreme politicization of the court, depending on the scope of populists' political power and developments in time, particularly on the level of consolidation of the populist regime. In the early stage, populists seek (partial) return to the dyadic structure of politics in order to prevent courts from vetting their reforms necessary for initial consolidation of the regime. Subsequently, populists seek to tame courts and absorb their factual veto power by extremely politicized appointments. In the case of large-scale personnel changes through replacement and/or court-packing, the court majority will consist of judges loyal to the government. This produces a deformed triadic structure skewed towards populists' preferences.

In the long term, such developments endanger the political culture of non-interference with judicial independence, which creates the backbone of judicial authority. Such a scenario implies a risk of transforming the regular triadic structure of governance into a charade triadic structure. In the charade triadic structure, the constitutional court turns from a third impartial actor into an inferior actor with a swinging ideological position depending on the preferences of its principals. Such a transformation is extremely problematic. The loss of autonomous status and the deformation of the triadic structure make compliance with considerable parts of constitutional law subject to the government's preferences, which make politics supreme over these constitutional norms.[148] That raises serious concerns from the viewpoint of the rule of law principles, and protection of fundamental, especially minority, rights. Moreover, it endangers the competitiveness of the party system. The deformation of the triadic structure strips constitutional courts of their 'democratic hedging' function, which protects polities from 'one-partyism'[149] – efforts to centralize power and reduce the government's democratic accountability – and, ultimately, from converting the system to a monist structure of governance, which excludes political opposition.

[148] Castillo-Ortiz (*supra* n. 85, at 70) depicts captured constitutional courts as devices of 'de-normativisation of the constitution.'

[149] Samuel Isacharoff. 'Constitutional Courts and Democratic Hedging'. 99 GEORGETOWN LAW JOURNAL 961 (2011).