VII. Conclusions

If the parliamentary opposition wins the 2023 elections, fundamental changes to the judiciary and restoring the rule of law are required. It is unlikely that an amendment to the Constitution will be possible. Therefore, most of the changes will have to be carried out through legislative amendments. At the same time, they may face a number of problems, including resistance from the President or a politically subservient Constitutional Court. However, it is important that the locomotive of the rule of law gets back on track and moves towards increasing the accountability of the authorities to the law, correcting systemic problems, and cooperating loyally with the European Union. The changes must concern the key organs of the judiciary, especially the National Council of the Judiciary and the system of common courts. They must also include the vetting process of judges. This is necessary due to the requirements of EU law and the case law of the European Court of Human Rights. But transitional justice mechanisms will also be important. Without them, confidence in the judiciary will not be restored and acts committed against the constitutional system will not be held to account. In the context of judicial reforms, improving the efficiency of the judiciary should not be forgotten. Without this, it will be difficult to gain the long-term support of citizens and their legitimacy for the changes being made. The support of international organizations for the transformation process should be taken into account to ensure the long-term effectiveness of the reforms.

Court-Unpacking: A Preliminary Inquiry

David Kosař and Katarína Šipulová[1]

The proliferation of court-packing wars across different political regimes has recently stirred up a lot of controversy. As one of the techniques allowing executive actors swiftly to capture the courts, align them with their own political preferences or even weaponise them against their opponents, court-packing is particularly tempting for both democratic and autocratic leaders. The legitimacy of court-packing and potential safeguards against this method have therefore triggered vibrant academic debate. Yet, much less attention has been paid to a vexing question: what to do with packed courts once the political actors who staffed them with loyal or ideologically aligned judges lose power. Can courts be unpacked? If so, how? Is unpacking always legitimate or does it depend on the legitimacy of previous court-packing? Should the content of decision-making, judicial behaviour or the personal independence and integrity of packed judges be considered in a normative assessment of unpacking? And what role does eventual redress for removed judges play in these considerations? Addressing these questions, this chapter analyses the normative underpinnings of unpacking in the broader context of democratic decay and abusive constitutionalism.

1 The research leading to this project has received funding from the European Research Council (ERC) under the European Union's Horizon 2020 research and innovation programme (INFINITY, grant no. 101002660).

I. Introduction

Comparative discussions of court-packing have never been more vibrant. It is no surprise. Court-packing wars are back, in both the Global South and the Global North. This time, court-packing affects not only nascent, transitioning and fragile democracies in Latin America, Central America, Africa and Asia, but also the Member States of the Council of Europe and European Union as well as other consolidated democracies.

Recep Erdoğan expanded the membership of the Turkish Constitutional Court.[2] Viktor Orbán used a similar strategy to achieve a majority in the Hungarian Constitutional Court.[3] Jaroslaw Kaczyński captured the Polish Constitutional Tribunal through a series of sinister actions and significantly increased the number of judges in the Polish Supreme Court.[4] More recently, court-packing debates have returned to the United States with a fervour unheard of since FDR's era.[5] Benjamin Netanyahu's recent coalition announced a wide-scale reform of the Israeli judiciary[6] and Prime Minister Narendra Modi's Government stepped up its pressure on the Indian Supreme Court.[7]

2 Ergun Özbudun, 'Turkey's Judiciary and the Drift Toward Competitive Authoritarianism', Int'l Spectator (Rome) 50 (2015), 42–55; Berk Esen and Sebnem Gumuscu, 'Rising Competitive Authoritarianism in Turkey', Third World Quarterly 37 (2016), 1581–1606; Ozan O. Varol, Lucia D. Pellegrina and Nuno Garoupa, 'An Empirical Analysis of Judicial Transformation in Turkey', Am. J. Comp. L. 65 (2017), 186–216.

3 Gábor Halmai, 'From the 'Rule of Law Revolution' to the Constitutional Counter-Revolution in Hungary' in: Wolfgang Benedek and Florence Benoît-Rohmer (eds), European Yearbook of Human Rights (2012), 367–384; Renata Uitz, 'Can You Tell When an Illiberal Democracy is in the Making? An Appeal to Comparative Constitutional Scholarship from Hungary', ICON 13 (2015), 279–300.

4 Anna Śledzińska-Simon, 'The Rise and Fall of Judicial Self-Government in Poland: On Judicial Reform Reversing Democratic Transition', GLJ 19 (2018), 1839–1870.

5 E.g., Ryan Doerfler and Samuel Moyn, 'Democratizing the Supreme Court', Calif. L. Rev. 109 (2020), 1703–1772; Richard Mailey, 'Court-Packing in 2021: Pathways to Democratic Legitimacy', Seattle Univ. L. Rev. 44 (2020), 35–68; Thomas M. Keck, 'Court-Packing and Democratic Erosion' in: Suzanne Mettler, Robert Lieberman and Ken Roberts (eds), *Democratic Resilience: Can the United States Withstand Rising Polarization?* (Cambridge: Cambridge University Press 2022), 141–168.

6 Joseph H. H. Weiler, 'Cry, the Beloved Country', Verfassungsblog, 1 February 2023, <https://verfassungsblog.de/cry-beloved-country/>.

7 Rohit Sarma, 'On the Road to Censorship', Verfassungsblog, 3 March 2023, <https://verfassungsblog.de/on-the-road-to-censorship/>.

While examples of "good" or legitimate court-packing exist,[8] most court-packing plans erode judicial independence, the separation of powers and the rule of law, because they either lack "just cause" for such sweeping interference with the judiciary or suffer from grave procedural flaws or disproportionality. Even court-packing plans that initially had a credible just cause and which many commentators considered legitimate often go astray over time.[9]

This raises an important question: What to do with the packed courts once those who packed them lose power? The question is not only to unpack or not to unpack, but also how to unpack and what factors should the "unpackers" take into consideration. In the European context, Poland has attracted the most attention due to the impending November 2023 parliamentary elections. With the gap between the electoral preferences of the PiS and Civic Coalition slowly closing,[10] the 2023 elections have renewed discussion on how to restore the judicial independence of the Polish judiciary if the ruling coalition led by PiS loses power. What should the liberal opposition do with the packed judiciary, if it regains power?[11] On the one hand, the statistical evidence we have on Polish packed courts deciding in favour of PiS[12] increases the pressure to act that the Civic Coalition will face in order to restore the robust separation of powers. On the other hand, the form of unpacking will be complicated due to the "original sin"[13] – the pre-emptive unconstitutional election of judges by the

8 Tom G. Daly, '"Good" Court-Packing? The Paradoxes of Democratic Restoration in Contexts of Democratic Decay', GLJ 23 (2022), 1071–1101; David Kosař and Katarína Šipulová, 'Comparative Court-Packing', I.CON 21 (2023), 80-126.

9 Daly (n. 8); Kosař and Šipulová (n. 8).

10 Opinion polling for the 2023 Polish parliamentary election. <https://en.wikipedia.org/wiki/Opinion_polling_for_the_2023_Polish_parliamentary_election>.

11 Armin von Bogdandy and Luke D. Spieker, 'Restoring the Rule of Law Through Criminal Responsibility', Verfassungsblog, 10 December 2021, <https://verfassungsblog.de/restoring-the-rule-of-law-through-criminal-responsibility/>; Armin von Bogdandy and Luke D. Spieker in this volume; Andrew Arato and András Sajó, 'Restoring Constitutionalism. An open letter', Verfassungsblog, 17 November 2021, <https://verfassungsblog.de/restoring-constitutionalism/>; Andrew Arato and Gábor Halmai, 'So that the Name Hungarian Regain its Dignity', Verfassungsbblog, 2 July 2021,<https://verfassungsblog.de/so-that-the-name-hungarian-regain-its-dignity/>.

12 Wojciech Sadurski, 'Polish Constitutional Tribunal Under PiS: From an Activist Court, to a Paralysed Tribunal, to a Governmental Enabler', Hague Journal on the Rule Law 11 (2019), 63–84.

13 Lech Garlicki, 'Disabling the Constitutional Court in Poland' in: Andrzej Szmyt and Bogusław Banaszak (eds), *Transformation of Law Systems Central, Eastern and*

lame duck government – committed by the Civic Platform's Government even before PiS came to power. If the Civic Coalition wins, it will also need to take into account that court-unpacking does not only react to the past, but also shapes the future. However, the implications of this chapter are much broader and go beyond Europe. In fact, unpacking has been a vexing issue, primarily in Latin America, Turkey and Asia,[14] until recently.

We need to add an important caveat though. The scope of this chapter is relatively narrow. First, our understanding of court-unpacking is narrow both procedurally and substantively, as it responds to a limited scope of political interferences in judicial independence. As to the procedural aspect, there must be a causal nexus between court-packing and court-unpacking. The sequence matters. You simply cannot have unpacking unless you have previous court-packing. We thus do not deal with reactions to other court-curbing techniques here. As to the substantive aspect, in our understanding not every irregularity in the selection of judges amounts to court-packing[15] and thus we leave redressing such "below the threshold of court-packing" situations aside. Second, we sketch the issues concerning unpacking in general terms and thus our theoretical framework is divorced from the particulars of Poland and other European States. We do so intentionally to emphasize the generality of our theoretical arguments and to make it easier to "transport" them to other contexts. That said, our theoretical inquiry is informed by the Polish debate and reflects on it, but it is not guided by the Polish specifics. Third, for similar reasons, we leave aside the separate questions what limits supranational courts set for unpacking[16]

Southeastern Europe in 1989–2015 (Gdansk: Gdansk University Press 2016), 63–78 (65–66). See also Aleksandra Gliszczyńska-Grabias and Wojciech Sadurski, 'The Judgment That Wasn't (But Which Nearly Brought Poland to a Standstill)', Eu Const. L. Rev. 17 (2021), 130–153.

14 See the examples discussed in Daly (n. 8); Kosař and Šipulová (n. 8); Benjamin G. Holgado and Raul Sanchez-Urribarri, 'Court-Packing and Democratic Decay: A Necessary Relationship?', Global Constitutionalism 12 (2023), 350–377.

15 This in the European context means that *Ástráðsson*-like irregularities do not necessarily amount to court-packing. See ECtHR (Grand Chamber), *Guðmundur Andri Ástráðsson v. Iceland*, judgment of 1 December 2020, application no. 26374/18.

16 On the limits set by the European Court of Human Rights, see the chapter of Adam Bodnar in this volume; and Marcin Szwed, 'Fixing the Problem of Unlawfully Appointed Judges in Poland in the Light of the ECHR', Hague Journal of the Rule of Law (2023 forthcoming, available at https://link.springer.com/article/10.1007/s40803-023-00191-3). On the limits set by the European Court of Justice, see the chapter of Pawel Filipek in this volume.

and what they require from States in response to court-packing.[17] This is again a peculiar European debate, because both European supranational courts have been far more active in engaging with these questions than the rest of the world.[18] Finally, we leave aside the rights of "packed judges" after undoing the court-packing, such as the right to individualized judicial review and their right to compensation, and what to do with these judges after unpacking.

This chapter proceeds as follows. Section II explains what court-packing is and identifies the key cleavages in the scholarly literature. Section III shows that unpacking is only one of the many options for dealing with a packed court the new rulers have, once the "packers" lose power. Section IV is the core of the chapter and provides the first comprehensive inquiry into the mechanisms of unpacking and the factors that influence them. Section V concludes.

II. What is Court-Packing?

Until recently, most of the scholarship on court-packing has centred on the US experience and focused, quite understandably, on FDR's iconic court-packing plan.[19] Only very recently has court-packing been studied

17 This is particularly relevant in Poland, as the ECtHR held in *Advance Pharma* that the Polish authorities are obliged under Article 46 of the Convention to 'draw the necessary conclusions from the present judgment and to take any individual or general measures as appropriate in order to resolve the problems at the root of the violation found by the Court and to prevent similar violations from taking place in the future' (ECtHR, *Advance Pharma sp. Z o.o v. Poland*, judgment of 3 February 2022, App. No. 1469/20, para. 366). The CJEU has stipulated additional requirements.

18 We are aware of the fact that the Inter-American Court of Human Rights (see e.g. David Kosař and Lucas Lixinski, 'Domestic Judicial Design by International Human Rights Courts', American Journal of International Law 109 (2015), 713–760) and the African Court of Human Rights (ACtHR, *XYZ v Republic of Benin*, judgment of 27 November 2020, Application No. 010/2020, paras 60–72; ACtHR, *Houngue Éric Noudehouenou v. Republic of Benin*, judgment of 1 December 2022, Application No. 028/2020, paras. 68–83; and ACtHR, *Sébastien Germain Marie Aïkoue Ajavon v. Republic of Benin*, judgment of 4 December 2020, Application No. 062/2019, paras 309–325.) have been active in this area. We merely say that the case law of the European Court of Human Rights and the Court of Justice of the European Union is more developed.

19 See Gregory A. Caldeira, 'Public Opinion and the US Supreme Court: FDR's Court-Packing Plan', Am. Polit. Sei. Rev. 81 (1987), 1139–1153; William Leuchtenburg, *The Supreme Court Reborn: The Constitutional Revolution in the Age of Roosevelt* (Ox-

comparatively.[20] This new scholarship, which has provided detailed case studies on jurisdictions such as Argentina, Turkey and Venezuela,[21] or reconceptualised court-packing based on the experience of various countries across the world and in history,[22] has freed court-packing from its peculiar American straightjacket and shed light on the ways in which politicians can change the composition of the existing courts to pursue their interests.

This section does justice to these developments. It briefly discusses the competing conceptualisations of court-packing and their major differences, summarises the burgeoning debate on whether there can be both "good" and "bad" court-packing, and addresses the specifics of cyclical court-packing. By doing so, it sets the stage for the analysis of unpacking that follows.

1. Conceptualisation(s) of court-packing

Until recently court-packing has been under-theorised, and a clear conceptualisation of the term was missing. In the US context, court-packing has been traditionally understood as a practice that concerned adding justices to the existing court.[23] This reflected the specific features of the abovementioned FDR court-packing plan, which has been the cornerstone of the

ford: Oxford University Press 1995); Barry Cushman, *Rethinking the New Deal Court: The Structure of a Constitutional Revolution* (Oxford: Oxford University Press 1998); Jeff Shesol, *Supreme Power: Franklin Roosevelt vs. the Supreme Court* (New York: W. W. Norton & Company 2010); Barry Cushman, 'The Court-Packing Plan as Symptom Casualty, and Cause of Gridlock', Notre Dame L. Rev. 85 (2013), 2089–2106; and Alex Badas, 'Policy Disagreement and Judicial Legitimacy: evidence from the 1937 Court-Packing Plan', JLS 48 (2020), 377–408.

20 David Kosař and Katarína Šipulová, 'How to Fight Court-Packing?', Constitutional Studies 6 (2020), 133–163; Daly (n. 8); Kosař and Šipulová 2023 (n. 8); Holgado and Sanchez-Urribarri (n. 14).

21 Daly (n. 8); and Holgado and Sanchez-Urribarri (n. 14).

22 Kosař and Šipulová (n. 20); Katarína Šipulová, 'Under Pressure: Building Judicial Resistance to Political Inference' in: Denis J. Galligan (ed.), *The Courts and the People: Friend or Foe? The Putney Debates 2019* (Oxford: Hart Publishing, 2021), 153–170; Kosař and Šipulová 2023 (n. 8),

23 See e.g., Daniel Epps and Ganesh Sitaraman, 'How to Save the Supreme Court', Yale L.J. 129 (2019), 148–209; David E. Pozen, 'Hardball and/as Anti-Hardball', N.Y.U. Journal of Legislation & Public Policy 21 (2019), 949–955; Rivka Weill, 'Court-Packing as an Antidote', Cardozo L. Rev. 42 (2021), 2705–2761; Adam Chilton, Daniel Epps and Kyle Rozemaand Maya Sen, 'The Endgame of Court-Packing', SSRN Electronic Journal <https://ssrn.com/abstract=3835502>; and Keck (n. 5).

court-packing debates in the US[24] Recently, Joshua Braver analysed all the successful changes in the size of the Supreme Court of the United States as well as the failed attempts to change, and came out with a broader conceptualisation of court-packing. He defines court-packing as "the manipulation of the Supreme Court's size primarily in order to change the ideological composition of the Court"[25] that includes both expansion of the size of the Supreme Court and reduction of the number of Supreme Court Justices.[26] He joins the growing chorus of scholars who argue that people often use "court-packing" to describe changes to the size of the Supreme Court, but it is better understood as any effort to manipulate the Court's membership for partisan ends.[27]

Similar debates have recently emerged in comparative scholarship. Compared to more traditional US-centred works, we introduced a broader definition of court-packing that covers expanding (adding judges), emptying (reducing the number of judges) and swapping (replacing judges) strategies.[28] More specifically, we defined court-packing as "any change of the composition of the existing court, which is irregular, actively-driven (non-random) and creates a new majority at the court or restricts the old one"[29] and elaborated on each element of this definition.[30] Tom Daly and Mark Tushnet and Bojan Bugaric[31] to a large extent concur with our definition, even though they disagree with our view on the legitimacy of court-pack-

24 Perhaps, for that reason, few American scholars pay attention to the conceptualisation of court-packing and immediately jump into discussions about its legitimacy. See ibid; and also (n. 21).

25 Joshua Braver, 'Court-Packing: An American Tradition?', Boston College Law Review 61 (2020), 2748–2809 (2749). Note that Braver provides a slightly different definition in the abstract of his paper ('manipulating the number of Supreme Court seats primarily in order to alter the ideological balance of the Supreme Court'), but we ignore these nuances here.

26 To justify this broader understanding which departs from the traditional view on court-packing in the US, see in particular Braver (n. 25), 2778–2789, n. 136.

27 Elizabeth A. Moore, 'What is Court Packing', Rutgers, 27 October 2020, <https://www.rutgers.edu/news/what-court-packing.>; see also James Macgregor Burns, *Packing the Court: The Rise of Judicial Power and the Coming Crisis of the Supreme Court* (London: Penguin Press 2009).

28 Kosař and Šipulová (n. 8).

29 Kosař and Šipulová (n. 8), 5.

30 Kosař and Šipulová (n. 8), 5–9.

31 Mark Tushnet and Bojan Bugarič, *Power to the People* (Oxford: Oxford University Press 2021), 99–100, 156–177.

ing.[32] Others disagree though. For instance, Holgado and Sanchez-Urribarri prefer a "more minimalist definition" that covers only "adding judges to a court in order to create a new majority with" a clear political purpose.[33] Reducing and potentially[34] also swapping judges are different court curbing techniques for them. Moreover, increasing the size of the court for technical reasons, such as the expansion in the number of seats that is linked to the admission of new States, is likewise outside the definition of court-packing, even though they do not provide guidance on how we can distinguish "technical" from "political" expansion of the size of the court.[35]

This brings us to another conceptual element of court-packing that seems to divide scholars: the element that distinguishes court-packing from other judicial reforms. This debate can be roughly framed as effect versus intent versus irregularity. Some scholars argue that we can know for sure that the change in the composition of the court amounted to court-packing only once we know the effects of this change on actual judicial decision-making – that is whether the newly composed court altered its decision-making and sides more often on hot-button political issues with the government that adopted a given judicial reform.[36] Others claim that the intent of those who adopted a judicial reform is crucial.[37] Finally, some scholars acknowledge the importance of the purpose behind the judicial reform, but either treats it as one of several factors[38] or are sceptical of objective assessment of the intent of the proponents of judicial reform.[39] Some of them even argue that imputation of intent to political leaders is inevitably

32 See below.
33 Holgado and Sanchez-Urribarri (n. 14), 4.
34 Holgado and Sanchez-Urribarri might include a swapping strategy within the ambit of court-packing too if certain conditions were met, because they acknowledge that 'In many cases, court-packing may combine removing sitting judges and the appointment of new judges to the newly free slots.'
35 Holgado and Sanchez-Urribarri (n. 14), 4–5. Their definition differs also in other aspects, which we cannot discuss in detail here.
36 See e.g., Varol, Pellegrina and Garoupa (n. 2); and Sadurski (n. 12); Holgado and Sanchez-Urribarri (n. 14); Neil Siegel, 'The Trouble with Court-Packing', Duke Law Journal 72 (2022), 71–159.
37 For proponents of such an approach see Tushnet and Bugarič (n. 31), 177; Holgado and Sanchez-Urribarri (n. 14).
38 Daly (n. 8).
39 Kosař and Šipulová (n. 8).

subjective and instead argue that the central feature of court-packing is irregularity of the change in the court's composition.[40]

We do not intend to resolve these conceptual debates here. We mention them in order to identify the main disagreements and to set out the scope of our chapter transparently. Unpacking the courts inevitably requires determining what is meant by "packing" them. Throughout this chapter, we stick to our broader definition of court-packing that includes not only adding judges but also reducing the size of the court and swapping judges. Readers who prefer a narrower or broader definition of court-packing should bear our conceptual choice in mind when reading the text that follows.

2. Good vs. bad court-packing

Court-packing traditionally has had negative connotations. Nevertheless, virtually all scholars writing on this topic agree that it can be legitimate under specific circumstances. Thus, "good" court-packing is possible. Of course, court-packing is never "good" in the sense that it is never an ideal or an easy choice.[41] But sometimes it is necessary to break the norm against court-packing to repair the democratic system. The borderline between "good" and "bad" court-packing is thin though, and scholars disagree on what exactly the dividing criteria are.

Tom Daly proposed a five-pronged analytical framework for evaluating court-packing: its democratic context, articulated reform purpose, reform options (i.e., alternative policies at hand), reform process (deliberation on the policy) and risk of repetition.[42] Mark Tushnet and Bojan Bugaric distinguish between court fine-tuning that increases judicial accountability and court smashing, which occurs when the government takes an otherwise constitutionally permissible action for the very purpose of making the court politically accountable to it rather than to anyone else.[43] They argue that the only reasonably objective way of distinguishing between fine-tuning and smashing is by adding another condition – it is fine-tuning when there is a plausible "good government" justification for the change.[44] Benjamin

40 Kosař and Šipulová (n. 8).
41 Daly (n. 8).
42 Daly (n. 8).
43 Tushnet and Bugarič (n. 31), 161–162.
44 Tushnet and Bugarič (n. 31), 162.

García Holgado and Raul Sanchez-Urribarri also propose to focus on the goals of the political leaders who implement court-packing as a key criterion. In particular, they distinguish between policy-driven court-packing, in which the alteration of the composition of a court aims to promote public policies, and regime-driven court-packing, in which the alteration of the composition of a court aims to assist the executive in replacing the existing regime with a new one.[45]

Our view sets probably the strictest threshold regarding the criteria for "good" court-packing. We have argued elsewhere that there are two different dimensions of evaluating the legitimacy of court-packing which must be addressed independently. The first dimension addresses the *ius ad bellum* of court-packing – "the just cause". Existing discourse traditionally relates the just cause of court-packing to meta-principles such as democracy (US discourse), the rule of law and judicial independence (Europe) or public trust. Yet, these terms are fuzzy and prevent us from finding a common denominator. Democracy itself does not bring much clarity to the debate; the US example demonstrates this fact quite well. Lack of agreement on the content of democracy makes the use of "democratic decay" or "restoration" language an easy target for abuse.[46] If we want to know how skilful populist leaders are in using democratic rhetoric, it is enough to remember that Orbán instigated his constitutional reform by stressing that Hungary had the only communist Constitution that remained unreformed after democratic transition; or that Kaczyński's entrée into court-packing was a media crusade against an already not particularly popular judiciary, painting judges as a corrupt, undemocratic, privileged "caste".[47]

These experiences bring us to the conclusion that perhaps the *ius ad bellum* dimension of court-packing legitimacy might follow more straightforward and pragmatic goals, and simply outline acceptable justifications which are typically associated with examples of "good" court-packing. These are typically democratic transition, addressing large-scale institutionalised judicial corruption, a reaction to previous court-packing (which will

45 Holgado and Sanchez-Urribarri (n. 14).

46 See Rosalind Dixon, 'Court-Packing in Comparative Perspective', 22 March 2022, <https://blog-iacl-aidc.org/new-blog-3/2022/3/22/court-packing-in-comparative-perspective-rzjbl>.

47 Anne Applebaum, 'The Disturbing Campaign Against Poland's Judges', The Atlantic, 28 January 2020, <https://www.theatlantic.com/ideas/archive/2020/01/disturbing-campaign-against-polish-judges/605623/>.

be particularly relevant for this chapter) and the resolution of other more pragmatic issues such as the low efficiency of the courts.

The second dimension is the *ius in bello* of court-packing, which informs us *how* actually to execute court-packing legitimately. Even if it is justified in the aims it pursues, in order to be legitimate it still needs to meet a set of procedural safeguards and an assessment of the techniques it uses against the backdrop of domestic constitutional and international norms. The fact that the survival of democracy is in danger does not mean that you can do whatever you want and pack the court with no limits. This means that court-packing must meet certain requirements, such as proportionality if "unpackers" react to illegitimate court-packing. Importantly, justifications based on court-packing framed in bureaucratic language such as increasing the efficiency of the court administration require particularly strict scrutiny, because strategic political leaders seeking to pack the judiciary, anticipating a public backlash, may disguise their efforts in neutral, apolitical or seemingly positive terms.[48] This means that Erdogan's court-packing, during which he first expanded the jurisdiction of the Constitutional Court just to argue subsequently that the number of justices in the Court needed to be increased to tackle the rising caseload, would still qualify as illegitimate court-packing. Furthermore, the *ius in bello* assessment needs to engage with even more problematic aspects and carefully analyse the compatibility of any reform with court-packing effects within the existing supranational and constitutional norms in a given country.

Why is there such a high threshold? We believe that each court-packing justification carries with it some dangers of backlash. While some of these dangers are inherent in any court-packing (danger of cyclical repetition), others are context-dependent and may vary from one jurisdiction to another. We therefore argue that the conceptualisation of court-packing legitimacy requires one to look both at *when* the court-packing is legitimate and at *how* to execute its techniques legitimately, eliminating as many risks as possible. This second dimension of legitimacy thus interacts with constitutional norms and internationally entrenched rules and practices, which

48 In fact, experimental research shows that would-be packers benefit from such bureaucratic framing, because those political leaders who advance court-packing reforms purported to be bureaucratic in nature are evaluated more positively by voters than those who aim to politicise the judiciary openly; see Michael J. Nelson and Amanda Driscoll, 'Accountability for Court Packing', Journal of Law and Courts (2023), 1–22.

narrow down the applicability of individual court-packing techniques in a funnel-like structure.

In sum, we need to know whether court-packing was "good" or "bad", because that affects the legitimacy of court-unpacking. In this chapter we focus on how to unpack a court that has previously been a target of "bad" court-packing. This is a value-oriented choice, as we are not interested in, for instance, unpacking the post-communist courts that were subjected to "good" court-packing after the fall of the Berlin Wall and after the dismantling of the communist regimes in Central and Eastern Europe.

Identifying examples of good court-packing is not easy due to the lack of agreement on what distinguishes good from bad court-packing.[49] Moreover, the assessment of whether court-packing is good or bad may change over time. In other words, we cannot be sure that legitimate court-packing will not go awry. For instance, Daly claims that the overhaul of the Turkish Constitutional Court in 2012 and purges at the Argentinian Supreme Court in the 1980s are contexts in which court-packing was initially justifiable but has become inextricably captured by deep-seated or developing pathologies of the political system.[50] However, these grey zones do not affect the fact that it is important to analyse how to unpack a court that was subject to "bad" court-packing.

3. Specifics of cyclical court-packing

Before we situate court-unpacking in the broader set of policy options responding to court-packing (Section III) and zero in on the factors to

49 For cases of possible good court-packing see papers in the International Association of Constitutional Law symposium: Oren Tamir, '"Good" Court-Packing in the Real World', International Association of Constitutional Law Blog, 2 April 2022, <https://blog-iacl-aidc.org/new-blog-3/2022/4/5/good-court-packing-in-the-real-world-z38xc>; Mark Tushnet, 'Court-Packing: Four Observations on a General Theory of Constitutional Change', International Association of Constitutional Law Blog, 17 March 2022, <https://blog-iacl-aidc.org/new-blog-3/2022/3/17/court-packing-four-observations-on-a-general-theory-of-constitutional-change-6wskd>; Rosalind Dixon, 'Court-Packing in Comparative Perspective', International Association of Constitutional Law Blog, 22 March 2022, <https://blog-iacl-aidc.org/new-blog-3/2022/3/22/court-packing-in-comparative-perspective-rzjbl>; David Kosař and Katarína Šipulová, 'The Ius ad Bellum and Ius in Bello of Court-Packing', International Association of Constitutional Law Blog, 24 March 2022, <https://blog-iacl-aidc.org/new-blog-3/2022/3/24/the-ius-ad-bellum-and-ius-in-bello-of-court-packing-wghpw>.

50 Daly (n. 8).

be taken into account when considering court-unpacking (Section IV), we want to add one more caveat concerning cyclical court-packing.

Virtually all comparative scholarship views cyclical court-packing as a major risk of resorting to court-packing.[51] Fear of the normalisation of court-packing and a tit-for-tat tactic resonates also in the US debate on the expansion of the Supreme Court. Some US scholars pointed out that court-packing implemented in the current polarised atmosphere would raise unprecedented dangers, spiralling and essentially ballooning the Court's size to such an extent that its legitimacy would "pop",[52] and potentially take down the entire constitutional system.[53] If court-packing becomes cyclical then it will never lead to a new stable equilibrium. Instead, it will lead to a convention of tinkering with the size and the composition of the court whenever the opposition party wins elections.[54] For instance, Chilton, Epps, Rozema and Sen have created a hypothetical model of partisan behaviour after the eventual expansion of the US Supreme Court and argue that repeated partisan court-packing will probably occur, increasing the size of the Court to 23 judges within the next 50 years.[55] Others seem to be more willing to take the risk.[56]

Again, we will not resolve this debate here. In short, cyclical court-packing is special and raises specific concerns. By this we mean, tentatively, the situation where a given court was packed at least three times after each major change at the helm of the country. A typical example was Argentina, as attested to by a famous quotation from President Menem —"Why should I be the only President who won't appoint his own Supreme Court?"[57] For the purposes of this chapter, it suffices to say that if a court (typically a Supreme Court or a Constitutional Tribunal) was already packed cyclically, it will be particularly difficult to "unpack" it, for many reasons. Cyclical court-packing may have changed judges' self-perception of their indepen-

51 Daly (n. 8), 1075 and 1100–1102; and Kosař and Šipulová (n. 8), 38–39.

52 Braver (n. 25), 2748.

53 Neil Siegel, 'Some Notes on Court-Packing, Then and Now', Balkinization, 26 November 2017, <https://balkin.blogspot.com/2017/11/some-notes-on-court-packing-then-and-now.html>.

54 Epps and Sitaraman (n. 23).

55 Chilton, Epps, Rozema and Sen (n. 23).

56 Tushnet and Bugarič (n. 31), 99–100 and 173–177.

57 See Rebecca B. Chavez, 'The Evolution of Judicial Autonomy in Argentina: Establishing the Rule of Law in an Ultrapresidential System', Journal of Latin American Studies 36 (2004), 451–478; and Daly (n. 8).

dence.[58] It may also have weakened the sensitivities of the people.[59] It may even become institutionalised and turned into a sort of convention.[60] In other words, cyclical court-packing raises specific issues and so, not surprisingly, unpacking a cyclically packed court likewise poses specific challenges.

III. Après Court-Packing: What Comes Next?

In order to understand court-unpacking it is necessary to consider its alternatives. However, that requires taking a step back and looking at the possible scenarios after "bad" court-packing, however defined, because there are several potential developments. As, to our knowledge, no one has addressed these scenarios comprehensively, we need to lay them out here.

1. "Packers" stay in power: What can they do?

After court-packing, the "packers" may stay in power. They sometimes stay for a long time, sometimes for a short one. It does not matter to us here, as we are more interested in what they can do *after* they have packed the court.

They have at least six options. The first scenario is that they are by and large happy with the packed court and do nothing. The second is that the packed court is still not delivering the goods (i.e., not ruling frequently enough in the government's favour in general or not rubber stamping an important specific government legislative plan) and thus those in power decide to engage in another round of court reform. This may include packing the courts again, which we would call multiple court-packing. Or, in the third scenario, they may also think that other court-curbing might be more efficient than another round of court-packing and decide

58 Chilton, Epps, Rozema and Sen (n. 23).

59 See e.g., Amanda Driscoll and Michael Nelson, 'The Costs of Court Curbing: Experimental Evidence from the United States', J. Pol. 85 (2023), 609–624.

60 Some scholars fear that the normalisation of court-packing in democratic regimes would further weaponise its use by authoritarian leaders. See Letter from Rosalind Dixon to Bob Bauer and Cristina Rodriguez, Co-Chairs, Presidential Commission on the Supreme Court of the United States 10–11, 25 June 2021, <www.whitehouse.gov/wp-content/uploads/2021/06/Dixon-Letter-SC-commission-June-25-final.pdf>; and Presidential Comm'n on the Sup. Ct. United States, Draft Final Report (Dec. 2021), <www.whitehouse.gov/wp-content/uploads/2021/12/SCOTUS-Report-Final.pdf>.

to use another technique of court-curbing. This may include, for example, merging several courts, replacing the chief justice (without removing them as a judge altogether), adopting procedural reforms such as increasing the quorum and introducing supermajority rule, or channelling packing and curbing only to some panels or judges.

If they believe that they might lose the next election,[61] they may resort to the fourth strategy, which is artificially to prolong the life of the packed court. This practice might be deemed court-hoarding.[62] Possible illustrations of this include, but are not limited to, prolonging judicial terms of office for constitutional justices, increasing the mandatory judicial retirement age, increasing the threshold for judicial impeachment or temporal incentivisation to stay on the bench. If they are really happy with the packed court, they can even adopt a judicial reform which gives that court more power, weaponise the packed court and make it more dangerous vis-à-vis the opposition. In the fifth and most unlikely strategy, "packers" start undoing their original court-packing. This means that they start ceding court seats to the opposition. They may have varying motivations. They can be forced to democratize by internal political competition or they may respond to supranational pressure to undo their previous court-packing. This is voluntary unpacking.

Finally, packers can attempt to wash off the appearance of their court-packing by loosening the legislative rules that allowed them to control the selection of new judges. This scenario played out in Hungary in 2023, after Orbán's government passed a new legislation increasing the participation and oversight of National Council of Justice over judicial appointments.[63] This technique does not in fact remove any of the packed judges and merely appeases the criticism of the centralisation of judicial governance powers. Moreover, its future effects are questionable. In a very long-time horizon, it can potentially lead to a future unpacking, but only if the packers do not possess other, indirect or informal means of control over new bodies in

61 Note that this is one possible condition for engaging in court-hoarding, but certainly not the only one.

62 We discuss this practice in a separate article (David Kosař and Patrick Casey Leisure, Court-Hoarding, forthcoming).

63 Cseke Balázs, Márton Balázs and Andrea Horváth Kávai, 'Hungarian judicial reform worth €13 billion voted through, hidden in amendment', Telex, 3 May 2023, <https://telex.hu/english/2023/05/03/hungarian-judicial-reform-worth-eur13-billion-voted-through-hidden-in-amendment>; on criticism of the reform see also Erika Farkas and András Kádár, 'Restoring the Rule of Law By Breaching It', Verfassungsblog, 10 July 2023, <https://verfassungsblog.de/restoring-the-rule-of-law-by-breaching-it/>.

which they vested judicial appointments. In the case of Hungary, the effect of the new legislation would hence depend on the speed of judicial turnover and on the level of independence of the National Council of Justice on the political actors.

2. "Packers" lose power: What can the new rulers do?

"Packers" may also lose power and another political party or a coalition with different governance ambitions may come into power. Importantly, new rulers could be not only democratic opposition, but also autocrats, would-be stealth authoritarians or, worse, would-be totalitarians.

The new rulers have a range of options at their disposal. The first scenario is again to do nothing. This is not necessarily because they are happy with the packed court. However, they might know that the packed judges' terms end soon and thus decide that it is better to wait for the natural renewal of the bench. The "packed judges" might also strategically defect[64] to the new rulers and these new rulers can decide that judges with a "guilty conscience" are good enough for them or maybe even more convenient for them than brand new properly selected judges who would replace them. Or there may be a combination of the two.

It is thus not a simple decision, but a difficult cost-benefit and capacity analysis. Moreover, it also depends on the branch or branches of government that engaged in the original packing. There is an inter-branch dynamic in court-packing that plays a role in court-unpacking. If the legislature packed the court and the original executive went along with it, then the newly elected legislature may want to unpack the court but be stymied by the executive branch, i.e. the incumbent president from the "packers' camp" who holds signatory power over new bills. For instance, even if a Civic Coalition wins Polish parliamentary elections in 2023, it will still face for more than two years President Andrzej Duda, who appoints Polish Judges and who in the past has cooperated with PiS on packing the Constitutional Tribunal. A Civic Coalition may try to overcome this hurdle by strategic litigation before supranational courts aimed at reducing the presidential prerogative. Hence, even the judicial branch can instigate or at least smoothen the court-unpacking. Nevertheless, the need for cooperation with other branches, which the new rulers do not necessarily control, may heavily influence what the new rulers will actually do. In other words, their decision may be not only a cost-benefit, but also a capacity analysis.

64 This term was coined by Gretchen Helmke. See Gretchen Helmke, 'The logic of strategic defection: court–executive relations in Argentina under dictatorship and democracy', American Political Science Review 96 (2002), 291–303.

The second scenario is to unpack the packed court. This is the solution we focus on most in this chapter and discuss in greater detail in Section IV. Thirdly, the new rulers might resort to alternative judicial reform and adopt measures other than court-unpacking. The range of such mechanisms that can be employed to reduce the impact of the packed judges is broad and may include jurisdiction stripping, selecting a new chief justice or a court president, merging the packed court with another court, abolishing the packed court altogether or various procedural mechanisms such as reducing the quorum, abolishing or introducing a supermajority required to reach the verdict, or channelling certain cases to only specifics panels or judges of the packed court. Some of these measures serve only to "buy time", while others are adopted to resolve the situation immediately. We discuss these alternative solutions briefly in Section IV.5 below.

Yet another strategy that does not interfere with the size or composition of the packed court and seeks to remedy the negative impact of court-packing on public trust is an attempt to legitimise the court via the work of a reconciliatory commission. Such a commission could be tasked with different goals. It might open public debate and create a platform for actors to share their worries and positions as regards the past court-packing (like the role Biden's Commission played, even though it did not arrive at a clear-cut finding). It can also allow deeper insight into court(s)' decision-making activity and spur on public debate on safeguards of judicial independence. This may in turn dispel the worries and questions regarding the legitimacy of a packed court. Alternatively, the new rulers might also decide to legitimise the packed court by additionally confirming the appointment of judges packed by the previous government through a vote of supermajority in the Parliament or, at least, in the upper chamber. The symbolic confirmation will at least formally re-establish the legitimacy of judges' irregular appointment (and hence will be relevant particularly where court-packing occurred via an increase in the number or swapping of judges on the bench). Finally, for the sake of completeness, court-hoarding is highly unlikely where the original packers lose power, as there the new rulers

often have nothing "to hoard" (i.e. no majority to preserve) on the packed court.[65]

3. A brief summary

In sum, court-unpacking is one of the many policy options new rulers have once the "packers" lose power. As such, it must be judged against the other available judicial reforms. Sometimes, especially if the packed judges' terms end soon, the best option might be, perhaps counterintuitively, to do nothing because that might protect judicial independence in the long run. Yet another option is to resort to "healing" and create the truth and reconciliation commission that would be applicable (also) to judges. While this transitional justice mechanism has not been tested on judges properly so far,[66] it cannot be disregarded.

Of course, not all the options will always be on the table. They may not be realistic, either politically or legally. The range of options available to new rulers will always be distorted based on endo- and exogenous factors such as the form of court-packing, disputes and cleavages it has triggered, the type and competences of a targeted court (the opposition will respond differently to the packing of Apex or Constitutional Courts compared to court-packing done at first instance), the behaviour of judges (were they actually aligned with packers?) as well as the public, political and expert pressure to unpack the courts. Needless to say, after court=packing, court-unpacking, which we next examine in more detail, is only one of a number of possible outcomes. In other words, unpacking is not the only game in town.

65 Of course, where the new party or ruler in power has the same, or even more anti-democratic, goals as the party losing power, court-hoarding might be an option. For instance, if Fidesz is replaced by Jobbik in Hungary or if Ziobro's United Poland replaces Kaczyński's Law and Justice.

66 It is telling that the South African Judges refused to appear before the Truth and Reconciliation Commission after the fall of the apartheid régime, invoking judicial independence as their defence. For a criticism of this approach see David Dyzenhaus, *Judging the Judges, Judging Ourselves: Truth, Reconciliation and the Apartheid Legal Order* (Oxford: Hart Publishing 2003).

IV. Court-Unpacking: A Preliminary Theoretical Inquiry

As previously mentioned, refraining from unpacking is actually a difficult and non-intuitive decision for the democratic opposition once it wins the election, for pragmatic, political and legitimacy reasons. The majority of political actors are attracted to either pushing the existing majorities closer to their preferences or, at least, preserving a balanced court which does not openly lean towards any ideology. We thus expect that new rulers will decide not to unpack the courts if it lacks a sufficiently strong mandate, where there is no agreement that the previous court-packing was illegitimate (or that it even qualifies as court-packing, as is the case with the 2021 US discourse), or where new rulers decide that the overall short-term costs of unpacking is greater than the potential long-term gains.

Given the frequency of court-packing in transitions as well as the importance of the perceived independence and legitimacy of courts for young democracies, we argue that in the majority of scenarios new rulers will actively seek to restore the balance at packed courts or even use the unpacking to its own advantage. In what follows we first briefly address the logic behind justifications for unpacking. Next, we look more closely at individual unpacking techniques, depending on whether new rulers seek to reverse the packing to restore the previous status quo, or whether they opt for an alternative reform which either interferes in court's composition or forces the packed judges to align with governmental preferences or reduces its influence. We discuss the role of the proportionality principle in theoretical considerations on unpacking and discuss the thin line between unpacking and cyclical court-packing. Finally, we conclude with a bird's eye view of more complex issues that require an in-depth future discussion regarding the role of time, the behaviour of packed judges and the form of previous court-packing in the assessment of costs and benefits of court-unpacking.

1. "Just cause"

The legitimacy of court-packing has troubled legal and political scholars for quite some time.[67] We have addressed the key issues concerning the conceptualisation of court-packing above. For the purposes of this article

67 Helgado and Sanchez-Urribarri (n. 14); Daly (n. 8); Weill (n. 23); Keck (n. 5); Mailey (n. 5).

we refrain from strong normative claims which would require more extensive debate and consideration. Instead, we refer to our previous work[68] and raise four points outlining our conceptualisation of court-unpacking.

First, unpacking reacts to illegitimate court-packing. New rulers thus must be able to demonstrate that the court-packing was illegitimate, i.e. that it either lacked the proper justification set out in the four scenarios we outlined above or was implemented in a way that was incompatible with domestic constitutional or supranational norms. The Polish and Hungarian examples offer several of these court-packing instances, be it tinkering with the composition of apex courts, the addition of new judges or lowering the retirement age of judges across the board. All these measures allowed Orbán and Kaczyński to pack the courts with loyal judges, shifting the judicial majorities at the constitutional as well as the top general courts in their favour. The existence of CJEU and ECtHR case law labelling several of these techniques illegitimate relieves the new rulers of the need to demonstrate and prove that Orbán and Kaczyński's court-packing acts were in fact illegitimate. On the other hand, it also increases the pressure that the new rulers will face to undo these court-packings. In the end, it will be a "balancing exercise, in which domestic political actors balance domestic political costs of compliance, on the one hand, with the international reputational costs of non-compliance, on the other".[69]

Second, unpacking can easily be used by politicians with both good and bad intentions. Historically, retaliation for past tinkering with the composition of courts has commonly been used as a moral and political justification behind what were, in fact, new court-packing plans.[70] Take again the example of Poland. Brutal as it turned out to be, Kaczyński's court-packing was first triggered by actual court-packing executed by the outgoing Civic Platform Government who, in the face of looming electoral loss, pre-emptively selected two constitutional justices. In other words,

68 Kosař and Šipulová (n. 8).

69 David Kosař and Jan Petrov, 'Determinants of Compliance Difficulties among 'Good Compliers': Implementation of International Human Rights Rulings in the Czech Republic', EJIL 29 (2018), 397–425 (422–425).

70 Matthew M. Taylor, 'The Limits of Judicial Independence: A Model with Illustration from Venezuela under Chavez', Journal of Latin American Studies 46 (2014), 229–259; Chavez (n. 57).

Civic Platform's appointment gave PiS an initial just cause to kick off its own reform.[71]

Third, the dividing line between unpacking and court-packing is very thin, if not non-existent. Some unpacking techniques easily meet the definition of court-packing, and even if they are legitimate, they may ignite a dangerous cycle, similar to the examples of cyclical court-packing[72] we often see in Latin American countries.[73]

Fourth, even if justified, unpacking does interfere with courts' composition, and as such potentially further distorts the principle of judicial independence (or, even more problematically, the perception of judicial independence). Scholars so far have disagreed as to the effect court-packing has on public confidence and the perceived legitimacy of courts.[74] While some scholars argue that the public legitimacy of courts depends on their visible independence from the political branches of power,[75] others argue that the public is not overly sensitive and in fact cares and knows very little about courts.[76]

To what extent do considerations of whether to implement unpacking change if packed courts still enjoy a reasonably high level of public trust? And new rulers still have just cause if packed judges did not demonstrate any behaviour indicating their alignment with past government and, instead, retained their personal independence? The installation of a new majority does not need to translate automatically into the actual decision-making practice of judges. Sometimes, conservative judges may form coalitions with liberal colleagues. In some judiciaries with deeply rooted career

71 This is now even more complicated, as two out of three "quasi judges" illegitimately elected in December 2015 have died and been replaced by new judges under the "standard process", see Gliszczyńska-Grabias and Sadurski (n. 13), and Sadurski (n. 12). The fact that all three seats were illegitimately stolen by Kaczyński from Civic Platform's Government remains though.

72 See above Part I.C.

73 Taylor (n. 70); Chavez (n. 57).

74 Caldeira, (n. 19); Cushman (n. 19); Badas (n. 19); Keck (n. 5).

75 Siegel (n. 36).

76 James L. Gibson, Gregory A. Caldeira and Vanessa A. Baird, 'On the Legitimacy of National High Courts', Am. Pol. Sei. Rev. 92 (1998), 343–358; Noah Feldman, 'The Contemporary Debate over Supreme Court Reform: Origins and Perspectives', White House 2, 30 January 2021, <www.whitehouse.gov/wp-content/uploads/2021/06/Feldman-Presidential-Commission-6-25-21.pdf>; Brandon L. Bartels, Jeremy Horowitz and Eric Kramon, 'Can democratic principles protect high courts from partisan backlash? Public reactions to the Kenyan Supreme Court's role in the 2017 election crisis', AJPS (2021); and Nelson and Driscoll (n. 48).

models, court-packing may not translate into partisan decision-making at all. Should these considerations matter for the *justness* of unpacking?

As previously noted, we refrain from taking a resolute position, and for the purposes of this chapter simply present the first mapping of various factors which need to be taken into consideration when thinking about unpacking.

2. Techniques

So what techniques can new rulers consider for actually unpacking the court? We argue that any unpacking decision will move on a two-pronged scale depending on whether new rulers (1) opt to remove the packed judges or to keep those who meet certain standards, and (2) strive to restore the "old" majority or to install a new balance at the court.

An obvious unpacking technique is removing the packed judges. Such a move is always controversial, since it has to deal with the question of the legitimate expectations of packed judges, their de facto behaviour, as well as the destiny of decisions they managed to issue between their appointment and removal.[77] Moreover, new rulers pursuing the removal of packed judges will also need to decide what to do with the vacant seats: whether to fill them with original judges removed during court-packing, leave them empty (or downsize the court) or fill them with new judges.

The removal of packed judges can be achieved via several different techniques. The most straightforward one is the *repeal of court-packing laws and the annulment of the appointment of packed judges as void.* Yet, this seemingly easy solution still raises all of the questions outlined above. If there is no general agreement on whether the reversal of court-packing is constitutional, the repeal risks throwing the country into legal chaos. Can a decision delivered by a judge whose appointment was annulled still be considered valid? Should it also be annulled? To what extent does such a judge make the whole panel (s)he sits on illegitimate?[78]

A slightly different scenario opens if new rulers decide to *downsize* the court and, instead of annulling the previous legislation, adopt a new amendment reducing the number of seats at the court. While not very probable, new rulers may rely on this technique when the appointment is at least partly in the hands of a different actor, loyal to the outgoing

77 Discussion on Verfassungsblog (n. 11).
78 Ibid.

government which executed the packing. By reducing the size of a court in a strategic moment, new rulers might prevent such actor from court-hoarding. Reducing the number of seats will freeze the appointments process, shift the existing majority at the court (as some of the packed judges may leave the bench without being exchanged for a new batch loyal to the previous government) and buy the new rulers time. For example, if the Polish liberal opposition wins the next election, for a brief period it will have to cohabitate with President Andrzej Duda, who appoints Polish judges and who in the past has cooperated with PiS on packing the Constitutional Tribunal.

Downsizing is typical retaliation for the expansion of courts, frequently implemented in Latin America. Interesting examples can, however, also be found in the history of the US Supreme Court, where waves of increasing and reducing the number of judges permeated the whole of the 19th century. While the majority of court-packing plans were justified by the changing territory of the USA and the increasing number of circuits, several politicians have recently used similar reasoning to adjust the balance on the bench slightly.[79] Even more complex questions would be triggered if new rulers simply opted for downsizing as a reaction to a different type of court-packing which did not change the size, but only the composition, of the court. It is, however, worth noting that in some countries the ability of new rulers to pass downsizing reforms will also rest on whether the resizing of a court requires a parliamentary supermajority.

Another potential technique would be to shorten the time packed judges serve on the bench. New rulers can achieve this by three different mechanisms, depending on the strategic timing, whether life tenure exists, the length of the terms involved and the ages of packed judges. It can either *remove life tenure*, introduce fixed terms and open the door for a new selection, *shorten the existing terms* (the least controversial option would be to shorten the terms en bloc) or introduce/lower a *mandatory retirement age.* All of these techniques would, most probably, target the whole composition of the court, opening up a completely new opportunity for new rulers to repack the court. It is also important to stress that all these techniques simultaneously qualify as court-packing and as such carry with them all dangers and risks of court-packing. Even if their implementation is

79 MSAB: according to the Washington Post, 11 democratic candidates in the 2020 primaries were open to the idea, <https://www.washingtonpost.com/politics/2020/09/22/packing-supreme-court/>.

legitimate, they need to be carefully balanced against the form and effect of previous court-packing, as well as domestic constitutional and supranational norms.

Alternatively, new rulers might therefore resort to a longer but less intrusive approach and try to sift out "the bad apples". In this scenario, they will typically rely on *impeachment, disciplining, criminal prosecutions* or even instruments of transitional justice, such as *retention elections, vetting and the lustration* of packed judges.[80] In general, these techniques are seen as legitimate and condoned even by supranational organisations[81] if tied to transitions or systemic problems of judiciaries, such as large-scale corruption.[82] However, the results we have seen so far (mostly in Central and Eastern Europe) seem to suggest that the application of transitional justice mechanisms to hierarchical models of judiciaries riddled with informal networks is, at best, underwhelming. The majority of those judges who had to reapply for their jobs after the reunification of Germany remained in office.[83] Similarly, the Czech Lustration Law as well as subsequent disciplinary proceedings in fact allowed the majority of judges to remain in office due to a combination of lack of evidence and the specific nature of judicial dependence on the communist party, which was difficult to subsume under lustration.[84] The Ukrainian large-scale judicial vetting of 2014, reacting to

80 Yuliya Zabyelina, 'Lustration Beyond Decommunization: Responding to the Crimes of the Powerful in Post-Euromaidan Ukraine', State Crime Journal 6 (2017), 55–78; Erhard Blankenburg, 'The Purge of Lawyers after the Breakdown of the East German Communist Regime', Law & Social Inquiry 20 (1995), 223–243; David Kosař and Katarína Šipulová, 'Judging the Judges, Judging Ourselves: Never-Ending Dealing with the Past within the Czech Judiciary' in: Christina Murray and Jan Van Zyl (eds), *Judges Facing Transitional Justice: Vetting and Other Mechanisms and How They Affect the Rule of Law* (London: Routledge, forthcoming 2023).

81 See European Commission for Democracy Through Law (Venice Commission), 'Final Opinion on the Law on Government Cleansing (Lustration Law) of Ukraine', 19 June 2015, <https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2015)012-e>;ECtHR, *Polyakh and others v. Ukraine*, judgement of 17 October 2020, no. 58812/15; Konstantsin Dzehtsiarou, 'Lustration in Ukraine: Political Cleansing or a Tool of Revenge?', Verfassungsblog, 26 June 2015, <https://verfassungsblog.de/lustration-in-ukraine-political-cleansing-or-a-tool-of-revenge/>.

82 See European Commission for Democracy Through Law (Venice Commission), Final Opinion on the Law on Government Cleansing (Lustration Law) of Ukraine, 19 June 2015, <https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2015)012-e>; ECtHR, *Polyakh and others v. Ukraine*, judgement of 17 October 2020 no. 58812/15; and Dzehtsiarou (n. 81).

83 Blankenburg (n. 80).

84 Kosař and Šipulová (n. 8).

widespread corruption, proved largely toothless,[85] with judges voluntarily re-electing the majority of court presidents removed through the lustration process.[86]

The Ukrainian example in particular raises an urgent question: what to do once the packed judges leave office. How should new rulers fill the empty seats? Generally, they will have to choose one of three options: they can attempt to reinstall previous illegitimately removed judges, leave the emptied seats vacant or select their own new candidates. The decision is tricky and is often beyond the direct control of new rulers.

First, depending on the time that has passed since the original court-packing, the removed judges may have already retired, may occupy different positions, be in exile or simply be unwilling (or unable) to return to the judiciary. Think of Hungarian and Polish court-packing by lowering the retirement age. A similar, large-scale court-packing technique will allow only a very short window of opportunity to get judges back before they actually really retire.

Second, depending on the scale of court-packing, small countries may also struggle to generate a sufficient number of new candidates to fill the emptied seats.[87] Third, depending on the passing of time, undoing the effects of court-packing will be more difficult in hierarchical judiciaries that have managed to inbreed and socialise a new generation of judges who are already loyal to the judicial oligarchy that is about to be removed but is nonetheless able to retain its influence via informal channels.[88]

Another way how to undo court-packing is a decision to keep the packed judges on the bench but balance them out by *increasing the size of the*

85 Maria Popova, 'Can a leopard change its spots? Strategic behaviour versus professional role conception during Ukraine's 2014 court chair elections', L. & Pol'y 42 (2020), 365–381.

86 Ibid.

87 Kosař and Šipulová (n. 8).

88 Popova (n. 85); Nino Tsereteli, 'Backsliding into Judicial Oligarchy? The Cautionary Tale of Georgia's Failed Judicial Reforms, Informal Judicial Networks and Limited Access to Leadership Positions', Rev. Cent. & E. Eur. L. 47 (2022), 167–201; Samuel Spáč, 'The Illusion of Merit-Based Judicial Selection in Post-Communist Judiciary: Evidence from Slovakia', Problems of Post-Communism 69 (2020), 528–538; Maria Popova and Daniel Beers, 'No Revolution of Dignity for Ukraine's Judges: Judicial Reform after the Euromaidan', Democratizatsiya 28 (2020), 113–142; David Kosař and Samuel Spáč, 'Post-communist Chief Justices in Slovakia: From Transmission Belts to Semi-autonomous Actors?', Hague Journal on the Rule of Law 13 (2021), 107–142.

court.[89] This mechanism is not court-unpacking in the narrow sense, because, in contrast to removal, downsizing and other sifting mechanisms, the "packed judges" remain on the bench. Nevertheless, it is one of the most frequent strategies how to undo court-packing through the change of court composition and thus we mention this technique already in this Section.

This increase in the size of the court can be immediate or staggered. The addition of new seats was the solution proposed by Biden's administration. Interestingly, the US debate justified the expansion plan using two different narratives: the first group advocated for the expansion as a reaction to the latest republican appointments of Barrett and Gorsuch; the second camp simply argued that the Court should be rebalanced and made socially responsive, because it had become too polarised and had lost public trust and legitimacy.[90]

Increasing the number of judges could allow for either the restoration of the old majority or the creation of a new balance. New rulers could add new seats to replicate the diversity from before the court-packing or it might aim for a new proportional composition.

Undoing court-packing by expansion brings several benefits as well as issues. On the one hand, it allows for a rather smooth transition between the two courts, avoiding questions of the legitimacy of previous appointments, the legitimate expectations of judges packed by the previous government, and the treatment of decisions delivered by those judges. On the other hand, if the new rulers go too far, what it does can easily be qualified as a new court-packing.[91] It exposes the danger of normalising court-packing[92] —making the technique less costly and more attractive to future political leaders, and risking the start of a court-packing cycle.[93] The decades-long repetitions of expanding and downsizing the Supreme Court in retaliation

89 See Joshua Braver 'Court-Packing: An American Tradition?', Boston College Law Review 61 (2020), 2748–2809; Daly (n. 8); Tushnet and Bugarič (n. 31) 99–100, 156–177; Kosař and Šipulová (n. 8); Holgado and Sanchez-Urribarri (n. 14).

90 Presidential Commission on the Supreme Court of the United States, Draft Final Report, December 2021, <www.whitehouse.gov/wp-content/uploads/2021/12/SCOTUS-Report-Final.pdf>.

91 Anibal Pérez-Liñán and Andrea Castagnola, 'Judicial Instability and Endogenous Constitutional Change: Lessons from Latin America', B. J. Pol. S. 46 (2016), 395–416.

92 Taylor (n. 70).

93 Taylor (n. 70).

for previous court-packing is typical for the 1950s-1960s era and the early 2000s in Argentina and Brazil.[94]

In sum, undoing court-packing can be executed via various methods, one of them being unpacking. New rulers need to think along two axes: (1) Are they aiming to restore the previous status quo or to create a new balance at the court; and (2) Do they wish only to remove packed judges or also to add new ones to the court? Each of the combinations opens different risks, pragmatic constraints and political considerations. New rulers thus need at the same time to take into account the trade-off between the political legitimacy and constitutionality of its choice, the lapse of time since the original "bad" court-packing, pragmatic considerations such as a shortage of suitable judicial candidates, the effect on public confidence in the judicial system, and sometimes also issues of legal certainty, as no government wants its country to descend into chaos or a dual state.

3. Proportionality: How to differentiate unpacking from new court-packing?

Any reader who has closely followed the constitutional crises in Poland or Hungary might point out the striking resemblance between many of the techniques we outlined in the previous section as a potential unpacking, and the interferences with domestic judges carried out by Orbán or Kaczynski. As one of his first steps after reaching a parliamentary supermajority, Orbán adopted a constitutional amendment increasing the number of Constitutional Court justices from 11 to 15, securing for the government four new seats to fill and thus eventually to obtain an effective veto at the Court.[95]Jaroslaw Kaczyński borrowed the expanding strategy from Orbán's playbook and expanded the number of judges of the Polish Supreme Court from 81 to 120.[96]

94 Keith S. Rosenn, 'The Protection of Judicial Independence in Latin America', U. Miami Inter-Am. L. Rev. 19 (1987), 1–35 (28).

95 David Landau, 'Abusive Constitutionalism', U.C.D.L. Rev. 47 (2013), 189–260 (209). But note that it took several years for Orbán to achieve full control of the Hungarian Constitutional Court.

96 Śledzińska-Simon (n. 4); Fryderyk Zoll and Leah Wortham, 'Judicial Independence and Accountability: Withstanding Political Stress in Poland', Fordham Int'l L.J. 42 (2019), 875–947.

Between 2015 and 2017, PiS annulled the pre-emptive election of two Constitutional Tribunal justices, replaced three justices properly elected by the previous government, and managed to get rid of other recalcitrant justices via a combination of forced sabbaticals (Vice-President of the Constitutional Tribunal, Stanisław Biernat) and benching (strategically removing three justices from their panel arguing that they were biased towards the Minister of Justice, Ziobro, who might theoretically turn to the Tribunal with a request for a constitutional review).[97]

Both governments emptied a significant number of senior positions in the judiciary through the lowering of the mandatory retirement age. Hungary first introduced this technique in 2012, reducing the retirement age for judges from 70 to 62.[98] Poland followed suit in 2017, reducing the retirement age for Polish judges from 70 to 65.[99] Poland, in particular, became renowned for the abusive use of the disciplining of recalcitrant judges for the smallest trespasses or misdemeanours (see the well-known case of Dorota Lutotsanska, who faced disciplinary proceedings after she appeared at the celebration of 100 years of Polish independence with "Constitution" inscribed on her T-shirt) or for asking the CJEU preliminary ruling questions.[100]

What distinguishes these instances of court-packing techniques from subsequent unpacking? The line between court-packing and unpacking is indeed very thin, if not non-existent in some cases. Its presence will largely depend on the ultimate goal the new rulers wish to achieve. Do they wish to restore the previous status quo or does it aim for a new balance of voices on the unpacked court(s)?

97 For a more detailed discussion of these acts of court-packing see Kosař and Šipulová (n. 8).

98 Tomás Gyulavári and Nikolett Hős, 'Retirement of Hungarian Judges, Age Discrimination and Judicial Independence: A Tale of Two Courts', ILJ 42 (2013), 289–297; Uladzislau Belavusau, 'On Age Discrimination and Beating Dead Dogs: Commission v. Hungary', CML Rev. 50 (2013), 1145–1160.

99 For more details see ECJ, *European Commission v. Hungary*, judgment of 6 October 2012, case no. C-286/12,ECLI:EU:C:2012:687.

100 Laurent Pech and Patryk Wachowiec, '1460 Days Later: Rule of Law in Poland R.I.P. (Part I)', Verfassungsblog, 13 January 2020, <https://verfassungsblog.de/1460-days-later-rule-of-law-in-poland-r-i-p-part-i/>, and '1460 Days Later: Rule of Law in Poland R.I.P. (Part II)', Verfassungsblog, 15 January 2020, <https://verfassungsblog.de/1460-days-later-rule-of-law-in-poland-r-i-p-part-ii/>. For more details see also ECJ, *Miasto Łowicz*, judgement of 26 March 2020, case no. C-558/18, ECLI:EU:C:2020:234, and ECJ, *Prokurator Generalny*, case no. C/563/18.

What is the pool of judges it targets? Any illegitimately appointed judges or judges biased towards the government? Consider the following scenarios that might unfold. First, assume that the new Polish and Hungarian oppositions will take on board the widely discussed proposal[101] to remove the central perpetrators from the judiciary and to criminally punish those Polish and Hungarian Judges who "seriously and intentionally" violate EU values. At first sight, the proposal works with an objective justification relying on the supranational law. Yet, both oppositions will have to tackle the question of how to identify these judge-perpetrators and whether it is legitimate to search for them outside the pool of packed judges. In other words, whether this extraordinary measure should address also judges appointed long before PiS arrived in power. In the most extreme case, the opposition might simply decide to use unpacking to get rid of not only packed judges but any "problematic" judges present at the court. Unless individually targeted, any lustration, screening or disciplining of judges will potentially sift through a much larger pool of judges, including those legitimately selected in the previous era. Both Polish and Hungarian cases raise a plethora of new questions. Are judges who violated EU values because they felt bound by the jurisprudence of their own Constitutional Tribunal to be held criminally accountable? And can the use of a wide-open criminal prosecution still pass the test of legitimacy, or does it already interfere in de facto judicial independence and impartiality?

Alternatively, the liberal opposition might be incentivised by the presented window of opportunity and use it actively to create a completely new majority, aligned with its own preferences. This is, in fact, the very same scenario that played out in Poland after the 2015 parliamentary elections, when Civic Platform's outgoing government selected two Constitutional Tribunal justices to replace the "lame duck judges" whose mandates were to end only after the 2015 parliamentary election, which Civic Platform eventually lost. This pre-emptive (and later confirmed as unconstitutional[102]) election of judges by the lame duck government was clearly motivated by the fear of losing the elections and responded to growing public support for the populist Law and Justice party. However, this strategy backfired badly. Instead of skewing the composition of the Constitutional Tribunal, this "original sin"[103] instigated (and also partly legitimised) Kaczyński's vendetta

101 von Bogdandy and Spieker (n. 11).

102 Polish Constitutional Tribunal, judgment of 3 December 2015, case no. 34/14.

103 Garlicki (n. 13). See also Gliszczyńska-Grabias and Sadurski (n. 13).

after the elections. Instead of removing two pre-emptively selected justices, PiS, with the help of President Duda, annulled the whole selection and replaced all five justices (two lame duck judges and three properly selected judges) with its own appointees.[104] Disproportional unpacking essentially equates to illegitimate court-packing, which carries the very obvious risk of spiralling into an endless cycle of court-packing practices, as seen in Argentina[105] and Venezuela.[106]

In our previous work on the legitimacy of court-packing we argued that any reactive court-packing, i.e. court-packing as a response to previous illegitimate court-packing, must be balanced and proportional. For example, had President Biden decided to proceed with an expansion of the Supreme Court, he would have been able to expand the bench by a single[107] or two judges, depending on the agreement of the constitutionality and legitimacy of the Senate's refusal to vote on Merrick Garland's appointment, and of the appointment of Amy Coney Barrett. The proportionality requirement, therefore, serves as a bulwark dividing unpacking from cyclical court-packing.

Similarly, in Poland, if PiS wanted to rectify the Civic Platform's 2015 original sin, it could have simply annulled the pre-emptive selection of two justices and selected two new candidates. Instead, PiS opted for a fully fledged illegitimate court-packing. We thus argue that any unpacking that goes beyond the restoration of the status quo and reshuffles the majority at the court needs to adhere to the principle of proportionality and to meet the previous court-packing with what we call "a paired effect".

4. Other issues to consider when resorting to court-unpacking

Broadly speaking, we suggest that any decision on whether or not to unpack the packed court(s) should consider at least four factors: (1) the form of the previous court-packing, (2) the lapse of time from the original illegitimate court-packing, (3) the behaviour of packed judges during the reign of "packers", and (4) position of the packed court within the hierarchy of the judicial system. A combination of these four issues will significantly impact the effectiveness as well as the public reception of unpacking.

104 See Zoll and Wortham (n. 96); and ECtHR, *Xero Flor w Polsce sp. z o.o. v. Poland*, judgment of May 7, 2021, application no. 4907/18.

105 Chavez (n. 57).

106 Taylor (n. 70).

107 We are of course aware that in cases similar to the US example it might be difficult to come to an agreement about what the constitutional principle is and whether the executive's step was or was not constitutional. For that reason, we rely on our definition of court-packing, not on constitutionality, which rests on more objective criteria evaluating the effect of a given practice created on the bench.

First, regarding the form of the previous court-packing, it is important to acknowledge that any illegitimate court-packing has a potentially detrimental effect on the quality of democracy, the rule of law or judicial independence, but individual court-packing techniques differ in the scope and intensity of their clash with the constitutional norms and conventions of a given country.

The form of court-packing will also impact the scale of options available to new rulers. Expansion of the court can be quite swiftly resolved by proportional downsizing. Vice versa, judges removed due to downsizing might be reinstalled by the responsive expansion of the bench. This option would be relatively easy for both the Hungarian Constitutional Court (returning to 11 justices) and the Polish Supreme Court (trimming it down to 81). Downsizing of a court does not necessarily have to put into question the legitimacy of decisions delivered by packed judges[108] but simply be presented as a structural reform. Similarly, benched judges (Venezuela 2004, Pakistan 2007) or judges sent on forced sabbaticals (Poland 2017) can, in most cases, be reinstated in their original seats with no further requirements.

Some swapping court-packing strategies (i.e. court-packing executed by changing the quality, not the size, of the court's composition) require more complex reactions, typically because they also raise problematic questions of what to do with the judges who filled the seats emptied by court-packing. Are all these new appointments automatically illegitimate? The restoration of the Polish Constitutional Tribunal is one of the examples where we expect the unpacking to be particularly difficult. Two out of three "quasi judges" illegitimately elected by Kaczyński's coalition in December 2015 had died in the meantime and were replaced by new judges under the "standard process".[109] The fact that two judges ("post-packed" judges) who replaced the original "quasi judges" through a standard process in the Sejm does not in itself rectify the original court-packing in 2015. In other words, the fact that all three seats were illegitimately stolen by Kaczyński from Civic Platform's Government remains. Here, we hypothesise that the

108 See, mutatis mutandis, ECtHR, *Guðmundur Andri Ástráðsson v. Iceland* (Grand Chamber), judgment of 1 December 2020, case no. 26374/18, para. 314.

109 Gliszczyńska-Grabias and Sadurski (n. 13).

decision-making matrix of the liberal opposition will most likely rest on how brutally the previous court-packing violated domestic constitutional and supranational norms (i.e. is "vendetta" necessary) and what techniques the same norms permit as constitutional.

Regarding the constitutionality of court-packing and unpacking, the harsher or more brutal forms of court-packing (abusive prosecution of judges, such as in examples from 2016 Turkey, abusive impeachments in Chile 2004, Sri Lanka 2013 and El Salvador 2021) probably increase both the public demand and the benefits the new rulers gain from unpacking, making the decision politically less costly, even if not necessarily technically and legally easy to execute. Additionally, the form of unpacking will also depend on the particular political and constitutional setting and context: techniques generally accepted in one country as constitutional might be detrimental and untransferable to a different state. The Polish and Hungarian situation is strongly impacted by the existence of the CJEU and ECtHR case law suggesting that acts of court-packing in both countries, in fact, violated their supranational commitments. From this perspective, both European Courts raised the pressure the new rulers would face in unpacking the domestic courts. The most recent Hungarian legislative reform aimed to restore the rule of law by removing the political control over judicial selection executed via unchecked National Office for the Judiciary, does not in any way solve the issue of what to do with packed judges and we hypothesize that it will not relieve potential new rules of the unpacking dilemma.

A second factor to consider is the lapse of time from the original illegitimate court-packing. The more time has passed since the court-packing, the more costly the unpacking usually will be. Judges removed by original court-packing may no longer be able to return to their seats. Or, even worse, several rounds of appointments may have occurred between the illegitimate court-packing and the new rulers' chance to undo it. Take again the example of the Polish conundrum around the 2015 appointment of constitutional justices. Any future consideration of how to unpack the Constitutional Tribunal, should PiS really lose the November 2023 elections, will inevitably be complicated by the fact that two out of three quasi-judges illegitimately selected by PiS in the disproportionate retaliation against Civic Platform's pre-emptive appointment, have already died and have been

replaced by new judges selected in a standard process.[110] Is unpacking able to address court-packing the effects of which span across "generations" of appointments?

Apart from the pragmatic level, the lapse of time also has a normative element. Courts cannot remain prisoners to political changes. Similarly, legal certainty and the protection of individual rights cannot depend on an uncertain future and whether the next incoming government decides to reverse policies of long ago. The threshold related to the passing of time is reduced in cases of illiberal regimes and vast abuses of human rights, committed through the direct or indirect engagement of courts. Nevertheless, the lapse of time from the transition itself increases the pressure to abandon transitional justice policies which might potentially undermine the general protection of human rights.[111] The European Court of Human Rights, for example, has already clarified that the lapse of time affects the compatibility of transitional measures such as lustration with the European Convention of Human Rights.[112] Similar considerations apply to the restoration of tinkering with courts' composition.

The stakes are high also for pragmatic reasons. The annulment and proclamation of the appointment of packed judges as unconstitutional invoke questions of what will happen with judgments and decisions delivered by such a packed illegitimate judge. Are they to be considered valid? Are they compatible with the requirements of the right to a fair trial and to a lawful judge (gesetzlicher Richter)? Should they somehow be undone, at least in vertical relationships of individuals vs the state? Obviously, the longer the time that has passed between packing and unpacking, the broader the scope of cases decided by packed judges will be, and thus unpacking will install more instability in the legal system and individual relations. That said, intertemporal aspects of court-unpacking are not necessarily linear. If more time passes, it does not automatically offer a reason for a more restrained approach.

The third issue complicating contemplation of the unpacking of courts is the behaviour of packed judges, as well as the cognitive capacity of the

110 Gliszczyńska-Grabias and Sadurski (n. 13).

111 Katarína Šipulová and Hubert Smekal, 'Between Human Rights and Transitional Justice', Europe-Asia Studies 73 (2021), 101–130.

112 See David Kosař, 'Lustration and Lapse of Time: Dealing with the Past in the Czech Republic', Eu Const. L. Rev. 4 (2008), 460–487; and Cynthia M. Horne, 'International Legal Rulings on Lustration Policies in Central and Eastern Europe: Rule of Law in Historical Context', Law & Social Inquiry 34 (2009), 713–744.

new rulers to decipher it in a timely manner. The question to what extent the behaviour of packed judges impacts the legitimacy of court-packing has already triggered a vibrant debate among international scholars.[113] While we lean towards a negative answer and evaluate court-packing without relying on imputation of intent or the de facto behaviour of judges, we also argue that such behaviour actually does matter and crucially shapes the decision whether to unpack the courts. The ability of judges to retain their de facto independence cannot legitimise previous court-packing, but it increases the costs and significantly reduces the benefits of subsequent unpacking. This is all the more relevant, given the mixed signals issued by the scholarship exploring the development of public confidence in courts which face court-packing or other forms of reform. A completely new perspective is needed when considering the unpacking of such illegitimate court-packing.

To what extent should new rulers care whether packed judges decided independently during[114] the reign of court packers?[115] Does the public still consider the packed court legitimate? How was the court-packing reflected in public trust and the perceived independence of judges? To what extent should political actors drive their important judicial reforms similar to court-packing and unpacking on the public sentiment? To what extent is our understanding of the just cause of unpacking formed by de facto behaviour we can observe? Do new rulers have just cause if the previous government packed the court illegitimately but judges, due to other safeguards of judicial independence or their own resilience, actually remained independent?

These questions relate also to the cognitive problem of the extent to which we are able recognise biased behaviour in packed judges. In some cases, such as the decision-making of the Polish Supreme Court or the Polish Constitutional Tribunal, the statistical evidence is quite straightforward and simple. Multiple studies have demonstrated that Polish judges in

113 Holgado and Sanchez-Urribarri (n. 14).

114 In a way, a change of power provides quite a good natural laboratory to "test" judicial independence, as one could see a change or a path-dependence in how packed judges decide cases pre- and post-change in executive/legislative power. However, a democratic opposition often cannot afford the luxury of waiting to see whether packed judges defect to the new democratic majority as it may lose momentum, often a short window of opportunity, in attempting to undo court-packing.

115 Sadurski (n. 12).

fact decide increasingly pro-governmentally.[116] A similar observation would probably hold also for the US Supreme Court. But what about strategically packed courts, or small important panels within the courts, that can be activated only once an important case against the previous government or its members is raised?

Finally, the tier of the court we talk about also matters. While packing the Constitutional Tribunals, Supreme Courts and other pinnacle court understandably attracts more attention, packing the lower courts is also consequential, because these courts decide the majority of disputes.[117] However, undoing court-packing at the lower echelons of the judiciary can be easier, because these courts are more numerous and vacancies open more often naturally, the number of judges of the lower courts are usually not fixed by law, and the "packers" usually exercise lesser pressure on the lower court judges which allows them to decide cases more independently than "packed judges" at the apex courts, whose behaviour is policed by the "packers" more closely. Moreover, judgments of lower courts can be reviewed by higher courts. In other words, in most cases, new rulers have more flexibility in undoing court-packing at lower tiers of the judiciary. On the other hand, new rulers can return career judges who were promoted to higher courts by "packers" to their original posts at lower courts (i.e. to demote them), but this measure cannot be used against judges of the lowest tier of the judiciary, which is usually most numerous.

5. Alternative reform options

The difficulties related to the implementation of unpacking techniques might prompt new rulers to search for an alternative reform that would leave the composition of court(s) intact but could indirectly mitigate the effect of court-packing.

First, new rulers might seek to gain the upper hand over the packed judiciary by *seizing control over judicial governance* (and its personal dimension in particular). Generally, this would take place in two steps: transferring the selection, promotion and removal of judges to a new body (either

116 See Sadurski (n. 12); M. Pyziak-Szafnicka, 'Trybunał Konstytucyjny á rebours', Państwo i Prawo 5 (2020), 25.

117 See Martin K. Levy, 'Packing and Unpacking State Courts', Wm. & Mary L. Rev. 61 (2020); 1121-1158; Andrea Castagnola, *Manipulating Courts in New Democracies: Forcing Judges off the Bench in Argentina* (New York: Routledge, 2017).

completely independent or under the control of the executive power), or via the installation of new court presidents.

Alternatively, new rulers might simply decide to weaken the court and reduce its impact on mega-politics (including elections, budgets and individual rights).[118] This can be achieved in several steps (or their combination). The most common one is *jurisdiction stripping*, typically related to judicial review competence.[119] Particularly in countries where Constitutional Courts significantly constrain the legislator, their increased polarisation will also increase the pressure to limit their influence on the formation of public policies. In the end, the supporters of court-packing, who see it as a suitable response to a too polarised and politicised US Supreme Court, largely overlap with the camp of judicial review critics.

A different technique would be a *reduction of the quorum for judicial review* or, alternatively, an *increase in the supermajority* required for a judicial review decision. While the reduction in quorum seeks to allow more variance in the formation of different alliances within the court, the increase in supermajority (higher than the majority the previous government achieved by packing the court) will make it difficult for packed judges to attract new colleagues who would be willing to create a coalition necessary to take a vote. The drawback of this clever technique is that if the supermajority is set too high, it may bring the court to a deadlock where it would be unable to take any decision.

Lastly, new rulers might also consider a large-scale reform of the judiciary to dissolve completely the court besmirched by the results of court-packing. One option, an alternative to jurisdiction stripping, would be to delegate the salient competence to a *newly created specialised panel* (with the selection of its members controlled) or to introduce an internal *rotation system*, forcing packed judges to alternate in different panels. This will allow new rulers to have a friendly group of judges while not losing the benefit of having a strong independent court. New rulers might also decide to *merge* the packed court with a different court, *split* it or *to dissolve and create a new court* – a pro forma institutional reshuffling which serves only one purpose: to get rid of packed judges and gain an opportunity to select

118 Ran Hirschl, 'The judicialization of mega-politics and the rise of political courts', Annual Review of Political Science 11 (2008), 93–118.

119 We have seen a manifestation of this weakening technique executed in Hungary and Poland. However, it is also worth noting that in the US context, the proponents of weaker judicial review eventually joined the pro-court-packing camp, accepting court-packing as an alternative reform to mellow down the effect of the court.

a completely new bench. Lastly, extensive court-packing that significantly delegitimised the judiciary and dramatically lowered public trust might actually spur the new rulers to restart the constitutional momentum and adopt a completely new constitution.

V. Conclusion: The Ultimate Goal of Unpacking

We have argued in this chapter that any new rulers that topple the court packers and come to power will face a tricky decision on whether and how to restore the independence and legitimacy of the packed judiciary. We also proposed to build the understanding of unpacking, its justness and its effects on three considerations: the (il)legitimacy and form of past court-packing, the lapse of time and the behaviour of packed judges.

However, the goal pursued by unpacking triggers even more vexing dilemmas. What aims should unpacking follow? What version of court composition is it restoring? Is it aiming simply to replicate the court from before the packing (return to the status quo) or should it strive to achieve a new balance? Perhaps aim for a more socially responsive court? And how would our answer evolve if the courts lacked independence or legitimacy, or enjoyed particularly low confidence and effectiveness before the court-packing? What if the courts we are trying to save were filled with mediocre, bad, slow or even corrupt judges? And how likely is unpacking to lead to cyclical court-packing?

Similarly, is unpacking equally legitimate if original "packed judges" died or left the judicial office and "packers" filled these vacant seats with new judges in a flawless process? Can unpacking travel across generations? Can it be healed by the independent de facto behaviour of packed judges or, on the other hand, will it be replicated as an original sin to future generations of judges filling the packed seats, irrespective of the quality and independence of their behaviour? Court-unpacking simply has both retrospective and forward-looking aspects that are often in tension. Every unpacking is a potential slippery slope that may end up in cyclical court-packing.

The answers to these dilemmas will not be easy to find. Yet, a proper understanding of unpacking, its goals and available techniques fit for different jurisdictions is necessary. As we have shown in the last section, the alternative reforms open to the opposition wishing to undo court-packing might have even more detrimental effects, indefinitely weakening the position of the judiciary in the country's political system. In cases like those

of Poland and Hungary, where supranational verdicts on the illegitimacy of the current judiciaries basically took away the option of "doing nothing", unpacking might still be one of the best as well as the most probable options.

What Role for Courts in Transforming a Society? A Central European Cautionary Tale

Michal Bobek

Abstract:
This chapter analyses the role of courts in social transitions in the specific Central European judicial context. It explains why, for the reasons embedded in the historical experience of Central European judiciaries throughout the 20th century, the idea of courts-driven transformations is not likely to find that many enthusiastic supporters in ordinary courts within that region. There is nonetheless a notable exception in the form of the much more active, not to say potentially activist, constitutional courts and their contributions to societal transformation. The chapter concludes with a few moderate suggestions what then might be expected of ordinary courts in terms of transitions in the Central European settings.

Keywords: courts enforcing values; value discontinuity; formalism; textualism; teleological reasoning; transformative constitutionalism; Constitutional Courts; separation of powers; Central Europe; national application of EU law; European Convention

I. Introduction

In the moment of rule of law back-sliding and crises, who do we turn to for help? The courts. When musing over re-establishing rule of law constitutional democracy one day, who do we turn to again? The courts. The argument of this contribution is simple: because of their prevailing judicial culture, shaped by historical experience, the (ordinary)[1] courts in

1 Unless expressly stated otherwise, the term 'courts' used in this contribution refers essentially to all 'ordinary' courts, i.e. excluding constitutional courts. The special role