DOI: 10.55019/plr.2026.1.35-53

Pázmány Law Review
XIII. 2026. • 35–53

BETWEEN AUTONOMY AND OBSTRUCTION

A Theoretical Framework for Constitutional Court Independence

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Abstract

This study analyzes the structuaral vulnerabilities of constitutional courts operating between legal doctrine and political power. Protecting constitutional adjudication requiers a dual layer of safeguards: institutional autonomy and personal guarantees to shield the members of the constitutional courts from political pressure. Evaluating comparative appointment models, the paper highlights a key shift in moder autocratization: overt court-packing is increasingly replaced by procedural obstruction, where political actors deliberately leave judicial seats vacant to paralyze the court. Applying a certain methodological technique, the legitimacy algorithm to gridlock-breaking measures, the study concludes that any unilaterl reform bypassing cross-party consensus and independent expert consultation lacks institutional legitimacy, degrading intended constitutional repair into a form of court-packing.

Keywords: constitutional courts, judicial independence, appointment models, thwarting strategy, court-packing, legitimacy algorithm.

1. Introduction

The institutional design and systemic survival of constitutional courts represent one of the most complex challenges in contemporary comparative constitutional law. Positioned at the critical intersection of law and political power, these bodies act as the ultimate guardians of constitutional democracy and the rule of law. However, because constitutional review inherently operates as a check on political actors, these actors frequently attempt to exert influence over the composition of the court. The structural

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interface through which politics attempts to engage with – or capture – constitutional tribunals is the judicial appointment mechanism. Ensuring that these selection procedures populate the bench with competent jurists without compromising the core independence of the institution remains a delicate balancing act for constitutional democracies worldwide.

While conventional legal scholarship thoroughly explores overt political interventions – such as structural 'court-packing' or radical legislative overhauls – contemporary autocratization and populist governance have given rise to subtler, more sophisticated strategies of institutional subversion. Rather than expanding court seats to alter judicial majorities, non-cooperative political actors increasingly weaponize existing consensus requirements to trigger a 'thwarting strategy.' By deliberately refusing to participate in nominations and keeping judicial seats vacant, political factors can effectively paralyze a constitutional court from within, transforming formal constitutional guarantees into tools of institutional blockade.

To comprehensively unpack these systemic vulnerabilities, this paper provides a multi-layered theoretical and dogmatic analysis. First, it establishes the normative foundations of constitutional adjudication, mapping out the multi-dimensional international recommendations and European standards that define judicial independence. Second, it distinguishes between the institutional, operational, financial, and personal dimensions of independence, assessing how these principles are structurally operationalized within constitutional frameworks. Third, the study explores the comparative landscape of selection mechanisms, developing a typology that synthesizes the 'split', 'collaborative', and 'pure parliamentary' appointment models. Finally, utilizing Kosař and Šipulová's legitimacy algorithm, this paper analyzes the modern paradigm of court-packing and procedural obstruction, offering a normative flowchart to distinguish between pathological political interference and legitimate institutional repair in constitutional democracies.

2. The independence of the constitutional courts

Independence of constitutional courts is highly relevant because to understand how these bodies protect constitutional rules from everyday political pressure, we must look at their independence through two distinct layers: how the court is protected as an institution, and how individual judges are shielded from political interference. While international standards provide a general blueprint for these protections worldwide, the actual strength of any court depends on how these two layers are put into practice. To map this out, this chapter analyzes the global standards of judicial independence, details the institutional and financial pillars of high courts, and examines the personal protections and selection mechanisms that keep judges free from political influence.

Regardless of whether a given state's system of constitutional review operates under a centralized or decentralized model, the independence of the body performing this

function from other branches of power is essential.[1] One of the primary reasons for this is that constitutional review is „one of the most important instruments of democracy and constitutionality" within a state structure.[2] Their existence is one of the ultimate guarantees of democratic systems of governance.[3] Imre Takács's thoughts, as cited by Csaba Erdős, further substantiate the significance of the constitutional court's independence, explaining that „after the separation of powers, constitutional review is the most vital guarantee of the rule of law, ensuring that an independent court (or similar body) stands guard[4] over the preservation of constitutionality".[5] As Péter Tilk puts it: „outside the legislative, executive, and judicial branches, this body constitutes the fourth branch of power".[6] This is also expressed by Géza Kilényi, who explains that the court „thinks on a different scale and judges matters differently than a parliament subjected to compromises born of daily skirmishes, or a Government that is not infrequently forced into firefighting mode".[7]

There are numerous dimensions to the independence of constitutional review. Several international organizations and European Union institutions have issued positions regarding the requirements that must be met to consider a constitutional court independent. As shown in the table below (Table 1), these requirements are also incorporated into standards and recommendations formulated by numerous international bodies.

Regarding the cited recommendations, it is important to note that, in line with international literature, these recommendations apply to the independence of bodies performing constitutional review. However, under a decentralized model, this activity is often carried out by bodies belonging to the judicial branch; therefore, certain elements of the recommendations warrant an expansive interpretation, and their substance should be applied to constitutional courts operating within a centralized model as well.

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1 Csaba Erdős: Az Alkotmánybíróság kontrollmechanizmusának változásai. [Transformation in the Review Mechanisms of the Constitutional Court]. In: Kecskés Gábor (ed.): *Doktori műhelytanulmányok*. [Doctoral Working Paper]. Széchenyi István Egyetem Állam- és Jogtudományi Doktori Iskola, Győr, 2013. 134.

2 Rait Maruste: The Role of the Constitutional Court in Democratic Society. *Juridica International* 13, (2007), 8.

3 Pablo Castillo-Ortiz: The Dilemmas of Constitutional Courts and the Case for a New Design of Kelsenian Institutions. *Law and Philosophy* 39, 6. (2020), 617. https://doi.org/10.1007/s10982-020-09378-3.

4 This thought already appears in the work of Hans Kelsen. See: Hans Kelsen: Ki legyen az alkotmány őre? [Who Should Be the Guardian of the Constitution?]. In: Péter Takács (ed.): *Államtan*. [Theory of State]. Osiris, Budapest, 2002. 289–332.

5 István Kukorelli – Imre Papp – Imre Takács: Az Alkotmánybíróság. [The Constitutional Courts]. In: István Kukorelli (ed.): *Alkotmánytan I.* [Constitutional Law I]. Osiris, Budapest, 2007. 441. Chapter cited by Erdős op. cit. 134.

6 Péter Tilk: *A magyar Alkotmánybíróság.* [The Hungarian Constitutional Court]. [PhD Dissertation]. Pécsi Tudományegyetem, Pécs, 2008. 21.

7 Géza Kilényi: Az Alkotmánybíróság és az önkormányzatok. [The Constitutional Courts and the Local Governments]. *Magyar Közigazgatás*, 12. (1992), 699.

Council of Europe[8]	UN High Commissioner for Human Rights[9]	Venice Commission[10]
Independence of judicial councils.	Impartial decision-making, free from external pressure.	Constitutional-level guarantee of judicial independence.
Efficiency of justice and the provision of resources.	Adjudication is performed exclusively by the court.	Legality of appointment and promotion.
Adequate system of selection.	As a general rule, judicial decisions are not subject to review.	Term of appointment.
Immunity, disciplinary proceedings, and ethics.	Providing adequate resources for the operation of the judicial system.	Irremovability and disciplinary matters.
	Conducting judicial proceedings in accordance with the proper rules of procedure	Salaries and allowances.
	Freedom to form judicial associations.	Freedom from undue external influence.
	Appropriate conditions for qualification, selection, and training.	Independence within the judiciary.
	Disciplinary liability, suspension, and removal from office.	Non-interchangeability of judicial and prosecutorial positions.

Table 1 - Elements of the independence of constitutional court judges in the recommendations of certain international organizations.

According to the co-authors Chronowski and Drinóczi, we can distinguish between institutional, operational, financial, and organizational independence regarding the constitutional court as a body, as well as personal, political, and professional independence regarding the individual constitutional court judges.[11]

2.1. The institutional independence of the constitutional courts

Most modern constitutions do not necessarily contain an explicit provision that verbatim declares the organizational independence of the constitutional court as a body from other actors within the state structure. At the same time, the framers' intention to this effect can be clearly deduced from the structure of the normative text, provided

8 Rafal Manko: *Standards of Judicial Independence*. Council of Europe. 2021.

9 Basic Principles on the Independence of the Judiciary. General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985. United Nations.

10 CDL–JD(2008)002 *European Standards on the Independence of the Judiciary.* Venice Commission, Strasbourg, October 3, 2008.

11 Nóra Chronowski – Tímea Drinóczi: Alkotmánybírói függetlenség Európában. És Magyarországon? [Judicial Independence of Constitutional Judges in Europe. And in Hungary?]. *Közjogi Szemle*, 3. (2010), 26–27.

that the regulations governing the body appear within an entirely separate, autonomous chapter inside the constitution – in a manner similar to how the regulations concerning other supreme constitutional organs are isolated. Statutes detailing the status of constitutional courts usually formally declare that the body, as the supreme interpreter of the constitution,[12] is independent of other constitutional organs and is subject only to the constitution and to its own governing legislation (the so-called principle of external or institutional independence).

The organizational independence of the body is closely linked to this, manifesting itself concretely in institutional and operational autonomy. Accordingly, a constitutional court is entitled – within the framework established by the constitution and the law – to adopt its own rules regarding its organization and operation (rules of procedure).[13] The exercise of administrative and employer authority by the president of the court over the clerk-officer corps and the professional staff serves[14] as another fundamental administrative guarantee, which prevents the executive branch (for instance, via the ministry of justice) from exerting direct influence over the court's internal personnel.

Independence does not, however, imply unrestricted, unchecked activity. Being bound absolutely by the constitution, the binding force of prior decisions (the nature of self-binding precedent or *stare decisis* ensuring legal certainty),[15] and being bound by the scope of the petition strictly delimit the functional room for maneuver of constitutional adjudication. Although the questions of *res iudicata* and precedential effect are regulated differently across various legal systems, constitutional court acts usually maintain strict internal procedural safeguards for instances where the body wishes to depart from its own established jurisprudence; in such cases, the matter must be referred to the full court (plenary session) of the body.[16] This internal mechanism ensures the predictability of legal interpretation and insulates the tribunal from sudden shifts driven by changing political climates.

The fourth, and practically most critical, element of institutional independence is financial autonomy.[17] As anchored in international standards – including the recommendations of the Venice Commission and the Council of Europe – the body must be independent not only legally but also financially, given that its operation requires an adequate and stable budgetary background that ensures the permanent and undisturbed

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12 Cf.: Luis Alejandro Silva Irarrázaval: ¿Es el Tribunal Constitucional el supremo intérprete de la Constitución? *Revista de Derecho de la Pontificia Universidad Católica de Valparaíso* 38, 1. (2012), 573–616.

13 László Klicsu – Endre Orbán – Kinga Zakariás: Az Alkotmánybíróság hivatali szervezete. [The Organizational Structure of the Office of the Constitutional Court]. In: Kinga Zakariás (ed.): *Az alkotmánybírósági törvény kommentárja*. [Commentary on the Act on the Constitutional Court]. Budapest, Pázmány Press, 2022. 215.

14 Act CVII of 2019 on Bodies with Special Legal Status and the Status of Their Personnel 22(1).

15 Decision 4/2013 (II. 21) of the Hungarian Constitutional Court. DO. 142.

16 E. g. Act CLI of 2011 on the Constitutional Court 48/A, 49(6b), 50(2f).

17 Chronowski–Drinóczi op. cit. 27.

functioning of the court.[18] According to the relevant theoretical and comparative models, the primary guarantee of this is that the budget of the constitutional court forms an entirely autonomous section within the general state budget act, and furthermore, that it is the legal obligation of the reigning government to provide the funds[19] required for the proper functioning of the body. The main procedural hallmark of this autonomy is that the constitutional court, as a sovereign constitutional organ, drafts and compiles its own budgetary requests. Under the authorization of the president, this task of planning,[20] execution, and accounting is typically carried out by the secretary-general or the court's internal administrative office, while the draft is adopted by the full court under its own authority before it integrates – without substantive alterations – into the annual budget bill presented to parliament.

2.2. The personal independence of the members of the constitutional courts

Another critical dimension of ensuring the overall autonomy of constitutional courts is the personal independence of the individual members of the tribunal.[21] This baseline is secured through a matrix of institutional, professional, and financial guarantees designed to buffer judges from external political friction. To mitigate political patron-client dynamics during the selection process, contemporary constitutional frameworks implement strict professional and eligibility criteria. Requiring candidates to possess recognized judicial, academic, or legal expertise alongside a substantial minimum threshold of senior professional experience reduces arbitrary, purely partisan appointments.[22] Once appointed, judicial irremovability acts as the primary shield for personal independence. To preserve this continuity, members are typically appointed for a long, fixed, non-renewable term – commonly ranging from nine to twelve years – which decouples their judicial performance from the political cycles of legislative majorities.[23] Under standard rule-of-law frameworks, the early termination of a judge's mandate cannot be triggered by political bodies. Outside of natural causes such as death or voluntary resignation, any dismissal or suspension must remain strictly within the internal purview of the court itself, typically requiring a high, qualified majority

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18 See: László Sólyom: The Role of Constitutional Courts in the Transition to Democracy: With Special Reference to Hungary. International Sociology 18, 1. (2003), 133., 135. https://doi.org/10.1177/0268580903018001008.

19 CCJE(2001)OP2 *Opinion No. 2 (2001) on the Funding and Management of Courts with Reference to the Efficiency of the Judiciary*. Consultative Council of European Judges, Strasbourg, 23 November, 2001. paras. 3–5.

20 CDL-AD(2010)004 *Report on the Independence of the Judicial System: Part I - The Independence of Judges*. Venice Commission, Strasbourg, 13 March, 2010. 53–55.

21 Chronowski–Drinóczi op. cit. 26–27.

22 See András Bragyova: *Az alkotmánybíráskodás elmélete.* [The Theory of Constitutional Adjudication]. Közgazdasági és Jogi Könyvkiadó, Budapest, 1994. 112–115.

23 Chronowski–Drinóczi op. cit. 27.

of the plenary session to adjudicate grounds of physical incapacity or severe ethical conflict of interest.[24]

Functional immunity ensures that constitutional judges cannot be held legally or politically accountable for the legal opinions, arguments, or votes expressed during the exercise of their official duties.[25] This immunity is reinforced by strict incompatibility regimes, under which judges are barred from holding concurrent legislative, executive, or administrative public offices, and are prohibited from occupying leadership or operational roles within political parties, trade unions, or commercial corporate entities.[26] Furthermore, they are generally bound by the same stringent ethical restrictions applied to the ordinary judiciary to avoid even the appearance of partiality. Alongside these ethical boundaries, financial stability operates as an indispensable material guarantee.[27] The remuneration and allowances of constitutional judges must be predefined by general statutory budget acts rather than discretionary executive decrees, ensuring that the executive branch cannot utilize targeted budgetary rollbacks or salary freezes as leverage to sway pending judicial review.

The architecture of the selection phase represents the primary structural interface between judicial independence and political representation, leading many democratic systems to opt for a multi-channel selection procedure. Rather than concentrating selection power within a single branch, appointment prerogatives are balanced across multiple constitutional actors, splitting quotas among political organs – such as the upper and lower houses of parliament or the government – and non-political judicial bodies, including supreme courts or national judicial councils.[28] While the final appointment is frequently finalized through a formal, symbolic act by the head of state, the substantive authority rests within these diverse nominating channels. To modernize this selection pipeline, contemporary organic regulations increasingly introduce procedural criteria, such as diversity metrics to ensure balanced gender representation among nominees,[29] or sub-national consultation mechanisms that integrate regional or state legislatures into the preliminary nomination pool to ensure geographical or federal pluralism.

Despite a well-calibrated legal framework comprising institutional autonomy, strict eligibility criteria, and diverse selection channels, formal rules rarely insulate a high court entirely from political pressure. Because these systems rely heavily on political nominators, the emergence of extra-legal elements, informal negotiations, and party-political quotas remains a persistent systemic risk. When political actors

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24 CDL-AD(2010)004 *Report on the Independence of the Judicial System: Part I - The Independence of Judges*. Venice Commission, Starsbourg, 29 March 2011.paras. 33–35, 43.

25 Ibid.

26 See István Kukorelli (ed.): *Alkotmánytan I.* [Constitutional Law I]. Osiris, Budapest, 2007. 444–446.

27 CCJE(2001)OP2 *Opinion No. 2 (2001) on the Funding and Management of Courts with Reference to the Efficiency of the Judiciary*. Consultative Council of European Judges, Strasbourg, 23 November, 2001. paras. 3–5.

28 See Katalin Kelemen: Appointment of Constitutional Judges in Central and Eastern Europe: A Comparative Analysis. *Acta Juridica Hungarica* 54, 1. (2013), 12. https://doi.org/10.1556/AJur.54.2013.1.2.

29 LOTC 16.1.

weaponize selection procedures – either by enforcing extreme ideological screening or by creating deliberate vacancies – the practical independence of a constitutional court faces challenges that formal rules alone cannot fully counteract. In summary, the rigorous framework governing high courts, comprising institutional autonomy, financial independence, and a multi-channel selection mechanism with strict eligibility and incompatibility criteria, is designed to insulate the tribunal from political encroachment. However, heavy reliance on political nominators and the emergence of informal political dynamics introduce inevitable challenges to the court's practical independence, even when the formal rules seemingly constitute a coherent whole.

3. Appointment models and the theory of the political thwarting of the constitutional courts

The institutional design governing the selection and appointment of constitutional judges constitutes one of the most critical junctures in comparative constitutional law. Far from being a mere technicality or a neutral bureaucratic routine, the mechanism of appointment serves as the primary structural interface between the judicial branch and political power. Consequently, the architecture of these systems inherently shapes the baseline of judicial independence, as well as the vulnerability of the court to external political pressures. In contemporary constitutional democracies, the formal rules of appointment have increasingly become ideological battlegrounds. To understand how constitutional courts can be captured, neutralized, or structurally paralyzed, one must first grasp the theoretical frameworks that categorize these selection mechanisms. This chapter provides a comprehensive dual analysis: it establishes a rigorous typology of constitutional court appointment models, and subsequently introduces the modern paradigm of court-packing – specifically focusing on the subtler, non-structural obstruction known as the thwarting strategy. Finally, by utilizing the Kosař-Šipulová legitimacy algorithm, this section provides a normative framework to distinguish between pathological political interference and legitimate institutional repair.

3.1. The typology of appointment models for constitutional courts

The appointment of members of a constitutional court can occur according to various models, and distinctions between these models can be drawn in multiple ways. Katalin Kelemen's classification – which is based on the model developed by the author duo Lach and Sadurski regarding Central European constitutional courts[30] – is divided into three parts: the split model (A1), the model termed collaborative appointment (A2), and the parliamentary model (A3), one of the most prominent features of which is the necessity of a multi-party consensus within parliament.[31] The author duo Chronowski

[30] See further: Kasia Lach – Wojciech Sadurski: Constitutional courts of Central and Eastern Europe: between adolscence and maturity. *Journal of Comparative Law* 3, 2. (2008), 212–233.

[31] Katalin Kelemen: Az alkotmánybírák újraválaszthatósága és kinevezési ideje. [The Re-electability and Tenure of Constitutional Court Judges]. *Pázmány Law Working Papers*, 5. (2011), 10–13.

and Drinóczi outlines a fundamentally similar, yet nuancedly different distinction. Similar to Kelemen, they also distinguish the pure parliamentary model (C1) and a model where both parliament and the constitutional court possess the prerogative to elect a certain number of members (C2). They also mention the multi-channel model, dividing it into two sub-types: in the first case, nomination is the procedural stage in which multiple actors participate (C3), while in the second, the act of appointment itself is multi-actor (C4). They speak of two models that specifically highlight the role of the head of state: firstly, one where the head of state approves the parliament's nomination (C5), and secondly, when the judiciary nominates members for the position and the head of state approves it through their appointment (C6). The fourth distinction corresponds to the final group established by Tiede: the situation where, due to a heightened ethnic situation, judges must be appointed within the framework of a quota system (C7).[32] Lydia Tiede distinguishes four types of appointment models. Accordingly, a distinction is made between cases where (i) with the participation of two branches of power, unanimously (B1); (ii) with the participation of three or more branches of power, unanimously (B2); (iii) multiple different branches of power jointly, in such a manner that the nomination of one requires the consent of the other branch of power (B3); furthermore, (iv) when the body is elected in an atypical way – for instance, on an ethnic basis (B4).[33] It is important to consider that Tiede's classification only mentions those models in which the selection procedure involves at least two actors.

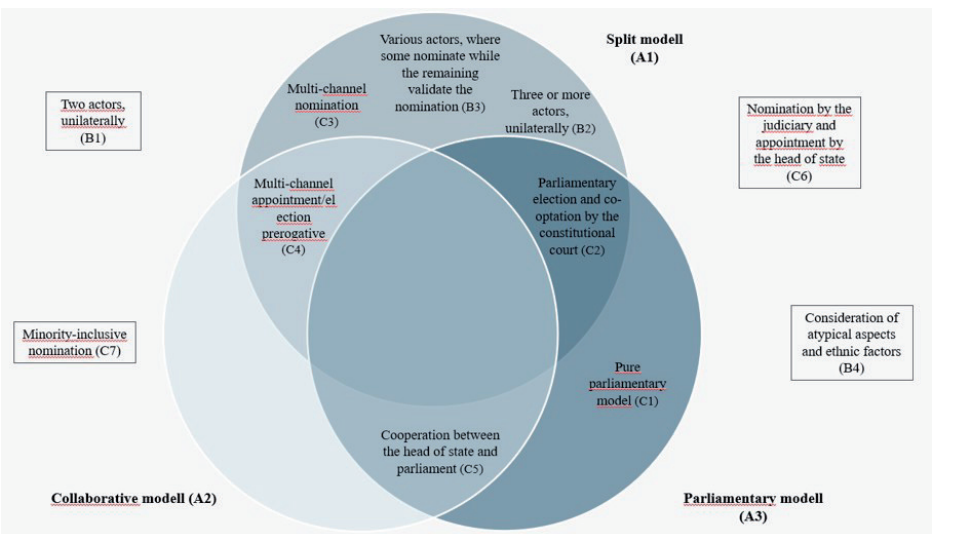


Figure 1: The System of Constitutional Court Appointment Models. (Author's own elaboration based on the sources used in the thesis.)

[32] Chronowski–Drinóczi op. cit. 26–32.

[33] Lydia Brashear Tiede: Mixed Judicial Selection and Constitutional Review. *Comparative Political Studies* 53, 7. (2020), 1097. https://doi.org/10.1177/0010414019879961.

The figure clearly demonstrates that the model termed 'split' by Kelemen plays a highly dominant role in the classifications established by other authors. At the same time, it is important to note that one should not draw the conclusion that the multi-channel model is in any way superior, more ideal, or the one that best ensures constitutional judicial independence. A primary reason for this is that Tiede's classification inherently differentiates only within the multi-channel model, which significantly overrepresents the categories classifiable under it. Nevertheless, in order to draw substantive conclusions regarding which model ensures judicial independence to the greatest extent, I will explore the characteristics of each appointment model based on the distinction established by Kelemen, addressing their advantages and disadvantages, as well as their relationship with the independence of the body.[34]

The essence of the split appointment model is that various organs „share the appointment of constitutional judges".[35] One of the two defining characteristics of the model is that the power of appointment is vested in all three branches of power, in most cases through a quota-like system; thus, each entity entitled to appoint can nominate members to a specific number of seats on the body. In numerous cases, quotas are distributed equally among the branches of power; however, there are exceptions, such as Spain, where – owing to the fact that both the Congress of Deputies and the Senate can nominate four members each – the legislative branch is entitled to select two-thirds of the members,[36] though several systems with a similar structure can be found.[37] Additionally, the other important element is that a legitimizing act is required in every case for the validity of the selection. In most cases – especially in parliamentary systems – the head of state possesses this prerogative, arising from their role within the state organization. In the figure above, both models classified purely into this set possess these two main factors: it is a requirement that all three branches of power have a quota for nomination – meaning that co-decision by the branches of power is not required in this case – and that there be a political actor outside the nominating organs to approve the decision made.

The essential element of the collaborative model is that the legislative and executive branches must cooperate in the appointment procedure. In the case of the legislative branch, if there are two chambers, typically both possess appointment prerogatives, whereas the actor proceeding on behalf of the executive branch is most often determined by the form of government: with a few exceptions, the head of the executive branch holds this prerogative. The greatest difference compared to the split model is that, in this case, the legislature and the executive do not receive a quota to appoint a certain number of nominees – about which they could decide independently of other nominating entities according to their internal decision-making mechanisms – but must name the candidate jointly, with the consent of the other branch of power. In practice,

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34 The models of both the classification established by Tiede and that according to Chronowski and Drinóczi can be integrated into one of the categories defined by Kelemen; therefore, I will use this as a baseline.

35 Kelemen (2011) op. cit. 11.

36 CE 159. 1.

37 See further: Kelemen (2011) op. cit. 11.

this model can be implemented in several ways. According to one method, the head of state appoints candidates from a list – or may even put forward their own nominees – which are then approved by parliament (or one of its chambers). The application of staggered appointments is not uncommon – although this is not a specific characteristic of the collaborative model but rather typical of all multi-actor models. In this case, members of the body are replaced not all at once, but in a staggered manner over time.[38] An important feature is that the judicial branch does not participate in this model,[39] and that in numerous cases, a qualified majority is required to confirm the nomination.[40] The multi-channel appointment and election prerogative (C4) described by Chronowski and Drinóczi does not possess all the characteristics of the collaborative model; however, a highly important common element – which places it at the intersection of the split and collaborative models – is that appointment prerogatives in this model are not quota-based either, but rather require the consensus of those entitled to appoint. Nevertheless, in this case, the entity entitled to appoint can be an organ belonging to any branch of power, and specific collaboration between the legislative and executive branches is not required.

In the case of the pure parliamentary model, the right of both nomination and election belongs to the parliament.[41] The model described by Chronowski and Drinóczi, which requires cooperation between the head of state and parliament (C5), incorporates certain characteristics of the collaborative model. However, the final decision is much more permeated by the logic characteristic of the parliamentary model; regardless of whether parliament nominates the members or accepts the nominations of the head of state, it inevitably decides during the process by taking into account the circumstances detailed below. In this model, the political affiliation of the candidate plays an important role in the appointment procedure.[42] Although in Germany it is not uncommon for certain constitutional judges to hold a party card prior to their election,[43] excessive influence can be filtered out through the codification of conflict-of-interest rules, and naturally, during their tenure as constitutional judges, the individuals may not engage in any related activities in order to ensure independence. This is a highly desirable regulatory requirement for the independence of the constitutional court. The existence of such regulation does not eliminate the risk of appointment decisions becoming overly politicized, particularly when a single party or a coalition of parties holds a majority in parliament. At the same time, as Chronowski and Drinóczi highlight, lower-level sources of law reinforce the „requirements of pluralism and professionalism" to

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38 Wojciech Sadurski: *Rights Before Courts. A Study of Constitutional Courts in Postcommunist States of Central and Eastern Europe*. Springer, Dodrecht, 2014. 30. https://doi.org/10.1007/978-94-017-8935-6

39 Katalin Kelemen: Appointment of Constitutional Judges in a Comparative Perspective – with a Proposal of for a new model for Hungary. *Acta Juridica Hungarica* 54, 1. (2013), 15.

40 Sadurski op. cit. 110., 113., 115.

41 Chronowski–Drinóczi op. cit. 28.

42 Kelemen (2013) op. cit. 18.

43 Louis Favoreu: *Les Cours constitutionnelles*. Presses Universitaires de France, Paris, 1992., cited by Kelemen (2013) op. cit. 17.

protect the democratic character of the system.[44] An important characteristic of the pure parliamentary model is that, similar to the collaborative model, a consensus is required in this case as well, given that a qualified majority is a requirement in almost all instances.

There are no clear correlations regarding the basis on which a state opts for a given model,[45] and appointment models can, of course, change from time to time. How appointment models can change, what reasons guide the legislature when enacting legislation aimed at altering the appointment model, and what consequences this may entail are questions that I will answer in the next chapter through the presentation of the court-packing strategy.

3.2. The modern form of *court-packing*: The thwarting strategy.

There is no uniform definition of the concept of 'court-packing' in modern literature; however, comparing various positions, it can be clearly established that the regulations governing the selection of a judicial body are amended in these cases precisely to alter the composition of the body in a manner that allows its decision-making mechanisms to be influenced. At the same time, authors do not hold a uniform view regarding whether there is a legislative intent that renders this type of restructuring inherently illegitimate, or whether there are cases when such reorganization is lawful.

The co-authors Benjamin Garcia Holgado and Raúl Sánchez Urribarri establishes a purpose-based distinction and divides court-packing efforts into two categories. According to them, the objective of court-packing can be either (i) the swifter implementation of a specific policy issue ('policy-driven court-packing') or (ii) the dismantling of democracy ('regime-driven court-packing').[46] Although the former case negatively affects judicial independence, it does not in itself aim to change the existing regime – in contrast to the latter case, where the restructuring's impact on judicial independence exerts a system-wide negative effect on the „various dimensions of liberal democracy", aiming to erode democracy.[47]

A similar position is held by Aylin Aydin-Cakir, who establishes that there is a close correlation between the proliferation of populism threatening liberal democracies and attempts to restrict (constitutional) judicial power, one instrument of which can be the transformation of the appointment system.[48] Cakir distinguishes between formal and informal court-packing. By formal court-packing, she understands any activity that „regulates the appointment and dismissal procedures, tenure, salaries, and review

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44 Chronowski–Drinóczi op. cit. 27.

45 Kelemen (2011) op. cit. 13.

46 Benjamin Garcia – Raúl Sánchez: Court-packing democratic decay: A necessary relationship? *Global Constitutionalism* 12, 2. (2023), 350. https://doi.org/10.1017/S2045381723000011.

47 Ibid. 350.

48 Aylin Adin-Cakir: The varying effect of court-curbing: evidence from Hungary and Poland. *Journal of European Public Policy* 31, 5. (2024), 1179. https://doi.org/10.1080/13501763.2023.2171089.

powers" of members of a higher court.[49] This mechanism is most often underpinned by a solid legal framework, whereas informal court-packing encompasses any action strategy „aimed at curtailing the power and independence of the judiciary".[50] This partially coincides with the concept of regime-driven court-packing mentioned above, given that the infringement of judicial independence can serve as a tool for dismantling democracy. This assertion holds true even if this issue arises not in relation to ordinary courts forming part of the judicial branch, but with respect to a constitutional court; indeed, numerous authors discuss court-packing within this context as well.

Beyond the two conceptual distinctions mentioned above, David Kosař and Katarína Šipulová mention sixteen sub-cases categorized into four major sets regarding illegitimate body transformations.[51] Out of the sixteen cases listed by them, two are closely linked to selection procedures: when judicial selection is obstructed ('thwarting strategy') and when new judges are appointed before the expiration of the current tenure ('premature appointment').

3.3. The end justifies the means: The legitimacy of *court-packing*

At the same time, Kosař and Šipulová also acknowledge that there are cases where, although political influence cannot be ruled out, it serves a legitimate purpose. Tom Daly also writes about instances where restructuring is a 'remedy' and others where it represents a 'pathological' situation.[52] The authors distinguish five objectives under which restructuring can be considered lawful. Accordingly, a reorganization is deemed legitimate if it is part of a democratization process or democratic transition.[53] The transformation is also lawful if the body becomes corrupt and its members cannot be dismissed through the application of the effective procedural rules. As a third scenario, the authors mention when 'court-packing' occurs due to a prior unlawful restructuring of the body, in order to restore the lawful functioning of the constitutional court.[54] The fourth element they mention is the situation where the restructuring aims to balance a body that is overly polarized from an ideological perspective. There is no scholarly consensus regarding the extent to which the composition of a constitutional court should reflect political and social dynamics; in fact, there are views suggesting that ideologically motivated restructuring results in a kind of retaliatory system – meaning that alternating regimes will always restructure bodies by invoking this justification.[55] There are, however, non-ideological efforts that keep a similar goal in mind – the balance

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[49] Adin-Cakir op. cit. 1180.

[50] Ibid. 1180.

[51] David Kosař –Katarína Šipilová: Comparative court-packing. *International Journal of Constitutional Law* 21, 1. (2023), 89–90. https://doi.org/10.1093/icon/moad012.

[52] Tom Daly: „Good" Court-Packing? The Paradoxes of Constitutional Repair in Contexts of Democratic Decay. *German Law Journal* 23, 8. (2022), 1092–1093.

[53] Kosař– Šipilová op. cit. 112–113.

[54] Ibid. 115–116.

[55] Jeff Shesol: Supreme Power: Franklin Roosevelt vs. the Supreme Court. *Journal of American History* 98, 1. (2011), 240–241. https://doi.org/10.1093/jahist/jar003.

of the bodies – during organizational restructurings. These are mostly attributable to the ethnic composition of a given state, or to characteristics stemming from a historical legacy, religious, or geographical features. The fifth case that legitimizes court-packing is increasing the efficiency of the body's work.[56] Restructuring is accepted in order to address the case backlog weighing on constitutional courts and the protraction of proceedings.

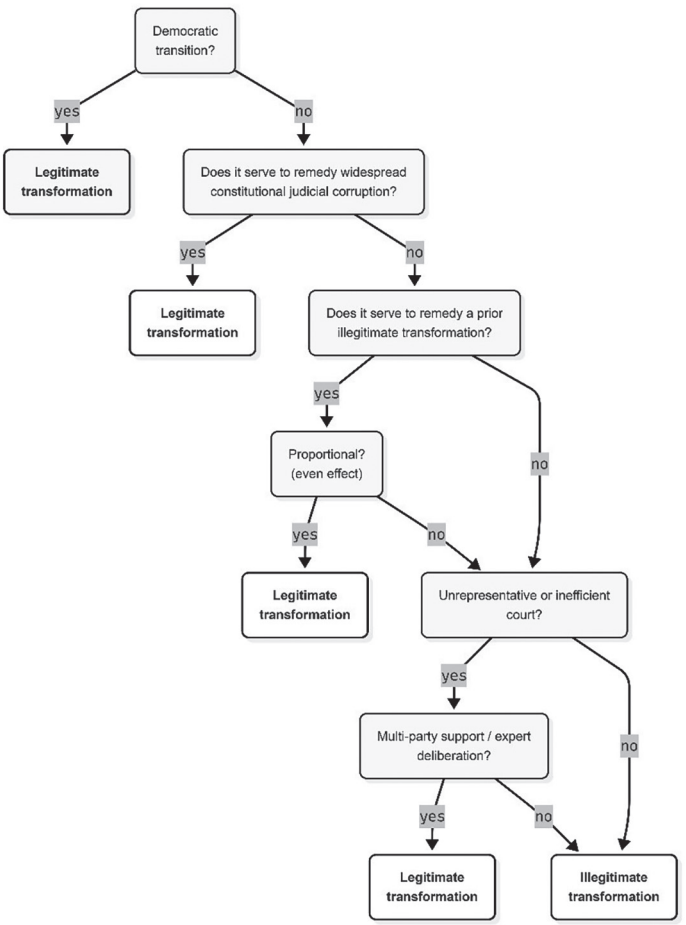


Figure 2: The Kosař–Šipulová Legitimacy Algorithm

The purpose of the legitimacy algorithm is to provide a practical set of criteria for the methodology used to achieve the objectives defined in the previous subsection. By following the steps of the flowchart (*Figure 2*), we can qualify whether the restructuring was lawful in a specific case. The algorithm developed by Kosař and

[56] Kosař – Šipilová op. cit. 116.

Šipulová is noteworthy because, as Daly notes, „declaring court-packing legitimate is not without danger" and requires a serious weighing of risks.[57] Such risks include the cyclical recurrence of court-packing and the politicization of the bodies, one consequence of which may be that judges' decision-making is permeated by fear when deciding on politically sensitive cases.[58] The four-step algorithm was designed taking these advantages and disadvantages into account.

In light of this – as shown in Figure 2 – it is essential to examine whether (i) the restructuring is among the measures introduced in the wake of a democratic transition. In the case of a democratic transition, governments have the opportunity to implement policies that would otherwise not comply with the principles of the rule of law.[59] If the transformation takes place as part of a democratic transition, it can fundamentally be considered lawful. If this condition is not met, it must be examined whether (ii) it aims to eliminate widespread judicial corruption. This likewise legitimizes the reorganization; however, if this condition is absent, it must be verified whether (iii) the court-packing serves to restore the body after a prior illegitimate transformation. If this is not the case, the final step is to study whether (iv) a representativeness aspect is prioritized, or if the objective is to increase the efficiency of the body's work. If none of these lie behind the reorganization, then the court-packing is certainly unlawful and will conflict with some democratic legal principle.[60]

In sum, contemporary political manipulation of high courts has shifted from overt structural expansions to informal, procedural blockades. As Kosař and Šipulová demonstrate, the thwarting strategy has become a highly effective tool of subversion, capable of neutralizing a constitutional court simply by intentionally leaving judicial seats vacant and weaponizing consensus requirements against the system itself.

When the legislature attempts to intervene in such gridlocks, the legitimacy of its corrections must be filtered through the Legitimacy Algorithm. In consolidated democracies, any unilateral, non-consensual reform aimed at altering court dynamics inevitably fails the criteria of proportionality and multi-party deliberation, sliding into illegitimate court-packing.

In light of these criteria, the Kosař–Šipulová algorithm provides a vital 'diagnostic tool' for modern constitutional theory. It exposes how contemporary political actors have replaced blunt legislative expansion with subtle procedural blockades, such as the thwarting strategy, to hollow out judicial resistance from within. By shifting the focus from formal structural changes to the underlying systemic intent and procedural context, this framework demonstrates that any unilateral correction of a judicial gridlock must be heavily scrutinized. Ultimately, in a consolidated democracy, skipping

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57 Daly op. cit. 1081.

58 Kosař – Šipilová op. cit. 117–118.

59 Ruti G. TEITEL: *Globalizing Transitional Justice: Contemporary Essays*. Oxford University Press, Oxford, 2014. 149.

60 According to Kosař and Šipulová (op. cit. 107.), court-packing can violate the principle of the rule of law (including the infringement of judicial independence), the separation of powers, democracy, public sensitivity, public trust in the courts, as well as the proper functioning of the judiciary.

multi-party deliberation and proportional necessity strips away institutional legitimacy – transforming what political actors might label as 'constitutional repair' into a clear case of pathological court-packing.

4. Conclusion

This paper has provided a comprehensive investigation into the intricate structural configuration and systemic vulnerabilities of constitutional courts operating at the delicate intersection of legal normativity and political power. As the premier guardians of constitutional democracy and the rule of law, these tribunals inherently exercise a counter-majoritarian check that frequently invites intense political friction. By establishing a multi-layered dogmatic framework, this analysis demonstrates that the survival of constitutional adjudication relies on a complex matrix of objective-institutional protections – encompassing robust operational and financial autonomy – and subjective-personal guarantees designed to shield individual jurists from external career friction and political alignment.

The comparative investigation of selection mechanisms reveals that judicial appointment models – categorization based on Kelemen's model: split, collaborative, and pure parliamentary typologies – serve as the primary structural interface between the judiciary and political branches. Far from being a neutral bureaucratic routine, the choice of an appointment model fundamentally dictates a court's exposure to systemic capture. A core finding of this study underscores that contemporary autocratization and populist governance have shifted their tactical focus away from aggressive, formal structural interventions, such as traditional court-packing. Instead, non-cooperative political actors increasingly weaponize existing procedural rules to implement a 'thwarting strategy', deliberately leaving judicial seats vacant to paralyze the tribunal from within and neutralize its review capabilities.

When democratic legislatures attempt to break these political gridlocks, the legitimacy of their interventions cannot rely on mere 'constitutional repair' rhetoric. By filtering these actions through the Kosař-Šipulová legitimacy algorithm, the study demonstrates that any unilateral correction bypassing proportional necessity, multi-party deliberation, and independent expert consultation is stripped of institutional legitimacy. In consolidated democracies, non-consensual procedural overrides inevitably slide into pathological court-packing. Ultimately, while formal rules are designed to secure judicial independence, their practical resilience depends heavily on the prevailing political culture; when that culture shifts toward subversion, formal guarantees alone cannot fully guarantee the stability of constitutional review.

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