PERSPECTIVE

Friedrich Ebert Stiftung

Democratic Expeditions

Remedying the Anti-Liberal Capture of Constitutional Courts

Fabio Wolkenstein

Constitutional Courts and Democracy

What are constitutional courts?

In many democracies, constitutional courts serve as the final arbiter of cases that raise constitutional questions, such as cases in which the constitutionally guaranteed fundamental rights of citizens are at stake. Constitutional courts typically have a monopoly on assessing the constitutionality of legislation and the power to invalidate laws and statutes that they deem unconstitutional. In addition, constitutional courts are often given equal status with the supreme court, which is usually the highest court of appeal in civil or criminal matters. Both are courts of last resort.

Constitutional courts – pros and cons

Because of their role as "guardians" of the constitution, constitutional courts are today widely seen as core institutions of liberal democracy. Proponents of constitutional courts celebrate them as the ultimate guarantee for the protection of democratic governance, the rule of law and respect for human rights. This view has become increasingly popular after 1989/90, in tandem with the democratisation of post-Soviet states (Manow 2024). Following the prevailing liberal-democratic wisdom, many of these new democracies established strong constitutional courts.

Yet constitutional courts have also been the subject of much controversy. Some critics argue that they are inevitably politicised institutions that ultimately implement the agendas of the partisan actors who appointed the judges, rather than being truly independent. This concern is familiar from debates about the U.S. Supreme Court, which also has the power to judge the constitutionality of legislation. For many years, judicial appointments have been a major point of contention between Democrats and Republicans seeking to gain a majority on the bench.

Other critics have suggested the opposite, namely that constitutional judges are often unduly "activist," pursuing their own political agendas while (falsely) claiming to defend the constitution. This criticism has routinely been levelled at the supranational European Court of Justice (ECJ). The objection here has been that ECJ judges actively pursue a policy of deepening European integration, disregarding the preferences of national majorities in legislatures (Schmidt 2018).

Constitutional courts in anti-liberal regimes

But few things are more controversial than the role of constitutional courts in political regimes where avowedly anti-liberal parties have come to power. As especially the recent experiences in Hungary and Poland have shown, these parties tend to strategically pack constitutional courts with loyalists, using various court-packing techniques. For example, the Orbán regime lowered the mandatory retirement age for judges, which created space to appoint new judges loyal to Orbán's Fidesz party.

Of course, it is not only anti-liberal parties that seek to appoint loyalists to constitutional courts; liberal parties have done so too in the past, not least in the United States. But when constitutional courts are packed with loyalists of anti-liberal parties, they will become powerful guardians of an anti-liberal political order – possibly even long after the anti-liberal government has been voted out of office. And since anti-liberalism sits uneasily with democracy, the rule of law and respect for human rights, constitutional courts that uphold an anti-liberal order can do serious harm.

How should liberal-democratic parties and coalitions respond when they return to power? This Reflection Paper examines this question.

The problem: Captured Constitutional Courts Impede Re-Democratisation

In October 2023, the liberal-democratic opposition won a parliamentary majority in Poland, eventually forming a broad-based government led by Donald Tusk. The anti-liberal government led by the Law and Justice Party (PiS), which was accused of undermining democracy and the rule of law, lost power. Of course, the PiS's defeat was not absolute; it still won the largest number of votes. But it failed to secure a majority of seats in parliament, opening a window of opportunity for the opposition.

Poland's new liberal-democratic government now faces a difficult challenge. Although the PiS Party is no longer in office, during its two terms in government it packed the Polish constitutional court – called Constitutional Tribunal – with party loyalists (Sadurski 2019; Kustra-Rogatka 2023). With a majority of PiS loyalist judges, the Constitutional Tribunal has the power to overturn laws passed by the new, liberal-democratic government. It can torpedo efforts to revoke the laws and policies introduced by the PiS Government, thus blocking the re-liberalisation and re-democratisation of society.

The Polish case promises to be instructive because similar things could happen elsewhere too. For example, in the (currently) unlikely event that Viktor Orbán's Fidesz party loses power to a liberal-democratic party or alliance of parties, Hungarian democrats would also face a constitutional court packed with Fidesz loyalists. How should liberal-democratic actors respond? What can they do against a constitutional court that is loyal to an anti-liberal party?

Alas, there are few, if any, cases other than Poland to which we can currently look to for guidance. There are many examples of far-reaching reconfigurations of judicial institutions in processes of democratisation – think of the judicial purges that took place in many Central and Eastern European countries after 1989/90 to get rid of communist judges (Williams, Fowler and Szczerbiak 2005). But it is difficult to see how such radical strategies could work in societies where the previous regime has neither collapsed nor is seen as illegitimate by large sections of the population.

The Dilemma

There is an obvious dilemma here that has to do with respect for the rule of law. The rule of law is a contested concept. But at the very least it is about "the clarity, generality, prospectivity, consistency, and stability of the norms by which a society is governed and the integrity of the procedures and institutions by which they are enforced" (Waldron 2021). The rule of law in this sense is a liberal and democratic ideal. But of course, it is logically possible for regimes that are neither liberal nor democratic to be governed in accordance with the ideal of the rule of law (Raz 1979).

So here is the dilemma. On the one hand, a constitutional court that is captured by a single party cannot reliably safeguard the rule of law. It does not matter whether the party in question is an anti-liberal one, although anti-liberal parties are arguably more likely than liberal parties to seek unilateral control of constitutional courts. The problem is that so long as people disagree politically, no party can credibly claim to protect the integrity of procedures and institutions *on its own*. While there is no consensus on how politically "balanced" constitutional courts should be, few would disagree that a court dominated by one party is ill-suited to ensuring the integrity of democratic processes and the constitutionality of laws.

On the other hand, it is unclear whether this problem can be addressed in a way that is itself consistent with respect for the rule of law. If liberal democrats decide to disempower the captured constitutional court, for example by weakening its powers of judicial review, who or what institution will be left to uphold the rule of law in its place? If liberal-democratic parties "re-pack" the court with liberal-democratic judges, does this not potentially undermine the prospectivity and stability of norms that are central to the rule of law? It may sound paradoxical, but any government that changes the composition of judges according to

its political preferences must ask itself whether this might weaken prospectivity and stability.

There is no simple answer to this dilemma. What is certain is that, on the face of it, repacking or disempowering a constitutional court does not look good for any liberal-democratic party. More on this in a moment.

Responses: Overhauling or Disempowering the Constitutional Court?

Option 1: Removing anti-liberal justices

In Poland, liberal-democratic scholars, activists and politicians have intensely debated what to do with the captured Constitutional Tribunal (see Tilles 2024a; Sadurski 2022; Zajadło and Koncewicz 2024). Legal experts have argued cogently that since PiS had packed the Constitutional Tribunal with loyalists, "[a]ll judgments that have been passed … are invalid because of the unlawful distortion of the pool of judges that can be drawn upon to fill the benches" (Sadurski 2022). In other words, the judges have been appointed by PiS in an illegitimate fashion.

This line of reasoning was also used when, in July 2024, the Polish parliament passed a bill providing that three PiS-appointed judges on the Constitutional Tribunal "would be removed from duty and all previous rulings made with their participation would be invalidated" (Tilles 2024b). The bill also called for the removal of Chief Justice Julia Przyłębska. She, too, was said to have been improperly appointed by PiS. In short, the Polish response has been to look for legally sound arguments to

1. remove judges that were illegitimately appointed by the anti-liberal PiS party, and

2. invalidate their judgments on the grounds that they were improperly appointed.

The final step in this process is, of course, the appointment of new judges who are committed to liberal-democratic norms. In the Polish case, the risk that these judges will be appointed by a single party is relatively low, as the government is a three-party coalition.

Option 2: Expanding the court

If the stated aim of the new Polish government is to *overhaul* rather than abolish the Constitutional Tribunal, removing illegitimately appointed judges is only one option. In principle, it is also possible to increase the number of judges and appoint additional judges to "balance out" the anti-liberal judges appointed by PiS. Indeed, increasing the number of judges sitting on a court has been "the most common court-packing strategy in both democratic and non-democratic countries, perhaps because of its seemingly rule-of-law-compatible character" (Kosař and Šipulová 2023). It has been attempted by both liberal-democratic politicians (such as Franklin D. Roosevelt) and anti-liberal ones (such as Viktor Orbán).

Option 3: Weakening the court's powers of judicial review

More assertive options are also available, at least in theory. Liberal-democratic actors could also seek ways to counterbalance the judiciary by limiting the powers of the constitutional court. This is a very demanding strategy that is only be feasible if the liberal-democratic alliance of parties has secured a sizeable majority, although the practical ways of modifying the powers of the constitutional court vary.

The argument for this strategy goes as follows: "Rather than allowing political issues to be constitutionalised through judicial capture, they should remain firmly within the political domain, where political institutions allow for a balance of power and agonistic competition between competing political forces." After all, in politically polarised societies, such as those that have experienced prolonged episodes of democratic decline, "granting the final say to ostensibly 'neutral' institutions like the Constitutional Tribunal merely invites their capture and instrumentalisation as a means of political domination" (Scholtes 2023).

This could be achieved by abolishing strong judicial review and moving "to a more political model of constitutionality control subject to legislative override, potentially modelled upon the 'notwithstanding clause' in the Canadian Charter of Rights and Freedoms" (Scholtes 2023). Accordingly, the court would have significantly less power to strike down laws passed by the liberal-democratic government. But note that this strategy is vulnerable to the objection that the rule of law would not be protected as effectively as with strong judicial review (Waldron 2023). And that is to say nothing of its feasibility.

Additional reform strategies?

Of course, *option 3* is not the only demanding path to reform. An additional, and probably even more demanding, strategy worth considering is to change the ways judges are appointed. If constitutional judges are elected by a single representative body – as in the case of Poland, where the parliament appoints constitutional judges – then introducing appointment mechanisms that require *two or more bodies to cooperatively appoint judges* could significantly reduce the risk of large parties packing and repacking courts as they see fit (Ginsburg 2003). If, on the other hand, a (anti-liberal) party has captured several state institutions, introducing an *independent commission*

for judicial appointments may be a more fruitful direction. The Judicial Appointments Advisory Committee in Ontario, Canada, is an interesting example to consider. Its task is to draw up a shortlist of three candidates for each vacancy. The attorney general of the province is required by law to appoint judges only from this list.

Deficits: Limited Effectiveness, Short-termism, Loss of Credibility

Risk 1: The loyalists strike back

Changing the composition or reducing the powers of a constitutional court is no easy task in well-functioning democracies. It will be even more difficult in countries where an anti-liberal party has managed to capture several key state institutions. Even if there is a broad liberal-democratic coalition in parliament, it is likely that loyalists of the former ruling party still hold powerful positions elsewhere in the political system. These actors are bound to slow down or obstruct the process of change.

The Polish case is again instructive. President Andrzej Duda, who is an ally of the anti-liberal PiS, refused to sign into law the bills that were proposed to overhaul the Constitutional Tribunal (Tilles 2024c). In fact, he decided to refer the bills to the Constitutional Tribunal – which, remember, is packed with PiS loyalists. It is highly unlikely that a majority of PiS judges will consent to their own removal and the annulment of their rulings. The Polish government's ambitious overhaul plan may well come to an end here.

Risk 2: Short-termism

A second danger is that short-term gains for liberal-democratic forces could bring long-term losses. Suppose a liberal-democratic government such as the current Polish one succeeds in overhauling the constitutional court. If anti-liberal forces return to power a few years later, they are likely to reverse the changes implemented by the liberal-democratic government. For this reason, legal scholars warn of the "risk of slipping into an endless cycle of court-packing retribution, where each government trumps the previous one by expanding or emptying the courts" (Kosař and Šipulová 2023). Indeed, anti-liberal parties may even look for ways to make it *even harder* for future governments to remove their judges, overturn their rulings, and so on. This could be seen as strengthening the case for introducing alternative appointment mechanisms.

Risk 3: Credibility losses

Finally, liberal-democratic parties may also risk losing credibility if their efforts to overhaul or disempower courts end up looking like mere "court-packing in reverse" – or, worse, a thinly disguised attack on the rule of law by ostensible "democrats." It is to be expected that supporters of the anti-liberal party will raise their voices in protest. But even more moderate political rivals could mobilise their supporters against the liberal-democratic government, arguing that it is disregarding the very values it promised to restore. With its recent decision to suspend the right to asylum, the current Polish government has created an additional opening for such accusations from the liberal-democratic camp. All of this could further deepen political divisions and weaken those who are prepared to defend liberal democracy.

Conclusions and Recommendations

When it comes to overhauling or disempowering a captured constitutional court, there are no easy fixes or simple solutions. But in any case, liberal-democratic parties and activists should bear in mind the following three things:

- → **Justify, explain, take concerns seriously.** At a the very least, liberal-democratic actors must justify their proposals for dealing with the constitutional court with *utmost clarity* to the public at large. No chosen path of reform is self-evident, and even democratically minded citizens may be sceptical out of a concern for the rule of law. A prudent approach would be to build public support for a particular strategy long before liberal-democratic parties come to power, and to make it part of a broader re-democratisation agenda.

- → **Long-term strategies.** For a liberal-democratic government that has just taken office, the best strategy for dealing with a captured constitutional court may simply be the one that seems most effective in the short term. But it is also crucial to think carefully about long-term consequences. Would an overhauled, restored Polish Constitutional Tribunal be able to keep the anti-liberal PiS in check if it manages to regain power in the future? This is an open question. Anti-liberal actors have proven to be fast learners, so they will look for ways to further increase their control over various state institutions (Hall and Ambrosio 2017). Such scenarios need to be considered before any plan is implemented.

- → **Realism about the rule of law.** Finally, liberal-democratic parties and activists must accept that there can be tensions between protecting the rule of law and re-democratising society. As one of the most eminent legal thinkers of the past century put it, "the rule of law is *just one of the virtues which a legal system may possess and by which it is to be judged.* It is not to be confused with democracy, justice, equality (before the law or otherwise), human rights of any kind or respect for persons or for the dignity of man" (Raz 1979). Liberal democrats should therefore not shy away from considering strategies that privilege democracy over the institutionalised protection of the rule of law – such as weakening the court's powers of judicial review.

Bibliograpy

Ginsburg, Tom. 2003. *Judicial Review in New Democracies: Constitutional Courts in Asian Countries.* Cambridge: Cambridge University Press.

Hall, Stephen G.F. and Thomas Ambrosio. 2017. "Authoritarian Learning: A Conceptual Overview." *East European Politics* 33: 143–61.

Kosař, David and Katarína Šipulová. 2023. "Comparative Court-Packing." *International Journal of Constitutional Law* 21: 80–126.

Kustra-Rogatka, Aleksandra. 2023. "The Hypocrisy of Authoritarian Populism in Poland: Between the Facade Rhetoric of Political Constitutionalism and the Actual Abuse of Apex Courts." *European Constitutional Law Review* 19: 25–58.

Manow, Philip. 2024. *Unter Beobachtung: Die Bestimmung der liberalen Demokratie und ihrer Freunde.* Berlin: Suhrkamp.

Raz, Joseph. 1979. *The Authority of Law: Essays on Law and Morality.* Oxford: Clarendon Press.

Sadurski, Wojciech. 2019. *Poland's Constitutional Breakdown.* Oxford: Oxford University Press.

Sadurski, Wojciech. 2022. "Extinguishing the Court: Why There Is No Salvation for the Current Polish Constitutional Tribunal." *VerfBlog*, August 14. https://verfassungsblog.de/extinguishing-the-court/.

Schmidt, Susanne. 2018. *The European Court of Justice and the Policy Process: The Shadow of Case Law.* Oxford: Oxford University Press.

Scholtes, Julian. 2023. "Constitutionalising the end of history? Pitfalls of a non-regression principle for Article 2 TEU." *European Constitutional Law Review* 19: 59–87.

Tilles, Daniel. 2024a. "Polish government unveils planned overhaul of "defective" constitutional court." *Notes from Poland*, March 4. https://notesfrompoland.com/2024/03/04/polish-government-unveils-planned-overhaul-of-defective-constitutional-court/.

Tilles, Daniel. 2024b. "Polish parliament approves constitutional court overhaul." *Notes from Poland*, July 25. https://notesfrompoland.com/2024/07/25/polish-parliament-approves-constitutional-court-overhaul/.

Tilles, Daniel. 2024c. "President Duda refers government's constitutional court overhaul to constitutional court." *Notes from Poland*, October 8. https://notesfrompoland.com/2024/10/08/president-duda-refers-governments-constitutional-court-overhaul-to-constitutional-court/.

Waldron, Jeremy. 2021. "The Rule of Law as an Essentially Contested Concept." In *The Cambridge Companion to the Rule of Law*, edited by Jens Meierhenrich and Martin Loughlin. Cambridge: Cambridge University Press.

Waldron, Jeremy. 2023. *Thoughtfulness and the Rule of Law*. Cambridge: Harvard University Press.

Williams, Kieran, Brigid Fowler, and Aleks Szczerbiak. 2005. "Explaining Lustration in Central Europe: A 'Post-Communist Politics' Approach." *Democratization* 12: 22–43.

Zajadło, Jerzy and Tomasz Tadeusz Koncewicz. 2024. "Restoration of the Polish Constitutional Tribunal as Reading the Constitution Forward." *VerfBlog*, February 19. https://verfassungsblog.de/restoration-of-the-polish-constitutional-tribunal-as-reading-the-constitution-forward/.

About the Author

Fabio Wolkenstein is Associate Professor of Transformations of Democracy at the University of Vienna, Austria. He works on democratic theory, political representation, and the theory and history of political ideologies, with a special focus on conservatism and Christian democracy. He is the author of *Rethinking Party Reform* (Oxford University Press, 2019) and *Political Representation as Communicative Practice* (with Christopher Wratil, Cambridge University Press, 2025).

E-Mail: fabio.wolkenstein@univie.ac.at

About "Democratic Expeditions"

This essay is based on the paper presented by the author at the workshop *Moral Dilemmas of Resistance: Political Ethics in the Face of Democratic Regression and Electoral Authoritarianism*. Convened by Zoltan Miklosi and Attila Mráz, the workshop took place at the CEU Democracy Institute in Budapest on 27 and 28 September 2024. It was the inaugural event of *Democratic Expeditions*, a series of openly sourced, carefully crafted international research workshops that shed light on underexplored issues of democratic crises and democratizing struggles. The initiative is a joint venture of the Regional Office of the Friedrich Ebert Foundation on Democracy of the Future in Vienna, the CEU Democracy Institute, and the CEU Department of Political Science.

Imprint

Published by
Friedrich-Ebert-Stiftung e.V.
Godesberger Allee 149
53175 Bonn, Germany
info@fes.de

Issuing Department
FES Regional Office for International Cooperation
Democracy of the Future
Reichsratsstr. 13/5
A-1010 Vienna

Contact
Filip Milačić
filip.milacic@fes.de

Design
pertext | www.pertext.de

Photo credit
Lerone Pieters | Unsplash

March 2025

Further publications of the Friedrich-Ebert-Stiftung can be found here:
↗ www.fes.de/publikationen

FES Regional Office for International Cooperation

CEU Democracy Institute