Democrazia e Sicurezza – Democracy and Security Review
ISSN: 2239-804X

anno XIV, n. 1, 2025
data di pubblicazione: 13 giugno 2026

Saggi

The Venice Commission's Role in Safeguarding Constitutional Courts' Independence: Emerging Challenges in an Era of Democratic Backsliding

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Abstract: This article examines the role of the Venice Commission in safeguarding the independence of constitutional courts, with particular focus on the challenges posed by contemporary democratic backsliding. Through a comparative analysis of appointment crises in Hungary, Poland, Spain, and Slovakia, the study identifies four principal categories of institutional manipulation: significant delay, deadlock, court-packing, and court-curbing. The analysis reveals that these crises are driven by the confluence of political polarization, partisan degradation, and populist challenges to liberal constitutionalism. Drawing on the German 2024 constitutional reform as a preventive case study, the article proposes specific recommendations including temporal cooling-off periods, constitutional entrenchment of structural essentials, anticipatory provisions against interpretive manipulation, and robust anti-deadlock mechanisms.

* Ricercatore a tempo determinato di Diritto pubblico comparato presso l'Università degli Studi di Bari «Aldo Moro». Contributo sottoposto a doppio referaggio cieco (*double blind peer review*): versione definitiva ricevuta il 28 marzo 2026.

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1. Introduction

Constitutions are, at their foundation, instruments for the regulation of political risk[1]. They are designed not merely to declare rights or distribute competences, but to anticipate and mitigate recurrent dangers that threaten the stability of democratic orders: the risk of power concentration, the risk of institutional paralysis, the risk of partisan capture, the risk of gradual democratic erosion. Seen through this lens, institutional design appears as a continuous exercise in risk management, whereby rules and procedures attempt to strike balances between different and often competing dangers[2].

Within this framework, the procedures for appointing judges to constitutional courts stand out as a particularly critical set of risk-management devices. These procedures determine the composition of the very bodies entrusted with controlling the constitutionality of political power. From the outset, constitutional designers and, later, the Venice Commission have treated appointments as one of the central levers for preserving judicial independence, legitimacy, and functionality[3]. Qualified majority requirements mixed or separated appointment models, anti-deadlock clauses, and the emphasis on pluralism in composition have all been promoted as precautions against the risk of partisan capture.

This precautionary toolkit has been crucial in shaping the institutional landscape of European constitutional justice[4]. But it was calibrated for a different environment of risk—an environment in which party systems were relatively stable, political actors operated within shared understandings of restraint, and episodes of manipulation were exceptions rather than the rule. In that setting,

[1] A. VERMEULE, *The Constitution of Risk*, Cambridge University Press, Cambridge 2013, p. 2 ff.

[2] Ibid.

[3] H.KELSEN, *Judicial Review of Legislation: A Comparative Study of the Austrian and the American Constitution*, in «The Journal of Politics», 4(2), 1942, p. 185

[4] V. FERRERES COMELLA, *The European model of constitutional review of legislation: toward decentralization?*, in «International Journal of Constitutional Law», 2004, p. 461 ff.

procedural hurdles, high thresholds, and reliance on conventions of reciprocity were seen as sufficient to contain the dangers of politicization.

The contemporary political environment is profoundly different. Across Europe and beyond, constitutional courts are exposed to risks that are not only more intense but also qualitatively different from those for which the original devices were designed[5]. Political polarization has deepened, partisan degradation has eroded long-standing norms of institutional forbearance, and constitutional hardball has become normalized as a legitimate strategy of political competition[6]. When these dynamics intersect with populist movements willing to challenge the liberal constitutional order, the result is a transformed landscape of risk[7].

In this landscape, the old safeguards are proving increasingly inadequate. Qualified majority requirements, once praised for ensuring pluralism, now generate recurrent standstill when consensus is unattainable. Collaborative appointment models, premised on inter-institutional trust, collapse into cycles of mutual veto. Even separated models, which the Venice Commission has often preferred, are vulnerable to prolonged vacancies and strategic manipulation. What was once a buffer against capture now produces deadlock, functional paralysis, and delegitimation.

These mechanisms were carefully designed for the problems of their time, and they often worked as intended. But risk profiles evolve. The escalation of polarization and populism has fundamentally altered the conditions under which appointment procedures operate. The traditional toolkit of risk management—whether embedded in founding arrangements or codified in the Commission's doctrine—no longer suffices to address these intensified and unforeseen challenges.

[5] J. Arlettaz, P. Passaglia, *La Justice Constitutionnelle saisie par la politique: naissance et conséquences des récentes crises de nomination des juges constitutionnels en Europe,* in «Revue Internationale de Droit Comparé», 2, 2024.

[6] M. Diakonova, C. Ghirelli, J.J. Pérez, *Political polarization in Europe,* in «Documentos de Trabajo» n. 2533, Banco de España, 2025; M.A. Vachudova, *Populism, Democracy, and Party System Change in Europe*, in «Annual Review of Political Science», 24, 2021.

[7] M. Kovalčik, *The instrumental abuse of constitutional courts: how populist can use constitutional courts against the opposition*, in «The International Journal of Human Rights», 26(7), 2022.

This article proceeds from that premise. It argues that the numerous crises of judicial appointments in European contemporary constitutional democracies must be understood as a crisis of risk management: the mismatch between inherited precautionary norms and the current configuration of political threats. The analysis that follows will show how appointment procedures have become focal points of constitutional conflict, and how practices of standstill, deadlock, court-packing, and court-curbing manifest the insufficiency of existing safeguards. It will also consider the doctrinal contributions of the Venice Commission, highlighting both their achievements and their limits in the face of today's transformed environment. The ultimate aim is to reflect on new strategies capable of protecting the independence and legitimacy of constitutional courts under conditions of heightened polarization and democratic backsliding.

2. The Venice Commission's doctrinal framework for constitutional jurisdictions appointments

Over more than three decades, the Venice Commission—has meticulously constructed a comprehensive and deeply influential doctrinal framework governing the composition and appointment of constitutional courts[8]. This extensive body of work, articulated across hundreds of country-specific opinions and thematic reports, represents one of the most comprehensive international efforts to codify the institutional prerequisites for judicial independence and legitimacy in contemporary democracies. Far from being a rigid set of prescriptive rules, the Commission's doctrine functions as a nuanced toolkit of constitutional

[8] A comprehensive compilation of the Venice Commission's doctrine on constitutional justice, as well as on the use of qualified majorities and anti-deadlock mechanisms in the appointment of constitutional judges and other high officials, is available in two official reports: the Compilation of Venice Commission opinions, reports and studies on constitutional justice (CDL-PI(2022)050, Strasbourg, 7 December 2022) and the Compilation of Venice Commission opinions and reports relating to qualified majorities and anti-deadlock mechanisms in relation to the election by parliament of constitutional court judges, prosecutors general, members of supreme prosecutorial and judicial councils and the ombudsman (CDL-PI(2023)018, Strasbourg, 18 July 2023).

risk management, offering principles and mechanisms designed to insulate constitutional adjudication from the corrosive pressures of partisan politics and to ensure its functional autonomy. Its recommendations are built upon the foundational understanding that the legitimacy of a constitutional court, and thus its capacity to operate as the ultimate guardian of the rule of law, is inextricably linked to the perceived integrity of its composition and the depoliticized nature of its appointment process. This doctrine, developed through iterative engagement with diverse constitutional systems, can be understood as resting on a triad of interconnected principles: the imperative of a pluralistic and balanced composition; the necessity of transparent, consensus-oriented appointment procedures; and the critical role of procedural safeguards, most notably the use of qualified majorities paired with robust anti-deadlock mechanisms.

The cornerstone of the Commission's approach is the principle of balanced composition. Society is necessarily pluralistic, and the Commission posits that «constitutional justice must, by its composition, guarantee independence with regard to different interest groups and contribute towards the establishment of a body of jurisprudence which is mindful of this pluralism»[9]. A court's ability to command public trust and societal acceptance hinges on its capacity to reflect a consideration of the different social, philosophical, and legal currents at stake, even as these are superseded by common constitutional values. This, however, is a direct rejection of any model wherein judges act as representatives of specific political parties or social constituencies. The Commission forcefully argues that judges have a «duty of ingratitude» towards the authorities that appointed them; their sole loyalty is to the Constitution, not to the political forces that facilitated their election[10]. Balance, therefore, is achieved not through direct political representation, but through institutional design. To this end, the Commission consistently favors mixed appointment models, where the authority to select judges is distributed among different branches of power—typically the legislature, the executive, and the judiciary itself. Such systems are deemed to

[9] CDL-STD(1997)020, p. 21.
[10] CDL-AD(2016)001, §§ 116, 119.

possess greater democratic legitimacy and are structurally more resilient against capture than those concentrating appointment power in a single institution, because they shield «the appointment of a part of the members from political actors»[11]. Furthermore, while the Commission supports policies aimed at ensuring gender balance and fair representation, it cautions that inflexible quotas must not override the paramount criterion of professional competence[12]. This emphasis on competence is coupled with a strong preference for professional pluralism within the court. The Commission has observed that an over-representation of career judges, for instance, might unduly influence «the interpretative methods used by the court as constitutional and statutory interpretation may differ in some aspects». The inclusion of legal academics is therefore encouraged not merely as a nod to diversity, but as a structural device intended to «bring together the widest possible span of human experiences» and to avoid an «excessive specialisation of the court»[13].

When parliamentary involvement is part of the appointment process, the Commission has developed a clear and unwavering position on the procedural mechanisms necessary to mitigate the inherent risk of politicization. The single most important safeguard in this context is the requirement of a qualified majority for the election of judges[14]. An election by simple majority is viewed as deeply problematic, as it allows the governing coalition to unilaterally determine the court's composition, rendering it susceptible to the charge of being an instrument of the ruling party. A qualified majority, typically of two-thirds or three-fifths, serves a crucial dual purpose. First, it institutionally empowers the parliamentary minority by giving it the negative power to block decisions, thereby compelling the majority to seek consensus and compromise. This dynamic encourages the nomination of highly qualified, independent, and broadly acceptable candidates rather than purely partisan figures. Second, it structurally depoliticizes the process, fostering a culture of cross-party agreement

[11] CDL-AD(2015)045, § 23.
[12] CDL-AD(2022)004, § 79.
[13] CDL-AD(2004)024, § 18.
[14] CDL-AD(2017)001, §§ 57-58.

on an institution that must stand above the political fray. The German model, which requires a two-thirds majority for the election of its federal constitutional court judges, is frequently cited by the Commission as a best practice that has been instrumental in securing the court's formidable authority and public respect[15]. The Commission's doctrine, however, extends beyond the vote itself, emphasizing the critical importance of the procedures preceding it. It consistently recommends that the entire selection process leading up to the parliamentary vote be made «as transparent as possible in order to ensure a high professional level of the constitutional judges»[16]. This includes the use of «a public call for the selection of candidates», transparent selection criteria, and open hearings, which serve as a preliminary safeguard to enhance public trust[17].

To be fully effective, the Commission stresses that this high threshold should be required in all rounds of voting. The Commission is, however, acutely aware that qualified majority requirements carry the significant risk of institutional deadlock. In a polarized political environment, the very mechanism designed to foster consensus can be transformed into a weapon of obstruction, leading to prolonged vacancies that paralyze the court's functions and undermine the rule of law. Consequently, the Commission insists with equal force that qualified majority rules must be paired with effective anti-deadlock mechanisms[18]. The design of such mechanisms is, in the Commission's view, a delicate balancing act. An effective anti-deadlock provision should not serve as a simple escape clause that nullifies the incentive for compromise; its primary function is precisely «that of making the

[15] CDL-AD(2004)043 §18-19.

[16] CDL-AD(2014)033, Montenegro, §§12-16, 19.

[17] While transparency in judicial appointments is undoubtedly important, it should be noted that greater openness may also complicate the negotiation process. In Germany, proposals during the 2000s to hold public hearings for prospective constitutional judges in the name of greater transparency were ultimately rejected. The prevailing argument was that the current practice of confidential political negotiations, precisely because of its non-public nature, facilitates reaching agreement more readily. See B. Zypries, *Politicts and the Federal Constitutional Court*, in «German Law Journal», 11(1) 2010, 87 ff.; See also J. Arlettaz, P. Passaglia, *supra*.

[18] CDL-AD(2015)027, Ukraine, §21; CDL-AD(2015)024, Tunisia, §21; CDL-AD(2013)028, Montenegro §5-8.

original procedure work, by pushing both the majority and the minority to find a compromise». Ideally, the mechanism should be «unattractive both to the majority and the minority»[19]. For this reason, the Commission has expressed clear and repeated reservations about mechanisms that simply lower the voting threshold to a simple majority after one or two failed attempts, as this may encourage the majority to deliberately obstruct initial rounds of voting, knowing that its candidate will ultimately prevail without any need for compromise. While acknowledging that there is no single model and each state has to devise its own formula, the Commission has signalled a preference for more refined solutions. These might include, after several unsuccessful votes, transferring the nomination power to other, preferably neutral, institutional actors (such as an independent judicial council or a body of legal academics) or establishing new procedural dynamics that force a different kind of negotiation.

Ultimately, however, the Commission recognizes the limits of purely procedural solutions. It has stressed that the functionality of any appointment system rests on a crucial meta-principle: the principle of loyal cooperation among state institutions. No mechanism, however well-designed, can succeed if political actors abandon constitutional conventions. The Commission warns that a crisis cannot be resolved through constitutionally problematic amendments to an ordinary law» and that a culture of mutual restraint is an indispensable, albeit unwritten, prerequisite for institutional stability.

To ensure the stable and uninterrupted functioning of constitutional justice, the Commission's framework is fortified by a series of additional, mutually reinforcing guarantees. Chief among these is the principle of continuity of membership. To prevent the weaponization of vacancies, the Commission strongly and repeatedly recommends the default rule that incumbent judges remain in office until his or her successor takes office[20]. This safeguard is critical

[19] CDL-AD(2013)028, Montenegro, § 5-8.

[20] See CDL-PI(2022)050, Strasbourg, 7 December 2022, 28 ff. At the same time, it is important to recognize that provisions of this kind can themselves become instruments of weaponization: the opposition may well have an interest in maintaining an expired judge in office and blocking the renewal of the seat because that judge is closer to its own position. Spain provides a case in point.

to prevent a political stalemate from degrading into functional paralysis of the court, a situation that has occurred in several member states. The Commission has cited cases where, due to political inaction and deadlock, a constitutional court was in-operational for more than a year and a half because the number of remaining judges had fallen below the *quorum*. The principle of continuity, therefore, is presented as an essential fail-safe mechanism to prevent a political crisis from becoming a constitutional one by ensuring the court remains functional. Further, the Commission advocates for long, non-renewable judicial terms, such as a single mandate of nine or twelve years. A long mandate helps to disassociate a judge's term from the political lifecycle of any single parliament or government, while non-renewability is seen as a definitive guarantee of independence, as it may undermine the independence of a judge to seek re-election, eliminating any potential incentive to rule in a manner pleasing to the appointing authority. This is complemented by strict rules on incompatibilities to shield judges from external influence, exceptionally narrow grounds for dismissal that must be adjudicated by the court itself, and a clear preference for the court's President to be elected by the judges from among their peers, further shielding the institution's internal leadership from external political appointment. Together, these principles form a coherent and resilient architecture designed to defend the functional autonomy of the courts against the enduring and evolving challenges of political practice.

3. A new landscape of constitutional risk

The mechanisms for appointing constitutional judges, as we have seen, were designed as instruments of risk management calibrated for a specific political environment. Yet that environment has fundamentally changed. The upheavals affecting contemporary party systems and the broader transformations in the structure of democratic competition have profoundly altered how appointment procedures actually function. Because constitutional courts selection is entrusted to the very political organs whose own dynamics are changed by shifts in the

political landscape[21], these shifts inevitably cascade into the appointment process itself, producing departures – sometimes subtle, sometimes dramatic – from constitutionally prescribed procedures, from established constitutional conventions, and from the ethic of pluralism and compromise that such requirements were meant to safeguard[22].

Political attempts to control constitutional court composition are not new. They have existed since the origins of constitutional review itself[23]. What distinguishes the contemporary moment is the intensity, pervasiveness, and brazenness of these attempts. The escalation of political polarization across liberal democracies[24], the phenomenon of partisan degradation eroding long-standing norms of institutional restraint[25], the rise of populist movements openly hostile to

[21] M. VOLPI, *Libertà e Autorità. La classificazione delle forme di Stato e delle forme di governo*, Giappichelli, Torino 2025, p. 252.

[22] Attacks on courts, and their potential capture, bring about a fundamental disruption of the relationships among the branches of government. This not only erodes the protection of fundamental rights but also empties out the constitutional mechanisms designed to limit and check power. The result is that the current majority – often the executive – gains the power to control and punish the opposition while securing itself against scrutiny of its own conduct. See A. SAJÓ, R. UITZ, *The Constitution of Freedom: An Introduction to Legal Constitutionalism*, Oxford University Press, Oxford 2017, p. 128; N. W. BARBER, The Principles of Constitutionalism, Oxford University Press, Oxford 2018, pp. 79-82.

[23] Indeed, the very origins of constitutional justice illustrate this dynamic. As is well known, following a series of controversial decisions by the Austrian Constitutional Court on marriage dispensations—particularly the so-called «Sever marriages» cases between 1927 and 1929, in which the Court, under Hans Kelsen's influence, upheld the validity of civil remarriages granted through administrative dispensations despite their conflict with Catholic canon law—the Christian Social Party launched a campaign to reform the Court. The 1929 constitutional amendment, ostensibly aimed at «depoliticizing» the Court, resulted instead in what scholars have termed «repoliticization»: all existing members of the Constitutional Court were removed from office and replaced under new appointment procedures that shifted power away from Parliament toward the government and introduced an age limit of seventy. Kelsen himself, the architect of the Austrian Constitution and the European model of constitutional review, was among those purged and left Austria profoundly embittered. The newly reconstituted Court promptly reversed Kelsen's jurisprudence in 1930. See S. LAGI, *Hans Kelsen and the Austrian Constitutional Court (1918-1929)*, Co-herencia, Vol. 9, n. 16 (2012), 273-295.

[24] M. DIAKONOVA, C. GHIRELLI, J.J. PÉREZ, *Political polarization in Europe*, cit., p. 6; M.A. VACHUDOVA, *Populism, Democracy, and Party System Change in Europe*, cit.

[25] T. GINSBURG, A. Z. HUQ, *How to save a constitutional democracy*, University of Chicago Press, Chicago 2018, p. 83 ff.

liberal constitutionalism[26], and in some cases the slide toward illiberal democracy[27] have combined to create an environment in which contingent majorities pursue court control more aggressively and with less inhibition than in previous decades[28].

A comparative and diachronic examination of recent appointment crises, supplemented by the extensive body of Venice Commission opinions addressing these matters, reveals that problematic episodes fall into four overlapping categories. First, significant delay in selection refers to situations where the appointing authorities fail to complete procedures within reasonable timeframes, allowing vacancies to persist or accumulate. What matters analytically is a delay that is extraordinary in duration, that appears strategically motivated, or that has become chronic—a regular feature rather than an exception. The significance of delay extends beyond its immediate functional impact on court operations. Prolonged appointment battles publicly advertise the partisan stakes in court composition, undermining the court's claim to stand above politics. Moreover, the practices employed by political forces to break deadlocks or overcome delays often carry consequences far exceeding the appointment itself, affecting the broader stability of rule of law institutions.

Second, deadlock represents the crystallization of delay into complete paralysis, where constitutional or legal requirements cannot be satisfied and no mechanism exists or is utilized to resolve the impasse. Deadlock most commonly emerges in systems requiring parliamentary supermajorities or involving collaborative appointment models where multiple institutions must reach agreement. In polarized environments, the very safeguards designed to ensure consensus transform into instruments of mutual veto and institutional warfare.

[26] H. SCHULZE, M. MAUK, J.LINDE, *How Populism and Polarization Affect Europe's Liberal Democracies*, in «Politics and Governance», 8(3), 2020, 1-5.

[27] M. KOVALČIK, *The instrumental abuse of constitutional courts*, cit.

[28] G. DELLEDONNE, *"Cattura" delle corti costituzionali e designazione dei loro componenti: un quadro comparato*, in «ENACTING Policy Papers Series», 1, 2022; M. DE VISSER, *Constitutional Courts Securing Their Legitimacy: An Institutional-Procedural Analysis*, in A.V. BOGDANDY et al. (eds.), *The Max Planck Handbooks in European Public Law: Volume IV: Constitutional Adjudication: Common Themes and Challenges*, Oxford University Press, Oxford 2023, p. 227.

Third, court-packing encompasses irregular and intentional changes in court composition designed to alter internal majorities. The techniques are diverse: expanding the number of seats to immediately appoint additional judges; manipulating eligibility requirements to disqualify sitting judges or reshape the candidate pool; adjusting mandate lengths to accelerate or decelerate turnover[29]. What defines packing is the instrumentalization of institutional reform for partisan ends—changes adopted not because they improve the institution but because they produce a more compliant court[30].

Fourth, court-curbing involves even more radical interventions: the forced removal of sitting judges, fundamental revision of their legal status, or changes to appointment procedures that retroactively affect incumbents. Court-curbing may also extend to structural attacks designed to paralyze courts—raising quorum requirements, stripping jurisdiction, refusing to publish decisions. Where packing seeks to gradually reshape a court's orientation, curbing attempts to immediately neutralize or subordinate it[31].

These categories should be understood not as discrete phenomena but as points along a continuum, frequently shading into one another in practice. Delay may be prelude to deadlock; deadlock may generate the pressure or pretext for packing; insufficient packing may escalate to curbing.

How do political actors actually accomplish these manipulations within constitutional systems? The question is crucial because it reveals the boundary

[29] D. KOSAŘ, K. ŠIPULOVÁ, *How to Fight Court-Packing*, in «Constitutional Studies», 6(1), 2020, p. 135.

[30] The desired effect is, needless to say, to introduce loyalist judges into the court who are to some extent subordinate to the majority. On the phenomenon of court-packing in the context of populist governments and transitions toward illiberal democracies, see M. WYRZYKOWSKI, M. ZIÓŁKOWSKI, *Illiberal Constitutionalism and the Judiciary*, in A. SAJÓ, R. UITZ, S. HOLMES (eds.), *Routledge Handbook of Illiberalism*, Routledge, London 2021, p. 528.

[31] In fact, court-curbing practices extend beyond measures affecting court composition to encompass, more broadly, attempts to block or alter courts' functions and role. Examples include refusing to publish judgments or manipulating quorum requirements for both the constitution of the bench and decision-making. See R. DIXON, D. LANDAU, *Abusive Constitutional Borrowing*, Oxford University Press, Oxford 2021, p. 92.

between normal political contestation and constitutional transgression. Adapting a framework originally developed to analyze populist constitutionalism but applicable more broadly, we can distinguish three principal modalities of intervention, which operate with different degrees of formality and visibility[32].

Constitutional amendment represents the most formal and visible pathway. It involves rewriting constitutional texts to alter the rules governing court composition, appointment procedures, or judicial independence. This route is constitutionally legitimate but extraordinarily demanding, typically requiring supermajority support exceeding ordinary governing coalitions. Consequently, successful manipulation through constitutional amendment usually occurs only where populist or authoritarian movements have achieved overwhelming dominance – Hungary after 2010 is the paradigmatic case – or where amendment procedures are unusually permissive. While relatively rare, this pathway is tremendously consequential when it occurs because constitutional entrenchment makes reversal extraordinarily difficult.

Far more common is manipulation through ordinary or reinforced legislation. Most constitutional systems delegate significant aspects of court organization and procedure to statutory regulation, creating opportunities for majorities to reshape institutions without formal constitutional amendment. This is what might be termed quasi-constitutional lawmaking: legislation that, while formally constitutional, fundamentally restructures institutional power relations and undermines constitutional checks. When enacted by narrow majorities pursuing partisan objectives, such legislation violates the spirit if not the letter of constitutional arrangements. The Venice Commission has repeatedly warned against this danger, yet statutory manipulation remains the dominant technique precisely because it requires only ordinary legislative majorities.

The third and perhaps most insidious modality involves forced, selective, or distorted interpretation and application of existing constitutional and legislative provisions. This technique exploits the inevitable ambiguities and silences in legal texts. Political actors engage in what might be called acontextual formalism: they

[32] M. KOVALČIK, *The instrumental abuse of constitutional courts*, cit.

invoke textually plausible readings while systematically ignoring constitutional purpose, historical practice, and established understandings that would constrain such interpretations. They weaponize procedural technicalities, manufacture pretexts for action or inaction, and disclaim responsibility for resulting dysfunction by asserting that they are merely following the rules as written. This strategy is particularly effective because it operates in the gray zone between legality and legitimacy, making it difficult to definitively characterize as constitutional violation.

What distinguishes contemporary practice from historical precedent is not the existence of these techniques but the attitude with which they are deployed. Political forces now openly acknowledge that controlling court composition is worth pursuing even at substantial institutional cost – damage to court legitimacy, erosion of minority protections, degradation of constitutional checks and balances. The rules protecting constitutional courts have shifted from being self-enforcing – respected because all parties recognize their long-term interest in preservation – to being objects of strategic manipulation[33]. Parties increasingly operate with short time horizons, focusing on immediate benefits while discounting long-term systemic costs. This represents a fundamental shift in constitutional culture.

This shift embodies what Mark Tushnet identified as constitutional hardball: political practices that remain within the formal bounds of constitutional doctrine but exist in tension with pre-constitutional understandings—the informal norms and conventions upon which constitutional systems actually depend[34]. Constitutional hardball involves actions that may survive legal challenge but violate the deeper norms sustaining constitutional democracy. In appointment contexts, this manifests as exploitation of procedural rules in formally permissible but functionally destructive ways, selective invocation of constitutional provisions while ignoring countervailing principles, and

[33] B. WEINGAST, *The Political Foundations of Democracy and the Rule of the Law*, in «American Political Science Review», 91(2), 1997, pp. 245-63. See also T. GINSBURG, A.Z. HUQ, *How to save a constitutional democracy*, cit., p. 85.

[34] M. TUSHNET, *Constitutional Hardball,* in «J. Marshall Law Review», 37, 2004, p. 552

abandonment of practices of restraint and reciprocity that previously stabilized the system.

Perhaps most troublingly, constitutional hardball generates a logic of escalation. When one party deploys aggressive tactics to secure institutional advantage, opposition parties face overwhelming pressure to respond in kind upon returning to power. The result is a destructive spiral in which each cycle further normalizes transgressive behavior and deepens institutional damage. The short electoral cycles of contemporary democracy prevent party leaderships from fully internalizing these long-term costs, creating a temporal mismatch between the immediate rewards of aggressive action and the delayed but severe consequences of constitutional erosion.

Why has this transformation occurred? The answer lies in the confluence of several mutually reinforcing political dynamics that have reshaped democratic competition across liberal democracies. These phenomena can present individually with varying intensities or in combination, and each proves independently dangerous for judicial appointments. Yet the most severe threats emerge when populist movements achieve governing majorities or when persistent democratic erosion transitions systems toward illiberal democracy.

Political polarization, understood in Sartori's sense as the centrifugal movement of parties away from moderate positions toward ideological extremes, fundamentally alters the incentive structure governing institutional behavior[35]. When parties view opponents not as legitimate competitors with different policy preferences but as existential threats to be defeated at any cost, compromise becomes electoral liability rather than virtue. The long-term institutional consequences of aggressive strategies fade from view, displaced by the imperative of immediate political victory. Polarization too proves self-reinforcing: each episode of institutional combat invites retaliation, ratcheting up intensity and further eroding restraint.

Partisan degradation describes the systematic breakdown of informal norms regulating democratic competition – what Levitsky and Ziblatt identify as

[35] G. SARTORI, *Parties and Party Systems: A Framework for Analysis,* ECPR Press, Colchester 2005.

mutual toleration and institutional forbearance[36]. As these norms erode, political actors increasingly treat formal constitutional boundaries not as outer limits but as tools for maximization. In appointment contexts, this manifests in exploitation of procedural ambiguities, weaponization of delay, and willingness to breach longstanding conventions when partisan advantage beckons. Rules shift from being self-enforcing to being objects of strategic manipulation, creating what has been termed partisan entrenchment: attempts by governing majorities to lock in advantages that will persist even after they lose power.

The rise of populist movements adds a qualitatively different dimension[37]. Populism's core claim – that populists alone represent the people while opponents are illegitimate – generates inherent hostility toward institutions designed to constrain majority rule and protect minority rights. Constitutional courts, as guardians of these constraints, become natural targets. When populist forces achieve durable governing majorities, court manipulation often becomes part of a broader project of regime transformation rather than merely episodic partisan advantage-seeking.

At the extreme lies systematic democratic erosion and transition toward illiberal democracy. Here, judicial appointment manipulation serves authoritarian consolidation. Courts are permanently subordinated, transformed from constraints on power into instruments of control. The techniques employed – packing, forced removals, jurisdictional stripping – aim at fundamental alteration of the separation of powers.

These dynamics do not operate in isolation. Polarization usually creates conditions in which populist movements flourish; partisan degradation facilitates populist attacks on institutions; successful institutional capture accelerates democratic erosion. The result is a fundamentally transformed risk environment in which traditional appointment safeguards prove inadequate.

The analysis that follows will demonstrate how these dynamics have played out in specific European jurisdictions, revealing both common patterns and

[36] S. Levitsky, D. Ziblatt, *How Democracies Die,* Crown, New York 2018, p. 102 ff.
[37] M. Kovalčik, *The instrumental abuse of constitutional courts*, cit.

context-specific variations. The goal is to understand why traditional safeguards have proven inadequate and what this reveals about the deeper challenge of protecting constitutional courts independence under conditions of heightened political conflict and democratic stress. Only by understanding the nature and sources of contemporary risks can we begin to conceptualize institutional responses capable of functioning effectively in this transformed environment.

4. Anatomy of European crises: the spectrum from polarization to democratic erosion

The analysis developed in the preceding section finds concrete and troubling expression in the recent experiences of several European jurisdictions[38]. These episodes, varying significantly in intensity and character, illuminate how the mechanisms designed to safeguard constitutional courts' independence can break down when confronted with the transformative political dynamics of contemporary democracy. They demand analysis as manifestations of deeper shifts in the structure of democratic competition – shifts that subject appointment procedures to pressures for which they were never designed. The cases examined below can be organized along a spectrum of threat severity, distinguishing two principal scenarios. At one end lies what might be termed polarization-driven degradation: situations where appointment crises emerge as consequences of intensified partisan conflict, the erosion of informal norms of institutional forbearance, and the weaponization of procedural mechanisms, yet without a systematic project of authoritarian capture. At the spectrum's opposite end stands populist constitutionalism and illiberal transformation: contexts where appointment manipulation becomes instrumental to a broader agenda of dismantling liberal constitutional constraints and subordinating courts to political control.

[38] See also G. DELLEDONNE, *"Cattura" delle corti costituzionali*, cit.

4.1 Illiberal transformation: Hungary and Poland

Hungary offers the clearest example of systematic court capture accomplished through coordinated legal reform. When Fidesz won a two-thirds parliamentary majority in 2010, the government immediately set about neutralizing the Constitutional Court, which had previously functioned as a significant constraint on executive power. The strategy operated on three levels.

The government first manipulated the Court's composition. Parliament amended the relevant statutes to eliminate any requirement for cross-party consultation in selecting judges, allowing the governing coalition to appoint judges unilaterally. The Court was then expanded from eleven to fifteen members, and Fidesz filled the four new seats with loyalists. Terms were simultaneously extended from nine to twelve years, deliberately spanning three electoral cycles to entrench appointments beyond potential defeats[39]. Critically, the judges appointed before 2010 – who still held a majority before these changes took effect – failed to review the constitutionality of the amendments themselves, missing what proved to be the only realistic opportunity for institutional self-defence[40].

The second intervention targeted the Court's jurisdiction directly. Constitutional amendments removed the Court's authority over budget and fiscal legislation, eliminating judicial review precisely in the area where the pre-2010 Court had most actively constrained government policy[41]. The government also made extensive use of «cardinal laws» – ordinary legislation requiring two-thirds majorities for modification – which effectively locked policy choices into frameworks nearly as difficult to change as the constitution itself.

[39] J. MILIUVIENĖ, *How to avoid constitutional court-packing in an era of democratic backsliding: Reflections on the appointment of constitutional judges*, in «Hungarian Journal of Legal Studies» 65(2), 2024, p. 187; G. HALMAI, *Dismantling Constitutional Review in Hungary*, in «Rivista di diritti comparati», 1, 2019, pp. 31-47.

[40] G. HALMAI, *Coping Strategies of the Hungarian Constitutional Court since 2010,* in *Verfassungsblog* (27 September 2022), https://verfassungsblog.de/coping-strategies-of-the-hungarian-constitutional-court-since-2010/.

[41] J. MILIUVIENĖ, *How to avoid constitutional court-packing in an era of democratic backsliding*, cit., p. 187.

The third and most striking measure came in March 2013 with the Fourth Amendment to the Fundamental Law. This constitutional revision effectively annulled the Court's previous caselaw, erasing two decades of precedent. When the Court – by then controlled by government appointees – declined to review an amendment that reinstated provisions it had previously struck down, the transformation was complete: constitutional review would no longer «place a limit on the government»[42].

The empirical record confirms complete capture. Analysis of high-profile cases shows that before Fidesz appointees gained control, the Court ruled against the government in every significant case; once the new majority took hold, the pattern reversed, with the Court supporting the government in ten of thirteen major decisions[43]. Since 2013, the Court has not opposed the government on any politically significant matter[44].

Poland presents a different path to a very similar outcome: a court capture without constitutional amendment power, accomplished instead through sustained defiance of constitutional requirements (selective constitutional interpretation) and quasi-constitutional law-making. Unlike Fidesz, the Law and Justice Party (PiS) that won Poland's October 2015 elections lacked the two-thirds majority necessary for formal constitutional revision)[45]. The Polish crisis therefore exemplifies how court-packing and curbing can be achieved when a government aggressively exploits statutory regulation of court procedures while openly defying clear constitutional boundaries.

The crisis began with a clearly *ultra vires* action by the outgoing parliament. In October 2015, the departing Sejm – still controlled by Civic Platform but facing certain defeat – elected five Constitutional Tribunal judges to replace

[42] *Ibid.*

[43] Eötvös Károly Institute, Hungarian Civil Liberties Union, Hungarian Helsinki Committee, *Analysis of the Performance of Hungary's «One-Party Elected» Constitutional Court Judges between 2011 and 2014*. Budapest, 2015.

[44] G. Halmai, *cit.*

[45] A. Kustra, *Poland's constitutional crisis: from court-packing agenda to denial of Constitutional Court's judgments*, in «Toruńskie Studia Polsko-Włoskie/Studi Polacco-Italiani», 12, 2016, p. 345.

those whose terms were expiring. Constitutional practice permitted the sitting Sejm to fill vacancies occurring during its tenure, but only three of the five positions clearly met this criterion; the remaining two judges' terms would expire after the new Sejm convened. The outgoing majority's election of all five judges thus exceeded its constitutional authority[46].

The incoming PiS government responded not by seeking judicial resolution of this ambiguity but by simply declaring all five appointments void and appointing five replacements in a dramatic late-night session on December 2, 2015 – hours before the Constitutional Tribunal was scheduled to rule on the matter[47]. When the Tribunal ruled on December 3rd that three of the original five appointments had been constitutional, President Andrzej Duda refused to swear them in while proceeding to install all five PiS nominees. This represented selective constitutional interpretation in its most brazen form: the executive simply ignored a binding constitutional court judgment, reinterpreting constitutional requirements to suit political objectives.

The government then deployed quasi-constitutional law-making to paralyze the Tribunal. The December 2015 amendments to the *Constitutional Tribunal Act* – ordinary legislation formally subordinate to the Constitution but governing the Court's essential operations – raised quorum requirements from nine to thirteen judges, mandated sequential rather than simultaneous case consideration, imposed two-thirds voting majorities, and required six-month delays before reviewing new legislation[48]. These provisions were explicitly designed to prevent the Tribunal from invalidating the amendments themselves or other government legislation. When on March 2016 the Tribunal ruled these amendments unconstitutional – grounding its decision directly in the Constitution to circumvent the paralytic procedures – the government refused to publish the judgment, denying it legal effect under Polish law's publication requirement[49], with the Minister of Justice

[46] J. Miliuvienė cit., pp. 185-186.

[47] A. Kustra, *Poland's constitutional crisis,* cit., p. 351.

[48] M. Derlatka, *Constitutional Court and the constitutional crisis in Poland,* in «Toruńskie Studia Polsko-Włoskie/Studi Polacco-Italiani di Toruń», 15, 2019, p. 12.

[49] Ivi, p. 14.

Zbigniew Ziobro, who also served as Prosecutor General, publicly threatened Tribunal President Andrzej Rzepliński with criminal investigation[50].

The Venice Commission characterized these measures as crippling the Tribunal's effectiveness and undermining the rule of law itself. The consequences of Poland's constitutional tribunal capture were not confined to the domestic sphere but reverberated across the European system of judicial protection, generating landmark rulings from both the Strasbourg and Luxembourg courts that significantly developed the European standards governing the composition of constitutional courts.

The European Court of Human Rights's judgment in *Xero Flor w Polsce sp. z o.o. v. Poland* (2021) represents the first occasion on which an international court formally condemned the irregularities in the composition of the Polish Constitutional Tribunal[51]. The case originated from a constitutional complaint dismissed by a panel that included one of the three judges unlawfully appointed by the eighth-term Sejm in December 2015. Applying the three-step test developed in the Grand Chamber judgment *Guðmundur Andri Ástráðsson v. Iceland* (2020) – which requires assessing whether there was a manifest breach of domestic law, whether the breach undermined the purpose of guaranteeing an independent judiciary, and whether the domestic courts adequately reviewed the irregularity – the Strasbourg Court found that all three conditions were satisfied. Crucially, the Court first established that Article 6(1) ECHR was applicable to proceedings before the Constitutional Tribunal, since the outcome of the constitutional complaint was directly decisive for the applicant's civil rights. It then concluded that the election of the three December 2015 judges constituted a manifest violation of domestic constitutional law, relying extensively on the Constitutional Tribunal's own prior rulings declaring those appointments unlawful. The Court further found that this breach struck at the very substance of the right to a tribunal established by law, as it resulted from the legislature's deliberate disregard for binding constitutional court judgments—a defiance that

[50] A. KUSTRA, *Poland's constitutional crisis*, cit., p. 359.
[51] J. MILIUVIENĖ cit. p. 186.

undermined the rule of law and the separation of powers. The Tribunal could therefore no longer be considered «a tribunal established by law» under Article 6 ECHR in any composition that included the irregularly appointed judges[52]. *Xero Flor* is thus doubly significant for the analysis developed in this article: it confirmed that the Ástráðsson framework applies to constitutional courts, extending the Convention's reach into what states had traditionally regarded as an exclusively domestic matter of constitutional design; and it demonstrated that court-packing accomplished through selective constitutional interpretation—the third modality identified above—can trigger international judicial condemnation, thereby raising the external costs of such manipulation.

Four years later, the Court of Justice of the European Union reached a convergent conclusion through EU law. In its Grand Chamber judgment of 18 December 2025 in Case C-448/23, *European Commission v. Republic of Poland*, the CJEU held that Poland had failed to fulfil its obligations under the Treaties on multiple grounds[53]. The Commission's action challenged two judgments of the Polish Constitutional Tribunal—of 14 July 2021 (P 7/20) and 7 October 2021 (K 3/21)—in which the Tribunal had declared provisions of the Treaties, as interpreted by the Court of Justice, incompatible with the Polish Constitution, and had characterised the CJEU's case law on effective judicial protection as *ultra vires*. The Court of Justice found that these judgments infringed the principle of effective judicial protection under Article 19(1) TEU, violated the principles of autonomy, primacy, effectiveness and uniform application of EU law, and disregarded the binding effect of the Court's own decisions. Most significantly for the present analysis, the CJEU upheld the Commission's third complaint, holding that the Constitutional Tribunal did not satisfy the requirements of an

[52] ECtHR, *Xero Flor w Polsce sp. z o.o. v. Poland*, Judgment of 7 May 2021, Application no. 4907/18, §§ 243-291. The Court applied the three-step test established in *Guðmundur Andri Ástráðsson v. Iceland* [GC], Judgment of 1 December 2020, Application no. 26374/18, §§243–252. For analysis, see M. SZWED, *The Polish Constitutional Tribunal Crisis from the Perspective of the European Convention on Human Rights*, in «European Constitutional Law Review», 18(2), 2022, pp. 287-315.

[53] CJEU, Grand Chamber, Judgment of 18 December 2025, Case C-448/23, *European Commission v. Republic of Poland*, ECLI:EU:C:2025:1017. See W. SADURSKI, *The CJEU Versus the Constitutional Tribunal in Poland: On the CJEU's Judgment in Case C-448/23*, in *VerfBlog*, 20 December 2025.

independent and impartial tribunal previously established by law within the meaning of EU law, on account of the serious irregularities vitiating the appointment of three of its judges and of its President. By reaching this conclusion through the autonomous standards of Article 19(1) TEU and Article 47 of the Charter of Fundamental Rights, the Luxembourg Court complemented and reinforced the Strasbourg Court's finding in *Xero Flor*. The two top European courts have now independently concluded that Poland's captured Constitutional Tribunal cannot be regarded as a lawfully constituted judicial body – a convergence that carries profound implications. It demonstrates that systematic court capture, when accomplished through the techniques catalogued in this analysis, exposes member states to concurrent condemnation under both the ECHR and EU law, thereby considerably raising the legal and reputational costs of such manipulation. Moreover, the CJEU's judgment illustrates how a constitutional tribunal instrumentalised for illiberal purposes can become a vehicle for broader defiance of the European legal order: the Tribunal's *ultra vires* rulings against the Treaties were not merely a consequence of captured composition but a deliberate weaponisation of the court's institutional authority against the very principles of European integration. The Polish experience thus reveals the full arc of court capture, from irregular appointments to the instrumentalisation of the captured court as a tool for rejecting the primacy and binding effect of European law.

4.2 Polarization and institutional deadlock: Spain and Slovakia

The Spanish experience demonstrates how sustained polarization can transform a carefully designed separated appointment system into a weapon of institutional warfare through deadlock and attempted quasi-constitutional lawmaking, putting even a consolidated democracy at risk. Spain's Constitutional Court comprises twelve judges appointed through multiple authorities – four by Congress, four by Senate (both requiring three-fifths majorities), two by the government, and two by the General Council of the Judiciary (CGPJ). This distribution theoretically prevents unilateral control. Yet between 2018 and 2024, the system generated

prolonged paralysis when PSOE and PP proved unable to renew the CGPJ following its December 2018 term expiration[54].

The CGPJ deadlock had cascading effects. Operating in *prorogatio* with a conservative majority (product of PP's 2013 appointments when it controlled both chambers), the Council systematically blocked appointment of Constitutional Court judges after two CGPJ-appointed judges' terms expired in June 2022. The conservative majority employed its internal three-fifths requirement as obstruction, preventing both CGPJ appointment of progressive judges and – by extension – government appointments, since the Constitution and the Organic Law on the Constitutional Tribunal (LOTC) require simultaneous renewal of government and CGPJ judges to maintain renewal by thirds rather than sixths[55]

The two government nominees – Juan Carlos Campo (a former Minister of Justice) and Laura Díez Bueso (a senior government official) – were themselves hotly contested for their proximity to the executive; critics framed them as partisan appointments, and the TC's conservative majority initially stalled the qualifications check to block their swearing-in[56]. Faced with indefinite obstruction, the government in December 2022 attempted an aggressive form of quasi-constitutional law-making. Through amendments attached to criminal code reform legislation, the majority parties sought to break the deadlock by modifying the organic laws governing appointment procedures – ordinary legislation that structures the Court's essential operations. The first amendment modified Article 599 LOPJ to introduce subsidiary election mechanisms: if CGPJ failed to elect judges within three months, the required majority would drop from three-fifths to simple plurality, with potential criminal sanctions for obstruction. The second one reformed the LOTC to permit government appointment independent of CGPJ action – breaking the constitutional principle of partial renewal by thirds – and eliminated the Constitutional Court's own power to verify nominee qualifications, transferring that authority to the appointing organs themselves.

[54] G. NAGLIERI, *Polarizzazione, giurisdizionalizzazione, delegittimazione. La crisi istituzionale spagnola tra regolarità ed anomalie,* in «Federalismi», n. 4, 2023, p. 73.

[55] Ivi, pp. 73-74

[56] Ivi, pp. 74-76.

The PP responded with an *amparo* complaint requesting suspension of parliamentary proceedings. On December 19-20, 2022, the Constitutional Court granted suspension by six-to-five vote (majority comprising predominantly conservative appointees, including two whose mandates had already expired and who nonetheless took part in the vote on their own recusal, a circumstance widely criticized as a breach of impartiality) – the first time since 1978 the Court had interrupted ongoing parliamentary legislation. The decision's legitimacy was deeply contested: the five dissenting judges argued the Court misused *amparo* jurisdiction as institutional arbitration between political forces, and that the suspension was procedurally and substantively disproportionate. The crisis dissolved only through last-minute compromise on December 27th when CGPJ unanimously elected its two judges, though the underlying CGPJ deadlock persisted until June 2024 European Commission mediation after over 2,000 days.

The appointment crisis in Slovakia shows how a collaborative model with weak parliamentary safeguards can generate deadlock through executive-legislative confrontation when confronted with a polarized political scenario and the rise of anti-establishment leaders with populist approaches[57]. The Slovak model of appointment is a collaborative one: the Constitutional Court comprises thirteen judges appointed by the President from among candidates proposed by the unicameral National Council for twelve-year non-renewable terms. The National Council proposes double the required number of candidates, and the President selects from that list. This represents a paradigmatic mixed model premised on inter-institutional cooperation: neither authority can act unilaterally, and successful appointments require agreement between legislative and executive branches. Critically, however, Slovakia's collaborative mechanism incorporates a structural vulnerability: the parliamentary phase requires only a simple majority of members present (provided that over half the Council is present to constitute a quorum) – effectively 39 votes out of 150. This exceptionally low threshold means

[57] K. BARANÍK, *Symposium on «The Slovak Constitutional Court Appointments Case» - Perplexities of the Appointment Process Resolved by Means of "Fire and Fury"*, in *ICONnectblog*, 24-01-2018; S. DRUGDA, *Symposium on «The Slovak Constitutional Court Appointments Case»- Intermezzo to the Constitutional Conflict in Slovakia*: *A Case Critique*, in *ICONnectblog*, 24-01-2018.

a single party with parliamentary dominance can control candidate selection without opposition input, transforming what should be a pluralistic nomination process into a partisan one. This kind of collaborative model thus becomes highly sensitive to executive-legislative alignment: when President and parliamentary majority share political orientation, appointments proceed smoothly despite low pluralism; when cohabitation emerges, the same low threshold that enabled partisan nominations becomes a source of presidential resistance and potential deadlock. Between July 2014 and December 2017, Slovakia experienced precisely such cohabitation-induced paralysis[58]. President Andrej Kiska, elected in 2014 as an independent candidate running explicitly against the established political class, confronted a National Council controlled by the social-democratic Smer-SD party, which had held an absolute majority since 2012. Kiska's election represented a populist-outsider challenge to the political establishment in a context of extreme polarization between the President's anti-establishment mandate and the parliamentary majority's partisan dominance. When judicial mandates expired between 2014 and 2016, President Kiska repeatedly refused to appoint candidates proposed by the Council, invoking concerns about inadequate qualifications and questionable integrity.

Crucially, Kiska's obstruction operated through distorted constitutional interpretation – the second modality of institutional manipulation identified in this analysis. Rather than formal amendment or quasi-constitutional legislation, the President expansively reinterpreted the scope of presidential discretion in the appointment process, claiming constitutional authority to assess candidate merit substantively rather than merely verifying formal eligibility. This interpretive claim effectively transformed the President's role from selector among qualified nominees into gatekeeper with independent veto power over parliamentary choices. The Constitutional Court itself intervened through multiple decisions between 2014 and 2017, ruling that the President's stated reasons constituted

[58] A. ANGELI, *Il rinnovo della composizione della Corte costituzionale slovacca a margine delle elezioni presidenziali del 2019, tra dinamiche coabitazioniste e riforma dei meccanismi di selezione dei giudici costituzionali*, in «Nuovi Autoritarismi e Democrazie: Diritto, Istituzioni, Società», n. 1, 2019, p. 145 ff.

constitutionally insufficient grounds for rejection and that presidential discretion could not encompass substantive quality assessments that would nullify Parliament's constitutional role. Yet this remarkable assertion failed to break the impasse, as Kiska maintained his refusal despite adverse judicial rulings.

The deadlock escalated dramatically by February 2019 when nine of thirteen positions faced simultaneous vacancy, threatening to render the Court functionally inoperative. Abstract constitutional review and constitutional interpretation require plenum decisions by absolute majority of all members – seven judges – meaning the Court teetered on the brink of complete paralysis. The crisis exposed how collaborative models, designed to ensure inter-institutional agreement, become venues for mutual veto under polarized cohabitation, particularly when a populist-outsider President confronts an entrenched parliamentary establishment.

5. The German example: constitutional entrenchment against the risk of illiberal court capture

Germany's 2024 constitutional amendment represents perhaps the most significant recent attempt to insulate a constitutional court against the manipulation techniques catalogued throughout this analysis. Observing illiberal court capture in neighbouring jurisdictions – particularly Poland and Hungary – and facing the domestic rise of the far-right Alternative für Deutschland (AfD), Germany's governing coalition and principal opposition party achieved a historic bipartisan supermajority to constitutionalize core features of the Federal Constitutional Court's organization and functioning, removing them from the reach of simple legislative majorities[59].

The reform's preventive logic directly addresses the vulnerabilities exposed by comparative experience. Prior to 2024, the German Basic Law contained remarkably

[59] D. PARIS, *Una riforma per mettere in sicurezza il giudice costituzionale in Germania*, in «Quaderni Costituzionali», n. 1, 2025.

sparse constitutional regulation of the Federal Constitutional Court. Article 94(1) merely stipulated that the Court comprises federal judges and other members, with half elected by each chamber, and that members cannot simultaneously hold parliamentary, governmental, or judicial office. All other organizational matters – Including the Court's internal structure, case assignment procedures, judicial term lengths, age limits, and critically, the specific appointment procedures – were delegated to the Federal Constitutional Court Act *(Bundesverfassungsgerichtsgesetz),* an ordinary federal statute amendable by simple *Bundestag* majority.

This delegation creates profound vulnerability. As Spain, Poland, and Hungary demonstrated, quasi-constitutional legislation – ordinary statutes governing fundamental institutional arrangements – constitutes the primary pathway for manipulating constitutional courts precisely because it requires only simple legislative majorities rather than the supermajorities necessary for formal constitutional amendment. Moreover, as the cases examined above demonstrate, the absence of rigid and detailed constitutional rules governing appointment procedures significantly facilitates use of distorted constitutional interpretation. Germany's delegated model meant that a future illiberal parliamentary majority could fundamentally restructure the Court's composition, procedures, and powers through ordinary legislation, just as Poland did in 2015-2016.

The 2024 amendment constitutionalizes numerous previously statutory provisions, elevating them beyond simple-majority control. The reform codifies the Court's division into two Senates of eight judges each, establishes twelve-year non-renewable terms with a retirement age of sixty-eight, constitutionalizes the Court's authority to adopt its own rules of procedure, and crucially, the binding effect of Court decisions (*Bindungswirkung*). Most significantly, it introduces an anti-deadlock mechanism through an opening clause: federal law may provide that if one chamber fails to elect a judge within a specified period after a vacancy arises, the election right transfers to the other chamber.

This constitutional entrenchment strategy directly responds to the techniques of institutional manipulation analyzed throughout this article. By constitutionalizing core organizational features, Germany places them beyond quasi-constitutional lawmaking – foreclosing the Spanish and Polish pathway of

using ordinary legislation to force appointments procedures for partisan advantage. The anti-deadlock mechanism addresses the Spanish and Slovak experiences of prolonged paralysis by ensuring vacancies cannot weaponize gridlock into court dysfunction. The explicit constitutionalization of binding effect pre-empts Hungarian-style jurisdiction-stripping through ordinary legislation.

Yet Germany's reform reveals critical limitations that expose continuing vulnerabilities: the most fundamental omission concerns the two-thirds parliamentary majority requirement itself – this cornerstone safeguard remains in the *Bundesverfassungsgerichtsgesetz*, not elevated to constitutional status[60]. A future simple-majority coalition could amend the Act to reduce the threshold to simple majority, then pack the Court with loyalists. This vulnerability is not hypothetical: it represents precisely how Poland captured its Constitutional Tribunal in 2015-2016 and how Spain attempted to force the rules of appointments in the 2022 deadlock.

The decision to leave the two-thirds requirement unprotected appears deliberate. Constitutionalizing it would create risks if democratic parties lost their two-thirds capacity – a permanent supermajority requirement could generate permanent deadlock if far-right forces achieved blocking-minority status[61]. Yet leaving it in ordinary legislation means whoever controls simple parliamentary majority can abolish the requirement entirely. Germany chose to accept this vulnerability rather than constitutionalize a threshold that might paralyze the Court under adverse political conditions.

Similarly critical is the failure to require *Bundesrat* consent for amendments to the Federal Constitutional Court Act. The *Bundesrat* explicitly advocated for transforming the Act into a consent law *(Zustimmungsgesetz)* requiring its approval for any modification. This would have comprehensively insulated the Court against simple-majority manipulation while respecting federalism's role as a power-limiting stability factor in Germany's institutional architecture.

[60] L. Westfal, *The resilience of the German Federal Constitutional Court*, Eurac Research, in *EUREKA Blog*, 12th May 2025.

[61] M. Eichberger, *Die erste von drei Säulen: Zum Arbeitsentwurf des BMJ zur Stärkung der Stellung des Bundesverfassungsgerichts*, in *VerfBlog*, 16-04-2024.

These omissions leave substantial regulatory terrain vulnerable. Numerous critical aspects remain governed by ordinary statute amendable by *Bundestag* simple majority: the two-thirds election threshold, detailed appointment procedures beyond the constitutional framework, and crucially, the implementation details of the constitutional anti-deadlock mechanism itself, which the amendment explicitly delegates to federal law. An illiberal *Bundestag* majority could manipulate these statutory provisions to undermine the Court without touching constitutionalized elements. The political calculus behind these omissions appears clear: requiring *Bundesrat* consent would grant Germany's sixteen *Länder* governments substantial influence over the Court, effectively creating a federal veto over institutional changes. The governing coalition and opposition evidently prioritized maintaining *Bundestag* primacy over maximizing Court protection – a choice that privileges existing power distributions over comprehensive institutional resilience.

6. Refining the Venice Commission's doctrine: learning from contemporary crises

The foregoing analysis reveals consistent patterns in how appointment crises unfold across diverse constitutional systems and political contexts. These patterns expose both the complexity of contemporary threats to constitutional courts' independence and how traditional safeguards struggle when confronted with the toxic combination of extreme polarization, partisan degradation and populist threats. Understanding these patterns is essential to developing recommendations capable of functioning effectively in the transformed political environment that characterizes many European democracies today.

6.1. Critical patterns emerging from contemporary appointment crises

Four analytical patterns emerge with particular clarity from the comparative examination of recent crises, each illuminating a distinct dimension of vulnerability in constitutional court appointment systems.

Democrazia e Sicurezza – Democracy and Security Review
ISSN: 2239-804X

anno XIV, n. 1, 2025
data di pubblicazione: 13 giugno 2026

Saggi

First, appointment crises display a clear temporal pattern, concentrating around electoral transitions. The Polish crisis was triggered by the outgoing parliamentary majority's attempt to appoint judges whose terms would commence after the 2015 elections, followed by the incoming majority's refusal to recognize these appointments. Hungary's constitutional court manipulation occurred immediately following Fidesz's overwhelming electoral victory in 2010, when the new supermajority moved swiftly to restructure the Court before opposition could organize resistance. Slovakia's prolonged deadlock began when the newly elected President Kiska, running as an anti-establishment outsider, confronted a parliamentary establishment controlled by Smer-SD in the politically charged atmosphere following the 2014 presidential election.

This temporal concentration is not coincidental. Electoral transitions represent windows of maximum institutional vulnerability because they combine several destabilizing factors simultaneously: outgoing majorities face temptations toward pre-emptive court-packing to entrench their influence beyond their electoral mandate; incoming majorities seek to impose immediate change to demonstrate responsiveness to their electoral mandate; the polarization inherent in electoral competition reaches its apex; and informal norms of institutional forbearance are at their weakest precisely when political actors view themselves as engaged in existential struggle for control. The proximity to electoral moments transforms appointment procedures into battlegrounds for partisan advantage, with each side justifying aggressive tactics as defensive responses to the other's perceived transgressions.

Second, distorted constitutional interpretation has emerged as a primary mechanism of institutional manipulation, operating alongside the more visible pathways of constitutional amendment and quasi-constitutional legislation. Poland exemplified this technique through creative reinterpretation of when constitutionally appointed judges could assume office and what constituted a judicial vacancy, allowing the governing majority to refuse recognition of judges appointed by the previous parliament while simultaneously appointing replacements. Slovakia demonstrated the technique through President Kiska's expansive reinterpretation of presidential discretion in the appointment process:

transforming what the Constitutional Court itself determined should be limited to formal verification of candidate qualifications into substantive assessment of candidate merit – a reinterpretation the Court explicitly rejected through multiple decisions, yet which the President continued to assert despite adverse judicial rulings. Spain's crisis involved competing interpretations of when the CGPJ could or must appoint judges, what «renewal by thirds» means in practice, and whether modifications to appointment procedures could apply retroactively to pending nominations.

Unlike constitutional amendments, which require supermajority support and generate high-visibility political contestation, and unlike quasi-constitutional legislation, which at least produces formal legal texts subject to judicial review, interpretive manipulation can be presented as routine application of existing constitutional text. The technique exploits inherent constitutional ambiguity – gaps, silences, and open-textured language that constitutional drafters either deliberately incorporated to preserve flexibility or inadvertently created through failure to anticipate specific scenarios. When political actors advance interpretations that serve partisan interests while remaining within the realm of textual plausibility, institutional resistance becomes extraordinarily difficult. Courts attempting to police such interpretations face accusations of themselves engaging in political decision-making, while the interpreting actors can claim fidelity to constitutional text even as they subvert constitutional structure (we already called it acontextual formalism). Slovakia's experience demonstrates the ultimate limit of judicial self-defense against interpretive manipulation: even when the Constitutional Court explicitly rejected the President's expansive interpretation, it possessed no mechanism to compel compliance beyond the persuasive force of its reasoning – a force insufficient when confronting a determined political actor claiming independent constitutional authority.

Third, qualified majority requirements exhibit a double vulnerability when subjected to the combined pressures of polarization and partisan degradation, creating a dilemma with no purely technical solution. Spain illustrates the first horn of this dilemma: high thresholds combined with extreme polarization

produce institutional paralysis[62]. The three-fifths parliamentary majority requirement that had functioned effectively for decades became a weapon of mutual veto when PSOE and PP proved incapable of dialogue, transforming the very mechanism designed to ensure pluralism into an instrument of obstruction. Qualified majorities presuppose the capacity for cross-party compromise; when polarization exceeds the threshold where such compromise remains possible, the system freezes. Slovakia and Poland both illustrate the second horn: low thresholds combined with partisan degradation enable unilateral institutional capture. In both systems, simple or near-simple majority requirements had functioned adequately when informal norms of self-restraint led governing majorities to seek broader consensus. When partisan degradation eroded these norms, both Smer-SD and PiS exploited the full extent of their formal legal authority, nominating candidates without meaningful opposition consultation, unconstrained by the forbearance that had previously operated as an unwritten safeguard.

This creates a genuine dilemma: in contexts characterized by high polarization and partisan degradation, high thresholds generate deadlock because political actors lack the capacity to reach the required consensus, while low thresholds enable capture because political actors nowadays lack the inclination to exercise voluntary restraint. Polarization destroys the ability to compromise; partisan degradation destroys the willingness to self-limit. The threshold that works in one political environment fails catastrophically in another, not because of defective calibration but because the underlying political conditions necessary for any threshold to function effectively have deteriorated. This suggests that excessive focus on identifying the «correct» threshold number may represent a category error – the problem lies not in the specific numerical requirement but in the collapse of the political preconditions that allow threshold requirements to operate as intended.

Fourth, the zone of quasi-constitutional legislation – ordinary or organic statutes that structure fundamental institutional arrangements – has proven to be

[62] J.C. Nieto-Jiménez, *Consecuencias de la fragmentación y la polarización en las Cortes Generales*, Tirant lo Blanch, Valencia 2025.

the principal theater of manipulation rather than formal constitutional amendment. Poland's court capture proceeded primarily through ordinary legislation modifying the Constitutional Tribunal's procedures and composition. Spain's crisis involved attempted reforms through organic legislation governing both the CGPJ and the Constitutional Court. Even Germany's preventive 2024 constitutional reforms, while elevating certain core provisions into the Basic Law, left critical vulnerabilities in ordinary legislation: most notably, the two-thirds voting requirement for judicial selection itself remains in the Federal Constitutional Court Act rather than being constitutionally entrenched, and the Act continues to be amendable by simple Bundestag majority without requiring Bundesrat consent.

This pattern reflects a structural reality of contemporary constitutional systems: the boundary between constitutional and sub-constitutional law creates a zone of regulation that is crucial for institutional architecture yet vulnerable to majoritarian manipulation. Quasi-constitutional legislation is important enough to determine how fundamental institutions actually function in practice, yet flexible enough to be modified without the supermajorities required for formal constitutional amendment. For political actors seeking to manipulate constitutional courts, this zone represents the path of least resistance – sufficient legal authority to effectuate substantial institutional change, yet insufficient visibility and procedural obstacle to trigger the political costs associated with constitutional amendment. The German example is particularly instructive precisely because it represents a self-conscious attempt to prevent manipulation: even when political actors recognized the vulnerability and achieved the bipartisan supermajority necessary for constitutional reform, they chose to leave certain critical elements unprotected, evidently preferring to preserve legislative flexibility over comprehensive institutional insulation. This suggests that the vulnerability of quasi-constitutional legislation is not merely an oversight but may reflect deeper political constraints – those with power to enact comprehensive protections often retain incentives to preserve their own future flexibility.

6.2. Recommendations for strengthening constitutional resilience

These patterns suggest that the Venice Commission's existing doctrine, while providing valuable guidance for well-functioning constitutional jurisdictions, requires substantial refinement to address the distinctive challenges posed by extreme polarization, partisan degradation, the normalization of constitutional hardball, and populist challenges to liberal constitutionalism. The following recommendations emerge from analysis of where traditional safeguards have failed and what innovations might prove more resilient.

6.2.1. Temporal insulation through extended cooling-off periods

Since appointment crises concentrate around electoral transitions, a solution could lie in introducing constitutional provisions that temporally separate judicial appointments from the moments of maximum political heat. The Commission should recommend that constitutional systems incorporate mandatory cooling-off periods during which constitutional court appointments are prohibited.

Specifically, constitutions should prohibit the nomination or appointment of constitutional judges during a period extending twelve months before scheduled national elections and twelve months following the investiture of a new government or parliament. This extended timeframe – substantially longer than the six-month periods that might initially appear sufficient – reflects empirical reality: the polarization and partisan tensions generated by electoral competition do not dissipate immediately upon electoral conclusion but persist well into the formation and early operation of new governmental configurations. A twelve-month buffer on each side creates genuine temporal separation rather than merely nominal distance.

The cooling-off period should operate as a comprehensive prohibition encompassing not only the appointment or nomination of judges but also any legislative or constitutional amendments affecting the constitutional court's composition, organization, powers, or appointment procedures. This prevents

political actors from exploiting the electoral transition period to manipulate the institutional framework itself.

To ensure that the cooling-off period functions as institutional protection rather than creating its own vulnerability, constitutions must couple the prohibition with automatic prorogatio. Any judge whose term expires during a cooling-off period continues in office until a replacement can be appointed following the period's conclusion. This prorogatio must be constitutionally mandated rather than legislatively granted to prevent political actors from eliminating it through ordinary legislation.

6.2.2. Constitutional entrenchment of structural essentials and anticipatory provisions

The vulnerability of quasi-constitutional legislation as the primary manipulation pathway suggests that constitutional systems must elevate core institutional features beyond the reach of ordinary legislative majorities. However, the challenge lies in determining what to entrench and how comprehensively to do so without rendering constitutional systems excessively rigid.

Structural essentials that should be constitutionally entrenched include: the number of judges (preventing court-packing through expansion); term length and prohibition of re-election (ensuring judicial independence from appointing authorities); the qualified majority threshold itself for judicial appointment (addressing Germany's critical omission); automatic continuity of judicial tenure until replacement (constitutionalizing prorogatio); and the binding effect and finality of court decisions (preventing legislative or executive nullification). Germany's 2024 reforms demonstrate both the value and incompleteness of entrenchment: by constitutionalizing the sixteen-judge two-Senate structure, twelve-year non-renewable terms, retirement age, and binding effect, Germany raised the cost of manipulation from simple legislative majority to two-thirds constitutional amendment majority in both chambers. Yet by leaving the two-thirds voting requirement itself in ordinary legislation and by failing to require

Bundesrat consent for amendments to the Federal Constitutional Court Act, Germany preserved exploitable vulnerabilities. The lesson is that partial entrenchment may generate false confidence while leaving critical gaps.

Beyond entrenching structural essentials, constitutions should incorporate anticipatory provisions that explicitly resolve interpretive ambiguities before they can be exploited. These provisions represent a form of preventive constitutional drafting that reduces the space for distorted interpretation by specifying in advance how controversial scenarios should be resolved. For instance, a constitution might provide that if a judicial term expires after national elections but before the investiture of a newly elected parliament, appointment authority remains with the outgoing parliament – directly foreclosing the interpretive controversy that generated Poland's 2015 crisis. Similarly, that presidential or executive discretion in appointment procedures extends solely to verification of formal constitutional qualifications and does not encompass substantive assessment of candidate merit or suitability – eliminating the interpretive space President Kiska exploited in Slovakia. Or, in systems requiring proposal of candidates by one organ and selection by another, refusal to select from properly proposed candidates constitutes a constitutional violation and clarifying the boundaries of collaborative appointment models.

The technique of anticipatory provisions will strike some as excessively detailed constitutional drafting, potentially constraining necessary flexibility and producing constitutional rigidity. This criticism has force in stable, well-functioning constitutional systems where ambiguity enables adaptive evolution and where political actors can be relied upon to resolve ambiguities through good-faith constitutional interpretation. However, in environments characterized by constitutional hardball and interpretive manipulation, ambiguity becomes vulnerability. The comparative evidence suggests that actors determined to manipulate will exploit whatever interpretive space exists; eliminating that space through anticipatory specification may be necessary precisely when constitutional culture has deteriorated to the point where informal norms no longer constrain interpretive creativity.

Democrazia e Sicurezza – Democracy and Security Review
ISSN: 2239-804X

anno XIV, n. 1, 2025
data di pubblicazione: 13 giugno 2026

Saggi

6.2.3. Constitutionally entrenched and robust anti-deadlock mechanisms

As discussed above, the Venice Commission has long recognized that qualified majority requirements must be paired with effective anti-deadlock mechanisms. However, traditional mechanisms have proven inadequate: automatic threshold reduction incentivizes deliberate sabotage of initial voting rounds, knowing that preferred candidates will eventually succeed through lowered requirements; indefinite prorogatio normalizes what should be exceptional, transforming temporary continuity into a strategic option; simple transfer of appointment power to another organ may merely relocate rather than resolve deadlock and works only in specific institutional configurations.

The Commission should recommend constitutionally entrenched anti-deadlock mechanisms that maintain qualified majority requirements throughout while progressively altering institutional dynamics when deadlock persists. The fundamental principle should be that thresholds never automatically reduce – what should change is the appointing authority, the procedural transparency, or the selection modality itself. This removes the incentive to sabotage early phases knowing that obstruction leads not to eventual victory under easier conditions but to loss of control over the process.

For separated appointment systems featuring multiple appointing authorities – such as bicameral legislatures where each chamber appoints a quota of judges, or systems where parliament, president, and judiciary each appoint portions of the court – sequential mechanisms offer effective pathways. When standard procedures fail within a constitutionally specified timeframe, appointment authority should transfer to an alternative constitutional organ applying the same qualified threshold, forcing the deadlock into a different political arena with different political dynamics. This is the German innovation, though Germany implemented it through ordinary legislation rather than constitutional entrenchment, leaving it vulnerable to future manipulation. If transfer also fails after a reasonable period, the constitution might mandate creation of a temporary judicial qualification commission comprising senior judges from the highest ordinary courts, distinguished legal academics meeting specified criteria, and

equal representation from governing majority and opposition parliamentary factions. This commission would evaluate candidates according to constitutional professional criteria and present a ranked list to the failed appointing authority, which must select with a qualified majority, or failing that, the commission's top-ranked candidate is automatically appointed. This mechanism depoliticizes selection when politics has proven incapable of functioning and maintains qualified assessment of professional merit.

For collaborative appointment systems where the process requires cooperation between multiple organs – such as parliamentary nomination with presidential selection, as in Slovakia – sequential transfer mechanisms cannot function because the system's architecture itself demands inter-institutional agreement. These systems require different approaches. Progressive transparency requirements can increase reputational costs of obstruction: making votes that were secret become public and nominal, opening sessions that were closed, requiring publication of all candidate evaluations and communications between cooperating organs. The threshold remains unchanged; only transparency increases, making strategic obstruction more costly by exposing it to public scrutiny. If transparency pressure proves insufficient after a specified period, the constitution might provide for temporary conversion to a separated model where the collaborative requirement suspends for the specific pending appointment. Crucially, appointment authority in this emergency phase should divide between the cooperating organs – each appointing a proportional share of pending positions autonomously. After emergency appointment, the system should revert to standard collaborative procedure for subsequent appointments.

7. The limits of institutional design and the role of the Commission

All these procedural safeguards, taken together, represent a comprehensive framework for protecting judicial appointments against manipulation: cooling-off periods remove temporal pressure, constitutional entrenchment prevents manipulation of the system itself, anticipatory provisions reduce interpretive

exploitation, and robust and constitutional entrenched anti-deadlock mechanisms prevent permanent paralysis. Nevertheless, we must be honest about the limits of institutional design when the dynamics analyzed in this article become sufficiently severe[63]. At some point, the problem transcends institutional design and becomes one of constitutional culture and political will.

We should therefore distinguish between preventive recommendations applicable to all systems, and diagnostic criteria for identifying when systems have crossed thresholds beyond which institutional reforms cannot succeed without external intervention. For the former category, the recommendations developed above can meaningfully enhance resilience. For the latter, the Commission's role will inevitably shift from advising institutional design to documenting democratic backsliding and supporting external accountability mechanisms—whether European Union rule-of-law procedures, Council of Europe monitoring, or other forms of international pressure.

This honest acknowledgment of limits strengthens rather than weakens the Commission's authority. By recognizing that institutional design has boundaries, we can more credibly advocate for robust preventive measures while also establishing clear criteria for when situations require responses beyond institutional adjustment. The goal is not to design systems invulnerable to every possible form of manipulation—no such system exists—but to raise the costs of manipulation sufficiently that it requires either overwhelming political force or such transparently abusive tactics that international condemnation and domestic resistance become likely. In many cases, these increased costs will deter manipulation; in cases where they do not, at least the manipulation cannot proceed through subtle exploitation of institutional ambiguities but must occur through open constitutional defiance that clearly identifies the responsible actors and the antidemocratic nature of their conduct.

[63] T. GINSBURG, A.Z. HUQ, *How to Save a Constitutional Democracy*, cit., p. 172 ff.