

CONSTITUTIONAL COURT REGRESSION IN POST- DEMOCRATIC TRANSITION: A COMPARISON OF COURT PACKING IN HUNGARY, POLAND, AND INDONESIA

Idul Rishan*

Faculty of Law, Universitas Islam Indonesia
idul.rishan@uui.ac.id

Received: 31 August 2023 | Last Revised: 6 May 2024 | Accepted: 28 October 2024

Abstract

Over the past two decades, the constitutional court established in the post-democratic transition has begun to face regression. The Constitutional Courts in Hungary, Poland, and Indonesia have evidence, carried out intensively through court packing. This article investigates the regime's undermining of the constitutional court against constitutional judges in selected countries. In addition, this article will also describe the regime's motives and objectives in undermining the independence of the constitutional court. This study argues that regression of the constitutional court occurs through several patterns, such as increasing and decreasing the number of constitutional judges, politicizing the appointment and dismissal of constitutional judges, and rearranging the requirements and selection procedures of constitutional judges. The regime uses court packing to place judges who are loyal or have the same political preferences as the regime to provide control over their independence.

Keywords: Constitutional Court; Court Packing; Judicial Independence

* Idul Rishan is a lecturer at Faculty of Law Universitas Islam Indonesia. Rishan focuses at constitutional law, politics and judiciary.

I. INTRODUCTION

Several legal and political scholars have intensively compared constitutional regression, including Aziz Huq, Tom Ginsburg,¹ Rosalind Dixon, and David Landau.² Regression refers to how the quality of constitutional supremacy is undermined, corrupted, or reduced. The studies were explained with contexts and factual practices. In them, constitutions were the objects of study. Eventually, they conclude that anti-democratic measures may also undermine constitutions. To make matters worse, democratic constitutions were amended to be authoritarian by adopting legally formal measures.

In Hungaria, Kim Lane argues that since winning the 2010 election, the Fidesz Party has influenced the supremacy of law and the principle of constitutionalism in Hungary. Fidesz Party has won four consecutive elections, including the last one in April 2022. According to Schepelle, the victory of Orban and Fidesz in the last four elections cannot be separated from three things: first, ensuring an unfair and uncompetitive electoral system through engineering laws, such as manipulating the number of parliamentary seats and determining voter requirements; second, controlling the press and limiting its role, especially in discussing government issues that are counterproductive for government policies; third, crushing the role of the opposition in the parliament.³

In Poland, Sadurski also claims that there are three patterns of undermining the Polish constitutional supremacy. The first is undermining the constitutional court's and its judges' independence. Only judges sharing the same political preference as the government were chosen. The second is disabling the opposition's role by means of the coalition to control all state resources in making policy and supervising or controlling policies. The third is coopting the media to maintain the pro-government narrative under the control of the President and the major party in the parliament.⁴

¹ Aziz Z. Huq and Tom Ginsburg, "How to Lose a Constitutional Democracy," *UCLA Law Review* 65 (March 2018): 79–169.

² Rosalind Dixon and David Landau, *Abusive Constitutional Borrowing: Legal Globalization and the Subversion of Liberal Democracy* (Oxford: Oxford University Press, 2021), 11.

³ Kim Lane Scheppele, "How Viktor Orbán Wins," *Journal of Democracy* 33, no. 3 (July 2022): 45–61.

⁴ Wojciech Sadurski, "How Democracy Dies (in Poland): A Case Study of Anti-Constitutional Populist Backsliding," *Sydney Law School Legal Studies Research Paper* No. 18/01 (January 2018).

Like Hungary and Poland, the development of democracy and constitutionalism in Indonesia has been regressed over the last five years. This study is of the position to view that democratic regression reached its peak under the leadership of Jokowi-Amin from 2019 to 2024. As the opposition, i.e., the Greater Indonesia Movement Party (Gerindra –*Gerakan Indonesia Raya*) joined the government coalition led by the Indonesian Democratic Party in Struggle (PDIP –*Partai Demokrasi Indonesia Perjuangan*), constitutional supremacy in Indonesia started to be undermined. The huge support from the majority in the parliament has led to several controversial and unpopular policies. For instance, “*autocratic legalism*” was shown in making laws⁵ and undermining the independence of Constitutional Court judges.⁶

Like the previous paper, this article discusses the undermining of constitutions. However, this study focuses on how judicial independence has been undermined. This article emphasized that constitutions have often been weakened by undermining the independence of the judiciary, i.e., constitutional courts. Dixon and Landau concepts indicate a decline in constitutional supremacy (*constitutional decline*) always carried out by “dwarfing” the constitutional court through the tenure of judges (*court packing*) and institutional organization (*court crubbing*). The differences between the two models of undermining the judiciary can be seen in the table below.

Table 1: Types of Undermining the Judiciary⁷

Technique for Undermining the Judiciary	
<i>Court Packing</i>	<i>Court Crubbing</i>
Decreasing or increasing the number of judges in their panels	Cutting the budget of the judiciary
Dismissing judges during their term of office for political reasons	Reducing the facilities for judges and the judiciary

⁵ Zainal Arifin Mochtar and Idul Rishan, “Autocratic Legalism: The Making of Indonesian Omnibus Law,” *Yustisia Jurnal Hukum* 11, no. 1 (April 2022): 29–41.

⁶ Idul Rishan et al., “Amendment to Term of Office of Constitutional Court Judges in Indonesia: Reasons, Implications, and Improvement,” *Varia Justicia* 18, no. 2 (2022): 141–155.

⁷ See Dixon and Landau, *Abusive Constitutional Borrowing*, 92.

Technique for Undermining the Judiciary

Court Packing

Court Crubbing

Changing the retirement age

Restricting court jurisdiction

Politicizing judicial appointment

Controlling judicial interpretation

Taking disciplinary measures through administrative sanctions

Restricting court authority

Source: reviewed by the author

The comparative context in this article uses the conceptualization developed by Dixon and Landau by limiting the study to the court packing method in constitutional courts in selected countries. As noted by Thusnet, there are three perspectives on comparative studies. First, the functionalist perspective emphasizes comparative studies to identify various models, arrangements, and practices to attain the same objective. Second, expressivism identifies differences to contextualize what a nation needs as a political entity. Third, *bricolage* works in a markedly different manner. Experiences and practices in other countries are not necessarily preferred, but they give lessons in building a model and system in the constitution.⁸

This study takes the functionalist view. This article discusses how the independence of constitutional courts in several countries has been undermined. The scope of comparison is Hungary, Poland, and Indonesia due to the same form of constitutions,⁹ form of states and government,¹⁰ and constitutional adjudication model. Therefore, this article has two issues: How are those countries undermining the constitutional court by the regime through court packing? And what are the regime's motives and objectives in undermining the independence of the constitutional court?

⁸ Mark Tushnet, "The Possibilities of Comparative Constitutional Law," *The Yale Law Journal* 108, no. 6 (April 1999): 1225–1309.

⁹ In terms of their forms, there are codified and uncoded constitutions. All the countries compared in this chapter have codified constitutions. The conceptual boundaries of constitutions refer to Albert's view. See Richard Albert, "How Unwritten Constitutional Norms Change Written Constitutions," *Dublin University Law Journal* 38, no. 2 (2015): 1–26.

¹⁰ In this article, the form of states is unitary and the form of government is republic. Thus, this study refers to Kelsen's view which defines forms of states, forms of government, and systems of government. See Hans Kelsen, *General Theory of Law and State* (New York: Russell & Russell, 1971), 255.

II. ANALYSIS & DISCUSSION

2.1. Constitutional Court in Hungary, Poland, & Indonesia

2.1.1. Hungarian Constitutional Court (HCC)

The Hungarian constitutional amendment in 1989 has significantly influenced Hungary's constitutional system. The phase was the starting point of the transition from communism to democracy. Hungarian political reform made a breakthrough by adopting the multi-party system, strengthening the parliamentary system, and establishing the constitutional court. In addition, *judicial review* was institutionalized to review laws against the constitution.¹¹

In 1989, the *Hungarian Constitutional Court* (HCC) was established as Hungarian constitutional tribunal. Since its onset, it has played an important role under the constitution amended in 1989. Due to institutionalized “*judicial review*” in Hungary, the HCC has been vital in assessing the validity of laws made by the parliament (*house*) against the new constitution of 1989. The communist parliament chose the first five HCC justices in April 1989. However, the new parliament appointed the other five because of the 1990 election. In 1993, one of the judges, Herczegh J, left his office to join the International Court of Justice in The Hague, and the parliament had to choose two justices. In Hungary, appointing constitutional court justices was a complicated political process. How the first judges of HCC were chosen was not separated from political tension. In addition, it took seven years until all 11 judges were inaugurated in 1996 and 1997.¹²

Laszlo Solyom was the first Chief Justice of the HCC in the history of the Hungarian constitutional tribunal. During the transition, the HCC transformed political issues into legal ones in which final and binding decisions could resolve.¹³ In the history of how constitutional adjudication established in post-communist states, the HCC was the finest example, and it was publicly legitimate in its first

¹¹ Ferenc Hörcher and Thomas Lorman, eds., *A History of the Hungarian Constitution: Law, Government and Political Culture in Central Europe* (London and New York: I.B. Tauris, 2018), 23.

¹² Catherine Dupré, *Importing the Law in Post-Communist Transitions: The Hungarian Constitutional Court and the Right to Human Dignity* (Oxford and Portland, OR: Hart Publishing, 2003), 35.

¹³ László Sólyom, “The Hungarian Constitutional Court and Social Change,” *Yale Journal of International Law* 19 (1994): 223–237.

years. Kim Lane Scheppele says that the HCC was “*courtcracy*” or an institution evolving into a pillar of protecting citizens under the constitution, particularly in the early 90s. It played a prominent role in protecting the fundamental rights of citizens against unpopular policies in the parliament. In its years, the HCC was particularly aggressive. It invalidated laws due to their articles, which conflicted with the constitution despite several constitutional articles.¹⁴

According to Imre Voros, the institutionalization of constitutional courts in Central and Eastern Europe was a new trend in the transition from communism to democracy. He adds that the HCC has broad authority. It assesses the constitutionality of legal norms made by the parliament, central government, and local governments. In addition, it has the authority to preview acts approved by the parliament. It even has the authority to interpret the constitution to resolve constitutional disputes between state institutions and impeach the President.¹⁵

2.1.2. Constitutional Tribunal

Following the same pattern as other post-communist countries, the idea to establish the *Constitutional Tribunal* (CT) already emerged in 1981. Then, it began to have several authorities in 1989 as the totalitarian regime fell. Compared to Hungary, the political transition in Poland took a longer time. The amendment to the *Polish Constitution* was adopted in 1997, strengthening the role of the CT in constitutional adjudication in Poland. It follows the “*Kelsenian*” model, having the authority to assess the constitutionality of laws.¹⁶

It seems that the Polish CT shows that political transition often results in a constitutional court. Political configuration shifts eventually lead to the need for legal development due to social, political, and economic crises it causes.¹⁷ At first, the CT was designed to be a strong institution. Furthermore, its institutional

¹⁴ James T. Richardson, “Religion, Constitutional Courts, and Democracy in Former Communist Countries,” *The Annals of the American Academy of Political and Social Science* 603 (January 2006): 129–138.

¹⁵ Imre Vörös, “Contextuality and Universality: Constitutional Borrowing on the Global Stage—The Hungarian View,” *University of Pennsylvania Journal of Constitutional Law* 1, no. 3 (1999): 651–660.

¹⁶ George Sanford, *Democratic Government in Poland: Constitutional Politics since 1989* (New York: Palgrave Macmillan, 2002), 210.

¹⁷ Ruti Teitel, *Globalizing Transitional Justice: Contemporary Essays* (Oxford: Oxford University Press, 2014), 4–5.

and judicial independence was ensured by the constitution. It is separated from the Supreme Court to ensure the bifurcation of the Polish judiciary.¹⁸

In Poland, the CT has promoted judicial activism to expand human rights, particularly since the totalitarian system fell in 1989 and the need to build a democratic state under the rule of law. It was even encouraged to interpret standards of rights and freedom indirectly enshrined by the constitution and complete existing constitutional provisions according to new democratic values and systems. Almost like the HCC, the establishment of the CT in the early 90s was called “*courtcracy*”.¹⁹

According to Sadurski, after 18 years since the Polish constitution was amended (1997- 2015), under Marek Safjan’s leadership, the CT has played a vital and constructive role in protecting human rights. The CT has been the symbol of the history of Polish democracy by proving the judiciary can be an effective control instrument during and after the political transition. Several of its *landmark* decisions have contributed to legal development in Poland after the political transition. They made some communist criminal laws congruent with the development of democracy and the constitution. Second, the CT helped make the Polish legal system congruent with EU laws and standards by invalidating the ratification of the Treaty of Accession and the Treaty of Lisbon. Third, the CT made important and positive contributions toward democratic government by reaffirming governmental organization’s power limits, constitutional amendment, and presidential prerogatives.²⁰

2.1.3. Constitutional Court

After economic and political crises hit Indonesia in 1998, the constitution was amended gradually from 1999 to 2002, laying the foundation for the Constitutional Court. Simon Butt says that the institutionalization of the Constitutional Court was associated with how global democracy changed. During the political transition,

¹⁸ Mirosław Granat and Katarzyna Granat, *The Constitution of Poland: A Contextual Analysis* (New York: Hart Publishing, 2019), 131.

¹⁹ Allan R. Brewer-Carías, *Constitutional Courts as Positive Legislators: A Comparative Law Study* (New York: Cambridge University Press, 2011), 57.

²⁰ Wojciech Sadurski, *Poland’s Constitutional Breakdown* (Oxford: Oxford University Press, 2019), 60.

constitution framers learned the phenomenon of constitutional adjudication institutionalized by South Africa, South Korea, and other countries in the face of the democratization phase.²¹

In Indonesia, the existence of the Constitutional Court aligns with the extraordinary transition from Soeharto's strong regime to liberal democracy. From the legal point of view, the transition was completed through a series of constitutional amendments passed by the People Consultative Assembly from 1999 to 2002. Even though the third amendment was approved in 2001, the Constitutional Court was established two years later. The Constitutional Court was designed as the final interpreter of constitutional values and norms to address mega-political issues based on principles of constitutionalism. In reaching the consolidation stage, the Constitutional Court catalyzed democracy.²²

As noted by Hendrianto, three factors were responsible for the establishment of the Constitutional Court in Indonesia. First, in terms of history and politics, the Constitutional Court was established in response to the continuous demand from civil society for institutionalizing constitutional review. Second, the fall of the military government allowed democratic reform, including strengthening the role of judicial control through *judicial review*. Third, the theory of political diffusion indicates that the introduction of *judicial review* is a response to constitutional development in other states.²³

The establishment of the Constitutional Court in 2003 was in line with constitutionalism, where no laws may contradict the constitution. Thus, judicial review is necessary. If citizens, individuals, communities, or legal entities think that a law infringes on their constitutional rights, they can file a constitutional review of the law to the Constitutional Court.²⁴ Constitutional review by the Constitutional Court plays an important role in upholding the rule of law and

²¹ Simon Butt, *The Constitutional Court and Democracy in Indonesia* (Leiden: Brill Nijhoff, 2015), 18

²² Hongyi Chen and Andrew Harding, *Constitutional Courts in Asia: A Comparative Perspective* (Cambridge: Cambridge University Press, 2018), 12.

²³ Stefanus Hendrianto, *Law and Politics of Constitutional Courts: Indonesia and the Search for Judicial Heroes* (New York: Routledge, 2018), 41.

²⁴ Saldi Isra, "Peran Mahkamah Konstitusi dalam Penguatan Hak Asasi Manusia di Indonesia," *Jurnal Konstitusi* 11, no. 3 (September 2014): 410–427

protecting citizens' rights fully, including protecting them from policies made by majoritarianism in the parliament.²⁵

Appointed by the Indonesian House of Representatives, Jimly Asshiddiqie was the first Chief Justice of the Constitutional Court. Theunix Roux shows that in its first ten, the court was known to be strong and responsive under the leadership of Ashiddiqie and Mahfud M.D. Roux states that their leadership left enduring legacies to the establishment of the Constitutional Court. Under his leadership, Constitutional Court was accountable and moderate. Ashiddiqie introduced syllogism in the court's decisions, *dissenting opinions*, and conditional rulings to maintain a non-confrontational relationship between the judiciary and legislative branches.

During Mahfud M. D's era, the court promoted substantive justice in each ruling. It can be seen from the doctrine of Structured, Systematic, and Massive in electoral violations, rejection of the liberalization and privatization of education, and protection of the independence of the Corruption Eradication Commission from various interventions threatening its role and authority. According to Dixon, during the two eras, the court responsively prevented threats or dysfunctional democracy. Constitutional Court even played a vital role in resolving conflicts of interest between lawmakers and citizens. According to Dixon, the public put the greatest trust in the court in those eras.²⁶

2.2. Comparative Court Packing

2.2.1. Experience of Hungary Constitutional Court

Since 2010, Fidesz has been the majority with two-thirds of the total seats in the National Assembly. Unsurprisingly, the Orban government can significantly amend laws and the Constitution of Hungary. The Orban government implemented its first anti-democratic policy after the election on 5 July 2010, when it abolished the requirement of 4/5 of the lawmakers for amending the

²⁵ Tom Ginsburg, *Judicial Review in New Democracies: Constitutional Courts in Asian Cases* (Cambridge: Cambridge University Press, 2003), 21.

²⁶ Rosalind Dixon, "Responsive Judicial Review in Indonesia" (paper presented at Konferensi Nasional Hukum Tata Negara, "20 Tahun Mempertahankan Hasil Perubahan Undang-Undang Dasar," Malang, 1–3 December 2022), 3.

Hungarian constitution. As a consequence, removing the requirement drew criticism because, with just a 2/3 vote, Fidesz does not need the opposition to amend the constitution. Unsurprisingly, several scholars deem the Hungarian Constitution (Fundamental Law (FL)) of 2011 to be the “*Fidesz Law*”. Despite²⁷ Fidesz’s maneuvers under the Orban government are like “*window dressing*” policy.²⁸ The government seems to have reformed FL 2011 but has been weakened or experienced regression.

In addition to making highly elitist procedures for constitutional amendment, Fidesz attacked the HCC, which had played a very strategic role in overseeing government policies for more than twenty years. It is crucial to see the majority’s response under the Fidesz Party to the HCC after the fall of communism in Central and Eastern Europe. Bugarcic reveals several ways to weaken the HCC. First, the Fidesz Party changed the rules on appointing HCC judges. Second, it changed the composition of judges by increasing the number of constitutional judges. Third, it limited the role of the HCC by amending the law on it.²⁹

In terms of procedures for appointing constitutional judges, the parliament under the Fidesz Party amended the constitution, allowing the winning party to propose nominated candidates and giving two-thirds of its votes to choose HCC judges. Thus, Fidesz can appoint judges without multi-party support. Regarding the composition of judges, the Fidesz Party changed the rules by increasing the number of constitutional judges from eleven to fifteen. It allowed the ruling party to appoint new judges directly. In addition, the Chief Justice and Deputy Chief Justice of the HCC are now voted by the majority in the parliament instead of the internal mechanism of the HCC.³⁰

Then, the role of the HCC is more limited. The amendment to the HCC Law has restricted constitutional review of laws on taxes and state budget if

²⁷ Stefano Fella, *Hungary: Viktor Orban’s Government and European Reaction*, Commons Library Research Briefing (London: House of Commons Library, 2022), 10.

²⁸ See Dixon and Landau, *Abusive Constitutional Borrowing*, 36.

²⁹ Bojan Bugarcic, “A Crisis of Constitutional Democracy in Post-Communist Europe: Lands In-Between Democracy and Authoritarianism,” *International Journal of Constitutional Law* 13, no. 1 (January 2015): 219–245.

³⁰ Miklós Bánkúti, Gábor Halmai, and Kim Lane Scheppele, “Hungary’s Illiberal Turn: Disabling the Constitution,” *Journal of Democracy* 23, no. 3 (July 2012): 138–146.

the petition is directly related to the right to life, the dignity of citizens, and the protection of personal data. It shows how the parliament fought back after the HCC frequently invalidated taxes and state budget laws. Interestingly, after limiting HCC's authority, the Hungarian parliament unilaterally claimed that all HCC decisions made before the constitutional amendment did not apply to the amended constitution (*Fundamental Law of 2011*).³¹

In addition, the Fidesz Party undermined judicial independence by dismissing judges by changing their retirement age. Consequently, several judges were laid off. As noted by Kosar, until the end of 2012, 277 out of 2,996 judges were pensioned off. Even Andras Baka (the Chief Justice of the *Hungarian Supreme Court*) was dismissed for frequently criticizing the Orban regime's judicial reform.³²

2.2.2. Experience of Constitutional Tribunal Poland

After Andrejz Duda won the presidential election 2015, Polish democracy experienced regression. After holding office for two terms, President Duda was re-elected in the 2020 election after being proposed by the same party supporting him in the first term, namely the Law and Justice Party (*PiS*). When the party won the 2015 election, a constitutional amendment was high on President Duda's agenda. However, the formal procedures for a constitutional amendment have very definitive rules, making it impossible to amend the Polish constitution.³³

After the attempt to amend the constitution failed, the CT experienced distortion as the majority of parties had tried to change the composition of Polish constitutional judges by-law amendment. The practice in Poland is almost like the "midnight appointment" carried out by Quincy Adams at the end of his term. President Adams had appointed Marshall as the Chief Justice of the Supreme Court, several judges, and ambassadors before Thomas Jefferson succeeded him the next morning. As Adams appointed them at midnight, James

³¹ Krisztina Juhász, "Abusive Constitutionalism in Hungary," *Politics in Central Europe* 18, no. 4 (2022): 573–601.

³² David Kosar and Katarina Šipulová, "The Strasbourg Court Meets Abusive Constitutionalism: Baka v. Hungary and the Rule of Law," *Hague Journal on the Rule of Law* 10, no. 1 (October 2018): 83–110.

³³ Aleksandra Kustra-Rogatka, "The Hypocrisy of Authoritarian Populism in Poland: Between the Facade Rhetoric of Political Constitutionalism and the Actual Abuse of Apex Courts," *European Constitutional Law Review* 19, no. 1 (March 2023): 25–58.

Madison, Jefferson's Secretary of State, did not receive the documents.³⁴ Hence, Marbury, Robert Townsen, and William Harper were not inaugurated under Jefferson's presidency.³⁵

Despite the difference, the political crisis in Poland arose at the end of 2015 when the parliament chose five constitutional judges because their terms were about to expire. Under the previous CT law, a candidate for a judge was proposed three months before the term of office ended. Five candidates were proposed and appointed by the old parliament under the major party (*Governing Party*) as the parliamentary election was held 30 days after the presidential election. Five judges were elected by the parliament, known as "*October Judges*."³⁶

After the parliamentary election, the Law and Justice Party (*PiS*) began to dominate the parliament, which rejected the appointment of those five constitutional judges. In addition, the President inaugurated them, although the old parliament had appointed in October. To strengthen its legitimacy, the parliament amended the CT Law in 2016 to reorganize the procedures for appointing judges by the parliament (*sejm*). Under the transitional provisions of the new CT law, constitutional judges whose terms expired should be proposed, selected, and appointed no later than three months after the law was enacted. Therefore, the winning party (*PiS*) appointed five constitutional judges to delegitimize the old candidates.³⁷

One of the appointed judges is Julia Przyłębska, who was chosen by (*PiS*) as a constitutional judge and controversially appointed as the Chief Justice of the CT by the President of Poland. The leadership of Julia Przyłębska is the beginning of CT's dark days. She was openly accused of illegally manipulating the composition of judges in strategic cases to decide in line with the government's political thinking, for instance, constitutional review of the pension system for

³⁴ Wolfgang Hoffmann-Riem, "Two Hundred Years of Marbury v. Madison: The Struggle for Judicial Review of Constitutional Questions in the United States and Europe," *German Law Journal* 5, no. 6 (June 2004): 685–701

³⁵ See also William W. Van Alstyne, "A Critical Guide to Marbury v. Madison," *Duke Law Journal* 1969, no. 1 (January 1969): 1–45.

³⁶ David Parra Gómez, "Crisis of the Rule of Law in Europe: The Cases of Hungary, Poland and Spain," *Athens Journal of Law* 7, no. 3 (July 2021): 379–398.

³⁷ Mirosław Wyrzykowski, "Experiencing the Unimaginable: The Collapse of the Rule of Law in Poland," *Hague Journal on the Rule of Law* 11, no. 2 (November 2019): 417–422.

citizens working in state security institutions. It became a very populist issue as the government tightened control over pension savings and ended state-guaranteed private investment schemes. Przyłębska, the Chief Justice of the CT, made six changes to the composition of judges settling the case.³⁸

It was criticized by the European Commission for the political and legal crises after the 2015 election. The Duda government, according to the commission, has undermined the CT and disregarded European standards on judicial independence. It should be emphasized that such a situation resulted in a significant decline in public trust in the constitutional court (CT).³⁹

2.2.3. Experience of Indonesian Constitutional Court

Interestingly, after the rule of law has been weakened, the independence of constitutional judges is always undermined. Indonesia, Hungary, and Poland have faced similar situations. The Constitutional Court is the primary victim of the rise of *illiberal democracy*. There are stages of undermining the independence of the Constitutional Court over the last five years. The first stage is the third amendment to the Constitutional Court Law. The second is the dismissal of Justice Aswanto. And the third is the proposal for the fourth amendment to the Constitutional Court Law.

In early 2020, the government developed a new blueprint to change the requirements and tenure of constitutional judges. The government's legal policy *shifted* or was in transition. After strengthening the institutional independence of the court, it attempted to maintain and legitimize the maximum age of 70 for constitutional judges and to maintain the leadership composition of Anwar Usman as the Chief Justice of the Constitutional Court.⁴⁰ Here are the impacts of the amendment to the Constitutional Court Law on the tenure of constitutional judges.

³⁸ Adam Ploszka, "It Never Rains but It Pours. The Polish Constitutional Tribunal Declares the European Convention on Human Rights Unconstitutional," *Hague Journal on the Rule of Law* 15 (June 2022): 51–74.

³⁹ Laurent Pech et al., "Poland's Rule of Law Breakdown: A Five-Year Assessment of EU's (In)Action," *Hague Journal on the Rule of Law* 13 (March 2021): 1–43.

⁴⁰ Idul Rishan, "Doubting the Impartiality: Constitutional Court Judges and Conflict of Interest," *Jurnal Jurisprudence* 12, no. 1 (2022): 92–105.

Table 2: Controversial Clauses in the Third Amendment to Constitutional Court Law

Issue	Before the Amendment to Constitutional Court Law		After the Amendment to Constitutional Court Law	
Minimum Age Limit	Article 16 point c	Shall be of the age of at least 40 when appointed	Article 15 paragraph (2) point d	Shall be of the age of at least 55
Term of Office for Justices	Article 22	5 years and can be reappointed for another term	Article 23 paragraph (1) point c	70 years
Term of Office for the Chief Justice and Deputy Chief Justice	Article 4 paragraphs (3) and (3)a	2 years and 6 months and can be reelected for the same office for 1 term	Article 4 paragraphs (3) and (3)a	Five years since appointed as the Chief Justice and Deputy Chief Justice
Transitional Provisions	-	-	Article 87 point a	The chief justice and deputy chief justice serve for a 5-year term based on the provisions of the law.
	-	-	Article 87 point b	the constitutional justices currently serving shall complete their term of office until the age of 70 as long as the term does not exceed 15 years

Source: reviewed by the author

In 2022, House of Representatives was arrogant when dismissing Justice Aswanto from the Constitutional Court. Theoretically speaking, the House of Representatives made *rude intervention* in judicial independence. The tactic of law politicization was designed to undermine the court's independence and make the Constitutional Court judges unable to work well. Justice Aswanto was deemed to be frequently against laws made by the House of Representatives. Thus, the House of Representatives replaced Guntur Hamzah. Instead of being legitimate, it infringed on the independence of the judiciary enshrined in the constitution (UUDN). According to Power and Warburton, this phenomenon is *lawfare*.⁴¹

⁴¹ Thomas Power and Eve Warburton, "Kemunduran Demokrasi Indonesia [The Decline of Indonesian Democracy]," in *Demokrasi di Indonesia dari Stagnasi Ke Regresi [Democracy in Indonesia: From Stagnation to Regression]*, ed. Thomas Power and Eve Warburton (Jakarta: Public Virtue and Kurawal Foundation, 2021), xxii.

Additionally, if the *draft* of the Fourth Amendment to the Constitutional Court Law is approved, political parties will have a high chance to evaluate the tenure of constitutional judges. By doing so every five years, they can influence the judges as public officials. The evaluation carried out by the proposing institution undermines the independence of the Constitutional Court as a court.

The logic of *checks and balances* is not relevant in this context. Instead, it is replaced by *striking the balances* or inequality between political intervention and the independence of the judiciary. The evaluation processes every five years will subordinate the independence and impartiality of constitutional judges, particularly in hearing and deciding cases. Through the evaluation process, constitutional judges can be dismissed not due to ethical reasons but because differences in the scientific preferences of judges contradicting the political preferences of political parties or the government.⁴²

2.3. Comparative Analysis

In Hungary, Poland, and Indonesia, constitutional courts have been undermined by court packing. The emergence of a populist leader is the main contributor to *constitutional* court packing. In this article, populism refers to support given by the majority of political parties in the parliament to the head of government (*chief executive*). Landau says that democratic countries adopting the principle of constitutionalism at first tended to be weak under populist leaders. With strong support, populist leaders tend to make anti-democratic policies (*illiberal democracy*).⁴³

By eliminating the opposition or controlling the parliament, they make state policies at will. Legal rules are established to serve the state and those in power without adhering to the principles of constitutionalism.⁴⁴ In Hungary, Poland, and Indonesia, each of the regimes are supported by the majority in

⁴² Idul Rishan, "Robohnya Independensi Mahkamah Konstitusi: Pembonsaian dan Alternatif Pemulihannya [The Collapse of the Constitutional Court's Independence: Stunting and Alternatives for Its Restoration]", a paper in *Konferensi Hukum Tata Negara Ke-7, 1-3 December 2022*, Malang, p. 6.

⁴³ David Landau, "Populist Constitutions," *The University of Chicago Law Review* 85, no. 2 (March 2018): 521-544.

⁴⁴ Kim Lane Scheppele, "Autocratic Legalism," *The University of Chicago Law Review* 85, no. 2 (March 2018): 549.

the parliament. Viktor Orbán is supported by Fidesz, Andrzej Duda by the *PiS*, and Joko Widodo by the PDIP and its coalition.

Instead of strengthening constitutionalism, the Hungarian constitution has been amended under the populist power to legitimize the regime. The amendment has increased the number of HCC judges from 11 to 15. Hungary did it perfectly by changing the constitutional amendment rules so that court packing was easily done through the constitution (FL).⁴⁵ To make matters worse, a constitutional amendment has also restricted the HCC's jurisdiction over judicial review. Hungary is the only country where court packing and crubbing have been done simultaneously.

In Polandia, court packing was not done through amending the constitution. Considering the Polish bicameralism, making political decisions is far more difficult. For this reason, court packing was only done through law amendment was court packing in Indonesia. However, it was done during Joko Widodo's presidency, not after the election results were confirmed. In Indonesia, judicial independence has been undermined by amending the Law on the Constitutional Court and removing its judge during his term of office.

This study views that court-packing is often done in two moments. The first is the beginning of a government after the announcement of election results. If the winning party has different political preferences from constitutional judges, court packing is carried out by rearranging the number of judges, terms of office, retirement age, or judicial selection procedures. It aims to appoint loyal judges so that the constitutional court and lawmakers cooperate more. The second is the midterm of governments. Through this moment, regimes have two aims. They legitimize government policies and ensure that all regulations on implementing elections align with the interests of those in power, including potential conflicts that may arise after election results are announced.

Kosar shows that regimes more frequently used court packing to appoint loyal judges or those having the same political preferences as the government.

⁴⁵ James E. Moliterno and Peter Čuross, "Recent Attacks on Judicial Independence: The Vulgar, the Systemic, and the Insidious," *German Law Journal* 22 (2021): 1159–1191.

Thus, they could control judicial decision-making to legitimize themselves.⁴⁶ This study agrees with Kosar. Because through the politicization of office, the independence of constitutional judges becomes weak and results in judges not being able to act impartially in cases involving the interests of power. This context is also in line with the results of the study of Ginsburg and Mustafa, governments often use the judiciary to counter many dysfunctions disrupting their regimes. The judiciary helps exert social control, attract capital, maintain bureaucratic discipline, adopt unpopular policies, and legitimize those regimes.⁴⁷ The court packing is compared in the table below:

Table 3: Comparative Court Packing

Indicators	HCC	CT	CC
Changing the composition of judges	✓	✓	-
Dismissing judges with no ethical and legal process	-	-	✓
Changing terms of office	-	-	✓
Politicizing judicial appointment	✓	✓	✓

Source: reviewed by the author

Table 4: Court Packing in Selected Countries

The Cause	The emergence of populist leader
	Elimination of the opposition movement
Subject	Political Party
	Government
Procedure	Abusive Law making/amendment
	Abusive Constitutional making/amendment
	Abusive policy making
Moment	the early of a government after the announcement of election results
	the midterm of governments before the election

⁴⁶ David Kosar and Katarína Šipulová, "Comparative Court Packing," *International Journal of Constitutional Law* 21, no. 1 (January 2023): 80–126.

⁴⁷ Tom Ginsburg and Tamir Moustafa, *Rule by Law: The Politics of Courts in Authoritarian Regimes* (Cambridge: Cambridge University Press, 2008), 21.

Goals	frequently used by regimes to appoint loyal judges or those having the same political preferences as the government
	Undermining judicial independence

Source: reviewed by the author

This comparison also shows that protecting judges under the constitution cannot always preserve judicial independence. To some extent, the protection of judges in the constitution can also be undermined if the constitution is flexible and does not have rigid limits to its amendment. It can be seen in court packing in Hungary. Even though the constitution protects judicial independence, court packing can be done by amending the supreme law of the land. This article reveals the strong correlation between political parties' role and constitutional courts' independence. The comparative study shows the high risk of court packing due to the influence of political parties over constitutional court justice appointments.

III. CONCLUSIONS

Based on the discussion and analysis, the constitutional courts adopted by Hungary, Poland, and Indonesia has experienced regression after twenty years following the democratic transition. The three countries show the same symptoms. There is a significant correlation between the declining quality of democracy and the rule of law and the independence of the constitutional court. The emergence of populist leaders born through democratic procedures tends to place the constitutional court as subordinate to government power. This effort was carried out using the court-packing technique by reorganizing the position arrangements for constitutional judges, starting from changing the composition of the number of judges, dismissing judges without legal and ethical processes, changing the term of office to politicizing the appointment of constitutional judges.

The results also show that the independence of judges is weakened through court-packing carried out by abusive procedures such as changes to the

constitution and the laws or through government policies. The governments use the momentum with the aim of placing judges who are loyal or at least have the same political preferences as those in power to undermine the independence of judges. Therefore, they are unable to act impartially in examining and settling cases, especially those related to the interests of power. Further research needs to formulate limits on the role of political parties in the constitutional court so that the level of exposure to the independence of the constitutional court can be minimized.

BIBLIOGRAPHY

Act of 2011 on the Constitutional Court of Hungary.

Act of 25 June 2015 on the Constitutional Tribunal of Poland.

Albert, Richard. "How Unwritten Constitutional Norms Change Written Constitutions." *Dublin University Law Journal* 38, no. 2 (2015).

Bánkuti, Miklós, Gábor Halmai, and Kim Lane Scheppele. "Hungary's Illiberal Turn: Disabling the Constitution." *Journal of Democracy* 23, no. 3 (July 2012).

Bugaric, Bojan. "A Crisis of Constitutional Democracy in Post-Communist Europe: Lands In-Between Democracy and Authoritarianism." *International Journal of Constitutional Law* 13, no. 1 (January 2015).

Butt, Simon. *The Constitutional Court and Democracy in Indonesia*. Leiden: Brill Nijhoff, 2015.

Carias, Allan R. Brewer. *Constitutional Courts as Positive Legislators: A Comparative Law Study*. New York: Cambridge University Press, 2011.

Chen, Hongyi, and Andrew Harding. *Constitutional Courts in Asia: A Comparative Perspective*. United Kingdom: Cambridge University Press, 2018.

Constitution of the Republic of Indonesia.

Dixon, Rosalind. "Responsive Judicial Review in Indonesia." Paper presented at *Konferensi Nasional Hukum Tata Negara, 20 Tahun Mempertahankan Hasil Perubahan Undang-Undang Dasar*, Malang, 1–3 December 2022.

- Dixon, Rosalind, and David Landau. *Abusive Constitutional Borrowing: Legal Globalization and the Subversion of Liberal Democracy*. UK: Oxford University Press, 2021.
- Dupre, Catherine. *Importing the Law in Post-Communist Transitions: The Hungarian Constitutional Court and the Right to Human Dignity*. Oxford and Portland, OR: Hart Publishing, 2003.
- Fella, Stefano. *Hungary: Viktor Orban's Government and European Reaction*. Commons Library Research Briefing, 6 April 2022.
- Ginsburg, Tom. *Judicial Review in New Democracies: Constitutional Courts in Asian Case*. Cambridge: Cambridge University Press, 2003.
- Ginsburg, Tom, and Tamir Moustafa. *Rule by Law: The Politics of Courts in Authoritarian Regimes*. UK: Cambridge University Press, 2008.
- Gómez, David Parra. "Crisis of the Rule of Law in Europe: The Cases of Hungary, Poland and Spain." *Athens Journal of Law* 7, no. 3 (July 2021).
- Granat, Mirosław, and Katarzyna Granat. *The Constitution of Poland: A Contextual Analysis*. New York: Hart Publishing, 2019.
- Hendrianto, Stefanus. *Law and Politics of Constitutional Courts: Indonesia and the Search for Judicial Heroes*. New York: Routledge, 2018.
- Hörcher, Ferenc, and Thomas Lorman, eds. *A History of the Hungarian Constitution: Law, Government and Political Culture in Central Europe*. London–New York: I.B. Tauris, 2018.
- Hoffmann-Riem, Wolfgang. "Two Hundred Years of *Marbury v. Madison*: The Struggle for Judicial Review of Constitutional Questions in the United States and Europe." *German Law Journal* 5, no. 6 (June 2004).
- Huq, Aziz, and Tom Ginsburg. "How to Lose a Constitutional Democracy." *UCLA Law Review* 65, no. 1 (March 2018).
- Hungarian Constitution (Fundamental Law of 2011).
- Imre, Voros. "Contextuality and Universality: Constitutional Borrowing on the Global Stages – The Hungarian View." *Pennsylvania Journal of Constitutional Law* 1, no. 3 (1999).

- Isra, Saldi. "Peran Mahkamah Konstitusi dalam Penguatan Hak Asasi Manusia di Indonesia." *Jurnal Konstitusi* 11, no. 3 (September 2014).
- James T. Richardson. "Religion, Constitutional Courts, and Democracy in Former Communist Countries." *The Annals of the American Academy of Political and Social Science* 603 (January 2006).
- Juhász, Krisztina. "Abusive Constitutionalism in Hungary." *Politics in Central Europe* 18, no. 4 (2022).
- Kelsen, Hans. *General Theory of Law and State*. New York: Russell & Russell, 1971.
- Kosar, David, and Katarina Sipulova. "Comparative Court Packing." *International Journal of Constitutional Law* 21, no. 1 (January 2023).
- Kosar, David, and Katarina Sipulova. "The Strasbourg Court Meets Abusive Constitutionalism: Baka v. Hungary and the Rule of Law." *Hague Journal on the Rule of Law* 10, no. 1 (October 2018).
- Kustra Rogatka, Aleksandra. "The Hypocrisy of Authoritarian Populism in Poland: Between the Facade Rhetoric of Political Constitutionalism and the Actual Abuse of Apex Courts." *European Constitutional Law Review* 19, no. 1 (March 2023).
- Landau, David. "Populist Constitution." *The University of Chicago Law Review* 85, no. 2 (March 2018).
- Laszlo, Solyom. "The Hungarian Constitutional Court and Social Change." *Yale Journal of International Law* 19 (1994).
- Law Number 24 of 2003 on the Constitutional Court.
- Law Number 7 of 2020 on the Third Amendment to Law Number 24 of 2003 on the Constitutional Court.
- Mochtar, Zainal Arifin, and Idul Rishan. "Autocratic Legalism: The Making of Indonesian Omnibus Law." *Yustisia Jurnal Hukum* 11, no. 1 (April 2022).
- Moliterno, James E., and Peter Čuroš. "Recent Attacks on Judicial Independence: The Vulgar, the Systemic, and the Insidious." *German Law Journal* 22 (2021).

- Pech, Laurent, et al. "Poland's Rule of Law Breakdown: A Five-Year Assessment of EU's (In)Action." *Hague Journal on the Rule of Law* 13 (March 2021).
- Ploszka, Adam. "It Never Rains but It Pours: The Polish Constitutional Tribunal Declares the European Convention on Human Rights Unconstitutional." *Hague Journal on the Rule of Law* 15 (June 2022).
- Polish Constitution of 1997.
- Power, Thomas, and Eve Warburton, eds. *Demokrasi di Indonesia dari Stagnasi Ke Regresi*. Jakarta: Public Virtue and Kurawal Foundation, 2021.
- Rishan, Idul, et al. "Amendment to Term of Office of Constitutional Court Judges in Indonesia: Reasons, Implications, and Improvement." *Varia Justicia* 18, no. 2 (2022).
- Rishan, Idul. "Doubting the Impartiality: Constitutional Court Judges and Conflict of Interest." *Jurnal Jurisprudence* 12, no. 1 (2022).
- Rishan, Idul. "Robohnya Independensi Mahkamah Konstitusi: Pembonsaian dan Alternatif Pemulihannya [The Collapse of the Constitutional Court's Independence: Stunting and Alternatives for Its Restoration]." Paper presented at *Konferensi Hukum Tata Negara Ke-7*, Malang, 1–3 December 2022.
- Roux, Theunix. "Indonesia's Judicial Review Regime in Comparative Perspective." *Constitutional Review* 4, no. 2 (December 2018).
- Sadurski, Wojciech. *Poland's Constitutional Breakdown*. United Kingdom: Oxford University Press, 2019.
- Sadurski, Wojciech. *Rights Before Courts: A Study of Constitutional Courts in Postcommunist States of Central and Eastern Europe*. The Netherlands: Springer, 2005.
- Sadurski, Wojciech. *How Democracy Dies (in Poland): A Case Study of Anti-Constitutional Populist Backsliding*. Legal Studies Research Paper No. 18/01, Sydney Law School, January 2018.

- Sanford, George. *Democratic Government in Poland: Constitutional Politics since 1989*. New York: Palgrave Macmillan, 2002.
- Scheppele, Kim Lane. "Autocratic Legalism." *The University of Chicago Law Review* 85, no. 2 (March 2018).
- Scheppele, Kim Lane. "How Viktor Orbán Wins." *Journal of Democracy* 33, no. 3 (July 2022).
- Teitel, Ruti. *Globalizing Transitional Justice: Contemporary Essays*. Oxford: Oxford University Press, 2014.
- Tushnet, Mark. "The Possibilities of Comparative Constitutional Law." *The Yale Law Journal* 108, no. 6 (April 1999).
- Van Alstyne, William W. "A Critical Guide to *Marbury v. Madison*." *Duke Law Journal* 1969, no. 1 (January 1969).
- Wyrzykowski, Miroslav. "Experiencing the Unimaginable: The Collapse of the Rule of Law in Poland." *Hague Journal on the Rule of Law* 11, no. 2 (November 2019).