Fixing the Hungarian Bench

Don’t Imitate – Innovate!

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Péter Magyar swept away Fidesz and won a constitutional majority. This brought a 16-year-long rule of Viktor Orbán to an end. Yet Orbán packed the courts with his people in the meantime. The million-dollar question is: should Magyar resort to another round of court-packing? This post advances a three-fold argument. First, legitimate court-packing, even if it reacts to previous court-packing, must have a just cause and must be proportional. Second, the proportionality of such reactive court-packing should in general respect the “paired effect”, although a stronger response may sometimes be justified, among other things, by the cumulative impact of prior illegitimate court-packing and other court-curbing reforms. Finally, Magyar should not aim just for returning to the status quo before Orbán’s court-packing. To build a resilient judiciary that enjoys the trust of the Hungarian people he must innovate. This inevitably requires addressing the shortcomings of the Hungarian judiciary in the pre-Orbán era[1] and considering other reforms than reactive court-packing, For space constraints, this post focuses primarily on the Chief Justice of the Supreme Court (Kúria) and the Kúria’s judges.

What Orbán Did to the Supreme Court?

Packing the Hungarian Supreme Court took a different twist than at the Constitutional Court. This time Orbán’s regime chose a swapping strategy. His 2012 reform reduced the mandatory retirement age (MRA) of Hungarian judges from 70 to 62 years. This step allowed Orbán to free 274 judicial positions, mostly at higher courts. The Supreme Court was hit particularly hard as the most senior judges sit there. This allowed Orbán to replace many of the suddenly retired judges with his own candidates. The Court of Justice of the European Union eventually found this reform in violation of EU law, but its judgment arrived too late. Some of the forcibly retired judges were allowed to return to their positions, but the harm was already done. Later, the MRA for judges was set at the age of 65.

In addition to court packing, Orbán also tinkered with the tail end of the career of Hungarian judges, as Hungary’s 14th Constitutional Amendment permits judges, on an individual basis, to remain on the bench until age 70, instead of facing the MRA at 65. This discretionary extension of tenure can easily be abused and qualifies as court-hoarding. Moreover, Chief Justices Peter Darák and András Varga filled many vacancies at the Supreme Court not through public calls and ordinary appointment processes, but by seconding judges from lower courts to do service at the top court. Chief Justice András Varga was also accused of rigging permanent appointments to the Supreme Court.

Finally, Orbán also ensured that leadership of the Supreme Court would be loyal to his regime. He changed the eligibility rules for the chief justice of the Supreme Court to make sure that his candidate, András Varga, was elected in 2020. Once Varga became a Chief Justice, Orbán’s regime increased his powers. As a result, Chief Justice Varga has a major say on key issues such as selecting judges as well as the vice-presidents of the Supreme Court, and can influence the interpretation of law by assigning judges to the grand panels and through a new unification complaint proce-

[1] Katarzyna Karolina Krzyżanowska just defended a wonderful PhD thesis at EUI on “Mimetic Rivalry” that shows that many empirical claims made by Kaczyński about the Polish judiciary in the early 2010s were actually grounded in reality and suggestions to reform the judiciary had a solid social support. To my knowledge, no such complex work exists on the Hungarian judiciary, but the problems of the pre-Orbán judiciary are well known.

dure. To further cement the role of Chief Justice Varga, Orbán ensured that the MRA is not applicable to the chief justice. Earlier on, Orbán also prolonged the term of a chief justice from 6 to 9 years. As a result of these measures, taken cumulatively, the current Chief Justice Varga can remain in position with full powers for an indefinite period by relying on a one-third parliamentary minority. The rationale of these reforms was clear – to provide insurance for Orbán against a future electoral loss and to rob a new electoral winner of a legitimate appointment opportunity. Orbán adopted similar tailored laws to pave the way of András Patyi to the position of Vice President of Administrative Affairs of the Kúria and then expand his powers.

What Should Be Done Now?

Now we can move to the potential solutions. Prime Minister Péter Magyar called on Chief Justice András Varga to resign. The proposal to remove him is also backed by scholars who argue that Magyar can remove the central perpetrators from the Hungarian judiciary and criminally punish those Hungarian judges who "seriously and intentionally" violate EU values. Some scholars disagree with Magyar though and suggest that the proper way to remove them is to implement ECtHR's *Baka* judgment and give an independent judicial body the right to review the political decision on the removal of a chief justice. Kim Scheppele suggested that Baka himself should be reinstated to the office of the chief justice.

Some of those solutions are very sweeping and go well beyond reactive court-packing. Magyar and many scholars view the 2026 parliamentary elections as a regime change that gives them carte blanche to reshape the judiciary. To be sure, it is an important constitutional moment for Hungary. However, in my opinion, the defeat of Orbán's regime is nowhere close to democratic transitions from totalitarian (such as post-communist Europe after 1989) and authoritarian (such as post-Salazar Portugal) regimes where judicial purges were limited anyways. Most CEE countries have witnessed democratic careening rather than a straightforward path since 1989. The danger of cyclical court-packing and tit-for-tat judicial reforms are thus high. Other solutions run into practical problems as András Baka's age is beyond the current MRA and his reinstatement would require adopting an ad hominem law.

Hence, I believe that the discussion on responding to court-packing should begin by determining the paired effect – that is, numerically counterbalancing out the results of the past illegitimate court-packing. Regarding the leadership of the Supreme Court, the actions and speeches of Chief Justice Varga provide potentially good grounds for removing him, as suggested by Erika Farkas. However, the Strasbourg Court's *Baka* judgment, paradoxically, complicates this move as it requires judicial review of a political decision to remove a chief justice by an independent judicial body. Such independent judicial body is difficult to find in Hungary now though. But recall that Orbán's regime also prolonged the term of a chief justice from 6 to 9 years and ensured that the MRA is not applicable to a chief justice. Undoing these ad hominem laws would do the job! If Magyar restores the original 6-year term, which applied when chief justice Baka was removed, and abolishes the ad hominem law which allows the chief justice to stay on the bench indefinitely (as the only judge in the Hungarian judicial system), Varga's term would finish in October 2026. And it would be in line with the *Baka* judgment that chastised personalized legislation. The impeachment or disciplinary trial can take place afterwards, if necessary. Similar actions could be taken against Vice President of the Supreme Court András Patyi.

The situation regarding other judges on the Supreme Court is more difficult. There is no clear smoking gun such as the participation of Polish judges in the brand new Disciplinary Chamber and the Extraordinary Chamber at the Polish Supreme Court (I propose to label this group as "black" judges even though the Venice Commission itself does not use this label, since the Venice Commission agrees that they can be removed from the judicial office immediately due to gravity of the violations of the independence of the judiciary – see §§ 58-60 of the Venice Commission's Opinion). Moreover, many Supreme Court judges forced to retire in the early 2010s due to a sudden lowering of MRA cannot be restored to the

judicial office due to their age. Bringing them back would require selective judicial overstay beyond the MRA for a transitional period, which raises serious rule of law concerns and only provides a short-term solution anyways. Moreover, it would replicate Orbán's strategy mentioned above – in fact, the discretionary extension of tenure that permits judges, on an individual basis, to remain on the bench until age 70 should be abolished quickly.

Then there is an issue with problematic external appointments and promotions to the Supreme Court made under chief justice Varga's leadership. The most reasonable solution is to transplant the Venice Commission's opinion on the so-called "yellow" and "red" judges in Poland and adjust it to the Hungarian specifics. "Yellow" judges in the Hungarian context would concern judges promoted between 2010 and 2026, while "red" judges would be persons who entered the judiciary from other legal professions between 2010 and 2026. Regarding both groups, the Venice Commission held that they should remain in office until the new competition is announced, in which they can take part. If they do not succeed in the new competition, "yellow" judges return to their previous positions within the judiciary, while "red" judges can be removed. Given the long 16-year rule of Orbán's regime, this solution will be difficult to implement across the whole Hungarian judiciary. But it makes sense to conduct such analysis at the Supreme Court. If Magyar's government wants to reinforce the legitimacy of such vetting, it can also involve foreign judges in this exercise, because they are the "impartial thirds" and citizens in polarized societies tend to trust them more. Finally, it is up to Hungarian scholars to identify "black judges" at the Supreme Court (beyond its leadership) that did the "dirty job" and committed such grave violations of judicial independence as to justify their immediate removal.

That said, court-packing, even if legitimate, entails opportunity costs (at 9:40 min) as other reforms might be more important. Even FDR learned this lesson the hard way.

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However, a careful restoring the status quo is not the only possible solution. Magyar's government should not only imitate Orbán's reforms in reverse order, but also innovate and think outside the box. It should ensure transparency in judicial appointments and promotion and introduce random case allocation. It can revise the powers of the chief justice of the Supreme Court to make this position less interesting for politicians' attention and less powerful vis-à-vis rank-and-file judges, as some scholars proposed a long time ago. It may introduce a rotation system of selecting a chief justice or entrench a seniority convention to ensure predictability and transparency in selecting leaders of the Supreme Court. It should get rid of the existing patronage system and abolish the informal carrots and sticks that allows politicians to "manage" courts. Instead of merely restoring the judge-dominated National Judicial Council, it should consider reconceptualizing it as a fourth-branch institution and balance judicial independence with other values such as accountability, efficiency and democratic legitimacy. It can also create public integrity councils and involve civil society in selecting and promoting judges. The momentum is there. To paraphrase Havel, this would give "power to the powerless" – to the people and the civil society. Magyar can even go ahead with the judicial reform that Orbán did not implement in the end – creating a Supreme Administrative Court and a new system of administrative courts. While Orbán's (unimplemented) 2018 reform establishing a new separate system of administrative courts, headed by a new Supreme Administrative Court, was rightly criticized by Hungarian and foreign scholars, as well as the Venice Commission, the situation nowadays is different in many ways.

In sum, Magyar should think beyond punishing Orbán's allies on the bench and beyond replacing "Fidesz" judges with "Tisza" judges (or just restoring pre-Fidesz judges). Returning to the status quo before court-packing works only if the judiciary before the initial illegitimate court-packing worked well. That

was *not* the case in Hungary.[2] Therefore, it is necessary to foster mental judicial independence *and* reorganize the judicial system to regain public trust. This might require innovative solutions that go beyond undoing Orbán's judicial reforms. Only then will Magyar be able to transform the Hungarian courts into a judiciary that will perform better, become more resilient and enjoy high public trust. In the end only the people can save the courts.

The stakes are high. Magyar might need to play constitutional hardball, but he should play it wisely and assess it against the anti-hardball measures. If he fails, cyclical court-packing and tit-for-tat reforms might ensue.

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[2] See Attila Vincze, "Nach der Wahl in Ungarn: Justiz vor dem Umbruch?", Deutsche Richterzeitung (forthcoming 6/26).