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RESEARCH ARTICLE

Court-packing and democratic decay: A necessary relationship?

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Abstract

A growing body of literature on the role of courts in democratic backsliding claims that court-packing weakens liberal democracy. However, this is not necessarily the case. The goals of the actors who produce court-packing help to explain why the co-optation of the judiciary can have a substantial negative effect on liberal democracy in some (although not all) cases. In this respect, we distinguish two types of court-packing. First, *policy-driven court-packing* occurs when politicians manipulate the composition of courts in order to assure a quick implementation of policies. Although this tends to negatively affect judicial independence, it is not per se a first step towards regime change. Second, *regime-driven court-packing* happens when politicians alter the composition of the courts with the goal of eroding democracy. In this case, court-packing's negative effect on judicial independence has a systemic negative effect on different dimensions of liberal democracy. Relying on a wide range of primary and secondary sources, we conceptualize these two types of court-packing by comparing two cases: Carlos Menem (1989–99) in Argentina, seeking judicial support to carry out pro-market economic reforms, and Hugo Chávez (1999–2013) and Nicolás Maduro (2013–present) in Venezuela, seeking to control the judiciary in the context of democratic backsliding.

Keywords: abusive judicial review; Carlos Menem; court-packing; democratic erosion; Hugo Chávez; Latin America; Nicolás Maduro

I. Introduction

There has been a boom in scholarship on the primary way that contemporary liberal democracies die: over time, elected leaders who are in charge of the executive progressively dismantle the institutions, procedures and rights that are the essential components of liberal democracies.[1] Lührmann and Lindberg (2019) argue that 70 per cent of

[1]Liberal democracy is a type of political regime in which free, fair, inclusive, effective and regular elections are the only way to access the top positions in the executive and legislative branches; where state power is divided among different institutional branches that check each other; and where there is a liberal constitution that effectively protects individual rights and freedoms (Gervasoni 2011: 118–19, 123–32).

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the 'autocratization episodes' between 1994 and 2017 were generated by elected leaders gradually undermining democratic institutions. Svolik (2019) concurs, affirming that there were twice as many 'executive takeovers' (i.e. legally elected incumbents who undermine democracy from within) as coups between 1973 and 2018. More specifically, Mainwaring and Bizzarro (2019: 99) find that the most common way in which countries that democratized after 1974 have fallen back into authoritarianism is by 'an incremental path without a clear breaking point'. Regarding Latin American countries, Perez-Liñán and Mainwaring (2015) show that the main threat to democracy is no longer a military coup but rather democratic erosion produced by 'presidents with hegemonic aspirations'.

Scholars have proposed multiple labels to characterize this process of democratic deterioration, including democratic 'backsliding' (Haggard and Kaufman 2021), 'regression' (Gerschewski 2021), 'decay' (Daly 2019), 'recession' (Diamond 2015) and 'erosion' (Landau 2017), among others. In this type of autocratization process, executives use a variety of legal mechanisms to change a political regime from within, a phenomenon that has been referred to as 'abusive constitutionalism' (Landau 2013: 191–200), 'abusive judicial review' (Landau and Dixon 2020: 1316–334), 'abusive constitutional borrowing' (Dixon and Landau 2019: 494), 'autocratic legalism' (Corrales 2015; Scheppele 2018: 547–49), 'constitutional retrogression' (Huq and Ginsburg 2018), 'constitutional capture' (Müller 2016), 'populist constitutionalism' (Landau 2018: 532), 'stealth authoritarianism' (Varol 2015: 1684–1687) and 'rule of law backsliding' (Pech and Scheppele 2017), among other terms. One such mechanism that has caught scholars' attention is court packing, usually understood as a deliberate change of the composition of a judicial adjudication institution pushed by the government to secure its control. Court-packing is usually present in processes of democratic erosion because it allows co-opting a court *without* necessarily modifying its powers – it is one of key strategies that illiberal executives implement to destroy democracy.

Recently, court-packing has played a major role in the erosion of democracy in Ecuador, Bolivia, Hungary, Poland, Turkey and Venezuela (Kosař and Šipulová 2023 forthcoming). Despite the negative role that court-packing can play, there is neither a theoretical nor empirical necessary connection between court-packing and democratic erosion. Consider the example of Argentina under Carlos Menem (1989–99). Soon after he was sworn into office in 1990, Menem enlarged the size of the Supreme Court from five to nine justices to gain judicial support for comprehensive pro-market economic reforms. This court-packing incident was widely criticized, but its effect on the broader health of the democratic system was limited. In fact, Argentina remained a democratic regime without experiencing significant deterioration. This stands in stark contrast to examples of court-packing that happen in the context of democratic deterioration. For example, in the case of Venezuela, different court-packing incidents under Hugo Chávez's rule (1999–2013) had a negative effect on the court's willingness to hold the government to account (Brewer Carías 2010). By the time his successor Nicolás Maduro arrived in power (2013), Venezuela was already a hybrid or 'competitive authoritarian' regime, on the verge of becoming a full autocracy (as would eventually happen). Moreover, further court-packing incidents during the Maduro administration (2015) have played a key role in the country's definitive democratic collapse and transition to autocracy in recent years.

This article seeks to enhance our understanding of the concept of court-packing in comparative perspective and its relationship with democratic deterioration. We conduct two in-depth case studies in order to analytically differentiate two types of court-packing by focusing on the goals and preferences of the elected leaders who carry out

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court-packing. In particular, we distinguish at least two types of court-packing that have disparate effects on democratic rule. The first type, which we call *policy-driven court-packing*, occurs when politicians manipulate the composition of courts in order to assure an easy and quick implementation of government policies. Although this negatively affects courts' independence, it is not a first step in a macro-process of regime change. On the other hand, a different type of court-packing – which we refer to as *regime change court-packing* – takes place when illiberal politicians alter the composition of the courts to ensure support for executive encroachment and regime change. In these cases, court-packing's negative effect on judicial independence subsequently has a systemic detrimental effect on other dimensions of liberal democracy.

In this article, we conduct in-depth case studies of Argentina under Carlos Menem (1989–99) and of Venezuela under Hugo Chávez (1999–2013) and Nicolás Maduro (2013–present) in order to conceptualize two different types of court-packing. Using a variety of primary and secondary sources (e.g. semi-structured elite interviews, judicial rulings, newspapers, books written by investigative journalists, reports by international organizations and memoirs), we show that the two court-packing sagas were very different in terms of their proponents' broad goals, leading to significantly different effects in the roles of high courts and democratic stability. Following the example of scholars such as Juan Linz (1964) and Guillermo O'Donnell (1973), we show how the careful description of sequences of events can contribute to conceptual innovation in the field of comparative judicial politics and public law (Swedberg 2014: 29–79).

The article proceeds as follows. We first discuss the expansive literature on democratic decline, judicial independence and court-packing in Section II. In Section III, we elaborate on our theoretical framework by discussing in detail the disparate goals of court-packers, focusing on policy reform and regime change. Sections IV and V discuss the Argentinean and Venezuelan cases respectively, explaining the key court-packing incidents that took place in both countries. In Section VI, we briefly reflect on the implications of our study to advance theory-building of court-packing in different contexts.

II. The concept of court-packing

Independent courts are typically endowed with the ability to interpret what institutions allow actors to do and adjudicate conflicts accordingly (Shapiro 1981). This is of crucial importance since formal institutions such as constitutions and laws are often ambiguous regarding the limits they impose on political actors. When governments attempt to erode democracy or implement public policies, an independent judiciary can limit such actions, often with the support of a broad network that includes opposition parties, the media, business organizations, NGOs, churches and other civil society actors.[2] Since courts have the capacity to interpret the constitutionality of executive and legislative actions, politicians often try to neutralize and/or co-opt the judiciary using different *court-curbing* strategies (i.e. formal or informal actions that aim to make it harder for the judiciary to limit the executive and legislative branches). There are many examples of court-curbing strategies, including modifying courts' jurisdictions; creating new tribunals stuffed with

[2]Although illiberal executives may not comply with court rulings and move forward with unconstitutional or illegal actions, this does not come without costs: domestic and international actors might use the conflict as a 'focal point' to coordinate a resistance against them, or the negative impact on judicial legitimacy could be such that courts cease to be a useful venue to adjudicate salient political conflicts.

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loyalist judges; merging different courts; reducing the judiciary's budget; limiting the judiciary's capacity to perform judicial review; and altering the internal decision procedures of courts (Clark 2010: 36–43; Nichols, Bridge and Carrington 2014: 3–4). Within this 'menu of manipulation', court-packing is one very specific type of *court-curbing* strategy.

In this article, our definition of court-packing is similar to that proposed by Kosař and Šipulová (2023 forthcoming), who conceptualize it as 'any change of the composition of the existing court which is irregular, actively-driven (non-random) and creates a new majority at the court or restricts the old one'. Although we agree with these authors that court-packing requires an intentional change in the composition of an existing court, with the immediate goal of crafting a new majority, we use a more minimalist definition. We define court-packing as actively adding judges to a court in order to create a new majority with political purposes. First, the purpose of altering the composition of the court is to gain a politically favourable outcome for the actors who do the court-packing. The presence of political purposes as an attribute of the concept of court-packing excludes cases in which a new majority of justices is created for technical reasons. For example, we do not consider the three increases of the US Supreme Court's size in 1807, 1837 and 1863 as cases of court-packing, since the expansion of seats was linked to the admission of new states to the Union and not the political needs of a sitting president (Braver 2020: 2759–72). In our view, court-packing requires the action of creating of a new majority of justices with a clear political purpose.

Additionally, most constitutional systems establish judicial appointment rules, given that sitting judges eventually die, retire or resign. Although many constitutions include the legal possibility of expanding the court, this is neither expected nor required for the system to work. Therefore, if a president appoints a majority of judges as a consequence of anticipated turnover (by death or retirement, for instance), this would not be an episode of court-packing. Therefore, court-packing does not include cases in which the judiciary is subject to political control over time as a consequence of the gradual and constitutionally expected turnover of high court judges, following pre-established rules (Kosař and Šipulová 2023 forthcoming). The result of this process can be a close alignment between the preferences of elected leaders and judges, but it is not the consequence of court-packing (Dahl 1957). These processes could involve looking at trajectories of (re) politicization without the need for court-packing (Sánchez Urribarri 2022).

Second, we do not think that court-packing needs to be 'irregular' if this term is defined as not observing 'the rules set in the past' (Kosař and Šipulová 2023 forthcoming). If we only consider cases of court-packing to be those in which 'the rules set in the past' were broken, how should we classify countries in which there is an informal norm of periodically changing the composition of the court? In these cases, the multiple alterations of the composition of a court in order to form a new majority would not be an irregular practice, and therefore they cannot be considered instances of court-packing. In Argentina between 1947 and 2003, an informal norm that established incoming presidents as having the 'right' to alter the composition of the Supreme Court was developed and institutionalized (Kapiszewski 2012: 81–83). In fact, when challenged by a journalist about the appropriateness of expanding the members of the court, Menem replied with a question: 'Why should I be the only President in fifty years who hasn't had his own Court?' (Larkins 1998: 177). However, the expansion of the court's seats from five to nine by President Carlos Menem in 1990 is typically considered a paradigmatic instance of court-packing.

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Third, court-packing implies that the executive or the incumbent party creates a *new* majority of loyal justices. There are many cases where a new majority of judges is created in a court in which no previous *stable* majority was clearly constituted over time. Finally, cases in which the number of judges of a court is *reduced* (without the addition of a majority of new judges) are not instances of court-packing, but belong to a different type of court-curbing strategy (Kosař and Šipulová 2023 forthcoming).

For court-packing to occur, there must be a number of seats to be filled. Usually, these vacancies are created *ex novo* via formal means (e.g. by impeachment or expanding the number of seats) or informal means (e.g. by unduly forcing a judge to retire or significantly worsening their working conditions). In many cases, court-packing may combine removing sitting judges and the appointment of new judges to the newly free slots. Additionally, in many scenarios the executive or incumbent party controls the designation process in a way that is able to appoint lawyers aligned with their preferences and/or who are otherwise loyal to the government.[3] In the latter case, appointed judges tend to be *committed* to support the government on the basis of personal connections and/or in exchange for material benefits or other particularistic advantages (Stroh 2018). Both dimensions – ideological and particularistic – are key for cross-national analyses of court-packing processes.

Unsurprisingly, court-packing is associated with a decrease of judicial independence since the judicial appointment process tends to be controlled by a single actor or a small elite (Brinks and Blass 2018: 23–27). In these cases, court-packing creates a majority of judges whose preferences mirror the preferences of the political actor who appoints them and/or are otherwise committed to support their decisions. Therefore, it diminishes the 'preference independence' and the *ex-ante* autonomy of the judiciary (Brinks 2005).[4] Notice, though, that we are not talking about *absolute* independence, which would require that courts have complete autonomy from pressures of the other branches of government and other political actors (Melton and Ginsburg 2014: 190). *Absolute* independence is impossible since, in most democracies, politicians appoint and remove judges and also control 'their budget, jurisdiction, structure, size, administration, and rulemaking' (Geyh 2003: 159–60). This is why the judiciary is considered to be structurally dependent on elected politicians' preferences (Ferejohn and Kramer 2002: 976–77). Therefore, court-packing affects *relative* judicial independence since the composition of courts is under the unilateral influence of a single actor or small group (Brinks and Blass 2018: 24).

Following a court-packing event, we can expect that newly appointed judges will tend to rule *consistently* in support of the actors who appointed them, especially on politically salient cases. By directly impairing the judiciary's willingness to hold the government accountable for unconstitutional or illegal actions, the court's ability to decide assertively against appointers is compromised. However, court-packing's effects on liberal democracy over time is contingent on a variety of factors, and court-packing does not inevitably contribute to democratic erosion. Since there is not a *necessary* connection between court-packing and democratic erosion (Landau and Dixon 2020: 1378–1379), it is important to conceptually distinguish court-packings that are associated with democratic decay from those that are not.

[3]This does not exclude the possibility of a majority of parties that agree to pack the courts.

[4]A second dimension of judicial independence (unconnected with court-packing) is 'decisional independence', which requires that judges have sufficient isolation from inappropriate influence and pressures from a single political actor while they are in the process of deciding a case (Brinks 2005: 599).

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III. The preferences and goals of 'court-packers'

In our view, the *preferences* and *goals* of the political actors who engage in court-packing are key to differentiate types of court-packing. Emerging literature on court-packing stresses the theoretical need of taking into consideration 'the *motivations* behind court-packing' (Kosař and Šipulová 2020: 135), 'the *character* and *motivations* of those elected or appointed to high office' (Huq 2018: 1530, our emphasis), and the '*purpose*—the need for a full articulation of the reform's *aims*' (Daly 2022: 1074, our emphasis). As Tushnet and Bugarič (2021: 161–62, 76) argue, predicting court-packing's effects requires taking into account the actors' *goals*, that means 'making some judgment about *what else the people proposing the policy want to do*' (our emphasis). Landau and Dixon (2020: 1326–333) highlight the need to focus on the *intent* of judges who engage in 'abusive judicial review' in order to explain why judges assist the executive in dismantling democracy. In sum, scholars who conceptualize court-packing and wish to explain its effects should assess whether court-packing is '*intended* for *potential* abuse' (Sajó 2021: 154–55, our emphasis).

Politicians who want to diminish judicial independence by packing the courts might do it with a variety of goals in mind; in turn, these are dependent on their preferences and contextual limitations. By pointing to the different purposes that politicians pursue when packing the courts, we stress the complexity of politicians' motivations, including their normative preferences towards a liberal democratic regime; their own programmatic goals and desired policies; their attitudes towards the law and legal institutions; and their perceptions of their (or their coalition's) need for political survival, among other reasons.

We can safely assume that most politicians want to win elections, access office, exercise their prerogatives and stay in power. However, the reasons behind these general goals vary considerably. Some desire to enrich themselves, maximize power as an end in itself or remain in office for an indefinite time. Moreover, sometimes politicians have an ideological commitment that motivate them to push forward specific public policies, or to prefer some political regimes over others, since they value characteristics that specific political regimes offer (Mainwaring and Pérez-Liñán 2014). For instance, if politicians are radicalized and *only* desire to implement a set of public policies, they would do whatever it takes to stay in government, including openly sidelining the rules of the game. However, non-ideological politicians who must protect the interests of some groups to remain in power might also be willing to bend the rules, especially when they are seen as instrumental to their governance (Hale 2015).

Taking these points into account, we differentiate types of court-packing by looking at their role within the more general objectives of the incumbent party. By focusing on the leaders' goals, we identify two types of court-packing: (1) *policy-driven*, in which the alteration of the composition of a court aims to promote public policies; and (2) *regime-driven*, in which the alteration of the composition of a court aims to assist the executive in replacing the existing regime with a new one.

This distinction between policy-driven and regime-driven court-packing does not exhaust all the possible goals that politicians can pursue – for example, incumbent parties could engage in court-packing to protect themselves in future criminal accusations or could do so to update or enhance informal judicial governance by way of appointing loyal justices that are closely linked to them. Moreover, court-packing can also be the result of actors pursuing more than one goal. In sum, we do not claim to have provided a final

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account of all possible instrumental and ultimate motivations that guide actors' goals, as that would be outside the scope of this article.

In order to empirically assess these two types of court-packing, we distinguish three temporal stages. First, the pre-court-packing stage immediately precedes the packing of the court. At this point, the idea of packing the court is conceived, discussed and articulated to further specific goals. The second stage tends to be short and consists of the court-packing event itself (i.e. actively adding judges to a court to create a new majority of judges with political purposes). Third, the post-court-packing phase focuses on the behaviour of the appointed judges regarding cases of political relevance for the government and related aspects. When characterizing different types of court-packing, scholars should look for evidence coming from diverse primary and secondary sources regarding the first two stages. We should therefore avoid looking at the actual behaviour of the judges after the court-packing (third stage) to retroactively infer the initial goals of the court-packing (first stage).

In the case of Argentina, the main and initial goal of the 1990 court-packing was to gain judicial support for President Carlos Menem's pro-market economic reforms (policy-driven court-packing). The actions of the Menem-appointed justices happened to be consistent with the initial goals of the court-packing. However, if those justices had not supported Menem, that would have not changed the fact that the court-packing was originally policy driven.[5] In the case of Venezuela, the main goal of the 1999 court-packing was to have the support of the Supreme Tribunal of Justice for President Hugo Chávez's project to create a new political regime. If, for some reason, the majority of the justices had later defected and stopped the process of democratic erosion, this would have not changed the fact that originally this court-packing was devised and implemented to dismantle and replace the previous democratic regime.

Policy-driven court-packing

This type of court-packing occurs when politicians manipulate the composition of courts in order to avoid judges vetoing new policies, to enact a package of public policies or to increase the likelihood of judges protecting existing policies.[6] In particular, if politicians want to implement a transformative policy agenda, they may believe that judges are driven by their desire to use the law to advance or stop a political agenda, or sometimes may anticipate that judges will interpret the law in an 'apolitical' fashion, favouring the status quo. In this view, politicians will proceed on the assumption that judges decide following their ideological preferences or, at best, rule based on their own constitutional or legal interpretations without due concern for the preferences of the majority (Epstein and Knight 1998: 22–51; Segal and Spaeth 2002: 86–97). Thus, a president who is either ideologically committed with a policy agenda, or who believes that their political survival depends on the implementation of certain public policies, may engage in court-packing in order to neutralize judges' capacity to block their agenda. For instance, a government that aims to implement free-market policies would engage in court-packing (or other court-

[5]Similarly, if the justices appointed during a policy-driven court-packing end up later supporting executive decisions that alter the political regime, we should not retroactively reclassify the court-packing as regime driven.

[6]In this case, the dominant consideration is not securing the political control of the court in order to protect the government from challenges against an illiberal agenda that undermines democracy.

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curbing strategies) if the current judges were considered to be social democrats, or simply committed to interpreting the law in a way that could block key policies – that is, the president might believe that judges follow a formalist and positivist approach to legal interpretation that may lead them to block emergency measures by the executive.

One clear illustration of this type of court-packing was Franklin Delano Roosevelt's Judicial Procedures Reform Bill of 1937. Regardless of the many flaws in this failed attempt and its potential negative consequences, it would be hard to argue that Roosevelt planned or intended to use a new majority of the Supreme Court to further a democratic erosion process in order to install an authoritarian regime (McKenna 2002). Instead, Roosevelt's Court-Packing Plan aimed to remove the legal obstacles created by some justices of the so-called *Lochner Court* who were impeding the enlargement of the federal government, a rebalance of power that would benefit the presidency at the expense of Congress and the implementation of interventionist economic and social policies.

Regime-driven court-packing

A second type of court-packing occurs when the composition of the courts is altered in order to use the judiciary as a tool for regime change. In most cases, leaders in liberal democracies implement this type of court-packing with the purpose of having judges who are willing to justify different measures to dismantle democratic institutions and protect the stability and consolidation of a new illiberal regime. For example, courts could validate executive or legislative decisions that modify electoral regimes or limit freedom of expression and association, creating an uneven playing field for opposition parties. Moreover, courts could prosecute opposition politicians and deprive them of their political rights, limit the powers of subnational governments (if they are under the control of opposition politicians), nullify constitutional limits for presidential re-elections or allow unconstitutional constitutional reforms to take place.

When court-packing for regime change is implanted to dismantle liberal democracy, judges are used as *defensive* and *offensive* weapons (Landau and Dixon 2020: 1345–63). First, judges play a defensive role when they shield the executive from civil society actors and opposition politicians' challenges by legally validating what the incumbent party does either in the executive or in Congress.[7] For example, co-opted courts not only uphold the constitutionality of laws and decrees, but also prevent public officials from going to prison due to criminal charges. Second, judges are offensive weapons when they actively allow the executive to accomplish a variety of goals. Judges exert an 'active role' either by directly modifying formal rules that constrain the executive or by attacking the rights of opposition actors. For instance, packed courts have utilized the 'unconstitutional constitutional amendments doctrine' to nullify limits for re-elections, allowing illiberal presidents to run again (Landau, Dixon and Roznai 2019). Also, courts can criminally prosecute opposition politicians, deprive them of their political rights or refuse to intervene against abuses by other authorities. Moreover, the executive can also use courts to limit the powers of the legislature, or of subnational governments under the control of the opposition.

The types of court-packing identified above are motivated by a preference to further policy interests or dismantle an existing democratic regime. On the other hand, there could be scenarios where the co-optation of apex courts is motivated by less questionable

[7]Sánchez Urribarri (2022) calls this modality 'reactive support', as opposed to proactive support, where pro-government actors request the assistance or intervention of the courts.

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normative preferences, such as safeguarding democracy. In countries that experienced a transition from an authoritarian regime, it might be necessary to remove justices who are not committed to the nascent democratic regime (Daly 2022), with the intention of tackling current or future undemocratic practices from remnants of an authoritarian regime and preventing sitting judges allied with the previous regime from protecting their interests at the expense of democracy. For example, democratic political parties could be boycotted by judges appointed by previous authoritarian leaders who oppose a liberal-democratic constitution and block public policies by the new democratically elected administration (Garoupa and Maldonado 2011: 608). Moreover, democracies may erode partially as a consequence of some decisions taken by justices who side with undemocratic actors. In the current US context, some scholars consider that the Roberts Court has helped the Republican Party to win elections without the support of a majority of the citizens and that Republicans have packed the judiciary (Huq 2022: 54–61; Keck 2021: 158–63). Therefore, for this position, court-packing by the Democratic Party is necessary to *reverse* democratic erosion; court-packing in this context is seen as 'pro-democratic constitutional hardball' (Belkin 2020; Weill 2021). However, this is far from uncontroversial: other scholars consider that court-packing in the currently polarized political system could damage the court's legitimacy and open the door for a 'tit-for-tat' retaliatory dynamic (Braver 2020). Moreover, court-packing could even be ineffective to secure constitutional rights (Fraley 2021).

In the next section, we illustrate a case of court-packing for policy implementation (without contributing to democratic erosion) that occurred during the presidency of Carlos Menem (1989–99) in Argentina. This case study will be followed by our discussion of the Venezuelan case, allowing us to compare and contrast both types of court-packing and their effects (see Table 1).

IV. Court-packing for policy reform: Argentina under Menem (1989–99)

In 1983, President Raúl Alfonsín (1983–89) from the Radical Party appointed, with the support of the Peronist Party, five fairly independent justices to the Supreme Court.[8] When President Alfonsín's economic policies ended in a hyperinflation crisis in 1989, he had to resign. Carlos Menem, a governor from the Peronist Party who had won the presidential elections, assumed office. Less than a year later, in April 1990, the Peronist majority in Congress expanded the number of justices from five to nine and confirmed the six nominees proposed by Menem.[9] Menem saw the composition of the Alfonsín-era Supreme Court as an obstacle to the implementation of pro-market economic reforms, which he believed were necessary to end the economic crisis (Menem 2018: 113–14).

Menem's court-packing aimed to facilitate the quick implementation of a comprehensive pro-market economic reform (Santiago 2014: 1305). Raúl Granillo Ocampo, who was one of the authors of the court-packing proposal, says the successful implementation

[8]Although some of them had ties to either Alfonsín (Genaro Carrió) or his party (José Cavallero), Justices Enrique Petracchi and Carlos Fayt were identified with opposition parties, Justice Augusto César Belluscio had a long prior experience as an independent civil law judge and professor, Justice Jorge Baqué was a law professor not identified with the Radical Party. Alfonsín appointed five justices because before he took office, the five justices appointed by the previous military dictatorship (1976–83) resigned.

[9]Menem appointed six justices after the resignation of two Alfonsín-appointed justices, Jorge Baqué and Jose Severo Caballero.

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Table 1. Court-packing in Argentina (1989–99) and Venezuela (1999–2015)

	Argentina	Venezuela
Main goal of the court-packing	Implementation of comprehensive pro-market reforms to solve an economic crisis	Enable the replacement of liberal democracy by a populist-authoritarian political regime
Court-packing modality	One-off president-sponsored change to court composition after arriving in power	President-sponsored change to court composition following constitutional reform, then at different points in time during regime transition to secure control
Years of court-packing	1990	1999, 2004, 2010, 2015
Appointment rules	Judicial nomination process did not breach constitutional rules	Judicial nomination processes breached nomination rules in different ways, at multiple points in time
Political-economic context during the first court-packing	Hyperinflationary and macroeconomic crisis; weakened opposition parties; very recent transition to democracy	Breakdown of the party system, social crisis and economic decline. Constituent Assembly modifying the 1961 Constitution (opposition largely excluded). The legislative and judicial branches were intervened.
Profile of justices appointed	Ideologically committed with the government; personal links with the president and/or the incumbent party	Each court-packing incident involved appointing several judges with ties or commitments with the regime, a trend that became stronger and clearer over time.
Support for constitutional reform	The court was not involved in the constitution-making process (1993-1994)	Court played significant role in the constitution-making process in 1999
Main policy outcome	Pro-market reforms safeguarded by the court. Argentina remains democratic.	Government consistently won at court. Reforms attempted largely counted with the support of the court.
Main regime outcomes	Absence of democratic backsliding	Full democratic backsliding

of the executive's economic reforms required an 'homogeneity of criteria and thought' between the executive and the Supreme Court.[10] Carlos Corach, Menem's Minister of the Interior, justifies this by saying that 'no government commits suicide by appointing justices who are opposed to its interests' (Corach 2011: 148). Jorge Matzkin, the leader of

[10]Interview with Raúl Granillo Ocampo. Legal and Technical Secretary (1989–91), ambassador to the United States (1993–97), and Minister of Justice (1997–99), Menem administration, 20 October 2020. Interview conducted over Zoom.

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the Peronist representatives in Congress, stated that Menem believed his economic reform could only be successful if the three branches of government reached an ideological agreement.[11]

The new composition of the Supreme Court validated a new balance of power that concentrated the decision-making process in the executive. In particular, the court upheld the most important *decretos de necesidad y urgencia* (DNUs, decrees of necessity and urgency)[12] and *decretos delegados* (delegated decrees),[13] indispensable tools in the implementation of Menem's economic policies.[14] During Menem's presidency, the use of DNUs assured Menem a quick implementation of economic policies that he thought would be resisted by members of his own party.[15]

Although the 1990 Supreme Court-packing helped to concentrate power in the executive and allowed the abuse of presidential legislative powers, Argentina did not just remain a democracy, but there was no backsliding. According to different conceptualizations and measurements of democratic erosion, there was no democratic erosion in Argentina between 1989 and 1999 (Boese et al 2021; Coppedge 2017; Lührmann and Lindberg 2019; Mainwaring and Bizzarro 2019; Pelk and Croissant 2021). In fact, both the Liberal Democracy Index and the Electoral Democracy Index from V-DEM (standard indexes to measure democracy) remained stable over Menem's presidencies and above the usual cut-off points used to code a country as democratic (see Figure 1) (Lührmann, Tannenberg and Lindberg 2018).[16]

Menem's court-packing was a necessary condition for his radical 'policy switch', which according to some critics created a democratic deficit (Stokes 2001).[17] Despite the fact that Menem had run for the presidency in 1989 with a traditionally Peronist pro-state intervention platform, once he took office, he drastically implemented a comprehensive neoliberal reform (Stokes 2001: 43–47). While it could be argued that Menem's 'mandate violation' expressed a lack of responsiveness to his voters, these same voters seemed to approve of Menem's 'policy switch' in that the Peronist Party won the 1991 and 1993 legislative elections, the 1994 elections for representatives to the Constituent Convention and most gubernatorial races. Moreover, Menem was reelected by ample margins in 1995 and poll data indicate that many Argentinian voters supported his neoliberal reforms (Stokes 2001: 126–29, 136–42).

[11]Interview with Jorge Matzkin. Peronist Representative (1983–97) and Deputy Minister of the Interior, Menem Administration (1997–99), 10 May 2021. Interview conducted over Zoom.

[12]At that time, DNUs were legal norms issued by the executive to implement public policy without an explicit congressional delegation or approval.

[13]Delegated decrees are legal norms issued by the executive when Congress authorizes it to legislate under limited circumstances in situations of public or administrative emergency. The Supreme Court had affirmed that 'proper' delegated decrees were unconstitutional. However, the court consistently accepted their use by calling them 'standard decree power to implement the law' (i.e. the executive is authorized to execute the law and 'fill up the details').

[14]Interview with Alberto García Lema, Nation's Treasury Attorney (1991–95), Menem Administration, Peronist Deputy, Constituent Assembly (1994), 9 December 2020. Interview conducted over Zoom.

[15]Interview with Raúl Granillo Ocampo.

[16]Also, according to Polity IV and Freedom House, there was no decrease in the level of democracy of Argentina during this period (Marshall and Gurr 2021). See *Freedom in the World Books* between 1990 and 1999, all available at <https://freedomhouse.org/reports/publication-archives>.

[17]We are grateful to Susan Kang for this observation.

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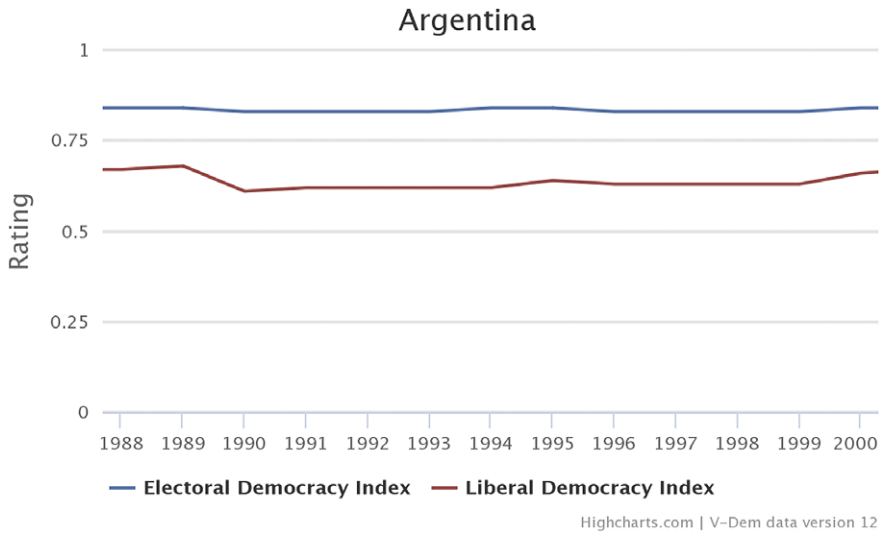


Figure 1. Liberal and electoral democracy indices in Argentina (1988-1999).

The Menem-era Supreme Court: A deferential attitude

Menem's court-packing followed an informal practice of court-crafting in Argentina. The Supreme Court's composition had been modified with political purposes in 1947, 1955, 1958, 1960, 1966, 1973, 1976 and 1983 (Castagnola 2018: 35–47). In this period, presidents assumed they 'had the right' to appoint a majority of the Supreme Court (Kapiszewski 2012: 81–83). The totality of the justices appointed in 1990 had personal ties to either Menem or his party, and showed ideological agreement with his policies (Santiago 2014: 1336–57). Alberto Kohan, Menem's close aide and General Secretary of the Presidency, confirms that ideological proximity and party loyalty were the main criteria for selecting the new justices.[18] Alberto Piotti, former federal judge and Peronist representative, agrees with Kohan when he says that personal recommendations and connections were the main criteria when deciding who to appoint to the Supreme Court.[19] Justice Eduardo Moline O'Connor was introduced to Menem by his brother-in-law, Hugo Anzorreguy, the head of the Secretary of State Intelligence; Justice Julio Nazareno was a friend of president Menem and he and his brother Eduardo Menem owned a law firm for many years; Justice Mariano Cavagna Martínez and Ricardo Levene, Jr were Peronist jurists. Finally, Justices Julio Oyhanarte[20] and Rodolfo Barra were members of Menem's cabinet (the latter was Secretary of Justice, the former was Secretary of Public Works and Deputy Minister of the Interior) (Verbitsky 1993: 34–48).

Many of the new justices justified their support for governmental policies by referring to the legal philosophy of self-restraint, according to which judges ought to be deferential

[18]Interview with Alberto Kohan, General Secretary of the Presidency, Menem administration (1989–90, 1995–99), 11 April 2021. Interview conducted over Zoom.

[19]Interview with Alberto Piotti, Federal Judge and Criminal Law Lawyer, 15 June 2021. Interview conducted over Zoom.

[20]Julio Oyhanarte was replaced by Antonio Boggiano in 1991. Justice Barra introduced Boggiano to Menem.

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to the decisions made by elected powers. For instance, Justice Julio Oyhanarte believed that the Supreme Court needed to adapt to the preferences of political actors (Oyhanarte 1972: 90). In order to harmonize the Supreme Court's jurisprudence with elected powers, the justices' preferences must be similar to those of the executive (Oyhanarte 1969: 60–69). In agreement with Oyhanarte, Justice Rodolfo Barra says the judiciary needed to understand that there was an unprecedented crisis and that the government was 'implementing a *New Deal* (but in the opposite direction to the one Roosevelt put into effect)'.[21] According to this justice, the new members of the Supreme Court shared with the executive and the Peronist Party the same values and a conviction that they should support the president in the process of economic reform (Barra 2008: 276). Moreover, Justice Antonio Boggiano wrote that in countries where there was a need to carry out structural reforms, the jurisprudence needed to adapt and justify the legislative changes (Boggiano 1992: 39).

Since the 1990 court-packing was a consequence of Menem's perception that a pliant court was necessary to implement his reforms, it is unsurprising that the most controversial rulings from this court are related to economic governance.[22] In what follows, we illustrate the deferential attitude of the Supreme Court to the incumbent party by analysing four paradigmatic rulings focused on economic policy (*Dromi* 1990, *Peralta* 1990, *Cocchia* 1993 and *Rodríguez* 1997). These cases show how important securing judicial support from the Bench was for the free-market policy agenda. Furthermore, the Supreme Court secured judicial support for the executive's economic policies in other cases,[23] and a majority of the justices also benefited the *political interests* of Menem and his party in other cases.[24]

A few months after the court-packing was implemented, in *Dromi* (1990), the court showed its commitment to supporting the government's privatization of public companies. A Peronist congressman presented a writ of amparo to stop Roberto Dromi, Minister of Public Works, from moving forward with the privatization of Aerolíneas Argentinas (the state-owned airline) because it 'failed to follow the legal structures required by the statute authorizing the privatization' (Miller 2000: 412). On the morning of 13 July 1990, a trial judge, Oscar Garzón Funes, accepted the precautionary measure, but a few hours later the Supreme Court nullified this decision and assumed immediate jurisdiction of the case.[25] The court argued that under situations of 'high institutional concern', the Supreme Court can decide a case even if a trial court and court of appeal has not made a final ruling.[26] The quick intervention of the Supreme Court allowed the executive to immediately move forward with the privatization of Aerolíneas Argentinas. Two months later, the Supreme Court rejected the legal challenge on grounds of the lack of standing of the

[21]Interview with Rodolfo Barra, Supreme Court Justice (1990–93), Peronist Deputy at the Constituent Assembly (1994), Minister of Justice (1994–96), 14 October 2020. Interview conducted over Zoom.

[22]In the few cases in which the court ruled against the executive's preferences, the issues at stake were irrelevant for the government. See *Cafés la Virginia* (1994), *Video Club Dreams* (1995), *Della Blanca* (1998) and *Verrocchi* (1999).

[23]See *Soengas* (1990), *Chocobar* (1996), *UOM* (1996) and *Prodelco* (1998).

[24]See *Riveros* (1990), *Rousselot* (1990), *Molinas* (1991), *Aquino* (1992), *Rossi Cibils* (1992), *A.T.E. San Juan* (1994), *Gauna* (1997), *Provincia de Chaco* (1998).

[25]'Bloqueó la Privatización en 1990 y 1994. El Primer Juez,' *Diario Página 12*, 3 June 2001. Available at: <https://www.pagina12.com.ar/2001/01-06/01-06-03/pag15.htm>.

[26]*Dromi*, *Considerandos* 5, 6, 10.

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plaintiff.[27] This decision was highly criticized because the existing procedural rules and jurisprudence stated that the Supreme Court could not hear a case via *per-saltum* appeal, and also because Dromi used to be the superior of Justice Barra in the Ministry of Public Works and recommended Menem to appoint him to the court (Miller 2000: 412–13; Santiago 2014: 1417–18, 1470–71).

In December 1990, in *Peralta* (1990), the court supported a broad use of executive emergency decrees. In the context of hyperinflation and fiscal crisis, the government transformed most bank deposits into public bonds to be paid over ten years. A majority of the justices considered the emergency decree valid for several reasons (Miller 2000: 400–03; Bianchi 2002: 431–32). First, the decree aimed to preserve 'national unity, peace and social order', promote the 'general welfare' of society and assure that 'the state continues to exist'. In this context, the restriction of property rights was totally justified.[28] According to Justice Barra, the new justices viewed the office of the President as one with strong, constitutional powers in situations of crisis. Barra identifies the position of the court with Justice Fred Vinson's dissent in *Youngstown Sheet & Tube Co. v. Sawyer*, which argues that the president has extraordinary powers during a national crisis.[29] Second, the principle of 'division of powers' cannot produce the fragmentation of the state. Given the characteristics of the economic crisis, the government was justified in using a decree instead of a law.[30] Third, as long as Congress does not explicitly reject an emergency decree, the court assumes that the legislative branch agrees with it.[31] Congress's *silence* means an implicit ratification of executive decisions (García-Mansilla 2004: 353–57).

Three years later, the Supreme Court continued to strengthen presidential powers in *Coccia* (1993), a ruling that expanded legislative delegation (Santiago 2014: 1398–1400). The court validated executive decree 817/92, which had nullified a collective bargaining agreement. According to the court, the decree was implementing a 'legality block' composed of several laws and an international treaty.[32] These norms constituted a 'public policy package approved by Congress' in support of a 'free market economy'.[33] Since Congress expressed its *broad support* for *general* policy principles (i.e. promoting a free-market economy), the president could regulate *very specific* economic activities (i.e. limit a union's right to engage in collective bargaining) (Gelli 2004: 618–20). In *Cocchia*, the court defended very broad principles of legislative delegation, going much further than the traditional jurisprudence on the matter (Ekmekdjian 2016: 660; Quiroga Lavié 1996: 494).

At the end of 1997, the Supreme Court in *Rodriguez* upheld Menem's decision to privatize Argentinian airports using emergency executive decrees. As in *Peralta*, *Dromi* and *Cocchia*, the Supreme Court supported the concentration of the decision-making process in the executive at the expense of Congress (Santiago 2014: 1380–86). Lower courts accepted a writ of amparo since there was no emergency that justified that decree and, most importantly, the executive had failed to gather enough support in Congress to sanction the airports' privatization. The court quickly accepted the government's appeal

[27] *Dromi*, *Considerando* 14.
[28] *Peralta*, *Considerandos* 28, 33, 35, 37–47.
[29] Interview with Rodolfo Barra.
[30] *Peralta*, *Considerandos* 18, 20, 26–28.
[31] *Peralta*, *Considerandos* 24, 25 and 26.
[32] *Coccia*, *Considerando* 13.
[33] *Coccia*, *Considerandos* 11 and 14.

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by *per-saltum* (without explicitly admitting it was doing it).[34] The court stated that Congress was the *only* actor authorized to evaluate whether a decree should be upheld, so the judiciary could not assess the constitutional attributions of the executive to issue decrees.[35] In this way, the issue at hand was a non-justiciable political question (although the justices did not explicitly say so).[36]

The political regime under Menem (1989–99): Democratic resilience

During Menem's presidencies, two institutional events occurred in which the pro-government majority in the Supreme Court could have intervened to favour the executive: a constitutional reform between 1993 and 1994, and Menem's attempt to run for a third consecutive term in 1999. In 1993, Menem was determined to run for a second term despite the existing Constitution not allowing him to do so. The Constitution stipulated that a constitutional reform could only be made by a constituent convention and the need for its amendment must be declared by the Congress by a vote of at least two-thirds of its members.[37] Since the incumbent party did not have two-thirds of the *total members* of Congress, Menem forced the main opposition party (the Radical Party) to support a constitutional amendment. In particular, in order to force the main opposition party to negotiate,[38] Menem implemented a three-step strategy to create the perception that he would call for a constituent convention unilaterally (Negretto 2013: 153–54).

The first step of this strategy involved two-thirds of the *total members* of the Senate approving a Bill calling a constituent convention (García Lema 1994: 105–06). Second, Francisco Duranona y Vedia, a Menem's ally in the Chamber of Deputies introduced a Bill arguing that the passage of the Senate's bill would only require two-thirds of *those members physically present* in the Chamber of Deputies. The government argued that Article 30 of the Constitution was ambiguous because it did not explicitly state which members of Congress it was referring to. On the contrary, the Radical Party supported a different interpretation of Article 30: 'its members' refers to two-thirds of the *total members* of Congress (Ekmekdjian 2016: 153–56; Gelli 2004: 264–65; Sagüés 2007: 255). Third, Menem issued a decree calling for a non-binding plebiscite on the need for constitutional reform to prove Radicals that a majority of voters supported his re-election (García Lema 1994: 111).

Given the clear prospects of Menem winning the plebiscite, some radical deputies decided not to oppose the constitutional reform (Alfonsín 1996: 310). Additionally, if the government's interpretation of Article 30 prevailed, it was very likely that the Senate Bill could have passed in the Chamber of Deputies. In this context, Alfonsín, the leader of the Radical Party, agreed with Menem a 'consensual reform' on the specific changes the constituent convention was authorized to make (Brinks and Blass 2018: 152–72; García Lema 1994: 145–46).

[34]*Rodríguez*, *Considerando* 21.

[35]*Rodríguez*, *Considerandos* 5, 6, 10, 13, 15, 17, 18, 23 and 24.

[36]*Rodríguez*, *Considerando* 16.

[37]Article 30. English version available at: <https://www.constituteproject.org/constitution/Argentina_1994.pdf>.

[38]Interview with Ricardo Gil Lavedra, member of the Radical Party legal teams that negotiated a constitutional reform with the Peronist Party (1987–93), 19 November 2020. Interview conducted over Zoom.

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Despite the presence of six Menem-appointed justices, who had shown their absolute loyalty to the government, the Supreme Court did not intervene in the constitution-making process. It could easily have supported the executive's interpretation of Article 30 of the Constitution, which affirmed that two-thirds of *those members physically present* in the Senate and in the Chamber of Deputies were enough to call for a constituent convention. However, the executive did not request the Supreme Court to provide a favourable interpretation of *who* were the members of Congress referred to by Article 30.[39] That is what we would typically expect in cases of 'abusive judicial review' after court-packing occurs. If the Supreme Court had ruled that the two-thirds constitutional rule referred to *physically present* congresspersons, then the Peronist Party would have been able to gather such a majority (regardless of the opposition of the Radical Party).

The recently reformed 1994 Constitution allowed Menem to run for a second term in 1995 but explicitly forbade him to run again in 1999. Therefore, Menem's supporters requested that the Supreme Court interpret the Constitution in such a way that would have allowed Menem to run for a consecutive third term (Barra 1999; Grondona 1997; Solá 1996). However, the justices rejected these arguments in *Ortiz Almonacid*, the only case in which the court decided against a central interest of President Menem (Santiago 2014: 1430–33). The 1994 Constitution stated that Menem's first administration (1989-1995) is legally considered as his first term under the new constitutional reform (Transitional Provision Number 9) (Gelli 2004: 678). Therefore, Menem's second term (1995–99) could not be interpreted as his first term after the 1994 Constitutional Reform. The lack of legal arguments to authorize Menem to run again is even recognized by some of Menem's closest advisers (Corach 2011: 159). It is likely that at least one out of the five justices who *always* voted in favour of the government in relevant cases did not supported his re-election due to the total lack of legal arguments.[40] According to Justice Belluscio, those justices who normally ruled in favour of Menem's interest did not have enough audacity in *Ortiz Almonacid* to rule against the Constitution just to please the executive.[41] One informant who was a direct witness to the internal discussions among the justices regarding this case affirmed in an interview that Chief Justice Julio Nazareno received huge pressure from the government and three other justices who did support Menem's position. However, Nazareno refused to join them in this case because of the total lack of legal support for this position.[42] He even went so far as to offer his resignation.

In conclusion, the Argentinean case shows that packing a court does not always lead to democratic deterioration. This stands in stark contrast to Venezuela, where Chávez's goal from the start was to accomplish regime change, even if this implied transgressing the constitutional order and dismantling democracy. In what follows, we illustrate how subsequent court-packing events during the staggered process of democratic deterioration experienced by Venezuela under Chávez and Maduro secured the court's political control, allowing the use of this venue to adjudicate a variety of cases in favour of the government (Figure 2).

[39]Interviews with three Supreme Court law clerks, two interviews conducted over Zoom (July and August 2021) and one in person in Buenos Aires (November 2021).

[40]Interview with Alfonso Santiago, Jr, constitutional law scholar, Universidad Austral, 14 July 2021. Interview conducted over Zoom.

[41]Personal communication with Augusto César Belluscio, Supreme Court Justice (1983–2005), 15 February 2021.

[42]Anonymous interview, 3 August 2021. Interview conducted over Zoom.

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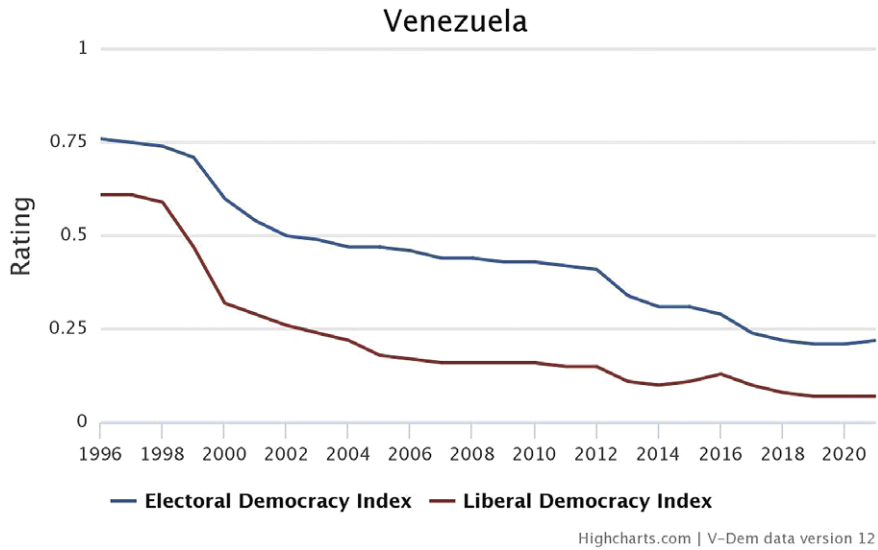


Figure 2. Liberal and electoral democracy indices in Venezuela (1996-2021)

V. Court-packing for regime change: Venezuela under Chávez and Maduro (1999–present)

Chávez's arrival to the presidency in January 1999 represented a major shift in Venezuelan politics. Venezuela had experienced uninterrupted democratic rule since the 1958 democratic revolution. The country adopted a liberal democratic constitution in 1961 and gradually transitioned to a two-party presidential democracy led by the social-democratic Democratic Action (AD) party and the Christian Democrats (COPEI). This regime began facing major challenges in the 1980s, when the country entered a process of economic decline and socio-political turmoil, including major civil riots (1989), two frustrated coup d'états (in 1992), the impeachment of President Carlos Andrés Pérez (AD) in 1993 and the subsequent fragmentation of the party system. By the 1998 election, Venezuela was in crisis and the party system was largely discredited (López Maya 2005).

This broad institutional crisis also engulfed the country's High Court – the Venezuelan Supreme Court – and the rest of the judiciary. Although the Supreme Court was conceived as an independent actor with judicial review prerogatives, it was also seen as part of an illegitimate regime and connected to the major political parties. In the 1980s and 1990s, the court tried to remedy this situation by playing a more assertive role in protecting rights and enhancing democracy – including the court's role in Pérez's impeachment, in protecting human rights and in adopting a judicial reform agenda. However, the judiciary was still perceived as corrupt, non-independent and inefficient. A key reason for the court's illegitimacy lay in the links of several justices with AD and COPEI, along with other political forces (Sánchez Urribarri 2011). This was the result of a practice of judicial designation known as *cuoteo*. As we elaborate below, these well-known issues eventually facilitated the takeover of the court system by Chávez and his allies in a context of institutional rupture (Pérez Perdomo 2005).

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Chávez's victory, the 1999 Constituent Assembly and the first court-packing

Chávez's presidential campaign made a point of the need to replace the leading political parties and begin a more inclusive and democratic political era. To these ends, Chávez made a commitment to replacing the 1961 Constitution by creating a Constituent Assembly. The Constituent Assembly was not contemplated in the 1961 Constitution, which only allowed the redrafting of the Constitution via amendments or reform. President Chávez's proposal for constitutional replacement implied a total clash with the existing constitutional procedures to change the 1961 Constitution (Aveledo 2002; Garcia Soto, Martinez Meucci and Sánchez Urribarri 2021).

The Supreme Court faced a daunting task. It had to preserve a commitment to the rule of law as defined by the 1961 Constitution while allowing and enabling institutional change driven by a charismatic populist leader who claimed to have been elected with a strong mandate to carry out the reform and argued that sovereignty resided in the Venezuelan people according to the 1961 Constitution. From the very start, Chávez made his expectations clear to the Supreme Court, going as far as to warn the Supreme Court that the ultimate responsibility of the conduct of state affairs was in his hands (Sánchez Urribarri 2022). The following months witnessed a saga of cases before the Supreme Court that pitted the court against the executive branch. At first, the Supreme Court decided not to confront Chávez head on. In January 1999, the Political Administrative Chamber of the Supreme Court proceeded to authorize a referendum to convoke a Constitutional Assembly.[43] After Chávez took office (2 February 1999), he proceeded to issue a decree ordering the referendum (a month later, on 10 March 1999). In a follow-up case, the Supreme Court decided not to block the referendum but instead compelled Chávez to consult people on an electoral rule matter.[44] The referendum took place on 25 April 1999, and the election was celebrated three months later (25 July 1999) through a controversial process that allowed for the ruling coalition (Polo Patriótico) to control 124 out of 131 available seats (despite having received more than 62 per cent of the votes).

Once installed, this Constitutional Assembly intervened with both Congress and the Supreme Court (10 August 1999). In response, a divided Supreme Court allowed the intervention to take place. This ended with Chief Justice Cecilia Sosa Gómez stepping down; a reconfiguration of the Supreme Court's directive, now led by Chief Justice Iván Rincón Urdaneta (a member of the Criminal Cassation Chamber); and subsequently a Plenary Chamber decision that sided with the Assembly and gave support to its broad powers by articulating and endorsing constituent power theory (14 October 1999) (Landau 2013). In the months that followed, until the approval of the 1999 Constitution by referendum (15 December 1999), the court continued to operate as it awaited its reorganization based on the rules of the new Constitution. In the meantime, a process of 'judicial emergency' continued, leading to a broad restructure of the judiciary – the suspension or dismissal of hundreds of judges and their interim replacement by the Constituent Assembly's Judicial Emergency Commission (Brewer Carias 2010). These decisions were part of a process that sought to remove effective opposition participation across all the branches of power and state institutions, with the judiciary being a key part of this process and, as we will see, it being co-opted to be part of this process in subsequent years (Landau 2013).

[43]Venezuelan Supreme Court, Political-Administrative Chamber, 19 January 1999.
[44]Venezuelan Supreme Court, Political-Administrative Chamber, 18 March 1999.

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The establishment of the new constitutional order based on the 1999 Bolivarian Constitution replaced the Supreme Court with a new apex court, the Tribunal Supremo de Justicia (TSJ). The new Supreme Tribunal had 20 justices (five more than the old Supreme Court) and a novel configuration that included the creation of a new Constitutional Chamber with a wide catalogue of constitutional review prerogatives. It was also tasked with judicial governance and administrative oversight prerogatives over the judiciary, a change that would increase the stakes of exerting political control over the Tribunal (Sánchez Urribarri 2011). Most of the justices appointed had various ties with the new Chavista ruling coalition, especially with Luis Miquilena, former President of the Constituent Assembly, and the regime's most powerful figure after Chávez.[45] The court-packing exercise included confirming a handful of justices from the 'old' Supreme Court in their seats, including Chief Justice Rincón Urdaneta (now appointed Justice of the Constitutional Chamber and was confirmed as Chief Justice of the new Supreme Tribunal), Antonio Ramírez Jiménez (confirmed in the Civil Cassation Chamber) and Alberto Martini Urdaneta (now appointed to the Electoral Chamber).

This first packing of the Supreme Tribunal offered reliable support to the executive, in particular the Constitutional Chamber. Some of the most important rulings were related to the Chamber's decision to position itself as maximum interpreter of the Constitution, including the ability to review cases of interim constitutional relief (amparo) on appeal from other courts, the power to interpret constitutional norms *in abstracto* and even the ability to establish proceedings ex novo to process class actions on constitutional grounds (Sánchez Urribarri 2011).[46] It also included siding with the executive in cases related to the stabilization of the new regime and the implementation of the new 1999 constitutional order. With respect to the regime's key features, the Constitutional Chamber positioned itself as an adjudicator of politically salient cases, including the suspension of the May 2000 general elections (an outcome that benefited Chavez).[47] During this time, with the exception of a lone dissenting justice who disagreed with the Chamber's expansive interpretation of its own powers, the Constitutional Chamber's justices tended to rule *en banc,* in a way that maximized their power relative to other branches. This positioned the Chamber well as a venue to adjudicate an increasing number of cases of political significance in the years to come. Moreover, it also increased the stance of the three justices responsible for the most emblematic decisions of this era, including Rincón Urdaneta, Cabrera Romero and Delgado Ocando. These justices eventually retained their seats in the December 2000 appointment round of the Supreme Tribunal, with the support of Chávez's Movimiento Quinta República Party (MVR) as key party of the ruling Polo Patriótico coalition, and select opposition parties (Berríos Ortigoza and Sánchez Urribarri, forthcoming). The December 2000 appointment round was considered to be at odds with the Constitution on a variety of grounds and was widely

[45]Yet this first round of Supreme Tribunal appointments did not entail a complete replacement of the court, with four justices continuing at the institution (including Rincón Urdaneta, who was now both President of the Supreme Tribunal and President of the Constitutional Chamber). Moreover, these appointments were interim, i.e. they would be enforced until a new group of justices was appointed by the new legislature (National Assembly) following its eventual election (Sánchez Urribarri 2022).

[46]See Constitutional Chamber rulings 0001/2000 (*Emery Mata Millán*) and 0002/2000 (*Domingo Gustavo Ramirez*) of 20 January 2000; 0007/2000 (*Jose Amado Mejía Betancourt*) of 1 February 2000; 0088/2000 (*Ducharme de Venezuela*) of 14 March 2000; and 1077/2000 (*Servio Tulio León Briceño*) of 22 September 2000, among other rulings directly related to the Chamber's own interpretation of its prerogatives.

[47]Constitutional Chamber, Decision 483/2000 (29 May 2000).

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considered a political intervention of the new Supreme Court, with the deliberate intention of further cementing judicial support for the executive. This new Supreme Tribunal would soon face new challenges as Chávez pressed for further reforms in a polarized environment.

Expansive judicial power and further democratic decline (2001–04)

After the new nominations took place, the Constitutional Chamber continued consolidating its authority within the Supreme Tribunal, in the lower courts and with respect to other public authorities. However, towards the end of 2001, President Chávez made a series of controversial decisions, including the approval of 49 executive decrees with legislative status in a variety of areas, encompassing the oil and telecommunication sectors and proposing land reform legislation. This mobilized the opposition against the government, leading to mass protests, which ended in the 11 April 2002 military uprising against Hugo Chávez and later led to a mass strike (including the oil sector, the most important in Venezuela's economy) in December 2002 (López Maya 2016). Chávez overcame both attempts and retained power, leading to a period of intractable conflict between a now-embattled regime and the opposition.

The Supreme Tribunal decided several politically salient cases linked to these conflicts, at the Plenary Chamber level (the Tribunal *en banc*), in the Constitutional Chamber and in other relevant divisions of the Tribunal. While the Plenary Chamber decided a range of important cases, including the decision to refuse to hold trial against the military generals who had led the April 2002 coup against Chávez,[48] the Constitutional Chamber ended up being the maximum political conflict adjudicator, battling against other actors (including other chambers of the Supreme Tribunal). This led to the Tribunal's split into warring factions that sought control of the institution, particularly the pro-government side led by Justice Rincón Urdaneta, Chief Justice and President of the Constitutional Chamber and an opposition-leaning side led by Justice Franklin Arrieche Gutiérrez.[49] As the conflict between Chávez and the opposition became increasingly judicialized, the stakes for controlling the Tribunal became higher, which had a further deleterious effect on the Tribunal's independence and legitimacy. During this time, the effects of the efforts made via court-packing with the intention of ensuring political loyalty and regime consolidation become clear.

During 2003 and 2004, the Supreme Tribunal decided multiple cases of political import. Perhaps the most important dealt with the appointment of the National Electoral Council (Consejo Nacional Electoral), and a series of rulings related to the recall referendum against Chávez. In 2003, the Constitutional Chamber appointed a majority of pro-government members to the Electoral Council who would oversee the referendum against Chávez and ended up creating obstacles for the opposition to collect enough signatures to trigger it (Sánchez Urribarri 2011: 870–72). The Electoral Chamber, which was controlled by justices sympathetic to the opposition, invalidated some decisions by

[48]Plenary Chamber Decision 2002-0038 (19 September 2002). Although this decision went against the government's interests, this does not mean the government lost the support of the Supreme Tribunal. On one hand, the Plenary Chamber was still presided over by Rincón Urdaneta, who enjoyed the support of a majority of his colleagues and was also in charge of overseeing the technical aspects of the cases and trials.

[49]Justice Arrieche was based at the Civil Cassation Chamber and had links with the former President of the Constituent Assembly, Luis Miquilena, who had defected from Chavismo in early 2002.

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the Electoral Council, which delayed the process. In turn, the Constitutional Chamber reinstated the Electoral Council's original measures, delaying the recall referendum (Martinez Meucci 2018: 230–33). The Constitutional Chamber also interpreted the recall referendum established in the 1999 Constitution as a 'ratification referendum'.[50] This allowed Chávez to remain in power, since the vote rejecting the motion that Chávez left office was higher than the vote in favour of him leaving. However, some scholars argue that the 1999 Constitution mandates that Chávez should have left office, since more people voted against him in 2004 than voted for him in the 2000 presidential election (Brewer Carías 2010: 113–14).

In the run-up to the election, given the need to cement the executive's control over the Supreme Tribunal in the event of a loss in the upcoming recall referendum, the Chavista majority in the National Assembly implemented a new packing of the court. This expanded the court to 32 members (five per chamber, and seven for the Constitutional Chamber) (Human Rights Watch 2004). The National Assembly removed opposition-leaning Justice Arrieche Gutierrez, the main leader of the opposition faction in the Court – a decision that the Constitutional Chamber refused to block (Human Rights Watch 2008). Several of the newly appointed justices had direct connections with Chávez or his close entourage, including Justice Morales Lamuño (appointed to the Constitutional Chamber and with alleged close ties to President Chávez himself), Justice Velásquez Alvaray, a Chavista politician who had captained the 2004 effort to pack the court, and Justice Carrasquero López, who had just been President of the National Electoral Authority, which had been appointed by the Supreme Tribunal in 2003. The Constitutional Chamber now only had one Justice left who was not a Chavista (Pedro Rondón Haaz), and only three judges remained in the Tribunal who had shown support for the opposition.

Authoritarian judicial activism: The TSJ as a tool of authoritarian politics (2005–15)

After Chávez won the 2004 referendum (August 2004) and the aforementioned 2004 court-packing had taken place, a novel phase started for the Tribunal and the Constitutional Chamber, one where it would move further ahead in its role of political ally of the executive while reducing its interest in protecting constitutional rights or serving as an accountability mechanism. This had a major negative effect on the institution's legitimacy – if there were any doubts regarding the Supreme Tribunal's neutrality beforehand, this phase further eroded its legitimacy as a neutral adjudicator. This diminishing perception had good grounds – as rigorous analyses have shown, the Tribunal stopped deciding cases against executive interests altogether (Canova et al. 2014).

Since 2005, the renewed Constitutional Chamber has supported the executive in several key cases, usually with a solid six-one pro-government majority (with Rondón Haaz as main dissenter until his retirement). In 2005, most of the political opposition refused to participate in the legislative elections in protest against the 2004 recall referendum's process and result, which left the Assembly in the hands of Chavismo. Emboldened, without restrictions and counting on a supportive Supreme Tribunal, the executive proceeded to move forward with a radical policy agenda known as Twenty-First Century Socialism, especially after Chávez's re-election in 2006 (López Maya 2016). In this context, the Constitutional Chamber's support was essential to redefine the regime's

[50]Constitutional Chamber, Decision 2003-2750 (21 October 2003).

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key institutional features, allowing the executive to further control key contestation arenas against the opposition (Sánchez Urribarri 2017). The most important cases that had a direct connection to the regime's architecture were decided in favour of the government, including the Constitutional Chamber's decision not to force the government to renew the broadcasting licence for the TV station Radio Caracas Televisión, RCTV (Louza Scognamiglio 2017).[51] Moreover, the Chamber issued key decisions in matters related to the 2007 constitutional reform proposed by Chávez (defeated in the referendum in December 2007) and the constitutional amendment successfully approved in February 2009, allowing Chávez and other political authorities to seek reelection without further restrictions re the number of times (Brewer Carías 2009). The Chief Justice publicly stated that the court should 'collaborate' or 'cooperate' with the regime – as opposed to exercising an accountability function (Sánchez Urribarri 2017).

During the years that followed the 2004 round of appointments, a total of four justices retired, leaving vacancies that were filled by alternate justices until 2010, when the National Assembly proceeded to both fill these vacancies and five other posts in other chambers and released a completely new list of 32 alternate justices (Berríos Ortigoza and Sánchez Urribarri, forthcoming). These appointments took place in 2010, in anticipation of upcoming legislative elections in which the ruling Chavista Socialist Party (PSUV) was increasingly unpopular, and which led to the party losing the qualified majority it had gained in the 2005 legislative elections. Although it was not as egregious as the 2004 court-packing event, this process was perceived as irregular by the opposition (*El Mundo* 2010). It allowed the government to retain control of the Supreme Tribunal with the appointment of a former legislator (Justice Mendoza) and the ex-Solicitor General Gutiérrez Alvarado, who would later become President of the Supreme Tribunal.

These appointments continued to further the autocratization process. This included the Constitutional Chamber's decision in October 2011 to prevent the enforcement of an Inter-American Court of Human Rights' ruling in favour of opposition politician Leopoldo López, who had been barred from holding office by a decision of the Comptroller General's Office (as opposed to via judicial decision, which is what was required by law) (Brewer Carías 2012).[52] Moreover, between 2012 and 2013, the Constitutional Chamber issued a series of rulings that allowed the government to count with constitutional interpretations that gave judicial backing to the government's claim to power during Chávez's absence from office due to illness and ongoing treatment in Cuba, and eventually his death (Brewer Carías 2013; Berríos Ortigoza 2013). Following Chávez's death, the Constitutional Chamber also issued a decision to give judicial support to Nicolás Maduro's interim rule during this time (interpreting article 233 of the Constitution). After Maduro's election in a narrow (and controversial) victory in the April 2013 presidential election, it took over all the cases related to the election pending before the Tribunal's Electoral Chamber, and declared them *inadmisibles* (Márquez Luzardo 2014).

The Constitutional Chamber continued to be a key ally for the regime in the years to come, especially after the opposition victory in the legislative elections in December 2015, which propelled the departing pro-government majority in the National Assembly to use its designating powers to once again stack the court with justices aligned to the ruling

[51]Constitutional Chamber, Decision 2007-957, 25 May 2007 (penned by Chief Justice Morales).
[52]Constitutional Chamber, Decision 1547-2011, 17 October 2011.

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factions in this new, ever-authoritarian phase conducted by Nicolás Maduro. These designations took place in open violation of the Constitution, once another legislature had been elected through a rush process that filled three justices who had retired three months before with three justices with strong links with the ruling party: Justices Ortega Ríos, Damiani Bustillos and Suárez Anderson. This renewed chamber provided solid support to President Maduro and the Chavista regime by confronting the head of the new National Assembly after it was sworn in (January 2016) and issuing over 100 decisions that effectively blocked the law-making power of the opposition-controlled institution. The chamber's prompt and resolute use of its powers to support the regime during Maduro's openly authoritarian phase is unprecedented in the region and poses new questions about the roles institutionally powerful constitutional adjudication institutions can play on behalf of authoritarian leaders with respect to governance and the judicialization of repression (Pérez Perdomo and Santacruz 2016).

VI. Conclusion

In this article, we have contributed to current debates in public law and political science on the role of courts in processes of democratic backsliding. Building on recent analyses that have sought to conceptualize court-packing and its various roles in different political systems and circumstances, we have argued that it is important to understand the preferences and goals of the 'court-packers' – that is, the ruling elites involved in court-packing – with an emphasis on the executive branch. Beyond the assumption that court-packing seek to secure control of the court lies a more complex framework of interests that reflect disparate attitudes towards the judiciary and the regime as a whole and different understandings of the role of law. Moreover, these different interests and their relevance help to explain court-packing and its subsequent effects on democracy.

This article focused on two paradigmatic cases of court-packing in Latin America: Argentina and Venezuela. We identified two types of court-packing which are analytically different, and which have different effects on democratic stability. One key criterion for this distinction is pointing to the difference in the motivations and goals behind court-packing. Of course, empirically identifying cases that fall into one or other category without doing it retroactively presents numerous methodological challenges, which cannot be addressed fully in this article (Daly 2022). Explicit criteria still need to be developed to empirically differentiate policy-driven court-packing from regime-driven court-packing.

Additionally, more theorizing is required regarding other motivations for court-packing proposals. For instance, court-packing can be implemented as a policy or regime insurance when a ruling coalition is about to lose power (Dixon and Ginsburg 2017). In these cases, the alteration in the composition of the court is designed to *prevent* a future change in the status quo. We would also like to investigate further the connection between court-packing and democratic deterioration, not only in terms of the direct effects that securing control of a High Court affords the regime, but also in terms of the costs of legitimacy that each court-packing incident entails for the regime and the judiciary itself. In turn, this could have an important effect on the overall state of democracy, as the case of Venezuela illustrates well, with a delegitimized court losing legitimacy over time *vis-à-vis* the overall population, while still retaining authority *vis-à-vis* the regime actors (Sánchez Urribarrí 2022).

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Finally, we think it is essential to further discuss what to do about packed courts if the situation changes and the country enters a period of re-democratization.[53] What should be done about a packed court or an openly politicized judiciary? We discussed above that one possibility is conducting a 'virtuous' form of court-packing that helps to recraft the court, designating justices who are committed to democratic values and principles or who will honour a new democratic pact. In theory, this should help to consolidate democracy, enhance judicial independence and regenerate judicial legitimacy. But this exercise might not be free from controversy: Who determines, and under which criteria, what judges are committed to democracy and through what process? And if court packing is not an option, what other mechanisms could be implemented to enhance the rule of law fwhen sitting justices from the previous (undemocratic) regime remain on the Bench? These are far from being abstract questions. Indeed, this would probably be the situation that opposition parties will face if Fidesz and Law and Justice lose control of the parliament in Hungary and Poland, respectively. All in all, the study of court-packing is an exciting emerging theme in the comparative study of law and courts, and future work should be able to engage with these issues and open new avenues of inquiry into this important phenomenon.

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