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Judges as Actors of Democratic Resilience

Habilitation Thesis

(A collection of previously published scholarly works with commentary)

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Abstract

This habilitation thesis engages with the timely question of what role judges play in the concept of democratic resilience. While traditional theories of democratisation did not historically pay too much attention to the courts, the new post-2020 scholarship frequently portrays judges as one of the key horizontal accountability actors or the guardians of democracy. But is that how judges understand their role? This thesis unpacks the topic in more depth. It demonstrates that judges have a profound role in shaping the institutional contours of young transitional democracies, and indeed are among the first actors targeted by different forms of backsliding and autocratisation. It also argues that while judiciaries (i.e. judges and courts) have variety of tools enabling them to avert and resist backsliding, they also face important limitations. As this thesis argues, the ability of judges to execute the role of democratic guardians differs from their traditional decision-making function under the separation of powers. That ability requires a different source of legitimacy and depends on professional role conception inside the judiciary – i.e. how judges understand democracy, its key underlining concepts, and their role in it. This thesis offers a bridge between traditional democratisation theories and scholarship researching judges and courts from the position of strategic and ideational (behavioural) approaches. It comprises six original studies, two single-authored and four co-authored (with me acting as the first author responsible for the conceptualisation, theory building and analysis of collected empirical data),

Keywords

Democratic resilience, democratisation, democratic erosion, democratic decline, judges, courts, separation of powers, professional role-conception

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M U N I

COMMENTARY TO HABILITATION THESIS

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INTRODUCTION

What role do courts and judges play in the resilience and protection of democratic regimes? Scholarship exploring the current wave of democratic backsliding often portrays courts as guardians of democracy. But is that how judges understand their own role in the political system? Are they equipped, politically, socially and legally, to push back against varieties of illiberal attacks, authoritarian practices and abusive norms? And what happens once they themselves are challenged?

This habilitation thesis fits within the wave of recent scholarship that explores political interferences in judicial independence, attacks on courts, and their role in containing and preventing democratic backsliding. Utilising mixed-method approaches, it offers a bridge between strategic and ideational theories on judicial decision-making and judicial behaviour, and links the emerging field of judicial resistance to classical studies of democratisation, transitional justice, and the judicialisation of politics. It brings to the fore a new holistic view that unpacks the role of judges as political actors in democratic resilience. It does so by looking at judiciaries (i.e. courts and judges) in three different stages of the cycle of democratisation and de-democratisation processes: transition to democracy, resilience against regression (backsliding) and a new wave of re-democratization. From this perspective, it is important to note that the thesis does not aim to solve the important conceptual dispute over the terminology and differentiation between de-democratisation (Keck 2022), democratic backsliding (Bermeo 2017; Waldner & Lust 2018), decline (Boese 2021; Kneuer 2021) and erosion (Keck 2023). While it acknowledges important differences between the concepts, for the purposes of its aim, it opts to use the broadest concept of de-democratisation and understands it as a blanket term covering all the different variations and nuances of events that challenge the quality of democracy and its structures.

At its heart, the thesis demonstrates that judges have a profound role in shaping the institutional contours of young transitional regimes, but it also analyses why they are among the first targets of political actors, who wish to weaken or undo democratic structures. The core of the thesis engages with the premise of judicial resistance as one of the preconditions for democratic resilience. It argues that while judges have a relatively vast toolbox of formal and informal resistance practices, the implementation of such practices has significant limitations: institutional (existence of formal safeguards of judicial independence and compliance, or (non-

)embeddedness of courts in supranational networks), political (the level of courts' legitimacy to act as civic or political actors beyond their traditional decision-making role) and behavioural (deeply embedded professional culture – i.e. how judges understand democracy, its key concepts, and their own role in it).

The introductory commentary to this thesis proceeds as follows. First, it contextualises the topic of judges as actors in democratic regimes within the recent trend towards populist and authoritarian backlash and the corresponding wave of judicial resistance. Second, it introduces the basic outline of the thesis and the logic behind its individual parts. Third, it discusses the broader theoretical and methodological underpinnings of the thesis and, fourth, it addresses the thesis's major contribution to the current scholarship. It discusses how democratisation and institution-building theories might benefit from what we have learnt about the examples of successful and unsuccessful transformations of judicial cultures. While institutional resilience can be strengthened by formally entrenched mechanisms empowering the courts vis-à-vis the political branches of power, it also depends on a transformation of judicial culture itself: how judges understand their role in the political system and how well they internalise democratic norms and concepts.

A. Judges at the Heart of Democratic Backsliding – The Challenge and Broader Context of the Thesis

The past decade has been one of a moral and professional reckoning for many judiciaries. Once expected to embody neutrality and restraint (Dixon and Ginsburg 2011; Dixon and Issacharoff 2016a; Delaney 2016; Gardbaum 2015; Roznai 2020), many judges have been thrust into roles they never envisaged—as public speakers, guardians of democracy, dissidents mobilising the streets. This shift has raised fundamental normative and empirical questions: Should judges remain silent in the face of political encroachment, trusting in institutional safeguards? Or must they step outside the courtroom, resisting through activism, media engagement and transnational alliances? And if they decide to act, how successful can they be in staying the hands of illiberal politicians? These dilemmas are not merely theoretical. The powerful images of judges marching in the streets, refusing to adjudicate, speaking up in the public media and coordinating public demonstrations spread across the globe as a reaction to the political backlash against the courts (Tew 2024; Yam 2024b; Coman & Puleo 2024; Šipulová 2025).

Interestingly, democratisation scholarship, particularly in the Anglo-American tradition, did not place courts at the centre of its attention, despite the long-existing works on judicial

review at the heart of the concept of militant democracy (Loewenstein 1937). The trend towards the judicialization (Hirschl 2007) and empowerment of courts, so strongly present in the second half of the twentieth century, prompted studies on judicial activism and compliance. However, these topics, although acknowledged as typical dominantly for democratic regimes, were largely divorced from theories on democratisation. Even those scholars who identified the rule of law as one of the key determinants of a constitutional democracy rarely engaged more deeply with courts, or warned against judicialization of democratic resistance. Ginsburg and Huq, for example, explicitly warned against the judicial review of rule of law safeguards, particularly when liberal and constitutional norms come under attack (Ginsburg & Huq 2018). Several other authors initially called for caution, avoidance and judicial deferral as the best strategy for allowing courts to escape frontal confrontation with political branches (Dixon & Issacharoff 2016b).

The change in the tide came with the rise of what legal scholars called *abusive constitutionalism* – the reliance of illiberal political leaders on the form of law to push through non-democratic changes, combined with the global backlash and attempts to weaken the courts. This, naturally, triggered political science interest (Boese et al. 2021). Comparative studies documented and catalogued various forms of attacks against judicial independence (Taylor 2014; Castagnola 2018) court-packing (Kosař & Šipulová 2023; Bugarič & Ginsburg 2016) jurisdiction stripping (Uitz 2015), and politicisation (Hendley 2009; Popova 2012; Ledeneva 2008). Several studies engaged with the motives behind these interferences, as well as with the question how potentially to restore the independent courts once illiberal governments have lost their power (Chavez 2008; Taylor 2014; Bugarič & Ginsburg 2016; Castagnola 2018; Levitsky & Ziblatt 2018; Botero & González-Ocantos 2020; Daly 2022; Kosař & Šipulová 2023).

A less-studied phenomenon, which has only very recently gained momentum, was the judicial resistance and its reasons, motives and effects. The first pioneering studies were largely theoretic, revisiting the concept of militant democracy (Sajo and Bentch 2004; Müller 2012), or casuistic, typically focusing on judicial demonstrations (or the lack thereof) in Poland and Hungary, building of domestic and Pan-European alliances and networks between Polish, Romanian and European judges (Coman & Puleo 2024; Puleo & Coman 2024; Bercea & Doroga 2023) or the supranational review and pressure exerted by the Court of Justice of the European Union and the European Court of Human Rights (Krygier, 2019, Suteu 2019, Von Bogdandy and Sonnenved 2015). With a very few exceptions, almost no attention has been paid to judges' agency, legitimacy, or the effectiveness of judicial resistance (Tew 2024 however on

South-East Asia, Bogea 2023 on Brazil), nor to the long-term effect of the resistance on the quality of democratic norms and the resilience of democratic institutions.

This thesis steps into this area with a set of articles which explore the role of judges in various phases of democratisation and de-democratisation cycle: from the transition from a non-democratic regime (i.e. institution building) to resistance against backsliding, to re-democratisation. The thesis, however, not only provides a descriptive-analytical exercise. It offers a novel conceptual understanding of the role of judiciaries (i.e. judges as individuals and courts as collective actors) in democratic resilience. By looking at judges as actors in the political system (i.a. political actors), it examines the interconnection between formal institutional safeguards and the strategic, rational and behavioural aspects of judges' agency to resist or to defer to democratic backsliding. It furthermore argues that one of the crucial questions overlooked by emerging scholarship on judicial resistance is the role of judicial culture, which has an impact on the ability of judges to understand and internalise new meta-concepts and values crucial to democracy – such as the rule of law, judicial independence, impartiality, accountability or the separation of powers. While doing so, the thesis argues that judges can significantly shape the form and design of new democratic institutions and can safeguard compliance with these institutions. However, in order to do so, they also require a different source of political and social legitimacy and a different professional role-conception compared to the legitimacy tied to their more traditional adjudicative role.

B. The Outline of the Thesis

This thesis presents a collection of articles and a manuscript chapter that engage with the role of judges in different stages of democratisation processes. The studies were selected due to the theoretical, conceptual and methodological novelties they bring to the research on courts in democratic regimes.

Hitherto, I have authored and co-authored many texts that address individual dimensions of democratic resilience and, in particular, the role of the judiciary in democratic resilience. I have studied immediate judicial reactions to democratic backsliding and attacks against courts (Kosař & Šipulová 2023), the creation of informal coalitions and alliances (Šipulová 2021; Šipulová 2024), the role and the strength of judicial review and the relationship between constitutional (and international) courts and national parliaments (Šipulová 2019, Šipulová & Králová 2024, Šipulová & Steuer 2023, Šipulová 2020). I have also analysed the position of courts in the separation of powers structure from a more theoretical perspective (Kosař,

Šipulová, Kadlec 2024; Šipulová, Spáč, Kosař, Papoušková, Derka 2023), theorising about the role of self-perception and autonomy as one of the tempering forces inside the separation of power doctrine (Šipulová & Spáč 2023). I have also devoted attention to questions of transition: How to deal with the judiciary after the revolution (Kosař & Šipulová 2023, Šipulová & Smekal 2021, Šipulová & Hloušek 2013), and how and to what extent to purge it in order to secure institutionally and mentally independent courts that can oversee and fulfil their role in the democratic regime (Šipulová & Smekal 2021, Šipulová & Kosař 2025). For the purposes of this habilitation thesis, I have chosen a set of works that are, however, most closely connected to the key research interest and communicate best with the larger research aim this thesis pursues – under what conditions judges become the actors of democratic resilience. In what follows I will thus present individual texts that approach this aim from the perspective of transition (and democratisation studies), judicial resistance (reactive strategies, coalition building and perceptions of the judiciary under attack) and a re-democratization and separation of powers theory (perceptions of the role of judges in relation to that of other political powers).

The format of this habilitation thesis, i.e. a collection of previously published scholarly works with a commentary, complies with Act No. 111/1998 Coll., Article 5, point (1) b) of Masaryk University Directive No. 7/2017 on Habilitation Procedures and Professor Appointment Procedures. The thesis comprises six original studies which have provided a number of novel insights into the research on the role of judges in democracies. The very core of the thesis consists of single-authored studies (III, IV) and co-authored works (studies I, II, V and VI). The co-authored works resulted from my engagement in cooperative research projects. However, in all of them, I was the first author, bearing over 50 per cent of the workload, including the conceptualisation, the formulation of the major argument, and the analysis of the collected empirical data. Overall, five of these studies have been published in foreign academic journals indexed among Q1 journals in the WoS database. One is a single-authored book chapter published in the edited monograph by the Edinburgh University Press. These studies were transferred from original pdf files into word documents with minimal formatting changes.

PART 1: JUDGES AS ACTORS OF DEMOCRATIC TRANSITION

- **Study I**: Šipulová, Katarína & Hubert Smekal (2021). Between Human Rights and Transitional Justice : The Dilemma of Constitutional Courts in Post-Communist Central Europe. Europe-Asia Studies, 73(1): 101-130. https://dx.doi.org/10.1080/09668136.2020.1841739 (Q1 WoS; authors' share 50 %).

Data work (%)	Supervision (%)	Manuscript (%)	Research direction (%)
50	75	50	75

- **Study II:** Šipulová, Katarína & David Kosař (2025). Purging the Judiciary After a Transition: Between a Rock and a Hard Place. *Hague Journal on the Rule of Law*, 17: 61-93, *https://doi.org/10.1007/s40803-024-00201-y* (Q1 WoS; author's share 60 %).

Data work (%)	Supervision (%)	Manuscript (%)	Research direction (%)
60	60	60	60

PART 2: JUDICIAL RESISTANCE

- **Study III**: Šipulová, Katarína (2025). The Light and the Dark Side of Judicial Resistance. *Law & Policy* 47 (1): 1-25 (Q1 WoS; author's share 100 %).

Data work (%)	Supervision (%)	Manuscript (%)	Research direction (%)
100	100	100	100

- **Study IV**: Šipulová, Katarína (2024). Judicial Resistance: The Shield and The Sword of Informality. In: Björn Dressel, Raul Sanchez-Urribarri, Alexander Stroh-Steckelberg (Eds.). *Informality and Courts* (1st ed, 136-153.). Edinburgh University Press (book chapter; author's share 100 %).

Data work (%)	Supervision (%)	Manuscript (%)	Research direction (%)
100	100	100	100

PART 3: THE ROLE OF INFORMAL JUDICIAL INSTITUTIONS IN DEMOCRATIC RESILIENCE

- **Study V:** Šipulová, Katarína & David Kosař (2023). Decay or Erosion? The Role of Informal Institutions in Challenges Faced by Democratic Judiciaries. *German Law Journal*, 24(8): 1577-1595 (Q1 WoS; author's share 75 %).

Data work (%)	Supervision (%)	Manuscript (%)	Research direction (%)
75	75	75	75

- **Study VI**: Šipulová, Katarína & Samuel Spáč (2023). (No) Ghost in the Shell: The Role of Values Internalization in Judicial Empowerment in Slovakia. *German Law Journal*, 24(8): 1412-1431 (Q1 WoS; author's share 75 %).

Data work (%)	Supervision (%)	Manuscript (%)	Research direction (%)
75	75	75	75

A Detailed synopsis of individual studies

Study I discusses the impact of courts on the final form of transitional justice, i.e. on how young democratic regimes come to terms with the crimes of the past. While a large body of work has been devoted to the question why and how States decide to punish past perpetrators of human rights abuses, these works have failed to factor in the role of constitutional courts, or the important restraints these courts place on the choices of political branches of power, when deciding on transitional justice issues. The role of judiciaries in transitional processes is relatively well documented in the countries of Latin America (Hilbink 2007, Huneeus 2010, Roth-Ariazza 2015; Gonzales-Ocantos 2018), but have so far remained surprisingly underexplored in Europe. The article makes three major contributions to the standing scholarship on transitional justice. First, it employs a unique combination of quantitative and qualitative content analysis of the Czech Constitutional Court rulings in all cases where the Court has reviewed the legislative acts on transitional justice policies. Based on the quantitative analysis, the article demonstrates the significant turn the Czech transitional policies took due to the constitutional review, often directly against the will of the original legislator. The Czech Constitutional Court significantly reshaped not only the form, but also the effectiveness of individual transitional justice policies. Second, the article uses discourse analysis to demonstrate the presence of clashes between the international human rights commitments of the Czech Republic and the constitutional justices' vision of transitional justice. Third, adding the insight from elite semi-structured interviews with retired constitutional justices, it also argues that constitutional justices used the international law of human rights strategically, i.e. in situations where it helped them to push forward their own vision of the transitional justice. Many of them acknowledged that they saw themselves as paramount actors of democratic consolidation, and were frustrated by the weak effect of political lustration, lacklustre rehabilitation, or the reshaping of key constitutional contours of the political system. Their activist approach towards the restoration and rehabilitation of communist victims had

significant fiscal repercussions not only for transitional justice, but also for the transition of the state's economy. (Šipulová and Smekal 2021).

Study II digs deeper into the role of judges in transitional processes. It shows that while we know that judges play a key role in the implementation of transitional justice mechanisms, little attention has been paid to the question of how to address their collaboration with non-democratic regimes. In theory, judges can be subjected to virtually all transitional justice mechanisms, ranging from criminal prosecution and lustration to truth-seeking and apologies. As part of the study, we collected and analysed all the criminal and disciplinary court cases brought against the Czech communist judges in the early 1990s, and we conducted a discourse analysis of parliamentary debates, analysing the rationalisations behind retention elections and the removals of communist court presidents. As the results show, the Czech Republic attempted to implement a wide variety of purging mechanisms to rid the system of judges who participated on the crimes of the communist past, judges who were ideologically and morally loyal to the previous establishment, and judges with low standards of legal education. However, these mechanisms proved to be ill-fitted to address the complicity of judges in past crimes for three reasons: (1) judges usually play different roles in past crimes from political elites, which makes traditional lustration almost non-applicable, (2) criminal and disciplinary trials fail on judicial collegiality and peer support; political removal is complicated due to principles of the rule of law, (3) pragmatic exigencies such as the shortage of lawyers not tainted by cooperation with the previous regime further complicate the renewal of the bench. Nevertheless, the study argues that drawing a thick line behind the role of the judiciary in a totalitarian regime may taint its legitimacy and negatively affect public confidence in courts. Examples from Hungary, Poland and Romania, moreover, show that populist leaders are quick to misuse the failure to deal with the past as a justification for vast court-curbing practices (Szwed 2023; Kosař and Šipulová 2023). Post-transition purges are therefore stuck between a rock (interfering in judicial independence and practical exigencies) and a hard place (the mental dependence of judges on the previous regime, low public trust in courts). As the Polish struggle with the reconstruction of judicial independence post-PiS suggests, while re-democratisation after the rule of populist parties differs from true regime transition, it faces the very same dilemmas of renewing the trust and legitimacy of courts. (Šipulová & Kosař 2024).

Study III broaches the topic that stands at the very heart of the thesis and shifts attention to judicial resistance and the role of judges as guardians against democratic backsliding. It hypothesises why some judges resist political challenges while others stay passive, defer to or

even condone governmental actions. Building on my previous work on judicial reactions to political pressure in the countries of the Visegrad four (Šipulová 2021), the study collects examples of judicial resistance from Europe, Latin America, Africa and South-East Asia. It draws a novel concept map of judicial resistance as a multi-dimensional phenomenon and argues for its study at three conceptual levels. The first captures the variety of techniques available to judges who wish to avert, punish or invalidate an attack. It shows whether judges rely on their official judicial function and use their decision-making power to avert or retroactively invalidate the attacks (i.e. on-bench resistance), or whether they rely more on extra-judicial means (i.e. off-bench resistance) like individual or collective public protests, talks, (social) media statements, indirect political influence and alliance building with domestic and supranational partners. The second dimension zooms in on the agency (individual and collective) and motivation of judges to resist, including their ability to recognise an attack and see it as critical. It outlines institutional, strategic and ideational factors that potentially form the cost-benefit analysis behind judges' decisions to resist. Finally, the third level prompts one to look into the normativity and effects of resistance (the dark and the light side) against the backdrop of the principle of the rule of law. The three dimensions allow us to study the phenomenon of judicial resistance against the element of time: to capture the short-, mid- and long-term effects of different resistance techniques not only vis-à-vis an immediate attack or wave of autocratisation, but also to analyse the overall institutional resilience of the judiciary within democratic structures. (Šipulová 2025).

Study IV unpacks an informal element of judicial resistance. It moves beyond the standard adjudicative role of courts to argue that judicial resistance far transcends the on-bench practices. As with any actors, judges are embedded in various relational networks (Dressel 2024; Dressel, Urribarri & Stroh 2018; Dallara & Piana 2015; Trochev & Ellett 2014; Baum 2006). How do these networks stand up against democratic erosion, and how do extra-judicial activities both within and outside courts, augment existing formal safeguards? Building on examples from recent attacks against domestic courts, this original published chapter shows that even courts embedded in strong systems of constitutional review and supranational commitments rely heavily on informal practices operating across intra-judicial (among domestic or foreign judges) and extra-judicial (contacts with media, politicians, academics, etc.) networks. It demonstrates that informal networks allow judges to plan strategies, communicate the dangers of erosion to the public, mobilise support, and exert pressure on actors who can

actually force democratic erosion agents into compliance.[1] However, the ability to build and utilise alliances depends on the participation of judges in networks tied by shared understandings of democracy, rule of law, or judicial independence (Šipulová 2024).

Study V opens the last, third part of the book which captures the role of courts in the multi-faceted processes of de-democratisation and subsequent potential re-democratisation, with specific attention being paid to informal institutions, networks and the role of socialisation and culture. This study represents a concluding piece of the Special Issue on Informal Institutions and Democratic Decay I co-edited, which was awarded by the 2024 MUNI Scientist award. This article discusses the role of informality in exogeneous decline and endogenous erosion of judicial structures. It explores types of attacks, formal and informal, that judiciaries in democracies experience. In the article, we argue that the participation of judges in informal practices has a crucial impact on how the public understands their role in the protection of democracy. The article is a stepping stone to the further research on the role of informal institutions, perceptions and the judicial culture on democratic resilience (Šipulová & Kosař 2023).

Study VI closes with an empirical research on the corruption allegations within the Slovak judiciary and explains why institutions that are supposed to safeguard judicial independence (mostly focusing on ethical and disciplinary accountability by the Slovak judicial council) failed to problematise and tackle judicial corruption. The article, which I consider to be one of my key works venturing into the field of socio-legal research, sheds light on why institutional reforms of judiciaries are sometimes not successful. My co-author and I argued that reforms of the Slovak judiciary, which followed the Council of Europe blueprint, had backfired because they did not take into consideration local judicial culture, different understanding of judicial independence, and informal patterns of behaviour present inside the judiciary. The design of the reforms did allow the Slovak judges to concentrate power and rid them of potential accountability. This in turn allowed informal institutions detrimental to judicial independence to flourish and can be seen in judges' lack of recognition that their off-bench behaviour often breaches principles of independence (Šipulová & Spáč 2023).

The final part of the habilitation, 'Concluding Remarks', synthetises all these aspects and presents a compact theory on the role of judges as actors of democratic resilience. It does so by looking at three dimensions of judicial behaviour: institutional, transitional and mental.

[1] For similar notes see Moustafa 2007; Trochev 2008; Widner 2008.

C. The Logic Behind the Thesis's Structure

The role of judges in democratic resilience can be understood from various perspectives. The logic behind the organisation of the thesis reflects the potential variations. It allows the reader to engage with three separate dimensions of the topic: i) the role and behaviour of judges during different segments of the democratisation and de-democratisation cycle, ii) the differentiation between the roles of judges as individual and judiciaries as collective actors (mostly when the court acts as a whole), and finally iii) the interaction between the systemic and relational perspectives, looking at the interplay and congruency between formal and informal institutions judges and courts engage in, and analysing the effect of this congruence on the quality and long-term resilience of the judiciary.

I) Time and the Democratisation Cycle

The guiding principle behind the thesis's structure is the element of time. The six studies described above are intentionally organised within three separate sections, which also mirror three different stages of (de-)democratisation cycle[2] and the different roles judges play in each of them: democratic transition, resistance to backsliding during the onset of de-democratisation, and the subsequent re-democratization. As such, the thesis links to scholarship suggesting that strong judicial constraints are associated not only with resilience to onset of democratic decline, but also against the breakdown once autocratisaiton has already begun (Boese et al. 2021).

The first part opens the narrative with a discussion on the impact of courts on the processes of democratic transition, and transitional justice in particular, i.e. how States that recovered from a conflict or authoritarian rule come to terms with the past (Kaminski et al. 2006) and how they deal with the personnel accountability of previous leaders and policy-makers (Kritz 1995; Huntington 1991; Moran 1994; Welsh 1996; Nalepa 2021). When transitional justice emerged as a field of practice amid the post-1989 wave of democratisation, many hoped that it would automatically reinforce the new rules and norms that prevent democratic decline (Dancy and Thoms 2025).[3] However, over half of all democracies that

[2] With no ambition to redefine the concept of democratization and its stages, this thesis merely uses the term to describe one of the circular scenarios where waves of democratization are interrupted by de-demoratization and backsliding.For vibrant scholarship on the topic see Bermeo 2017, Daly 2019; Huntington 1991; 1996, Keck 2023, Kneuer 2021, Luhrmann and Lindberg 2019, Nord, Angiolillo, Lundstedt, Wiebrecht and Lindberg 2015, O'Donnell and Schmiter 2013 and others.

[3] Although, admittedly, the presumed correlation differed among the supporters of the retributive approach which called for transparent criminalisation, justice and the rule of law as a deterrent from future human rights abuses, and supporters of 'forgive and forget' policies (such as '*oblivion'* in post-frankoist Spain, or 'thick line behind the past' in Mazowiecki's Poland (Šipulová & Hloušek 2013; Sczerbiak 2016).

transitioned in the third wave have since undergone some form of backsliding or breakdown (Keck 2023). Even consolidated democracies face the rise of populism, illiberal rhetoric and the collapse of key constitutional structures. The decay and erosion of democratic institutions are further enabled by continuously declining public trust in the State (Nelson & Driscoll 2023; Gandur, Kingsley & Driscoll 2025). This includes the judicial system, with formerly independent courts captured or co-opted by the executive power (Gardbaum 2015; Gibler & Randayyo 2011). Some scholars, therefore, raised the question 'whether transitional justice was partly to blame' (Dancy and Thomas 2025; Nalepa 2021; questioning the arguments against harsh repressive processes raised by Snyder and Vinjamuri 2004, 5; O'Donnel and Schmitter 2013, 31-32). In the Central and Eastern European ('CEE') setting, this question morphed into the ex-post reflection of the depth of the de-communisation processes and their role in the eradication of informal networks and institutions, which helped the communist power to hold the civic society and opposition on a tight leash (Nalepa 2021). The empirical evidence suggests that, on the global level, an active approach to transitional justice is associated with stronger institutional structures that reinforce the safeguards against the autocratic reversion (Smulovitz 2002; Roht and Arriaza 2015; Dancy and Thoms 2025). At the same time, an environment in which voters cannot be certain about the ideological preferences of the incumbent allows democratic backsliding even in those societies that otherwise strongly oppose authoritarian and unconstitutional politics (Nalepa, Vanberg, Ciopris 2024). Nalepa explicitly shows how much the early 1990s reluctance of Polish and Hungarian elites to initiate lustrations enabled the populist successor to undermine judicial independence and use de-communisation to get rid of the key accountability actor and tighten PiS's and Fidesz's grip on power (Nalepa 2021, 279).

From this perspective, it is surprising how little we know about the role of judiciaries in transitional justice processes in Central and Eastern Europe, both as actors and as targets of de-communisation processes. The dominant narrative of political science has identified a whole set of variables that impact on how countries come to terms with crimes of the past and how much they isolate the perpetrators of those crimes from further political engagements. From Huntington (1991) to Szczerbiak (2016), scholars have typically analysed the impact of the form of the transition (Huntington 1991), previous democratic experience, the harshness of the non-democratic regime (Moran 1994) the time between the crimes and the transition (Stan 2009), the power-balance between the old and the new elite, partisan polarisation (Nalepa 2021; Welsh 1996; Szcerbiak 2016), and the external pressure of international actors (Crocker 1998). Yet, in the European setting, where many CEE countries opted for so-called legal transition,

the execution of a majority of these processes was de facto delegated to the domestic courts, who were, however, themselves among the actors targeted by vetting and early democratic purges. This opens the interesting question, to what extent the past engagement with communist regimes skewed the role of judges in transitional processes. The Latin American experience suggests that those judges who were co-opted by totalitarian regimes were also less likely actively to push for transitional justice issues and more willing to block them (Kapiszewski 2010; Gonzalez-Ocantos 2016; Aguiar-Aguilar 2024).

The first part of the thesis covers the blind spot in European transitional justice scholarship and shows that post-communist judiciaries were indeed influential primary actors who reshaped many transitional justice policies (Dyzenhaus 2003a) beyond the development of new legal doctrines (Šipulová and Smekal 2021). They changed the scope and harshness of lustration, led prosecutions of communist crimes, set out the contours of corruption criminalisation and shaped and supervised the processes of property privatisation. Yet, these decisions were often influenced by judges' personal engagement with the communist regime, their ideational views and political orientation, as well as the judicial culture in general. From this perspective, more attention should be paid to judges as targets of transitional justice purges (Šipulová and Kosař 2025).

The relational and ideational sources of judicial behaviour, of course, far transcend the area of transitional justice. They also have an impact on the overall position, independence and autonomy of the judiciary vis-a-vis the two political branches of power. This narrative opens up the second part of the thesis. **Studies III and IV shift** attention to the stage of early de-democratisation and focus on factors influencing the ability of judiciaries to resist democratic backsliding. As previously discussed, courts, one of the key horizontal accountability actors (Feierherd, González-Ocantos and Tuñón 2024), recently found themselves in the first line of illiberal, populist or non-democratic attacks. The form of these attacks is relatively unique. Modern authoritarian regimes often do not obtain power by using brute force, direct politicisation, and violence. Instead, they opt to maintain the legal façade (Lührmann &Lindberg 2019, 1104; Tapscott 2021, 17; Garcia Holgado & Urribarri 2024). The attacks aimed to weaken, dismantle or capture the courts therefore rely on a mixture of non-majoritarian difficulty and democratic legitimacy rhetoric, justifying abusive legislative and constitutional techniques (Dixon and Landau 2021; Scheppele 2019).

Naturally, the form of non-democratic attacks on courts opened the question to what extent judges can avert the non-democratic and unconstitutional practices through the institute

of judicial review and invalidation of the abusive legislation at the constitutional or supranational level. Generally, the legal scholarship was initially split along the division between the continental and Anglo-American traditions, the first trusting in the strength of courts and supranational judicial safeguards (Kapiszewski 2010; Krygier 2019; Suteu 2019, Von Bogdandy and Sonnenvend 2015, Müller 2016; Kochenov & Bard 2020; Sadurski 2019; Roznai 2020; Schaff 2022), the second sceptical of the ability of courts to prevent further backlash and calling for a careful deferential approach (Dixon & Issacharov 2016a). The wave of judicial resistance that surprisingly swept across continents spurred studies on forms, patterns and motives of judicial independence. Studies III and IV are at the heart of this emerging scholarship and contextualise judicial resistance in broader political, historical and cultural externalities. They show that adjudicative resistance has significant practical and theoretical limits. It soon proved to be difficult for courts to exert sufficient pressure on incumbent politicians to comply with rulings and reverse the course of their policies, or legitimately to invalidate the reforms of leaders with a constitutional majority. In some cases, the courts quashed court-packing reforms but failed to re-establish unconstitutionally removed judges (or actors of other accountability structures) in their previous positions. Many judges under pressure therefore increasingly rely on non-adjudicative strategies, which allow them to leave the courtroom and spread the narrative about the unconstitutional practices of incumbents to new audiences – journalists, members of legal professions, but also politicians (opposition), international partners, or the public itself (Baum 2006; Kureshi 2021; Bogea 2023). Apart from conceptualising the off-bench, non-adjudicative strategies and alliances judges form, the second part of the thesis also highlights the empirical findings that courts packed by non-democratic leaders do not necessarily always serve the regime's interest but sometimes remain independent and stay under the radar of autocrats, thanks to the use of minimalistic review, and formalistic language (Dichio & Logvinenko 2024; Šipulová & Steuer 2024). This part highlights how the judicial resistance to non-democratic practices of the political regime depends on a fragile interaction between institutional safeguards, individual motivations (fear, career considerations, but also institutional loyalty) and cost-benefit analysis of potential risks they need to undertake (also Yam 2024).

Finally, the third part of the thesis closes the circle by looking deeper into the dynamic between informal and formal institutions in democratic backsliding and it revisits the question of how to reflect this dynamic in the future restoration of independent judiciaries and their long-term resilience at the stage of re-democratisation. In other words, it shows what States in a

situation similar to that of post-2023 Poland can take from the experience of democratic backsliding and judicial resistance in order to redesign the contours of their democratic institutions. In the case of courts in particular, it ponders how to strengthen not only their independence but also their legitimacy and public confidence, in order to make the judiciaries more impervious to future attacks. In this sense, the two final studies link traditional scholarship on courts with institutional and relational theories. They zero in on the problem of informal institutions present within and around the judiciary. The third part therefore highlights how incongruence between formal and informal institutions (related to the governance and decision-making of courts) eventually hollows out the judicial structures and make them more susceptible to swift co-optation and capture. It also underlines the so far underexplored role of judicial culture in the democratisation of judiciaries and argues that Pan-European models of judicial governance, imposed upon the CEE countries by the Council of Europe and European Commission, overlooked the need 1) to eradicate competing informal norms, rules and practices (Beers 2010; Hilbink 2012) and 2) to support the transplantation of formal rules existing in the West with the resocialisation of their actors. In many post-communist countries, judiciaries troubled with widespread corruption networks, patronage and clientelism simply bypassed the new institutional setup, stuck to informal patterns of behaviour, or used new rules of the game to concentrate their powers further and eliminate the aims of judicial independence, merit-based selection, or accountability reforms (Popova 2012; 2020; Popova & Beers 2020).

II) Actors

The second dimension of the thesis differentiates between the role of judges and that of the courts as collegial bodies, particularly in the area of judicial resistance. The duality between the roles and behaviour of judges and courts has always been present inside the scholarship engaged with judicial politics. It highlights the clash between studies explaining judicial decision-making as a result of legal doctrines, principles and conventions and those relying on strategic and behavioural explanations (Epstein and Knight 1998; Vanberg 2015; Moustafa 2007; Widner 2008; Trochev 2008; Verdugo 2021). The view that judges (and courts) simply apply the law driven by formal legalistic principles is traditionally present particularly among legal and constitutional scholars. The legalistic interpretation surely has a certain logic and offers the courts an important veil of legitimacy (Smekal and Vyhnánek 2020), as it downplays the effect of potential extra-legal factors that might bring an element of arbitrariness or politicisation to judicial activity. Yet, from the position of empirical studies documenting

reasons behind judicial decision-making, it does come across as significantly reductionist. This thesis therefore leans more on strategic and behavioural theories in political science research, which capture the complexity of judicial behaviour at both individual and collective levels.

The differentiation between how judges as individual actors and courts as collegiate authorities experience and perceive their role in democratic regimes has many benefits. It allows us better to understand the roles of the collegiality, culture, ideational and professional closeness of judges, vis-à-vis the survivalist models of behaviour. It also points to the roles of court presidents and the various networks judges engage with. As Study III argues, the scholarship on judicial resistance typically recognises three key considerations that impact on the strategic choice of judges. Each of them, however, differs on the individual and collegiate level.

1) The first condition that has an impact on the nature, strength and speed of judicial reaction is awareness of the attack and of the potential threat it poses to the democratic regime. It factors in the particularities of judicial culture, the professional role conception and the socialisation of judges (Bell 2001; 2006). Do they see themselves as guardians of democracy? How do they understand the effect of key values and meta-concepts such as judicial independence or the rule of law (Clarks 2015)? Of course, the ideational position might not be the same for the whole of the judiciary; we can document differences and cleavages inside the judicial culture depending on the chosen type of selection of judges, distribution of governance competences, openness of judiciary to incomers from different legal career fields, etc. (Bobek 2008; Beers 2010; Jakab 2020; Brinks et al. 2020; Popova & Beers 2020), including the degree of loyalty to the profession or the feeling of individual independence. Judges who enter the judiciary at a young age in deeply hierarchical career models might behave differently from judges with rich and varied professional experience in less hierarchical systems (Šipulová & Spáč 2023).

2) On the other hand, the structure and design of the separation of powers, i.e. the strength of judicial review, commitment to supranational human rights treaties, the tiered domestic constitution, bicameral parliaments and the presence of eternity closes or material core doctrine inside the written constitution (Dixon & Landau 2017; Kosař & Šipulová 2020) impacts the strength of the formal position of the judiciary as a whole. The institutional setup allows us to understand courts as unitary actors vis-à-vis other structures of the political system. It also forms one of the most common considerations in theories on the role of judges in the protection of constitutionality. Depending on these capacities, judges might be able to keep

their jurisprudential independence and show their opposition in secret or openly (Graver 2018). Nevertheless, even institutionalists have recently acknowledged that the experience of institutional safeguards might differ for individual levels and individual positions inside the judiciary. Co-opted judicial systems might result in semi-independent individual judges and politicised court presidents, and vice versa, depending on the level of hierarchical control in every judicial system. Furthermore, the awareness of structural safeguards and of demarcation lines they draw for judges' behaviour might also be conditioned by many social and individual factors (such as education, the socio-economic background of the judge, previous career experience, etc.).

3) Finally, the strategic theories focus dominantly on cost-benefit calculations as the major factor in the resistance decisions of judges. Yet, even here scholarship differs in implicit understanding whether the calculations appear at the collective or individual level. Study III highlights the missing understanding of how willingness to resist or defer to the pressure changes depending on whether we look at the calculation of the potential risks to and personal gains of individual judges or of the court as a whole. The cost-benefit analysis may, of course, interact with other social, political and economic factors like salaries, family background or gender.

The courts vs judges cleavage seeps through all three parts of the thesis. It is most visible in the second part, which directly unpacks the different theoretical expectations behind the strategic and relational behaviour of individual and collective actors. However, the differentiation also stands out in parts 1 and 3, particularly when addressing the question of how well new courts filled with old communist judges socialise and internalise values of the democratic regime, how strategically judges act or how they decide to resist or defer to non-democratic leaders and illiberal threats.

III) Interplay Between the Formal and Informal Institutions Inside Judiciaries

The final dimension the thesis explores is the interplay between formal and informal institutions and judiciaries. The clash between the formal and informal practices, norms, rules and institutions runs throughout the whole of the thesis, although it is probably dominant in the third part, which uses the concept of informal institutions to understand the deeply ingrained role of judicial culture in the reconstruction and subsequent resilience of judiciaries towards future political interferences. It also discusses the role of informality in how well, how easily and how quickly judges internalise and commit to new democratic rules of the game. However, the thesis

also unpacks the informal dimension of courts as political actors (Dressel, Urribarri, Stroh 2018, Beers 2010, Popova 2020, Hamřík 2023). Informality and informal institutions shape all aspects of courts decision-making and governance. They have an impact on the dynamics inside judicial systems (between judicial authorities and rank-and-file judges) but also on those between the judiciary and the two political branches of power. The thesis as such covers not only institutional framings in which judiciaries operate, but also the relational perspective on the role of judicial dialogues, social learning, and norm diffusion (Dressel, Urribbarri and Stroh 2018). It suggests that informality is naturally ingrained in every judicial culture, and that understanding it can help us dissect the mismatch between the de jure and de facto indicators of judicial independence, performance and the quality of justice in some countries (Pozas-Loyo and Ríos Figueroa 2022). Study IV in particular shows that motivation to resist might depend more on relational aspects of judicial dialogue and the personal beliefs of judges than on the strength of the institutional framework and competences vested in the courts (Šipulová 2024). Study II suggests that formal frameworks set up by young democratic governments to facilitate processes of transition are frequently abandoned or reshaped, or fail to eradicate unwritten constraints and competing informal rules (Šipulová and Kosař 2025; see also Williamson 2009; Grzymala-Busse 2010). The networks between judges, lawyers and politicians influence the performance of courts, as does the merit-based selection of judges (Kosař 2017; Šipulová & Spáč 2023). Individual beliefs and role-conceptions of judges then in turn shape how actively or passively they approach judicial oversight over policies of democratisation. Last but not least, judges as political actors communicate with different audiences. The relational perspective captures formalised as well as informal networks between judges and their potential allies, and traces coalition building and the role of domestic and supranational networks in the ability of judges to withstand the political pressure and pushback against non-democratic governments (Yam 2024; Kureshi 2023). This element is particularly important for European domestic judiciaries which, in contrast to journalists, media, or the NGO sector, are relatively well networked and socialised at the supranational level with very close links to political authorities of the European Union and the Council of Europe (Kosař and Šipulová 2025, forthcoming; Kubal 2024; Bercea and Doroga 2023).

D. Theoretical and Methodological Background of the Thesis

The three horizontal dimensions described above significantly shape the multi-disciplinary background of the thesis and explain its situation in the area of mixed methods. The thesis itself is located on two axes of scholarship that traditionally research courts and judicial politics: the

rational vs ideational perspectives and neo-institutional vs relational approaches. The first axis reflects two strands of research that explain the behaviour of judges from the rational vs ideational perspective. The tradition of assessing the judicial decision-making and behaviour of judges from the position of strategic theories is very well established among political scientists. Proponents of strategic approaches typically argue that judges behave independently depending on the favourable conditions of their institutional and political environment (Ginsburg 2003). Typically, partisan or electoral competition increases the likelihood of politicians supporting judicial independence as a form of insurance against future persecution (Epstein and Knight 1998; Ginsburg 2003, Chavez 2004; Helmke 2005; Ríos-Figueroa 2007; Helmke 2009; Popova 2012; Vanberg 2015). Judges form their survival or confrontational tactics on the basis of a prediction of how costly it will be for the regime not to comply with their judgments (Verdugo 2021, 554). Other scholars include public trust as a predictor of strategic decision-making, explaining how domestic support for the rule of law incentivises independent judicial behaviour (Hendley 1999). This position is challenged by the newest empirical research, which finds that public support for the rule of law is actually secondary to partisan or ideological preferences (Dressel&Nelson 2024; Krehbiel 2020). Other variables include the pressure of investors (Moustafa 2007, Wang 2015) or international pressure (Spendzharova and Vachudova 2012).

Ideational and professional role conception theories, on the other hand, accept the importance of the strategic environment but argue that it is not a sufficient or necessary condition for independent courts. We typically understand them as opposite to rational approaches, as they place premium on normative beliefs of judges. In fact, however, they see judicial resistance as a mix of the rational and normative calculations of judges (Claes & De Visser 2012; Brinks et al. 2020; Dixon & Landau 2021, Popova & Beers 2020), which depend on the combination of institutional capacities, available tools, reputation, position within the judicial hierarchy, as well as the normative preferences of judges. The dominant factor for ideational theories is the judicial culture (Bell 2001) and professional norms judges were socialised into.[4] These norms impact on the extent to which judges value and protect their independence and insulation from political influence, private sphere clientelism, or from the internal patronage withing the judiciary itself (e.g. how much deference they show to their superiors, political establishment, and business and oligarchs).

[4] For a detailed critique of the limitations of the interest-based approach in explaining high-risk judicial assertiveness, see Hilbink, 2012 and Ingram 2015.

There is, however, also a third stream of scholarship, where this thesis is situated, which explores interactions between the two theoretical schools. Hilbink (2012), Popova (2020), Aguiar-Aguilar (2024) and Beers (2010) argue that every judicial culture might experience a critical change in the role conception of its actors ('moments of critical juncture', Popova 2020) brought in by the agents of change. These junctures combine the fragmented political competition, public demand for judicial independence and increased pressure of the international community with the behaviour of judges shaped by historical path dependencies (Garoupa 2024) and professional norms (Popova 2020).

The thesis communicates with both ends of the axis, and while it accepts that institutional safeguards empower courts and impact on the perceptions of judges about how safely and effectively to utilise their accountability role against the other actors, it also stresses that some of these considerations are born under broader historical and social contingencies and their impact on the judicial culture.

The second theoretical axis that underpins the thesis captures the differences in focus of neo-institutional and relational theories. The (neo)institutional approach focuses on norms and practices, formal and informal, that judges are committed to. This approach is particularly useful when one is explaining the emergence and survival of rules. It also guides the democratisation research that is critical of the formalistic transplantation of foreign institutional models and rules which are heavily promoted by international organisations. Neo-institutional research warns against the extrapolation of a change of actors' behaviour solely on the implementation of foreign normative systems (Dimitrova 2010; Nicolaidis & Youngs 2023; Brinks 2006; Popova 2020, Kosař, Šipulová and Urbániková 2023). The relational approach, on the other hand, highlights the environment in which the institutions and rules of behaviour are created, and zooms in on the role of networks and relations between individual actors in respective arenas. Compared to neo-institutional theories, the relational approach allows one to capture informal behaviour (Dressel, Urribarri, Stroh 2025, 5) and explains how the informal social patterns, roles and decisions form actors' understanding of their particular role in the judicial or political system.[5]

The thesis benefits from this theoretical variation. It explains how each theoretical approach allows us to uncover different aspect of otherwise complex phenomena of the role of

[5] It is worth noting that these two approaches are not in conflict but mostly support each other by exploring the arenas of informality from an institutional and from the actors' perspective.

judges in the political arena. It explores judges as actors who utilise and stick to certain norms and institutions, but also judges as actors who share different understandings of their role in the political system. It argues that the combination of these different optics is capable of capturing the different dimensions of the judicial role in democratic resilience.

To an extent, the theoretical complexity is also reflected in the methodology of the thesis. While the majority of the thesis is located within the qualitative research tradition, some parts benefit from mixed methods (the quantitative content analysis in particular). Yet, the key part of the thesis explores the junctures between relational perspective and ideational theories on judicial behaviour through the lenses of qualitative content and discourse analyses.[6] Both methods are fairly commonly used by political science scholarship on judicial decision-making. As the key driving methods of the thesis, they allowed me to comb through the narratives present in judicial decision-making (Study I), parliamentary debates on legislation related to judicial reforms and transitional purges (Study II), transcripts of the Slovak judicial council on the application of accountability mechanisms within the judiciary (Study VI) and also to capture the perceptions of judges in semi-structured elite interviews (Study I, Study V).

E. Contribution of the Thesis to the Existing Scholarship

As Huntington (1996) and O'Donnell (1995) correctly hypothesised, the recent wave of democratic backsliding has shown that the major challenge democratic regimes (and new democracies in particular) face is not the bloody overthrow, but gradual decay, the co-optation of key state structures and weakening of accountability actors who ought to keep the executives in check. Courts, next to the media, appear to be among the first of the structures targeted by illiberal processes. The focus of political actors on courts is natural. The trend of judicial empowerment at the beginning of the 21st century (Ginsburg 2003; Hirschl 2007, Moustafa 2007) increased the role of the courts in policy-making. Courts can impose significant checks on the political branches of power, restrict their manoeuvring space (depoliticisation of mega-politics, Hirschl 2007) but they also have an impact on electoral campaigns and hold politicians accountable (Feierherd, Gonzalez-Ocantos & Tuñón 2024). Although the broad public might not always be familiar with the judicial system (Gandur, Kingsley, Chewning, Driscoll 2025), courts have sufficiently large and structured audiences who spread the narrative about criminal, unethical and undemocratic behaviour among the citizens, allowing them to punish incumbents

[6] The detailed methodology is elaborated on in each study of the thesis.

by electoral defeat. Lastly, courts are one of the few actors equipped to recognise 'autocratisation in the making' even in situations where politicians rely on abusive legislative and constitutional techniques (Dixon & Landau 2021; Uitz 2015), i.e. reforms pushed through in a seemingly legal form which however, often under the pretence of a direct democracy, popular will, or will of the majority, dismantle democratic values, principles and constitutional conventions (Kosař and Vincze 2023). To add fuel to the fire, courts are not completely safe even in democracies, as politicians in general seem to be more and more tempted to risk non-compliance where court decisions seem to go against the will of the electorate (Kosař and Šipulová 2023; Daly 2022) or opt to tinker with courts' composition and independence in order to gain future political leverage. Interestingly, while many proponents of insurance theories predicted that political actors would honour judicial independence in increased partisan polarisation where they faced potential electoral defeat, the past decade has brought a plethora of examples where democratic leaders played the constitutional hardball and intentionally impacted on the courts' composition, in order pre-emptively to secure the ideological alignment of courts with their own preferences against the potential rise of non-democratic and populist forces.[7]

This development naturally highlighted the need to understand how courts can resist mounting political pressure. While judicial resistance studies have gained in popularity in the last two years, the emerging scholarship **suffers from two major gaps**. **First**, the majority of existing works present judicial resistance as a normative concept, a desirable behaviour that might contain democratic decline and stop the dismantling of democratic institutions (Kureshi 2021; Dixon and Issacharoff 2016b). Furthermore, the scholars working on resistance suggest that resistant courts also lead to stronger and more resilient democratic concepts in the long run, as well as better public trust in the courts and in the rule of law in general (Daly 2019; Krygier 2020). Yet, similar claims are not supported by empirical evidence. Only a very few works have questioned the rationale behind these expectations (Jakab 2020), warning that too much activism or certain forms of resistance might actually further politicise the judiciary (Gardbaum 2015, Dixon and Landau 2017).

Second, even though several empirical studies have approached the question of what motivates judges to resist the political interferences (and others to defer or to comply), (Puleo

[7] See the pre-emptive packing of the Polish Constitutional Tribunal by the Polish liberal government shortly before they lost the 2015 elections to PiS, which triggered a court-packing war. Similar troubles appeared in the USA, where Biden repeatedly considered and abandoned a plan to pack the Supreme Court before the upcoming 2024 presidential elections (Kosař and Šipulová 2023).

& Coman 2024; Coman & Puleo; Robinson & Swedlow 2018; Trochev 2018) they rely dominantly on strategic theories and explain judicial behaviour by institutional and political factors, such as the strength of institutional protection, i.e. the presence of formal judicial independence safeguards, or de jure judicial independence indicators (Yam 2024b). Significantly less attention has been paid to the concept of judicial culture - the internalised norms, attitudes, ideas, values, and beliefs (Bell 2001; 2006; Hilbink 2007; Couso 2011; Couso and Hilbink 2012; Ingram 2016a, Ingram 2016b; González-Ocantos 2016; Robinson and Swedlow 2018; Kureshi 2021; Aguiar-Aguilar 2022; 2024) - and its impact on judicial behaviour and the loyalty of judges to democratic principles (Schaff 2022; Garcia-Holgado 2025). Here, the thesis implements approaches of professional role conception theories to argue that judicial culture and the understandings judges develop about democracy, their own role in a democratic political system, and limits imposed on this role by the principle of judicial independence (Dixon and Issacharoff 2016b, 45) might crucially not only impact on the ability and willingness of judges to resist the incoming attacks, but also form the long-term resilience of the judiciary as a check against the recalcitrant political powers. This view is missing particularly in the post-communist area, where supranational and domestic policy-makers, despite the political science suggesting the very opposite (Borzel 1999; Gutmann and Voigt 2020, Nicolaidis & Youngs 2023; Skapska 2011; Krygier 2020), hoped that new formal institutions and rules would sufficiently secure de facto judicial independence and help judges to transit from the branch loyal to communist incumbents to a truly autonomous and resilient entity.

From this perspective, the thesis brings valuable insights into several strands of scholarship and advances the fields of democratisation, transitional justice, and the judicialisation of politics. It builds on the scholarship suggesting that culture and informal institutions determine the degree of de facto judicial independence (Gutmann and Voigt 2020; Pozas-Loyo and Figueroa 2018; 2022) and disentangles the variability of effects of informal institutions on the stability and behaviour of judiciaries. It also adds a new dimension to the research on transitional justice processes, not only by highlighting the impact of judicial review on the adopted transitional policies, but also by establishing a clear link between judicial behaviour and the culture and position of judges vis-à-vis the transition itself. As such, the thesis highlights the need to refocus the transitional processes on judges not only as second-order actors who implement executive policies adopted by the new democratic elite, but as actors whose involvement and loyalty to a previous regime might significantly hinder not only

the transition to but the future of an effective separation of powers (a.i. Dyzenhaus 2016; Yam 2024a; Cover 1975). In a similar vein, the thesis suggests that formal redesign of transitional judiciaries according to the blueprints provided by international organisations (Parau 2015; Hammegren 2002) might not be enough, and opens new research questions on how and when to purge post-authoritarian judiciaries, and how to re-socialise old judges in the new political system. Last but not least, the thesis, with its focus on judicial resistance, enriches the field of the study in a new direction. It brings new insights for scholars who started to map the extra-judicial behaviour of judges (in a civic, private or political capacity; Daly 2018; Bogea 2023; Yam 2024b). It warns against too normative a reading of judicial resistance (see also Jakab 2020 and Graver 2018), and calls for a deeper exploration of the limits and negative repercussions which might follow the engagement of judges as civic and political actors on the perceived legitimacy, confidence in courts and resilience of judiciaries in general (Turenne 2016; Yam 2024b).

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PART 1. JUDGES AS ACTORS OF DEMOCRATIC TRANSITION

Study I: Between Human Rights and Transitional Justice: The Dilemma of Constitutional Courts in Post-Communist Central Europe

Šipulová, Katarína & Hubert Smekal (2021). Between Human Rights and Transitional Justice: The Dilemma of Constitutional Courts in Post-Communist Central Europe. Europe-Asia Studies, 73(1): 101-130. https://dx.doi.org/10.1080/09668136.2020.1841739 (Q1 WoS; authors' share 50 %).

Countries experiencing a transition to democracy face an uneasy challenge: how to reconcile transitional justice issues with their human rights commitments and aspirations. A first look at the issue might not indicate any trouble, as democratising countries strive to distinguish themselves from the previous regime by upholding principles of liberal democracy and human rights. Nevertheless, closer inspection reveals that, although transitional justice uses human rights language and builds on ideas shared by human rights movements, some of its principles can differ considerably. Transitional justice legislation introduces a different logic of punishment and reparations based on arbitrary baselines, time-limited provisions, values, and principles (Teitel 2000, pp. 285–87), which are often at odds with general conceptions of human rights and international human rights commitments (Whitehead 2009, p. 1). For example, lustration (the vetting of public officers for ties with the previous regime) can have consequences for passive voting rights and employment rights. Wide access to secret police files and archives interferes with the right to privacy. Condemnation of political parties associated with the previous regime might have repercussions for free political competition and even the whole party system. Similarly, reparations are ordinarily organised around arbitrary policy lines, because new political elites decide who will benefit from reparations and under what conditions, thus potentially violating equality rights. Teitel therefore considers 'the transitional rule of law' an alternative model of principles, one that does not necessarily conform to the point of view of established liberal democracy (Teitel 2000).

We expose the apparent contradictions between human rights and transition justice in the particularly compelling case of post-1989 Central and Eastern Europe (CEE). After more than four decades of communist dictatorships, countries from the CEE region turned to Western

European democracies as a model, as they performed better both economically and in terms of human rights standards. The international context adds an important element because at that time, international human rights regimes had already existed for decades and international human rights bodies had developed rich jurisprudence. Moreover, newly established CEE constitutional courts with the power of constitutional review presented a well-tested institutional mechanism for putting checks on other branches of power. The transitioning CEE countries therefore had both rules (international human rights) and institutional templates (parliamentary democracies with constitutional courts) to emulate.

At the same time, all CEE countries had their own internal issues to resolve. Post-1989 transitional processes in the region revolved around communist parties and their repressive apparatuses, especially the secret state police and its numerous collaborators (David 2008). The new regimes sought to eliminate the old cadres from holding powerful positions in the political system (Stan 2009; Welsh 2015; Horne 2015) and compensate the victims of past injustices (Czarnota 2005; Sadurski 2008; Stan & Nedelsky 2015, p. xli). Economic rebirth was no less important; privatisation schemes and plans for how to reintroduce private ownership opened up challenges regarding the return of forcibly nationalised properties to the rightful owners.

Despite the similarities between CEE communist regimes, the transitional justice choices adopted by individual countries varied greatly. The diversity of transitional justice decisions attracted the attention of political science scholarship (Huntington 1991; Moran 1994), which has long focused solely on decisions adopted by political actors (Welsch 1996; Kornai & Rose-Ackerman 2004; David 2009), or the impact of transnational human rights networks on political actors (Crocker 1998; Sikkink 2011). Beyond a few doctrinal studies, constitutional courts have been neglected by the transitional justice scholarship, or at best, perceived as mere second-order agents implementing political actors' decisions regarding transitional justice.[1] Nevertheless, the evidence from CEE shows that constitutional courts played an important role in transitional justice processes, as the majority of CEE transitional justice legislation has been adjusted in constitutional review proceedings (Sólyom 2003; Sadurski 2008; Kosař & Petrov 2017). We argue that not factoring constitutional courts into the analysis inevitably misses important restraints on the choices of other branches of power when deciding transitional policy issues. We draw on more recent scholarship researching the role of judiciaries in Latin American transitional processes (Hilbink 2007; Huneeus 2010; Ocantos

[1] Exceptions include Ginsburg (2003, 2012), Kopeček and Petrov (2016).

2018) and place constitutional courts among the significant actors of transitional justice. Exploring their case law and interviewing former judges helps us to open the 'black box' surrounding the process by which states decide on certain forms of transitional justice policies.

The newly (re)established constitutional courts in CEE countries experienced the contradiction between protecting human rights and dealing with the past. They were expected to contribute to safeguarding liberal values (Hirschl 2004, p. 31; Ferreres Comella 2004), as proclaimed both in national bills of rights and in international human rights treaties.[2] Moreover, bodies such as the European Court of Human Rights (ECtHR) or the UN Human Rights Committee (UN HRC) had developed rich case law that the parties to these treaties were supposed to follow. Constitutional courts thus had to think hard about how to reconcile international human rights requirements with domestic transitional justice processes. Using the example of the Czech Republic, we examine how CEE constitutional courts approached the dilemma between transitional justice policies and the requirements that stemmed from international human rights treaties in the period 1993–2018. Did they defer to the transitional justice solutions adopted by the political actors, or did they challenge them? Did they step into this sensitive arena and push for a human rights perspective?

The contribution of our essay is threefold. First, it illustrates the significance of constitutional courts in transitional justice. Second, the essay analyses the clash between human rights and transitional justice in constitutional case law. Third, we show to what extent and when the constitutional courts make use of international human rights law in transitional justice disputes.

The Czech Republic offers a compelling story in this regard.[3] The particularly severe and pervasive nature of the Czechoslovak police state in 1950s and 1960s, together with weak communist political forces shortly after the transition, contributed to a very harsh approach to ridding the political system of its communist legacy. This translated into the implementation of the strictest and broadest lustration policies in the CEE region (Sadurski 2014, pp. 344–45). The range of lustration surprised early scholars working on CEE transitional justice rationales, given the peaceful Velvet Revolution of 1989 (Huntington 1991; Moran 1994). At the same time, the country signalled its allegiance to international standards of human rights protection,

[2] After 1989, the CEE countries committed to majority of then-existing HR treaties of the Council of Europe and to UN core HR treaties (Smekal *et al*. 2016). The European Convention on Human Rights represents the most important of these treaties.

[3] The Czech and Slovak Federal Republic split in the 'Velvet Divorce' shortly after the 1989 revolution. On 1 January 1993, the Czech Republic was established as an independent state.

entering the Council of Europe (CoE) in 1991. This combination of factors, coupled with the strong position of the Czech Constitutional Court (CCC), makes the Czech Republic a suitable case for studying the clash between human rights and CCC case law on transitional justice. The case study will help in understanding the role of constitutional courts in transitional jurisprudence in similar configurations—namely, in a scenario of harsh transitional justice measures, a strong constitutional court and international human rights constraints.

The essay proceeds as follows. Section 2 introduces in more detail the post-communist form of transitional justice and the role played by CEE constitutional courts. This section also focuses on the obligations of CEE constitutional courts stemming from international human rights law. Section 3 is a prelude to the empirical part of the essay. It sets the stage, providing an overview of the Czechoslovak transition and of the transitional justice choices made by the Czech government, and describes our study design. Section 4 presents the quantitative data and broad patterns of the CCC's decision-making in transitional justice issues. Section 5 is composed of four individual transitional justice cases portraying different approaches of the CCC to clashes with ECtHR case law and the human rights commitments of the Czech Republic. Section 6 concludes.

1. Constitutional courts and international law in post-communist transitional justice processes

The term 'transitional justice' generally stands for judicial and non-judicial measures such as prosecution, truth and reconciliation commissions, and reintegration and reparation processes, used by states and social groups striving to come to terms with the crimes of previous regimes (Kritz 1995). In the post-communist environment, transitional justice measures typically revolved around various vetting mechanisms (Stan 2009; Welsh 2015; Horne 2015). Communist totalitarian regimes exhibited remarkably high degrees of public participation in their activities. Communist parties controlled enormous apparatuses; in 1989, the East German Stasi employed about 90,000 officers and a further 150,000 informers in a population of 17 million (Stan 2009, p. 6). The fragile new democracies sought to eliminate the networks of communist elite. Lustration and the opening of secret police archives largely prevailed over attempts to prosecute the crimes of the communist era. This was also due to the significant period of time that had elapsed since the heaviest repression in the 1950s.

In addition to these important political choices, crucial decisions were made about how to deal with property issues (restitution) and how to compensate victims of past atrocities, political prisoners in particular (Sadurski 2008; Stan & Nedelsky 2015; Czarnota 2015). The CEE transitions thus consisted both of retributive and restorative streams of transitional justice policies, [4] because they engaged both in punishing the supporters of previous regimes (retribution) and in helping their victims (restoration). In short, CEE transitional justice policies included politically sensitive decisions on who should govern, how history would be written, and what the new distribution of significant assets would look like. At the same time, CEE states undergoing transition already faced a well-developed body of international human rights jurisprudence that constrained some of their transitional justice options.

However, the 1989 CEE transitional justice decisions were made amid political turmoil and somewhat chaotic institutional reconstructions (Pithart 1993; Grudzińska-Gross 1994). Given the compromised state institutions and low public trust, it was often left to constitutional courts, which represented a break with the past (Teitel 2000) and a disengagement from the previous regime (Grudzińska-Gross 1994; Uitz 2009, pp. 71–98; Teitel 2009) to intervene and articulate the values underlying the new democratic regimes (Sadurski 2008). Constitutional courts were expected to align the transitional justice policies with new rule of law standards, as well as with emerging international human rights commitments.

In the following section, we describe transitional justice policies typical for the CEE region and show how these were constrained by regional and international human rights commitments. Next, we formulate research questions about how constitutional courts dealt with these constraints.

1.1 Post-communist transitional justice processes within the scope of international human rights commitments

Generally speaking, international bodies tolerate transitional measures only for a very limited time, prompting states to terminate potentially problematic policies as soon as possible. The tension between post-communist transitional justice policies and human rights standards is particularly visible under the European Convention on Human Rights (ECHR or the Convention), which was itself created in political reaction to the atrocities of World War II and

[4] Restorative transitional justice measures aim to restore communities or relationships (Lambourne 2009, p. 30). They seek to reverse the results of the crimes to situation before the crimes occurred, or compensate the victims of the past regime's crimes. Retributive justice involves punishment of the wrongdoer (Lambourne 2009, p. 30), which can range from criminal or administrative sanctions to punishment of a purely moral character, such as public condemnation .

the Holocaust (Ní Aoláin 2011, p. 26). As a result of this legacy, the ECtHR recognised the possibility of a derogation from certain standards of human rights protection during transition processes.

However, the accession of CEE countries to the ECHR system led to worries that the application of such derogation to transitioning post-communist democracies would lead to the erosion of the Convention's integrity (Ní Aoláin 2011, p. 33) and to the entrenchment of transitional justice precedents beyond the transition (Buyse & Hamilton 2016). The possibility of derogating human rights became a problem, particularly for those countries that had joined the CoE with the aim of locking in certain domestic practices and policies (Moravcsik 2000) and preventing backsliding to nationalist or populist authoritarianism (Sadurski 2014). This might explain why the accession of CEE countries led the ECtHR to place a stricter emphasis on the new regimes' loyalty to the Convention's rule of law. Consequently, the ECtHR allowed the derogation and limits on human rights protection only very early after the transition, typically justified by the concept of 'militant democracy'.[5]

The ECtHR developed several approaches towards CEE transitional justice policies (see Table 1). It leaves some areas, like rehabilitation processes for the unjustly prosecuted, fully at the discretion of the state (no obligation). In others, the ECtHR requires member states to either refrain from implementing certain policies (negative obligations) or, on the contrary, to do something (positive obligations).

TABLE 1
OBLIGATIONS CONCERNING TRANSITIONAL JUSTICE (TJ) POLICIES SET BY ECTHR CASE LAW

	No obligation	*Negative obligation*	*Positive obligation*
Retributive TJ	X	Lustration; amnesties	Prosecutions and regime condemnation; archives of the past* (uncovering perpetrators of crimes)
Restorative TJ	Rehabilitation; restitution	X	Archives of past (rights of victims to know the truth)

Note: * We split the policy related to 'archives of the past' between restorative and retributive measures, as the opening of archives follows two different aims. Disclosing the truth about perpetrators of crimes falls under 'retributive' policies, while the right of the victims to know the truth under 'restorative'.
Source: Authors.

The ECtHR does not require transitioning states to compensate the victims of past crimes (Brems 2011). Nevertheless, once states decide to implement compensation policy, the

[5] The concept of 'militant democracy' was developed in the interwar period by Karl Loewenstein, who argued for constitutional democracy authorised to protect civil and political freedom by pre-emptively restricting the exercise of such freedoms (Macklem 2006, p. 488).

ECtHR oversees the conditions and eligibility criteria to ensure that they are not too arbitrary, do not set manifestly unequal practices,[6] and are executed in practice.[7] Stricter conditions apply for restitution. The Czechoslovak communist regime sold some nationalised properties to private individuals, whose property rights after the regime change clashed with rights of pre-communist era owners claiming their properties back. The Court, in principle, upholds the legitimacy of restitution laws but requires compensation for collateral damages, typically damages paid to the subsequent owners who had to return the property.[8]

By contrast, the ECtHR, as well as other international bodies, criticised lustration and the vetting of public officials for putting too many restrictions on passive electoral rights, political freedoms, and respect for private life. The post-communist lustration legislation adopted in CEE was addressed by various international organisations and bodies, including the International Labour Organisation (ILO),[9] the CoE Parliamentary Assembly (PACE),[10] the Venice Commission,[11] and the ECtHR.[12] Most of the CoE's human rights bodies refer to PACE Resolution 1096 'On Measures to Dismantle Communist Totalitarian Systems', which did not find lustration to be completely incompatible with the Convention. The resolution stated that lustration measures 'can be compatible with a democratic state under the rule of law if several criteria are met'.[13] These criteria include individual guilt proven in each individual case, the right of defence, the presumption of innocence, the right of appeal and, finally, constant checks on whether the lustration still fulfils the pre-set aims. PACE commented several times on the negative effect of the prolongation of lustration laws.[14] The guidelines were later confirmed by

[6] *Wos v Poland*, ECtHR judgment of 8 June 2006.
[7] Under the doctrine of legitimate expectations, see, *Broniowski v Poland*, ECtHR judgment of 22 June 2004.
[8] *Pincová and Pinc v Czech Republic*, ECtHR judgment of 5 November 2002.
[9] International Labour Organisation, Decision of the Governing Body, Report File No. GB.252/16/19, 5 March 1992. Quoted from Přibáň (2007, p. 189).
[10] 'Measures To Dismantle the Heritage of Former Communist Totalitarian Systems', Parliamentary Assembly of the Council of Europe, Resolution 1096 (1996), 27 June 1996, available at: http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=16507&lang=en, accessed 26 August 2020.
[11] 'Amicus Curie on the Law on the Cleanliness of the Figure of High Functionaries of the Public Administration and Elected Persons of Albania', Venice Commission, CLD-AD(2009)044, Opinion no. 524/2009, 13 October 2009; 'Amicus Curie Brief on Determining a Criterion for Limiting the Exercise of Public Office, Access to Documents and Publishing, the Co-operation with the Bodies of the State Security', Venice Commission, CDL-AD(2012)028, Opinion no. 694/2012, 17 December 2012. The Venice Commission is a popular title for the European Commission for Democracy through Law, an advisory body of the CoE on constitutional matters, especially as regards the legal and institutional structures of states.
[12] *Turek v Slovakia*, 57986/00, ECtHR judgment of 13 September 2006.
[13] 'Measures To Dismantle the Heritage of Former Communist Totalitarian Systems', Parliamentary Assembly of the Council of Europe, Resolution 1096 (1996), 27 June 1996, available at: http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=16507&lang=en, accessed 26 August 2020.
[14] 'Obligations and Commitments of the Czech Republic as a Member State', Parliamentary Assembly of the Council of Europe, Recommendation 1338 (1997), available at: http://assembly.coe.int/nw/xml/XRef/Xref-

a whole set of ECtHR case law, which sees lustration as a transitional justice measure justifiable by the concept of 'militant democracy' able to take measures preventing the return of totalitarian practices. At the same time, states have to ensure that lustration does not violate human rights and does not remain in force once the need for screening public figures ceases to exist—which, in the ECtHR's narrow understanding, is almost immediately after the transition and the first round of free elections.[15]The ECtHR explicitly prohibits amnesty for perpetrators of human rights atrocities as a transitional justice measure, which is supported by a significant part of the transitional justice scholarship (Bell 2009, pp. 5–27).

Positive obligations run across both restorative and retributive policies. The ECtHR recognises the necessity to prosecute perpetrators of human rights atrocities,[16] to allow debates about the past—including historical truth under the protection of freedom of expression,[17] and to provide access to personal files kept by secret security services[18] (Brems 2011).

To sum up, ECtHR case law sets some boundaries within which CoE member states are obliged to realise their transitional justice polices. Transitioning states are generally expected to uncover the truth about human rights violations and prosecute them. They are discouraged from lustration, which represents an extraordinary measure, acceptable under strict conditions for a very short time. They can proceed with rehabilitation and restitution policies, on the condition that restorative policies do not create new injustices.

1.2 Research puzzle

A large body of literature suggests that constitutional courts are essential intermediaries and allies of international bodies, helping to diffuse international norms and implement their findings domestically (Stone Sweet 2012; Gerards 2014; Kosař & Petrov 2017). Nevertheless, there is no clear indication how this relationship holds in the transitional justice arena; similarly,

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XML2HTML-en.asp?fileid=15372&lang=en, accessed 26 August 2020; 'Progress of the Assembly's Monitoring Procedures', Parliamentary Assembly of the Council of Europe, 2 April 1998, available at: http://assembly.coe.int/nw/xml/XRef/X2H-Xref-ViewHTML.asp?FileID=8494&lang=EN, accessed 26 August 2020.

[15] *Sidabras and Džiautas v. Lithuania*, Applications No. 55480/00 and 59330/00, ECtHR judgment of 27 July 2004; *Rainys and Gasparavičius v. Lithuania*, Applications No. 70665/01 and 74345/01, ECtHR judgment of 7 April 2005; *Žičkus v. Lithuania*, Application No. 26652/02, ECtHR judgment of 7 April 2009; *Ždanoka v. Latvia*, Application No. 58278/00, ECtHR judgment of 16 March 2006; *Adamsons v. Latvia*, Application No. 3669/03, ECtHR judgment of 24 June 2008; *Naidin v. Romania*, Application No. 38162/07, ECtHR judgment of 21 October 2014; *Vogt v. Germany*, Application No. 17851/91, ECtHR judgment of 26 September 1995; *Turek v. Slovakia*, Application No. 57986/00, ECtHR judgment of 13 September 2006.

[16] *Sandru and Others v. Romania*, ECtHR judgment of 8 December 2009.

[17] *Monnat v. Switzerland*, ECtHR judgment of 21 September 2006; *Karsai v Hungary*, ECtHR judgment of 1 December 2009; *Feldek v Slovakia*, ECtHR judgment of 12 July 2001.

[18] *Gaskin v. the UK*, ECtHR judgment of 7 July 1989.

there is no literature systematically exploring the constitutional courts' interaction with ECtHR's demands on post-communist transitional justice.

Following the previous remarks, we expect that constitutional courts adjust transitional justice policies. However, this adjustment is constrained by the influence of international human rights commitments, which changes over time. Transitional justice policies sometimes justify departures from the general principles of human rights protection using the concept of militant democracy or extraordinary conditions. Recourse to the transitional rule of law is, however, time-limited. Therefore, the 'transitional justice' justification of departures from human rights should eventually cease. The influence of international human rights commitments, with gradually burgeoning international case law, on constitutional courts' findings increases over time. The further a state moves from the transitional period, the more difficult it is for constitutional courts to justify the specific nature of transitional justice. We expect that, over time, constitutional courts will favour human rights protection rather than transitional justice principles. With a state's increasing embeddedness in international human rights regimes, transitional justice reasoning will fade. If courts pursue transitional rule of law reasoning, they will limit its use to addressing past injustices and shift the focus to restorative transitional justice, oriented at victim rehabilitation.

We pose the following questions: do constitutional courts prefer to keep the debate on transitional justice issues within domestic confines, either respecting the choices of domestic legislatures or confronting them by pursuing their vision of transitional justice? What is the role of international human rights law in a constitutional review of transitional justice legislation? In order to answer these questions, we analyse the case of the CCC and its transitional justice jurisprudence.

2. Case study: Czech transitional justice jurisprudence

On 15 October 2019, almost 30 years after the Velvet Revolution, which started the transition of then Czechoslovakia to democracy, the CCC quashed legislation introducing an indirect tax on restitutions of church property.[19] The judgment drew a lot of media attention and immediate political reactions questioning the legitimacy of the Court to rule on what was essentially a political question. Church restitution has been a highly salient issue dividing the political sphere for the past 20 years. Back in 2010, the CCC ruled that the Parliament had failed in its

[19] CCC judgment No, Pl. ÚS 5/19, 15 October 2019.

constitutional obligation to legislate on the restitution and finish the transitional justice process initiated in the early 1990s.[20] The 2010 judgment eventually pushed the Czech parliament to deal with the issue and return properties to churches. In 2019, a controversial law, proposed by the Communist Party ['Komunistická strana Čech a Moravy'], introduced a tax on the compensation churches receive for seized property; however, the CCC annulled the 2019 law, claiming that it violated the principles of democratic society and the commitments following from the ECHR. The chief justice of the CCC condemned the legislation as both unconstitutional and unethical, breaking promises made by the state in order to ease the injustices of the communist regime. He stressed that the law violated the principle of legitimate expectations, a concept used by the ECtHR (Mazancová & Janáková 2019).

This fresh example demonstrates that the Czech case offers a timely and compelling opportunity to study the clashes between transitional justice and international human rights commitments. Very shortly after the 1989 Velvet Revolution, the country adopted all types of transitional justice policies typical of the CEE region. The cornerstone of retributive legislation was laid out in Act No. 198/1993 Coll., 'On the Illegality of the Communist Regime', which, in Article 2, characterised the communist regime and the Communist Party as criminal, illegitimate, and reprehensible. The lustration agenda, however, attracted the most international attention. In 1991, then Czechoslovakia was the first country in the region to implement a Lustration Act (Act No 451/19991 Coll.), arguably the harshest among the CEE states (Schwartz 1994; Skapska 2003; Robertson 2006). Far-reaching lustration, which targeted high posts in public administration as well as in academia and culture, polarised political actors and society.[21] The law affected not only former Communist Party officials, members of the People's Militia and secret police (StB) agents and informers, but also people listed by the StB as potential candidates for collaboration. The lustration included approximately 400,000 people. Between 1991 and 2001, the Ministry of Interior issued 420,270 positive lustration certificates (Nedelsky 2004, p. 76). The law originally did not recognise the right to appeal or the access of an individual accused of collaboration to archival files listing his name. A significant number of dissenters, including President Václav Havel, soon opposed the lustration agenda from an human rights perspective and warned of an impending 'witch hunt' (Kosař 2008, p. 5).

[20] CCC judgment No. Pl. ÚS 9/07, 1 July 2010.

[21] The Act targeted basically all governing positions inside the state administration as well as, for example, those of deans and rectors of public universities (Nalepa 2006; Kosař 2008; David 2009). A positive lustration certificate, proving collaboration or the direct participation of an individual in the communist regime, led automatically to either ineligibility for, or the loss of, public office.

Lustration was soon followed by the establishment of the Office for the Documentation and Investigation of the Crimes of Communism (*Úřad dokumentace a vyšetřování zločinů komunismu*), enabling access to StB files on collaborators, spies, and persons under surveillance. On the restorative front, the state initiated an intensive campaign of rehabilitation of political prisoners and restitution of state property nationalised by the Communist Party in the 1950s and early 1960s.

All the while, the idea of a 'return to Europe' motivated the process of democratisation. The CoE recommendations and the European Union's accession conditionality, in particular, shaped the decision-making of all Czech political actors.[22] Despite the rapid implementation of various legislative acts in the first three years after the Velvet Revolution of 1989,[23] transitional justice policies in the Czech Republic remained a sensitive issue even 30 years after the regime change. In 2014, the Czech Republic adopted a politically controversial decision to restitute church property, which had a significant impact on the state's budgetary policy. As demonstrated above, the legislation has been repeatedly contested before the CCC. Also, lustration remained a recurring topic among the retributive policies. Despite European Commission criticism, lustration stayed in effect, after being debated and extended by the Parliament twice, in 1995 and 2000. After the 2013 election, with significant gains by the populist political party 'ANO 2011' [YES 2011], led by billionaire Andrej Babiš, who had a positive lustration certificate, the policy again made the front pages of the newspapers, subsequently leading to a renewal of the debate and significant amendment of the Lustration Act in 2017.

Consequently, the long timeframe (1989–2018), with recurring transitional justice issues, offered the CCC various opportunities to become involved in very sensitive issues. However, EU and CoE membership, in addition to the long period that had passed since the transition, led the CCC to sideline transitional justice considerations and replace them with human rights ones. Overall, this combination of factors provides an opportunity to study the variability of the solutions and policies considered by the CCC.

Finally, a few words on the composition and competences of the CCC are helpful to understand the overall setting. The CCC and its federal predecessor were endowed with strong

[22] The Czech Republic acceded to the CoE in 1993 and to the EU in 2004.
[23] Apart from the above mentioned Act on the Illegality of the Communist Regime, two other lustration statutes, legislation restoring to its original owners property seized by the Communist Party, and three other acts regulating judicial and extra-judicial rehabilitation and the restitution of property to individuals.

powers and could review both legislation and individual complaints. A significant proportion of the first serving judges were dissidents and scholars who had emigrated from Czechoslovakia during the 1960s. Although the Federal Constitutional Court (Federal CC) existed only for one year,[24] the majority of its judges were reappointed to the first CCC.[25] In its first decade, the CCC, chaired by former dissident Zdeněk Kessler, addressed very important political issues and decided on topics that had a fundamental impact on the design of the Czech democratic regime. The strong dissident and anti-communist atmosphere also permeated case law. In its second decade, under the presidency of former dissident and then-politician Pavel Rychetský, the CCC shifted its attention to social policy and the quality of the legislative process (Kopeček & Petrov 2016). Since 2014, the composition of the CCC has changed significantly and the dissident ethos has evaporated.[26] This translates to a more fragmented approach towards remaining issues of transitional justice.

3. Quantitative overview: the Constitutional Court as a transitional justice actor

Having introduced the Czech transitional justice setting, we now move to the analysis of the CCC's transitional justice case law. First, we briefly introduce the methodology used to analyse the case law. Then, we proceed with the overview of the CCC's involvement in the transitional justice legislative development. We analyse how often the CCC used references to international human rights law in transitional justice case law and focus on what purpose those references served. We show how the CCC addressed conflicts between transitional justice policies and international human rights commitments and how patterns in the frequency of references and their purposes differ according to the type of transitional policy.

3.1 Methodology

We base our research on a combination of qualitative and quantitative analysis of case law and on interviews with six former and current judges of Czech apex courts, which contribute to a contextual understanding of developments.

[24] The Federal CC was active only from March 1992 until the end of 1992.
[25] The CCC also included several judges who were members of the Communist Party before 1989.
[26] Interview with a former Constitutional Court official, 4 December 2018, Brno.

During the observed period (1993–2018),[27] the Czech Republic adopted 16 different statutes to address various transitional justice policies. Many of these were frequently amended.

TABLE 2
OVERVIEW OF KEY LEGAL ACTS IN THE FIELD OF TRANSITIONAL JUSTICE AND THEIR REVIEW BY THE CCC

Policy	*Coll. No.*	*Legislation title*	*Reviewed?*	*Invalidated (also in part)?*
Lustration	451/1991	Big Lustration Act ('Velký lustrační zákon')	Yes	Yes
	279/1992	Small Lustration Act ('Malý lustrační zákon')	Yes	No
Regime condemnation	480/1991	On the Period of Oppression ('O době nesvobody')	Yes	No
	198/1993	On the Illegality of the Communist Regime ('O protiprávnosti komunistického režimu a o odporu proti němu")	Yes	No
	140/1996	On Access to Files of the Former StB ('O zpřístupnění svazků vzniklých činností bývalé Státní bezpečnosti')	Yes	Yes
Archives	107/2002	Amendment of Act on Access to Files of the Former StB	Yes	No
	499/2004	Archives Law ('Zákon o archivnictví')	Yes	Yes
	181/2007	The Institute for the Study of Totalitarian Regimes ('O Ústavu pro studium totalitních režimů')	Yes	Yes
	496/1990	On the Return of the Property of KSČ to People ('O navrácení majetku KSČ lidu ČSFR')	No	Not submitted
Restitution	497/1990	On the Return of the Property of Socialist Youth ('O navrácení majetku Socialistického svazu mládeže lidu ČSFR')	Yes	No
	229/1991	Land Act ('Zákon o půdě')	Yes	Yes
	119/1990	On Judicial Rehabilitation ('O soudních rehabilitacích')	Yes	No
	87/1991	On Extrajudicial Rehabilitation ('O mimosoudních rehabilitacích')	Yes	Yes
Rehabilitation	261/2001	On the Rehabilitation of Persons in Military Camps of Forced Labour ('O odškodnění osob soustředěných do vojenských pracovních táborů')	Yes	No
	172/2002	On Compensation for Persons Abducted to the USSR ('O odškodnění osob odvlečených do SSSR')	No	Not submitted
	428/2012	On Church Restitution ('O cirkevních restitucích')	Yes	Yes

Source: Authors.

Table 2 demonstrates the importance of the CCC in this process: the Court had to address almost all adopted statutes (14 out of 16) in constitutional review proceedings. This confirms our supposition that transitional justice legislative acts touched upon sensitive issues that mobilised the parliamentary opposition, which attempted to contest the legislation through constitutional review. The CCC invalidated half (seven of 14) of the acts, or their provisions, which supports our contention that it had an important position in shaping transitional justice policies.

[27] Note that some statutes were enacted by the Czechoslovak Federal Republic and succeeded to by the Czech Republic.

After identifying all Czech transitional justice legislation (see Table 2), we searched the CCC electronic database[28] for all rulings contesting these statutes in either a constitutional review of the legislation or individual complaints proceedings. A constitutional review of legislation gives the Court the power to strike down statutes or their provisions in case of incompatibility with constitutional or human rights norms, including international commitments such as the ECHR. It can be initiated by an individual whose rights are violated, or abstractly, by members of Parliament, the president and other political actors. Constitutional review is therefore a powerful tool that permits political actors to contest decisions and policies pushed through by the governing political elite. Comparatively, individual complaints might seem to have a weaker impact, as they can 'only' lead to the CCC quashing other judicial or administrative decisions. However, the CCC often actively changes the interpretation of legal norms in constitutional complaint procedures, while enjoying a lower threshold of attention compared to constitutional review. Leaving out individual constitutional complaints would therefore run the risk of missing important decisions.

Due to the vast amount of CCC case law (over 1,500 rulings), we decided to create a sample to allow a more in-depth analysis of the CCC's approach to the clash between transitional justice policies and human rights. From the population of all CCC rulings, we selected all constitutional review rulings contesting provisions of transitional justice laws and all rulings on individual complaints published in the CCC Collection of judgments and decisions.[29] This allowed us to include all those rulings which the CCC itself considers the most influential. The rest of the case law in the sample was selected by the systematic sampling of individual complaints. This method left us with a sample of 233 rulings.

Subsequently, we tracked references to international human rights treaties and case law in our sample and coded the impact of the reference on the result of the case. We distinguished if the reference played an important role in the outcome of the case, or if it merely had a supporting function. Accordingly, we coded references to international human rights law or case law as substantive (playing an important role in CCC's reasoning), or supporting (creating an additional, but not necessary, argument for the CCC to achieve the result). We also captured situations where the CCC explicitly refused the use of a particular international human rights

[28] NALUS, available at: nalus.usoud.cz, accessed on 24 August 2020.
[29] A collection of judgments and decisions is published a few times a year by the CCC. Available online: https://www.usoud.cz/sbirka-nalezu-a-usneseni-us, accessed on 5 October 2020.

treaty or case law. This allowed us to uncover what role the CCC assigned to international human rights commitments.

Finally, we complemented analysis of the CCC's use of international human rights law with six interviews with past and present judges of apex courts (CCC as well as the Supreme Court), some of whom had also worked in other positions as important court functionaries or law clerks in earlier period of the CCC. The interviews served to identify the motives behind the choices the CCC made regarding transitional justice jurisprudence. Specifically, we used insiders' views to complement the analysis of how the perception of transitional justice issues evolved within the Federal CC and CCC.

3.2 The Czech Constitutional Court in transitional justice and its use of international law

This section introduces the results of a quantitative analysis of the CCC's transitional justice case law, which allows us to understand trends in the court's jurisprudence and more general patterns in how the Court approached the potential clash between transitional justice narratives and international human rights commitments.

Firstly, we were interested in the overall activity of the CCC in the field of transitional justice. It is worth noting that the CCC had a very strong example in its predecessor, the Federal CC, which, during its first and only year of existence, issued several important judgments concerning the character of the previous regime, such as the competence of the new Parliament to enact a binding (legal) interpretation of the communist regime (Pl.ÚS 5/92), the legitimacy of the new regime as embedded in rule of law and human rights principles (Pl.ÚS 1/92), and the procedural aspects of early attempts at lustration (I.ÚS 191/92). These judgments already encompassed several references to UN Covenants accepting their direct effect.[30] This was a huge step for the Czech judiciary, as communist legal theory and practice refused to recognise a direct applicability of international human rights treaties, stating they merely bind the administrative apparatus, but not the courts.[31] In other words, it was the responsibility of the executive power to implement international human rights treaties domestically. In case there

[30] Under UN Covenants, we mean the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR).

[31] See also the decision of the Czech Supreme Court (CSC) of 31 August 1994, No. Skno 1/94, in which the SC acquitted a judge who, during the communist era, convicted two individuals for distributing anti-regime material (Charter 77). The CSC claimed that the judge was not bound by the ICCPR, despite the fact that Czechoslovakia had ratified the ICCPR in 1976.

was a conflict between an individual right contained in the treaty and domestic legislation, courts still had to apply domestic legislation.

The CCC built on the example set by its federal predecessor as regards the use of international human rights law. Figure 1 depicts the overall development in the proportion of CCC judgments that refer to an international human rights treaty or international human rights case law (hereinafter only 'an international human rights reference') in the transitional justice field. It demonstrates how the CCC relied on the guidance of international human rights law and how its reference patterns developed over time. Figure 1 shows a high reliance on international human rights law in the 1990s, which, however, coincided with a very low number of transitional justice rulings; for example, there was only one such ruling in 1993. The second half of the 1990s saw relatively low rates of the use of the international human rights law by the CCC, with a subsequent drop to as little as 19% of transitional justice rulings in the year 2000. After this period, the use of international human rights law significantly increased. Overall, the CCC has used international human rights law in 54% of the relevant case law.

FIGURE 1. TRENDS IN THE PROPORTION OF CCC TRANSITIONAL JUSTICE RULINGS WITH INTERNATIONAL HUMAN RIGHTS LAW REFERENCES, 1993–2018 (%)
Source: Authors.

Czechoslovakia ratified the ECHR in March 1992 and the Czech Republic did so soon after its creation in 1993, but the CCC preferred references to the UN Covenants and a few ILO treaties throughout the 1990s. There were two reasons for initial reluctance to use the ECHR and ECtHR case law. First, communist Czechoslovakia had ratified both UN Covenants in 1976; hence the CCC could use these commitments to condemn the practices of the previous regime without violating the principle of non-retroactivity. Second, acknowledgment and understanding of the ECHR among Czech judges developed slowly, and there were very few

opportunities for CCC judges to learn about the ECHR or new ECtHR case law. Furthermore, the low number of Czech translations or commentaries on cases meant that judges with limited language skills had to rely on the experience of their colleagues (and younger clerks) who had participated in research stays abroad and learned about international human rights law (Kosař *et al*. 2020).

The low familiarity with ECtHR case law changed significantly in early 2000s. First, between 2002 and 2003, the composition of the CCC changed, with a new generation of judges coming to the bench and employing younger law clerks with a better knowledge of international human rights law. Second, in the same year, two important publications (Berger 2003; Hubálková 2003) on the ECtHR and its case lase were published in the Czech language, which made a huge difference for judges without foreign language skills. It is worth noting that in 2003, there was still no HUDOC[32] or other online database allowing judges to search for ECtHR case law. Third, the rise of references to international law coincided with the constitutional amendment of 2001, which facilitated the Czech accession to the European Union. The amendment also brought about a complex revision of the relationship between domestic constitutional and international human rights law. Moreover, with the country's entry into the European Union, Czech judges participated in several training programmes aimed to foster their knowledge of both European and international law (Kosař *et al*. 2020). EU accession itself played no small role, although transitional justice measures were not a huge part of the EU accession conditionality.[33] Both the European Commission and the European Parliament criticised the extensive prolongation of the effect of lustration,[34] although the Commission admitted that the lustration enabled the establishment of an independent judiciary and public

[32] HUDOC is the official online databa of ECtHR case law, available at https://hudoc.echr.coe.int/.
[33] The lack of explicit conditions might also have been a result of a discord between the position of the European Commission and European Parliament on transitional justice. While the Parliament was rather critical of long-standing lustration and the exemption of German pre-World War II property from the restitution (the so-called Beneš decrees), the European Commission had milder stance. While it favoured time-limited lustration, it did not impose any strict conditions on the Czech government. See European Commission, 'Commission Opinion on the Czech Republic's Application for Membership of the European Union', 15 July 1997, available at: http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:51997DC2009&qid=1480887404045&from=EN, accessed 26 August 2020; 'Agenda 2000—Commission Opinion on the Czech Republic's Application for Membership of the European Union', European Commission, 15 July 1997, available at: europa.eu/rapid/press-release_DOC-97-17_en.pdf, accessed 26 August 2020; '2000 Regular Report from the Commission on the Czech Republic's Progress Towards Accession' of 8 November 2000', European Commission, available at: http://ec.europa.eu/enlargement/archives/pdf/key_documents/2000/cz_en.pdf; '2002 Regular Report on Czech Republic's Progress Towards Accession', of 9 October 2002, European Commission, available at: http://ec.europa.eu/enlargement/archives/pdf/key_documents/2002/cz_en.pdf, accessed 7 October 2020.
[34] 'Regular Report from the Commission on Czech Republic's Progress Towards Accession', European Commission, available at: http://ec.europa.eu/enlargement/archives/pdf/key_documents/1998/czech_en.pdf, accessed 26 August 2020.

administration.[35] The EU accession raised the stakes for alignment with commitments following from the CoE (and hence, the ECtHR), as the European Commission put an emphasis on the compliance with CoE bodies' demands (Merlingen, Mudde & Sedelmeier 2000).

We might therefore argue that better accessibility and the gradual 'visibility' of the ECHR and ECtHR case law partly influenced the higher occurrence of references. In the following era, the raw number of references does not show any clear pattern. The dramatic decreases around 2010 and 2017 might have resulted from a high number of pilot, precedential domestic cases, allowing the Court to refer easily to its own previous case law instead of using international references. The final decline after 2015 happened due to a significant increase in transitional justice rulings (especially related to restitution), with very few of them containing an international human rights reference.

The use of international human rights references also differed based on particular transitional justice policy. While lustration, adopted in 1991, divided society and captured a lot of attention, case law was dominated by a restorative agenda, be it restitution or rehabilitation. To a certain degree, this is understandable, as restituents' claims prompted many disputes and controversies (see the section 'property restitution'). The scope of restitution on its own was long unclear. Individual complainants petitioned the CCC to return not only the property confiscated by the communist regime but also property taken during and in the aftermath of World War II. Quite a wide set of cases also resulted from the inactivity of state authorities, as the Land Registry often failed to act on its duty to offer claimants an alternative property in case the original requested property could not be restituted. Due to the Land Registry's chronic inactivity, many claimants petitioned the CCC directly. The CCC therefore actively engaged in restitution policy, allowing extensive individual restitutions, with a significant impact on state ownership. Another group of the rulings addressed immaterial damages claims; namely, violation of personal and moral rights, typically argued by political prisoners sentenced by the communist regime.

On the contrary, very few individual lustration cases reached the CCC, hence revealing an interesting paradox: although the Czech Republic adopted rather harsh lustration legislation (Sadurski 2014, pp. 344–345), it has not put it thoroughly into practice. The missing evidence and the lack of cooperation by police authorities with the Office for the Documentation and

[35] 'Agenda 2000—Commission Opinion on the Czech Republic's Application for Membership of the European Union', European Commission, 15 July 1997, available at: europa.eu/rapid/press-release_DOC-97-17_en.pdf, accessed 26 August 2020.

Investigation of the Crimes of Communism, as well as the unreliability of StB witnesses, led to acquittals of the majority of positive lustration holders. Only very few cases reached the top courts.[36]

The CCC used international human rights law in approximately 46% of the rulings in our sample. However, the use of international human rights law differed in individual transitional justice policies. Figure 2 captures a simple count of the three types of references (substantive, supporting, and reference where the CCC refused the application of international human rights norms) in the CCC's transitional justice case law. Although both substantive and supporting international human rights references appear in almost all transitional justice policies, the use of substantive references in rulings on rehabilitations and restitution clearly outweighs their use in rulings on archives and lustration. This coincides with above-mentioned variance, as well as with the frequent references to ECtHR's rulings against the Czech Republic, which are closely related to the restitution agenda. Higher coverage of the restitution agenda and more detailed rules developed by the ECtHR, often in direct response to Czech cases, made the references more pressing and also helpful for the CCC. Interestingly, petitioners frequently raised references to international human rights commitments in lustration cases, but the CCC mostly disregarded them. The CCC does not refer much and, moreover, largely denies the substantive relevance of international human rights law in rulings on archives and lustration. By contrast, however, the CCC quite often and noticeably relies on international human rights in rulings on rehabilitation and restitution, that is, in areas where rich ECtHR case law exists.

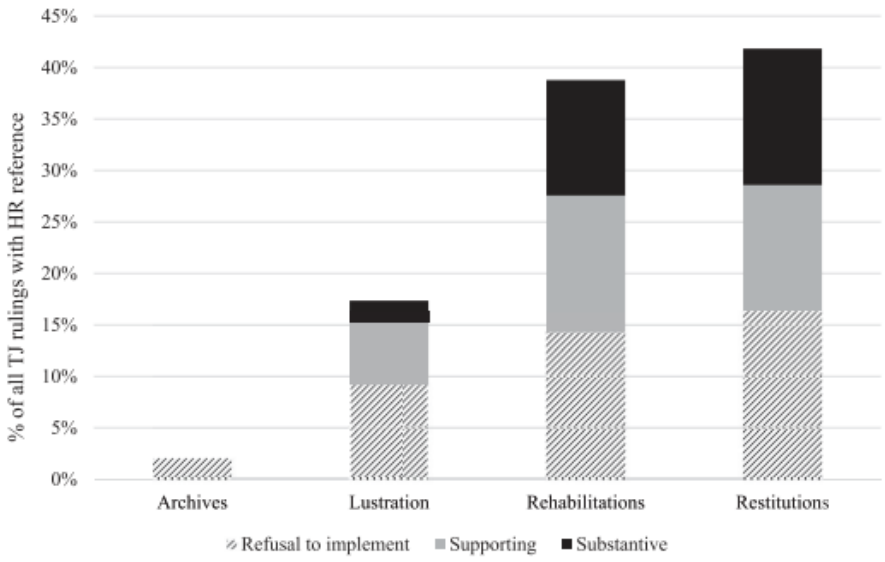

FIGURE 2. USE OF INTERNATIONAL HR LAW REFERENCES IN INDIVIDUAL TRANSITIONAL JUSTICE POLICIES IN CCC RULINGS
Source: Authors.

[36] Interview with a former CCC judge, Brno, 18 December 2018.

4. From general patterns to pivotal questions: clashes between transitional justice and human rights

As we showed in the previous section, the proceedings initiated before the CCC in the period between 1993 and 2018 addressed a very wide spectrum of topics and policies belonging to a transitional justice framework. The CCC decided on the constitutionality of almost every single enacted transitional justice statute, invalidating and interpreting the provisions of most of them. International human rights references appear in approximately 46% of this case law, although most frequently only in the form of a supporting argument. Yet, a significant portion of the rulings incorporate references that have a substantive impact on the results of the case. We were therefore further interested in seeing how the CCC approached potential clashes between international human rights protection and transitional justice narratives in these cases. To demonstrate the dilemmas, we analysed four categories of CCC rulings that highlight the conflict between transitional justice jurisprudence and international human rights obligations. Our case selection draws on eight possible ideal scenarios of how the CCC might settle the relationship between transitional justice policy, the national human rights catalogue[37], and international human rights commitments (see Table 3). We identified which scenarios existed in CCC case law and picked those that contained a clear conflict between transitional justice policy on one hand and domestic or international human rights on the other. Conflicts with international human rights law are of special interest for us, because the CCC appears indeed to be placed between a rock - sensitive national transitional justice legislation - and a hard place, namely a disagreement with international human rights law. While discrepancies might also occur on a domestic level, constitutional courts in general primarily act as guardians of domestic constitutions, including domestic human rights catalogues. Yet, their role is different when it comes to international treaties, as they enjoy less freedom when interpreting them. It is primarily the international human rights bodies that are entrusted with the interpretation of international human rights treaties.

[37] A domestic charter or a constitutional list of human rights.

TABLE 3
SCENARIOS OF THE CCC SOLVING HUMAN RIGHTS (HR) V. TRANSITIONAL JUSTICE (TJ) DILEMMA

TJ in breach of domestic HR?	*TJ in breach of international HR?*	*Response of CCC to domestic TJ policy?*	*CCC case*
No	No	Confirms	No conflict
No	No	Invalidates	Should not happen
Yes	No	Confirms	University lecturers
Yes	No	Invalidates	No CCC judgment
No	Yes	Confirms	Should not happen
No	Yes	Invalidates	Rehabilitations (Jehovah Witnesses)
Yes	Yes	Confirms	Restitutions (Pinc and Pincova)
Yes	Yes	Invalidates	Lustration I

Source: Authors.

Given our research aim, we focus on two situations. The first is when the CCC found differently than the pre-existing case law of the ECtHR or the UN HRC. In such situations, the CCC preferred not to follow international guidelines and opted for a national transitional justice solution, which typically followed the government's policy. Second, we were interested in scenarios wherein the CCC found domestic transitional justice practice to be unconstitutional. We searched for instances when the CCC had utilised pre-existing international case law, therefore favouring an international human rights solution to transitional justice dilemmas over a domestic one. Following this logic, we analysed CCC's case law in four areas, one representing each of these categories: a legislative review of the Lustration Act; the premature termination of university lecturers' contracts; the restitution of property nationalised under the communist regime; and the rehabilitation of political prisoners. We complemented the analysis with elite interviews to shed light on the motives behind CCC choices.

4.1 Lustration rulings

The petition to review the Big Lustration Act ('Velký lustrační zákon', 451/1991 Sb., kterým se stanoví některé další předpoklady pro výkon některých funkcí ve státních orgánech a organizacích České a Slovenské Federativní Republiky, České republiky a Slovenské republiky) reached the CC twice.[38] The first constitutional review in 1992 began with the jurisprudence of the Federal CC. The judgment Pl. ÚS 1/92 presented a value-based definition of the new democratic regime, which became a cornerstone for almost all future transition period case law. The Federal CC stressed that there was no value continuity between the new

[38] The Small Lustration Act ('Malý lustrační zákon', 279/1992 Sb., o některých dalších předpokladech pro výkon některých funkcí obsazovaných ustanovením nebo jmenováním příslušníků Policie České republiky a příslušníků Sboru nápravné výchovy České republiky) was similarly challenged before the CCC. Compared to the Big Lustration Act, it only regulated the vetting of prison guards and members of police.

and the old regime, which had violated human rights, misused state power, and led to the loss of hundreds of thousands of lives and citizen freedoms. The Federal CC, conscious of a possible conflict of lustration with human rights and international commitments,[39] used the doctrine of militant democracy to allow these individual rights restrictions. Lustration, therefore, was not characterised as a discriminatory measure but as a justifiable condition placed on the execution of particular professions. The Federal CC was not in an easy position: Czechoslovakia was the first CEE country to introduce a lustration mechanism in practice and hence was monitored by international organisations. The CoE, and the Venice Commission in particular, followed developments closely, warning Czechoslovakia that the implementation of lustration violated the principles of the rule of law underlying the ECHR.[40] The Federal CC, however, was unified in its intention to support lustration as a necessary element of Czech transitional justice and de-communisation. It therefore recognised a potential conflict with the ICCPR, which commits the state to secure equal rights for individuals and forbids any discrimination, and ICESCR, which only allows limits on economic and social rights that promote the general welfare of a democratic society. Nevertheless, drawing inspiration from rulings of the German Federal CC[41] on the possibility of forbidding the employment of former active communists, it concluded that even these international human rights treaties allowed limitations on the freedom of occupation in public service based on past loyalty. In other words, the CCC rejected the understanding of lustration as a retributive transitional justice measure and stressed its preventive character: that every state with a totalitarian past and experience of human rights abuses has the right to implement the principle of militant democracy to prevent subversion.

The Federal CC rejected the motion to quash the Lustration Act as a whole, but it still annulled several provisions regarding the lack of guarantees for a fair trial before the Investigation Committee and the unreliability of secret police archives when it comes to those accused of collaboration.[42] The Federal CC used UN Covenants as reference criteria for the compatibility of the general principles of the Lustration Act, pointing out that vetting is not unknown in other democratic countries. The reasoning leading to the annulment of these provisions, however, rested primarily on the value-oriented interpretation of domestic

[39] Interview with a former CCC judge, Brno, 5 December 2018.
[40] Interview with a former CCC judge, Brno, 18 December 2018.
[41] Interview with a former CCC judge, Brno, 5 December 2018. Generally, the German CC serves as a frequent source of inspiration for the CCC (Smekal & Vyhnánek 2016, p. 148).
[42] It was a widespread practice that some people were included on lists of collaborators without their knowledge or any active participation, either because StB planned to approach them in future or was trying to tarnish their reputations (Interview with a former CCC judge, Brno, 18 December 2018).

constitutional norms, which would reflect the legacy of totalitarianism and coming to terms with the past. Moreover, judges of the Federal CC shared an understanding regarding their role in transitional justice, securing the goals and endpoints of the transition, just as the first CCC was to do later.[43] Preventing old cadres from assuming high positions in the newly democratic system was an essential part of the transition. This view of the Federal CC reflected public sentiments. A 1991 poll showed that 50% of respondents considered lustration to have a beneficial effect on the state administration, while 42% considered it to have a beneficial effect on democracy (CVVM 2009). Part of the Federal CC reasoning upholding the lustration legislation in 1992 rested on the fact that the vetting of public officers was only a transitional measure, not a permanent feature of the political system. The side effect of limiting the access of citizens to some positions in public administration was, therefore, seen only as a temporary issue, as the lustration mechanism was expected to cease its effect by the end of 1996. Nevertheless, the policy persisted. Parliament repeatedly extended the Act. In September 1995, the Chamber of Deputies prolonged its effectiveness until 31 December 2000.[44] President Havel rejected the amendment but the Chamber of Deputies overruled his veto. In 2001, after the second prolongation, the Czech Social and Democratic party ('ČSSD, Česká sociálně-demokratická strana') then in power attempted to overturn the lustration law for good, claiming it had lost its social and historical function as the process of democratisation had already been completed. The CCC, however, dismissed the petition, stating that it was not up to the judiciary to evaluate whether democratisation had already reached a level where democracy no longer needed to defend itself.[45]

The CCC found itself in a much more difficult position regarding the potential conflict of lustration with international human rights commitments than its federal predecessor, the Federal CC. Apart from direct recommendations from the Venice Commission to cease applying the Lustration Act, it also had to deal with the evolving anti-lustration case law of the ECtHR and the pressure from the EU institutions to terminate. Although some CCC judges were very conscious of this conflict, the rhetoric of militant democracy persisted.[46] The CCC highlighted that even the ECtHR recognised militant democracy as a legitimate derogatory principle (*Vogt v Germany*, *Glasenapp v Germany*), and that protecting equal access to civil services was never the intention of ECHR drafters. The CCC also stressed that many countries

[43] Interview with a former CCC judge, Brno, 5 December 2018.
[44] Act No. 254/1995 Coll.
[45] Pl.ÚS 9/01, CCC judgment of 5 December 2001.
[46] Interview with a CCC judge, Brno, 11 December 2018.

across Europe had even longer standing lustration. Hence, the twofold argument, that lustration was not a retributive measure and was used also by other democratic regimes, persisted.

Compared to the first ruling, the judges were not united in their views on the constitutionality of lustration statutes.[47] An understanding of the conflict between the lustration mechanism and human rights remains strongly present in the wording of the second ruling. Still, while formally executing judicial self-restraint, stating that it did not have the competence to review the level of Czech democratisation, the CCC decided to support a certain policy line. In fact, some CCC judges shared a belief that Czech lustration had not accomplished its aim; furthermore, that it was not fully effective because of inadequate investigations and because the testimony of former secret agents allowed lustration rulings to be overturned on the basis that the archives contained false and fabricated documentation. Some CCC judges, therefore, did not perceive lustration as an effective punitive mechanism.[48] CCC's views again reflected social sentiments: a public poll in 2000 reported increasing disillusion with the policy of lustration (CVVM 2009; Choi & David 2012).

The Lustration Act, therefore, stayed in effect and kept emerging as an important political tool until very recently, when it almost prevented Andrej Babiš from taking a ministerial (2013) and later the premiership (2017) position after the 2013 and 2017 elections (Pl.ÚS 21/14). The example of lustration shows that the CCC saw the need to address the past crimes and rebuild social trust as justifying a certain derogation of human rights. This narrative, fuelled by constitutional judges' feelings that lustration was not being properly implemented, subsided only very recently.

4.2 University lecturers

Lustration was a straightforward way to prevent communists and communist collaborators from holding important positions in the aspiring liberal democracy. However, the Czech legislature also used subtler means to achieve the same aim, specifically targeting university lecturers.[49] The 1993 amendment to the 1990 Law on Universities stated that the permanent contracts of

[47] Interview with a former CCC judge, Brno, 5 December 2018.
[48] Interviews with former and sitting CCC judges, Brno, 14 December 2018, 14 December 2018, 18 December 2018.
[49] The explanatory memorandum to the Act No. 216/1993 Coll. amending the Act No. 172/1990 Coll., On Universities (Důvodová zpráva k vládnímu návrhu zákona, kterým se mění a doplňuje zákonj č. 172/1990 Sb., o vysokých školách, 24 February 1993, available at: http://www.psp.cz/eknih/1993ps/tisky/t0191_00.htm, accessed 13 October 2020) singles out university lecturers because their job requires also a very high moral character. By changing contracts from an indefinite to a fixed period, the amendment enables the replacement of old cadres by new academics who meet these requirements. .

university lecturers and researchers would be automatically changed to fixed-term contracts. The official purpose of the amendment was to enable researchers' mobility. The real reason was to get rid of university lecturers appointed under the communist regime. Becoming an associate professor or professor before 1989 was a political process: an academic had to prove both expertise and ideological loyalty, and was appointed by the Minister of Education or the president. A group of parliamentarians lodged a constitutional review complaint, but the CCC dismissed it and supported the legislature's transitional justice considerations instead.[50]

The CCC based its conclusions on a specific characteristic of the profession of university lecturer. Lecturers are responsible for transmitting non-ideological expertise to young generations. Such objectivity could not have been guaranteed with lecturers approved by the communist regime. Even after the 1989 Velvet Revolution, the positions of associate professors and professors (that is, those with permanent contracts) remained largely filled by the previous regime's appointees. Given the limited number of positions in academia, the legislature considered it fair to abolish permanent contracts and open the competition so that posts could be filled by people who wanted to work in academia but had not been able to do so under the communist regime. The legislature therefore justifiably sought to remove the residue of the past. The CCC emphasised that it was necessary to equalise the starting line and create equal opportunities.[51]

The Court applied Art. 6 of the ICESCR to argue that the past regime had severely violated the right of everyone to earn a living in work that they had chosen freely, and that the consequences of this violation had persisted even after the 1989 change of regime. The 1993 amendment thus merely eliminated the unjust privileges of the past. Moreover, opined the Court, without the 1993 amendment, the constitutional right of students to (high-quality) education and the development of new expertise to improve the quality of research and education could not have been guaranteed. The CCC's use of international human rights law, therefore, gave precedence to transitional justice considerations over the principle of legal certainty for academics on permanent contracts. The CCC ruling combined elements of both retributive and restorative justice. Abolishing permanent contracts had a retributory element, while restorative features included opening up academic positions so that those excluded under the communist regime had a chance to apply.

[50] Pl.ÚS 36/93, CCC judgment of 17 May 1994.
[51] Pl.ÚS 36/93, CCC judgment of 17 May 1994, part IV.

4.3 Property restitution

The aim of returning property to previous owners, who lost it during the communist regime, has led to many unforeseen consequences. Both the people whose properties were confiscated and the people who had acquired them under the communist regime and were now expected to return them to the previous owners brought their cases before the Czech courts. Some of the problems were solved in the 1990s by the CCC, which wanted to help the victims of communism and restore historical justice, returning or at least compensating for properties seized by the communists.[52] Nevertheless, many remaining problems resulted in adverse rulings by the ECtHR and the UN HRC,[53] which found numerous violations of the right to property.

Law no. 87/1991, On Extrajudicial Rehabilitation, set two crucial conditions for the restitution of properties lost due to injustice during the communist regime: citizenship of the Czech and Slovak Federal Republic and permanent residence in the territory of the Federation. After the split of the Federation, a group of Czech MPs challenged the permanent residency requirement and the newly established CCC agreed to rescind it. However, when individual applicants petitioned that the citizenship requirement be struck down as well, the CCC disagreed and upheld it. The UN HRC concluded that both the citizenship and the permanent residence conditions violated the principle of equality. The CCC refused to comply with these findings and confirmed citizenship as a condition for restitution, also pointing to ECtHR case law, which did not go as far as the UN HRC (Kosař & Petrov 2018, pp. 408–11).

Yet, in a series of cases, the ECtHR raised another concern that arose as a consequence of the Czech restitution. The ECtHR accepted that the member states had a certain leeway in dealing with the past; however, when trying to pursue justice for victims of communist injustices, its guiding principle was that the state should not create disproportionate new wrongs. One group of successful complainants before the ECtHR in restitution cases against the Czech Republic were people who had acquired properties from the communist state, arguably not knowing that the state had confiscated the property for political reasons before they bought it. The complainants were ordered to return the property to the previous owners because original restitution of property has generally been the preferred solution. In return, in accordance with the law, the state compensated the complainants with the price they had paid when they had bought the properties from the state, for example, back in the 1960s. However,

[52] Interview with a CCC judge, Brno, 5 December 2018. The CCC perceived the seizure of property as a violation of the right to property by an illegal regime; only restitution compensated for this violation.
[53] The UN HRC monitors implementation of the ICCPR.

prices had increased over the three decades, and the sums paid in the 1960s were approximately one-fiftieth of prices in late 1990s. In *Pincová and Pinc*, the ECtHR posited that the legislation should take into consideration particular circumstances and not put the burden of responsibility on persons who had acquired their possessions in good faith. Such responsibility should lie with the state. A fair balance should be maintained between the demands of the general interest and protection of the right to the peaceful enjoyment of possessions.[54]

The *Pincová and Pinc* judgment did not enjoy a warm reception in Czech elite legal circles. Interviewees generally complained that, unlike earlier cases against Germany, the ECtHR had not paid enough attention to the specific transitional context.[55] Some even urged the government to request a referral to the ECtHR Grand Chamber,[56] but the government refused to do so.

The CCC struggled with the *Pincová and Pinc* judgment when it neither quashed the provision setting the low compensation price, which placed a disproportionate burden on the current owners of the property to be restituted, nor openly defied the ECtHR. Instead, the CCC proceeded in a piecemeal fashion by complying with the ECtHR judgment in individual cases and not dealing with the situation systemically. The CCC declared that derogation of a legal provision is the last option in situations when there is no constitutionally conforming interpretation available.[57] In the meantime, in judicial practice the defective legal provision was ignored, and thus the CCC did not find a need to quash it.

The Constitutional Court deferred to the legislature in other cases as well, such as in upholding the above-mentioned requirement of citizenship for restitution, or in limiting the period to cover only the injustices of the communist regime and not extending it earlier than 1948, the year when the communists took control, to the immediate post-war period. Restitution was understood as the duty of the state to revive the original legal state of affairs and annul illegal property transfers (Pl.ÚS 16/93). While Czech transitional justice measures were aimed at previous owners harmed by the political actions of the communist regime, the ECtHR brought into play the need to also take into account the interests of the subsequent owners, who arguably acted in good faith when they bought confiscated properties from the state. The restitution saga presents a peculiar case because the CCC did not formally quash the transitional

[54] *Pincová and Pinc v. the Czech Republic*, ECtHR judgment of 5 November 2002, paras. 58 and 64.
[55] Interview with a former CCC high official, Brno, 4 December 2018; interview with a current CCC judge, Brno, 5 December 2018 and 11 January 2019; interview with a former CCC judge, Brno, 5 December 2018.
[56] Interview with a former CCC judge, Brno, 18 December 2018.
[57] Pl.ÚS 33/10 #1, CCC judgment of 23 April 2013, part V.

justice policy as such but settled only individual cases. It followed the ECtHR interpretation and supported the practice of Czech courts, which has since changed to reflect huge increases in property prices, making the statutory provision outdated. The whole sensitive issue of restitution is, from the CCC perspective, an uneasy exercise in deference to the national transitional justice solution alongside simultaneous attempts to deal with boundaries set by the ECtHR. The CCC managed to reconcile the two by pointing to newer judicial practice that already conforms to the ECtHR case law without clearly contradictory national legislation having been overturned.

Overall, the CCC focused on redressing past injustice. It was only after interventions by international human rights bodies that the CCC started considering the human rights consequences of its case law to be unfavourable.

4.4 Rehabilitation of political prisoners

A relatively large number of cases in which the domestic courts struggled with awarding financial compensation for moral (immaterial, non-financial) damages centred around the rehabilitation of political prisoners of the 1950s,[58] the most repressive era of Czechoslovak communism. Many political prisoners had refused obligatory military service because of their religious beliefs. The criminal convictions of these prisoners of conscience were invalidated by Czech military courts at the beginning of the 1990s, first, by only changing the decisions so that no punishment was decreed, then later, around 2007, invalidating the convictions themselves.[59] Nevertheless, the rehabilitation act did not cover compensation for inferred immaterial damages. The problem spurred the so-called 'judicial wars' between the CCC and the Czech Supreme Court (CSC).

The core of the dispute turned out to be the temporal application of the ECHR, which the CCC used to justify higher compensation for political prisoners against the Parliament's will.[60] The CCC thus backed a more pro-transitional justice solution. The CSC claimed that the damages as such occurred in the 1950s, therefore they could not justify the application of the Convention, which was binding on the Czech Republic only from 18 March 1992.[61] The CCC, on the contrary, advocated an interpretation that damages emerged only upon their recognition in the 1990s, essentially pushing through a retroactive use of the Convention's principles.

[58] Act No. 119/1990 Coll., On Judicial Rehabilitation.
[59] Pl.ÚS-st 39/14, CCC judgment of 25 November 2014.
[60] Ibid.
[61] See, for example, CSC, 30 Cdo 1614/2009, judgment of 8 September 2010.

The dispute between the courts took several years. The CCC quashed dozens of SC decisions as 'poorly written' and 'failing to recognise which legal norms should be applied', or 'surrendering its role to find justice and unify the decision-making practice of the Czech courts'.[62] Interestingly, the quarrel with the CCC challenged the traditionally conservative CSC judges to engage in more nuanced work with ECtHR case law. The CCC directly bound the CSC with its opinion that the ECHR (Art. 5 para. 5) should be directly applied to compensate political prisoners for the immaterial damage caused by the unjust decisions of the communist era. Hoping for a resolution, the CSC attempted to settle the case by awarding the claimants only moral compensation (i.e. recognition of the violation). This only further irked the CCC's judges, who adamantly and very actively pursued a change in the application of compensatory politics, arguing for the right of the victims of communism to justice.

The argument of the CSC, that such an overarching interpretation and application of the Convention[63] to situations taking place before its ratification actually goes against the ECHR,[64] remained unheard. Although the CCC did not use any traditional transitional justice arguments justifying the derogation from standard principles, the motives of transition and coming to terms with the past were strongly present in the judges' considerations.[65] The CCC was very conscious of the fact that the exclusion of immaterial damages from the compensatory scheme was a political choice by the democratically elected legislature. Still, it attempted to bring about the change *via* an expansive interpretation of international human rights commitments.

The CCC eventually changed its line of reasoning and backtracked on the retroactive use of the Convention against the will of the Parliament.[66] However, financial compensation to political prisoners was preserved. The CCC judges used human rights language and international commitments to push through their vision of transitional restorative justice.

5. Discussion and conclusion

The clash between human rights and transitional justice presents young democracies with a thorny dilemma. On one hand, they seek to address the crimes of the past and distance

[62] I.ÚS 3438/11, CCC judgment of 23 May 2012.
[63] 30 Cdo 2916/2012, CSC judgment of 29 May 2013.
[64] 30 Cdo 1770/2012, CSC judgment of 24 April 2013; 30 Cdo 1663/2012, CSC judgment of 12 June 2013.
[65] Interview with a CCC judge, Brno, 18 December 2018.
[66] The Plenum even admitted that by an overreaching interpretation of the Convention, it had created an unjust dual-track justice system that could establish legitimate expectations by petitioners. Pl. ÚS-st. 39/14, CC judgment of 25 November 2014.

themselves from the previous regime with a set of very specific policies, while, on the other hand, they strive to re-establish their position in international society by, among other things, showing serious commitment to international human rights standards (Smekal *et al*. 2016). The 'return to Europe' (Havel 1990) consisted of value reorientation towards the Western triad of liberal democracy, human rights, and the rule of law, coupled with the 'Washington Consensus' economic template. Visions for the future were set clearly but, at the same time, the CEE countries had to deal with sensitive and pressing legacies of the past.

Our essay sheds light on the role of constitutional courts in transitional justice, focusing on their role in mitigating the inherent conflicts between the concept of transitional justice and international human rights law when confronting legislative and executive transitional justice policies. We argue that constitutional courts significantly adjust transitional justice policies. However, they are constrained by respective international human rights commitments, which are supposed to eventually prevail over the transitional rule of law. In that sense, we expected the constitutional courts to gradually cease departing from general human rights principles justified by the transitional rhetoric and harmonise transitional justice policies with international human rights. Nevertheless, the study of the CCC did not confirm this expectation.

The analysis of the transitional justice jurisprudence of the CCC demonstrates that international human rights regimes work both as a constraint and a tool. The CCC has addressed the transitional justice issues for almost 30 years, which has allowed it to tackle all types of policies and problems. It has reviewed 14 out of 16 transitional justice statutes and their amendments and invalidated provisions in half of them, confirming its position as an important transitional justice actor, able and willing to challenge political compromises.

Our analysis of how the CCC reconciled the conflict between human rights and transitional justice principles establishes that the CCC acted as an independent player with its own conception of transitional justice. This demonstrates that the existing omission of constitutional courts by transitional justice literature has serious consequences.

Most of the case law regarding the retributive dimension of transitional justice (lustrations, condemnation of the communist regime) eschews references to international human rights law. The rulings identifying the values and democratic principles of new regimes are very normative, yet parsimonious in references. Interestingly, references (or elaborated interpretations and evaluations of compatibility) are also lacking in cases when petitioners raised the incompatibility between transitional justice measures and international obligations.

If the CCC managed to find sufficient reasoning in the domestic Constitution, it did not feel the need to shield itself with international human rights arguments. That being said, we also found evidence that CCC judges were aware of the human rights clashes inherently present in 1990s transitional justice considerations. Yet, the transitional narratives prevailed, fuelled by the feeling that the core retributive measure, lustration, was not sufficiently implemented, especially in the first decade after the Velvet Revolution.

By contrast, restorative measures, including rehabilitation and the restitution of property, are full of references to international human rights law, especially the ECHR and ECtHR case law. International human rights law played a tremendous role and helped the CCC to push for more transitional justice for victims of communist crimes, often directly against the will of legislator or the rest of the judiciary. The CCC therefore displayed a tendency to reference international human rights case law in restorative policies when it generally supported its views, while tending to withhold references to international human rights in retributive policies where ECtHR case law has not been always in line with the CCC's preferences.

Three factors explain the CCC's behaviour. First, shortly after the 1989 revolution, the CCC, composed mostly of former dissidents and enjoying a high level of social legitimacy, attempted to establish the new domestic Charter of Fundamental Rights in practice and develop the interpretation of Czech constitutional order as embedded in rule of law principles. The need to diffuse international norms came only as a second-order interest. Second, the constitutional judges only gradually gained in-depth knowledge of international human rights law. The language barrier and lack of electronic databases or literature at the beginning of the 1990s significantly constrained the judges' knowledge of international human rights law. The situation changed around 2000, when the CCC delivered most of its restorative transitional justice case law, which frequently used international human rights law. Third, the first CCC felt particularly strongly about its role in transitional justice and shared a common understanding of how the transition, at least in the most important political aspects, should evolve.

As public polls demonstrate, the CCC enjoyed high social legitimacy with its transitional justice case law shortly after 1989. The Federal and first Czech CC, composed largely of former dissidents and judges with first-hand experience of the repression of the totalitarian regime, shared public sentiments on restoring justice and punishing wrongdoers. Moreover, the few judges from the communist era who joined the CCC pursued transitional

justice issues even more vehemently.[67] This what? supports the suggestion that pro-justice behaviour of courts in transition follows from judges seeking atonement for their service under the previous regime (Huneeus 2010).

International human rights law, especially if supported by existing case law, left the CCC less room for manoeuvring and constrained its vision of transitional justice. It was rare, therefore, for the CCC to openly oppose the content of international human rights commitment; rather, it 'cherry-picked' those aspects that conformed to its vision of transitional rule of law. On some occasions, the CCC even shifted the interpretation of some international human rights law provisions in order to gain more leverage to promote certain views. This practice has been very visible, especially in the field of restorative transitional justice, where the CCC frequently stood in for the non-active legislature. The CCC used international human rights commitments to justify new schemes for rehabilitation of victims.

To a large extent, the CCC overstepped constraints of transitional justice legislation. While formally it had clear lines of transitional justice set by domestic legislation and constrained by the ECtHR, it did not keep within those boundaries. The CCC contested and struck down provisions of most of the Czech transitional justice statutes, thus significantly reshaping their form. Moreover, we also saw a tendency to broaden the scope of transitional justice by including transitional justice rationales in policies not originally seen by the government as transitional—the case of university lecturers being one example. The CCC pushed forward its own idea of transitional justice, which it advertised as a response to widespread public demand.

The judges were disappointed with the implementation of transitional justice policies, both in their retributive (ineffective lustration) and restorative (narrow compensation) forms. When it comes to the boundaries created by the ECtHR, the CCC acted casuistically (see *Pincová and Pinc* case or the case related to prisoners of conscience described above), although showing more willingness to comply with restorative transitional justice policies. So far as international human rights law demanded more compensation to individuals, the CCC was happy to use it to support its findings. To a degree, its approach to restorative and retributive mechanisms differed. While the CCC tamed the most apparent injustices of retributive legislation, it pushed for more active restorative policies. Contrary to our expectations, the CCC did not automatically put more emphasis on 'collateral damage' and victims of transitional

[67] Interview with a former CCC judge, 11 December 2018, Brno.

justice. It therefore follows that the CCC did not mitigate conflicts between human rights and transitional justice shortly after the transition. human rights concerns prevailed over transitional justice justifications only partly and only over some time. International human rights commitments constrained the CCC only in situations when a direct ruling against the Czech Republic existed. Otherwise, the CCC merely used international human rights law where it suited its reasoning. In this sense, transitional justice reasoning still survives.

The example of the CCC carries an important lesson for transitional justice scholarship. It shows that by omitting constitutional courts, we miss a significant piece in the search for factors prompting a particular set of transitional justice policies. While largely overlooked by political science scholarship, constitutional judges, especially in the transitional setting, often have their own vision of transitional justice, prompted by their first-hand experience, and have their own, considerable, means of influencing it. The reluctance of the CCC to follow some of the ECtHR's views on transitional justice demonstrates that constitutional courts need to be understood and studied as distinctive actors, not as mere implementers of norms.

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Study II: Purging the Judiciary After a Transition: Between a Rock and a Hard Place

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Introduction: Revival of Transitional Justice Debates

In August 2023, the former vice-president of the International Criminal Court, Robert Fremr, withdrew his candidacy for the position of judge of the Czech Constitutional Court. With his impressive international experience,[1] Fremr was meant to be one of the key candidates in the newly reformed process of appointment of constitutional justices, which highlighted the need for a transparent, merit-based selection that would secure a better quality as well as greater diversity of candidates.

Fremr's resignation arrived in response to the intense political and medial backlash[2] after the Czech Institute for the Study of Totalitarian Regimes publicised information that Fremr, who had served as a criminal judge under the communist regime between 1982 and 1989, had participated in a political trial and, moreover, sentenced 166 individuals to prison in their absence for illegal emigration from communist Czechoslovakia.[3] The public was immediately swept into a highly polarised discussion. How could communist-era judges who actively participated in or legitimised human rights violations still enjoy a place among the democratic elite? Were lustration and vetting processes not successful? Should Fremr's failure to revolt against the communist law disqualify him from holding a position as a constitutional judge, or did he manage to rehabilitate his profile and regain credibility through his 30-year-long career in international criminal law arena?

There are two interesting dimensions to this story. First, Czechia has long been praised as a poster child for transitional justice and decommunisation. The Czech lustration law that aimed to remove old communist cadres from public life has been referred to as 'thorough and

[1] Apart from his position at ICC, Fremr also served as a judge at the International Criminal Tribunal for Rwanda.
[2] Procházková (2023) Nejde o Fremra, RESPEKT, available at https://www.respekt.cz/newsletter/nejde-o-fremra.
[3] USTR (2023), https://www.ustrcr.cz/wp-content/uploads/2023/10/Zprava-Fremr-USTR-pro-KPR.pdf.

comprehensive,'[4] 'one of the strongest',[5] and even 'the most sweeping'[6] among the post-communist countries of Central and Eastern Europe ('CEE'). It intentionally applied also to judges as the courts played an important role in upholding the legitimacy and strength of the communist regime.[7] Yet, Fremr's story is not the first in which the communist past of judges has returned to public discussion and prompted analyses of why the (allegedly vast and thorough) processes of transitional justice failed to de-communise the Czech judiciary.

Second, this reflection on the shortcomings of the de-communisation of judiciaries resurfaced right at the moment when the transitional justice narrative returned to Europe. The increasing intensity of a political backlash against the courts documented in Poland, Hungary, Romania and Israel has reminded us how much undemocratic regimes care about the capture of an independent judiciary and how important a role packed judges play in the implementation of their, often unconstitutional, policies.[8] The liberal opposition's success in the 2023 Polish parliamentary elections highlighted the urgency of resolving the question of what to do with unlawfully appointed judges,[9] or how to un-pack the captured courts.[10]

Democratic elites returning to power after periods of backsliding face no easy dilemma. Should they try to remove all illegitimately appointed judges, irrespective of their behaviour? Or, instead, should they aim to 'sift out the bad apples' and remove those judges that appear to be loyal to the previous elite? Can they limit the cleansing at apex courts? And how can these removals be done without imposing further strains on principles of the rule of law?

While addressing these questions, many scholars ask to what extent we can rely on transitional rule of law[11] and the toolbox of transitional justice,[12] and how to make mechanisms of transitional justice compatible with commitments to international human rights law[13] and requirements laid down by European supranational courts.[14]

The dilemmas outlined above remind one of the core discussions led by CEE democratic elites in the early 1990s. Terms like vetting and lustration returned to public and scholarly

[4] Skapska (2003) p. 199, p. 202.
[5] Robertson (2006) p. 73, p. 87.
[6] Schwartz (1994) p. 141, p. 142.
[7] Kuhn (2011), Kosař (2016; 2017).
[8] Holgado and Urribarri-Sanchez (2023), Keck (2023). ETC.
[9] Szwed (2023).
[10] Kosař and Šipulová (2023).
[11] Teitel (2009), similarly Sajo – militant rule of law concept.
[12] Bobek et al (2023), Mikuli (2023), Szwed (2023), Přibáň (2023).
[13] Šipulová and Smekal (2021).
[14] Schwetz (2023).

discourse. Yet, scholars also repeatedly pointed out that, despite the generally rich literature on how countries come to terms with the crimes of the past,[15] why they chose to forgive or prosecute the perpetrators,[16] or how effective vetting and lustration of political elites was,[17] only limited attention had been paid to purges of judges.

This gap in the transitional justice field is surprising. First, judges played an indispensable role in communist regimes. Communist parties kept judges on a short leash, instructed them how to decide politically salient cases (a practice colloquially referred to as 'telephone justice'[18]), or used them to consolidate and display the parties' power in political show trials.[19] Second, courts, often staffed with the very same judges, later on played a crucial role in the application of the transitional justice policies of young democratic regimes.[20] They reshaped many political agreements on transitional justice, implemented victim-oriented programmes and addressed doctrinal clashes between principles of transitional justice and newly reinforced commitments to fundamental rights.[21]

Understanding the logic and effects of judicial purges is even more important in the face of the first empirical studies from Latin America which suggest that the totalitarian past of judges has consequences for their decision-making during the transition. For example, judges who participated in or condoned past crimes are less likely actively to approach transitional justice issues,[22] or are even more willing to block them.[23] While some studies demonstrate that judges may support transitional justice in order to atone for their role in past crimes,[24] others hypothesise that the successful implementation of transitional justice decisions depends on judicial reform and the commitment of judges to the rule of law.[25] Despite of this significance,

[15] Kritz (1995), Teitel (2000), Elster (1994).
[16] Huntington (1993); Czarnota, Krygier & Sadurski (2005); Calhoun (2004), Cohen (1995), David (2015), Filjakowski (2014), Grodsky (2009), Kornai & Rose-Ackerman (2004), Stan (2009), Nalepa (2010), Teitel (1997) and Stan & Nedelsky (2015).
[17] David (2011), Horne & (2004), Huntington (1991); Iancu (2010), Moran (1994), Nedelsky (2004), Szczerbiak (2002).
[18] Ledeneva (2008), Popova (2012).
[19] Kűhn (2011), p. 163.
[20] Šipulová & Smekal (2020); Dyzenhaus (2003b), Kavanagh (2023).
[21] Šipulová & Smekal (2021).
[22] Ocantos (2014), Huneeus (2010), Skaar (2011), Hilbink (2007).
[23] Arendt (1963), p. 25. Arendt states that in the early 1960s, approx. 5,000 out of 11,000 judges had served in Nazi courts. The purging took place only in 1962, possibly in relation to the publicity the Eichmann trial gave to the missing vetting of the German public administration. Arendt uses the composition of courts to explain why post-war German courts proceeding in criminal proceedings involving Nazi criminals very leniently.
[24] Huneeus (2010).
[25] Skaar (2011), Hilbink (2007), Graver (2018).

the greater part of the relevant scholarship has perceived judges as second-order actors of transition, and paid almost no attention to cleansing within the judiciary itself.

In this article we step into this field and argue that the historical analysis of effects and forms of judicial purges after 1989 can bring important insights into current CEE discussions on how to restore judicial independence and undo court-packing reforms introduced by populist governments. We use the study of how Czechia came to terms with the totalitarian past of judges to demonstrate two critical points. First, the Czech story uncovers the limits of transitional justice tools when applied to judiciaries. The post-1989 decommunisation of the courts consisted of five different mechanisms aimed at cleansing the courts of communist cadres, from general measures like lustration to tools specifically tailored to the judiciary (like retention elections or the removal of court presidents). However, the majority of these were not successful. They clashed with principles of judicial independence, as well as with practical exigencies such as a shortage of new judges or educated lawyers willing to join the judiciary.

Second, the Czech experience provides important lessons for those countries, that aim to restore their judiciaries after court-packing and democratic backsliding, like Poland, or potentially Hungary and Israel in the future, or EU candidate countries that repeatedly attempt to tackle widespread judicial corruption and low public trust in courts, like Georgia and Albania. On the one hand, purges of judges appointed by populist leaders are problematic for both theoretical and pragmatic reasons as they encroach on the principle of judicial independence and, particularly in smaller countries, are difficult to carry out due to the lack of new qualified judges. On the other hand, the decision to bury the past and leave the illegitimate selection or biased behaviour of judges unaddressed endangers not only the implementation of transitional justice, but also the development of the rule of law and judicial independence in general. Moreover, the experience from CEE suggests that in order to be effective, transitional justice must be visible. Otherwise, non-democratic political leaders are quick to exploit the opaque past of judges to delegitimise them in the eyes of the public and to justify their own future court-packing policies.[26]

The article proceeds as follows. Section 1 briefly introduces the communist capture of the judiciary. Section 2 discusses the transition of the Czech judiciary and explains the logic of five different mechanisms aimed at judicial cleansing. Section 3 analyses the effectiveness of

[26] Iancu (2021).

individual measures and problematises their impact on judicial independence. Section 4 juxtaposes this historical experience with current efforts at judicial purges. Section 5 concludes.

1. The Role of the Judiciary Under the Communist Regime

After the fall of the Austro-Hungarian Empire in 1918, the new democratic Czechoslovakia kept a bureaucratic career model of the judiciary, a system of court administration run by the Ministry of Justice and the hierarchical ideal of officialdom.[27] However, the February 1948 communist coup d'état revamped the Czechoslovak judicial system. After the coup d'état, the Czechoslovak communist regime quickly remodelled the judicial system and suppressed judicial independence. Once the Communist Party had realised that the original Marxist prophecy of the state and law 'withering away' was not about to materialise, the law became critical in preserving communist power.[28] Therefore, in contrast to those authoritarian regimes which attempted to insulate the courts from politics,[29] the judges became an important weapon of the Czechoslovak Communist Party.

In the first years after the coup, the Communist Party abolished all courts that could scrutinise its work[30] and adopted a grand-scale court-packing plan. Since only very few professional judges joined the Communist party immediately after 1949, it introduced an institute of lay judges. These were pre-screened by the Party and were in the majority in all tiers of the general courts including the Supreme Court.[31] Moreover, the Party created an extraordinary court (the State Court) that dealt with show trials of political opponents,[32] and it installed trusted loyal communists as judges of the Supreme Court and presidents of the general courts.[33] Furthermore, through the so-called 'security fives' (*bezpečnostní pětky*),[34] the Communist Party instructed judges how to decide cases that were sensitive for the communist

[27] See Bobek (2008), Kosař (2016), Kühn (2011 and 2021), Čuroš (2021). On the hierarchical model of officialdom in general see Damaška (1986), pp. 16-46 and 181-239.
[28] Vyshinsky (1948), pp. 303ff.
[29] See Toharia (1975), p. 475; and Hilbink (2008).
[30] It abolished the Constitutional Court, the Supreme Administrative Court and the Election Court.
[31] Kosař (2016), Kühn (2011).
[32] Probably the most famous show trial was the prosecution of Milada Horáková, a female opposition leader who in 1950 was sentenced to death on fabricated charges of conspiracy and treason. See below notes **Error! Bookmark not defined.** and 72.
[33] Kühn (2021).
[3434] These bodies worked at the regional level, composed of the regional secretary of the Communist party, the bursar and three other regional chiefs of state security. They misused the rhetoric of communist security in order to monitor the activity of the state prosecution and prepare important politicalised trials.

regime, imprisoned those few 'recalcitrant' judges who dared to disobey Party orders, and introduced a Soviet-style *prokuratura* which exercised tight oversight over judges.[35]

Once the Czechoslovak communist regime had ensured that it had full control over the judiciary, the Party abolished the State Court, gradually reduced the role of lay judges, and left judges some autonomy in deciding civil and ordinary criminal cases.[36] However, it kept judges on a short leash through the 'body that elects judges can also dismiss them' principle and a system of regular retention elections.[37] This allowed the Communist Party to get rid of problematic judges without attracting any public attention.

The 1968 Prague Spring movement reformed this system. However, the Communist Party quickly re-established its control after the Spring was crushed. It relied primarily on regular retention elections, the specific retention of all judges who reached the age of 65, and the expulsion of judges who, by actively participating in the Prague Spring, had violated their judicial oath by 'betraying the working class'.[38] Resistance by the bench was almost non-existent.[39]

1989 therefore found the Czechoslovak judiciary a subservient branch with little independence and prestige. Public confidence polls conducted in 1990 showed that only 28 per cent of citizens trusted Czech courts.[40] Moreover, the purges after the crushing of the Prague Spring not only secured fast 'normalisation', but also created a specific mindset among Czech judges that could not easily be changed with the imposition of the new formal institutions.[41]

The transitional processes aimed at communist courts had to tackle two different dilemmas. The first dilemma was: How to deal with communist-era judges who participated in violations of individual rights? Post-communist courts in 1989 still contained a small number of judges who had been involved in political show trials (the most gruesome processes, however, dated back to the 1950s), judges who had penalised actors in 1968 Prague Spring, as well as judges who, in line with communist law, had imposed sanctions on those individuals who had illegally emigrated from Czechoslovakia, or had spread pro-Western propaganda or

[35] See Ulč (1972); Vorel, Šimáková et al (2003); and Kühn (2011 and 2021).
[36] See Wagnerová (2003), pp. 163-179.
[37] By retention we mean a periodic process the aim of which is to decide whether a judge should stay in office (see Kosař 2016, pp. 78-80).
[38] See Motejl (2009), pp. 813-821. p. 821.
[39] Ibid.
[40] Czech Social Science Data Archive of the Czech Institute of Sociology.
[41] See Bobek (2008), p. 118, Čuroš (2021).

were otherwise involved in 'anti-state activity'. Military, criminal and labour courts in particular were full of judges who had served as the right hand of the Communist party.

The second dilemma was: How to deal with judges appointed by the communist regime, who did *not* participate in any politicised trials or human rights violations, but who were loyal to the ideology of the Communist Party, or who shared the professional role conception of judges in the political system created and nurtured by the Communist Party.

These two dilemmas point to two separate categories of judges and trigger different rationales for their potential purges: (I) those who actively participated in violations of human rights; and (II) those who were ideologically aligned with the previous regime (Table 1). Transitional judicial purges of these two categories of judges were built on four different normative justifications. First, the removal of judges (1) who actively participated in violations of individual rights belongs under the core umbrella of transitional justice. The source of judges' accountability is two-fold. It targets either those judges who explicitly violated domestic communist law (e.g. by taking part in politicised processes and show trials, manipulating evidence or engaging in corruption), or those judges who acted in line with domestic legal provisions, but in doing so violated norms or general principles of international human rights law. Individual accountability based on principles and norms of international law, however, requires these norms to be effective and directly applicable by the judges in question (for more on this see Section 3 b). Otherwise, the removal of judges who acted against international law might be seen as contrary to the rule of law and in violation of both the principle of non-retroactivity and of judicial independence.[42]

The second category of purges targeted the rest of communist judges and sought to remove them because of their indoctrination (2), lack of expertise or ethical standards (3), and the illegitimacy of their appointment[43] (4). While these processes are not aimed at the removal of perpetrators of crimes, they seek to reform those structures of a political system that failed to prevent crimes from happening. Because of their loser link to normative aims of transitional justice, we label them as derived transitional justice processes.

[42] Szwed (2023).
[43] This question in particular is discussed in context of Poland, with both European courts labelling the packed judges as „non-judges". See Szwed (2023), Leloup (2022, 2023), Leloup and Kosař (2022).

Table 1: Conceptualisation of Judicial Turnovers After the Transition. Source; authors.

<table>
<tr><th>CATEGORY OF JUDGES</th><th colspan="2">JUSTIFICATIONS</th><th>TJ TOOLBOX</th></tr>
<tr><td rowspan="2">I. Perpetrators of HR violations</td><td rowspan="2">1. Individual accountability of judges</td><td>Violation of domestic law

(political trials, corruption)</td><td rowspan="2">Core TJ processes</td></tr>
<tr><td>Violation of international HR law

(political prisoners, punisment of emigration, …)</td></tr>
<tr><td rowspan="3">II. Ideologically aligned or indoctrinated</td><td colspan="2">2. Indoctrination of judges (moral & ethical standards)</td><td rowspan="3">Derived TJ processes</td></tr>
<tr><td colspan="2">3. Lack of expertise</td></tr>
<tr><td colspan="2">4. Illegitimate appointment</td></tr>
</table>

It is also worth noting that this second category of purges resulted from the implementation of core transitional justice tools used in CEE de-communisation processes, such as lustration and vetting in general. It also corresponds to the recent trend which seeks to enlarge the legitimacy of judicial vetting from transitional justice to other reasons such as large-scale corruption (Albania in 2017, Ukraine in 2014, or more recent debates in Macedonia, Georgia and Kosovo). Compared to the first category, derived TJ processes do not require material individual accountability or intentional violation of individual rights on the part of the judge.

Against this conceptual backdrop, we next identify all mechanisms adopted to reckon with the communist past of the Czech judiciary and analyse their effects.

2 Reckoning with the Communist Past within the Czech Judiciary

The early post-1989 transitional justice debates addressed the role of communist-era judges in the new democratic judiciary, although admittedly with much less vigour and publicity than lustration targeting politicians. The moral dilemmas related to judicial purges were very similar to those accompanying the vetting of party officials, executives or members of the armed forces.[44] They focused mainly on the active role played by judges in violations of human rights committed between 1948 and 1989. The political discussion on removals of judges did not stir up as many controversies and was, more or less, a derivate of the general decision on how to deal with past elites. The extent to which individual judges had participated on human rights

[44] Elster (2003); Teitel (2002).

violations was left for the consideration of the courts and the prosecution in individual proceedings.

However, the new democratic actors also understood that the removal of "the judges-perpetrators" (first category of removals) would not be enough to redeem the poor reputation of the judiciary in Czech society and that the renewal of public trust in the courts would require the systemic addressing of the past among all sitting judges (second category of removals). The courts were absolutely vital to the success of the government's efforts to implement restorative processes (rehabilitation of victims and restitutions of property) and establish the new legal framework necessary for the economic reform of the country. Moreover, the government also needed to create a hitherto missing branch of administrative courts and fill hundreds of new judicial positions.[45]

The Federal government therefore decided that the new culture of the rule of law would rest on two pillars: (1) cleansing the courts of the communist legacy, and (2) increasing the prestige of judges.[46] The communist regime left the judiciary extremely weak. As explained in the previous Section, the pre-1989 courts were under the tight control of the Communist Party, executed via a triad of the ministry of justice, the general prosecutor and court presidents. The Communist government packed the courts with judges who were willing to comply with the political interpretation of law. Some were by conviction hard-core communists, while others complied with the communist expectations for prudential or career reasons. Some judges even entered the judicial system after a very questionable and speedy legal education – sometimes lasting no longer than a year. This combination of poor expertise and formalistic decision-making resulted in the very low prestige of and public confidence in the courts.[47] Judicial purges advocated by the new government therefore wrestled with a dual task: to get rid of judges compromised by their communist past and of judges of poor quality and ethical standards.[48]

The dilemma before the new democratic politicians of 1989 was hence very similar to the current discussions in Poland.[49] They wanted to get rid of judges who had actually collaborated, as well as of judges who were perceived by the public as loyal to the previous regime. At the same time, politicians did not want to erode judicial independence any more than

[45] Law on courts and judges. transcription from meeting no. 16, 8 July 1991.
[46] Virtual Library of the Chamber of Deputies, Parliament of the Czech Republic, transcription of meeting. 4, 10 July 1990.
[47] Czech Social Science Data Archive of the Czech Institute of Sociology.
[48] Kühn (2011).
[49] Kosař and Šipulová (2023).

necessary. Moreover, they could not afford to dismiss too many judges because, '[i]n contrast to East Germany, there was no West Czechoslovakia … which might have easily … re-staffed judicial posts virtually overnight.'[50] Not surprisingly, the negative image of the courts, mediocre working conditions and poor salaries did not attract many new candidates into the judiciary. This fact significantly tied the hands of the post-1989 government.

Despite this dilemma, Czechia adopted an impressive number of transitional justice mechanisms aimed at judicial purges. Apart from the best known (1) lustration of judges, Czech political leaders actually implemented four additional mechanisms: (2) removal of the communist-era court presidents; (3) retention elections for communist rank-and-file judges; (4) the disciplining of communist-era judges for dereliction of judicial duty; and (5) the criminal prosecution of communist judges for the most egregious violations of judicial duty. In what follows we introduce the logic and expectation behind each of these mechanisms in chronological order.

2.1 Five mechanisms of judicial purges

In the first three months of 1990, the Minister of Justice started with a radical transitional justice step and in a large-scale political decision removed 65 court presidents and vice-presidents.[51] This meant that virtually all *court presidents were replaced*. Given the fact that court presidents were 'the most reliable cadres [who] not only implemented party resolutions, but, in practice, ruled over the judges and personified the dictatorship and the subordination of the system of justice',[52] this was an important step in the decommunisation of the Czech judiciary.

Despite this effort, on 30 March 1990 Czech MPs criticised the Minister of Justice for insufficient de-communisation of the judiciary. The *retention elections* of judges that took place at this meeting led to a heated debate, during which deputies raised objections to proposed candidates and questioned their past. Nevertheless, judges managed to persuade MPs that they were just small cogs in the wheel of the Communist regime who had prevented the worst from happening. This controversial narrative eventually prevailed, and the candidates for whom the Minister of Justice had provided a personal guarantee were re-elected, including those who had

[50] Kühn (2011) p. 163.
[51] Wagnerová (2003), p. 169.
[52] Bröstl (2003), 143.

participated in the conviction of well-known political prisoners.[53] This resulted from a disagreement on how far the individualised guilt of communist-era judges should go, and whether decision-making in line with communist-era laws can be considered so heinous a crime that it required removal. Overall, the retention election had limited link to individual accountability. Instead, it focused much more on the renewal of formal legitimacy of those judges who were reappointed by the democratic regime.

The attempts to purge the judiciary via retention extended far beyond 1990. The new 1991 Law on Courts and Judges, which entered into force on 1 September 1991, stipulated that all judges elected before 1 January 1990 (i.e. during the communist era) had to be reappointed under the new rules within 12 months. As a result, eight Federal Supreme Court judges had lost their jobs by August 1992 due to retention legislation.[54] These, together with five judges who were leaving the court as a result of lustration, left the Federal Supreme Court, which adjudicated in panels of five judges, on the brink of dysfunctionality, because only four judges in the Civil Section, three in the Criminal Section, three in the Commercial Section, and six in the Military Section remained.

However, the high turnover of judges at the Federal Supreme Court was an exception. Overall, almost all Czech judges targeted by retention were eventually re-appointed. This was in stark contrast to the way reunified Germany addressed the reckoning with the past in the judicial sector. The German authorities adopted a similar scheme, under which all active judges in the German Democratic Republic had to re-apply for their jobs. They had to fill out a complex questionnaire and their applications were scrupulously screened.[55] As a result, only 10 per cent of former GDR judges were reappointed in Berlin. The average success rate in other East German states was higher (55 per cent), but these purges were still very thorough.[56]

The 1991 Czech Law on Courts and Judges also introduced the third mechanism for reckoning with the problematic past of communist-era judges, the *disciplinary liability of judges for dereliction of judicial duty* during the communist regime. More specifically, it empowered the disciplinary courts to dismiss judges for wrongdoing during that era. These

[53] Wagnerová 2003, p. 169. See also Virtual Library of the Chamber of Deputies, Parliament of the Czech Republic, transcribed record of 30 March 1990 meeting, http://www.psp.cz/eknih/1986cnr/stenprot/025schuz/s025027.htm.
[54] Virtual Library of the Chamber of Deputies, Parliament of the Czech Republic, draft proposal of the amendment of Act 335/1991 on courts and judges, http://www.psp.cz/eknih/1992fs/tisky/t0040_00.htm.
[55] For further details see Blankenburg (1995), p. 223.
[56] Ibid., pp. 240–241. See also Markovits, pp. 2270, 2271–2272.

measures provided clear grounds for holding communist-era judges to account for their past behaviour.[57]

The Czech Ministers of Justice initiated several disciplinary motions in which they tried to invoke these provisions in order to get rid of the judges with the most problematic pasts, who sentenced dissidents to imprisonment for the exercise of their freedom of political speech and the publication and distribution of the Charter 77 document during the late 1960s. However, the Czech disciplinary courts took a protective stance and required evidence of repeated instances in which an impugned judge had interpreted the law in an excessive and politically tendentious fashion.[58]

A typical example is the decision of 31 August 1994 in which the Supreme Court acquitted an ex-communist judge who had convicted two individuals for dissemination of anti-state publications (mostly Charter 77). The Supreme Court's reasoning perhaps best interprets the deeply rooted formalism and judicial solidarity. When the Minister of Justice argued in his disciplinary motion that a given judge had violated the International Covenant on Civil and Political Rights (ICCPR), ratified by communist Czechoslovakia in 1968, the Supreme Court simply denied the direct effect of the ICCPR. The Supreme Court stressed that '…as follows from legal theory and practice, the international treaty did not have primacy over domestic legal statute [under communist law]…Until then [meaning until the new Constitutional Law 23/1991], the state merely had an obligation to secure the conformity of its legal provisions and statutes with the international treaty.' In other words, any potential violation was a problem for the state administration, not the courts, which decided the case according to the domestic legal provisions. Thus, the Supreme Court was willing to assert that during the communist era the ICCPR was no more than an ethical commitment.

Only after these events, in October 1991, did the Federal Assembly pass the *Large Lustration Law*. Three factors raised the stakes and the interest of the new Czech elites in lustration: (1) the fear of 'skeletons in the closet,' and the insecurity of political leaders about which of their party members had a communist past giving rise to the risk of future exposure

[57] Note that some judges active in 1989 did not obtain standard legal education as they were alumni of the so-called 'crash courses for the working class' (that usually took only one year). These 'crash courses' were introduced by the Communist Party in the periods of shortage of loyal judges with a standard education (namely after the communist coup d'état in 1948 and after the purges in the wake of the crushing of the 1968 Prague Spring). Judges who had been through these 'crash courses' were generally considered incompetent hard-core communists.

[58] See judgment of the Czech Constitutional Court No. IV. ÚS 23/05 of 17 July 2007 (N 111/46 SbNU 41), paras 21 and 48.

or blackmail;[59] (2) the 1990 scandal when 15,000 secret police documents disappeared from the archives;[60] and (3) the surprisingly positive result for the Communist party in the 1990 elections. The tacit agreement established between the communist elites and dissidents at the roundtable talks slowly dissolved and the need for a lustration law became apparent.

Thus, in October 1991 Czechoslovakia adopted the first and strictest lustration law in the CEE region, the so-called Large[61] Lustration Law.[62] The parliamentary debate on the Lustration Law was extremely heated and, once adopted, the Law was severely criticised for its breadth by academics and international institutions,[63] and also by many dissidents.[64] The part of it that dealt with citizens' collaboration with the secret police was the most controversial, [65] as the law affected not only agents, informers and political collaborators, but also candidates for collaboration. The Venice Commission's stance on lustration was discussed during the parliamentary debate, but not taken seriously. The MPs identified lustration as a necessity for personnel discontinuity and the establishment of minimal justice.[66]

The Lustration Law envisaged the preparation of two lists: the so-called 'protected positions' and the 'suspect positions' lists.[67] The list of protected positions referred to those offices and positions appointment to which requires a negative lustration certificate (indicating no involvement with the communist regime). The 'protected positions' include *inter alia* all those filled by election, nomination or appointment to bodies of state administration, the army, the security service, the police force, staff working in the offices of the President, Government, Parliament, the courts, state radio and television, and state-owned companies.[68] The second list, suspect positions, covered offices held or activities done during the communist regime that disqualified their holders from working in capacities included in the first list of 'protected positions.' Thus, people who fell into one of the categories in the list of 'suspect positions' were barred from holding 'protected positions'.

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[59] Nalepa (2010), p. 65.
[60] Orbman, (1991), pp. 4-11; David (2011).
[61] There was also a Small Lustration Law (Law No. 279/1992) dealing with members of police forces.
[62] Law No. 451/1991 Coll., on Standards Required for Holding Specific Positions in the State Administration of the Czech and Slovak Federal Republic, Czech Republic and Slovak Republic (hereinafter 'Large Lustration Law').
[63] Parliamentary Assembly of the Council of Europe (1996). International Labour (1992). Quoted from Přibáň. (2017), p. 189.
[64] Kosař (2008).
[65] The very first proposal of the Large Lustration Law was nevertheless even harsher, and was criticised by Havel and some other dissidents as draconian and a basis for a witch hunt, with limited application of the fair trial principle.
[66] David (2011).
[67] Gillis (1999), p. 56.
[68] Art. 1 (1) of the Large Lustration Law.

The law, which is still in force, thus does not affect communist party members in general. In practice, it has affected mainly the state security forces, army, secret police collaborators, higher communist party officials, members of the people's militia and the purge committee. The law targeted approximately 400,000 people.[69] Individuals who received 'positive lustration' in the screening (i.e., they were proven to have collaborated or to have held one of the proscribed posts) could still participate in political life, as the law did not limit their active or passive suffrage. The law was originally meant to remain in force for five years but, despite two challenges before the Czech Constitutional Court,[70] it is still in force.

This Law applied to judges, among other public figures. As a result, a judge who in the communist era had held one of the 'suspect positions' outlined above could no longer remain in office. It was up to court presidents to require negative lustration certificates from the judges at their courts. This regulation had certain flaws though. In particular, many apex court judges refused to submit certificates or any other information on their communist pasts. They claimed that lustration laws violated the ICCPR and the Czech Charter of Fundamental Rights and Freedoms. In total, next to five judges who were removed due to positive lustration findings, seven Czech Supreme Court judges refused to submit lustration certificates or submitted incomplete information. As a result, the Minister of Justice initiated disciplinary motions against them. Nevertheless, the division of Czechoslovakia prevented the completion of these proceedings.[71]

Finally, Czechia also suspended statutory time limitations for judicial murders and paved the way for the *criminal prosecution* of judges for the most egregious violations of judicial duty that had taken place during the show trials in the 1950s. Nevertheless, no criminal prosecutions were initiated against professional communist-era judges in Czechia. In the end, the only judge who was successfully prosecuted was a lay judge, Ludmila Brožová-Polednová, who had taken part in the show trial of Milada Horáková, an opposition politician and former prisoner in Nazi concentration camps.[72] Brožová-Polednová was charged with being a prosecutor in this political trial and accessory to murder. She was found guilty of assisting in judicial murder and sentenced to eight years in prison. The Czech courts carefully defined both

[69] Cf. Nalepa 2010, p. 68.
[70] Czechoslovak Constitutional Court, judgment Pl. ÚS 1/92 of 26 November 1992 and Czech Constitutional Court, judgment Pl. ÚS 9/01 of 5 December 2001.
[71] See Communication of the President of the Czech Supreme Court, Antonín Mokrý, with the Ministry of Justice, 23 April 1992, no. ÚPP-190/92.
[72] See ECtHR, Polednová v the Czech Republic, decision of 21 June 2011, 2615/10. See also note **Error! Bookmark not defined.** above.

the concept of judicial murder and the role of judges in committing it.[73] However, the symbolism of this case was watered down due to Brožová-Polednová's age. In 2009, she was officially the oldest Czech prisoner (being 86 at the time of the final verdict) and President Václav Klaus pardoned her just a year later.

All in all, as we will demonstrate in the following Section, only a small number of judges have been prosecuted for the abuse of their power or the violation of individual rights under the communist regime.[74]

3 The Aims and Effects of Czech Judicial Purges: Bold on Paper, Meagre in Practice

Generally speaking, the purges within the CEE post-communist judiciaries were rather minimal. For example, in Romania 'a large proportion of the ordinary judges … held their former public offices during the 1990s, even if they had been appointed during the previous regime.'[75] The situation in Bulgaria,[76] Hungary[77] and Slovakia[78] was very similar. Only Poland did slightly better, as it purged at least the Polish Supreme Court.[79]

Although Czechia is often presented as an outlier among the CEE countries[80] with relatively complex vetting programmes, the number of those who actually left the bench was rather low. Between January 1990 and December 1992, approximately one third, i.e. 484 out of 1,460 communist-era judges, left their jobs.[81] Moreover, the majority of these judges were dismissed for a reason other than lustration, or left their posts voluntarily in order to improve their financial situation in the quickly developing private sector.[82]

In what follows we offer a bird's eye view of how all five identified mechanisms of judicial turnover worked in practice. We start with an outline of the aims of political actors associated with individual mechanisms and then discuss their effectiveness.

[73] See the Czech Supreme Court judgment of 4 February 2008, building on its previous judgment no. 7 Tz 179/99 of 7 December 1999.
[74] Virtual Library of the Chamber of Deputies, Parliament of the Czech Republic, transcription of meeting no 28, 17 December 1991
[75] Piana (2010) at 132.
[76] Ibid., p. 130.
[77] Ibid., p. 99.
[78] Spáč (2014).
[79] Piana (2010) at p. 98.
[80] Piana (2010) at 98-100, 108 and 110.
[81] Wagnerová (2003). See also Kühn (2011), p. 181.
[82] See e.g. Kühn (2011), p. 181; Bobek, (2008) at pp. 99, 118–119; and Kosař (2016)

3.1 Expectations

As already mentioned, the discussions on judicial purges addressed both categories of judges: those who actively participated in violations of individual rights, and those whose legitimacy was compromised simply by the function of courts under the previous regime. The adopted mechanisms of judicial purges explicitly invoked three out of four possible aims (Table 2): (1) the individual accountability of judges for communist crimes (which corresponds to the core transitional justice narrative), (2) the moral and ethical standards of communist-era judges, and (3) their expertise and education (both reflecting the *derived transitional justice dilemmas*, which were specific to the judiciary and did not appear in other transitional justice areas).[83] One remaining issue that was not mentioned by the incoming political elite was the potential delegitimisation of past appointments made by the communist power. This was understandable, as the court-packing and other forms of selection of judges that contravened the law and constitutional principles had happened decades ago and their effects had already been diluted by time. Therefore, the education, expertise, and ethical standards became secondary considerations.

The focus on expertise and moral integrity stemmed from the instrumental use of the courts by the communist regime. Communists put their idea of the popularisation of the judiciary into practice by staffing it with lay judges who lacked university or high school education, and who had gained the necessary qualification in fast-track legal courses set up by the regime.[84] For professional judges, the requirement to have a university law degree was dropped soon after the 1948 communist coup d'état and re-established only in 1964. The career model of the judiciary inherited from the Austrian Empire and the interwar period, when new candidates entered the ranks of the judiciary in their early twenties, combined with political elections overseen by the Communist Party, socialisation within the judiciary, and dependence on older peers prevented there being a significant increase in the quality of the communist judiciary. Transitional purges therefore had to address all of the complicity of judges in the communist regime, the deeply ingrained logic of judicial dependence, and the lack of ethical and intellectual standards.

[83] This classification builds on our own content analysis of parliamentary debates on all transitional justice mechanisms as well as judicial reforms.
[84] See Section 2 of this article, as well as e.g. Kühn (2011).

3.2 Outcomes of judicial purges

How successful were individual mechanisms? Table 2 demonstrates the results of our analysis, and for each mechanism identifies the officially declared aim, who was most critical of its implementation, and the evaluation of the effect – how successful the mechanism was and why.

Table 2: Overview of the effectiveness of and opposition to individual mechanisms aimed at purging the Czech judiciary.

MECHANISM	DECLARED AIM	OPPOSED BY	SUCCESS	REASON
LUSTRATION	**1. Aim**: Individual accountability (category I)	communists, court presidents, Supreme Court judges	Partial	Understaffed courts Lack of data Many judges left on their own
CRIMINAL PROSECUTION	**1. Aim**: individual accountability (category I)	judges, prosecutors	No	Judicial independence
REMOVAL OF COURT PRESIDENTS	**1. Aim**: individual accountability (category I) **2. Aim:** Ethical standards (category II) **3. Aim:** Expertise (category II)	communist-era court presidents	Yes	Pure transitional political decision
DISCIPLINARY LIABILITY	**1. Aim**: individual accountability (category I) **2. Aim**: Ethical standards (category II) **3. Aim**: Expertise (category II)	judges, court presidents	No	Non-retroactivity principle Judicial solidarity Many judges left on their own
RETENTION ELECTION	**1. Aim**: individual accountability (category I) **2. Aim**: Ethical standards (category II) **3. Aim**: Expertise (category II)	court presidents (communist-era and new democratic), judges	Partial	Judicial independence Judicial solidarity

Source: authors.

Given the prominent role of lustration within Czech transitional justice, it comes as no surprise that lustration also attracted the most attention among mechanisms aimed at judicial cleansing. Political elites saw lustration as a means to remove judges who participated in violations of individual rights (including those guaranteed by supranational human rights commitments). The trust vested in lustration as the most appropriate mechanism was strengthen by the Supreme Court and the Office of the General Prosecutor,[85] who jointly advocated the incompatibility of function as a judge with active collaboration with former secret police as the core aim to be achieved in the judicial turnover.[86]

All sitting and newly appointed judges had to be screened for negative lustration. The results of lustration triggered political and public interest, especially in the selection of apex court judges.[87] The biggest impact of lustration was in the case of the military courts (abolished in 1993), where lustration managed to filter out those who had held important posts in the Communist Party's organisation.[88]

Yet, the overall effect of lustration in the judiciary was much lower than scholarship had hypothesised.[89] The reasons are several. By November 1991, when the Large Lustration Law came into effect, the majority of the 'compromised judges' had already left the judiciary. Lustration therefore arrived in an atmosphere of understaffed courts frantically seeking new candidates for vacant or new judicial posts. The critical shortage of judges meant that newer judicial positions were once again filled by judges from the communist era.

The implementation of lustration was also complicated by the specific role of judges in the communist regime. Lustration primarily tackled people who had held high-ranking positions in the Communist Party or who had worked for or cooperated with the secret services. That was highly improbable in the case of judges. Under the career model, judges joined the courts at a very young age, and it was hardly improbable that they would manage to hold important official positions inside the Communist Party. Moreover, they were carefully screened, both when they entered law school and when they were appointed, and thus the

[85] Virtual Library of the Chamber of Deputies, Parliament of the Czech Republic, transcription of meeting discussing Lustration, no. 11, 8 January 1991.
[86] Ibid.
[87] Virtual Library of the Chamber of Deputies, Parliament of the Czech Republic, transcription of meeting no. 9 on the election of judges to the military division of the Federal Czechoslovak Supreme Court, 28 November 1990.
[88] Virtual Library of the Chamber of Deputies, Parliament of the Czech Republic, transcription of meeting discussing the execution of lustration, no. 11, 8 January 1991.
[89] Šipulová and Smekal (2021); Bröstl (2003), pp. 141-159.

communist regime did not need to keep additional tabs on them by forcing them to join the 'Peoples' Militia' or to cooperate with the State Security Police.

At the same time, judges with positive lustration certificates fought back – and often successfully. Several judges pressed charges against the Ministry of the Interior for false and unjustified listing of names in the archive files of the State Security Police and for violating their rights to privacy and human dignity. The general lack of credibility, frequent falsification and fabricated stories in secret archives led courts to quash the majority of the positive lustration certificates relating to both judges and other public servants.[90] In some cases, the courts found the ministerial decisions too sweeping and poorly justified.[91] In other cases, listings in secret police archives were questioned for lack of proof beyond reasonable doubt.

All in all, lustration seemed to be a sieve for different grains and failed to capture typical examples of judicial complicity in human rights abuses during the communist era. The belief of the new political elite that lustration would rid the judiciary of judges who committed any violations of individual rights fell short. In theory, lustration of judges could have weakened their ties with political actors and removed those judges who had dangerous informal ties with the political arena, but it arrived too late and did not operate with the understanding of what role judges actually had done under communism.

Criminal prosecutions, like lustration, focused on the first aim and on the individual accountability of judges for human rights violations committed under the communist regime. In theory, criminal prosecutions were better equipped to capture the conduct of compromised communist judges and to force them out of the system. According to the 1991 Law on Courts and Judges, any criminal prosecution required the agreement of the political authority which originally appointed the judge. In the case of communist-era judges, this was the Czech Parliament. As it turned out, however, political agreement was the smallest obstacle to be overcome. While MPs appeared to be eager to purge compromised judges,[92] the prosecution was not ready to bring enough criminal cases and judges were reluctant to criminalise the behaviour of their peers who followed the letter of the communist Czechoslovak law, but who violated higher constitutional principles or commitments from international human rights law.

[90] Šipulová & Smekal (2021) .
[91] See e.g. Prague Municipal Court, decision 37 C 116/2005 of 16 November 2005 against a High Court of Olomouc judge who had been listed in secret police archives as a potential collaborator. The Municipal Court confirmed the Ministry of the Interior's obligation to justify the refusal.
[92] Virtual Library of the Chamber of Deputies, Parliament of the Czech Republic, transcription of meeting no. 16 discussing Law on courts and judges, 8-9 July 1991 and meeting no. 11, discussing lustration, 8 January 1991, meeting no 21, report on the tasks of the Czech judiciary, 10 July 1991.

Apart from potential hypotheses on judicial solidarity, the couple of cases which did make it to the criminal courts demonstrated the many procedural and legal difficulties in prosecuting communist judges without violating the prohibition on retroactivity. Next to the suspension of statutory time limitations for judicial murders, the only other documented case we found was the criminal prosecution of two judges from the Prague Municipal Court, in which the Federal General Prosecutor managed to prove that they had kept seven people accused of treason (spreading dissident literature transported from France) in detention without any relevant legal cause. Both judges were first dismissed and then, after the approval of the Parliamentary assembly, tried for the abuse of their power.[93]

On the opposite site of the spectrum, the removal of the communist-era court presidents in 1990 worked relatively well. One of the key Czech transitional justice mechanisms aimed at removing those judges who had acted as transmission belts for the Communist Party[94] and to prevent them from functioning as court presidents,[95] with a potentially crucial impact on the further selection of rank-and-file judges.[96] The removal also met with minimal opposition, which secured the Minister of Justice sufficient legitimacy swiftly to carry out the dismissals and fill the posts with new pro-democratic court presidents.

Disciplinary proceedings, like criminal sanctioning, also relied on the already existing concept of judicial accountability. The disciplining of communist judges pursued all three aims of the purges. They targeted both judges who committed violations of individual rights (as already mentioned, mostly by sentencing political opponents and dissenters to prison) and judges who lacked ethical and moral qualities or professional skills and expertise. The legal background for this disciplining appeared in the 1991 Law on Courts and Judges, which contained a specific provision allowing for the dismissal of a judge who had violated his or her obligation and duties, or had otherwise harmed judicial independence between 25 February 1948 and 31 December 1989. In the eyes of the government, this provision was supposed to be another breakthrough in judicial purges, as the Rehabilitation Act allowed criminal prosecution

[93] Virtual Library of the Chamber of Deputies, Parliament of the Czech Republic, transcription of meeting no 28, 17 December 1991
[94] See Bröstl (2003), p. 143; Kühn (2011), p. 124; Bobek (2015); and Kosař (2016).
[95] Note that judges dismissed from positions as court presidents often remained in the judiciary as rank-and-file judges.
[96] On the importance of court presidents in the post-Velvet Czech judiciary see Bobek (2010), Kosař (2016) and Kosař (2017).

only for explicit material violations, while the majority of communist judicial misdeeds had taken place in the context of interference in judicial decision-making by the public authorities.[97]

The promising mechanisms, however, failed to deliver the goods. First, the Minister of Justice failed to collect sufficient evidence to meet the required standard of proof in disciplinary petitions. Second, of the dozens of cases that were begun, the majority were dismissed by the disciplinary courts. The Supreme Court in particular demonstrated a high level of solidarity with communist-era judges when it stuck to a formalistic interpretation of communist law and refused to implement the protection of individual rights following from the then existing international human rights commitments. The Supreme Court relied on a dualist interpretation of international human rights commitments and argued that the ratification of two international covenants bound only the executive power, not the judiciary. According to the Supreme Court, any other interpretation would put too great of a burden on communist judges, and would punish them with retroactive rules.[98] The Supreme Court was not able nor willing to solve this dilemma.

Just like disciplining, retention elections were intended to cover all three aims of judicial purges – to remove several generations of dependent judges, tackle the degradation of the role of a judge by raising the requirements on ethical and moral standards and, finally, to strengthen the level of expertise and the intellectual qualities of judges.[99] The greatest motivation behind the retention election was to secure that judges who had participated in communist justice would not implement the transitional justice policies – especially the large-scale restorative processes.[100] All retentions were also conditioned by a negative lustration of re-elected judges, but the power of the Minister of Justice not to reappoint a judge was much broader and could rest on the candidate's inadequate ethical qualities or expertise. Retention elections thus had the greatest potential really to purge communist judges. Accordingly, they also stirred up the biggest controversies, and faced opposition both from MPs and from new, democratic court presidents. Many feared that retention would negatively fall also on those judges who had carried out their duties justly, but joined the Communist Party as they had no other means of pursuing a judicial career.

[97] Virtual Library of the Chamber of Deputies, Parliament of the Czech Republic, transcription of meeting no. 16 discussing Law on courts and judges, 8-9 July 1991.
[98] The Supreme Court of the Czech Republic, S Kno 1/94, decision of 31 August 1994.
[99] Virtual Library of the Chamber of Deputies, Parliament of the Czech Republic, transcription of meeting no 21, report on the tasks of the Czech judiciary, 10 July 1991.
[100] Ibid.

Interestingly, the Deputy Prime Minister toned down these fears with the argument that retention was not intended to purge large numbers of rank-and-file judges, as 'those judges who had been compromised by violation of laws and judicial ethics'[101] had already left the judiciary. The government also admitted that, given the time required for a large-scale transformation of the judiciary, its hands were tied due to a shortage of judges and the need to start other parts of a legal reform. In the end, apart from in the Federal Supreme Court, retentions did not lead to massive purges in the judicial ranks. The lukewarm political support and opposition from new court presidents sealed the mechanism's fate. De-communisation of the courts was, therefore, already in the early 1990s, planned as a continuous and meticulous process.[102] Instead of large-scale dismissals, the government vowed to invest in fostering the quality of legal education, professional exams and the material needs of courts.

The marginal effect of the five mechanisms aimed at judicial purges also showed that they were ill-equipped to tackle the often informal participation of judges in the politicisation of justice and abuses of individual rights. For these reasons, removals of judges due to their loyalty to the communist regime were minimal. To put it bluntly, the Czech post-communist regime simply had no choice but to retain a significant number of judges from the communist era. The only available solution was to re-socialise communist judges, i.e. 'fill old bottles with new wine' and produce as many 'new bottles' as soon as possible.

Unfortunately, this hope was not realised. Path-dependence prevailed in the end and control of the higher echelons of the judiciary remained in the hands of judges from the communist era. The communist-era judges thus did not lose their influence. On the contrary, even in the early 2020s the presidents of both the Supreme and Supreme Administrative Courts and key figures of the High Court in Prague (the president and two out of the five vice-presidents) were still former members of or candidates for the Communist Party.[103] The numbers of rank-and-file judges at top courts are also striking. In 2019, on the anniversary of the Velvet Revolution, the updated list published by the Ministry showed that 13.5 per cent of all active members of the judiciary had joined the Communist Party prior to 1989. [104] Most of

[101] Virtual Library of the Chamber of Deputies, Parliament of the Czech Republic, transcription of meeting no. 16 on the Law on courts and judges, 8 July 1991.
[102] Virtual Library of the Chamber of Deputies, Parliament of the Czech Republic, transcription of meeting no. 16 on the amendment of the Constitution of Czechoslovak Federal Republic, 16 July 1991.
[103] Recall again that all Czech judges had to undergo lustration, but mere membership of the Communist Party of Czechoslovakia is not an obstacle to holding judicial office according to the Large Lustration Law.
[104] Ministry of Justice, list of judges – former members of the Communist Party of Czechoslovakia, first published on 7 January 2011, updated on 17 November 2019. Available at https://www.justice.cz/web/msp/clenstvi-v-ksc1.

the judges with a communist past were sitting in the Supreme Court (37 per cent), the High Court in Olomouc (34 per cent) and the Regional Court in Prague (27 per cent).[105] In contrast, the percentage of ex-communists among judges of district courts has been relatively low. In 2018, the majority of district courts had a proportion of judges with a communist partisan legacy which was lower than 15 per cent. This 'inverse pyramid,' showing a linear relationship between the percentage of ex-communists and level of the judicial career structure,[106] is of course a natural consequence of the fact that lower-court judges are younger and the personnel change at district courts happened faster as those judges were drawn from the younger population.

In sum, the most effective of the judicial purges was the removal of ex-communist court presidents, due to the risk of their ties with and loyalty to the Communist Party, as well as inadequate moral, ethical or expertise standards. The derived mechanisms of transitional justice prevailed and left aside the core transitional justice issue, the role of judges or court presidents in human rights violations. In a way, replacing court presidents was a necessary top-down measure of the consolidation of democracy. It solved the dilemma of an immediate lack of qualified judges who would not have connection to communist elites. New courts presidents were meant to oversee the commitment of the judiciary to the rule of law, democracy and the protection of individual rights. As mentioned above, 'new bottles' were not available in sufficient numbers, and thus new court presidents had to make sure that 'old bottles are filled with new wine'.

The removal of court presidents also had the broadest support from both the political and judicial ranks. Interestingly, the issue of whether and how much to purge the judiciary did not lead to many disputes among the political elite. Some MPs expressed the fear that the change of judges was not enough or not fast enough, but in general dealing with the past within the judiciary was primarily outsourced to judges themselves. It seems that successful implementation depended on the cost-benefit considerations of politicians. The more successful mechanisms were those directly tailored to the needs of the judiciary and carried out directly by the government. Those mechanisms the implementation of which was left to the judiciary itself mainly failed to deliver substantive change.

[105] Ibid and iRozhlas, 17 November 2018, available at: https://www.irozhlas.cz/zpravy-domov/soudci-clenstvi-v-ksc_1811170600_pek.
[106] Kühn (2011), p. 181.

4 Haunted Judiciaries and Invisible Transitional Justice

The hunger to uncover the past of communist judges never really left the Czech public discourse. In 2011, a human rights activist, Tomáš Pecina, brought an action against the Ministry of Justice for failure to provide him with information about former members of the Communist Party on the bench.[107] The case travelled all the way to the Constitutional Court, which agreed with the petitioner and argued that there was a public interest in obtaining information on the past roles of judges under the communist regime. When the Ministry of Justice complied and published the list of active ex-communist judges, it caused an outcry both outside and within the judiciary.

However, the length of the time which passed since human rights violations to the regime transition and opening of secret services archives complicated the whole process and triggered questions about the reliability of the information stored in these archives. Judges who were correctly included in the list of active ex-communists downplayed the importance of their membership in the Communist Party, whereas judges whose names appeared in the list by mistake vigorously protested and threatened the Ministry of Justice with defamation actions.[108] The media started digging up stories about individual judges and their careers. The public was appalled and flooded social media with hate comments directed at the judiciary. Some politicians knew about the communist pasts of a couple of judges, but they too were surprised by the number of ex-Communist Party members still present in the top tiers of the judiciary

This forced 'coming out' of ex-communist judges has haunted the Czech judiciary ever since. The communist past of candidates to apex courts occasionally resonated among the public in following years and culminated in 2023 with the resignation of the former ICC vice-president and constitutional court justice candidate, Fremr.

How was this possible if Czechia had five complex mechanisms that addressed almost all aspects of judicial turnover? As we noted in the previous Section, although individual mechanisms seemed comprehensive, they often did not correctly aim at the roles of judges under the communist regime.

[107] By the 1980s, the majority of judges were automatically also members of the Communist Party, therefore, democratic politicians of 1989 were willing to accept the past membership as a mere formality, and not a signal of ideological affiliation with the Communist Party. The request was based on the Law No. 106/1999 Coll., on Free Access to Information (Freedom of Information Law).
[108] See e.g. Lidové noviny (2011), Mladá fronta DNES (2011).

(1) Core transitional justice mechanisms, such as lustration, but also criminal prosecutions, aimed at judges who broke Czechoslovak communist law, manipulated evidence or helped communist power to orchestrate criminal trials. The majority of these exemplary show trials, however, appeared in the 1950s and judges complicit therein were no longer on the bench in the late 1980. Hence, the long period between crimes and retributive processes significantly impaired the effectiveness of these transitional justice mechanisms.

(2) The second targeted group were judges who implemented communist law that was in conflict with human rights principles and international commitments of communist Czechoslovakia. These were judges who sentenced political opponents to prison, prosecuted the signatories of Charter 77 or confiscated property of illegal immigrants. The retribution for their activity was no less complicated. While some of them left the judiciary on a voluntary basis, the Supreme Court was hesitant to proceed with criminal or disciplinary proceedings against the rest of them, arguing that such a step would violate both judicial independence and the principle of non-retroactivity.

(3) The derived transitional justice mechanisms against judges who did not commit any crimes per se, but who were ideologically aligned with the Communist Party and communist understanding of judicial independence, or who lacked required expertise or ethical qualities, were even more problematic. Although the early transitional processes removed communist court presidents (who had great formal and informal influence on the rank-and-file judges[109]), later on, removals from ideological or moral reasons also became theoretically and legally challenging because of principles of non-retroactivity and protection of judicial independence. Nowadays, the jurisprudence of the European Court of Human Rights renders political removals (which would have been the essence of a removal of judge appointed legally by the communist power) almost impossible. Unfortunately, lustration, a mechanism European supranational bodies tolerated for a limited period of time despite of its extraordinary interference in public offices, was largely misplaced when it came to the role of judges and vetting procedures.

With certain simplification, we can argue that despite the initial effort, the way how Czechia dealt with the past of the judiciary was not only substantively insufficient, but it also failed to clearly communicate the extent to which the communist-era judges participated on the communist regime and its ideology. Why is it important? It is true that after the transition, political leaders typically enjoy relatively large space for manoeuvre when deciding how to deal

[109] Blisa and Kosař (2019); Kosař and Šipulová (2024 forthcoming).

with representants of the previous regime, based on normative or pragmatic considerations. However, as Mainwaring and Peréz-Liňán argued, 'the cumulative experience of past generations affects the level of democracy in contemporary political regime' and that the justice system plays a central role therein, as it 'operates as an institutional carrier of regime legacies'.[110] The Czech story, magnified by the recent resignation of judge Fremr, suggests that the lack of visible dealing with the past of judges may haunt and reduce the legitimacy of the courts for a surprisingly long time.

Moreover, the development in other CEE countries hints that judicial turnover after the democratization is more important than core transitional justice scholarship anticipated. First, the evidence of judges being the vehicles of transitional justice comes from Latin America,[111] Africa,[112] South-East Asia[113] and post-war Europe.[114] While some scholars note that the pro-transitional justice behaviour of courts emerges as a symbol of judges' atonement for their role in the oppressive regimes,[115] others point out that such behaviour is further conditioned by structural reforms[116] or changes in behavioural patterns, which again depend on transitional justice policies and the successful implantation of new rule-of-law institutions.[117] The empirical evidence of pre-transition judges behaving leniently towards the prosecution of past crimes prevails.[118] In the end, the Czech story is similar, as unreformed top courts protected their own colleagues and decided formalistically on transitional justice issues.[119]

Second, the lack of judicial purges and truth-seeking harms the legitimacy of judiciaries in the long run. De-communisation scholars have repeatedly pointed out that lustration that targets broad bureaucratic systems has positive effects on the degree of democratisation.[120] As with 'the skeletons in the closet' argument, judges with an unknown past instigate biases in the public perception of transitional justice implementation.

Third, the unaddressed communist past of judges became an instrumental wild card in the hands of political leaders who sought to tinker with judicial independence.[121] Many populist

[110] Mainwaring and Peréz-Liňán (2013), p. 394.
[111] Ocantos Gonzalez (2014).
[112] Yusuf (2008, 2013).
[113] Holliday (2014), Bedner (2013), Mochizuki (2017).
[114] Arendt (1963).
[115] Hunneus (2010).
[116] Skaar (2011), Hilbink (2007).
[117] Ocantos Gonzales (2014).
[118] Yusuf (2008), Spáč (2020).
[119] Šipulová & Smekal (2021).
[120] Horne & Levi (2004).
[121] Iancu (2021).

leaders have recently adopted the language of de-communisation and cleansing the judiciaries of past non-democratic legacies. Fidesz has long argued that the corruption and inefficiency of the Hungarian judiciary is the result of missing de-communisation.[122] Orbán initially advocated large-scale reforms and court-packing plans initiated in 2011 using de-communisation rhetoric.[123] Similarly, the Polish PiS has repeatedly stated that judicial reforms tackle the corruption that results from the Polish judiciary being plagued by remnants of its communist past. Prime Minister Mateusz Morawiecki has repeatedly stressed that the Polish judiciary remained independent of any checks and balances and lacked public accountability due to the form of the 1989 roundtable talks, which allowed the new democratic-era courts to be staffed with communist-era judges.[124] In both cases, the political statements failed to acknowledge how many judges with a communist past were actually still sitting at their national courts. De-communisation was primarily a slogan to delegitimise the judiciary and to justify problematic judicial reforms.

These three reasons have potential repercussions not only for those countries that are transitioning from a fully non-democratic regime, but for any countries that struggle with low legitimacy of the courts and mistrust in the individual independence of judges appointed under previous regimes (often in illegitimate processes). The Czech story has demonstrated that elites need to take the re-establishment of the legitimacy of the judiciary seriously. Both key questions, whether and how to punish judges who participated actively in human rights violations and what to do with judges whose decision-making has always complied with principles of the rule of law, but who were otherwise ideologically aligned with the previous non-democratic elite, indoctrinated, or illegitimately appointed, need to be addressed as swiftly as possible, and in a transparent open discussion that would be comprehensible and visible also to the broader public.

The strategic use of an anti-communist narrative more than three decades after the fall of the Berlin Wall has responded to societal sentiments. The lack of judicial purges failed not only transitional justice, but also the rebuilding of the rule of law. As demonstrated by the Czech case, judicial purges in post-communist countries had to follow several objectives. Apart from cleansing the judiciary of judges who had taken part in crimes of the communist regimes, they were also aimed at reinstating mental judicial independence,[125] increasing the prestige of judges

[122] Hungary Today (2018).
[123] Kosař and Šipulová (2020).
[124] Chhor (2018) and Morawiecki (2017).
[125] Čuroš (2022), Šipulová and Spáč (2024).

and instilling new ethical and moral standards into the judiciary. As we have seen in many CEE states, the lack of mental independence of communist judges, who were used to exist in very hierarchical models with loyalty and dependence of rank-and-file judges on their senior peers and court presidents, prevented the internal reforms and democratization of judiciaries from taking place. Instead, judiciaries started to replicate the old patterns.[126] The people did not like it and skilful politicians managed to exploit this anger towards judges. This, in our understanding, demonstrates that a policy as fragile and, at the same time, politically salient as transitional justice in the judiciary needs to be comprehensible and visible to the public. Otherwise, it may easily become a hostage to political elites pursuing their own interests at the expense of judicial independence.

5 Conclusion

In the last decade, the notion of judicial vetting and lustration has changed. Both mechanisms have abandoned their exclusive relationship with regime transition and are now more broadly invoked as extraordinary tools that may be applicable in situations where the legitimacy of the judiciary, its commitment to the rule of law, independence or justice is in question. Lustration of judges has turned out to be a rather standard, even internationally approved, vetting mechanism for dealing with wide-spread judicial corruption scandals.

In this article we have offered a historical analysis of the Czech post-1989 judicial turnover. We have argued that the Czech case contains several interesting observations for the ongoing debates on judicial vetting in Poland, but also in for future reforms to come in countries like Hungary, Romania, Ukraine, Albania, Georgia, Kosovo and Macedonia.

First, the public cares about the role of judges under the previous regime. This means that political elites need to take the transitional removals and judicial turnovers very seriously. Second, timing is of the essence, both from the perspective of access to original documentation, but also from the point of view of supranational organisations that typically are willing to accept the transitional rule of law (and processes like lustration) for only a limited time. Third, mechanisms of transitional justice do get into significant tension with principles of judicial independence, non-retroactivity and the rule of law.[127] In the most extreme case, they can even lead to the erosion of judicial independence and the separation of powers, which would set a

[126] Popova & Beers (2020).
[127] Dyzenhaus (2003a).

dangerous precedent for future political interferences. Large-scale judicial turnover may negatively impact on the quality and effectiveness of judicial decision-making. Many young transitional countries struggle with a shortage of judges unburdened by the past and must strike a compromise between qualified candidates and judicial candidates with no ties to the past regime.[128] This, in turn, leads to an unfortunate trade-off between the effectiveness of justice and judicial independence.

We have shown that Czechia, despite having the harshest lustration law in the region and mechanisms that ought to have address the individual accountability of judges who participated on communist regime crimes, who violated standards of international law, or lacked knowledge or ethical standards, has eventually managed to achieve only limited de-communisation of the judiciary. In fact, of the five transitional justice mechanisms aimed at purging the judicial ranks, only one – dismissal of communist-era court presidents – has proved to be a fully successful strategy. The other four mechanisms – the retention, lustration, disciplining and criminal prosecution of judges – have yielded limited results, albeit for different reasons.

At the same time, the Czech case also shows that typical transitional justice mechanisms may not be well equipped to resolve the problem of the complicity of judges in past crimes for three reasons. First, judges played different roles in past crimes from political elites, and the traditional transitional justice mechanisms usually fail to capture the specific judicial complicity with the non-democratic regime. Second, the principles of the separation of powers and judicial independence, vigorously defended by judges themselves, preclude judicial reform from being easy. Third, practical exigencies such as the shortage of educated lawyers not tainted by cooperation with a previous regime further limit the effects of purges and the vetting of judges in transitional countries.

Yet addressing the authoritarian and totalitarian past of judges is extremely important for three reasons. First, judges played an important role in the implementation of transitional justice policies, and there is growing evidence that judges who participated in a totalitarian or authoritarian regime are biased against transitional justice and unlikely to implement its mechanism effectively. Second, the lack of judicial purges and truth-seeking harms the legitimacy of the judiciary and public confidence in the courts. Moreover, it prevents the mental transition of judges who may adopt a skewed understanding of judicial independence, block the

[128] Ellett. (2013), Kosař (2016), Betts et al (2001), Oko (2005), Dyzenhaus (2003a), Yusuf (2008).

development of ethical standards and engage in problematic behaviour on as well as off the bench. Several countries in CEE show clear signs of these problems. In Ukraine and Slovakia limited judicial purges allowed informal corruption networks to emerge within the judiciary.[129] It is also becoming clear that these judiciaries will not cleanse themselves due to the corporativist career-model and replication of older patterns.

Third, the failure within the judiciary to deal with the past entails a risk that political leaders who wish to tinker with judiciaries will use the revealed communist past as a wild card to delegitimise the judiciary and justify interference with its independence. Skeletons in the cupboard then start haunting judges. We have seen this strategy applied over and over again by populist governments in Hungary, Poland and Romania. These politicians simply abuse belated lustration and other mechanisms in order to get rid of their opponents on the bench and staff the courts with ideologically aligned judges.

The clashes between these dilemmas thus place judicial purges between the proverbial rock and hard place. It is clear that the repercussions of insufficient reckoning with the pasts of judges transcend transitional justice. Even more importantly, the events of the last decade have demonstrated that judicial purges are still a highly relevant topic for European countries. For example, in order to address widespread judicial corruption and low trust in courts, Albania implemented judicial lustration in 2017 and Ukraine removed all court presidents in 2014. Despite the (relatively surprising) support of European supranational bodies, both lustration processes brought mixed results. Ukraine in particular demonstrates how influential informal institutions are in sabotaging structural reforms: Ukraine left the re-election of court presidents, removed due to corruption, bossing and patronage, to rank-and-file judges. At majority of courts, judges re-elected those court presidents that were previously removed by the lustration law.[130]

Retention and lustration of judges is very much discussed also by scholarship exploring what to do with judges artificially packed into courts by populist and non-democratic leaders. In the case of post-Kaczynski's Poland, scholars have already suggested several ways of instigating criminal prosecutions of individual judges who have acted against the spirit and letter of international and EU law,[131] as well as the potential retention and vetting of all judges

[129] Popova (2020), Spáč (2020).
[130] Popova (2020).
[131] Von Bogdandy and Speaker (2023).

illegitimately selected as a part of PiS court-packing policies.[132] It is, however, still worth stressing that, compared to other political elites, judges, including those selected under a non-democratic government, are protected by internationally entrenched principles of judicial independence, which is also recognised as a building block of the rule of law doctrine. Although European supranational bodies are slowly becoming more receptive towards the idea of lustration as an extraordinary mechanism implemented when other means fail, the shortcoming of the mechanism demonstrated in the Czech case suggest that much more work on the relationship between transitional justice measures and the transitional dimension of judicial independence is needed.

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[132] Kosař and Šipulová (2023).

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PART 2. JUDICIAL RESILIENCE

Study III: The Light and the Dark Side of Judicial Resistance

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1. Introduction

What determines the ability of judges to resist different forms of political pressure? The last decade has demonstrated amply that both democratic and autocratic political leaders are very tempted to tinker with courts (Daly2022, Braver 2020, Castagnola 2018, Chavez 2012, Taylor 2014). Typically, they either aim to capture and weaponize them against potential enemies, or to disempower them (Pierson 2000, Pozas-Lozo & Rios-Figueroa 2018 Guarnieri 2013, Vauchez 2018, Spáč2020; Kosař&Šipulová2022). The examples from just the last decade are staggering. Following the unsuccessful military coup d'etat in Turkey, Recep Erdoğan had 2,700 judges removed from office in violent persecutions unprecedented in (semi-)democratic countries seeking membership of the EU (Özbudun2015; Esen&Gumuscu 2016; Varol&al.2017). Victor Orbán, shortly after his electoral win which secured him a constitutional majority in the Hungarian parliament, implemented a whole variety of techniques which helped him to pack the courts with loyal judges – only to be closely followed by Kaczyński, and, later on, Fico in Slovakia. The outgoing government of the Polish Law and Justice party (PiS) left behind more than 1,500 packed judges. Benjamin Netanyahu's recent coalition has announced wide-scale reform of the Israeli judiciary (Weiler 2023) and Prime Minister Narendra Modi's government has stepped up its pressure on the Indian Supreme Court (Sarma 2023).

We have also seen the extensive use of mass media to discredit and delegitimise the courts in the eyes of the public. The judicial review of the UK Brexit referendum and its aftermath translated into a harsh media campaign against the reputation of judges, calling them the "enemies of the people." Israel's Minister of Justice, Aylet Shaked, released a controversial campaign advertisement in March 2019. Spraying a perfume labelled "Fascism," she taunted her critics and presented her court-curbing proposals as if they were, in fact, fighting the counter-majoritarian problem with a catchy slogan: "to me, it smells like democracy."

(Habfinger 2019). In 2020, the Polish government funded a new documentary series on Polish State television called Kasta (the Caste), which depicted judges as corrupt and incompetent. Daily episodes aired for over a month picked out the most controversial judgments and episodes of judicial conduct, labelling them hurtful, corrupt and unjust.[1] The campaign also featured billboards and TV spots with impressive black-and-white photographs accompanied by slogans such as "a judge stole a sausage from a shop" or "a drunk judge found fighting in a bar."

Generally, scholarship has engaged at length with the rationales and forms of these political interferences, as well as hypotheses regarding the potential rebuilding of independent judiciaries once democratic governments are returned to power. Nevertheless, much less attention has been paid to how judiciaries react to these attacks (cf. Graver 2018; Šipulová 2021; Tew 2023; Puleo & Ramona 2023), leaving us to wonder why some judges decide to resist political pressures, while others remain passive. Recent decades have given us some extraordinary examples.

In 2023, a proposal to enact large-scale court-rigging reform in Israel triggered an outcry from domestic judges, who immediately turned to their European colleagues for advice (Kahn 2023; Lurie 2023). In 2020, Kaczyński's crusade against the Polish Constitutional Tribunal mobilised judges not only in Poland, but also across Europe, culminating in the March of a Thousand Robes in the streets of Warsaw. In 2022, Romanian judges attracted the attention of the international community by strategic coordinating the submission of dozens of preliminary ruling questions to the Court of Justice of the European Union and of over 300 applications to the European Court of Human Rights (Moraru 2022; Doroga & Bercea 2023). After the *Daily Mail* published an infamous article entitled "Enemies of the People" in 2016 and suggested that the UK's Supreme Court judges had failed to respect the voice of 17.4 million Brits voting "Leave" in the Brexit referendum, hundreds of judges petitioned the British parliament asking it for political protection (Rozenberg 2020). Moreover, the Supreme Court itself adopted a set of policies aimed at increasing its transparency and visibility, and the public's trust. In the early 1990s, Italian judges and prosecutors triggered the famous Mani Pulite (clean hands) protests and used the public as leverage on judicial oligarchs and politicians to push through significant reforms regarding judicial independence (Della Porta & Vannucci 2016; Benvenuti 2018; Van Dijk & Vos 2018). The Supreme Court of India famously struck down 128 legislative

[1] The telling example is the official description of the show: "In each episode, reports will present stories of people injured by the judiciary and controversial court judgments". See https://www.tvp.info/46255229/kasta, also https://www.theatlantic.com/ideas/archive/2020/01/disturbing-campaign-against-polish-judges/605623/ and https://polandin.com/46515871/analysis-judging-the-judges-takes-political-centre-stage.

amendments between the 1950s and the 1970s and protected the fundamental right to property against the government's land reform and privatisation attempts (Hilbink 2012). It also exerted pressure on Indira Ghandi's government which repeatedly attempted to pack it (Khaitan 2020).

In 2023, the recurring challenges undergone by the Brazilian Supreme Court under Bolsonaro's government culminated in an attack by the radical right on the Supreme Court building. However, the Supreme Court successfully resisted these, thanks to the pre-emptive communication strategy implemented at the very beginning of Bolsonaro's rise to power (Bogea2023). In Kenya, the Supreme Court annulled the 2010 presidential elections, demonstrating that courts in hybrid regimes do not necessarily always support the incumbent (Gerszo 2023).

On the other hand, these sparks of judicial resistance are challenged by multiple examples of passivity. Hungarian judges remained split when faced with Orbán's large-scale court-packing plan (Hannelt & Vincze 2023). The Turkish Constitutional Court, after a series of attacks by Recep Erdoğan after 2010, demonstrated selective resistance; it showed some deference to autocratising emergency degrees, but it also defended the crucial constitutional rights of journalists, scholars and the public (Oder 2022). A majority of the Slovak judiciary "tolerated" increasing politicisation imposed by the former Minister of Justice turned Chief Justice, Harabin, and unwillingly participated in a large-scale judicial corruption network which was revealed after the murder of investigative journalist Jan Kuciak in 2019 (Šipulová 2021; Čuroš 2022). The 2014 lustration of Ukrainian judges, which aimed to rid the system of old politicised cadres, surprisingly failed. Judges in the majority of courts re-elected their former court presidents, who were implicated in corruption and patronage networks (Popova 2020). Similar passivity towards internal capture of the judiciary by judicial oligarchs has been shown in Georgia (Tsereteli 2023, 2022).

What are the reasons behind these differences in judiciaries' reactions to interferences in their independence? It seems that this question has so far attracted less attention from the scholarship. The first studies of judicial resistance have so far focused mainly on international and regional courts (Caserta & Cebulak2021; Gonzales-Ocantos & Sandholtz 2021). Research on the resistance of domestic judiciaries, however, lacks similar rigour, academic interest and conceptual clarity.

While legal scholars study the attacks on the judiciary and the legal and judicial protection, in particular of the two European supranational courts (Kovács & Scheppele 2018;

Leloup & Kochenov & Dimitrovs2021; Scheppele, Kochenov, Grabowska-Moroz 2020), their research is oriented to the analysis of the case law and often remains doctrinal and casuistic (cf. Graver 2018; Jakab 2020). Anglo-American legal scholarship has moved furthest, since it engages with strategic judicial decision-making, such as avoidance (Delaney 2016; Dixon & Issacharoff 2016), weak judicial review (or judicial deference; Verduo 2021) and legal diplomacy (Lupu & Voeten 2012; Madsen 2011). Still, its focus remains on the jurisprudential activities of judges, which reveal only a small segment of their potential reactions to attacks. Judges do much more than write judgments and deliberate. They communicate with media, share their views on social platforms, give interviews, negotiate, or even protest in the streets. There are suggestions that courts in flawed regimes may act as pockets of resistance against further electoral autocratisation (McDonnell 2017; Garoupa & Ginsburg 2011), but the effect of such resistance remains uncharted.

Socio-legal scholars and political scientists have addressed some instances of strategic judicial behaviour (Puleo & Coman 2023; Tew 2023; Trochev 2018; Popova 2012; Trochev & Ellett 2014) and their relationship with the institutional capacities of courts (Brinks, Levitsky & Murillo 2020). Attacks on judiciaries appear in all regimes, although they are not equally visible. However, we do not understand whether judiciaries under pressure behave differently in consolidated or backsliding democracies. Trochev and Ellet have pointed to the need better to map judges' off-bench behaviour and alliances they form with their peers, politicians or civilians (Trochev & Ellett 2014). Yet, no systematic analysis has so far been conducted. Moreover, we lack deeper sociological insight into the ability of judges to recognise attacks that endanger democracy and their personal motivations to withstand them (Spáč 2023; Šipulová & Spáč2023). We have very little understanding of the individual or collective agency of judges and its relationship with professional culture or mental dependency (Bobek 2008; Beers 2010; Čuroš 2022). There is a single research group that examines the different leadership roles of female and male chief justices and their ability to shield courts from pressures (Dixon & Dellaney 2023). The role of individual characteristics (career path, education, social class, partisanship, individual independence) other than gender in the willingness of judges to resist remains completely unknown.

Like the current discussion among democratisation scholars who argue that the field of resistance requires more attention (Tomini et al. 2022), this article highlights the same gap in the area of judicial resistance. We still lack a more nuanced understanding of the effects of, as

well as motives behind, judicial resistance and its relationship with the broader question of what role judges play in the long-term resilience of democracies.

This article fills this gap and with two interrelated aims. First, it offers a very first concept map of how to study judicial resistance - its forms, rationales (or motivations) and effects. It argues that in order fully to understand the nature of judicial resistance and its long-term role in democratic resilience, future research must take into consideration three separate dimensions: the techniques judges use, the motives that impact on their individual and collective agency, and the short-, mid- and long-term effects of resistance on the rule of law and democracy.

Second, based on the extensive literature review and data collection, it also provides an typology of resistance techniques implemented by judges across different regions according to their aims, arenas (on-bench and off-bench) where they take place, and potential alliances they rely on. The article proceeds as follows. Section 2 introduces core theoretical and methodological considerations. Section 3 analyses empirical examples of judicial resistance and organises them into techniques, depending on aims they pursue, whether judges implemented them individually or collectively, and whether they comply with or violate the rule of law. Section 4 offers crucial considerations on the motives judges have when they decide to resist (or not). Section 5 discusses a thin red line between the light and dark side of judicial resistance. Section 6 concludes.

2. What is Judicial Resistance? Theoretical and Methodological Considerations

How do judges resist? What techniques do they use if they want to react to an incoming attack? There are generally four different ways in which judges can react once they appear to be under political (or non-political) pressure.

(I) First, they can decide to ***do nothing*** and show deference to the incumbent government. Non-activity can be the result of several motives and rationalisations. For example, judges may not consider the attack fatal. They can believe that they have no chance or means to fight back, they may also strategize and wait to see if the threat turns out to be serious. And, of course, they can actually support the change of political course (Spáč 2023). Passivity is a common reaction and its analysis may help us to understand the dynamics between the different

motivations of judges, and also observe which threats judges simply do not see as critical for the quality of the democratic system (or for the vulnerability of their own position).

(II) Second, if the government is threatening the courts with plans for jurisdiction-stripping, the containment of the selection process or court-packing, courts may seek to ***avert*** the threat by increasing the costs or reducing the benefits of the attack, thus forcing the government to abandon it (Caldeira 1987; Perez-Linan & Castagnola 2016).

(III) Third, a different path will be taken by judges already under attack, especially those who face legislative curbing and various techniques of abusive constitutionalism (Dixon & Landau 2021). In such scenarios, courts may seek to ***invalidate*** the attack, typically through constitutional review or petition to supranational courts, such as the ECtHR and CJEU.

(IV) Finally, courts that enjoy certain power and legitimacy among other actors or with the public may even attempt to ***punish*** the authors of attacks and force them to backtrack with strategically timed decisions on salient policies (budget, social policies, taxes, etc.).

Obviously, not all of these reactions can be qualified as resistance, and not all of them are formed as strategically and consciously taken decisions. The first path of reaction, the deference to the attackers, is often conceptualized as the normative and factual opposite to judicial resistance. However, the passive position and avoidance can actually sometimes be part of a selective resistance and long-term strategic considerations on how risky and how impactful individual acts of resistance are for judges (Delaney 2013; Oder 2024). Even more importantly, understanding of deference and motives of those judges who decide to **not** resist the pressure on their independence has a crucial impact on the whole conceptualisation of judicial resistance.

This article works with a concept of judicial resistance understood as those judicial reactions that can be initiated by judges (individually or collectively), i.e. outside institutional precursors aimed to increase the level of judicial independence (such as salaries, tenures, modes of appointment, levels of self-government, etc.). Resistance is then formed by *techniques, tools* and *practices* that judges or courts can actively use against the attack on their independence. Drawing on the scholarship on democratic resistance (Tomini 2023) as well as judicial alliances (Trochev 2018) and democratic decay (Šipulová & Kosař 2023, Holgado & Urribarri 2023; Daly 2020), I argue that in order to understand the effect and conditions of successful judicial resistance, future research needs to explore three separate dimensions of judicial resistance: 1) forms of resistance and their relationship to the attack; 2) the individual and collective agency of judges, and 3) the effects of resistance on democracy and the rule of law (Figure 1).

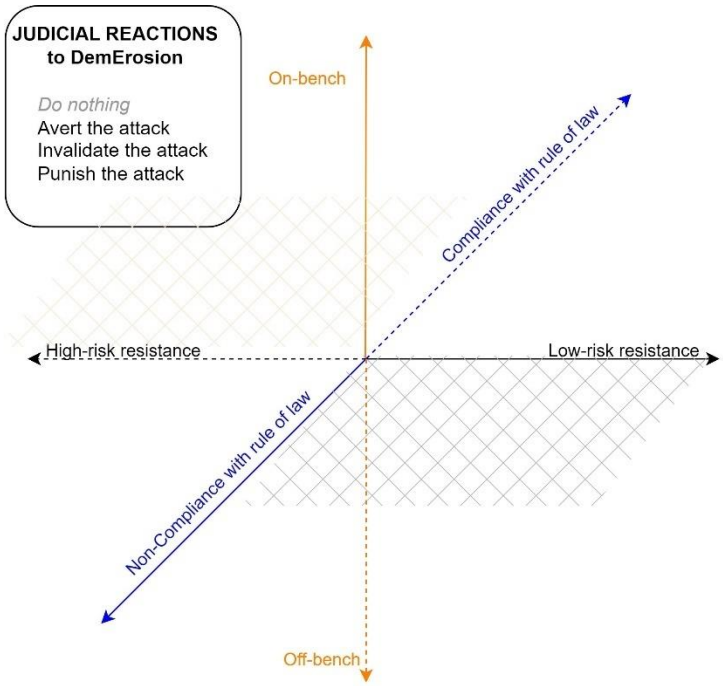
The first dimension shows whether judges rely on their official judicial function and execute their decision-making power to protect themselves (i.e. act on-bench, pivot,

strategically time the decisions important for the government), or whether they use extra-judicial (off-bench) means: public protest, talks, (social) media statements, political influence or indirect pressure.

The second dimension zooms in on the agency (individual and collective) behind judges' motivation to resist. It challenges the view that resistance is a normative virtue of "democratic opposition" judges and instead argues that it appears across regimes and judicial cultures as a result of strategic cost-benefit analysis. The dichotomy between resistance and deference to political actors is more of a continuum than two opposing poles. Packed judges might decide independently and vice versa, judges appointed by the previous elite might opt to show deference to the new regime based on the extent of personal risks they face in every single case. In order to understand how the motivation of judges to resist is formed and how the agency changes, the future research should focus on exploration of four factors: 1) the ability of judges to recognise the incoming attack, 2) the institutional capacity to resist, 3) the individual's willingness to withstand the pressure, and 4) the potential to attract and build a supporting alliance within or outside the judiciary. The judicial alliances can run within different domestic or supranational courts, particularly the regional (human rights) courts such as the Inter-American Court of Human Rights, the European Court of Human Rights and the Court of Justice of the European Union (intra-judicial). Alternatively, judges can build alliances with public or political actors, media and NGOs (extra-judicial).

Finally, the third dimension therefore explores the relationship between resistance, social legitimacy of courts and public trust and confidence in courts. It prompts the future research to pose a the more nuanced question of what role courts now have in democracy and how judges are expected to behave as the guardians of democratic regimes.

Figure 1: Axes of judicial resistance that divide the field in separate but interacting dimensions. Source: author.



One caveat needs to be mentioned here. With the recent wave of de-democratisation, judicial resistance has started to be used normatively as the ability of the judiciary to withstand various exogenous and endogenous pressures and interferences in their independence and impartiality. Nevertheless, it is important to note that part of literature uses "judicial resistance" also to describe courts that resist legitimate legislative or constitutional changes, domestic courts that resist the effect of international law and the case law of international courts, and lower courts that simply resist implementing prescriptions issued by apex or constitutional courts. This article takes the first normative route and adopts the understanding of judicial resistance as resistance to illegitimate interference in judicial independence and autonomy. However, it also acknowledges that resistance can have both a light and a dark side, eventually alienating courts from their public and potential allies (section 6).

3. First Dimension: Judges Under Pressure in Comparative Perspective

As stated in the previous section, reactions to political interferences can pursue various aims, typically depending on the form of the attack, its timing, as well as the institutional capacity of the judiciary and its ideational strength (perceived legitimacy or prestige). Judges will have different opportunities to react to an attack that has legal form, compared to openly illegal

interferences such as threat, arbitrary removal or corruption. The visibility of the attack allows judges to take precious time to make a strategic decision and weigh up the costs, but it requires either judges to be privy to political development or political actors to act in the open (or to allow the fact of the preparation of the attack to be leaked in advance). In a similar fashion, the position of courts in the system, the availability of legal tools, but also the political or ideational strength of courts (their reputation, public trust, perceived independence and legitimacy across society) will impact on the pool of measures and techniques judges can decide to implement, as well as the costs of their implementation.

In this section I will further develop the conceptualisation of judicial resistance and organise it into categories based on the pursued aim: to avert, punish or to invalidate the attack. Yet, it is difficult to evaluate the effect of individual resistance techniques without acknowledging that they move on three different continuums. Table 1 shows techniques of judicial resistance collected on the basis of examples from countries that experienced political attacks on courts in countries of Europe, Latin America, Africa and South-East Asia.[2] While some of them can easily be associated with judges acting on- or off-bench (i.e. resistance by way of using the decision-making power), other, like the creation of public narrative against the attacker, can be employed either in decision reasoning or via a media interview, press release or statement on social medias. Interestingly, all techniques can potentially be placed at both ends of the "compliance with the rule of law" axis. The constitutionality of resistance will always depend on the national context, although some techniques (such as jurisprudential pivoting or political negotiations) are more controversial than others. In what follows I will describe individual techniques and discuss the examples of their use in practice.

[2] The examples were collected by the author based on a combination of literature review and elite interviews with judges, politicians and lawyers. The elite interviews were conducted in 10 European countries and here serve merely for the conceptualisation of resistance techniques.

Table 1: Categories of judicial resistance techniques. Source: author.

	On-bench	Off-bench
Averting OR Punishing	Timing of decisions	(High-risk) individual judicial activism
	Pivoting	Strategic resignation
	Jurisprudential pushback against government	Official legislative comments
	Creation of public narrative against actor	Formal denouncement by JSG body
	Activistic decision-making	Organised judicial action
		Judicial riots
		Medialisation
		Creation of public narrative against actor
		Engagement of political opposition
		Engagement of academic support
		Engagement of public and civic society
Invalidating	Annulment via (constitutional) review of legislation	Engagement of transnational judicial networks
	embedded competence	
	derived competence (activism)	
	Petition to a supranational court	

3.1 On-Bench Resistance

The most frequent reaction of courts to incoming political attack is an attempt to invalidate it through formal judicial powers. This is particularly true for those interferences that are, in fact, legal in character and try to strip the courts of their competence or powers and to weaken or incapacitate them. However, personal attacks against individual judges (via the misuse of disciplinary proceedings, threats, evictions or even the use of violence) can also potentially be grounds for domestic or international petition by a targeted judge, relying on the principles of judicial independence and the protection offered by the constitution or supranational commitments of the given state.

Invalidation techniques come in two major forms: invalidation through domestic *(constitutional) legislative review* and *petition to a supranational court.* Their use therefore depends on the domestic structural safeguards and commitments to international law. Constitutional review of legislation is relevant for countries where the constitution drafters embedded certain principles of judicial independence directly in the text, typically in the form of an unamendable eternity clause, the doctrine of "unconstitutional constitutional amendment,"[3] or a tiered constitutional design.[4] The protection of such a clause is typically

[3] In theory, courts might even introduce unconstitutional constitution doctrine, although we are yet to see it in practice (Landau, Dixon and Roznai 2019). On the other hand, neither doctrine will stop a determined leader with a constitutional majority, as we have seen in Hungary, where Viktor Orbán used a landslide electoral victory to adopt a completely new constitution.

[4] The *tiered constitutional design* divides the constitution into segments (tiers). It does not just rely on constitutional courts, but protects the top tier with requirements of supermajority, referenda, temporal limitations and single-subject requirements (Dixon and Landau 2018).

vested in the constitutional courts (Preuss 2011; Suteu 2017; Kosař and Šipulová 2020) and offers them an easy route to invalidating political attacks as unconstitutional or procedurally unfit. This technique, however, comes with a very clear institutional limitation. If the interfering executive actor enjoys a supermajority in the Parliament, it can also easily use constitutional amendments to rig the courts in the way, that would be difficult to undo for potential future governments. This is the case particularly in those jurisdictions where doctrine does not recognise the authority of the constitutional court to review constitutional amendments (Landau, Dixon & Roznai 2019; Dixon & Landau 2021). Moreover, the invalidation is also dependent on the willingness of judges to challenge the political actor, or, as will be discussed in Section 5, their ability to recognise that the incoming attack is in fact damaging for the rule of law and the democratic regime. This was particularly obvious after the first set of changes were implemented by Orbán in Hungary; these attracted relatively high support not only among the public but also among legal scholars. Many conservative lawyers, as well as judges, simply believed that the new Constitution and restructuralisation of the judiciary was an inevitable step in modernising and increasing the quality and accountability of judicial power (Vincze 2023).

A different invalidation technique is available to courts in countries which have locked down the core principles of judicial independence via commitments to various international human rights treaties. Favourable rulings of international courts may serve as an important signal to or impose sanctions on court-curbers and support domestic judges in their crusade as another layer of legitimacy. In the European setting the two most important actors are the European Court of Human Rights (ECtHR) and the Court of Justice of the European Union (CJEU). Neither of these had a straightforward journey towards the protection of judicial independence. Although the ECtHR has long represented a bulwark against violations of human rights, its competence draws on the European Convention on Human Rights, which does not cover the rules of judicial governance (such as selection of judges, for example). Only in the last decade has the Court developed case law that significantly extends its authority to impose rules on the judicial governance, which allowed it to review the rules on removal,[5] disciplining,[6] selection of judges,[7] removal of chief justices,[8] or court-packing[9] opposite the positive rule of

[5] *Volkov v Ukraine*, 21722/11; judgment of 21 July 2009, *Luka v Romania* 34197/02; judgment of 28 October 1999, *Wille v Liechtenstein*, 28396/95; judgment of 26 February 2009, *Kudeschkina v Russia*, 29492/05.
[6] ECtHR, judgment of 8 February 2001, *Pitkevich v Russia*, 47936/99; judgment of 5 February 2009, *Olujic v Croatia*, 22330/05; judgment of 19 October 2010, *Ozpınar v. Turkey*, 20999/04.
[7] ECtHR, GC judgment of 9 June 1998, *Incal v Turkey*, 22678/93.
[8] ECtHR, GC judgment of 23 June 2016, *Baka v Hungary*, 20261/12.
[9] ECtHR, judgment of 15 March 2022, *Grzęda v Poland*, judgment of 9 January 2013; judgment of 26 February 2002, *Morris v UK*, 38784/97.

law commitments laid on member states by the European Convention of Human Rights. Nevertheless, the ECtHR can find a violation only if the targeted judges can also argue a violation of their individual human rights (Kosař and Lixinski. 2015, Kosař and Šipulová 2018; Kosař and Leloup 2022). The most frequent petitions include those on the violation of a right to a fair trial (for example if disciplined or removed judges cannot have their cases reviewed by a court), or of freedom of speech[10] (if a judge can prove that the attack was in retaliation for his or her criticism of the government), or the right to property or a private life.[11] An alternative route the ECtHR found to address the erosion of the rule of law is that of individual petitions in which civilians argue that courts deciding their cases cannot guarantee a fair trial as a result of court-packing or politicised selection.[12]

The engagement of the CJEU is even more troublesome, since the only possible legal route targeted judges can employ to achieve an invalidation is *the preliminary ruling procedure*, in which the CJEU interprets EU law or its compatibility with domestic norms. The national institutional structure or separation of powers, however, does not belong under the umbrella of EU-conferred competences; the CJEU was therefore able to adjudicate on political interferences in judicial independence only by significantly stretching its authority. At first, the CJEU used the concept of non-discrimination[13] to target a reduced retirement age for in Hungary (Kosař & Šipulová 2020; Belavusau 2013) and Poland (Halmai 2017; Zoll and Wortham 2019; Sadurski 2019). In the face of increasing pressure from domestic judges and the very lukewarm (and politicised) efforts of other EU institutions, the CJEU eventually started relying on Article 19 of the Treaty on the Functioning of the EU, which requires EU member states to secure effective legal protection in fields covered by EU law. In an overstretched analogy, the CJEU started arguing that a dependent judiciary no longer fits the requirements of this Article and found violations in dozens of cases related to Polish structural reforms,[14] as well as the organisation of the Romanian judiciary (Kosař and Kadlec 2023).[15]

Compared to both European courts, the Inter-American Court of Human Rights is in a slightly easier position. It has long established that rule of law issues and separation of powers

[10] ECtHR, judgment of 16 June 2022, *Żurek v Poland*; judgment of 28 October 1999, *Wille v Liechtenstein*, 28396/95.
[11] ECtHR, judgment of 6 July 2023, *Tuleya v Poland*; GC judgment of 23 June 2016, *Baka v Hungary*, 20261/12.
[12] ECtHR, judgment of 7 May 2021, *Xero Flor v Poland*; judgment of 22 July 2021 *Reczkowicz v Poland*; judgment of 3 February 2022, *Advance Pharma v Poland.*
[13] CJEU, *European Commission v Hungary*, C-286/12, judgment of 6 November 2012.
[14] E.g. CJEU, *European Commission v Republic of Poland*, C-791/19, judgment of 15 July 2021, *Commission v Poland*, C-204/21, judgment of 5 June 2023.
[15] CJEU, AFJR, C-83/19, C-127/29, and others, judgment of 18 May 2021.

questions fall under the ambit of the Inter-American Convention.[16] It also repeatedly stood up against interferences in judicial independence. In the case of the arbitrary removal of judges of the three high courts of Ecuador, including eight judges of the Constitutional Court, the Court found the violation in the form of irregularities in the selection and removal process.[17] It also extended the protection of independence offered by the Inter-American Convention to special prosecutors in the case of an arbitrary removal of the special prosecutor Sandoval in Guatemala.

All forms of resistance via initiating proceedings at supranational level, however, also have significant limitations. The ECtHR can rely on the Committee of Ministers which oversees the process of compliance with judgments, yet it has no "hard power" means to enforce it. The IACtHR does not even have such a specialised monitoring body and frequently faces the reluctance of member states to comply with those judgments that require structural policy changes. The CJEU is potentially the strongest supranational court as it has the institutional support of the European Commission. Yet again, the recent unfreezing of funds before Polish or Hungarian governments effectively implemented changes suggest that even the CJEU is often a hostage to various unrelated political negotiations.

A second type of aim judges pursue with their on-bench resistance techniques is *averting* the looming political attack by means of strategic decision-making. Generally speaking, courts can achieve this by either demonstrating their loyalty or raising the costs of political interference and forcing the executive to retreat. If they are powerful enough, they can even turn the averting into *a punishment* against the government and retaliate by means of pushbacks against policies in areas that are of importance to the government. In 2009 the Supreme Court of Pakistan enjoyed widespread support which allowed it to execute a strong pushback against the government which tried to disregard its judgments. The Supreme Court reopened several corruption investigations into the government and when the latter attempted to avoid them, the Court charged Prime Minister Gilani with contempt of court and disqualified him from holding elected office (Kureshi 2022). While political leaders will often feel motivated to tinker with the courts' composition, widespread judicial replacements increase the risk of judicial instability, and direct interferences in judicial independence are rather costly. Especially in a fragmented political context, apex courts can actually often negotiate the content of planned interferences in order to protect their standing (Perez-Linan 2014).

[16] IAmCthr, judgment on Merits, Reparations and Costs, 3 January 2001.
[17] IAmCtHR, judgment of 28 August 2013, *Camba Campos et al. V Ecuador*.

The most common example of such a tactic is the *pivoting*, which Caldeira identified on the basis of the US Supreme Court's answer to Roosevelt's court-packing plan (Caldeira 1987). Pivoting, which he describes as a jurisprudential retreat, suggests both the ability and the willingness of the court to be sensitive to the political atmosphere and to adjust its decision-making accordingly. In the US case, the Supreme Court strategically changed the course of its jurisprudence when it announced its decision in *West Coast Hotel v Parrish*, upholding the State of Washington's minimum-wage law (Shesol 2012, Calderia 1987). By doing so the Supreme Court overruled its (rather perplexing) precedent of *Adkins v Children's Hospital* and retreated from invalidation to a more hospitable approach to the New Deal. This judicial retreat became an important signal to the public (as well as to Roosevelt's political allies) that the Court's position was in fact very far from how the President originally presented it.

There is, however, a dark side to the pivoting tactic. Staton, for example, argues that as much as the public wishes to have socially responsive courts (and courts care about the public opinion; Marshall 1989), judges that act strategically are unlikely to gain legitimacy. Pivoting to appease the government comes at a considerable cost and judges are aware of that; therefore, they often defy the government even if they lack sufficient public support (Staton 2009). Nevertheless, the pivoting strategy does not have to take so stark a form as it did in *West Coast Hotel v. Parrish*. Many courts opt to use less dramatic departures from their previous case-law, typically relying on deference or self-constraint (some of the examples would be the minimalistic formal jurisprudence of the Slovak Constitutional Court under countries frozen authoritarian regime in 1990s, the Andean Tribunal of Justice when confronting the ideological schism between neoliberal Colombia and Peru and left-populist Bolivia).

A less controversial, albeit still risky, alternative is the *timing of decisions*. The strategically planned publication of high-profile judgments, closely watched by the public and media, can help courts to gather public support. Alternatively, courts can also *delay the issuing of decisions that are important for the government.* Judges can either withhold decisions in cases that are vital for the government's policy (typically involving state liability or taxes), postpone the assignment of certain cases from the docket, slow down their responsiveness, or strategically time the publication of decisions that are potentially harmful to the government's interests. The effect of strategic delay, especially in the economic area, comes very close to another aggressive averting strategy: the jurisdictional *pushback against the government*, i.e. the issuing of decisions harming the government's interests in various policy fields (Helmke 2010). An example of this strategy comes from India and concerns the behaviour of the

Supreme Court between the 1950s and the 1970s which, although restrained, struck down 128 pieces of legislation, and thus upheld the constitutionally protected fundamental right to property against the government's land reform and privatisation attempts. The Supreme Court's efforts, however, eventually led Indira Ghandi's government to pack it with loyal judges in 1975-1977 (Hilbink 2012). In 2002, Argentinian justices reacted to an impeding impeachment with a series of decisions which overturned the government's economic policy. The strategy was quite timely, given that the series of rulings came during the worst economic crisis in the history of the country and jeopardised not only the government's survival, but the economic life of the whole country (Helmke 2010).

It is worth noting that any openly strategic decisions increase the benchmark of justification courts need to pass in order to still be perceived as legitimate by numerous actors and audiences (Baum 2006). Epstein, Knight & Schvetsova propose that judges need to learn to identify *tolerance intervals of other actors* – presuming when to flex and when to shield their judicial review muscles (Epstein et al. 2001).

3.2 Off-Bench Resistance

Similarly to democratic resistance, strategies and techniques judges use against autocrats and backsliders are strongly conditioned by the form of the attack (Riedl et al. 2023). Judicial review, at domestic or supranational level, plays an important role in limitation of autocrats' space for manoeuvre, but it might also become futile if the incumbent manages to swiftly pack the high courts with loyal judges, or strip their jurisdiction. In many cases, judges go beyond their traditional decision-making roles and move the resistance off-bench.

Compared to judicial decision-making, off-bench resistance is much more complex and combines institutional capacities with relational perspective and ability of judges to, often informally, form alliances with judicial or non-judicial partners and use the networks they are embedded in to create a narrative of undemocratic attack. By its definition, off-bench resistance would therefore pursue the aim to either avert an imminent attack by increasing the costs and backlash against the political actor, or to retaliate and punish the attacker by delegitimising their position vis-à-vis the public.

One of the areas where off-bench resistance strategies appear is the judicial governance. Similarly to politicians, judges, as one of the self-governing bodies, can use their powers to manipulate the composition and ideological polarisation of the bench. For example, if the upcoming elections coincide with new judicial appointments, the soon-to-be-leaving judge(s)

can pre-emptively strategically resign (Castagnola 2018) or voluntarily transfer to a court of a different level. The rationale behind strategically timed decisions is two-fold: First, a judge may wish to make sure that his or her seat will be taken by a new judge with similar political and ideological preferences. Second, a judge can also try to appease the government that wants to retaliate against the court and tinker with its composition, offering the government a way to impact the bench without abusing the rules of the game. However, the relationship of strategic resignation to the rule of law is complicated, as many political actors also pressure judges into resignation (i.e. in a move opposite to judicial resistance) when they want to actively get a new empty seat on the bench to fill with their candidate (Kosař and Šipulová 2023).

Compared to judges, chief justices have much larger scope of governance-related strategies at their disposal. As jurisprudential, managerial and diplomatic leaders, they often have direct access to parliamentary debates and hearings related to judicial governance. This allows them not only to be seen and heard, but also to establish a potential networking alliance with political actors. Similarly, judicial councils, depending on their degree of collegiality and culture, give judges formal means of publicly denouncing the executive actors' actions. But high-risk *individual judicial activism* can also have a much more informal form. At the end of the 1990s, the High Court of Australia faced a political and medial backlash following its decision recognising the native right to land of the indigenous peoples. The mounting derogatory comments by politicians led the Chief Justice to write a private letter to the Prime Minister, which was immediately leaked and widely publicised (Kirby 1998). Similar professional assertiveness outside the courtroom is of particular importance in cases where political actors have limited formal avenues in which to assert their authority over the judges.

Next to individual activism, *organised judicial action,* most often carried out through judicial unions, can also be an effective voice in advocating judicial independence from political power. Judicial associations have access to important political networks. They can issue statements and communicate more easily with the media or the political opposition (Beers 2010). Organised judicial activism has long been history in Europe. Hilbink, for example, mentions the example of activist Spanish judges in the late Franco era, when courts of all levels refused to be politically subservient and challenged the abuses of the regime by seizing upon strategic opportunities (Hilbink 2012, 590; Popova and Beers 2020). In January 2020, Polish judges took to the streets in "A March of Thousand Robes," supported by their colleagues who travelled to Warsaw from France, Norway and the Czech Republic, to protest against the PiS's policies dismantling Polish judicial independence (Guardian 2021). Similarly, when the CJEU

held a hearing in one of the infringement cases against Poland, that hearing was attended by Dutch, Belgian and Turkish judges as a gesture of support for their Polish peers (Morijn 2020). After Netanyahu announced his court-curbing plan, Israeli judges successfully mobilised both judicial and academic networks on a global scale, gaining thousands of signatures on petitions labelling Netanyahu's proposals as anti-democratic and constitutionally abusive (Weiler 2023).

This demonstrates that organised judicial action can quickly grow to involve the *engagement of transnational judicial networks,* particularly in European setting. The effectiveness of transnational alliances depends on the level of institutionalisation of contacts between judges, as well as on the embeddedness of cooperation on the platform of regional (human rights) organisations. In September 2022 the Australian Law Council and Bar Association stood up in support of three senior New Zealand judges suspended by Kiribati President Maamau (the suspension followed the previous removal of Kiribati's Chief Justice). The recent court-curbing attacks and retaliation against protesting judges in Poland and Hungary have prompted large-scale activity on the European level. Many of the preliminary rulings targeting judicial independence in Poland and Hungary actually arrived from other member states' courts. The Network of Presidents of Supreme Courts of the European Union played a particularly important role. In 2013 the Network distributed a questionnaire to its members, inquiring whether it was possible to use the principle of mutual trust as a vehicle for supressing the fifth freedom of the European common market, the free movement of judgments, and exerting pressure on the rebelling Hungarian government. The first preliminary ruling question posed by the Irish High Court on whether Polish judiciary can still be considered as independent in the light of the EU law (and whether Irish courts can execute an arrest warrant in a good faith) was also first discussed in this forum during the Irish presidency of the Network. And not only that; the Network actively sought the help of Viviane Reding, the European Commissioner for Justice, Fundamental Rights and Citizenship in 2010 to 2014, adding to the pressure on the European Commission to act against Hungary. The European domestic courts did not stop there. In the aftermath of the controversial Polish Muzzle Law adopted by the PiS, which openly refused to comply with the CJEU's findings, the German District Court of Appeal in Karlsruhe refused to extradite a person sought by the Polish authorities, arguing that the Polish courts were no longer independent enough to guarantee a fair trial. Judicial networks also proved essential for Romanian judges, who managed to coordinate in an unprecedented manner and send the CJEU thousands of preliminary questions (Bercea and Doroga 2023),

which rang alarm bells on a hitherto under-monitored development in Romania's judiciary (Puleo & Coman 2023).

Nevertheless, the effectiveness of off-bench pressure is relatively short-term. It often triggers further political backlash, especially in regimes that are already actively backsliding from democracy. The Polish PiS, for example, reacted to protests organised by unions of judges with a specific provision in the Muzzle Law requiring judges to disclose their membership of any association, their functions in the NGO sector and their membership of any parties. Similarly, the government retaliated against individual judges who participated in demonstrations (Siedlecka 2020). Examples of governments prosecuting judges also come from Malaysia (Robertson 1988) and Ukraine, after several judges attempted to initiate a criminal investigation against President Kuchma (Budz 2019). Violence following resistance decisions is very common in Senegal, Venezuela, Guatemala, El Salvador and Uganda (Llanos 2015; Taylor 2014).

What judges often do in a similar scenario is to turn to press to medialise the attack and twist the public narrative in their favour. In the 1950s, the negotiation of the plan to establish the European Defence Community sparked a heated dispute between the German government and the Federal Constitutional Court, leading the government to a very confrontational policy and publicly issuing threats against the Court (Vanberg 2018, 333). The issue immediately filled the newspapers and the threats did not sit well with German public. Open criticism in the end forced the government to backpedal and retreat (Vanberg 2018, 333).

In Slovakia, the investigation into the murder of a young journalist and his fiancée in February 2018 stirred up the society and eventually helped to uncover a convoluted corruption network including the mafia, entrepreneurs, politicians and very senior judges. Coincidentally, in that very same year the Constitutional Court faced a large-scale change of bench, with nine out of 13 justices coming to the end of their terms. The government first tried to use the opportunity to pack the court with loyal people and secure some of the posts for its own members – including the then serving Prime Minister Fico. The public pressure and media coverage, however, prevented the government from doing so. In an unprecedented move, a local NGO prompted the three-day-long live streaming of candidates' interviews to the main square of the country's second largest city and a seat of the Constitutional Court (Steuer 2019).

Judges can exert pressure on the government also using softer tools. Their judgments serve more purposes beyond the judicial review. They also form the narrative, they have access

to data and evidence unavailable to media (particularly on the criminal activity of politicians) and they *document the attacks* and interpret their constitutionality. The success of this strategy however correlates with the ability of judges to *communicate with the media,* and use them to tell their stories and version of truth to the broader public (Stoutenborough & Haider-Markel, 41; Grosskopf & Mondak 2016). The exposure of judges to the media matters. It helps to translate and deliver the results of the courts' activity to the public, and to make them more visible and relatable (Grimmelikhuijsen & Klijn 2015). The first Czech Constitutional Court justice, Vladimír Čermák, one of the intellectual leaders of the Court after the 1989 Velvet revolution, became popular among Czech journalists for his practice of inviting a reporters who specialized in judicial politics to his office, briefing them on the reasons behind his rulings (Navara 2018). In early 2000s, the Special Court for Sierra Leone ('SCSL') became famous for its close cooperation with civic society actors. Aimed at both punishing the perpetrators of crimes committed during the bloody civil war and reconciling the deeply divided society, it went to great lengths to interpret the rulings to largely illiterate audience. The SCSL cooperated closely with broadcast media and NGOs, allowing streaming of hearings on local radio stations and supported publications of illustrated case reports from individual trials (Dougherty 2004).

The alliance with domestic political opposition is an important factor in the exertion of both direct and indirect pressure against attacking executives. The opposition pressure is particularly important in regimes with sufficient electoral competition, where executives still have to convince the its voters that the interference in judicial independence can be reasonably justified. For example, in 2016 Republicans in North Carolina attempted to use the Hurricane Matthew crisis to pack the Supreme Court of North Carolina with two new justices. The negative opposition reactions provoked further public attention which forced the Republicans to abandon their strategy, unless it could be proved that the Supreme Court judges were not able to meet the demands of their workload (Robinson 2018). However, in countries with too high partisan polarisation or fragmented dissent, the potential support of opposition alliance might be difficult due to coordination-dilemmas across ideological and representational differences (Riedl et al. 2023).

An important form of resistance can also be formed around alliance between courts and the civic sector. Frontal assaults on courts often trigger antipathy to the executive power (Taylor 2014). *Public riots* therefore increase the costs of political interference and may force the executive to reconsider its plan (Vanberg 2018). The role of the public's confidence in the courts' authority, legitimacy and independence has been widely documented (Caldeira 1986,

Gibson and Baird 1998, Vanber 2001). Ecuadorian president Gutierrez's removal in 2004 happened as a result of his court-packing attempt. Similarly, Honduran president Zelaya was ousted in 2009 after disregarding an important court decision. Pakistani president Musharraf faced a political backlash after he suspended chief justice Chaudrhy in 2007 (Shah 2014). Sometimes, public sector support targets judges in neighbouring countries. In response to developments in Poland, the Norwegian Court Administration in February 2020 withdrew from a generous programme of the EEA and Norway Grants (which had allocated around 70 million euros to the justice sector; Holmøyvik 2020). While in other sectors cooperation between Norway and Poland continues, the symbolic step was an important indicator of the "no-rule-of-law in Poland" argument and opened the door to other possible cuts and pressure.

The public does not support courts merely because it agrees with how they decide cases. On the contrary, it can often stand behind the courts despite that, simply because it feels that they are an appropriate institution for making such a decision (Gibson & Caldeira 2003, 2). Moreover, judges are aware of the role of public confidence and may sometimes consciously choose to pivot in order to preserve it (Vanberg 2018), as the public may potentially punish the court-curbing executive by causing it to lose an election.

Finally, the last time of alliance can be formed between the judges and academia (as we have seen, for example, in Hungary, where both actors were targeted by Orbán's curbing reforms). Legal scholars in particular have a strong say in debates on the constitutionality of interferences in judicial independence. However, alliance with academia comes with several caveats. First, scholars have much less access to the public than do the media, although their voice can be more credible. Second, compared to the alliance with media, the support of academia is less predictable, with less chance of judges actually soliciting it (Heydon 2018). To use again the Hungarian example, legal scholars initially offered Orbán not only a lot of support and legitimacy, but also expertise on how to rig the courts within formal lines of Hungarian constitution. Finally, there is an ongoing unresolved debate on whether academics and scholars should become active participants, or at least take clear positions, in or, on the contrary, remain objective and impartial observers who do not fuel political conflicts (Jakab 2020; Sadurski 2020; Khaitan 2022).

4. The Second Dimension: Motives of Resistance

The previous section showed an impressive portfolio of techniques judge under pressure have implemented in various jurisdictions. It is quite obvious that supranational legal framework and

strong judicial review plays a significant role in empowerment of European judges. Irrespective of the enforcement issues, it does narrow down the scope of measures politicians can use against courts and moderates the autocratic abusive constitutionalism. As a result, it seems that European judges respond to attacks differently and rely much more on structural capacities and invalidation via judicial review, while judges in Latin America, but mostly in Africa and Asia utilise more often the off-bench pressure and extra-judicial alliances. However, more comparative research on this and on the correlation between the type of the attacks on forms (and success) of resistance is needed.

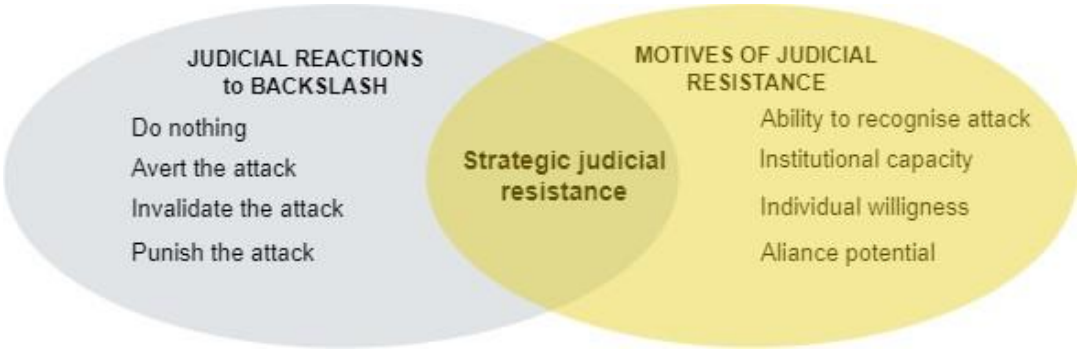
But even apart from the institutional framework, there are significant differences in how judges react, sometimes even within a single jurisdiction (Puleo & Coman 2023; Oder 2024). The agency of judges seems to be changing with the extent of risk (backlash) they are facing and potential gain, ideational or material, they can get from resistant or deferent behaviour.

The second dimension of the concept map of judicial resistance focuses on understanding how judges decide whether or not to resist and how they select individual techniques of resistance. It explores the motives and analyses the individual and collective agency of judges (Puleo & Coman 2023). It identifies factors that impact on judges' strategic considerations that result from a mix of rational and normative calculations (Claes & DeVisser 2012; Brinks, Levitsky & Murillo 2020; Dixon & Landau 2021, Popova & Beers 2020). Strategic resistant will depend on the combination of institutional capacities, available tools, reputation and position within the judicial hierarchy, as well as judges' normative preferences. This dimension reveals the necessary and sufficient conditions for strategic resistance. The scholarship that explores how judges form strategic decisions in general (Trochev 2018; Graber 2018; Tew 2023; Šipulová 2021; Puleo & Coman2023), how they understand key democratic concepts (Clarks 2015; Popova 2020,2021) and how they internalise judicial independence (Čuroš 2022; Šipulová & Spáč 2023) has so far identified the following conditions:

A) the ability to recognise the attack (soon enough) and identify it as potentially harmful for democracy,
B) the institutional capacity to implement a technique of resistance,
C) the willingness of individual judges to withstand political pressure, and
D) the ability of judges to build alliances.

The combination of these factors creates motives of judicial resistance, which then impact on the forms and aims of judicial strategic resistance (Figure 2).

Figure 2: The relationship between how judges react and what their motives of resistance are. Source: author.



A. The implementation of any reaction will depend on the ability of judiciaries to recognise a pending attack and its potential harmfulness to judicial independence, the rule of law or democracy in general. Of course, judges will also sometimes resist for less noble reasons, or they may resist changes that would actually strengthen, not weaken, democracy in the long run.

B. Institutional capacity describes the formal powers and means available to judges or courts. The majority of law scholarship focuses on institutional capacity as a safeguard against interference with judicial independence. The general expectation is that the existence of strong judicial review, supranational human rights commitments, a tiered constitution, eternity clauses, a bicameral parliament (and other veto players) reduces the chance or success of an attack. Depending on these capacities, judges may be able to keep their jurisprudential independence and show their opposition clandestinely or openly (Graver 2018). However, recent experience has also shown that formal tools are often short-lived and easily crumble under pressure (Scheppele 2019). Still, the existence of institutional capacity might significantly impact on the motivation of judges to resist the interferences (Šipulová & Kosař 2020).

C. The willingness of judges to resist depends on a plethora of social, political, economic and ideational factors. It interacts with institutional capacities and the autonomy of judiciaries. The model of selection and governance will impact on judicial culture and professionalism (Bobek 2008; Beers 2010; Barmes & Malleson 2018; Jakab 2020; Brinks & Levitsky & Murillo 2020; Popova & Beers 2020), including the degree of loyalty to the profession or the feeling of individual independence. Judges who enter the judiciary at a young age in deeply hierarchical career models might behave differently from judges with rich and varied professional experience (Šipulová & Spáč 2023). Socio-economic factors, salaries, family background or gender (particularly in countries with vertical gendered segregation) may play a role as well.

Moreover, willingness will also depend on ideational factors, such as commitment to democracy, the rule of law and the level of internalisation of principles of judicial independence (Bobek 2008; Popova 2020; Dixon & Landau 2021; Čuroš 2021; Šipulová & Spáč 2023). Lastly, we also need to acknowledge that willingness to resist will be used both by judges resisting interferences from non-democratic leaders, as well as judges of previous regimes who may try to resist transition back to democracy (Graver 2018; Kosař & Šipulová 2023).

D. The ability to build alliances is a crucial factor which helps judiciaries effectively to implement resistance strategies or exert pressure on the attackers (Trochev 2018; Trochev & Ellet 2014). Intra-judicial and transnational judicial networks have played some role in the organisation of judicial protests in Poland, Romania and Israel (Holmøyvik 2020; Bercea & Doroga 2023). However, judges and courts may also find strong allies outside judiciaries, in cooperation with the political establishment, opposition, academia, media or the civil sector (Trochev 2018; Steuer 2019; Šipulová 2021; Brett 2022). The alliance potential, however, depends on the level of public trust, and on how different actors perceive the legitimacy and independence of the judiciary. The emerging research on judicial resistance in Poland and Hungary suggests that the relationship between resistance and public trust in the courts is problematic, since the public perceives some strategic actions, such as jurisprudential pivoting, as evidence of the deep politicisation of the judiciary (Caldeira 1987; Cushman 2012; Claes & DeVisser 2012; Vanberg 2018; Halbfinger 2019; Krehbiel 2021; Driscoll & Nelson 2023). In some contexts, strategic resistance might actually reduce the future alliance potential of judiciaries, or lower public trust to the point where political actors will easily justify any attack (Gandur 2023). That means that while judiciaries depend on public trust in order to implement resistance techniques, the trust can increase or decrease as a result of certain resistance behaviour.

5. The Third Dimension – the Light and the Dark Side of Resistance

How successful are individual resistance techniques and what effect do they have on the quality of democracy and the rule of law? Research on democratisation generally acknowledges the role of courts in building and sustaining liberal democratic regimes (Epstein et al. 2001; Bermeo 2003; Gibler & Kirk 2011; Daly 2017; Staton & al. 2018; Jakab 2021). For a long time the argument that only resilient courts can fulfil their role in preventing democratic backsliding was taken for granted. While some judiciaries with long traditions of strong judicial review quickly crumble under the pressure (Scheppele 2018), in other hybrid regimes courts serve as “pockets

of resistance" (McDonnell 2017; Garoupa & Ginsburg 2011), constrain political actors and prevent them from further removing liberal and electoral elements of democracy.

However, there is almost no research tracing the long-term effect of individual examples of judicial resistance beyond the analytical description of judges' reactions or doctrinal interpretation of (mostly supranational) case law. For example, we know that European judges have at disposal more layers of protection than the rest of the world. Almost all European countries have strong formal safeguards of judicial independence: some form of judicial review, which is further guaranteed by the international oversight of Council of Europe and European Union, as well as relatively independent media and active civic society. Both European Courts, the CJEU and the ECtHR, have issued dozens of judgments that have found interferences in judicial independence in Poland, Hungary, Turkey, Ukraine, Russia, but also in the UK or Slovakia, incompatible with the rule of law and international commitments. Poland and Hungary have repeatedly been fined, forced to withdraw the contested laws, or change the regulation of judicial selection processes. Yet, what are the long-term effects of these safeguards and multiple episodes of judicial resistance? The hard data on democratic decline in Europe suggest that the position of the judiciary has not significantly changed for the better in either of the countries, nor has the executives stopped curbing the courts' power using new, increasingly cunning, methods.

The third dimension of the research on judicial resistance analysis should therefore pursue the temporal effects and compatibility of resistance techniques with the rule of law. From the short-term perspective, resistance seems to be successful when judges deter the political (or non-political) attack or force the executive to backpedal. Yet, very few cases are that easy. The former chief justice of the Hungarian Supreme Court, Baka, won his case in Strasbourg, which found his removal arbitrary and in violation of his freedom of expression. Both Hungary and Poland amended their laws on reducing the retirement age of judges. However, while we can argue that these steps helped to slow down Orbán's and Kaczyński's authoritarian erosion, they did not save the courts from further backlash. They did not even manage to reinstall many of the judges who had been removed by invalidated legislation (Kosař & Šipulová 2023).

Each resistance technique needs therefore to be evaluated in the mid-term perspective that goes beyond formal adjustment on the part of the political actor and looks at the general ability of the judiciary to withstand the accumulating pressure from the given political establishment. The mid-term approach allows us better to understand not only whether courts

can avert, invalidate or punish the attack on their independence, but also whether they can step in during the process of democratic backsliding and stop the gradual undoing or erosion of democratic institutions. Some examples like the resistance of the judiciaries in Pakistan (Shah 2014), Argentina (Holgado 2023) and Poland (after the 2023 elections) suggest that judges can act as islands of positive deviation, that they have a significant role in helping the political opposition, media or wider public to recognise that certain political activity is detrimental to and incompatible with democracy. As previously suggested, this mid-term perspective depends on how judges themselves understand the concept of the rule of law and democracy and their role in its protection.

Finally, the long-term perspective allows us to abandon the normative understanding of resistance as democracy-enhancing process and engage with both the its light and dark sides. Contrary to the position the majority of current scholarship takes on judicial resistance, its form and political context can actually have determinantal effect on the long-term democratic resilience. Let's unpack both factors in a more detail.

First, as Jakab (2021) and Graver (2018) aptly point out, some forms of judicial resistance might not always be compatible with the rule of law. Sometimes, the undoing of political interference cannot be achieved constitutionally, or, at least, without significantly stretching the written and unwritten principles of the rule of law. Out of the techniques identified in this paper, off-bench practices, although often very effective, are more vulnerable as they encroach on informal rules and limits on judicial behaviour in specific political contexts. In many countries, close contacts and negotiations between judges and politicians are considered unacceptable. There are strong arguments against revolving door practices (judges switching between career in the judiciary and politics), as they create the space for judicial corruption. Similarly, many jurisdictions increasingly narrow down the scope of extra-judicial activities allowed by ethics and disciplinary rules, prevent judges socialising with politicians, attorneys, prosecutors. In continental judicial culture, judges are often expected to not be publicly active, or condition communication with the media by official agreements of court presidents or judicial self-governance bodies. However, examples for non-European countries suggest that it is the embeddedness of judges in these networks that plays a crucial role in their ability to pushback against political interferences.

The long-term clashes with the rule of law go even further. Even those forms of judicial resistance, which formally align with the rule of law, can be perceived negatively by the public and harm courts in the long run. The expansive reading of (supranational) jurisdiction to review

problematic legislation, as we have seen with both European courts, oftentimes spurs backlash because of unconvincing and inconsistent reasoning (Kosař and Šipulová 2018; Leloup and Kosař 2023) and harms the long-term legitimacy and trust in courts. It also frequently encourages antagonistic rhetoric against "undemocratic" and "anti-majoritarian" judicial review. The ECtHR faced serious criticism for its underwhelming reasoning in cases like *Baka v Hungary, Grzeda v Poland* or *Grosam v the Czech Republic* even inside the academic circles. Turkish Constitutional Court is criticised for its cherry-picking approach and deference to some governmental policies, although it proves to also be an important mediator of regime's pressure on individual rights (Oder 2024). The public generally distrusts courts that resort to jurisprudential pivoting (Caldeira 1987). The inconsistencies and weak justifications are very dangerous as they are easily interpreted as politicisation, decrease the public trust in courts (Cushman 2012; Claes & DeVisser2012; Vanberg 2018; Halbfinger 2019; Krehbiel 2021; Driscoll & Nelson 2023) provide legitimacy to further governmental attacks in their independence (Jakab 2021; VanDijk 2021; Gandur 2023).

The second problematic dark side to judicial resistance relates to the perception that ascribes it a positive normative values. A lot of scholarship presents resistance as the sword and shield judges use against non-democratic politicians attacking judicial independence. However, majority of the techniques identified in section 3 can in fact be just as well implemented by those judges, who are loyal to non-democrats, who were illegitimately appointed to their offices, who legitimised autocratic policies, or were involved in extensive corruption and patronage networks. In other words, the dark side of resistance describes the ability of judges to utilize the concept of judicial independence to resist attempts of democratic politicians to purge and reform the judiciary, to open it to more diversity or reduce the dependency of rank-and-file judges on court presidents. The Polish 2023 parliamentary elections and return of democratic government opened the question of what to do with hundreds of judges illegitimately appointed by PiS, how and to what extent to undo the previous court-packing, how to invalidate those legislative changes that allowed courts to become Kaczyński allies (Bobek 2023 et al). Scholarship disputes what the renewal of independence means and whether the new government should remove everyone whose legitimacy is tarnished by unconstitutional appointment, or only sift out those judges who were loyal and actively supported the governmental policies. Neither of scenarios is without additional troubles, the first one disrupts the legal certainty of what to do with existing caseload of "illegitimate" judges, the second one requires an answer to a dilemma of how to prove which judges and in which cases decided in

line with old incumbents' policies (Kosař and Šipulová 2023b). To complicate matters even more, there is an ongoing discussion whether the changes carried out by PiS can even be undone constitutionally, given the extensive jurisprudence of European Courts that now increased the protection of judges against removals and subsumes them under individual rights conveyed by the European Convention.

The former Slovak chief justice Štefan Harabin is one of many examples of judges who successfully used the international arena as a protection of their own position. Harabin acted as a mouth-piece of semi-authoritarian government in 1990s, and later, as a chief justice of the Supreme Court and head of the judicial council became the most powerful gate-keeper of judicial selections in the whole country, surrounded himself with loyal judges and harassed disobedient ones with disciplinary proceedings. Yet, he also managed to successfully gain the support of EUN bodies and for a brief period of time even the Strasbourg court when the new democratic government attempted to impeach him (Kosař and Spáč 2021). The 2014 post-Maidan judicial reform in Ukraine, that attempted to dissolve the corruption networks existing within the judiciary, also demonstrated how far the informal influence of court presidents can reach. The post-Maidan government removed all incumbent court presidents and in an attempt to depoliticise the courts, gave Ukrainian judges an opportunity to elect new chairs in a secret ballot. However, the reform backfired when majority of judges simply reelected the ousted presidents to their previous offices, acted according to lines of deeply embedded hierarchical and loyalty relationships (Popova 2021).

In 2017, Supreme Court of Venezuela took an unprecedented step and decided to strip the opposition-led Congress of legislative power and to take over its authority. The controversial ruling was the culmination of the dispute between the Congress and the Supreme Court that had consistently blocked Congress' legislative proposals in retaliation for the opposition's attempts to remove president Maduro from office. The Court later reversed its ruling, mainly under pressure from the UN and the USA. The fight did not however end there. After the National Assembly retaliated by appointing 33 new judges to the Supreme Court, the mostly pro-governmental Court once again ruled that new appointments were illegal and ordered the civil and military authorities to carry out coercive actions.

These are just a few examples that hint that judicial resistance appears both within democratic and non-democratic regimes and does not always correlate with courts' political emancipation. Resistance is not a right, a duty or a virtue of judges. Instead, it needs to be

carefully examined against the backdrop of its relationship and effect on meta-values such as judicial independence, legitimacy and public trust in courts.

6. Conclusion

How judges react to political pressure? The marching judges in the streets of Warsaw created a strong visual image and spurred on a new extensive scholarship. However, the powerful imaginary might have also deformed the way how we think about judicial resistance. Resistance is not unique to judges in democratic backsliding context. It is also not uniform and does not operate on a binary axis of deference vs resistance. It is a complex phenomenon, dependent on many socio-economic aspects, structural safeguards, internalisation of judicial independence and commitment to the rule of law. Many judges under authoritarian regimes resist political pressures and many packed judges, contrary to political actors who wish to fix the bench in order to gain ideologically aligned courts, remain internally independent, although they do not openly rebel against the government. Judicial culture and collegiality plays a huge rule in judicial resistance – that is one of the reason why, for example, communist elites executed brutal purges that dismantled the whole professional group and exchanged professional judges for lay juries or newly trained "experts". In the new way of de-democratization we currently experience, steps like jurisdiction stripping or removals of individual petitions are too costly for political incumbents, forcing them to opt for less frontal and more nuanced attacks. This means that some of the attacks are more difficult to spot, but also give judges more opportunities to resist.

This article offered a new concept map on how to study different aspects to judicial resistance, in order to fully understand its dynamics and relationship to democracy and democratic resilience. It suggested that future research on judicial resistance should focus on three dimensions. The first captures the variety of techniques available to judges, on-bench (ie.. as a part of their official decision-making role) or off-bench, utilising their role in governance, as well as existing relational ties to other actors. The second dimension zooms in on motives of resistance. Judicial resistance is formed in careful cost-benefit considerations on the level of risk vs potential gains that is in for judges. It calls for a more research on motivations, and highlights the need to understand what judges see as threats to democracy, how they perceive their own role in democracy, what personal or institutional factors form their decision to stand up against the pressure. It also stresses that resistance can be purposefully selective and needs to be analysed in a wider context. Finally, the third dimension offers a suggestion on how to explore the effects of resistance. The short-term perspective allows us to merely understand the

result of a single decision against a single attack. However, its relationship to democracy and democratic resilience is visible only in the in the mid- and long-term perspective, ie. in the ability of courts to halt democratic backsliding (mid-level perspective) and to effects the resistance creates on the rule of law, public trust in courts and perceived legitimacy of the judiciary (long-term perspective). From this perspective, the article calls for a more nuanced research that would abandon the normative understanding of resistance as beneficial for democracy. Even unsuccessful high-risk resistance act might be important for the creation of certain judicial culture in society.

On the other hand, the research should also acknowledge the potential dark side of judicial resistance and the complex relationship of resistance to meta-concepts such as the rule of law, judicial independence, legitimacy or the public trust in courts. The dangers of the dark side of judicial resistance are two-fold. Many high-risk resistance decisions stretch the limits of the rule of law and might negatively impact the legitimacy of judges in the long run. Moreover, entrenchment of these techniques allows also non-democratic judges who were appointed by previous incumbents and stay loyal to their political orientation, to deter attempts of future democratic governments to execute large-scale judicial reforms.

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Study IV: Judicial Resistance: The Shield and the Sword of Informality

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Introduction

How do judges resist political interferences? The decline of democracy reached a new low in 2023 with over 72 percent of the world's population, or 5.7 billion people, living in autocracies (Keck 2023). Given the pivotal role of courts in constitutional democracies, courts swiftly appear among the prime targets of democratic backsliding. As an independent branch of power, the judiciary ensures horizontal accountability, and can impose sanctions on political actors that go well beyond the invalidation of legislation. Courts constrain executive and legislative power and can potentially hold abusers of constitutional norms to account (Šipulová & Kosař 2023). Decisions on highly salient cases also allow courts to shape public narratives. They can also mobilise people and potentially delegitimise political leaders.

Therefore, political leaders across regimes find it hard to resist the temptation to align courts more closely to their own interests (Kosař & Šipulová 2023; Holgado & Urribarri 2023; Daly 2022). In just the last decade, sinister practices have led to the capture of numerous national judiciaries (Halmai 2017; Uitz 2015; Śledzińska-Simon 2018). Some of these were frontal attacks led by executives through techniques such as court-packing, jurisdiction stripping, or the monopolisation of judicial councils and selection committees to control future appointments and removals (Esen & Gumuscu 2016; Varol, Pellegrina & Garoupa 2017; Halbfinger 2023). Others appeared much more covertly and gradually due to clientelism or corruption both outside and inside the judiciary (Tsereteli 2023; Popova 2020, Pozas-Loyo & Figueroa 2018).

The backlash against courts and their independence provoked a full palette of reactions, from mass demonstrations by judges in the streets of Warsaw and Jerusalem to low-key support of illiberal constitutional reforms in Hungary and Turkey. Although the differences in the character and success of these reactions naturally attract scholarly attention (Tew 2022; Puleo & Coman 2023, Šipulová 2024), so far we lack comprehensive data that would allow us to understand judges' motivations to resist.

This chapter therefore represents an important addition to the emerging scholarship on judicial resistance as it shifts the attention beyond courts' decision-making to argue that judicial resistance far transcends on-bench practices. As with any actors, judges are embedded in various relational networks (Dressel 2023; Dressel, Urribarri & Stroh 2018; Dallara & Piana 2015; Trochev & Ellett 2014; Baum 2006). How do these networks stand against democratic erosion, and how do extra-judicial activities both within and outside of courts augment existing formal safeguards?

Building on examples from recent attacks against domestic courts, this chapter shows that even courts embedded in strong systems of constitutional review and supranational commitments rely heavily on informal practices operating across intra-judicial (among domestic or foreign judges) and extra-judicial (contacts with media, politicians, academics, etc.) networks. It demonstrates that informal networks allow judges to plan strategies, communicate the dangers of erosion to the public, mobilise support, and exert pressure on actors that can actually force democratic erosion agents into compliance. However, the ability to build and utilise alliances depends on the participation of judges in networks tied by shared understandings of democracy, rule of law, or judicial independence.

The chapter proceeds as follows. First, it offers a conceptualisation of judicial resistance and discusses its different dimensions. Then it focuses on informal resistance. It differentiates informal practices into i) shield: those protecting the courts from unwarranted interferences, and ii) sword: those retaliating against eroding political actors, and discusses their effects.

1. What is judicial resistance?

In the last couple of years, interest in judicial resistance has naturally increased. Although judges have a set of techniques they can use to prevent, avert, or punish imminent political attacks (Šipulová 2021; 2024), so far we have only very limited understanding of how, when, and with what success they use them. Do judges act strategically? How do they react to different attacks?

The empirical evidence suggests that judicial reactions range from passivity to active attempts to punish the attacker. Some of these reactions are incidental, others are formed by strategic considerations. The agency to resist is driven by different individual and collective motivations: The ability of judges to recognise the attack and dangers it presents for democracy,

institutional capacity (such as existence of judicial review) and personal willingness, which may beinfluenced by family, economic, gender, and career considerations, as well as potential alliances within and outside the judiciary.

1.1 Typology of judicial resistance

Once under attack, judges may adopt one of four positions (Šipulová 2021; 2024). Firstly, they can decide to do nothing. They may not recognise the attack or its significance, or they may feel that there are no other options or fear the repercussions. They might even support the proposed political changes. Mental independence (Bobek 2014; Čuroš 2021) and the co-related conception of judges' professional roles also significantly shape strategic considerations.

If judges pursue active resistance, they form three main responses. First, if the government threatens courts with jurisdiction stripping, containment of the selection process, or court-packing, judges may seek to avert the threat by raising the costs and/or reducing the benefits of the attack, thus forcing the government to abandon it (Caldeira 1987; Perez-Linan & Castagnola 2016).

Second, a different path would be pursued by courts and judges already under attack, especially those that face legislative curbing and various techniques of abusive constitutionalism (Dixon & Landau 2021). In such scenarios, courts might seek to invalidate the attack, typically through constitutional review or petition to supranational courts such as the ECtHR and CJEU.

Third, courts that enjoy certain power might even attempt to punish the authors of attacks and force them to backtrack with strategically timed decisions on salient policies such as budget, social policies, taxes, and so on.

Apart from the major responses, judicial resistance can be further distinguished along two axes (Table 1). The first is on-bench vs off-bench resistance, whereby judges act within or outside of their judicial functions. The second is formal vs informal resistance, and captures the extent to which judges utilise their formal competences. This could be through decision-making or judicial governance or through practices and coordination within informal networks (Dressel 2023; Dressel, Urribarri, Stroh 2018).

Table 1: Typology of judicial resistance based on formal vs informal and on-bench vs off bench axes.

	Formal (competence-based perspective)	**Informal (relational perspective)**
On-bench	Annulment of legislation *embedded competence* *derived competence (activism)* Strategic pressure *pivoting* *timing* *jurisprudential pushback* Petition to supranational court	Strategically coordinated pressure *domestic* *transnational judicial networks* Creation of public narrative against actor *decision's reasoning* *press release / public statement* *social media statement*
Off-bench	Strategic resignation Official legislative comments Formal denouncement by JSG body	High risk individual activism (interview, protest) Judicial riots Creation of public narrative against actor Engagement of political opposition Engagement of academic support Engagement of public and civic society

Source: author.

The majority of formal resistance techniques revolve around on-bench decision-making, which is also the most frequently analysed by existing scholarship. By the essence of their role, courts endowed with judicial review competence can annul problematic legislation. Many apex courts have even derived the concept of unconstitutional constitutional amendments without explicit provision in the constitutional text (Lurie 2023; Dixon and Landau 2021). In the European setting, individual petitions as well as preliminary ruling proceedings gave judges a lot of leverage, particularly against the Polish and Hungarian governments (Halmai 2017; Jakab 2020; Kóvacs and Scheppele 2018; Leloup, Kochenov and Dimitrovs 2021; Bobek et al 2023).

Judges can also use their decision-making powers to strategically avert attacks, as was the case of the US Supreme Court pivoting its anti-New Deal jurisprudence against Roosevelt's court-packing plan (Caldeira 1987; Cushman 2012). Courts can also strategically time or push against the government in other reviewed policies.

Formal off-bench resistance, on the other hand, activates judges' governance powers and is most often manifested via chief justices, court presidents or judicial councils. Many of these actors have official roles in legislative processes, and direct access to the Parliament, when they can express their concerns and or denounce attacks as unconstitutional. Some judges

decide to pre-emptively resign to appease the executive or to allow the incumbent to nominate a new ideologically-aligned candidate in case the next government wishes to pack the court (Kosař & Šipulová 2023).

However, as I will show later, the effectiveness of judges' formal powers often also depends on informal networks (Dressel 2023): relationships of judges with on-bench peers and in-between different domestic and supranational courts, closeness of contact, reputation as well as ideational roles vis-à-vis the political opposition, media, civil society or the public (Bogea 2023; Blisa and Kosař 2018). Particularly with the use of media or academia, judges can exert significant control over the narrative of events.

From this perspective, the ability to build alliances is a crucial factor of judicial resistance (Trochev 2018; Trochev & Ellet 2014). Intra-judicial and transnational judicial networks (such as 'on- and between-bench' in Dressel, Urribarri and Stroh's terminology) played a role in the judicial protests in Poland, Romania, and Israel (Bercea & Doroga 2023). Judges and courts might also find strong allies outside of judiciaries, and cooperate with e.g. the political opposition, academia, the media or the civil sector (Trochev 2018; Steuer 2019; Šipulová 2021; Brett 2022). The potential for alliance-building, however, depends on the level of public trust and how different actors perceive the legitimacy and independence of the judiciary.

Emerging research on judicial resistance in Poland and Hungary suggests that there is a complex relationship between resistance and public trust in the courts, since the public perceives some strategic actions – such as jurisprudential pivoting – as the evidence of the politicisation of courts (Caldeira 1987; Cushman 2012; Claes & De Visser 2012; Vanberg 2018; Halbfinger 2019; Krehbiel 2021; Driscoll & Nelson 2023). In some contexts, strategic resistance might reduce the potential of judiciaries to build alliances or even lower public trust to the point where political actors feel emboldened and can easily justify attacks to the public (Gandur 2023). As such, while judiciaries depend on public trust in order to implement resistance techniques, this trust can also increase or decrease as a result of certain resistance behaviours.

1.2 Does the form of the political attack matter?

Why is it important to differentiate between formal and informal techniques of resistance? While legal scholarship engages extensively with jurisprudential doctrines of judicial independence, not all types of attacks are easy to undo via judicial review. Interference in

decision-making is often easier to invalidate than interference in judicial governance, particularly as it does not follow a single model, nor is it covered by broad international human rights agreements. The troubles of two European supranational courts to subsume the attacks againt the composition of judicial council under the elements of the right to a fair trial protected by European Convention on Human Rights, or EU Founding Treaties, attest to this (Leloup and Kosař 2023; Kadlec and Kosař 2023).

A lot of scholarship notes the immense portfolio of techniques that contemporary democratic erosion actors use to attack or capture courts. Politicians may wish to dismantle problematic courts (or prosecutors' offices) completely, as we have seen in Slovakia, Hungary, Ukraine and Russia. Slovak Prime Minister Fico, who was re-elected after severe corruption allegations, scraped the special prosecutor's office dealing with high-level corruption just four months after his return to power. Ukrainian President Yushchenko abolished the Kyiv City Administrative Court and set up two new courts instead (Trochev 2010). Vladimir Putin merged Russian commercial courts – generally considered more independent than the civil and criminal courts – with the rest of the judiciary, and replaced the Supreme Commercial Court with an Economic Collegium at the new 'super' Supreme Court (Solomon 2005).

Another strategy is the capture of courts to control and weaponise judges. This happens most often via tinkering with court compositions, such as court-packing, monopolisation of selection, delegated control, and direct politicisation of courts.

Finally, some political actors may wish to incapacitate and weaken the courts. They can achieve this in a variety of ways, such as hollowing out the courts by removing the most important competences. They can also paralyse courts by temporarily blocking their decision-making until the court is packed with loyal judges, by refusing to appoint new judges (for example, Slovakia in 2007, Czechia in 2003/2005, and Spain post-2018), cutting funding, or manipulating the docket by stacking the agenda with mundane or administrative disputes. They can also limit the access of individuals or certain cases to courts, such as Orbán did in case of Hungarian Constitutional Court. While a majority of these steps rely on law and 'abusive constitutionalism', sometimes politicians are able to achieve similar results informally.

What does the form of the pressure mean for judicial resistance? Independent domestic judges may invalidate frontal attacks and abusive legislation with relative ease. A more difficult scenario occurs when abusive governments enjoy parliamentary supermajorities and can push through constitutional amendments, and thereby increase the political and legitimacy threshold

for their invalidation (Dixon & Landau 2021). However, governments who seek to weaken or weaponise the courts often firstly aim to capture the bench of apex courts. If they can do so swiftly, they eliminate the risk of domestic judicial review as well as judicial backlash in other salient cases. Once the courts are captured, formal safeguards cease to work, leaving individual judges to rely on the supranational level. So far, the European experience shows that the speed and decisiveness of supranational actors is of essence, but frequently lags behind even though theoretically the system is armed with numerous preventative mechanisms (Kelemen 2023; Priebus & Anders 2023).

2. Judges' Networks and Resistance as a Sword

In 2013, Nick Barber presented a concept of self-defence mechanisms outside of the traditional separation of powers tools, which protect institutions from other constitutional bodies. 'Swords' are the positive self-defence mechanisms that provide institutions with a sanction or threat against the other power, while 'shields' protect the institutions (Barber 2013). Judicial resistance works similarly. However, as I show in this section, its implementation lies outside of the scope of checks and balances presumed by the separation of powers, and instead relies on informal practices and networks among as well as between judges and other actors (Dressel 2023).

This is not to say that formal safeguards of judicial independence do not matter. However, their practical implementation might be fragile. It requires the appropriate institutional setup – ideally one which recognises review and resistanceby-review as part of the judicial core function. But even if such a framework exists, its application is still conditioned by the willingness of individual judges to use it. The effect of resistance further depend also on sufficient incentives that would force political actors to comply. Informal resistance, on the other hand, utilises relational ties between judges across jurisdictions and countries, or ties between judges and the media, NGOs, or politicians. It can both strengthen the effect of formal resistance techniques as well as increase political and reputational costs for the attacking government, or it can effectively shield the courts from potential attacks. This section discusses the relational aspects of techniques that judges use to repel attacks, both on-bench (2.1) and off-bench (2.2). Section 3 focuses on preventive techniques that shield courts from potential attacks and build long-term resilience.

2.1 On-Bench Resistance and Informal Networks

A large segment of judicial resistance occurs on-bench via courts' decision-making, through invalidation of legislation that seeksto pack the courts, strip them of their jurisdiction, alter the selection processes, and so on. However, judges also heavily rely on less formal practices and rules. The collegiality among judges plays a huge role in their ability to exert pressure against attacks.

Once under pressure, judges are quick to resort to different strategies. A mix of rational and normative calculations inform strategic decision-making (Claes and De Visser 2012; Brinks, Levitsky and Murillo 2020; Dixon & Landau 2021; Popova & Beers 2020; Puleo & Coman 2023). These depend on a combination of institutional capacities and available tools, as well as judges' reputation, position, and normative preferences. For strategies such as jurisprudential pivoting, timing or intentional pushback against the government, judges need sufficient time to organise. The efficacy of their strategy largely depends on the strength of their collegiality, and shared role-conception. For example, if judges share an understanding of their role in protecting democracy, they will also be much efficient in organising and gathering support between the bench, at both the domestic or supranational level.

Perhaps the most astonishing example of between-the-bench alliance of judges comes from Romania. Since 2022, Romanian judges have engaged in unprecedented co-ordination to send hundreds of petitions to both European supranational courts to have them declare the interferences in independence of Romanian prosecutors and courts a a violation of international commitments (Doroga & Bercea 2023). The majority of these submissions were coordinated by Dragoș Călin, the co-president of Romanian Judges' Forum Association, who used his reputation and professional capital to build an impressive network.

Another striking example of high-risk individual judicial activism comes from Poland. In January 2020, judges from France, Norway, and the Czech Republic travelled to Warsaw to support their Polish colleagues in the March of Thousand Robes and protest against the Law and Justice Party's (PiS) dismantling of Polish judicial independence.[1] Similarly, Dutch, Belgian, and Turkish judges attended a CJEU hearing on the cases against Poland to support of their Polish colleagues (Morijn 2020). At the local level, the German District Court of Appeal in Karlsruhe also refused to extradite a person after the Polish government adopted the

[1] See *The Guardian*, 12 January 2020, Judges join silent rally to defend Polish justice, available at www.theguardian.com/world/2020/jan/12/poland-march-judges-europe-protest-lawyers

controversial Muzzle Law, disciplining judges who turned to European Court of Justice with a preliminary question on judicial independence issues. The District Court reasoned that Polish courts could no longer be considered independent as Polish judges could at any point be subjected to arbitrary disciplinary proceedings and sanctions, and hence could not guarantee a fair trial.[2] Similarly, Israeli Prime Minister Netanyahu's plans to pack the courts, politicise judicial council, intervene in the selection of judges, as well as strip the Supreme Court of some of its competences, triggered an outcry among judges, who immediately sought support among their European colleagues (Lurie 2023).

Many co-ordinated acts of judicial resistance are carried out through judicial associations, which can be effective in advocating for judicial independence against political opposition. Judicial unions typically have access to important political networks, while enjoying some official competences which allow them to issue statements and easier access to the media or political opposition (Beers 2010). Moreover, the alliances are seldomly random, but built on established networks and ideational communities. These networks have been cultivated for decades, typically with an aim of legal unification and increasing the legitimacy and authority of the CJEU and ECtHR.

A shared understanding of the importance of judicial independence – as well as recognising threats to it – emerged as a surprising side-effect of these networks, with immense impact on interferences in Poland, Hungary, and Romania. For example, the Network of Presidents of Supreme Courts of the European Union was crucial in sounding the alarm on developments in Hungary to other EU institutions. In 2012, after Prime Minister Orbán removed András Baka as Supreme Court Chief Justice after his parliamentary speeches criticised Orbán's proposed reforms, the Network proclaimed Baka as honorary president, and informally petitioned the EU Commissioner for Justice, Fundamental Rights and Citizenship, Viviane Reding, as well as members of the Venice Commission. Leading the charge were the Czech and Austrian chief justices, both of whom had first-hand experience with political attacks domestically. In the same year, the Network initiated a questionnaire among members to inquire whether it was possible to use the principle of mutual trust among EU member states to suspend

[2] German District Court push further previous ruling of CJEU in the LM (Celmer) case. See Ausl 301 AR 15/19 of 17 February 2020 www.docdroid.net/i7WqNpA/aufhebung-des-haftbefehls-wegen-hoher-wahrscheinlichkeit-der-zumindest-derzeitigen-unzulaessigkeit-der-auslieferung-wegen-verletzung-des-rechts-auf-ein-faires-verfahren-pdf#page=2

the fifth freedom of the European common market – the free movement of judgments – and exert pressure on the Hungarian government by inconveniencing large enterprises.

2.2 Off-Bench Resistance and Informal Networks

Judges however do not form networks only within the judiciary. They use judicial diplomacy to engage with a broader scope of actors and to gain support and legitimacy. If they decide politically salient cases, they also increase their communication and visibility in order to explain their findings to broader audiences (Baum 2006). Scholars propose that judges need to identify *tolerance intervals of other actors* – predicting when to flex and when to shield their judicial review muscles (Verdugo 2021; Epstein, Knight & Schvetsova 2001).

Chief justices, court presidents of apex and constitutional judges, are the most visible and engage in public and political statements most frequently. By the virtue of their function, they have much better access to the media and broader public. They are not only judicial but also political actors, as they participate on judicial governance. This however makes chief justices also more interesting and susceptible to pressure – as we have, for example, seen in the case of András Baka, the former Hungarian Supreme Court chief justice (Kosař & Šipulová 2018). Many executives, who wish to control the judiciary, suffice to change the chief justice and further rely on their informal control over the rest of the judiciary.

The alliance of *political opposition* can be a powerful tool and help judges to put the interfering government under pressure. This is particularly the case in countries, where electoral competition exists or where elites care about their international image and reputation. Opposition can help judges delegitimise the steps of an intervening government, increase the public support and make attacks very costly. It also raises the bar of justification executive needs to use in order to secure the support of its voters and convince them that the interference in courts' judicial independence is not only reasonable but vital. Public support to courts often correlates more with partisan alignment than with trust in judicial independence (Driscoll & Nelson 2023).

For example, in 2016, Republicans in North Carolina attempted to use the Hurricane Matthew crisis to pack the state Supreme Court with two new justices. The negative public response forced Republicans to abandon their strategy (Robinson 2018). Similarly, negative public reaction partly helped to shield the US Supreme Court from several attempts at court-packing, from Roosevelt's attempt in 1937 to Biden's desire to balance the ideologically-skewed bench (Caldeira 2012, Kosař & Šipulová 2023; Keck 2023). Compared to later

examples of court-packing, Roosevelt's plan was well-crafted, constitutional, and subtle, and proposed only to add one additional judge for every justice who had served on the bench for 10 years and who had not yet retired at the age of 70 (Caldeira 1987). Although the public supported the New Deal and was frustrated with the Supreme Court's decisions, they considered the interference as unacceptable (Shesol 2022). Ecuadorian President Gutierrez was removed from office in 1994 due to his court-packing attempt (Taylor 2014), and similarly in Honduras in 2009, President Zelaya was ousted after disregarding a Supreme Court order cancelling a referendum on another presidential term (Taylor 2014). Pakistani President Musharraf also faced political backlash after suspending Chief Justice Chaudhry in 2007 (Ghias 2010). The public support for courts may occur in spite of the court's decisions, simply because the public feels that they are the appropriate institution to wield such power (Gibson, Caldeira & Baird 1998).

The devil however lies in details. The role of public confidence in determining courts' authority, legitimacy, and independence has been widely documented (Caldeira 1986, Gibson, Caldeira & Baird 1998, Vanberg 2001), however, its effect is not straightforward.

Frontal assaults on courts may trigger antipathy for the executive (Heydon 2015, Taylor 2014), but may also result in a very lukewarm reaction, depending on how much public cares about the rule of law (Gutman, Kantorowicz & Voigt 2023), how much it trusts the public bodies in general, and how polarised it is. The experimental research from Poland and Hungary suggests that international criticism against Orbán and Kaczynski and their attacks on courts did not decrease the voters' support, majority of citizens formed their views more around partisan preferences than the views on judicial independence (Driscoll & Nelson 2023). To complicate matters even more, some types of judicial resistance can even decrease the public trust in courts (Caldeira 1987; Cushman 2012; Claes & DeVisser 2012; Vanberg 2018; Halbfinger 2019; Krehbiel 2021). Too strategic courts can reduce the future alliance potential to the point where political actors will easily justify any attack (Gandur 2023).

From this perspective, the media (and partly also academia) plays an essential role in communicating anti-democratic attacks and their repercussions to the public. They can report on court cases with their own independent agenda or on behalf of other actors. They create stories and increase visibility of courts. They can also shape the public perception – create an image of courts as representatives of public power, or image of judges as guardians of citizens against the public power. In the 1950s, negotiations on establishing the European Defence Community sparked a heated dispute between the German government and the Federal

Constitutional Court, during which the German government made open threats towards the Court (Vanberg 2001). These were immediately reported by the newspapers, and public criticism ultimately forced the government to retreat (Vanberg 2001).

3. Resistance as a Preventive Shield

Frequent political attacks against courts, in both democratic and autocratic regimes, have spurred complex discussions on how to increase public trust in courts, and how to raise the costs for executives who threaten their integrity. In the search of shields that would increase their resilience, many courts invest in better communication, transparency, or accessibility vis-à-vis the public. However, as I noted in the previous section, the effect of these efforts requires more research. Scholars have long debated whether courts are even equipped to attract public support due to their complicated jargon (Bobek 2023) and counter-majoritarian difficulty.

The relationship between the courts and the public depends on mediators (Urbánková & Šipulová 2018). From this perspective, building long-term social legitimacy of the judiciary requires complexity networks and close ties between judges and allies in the media, political opposition or academia. If allies can report threats to the public and boost public commitment to judicial independence, they can significantly constrain the executive's strategies and/or impose drastic political and reputational costs.

Courts take several steps in attempts to raise more resilient shields. *Transparency in decision-making* and court administration has recently gained dominance in studies on judicial legitimacy (De Fine Licht, Naurin, Esaiasson & Gilljam 2014; Michhener & Bersch 2013). It highlights the need to make decision-making processes more visible, accessible, and comprehensible to the parties of the proceedings as well as the broader public (Michhener & Bersch 2013). That means that rulings must be understandable and well-reasned, but also easily accessible to the public. The pressure on transparent decision-making stands out in high-profile cases. Transparency does not cover only the results of courts' decision-making, but also the processes or conditions of judicial government, such as the selection of judges as well as the organisation and workings of a court.[3]

The COVID-19 crisis brought significant challenges for judicial decision-making – particularly in terms of the access of individual, transparency, and closeness of individuals to

[3] Opinion no.10 (2007) of the Consultative Council of European Judges (CCJE) to the attention of the Committee of Ministers of the Council of Europe on the Council for the Judiciary at the service of society," adopted by the CCJE at its 8th meeting (Strasbourg, 21–21 November 2007).

courts – though many domestic courts adapted aptly to social media and online streaming. In April 2020, the US Supreme Court announced for the very first time that it would live stream an audio feed during the hearing of arguments in ten cases (Liptak 2007), which included the request of Congress to release President Trump's financial records. The breakthrough approach occurred after repeated rescheduling of hearings. Remote online hearings during the pandemic also occurred in Ireland, Romania, Brazil, and the UK.

Comprehensible decision-making is irrevocably related to the *communication with the media,* who then deliver the most important decisions to the public. Public exposure helps to translate and deliver the results of court activity to the public, and to make judges more visible and relatable. The first Czech Constitutional Court Justice Vladimír Čermák, one of the intellectual leaders of the court after the 1989 Velvet Revolution, became popular among Czech journalists for his practice of inviting reporters to his office to brief them on his rationale for decisions and for patiently responding to questions (Navara 2018). Another example is the Special Court for Sierra Leone. Aimed at both punishing perpetrators and reconciling a deeply divided society following a bloody civil war, it went to great lengths to deliver news to an audience with limited literacy. The Court cooperated closely with local broadcast media and NGOs to allow live streaming during individual trials, as well as issued case reports on what was happening, what crimes were being prosecuted, and their outcomes (Dougherty 2004).

Localisation of hearings is another strategy recently implemented by both domestic and international courts to bring justice closer to citizens. The UK Supreme Court decided to organise a hearing outside of its official London seat in a highly monitored and sensitive case, Lee v Ashers Baking Company Ltd and others. Mr Lee had ordered a cake with the inscription 'support gay marriage' to protest the ban on same-sex marriage in Northern Ireland, but the owners of the bakery refused to fulfil the order on religious grounds. The case attracted considerable media attention, which in part led the Supreme Court to abandon its London seat for the very first time since its establishment to hear the case in Belfast. Other instances include the Supreme Courts of Canada and Ireland adopting similar techniques to increase public confidence. Even the International Criminal Court (ICC), which has faced criticism for its alienated Hague-based execution of justice (Takemura 2023), attempted to organise hearings in respective African countries. The proposal was of particular importance as the ICC struggles with public confidence in post-conflict societies as well as the cooperation of political leaders and governments. However, security reasons and high costs ultimately forced the court to backtrack (Šipulová 2021).

Public confidence in courts is conditioned by cultural, political, and individual factors, including the characteristics and experiences of citizens (Mishler & Rose 1997; Salzman & Ramsey 2013). In countries with muted electoral competition or no popular rights culture, public confidence in courts is typically very low (Helmke & Rosenbluth 2009). In non-democratic countries with generally low standards of judicial independence and human rights protection, courts typically do not enjoy significant public confidence and are vulnerable to skilful politicking (Helmke & Rosenbluth 2009). A noteworthy example comes from Peru, when Fujimori's purging of the judiciary attracted an 89 percent public approval. Similarly in Bolivia, Morales' 'Towards a New Justice System' proposal named the judiciary as the most corrupt institution, which resonated well with citizens and attracted public support (Helmke & Rosenbluth 2009). Communication and increased transparency about courts also does not generate universal results. Instead, more knowledge and coverage of courts in developing democracies – where courts might not work as intended – can expose inadequacies and increase cynicism (Llanos & Weber 2021).

It is also important to note that communication with the public is not equally accessible to all judges. Similarly to communication with political actors, chief justices enjoy unique privileges due to their ideational and ambassadorial roles (Blisa and Kosař 2018), and it is mostly they who can initiate strategic pre-emptive dialogue with media, social media or the opposition (Bogea 2023). This is also one of the reasons why governments who aim to rig the courts oftentimes target chief justices first (Kosař and Šipulová 2024).

Conclusion

This chapter began by suggesting that courts are not merely passive recipients of political attacks, and instead employ a range of practices and techniques to ward off interference. However, these techniques are governed by a complex matrix of institutional design, timing, as well as alliances. Recent examples of attacks on judicial independence in Europe suggest that invalidation strategies – the most straightforward and constitutionally entrenched defence mechanism – have limited effect if: a) the courts are already captured by the executive; and b) judges cannot rely on relational ties to implement political and reputational sanctions on the executive via judicial review. Informal resistance techniques are often auxiliary and can help courts to bring attention to the interference. Informal networks allow judges to communicate their decisions against eroding acts to the public, as well as to exert pressure on allies that can actually influence democratic erosion actors. However, the effectiveness of alliances depends

on the participation of judges in networks that share an understanding of democracy, rule of law, or judicial independence.

Overall, courts can mitigate interferences from the executive by raising the costs and minimising the benefits of attacks, but they can do this only if they meticulously engage in communication and increase transparency to the public. The ability of judges to build alliances with international peers, the opposition, the media or the public depends greatly on the ability of courts to garner sufficient public trust. It could therefore be argued that long-term preventive strategies that increase public confidence and raise the cost of potential attacks should be considered part of judicial resistance.

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PART 3. THE ROLE INFORMAL JUDICIAL INSTITUTIONS IN DEMOCRATIC RESILIENCE

Study V: Decay or Erosion? The Role of Informal Institutions in Challenges Faced by Democratic Judiciaries

Šipulová, Katarína & David Kosař (2023). Decay or Erosion? The Role of Informal Institutions in Challenges Faced by Democratic Judiciaries. German Law Journal, 24(8): 1577-1595 (Q1 WoS; author's share 75 %)

A. Introduction: Courts in the Cycle of New Lows for Democracy

The decline of democracy[1] has affected young and unconsolidated, as well as long-established, democracies all over the world.[2] The 2023 V-Dem report noted that the global level of democracy in 2022 had returned to its 1986 value.[3] Over seventy-two percent of the world's population, 5.7 billion people, live in autocracy. Within the last two decades, the number of democratizing countries has dropped from forty-three to fourteen, while a tightening of regimes has occurred in forty-two states with forty-three percent of the world's population—compared to thirteen states in 2002. Moreover, the tempo of de-democratization is increasing. Just within the last year, the number of autocratizing countries has increased by nine.[4] The hope for the fourth wave of democratization, ignited by the Arab Spring in 2011, has been crushed, and a part of the third wave of democratization has been undone.

The dreadful numbers are a bad omen for international organizations that have invested a great deal of finance and capital in various state-building programs.[5] Liberal democracy, it

[1] For simplification purposes, we use the word democracy as an overarching label for liberal and constitutional democracies.
[2] In 2020, The Economist introduced the results of its Global Democracy Index with the title "Global Democracy Has Another Bad Year." *See Global Democracy Has Another Bad Year*, THE ECONOMIST (Jan. 22, 2020), https://www.economist.com/graphic-detail/2020/01/22/global-democracy-has-another-bad-year. In 2022, a new low for democracy followed. *See A New Low for Global Democracy*, THE ECONOMIST (Feb. 9, 2022), https://www.economist.com/graphic-detail/2022/02/09/a-new-low-for-global-democracy.
[3] 1978 in the Asia-Pacific region. *See* DEMOCRACY REPORT 2023: DEFIANCE IN THE FACE OF AUTOCRATIZATION 6, V-DEM INSTITUTE (2023) https://www.v-dem.net/documents/29/V-dem_democracyreport2023_lowres.pdf.
[4] *Id*.
[5] Christina Parau, *Explaining Judiciary Governance in Central and Eastern Europe: External Incentives, Transnational Elites and Parliament Inaction*, 67 EUR.-ASIA STUDS. 409 (2015); Linn Hammegren, *Do Judicial*

seems, cannot be easily anchored via institutional blueprints or global international law regimes.[6] Moreover, as many scholars recently noted, the character of the de-democratization process has changed dramatically.[7] Instead of the ruptures or theatrical coups d'état of the past, modern democracies die in slow, almost invisible processes,[8] while still very much committed to formal legality[9] or advocating the benefits of majoritarian democracy.[10]

This is not entirely surprising. Both Huntington and O'Donnell have long predicted that the major risks new democracies will face is not an overthrow, but a gradual weakening by elected leaders,[11] who will erode civil liberties and freedoms, and dismantle unelected safeguards of constitutional democracy.[12] Still, the extent and speed of the recent regression wave is troubling.

Legal scholars have recently developed several concepts to address this phenomenon, such as abusive constitutionalism,[13] abusive techniques of legal interpretation,[14] constitutional rot,[15] constitutional backsliding,[16] constitutional capture,[17] constitutional retrogression,[18] and autocratic legalism.[19] Political scientists do not lag behind and have employed myriads of concepts to describe the downgrading of democracy across hybrid as well as fully democratic

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Councils Further Judicial Reform? Lessons from Latin America (Carnegie Endowment for Int'l Peace, Working Paper, 2002).

[6] Andrew M. Moravcsik, *The Origins of Human Rights Regimes: Democratic Delegation in Postwar Europe,* 56 INT'L ORGS. 217 (2000).

[7] STEVEN LEVITSKY & DANIEL ZIBLATT, HOW DEMOCRACIES DIE: WHAT HISTORY REVEALS ABOUT OUR FUTURE (2018).

[8] Thomas Keck, *Erosion, Backsliding, or Abuse: Three Metaphors for Democratic Decline*, 48 L. & SOC. INQUIRY 314 (2023).

[9] Conor Casey & David Kenny, *How Liberty Dies in a Galaxy Far, Far Away: Star Wars, Democratic Decay, and Weak Executives*, 35 L. & LITERATURE 221 (2022); DAVID LANDAU & ROSALIND DIXON, ABUSIVE CONSTITUTIONALISM BORROWING (2021).

[10] BOJAN BUGARIČ & MARK TUSHNET, POWER TO THE PEOPLE: CONSTITUTIONALISM IN THE AGE OF POPULISM (2021).

[11] Samuel Huntington, *Democracy for the Long Haul*, 7 J. DEMOCRACY 3 (1996).

[12] Guillermo O'Donnell, *Democracy's Future: Do Economists Know Best?*, 6 J. DEMOCRACY 23 (1995).

[13] Daniel Landau, *Abusive Constitutionalism*, 47 U.C. DAVIS L. REV. 189 (2013).

[14] *See* LANDAU & DIXON, *supra* note 9.

[15] Jack M. Balkin, *Constitutional Crisis and Constitutional Rot,* 77 MD. L. REV. 147 (2017); Jack M. Balkin, *Constitutional Crisis and Constitutional Rot*, *in* CAN IT HAPPEN HERE?: AUTHORITARIANISM IN AMERICA (Cass R. Sunstein ed., 2018).

[16] Nancy Bermeo, *On Democratic Backsliding*, 27 J. DEMOCRACY 5 (2017).

[17] Jan-Werner Müller, *Protecting the Rule of Law (and Democracy!) in the EU: The Idea of a Copenhagen Commission*, *in* REINFORCING RULE OF LAW OVERSIGHT IN THE EUROPEAN UNION (Carlos Closa & Dimitry Kochenov eds., 2016).

[18] Nadiv Mordechay & Yaniv Roznai, *A Jewish and (Declining) Democratic State? Constitutional Retrogression in Israel*, 77 MD. L. REV. 244 (2017); Aziz Huq & Tom Ginsburg, *How to Lose a Constitutional Democracy,* 65 UCLA L. REV. 95 (2018).

[19] Javier Corrales, *The Authoritarian Resurgence: Autocratic Legalism in Venezuela*, 26 J. DEMOCRACY 37 (2015); Kim Lane Scheppele, *Autocratic Legalism*, 85 UNIV. CHI. L. REV. 545 (2018).

regimes, such as democratic regression,[20] democratic backsliding,[21] de-democratization,[22] democratic erosion, and the death of democracy.[23]

The terminological hive is not a mere language exercise. Scholars are employing these terms in an effort to understand the nature and so far less explored factors leading to the crumbling of democratic institutions: The incrementality, gradual emptying of formal institutions, and state inertia. A deeper view in the myriad of concepts hints that they build on empirical experience that, however, occurs on two different axes. The first axis differentiates between exogenous and endogenous factors leading to de-democratization. The second axis explores the agency of regime changes, understanding de-democratization either as deliberate steps of political actors relying on strong electoral majorities or unintentional deterioration of norms and values that underpin constitutional democracies.[24]

In this Article we do not aspire to solve the terminological battle nor to create a bulletproof causal sequence. While we see terminological debates as helpful, we also acknowledge that the intentionality of de-democratization is a loaded concept that will, in many instances, be almost impossible to prove empirically. Instead, we turn our attention to one particular aspect of de-democratization, the deterioration of judiciaries, and focus on the origin of informal processes that partake in the deterioration.

Judiciaries appear to be one of the first targets of de-democratization on both axes.[25] Political leaders across regimes cannot withstand the temptation to either weaken or align courts more closely to their own interests,[26] deliberately undoing democratic checks, or simply prioritizing short-term partisan benefits.[27] But, like other democratic structures, courts face challenges other than executive-led attacks. To complicate matters even further, recent scholarship has suggested that many of these challenges occur covertly, informally, or via the

[20] GERO ERDMANN & MARIANNE KNEUER, REGRESSION OF DEMOCRACY? (2011).
[21] David Waldner & Ellen Lust, *Unwelcome Change: Coming to Terms with Democratic Backsliding*, 21 ANN. REV. POL. SCI. 93 (2018). *See* Bermeo, *supra* note 16.
[22] Matthijs Bogaards, *De-democratization in Hungary: Diffusely Defective Democracy*, 25 DEMOCRATIZATION 1481 (2018).
[23] *See* LEVITSKY & ZIBLATT, *supra* note 7.
[24] András Jakab, *Informal Institutional Elements as Both Preconditions and Consequences of Effective Formal Legal Rules: The Failure of Constitutional Institution Building in Hungary*, 68 AM. J. COMPAR. L. 760 (2020); Christine C. Bird & Zachary A. McGee, *Looking Forward: Interest Group Legal Strategy and Federalist Society Affiliation in the United States Circuit Courts of Appeal*, 55 POLITY 389 (2023); Edit Zgut, *Informal Exercise of Power: Undermining Democracy Under the EU's Radar in Hungary and Poland*, 14 HAGUE J. ON RULE L. 287 (2022).
[25] *See, e.g.*, ANDRÁS SAJÓ, RULING BY CHEATING 66–80 (2021).
[26] David Kosař & Katarína Šipulová, *Comparative Court-Packing*, 21 ICON 80 (2023).
[27] *See* Keck, *supra* note 8.

abuse of existing constitutional norms. We show that the endogenous-exogeneous distinction implicitly invoked in academic debate is actually very helpful in understanding the role that informal judicial institutions play in de-democratization processes.

The core argument of this Article is that informal judicial institutions interact with democracy in two directions. The first one is endogenous and describes *the decay* of democratic judiciaries as a result of a long-term incongruence between formal and informal judicial institutions. Typical examples of endogenous informal influence are deeply running clientelist and patronage networks among judicial oligarchs, court presidents, and politicians in Georgia, Romania, Slovakia, or pre-2014 Ukraine. The internal tension between these informal institutions and formal rules creates alternate systems of behavioral incentives and eventually rendered the processes of judicial selection fragile and dysfunctional. The competition between alternate formal and informal systems of rules slowly emptied formal regulatory framework and led to its internal decay.

The second direction is exogenous and captures the gradual *erosion* of informal institutions that have positive effects on judicial democratic resilience. Typically, these are informal practices that limit the executive's discretion and insulate judiciaries from partisan politics. For example, various constitutional conventions require regional, demographic, or partisan proportionality in the selection of judges. On the one hand, at first glance, they might be criticized for lessening the merit-based character of selection processes, but, on the other hand, they also prevent political branches of power from easily capturing the process and packing courts with ideologically aligned judges. Similarly, the rule of seniority that some countries follow in selecting the chief justice increases the predictability of the system and reduces the discretion of executive actors.[28] Such auxiliary, informal judicial institutions rely on the deeper running commitment of elites to values behind the formal institutions. That makes them both strong—they are socially shared and accepted—and weak—they are easy to abandon or overrule by new legislation. Once eroded, the remaining formal institutions can be completely hollowed out.

These two processes, decay and the erosion of judicial institutions, should not be overlooked. They can originate from endogenous decay caused by internal tensions inside judicial structures – such as existence of two alternate systems of selection of judges, or from

[28] David Kosař & Attila Vincze, *Constitutional Conventions Concerning the Judiciary Beyond the Common Law*, in this issue.

exogenous, often non-consensually executed, erosion of positive informal institutions and constitutional conventions. While they are less visible, slower, and often unintentional as they may not even aim at de-democratization itself, they are as dangerous as frontal executive-led attacks on courts because they significantly increase the window of opportunity for politicians who wish to implement regime change and further downgrade the substance of democracy.

The Article proceeds as follows. Section B conceptualizes informal judicial institutions and de-democratization. Section C offers empirical examples of institutional decay and institutional erosion, discussing the relationship between formal and informal judicial institutions. Section D shows how agents of change can exploit decay and the erosion of informal institutions because both processes increase the window of opportunity for a regime change. Section E concludes.

B. De-Democratization and Informal Judicial Institutions

In this section, we explain the key theoretical concepts we work with and provide our synthesis of the existing literature. We first introduce what we mean by informal judicial institutions and how we understand their interaction with formal ones. Then, we synthetize the existing scholarship on the de-democratization of judiciaries. Finally, by using two concepts, decay of judicial institutions and erosion of judicial institutions, we place informal institutions in the de-democratization sequence and explain how they can either increase the window of opportunity for agents of a regime change or narrow it down and increase the resilience of democratic judiciaries.

I. Understanding the Judiciary is Incomplete Without Informal Institutions

If there was one common denominator of the de-democratization wave of the twenty-first century, it would be the widespread attacks on courts shielded by the veil of legality.[29] Both Viktor Orbán[30] and Jarosław Kaczyński[31] captured national judiciaries through a series of sinister reforms. Recep Erdoğan packed the Constitutional Court and persecuted any judges

[29] *See* Scheppele, *supra* note 19.
[30] Gábor Halmai, *From the "Rule of Law Revolution" to the Constitutional Counter-Revolution in Hungary*, *in* 2012 EUR. Y.B. HUM. RTS. 367–84 (Wolfgang Benedek & Florence Benoît-Rohmer eds., 2012); Renata Uitz, *Can You Tell When an Illiberal Democracy Is in the Making? An Appeal to Comparative Constitutional Scholarship from Hungary*, 13 ICON 279 (2015).
[31] Anna Śledzińska-Simon, *The Rise and Fall of Judicial Self-Government in Poland: On Judicial Reform Reversing Democratic Transition*, 19 GERMAN L.J. 1839 (2018).

deciding against his autocratizing policies.[32] Benjamin Netanyahu's recent coalition announced a widescale reform of the Israeli judiciary[33] and Prime Minister Narendra Modi's government stepped up its pressure on the Indian Supreme Court.[34]

All these examples show that authoritarian and populist leaders view courts as bastions of liberal constitutionalism and their enemies, and, therefore, go after courts quickly and resolutely.[35] Democracies are generally perceived as more resilient when strong judicial constraints on the executive power are present, and when democratic institutions were strong in the past.[36] The sanctions courts can inflict on political actors go well beyond the constitutional review of legislation or criminal prosecutions. As a branch of power, the judiciary serves as a check on two political powers, constrains the executive, and can potentially hold abusers of constitutional norms to account. Moreover, courts may also shape political narrative, do important fact-finding work, and interpret the stories to the public. They can mobilize people and potentially lower or delegitimize the rhetoric of political leaders.[37]

Yet, the swift capture of the judicial branch across several jurisdictions[38] has shown that formal structures of democratic judiciaries dismantled surprisingly easily once the struggle became real.[39] However, some scholars have recently pointed out that informal institutions could also have contributed to the rapid decay in the judiciary.[40] The resurrection of the

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[32] Ergun Özbudun, *Turkey's Judiciary and the Drift Toward Competitive Authoritarianism*, 50 INT'L SPECTATOR 42 (2015); Berk Esen & Sebnem Gumuscu, *Rising Competitive Authoritarianism in Turkey*, 37 THIRD WORLD Q. 1581 (2016); Ozan O. Varol, Lucia D. Pellegrina & Nuno Garoupa, *An Empirical Analysis of Judicial Transformation in Turkey*, 65 AM. J. COMP. L. 186 (2017).
[33] Joseph H.H. Weiler, *Israel: Cry, The Beloved Country*, VERFBLOG (Feb. 1, 2023), https://verfassungsblog.de/cry-beloved-country/.
[34] Rohit Sarma, *On the Road to Censorship*, VERFBLOG (Mar. 3, 2023), https://verfassungsblog.de/on-the-road-to-censorship/.
[35] Pablo Castillo-Ortiz, *The Illiberal Abuse of Constitutional Courts in Europe*, 15 EUR. CONST. L. REV. 48 (2019).
[36] Vanessa A. Boese, Amanda B. Edgell, Sebastian Hellmeier, Seraphine F. Maerz, & Staffan I. Lindberg, *How Democracies Prevail: Democratic Resilience as a Two-Stage Process*, 28 DEMOCRATIZATION 885 (2021).
[37] Amanda Driscoll & Michael J. Nelson, *Are Courts "Different?" Experimental Evidence on the Unique Costs of Attacking Courts*, RSCH. & POLS., (2023).
[38] Kriszta Kovács & Kim Lane Scheppele, *The Fragility of an Independent Judiciary: Lessons from Hungary and Poland—And the European Union*, 51 COMMUNIST & POST-COMMUNIST STUDS. 189 (2018).
[39] David Kosař, Jiří Baroš & Pavel Dufek, *The Twin Challenges to Separation of Powers in Central Europe: Technocratic Governance and Populism*, 15 EUR. CONST. L. REV. 427 (2019).
[40] Guillermo A. O'Donnell, *Polyarchies and the (Un)Rule of Law in Latin America: A Partial Conclusion*, *in* (UN)RULE OF LAW AND THE UNDERPRIVILEGED IN LATIN AMERICA 303–37 (Juan E. Mendez, Guillermo A. O'Donnell & Paulo Sergio Pinheiro eds., 1999); Hans-Joachim Lauth, Director, Univ. Wurzburg Inst. Pol. Sci. & Socio., Paper Presented at the Conference on Informal Institutions and Politics in the Developing World, WCFIA, Harvard University (Apr. 5, 2002); Henry Farrell & Adrienne Héritier, *Formal and Informal Institutions Under Codecision: Continuous Constitution-Building in Europe*, 16 GOVERNANCE 577 (2003); Gretchen Helmke & Steven Levitsky, *Informal Institutions and Comparative Politics: A Research Agenda*, 2 PERSPS. ON POL. 725 (2004); Daniel M. Brinks, *The Rule of (Non)Law: Prosecuting Police Killings in Brazil and*

court-packing debate, long considered a constitutional hardball practice,[41] spurred debates about the looming democratic crisis.[42] The abandonment of the *sub judice* rule in the UK, where the executive did not stand by the courts whose public image crumbled under the pressure of tabloid media after the Brexit decision, challenged the courts in a way unheard of for decades.[43] Even in countries that have so far escaped democratic decline, such as Norway and Germany, scholars and politicians have started ringing the bell and calling for rigorous stress-tests in order to find and fix the loopholes in their court administration.[44]

The fixation on formalization as a panacea for looming de-democratization failed, though.[45] As with any social reality, the functioning of courts cannot rely solely on formal frameworks.[46] While in some countries well-designed formal institutions do not function well, owing to the existence of competing informal institutions,[47] in other countries not so well-designed formal institutions operate smoothly because of corresponding informal institutions that fill the gaps in formal rules and increase the commitment to their essence.[48]

Argentina, *in* INFORMAL INSTITUTIONS AND DEMOCRACY: LESSONS FROM LATIN AMERICA 201–26 (Gretchen Helmke & Steven Levitsky eds., 2006); *see* Jakab, *supra* note 24.

[41] David E. Pozen, *Hardball and/as Anti-Hardball*, 21 N.Y.U. J. LEGIS. & PUB. POL'Y 949 (2019); Jeff Schesol, *The Case Against Packing the Court*, THE NEW REPUBLIC (Oct. 14, 2020), https://newrepublic.com/article/159691/case-against-packing-supreme-court.

[42] *E.g.*, Ryan Doerfler & Samuel Moyn, *Democratizing the Supreme Court*, 109 CALIF. L. REV. 1703 (2020); Richard Mailey, *Court-Packing in 2021: Pathways to Democratic Legitimacy*, 44 SEATTLE UNIV. L. REV. 35 (2020); Thomas M. Keck, *Court-Packing and Democratic Erosion*, *in* DEMOCRATIC RESILIENCE: CAN THE UNITED STATES WITHSTAND RISING POLARIZATION? 141–68 (Suzanne Mettler, Robert Lieberman, & Ken Roberts eds., 2022).

[43] PIPPA NORRIS & RONALD INGLEHART, CULTURAL BACKLASH: TRUMP, BREXIT, AND AUTHORITARIAN POPULISM (2019); Robert C. Lieberman, Suzanne Mettler, Thomas B. Pepinsky, Kenneth M. Roberts, & Richard Valelly, *The Trump Presidency and American Democracy: A Historical and Comparative Analysis*, 17 PERSPS. ON POL. 470 (2019); Emily Ekins, *Poll: Democratic Support for Socialism Rises Under Trump*, CATO INSTITUTE (Sep. 25, 2019), https://www.cato.org/blog/poll-democratic-support-socialism-rises-under-trump; Mark Tushnet, *Varieties of Populism*, 20 GERMAN L.J. 382 (2019).

[44] Eirik Holmøyvik & Anne Sanders, *A Stress Test for Europe's Judiciaries*, 2020 EUR. Y.B. CONST. L. 289; Michaela Hailbronner, *Combatting Malfunction or Optimizing Democracy? Lessons from Germany for a Comparative Political Process Theory*, 19 ICON 495 (2021).

[45] Mathieu Leloup, *Supranational Actors as Drivers of Formalization*, in this issue.

[46] Andrea Pozas-Loyo & Julio Rios-Figueroa, *Anatomy of an Informal Institution: The "Gentlemen's Pact" and Judicial Selection in Mexico, 1917–1994*, 39 INT'L POL. SCI. REV. 647 (2018); Bjoern Dressel, Raul Sanchez-Urribarri & Alexander Stroh, *Courts and Informal Networks: Towards a Relational Perspective on Judicial Politics Outside Western Democracies*, 39 INT'L POL. SCI. REV. 573 (2018); Erica Harper & Yann Colliou, *Re-Imagining Customary Justice Systems: Interrogating Past Assumptions and Entertaining New Ones*, 15 HAGUE J. ON RULE L. 75 (2022).

[47] Maria Popova & Daniel J. Beers, *No Revolution of Dignity for Ukraine's Judges: Judicial Reform After the Euromaidan*, 28 DEMOKRATIZATSIYA: J. POST-SOVIET DEMOCRATIZATION 113 (2020); Andrea Pozas-Loyo & Julio Ríos Figueroa, *Informal Institutions and De Facto Judicial Independence: The Missing Link Towards Formal Efficacy*, 29 POLÍTICA Y GOBIERNO 2 (2022).

[48] Paul Pierson, *The Limits of Design: Explaining Institutional Origins and Change*, 13 GOVERNANCE 475 (2000); Scott Stephenson, *Constitutional Conventions and the Judiciary*, 41 OXFORD J. LEGAL STUDS. 750 (2021); Leonid Sirota, *Towards a Jurisprudence of Constitutional Conventions*, 11 OXFORD UNIV. COMMONWEALTH L.J. 29 (2011).

Informal institutions are sometimes described as the invisible social glue of political systems, filling in the gaps of formal regulation. They thus may either complement or compete with formal institutions[49] and, based on consonance with values and principles underlining existing formal frameworks, these informal institutions can either subvert the quality of democracy or help to protect it.[50]

It is important to note here that we draw on a standard political science approach to institutions which understands them as "the rules of the game."[51] Therefore, we also appropriate the definition of informal institutions as mostly unwritten rules and practices affecting the functioning of the judiciary, created outside of officially sanctioned channels,[52] and widely accepted as binding.[53] What makes research into informal institutions particularly difficult is their ubiquity, which manifests in three separate problems.

First, institutions are often neither fully informal nor fully formal. Instead, they operate on a sliding scale and simultaneously combine elements of formality and informality. For example, the communist parties of Central and Eastern Europe were formal institutional establishments with their own normative systems enforced via party discipline. Nevertheless, the amount of communist party interference with judicial decision-making rested heavily on informal channels and practices and the loyalties of court presidents to the party's apparatus.[54]

Second, informal institutions are less transparent. They are more nuanced than formal institutions and more difficult to spot. They can appear in the shadows of existing formal rules. At times, actors might not even be aware that certain behavior is incentivized by informal institutions, which might become visible only once they are put under stress. In turn, this makes them vulnerable to executive-led change.

Third, not all informal rules are necessarily institutionalized. Actors sometimes create informal practices which do not stick or fail to become widely accepted by other stakeholders. In order to capture these problematic dynamics, we use our triadic approach to the study of

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[49] *See* Helmke & Levitsky, *supra* note 40; Pozas-Loyo & Figueroa, *supra* note 47.
[50] Paul Pierson, *Increasing Returns, Path Dependence, and the Study of Politics*, 94(2) AM. POL. SCI. REV. 251–67 (2000).
[51] We are drawing on North—from 1997—and Helmke and Levitsky—from 2004—who define informal institutions as socially shared rules, usually unwritten, that are created, communicated, and enforced outside of officially sanctioned channels and widely accepted as official. *See* Helmke & Levitsky, *supra* note 40.
[52] David Kosař, Katarína Šipulová and Marína Urbániková, *Informality and Courts: Uneasy Relationship*, this volume.
[53] *See* Helmke & Levitsky, *supra* note 40.
[54] *See* David Kosař & Samuel Spáč, *Post-Communist Chief Justices in Slovakia: From Transmission Belts to Semi-Autonomous Actors?*, 13 HAGUE J. ON RULE L. 107 (2021).

informality,[55] and explore informal acts, informal practices, and informal institutions affecting the functioning of the judiciary. We discuss the distinction between informal acts, practices, and institutions in the introduction to this Special Issue.[56] By "functioning of the judiciary" we mean both judicial decision-making and judicial governance. Understanding these two definitions is crucial for analyzing the interaction between informality and two axes of de-democratization, to which we now turn.

II. Two Axes of De-Democratization

Even if we establish that informal judicial institutions play a significant role in the quality of democracy, the understanding of the interaction of informal judicial institutions and de-democratization is complicated by the influx of concepts. The existing scholarship has delivered rich case studies on global court-packing,[57] gentlemen's pacts in Mexico,[58] social exchange in China,[59] corruption networks in Ukraine,[60] and a lack of diversity in the composition of the Supreme Court in India,[61] but it lacks better conceptual clarity and coherence.[62] No research has so far comprehensively addressed the interactions between formal and informal institutions in European judiciaries and engaged with the impact of informal judicial institutions on the quality of democracy.

Nevertheless, the case studies do hint at certain key variables, although the direction behind their impact remains unclear: The speed of the process, the agency behind the process, and the origins of factors creating opportunities for de-democratization. Both Ginsburg and Huq and Levitsky and Ziblatt use the term "erosion" to capture the slow, gradual, and barely visible character of de-democratization.[63] Tom Daly also highlights the unintentional character of degradation in his conceptualization of democratic decay, which he understands

[55] David Kosař, Katarína Šipulová and Marína Urbániková, *Informality and Courts: Uneasy Relationship,* this volume.
[56] Ibid.
[57] *See* Kosař & Šipulová, *supra* note 26; Benjamin Garcia Holgado & Raul Sánchez Urribarri, *Court-Packing and Democratic Decay: A Necessary Relationship?*, 12 GLOB. CONSTITUTIONALISM 350 (2023); Keck, *supra note* 42.
[58] *See* Pozas-Loyo & Rios-Figueroa, *supra* note 46.
[59] Ling Li, *Political-Legal Order and the Curious Double Character of China's Courts,* 6 ASIAN J. L. & SOC'Y 19 (2019).
[60] *See* Popova & Beers, *supra* note 47.
[61] ABHINAV CHANDRACHUD, THE INFORMAL CONSTITUTION: UNWRITTEN CRITERIA IN SELECTING JUDGES FOR THE SUPREME COURT OF INDIA (2014).
[62] Johannes Gerschewski, *Erosion or Decay? Conceptualizing Causes and Mechanisms of Democratic Regression*, 28 DEMOCRATIZATION 43 (2021).
[63] Tom Ginsburg & Aziz Z. Huq, *How to Save a Constitutional Democracy*, *in* HOW DEMOCRACIES DIE (Steven Levitsky & Daniel Ziblatt eds., 2020).

as an "incremental degradation of the structures and substance of liberal constitutional democracy."[64] For Daly, democratic decay is often almost invisible backsliding,[65] which comprises a subtle, step-by-step hollowing out of democratic governance. Similarly, Sadurski understands decay, just like constitutional rot, as a slow degradation occurring almost as if without a plan.[66] However, Ginsburg[67] and Knauer[68] use the term "erosion" explicitly to describe the deliberate character of de-democratization, and Haggard and Kaufman reject erosion and decay because they want to emphasize the deliberate character of de-democratization.[69]

Holgado and Urribarri, as well as Kosař and Šipulová, use the example of court-packing practices to demonstrate that the same technique can be used both with an intent to instigate a regime change and with an intent "merely" to gain short-term partisan benefits.[70] Thomas Keck points out that some of the de-democratization occurs as a result of inertia, inability of the state to fulfill its role. The dysfunction of state democratic structures can be deliberate but can also result from neglect.[71] Casey and Kenny argue that the failure of decaying democratic institutions follows from the bureaucracy's dominance over the political executive, sclerotic inaction,[72] or corruption, but also obsession with formalistic legality.[73] Gerschewski acknowledges gradual institutional change and uses it as a springboard which distinguishes endogenously caused decay—exhaustion and the gradual breakdown of institutions created by internal tensions[74]—or exogenously driven erosion—where democratic institutions are washed out by external, outside forces.[75]

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[64] Tom Gerald Daly, *Democratic Decay: Conceptualising an Emerging Research Field,* 11 HAGUE J. ON RULE L. 9 (2019).
[65] *Id*.
[66] WOJCIECH SADURSKI, POLAND'S CONSTITUTIONAL BREAKDOWN 12 (2019).
[67] Tom Ginsburg, *Democratic Erosion Without Prerequisites? Poland and the Two Liberalisms, in* CONSTITUTIONALISM UNDER STRESS (Uladzislau Belavusau & Aleksandra Gliszczynska-Grabias eds., 2020).
[68] *Id*.
[69] STEPHAN HAGGARD & ROBERT KAUFMAN, BACKSLIDING: DEMOCRATIC REGRESS IN THE CONTEMPORARY WORLD (2021); Stephan Haggard & Robert Kaufman, *The Anatomy of Democratic Backsliding,* 32 J. DEMOCRACY 27 (2021).
[70] *See* Kosař & Šipulová, *supra* note 26.
[71] *See* Keck, *supra* note 8.
[72] Paul F. Scott, *The "Publius Paradox" and the United Kingdom: Comments on Adrian Vermeule's 2018 Chorley Lecture,* MOD. L. REV. F. (2019).
[73] *See* Casey & Kenny, *supra* note 9.
[74] EXPLAINING INSTITUTIONAL CHANGE: AMBIGUITY, AGENCY, AND POWER (James Mahoney & Kathleen Thelen eds., 2010); Kathleen Thelen, *Introduction: Institutional Change in Advanced Political Economies*, *in* BEYOND CONTINUITY: INSTITUTIONAL CHANGE IN ADVANCED POLITICAL ECONOMIES 1–39 (Wolfgang Streeck & Kathleen Thelen eds., 2005).
[75] *See* Gerschewski, *supra* note 62.

It therefore seems that the scholarship on de-democratization, although not united in its terminology, can be organized on two axes. The first one focuses on the agency of actors, and the second on the origins of the causal forces behind de-democratization.

While the origins of causal forces have so far attracted very limited attention, the split between the scholars posited along the first axis is surprisingly large. The problem with the conceptualization of de-democratization through agency and intentionality is two-fold. First, empirically, it is almost impossible to prove, and, even if proved, the evidence might come too late to undo its effects.[76] Second, many empirical examples essentially suggest that intentionality is not necessary in order to achieve the very same effects by employing the very same strategies. Court-packing is detrimental to courts' independence and legitimacy, irrespective of whether actors implement it in order to overthrow the existing regime or to secure support for their future policies.[77] In other words, we can also argue that the autocratizing intent has a limited bearing on our understanding of the nature of de-democratizing processes. Instead, it is worth pursuing whether de-democratization appears outside of any agency—in other words, outside of the executive-led actions—which, however, is a question sufficiently covered by the second, origin-oriented axis.

For these reasons, we leave intentionality aside. Instead, we focus our attention on the origin of causal forces leading to the degradation of democratic structures. Building on Gerschewski's distinction between endogenous decay and exogenous erosion,[78] we use these concepts to explain two different processes, in which the interaction between informal and formal judicial institutions may negatively reflect on the quality of democracy. Informal judicial institutions may not seek to autocratize political regimes. Nevertheless, through their relationship with formal institutions, they step into the sequence of de-democratization and may open or close the window of opportunity for the agents of change, who seek to shift the regime further away from liberal democracy.

C. Decay and Erosion: Why Informal Judicial Institutions Can Lead to De-Democratization

De-democratization can result both from exogenous executive-led interference with the judiciary and from the internal inertia and dysfunction of judicial institutions. Looking at

[76] *See* SAJÓ, *supra* note 25, at 294–99.
[77] *See* Kosař & Šipulová, *supra* note 26.
[78] *See* Gerschewski, *supra* note 62.

empirical examples of courts in democracies under stress, we have identified two core directions in which informal judicial institutions interact with democracy, and the process of de-democratization in particular.

I. Decay of Democratic Judiciaries

The first one is endogenous and describes *the decay* of democratic judiciaries as a result of a long-term incongruence between formal and informal judicial institutions. As we explained in the previous section, all judiciaries contain both formal and informal institutions that interact with each other. If they are not aligned and coexist in long-term disharmony, they create incongruence which weakens the formal institutions. Decay here describes the internal process in which formal judicial institutions disintegrate and crumble down: As a result of incongruence, the formal rules experience internal tensions. If informal institutions are more effective and more widely followed, formal institutions are emptied, become ineffective and eventually also weaken the judiciaries, leading to their decay.[79] As we demonstrate below, the incongruence and existence of alternate regimes of rules is always dangerous. Although the scenarios where incongruence results from informal institutions with negative impact on democracy (such as corruption or nepotism), in principle, any long-term incongruence is dangerous for the stability of formal institutions and has the decaying potential.

How can this incongruence happen? Helmke and Levitsky, in their landmark typology of interactions between formal and informal institutions, identified incongruence in two scenarios, depending on whether the formal institutions are effective, which they understand as institutions that are functional and capable of solving problems of social interactions, or enhance the efficiency of public structures.[80]

If, on the one hand, formal institutions are still effective, then divergent informal judicial institutions will create incentives for actors to alter the substantive effect of formal rules without directly violating them. Helmke and Levitsky label such informal institutions as *accommodating*.[81] For example, the selection of judges in Paraguay is formally shared between the President, the Senate, and, in the case of the lower judiciary, the Supreme Court. The formal selection rules, however, fail to guarantee external judicial independence because judges who

[79] *See* Helmke & Levitsky, *supra* note 40; *see* Pozas-Loyo & Figueroa, *supra* note 46.
[80] *See* Helmke & Levitsky, *supra* note 40, at 728.
[81] Helmke & Levitsky, *supra* note 40, at 730.

attempt to act independently against the government are typically swiftly dismissed.[82] As a result, the formal institution regulating the selection of judges is still in place and technically effective. Nevertheless, contrary to its purpose, it does not strengthen the value of judicial independence because the behavior of judges is incentivized by alternative divergent informal practices.

If, on the other hand, formal rules are ineffective, *competing* divergent informal judicial institutions will create incentives for actors to behave in ways that are incompatible with both the spirit and the letter of formal rules.[83] The competitiveness is, however, nuanced and can lead to different scenarios that insert different sources of tension into democratic structures. A typical example would be corruption networks in the Italian judiciary and prosecutors' offices, together labeled as "magistrates," leading to the *Mani pulite* ["Clean Hands"] protests in the 1990s.[84] Similarly, the credibility of the Spanish judiciary suffers due to an informal practice of politicians who contact judges to discuss issues related to court cases or propose legislative changes.[85] This competing informal institution challenges the entrenched formal principle of judicial independence.

Informal networks among judicial oligarchs, court presidents, and politicians in Georgia, Romania, Slovakia, and pre-2014 Ukraine fall into this category as well. Ukraine, in particular, is an interesting example of a country having a competing informal judicial institution. Widespread judicial corruption created a deeply ingrained system of loyalty among judges and court presidents.[86] This resulted again in informal practices affecting the selection and promotion of judges, as well as informal case assignment to loyal judges. Such problems have been reported from Georgia as well.[87]

Similarly, in pre-2011 Hungary, the long-term criticism of the old communist constitution, detached from the new democratic regime, the poor effectiveness of the pre-Orbán

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[82] *See* Pozas-Loyo & Ríos-Figueroa, *supra* note 47, at 22.
[83] *See* Helmke & Levitsky, *supra* note 40, at 730.
[84] Simone Benvenuti & Davide Paris, *Judicial Self-Government in Italy: Merits, Limits and the Reality of an Export Model*, 19 GERMAN L.J. 1641 (2018).
[85] SOPHIE TURENNE, JUDGES AND JUDGING (forthcoming 2024). For more recent examples of an inappropriate "closeness" of Spanish apex court judges to politicians, see Joan Solanes Mullor, *Spain, Judicial Independence, and Judges' Freedom of Expression: Missing an Opportunity to Leverage the European Constitutional Shift?*, 19 EUR. CONST. L. REV. 271 (2023).
[86] Maria Popova, *Can a Leopard Change its Spots? Strategic Behavior Versus Professional Role Conception During Ukraine's 2014 Court Chair Elections*, 42 L. & POL'Y 365 (2020).
[87] Nino Tsereteli, *Constructing the Pyramid of Influence: Informal Institutions as Building Blocks of Judicial Oligarchy in Georgia*, in this issue. *See also* Nino Tsereteli, *Backsliding into Judicial Oligarchy? The Cautionary Tale of Georgia's Failed Judicial Reforms, Informal Judicial Networks and Limited Access to Leadership Positions,* 47 REV. CENT. & E. EUR. L. 167 (2022).

judicial council, and the professional solidarity of conservative communist-era judges created an opportunity for Viktor Orbán, when he came into power. Personal policies, such as the selection of judges or apex courts' chief justices, were foggy and nontransparent, leading to the establishment of various informal practices organized around collegiality and loyalty, which contravened the idea of meritocratic and transparent selection criteria.[88] Neither political actors nor judicial self-governance actors managed to amend the formal institutions that filled the system with too much arbitrariness. The Hungarian conservative legal elites initially backed Orbán's reforms because they wanted to undo liberal reforms of Orbán's predecessors—including the few informal institutions that filled in their gaps and contravened the ideals of an independent, transparent, and accountable judiciary. Because these were constitutionally entrenched, it was Orbán with his constitutional supermajority in the Parliament who finally offered them the chance to undo the liberal reforms.

Sometimes, however, the incongruence appears as a result of a scenario in which formal institutions are effective on the surface and complied with by actors who participate in them, but are not sufficient to inspire the commitment of actors to underlying democratic values, or fail to create the perception in the public that they lead to the strengthening of democratic values. In post-Maidan Ukraine, the public's distrust in the judiciary and in efficiency of internal judicial accountability mechanisms led to a situation where the public informally appropriated the role of the accountability actor and watchdog over the courts.[89] In terms of the expected outcome, both formal institutions and informal practices meant increasing judicial accountability.

Another interesting example comes from Slovakia. The original design of the Slovak judicial council was expected to create a council composed of a mixture of judges and politicians. The formal institution, however, regulated merely how many seats should be elected by the judiciary and the political branches without explicitly specifying from which pool of candidates each branch is supposed to elect its members of the judicial council. The formal institution implicitly expected that each branch would elect agents from its own professional group—in other words, judges would elect judges, and political actors would elect either politicians or lay people having similar political preferences. This assumption did not work out. Instead, an informal practice of electing judges appeared across all principals, including

[88] Attila Vincze, *Schrödinger's Judiciary—Formality at the Service of Informality in Hungary*, in this issue.
[89] Serhii Lashyn, Anastasia Leshchyshyn, & Maria Popova, *Civil Society as an Informal Institution in Ukraine's Judicial Reform Process*, in this issue.

politicians. This resulted in a very homogenous judicial council from the professional point of view, packed with judges. This practice not only conflicted with the intention of the constitution-makers, who wanted to have the different voices inside the council, but also reduced the perceived independence of those judges who were elected by political actors.[90]

These examples already hint that the incongruence does not result only from informal institutions with *negative* effect on judiciaries. In theory, even incongruence between a formal institution that contradicts values pursued by democratic judiciary and an informal institution, which attempts to rectify and strengthen judicial independence can be harmful. A dense concentration of alternative regimes of rules might lead to chaotic compliance decrease the public trust in formal institutions, and ability of actors to commit to them in the long-term perspective.

Finally, sometimes formal institutions experience decay outside of any incongruence, simply because they are ineffective and are not tied to any other informal institution or practice that would attempt to fill in their gaps. In Spain, the renewal of the Judicial Council has been pending since 2018 because the Parliament has yet to appoint twenty members, twelve judges, and eight jurists, which should happen by means of a three-fifths majority. The supermajority rule, however, requires the agreement of the two major political parties, the Socialist Party PSOE and the Popular Party, which has led to a stalemate.[91] The current judicial council hence reflects the previous conservative majority in the Parliament of 2013.[92] The head of the Council and one of the judicial members have already resigned from their posts due to unsustainable gridlock.

II. Erosion of Democratic Judiciaries

In the previous Subsection, we described the decay of democratic judiciaries which involves internal disruptions inside judicial structures due to the tension created by the incongruence between formal and informal institutions. In this Subsection, we analyze the *erosion* of democratic judiciaries which describes a different process, in which the informal institutions

[90] Samuel Spáč, Katarína Šipulová, & Marína Urbániková, *Capturing the Judiciary from Inside: The Story of Judicial Self-Governance in Slovakia*, 19 GERMAN L.J. 1741 (2018). Katarína Šipulová & Samuel Spáč, *(No) Ghost in the Shell: The Role of Values Internalization in Judicial Empowerment in Slovakia*, in this issue.
[91] *See* Aida Torres Pérez, *Judicial Self-Government and Judicial Independence: The Political Capture of the General Council of the Judiciary in Spain*, 19 GERMAN L.J. 1769 (2018). *See also* Bragado v. Spain, App. Nos. 53193/21, 53707/21, 53848/21, 54582/21, 54703/21, 54731/21 (June 22, 2023), https://hudoc.echr.coe.int/eng?i=001-225331.
[92] *See* Torres Pérez, supra *n.* 91.

with positive effects on judicial resilience are dismantled by external (extra-institutional) forces and gradually lead to the hollowing out of formal judicial institutions that are, on their own, not sufficient to keep the de-democratization at bay.

This group of informal judicial institutions typically contains institutions, practices, or constitutional conventions that fill the gaps in incomplete formal institutions, support them, or accommodate ineffective ones. For example, formal rules of merit-based selection often overlook deeper structural problems of societies like horizontal gender segregation[93] or lack of access of minorities to public offices. In some countries, constitutional conventions supplement formal rules with various requirements on proportionality—gender, social, regional, political opposition, and so on. These additional criteria do not necessarily contravene the spirit of the merit-based selection, but stratify it in a way which actually makes the process of judicial selection more robust and less susceptive to easy capture by one political actor. [94]

Such auxiliary informal judicial institutions rely on a deeper running commitment of elites to values behind the formal institutions. That makes them both strong—they are shared socially and accepted—and weak—they are easy to abandon or overrule by new legislation. Once eroded, the remaining formal institutions can be completely hollowed out. However, if they work well and embed democratic substance beyond the formal structures, they may close down the window of opportunity for agents of autocratization and provide an additional layer of resistance against them. A fragile equilibrium between the two determines the split between countries which manage to survive democratic attacks—often narrowly[95]—and rebound,[96] and those that succumb to democratic decay.

We opted for the term "erosion" because it allows us to highlight the exogenous factors and outside forces[97] standing behind interference with this category of informal judicial institutions. In the majority of cases these outside forces come from the executive and other political actors. The most discussed example of the removal of an auxiliary informal institution comes from the United States, where President Trump's appointments of conservative Justices Neil Gorsuch and Amy Coney Barrett to the Supreme Court met with stark criticism because

[93] Barbara Havelková, Marína Urbániková & David Kosař, *The Family Friendliness That Wasn't: Access, but Not Progress, for Women in the Czech Judiciary*, 47 L. & SOC. INQUIRY 1 (2021).
[94] David Kosař & Attila Vincze, *Constitutional Conventions Concerning the Judiciary Beyond the Common Law*, in this issue.
[95] Tom Ginsburg & Aziz Huq, *Democracy's "Near Misses"*, 29 J. OF DEMOCRACY 16 (2018).
[96] Tom Ginsburg & Aziz Huq, *The Pragmatics of Democratic "Front-Sliding*", 36 ETHICS & INT'L AFFS. 437 (2022).
[97] Marianne Kneuer & Thomas Demmelhuber, *Gravity Centres of Authoritarian Rule: A Conceptual Approach*, 23 DEMOCRATIZATION 775 (2016).

they allegedly violated the constitutional convention that in a presidential election year the Senate can confirm a Supreme Court Justice only with bipartisan support.[98]

The ongoing constitutional crisis in Israel also has deep roots in the slowly-built populist criticism of a too activistic Supreme Court.[99] In Israel the window of opportunity for populist leaders is arguably bigger, because there is a lot of informality in the governance of the judiciary. Unlike in Central and Eastern Europe, these informal judicial institutions were not competing with formal rules or replacing them, but rather filling in the gaps. This is laudable, but it has created a lot of blind spots, as informal judicial institutions with no support in law which are thus unenforceable are very easy to dismantle.[100] Recent attempts to embed these institutions via constitutional conventions have failed. For instance, in a relatively recent case in 2020, the Supreme Court of Israel decided that the informal practice of the Knesset [Parliament] to appoint at least one opposition member—as one of the two Knesset members in the nine-member Committee for the Selection of Judges—is not a binding constitutional convention that may be enforced in court.[101]

In Hungary, the removal of András Baka from office as the President of the Supreme Court was partly legitimized by the erosion of a long-existing informal practice of selecting the Chief Justice from among only judges with sufficiently long practice at Hungarian domestic courts.[102] Baka, himself having spent most of his judicial practice as a Judge of the European Court of Human Rights, did not fulfill this informal requirement.

Attempts to erode informal institutions are not always successful. If the participants in the institutions are sufficiently committed and autonomous and if they have internalized the values the informal judicial institution is protecting, they can withstand a certain amount of pressure. For example, Czech courts and judges have faced several attempts at political interference exercised via informal means. For instance, several judges of the Constitutional Court and the Supreme Administrative Court have alleged that the then President Miloš

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[98] Rivka Weill, *Court-Packing as an Antidote*, 42 CARDOZO L. REV. 2705 (2021); Ian Millhiser, *Let's Think About Court-Packing*, DEMOCRACY: J. IDEAS, Winter 2019, https://democracyjournal.org/magazine/51/lets-think-about-court-packing-2/; William G. Ross, *Presidential Commission on the Supreme Court of the United States: Testimony of William G. Ross*, THE WHITE HOUSE (June 20, 2021), https://www.whitehouse.gov/wp-content/uploads/2021/08/Professor-William-G.-Ross.pdf; Michael J. Klarman, *Presidential Commission on the Supreme Court of the United States: Court Expansion and Other Changes to the Court's Composition*, THE WHITE HOUSE (July 20, 2021), https://www.whitehouse.gov/wp-content/uploads/2021/07/Klarman-Testimony.pdf.

[99] ARMIN VON BOGDANDY, TRANSITIONS 2.0 (forthcoming 2023).

[100] Guy Lurie, *The Invisible Safeguards of Judicial Independence in the Israeli Judiciary*, in this issue.

[101] HCJ 4956/20 Movement for Quality Government v. Knesset (2020).

[102] Attila Vincze, *Schrödinger's Judiciary—Formality at the Service of Informality in Hungary*, in this issue.

Zeman's Chancellor had attempted to persuade the judges of these two courts to decide high-profile political cases in line with Zeman's preferences.[103] Yet, this attempt backfired because some of the contacted judges went public.[104] Similarly, Czechia witnessed several attempts to install executive-friendly chief justices, either through the dismissal of an incumbent Supreme Court President[105] or, more recently, by the preemptive appointment of a new President of the Constitutional Court well ahead of the end of the incumbent Chief Justice's term.[106] Nevertheless, the dismissed Supreme Court President fought back before the Czech Constitutional Court and won her reinstatement,[107] and the concerted pressure of virtually all constitutional lawyers forced President Miloš Zeman to abandon his plan to appoint a new Constitutional Court President prematurely.[108]

The majority of the examples we have mentioned here have described erosions, which were executed by political actors in attempts to fulfill their short-term policy preferences, obtain leverage, or increase their partisan gains. They were not necessarily aimed at initiating the cycle of de-democratization. However, their effect hollowed the remaining formal institutions to such a degree that it opened the window of opportunity to the next agents of change. That being said, we are aware that some of these acts that erode informal auxiliary institutions with positive effects on democracy can also be done in a deliberate attempt to undermine a democratic regime. The best example is perhaps the developments in Hungary and Israel, given that in both countries the executive openly advocates regime change towards an illiberal democracy.

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[103] *See* Ondřej Kundra & Andrea Procházková, *Mynář se pokusil ovlivnit vysoce postavené soudce*, RESPEKT (Jan. 6, 2019), https://www.respekt.cz/politika/mynar-se-pokusil-ovlivnit-vysoce-postavene-soudce; Renata Kalenská, '*Soudcova výpověď o Zemanově útoku na justici: Dával mi jasně najevo, jak máme rozhodnout, říká Baxa,* DENÍK N (Jan. 16, 2019), https://denikn.cz/54570/soudcova-vypoved-o-zemanove-utoku-na-justici-daval-mi-jasne-najevo-jak-mame-rozhodnout-rika-baxa/; Ondřej Kundra, *Mynář prozradil před poslanci o kontaktech se soudci víc, než chtěl*, RESPEKT (Jan. 23, 2019), https://www.respekt.cz/politika/hradni-pokus-o-ovlivnovani-soudcu-mynar-prozradil-vic-nez-chtel.

[104] DAVID KOSAŘ & LADISLAV VYHNÁNEK, THE CONSTITUTION OF CZECHIA: A CONTEXTUAL ANALYSIS (2021).

[105] *Id*.

[106] *Zeman o jmenování nového předsedy Ústavního soudu teprve rozhodne, čeká na analýzu*, IROZHLAS (Dec. 18, 2022), https://www.irozhlas.cz/zpravy-domov/milos-zeman-ustavni-soud-analyza-jmenovani-predsedy-soudce-rychetsky_2212181221_pik.

[107] Michal Bobek, *The Fortress of Judicial Independence and the Mental Transitions of the Central European Judiciaries*, 14 EUR. PUB. L. 99 (2008); David Kosař, *Politics of Judicial Independence and Judicial Accountability in Czechia: Bargaining in the Shadow of the Law between Court Presidents and the Ministry of Justice*, 13 EUR. CONST. L. REV. 96 (2017).

[108] Anna Fodor, *Fiala: Zeman Will Not Appoint Head of Constitutional Court*, RADIO PRAGUE INTERNATIONAL (Feb. 6, 2023), https://english.radio.cz/fiala-zeman-will-not-appoint-head-constitutional-court-8774306.

D. From Unintentional Processes to Agency: How Informal Judicial Institutions Change the Window of Opportunity for Regime Change

The processes of de-democratization are complex. Marianne Knauer proposed an explanatory causal mechanism,[109] which triangulates the sequence between agency, opportunity, and backsliding.[110] Informal institutions potentially affect all three of these changes. Agency describes the power to change the rules of the game, the intention to do so, and the ability to organize and attract followers. It often comes from systems where elites which arose from liberal elections lack deeper commitment to democratic values[111] or stop believing that democracy is an effective system that can resolve deep social cleavages and sufficiently represent their interests and those of their voters.[112]

Opportunity often arises out of the two processes of decay and erosion we described in the previous section. Long-term incongruence leads to institutions' internal decay, as it prevents actors from internalizing values essential for the substance of democracy. In doing so, incongruence undermines institutional checks and balances. The formal institutions are eventually either replaced or weakened and are paralyzed to the degree that can swiftly tip over the cycle of de-democratization.[113]

Finally, backsliding can be used to describe two different groups of political agents seeking to attack the judiciary. The first group attempts completely to abolish the court disliked by the erosion agent, while the second group keeps the existing courts in place but either weakens the courts or weaponizes them to its benefit.

I. Agency and Opportunity

Like decay, erosion can be a prequel to de-democratization as it leaves the formal institutions hollowed out. The formal frameworks remain, but they fail to trigger social changes with intended results. In the end, the system looks the same but is not in fact the same.[114]

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[109] She explicitly uses the term "democratic erosion" to mean intentional democratic decline. We forego it as the majority of scholarship, including our typology, understands erosion as a largely unintentional process.
[110] Marianne Kneuer, *Unravelling Democratic Erosion: Who Drives the Slow Death of Democracy, And How?*, 28 DEMOCRATIZATION 1442 (2021).
[111] *Id*.
[112] Wolfgang Merkel, *Is There a Crisis of Democracy?*, 1 DEMOCRATIC THEORY 11 (2014).
[113] Attila Ágh, *The Bumpy Road of Civil Society in the New Member States: From State Capture to the Renewal of Civil Society*, 11 POL. CENT. EUR. 7 (2015).
[114] Kim Lane Scheppele, *Autocratic Legalism*, 85 UNIV. CHI. L. REV. 545 (2018); *See* LEVITSKY & ZIBLATT, *supra* note 7.

As we have argued before, both processes, erosion and decay, often happen without a deliberate intention to dismantle the democracy. However, in this section, we demonstrate that they weaken democratic institutions and structures to such a degree that they are able to enlarge the window of opportunity for the agents of change to initiate democratic backsliding. Generally speaking, the window of opportunity is shaped by interaction between institutional safeguards—the "amendability" of the constitution, the number of checks and balances and veto points, the resilience of formal institutions, and the congruence between formal and informal institutions—and social safeguards—political culture, government cohesion, and the size of the legislative majority. In order to use it for change, agents typically proceed in five stages: They need to (1) recognize—or spot—the window and (2) locate it. Then, they must (3) measure the window, weighing their options, and (4) assess the potential costs of failure. If they recognize the window as sufficiently big, they (5) open it, execute their change, and close it.[115]

The Polish PiS (Law and Justice Party) has never enjoyed constitutional supermajority in the same way as the Hungarian Fidesz. Yet, it has utilized the relatively poor reputation of Polish judges and their disconnection with the people, as well as the unconstitutional attempt by the previous leaving government swiftly to pack the Constitutional Tribunal with liberal judges before the parliamentary elections.[116] Delegitimization, smear campaigns in public media,[117] and reputational attacks on courts also appeared in Israel as a prequel to political attacks on the courts.[118]

However, it is important to remember that informal judicial institutions may survive attempts at their erosion. In fact, informal judicial institutions actively help to increase the judiciary's resilience and effectively close or at least to narrow down the window of opportunity for an erosion actor. This might happen particularly if the informal institutions are so strongly embedded in society that they will survive even if the formal institutions are dismantled. Once informal practices are deeply entrenched and institutionalized, they are difficult to dismantle by

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[115] PHILIP A. WICKHAM, STRATEGIC ENTREPRENEURSHIP (2001).
[116] *See* Kosař & Šipulová, *supra* note 26; Lech Garlicki, *Disabling the Constitutional Court in Poland*, *in* TRANSFORMATION OF LAW SYSTEMS IN CENTRAL, EASTERN AND SOUTHEASTERN EUROPE IN 1989–2015 (Andrzej Szmyt & Bogusław Banaszak eds., 2016).
[117] *See Szanujemy Twoja prywatnosc*, TVP INFO (last visited Oct. 8, 2023), https://www.tvp.info/46255229/kasta. *See also* Anne Applebaum, *The Disturbing Campaign Against Poland's Judges*, THE ATLANTIC (Jan. 28, 2020), https://www.theatlantic.com/ideas/archive/2020/01/disturbing-campaign-against-polish-judges/605623/. *See also Analysis: Judging the Judges Takes Political Centre Stage*, TVP WORLD (Feb. 5, 2020), https://tvpworld.com/46515871/analysis-judging-the-judges-takes-political-centre-stage.
[118] David M. Halbfinger, *Why Is Israel's Justice Minister in an Ad for "Fascism" Perfume?*, N.Y. TIMES (Mar. 19, 2019), https://www.nytimes.com/2019/03/19/world/middleeast/ayelet-shaked-perfume-ad.html.

democratic and constitutional means. They become sticky and their elimination requires a drastic change in actors' behavior and beliefs.[119]

A fitting example is the strong informal bond between the Bench and the Bar, which may prevent attacks on the judiciary or even help to restore removed judges to office. We saw this most clearly in Pakistan after General Pervez Musharaff suspended Chief Justice Iftikhar Chaudhry.[120] Lawyers across Pakistan took to the streets and began boycotting all court proceedings in protest at the suspension. Under this pressure, backed by the Supreme Court of Pakistan, Chief Justice Iftikhar Chaudhry resumed his work in that office.

On the one hand, such informal judicial institutions need to be sufficiently transparent and recognized. On the other hand, if the divergent informal practices become too deeply institutionalized, their stickiness significantly complicates the successful establishment of new formal institutions in democratization processes. In this Section we discuss the scenarios in which political actors have successfully used the windows of opportunity to execute the de-democratization of judiciaries, once again relying on both formal and informal practices.

II. Forms of Attacks Against Courts

In general, agents using decay or erosion further to attack the courts follow two different paths. The first strategy, dismantling, is to abolish completely a given independent court which the erosion agent dislikes. The second strategy, capture, is to gain control over the existing court, turn it into an ally of an erosion agent, and keep it loyal to him.

The dismantling practice is rather rare though, at least in Europe, because it clashes with several layers of external safeguards provided by EU law and European Convention. One of the few examples within the EU is the Hungarian reform of the Supreme Court to *Kúria*, a step publicly presented as a pure symbolic return to the historical name of the institution. More specifically, Orbán used this reform as a cover for organizing sweeping retention elections and ousting his major critics, Chief Justice Baka and Vice-President Erményi, from the judicial leadership. It was, however, not a dismantling *per se* because Orbán did not abolish the Supreme

[119] Ezequiel Gonzáles-Ocantos, *Courts in Latin American Politics*, OXFORD RESEARCH ENCYCLOPEDIAS (Apr. 26, 2019), https://oxfordre.com/politics/display/10.1093/acrefore/9780190228637.001.0001/acrefore-9780190228637-e-1680; Popova, *supra* note 86.
[120] Shoaib Ghias, *Miscarriage of Chief Justice: Judicial Power and the Legal Complex in Pakistan under Musharraf*, 35 L. & SOC. INQUIRY 985 (2014).

Court but merely misused the reform to remove Baka from the office of Supreme Court President.

Ukraine and Russia witnessed full-fledged "court dismantling," though. Ukrainian President Yushchenko abolished the Kyiv City Administrative Court and set up two new courts instead.[121] Vladimir Putin merged Russian commercial courts that were generally considered more independent than the civil and criminal courts with the rest of the judiciary, and replaced the Supreme Commercial Court with an Economic Collegium at the new "super" Supreme Court.[122]

In the vast majority of cases, however, agents of change opt for more indirect and inconspicuous techniques constraining the courts while maintaining the facade of their independence. The attacks typically follow three different aims, which can be combined: To weaken the courts—to adopt reforms that severely reduce their powers—, to paralyze them—to temporarily render the decision-making of the court impossible, for example, by not appointing new judges—, or to weaponize the courts—to turn them into government's enablers, rubber-stamping decisions in the government's favor. While the dismantling of judicial structures relies mostly on formal frameworks, these three forms of court capture combine formal and informal acts and practices.

Weakening courts relies mostly on formal practices and acts, such as jurisdiction stripping, reducing competences, or limiting access to the court, and can target both courts and judicial governance bodies, such as judicial councils or selection and appointment committees. If the agents of change cannot rely on legislative supermajorities or high electoral support, they might opt for more covert and indirect techniques. This was the case with Hungary, where Orbán pushed through a constitutional amendment and prohibited the Hungarian Constitutional Court from reviewing any legislation with budgetary effects.[123] Jurisdiction-stripping has long been debated also in Israel, where populist ministers fed the public with criticism of a too-activistic Supreme Court which had lacked democratic accountability for several years.

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[121] Alexei Trochev, *Meddling with Justice: Competitive Politics, Impunity, and Distrusted Courts in Post-Orange Ukraine*, 18 DEMOKRATIZATSIYA 122, 135 (2010).
[122] *See, e.g.*, William Partlett, *Judicial Backsliding in Russia*, JURIST (Sept. 30, 2014), https://www.jurist.org/commentary/2014/09/william-partlett-russia-reform/. *See also* Kathrin Hille, *Putin Tightens Grip on Legal System*, FINANCIAL TIMES (Nov. 27, 2013), https://www.ft.com/content/a4209a42-5777-11e3-b615-00144feabdc0.
[123] Nóra Chronowski & Márton Varju, *Two Eras of Hungarian Constitutionalism: From the Rule of Law to Rule by Law*. 8 HAGUE J. ON RULE L. 271 (2016); Gábor Halmai, *From the ''Rule of Law Revolution'' to the Constitutional Counter-Revolution in Hungary*, 2012 EUR. Y.B. HUM. RTS. 367.

Increasing court fees or abolishing individual petitions will also significantly constrain courts' decision-making.

Some of the practices leading to the hollowing out of courts are quite costly for actors attempting further to de-democratize the judiciary. The Polish government, for example, attempted simply to ignore rulings of the Constitutional Tribunal that found some of the government's steps unconstitutional. Kaczynski's government simply decided not to publish problematic rulings, limiting both the legal and political impacts of the Tribunal's judgments. The Czech government, otherwise an outlier among those of CEE (Central and Eastern Europe) countries in demonstrating its solid score of compliance with international law, keeps revisiting international criticism for the non-implementation of the ECtHR's judgment on the segregation of Roma children. Nevertheless, such explicit pushback against courts brings high reputational costs for the governments.[124]

Paralyzing courts most commonly occurs in countries where erosion actors fail to pack the courts with their own candidates. Instead, they have to adopt the second-best strategy and temporarily block courts from decision-making, until the erosion actor is able to control them via the politics of loyalty and fear. Compared to weakening the courts, paralyzing mixes more elements of formal and informal practices. The most common type of paralyzing is the starvation of the courts by refusing to select or appoint new judges and leaving too many vacancies open. This technique is particularly damaging for courts with high quora, as it can very quickly impair their ability to adjudicate in plenary session. For instance, in 2007, the Slovak parliament thwarted the selection of new constitutional justices by not submitting the formally required number of candidates to the President of the Republic. In turn, the Constitutional Court was left with only four out of thirteen justices for almost a month.[125] In Czechia, President Václav Klaus refused to nominate a new candidate as a constitutional justice after the upper chamber, the Senate, rejected several of his candidates in a row, severely restricting the court's *modus operandi* in 2003–2005.[126] The paralyzing is obviously not exclusive to courts and targets also other judicial bodies, such as judicial councils which are often the aim of political actors. It is worth noting that sometimes, paralyzing can appear as a

[124] Hubert Smekal & Katarína Šipulová, *DH v Czech Republic Six Years Later: On the Power of an International Human Rights Court to Push Through Systemic Change*, 32 NETH. Q. HUM. RTS. 288–321.
[125] Katarína Šipulová, *Under Pressure*, *in* COURTS: FRIEND OR FOE (Denis Galligan ed., 2021); *See* Kosař & Šipulová, *supra* note 26.
[126] David Kosař and Ladislav Vyhnánek, *The Constitutional Court of Czechia*, in THE MAX PLANCK HANDBOOKS IN EUROPEAN PUBLIC LAW, VOL. III: CONSTITUTIONAL ADJUDICATION: INSTITUTIONS 139 (Armin von Bogdandy, Peter Hubert & Christoph Grabenwarter eds., 2020).

by-product of deeper political disagreements, such as the case of the inability of the Spanish parliament to appoint 20 members of the Judicial Council between 2018 and 2023.[127]

Agents of change might also wish to paralyze the court more indirectly by cutting the funding, significantly increasing the agenda in mundane issues, overburdening judges, and turning the court into bureaucratic machinery. Similar effects can, however, be achieved via informal means or networks. For example, in 2017 to 2018 in Albania, the government blocked the activity of the selection committee for judges, and this thwarted the appointment of new constitutional justices.[128]

Alternatively, agents of change might wish to keep the courts relatively strong but control them and *weaponize* them to use them as a legitimizing rubberstamp for their further decaying policies. Erosion actors can achieve this either via changing the composition of courts—mostly via court-packing[129]—or taming judges appointed under a previous democratic regime via smear campaigns and fear. Majority erosion actors try to incentivize judges to take part in accommodating informal institutions, particularly via fear. Most examples come from Latin America. In Venezuela, President Hugo Chávez benched the recalcitrant Supreme Court Judge Frankline Arrieche.[130] In Paraguay, Stroessner's regime simply dismissed Judges of the Supreme Court who were deciding cases against the interests of the government.[131] Similar examples, however, come also from Ecuador[132] or the Maldives.[133] In Europe, the most well-known cases of benching or misuse of removals, dismissals, and disciplining come from Hungary and Poland.[134] Benching can, however, be even less visible to the public, for example if the chief justice who is in charge of case assignment simply stops assigning new cases to recalcitrant judges.[135]

The policies invoking obedience via fear often rely on formal acts. However, they operate via informal networks between judicial actors, mostly court presidents, and politicians

[127] Pérez, *supra* note 91.
[128] *Meta Blames Majority for Non-Functioning of Constitutional Court*, ALBANIAN DAILY NEWS (Sept. 16, 2019), www.albaniandailynews.com/index.php?idm-35519&mod=2.
[129] *See* Kosař & Šipulová, *supra* note 26; *see* Holgado & Urribarri, *supra* note 57. *See* Keck, *supra* note 57.
[130] Matthew M. Taylor, *The Limits of Judicial Independence: A Model with Illustration from Venezuela under Chavez*, 46 J. LATIN AM. STUDS. 229 (2014).
[131] *See* Pozas-Loyo & Ríos-Figueroa, *supra* note 47.
[132] ANDREA CASTAGNOLA, MANIPULATING COURTS IN NEW DEMOCRACIES: FORCING JUDGES OFF THE BENCH IN ARGENTINA 84–108 (2018).
[133] Fathima Musthaq, *Shifting Tides in South Asia: Tumult in the Maldives*, 25 J. DEMOCRACY 164 (2014).
[134] *See* Kosař & Šipulová, *supra* note 26; Fryderyk Zoll & Leah Wortham, *Judicial Independence and Accountability: Withstanding Political Stress in Poland*, 42 FORDHAM INT'L L.J. 875 (2019).
[135] Patrick O'Brien, *Informal Judicial Institutions in Ireland*, in this issue.

or oligarchs.[136] A different type of weaponization can take place directly via informal practices. For example, some political actors managed to achieve effective court-packing by offering judges so-called golden parachutes—promotion to a higher court, to executive office, or even to an international organization—typically promising safer jobs or higher financial benefits. Alternatively, political actors try to lure judges away and vacate their seats preemptively with the promise of higher pensions. Similar informal agreements have been used successfully in Argentina and Poland. In 1965, Arthur Goldberg resigned from the U.S. Supreme Court and accepted President Johnson's appointment as the Ambassador to the United Nations, vacating the seat for Johnson's close friend, Abe Fortas.[137] The insidious character of this technique is that the only safeguard against it is the moral integrity of the judges who are offered the golden parachute.

Frontal attacks at judicial independence executed through court-packing appear all over the world. However, particularly interesting examples come from the U.S. and Poland, where political actors opened the window of opportunity for future court-packing by ignoring existing informal institutions. In the United States, the appointment of Neil Gorsuch and Amy Coney Barrett allegedly eroded the constitutional convention that in a presidential election year the U.S. Senate can confirm a Supreme Court Justice only with bipartisan support.[138] The abandonment of the constitutional convention gave rise to a situation in which Biden's next administration seriously considered carrying out court-packing, and triggered political and scholarly debates on the backsliding of American democracy.

The preemptive appointments of Polish constitutional justice in 2015 offer an even better example. The Civic Platform's government selected two Constitutional Tribunal Justices to replace "lame duck judges" whose mandates were to end only after the 2015 parliamentary election, which Tusk eventually lost. In fact, Civil Platform executed court-packing, later confirmed as unconstitutional by the Constitutional Tribunal. The strategy, clearly motivated by the fear of losing the elections in the face of growing public support for the PiS party, eventually backfired. Instead of skewing the composition of the Constitutional Tribunal in the

[136] Popova, *supra* note 86; DAVID KOSAŘ, PERILS OF JUDICIAL SELF-GOVERNMENT IN TRANSITIONAL SOCIETIES (2016); Nino Tsereteli, *Constructing the Pyramid of Influence: Informal Institutes as Building Blocks of Judicial Oligarchy in Georgia*, in this issue.
[137] Nelson, Michael, *Fortas' Nominations: One Era Ends, Another Begins,* 48 JOURNAL OF SUPREME COURT HISTORY 239 (2023); Larry M. Roth, *Remembering 1965: Abe Fortas and the Supreme Court,* 28 MERCER L. REV. 961 (1976–1977).

[138] *See* Weill, *supra* note 98; Millhiser, *supra* note 98; Ross, *supra* note 98; Klarman, *supra* note 98.

liberal direction, this "original sin" instigated another cycle of court-packing and allowed Kaczyński swiftly to execute further reforms that captured the Polish judiciary.

These last examples do not necessarily always relate to the intentional activity of political leaders. However, they demonstrate how formal institutions, established to protect certain values—the independent appointment of judges—are eventually repurposed or hollowed out and completely overtaken by other competing informal institutions. In fact, hollowing out of judicial institutions often accompanies democratic decay in judicial structures, leaving them formally existing but fulfilling roles incompatible with the principle of the rule of law and judicial independence. In turn, these incongruent institutions then feed opportunities leading to further cycles of democratic decay and erosion.

E. Conclusion

We showed that de-democratization may take the form of executive-led attacks—exogenous erosion—as well as incremental decrepitude, the gradual emptying of underlying constitutional values, and state inertia—endogenous decay—and that informality affects both processes. More specifically, we have focused on informality in the process of erosion and decay of judicial institutions and argued that informal judicial institutions interact with democracy in two major ways: First, the decaying of democratic judiciaries as a result of a long-term incongruence between formal and informal judicial institutions and second, the gradual erosion of informal institutions that have positive effects on judicial democratic resilience. These two processes are often invisible, slow, and unintentional, but they are very dangerous as they significantly widen the window of opportunity for politicians who wish to implement a regime change and further downgrade the substance of democracy. We have shown several examples of such politicians managing to exploit this window of opportunity.

Future research should explore the sequence of de-democratization in more detail on at least two levels. First, do we experience decay in institutions also outside of fully democratic states—in other words, in flawed and hybrid democracies, or transitional democracies—and, if so, how would its conceptualization differ? Although more and more literature seems to suggest that neither democratization nor backsliding is a linear process,[139] we also need to acknowledge

[139] Seán Hanley & Licia Cianetti, *The End of the Backsliding Paradigm*, 31 J. DEMOCRACY 66 (2021); *see* Keck, *supra* note 8; *see also* Moravscik, *supra* note 6.

that the embeddedness of democratic values is time-dependent and that structures of transitional democracies are relatively easy to collapse or careen.[140]

This would mean that incongruence between formal and informal rules in young democracies might essentially make the structures more susceptible to breaking down, even if the dissonant informal rules are at play for a relatively limited time or if the existing formal judicial institutions are repeatedly undermined by individual informal acts. This Special Issue has shown clearly that informal institutions competing with and subverting judicial independence and the rule of law suffocate many young democracies—Georgia, Hungary, Slovakia, and Ukraine—despite the fact that these countries have gone through a significant reshaping of their political, constitutional, and judicial systems, often under the auspices of supranational bodies. Nevertheless, these transfers of formal institutions were not accompanied by the internationalization of corresponding norms and values due to the clash with informal judicial institutions.[141] Evidence from Slovakia and Ukraine in particular supports the theory that transitioning and young democracies that struggle with incongruence between formal and informal institutions require a much higher level of regulation, at least until the actors internalize the formal institutions and their goals.

Second, further research should address the role of the form of governance, asking whether institutional decay and erosion occur in both highly regulated and informal environments. Does the extent of regulation and the formal embeddedness of democratic safeguards help to create more resilient democratic structures? How does the degree of formalization translate into the form of democratic decay or erosion? Does it matter whether democracy is dismantled by abuse of law or, in other words, abusive constitutionalism[142], informal hollowing out of democratic substance and structures, or both?[143]

While this Article has focused only on the judiciary, it has shown that increasing regulation and formalism as a response to the risk of de-democratization[144] might not work if they fail to resolve the incongruence between formal and informal institutions. Likewise, a recent assessment of the Latin American experience with the judicialization of politics has also

[140] Dan Slater, *Democratic Careening*, 65 WORLD POL. 729 (2013).
[141] Attila Ágh, *The Bumpy Road of Civil Society in the New Member States: From State Capture to the Renewal of Civil Society*, 11 POL. CENT. EUR. 7 (2015).
[142] *See* Landau, *supra* note 13; *See* LANDAU & DIXON, *supra* note 9.
[143] *See* SAJÓ, *supra* note 25.
[144] Mathieu Leloup, *Supranational Actors as Drivers of Formalization*, in this issue.

shown that this strategy has its limits.[145] Reliance on law as a solution to conflict between existing formal and informal institutions often fails to acknowledge commitments of relevant elites to democracy.

According to Gonzáles-Ocantos, the embeddedness of institutions in the perceptions and beliefs of public and political actors has a significant role to play in building institutional resilience.[146] We concur. One of the factors crucial for the resilience of democracy is how actors self-understand their roles.[147] The reason for the prevalence of informal practices in many transitioning countries that attempted to increase judicial independence via institutional reforms can be found in the lack of internalization of key values and proper understanding of judicial independence, which consequently leads to a skewed professional role conception. It is up to the policy makers and scholars to find ways of nudging this internalization forward. It will be more difficult than ticking the boxes in implementation sheets for supranational institutions, but it is the only viable way forward.

[145] THE LIMITS OF JUDICIALIZATION: FROM PROGRESS TO BACKLASH IN LATIN AMERICA (Sandra Botero, Daniel Brinks & Ezequiel González-Ocantos eds., 2022).
[146] Gonzáles-Ocantos, *supra* note 119.
[147] Katarína Šipulová & Samuel Spáč, *(No) Ghost in the Shell: The Role of Values Internalization in Judicial Empowerment in Slovakia*, in this issue.

Study VI: (No) Ghost in the Shell: The Role of Values Internalization in Judicial Empowerment in Slovakia

Šipulová, Katarína & Samuel Spáč (2023). (No) Ghost in the Shell: The Role of Values Internalization in Judicial Empowerment in Slovakia. German Law Journal, 24(8): 1412-1431 (Q1 WoS; author's share 75 %)

A. Introduction

In February 2018, the assassination of a young couple, the investigative journalist, Ján Kuciak, and his fianceé, Martina Kušnírová, shocked Slovak society. The investigation that followed uncovered a convoluted corruption network between oligarchs and state functionaries, including judges.[1] Public protests and mass demonstrations seemingly stirred up a new pro-democratic movement: The 2019 presidential elections brought about the surprising victory of a liberal candidate, lawyer and environmental activist Zuzana Čaputová. Foreign media celebrated a win for democracy over far-right sentiments in Central Europe.[2] The following 2020 parliamentary elections, which catapulted to power a small opposition movement with a very strong anti-corruption program, seemed to confirm the trend.[3] The new government, led by a populist, Igor Matovič, promised to clean the system of old cadres, break corruption networks, and strengthen both judicial independence and the rule of law.[4] He was true to his word, as the investigations into the corruption continued and exposed a significant level of clientelism and politicization, reaching the highest ranks of the Slovak judiciary, the general prosecutor's office, and the Ministry of Justice.

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[1] Michal Ovádek, *Deep Rot in Slovakia*, VERFASSUNGSBLOG (Oct. 15, 2019), https://verfassungsblog.de/deep-rot-in-slovakia/.

[2] Emily Tamkin, *Hailed by Liberals, Slovakia President is Under a Lot of Pressure to Turn the Tide of Populism*, WASHINGTON POST (Apr. 1, 2019), https://www.washingtonpost.com/world/2019/04/01/hailed-by-liberals-slovakias-new-female-president-is-under-lot-pressure-turn-tide-populism/; Paul Hockenos, *The End of Eastern Europe's Great Liberal Hope*, FOREIGN POLICY (Mar. 1, 2020), https://foreignpolicy.com/2020/03/01/zuzana-caputova-slovakia-the-end-of-eastern-europes-great-liberal-hope/.

[3] It is, however, also important to stress that although Matovič's party embraced an anti-corruption agenda, it was not a liberal party, as is sometimes perceived by foreign media and commentators. The party in fact incorporated many smaller ultra-conservative and Christian movements.

[4] *See* IGOR MATOVIČ, OBYČAJNÍ ĽUDIA A NEZÁVISLÉ OSOBNOSTI, 'ÚPRIMNE, ODVÁŽNE PRE ĽUDÍ' [ORDINARY PEOPLE AND INDEPENDENT PERSONALITIES, 'HONESTLY, COURAGEOUSLY FOR THE PEOPLE'] (2020).

This was, however, only the very tip of the iceberg. Increased media coverage soon documented the widespread use of informal practices interfering in decision-making and further compromising the public's perception of judicial independence. Communications between several judges and oligarchs accused of a variety of criminal offenses were published, more than twenty judges eventually ended up under investigation and were arrested.[5] Although the Slovak judiciary went through a substantive institutional transformation after the fall of the semi-authoritarian regime in the late 1990s, the new institutional setup overseen by European supranational bodies clearly failed to eradicate old informal patterns deeply embedded in its political culture.[6]

Slovakia in fact represents a cluster of Central and Eastern European (CEE) post-communist countries where entrepreneurial political elites established brokerage party systems and where new public policies and institutions developed only as a by-product of economic competition, with very little commitment to democratic values and primarily serving the exercise of private gains.[7] This can be seen in the Judicial Council, established in 2002, which transferred considerable powers to the judiciary, yet was swiftly hijacked by old judicial elites to serve corporatist interests present in the judicial ranks.[8] The rather loose commitment to principles of separation of powers was exhibited also in the so-called revolving door phenomenon. No rules—formal or informal—prevented the widespread practice of judges serving as high-ranking officials at the Ministry of Justice, just to eventually return to the judiciary.[9] One such judge-turned-official, Monika Jankovská, played a central role in the corruption networks uncovered in the aftermath of Ján Kuciak's murder.

In this article we examine the conflict between the intended and actual functioning of a strong, judge-dominated judicial council in the context of the Slovak judiciary. We do so using

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[5] Which is approximately 1% of the Slovak judiciary. *Kočner's judges charged and detained*, THE SLOVAK SPECTATOR (Mar. 11, 2020), https://spectator.sme.sk/c/22355425/kocners-judges-charged-and-detained.html; *Storm transforms into Gale. More Judges and an Influential Businessman Detained*, THE SLOVAK SPECTATOR, (Oct. 28, 2020), https://spectator.sme.sk/c/22520635/storm-transforms-into-gale-more-judges-and-an-influential-businessman-detained.html.

[6] Samuel Spáč , Katarína Šipulová, and Marína Urbániková, *Capturing the Judiciary from Inside: The Story of Judicial Self-Governance in Slovakia*, 19 GER. L.J. 1741, 1742–46 (2018); DAVID KOSAŘ, PERILS OF JUD. SELF-GOVERNMENT IN TRANSITIONAL SOCIETIES (2016).

[7] Abby Innes, *The Political Economy of State Capture in Central Europe*, 52 J. OF COMMON MKT. STUD. 88, 89 (2014).

[8] *See* Spáč et al., *supra* note 6; and KOSAŘ, supra note 6; Samuel Spáč, *The Illusion of Merit-Based Judicial Selection in Post-Communist Judiciary: Evidence from Slovakia*, 69 PROBLEMS OF POST-COMMUNISM 528, 533–63 (2020), David Kosař and Samuel Spáč, *Post-communist Chief Justices in Slovakia: From Transmission Belts to Semi-autonomous Actors?* 13 HAGUE J. RULE L. 107, 122–23 (2021).

[9] The most prominent representatives of this trend were Štefan Harabin, who served as a Minister of Justice between 2006 and 2009 prior to becoming Chairman of the Judicial Council, and Chief Justice of the Supreme Court (2009-2016), and Monika Jankovská, who was a Deputy Minister of Justice from 2012 until her forced removal in 2019 after numerous substantiated allegations of corruption.

the concept of informality and describe how practices such as corruption, clientelism, and spatial travelling between judicial and political positions became institutionalized in a judicial governance system which provided judges with a relatively high level of institutional independence but low level of accountability.[10] Consequently, the reforms aimed at securing judicial independence actually prevented the proper internalization of values typical of judicial systems in developed democracies and affected how independently courts decide.

In this respect, Slovakia sheds light on a more general scholarship on institution-building,[11] its ability to change the professional role conception,[12] and its relation with broader ideational changes in judicial culture. Why did the formal institutional reforms not provide sufficient incentives for judges to change their behavior? We show that the transformation of the Slovak post-communist judiciary relied on the presumption that judges' interests are automatically complementary to principles of the rule of law. Therefore, the majority of implemented reforms insulated the judiciary from the political branches of power, but allowed the existence of strong hierarchical relationships *inside* the courts. In contrast to international expectations, judicial authorities used their empowerment to create or strengthen competing informal practices, which helped them to maximize their power.

Slovak experience with the top-down implantation of a judicial council therefore echoes theories suggesting that formal institutions have only limited impact on the ideational level.[13] We postulate that alignment between formal and informal institutions is associated with the internalization of new roles, which is a necessary—but not sufficient—condition for the institutional reform to trigger behavioral change. In Slovakia, this relationship manifested itself in two processes which potentially reinforce each other.

First, despite the belief that the Slovak judiciary underwent a transformation after communism, the principle of judicial independence has not been properly internalized by

[10] Michal Bobek & David Kosař, *Global Solutions, Local Damages: A Critical Study in Judicial Councils in Central and Eastern Europe*, 15 GER. L.J. 1257, 1270 (2014).
[11] Antoaneta Dimitrova, *The New Member States of the EU in the Aftermath of Enlargement: Do new European Rules Remain Empty Shells?*, 17 J. OF EUR. PUB. POL'Y 137, 137 (2010); Attila Ágh, *The Bumpy Road of Civil Society in the New Member States: From State Capture to the Renewal of Civil Society*, 11 POL. IN CENT. EUR. 7, 7 (2015).
[12] Maria Popova, *Can a Leopard Change its Spots? Strategic Behaviour Versus Professional Role Conception During Ukraine's 2014 Court Chair Elections*, 42 LAW & POL'Y 365, 366 (2020); Lisa Hilbink, *Beyond Manicheanism: Assessing the New Constitutionalism*, 65 MD. L. REV. 15 (2006); Lisa Hilbink, *The Origins of Positive Judicial Independence*, 64 WORLD POL. 587, 587 (2012); DIANA KAPISZEWSKI, HIGH CTS. AND ECON. GOVERNANCE IN ARG. AND BRAZ. (2012), Kim Lane Scheppele, *Guardians of the Constitution: Constitutional Court Presidents and the Struggle for the Rule of Law in Post-Soviet Europe*, 154 UNIV. OF PA. L. REV. 1757 (2006); Jennifer Widner, *Building Judicial Independence in Common Law Africa, in* THE SELF-RESTRAINING STATE: POWER AND ACCOUNTABILITY IN NEW DEMOCRACIES (Andreas Schedler et al. eds., 1999).
[13] Popova, *supra* note 12; Hillbink, *The Origins of Positive Judicial Independence*, *supra* note 12.

judges. This lack of internalization followed partly from the tension between new formal and old informal institutions, but partly also from the very limited personal change in judicial ranks after the regime transition.[14] The combination of the deeply hierarchical structure and bureaucratic nature of the judiciary helped the competing informal institutions to survive the regime change and reduced the effect of new institutional incentives on actors' behavior.[15]

Second, the lack of internalization manifested itself in the fact that actors of judicial empowerment—both judges and politicians—eventually adopted a skewed understanding of judicial independence, leaning heavily towards the insulation of the judiciary from the political branches of power. The misunderstanding allowed the creation of new informal practices that later on institutionalized and turned formal reforms of judicial empowerment into empty shells with little substance.

In short, we argue that the lack of internalization of judicial independence explains why institutional self-governance reforms might fail to trigger intended changes in the professional role conception of judges in regimes riddled with deeply embedded informal institutions. The article proceeds as follows. First, we set the stage and explain the role of internalization in translating institutional changes into behavioral shifts in role conceptions. Second, we introduce the formal framework in which the Slovak judiciary operates and observe its conflicts with existing informal practices. Third, we delve more deeply into selected episodes that shaped the Slovak judicial role conception and competed with the intended consequences behind the establishment of the Judicial Council. Fourth, we summarize the findings and discuss whether the observed practices occurred merely as isolated incidents or were institutionalized.

B. The Role of Value Internalization in Institutional Design Reforms

When do institutional reforms trigger change in actors' behavior? Institutions, the rules of the game that structure our social and political life, seek to shape actors' behavior through incentive structures.[16] Institutional design typically creates expectations about how actors should behave, sets up rewards and sanctions, and tries to make non-compliant behavior costly. These

[14] David Kosař & Katarína Šipulová, Purging the Judiciary After a Transition: Between a Rock and a Hard Place (2023) (unpublished manuscript) (on file with authors).
[15] Peter Čuroš, *Panopticon of the Slovak Judiciary – Continuity of Power Centers and Mental Dependence*, 22 GER. L.J. 1247, 1251–55 (2021). *See also* Popova, *supra* note 12 (pointing out similar observations made on the Ukrainian judiciary).
[16] *See supra* Part A.

institutions can be both formal and informal.[17] While formal institutions typically overlap with the legal and constitutional regulatory framework, informal institutions are created, communicated, and enforced mostly outside of officially sanctioned channels.[18]

Judicial systems, particularly in continental Europe, tend to be generally highly formalized and regulated, not leaving much space for behavior outside of formal institutional incentives.[19] Perhaps that is also why the scholarship on judicial governance long focused on institutional independence and the creation of institutional designs able to secure it.[20]

In the last decade we have heard the stronger voice of scholars leaning towards ideational explanations and suggesting that, apart from institutional designs, the behavior of judges is in fact shaped by historical path dependencies[21] and professional norms judges are socialized into.[22] Whether actors do or do not internalize values behind the (new) rules of behavior affects their professional role conception—in other words, how they understand their roles and duties in the system. In judiciaries, the role conception is closely intertwined with what scholarship addresses as the decisional independence of individual judges.[23] In other words, while institutional independence describes the regulatory design of judicial governance and decision-making, decisional independence relies on how individual judges decide in individual cases and how they address potential conflicts and biases.[24] If the formal and informal institutions compete,[25] such as in the scenario when institutional reforms in CEE judiciaries introduced new safeguards of merit-based judicial decision-making next to still existing corruption and clientelist networks, the non-alignment may eventually lead to a

[17] GRETCHEN HELMKE & STEVEN LEVITSKY, INFORMAL INSTITUTIONS AND DEMOCRACY: LESSONS FROM LATIN AMERICA (2006); Gretchen Helmke & Steven Levitsky, *Informal Institutions and Comparative Politics: A Research Agenda*, 2 PERSPECTIVES ON POLITICS 725, 725 (2004); Bjoern Dressel, Raul Urribarri and Alexander Stroh, *The Informal Dimension of Judicial Politics: A Relational Perspective*, 13 ANN. REV. OF L. & SOC'Y 413, 413 (2017); Bjoern Dressel et al., *Courts and Informal Networks*, 39 SPECIAL ISSUE INT'L POL. SCI. REV. 573, 573 (2018).
[18] David Kosař, Katarína Šipulová & Marína Urbániková, Informality and Courts: Uneasy Partnership, in this issue..
[19] Ibid.
[20] TOM GINSBURG, JUDICIAL REVIEW IN NEW DEMOCRACIES (2003); Tom Ginsburg & Nuno Garoupa, *Judicial Audiences and Reputation: Perspectives from Comparative Law*, 47 COLUM. J. OF TRANSNAT'L L. 451, 451 (2009); MARIA POPOVA, POLITICIZED JUSTICE IN EMERGING DEMOCRACIES (2012).
[21] Čuroš, *supra* note 15.
[22] Hilbink, *The Origins of Positive Judicial Independence*, *supra* note 12; KAPISZEWSKI, *supra* note 12, Popova, *supra* note 12. Pozas-Loyo & Figueroa also problematize the role of informal practices as one of the factors impacting the gap between what they call de jure and de facto judicial independence.
[23] David Kosař & Samuel Spáč, *Judicial Independence, in* CAMBRIDGE HANDBOOK TO CONSTITUTIONAL THEORY (Richard Bellamz & Jeff King eds.) (forthcoming 2023).
[24] Kosař & Spáč, *supra* note 23.
[25] VALERIE J. BUNCE & SHARON L. WOLCHIK, DEFEATING AUTHORITARIAN LEADERS IN POSTCOMMUNIST COUNTRIES 156 (2011); Helmke & Levitsky, *Informal Institutions and Comparative Politics: A Research Agenda*, *supra* note 17.

situation where actors create several competing role conceptions. Once a particular role conception prevails, it will impact the overall functioning of the judiciary. The prevalence may occur in a variety of ways, from becoming collectively shared by actors to being imposed by more dominant or influential groups within the system on all actors, including those who were not involved in their original formation.[26]

This article therefore extends the theories on institution-building and places the internalization of the value of judicial independence in the forefront of its attention as a necessary—but not sufficient—condition for any formal behavioral incentives to be effective. If judges do not internalize values protected by newly introduced institutional reforms, the existing role conception will allow them to participate in incongruent informal practices and eventually to institutionalize them.

The focus on the duality between formal institutional designs of judicial governance and informal institutions is therefore particularly important for understanding the performance of judiciaries in a post-transitioning setting. Although post-communist countries, such as Slovakia, have adopted a whole range of supranationally adorned institutional reforms, the combination of the role of law in the previous regime, limited judicial turnover after the transition, and the bureaucratic and hierarchical nature of socialization of new incomers all contributed to the non-internalization of new institutional incentives and, instead, allowed old patterns of behavior and belief structures to be passed on to a new generation of democratic judges.

C. Unsuccessful Story of Slovak Judicial Transition

Since the establishment of its independence in 1993, judicial governance in Slovakia has undergone a series of turbulent changes reacting to the shortcomings, and at times outright failures, in its functioning. There are three distinguishable periods between 1993 and 2023,[27] yet it is not clear whether the core institutional design of judicial governance is going to be settled any time soon. First, after the division of Czechoslovakia, under a semi-authoritarian government led by prime minister Vladimír Mečiar, the judiciary was to a considerable extent controlled by the Ministry of Justice with the help of the parliament. Second, after Mečiar's

[26] Renate E. Meyer, *A Processual View on Institutions: A Note from a Phenomenological Institutional Perspective*, *in* INSTITUTIONS AND ORGANIZATIONS: A PROCESS VIEW 33, 33 (Trish Reay et al. eds., 2019).
[27] Spáč et al., *supra* note 6.

defeat in 1998,[28] the new coalition made it its priority to ensure that Slovakia would be seen as a trustworthy partner with its Western allies in order to secure successful integration into NATO and the EU.[29] Due to these incentives, Slovakia somewhat swiftly established the 'Euro-model' of judicial governance,[30] including the new judge-dominated judicial council, and transferred substantive powers from the executive branch to the judiciary. Third, however, the performance of judge-dominated judicial governance was perceived by many as sub-optimal, and, consequently, Slovakia started to look for a new arrangement that would counterbalance the dominance of judicial actors, as well as bring a considerable level of transparency to judicial administration.

The common denominator of these paradigmatic shifts was the conflict between formal institutions and informal practices. Despite their internationally approved design, new institutions have not been able to deliver expected outcomes. The Slovak judiciary has for a long time suffered from low public confidence,[31] and has been perceived as corrupt by Slovak citizens.[32] Because of that, Slovakia has been on an almost three-decades-long search for a fool-proof design that would find a reasonable balance between judicial independence and accountability while securing the desired performance of the judiciary. In this section we briefly sketch three examples of how Slovakia experimented with different institutional setups, which failed to deliver what was expected due to the existence of surviving informal practices. We will look in more detail at the Judicial Council, and the disciplining, selection, and promotion of judges.

The Judicial Council of the Slovak Republic ("JCSR") was established in 2002 in the wake of the EU integration process. It closely followed the recommendations of various international bodies suggesting that a judge-dominated-council model is well suited to insulating the judiciary from political influences and to securing merit-based decision-making regarding the issues falling under the umbrella of judicial governance.[33] The trust invested in a judge-dominated and internationally endorsed JCSR resulted from the considerable pressure exerted on the judicial branch by the previous semi-authoritarian government. This was

[28] BUNCE & WOLCHIK, *supra* note 25, at 65.
[29] Samuel Spáč, *Judiciary Development After the Breakdown of Communism in the Czech Republic and Slovakia*, 3–4 CEU POL. SCI. J. 234, 246 (2014), Bobek & Kosař, *supra* note 10; Kosař & Spáč, *supra* note 23; Spáč et al., *supra* note 6.
[30] Bobek & Kosař, *supra* note 10.
[31] Spáč et al., *supra* note 6, at 1760–762.
[32] *See generally Global Corruption Barometer*, TRANSPARENCY INTERNATIONAL (2021), https://www.transparency.org/en/gcb/eu/european-union-2021/results/svk.
[33] Kosař, *supra* note 6; Spáč et al., *supra* note 6, at 1760–62.

manifested mainly in the process of the selection of judges (who were elected and faced retention elections every four years), but also in massive verbal attacks on judges.[34]

However, just a few of years after its establishment, the JCSR was captured from the inside by actors close to Mečiar. Slovakia's pro-integration optimism was quickly exchanged for harsh economic reforms, deepening the economic crisis and social inequalities, and eventually allowing Mečiar to return to government, although with his party as a smaller coalition party with Robert Fico's Direction – Social Democracy (SMER). In 2006, Fico and Mečiar secured the nomination of Štefan Harabin, Chief Justice of the Supreme Court appointed under Mečiar, as the new Minister of Justice. Harabin then swiftly used his judicial influence as well as his new political connections to secure the packing of the JCSR with judges loyal to him, as well as to orchestrate his own re-election as the Chief Justice, and, hence, also the Chairman of the JCSR in 2009. This event marked an important milestone in the period when the JCSR played a particularly controversial role in the Slovak judiciary, heightened polarization among the judges, and turned the judicial system into one of the most salient issues of the 2010 elections.[35]

This was not the only example of the JCSR failing to protect the judiciary from political influences. As Kosař and Spáč have shown,[36] despite the JCSR's role of insulating the judicial branch from politicians, parliamentary majorities were almost consistently able to secure the election of the Chief Justice of the Supreme Court in line with their preferences, which was particularly dangerous because of the dual role of Chief Justice and Chairman of the JCSR. All in all, it took almost 20 years for the JCSR to effectively curb the interests of judges and politicians which had in the past managed to circumvent formal institutions.

The second example of the conflict between formal institutions and informal practices concerns disciplinary procedures, mainly during the period when Štefan Harabin played the central role in the Slovak judiciary. The disciplining of judges was at that time carried out by disciplinary panels created by the JCSR. Despite the fact that the JCSR was designed to ensure a balance between judicial and political interests, the disciplinary procedures were often

[34] For instance, the then Minister of Justice referred to judges as "buggers and frats stupid as cues." *See* Kosař, *supra* note 6, at 255.
[35] *See, e.g.*, LUKASZ BOJARSKI & WERNER STEMKER KOSTER, THE SLOVAK JUDICIARY: ITS CURRENT STATE AND CHALLENGES (2011); Bobek & Kosař, *supra* note 10.
[36] Kosař & Spáč, *supra* note 8.

consciously left to the discretion of the judicial members of the Council. In turn, disciplinary competence was heavily misused, leading to numerous accountability perversions.[37]

Selective accountability and a policy of sticks and carrots became a prominent feature of Harabin's era at the top of the judiciary.[38] At least fifteen judges faced disciplinary proceedings in retaliation after they openly criticized Harabin and the status quo of the Slovak judiciary. These disciplinary actions typically proposed to apply the harshest punishments, i.e., dismissal from judicial office, accompanied by substantial salary cuts and the temporary suspension of individual judges.[39] To show how this mechanism worked, let us illustrate it using one example. A district court judge complained in 2008 in a letter to the President of the Republic about the conditions and atmosphere in the judiciary. The President forwarded the letter to the respective court president, who initiated disciplinary proceedings against the judge for violation of ethical obligations. The first instance panel decided to suspend the judge for the maximum period allowed of two years, and reduce his salary by fifty percent for six months. The suspension had been served before the judge's appeal reached the appeal court. The judge was punished for his intra-judicial criticism without the final decision of the disciplinary court.[40] In 2021, after the change in political establishment following the elections after Kuciak's murder, disciplinary powers were taken away from the JCSR and transferred into the hands of the newly created Supreme Administrative Court, following Czechia's example.

The third area illustrating the prevailing conflict between formal institutions and informal practices can be found in the selection and promotion of judges. Before the establishment of the JCSR, judges were elected by the parliament for a renewable four-year term.[41] This obviously troubling design was changed, and the power to appoint judges was transferred to the president of the Republic upon the nomination of the judge-dominated JCSR.[42] The re-delegation of selection competence from the political to the judicial branch via the JCSR, however, achieved the opposite extreme: Instead of a merit-based selection, new judges were mainly selected from the pool of "judicial aspirants" socialized within the system,

[37] *See* KOSAŘ, *supra* note 6, at 68–72 (describing more on accountability perversions).
[38] KOSAŘ, *supra* note 6, at 330–33; *see also* Pavol Žilinčík & Samuel Spáč, *Selektívna zúčtovateľnosť: Príklady z disciplinárneho súdnictva*, *in* NEDOTKNUTEĽNÍ? POLITIKA SUDCOVSKÝCH KARIÉR NA SLOVENSKU V ROKOCH 1993–2015 154, (Erik Láštic & Samuel Spáč eds., 2017).
[39] See, *e.g.*, BOJARSKI & STEMKER KOSTER, *supra* note 35.
[40] BOJARSKI & STEMKER KOSTER, *supra* note 35, at 104–05.
[41] ÚSTAVA SLOVENSKEJ REPUBLIKY [Constitution] ch. 7, art. 145, para. 1 (repealed 2001) (Slovk.) (stating that a life tenure for judges followed the renewal of the original 4-year term of office).
[42] The judge-centred nature of the JCSR was further strengthened by the fact that although the legal regulation presumed the equal participation of the judiciary, parliament and president on the selection, in fact even political actors nominated judges to the JCSR.

while the power to assign individual judges to courts rested de facto in the hands of court presidents.[43] In 2011, political actors attempted to balance the extreme influence of court presidents and to secure more transparency and openness in the system by the creation of new selection committees. However, even this system did not manage to compete with existing informal institutions. As previous research has shown, candidates with connections to members of selection committees or candidates from "judicial families" enjoyed a greater chance of winning and being appointed to vacant positions.[44] Such results suggest that the judiciary preferred candidates who could be expected to share the beliefs, values, and practices that already prevailed in the judiciary. In addition, court presidents remained the crucial gatekeepers as it was they who were responsible for the creation of individual selection committees, and in this way controlled who was selected. As a consequence, in 2017 the selection of district court judges became one of the so-called mass selection procedures in which all judges for a given region are selected in one, centrally organized, procedure.

The process of the promotion of judges to higher courts was, and still remains, dominated by informal practices aimed at bypassing formal institutions designed to ensure open, transparent, and merit-based decision-making. Many judges are promoted via an informal path that starts with secondment to a higher court, which is eventually formalized through the selection procedure in which these candidates are often unopposed. The process of secondment, once again, empowers court presidents, who can propose the secondment of a particular judge chosen in a completely untransparent way, and the JCSR then, usually without much discussion or hesitation, approves such proposal.[45]

D. Competing Informal Institutions and Practices in the Slovak Judiciary

In this section we provide an overview of selected patterns of behavior observable in the Slovak judiciary which illustrate the conflict between the intentions behind the newly established formal institutions in judicial governance, portrayed mainly in the Judicial Council, and their interaction with existing informal practices. These patterns demonstrate particular professional role conceptions[46] shared by (parts of) the Slovak judiciary, which will be further discussed in the following section.

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[43] Juraj Palúš, *Právna úprava výberu sudcov na Slovensku*, *in* VÝBER SUDCOV 21, 9–13 (Kristína Babiaková ed., 2015).
[44] Spáč, *supra* note 8.
[45] Samuel Spáč, *Kariérny postup na vyššie súdy: Pod kontrolou predsedov súdov*, *in* NEDOTKNUTEĽNÍ? 106, 111 (Erik Láštic & Samuel Spáč eds., 2017).
[46] Hilbink, *The Origins of Positive Judicial Independence*, *supra* note 12.

First, on the basis of medialized corruption cases in recent years (2019–2022), we argue that these were not isolated incidents, but rather constitute a pattern of behavior that can be seen as institutionalized. Second, we examine the willingness of the Slovak judiciary to condemn and hold accountable judges who misuse their powers and participate in corruption networks. In the third and fourth sub-sections we delve even deeper and focus on off-bench informal practices that contravene formal rules of judicial independence: Spatial traveling between the judicial and executive branches, and the behavior of judges towards the media and the public. In both cases we discuss the consequences and applicability of the existing accountability mechanisms.

I. Corruption in the Slovak Judiciary

The political upheaval following the murder of journalist Ján Kuciak and his fianceé Martina Kušnírová led to an electoral result which gave significant leverage and salience to a specialized anti-corruption unit, the NAKA, of the Slovak police. When the investigation into the murder pointed to influential Slovak businessman and oligarch Marián Kočner, NAKA seized his mobile phone and, with the assistance of Europol, found and decoded his encrypted communication application, Threema, which he used to exchange messages and discuss salient judicial cases related to the investigation into his business activities or his broader business interests.

The Threema messages, sent between September 2017 and May 2018, were leaked to the public in Summer 2019. They suggested that Kočner operated a structured network of contacts among judges, politicians, prosecutors, journalists, and investigative policemen, who helped him to obtain sensitive information or manipulate individual judicial cases by bribing certain judges and prosecutors. Kočner relied on a few highly positioned actors of judicial governance, who served as a hook to persuade or pressurize random judges assigned to cases he was interested in.[47] Many of these contact nodes in his network were either judicial authorities[48] or people in senior positions in the government—such as the deputy Minister of

[47] Kočner, for example, discussed the pending disciplinary case of the former Chief Justice of the Supreme Court, Harabin. Veronika Prušová, *Harabin opäť vyhral. Ministerstvo spravodlivosti mu má vyplatiť takmer 90-tisíc eur*, DENNÍK N (Dec. 6, 2020), https://dennikn.sk/2174879/harabin-opat-vyhral-ministerstvo-spravodlivosti-mu-ma-vyplatit-takmer-90-tisic-eur/?ref=list.

[48] *See* Roman Pataj, *Plevel a Búrka odhalili najbytočnejšiu organizáciu na Slovensku*, DENNÍK N (Sept. 14, 2020), https://dennikn.sk/2038915/plevel-a-burka-odhalili-najzbytocnejsiu-organizaciu-na-slovensku/ (noting example, Vladimír Sklenka, then the vice-president of the Bratislava district court, who eventually confessed and started cooperating with the police.); *see also* Veronika Prušová, *Politici a médiá nám kazia*, DENNÍK N

Justice, Monika Jankovská,[49] a former judge and a candidate for a constitutional justice post. Kočner's links reached as high as to the Constitutional Court,[50] and his interests did not stop at his personal issues. Kočner clearly influenced investigations and cases related to individuals close to his business activities. Although the media and NGOs had long suspected that there was high-profile judicial corruption at Slovak courts, the vulgar language in which Kočner communicated with his contact nodes came across as shocking, demonstrating the considerable extent of the loyalties the oligarch enjoyed and the leverage he wielded over the judicial and political authorities.[51]

Leaked messages were just the start of the turmoil in the Slovak judiciary. In March 2020, the police investigative operation "Tempest" [Búrka] led to the arrest of and charges being made against thirteen Bratislava judges, including the regional and district court presidents and vice presidents.[52] In the meantime, the media continued to publish leaked text messages between judges, oligarchs, and politicians containing sensitive case file information, or even instructions on how to decide particularly salient cases. Later that year, operations "Gale" [Víchrica] and "Weeds" [Plevel] took place, leading to six more judges facing accusations of corruption and abuse of power. Operation "Weeds" continued in 2021 and focused on the corruption network at the regional court in Žilina, a city in northern Slovakia.[53] The network crumbled when one of the cases intended to be manipulated was assigned to a

(Mar. 27, 2020), https://dennikn.sk/1823747/politici-a-media-nam-kazia-meno-cast-sudcov-po-operacii-burka-hlada-vinnikov-mimo-svojich-radov/.

[49] *Marian Kočner jí říkal opička. Slovenská tajemnice Jankovská rezignovala*, IDNES.CZ (Sept. 3, 2019), https://www.idnes.cz/zpravy/zahranicni/slovensko-monika-jankovska-rezignovala-tajemnice-ministerstvo-spravedlnosti-marian-kocner-threema-op.A190903_145715_zahranicni_kha.

[50] Eva Kubániová, *Kočnerovo svádění ústavního* soudce, INVESTIGACE.CZ (May 4, 2020), https://www.investigace.cz/kocnerovo-svadeni-ustavniho-soudce/.

[51] Kočner addressed the Deputy Minister as "his little monkey," who did his bidding and made sure judges knew how to proceed and act in cases assigned to them. Recalcitrant judges who demonstrated any disloyalty got warnings suggesting "they will end up like Kuciak,". *See Marian Kočner jí říkal opička*, *supra* note 49.

[52] Accused judges included Jarmila Urbancová, deputy chairman of the JC (acting chief justice); Ľuboš Sádovský, judge and former president of the Regional court in Bratislava; Andrea Haitová, Jankovská's sister and a judge of the Regional court in Bratislava; Denisa Cviková, judge of the Bratislava I District Court; Miriam Repáková, former judge of the Bratislava I District Court; Eva Timár Myjavcová, insolvency administrator; Richard Molnár, judge of the Regional corut in Bratislava; Gabriela Buľubašová, judge of the Bratislava I District Court; Zuzana Maruniaková, judge of the Bratislava V District Court; Dušan Srogončík, judge of the Bratislava V District Court; Katarína Bartalská, insolvency judge and vice-presdent of the Bratislava I District Court; Dávid Lindtner, attorney and former president of the Bratislava III District Court; Eugen Palášthy, judge of the Regional court in Bratislava, and Angela Balázsová, judge of the Bratislava I District Court. *See Po búrke prišla Víchrica: Zadržali Zoroslava Kollára aj sudkyňu Urbancovú*, AKTUALITY.SK (Oct. 28, 2020), https://www.aktuality.sk/clanok/834794/burka-ide-dalej-zadrzali-zoroslava-kollara/; Peter Kováč, *Kočner o nej písal ako o Jarinke či Prútiku. Začne sa proces s ďalšou sudkyňou*, SME DOMOV (June 13, 2023), https://domov.sme.sk/c/23181708/urbancova-kocner-sud-kauza-burka-vichrica.html.

[53] Veronika Prušová, *Za štyri prípady si traja žilinskí sudcovia a ich vybavovač rozdelili 50-tisíc* eur, DENNÍK N (Jan. 21, 2021), https://dennikn.sk/2235831/za-styri-pripady-si-traja-zilinski-sudcovia-a-ich-vybavovac-rozdelili-50-tisic-eur/?ref=list.

new judge[54] who, when approached by her colleague[55] with a note from a former mafia boss, refused to follow through and instead turned to the police.[56]

Interestingly, the two corruption groups existed independently of each other but operated very similarly. A regional businessmen and some oligarchs managed to develop a network of contactable judges, who received instructions from regional or district court presidents, but also from attorneys and prosecutors, or court personnel with family ties to oligarchs and local criminal groups.[57] Oligarchs did not use the network merely to influence their own judicial cases, but turned it into a profitable business of obtaining bribes to reduce sentences.[58] The bribes were handled by friendly attorneys, who were at times assigned ex officio to particular cases.[59]

Corruption networks seem to have operated on two levels. On the first, they incorporated ties between oligarchs, senior judges (typically court presidents or vice-presidents), and politicians, many of whom had close ties to the judiciary or had previously been judges. On the second, the institutionalized corruption network built around public authorities or court presidents allowed oligarchs to exert influence on rank-and-file judges and strategically place loyal or compliant judges in courts they were interested in. Some scholars interpret the susceptibility of the Slovak judiciary to corruption as a heritage of the communist regime, which makes judges open to influence and policing by powerful actors outside of the judiciary.[60] What these cases actually show is that judicial reforms aimed at increasing the involvement of judges in judicial governance have failed to eradicate hierarchical loyalty and subservience inside the judiciary.[61]

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[54] Judge Marcela Malatková.
[55] Veronika Prušová & Monika Tódová, *Už aj sudkyni Najvyššieho súdu Wänkeovej hrozí stíhanie, Šikuta s potrestaním váha*, DENNÍK N (Oct. 26, 2020), https://dennikn.sk/2108050/uz-aj-sudkyni-najvyssieho-sudu-wankeovej-hrozi-stihanie-sikuta-s-potrestanim-vaha/?ref=inc.
[56] Veronika Prušová, *Bývalý bos podsvetia Salinger sa pochválil priamymi kontaktmi na sudkyňu Kyselovú. Súd ju posiela do väzby*, DENNÍK N (Jan. 23, 2021), https://dennikn.sk/2238356/byvaly-bos-podsvetia-salinger-sa-pochvalil-priamymi-kontaktmi-na-sudkynu-kyselovu-sud-ju-posiela-do-vazby/?ref=list.
[57] Some orders and instructions were delivered to individual judges by uncles employed as court drivers or via childhood friends. *See* Prušová, *supra* note 53; Veronika Prušová, *Žilinský sudca bral dlhé roky úplatky, môže vyviaznuť s podmienkou,* DENNÍK N (Feb. 23, 2021), https://dennikn.sk/2283242/zilinsky-sudca-bral-dlhe-roky-uplatky-moze-vyviaznut-s-podmienkou/?ref=list.
[58] Prušová, *supra* note 56; Prušová, *supra* note 53.
[59] The automated system of ex officio assignments was introduced only in 2019. Veronika Prušová, *Nemali medzi nimi robiť rozdiely, ale robili. Sudcovia v Žiline mali medzi advokátmi favoritov*, DENNÍK N (Jun. 22, 2021), https://dennikn.sk/2440300/nemali-medzi-nimi-robit-rozdiely-ale-robili-sudcovia-v-ziline-mali-medzi-advokatmi-favoritov/?ref=list.
[60] Čuroš, *supra* note 15.
[61] This was well demonstrated by one judge who stood witness to the corruption practices of her two senior colleagues on the panel. The corruption involved the arbitrary reduction of sentences, in one case from 16 to 6

These networks would have been much less efficient had they not been supported by those involved in judicial governance—either in senior positions in the judiciary or within the state administration. This way they managed to secure the strategic placement of judges at courts, and created an atmosphere in which corrupt behavior simply became accepted, or at least tolerated, as a feature of the system, and consequently overlooked. This can be illustrated by one of Kočner's highly salient cases related to promissory notes issued by the first Slovak private TV broadcaster, Markíza. The case was assigned to a judge of a district court in Bratislava, Zuzana Maruniaková. Maruniaková had previously served as an assistant to Deputy Minister of Justice Jankovská. In the text messages between Kočner and Jankovská, the Deputy Minister of Justice stated: "She promised. Multiple times. I made her what she is, it is time to pay the debt!"[62] The text message most probably referred to Jankovská's role in the appointment of Maruniaková as a judge in 2013. While Maruniaková became a judge after she won the selection procedure in 2013, it was Deputy Minister Jankovská who nominated two out of five members of the respective selection committee (one of them, the president of a regional court in Bratislava, was later also arrested on corruption charges).[63]

While the era of chief justice Harabin, famous for leaving judges post-it notes with instructions on how to decide their cases,[64] was long gone, the new institutional rules failed to eradicate hierarchical loyalty and subservience inside the judiciary. It is also worth noting that the corruption allegations were not confined to the functioning of the courts but permeated the whole public sector.[65] The investigations targeted prosecutors, politicians, and ministers,

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years. When asked whether she did not suspect ulterior motives, the witness-judge stated that the atmosphere in her chamber was one of mutual respect and trust, so she never even considered to question the drafts and reasonings of her colleagues. *See* Veronika Prušová, *Roky súdila iných, teraz je na lavici obžalovaných. Žilinská sudkyňa Kyselová vinu odmieta*, DENNÍK N (June 21, 2022), https://dennikn.sk/2902401/roky-sudila-inych-teraz-je-na-lavici-obzalovanych-zilinska-sudkyna-kyselova-vinu-odmieta/?ref=inc; *see also* Prušová, *supra* note 53; *see also* Veronika Prušová, *Sudkyňa Najvyššieho súda sa vyhla disciplinárnímu konaniu vďaka tomu, že nefungujú disciplinárne senáty*, DENNÍK N (June 4, 2021) HTTPS://DENNIKN.SK/2417279/SUDKYNA-NAJVYSSIEHO-SUDU-SA-VYHLA-DISCIPLINARNEMU-KONANIU-VDAKA-TOMU-ZE-NEFUNGUJU-DISCIPLINARNE-SENATY/; *see also* Veronika Prušová, *Už aj sudkyni Najvyššieho súdu Wänkeovej hrozí stíhanie, Šikuta s potrestaním váha*, DENNÍK N (Oct. 26, 2020), https://dennikn.sk/2108050/uz-aj-sudkyni-najvyssieho-sudu-wankeovej-hrozi-stihanie-sikuta-s-potrestanim-vaha/?ref=inc.

[62] *"Ja som z nej urobila to, čo je. Je čas splatiť dlh." Threema ukazuje, ako Kočner a Jankovská riadili*, HN ONLINE, (Oct. 3, 2019), https://hnonline.sk/slovensko/2017306-ja-som-z-nej-urobila-to-co-je-je-cas-splatit-dlh-threema-ukazuje-ako-kocner-a-jankovska-riadili-sudkynu.

[63] The selection process in Slovaka rested on the results of the written part and oral interview. What made Maruniaková's selection suspicious was that, while she underperformed in the written part, the evaluation of her interview was so good that it allowed her to overtake her competitors. *See* Samuel Spáč, *Maruniakovú vybrali Sádovský a Sopoliga*, SME.SK (Oct. 4, 2019), https://komentare.sme.sk/c/22228910/maruniakovu-vybrali-sadovsky-a-sopoliga.html.

[64] Spáč et al., *supra* note 6.

[65] Monika Tódová, *Nie je to len Makó. K trestným činom sa priznalo už 26 vplyvných ľudí*, DENNÍK N (Sept. 21, 2021), https://dennikn.sk/2516034/nie-je-to-len-mako-k-trestnym-cinom-sa-priznalo-uz-25-vplyvnych-ludi/?ref=inc.

including the president of the Slovak intelligence service, both the special prosecutor and former general prosecutor,[66] the head of the criminal office of the Financial Administration, former ministers of justice,[67] of the economy, and of the interior, and, last but not least, former prime minister Fico.[68]

In the next three subsections we approach the informality in the Slovak judiciary from a different perspective, which suggests that cases of corruption are not necessarily individual mistakes, but rather a pattern of behavior that suggests a deeper problem with the understanding and internalization of the substantive content of "judicial independence" by Slovak judges. In the aftermath of massive corruption scandals, it manifested itself in the defensive, or at least reluctant, stance of the Judicial Council towards these allegations, but it is also present in the lack of recognition of other problematic off-bench behavior of judges: Spatial traveling between political and judicial roles, and the public appearance of and communications from judges through (social) media.

II. Internal Judicial Accountability Mechanisms and the Lack of Reaction to Corruption Scandals

The extent of the corruption cases described above targeted a surprisingly large segment of the judiciary. The trust in the courts further deteriorated, among both the public[69] and legal professionals.[70] Yet, the Judicial Council, the core self-governance body, remained silent. It failed to recognize, acknowledge (when confronted by the media), and react to the corruption allegations. Furthermore, the Chairman of the Judicial Council first dismissed fears about the

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[66] *See* Mária Benedikovičová, *8 verzus 14 rokov, celý majetok alebo 100-tisíc eur. V čom sa súdy v prípade Kováčika*, DENNÍK N, (May 24, 2022), https://dennikn.sk/2864009/8-verzus-14-rokov-cely-majetok-alebo-100-tisic-eur-v-com-sa-sudy-v-pripade-dusana-kovacika-nezhodli/?ref=list (naming special prosecutor and general prosecutor as Dušan Kováčik and Maroš Žilinka).

[67] *See* Benedikovičová, *supra* note 66 (naming Former Minister of Justice, Gábor Gál).

[68] Roman Cuprik, *Vyšetrovanie sudcov vedie aj k Ficovi, ten pred otázkami o Kočnerovi*, SME (Mar. 27, 2020), https://domov.sme.sk/c/22369604/vysetrovanie-sudcov-vedie-aj-k-ficovi-ten-pred-otazkami-o-kocnerovi-usiel.html.

[69] *Eurobarometer: Public Opinion in the European Union*, EUROPEAN COMMISSION, https://ec.europa.eu/commfrontoffice/publicopinion/index.cfm/Survey/getSurveyDetail/search/justice/surveyKy/2258. *See also* Perceived *Independence of Courts and Judges in the EU Among the General Public*, EUROPEAN COMMISSION (July 2020), https://europa.eu/eurobarometer/surveys/detail/2258; *Perceived Independence of the National Justice Systems in the EU Among the General Public*, EUROPEAN COMMISSION (Jan. 2019), https://europa.eu/eurobarometer/surveys/detail/2199.

[70] Survey, *Independence and Accountability of the Judiciary, ENCJ Survey on the independence of Judges 2019*, EUROPEAN NETWORK OF COUNCILS FOR THE JUDICIARY (ENCJ) (2019); *see also* Čuroš , *supra* note 15; Lucia Berdisová et al., *Coping with Threema: How do Lawyers Perceive Their Biggest Corruption Scandal?*, 103 PRÁVNY OBZOR 63, 67 (2020).

large-scale corruption present inside the judiciary,[71] and later, after the first round of group detentions and investigations, criticized politicians for attempting to interfere in the judiciary.[72] The majority of the judges in the Council supported this view and actively refused to take any action, suffocating attempts to engage in the discussion with the self-constrained, formalistic argument that the Judicial Council does not have any official authority to step into ongoing criminal proceedings.[73] But why did the judicial self-government body fail to react?

Indeed, aside from criminal proceedings, the Slovak judiciary has existing disciplinary mechanisms to address judges' misbehavior. However, this proved to be rather ineffective in the aftermath of the ongoing investigations. For example, in October 2020, the chief justice of the Supreme Court initiated disciplinary proceedings against Dana Wänkeová, a judge of the Supreme Court,[74] who allegedly attempted informally to pressure her colleague who was a witness in one of the ongoing criminal cases. Interestingly, the Chief Justice suggested reprimand as a sanction—and although he had the power personally to reprimand Wänkeová, he instead opted to rely on the disciplinary chamber. The recusal of one of its sitting judges required the case to be examined by an appellate chamber, which had long been non-functioning due to it having no presiding judge. In June 2021, the Chief Justice revoked his proposal, arguing that the non-activity of the disciplinary panel rendered the case ineffective. The new Minister of Justice[75] began new disciplinary proceedings in 2022, this time requesting Wänkeová's transfer from the Supreme Court to the regional level, in order to isolate her.[76] The Minister of Justice argued that she had failed "in the very core of her judicial duties by not

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[71] *Predsedníčka súdnej rady reaguje na aktuálne dianie v slovenskej justícii*, SÚDNA RADA SLOVENSKEJ REPUBLIKY (Aug. 26, 2019), https://www.sudnarada.gov.sk/predsednicka-sudnej-rady-reaguje-na-aktualne-dianie-v-slovenskej-justicii/ (naming the Chairman of the Judicial Council as Lenka Praženkova).

[72] VYJADRENIE PREDSEDNÍČKY SÚDNEJ RADY K SITUÁCII V JUSTÍCII, SÚDNA RADA SLOVENSKEJ REPUBLIKY (Mar. 13, 2020), https://www.sudnarada.gov.sk/data/files/1157_ts-english-16032020.pdf; *see Predsedníčka súdnej rady reaguje na aktuálne dianie v slovenskej justícii*, SÚDNA RADA SLOVENSKEJ REPUBLIKY (Aug. 26, 2019), https://www.sudnarada.gov.sk/predsednicka-sudnej-rady-reaguje-na-aktualne-dianie-v-slovenskej-justicii/.

[73] While technically correct, the Judicial Council was supposed to play significant role in ethical dimension, signalling the awareness of the problem inside the judiciary and willingness to address it, to the public.

[74] Veronika Prušová, *Sudkyňa Najvyššieho súda sa vyhla disciplinárnímu konaniu vďaka tomu, že nefungujú disciplinárne senáty*, DENNÍK N (June 4, 2021), https://dennikn.sk/2417279/sudkyna-najvyssieho-sudu-sa-vyhla-disciplinarnemu-konaniu-vdaka-tomu-ze-nefunguju-disciplinarne-senaty/?ref=list; Veronika Prušová, *Už aj sudkyni Najvyššieho súdu Wänkeovej hrozí stíhanie, Šikuta s potrestaním váha*, DENNÍK N (Oct. 26, 2020), https://dennikn.sk/2108050/uz-aj-sudkyni-najvyssieho-sudu-wankeovej-hrozi-stihanie-sikuta-s-potrestanim-vaha/?ref=inc.

[75] The new minister was Mária Kolíková, who had previously served at the ministry as a deputy and external advisor to Radičová's liberal government. She was responsible for one of the largest reform agendas of the Slovak judiciary.

[76] Veronika Prušová, *Ministerka o sudkyni Najvyššieho súdu" Porušila všetko, čo robí sudcu sudcom*, DENNÍK N (Sept. 10, 2021), https://dennikn.sk/2529933/ministerka-o-sudkyni-najvyssieho-sudu-porusila-vsetko-co-robi-sudcu-sudcom/?ref=list.

recognizing her own biases and lack of independence."[77] As of July 2023, the case of judge Wänkeová has still not been decided; she continues to work as a judge, and is even a member of the judicial board of the court.[78]

It was in this atmosphere that the Judicial Council faced a decision on how to react to decreasing public trust. In order to better understand its reactions we analyzed all plenary meetings in which the Council discussed corruption cases and disciplinary or criminal proceedings concerning judges involved in these networks, i.e. the seven meetings held between September 2019 and May 2022.[79] According to the Constitution, the Council is tasked with a duty to ensure that judges comply with requirements and personal qualities that allow them to execute their office justly.[80] The essence of these meetings therefore revolved around the question whether the Judicial Council should take any stance at all in the cases of judges under investigation of alleged corruption. The debates during meetings revolved around the following four topics: 1) Whether corruption cases represented individual failures or signaled a large-scale problem targeting the whole judiciary on the national level; 2) whether the Council had any formal authority to act; 3) whether the Council had a moral, ethical, or public responsibility to act, and, if so, 4) what the Council could do to address the situation.

Very early into the first meeting in September 2019, the members of the Council split into two camps. The conservatives—most of whom were judges, including the leadership of the Council, later implicated as being close to Kočner's circles—[81]vehemently argued that corruption cases are mere examples of individual failures, not a systemic problem that would

[77] Prušová, *supra* note 76.
[78] A similar scenario occurred after the Minster Kolíková initiated disciplinary proceedings against another accused judge Otília Doláková. First instance did not find a reason to suspend her office and since the autumn of 2020 there has been no appeal chamber to decide the case. There are two appeal chambers, neither of which had a president. The Judicial Council repeatedly asked judges to propose a candidate, but there was little interest among the judges. Should be solved by the new SAC. Veronika Prušová, *Sudkyňa Najvyššieho súda sa vyhla disciplinárnímu konaniu vďaka tomu, že nefungujú disciplinárne senáty*, DENNÍK N (June 4, 2021), https://dennikn.sk/2417279/sudkyna-najvyssieho-sudu-sa-vyhla-disciplinarnemu-konaniu-vdaka-tomu-ze-nefunguju-disciplinarne-senaty/?ref=list.
[79] SÚDNA RADA SLOVENSKEJ REPUBLIKY, Meeting on September 30, 2019, https://zasadnutia.sudnarada.sk/145669-sk/8-zasadnutie-sudnej-rady-sr/, in relation to cooperation with the Office of the General Prosecutor in case of seizure of mobile phones and personal computers from judges under investigation. The case was further discussed during meetings on the results of the activities of the Ethical committee, October 28, 2019, November 26, 2019, December 16, 2019, January 28, 2020, February 24, 2020, and May 25–26, 2020. For additional information on meetings, see *Zasadnutia Súdnej rady Slovenskej republiky*, SÚDNA RADA SLOVENSKEJ REPUBLIKY, https://zasadnutia.sudnarada.sk/zasadnutia-sudnej-rady-slovenskej-republiky/?art_rok=2019&ID=138352&frm_id_frm_filter_2=653139f69f9c2.
[80] ÚSTAVA SLOVENSKEJ REPUBLIKY [Constitution] ch. 7, art. 141a, para. 5; Act on the Judicial Council of the Slovak Republic, Act No. 185/2002 Coll.
[81] Martin Hanus & Pavol Rábara, *Threema: Zabíjačka elitných advokátov a sudcov s Kočnerom*, POSTOJ (Oct. 15, 2019), https://www.postoj.sk/48028/threema-zabijacka-elitnych-advokatov-a-sudcov-s-kocnerom.

shed poor light on the whole Slovak judiciary, and stressed the need to differentiate between judges proven to have participated in corruption and the rest of the judiciary.

The very same group was also adamant that the Council does not have any powers, that there is no accountability mechanism, or any other tool for that matter, that could be used to address the crisis. It relied on a restrictive reading of the Council's competences and refused to recognize the matters discussed on any other than the criminal level. The core judicial members repeatedly argued that the Judicial Council has no further ethical or moral responsibility that would oblige or allow it to act against, question, or sanction judges, or to take any stance in the matter. When the Council met on January 28, 2020 to discuss the effect of criminal proceedings initiated by the Minister of Justice against two judges involved in corruption networks,[82] the Council failed to find an answer to whether it can technically temporarily remove one of them from office when that judge is on a maternity leave. Instead, this group shifted on to the media the blame for manipulating information from the prosecution and investigation of corruption networks. In turn, the majority of members suggested that the Council should actually protect the judiciary from the blame-shifting.

The second camp that formed inside the Council was open to a more creative interpretation of the Council's role in judicial accountability processes. This camp (consisting of judges and non-judges) pushed through a successful proposal to establish a new Ethical Committee tasked with investigating cases, but also with creating interpretative rules for the future.[83] In June 2020, after the Council's Chairman was forced to step down,[84] the atmosphere changed and the rhetoric shifted to a more critical position which argued that the independence of the Slovak judiciary is dysfunctional and devalues the rule of law. This criticism, however, triggered outrage in the Slovak judiciary, with some judges closely tied to the conservative camp in the Council publishing opinions on the Chairman's incompetence in major Slovak media.[85]

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[82] Zuzana Marunikakova, judge for Bratislava v. District Court and Denisa Cvikova, judge for Bratislava I District Court.

[83] Interestingly, two judges (one of them the Chairman of the Council) who opposed any activity inside the Council, were nominated to this new committee. However, they had to resign within a month, since the media reported that they had attended a barbecue party with Kočner.

[84] Praženková, implicated by a relaitonship with Kočner, was succeeded by Ján Mazák, a former judge of the ECTHR, returning as an outsider with international experience.

[85] Patrik Števík, *Pôsobenie pána Mazáka vo funkcii predsedu súdnej rady je nedôstojné*, DENNÍK N (Jan. 19, 2021), https://dennikn.sk/2232040/posobenie-pana-mazaka-vo-funkcii-predsedu-sudnej-rady-je-nedostojne/; *see* Mária Tóthová et al., *K článku sudcu Števíka o predsedovi súdnej rady Mazákovi,* DENNÍK N (Jan. 21, 2021), https://dennikn.sk/2235302/k-clanku-sudcu-stevika-o-predsedovi-sudnej-rady-mazakovi/ (providing a response of judges and ex-judges).

Compared to the lukewarm reaction of the Judicial Council, the Association of judges of Slovakia reacted only two weeks after special operation Tempest took place. It suspended the membership of accused judges and somewhat vaguely noted that corruption in the judiciary is one of the core challenges and threats to society and a democratic state: It undermines judicial integrity, which is the basis of the rule of law; and it significantly reduces public trust in the execution of justice.[86]

Similarly, the reaction of a couple of individual judges also stood in a stark contrast to that of the Judicial Council, lost in debates on the essence of its competence. A group of judges from Eastern Slovakia reacted to news about operation Tempest by issuing a memorandum titled "Screen us," stating that "the extent of the pathological activity of some of the representatives of the judicial power calls for another response next to the initiated criminal proceedings," stressing that the leadership of the judicial authorities does not seem properly to ensure the accountability of the judicial branch.[87] For these reasons, the authors of the memorandum argued that lustration or the screening of judges' integrity cannot be considered unconstitutional, but rather a potential step to end the drastic fall in public trust in the judiciary.[88]

Nevertheless, reactions calling for some kind of measures aimed at increasing the public accountability of judges were few and far between. When the discussion about the potential lustration of judges reached the Judicial Council, it acted as if it was horrified and labeled the step as an unprecedented interference in the independence of Slovak judges, and a mere "marketing tool." Many courts supported this position. Judges in Bratislava circulated a memorandum that called upon judges to protect their reputation, tarnished by attacks from the media and politicians. The memorandum was signed by seventy judges on the very first day of its publication.[89]

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[86] Veronika Prušová, *Politici a médiá nám kazia meno*, DENNIK N (Mar. 27, 2020), https://dennikn.sk/1823747/politici-a-media-nam-kazia-meno-cast-sudcov-po-operacii-burka-hlada-vinnikov-mimo-svojich-radov/.

[87] Veronika Prušová, *Sudca, ktorý sa podpísal pod výzvu Preverte nás§" Bolo by naivné myslieť si, že problém je len v Bratislave*, DENNIK N (Mar. 19, 2020), https://dennikn.sk/1808555/sudca-ktory-sa-podpisal-pod-vyzvu-preverte-nas-bolo-by-naivne-si-mysliet-ze-problem-na-sudoch-je-len-v-bratislave/?ref=inc.

[88] The proposal for in-depth screening refers to a previously held debate in the Slovak judiciary. In 2014, political actors were already attempting to push forward the screening of judges, which the Constitutional Court quashed down after more than 5 years of deliberation. *See* Tomáš Ľalík, *The Slovak Constitutional Court on Unconstitutional Constitutional Amendment (Pl. ÚS 21/2014)*, 16 EUR. CONST. L. REV. 328 (2020).

[89] The memorandum was created by a district court judge, Martin Smolko. Veronika Prušová, *Politici a médiá nám kazia meno*, DENNIK N (Mar. 27, 2020), https://dennikn.sk/1823747/politici-a-media-nam-kazia-meno-cast-sudcov-po-operacii-burka-hlada-vinnikov-mimo-svojich-radov/.

III. Slovak Spatial Travelers: Revolving Doors Between Judicial and Political Careers

The phenomenon of spatial traveling or so-called "revolving doors," inter-institutional traveling between positions in the judicial and political branches of power, is one of the very common challenges political systems face on a global level.[90] Although spatial traveling raises concerns from the perspective of the separation of powers, in many systems it has been a fairly common occurrence. In some civil law judiciaries, judges routinely engage with the executive branch for limited periods of time, providing the expertise and first-hand experience to those involved in judicial governance.[91] Elsewhere, politicians serve on judicial bodies, such as in the French Conseil d'état. In countries with few judicial retirement strategies, former judges may be interested in serving as members of upper chambers of parliaments.[92] In other words, the challenges of spatial traveling are context-dependent. Besides traditions, the size of the country as well as the nature of the "traveling" comes into play. One-way career moves from the judiciary to politics may be acceptable, while traveling in the opposite direction may compromise perception of a judge's independence.

Spatial traveling in Slovakia, however, was in both directions, and, even more importantly, happened repeatedly. The prime example of cyclical spatial traveling is Štefan Harabin, who managed to serve for three years as the Minister of Justice, before becoming a Chief Justice of the Supreme Court and the Chairman of the JCSR, a position which he had already held in the past.[93] Harabin thus transitioned from the judiciary to the government and back within a short period of time, which raised questions about the independence of the court system, his impartiality as an individual judge, and the functional separation of powers. Harabin was, however, far from an isolated example. Traveling between judicial and governmental positions happened to even small district court judges, whose sudden political career intermezzos opened the door to swift promotion to the apex level. Several judges served as deputies at the Ministry of Justice while never resigning from their judicial office, smoothly returning to the judiciary once their political mandates were over.[94] As we described in Section

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[90] Juan Wang & Sida Liu, *Institutional Proximity and Judicial Corruption: A Spatial Approach*, 35 GOVERNANCE 633 (2021).
[91] *See* Silvia Steininger, *Talks, Dinners, and Envelopes at Nightfall: The Politicization of Informality at the Bundesverfassungsgericht*, in this Issue.
[92] *See* Patrick O'Brien, *Informal Judicial Institutions in Ireland*, in this Issue. O´Brien and Yong, *The Judicial Afterlife*, (2023), https://sites.google.com/brookes.ac.uk/the-judicial-afterlife.
[93] Spáč et al., *supra* note 6; KOSAŘ, *supra* note 6; Spáč & Kosař, *supra* note 8.
[94] This was the case of, for example, the judge in Žilina district, later Supreme Court judge and founder of the pro-Harabin Slovak union of independent judiciary, Daniel Hudák, former deputy at the Ministry of Justice in 2006–2010, under i.a. Harabin, and judge/deputy Minister Jankovská.

III(a), judges with previous careers in politics had a huge impact on the formation of corruption networks.[95]

Ever since the major reform of the judiciary in 2000, judges' political activity has been restricted by law "to exclude any possible grounds for challenging their impartiality."[96] Judges who had run in elections, even if unsuccessfully, were forced into a three-month cooling-off period in order to limit the effects on their reputations and perceived impartiality. Yet, as judges continued to be involved in politics, in 2019 the Parliament passed a law requiring judges who wished to run in parliamentary elections to resign from office.[97] The law was labeled "Lex Harabin," referring to the fact that Harabin—a former Minister of Justice, Chief Justice, and Chairman of the Judicial Council—in 2018 ran for the Presidency as a judge, and returned to the judiciary after the campaign, only to establish his own, ethno-nationalistic, populist party to run in the parliamentary elections.

Nevertheless, the new regulation targets only judges' careers in Parliament and is silent on the presence of judges in bodies of the executive branch, including in Presidential elections, which are arguably just as political.[98] Furthermore, it completely disregards the other, potentially more dangerous direction of traveling from politics to the judiciary, which has already proved to be consequential in Slovak history.

These examples demonstrate that traveling between the judicial and executive branches has been a common practice in the Slovak judiciary. The judiciary's reactions, or rather the lack of them, then show that this practice has been tolerated, sympathized with, at times even encouraged. In 2009, Harabin was elected by the Judicial Council to the position of Chief Justice of the Supreme Court and Chairman of the Judicial Council. He ran for that office as a

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[95] For example, Monika Jankovská served under two ministers of justice from 2012 until her detention in 2020, while being still officially listed as a judge. Jankovská was even included in the list of party members of SMER-SD in the 2016 parliamentary elections. Other well-known judges also became involved in political competition. To mention just a couple of examples, Supreme Court judge Peter Paluda ran for office in the 2012 parliamentary elections, former judge Jana Dubovcová served as an MP between 2010 and 2012 before becoming the ombudsperson, and judge Radačovský was successfully elected as an MP to the European Parliament in 2019, just a few months after his resignation from the judiciary. Radačovský became famous for his avid criticism of President of the Republic Kiska, potentially helping him become visible later on in the campaign for the European Parliament elections.

[96] Memorandum to the Act on Judges and Lay Accessors No. 385/2000 Coll. (May 26, 2000), https://www.nrsr.sk/dl/Browser/Document?documentId=137232.

[97] A judge who loses judicial office because of the exercise of the right to be elected can re-enter the judiciary only through the regular route of an open call for applications. Šimon Drugda, *Judges Cannot Run in Parliamentary Elections in Slovakia Anymore*, I-CONNECT (Nov. 12, 2019), http://www.iconnectblog.com/judges-cannot-run-in-parliamentary-elections-in-slovakia-anymore/.

[98] The same applies to the position of a minister of government, although technically judges could be appointed to government as independent experts.

serving Minister of Justice, and the Council, in which at that time fifteen out of eighteen members were judges, elected him without any hesitation. In a similar fashion, judges inside the Judicial Council did not protest and re-elected another member of the Council, Daniel Hudák, who at the same time was serving as the Deputy Minister.[99] When in 2017 it was rumored that serving Deputy Minister Monika Jankovská might be nominated to the Council, judges' objections were not heard;[100] instead, she was later even nominated for a position at the Constitutional Court. It needs to be mentioned that the most recent judge who served as the Deputy Minister, Michal Novotný, was severely criticized from within the judiciary. At the core of this criticism was the questioning of his independence, as he served as a member of a disciplinary panel at the newly established Supreme Administrative Court.[101] However, as some of the criticism aimed at his professional ability to serve at the Administrative Court, it showed traces of personal animosity as he served as a Deputy to the minister disliked by a considerable number of Slovak judges for her proposed, not well received, to reform the judicial map.

IV. Slovak Judges and Freedom of Expression

Judges everywhere have traditionally been expected to exercise considerable self-restraint in their freedom of expression.[102] Slovak judges in this area have skated dangerously close to the margins of what seems to be immediately acceptable. In the previous subsections we touched upon the reluctance of the Slovak judiciary to take a robust stance on corruption allegations, or on traveling between the branches of power. If we look at judges' off-bench behavior, particularly that related to the freedom of speech, we see another area in which the Slovak judiciary has failed to face the challenge and set some ground rules in order to protect the judicial branch's public image. The majority of the off-bench practices we identified target the media presence of judges: Communication via social media platforms, interviews, leaking

[99] After his initial term ended in 2007, he was nominated to the Council by the government and served there until 2011. This was, however, not the end of his career in the Council; in 2017 he was once again elected by the judges and remained a member until his death in 2018.
[100] Jankovská, nominee of the SMER-SD party at the Ministry, eventually withdrew her application after Minister Lucia Žitňanská from the junior coalition party, Most-Híd, threatened to resign if Jankovská were to be elected by the parliament. *See Jankovská nebude kandidovať do Súdnej rady, z ministerstva neodchádza*, TERAZ.SK (Dec. 5, 2017), https://www.teraz.sk/slovensko/brief-m-jankovska-nebude-kandidovat/296124-clanok.html.
[101] Letter from Michal Novotný, Judge of the Supreme Administrative Court of the Slovak Republic, to the Judicial Council (Mar. 14, 2023), https://zasadnutia.sudnarada.sk/stanovisko-michala-novotneho-sudcu-najvyssieho-spravneho-sudu-slovenskej-republiky/ (arguing that in questionable cases he recused himself, although in some of these cases the court decided that his impartiality was not endangered).
[102] Anja Seibert-Fohr, *Judges and their Freedom of Expression: An Ambivalent Relationship*, 2 REVISTA FORUMUL JUDECATORILOR 1, 1 (2019).

information from live cases, or giving opinions on political issues. While some representatives of the judiciary (mostly chief justices and court presidents) may occasionally appear in the media and comment on issues of judicial governance, the Slovak cases discussed below do not come into this category, and instead raise concerns about limits on judges' public behavior.

At the time when the Slovak public was closely watching the ongoing investigations into the judiciary and when the media were publishing some of the communications between judges and oligarchs, the president of the criminal division of Bratislava regional court, Peter Šamko, extensively commented on the current events and frequently published parts of case files on his personal blog, "Legal Letters" [Právne listy]. Šamko explained his activity as an attempt to balance the incorrect reports produced by the media covering the investigation of Kuciak's case, and to offer the public a more objective picture of what was *really* happening in individual proceedings.[103] With a similar rationalization, Šamko intentionally published the whole of the leaked Threema communication, as well as several allegations of judicial purges led by political actors after Kuciak's assassination, while never submitting any evidence to back them up. For example, he suggested that the individual who had cooperated with the police in the murder investigation as one of the key witnesses was in fact coerced into doing so and should not be trusted.[104] His activities did not go unnoticed. His own court president sanctioned his behavior with a reprimand. The Judicial Council debated his case twice,[105] however with no substantive conclusion. Opinions raised during the Council meeting were mostly sympathetic, explaining that he was indeed bringing an objective voice into the public discourse which had been full of half-truths and misinterpretations. In 2023 Šamko was elected by the judges to the Judicial Council.

Another group of judges, some of them very active and influential members of the Judicial Council, started their own website, "Judicial Power" [Súdna moc], where they publish their unconstrained views on ongoing debates—from reacting to articles published in the media to commenting on political developments related to the judiciary and judicial governance, and offering largely subjective summaries of some of the debates that take place in the Judicial Council. On this website, a judge of Bratislava II District Court, Patrik Števík, in October 2022 published a political manifesto criticizing the President of the Republic, Zuzana Čaputová. The Judicial Council once again failed to take any action, and instead debated whether it even had

[103] PRÁVNE LISTY, http://www.pravnelisty.sk/uvod (last visited Sept. 14, 2023).
[104] Monika Tódová, *Predseda súdnej rady Mazák: Je koniec vybavovania na súdoch*, DENNIK N (Jan. 28, 2022), https://dennikn.sk/2697289/predseda-sudnej-rady-mazak-je-koniec-vybavovania-na-sudoch-video/?ref=inc.
[105] In 2018 and in 2022.

the competence to interpret ethical standards (and their potential trespassing by Števík). The Council never reached any conclusion.[106]

Even more examples can be found in the presence of judges on social media, where they not only further share personal information and opinions, but sometimes participate in sharing common hoaxes or articles using hate-speech.[107] The most infamous representative of this group is Harabin. In 2016 he started a youtube channel, labeled Štefan Harabin The Judge, as the Chief Justice of the Supreme Court, only eventually to use it in his presidential campaign.[108] As of July 2023, Harabin, approaching viewers from his own living room, sharing his opinions on politics, court decisions, international affairs, or attempts to assassinate him, reached 44.6 thousand subscribers, with 320 videos and 17 million video views.[109] Harabin, who served as a judge until late 2019, when his tenure was terminated because he ran in the parliamentary elections, did not shy away from defamatory statements comparing the President of the Republic to a director of Guantanamo,[110] or suggesting that the new Chief Justice of the Supreme Court was mentally unstable.[111] Only after Harabin's term of office was over did the new Supreme Court Chief Justice initiate eleven disciplinary motions against him.[112] However, the disciplinary panels found the language used in his public speeches inconclusive and unclear.[113] The Judicial Council remained largely passive against Harabin's statements, and generally allowed judges to self-regulate their use of social media. In another case, the Council let slide the case of a media article in which a judge contested the decision-making practice of their appeal court.[114] In January 2021 the Council's Ethical Committee identified the case as an expression of individual independence, found it not problematic, but stressed that judges

[106] Meeting Minutes, Judicial Council of the Slovak Republic, Minutes from the 15th Session (Meeting of Nov. 15, 2022), https://zasadnutia.sudnarada.sk/data/att/11676.pdf.
[107] A somewhat separate story is that of Justice of the Constitutional Court Rastislav Kaššák. He used a false Facebook profile where he infamously called Putin a murderer, Trump a crook, and expressed his sympathy with Israel in the conflict in Gaza. He also publicly commented on a constitutional amendment he was supposed to review as a part of Constitutional Court chamber. The Judicial Council opened debate over his statements on behalf of Putin, Trump and Israel, however, once again without any concluding finding or position.
[108] But also Constitutional court justices Kaššák and Buchalová.
[109] Filip Struhárik, *YouTube zablokoval opäť obnovil Harabinov kanál. Daňovi zobral možnosť zarábať*, DENNIK N (Feb. 21, 2020), https://dennikn.sk/1766100/mediabrifing-youtube-zablokoval-a-obnovil-harabinov-kanal-danovi-zobral-moznost-zarabat/?ref=list.
[110] Veronika Prušová, *Švecová: Harabin dehonestuje justíciu. On oponuje, že predsedníčka je na liekoch*, DENNIK N (Mar. 1, 2017), https://dennikn.sk/694344/svecova-harabin-dehonestuje-justiciu-on-oponuje-ze-predsednicka-je-na-liekoch/?ref=list.
[111] Prušová, *supra* note 110.
[112] Prušová, *supra* note 110.
[113] Veronika Puršová, *Zatiahnuť do pojednávania osud detí sudkyne? Harabin to spravil*, DENNIK N (Dec. 11, 2019), https://dennikn.sk/1683403/zatiahnut-do-pojednavania-osud-deti-sudkyne-harabin-to-spravil/?ref=list.
[114] Meeting Minutes, Judicial Council of the Slovak Republic, Minutes from the 2d Session (Meeting on Jan. 26, 2021), https://zasadnutia.sudnarada.sk/data/att/7677.pdf.

needed to exercise a "great level of self-restraint, professionalism and support for the judicial authority as such".[115]

All in all, the Slovak judiciary's approach to judges' freedom of expression is rather clear—anything goes. The Judicial Council formally set some boundaries, but these were developed and applied only in a case in which a judge spoke critically about his job. Every other discussion was inconclusive, with the Judicial Council willing to close its eyes to some of the trespasses (such as leaking file information) for the sake of correcting the picture of the courts offered by public media. In addition, Slovak judges signaled their views on ethical issues and limits of judicial independence when they elected to the Judicial Council a judge famous for commenting on legal and political cases on his personal website. The step showed that for the majority of judges similar behavior is appreciated and, perhaps, even encouraged. Such a development suggests that the lack of clear regulation has led to the creation of an informal practice of judicial protagonism,[116] and tolerance of judges' public appearances, in which they used the media to gain more visibility and the opportunity to address the public, almost as if speaking to an electorate.

D. Conclusion: Non-internalization as the Underlying Cause of Informality

As was shown in Section II, the Slovak judiciary enjoys a considerable amount of self-governance, with the judge-dominated Judicial Council playing a central role in the system.[117] This model is a direct result of supranational recommendations Slovakia followed at the turn of the millennium, in the hope of insulating the judiciary from political interferences by transferring key competences, particularly over judicial careers, into the hands of the judges themselves. As a consequence, Slovak judges are very sensitive to political interference with the judicial branch, yet, as we have shown, lack sensitivity to other possible sources of interference or pressure. In Section III we focused on recently revealed cases of corruption in the Slovak judiciary which included interferences coming from outside of the judiciary as well as from within and the reaction of the Slovak judiciary. This lack of sensitivity then results in the inability to recognize instances of problematic behavior—be it corruption, traveling between the judicial and political branches, or instances where judges' freedom of expression

[115] Judicial Council of the Slovak Republic, *supra* note 114.
[116] LAWRENCE FRIEDMAN & ROGELIO PEREZ-PERDOMO, LEGAL CULTURE IN THE AGE OF GLOBALIZATION: LATIN AMERICA AND LATIN EUROPE 176 (2003).
[117] Katarína Šipulová et al., *Judicial Self-Governance Index*: *Towards Better Understanding of the Role of Judges in Governing the Judiciary*, 17 REGULATION AND GOVERNANCE 22, 33 (2023).

may have been taken too far. It further manifests itself in the avoidance of accountability processes designed with the intention of capturing informal practices undermining the formal safeguards of judicial independence, rendering past institutional changes essentially ineffective.

In this section we focus on possible explanations of why institutional changes aimed to increase judicial independence have failed to trigger the desired change. We argue that, due to problems with the understanding and internalization of judicial independence, they failed to create a change in the existing professional role conception shared among Slovak judges. Indeed, judicial independence is a fairly elusive term used with a variety of meanings. At times it is understood as the institutional insulation of the judiciary from the other branches; sometimes it is conceptualized as the individual discretion of a judge; in other instances it is approached as something that is perceived by judges themselves.[118] Independence can be understood as freedom from interference by actors outside of the judiciary—such as politicians, the media, organized interests, as well as from internal actors, mainly court presidents or senior judges.[119] The ambiguity of the concept, together with its normative power, provides, on the one hand, an opportunity for a strong rhetorical weapon, and, on the other, makes it so vague that it can become almost meaningless.

What the examples provided in Section III have in common is that the judiciary vigorously resisted any attempts at criticism or accountability coming from the outside, while remaining very benevolent towards the actors inside the system. What these examples also share is that the judiciary continuously used judicial independence, or its variations, as an ultimate argument shielding it from accountability, without properly addressing the meaning of the term or its margins. Even when faced with evidence of large-scale corruption and criminal investigations, the Judicial Council attempted to insulate judges from further public scrutiny, even accusing the media of harming public trust. The judiciary's reactions suggest

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[118] *See* Stephen B. Burbank & Barry Friedman, *Reconsidering Judicial Independence*, *in* JUDICIAL INDEPENDENCE AT THE CROSSROADS 9 (Stephen B. Burbank & Barry Friedman eds., 2002) (introducing Impartiality as individual independence); Shimon Shetreet, *Judicial independence and Accountability: Core Values in Liberal Democracies, in* JUDICIARIES IN COMPARATIVE PERSPECTIVE 3 (H. P. Lee ed., 2011); Kate Malleson, *Safeguarding Judicial Impartiality*, 22 LEGAL STUDIES 53, 59 (2002); Charles G. Geyh, *The Dimensions of Judicial Impartiality,* 65 FLA. L. REV. 493, 499, 513 (2014). *But see* MARIA POPOVA, POLITICIZED JUSTICE IN EMERGING DEMOCRACIES: A STUDY OF COURTS IN RUSSIA AND UKRAINE (2014) (viewing insulation as a structural independence); THEODORE L. BECKER, COMPARATIVE JUDICIAL POLITICS: THE POLITICAL FUNCTIONINGS OF COURTS (1970) (Becker focusing on behavioral aspects).

[119] *See, e.g.*, Peter H. Russell, *Toward a General Theory of Judicial Independence*, *in* JUDICIAL INDEPENDENCE IN THE AGE OF DEMOCRACY: CRITICAL PERSPECTIVES FROM AROUND THE WORLD 1 (Peter H. Russell & David M. O'Brien eds., 2001).

that this attitude and the instrumental use of independence as a shield from public accountability were widely shared among many Slovak judges and eventually emptied the formal institutions designed to protect judicial independence. This allowed for the subsequent creation of new informal acts and practices that further undermined formal guarantees, and once they were institutionalized, they turned reforms of judicial empowerment into empty shells with little substance.

Based on these processes, we argue that internalization of values is a necessary (but not sufficient) condition of institutional reforms. In the case of judicial independence, the internalization happens in five steps. First, judges need to recognize the normative importance of judicial independence for the rule of law and democracy. Second, they need to understand the concept and its individual dimensions and nuances, vis-à-vis both external actors and internal pressures stemming from the judiciary. Ultimately, they also need to understand that independence is their individual responsibility. Third, judges need to be aware of structural safeguards provided by the formal contours of their own system, again in all dimensions and nuances. Fourth, judges need to be able to identify situations in which judicial independence may be under threat. And, finally, judges need to be willing to act within the demarcation lines provided by the concept.

These five steps eventually lead to the creation of what we label "mental maps of judicial independence," which illustrate how judges navigate situations in their on-and-off bench behavioral practice, and recognize and potentially resist the threats to their independence.

The cases we described in Section III may appear to be examples of individual incidents. However, the protective and very corporatist reaction of the judiciary and the inability of the Judicial Council clearly to identify and condemn those instances where judges infringed principles of judicial independence indicate that the Slovak judiciary eventually institutionalized rules of behavior which were driven by a loose and instrumental understanding of judicial independence. In our understanding, the institutionalization of informal practices has two core aspects: A temporal requirement positing that a practice becomes a social fact when it is passed on to a new generation of actors, and the presence of sanctions for disobedience to institutionalized norms.[120] Both these defining features of institutionalization are present in the judicial behavior described in Section III. The longevity of these norms can

[120] *See* the introduction of this issue.

also be supported by existing scholarship, some people tying these practices to the heritage of the communist regime,[121] and others showcasing deficiencies in the functioning of accountability mechanisms prior to as well as after the establishment of the Judicial Council.[122] Also, some of these patterns of behavior have occurred only recently. Acceptance of "spatial traveling" has been encouraged for almost two decades, as demonstrated, for example, in support of revolving doors for Harabin's and Jankovská's career choices. The sanctioning element is a little more tricky. However, what we can observe is that even in the most blatant cases that required a response from within the system, only a very few judges publicly condemned the behavior of their colleague. On the other hand, judges who were fairly vocal defenders of their fellow colleagues were rewarded by being elected by their peers to the Judicial Council.[123]

Of course, the judiciary, like any other collective body, consists of a variety of individuals. By no means do we intend to claim that all Slovak judges have the same concept of the role of a judge or share an understanding of judicial independence. There are instances, be they in the Judicial Council or in reactions from individual courts, that suggest that there is some disagreement over these issues. However, the consistency of the reactions of the most influential representatives of the judiciary, the fact that a similar approach has again and again been dominant in the Slovak judiciary, and the reality that this approach seems to be encouraged and rewarded give validity to the argument that it has been, in fact, institutionalized.

[121] Čuroš, *supra* note 15; Spáč, *supra* note 8.
[122] KOSAŘ, *supra* note 6.
[123] Such as judges Kosová, Dudzíková, Erenová and Šamko.

CONCLUDING REMARKS

This thesis has explored the question of what role judges play in democratic resilience by looking at their individual, as well as institutional and collective engagement in different phases of the democratisation cycle. While political science scholarship typically accepts judges as quasi-political actors, theories of democratisation and transitional justice rarely take judiciaries into account beyond their role in the development of new constitutional and legal principles.

The set of studies presented in this thesis aimed to change this perspective and explain why judiciaries (i.e. courts as whole and judges as individuals) are, in fact, crucial first-order actors of democratic resilience. It has also argued that the role of judges in democratic political systems far transcends their traditional decision-making role. In these concluding remarks, I will first briefly summarise the major findings of the six selected studies and then explore the new routes of research I would like to undertake in the near future.

A. Judges, Democracy and the Impact of Judicial Resistance

The core research aim of this thesis was to explore the multi-layered role of judges in a democratic political system, particularly in relation to democratic backsliding and (re)democratisation. The political role of judges is, of course, not new to political science literature. Compared to legal and constitutional studies, which focus on doctrinal and normative explanations of judicial decision-making, the field of judicial politics has long engaged with the phenomenon of judicialisation, the delegation of political questions from the executive and legislator on judicial power, and consequential constraints on and limitation of the manoeuvring space political branches have in the area of so-called mega-politics (Hirschl 2007; Kopeček and Petrov 2016). Similarly, there is a long tradition of political science and economy scholarship exploring the conditions which facilitate judicial independence and the willingness of political branches to guarantee this independence even though it comes with a cost of power constraints (Ginsburg 2003; Rios-Figueroa 2007; Popova 2012; Kosař 2017; Graver 2018).

Nevertheless, the research in the field of judicial politics did not engage with a specific question of the judicial role in democratic resilience. The new avenue of research opened only with the wave of democratic decline, which revisited theories on militant democracy and extrapolated the role of judicial review in the fight against abusive constitutional and legal strategies but also demonstrated the fragility of courts vis-à-vis the political capture.

This thesis uses the recent phenomenon of judicial resistance as a vehicle to advance the debate on the role of judges in democratic resilience. It does so through an analysis of the judicial engagement in democratisation processes (transition, backsliding and re-democratisation). As I explicated in three consecutive parts of the thesis, there is strong empirical evidence that judiciaries played a crucial role in all three phases of the democratisation cycle. First, the courts matter in the implementation of transitional justice in the broad sense. The CEE experience supports the older empirical evidence from Latin America which suggests that courts change the logic and content of transitional policies. These go well beyond the decisions on transitional justice and shape systemic political decisions on the new state structures, constitutional design or fiscal policies. Moreover, judiciaries do not adopt these decisions as a result of a mechanical exercise and predictable formalistic application of the letter of the law. As I showed in a research with Hubert Smekal, they do so with explicit agency and perception that they are meant to play a certain role in setting the key values and democratic principles of new constitutions (Šipulová & Smekal 2021). The judicial approaches to the transitional agenda then depend, aside from institutional design, on broader models of judges' selection, governance structure, historical contingencies and personal experience with non-democratic regimes.

It is also important to stress that these considerations affect not only constitutional and apex courts (the crème de la crème of judicial elites). General courts, often composed of judges selected, educated and socialised under totalitarian regimes, adopt hundreds or thousands of cases relevant for the execution of transitional justice, that never reach the top judicial tier. As we highlighted in a study with David Kosař, political science research and practice should therefore pay more attention to the question of judicial transition, i.e. how effectively to purge and restructure judiciaries loyal to certain political establishments after regime change (Šipulová & Kosař 2025). Furthermore, the absence of judicial transition has repercussions that transcend the arena of transitional justice and democratic consolidation. The lack of "judicial transition" reflects in the formation of judicial culture and conditions the success of the adoption of new institutional frameworks meant to secure the independence of courts. Looking at examples from Slovakia, Georgia, Albania and Ukraine, we might hypothesise to what extent the lack of judicial transition enables the survival of incongruent informal institutions like judicial corruption networks, nepotism, clientelist networks that prevent merit-based selection, or the simple transformation of the logic which guides judges' relationship to political branches of power. There is plenty of scholarship suggesting that some CEE judiciaries never rid

themselves of the formalistic logic that aligns the role of judges with the protection of the state and of the legal order (Bobek 2009).

Moreover, populist strikes against courts have also shown that invisible transitional justice becomes a wild card in the hands of skilful politicians who can use it to manipulate the public trust and perception of the legitimacy of courts (Szcerbiak 2016; Nalepa 2021). In the end, this question repeatedly resonated even in the Czech Republic, where the communist past of judges keeps periodically popping up as a wild card that allows the politicians to question the legitimacy of judicial power (Šipulová and Kosař 2025).

The phenomenon of judicial resistance also deepened the interest of scholarship in the extra-judicial (also described as the non-adjudicative) role of judges in the political system. The visual image of judges stepping outside the courtrooms to protect the democracy against political abuses has shifted the perceptions of the judicial role across public, media, political elites and legal professional groups. It forced the acknowledgement across individual disciplines that judicial role is by its definition also political, as judges operate in between the judicial and political arenas of the separation of powers (Latour 2002; Bourdieu 1987; Bell 2001; 2006; Dyzenhaus 2003a).

However, the political role of judges comes with important limitations. The formation of alliances, negotiations, pivoting, and strategic litigation makes courts and judges vulnerable to politicisation. Furthermore, the stronger judiciaries become, the more tempting it will be for illiberal leaders to capture or weaken them. As I argued in Study III, the normative understanding of judicial resistance as an inherently helpful tool for democratic resilience comes at a cost. The techniques of resistance and networks forged to protect the courts can easily be utilised to foster as well as to weaken the quality of democracy. Judges who face political interference by populist forces can rely on the very same techniques as judges who object to and resist attempts to re-democratise (Study VI, Šipulová and Spáč 2023). Judicial independence therefore cannot be equated with an absolute insulation of the branch from any mechanisms of political accountability.

Based on these general observations, the thesis offers several theoretical takeaways. First, if judiciaries play a crucial role in the implementation of transitional (justice) policies, then it is crucial to pay more attention to the transitional reform of courts. This needs to go beyond the current ideas on the institutional redesigning of judicial independence and the rule of law. Like political actors and the civil service, transitional justice theories need to rethink

how to come to terms with the role of judges under non-democratic regimes (Garoupa 2024). However, judicial purges are complicated by two factors. The first is judicial independence, which protects judges against political interference and arbitrary removal. While it might be relatively easy to criminalise straightforward transgressions and disciplinary offences of judges, it is much more problematic to remove judges only on the grounds of the lack of legitimacy behind their selection. The Polish post-2023 struggle to reform the judicial system and address the position of so-called 'neo-judges' best demonstrates this struggle, as it opens the pandora's box of pragmatic considerations.[124]

Second, the narrative of judges as democratic guardians has gained important momentum. However, the empirical evidence suggests that judicial resistance has its limitations and needs to be better conceptualised and grounded in current theories on judicial independence and legitimacy. The very same techniques judges utilise to fight political interferences might make them more susceptible to political interest and future pressure, but may also perceive them as more political or even politicised. This is particularly the case for those resistance strategies that bend the letter of the law and stretch the contours of judicial power for the sake of the greater good. As some of the judges who actively participated in resistance have noted, resistance cannot be unseen and judges need to stay clear of understanding their roles as acts of heroism (Šipulová 2025b, forthcoming).

If judicial resistance has shifted public perception as well as judges' self-perception of what the role of judges in democratic societies is, it is up to academia to rise to the challenge and match the shifting narrative with a reconceptualisation of the limitations of judicial independence and its repercussions on the theory of separation of powers, judicial independence and its legitimacy.

B. The Way Forward

The theoretical contribution identified in the thesis shed light on many blind spots of empirical scholarship and research. I would like to use the opportunity to unpack these and fill in the gaps in our understanding of courts in my future research. The areas in which I identified a need for

[124] The legal scholars sometimes offer a seemingly easy answer, arguing that illegitimately selected judges were never really judges in the first place. However, the question is far more complicated – these judges were educated and affirmed under the contours of the democratic system. They passed all official requirements, many also accepted selection outside any political incentives. Even more importantly, they acted in individual disputes and issued thousands of binding decisions. The 'swipe of the hand' removal of these neo-judges would not only undermine legal certainty in individual relations, but also open deeper questions on guarantees the rules of the game bring to how we educate the judicial elite, prepare individuals for future judicial role and control for their moral and ethical standards.

further empirical and theoretical research revolve around five topics: 1) The link between the judicial culture and resistance, including the normativity of the concept; 2) the lacking empirical evidence on the de facto behaviour of judges under non-democratic regimes; 3) the exploration of the theoretical and practical limitations of judicial resistance; 4) the role of extra-judicial activities and off-bench behaviour in judicial culture and the public perception of judicial legitimacy, and 5) the invisible barriers to judicial resistance, in other words, what other constraints prevent judiciaries from playing their role of bulwark against democratic backsliding.

First, as the thesis suggests, despite the rich scholarship on democratic backsliding and political attacks against courts, very little attention has been paid to the implicit normativity behind the concept of judicial resistance. The terms resistance and resilience have been deliberately used almost as synonyms, without any deeper consideration of what the resilience of an institution or democratic structure really means. Natural sciences, where the concept originally developed, understand resilience as a broad phenomenon including the adaptability of the organism or environment to upcoming challenges. The first blind spot I would like to focus on in future is, therefore, a better conceptualisation of judicial resistance and its relationship to democratic resilience. My future theoretical focus lies with the concept of judicial culture in the ability of judiciaries to act as one of the agents of resilience. In this respect, I would like to build on Gutmann and Voigt (2018) who suggested that culture and informal institutions might determine the degree of (de facto) judicial independence, its correlation with formal de jure judicial independence, as well as the institutionalisation of key norms of rule of law and democratic institutions (Krygier 2020).

The importance of judicial perspectives cannot be overstated. Judges do not operate in a vacuum; they interpret and apply the law through the lens of their professional experiences, historical context, and ideological dispositions (Ginsburg and Moustafa 2008; Gonzalez-Ocantos 2016). The judicial culture, however, does not emerge as a mere by-product of formal constitutional guarantees. Instead, it is inherently relational (Kubal 2024), actively forged through professional socialisation (Aguiar-Aguilar 2022; 2024) and the constant internalisation of new norms across different internal and external judicial networks (Kubal 2024).

Second, the understanding of the judicial role should be paired with more empirical evidence of what is happening once the courts are successfully co-opted by the political power. Despite theories on the internal, individual judicial independence and impartiality of judges, very few studies so far have traced how judges hand-picked, captured, or packed by non-

democratic regimes actually decide (Popova 2012; Kureshi 2021). More research in a similar direction is needed. In the European setting, the studies on the judicial behaviour of Polish, Hungarian and Slovakian judges would be an ideal candidate to enable us to understand to what extent are domestic judges able to remain individually independent under an institutional capture, and to see to what extent the co-opted judiciary actually plays to the benefit of political actors.

Third, cultural subservience to the State not only limits the ability of judges to resist, but also prevents them from gaining social legitimacy. If we talk about the changing perception of and expectations from the judicial role, this openly calls for wider, survey-based studies. The excellent recent research conducted in CEE populist jurisdictions by Krehbiel (2021), Nelson and Driscoll (2023) suggests a weak link between political attacks on the rule of law and public support for the judiciary. This emerging vein of political science scholarship suggests that the public forms its position as regards the judiciary primarily based on two factors: partisan preferences and awareness of the rule of law and the courts. First-hand experience with courts plays only a secondary role (with the surprising result that a majority of the public with first-hand experience with courts actually has a greater trust in the courts than people with no experience at all; Urbániková and Šipulová 2018). This suggests that the widespread call to increase the public's trust in the courts in the hopes of punishing political actors for tinkering with courts is not a straightforward process. The public trust in the majority of society might depend on the narratives shaped by judicial intermediaries, such as the media, NGOs, legal professional groups, and also politicians. I would like to focus on this link and explore how judges and courts communicate with different audiences and how these communication channels shape the narratives intermediaries create about the courts and the judicial role in the public sector.

Fourth, I have repeatedly noted that judicial resistance comes with limitations. Some of these limitations stem from the concept of judicial independence (are judges who mobilise the public in the streets still independent?), some from the risks of political non-compliance (many democratic politicians recently broke the unwritten rule that judicial decisions are to be respected, even if they are not convenient), and some from the limits of judicial alliances. The reactions of judges to democratic backsliding in Romania, Hungary and Poland have brought a short-lived optimism about the role of European supranational actors in supporting their domestic judicial peers. The practice, however, has proved to be much less optimistic. Supranational actors, and supranational courts in particular, may motivate judges to resist, but

they are not always reliable. The European Commission is an important partner for judicial resistance, but does not always act in domestic judges' best interest (Šipulová 2025b forthcoming; Coman and Buzogány 2024; Kelemen and Pavone 2023). The interviews with CEE judges who participated in supranational alliances and resisted domestic populist leaders suggest that EU institutions struggle to read the domestic context or to respond to judicial requests (Puleo and Coman 2024; Nikolaidis and Youngs 2023). This is a bad omen for other democratic structures targeted by illiberal non-democratic leaders, since judges belong among the professional groups with very solid supranational networks, including high-profile political actors. This early observation, however, calls for more research on how well other actors, such as the media or NGO sector, can replicate the resistance patterns and strategies that relied on pressure and networks at the European supranational level.

Finally, fifth, it is important to keep in mind that judges are not the agenda-setters of court decision-making. They can safeguard democratic values only if they can rely on actors who are capable of bringing forward well-argued claims and petitions against undemocratic practices. This puts judicial resistance in a different perspective. To what extent will the destiny of de-democratisation change if illiberal politicians target other democratic structures? I hypothesise, that just like the political role of judges changes in different phases of the democratisation cycle, their role in the protection of democracy might change depending on a particular structure that is under the attack. This then shifts the burden of responsibility to other actors, and in particular, other legal professional groups, such as attorneys, barristers, prosecutors or NGO lawyers, and academia, who might act on behalf of individuals and structures facing the risk of dismantling under non-democratic reforms. Surprisingly, the role of other professions in democratic backsliding remains almost completely unexplored, despite pilot studies from the US suggesting that lawyers have a tremendous impact on the State and the quality of democracy, since they pervade all three branches of power (Pavone 2023). Next to judges, these actors might have a similarly profound impact on the formulation and distribution of narratives, not to mention that they, when present in civil and public service, actively forge crucial state policies. As the final part of the research on judiciaries in democratic resilience, I would therefore like to zoom in on these other professional legal groups and their interaction with judiciaries in the current wave of democratic backsliding.

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