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Annex No. 10 to the MU Directive on Habilitation Procedures and Professor Appointment Procedures

HABILITATION THESIS REVIEWER'S REPORT

Masaryk University	
Faculty	Faculty of Social Studies
Applicant	Mgr. et Mgr. Katarína Šipulová, Ph.D.
Habilitation thesis	Judges as Actors of Democratic Resilience
Reviewer	Prof. Dr. Anne Sanders
Reviewer's home unit, institution	Bielefeld University, Faculty of Law

Review
This review seeks to summarise my considerations for supporting the acceptance of the habilitation thesis of Mgr. et Mgr. Katarína Šipulová, Ph.D.

I. Presented Papers

Introduction
The introduction explains the research questions of the habilitation thesis. Using mixed-methods approaches, it seeks to offer a bridge between different theories on judicial decision making and judicial behaviour, judicial resistance and democratisation, transitional justice and the judicialization of politics. Katarína Šipulová investigates the role of judges as political actors of democratic resilience. This way, the thesis makes not only an impressive contribution to the growing literature on judges under stress and democratic backsliding but builds a holistic model of judges as actors of democratisation and de-democratisation. Katarína Šipulová does so by looking at the role of judges in transition to democracy (Study I, II), and resistance (Study III, IV) including the role of informal institutions and values (Studies V, VI).

Part 1: Judges as Actors of Democratic transition
Study I between Human Rights and Transitional Justice explain the role of CEE constitutional courts in Post Communist Central Europe.
The paper shows the Czech Constitutional Court as an actor in the democratic transition of the Czech Republic with its own vision of transitional justice, using both the national constitution and international human rights law as tools to implement this vision. This is a fascinating paper that clearly shows the distinct role judges can play in the democratic transition. The development of references to international Human Rights Law in the case law of the court is an interesting aspect which Katarína Šipulová and her co-author explain convincingly with initial barriers to access to the case law of the ECtHR such as a lack of language skills and skilled law clerks. This is an aspect that e.g. David Law has also discussed as an important factor in judicial diplomacy and use of decisions of foreign courts in different Asian Apex Courts (David Law, Judicial Comparativism and Judicial Diplomacy, 163 University of Pennsylvania Law Review (2015) 927, 1010-1020). The strategic use of Human Rights Case Law is another important insight, underlining the court's agency.

Study II Purging the judiciary after a transition: between a rock and a hard place
This is an extremely timely paper that builds on the Czech experience of lustration after the democratic transition in the early 1990s. The topic is particularly interesting given not only the

extensive experience with the exchange (or lack thereof) of judges after system changes in Europe after World War II and in the 1990s. Moreover, after the end of the PiS government in Poland in 2023, the question also arose famously how to deal with judges appointed and promoted under the old regime. Katarína Šipulová and her co-author describe this aptly as a position between a rock and a hard place. On the one hand, removal of old elites can be seen as an important part of transition. Otherwise, old elites might replicate themselves and continue old practices even in new institutional settings, an aspect Katarína Šipulová and her co-author explore further also in Study VI. On the other hand, few countries have enough trained lawyers available that could replace sitting judges. Moreover, judicial independence (as interpreted especially by the institutions of the Council of Europe) only allows a removal of sitting judges under stringent prerequisites, usually only because of concrete, personal misdeeds, not just because of an appointment under a previous regime and even closer ideological ties. In the last decade, in the face of growing concerns of a removal of judges in the European rule of law crisis, these standards have been tightened even more. Katarína Šipulová and her co-author explore this topic with great intellectual force.
In the Czech Republic, they diagnose a missed opportunity despite the fact that more judges were removed from office there than in other countries. They describe effective lustration as important for rebuilding judicial independence and public trust. However, the question remains if and how lustration could have been done differently and better, given the constraints Katarína Šipulová and her co-author describe, including a lack of trained personal. Answering this question may go beyond the scope of this paper, however.
Moreover, the question arises if public trust is indeed higher after a purge of the judiciary, as the applicant and her co-author suggest. Is there reliable data on this point? Germany could offer an interesting case study of different developments of the judiciary, including if public trust in the judiciary is higher in case of complete exchange. In Eastern Germany, just like in Czechoslovakia, after the communist regime came into power, there was a removal of old judges and new judges put into office after short trainings. In Western Germany, judges that had already been in office under the Nazi-regime stayed in office. After the German reunification, almost all East-German judges were replaced with judges trained in Western Germany. If this led to higher trust in the judiciary is not clear, however. This could also have contributed to a perceived loss of self-determination. Maybe this would be worth investigating.

Part 2: Judicial Resilience

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

This is an important, thought-provoking paper that explores the different strategies judges may employ in judicial resistance. Mgr. et Mgr. Katarína Šipulová, Ph.D develops a typology of different measures judges take, including on-bench and off-bench actions and doing nothing, invalidation, aversion and punishing (p. 114-115). She then convincingly challenges the view that judicial resistance as such has normative value (p. 116). This means that resistance must be measured against a normative standard to decide whether it is from the “light” or “dark side”. In this respect, I would have welcomed a discussion what standards are relevant here. The standard is likely to be found in national constitutional law that judges are obliged to apply. European standards based on the case law of CJEU and ECtHR and even the CoE softlaw developed e.g. by the Venice Commission and the CCJE probably also plays a role. Several CCJE Opinions and an ECtHR decision e.g. stress that judges should speak out against attacks against judicial independence: CCJE Opinion No. 3 (2002) para 34; CCJE Opinion No. 18 (2015) para 41; CCJE Opinion No.25 (2022) para 58; ECtHR Zurek v. Poland 10.10.2022, No. 39650/18 para 222.
The role of normative standards comes back at the discussion of the invalidation and of the case law of CJEU, ECtHR and the Inter American Court of Human Rights (pp. 119-124). While one can certainly hold very different views on the convincingness of the case law of these courts, I would have welcomed a deeper discussion. For example, p. 121 mentions a “troublesome involvement” of the CJEU and an “overstretched analogy”. This sounds like an evaluation of the case law from the perspective of EU-law. This would have deserved a

discussion taking into account not only the entire case law of the CJEU but also the extensive legal academic discussion on the issue. In relation to the legal basis the CJEU uses, Art. 19 TFEU, for example, Art 47 European Charter of Fundamental Rights, and Art 2 TEU could have been mentioned and the decision in which the CJEU has developed this line of reasoning (Associação Sindical dos Juízes Portugueses (ASJP) C 64/16, 27.2.2018).
According to the paper, the involvement of the Inter American Court of Human Rights is not "troublesome", but the court is in an "easier position". However, it is not explained why this is the case. If the Inter American Court of Human Rights found a better legal basis in the American Convention on Human Rights, this should have been mentioned, but only two judgements are quoted here. If there is just a line of case law this might have been criticised just like the case law of the CJEU and ECtHR. According to the article, it seems to make a difference that the Inter American Court of Human Rights stood up "repeatedly" against interferences with judicial independence. More references to these decisions would have been welcome to understand this argument. Moreover, the CJEU und ECtHR have by now stood up repeatedly against interferences with judicial independence in different European member states as well.
The diagnosis for the limitations p. 122 is certainly true.
On p. 123, the discussion of the US Supreme Court case law is also a bit short.
I understand that a full discussion would go beyond this paper, which does not have a legal focus, but I think it would have been helpful to address more clearly if and how important it is that judicial decisions as acts of judicial resistance are convincing from the perspective of legal doctrine, how this is to be ascertained, and also what role different legal views play. As there are extensive legal discussions on the case law, I would have preferred a more cautious or more extensive discussion.
Mgr. et Mgr. Katarína Šipulová, Ph.D. also makes the argument that public trust could be affected by judicial resistance (p.155). This is a good point that raises the question what role manipulation/delegitimation of public opinion plays in this respect.

Study IV: Judicial Resilience: The Shield and Sword of Informality
This paper also offers important insights on the importance of judicial networks. European judicial networks is a topic that gained attention during the rule of law crisis and was also explored by e.g. Jackson in her PhD thesis "Inside European Judicial Networks (2024).

Part 3: The Role of Informal Judicial Institutions in Democratic Resilience
Study V: Decay or Erosion? The Role of Informal Institutions in Challenges Faced by Democratic Judiciaries
Informal institutions and value internalisation are fundamental topics of democratic resilience and the contribution of Katarína Šipulová in this area alone makes her a leading scholar in this field. The study provides great insights. The argument that informality can work as a safeguard against challenges was a point very well made.

Study VI: (No) Ghost in the Shell: The Role of Values Internalization in Judicial Empowerment in Slovakia
Another important work is the empirical study VI that argues convincingly that following the blueprint of the Council of Europe's recommendation is not enough, but that judicial culture must be a major concern of any judicial reform. The formal and informal side of organisations is a classic topic of sociological research. The German sociologist Niklas Luhmann (Funktionen und Folgen formaler Organisationen 5.ed. 1999) e.g. has argued that every organisation has a formal and informal side and that any attempt to remove informality will just create circumvention tactics. While violations of the formal rules must be avoided, a successful formal organisation is strengthened by supporting informal institution. The applicant and her co-author have convincingly tackled this topic in relation to a judiciary in transition and have shown that mere formal rules without any effects on underlying values and judicial culture were not enough for the transition of a judiciary.

II. Conclusion

The study's presented in this habilitation thesis provide groundbreaking and timely insights skilfully using multiple method approaches. Mgr. et Mgr. Katarína Šipulová, Ph.D. is a renowned scholar in the area. The research agenda she presents in the conclusion of her thesis suggests that she will continue her important path and that even more important insights can be expected from her.
She fulfils all requirements to have her habilitation accepted and deserves all good wishes for her future research.

Reviewer's questions for the habilitation thesis defence (number of questions up to the reviewer)

1) My first question relates to the importance of legal reasoning and arguments in Mgr. et Mgr. Katarína Šipulová, Ph.D. research. She has pointed out convincingly that legalistic ideals of a neutral and objective application of the law do not fully explain judicial behaviour. For this reason, she applies behavioural theory to explain judicial actions. However, Katarína Šipulová submits that legalistic ideals contribute to judges' legitimacy. If legalistic reasoning might be a legitimising element for the rule of law, how important is the convincingness of judicial actions judged against a legal standard? How should research in the field of political science integrate such a standard?

2) My second question is about the relationship between general culture, judicial culture and political culture in a country and how they interact in democratisation and de-democratisation processes?

Conclusion

The habilitation thesis entitled "Judges as Actors of Democratic Resilience" by Mgr. et Mgr. Katarína Šipulová, Ph.D., **fulfils** requirements expected of a habilitation thesis in the field of Political Science.

Date: Bielefeld, 30.10.2025 Signature