ABUSE OF JUDICIAL APPOINTMENTS AND DISMISSALS: A RULE OF LAW FRAMEWORK

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Author's Declaration

I, the undersigned, Teodora Miljojkovic, candidate for the PhD degree in law at CEU Department of Legal Studies declare herewith that the present thesis titled "Abuse of Judicial Appointments and Dismissals – A Rule of Law Framework" is exclusively my own work, based on my research and only such external information as properly credited in notes and bibliography. I declare that no unidentified and illegitimate use was made of the work of others, and no part of the thesis infringes on any person's or institution's copyright. I also declare that no part of the thesis has been submitted in this form to any other institution of higher education for an academic degree.

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Abstract

This thesis develops a normative and analytical framework for evaluating political interference with judicial appointments and dismissals through the lens of a teleological conception of the rule of law. Rather than prescribing fixed thresholds for legitimate institutional reform, it seeks to enrich rule of law theory by offering typological tools to assess whether state actions affecting the judiciary adhere to the justificatory commitments at the heart of the rule of law. On this account, legality is treated as a necessary but insufficient condition: public power must also be exercised in a manner that is reasoned, transparent, and capable of withstanding public scrutiny.

The thesis constructs typologies of abusive practices that reveal how formal legal procedures may be repurposed to achieve politically instrumental ends. These classificatory devices—developed through a combination of theoretical analysis and comparative inquiry—enable a more refined evaluation of institutional reforms that comply with procedural legality but subvert the underlying normative aims of the rule of law. Emphasis is placed on patterns of interference that exploit legal form while eroding the substantive guarantees of judicial independence.

Special attention is devoted to the figure of the *inherited judge*, whose continued tenure in moments of political transition exposes a fundamental paradox: while judicial permanence safeguards against arbitrary power, it may also provoke attempts at removal in the name of democratic renewal or systemic reform. The thesis treats such tensions not as anomalies but as illustrative of broader structural dilemmas in constitutional democracies.

Through the development of a justification-based evaluative lens and its context-sensitive typological analysis, the thesis contributes to a more nuanced vocabulary for identifying and assessing rule of law violations. It moves beyond formalist approaches by foregrounding the justificatory ethos that must accompany institutional change, and by clarifying how ostensibly lawful reforms may amount to disguised efforts at judicial capture. In doing so, the study makes both conceptual and methodological contributions to contemporary debates on judicial independence, democratic backsliding, and the normative resilience of the rule of law.

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Formally Lawful but Functionally Abusive Reforms	De Facto Infringements of Judicial Autonomy
Recrafting appointment procedures to increase political control (e.g., shifting appointment powers to politically dominated bodies).	Appointing loyalists under the guise of meritocratic or legal reform, despite political motivations being clear in practice.
Expanding the number of judicial seats or altering quorum thresholds in ways that enable political packing.	Creating new judicial bodies or reconfiguring existing institutions to consolidate political control.
Establishing parallel or new judicial governance institutions to circumvent existing checks.	Filling purposefully created vacancies resulting from prior illegal dismissals or forced retirements.
Altering rules of procedure to favor executive or legislative dominance without explicitly removing judicial guarantees.	Using supermajority requirements to simulate constitutional protection while enabling unchecked political dominance.

Table 3. Typology of Abuse of Procedure in Judicial Appointments

Type of Abuse	Category	Definition
Opaque and Expedited Procedures	Formal	Acceleration of appointments without sufficient deliberation or transparency, preventing thorough candidate evaluation or public oversight.
Procedural Manipulation During Institutional Transition	Formal	Strategic timing of appointments during government transitions to preempt incoming authorities or extend control over the judiciary.
Circumvention of Internal Institutional Rules	Formal	Bypassing legislative or institutional rules governing appointments, such as quorum requirements or mandatory committee participation.
Deviation from Statutory Appointment Requirements	Formal	Failure to comply with legal procedures or qualification criteria prescribed for judicial appointments under national law.
Discretionary and Non-Transparent Selection	Informal	Vague or opaque selection criteria allow for politically motivated choices without accountability or oversight.
Personalization and Ideological Appointments	Informal	Appointments are based on personal loyalty, ideological alignment, or political affinity rather than merit or independence.
Appointments as Outcomes of Political Bargaining	Informal	Judicial appointments are part of informal political compromises or power-sharing arrangements prioritizing partisan interests over judicial independence.
Post-Reform Elite Capture and Structural Dependence	Informal	Political influence over appointments is persistent despite formal reforms to enhance judicial independence.

List of Abbreviations

ACHPR – African Commission on Human and Peoples' Rights
AfCHPR – African Court on Human and Peoples' Rights
CCJE – Consultative Council of European Judges
CJEU – Court of Justice of the European Union
CoE – Council of Europe
ECtHR – European Court of Human Rights
EComHR – European Commission of Human Rights
ECHR – European Convention on Human Rights
EU Charter – Charter of Fundamental Rights of the European Union
IBA – International Bar Association
ICCPR – International Covenant on Civil and Political Rights
ICTJ – International Center for Transitional Justice
IACtHR – Inter-American Court of Human Rights
IACHR – Inter-American Commission on Human Rights
KB – King's Bench
OAS – Organization of American States
OHCHR – Office of the UN High Commissioner for Human Rights
OSCE – Organization for Security and Co-operation in Europe
PACE – Parliamentary Assembly of the Council of Europe
PC – Judicial Committee of the Privy Council
RoL – Rule of Law
SA – South African Law Reports
SCC – Supreme Court of Canada
SCR – Supreme Court Reports (Canada)
TJ – Transitional Justice
UN – United Nations
UNDP – United Nations Development Programme
UNGA – United Nations General Assembly
UNHRC – United Nations Human Rights Committee
Venice Commission – European Commission for Democracy through Law
ZACC – Constitutional Court of South Africa
ZAGPJHC – Gauteng Local Division, High Court of South Africa

Introduction

In February 2025, Italian Prime Minister Giorgia Meloni offered a striking formulation of a common political grievance towards the judicial branch: *"If I make a mistake, the Italians can vote me out of office. If they make a mistake, no one can say or do anything. No power in a democratic state works like that."*[1] While framed as a call for democratic accountability, this remark reflects a deeper structural dilemma in constitutional democracies: how to reconcile the rule of law's imperative to shield the judiciary from political pressure with the political branches' claim to democratic legitimacy and institutional oversight.

At the core of this tension lies the doctrine of judicial independence, which has long been upheld as an essential pillar of the rule of law. Security of tenure—the guarantee that judges cannot be removed except under narrowly circumscribed conditions—is traditionally seen as a bulwark against arbitrary interference and instrumentalization. Yet this same guarantee can become a source of frustration for elected officials who confront a judiciary perceived as unaccountable, ideologically opposed, or resistant to institutional reform. The problem is not new, but it becomes particularly fraught in moments of political transformation, where inherited judicial structures are seen as relics of an earlier regime, and where demands for "renewal" or "purification" of the bench may arise.

[1] Giorgia Meloni, quoted in Angelo Amante and Crispian Balmer, 'Meloni Takes on Italy's Judiciary in Echo of Berlusconi' (Reuters, 17 February 2025) https://www.reuters.com/world/europe/italys-meloni-takes-judiciary-echo-berlusconi-2025-02-17 accessed 1 March 2025.

This sets the stage for a paradox of the rule of law. On the one hand, the protection of judicial tenure is indispensable for preserving the autonomy of adjudication and for restraining majoritarian impulses. On the other hand, when that protection is wielded to shield the judiciary from all forms of institutional critique or adaptation, it may give rise to calls for correction, often articulated in the name of democratic responsiveness or systemic reform. These calls, however, are rarely normatively neutral. The same legal instruments designed to protect the judiciary can be repurposed to undermine it. Political actors may adopt the rhetoric of reform, transparency, or modernization to justify practices whose underlying aim is to weaken judicial resistance and recalibrate the balance of power in their favour.

It is here that the limits of legal formalism become most apparent. The mere fact that a reform complies with procedural legality does not settle the question of whether it respects the rule of law. Formal rules may be observed, yet the telos—the normative end—of the rule of law may be compromised. This thesis addresses precisely that dilemma: how to differentiate between legitimate judicial reform and disguised efforts at court capture, how to identify the threshold of the rule of law at which political discretion in judicial design becomes normatively suspect, and how to articulate a framework for such scrutiny that does not collapse into subjective or partisan judgment.

1. Terminology

Across a wide array of constitutional systems, the rule of law is frequently heralded as a foundational element of legal and political order. Yet, despite its rhetorical centrality, the concept remains elusive, invoked in varied and sometimes contradictory ways. As a formal principle, the

rule of law reflects a foundational concern of political theory—how to subordinate power to law—a dilemma famously likened by Rousseau to the challenge of squaring the circle.[2]

Rather than retracing the well-trodden path of definitional debates concerning the meaning and scope of the rule of law, this thesis advances a more focused inquiry: it examines how the rule of law theory, particularly in its teleological conception, may serve as an evaluative framework for assessing interference of political branches of the government with judicial independence—specifically through appointments and dismissals of judges. While judicial independence is conventionally regarded as a structural prerequisite for the rule of law, the normative contours of appointment and dismissal procedures are more commonly addressed within the framework of the separation of powers. Yet, contemporary rule of law theory and jurisprudence reveal a notable convergence between these principles.[3] The recent jurisprudence of the Court of Justice of the European Union (CJEU), for example, has affirmed that "the judiciary must be distinguished, following the principle of the separation of powers which characterizes the operation of the rule of law, from the executive."[4] While the CJEU's emphasis on the interdependence between the rule of law and the separation of powers is laudable, the precise contours of how the latter operationalizes the former remain unclear.

This thesis seeks to address that lacuna by advancing a more refined conceptual vocabulary—centering on *political insularity* understood as a functional modality of judicial independence—to capture the specific form required to uphold the rule of law in the face of

[2] Martin Loughlin, 'The Rule of Law: A Slogan in Search of a Concept' (2024) 16 *Hague Journal on the Rule of Law* 509, 516.
[3] Laurent Pech, 'The Rule of Law as a Well-Established and Well-Defined Principle of EU Law' (2022) 14 *Hague Journal on the Rule of Law* 107.
[4] *Openbaar Ministerie v Ruslanas Kovalkovas* Case C-477/16 PPU (CJEU, 10 November 2016) para 36.

executive interference. The conceptual nexus between these principles is often asserted rather than explicated. This thesis argues that a more robust theoretical vocabulary is necessary to illuminate the intrinsic connection between the rule of law and political insularity, a particular aspect of judicial independence at stake. This notion—judicial detachment from transient political pressures—best captures the normative core of judicial independence as a rule of law requirement in the context of judicial appointments and dismissals. This thesis deliberately refrains from engaging with the concept of individual judicial impartiality, not because it is normatively insignificant, but because it pertains to a different analytical register. The inquiry pursued here concerns the structural integrity of the judiciary as an institutional branch, rather than the impartiality of individual judges or the correctness of particular judicial outcomes. While impartiality is a core element of fair adjudication, its evaluation typically occurs ex post and at the level of specific decisions or personal conduct. By contrast, this thesis adopts a systemic and forward-looking perspective, aimed at identifying when political interference with judicial appointments and dismissals—whether through institutional restructuring or the appointing and dismissing procedures—compromises the judiciary's capacity to function as an autonomous and politically insulated check on power. Accordingly, the focus is on the institutional safeguards required to uphold the rule of law as a constraint on arbitrary authority, rather than on the epistemic or ethical attributes of individual judges.

This thesis builds on the doctrinal work on the rule of law and separation of powers but moves beyond a pure recognition of the intrinsic interdependency of these notions. Instead, it seeks to articulate how the rule of law—a constraint on arbitrary power in the exercise of authority—can guide and limit political discretion and abuse in judicial design. In doing so, it develops an analytical framework aimed at detecting and evaluating interferences in the design

of judicial appointments and dismissals that are incongruent with the normative commitments to the rule of law.

This dissertation endorses the *teleological conception of the rule of law*, understood not merely as a set of procedural constraints but as an institutional ideal oriented toward limiting the exercise of arbitrary power and safeguarding the conditions for accountable governance. Rather than engaging with the rule of law through its traditionally delineated conceptions, discussed in Chapter I, this thesis approaches it as a normative commitment anchored in a *justificatory ethos* that requires exercises of public power to be grounded in reasoned and publicly accessible justification. In this view, legality does not exhaust the requirements of the rule of law; it is only a threshold condition for legitimacy. What is required is not merely that power be exercised according to standards that fall within the concept of *legality* but that it be defensible through reasons addressed to the public, capable of withstanding rational scrutiny and contestation. *The culture of justification*, a notion advanced by Etienne Mureinik, is understood in this thesis as the broader normative and societal condition through which the rule of law is actualized—as opposed to a culture of authority or, in the vocabulary of the rule of law theory, the rule of men, both of which reflect the prevalence of unaccountable power.[5]

Beyond the existence of an entrenched legal framework that facilitates adherence to the rule of law, the culture of justification also presupposes what Gerald Postema terms *fidelity to law*—a sustained and principled orientation of public authorities toward legal norms, characterized by reasoned engagement and a refusal to instrumentalize the law for contingent

[5] Etienne Mureinik, 'A Bridge to Where? Introducing the Interim Bill of Rights' (1994) 10 *South African Journal on Human Rights* 31.

political ends.[6] This thesis aims to examine how fidelity to the law can be articulated and operationalized in the context of governmental acts that interfere with the institutional autonomy of the judiciary, particularly in relation to judicial appointments and dismissals. In doing so, it aims to illuminate the normative thresholds that must guide such interventions to remain consistent with the teleological demands of the rule of law.

Judicial design—particularly the processes surrounding judicial appointments and dismissals—constitutes a crucial site for testing the integrity of the rule of law justificatory lens. While institutional reforms targeting the judiciary may be justified in principle, such as in response to concerns about inefficiency or politicization, they are frequently deployed in contexts where the motivations and consequences of reform are far less benign. This is particularly evident during regime change or political transition, when the newly empowered political elite often seeks to recalibrate the judicial branch by enacting structural reforms or initiating the removal or replacement of *inherited judges*, a term coined and theoretically developed in Chapter III of this thesis. These are judges appointed under prior regimes whose continued tenure may be politically inconvenient or symbolically discordant with the new governing coalition. In such settings, the language of reform often masks strategic interventions aimed at consolidating political control rather than remedying institutional deficiencies. While these instances of interference may comply with formal legality, they frequently violate the rule of law's deeper normative commitments, particularly its requirement of non-arbitrariness.

The position of inherited judges is of particular analytical significance in studying political interference with judicial institutions. The present study builds upon a growing body of

[6] Gerald Postema, *Law's Rule: The Nature, Value, and Viability of the Rule of Law* (Oxford University Press 2022) 20.

scholarship that has begun to examine post-transitional judicial reform through the lens of the rule of law, most notably Katarína Šipulová and David Kosař's recent analysis of judicial purges as revealing the inherent tensions between the demands of transitional justice and the normative constraints imposed by rule of law principles.[7] As appointees of prior regimes, these judges often become the primary targets of governmental efforts to reconfigure judicial authority through formalized legal reforms or more subtle, informal mechanisms of influence. Inherited judges consistently occupy a structurally exposed position, rendering them a particularly illuminating subject of inquiry for assessing the rule of law vulnerabilities that arise during political transition or regime transformation. Targeting inherited judges aligns with what Diana Kapiszewski describes as a path-dependent cycle of judicial politicization, whereby prior instances of court manipulation create positive feedback loops. As court-crafting becomes institutionalized as a governance tool, the political costs of tolerating judicial independence rise, reinforcing a logic that favors recurrent interference, especially with those judges perceived as vestiges of a previous political order.[8]

In addition to the challenges associated with political transitions, the susceptibility of inherited judges to political interference is further shaped by broader institutional configurations, most notably those identified by the *spatial theory of judicial independence*.[9] This perspective suggests that in systems where unified partisan control over the executive and legislative branches weakens judicial autonomy by removing the structural checks necessary to insulate the judiciary from political reprisal. When the same party controls both branches, it acquires the

[7] Katarína Šipulová and David Kosař, 'Purging the Judiciary After a Transition: Between a Rock and a Hard Place' (2025) 17 *Hague Journal on the Rule of Law* 61.
[8] Diana Kapiszewski, *Politicization and the Political Court in Argentina* in *High Courts and Economic Governance in Argentina and Brazil* (Cambridge University Press 2012) 83.
[9] Rachel B Chávez, John A Ferejohn and Barry R Weingast, 'A Theory of the Politically Independent Judiciary: A Comparative Study of the United States and Argentina' in Gretchen Helmke and Julio Ríos-Figueroa (eds), *Courts in Latin America* (Cambridge University Press 2011) 220.

capacity to override judicial decisions and discipline or remove judges who do not align with the prevailing political agenda. In such environments, judges inherited from previous regimes—often perceived as ideologically or institutionally distant—are particularly vulnerable. Their continued presence may be perceived as a threat to executive-legislative cohesion or an obstacle to institutional realignment. By contrast, conditions of divided government tend to foster greater judicial independence by enabling inter-branch accountability. The spatial theory thus offers a valuable explanatory lens for understanding how inherited judges become focal points for political interference beyond the temporal context of regime change alone.

Having established the theoretical foundation for this inquiry, this thesis now turns to the methodological apparatus employed to operationalize these normative commitments. This study develops typologies of abusive practices to systematically assess how political interference with judicial appointments and dismissals may undermine the rule of law. The abuse classification serves not merely as a descriptive device but as a framework that narrows the analytical scope and facilitates the identification of recurring patterns of interference that evade formal illegality but contravene the justificatory standards of rule of law theory. The typology, in turn, structures the empirical inquiry: the case studies examined throughout the thesis are not isolated examples but illustrative manifestations of broader types of abuse theorized herein. This methodological approach thus enables both conceptual clarity and comparative insight, allowing the thesis to bridge the abstract principles of justificatory governance, as required by the rule of law telos, with the concrete practices of political interference in judicial independence.

2. Designing the Inquiry: Methodological Choices and Scope Constraints

The central aim of this thesis is to develop a theoretical and analytical framework for identifying and evaluating interference with judicial appointment and dismissal procedures through a teleological lens of the rule of law. The inquiry adopts a cross-contextual perspective rather than being delimited by jurisdictional or institutional design parameters. In contrast to dominant frameworks in comparative constitutional law that emphasize cross-jurisdictional comparisons of specific institutional arrangements, this thesis employs a context-driven methodology, anchoring its analysis in moments of political transition and focusing on the trajectories of interference of the political branches of the government with inherited judges as a site where rule of law tensions become most visible.[10] This thesis deliberately extends the methodological boundaries of comparative constitutional law by combining traditional classificatory techniques with an interdisciplinary engagement with constitutional politics. While it retains the comparative method's systematic commitment to classification—developing typologies of abusive practices in judicial appointments and dismissals—it expands the analytical lens beyond institutional design and doctrinal reasoning. In doing so, it engages the evolving interface between law and politics, emphasizing the flux and contingency of political interference trajectories rather than treating legal systems as static objects of comparison.

[10] For the importance of the context-sensitive approach in comparative constitutional law studies, see Renáta Uitz, 'Can you tell when an illiberal democracy is in the making? An appeal to comparative constitutional scholarship from Hungary' (2015) 13(1) *International Journal of Constitutional Law* 279.

This approach responds to Ran Hirschl's critique of the methodological myopia in much of contemporary comparative constitutional scholarship, which, he argues, has often disengaged from the empirical realities of political power and its exercise through legal mechanisms.[11] Rather than viewing legal developments as detached from broader political dynamics, this thesis treats judicial appointments and dismissals as key sites in which formal legal structures and informal political logics converge. It adopts, therefore, a dual orientation: anchored in the normative vocabulary of rule of law theory, yet attuned to the concrete practices of institutional manipulation and political consolidation. This thesis develops an evaluative framework capable of detecting how power is exercised—and often concealed—within ostensibly lawful processes, revealing not only structural anomalies but also the justificatory deficits that define rule-of-law abuse. Such an enterprise requires attentiveness to what Frankenberg has called "odd details"—those marginal, context-specific practices that defy easy classification but illuminate the localised anxieties, strategic considerations, and contested meanings embedded in legal reform.[12]

By focusing on these details and treating them as analytically meaningful rather than deviant anomalies, the thesis resists the universalizing impulse of comparative law. Instead, it adopts a mode of contextualized comparison, sensitive to the hybridity of legal, political, and historical forces that shape judicial reform. This methodological stance aims not merely to catalogue institutional variance but to uncover how particular practices of judicial interference encapsulate deeper rule of law vulnerabilities, often legible only through close empirical and interpretive attention. As Frankenberg argues, "searching for odd details liberates comparative

[11] Ran Hirschl, 'From Comparative Constitutional Law to Comparative Constitutional Studies' (2013) 11(1) *International Journal of Constitutional Law* 1, 9.
[12] Günter Frankenberg, *Comparative Constitutional Studies: Between Magic and Deceit* (Edward Elgar 2018), 138.

constitutional studies from the straightjacket of unitary thinking" and opens the way for "a new interpretive horizon geared towards surprise instead of cognitive control."[13]

In Chapter III, the thesis examines the theoretical intersection of rule of law theory and transitional justice theory to assess the extent to which the transitional rule of law provides an adequate framework for evaluating state-led interference with judicial independence.[14]

Nevertheless, the theoretical contribution advanced herein is not limited to transitional contexts. While the focus on inherited judges allows for a particularly acute illustration of the tensions inherent in the rule-of-law-deficient redesign of the judiciary, the evaluative framework developed retains broader normative validity. Inherited judges are an illustrative case to examine as they encapsulate a fundamental paradox within the rule of law discourse: their continued tenure is conventionally seen as integral to safeguarding judicial independence and institutional continuity—principles central to the rule of law—yet their removal is frequently portrayed as a necessary condition for democratic renewal, itself framed as a precondition for the genuine realization of the rule of law commitments in transitional settings. This *rule of law paradox* is particularly revealing in transitional contexts, exposing the justificatory deficits and structural vulnerabilities that the rule of law, properly understood, is meant to guard against—even if such vulnerabilities are not exclusive to these moments.

It encompasses comprehensive legislative or constitutional reforms, as well as individual instances of judicial appointments and dismissals over time. The analytical emphasis does not rest on the peculiarities of any single legal system, but rather on the underlying logic and structural dynamics of abuse that transcend jurisdictional boundaries. Even the most

[13] Ibid 153.
[14] Ruti Teitel, *Transitional Justice* (Oxford University Press 2000).

meticulously crafted constitutional arrangements can be manipulated when institutional safeguards are exploited for the purpose of political consolidation.

To render this inquiry analytically tractable and conceptually rigorous, the thesis employs a classificatory methodology, constructing a typology of abusive practices as a heuristic device to systematize and evaluate disparate forms of interference with judicial dismissals (Chapter IV) and appointments (Chapter V). This approach narrows the scope of the research by focusing on *recurring yet diverse patterns of power abuse,* rather than jurisdiction-specific anomalies. Case studies serve not as the object of analysis in themselves, but as illustrative manifestations of the broader categories of abuse identified.

As John Hazar has observed, "classification is suggested only to facilitate study of otherwise unwieldy bodies of information. It is only a first step, after which the researcher is expected to explore the details and determine variations on the model."[15]

The classification of abusive practices developed in this thesis draws upon Max Weber's well-established concept of ideal types as a methodological tool for analytical abstraction. As Weber emphasized, "The ideal typical concept …is no 'hypothesis' but it offers guidance to the construction of hypotheses. It is not a *description* of reality, but it aims to give unambiguous means of expression to such a description."[16] Weber emphasizes that ideal types are not derived from an aggregation or average of empirical instances. Instead, they are constructed through the

[15] John N Hazard, 'Éric Agostini: *Droit Comparé*' (1990) 38(1) *American Journal of Comparative Law* 191, 192.
[16] Max Weber, *The Methodology of the Social Sciences* (EH Shils and HA Finch eds and trs, Free Press 1949) 90.

selective accentuation of certain elements, enabling a comparative assessment of the extent to which a given empirical case conforms to or departs from the ideal construct.[17]

The classificatory exercise of this thesis aims not to present a comprehensive or fixed taxonomy but to offer an initial analytic framework that sharpens the normative evaluation of the intersection of the rule of law and judicial independence. In line with Hazar's caution, the typologies are intended to invite further scrutiny rather than foreclose it, remaining responsive to contextual variation, particularly in how inherited legal legacies and regime transitions shape the form and justification of reform efforts.

Building on this methodological foundation, the thesis proceeds through a structured inquiry that moves from conceptual elaboration to normative grounding and, ultimately, to analytical application. The initial chapters develop the analysis's theoretical underpinnings and normative parameters: Chapter I elaborates a teleological conception of the rule of law, emphasizing its justificatory ethos and implications for constraining arbitrary power through judicial independence. Chapter II surveys the evolving standards of international and regional law concerning judicial appointments and dismissals, situating them within broader debates on judicial accountability and independence. Chapter III introduces the figure of the inherited judge as a paradigmatic object of political interference during periods of regime transition, highlighting the conceptual and doctrinal tensions such cases reveal. These foundations serve as a basis for the typological analysis advanced in Chapters IV and V, which construct a framework for identifying and evaluating patterns of abuse in judicial design across diverse political-legal contexts.

[17] Ibid.

Accordingly, this thesis advances a normative and analytical inquiry into how the rule of law, when understood in its teleological and justificatory dimensions, constrains the exercise of political discretion in the domain of judicial design. By foregrounding political insularity as a functional expression of judicial independence, and by constructing typologies that expose structurally patterned abuses within ostensibly legal frameworks, the thesis seeks to elucidate the modalities through which public power may be exercised in ways that conform to legality while subverting the justificatory ethos at the heart of the rule of law. This framework neither equates all institutional change with abuse nor presumes a static ideal of judicial autonomy. Instead, it delineates the conditions under which reforms to appointments and dismissals may be regarded as normatively suspect, namely when they fail to meet the threshold of being reasoned, accessible, and publicly contestable. In doing so, the thesis contributes to a broader theoretical and comparative discourse on the erosion of constitutional democracy, institutional capture, and the limits of legal formalism in safeguarding the independence of the judiciary. Judicial design, particularly under conditions of political transformation or regime consolidation, emerges as a privileged analytical lens through which the normative integrity of the rule of law may be both interrogated and defended.

Chapter I

Reasserting the Normative Core of the Rule of Law

This chapter undertakes a comprehensive exploration of the extent to which the theory of the rule of law and its associated legal doctrines can serve as evaluative tools for assessing interference with judicial independence. Given the multifaceted nature of the concepts central to this inquiry, the chapter begins by qualifying and clarifying the key terms and theoretical frameworks that underpin this thesis. Judicial independence, particularly understood through the lens of political insularity, is examined in this thesis concerning its specific institutional guarantee: appointment and dismissal procedures.

The analysis investigates whether the orthodox rule of law theory possesses the conceptual tools necessary to address how interference with judicial independence can be aligned with rule of law principles. Traditional approaches, often grounded in formalist interpretations, are critically evaluated for their ability to analyze complex constitutional dynamics. The chapter identifies gaps in existing frameworks by contrasting these orthodox perspectives with accounts that focus on the rule of law as a limit to arbitrary power. It examines whether they effectively capture the tensions between procedural compliance and the fulfillment of the underlying telos of the rule of law, thereby limiting arbitrariness.

Building on this critique, the chapter examines how the praxis of the rule of law and theoretical insights on public reason and public justification can enrich rule of law theories, offering more robust analytical tools. Public reason and justification, deeply rooted in liberal

political thought, are explored as mechanisms for fostering procedural integrity and substantive fairness in governance. These principles are examined for their potential to enhance the evaluation of the arbitrary exercise of government power under the rule of law.

The ultimate aim of this chapter is to propose new pathways for expanding the conceptual framework of the rule of law theory, enabling it to develop a more nuanced vocabulary for assessing various forms of arbitrariness, including interference with judicial design as a means of consolidating power.

1. Qualifying the Concepts

The prolific debates on the concepts of the rule of law widely across various fields of social sciences, policy papers, and political agendas have led to the denomination of this term as "essentially contested," "international hurrah term,"[18] or "self-congratulatory rhetorical device"[19] to the point that Shklar concluded concerning the rule of law that "no intellectual effort need therefore be wasted on this bit of ruling-class chatter."[20] The concept of judicial independence, which is commonly perceived as intrinsic to the rule of law as its precondition or constitutive element, has undergone similar criticism, as it has been characterized as an "ambiguous reality and insidious illusion," "often cited, but rarely understood," and even a useless theoretical category. One of the reasons for the various contestations of these concepts and their "wear-off effect" is arguably the existing disagreement within the scholarship itself on what these concepts stand for. Still, there is also the discrepancy between the constantly insisted normative

[18] Martin Krygier, 'Four Puzzles of the Rule of Law: Why, What, Where? And Who Cares?' in James E Fleming (ed), *Getting to the Rule of Law* (OUP 2011) 64.
[19] Judith Shklar, 'Political Theory and the Rule of Law' in Allan C Hutchinson and Patrick Monahan (eds), *The Rule of Law: Ideal or Ideology* (Carswell 1987) 1.
[20] Judith Shklar, 'Political Theory and the Rule of Law' in Allan C Hutchinson and Patrick Monahan (eds), *The Rule of Law: Ideal or Ideology* (Carswell 1987) 4.

propositions of scholars and the empirical diversity of their implementation across legal cultures.[21] The alleged illusiveness of these terms and the confusion around them cannot constitute a legitimate reason for their abandonment altogether, especially if they imply overarching consequences in practice.[22]

As Fallon argues, the rule of law is an 'essentially contestable concept", as determining the "true," "optimal," or "preferred" interpretation of the RoL hinges on the resolution of contentious normative matters, thus making disagreements a natural outcome.[23]

When applied in practice, the diversity of interpretations of what these concepts represent in a normative realm becomes even more complex.

As acknowledged in the literature, measuring the rule of law and judicial independence from a comparative perspective has its pitfalls, which should not be underestimated.[24] Firstly, there are constringent methodological obstacles to the empirical research on the concepts of the rule of law and judicial independence and their inter-dependency, as the research tends to be "anecdotal, rather than systematic"[25] but also risks being "one-sided," as the comparison needs a normative concept - "whichever concept is chosen as the relevant one is a value judgment that will determine the outcome of the comparison: a country may qualify as an RoL -compliant

[21] As András Sajó argues, "the differences in legal and political theory are so deep that even the essentially contested conceptual nature of the rule of law is contested." András Sajó, 'The Rule of Law' in Roger Masterman and Robert Schütze (eds), *The Cambridge Companion to Comparative Constitutional Law* (1st edn, Cambridge University Press 2019) 263.

[22] As Jeremy Waldron argued, these concepts didn't lose their meaning over time, as their complexity can be traced to the very roots of the idea behind them. "This lamentation over lost clarity is a common trope in the rhetoric of philosophical analysis. But it is usually a myth." Jeremy Waldron, 'Is the Rule of Law an Essentially Contested Concept (In Florida)?' (2002) 21 *Law and Philosophy* 137, 140.

[23] Richard H Fallon, '"The Rule of Law" as a Concept in Constitutional Discourse' (1997) 97 *Columbia Law Review* 1.

[24] See Tom Ginsburg, 'Pitfalls of Measuring the Rule of Law' (2011) 3 *Hague Journal on the Rule of Law* 269; Nuno Garoupa and Tom Ginsburg, 'Guarding the Guardians: Judicial Councils and Judicial Independence' (2009) 57 The American Journal of Comparative Law 103.

[25] Nuno Garoupa and Tom Ginsburg, 'Guarding the Guardians: Judicial Councils and Judicial Independence' (2009) 57 *The American Journal of Comparative Law* 103, 173.

country by one account but not by another one, and a specific judicial ruling or legal reform will conform with one concept but not under another."[26] Additional obstacles arise when the scholarly normative concept faces the living "rule of law experience" which is construed and shaped not only by its historical accounts but also by the society's cognitive and cultural factors.[27]

Secondly, the difficulties of the empirical research on the rule of law and judicial independence lead to a significant inference that the vague normative concepts or their intrinsic interconnection should not be taken for granted as an absolute good. A readily apparent alternative to the consideration of judicial independence or the rule of law unequivocally or unconditionally involves reframing these concepts in a *qualified manner* as *organizing principles*."[28] Experience from the ground shows examples of countries that, on the surface, follow the rule of law guidebook but lack judicial independence, at least not in the Western concept of a judiciary's political insularity.[29] Conversely, the line of literature that explores authoritarian regimes suggests that there can be various reasons for the empowerment of the judiciary, which is not necessarily accompanied by the establishment of the rule of law, at least

[26] András Sajó, 'The Rule of Law' in Roger Masterman and Robert Schütze (eds), *The Cambridge Companion to Comparative Constitutional Law* (Cambridge University Press 2019) 275.

[27] When discussing the interpretation of constitutional norms, Piana states that "the interpretation of the norms is strongly related to the values that social actors attributed to them. Since constitutions are very general rules governing the abstract relationship between citizens on the one hand, and between citizens and the State on the other hand, their normative value is not only related to the specific, punctual outcomes reached through their implementation, but also the general meaning that is attributed to them. This meaning is determined by cognitive and cultural factors shared by a collectivity." This observation is equally relevant to the interpretation of constitutional principles, such as the rule of law and judicial independence. See Daniela Piana, 'An Evolutionary Approach to the Constitutionalism of an Enlarged EU: Why will Cognitive and Cultural Boundaries Matter?' in Wojciech Sadurski, Adam Czarnota and Martin Krygier (eds), *Spreading Democracy and the Rule of Law?: The Impact of EU Enlargement for the Rule of Law, Democracy and Constitutionalism in Post-Communist Legal Orders* (Springer Netherlands 2006); see also Donald Davidson, *Subjective, Intersubjective and Objective* (Clarendon Press 2001).

[28] Charles G Geyh, 'Judicial Independence as an Organizing Principle' (2014) 10 *Annual Review of Law and Social Science* 185, 189.

[29] Tom Ginsburg, 'Pitfalls of Measuring the Rule of Law' (2011) *3 Hague Journal on the Rule of Law* 269, 272.

not within the paradigm that Western legal theory on the rule of law has been developing.[30] As Silverstein noted, Western tendencies to blend comprehensive and minimalist interpretations of the rule of law, combining concepts of separation of powers, restrained governance, democratic engagement, and liberal principles with the fundamental prerequisites of the rule of law or even the narrower rule by law in the Rechtsstaat, which are not necessarily predetermined conclusions.[31]

Before proceeding with the analysis, it is essential to consider the challenges highlighted in the literature regarding appointment and dismissal procedures, as well as their complex relationship with the rule of law, which is the central focus of this thesis.

The safeguards associated with the appointment and judicial procedures of judges are entrenched in the constitution, vested in "packages of judicial independence," which are, in theory, also referred to as de jure independence.[32] The contexts in which this research question has been previously examined heavily diverge. Before analyzing the relationship between judicial appointment and dismissal procedures and the rule of law, it is essential to acknowledge that the literature has already questioned the extent to which *de jure* independence translates into the actual independence of the judiciary.[33] Melton and Ginsburg claim that de jure independence

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

[31] Gordon Silverstein, 'Singapore – The Exception That Proves That Rules Matter' in Tom Ginsburg and Tamir Moustafa (eds), *Rule by Law: The Politics of Courts in Authoritarian Regimes* (Cambridge University Press 2008) 86.

[32] De *jure* independence "deals with formal rules designed to insulate judges from undue pressure, either from outside the judiciary or from within," whereas *de facto* independence "is behavioural." Julio Ríos-Figueroa and Jeffrey K Staton, 'An Evaluation of Cross-National Measures of Judicial Independence' (2012) 30 *The Journal of Law, Economics, and Organization* 104, 106–07.

[33] As Lydia Brashear Tiede noted, "despite a large amount of scholarship on judicial appointment as well as examples of politicians' attempts to alter the appointment rules to favor their positions, the exact impact of appointment on judicial independence has to date defied rigorous empirical examination." Lydia Brashear Tiede, 'Judicial Independence: Often Cited, Rarely Understood' (2006) 15 *Journal of Contemporary Legal Issues* 129.

doesn't substantially contribute to de facto independence despite the long-established doctrinal premise that argues the contrary.[34]

Similarly, Urribarri emphasized the contextualization of judicial independence research, noting that the formal guarantees of judicial independence in consolidating democracies cannot be analyzed without paying attention to the informal linkages between the judiciary and other actors, which "often distort the effect of formal rules, for court insulation."[35]

The anecdotal instrumentalization of judicial dismissals and appointments for political purposes is no news in the scholarly literature[36]. Political science has developed rich theoretical approaches to judicial appointment and dismissal procedures in the context of political transitions, which have emerged from the analysis of experiences in Latin American countries. Three models that stand out explain the dynamics of judicial independence through the "insurance policy" paradigm[37], due to the competition among political parties, and as a paradigm of political legitimacy.[38] While these models provide essential insights into the politicization of judicial reforms, they do not address how the interference with judicial independence interplays with the constitutionally entrenched principles, specifically the rule of law.

[34] James Melton and Tom Ginsburg, 'Does De Jure Judicial Independence Really Matter? A Reevaluation of Explanations for Judicial Independence' *Law & Economics Working Papers* (2014).
[35] Raúl Sánchez Urribarri, 'Politicization of Latin American Judiciary via Informal Connections' in David K Linnan (ed), *Legitimacy, Legal Development and Change: Law and Modernization Reconsidered* (Routledge 2016).
[36] The case studies that serve as emblematic examples of such a phenomenon include Pakistan under Musharraf's regime and Venezuela under Chávez. See Allan R Brewer-Carías, 'The Government of Judges and Democracy: The Tragic Institutional Situation of the Venezuelan Judiciary' in Sophie Turenne (ed), *Fair Reflection of Society in Judicial Systems: A Comparative Study* (Springer International Publishing 2015); see also Shoaib A Ghias, 'Miscarriage of Chief Justice: Judicial Power and the Legal Complex in Pakistan under Musharraf' (2010) 35 *Law & Social Inquiry* 985.
[37] Jodi Finkel, 'Judicial Reform in Argentina in the 1990s: How Electoral Incentives Shape Institutional Change' (2004) 39 *Latin American Research Review* 56; Jodi Finkel, 'Judicial Reform as Insurance Policy: Mexico in the 1990s' (2005) 47 *Latin American Politics and Society* 87.
[38] Daniel Brinks, 'Judicial Reform and Independence in Brazil and Argentina: The Beginning of the New Millennium?' (2005) 40 *Texas International Law Journal* 595; Alba M Ruibal, 'Self-Restraint in Search of Legitimacy: The Reform of the Argentine Supreme Court' (2009) 51 *Latin American Politics and Society* 59.

Although the development of international standards on this issue has made significant progress in recent years (see Chapter II), a pressing need remains to develop theoretical tools that can systematically address the rule of law assessment of judicial design and provide a coherent framework for its continued advancement. Bridging the gap between disciplines has the potential to offer valuable insights and innovative approaches for analyzing the complex dilemmas associated with judicial design interference.

This thesis goes beyond the comparative analysis of the appointment and dismissal procedures presented in the constitutional texts, referred to as the "institutional approach" in theory.[39] To critically assess the extent to which the rule of law as a moral value, legal principle, and political discourse shapes the appointment and dismissal procedures of the judiciary, it is necessary to move beyond a formalistic evaluation of constitutional adherence to widely accepted standards of judicial independence and engage with the empirical realities of its operation (see Chapter IV and V). The (in)dependence of the judiciary manifests more profoundly in constitutional practices than in the formal provisions of the constitution itself.

Evaluating whether judicial appointment and dismissal processes are intended to reinforce or undermine judicial insularity through the lens of the rule of law requires a contextualized analysis that interrogates the procedural guarantees and substantive motivations underlying interference with the judiciary. Before evaluating whether the rule of law theory provides the appropriate terminology and interpretative tools for such an analysis, it is crucial to clarify the specific aspect of judicial independence. As previously noted, judicial independence is a multifaceted concept. This study examines judicial independence through the lens of political

[39] Lydia Brashear Tiede, 'Judicial Independence: Often Cited, Rarely Understood' (2006) 15 *Journal of Contemporary Legal Issues* 129, 136.

insularity, as this dimension provides a particularly relevant and analytically useful framework for addressing the research questions at hand.

1.1. Judicial Independence as Political Insularity

The idea of the judiciary as an institutionally separated branch of the government developed in what Sheetreet defined as the second and third normative cycles of judicial independence when it was transposed internationally.[40] To grasp the elements and limits of institutional judicial independence, it is helpful to revisit the basics of conceptual analysis of the concept.

Shapiro's classical idea of courts perceives them as bodies in charge of resolving conflicts (adjudication, in which they decide on controversies based on facts concerning relevant laws) by a "neutral third."[41] The neutrality of courts in Shapiro's "triad conception" is what Fiss called "party detachment," which presupposes that the judiciary is independent of the parties in the litigation. The literature and constitutional practice refer to it as impartiality and internal independence. This type of judicial independence is based on impartiality, just as the judiciary should be when one of the litigants is the government itself. It requires an individual judge to adjudicate neutrally and objectively, which should reflect the rules that derive from the rule of law (lack of arbitrariness – adjudication should be based on clear legal standards and derive only from the law and not the will of man; legal certainty; equality before the law). This research seeks to reframe that connection between judicial independence and the rule of law by analyzing it through the notion of judicial independence, which Fiss defined as "political insularity," which

[40] Shimon Shetreet, 'The Normative Cycle of Shaping Judicial Independence in Domestic and International Law: The Mutual Impact of National and International Jurisprudence and Contemporary Practical and Conceptual Challenges' (2009) 10 *Chicago Journal of International Law* 275.
[41] Martin Shapiro, *Courts: A Comparative and Political Analysis* (University of Chicago Press 1986).

consists of safeguards that aim to protect the judiciary from other branches of government (the political ones) on the one hand, and the general public on the other. As Fiss noted, the judiciary's moral authority rests on its ability to engage in a dialogic process of reasoned justification while maintaining insularity from political influence, ensuring decisions are guided by justice rather than political considerations.[42] The difference between political insularity and impartiality has also been recognized in the constitutional courts' jurisprudence.[43] Political insularity as a manifestation of judicial independence is essential as it, to a great extent, determines "the scope of the judiciary's authority as an institution, or, in other words, the relationship of the courts to other parts of the political system and society, and the extent to which they are collectively seen as a legitimate body for determination of right, wrong, legal and illegal."[44]

Nevertheless, what this research presupposes, following Fiss, is that political insularity, unlike party detachment, does not function by the principle "the more, the better." Fiss considers the two limitations: one which derives from our commitment to majority rule (which supports the idea that having too independent a judiciary can sometimes interfere with other democratic values) and the second, which derives from the fact that "independence is regime relative."[45]

This argument becomes even more critical when assessed from the perspective of protecting the rule of law. As Ginsburg captured, many reforms aimed at importing the rule of law were

[42] Owen M Fiss, 'Perspective: The Limits of Judicial Independence' (1993) 25 *University of Miami Inter-American Law Review* 57, 60.
[43] See, for example, *Beauregard v Canada* [1986] 2 SCR 56, 69 (SCC) ("the generally accepted core of the principle of judicial independence has been the complete liberty of individual judges to hear and decide the cases that come before them: no outsider – be it government, pressure group, individual or even another judge – should interfere in fact, or attempt to interfere, with the way in which a judge conducts his or her case and makes his or her decision"); *Valente v The Queen* [1985] 2 SCR 673, 687 ("[J]udicial independence involves both individual and institutional relationships: the individual independence of a judge, as reflected in such matters as security of tenure, and the institutional independence of the court or tribunal over which he or she presides, as reflected in its institutional or administrative relationships to the executive and legislative branches of government"); *Van Rooyen v The State* 2002 (5) SA 246 (CC) [27]–[28].
[44] Christopher M Larkins, 'Judicial Independence and Democratization: A Theoretical and Conceptual Analysis' (1996) 44 *American Journal of Comparative Law* 605, 610.
[45] Owen M Fiss, 'The Limits of Judicial Independence' (1993) 25 *University of Miami Inter-American Law Review* 57, 68.

driven by the assumption that judicial independence was a prerequisite to the well-functioning rule of law. Despite that assumption being taken almost for granted within the literature, it requires a continuous re-evaluation as the circumstances and political configurations in which the courts nowadays operate show that straightening the judiciary can lead to, the least to say, undesirable outcomes from the perspective of other values that we namely cherish in liberal societies – democracy, human rights, justice and even the rule of law itself. "Judicial independence is an example of a mid-level concept that is relatively clear and about whose institutional manifestations there is some amount of consensus. However, as a theoretical matter, we should not think it is an "unlimited good thing."[46]

1.2. The Limits of Orthodoxy in Rule of Law Thinking

As Trevor Allan noted: "The rule of law is an amalgam of standards, expectations, and aspirations: it encompasses traditional ideas about individual liberty and natural justice, and, more generally, ideas about the requirements of justice and fairness in the relations between government and governed."[47]

This section provides a concise examination of the most influential theories of the rule of law, focusing on their relevance to the analysis of institutional approaches to addressing the challenges of dealing with inherited judges. It identifies their limitations when employed as criteria for assessing adherence to the rule of law, particularly as reflected in institutional design.

Albert Venn Dicey conceptualized the rule of law in his seminal 1885 work as the foundation of the British constitutional system, emphasizing the principles of legal regularity,

[46] Tom Ginsburg, 'Pitfalls of Measuring the Rule of Law' (2011) 3 *Hague Journal on the Rule of Law* 269.
[47] Trevor RS Allan, *Law, Liberty, and Justice: The Legal Foundations of British Constitutionalism* (Oxford University Press 1994) 21–22.

formal equality, and individual liberty.[48] He argued that these principles were inherent in the English common law tradition, which he regarded as superior to systems like the French *droit administratif*. Dicey's rule of law was rooted in judicial precedents developed over centuries, demonstrating the restraint of executive power through judicial independence and adherence to legal norms. For Dicey, the British constitution's reliance on unwritten but enforceable common law principles distinguished it as a system where the rule of law was deeply ingrained, providing a durable safeguard against arbitrary governance.

In contrast, the German concept of the *Rechtsstaat*, which emerged during the Enlightenment and gained prominence during the liberal reforms of the 1848 revolution, shared an emphasis on the primacy of law but developed through distinct historical and theoretical trajectories. Influenced by Kantian principles, the *Rechtsstaat* sought to legitimize the state by structuring governmental powers through formal legal systems that guaranteed liberty, security, and property. While Dicey rejected administrative law as antithetical to the rule of law, German jurists, such as Rudolf Gneist, viewed the establishment of administrative courts as central to the *realization of the Rechtsstaat*.[49] Over time, however, the *Rechtsstaat*'s formalist emphasis rendered it vulnerable to co-option by authoritarian regimes, as demonstrated during the Nazi period (See Chapter III).

These contrasting developments underscore the tensions between formal legal principles and their substantive realization, revealing the complex interplay between legality, institutional design, and broader socio-political contexts in shaping the rule of law. The standard approach to rule of law theorizing within the 20th century was to explore what the concept entails or consists

[48] Albert Venn Dicey, *Introduction to the Study of the Law of the Constitution* (Macmillan 1915).
[49] Rudolf Gneist, *Der Rechtsstaat und die Verwaltungsgerichte in Deutschland* (Springer 1879).

of, to answer the question: what qualities should the law have to fulfill the requirement of limiting arbitrary power? These concerns prompted the "laundry-list"[50] approach to the rule of law theorizing.

For Waldron, the concept of the rule of law cannot be separated from the law itself as "we should understand these terms as a package, rather than understanding one as a separable component of the other."[51] On the contrary, for Raz, the rule of law is first and foremost a political ideal and just "one of the virtues of the law," a societal value akin to human rights, democracy, justice, and equality, which should be distinguished from them. It serves as a check for potential abuses that arise from the law.[52] For some stricter positivists, such as Kramer, the rule of law is only a "state of affairs constituted by the substantial fulfillment of the eight precepts" that Fuller famously outlined: 1. Generality of the norms; 2. Promulgation; 3. Prospectiveness rather than retrospectiveness of the norms; 4. The intelligibility of the norms (the norm should be understood by the citizens to whom it's binding) 5. Coherence in the sense of the norms not contradicting each other; 6. The possibility of fulfilling the obligation that the norm requires; 7. The persistence of norms over time contributes to their predictability, as well as congruence between the prescribed norm and its implementation.[53] What Kramer called the state of affairs in which the law exists, Fuller referred to as the inner morality of law. These requirements do not envision what kind of norms will exist or whether they are good or bad in their substance, but they determine whether the law exists.

[50] Jeremy Waldron, 'The Rule of Law and the Importance of Procedure' in James E Fleming (ed), *Getting to the Rule of Law: NOMOS L* (New York University Press 2011) 3–31.
[51] Jeremy Waldron, 'The Concept and the Rule of Law' (2008) 43 *Georgia Law Review* 1.
[52] Joseph Raz observed that "[t]he law inevitably creates a great danger of arbitrary power. The Rule of Law is designed to minimize the danger created by the law itself... Thus, the Rule of Law is a negative virtue. The evil which is avoided is evil which could only have been caused by the law itself." See Joseph Raz, *The Authority of Law: Essays on Law and Morality* (Oxford University Press 1979) 212.
[53] Lon L Fuller, *The Morality of Law* (revised ed, Yale University Press 1969).

Raz also relied on the anatomical approach to the rule of law, not determining whether a law exists but whether it can guide people's behavior. Raz asserts that these characteristics ensure individuals can understand and comply with the law, thereby preventing arbitrary power.[54] However, Raz explicitly separates the rule of law from moral considerations, stating that it is a framework for guiding behavior rather than a guarantee of justice. For Raz, the rule of law is a morally neutral ideal, valuable for its ability to reduce uncertainty and constrain capricious governance, but insufficient as a criterion for evaluating the substantive content of laws. Hayek also advocated a formalist conception of the rule of law, emphasizing its role in fostering economic freedom and limiting state interference.[55] For Hayek, the rule of law ensures that government actions remain predictable and confined to general rules, enabling individuals to plan their lives and economic activities without fear of arbitrary intervention. Hayek's theory, like Raz's, underscores the instrumental value of the rule of law in creating a stable legal environment. Schauer cautions that conflating the rule of law with the *rule of rules* risks reducing legal reasoning to rigid formalism, detached from the normative justifications that underpin legal norms.[56] He argues that rules must always be within their justificatory framework, ensuring their application aligns with the broader purposes and values they intend to advance.

As an answer to these formal or thin conceptions of the rule of law, there has been a response of substantive or thick theories, which perceive RoL as either encompassing or being

[54] Joseph Raz, 'The Rule of Law and its Virtue' in *The Authority of Law: Essays on Law and Morality* (Oxford, 1979; online edn, Oxford Academic, 22 March 2012).
[55] Friedrich A Hayek, *The Constitution of Liberty* (Routledge and Kegan Paul 1960) 153–54.
[56] Frederick Schauer, 'Rules, the Rule of Law, and the Constitution' (1989) 6 *Const Comment* 69.

intrinsically connected to other societal values.[57] The rule of law for substantive theories reflects a certain quality of the law or its compliance with different values.

As Paul Craig points out, relying on substantive theories presents a challenge because 'the rule of law' inherently carries persuasive weight. Labeling government actions as contrary to the rule of law automatically portrays them in a negative light. The validity of such criticism depends on the specific circumstances. However, suppose the critique is based on a substantive view of the rule of law. In that case, it is essential to be transparent about this and to clarify the particular theory of justice that informs the criticism.[58] Thus, one must be mindful of using the substantive rule of law notion as a point of reference when assessing any problem arising from the practice, as the relativity of the ideas underlying the concept could blur the conclusions.

Having outlined the main propositions of the rule of law theories, the next step is to examine their relevance to the judicial organization. This involves exploring the relationship between the rule of law and institutional design, with a particular focus on interference in the structure and functioning of the judiciary, which is central to this thesis.

Marmor asserts that the requirement of congruence between legal norms and their application is precisely the point at which the question of institutional design becomes integral to the rule of law.[59] For the law to fulfill its guiding function, the rules as promulgated must align with how they are enforced and applied in specific cases. Legal norms cannot guide behavior effectively unless deviations from those norms are consistently identified and addressed within the legal framework. Therefore, the success of the rule of law is not measured only by the

[57] Paul Craig, 'Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework' in Richard Bellamy (ed), *The Rule of Law and the Separation of Powers* (1st edn, Routledge 2017).
[58] Paul Craig, 'Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework' in Richard Bellamy (ed), *The Rule of Law and the Separation of Powers* (1st edn, Routledge 2017) 487.
[59] Andrei Marmor, 'The Rule of Law and Its Limits' (2004) 23(1) *Law and Philosophy* 1, 35.

existence of formal legal rules but by the mechanisms that ensure their practical application in alignment with their intended purpose.

Institutional design plays a pivotal role in achieving this congruence, acting as the interface between abstract legal principles and their implementation in governance. It establishes the structural and procedural frameworks necessary to ensure that legal norms are effectively operationalized and applied consistently. By shaping these institutional mechanisms to align with a given society's specific social and political contexts, institutional design ensures that the principles of the rule of law are not merely theoretical ideals but concrete realities, thereby maintaining their coherence and functionality.

Ensuring alignment between legal norms and their application captures the essential teleological perspective of the rule of law theory, emphasizing its role in achieving its underlying objectives. As Krygier noted, the rule of law should be perceived and analyzed as a "teleological notion, not anatomical one" and therefore, "unless we seek first to clarify [those] purposes and reasons and in their light explore what would be needed and assess what is offered to approach them, we are bound to be flying blind."[60] By identifying these foundational values and objectives, such an approach ensures that institutional design is informed and guided by the rule of law's ultimate aims, aligning structures and processes with its core principles.[61] Krygier's central assumption is that the rule of law should be analyzed as tempering arbitrary power.[62] Similarly, Tamanaha proposes that returning to this "preliberal" notion of the rule of law

[60] Martin Krygier, 'Four Puzzles of the Rule of Law: Why, What, Where? And Who Cares?' in James E Fleming (ed), *Getting to the Rule of Law* (OUP 2011) 68.
[61] Martin Krygier, 'The Rule of Law: An Abuser's Guide' in András Sajó (ed), *Abuse: The Dark Side of Fundamental Rights* (Eleven International Publishing 2006) 129–61.
[62] Martin Krygier, 'Tempering Power' in Maurice Adams, Anne Meuwese and Ernst Hirsch Ballin (eds), *Constitutionalism and the Rule of Law* (CUP 2017).

responds to the need to move beyond Western-centric interpretations of the rule of law.[63] The challenge lies in translating the idea that the rule of law tempers arbitrariness into institutional design—a point previously highlighted in Krygier's argument that such design must be informed by the values and objectives underlying the rule of law.

In that regard, Palombella contends that while the teleology of the rule of law is a crucial guiding principle, it cannot function independently of a foundational institutional framework. The institutional design of the rule of law must align with its overarching teleological aims, necessitating a consistent core structure that anchors its purpose.[64] Although the specific expressions of this structure may vary across contexts, and prescriptive norms may evolve, the teleological coherence of the rule of law requires stability in its institutional foundation. Palombella further emphasizes that the rule of law as an institutional practice is inextricably linked to its constitutive rules—those that define its fundamental conditions and establish its internal logic. These constitutive rules are indispensable for ensuring that the teleology of the rule of law is not merely abstract but embedded within a concrete institutional framework. Thus, he argues that teleological approaches, such as Krygier's, must be complemented by a constitutive framework that maintains the coherence and identity of the rule of law, ensuring that it is not reduced to context-dependent norms, even when those norms reflect core principles like non-retroactivity, publicity, or generality.[65]

Although conceptually and historically distinct, the rule of law and the separation of powers can be analyzed in light of their shared aim (or telos) to ensure that governmental actors exercise their power not only in accordance with the law but also following the principles

[63] Brian Z Tamanaha, *On the Rule of Law: History, Politics, Theory* (CUP 2004).
[64] Gianluigi Palombella, 'The Abuse of the Rule of Law' (2020) 12 *Hague J Rule Law* 387–97.
[65] Gianluigi Palombella, 'The Abuse of the Rule of Law' (2020) 12 *Hague Journal on the Rule of Law* 387–397.

underlying it. According to Allan, the separation of powers between the executive and legislature is constitutionally significant not merely for enabling popular government control but for ensuring the rule of law through institutional safeguards. This principle emphasizes that coercive governmental actions must operate within a framework of general rules designed to prevent arbitrary conduct and that these rules should be established through a deliberative process detached from immediate political pressures. Such a framework aims to uphold justice by treating each citizen's well-being as an equal aspect of the common good, thereby protecting individual freedom while balancing legitimate requirements of collective welfare.[66]

While Allan positions the common good as the ultimate goal, Waldron calls for embracing the same idea, but construing it in terms of "respectfully exercised power" towards an individual. As Waldron claims, the rule of law and the separation of powers share the need for respect for every step in the exercise of power—from the legislative norm through implementation to adjudication—until it reaches the individual.[67] Through his theory on the rule of law as a procedural principle, Waldron argues that RoL should be respected and applied coherently in legislation and through procedural guarantees of citizens' rights. The only way to ensure that is through the integrity of all three branches of government.[68] Waldron's concept of respectfully exercised power appears as an antidote to Krygier's definition of arbitrary power, which he characterizes as uncontrollable, unpredictable, and lacking respect for those subject to it.[69]

[66] Trevor R S Allan, *Constitutional Justice: A Liberal Theory of the Rule of Law* (Oxford, 2003; online edn, Oxford Academic, 1 January 2010) 47.
[67] Jeremy Waldron, 'Separation of Powers in Thought and Practice' (2013) 54 *Boston College Law Review* 433, 92.
[68] Jeremy Waldron, 'The Rule of Law and the Importance of the Procedure' in James E Fleming (ed), *Getting to the Rule of Law* (University Press Scholarship Online 2016).
[69] Martin Krygier, 'Illiberalism and the Rule of Law' in András Sajó, Renáta Uitz and Stephen Holmes (eds), *Routledge Handbook of Illiberalism* (Routledge 2021) 533–553.

The uncontrolled and unpredictable exercise of power can often be addressed through anatomic accounts of the rule of law, emphasizing certainty, predictability, and clarity. However, the third dimension—governance exercised disrespectfully—reveals a more profound challenge that existing theories struggle to address: how to respond to the problem of apparent adherence to formal legality while failing to achieve the substantive aims of the rule of law, particularly the imperative to ensure that power is meaningfully constrained and not merely raw power motivated by political interests coated in the veneer of legality. Such an enterprise manifests a disrespectful government, as it subverts the core value of the rule of law while simultaneously benefiting from it.

Sajó defines this phenomenon as "legal cheating" when discussing the illiberal regimes that emerged in the EU in the last decade.[70] Legal cheating is not the only way to exercise disrespectful governance, but it has become increasingly prominent over the past decade.

The concept of legal cheating highlights how some regimes exploit the formal features of the rule of law to maintain legitimacy while undermining its foundational objectives. He describes a system of "disciplined arbitrariness," where legal procedures are followed in form but subvert the teleology of the rule of law, enabling regimes to manipulate legality as a legitimating tool. As Sajó explains, legalism leads to a pattern where the rule of law is simultaneously followed and breached, allowing illiberal governments to claim adherence to the rule of law while engaging in practices that contradict its animating values, such as non-arbitrariness. This duality illustrates the rule of law's inherent susceptibility to instrumentalization, where formal compliance is employed to conceal substantive violations. Sajó argues that this dynamic renders the rule of law "ready to endorse its own abuse," as it

[70] András Sajó, 'The Rule of Law as Legal Despotism: Concerned Remarks on the Use of "Rule of Law" in Illiberal Democracies' (2019) 11 *Hague Journal on the Rule of Law* 371–376.

becomes a mechanism for legitimizing arbitrary power rather than restraining it.[71] Similarly, when discussing the elusiveness of the legality requirements, such as legal certainty, Endicott noted that "the law may offer the citizens *the certainty* that they will be dealt with arbitrarily."[72] These insights underscore the crucial need to align institutional design and legal procedures with the fundamental objectives of the rule of law, ensuring that its teleology is not merely formal but actively resistant to manipulation and abuse.

Palombella views Sajó's concept of legal cheating as a litmus test for the abuse of the rule of law, because it reveals the critical tension between formal compliance with legal rules and the subversion of the rule of law's teleological aims.[73] He argues that cheating exposes the inherent vulnerability of the rule of law to being instrumentalized, as it highlights how adherence to regulative rules can mask the rejection of constitutive principles that define the rule of law as a distinctive institutional practice. For Palombella, this ability to adhere to procedural legality while undermining the substantive goals of the rule of law demonstrates the core mechanism through which abuse occurs, making legal cheating a crucial indicator of the fragility and potential manipulation of the rule of law through arbitrary government.

The challenge of identifying abuse of the rule of law through its enforcement becomes a critical inquiry, and Endicott's typology of arbitrariness offers a valuable framework for informing this endeavor. Endicott's typology of arbitrariness identifies three characteristics of arbitrary government: the absence of constraint on rulers, inconsistency in treating similar cases alike, and unpredictability in applying laws. These forms of arbitrariness, as previously

[71] András Sajó, 'Profiting from the Rule of Law' in *Ruling by Cheating: Governance in Illiberal Democracy* (Cambridge Studies in Constitutional Law, Cambridge University Press 2021) 237–278, 275.
[72] Timothy A O Endicott, 'The Impossibility of the Rule of Law' in *Vagueness in Law* (Oxford, 2000; online edn, Oxford Academic, 1 January 2010).
[73] Gianluigi Palombella, 'The Abuse of the Rule of Law' (2020) 12 *Hague J Rule Law* 387–97, 391.

discussed, can be addressed using the interpretative tools of both formal and substantive conceptions of the rule of law. However, Endicott adds a fourth, critical sense of arbitrariness, where government actions diverge from the *reason of the law*, which he considers fundamentally opposed to the rule of law because it abandons the rational justification that should underpin legal authority.[74] Hence, for Endicott, arbitrary government is "a particular form of unreasonable government."[75]

The following section examines the theoretical foundations of reason and justification as normative concepts, refining the teleological understanding of the rule of law and illuminating how reasoning-giving deficits can give rise to forms of arbitrariness that undermine its foundational principles.

2. Reason and Justification as Fundamental Pillars of Rule of Law Theory and Practice

2.1. Reason and Justification in Political and Legal Theory

Before delving into the legal implications of (un)reasonable government or state action as a particular manifestation of arbitrariness, it is essential to first address the overarching significance of reason and rationality within the foundational theories of liberalism and its intrinsic connection with public justification. The scope of public reason theory in political philosophy and its associated debates extends far beyond the confines of this chapter.

[74] Timothy A O Endicott, 'The Impossibility of the Rule of Law' in *Vagueness in Law* (Oxford, 2000; online edn, Oxford Academic, 1 January 2010).
[75] Timothy A O Endicott, 'The Impossibility of the Rule of Law' in *Vagueness in Law* (Oxford, 2000; online edn, Oxford Academic, 1 January 2010).

Nevertheless, key theoretical positions will be examined to illuminate the relationship between public reason and public justification, providing a foundation for further conceptualizing the rule of law as a constraint on arbitrariness.

Immanuel Kant is often regarded as the foundational figure in developing the idea of public justification, particularly as contemporary liberals and deliberative democrats understand it.[76] In Kantian thought, public reason is democratic, grounded in the collective reasoning of free and equal individuals who use discourse to shape the collective will without interference or coercion. This contrasts sharply with Thomas Hobbes's conception, where public reason is concentrated in the sovereign, whose role is to resolve political conflicts arising from pluralism and destabilizing politics.[77] While Hobbes and neo-Hobbesians, such as David Gauthier, conceive public justification in instrumental terms, focusing on bargaining and strategic interaction to motivate compliance, Kantian and neo-Kantian theorists like Rawls and Habermas aim to link public reason with justice and democracy, ensuring that all participants freely exchange reasons in a way that respects their rational capacities.[78] For Kant, as echoed by Onora O'Neill, reason derives its authority not from external foundations but from its ability to withstand internal criticism, emphasizing reciprocity, non-coercion, and respect for individuals' rational agency.[79]

Public reason and justification occupy central positions in liberal political theory, providing frameworks for legitimizing political authority and guiding democratic decision-

[76] Lawrence B Solum, 'Constructing an Ideal of Public Reason' (1993) 30 *San Diego Law Review* 729.
[77] For this discussion, see Ronald C Den Otter, 'Competing Conceptions of Public Reason' in *Judicial Review in an Age of Moral Pluralism* (Cambridge University Press 2009) 109–138.
[78] David Gauthier, 'Public Reason' (1995) 12 *Social Philosophy and Policy* 30.; Jürgen Habermas, 'Reconciliation through the Public Use of Reason: Remarks on John Rawls's *Political Liberalism*' (1995) 92 *Journal of Philosophy* 131.
[79] Onora O'Neill, 'The Public Use of Reason' in *Constructions of Reason: Explorations of Kant's Practical Philosophy* (Cambridge University Press 1989) 38.

making in diverse societies.[80] Theories of public reason emphasize the role of shared reasoning principles in enabling rational consensus, while public justification evaluates whether coercive laws and policies can be defended through publicly accessible reasons. Wendt states, "The core commitment of public reason liberalism is a commitment to a *principle of public justification*."[81] As the author claims, public reason theorists insist that there must be a public justification for *something,* although the nature of that justification differs across theories, encompassing laws, constitutional essentials, political decisions, coercion, claims to authority, and moral rules.[82]

Rawls' theory of public reason is one of the most prominent articulations of these concepts, where the public justification requirement is construed through the term "liberal principle of legitimacy."[83] Rawls argues that in constitutional democracies, political decisions must be justified through reasons that all reasonable citizens can endorse. Rawls' concept is closely tied to his notion of the duty of civility, which requires citizens and officials to provide reasons for their political decisions that others, regardless of their comprehensive doctrines, can

[80] See, e.g., Ronald Dworkin, 'Liberalism' in *A Matter of Principle* (Harvard University Press 1985) 181–204; Gerald F Gaus, *Value and Justification: The Foundations of Liberal Theory* (Cambridge University Press 1990); Stephen Macedo, *Liberal Virtues: Citizenship, Virtue, and Community in Liberal Constitutionalism* (Clarendon Press 1991); Jeremy Waldron, 'Theoretical Foundations of Liberalism' in *Liberal Rights: Collected Papers: 1981–91* (Cambridge University Press 1993) 36–37; Thomas Nagel, *Equality and Partiality* (Oxford University Press 1991) 3; Thomas Nagel, 'Moral Conflict and Political Legitimacy' (1987) 16 *Philosophy and Public Affairs* 215–240.

[81] Fabian Wendt, 'Rescuing Public Justification from Public Reason Liberalism' in David Sobel, Peter Vallentyne and Steven Wall (eds), *Oxford Studies in Political Philosophy Volume 5* (*Oxford Studies in Political Philosophy*, Oxford University Press) 2.

[82] Ibid.

[83] The liberal principle of legitimacy presupposes that "our exercise of political power is fully proper only when it is exercised in accordance with a constitution the essentials of which all citizens as free and equal may reasonably be expected to endorse in the light of principles and ideals acceptable to their common human reason.' John Rawls, *Political Liberalism* (Columbia University Press 1993–1996) 137.

reasonably accept. This ensures that state coercion respects individuals' moral agency and upholds the legitimacy of the democratic process.[84]

In contrast to Rawls' explicit connection between public reason and political legitimacy, Gerald Gaus explores the role of public justification in liberal theory by emphasizing the moral foundations of freedom and equality.[85] Gaus views public justification as the process through which coercive actions are rendered acceptable to all members of society by providing reasons that individuals can rationally endorse. His "sincerity requirement" highlights the necessity for individuals engaging in public deliberation to *sincerely believe that their justifications would be acceptable to others.*[86]

Despite substantial contestation within the literature concerning the criteria for what constitutes public reasons and the standard of a reasonable member of society, such debates do not detract from the essential role of justification in structuring the relationships between citizens and between the state and its constituents. The importance of public justification transcends the confines of liberalism and deliberative democracy, encompassing all who prioritize procedural integrity and substantive fairness in collective political decision-making and seek to legitimize political authority through reasoned deliberation.[87]

[84] John Rawls, *Political Liberalism* (Columbia University Press 1993–1996) 224.
[85] Gerald Gaus, 'Liberal Neutrality: A Compelling and Radical Principle' in Steven Wall and George Klosko (eds), *Perfection and Neutrality: Essays in Liberal Theory* (Rowman and Littlefield 2003).
[86] Gerald Gaus , 'Reason, Justification, and Consensus: Why Democracy Can't Have It All' in James Bohman and William Rehg (eds), *Deliberative Democracy* (The MIT Press 1997) .
[87] Ronald C Den Otter, 'Competing Conceptions of Public Reason' in *Judicial Review in an Age of Moral Pluralism* (Cambridge University Press 2009) 109–138.

Viewed through the framework of public justification as a conduit for procedural integrity and substantive fairness, the concepts of public reason and public justification can be critically examined within legal theory and practice.

2.2. Reason and Justification in Legal Practice

The principles of public reason and justification have also permeated both the theoretical foundations and practical applications of constitutional and administrative law.

Otter conceptualizes constitutional public reason as a framework in which laws and judicial decisions must be justified through reasons accessible and acceptable to all reasonable members of a pluralistic society.[88] This principle acknowledges the moral diversity inherent in constitutional democracies and ensures that legal and political justifications are grounded in shared and universally acceptable principles. Otter advocates for an exclusive conception of public reason, arguing that its narrower scope provides a more rigorous foundation for public justification. By restricting the range of acceptable justifications to those rooted in constitutional essentials and accessible to all, the exclusive conception upholds the legitimacy and equality of all citizens. This approach strengthens the coherence of legal reasoning and reinforces the integrity of constitutional governance by adhering to principles of fairness and inclusivity.[89] The issue identified in political philosophy, namely, that the concept of a reasonable member of a pluralistic society constitutes an imperfect legal standard due to the tension between what reasonable individuals ought to accept in theory and what they actually accept in practice, equally manifests as a challenge within the domain of constitutional practice. As Otter notices,

[88] Den Otter RC. Constitutional Public Reason. In: *Judicial Review in an Age of Moral Pluralism*. Cambridge University Press; 2009:139-171, p. 139-140.
[89] Ibid.

this tension is particularly stark in unjust societies, where reasons may meet the criteria for public justification—being acceptable from a shared rational perspective—but lack political efficacy, failing to be widely accepted by most reasonable individuals. Conversely, reasons that achieve political efficacy may lack sufficient public justification.[90] This tension is precisely what government arbitrariness thrives on.

The significance of justification has been extensively articulated within the framework of the culture of justification, a concept that holds a prominent place in administrative law theory.

The "culture of justification" was coined by Etienne Mureinik to describe a constitutional paradigm in which *every* exercise of governmental power must be rationally and substantively justified.[91] He contrasted this with the "culture of authority" that dominated during South Africa's apartheid regime, where legitimacy rested on coercion and hierarchical power. Mureinik envisioned the culture of justification as the foundation of South Africa's post-apartheid constitutional order, emphasizing a shift toward governance based on accountability and persuasion rather than coercion.[92] This transformative framework establishes that legitimacy arises not from the mere authorization to act but from providing principled and reasoned explanations that align with constitutional standards. The culture of justification seeks to safeguard governance from arbitrary power exercises by embedding accountability, rationality, and participation into the very fabric of state decision-making.

[90] Den Otter RC. The Challenge of Public Justification. In: *Judicial Review in an Age of Moral Pluralism*. Cambridge University Press; 2009:81-108.
[91] Etienne Mureinik, 'A Bridge to Where? Introducing the Interim Bill of Rights' (1994) 10(1) *South African Journal on Human Rights* 31–48.
[92] Etienne Mureinik, 'A Bridge to Where? Introducing the Interim Bill of Rights' (1994) 10(1) *South African Journal on Human Rights* 31–48, 32.

Dyzenhaus argues that the expansion of legality's scope should not be viewed as limiting democracy but as enhancing it when framed within a judicial understanding that the values of legality inherently structure processes of justification. This perspective redefines the traditional view of administrative law as merely a narrow extension of constitutional law. Instead, Dyzenhaus proposes that if administrative law is grounded in the culture of justification, constitutional law should be seen as an expanded version of administrative law ("administrative law writ at large"). This reframing suggests that constitutional law embodies and amplifies the principles of justification central to administrative governance, positioning both as integral to the democratic and rational exercise of power.[93]

Dyzenhaus's conception of constitutional law as "administrative law writ large" supports the idea that judicial scrutiny compels governments to adopt a culture of justification throughout the policy-making process, a point also argued by Mureinik. The awareness that any government program may face judicial examination incentivizes policymakers to rigorously justify their decisions by addressing objections, evaluating alternatives, and articulating the logical connections between evidence and conclusions. This preemptive process enhances the rationality and coherence of governmental actions, aligning with Dyzenhaus's assertion that administrative law, when properly understood, embodies the principles of justification. Consequently, as an extension of these principles on a broader scale, constitutional law ensures that democratic governance operates transparently and in an accountable manner.

The culture of justification elevates the rule of law from a mere formal system of authorization to a framework that requires actions to satisfy both the criteria of legality and their

[93] Etienne Mureinik, 'Beyond a Charter of Luxuries: Economic Rights in the Constitution' (1992) 8 *South African Journal on Human Rights* 464, 472–73.

justification within a broader constitutional context. Doing so reinforces the fundamental purpose of the rule of law as a constraint on arbitrariness, ensuring that power is exercised under its underlying principles and objectives.

The framework of the culture of justification in practice can be examined through recent case law of the Supreme Court of Canada. In the decision in *Canada (Minister of Citizenship and Immigration) v. Vavilov* (2019), the Court aimed to resolve longstanding uncertainties in Canadian administrative law, particularly regarding the standard of review in judicial oversight of administrative decisions. The Court used this context to address broader issues in administrative law, introducing a detailed methodology for reasonableness review. This framework emphasized that administrative decisions must be justified, intelligible, and transparent, marking a shift towards a robust "culture of justification" in judicial review. In his analysis of Vavilov, Paul Daly identifies four pillars of this culture of justification: reasoned decision-making, responsiveness, demonstrated expertise, and contextualism.[94] Reasoned decision-making requires that decisions be coherently justified within the relevant legal and factual framework. Responsiveness obliges decision-makers to address central issues raised by the parties and demonstrate consideration of the consequences of their decisions. Demonstrated expertise ensures decisions are grounded in the decision-maker's specialized knowledge and competence. Finally, contextualism requires that reasonableness be assessed in relation to the broader legal, factual, and institutional context of each decision. Together, these pillars form a

[94] Paul Daly, 'Vavilov and the Culture of Justification in Contemporary Administrative Law' (2021) 100 *Supreme Court Law Review: Osgoode's Annual Constitutional Cases Conference* 282–290.

comprehensive framework that clarifies the principles underlying judicial review and reinforces the accountability and transparency of administrative decision-making.[95]

The culture of justification framework resonates with the historical understanding that the first limit to arbitrary royal power in the 17th century was the common law, which was the reason for common men.[96] Although the evolution of common law extended the duty to act reasonably and without caprice even to non-state actors [97], the principle that reason constrains power remains deeply embedded in the authority of contemporary common law courts to exercise judicial review, particularly through the ultra vires doctrine and the *Wednesbury* doctrine of reasonableness, which serve as quintessential manifestations of the judicial checks on administrative power. As Lord Brown Wilkinson stated for the majority in *R. v. Lord President of the Privy Council, ex parte Page*:

"If the decision-maker exercises his powers outside the jurisdiction conferred, in a manner which is procedurally irregular or is *Wednesbury* unreasonable, he is acting ultra vires his powers and therefore unlawfully."[98]

The Wednesbury doctrine, originating from the *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* (1948), establishes that a decision is unreasonable and unlawful if it is so irrational that no reasonable authority could have made it.[99] This doctrine has been recognized as the cornerstone of judicial review, emphasizing the role of reasonableness as a

[95] Paul Daly,"Vavilov and the Culture of Justification in Contemporary Administrative Law." *The Supreme Court Law Review: Osgoode's Annual Constitutional Cases Conference* 100. (2021), p. 282-290.
[96] András Sajó, 'The Rule of Law as Legal Despotism: Concerned Remarks on the Use of "Rule of Law" in Illiberal Democracies' (2019) 11 *Hague Journal on the Rule of Law* 371, 374.
[97] See *De Portibus Maris* (1787) 1 Harg L Tr 78; *Alnutt v Inglis* (1810) 12 East 527; *Nagle v Fielden* [1966] 2 QB 633. All cases are discussed in Christopher Forsyth, 'Of Fig Leaves and Fairy Tales: The Ultra Vires Doctrine, the Sovereignty of Parliament and Judicial Review' (1996) 55(1) *Cambridge Law Journal* 122.
[98] R v Lord President of the Privy Council, ex p Page [1993] AC 682 (HL) 693 (Lord Browne-Wilkinson).
[99] *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223 (CA).

constraint on administrative discretion. It serves as a mechanism to ensure that public authorities act within the boundaries of rationality. Although *Wednesbury* has been recognized in the literature as *the* decision establishing the anti-arbitrariness doctrine, Endicott draws attention to two other cases that preceded Wednesbury and phrased the same doctrine more carefully: *Slattery v Naylor* and *Kruse v Johnson.*[100] In *Slattery*, Lord Hobhouse emphasized that courts should invalidate decisions deemed "capricious or oppressive," reflecting an intolerance for arbitrary discretion. Similarly, in *Kruse*, Lord Russell clarified that courts could strike down by-laws that were partial, unjust, or gratuitously interfered with rights without justification, highlighting a structured approach to arbitrariness. [101] In *Wednesbury*, reasonableness was established as an independent ground for judicial review, functioning as a safety net to be invoked only when other conventional grounds of review are insufficient, thereby limiting its application to extreme cases.[102] This understanding was reaffirmed in the *1985 GCHQ* case that asserted that the reasonableness test would apply only to "a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question could have arrived at it."[103]

Rationality and reasonableness have been central to the development of common law in the UK. However, their ideas extend beyond the Anglo-Saxon legal tradition and broadly apply across different legal systems.

[100] *Slattery v Naylor* (1888) 13 App Cas 446 (PC), *Kruse v Johnson* [1898] 2 QB 91 (DC).
[101] *Kruse v Johnson* [1898] 2 QB 91 (DC).
[102] Yossi Nehushtan, 'The True Meaning of Rationality as a Distinct Ground of Judicial Review in United Kingdom Public Law' (2020) 53(1) *Israel Law Review* 135, 138.
[103] *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374, 410 (*GCHQ*).

Wednesbury reasonableness is often compared to its "non-identical twin"– proportionality review.[104] Although the proportionality review is currently discussed in the prism of constitutional law across jurisdictions and international law, it originated in 19th-century Prussian administrative law as a principle designed to assess the compliance of executive actions with established legal standards. Nowadays, it is an essential test employed by constitutional and international courts, such as the ECtHR and CJEU. As Matthews argued, on the most basic level, proportionality requires that the government's means are well-adapted to the ends it is pursuing, or, as German administrative law scholar Fritz Fleiner put it, "the police should not shoot at sparrows with cannons."[105] In administrative law, Endicott considers proportionality review an essential mechanism for maintaining the integrity of legislative purposes in exercising administrative discretion. The first two stages of the proportionality inquiry ensure that administrative actions align with statutory objectives, while promoting principles of reasoned governance, transparency, and democratic accountability. By necessitating a clear justification for the suitability of the contested measures and the rationale for selecting a particular regulatory option, proportionality review reinforces the coherence and legitimacy of administrative decision-making.[106]

The objective of analyzing these doctrines is not to critique their applicability or relevance within their respective local contexts but to examine how reason and justification function as fundamental pillars of lawfulness. By emphasizing reasonableness and justification

[104] See for example Claire Weir (1999) Is EC Proportionality the Same as Wednesbury Unreasonableness?, Judicial Review, 4:4, 263-266; Jack Matthews, 'Reasonableness and Proportionality' in Peter Cane, Herwig C Hofmann, Eric C Ip and Peter L Lindseth (eds), *The Oxford Handbook of Comparative Administrative Law* (Oxford University Press 2020) 917.

[105] Jud Matthews, 'Proportionality Review in Administrative Law' in Susan Rose-Ackerman, Peter L Lindseth and Blake Emerson (eds), *Comparative Administrative Law* (Edward Elgar Publishing 2017).

[106] Paul P Craig, 'Reasonableness, Proportionality and General Grounds of Judicial Review: A Response' (2021) 2 *Keele Law Review* 15.

through various judicial review tests, courts indirectly assess the extent to which the rule of law is upheld within the practice of the legal order.

The scholarship examines the culture of justification primarily through the lens of court adjudication, as the concept itself aims to eliminate "legal black holes," or areas immune from judicial review, by ensuring that no government action is exempt from the justification requirement.[107] Hence, judicial review is perceived as the main channel of enforcing the culture of justification. Still, judicial pronouncements alone may not suffice to effect systemic cultural transformation. Courts hear only a small fraction of the millions of decisions made daily by public bodies, and their judgments may not have a lasting impact across all branches of governance. If a sustained culture of justification is to be realized, the expectation of reasoned decision-making must be reinforced through formal procedures and legal standards that guide executive and legislative discretion.[108] In this context, procedural constraints are not merely formalistic requirements; they serve a substantive function, as they condition the legitimacy of public action by demanding transparency, consistency, and accountability in the exercise of power.

While judicial reasoning remains essential in articulating the values underpinning the rule of law, fostering a culture of justification requires more than the isolated efforts of the judiciary. The expectation that public power be exercised based on reasons capable of public scrutiny ought to be embedded institutionally across the constitutional order, extending beyond the courtroom to inform both executive and parliamentary conduct. As Joanna Bell has observed in the context of the United Kingdom—the cradle of the common law tradition from which the

[107] Moshe Cohen-Eliya and Iddo Porat, 'Proportionality and the Culture of Justification' (2011) 59 *Am J Comp L* 463, 477.
[108] Joanna Bell, *Reason-Giving in Administrative Law: Where are We and Why Have the Courts Not Embraced the 'General Common Law Duty to Give Reasons'?* (2019) 82 *Modern Law Review* 983.

principle of reasonableness in administrative decision-making derives—recent decades have seen the emergence of a body of legislation and soft law initiatives encouraging greater transparency and reason-giving within public administration.[109] This includes the *Freedom of Information Act* 2000, which obliges public authorities to maintain publication schemes reflecting the public interest in decision-making rationale;[2] the *Local Government Transparency Code* 2015, promoting broader disclosure by local authorities;[3] and the statutory "duty of candor" under the *Health and Social Care Act* 2008 (Regulated Activities) Regulations 2014.

The duty of candor serves as a particularly salient example of a normative instrument grounded in the culture of justification, as it is a dual-level obligation—professional and statutory—imposing a requirement on practitioners and public service organizations for complete openness and frankness when harm occurs. It requires disclosure of adverse outcomes and provides for fully reasoned explanations of why they happened. This duty reflects a private obligation toward individuals (enhancing respect for autonomy and dignity) and a public law obligation aiming at procedural justice, organizational learning, and the maintenance of public confidence.[110]

While these examples are merely illustrative, they point to a broader observation: the constitutional architecture of many democratic systems contains mechanisms that reinforce and sustain a culture of justification. However, especially during periods of political transition, such mechanisms ought to be upheld with heightened fidelity and must not be compromised as collateral in response to shifting political contingencies.

[109] Ibid.
[110] Stephen Gardiner, Douglas Morrison and Simon Robinson, 'Integrity in Public Life: Reflections on a Duty of Candour' (2022) 24 *Public Integrity* 217, 218.

Hence, the justiciability of issues arising from governmental actions should not be regarded as the sole mechanism for embedding the culture of justification within a legal system, as it fails to address scenarios where governments circumvent legal constraints and exert undue influence over the judiciary. For example, governments may exploit their parliamentary majority to amend constitutional provisions, thereby precluding judicial oversight of such changes—unless the jurisdiction recognizes the doctrine of unconstitutional constitutional amendments. Moreover, the government's institutional capture of the judiciary inherently undermines the culture of justification, rendering it ineffective as a mechanism for ensuring governmental accountability. Mureinik anticipated the potential for judicial power abuse, emphasizing the importance of implementing procedural mechanisms to ensure the appointment of judges who embody these essential qualities.[111]

3. Applying the Teleological Rule of Law Framework to Judicial Design

As will be further elaborated in Chapter III, the problem of arbitrary interference, particularly concerning inherited judges, becomes especially pronounced during periods of political transition, when newly elected governments initiate far-reaching legal reforms, including those targeting the judicial institution's structure. While particular rule of law violations in judicial design are readily identifiable through established legal standards, such as the international requirement of an "independent tribunal established by law" (as discussed in Chapter II), the more pressing challenge lies in detecting and evaluating subtler forms of rule of

[111] Etienne Mureinik, 'Beyond a Charter of Luxuries: Economic Rights in the Constitution' (1992) 8(4) *South African Journal on Human Rights* 464, 473.

law erosion. These are often masked by formal legality and framed as legitimate policy choices. The central inquiry, therefore, concerns how to conceptualize and articulate the normative benchmarks—whether in the form of *prescriptive best practices* or *boundary-setting standards*—that can serve as interpretive tools for assessing the legitimacy of such reforms. These standards should safeguard the power-constraining function of the rule of law while remaining sufficiently flexible to account for contextual variation across different constitutional and political settings.

Prescribing best practices to achieve rule of law coherence has long been a hallmark of international standard-setting bodies in the realm of the rule of law. However, scholarly critiques have highlighted the significant pitfalls associated with this approach, particularly its tendency to oversimplify complex legal and institutional realities.[112] When discussing the work of the Venice Commission, Iancu argues that the Commission's reliance on standardized solutions and one-size-fits-all models often overlooks the specificities of local contexts, leading to the imposition of frameworks that may distort foundational principles such as the rule of law and judicial independence. By conflating constitutional norms with policy imperatives, the Commission risks reducing the rule of law to a series of rigid, context-dependent prescriptions rather than maintaining its coherence as a power-tempering framework. This critique reinforces the importance of articulating rules that reflect the substantive values of the rule of law and respect the nuances of diverse institutional and cultural contexts.

The best-practices approach also presents significant limitations from a theoretical perspective. The rule of law, as Raz noted, is not the rule of good law[113] and cannot be understood as a panacea for every foul and malicious act of governmental or non-governmental

[112] Bogdan Iancu, 'Quod licet Jovi non licet bovi?: The Venice Commission as Norm Entrepreneur' (2019) 11 *Hague Journal on the Rule of Law* 189.
[113] Joseph Raz, *The Authority of Law: Essays on Law and Morality* (Oxford University Press, 1979) 211.

actors. Imposing generalized solutions across diverse contexts risks inadvertently enabling legal manipulation, as it provides political leaders with the means to legitimize their actions by invoking international best practices or comparative models that work in other "well-functioning" democracies.[114] This can allow governments to justify reforms that serve political agendas while undermining the substantive values of the rule of law, effectively using these standards as a façade for actions that erode its foundational principles. Analyzing various forms of interference with judicial independence from the perspective of adherence to legality often doesn't lead to substantive conclusions regarding whether the reform represents an encroachment on judicial independence and the undermining of the rule of law or a legitimate exercise of government (see Chapter V).

Given these theoretical and practical shortcomings, this thesis departs from the prescriptive logic of best practices and instead advances a boundary-setting framework rooted in the teleological understanding of the rule of law. Rather than proposing substantive standards, it seeks to establish an architectural framework for assessing judicial reforms that foreground the framework under which legal changes may be evaluated through the justificatory lens of the rule of law.

Through the typologies of abuse developed in Chapters IV and V, this thesis advances a conceptual framework for the context-sensitive evaluation of judicial reforms that implicate the core rule of law values of non-arbitrariness and public justification, identifying the conditions under which the tools of justificatory governance ought to be engaged. In doing so, it aims to contribute to the epistemological foundations and normative vocabulary available for diagnosing and assessing forms of institutional interference in the judicial domain, particularly those that

[114] See e.g. Julian Scholtes, *The Abuse of Constitutional Identity in the European Union* (Oxford University Press 2023).

evade detection through conventional legality tests. In this way, the analysis enriches the teleological understanding of the rule of law, reconceptualizing judicial accountability as the "other side of judicial independence," not solely in terms of institutional outcomes but as a normative demand for legal and structural reforms to exhibit both necessity and public defensibility in their design and implementation. The framework offered thus aims to guide the interpretation and construction of standards in specific contexts, ensuring that interventions in judicial design remain consistent with the fundamental function of the rule of law as a check on arbitrary power.

3.1. The Doctrinal Tools of the Teleological Rule of Law Paradigm – Notes from the South African Constitutional Court

The central question concerns which interpretative tools are available to discern ulterior motives underlying judicial reforms and to identify instances of the rule of law-deficient interference with judicial independence. As previously noted, a core principle within the culture of justification is the requirement of rationality and reasonableness, which function as a normative constraint on arbitrariness—precisely the type of discretionary power the teleological conception of the rule of law is designed to prevent. The invocation of these principles in the institutional design of the public sector—particularly in matters of appointing and dismissing public officials, including judicial members—is not a novel concept. Comparative courts' jurisprudence has recognized that discretion in such contexts must be bounded by rationality, fairness, and proportionality standards to prevent arbitrariness and abuse of power.

Especially in the case of judicial appointments and terminations, these principles operate not merely as a vague administrative ideal but as a normative constraint anchored in broader rule of law commitments. As such, they serve as a key reference point in legal doctrine and

jurisprudence for assessing whether the procedures employed and the justifications offered by public authorities withstand constitutional and legal scrutiny. This is reflected in comparative case law, where courts have emphasized that structural changes to public officials — particularly those affecting tenure and selection — must meet the necessary threshold in light of their objectives, context, and institutional impact.

The South African Constitutional Court has developed a robust body of jurisprudence on rationality and reasonableness as a constraint on executive discretion, frequently invoked in litigation by the Democratic Alliance in challenges to different legislative and executive acts, including high-level public appointments.

South African constitutional jurisprudence draws a clear and principled distinction between the doctrines of rationality and reasonableness, each corresponding to a different constitutional function and level of judicial scrutiny. As affirmed in *Democratic Alliance v Independent Communications Authority of South Africa*, the classification of a review as either rationality-based or reasonableness-based significantly determines the judicial posture adopted in evaluating the impugned decision.[115] This distinction is further elucidated by the *Constitutional Court in Ronald Bobroff & Partners Inc v De La Guerre*, where it emphasized that rationality review is a baseline requirement flowing from the principle of legality, applicable to all exercises of public power regardless of whether fundamental rights are implicated.[116] *Rationality* entails an objective inquiry into whether a sufficiently coherent link exists between the means employed and the ends pursued without regard to the court's view of the appropriateness or efficacy of the

[115] *Democratic Alliance v Independent Communications Authority of South Africa and Another* (2024/029892) [2024] ZAGPJHC 1639 (30 March 2024).
[116] *Ronald Bobroff & Partners Inc v De La Guerre; South African Association of Personal Injury Lawyers v Minister of Justice and Constitutional Development* (CCT 122/13, CCT 123/13) [2014] ZACC 2; 2014 (3) SA 134 (CC); 2014 (4) BCLR 430 (CC) (20 February 2014).

measure in question. It is thus a formally constrained test, guarding against arbitrary decision-making without permitting courts to intrude upon the policy-making discretion of the legislative or executive branches.

Reasonableness review is triggered when legislation or executive action implicates or limits constitutionally protected rights. In such cases, the court assumes a more substantive and evaluative role, scrutinizing whether the limitation satisfies the criteria laid out in section 36 of the South African Constitution—that is, whether it is "reasonable and justifiable in an open and democratic society based on human dignity, equality, and freedom."[117] Unlike rationality, which tests coherence, reasonableness evaluates proportionality and justification. It is a higher threshold that demands a connection between means and ends, as well as a demonstration that the chosen measure is appropriate, necessary, and balanced in light of competing constitutional values.

Hence, a rationality review ensures the legality of public power, while a reasonableness review ensures the legitimacy of the limitations of the rights. Interference with judicial independence could arguably be subject to both the rationality and reasonableness-based scrutiny, reflecting its dual character as an exercise of public power and a potential infringement on the right to a fair trial before an independent and impartial tribunal.

Jurisprudence such as that of the South African Constitutional Court illustrates that the language of constitutional law *does possess* interpretative tools capable of evaluating such interference, tools grounded in the principles of legality, justification, and the teleological demands of the rule of law.

[117] Constitution of the Republic of South Africa, 1996, s 36.

In *Democratic Alliance v President of the Republic of South Africa*, the case which particularly concerns the appointments in the public sector, the Court applied the principle of rationality—*embedded within the broader doctrine of legality*—to assess the constitutionality of the President's appointment of Mr Menzi Simelane as National Director of Public Prosecutions.[118]

Acting Deputy Chief Justice Yacoob wrote for a unanimous bench and held that the appointment was irrational and, therefore, constitutionally invalid. The judgment emphasized that executive decisions, particularly those concerning public office appointments, must be rationally connected to the purpose for which the power is conferred, thereby reaffirming the duty of public justification. As affirmed by the Court, the principle of separation of powers does not exempt executive decisions from rationality review, nor does it justify applying a lower threshold of scrutiny to such decisions. The Court clarified that rationality is a uniform constitutional standard: an irrational decision in an administrative law context cannot become rational simply because the executive takes it.[119] This reasoning aligns with the central claim advanced in this thesis—namely, that appointments and dismissals within the judiciary, though often falling within the discretion of political actors, must still satisfy the justificatory demands imposed by the rule of law. Interference with the institutional autonomy of the judiciary, particularly through design reforms or personnel changes, implicates the balance of powers and, therefore, requires explicit, reasonable, and publicly defensible justifications. When understood as part of a broader culture of justification, the rationality standard offers a doctrinal mechanism for evaluating whether such decisions are legitimate exercises of constitutional authority or

[118] Democratic Alliance v President of the Republic of South Africa [2012] ZACC 24, 2013 (1) SA 248 (CC), 2012 (12) BCLR 1297 (CC)('Democratic Alliance CC' or 'Simelane').
[119] Democratic Alliance v President of the Republic of South Africa [2012] ZACC 24, 2013 (1) SA 248 (CC), 2012 (12) BCLR 1297 (CC)('Democratic Alliance CC' or 'Simelane'), para. 44.

concealed attempts at political control. In this way, rationality review not only complements but reinforces the separation of powers by ensuring that political discretion over the judiciary remains constrained by principles of legality, coherence, and institutional respect.

By setting aside the appointment, the Court underscored the role of rationality as a safeguard against arbitrariness and clarified that legality requires more than procedural compliance—it demands substantive justification consistent with constitutional values. This decision thus represents a significant affirmation of the Court's role in enforcing justificatory standards within executive action and protecting the integrity of institutional appointments.[120]

This illustration from the South African Constitutional Court reveals that the principles of rationality and reasonableness serve not only as conceptual constraints but also as judicially enforceable standards capable of disciplining the exercise of public power in contexts that affect judicial independence. Far from being abstract ideals, these doctrines operate as part of a broader justificatory architecture that ensures appointments and dismissals within the judiciary are assessed for procedural compliance and their substantive coherence with the values underpinning the rule of law. By anchoring institutional reforms in public justification and subjecting them to interpretative tools that reveal arbitrariness, courts reinforce the integrity of the judicial office and the normative limits on political discretion, ensuring that the balance of powers remains formally structured and substantively protected. While these are by no means the only interpretative tools available for such analysis, they provide a principled and practicable starting point for evaluating judicial reforms through the lens of the rule of law.

[120] Karthy Govender, 'The Risk of Taking Risky Decisions: Democratic Alliance v President of the Republic of South Africa' (2013) 5 *Constitutional Court Review* 451.

3.2. Constraining Power Through Justification: Embedding the Reason-Giving into the Design of Judicial Reforms

Determining whether political interventions in judicial appointments and dismissals conform to the rule of law requires moving beyond assessments of procedural formality or institutional design alone. While the typologies presented in Chapters IV and V reveal structural interference patterns, these frameworks must be complemented by analyzing the motivational content underlying the reforms. This section advances the claim that public justification behind the reforms is not merely a matter of political prudence but a rule of law necessity. Embedding justification within the legal design of judicial reforms exposes opportunistic motivations that may be obscured behind a veneer of formal legality. In this way, justification functions as both a normative standard and a diagnostic tool for identifying when the limits of legitimate institutional reform have been transgressed.

Publicly declared motives behind the reforms that alter the institutional autonomy of the judiciary frequently fail to satisfy the justificatory threshold required by the normative commitments of the rule of law. This failure tends to manifest through three principal strategies: *overt arbitrariness*, *appeal to the majoritarian legitimacy*, and *pretextual reasoning*—the latter involving the concealment of ulterior motives behind facially neutral or public-spirited reform narratives.

Notably, there are instances in which even the language of democratic will is eschewed, and reform efforts are justified in explicitly personal or strategic terms, which amounts to overt arbitrariness when analyzed through the teleological lens of the rule of law. A paradigmatic example is the statement by former Argentine President Carlos Menem: “Why should I be the

only president in Argentine history not to have my court?"[121] This remark highlights the extent to which judicial appointments can be viewed not as a function of institutional necessity but as an instrument of executive consolidation. Such expressions underscore the risks posed by unconstrained discretion in judicial design and reinforce the importance of embedding reforms within a culture of justification that reflects the rule of law's core function as a limitation on arbitrary power, even in the context of electoral legitimacy.

While the second strategy, appeal to majoritarian legitimacy, is frequently employed to justify structural reforms, including those concerning the judiciary, majoritarian support alone cannot constitute a sufficient justification for an institutional redesign that affects the independence and internal configuration of the judicial branch of government (See Chapter V). In such contexts, the rule of law imposes substantive constraints on the exercise of political authority, requiring that reforms be grounded in reasoned, proportionate, and publicly defensible justification. The principle of democratic accountability must be balanced against the need to preserve institutional checks and prevent the concentration of power.

Finally, in the realm of judicial reform, pretextual justification has increasingly come to represent a sophisticated form of legal manipulation, whereby illiberal governments cloak politically motivated interventions in the judiciary under ostensibly neutral or public interest rationales. Consider the example of anti-corruption and efficiency aspirations governments often invoke when pursuing judicial reforms. Reducing corruption and boosting efficiency are laudable RoL aims, as they ensure the integrity of the administration of justice and guarantee that the right

[121] Christopher Larkins, *'The Legacies of Hyper-Presidentialism: Executive-Judicial Relations, Constitutional Cultures, and the Future of Democratic Governance in Argentina and Peru'* (PhD dissertation, University of Southern California 1998) 177.

to a fair trial is observed. These aims fall under the general demand for judicial accountability in the liberal constitutional context.

The empirical evidence suggests that anti-corruption measures targeting the judiciary, justified by international commitments to the rule of law, may, in a national context, lead to the opposite: rule of law-violating outcomes. In the aftermath of the post-communist transition, CEE governments used corruption to advocate for looser legal limits on the concentration of government power.[122] Eradicating judicial corruption has also been on the agenda of many populist leaders' election campaigns, such as those of Chavez and Fujimori in the late 90s.[123] How Chávez and Fujimori invoked existing corruption as a pretext for public sector reforms, including the judiciary—ultimately aimed at consolidating executive control and undermining judicial independence—illustrates the deceptive use of rule of law rhetoric as a tool of authoritarian entrenchment.[124]

The oversight of the international community or foreign donors is also insufficient as a safeguard against such dangers, as recently demonstrated in Romania, which Iancu characterized as an E.U. "laboratory for implementing international anti-corruption and judicial independence standards."[125] Similarly, in the context of Moldova's transitional judicial reforms, a self-proclaimed oligarch heading a minor political party could secure a parliamentary majority and

[122] "It is true that some aspects of coming to terms with the communist past were not dealt with in the immediate aftermath of 1989, when "instant democracy" was the motto of the day, and they are now returning like a boomerang. But also at work, most obviously in the Polish case, is the political instrumentalization of the issue, accompanied by selfserving authoritarian arguments: To "clean house" by purging corruption and communist agents we need more powers in our hands, and thus we must do away with some constitutional and institutional constraints." Jacques Rupnik, 'Is East-Central Europe Backsliding? From Democracy Fatigue to Populist Backlash' (2007) 18 *Journal of Democracy* 17, 21.

[123] Gustavo Coronel, *Corruption, Mismanagement, and Abuse of Power in Hugo Chávez's Venezuela* (Cato Institute, 27 November 2006) 4, https://www.cato.org/publications/commentary/corruption-mismanagement-abuse-power-hugo-chavezs-venezuela accessed 13 February 2022;

[124] Lisa J Laplante, 'The Rule of Law in Transitional Justice: The Fujimori Trial in Peru' in Mortimer Sellers and Tadeusz Tomaszewski (eds), *The Rule of Law in Comparative Perspective* (Springer 2010) 183.

[125] Bogdan Iancu, '*Quod licet Jovi non licet bovi?*: The Venice Commission as Norm Entrepreneur' (2019) 11 *Hague Journal on the Rule of Law* 189.

exert control over the state. This set-up was achieved by strategically appointing loyalists to newly established, donor-funded anti-corruption institutions, which were subsequently used to undermine political opponents through tactics such as blackmail and arrests.[126]

As Mariam Begadze argues, judicial reforms are one of the core terrains where pretextual rulemaking occurs, particularly in hybrid regimes seeking to erode judicial independence without overtly violating formal legal requirements.[127] The courts, traditionally reluctant to impute bad faith to co-equal branches of government due to concerns about the separation of powers and institutional vulnerability, have nonetheless begun to acknowledge the inadequacy of formalist scrutiny when faced with reforms whose effects substantially undermine judicial impartiality. The ECtHR in *Dolińska-Ficek and Ozimek v. Poland* found that judicial appointment practices were undertaken "with the ulterior motive" of preventing judicial review of government decisions, thus breaching Article 6 of the Convention and compromising judicial independence.[128] Similarly, in *Advance Pharma v. Poland*, the ECtHR underscored that the executive's disregard for judicial authority and its effort to shield contested appointments from oversight reflected not a neutral policy aim but a systemic encroachment on the judiciary's role.[129] The CJEU adopted a parallel approach in *Commission v Poland (C-619/18)*, where it held that judicial retirement reforms—formally justified on the grounds of efficiency and generational renewal—raised "serious doubts" about their true purpose of marginalizing a segment of the judiciary. By highlighting inconsistencies in the government's stated rationale and the legislative context, the CJEU inferred an ulterior political motive to weaken judicial autonomy. These

[126] Alina Mungiu-Pippidi, 'Five Lessons on International Rule of Law Support' (Carnegie Europe, 6 September 2022) https://carnegieeurope.eu/2022/09/06/five-lessons-on-international-rule-of-law-support-pub-87737 accessed 27 April 2023.
[127] Mariam Begadze, 'Pretext as a Legal Matter' in Mark Tushnet and Dimitry Kochenov (eds), *Research Handbook on the Politics of Constitutional Law* (Edward Elgar Publishing 2023).
[128] *Dolińska-Ficek and Ozimek v Poland* App nos 49868/19 and 57511/19 (ECtHR, 8 November 2021) para 330.
[129] *Advance Pharma sp. z o.o. v Poland* App no 1469/20 (ECtHR, 3 February 2022) para 333.

cases reflect a broader doctrinal shift toward recognizing pretext as a legal issue that threatens the appearance and substance of judicial independence, and therefore necessitates heightened scrutiny, even in the absence of direct evidence of bad faith. Pretextual reforms—especially in the judicial domain—cannot be adequately assessed through traditional legal tests alone, but demand an evaluative framework that is attentive to procedural irregularities, institutional context, and governmental behavior patterns, which reveal the true nature of the purported reforms.

The typologies of interference outlined further in this thesis map the structural contours of abuse. However, it is only through attention to reason-giving practices—and the sincerity, consistency, and proportionality of such justifications—that the normative legitimacy of reforms can be meaningfully assessed. Whether through overt arbitrariness, populist appeals, or strategic pretexts, political actors may seek to exploit the judiciary's design under the guise of reform. As comparative jurisprudence increasingly recognizes, such interventions must be scrutinized for their formal legality and teleological coherence with the foundational purpose of the rule of law: constraining public power through reason. In this sense, embedding justification within judicial reform design is not merely a safeguard against manipulation but a constitutive feature of the rule of law fidelity.

4. Conclusion

This chapter presents a theoretical framework for evaluating the interventions of political branches in judicial appointments and dismissals through the lens of the rule of law, understood in its teleological and justificatory dimensions. It has argued that anatomical conceptions of the rule of law, while necessary, are insufficient for capturing the full normative stakes involved in

interfering with the judiciary by other branches of government. In particular, where institutional autonomy is implicated, the rule of law demands more than procedural compliance; it requires that exercises of public power be grounded in reasons that are rational, proportionate, and publicly defensible. The culture of justification—central to this account—thus emerges not as a merely aspirational ideal but as a structural constraint on arbitrary power and an epistemological guide for evaluating the legitimacy of reform.

To that end, the chapter examined interpretative tools such as rationality and reasonableness as mechanisms through which courts and theory can assess whether state interventions comport with the rule of law requirements. Although rooted primarily in administrative law, these standards have demonstrable applicability in the context of political branches' acts affecting the judicial design, particularly concerning appointments and dismissals. Their function in this domain is to assess coherence between means and ends, serving as normative thresholds that mark the boundaries of legitimate institutional restructuring. Such tools within constitutional jurisprudence illustrate that legal systems already possess—at least in latent form—the doctrinal resources necessary for scrutinizing politically sensitive reforms.

These concerns become especially pronounced in political transitions, where the position of "inherited judges"—those appointed under previous regimes—frequently becomes the object of reformist efforts. While such initiatives may be presented as part of broader efforts to enhance democratic legitimacy or institutional renewal, they simultaneously raise fundamental questions about the limits of political discretion in reshaping the "least dangerous" branch of government. The issue of inherited judges thus serves as a prism through which the tension between institutional continuity and political change is most clearly observed. It also provides a critical

test case for evaluating the capacity of the rule of law, in its justificatory and power-constraining function, to resist incursions on judicial independence cloaked in the language of necessity.

Before examining this issue in greater detail, Chapter II reviews the existing international legal standards governing judicial appointments and dismissals, as articulated in the jurisprudence of international courts and soft law standard-setting bodies. Rather than merely assessing the extent to which domestic practices conform to these standards, the next chapter explores whether the theoretical framework developed here—grounded in the principles of justification, non-arbitrariness, and institutional integrity—can provide a complementary perspective that supports and potentially enriches the normative content of international standards on judicial appointments and dismissals.

Chapter II

International Standards on the National Design of Judicial Appointment and Dismissal Procedures

This chapter outlines international standards regarding judicial design, with a specific focus on judicial appointments and dismissals within the context of the rule of law. While Chapters IV and V examine the prevalent models and trends in judicial appointments and dismissals across various national jurisdictions, this chapter focuses exclusively on international standards in contrast to the evidence of deviations from the rule of law. A more precise understanding of the evolution of judicial design standards internationally is provided, highlighting a transition from national contexts to the embedded state obligations under regional frameworks for human rights protection. This analysis serves two purposes:

1) establishing an international normative benchmark for assessing "irregular" or rule of law-inconsistent interferences in judicial appointments and dismissals within national settings;

2) It lays the groundwork for the main research question of this thesis, questioning whether these norms and standards are universally applicable, even in transitional contexts, or if there are circumstances where adhering to the established rule of law standards on judicial independence could paradoxically lead to violations of the rule of law.

According to Shimon Shetreet, the evolution of judicial independence culture has been a confluence of national and international factors, unfolding through a cyclical process of

reciprocal influence between domestic and international legal realms.[130] The initial phase witnessed the conceptualization of judicial independence primarily within domestic boundaries. Subsequently, during the second phase, this domestic evolution transcended national confines, influencing the perspectives of scholars and political leaders globally. This phase culminated in the formulation of established principles of judicial independence at the transnational level, encompassing both regional and global arenas. In the contemporary third phase, the international jurisprudence on judicial independence actively shapes domestic legal frameworks across nations, yielding significant and, at times, transformative outcomes.

The chapter will proceed as follows:

First, it delineates the authoritative international framework on judicial independence, examining both soft law and the jurisprudence of international courts to identify prevailing trends in the design of appointment and dismissal processes for judges.

Second, it examines the evolution of international jurisprudence that has shaped the national design for the appointment and removal of judges in four regional courts: the European Court of Human Rights, the Inter-American Court of Human Rights, the African Court on Human and Peoples' Rights, and the European Court of Justice.[131] This comparative analysis is conducted along three distinct dimensions:

[130] Shimon Shetreet, 'The Normative Cycle of Shaping Judicial Independence in Domestic and International Law: The Mutual Impact of National and International Jurisprudence and Contemporary Practical and Conceptual Challenges' (2009) 10 *Chicago Journal of International Law* Art 13.

[131] The African court system encompasses various adjudicatory bodies with jurisdiction over human rights claims, including the quasi-judicial African Commission on Human and Peoples' Rights, the African Court on Human and Peoples' Rights, and three subregional courts: the Court of Justice of the Economic Community of West African States, the Southern African Development Community Tribunal, and the East African Court of Justice. While these institutions do not represent all judicial bodies in Africa, their distinct role in adjudicating human rights claims sets them apart from other courts on the continent. See Daniel Abebe, 'Does International Human Rights Law in African Courts Make a Difference' (2016) 56 *Virginia Journal of International Law* 527, 538.

Firstly, it analyzes how these courts, in the course of their jurisprudence, established the jurisdiction to scrutinize the national frameworks governing the appointment and dismissal of judges; secondly, it discusses the judicial independence doctrines of each Court in question; and thirdly, it comparatively lays out the standards governing the appointments and dismissal of judges.

The jurisprudence of regional courts is intricately linked to the developments within national constitutional frameworks, providing the rationale for the discernible trajectory of the regional courts' legal doctrines.

The political context of the *Ajavon v. Benin* case, characterized by accusations of rigged parliamentary elections and controversial constitutional amendments in Benin, directly relates to the doctrine of judicial independence that the ACtPHR outlined in the case.[132]

Notably, the ECtHR and CJEU have recently rendered extensive jurisprudence on judicial appointments and dismissals, responding to specific cases arising from challenges to judicial independence in Europe.

Similarly, the IACtHR's pivotal case law on judicial independence was influenced by a phase of severe attacks on the judiciary in the Latin American region, e.g., the sweeping attacks on the judiciary under Chavez's rule in Venezuela, the political dismissal of Peruvian judges amidst Fujimori's reelection attempt as well as the 2004 mass dismissal of all apex courts of Ecuador as a consequence of the political arrangements in Congress to avoid a political trial

[132] Application 062/2019, *Sébastien Germain Marie Aïkoue Ajavon v Republic of Benin*, Judgment, 4 December 2020, 286–289.As highlighted in the ruling, the renewable nature of judges' terms on the Constitutional Court raised fears that judges might not act impartially if their reappointment could be influenced by the same political forces accused of undermining democratic processes.

against the President.[133] This argument aligns with legal scholarship observing that the performance of the IACtHR over its 40-plus years has been influenced by the region's socio-economic and political context, with the evolution of its case law paralleling the adoption of human rights discourse as a political tool to counter dictatorial abuses in the 1970s and 1980s, following an initial period dominated by the principle of non-intervention and the dynamics of US foreign policy.[134]

Hence, the socio-political context of the cases adjudicated by the examined courts suggests that, in addition to Shetreet's proposition that international and national law mutually influence the establishment of judicial independence standards, the dynamics of constitutional politics hold equal importance in shaping the trajectory of international standards.

Building on the comprehensive overview of how international standards shape judicial appointments and dismissals, it is essential to delve deeper into the specific sources that inform these standards. This examination is crucial for understanding the layered nature of the standards, which are legal mandates, but also reflect a broader political commitment to upholding the rule of law on the international level.

[133] Oscar Parra Vera, 'La Independencia Judicial en la Jurisprudencia de la Corte Interamericana de Derechos Humanos. Evolución, debates y diálogos' in Alejandro Saiz Arnaiz, Joan Solanes Mullor and Jorge Ernesto Roa Roa (eds), *Diálogos Judiciales en el Sistema Interamericano de Derechos Humanos* (Tirant Lo Blanch 2017) 487–88. The backlash to the IACtHR's case-law on Venezuela resulted in Chavez's government submitting a motion to withdraw from the Convention in 2012. See International Justice Resource Center, 'Venezuela Denounces American Convention on Human Rights as IACHR Faces Reform' (19 September 2012) https://ijrcenter.org/2012/09/19/venezuela-denounces-american-convention-on-human-rights-as-iachr-faces-reform/ accessed 11 June 2023.

[134] Natalia Zúñiga, *The Inter American Court of Human Rights: The Legitimacy of International Courts and Tribunals* (1st edn, Routledge 2022) 70. See also Tom Farer, 'The Rise of the Inter-American Human Rights Regime: No Longer a Unicorn, Not Yet an Ox' (1997) 19(3) *Human Rights Quarterly* 510; Clara Sandoval, 'Two Steps Forward, One Step Back: Reflections on the Jurisprudential Turn of the Inter-American Court of Human Rights on Domestic Reparation Programmes' (2018) 22(9) *The International Journal of Human Rights* 1192.

1. The Sources of International Standards on Judicial Independence

The international standards of judicial independence stem from international treaties and non-treaty instruments, predominantly crafted by non-governmental and inter-governmental organizations. Given that the structure of the domestic judiciary falls inherently within the purview of national jurisdiction, it is a foreseen inference that the instruments commonly referred to as soft law predominate as the primary sources of international standards on judicial independence.[135]

Among the soft law instruments, the most influential ones are those precisely drafted for the judicial profession's global standard-setting purposes, such as the International Bar Association's Code of Minimum Standards of Judicial Independence ("IBA Minimum Standards")[136] and United Nations Basic Principles on the Independence of the Judiciary ("UN Basic Principles")[137]. The UN Basic Principles recognize judicial independence as a constitutional principle that should be explicitly recognized in national constitutions or legislation.[138] The IBA

[135] Despite the common view that the soft law is not of a robust normative nature, more recent scholarship challenges that presumption. Regarding judicial independence, soft law instruments "constitute a potentially fertile source of standards that may be appropriated, mutatis mutandis, for the elaboration of equivalent standards for international courts and tribunals." Ben Olbourne, 'Independence and Impartiality: International Standards for National Judges and Courts' (2003) 2 Law and Practice of International Courts and Tribunals 97, 106.The repeated courts' reference to the soft law and professional standards in their jurisprudence confirms this stance.

[136] International Bar Association Code of Minimum Standards of Judicial Independence (1982).

[137] UN Doc. A/CONF.121/22/Rev.1, at 59 (1985). Shetreet, S. (2009). Shimon Shetreet, 'The Normative Cycle of Shaping Judicial Independence in Domestic and International Law: The Mutual Impact of National and International Jurisprudence and Contemporary Practical and Conceptual Challenges' (2009) 10(1) *Chicago Journal of International Law* 275.

[138] "The independence of the judiciary shall be guaranteed by the State and enshrined in the Constitution or the law of the country. It is the duty of all governmental and other institutions to respect and observe the independence of the judiciary". United Nations, *Basic Principles on the Independence of the Judiciary* (adopted 6 September 1985, endorsed by UN General Assembly Res 40/32 of 29 November 1985 and 40/146 of 13 December 1985).

Minimum Standards emphasize structural independence from other branches of government, while stressing that no specific design guarantees independence in itself.[139] While the IBA Minimum Standards and UN Basic Principles focus more on the institutional judicial setting, the Bangalore Principles of Judicial Conduct and the Universal Charter of the Judge emphasize the other side of the coin – judicial accountability and judicial ethics.[140] Judicial independence is also protected through the right to equality before courts and tribunals and to a fair trial, as guaranteed under Article 14 of the International Covenant on Civil and Political Rights (ICCPR).[141] According to the Human Rights Committee, General Comment No. 32, this right serves as a procedural means to safeguard the rule of law.[142]

In addition to globally recognized standard-setting soft law instruments, regional counterparts are often used as supplementary points of reference for regional courts beyond the pertinent regional treaty system.[143] Regional bodies, including the Venice Commission, the African Commission on Human and Peoples' Rights, and the Inter-American Commission on Human Rights, play a pivotal role in enhancing and providing substantive depth to soft law. International courts frequently cite the opinions and interpretations of these bodies in their

[139] Shimon Shetreet, 'The Emerging Transnational Jurisprudence on Judicial Independence: The IBA Standards and Montreal Declaration' in Shimon Shetreet and Jules Deschênes (eds), *Judicial Independence: The Contemporary Debate* (Martinus Nijhoff 1985) 393.
[140] *Bangalore Principles of Judicial Conduct* (2002) UN Doc E/CN.4/2003/65.
[141] *International Covenant on Civil and Political Rights* (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171.
[142] UN Human Rights Committee, *'General Comment No 32: Article 14: Right to Equality before Courts and Tribunals and to a Fair Trial'* (23 August 2007) UN Doc CCPR/C/GC/32.
[143] In the European context see Consultative Council of European Judges (CCJE), *European Charter on the Statute for Judges* (Adopted by the CCJE in 1998, revised in 2010); Council of Europe, *Recommendation CM/Rec(2010)12 of the Committee of Ministers to member states on judges* (adopted 17 November 2010); Consultative Council of European Judges (CCJE), *Opinion No 1 (2017) on standards concerning the independence of the judicial system* (adopted 10 February 2017); Consultative Council of European Judges (CCJE), *Code of Conduct for European Judges* (adopted 17 December 2009). In the African context, the relevant soft law instrument is *The Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa* (adopted as part of the African Commission's activity report at the 2nd Summit and Meeting of Heads of State of the African Union, held in Maputo from 4–12 July 2003). For the Latin American region, see *American Declaration of the Rights and Duties of Man* (approved by the Ninth International Conference of American States, Bogotá, Colombia, 1948) and *Inter-American Democratic Charter* (adopted by the OAS General Assembly at its special session held in Lima, Peru, 11 September 2001).

judgments. While these opinions are not legally binding, they constitute authoritative interpretations of regional standards that, through the jurisprudence of international courts, are increasingly incorporated into international law.

Soft law instruments play an essential role in shaping global trends in judicial appointments and dismissal design by exerting persuasive pressure on national governments to adhere to internationally recognized benchmarks of judicial independence. However, the substantive impact is notable in the regional treaty systems, primarily due to their legally binding character for the signatory countries and the comparatively robust legitimacy of the discussed regional courts. The literature has recognized that international courts extend beyond adjudicating particular cases; they actively promote specific values and strive to maintain states within a particular normative community.[144] Despite the standard objection to their legitimacy due to the inherent democratic accountability deficit, these courts *de facto* shape and reinforce value-based communities internationally.[145] The courts' interpretations of international human rights treaties have played a pivotal role in shaping the influence of the international framework on the right to a fair trial and, thereby, standards on judicial independence.[146] Nevertheless, the

[144] Yuval Shany, 'Assessing the Effectiveness of International Courts: A Goal-Based Approach' (2012) 106 *American Journal of International Law* 225, 246.
[145] Nienke Grossman, 'The Normative Legitimacy of International Courts' (2013) 86 *Temple Law Review* 61, 75.
[146] European Convention on Human Rights, Section 1 states: "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law"; see European Convention on Human Rights (adopted 4 November 1950, entered into force 3 September 1953) ETS No 5.
Article 14 of the International Covenant on Civil and Political Rights, General Assembly Res No 2200 Supp No 16, UN Doc A/6316 (1966) (entered into force 23 March 1976), paragraph 1 provides: "In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law"; see International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) UNGA Res 2200A (XXI), UN Doc A/6316 (1966).
Article 8 of the American Convention on Human Rights (1969), 1114 UN Treaty Series 123 (entered into force 18 July 1978), paragraph 1 provides: "Every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent and impartial tribunal, previously established by law"; see American Convention on Human Rights (adopted 22 November 1969, entered into force 18 July 1978) 1144 UNTS 123.

connection between the standards governing the right to a fair trial and the specific design of the judicial system endorsed by these courts is neither direct nor explicitly mandated by the object and purpose of the normative regimes they were established to adjudicate.[147]

The subsequent section explores the legal techniques international courts employ to assert jurisdiction over matters of national judicial design.

2. The International Courts' Jurisdiction to Examine National Judicial Design

Setting the standards for national judicial design was not one of the primary aims behind establishing international human rights courts.[148] The regional human rights conventions implicitly refer to the required minimum of judicial independence, albeit through the lens of rights protection.[149] Over time, through an expansive interpretation of specific due process provisions, the international courts devised methods to tackle various issues pertinent to the organization and functioning of judicial structures.

Article 7 of the African Charter on Human and Peoples' Rights (1981), 21 ILM 58 (entered into force 21 October 1986), Section 1 provides: "Every individual shall have the right to have his cause heard. This comprises:... (d) the right to be tried within a reasonable time by an impartial court or tribunal"; see African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986) 21 ILM 58.
Article 47 of the Charter of Fundamental Rights of the European Union, 2000 OJ (C 364) 10 states: "Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article. Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law"; see Charter of Fundamental Rights of the European Union [2000] OJ C364/1: "Everyone shall have the possibility of being advised, defended and represented. Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice".

[147] On the need for the regional courts to remain within the object and purpose of their respective normative regimes, see Juan Pablo Pérez-León-Acevedo, 'The Control of the Inter-American Court of Human Rights over Amnesty Laws and Other Exemption Measures: Legitimacy Assessment' (2020) 33(3) *Leiden Journal of International Law* 667, 669.

[148] David Kosař and Lucas Lixinski, 'Domestic Judicial Design by International Human Rights Courts' (2015) 109 *American Journal of International Law* 713, 717.

[149] David Kosař and Lucas Lixinski, 'Domestic Judicial Design by International Human Rights Courts' (2015) 109 *American Journal of International Law* 713, 717.

As the ECtHR, IACtHR, and ACtHPR were established as human rights tribunals, their involvement in the design of national judicial systems is somewhat warranted by their role in safeguarding human rights, particularly the right to a fair trial by an independent and impartial tribunal.[150] The European Court of Justice (ECJ), although not a human rights court, has expanded its jurisdiction and assessed the judicial independence safeguards of Member States through the principle of adequate judicial protection within the EU.[151]

Despite a recent trend of resistance from signatory member states, the legitimacy of international human rights courts as standard-setting institutions remains undiminished, as they serve as pivotal arenas for addressing and resolving theoretically complex questions of judicial independence. Wary of overstepping their primary jurisdiction and mindful of preserving their legitimacy, international courts exercise caution in prescribing specific methods for integrating principles of judicial independence into national constitutional architectures.

The establishment of jurisdiction for international courts to review national judicial design has been approached in three ways: 1) by relying on norms safeguarding subjective rights

[150] The ACtHPR's predecessor, African Commission on Human and Peoples' Rights, has been functioning since 1988 but has faced significant challenges regarding state compliance with its decisions on individual communications, which some states argue are not legally binding due to the Commission's ambiguous mandate under the African Charter. This has undermined the Commission's effectiveness, prompting the establishment of the African Court on Human and Peoples' Rights to issue binding decisions and strengthen the Commission's protective functions. This part of the analysis focuses exclusively on the standards jurisprudence of regional courts, binding on the signatory states. Consequently, the findings of the African Commission will be considered incidentally, primarily through the lens of references made by the ActHR. The ACtHR complements the Commission by providing a judicial avenue to enforce recommendations or provisional orders that states have not complied with, enhancing the enforcement of human rights across Africa. See Rachel Murray and Debra Long, *Range and Status of Findings of the African Commission on Human and Peoples' Rights*, in *The Implementation of the Findings of the African Commission on Human and Peoples' Rights* (Cambridge University Press 2015) 51; Rachel Murray and Debra Long, *The Relationship with the African Court on Human and Peoples' Rights*, in *The Implementation of the Findings of the African Commission on Human and Peoples' Rights* (Cambridge University Press 2015) 140.

[151] The background of this development is the ECJ's strategic shift from a marginalized position to actively intervening in the debates surrounding controversial legal changes in Poland, which was the frontier of the last decade's EU rule of law crisis. See generally Pieter Van Elsuwege and Frederik Gremmelprez, 'Protecting the Rule of Law in the EU Legal Order: A Constitutional Role for the Court of Justice' (2020) 16(1) *European Constitutional Law Review* 8.

as seen in the jurisprudence of the ECtHR and IACtHR or 2) by invoking "foundational principles" enshrined in the respective regional instruments, exampled in the jurisprudence of the ACtHPR ; 3) by relying on the function of judicial independence and, consequently, on standards of judicial design to further the more apparent aims of the regional instrument, as demonstrated in the case of the ECJ's trajectory of establishing jurisdiction on the matter.

Various factors may influence the direction an international court chooses for establishing jurisdiction, including its perceived legitimacy among treaty signatories, inter-court politics, the legal tradition of the court's respective region, and the interpretative scope permitted by the texts of the legal instruments.

Both approaches have advantages and disadvantages from the lens of judicial independence protection. Addressing judicial design only in cases where a violation of subjective rights can be directly attributed to a structural issue in the national judicial system allows the Court to stay within the boundaries set by the principle of subsidiarity, the cornerstone of international human rights law.[152] This approach helps maintain the Court's legitimacy and, on a practical level, avoids backlash from national members dissatisfied with the Court's decisions.[153] However, connecting a structural design or a particular national socio-political background to a specific alleged violation is often challenging, preventing the courts from fully addressing the problem.

Conversely, establishing jurisdiction based on norms that protect fundamental values, such as the rule of law and judicial independence, grants an international court broad authority to

[152] Paolo Carozza, 'Subsidiarity as a Structural Principle of International Human Rights Law' (2003) 97 *American Journal of International Law* 38, 69.
[153] See in general Erik Voeten, 'Populism and Backlashes against International Courts' (2020) 18 *Perspectives on Politics* 407.

adjudicate on national judicial design. Nonetheless, this can lead to significant backlash, particularly if the regional instrument does not clearly define the values the Court invokes, and may result in accusations of the international court's unjustified overreach.

The dilemma regarding which approach to adopt represents a microcosm of the rule of law paradox concerning judicial design. If the International Court opts for a restrained and strategic approach, it risks remaining within the boundaries of formalistic superficiality and failing to establish comprehensive standards for judicial independence and the protection of the rule of law among signatory countries. Conversely, if the Court extends its reach to thoroughly address national judicial design, it may compromise legal certainty if the standards applied in one case cannot be generalized to others. Furthermore, this expansive approach risks the Court being perceived as acting ultra vires, constituting another potential violation of the rule of law principle on the international level.

The following section examines how international courts have navigated this dilemma.

2.1. Subjective Rights Protection Lens

The predominant method by which international courts establish jurisdiction to evaluate national judicial design is by protecting subjective rights, as evidenced in the jurisprudence of the ECtHR and the IACtHR. The establishment of jurisdiction by these two courts is contingent upon the procedural context in which the cases are presented. Jurisdiction is asserted 1) either when judges themselves are the applicants alleging violations of their rights under different articles of the regional human rights instrument or 2) when an applicant is a party to a trial contending that the adjudicating Court does not possess the characteristics of an independent and impartial tribunal as mandated by the regional human rights instrument.

By invoking their right to a fair trial, as well as other rights under the ECHR, such as the rights to freedom of expression, freedom of religion, and respect for private and family life, the national judges-applicants prompted the ECtHR to examine further the framework of judges' rights in Member States.[154] Pushing beyond the limits of the political rights of judges similarly took place in the IACtHR's jurisprudence. In the case *López Lone et al. v. Honduras*, the IACtHR determined that the State of Honduras had unduly restricted the freedom of expression, assembly, and political rights of judges who, after the coup d'état, advocated for democracy, resulting in disciplinary actions against them. The IACtHR further found a violation of the right to freedom of association, as dismissals from disciplinary processes impeded judges' participation in the Association of Judges for Democracy. The Court emphasized that in a critical democratic crisis, inhibiting judges from defending the rule of law would contradict the independence of state powers.[155]

Given that it is relatively infrequent for national judges to bring cases before international courts as applicants, more extensive jurisprudence has developed under the second approach, under the due process prism.

To establish jurisdiction over the national judicial design, the ECtHR has prevalently relied on the individual right to be tried before a competent, independent, and impartial tribunal established by law, as guaranteed by Article 6(1) of the ECHR. The ECtHR has never formally appealed to the "dynamic" or "evolutive" interpretation of Article 6.[156] However, it justified its

[154] David Kosař and Lucas Lixinski, 'Domestic Judicial Design by International Human Rights Courts' (2015) 109 *American Journal of International Law* 713, 718.
[155] IACtHR Case Of López Lone et Al. v. Honduras, Judgment Of October 5, 2015 (Preliminary objection, merits, reparations and costs), para. 172. See also Centro por la Justicia y el Derecho Internacional (CEJIL), *Compendio de Estándares Internacionales para la Protección de la Independencia Judicial* (1st edn, San José, 2019) 43.
[156] Rudolf Bernhardt, 'Evolutive Treaty Interpretation, Especially of the European Convention on Human Rights' (1999) 42 *German Yearbook of International Law* 11, 18.

teleological reading, notably in the *Golder vs. United Kingdom* judgment, where the Court, referring directly to the rule of law principle, recognized the access to the Court implied in Article 6 guarantees.[157] It further emphasized that the extensive reading of Article 6 (1) does not impose new obligations on Member States. Instead, it is "based on the very terms of the first sentence of Article 6(1) read in its context and having regard to the object and purpose of the Convention, a lawmaking treaty..., and to general principles of law."[158]

Early on, the scholarship recognized that, in addition to the individual right to fair trial guarantees, Article 6(1) also implies an institutional aspect referred to as "structural guarantees."[159] According to Trechsel, institutional guarantees under Article 6(1) are not merely a theoretical concept, but essential constitutive elements in practice. This position has been confirmed in the ECtHR's recent jurisprudence, which emphasized that there is "a common thread running through the institutional requirements of Article 6 (1) in that they are guided by the aim of upholding the fundamental principles of the rule of law and the separation of powers."[160] Only recently has the ECtHR delineated more precise standards that disentangle the link between the institutional aspect of Article 6(1) and the rule of law, arising in response to instances of regression from the rule of law in the Council of Europe region.

The question of the tribunal established by law is the ECtHR's point of departure in reasoning under Article 6. According to the ECtHR's jurisprudence, the phrase "established by law" ensures that the judiciary's organization in a democratic society is not at the discretion of

[157] *Golder v United Kingdom* App no 4451/70 (ECtHR, 21 February 1975).
[158] *Golder v United Kingdom* App no 4451/70 (ECtHR, 21 February 1975).
[159] The main question of this case was whether the Article 6 (1) guarantees apply only to the proceedings which have already commenced under national law or presuppose the right to access the court as well. The ECtHR referred to the rule of interpretation as envisioned in Article 31-33 of the Vienna Convention on the Law of Treaties and found that the right to access is an integrative element of the Article 6 (1). See Paul Lemmens, 'The Right to a Fair Trial and Its Multiple Manifestations: Article 6(1) ECHR' in Eva Brems and Janneke Gerards (eds), *Shaping Rights in the ECHR* (1st edn, Cambridge University Press 2014) 304.
[160] *Guðmundur Andri Ástráðsson v Iceland* App no 26374/18 (ECtHR, 1 December 2020) para 233.

the Executive but is instead governed by laws enacted by Parliament.[161] Additionally, the term "established by law" encompasses not only the legal basis for the existence of a "tribunal" but also stipulates the composition of the bench in each case, as noted in cases like *Buscarini v. San Marino* and *Posokhov v. Russia*.[162] Furthermore, practices such as the tacit extension of judges' terms indefinitely beyond their statutory period until reappointment have been ruled as violations of the principle of a "tribunal established by law," as seen in *Gurov v. Moldova.*[163]

Furthermore, proceedings conducted before a tribunal lacking independence and impartiality can never be considered fair, making it redundant to assess whether a hearing was public or took place within a reasonable time.[164] Over time, the ECtHR analyzed the national judicial design under the interpretation of the specific meaning behind the elements of the definition of "independent and impartial." However, interpreting the elements of "tribunal" and "established by law" has also enriched the Court's scope of protection under the Convention. The ECtHR adopted a functional understanding of the concept of a "tribunal," which is broader than what national constitutional frameworks consider a judiciary.[165] This approach is not unique to the ECtHR, as the IACtHR has taken a similar stance. *The Constitutional Court v. Peru* case expanded fair trial protections to encompass the impeachment of constitutional judges before the Peruvian Congress, despite the inherently political character of such proceedings.[166] It extended

[161] *Volkov v Ukraine* App no 21722/11 (ECtHR, 9 January 2013) para 150.
[162] *Buscarini v San Marino* App no 31657/96 (ECtHR, 4 May 2000); *Posokhov v Russia* App no 63486/00 (ECtHR, 4 March 2003).
[163] *Gurov v Moldova* App no 36455/02 (ECtHR, 11 July 2006).
[164] Stefan Trechsel, 'The Right to an Independent and Impartial Tribunal' in Stefan Trechsel and Sarah Summers, *Human Rights in Criminal Proceedings* (1st edn, Oxford University Press 2006) 47.
[165] *Rolf Gustafson v Sweden* (1997) Reports 1997-IV § 45 (ECtHR, 1 July 1997). For a definition of a tribunal in a function sense, see *Olujić v Croatia* App no 22330/05 (ECtHR, 5 February 2009) para 37. "A tribunal, within the meaning of Article 6 § 1, is characterised in the substantive sense of the term by its judicial function, that is to say, the determining of matters within its competence on the basis of rules of law and after proceedings conducted in a prescribed manner. It must also satisfy a series of requirements – independence, in particular of the executive, impartiality and guarantees afforded by its procedure."
[166] *Constitutional Court v Peru* (Merits, Reparations and Costs) IACtHR Series C No 71 (31 January 2001) para 77.

fair trial guarantees to encompass any body exercising judicial functions, whether judicial or non-judicial.[167]

A significant advancement in the protection of judicial independence under the European Convention occurred with the Vilho Eskelinen and Other*s vs. Finland* judgment.[168] Although the *Eskelinen* judgment did not concern a judge's status, the test was subsequently applied to various proceedings involving judicial status.[169]

In the *Eskelinen judgment,* the ECtHR interpreted the civil limb of Article 6(1) to extend to the rights of civil servants.[170] For the civil limb of Article 6 to apply, there must be a 'genuine and serious dispute over right' that is civil and recognized in the national law, even when it is not protected under the Convention.[171] Further, the dispute must concern the scope or the exercise of the right and not just its mere existence, but also the outcome of the proceeding must be "directly decisive" for the right in question.[172] From today's lens, the Eskelinen judgment has had two notable positive implications for the ECtHR oversight of judicial independence.[173] First, it required the review of decisions regarding judges' legal status by judicial or equivalent bodies. Second, it empowered judges to challenge national decisions before the ECtHR. Ultimately, this

[167] In *Castañeda Gutman v Mexico* the IACtHR applied this approach to electoral courts as well and in the *Yatama v. Nicaragua* case it extended fair trial guarantees to the non-judicial bodies as well. In *Lopez Mendoza*, the IACHR stated that "all bodies which exercise functions of a judicial nature, whether criminal or not, have a duty to adopt fair decisions based in the full respect for the guarantees of due process established in Article 8 of the American Convention." *Castañeda Gutman v Mexico* (Preliminary Objections, Merits, Reparations and Costs) IACtHR Series C No 184 (6 August 2008); *López Mendoza v Venezuela* (Merits, Reparations and Costs) IACtHR Series C No 233 (1 September 2011); *Yatama v Nicaragua* IACtHR Series C No 127 (23 June 2005).
[168] *Vilho Eskelinen and Others v Finland* App no 63235/00 (ECtHR, 19 April 2007).
[169] *G v Finland* App no 33173/05 (ECtHR, 27 January 2009); *Volkov v Ukraine* App no 21722/11 (ECtHR, 9 January 2013); *Di Giovanni v Italy* App no 51160/06 (ECtHR, 9 July 2013); *Tsanova-Gecheva v Bulgaria* App no 43800/12 (ECtHR, 15 September 2015); *Olujić v Croatia* App no 22330/05 (ECtHR, 5 February 2009); *Harabin v Slovakia* App no 58688/11 (ECtHR, 20 November 2012).
[170] *Vilho Eskelinen and Others v Finland* App no 63235/00 (ECtHR, 19 April 2007).
[171] *Grzęda v Poland* (Grand Chamber) App no 43572/18 (ECtHR, 15 March 2022) para 257.
[172] *Denisov v Ukraine* (Grand Chamber) App no 76639/11 (ECtHR, 25 September 2018) para 44.
[173] Rafael Bustos Gisbert, 'Judicial Independence in European Constitutional Law' (2022) 18 *European Constitutional Law Review* 591, 596.

extension of Article 6's scope allowed the ECtHR to scrutinize national decisions regarding judges' appointments, promotions, dismissals, and disciplinary measures.[174]

The Eskelinen judgment provided exceptions for which a respondent State must fulfill two conditions: expressly exclude court access in its national law for the relevant staff category and provide objective justification in the state's interest.[175] In *Grzeda v. Poland*, the ECtHR recently revised its approach to interpreting the Eskelinen exceptions. It prescribed that the exclusion from access to the Court need not be expressly stated but may also have "an implicit nature, in particular where it stems from a systemic interpretation of the applicable legal framework or the whole body of legal regulation."[176] In practice, this narrows the scope of protection for judges claiming a violation of their Article 6 rights.[177] However, the Court also examines "whether access to a court had been excluded under domestic law before the time, rather than when the impugned measure concerning the applicant was adopted."[178] Similar to the prevention of *ad hominem* legislative changes observed in the *Baka* case, evaluating the timing of legislation excluding access to the Court seeks to deter dismissals of judges outside of the legally envisioned disciplinary regime. More recently, through the extensive interpretation of the "established by law" element, the ECtHR threaded further into rule-setting regarding judicial design after *Ástráðsson v. Iceland*.

[174] *Baka v Hungary* (Grand Chamber) App no 20261/12 (ECtHR, 23 June 2016) para. 104-105. Other than applying the Eskelinen test to the proceedings on judicial status, another milestone for judicial independence in *Olujic v. Croatia* was that the ECtHR recognized judicial councils as "tribunals" under the Convention. In practice, this meant that the proceedings before judicial councils as independent state organs also fall within the fair trial requirements, such as the right to a public hearing within a reasonable time and the respect for the principle of equality of arms.

[175] Further, to demonstrate that the exception to the Eskelinen test applies, the state must demonstrate a civil servant's involvement in exercising public power ("special bond of trust and loyalty") and establish a direct connection between the subject matter of the dispute and the exercise of State power or the challenge to the special bond.

[176] *Grzęda v Poland* (Grand Chamber) para. 292.

[177] Marcin Szwed, 'Fixing the Problem of Unlawfully Appointed Judges in Poland in the Light of the ECHR' (2023) 15 *Hague Journal on the Rule of Law* 353, 371.

[178] *Grzęda v Poland* (Grand Chamber) para. 290.

Similarly to the ECtHR, the IACtHR primarily views judicial independence through the lens of due process, while explicitly recognizing the importance of the judiciary's external independence from other state powers as essential for effectively exercising its judicial functions.[179] Consequently, Article 8(1) of the Inter-American Convention served as a means for the IACHR to address some of the essential questions regarding the national organization of the judiciary. The Inter-American Convention does not explicitly mandate a state's duty to protect judicial independence, but the IACHR's jurisprudence developed in that direction. In *Reveron Trujillo v. Venezuela*, the IACHR interpreted Article 8(1) as recognizing, on the one hand, the individual right to an independent and impartial tribunal, and, on the other, the duties imposed on the particular judge and the state.[180] The state's duties can be broken down into three main types: The duty of respect requires the state to refrain from illegal interference in the judiciary, and the duty of guarantee involves preventing and addressing such interferences. Furthermore, the duty of prevention requires a suitable regulatory framework that ensures the proper appointment and tenure of judges. This interpretation purports Article 2 of the Convention, which obliges states to protect rights and freedoms effectively.[181]

2.2. *Foundational values lens*

Among the courts discussed, the ACtHRP is distinguished by its predominant reliance on the foundational norms to address the national judicial design, due to a special provision in the African Charter that guarantees the institutional independence of courts. Besides Article 7, which grants the subjective right to an independent and impartial judiciary, the African Charter also

[179] *Palamara Iribarne v Chile* (Merits, Reparations and Costs) IACtHR Series C No 135 (22 November 2005) para 145.
[180] *Reverón Trujillo v Venezuela* (Preliminary Objection, Merits, Reparations and Costs) IACtHR Series C No 197 (30 June 2009).
[181] *Reverón Trujillo v Venezuela* para. 143.

envisions Article 26, which prescribes that the signatory states shall have a *duty* to guarantee the independence of courts.[182] While Article 7 protects the subjective right to a fair trial, Article 26 defines judicial independence as a "directive principle of state policy."[183]

While a provision explicitly mandating states to maintain institutional integrity may offer a comparative advantage in protecting judicial independence, applicants invoking this provision in their claims encounter the evidentiary challenge of establishing a causal link between the harm they experienced and the institutional deficiency.[184]

As previously noted, courts that rely on broad foundational principles embedded in regional conventions risk a potential backlash. This is particularly true for the ECJ, whose primary jurisdiction is not human rights protection. However, in its effort to address the EU rule of law crisis, the ECJ employed a creative interpretation of existing TEU norms to establish its jurisdiction over national judicial design standards. Unable to solely invoke the rule of law as articulated in Article 2 of the TEU or adopt the due process lens of the ECtHR and IACtHR, the ECJ navigated this challenge by linking judicial independence with the national courts' capacity to apply EU law, thereby asserting its authority to set specific standards for national judiciaries.

2.3. Functional lens

The CJEU's jurisdiction to set standards for judicial independence in Member States was not overt before the 2018 landmark judgment *Associação Sindical dos Juízes*

[182] "State Parties to the present Charter shall have the duty to guarantee the independence of the Courts and shall allow the establishment and improvement of appropriate national institutions entrusted with the promotion and protection of the rights and freedoms guaranteed by the present Charter". African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986) art 26.
[183] Sègnonna H Adjolohoun, 'Judges Guarding Judges: Investigating Regional Harbours for Judicial Independence in Africa' (2023) 67 *Journal of African Law* 169, 182.
[184] Sègnonna H Adjolohoun, 'Judges Guarding Judges: Investigating Regional Harbours for Judicial Independence in Africa' (2023), 182.

Portugueses.[185] In this case, the ECJ interpreted judicial independence as an essential prerequisite for the judiciary to provide effective judicial review within the EU legal order, thereby understanding judicial independence through the function of national judges in interpreting EU law.[186]

The CJEU expressed the importance of judicial independence early on in the 2006 *Wilson* judgment, referring to it as a "general principle of Community law stemming from the constitutional traditions common to the Member States."[187] However, until ASJP, its applicability was tied to the material law of the EU. What initially seemed like an austerity case brought by Portuguese judges dissatisfied with the salary cuts became a turning point in the ECJ's interpretation of the principle of effective legal protection and its connection to the rule of law as a fundamental EU value. As Bonelli and Claes noted, this ruling shifted the focus from the economic (Eurozone) crisis to the rule of law crisis.[188]

With ASJP, ECJ sought to contribute to the EU's rule of law discourse, prompted by significant alterations to judicial structures in Poland. Nonetheless, it refrained from basing its jurisdiction directly on the rule of law as a foundational TEU principle to legitimize its intervention in the protection of national judicial independence, instead interpreting Article 19(1) as the "concrete expression" of the rule of law as an Article 2 TEU value.[189] Acknowledging the

[185] *Case C-64/16 Associação Sindical dos Juízes Portugueses v Tribunal de Contas* ECLI:EU:C:2018:117 (CJEU, 27 February 2018).
[186] Case C-64/16, Associação Sindical dos Juízes Portugueses para. 40.
[187] *Case C-506/04 Graham J Wilson v Ordre des avocats du barreau de Luxembourg* ECLI:EU:C:2006:587 (CJEU, 19 September 2006).
[188] Matteo Bonelli and Monica Claes, 'Judicial Serendipity: How Portuguese Judges Came to the Rescue of the Polish Judiciary: ECJ 27 February 2018, Case C-64/16, Associação Sindical dos Juízes Portugueses' (2018) 14 *European Constitutional Law Review* 622, 623.
[189] Associação Sindical dos Juízes Portugueses para. 32. This approach aligns with Article 5.2 TEU, which dictates that the Union's actions must fall within the competences delegated by Member States in the Treaties.

necessity for a certain degree of independence within national judiciaries to interpret EU law, the ECJ made the domestic judicial design justiciable.

As Krajewski noted, this outcome would hardly have been possible if the ECJ had relied on Article 47 of the Charter and based its jurisdiction on the protection of subjective rights.[190] Art. 47 of the Charter, construed in line with the prevailing paradigm of fundamental rights as subjective rights in case law, denotes a subjective right. This provision empowers individuals to invoke the right before national courts, provided they reasonably assert a "violation" of their "rights and freedoms" protected by EU norms, allowing the ECJ to review specific procedures in domestic courts enforcing EU law within the preliminary reference procedure, encompassing various issues albeit with a limited scope of scrutiny focused on specific domestic judicial procedures rather than the comprehensive design of a national judicial system.[191] Opting to rely on Article 19(1) instead, the ECJ sought to address the structural problems of national judiciaries vested with the power and duty to interpret EU law.

Nevertheless, the normative value of Article 47 of the Charter should not be disregarded as it was the basis for the ECJ's seminal case *Simpson and HG v. Council and Commission*, in which the ECJ decided to set aside judgments delivered by an irregularly composed bench of the European Union Civil Service Tribunal (*discussed below*).[192] The judicial independence test applied by the ECJ under Article 19(1) TEU and Article 47 of the CFR should be distinguished from the *Dorsch criteria*, which the ECJ uses to determine whether a body submitting a request

[190] Michał Krajewski, 'Associação Sindical Dos Juízes Portugueses: The Court of Justice and Athena's Dilemma' (2018) 3 *European Papers – A Journal on Law and Integration* 395, 402.
[191] Michał Krajewski, 'Associação Sindical Dos Juízes Portugueses: The Court of Justice and Athena's Dilemma' (2018), 402.
[192] *Joined Cases C-542/18 RX-II and C-543/18 RX-II Simpson and HG v Council and Commission* EU:C:2020:232 (CJEU, 26 March 2020).

for a preliminary ruling qualifies as a court or tribunal under Article 267 TFEU.[193] This distinction was clearly shown in *VQ v Land Hessen (C-272/19).*[194] In this case, the Administrative Court of Wiesbaden in Hesse made a preliminary request regarding its independence under Article 47 CFR and Article 267 TFEU, citing various forms of influence by the Minister of Justice of Hesse. However, the ECJ ruled that these factors alone were insufficient to conclude that the court's independence and impartiality were compromised for the admissibility of the request for a preliminary ruling. Thus, as articulated by Advocate General Bobek, the principle of judicial independence under EU law is the same; however, the scope of its assessment differs depending on the specific Article invoked in each case.[195]

The following section outlines the main regional courts' case laws, which have shaped their respective doctrines of judicial independence.

3. Setting Foundations for the Judicial Independence Doctrines

The doctrines on judicial independence crafted by international courts exhibit a range of commonalities in the conceptualization of independence and its essential components. This harmonization arises for two reasons: first, the regional courts adhere to universally recognized soft law standards, and second, an inter-court dialogue prevails, with courts referencing each other's jurisprudence in developing their respective standards.

[193] These criteria pressupose the ECJ checking whether the referring body is established by law, whether it is permanent, whether its jurisdiction is compulsory, whether its procedures are inter partes, whether it applies rules of law, and whether it is independent and impartial). See *Case C-54/96 Dorsch Consult Ingenieurgesellschaft mbH v Bundesbaugesellschaft Berlin mbH* EU:C:1997:413 (CJEU, 17 September 1997) para 23.
[194] *Case C-272/19 VQ v Land Hessen* EU:C:2020:535 (CJEU, 9 July 2020).
[195] Opinion of AG Bobek, *Case C-132/20 BN, DM, EN v Getin Noble Bank SA* EU:C:2021:557 (8 July 2021). According to the CJEU: "in order to determine the admissibility of a request for a preliminary ruling, the criterion relating to independence which the referring body must satisfy before it can be considered to be a 'court or tribunal', within the meaning of Article 267 TFEU, may be assessed solely in the light of that provision." *Case C-272/19 VQ v Land Hessen* para. 46.

The ECtHR and the Commission recognized the importance of structural judicial independence in the early judgments, *Ringeisen v. Austria* and *Crociani and Others v. Italy*.[196] In judgments such as *Neumeister v Austria*[197] and *Le Compte, Van Leuven, and De Meyere v. Belgium,* the Court tied the criteria of judicial independence to the definition of the "tribunal" itself.[198] The tribunal is not only an organ that asserts judicial function, but should also fulfill additional requirements of being independent and impartial.

In numerous decisions, ECtHR reaffirmed that the criteria for determining whether a tribunal is independent are, *inter alia*: 1) manner of appointment; 2) term of office; 3) safeguards against outside pressures; 4) whether the tribunal in question appears independent.[199]

The IACtHR referred to the ECtHR elements of judicial independence and reiterated them in the landmark cases *Constitutional Court v. Peru* and *Chocrón Chocrón v. Venezuela*.[200] In *Apitz Barbera and Others v. Venezuela* and *the Case of the Supreme Court of Justice (Quintana Coello v. Ecuador), the IACtHR emphasized the importance of judicial independence and the need to safeguard* against internal pressures within the judiciary.[201] In *Herrera Ulloa v. Costa Rica* and *Palamara Iribarne v. Chile,* the IACtHR distinguished the judiciary from other public officials, as independence is essential for the latter's functioning.[202] In *Reverón Trujillo v. Venezuela*, the

[196] *Ringeisen v Austria* App no 2614/65 (ECtHR, 16 July 1971) Series A no 13, para 95; *Crociani and Others v Italy* App nos 8603/79 and others (EComHR, 18 December 1980) 22 DR 220.
[197] *Neumeister v Austria (No 1)* App no 1936/63 (ECtHR, 27 June 1968) Series A no 8.
[198] See Trechsel S, 'The Right to an Independent and Impartial Tribunal'(2006), 53.
[199] *Findlay v United Kingdom* (1997) Reports 1997-I, 281 (ECtHR, 25 February 1997) para 73.
[200] *Constitutional Court v Peru* (Judgment) IACtHR Series C No 55 (24 September 1999).
[201] "The purpose of protection is to ensure that the judicial system in general, and its members in particular, are not subject to possible undue restrictions in the exercise their duties by bodies outside the Judiciary, or even by judges who exercise functions of review or appeal." *Supreme Court of Justice (Quintana Coello et al) v Ecuador* (Preliminary Objection, Merits, Reparations and Costs) IACtHR Series C No 266 (23 August 2013) para 144; *Apitz Barbera and Others ("First Court of Administrative Disputes") v Venezuela* (Preliminary Objection, Merits, Reparations and Costs) IACtHR Series C No 182 (5 August 2008) para 55.
[202] *Herrera Ulloa v Costa Rica* (Preliminary Objections, Merits, Reparations and Costs) IACtHR Series C No 107 (2 July 2004) para 171; *Palamara Iribarne v Chile* (Merits, Reparations and Costs) IACtHR Series C No 135 (22 November 2005) para 145.

IACtHR distinguished three central guarantees deriving from the principle of judicial independence: 1) an adequate appointment process, 2) tenure, and 3) the guarantees against external pressures.[203] Relying on the UN Basic Principles and the UN Human Rights Committee's views, the IACtHR established three standards deriving from the protection of judicial tenure: 1) continuance in the position; 2) an adequate promotion process; 3) no unjustified dismissals/free removals.[204]

The CJEU has connected the necessity for independence in bodies functioning as tribunals under EU law to the principle of effective judicial protection, as enshrined in Article 19(1) TEU, highlighting that effective judicial review designed to ensure compliance with EU law represents the very "essence" of the rule of law.[205] Additionally, it asserted that an 'independent' tribunal is one of the requirements linked to the fundamental right to an effective remedy under Article 47 of the EU Charter.[206]

Given the innovative nature of the ECJ's approach to judicial independence, a subject not traditionally within its purview, a more detailed analysis of its jurisprudence is warranted. The following jurisprudence of the ECJ on the reforms in Poland laid the foundation for the ECJ's doctrinal stance on judicial independence under Article 19(1) TEU.

The EU's rule of law framework concerning the capture of the Polish judiciary commenced with the 2015 reform of the Polish Constitutional Court.[207] However, the pivotal events triggering the ECJ's jurisprudence on Poland under Article 19(1) include changes to the

[203] *Reverón Trujillo v. Venezuela* para. 70.
[204] *Reverón Trujillo v. Venezuela* para. 79.
[205] *Associação Sindical dos Juízes Portugueses* para. 36, *Case C-216/18 PPU Minister for Justice and Equality (Deficiencies in the system of justice)* EU:C:2018:586 (CJEU, 5 July 2018) para 52.
[206] *Associação Sindical dos Juízes Portugueses* para. 41.
[207] On the capture of the Polish CT, see Wojciech Sadurski, 'Polish Constitutional Tribunal Under PiS: From an Activist Court, to a Paralysed Tribunal, to a Governmental Enabler' (2018) 11 *Hague Journal on the Rule of Law* 63.

retirement system and composition of the Supreme Court, the capture of the National Council of the Judiciary (NCJ), the introduction of the early retirement system for ordinary judges, and the establishment of the Disciplinary and Extraordinary Chambers in the Supreme Court, as well as the introduction of new disciplinary procedures under the Muzzle Law in 2019, all of which were retaliatory measures against national judges following the ECJ's case law that allowed them to assess the independence of their fellow judges appointed by PiS.[208]

The first case in which the ECJ addressed the Polish systemic changes to the judiciary was the *Minister of Justice and Equality (C-216/18)*, prompted by the European Arrest Warrant procedure.[209] This decision followed concerns raised by the Irish court about the independence of the Polish judiciary, citing systemic issues highlighted by the Venice Commission.[210] Although the Irish Supreme Court determined that the Polish national's circumstances did not justify refusing to execute the EAW, this case highlighted how systemic issues with judicial independence in a Member State can undermine the principle of mutual trust, a cornerstone of the EU legal order. The issue of mutual trust in light of systemic deficiencies was reconsidered in the later case of *L. and P. (C-354/20 PPU and C-412/20 PPU)*, where the Amsterdam Court requested the ECJ to elaborate further on its doctrine regarding the European Arrest Warrant.[211] However, the ECJ reaffirmed that it is the responsibility of the national court in each specific

[208] For a comprehensive assessment of the events timeline, see Laurent Pech, Patryk Wachowiec and Dariusz Mazur, 'Poland's Rule of Law Breakdown: A Five-Year Assessment of EU's (In)Action' (2021) 13 *Hague Journal on the Rule of Law* 1.
[209] *Case C-216/18 PPU Minister for Justice and Equality (Deficiencies in the system of justice)* EU:C:2018:586 (CJEU, 25 July 2018).
[210] CJEU ruled that the executing judicial authority must determine whether a person subject to a European arrest warrant (EAW) would face a real risk of a breach of their fundamental right to a fair trial due to deficiencies in the issuing Member State's judicial system. See Venice Commission, *Opinion on the Judicial Reform in Poland* CDL-AD(2017)035 (13 December 2017).
[211] Joined Cases C-354/20 PPU and C-412/20 PPU *L and P* EU:C:2020:1033 (CJEU, 17 December 2020).

case to determine whether the judiciary of the extradition-receiving country meets the necessary standards of independence.

In the ground-breaking judgment that followed, *Commission v Poland – Retirements from Supreme Court (C-619/18)* (*discussed below*), the ECJ applied the judicial independence doctrine under Article 19(1) TEU to the issue of Poland lowering the retirement age of Supreme Court judges from 70 to 65, thereby undermining judicial independence, and by granting the President discretionary power to extend judges' terms, leading to concerns about compliance with the principle of irremovability of judges and effective judicial protection under EU law.[212] The ECJ applied the same rationale in *Commission v Poland (C-192/18) (discussed below),* which concerned lowering the retirement age for ordinary judges.[213] In *AK v Krajowa Rada Sądownictwa (C-585/18, C-624/18 & C-625/18),* the ECJ assessed the independence of Poland's Disciplinary Chamber, emphasizing the need for national courts to determine whether the reformed National Judiciary Council (NCJ) provided sufficient guarantees of independence from the legislature and executive.[214] In this judgment, the CJEU emphasized that alleged breaches of the principle of judicial independence must be examined by considering all relevant factors, the reasons, and the specific objectives purportedly justifying the measures in question. The significance of these factors should not be assessed individually or in isolation but evaluated collectively within the broader legal and institutional context.[215]

[212] *Case C-619/18 European Commission v Republic of Poland* EU:C:2019:531 (Grand Chamber, 24 June 2019).

[213] *Case C-192/18 Commission v Poland (Independence of ordinary courts)* EU:C:2019:924 (Grand Chamber, 5 November 2019).

[214] *Case C-585/18 A K and Others v Sąd Najwyższy* EU:C:2019:982 (Grand Chamber, 19 November 2019).

[215] *AK and Others*, para. 152-153.

The independence of the NCJ in the light of its role in the judicial appointments was also addressed in *AB v Krajowa Rada Sądownictwa (C-824/18)(discussed below).*[216]

The first Polish case to address the disciplinary regime for judges under the scope of Article 19(1) TEU was *Miasto Łowicz v Wojewoda Łódzki (C-558/18 and C-563/18).*[217] Although the ECJ declared this preliminary question by Polish judges inadmissible, it indicated that the review of the disciplinary regime for judges could fall within its jurisdiction, despite the Polish government's assertion to the contrary. This ECJ's stance was confirmed in *Commission v Poland – Disciplinary Regime for Judges (C-791/19)*, where the ECJ ruled that Poland's 2019 disciplinary regime violates Article 19(1) TEU, as the Polish SC Disciplinary Chamber lacks impartiality and independence due to its composition and susceptibility to legislative and executive influence, thereby enabling political control over judicial decisions.[218]

In *Commission v Poland (C-204/21),* the ECJ comprehensively assessed the impact of the Polish judicial reforms under Article 19(1), read in conjunction with Article 47 of the Charter and Article 267 TFEU.[219] In this case, the ECJ determined that Poland breached EU law by assigning jurisdiction to the Disciplinary Chamber, which lacks independence, to handle cases affecting judges' status; by classifying the examination of EU requirements for judicial independence as a disciplinary offense; by prohibiting national courts from verifying compliance with EU law on judicial independence; by placing such assessments exclusively under the

[216] *Case C-824/18 AB v Krajowa Rada Sądownictwa* EU:C:2021:153 (Grand Chamber, 2 March 2021).
[217] *Joined Cases C-558/18 and C-563/18 Miasto Łowicz v Wojewoda Łódzki* EU:C:2020:234 (Grand Chamber, 26 March 2020).
[218] *Case C-791/19 Commission v Poland – Disciplinary Regime for Judges* EU:C:2021:596 (Grand Chamber, 15 July 2021).
[219] *Case C-204/21 Commission v Poland* EU:C:2023:416 (Grand Chamber, 5 June 2023).

Extraordinary Review and Public Affairs Chamber; and by infringing on privacy and data protection rights through specific legislative measures.[220]

Although the constitutional breakdown caused by the Polish years-long reforms led to the establishment of extensive ECJ jurisprudence, the normative framework under Article 19(1) TEU had already been entrenched in the ECJ's case law and was subsequently applied to evaluate the judicial design in other Member States, such as Romania and Malta (*discussed below*).[221] Consequently, assessing judicial independence within member states has become an integral facet of the ECJ's jurisdiction.[222]

According to the ACtHPR, judicial independence encompasses two key aspects: institutional and individual.[223] Institutional independence involves the judiciary's distinct status and relationship with the executive and legislative branches, administrative autonomy, and the allocation of adequate resources. Individual independence is reflected in the selection method, which includes clear criteria for appointment, term duration, and safeguards against external pressure, ensuring that judges are not arbitrarily transferred or dismissed. Besides these standards, the ACtHPR ruled against constitutional judges' renewable terms, which depend on the discretionary decision of the political branches.[224] This comprehensive understanding of judicial independence is encapsulated in Article 26.[225] The ACmHPR reiterated those standards

[220] *Case C-204/21 Commission v Poland* EU:C:2023:416 (Grand Chamber, 5 June 2023) para 386.
[221] See *Case C-896/19 Repubblika v Il-Prim Ministru* EU:C:2021:311 (Grand Chamber, 20 April 2021). More recently, see *Case C-216/21 Asociaţia 'Forumul Judecătorilor din România' and YN v Consiliul Superior al Magistraturii* EU:C:2023:628 (First Chamber, 7 September 2023).
[222] For example *Case C-497/20 Randstad Italia SpA v Umana SpA and Others* EU:C:2021:1037 (Grand Chamber, 21 December 2021). See Mathieu Leloup, 'The Untapped Potential of the Systemic Criterion in the ECJ's Case Law on Judicial Independence' (2023) 24 *German Law Journal* 995, 997.
[223] *Ajavon v Republic of Benin* (merits and reparations) Application No 062/2019 [2020] AfCHPR 5 (African Court on Human and Peoples' Rights, 4 December 2020) paras 277–80.
[224] *Ajavon v Republic of Benin* para. 288.
[225] *Ajavon v Republic of Benin* paras 277-280.

in its own jurisprudence.[226] In *Zimbabwe Lawyers for Human Rights and Others v. Zimbabwe, the ACmHPR emphasized the importance of executing the Court's decision to maintain the perception of independence and impartiality, tying* it directly to the principle of the rule of law.[227]

In the landmark case *Ajavon v. Benin*, the ACtHPR applied its doctrine on judicial independence in a systemic manner. Initially, a case of freedom of expression, this case was presented to the Court as a challenge to irregularities in parliamentary elections. However, the applicant's claim of a violation of Article 26 of the African Charter, asserting the lack of independence of the Constitutional Court and Benin's High Judicial Council (CSM), prompted the ACtHRP to scrutinize the entirety of Benin's constitutional framework concerning judicial independence.[228]

The applicant challenged amendments made by Organic Law No. 2018-02, which modified the composition of Benin's Higher Judicial Council (CSM). According to the law, the President of the Republic serves as the President of the Higher Judicial Council (CSM), with the CSM's role defined as assisting the President. Furthermore, the law stipulates that the CSM comprises

[226] *Zimbabwe Lawyers for Human Rights and Institute for Human Rights and Development in Africa (on behalf of Andrew Barclay Meldrum) v Zimbabwe* Communication 294/04 (2009) AHRLR 268 (ACHPR 2009) para 122; *Wetsh'okonda Koso and Others v Democratic Republic of Congo* Communication 281/03 (2008) AHRLR 93 (ACHPR 2008) para 79.

[227] "It is impossible to ensure the rule of law, upon which human rights depend, without guaranteeing that courts and tribunals resolve disputes both of a criminal and civil character free of any form of pressure or interference. The alternative to the rule of law is the rule of power, which is typically arbitrary, self-interested and subject to influences which may have nothing to do with the applicable law or the factual merits of the dispute". *Zimbabwe Lawyers for Human Rights and Institute for Human Rights and Development in Africa (on behalf of Andrew Barclay Meldrum) v Zimbabwe Communication* 294/04 (2009) AHRLR 268 para. 118.

[228] The applicant contended that the Constitutional Court's independence and impartiality were compromised due to the dual role of its President, who concurrently served as an adviser to the Head of State and had previously held the position of Minister of Justice during the passage of laws whose constitutionality was subsequently affirmed by the Constitutional Court. From the perspective of judicial appointments, a notable aspect emerged as the government asserted an opposing stance, contending that the sitting members of the Court had been appointed by the preceding government, predating the Head of State's term. *Ajavon v. Benin* paras. 267-269.

ex officio members from the Executive, while the President of the Republic appoints the other members.

The Constitutional Court of Benin initially reviewed these amendments and found parts of the Organic Law inconsistent with the Benin Constitution, citing concerns over judicial independence. Specifically, the Court objected to the presence of the Minister of Public Service and the Minister of Finance as ex officio members, alongside the President and the Minister of Justice.

However, following a government-driven change in the composition of the Constitutional Court, a subsequent decision in 2018 reversed the earlier ruling, declaring the law in conformity with the Constitution. The ACtHPR noted that including executive members in the CSM and the presidential authority to appoint external members compromised the body's independence. It highlighted that such arrangements disrupt the essential separation between the judiciary and other branches of government, as outlined in the African Charter on Human and Peoples' Rights.

Ultimately, the African Court found that the structure and governance of the CSM, as mandated by the impugned law, resulted in undue executive interference in judicial matters, violating Article 26 of the Charter.

2.2. International Standards on Judicial Appointments

International law has recently emerged as a potential alternative to address the concerns surrounding irregularities in judicial appointments, even in jurisdictions previously reliant on

political solutions.[229] However, the issue with international judicial appointment standards is that, unlike judicial dismissals—which exhibit a relatively uniform approach across regions regarding acceptable procedures and due process guarantees—judicial appointments are significantly more politically contingent (*see Chapter V*). Due to the previously mentioned fear of backlash and adherence to the principle of subsidiarity, international court-induced standards typically remain within the bounds of generally acceptable minimum requirements for making judicial appointments compliant with the rule of law. Frequently, these standards are sufficiently broad and formalistic that judicial appointments, even those influenced by complex or controversial political contexts, can satisfy them. This legalistic approach can be exploited by national governments, which may secure political control through judicial appointments while ostensibly adhering to internationally recognized standards.

The robustness of international standards on judicial appointments is further questioned by the recurrent emphasis in international court jurisprudence that the political dimension in judicial appointments is not inherently detrimental.[230] Relying on international soft law standards, the ECtHR has consistently emphasized throughout its jurisprudence that it is not obligated to review the system of judicial appointments due to the variety of existing models across Europe.[231]

[229] Discussing this argument in the context of the US, see Suzanna I Strong, 'Judging Judicial Appointment Procedures' (2021) 53 *Vanderbilt Law Review* 615, 617.

[230] The ECtHR has traditionally displayed considerable reluctance in identifying instances of undue influence from other branches of government in the judicial design, particularly concerning the judges of the national apex courts. For a discussion of the relevant case-law, see Jörg Luther, 'Judicial Independence and Accountability in the Council of Europe and the European Court of Human Rights' in Ernst Hirsch Ballin, Gerhard van der Schyff and Maarten Stremler (eds), *European Yearbook of Constitutional Law 2019* (vol 1, TMC Asser Press 2020) 206–208.

[231] In *Kleyn and Others v Netherlands* App no 39343/98 (ECtHR, 6 May 2003) ECHR 2003-VI, the ECtHR expressed its stance that will have been repeated throughout its jurisprudence: "although the notion of the separation of powers between the political organs ofgovernment and the judiciary has assumed growing importance in the Court's case law […] neither Article 6 nor any other provision of the Convention requires States to comply with any

In *Henryk Urban and Ryszard Urban v. Poland*, the ECtHR repeated its old stance that "neither Article 6 nor any other provision of the Convention requires States to comply with any theoretical constitutional concepts regarding the permissible limits of the powers' interaction."[232] Only recently has the ECtHR delved deeper into the appointment design rules of the ordinary judiciary, prompted by the numerous applications from Polish judges affected by the PiS's overarching changes to the national judicial system. Before this shift in jurisprudence, the criterion of the appointment method in the judicial independence test primarily signified the imperative for both functional autonomy and the appearance of independence, rather than placing paramount importance on the specific composition of the body falling within the ECHR's meaning of "tribunal." Similarly to the ECtHR, the IACtHR recognized the diversity of appointment models worldwide, refraining from enforcing any specific one as the sole standard, instead adhering to international standards.[233] The ACtHPR can be distinguished from former courts in that the involvement of the Executive in appointing bodies has been a significant factor in the ACtHPR's jurisprudence for establishing violations of judicial independence.

While the ECtHR has traditionally refrained from extensively scrutinizing ordinary and constitutional judicial appointments, it has been less hesitant to assess the composition and decision-making of other bodies, such as military, quasi-judicial, and administrative ones. Nonetheless, the ECtHR's approach to special and military courts remained within its general compliance framework, adhering to globally recognized minimal standards. As long as these types of courts resembled ordinary courts in their structure and functioning, they were generally deemed acceptable by the Court, especially in countries that justify their existence based on the

theoretical constitutional concepts regarding the permissible limits of the powers' interaction." See also *Guðmundur Andri Ástráðsson v. Iceland*, para. 207.

[232] *Henryk Urban and Ryszard Urban v. Poland* para. 46; Kleyn and Others v. the Netherlands [GC] para 193.

[233] *Constitutional Court v. Peru* para. 73 and *Apitz Barbera et al. (First Court of Administrative Disputes) v. Venezuela* para. 44.

particularities of their long-entrenched legal culture.[234] For example, in the *Lithgow v. United Kingdom* judgment,[235] the applicants raised concerns about the independence of the Arbitration Tribunal, pointing to executive influence from two members appointed by the Minister, a party to the proceedings. However, the Court emphasized the tribunal's adherence to statutory procedures, akin to those of ordinary courts, including collaborative criteria for member selection and autonomy in award determinations, thereby affirming its independence.[236]

Even in cases where the ECtHR found a violation of Article 6, the issue at stake was not the appointment procedure itself. In *Sramek v. Austria*, the ECtHR found a violation of Article 6(1) based on the functional independence and decision-making process of the Austrian provincial real property administrative body. In the *Borgers* line of cases, the Court focused on fair trial aspects, such as the principle of adversary proceedings and the participation of government officials in judicial deliberations, rather than the appointment system or the institutional independence of judges.[237]

Although these ECtHR's interferences in the national design were not based on the appointment design, their importance lies in the fact that they sent a message that the ECtHR

[234] The ECtHR has extensively examined the structure and jurisdiction of military and special courts in Turkish and British cases. A notable instance involves the Turkish National Security Courts, established in 1973 to address crimes against Turkey's territorial integrity, democratic order, or national security. In Incal v. Turkey, the ECtHR found the composition of these courts, which included the appointment of both civilian and military judges, incompatible with the right to an independent and impartial court under Article 6 of the European Convention. See *Incal v Turkey* (1998) Reports 1998-IV (ECtHR, 9 June 1998) paras 21–33. Later, in cases like Cooper v. UK, the ECHR emphasized the need for civilian and permanent military judges on military benches, requiring legal qualifications for all members or proper instruction by experienced lawyers. *Cooper v United Kingdom* (Grand Chamber) App no 48843/99 (ECtHR, 16 December 2003).

[235] The ECtHR took a flexible approach to assessing the design of the Aircraft and Shipbuilding Industries Arbitration Tribunal in the UK in *Cooper v. United Kingdom*.

[236] *Lithgow and Others v United Kingdom* App nos 9006/80 and others (ECtHR, 8 July 1986) paras 200–202.

[237] *Borgers v Belgium* App no 12005/86 (ECtHR, 30 October 1991); *Vermeulen v Belgium* App no 19075/91 (ECtHR, 20 February 1996); *Kress v France* App no 39594/98 (ECtHR, 7 June 2001).

could potentially intervene when the national design hindered compliance with the Convention.[238]

In *Reverón Trujillo v. Venezuela*, the IACtHR outlined fundamental standards for evaluating judicial appointments, drawing on comparative jurisprudence and other regional human rights systems.[239] Referencing the UN Basic Principles, the IACtHR emphasized that judicial appointments should focus on integrity, capability, and legal qualifications. It also underscored, based on the CoE Recommendation No. R (94) 12, that decisions affecting judges' careers should be founded on objective criteria, including personal merit, qualifications, integrity, ability, and efficiency. The Court highlighted that processes for appointing judges should ensure merit-based selection and equal opportunities.

Furthermore, these processes must be transparent, openly competitive, and free from undue influence or discrimination, ensuring that all eligible candidates can compete on an equitable basis. Ultimately, the IACtHR mandated that judicial appointment procedures adhere strictly to the principles of objectivity and reasonableness, which are crucial for maintaining judicial independence and upholding the rule of law. If the criteria of objectivity and reasonableness are disregarded, a system that permits extensive discretionary decision-making in selecting judicial officials could be devised.[240] Alongside the principles of objectivity and reasonableness, the IACtHR emphasized the importance of prohibiting the appointment of judges for improper motives.

[238] "The mere fact that the administrative courts, and the Government Commissioner in particular, have existed for more than a century and, according to the Government, function to everyone's satisfaction cannot justify a failure to comply with the present requirements of European law." *Kress v. France* para. 70.
[239] *Reverón Trujillo v. Venezuela* paras. 71-74.
[240] Ibid.

The challenge with the IACtHR's reiteration of broad, soft law standards, a characteristic common to other international courts, is its failure to provide concrete operational guidelines for their interpretation. As a result, although merit-based appointments are recognized as a norm, the legal consequences of violating this standard remain unclear. Specifically, there is ambiguity regarding how deviations from merit-based appointments impact the legality of judicial appointments. To address this, concrete operational guidelines lack specific criteria for merit-based assessment, detailed procedures for challenging non-merit-based appointments, and clear outlines of corrective measures and sanctions for non-compliance. The ECtHR has extensively grappled with this issue, marking a significant shift in its jurisprudence on the appointment of ordinary court judges, as seen in the judgment in Guðmundur Andri Ástráðsson v. Iceland (discussed in Chapter II).

In this case, the Court established for the first time a detailed doctrinal test for judicial appointments under Article 6(1) of the European Convention. The particulars of this case arose amidst the Icelandic judicial reform enacted in 2017, in which Iceland replaced its two-tier judicial system with a three-tier one, introducing a new Court of Second Instance – the Court of Appeal.[241]

Despite a rigorous merit-based selection by an independent committee, the Icelandic Minister of Justice deviated from the recommendations, appointing four judges who were ranked lower on the list of candidates. Guðmundur Andri Ástráðsson, convicted by a Court of Appeal that included one such judge, challenged the legitimacy of his conviction, arguing that the irregular

[241] The Republic of Iceland, Judiciary Act no. 50/2016.

appointment compromised his right to a trial by an "independent and impartial tribunal established by law."[242]

In its *reasoning in Guðmundur Andri Ástráðsson vs. Iceland, the Grand Chamber of the Court has clarified the scope and interpretation of the concept of a "tribunal established by law" and provided a comprehensive analysis of its constituent elements*. A pivotal aspect of this redefinition is marked by the ECtHR's inaugural incorporation of merit-based selection, judicial competence, and bench composition as integral components within the conceptual scope of the "tribunal established by law."[243]

Concerning the notion of a "tribunal," beyond the requirements outlined in the ECtHR's established jurisprudence, it is inherently implied that a "tribunal" should consist of judges chosen based on merit, denoting judges possessing the necessary technical competence and moral integrity.[244] The ECtHR observed that the higher a tribunal's position in the judicial hierarchy, the more stringent the selection criteria should be.[245]

Regarding the term "established," the ECtHR reiterated its previous case law, which presupposes that the phrase encompasses not only the existence of the tribunal but also its competence and the composition of the bench in each case.[246] Citing the rule of law, the Court underscored the underlying purpose of this requirement: to shield the judiciary from unlawful external influences, notably those stemming from the executive branch but also encompassing influences from the legislature or from within the judiciary itself. The Court emphasized that the process of appointing judges is an integral component of the "established by law" concept and,

[242] *Guðmundur Andri Ástráðsson vs. Iceland* para. 154.
[243] *Guðmundur Andri Ástráðsson vs. Iceland* para. 222.
[244] *Guðmundur Andri Ástráðsson vs. Iceland* paras. 220-221.
[245] Ibid.
[246] See e.g. *Sokurenko and Strygun v Ukraine* App nos 29458/04 and 29465/04 (ECtHR, 20 July 2006) para 24.

as such, warrants rigorous scrutiny. Violations of the laws governing the judicial appointment process may render a judge's participation in a case "irregular."

The Court also emphasized the requirement of legal clarity, maintaining that the relevant domestic legislation on judicial appointments should be precisely defined to the extent possible, thereby preventing arbitrary interventions in the appointment process.[247]

Subsequently, the Court explored the interplay between the requirement of a "tribunal established by law" and the conditions of independence and impartiality. It noted that while the right to a "tribunal established by law" stands as an independent right under Article 6 § 1 of the Convention, a close interconnection has been established in the Court's case law between this specific right and the guarantees of "independence" and "impartiality." The institutional requirements of Article 6 § 1 collectively aim to uphold the rule of law and the separation of powers. The Court emphasized that when assessing the "tribunal established by law" requirement, a *systematic* inquiry must be made into whether the alleged irregularity in a given case is of such seriousness as to undermine the aforementioned fundamental principles and compromise the independence of the relevant Court. Such a position supports the ECtHR's view that the adherence to the "established by law" principles need to be weighed against the other two principles – legal certainty and judicial irremovability as "upholding those principles at all costs … may in certain circumstances inflict even further harm on the rule of law and public confidence in the judiciary."[248]

To evaluate whether irregularities in a specific judicial appointment procedure constitute a violation of the right to a tribunal established by law and to determine whether state authorities

[247] *Guðmundur Andri Ástráðsson vs. Iceland* paras. 229-230.
[248] *Guðmundur Andri Ástráðsson v. Iceland* para 240.

have struck a balance between competing principles of the rule of law, the ECtHR formulated a threshold test comprising three criteria.[249]

First step – objective and genuinely identifiable breach

Firstly, there must generally be an evident breach of domestic law, meaning that the breach must be objectively and genuinely identifiable. In these cases, the ECtHR would follow the national courts' findings as they are the primary interpreters of the national law unless the violation is "flagrant" – that is, "unless the national courts' findings can be regarded as arbitrary or manifestly unreasonable."[250] This exception proved to be of great significance in the subsequent line of Polish cases. The Court additionally underscored that the absence of an evident breach in domestic rules on judicial appointments does not preclude the potential violation of the right to a tribunal established by law, as circumstances may arise where a seemingly compliant judicial appointment procedure still yields outcomes inconsistent with the object and purpose of the Convention right. This concession exemplifies the ECtHR's endeavor to address ostensibly pretextual and covert encroachments upon judicial independence. In these instances, the Court is to further assess under the second and third limbs of the provided test to ascertain compatibility with the specific requirements of the right to a "tribunal established by law" within the Convention's context.

In *Guðmundur Andri Ástráðsson v. Iceland,* the Icelandic Supreme Court had already determined that there were two breaches of domestic law in the appointment of four judges to the Appeal Court; hence, the ECtHR had no reason to undertake further assessment at the first step

[249] *Guðmundur Andri Ástráðsson* v. Iceland para 243.
[250] *Guðmundur Andri Ástráðsson v. Iceland* para 244.

of the test.[251] However, a nuanced complexity emerged in one of the following Polish cases, *Reczkowicz v. Poland*, with notable discord between the two Polish apex courts, the Supreme Court and the Constitutional Court. This discord primarily concerned assessing whether the appointment of judges to the recently established Polish Supreme Court's Disciplinary Chamber violated domestic law.[252]

Second step – teleological interpretation of the "tribunal established by law" requirement

The second step of the test presupposes that the breach in question should be assessed in light of the objectives and purpose of the "tribunal established by law" requirement, ensuring the judiciary's ability to perform its duties free from undue interference and safeguarding the rule of law and the separation of powers. This linkage of the rule of law principle with the institutional safeguards resonates with the *Golder* assertion that Article 6 should be analyzed teleologically. As a result of such understanding, only breaches that *fundamentally* disregard the essential rules in the appointment process or that may otherwise undermine the purpose and effect of the "established by law" requirement should be considered violations of that requirement.[253]

Lastly, the review carried out by national courts, if any, concerning the legal consequences of a breach of a domestic rule on judicial appointments in terms of an individual's Convention rights plays a significant role in determining whether such a breach amounts to a violation of the right to a "tribunal established by law." This review should follow relevant Convention case law and its derived principles.[254] Nevertheless, in cases of flagrant violations of national law, the ECtHR is mandated to exercise "European supervision" over the national courts' interpretation

[251] *Guðmundur Andri Ástráðsson v. Iceland* para. 254.
[252] *Besnik Cani v Albania* App no 37474/20 (ECtHR, 4 October 2022).
[253] *Guðmundur Andri Ástráðsson v. Iceland* para 246.
[254] *Guðmundur Andri Ástráðsson v. Iceland* paras. 248-250.

of domestic law.[255] In this regard, the ECtHR has significantly deviated from the principle of subsidiarity in cases concerning judicial independence.

The three-step test was reiterated in the most recent series of cases concerning Poland's judicial reforms – *Advance Pharma sp. z o.o v. Poland,*[256] *Dolińska-Ficek and Ozimek v. Poland,*[257] *Reczkowicz v. Poland,*[258] *Xero Flor w Polsce sp. z o.o. v. Poland,*[259] *Juszczyszyn v. Poland*[260], *Wałęsa v. Poland.*[261]

Although this test was primarily used in the Polish line of cases, the ECtHR has already applied it outside the context of Polish judicial reforms, notably in Albanian cases *Xhoxhaj v. Albania* and *Besnik Cani v. Albania*.[262]

Relying on the Eskelinen test, as well as the above-discussed standards derived from *Ástráðsson v. Iceland* and *Volkov v. Ukraine,* the ECtHR found that the Albanian vetting body meets the requirements of an independent and impartial tribunal established by law.[263] The factual background of this case revolves around L.D., a judge appointed to the Special Appeal Chamber (SAC) of the Albanian Constitutional Court, which is tasked with overseeing judicial vetting in Albania as the final instance. Despite a prior disciplinary measure of dismissal for breaching the law and incompetence, LD was appointed to the SAC, as the government didn't conduct a thorough background check upon his appointment. This appointment led to Cani contesting the SAC's status as an independent tribunal in his proceeding, arguing that its status

[255] *Guðmundur Andri Ástráðsson v. Iceland*, para. 100.
[256] *Advance Pharma sp. z o.o. v Poland* App no 1469/20 (ECtHR, 3 February 2022) para 349.
[257] *Dolińska-Ficek and Ozimek v Poland* App nos 49868/19 and 57511/19 (ECtHR, 8 November 2021) para 353.
[258] *Reczkowicz v Poland* App no 43447/19 (ECtHR, 22 July 2021) para 280.
[259] *Xero Flor w Polsce sp. z o.o. v Poland* App no 4907/18 (ECtHR, 7 May 2021) para 289.
[260] *Juszczyszyn v Poland* App no 35599/20 (ECtHR, 6 October 2022).
[261] *Wałęsa v Poland* App no 50849/21 (ECtHR, 23 November 2023).
[262] *Besnik Cani v Albania* App no 37474/20 (ECtHR, 4 October 2022).
[263] *Xhoxhaj v Albania* App no 15227/19 (ECtHR, 9 February 2021) para 304.

as the "tribunal established by law" was compromised by LD not fulfilling statutory obligations of eligibility to sit on the SAC. In its deliberation, the ECtHR employed the three-step test and determined a violation of Article 6(1). The central issue was not merely the government's failure to conduct a comprehensive background check on LD's eligibility for the SAC but rather the national courts' inability to adjudicate on the matter and provide a remedy for Cani, whose proceedings were decided by an irregularly composed bench.[264]

Finally, the ECtHR reminded that an irregularity in a judge's appointment procedure may not be indefinitely or unqualifiedly challenged by an individual invoking the "tribunal established by law" right; as time progresses, the preservation of legal certainty and security of judicial tenure increasingly outweigh the individual litigant's right in the requisite balancing exercise.[265]

As previously noted, the CJEU's engagement with judicial independence through the right to effective legal protection is a relatively recent development precipitated by the broader rule of law crisis within the European Union. As the same developments prompted both courts to develop jurisprudence concerning national judicial appointment design, these courts exhibit significant convergence, with frequent cross-references that help refine their respective standards.[266]

Although the ECJ developed its seminal case-law on judicial independence under Article 19(1) TEU, the case of *Review of Simpson and HG v. Council and Commission*, decided under

[264] *Besnik Cani v. Albania* para. 112.
[265] *Besnik Cani v. Albania* para. 113, *Guðmundur Andri Ástráðsson* paras. 252-284.
[266] On the detailed analysis of this convergence, see Ben Smulders, 'Increasing Convergence between the European Court of Human Rights and the Court of Justice of the European Union in Their Recent Case Law on Judicial Independence: The Case of Irregular Judicial Appointments' (2022) 59 *Common Market Law Review* (Special Issue) 105.

the principle of a lawful judge as outlined in Article 47 of the Charter of Fundamental Rights of the EU, established the foundational doctrinal approach of the CJEU to judicial appointments.[267]

The case revolved around the review proceedings of judgments from the General Court of the European Union regarding the legality of judicial appointment procedures in the European Union Civil Service Tribunal. In this judgment, the CJEU affirmed that the fundamental right to an effective remedy before an independent and impartial tribunal, as guaranteed by Article 47 of the Charter of Fundamental Rights, requires the EU courts to assess any irregularities in judicial appointment procedures that could infringe upon this right. Moreover, the Court emphasized that the guarantees defining a tribunal and its composition are crucial for ensuring a fair trial, obliging courts to verify their legitimacy, especially when their regularity is called into question. The CJEU subsequently established the "Simpson test," which draws explicitly from the jurisprudence of the ECtHR. This test determines that any irregularities in the appointment of judges within a judicial system infringe Article 47(2) of the CFR when such irregularities are significant enough to pose a real risk that other state branches, especially the Executive, might exert undue influence, thereby compromising the integrity of the appointment process.[268] Such irregularities provoke reasonable doubts among the public regarding the independence and impartiality of the affected judges, particularly when they disrupt fundamental rules essential to the structure and operation of the judicial system.

Despite developing the Simpson test on the "established by law" criterion, in subsequent *Case C-791/19 Commission v. Poland*, the CJEU determined that the Disciplinary Chamber of the Polish Supreme Court did not meet the "independence" and "impartiality" criteria due to

[267] *Joined Cases C-542/18 RX-II and C-543/18 RX-II Simpson and HG v Council and Commission* EU:C:2020:232 (CJEU, 26 March 2020).
[268] *Simpson and HG v. Council and Commission* paras. 71-73.

appointments influenced by a politically compromised National Council of the Judiciary while omitting a detailed analysis of whether the Chamber was "a tribunal previously established by law."[269] The CJEU's decision to focus primarily on one aspect of the right to an independent and impartial tribunal established by law mirrors the approach of the European Court of Human Rights (ECtHR) in the *Reczkowicz* judgment.[270] In that case, the ECtHR concentrated solely on the "established by law" criterion, bypassing an evaluation of "independence" and "impartiality" because all these elements in the particular case "stem from the same underlying problem of an inherently deficient procedure for judicial appointments to the Disciplinary Chamber of the Supreme Court," hence, there was no need for further assessment.[271] Ben Smulders argued that judgments hinging on the "established by law" element require applicants to demonstrate specific procedural or statutory violations in judicial appointments.[272] Such violations are exemplified in cases like *Guðmundur Andri Ástráðsson v. Iceland*, where evidence showed that the Minister bypassed qualified candidates, and the above-mentioned *Besnik Cani v. Albania*, where a judge did not meet the statutory requirements to sit on the SAC bench.

In contrast, focusing on the "independence and impartial tribunal" criteria seemingly permits a broader scope of assessment, allowing for the identification of violations due to systemic deficiencies, as seen in the CJEU's infringement procedure in *Case C-791/19 Commission v. Poland*. In the *C-487/19 WZ case*, addressing a preliminary question concerning the irregular appointment of judges to the Extraordinary Chamber of the Polish Supreme Court, the CJEU

[269] *Case C-791/19 Commission v Poland – Disciplinary Regime for Judges* EU:C:2021:596 (Grand Chamber, 15 July 2021).
[270] Ben Smulders , 'Increasing Convergence between the European Court of Human Rights and the Court of Justice of the European Union in Their Recent Case Law on Judicial Independence: The Case of Irregular Judicial Appointments' (2022) 118.
[271] *Reczkowicz v. Poland* para 280, paras. 283-284.
[272] Ben Smulders, 'Increasing Convergence between the European Court of Human Rights and the Court of Justice of the European Union in Their Recent Case Law on Judicial Independence: The Case of Irregular Judicial Appointments' (2022) 119.

ruled under Article 19(1) TEU that a national court must declare the decision of a single-judge court at last instance null and void to comply with the primacy of EU law.[273] This is required if the judge's appointment involved clear violations of fundamental rules integral to the judicial system's setup and function, undermining the decision's integrity and casting reasonable doubt on the judge's independence and impartiality, thereby rendering it not an "independent and impartial tribunal established by law."

The appointments to the Extraordinary Chamber of the Polish Supreme Court were also assessed in the ECtHR's judgment *Dolińska-Ficek and Ozimek v. Poland*. In that case, ECtHR identified a violation of Article 6(1) due to manifest breaches in the judicial appointment process for Poland's Chamber of Extraordinary Review and Public Affairs. Specifically, appointments were made based on recommendations from a compromised NCJ and were executed by the President despite a judicial suspension of the resolution that nominated them by the Supreme Administrative Court, thereby making a manifest breach of the rule of law.[274] The CJEU applied its judicial independence test in a procedure initiated upon the European Arrest Warrant in the case *X and Y v. Openbaar Ministerie*. In this case, following its previous reasoning in the *WZ and Land Hessen case (see above),* the CJEU determined that while the predominance of legislative appointees in a judicial appointment body like the NCJ does not inherently undermine the independence of the resulting judges, the combination of this with other factors and conditions could raise doubts about their independence.[275] Aligned with the ECtHR's perspective, the ECJ ruled that no particular judicial design inherently results in a lack of independence; instead, such doubts may arise only when the design is considered in conjunction

[273] *Case C-487/19 WZ v Polska* EU:C:2021:798 (Grand Chamber, 6 October 2021).
[274] *Dolińska-Ficek and Ozimek v. Poland* para. 353.
[275] *VQ v. Land Hessen* paras. 55- 56.

with other circumstances. Consequently, the CJEU has adopted a narrower approach in preliminary reference and European Arrest Warrant procedures than infringement procedures, reflecting their distinct nature and scope. In *Getin Noble Bank S.A.*, the ECJ had the opportunity to determine whether the potential illegality of judicial appointments in a Member State before it acceded to the EU could jeopardize the principle of judicial independence.[276]The referring court questioned the independence of the judges involved in the case due to their appointments under potentially politically compromised procedures, some of which dated back to the undemocratic regime prior to Poland's accession to the EU. The ECJ ruled that the circumstances surrounding the initial or subsequent appointments of judges under such conditions do not automatically undermine judicial independence and impartiality, provided that these appointments do not create a real risk of undue influence by other state branches.

Although the ECJ's jurisprudence on judicial independence and specific standards for judicial appointments was primarily developed in response to the Polish judicial reforms, these principles have already been applied in the context of another EU Member State.

In the case *Repubblika v Il-Prim Ministru (C-896/19*), the Constitutional Court of Malta sought a preliminary ruling from the ECJ regarding the compliance of Malta's judicial appointment procedures with EU law. The case was brought by the NGO Repubblika, which argued that the Maltese Prime Minister's discretion in appointing judges raised doubts about their independence, particularly given the political affiliations of many appointees since 2013. Although the ECJ ruled that the Maltese reforms conformed with EU law, it established a new standard: the prohibition of regression in judicial independence among Member States, ensuring

[276] *Case C-132/20 BN, DM, EN v Getin Noble Bank SA* EU:C:2021:557 (8 July 2021).

compliance with Article 2 TEU values and the judicial independence protections required by Article 19(1) TEU.

In conclusion, the evolution of international standards on judicial appointments underscores a significant shift towards ensuring judicial independence, even as these standards grapple with the inherent political contingencies of the appointment process. While the international courts have begun to delineate more precise guidelines, the concrete operationalization of the offered standards remains challenging, potentially allowing political influence to persist. Consequently, further refinement of these standards to adapt them more closely to the political realities of national constitutional settings is essential to prevent arbitrariness as a RoL violation in judicial appointments.

2.3. International Standards on Judicial Dismissals

International standards stipulate that judges' terms should be established by law, ensuring that judges, whether appointed or elected, enjoy guaranteed tenure until the mandatory retirement age or the expiration of their terms.[277] Consequently, judges can only be dismissed for serious misconduct or incompetence, and such dismissals must adhere to fair procedures that guarantee objectivity and impartiality, as outlined in the national constitution and relevant legislation.[278]

The IACtHR actively challenged efforts by Latin American countries to dismiss politically unsuitable judges, which led to Peru attempting to withdraw from the Inter-American

[277] Principle 12 - United Nations, Basic Principles on the Independence of the Judiciary (adopted 6 September 1985, endorsed by UN General Assembly Res 40/32 of 29 November 1985 and 40/146 of 13 December 1985).
[278] UN Human Rights Committee, 'General Comment No 32: Article 14 – Right to Equality before Courts and Tribunals and to a Fair Trial' (23 August 2007) CCPR/C/GC/32, para 20.

Convention to avoid the implications of the Constitutional Court v. Peru ruling and to Venezuela's withdrawal following a series of decisions emphasizing judicial independence.[279]

The jurisprudence of the IACtHR on judicial independence has been profoundly shaped by cases involving the arbitrary dismissal of supreme court judges across several jurisdictions (see Chapter IV). Consequently, its standards should be interpreted through the lens of prohibiting arbitrariness in decisions regarding judicial status, especially in contexts where judicial dismissals, rather than being based on legally established grounds, are politically utilized as a means for current leaders to entrench or perpetuate their power.

In 2004, Ecuador faced a political crisis when President Lucio Gutiérrez secured a parliamentary majority to prevent his impeachment by swiftly dismissing and reappointing members of the Constitutional Tribunal, the Supreme Electoral Tribunal, and the Supreme Court through a parliamentary resolution, citing the need for judicial reform and reorganization. This led to the appointment of judges aligned with political interests, particularly those of the Ecuadorian Roldosist Party, and the exile of former President Abdalá Bucaram. The dismissals and subsequent political maneuvers caused widespread protests and institutional instability, culminating in the Supreme Court's temporary dissolution and the eventual ousting of President Gutiérrez in 2005. This institutional instability led to the seminal case before the IACtHR, *Quintana Coello v. Ecuador*.[280] In this case, the IACtHR emphasized that the violation of the guarantee of judicial independence, particularly in terms of a judge's tenure and stability,

[279] Jo M Pasqualucci, *The Practice and Procedure of the Inter-American Court of Human Rights* (Cambridge University Press 2003) 115–116 and International Justice Resource Center, 'Venezuela Denounces American Convention on Human Rights as IACHR Faces Reform' (19 September 2012) https://ijrcenter.org/2012/09/19/venezuela-denounces-american-convention-on-human-rights-as-iachr-faces-reform/ accessed 13 January 2024.

[280] *Supreme Court of Justice (Quintana Coello et al) v Ecuador* (Preliminary Objection, Merits, Reparations and Costs) IACtHR Series C No 266 (23 August 2013).

warrants scrutiny in the context of the conventional rights of a judge affected by a State decision that arbitrarily impacts the duration of their term, highlighting the intrinsic connection between institutional guarantees and a judge's right to maintain their position as an outcome of the guarantee of tenure. This reading reflects the IACtHR's position that the "objective dimension" of judicial independence is essential for the rule of law, as it affects not only the judiciary but society as a whole.[281] Furthermore, in this decision, the IACtHR reaffirmed the UN Human Rights Committee's view that the right against arbitrary dismissal is encompassed within "the right to access public functions under conditions of general equality."[282]

The cases *Apitz Barbera et al. v. Venezuela*, *Reverón Trujillo v. Venezuela*, and *Chocrón Chocrón v. Venezuela* all stem from the judicial restructuring process in Venezuela initiated under Hugo Chávez in 1999 (See Chapter V). The institutional instability introduced by Chávez's regime, characterized by arbitrary dismissals and appointments of judges and maintaining the majority of judges in provisional status to exert control, resulted in extensive jurisprudence by the IACtHR.

In *Apitz Barbera et al. v. Venezuela*, the IACtHR clarified that the right to hold a public office is not explicitly protected under the Inter-American Convention, in contrast to the right to access public functions under conditions of general equality.[283] The latter is realized when the procedures for appointment, promotion, suspension, and dismissal are governed by criteria that are reasonable, objective, and free from discrimination. The Court clarified that any disciplinary

[281] *Quintana Coello* paras. 153-154.
[282] UN Human Rights Committee, *Communication No 1376/2005*, CCPR/C/93/D/1376/2005 (4 August 2008) para 7.1. See also *Quintana Coello* para 155.
[283] *Apitz Barbera et al*. para. 206. The context of the case Apitz Barbera et al. v. Venezuela pertains to judges from the First Court of Administrative Disputes who were arbitrarily dismissed without due process under accusations of judicial errors, reflecting broader efforts to align the judiciary with the government's political agenda. IIACtHR clarified that the right to hold a public function is not explicitly protected under the Inter-American Convention, in contrast to the right to access public functions under conditions of general equality.

or sanctioning actions against judges must mandatorily adhere to due process guarantees and provide an effective remedy for those adversely affected. This holding aligns with the general duty of the public authority to comply with due process guarantees when an individual's rights are affected.[284]

In *Reveron Trujillo*, the IACtHR held that, for both provisional and titular judges, a fundamental aspect of the guarantee of tenure is the right to reinstatement and reimbursement of unpaid salaries when it has been established that the dismissal was arbitrary.[285] The reasons for not reinstating a judge must align with conventionally acceptable objectives and be necessary, meaning that no less harmful or proportionate measure was available in the particular case of the provisional judge Trujillo. The IACtHR stated that acceptable reasons for non-reinstatement could include the non-existence of the Court or tribunal to which she was appointed, the restructuring of the Court to include only titular judges who are legally appointed, or a loss of physical or mental capacity of a judge to perform their duties.[286]

In the *Chocron Chocron v. Venezuela case*, the IACtHR articulated how a reasoned judgment safeguards against arbitrariness in judicial dismissals.[287] The principles underlying the right to a ground for decision are the proper administration of justice and the legitimacy of judicial decisions within a democratic society. The IACtHR emphasized that reasoning in judicial or administrative decisions must delineate the facts, rationale, and legal bases upon which the authority relied to reach its conclusion, thereby effectively eliminating any perception of arbitrariness. Additionally, a well-founded justification confirms to the involved party that

[284] *Escher et al v Brazil* (Preliminary Objections, Merits, Reparations and Costs) IACtHR Series C No 200 (6 July 2009) para 139.
[285] *Reverón Trujillo v. Venezuela* para. 121.
[286] *Reverón Trujillo v. Venezuela* para. 124.
[287] The IACtHR defines the grounds for decision as "the exteriorization of the reasoned justification that allows a conclusion to be reached." *Apitz Barbera et al. v. Venezuela* para. 77, and *Escher et al. v. Brazil* para. 208.

their positions have been duly considered, enabling them to challenge the decision and facilitating a subsequent review by a higher court.[288] In *Quintana Coello*, the IACtHR identified that an improper motive or purpose behind judicial dismissal by a public authority constitutes another form of arbitrariness.[289]

The ECtHR's extension of due process guarantees to procedures before judicial councils acting as disciplinary bodies in *Olujic v. Croatia* has significantly impacted standards on judicial dismissals within the Council of Europe region.[290] By interpreting the term "tribunal" under the Convention to include judicial councils, the court has intensified its scrutiny of the design and functioning of these bodies, as defined by an "independent tribunal established by law."[291]

As the ECtHR recognized judicial councils as independent tribunals established by law *when acting as disciplinary bodies*, it progressively formulated a body of jurisprudence concerning the specific design of these institutions in countries where they have disciplinary functions.[292] The principal focus of jurisprudence regarding judicial councils centers on their composition, emphasizing the necessity for sufficient independence to ensure due process in disciplinary procedures for judges.[293] In *Volkov v. Ukraine*, the ECtHR clarified that the appropriate model for appointing judge-members to judicial councils is through election by their peers.[294]

[288] *Chocrón Chocrón v Venezuela* (Preliminary Objection, Merits, Reparations and Costs) IACtHR Series C No 227 (1 July 2011) para 118.
[289] *Quintana Coello* para. 173. "Taking into account the motive or purpose of a particular action by state authorities is relevant to the legal analysis of a case, inasmuch as a motivation or purpose that differs from the provision granting powers to the state authorities to act may demonstrate whether the action may be considered arbitrary." Eur. Ct. H.R. 73.
[291] See *Olujic v. Croatia* para. 44; *Volkov v. Ukraine* para. 91.
[292] *Volkov v. Ukraine* para. 91.
[293] David Kosař, 'Nudging Domestic Judicial Reforms from Strasbourg: How the European Court of Human Rights Shapes Domestic Judicial Design' (2017) 13 *Utrecht Law Review* 112, 119.
[294] *Volkov v. Ukraine* para. 112.

Before *Olujic v. Croatia*, judges from CoE member states who were dismissed or disciplined typically appealed to the ECtHR by invoking substantive rights under the European Convention.[295] In *Pitkevich v. Russia*, the applicant, dismissed for proselytizing while on the bench, appealed to the ECtHR, invoking the European Convention's provisions on freedom of religion (Article 9), freedom of expression (Article 10), freedom of association (Article 11), and prohibition of discrimination (Article 14).[296] Similarly, in *Ozpinar v. Turkey*, the applicant relied on Article 8 as she faced a disciplinary investigation for chronic lateness, inappropriate attire, and questionable relationships influencing her judicial decisions, which led to her dismissal by the Turkish High Council of Judges and Public Prosecutors because her conduct compromised the dignity and honor of the profession.[297] The ECtHR recognized that the dismissal of Judge Özpınar interfered with her private life, as defined to include professional activities, but deemed it legitimate in upholding the duty of judges to exercise restraint and preserve decision authority.[298]

Despite recognizing a legitimate aim behind the dismissal of Judge Özpınar, the ECtHR found a violation of Article 8 and Article 13 in conjunction, as the interference with the right to private and family life, in this case, was not proportional due to a lack of adequate procedural safeguards.[299] Specifically, Judge Özpınar's appeal was dismissed without her being informed, she was not provided with the evidentiary materials before her disciplinary proceeding, and she was only allowed to appear once before the judicial council. The ECtHR emphasized that when judges face dismissal related to private and family life issues, critical safeguards against arbitrary

[295] David Kosař and Lucas Lixinski, 'Domestic Judicial Design by International Human Rights Courts' (2015) 109 *American Journal of International Law* 713, 735.
[296] *Pitkevich v Russia* (dec) App no 47936/99 (ECtHR, 8 February 2001).
[297] *Özpınar v Turkey* App no 20999/04 (ECtHR, 19 October 2010).
[298] *Özpınar v Turkey* paras. 45-48.
[299] *Özpınar v Turkey* para. 79.

decisions are essential, particularly the guarantee of an adversarial hearing before an independent and impartial tribunal.[300] Furthermore, relying on its findings in *Kayasu v. Turkey*, the ECtHR held that the applicant had not had access to a remedy meeting the minimum requirements of Article 13 for her Article 8 complaint, as the impartiality of the body deciding on her appeal was highly questionable.[301]

As previously noted, the judgment in *Olujic v. Croatia*, applying the Eskelinen test, has enabled national judges to invoke due process guarantees when presenting their cases under Article 6 of the Convention.[302] In 1998, the Croatian National Judicial Council dismissed a judge, who was also the President of the Supreme Court, after conducting a disciplinary proceeding based on allegations that the judge had used his position to protect individuals engaged in criminal activities. The ECtHR identified violations of Article 6 on four distinct bases: the present bias of several members of the Croatian NCJ as the violation of the right to an impartial and independent tribunal, the infringement of the right to a public hearing, the breach of the principle of equality of arms, and the denial of the right to a fair trial within a reasonable time.[303]

Volkov v. Ukraine was crucial for the ECtHR's engagement with the national judicial design regarding judicial dismissals following disciplinary procedures. The case involved the dismissal of the President of the Military Chamber of the Supreme Court, initially adjudicated by the Ukrainian High Council of Justice (UHCJ). The ECtHR, relying on the European Statute of Judges but also drawing inspiration from the model of Italian Consiglio della Magistratura, pinpointed four significant structural flaws during the initial disciplinary proceedings: firstly,

[300] *Özpınar v Turkey* para. 85.
[301] *Kayasu v Turkey* App nos 64119/00 and 76292/01 (ECtHR, 13 November 2008).
[302] *Olujic v. Croatia* para. 44.
[303] *Olujic v. Croatia* paras. 55-91.

judges constituted a minority within the UHCJ; secondly, the judges were not selected by their judicial peers; thirdly, only four of the UHCJ's twenty members were full-time; fourthly, the inclusion of the prosecutor general as a member raised concerns about impartiality.[304] At the second level of disciplinary review of Volkov's case, a plenary meeting of Parliament presented the case as an exchange of general opinions, drawing heavily on the HCJ's and the Parliamentary Committee's prior conclusions. According to the ECtHR, this stage did not provide a robust forum for a detailed examination of legal and factual issues, compromising the adjudicative quality expected in such disciplinary proceedings. The involvement of politicians, lacking requisite legal expertise, in resolving complex legal disputes in this format was neither clarified nor justified by the government, raising issues with the independence and impartiality required under Article 6 of the Convention.[305] Hence, the Court subtly indicated that relying on political impeachment as a disciplinary mechanism for judges does not conform to the standards outlined in the European Convention of Human Rights.

Despite the procedural shortcomings at earlier stages, the ECtHR reminded that a violation of the Convention may be remedied if the proceedings are subject to subsequent control by a judicial body that provides full jurisdiction and guarantees as per Article 6(1), as demonstrated in cases like *Albert and Le Compte v. Belgium* and *Tsfayo v. the United Kingdom*.[306] However, in this instance, the review by the Higher Administrative Court (HAC) did not constitute a sufficient remedy, and therefore, a violation of Article 6(1) was found.

The ECtHR also expanded the remedial scope of its decision in this type of case, mandating Ukraine to implement comprehensive general measures to overhaul the judicial

[304] *Volkov v. Ukraine* paras. 111-113.
[305] *Volkov v. Ukraine* paras. 119-121.
[306] *Albert and Le Compte v Belgium* (1983) Series A no 58 (ECtHR, 10 February 1983) para 30; *Tsfayo v United Kingdom* App no 60860/00 (ECtHR, 14 November 2006).

disciplinary system and, for the first time in its history, the Court also ordered the reinstatement of the applicant to his former position as a judge on Ukraine's Supreme Court.[307]

A dismissal of a Supreme Court President was also the factual background of *Baka v. Hungary*, where the ECtHR affirmed the applicability of Article 6's civil limb to the status of judges, noting that the judiciary is part of the "typical civil service."[308]

The applicant, a former EctHR judge, had his tenure curtailed by the 2011 enactment of Hungary's new Constitution, which replaced the Supreme Court with the Kúria and rendered him ineligible for the presidency of the Kúria due to a requirement of at least five years of domestic judicial experience, excluding service on international courts. In this case, the ECtHR introduced a new condition, in addition to the traditional Eskelinen criteria, to determine the inapplicability of Article 6.[309] This new requirement mandated that national measures limiting court access to civil servants must meet the conventional criteria and align with the broader concept of the rule of law.[310] As Polgari noted, within the ECtHR's jurisprudence concerning judicial independence, references to the rule of law and the separation of powers appear primarily symbolic, with the Court relying on "traditional" standards.[311] Hence, imposing the rule of law as a limit to the state's power to deny judges access to the Court represented a rare instance of the ECtHR employing the rule of law beyond its declaratory value.

This innovation stemmed from the unique circumstances of Mr. Baka's case, where access to the Court was not explicitly denied by national law but became practically impossible

[307] David Kosař and Lucas Lixinski, 'Domestic Judicial Design by International Human Rights Courts' (2015) 109 *American Journal of International Law* 713, 750.
[308] *Baka v. Hungary* paras. 103-104.
[309] Ivana Jelić and Dimitrios Kapetanakis, 'European Judicial Supervision of the Rule of Law: The Protection of the Independence of National Judges by the CJEU and the ECtHR' (2021) 13 *Hague Journal on the Rule of Law* 45, 53.
[310] *Baka v. Hungary* para. 117.
[311] Eszter Polgári, 'In Search of a Standard: References to the Rule of Law in the Case-Law of the European Court of Human Rights' (2020) 14 *ICL Journal* 43, 14.

due to the termination of his mandate resulting from structural changes in the Supreme Court's design. The ECtHR emphasized that national legislation preventing court access must adhere to the rule of law for Article 6 § 1 to be applicable, asserting the principle that interferences should generally be based on instruments of general application. The Court rejected legislation *ad hominem*, as allowing such would create the potential for abuse by contracting states. Going beyond the confines of the domestic legislative framework and invoking the rule of law as an overarching principle binding on states, the Court rebuffed the Hungarian government's endeavor to remove Judge Baka under the guise of constitutional change. Yet, the ECtHR failed to address judicial independence as an underlying issue in the case and did not effectively connect the institutional guarantees with the rule of law.

Apart from the dismissal of Judge Baka, which occurred in the aftermath of constitutional and legislative changes, the ECtHR had not adjudicated the dismissal of national judges outside of disciplinary proceedings until it addressed the case of *Xhoxhaj v. Albania*.[312] Xhoxhaj, a judge at the Court of Appeals in Tirana, was dismissed following a judicial reevaluation process that scrutinized his assets, background, and proficiency as part of Albania's vetting process, a comprehensive judicial reform aimed at enhancing integrity within the judiciary. Furthermore, the ECtHR found that the applicant had received sufficient procedural guarantees during the vetting process.[313]

Unlike ECtHR, which has established a comprehensive body of case law on the dismissal of judges, the CJEU has not yet extensively decided on this issue before the Polish judicial reforms, as it had traditionally fallen outside its purview.

[312] *Xhoxhaj v Albania* App no 15227/19 (ECtHR, 9 February 2021).
[313] *Xhoxhaj v Albania* para. 329-336.

In the 2012 case *Commission v. Hungary*, which concerned the compulsory retirement of judges, prosecutors, and notaries at the age of 62, the CJEU applied Articles 2 and 6(1) of Council Directive 2000/78/EC, establishing a general framework for equal treatment in employment and occupation.[314] The CJEU found that the compulsory retirement scheme introduced age-based discrimination that was not supported by legitimate objectives or deemed appropriate or necessary for achieving the intended goals.

In the case *C-619/18, European Commission v. Poland*, the CJEU was prompted to examine the question of the dismissal of judges through the specific Polish reform on early retirement of Supreme Court judges.[315] The CJEU applied its test for judicial independence to *Portuguese judges*. The CJEU emphasized that rules governing the composition, appointment, and terms of service for judicial members are crucial in maintaining their independence and impartiality, aiming to eliminate any reasonable doubts about their susceptibility to external influences. Notably, the principle of irremovability underscores that judges should remain in their positions until the designated retirement age or the end of their term unless there are compelling and justified reasons for their removal, adhering to a strict proportionality test. Furthermore, in the event of potential dismissal or disciplinary actions against judges, the Court emphasized the need for a judicial framework that prevents the misuse of disciplinary measures as a form of political control over judicial decisions.[316]

In the specific case concerning the lowering of the retirement age for judges of the Sąd Najwyższy (Polish Supreme Court), the Court evaluated that such a reform was not justified and proportionate to its stated objectives of standardizing retirement ages and enhancing age

[314] *Case C-286/12 European Commission v Hungary* EU:C:2012:687 (CJEU, 6 November 2012).
[315] *Case C-619/18 European Commission v Poland* EU:C:2019:531 (Grand Chamber, 24 June 2019).
[316] *Case C-619/18 European Commission v Poland* para. 77.

diversity within the judiciary.[317] Furthermore, the CJEU criticized the discretionary power of the President to extend the term of particular judges, raising doubts about the legitimacy of the reform. The CJEU held that the reform was not justified by a legitimate objective, thus undermining the principle of irremovability and, by extension, judicial independence.

3. Conclusion

This chapter has systematically dissected the intricate web of international standards impacting the national judicial appointment and dismissal procedures, reflecting the profound interplay between domestic frameworks and international jurisprudence. A detailed examination of critical regional court decisions and soft law instruments has demonstrated the significant role these standards play in shaping national judicial systems within the framework of the rule of law.

While the uniformity of judicial independence standards might disproportionately challenge democracies that are still developing their legal frameworks, as opposed to older democracies with entrenched systems, this uniformity still plays a vital role. It serves as an essential safeguard against governmental attempts to undermine the judiciary and consolidate power, thereby serving as a critical mechanism for maintaining the rule of law across diverse political landscapes. Consequently, the interdependence between national legal systems and international human rights norms becomes a focal point for understanding the dynamics that govern judicial reforms.

Furthermore, the case law of international courts often transcends mere standard-setting, serving as a potent political message to countries that encroach upon judicial independence. These courts do not operate in a vacuum; their rulings are deeply embedded within the

[317] *Case C-619/18 European Commission v Poland* paras. 112-114.

geopolitical contexts of their member states. When international courts issue decisions that critique or demand changes to national judicial practices, these are not solely legal directives but also strategic communications that warn against the deterioration of already reached levels of human rights standards. Such decisions are instrumental in signaling international disapproval and can exert considerable pressure on governments to align their judicial reforms with accepted global standards. The jurisprudence of international courts extends beyond the "naming and shaming" function, as it can lead to severe repercussions for national member states, as is the case, for example, with the EU implementing the rule of law conditionality mechanism in response to Poland's persistent attacks on the judicial branch.[318]

Finally, while international standards have consistently stressed the connection between the rule of law and judicial independence, the precise manner in which reverence for the rule of law manifests in international jurisprudence on the procedures for appointing and removing judges remains somewhat ambiguous. A comprehensive paradigm is still in the making – one that goes beyond merely acknowledging the rule of law as a tool of interpretation[319] and incorporates it into a cohesive paradigm for establishing institutional safeguards in judicial design.

[318] Antonia Baraggia and Matteo Bonelli, 'Linking Money to Values: The New Rule of Law Conditionality Regulation and Its Constitutional Challenges' (2022) 23 *German Law Journal* 131, 132.
[319] András Sajó, 'The Rule of Law' in Roger Masterman and Robert Schütze (eds), *The Cambridge Companion to Comparative Constitutional Law* (1st edn, Cambridge University Press 2019) 275.

Chapter III

Inherited Judges as a Rule of Law Paradox

This chapter aims to illustrate the manner and circumstances in which the protection of judicial independence, through the stability of judicial tenure, may compromise the rule of law instead of upholding it. Through a theoretical conceptualization of the phenomenon of inherited judges in regime shifts and political transitions, this chapter reveals the inherent tension between the principles of the rule of law and judicial independence, which orthodox constitutional theory essentially overlooks.

International standards on judicial independence and constitutional theory emphasize the importance of formal guarantees of judicial independence, particularly those related to the stability of judicial tenure and procedural guarantees in the appointment and dismissal procedures.[320] However, empirical constitutional research has already provided solid evidence challenging the importance of de jure judicial independence.[321] As Matthew Taylor recently argued, formal guarantees of judicial independence, such as protection of tenure and the principle of irremovability, "are merely trip-wires that alert society when ignored" as they "mean little on their own, without reference to the courts' interactions with the other branches."[322] A

[320] The guarantees of judicial independence in appointment and dismissal procedures are discussed in detail in Chapter II of this thesis.
[321] James Melton and Tom Ginsburg, 'Does De Jure Judicial Independence Really Matter?: A Reevaluation of Explanations for Judicial Independence' (2014) 2 *Journal of Law and Courts* 187.
[322] Matthew M Taylor, 'Courts and Judicial Independence' in Conrado Hübner Mendes, Roberto Gargarella and Sebastián Guidi (eds), *The Oxford Handbook of Constitutional Law in Latin America* (OUP 2022, online edn, 13 January 2022) 404.

historical illustration to support this claim can be found in the Venezuelan Constitution of 1999, adopted under Chavez, which, de jure, provided robust guarantees of judicial independence on paper.[323] However, de facto, the new constitutional provisions didn't apply to most judges in the following time as they were provisionally appointed. The latest formal guarantees did not protect the sitting judges' precarious appointments, and the Chavista administration could arbitrarily dismiss them at any time.[324]

Besides the discrepancy between constitutional provisions and constitutional practice, the problem with formal guarantees of judicial tenure is that they are construed in a manner that presumes the judiciary operates in an institutional vacuum, shielded from socio-political contingencies, which is manifestly not the case.[325] The international standards on judicial appointment and dismissal are translated into national constitutional texts, but often remain there without addressing the rapid changes of constitutional politics on the ground. Furthermore, they do not provide guidelines on whether the guarantees of judicial independence enjoyed by the sitting judges should remain robustly in place even when the circumstances in which they were appointed significantly change.

[323] Human Rights Watch, *A Decade under Chavez: Political Intolerance and Lost Opportunities for Advancing Human Rights in Venezuela* (Human Rights Watch 2008) 36–37. According to Article 264 of the Constitution, the justices of the newly established Supreme Tribunal of Justice would be elected for a non-renewable period of 12 years, and the candidates could be proposed either by their initiative or initiative of organizations related to the judiciary. Additionally, citizens of Venezuela could raise fundamental objections against any appointment. See Article 264 of Venezuelan Constitution. *Constitution of the Bolivarian Republic of Venezuela* [CV], 30 December 1999.

[324] *Chocrón Chocrón v Venezuela*, Preliminary Objections, Merits, Reparations and Costs, Inter-Am Ct HR Series C No 216 (1 July 2011) para 69. Also see Román Perdomo, 'Reforma judicial, estado de derecho y revolución en Venezuela' in Luis Pásara (ed), *En búsqueda de una justicia distinta: Experiencias de reforma en América Latina* (Consorcio de Justicia Viva, Lima) 357.

[325] As Linton and Kebede Tiba put it : "The end game for the judges should always be about justice and rule of law; social engineering has never been their concern. However, as we know, law and society do not operate in parallel universes, and what happens in a legal process can have major ramifications beyond the parties and the immediate issue". In times of transition, this phenomenon becomes even more evident. Suzannah Linton and Firew Kebede Tiba, 'Judges and Rule of Law in Times of Political Change or Transition' in M Cherif Bassiouni and others (eds), *The Global Community Yearbook of International Law and Jurisprudence: Global Trends: Law, Policy & Justice – Essays in Honour of Professor Giuliana Ziccardi Capaldo* (2013; online edn, Oxford Academic, 20 April 2015) 173.

In light of these premises, this chapter aims to contribute to the existing line of literature examining the role of inherited judges during regime changes and political transitions. Incidentally, the dilemma of inherited judges has been addressed within the transitional justice theory through the more holistic prism of lustration and post-authoritarian and post-conflict capacity-building politics. The problem might seem like a puzzling relic of the past, but it is as present today. The question of when it is viable and constitutionally permissible to interfere with judicial independence lies at the heart of contemporary debates in comparative constitutional law, particularly in the context of accountability considerations.[326]

This thesis aims to situate the problem of inherited judges within the broader paradigm of comparative constitutionalism, focusing on judicial independence and the rule of law. As the chapter will argue, the issue of inherited judges poses a challenge to the widely accepted theoretical paradigm that posits an intrinsic connection between the principles of the rule of law and the irremovability of judges as the essential guarantee of judicial independence. The phenomenon of inherited judges is not just a theoretical puzzle, but has far-reaching consequences for legal practice. Proper justice administration requires efficient solutions to keep the judicial system running. This consideration is as valid in a "mature" liberal democratic setting as it is in the post-transitional one. As Chapter I argues, the dilemma of reconciling the different tensions that emerge from adhering to both the theoretical and practical aspects of the same principle – the rule of law - lingers throughout this thesis.

[326] See e.g. Stephen M Feldman, 'Court-Packing Time? Supreme Court Legitimacy and Positivity Theory' (2020) 68 *Buffalo Law Review* 1519. This issue will be further analyzed in Chapter V of this thesis.

Owen Fiss argued that the notion of judicial independence in stable democracies could not be applied to countries that represent unstable socio-political environments.[327] In liberal democracies, the stability of judicial tenure and the manner of appointing judges have a significant impact on assessing the perception of judicial independence.[328] The stable judicial tenure does not presuppose appointment for life, but rather that the exceptions on the irremovability of judges must be narrowly curtailed, established by law, and accompanied by procedural guarantees.[329]

In unstable political environments and during times of political and regime transition, this principle appears to be challenged. The empirical evidence on judicial appointments and dismissals in Latin American countries over the 20th century shows that "change in administration generally boosted the number of judicial appointments by 84 percent".[330] Furthermore, authoritarian regimes were more inclined to interfere with judicial tenure through appointment and dismissal than other types of regimes.[331] The authoritarian regimes' disregard for the irremovability of judges and procedural guarantees of judicial dismissal, which stem from the rule of law requirements, is no surprise. However, the dilemma emerges when the authoritarian regime collapses – what to do with the judges appointed by the previous regime?

[327] Owen M Fiss, 'The Right Degree of Independence' in *Transition to Democracy in Latin America: The Role of the Judiciary* (Routledge 1993) 67.
[328] As Rafael Bustos Gisbert claims: "while the manner of appointment is a basic element, in practice it is not definitive for the final outcome of the assessment. In fact, it will often represent a complementary aspect in assessing the appearance of independence and/or impartiality." Roberto Bustos Gisbert, 'Judicial Independence in European Constitutional Law' (2022) 18 *European Constitutional Law Review* 591, 604. Arguably, this has been changed at least in the jurisprudence of the European Court of Human Rights, after the *Guðmundur Andri Ástráðsson* v Iceland judgment.
[329] UN Human Rights Committee, *General Comment No 32: Article 14: Right to Equality before Courts and Tribunals and to a Fair Trial* (23 August 2007) UN Doc CCPR/C/GC/32 para. 20.
[330] Aníbal Pérez-Liñán and Andrea Castagnola, 'Presidential Control of High Courts in Latin America: A Long-term View (1904–2006)' (2009) 1 *Journal of Politics in Latin America* 87, 101.
[331] Ibid.

Various screening tools, such as lustration and vetting, were adopted in the post-authoritarian and post-conflict state-building projects to address this issue.[332]

Thus, there is already a point of departure within the praxis and theory of transitional justice in addressing the past judiciary. Nevertheless, this chapter argues that the existing transitional justice framework is insufficient to address the discussed problem adequately. This chapter puts forward three arguments to support this claim:

1) The prolific democratization theory has demonstrated that the nature of regime shifts has undergone significant changes over time.[333]

As Thomas Carothers already noted in 2002:

> "What is often thought of as an uneasy, precarious middle ground between full-fledged democracy and outright dictatorship is the most common political condition today of countries in the developing world and the post-communist world."[334]

This presents a challenging case for establishing a straightforward regime change that would justify interfering with the tenure of inherited judges as a "one-time solution" due to extraordinary political circumstances.[335]

[332] For an extensive overview of the procedures, see Alexander Mayer-Rieckh and Pablo de Greiff (eds), *Justice as Prevention: Vetting Public Employees in Transitional Societies* (Social Science Research Council 2008).
[333] As Georg Sørensen claimed, "the concept of transition is too optimistic to function concisely as a label covering the current fate of regime change. Actually there has been a shift from 'transition' to 'standstill' in the sense that many regimes remain in the gray area of semidemocracy or semiauthoritarianism," Georg Sørensen, *Democracy and Democratization: Processes and Prospects in a Changing World* (3rd edn, Routledge 2008) 2. For more recent literature, see Anna Lührmann and Staffan I Lindberg, 'A Third Wave of Autocratization is Here: What is New About It?' (2019) 26 *Democratization* 1095–1113; Licia Cianetti, James Dawson and Seán Hanley, 'Rethinking "Democratic Backsliding" in Central and Eastern Europe – Looking Beyond Hungary and Poland' (2018) 34 *East European Politics* 243–256; Luca Tomini and Claudius Wagemann, 'Varieties of Contemporary Democratic Breakdown and Regression: A Comparative Analysis' (2017) *European Journal of Political Research* (advance online publication).
[334] Thomas Carothers, 'The End of the Transition Paradigm' (2002) 13 *Journal of Democracy* 6, 18.

2) The growing literature on judicial politics has also shown that the judiciary's position changes across regimes. In a contemporary setting, the lines distinguishing between interference with judicial tenure through appointment and dismissal procedures in authoritarian and hybrid regimes, and those in democracies, tend to become blurred. This claim will be supported by the analysis provided in Chapters IV and V of this thesis.

3) The legality and legitimacy of interference with judges that governments encounter upon assuming office are not a transitional question only; they are equally present in democratic settings, particularly in the context of political transitions and changes in the political ideology of public administration.

In sum, this chapter problematizes the prevailing assumption that the irremovability of judges, as a formal guarantee of judicial independence, necessarily reinforces the rule of law. By examining the phenomenon of inherited judges across both transitional and democratic contexts, it exposes the normative and institutional tensions that arise when stability of tenure is preserved irrespective of the political conditions under which judicial appointments were made. The inherited judiciary dilemma does not lend itself to binary classifications such as democratic versus authoritarian or transitional versus consolidated regimes. Accordingly, the chapter calls for a recalibration of the normative and doctrinal frameworks that govern the rule of law-judicial independence nexus, particularly in light of shifting constitutional realities.

1. Defining the problem of inherited judges

[335] Reference to vetting as a one-time solution for the problem of inherited judges, see OSCE Office for Democratic Institutions and Human Rights (ODIHR), *Towards a Culture of Accountability of Councils for the Judiciary* (OSCE/ODIHR 2022) 21.

The question of how to deal with the judges of the past regime became prominent in the transitions to democracy in the 20th century. Still, its roots can be traced back to much earlier points in history, as far back as the transition from 13 British colonies to the birth of the United States. Nuno Garoupa and Maria A. Maldonado claimed that "the solution to replacing the British judges that the new American states did not trust is at the heart of many features developed in the United States concerning judicial appointment, selection, and retention at the state level," as well as the federal level.[336] The issue persisted throughout the 19th century as new states joined the US, whose judiciary was shaped by the previous French, Spanish, and Mexican colonizing contexts.

The inherited judges were also a problem to be addressed by the French Revolution. Society perceived the judiciary as a strong ally of the Old Regime. The *parlements* (sovereign courts) were "the most avid and strategically located of the institutional defenders of property and privilege."[337] The post-revolutionary sentiment was that judges represented an obstacle and even a threat to the established French Republic.[338] Even before the Revolution, the writings which served as inspiration for revolutionary legislation drew on Cesare Beccaria's influential work *Dei delitti e delle pene* (later popularized by Voltaire), whose main idea was the restraint of the judiciary and reduction of its role to the "automata mechanically applying the rules laid down

[336] Nuno Garoupa and Maria A Maldonado, 'The Judiciary in Political Transitions: The Critical Role of US Constitutionalism in Latin America' (2011) 19 *Cardozo Journal of International and Comparative Law* 593.
[337] Theda Skocpol, 'France, Russia, China: A Structural Analysis of Social Revolutions' (1976) 18 *Comparative Studies in Society and History* 175, 187.
[338] Geoffrey C Hazard Jr, 'Discovery and the Role of the Judge in Civil Law Jurisdictions' (1998) 73 *Notre Dame Law Review* 1017, 1027.

by a legislator."[339] The judiciary of the Old Regime was not dismissed, but its prerogatives were significantly reduced.[340]

A somewhat similar consideration appeared in the context of the October Revolution. The First Soviet decree on courts nominally abolished the court system established under Alexander II in 1864.[341] Lenin envisioned that the tsarist judicial system would be repealed as imperialist relics and replaced by revolutionary and people's courts, which did not presuppose legal training for their judges.[342] Despite the revolutionary promises, a notable legal continuity with the pre-revolutionary legal system was evident in practice. Rendle emphasized the continuity in that the old regime *volost*' courts were renamed people's courts after the Revolution; further, "judges were often far from the class-conscious, Bolshevik-sympathizing figures that the Bolsheviks had intended."[343] On the other hand, individuals who became judges after the Revolution, often without formal legal training, were often newcomers to the party; hence, they could not effectively implement the concept of *revolutionary justice* in practice.[344]

The inherited judges' paradox represented a puzzle in the second half of the 20th century, as the responsibility of the judges for supporting and *legalizing* gross human rights violations had to be addressed in many transitions from authoritarian regimes. After World War II, the problem of distrust in the judges of the previous regime was addressed by applying the Kelsenian model

[339] David Bell, *Lawyers and Citizens: The Making of Political Elite in Old Regime France* (Oxford University Press 1994) 180.
[340] John Henry Merryman, 'The French Deviation' (1996) 44 *American Journal of Comparative Law* 109, 111.
[341] Decree No 1 on the Courts, 27 November 1917, I Sob Uzak RSFSR, no 5, item 50.
[342] For a detailed analysis of the courts' change in the aftermath of the revolution, see John N Hazard, 'The Courts and the Legal System' in Cyril E Black (ed), *The Transformation of Russian Society: Aspects of Social Change Since 1861* (Harvard University Press 1960) 145.
[343] Matthew Rendle, 'How Revolutionary Was Revolutionary Justice?: Legal Culture in Russia across the Revolutionary Divide' in Ian D Thatcher (ed), *Rethinking the Russian Revolution as Historical Divide* (Routledge 2017) 52.
[344] Ibid.

of judicial review as a response to the new societal reality.[345] Many countries established constitutional courts after 1945 as bodies functioning outside the judicial sector, which would, besides judges, be comprised of lawyers and law professors committed to the values of the new democratic order.[346] This solution was adopted in Germany, Italy, France, Spain, Portugal, South Africa, and the former communist countries of Central and Eastern Europe.[347] As András Sajó argued concerning the Eastern post-communist countries, it was no surprise that centralized control had to be established.[348] The question of ordinary judges, however, remained.

Inherited judges were not an obstacle to the establishment of a new democratic regime merely because they sat on the bench throughout the authoritarian rule. Instead, their active involvement in obtaining and strengthening authoritarian rule through their judicial ideology would jeopardize the rule of law after the transition.[349]

The practical dimension refers to two strains of considerations: 1) in the case of non-dismissal, the capacity and willingness of the inherited judges to get integrated into the post-transition reality; 2) in the case of dismissal, the state's capacity to promptly integrate new personnel into the legal system. An illustrative example of the latter problem was provided in Germany following the Reunification Treaty of October 3, 1990. The reunified government implemented thorough judicial screening and retraining programs for GDR judges, as dismissing

[345] On the new form of constitutional justice, see Mauro Cappelletti, 'Repudiating Montesquieu?' (1980) 35 *Catholic University Law Review* 1.
[346] Nuno M. Garoupa & Maria A. Maldonado-Adrian, The Judiciary in Political Transitions: The Critical Role of U.S. Constitutionalism in Latin America, 606.
[347] Wojciech Sadurski, *Rights Before Courts* (Springer Netherlands 2014).
[348] András Sajó, 'Reading the Invisible Constitution: Judicial Review in Hungary' (1995) 15 *Oxford Journal of Legal Studies* 253, 254.
[349] As Hans Peter Graver pointed out: "In a situation where the regime actively attacks the rule of law and established legal principles, omission of defence by the courts, who are the very guardians of these values, amounts to positive support of the policies of the regime." Hans Petter Graver, 'Judicial Acceptance of Oppression' in *Judges Against Justice* (Springer, Berlin and Heidelberg 2015) 54.

them all was deemed an impractical solution.[350] Many GDR judges were forced into early retirement; at the same time, the rest had to promptly learn a whole new set of laws, which created "widespread suspicions about the quality of justice among citizens."[351] Meanwhile, in post-1989 Russia, "a new political class has arisen to compete with the old *nomenklatura*," but no official dismissal of judges or other public officials occurred.[352]

Hence, the principle of judicial irremovability presents a problem in transitional regime settings – due to the principle of irremovability, judges may not be dismissed as other members of the public sector; additionally, selective removal may undermine the judicial independence and adherence to the rule of law that the new regime aims to establish.[353] That is a *prospective RoL tension* within the transitions.

However, we may also notice a *retrospective RoL tension*; as David Dyzenhaus noted, "there is the rule of law issue about whether, from the perspective of the present, one can legitimately prosecute acts which were legal or arguably legal under the law of the old regime."[354] A similar issue arises in considering the inherited judges – whether they may be dismissed in the new democratic order outside the boundaries of the law if their appointment was

[350] Daniel Meador, 'Transition in the German Legal Order: East Back to West, 1990–91' (1992) 15 *Boston College International and Comparative Law Review* 283, 295.
[351] "The training of new judges has created widespread suspicions about the quality of justice. In the new states, it is reported that many people do not want their cases heard by a judge who served in the GDR, because the holdover judiciary is viewed as biased and incompetent. Sending judges to the new states has also created a shortage of personnel in the old territory of the Federal Republic." Thomas R Rochon, 'The Wall Within: Germans Cope With Unification' in Gaines Post Jr (ed), *German Unification: Problems and Prospects* (The Keck Center for International and Strategic Studies, Claremont CA 1992) 40.
[352] John Borneman, *Settling Accounts: Violence, Justice, and Accountability in Postsocialist Europe* (Princeton University Press 1997) 9.
[353] Frank Haldemann and Thomas Unger (eds), *The United Nations Principles to Combat Impunity: A Commentary* (Oxford University Press 2018) 325.
[354] David Dyzenhaus, 'Judicial Independence, Transitional Justice and the Rule of Law' (2003) 10 *Otago Law Review* 345, 346.

considered legal under the previous regime. If the judicial tenure of the judges of the prior regime is preserved, two considerations must be addressed.

The first is a *prudent consideration* of whether the judges will hinder the proper functioning of the new government; the second involves moral and legitimacy considerations, which depend on the extent to which the judiciary was active in upholding and enforcing the atrocities of the previous regime. Suppose the judiciary of the last regime remains on the bench. In that case, the inherent danger is that their judicial ideology and ties to the earlier elite will hinder adherence to the rule of law in the newly established democracy. An illustrative example of this dilemma was evident in the case of post-World War II Germany.

In Germany, the issue of judges from the previous regime first arose in the context of denazification after World War II and later, following reunification, amid the fall of the Berlin Wall. Nazi judges disregarded the rule of law requirements or curtailed the interpretation to the regime's needs, for example, by extending the scope of criminal offenses or ignoring the requirements of legal certainty through speedy trials, disproportionate sentences, and violations of non bis in idem rule.[355] This was a practice that the Nazi judges embraced pridefully not only in Germany but also in the occupied territories.[356] Hans Peter Graver offered a thorough analysis of cases in which the German judges did not comply with the Nazi regime.[357] However, as the

[355] Ingo Müller, *Hitler's Justice: The Courts of the Third Reich* (Harvard University Press, Cambridge 1991) 157.
[356] Ingo Müller, *Hitler's Justice: The Courts of the Third Reich*, 160. However, there were judges in the occupied territories, namely Belgium and the Netherlands, which were punished for their resistance to comply with the regime. See Derk Venema, 'The Judge, the Occupier, his Laws, and their Validity: Judicial Review by the Supreme Courts of Occupied Belgium, Norway, and the Netherlands 1940–1945 in the Context of their Professional Conduct and the Consequences for their Public Image' in Maarten de Koster and Dirk Heirbaut (eds), *Justice in Wartime and Revolutions: Europe 1795–1950* (2012) 203, 209, 213.
[357] Hans Petter Graver, 'Why Adolf Hitler Spared the Judges: Judicial Opposition Against the Nazi State' (2018) 19 *German Law Journal* 845.

author notes, previous theoretical attempts to reveal the judicial resistance to the Nazi regime have been in academic discourse dismissed as apologetic.[358]

The judges were not the only representatives of the legal profession contributing to the perversion of the legal system. Legal theorists of National Socialism also significantly contributed to the cause, theoretically entrenching the view that "the moral sense of the people's community should form the new foundations of law."[359] According to the SS jurist Reinhard Höhn, "the community under the new German concept of law is not only a social fact but also a legal principle."[360] The emphasis on the changed understanding of the law under the NS regime is crucial for understanding the Nazi judges' responsibility considerations.

The consequences of misusing the 19th-century concept of Rechtsstaat through the judicial ideology developed during the Third Reich were remediated post-war through the insistence on a material understanding of Rechtsstaat and the elevation of the Federal Constitutional Court to the "Guardian of the Constitution."[361]

However, the Federal Republic of Germany's post-war legal system had to be cleansed from the pervasiveness of the Nazi judicial ideology. In 1946, a prominent legal theorist, Gustav Radbruch, put forward the so-called *Radbruch formula* in the influential paper "Statutory

[358] Hans Petter Graver, 'Why Adolf Hitler Spared the Judges: Judicial Opposition Against the Nazi State', 847.
[359] Hildegard Pauer-Studer, 'The Moralization of Law in National Socialism' in *Justifying Injustice: Legal Theory in Nazi Germany* (Cambridge University Press 2020) 205.
[360] Reinhard Höhn, 'Volk, Staat und Recht' in Reinhard Höhn, Theodor Maunz and Ernst Swoboda (eds), *Grundfragen der Rechtsauffassung* (Duncker & Humblot, München 1938) 9.
[361] Gustavo Gozzi, 'Rechtsstaat and Individual Rights in German Constitutional History' in Pietro Costa and Danilo Zolo (eds), *The Rule of Law: History, Theory and Criticism* (Springer, Dordrecht 2007) 251.

Lawlessness and Supra-Statutory Law,"[362] which proved helpful in that regard, as it shaped both the legal theory and German case law in the coming years.[363]

The formula, built upon the analysis of the so-called "grudge-informer" cases,[364] was an effort to revisit the author's previous position laid out in *Rechtsphilosophie*[365] and the 1937 article 'Der Zweck des Rechts' (The Aim of Law).[366] Although Radbruch's formula has been a focal point of legal philosophy on the question of what law is as a concept, this chapter addresses it from a particular and rather practical angle: how it defined the role and responsibility of Nazi judges.

According to Radbruch's pre-war views, three elements constitute the idea of law: justice (understood as formal equality), purposiveness, and legal certainty.[367] While these may, in practice, be in friction, Radbruch perceived legal certainty as the one that should prevail in statutory interpretation by judges, even in the case of *false laws*.[368] The 1946 paper revoked the absolute priority of legal certainty in this triad.

The formula consists of two elements – intolerability and disavowal.[369] The first part proposes a threshold at which the law becomes so intolerable that justice must prevail over legal certainty in judicial decision-making.[370] The second part, however, goes further:

[362] Gustav Radbruch, 'Statutory Lawlessness and Supra-Statutory Law (1946)' (2006) 26 *Oxford Journal of Legal Studies* 1.
[363] Robert Alexy provided an incisive interpretation. Robert Alexy, 'A Defence of Radbruch's Formula' in David Dyzenhaus (ed), *Recrafting the Rule of Law: The Limits of Legal Order* (Hart 1999) 15.
[364] Lon L Fuller, 'The Problem of the Grudge Informer' in *The Morality of Law* (Yale University Press 1969) 245.
[365] Gustav Radbruch, *Rechtsphilosophie*, Studienausgabe, 2nd revised edn (Müller, Heidelberg 2003).
[366] Gustav Radbruch, 'Der Zweck des Rechts' (1937/38) in Arthur Kaufmann (ed), *Gustav Radbruch Gesamtausgabe*, vol 3 (C F Müller, Heidelberg 1990) 39.
[367] Gustav Radbruch, *Legal Philosophy*, translated by Bonnie Litschewski Paulson and Stanley L. Paulson (Oxford University Press 2008).
[368] Robert Alexy, 'Gustav Radbruch's Concept of Law' in *Law's Ideal Dimension* (Oxford University Press 2021).
[369] Rober Alexy, 'Gustav Radbruch's Concept of Law', 115.

"Where there is not even an attempt at justice, where equality, the core of justice, is deliberately betrayed in the issuance of positive law, then the statute is not merely 'false law' ("unrichtiges Recht"), it lacks completely the very nature of law."[371]

Devoiding statutes of their legal nature due to their intolerable injustice greatly impacted the post-war understanding of the legal system and judges as its interpreters.

Gesetzliches Unrecht und übergesetzliches Recht paper influenced the post-war German adjudication, which aimed to de-nazify the legal system.[372] The post-war German courts used the Radbruch formula to declare the Nazi laws null and void as they surpassed the intolerability threshold.[373] Later, Radbruch was invoked again before the courts assessing the validity of the East German Border Law, which effectively had allowed the GDR guards to shoot at the Berlin Wall fugitives.[374]

Radbruch's revised views also shaped the author's position on the responsibility of judges. Through the "positivism thesis,"[375] the author argued that "positivism, with its credo a law is a law,' has in fact rendered the German legal profession defenseless against laws of arbitrary and criminal content."[376] The literature refers to this view as "the exoneration thesis," which several legal thinkers found controversial as it served to excuse "the entire legal

[370] "The conflict between justice and legal certainty may well be resolved in this way: The positive law, secured by legislation and power, takes precedence even when its content is unjust and fails to benefit the people, unless the conflict between statute and justice reaches such an intolerable degree that the statute, as 'flawed law', must yield to justice." Gustav Radbruch, 'Statutory Lawlessness and Supra-Statutory Law (1946)' (Bonnie Litschewski Paulson and Stanley L Paulson trs, 2006) 26 *Oxford Journal of Legal Studies* 1, 7.
[371] Gustav Radbruch, "Gesetzliches Unrecht und übergesetzliches Recht", 119.
[372] Stanley L Paulson, 'On the Background and Significance of Gustav Radbruch's Post-War Papers' (2006) 26 *Oxford Journal of Legal Studies* 17, 18.
[373] Ibid 27.
[374] See Julian Rivers, 'Interpretation and Invalidity of Unjust Laws' in David Dyzenhaus (ed), *Recrafting the Rule of Law: The Limits of Legal Order* (Hart 1999) 40.
[375] Hans Petter Graver, 'The Positivism Thesis' in *Judges Against Justice* (Springer, Berlin and Heidelberg 2015).
[376] Radbruch 1946, 107.

community, even the entire population."[377] The positivist thesis resonated with many prominent legal thinkers, e.g., Karl Loewenstein.[378] Furthermore, Frank Haldemann wrote that the exoneration thesis entails "the claim that legal positivism, in virtue of ostensibly binding the judges in Nazi courts, might serve to exonerate them"; even if one rejected the exoneration thesis, "the judges could invoke the state of necessity by pointing out that they would have risked their own lives had they refused to apply Nazi law."[379]

While the theoretical debate on a judge's responsibility in a dictatorial regime is intriguing, this chapter is concerned with how it reflected on the post-war judicial tenure. The Nazi judges, in large part, stayed on the bench.

According to many commentators, the denazification process of judges largely failed, as the newly established Republic of Germany initiated almost no sanctions against its nazi-regime judges.[380] Teitel noted that the sanctions were light; only a few judges of the lowest ranks were temporarily dismissed, and "long after the denazification, many of the collaborationist elite still held on to jobs they had under the Nazi regime; even institutions like the judiciary remained dominated by former Nazis…Nazi Party membership was so pervasive that continuing denazification would have meant eliminating many sitting judges".[381] Neil Kritz revealed the

[377] Stanley L Paulson, 'Lon L Fuller, Gustav Radbruch, and the "Positivist" Theses' (1994) 13 *Law and Philosophy* 313; See also Thomas Mertens, 'Nazism, Legal Positivism and Radbruch's Thesis on Statutory Injustice' (2003) 14 *Law and Critique* 277.
[378] Karl Loewenstein, 'Reconstruction of the Administration of Justice in the American Occupied Germany' (1948) 61 *Harvard Law Review* 419, 432.
[379] Frank Haldemann, 'Gustav Radbruch vs Hans Kelsen: A Debate on Nazi Law' (2005) 18 *Ratio Juris* 162, 172 fn 13.
[380] Suzannah Linton, 'The Role of Judges in Dealing with the Legacies of the Past' (2009) 9 *The Global Community: Yearbook of International Law and Jurisprudence* 45.
[381] Ruti Teitel, *Transitional Justice* (Oxford University Press 2000) 159. According to Rosenberg, in 1970, almost half of the country's bench (around 7500 judges) consisted of Third Reich holdovers. Tina Rosenberg, *The Haunted Land: Facing Europe's Ghosts After Communism* (Random House 1995) 313.

paradox in that when the victims of the Nazi Regime filed claims for damages post-war, at times, their cases were dealt with by the same judges that had sentenced them or their relatives.[382]

Dyzenhaus explored the role of the judges in upholding the state repression and the policies of racial segregation during apartheid South Africa.[383] As the author claimed elsewhere, "from early on in the apartheid era, the National Party government packed the bench either with political appointments or with lawyers who had no history of opposition to apartheid."[384] Similar considerations emerged in Italy after World War II, as well as in Portugal, Spain, and Greece at the end of their authoritarian regimes in the 1970s, in Latin American countries following their military rule, and in the post-communist countries of Central and Eastern Europe after the fall of communism.[385]

Several approaches have emerged in the practice of countries in transition regarding the judiciary of the previous regime. The solution not to address the judicial involvement in the regime repression by the TJ measure of dismissals was characteristic of post-Franco Spain,[386] even though the ordinary judiciary collaborated and supported Franco's regime by applying Francoist ideology in its sentences. At the same time, the special tribunals handled political trials.[387] Paloma Aguilar explained the Spanish case by putting forward the thesis that "the more direct the involvement of the judiciary in authoritarian repression, the less likely is the

[382] Neil J Kritz (ed), 'The Dilemmas of Transitional Justice' in *Transitional Justice: How Emerging Democracies Reckon with Former Regimes, vol I: General Considerations* (United States Institute of Peace 1995) 38.
[383] David Dyzenhaus, *Hard Cases in Wicked Legal Systems: Pathologies of Legality* (2nd edn, Oxford University Press 2010).
[384] David Dyzenhaus, *Judging the Judges, Judging Ourselves: Truth, Reconciliation and the Apartheid Legal Order* (Hart Publishing 1998) 38.
[385] Nuno Garoupa & Maria A. Maldonado, The Judiciary in Political Transitions: The Critical Role of U.S. Constitutionalism in Latin America, 599.
[386] Paloma Aguilar, 'Judiciary Involvement in Authoritarian Repression and Transitional Justice: The Spanish Case in Comparative Perspective' (2013) 7 *International Journal of Transitional Justice* 245, 252.
[387] For the detailed account on the application of Francoist ideology in judicial sentencing, see Francisco Bastida, *Jueces y franquismo: El pensamiento político del Tribunal Supremo en la Dictadura* (Ariel 1986).

establishment of judicial accountability or truth measures during the democratization period."[388] Similar considerations have been present in the case of post-apartheid South Africa, where the official stance was against the dismissal of judges. Due to the sensitive nature of political negotiations of transition, but also for practical reasons, the country "could not afford to dismiss large numbers of its professionals until a new generation of qualified professionals became available."[389] However, according to Jonathan Klaaren, the absence of official vetting in the public sector, including judges, was replaced by more subtle measures of rationalizing the public sector and affirmative action in new appointments.[390]

Finally, the transitional justice framework provided a toolkit for active engagement with inherited judges from post-communist and post-conflict regimes through lustration and vetting procedures. An analysis of various legal approaches to addressing inherited judges within the TJ framework sheds light on the contentious aspects of the judiciary's position during transition, as well as the inherent tension between transitional justice and the rule of law.

2. Transitional Justice Lessons on Inherited Judges

The transitional justice paradigm has been the focal point for the debate on inherited judges in transitional contexts. An overview of the transitional justice discourse illustrates the historical development of dismissing the previous regime's judges to establish a new regime based on democratic values. Before discussing how the transitional regimes of the 20th century

[388] Paloma Aguilar, Judiciary Involvement in Authoritarian Repression and Transitional Justice: The Spanish Case in Comparative Perspective, 246.
[389] Maryam Kamali, 'Accountability for Human Rights Violations: A Comparison of Transitional Justice in East Germany and South Africa' (2001) 40 *Columbia Journal of Transnational Law* 89, 136.
[390] Jonathan Klaaren, 'Institutional Transformation and the Choice Against Vetting in South Africa's Transition' in Alexander Mayer-Rieckh and Pablo de Greiff (eds), *Justice as Prevention: Vetting Public Employees in Transitional Societies* (Social Science Research Council 2007) 152.

addressed inherited judges, a brief overview of the transitional justice framework and the role of the rule of law in times of transition will be provided.

Ruti Teitel defines transitional justice as a "conception of justice associated with a period of political change, characterized by legal responses to confront the wrongdoings of repressive predecessor regimes."[391] Jon Elster offers a narrower definition of TJ as „the legal and administrative process carried out after a political transition to address the wrongdoings of the previous regime."[392] Arthur traces the emergence of transitional justice as a distinct field in the late 1980s, when authoritarian regimes in Latin America began to crumble. Still, the discussion of the matter peaked during the late 1990s and 2000s in the context of the consolidation process of Third Wave Democracies.[393] According to Teitel's genealogy of transitional justice, we can distinguish three phases in the development of the concept.[394] Even though the concept's origins can be traced back to World War I[395], Teitel places the first phase after World War II, when transitional justice became recognized as a triumph of international law, symbolized by the Nuremberg trials.[396] The second phase is the period of Third Wave democratization, which transitional justice primarily addresses. Finally, the third "steady-state phase" is the contemporary one, where "transitional justice moves from the exception to the norm to become a paradigm of the rule of law."[397] Teitel's claim that transitional justice constitutes a new rule of

[391] Ruti G Teitel, 'Transitional Justice Genealogy' in Ruth Jamieson (ed), *The Criminology of War* (Routledge 2014).
[392] Jon Elster, 'Memory and Transitional Justice' ("Memory of War" Workshop, MIT, January 2003) http://web.mit.edu/rpeters/papers/elster_memory.pdf accessed January 21, 2023.
[393] Cheryl Lawther, Luke Moffett and Dov Jacobs, 'Introduction' in Cheryl Lawther, Luke Moffett and Dov Jacobs (eds), *Research Handbook on Transitional Justice* (Edward Elgar Publishing 2017).
[394] Ruti G Teitel, 'Transitional Justice Genealogy' (2003) 16 *Harvard Human Rights Journal* 69, 70.
[395] The author refers here to the trials to Charles I and Louis XVI, see Michael Walzer, 'Regicide and Revolution' (1973) 40 *Social Research* 617.
[396] Teitel, 'Transitional Justice Genealogy', 72.
[397] Teitel, 'Transitional Justice Genealogy', 71.

law paradigm should be examined in light of Wojciech Sadurski's assertion that there are inherent tensions between transitional constitutionalism and the rule of law.[398]

According to Teitel's classical work, *Transitional Justice, the function of law in a country's* transition is crucial.

The author states, "while the rule of law ordinarily implies prospectivity in the law, transitional law is both settled and unsettled; it is both backward- and forward-looking, as it disclaims past illiberal values and reclaims liberal norms."[399] The emphasis on the transformative and extraordinary character of the rule of law in times of transition has been challenged in the literature, although from different angles, by authors such as David Dyzenhaus, Eric Posner, and Adrian Vermeule.[400] Nevertheless, the extraordinary nature of transitions defined how the lustration and vetting procedures in the post-communist setting would be carried out. The political exigency replaced strict compliance with legal principles and procedural safeguards as a first step towards cleansing the public sector and achieving democratic governance.

The TJ relies on the mechanisms and interventions "premised on a notion of a special 'window of opportunity,' a period of rupture in which some kind of extraordinary justice might be carried out."[401] The extraordinary circumstances of a sensitive political transition were

[398] Wojciech Sadurski, 'Transitional Constitutionalism Versus the Rule of Law?' (2016) 8 *Hague Journal on the Rule of Law* 337.
[399] Ruti G Teitel, *Transitional Justice* (Oxford University Press 2000). As Teitel well stated: "Law is caught between the past and the future, between backward-looking and forward-looking, between retrospective and prospective, between the individual and the collective. Accordingly, transitional justice is that justice associated with this context and political circumstances. Transitions imply paradigm shifts in the conception of justice; thus, law's function is deeply and inherently paradoxical. In its ordinary social function, law provides order and stability, but in extraordinary periods of political upheaval, the law maintains order even as it enables transformation. Accordingly, in transition, the ordinary intuitions and predicates about law simply do not apply. In dynamic periods of political flux, legal responses generate a sui generis paradigm of transformative law". 6-8.
[400] David Dyzenhaus, 'Judicial Independence, Transitional Justice and the Rule of Law' (2003) 10 *Otago Law Review* 345, 346; For the opposite view, see Eric A Posner and Adrian Vermeule, 'Transitional Justice as Ordinary Justice' (2004) 117 *Harvard Law Review* 761.
[401] Dustin Sharp, 'Building a Better Foundation' in *Rethinking Transitional Justice for the Twenty-First Century: Beyond the End of History* (Cambridge University Press 2018) 93.

underlying justifications for the restructuring of the state through various procedures, such as lustration, de-communization, and vetting. These procedures also apply to the judicial sector. The terms "screening," "vetting," "administrative justice," and "purging" have often been conflated and used interchangeably in the literature.[402] Unpacking these terms reveals the rationale behind the legal response to restructuring the public sector in the transition, including the judiciary.

Drawing clear theoretical distinctions among these concepts may illuminate the purpose and consequences of this type of interference with the judicial organization in each case and context. According to Horne, "sometimes there is a normative connotation embedded in the choice of a definition or word, in the way that architects of lustration framed the screening practices as bound by the rule of law to differentiate them from the extralegal purges prevalent under communism."[403]

The post-1945 period marks a crucial starting point for understanding lustration as a primary tool of transitional justice. According to Maria Loś, lustration stands for "the screening (or vetting) of candidates for and holders of important public offices to 'eliminate' (usually bar for a certain period) former secret police collaborators.[404] Although lustration as a practice is inseparable from decommunization, according to Los, these processes share the same exclusionary principle but target different subjects.[405] Lustration as legal practice predates

[402] Alexander Mayer-Rieckh and Pablo de Greiff (eds), *Justice as Prevention: Vetting Public Employees in Transitional Societies* (Social Science Research Council 2008) 16.
[403] Cynthia M Horne, 'Transitional Justice: Vetting and Lustration' in Cheryl Lawther, Luke Moffett and Dov Jacobs (eds), *Research Handbook on Transitional Justice* (Edward Elgar Publishing 2017) 438. Also Natalia Letki, 'Lustration and Democratisation in East-Central Europe' (2002) 54(4) *Europe-Asia Studies* 529–552.
[404] The standard reference in theorizing the lustration processes is the Law&Social Enquiry's 1995's volume which discussed the phenomenon in light of the decommunization process of the post-communist emerging democracies. Maria Loś, 'Lustration and Truth Claims: Unfinished Revolutions in Central Europe' (1995) 20 *Law & Social Inquiry* 117, 121.
[405] Ibid.

decommunization and can be found in Germany after 1945 and again in 1989.[406] The term used in Germany for these procedures is *Vergangenheitsbewältigung* (coming to terms with the past). According to Karstedt, it presupposes the "moral dimension of dealing with the past, as well as the process of the general public's reorientation and reevaluation of the past." Still, importantly, they refer to "processes based on the law that include specific types of legal procedures and are not mere political purges."[407]

The lustration procedure is commonly associated with the context of post-communist countries, which formally departed from their communist past, starting with Czechoslovakia and Lithuania in 1991, followed by Bulgaria, Hungary, Albania, and Poland.[408] However, lustration is not necessarily tied to a communist past. The Encyclopedia of Transitional Justice defines lustrations as a form of vetting that "describes the broad set of parliamentary laws that restrict members and collaborators of former repressive regimes from holding a range of public offices, state management positions, or other jobs with strong public influence (such as in the media or academia) after the collapse of the authoritarian regime."[409]

"Lustration" applies to the screening of persons seeking to occupy (or occupying) certain public positions for evidence of involvement with the communist regime (mainly with the secret security apparatus). At the same time, "decommunization" refers to the exclusion of specific categories of former Communist officials from the right to run for, and occupy, certain public

[406] Susanne Karstedt, 'Coming to Terms with the Past in Germany after 1945 and 1989: Public Judgments on Procedures and Justice' (1998) 20 *Law & Policy* 15.
[407] Ibid.
[408] Neil J Kritz (ed), *Transitional Justice: How Emerging Democracies Reckon with Former Regimes*, 3 vols (US Institute of Peace 1995).
[409] According to Roman David, "lustration law is a special public employment law that regulates process of examining whether a person holding certain higher publications worked or collaborated with the repressive apparatus of the communist regime. The law defines who can/must be subjected to the examination, who is in charge of the examination, how the lustration procedure and the consequences of an eventual positive lustration. A finding of positive lustration means the examination uncovers evidence that a person worked for the repressive apparatus of the previous regime" Roman David, 'Lustration Laws in Action: The Motives and Evaluation of Lustration Policy in the Czech Republic and Poland (1989–2001)' (2003) 28 *Law & Social Inquiry* 387, 388.

positions in the new system. However, in the public debate on the moral and legal rationales for and against the policies encompassed by these concepts, the two have often been conflated.[410] Czarnota additionally emphasizes the difference between these two concepts and vetting. Lustration does have some elements of vetting. However, it goes further, as it is connected with the process of decommunization which means a conscious attempt at removal of the remnants of communism from the public life of the societies and states embarked on the process of democratization and creation of a law-governed state."[411] Emphasizing that changing the formal legal framework is much easier than changing the people, Czarnota further claimed that "the lustration procedure focuses on eliminating some groups of people who potentially could harm the new democracy and the rule of law"[412] This resonates with the previously discussed Teitel's position on the importance of legal procedures in the transitional justice.

The emphasis of the lustration and vetting procedures in the post-communist setting was on the moral cleansing of the public sector, including the judges. The ethical nature of the screening process of judges was emphasized in the second wave of judicial dismissals in Germany following the Reunification Treaty of October 3, 1990.

The criteria for screening were broadly defined, but it focused on two main aspects: 1) whether and to what extent the judge was engaged with the Stasi; 2) the judge's prior involvement in GDR criminal cases. The first criterion was to be expected as it was justified by the necessity for the judge to be fit for integration into a new democratic system. The second criterion, however, deserves closer attention – "If the facts show that a judge gave harsh sentences in what are considered to have been political cases, such a judge is likely to be

[410] Wojciech Sadurski, *Rights Before Courts: A Study of Constitutional Courts in Postcommunist States of Central and Eastern Europe* (Springer 2005) 245.
[411] Adam Czarnota, 'Lustration, Decommunisation and the Rule of Law' (2009) 1 *Hague Journal on the Rule of Law* 307, 311.
[412] Adam Czarnota, 'Lustration, Decommunisation and the Rule of Law' (2009), 330.

disqualified. Also likely to be disqualifying is evidence that a judge acted overzealously and with undue severity, going beyond the demands of the law."[413] The illustrative example for this would be the criminal trial for the "abuse of law" of a lay judge who in 1950 tried almost 4000 alleged Nazis largely disregarding the due process and sentenced 34 of them to death – the process known as "Waldheim process."[414]

These two criteria demonstrate the inherent political and moral nature of the screening procedures. The aims of the screening were not only limited to questions about whether the judge would be bound by the values and principles within the scope of Rechtsstaat in their future work, but also to decide cases according to Western Germany's legal tradition. The significant element to be explored was whether the judge, in their previous judicial capacity, contributed to the establishment and preservation of the communist regime. However, as Wilke noted, "vetting was initially demanded by East Germans on quasi-retributive grounds, but was codified and implemented with a utilitarian and prospective concern about the establishment of a loyal and credible civil service."[415] Hence, the legal procedures did not formally refer to cleansing as a response to past wrongdoing, but rather as a verification of suitability for holding a public office, which caused societal dissatisfaction with the entire process. The political and moral implications behind the lustration procedures, in general, and the vetting of the judiciary in particular, were present in other countries that sought to break the ties with their communist past.

[413] Ibid.
[414] Erhard Blankenburg, 'The Purge of Lawyers after the Breakdown of the East German Communist Regime' (1995) 20(1) *Law & Social Inquiry* 223, 230.
[415] Christiane Wilke, 'The Shield, the Sword, and the Party: Vetting the East German Public Sector' in Alexander Mayer-Rieckh and Pablo de Greiff (eds), *Justice as Prevention: Vetting Public Employees in Transitional Societies* (Social Science Research Council 2007) 349.

Alongside Germany, the Czechoslovakian example has been seen in literature as perhaps the most radical one in terms of the post-communist lustration procedures.[416]

Chapter IV of this thesis will demonstrate that the practices of dismissing judges in post-authoritarian and post-conflict settings varied significantly, but there was no uniform approach to this issue in international standards either.

International authoritative standards on judicial independence do not specifically address either the aims or challenges of judicial dismissals at times of transition per se. Until now, these procedures have been scarcely assessed through the prism of the general theory of judicial independence, as they have been immersed in the more holistic transitional justice framework. International standards are also not particularly helpful in this regard.

The Council of Europe's framework for assessing transitional justice measures in European post-communist countries has established necessary standards for lustration procedures, albeit to a lesser extent through the PACE Resolution 1096 (1996) and its explanatory memorandum, and more thoroughly through the jurisprudence of the European Court of Human Rights. Although the standards under the CoE provide general guidelines on restructuring institutions during the transitional period, they do not specifically regulate the vetting of judges as a distinct branch of the public sector. In that sense, more thorough are the Operational Guidelines of the International Center for Transitional Justice (ICTJ) "Vetting Public Employees in Post-Conflict Settings – Operational Guidelines," produced in collaboration with the UNDP of 2006 and the same year's report of the United Nations High Commissioner for

[416] Natalia Letki, 'Lustration and Democratisation in East-Central Europe' (2002) 54(4) *Europe-Asia Studies* 529, 539. Kieran Williams, Brigid Fowler and Aleks Szczerbiak, 'Explaining Lustration in Central Europe: A "Post-Communist Politics" Approach' (2005) 12(1) *Democratization* 22, 25.

Human Rights "Rule of Law Tools for Post-Conflict States – Vetting: An operational Framework."[417]

The European Court of Human Rights addressed the consequences of German lustration procedures following reunification, even before the PACE Resolution in *Vogt v. Germany*.[418] The decision, however, did not refer to the term "lustration" at all, but it became a point of reference for the subsequent jurisprudence on lustration procedures of Eastern European countries.[419] Only a year later, the PACE resolution 1096 was adopted, which envisioned that the process of "dismantling the heritage of former communist totalitarian regimes" should be guided by these main principles: 1) demilitarization; 2) decentralization; 3) de-monopolization; 4) debureaucratisation.[420]

In addition to these principles, which pertain to state reform, the Resolution also provides guidelines for determining individual accountability for contributions to the past regime. Besides the criminal prosecution of crimes committed under the totalitarian regime, the Resolution also envisions "administrative" measures, such as lustration and decommunization laws, for the persons "who did not commit any crimes that can be prosecuted […], but who nevertheless held high positions in the former totalitarian communist regimes and supported them".[421] According to PACE, the specific aim of these measures was to "exclude persons from exercising governmental power if they cannot be trusted to exercise it in compliance with democratic

[417] International Center for Transitional Justice and United Nations Development Programme, *Vetting Public Employees in Post-Conflict Settings: Operational Guidelines* (Bureau for Crisis Prevention and Recovery 2006) ("Vetting Operational Guidelines").
[418] *Vogt v Germany* (1996) 21 EHRR 205.
[419] James A Sweeney, *The European Court of Human Rights in the Post-Cold War Era: Universality in Transition* (1st edn, Routledge 2012) 129.
[420] PACE Resolution para. 5.
[421] PACE Resolution para. 11.

principles, as they have shown no commitment to or belief in them in the past and have no interest or motivation to make the transition to them now."[422]

By emphasizing the exclusionary purpose of the transitional administrative measures, the PACE affirmed their inherent moral and political nature. The concept of a public employee being "fit for office" entails having the professional capacity and adhering to the political beliefs that uphold the democratic system. Further, the Resolution emphasizes that these measures may be deemed to be adhering to the rule of law if the following conditions are fulfilled:

Firstly, individual guilt must be proven in each case; this rule emphasizes the need to depart from the assumption of collective guilt. Secondly, the guarantees of a fair trial must be present - the right to defense, the presumption of innocence until proven guilty, and the right to appeal to a court of law.

The Resolution rejects the vindictive and political or social misuse of the lustration process, as lustration aims to "protect the newly emerged democracy."[423]

By setting these criteria, the Assembly aimed to highlight the pragmatic nature of the lustration procedures, whose primary purpose is to enable a smooth transition, rather than to address past wrongdoings. This rationale reappears in the context of institutional reforms as a necessity of transitional justice, including the vetting of the judiciary. The Guidelines supporting the Resolution, contained within the Explanatory Memorandum, discuss in detail the requirements to be considered within the lustration procedures.

The ECtHR's jurisprudence on lustration in post-communist European countries broadly reflects the Resolution. The claims brought before the Court were mainly argued under Article

[422] Ibid.
[423] PACE Resolution para. 12.

14 in conjunction with Article 8 and under Article 6 (on procedural grounds).[424] In *Matyjek v Poland*, *the ECtHR applied the criminal limb of Article 6 (referring to the tests set out in the well-known case Engel and Others v Netherlands*) and equated lustration to criminal trials in terms of procedural safeguards.[425]

The requirement of the same procedural safeguards under the criminal limb of Article 6 (which imposes a significant burden on countries seeking lustration) does not entail that the Court equates the process of lustration itself with the criminal trial. The ECtHR addressed transitional justice measures generally (e.g., compensation, restitution, memory, and truth) and lustration specifically in hundreds of judgments.[426]The specific nature of the lustration was illustrated in conditions necessary for it to be compatible with the Convention, which the Court laid out in judgments such as *Adamsons v. Latvia*, *Bobek v. Poland*[427] , and *Turek v. Slovakia*.[428] According to this judgment, there are several necessary conditions for the lustration process to be compatible with the Convention:

Firstly, a lustration law must be accessible and predictable, as required by the principle of legality. Secondly, punishment cannot be its sole purpose; thirdly, the procedure must be precise enough to address individual (rather than collective) responsibility and must be followed by sufficient procedural safeguards.[429] Finally, in *Adamsons v. Latvia*, the Court held (notwithstanding its reasoning in the previous jurisprudence) that "the national authorities must

[424] See James A Sweeney, *The European Court of Human Rights in the Post-Cold War Era: Universality in Transition*, 133-139.
[425] James A Sweeney, *The European Court of Human Rights in the Post-Cold War Era: Universality in Transition*, 141.
[426] For a comprehensive analysis of the ECtHR's jurisprudence on transitional justice, see Eva Brems, 'Transitional Justice in the Case Law of the European Court of Human Rights' (2011) 5(2) *International Journal of Transitional Justice* 282; also Cynthia Horne, 'International Legal Rulings on Lustration Policies in Central and Eastern Europe: Rule of Law in Historical Context' (2009) 34(3) *Law & Social Inquiry* 713.
[427] *Adamsons v Latvia* App no 3669/03 (ECtHR, 24 June 2008).
[428] *Bobek v Poland* App no 68761/01 (ECtHR, 17 July 2007); *Turek v Slovakia* App no 57986/00 (ECtHR, 14 February 2006) [115].
[429] *Adamsons v Latvia* para. 116.

bear in mind that, since lustration measures are, by their nature, temporary, the objective need for a restriction of individual rights resulting from such a procedure decreases over time."[430]

This brief overview of the Council of Europe's framework on transitional justice measures highlights the primary rationales that have emerged in various post-communist settings.

The often-cited documents on vetting as a transitional justice tool that served to dismiss the inherited judges are the Operational Guidelines of the International Center for Transitional Justice (ICTJ), "Vetting Public Employees in Post-Conflict Settings – Operational Guidelines," produced in collaboration with the UNDP in 2006. The same year's report of the United Nations High Commissioner for Human Rights, 'Rule of Law Tools for Post-Conflict States – Vetting: An Operational Framework,' is equally important.

According to the ICTJ Operational Guidelines, judicial vetting "ordinarily refers to a process of assessing integrity to determine suitability for public employment."[431] In the definition of the vetting procedure, integrity refers to "an employee's adherence to international standards of human rights and professional conduct, including a person's financial propriety."[432] Although conceptually narrower than the terms of lustration and decommunization, vetting has been one of the most important but controversial tools for rebuilding the public sector in post-authoritarian and post-conflict societies. What differentiates vetting from pure purging is its institutional and individualized nature, as well as the requirement to adhere to due process guarantees. The ICTJ Operational Guidelines further emphasize that "There is no 'one-size-fits-all' response to vetting, and public consultations help in designing context-and institution-

[430] Ibid.
[431] International Center for Transitional Justice (ICTJ), *Operational Guidelines for Vetting in Transitional Societies* (2006).
[432] UN HCHR report. p.4

specific vetting strategies."[433] Nevertheless, before a country proceeds with vetting as a transitional justice mechanism, six different types of conditions need to be fulfilled:

1) political (determining whether there is a political will to pursue vetting); 2) institutional (assessing which state institutions need to be vetted); 3) individual (identifying the individuals who fall within the scope of vetting); 4) legal (specifying which actor will have the legal mandate to implement vetting; 5) operational (related to the resources needed to carry on the vetting procedure); 6) temporal (adapting the vetting process to the other transitional processes within the country, such as political one);[434] The experience of the post-communist countries shows that the transitional regimes mainly grappled with the lack of will within the society to carry on radical reform in both the institutional and political realm, which, for example, took place in post-1989 Hungary and Poland.[435]

This section outlines the main arguments and standards derived from the transitional justice paradigm for post-transition public sector reforms. However, as already argued, the mainstream TJ approaches are not sensitive to the issues of judicial independence. Thus, the following section will outline the main theoretical accounts that discuss the inherited judges' dilemma from the theory of judicial independence.

[433] International Center for Transitional Justice (ICTJ), *Operational Guidelines for Vetting in Transitional Societies* (2006), 19.
[434] International Center for Transitional Justice (ICTJ), *Operational Guidelines for Vetting in Transitional Societies* (2006), 11-14.
[435] Monika Nalepa, 'Transitional Justice and Authoritarian Backsliding' (2021) 32 *Constitutional Political Economy* 278, 279.

3. Lessons on inherited judges from the judicial independence theory

Theoretical accounts of TJ scarcely discuss the problem of inherited judges from the normative lens of judicial independence theory. As already observed, the lustration in the context of post-communist and post-conflict justice was curtailed to the specific exigencies of the time. The political considerations overshadowed the importance of judicial independence standards that we now recognize as internationally valid; however, the literature on Latin American transitions from authoritarian regimes carved out some notable exceptions. Fiss-Larkin's debate precisely addresses the problem of inherited judges from the lens of judicial independence.[436]

Owen Fiss's theory departs from his notion of judicial independence as a regime-relative concept of political insularity.[437] Fiss's stance is that there is no philosophical basis for the claim that a democratic government needs to respect the independence of justices appointed by a previous dictatorship-like regime, as long as the regime shift represents a radical break with the past.[438] Illustrating what a radical regime shift means, Fiss refers to the three instances of power transition in Latin American countries – Argentina's transition from the junta regime to democracy under the presidency of Raúl Ricardo Alfonsín in 1983 and the subsequent transition from Alfonsin's to Menem's Government, as well as Chile's shift from Pinochet's to Aylwin's presidency in 1990.[439] According to Fiss, these three instances of power shift are different in nature. They, therefore, affect the scope of the obligation of the incoming governments in respect

[436] By Fiss-Larkins debate I refer to the exchange between the authors in two articles: Owen M Fiss, 'The Limits of Judicial Independence' (1993) 25 *University of Miami Inter-American Law Review* 57, 60; Christopher M Larkins, 'Judicial Independence and Democratization: A Theoretical and Conceptual Analysis' (1996) 44 *The American Journal of Comparative Law* 605.
[437] Owen M Fiss, 'The Limits of Judicial Independence' (1993), 60.
[438] Owen M Fiss, 'The Limits of Judicial Independence' (1993), 64.
[439] Ibid, 62-67.

of the judicial independence of inherited judges. The author's main argument is that Alfonsin assumed office after the fall of the illegal, de facto regime; at the same time, Aylwin and Menem's governments represented a constitutional continuation of the previous legal administration.

Fiss argued that Alfonsin, unlike Aylwin and Menem, had no obligation to respect the independence of the Argentine Supreme Court justices appointed by the previous de facto military Government.[440] The circumstances surrounding the appointment of the Supreme Court bench in 1983 by Alfonsin may illustrate the rationale behind Fiss's theory. The previous junta government, which took power on March 24, 1976, issued the "Act Establishing the Purpose and Basic Objectives of the Process of National Reconstruction."[441] This act laid the groundwork for the country's new institutional order, aiming to "restore the true values of the Argentine nation, eradicate subversion and corruption, and promote the economic development of the state."[442] The junta issued a set of decrees removing Isabel Peron from office, dissolving Congress, and suspending the sitting Supreme Court judges, the provincial Supreme Courts, and the Attorney General.[443]

Alfonsin had the option to use formal impeachment procedures to dismiss the junta regime's justices or to employ informal dismissals, which had been common in Argentina since Peron's first presidency.[444] He preferred the latter, announcing that the judges would be

[440] Ibid, 64.
[441] Ley Nº 21.256, *Proceso de Reorganización Nacional* (Buenos Aires, 24 March 1976).
[442] Gretchen Helmke, *Courts under Constraints: Judges, Generals, and Presidents in Argentina* (Cambridge University Press 2005) 68, citing Groisman (1983).
[443] Alejandro Carrió, *La Corte Suprema y su independencia* (Abeledo Perrot 1996) 93.
[444] Rebecca Bill Chavez, 'The Evolution of Judicial Autonomy in Argentina: Establishing the Rule of Law in an Ultrapresidential System' (2004) 36 *Journal of Latin American Studies* 451, 459.

dismissed by decree, which led them to resign on their own.[445] Alfonsin's constitutional justification for pursuing this path was that the military Government was an illegal, de facto Government that held no legal authority to appoint the justices to the Supreme Court.[446] In line with that rationale, Alfonsin's administration also stroke down the laws passed under the junta regime.[447] What is particularly noteworthy is that, on the other hand, 70% of the federal justices on the lower level retained their posts, despite being required to swear allegiance before the military junta in 1976.[448] This discrepancy between Alfonsin's policy on inherited judges of the SC and the one on the judges of the lower courts makes the justification of dismissal based on unlawful appointment less compelling.

Some scholars argued that this was justified, a one-time "respond to the conditions specific to transitions and should not be expected in multilateral/divided settings in general."[449] On the other hand, Larkins believed Alfonsin should have opted for a formal path of dismissing the judges; that would end the path-dependence of informal interference with judicial tenure in Argentina. Moreover, Larkins claimed that Fiss's theory might damage the institutional continuity of the judiciary, which is perceived as essential for judicial independence.[450] Larkins' suggestion was to deal with the inherited judges on a "judge-by-judge" basis, dismissing through legal means only the ones that "demonstrate their partiality toward old methods of governance or

[445] Rebecca Bill Chavez, *The Rule of Law in Nascent Democracies: Judicial Politics in Argentina* (Stanford University Press 2004) 39.
[446] Christopher J Walker, 'Toward Democratic Consolidation: The Argentine Supreme Court, Judicial Independence, and the Rule of Law' (2006) 18 *Florida Journal of International Law* 745, 779.
[447] Rebecca Bill Chavez, *The Rule of Law in Nascent Democracies: Judicial Politics in Argentina* 49.
[448] Gretchen Helmke, *Courts under Constraints: Judges, Generals, and Presidents in Argentina* (Cambridge University Press 2005) 66, citing Smulovitz (1995) 94.
[449] Andrea Pozas-Loyo and Julio Ríos-Figueroa, 'When and Why "Law" and "Reality" Coincide? De Jure and De Facto Judicial Independence in Mexico, Argentina, and Chile' (Justice in Mexico Project of Trans-Border Institute, Working Paper Series, Issue 7, 2006) 21.
[450] Christopher M Larkins, 'Judicial Independence and Democratization: A Theoretical and Conceptual Analysis' (1996) 623.

disregard clear constitutional stipulations to thwart the process of democratization."[451] From a rule of law perspective, both approaches seem hardly attainable, as they rely solely on political considerations when assessing how the inherited judges should be approached.

Fiss also discussed the vice-versa scenario. If the dictatorship replaced democracy, it would be desirable that the previous judiciary would remain. However, *according to the author, our desire that autocrats should respect the democratically appointed judiciary stems from a* commitment to democratic values, not judicial independence.[452] This thought-provoking claim complements Burbank's theory which argues that the judicial independence principle is a "means to an end and not the end itself."[453] Burbank emphasizes that judicial independence is not a *monolith* as "the quantum and quality of independence (and accountability) enjoyed by different courts in different systems, and indeed by different courts within the same system, may not be, and perhaps should not be, the same."[454] While the paradigm Fiss proposed for the dismissal of inherited judges may have been applicable in the historical context of the clear-cut regime shifts of the past, such as the shift from a junta regime to democracy under Alfonso in Argentina in 1983, this is no longer the case.

The following section addresses the challenges that the phenomenon Thomas Carothers, 20 years ago, referred to as the "end of transition paradigm" represents for the RoL assessment of interference with judicial tenure.

[451] Ibid.
[452] Ibid.
[453] Stephen B Burbank, 'What Do We Mean by Judicial Independence?' (2003) 64 *Ohio State Law Journal* 323, 324.
[454] Stephen B Burbank, 'What Do We Mean by Judicial Independence?' (2003) 324-334. See also Stephen B Burbank, 'The Architecture of Judicial Independence' (1999) 72 *Southern California Law Review* 315.

3. Beyond Transitional Justice: New Patterns of Political Change

Ever since the Third Wave of democratization, it has become increasingly challenging to define what constitutes a regime shift from and to democracy, which would justify interference with the tenure of inherited judges. The data show that over the last two decades, democratic regression has become the rule, rather than the exception, to the point where democratic decline and restrictions on freedoms have even appeared in established democracies such as the US.[455] These regressive trends do not necessarily entail a curtailment of judicial independence. Still, they blur the criteria of the definition of a well-functioning democracy that we depart from when determining a regime shift in the context of the inherited judiciary problem.

Secondly, after the Third Wave of democratization, the democracy's outliers became much more difficult to delineate as the hybrid regimes prevailed over the straightforward authoritarian structures. As the literature has established, many hybrid, post-authoritarian regimes often mimic democratic forms. They are, therefore, pseudodemocratic as "the existence of formally democratic political institutions, such as multiparty electoral competition, masks (often, in part, to legitimate) the reality of authoritarian domination."[456] How they mimic it and how they stray from what we conceive as liberal democracy widely depends on the internal context of each regime in place. Different characterizations of these regimes emerged within the literature, which Collier and Levitsky prominently put under the umbrella of "democracy with adjectives."[457] Several lines of research have viewed these regimes as weaker forms of authoritarianism, which have been incorporated into the theories of competitive authoritarianism

[455] Larry Diamond, 'Democratic Regression in Comparative Perspective: Scope, Methods, and Causes' (2021) 28 *Democratization* 22, 29.
[456] Larry Diamond, 'Elections Without Democracy: Thinking About Hybrid Regimes' (2002) 13 *Journal of Democracy* 21, 25.
[457] David Collier and Steven Levitsky, 'Democracy with Adjectives: Conceptual Innovation in Comparative Research' (1997) 49 *World Politics* 430.

and semi-authoritarianism.[458] A slightly different theoretical approach by Mikael Wigell is to examine the problem from the opposite perspective, highlighting that hybrid regimes are not, per se, authoritarian or less democratic, but rather "*differently* democratic."[459]

The paradox of these regimes scoring high under some criteria of the constitutional democracy checklists, while at the same time failing in others, nuanced further the "gray zone" that these regimes fell into amidst the transition.[460] The question appeared whether they might be referred to as transitional once they reach a certain level of stabilization.[461] The difficulty of capturing the essence of these regimes with "uncertain, ancipital patterns" is also transposed into legal and constitutional theory.

As Angela De Gregorio noted, the constitutionalists so far have been reluctant to acknowledge that the regime fluctuations affect the nature of legal order as "the traditional approach of constitutional law or comparative law studies, which is 'Western-centric,' generally denies dignity to these conceptual categories."[462] However, this has changed as the conceptual and theoretical perplexity has spilled over into constitutional theory following the democratic backsliding in Europe over the last decade. New doctrines, such as abusive constitutionalism,[463] "constitutional breakdown,"[464] and "statutory anti-constitutionalism,"[465] examine the regressive

[458] Marina Ottaway, *Democracy Challenged: The Rise of Semi-Authoritarianism* (Carnegie Endowment for International Peace 2003).
[459] Mikael Wigell, 'Mapping "Hybrid Regimes": Regime Types and Concepts in Comparative Politics' (2008) 15(2) *Democratisation* 230.
[460] Thomas Carothers, 'The End of the Transition Paradigm' (2002) 13(1) *Journal of Democracy* 5.
[461] Leonardo Morlino, 'Hybrid Regimes' in András Sajó, Renáta Uitz and Stephen Holmes (eds), *Routledge Handbook of Illiberalism* (Routledge 2021) 143.
[462] Angela Di Gregorio, 'The Degeneration of Contemporary Democracies as a New Phenomenology of Constitutional Transition' in Martin Belov (ed), *Populist Constitutionalism and Illiberal Democracies: Between Constitutional Imagination, Normative Entrenchment and Political Reality* (Intersentia 2021) 103.
[463] Grażyna Skąpska, 'Abuse of the Constitution as a Means of Political Change: Sociological Reflections on the Crisis of Constitutionalism in Poland' (2019) 208(4) *Polish Sociological Review* 421.
[464] Wojciech Sadurski, *Poland's Constitutional Breakdown* (Oxford University Press 2019).
[465] Maciej Bernatt and Michał Ziółkowski, 'Statutory Anti-Constitutionalism' (2019) 28(2) *Washington International Law Journal* 487.

phenomena by emphasizing its deviant nature compared to liberal constitutionalism. More terms appeared, such as populist constitutionalism[466], illiberal constitutionalism and anti-constitutional populism.[467]

The blurring of lines between regimes has been reflected in the judiciary's position in relation to other constitutional and political actors. It has also affected the nature of the interference with judicial tenure. The following section illustrates how judicial independence and the principles of the rule of law are applied in regimes that do not fall under the standard definition of liberal democracy.

4. Judicial Independence Across Regimes

The constitutional theory views independent judges as enforcing the rule of law by applying legislation and protecting rights, which are considered key traits of democracy.[468] Helmke and Rosenbluth questioned this presumption, claiming that other inherent elements of democratic regimes, such as institutional fragmentation and electoral competition, may "challenge the notion that the rule of law represents an apotheosis of judicial power at the expense of politics, at least in democracies."[469] Judicial independence may be even more important in authoritarian regimes, making it more susceptible to interference.[470]

The literature on authoritarian regimes reveals valuable insights which challenge the notion of the rule of law and judicial independence being decisive traits of liberal constitutional

[466] Paul Blokker, 'Varieties of Populist Constitutionalism: The Transnational Dimension' (2019) 20(3) *German Law Journal* 332.
[467] Julia Wesołowska, 'Law and Emotions: Insights for the Study of Anti-Constitutional Populism' in Martin Belov (ed), *Populist Constitutionalism and Illiberal Democracies: Between Constitutional Imagination, Normative Entrenchment and Political Reality* (Intersentia 2021).
[468] John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* (Harvard University Press 1980)
[469] Gretchen Helmke and Frances Rosenbluth, 'Regimes and the Rule of Law: Judicial Independence in Comparative Perspective' (2009) 12 *Annual Review of Political Science* 345, 347.
[470] Ibid.

democracies. Firstly, the research already identified that constitutions that authoritarian regimes adopt are more than just "sham"[471] and may serve various functions other than the one most often referred to in literature, which is the constitution as a map of power relations.[472] Mark Tushnet claimed that even the concept of constitutionalism is not irreconcilable with authoritarian regimes, although in a relatively impoverished form, which the author refers to as "mere rule of law constitutionalism."[473] Secondly, the role of the law and courts has become much more versatile in authoritarian regimes. As Tamir Moustafa noted, the position of the judiciary in authoritarian regimes significantly shifted from the "simplistic caricatures of kangaroo courts and telephone justice" to the extent that the "authoritarian/democratic dichotomy" becomes "increasingly blurred."[474] Authoritarian governments use courts for legitimacy purposes, to facilitate a market economy, to restrict majoritarian institutions, or to delegate sensitive reforms.[475]

As Barros pointed out, "Dictatorships do not have to interfere with judges.. [..] nor involve the courts in political repression, to render courts ineffectual before extralegal and extraordinary repression".[476] The Chilean courts' position under Pinochet's regime is a historical example supporting this claim. Within the sixteen years of Pinochet's military regime, there were no instances of interference with the judicial tenure through appointment and dismissal procedures,

[471] David S Law and Mila Versteeg, 'Sham Constitutions' (2013) 101 *California Law Review* 863.
[472] For the account of constitutions being maps of power-relations see "all law, and constitutional law in particular, is concerned, not with abstract norms, but with the creation, distribution, exercise, legitimation, effects, and reproduction of power". Hastings W.O. Okoth-Ogendo, 'Constitutions Without Constitutionalism: Reflections on an African Political Paradox' in Douglas Greenberg and others (eds), *Constitutionalism and Democracy: Transitions in the Contemporary World* (Oxford University Press 1993) 67.
[473] Mark Tushnet, 'Authoritarian Constitutionalism' (2015) 100(2) *Cornell Law Review* 391.
[474] Tamir Moustafa, 'Law and Courts in Authoritarian Regimes' (2014) 10 *Annual Review of Law and Social Science* 281.
[475] Ibid 284-287.
[476] Robert Barros, 'Courts Out of Context: Authoritarian Sources of Judicial Failure in Chile (1973–1990) and Argentina (1976–1983)' in Tamir Moustafa and Tom Ginsburg (eds), *Rule by Law: The Politics of Courts in Authoritarian Regimes* (Cambridge University Press 2008) 158.

seemingly indicating a high level of autonomy.[477] However, as Larkins emphasized, "it would be practically absurd to label it an independent judicial body during this time," considering the courts' jurisprudence alignment with the governmental policies.[478]

Nevertheless, empirical research suggests that establishing an authoritarian regime does not necessarily lead to a more politically dependent judiciary. Iaryczower, Spiller, and Tommasi claimed that Argentine Supreme Court proved to be more than just a "rubber stamp" throughout the last century, despite the decade's military rule.[479] Guillermo Molinelli indicated that during the years of military rule, the Argentine Supreme Court increased its autonomy, despite lacking political insulation. During the 1950s, the Court acquired the authority to appoint its own President and introduced injunctions as a crucial legal remedy for the infringement of citizens' rights. During the 1970s and 1980s, the same SC increased the ability of litigants to sue the state.[480] Another notable example is the position of the Spanish judiciary under Franco's regime. According to José Toharia, the Spanish judiciary under the authoritarian Franco regime demonstrated a fair amount of independence and ideological diversity, but only because it was powerless, as their jurisdiction extended only to what may be referred to as the "private sphere of social life."[481] Public affairs being shielded from the ordinary courts' jurisdiction, as Toharia notes, is a common trait of civil law tradition. Still, in Franco's Spain, this phenomenon was exacerbated by the creation of special tribunals, which took over almost all cases that could

[477] Christopher M Larkins, 'Judicial Independence and Democratization: A Theoretical and Conceptual Analysis' (1996) 44 *American Journal of Comparative Law* 605, 613.
[478] Ibid.
[479] Matias Iaryczower, Pablo T Spiller and Mariano Tommasi, 'Judicial Independence in Unstable Environments, Argentina 1935–1998' (2002) 46 *American Journal of Political Science* 699, 713.
[480] Guillermo Molinelli, 'La Corte Suprema de Justicia de la Nación frente a los poderes políticos, a través del control de constitucionalidad, 1983–1998' (1999) Mimeo, Universidad de Buenos Aires.
[481] José J Toharia, 'Judicial Independence in an Authoritarian Regime: The Case of Contemporary Spain' (1975) 9(3) Law & Society Review 475, 48.

potentially be politically sensitive.[482] The judges sitting in the special tribunals came from the ordinary judiciary. However, they were freely appointed by the Government and hierarchically subordinate to ministries other than the one of justice.[483]

A similar pattern was used in the early years of Nazi Germany.[484] It is essential to note that German Socialists did not establish the special courts; Germany introduced them for the first time after World War I.[485] When the special courts (Sondergericht) were introduced by decree in 1933, the legal basis for it was found in the ordinance from the republican era.[486] Initially, the special courts had jurisdiction limited only to the offenses related to "offending the Nazi party," as the regime wanted to use the regular courts as long as possible to sustain the appearance of legitimate governance. However, this changed as the country prepared for war, when "virtually all regulations passed or revised after 1938 gave jurisdiction to the Special Courts".[487] Fraenkel argued that the functioning of special tribunals encapsulates the fundamental distinction between a Rule of Law state (*Rechtsstaat*) and a Dual State.[488] Similar yet more subtle ideas can also be found in hybrid regimes. The Hungarian government has recently attempted to vest jurisdiction in important state matters in a specialized Supreme Administrative Court, in the context of its illiberal shift. The Hungarian government eventually dropped the initial plan, presumably due to

[482] Ibid 487.
[483] Ibid.
[484] Peter H Solomon, 'Courts and Judges in Authoritarian Regimes' (2007) 60(1) World Politics 122.
[485] Ingo Müller, *Hitler's Justice: The Courts of the Third Reich* (Harvard University Press 1991) 157.
[486] Ibid.
[487] Decree of the Reich President for the Defense against Malicious Attacks against the Government of National Uprising (Verordnung des Reichspräsidenten zur Abwehr heimtückischer Angriffe gegen die Regierung der nationalen Erhebung), 21 March 1933.
[488] Ernst Fraenkel, *The Dual State: A Contribution to the Theory of Dictatorship*, trans Edward Shils in collaboration with Edith Lowenstein and Klaus Knoor (Octagon Books 1941).

public pressure, but it continued working on administrative justice reforms to fulfill its initial purpose.[489]

The growing research on judicial politics in authoritarian regimes reveals that the inter-branch relationship between authoritarian governments and the judiciary is far more complex than the common view, which presupposes that "the idea of empowered judges does not fit with the classic understanding of authoritarianism."[490] Peter Solomon distinguishes four different patterns of judicial power in authoritarian regimes. The first are "politically marginal" courts, characterized by provisional appointments, repetitive evaluations, and various strains of political dependency, as were historically the courts under the USSR.[491] The second type is what Tamir Moustafa referred to as a "fragmented judicial system," a Spanish case under Franco discussed above, where the ordinary courts could obtain a certain level of independence, as most regime-sensitive issues were transferred to courts of special jurisdiction.[492] The third type represents courts created by authoritarian regimes, but they occasionally decide against the executive, making them unpredictable for the authoritarian leader. Solomon offers a historical example of this type – judges in Tzarist Russia after the Judicial Reform of 1864.[493] More recently, the judiciary's estrangement from the authoritarian leader who appointed it can be seen in the story of Chief Justice Chaudhry in Pakistan under Musharraf's regime.

Courts going against the regime that appointed them is a phenomenon peculiar not only to authoritarian contexts. It also appeared in the hybrid ones. For example, in the late 1990s,

[489] Boldizsár A Szentgáli-Tóth and Evelin Burjàn, 'A Cursory Glance on the Hungarian Administrative System after Two Main Reform Attempts' (2020) *Dublin Law & Politics Review*.
[490] Peter H. Solomon, 'Courts and Judges in Authoritarian Regimes' (2007) 60(1) *World Politics* 122, 123.
[491] Ibid 126.
[492] Tamir Moustafa, *The Struggle for Constitutional Power: Law, Politics, and Economic Development in Egypt* (Cambridge University Press 2007) 50–52.
[493] Peter H. Solomon, 'Courts and Judges in Authoritarian Regimes' (2007) 126.

Argentina's Menemista Court employed what Gretchen Helmke referred to as strategic defection, going against Menem in the hope of avoiding consequences through impeachment once it became clear he would lose the elections.[494]

The discussed examples demonstrate that Fiss' argument on the importance of the regime's nature for the judges' dismissal is hardly applicable to the contemporary context.

5. Conclusion

Stephen Holmes noted that the "judiciary is anything but a free-floating island."[495] This view supports the initial claim of this chapter that the judiciary or the guarantees of its independence cannot be perceived in an institutional vacuum but rather in its contextualized dynamics. The contextualized dynamics of judicial independence lie between the empirical question of what has been done with the inherited judges in the past and what should be done with the inherited judges from the RoL lens. After all, judicial independence and accountability are "the joint product of purposive legal and political arrangements,"[496] and "elements that are regarded as favorable to judicial independence in one setting may have a quite different, indeed the opposite, valence in another context."[497] Prolific literature is emerging against this backdrop,

[494] Helmke defines strategic defection as a case when" judges come to believe that their fates rest with the incoming opposition, they may be tempted to reduce the incentives of the future government to sanction them by ruling against the government that they expect to be defeated electorally or otherwise removed." Gretchen Helmke, 'Checks and Balances by Other Means: Strategic Defection and Argentina's Supreme Court in the 1990s' (2003) 35(2) *Comparative Politics* 213, 214.

[495] Stephen Holmes, 'Judicial Independence as Ambiguous Reality and Insidious Illusion' in Ronald Dworkin (ed), *From Liberal Values to Democratic Transition: Essays in Honor of Janos Kis* (Central European University Press 2004) 5.

[496] Stephen B Burbank, Barry Friedman and Deborah Goldberg (eds), *Judicial Independence at the Crossroads: An Interdisciplinary Approach* (SAGE Publications 2002) 14–16.

[497] Vicki C Jackson, 'Judicial Independence: Structure, Context, Attitude' in A Seibert-Fohr (ed), *Judicial Independence in Transition* (Springer 2012) 61.

claiming that interference with judicial tenure might be justifiable in specific contexts.[498] The question remains how to assess the context from the rule of law perspective. Bringing political considerations into the analysis of the rule of law can be a slippery slope. However, as Andras Sajo and Renata Uitz emphasized: "Legal formalism may be a safeguard, but it is not a life-saver" as "the power of the rule of law can achieve the same results as sheer arbitrariness."[499] A related rationale may be inferred from the formal guarantees of tenure protection as an essential trait of judicial independence. Due to the blurring of lines between the regimes, transitional justice struggles to keep pace with the problems emerging around the appointment and dismissal of judges. On the other hand, focusing solely on the formal aspects of the appointment and dismissal of judges fails to adequately explain the challenge that judges pose to the proper functioning of liberal democracy.

[498] This literature will be thoroughly analyzed in Chapter V. Mark Tushnet and Bojan Bugarič, 'Court-Packing or Court Reform?: Challenging Judicial Independence by Enhancing Accountability' in *Power to the People: Constitutionalism in the Age of Populism* (New York, 2022; online edn, Oxford Academic, 20 January 2022).
[499] András Sajó and Renáta Uitz, *The Constitution of Freedom: An Introduction to Legal Constitutionalism* (Oxford, 2017; online edn, Oxford Academic, 21 December 2017) 310.

Chapter IV

Rule of Law and Extraordinary Techniques of Judicial Removal

Building on the theoretical foundation of this thesis (see Chapter I), to effectively assess rule of law compliance in the context of judicial design interference, it is essential to evaluate judicial appointments and dismissals, focusing on the interplay between these actions and the relevant norms guiding them. This approach facilitates the detection of malpractices that may not be apparent from formal constitutional guarantees alone, by analyzing how the dynamics between dismissals and new appointments reveal underlying political aims and influences.

When considered in isolation, individual judicial dismissals and appointments, along with the legal framework governing them, may appear to satisfy the formal requirements of legality as established by the constitutional and legal order. However, such formal compliance may still fall short of upholding the principle of the rule of law, which demands adherence to legal formalities and a commitment to the fundamental understanding that the ruling power must be constrained. The institutional design of the judiciary, including appointment and dismissal procedures, should reflect this understanding by ensuring that the political insularity of the judiciary is effectively maintained. (See Chapter I).

In times of regime change or political transition, governments may employ a range of techniques to address the potential dangers that the inherited judiciary may pose to their rule.

Some do not affect judicial tenure. For example, governments may opt for jurisdiction stripping, the strategic allocation of cases to specific court panels, heightening the quorum for decision-making in apex courts, or making a gentlemen's agreement with the highest judicial authorities to keep the entire branch in check.[500]

If incumbent governments opt to tamper with judicial tenure, they may either dismiss the inherited judges or interfere with the successive cycles of judicial appointments. This chapter discusses the former strategy.

This chapter proceeds as follows:

The first Section will illustrate how the claim put forward in Chapter III, regarding the blurring of lines between the regimes, translates into the legal framework for interference with judicial tenure. Consequently, it will demonstrate the difficulty those blurring lines represent for the rule of law.

The second Section will elaborate on the existing approaches to identifying RoL violations in interference with judicial appointment and dismissal procedure and explain how the typology used in this thesis may inform the current literature.

Finally, a thorough analysis of the identified techniques of judicial dismissal will be put forward. The chapter analyzes the extraordinary techniques in the contexts in which they appeared across various regimes at different points in time, particularly during regime shifts or political transitions. This thesis defines extraordinary judicial dismissal techniques as the removal of judges outside the standard disciplinary or impeachment processes established by the

[500] See the further discussed example of the judiciary under Pinochet in Chile.

democratically enacted legal and constitutional framework, in line with authoritative international standards.

Hence, this chapter focuses on the RoL tensions of less obvious constitutional tools available to governments wanting to interfere with judicial tenure.

This chapter examines a range of jurisdictions, each characterized by distinct socio-legal traditions and constitutional frameworks. However, the objective of these jurisdictional examples is not to provide an in-depth analysis of the socio-legal context of judicial dismissals within each jurisdiction. Instead, it highlights the diverse legal mechanisms through which judges may be removed, relying on or invoking constitutional and legal provisions. Such an enterprise may guide further constitutional analysis of RoL tensions in the judicial appointment and dismissal procedures.

1. Blurring lines in the interference with the judicial tenure

In the following sections, this chapter demonstrates that authoritarian and democratic regimes tend to occupy opposite ends of the RoL adherence scale in terms of interference with judicial tenure. Nevertheless, the increasing resemblance between the hybrid and autocratic regimes on one side and hybrid regimes and democracies on the other imposes a methodological difficulty when labeling interference with judicial tenure as a unique feature of a specific regime type.

Interference with the judicial term of office may be achieved either by introducing new legal mechanisms or relying on the misuse of ones already provided by the existing constitutional framework. Amending the constitutional and legal framework has been recognized by the

literature as one of the critical tools of hybrid regimes to entrench and perpetuate power.[501] With the democratic legitimacy they enjoy, mixed regimes pursue changes to the institutional design to adjust it to their political aspirations. Kim Lane Scheppele, following Javier Corrales, referred to this phenomenon as "autocratic legalism."[502] The abuse of constitutional amendments has also been used to curtail judicial independence, a trend that predates the emergence of illiberal regimes in Europe, most notably in the introduction of the Bolivarian Constitution under Chavez in Venezuela.[503] Nevertheless, when governments lack the majority to change the Constitution, they may misuse the existing framework or introduce changes through law proliferation, as occurred in Poland under the PiS government from 2015 onwards.[504]

Assessing these institutional reforms under the rule of law is no easy task, as governments pursue them either by changing the constitutional setup or circumventing it. András Sajó defines the latter as *legal cheating* and offers the example of Polish reforms to the Act on High Judicial Council, which violated judicial independence through politicizing judicial appointment prerogatives, as decided by the CJEU, but was achieved through the misuse of "sloppy constitutional provisions."[505] Law's vagueness has already been recognized as potentially inconsistent with the rule of law ideal in legal philosophy and sporadically in legal practice, as it

[501] András Sajó, *The Emergence of the Illiberal State* in *Ruling by Cheating: Governance in Illiberal Democracy* (Cambridge Studies in Constitutional Law, Cambridge University Press 2021) 56–91; Takis S Pappas, *Populism and Liberal Democracy: A Comparative and Theoretical Analysis* (Oxford University Press 2019) 190.

[502] Kim Lane Scheppele highlighted the danger of the apparent legality: "By attacking the very basis of a constitutional order while using the methods made possible by that constitutional order, the new illiberals may be cheered on at first by the adulating crowds who sought change, but those same crowds will find these illiberals impossible to remove once they have destroyed the constitutional system that could have maintained their democratic accountability over the long run." Kim Lane Scheppele, 'Autocratic Legalism' (2018) 85(2) *University of Chicago Law Review* 545, 548.

[503] Allan R Brewer-Carias, *La Demolicion de la Autonomía E Independencia de Poder Judicial En Venezuela 1999–2021* (Fundación Editorial Jurídica Venezolana 2021) 41. Richard Gott, *Hugo Chavez and the Bolivarian Revolution* (Verso Books 2011) 180–183.

[504] Kamil Joński and Wojciech Rogowski, 'Legislative Practice and the "Judiciary Reforms" in Post-2015 Poland – Analysis of the Law-Making Process' (2020) 11(2) *International Journal for Court Administration*.

[505] András Sajó, 'Cheating: The Legal Secret of Illiberal Democracy' in *Ruling by Cheating: Governance in Illiberal Democracy* (Cambridge University Press 2021) 288.

may contribute to legal uncertainty.[506] However, once the power-holder uses the vagueness of applicable norms to advance political goals and capture independent institutions, such as courts, the threats to the rule of law principle become more palpable. An additional threat emerges when the hybrid regimes rely on comparative constitutional practices to justify their legal misuse of an institutional setting. The literature refers to this phenomenon as abusive constitutional borrowing, malicious legal transplants, or *legal whataboutism*.[507]

Matt Andrews, Lant Pritchett, and Michael Woolcock describe it as *isomorphic mimicry,* meaning "reforms copying the forms of Western institutions but without their substance."[508] However, Alvin Y.H. Cheung points out, "the emulation need not be thorough, or even sincere; it may suffice simply to assert that a proposed change resembles that in a jurisdiction with ironclad rule-of-law credentials."[509] The hybrid regimes' simulacrum of RoL adherence represents a problem when identifying malicious legal reforms. The following Section addresses how this problem may be overcome.

2. How does a typology of dismissal techniques help?

[506] "Rule of law ideal norms... presuppose that legal commands-including those embedded in legal analogies-are deductively applicable, and that vague norms-of the sort with which one is left if legal commands are not deductively applicable-are inconsistent with those basic values." Scott Brewer, 'Exemplary Reasoning: Semantics, Pragmatics, and the Rational Force of Legal Argument by Analogy' (1996) 109 *Harvard Law Review* 923, 972, 992–93.

[507] Alvin Y Cheung, 'Legal Whataboutism' (LawArXiv, 23 January 2020) https://doi.org/10.31228/osf.io/7zbtw accessed 14 January 2022.

[508] Matt Andrews, Lant Pritchett and Michael Woolcock, *Escaping Capability Traps through Problem-Driven Iterative Adaptation (PDIA)*, Working Paper 299, Center for Global Development (2012) cited in Bojan Bugaric, 'The Rule of Law Derailed: Lessons from the Post-Communist World' (2015) 7 *Hague Journal on the Rule of Law* 175, 177.

[509] Alvin Y Cheung, 'Legal Whataboutism' (LawArXiv, 23 January 2020) 2 https://doi.org/10.31228/osf.io/7zbtw accessed 14 January 2022.

The methodological benefits of a typology in constitutional theory have been put forward in the introduction of this thesis. Nevertheless, typology as an epistemic tool is of unique value when analyzing the RoL tensions in regimes dealing with inherited judges. This Section first addresses the existing approaches to identifying the Rol violation in judicial tenure interference and then explores how typological methods may inform the established discourse.

The literature presents two influential approaches to identifying a RoL violation in the context of judicial appointment and dismissal reforms. They have been briefly addressed in Chapter III, but will be analyzed here in the context of the need for a typology of RoL interference with judicial tenure.

The first, "systemic RoL violation," was developed within theory regarding the illiberal regimes that have operated in Europe for the last decade, specifically Hungary and Poland. A phenomenon that emerged as a dangerous threat to the judiciary occurs when governments pursue a line of separate, prima facie RoL adherent but incremental reforms which, assessed together in interaction, undermine judicial independence. Those may rely on the mentioned tool of abusive constitutional borrowing, but the current political exigencies can also curtail them nationally.[510] The latter example is a 2023 Polish draft bill that proposes transferring judicial disciplinary prerogatives to the Supreme Administrative Court or the Criminal Chamber of the Supreme Court.[511] Such a solution is hardly present in comparative constitutionalism, but it was a salient way for Poland to unlock EU funds amidst elections.[512] This phenomenon is a small-

[510] Abusive constitutional borrowing and systematic RoL violation are discussed in detail in Chapter I. For the puroses of this argument, see generally Rosalind Dixon and David E Landau, *Abusive Constitutional Borrowing: Legal Globalization and the Subversion of Liberal Democracy* (Oxford University Press 2021).
[511] *Ustawa o zmianie ustawy o Sądzie Najwyższym oraz niektórych innych ustaw*, 31 January 2023.
[512] Jakub Jaraczewski, 'Just a Feint?: President Duda's Bill on the Polish Supreme Court and the Brussels-Warsaw Deal on the Rule of Law' (Verfassungsblog, 1 June 2022) https://verfassungsblog.de/just-a-feint/ accessed 26 June 2022.

scale reflection of the general modus operandi of contemporary hybrid regimes, Frankenstate-building[513], an illiberal patchwork of otherwise commonly accepted liberal constitutional design solutions.

An illustrative example of systematic RoL infringement is the Polish series of judicial reforms, which Sujit Choudry labeled "La suite Polonaise" and defined as "a series of distinct initiatives that nonetheless are components of a coherent strategy with thematic unity."[514] The reforms under the PiS government began with the 2015 changes to the Law on the Constitutional Tribunal, continued with modifications to the Act on the High Judicial Council, the Supreme Court, ordinary courts, the prosecutorial system, and the judicial disciplinary regime.[515] The invasive Polish interference with the organization of the judiciary has prompted a scholarly discussion on the systematic violation of the rule of law through interference with judicial independence, as perceived through the lens of the RoL as an EU value.[516] Infringement with judicial independence as a rule of law violation has been addressed in the RoL context on the international level through the jurisprudence of the European Court of Human Rights and

[513] Kim Lane Scheppele explains that "The Frankenstate, too, is composed from various perfectly reasonable pieces, and its monstrous quality comes from the horrible way that those pieces interact when stitched together." Kim Lane Scheppele, 'The Rule of Law and the Frankenstate: Why Governance Checklists Do Not Work' (2013) 26 *Governance* 559, 560.

[514] Sujit Choudhry, 'Will Democracy Die in Darkness? Calling Autocracy by Its Name' in Mark A Graber, Sanford Levinson and Mark Tushnet (eds), *Constitutional Democracy in Crisis?* (Oxford University Press 2018) 574.

[515] Constitutional Tribunal Act of 25 June 2015 (Journal of Laws – Dz. U. of 2016, item 293), later repealed with The Constitutional Tribunal Act Of 22 July 2016 (Published in the Journal of Laws of the Republic of Poland On 1 August 2016, Item 1157); the Ustawa o zmianie ustawy o Krajowej Szkole Sądownictwa i Prokuratury, ustawy - Prawo o ustroju sądów powszechnych oraz niektórych innych ustaw (Law amending the Law on the National School of Judiciary and Public Prosecution, the Law on the system of the ordinary courts and certain other laws) of 11 May 2017 (Dz. U. of 2017, heading 1139, as amended); (2) the Ustawa o zmianie ustawy - Prawo o ustroju sądów powszechnych oraz niektórych innych ustaw (Law amending the Law on the system of the ordinary courts and certain other laws) of 12 July 2017 (Dz. U. of 2017, heading 1452, as amended); (3) the Ustawa o Sądzie Najwyższym (Law on the Supreme Court) of 8 December 2017 (Dz. U. of 2018, heading 5, as amended), amended on 10 May 2018.; and (4) the Ustawa o zmianie ustawy o Krajowej Radzie Sądownictwa oraz niektórych innych ustaw (Law amending the Law on the National Council of the Judiciary and certain other laws) of 8 December 2017 (Dz. U. of 2018, heading 3, as amended), the Act amending the Law on the System of Ordinary Courts, the Act on the Supreme Court and certain other acts, VII.510.176.2019/MAW/PKR/PF/MW/CW, 7 January 2020.

[516] Michael Ioannidis and Armin von Bogdandy, 'Systemic Deficiency in the Rule of Law: What It Is, What Has Been Done, What Can Be Done' (2014) 51(1) *Common Market Law Review* 59.

European Court of Justice under Article 6 of the European Convention and Article 19(1) of the TEU (for the detailed analysis of the relevant case-law, see Chapter II).[517] However, the relevant courts linked the undermined judicial independence to existing legal concepts, while systematic RoL violation is only hinted at.[518] The concept of systematic deficiency as a violation of international norms has emerged within the EU legal order and the CoE's legal framework through the ECtHR's pilot judgments.[519] Despite emerging theories on systemic RoL deficiency as a violation of law, the criteria for breaching the systemic rule of law have not yet been defined in legal terms at the international level. A further complexity arises from the fact that the incremental character of institutional interference does not, in itself, constitute conclusive evidence of a violation. Determining the point at which a series of legal interventions amounts to a systemic breach ultimately hinges on the appearance of judicial independence.

However, the appearance of judicial independence is a vague concept as it relies on the idea that the judicial authority "cannot give rise to reasonable doubts, in the minds of individuals, as to the imperviousness of the judges concerned to external factors and as to their neutrality concerning the interests before them, once appointed as judges."[520] The appearance of judicial independence is a legal standard and, as such, is inherently vague, which is not unusual in law.[521]

[517] On the judicialization of the rule of law as an EU value, see Carlos Saenz Perez, 'Judicialising the Rule of Law Through the Preliminary Ruling' in Josep Maria Castellà Andreu and Marco Antonio Simonelli (eds), *Populism and Contemporary Democracy in Europe* (Springer International Publishing 2022).
[518] The CJEU tied judicial independence with effective legal protection in the fields covered by the EU law and ECtHR with the right to a fair trial. For a thorough analysis of the relevant case-law, see Chapter II.
[519] Jakub Czepek, 'The Application of the Pilot Judgment Procedure and Other Forms of Handling Large-Scale Dysfunctions in the Case Law of the European Court of Human Rights' (2018) 20 *International Community Law Review* 347.
[520] *A.K. (Indépendance de la chambre disciplinaire de la Cour suprême)* (C-585/18; Grand Chamber, 19 November 2019) para 134.
[521] Scott Soames, '2 The Value of Vagueness' in Andrei Marmor and Scott Soames (eds), *Philosophical Foundations of Language in the Law* (Oxford University Press 2011) 29.

Nevertheless, the ostensibly democratic approach to evaluating the appearance of judicial independence may, paradoxically, undermine rather than enhance the integrity of assessments concerning judicial appointment and dismissal procedures.[522] Additionally, the concept of the appearance of judicial independence may be abused.[523]

Building up on these theories, this chapter develops a typology of legal interference by examining the inherent tensions between the rule of law and the legal techniques employed in systemic attacks on the judiciary. Demonstrating these tensions within each interference segment through constitutional analysis will facilitate proving the cumulative effect, ultimately leading to a violation of the law.

The analysis of empirical evidence on judicial dismissals through a typology that relies on the constitutional theory of the rule of law and judicial independence reveals the shortcomings of liberal constitutions. [524] Focusing on the flaws of liberal constitutionalism and its principles informs the assessment of how they undermine it. Ultimately, by comparing the legal techniques employed in extraordinary judicial dismissals, this analysis seeks to demonstrate that attacks on the judiciary through such dismissals are neither regime-specific nor a novel phenomenon. Instead, they reflect broader interference patterns, highlighting the recurring use of similar

[522] Michał Krajewski, 'The AG Opinion in the *Celmer* Case: Why the Test for the Appearance of Independence is Needed' (Verfassungsblog, 5 July 2018) https://www.verfassungsblog.de/the-ag-opinion-in-the-celmer-case-why-the-test-for-the-appearance-of-independence-is-needed/ accessed 27 May 2020.
[523] Michał Krajewski and Michał Ziółkowski, 'The Power of "Appearances"' (Verfassungsblog, 26 November 2019) https://www.verfassungsblog.de/the-power-of-appearances/ accessed 5 June 2020.
[524] As Eoin Daly pointed out, when referring to the existing literature on recent illiberal regimes: "Much of this commentary casually, or at least implicitly, tends to collapse antiliberalism into authoritarianism, tends to implicitly conflate liberal constitutionalism with democracy, and thus tends to neglect the question of democratically legitimate aspects of antiliberal constitutional thought—and, specifically, the question of how antiliberal perspectives might themselves shed light on the shortcomings of liberal constitutionalism or liberal democracy itself." Eoin Daly, 'Rousseau's Illiberal Constitutionalism: Austerity, Domination, and the Circumstances of Politics' (2022) 20 *International Journal of Constitutional Law* 563, 573.

strategies across different contexts and political regimes to interfere with judicial independence, thereby blurring the assessment of the rule of law.

3. The typology of extraordinary techniques of judicial dismissals

Typology of extraordinary techniques of judicial dismissals
1. Purges **1.1. Forced resignations** **1.2. Purging by decree**
2. Nullification of appointment
3. Abuse of the Ordinary Dismissal Procedures **3.1. Abuse of the Impeachment Procedures** **3.2. Abuse of the Disciplinary and Criminal Sanctions against Judges**
4. Abusive constitution-making
5. Legal changes to the retirement scheme
6. Extraordinary evaluative procedures **6.1. Lustration**

6.2. Post-conflict vetting
6.3. Anti-corruption vetting

Table 1: Typology of extraordinary techniques of judicial dismissals

This typology identifies the outliers in the judicial removal framework. While some examples of the rule of law's violation are relatively straightforward, such as purges, others require a close analysis of the context in which they appear. While context cannot be the sole indicator of a rule of law violation, this typology seeks to address the limitations of formal legal analysis by offering a more nuanced framework that bridges the gap between legal formalism and purely political assessments of interbranch conflicts.

3.1. Purges

Purging has been a commonly used term to describe the dismissal of public officials, including judges, in post-authoritarian and post-conflict settings.[525] In the transitional justice literature, the term was perceived as an informal attack on state personnel through en masse dismissal, particularly in authoritarian regimes, as opposed to the judiciary's post-communist vetting and lustration procedures in emerging democracies, which were regulated by lustration

[525] Moira Lynch defines purging as "a method that involves the removal of individuals from employment positions through dismissal, job transfer, or forced retirement, bans of individuals from future employment or restrictions on civil and political rights." Moira Lynch, 'Purges' in Lavinia Stan and Nadya Nedelsky (eds), *Encyclopedia of Transitional Justice* (Cambridge University Press 2013) 61.

laws.[526] Nevertheless, the transitional justice literature often uses this term interchangeably with vetting and lustration procedures.[527]

This Section focuses on purges as a tool of dismissal when explicitly applied to the judicial branch. The research on judicial politics in Latin American countries used the term to describe the phenomenon of executive attacks on the judiciary as a consequence of inter-branch conflict during times of political transition.[528] The scholarship on Latin American courts employs the term to refer to reshuffles of the bench through various mechanisms, including forced resignations, impeachments, judicial reorganization laws, and constitutional changes. The incoherence within the literature is a consequence of the interdisciplinary nature of the research on judicial dismissals.

In light of the proposed typology, this chapter will adopt a narrow approach to defining the purging of the judiciary, informed by internationally recognized legal standards on the protection of judges against arbitrary removal, which are part of most contemporary constitutions. This type of dismissal mirrors arbitrariness in its lack of constitutional basis and procedural safeguards of judicial independence. Purges are "seldom based on constitutional consensus' and 'rarely emanate from legislative or parliamentary laws."[529]

[526] According to Cynthia Horne "sometimes there is a normative connotation embedded in the choice of a definition or word, in the way that architects of lustration framed the screening practices as bound by rule of law in order to differentiate them from the extra-legal purges prevalent under communism." Cynthia Horne, 'Transitional Justice: Vetting and Lustration' in Lavinia Stan and Nadya Nedelsky (eds), *Routledge Handbook of Transitional Justice* (Routledge 2017) 438.

[527] Mayer-Rieckh A and de Greiff P (eds), *Justice as Prevention: Vetting Public Employees in Transitional Societies* (Social Science Research Council 2008) 16.

[528] See for example, Rebecca Bill Chavez, John A Ferejohn and Barry R Weingast, 'Theory of Politically Independent Judiciary' in Gretchen Helmke and Julio Ríos-Figueroa (eds), *Courts in Latin America* (Cambridge University Press 2011) 236 and Gretchen Helmke and Jeffrey K Staton, 'The Puzzling Judicial Politics of Latin America: A Theory of Litigation, Judicial Decisions, and Interbranch Conflict' in Gretchen Helmke and Julio Ríos-Figueroa (eds), *Courts in Latin America* (Cambridge University Press 2011) 324.

[529] Moira Lynch, 'Purges' in Lavinia Stan and Nadya Nedelsky (eds), *Encyclopedia of Transitional Justice* (Cambridge University Press 2013) 61.

The lack of legal basis for this type of dismissal should be understood in the contexts in which purges appear. Historically, illegal purges of judges have taken place amidst coup d'états, factional struggles, or leadership succession, when authoritarian leaders departed from the constitutional order and adopted the practice of ruling by executive decrees. The examples that illustrate this type of dismissal could be traced back to the history of 20th-century military regimes in Latin American countries, Egypt under Nasser's "massacre of the judiciary'[530], and more recently in Pakistan in a constitutional crisis of 2007 under Musharaff.[531] However, variations of this dismissal may also be found in contemporary settings, although rarely, in countries that are sliding back towards authoritarianism. The most recent example is the attempt by Tunisian President Kais Saied to dismiss 57 judges by decree in 2022.[532]

This chapter's typology identifies two main types of dismissal through purges: forced resignations and purges by decree. As the next section shows, forced resignations appeared as a tool for judges' dismissal in authoritarian regimes, which would have been the usual suspect for informal attacks on the judiciary, but also in hybrid regimes and emerging democracies. Purges by decrees are characteristic of military and dictatorial regimes. These types of dismissal represent a conspicuous rule of law violation as they do not adhere even to the minimal requirements of generality and certainty stemming from the *rule-by-law* concept.[533] Instead, they are examples of the "rule of exception."[534]

[530] Tamir Moustafa, 'Law and Resistance in Authoritarian States: The Judicialization of Politics in Egypt' in Tom Ginsburg and Tamir Moustafa (eds), *Rule by Law: The Politics of Courts in Authoritarian Regimes* (Cambridge University Press 2008) 134.
[531] Amanullah Shah, 'Role of the Superior Judiciary during Constitutional Crisis in Pakistan' (2008) 38(52) *Journal of Law and Society (University of Peshawar)* 65.
[532] Decree-Law No 2022-35 of 1 June 2022 supplementing Decree-Law No 2022-11 of 12 February 2022 on the creation of the Provisional Superior Council of the Judiciary https://legislation-securite.tn/law/105296 accessed 27 September 2023.
[533] As Bedner emphasized: ''rule by law' is often juxtaposed with 'rule of law', conveying a rather negative meaning upon it. It in fact suggests that the state has law at its disposal as a powerful weapon without being subject

Unlike purges by decree, whose illegality is readily identifiable, forced resignations present a more complex challenge, as they often evade thorough legal scrutiny.

3.1.1. Forced resignations

Staton noted that a "successful judicial purge is costly, but a mere attempt, which involves non-compliance, is not."[535] The interference of members of the elected branches of government in the judiciary through extralegal, informal measures has been widely acknowledged by scholars, but is arguably still under-theorized, primarily due to methodological obstacles in collecting empirical data and establishing an adequate theoretical framework.[536] Sanchez Urribarri noted that the analysis of intervention with the judiciary in consolidating democracies cannot be performed only through the lens of formal constitutional rules, as the informal linkages between the judiciary and other actors "often distort the effect of formal rules for court insulation."[537] These methodological obstacles translate into assessing forced resignations as a means of judicial removal. Although it constitutes a form of interference, this technique primarily operates within the political sphere, making it challenging to substantiate as a violation of the existing legal norms.

to any restraint it inherently imposes. However, if one considers the situation that the government rules by individual decree only, it becomes clear that the requirement of rule by law is vital." Adriaan Bedner, 'An Elementary Approach to the Rule of Law' (2010) 2(1) *Hague Journal on the Rule of Law* 48, 57.

[534] Kanishka Jayasuriya, 'The Exception Becomes the Norm: Law and Regimes of Exception in East Asia' (2001) 2 *Asian-Pacific Law & Policy Journal* 1, 108.

[535] Gretchen Helmke and Jeffrey K Staton, 'Courting Conflict: A Logic of Risky Judicial Decisions in Latin America' (Paper presented at the Law and Positive Political Theory Conference, University of Rochester, 1–2 May 2009) 5.

[536] Mariana Llanos and others, 'Informal Interference in the Judiciary in New Democracies: A Comparison of Six African and Latin American Cases' (2016) 23 *Democratization* 1236, 1241.

[537] Raúl Sánchez Urribarri, 'Politicization of the Latin American Judiciary via Informal Connections' in David K Linnan (ed), *Legitimacy, Legal Development and Change: Law and Modernization Reconsidered* (Routledge 2016).

In a broader context, the issues surrounding informal judicial dismissals can reflect what O'Donnell identifies as "flaws of the rule of law."[538] He emphasizes that one of the flaws may be "sheer lawlessness," which arises from the disconnection between the state and its bureaucratic apparatus. He highlights that while formally enacted laws may exist, their application is often intermittent and overshadowed by informal legal systems dominated by private or informal powers. This phenomenon creates complex dynamics in which the boundaries between formal and informal legalities are continually renegotiated, ultimately leading to a legal framework that is inadequate for ensuring compliance with the rule of law *in practice*.[539]

An additional difficulty in analyzing informal judicial dismissals lies in distinguishing between forced and voluntary resignations, as such determinations are primarily contingent on political interpretations of judicial reshuffles, unless backed up by extensive fieldwork research.[540]

Forcing resignation was common in the hybrid regimes of Latin America and several African countries.[541]

In some authoritarian and hybrid regimes, the pressure on judges to resign may result in threats and actual harm to their physical integrity.[542] However, assaults on the physical integrity

[538] Guillermo O'Donnell, 'The Quality of Democracy: Why the Rule of Law Matters' (2004) 15(4) *Journal of Democracy* 32.
[539] Ibid 41.
[540] Mariana Llanos and others, 'Informal Interference in the Judiciary in New Democracies: A Comparison of Six African and Latin American Cases' (2016) 1238.
[541] "Jorge Luis Manzano, leader of the president's Peronist party in the chamber of deputies, also supposedly threatened particular justices with impeachment should they refuse to resign. While these pressures succeeded in securing the resignation of Chief Justice Caballero, none of the other justices budged." Christopher Larkins, 'The Judiciary and Delegative Democracy in Argentina' (1998) 30(4) *Comparative Politics* 423, 428.
[542] An example of the most severe method of eliminating a judge occurred in Senegal, exemplified by the assassination of Babacar Sèye, the vice president of the Constitutional Council, who was shot in 1993 just as the court was poised to validate the final results of the legislative elections during its inaugural year. Mariana Llanos and others, 'Informal Interference in the Judiciary in New Democracies: A Comparison of Six African and Latin American Cases' (2016) 1238.

of individual judges are relatively uncommon due to the significant political costs associated with such actions. More frequently, the pressures exerted on judges to resign manifest in more subtle forms.

Evo Morales systematically dismantled Bolivia's Constitutional Tribunal (T.C.) by employing political pressure to force the resignation of its justices, following the T.C.'s earlier intervention to block Morales's court-packing attempt.[543] Pivotal justices resigned, citing political persecution and public defamation, which led to the loss of the T.C.'s quorum and rendered it inoperative. This strategic move occurred at a critical juncture when the MAS government initiated constitutional reforms, ensuring that the T.C. could not challenge or oversee these significant changes.[544] Morales pursued this strategy against the judiciary with the understanding that the political opposition lacked both cohesiveness and the capacity to safeguard the judiciary from such attacks.[545] Another example of overtly forcing judicial retirement to achieve a specific political goal can be found in Zimbabwe in 2001, when the Mugabe regime, facing opposition from the judiciary to its radical land reform policies, initiated a radical composition shift of the Supreme Court by compelling the early retirement of Chief Justice Anthony Gubbay.[546]

Although one might argue that the informal pressures resulting in judicial dismissals in the countries mentioned above stemmed from the instability characteristic of the hybrid regimes of that era, such pressures have also appeared in states transitioning to democracy and those that already ostensibly uphold democratic principles. In these cases, however, the influences are more

[543] In contrast to the informal pressures applied to the Constitutional Tribunal, Evo Morales utilized formal impeachment procedures to capture Bolivia's Supreme Court (See this Chapter Section 3.4.1).
[544] Omar Sánchez-Sibony, 'Competitive Authoritarianism in Morales's Bolivia: Skewing Arenas of Competition' (2021) 63(1) *Latin American Politics and Society* 118, 130.
[545] Ibid.
[546] Alex Magaisa, 'Zimbabwe: An Opportunity Lost' (2019) 30(1) *Journal of Democracy* 143, 154.

subtle and often framed within the narrative of reforms purportedly aimed at strengthening the rule of law or addressing the past.

For example, upon assuming office in 1983 with the agenda of restoring democracy in Argentina, President Raul Alfonsin threatened to issue a decree dismissing the judges, which led to their *voluntary* resignations.[547]

A more recent example can be found in Mexico under the government of Andrés Manuel López Obrador, whom Aguiar Aguilar refers to as one of the "false democrats."[548]

López Obrador's presidency marks a shift towards populism, characterized by efforts to centralize power in the executive and undermine democratic checks and balances, raising concerns about authoritarian tendencies. His administration has employed populist rhetoric to justify these actions, positioning itself against entrenched elites while weakening critical institutions, such as the judiciary and electoral bodies.[549] López Obrador publicly threatened to reform the judiciary, accusing it of being an ally of the previous regime. The most notable incident occurred in 2019, when Mexican Supreme Court Justice Eduardo Medina Mora unexpectedly resigned amidst an open money laundering investigation, 11 years before the end of his constitutional term. Despite the case against him remaining unresolved, his resignation allowed the President to appoint an ally quickly, and Medina Mora's accounts were unblocked soon after, with no further investigation into the allegations against the judge.[550]

[547] Jodi Finkel, 'Judicial Reform in Argentina in the 1990s: How Electoral Incentives Shape Institutional Change' (2004) 39(3) *Latin American Research Review* 56, 62.
[548] Agustín A Aguiar Aguilar, 'Courts and the Judicial Erosion of Democracy in Latin America' (2023) 51 *Politics & Policy* 7, 16.
[549] Mariano Sánchez-Talanquer and Kenneth F Greene, 'Is Mexico Falling into the Authoritarian Trap?' (2021) 32(4) *Journal of Democracy* 56.
[550] Ibid 59.

Lastly, the informal political pressure for judges to resign can be framed in legal terms during judicial restructuring, in the name of upholding the rule of law. The solution has been evident in several lustration and anti-corruption vetting reforms discussed in Section 3.5. For example, *Moldova's Law No. 252/2023 on the external evaluation of judges and prosecutors* stipulates that the extraordinary evaluation of the judiciary will not apply to judges who resign upon being notified of the initiation of their evaluation.[551] While this provision may appear neutral or beneficial in contexts transitioning to democracy, as a means for the inherited judiciary to "clean itself up," its vagueness in other contexts could be politically exploited to undermine the independence of judges. As previously noted, any norm can be subject to abuse. However, as highlighted in the introduction, one of the objectives of this chapter is to identify the potential weaknesses inherent in specific standard legal solutions that are generally acceptable in liberal democracies for the dismissal of judges.

Recalling O'Donnell's argument on the limitations of the legal state, the challenge of preventing or sanctioning informal judicial dismissals demonstrates that the mere existence of a legal framework is insufficient to combat "sheer lawlessness" in practice. This argument highlights why de jure constitutional guarantees of judicial independence often fail to protect judges in real-world constitutional contexts when institutional capacity and a culture of judicial independence are lacking. Conversely, the final example illustrates that the nudge for judges to resign to prevent investigations into their activities amid judicial reforms is perceived as a convenient solution for addressing the "inherited judges dilemma" within a democratic framework. This phenomenon is not viewed as a direct affront to judicial independence. Instead,

[551] Law No 252 of 17 August 2023 on the External Evaluation of Judges and Prosecutors and the Modification of Some Normative Acts (Moldova, Official Gazette Nos 325–327).

it suggests that even informal interference with judicial tenure can be politically regarded as acceptable and desirable within a liberal democratic context.

The informal nature of the discussed techniques complicates the evaluation of adherence to the rule of law, although it does not preclude the existence of a violation. However, identifying such violations through conventional constitutional analysis proves challenging. By contrast, the subsequent technique poses fewer difficulties, as it attempts to operate within established legal language and norms.

3.1.2. Purging by decree

As previously stated, purges of the judiciary by military de facto governments were a common feature in the history of Latin American countries. Still, this technique is not exclusive to the Latin American military regimes. This Section also addresses the case of Pakistan under Musharaff and Fiji under President Ratu Josefa Iloilo.

Historical evidence from several Latin American countries reveals that military regimes tended to purge the judiciary without particular observance of its constitutional independence, aiming to appoint regime-loyal judges. The case of Argentina under military rule illustrates how profoundly instability in the political and legal order disrupted the institutional architecture of judicial independence, resulting in interference with judicial tenure and the normalization of unconstitutional dismissals.[552]

As Chavez's study on the evolution of judicial autonomy in Argentina shows, the informal politicization of judicial appointment and dismissal procedures began only after 1946,

[552] Gretchen Helmke, *Courts under Constraints: Judges, Generals, and Presidents in Argentina* (Cambridge University Press 2004) 65.

with Peron's rise to power.[553] The period between 1946 and 1983 was marked by frequent military coups, which significantly amplified executive control over the judicial appointment and dismissal processes. Nevertheless, the practice of dismissing the Supreme Court's judiciary by decree was normalized after the 1955 military coup, in the context of the Liberalization Revolution led by General Eduardo Lonardi, which aimed to depersonalize state institutions, particularly the Supreme Court.[554] In addition to the S.C. justices, 70% of the lower court judges were suspended.[555]

In the aftermath of the 1955 and 1966 coups, military de facto governments purged the Supreme Court by decree without following the formal impeachment procedure.[556] In 1973, the administration under Hector Campora dismissed the entire Court, and in the coup three years later, the military junta issued a decree removing all justices.[557] After each coup, the executive had the chance to select new judges, which they used to appoint justices with ties to the military forces.

Historical evidence indicates that the instability of judicial tenure, often characterized by judicial reshuffles, was also prevalent in Bolivia.[558] Among other means of judicial dismissal, decrees were used by military de facto authorities in 1936, when Colonel David Toro dismissed the judiciary after the coup; in 1952, during the rule of the Movimiento Nacionalista Revolucionario (MNR); and in 1964, when General Barrientos came to power. Similarly,

[553] Rebecca Bill Chavez, 'The Evolution of Judicial Autonomy in Argentina: Establishing the Rule of Law in an Ultrapresidential System' (2004) 36(3) *Journal of Latin American Studies* 451, 455.
[554] Andrea M Castagnola, *Rethinking Judicial Instability in Developing Democracies: A National and Subnational Analysis of Supreme Courts in Argentina* (PhD dissertation, University of Pittsburgh 2010) 57.
[555] Ibid 57.
[556] Gretchen Helmke, *Courts under Constraints: Judges, Generals, and Presidents in Argentina* (Cambridge University Press 2004) 65.
[557] Rebecca Bill Chavez, 'The Evolution of Judicial Autonomy in Argentina: Establishing the Rule of Law in an Ultrapresidential System' (2004) 36(3) *Journal of Latin American Studies* 451, 459.
[558] Andrea Castagnola and Aníbal Pérez-Liñán, 'Bolivia: The Rise (and Fall) of Judicial Review' in Gretchen Helmke and Julio Ríos-Figueroa (eds), *Courts in Latin America* (Cambridge University Press 2011) 284–285.

"Ecuador's judicial system hardly has been a paragon of political independence" amidst the democratic transition.[559] The instability of tenure has affected Ecuadorian Constitutional Court judges since the establishment of the Constitutional Court in 1997. However, most dismissals "took place on the margins of this legal process" with hardly any procedure in place.[560] The Ecuadorian Supreme Court justices had similar faith. Still, the most arbitrary instance falling under the definition of a purge was President Febres Cordero's forceful aversion of Supreme Court justices from assuming office using police and military tanks.[561]

The purges, including forced resignations and military decrees, were absent in all the transitions to authoritarian regimes. As already mentioned, the political insularity of the judiciary under Pinochet in Chile was relatively high, and no significant pattern of dismissals was present. The Chilean judiciary cooperated with the regime and did not try to challenge its illegal and illiberal nature.[562] According to Hilbink, the Chilean judiciary under Pinochet quickly "gave up" on the rule of law by surrendering its constitutional review power and the power to review military courts' decisions due to the institutional ideology of judicial apoliticism.[563] Pereira claimed that if the case Chilean Supreme Court challenged Pinochet's regime, it would have been dissolved just like the Congress.[564]

[559] Omar Sánchez-Sibony, 'Competitive Authoritarianism in Ecuador under Correa' (2018) 14(2) *Taiwan Journal of Democracy* 97, 112.
[560] Santiago Basabe-Serrano, 'Judges without Robes and Judicial Voting in Contexts of Institutional Instability: The Case of Ecuador's Constitutional Court, 1999–2007' (2012) 44(1) *Journal of Latin American Studies* 127, 137.
[561] Omar Sánchez-Sibony, 'Competitive Authoritarianism in Ecuador under Correa' (2018) 14(2) *Taiwan Journal of Democracy* 97, 112.
[562] Lisa Hilbink, 'Agents of Anti-Politics: Courts in Pinochet's Chile' in Tom Ginsburg and Tamir Moustafa (eds), *Rule by Law: The Politics of Courts in Authoritarian Regimes* (Cambridge University Press 2008) 103.
[563] Ibid 104.
[564] Anthony W Pereira, 'Of Judges and Generals: Security Courts under Authoritarian Regimes in Argentina, Brazil, and Chile' in Tom Ginsburg and Tamir Moustafa (eds), *Rule by Law: The Politics of Courts in Authoritarian Regimes* (Cambridge University Press 2008) 27–28.

A Central American example of the judiciary subsiding with the government without necessitating a bench reshuffle is the Honduran military coup d'état against President Zelaya.[565] A portion of judges opposing the new regime was ousted, but the majority faction of Supreme Court judges used the constitutional crisis to further strengthen their power.[566]

Another characteristic that distinguishes purging in authoritarian or military regimes from other means of judicial dismissals is the lack of procedural safeguards and the overtly political nature of its motivation.[567] As discussed throughout this chapter, hybrid regimes will likely employ more subtle techniques to dismiss judges and hide behind different pretexts. On the other hand, the arbitrary nature of the political purging of judges in an authoritarian context is more readily apparent. Consider the following examples.

When Argentina's military government ousted the judiciary in 1955, it publicly stated that it intended to remove Peronist judges and appoint conservative ones whose ideology aligned with the military's.[568]

As the leading cause behind the constitutional crisis in Pakistan, which prompted the proclamation of a state of emergency in 2007, Musharaff cited "some judges overstepping the limits of judicial authority" and "working at cross purposes with the executive and legislature."[569] His years-long attempt to discredit CJ Chaudhry directly reacted to Chaudhry's initiatives to question the government's privatization of the Pakistan Steel Mills and hear cases

[565] Rachel Bowen, *The Achilles Heel of Democracy: Judicial Autonomy and the Rule of Law in Central America* (Cambridge University Press 2017) 208.
[566] Ibid.
[567] On the back-looking and forward-looking nature of dismissals through vetting and lustration see Claus Offe, *Varieties of Transition: The East European and East German Experience* (Cambridge University Press 1996).
[568] Gretchen Helmke, *Courts under Constraints: Judges, Generals, and Presidents in Argentina* (Cambridge University Press 2004) 67.
[569] 'Text of Pakistan Emergency Declaration' *BBC News* (3 November 2007) http://news.bbc.co.uk/2/hi/southasia/7077136.stm accessed 8 August 2022.

concerning the government's secretive terrorism detentions.[570] The revocation of judicial appointments in Fiji was an evident political backlash to the outcome of the case *Qarase v Bainimarama*.[571] In that judgment, the Appeal Court declared the interim government established after the 2006 coup to be unconstitutional.[572] The judgment outraged President Ratu Josefa Iloilo, who announced the abolition of the Constitution and revoked all judicial appointments through the Presidential Administration of Justice Decree and the Revocation of Appointment of Judicial Officers Decree.[573]

The arbitrary and illegal nature of purging by decree does have a caveat. These regimes' departure from the constitutional order does not imply that their leaders would not refer to the preexisting legal order in their rhetoric amidst judicial dismissals. These appeals to previously valid norms are declaratory but serve the purpose of regime legitimacy.

For example, the oath that the judges needed to take before the Argentine's military leadership in 1955 referred not only to the primary objectives of the junta and the Statute for the National Reorganization but also to the National Constitution.[574] When Musharaff, aiming to dismiss the judiciary, proclaimed the state of emergency and introduced the Provisional Constitutional Order on November 3, 2007, he did not repeal the previous Pakistani Constitution. Instead, he put it in "abeyance," providing that the new order may amend the existing

[570] Taiyyaba A Qureshi, 'State of Emergency: General Pervez Musharraf's Executive Assault on Judicial Independence in Pakistan' (2009) 35 *North Carolina Journal of International Law* 485, 520.
[571] *Qarase v Bainimarama* (Unreported, Fiji Court of Appeal, Powell, Lloyd and Douglas JJA, 9 April 2009).
[572] Ibid para 162.
[573] Ratu Josefa Iloilovatu Uluivuda, *President's Address to the Nation* (Government of Fiji, 2009) http://www.fiji.gov.fj/publish/page_14681.shtml accessed 2 February 2023. For a theoretical discussion on the legality of judicial appointments in illegal regimes, see generally Jennifer Corrin, 'Judge or Be Judged: Accepting Judicial Appointment in an Unlawful Regime' (2009) 16(2–3) *International Journal of the Legal Profession* 191.
[574] Alejandro Carrió and Alberto F Garay, *La jurisdicción "per saltum" de la Corte Suprema: Su estudio a partir del caso Aerolíneas Argentinas* (Abeldo Perrot 1991) 94, cited in Gretchen Helmke, *Courts under Constraints: Judges, Generals, and Presidents in Argentina* (Cambridge University Press 2004) 70.

Constitution "as is deemed expedient."[575] The new legal order established by the PCO, established under the pretext of existing treat, created, as Kahlan noted, an *extraconstitution* that aspired "to create the simulacrum of adherence to legality, constitutional norms, and existing institutions, as a means of establishing its own authority and, ultimately, acquiescence to its supremacy, if not full legitimacy."[576]

References to previous constitutional frameworks or simulations of adherence to legality may be explained by the world society hypothesis, which presupposes that authoritarian regimes desire to appeal to the recognition of the international community.[577]

The adherence to legal order in authoritarian regimes, although generally perceived as a sham[578] or "window dressing,"[579] may extend from the mere reliance on legal norms in theory to an attempt to misuse the legal framework in practice through "twisting and bending" of the existing constitutional and legal norms.[580] The same logic applies to interference with judicial tenure. The more the authoritarian regime appears to respect judicial independence, the closer it comes to adopting a hybrid nature. Authoritarian leaders might attempt to achieve their purposes through traditional lawful means if acting outside the law is too costly due to societal and international pressure. Before enforcing the emergency regime, Musharaff attempted several times to use existing legal tools to oust Chief Justice Chaudhry. For example, he referred C.J. to the judicial disciplinary body, the Supreme Judicial Council.

[575] *Provisional Constitutional Order No 1 of 2007* (3 November) (Musharraf).
[576] Anil Kalhan, 'Constitution and "Extraconstitution": Colonial Emergency Regimes in Postcolonial India and Pakistan' in Victor Ramraj and Arun Thiruvengadam (eds), *Emergency Powers in Asia: Exploring the Limits of Legality* (Cambridge University Press 2009) 101.
[577] David S Law and Mila Versteeg, 'Constitutional Variations among Strains of Authoritarianism' in Tom Ginsburg and Alberto Simpser (eds), *Constitutions in Authoritarian Regimes* (Cambridge University Press 2014) 107.
[578] Jennifer Gandhi, 'The Role of Presidents in Authoritarian Regimes' in Tom Ginsburg and Alberto Simpser (eds), *Constitutions in Authoritarian Regimes* (Cambridge University Press 2014) 199.
[579] Tom Ginsburg and Alberto Simpser, 'Introduction: Constitutions in Authoritarian Regimes' in Tom Ginsburg and Alberto Simpser (eds), *Constitutions in Authoritarian Regimes* (Cambridge University Press 2014) 7.
[580] András Sajó, *Ruling by Cheating: Governance in Illiberal Democracy* (Cambridge University Press 2021) 280.

Nevertheless, suppose the legal means do not yield results, as was Musharraf's case, since the SJC ruled that Chaudhry's suspension was illegal. Once the misuse of existing legal tools fails to achieve the leader's purpose, an authoritarian leader need not shy away from unlawful and arbitrary purging, differentiating it from the techniques of judicial dismissal employed by hybrid regimes.

In hybrid regimes, as discussed above, the appearance of legal adherence is crucial for the governments to recalibrate the judicial bench they encounter upon assuming office.[581] As regimes transition from hybrid to actual democracies, the demand for a façade of legal adherence intensifies. Consequently, some governments move beyond merely invoking legality in their narratives to justify their actions; they actively alter the legal and constitutional frameworks if given the opportunity. Instead of aligning their political objectives with the law, they do the opposite, modifying the legal framework to serve their political aims, which is, in theory, referred to as abusive constitution-making. In these instances, the tension surrounding the rule of law becomes particularly pronounced, raising the challenge of demonstrating that a specific legal action or enacted norm by a democratically elected government violates the rule of law, despite ostensibly meeting the requirements of legality and constitutionality.

The following Section examines the impact of abusive constitution-making on judicial independence in the context of judicial dismissals.

3.2. Dismissal through nullification of the appointment

[581] Frequently the literature analyzes this phenomenon from the lens of populism and democratic backsliding as the distinctive features of these regimes. "One striking novelty of these new populisms is that, while like most populists they undermine constitutionalism, they do so with often striking attention to the forms of law." Martin Krygier, 'The Challenge of Institutionalisation: Post-Communist "Transitions", Populism, and the Rule of Law' (2019) 15(3) *European Constitutional Law Review* 544.

The nullification of a judicial appointment is not commonly used, although it may appear crucial in the context of inherited judges. The nullification should theoretically be differentiated from the revocation of a judicial appointment. The difference is that in the former, the starting premise is that the appointment lacked the quality of legality from the outset. The latter falls closer to the category of purging if not performed in a legally envisioned manner and followed by the due process guarantee (see the Fiji example above).

The nullification of judicial appointments does not seem viable from the RoL perspective, as it undermines the guarantees of legal certainty. However, suppose there is clear evidence that the circumstances in which a judge was appointed were illegal. An illustrative example is the Pakistani PCO judgment, through which the Supreme Court declared the appointments of judges who took oath under Musharraf unconstitutional and void.[582] As discussed throughout this chapter, Musharaff's regime represented an apparent coup d'etat, which gave the Pakistani Supreme Court enough grounds to declare the whole regime and its judges unconstitutional.

Appointment nullification doesn't necessarily represent a way forward to democracy. Instead, it may serve the purpose of judicial capture by the executive. An illustrative example of this phenomenon is the Venezuelan Organic Law of the Supreme Tribunal of Justice,

[582] "since Mr. Justice Abdul Hameed Dogar was never a constitutional Chief Justice of Pakistan, therefore, all appointments of Judges of the Supreme Court of Pakistan, of the Chief Justices of the High Courts and of the Judges of the High Courts made, in consultation with him, during the period that he, unconstitutionally, held the said office from 3.11.2007 to 22.3.2009 (both days inclusive) are hereby declared to be unconstitutional, void ab initio and of no legal effect and such appointees shall cease to hold office forthwith." *PETITION NO 08 OF 2009, Nadeem Ahmed v Federation of Pakistan through Secretary, Ministry of Law and Justice, Islamabad, and others* (Supreme Court of Pakistan, 31 July 2009) https://www.dawn.com/news/889917/text-of-supreme-court-judgment accessed on October 10 2021.

passed by the Chavista regime in 2004.[583] According to Article 23 of the TJC Law, the National Assembly could nullify the appointment of judges by a simple majority for the following reasons: if a judge gave false information before being selected for the court, if the judge acted in a manner that offended the prestige of the court or any of its members, or if the judge undermined the functioning of the court.[584] Such nullifications were effective immediately without the proper guarantees of due process. This technique was used immediately against one of Chávez's opponents, Supreme Court Vice President Franklin Arriéche, which proves that the aim behind these changes was political retaliation.[585]

The previous sections examined the techniques employed predominantly in authoritarian and hybrid regimes, where governments faced minimal political costs for openly disregarding constitutional and legal norms. The following section will examine the methods employed in systems that aspire to be democracies or self-identify as such, despite exhibiting practices that significantly deviate from the principles of liberal constitutionalism.

3.3. Abusive constitution-making and dismissal of judges

The comparative scholarship expanding beyond the "traditional canon" has challenged many assumptions of public law regarding the constitution-making process.[586] David Landau and William Partlett explored the inherent dangers of the formal constitution-making process in

[583] *Ley Orgánica del Tribunal Supremo de Justicia de la República Bolivariana de Venezuela* [Organic Law of the Supreme Tribunal of Justice of the Bolivarian Republic of Venezuela] art 2 (2004) http://www.tsj.gov.ve/legislacion/Nuevaleytsj.htm accessed July 20, 2022.
[584] Ibid, Article 23.
[585] Lauren Castaldi, 'Judicial Independence Threatened in Venezuela: The Removal of Venezuelan Judges and the Complications of Rule of Law Reform' (2006) 37 *Georgetown Journal of International Law* 477, 504.
[586] William Partlett, 'Courts and Constitution-Making' (2015) 50 *Wake Forest Law Review* 921, 922.

fragile democracies.[587] When constitutional amendments or replacements go awry, they may lead to the curtailment of human rights and the erosion of principles underlying liberal constitutionalism, such as the rule of law and checks and balances. Landau labeled this phenomenon as *abusive constitutionalism*, defined as "the use of constitutional change to erode democratic order."[588] One of the first targets of the attack through constitutional change is independent institutions, such as courts.[589] This chapter relies on the discussed premises to explore how abusive constitution-making may lead to the dismissal of judges.

The constitution-making process calls for higher scrutiny when the model in question is what Hans Kelsen called a constitutional "revolution," where the entire legal order is replaced.[590] Landau notes that since few constitutions in the world envision a procedure for complete replacement, the revolution is carried out either extralegally[591] or is legalized through a court's decision, citing the power of the people to decide on their Constitution. The Supreme Court of Colombia provided an example of the latter model in the 1990s, and the Supreme Court of Venezuela followed suit in 1999. Both courts upheld the invocation of constituent assemblies.[592]

The problem with building the Constitution "from scratch" is that principles such as the rule of law and judicial independence, which bound the governments operating under the previous Constitution, now exist in a constitutional vacuum. Consequently, the degree of adherence to those principles depends solely on the will of the constituent assembly, as Fiss

[587] See generally David Landau, 'Constitution-Making Gone Wrong' (2013) 64 *Alabama Law Review* 923 (discussing Venezuela and Bolivia); William Partlett, 'The Dangers of Popular Constitution-Making' (2012) 38 *Brooklyn Journal of International Law* 193 (exploring Russia, Belarus, and Kazakhstan);
[588] David Landau, 'Abusive Constitutionalism' (2013) 47 *UC Davis Law Review* 189.
[589] David Landau and Rosalind Dixon, 'Constraining Constitutional Change' (2015) 50 *Wake Forest Law Review* 859, 859.
[590] Hans Kelsen, *General Theory of Law and State* (Anders Wedberg tr, Harvard University Press 1945) 118.
[591] The Honduran case under President Zelaya, see David Landau, 'The Importance of Constitution-Making' (2012) 89 *Denver University Law Review* 611, part III.
[592] Rafael Ballen M, *Constituyente y Constitución del 91* (1991) 169 (providing the text of the Colombian judgment); *Caso: Miguel José Mónaco y Otros, Revista Derecho Público* (Venezuela, Jan–Dec 1999) 68, 73.

claimed in his theory of regime-relative judicial independence. (See Chapter III). Nevertheless, whether that will is entirely unbound is open for debate (See Chapter I).

Illustrative examples of such abuse may be found in Venezuela, where Chavez assumed office in 1998.

The Venezuelan 1999 Constitution, also known as the Bolivarian Constitution, resulted from a constitution-making process that appealed to "extralegal popular sovereignty," aiming to rupture the legal continuity with the previous constitutional framework in place.[593] The departure from the last constitutional framework was symbolized by the establishment of the extraparliamentary Constituent Assembly, created through the 1999 referendum.

On August 18, 1999, the Constituent Assembly declared that the judicial branch was in crisis before even starting to draft the new Constitution. It, therefore, established a Judicial Emergency Commission, whose task was to evaluate the performance of the Supreme Court and National Judicial Council.[594] The Commission was also responsible for crafting the new procedure for appointing judges.

In times of constitution-changing, apex courts may impose a powerful constraint on the government. Such was not the case with the Supreme Court of Venezuela in the context of Chavez's constitutional reforms. In 1999, the Supreme Court controversially upheld the work of JEC and even let one of its magistrates participate.[595] The Decree on the Reorganisation of the Judicial Power, in addition to establishing the Judicial Emergency Commission and outlining its

[593] Andrew Arato, 'Beyond the Alternative Reform or Revolution: Post-sovereign Constitution-Making and Latin America' (2015) 50 *Wake Forest Law Review* 891, 892.
[594] *Reorganización del Poder Judicial* [Reorganization of Judicial Power], *La Gaceta Oficial* No 36.805, 2 (1999) (Venez).
[595] Ibid.

competencies, introduced two controversial provisions. According to Articles 6 and 7, the NJC could immediately dismiss the judges due to the initiated processes against them on the corruption charge and "inexcusable delay."[596] In liberal constitutional democracies, these grounds seem reasonable and aligned with the discussed need for reform. However, Chavez's twisted version misused them to boot out unsuitable judges. Another rule of law flaw was that the decree didn't guarantee due process.

Article 10 of the Decree on Reorganization of Judicial Power stipulated that judges who would have been suspended or dismissed could appeal to the Constitutional Assembly.[597] Despite that provision appearing to give the right to appeal as required by the standards of the due process and the rule of law principle, it did not work in practice.

Firstly, the fact that the Constitutional Assembly consisted primarily of Chavez's supporters and affiliates deprived the due process guarantees of their efficiency. Secondly, the Judicial Commission was not a body established by the previous Constitution; thus, the acts of the Commission were essentially "above the Constitution," and the due process guarantees deriving from the last constitutional framework would not apply to the dismissed and suspended judges either way.[598] The Commission arbitrarily determined the criteria for dismissal but also applied them arbitrarily.[599] Thus, the new process for dismissing allegedly corrupt judges was flawed and susceptible to political manipulation. Without the guarantees of an efficient right to appeal and clear, reasonable criteria for determining what constitutes a corrupt judge, the

[596] Reorganizacio n del Poder Judicial [Reorganization of Judicial Power], La Gaceta Oficial No. 36.805, 2 (1999) (Venez.).
[597] Ibid.
[598] Lauren Castaldi, *Judicial Independence Threatened in Venezuela: The Removal of Venezuelan Judges and the Complications of Rule of Law Reform* (2006) 37 *Georgetown Journal of International Law* 477, 497, Interview with Jose Tadeo Martinez Campo.
[599] Ibid.

inconsistent application of the set standards highlights the politicization of the reform and disrespect for the rule of law. The practical consequence was that JEC dismissed around 1/3 of the judicial corps.[600]

The Bolivarian Constitution de jure provided robust guarantees of judicial independence.[601] In practice, these guarantees did not apply, as 80% of the judges at the time held provisional tenure, which was the reason the JEC did not grant them the same guarantees against dismissal.[602] The ECJ began dismissing judges in a "discretionary manner and without any kind of disciplinary procedure" guided by evident political considerations.[603] With the Organic Law of 2004 (see Chapter V), Chavistas obtained complete control over the Supreme Court while continuing to dismiss unloyal judges by introducing a novel technique of appointment revocation (see Section). By 2006, hundreds of lower court judges were fired, while the criminal sanctions threatened judges who would decide against the regime.[604]

The constitution-making political and legal strategies employed by Chavez, which the literature discusses under the umbrella term *Bolivarianism*, spilled over to other Latin American

[600] Some of the judges resigned themselves. Tribunal Supremo de Justicia, Dirección Ejecutiva de la Magistratura, Unidad Coordinadora del Proyecto de Modernización del Poder Judicial, *Proyecto para la Mejora de la Administración de Justicia en el Contexto de la Resolución de Conflictos en Venezuela* (Tribunal Supremo de Justicia) 23. Also see Human Rights Watch, *Rigging the Rule of Law: Judicial Independence under Siege* (2004).
[601] AR Brewer-Carías, *La Constitución de 1999. Derecho Constitucional Venezolano* (Caracas, Editorial Jurídica Venezolana 2004); Human Rights Watch, *A Decade under Chávez: Political Intolerance and Lost Opportunities for Advancing Human Rights in Venezuela* (Human Rights Watch 2008) 36–37.
[602] OAS Report found that in 2003 only about 10% were tenured, Inter-American Commission on Human Rights, *Report on the Situation of Human Rights in Venezuela*, OEA/Ser.L/V/II.118 (29 December 2003) http://www.cidh.org/countryrep/Venezuela2003eng/toc.htm accessed 8 August 2022, para 174.
[603] *Chocrón Chocrón v Venezuela* (Preliminary Objection, Merits, Reparations and Costs) IACtHR Series C No 227 (1 July 2011).
[604] Kirk A Hawkins, 'Responding to Radical Populism: Chavismo in Venezuela' (2016) 23(2) *Democratization* 242, 252.

countries, such as Bolivia and Ecuador.[605] Abuse of constitution-making to concentrate power was also present in Peru under Fujimori's 1993 Constitution.[606]

The apex courts of Ecuador have undergone an attack of dismissal already under President Gutierrez (see Section on Abuse of Impeachment Procedures).[607] President Correa, however, followed Chavez's textbook on capturing the judiciary. Correa called a referendum and invoked constituent assembly, promising the citizens a complete overhaul of state institutions.[608] Despite the promises, scholars argued that the announced reforms served Correa as a "free pass in the designation of the members of the Judicial Council and the National Court of Justice." [609] President used a transitory body, "congresillo," to install loyalist individuals into judicial institutions. In 2011, the MPAIS government created ad hoc Consejo de la Judicatura, which is responsible for judicial appointments (the appointment tricks discussed in Chapter V).[610] However, Correa also used the constitution-changing opportunity to dismantle the Supreme Court, rename it, and announce significant restructuring, which led to the resignation of many judges.[611]

The misuse of the constitution-making process has not been limited to Latin American countries only. The European example is the introduction of the Hungarian Constitution, titled

[605] For similarities among these three regimes, see generally Carlos de la Torre, 'Hugo Chávez and the Diffusion of Bolivarianism' (2017) 24(7) *Democratization* 1271.
[606] Enrique Bernales Ballesteros, 'El desarrollo de la Constitución de 1993 desde su promulgación a la fecha' (2013) 18 *Pensamiento Constitucional* 35.
[607] Carlos Scartascini and others, *El juego político en América Latina: ¿Cómo se deciden las políticas públicas?* (Inter-American Development Bank 2011) 266.
[608] Regarding the judiciary, Corrales stated: "People will say we want to get our hands on the courts. Yes, of course we want to get our hands on them, for the sake of Ecuadorians!", El Universo 2011 in Paula Armendariz, 'Trusting the Dependent Judiciary: Evidence From Ecuador' (2020) 40(3) *Revista de Ciencia Política (Santiago)* 643.
[609] Flavia Freidenberg, 'Ecuador 2011: Revolución Ciudadana, Estabilidad Presidencial y Personalismo Político' (2012) 32(1) *Revista de Ciencia Política* 129, 140.
[610] Carlos de la Torre and Francisco Burbano de Lara, 'Populism, Constitution Making, and the Rule of Law in Latin America' (2020) 13 *Partecipazione e Conflitto* 1453, 1459.
[611]Santiago Basabe-Serrano, 'Ecuador: reforma constitucional, nuevos actores políticos y viejas prácticas partidistas' (2009) 29(2) *Revista de Ciencia Política (Santiago)* 381, 381.

Fundamental Law, under the government led by Viktor Orbán.[612] Unlike the previously mentioned Latin American countries, the Fundamental Law was not passed through an extraparliamentary constituent assembly, but rather through the two-thirds majority that the Christian conservative coalition of Fidesz and KDNP (Christian Democratic People's Party) obtained in Parliament after the 2010 general elections. The Fundamental Law has been criticized in the literature for undermining democracy in Hungary and consolidating executive power.[613] It has also been criticized for severely undermining judicial independence.[614] The Fundamental Law had more severe consequences regarding RoL in judicial appointment procedures than dismissals (discussed in Chapter V). However, the government also used transitory provisions to artificially recreate the apex court and change its name from the Supreme Court to Kúria. According to the government, a new president of a recent court had to be elected once the Fundamental Law entered into force. Effectively, this technique was used to dismiss András Baka, then-President of the Supreme Court, ex-legislator chairman of the National Judicial Council, and one of the most vocal critics of Orbán's regime.[615] An additional amendment to the Fundamental Law introduced only a few days before the scheduled date for the election of the President of Kúria made Baka ineligible for the new position. Baka challenged his dismissal before the European Court of Human Rights and won the case in the now-famous judgment Baka v. Hungary [616](discussed in Chapter II). However, Baka was never reinstated back to the position of President.

[612] Fundamental Law of Hungary (25 April 2011), as amended.
[613] Márton Bánkuti, Gábor Halmai and Kim Lane Scheppele, 'Hungary's Illiberal Turn: Disabling the Constitution' (2012) 23(3) *Journal of Democracy* 138.
[614] Gábor Halmai, 'The Early Retirement Age of the Hungarian Judges' in Fernanda Nicola and Bill Davies (eds), *EU Law Stories: Contextual and Critical Histories of European Jurisprudence* (Cambridge University Press 2017).
[615] David Kosař and Katarína Šipulová, 'The Strasbourg Court Meets Abusive Constitutionalism: *Baka v Hungary* and the Rule of Law' (2018) 10 *Hague Journal on the Rule of Law* 83.
[616] *Baka v Hungary* (Grand Chamber) App no 20261/12 (ECtHR, 23 June 2016)

Abusive constitution-making was not the only technique in the illiberal playbook pursued in Orbán's illiberal democracy. The government also changed the legal retirement scheme to eliminate unsuitable judges (see Section 3.5).

3.4. Abuse of the Ordinary Judicial Dismissal Techniques

Constitutional scholarship warns that once constitutional reforms expand presidential powers, they may threaten independent institutions, including the judiciary, as seen in cases such as Venezuela under Chavez and Ecuador under Correa. Recent cases, such as the 2017 Turkish constitutional amendments under Erdoğan, further illustrate this trend.[617]

However, there are cases where the judiciary has been effectively captured without a corresponding increase in executive authority through constitutional means, such as Bolivia under Evo Morales, or any constitutional changes, as seen in Poland during the PiS government.[618] Governments intent on entrenching their power frequently pursue constitutional amendments; however, some lack the legal and political means to accomplish this objective. In such cases, they often resort to manipulating existing legal mechanisms. Regarding the judiciary, there are numerous instances in which countries exploit conventional impeachment and disciplinary procedures—typically considered legitimate and aligned with international standards within a liberal democratic context—for their political gain. These governments often exploit legal technicalities and the inherent ambiguity in legal norms to advance their agendas, thereby undermining the integrity of judicial independence.

[617] Ahmet Erdi Öztürk and İştar Gözaydın, 'Turkey's Constitutional Amendments: A Critical Perspective' (2017) 2(2) *Research and Policy on Turkey* 210.
[618] For Bolivia, see Omar Sánchez-Sibony, 'Competitive Authoritarianism in Morales's Bolivia: Skewing Arenas of Competition' (2021) 63(1) *Latin American Politics and Society* 118–144, 128.

The constitutional framework significantly influences the abuse of ordinary dismissal procedures as a means of extraordinary judicial removal. The scope and limitations of such interference are primarily determined by what the constitutional structure permits. In this context, two subtypes of these dismissal techniques can be distinguished based on the most common procedures for judicial removal. The first is impeachment, an inherently political process in which the political branches are the primary actors in deciding the outcome of judicial wrongdoing. The second involves variations of judicial disciplinary mechanisms, where judicial institutions play the central role, though political branches may have varying degrees of involvement.

3.4.1. Abuse of the Impeachment Procedures

The practice of judicial impeachment can be traced back to the British legal tradition as early as the 14th century.[619] The procedure itself – presentment by the House of Commons and trial by the Lords, heavily influenced early American governance. During the drafting of the U.S. Constitution in 1787, the framers sought to establish a mechanism for holding federal judges accountable while maintaining judicial independence. However, the Founding Fathers recognized the potential drawbacks and slippery slopes associated with impeachment procedures, mainly due to its political nature, referring to it as "the engine more of passion than justice."[620] The cumbersome nature of the impeachment procedure for removing judges may explain why, throughout U.S. history, only one federal judge has been impeached, which occurred in the

[619] Mary L Volcansek, *Judicial Impeachment: None Called for Justice* (University of Illinois Press 1993) 3.
[620] As Jefferson referred to in in one of his letters to James Madison. See Mary L Volcansek, *Judicial Impeachment: None Called for Justice* 3-5.

Republic's early years.[621] Furthermore, U.S. states have infrequently employed impeachment to address judicial misconduct, instead opting for alternative solutions to manage such issues.[622]

Nonetheless, the historical evidence demonstrates that the potential for abuse of the impeachment mechanism for judicial removal has been prevalent in Latin American and Caribbean countries, whose constitutional frameworks were significantly influenced by the United States.

In Haiti, following the 2004 coup, Chief Justice Boniface Alexander, upon assuming the presidency, dismissed the Supreme Court after it ruled in favor of a presidential candidate unpopular with the new regime. Similarly, in 1985, Honduras witnessed a congressional purge of the Supreme Court due to its denunciation of corruption, resulting in a brief period with two competing Supreme Courts until a political agreement was reached. In Guatemala, General Ríos Montt suspended the entire Supreme Court in 1982, replacing it with university deans aligned with his administration. Similarly, in 1993, President Jorge Serrano Elías attempted to dissolve the Supreme Court and Constitutional Court during an autogolpe.[623]

The Bolivian 2009 Constitution, designed in an agreement with the opposition specifically to constrain executive power, paradoxically facilitated President Morales's consolidation of power.[624] During his first two years in office, President Morales struggled to secure a two-thirds majority in Congress to appoint four justices to the Supreme Court. In a controversial move, he issued a presidential decree to unilaterally appoint them on an interim

[621] Adam A Perlin, 'The Impeachment of Samuel Chase – Redefining Judicial Independence' (2009–2010) 62 *Rutgers Law Review* 725.
[622] Mary L Volcansek, *Judicial Impeachment: None Called for Justice* 5.
[623] Andrea Castagnola, *A Long History of the Political Manipulation of the Supreme Courts in Central America and the Caribbean, 1900–2009* (CEPI Working Paper No 24, June 2010).
[624] Sergio Verdugo, 'The Fall of the Constitution's Political Insurance: How the Morales Regime Eliminated the Insurance of the 2009 Bolivian Constitution' (2019) 17(4) *International Journal of Constitutional Law* 1098, 1099.

basis at the end of 2006, which led to appeals from the opposition to the Supreme Court. The Court ruled that the appointees could only serve for 90 days and mandated that new appointments require congressional approval. In response, Morales escalated tensions by suing the justices, accusing them of political motivations. Throughout this period, judicial independence was severely compromised as numerous justices were suspended, impeached, or resigned due to political pressure. Morales labeled the judiciary as the most corrupt elite, claiming its composition discriminated against indigenous peoples. Notably, Chief Justice Eduardo Rodríguez Veltze faced impeachment on charges of treason and espionage, while others resigned or were suspended amid similar allegations. By mid-2007, the Supreme Court operated with only seven justices, dwindling to six by 2009, underscoring the erosion of judicial integrity under executive overreach.[625]

Impeachment as a form of political retribution was also evident in the cases of Peru under Fujimori and Ecuador under Gutierrez.

Following Fujimori's controversial reelection in 1995, his government sought to extend his rule through a legal mechanism that would allow him to run for an unprecedented third term. This required interpreting a 1996 law that permitted multiple presidential reelections, which the Peruvian Constitutional Court partially struck down as unconstitutional.[626] The ruling directly challenged Fujimori's political agenda and provoked swift retaliation. Fujimori's allies in the Peruvian Congress, which had already been weakened by Fujimori's earlier dismantling of democratic checks, initiated impeachment proceedings against the three judges who had ruled

[625] Azul A Aguiar Aguilar, 'Courts and the Judicial Erosion of Democracy in Latin America' (2023) 51 *Politics & Policy* 7, 18.
[626] Inter-American Commission on Human Rights, *Second Report on the Situation of Human Rights in Peru* (2 June 2000) ch III(c) http://www.cidh.oas.org/countryrep/Peru2000en/TOC.htm accessed May 2, 2022.

against the government's interests.[627] The impeachment lacked transparency and was conducted without proper legal justifications or procedural safeguards, as the IACtHR concluded in its judgment *Constitutional Court v. Peru* (See Chapter II).

The 2004 judicial crisis in Ecuador demonstrates that the judiciary's institutional legitimacy and political capital can be significant barriers to political attempts to undermine the courts by misusing dismissal procedures. These attributes of the judiciary may constrain or complicate efforts by political actors to weaken judicial independence through illegitimate means. In 2002, Lucio Gutiérrez won Ecuador's presidency on a populist, anti-corruption platform but soon faced economic pressures and the collapse of his left-leaning coalition after instituting austerity measures. In November 2004, the Supreme Court backed efforts to impeach Gutiérrez on corruption charges, though the attempt ultimately failed. In retaliation, Gutiérrez allied with the Roldosista Party, securing a narrow majority in Congress, which controversially voted to remove the entire Supreme Court in December 2004 through the impeachment procedure.[628] This sparked widespread public outrage, and by April 2005, mass protests forced Gutiérrez to flee the country.

The impeachment process is typically reserved for removing high court justices and is most commonly found in systems where judges hold lifetime tenure. In contrast, in systems with constitutional courts, where judges serve fixed terms, governments seeking to exert political influence may either wait for a judge's term to expire or engage in court-packing strategies to alter the composition of the judiciary (see Chapter V).

[627] *Constitutional Court v Peru* (Merits, Reparations and Costs) IACtHR Series C No 71 (31 January 2001).
[628] Jennifer E Horan and Stephen S Meinhold, 'Separation of Powers and the Ecuadorian Supreme Court: Exploring Presidential–Judicial Conflict in a Post-Transition Democracy' (2012) 49 *Social Science Journal* 229, 235.

In the case of the removal of ordinary judges, the predominant form of abuse involves the misuse of disciplinary and criminal sanctions.

3.4.2. Dismissal through the abuse of disciplinary sanctions against judges

Governments may exploit ordinary disciplinary mechanisms to dismiss politically inconvenient judges, misapplying established legal procedures for improper purposes. While such procedures may appear lawful, their misuse violates international standards that require judges to be removed only for serious misconduct or incapacity, and that disciplinary actions adhere to fair processes free from political interference. Furthermore, authoritative standards such as the European Charter on the Statute for Judges stress that the grounds for judicial misconduct must be narrowly defined and delineated to prevent arbitrary or politically motivated dismissals.[629]

A prominent example of such abuse can be observed in the case of Poland under the PiS government.

Poland's abuse of disciplinary procedures began with a 2017 overhaul of its judicial system, primarily targeting judges who were critical of government reforms. The Law on the Organization of Ordinary Courts and the Law on the Supreme Court introduced a new disciplinary framework, centralizing power in the hands of the Minister of Justice, who also functioned as the Prosecutor General. Under Article 112b of the Law on the Common Court System, the Minister could arbitrarily appoint disciplinary officers to initiate proceedings against judges, bypassing existing judicial structures. This allowed the executive to directly influence

[629] Council of Europe, *European Charter on the Statute for Judges* (adopted 10 July 1998) DAJ/DOC (98) 23.

who was accused and prosecuted, often targeting judges for actions such as applying E.U. law or questioning government-led judicial appointments.

The "Muzzle Law" of 2019, formally an amendment to the *Law on the System of Ordinary Courts, the Act on the Supreme Court and Certain Other Acts* intensified these efforts.[630] It created new disciplinary offenses under Article 107 para 1 (3), allowing for punitive actions against judges who questioned the legality of judicial appointments or criticized political interference in the judiciary. The law also enabled disciplinary officers to pursue cases without a clear legal breach, using broad, vague terms such as "public activity incompatible with judicial independence" (Article 107, paragraph 4). Judges could be suspended indefinitely or dismissed under these provisions.

The Disciplinary Chamber of the Supreme Court, established by the same 2017 reforms, became a central instrument in enforcing these disciplinary actions. Although formally part of the Supreme Court, the Disciplinary Chamber operated as a politically controlled body, with its members appointed by the restructured National Council of the Judiciary (NCJ), primarily composed of government-aligned judges. This chamber could lift judicial immunity, initiate criminal proceedings, and impose sanctions, including suspension and dismissal. Despite a ruling from the CJEU in 2020 (Case C-791/19) that the Disciplinary Chamber lacked the necessary judicial independence under EU law, it continued to operate, thereby undermining the rule of law in Poland by targeting judges perceived as critical of the government.[631]

[630] *Act amending the Law on the System of Ordinary Courts, the Act on the Supreme Court and Certain Other Acts* (VII 510.176.2019/MAW/PKR/PF/MW/CW, Poland, 7 January 2020).
[631] *Case C-791/19 Commission v Poland – Disciplinary Regime for Judges* EU:C:2021:596 (Grand Chamber, 15 July 2021).

The misuse of existing legislation extends beyond the provisions related to the dismissal and appointment of judges. Other avenues for facilitating judicial dismissals can be found in reforms that, at first glance, appear unrelated to such outcomes, such as changes to retirement regulations, which will be examined in the following section.

3.5. Dismissal through legal changes to retirement scheme regulation

In democracies that do not envision life tenure, judges are subject to the state's legal retirement rules, just like other civil servants. Nevertheless, when it comes to the judiciary, higher scrutiny must be required when governments pursue changes to the retirement scheme. A notable example of the abuse of the retirement scheme can be found in the Hungarian context mentioned above, following the introduction of the Fundamental Law.[632] Not much later, Poland followed a similar path.[633]

Before December 31, 2011, Hungarian judges could remain in office until the age of 70. However, after the introduction of Fundamental Law (Article 23) and Act 162 of 2011, the judges were subject to the general retirement age, which was reduced to 62. The additional problem was that the Fundamental Law, in its transitory provisions, stipulated that the new rules would apply to sitting judges who needed to leave the office by 2012 if they reached the prescribed maximum age. The result of these changes was that 231 out of the 2996 Hungarian judges had to retire in 2012.[634] Reducing the retirement age affected the most senior judges, who occupied the highest positions within the judicial hierarchy. This technique would have enabled

[632] Gabor Halmai , 'The Early Retirement Age of the Hungarian Judges' in Nicola F and Davies B (eds), *EU Law Stories: Contextual and Critical Histories of European Jurisprudence* (Cambridge University Press 2017).
[633] Wojciech Sadurski, 'Dismantling Checks and Balances (II): Judges and Prosecutors' in *Poland's Constitutional Breakdown*, Oxford Comparative Constitutionalism (Oxford University Press 2019).
[634] Tamás Gyulavári and Nikolett Hős, 'Retirement of Hungarian Judges, Age Discrimination and Judicial Independence: A Tale of Two Courts' (2013) 42 *Industrial Law Journal* 289.

the Orban government to appoint loyal candidates to the courts and remove politically unsuitable judges. The CJEU ordered the early-retired judges to be reinstated, but due to the government's delay in complying with the order, all the former judges' positions had already been filled.[635]

Polish PiS government attempted to do the same trick with the Law on the Supreme Court in 2017, which retroactively lowered the retirement age for Supreme Court judges from 70 to 65, led to the forced early retirement of approximately 40% of the Court's sitting judges, including Małgorzata Gersdorf, the First President of the Supreme Court.[636] Despite her constitutionally guaranteed six-year term, she was required to retire solely based on her age, thereby violating the lex superior rule.[637] Judges seeking to continue their tenure could request an extension from the President of the Republic; however, the decision was left entirely to the President's discretion, without substantive criteria or judicial review, thereby undermining the principle of judicial independence. In the case of *Commission v. Poland (C-619/18)*, the CJEU ruled that this measure, which allowed the President unchecked authority to extend judges' tenures, violated the principle of the irremovability of judges, a core component of judicial independence as outlined in Article 19(1) of the Treaty on European Union (TEU) and Article 47 of the Charter of Fundamental Rights. (See Chapter II).[638]

The introduction of a legal framework reducing the retirement age for judges may be defended on socio-economic grounds. However, applying this reduction retroactively to sitting judges, as was done in Poland with the 2017 Law on the Supreme Court, directly conflicts with

[635] Kim Lane Scheppele: How to Evade the Constitution: The Hungarian Constitutional Court's Decision on Judicial Retirement Age, Part II, VerfBlog, 2012/8/09, https://verfassungsblog.de/evade-constitution-case-hungarian-constitutional-courts-decision-judicial-retirement-age-part-ii.
[636] Ustawa o Sądzie Najwyższym (Law on the Supreme Court) of 8 December 2017 (Dz. U. of 2018, heading 5).
[637] Adam Blisa and David Kosař, 'Court Presidents: The Missing Piece in the Puzzle of Judicial Governance' (2018) 19 *German Law Journal* 2031.
[638] *Case C-619/18 European Commission v Republic of Poland* EU:C:2019:531 (Grand Chamber, 24 June 2019).

the principle of judicial tenure and the rule of law, which protects judges from arbitrary governmental actions that may result in the judge's dismissal. This retroactive application undermines legal certainty by disregarding the legal conditions under which judges were initially appointed, thus undermining the rule of law and public trust in the judiciary.

3.6. Dismissal through extraordinary evaluative procedures

The common wisdom from both scholarship and international soft-law standards suggests that judicial performance evaluation serves the purpose of enhancing accountability and integrity, and should not automatically lead to judges' dismissal. According to Joe McIntyre, judicial performance evaluation "indirectly promotes the purposes of judicial accountability by aiding the operation of related primary mechanisms of accountability."[639] Contemporary legal trends suggest that judicial accountability mechanisms should be enforced *within* the judiciary[640], due to the fear of misuse of the tool by other branches of the government for the political harassment of judges.[641]

However, transitions to democracy present a specific tool that requires an extraordinary assessment of the entire judicial branch, referred to as the vetting procedure. In light of this chapter's typology, vetting deserves special attention as it represents a model used in democratic countries or post-authoritarian regimes transitioning to democracy.

[639] Julie McIntyre, 'Evaluating Judicial Performance Evaluation: A Conceptual Analysis' (2014) 4(5) *Oñati Socio-legal Series* 898, 908.
[640] See Jeffrey M Shaman, Steven Lubet and James J Alfini, *Judicial Conduct and Ethics* § 1.03 (3rd edn, Michie 1995); Howard T Markey, 'Federal Judicial Ethics: Choices Made; Choices Due' in Cynthia Gray (ed), *Ethics in the Courts: Policing Behavior in the Federal Judiciary* (Federal Judicial Center 1990) 1, 3–4.
[641] As Judge Clifford Wallace stated: "Giving power to the executive or legislative branch to investigate judges for all misconduct can interfere with an independent judiciary. It provides too ready a tool to harass judges whose judicial opinions are not consistent with the wishes of political leaders." James Clifford Wallace, 'Resolving Judicial Corruption While Preserving Judicial Independence: Comparative Perspectives' (1998) 28(2) *California Western International Law Journal* 345. Nevertheless, the model in which the judiciary is responsile for carrying out the disciplinary measures against judges does not prevent the political misuse, as the recent experience of Poland shows.

The vetting procedure gained momentum in the Third Wave Democracies as a tool for rebuilding state capacity during post-crisis or regime shifts within the transitional justice framework.[642] In the broadest sense, vetting is a process of "assessing integrity to determine suitability for public employment,"[643] which aims at "excluding from public service persons with serious integrity deficits to reestablish civic trust and re-legitimize public institutions, and to disable structures within which individuals carried out serious abuses."[644]

Throughout the 1990s, vetting was used to restructure various public sector structures, including the police, state officials, and the judiciary, in the new democracies emerging from the departure from communism or authoritarianism. Post-communist countries, such as East Germany, the Czech Republic, Hungary, and Poland, implemented vetting as a transitional justice tool. It was also applied in the post-conflict settings in line with the "justice cascade" phenomenon that sought to create new international norms of accountability for the regime's human rights abuses—for example, Bosnia and Herzegovina and Libya.[645] As a radical measure to restructure the public sector, authoritative international organizations, such as the OSCE, the UN, and the CoE, have closely monitored the vetting procedures. Nevertheless, research on its precise nature, impact, and scope has still been considerably scarce, except for notable transitional justice scholarship.[646]

[642] Alexander Mayer-Rieckh, 'Vetting to Prevent Future Abuses: Reforming the Police, Courts, and Prosecutor's Offices in Bosnia and Herzegovina' in Pablo de Greiff and Alexander Mayer-Rieckh (eds), *Justice as Prevention: Vetting Public Employees in Transitional Societies* (Social Science Research Council 2007).
[643] United Nations Development Program, *Vetting Public Employees in Post-conflict Settings: Operational Guidelines* (2006).
[644] Ibid 9.
[645] On the notion of "justice cascade", see Ellen L Lutz and Kathryn Sikkink, 'The Justice Cascade: The Evolution and Impact of Foreign Human Rights Trials in Latin America' (2001) 2 Chicago J Intl L 1.
[646] Cynthia Horne, 'Vetting and Lustration' in Dov Jacobs, Cheryl Lawther and Luke Moffett (eds), *Research Handbook on Transitional Justice* (Edward Elgar 2017); Moira Lynch, 'Purges' in Lavinia Stan and Nadya Nedelsky (eds), *Encyclopedia of Transitional Justice* (Cambridge University Press 2013); Pablo De Greiff, 'Vetting and Transitional Justice' in Alexander Mayer-Rieckh and Pablo De Greiff (eds), *Justice as Prevention: Vetting*

This Section aims to place vetting within the general framework of judicial independence theory through the proposed typology. As a tool widely endorsed by international organizations and established democracies, the possible shortcomings of judicial vetting are rarely discussed in the literature. This chapter illustrates the RoL tensions in previous vetting attempts, which serve as a precaution for countries wishing to pursue it in the future.

This Section identifies three types of vetting: 1) vetting through a broader lustration framework, 2) vetting in the post-conflict setting, and 3) vetting as an RoL strengthening mechanism. Each of these carries inherent RoL tensions.

3.6.1. Dismissal through Lustration

Lustration procedures are extensively discussed in the literature on transitional justice. This subsection focuses on the particular consequences of these procedures for the judicial sector. The following examples are primarily historically significant except in more recent instances, such as post-Maidan Ukraine. Still, the analysis may serve to draw some general conclusions about the effects of lustration on the RoL in the context of judicial tenure.

The political and moral implications of the lustration procedures, in general, and the vetting of the judiciary in particular, were present in post-communist countries that sought to break ties with their communist past. The concept is not limited to countries that departed from the communist regime during the 1990s only. For example, it was recently used in post-Maidan

Public Employees in Transitional Societies (Social Science Research Council 2007); Jon Elster, *Closing the Books: Transitional Justice in Historical Perspective* (Cambridge University Press 2004); Elster J, *Closing the Books: Transitional Justice in Historical Perspective* (Cambridge University Press 2004).

Ukraine as well.[647] However, the typical models derive from the post-communist experience of Germany and several Central European countries, as discussed below.

Alongside the German example (discussed in Chapter III), the literature recognizes the Czechoslovakian model as perhaps the most radical in terms of the post-communist lustration procedures.[648]

Czechoslovakia was the first of post-communist countries to introduce lustration procedures with the law passed already in October 1991 (the so-called Large Lustration Act)[649] , which envisioned a large-scale cleansing of the whole state apparatus: communist officers, secret service agents, senior academic positions, and also prosecutors, lawyers, and judges, but even candidates who would become judges.[650] It combined both elements of vetting and exclusion, resulting in the dismissal of 9000 officials from public service posts. Until 2002, more than 400,000 positions were cleared.[651]

The procedure established by the Large Lustration Act envisioned that the person applying for public office would need to provide a certificate of "negative lustration," meaning that there was no evidence of her involvement in the previous regime. An important detail to note is that the body in charge of lustration was an executive body, the Commission within the Ministry of Internal Affairs, and only in the case that the applicant for public office did not agree

[647] Klaus Bachmann and Igor Lyubashenko, 'The Puzzle of Transitional Justice in Ukraine' (2017) 11(2) *International Journal of Transitional Justice* 297.
[648] Natalia Letki, 'Lustration and Democratisation in East-Central Europe' (2002) 54(4) Europe-Asia Studies 529, 539; Kieran Williams, Brigid Fowler and Aleks Szczerbiak, 'Explaining Lustration in Central Europe: A "Post-Communist Politics" Approach' (2005) 12(1) Democratization 22, 25.
[649] Act No 451/1991 Coll on Standards Required for Holding Specific Positions in State Administration of the Czech and Slovak Republic.
[650] Adam Czarnota, 'Lustration, Decommunisation and the Rule of Law' (2009) 1(2) *Hague Journal on the Rule of Law* 307, 322. The Czechoslovakian law was applied only in the Czech Republic (and not Slovakia).
[651] Kieran Williams and Dennis Deletant, *Security Intelligence Services in New Democracies: The Czech Republic, Slovakia and Romania* (Palgrave Macmillan 2001) 74–75.

with the Commission's decision could they appeal to the Court.[652] The position of judges in the case of Czech lustration procedures did not differ from one of the other public officials.

On several instances, the literature cited the Czech example as a positive one, "most thorough and comprehensive," especially as David and Horne have shown through empirical research that the models focused on dismissals were the most effective in fostering trust within society in the post-communist governments. [653] There were also many critics of this model.[654] This model's main criticism was that it affected only ordinary citizens. At the same time, the true elite of the communist regime managed to quietly reposition themselves within the newly democratic administration.[655] This observation should be assessed through the lens of the rationales behind the lustration procedures, as it highlights the moral nature of post-communist cleansing. The narrative of perpetrators evading sanctions supports the argument that the post-communist screening had more to do with the moral condemnation of past actions and less with the "fit for office" requirement imposed for the functioning of the newly established democracy.

The Polish model was somewhat different, as the lustration initiatives intertwined with the political agendas, which inevitably slowed down and blurred the procedures to reform the public sector, including the judiciary. Poland chose a less radical path regarding the lustration of

[652] Adam Czarnota, 'Lustration, Decommunisation and the Rule of Law' (2009) 322.
[653] Grazyna Skapska, 'Moral Definitions of Constitutionalism in East Central Europe: Facing Past Human Rights Violations' (2003) 18 *International Sociology* 199, 202; Herman Schwartz, 'Lustration in Eastern Europe' (1994) 1 *Parker School Journal of East European Law* 141; Cynthia M Horne, 'Lustration, Transitional Justice, and Social Trust in Post-Communist Countries: Repairing or Wresting the Ties that Bind?' (2014) 66(2) *Europe-Asia Studies* 225; Cynthia M Horne, 'Assessing the Impact of Lustration on Trust in Public Institutions and National Government in Central and Eastern Europe' (2012) 45(4) *Comparative Political Studies* 412; Stephen Holmes, 'The End of Decommunization: Special Report' (1994) 3 *East European Constitutional Review* 33; Roman David, *Lustration and Transitional Justice: Personnel Systems in the Czech Republic, Hungary, and Poland* (University of Pennsylvania Press 2011).
[654] Tina Rosenberg, *The Haunted Land: Facing Europe's Ghosts after Communism* (Vintage Books 1995).
[655] David Kosař, 'Lustration and Lapse of Time: "Dealing with the Past" in the Czech Republic' (2008) 4(3) *European Constitutional Law Review* 460.

the public sector, particularly concerning judges.[656] The issue of lustration was a contentious topic that even led to the fall of Jan Olszewski's government in 1992. Nevertheless, the role of judges in the Polish transition has been a significant topic ever since the Round Table talks.[657] The 1989 round tables sought a solution similar to the Spanish "forgive and forget" strategy. Thus, the judges remained largely unaffected by dismissals in the first year of the transition.[658] The idea was to cleanse only the high judicial positions (e.g., Supreme Court) while the government expected the ordinary judiciary to clean itself "internally." Accordingly, all sitting Supreme Court justices were dismissed by the 1989 law, while a small number were reappointed to a restructured bench.[659] Bodnar further clarifies that a complete overhaul of the judiciary in 1989 was not feasible, as it would have rendered the judicial system inoperative.[660] However, the government introduced institutional and personnel changes to enable the judicial sector's smooth transition.[661] The government introduced the National Council of the Judiciary as part of this legislative package, and, as previously mentioned, the term of office of over 80% of the judges of the Supreme Court expired. Other judges of the Supreme Court (only three) were cleansed

[656] The general Polish Lustration Law (Ustawa o ujawnieniu pracy lub służby w organach bezpieczeństwa państwa lub współpracy z nimi w latach 1944-1990 osób pełniących funkcje publiczne) was introduced only in 1997, mostly due to lack of political consensus on it in the first transition years after the Round Table of 1989 until the election of the center-right party in 1997. See Roman David, 'Lustration Laws in Action: The Motives and Evaluation of Lustration Policy in the Czech Republic and Poland (1989–2001)' (2003) 28(2) *Law and Social Inquiry* 387, 390.
[657] Adam Zamoyski, *Poland: A History* (HarperPress 2009) 381–82.
[658] Pedro C Magalhães, 'The Politics of Judicial Reform in Eastern Europe' (1999) 32(1) *Comparative Politics* 43, 51.
[659] Fryderyk Zoll and Leah Wortham, 'Judicial Independence and Accountability: Withstanding Political Stress in Poland' (2019) 42 *Fordham International Law Journal* 875, 887.
[660] Adam Bodnar, 'The Judiciary in Poland after 20 Years of Transformation' in Jacek Kucharczyk and Jarosław Zbieranek (eds), *Democracy in Poland 1989–2009: Challenges for the Future* (Institute of Public Affairs 2010) 31.
[661] On 20 December 1989, under President Jaruzelski, the Sejm passed laws on the system of ordinary courts, the Supreme Court, the Supreme Administrative Court, and the Constitutional Tribunal: KONKRET24, 'Was There a Verification of Judges in Poland? We Check the Prime Minister's Words' (12 December 2018) https://konkret24.tvn24.pl/polska,108/czy-byla-w-polsce-weryfikacja-sedziow-sprawdzamy-slowa-premiera,891666.html accessed May 12 2022.

internally under the then-appointed President of the S.C. President Adam Strzembosz. Still, they passed the verification and, thus, remained on the bench.[662]

The Little Constitution of 1993, entrenched on a constitutional level (as agreed upon in the 1989 round table talks), introduced the High Judicial Council, which would be constituted by the majority of judges, but would still be dependent on the Ministry of Justice.[663] The vision that the judiciary would be internally cleansed soon proved futile.[664] The National Council of the Judiciary introduced post-roundtable talks to establish judicial independence, which were severely criticized by anti-communist parties in the Sejm in the first years of the 1990s for the lack of purging activities among judges.[665] However, the perception that the High Judicial Council did not engage in the internal cleansing during the '90s has been recently contested by the Polish Association of Judges Iustitia".[666]

This brief historical reference to the first post-1989 years of the Polish transition reveals that the discourse of dealing with communist judges was employed as a bargaining chip in the political arena during the initial transitional period. The phenomenon of discourse politicization surrounding the dismissal of post-communist judges is vital as a historical reference in transitional justice. Nalepa recently claimed that "reluctance by the liberal governments in office

[662] Stowarzyszenie Sędziów Polskich IUSTITIA, *Response to the Compendium of the White Paper on Reforms of the Polish Justice System Presented by the Government of the Republic of Poland to the European Commission* (13 March 2018) https://www.iustitia.pl/informacje/2160-odpowiedz-na-kompedium-bialej-ksiegi-w-sprawie-reform-polskiego-wymiaru-sprawiedliwosci-przedstawione-przez-rzad-rzeczypospolitej-polskiej-d accessed June 11 2019.
[663] Daniela Piana, 'The Power Knocks at the Courts' Back Door: Two Waves of Postcommunist Judicial Reforms' (2009) 42(6) *Comparative Political Studies* 816, 820.
[664] Pedro C. Magalhães, "The Politics of Judicial Reform in Eastern Europe" 54.
[665] Ibid. The government coalition of 1992 was inclined to share the sentiment. The presented bill aimed to dismiss the magistrates from those "who in the past had succumbed to political pressures" to boost the judicial administration's efficiency. That bill was amended immediately, aiming to cleanse other governmental positions, so it became a symbol of political vendetta that divided the government. Not long after that, the Constitutional Court declared the bill unconstitutional.
[666] Stowarzyszenie Sędziów Polskich IUSTITIA, *Response to the Compendium of the White Paper on Reforms of the Polish Justice System Presented by the Government of the Republic of Poland to the European Commission* (13 March 2018) https://www.iustitia.pl/informacje/2160-odpowiedz-na-kompedium-bialej-ksiegi-w-sprawie-reform-polskiego-wymiaru-sprawiedliwosci-przedstawione-przez-rzad-rzeczypospolitej-polskiej-d accessed June 11 2019.

since 1993 to engage in the transitional clearing of the judiciary has provided their populist successors (PiS in Poland and Fidesz in Hungary) with an excuse to undermine judiciary independence and to use a broadly defined decommunization project to tighten their grip on power."[667] The evidence for this is highlighted in Poland, where the Polish PiS government adopted the mentioned trend of abusing the discourse of transitional justice as a pretext to initiate judicial reforms from 2015 onwards.[668] Thus, the full-scale reform undertaken by the Polish government from 2015 until its loss of power in 2023 has been disproportionate in addressing this issue. Although the argument that there was no vetting of the communist judges is ever-present in the public sphere, the picture was much more complex.

With the passing of the 1997 Lustration Act, which came into force only in 1998, after establishing the Lustration Chamber within the Warsaw Appellate Court, the judges were subject to the same lustration treatment as other public service members.[669] The sanction of the lustration procedure was the loss of moral qualification to hold a public office and a ten-year ban from obtaining one. [670]

The supplementing legal framework for the lustration of judges was provided in the Act of December 17, 1997, amending the Act - Law on the System of Common Courts of 1985 and

[667] Monika Nalepa, 'Transitional Justice and Authoritarian Backsliding' (2021) 32 *Constitutional Political Economy* 278, 279.
[668] According to the statement of the former Polish Prime Minister Morawiecki for the French newspaper Le Figaro: "In Poland, after the fall of communism, 100 percent of judges remained in the judiciary, and no one was held responsible for the crimes committed in the 1980." Isabelle Lasserre, 'Mateusz Morawiecki, le visage modéré du régime ultraconservateur polonais' *Le Figaro* (11 December 2018) https://www.lefigaro.fr/international/2018/12/11/01003-20181211ARTFIG00287-le-visage-modere-du-regime-ultraconservateur-polonais.php accessed 5 July 2019. Iustitia pointed out that out of all martial law judges, only a few remained on the Supreme Court.
[669] Adam Czarnota, 'The Politics of the Lustration Law in Poland, 1989–2006' in Alexander Mayer-Rieckh and Pablo De Greiff (eds), *Justice as Prevention: Vetting Public Employees in Transitional Societies* (Social Science Research Council 2007) 232. The Lustration Law of 1997 required all citizens who were adults under the law in 1989 when the transfer of power took place to submit a positive or a negative lustration statement concerning their collaboration with institutions of state security between 1944 and 1990.
[670] Ibid.

Certain Other Acts.[671] This amendment was challenged before the Polish Constitutional Tribunal by the President of Poland, Kwaśniewski, in judgment K3/98.[672] The President of the Republic prompted the Constitutional Tribunal to question whether the vetting of judges in the context of transitional justice is reconcilable with the principle of judicial independence. The Polish CT chose not to enter the substantive analysis of the vetting procedures and stroke down the law only on procedural grounds.[673] The Lustration Law 1997 also affected the judges who retired before the lustration began. The 1997 Law amending the law on the System of Common Courts of 1985 and Certain Other Acts also introduced the status of a "retired judge." As Czarnota explained, this status instituted "the legal construction that judges do not retire but rather, after retirement age, are not in active service."[674]

[671] Poland, Act of 17 December 1997 Amending the Act – Law on the System of Common Courts of 1985 and Certain Other Acts. These December amendments introduced two critical changes: 1) Article 1 (1) amended Art. 59 of the Act - Law on the System of Ordinary Courts in such a way that it changed the retirement age from 70 to 65 and restored the competence of the National Council of the Judiciary to consent to further holding of the position of the judging judge beyond this age. 2) Art. 6 (1) of the Amending Act provided for the exclusion of the statute of limitations in judicial disciplinary proceedings in the period until December 31, 2000, concerning judges who violated the obligation to adjudicate independently and impartially in political trials conducted before 1989 and introduced a particular disciplinary proceeding for them which imposed a mandatory penalty of expulsion from the judicial service.

[672] Polish Constitutional Tribunal, Judgment of 24 June 1998, Case K 3/98, *Monitor Polski* 1998 No 22, item 331 https://ipo.trybunal.gov.pl/ipo/Sprawa?cid=1&dokument=290&sprawa=3503 accessed 15 January 2021. 1) procedural, due to the hastiness of the legislative process and the fact that the Sejm failed to consult the National Council of the Judiciary when introducing the extension of the statute of limitation for judicial disciplinary liability in Article 6 of the Law (alleged violation of Article 186 (1) of the Polish Constitution); 2) due to the change of retirement age and the attachment of conditionality of its extension to the consent of the NCJ, the President cited the violation of the principle of irremovability of judges, as guaranteed under Article 180 of the Constitution); 3) the mentioned Article 6 of the Amending Law, which regulated the disciplinary procedure for judges, according to the President, violated the principle of irremovability of judges as the norms under these provisions were construed in vague criteria (contrary to the rules applicable when formulating exceptional norms such as this in which the judicial irremovability is being curtailed).

[673] According to the Polish CT: "The opening of additional and extraordinary possibilities of removing a judge from office touches the core of the principle of independence, the more so as it is related, among other things, with the content of the issued judgments. Such statutory regulations, even if their admissibility may have constitutional grounds, the Constitution impose extremely high requirements and subjects them to particularly strongly defined frameworks and limitations. Thus, their admission procedure must also be assessed with much more meticulousness, and violations of this procedure must be treated with much greater seriousness." Polish Constitutional Tribunal, Judgment of 24 June 1998, Case K 3/98, *Monitor Polski* 1998 No 22, item 331 para. 199. https://ipo.trybunal.gov.pl/ipo/Sprawa?cid=1&dokument=290&sprawa=3503 accessed 15 January 2021.

[674] Adam Czarnota, 'The Politics of the Lustration Law in Poland, 1989–2006' in Alexander Mayer-Rieckh and Pablo De Greiff (eds), *Justice as Prevention: Vetting Public Employees in Transitional Societies* (Social Science

Historical references to the position of judges in post-communist vetting procedures may lead to several conclusions.

Firstly, within the post-communist transitional framework of the observed countries, judges were subject to the same legal treatment as other members of the public sector. This approach to communist judges can be explained in light of the rationale behind the post-communist vetting procedures; they were not designed to tackle the judiciary as a specific branch of government.

Additionally, in the context of judges, in some cases, it was difficult to determine how they collaborated with the regime within their function in the first place. This uncertainty opens the door to the misuse of vetting for political retaliation purposes, at the expense of the due process guaranteed under the principle of the rule of law. Concerning the Polish case, Bodnar claimed that the number of judges belonging to the Communist party was high, but "such membership did not mean necessarily a high politicization of judgments" as sometimes judges "were obliged to be party members."[675] Regarding the criminal responsibility of Polish judges who applied the 1981 communist martial law, the Polish Supreme Court issued a resolution in 2007 stating that ordinary judges could not be held criminally liable for simply applying the law during the communist martial regime.[676] Furthermore, even if martial law were found to be unconstitutional and discordant with international law, it would raise the question of the unlawful assessment of its provisions by courts. The unconstitutionality of martial law would not

Research Council 2007) 232, 237. Through that amendment, they fell within the legal definition of the public sector as laid out in the Lustration Law. In December, the Law of 1985 was again amended, prescribing that the retired judges "shall be obliged to keep the dignity of the position of a judge" and are, therefore, obliged to submit a lustration statement following the Lustration Law of 1997. The practical consequence of this amendment was that the judges would not receive a pension, but a percentage of their previous salary and certain bonuses.

[675] Adam Bodnar, 'The Judiciary in Poland after 20 Years of Transformation' 38.

[676] Polish Supreme Court, Resolution of 20 December 2007, I KZP 37/07, legal justification available at https://www.sn.pl/sites/orzecznictwo/Orzeczenia3/I%20KZP%2037-07.pdf accessed 5 April 2021.

automatically impose criminal liability on judges for its application, as that would still require proof of guilt in each case.[677] This resolution of the Supreme Court was cited as one of the justifications for the ongoing Polish judicial reform in the PiS government's White Paper to the European Commission in 2018. According to the PiS government, the 2007 resolution "virtually absolved all judges from responsibility for the unlawful rulings delivered during martial law in the 1980s."[678] Although the mentioned resolution sparked criticism at the time it was issued, a careful reading of it proves this government's claim to be inaccurate.[679] Additionally, many judges who served during martial law have passed away due to the passage of time.

The abuse of the post-communist judges narrative present during the 90s in Hungary and Poland highlights the susceptibility of lustration procedures to politicization.[680] Furthermore, the lustration per se, except in notable cases such as Germany and the Czech Republic, did not lead to the en-masse dismissal of the judiciary, primarily due to the lack of political consensus.

The rule of law and observance of procedural safeguards were secondary considerations in the post-communist setting. The following Section illustrates the RoL tension with the dismissal of judges in the post-conflict environment.

3.6.2. Dismissal through the post-conflict vetting

[677] Ibid.
[678] The Chancellery of the Prime Minister of Poland, *White Paper on the Reform of the Polish Judiciary* (7 March 2018) 13.
[679] Stowarzyszenie Sędziów Polskich IUSTITIA, *Response to the Compendium of the White Paper on Reforms of the Polish Justice System Presented by the Government of the Republic of Poland to the European Commission* (13 March 2018) https://www.iustitia.pl/informacje/2160-odpowiedz-na-kompedium-bialej-ksiegi-w-sprawie-reform-polskiego-wymiaru-sprawiedliwosci-przedstawione-przez-rzad-rzeczypospolitej-polskiej-d accessed June 11 2019.
[680] Monika Nalepa, 'Transitional Justice and Authoritarian Backsliding' (2021) 32 *Constitutional Political Economy* 278.

The vetting regime of judges in post-conflict countries, which still falls under the transitional justice framework, differs in both its aims and the form it took previously. The sensitive nature of the post-conflict setting requires higher scrutiny when pursuing state rebuilding, particularly in the judicial sector. Some of the post-conflict vetting processes have gone notoriously bad. The de-Ba'athification program in Iraq is recognized in the literature as a prime example of how vetting can be misused for political purposes.[681] In other cases, the international community's presence was supposed to guarantee that the rule of law would be observed. A notable example of this scenario is Bosnia and Herzegovina in the early 2000s, following the Dayton Peace Agreement.

In the initial years following the Dayton Peace Agreement, there was little effort to reform the judiciary in Bosnia and Herzegovina (BiH), leading some international observers to characterize the state of the administration of justice as a "misrule of law."[682] This stagnation in judicial reform can be attributed to the Dayton Peace Agreement not outlining specific measures for reforming the Bosnian judiciary or designating an international organization to oversee such efforts. Notably, the judicial reform in Bosnia following the agreement involved implementing both vetting models: first, certification, and subsequently, reappointment, although the initial certification model proved largely ineffective. Between 2002 and 2004, all judges were dismissed and required to reapply for their positions, a process managed by the Bosnian High Judicial Council with international oversight. However, significant concerns arose about the

[681] Miranda Sissons and Abdulrazzaq Al-Saiedi, *A Bitter Legacy: Lessons of De-Baathification in Iraq* (International Center for Transitional Justice 2013) https://www.ictj.org/ar/node/16677 accessed 5 October 2022.
[682] International Crisis Group, *Courting Disaster: The Misrule of Law in Bosnia & Herzegovina* (ICG Balkans Report No 127, 25 March 2002).

thoroughness of the vetting process, particularly regarding the council's capacity to investigate judges' past involvement in war crimes.[683]

While the vetting process was hailed as a success story at the time, the objective of removing judges associated with war crimes was only superficially realized, as investigations were hindered by insufficient information and the overwhelming volume of data to process. Consequently, many dismissed judges claimed their rights were violated during the reappointment process, but their appeals were largely unsuccessful due to narrowly defined grounds for appeal.[684] The Bosnian experience illustrates that while the rule of law guarantees, such as judges' rights to appeal upon dismissal, are crucial, they were often overshadowed by the imperative to establish new institutional frameworks and promote peace-building. This example raises an important question: whether the rule of law is and should be the primary political ideal in sensitive contexts, such as post-conflict or post-war environments.

The following subsection addresses how vetting is used for anti-corruption purposes.

3.6.3. Dismissal through vetting as an anti-corruption tool

The judicial vetting experiences of the last decade demonstrate that the aims and rationales of the vetting procedures have significantly changed over time and cannot be perceived solely as a tool supporting the democratic transition. In the post-communist setting, the main grounds for vetting were the involvement of the previous communist regime. In the post-conflict

[683] Massimo Moratti and Amra Sabic-El-Rayess, *Transitional Justice and DDR: The Case of Bosnia and Herzegovina* (International Center for Transitional Justice, June 2009) 25 https://www.ictj.org/sites/default/files/ICTJ-DDR-Bosnia-CaseStudy-2009-English.pdf accessed 13 April 2022.
[684] Jasmin Hasić, *Governing Diversity: The Unexposed Rules of Engagement within the Justice System of Bosnia and Herzegovina* (2015) https://humanityinaction.org/knowledge_detail/governing-diversity-the-unexposed-rules-of-engagement-within-the-justice-system-of-bosnia-and-herzegovina/ accessed 20 April 2022.

environment, the primary rationale was to vet the officials who could have been linked to severe human rights abuses. The same aims and grounds of vetting have been applied to judges and other parts of the public sector.

In the past decade, a notable shift has occurred, with new objectives and distinct grounds for vetting emerging, explicitly targeting the judicial sector and primarily aimed at reinforcing the rule of law and judicial integrity. However, contemporary judicial reforms, driven by vetting, are increasingly shaped by a country's international commitments to upholding the rule of law and judicial independence.

The institutional capacity-building of the judiciary, as an aspect of transitional justice, merged with the constitutionalization of international standards on judicial independence. The vetting of judges nowadays focuses on assessing the judiciary through objective criteria, such as competence and impartiality, rather than examining their particular involvement in the previous regime.[685] With objective grounds for the evaluation and strict procedures following its implementation, the vetting process might appear shielded from the possible political misuses detected in the post-communist setting. However, the empirical evidence shows this is not always the case.[686] Gloppen warned, "If misused, however, anti-corruption strategies become very effective tools for undermining judicial independence by ridding the judiciary of independent-minded judges that the authorities find bothersome."[687] Similarly to the post-conflict setting, international presence should prevent such scenarios. However, the danger of

[685] See the recent Albanian example on vetting Law No 84/2016 of 30 August 2016 on the Transitional Re-Evaluation of Judges and Prosecutors in the Republic of Albania.
[686] See the example of Serbia in the reappointment of 2008-2012, see Vesna Rakić Vodinelić, Milan Reljanović and Ana Knežević Bojović (eds), *Judicial Reform in Serbia 2008–2012* (Center for Advanced Legal Studies 2012).
[687] Siri Gloppen, 'Courts, Corruption and Judicial Independence' in Tina Søreide and Aled Williams (eds), *Corruption, Grabbing and Development: Real World Challenges* (Chr. Michelsen Institute 2014) https://www.cmi.no/publications/5091-courts-corruption-and-judicial-independence accessed 15 April 2022.

political misuse precisely calls for a deeper engagement with the national context, for which international experts often lack the capacity.

In the European context, this trend is especially prominent in the EU accession process.[688] As Bogdan Iancu observed, "anti-corruption has become the fulcrum of conditionalities for unstable democracies," to the extent that anti-corruption mechanisms, including vetting, have emerged as a "quick fix" for European peripheral states in their efforts to align more closely with the European acquis.[689]

Notable recent examples in the context of EU accession include Albania and Moldova. Judicial vetting in Albania and Moldova has become a pivotal mechanism to enhance the judiciary's integrity as part of broader anti-corruption reforms, particularly in their aspirations for EU membership.

While Moldova's vetting process is still in development, the Albanian experience has been perceived as a stellar example of judicial reform, aimed at strengthening the rule of law and serving as a potential export model.[690]

In Albania, the vetting process was introduced through comprehensive constitutional amendments in 2016, backed by the Venice Commission and international organizations. This extraordinary measure, designed to address systemic corruption and clientelism within the judiciary, thoroughly reassessed all judges and prosecutors based on asset declarations,

[688] Ramona Coman, 'Quo Vadis Judicial Reforms? The Quest for Judicial Independence in Central and Eastern Europe' (2014) 66(6) *Europe-Asia Studies* 892.
[689] Bogdan Iancu, 'Quick Fix Solutions—Anticorruption as Core/Peripheral Modality of the "Rule of Law"' (2024) 16(3) *Hague Journal on the Rule of Law* 611.
[690] Parliamentary Assembly of the Council of Europe (PACE), 'Albania: Satisfaction with Vetting of Judges and Prosecutors; Further Steps Needed to Fight High-Level Corruption' https://pace.coe.int/en/news/7179/albania-satisfaction-with-vetting-of-judges-and-prosecutors-further-steps-needed-to-fight-high-level-corruption accessed 6 February 2023.

professionalism, and integrity. Despite its ambitious scope and international support, the vetting process led to significant institutional disruption. Nearly half of Albania's judiciary, including key members of the Constitutional and High Court, was removed, leading to operational paralysis and a severe backlog of cases. Furthermore, concerns were raised about the long-term sustainability of the reforms, as the process was primarily externally driven, with insufficient mechanisms in place to ensure the continuity of judicial integrity after international oversight wanes.

Similarly, after receiving EU candidate status in 2022, Moldova introduced a vetting framework under Law No. 252/2023, focusing on the external evaluation of judges and prosecutors. Initially conceived as a filtering process targeting members of the Superior Council of Magistracy (SCM) and Superior Council of Prosecutors (SCP), the scope of the vetting was later expanded to cover the entire judiciary. Although the international community, particularly the EU and the OSCE, has played a significant role in shaping Moldova's vetting framework, the process has faced delays and procedural shortcomings. These include concerns about the legitimacy and transparency of the Evaluation Committee, particularly regarding the selection and accountability of its members, some of whom lacked sufficient expertise in Moldova's legal system. Additionally, the process has been criticized for allowing judges to resign before evaluation, thus potentially undermining the reform's objectives by enabling problematic judges to avoid scrutiny.

In both countries, while vetting is presented as a necessary step towards meeting EU standards of judicial independence and the rule of law, the heavy reliance on international actors has highlighted significant challenges. The lack of strong, locally driven institutional frameworks raises questions about the long-term effectiveness of these reforms. Without more profound

cultural shifts and domestic ownership of the vetting process, there is a risk that the judiciary may revert to prior patterns of inefficiency and corruption once international oversight diminishes. Thus, the vetting processes in Albania and Moldova, despite their initial successes, highlight the inherent limitations of externally imposed judicial reforms in contexts where systemic and cultural changes are necessary for visible improvement.

The inherent limitations of externally imposed judicial reforms in contexts requiring systemic and cultural transformation demonstrate that, even when reforms adhere to all international standards on judicial independence, they may fail to achieve the desired outcomes in practice. The discussed examples raise critical questions about whether such interference with judicial tenure can be justified from a rule-of-law perspective.

4. Conclusion

This chapter has demonstrated that the use of extraordinary techniques for judicial dismissals poses a significant challenge to the principle of judicial independence. By analyzing various methods, it has become clear that governments often resort to these techniques when attempting to entrench their power via the control of the judiciary. These methods, although diverse in their application, share a common characteristic: they enable political actors to bypass or distort established legal processes to achieve political dominance, thereby undermining the judiciary's role as an independent check on the political branches.

Throughout the chapter, it has been demonstrated that such practices are not confined to authoritarian or hybrid regimes alone, but are also found in democracies, particularly during periods of political instability or transition. These techniques demonstrate how governments can maintain a facade of legality while effectively eroding judicial independence. The chapter's exploration of these techniques reveals the subtle yet systematic ways in which judicial dismissals are used to reshape the judiciary in line with political objectives. Even in contexts where formal legal mechanisms are followed, the abuse of these processes highlights the fragility of judicial independence when confronted with political manipulation.

This analysis has further underscored that, when examined in isolation, judicial dismissals may not always appear to violate the principles of the rule of law. However, when viewed within the broader context of sustained interference in judicial tenure, these practices reveal a pattern of deliberate attempts to weaken judicial oversight. The typology presented in this chapter provides a structured understanding of how these techniques operate across different political systems, serving as a crucial tool in identifying the erosion of judicial autonomy. Focusing on the specific dismissal mechanisms, this chapter has highlighted the critical importance of understanding judicial tenure as a legal status and a key element in the broader rule of law framework.

In sum, the chapter has illustrated that manipulating judicial tenure through extraordinary dismissal techniques is a recurrent strategy regimes employ to consolidate power. The cumulative impact of these practices extends beyond individual dismissals, affecting the structural independence of the judiciary as a whole. Understanding these dismissal strategies as part of a broader cycle of judicial interference provides a clearer picture of how political control over the judiciary is exerted and how this threatens the rule of law. By categorizing and

analyzing these techniques, this chapter highlights the complex dynamics between judicial tenure and political power, demonstrating how the dismissal of judges can serve as a critical instrument in eroding judicial independence.

Chapter V

Mapping Rule of Law Violations in Judicial Appointments: Toward a Typology of Abuse

Building on the theoretical framework developed in Chapters I and III and the typology of the rule of law abuse in judicial dismissals set out in Chapter IV, this chapter turns to the sphere of judicial appointments to construct a complementary analytical typology. It examines how judicial selection processes—particularly those initiated in regime change or political transition—may be instrumentalized in ways that compromise the rule of law. In doing so, the chapter seeks to identify the normative standards applicable to such practices and to delineate the conditions under which judicial appointments may give rise to structurally embedded forms of abuse.

The implications of different judicial selection methods have been a critical question in the literature on judicial independence.[691] Despite the prolific literature, the examination scope is primarily confined to the prism of separation of powers, "new institutionalism," inter-branch relations, and theories on strategic branches' interaction.[692] This chapter doesn't delve into the debate on the appropriateness of different appointment models from the perspective of judicial independence, nor does it explore how judicial appointments define the power dynamics among

[691] E.g. Shimon Shetreet, 'Who Will Judge: Reflections on the Process and Standards of Judicial Selection' (1987) 61 *Australian Law Journal* 766.

[692] This typology was put forward in Lydia Brashear Tiede, 'Judicial Independence: Often Cited, Rarely Understood' (2006) 15 *Journal of Contemporary Legal Issues* 129, 132. For interbranch relations literature, see Stephen B Burbank, 'Judicial Independence, Judicial Accountability, and Interbranch Relations' (2007) 95(4) *Georgetown Law Journal* 909; Mathew D McCubbins, Roger G Noll and Barry R Weingast, 'Conditions for Judicial Independence' (2006) 15 *Journal of Contemporary Legal Issues* 105; Henry M Hart Jr and Albert M Sacks, *The Legal Process: Basic Problems in the Making and Application of Law* (William N Eskridge Jr and Philip P Frickey eds, Harvard University Press 1994) (first published 1958).

branches of government. Instead, it places judicial appointments within the broader theoretical framework of this thesis, which explores the rule of law dimension of interferences with judicial tenure in extraordinary circumstances—regime shifts and political transitions. While the previous chapter explored the underrecognized techniques of judicial dismissals, this part seeks to examine how transitions may contribute to rule of law deficits in judicial appointments.

The rule of law assessment of the judicial appointments procedure requires an analytically nuanced approach for at least three reasons, which constitute the underpinning theoretical premises of this chapter:

Firstly, the international standards guiding the appointment procedures provide the national constitutional setup much more flexibility than judicial dismissals. Due to the variety of accepted models of judicial appointments within the liberal constitutional framework, it is more challenging to distinguish what constitutes unwarranted interference or to identify a possible rule of law tension.[693]

Secondly, the prolific constitutional theory on the judicialization of politics[694] and juristocracy[695] suggests that it is at certain times necessary to influence the composition of the bench for political accountability purposes.

Lastly, unlike judicial dismissals, which often generate immediate institutional backlash or legal challenge, political interference in judicial appointments tends to operate more subtly

[693] See e.g. Pablo Castillo-Ortiz, *Judicial Governance and Democracy in Europe* (Springer Nature Switzerland 2023); Sergio Bartole, 'Organizing the Judiciary in Central and Eastern Europe' (1998) 7 *East European Constitutional Review* 62; Mary L Volcansek, 'Appointing Judges the European Way' (2007) 34 *Fordham Urban Law Journal* 363;

[694] Charles Neal Tate and Torbjörn Vallinder, 'The Global Expansion of Judicial Power: The Judicialization of Politics' in Charles Neal Tate and Torbjörn Vallinder (eds), *The Global Expansion of Judicial Power* (NYU Press 1995) 1.

[695] Ran Hirschl, *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism* (Harvard University Press 2004).

and is less readily perceived as violating the rule of law. Appointing politically compliant judges may leave formal tenure guarantees intact and even extend judicial mandates, thereby preserving the illusion of institutional continuity. Indeed, illiberal regimes frequently exploit this dynamic by extending the tenure of loyal judges as a means of entrenching power beyond their political lifecycle.[696] However, the mere preservation of tenure in formal terms does not suffice to uphold the rule of law.

This chapter argues that judicial tenure may be compromised in terms of the rule of law when appointment procedures serve as a vehicle for legal manipulation—whether through design abuse, procedural distortion, or strategic reshuffling of the judiciary. A more robust rule of law evaluative framework is needed to detect such abuse—one that moves beyond anatomical accounts and assesses judicial appointments through the rule of law's teleological aim to constrain arbitrary power. As such, politicization may unfold beneath or even through procedural compliance, requiring a more discerning rule of law lens—one that moves beyond surface-level legality to expose the overt distortions of judicial autonomy and institutional balance.

For regimes intent on controlling the courts, appointing loyal judges is a more covert method of interference than outright dismissals: it maintains the façade of legal continuity while quietly compromising the judiciary's independence. In effect, this strategy exemplifies "legal cheating," a practice of adhering to the letter of the law while betraying its spirit and purpose. A teleological perspective on the rule of law, as a constraint on arbitrary power, clarifies why such manipulative appointments are problematic: by exploiting lawful procedures to entrench partisan influence, these practices subvert the law's essential purpose of preventing arbitrariness under

[696] For the Hungarian example, see András Sajó, 'The Constitution of Illiberal Democracy as a Theory About Society' (2019) 208 *Polish Sociological Review* 396, 399. For the Turkish example, see Berk Esen and Şebnem Gümüşcü, 'Rising Competitive Authoritarianism in Turkey' (2016) 37 *Third World Quarterly* 1581.

the guise of formal compliance. Moreover, in a rule-of-law order, the legitimacy of judicial selection rests on reasons that can be publicly justified as serving the common good; appointments made for partisan gain manifestly fail this test of public justification, revealing themselves as exercises of power untethered from any impartial principle. When appointments fail to meet the justificatory threshold expected in a constitutional democracy—when they are not grounded in transparent, unbiased, and reasoned processes—they amount to a form of the RoL disregard that corrodes the normative foundations of judicial independence.

The chapter will proceed as follows:

Firstly, it will review how the existing literature assesses the extraordinary political interference with judicial appointments under different theoretical paradigms. While these paradigms inform the rule of law analysis, they do not offer a sufficiently fine-tuned analytical lens for detecting the more subtle but consequential forms of interference that may appear formally lawful.

Secondly, it will address the theoretical claims presented in this chapter and their implications for assessing the rule of law in the judicial appointments procedure.

Finally, building on the theoretical framework developed in Chapter I, this chapter identifies three primary modalities through which the rule of law may be compromised in the judicial appointment process. These modalities are situated along a continuum—ranging from more overt and legally identifiable forms of interference to increasingly latent and structurally embedded mechanisms of manipulation. This progression highlights the need for a more analytically rigorous evaluative framework that emphasizes a reason-giving ethos as a foundational element of the rule of law, as outlined in Chapter I. Such an ethos must inform not

only the retrospective scrutiny of judicial reforms but also the normative standards guiding their initiation, design, and justification, thereby ensuring that procedural legality is accompanied by substantive accountability and that legal reforms are subjected to principled, transparent, and contextually grounded justification before their implementation.

The first modality—procedural irregularities—encompasses overt departures from established legal norms, accelerated timelines, and seemingly minor or technical adjustments, which—although often framed as administratively necessary—can significantly influence appointment outcomes and circumvent deliberative safeguards. While these irregularities are more amenable to detection through conventional rule of law metrics focused on legality and compliance, they must also be understood as the first defense against arbitrariness. When procedures are distorted under the guise of efficiency, they not only compromise the transparency and predictability of judicial selection but also signal an early departure from the justificatory ethos that underpins the rule of law.

The second modality—abuse of institutional design—refers to the deliberate recalibration of judicial appointment frameworks that, while formally consistent with constitutional structures, substantively diminishes judicial independence. This may involve shifting the balance of discretion toward political actors, restructuring appointment bodies, or redefining eligibility criteria in ways that privilege partisan alignment. Such design changes are typically justified as institutional reform or democratic recalibration, rendering their implications for the rule of law less immediately apparent. Yet, when reforms lack demonstrable grounding in evidence-based evaluation of systemic deficiencies and fail to enhance the judiciary's impartiality or competence, they function as vehicles for entrenching executive influence. Here, the justificatory dimension of governance assumes critical importance: rule of law scrutiny must interrogate not

only the legality of design alterations but also the rationales offered, the context in which they arise, and their proportionality to the purported objectives.

The third modality—manipulation of judicial reshuffling dynamics—represents the most insidious form of interference, involving the strategic timing, sequencing, or selective extension of judicial mandates to reconfigure the ideological composition of the bench. Unlike the previous two modalities, this practice often proceeds without formally altering institutional structures or explicit procedural breaches. Instead, it capitalizes on the discretionary margins embedded in judicial tenure management, enabling the political branches to shape the judiciary's future trajectory without overtly violating legal norms. Precisely because these strategies operate within the zone of technical legality, they exemplify what has been described as 'legal cheating'—the instrumental use of lawful mechanisms to achieve outcomes that contravene the normative foundations of the rule of law. In such cases, the absence of procedural violations cannot obscure the erosion of judicial autonomy and public justification. Therefore, rule of law analysis must incorporate a contextual inquiry into the motivations, patterns, and cumulative effects of judicial reshuffling, recognizing that its subtlety does not diminish its corrosive potential.

Against this backdrop, the following section reviews the existing literature on irregular interference with judicial appointments, examining how different theoretical paradigms—particularly from constitutional theory and political science—have conceptualized such interference.

1. Capturing extraordinary interference in judicial appointments

Contemporary scholarship frequently analyzes political interference with judicial independence through the conceptual frameworks of court-packing and court-curbing—terms originating in mid-20th century American legal discourse and subsequently adopted across comparative politics and constitutional scholarship. These theoretical paradigms contribute significantly to understanding the institutional consequences and broader political environments in which such interference occurs. Nevertheless, they offer comparatively limited engagement with the specific legal techniques and procedural instruments through which such interference is operationalized. This chapter seeks to complement these accounts by shifting analytical focus toward the legal architecture itself, examining how the instrumental use of formally lawful mechanisms may undermine the rule of law in judicial appointments.

In simple terms, court-curbing refers to attempts by other branches of government to limit or remove the powers of the judicial branches.[697] Some typical curbing practices include jurisdiction stripping, establishing new tribunals with specialized jurisdictions comprised of judges loyal to the governing authority, merging different courts, cutting courts' budgets, modifying internal structures, or relocating cases.[698]

Court-curbing practices throughout US history were used more as an institutional threat than the actual limitation of the Supreme Court's powers.[699] However, the combined effect of judicial appointments, court-curbing threats, and Congress's power to enact decision reversals

[697] "Court curbing legislation might be defined as any congressional bill having as its purpose or effect, either expressed or implied, an alteration in the structure or functioning of the Supreme Court as an institution within the context of legislative-judicial conflict." Harry P Stumpf, 'Congressional Response to Supreme Court Rulings: The Interaction of Law and Politics' (1965) 14 *Journal of Public Law* 377, 382.
[698] Tom S Clark, *The Limits of Judicial Independence* (Cambridge University Press 2010) 36–43.
[699] Ibid 75. "Although this legislation is rarely enacted, that fact does not in and of itself demonstrate that Court-curbing cannot achieve fundamental changes in the Court's power."

has been cited as the primary reason why the Supreme Court rarely rules against majoritarian preferences.[700]

Nowadays, comparative constitutional theory depicts court curbing mainly as a coercive mechanism employed by "elected authoritarian leaders" against the courts.[701] However, in the earlier studies on the US Supreme Court, some court-curbing practices, such as congressional overrides of judicial decisions, have also been understood as an "important component maintaining equilibrium between judicial and legislative power."[702]

Assessed through the lens of their impact on democracy and the separation of powers, the analysis of court-curbing practices is inconclusive. This aligns with the discourse on the necessity for a delicate equilibrium between the judiciary's autonomy and accountability (See next section).

Meanwhile, court-packing has become a buzzword in constitutional theory. The term was coined within American public discourse during Roosevelt's 1937 Reorganization Bill debate by members of the self-instituted National Committee to Uphold Constitutional Government, led by journalist Edward Rumely.[703] President Roosevelt proposed legislation to add a new Supreme Court justice for every sitting justice over seventy who declined to retire, potentially expanding

[700] Ryan Eric Emenaker, 'Constitutional Interpretation and Congressional Overrides: Changing Trends in Court-Congress Relations' (2013) 3 *Journal of Law* 197, 202.
[701] See for example Aylin Aydin-Cakir, 'Court-Curbing through Legal Reforms or Coercion?' in Kirk Randazzo, Rebecca Reid and Roger Howard (eds), *Research Handbook on Law and Political Systems* (Edward Elgar 2023) 8.
[702] Ryan Eric Emenaker, 'Constitutional Interpretation and Congressional Overrides: Changing Trends in Court-Congress Relations' 197.
[703] Richard Polenberg, 'The National Committee to Uphold Constitutional Government, 1937–1941' (1965) 52(3) *The Journal of American History* 582. The committee's main goal was to stop President Roosevelt and his New Deal measures, one of which was the planned Judicial Procedures Reform Bill to push for his economic regulation measures.

the bench from nine to fifteen members. This attempt failed, but the idea remained a part of American constitutional history as the "court-packing plan."[704]

However, Roosevelt was neither the first nor the last representative of other branches of government to try to change the size of the Supreme Court for political gain.[705] Throughout the 18th and 19th centuries, "court-packing was an appropriate and even desirable method of dealing with a recalcitrant Supreme Court."[706] The number of SC justices has changed several times throughout US history, starting with the 1802 episode, indirectly leading to Marbury versus Madison.[707] Furthermore, as the US Constitution is silent on the number of Supreme Court Justices, the prohibition of court-packing is not explicitly worded in the US Constitution or the Supreme Court's jurisprudence. Hence, political animosity towards this practice did not derive from a constitutional norm, but rather from a constitutional convention established in the mid-twentieth century.[708]

Recently, the discourse on court-packing in the US has changed significantly. It gradually shifted from the "nuclear constitutional weapon" to "the least-bad option for restoring the Court's role as a democratic guardrail."[709] The change occurred in the struggle to rebalance the

[704] William E Leuchtenburg, 'The Origins of Franklin D. Roosevelt's "Court-Packing" Plan' (1966) *The Supreme Court Review* 347.
[705] Tara Leigh Grove, 'The Origins (and Fragility) of Judicial Independence' (2018) 71 *Vanderbilt Law Review* 465, 470.
[706] As Grove noted, "Perhaps most surprising to modern readers, in the nineteenth and early twentieth centuries, many government officials believed that it was constitutionally permissible to remove inferior federal court judges by abolishing their courts". Ibid 468.
[707] As Brever noted in the context of the US, "no work has systematically explored the history of the Supreme Court's size," but still, "the narrative maintains that there is a long history of court-packing" and the fundamental problem is that the theorists "disagree on whether court-packing is a live tradition worth preserving or a dead tradition better left buried." Joshua Braver, 'Court-Packing: An American Tradition?' (2020) 61 *Boston College Law Review* 2747, 2752.
[708] Tara Leigh Grove, 'The Origins (and Fragility) of Judicial Independence' 469.
[709] Thomas M Keck, 'Court-Packing and Democratic Erosion' in Robert C Lieberman, Suzanne Mettler and Kenneth M Roberts (eds), *Democratic Resilience: Can the United States Withstand Rising Polarization?* (Cambridge University Press 2021) 141.

political influence within the US Supreme Court following the Trump era.[710] The new perception of the phenomenon prompted advocacy on both political and academic levels for "good court-packing."[711]

Court-packing is not a specific regime peculiarity. The perspective on this phenomenon shifts outside the US context, as the dominant line of contemporary literature on democratic decay has analyzed it as an illiberal regime's tool to obtain and perpetuate its power. Several theoretical approaches have recently emerged to conceptualize court-packing and court-curbing practices from a comparative perspective.

Kosar and Sipulova's research captures "politicians' motivation to tinker with the court's composition, irrespective of their means."[712] According to the authors, court-packing is "an intentional irregular change in the composition of the existing court, in quantitative and qualitative terms, that creates a new majority at the court or restricts the old one."[713]

Unlike Dixon and Landau, Kosar and Sipulova do not distinguish between court-packing and court-curbing. Instead, the authors conceive the former as the subtype of the latter.

Their research differentiates three different strategies of court-packing: 1) the expanding strategy, 2) the emptying strategy, and 3) the swapping strategy.[714] While the first two strategies are relatively straightforward and presuppose formal changes in the number of judges, the third one entails situations in which governments do not alter the number of sitting judges but change the composition of the bench qualitatively instead.[715] This interference occurs within the regular

[710] Stephen Feldman, 'Court-Packing Time? Supreme Court Legitimacy and Positivity Theory' (2020) 68 *Buffalo Law Review* 1519.
[711] Tom Gerald Daly, '"Good" Court-Packing? The Paradoxes of Constitutional Repair in Contexts of Democratic Decay' (2022) 23(8) *German Law Journal* 1071.
[712] David Kosař and Katarína Šipulová, 'How to Fight Court-Packing' (2020) 6 *Constitutional Studies* 133, 135.
[713] Ibid 139.
[714] David Kosař and Katarína Šipulová, 'Comparative Court-Packing' (2023) 21(1) *International Journal of Constitutional Law* 80, 88.
[715] Ibid.

constitutional framework when the seat on the bench becomes vacant due to ordinary circumstances, such as the retirement of a judge upon reaching the legally prescribed age. Due to the lack of formal legal changes, this technique poses a challenge to address from a rule of law perspective. Yet, such an enterprise is not theoretically inconceivable (see section 5.1).

Dixon and Landau took a slightly more nuanced approach, which places court-packing within their analytical framework of abusive judicial review.[716] As Dixon and Landau suggest, when authoritarians capture the apex courts that perform the constitutional review, they utilize them for legitimacy as they "benefit from the associations that judicial review has with democratic constitutional traditions and the rule of law."[717] Hence, these authors observe court-packing and court-curbing practices as the government's strategy to influence the courts to engage in abusive judicial review. That way, governments indirectly, through the courts, undermine the tenets of liberal democracy, including the rule of law.

An example the authors refer to is the notorious judgment of Nicaragua's Supreme Court, which annulled the term limits for President Ortega's office. In that case, the procedural irregularity in judicial decision-making indicated a clear RoL violation. As the President of the Court set the case for voting after business hours, the opposition judges were, through a mala fide act, prevented from giving their vote. This aspect of the RoL violation, enabled through court-capturing, is a vital research venue but falls outside the scope of this chapter. Dixon-

[716] Rosalind Dixon and David Landau, 'Abusive Judicial Review: Abusive Borrowing by and of Constitutional Courts' in Rosalind Dixon and David Landau (eds), *Abusive Constitutional Borrowing* (Oxford University Press 2021). Dixon and Landau differentiate between court-packing and court-curbing. Court-packing includes "altering court size (through non-staffing, or court-packing), removing judges (via misconduct allegations, or new retirement norms), 'disciplining' (but not removing) judges through various administrative sanctions." In court-curbing techniques, the authors include budget cuts, non-publication of the decisions, non-compliance with the Court's decisions, and jurisdiction stripping or altering the quorum. The authors note that these two strategies are usually intertwined or enable the other.

[717] Ibid 82.

Landau's scheme of abusive judicial review examines the responsibility of the captured courts for the regime's subversion through judicial decision-making.[718] Dixon and Landau's framework on abusive judicial review focuses on the role of captured courts in advancing regime subversion through their jurisprudence. By contrast, this chapter takes a step back to assess whether the legal mechanisms employed by other branches to capture judicial institutions constitute a breach of the rule of law.

Tom Daly proposes a comprehensive framework for assessing court-packing, structured around five criteria: (i) the broader democratic context; (ii) the stated purpose and its deviation from established norms; (iii) the availability of less contentious reform alternatives; (iv) the openness and inclusivity of the reform process; and (v) the risk of retaliatory repetition.[719]

From the lens of democratic decay theory, Benjamin Garcia Holgado and Raúl Sánchez Urribarri differentiate two contexts of court-packing: *policy-driven* and *regime-change court-packing*.[720] The former represents an isolated technique employed by the other branches of government to achieve a specific political goal or agenda. Although this interference may well affect the independence of a current bench, it does not distort it to the extent that the citizens are deprived of adequate legal protection. According to Garcia Holgado and Urribari, the critical difference between the two court-packing types lies in the preferences and goals of the political

[718] Ibid 83. Abusive judicial review constitutes a type of the abusive constitutional borrowing, as envisioned by authors. "In the hands of courts, the focus of abusive borrowing will be on foreign and international precedents or doctrines. It will involve reliance on these precedents in ways that are highly superficial, selective, acontextual, or that invert the purpose of the relevant doctrine, and that help justify outcomes that have a material adverse effect on the minimum core of democracy. The common theme of all these approaches is that they involve courts engaging in review that ultimately undermines rather than protecting or promoting democracy."

[719] Tom Gerald Daly, '"Good" Court-Packing? The Paradoxes of Constitutional Repair in Contexts of Democratic Decay' (2022) 23(8) *German Law Journal* 1071, 1074–75.

[720] Beatriz Garcia Holgado and Raul Sánchez Urribarri, 'Court-Packing and Democratic Decay: A Necessary Relationship?' (2023) *Global Constitutionalism* 1.

actors who seek to intervene in the judicial design.[721] The authors develop their typology by contrasting patterns of judicial appointment interference in Argentina under Menem and Venezuela under Chávez and Maduro (1999–present). From the perspective of the rule of law typology of abuse advanced in this chapter, both cases fall within the category of abuse through constitutional design. As previously emphasized, this form of interference necessitates a contextual and holistic assessment—one that is attentive to its long-term political consequences and structural, normative effects on judicial independence and the broader constitutional order.

Upon assuming office in 1989, Menem viewed court-packing as a legitimate means of addressing the state's economic crisis following the Alfonsin term. The Peronist-majority Congress expanded the size of the Supreme Court from five to nine and approved six of Menem's appointees. The new composition of the SC supported Menem's economic policy. It was affirmed in the series of decisions regarding the decrees of necessity and urgency and delegated decrees, which were the leading legal tools Menem employed to implement his pro-market reform.[722] Comparatively assessed, Menem's court-packing could be perceived as a successful implementation of Roosevelt's idea that failed in 1937. According to the data, despite Menem's expansion of the court for political purposes, Argentina remained a democracy.[723] In addition, the *Menemista* majority refused blind support to Menem near the end of his second term. Menem sought to bypass the prohibition on running for a third term, as explicitly envisioned by the 1994 constitutional reform.[724] The Supreme Court could have attempted to authorize his intention to run for a third term legally but refrained from doing so. Helmke

[721] Ibid 6.
[722] Ibid 11.
[723] Lars Pelke and Aurel Croissant, 'Conceptualizing and Measuring Autocratization Episodes' (2021) 27(2) *Swiss Political Science Review* 434.
[724] Gretchen Helmke, 'Checks and Balances by Other Means: Strategic Defection and Argentina's Supreme Court in the 1990s' (2003) 35(2) *Comparative Politics* 213, 220.

explained this court's behavior using the *strategic defection* theory. [725] Judges lacking independence and institutional security may be motivated to shift their side when the government in power begins to lose its influence. To distance themselves from the weakening government, judges without institutional security are inclined to decide in line with the political position of the incoming administration.

On the other hand, according to Holgado-Urribari's theoretical scheme, Chavez's intention to change the regime and dismantle democracy was clear from the first instance of court-packing in 1999.[726] The court, particularly its Constitutional Chamber, served as Chavez's ally and entrenched his power through a series of line decisions. The pattern continued throughout Chavez's terms after the second court-packing episode brought up by the Organic Law of 2004. Supreme Court's institutional contribution to the perpetuation of the Chavista regime extended to Maduro's presidency of 2015. Once faced with the loss over the legislature in the 2015 election, Maduro packed the already loyal court with 13 new members to block the functioning of the incoming opposition-led Parliament.[727] In the subsequent years, the packed Supreme Court continued striking down the opposition's legislation, which ultimately led to the "constitutional coup" when, in 2017, it temporarily dissolved the Parliament and froze its power to legislate.[728]

[725] Gretchen Helmke, 'The Logic of Strategic Defection: Court–Executive Relations in Argentina under Dictatorship and Democracy' (2002) 96(2) *American Political Science Review* 291. The theory of strategic defection takes into account various factors such as the level of institutional security judges have, the number of relevant political actors, and the timing of sanctions. According to this theory, there is a reverse legal-political cycle where the number of antigovernment decisions increases towards the end of weak governments, and these decisions are made by the very judges who were originally appointed by the government.

[726] What is interesting to note is that although the members of the new Supreme Tribunal of Justice were appointed by the constituent assembly comprised of Chavistas, a significant improvement in the Court's activism was noted in the following years, especially of the Sala Constitutional.

[727] Javier Corrales, 'Authoritarian Survival: Why Maduro Hasn't Fallen' (2020) 31(3) *Journal of Democracy* 39, 41.

[728] Gretchen Helmke, Yong Jeong and Jihyun Kim, 'Insecure Institutions: A Survivalist Theory of Judicial Manipulation in Latin America' (2022) 10(2) *Journal of Law and Courts* 265, 267.

Holgado and Urribari emphasize that the assessment of court-packing should focus on the intentions behind it, rather than the behavior of judges following its implementation.[729]

One of the arguments supporting this view is that there are blurring lines between the behavior of courts in both policy-driven and regime-change court-packing. The shift of the menemista court against the government may signal that the court-packing was just an episode, not a path towards a complete regime capture. Nevertheless, even Chavez's packed court went against him in the pre-hearing trial (antefuicio de merito) of the military officer who attempted a coup against Chavez in 2002.[730] The court refused to allow the hearing, leading to Chavez's supporters' violent surrounding of the court premises. In the aftermath, Chavez's National Assembly set the commission to investigate "the crisis of the judicial branch." These events led to the Organic Law in 2004, which was the final blow to the Supreme Court's institutional independence. This episode highlighted the Supreme Court's attempts to carve out a line of insularity from the regime, thereby proving Holgado and Urribari's point that judicial behavior is not an accurate indicator.

However, differing interpretations of the legitimacy of judicial reforms, even within liberal democratic constitutionalism, pose challenges to using intent analysis as a definitive measure of rule of law violations. Reliance on intent alone risks conflating legal evaluation with political judgment, potentially framing the rule of law as a normative ideal rather than as a binding constitutional standard.

[729] Beatriz Garcia Holgado and Raul Sánchez Urribarri, 'Court-Packing and Democratic Decay: A Necessary Relationship?' 356.

[730] Rogelio Pérez Perdomo, 'Judicialization and Regime Transformation: The Venezuelan Supreme Court' in Rachel Sieder, Line Schjolden and Alan Angell (eds), *The Judicialization of Politics in Latin America* (Palgrave Macmillan 2005) 141.

2. From Outcomes to Process: Reframing Judicial Accountability Through the Lens of Non-Arbitrariness

The tension between judicial independence and accountability adds a layer to the RoL analysis. Ferejohn and Weingast discuss how the "intertemporal conflict of interest" in policies between previous and present governments affects the courts' ability to exercise constitutional review.[731] This section examines how the same phenomenon impacts judicial appointments and dismissals, guided by concerns on judicial accountability.

As Chapter I put forward, judicial independence is not an ultimate value. Its scope is limited by judicial accountability as its "other side of the coin."[732]

Judicial accountability is yet another multifaceted concept, which, like judicial independence, needs to be conceived in relation to other actors.[733] Furthermore, not all aspects of judicial accountability warrant possible changes to the appointment design. Mauro Cappelletti developed a typology that distinguishes four forms of judicial accountability: (1) political accountability, encompassing both interbranch and constitutional dimensions; (2) public accountability, referring to the judiciary's relationship with the general public; (3) legal accountability of the state for judicial conduct; and (4) personal legal accountability of individual judges.[734]

[731] John A Ferejohn and Barry R Weingast, 'A Positive Theory of Statutory Interpretation' (1992) 12(2) *International Review of Law and Economics* 263, 264.
[732] Stephen B Burbank, 'What Do We Mean by Judicial Independence?' (2003) 64 *Ohio State Law Journal* 323.
[733] As Burbank posed – independence and accountability from whom or what? See Stephen B Burbank, 'Judicial Independence, Judicial Accountability, and Interbranch Relations' (2007) 95 *Georgetown Law Journal* 909.
[734] Mauro Cappelletti, 'Who Watches the Watchmen: A Comparative Study on Judicial Responsibility' (1983) 31 *American Journal of Comparative Law* 1.

These distinctions are analytically significant within a rule of law framework, as they clarify which aspects of judicial status are most susceptible to politicization and potential overreach by the political branches. According to Charles Gardner Geyh, political-institutional judicial accountability responds to three objectives that underpin this concept: the promotion of the rule of law, public confidence, and institutional responsibility.[735] This rationale underlies the notorious anti-majoritarian difficulty debate in the US, which stems from the fear that unelected institutions may usurp state power at the expense of the political will.[736] John Ferejohn and Larry Kramer argued that judicial independence is delineated by its capacity to "foster a decision-making process in which cases are decided based on reasons that an existing legal culture recognizes as appropriate."[737] From the interbranch perspective, those called to interpret the existing legal culture are the government's majoritarian branches, as the people's elected representatives. There is no significant disagreement on whether the courts should be kept in check by the majoritarian branches when overstepping their prerogatives.[738]

The conceptual foundations of judicial accountability risk being undermined when accountability is framed primarily in terms of agreement with judicial outcomes rather than the legitimacy of the procedures through which those outcomes are reached. Justice Sandra Day O'Connor advanced an influential argument in favor of procedural over substantive conceptions of judicial legitimacy, emphasizing that the judiciary's authority must rest on its commitment to impartial adjudication, reasoned justification, and adherence to constitutional norms rather than

[735] Charles Gardner Geyh, 'Rescuing Judicial Accountability from the Realm of Political Rhetoric' (2006) 56 *Case Western Reserve Law Review* 911, 912.
[736] Alexander M Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (Yale University Press 1962).
[737] John A Ferejohn and Larry D Kramer, 'Independent Judges, Dependent Judiciary: Institutionalizing Judicial Restraint' (2002) 77 *New York University Law Review* 962, 971–72
[738] Charles Gardner Geyh, 'Rescuing Judicial Accountability from the Realm of Political Rhetoric' 912.

the political palatability of its rulings.[739] In her view, a well-functioning judiciary cannot be expected to reflect the immediate preferences of the political majority; rather, it must maintain fidelity to the rule of law through institutional processes that are publicly defensible and transparent. This distinction between procedural integrity and outcome responsiveness is especially pertinent in judicial reform debates, where calls for greater accountability often conceal efforts to discipline the judiciary for rendering politically inconvenient decisions. Within the teleological rule of law framework, as elaborated in this chapter, such reform efforts warrant close scrutiny, not because they interfere with judicial outcomes per se, but because they erode the procedural safeguards that ensure adjudicative independence and constrain arbitrariness. O'Connor's contribution thus reinforces the normative claim that genuine accountability in judicial appointments and tenure must be anchored in the integrity of legal and constitutional procedures, not in retrospective assessments of judicial performance based on political desirability.

The following section examines the conditions under which interference with judicial appointments may be considered a rule of law-consistent response to perceived judicial overreach, particularly in contexts characterized by political polarization and the potential for partisan influence over institutional design. It further examines cases in which the direction and intent of judicial reform remain ambiguous—so-called "suspect cases"—to demonstrate that neither electoral legitimacy nor majoritarian support can replace the distinct requirements imposed by the rule of law: first, the entrenched element of legality, that is, "independent tribunal established by law" (See Chapter II); and second, the teleological expectation that reforms be grounded in public justification, with a reasoned and evidence-based demonstration

[739] Sandra Day O'Connor, 'The Majesty of the Law: Reflections of a Supreme Court Justice' (2008) 86 *Denver University Law Review* 1.

of necessity from the perspective of procedural integrity, rather than outcome-oriented legitimacy.

3. Unclear Mandates and Rule-of-Law Risk: The Problem of Suspect Cases

This section examines how governments invoke concerns over judicial accountability to justify reforms to judicial appointment procedures and how such justifications obscure the clarity of rule of law analysis. As discussed in Chapter III, this issue is closely tied to the "inherited judges" problem, whereby incoming administrations confront a judiciary composed of judges appointed under previous governments. The risk to judicial independence in such contexts may not stem from the original appointing authority but from successor governments—regardless of their democratic legitimacy—who may seek to reassert institutional control or address perceived deficiencies in the existing judiciary. The line between legitimate accountability measures and politicized restructuring is often difficult to delineate, thereby challenging the normative assessment of such reforms within a rule of law framework.

A line of research posits that, despite populists' calls for reforms, which are often characterized as jeopardizing judicial independence, it is imperative to discern that mere alterations in mechanisms do not necessarily entail such a threat. According to the authors, under specific circumstances, these changes can be justified as systemic improvements to rectify

demonstrated shortcomings or as a replacement for mechanisms that have become politically untenable.[740]

While public confidence and the institutional responsibility of the judiciary are widely accepted as legitimate objectives in democratic governance, their invocation as grounds for reforming judicial appointment procedures presents specific normative and institutional challenges. When these concepts are deployed without being anchored in a robust framework of public justification—understood as the duty of political actors to provide reasons that are transparent, impartial, and oriented toward enhancing the procedural integrity of decision-making rather than judicial outcomes—they risk becoming rhetorical tools that conceal partisan agendas. In such cases, legal procedures governing appointments may be formally preserved yet functionally distorted, as accountability is reframed not as a constraint on power but as a justification for reshaping judicial composition in line with transient political preferences. This dynamic is particularly troubling in transitional or weak-rule-of-law contexts, where the absence of structured procedural safeguards and a developed culture of reason-giving enables reforms to proceed with minimal scrutiny.[741] As such, reforms purportedly aimed at strengthening institutional legitimacy may instead erode judicial independence and the integrity of constitutional adjudication, thereby undermining the substantive aims of the rule of law.

When discussing the recent illiberal attacks on the judiciary in Central Europe, Moliterno and Čuroš emphasized the difficulty of balancing the justification of judicial reform on the scales of judicial independence and accountability.[742] Petrov analyzes the same phenomenon through

[740] Mark Tushnet and Bojan Bugarič, 'Populism and Constitutionalism: An Essay on Definitions and Their Implications' (2021) 42 *Cardozo Law Review* 2345.
[741] Peter Čuroš, 'Attack or Reform: Systemic Interventions in the Judiciary in Hungary, Poland, and Slovakia' (2023) 13(2) *Oñati Socio-Legal Series* 626, 629.
[742] James E Moliterno and Peter Čuroš, 'Recent Attacks on Judicial Independence: The Vulgar, the Systemic, and the Insidious' (2021) 22 *German Law Journal* 1159. For the threats to the judicial independence within the judicial sector itself, see David Kosař, 'Politics of Judicial Independence and Judicial Accountability in Czechia: Bargaining

the well-established paradigm of "judicialization of politics"[743] and claims that "court-curbing techniques employed by populists combine strategies of de-judicialization of politics and extreme politicization of the judiciary, and target different components of judicial power depending on the scope of populists' political power and developments in time, particularly on the level of consolidation of the populist regime."[744]

The outcry over judicial activism, entangled with judicial appointments, has also catalyzed the discourse on judicial reforms in India and culminated in the aftermath of the NJAC judgment.[745]

Another illustrative example of the judicial activism pretext was Israel's reform of the Israeli Supreme Court appointment under the Netanyahu government in 2025.[746] This technique falls within the rule of law abuse of constitutional design (See Section 4.1). The government-backed its proposal with the claim that the Supreme Court has exceeded its jurisdiction over the past decade and significantly impeded the capacity of elected coalitions and ministers to

in the Shadow of the Law between Court Presidents and the Ministry of Justice' (2017) 13 *European Constitutional Law Review* 96. "While some documents dealing with judicial independence and judicial councils acknowledge that improper pressure on a judge can stem from within the judiciary, they take for granted that internal pressure is somehow less dangerous. Recent scholarship also proceeds from the assumption that independence from politicians is at the heart of the normative importance of independent courts to the rule of law."

[743] Jan Petrov, '(De-)Judicialization of Politics in the Era of Populism: Lessons from Central and Eastern Europe' (2021) *The International Journal of Human Rights* 1.

[744] Ibid 10.

[745] *Supreme Court Advocates-on-Record Association and Another v Union of India* (2015) 4 SCC 1. The Indian Supreme Court struck down the 99th amendment to the Indian Constitution and the National Judicial Appointments Commission Act of 2014, which aimed to change the process of appointing judges to the higher judiciary in India. Tarunabh Khaitan assessed this amendment as just one of the "thousand cuts to the Constitution" Modi strategically pursued to undermine executive accountability and entrench power under the populist and nationalistic pretext. See Tarunabh Khaitan, 'Killing a Constitution with a Thousand Cuts: Executive Aggrandizement and Party-State Fusion in India' (2020) 14(1) *Law & Ethics of Human Rights* 49, 74.

[746] Library of Congress, 'Israel: Knesset Adopts Controversial Reform on Appointing Judges' (Global Legal Monitor, 16 April 2025) https://www.loc.gov/item/global-legal-monitor/2025-04-16/israel-knesset-adopts-controversial-reform-on-appointing-judges/ accessed 10 May 2025.

implement governmental policies.[747] In response to the government's proposed judicial reform, the Israeli Supreme Court attempted to strike down the amendment restricting the Court's use of the reasonableness doctrine (see Chapter I).[748] Despite this unprecedented intervention, the government enacted legislation reshaping the judicial selection process, which was only one part of the initially suggested overhaul.

Critics argue that the reforms' sole purpose was perpetuating unlimited power, reversing the constitutional revolution of the 1990s, and may lead to the "end of democracy" in Israel.[749]

The judicial appointment reform aims to transform the Israeli Judicial Selection Committee from predominantly composed of legal professionals to one controlled by the ruling government coalition. If implemented, these changes would grant the ruling coalition substantial influence over judicial appointments. The potential executive power over future appointments is hidden in design details.

Since the enactment of the Judges Law in 1953—later reinforced through Israel's Basic Laws—the authority to appoint judges, including Supreme Court justices, has rested with the Judicial Selection Committee (JSC).[750] The original composition of the JSC consisted of nine members: three Supreme Court justices (including the President of the Court), two government ministers (one of whom is the Minister of Justice), two Knesset members (typically representing both coalition and opposition), and two representatives of the Israel Bar Association. This

[747] Jeremy Sharon, 'Levin Unveils Bills to Weaken Top Court, Enable Laws to Be Immune to Judicial Review' *Times of Israel* (11 January 2023) https://www.timesofisrael.com/levin-unveils-bills-to-weaken-top-court-enable-laws-to-be-immune-to-judicial-review/ accessed 2 April 2023.
[748] *HCJ 5658/23 Movement for Quality Government v The Knesset* (Israeli Supreme Court, 1 January 2024).
[749] Yotam Margalit, 'How Is This the End of Democracy?' (Israel Democracy Institute, 21 March 2023) https://en.idi.org.il/articles/49023 accessed 15 June 2023; Amichai Cohen and Yuval Shany, 'Reversing the "Constitutional Revolution": The Israeli Government's Plan to Undermine the Supreme Court's Judicial Review of Legislation' (Israel Democracy Institute, 15 February 2023) https://en.idi.org.il/articles/47916 accessed 15 June 2023.
[750] Israeli Judges Law 1953, *Sefer Ha-Chukkim* No 2, p. 94 (Isr); Israeli Basic Law: The Judiciary, *Sefer Ha-Chukkim* No 1692, p. 150 (2001) (Isr), part on Adjudication.

composition required a qualified majority of seven out of nine members to approve appointments to the Supreme Court, thereby institutionalizing a model of power-sharing and negotiation across the branches of government and professional bodies. The 2025 constitutional amendment restructured the JSC by expanding it to 11 members while increasing the representation of the political majority. Although the three judicial members remain, the reform grants the governing coalition effective control over appointments by reducing the required threshold to a simple majority of six votes, thus significantly diminishing the role of the judiciary and the legal profession in the selection process. The proposed reform deeply polarized Israeli society as the critics compared it to the illiberal decline in Hungary and Poland.[751]

As an example to support the theoretical justification of differentiating between the phenomena of reforms in judicial appointments as either assaults or improvements in a flawed system, Tushnet and Bugaric compare the court-packing tendencies of the last decade in illiberal regimes, namely Hungary and Poland, with those in the US.

Tushnet and Bugaric argue that the court reform movement in the United States differs from the Polish movement, as it is not inherently opposed to the Constitution or liberal values. Contemporary US court reform supporters believe that the Supreme Court has made serious errors in its interpretation of the Constitution, influenced mainly by conservative ideologies. According to their viewpoint, the Court has strayed from its intended trajectory, and implementing court reform is perceived as the most effective means to restore genuine U.S.-style constitutionalism.[752] Finally, the authors suggest that addressing these interferences across

[751] Ishaan Tharoor, 'Analysis | Netanyahu Drags Israeli Democracy into the Illiberal Mire' *Washington Post* (25 January 2023) https://www.washingtonpost.com/world/2023/01/25/israel-illiberal-democracy-right-netanyahu/ accessed 1 June 2023.

[752] Bojan Bugaric and Mark Tushnet, 'Court-Packing, Judicial Independence, and Populism: Why Poland and the United States Are Different' *Verfassungsblog* (11 July 2020) https://verfassungsblog.de/court-packing-judicial-independence-and-populism/ accessed 2 August 2020.

different socio-political contexts by putting them in the same framework of undermining judicial independence is "analytically tricky."[753] This research contends the opposite - from a *rule of law perspective*, attaching the legitimacy of interference to the socio-political context is an analytical challenge.

Conflating efforts to protect a particularly preferred form of liberal constitutionalism and democracy (through, e.g., judicial reform) with adherence to the rule of law is not only analytically challenging but also dangerous. Holding that interference with judicial independence should be assessed differently in societies with different political traditions merely reinforces illiberal contentions of inconsistent criteria and lacks a discernible theoretical rationale. Additionally, what was once perceived as reform for a liberal cause can, over time, pave the way for the illiberal entrenchment of power. Such was the case with the 2012 judicial reforms in Turkey. In 2012, the judiciary underwent major changes as part of broader constitutional reforms adopted in 2010 and approved by a popular referendum on September 12, 2010. The 2012 reforms involved an expansion of the Constitutional Court's membership from 11 permanent judges to 17 permanent judges, and the High Council of Judges and Prosecutors (HSYK), an institution with significant authority over judicial officers, also experienced an enlargement in its membership. When the reform was implemented, it was generally perceived as a positive step toward EU membership by the Venice Commission and the scholarship.[754] It was only after the

[753] Ibid.

[754] Aslı Bâli, 'Courts and Constitutional Transition: Lessons from the Turkish Case' (2013) 11(3) *International Journal of Constitutional Law* 666, 694; Venice Commission, *Law on the Establishment and Rules of Procedure of the Constitutional Court of Turkey (Law No. 6216)* CDL-REF(2011)047 (30 March 2011) 33; Venice Commission, *Opinion on the Draft Constitutional Amendments with Regard to the Constitutional Court of Turkey* CDL-AD(2004)024 (18–19 June 2004) 6.

regime's power had shown the direction in which it was heading that the reform was assessed as a bad move.[755]

The preceding discussion has highlighted the conceptual ambiguity and normative risk inherent in judicial appointment reforms justified in the name of accountability, remarkably where such reforms are not grounded in a robust framework of procedural justification. While claims of institutional renewal and democratic legitimacy may accompany these reforms, the absence of explicit constraints and transparent reasoning risks facilitating executive entrenchment and undermining judicial independence. As illustrated by the examples of Israel and Turkey, even reforms initially presented as liberal or corrective can become vehicles for the long-term degradation of judicial autonomy when not institutionally bounded. This affirms the central contention of this section: the analytical focus must shift from the political legitimacy of actors or intentions to the structural conditions that either safeguard or erode the rule of law. In this respect, **procedural integrity**—not judicial outcomes—should remain the anchor of rule of law analysis. Enduring constraints on arbitrariness are more likely to be institutionalized when the legal mechanisms governing judicial appointments are subjected to detailed scrutiny, which the following sections undertake.

4. Political Influence on Judicial Appointments – Where is the Rule of Law Tension?

[755] Tom Daly, "Good Court-Packing" 15. See also Ozan Varol, 'Stealth Authoritarianism in Turkey' in Mark Graber, Sanford Levinson and Mark Tushnet (eds), *Constitutional Democracy in Crisis?* (Oxford University Press 2018) 349.

While the preceding section addressed the analytical challenges posed by "suspect cases"—instances where judicial appointment reforms are ambiguously framed as advancing judicial accountability—this section focuses on the broader structural question of political influence in judicial appointments. Political involvement in judicial selection is a constitutive feature of most constitutional systems and, in itself, does not necessarily entail a violation of the rule of law. However, the normative threshold is crossed when such involvement is exercised in ways that distort the integrity of appointment procedures or instrumentalize them for partisan consolidation. The challenge lies in delineating the conditions under which political discretion, otherwise legitimate within a constitutional framework, becomes a vehicle for undermining judicial independence. By surveying the spectrum of existing institutional models and their susceptibility to politicization, this section aims to sharpen the evaluative lens for identifying when the design and implementation of judicial appointments raise concerns about the rule of law.

It is widely acknowledged in contemporary constitutional theory that the judiciary should maintain independence from the other branches of government. As discussed in Chapter I, this independence dimension is commonly conceptualized in the literature as *external independence* or *political insularity*. However, in the context of judicial appointments, this principle often functions more as a normative ideal than a consistently realized constitutional practice. As Peter H. Russell stated: "No matter how the process is constructed, it always has a political dimension."[756] Moreover, there have been calls in both scholarship and political practice to reassess the balance between judicial independence and accountability, which presupposes that political interference in judicial design is sometimes warranted.

[756] Peter H Russell, 'Conclusion' in Kate Malleson and Peter H Russell (eds), *Appointing Judges in an Age of Judicial Power: Critical Perspectives from Around the World* (University of Toronto Press 2006) 420.

Historically, the notion of judges' political insularity is more recent than it appears.[757] A brief overview of existing models reveals that judicial appointments are not immune to political considerations. Even in the countries that adopted the judicial council model where "judges elect judges," other branches of government may find a way, directly or indirectly, to influence the appointment procedures.[758]

There is a variety of accepted models for judicial appointments.[759] Two general trends in judicial appointments have emerged over the last century – judges are either elected or appointed by the other branches of government. The direct popular election of judges is a phenomenon that has been researched primarily in the American legal context, particularly regarding the state-level judiciary. It is generally unfamiliar to the Continental tradition, except for a few exceptions.[760]

In the European context, the question of the appointment falls within the broader framework of judicial governance models. Aníbal Pérez-Liñán and Andrea Castagnola have offered a typology based on the involvement of other authorities in the judicial selection process.[761] The authors differentiate: 1) cooperative procedures – where at least two bodies participate in the judicial appointment; 2) the representative model – where the multiple

[757] The genesis of judicial independence in the United Kingdom traces back to pre-1701, fundamentally shaped by political tensions between the Royalty and Parliament, as detailed by Shetreet. Notably, during the Stuart era, legislative interventions by Parliament curtailed royal encroachments on judicial processes and safeguarded judicial salaries and tenure through the Acts of Settlement, driven more by political motives to limit royal authority than by a dedication to judicial independence. The historical reminder that political considerations were embedded in the development of judicial independence from the beginning sheds a different light on the contemporary discourse on political checks of judicial power through various judicial selection mechanisms. See *Colt and Glover v Bishop of Coventry* (1616) 80 ER 290 (KB).

[758] Aida Pérez, 'Judicial Self-Government and Judicial Independence: The Political Capture of the General Council of the Judiciary in Spain' (2018) 19(7) *German Law Journal* 1769.

[759] European Commission for Democracy Through Law (Venice Commission), *Judicial Appointments*, Opinion No 403/2006 (22 June 2007), Report adopted at the 70th Plenary Session (16–17 March 2007).

[760] See Carlo Guarnieri, 'Courts and Marginalized Groups: Perspectives from Continental Europe' (2007) 5(2) *International Journal of Constitutional Law* 187.

[761] Aníbal Pérez Liñán and Andrea Castagnola, 'Institutional Design and External Independence: Assessing Judicial Appointments in Latin America' (APSA Annual Meeting Paper, 2011) 3.

authorities are equally represented on the bench; and 3) popular elections – where the citizens politically choose judges.[762]

The variety of models and disagreements within the scholarship suggest that there is no single "best mechanism" for judicial appointments to achieve judicial independence.[763] The lack of consensus on the most appropriate way to select judges makes the quest for the rule of law violation in appointment procedures even more complex.

The implications of the elective model on the politicization of justice and the rule of law have been widely discussed in the US.[764] Abuse of the judicial procedure in the case of partisan judicial elections may occur either by politicians or campaigning judges themselves.[765] On the other hand, the appointment of Article III judges, particularly to the Supreme Court, has been a central point of contention between the executive and legislative branches.[766] The ideological nature of *advice and consen*t politics has been widely recognized in the literature, often prompting discussions on possible changes to the rules governing judicial nominations in the Senate.[767]

[762] Ibid.
[763] Lee Epstein, Jack Knight and Olga Shvetsova, 'Selecting Selection Systems' in Stephen B Burbank and Barry Friedman (eds), *Judicial Independence at the Crossroads: An Interdisciplinary Approach* (SAGE Publications 2002) 191; Tom Ginsburg, *Judicial Review in New Democracies: Constitutional Courts in Asian Cases* (Cambridge University Press 2003).
[764] Steven P Croley, 'The Majoritarian Difficulty: Elective Judiciaries and the Rule of Law' (1995) 62(2) *University of Chicago Law Review* 689.
[765] John D Fabian, 'The Paradox of Elected Judges: Tension in the American Judicial System' (2001) 15 *Georgetown Journal of Legal Ethics* 155, 161.
[766] Jeffrey K Tulis, 'Constitutional Abdication: The Senate, The President, and Appointments to the Supreme Court' (1997) 47 *Case Western Reserve Law Review* 1331.
[767] Vicki C Jackson, 'Packages of Judicial Independence: The Selection and Tenure of Article III Judges' (2007) 95 *Georgetown Law Journal* 965; Charles R Shipan, 'Partisanship, Ideology, and Senate Voting on Supreme Court Nominees' (2008) 5 *Journal of Empirical Legal Studies* 55.

In the continental European tradition, on the other hand, the ordinary judiciary has historically been organized around the civil service (executive) model, with variations such as the Nordic managerial model, the German ministerial model, or the Irish court service.[768]

The shift towards greater external judicial independence occurred only after World War II, when emerging democracies adopted variations of the Italian Consiglio della Magistratura.[769] This model, also known as the "European model" or the "Judicial Council Model," assumes that an independent body, comprising a majority of judges, elects judges independently or in collaboration with other branches.[770] Many Latin American and most European post-communist countries took this path during their transitions to democracy.[771] However, different countries still organize their judicial system within the executive-judiciary axis.

The appointment procedures also depend on the nature of the court to which the judges are selected. The previously mentioned typologies primarily refer to the ordinary court system. As for constitutional courts, due to their specific nature and the reasons why they were established,[772] they are mainly selected through a shared appointment system, giving different state actors equal "quota" in the representation on the bench.[773]

This brief overview suggests that judicial appointment procedures inherently incorporate political considerations, as the interbranch constellation of power shapes their design. Hence, despite the recent trend towards complete judicial self-governance, the participation of political

[768] Peter O'Brien, 'Never Let a Crisis Go to Waste: Politics, Personality and Judicial Self-Government in Ireland' (2018) 19(7) *German Law Journal* 1871.
[769] Carlo Guarnieri, 'Appointment and Career of Judges in Continental Europe: The Rise of Judicial Self-Government' (2004) 24(1–2) *Legal Studies* 169, 169. On the executive model of judicial organization, see generally John Henry Merryman, *The Civil Law Tradition* (2nd edn, Stanford University Press 1985).
[770] Michal Bobek and David Kosař, 'Global Solutions, Local Damages: A Critical Study in Judicial Councils in Central and Eastern Europe' (2014) 15 *German Law Journal* 1257.
[771] Katarína Šipulová and others, 'Judicial Self-Governance Index: Towards Better Understanding of the Role of Judges in Governing the Judiciary' (2023) 17 *Regulation & Governance* 22.
[772] See Chapter III.
[773] This model corresponds to Pérez-Liñán and Castagnola's cooperative procedures.

branches in appointing judges doesn't per se indicate a possible RoL violation. While the point may appear self-evident, it underscores the importance of articulating clear and discernible standards for evaluating when the political prerogative to appoint judges crosses into impermissible overreach.

In conclusion, although political participation in judicial appointments is an institutional feature of most constitutional democracies, the rule of law imposes normative constraints on how such participation is exercised. The principle of judicial independence does not demand the complete exclusion of political actors from the selection process, but it does require that their involvement be circumscribed by legal norms that promote transparency, impartiality, and procedural integrity. When these conditions are absent or undermined, political influence risks devolving into domination, eroding the judiciary's legitimacy as an independent adjudicative body. The critical task, therefore, is not to eliminate political considerations but to articulate and apply standards that distinguish permissible interbranch cooperation from impermissible political capture—a task that the subsequent analysis undertakes through a closer examination of the formal and informal mechanisms by which judicial appointments are shaped.

5. Detecting the Rule of Law Abuse in Judicial Appointments

As the previous discussion shows, detecting the RoL undermining efforts in the reforms on judicial appointments is no easy task. Nevertheless, some standards have emerged within the scholarship, although not discussed under the rule of law paradigm.

Judicial appointments, as one aspect of the de jure guarantees of judicial independence, are in the ECHR, and CJEU jurisprudence is traditionally perceived as delineating *the appearance of judicial independence*.[774] The international courts have recently engaged more deeply with the government's hidden agendas when assessing the possibility of foul play in judicial reforms, signaling a shift from the commonly deferential approach.

Only recently has the ECtHR gone a step further than the requirement of judicial independence, e.g., in its interpretation of the case *Guðmundur Andri Ástráðsson v. Iceland*. The ECtHR characterized the analysis "behind the appearances" to determine whether "a breach of the applicable national rules on the appointment of judges created *a real risk* that the other organs of Government, in particular the executive, exercised *undue discretion undermining the integrity of the appointment process* to an extent not envisaged by the national rules in force at the material time" (emphasis added).[775]

5.1. Abuse of Constitutional Design

Chapter IV discusses how constitutional amendments may oust the inherited judges at the expense of protected tenure, one of the inherent elements of the rule of law. However, the regime's abuse of the judicial appointment privilege may pose an even bigger threat to judicial independence and the rule of law. Appointing politically pliant judges and curtailing the appointment procedure to the current political needs allows the regime to extend its power beyond its elected mandate and control various aspects of the administration of justice. One of

[774] See Chapter II. According to the CJEU: "It is not only essential that judges are independent and impartial, but also that the procedure for their appointment appears to be so. It is for that reason that the rules for the appointment of a judge must be strictly adhered to." Case T-639/16 P *FV v Council of the European Union* EU:T:2018:24 (General Court, 23 January 2018).

[775] *Guðmundur Andri Ástráðsson v Iceland* App no 26374/18 (ECtHR, 12 March 2019) [Section II] para 103.This reasoning does not appear in this wording in the final judgment. *Guðmundur Andri Ástráðsson v Iceland* App no 26374/18 (ECtHR, 1 December 2020) [GC] para 207.

the prominent examples is the capture of constitutional courts to legitimize arbitrary rule through abusive judicial review.[776]

Amendments to a state's constitutional framework—particularly those restructuring judicial appointment procedures—represent the apex of formal democratic expression and, as such, often benefit from a strong presumption of legitimacy. However, this status complicates the evaluation of their compatibility with the rule of law. Because constitutional reform is a legally valid exercise of political will, its capacity to facilitate subtle forms of institutional capture demands careful normative scrutiny. As elaborated in Chapter IV, such reforms frequently implicate the position of "inherited judges"—those appointed under prior administrations—raising concerns that political disagreement, rather than institutional inadequacy, motivates attempts to recalibrate judicial composition. In these circumstances, it is imperative to assess whether the rationale for reform extends beyond mere partisan dissatisfaction. Given the potential of such amendments to entrench political dominance through formally lawful means, their legitimacy cannot rest solely on procedural regularity. Instead, they must be subjected to heightened justification standards rooted in the culture of justification. This entails a demonstrable commitment to transparent, impartial, and substantively reasoned reform that upholds the structural integrity and independence of the judiciary and guards against the instrumentalization of constitutional change for political gain.

[776] "Regimes turn to courts to carry out their dirty work because, in doing so, they benefit from the associations that judicial review has with democratic constitutional traditions and the rule of law. Having a court, rather than a political actor, undertake an anti-democratic measure may sometimes make the true purpose of the measure harder to detect, and at any rate it may dampen both domestic and international opposition." Rosalind Dixon and David Landau, 'Abusive Judicial Review: Abusive Borrowing by and of Constitutional Courts' in Rosalind Dixon and David Landau (eds), *Abusive Constitutional Borrowing: Legal Globalization and the Subversion of Liberal Democracy* (Oxford University Press 2021) 82.

Governments frequently adopt a range of strategies to circumvent the ordinary framework governing judicial appointments—namely, the assumption that judicial vacancies arise through legally recognized causes such as death, retirement, disciplinary dismissal or impeachment, promotion, or the natural expiration of a term. The following table illustrates the principal techniques by which governments may depart from the regular framework of judicial appointments, highlighting the constitutional or institutional mechanisms employed to create or exploit vacancies and thereby increase political control over the judiciary.

Formally Lawful but Functionally Abusive Reforms	De Facto Infringements of Judicial Autonomy
Recrafting appointment procedures to increase political control (e.g., shifting appointment powers to politically dominated bodies).	Appointing loyalists under the guise of meritocratic or legal reform, despite political motivations being clear in practice.
Expanding the number of judicial seats or altering quorum thresholds in ways that enable political packing.	Creating new judicial bodies or reconfiguring existing institutions to consolidate political control.
Establishing parallel or new judicial governance institutions to circumvent existing checks.	Filling purposefully created vacancies resulting from prior illegal dismissals or forced retirements.
Altering rules of procedure to favor executive or legislative dominance without explicitly removing judicial guarantees.	Using supermajority requirements to simulate constitutional protection while enabling unchecked political dominance.

The following illustrative cases demonstrate how these techniques have been operationalized through constitutional reforms in various jurisdictions, highlighting how ostensibly lawful amendments can be strategically employed to consolidate political control over the judiciary.

The Chilean Constitution of 1980, adopted during Pinochet's dictatorial regime, provided that the judges of the Constitutional Court would be constituted in the following manner: three of them were judges who were simultaneously sitting on the Supreme Court, one was appointed by the President, one by the Senate and two by the National Security Council.[777] At first sight, such a design provides a power balance between different constitutional actors. However, a systematic reading of the Constitution reveals that the regime directly controlled all the mentioned bodies, which it was also faithful to in practice.[778] When it comes to the ordinary judiciary from all three instances, their appointment was purely in the hands of the President of the Republic.[779] The 1980 Constitution didn't prescribe the protection of judicial independence, meaning there was no constitutional ground for judges to claim their autonomy from political actors.

The design of the 1980 Chilean Constitution reflects the theoretical debate on the role of written constitutions in authoritarian regimes, specifically their purpose of coordinating and maintaining cohesion among the ruling elite without necessarily introducing separation of

[777] Constitution of the Republic of Chile 1980, art 81.
[778] Sergio Verdugo, 'How Judges Can Challenge Dictators and Get Away with It: Advancing Democracy While Preserving Judicial Independence' (2021) 59(3) *Columbia Journal of Transnational Law* 554, fn 160. the Supreme Court's loyalty to the Pinochet's regime, see Lisa Hilbink, 'Agents of Anti-Politics: Courts in Pinochet's Chile' in Tom Ginsburg and Tamir Moustafa (eds), *Rule by Law: The Politics of Courts in Authoritarian Regimes* (Cambridge University Press 2008) 102.
[779] Constitution of the Republic of Chile 1980, art 75.

powers or interbranch checks.[780] In that sense, it corresponds to the *rule by law* rather than the rule of law. The Constitution legalizes rather than limits the government's arbitrary power in such a context.

The interference with judicial design in pursuit of entrenching and perpetuating power is also present in contemporary hybrid regimes. These instances are often camouflaged in abusive constitutional borrowing[781] and legal whataboutism or hidden through incremental *legal* changes that disable the judiciary and create systematic RoL violation.[782] There are two reasons why the systematic RoL violation framework does not answer the question of RoL adherence through interference with judicial appointments. Firstly, the problem with systematic RoL violations is that it is difficult to assess at what point a series of separate institutional reforms, adhering to applicable laws, amounts to a RoL violation.[783] Secondly, not all incremental changes affect judicial tenure through judicial appointment and dismissal. Only when coupled with other possible court-curbing practices (such as jurisdiction stripping and budget allocation) do they amount to a RoL violation.

Shortly after assuming power in 2010, the Fidesz government aimed to depart from the previous Constitution, which the government perceived as a relic of the communist past. The

[780] According to Tom Ginsburg and Alberto Simpser, the 1980 Constitution served for the coordination which was "a ubiquitous need of government that can be facilitated by formal written constitutions, facilitating elite cohesion." Tom Ginsburg and Alberto Simpser, 'Introduction: Constitutions in Authoritarian Regimes' in Tom Ginsburg and Alberto Simpser (eds), *Constitutions in Authoritarian Regimes* (Cambridge University Press 2014) 3–5.
[781] Rosalind Dixon and David Landau, 'The Concept and Scope of Abusive Constitutional Borrowing' in Rosalind Dixon and David Landau (eds), *Abusive Constitutional Borrowing: Legal Globalization and the Subversion of Liberal Democracy* (Oxford University Press 2021; online edn, Oxford Academic, 19 August 2021).
[782] A good example of the incremental legal changes affecting various aspects of the judiciary (both competencies and organization) is the manner in which the Hungarian Fundamental Law amendments affected the judiciary. For further details, see Tom Ginsburg and Aziz Z Huq, 'How to Lose a Constitutional Democracy' (2018) 116 *Michigan Law Review* 667.
[783] See the discussion in Chapter I and Chapter IV.

Fundamental Law was introduced the following year.[784] Fundamental law brought significant changes and revisions to the constitutional framework of Hungary, reflecting a shift in political ideology and governance principles.[785]

The Fourth Amendment to the Fundamental Law introduced modifications to the selection process of Constitutional Court justices and the election rules for the Court's President.[786] As the amendment prescribes, the Court's President is elected through a two-thirds majority vote in Parliament. At the same time, the nomination of Constitutional Court judges is carried out by a parliamentary committee, followed by a two-thirds vote in Parliament. According to the Cardinal Law on Constitutional Court (Act CLI of 2011), the parliamentary committee should represent each fraction of the Parliament, while the Standing Committee should hear the candidates on constitutional matters.[787] As the ruling coalition has a 2/3 majority, such a design in practice ceases to be an effective check.

Consequently, the selection of new Constitutional Court judges has, in practice, been in the hands of the ruling coalition. Additionally, the government abolished the previous judicial self-governance framework and established a new institution called the National Judicial Office.[788] The President of the National Judicial Office has authority over the "central responsibilities of the administration of the courts," including the power to appoint judges, subject only to the President of the Republic's countersignature.[789] The parliamentary supermajority appoints the NJO President for a nine-year term and wields discretionary power to

[784] Fundamental Law of Hungary, 25 April 2011.
[785] János Kis, 'Introduction: From the 1989 Constitution to the 2011 Fundamental Law' in Gábor Attila Tóth (ed), *Constitution for a Disunited Nation: On Hungary's 2011 Fundamental Law* (Central European University Press 2012) 1–22.
[786] Article 12 of the Fourth Amendment to the Fundamental Law of Hungary, Office of the Parliament, T/9929, 8 February 2013.
[787] Section 7(1), (2) of Act CLI of 2011 on the Constitutional Court (Hungary).
[788] Act CLXI of 2011 on the Organization and Administration of Courts (Hungary).
[789] Fundamental Law of Hungary, Art 25(5).

recommend the President of the Republic judges for promotion, demotion, transfer, and reassignment, as well as to initiate and organize judicial disciplinary proceedings.[790]

Despite the appearance of the 2/3 majority for appointment decisions as a robust safeguard against the politicization of the judiciary and the potential consolidation of arbitrary power, the Hungarian context has demonstrated a contrasting outcome in practice. With the governing coalition enjoying a 2/3 majority, the requirement of this voting threshold for judicial appointments has effectively prevented the opposition from imposing accountability on the judiciary. Instead of ensuring checks and balances and minimum judicial insularity, the overwhelming majority requirement has hindered the opposition's ability to counterbalance the political influence over the judiciary, thereby undermining the intended purpose of the 2/3 majority as a protective measure. This illustration shows how even a robust constitutional design may, in practice, not only enable but also exacerbate rule of law violations.

A similar pattern was observed in Turkey amidst the 2017 constitutional amendments.

In 2017, the constitutional amendments to the Turkish Constitution altered the design of the Supreme Board of Judges and Prosecutors (HSYK), which is responsible for appointing and promoting judges and prosecutors. The revision to the system reduced the number of HSYK members to 13, granting the President the authority to appoint four members, while the parliament would appoint the remaining seven, joined by two ex officio members: the Minister of Justice and his deputy.[791] As for the Constitutional Court, the amendments prescribed that the President appoints 12 members and Parliament appoints three.[792]

[790] Act CLXI of 2011 on the Organisation and Administration of Courts of Hungary, s 76(5).
[791] Constitution of the Republic of Turkey, art 159, as amended by Act No 6771 of 11 February 2017.
[792] Constitution of the Republic of Turkey, art 146, as amended by Act No 6771 of 11 February 2017.

These changes must be analyzed in conjunction with two additional amendment provisions. In light of the constitutional provisions permitting the President to simultaneously hold the position of the President of his political party and the governing coalition's substantial 2/3 majority in Parliament, coupled with the President's authority to appoint ministers, a notable consequence arises.[793] Specifically, this configuration establishes a clear and unequivocal concentration of judicial accountability oversight within the purview of the President. Consequently, the allocation of this check on the judiciary predominantly resides within the President's discretionary powers.

Another illustrative instance can be observed in the amendment made to the Organic Law on TSJ (Comité de Postulaciones Judiciales) in 2017, which was enacted by a Parliament heavily packed by Maduro's allies in the contentious 2020 elections that were widely condemned by the international community as lacking legitimacy.[794] This reform aimed to reduce the number of judges in the TSJ from 32 to 20 and to change the composition of the committee responsible for nominating candidates for the TSJ, granting a majority of seats to members of Congress instead of representatives from diverse sectors of society. All members are selected by the two/thirds majority of the National Assembly.[795] The same amendment presupposes that a two-thirds majority will nominate the judges of the Supreme Court.[796]

[793] Constitution of the Republic of Turkey, arts 101 and 146, as amended by Act No 6771 of 11 February 2017.
[794] Inter-American Commission on Human Rights (IACHR), 'IACHR Expresses Concern Over Reform of Organic Law of Supreme Court of Justice of Venezuela' (17 February 2022) https://www.oas.org/en/iachr/jsForm/?File=/en/iachr/media_center/preleases/2022/034.asp accessed 5 December 2023; IACHR, 'IACHR Flags Obstacles for Fair Parliamentary Elections in Venezuela' (11 November 2020) https://www.oas.org/en/iachr/media_center/PReleases/2020/269.asp accessed 5 December 2023.
[795] Ley Orgánica de Reforma de la Ley Orgánica del Tribunal Supremo de Justicia, Gaceta Oficial de la República Bolivariana de Venezuela, Caracas, 19 January 2022, No 6.684 Extraordinario Art 65.
[796] Ibid, Art 35.

The cases examined above demonstrate how constitutional reforms concerning judicial appointments, while formally enacted through legitimate democratic channels, can nonetheless pose serious challenges to the rule of law. As constitutional amendments represent the highest expression of democratic authority, they often carry a presumption of legitimacy that makes contestation difficult. Yet, it is precisely this elevated status that warrants heightened scrutiny. When such reforms alter the institutional safeguards of judicial independence or recalibrate the balance of powers, their justification must meet a correspondingly higher threshold. This is particularly essential in contexts involving inherited judges, where the political majority's dissatisfaction with prior appointments cannot, on its own, justify institutional restructuring. From a rule of law perspective grounded in a culture of justification, reforms must not only conform to procedural validity but also be demonstrably reasoned, impartial, and necessary to uphold the integrity of the judicial function. Without such substantive justification, constitutional amendments risk becoming instruments of entrenched power rather than vehicles of lawful governance.

While constitutional design reforms operate at the structural level of judicial governance, the potential for undermining the rule of law also manifests in the manipulation of appointment procedures—often under the guise of legality. The following section turns to these more granular, procedural forms of interference, where abuse occurs not through constitutional redesign but through distortions in the implementation of existing legal frameworks.

5.2. Abuse of the Procedure

The procedural RoL criteria aim to uphold the integrity of the appointment process and, thereby, the institutional integrity of the prospective bench. Rebecca Bill Chavez enlists three factors to be considered in detecting procedural abuse in judicial appointments: 1) the level of transparency of the procedure, 2) the speed of the selection process, and 3) the nature of the parliamentary debate.[797] These standards broadly reflect the principle of legal certainty as one of the essential elements of the rule of law.

This section carves out a similar typology of procedural abuses in judicial appointments, drawing on comparative examples and jurisprudence to illustrate how the integrity of appointment processes may be compromised. While some forms of abuse involve overt breaches of legal norms—such as bypassing statutory requirements or manipulating institutional procedures—others operate through informal channels, including discretionary influence, political bargaining, or the personalization of appointments. Though often concealed beneath a veneer of legality, these informal practices may be equally corrosive to judicial independence and the rule of law. The typology presented below distinguishes between **formal** and **informal** procedural abuses, offering a structured framework for identifying and evaluating different modalities of manipulation that undermine the legitimacy and impartiality of the judiciary.

Type of Abuse	Category	Definition
Opaque and Expedited Procedures	Formal	Acceleration of appointments without

[797] Rebecca Bill Chávez, 'The Appointment and Removal Process for Judges in Argentina: The Role of Judicial Councils and Impeachment Juries in Promoting Judicial Independence' (2007) 49(2) Latin American Politics and Society 33, 34.

		sufficient deliberation or transparency, preventing thorough candidate evaluation or public oversight.
Procedural Manipulation During Institutional Transition	Formal	Strategic timing of appointments during government transitions to preempt incoming authorities or extend control over the judiciary.
Circumvention of Internal Institutional Rules	Formal	Bypassing legislative or institutional rules governing appointments, such as quorum requirements or mandatory committee participation.
Deviation from Statutory Appointment Requirements	Formal	Failure to comply with legal procedures or qualification criteria prescribed for judicial appointments under national law.

Discretionary and Non-Transparent Selection	Informal	Vague or opaque selection criteria allow for politically motivated choices without accountability or oversight.
Personalization and Ideological Appointments	Informal	Appointments are based on personal loyalty, ideological alignment, or political affinity rather than merit or independence.
Appointments as Outcomes of Political Bargaining	Informal	Judicial appointments are part of informal political compromises or power-sharing arrangements prioritizing partisan interests over judicial independence.
Post-Reform Elite Capture and Structural Dependence	Informal	Political influence over appointments is persistent despite formal reforms to enhance judicial independence.

The categories outlined in the typology serve as an analytical framework for interpreting concrete instances of judicial appointment abuses; the following examples illustrate how these formal and informal techniques have been employed across different jurisdictions to undermine the integrity of judicial selection processes.

5.2.1. Formal Distortions of Legal Procedure in Judicial Appointments

At times, the breach is readily discernible, as was the case with the procedural irregularities in judicial appointments in Argentina following Menem's 1990 court-packing. To secure Senate approval for his appointees, Menem disregarded a transparent procedure when selecting four justices. The rapid pace of the proceedings hindered a comprehensive assessment of the candidates. Menem swiftly presented his nominees to the Senate, under the control of the PJ (Justicialist Party), a mere day after the announcement of the Supreme Court expansion. During the meeting to review Menem's candidates, the two UCR (Radical Civic Union) representatives on the Senate Appointment Committee were absent. When the committee's recommendation was brought to the Senate floor, Menem's list received approval in a seven-minute closed session with no UCR senators present.[798] Menem used the opportunity to fill the empty seats with his cronies, who lacked the necessary qualifications for the role.[799]

The President of Venezuela, Nikolas Maduro, used the same playbook in 2015. By convening an extraordinary Parliamentary session after the Parliament had already gone into the Christmas holiday recess, he appointed 13 more justices to the Supreme Court. The procedure was marred by irregularities – the Committee on Judicial Matters (El Comité de Postulaciones

[798] Horacio Verbitsky, *Hacer la corte: la construcción de un poder absoluto sin justicia ni control* (Buenos Aires, 1993) 52.
[799] Rebecca Bill Chavez, 'The Evolution of Judicial Autonomy in Argentina: Establishing the Rule of Law in an Ultrapresidential System' (2004) 36(3) *Journal of Latin American Studies* 451, 458.

Judiciales) preselected the candidates in an opaque manner without the approval of the Citizen Committee (Comité de Evaluación de Postulaciones del Poder Ciudadano) and in contravention of the relevant provisions of the Organic Law on the TJ.[800]

A more recent illustration pertains to the irregular nomination of Constitutional Tribunal judges in Poland by both the outgoing and incoming governments during the 2015 parliamentary elections, also known as the saga of the *November and December judges*.[801]

Amidst the end of its term, the 7th parliamentary composition led by the coalition composed of the Civic Platform (PO) and the Polish Peasants' Party (PSL) amended the law on CT, allowing it to nominate five justices to the Constitutional Tribunal.[802] Such a move was an attempt to politically constrain the incoming government in the light of its probable victory and block them from appointing their candidates upon assuming office. The issue was that only three seats would become vacant when the parliamentary term expired.[803] Hence, the appointment of three justices was legal (the November judges), while nominating two extra judges for the positions, which would become vacant only after the new Parliament convened, was not. The Constitutional Tribunal at that time affirmed this view.[804] The problem arose when President Duda refused to accept the oaths of either of the justices nominated by the previous parliamentary composition. According to Sadurski, this way, the President "de facto changed the

[800] Daniel Pardo, 'Por qué importan tanto los magistrados que designó el chavismo en Venezuela' [Why do the magistrates appointed by Chavismo matter so much in Venezuela], *BBC Mundo* (23 December 2015) https://www.bbc.com/mundo/noticias/2015/12/151222_venezuela_tsj_magistrados_dp accessed 1 June 2020.
[801] Anne E. Sanders and Luc von Danwitz, 'Selecting Judges in Poland and Germany: Challenges to the Rule of Law in Europe and Propositions for a New Approach to Judicial Legitimacy' (2018) 19(4) *German Law Journal* 769.
[802] Poland, *The Act of 19 November 2015 amending the Constitutional Tribunal Act* (Journal of Laws – Dz. U. 2015, item 1928).
[803] Wojciech Sadurski, *'Dismantling Checks and Balances (I): The Remaking of the Constitutional Tribunal'*, in *Poland's Constitutional Breakdown*, Oxford Comparative Constitutionalism (Oxford, 2019; online edn, Oxford Academic, 18 July 2019), 62.
[804] Constitutional Tribunal of Poland, Judgment K 34/15 (3 December 2015).

constitutional system of the appointment of CT judges," introducing the presidential veto to an appointment, a prerogative that the Constitution does not envision.[805]

Furthermore, following the conclusion of the parliamentary elections, the newly constituted Parliament, dominated by the PiS party, implemented an unusual and potentially unlawful set of resolutions on November 25, 2015.[806] These resolutions asserted that the entire procedure for selecting all five justices, including the three judges duly elected in October, violated the Parliament's Rules of Procedure, rendering the elections of all five judges null and void. Based on this premise, on December 2, 2015, the new Parliament appointed five new judges, all aligned with the ruling party, exceeding the intended initial number of two appointments (referred to as the "December judges"). The crisis ended in a stalemate – the President refused to swear in three justices appointed by the previous Parliament. On the other hand, the CT refused to assign cases to the three justices appointed by the incoming coalition.[807] In the following two years, tensions between the government and the CT were exacerbated, leading to the Government's refusal to publish the CT's judgments on ultra vires grounds.[808] The conundrum of three seats being filled by both the outgoing and the incoming Parliaments was

[805] Wojciech Sadurski, *'Dismantling Checks and Balances (I): The Remaking of the Constitutional Tribunal'*, in *Poland's Constitutional Breakdown* 64.

[806] Both sets of the resolutions (from November 25th and December 2) are available at Trybunał Konstytucyjny, 'U 8/15' https://trybunal.gov.pl/s/u-815 accessed 28 May 2020.

[807] A motion was presented to the Constitutional Tribunal by a group of Sejm Deputies, seeking a review of five resolutions made by the previous Sejm on November 25, 2015, which declared the appointments made by the previous Sejm invalid. Additionally, they aimed to review five resolutions made on December 2, 2015, regarding the appointment of new constitutional judges. However, these motions were not examined on their merits. On January 7, 2016, the Constitutional Tribunal discontinued the proceedings (ref. no. U 8/15) based on the majority of judges' opinion that the Tribunal lacked constitutional authority to review the aforementioned resolutions. See Marcin Wiącek, 'Constitutional Crisis in Poland 2015–2016 in the Light of the Rule of Law Principle' in Armin von Bogdandy and others (eds), *Defending Checks and Balances in EU Member States* (Springer 2021) vol 298, *Beiträge zum ausländischen öffentlichen Recht und Völkerrecht*.

[808] Ewa Łętowska and Aneta Wiewiórowska-Domagalska, 'A "Good" Change in the Polish Constitutional Tribunal?' (2016) 1 *Osteuropa Recht* 79, 88.

incontestably solved by the 2017 judgment of the already packed Court.[809] Through creative interpretation, the CT legitimized the appointment of three PiS judges, relying on the argument that the appointments made by the 7th parliamentary composition were declared invalid by the 8th composition, making those seats vacant.[810] Two of the judges whose appointment was questioned refused to recuse themselves from deciding on the issue, which failed to provide the minimum requirement of impartiality as expressed by the principle Nemo judex in causa sua.[811]

The appointment of Justice Amy Coney Barrett in 2020 serves as a significant example of procedural irregularity within a formal legal appointment process. Although the constitutional procedures for nomination and confirmation were followed in principle, the Senate Judiciary Committee deviated from its own internal procedural rules during the confirmation process. Specifically, the Committee advanced Barrett's nomination to the Senate floor without a valid quorum, as Democratic members boycotted the markup session in protest of the rushed timeline. Under Senate Judiciary Committee Rule III.1, at least two members of the minority party must be present for the Committee to transact business. Nevertheless, the Republican majority voted on the nomination in their absence. A point of order was subsequently raised in the Senate challenging the procedural validity of the Committee's action. However, it was dismissed by invoking the so-called "cleansing clause"—a parliamentary doctrine under Senate Rule XXVI.7(a)(3) stating that any committee vote taken with a majority present and voting is presumed to ratify prior procedural steps. This invocation allowed the nomination to proceed

[809] Constitutional Tribunal of Poland, Judgment K 1/17 of 24 October 2017.
[810] Ibid.
[811] Wojciech Sadurski, *'Dismantling Checks and Balances (I): The Remaking of the Constitutional Tribunal'*, in *Poland's Constitutional Breakdown* 64.

despite the procedural defect, effectively overriding the quorum requirement and setting a precedent that was controversial for bypassing minority participation in judicial confirmations.[812]

The ECtHR Grand Chamber judgment in *Guðmundur Andri Ástráðsson v Iceland* established that serious procedural flaws in judicial appointments may violate the right to a tribunal "established by law" under Article 6(1) of the European Convention on Human Rights.[813] Following the 2018 judicial reforms, the Icelandic Evaluation Committee identified the most qualified candidates for the newly created Court of Appeal. However, the Minister of Justice deviated from the Committee's recommendations in four cases—without conducting an adequate independent assessment or providing a reasoned justification to Parliament, as required by domestic law. One of the irregularly appointed judges later participated in deciding Mr. Ástráðsson's appeal. Parliament compounded the irregularity by confirming the appointments en bloc rather than through individual deliberation. While the Icelandic Supreme Court acknowledged procedural breaches, it upheld the appointments. The European Court, applying a three-step test, concluded that these flagrant violations of national appointment procedures compromised judicial independence and rendered the tribunal unlawful under Article 6(1) (See Chapter II).

Continuing this line of jurisprudence, the Court in *Bakradze v Georgia* further clarified the procedural guarantees inherent in the right to a tribunal established by law, emphasizing that deficiencies in judicial selection processes—particularly those involving arbitrariness or lack of transparency—may give rise to violations of Article 6(1) of the Convention.[814] In *Bakradze v Georgia*, the applicant contested her exclusion from two consecutive judicial selection

[812] Michael A Fragoso, 'The Judicial Appointment Process' (2024) 2024 *Harv JL & Pub Pol'y Per Curiam* 1, 9.
[813] *Guðmundur Andri Ástráðsson v Iceland* App no 26374/18 (ECtHR, 1 December 2020)
[814] *Bakradze v Georgia* App no 20592/21 (ECtHR, 19 October 2023).

procedures, arguing that the process lacked objectivity, transparency, and foreseeability. The domestic authorities failed to provide individualized assessments or adequate reasoning for her non-selection despite national legal provisions requiring a merit-based and reasoned evaluation. Instead, the selection process was conducted in a manner that appeared opaque and discretionary, allowing for excessive executive influence without effective procedural safeguards. The European Court held that such systemic irregularities—characterized by the absence of clear criteria, justification, and effective oversight—undermined the very essence of a tribunal "established by law," thereby resulting in a breach of Article 6(1) of the ECHR.

A similar strategy can be observed recently in Hungary. The Hungarian judicial appointment framework has been structurally distorted through regulatory and legislative changes that disproportionately favor candidates with executive backgrounds, thereby undermining the principle of procedural integrity. Since 2017, the judicial candidate evaluation process has relied on a points system established by Ministerial Decree 7/2011 (III. 4.) KIM, which assigns greater value to professional experience gained outside the judiciary—particularly within the executive branch—than to judicial career pathways. Although the 2023 judicial reform nominally enhanced the National Judicial Council's authority by granting it a binding opinion over future amendments to the points system, the decree regulating it has remained unchanged, preserving the systemic preference for executive-affiliated candidates.[815] This bias is further entrenched by the 14th Amendment to the Fundamental Law, which may also fall within the scope of abuse through constitutional change, as it raised the minimum age for judicial appointment from 30 to 35 and introduced new eligibility criteria that disadvantage candidates

[815] Erika Farkas, 'Hungary's 14th Constitutional Amendment: Cementing the Incremental Political Takeover of Judicial Power' (ConstitutionNet, International IDEA, 30 April 2025) https://constitutionnet.org/news/voices/hungarys-14th-constitutional-amendment-cementing-incremental-political-takeover-judicial-power accessed 2 May 2025.

with experience solely within the judiciary.[816] As a result, individuals transitioning from the executive branch face fewer professional hurdles, receive more favorable point assessments, and gain facilitated access to judicial posts. These cumulative effects represent a procedural irregularity that, while cloaked in formal legality, enables political actors to steer the composition of the judiciary through nominally neutral but substantively biased appointment mechanisms.

While formal procedural abuses manifest through identifiable violations of legally codified rules, informal abuses of procedure operate more subtly—through discretionary practices and structural manipulations that, while nominally legal, distort the integrity and impartiality of judicial appointments.

5.2.2. Informal Mechanisms of Influence and Political Capture

While the preceding cases demonstrate how overt breaches of formal legal rules governing judicial appointments may constitute violations of the right to a tribunal established by law, such irregularities represent only one dimension of the problem. Equally concerning, yet often more challenging to detect and substantiate, are informal practices and discretionary influences that distort the judicial appointment process while maintaining a façade of procedural regularity. These informal mechanisms—from politicized nominations and opaque selection criteria to patronage networks and institutional pressure—may not directly contravene codified rules. However, they undermine the normative foundations of judicial independence and erode the rule of law by compromising the appearance of adjudication.

[816] Fundamental Law of Hungary, 14th Amendment (as in force of 15 April 2025), arts 26(2), T14.

Discussing the politicization of judicial appointments in Venezuela, Raul Sanchez Urribari enlists several techniques employed towards that goal: 1) the reflection of the *personalization of power* in judicial appointments – the case in which the leader has the direct (in)formal role in advancing specific nominees; 2) rhetorically portraying the control of judiciary through appointments as a necessary democratic change; 3) the deliberate circumvention or reinterpretation of appointment regulations to ensure the presence of ideologically or partisan-aligned justices on the bench.[817] As Urribari stresses, these types of political interferences may go beyond capturing the judiciary – they may as well serve to entrench "the cleavages, agenda, rhetoric and overall governance style of the populist regime in question."[818] A higher degree of informality contributes to further arbitrariness in the judicial organization and adjudication, jeopardizing legal certainty and ultimately resulting in the legal system being closer to rule by law than the rule of law.

As Dressel, Urribarri, and Stroh claim, the informality of judicial appointments is vastly present in non-Western societies.[819] Pozas-Loyo & Rios-Figueroa have focused on patronage networks within the Mexican federal judiciary and how these networks have negatively impacted judicial appointments at all levels.[820] Adouki, Fombad, and Roux have examined the impact of informal networks on judicial appointments in different African contexts.[821] Chua et al. analyzed

[817] Raul Sánchez Urribarrí, 'Populism, Constitutional Democracy, and High Courts – Lessons from the Venezuelan Case' in Martin Krygier, Adam Czarnota and Wojciech Sadurski (eds), *Anti-Constitutional Populism* (Cambridge University Press 2022) 195.
[818] Ibid.
[819] Björn Dressel, Raul Sanchez-Urribarri and Alexander Stroh, 'The Informal Dimension of Judicial Politics: A Relational Perspective' (2017) 13 *Annual Review of Law and Social Science* 413.
[820] Andrea Pozas-Loyo and Julio Ríos-Figueroa, 'Anatomy of an Informal Institution: The "Gentlemen's Pact" and Judicial Selection in Mexico, 1917–1994' (2018) 39(5) *International Political Science Review* 647–61.
[821] Delphine Emmanuel Adouki, *Contribution à l'étude de l'autorité des décisions du juge constitutionnel en Afrique* (2013) RevFrDrConst 95, 611; Charles Manga Fombad, 'Appointment of constitutional adjudicators in Africa: some perspectives on how different systems yield similar outcomes' (2014) 46 *Journal of Legal Pluralism and Unofficial Law* 249; Theunis Roux, 'Constitutional Courts as Democratic Consolidators: Insights from South Africa after 20 Years' (2016) 42(1) *Journal of Southern African Studies* 5.

the political dynamics surrounding appointments in the Philippines.[822] As mentioned, Latin American countries offer compelling illustrations of the prevalence of informal influence in judicial appointments.[823]

At times, the informal politicization of judicial appointments is conspicuous, or the appointments are used as a bargaining chip in the political trade-offs. One such trade-off was the Pacto de Olivos (Olivos Agreement) reached in Argentina in 1994 between President Carlos Menem and former President Raúl Alfonsín.[824] The agreement aimed to introduce significant constitutional reforms, particularly regarding the presidency and the establishment of term limits. One of the key provisions of the pact was to amend the Argentine Constitution to allow for the re-election of the President for a consecutive term. Having endorsed these amendments, the opposition effectively allowed Menem to seek re-election and serve a second term, a move that was previously prohibited.

On the other hand, Menem's obligation was to break *the mayoría automatica* and free three seats at the Supreme Court from his loyalists, allowing the opposition coalition to appoint their candidates.[825] Three of Menem's justices, Barra, Cavagna, and Levene, stepped down, but Menem did not meet his part of the deal. Instead of allowing the opposition to participate in the

[822] Yvonne T Chua, Booma B Cruz, Ma Gisela Ordenes-Cascolan, Luz Rimban, Jennifer Santiago and Ellen Tordessillas, *Political Economy Analysis of Judicial Appointments in the Philippines* (VERA Files, Manila 2012).
[823] Gretchen Helmke and Frances Rosenbluth, 'Regimes and the Rule of Law: Judicial Independence in Comparative Perspective' (2009) 12 *Annual Review of Political Science* 345.
[824] For the scope, details and consequences of the Olivos Agreement, see Mara Pegoraro and Florencia Zulcovsky, *El juego anidado de la reforma constitucional argentina* (Colección 21, UCA Repositorio, Buenos Aires 2011) https://repositorio.uca.edu.ar/handle/123456789/7086 accessed 20 June 2020; Antonio María Hernández, 'A tres lustros de la reforma constitucional de 1994' (2010) 60 *Revista de la Facultad de Derecho de México* 249 https://www.revistas.unam.mx/index.php/rfdm/article/view/30208 accessed 20 June 2020.
[825] Catalina Smulovitz, 'Constitución y Poder Judicial en la nueva democracia Argentina. La experiencia de las instituciones' in Carlos Acuña (ed), *La nueva matriz política argentina* (Nueva Visión, Buenos Aires 1995) 71–114.

appointment to the three free seats, he again irregularly filled them with his loyalists, further entrenching his power.[826]

The informal influence on judicial appointments often coexists with formal breaches of procedure and the recrafting of appointment rules through legal and constitutional amendments. According to Allan Brewer-Carias, the Chavista regime began exerting political influence over the judiciary in 1999 by appointing new magistrates to the Supreme Tribunal of Justice, deviating from the constitutional requirements established by the National Constituent Assembly.[827] Subsequent formal and informal interventions incrementally increased Chavez's political control over the Supreme Tribunal of Justice and the Venezuelan judicial system.[828]

The constitutional conditions for the appointment of Supreme Tribunal Magistrates and the procedures involving the participation of representatives from various civil society sectors were violated from the outset. Firstly, in 1999, the National Constituent Assembly dismissed the previous justices and appointed new ones without receiving nominations from any Nominating Committee, with many of the new appointments not meeting the constitutional requirements to serve as magistrates. Secondly, in 2000, the newly elected National Assembly introduced a Special Law to appoint Magistrates temporarily, again without complying with the constitutional conditions. Lastly, in 2004, the National Assembly passed the Organic Law of the Supreme Tribunal of Justice, which combined the court-packing with the distortion of the constitutional criteria for appointment and dismissal. It allowed the government to exercise absolute control

[826] Andrea Castagnola, 'La trampa de la manipulación judicial: un análisis histórico de la manipulación política de la Corte Suprema Argentina' (2020) 29(1) *Revista Uruguaya de Ciencia Política* 49, 71.
[827] Alan Brewer Carías, 'Venezuela under Chávez: Blurring Between Democracy and Dictatorship' (Lecture, University of Pennsylvania Law School, Philadelphia, 16 April 2009) 15 https://allanbrewercarias.com/wp-content/uploads/2009/04/1044.-989.-VENEZUELA-UNDER-CHAVEZ.-BLURRING-BETWEEN-DEMOCRACY-AND-DICTATORSHIP.-Pennsylvania-Law-April-2009.-l.pdf accessed 13 December 2022.
[828] Ibid.

over the Supreme Tribunal, particularly its Constitutional Chamber. Following the 2004 reform, the selection process for new Magistrates was subject to the will of the President of the Republic, as openly acknowledged by the President of the parliamentary Commission responsible for selecting candidates for the Supreme Tribunal of Justice. The regime throughout that period continued to formally change the appointment procedures while, at the same time, ignoring them in practice, advancing the principle "hecha la ley, hecha la trampa" ("make the law and then find your way around it").

In an attempt to restrain informal practices coming from non-governmental actors, governments often pursue formal reforms. However, even the advancement of reforms to strengthen judicial independence cannot address the problem.[829] The judicial appointment procedure may be designed to appear objective and adhere to the legislative framework, while simultaneously, the formal or informal power-holders may lobby for specific candidates. An illustrative example can be observed in the efforts to bring Russia and China closer to a rule of law governance model.

In these two regimes, the politicization of appointments didn't come directly from the formal interbranch meddling with the constitutional design. Judges in the Soviet regime were notoriously dependent on the Communist Party as they were obliged to be its members and faced 5-year reappointments.[830] The prerogative of the appointment was in the hands of the local party elite. In his attempt to introduce *pravovoe gosudarso*, Gorbachev launched judicial reforms that were supposed to bring radical change. Regarding judicial appointments, the reform formally

[829] See David Kosař, *Perils of Judicial Self-Government in Transitional Societies: Holding the Least Accountable Branch to Account* (Cambridge University Press, Cambridge 2016) for the critic of such practices in the post-communist countries that adopted the judicial council model.
[830] Peter H. Solomon Jr, 'Authoritarian Legality and Informal Practices: Judges, Lawyers and the State in Russia and China' (2010) 43 *Communist and Post-Communist Studies* 351, 353.

transferred the judicial appointment power from the party apparatus and introduced an obligatory screening of candidates by the Judicial Qualification Commission.[831] In practice, this didn't bring to the fore the political insularity of the judiciary, as regional and local elites continued to influence appointments throughout the Yeltsin era.[832]

Similar circumstances were present in China until Xi's 2013 Resolution, which aimed to implement broad judicial centralization reform: judicial appointments were moved from local governments to provincial governments.[833] Analyzing these developments, Yueduan Wang concluded that the Chinese and Russian examples raise questions about the insurance theory in the context of authoritarian and hybrid regimes.[834] The lack of political competition in these countries helped the government to free the judiciary from the pressure of the local elites. However, this doesn't mean that the judicial reforms produced political insularity of the judiciary from the central government. Instead, they strengthened the impartiality of judges when deciding individual cases.[835] These nuances reaffirm the multifaceted nature of judicial independence. Bolstering one of its elements does not necessarily lead to an overall more politically insulated judiciary as a branch of government.

This section outlines a typology of procedural abuses in judicial appointments, demonstrating that distortions of the legal process—whether manifest in overt violations of

[831] Peter H. Solomon Jr, 'Judicial Power in Authoritarian States: The Russian Experience' in Tom Ginsburg and Tamir Moustafa (eds), *Rule by Law: The Politics of Courts in Authoritarian Regimes* (Cambridge University Press 2008) 261–82.
[832] Alexei Trochev, 'Judicial Selection in Russia: Towards Accountability and Centralization' in Kate Malleson and Peter H. Russell (eds), *Appointing Judges in an Age of Judicial Power: Critical Perspectives from around the World* (University of Toronto Press, Toronto 2006) 375–94, 380–87.
[833] Yueduan Wang, 'The More Authoritarian, the More Judicial Independence? The Paradox of Court Reforms in China and Russia' (2020) 22 *University of Pennsylvania Journal of Constitutional Law* 529, 549.
[834] Ibid.
[835] Ibid 558. "The flip side of China's "advantage" that the top power is not bound by democratic formalities or other institutional constraints is its high dependence on the individual leader, which brings considerable unpredictability to any reform that requires long-term commitment."

formal rules or the operation of informal political influence—can fundamentally compromise the independence and legitimacy of the judiciary. The examples discussed illustrate that procedural compliance in form does not necessarily amount to compliance in substance. When appointments are made through accelerated procedures, opaque deliberations, or political deals, the underlying institutional safeguards are weakened, even if the legal framework remains formally intact. A pattern emerges in which judicial appointments serve not to reinforce the separation of powers, but to entrench political dominance. However, the abuse of judicial design does not begin at the point of appointment. In many cases, the integrity of the appointment process is already compromised by prior irregularities—most notably, by the unlawful or politically motivated dismissal of sitting judges, which creates the vacancies new appointees are intended to fill.

5.3. Abuse in the Dynamics of the Judicial Reshuffle

As argued in Section 3, the political nature of a regime, taken in isolation, offers limited analytical traction for identifying rule of law violations in the sphere of judicial appointments. This, however, does not diminish the importance of contextual analysis. On the contrary, tracing patterns of judicial tenure and turnover over time provides a critical corrective to the limitations of purely formal or constitutional inquiry. It enables a more nuanced assessment of how judicial independence may be eroded in practice, even when appointments appear to conform to de jure standards. The underlying premise here is that compliance with the rule of law in any judicial appointment or reform initiative cannot be assessed in abstraction; rather, it is contingent upon the legality of the prior cycle of judicial dismissals. Raul Sanchez Urribari stressed the importance of relying on the dynamic approach in assessing the politicization of the judiciary, i.e., “that is, how, to what degree and in what respects the court system is being used to establish,

consolidate, and advance the populist project's agenda and/or protect it against challenges from political opponents."[836]

To explore the implications of this standard, the following section examines the political and legal conditions under which judicial vacancies were created, illustrating how irregular removals undermine the legitimacy of subsequent appointments.

Following the capture of the Constitutional Court after 2010, the Hungarian government also pursued reforms of the ordinary judiciary. Cardinal Act CLXII/2011 on the Status and Remuneration of Judges marked a significant threat to the independence of ordinary courts.[837] This legislation effectively reduced the mandatory retirement age. Consequently, a substantial proportion of senior judges, comprising approximately 10 to 15% of the overall judiciary and disproportionately affecting court leaders, were compelled to vacate their positions immediately. Before its restructuring, the Hungarian Constitutional Court ruled that applying the reduced retirement age to sitting judges was unconstitutional, as it contradicted the principle of judicial irremovability.[838]

In response to the Constitutional Court's decision, the government later incorporated the annulled provision on the retirement age into the Fundamental Law as an amendment.[839] The European Commission and the European Parliament also expressed concerns regarding Hungary's abrupt reduction of the retirement age for judges. The European Commission initiated legal proceedings before the CJEU, which subsequently ruled that premature judicial retirements

[836] Raul Sánchez Urribarrí, 'Populism, Constitutional Democracy, and High Courts – Lessons from the Venezuelan Case' 194.
[837] It was adopted in a bundle with another cardinal act on the organization of the judiciary. Hungary, Act CLXI of 2011 on the Organisation and Administration of Courts, adopted 28 November 2011, entered into force 1 January 2012; Hungary, Act CLXII of 2011 on the Legal Status and Remuneration of Judges, adopted 28 November 2011, entered into force 1 January 2012.
[838] Constitutional Court of Hungary, Decision 33/2012 (VII. 17.) AB on new retirement age of judges, 17 July 2012.
[839] Fundamental Law of Hungary (25 April 2011, as amended) art 26(2).

constituted a violation of EU law on age discrimination.[840] Hungary was compelled to provide compensation but avoided reinstating the most significant judges to their former posts, as they were already filled.

Judge Andras Baka, whose dismissal was described in Chapter IV, had a similar fate. By the time he won his case before the European Court of Human Rights, the position of President of the Curia had already been filled, and Baka was reinstated to a lower position.[841]

At times, the illegal mass dismissal of judges creates vacant seats.

In response to the Gulenist coup attempt in 2016, Erdogan declared a State of Emergency, granting himself the ability to govern through executive decrees. Subsequently, over 150,000 individuals were detained, and the Turkish government issued thirty-two state-of-emergency decrees within the following two years, introducing amendments to various laws, including the Criminal Procedure Code and the Law on International Protection.

The state of Emergency following the coup allowed Erdogan to eliminate political opponents with the judiciary through extensive purges systematically. By the subsequent summer, more than 4,000 judges and prosecutors, constituting a quarter of the total number, were dismissed, including two members of the Constitutional Court. Despite numerous applications to review government decrees, the Council of State made no decision. Many of the suspended judges and prosecutors were convicted of terrorism charges. Most lower court judges were promoted to appeals courts to fill the vacancies left by the dismissed judges, while newcomers with limited experience entered the judiciary.[842] Consequently, the Turkish Bar Association

[840] Case C-286/12 Commission v Hungary EU:C:2012:687 (CJEU, 6 November 2012).
[841] *Baka v Hungary* (Grand Chamber) App no 20261/12 (ECtHR, 23 June 2016). See also Gabor Halmai, 'The Early Retirement Age of the Hungarian Judges' in Nicola F and Davies B (eds), *EU Law Stories: Contextual and Critical Histories of European Jurisprudence* (Cambridge University Press 2017).
[842] Merve Tahiroglu, 'How Turkey's Leaders Dismantled the Rule of Law' (2020) 44(1) *The Fletcher Forum of World Affairs* 67, 74.

reported that the average years of legal practice among Turkey's 14,000 judges dropped to just two and a half years.[843] The illegally created vacancies paved the way for Erdogan to appoint his judges following the Constitutional Amendments in 2017.

These two instances demonstrate that even if the appointment procedure for incoming judges is implemented according to the law and in an appropriate manner, the appointment is based on illegally obtained vacancies, thereby violating the rule of law.

This standard applies to all instances of RoL violating dismissals described in Chapter IV.

The standard of respect for judicial tenure in a cycle also illustrates why the RoL assessment cannot depend on the political context in which the interference occurs. At times, a RoL is violated to enhance other constitutionally viable principles, such as democratic government or, ironically, judicial independence. Consider the following two examples.

The 1994 judicial reforms in Mexico under President Zedillo aimed to enhance the judiciary's independence, efficiency, and transparency. These reforms were part of broader efforts to strengthen the rule of law and improve the functioning of the justice system in Mexico.[844] The reforms included measures such as the creation of the Federal Judicial Council (CJF) as an autonomous body responsible for administrative and budgetary matters of the federal judiciary, the establishment of the Federal Court of Administrative Justice (TFJA) to handle administrative disputes, and the introduction of oral trials in criminal proceedings. The reforms

[843] Carlotta Gall, 'Erdogan's Purges Leave Turkey's Justice System Reeling' *The New York Times* (online, 21 June 2019) https://www.nytimes.com/2019/06/21/world/asia/erdogan-turkey-courts-judiciary-justice.html accessed 30 June 2019.

[844] For a detailed account on the reform, see Jorge A. Vargas, 'Rebirth of the Supreme Court of Mexico: An Appraisal of President Zedillo's Judicial Reform of 1995' (1996) 11 *American University Journal of International Law & Policy* 295.

also aimed to enhance judicial professionalism and expertise by implementing merit-based selection processes for judges and improving judicial training programs.

Despite the reform being praised from a rule of law perspective, Zedillo's manner of clearing the Supreme Court to restructure it sheds another light. Through a special decree establishing the grounds for "forced or voluntary retirement (Retiro forzoso o voluntario) of the Supreme Court Justices," the President effectively eliminated the 26 inherited justices.[845]

President Zedillo's move was not seen as undermining the rule of law, given the existing judiciary's poor reputation and lack of credibility.[846]

Similarly, during Argentina's transition to democracy, President Raúl Alfonsín initiated the retirement of inherited judiciary members without launching formal procedures (see Chapter III). Although the reform aimed to advance other constitutionally significant values—such as the consolidation of democracy or the restoration of the rule of law—this form of interference nonetheless constitutes a violation of the rule of law insofar as it compromised procedural safeguards and cast doubt on the legitimacy of subsequent judicial appointments.

In light of that conclusion, it is essential to reemphasize Fallon's argument that "even when departures from Rule Law values may be justified to promote other, substantive political values, it may be unwise and dishonest to prefer a conception of the Rule of Law that conceals the trade-off."[847]

These examples demonstrate that judicial appointments cannot be evaluated without the conditions under which judicial vacancies arise. A formalistic focus on the legality of the

[845] Decreto, *Diario Oficial de la Federación* (Mexico), 31 December 1994, Article Segundo Transitorio (implementing constitutional reform on the composition of the Supreme Court under President Ernesto Zedillo).
[846] Nuno Garoupa and Maria A. Maldonado, 'The Judiciary in Political Transitions: The Critical Role of U.S. Constitutionalism in Latin America' (2011) 19 *Cardozo Journal of International and Comparative Law* 593, 38.
[847] Richard H. Fallon Jr, '"The Rule of Law" as a Concept in Constitutional Discourse' (1997) 97 *Columbia Law Review* 1, 17.

appointment procedure itself risks overlooking the deeper structural violation that occurs when judicial tenure is undermined through unconstitutional or politically motivated dismissals. As illustrated by the Hungarian and Turkish cases, as well as by transitional episodes in Mexico and Argentina, the creation of vacancies through irregular means—whether under the guise of reform, emergency rule, or institutional restructuring—corrupts the constitutional legitimacy of subsequent appointments, regardless of their procedural formality. This standard, grounded in respect for judicial tenure as a foundational element of the rule of law, compels a more cyclical and context-sensitive assessment of judicial independence. It also cautions against the instrumental use of the rule of law to justify regime change or institutional renewal without acknowledging the normative costs. As Fallon rightly observes, such trade-offs, even when politically defensible, should not be mischaracterized as rule-of-law-compliant, lest the concept be emptied of analytical and normative coherence.

5. Conclusion

This chapter sought to articulate a more rigorous analytical framework for evaluating political interference in judicial appointments—one that remains sensitive to the inherently political nature of such processes while grounded in the normative demands of the rule of law.

Building on the initial premise that judicial appointments function simultaneously as instruments of democratic accountability and potential sites of abuse, the chapter examines when and how such interferences may justifiably be considered breaches of the rule of law. Through a structured examination of different forms of abuse—ranging from suspect reforms and manipulations of constitutional design to procedural distortions and informal pressure—the chapter has shown that formal legality is insufficient to shield against the erosion of judicial

independence. By introducing criteria rooted in justificatory governance and procedural integrity, the analysis disaggregated the "rule of law violations" category and demonstrated the need for more precise evaluation standards.

Importantly, the chapter argued that the normative threshold for acceptable interference could not be determined solely by reference to political will or majoritarian support for the reform due to the dislike of the judicial-making outcomes. Rather, the legitimacy of judicial reform hinges on whether such measures are accompanied by transparent, impartial, and reasoned justifications—particularly in contexts involving inherited judiciaries and systemic attempts to alter the composition of courts. In this way, the chapter contributes to an emerging understanding of the rule of law not merely as a formal or liberal-democratic ideal but as a constraint on arbitrariness that must be sustained through context-sensitive, procedurally robust mechanisms.

In this regard, the typologies developed in the chapter provide valuable tools for identifying the modes through which judicial appointments may be distorted. By offering a clear layout of the institutional and procedural mechanisms commonly used to reshape the judiciary—whether through constitutional amendments, strategic reshuffling, or opaque selection procedures—the typology enables a more targeted application of the culture of justification instruments in judicial reform assessments. It enhances scrutiny of reform initiatives by prompting a shift from outcome-oriented assessments to a principled inquiry into whether such changes are sufficiently reasoned, impartial, and contextually warranted. This approach emphasizes that the legitimacy of judicial reform depends not only on democratic endorsement

but also on the capacity of political actors to justify their actions in a manner that meets the procedural and justificatory demands of the rule of law.

Conclusion

In response to concerns that judicial activism undermines democratic legitimacy, András Sajó and Renáta Uitz have noted that "crying activism is often an expression of intellectual laziness, a lack of readiness to provide deeper, more informed analysis on constitutional conflicts."[848] A similar caution applies to the expanding discourse on the decline of the rule of law, where the invocation of "violations" may, at times, conflate all instances of political interference with a broader narrative of authoritarian or illiberal backsliding. Without careful attention to the interplay of institutional design and context-specific dynamics, such generalizations risk obscuring the nuanced mechanisms through which judicial independence is recalibrated or eroded under formally legal and procedurally regular frameworks.

In light of this concern, the thesis aimed to develop an evaluative framework that is attentive to the justificatory requirements of the rule of law, tracking the internal logic of political abuse as it manifests through various legal mechanisms of interference. By doing so, it sought to contribute to the vocabulary through which we may more precisely describe, scrutinize, and detect forms of abuse that operate within ostensibly lawful frameworks. The following chapters pursued this task by combining theoretical, doctrinal, and comparative perspectives to examine how judicial independence is recalibrated or undermined under conditions of formal legality and procedural compliance.

[848] András Sajó and Renáta Uitz, *'Who Guards the Guardians? Constitutional Adjudication'* in *The Constitution of Freedom: An Introduction to Legal Constitutionalism* (Oxford University Press 2017) 357.

Chapter I laid the conceptual groundwork for the thesis by situating its inquiry within contemporary theoretical debates on the rule of law. It mapped key distinctions among prominent rule of law accounts and assessed their respective capacities to illuminate the rule of law's function in constraining arbitrary power. Rather than rejecting these theories, the chapter positioned the thesis within a teleological conception of the rule of law, emphasizing its role as a normative ideal aimed at disciplining the exercise of public authority through the demand for reasoned and publicly accessible justification.

To articulate this justificatory orientation, the chapter drew on liberal theories of public reason and justificatory governance. These frameworks helped specify the principled and transparent reasoning that public actors must provide when exercising power, particularly in contexts of institutional reconfiguration. On this account, the authority of law lay not only in its observance but in its capacity to be publicly defended and scrutinized—especially when invoked to justify interventions in judicial design.

The chapter thus reframed the rule of law as a practice embedded in a broader justificatory ethos rather than as a static legal or political ideal. This conceptual move enabled the thesis to advance evaluative criteria for identifying when exercises of power—specifically in the domain of judicial appointments and dismissals—deviated from the justificatory commitments at the core of the rule of law. Notably, the chapter shifted its focus away from essentialist debates over the definition of the rule of law, instead grounding the analysis in institutional practice.

To that end, it introduced the concept of political insularity as a more analytically precise lens for understanding the aspect of judicial independence most relevant to this inquiry. Unlike

structural or competence-based definitions of independence, political insularity captured the judiciary's capacity to remain detached from transient partisan pressures and instrumentalization. This reframing was particularly salient in contexts where formal legality was preserved, yet underlying commitments to the rule of law were subverted.

By clarifying how the rule of law could constrain government discretion in judicial appointments and dismissals, Chapter I set the evaluative baseline for the typological analysis in later chapters. It proposed that interference with judicial independence be treated not merely as a breach of institutional design principles but as a failure to satisfy the justificatory burdens that define legitimate public authority under the rule of law.

Chapter II analyzed international standards governing judicial appointments and dismissals to assess their adequacy in addressing politically motivated interference with judicial independence. It situated this inquiry within the broader evolution of the "culture of judicial independence," understood as a dynamic interaction between national legal traditions and international normative frameworks. Tracing this development through Shetreet's tripartite model—from domestic elaboration to international codification and, more recently, to domestic incorporation—the chapter interrogated the extent to which contemporary international instruments and jurisprudence could serve as evaluative benchmarks for identifying rule of law-deficient reforms in judicial design.

It first canvassed the relevant soft-law instruments—particularly those developed under the auspices of the United Nations, the Council of Europe, and the Inter-American system—highlighting their consensus on core elements such as merit-based selection, security of tenure, and procedural safeguards in disciplinary mechanisms. These standards, while providing a

shared normative vocabulary, remained abstract and formal, which limited their capacity to capture politically motivated manipulations that often occurred within the bounds of formal legality.

The second part of the chapter undertook a comparative analysis of four regional judicial bodies—the European Court of Human Rights (ECtHR), the Inter-American Court of Human Rights (IACtHR), the African Court on Human and Peoples' Rights (ACtHPR), and the Court of Justice of the European Union (CJEU)—examining how their case law approached state interference in judicial appointments and dismissals. The analysis was structured across three dimensions: the scope of institutional autonomy required under international law; the procedural and substantive requirements surrounding appointments and dismissals; and the interpretive approaches each court adopted when confronted with institutional reforms affecting judicial independence.

The findings revealed a consistent commitment across the courts to the principle that judicial independence is a foundational element of the rule of law. However, their reasoning often remained confined to formal legality and procedural guarantees, rarely engaging with the broader political logic underpinning systemic efforts to subordinate the judiciary. This formalist orientation was particularly evident in cases where courts limited themselves to assessing procedural compliance, without interrogating the surrounding institutional or political context. Notable exceptions—especially within IACtHR jurisprudence—remained rare and highly context-specific.

The chapter concluded that while international courts and soft-law instruments offered valuable baseline protections, they operated with a conceptual and doctrinal vocabulary that

lacked the granularity required to identify more subtle forms of abuse. Their emphasis on procedural regularity over justificatory reasoning meant they may overlook structural distortions of judicial independence that complied formally with legal norms. It thus underscored the need for a more substantive, justification-based evaluative lens—developed in the thesis's theoretical framework—that could supplement and critically assess the limitations of existing international standards when confronted with politically insulated institutional abuse.

Chapter III introduced the concept of "inherited judges" as a distinctive institutional phenomenon arising during regime change and political transition. It problematized the assumption—prevalent in international standards and orthodox constitutional theory—that judicial independence is sufficiently safeguarded through formal guarantees such as tenure security and irremovability. Rather than securing judicial independence, the chapter argued that under specific political and historical conditions, such guarantees may serve as tools to undermine the rule of law. It thereby identified inherited judges as an analytical category that embodied a core paradox of rule of law theory: the tension between legal continuity and political rupture.

The chapter critiqued the static and ahistorical application of international standards on judicial independence. While these standards emphasized tenure stability and protection from arbitrary dismissal, they often failed to account for the broader socio-political contexts of judicial appointments. Drawing on empirical examples, the chapter highlights how constitutionally protected judges may nonetheless operate in politically precarious environments, illustrating the persistent gap between de jure independence and de facto vulnerability in transitional settings.

The theoretical discussion then turned to transitional justice literature, where the challenge of inherited judges has been more explicitly acknowledged, though primarily through the lens of institutional reform aimed at "dealing with the past." While transitional justice provided useful insights, the chapter argued that its temporal framing and emphasis on purge-style remedies remained insufficient. It treated inherited judges primarily as remnants of illiberal regimes, rather than as politically consequential actors in the present.

Consequently, the chapter posited that a general theory of the rule of law must account for the dilemmas inherited judges pose. These figures exposed blind spots in both international standards and dominant constitutional frameworks. Their continued presence often provoked politically motivated targeting, typically through legally permissible yet substantively abusive means. Such cases illustrated how formal legality may conceal deeper rule of law violations.

By theorizing inherited judges not merely as transitional anomalies but as recurring figures in constitutional politics, the chapter laid the groundwork for the typological approach developed in Chapter IV to classify forms of abuse.

Chapter IV developed a typology of *extraordinary judicial dismissal techniques*, aiming to systematize the wide array of practices through which political actors interfered with judicial tenure under the guise of legality. Drawing on Chapter I's theoretical framework and Chapter III's contextual insights, the chapter presented a taxonomy that transcended the binary of legal versus illegal acts, instead tracing the internal logic of manipulation within removal processes.

It identified six principal categories:

(1) *Purges*:

- *Forced resignations*: initiated through political pressure or coercion.
- *Purging by decree*: retroactive legal acts invalidating tenure without individualized justification.

(2) *Nullification of appointment*:

- Ex post reinterpretations of appointment legality.
- Alleged procedural flaws used to remove inconvenient judges.

(3) *Abuse of ordinary dismissal procedures*:

- *Impeachment Abuse: Weaponizing Accountability Mechanisms for Political R*eprisal.
- *Disciplinary/criminal sanctions abuse*: using investigations or charges to intimidate or remove judges.

(4) *Abusive constitution-making*:

- Drafting new constitutional provisions to eliminate or disqualify existing judges.

(5) *Legal changes to retirement schemes*:

- Revisions to age or term limits targeting specific cohorts of judges.

(6) *Extraordinary evaluative procedures*:

- *Lustration*, *post-conflict vetting*, *anti-corruption vetting* used as tools of disguised political purging.

Each technique demonstrated how compliance with formal rules could still amount to abuse when deployed without adequate justification. Breaking down these techniques helps clarify the specific circumstances in which heightened scrutiny—grounded in a teleological understanding of the rule of law—is necessary to detect disguised institutional manipulation and to assess adherence to the rule of law through justification that is embedded both in the underlying rationale for the interference and in the integrity of the procedure by which it is carried out.

Chapter V then extended the typological analysis to the domain of *judicial appointments*. Building on the thesis's overarching framework—especially the rule of law as a justificatory constraint on power—it examined how legal procedures governing appointments could be manipulated to erode judicial independence. While overt removals attract greater scrutiny, the chapter showed how similarly corrosive effects may arise through the instrumentalization of appointments.

It proposed a threefold typology: (1) The typology of *procedural irregularities* identifies both formal and informal techniques by which appointment procedures are distorted—ranging from opaque acceleration and legal non-compliance to ideological patronage and post-reform elite capture—each undermining the transparency, legality, and impartiality essential to rule of law–compliant judicial selection. (2) *Abuse of institutional design*, such as restructuring judicial councils or nominating authorities to centralize power and erode the functional independence of appointment bodies; (3) *Manipulation of reshuffling dynamics*, whereby governing elites leverage term renewals, premature appointments, or court enlargement to gradually recalibrate the judicial composition in their favor.

Each modality illustrated how legality may be strategically exploited to mask deeper norm violations. The chapter also critically engaged with existing analytical terms, such as "court-packing" and "court-curbing," noting their limitations in capturing the subtler forms of legal manipulation that may accompany institutional reforms.

By grounding its analysis in justificatory standards and comparative case studies, the chapter clarified that political discretion over appointments is not inherently abusive—but must remain subject to contestable, reasoned justification. It thus developed an evaluative vocabulary for identifying rule of law violations in judicial appointments that would otherwise remain obscured by formal compliance and democratic rhetoric.

As this thesis has argued, the invocation of the "rule of law" must not serve as a discursive shortcut that flattens complex dynamics into binary evaluations of legality versus illegality—nor should it be instrumentalized to delegitimize institutional reforms solely based on political disagreement, absent a principled analysis of their justificatory foundations and systemic implications. Instead, it necessitates a robust evaluative framework that foregrounds the justificatory commitments inherent in the rule of law and systematically engages with the structural dynamics of power consolidation, particularly as they pertain to the configuration and recalibration of judicial authority.

This study contributes to that task by advancing a teleological conception of the rule of law, grounding it in a justificatory ethos, and developing a typology of practices through which political branches interfere with judicial independence while maintaining a façade of legal compliance. While the thesis did not delineate exhaustively the justificatory standards that would legitimize judicial reforms, it emphasizes that the existence and structure of justification are

normatively significant. Determining the nature and sufficiency of such justifications through a rule of law lens constitutes a critical direction for future research.

Whether grounded in efficiency, legitimacy, accountability, or transitional necessity, the justifications for political interventions that compromise judicial independence should be evaluated not solely on their content, but also on the discursive and legal practices through which they are generated, defended, and contested. In this sense, future research may explore whether justification exists and how the legal structure of interference with the judicial design conditions the normative plausibility of the explanation in terms of the rule of law. The rule of law evaluative inquiry must consider not only the type of justification offered for reforms affecting judicial independence but also how such justification is institutionally embedded—whether it is reflected in the formal legal architecture of the reform, procedurally enacted through deliberative processes, or merely invoked as an external rationale without normative or legal integration. Judicial independence, as understood following this preposition, is not solely a structural or functional attribute but a precondition for the judiciary's claim to epistemic legitimacy in adjudicating public power disputes. This normative core requires more than structural insulation—it entails a systemic design that enables the judiciary to serve as a reason-giving institution, responsive to legal principle rather than political expediency. In this view, the justificatory ethos serves as a mechanism that expresses and sustains independence.

The framework developed here also extends to cross-contextual application beyond the case studies implicitly referenced. For example, in future post-conflict or post-authoritarian states where judicial vetting is undertaken, the criteria proposed here could map the distinction between restorative reform and pure political purging. Likewise, the increasing politicization of

judicial councils or disciplinary mechanisms in hybrid regimes—often justified through anti-corruption rhetoric—raises important questions about when justification ceases to mask political expediency.[849] These emerging dynamics underscore the need to refine and adapt the justificatory lens to be attentive to global variation and local specificity.

The present inquiry does not purport to deliver empirical breakthroughs or normative prescriptions. Instead, it aims to reframe prevailing analytical approaches by offering a conceptual framework that accounts for structurally embedded forms of interference with judicial independence—those that operate not in defiance of legal form but through its strategic manipulation. By foregrounding judicial appointments and dismissals as critical constitutional junctures, the thesis outlines the modalities through which the rule of law may be eroded from within, under the guise of procedural regularity and formal compliance.

The thesis also critically examines the limitations of existing international standards and soft law instruments in safeguarding judicial independence. While such instruments have established a minimal normative baseline for judicial guarantees, they frequently remain tethered to a formalist logic that equates structural conformity with normative adequacy. This tendency constrains their capacity to detect more sophisticated forms of institutional subversion that embed political control within ostensibly lawful procedures. The jurisprudence of international and regional courts, which often serves as the basis for these standards, reflects similar constraints. These adjudicatory bodies are not unaware of the depth and complexity of structural manipulation. However, they tend to exercise epistemic and institutional restraint in addressing

[849] For the relevant scholarly discussion, see Bogdan Iancu, 'Quick Fix Solutions—Anticorruption as Core/Peripheral Modality of the "Rule of Law"' (2024) 16 *Hague Journal on the Rule of Law* 611; David Kosař and Katarína Šipulová, 'Politics of Judicial Governance' in Mark Tushnet and Dimitry Kochenov (eds), *Research Handbook on the Politics of Constitutional Law* (Edward Elgar Publishing 2023) 262.

it—frequently citing the limits of their mandate or the risks associated with encroaching on the prerogatives of domestic constitutional actors. While such restraint may be justified by concerns over judicial legitimacy and deference to domestic democratic processes, it also risks normalizing forms of political interference that, although legally codified, violate the justificatory commitments of the rule of law.

This thesis does not call for a wholesale abandonment of the legality assessment but argues that its sufficiency must be assessed in light of deeper normative imperatives—namely, whether exercises of public power, particularly in the judicial domain, are embedded within frameworks that enable principled justification, institutional contestability, and resistance to instrumentalization. The inability—or unwillingness—of international standards to engage with these dimensions underscores the need for an evaluative shift that does not dispense with legality but subjects it to a more exacting normative lens.

Ultimately, this thesis addresses constitutional law scholars and broader democratic audiences concerned with institutional integrity and the erosion of the rule of law and judicial independence. At a time when political polarization and executive aggrandizement often cloak themselves in legalism, the insistence on public justification also serves as a democratic counterweight, not only a legal requirement. It reaffirms that the rule of law is not a technocratic aspiration but a civic and normative practice rooted in transparency, contestation, and recognizing judicial independence as a public good rather than a partisan obstacle.

The systematization of knowledge regarding the treatment of inherited judges constitutes a critical contribution of this thesis to the broader discourse on judicial independence and transitional governance. While much of the existing literature has focused on lustration, vetting,

or transitional justice mechanisms in response to systemic change, a lack of sustained analytical attention remains to the structural and normative dimensions of inherited judicial authority in post-authoritarian or post-illiberal contexts. By examining the diverse modalities through which inherited judges have been removed, marginalized, or co-opted—ranging from purges and forced resignations to more insidious legal manipulations—this thesis offers a framework for understanding not only the vulnerability of judges appointed under prior regimes but also the dangers of overcorrective reform that disregard the rule of law constraints in the name of judicial renewal.

This systematization acquires particular salience in the context of ongoing debates concerning the appropriate treatment of judges appointed under illiberal regimes, as illustrated by the Polish case following the electoral defeat of the Law and Justice (PiS) government, whose tenure was marked by a decade-long restructuring of the judiciary.[850] Although political incentives to restore judicial legitimacy may be strong, this thesis underscores that the means through which such restoration is pursued are normatively consequential. Significantly, this study does not advance a prescriptive answer to what should be done with inherited judges. Instead, it cautions against *what should not be done*—engaging in politically motivated or legally ungrounded dismissals that reproduce the logic of arbitrary power consolidation they purport to reverse. The empirical record surveyed herein reveals that even well-intentioned interventions if insufficiently justified or legally embedded, may undermine judicial independence and weaken the normative legitimacy of the new democratic order. In this respect, the typology and

[850] For the relevant scholarly debate, see Marcin Szwed, 'Fixing the Problem of Unlawfully Appointed Judges in Poland in the Light of the ECHR' (2023) 15 *Hague Journal on the Rule of Law* 353; Wojciech Piątek, 'Restoring the Rule of Law in Poland: Towards the Most Appropriate Way to Put an End to the Systemic Violation of Judicial Independence: Wałęsa v Poland, ECtHR 23 November 2023, No 50849/21' (2025) 21(1) *European Constitutional Law Review* 139.

conceptual tools developed in the thesis guide future reformers in avoiding recursive patterns of institutional subversion.

Notwithstanding its contributions, this thesis inevitably invites critical reflection on the limitations inherent in its methodological and conceptual choices.

First, the typological approach advanced here—rooted in Weberian ideal-type construction—may be criticized for its partial indeterminacy and potential conceptual overlap. While intended as heuristic rather than exhaustive, the boundaries between modalities presented in Chapters IV and V are not always neatly separable. This ambiguity, however, is not a methodological defect but a reflection of the empirical reality the typology seeks to capture: judicial interference is rarely discrete or uniform, and its articulation in law and politics often occurs along intersecting vectors. The typology thus functions not as a rigid classificatory system but as an analytical schema that enables the identification of structurally recurrent practices otherwise obscured by formal legality. Methodologically, the thesis exemplifies a mode of comparison that operates neither at the level of abstract normativity nor pure empirical particularism. By constructing typologies that reflect recurring institutional patterns while remaining attentive to contextual variability, this approach aims to resist both the arrogance of globalist generalization and the paralysis of local exceptionalism.

Second, the justificatory lens through which the rule of law is operationalized in this study may be deemed overly idealistic or normatively elastic. The normative emphasis on public reason and justificatory governance as criteria for evaluation may elicit critique, particularly from formalist (thin) traditions that conflate the rule of law with the legality and construe legitimacy as a function of political authority outside of the legal sphere and interference with

judicial independence as an inevitable act of efficient governance. Yet, this thesis does not discard legality as a core component of the rule of law; instead, it argues that legality, while necessary, is normatively insufficient when abstracted from the substantive requirement that exercises of public power be reasoned, transparent, and responsive to contestation. In this respect, the justificatory ethos is not an invitation to indeterminacy but a demand for normative rigor beyond surface-level compliance.

Third, the framework proposed here may be critiqued for insufficient engagement with the strategic logic of political actors operating in transitional or hybrid regimes, where institutional manipulation is both systemic and resilient. The deployment of justificatory standards in such contexts may appear naïve or impracticable. However, the argument advanced here is not one of prescriptive institutional design, but of normative evaluation: even if justificatory standards are routinely circumvented in practice, their articulation is indispensable for delineating the contours of rule-of-law adherent reform and identifying when legality is instrumentalized to entrench arbitrary power.

The thesis departs from conventional comparative constitutional law from a methodological perspective by adopting a broader cross-contextual and normatively grounded approach. It aligns more closely with what Hirschl has termed *comparative constitutional study rather than comparative constitutional law*—a field attentive to institutional form and the embedded political and sociological dynamics through which constitutional norms are instantiated and contested. Scholars seeking greater jurisdictional precision or doctrinal determinacy may resist this move beyond strict institutional comparison. In this spirit, the thesis aims not to define or answer the problem of a rule of law violation but to *situate* it: to understand

judicial interference not as a universal pathology but as a contingent phenomenon shaped by particular institutional legacies, political configurations, and reform discourses.

Ultimately, the contribution of this study lies neither in comprehensive empirical examination nor in prescriptive reform proposals but in furnishing a conceptual vocabulary and evaluative framework for discerning how judicial appointments and dismissals may erode the rule of law while preserving an appearance of legality. By recentering the analysis on justification as a normative threshold and identifying the institutional exposure of inherited judges as a particularly salient site of contestation, the thesis seeks to reframe the terms of scholarly inquiry. In so doing, it invites further theoretical and empirical work to refine, critique, and expand the analytical categories proposed here—particularly in light of the evolving forms of democratic decline and institutional manipulation that challenge the integrity of judicial independence in constitutional orders worldwide.

This reframing is especially relevant in a constitutional landscape increasingly characterized by legalistic autocrats who instrumentalize the very institutions designed to uphold democratic constraints. By shedding light on how legality can be strategically deployed to mask normatively suspect reforms, the thesis calls for a shift in how we approach constitutional resilience—away from a fixation on formal compliance and toward an inquiry into the discursive, institutional, and justificatory structures that render such compliance meaningful. The typologies and analytical frameworks developed herein are not intended as static tools, but rather as prompts for a more reflexive, context-sensitive methodology that recognizes the normative fragility of the rule of law and its institutional embeddedness. As such, this study aspires not only to contribute to academic debates but also to broader conversations about how to discern, resist,

and ultimately counteract the erosion of judicial independence in regimes that no longer violate the law but redefine it.

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