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Abstract

Judicial independence has been for decades considered a political objective used in policy arena, as well as an analytical tool. However, scholars tend to use it in a variety of shapes and forms and under many different labels. In this paper we present an attempt to unify existing theories of judicial independence in such a way as to be useful for analyses of the performance of judicial systems, as well as for policy-makers. We build on the existing scholarship that tends to define judicial independence as either a feature of an institutional design or as a feature of the output of the judicial system. At the same time, we remain sensitive to experiences from new democracies, where the establishment of independent judiciaries through changes in institutional arrangements has failed to deliver desired outcomes. We propose to define judicial independence as a consequence of the interplay between the capacity and willingness of powerful actors to inappropriately interfere with the workings of the judiciary, and resistance of judicial actors and their ability to withstand such actions. In addition, we distinguish between three levels of judicial independence: de jure institutional independence, de facto institutional independence, and output independence, while proposing that for analytical clarity each level should be analysed independently, and connections between them should be examined carefully. An independent judiciary is then such when there is no consistent bias found in outputs traceable to the way formal and informal powers are used. Also, we show that the judiciary can become dependent in several ways. We argue that there are at least three distinct modifications of a dependent judiciary: a captured judiciary, a rigged judiciary and a biased judiciary.

Keywords

Judicial independence, impartiality, structural insulation, institutional design, judicial decision-making

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JUDICIAL INDEPENDENCE

David Kosař* and Samuel Spáč**

1. Introduction

Judicial independence appears on most laundry lists of principles of the rule of law.[1] This phenomenon is not surprising, since judicial independence has for decades been considered an unqualified human good. Although the wording varies, all major international human rights treaties stipulate the right to a fair trial by an independent tribunal. Most notably, we can find such right in Article 14(1) of the International Covenant on Civil and Political Rights, Article 6(1) of the European Convention on Human Rights, Article 8(1) of the American Convention on Human Rights and Article 29 of the African Charter of Human and Peoples' Rights. Judicial independence is also advanced by the United Nations[2] and explicitly mentioned in most national constitutions.[3] One could thus speak of judicial independence as being of nearly universally acknowledged virtue.

Yet judicial independence has been challenged in virtually all parts of the world. Ukrainian President Yushchenko abolished the Kyiv City Administrative Court, which dared to challenge him, and set up two new courts instead.[4] Vladimir Putin merged Russian commercial courts that were generally considered more independent than the civil and criminal courts with the rest of the judiciary.[5] Venezuelan President Hugo Chávez used virtually all available tools against judges, ranging from expanding the size of the Supreme Court to the dismissal and

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[1] James Crawford. 'The Rule of Law in International Law'. 25 ADELAIDE LAW REVIEW 3 (2003); John Finnis. NATURAL LAW AND NATURAL RIGHTS 271 (1980); John Rawls. A THEORY OF JUSTICE 239 (1971); Joseph Raz. THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY 216–217 (2009); Jeremy Waldron. 'The Rule of Law and the Importance of Procedure'. In GETTING TO THE RULE OF LAW 3–31 (James E. Fleming, ed., 2011).

2 U.N. Basic Principles on the Independence of the Judiciary (1985), adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held at Milan from 26 August to 6 September 1985 and endorsed by General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985.

[3] Research conducted under the auspices of the Comparative Constitutions Project suggests that 65% of current constitutions contain an explicit declaration regarding the independence of the judiciary. See CONSTITUTIONMAKING.ORG: JUDICIAL INDEPENDENCE (May 22, 2008), http://www.constitutionmaking.org/reports.html.

[4] Alexei Trochev. 'Meddling with justice: Competitive politics, impunity, and distrusted courts in post-orange Ukraine'. 18 DEMOKRATIZATSIYA, 122, 135 (2010).

[5] William Partlett. 'Judicial Backsliding in Russia'. JURIST (Sep. 30, 2014), https://www.jurist.org/commentary/2014/09/william-partlett-russia-reform/; Kathrin Hille. 'Putin tightens grip on legal system'. FINANCIAL TIMES (Nov. 27, 2013), https://www.ft.com/content/a4209a42-5777-11e3-b615-00144feabdc0.

criminal prosecution of judges.[6] Politicians in other Central and Latin American countries have also exercised inappropriate pressure on judges.[7] In Asia, President Duterte of the Philippines in 2018 impeached his vocal critic, Chief Justice Maria Lourdes Sereno.[8] The Rajapaksa government in Sri Lanka did the same in 2013, when it successfully impeached its Chief Justice.[9] In Europe, Recep Erdoğan expanded the membership of the Turkish Constitutional Court, purged the judiciary following the 2016 unsuccessful coup in Turkey, and even jailed some judges with alleged links to the terrorist organisations.[10] More recently, several EU member states such as Hungary[11], Poland[12] and Romania[13] have witnessed frontal attacks on the judiciary too. Even consolidated democracies have not been spared these debates. For instance, in the United States court-packing plans have recently been implemented on the state-court level[14] and are increasingly debated also on the federal level.[15] All these reforms have been framed by their critics as attacks on judicial independence, but vigorously defended by their supporters. How is this possible?

The major reason is, that despite its seeming obviousness, there is no agreement on the definition of judicial independence. Scholars tend to use it in a variety of shapes and forms and under different labels such as independence of judges, impartiality, independence of the judiciary or structural insulation. As Tiede puts it, '[p]art of the problem with attempting to define judicial independence is in that the use of the term is amoebic, changing shape to fit the particular context in which it is used.'[16] When analysed, it is commonly conceptualised and operationalised anew, often irrespective of previous writings. This led some authors even to

[6] Matthew M. Taylor. 'The Limits of Judicial Independence: A Model with Illustration from Venezuela under Chávez'. 46 JOURNAL OF LATIN AMERICAN STUDIES 229 (2014).

[7] Andrea Castagnola. MANIPULATING COURTS IN NEW DEMOCRACIES: FORCING JUDGES OFF THE BENCH IN ARGENTINA (2018); Rachel E. Bowen. THE ACHILLES HEEL OF DEMOCRACY: JUDICIAL AUTONOMY AND THE RULE OF LAW IN CENTRAL AMERICA (2017); Gretchen Helmke and Julio Rios-Figueroa, eds. COURTS IN LATIN AMERICA (2011).

[8] Anthony F. T. Fernando. 'Procedure for removal of superior court judges in Sri Lanka and the issue of 'quis custodiet ipsos custodes?' 39 COMMONWEALTH LAW BULLETIN 717 (2014).

[9] David C. Steelman. 'Judicial Independence in a Democracy: Reflections on Impeachments in America and the Philippines'. 9 INTERNATIONAL JOURNAL FOR COURT ADMINISTRATION 1 (2018).

[10] Ergun Özbudun. 'Turkey's Judiciary and the Drift Toward Competitive Authoritarianism'. 50 THE INTERNATIONAL SPECTATOR 42 (2015); Berk Esen and Sebnem Gumuscu. 'Rising competitive authoritarianism in Turkey'. 37 THIRD WORLD QUARTERLY 1581 (2016 Ozan O. Varol, Lucia D. Pellegrina and Nuno Garoupa. 'An Empirical Analysis of Judicial Transformation in Turkey. 65 AM. J. COMP. L. 186 (2017); Tarik Olcay. 'Firing Bench-mates: The Human Rights and Rule of Law Implications of the Turkish Constitutional Court's Dismissal of Its Two Members. Case Note'. 13 EUR. CONST. LAW REW. 568 (2017).

[11] Renáta Uitz. 'Can you tell when an illiberal democracy is in the making? An appeal to comparative constitutional scholarship from Hungary'. 13 INTERNATIONAL JOURNAL OF CONSTITUTIONAL LAW (ICON) 279 (2015).

[12] Wojciech Sadurski. POLAND'S CONSTITUTIONAL BREAKDOWN (2019a); Wojciech Sadurski. 'Polish Constitutional Tribunal Under PiS: From an Activist Court, to a Paralysed Tribunal, to a Governmental Enabler'. 11 HAGUE J. RULE LAW 63 (2019b).

[13] Madalina Moraru and Raluca Bercea. 'The First Episode in the Romanian Rule of Law Saga: Joined Cases C-83/19, C-127/19, C-195/19, C-291/19, C-355/19, Asociaţia 'Forumul Judecătorilor din România, and their follow-up at the national level'.18 EUROPEAN CONSTITUTIONAL LAW REVIEW 82 (2022).

[14] Marin K. Levy. 'Packing and Unpacking State Courts'. 61 WM. & MARY L. REV. 1121 (2020).

[15] Presidential Commission on the Supreme Court of the United States, Draft Final Report, THE WHITE HOUSE (Dec. 2021), https://www.whitehouse.gov/wp-content/uploads/2021/12/SCOTUS-Report-Final.pdf; and the burgeoning U.S. literature on the topic of court-packing.

[16] Lydia B. Tiede. 'Judicial Independence: Often Cited, Rarely Understood'. 15 JOURNAL OF CONTEMPORARY LEGAL ISSUES 129, 130 (2006).

call judicial independence a useless concept that should be unpacked to be studied meaningfully.[17]

One of the reasons behind the abundance of definitions of judicial independence is the fact that it lies on the borderline between legal and social scientific research. As a result, it is commonly approached by disciplines which do not necessarily communicate with each other and explore different aspects of reality for different analytical purposes without sharing expectations about the required qualities and features of the concept. They may share the vocabulary, yet, to a large extent – to use the language of philosophy of science – they can be incommensurable.

At the same time, the term carries various meanings in different parts of the world. What would pass in the United States as sufficient safeguards of judicial independence may easily be discarded in Europe, while some of the requirements inherent in the emerging 'pan-European' theory of judicial independence,[18] driven by the European Court of Human Rights, the European Court of Justice and various soft law standards, may be perceived from the American point of view as excessive, redundant, or even possibly undemocratic. Post-Soviet and Global South understandings of judicial independence diverge even more due to the specific contexts ranging from transition to democracy[19] to authoritarianism.[20] Recent research has shown that even non-state armed groups can legally establish and operate a system of courts to administer justice, where reasonable judicial independence can be maintained.[21]

In this chapter we present an attempt to unify existing theories of judicial independence in such a way as to be useful for analyses of the performance of judicial systems, as well as for policy-makers. We build on existing scholarship on judicial independence while remaining sensitive to experiences from new democracies, where the establishment of independent judiciaries through changes in institutional arrangements has failed to deliver desired outcomes. We do so by identifying the main approaches to the concept found in the literature, analysing their commonalities as well as their differences, and discussing how they relate to each other in order to reconcile them in one coherent model. The main objective of our inquiry is to contribute to the understanding of the complexity surrounding judicial independence and to help overcome confusion about the concept resulting in a lack of comprehension between

[17] Lewis A. Kornhauser. 'Is Judicial Independence a Useful Concept?' In JUDICIAL INDEPENDENCE AT THE CROSSROADS 45 (Stephen B. Burbank and Barry Friedman eds., 2002).

[18] Daniel Smilov. 'EU Enlargement and the Constitutional Principle of Judicial Independence'. In SPREADING DEMOCRACY AND THE RULE OF LAW? THE IMPACT OF EU ENLARGEMENT ON THE RULE OF LAW, DEMOCRACY AND CONSTITUTIONALISM IN POST-COMMUNIST LEGAL ORDERS 313 (Wojciech Sadurski, Adam Czarnota and Martin Krygier eds., 2006); Joost Sillen. 'The concept of 'internal judicial independence' in the case law of the European Court of Human Rights'. 15 EUROPEAN CONSTITUTIONAL LAW REVIEW, 104 (2019).

[19] Elin Skaar. JUDICIAL INDEPENDENCE AND HUMAN RIGHTS IN LATIN AMERICA: VIOLATIONS, POLITICS, AND PROSECUTION (2011); M. Ehteshamul Bari. THE INDEPENDENCE OF THE JUDICIARY IN BANGLADESH: EXPLORING THE GAP BETWEEN THEORY AND PRACTICE (2022); Bowen, *supra* n. 7; Anja Seibert-Fohr ed. JUDICIAL INDEPENDENCE IN TRANSITION (2012); Lorne Neudorf. THE DYNAMICS OF JUDICIAL INDEPENDENCE: A COMPARATIVE STUDY OF COURTS IN MALAYSIA AND PAKISTAN (2017).

[20] Randall Peerenboom. JUDICIAL INDEPENDENCE IN CHINA: LESSONS FOR GLOBAL RULE OF LAW PROMOTION (2012); Alena Ledeneva. 'Telephone Justice in Russia'. 14 *Post-Soviet Affairs* 324 (2008); Maria Popova. POLITICIZED JUSTICE IN EMERGING DEMOCRACIES: A STUDY OF COURTS IN RUSSIA AND UKRAINE (2012); Li Li. JUDICIAL DISCRETION WITHIN ADJUDICATIVE COMMITTEE PROCEEDINGS IN CHINA: A BOUNDED RATIONALITY ANALYSIS (2014).

[21] René Provost. REBEL COURTS: THE ADMINISTRATION OF JUSTICE BY ARMED INSURGENTS (2021).

scholars, judges, domestic policy-makers implementing judicial reforms as well as those involved in democracy and rule of law promotion on the supranational level.

We propose to define judicial independence as a consequence of the interplay between the capacity and willingness of powerful actors to inappropriately interfere with the workings of the judiciary, and resistance of judicial actors and their ability to withstand such actions. By 'powerful actors' we mean any actors that hold formal or informal powers to exercise pressure on the judiciary. This includes not only politicians, oligarchs or interest groups, but also judges in such environments where they are considerably involved in the judicial governance and have a reasonable chance to systematically skew how the courts operate. By the 'workings of the judiciary' we mean both judicial decision-making and judicial governance.

We distinguish between three levels of judicial independence: *de jure* institutional independence, *de facto* institutional independence, and output independence. We propose that, for analytical clarity, each level should be analysed independently, and connections between them should be explained and elaborated very carefully. At each of these levels independence is a consequence of this interaction between powerful and judicial actors and is not necessarily affected by levels which precede it. An independent judiciary is then such when there is no consistent bias found in outputs traceable to the way formal and informal powers are used.[22] Having said that, we show that the judiciary can become dependent in several ways. We argue that there are at least three distinct modifications of a dependent judiciary: a captured judiciary, a rigged judiciary and a biased judiciary. The judiciary is 'captured' where powerful actors, holding formal powers to modify it, use them in such a manner as to lead to a judiciary consistently delivering outcomes favourable to these powerful actors – be it politicians or even judges. The 'rigged' judiciary is one which formally works correctly, but somewhere between the institutional framework and the output can be skewed in certain actors' favour. Finally, the 'biased' judiciary is one that delivers decisions that are favourable to some groups without them exerting any pressure on the judiciary, for instance because it has internalised the views of those groups.

This chapter proceeds as follows. Part I conceptualises judicial independence and identifies two major approaches to it – institutional and output-oriented. Part II proposes a unified theory of judicial independence. Part III concludes.

2. Defining judicial independence

Any conceptualisation of judicial independence can be almost certainly located on a continuum of understanding the concept on the level of individual judges' decision-making and understanding it on the institutional levels, as the separation of the judiciary from the executive and legislative branches of power. A varied vocabulary has been used to describe this dichotomy. It can be referred to as a difference between independence as certain ends and independence as means supposedly to realise those ends;[23] some distinguish between

[22] Popova, *supra* n. 20.

[23] Stephen B. Burbank and Barry Friedman. 'Reconsidering Judicial Independence'. In JUDICIAL INDEPENDENCE AT THE CROSSROADS 9 (Stephen B. Burbank and Barry Friedman eds., 2002).

independence understood as values and mechanisms,[24] others label the former 'impartiality'[25] and the latter 'structural insulation';[26] sometimes authors draw a distinction between institutional, decisional and behavioural independence – the first referring to independence on the level of the judiciary, the other two understanding it on the level of individual judges.[27]

Scholars usually define independence more closely to either of the poles of the continuum. However, there are few who acknowledge that independence does at the same time belong to both categories. For instance, Tiede[28] presents two conceptions of independence that considerably overlap with the categories described above: the first understands independence as separation from the executive branch – if executive bodies, such as ministries, exercise control over the judiciary, its resources and judges, judiciary is not independent; the second perceives independence as an amount of discretion judges enjoy at any particular moment in time. In Russell's two-dimensional theory of independence, this distinction relates to targets of possible undue influence – which can be either on the level of individual judges, or at the collective level of the judiciary as a whole.[29] Burbank and Friedman claim that judicial independence should be perceived as a means to an end, not an end in itself.[30] By this they in fact argue that the theory of judicial independence should connect the two approaches and device mechanisms, that would be protected from the will and capriciousness of those in power, in order to secure a particular normatively valuable objective.

This distinction does not necessarily help us to understand what judicial independence actually is. It shows that independence in the literature means various things, yet does not clarify how we can use independence analytically – when we can observe independence, nor how it comes into being. To come closer to the answer to these questions it is necessary to emphasise that independence is a relational concept. As Russell writes, judicial independence 'is first and foremost a concept about connections – or, more precisely, the absence of certain connections – between the judiciary and other components of political system.'[31] An important implication of this claim is that it defines independence as a result of a relationship between the judicial system and the rest of the political system without clarifying what falls under the 'political system' label. Russell's inconclusiveness on the matter can be further demonstrated by the claim that 'general theory cannot decisively settle whether or not pressure on judges generated from within the justice system … constitute a violation of judicial independence, any more than it can determine whether the media pressure … is altogether incompatible with judicial independence.'[32]

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[24] Shimon Shetreet. 'Judicial independence and accountability: core values in liberal democracies'. In JUDICIARIES IN COMPARATIVE PERSPECTIVE 3 (H. P. Lee ed., 2011).
[25] Kate Malleson. 'Safeguarding judicial impartiality'. 22 LEGAL STUDIES 53 (2002); Charles G. Geyh. 'The Dimensions of Judicial Impartiality'. 65 FLORIDA LAW REVIEW 493 (2014).
[26] Popova, *supra* n. 20.
[27] Popova, *supra* n. 20, at 14–19; Theodore L. Becker. COMPARATIVE JUDICIAL POLITICS: THE POLITICAL FUNCTIONINGS OF COURTS (1970).
[28] Tiede, *supra* n. 16.
[29] Peter H. Russell. 'Toward a General Theory of Judicial Independence'. In JUDICIAL INDEPENDENCE IN THE AGE OF DEMOCRACY: CRITICAL PERSPECTIVES FROM AROUND THE WORLD 1 (Peter H. Russell and David M. O'Brien eds., 2001).
[30] Burbank and Friedman, *supra* n. 23.
[31] Russell, *supra* n. 29, at 2.
[32] Russell, *supra* n. 29, at 4.

In the same fashion, Ferejohn defines independence as a 'consequence of self-restraint by powerful actors.'[33] Two questions regarding this conceptualisation need to be addressed: who are 'powerful actors'?; and why would they restrain themselves from influencing courts? Popova provides an answer to the latter. While in her analysis she focuses only on politicians as powerful actors, she distinguishes between the *capacity* and *willingness* of these actors to influence the judiciary.[34] Capacity then refers to the channels these actors can use to pressure courts – both formal and informal. Willingness, on the other hand, refers to a conscious choice made by these actors.[35] Popova provides two answers to why politicians may refrain from utilising their capacity to threaten independence.[36] First, it can be the result of their strategic calculation when benefits do not outweigh costs (a strategic rationale). Second, politicians may have a strong belief in the ideal of rule of law which would prevent them from applying any pressure on courts (a moral rationale).

However, leaving independence only at the will of 'powerful actors' treats judges – or the judiciary in general – as pure subjects of powerful actors' capriciousness. To give due credit to judges, we must also include in this formula the *ability of judicial actors to resist* such pressures.[37] Ability of judicial actors to exercise resistance can also be understood in terms of capacity and willingness. However, capacity to resist rests on different principles. Judicial actors may be more empowered to exercise resistance in instances when the judiciary feels supported by the media,[38] or public,[39] or in environments that are sensitive to attacks on democratic institutions and institutions of separation of power. Their willingness – reasons for resistance – then may be somewhat similar to politicians' reasons for not using their capacity. The strategic calculation in this case would refer to a state where possible risks are too small, so judges are willing to disregard the desires of powerful actors.[40] Strong belief in the rule of law, then again, would suggest higher judicial willingness to resist even when the risks are high. Taking all that is discussed into consideration, we propose to define judicial independence as a consequence of the interplay between powerful actors' capacity and willingness to inappropriately interfere with the workings of the judiciary and the resistance of judicial actors to withstand such actions By powerful actors we mean any actors holding formal or informal powers to exercise pressure on the judiciary, and by 'workings of the judiciary' we mean both judicial decision making and judicial governance.

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[33] John Ferejohn. 'Independent Judges, Dependent Judiciary: Explaining Judicial Independence'. 72 SOUTHERN CALIFORNIA LAW REVIEW 353, 375 (1999).

[34] Popova, *supra* n. 20, at 20–23.

[35] William M. Landes and Richard A. Posner. 'The Independent Judiciary in an Interest-Group Perspective'. 18 THE JOURNAL OF LAW & ECONOMICS 875 (1975); Barry R. Weingast. 'The Political Foundations of Democracy and the Rule of Law'. 91 THE AMERICAN POLITICAL SCIENCE REVIEW 245 (1997); Andrew Hanssen. 'Is There a Politically Optimal Level of Judicial Independence?' 94 THE AMERICAN ECONOMIC REVIEW 712 (2004).

[36] Popova, *supra* n. 20.

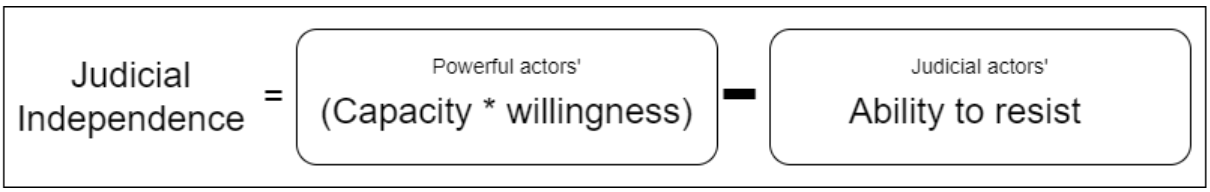
[37] Katarína Šipulová. 'Under Pressure: Building Judicial Resistance to Political Inference'. In THE COURTS AND THE PEOPLE: FRIEND OR FOE? THE PUTNEY DEBATES 2019 153 (D. J. Galligan ed., 2021).

[38] Jennifer Widner. 'Building Judicial Independence in Common Law Africa'. In THE SELF-RESTRAINING STATE: POWER AND ACCOUNTABILITY IN NEW DEMOCRACIES 177 (Marc F. Plattner, Larry Diamond and Andreas Schedler eds., 1999); Alexei Trochev and Rachel Ellett. 'Judges and Their Allies: Rethinking Judicial Autonomy Through the Prism of Off-Bench Resistance'. 2 JOURNAL OF LAW AND COURTS 67 (2014).

[39] Tom S. Clark. THE LIMITS OF JUDICIAL INDEPENDENCE (2011).

[40] Gretchen Helmke. 'The Logic of Strategic Defection: Court-Executive Relations in Argentina under Dictatorship and Democracy'. 69 AMERICAN POLITICAL SCIENCE REVIEW 291 (2002).

Figure 1: Judicial independence – definition



That said, we also need to acknowledge that judges themselves can endanger judicial independence and other constitutional values. In other words, when judges are equipped with substantial powers to exert influence over the judiciary, they pose as much of a threat as any other powerful actor. The underlying assumption of various international soft-law standards, until very recently, was that judges, unlike politicians, do not have their own interests which could endanger the independence of the judicial branch.[41] However, numerous examples in academic literature contradict this assumption. In Hungary, the establishment of a judicial council – an institution designed to secure the insulation of the judiciary from other branches of power – helped to isolate the judiciary from the public, causing harm to the very idea of the democratic accountability of all branches of power.[42] In Poland, new judges installed by Jaroslaw Kaczyński to the Constitutional Tribunal and the Supreme Court became enablers of democratic decay.[43] In Slovakia, judiciary representatives used their substantial powers to punish their critics and reward their allies within the judicial system, leading to 'the system of dependent judges within independent judiciary.'[44] The Ukrainian judiciary failed to curtail informal channels for influencing judges which allowed for the politicisation of justice.[45] In Latin America, the judicial self-government was misused to 'foster sectoral privileges of judicial personnel or to allow unchallenged, arbitrary interpretations of law.'[46] In Mexico, the Supreme Court controlled the staffing of all courts through informal means that led to patronage and corruption within the judiciary.[47] In Japan, powerful judicial leadership created a judiciary which was more prone to decide in accordance with the preferences of some actors at the expense of others.[48] Due to these experiences now we know better than ever before

[41] Michal Bobek and David Kosař. 'Global Solutions, local damages: A critical study in judicial councils in Central and Eastern Europe'. 15 GERMAN LAW JOURNAL.1257 (2014); Frank Emmert.' Rule of Law in Central and Eastern Europe'. 32 FORDHAM INTERNATIONAL LAW JOURNAL 551 (2008); Daniela Piana. JUDICIAL ACCOUNTABILITIES IN NEW EUROPE: FROM RULE OF LAW TO QUALITY OF JUSTICE (2010); Cristina Parau. TRANSNATIONAL NETWORKING AND ELITE SELF-EMPOWERMENT: THE MAKING OF THE JUDICIARY IN CONTEMPORARY EUROPE AND BEYOND (2018); Katarína Šipulová et al. 'Judicial Self-Governance Index: Towards better understanding of the role of judges in governing the judiciary'. REGULATION & GOVERNANCE 1(Early View, 2022).

[42] Zdeněk Kühn. 'Judicial Administration Reforms in Central-Eastern Europe: Lessons to be Learned'. In JUDICIAL INDEPENDENCE IN TRANSITION 603(Anja Seibert-Fohr ed., 2012).

[43] Sadurski, 2019a, *supra* n. 12; 2019b, *supra* n. 12.

[44] David Kosař. PERILS OF JUDICIAL SELF-FOVERNMENT IN TRANSITIONAL SOCIETIES: HOLDING THE LEAST ACCOUNTABLE BRANCH TO ACCOUNT 407 (2016).

[45] Popova, *supra* n. 20.

[46] Guillermo O'Donnell. 'Why the Rule of Law Matters'. 15 JOURNAL OF DEMOCRACY 32 (2004).

[47] Andrea Pozas-Loyo and Julio Rios-Figueroa. 'Anatomy of an informal institution: The 'Gentlemen's Pact' and judicial selection in Mexico, 1917–1994'. 39 INTERNATIONAL POLITICAL SCIENCE REVIEW 647 (2018).

[48] Mark Ramseyer and Eric B. Rasmusen. 'Judicial Independence in a Civil Law Regime: The Evidence From Japan'. 13 THE JOURNAL OF LAW, ECONOMICS, & ORGANIZATION 259 (1997); David O'Brien and Yasuo Ohkoshi. 'Stifling Judicial

that judicial independence can be threatened from the inside just as well as from external actors.[49]

Yet, existing theories of judicial independence rarely reflect these dynamics. Even when the possibility of jeopardising judicial independence from inside the judicial system is acknowledged, it is related only to interferences in the capacity of individual judges to carry out their judicial duties. Russell writes, 'From the internal perspective, it is only the individual judge, not the judiciary in a collective or institutional sense, whose independence is at stake.'[50]

In this paper we posit that, similarly to how political branches can compromise judicial independence through the process of selection and appointment of judges,[51] through the exercise of judicial accountability[52] such as promotion, remuneration, disciplining or removal, if these powers are transferred to the judiciary, that can be just as dangerous to the independence of the judicial branch. Certainly, in terms of democratic government such a breach of independence may appear perhaps less precarious than if the judiciary is in the hands of political elites. Nonetheless, when we want to analyse judicial independence, it does not matter where interferences come from. What is important is what their consequences are and how severe they are.

In several countries we have also witnessed that if judges are too independent,[53] they may express partial views with impunity, become enablers of democratic decay or uphold the interests of a privileged few against the public interest or rights of many. Hence, judicial independence must be balanced with judicial accountability, which is important to bear in mind when studying both institutional and output approaches to judicial independence in the literature.

2.1. Institutional approach to the definition of judicial independence

This approach focuses on the degree of separation of the judiciary from the other branches of power – perceives judicial independence as a feature of institutional design. This approach is very commonly used for the definition and examination of judicial independence by scholars,[54] as well as by policy-makers and democracy promoters. Certainly, it may be unsurprising that

Independence from Within'. In JUDICIAL INDEPENDENCE IN THE AGE OF DEMOCRACY: CRITICAL PERSPECTIVES FROM AROUND THE WORLD 37 (Peter H. Russell and David M. O'Brien eds., 2001).

[49] Sillen, *supra* n. 18.

[50] Russell, *supra* n. 29, at 11–12.

[51] Samuel Spáč. 'The Illusion of Merit-Based Judicial Selection in Post-Communist Judiciary: Evidence from Slovakia'. PROBLEMS OF POST-COMMUNISM 1 (published online, 2020).

[52] Kosař, *supra* n. 44.

[53] Frank Emmert. 'The Independence of Judges - A Concept Often Misunderstood in Central and Eastern Europe'. 3 EUROPEAN JOURNAL OF LAW REFORM 405 (2002).

[54] Owen M. Fiss. 'The Limits of Judicial Independence'. 25 THE UNIVERSITY OF MIAMI INTER-AMERICAN LAW REVIEW 57 (1993); Roger Handberg. 'Judicial Accountability and Independence: Balancing Incompatibles?' 49 UNIVERSITY OF MIAMI LAW REVIEW 127 (1994); Christopher M. Larkins. 'Judicial Independence and Democratization: A Theoretical and Conceptual Analysis'. 44 THE AMERICAN JOURNAL OF COMPARATIVE LAW 605 (1996); Jodi S. Finkel. JUDICIAL REFORM AS POLITICAL INSURANCE: ARGENTINA, PERU, AND MEXICO IN THE 1990S (2008); Hanssen, *supra* n. 35; Bruno Schönfelder. 'Judicial Independence in Bulgaria: A Tale of Splendour and Misery'. 57 EUROPE-ASIA STUDIES 61 (2005); Nuno Garoupa and Tom Ginsburg. 'Guarding the Gardians: Judicial Councils and Judicial Indpendence'. 57 THE AMERICAN JOURNAL OF COMPARATIVE LAW 103 (2008).

so much emphasis has over the years been placed on institutions when discussing independence. From the perspective of political science, it is institutions that are a point of politicians' attempts to foster – or hamper – independence, hence it is logical to analyse it at this level, even though it is necessary to accept that it is impossible to secure absolute separation of the judiciary from other branches of power. Legal scholars and policy-makers have also preferred institutional solutions, in particular in the democratisation context in Latin America and post-communist Europe, as they believed that new institutions will also change the prevailing judicial culture and strengthen judicial independence.[55]

Even Russell, who proposes that independence can be threatened on both collective and individual levels – hence acknowledging the importance of independence on the level of individual judges or cases – claims that it makes more sense to focus on an institutional framework when analysing judicial independence. Although judges' capacity to act impartially cannot be guaranteed by their insulation from other branches of power, without it they can hardly ensure independence in the exercise of their power.[56] Similarly, Fiss argues in favour of an institutional approach to independence while labelling it as 'political insularity' which should ensure judges were protected from political interferences in order to remain impartial.[57] Larkins, too, writes about insulation of the judiciary from the government, although he does so with regard to specific cases in which the government is directly involved in the litigation as a party in dispute. Admittedly it is not always straightforward to assess in what cases the government is or is not interested – and hence where it can have a preference over eventual dispute resolution – we can easily stretch the requirements Larkins proposed to all cases, therefore to the judiciary in general. Either way, what Larkins claims is that 'it is important that judges not be subject to control by the regime, and that they be shielded from any threats, interference, or manipulation which may either force them to unjustly favor the state or subject themselves to punishment for not doing so'.[58]

Shetreet also admits that 'modern conception of judicial independence is not confined to the independence of an individual judge and his or her personal and substantive independence.[59] It must include collective independence of the judiciary as an institution'. The institutional approach is similarly central to Rios-Figueroa's definition when he perceives judicial independence as a 'relation between actor A that delegates authority to an actor B, where the latter is more or less independent of the former depending on how many controls A retains over B.'[60] Notably, this definition not only holds that independence is a structural feature, but recognises that independence is not reducible to a binary variable but is a continuum, where B can be independent from A in varying degrees. Acknowledging the non-binary nature of judicial independence, however, is not completely sporadic in the literature. The Smithey-Ishiyama index differentiates between different degrees of independence based on factors

[55] Inga Markovits. 'Children of a Lesser God: GDR Lawyers in Post-Socialist Germany'. 94 MICHIGAN LAW REVIEW 2270 (1996); Erhard Blankenburg. 'The Purge of Lawyers after the Breakdown of the East German Communist Regime'. 20 LAW & SOCIAL INQUIRY 223 (1995).
[56] Russell, *supra* n. 29.
[57] Fiss, *supra* n. 54.
[58] Larkins, *supra* n. 54, at 608.
[59] Shetreet, *supra* n. 24, at 3.
[60] Julio Rios-Figueroa. 'Judicial Independence and Corruption: An Analysis of Latin America'. SSRN (2006), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=912924.

related to the structural insulation of the judiciary from political branches.[61] Similarly, Voigt, Gutman and Feld measure *de jure* and *de facto* independence, treating none of them as a binary variable, differentiating between institutional design as entrenched in laws and how these formal rules are applied.[62]

However, there are some authors who dispute the usefulness of the institutional approach to the definition of judicial independence. The main reasons for such critiques come from a rule of law standpoint, as there is no institutional set-up that would clearly secure what independence should secure – that everybody is treated equally before the law. According to Kornhauser, the institutional approach cannot ensure delivery of such values as economic growth or democracy, and therefore any endeavour aimed at fulfilling institutional prerequisites of independence should be abandoned.[63] Nevertheless, findings by Voigt, Gutmann and Feld provide evidence in favour of the focus on institutions.[64] What their research finds is that it is not *de jure* independence – institutional design - but *de facto* independence – the utilisation of formal powers by politicians, or rather lack thereof – that is a significant predictor of economic growth. This, on the one hand, undermines the notion that creating structurally insulated institutions is sufficient insurance for an adequate performance of the judiciary, but on the other hand it demonstrates that appointments or dismissals of judges, their jobs and financial security are important for the proper exercise of their duties.

These findings force us to think about why *de jure* independence does not systematically deliver desired outcomes in terms of economic performance. A possible avenue for explaining this discovery is that closing doors to external threats does not provide for satisfactory protection from other actors who gained *de jure* powers at the expense of political branches. In line with the definition proposed earlier – independence as a consequence of the interplay between powerful actors' capacity and willingness to pressure courts and judicial actors' resistance – we argue that the institutional approach – structural insulation of the judiciary – does not lead to powerless or incapacitated actors; it just transfers power into – and possibly concentrates it in – different hands. And there is considerable evidence that when powers are snatched out of the hands of political powers and transferred into those of the judiciary it may prove to be just as dangerous, although often in a different form.[65]

2.2. Output-oriented approach to the definition of judicial independence

The approach to defining judicial independence as a feature of the output of the judicial system is much scarcer in the literature. However, the logic behind it is much more straightforward. If the reason we care about independence is to secure that nobody stands 'above' the law, then all judicial decisions – hence the output of all cases – should be based solely on the law and facts relevant to cases. Shapiro labels this approach 'impartiality' – to

[61] Shannon Ishiyama Smithey and John Ishiyama. 'Judicial Activism in Post-Communist Politics'. 36 LAW & SOCIETY REVIEW 719 (2002).
[62] Stefan Voigt, Jerg Gutmann and Lars P. Feld. 'Economic growth and judicial independence, a dozen years on: Cross-country evidence using an updated set of indicators'. 38 EUROPEAN JOURNAL OF POLITICAL ECONOMY 197 (2015).
[63] Kornhauser, *supra* n. 17.
[64] Voigt et al., *supra* n. 62.
[65] Ramseyer and Rasmusen, *supra* n. 48; O'Brien and Ohkoshi, *supra* n. 48; Schönfelder, *supra* n. 54; Bobek and Kosař, *supra* n. 41; Kosař,*supra* n. 44; Bogdan Iancu. 'Perils of Sloganised Constitutional Concepts Notably that of 'Judicial Independence'. 13 EUROPEAN CONSTITUTIONAL LAW REVIEW 582 (2017).

distinguish it from a confusion surrounding the term 'independence' – and connects it primarily to the absence of influence and inability of the government to influence the outcomes of judicial cases.[66]

Similar reasoning may be found in other works. Clark uses the term independence and understands it as the ability of courts 'to make decisions that are unaffected by political pressure from outside of the judiciary'[67]; Melton and Ginsburg similarly argue that independence means the 'ability and willingness of courts to decide cases in the light of the law without undue regard to the views of other government actors.'[68] Fiss refers to this type of independence as 'party detachment' and broadens the definition by stating that judges should be independent from all litigating parties – there should not be any connection, feeling of gratitude, threats, bribery or, in some instances, cultural ties as they 'could cause a judge to identify with one party more than the other.'[69] Importantly, Fiss admits that a threat to the independence of individual judges can come from within the judiciary, most probably referring to threats and bribery that can take place inside the judiciary without the exposition of a judge to the outside world.[70] Larkins argues similarly; according to him, we can speak of independence 'when judges have no interest in the issues of the case and no bias toward either of the parties, all citizens – rich, poor, strong, and weak – are put on equal footing before the law.'[71]

Here, we need to make two notes. The first one clarifies Larkins' position, as the definition provided seems to be too broad. He stresses the political dimension of judicial independence by emphasising that independent judges 'are not manipulated for political gain.'[72] Second, however, to have judges who 'have no interest in the issues of the case' is an unattainable objective in the real world. If only such judges were to be considered independent, they would have to be chosen from people absolutely excluded from society with no personal life experiences, or should decide only cases that they can under no circumstance relate to – if such are even imaginable. Nevertheless, definitions placing emphasis on judges' side of judicial independence can be found in the works of other authors as well. Karlan argues that judges shall be free to pursue justice as they understand it, free from undue pressures.[73] Aydin posits that 'a judge is independent when she can take decisions based on her preferences and interpretation of law.'[74]

Despite the seeming clarity of this approach to the definition of judicial independence, it is rarely conscientiously used for analytical purposes. For instance, Herron and Randazzo expect independent judges not to be influenced 'by exogenous factors during the adjudication

[66] Martin Shapiro. COURTS: A COMPARATIVE AND POLITICAL ANALYSIS (1981).
[67] Clark, *supra* n. 39, at 5.
[68] James Melton and Tom Ginsburg. 'Does De Jure Judicial Independence Really Matter?: A Reevaluation of Explanations for Judicial Independence. 2 JOURNAL OF LAW AND COURTS 187, 190 (2014).
[69] Fiss, *supra* n. 54, at 58.
[70] *Ibid*.
[71] Larkins, *supra* n. 54, at 608.
[72] *Ibid*., at 611.
[73] Pamela S. Karlan. 'Judicial Independences'. 95 THE GEORGETOWN LAW JOURNAL 1041 (2007).
[74] Aylin Aydın. 'Judicial Independence across Democratic Regimes: Understanding the Varying Impact of Political Competition'. 47 LAW & SOCIETY REVIEW 105, 108 (2013).

process',[75] yet for the purpose of analysis use as a measure of independence the Ishiyama-Smithey index[76] concentrated on structural aspects of the concept. Isolated in this respect are Popova[77] and Clark whose measures of independence focus on how frequently, and to what extent the judiciary delivers decisions that are contradictory to preferences of political actors.[78] Popova's definition argues that an 'independent judiciary delivers decisions that do not consistently reflect the preference of a particular group of actors.'[79] In this, she sets an example of how conscientiously to study independence understood as a feature of the output of judicial systems.

The reason her approach is unique and so difficult for scholars to utilise more frequently is twofold. First, judicial independence understood as 'impartiality' is perceived by many as consecutive to 'structural insulation', and hence encourages many to refrain from this type of analysis. Second, her method is extremely time-consuming and costly, hence enormously difficult to replicate.[80] The same to a large extent applies to Clark's work.[81] His approach has however not been as novel, as he analysed independence similarly to other authors before him who labelled it differently, using expressions such as 'judicial review'[82] or 'judicial activism.'[83]

In agreement with the chronological argument, that independence on the level of judges needs to be preceded by independence on the institutional level, Tiede adds the condition of impartiality only after there is a certain level of insulations, as she argues that judicial independence 'can and should be defined as the judiciary's independence from the executive, as measured by the amount of discretion that individual judges exercise in particular policy areas.'[84] Russell also admits that there are two different approaches to independence, one understood as the autonomy of judges from other parts of the political system, the other as a type of behaviour or set of attitudes observable in judges' behaviour related to enjoying the specific level of autonomy present in the given system.[85]

All in all, it is quite common to define judicial independence as a feature of the output of the system, while it is very rare to use this approach empirically. There is no consensus regarding the connection between the institutional and output-oriented approaches; however there is no evidence that would undermine the idea that the two are related. We need to include one important comment at the end of this section, though. Although it may be quite accepted that judges should 'do justice' in accordance with the law and their interpretation of it, free from

[75] Erik S. Herron and Kirk A. Randazzo. 'The Relationship Between Indpendence and Judicial Review in Post-Communist Courts'. 65 THE JOURNAL OF POLITICS 422, 423 (2003).
[76] Ishiyama and Ishiyama, *supra* n. 61.
[77] Popova, *supra* n. 20.
[78] Clark, *supra* n. 39.
[79] Popova, *supra* n. 20, at 14.
[80] Chris Hanretty. A COURT OF SPECIALISTS: JUDICIAL BEHAVIOR ON THE UK SUPREME COURT (2020).
[81] Clark, *supra* n. 39, at 5.
[82] Herron and Randazzo, *supra* n. 75.
[83] Ishiyama and Ishiyama, *supra* n. 61.
[84] Tiede, *supra* n. 16, at 131.
[85] Russell, *supra* n. 29.

any undue influence, it needs to be emphasised that this 'independence' shall not be unconstrained.[86]

3. A unified theory of judicial independence: a proposal

The main argument of this chapter is that to unify theories of judicial independence we need to be able to link the institutional configuration of judiciaries with their actual performance, that is with the output of adjudication. Burbank and Friedman argue that independence should not be the ultimate end of efforts related to judicial systems.[87] There are certainly many other ends that need to be met in order for a judicial system to be considered 'good.'[88] Nevertheless, we argue that judicial independence is an important objective related to the rule of law as an essential condition of democratic governance.[89] In general, the rule of law ideal stems from the necessity to constrain power to minimise its concentration in the hands of a few, and to prevent the arbitrary use of it. This can be achieved only when equality before the law is secured, when all laws apply to everyone at all times and no one is treated preferentially.

For that reason, in this part we introduce three levels of judicial independence – three levels on which we can study and analyse judicial independence. The three levels are: institutional *de jure* independence, institutional *de facto* independence, and output independence that can be observed either on a systemic level or on the level of individual judges. We propose that these three levels should be analysed independently, with an assumed link between them. This assumption goes as follows: institutional *de jure* independence – hence the institutional design – should translate in the actual functioning as such matters as the selection, removal and disciplining of judges, their financial security or the administrative functioning of courts – institutional *de facto* independence; the way these formal powers are utilised then influences the composition of the judiciary and provides incentives for individual judges, and eventually gets translated into the adjudication of courts – hence the output independence.

Distinguishing between different levels on which judicial independence can be analysed communicates well with the proposal made by Advocate General of the European Court of Justice Michal Bobek who proposed to assess independence of formal institutional design – 'paper assessment only', independence in the use of formal setup in practice – 'paper as applied', and 'practice only' independence focusing on practical legal and institutional context.[90] Our proposal aims to unify these understandings, hence proposes how to analytically link institutional design with the actual outputs of the judicial conduct.

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[86] Burbank and Friedman, *supra* n. 23, at 9; Stephen S. Burbank. 'Judicial Independence, Judicial Accountability, and Interbranch Relations'. 95 THE GEORGETOWN LAW JOURNAL 909, 911 –913 (2007).

[87] Burbank and Friedman, *supra* n. 23.

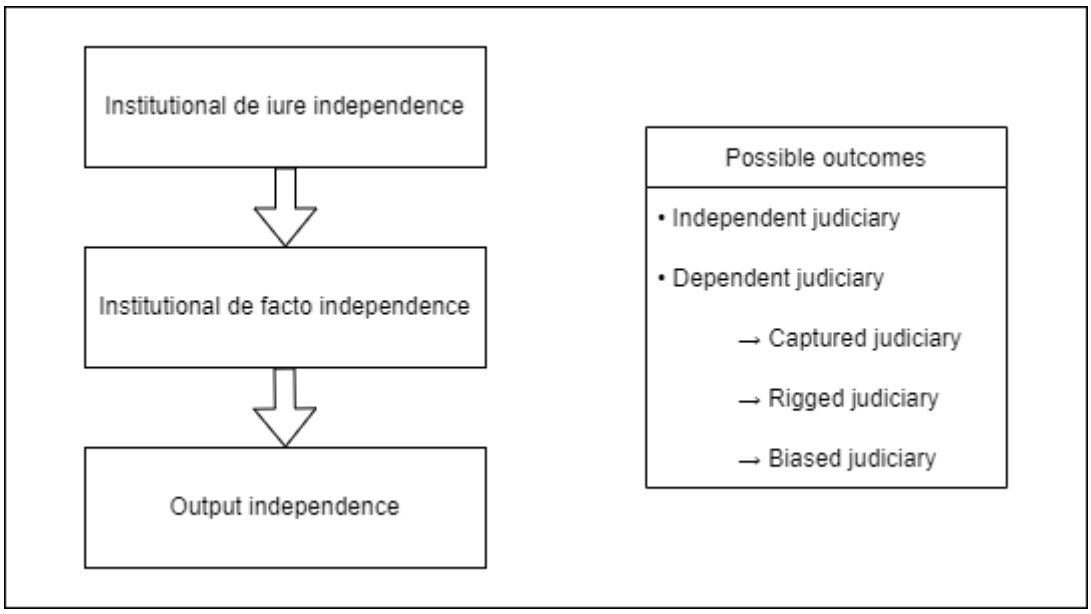
[88] Shetreet, *supra* n. 24.

[89] Juan J. J. Linz and Alfred Stepan. PROBLEMS OF DEMOCRATIC TRANSITION AND CONSOLIDATION: SOUTHERN EUROPE, SOUTH AMERICA, AND POST-COMMUNIST EUROPE (1996); O'Donnell, *supra* n. 46; Jørgen Møleer and Svend-Erik Skaaning. 'Beyond the Radial Delusion: Conceptualizing and Measuring Democracy and Non-democracy'. 31 INTERNATIONAL POLITICAL SCIENCE REVIEW 261 (2010).

[90] Opinion of AG Bobek in ECJ 23 September 2020, Joined Cases C-83/19, C-127/19, C-195/19m C-291/19, C-355/19 and C-397/19.

The purpose behind our proposal to analyse them independently is that the link between them is only assumed, and at each level judicial independence is a consequence of the interplay between powerful actors' capacity and willingness to inappropriately interfere with the workings of the judiciary and the resistance of judicial actors to such actions. To put it differently, at all the levels capacity, willingness and resistance interact anew, hence at all times independence on the subsequent level can either increase, decrease or stay the same as compared to the level by which it is preceded. In the following parts we clarify questions that can be asked on each level, propose tentative definitions of independence on each of these levels, identify 'powerful actors,' and list possible factors that may enhance or threaten independence on each level.

Figure 2: Levels of judicial independence



3.1. Institutional de jure independence

Institutional *de jure* independence is concerned with the allocation of formal powers to administer the judiciary. The rationale for this lies at the heart of the separation of powers concept. As James Madison put it, 'The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny.'[91] Questions that may, therefore, be raised at this level – to list a few – are the following. Who holds formal powers to administer judiciary? How is the judiciary structurally insulated from other branches of power? Or, how autonomous judiciary formally is in administering its matters? Each of these questions has some different implications but they generally refer to the same thing.

The capacity to alter judicial institutions belongs almost exclusively to political branches who can 'create, modify, and destroy judicial structures as well as … establish and alter the system of appointing, removing, and remunerating judges'[92], among other competences. Indeed,

[91] Federalist papers, No. 47.
[92] Russell, *supra* n. 29, at 13.

political branches can both increase and decrease the amount of independence at this level. Their willingness to alter institutions may be dependent on a variety of factors. First, political branches can be more inclined to threaten the independence of judiciaries for reasons spanning from efforts to subjugate the courts to being able better to address existing problems with the performance of a judicial system, to remedy certain undesired and unintended consequences of previously increased independence at this level. Their powers to alter institutions are, however, very much dependent on the context in which they find themselves. For instance, as FDR's 'court-packing plan' showed,[93] such an intrusion can face enormous public opposition which can prevent those branches from stifling the judiciary.[94] In other instances they may be more successful, as happened recently in Hungary and Poland.[95] Of course, the level of public opposition is dependent on further factors – such as the perceived competence of judiciary, its impartiality or its efficiency.

Additionally, there is a considerable amount of literature that explains the increase in institutional *de jure* independence through strategic action. Politicians may strengthen independence to protect their short-term political interests,[96] but also to protect themselves in case they lose power – hence 'political insurance theories.'[97] Judges themselves can play an important role in establishing greater *de jure* independence. Piana argues that in relation to EU accession transnational networks of judges and lawyers helped in the introduction of judicial councils in Europe.[98] Correspondingly, Kosař proposes that domestic judicial leadership – Supreme Court judges, court presidents, and judicial associations – was a crucial actor for the increase of institutional *de jure* independence.[99] Finally, the role of the international context itself should not be overlooked either. For instance, during the EU enlargement period, pressures from the international arena contributed to the rise of the number of institutions designed to strengthen separation of judiciaries from other branches of power, hence securing institutional *de jure* independence of judiciaries.[100]

Assessing and measuring institutional *de jure* independence should not – at least in theory – be too demanding a task, and there have been several attempts at measuring it. The judiciary in this regard is as independent as the many powers it holds as compared to other branches of power. Or, to put it differently, the judiciary is as independent and as autonomous as it is in the administration of its own matters. Ishiyama Smithey and Ishiyama in their work introduce an index called 'judicial power,' which measures the extent of constitutionally

[93] Gregory A. Caldeira. 'Neither the Purse Nor the Sword: Dynamics of Public Confidence in U.S. Supreme Court'. 80 AMERICAN POLITICAL SCIENCE REVIEW 1209 (1986); Barry Cushman. RETHINKING THE NEW DEAL COURT: THE STRUCTURE OF A CONSTITUTIONAL REVOLUTION (1998).

[94] Georg Vanberg. 'Legislative-Judicial Relations: A Game-Theoretic Approach to Constitutional Review'. 42 AMERICAN JOURNAL OF POLITICAL SCIENCE 346 (2001); Widner, *supra* n. 38.

[95] Uitz, *supra* n. 11; Sadurski, 2019a, *supra* n. 12.

[96] J. Mark Ramseyer. 'The Puzzling (In)dependence of Courts: A comparative approach'. 23 *Journal of Legal Studies* 721 (1994); Matthew C. Stephenson. '"When the Devil Turns...": The Political Foundations of Independent Judicial Review'. 32 JOURNAL OF LEGAL STUDIES 59 (2003); Hanssen, *supra* n. 35.

[97] Tom Ginsburg. JUDICIAL REVIEW IN NEW DEMOCRACIES: CONSTITUTIONAL COURTS IN ASIAN CASES (2003); Finkel, *supra* n. 54.

[98] Piana, *supra* n. 41.

[99] Kosař, *supra* n. 44.

[100] Seibert-Fohr, *supra* n. 19; Wojciech Sadurski, Adam Czarnota and Martin Krygier eds. SPREADING DEMOCRACY AND THE RULE OF LAW? THE IMPACT OF EU ENLARGEMENTE FOR THE RULE OF LAW, DEMOCRACY AND CONSTITUTIONALISM IN POST-COMMUNIST LEGAL ORDERS (2006).

granted powers to constitutional courts and the degree to which these institutions are separated from political actors, and use it to explain the observed level of judicial activism of post-communist Constitutional Courts.[101] Garoupa and Ginsburg proposed three categories of judicial councils based on their competences and composition, with a focus on who dominates the judicial councils.[102] Another measure of formal powers of judiciaries was developed in Feld and Voigt's study where they introduce a measure of *de jure* independence which focuses on formal powers related to judicial careers.[103] Šipulová et al. propose a judicial self-governance index similarly focusing on the extent of formal powers held by judges in judicial governance.[104]

Where the task of measuring institutional *de jure* independence gets tricky is in the question: of what dimensions this level of independence consists of? There is no definitive answer – this question will always be a matter of methodological choices made for the purpose of specific analyses. There are several options one can choose from. In all the measures included in the previous paragraph, but also in international documents that supported the rise of institutional *de jure* independence and the introduction of judicial councils around the Europe, the personal dimension – a dimension concerned with the professional careers of judges – was stressed the most. In this dimension fall powers to select, appoint, promote, discipline, dismiss, demote or relocate judges. Additionally, the independence of judges may be threatened by providing them with certain benefits (or denying such benefits for that matter) such as financial remuneration or changing their working conditions. Also, independence can be threatened using administrative powers – such as case assignments, works schedules, performance evaluations – or matters related to courts rather than judges – such as deciding on the number of judges, law clerks, administrative personnel in courts, or possibly technical equipment. There are other dimensions in which independence can be put at risk – for instance, the financial dimension related to powers to alter the budgets for the judiciary and courts, possibly educational independence concerned with who provides professional training for judges, who controls who can attend conferences, and so on.[105]

3.2. Institutional de facto independence

Institutional *de facto* independence focuses on the substantive use of formal powers in modifying the composition of the judiciary. The reason we should care about it is twofold. First, powerful actors can consistently utilise their powers, for instance, to select or promote judges, so that no other pressure will be necessary to secure desired outcomes.[106] Second, they can use their powers to demonstrate their capacity to motivate judges to carry out certain actions, or contrarily discourage them from some. Generally, it can be very well anticipated that if powerful actors utilise their powers on this level in a way that either substantively changes the composition of the judiciary in favour of attitudes that would be more aligned with those of powerful actors, or if they utilise their powers in such a way that

[101] Ishiyama and Ishiyama, *supra* n. 61.
[102] Garoupa and Ginsburg, *supra* n. 54.
[103] Voigt et al., *supra* n. 62.
[104] Šipulová et al., *supra* n. 41.
[105] Šipulová et al., *supra* n. 41, at 5–7.
[106] Gordon Silverstein. 'Singapore: The Exception That Proves Rules Matter'. In RULE OF LAW: THE POLITICS OF COURTS IN AUTHORITARIAN REGIMES 73 (Tom Ginsburg and Tamir Moustafa eds., 2008).

would be visible among judges and recognised, they may force judges to behave in a desired way. A tentative definition of independence on this level, therefore, could be that the judiciary is independent when decisions regarding its composition and internal matters are not done in a manner that would reflect the sectoral preferences of any actor. This requirement is articulated in international documents as they placed much emphasis on the depoliticisation of these processes and merit-based decisions about the professional careers of judges.

The capacity to influence the judiciary on this level is dependent on the answer to the question asked at the previous level: who holds formal powers? This is certainly not a simple yes or no question, as the answer depends on the scope of powers we care about, and these can be arranged in various setups. Most commonly, these powers belong either to political branches, the judiciary itself, occasionally to some expert bodies or the public. Whether powerful actors are willing to interfere in the composition of the judiciary is a matter of strategic choice based on the estimated cost and benefits of such actions.

Costs are mainly dependent on two factors – public confidence and the perceived legitimacy of such actions. As to the public confidence,[107] what matters is a confidence towards a powerful institution vis-à-vis other actors in the political arena. If the judiciary is perceived as untrustworthy while politicians enjoy great public confidence, then if politicians hold formal powers, the costs of utilizing these powers for their benefit would be relatively low. If the situation was reversed, costs of such actions would be much higher. The legitimacy argument relates to how these tasks have traditionally been performed, hence whether the mechanisms are perceived as legitimate. Even though justices at federal courts in the United States are selected and appointed by politicians, and even though they are selected precisely on their ideological proximity to the selector, the process is not perceived as a serious risk to independence.[108]

The benefits of utilising formal powers to change the composition of the judiciary increase when powerful actors perceive the need to exercise control over the judiciary – to secure desired outcomes or to ensure the desired atmosphere within the judiciary. For instance, politicians – particularly autocrats and wannabe autocrats – may rely on courts if the political competition is greater, as courts may provide an important bulwark in protecting the achieved level of concentration of power.[109] On the other hand, the benefits decrease if actors are strongly supportive of the rule of law ideal and democratic institutions – including the separation of powers, or, for instance, when they do not want to endanger economic growth by sending peculiar signals to potential investors.[110] As the internal workings of judicial systems are not too salient a topic among the public, the judiciary's and judges' ability to resist these pressures is rather limited. It can be dependent on how empowered judicial actors are, the extent to which they enjoy support of the media and the public, and on how willing they are to exercise resistance depending on their internalization of rule of law ideals, or strategic calculations.

[107] Marína Urbániková and Katarína Šipulová. 'Failed Expectations: Does the Establishment of Judicial Councils Enhance Confidence in Courts?' 19 GERMAN LAW JOURNAL 2105 (2018).
[108] Ferejohn, *supra* n. 33.
[109] Brad Epperly. THE POLITICAL FOUNDATIONS OF JUDICIAL INDEPENDENCE IN DICTATORSHIP AND DEMOCRACY (2019).
[110] Voigt et al., *supra* n. 62.

As institutional *de facto* independence is closely related to *de jure* independence, the dimensions that can be studied largely overlap. Mainly, powerful actors can exercise pressure in matters of court personnel through administrative powers or via financial channels. Scholars often emphasise the first of these dimensions – hence decisions about personnel, especially judges themselves. Among indicators of *de facto* independence Voigt, Gutman and Feld include average term length, the difference between term length in law and reality, instances of the removal of judges before the end of their terms, or the stability of salaries.[111] Except for these they also looked at the stability of a number of judges and changes in the legal framework related to apex courts – hence the stability of the institutional setting and a level of enforcement of judicial decisions. Additionally, Kosař looks at who utilises powers related to this aspect of judicial accountability and how they do it as 'what really matters is not what the law says about mechanisms of judicial accountability (*de jure* judicial accountability), but how mechanisms of judicial accountability operate in practice (*de facto* judicial accountability).'[112] Also, previous research described that even court-packing, understood as an intentional irregular change in the composition of the existing court, both quantitative and qualitative, may occur through the use of *de facto* powers.[113]

This differentiation importantly shows that there are considerable discrepancies between who holds powers 'on paper' and who utilises them and how they do it. These authors also show that there are two possible ways in which *de facto* independence can be threatened. The former suggest that independence is endangered when rules are applied arbitrarily as measures against certain selected judges; the latter shows that independence is at risk when rules are applied consistently in such a way that punishes – but possibly also rewards – actors with specific shared characteristics.

There are several contributing factors that may increase dependence on this level. They can be divided into two broad categories – rewards and sanctions. Regarding rewards, judges are, for instance, motivated by their ambitions, a factor which is closely related to bureaucratic and corporatist tendencies that can be found in judiciaries. In civil law countries, judiciaries with the civil-service model of judicial careers to a large extent function as bureaucracies.[114] Russell writes, 'If those who control career advancement within the judiciary are perceived to reward or punish a particular ideological orientation in judicial decision making, judicial independence can be seriously compromised,'[115] which suggests that the decision-making of an ambitious judge can become a matter of conformity. According to Buscaglia and Dakolias, compliant behaviour driven by ambitions can be subsumed under the label of corruption, which certainly would imply the use of formal powers to control adjudication.[116] Also, this may be especially true in socialist and post-socialist judiciaries, as Sajó and Losonci claim about judges in socialist regimes that 'the career of judges was bureaucratic as was their

[111] *Ibid.*
[112] Kosař, *supra* n. 44, at 149.
[113] David Kosař and Katarína Šipulová. 'How to Fight Court-Packing?' 6 CONSTITUTIONAL STUDIES 133 (2020).
[114] Mary L. Volcansek. 'Appointing judges the European Way'. 34 *Fordham Urban Law Journal* 363 (2007); Samuel Spáč. 'Recruiting European Judges in the Age of Judicial Self-Government'. 19 GERMAN LAW JOURNAL 2077 (2018).
[115] Russell, *supra* n. 29, at 17.
[116] Edgardo Buscaglia and Maria Dakolias. AN ANALYSIS OF THE CAUSES OF CORRUPTION IN THE JUDICIARY (1999).

remuneration and evaluation; all were based on political loyalty'.[117] A sub-category of ambition can be related to financial motivation provided by powerful actors, mainly remuneration mechanisms. It can appear in two forms: an individual judge can be financially motivated to act in a certain way, but a superior judge can also be motivated to apply pressure on a subordinate judge.

Among possible sanctions that may threaten independence are, for instance, accountability perversions – most prominently selective accountability recognisable through the unfair application of rules to specific judges or groups of judges,[118] but, indeed, also such tools as arbitrary removal, transfers between senates or chambers within courts, or informal tools such as reassigning judges to smaller offices, supplying them with worse equipment and the like. The last point related to material conditions in which judges' work can be theoretically observed on the level of individual judges, but also on the level of courts, but what they share is the unfair application of rules that allow one to distinguish between winners and losers with regard to a certain formal power. Finally, powerful actors may provide incentives for judges to retire, and hence leave offices which can be subsequently filled by judges who are more in sync with the preferences of these actors.[119]

Finally, we must add one caveat. Recently, several supranational bodies have introduced surveys of judges concerning their perceptions of judicial independence.[120] While studies based on these surveys have provided interesting insights into judicial independence and may serve as early alarm bells identifying new techniques used to curb judicial independence,[121] the perception of judicial independence is only a very loose proxy for *de facto* institutional independence.[122] There are at least to major reasons behind this claim. First, surveys are subjective, and data obtained from judges may not necessarily reflect what is actually happening but may be affected by particular tensions within individual polities. Second, such data may invite comparisons across countries not taking into account various understandings of judicial independence and different sensitivity regarding interference with the judiciary.

3.3. Output independence

That no specific actor is preferred in judicial decision-making and everybody is equal before the law lies at the heart of output independence as an essential feature of the rule of law. It

[117] András Sajó and Vera Losonci. 'Rule by Law in East Central Europe: Is the Emperor's New Suit a Straightjacket?' In CONSTITUTIONALISM AND DEMOCRACY: TRANSITIONS IN THE CONTEMPORARY WORLD 321, 324 (Douglas Greenberg et al., eds., 1993).

[118] Kosař, *supra* n. 44, at 68–72.

[119] Aníbal Pérez-Liñán and Andrea Castagnola. 'Presidential Control of High Courts in Latin America: A Long-term View (1904-2006)'. 1 JOURNAL OF POLITICS IN LATIN AMERICA 87 (2009); Andrea Castagnola. 'I Want It All, and I Want It Now: The Political Manipulation of Argentina's Provincial High Courts'. 4 JOURNAL OF POLITICS IN LATIN AMERICA 39 (2012).

[120] E.g. in 2022, European Network of Councils for the Judiciary (ENCJ) published its 4th ENCJ Survey on the Independence of Judges.

[121] Frans van Dijk. PERCEPTIONS OF THE INDEPENDENCE OF JUDGES IN EUROPE: CONGRUENCE OF SOCIETY AND JUDICIARY (2021).

[122] David Kosař and Samuel Spáč. 'Conceptualization(s) of Judicial Independence and Judicial Accountability by the European Network of Councils for the Judiciary: Two Steps Forward, One Step Back'. 9 INTERNATIONAL JOURNAL FOR COURT ADMINISTRATION 37 (2018).

can be analysed on two levels: on the systemic one,[123] and on the level of individual judges or cases. The difference between the two is that the former is concerned with certain predictability in adjudication about specific actors or group of actors, while the latter looks at individual instances where independence can be compromised. On the systemic level, scholars usually focus on the relationship between judicial power and political powers, operationalised either as a level of opposition to politicians[124] or as the consistency of the desired outcomes for a specific group of actors.[125] From the rule of law perspective, this is, we believe, the more important level for the assessment of judicial independence, as on the individual level independence is at stake virtually at all times. Judiciaries consist of hundreds or thousands of individuals and it can be safely assumed that at least some are always susceptible to succumbing to pressure. The level of the individual judge is concerned with the ability of judges to decide cases according to their assessment of the law and the facts of the case. Regardless of the normative debate whether societies really desire judges to decide solely according to their understanding of the law, it is necessary to distinguish between independence on the level of a case and that on the level of the rule, where for judicial independence we should care about the former – hence the situation in which judges are not pressured to decide a case in a particular fashion – while the latter refers to a change of rules that would secure desired outcomes and in which the consistency of desired outcomes will not tell us anything about the independence of the courts, but rather about the fairness of legislation.[126]

To be able to decide according to their preferences, judges need to be, first and foremost, free from fear that there will be any repercussions from their decision-making, beyond regular and legal ways in which judges can be reprimanded. Karlan writes, 'If judges were imprisoned or physically attacked for their decisions … they would lack the minimal safe space within which to perform judicial role.'[127] Judges who need to worry about their safety, or about the safety of people in any way affiliated with them, are certainly very vulnerable to outside pressures. Within this category fall attacks or threats of violence coming from individuals, organised criminal groups, but theoretically from state apparatus as well. Another unambiguously illegal way to pressure judges is corruption, and specifically bribery. Such threats to independence are direct dangers and can be defined as the 'misuse of judicial power for private gain.'[128] According to Rios-Figueroa, corruption is most likely in a setting in which the judiciary is too dependent on other branches of power, or where it is totally independent – in terms of institutional *de jure* independence – and lacks effective accountability mechanisms.[129] Research focused on judges' attitudes to corruption in post-communist Europe showed that the level of tolerance to corruption correlates with judges' trust for self-governing institutions,

[123] Indeed, this dichotomy is an over-simplification – the level of judicial independence can differ between courts or types of cases. For instance, if all levels of the judiciary except for the Supreme Court decide independently, yet powerful actors can obtain desired result when they appeal to the highest court, the independence of the judiciary as a whole is compromised.
[124] Herron and Randazzo, *supra* n. 75; Clark, *supra* n. 39, at 5.
[125] Popova, *supra* n. 20.
[126] Popova, *supra* n. 20.
[127] Karlan, *supra* n. 73, at 1043.
[128] Daniel J. Beers. 'Understanding Corruption in the Post-Communist Courts: Attitudinal Data from Romania and Czech Republic', (2012). Paper prepared for 11th Annual International Researchers Conference "Post Communist Corruption: Causes, Manifestations, Consequences" held on March 29-31, 2012, Miami University.
[129] Rios-Figueroa, *supra* n. 60.

material conditions in courts, social and cultural context, as well as with participation in international programmes.[130]

Another tool of direct influence over judicial decision-making is so-called 'telephone justice' that originally refers to the utilisation of informal mechanisms to pressure judges by politicians in Russia but is not too remote to other post-communist judiciaries,[131] and perhaps is not necessarily connected just to political actors. It consists of oral commands that are not necessarily to be perceived as a sign of corruption, and it is related to the existence of informal rules that in certain cases enjoyed supremacy over formalised law and disobedience to them may have put judges' careers at risk as their jobs depended on political leaders.[132] Additionally, such patterns of behaviour may still be present in post-communist judiciaries if a sufficient change of personnel has not taken place. As Ledeneva states, 'Although it is ridiculous to suggest that every court case in Russia is decided according to directives from above or on the basis of alternative incentives, it is perfectly possible to imagine that a way to influence a particular case can be found if necessary.'[133] Despite the fact that 'telephone justice' may have been tolerated in the past, in democratic regimes or regimes declaring themselves to be democratic it is surely not acceptable, and if it persists it must be considered as an external threat to the independence of an individual judge.

Additionally, media can occasionally threaten or, at least, skew the independence of judges, both on a systemic and on an individual level. According to Russell, however, attempts to influence judges via media, even by politicians, 'are tolerable when the worst injury they can inflict is to make the judge unpopular.'[134] In democratic societies, where media play an important role in the control of power, certain pressure exerted by media on the judiciary is unavoidable and can serve an important goal with regard to responsiveness requirement in democratic theories. Nevertheless, media can also be dangerous; by creating public pressure they can force judges to decide cases in certain ways – for instance, it can be easily imagined how media could frame cases concerning the corruption of government officials where courts would have a difficult task in objectively considering all the facts. In addition, media can occasionally pressure judges even to leave the bench or contribute to their removal from office;[135] in such cases judicial independence would surely be compromised.

Finally, judges, just like any other actors in society, possess different sets of values, opinions, biases or ideas of justice. This is not necessarily a condemnable fact; it is both legitimate and inevitable, but it needs to be realised that the 'impartiality' ideal of a judge completely rational and detached from the environment is unattainable.[136] This becomes problematic when a judge, courts or the judiciary as a whole imposes its values through the consistent preferment of specific actors in disputes; for instance, in cases against members of racial or ethnic

[130] Beers, *supra* n. 128.
[131] Ledeneva, *supra* n. 20; Popova, *supra* n. 20.
[132] Zdeněk Kühn. 'Socialistická Justice'. In KOMUNISTICKÉ PRÁVO V ČESKOSLOVENKU: KAPITOLY Z DĚJIN BEZPRÁVÍ 822 (Michal Bobek, Pavel Molek and Vojtěch Šimíček eds., 2009).
[133] Ledeneva, *supra* n. 20, at 347.
[134] Russell, *supra* n. 29, at 22.
[135] Donald P. Kommers. 'Autonomy versus Accountability: The German Judiciary'. . In JUDICIAL INDEPENDENCE IN THE AGE OF DEMOCRACY: CRITICAL PERSPECTIVES FROM AROUND THE WORLD 131 (Peter H. Russell and David M. O'Brien eds., 2001).
[136] Adam Benforado. UNFAIR: THE NEW SCIENCE OF CRIMINAL INJUSTICE (2015).

minorities.[137] As Karlan states, 'Judges should strive to overcome their irrational and unconscious prejudices against certain sorts of cases or litigants', but they are not always to be perceived negatively.[138] A judiciary may desire a minority view on specific topics, or it may ideologically favour citizens in consumer disputes. If we then accept that some prior knowledge can be attributed to a judge, in any case, impartiality would be close to impossible. Building on similar concerns, Karlan argues that 'if we think of judicial independence as a systemic attribute, rather than simply a character trait of individual judges, it may be that impartiality is better achieved by ensuring diverse perspectives on the bench.'[139]

Identifying powerful actors at the level of output independence is a complicated task. First, it needs to be clarified that output independence can be threatened without any pressure being exercised on individual judges. Popova operationalises independence as a state where no actor can consistently secure the preferable outcome.[140] To apply this definition, the judiciary can consistently decide according to one's preferences if its composition was altered at the *de facto* level – mainly through mechanisms of selection, promotion, and removal of judges; when some actor or group of actors can utilise informal channels to pressure judges in specific types of cases; or it can be observed that judges share certain values or biases towards a specific group of actors.

We can thus say, recalling the Anna Karenina principle,[141] that while independent judiciaries are roughly all alike, every dependent judiciary is dependent in its own way. We argue that there are at least three distinct modifications of a dependent judiciary: a captured one, a rigged one and a biased one.

The judiciary is 'captured' in a case where powerful actors, holding formal powers to modify it, use them in such a manner as to lead to a judiciary consistently delivering outcomes favourable to those powerful actors. This means that outcomes of the judicial system align with preferences of actors that can alter the composition of the institution. Instances of the captured judiciary may be found in Slovakia in the late 2000s, when courts tended to side with powerful judges who played a crucial role in judicial governance,[142] or in Italy where Christian Democrats in the second half of the 20th century had for a long time enjoyed virtual impunity.[143] The 'rigged' judiciary is one which formally works correctly, but which somewhere between the institutional framework and the output certain actors can skew in their favour. The 'rigged' judiciary, therefore, relates to the utilisation of informal channels, but also to a large-scale ability to pressure a variety of courts and judges. An example of a judiciary that was rigged by actors that were not equipped with formal powers to affect the judicial branch can be found in Guatemala, where organized crime had systematically been able to secure

[137] Katheryn Russell-Brown. THE COLOR OF CRIME: RACIAL HOAXES, WHITE FEAR, BLACK PROTECTIONISM, POLICE HARASSMENT AND OTHER MACROAGGRESSIONS (2009).
[138] Karlan, *supra* n. 73, at 1051.
[139] *Ibid*.
[140] Popova, *supra* n. 20.
[141] As Tolstoy writes in the novel Anna Karenina: 'Happy families are all alike, each unhappy family is unhappy in its own way.'
[142] Samuel Spáč, Katarína Šipulová and Marína Urbániková. 'Capturing the Judiciary from Inside: The Story of Judicial Self-Governance in Slovakia'. 19 GERMAN LAW JOURNAL 174 (2018).
[143] Donatella Della Porta. 'A judges' revolution? Political corruption and the judiciary in Italy'. 39 EUROPEAN JOURNAL OF POLITICAL RESEARCH 1 (2001).

desired outcomes.[144] Finally, the 'biased' judiciary is one that, without suffering external pressure, delivers decisions that are more favourable to some groups than other. This may happen, for instance, when the judiciary has internalised the views of a certain caste or social class most judges are recruited from. The extreme examples was the apartheid-era South Africa, where judges consistently prioritised the white minority.[145] More recently, caste bias has been reported from India.[146] Even in the consolidated democracies such as the United States, researchers have claimed that the judiciary is biased with regard to the criminalisation of the African-American minority.[147] A more subtle kind of biased judiciary is one that produces decisions that are more favourable to some groups than others for reasons that are not related to the decision-making itself, but to the access to courts. We can easily imagine a judiciary that in its decision-making favours corporations or the haves against the have nots, or even against average population.

Judicial independence is thus an institutional characteristic that needs to be distinguished from impartiality of individual judges. Impartiality refers to the way how judges treat parties before the court in individual cases. On the individual level of judicial independence, virtually anybody can prove to be a powerful actor – anybody who has an informal channel at hand that would allow for the pressuring of a judge. The willingness of powerful actors to influence judges is – as always – dependent on a cost-benefit analysis related to a specific case. Factors that surely belong to those influencing willingness are the ease of access to judicial actors, knowledge about the level of corruption in the country, and the ability to bribe a judge, or the perception of possible criminal repercussions in the event of attempted bribery. The benefits of any exercise of pressure on judges lie in the eyes of the beholder in combination with trust for the judicial system, a court or a judge, or the general attitude towards concepts such as fairness or justice.

The resistance of judicial actors at this level is very much related to judges' readiness to misuse their power and fulfil some actors' ambitions.[148] The level of resistance is certainly dependent on tools utilised by powerful actors. When a factor of fear comes into the picture and judges feel threatened, their ability to exercise resistance dramatically decreases. The ability not to give in to offered bribes is also reliant on a judge's perception of her role in society, trust for the institution, a general attitude towards democratic institutions and the idea of fairness in the judicial process. Additionally, there are two main instruments which may discourage judges from succumbing to pressure: well-functioning accountability mechanisms that can recognise and penalise wrongful judicial behaviour; and, with regard to corruption, an effective criminal justice system able to investigate and punish those involved.

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[144] Claudia Escobar. 'How Organized Crime Controls Guatemala's Judiciary'. In *Corruption in Latin America* 234 (Robert I. Rotberg ed., 2019).

[145] David Dyzenhaus. JUDGING THE JUDGES, JUDGING OURSELVES: TRUTH, RECONCILIATION AND THE APARTHEID LEGAL ORDER (1998).

[146] Rajiv Shah. 'Top upper caste judges in India 'biased' against Dalit colleagues: US Bar Association report'. (Oct. 17, 2021), https://theleaflet.in/top-upper-caste-judges-in-india-biased-towards-dalit-colleagues-us-bar-association-report/; Shyam Krishan Sriram. 'Caste and the Court: Examining Judicial Selection Bias on Bench Assignments on the Indian Supreme Court' (Thesis). (2006).

[147] Russell-Brown, *supra* n. 137.

[148] Šipulová, *supra* n. 37.

4. Conclusion

In this chapter we have presented a unified theory of judicial independence that may be useful for the analysis of judicial systems, as well as for policy-makers involved in the design of judicial institutions. We have done so by building on the existing scholarship on judicial independence, while remaining sensitive to experiences from around the world, where institutional arrangements have not necessarily led to desired outcomes. We propose a coherent model that reconciles the main approaches to the concept found in the literature in order to contribute to the understanding of the complexity of judicial independence and to help to overcome the lack of comprehension between scholars, judges and domestic as well as supranational policy-makers.

We define judicial independence as a consequence of the interplay between the capacity and willingness of powerful actors to interfere with the workings of the judiciary, and the resistance of judicial actors and their ability to withstand such actions. By 'powerful actors' we mean any actors holding formal and informal powers to exercise pressure on the judiciary, and by 'workings of the judiciary' we mean both judicial decision-making and judicial governance. We distinguish between three levels of judicial independence: *de jure* institutional independence, *de facto* institutional independence, and output independence. We propose that, for analytical clarity, each level should be analysed independently, and connections between them should be explained and elaborated very carefully. At each of these levels, independence is not necessarily affected by levels which logically precede it.

Based on this, we identify several possible outcomes. An independent judiciary is one which produces outputs that do not consistently reflect preferences traceable to the way in which any group of actors uses its formal and informal powers. We also argue that there are at least three distinct modalities of a dependent judiciary: a captured one, a rigged one and a biased one. The judiciary is 'captured' in a case where actors formally empowered to modify the judiciary use these powers in such a manner as to lead a judiciary consistently to deliver outcomes favouring these actors. The 'rigged' judiciary is one which formally works correctly, but somewhere between the institutional framework and the output can be skewed by certain actors in their favour. Finally, the 'biased' judiciary is one that delivers decisions that are more favourable to some groups, for instance because of the internalisation of certain views or values, without any recognisable external pressure.