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Teodora Miljojković

Reviewer:

Violeta Beširević

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REFRAMING JUDICIAL APPOINTMENTS: RULE OF LAW AS A CONSTRAINT ON POLITICAL MANIPULATION

Teodora Miljojković
Central European University PU in Vienna, Department of Legal Studies

Abstract: This chapter addresses the political abuse of judicial appointment procedures as a mechanism through which judicial independence may be undermined. It begins by reviewing the literature on appointment-related irregularities, drawing on both doctrinal analyses and comparative studies, while also noting conceptual limitations that leave important aspects of contemporary practices insufficiently explained. Against this backdrop, the chapter situates its inquiry within the existing theoretical debates on the rule of law and judicial independence, and seeks to enrich these normative concepts by examining how institutional safeguards can be eroded through formally legal but politically motivated interventions. By employing the rule of law as an interpretive lens—highlighting its role in constraining arbitrariness and grounding the exercise of public authority in justification—the chapter offers an additional analytical perspective for evaluating the legitimacy of judicial appointment reforms, complementing both the existing scholarship and the emerging case law.

Keywords: Rule of Law; Judicial Independence; Political Insularity; Judicial Appointments.

Resumo: Este artigo debruça-se sobre o abuso político dos procedimentos de nomeação judicial como um mecanismo suscetível de comprometer a independência judicial. Começa por examinar a literatura em matéria de irregularidades relacionadas com as nomeações, tendo por base tanto análises doutrinárias como estudos comparativos, salientando em simultâneo as limitações conceptuais que deixam importantes aspetos das práticas contemporâneas insuficientemente explicados. Face a este contexto, o artigo centra a sua investigação nos debates teóricos existentes relativos ao Estado de direito e à independência judicial, procurando enriquecer estes conceitos normativos mediante a análise de como as medidas de salvaguarda institucionais podem ser enfraquecidas por intervenções formalmente legais, porém motivadas por fatores políticos. Ao utilizar o Estado de direito como lente interpretativa - enfatizando o seu papel em conter a arbitrariedade e em assentar o exercício da autoridade política na justificação, o presente artigo apresenta uma outra visão analítica para avaliar a legitimidade das reformas na nomeação de juízes, complementando tanto a investigação académica existente como a jurisprudência emergente.

Palavras-chave: Estado de Direito; Independência Judicial; Insularidade Política; Nomeações Judiciais.

1. Introduction

This chapter builds on the expanding literature on the misuse of power in judicial appointment procedures by re-examining the normative foundations

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of the rule of law and judicial independence, as well as the doctrinally entrenched assumption of their intrinsic and indispensable connection. While these two principles are often treated as mutually reinforcing, their conceptual ambiguity and varied institutional manifestations complicate their application, particularly in contexts where political actors exploit legal mechanisms to reshape judicial institutions.

The chapter begins with a reassessment of how judicial independence has been understood in both legal and political theory, drawing attention to the concept of political insularity as a core dimension of institutional autonomy. This first section reaffirms the critique of the prevailing assumption that formal guarantees (de jure independence) suffice to protect courts from political interference. Instead, it argues that judicial independence must be examined through the broader lens of the rule of law, understood not simply as a checklist of legal formalities, but as a normative principle designed to constrain arbitrary power and require justification in governance.

Recent years have witnessed the development of a substantial body of European regional courts' jurisprudence that elaborates on the relationship between the rule of law and judicial independence in general, and delineates the specific constraints that the rule of law places upon judicial appointment procedures in particular.

Setting the standards for national judicial design was not one of the primary aims behind establishing international human rights courts. (Kosař, Lixinski, 2015: 717). The regional human rights conventions implicitly refer to the required minimum of judicial independence, albeit through the lens of rights protection. 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.

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 (Bernhardt, 1999: 18). However, it justified its 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. 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."[1]

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" (Lemmens, 2014: 304). According to Trechsel, institutional guarantees under Article 6(1) are not merely a theoretical concept, but essential constitutive elements in practice. This

1. ECtHR, *Golder v United Kingdom*. App no 4451/70, 21/02/1975.

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."[2] 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 CJEU's jurisdiction to set standards for judicial independence in Member States was not overt before the 2018 landmark judgment *Associação Sindical dos Juízes Portugueses*.[3] In this case, the CJEU 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.[4]

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."[5] 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 (2018: 623) noted, this ruling shifted the focus from the economic (Eurozone) crisis to the rule of law crisis.

With ASJP, CJEU 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.[6] Acknowledging the necessity for a certain degree of independence within national judiciaries to interpret EU law, the ECJ made the domestic judicial design justiciable.

In the course of elaborating the general requirements of judicial independence, both regional courts have also articulated specific criteria governing judicial appointments, aimed at ensuring compliance with Article

2. ECtHR. *Guðmundur Andri Ástráðsson v Iceland*. App no 26374/18, 01/12/2020, para. 233.

3. CJEU. *Associação Sindical dos Juízes Portugueses v Tribunal de Contas*. Case C-64/16, ECLI:EU:C:2018:117, 27/02/2018.

4. *Ibid*. para. 40.

5. CJEU. *Graham J Wilson v Ordre des avocats du barreau de Luxembourg*. Case C-506/04, ECLI:EU:C:2006:587, 19/09/2006.

6. *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.

6 of the ECHR and Article 19(1) of the TEU. The ECtHR, in *Guðmundur Andri Ástráðsson v. Iceland*, developed a three-step test for assessing the impact of appointment irregularities on the right to a tribunal established by law. This reasoning was further elaborated in *Grzęda v. Poland* and *Reczkowicz v. Poland*, where the Court examined the systemic implications of politically influenced appointment procedures and the restructuring of judicial councils. Similarly, the CJEU in *Simpson and HG v. Council and Commission* confirmed that serious flaws in judicial appointments may affect the validity of judicial decisions and the right to an independent tribunal under EU law. The CJEU has made clear that judicial independence cannot be divorced from the procedures by which judges are appointed. In *A.K. and Others v. Sąd Najwyższy*, the Court held that appointment procedures which allow political authorities to exercise a decisive influence—such as through the restructuring of judicial councils—may undermine the appearance of independence and thereby breach Article 19(1) TEU. This jurisprudence demonstrates that the rule of law requires not only substantive guarantees of judicial tenure, but also procedural safeguards in appointment mechanisms capable of shielding judges from political capture These decisions reflect an increasing judicial engagement with the structural dimensions of judicial independence. This chapter aims to contribute to this evolving field by enriching the theoretical vocabulary through which such developments are understood—offering a normative framework grounded in rule of law theory that helps connect legal reasoning on judicial appointments with broader concerns about arbitrariness and justification in governance.

Second, the chapter explores the challenges of assessing political abuse in judicial appointments. It engages with existing political science models (such as the "insurance", "legitimacy" and "competition" theories) as well as comparative legal frameworks, highlighting their respective limitations in diagnosing subtle forms of institutional manipulation—particularly in hybrid and illiberal regimes.

Third, the chapter advances a refined analytical framework grounded in contemporary rule of law theory. Building on the body of work that explores the rule of law as the antidot to arbitrariness, it proposes a shift away from doctrinal legality and toward justificatory governance—where the legitimacy of state action depends not merely on compliance with formal rules, but on the provision of public, reasoned justification.

Taken together, these three lines of inquiry aim to establish a more context-sensitive and normatively robust framework for evaluating judicial appointment reforms. This approach not only clarifies how political actors may abuse legal mechanisms to undermine judicial independence, but also offers tools for assessing such practices through the teleological function of the rule of law: to temper arbitrariness and safeguard institutional integrity.

2. Revisiting the Intrinsic Rule of Law-Judicial Independence Nexus

The prolific debates on the concepts of the rule of law across various fields of social sciences, policy papers, and political agendas have led to the denomination of this term as "essentially contested" (Waldron, 2021), "self-congratulatory rhetorical device" (Shklar, 1987) to the point that "no

intellectual effort need therefore be wasted on this bit of ruling-class chatter" (Shklar, 1987). The concept of judicial independence, which is commonly perceived as intrinsic to the rule of law as its precondition or its constitutive element, has undergone similar criticism, as it has been characterized as "ambiguous reality and insidious illusion" (Holmes, 2004) "often cited, but rarely understood" (Tiede, 2006) and even a useless theoretical category (Kornhauser, 2002). One of the reasons for the various contestations to these concepts and their "wear-off effect" is arguably the existing disagreement on what these concepts stand for within the scholarship itself. However, there is also a discrepancy between scholars' constantly insisted normative propositions and the empirical diversity of their implementation across legal cultures.[7] The alleged illusiveness of these terms and the confusion surrounding them cannot constitute a legitimate reason for their abandonment, especially if they imply overarching consequences in practice. [8]

Fallon (1997) asserts that the rule of law is fundamentally contestable, given that establishing a definitive, ideal, or favored interpretation of the rule of law is contingent upon resolving contentious normative issues. Consequently, disagreements emerge as an inherent consequence of this contestability. The idea of the judiciary as the institutionally separated branch of the government developed in what Sheetreet (2009) defined as the second and third normative cycles of judicial independence when it was transposed internationally. To grasp the elements and limits of institutional judicial independence, it is helpful to go back to the basics of the conceptual analysis of the concept. In a similar vein to the rule of law, the concept of judicial independence has been repeatedly challenged and reinterpreted, contributing to its growing conceptual ambiguity.

Shapiro's classical idea of courts (1986) perceives them as bodies in charge of resolving conflicts (adjudication in deciding on controversies based on facts concerning the relevant laws) by a "neutral third party." The neutrality of courts in Shapiro's "triad conception" is what Fiss (1993: 58) 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 has impartiality as its rationale, just like the type of independence the judiciary should have 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 autonomy, which Fiss defined as "political insularity", and which consists of safeguards that aim to protect the judiciary from other branches

7. 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". (Sajó, 2019: 263).

8. Waldron argued these concepts did not 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". (Waldron, 2002: 140).

of government (the political ones) on the one hand, and the general public on the other. As Fiss (1993: 60) noted, the judiciary's moral authority is contingent upon the dialogic process in which judges engage and their insulation from political influence.

This argument becomes even more critical when we assess it from the perspective of the protection of the rule of law. As Ginsburg (2013) captured, many reforms aimed at importing the rule of law were driven by the assumption that judicial independence was a prerequisite to the well-functioning rule of law. While the assumption has been largely unquestioned in existing scholarship, it necessitates ongoing scrutiny in light of the contemporary context and political dynamics in which today's courts function, as the efforts to bolster the judiciary can sometimes result in outcomes that run counter to liberal values such as democracy, human rights, justice, and even the RoL itself (Ginsburg, 2011).

Following Fiss, 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 a too independent judiciary can sometimes interfere with other democratic values) and the second which derives from the fact that "independence is regime relative."

Assessing institutional reforms within the rule of law framework is complex, mainly when governments modify or bypass constitutional structures. Vagueness in law, recognized as potentially inconsistent with the rule of law ideal, can contribute to legal uncertainty. When those in power exploit this vagueness for political gain and to control independent institutions like the judiciary, it poses a more tangible threat to the rule of law. Furthermore, hybrid regimes using comparative constitutional practices to justify such legal misuse are engaged in abusive constitutional borrowing (Dixon and Landau, 2019) or legal whataboutism (Cheung, 2020), potentially leading to challenges in identifying RoL-violating practices.

When transferred into practice, the diversity of accounts of what these concepts stand for 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 pitfalls that should not be underestimated (Garoupa and Ginsburg, 2009; Ginsburg, 2011).

First, there are constraining methodological obstacles to 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" (Garoupa and Ginsburg, 2009) but also risks being one-sided, as the comparison needs a normative concept.[9] Additional obstacles arise when the scholarly normative concept faces the living "rule of law experience"

9. "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 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." (Sajó, 2019: 275).

construed and shaped not only by its historical accounts but also by society's cognitive and cultural factors.[10]

Second, difficulties of empirical research on the rule of law and judicial independence lead to the significant inference that vague normative concepts or their intrinsic interconnection should not be taken for granted as an absolute good. A readily apparent alternative to considering judicial independence or the rule of law unequivocally or unconditionally involves reframing these concepts in a "qualified manner as organizing principles" (Geyh, 2014: 189). Experience from the ground shows examples of countries that prima facie follow the rule of law guidebook but do not have judicial independence, at least not in the Western concept of the judiciary's political insularity (Ginsburg, 2011: 272).

In contrast, the literature that explores authoritarian regimes indicates that there can be various reasons for the empowerment of the judiciary, which is not necessarily followed by the rule of law strengthening, at least not in the paradigm that the Western legal theory on the rule of law has been developing (Ginsburg and Moustafa, 2008). As Silverstein (2008: 86) noted, Western tendencies 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.

The safeguards for judges are entrenched in the Constitution, vested in "packages of judicial independence" (Jackson, 2006), which are, in theory, also referred to as de jure independence.[11] The contexts in which this research question has been examined have diverged heavily. Before assessing the relationship between appointment and dismissal procedures and the rule of law, it should be noted that the importance of de jure independence for the actual independence of the judiciary has already been questioned within the literature. Melton and Ginsburg (2014) claim that de jure independence does not substantially contribute to de facto independence despite the long-established doctrinal premise that argues the contrary.

Similarly, there is a growing need for a contextualization of the judicial independence research, as the formal guarantees of judicial independence in consolidating democracies cannot be analyzed without paying attention

10. 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 reasoning may apply not only to constitutional norms but also to constitutional principles, such as rule of law and judicial independence. See Piana, 2006: 223. See also Davidson, 2001.

11. *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." (Rios-Figueroa and Staton, 2014: 106).

to the informal linkages of the judiciary and other actors, which "often distort the effect of formal rules, for court insulation" (Urribarri, 2012).

The anecdotal instrumentalization of judicial appointments for political purposes is no news in the scholarly literature (Brewer-Carías, 2015, Ghias, 2010). However, what seems to be missing from existing rule of law theory is a sufficiently developed framework for analyzing how judicial independence might be shielded from political influence, beyond the standard reliance on *de jure* guarantees—whose capacity to address contemporary challenges appears increasingly limited. Political science has carved out rich theoretical approaches to judicial appointment and dismissal procedures in political transitions, which have emerged from the analysis of the experience of Latin American countries. Three models explain the dynamics of judicial independence through the "insurance policy" paradigm (Finkel, 2004) due to competition among political parties (Chavez, 2003) and the paradigm of political legitimacy (Brinks, 2005; Ruibal, 2009). While these models provide essential insights into the politicization of judicial reforms, they do not address how interference with judicial independence interplays with constitutionally entrenched principles, specifically the rule of law. On the other hand, as previously suggested, constitutional theory and comparative constitutional law have traditionally focused on de jure guarantees of judicial independence, often lacking the conceptual tools or legal vocabulary to capture its more subtle violations in practice. However, this has begun to change in recent years, particularly in response to the increasingly creative and covert strategies used to undermine the judiciary in illiberal regimes across Europe (Wyrzykowski and Ziółkowski, 2021). Bridging the gap among disciplines in analyzing judges' appointments may provide valuable explanations on what constitutes a rule of law violation in judicial design.

The value of reassessing the established paradigm of the intrinsic connection between the rule of law and judicial independence lies in the realization that what constitutes infringement on judicial independence or its empowerment significantly depends on the context in which the reforms to the judiciary occur.

Constitutional practice reveals that, in certain circumstances, interference with judicial independence may be justified in the interest of ensuring judicial accountability. Moliterno and Čuroš (2021) emphasized the difficulty of positioning the justification of judicial reform on the balancing scale between judicial independence and accountability. The tension between judicial independence and accountability represents a problem in assessing judicial reform through the prism of the rule of law. As the theory has already established (Kosar, 2017), more judicial autonomy doesn't necessarily lead to higher adherence to the rule of law, and judicial accountability is a legitimate reason for the other branches of government to interfere with the organization and competencies of the judicial sector.[12] However, the

12. "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." (Kosar, 2017: 116).

boundary between legitimate interference aimed at ensuring democratic accountability and illegitimate encroachment that may undermine the rule of law remains difficult to delineate—highlighting a tension that calls for closer theoretical and contextual examination.

On the other hand, the dynamics of judicial independence suggest that certain practices related to judicial appointments may shift in nature—or at least in how they are perceived—depending on the surrounding political context, potentially transforming what might be viewed as constitutional manipulation or "cheating" into a discourse framed as the legitimate exercise of constitutional authority.

Analyzing various forms of interference with judicial independence, isolated from the political and legal context, does not lead to substantive conclusions as the answer to the question of whether the reform represents an encroachment on judicial independence and undermining of the rule of law or a legitimate exercise of government will vastly depend on the perspective and normative framework that is initially taken. As Moustafa (2014: 281) noted, for example, 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." Authoritarian governments may benefit from judicial independence by conceding many functions that are not as rare in democratic regimes as scholarship perceives (Moustafa, 2014). Graver (2015) noted that upholding the pretense of judicial independence by authoritarian regimes was present even in Europe and can be traced back to Nazi Germany.

When similar forms of interference with judicial design appear across both democratic and hybrid regimes, the absence of clearly discernible legal standards and robust theoretical underpinnings makes it particularly difficult to distinguish between the misuse of judicial reform as a tool to undermine the rule of law and the legitimate exercise of constitutional authority aimed at recalibrating the judiciary's anti-majoritarian role.

The *de jure* independence, assessed only through a comparative analysis of constitutional and legislative texts (reforms and safeguards on paper), often does not faithfully reflect de facto independence from other constitutional and political actors, which is the phenomenon of legal cheating exercised by the government driving the reforms (Sajó, 2021). Sajó (2021) contends that legal infidelity manifests when systems ostensibly adhere to specific legal prerequisites and the precepts of the rule of law yet neglect the pertinent standards and principles integral to its application. The author develops the theory on legal cheating prevalently regarding the systems that are, in theory, labeled as illiberal democracies (Zakaria, 1997).

However, established liberal democracies are not shielded from the abusive constitutionalism practices by the political branches of the government (Landau, 2013). Comparative constitutional scholarship has underscored that the ethical aspiration of judicial independence is embedded in the institutional design and strategic choices made at the moment of constitutional creation, such that later failures of independence "are not a

matter of a recent generation's fall from grace, but a question of original sin." (Huq, 2021: 1093). Thus, the encroachment upon judicial independence is not an occurrence exclusive to present-day illiberal and populist governments but rather a phenomenon that may emerge once the constitutional design is abused.

3. The complexities of rule of law assessment of appointment procedures

For two reasons, the rule of law assessment of judicial appointment procedures requires an analytically nuanced approach. First, the international standards guiding 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 difficult to distinguish what unwarranted interference would be or to point at a possible rule of law tension (Castillo-Ortiz, 2023; Volcansek, 2007).

Second, the prolific constitutional theory of the judicialization of politics (Tate and Valinder, 1995) and juristocracy (Hirschl, 2004) suggests that it is at certain times necessary to influence the composition of the bench for political accountability purposes.

There are various accepted models for judicial appointments. Three general trends in judicial appointments appeared over the last century: the elective model, the executive model and the "European"/judicial council model. The variety of models and disagreement within the scholarship suggests that there is no "best mechanism" of judicial appointments for achieving judicial independence. The lack of consensus on the most appropriate way to select judges makes the quest for violation of the rule of law in appointment procedures even more complex.

The direct popular election of judges is a phenomenon researched primarily in the American legal reality regarding the state-level judiciary. It is generally unfamiliar in the Continental tradition, with a few exceptions (Guarnieri, 2007: 280). The implications of the elective model on the politicization of justice and the rule of law have been widely discussed in the U.S. Abuse of judicial procedure in the case of partisan judicial elections may occur either by politicians or by campaigning judges themselves (Fabian, 2001). On the other hand, the appointment of Article III judges, particularly to the Supreme Court, has been the central contest between the executive and legislative branches (Tulis, 1997).

The ideological nature of *advice and consen*t politics has been widely recognized in the literature. It has often prompted discussions on possible changes to the rules of judicial nominations in the Senate (Shipan, 2008).

On the other hand, in continental European tradition, the ordinary judiciary has been historically organized around the civil service (executive) model, with variations such as the Nordic managerial model, German ministerial model, and Irish court service (Castillo-Ortiz, 2023). The shift towards greater external judicial independence occurred only after World War II when emerging democracies adopted some Italian Consiglio della Magistratura variations (Guarnieri, 2004). This model also referred to as the

"European model" or "Judicial Council Model" (Bobek and Kosar, 2014), presupposes that an independent body, consisting of a majority of judges, elects the judges independently or in cooperation with other branches. Latin America and most European post-communist countries took this path during their transition to democracy (Sipulova, *et al*., 2023). However, many countries still organize their judicial systems within the executive-judiciary axis.

The appointment procedures also depend on the nature of the court for which the judges are selected. The typologies above primarily refer to ordinary court systems. As for constitutional courts, due to their specific nature and the reasons why they were established, they are mainly selected through a shared appointment system, giving different state actors an equal "quota" in the representation on the bench (Volcansek, 2007).

This overview suggests that judicial appointment procedures inherently warrant political consideration, as the interbranch constellation of power defines their design. Hence, despite the recent trend towards complete judicial self-governance, the participation of political branches in appointing judges does not per se indicate a possible RoL violation. This assertion seems self-evident but further emphasizes the need to carve out discernible standards in assessing what stands as an overreach of the political prerogative to appoint judges.

The analysis gets further convoluted by the democratic accountability considerations.

Judicial accountability is another multifaceted concept that, as well as judicial independence, needs to be conceived in relation to other actors (Burbank, 2007). Furthermore, not all aspects of judicial accountability warrant possible changes to appointment design. Cappelletti (1983) proposed a typology that differentiates four J. A. types: 1. Political accountability, divided into interbranch and constitutional accountability; 2. public accountability – vis-à-vis the general public; and 3. Legal accountability of the state: 4. Personal legal accountability of a judge.

These theoretical distinctions matter, as they portray which aspects of judicial status are the most susceptible to politicization and abuse by other branches of government. When governments refer to accountability as the reason behind the reform of judicial appointments, what they usually have in mind are the first two types: political and public accountability of the judiciary. According to Geyh (2006: 912), political-institutional judicial accountability responds to three objectives underpinning this concept: promoting the rule of law, public confidence, and institutional responsibility. This rationale stands behind the notorious anti-majoritarian difficulty debate in the U.S. (Bickel, 1962), which stems from the fear that unelected institutions may use state power at the expense of political will. The U.S. context illustrates how political accountability shapes judicial appointments.

In the U.S., debates on judicial activism—targeting both liberal and conservative jurisprudence (Easterbrook, 2002; Marshall, 2002)—have amplified concerns over the political accountability of the Supreme Court, particularly in its perceived anti-majoritarian role (Kramer, 2001; Benson, 2008). While tenure during good behavior ensures judicial independence, accountability pressures have shifted to the highly politicized appointment

and confirmation process (Ferejohn and Kramer, 2002; Witres, 2006), as well as to self-imposed doctrines of restraint such as justiciability limits and discretionary certiorari review (Bickel, 1962), all of which highlight the tension between institutional autonomy and the democratic imperative to constrain power through the rule of law (Rosenfeld, 1993; Gardbaum, 2001).

The outcry over judicial activism entangled with judicial appointments has also catalyzed the judicial reform discourse in India and culminated in the aftermath of the NJAC judgment.[13]

Another illustrative example of judicial activism was the recent reform of the Israeli Supreme Court appointment under the Netanyahu government. The government backed up its proposal with the claim that the Supreme Court had exceeded its jurisdiction over the past decade and significantly impeded the capacity of elected coalitions and ministers to implement governmental policies.

While judicial reforms are often criticized as threats to judicial independence, Bugaric and Tushnet (2021: 2368) emphasize that not all alterations are inherently harmful, as some may serve as justified systemic improvements, especially when existing mechanisms have become ineffective or politically untenable. To contextualize such reforms, the authors (2022: 162) distinguish between "fine-tuning"—modest, constitutionally bounded adjustments motivated by good governance—and "court-smashing," which entails more radical interventions that risk undermining judicial independence, urging the development of tailored criteria and context-based assessments to differentiate between the two.

There have been numerous theoretical accounts recently aiming to conceptualize irregular interference in the composition of the bench, which include tampering with the judicial appointments, grouped under the court-packing umbrella term. The theoretical ambiguities in rule of law discourse become particularly acute when examining emerging practices of court-packing, which blur the line between reform and manipulation.

Court-packing has become a buzzword in constitutional theory. The term was coined within the American public discourse amidst Roosevelt's 1937 Reorganization Bill debate by members of the self-instituted National Committee to Uphold Constitutional Government, run by journalist Edward Rumely. 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 economic regulation measures. Roosevelt attempted to pass a law to add a new justice to the bench for each sitting who failed to retire after age 70. This attempt failed, but the idea remained within American constitutional history as the "court-packing plan."

However, Roosevelt was neither the first nor the last representative of other branches of government that tried to change the size of the Supreme Court for political gain (Grove, 2018: 470). Throughout the 18th and 19th centuries, court packing was an appropriate and desirable method of dealing with a recalcitrant Supreme Court. Furthermore, as the U.S. Constitution is silent on the number of Supreme Court Justices, the prohibition of court packing is

13. *Supreme Court Advocates-on-Record Association and Another v. Union of India* (NJAC Case) (2015) 4 SCC 1.

not explicitly worded in the U.S. Constitution or the Supreme Court's jurisprudence. Hence, political animosity towards this practice was not derived from a constitutional norm but from a constitutional convention construed in the mid-twentieth century (Grove, 2018: 469).

Recently, the discourse on court packing in the U.S. has changed significantly. It gradually shifted from the "nuclear constitutional weapon" (Weill, 2021) to "the least-bad option for restoring the Court's role as a democratic guardrail" (Keck, 2021).

The perspective on this phenomenon shifts outside of the U.S. 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 departs from this to capture "politicians' motivation to tinker with the court's composition, irrespective of their means" (Kosar and Sipulova, 2020: 135). 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." Their research differentiates three different strategies of court-packing:1) expanding, 2) emptying, and 3) swapping. While the first two strategies are relatively straightforward and presuppose formal changes in the number of judges, the third entails situations in which governments do not alter the number of sitting judges but change the composition of the bench qualitatively instead.

Dixon and Landau (2021) took a slightly more nuanced approach that places court packing within the analytical framework of abusive judicial review.[14] 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" (Dixon and Landau, 2021: 82). Hence, these authors observe court-packing and court-curbing practices as the government's strategy to influence courts to engage in abusive judicial review. In this way, governments indirectly undermine the tenets of liberal democracy, including the rule of law.

In search for a comprehensive framework on court-packing, Tom Daly (2022) distinguishes five criteria to be considered when assessing this phenomenon: (i) the democratic context – analyzing court-packing within the broader political context and democratic trajectory of the nation; (ii) articulated purpose – emphasizing the importance of clearly stating the reform's objectives and the extent to which it deviates from the norm; (iii) reform options – considering alternative or less controversial reforms that can achieve the desired outcomes; (iv) reform process – highlighting the

14. 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.

significance of an open, inclusive, and participatory process for implementing reforms; and (v) repetition risk – addressing measures to prevent the potential for retaliatory actions when undertaking well-intentioned reforms.

Based on democratic decay theory, Benjamin Garcia Holgado and Raúl Sánchez Urribarri (2023) differentiate between two contexts of court-packing: *policy-driven* and *regime-change*. The former is an isolated technique employed by other branches of government to achieve a specific political goal or agenda. Although this interference may affect the independence of a current bench, it does not distort it to the extent that citizens are deprived of effective legal protection. According to Garcia Holgado and Urribari (2023: 6), the critical difference between the two court-packing types is the *preferences* and *goals* of political actors who wish to pursue such interference with judicial design.

The conflicting opinions regarding the legitimacy of judicial reforms, even within democratic liberal constitutionalism alone, complicate the argument for using intent analysis as a conclusive indicator of the rule of law violations. Relying solely on intent analysis quickly blurs into a political assessment, suggesting that the rule of law is limited to being a political ideal rather than a constitutionally binding principle.

The previously mentioned court-packing theories seek to deepen the analytical framework for assessing interference with judicial independence. The question we now engage with is how the rule of law theory may respond to that quest.

3.1 Common Approaches to the Rule of Law and Their Limitations

This section outlines the most influential rule-of-law theories, not to provide an exhaustive overview—nor would such an endeavor be warranted—but to illuminate how existing frameworks struggle to account for the political abuse of legal mechanisms, particularly in matters of institutional design and judicial governance. These theoretical constraints become especially apparent when rule-of-law standards are employed to assess reform interventions targeting judicial appointments and dismissals. While such standards often succeed in identifying formal compliance or blatant violations, they offer limited traction in addressing the subtle and context-dependent forms of interference that now characterize backsliding democracies.

Traditionally, the rule of law has been framed as a constellation of formal legal qualities meant to safeguard individual liberty and constrain arbitrary government. Allan (1994: 21-22) observed that the rule of law embodies an amalgam of standards, expectations, and aspirations, integrating ideas of liberty and justice into the framework that governs the relationship between state and citizen. The dominant 20th-century approach—sometimes described as a "laundry-list" theory (Krygier 2019, 748)—has focused on enumerating formal criteria that the law must meet to be deemed compatible with the rule of law. These include generality, clarity, stability, and congruence between legal norms and their application. Raz (1979) notably presented the rule of law as a morally neutral ideal, one among

several societal virtues such as democracy or equality. For Raz, the value of the rule of law lies in its capacity to guide behavior and limit uncertainty, not in the substantive justice of the laws themselves. Kramer (2004: 65) extended this formalist tradition by framing the rule of law as a "state of affairs" defined by the extent to which a legal system fulfills Fuller's (1969) eight principles of legality—such as generality, non-retroactivity, and coherence.

This formalist tradition has been met with both practical and theoretical challenges. On the one hand, such conceptions shield the rule of law from becoming an open-ended or manipulable ideal; on the other, they leave it vulnerable to being exploited by regimes that abide by procedural legality while hollowing out its animating values. Scholars such as Allan (2003: 31-60) have pointed out that the narrow focus on legality may prevent rule-of-law theory from addressing real-world political manipulation of institutions. In response, "substantive" or "thick" theories have emerged, seeking to anchor the rule of law in broader values such as justice, democracy, or human rights. Craig (2017) has shown that while substantive theories enrich the normative content of the rule of law, they risk rhetorical inflation: once a government act is labeled as violating the rule of law, it is immediately cast in a negative light, regardless of interpretive variation. Thus, even substantive theories require internal clarity to be used meaningfully in evaluation.

Another recurrent assumption across both formal and substantive theories is the idea of a politically insulated judiciary. Existing frameworks frequently presuppose that judicial independence is structurally guaranteed and do not sufficiently explore how the rule of law might be operationalized to defend this independence in adverse political conditions. A shift in theoretical focus is thus warranted—one that moves away from abstract definitional debates and instead examines how the rule of law can serve as a practical tool for safeguarding institutional integrity. Krygier (2011: 68) makes this case by urging scholars to treat the rule of law as a "teleological, not anatomical" concept. Rather than merely cataloguing its institutional or procedural components, analysis should begin by clarifying the purposes it is meant to serve—chiefly, the tempering of arbitrary power—and assessing whether current practices align with that end (Krygier, 2017). Such an approach opens the door to investigating how the rule of law is implicated in the design, operation, and reform of the judiciary—not only through legislation or adjudication but in broader governance processes where law and political discretion intersect.

Institutional design becomes a crucial site of inquiry in this framework. As Palombella (2010) contends, a teleological approach to the rule of law cannot function independently of a stable institutional architecture. If the rule of law is to resist manipulation, it must be supported by "constitutive rules" that embed its telos into the structure of governance. Otherwise, even well-intentioned reform initiatives can become vehicles for distortion, especially when formally compliant but substantively deviant from the principle of non-arbitrariness. Endicott (2020) reinforces this argument by identifying a critical dimension of arbitrariness that conventional legality-focused tests fail to capture: the departure of state actions from reasoned justification. For Endicott, arbitrary government is not simply unregulated, inconsistent, or unpredictable; it is unreasonable in the sense that it lacks the

justificatory grounding expected within a rule-of-law order. This insight underscores the need for a framework that can recognize when power is exercised in ways that disrespect the individual or the political community, even if legal procedures are followed.

This conceptual shift toward justification has been further advanced through the normative paradigm of the "culture of justification." Coined by Mureinik (1994) and developed by Dyzenhaus (2006), this framework reimagines legality as grounded not in authority or compliance but in the obligation to provide reasoned and persuasive justifications for the exercise of public power. The culture of justification seeks to replace what Mureinik called the "culture of authority," transforming constitutional governance into a deliberative and accountable practice. Dyzenhaus situates this culture at the intersection of administrative and constitutional law, proposing that judicial review serves not only to enforce legality but to institutionalize rational governance. Within this perspective, legal rules are not merely regulatory tools but standards of justification that protect against abuse.

Schauer (1991) warns that a rigid attachment to rules, absent their justificatory frameworks, can lead legal reasoning to devolve into formalism detached from purpose. Thus, justificatory reasoning must infuse not only judicial decision-making but the very structures through which laws are interpreted and applied. For rule-of-law theory, this entails a stronger focus on how institutions are designed to channel, constrain, and legitimize power through reasoned justification. Institutional design is not a neutral container for rule-of-law values—it is their medium and condition of possibility (Palombella, 2010).

In illiberal contexts, these conceptual insights acquire particular urgency. As Sajó (2021) shows, regimes may follow legal procedures precisely to undermine their purpose. This phenomenon of "legal cheating" demonstrates how the rule of law can be instrumentalized to confer legitimacy on practices that erode judicial independence. By formalistically adhering to legal norms while manipulating their implementation, governments can claim compliance with the rule of law while actively betraying it. In such circumstances, traditional criteria of legality fail to register the abuse. The emphasis must instead be placed on whether governmental action reflects the justificatory commitments and non-arbitrary character central to the rule of law.

To meet this challenge, rule-of-law theory must engage more deeply with political practice. Rather than treating legal norms as autonomous evaluative tools, it must ask how these norms are operationalized within institutional arrangements and how they perform under political pressure. The rule of law, understood as the tempering of arbitrary power through public justification, cannot be reduced to doctrinal benchmarks or procedural compliance. It must be defended as a dynamic and relational principle—one that requires attention to both its normative foundations and its institutional preconditions.

The constitutional practice already reveals possible tools to engage in such an enterprise. One of the possible trajectories is looking into the public justification behind the judicial reforms. 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. 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, appealing 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. 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 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.[15]

15. "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

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 (2019: 189) characterized as an E.U. "laboratory for implementing international anti-corruption and judicial independence standards." 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 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 (Mungiu-Pippidi, 2022).

As Mariam Begadze (2023) 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. 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.[16] 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.[17] 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 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,

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 self-serving 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." (Rupnik, 2007: 21)

16. ECtHR. *Dolińska-Ficek and Ozimek v Poland*. App nos 49868/19 and 57511/19, 08/11/2021, para. 330.

17. ECtHR. *Advance Pharma sp. z o.o. v Poland*. App no 1469/20, 03/02/2022, para. 333.

institutional context, and governmental behavior patterns, which reveal the true nature of the purported reforms.

It is 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 not only for their formal legality but also their 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.

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 been 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.

Conventional rule of law assessments—rooted either in formal legality or in broadly defined substantive values—struggle to capture the nuanced dynamics of judicial appointment reforms in contemporary governance. This chapter has argued that such approaches are insufficient when political actors engage in *legal cheating* or strategic manipulation of judicial design under the guise of compliance. By treating the rule of law as a dynamic constraint on arbitrary power rather than a static set of institutional requirements, we gain a more precise tool for distinguishing between legitimate institutional reform and abuse.

The proposed framework draws on the normative imperative of justification, viewing the rule of law not merely as procedural regularity but as a requirement that power be exercised in a reasoned and accountable manner. This perspective foregrounds the relationship between institutional architecture and the legitimacy of legal reform, particularly in the context of judicial appointments where political prerogative and judicial autonomy are in tension.

In focusing on *political insularity* as the core evaluative dimension of judicial independence, this chapter reframes rule of law analysis around the capacity of institutions to resist political instrumentalization. While this represents only an initial step in theorizing the rule of law–judicial design nexus, it

suggests a promising direction for further research. Future studies should refine how justificatory standards can be operationalized in comparative contexts—especially where legal forms are co-opted to undermine the very values they purport to uphold.

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