

ARTICLE

Special Issue: Informal Judicial Institutions—Invisible Determinants of Democratic Decay

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

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Abstract

De-democratization may take the form of executive-led attacks as well as incremental decrepitude, gradual emptying of underlying constitutional values, and state inertia. Contrary to general wisdom, both exogenous erosion and endogenous decay are heavily affected by informality. As courts are often the first institutions affected by de-democratization, this Article analyzes informality in erosion and decay of judicial institutions. It argues that such institutions interact with democracy in two core directions. The first one is endogenous and describes the decay of democratic judiciaries as a result of a long-term incongruence between formal and informal judicial institutions. The second direction captures the gradual erosion of informal institutions that have positive effects on judicial democratic resilience. These two processes, decay and erosion of informal judicial institutions, should not be overlooked. While they are less visible, slower, and often unintentional, they are as dangerous as frontal executive-led attacks on courts, because they significantly increase the window of opportunity for politicians who wish to downgrade the substance of democracy or even implement a regime change.

Keywords: De-democratization; democratic decay; democratic erosion; courts; informal judicial institutions

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

The decline of democracy¹ has affected young and unconsolidated, as well as long-established, democracies all over the world.² The 2023 V-Dem report noted that the global level of democracy in 2022 had returned to its 1986 value.³ Over seventy-two percent of the world's population, 5.7 billion people, live in autocracy. Within the last two decades, the number of democratizing countries has dropped from forty-three to fourteen, while a tightening of regimes has occurred in forty-two states with forty-three percent of the world's population—compared to thirteen states in 2002. Moreover, the tempo of de-democratization is increasing. Just within the last year, the

¹For simplification purposes, we use the word democracy as an overarching label for liberal and constitutional democracies.

²In 2020, The Economist introduced the results of its Global Democracy Index with the title “Global Democracy Has Another Bad Year.” See *Global Democracy Has Another Bad Year*, THE ECONOMIST (Jan. 22, 2020), <https://www.economist.com/graphic-detail/2020/01/22/global-democracy-has-another-bad-year>. In 2022, a new low for democracy followed. See *A New Low for Global Democracy*, THE ECONOMIST (Feb. 9, 2022), <https://www.economist.com/graphic-detail/2022/02/09/a-new-low-for-global-democracy>.

³1978 in the Asia-Pacific region. See DEMOCRACY REPORT 2023: DEFIANCE IN THE FACE OF AUTOCRATIZATION 6, V-DEM INSTITUTE (2023) https://www.v-dem.net/documents/29/V-dem_democracyreport2023_lowres.pdf.

number of autocratizing countries has increased by nine.⁴ The hope for the fourth wave of democratization, ignited by the Arab Spring in 2011, has been crushed, and a part of the third wave of democratization has been undone.

The dreadful numbers are a bad omen for international organizations that have invested a great deal of finance and capital in various state-building programs.⁵ Liberal democracy, it seems, cannot be easily anchored via institutional blueprints or global international law regimes.⁶ Moreover, as many scholars recently noted, the character of the de-democratization process has changed dramatically.⁷ Instead of the ruptures or theatrical coups d'état of the past, modern democracies die in slow, almost invisible processes,⁸ while still very much committed to formal legality⁹ or advocating the benefits of majoritarian democracy.¹⁰

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

Legal scholars have recently developed several concepts to address this phenomenon, such as abusive constitutionalism,¹³ abusive techniques of legal interpretation,¹⁴ constitutional rot,¹⁵ constitutional backsliding,¹⁶ constitutional capture,¹⁷ constitutional retrogression,¹⁸ and autocratic legalism.¹⁹ Political scientists do not lag behind and have employed myriads of concepts to describe the downgrading of democracy across hybrid as well as fully democratic regimes, such as democratic regression,²⁰ democratic backsliding,²¹ de-democratization,²² democratic erosion, and the death of democracy.²³

The terminological hive is not a mere language exercise. Scholars are employing these terms in an effort to understand the nature and so far less explored factors leading to the crumbling of democratic institutions: The incrementality, gradual emptying of formal institutions, and state inertia. A deeper view in the myriad of concepts hints that they build on empirical experience that, however, occurs on

⁴*Id.*

⁵Christina Parau, *Explaining Judiciary Governance in Central and Eastern Europe: External Incentives, Transnational Elites and Parliament Inaction*, 67 EUR.-ASIA STUDS. 409 (2015); Linn Hammegren, *Do Judicial Councils Further Judicial Reform? Lessons from Latin America* (Carnegie Endowment for Int'l Peace, Working Paper, 2002). <https://carnegieendowment.org/files/wp28.pdf>.

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

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

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

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

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

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

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

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

¹⁴See LANDAU & DIXON, *supra* note 9.

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

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

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

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

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

²⁰GERO ERDMANN & MARIANNE KNEUER, *REGRESSION OF DEMOCRACY?* (2011).

²¹David Waldner & Ellen Lust, *Unwelcome Change: Coming to Terms with Democratic Backsliding*, 21 ANN. REV. POL. SCI. 93 (2018). See Bermeo, *supra* note 16.

²²Matthijs Bogaards, *De-democratization in Hungary: Diffusely Defective Democracy*, 25 DEMOCRATIZATION 1481 (2018).

²³See LEVITSKY & ZIBLATT, *supra* note 7.

two different axes. The first axis differentiates between exogenous and endogenous factors leading to de-democratization. The second axis explores the agency of regime changes, understanding de-democratization either as deliberate steps of political actors relying on strong electoral majorities or unintentional deterioration of norms and values that underpin constitutional democracies.²⁴

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

Judiciaries appear to be one of the first targets of de-democratization on both axes.²⁵ Political leaders across regimes cannot withstand the temptation to either weaken or align courts more closely to their own interests,²⁶ deliberately undoing democratic checks, or simply prioritizing short-term partisan benefits.²⁷ But, like other democratic structures, courts face challenges other than executive-led attacks. To complicate matters even further, recent scholarship has suggested that many of these challenges occur covertly, informally, or via the abuse of existing constitutional norms. We show that the endogenous-exogeneous distinction implicitly invoked in academic debate is actually very helpful in understanding the role that informal judicial institutions play in de-democratization processes.

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

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

²⁴András Jakab, *Informal Institutional Elements as Both Preconditions and Consequences of Effective Formal Legal Rules: The Failure of Constitutional Institution Building in Hungary*, 68 AM. J. COMPAR. L. 760 (2020); Christine C. Bird & Zachary A. McGee, *Looking Forward: Interest Group Legal Strategy and Federalist Society Affiliation in the United States Circuit Courts of Appeal*, 55 POLITY 389 (2023); Edit Zgut, *Informal Exercise of Power: Undermining Democracy Under the EU's Radar in Hungary and Poland*, 14 HAGUE J. ON RULE L. 287 (2022).

²⁵See, e.g., ANDRÁS SAJÓ, *RULING BY CHEATING* 66–80 (2021).

²⁶David Kosář & Katarína Šipulová, *Comparative Court-Packing*, 21 ICON 80 (2023).

²⁷See Keck, *supra* note 8.

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

These two processes, decay and the erosion of judicial institutions, should not be overlooked. They can originate from endogenous decay caused by internal tensions inside judicial structures – such as existence of two alternate systems of selection of judges, or from exogenous, often non-consensually executed, erosion of positive informal institutions and constitutional conventions. While they are less visible, slower, and often unintentional as they may not even aim at de-democratization itself, they are as dangerous as frontal executive-led attacks on courts because they significantly increase the window of opportunity for politicians who wish to implement regime change and further downgrade the substance of democracy.

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

B. De-Democratization and Informal Judicial Institutions

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

1. Understanding the Judiciary is Incomplete Without Informal Institutions

If there was one common denominator of the de-democratization wave of the twenty-first century, it would be the widespread attacks on courts shielded by the veil of legality.²⁹ Both Viktor Orbán³⁰ and Jarosław Kaczyński³¹ captured national judiciaries through a series of sinister reforms. Recep Erdoğan packed the Constitutional Court and persecuted any judges deciding against his autocratizing policies.³² Benjamin Netanyahu's recent coalition announced a widescale reform of the Israeli judiciary³³ and Prime Minister Narendra Modi's government stepped up its pressure on the Indian Supreme Court.³⁴

All these examples show that authoritarian and populist leaders view courts as bastions of liberal constitutionalism and their enemies, and, therefore, go after courts quickly and resolutely.³⁵

²⁹See Scheppele, *supra* note 19.

³⁰Gábor Halmai, *From the "Rule of Law Revolution" to the Constitutional Counter-Revolution in Hungary*, in 2012 EUR. Y.B. HUM. RTS. 367–84 (Wolfgang Benedek & Florence Benoit-Rohmer eds., 2012); Renata Uitz, *Can You Tell When an Illiberal Democracy Is in the Making? An Appeal to Comparative Constitutional Scholarship from Hungary*, 13 ICON 279 (2015).

³¹Anna Śledzińska-Simon, *The Rise and Fall of Judicial Self-Government in Poland: On Judicial Reform Reversing Democratic Transition*, 19 GERMAN L.J. 1839 (2018).

³²Ergun Özbudun, *Turkey's Judiciary and the Drift Toward Competitive Authoritarianism*, 50 INT'L SPECTATOR 42 (2015); Berk Esen & Sebnem Gumuscu, *Rising Competitive Authoritarianism in Turkey*, 37 THIRD WORLD Q. 1581 (2016); Ozan O. Varol, Lucia D. Pellegrina & Nuno Garoupa, *An Empirical Analysis of Judicial Transformation in Turkey*, 65 AM. J. COMP. L. 186 (2017).

³³Joseph H.H. Weiler, *Israel: Cry, The Beloved Country*, VERFASSUNGSBLOG (Feb. 1, 2023), <https://verfassungsblog.de/cry-beloved-country/>.

³⁴Rohit Sarma, *On the Road to Censorship*, VERFASSUNGSBLOG (Mar. 3, 2023), <https://verfassungsblog.de/on-the-road-to-censorship/>.

³⁵Pablo Castillo-Ortiz, *The Illiberal Abuse of Constitutional Courts in Europe*, 15 EUR. CONST. L. REV. 48 (2019).

Democracies are generally perceived as more resilient when strong judicial constraints on the executive power are present, and when democratic institutions were strong in the past.³⁶ The sanctions courts can inflict on political actors go well beyond the constitutional review of legislation or criminal prosecutions. As a branch of power, the judiciary serves as a check on two political powers, constrains the executive, and can potentially hold abusers of constitutional norms to account. Moreover, courts may also shape political narrative, do important fact-finding work, and interpret the stories to the public. They can mobilize people and potentially lower or delegitimize the rhetoric of political leaders.³⁷

Yet, the swift capture of the judicial branch across several jurisdictions³⁸ has shown that formal structures of democratic judiciaries dismantled surprisingly easily once the struggle became real.³⁹ However, some scholars have recently pointed out that informal institutions could also have contributed to the rapid decay in the judiciary.⁴⁰ The resurrection of the court-packing debate, long considered a constitutional hardball practice,⁴¹ spurred debates about the looming democratic crisis.⁴² The abandonment of the *sub judice* rule in the UK, where the executive did not stand by the courts whose public image crumbled under the pressure of tabloid media after the Brexit decision, challenged the courts in a way unheard of for decades.⁴³ Even in countries that have so far escaped democratic decline, such as Norway and Germany, scholars and politicians have started ringing the bell and calling for rigorous stress-tests in order to find and fix the loopholes in their court administration.⁴⁴

The fixation on formalization as a panacea for looming de-democratization failed, though.⁴⁵ As with any social reality, the functioning of courts cannot rely solely on formal frameworks.⁴⁶ While in some countries well-designed formal institutions do not function well, owing to the existence of

³⁶Vanessa A. Boese, Amanda B. Edgell, Sebastian Hellmeier, Seraphine F. Maerz, & Staffan I. Lindberg, *How Democracies Prevail: Democratic Resilience as a Two-Stage Process*, 28 DEMOCRATIZATION 885 (2021).

³⁷Amanda Driscoll & Michael J. Nelson, *Are Courts “Different?” Experimental Evidence on the Unique Costs of Attacking Courts*, RSCH. & POLS., (2023).

³⁸Kriszta Kovács & Kim Lane Scheppelle, *The Fragility of an Independent Judiciary: Lessons from Hungary and Poland—And the European Union*, 51 COMMUNIST & POST-COMMUNIST STUDS. 189 (2018).

³⁹David Kosař, Jiří Baroš & Pavel Dufek, *The Twin Challenges to Separation of Powers in Central Europe: Technocratic Governance and Populism*, 15 EUR. CONST. L. REV. 427 (2019).

⁴⁰Guillermo A. O'Donnell, *Polyarchies and the (Un)Rule of Law in Latin America: A Partial Conclusion*, in (UN)RULE OF LAW AND THE UNDERPRIVILEGED IN LATIN AMERICA 303–37 (Juan E. Mendez, Guillermo A. O'Donnell & Paulo Sergio Pinheiro eds., 1999); Hans-Joachim Lauth, Paper Presented at the Conference on Informal Institutions and Politics in the Developing World, WCFA, Harvard University (Apr. 5, 2002); Henry Farrell & Adrienne Héritier, *Formal and Informal Institutions Under Codicision: Continuous Constitution-Building in Europe*, 16 GOVERNANCE 577 (2003); Gretchen Helmke & Steven Levitsky, *Informal Institutions and Comparative Politics: A Research Agenda*, 2 PERSPS. ON POL. 725 (2004); Daniel M. Brinks, *The Rule of (Non)Law: Prosecuting Police Killings in Brazil and Argentina*, in INFORMAL INSTITUTIONS AND DEMOCRACY: LESSONS FROM LATIN AMERICA 201–26 (Gretchen Helmke & Steven Levitsky eds., 2006); see Jakab, *supra* note 24.

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

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

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

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

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

⁴⁶Andrea Pozas-Loyo & Julio Rios-Figueroa, *Anatomy of an Informal Institution: The “Gentlemen’s Pact” and Judicial Selection in Mexico, 1917–1994*, 39 INT’L POL. SCI. REV. 647 (2018); Bjoern Dressel, Raul Sanchez-Urribarri & Alexander Stroth, *Courts and Informal Networks: Towards a Relational Perspective on Judicial Politics Outside Western Democracies*, 39 INT’L

competing informal institutions,⁴⁷ in other countries not so well-designed formal institutions operate smoothly because of corresponding informal institutions that fill the gaps in formal rules and increase the commitment to their essence.⁴⁸ Informal institutions are sometimes described as the invisible social glue of political systems, filling in the gaps of formal regulation. They thus may either complement or compete with formal institutions⁴⁹ and, based on consonance with values and principles underlining existing formal frameworks, these informal institutions can either subvert the quality of democracy or help to protect it.⁵⁰

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

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

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

Third, not all informal rules are necessarily institutionalized. Actors sometimes create informal practices which do not stick or fail to become widely accepted by other stakeholders. In order to capture these problematic dynamics, we use our triadic approach to the study of informality,⁵⁵ and explore informal acts, informal practices, and informal institutions affecting the functioning of the judiciary. We discuss the distinction between informal acts, practices, and institutions in the introduction to this Special Issue.⁵⁶ By “functioning of the judiciary” we mean both judicial decision-making and judicial governance. Understanding these two definitions is crucial for

POL. SCI. REV. 573 (2018); Erica Harper & Yann Colliou, *Re-Imagining Customary Justice Systems: Interrogating Past Assumptions and Entertaining New Ones*, 15 HAGUE J. ON RULE L. 75 (2022).

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

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

⁴⁹See Helmke & Levitsky, *supra* note 40; Pozas-Loyo & Figueroa, *supra* note 47.

⁵⁰Paul Pierson, *Increasing Returns, Path Dependence, and the Study of Politics*, 94(2) AM. POL. SCI. REV. 251–67 (2000).

⁵¹We are drawing on North—from 1997—and Helmke and Levitsky—from 2004—who define informal institutions as socially shared rules, usually unwritten, that are created, communicated, and enforced outside of officially sanctioned channels and widely accepted as official. See Helmke & Levitsky, *supra* note 40.

⁵²David Kosař, Katarína Šipulová & Marina Urbániková, *Informality and Courts: Uneasy Partnership*, in this Special Issue.

⁵³See Helmke & Levitsky, *supra* note 40.

⁵⁴See David Kosař & Samuel Spáč, *Post-Communist Chief Justices in Slovakia: From Transmission Belts to Semi-Autonomous Actors?*, 13 HAGUE J. ON RULE L. 107 (2021).

⁵⁵David Kosař, Katarína Šipulová and Marina Urbániková, *Informality and Courts: Uneasy Partnership*, in this issue.

⁵⁶David Kosař, Katarína Šipulová and Marina Urbániková, *Informality and Courts: Uneasy Partnership*, in this issue.

analyzing the interaction between informality and two axes of de-democratization, to which we now turn.

II. Two Axes of De-Democratization

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

Nevertheless, the case studies do hint at certain key variables, although the direction behind their impact remains unclear: The speed of the process, the agency behind the process, and the origins of factors creating opportunities for de-democratization. Both Ginsburg and Huq and Levitsky and Ziblatt use the term "erosion" to capture the slow, gradual, and barely visible character of de-democratization.⁶³ Tom Daly also highlights the unintentional character of degradation in his conceptualization of democratic decay, which he understands as an "incremental degradation of the structures and substance of liberal constitutional democracy."⁶⁴ For Daly, democratic decay is often almost invisible backsliding,⁶⁵ which comprises a subtle, step-by-step hollowing out of democratic governance. Similarly, Sadurski understands decay, just like constitutional rot, as a slow degradation occurring almost as if without a plan.⁶⁶ However, Ginsburg⁶⁷ and Knauer⁶⁸ use the term "erosion" explicitly to describe the deliberate character of de-democratization, and Haggard and Kaufman reject erosion and decay because they want to emphasize the deliberate character of de-democratization.⁶⁹

Holgado and Urribarri, as well as Kosař and Šipulová, use the example of court-packing practices to demonstrate that the same technique can be used both with an intent to instigate a regime change and with an intent "merely" to gain short-term partisan benefits.⁷⁰ Thomas Keck points out that some of the de-democratization occurs as a result of inertia, inability of the state to fulfill its role. The dysfunction of state democratic structures can be deliberate but can also result from neglect.⁷¹ Casey and Kenny argue that the failure of decaying democratic institutions follows

⁵⁷See Kosař & Šipulová, *supra* note 26; Benjamin Garcia Holgado & Raul Sánchez Urribarri, *Court-Packing and Democratic Decay: A Necessary Relationship?*, 12 GLOB. CONSTITUTIONALISM 350 (2023); Keck, *supra* note 42.

⁵⁸See Pozas-Loyo & Rios-Figueroa, *supra* note 46.

⁵⁹Ling Li, *Political-Legal Order and the Curious Double Character of China's Courts*, 6 ASIAN J. L. & SOC'Y 19 (2019).

⁶⁰See Popova & Beers, *supra* note 47.

⁶¹ABHINAV CHANDRACHUD, *THE INFORMAL CONSTITUTION: UNWRITTEN CRITERIA IN SELECTING JUDGES FOR THE SUPREME COURT OF INDIA* (2014).

⁶²Johannes Gerschewski, *Erosion or Decay? Conceptualizing Causes and Mechanisms of Democratic Regression*, 28 DEMOCRATIZATION 43 (2021).

⁶³Tom Ginsburg & Aziz Z. Huq, *How to Save a Constitutional Democracy*, in *HOW DEMOCRACIES DIE* (Steven Levitsky & Daniel Ziblatt eds., 2020).

⁶⁴Tom Gerald Daly, *Democratic Decay: Conceptualising an Emerging Research Field*, 11 HAGUE J. ON RULE L. 9 (2019).

⁶⁵*Id.*

⁶⁶WOJCIECH SADURSKI, *POLAND'S CONSTITUTIONAL BREAKDOWN* 12 (2019).

⁶⁷Tom Ginsburg, *Democratic Erosion Without Prerequisites? Poland and the Two Liberalisms*, in *CONSTITUTIONALISM UNDER STRESS* (Uladzislau Belavusau & Aleksandra Gliszczynska-Grabias eds., 2020).

⁶⁸*Id.*

⁶⁹STEPHAN HAGGARD & ROBERT KAUFMAN, *BACKSLIDING: DEMOCRATIC REGRESS IN THE CONTEMPORARY WORLD* (2021); Stephan Haggard & Robert Kaufman, *The Anatomy of Democratic Backsliding*, 32 J. DEMOCRACY 27 (2021).

⁷⁰See Holgado & Urribarri, *supra* note 57; Kosař & Šipulová, *supra* note 26.

⁷¹See Keck, *supra* note 8.

from the bureaucracy's dominance over the political executive, sclerotic inaction,⁷² or corruption, but also obsession with formalistic legality.⁷³ Gerschewski acknowledges gradual institutional change and uses it as a springboard which distinguishes endogenously caused decay—exhaustion and the gradual breakdown of institutions created by internal tensions⁷⁴—or exogenously driven erosion—where democratic institutions are washed out by external, outside forces.⁷⁵

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

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

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

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

De-democratization can result both from exogenous executive-led interference with the judiciary and from the internal inertia and dysfunction of judicial institutions. Looking at empirical examples of courts in democracies under stress, we have identified two core directions in which informal judicial institutions interact with democracy, and the process of de-democratization in particular.

I. Decay of Democratic Judiciaries

The first one is endogenous and describes *the decay* of democratic judiciaries as a result of a long-term incongruence between formal and informal judicial institutions. As we explained in the

⁷²Paul F. Scott, *The "Publius Paradox" and the United Kingdom: Comments on Adrian Vermeule's 2018 Chorley Lecture*, MOD. L. REV. F. (2019).

⁷³See Casey & Kenny, *supra* note 9.

⁷⁴EXPLAINING INSTITUTIONAL CHANGE: AMBIGUITY, AGENCY, AND POWER (James Mahoney & Kathleen Thelen eds., 2010); Kathleen Thelen, *Introduction: Institutional Change in Advanced Political Economies*, in BEYOND CONTINUITY: INSTITUTIONAL CHANGE IN ADVANCED POLITICAL ECONOMIES 1–39 (Wolfgang Streeck & Kathleen Thelen eds., 2005).

⁷⁵See Gerschewski, *supra* note 62.

⁷⁶See SAJÓ, *supra* note 25, at 294–99.

⁷⁷See Kosař & Šipulová, *supra* note 26.

⁷⁸See Gerschewski, *supra* note 62.

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

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

If, on the one hand, formal institutions are still effective, then divergent informal judicial institutions will create incentives for actors to alter the substantive effect of formal rules without directly violating them. Helmke and Levitsky label such informal institutions as *accommodating*.⁸¹ For example, the selection of judges in Paraguay is formally shared between the President, the Senate, and, in the case of the lower judiciary, the Supreme Court. The formal selection rules, however, fail to guarantee external judicial independence because judges who attempt to act independently against the government are typically swiftly dismissed.⁸² As a result, the formal institution regulating the selection of judges is still in place and technically effective. Nevertheless, contrary to its purpose, it does not strengthen the value of judicial independence because the behavior of judges is incentivized by alternative divergent informal practices.

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

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

⁷⁹See Helmke & Levitsky, *supra* note 40; see Pozas-Loyo & Figueroa, *supra* note 46.

⁸⁰See Helmke & Levitsky, *supra* note 40, at 728.

⁸¹Helmke & Levitsky, *supra* note 40, at 730.

⁸²See Pozas-Loyo & Rios-Figueroa, *supra* note 47, at 22.

⁸³See Helmke & Levitsky, *supra* note 40, at 730.

⁸⁴Simone Benvenuti & Davide Paris, *Judicial Self-Government in Italy: Merits, Limits and the Reality of an Export Model*, 19 GERMAN L.J. 1641 (2018).

⁸⁵For more recent examples of an inappropriate "closeness" of Spanish apex court judges to politicians, see Joan Solanes Mullor, *Spain, Judicial Independence, and Judges' Freedom of Expression: Missing an Opportunity to Leverage the European Constitutional Shift?*, 19 EUR. CONST. L. REV. 271 (2023).

⁸⁶Maria Popova, *Can a Leopard Change its Spots? Strategic Behavior Versus Professional Role Conception During Ukraine's 2014 Court Chair Elections*, 42 L. & POL'Y 365 (2020).

judges, as well as informal case assignment to loyal judges. Such problems have been reported from Georgia as well.⁸⁷

Similarly, in pre-2011 Hungary, the long-term criticism of the old communist constitution, detached from the new democratic regime, the poor effectiveness of the pre-Orbán judicial council, and the professional solidarity of conservative communist-era judges created an opportunity for Viktor Orbán, when he came into power. Personal policies, such as the selection of judges or apex courts' chief justices, were foggy and nontransparent, leading to the establishment of various informal practices organized around collegiality and loyalty, which contravened the idea of meritocratic and transparent selection criteria.⁸⁸ Neither political actors nor judicial self-governance actors managed to amend the formal institutions that filled the system with too much arbitrariness. The Hungarian conservative legal elites initially backed Orbán's reforms because they wanted to undo liberal reforms of Orbán's predecessors—including the few informal institutions that filled in their gaps and contravened the ideals of an independent, transparent, and accountable judiciary. Because these were constitutionally entrenched, it was Orbán with his constitutional supermajority in the Parliament who finally offered them the chance to undo the liberal reforms.

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

Another interesting example comes from Slovakia. The original design of the Slovak judicial council was expected to create a council composed of a mixture of judges and politicians. The formal institution, however, regulated merely how many seats should be elected by the judiciary and the political branches without explicitly specifying from which pool of candidates each branch is supposed to elect its members of the judicial council. The formal institution implicitly expected that each branch would elect agents from its own professional group—in other words, judges would elect judges, and political actors would elect either politicians or lay people having similar political preferences. This assumption did not work out. Instead, an informal practice of electing judges appeared across all principals, including politicians. This resulted in a very homogenous judicial council from the professional point of view, packed with judges. This practice not only conflicted with the intention of the constitution-makers, who wanted to have the different voices inside the council, but also reduced the perceived independence of those judges who were elected by political actors.⁹⁰

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

⁸⁷Nino Tsereteli, *Constructing the Pyramid of Influence: Informal Institutions as Building Blocks of Judicial Oligarchy in Georgia*, in this issue. See also Nino Tsereteli, *Backsliding into Judicial Oligarchy? The Cautionary Tale of Georgia's Failed Judicial Reforms, Informal Judicial Networks and Limited Access to Leadership Positions*, 47 REV. CENT. & E. EUR. L. 167 (2022).

⁸⁸Attila Vincze, *Schrödinger's Judiciary—Formality at the Service of Informality in Hungary*, in this issue.

⁸⁹Serhii Lashyn, Anastasia Leshchshyn, & Maria Popova, *Civil Society as an Informal Institution in Ukraine's Judicial Reform Process*, in this issue.

⁹⁰Samuel Spáč, Katarína Šipulová, & Marina Urbániková, *Capturing the Judiciary from Inside: The Story of Judicial Self-Governance in Slovakia*, 19 GERMAN L.J. 1741 (2018). Katarína Šipulová & Samuel Spáč, *(No) Ghost in the Shell: The Role of Values Internalization in Judicial Empowerment in Slovakia*, in this issue.

Finally, sometimes formal institutions experience decay outside of any incongruence, simply because they are ineffective and are not tied to any other informal institution or practice that would attempt to fill in their gaps. In Spain, the renewal of the Judicial Council has been pending since 2018 because the Parliament has yet to appoint twenty members, twelve judges, and eight jurists, which should happen by means of a three-fifths majority. The supermajority rule, however, requires the agreement of the two major political parties, the Socialist Party PSOE and the Popular Party, which has led to a stalemate.⁹¹ The current judicial council hence reflects the previous conservative majority in the Parliament of 2013.⁹² The head of the Council and one of the judicial members have already resigned from their posts due to unsustainable gridlock.

II. Erosion of Democratic Judiciaries

In the previous Subsection, we described the decay of democratic judiciaries which involves internal disruptions inside judicial structures due to the tension created by the incongruence between formal and informal institutions. In this Subsection, we analyze the *erosion* of democratic judiciaries which describes a different process, in which the informal institutions with positive effects on judicial resilience are dismantled by external institutional forces and gradually lead to the hollowing out of formal judicial institutions that are, on their own, not sufficient to keep the de-democratization at bay.

This group of informal judicial institutions typically contains institutions, practices, or constitutional conventions that fill the gaps in incomplete formal institutions, support them, or accommodate ineffective ones. For example, formal rules of merit-based selection often overlook deeper structural problems of societies like horizontal gender segregation⁹³ or lack of access of minorities to public offices. In some countries, constitutional conventions supplement formal rules with various requirements on proportionality—gender, social, regional, political opposition, and so on. These additional criteria do not necessarily contravene the spirit of the merit-based selection, but stratify it in a way which actually makes the process of judicial selection more robust and less susceptible to easy capture by one political actor.⁹⁴

Such auxiliary informal judicial institutions rely on a deeper running commitment of elites to values behind the formal institutions. That makes them both strong—they are shared socially and accepted—and weak—they are easy to abandon or overrule by new legislation. Once eroded, the remaining formal institutions can be completely hollowed out. However, if they work well and embed democratic substance beyond the formal structures, they may close down the window of opportunity for agents of autocratization and provide an additional layer of resistance against them. A fragile equilibrium between the two determines the split between countries which manage to survive democratic attacks—often narrowly⁹⁵—and rebound,⁹⁶ and those that succumb to democratic decay.

We opted for the term “erosion” because it allows us to highlight the exogenous factors and outside forces⁹⁷ standing behind interference with this category of informal judicial institutions. In the majority of cases these outside forces come from the executive and other political actors. The most discussed example of the removal of an auxiliary informal institution comes from the United

⁹¹See Aida Torres Pérez, *Judicial Self-Government and Judicial Independence: The Political Capture of the General Council of the Judiciary in Spain*, 19 GERMAN L.J. 1769 (2018). See also Bragado v. Spain, App. Nos. 53193/21, 53707/21, 53848/21, 54582/21, 54703/21, 54731/21 (June 22, 2023), <https://hudoc.echr.coe.int/eng?i=001-225331>.

⁹²See Torres Pérez, *supra* note 91.

⁹³Barbara Havelková, Marina Urbániková & David Kosař, *The Family Friendliness That Wasn't: Access, but Not Progress, for Women in the Czech Judiciary*, 47 L. & SOC. INQUIRY 1 (2021).

⁹⁴David Kosař & Attila Vincze, *Constitutional Conventions Concerning the Judiciary Beyond the Common Law*, in this issue.

⁹⁵Tom Ginsburg & Aziz Huq, *Democracy's "Near Misses"*, 29 J. OF DEMOCRACY 16 (2018).

⁹⁶Tom Ginsburg & Aziz Huq, *The Pragmatics of Democratic "Front-Sliding"*, 36 ETHICS & INT'L AFFS. 437 (2022).

⁹⁷Marianne Kneuer & Thomas Demmelhuber, *Gravity Centres of Authoritarian Rule: A Conceptual Approach*, 23 DEMOCRATIZATION 775 (2016).

States, where President Trump's appointments of conservative Justices Neil Gorsuch and Amy Coney Barrett to the Supreme Court met with stark criticism because they allegedly violated the constitutional convention that in a presidential election year the Senate can confirm a Supreme Court Justice only with bipartisan support.⁹⁸

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

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

Attempts to erode informal institutions are not always successful. If the participants in the institutions are sufficiently committed and autonomous and if they have internalized the values the informal judicial institution is protecting, they can withstand a certain amount of pressure. For example, Czech courts and judges have faced several attempts at political interference exercised via informal means. For instance, several judges of the Constitutional Court and the Supreme Administrative Court have alleged that the then President Miloš Zeman's Chancellor had attempted to persuade the judges of these two courts to decide high-profile political cases in line with Zeman's preferences.¹⁰³ Yet, this attempt backfired because some of the contacted judges went public.¹⁰⁴ Similarly, Czechia witnessed several attempts to install executive-friendly chief justices, either through the dismissal of an incumbent Supreme Court President¹⁰⁵ or, more recently, by the preemptive appointment of a new President of the Constitutional Court well

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

⁹⁹ARMIN VON BOGDANDY, TRANSITIONS 2.0 (2023).

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

¹⁰¹H CJ 4956/20 Movement for Quality Government v. Knesset (2020).

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

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

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

¹⁰⁵*Id.*

ahead of the end of the incumbent Chief Justice's term.¹⁰⁶ Nevertheless, the dismissed Supreme Court President fought back before the Czech Constitutional Court and won her reinstatement,¹⁰⁷ and the concerted pressure of virtually all constitutional lawyers forced President Miloš Zeman to abandon his plan to appoint a new Constitutional Court President prematurely.¹⁰⁸

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

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

The processes of de-democratization are complex. Marianne Knauer proposed an explanatory causal mechanism,¹⁰⁹ which triangulates the sequence between agency, opportunity, and backsliding.¹¹⁰ Informal institutions potentially affect all three of these changes. Agency describes the power to change the rules of the game, the intention to do so, and the ability to organize and attract followers. It often comes from systems where elites which arose from liberal elections lack deeper commitment to democratic values¹¹¹ or stop believing that democracy is an effective system that can resolve deep social cleavages and sufficiently represent their interests and those of their voters.¹¹²

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

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

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

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

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

¹⁰⁹She explicitly uses the term "democratic erosion" to mean intentional democratic decline. We forego it as the majority of scholarship, including our typology, understands erosion as a largely unintentional process.

¹¹⁰Marianne Kneuer, *Unravelling Democratic Erosion: Who Drives the Slow Death of Democracy, And How?*, 28 DEMOCRATIZATION 1442 (2021).

¹¹¹*Id.*

¹¹²Wolfgang Merkel, *Is There a Crisis of Democracy?*, 1 DEMOCRATIC THEORY 11 (2014).

¹¹³Attila Ágh, *The Bumpy Road of Civil Society in the New Member States: From State Capture to the Renewal of Civil Society*, 11 POL. CENT. EUR. 7 (2015).

1. Agency and Opportunity

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

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

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

However, it is important to remember that informal judicial institutions may survive attempts at their erosion. In fact, informal judicial institutions actively help to increase the judiciary’s resilience and effectively close or at least to narrow down the window of opportunity for an erosion actor. This might happen particularly if the informal institutions are so strongly embedded in society that they will survive even if the formal institutions are dismantled. Once informal practices are deeply entrenched and institutionalized, they are difficult to dismantle by democratic and constitutional means. They become sticky and their elimination requires a drastic change in actors’ behavior and beliefs.¹¹⁹

A fitting example is the strong informal bond between the Bench and the Bar, which may prevent attacks on the judiciary or even help to restore removed judges to office. We saw this most clearly in Pakistan after General Pervez Musharaff suspended Chief Justice Iftikhar Chaudhry.¹²⁰ Lawyers across Pakistan took to the streets and began boycotting all court proceedings in protest

¹¹⁴Kim Lane Scheppele, *Autocratic Legalism*, 85 UNIV. CHI. L. REV. 545 (2018); See LEVITSKY & ZIBLATT, *supra* note 7.

¹¹⁵PHILIP A. WICKHAM, *STRATEGIC ENTREPRENEURSHIP* (2001).

¹¹⁶See Kosař & Šipulová, *supra* note 26; Lech Garlicki, *Disabling the Constitutional Court in Poland*, in *TRANSFORMATION OF LAW SYSTEMS IN CENTRAL, EASTERN AND SOUTHEASTERN EUROPE IN 1989–2015* (Andrzej Szmyt & Bogusław Banaszak eds., 2016).

¹¹⁷See *Szanujemy Twoją prywatność*, TVP INFO (last visited Oct. 8, 2023), <https://www.tvp.info/46255229/kasta>. See also Anne Applebaum, *The Disturbing Campaign Against Poland’s Judges*, THE ATLANTIC (Jan. 28, 2020), <https://www.theatlantic.com/ideas/archive/2020/01/disturbing-campaign-against-polish-judges/605623/>. See also *Analysis: Judging the Judges Takes Political Centre Stage*, TVP WORLD (Feb. 5, 2020), <https://tvpworld.com/46515871/analysis-judging-the-judges-takes-political-centre-stage>.

¹¹⁸David M. Halbfinger, *Why Is Israel’s Justice Minister in an Ad for “Fascism” Perfume?*, N.Y. TIMES (Mar. 19, 2019), <https://www.nytimes.com/2019/03/19/world/middleeast/ayelet-shaked-perfume-ad.html>.

¹¹⁹Ezequiel González-Ocantos, *Courts in Latin American Politics*, OXFORD RESEARCH ENCYCLOPEDIAS (Apr. 26, 2019), <https://oxfordre.com/politics/display/10.1093/acrefore/9780190228637.001.0001/acrefore-9780190228637-e-1680>; Popova, *supra* note 86.

¹²⁰Shoaib Ghias, *Miscarriage of Chief Justice: Judicial Power and the Legal Complex in Pakistan under Musharraf*, 35 L. & SOC. INQUIRY 985 (2014).

at the suspension. Under this pressure, backed by the Supreme Court of Pakistan, Chief Justice Iftikhar Chaudhry resumed his work in that office.

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

II. Forms of Attacks Against Courts

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

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

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

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

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

¹²¹Alexei Trochev, *Meddling with Justice: Competitive Politics, Impunity, and Distrusted Courts in Post-Orange Ukraine*, 18 DEMOKRATIZATSIIYA 122, 135 (2010).

¹²²See, e.g., William Partlett, *Judicial Backsliding in Russia*, JURIST (Sept. 30, 2014), <https://www.jurist.org/commentary/2014/09/william-partlett-russia-reform/>. See also Kathrin Hille, *Putin Tightens Grip on Legal System*, FINANCIAL TIMES (Nov. 27, 2013), <https://www.ft.com/content/a4209a42-5777-11e3-b615-00144feabdc0>.

¹²³Nóra Chronowski & Márton Varju, *Two Eras of Hungarian Constitutionalism: From the Rule of Law to Rule by Law*, 8 HAGUE J. ON RULE L. 271 (2016); Gábor Halmai, *From the “Rule of Law Revolution” to the Constitutional Counter-Revolution in Hungary*, 2012 EUR. Y.B. HUM. RTS. 367.

also in Israel, where populist ministers fed the public with criticism of a too-activistic Supreme Court which had lacked democratic accountability for several years. Increasing court fees or abolishing individual petitions will also significantly constrain courts' decision-making.

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

Paralyzing courts most commonly occurs in countries where erosion actors fail to pack the courts with their own candidates. Instead, they have to adopt the second-best strategy and temporarily block courts from decision-making, until the erosion actor is able to control them via the politics of loyalty and fear. Compared to weakening the courts, paralyzing mixes more elements of formal and informal practices. The most common type of paralyzing is the starvation of the courts by refusing to select or appoint new judges and leaving too many vacancies open. This technique is particularly damaging for courts with high quora, as it can very quickly impair their ability to adjudicate in plenary session. For instance, in 2007, the Slovak parliament thwarted the selection of new constitutional justices by not submitting the formally required number of candidates to the President of the Republic. In turn, the Constitutional Court was left with only four out of thirteen justices for almost a month.¹²⁵ In Czechia, President Václav Klaus refused to nominate a new candidate as a constitutional justice after the upper chamber, the Senate, rejected several of his candidates in a row, severely restricting the court's *modus operandi* in 2003–2005.¹²⁶ The paralyzing is obviously not exclusive to courts and targets also other judicial bodies, such as judicial councils which are often the aim of political actors. It is worth noting that sometimes, paralyzing can appear as a by-product of deeper political disagreements, such as the case of the inability of the Spanish parliament to appoint 20 members of the Judicial Council between 2018 and 2023.¹²⁷

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

Alternatively, agents of change might wish to keep the courts relatively strong but control them and *weaponize* them to use them as a legitimizing rubberstamp for their further decaying policies. Erosion actors can achieve this either via changing the composition of courts—mostly via court-packing¹²⁹—or taming judges appointed under a previous democratic regime via smear campaigns and fear. Majority erosion actors try to incentivize judges to take part in

¹²⁴Hubert Smekal & Katarína Šipulová, *DH v Czech Republic Six Years Later: On the Power of an International Human Rights Court to Push Through Systemic Change*, 32 NETH. Q. HUM. RTS. 288–321.

¹²⁵Katarína Šipulová, *Under Pressure: Building Judicial Resistance to Political Inference*, in *THE COURTS AND THE PEOPLE: FRIEND OR FOE* (Denis Galligan ed., 2021); See Kosař & Šipulová, *supra* note 26.

¹²⁶David Kosař and Ladislav Vyhnanek, *The Constitutional Court of Czechia*, in *THE MAX PLANCK HANDBOOKS IN EUROPEAN PUBLIC LAW, VOL. III: CONSTITUTIONAL ADJUDICATION: INSTITUTIONS 139* (Armin von Bogdandy, Peter Hubert & Christoph Grabenwarter eds., 2020).

¹²⁷Pérez, *supra* note 91.

¹²⁸*Meta Blames Majority for Non-Functioning of Constitutional Court*, ALBANIAN DAILY NEWS (Sept. 16, 2019), www.albaniandailynews.com/index.php?idm-35519&mod=2.

¹²⁹See Kosař & Šipulová, *supra* note 26; see Holgado & Urribarri, *supra* note 57. See Keck, *supra* note 57.

accommodating informal institutions, particularly via fear. Most examples come from Latin America. In Venezuela, President Hugo Chávez benched the recalcitrant Supreme Court Judge Frankline Arrieche.¹³⁰ In Paraguay, Stroessner's regime simply dismissed Judges of the Supreme Court who were deciding cases against the interests of the government.¹³¹ Similar examples, however, come also from Ecuador¹³² or the Maldives.¹³³ In Europe, the most well-known cases of benching or misuse of removals, dismissals, and disciplining come from Hungary and Poland.¹³⁴ Benching can, however, be even less visible to the public, for example if the chief justice who is in charge of case assignment simply stops assigning new cases to recalcitrant judges.¹³⁵

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

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

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

¹³⁰Matthew M. Taylor, *The Limits of Judicial Independence: A Model with Illustration from Venezuela under Chavez*, 46 J. LATIN AM. STUDS. 229 (2014).

¹³¹See Pozas-Loyo & Ríos-Figueroa, *supra* note 47.

¹³²ANDREA CASTAGNOLA, MANIPULATING COURTS IN NEW DEMOCRACIES: FORCING JUDGES OFF THE BENCH IN ARGENTINA 84–108 (2018).

¹³³Fathima Musthaq, *Shifting Tides in South Asia: Tumult in the Maldives*, 25 J. DEMOCRACY 164 (2014).

¹³⁴See Kosar & Šipulová, *supra* note 26; Fryderyk Zoll & Leah Wortham, *Judicial Independence and Accountability: Withstanding Political Stress in Poland*, 42 FORDHAM INT'L L.J. 875 (2019).

¹³⁵Patrick O'Brien, *Informal Judicial Institutions in Ireland*, in this issue.

¹³⁶Popova, *supra* note 86; DAVID KOSAR, PERILS OF JUDICIAL SELF-GOVERNMENT IN TRANSITIONAL SOCIETIES (2016); Nino Tsereteli, *Constructing the Pyramid of Influence: Informal Institutes as Building Blocks of Judicial Oligarchy in Georgia*, in this issue.

¹³⁷Nelson, Michael, *Fortas' Nominations: One Era Ends, Another Begins*, 48 JOURNAL OF SUPREME COURT HISTORY 239 (2023); Larry M. Roth, *Remembering 1965: Abe Fortas and the Supreme Court*, 28 MERCER L. REV. 961 (1976–1977).

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

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

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

E. Conclusion

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

Future research should explore the sequence of de-democratization in more detail on at least two levels. First, do we experience decay in institutions also outside of fully democratic states—in other words, in flawed and hybrid democracies, or transitional democracies—and, if so, how would its conceptualization differ? Although more and more literature seems to suggest that neither democratization nor backsliding is a linear process,¹³⁹ we also need to acknowledge that the embeddedness of democratic values is time-dependent and that structures of transitional democracies are relatively easy to collapse or careen.¹⁴⁰

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

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

¹⁴⁰Dan Slater, *Democratic Careening*, 65 WORLD POL. 729 (2013).

¹⁴¹Attila Ágh, *The Bumpy Road of Civil Society in the New Member States: From State Capture to the Renewal of Civil Society*, 11 POL. CENT. EUR. 7 (2015).

Second, further research should address the role of the form of governance, asking whether institutional decay and erosion occur in both highly regulated and informal environments. Does the extent of regulation and the formal embeddedness of democratic safeguards help to create more resilient democratic structures? How does the degree of formalization translate into the form of democratic decay or erosion? Does it matter whether democracy is dismantled by abuse of law or, in other words, abusive constitutionalism¹⁴², informal hollowing out of democratic substance and structures, or both?¹⁴³

While this Article has focused only on the judiciary, it has shown that increasing regulation and formalism as a response to the risk of de-democratization¹⁴⁴ might not work if they fail to resolve the incongruence between formal and informal institutions. Likewise, a recent assessment of the Latin American experience with the judicialization of politics has also shown that this strategy has its limits.¹⁴⁵ Reliance on law as a solution to conflict between existing formal and informal institutions often fails to acknowledge commitments of relevant elites to democracy.

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

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¹⁴²See Landau, *supra* note 13; See LANDAU & DIXON, *supra* note 9.

¹⁴³See SAJÓ, *supra* note 25.

¹⁴⁴Mathieu Leloup, *Supranational Actors as Drivers of Formalization*, in this issue.

¹⁴⁵THE LIMITS OF JUDICIALIZATION: FROM PROGRESS TO BACKLASH IN LATIN AMERICA (Sandra Botero, Daniel Brinks & Ezequiel González-Ocantos eds., 2022).

¹⁴⁶González-Ocantos, *supra* note 119.

¹⁴⁷Katarína Šipulová & Samuel Spáč, (*No*) *Ghost in the Shell: The Role of Values Internalization in Judicial Empowerment in Slovakia*, in this issue.

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