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RESEARCH ARTICLE



Explaining judges' opposition when judicial independence is undermined: insights from Poland, Romania, and Hungary

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ABSTRACT

Over the past decade, governing parties in Central and Eastern Europe have dismantled liberal democracy, violating the rule of law and limiting the power of judges. This article examines the opposition to these transformations, focusing on the role of judges in Poland, Hungary, and Romania. Drawing on an original survey, as well as a set of interviews with judges, the article shows that while in Poland judges have developed a unified opposition to the government in defending their independence, in Romania, in contrast, governmental measures have polarized judges into a divided opposition, while their mobilization has been rather non-existent in Hungary. Why do judges oppose governmental action limiting judicial independence in some contexts but not in others? The article shows that the nature and the sequencing of domestic transformations, coupled with ideational factors and interests-based calculations, explain judges' opposition at the collective and individual levels.


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KEYWORDS Rule of law; judicial independence; judges professional association; Hungary; Poland; Romania

1. Introduction

In recent decades, governmental measures limiting judges' independence have made the headlines in different EU member states. This process of important institutional change has been examined in different ways within political science, law, and in EU studies,¹ either as an illustration of autocratic legalism² or democratic backsliding,³ as an expression of the populist uprising⁴ or a counter-revolution against liberal democracy.⁵ While this body of research mainly focuses on governmental motivations and party politics, especially on the roles of the Polish Law and Justice (PiS) party, the Hungarian Fidesz and also that of their counterparts in other national contexts in the region (albeit unevenly), forms of opposition have remained under-researched. This article focuses on judges' response in three national contexts: Poland, Hungary, and Romania. In Hungary, judges, with some exceptions, have remained rather silent since the adoption of the first FIDESZ measures weakening their independence. In contrast, in Romania and Poland, judges have mobilized against governmental

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measures, leading to an apparent unified opposition in the latter and a divided opposition in the former.

Why, in some contexts, have measures limiting the independence of the judiciary and undermining the rule of law been actively opposed within the judiciary, while similar reforms in other contexts have been accepted passively? Following an institutionalist perspective, we argue that the sequencing of reforms (macro level), as well as the perceived hierarchy within the judiciary (meso level) and judges' ideological beliefs and preferences (micro level) are key factors explaining judges' opposition to governmental measures. Empirically, we draw on an original survey conducted in 2022, thanks to the permission of the studied national associations of judges to distribute it among their members, as well as a series of comprehensive interviews with judges.

The article is organized as follows: Section 2 introduces the theoretical framework accounting for judges' opposition, putting forward a multi-dimensional analytical grid which brings together micro-, meso-, and macro-level factors. Section 3 specifies the research design and the data set. Section 4 explains opposition observed in Poland, Romania, and Hungary. Section 5 discusses the impact of macro, meso, and micro factors across our three cases, followed by a comparative outlook on the drivers of judges' opposition in Section 6. Our research design serves a theory building purpose,⁶ seeking to provide a theoretical framework which can be used to analyse judges' opposition in other contexts where judicial independence and the rule of law are under threat.

2. Explaining judges' opposition

When a political regime attempts to seize the judiciary, judges are confronted with a complex dilemma: should they obey and enforce the new laws that contrast the values of judicial independence and the rule of law to which judges' have been educated and socialized? What happens when the law is oppressive or when the law affects not only judicial independence but also the democratic foundations of the political regimes? Should judges oppose those laws and – at the same time – betray their function as the *bouche de la loi*? While the topic is key, it has only been addressed sporadically from a normative, legal or a political science perspective, with a focus on democratic⁷ and authoritarian regimes⁸ yet looking mainly at constitutional judges and supreme courts either in the United States or in Latin America and more recently in Europe.⁹ Although judges do not directly take part in political debates,¹⁰ they do not act in a vacuum either, but in response to the changing rules and practices of institutions. Still, which factors can lead judges to organize individual or collective opposition has remained in a grey zone. This article seeks to make a theoretical and empirical contribution to this debate.

Scholars have provided compelling analyses explaining how, in democratic or authoritarian regimes moving towards an uncertain “something else,”¹¹ institutions are created, changed and reproduced, how they organize the polity and by the same token how authority and power are constituted, exercised or controlled. Political order is created by a set of institutions and change is a constant feature of these bodies.¹² Institutions – defined broadly as a set of rules, norms, prescriptions, beliefs¹³ – prescribe the behaviour for specific actors in specific contexts. As March and Olsen put it, institutions empower, enable, and constrain actors and make them more or less capable of acting.¹⁴ Understanding opposition is just the other facet of

the same coin: institutions also shape patterns of opposition. Drawing on the seminal contribution of Robert A. Dahl – who defined opposition as the behaviour of an actor who is opposed to the conduct of the government¹⁵ – this concept is understood here as “a disagreement with the government or its policies, the political elite, or the political regime as a whole, expressed in public sphere, by an organised actor through different modes of action.”¹⁶

We argue that judges’ opposition depends on institutional incentives and disincentives.¹⁷ It is shaped by rules, procedures, and practices, and requires us to examine not only how institutions impose themselves on actors but also how institutions are the product of actors’ continuous struggles.¹⁸ Against this backdrop, we contend that

- (1) the sequencing and the scope of the institutional change, that is the nature and the timing of governmental action, shape patterns of judges’ opposition (macro level);
- (2) the institutional and cultural rules internal to the judiciary such as hierarchical rules might limit the opportunities for judges’ opposition (meso level explanation);
- (3) ultimately, judges’ ideological beliefs and preferences influence their propensity to voice their opposition (micro-level individual-based explanation).

2.1. Macro explanations

The threats posed by the government to the judiciary and their independence might trigger judges’ opposition. According to Moustafa and Ginsburg, in its attempt to limit judicial independence a government might (1) increase the sense of insecurity among individual judges, pushing them towards the self-censorship (e.g. establishing a contested framework of disciplinary sanctions); (2) fragment the judicial system by empowering parallel auxiliary/exceptional courts (or judicial bodies) directly controlled by the executive; (3) constrain the access to justice; and (4) obstruct the formation of a judicial support network.¹⁹ Against this backdrop, as Hilbink put it, “judicial capitulation” occurs in particular when “authoritarian leaders manipulated the courts, through either purges, threats, or jurisdictional restrictions.”²⁰ Indeed, a gradual process of subjugation of the judiciary might shape a new system of allegiances and loyalties preventing the articulation of the opposition within the judiciary. Against this backdrop, we hypothesize that:

H1a: The more incremental the institutional change limiting judicial independence, the less likely opposition will be among judges.

This relationship might also be driven by a non-linear logic in the sense that the sequencing of the measures enacted by a regime can influence judges’ opposition. In a context of prolonged political crises characterized by the presence of discredited political elites, judges might be tempted to see themselves as the “true” defenders of the country’s institutional and constitutional system and of its democratic values.²¹ In this respect, we argue that when institutional change is too abrupt, preventing the formation of new stable allegiances between judges and political authority, then the governmental measures limiting judicial independence may encourage opposition among judges who believe their independence is being unlawfully taken away.

H1b: The more sudden the institutional reform process that limits judicial independence, the more likely is that judges will be opposed to it.

2.2. Meso-level explanations

Professional conduct is governed by normative expectations, which could be determined by the position that a profession is expected to fill. Yet judges do not act in isolation from their judicial superiors.²² The way in which the judiciary is organized can also influence judges' behaviour. Explaining the compliance of Chilean judges during Pinochet's regime, Hilbink²³ argued that the institutional legacy of the judicial system influences the willingness of judges in defending liberal institutions.²⁴ More precisely, the set of formal and informal rules regulating the system of access (in the sense of career) and promotion within the judiciary shapes judges' perception of their role vis-à-vis authority, affecting the types of relationships that judges are expected to have with their peers and superiors.²⁵ Furthermore, judges' perception of the hierarchy of a judicial system affects their prospectus in imagining future steps in their careers. More specifically, the perceived opaqueness of the mechanisms of judges' selection and promotions strengthens a top-down system of loyalties, discouraging judges from contesting all the formal and informal rule approved by their superiors. In this respect, we suggest that judges' perceptions of the institutional structure provide more insights than the assessment of the written norms, precisely because they are intertwined with the way in which judges perceive their role within the judiciary.

H2: The more the judiciary is perceived as hierarchical and appointment rules as opaque, the less likely opposition among judges will be.

2.3. Micro-level explanations

Actors orient themselves towards institutions “on the basis of their normative values [...], their perceived interests [...] and their understandings of the opportunities and constraints that different institutional contexts afford them.”²⁶ Judges are not disconnected from their political and social environment. They possess their own preferences and belief systems and are embedded in different communities – ranging from family to personal communities and from friends and neighbours to professional and political groups – that might influence their behaviour.²⁷ Judges' choices can be motivated by ideological values.²⁸ One example is the behaviour of southern judges in the United States during the civil rights movement.²⁹ In contrast, in her study on the role of Chilean judges against Pinochet, Hilbink³⁰ argued that judicial “complicity” can be a function of ideological sympathy or a lack of individual moral integrity. Judges might ideologically support a regime that is curtailing their independence or oppose it.

H3a: The higher the ideological congruence between judges and the ruling party, the less likely oppositional behaviour among judges will be.

Studies devoted to the attitudes of judges towards EU integration show that they are the architects of their own empowerment and are supportive of transnational governance.³¹ European judiciaries and legal systems have experienced a process of Europeanization, strengthening, and diffusing a common understanding of rule of law and judicial independence.³² In this respect, we argue that

H3b: The more judges share the primacy of EU law, the more they are likely to voice opposition when this principle is under strain.

3. Data and research design

After several decades of communist rule in Poland, Hungary and Romania, in the 1990s, the countries' accession to the EU has contributed to the diffusion of an institutional model of judicial independence and governance at the centre of which lies the Judicial Council, body established to insulate from political power measures concerning the appointment and the careers of judges.³³ Prior to EU accession, in theory, the judiciary in each country was trained and socialized in relation to the values of judicial independence and the rule of law as a result of a top-down or bottom-up process, yet with mixed outcomes.³⁴ While in the enlargement contexts the reforms in the field of justice in Poland and Hungary led to positive assessments from European institutions, Romania's EU accession had been delayed due to the fragile judicial independence.³⁵ Yet since the 2010s, Poland and Hungary have lost the status of "front runner" that regional and international organizations and academics attributed them in acknowledgement of the rapid process of change prior to 2004. In the three countries, for different reasons, a few years after joining the EU, governments have initiated a process of de-Europeanization³⁶ by replacing the legislation adopted in the context of the enlargement with new disputed provisions followed by paths towards autocracy,³⁷ giving rise to concerns not only at the domestic level but also among EU institutions and regional and international organizations.³⁸ The transformations at stake are challenging key research findings in comparative politics and EU studies requiring an in-depth analysis of this process of change in reverse. While the process of autocratization is complete in Hungary and ongoing in Poland, in Romania the government's attempts to de-Europeanization have to some extent failed.

In this article, the study of judges' opposition is conducted drawing on survey data, judges associations' official documents and semi-structured interviews. Considering that there are several professional associations in Poland, Romania and Hungary, we selected the ones which have been the most visible in the public sphere over the past years. The Polish Judges Association *Iustitia* was created at the beginning of the 1990s and proclaims itself the largest one in the country. In Romania, the most active professional judges' associations have been created after the accession to the EU. On the one hand, the Romanian Judges' Forum (AFJR) works in close cooperation with the Movement for the Defence of the Status of Prosecutors Association and the Initiative for Justice Association. On the other hand, the Romanian National Union of Judges (UNJR) has developed its activities together with the old Romanian Association of Magistrates and the Association of Judges for the Defence of Human Rights (AJADO), and the Association of Prosecutors (APR). In Hungary, the Association of the Hungarian Judges (MABIE) is the largest professional association established also at the beginning of the 1990s; while other associations exist, none of them has the ambition to represent the judiciary as a whole.

The article draws on a set of original data including responses to a survey distributed among the members of judges' professional associations as well as semi-structured interviews³⁹ with active members of these professional associations in Poland, Romania and Hungary (see below). To avoid a strong recall bias, the retrospective questions on judges' opposition are limited to the last three years (2019–2021), a timeframe considered as consistent by the literature.⁴⁰ We distributed the survey among members of the four main associations in the three countries: the Romanian AFJR (170 members) and UNJR (number of members unknown, yet limited membership),

the Polish Iustitia (3600 declared members⁴¹) and, the Hungarian MABIE (1400 declared members).⁴² It goes without saying that there is some space for argument regarding the membership of these associations and that they are not entirely representative. Yet our goal was to understand the motivations behind the judges who are members of these organizations and who are actively opposed to governmental acts. The findings should be read with this methodological precaution and analytical aim in mind. Although the sample is not representative of the entire judiciary, our data illustrate the preferences and beliefs of those judges who are more likely to oppose the threats to judicial independence and the rule of law. The results are likely to reflect a self-selection bias, since our respondents are arguably those that are more concerned by the rollback of the rule of law in their country. Where the opposition is visible, as in Romania or Poland, professional associations kindly agreed to support our research activity by disseminating our survey to their members. Where the opposition is less visible or organized like in Hungary, we did not manage to obtain any complete questionnaire, therefore the data set is incomplete.⁴³

The survey was translated into the national languages and included 33 questions. The response rate we obtained both in Romania (5%) and in Poland (6.4%) are in line with previous analyses including surveys with email invitations.⁴⁴ We complemented the results of the survey with other datasets to measure not only the pace of institutional change but also the ideological preferences of the parties in government (Chapel Hill Expert Survey⁴⁵) and to assess the evolution of liberal democracy in the three countries (V-DEM⁴⁶). Table 1 sums up the operationalization of our explanatory variables, linking them with our hypotheses.

4. Individual and collective forms of judges' opposition

In Poland, judges have reacted loudly to the provisions introduced by the PiS government since 2015 curbing judicial independence. No judges' professional association has expressed support, on the contrary, Iustitia and other professional associations such as Themis have united (despite their previous differences) in efforts to voice their concerns (Interviews 1, 2, 3, 4, 2022). One important albeit indirect test to gauge the unity of judges and support for Iustitia has been the boycott of the 2017 elections for the members of the politically controlled body, the Council for the Judiciary (Krajowa Rada Sądownictwa, KRS). In a country with approximately 10,000 judges, only 90 judges submitted their applications for these jobs at that time (Interview 1, 2022). Iustitia, together with other professional associations, has constantly contested the legality of the measures adopted by the Polish government such as the packing of the Constitutional Court or the politicization of the KRS, drafting reports on governmental action, adopting resolutions, drafting letters and petitions and supporting judges under pressure. The strategies adopted demonstrated a strong potential for mobilisation as well as a dispersed network of solidarity to defend those judges who were facing disciplinary measures (Interview 3, 2022). Iustitia has also deployed resource-intensive forms of opposition by organizing demonstrations, engaging in litigation, and using the tool of the preliminary reference mechanism to the CJEU and participating in meetings with representatives of different EU institutions.

In Romania judges are divided. Different associations seek to fight for the independence of the judiciary, but for different reasons and in different ways. In 2017–2019, in the context of the adoption of controversial measures by the Social Democrat

Table 1. Drivers of judges' mobilization.

Level	Dimension	Data	Hypothesis
Macro	Regime pressures & reforms	Scope and sequencing of the reforms [Original survey] Judges' evaluation of the state of judicial independence in their countries [Original survey] Judges' perception of threat from political elites and media	H1a: The more incremental the institutional change limiting judicial independence, the less likely oppositional behaviour will be among judges. H1b: The more sudden the institutional reform process that limits judicial independence, the more likely is that judges will be opposed to it.
Meso	Perception of hierarchy in the judiciary	[Interviews] Perception of the hierarchy of the judiciary and the transparency of the procedures of selection and appointment.	H2: The more the judiciary is perceived as hierarchical and appointment rules as opaque, the less likely oppositional behaviour among judges will be.
Micro	Ideological congruence	[Original survey – CHES] Judges' self-placement and main governmental party position on the Left–Right dimension [Original survey – CHES] Judges' preferences on same-sex marriages and main governmental party position on GAL/TAN dimension [Original survey – CHES] Judges' preferences and main governmental party position on EU integration	H3a: The higher the ideological congruence between judges and the ruling party, the less likely oppositional behaviour among judges will be. H3b: The more judges share the primacy of EU law, the more they are likely to voice opposition when this principle is under strain.
	Belief on EU law	[Original survey] Judges' belief on the precedence that EU law should take over national (constitutional) law	

government (PSD, Partidul Social Democrat), the AFJR deplored them as an attempt to undermine the independence of the judiciary, as an assault on judicial institutions. The UNJR leaders argued, in contrast, that the Romanian justice system was (and still is) facing multiple problems, which pre-existed the victory of the PSD in 2016 (Interview 5, 2022). The creation of the Section for the Investigation of Offences Committed within the Judiciary (Sectia pentru investigarea infractiunilor din justitie, SIOJ) was one of the main bones of contention, among others. On the one hand, the Forum contested the existence and the rules of appointment of this Section established by the Superior Council of Magistracy (Consiliul superior al Magistraturii, CSM). On the other hand, the UNJR argued that the dismantlement of the SIOJ would be an attack on the independence of the judiciary (Interview 5). The two associations have used different opposition strategies.⁴⁷ Since 2016, both associations have published reports, memoranda and open letters concerning the state of the judiciary. While the Forum and its members organized a series of silent protests, the UNJR declared in 2016 and 2018 that “justice problems must be solved institutionally, through legal procedures, not in the streets.”⁴⁸ The Union agreed to attend some meetings and consultations with members of the Romanian parliament; in contrast, the Forum refused to follow this approach and also declined to meet and discuss matters with the Minister of Justice arguing that “the independence of justice is not negotiable!”⁴⁹ The AFJR strategically employs the preliminary ruling mechanism, for instance asking the CJEU whether the reforms on judges' civil and criminal liability threaten their independence and are in compliance with the UE rule of law. In a context where the CSM and the

Supreme Court tend to support governmental action, AFJR considers the CJEU as the only way out (Interview 8, 2022). In contrast, the Union has developed a more critical approach vis-à-vis supranational institutions, such as the European Commission or the Commission for Democracy through Law (Venice Commission).

In Hungary, MABIE has rarely taken a critical position publicly on the measures adopted by the Fidesz government. In January 2012, referring to the new Hungarian Constitution, MABIE declared that “although the legislature has not adopted each of the MABIE’s proposals, the laws on the judiciary correspond to the criteria of the rule of law.”⁵⁰ In an interview in 2012, the former MABIE president Makai Lajos partially justified the “forced retirement” of the Hungarian judges, arguing that the measure has a political rationale since lustration policies did not produce relevant results in the country.⁵¹ According to two Hungarian judges, young members of the profession distrust MABIE because it provides “external legitimation to Orbán’s reforms of justice” (Interviews 9, 10, 2022). In the same vein, Zoltan Fleck argued that the politics of MABIE “are very close to the interests and opinions of the administrative leader of the courts.”⁵² MABIE’s official stances published on its website from 2016 to 2022 reveal that the most discussed issue was related to judges’ salaries.⁵³ One judge bitterly declared that “[MABIE] fight for increasing salaries, but they can also be ‘bought’ when salaries are increased” (Interview 10, 2022).

In contrast, during the institutional conflict between the president of the National Judicial Office (Országos Bírósági Hivatal, OBH) and the National Judicial Council (Országos Bírói Tanács, OBT), MABIE officially denounced the malpractices of the OBH president regarding the appointment and promotion of judges. It has also expressed its concerns when brutal attacks were committed against individual judges (Interview 10, 2022). However, MABIE has also asked individual judges to restrain themselves and refrain from commenting on domestic political transformations. Only in February 2019, the new president of MABIE, judge Judit Olta, solicited the European Association of Judges (EAJ) to run an investigative mission to assess the situation of the judiciary in Hungary.⁵⁴

Figure 1 illustrates the overwhelming dominance of opposition versus no action both in Poland and Romania, with, respectively, 89.7% and 76.1% of the respondents in our sample declaring that they have taken some actions in order to voice their concern against justice reforms.

5. Why do judges oppose?

5.1. Macro factors, or the pace and the scope of institutional change

In Hungary in 2010, FIDESZ obtained 68% of the parliamentary seats,⁵⁵ resulting in a two-thirds parliamentary majority that allowed the party to modify the Hungarian Constitution. Gradually, the government dismantled all the checks and balances established in the post-1989 context.⁵⁶ Even before the adoption of the Fundamental Law, on 5 July 2010, a constitutional amendment changed the procedure for the selection of the members of the Constitutional Court, enabling governing parties to control the selection of its members.⁵⁷ Once the Court was packed, a new constitutional amendment further restricted the competencies of the institution on financial matters. Then the new Constitution limited the competencies of the Court by excluding budget policies from constitutional review and restricting access to the constitutional review.⁵⁸ In

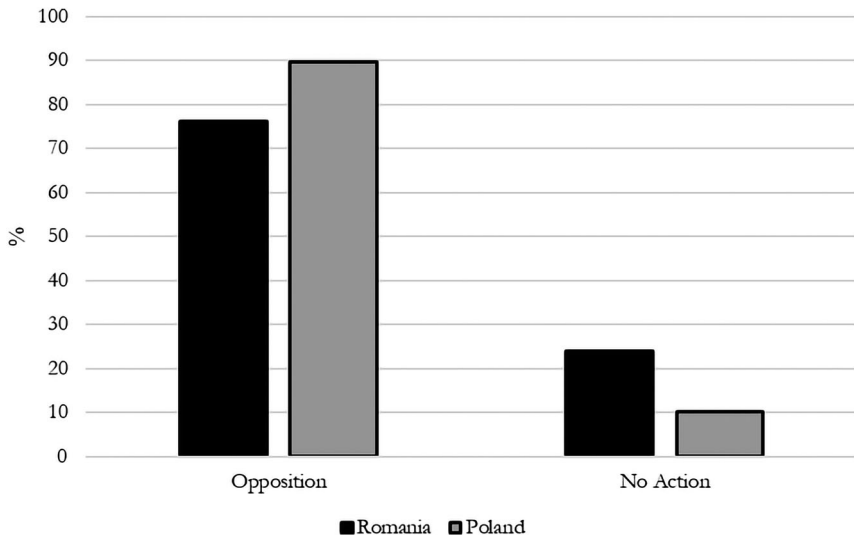


Figure 1. Judges' individual actions in order to voice their concern against justice reforms.

Notes: Romania $N = 67$; Poland $N = 175$. The category of "forms of opposition" includes different answers: "Litigations," "Preliminary ruling," "Building networks with other associations," "Building transnational networks of judges," "Voicing concern on traditional media," "Voicing concern at academic events," "Voicing concern on social media," "Petitions," "Demonstrations." Source: Authors' original dataset, 2022.

March 2013, the Parliament approved the fourth amendment to the 2011 Constitution that annulled all the Constitutional Court's decisions from 1990 to 2011, taken before the enactment of the new Fundamental law, invalidating all the caselaw of the Constitutional Court. In this way, "the entire activity of the Constitutional Court between its foundation and the date of the Fourth Amendment was therefore destroyed as a matter of law by this amendment."⁵⁹ In addition, Act CLLXII/2011 lowered the age for the compulsory retirement of judges, forcing 274 judges to leave the system, including several court presidents (10 out of 25) and twenty Supreme Court judges (out of 80).⁶⁰ In parallel, the new fundamental law (art 25.5) centralized the responsibilities for judges' appointments in the hands of the president of the OBH, appointed for a nine-year term. The president of the OBH – elected by parliament – gained a disproportionate influence in judges' appointments and promotions,⁶¹ establishing direct control over the whole judiciary, through a loyalty system trickling down from the president him- or herself to the court leaders (Interviews 10, 12, 2022).

In Poland,⁶² the Constitutional Tribunal was the first target of PiS when it came to power in 2015. The new government elected five new members of the Constitutional Tribunal, refusing to acknowledge the decision of unconstitutionality emitted by the Tribunal and exercising its full political capture.⁶³ The next step for the PiS-led majority was to take over the KRS, which has been key towards controlling the whole judiciary. The measures adopted in 2017 increased the number of KRS members nominated by the Parliament, allowing PiS to reach the majority within this body. Before 2017, 17 out of 25 members of the KRS were elected by peer judges. Since then, 23 out of 25 members are selected by the political power.⁶⁴ In addition, the Act on the KRS issued on 8 December 2017 instituted the Disciplinary Chamber and the Extraordinary Control and Public Affairs Chamber.⁶⁵ The

members of these chambers were selected by the KRS (already controlled by the political power). The Disciplinary Chamber has the role of dealing with disciplinary cases coming from the Supreme Court and ordinary courts.⁶⁶ The 2017 Act also expanded the competence attributed to the Minister of Justice. In Poland (since 2016), the Minister of Justice is also the General public prosecutor, and she or he can fire the presidents of lower courts and select her or his candidates. Furthermore, the Minister of Justice can decide the branch divisions of the court and decide whether to abolish any courts or transfer judges. Finally, the Minister can ask for disciplinary sanctions against any judge.⁶⁷ Ultimately, on 19 December 2019, the parliament approved an amendment to the law on the Supreme Court and law on ordinary courts (e.g. Muzzle Law). Based on this law, disciplinary proceedings can be started against those judges who question the legitimacy of PiS's measures in the field of the judiciary.⁶⁸ After the CJEU judgment on the case C-791/19 issued in 2021 and the Commission's decision to withdraw Polish funds as part of the EU Recovery and Resilience Plan, the Polish Government abolished the Disciplinary Chamber replacing it with a new Chamber of Professional Liability. Despite the National Program's approval, the Recovery and Resilience Facility payments have been delayed because this amendment did not address the underlying problems.⁶⁹

In Romania, disputed laws on justice had been adopted between 2017–2019, following the PSD's electoral victory in December 2016. These measures sparked massive protests in Bucharest and in many other cities, tens of thousands standing for the rule of law and European values. Social Democrats won the parliamentary elections with 45% of the vote (alone), allowing the party to form a solid coalition with the Liberals from ALDE. In January 2017, the PSD-led parliamentary majority proposed to reduce the penalties for corruption and other related crimes, and to create a new body to investigate the alleged crimes committed by judges and prosecutors in their fight against corruption. The PSD government drafted three bills labelled as "laws on justice," approved through an emergency procedure, despite the lack of any emergency.⁷⁰ Additionally, the government enforced five emergency ordinances which increased the political control over the Judicial Inspectorate, by concentrating the powers in the hands of the Chief Inspector who was appointed directly by the government following an ad interim procedure. Judges complained that the Chief Inspector immediately started disciplinary investigations against anyone who contested the measures introduced by the government.⁷¹ In parallel, the Parliament discussed and adopted – without public debate – changes to the Criminal Code, while the Code of Criminal procedure aimed to create a more benevolent environment for the indictment of corruption offences.⁷²

Drawing on the V-DEM dataset, the pace and the scope of macro-level institutional change in limiting judicial independence in these three countries is illustrated in [Figure 2](#). Higher scores on the indicators show autonomous judicial decision-making, while lower scores signal that judicial decisions merely reflect government wishes.⁷³ Poland is marked by a collapse of judicial independence precisely in 2015 (High Court) and 2016 (Lower Courts). In this respect, the rise of the PiS to power marks an evident discontinuity between the pre- and post-2015 phases. In Hungary, the erosion of judicial independence has been constant; however, the decline of the indicators follows a smoother path, inaugurated in 2010 with the second FIDESZ-led cabinet. The picture from Romania is blurrier. The judicial independence scores registered in 2020 and 2021 are the highest in our sample. However, the evolution of the

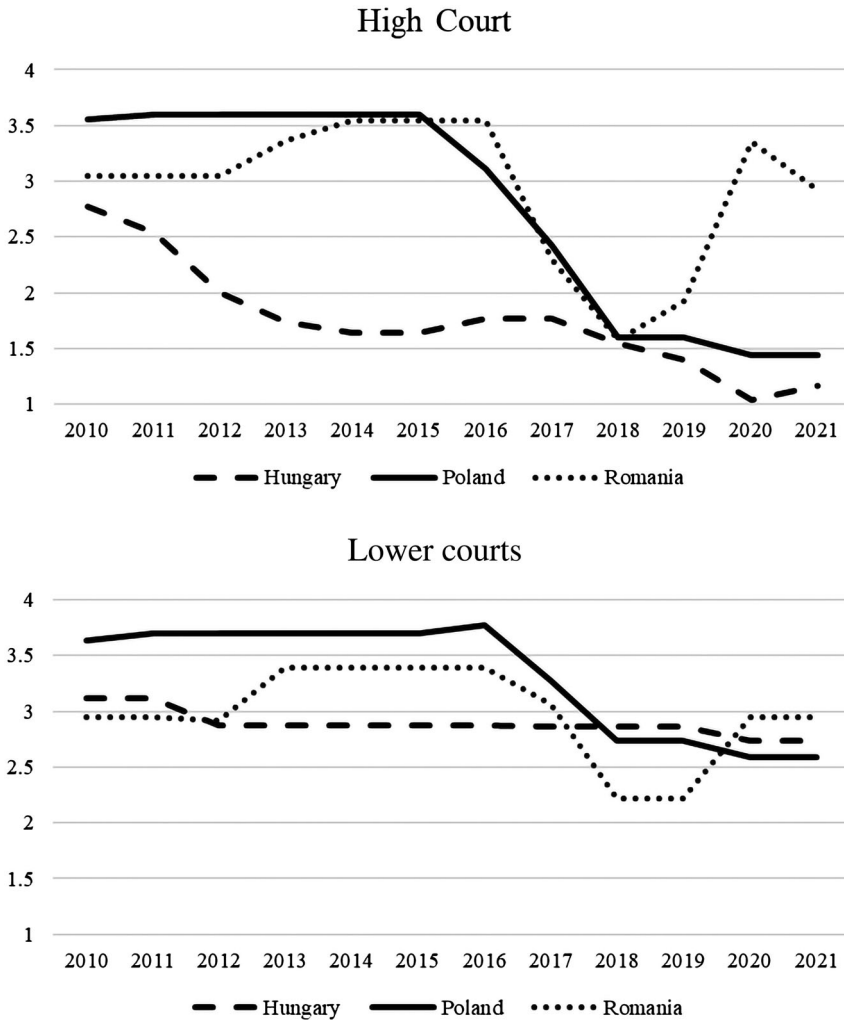


Figure 2. V-DEM indicators on high and lower courts independence.

Note: Data show V-DEM original scale (i.e. _osp). Source: Authors' elaboration (data from Coppedge et al. 2023).

index does not show a linear trend. More precisely, the index reveals an increase until 2016. Then, after the PSD electoral victory, Romania displays an erosion of judicial independence that neatly corresponds to the party's time in power. Finally, from 2018 onwards the index shows some signs of change, revealing the episodic nature of the attacks against judicial independence.

Most judges participating to our survey both in Romania and Poland consider that judicial independence has deteriorated in their countries over the last 3 years (see Figure 3). Still, the proportion of judges affirming that judicial independence has deteriorated is larger among Polish (91.43%) than Romanian (66.67%) judges. In a similar fashion, our data reveal how most judges in both countries believe that rule of law is under threat. Still, the share of judges is greater in Poland (95.43%) than in Romania (62.7%). These data at the individual level strengthen what we already suggested at the

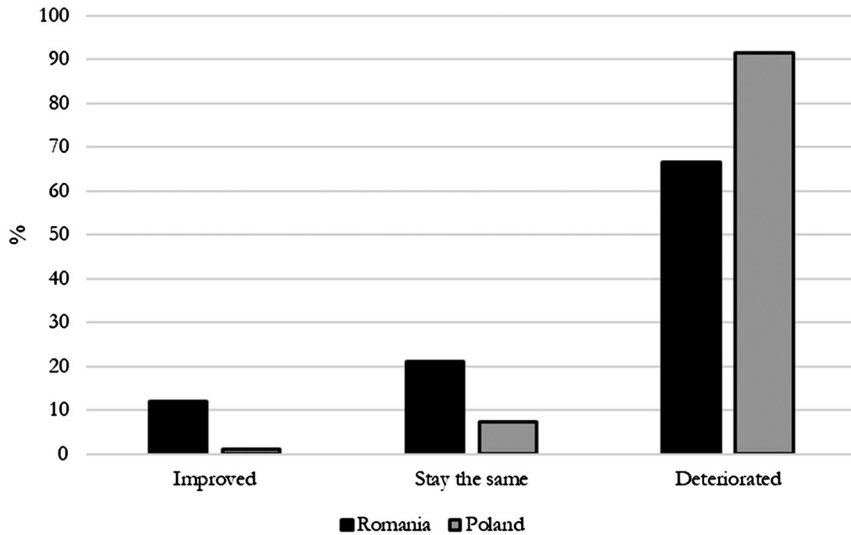


Figure 3. Do you think that the situation of judicial independence in your country ... ?

Note: Romania $N = 66$; Poland $N = 175$. Source: Authors' original dataset.

macro level, namely that the pressure and threats posed by the executive power to the rule of law and judicial independence have been more widespread in Poland than in Romania.

5.2. Meso factors, or the shadow of hierarchy

The organization of the judiciary can create both constraints and incentives for the judges' opposition. We argue that the way in which judges perceive the clarity and objectiveness of the patterns of their careers (e.g. promotions and appointments) might help shape the likelihood of their complying or opposing dissatisfactory decisions taken by their superiors or by political authorities. Indeed, the more judges perceive the process of evaluation of their performance as subjective, the more they might tend to strengthen a chain of loyalty with their superior.⁷⁴

In Hungary, the system of appointment and promotion presented several grey zones even before the radical institutional change initiated by FIDESZ. Our interviewees pointed to the presence of several powerful factions and groups within the judiciary affecting the transparency of the appointment process (Interviews 9 and 10, 2022). The system of appointment and promotion of judges was non-transparent and there was no objective system of selections and promotions.⁷⁵ This situation produced a high degree of conformism strengthening a hierarchical system of loyalties.⁷⁶ Still, the system was isolated from the arbitrary power of the executive. FIDESZ's measures delegated the appointment of all court leaders to the willingness of the OBH president creating a form of personal subordination, whereby the president of the OBH keeps an "institutionalised channel" to exercise a strong influence over the behaviour of the judiciary.⁷⁷ In this respect, the FIDESZ's sponsored measures institutionalized a channel of permanent influence trickling down from the top of the justice administration (i.e. OBH president) to the ordinary courts. However, if in the past the

bureaucratic system of loyalties was internal to the judiciary, the political nature of the OBH president's appointment enabled the political capture of the judiciary. Our interviewees stated that the new measures contributed to an increase in the mechanic and bureaucratic mentality within the Hungarian judiciary, although this was already present in the pre-2011 period (Interviews 10, 12, 2022).

In Romania, until 2017 the procedure for the selection and appointment of judges was based on the experience and professional merits displayed by the candidate (law no. 303/2004). With the changes introduced in 2017, interviewees declared that the procedure of appointment is dependent upon subjective factors related to the willingness of the commission – nominated by the CSM – that evaluates the candidates (Interviews 5, 6, 2022). Our interviewees suggested that the appointment and promotion procedure is empowering those factions within the CSM that are supporting the measures adopted by the government, “like in communist times” as one interviewee bitterly added (Interview 8, 2022). The CSM managed to appoint a considerable number of “loyal” court presidents, if not in all the country at least in the biggest cities and in the capital (Interviews 7,8). As a result, these court presidents support the decisions of the CSM, which are often contested by some judges and certain professional associations in the public sphere.⁷⁸

In Poland, the creation of the KRS in 1989 marked the birth of judicial self-government empowering general assemblies of judges in the process of decision-making on judicial issues; this trend was reverted in 2017 when the PiS government re-empowered the Minister of Justice.⁷⁹ The reform of the KRS enacted on 8 December 2017 aimed to replace all the relevant actors in justice administration with individuals nominated – and loyal – to the Minister of Justice.⁸⁰ The government removed any veto power from the assemblies of judges, delegating the responsibilities fork of appointing, promoting, and removing judges to the KRS which is entirely controlled by the executive power (Interview 2, 2022). In an interview, a judge contended that: “Also when only a single candidate – brilliant and with all the requisites – is running for a position, the KRS can still invalidate her/his candidacy without providing any justification. In this context, it is very easy to anticipate promotions because they are politically motivated” (Interview 3, 2022). If the PiS government managed to replace judges at the highest level of the judiciary and in all the main cities, yet “court leaders have been not replaced everywhere” (Interview 3, 2022).

Our survey data shows remarkable differences between how Romanian and Polish judges perceive the fairness of the judicial system in terms of judges' appointments and case allocation. [Figure 4](#) shows that in Poland most of the judges of our sample (90. 2%) declared that over the last three years, appointments have been based on something other than experience. In contrast to the interviews, the survey shows that in Romania only 24,2% of respondents believe that appointments and the distribution of cases move away from objective criteria.

We found that almost half of the Polish judges in our sample (47.4 perrcent) affirm that some cases have not been allocated in accordance with the existing rules and procedures in order to influence the outcome of the cases.

5.3. Micro factor, or the role of values

Judges' opposition is driven by values which stand in stark contrast with the ones promoted by the government. We asked in our survey several questions measuring judges' ideological orientation on the left/right dimension, their preferences on liberal issues,

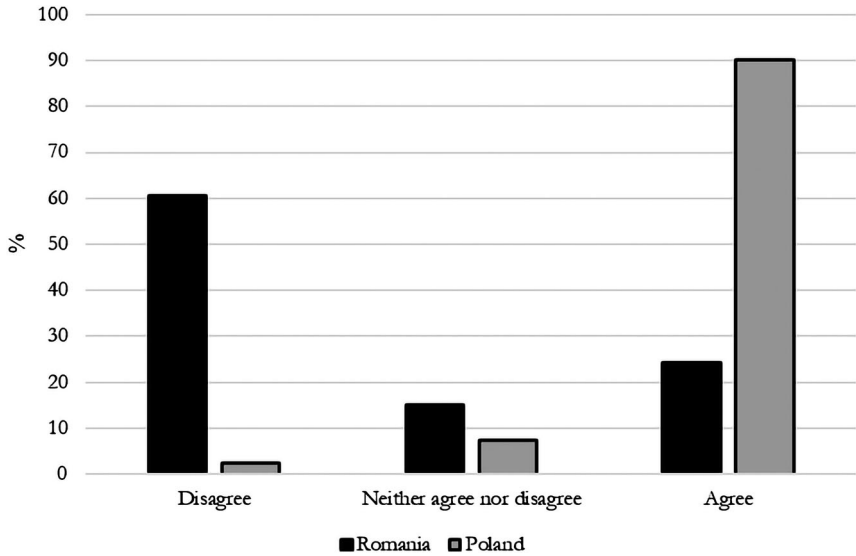


Figure 4. During the last three years judges have entered the judiciary on first appointment other than solely on the basis of their ability and experience.

Note: Romania $N = 66$; Poland $N = 175$. Source: Authors' original dataset.

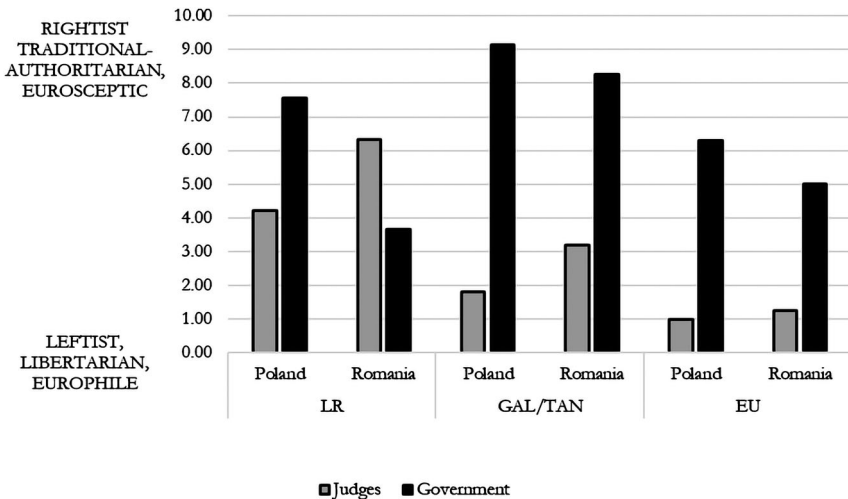


Figure 5. Ideological differences among judges and governments in Poland and Romania.

Notes: The y-axis shows the average position of judges (Poland $N = 172$; Romania $N = 65$) and parties (PiS and PSD) on the left-right, GAL-TAN, and EU dimensions. The positions of political parties are taken from the Chapel Hill Expert Survey Dataset (CHES, Jolly et al., "Chapell Hill Expert Survey Trend File"). The wording of the questions measuring left-right, and EU preferences are the same both for our original survey and CHES dataset. For measuring judges' GAL/TAN location we use their level of approval vis-à-vis same-sex marriage. Source: Authors' original dataset and CHES (Jolly et al., "Chapell Hill Expert Survey Trend File").

and EU integration.⁸¹ In parallel, we used data from the CHES dataset to get the positions on these issues held by the political parties that threatened the rule of law and judicial independence (e.g. PSD in Romania and PiS in Poland). In this respect,

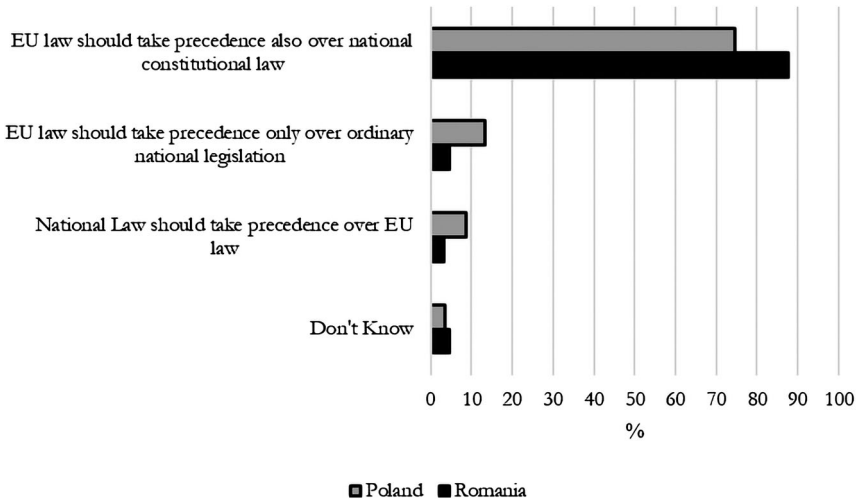


Figure 6. Does EU law take precedence over national law?

Note: Romania $N = 65$; Poland $N = 173$. Source: Authors' original dataset.

Figure 5 shows that while the PiS is located on the right of the ideological continuum, in Poland, the judges who responded to our survey do not – on average – share these values, allowing us to situate them closer to a left-wing orientation. Looking at liberal values, the differences are even more extreme, showing how the average position of Polish judges participating in our survey is far more liberal than PiS. Similarly, looking at preferences regarding the EU, Polish judges in our sample are much more in favour of EU integration than their government.

The distance between judges and the government is also relevant in Romania. Here, on the left-right dimension, the distance is more limited and, on average, judges who responded to our survey lean towards the centre-right of the political spectrum, whereas the PSD is on paper positioned in the centre-left. Also, regarding liberal values and EU preferences, the distance between judges in our sample and the executive is smaller than in the Polish case, however, the trend is following the same direction showing how judges are on average more pro-European and liberal than the ruling party.

No less important, judges who responded to our survey believe that EU law should take precedence over national law (see Figure 6), with the number of judges in Romania considering this to be true being considerably higher than in Poland (but still low compared to the overwhelming majority). The overwhelming majority of respondents in Romania (92.4%) and in Poland (86.9%) agree that the EU as an actor strengthens judicial independence in their countries.

6. A comparative outlook to conclude

The synoptic Table 2 summarizes our findings on the presence/absence of the predictors that are supposed to explain judges' opposition and the differential outcomes observed.

At the macro level, our data confirmed what has been already highlighted by the literature: Hungary and Poland sharply decrease their democratic credentials, with

Table 2. Synoptic table on the drivers of judges' opposition.

Dimensions	Variables	Poland	Romania	Hungary
Macro factors	Magnitude of the democratic decline	+	-	+
	Abruptness of the democratic decline	+	-	-
Meso factors	Hierarchy of the judiciary	-	+	+
Micro factors	Ideological distance	+	-	no data available
<i>Outcomes</i>		<i>United opposition</i>	<i>Divided opposition</i>	<i>Passivity</i>

Notes: (-) = weak; (+) = strong.

Poland evolving into an electoral democracy since 2016 and Hungary falling into electoral autocracy category since 2018.⁸² Romania, in contrast, according to V-DEM indicators, shows signs of recovery – and resilience – of its liberal democratic institutions following the demise of the PSD's executive. However, the collapse of the indicators measuring liberal democracy and the rule of law differs across the three countries. This important difference in the magnitude of democratic decline is also evidenced by our individual-level data. In Poland, almost all the judges interviewed agree that the rule of law is threatened in their country and this explains to a large extent their own opposition. On the contrary, in Romania, the perception of the threat is more limited, leading to a divided opposition. The timing and the sequencing of the measures introduced matter as well. In Hungary, a constant democratic decline is observed from 2010 to 2018 (Figure 2) and a form of stabilization of the decline since 2018, while in Poland the collapse has been abrupt and concentrated in the 2015–2016 period. We argued that a such rapid and harsh decrease in democratic performance can be considered a driver for judges' opposition. This result supports H1b. On the contrary, the graduality of the capturing of the judiciary in Hungary allowed the creation of new alliances between the judiciary and the political power, limiting the opportunities for judges' opposition, disconfirming H1a.

At the meso level, interviews pointed out that the institutional change in Poland and Romania added a considerable degree of subjectivity over the process of judges' selection that advantaged those judges aligned with the governmental position. If in Romania, new presidents "loyal" to the CSM have been appointed in the major cities,⁸³ in Poland the process is ongoing. In Hungary, our data support the interpretation which portrays the Hungarian judiciary as having been highly hierarchical and conformist well before the beginning of FIDESZ's led reforms.⁸⁴ In interviews, Hungarian judges often referred to a "mechanical" or "bureaucratic" mentality (Interview 10, 11) pointing to the passive behaviour of judges, which stand in stark contrast with the more engaged opposition of all the Romanian and Polish judges. In this respect, the centralization of the recruitment and promotion process at the hand of the OBH's president further strengthens this tendency, supporting H2, but also showing the importance of judges' values and beliefs, discussed next.

At a micro level, Romania and Poland showed an important ideological distance between judges interviewed and the executive, supporting H3a. The ideological distance appears to be larger in Poland than in Romania. In this respect, both on the LR continuum and EU positioning, the Polish governing PiS party displayed anti-

European and far-right positions close to the fringe of the ideological space. Furthermore, the pro-European attitude of both Polish and Romanian judges in the application of EU law provides support for H3b. Regarding Hungary, survey data are still not available. However previous research portrayed the existence of political divisions and ideological heterogeneity within the Hungarian judiciary.⁸⁵

In conclusion, Hungarian judges seem to be reluctant to oppose governmental decisions related to the rule of law and judicial independence. Their unwillingness to reply to our anonymized survey – also confessed in some interviews – is illustrative of the fact that judges perceive their freedom of speech as constrained. As one Hungarian interviewee declared: “Hungarian judges do not have the permission to give official interviews. They do not want to be involved in risky topics. They want peace, and judicial independence is very sensitive for the Hungarian government” (Interview 9, 2022). We found that Hungarian judges traditionally perceived their careers as subordinated to the *arbitrium* of their superiors. Even before the radical transformation introduced by FIDESZ, the judiciary was characterized by a diffused bureaucratic mentality, which discourages judges from contesting the authority both internal and external to the judiciary, explaining their passivity. In this respect, we suggest that the degrees of conformism should be regarded as a key factor in explaining our differential outcomes, and this requires further investigation. The political control that the executive exercises over judges’ careers seems to be higher in Poland than in Hungary, yet it is in the latter that opposition within the judiciary has not crystalized. While opposition is publicly voiced in Poland and Romania, it takes on more subtle forms in Hungary. For instance, the election of the new Judicial Council has received significant effort from judges in general and MABIE in particular. The Council seems to be made up of active judges committed to upholding judicial independence. Thus, the relationship between the Council and the OBH is where opposition is more frequently voiced than in the streets. Another possible explanation lies in the sequencing and the timing of the reform in the different countries. The PiS government has blatantly violated the Constitution and sparked massive contestation. In Hungary, the change has received an aura of legitimacy and societal opposition has been lower. Changes in the legal system have been more insidious, and too subtle to spark massive discontent. While in Hungary opposition is not expressed by MABIE and its members, in Poland the sequencing and the nature of the transformations seem to have unified opposition, despite differences between the two associations. In Romania opposition is divided and coexists with passivity. All the interviewed judges in Poland perceive that they are playing a crucial role in the defence of liberal democracy. “Judicial substitution” as described by Alessandro Pizzorno⁸⁶ seems to be the main motivation behind their opposition, as they perceive themselves as “the last bastion” between the abuses of the state and the citizenry⁸⁷ (Interviews 1, 2, 3, 4).

Our research is a first step in explaining judges’ opposition in the three cases under consideration. The article provides an institutionalist framework of analysis that combines macro-, meso- and micro-level explanations to understand judges’ opposition in contexts where an erosion of the rule of law and judicial independence is in motion. Further studies should test the validity of this framework both within and outside the European context.

Notes

1. Ioannidis and von Bogdandy, “Systemic Deficiency in the Rule of Law”; Pech and Scheppele, “Illiberalism Within: Rule of Law Backsliding”; Bodnar, “Polish Road Toward an Illiberal State”; Kelemen, “The European Union’s Authoritarian Equilibrium”; Closa, “The politics of Guarding the Treaties.”
2. Scheppele, “Autocratic Legalism.”
3. Bugarič and Ginsburg, “The Assault on Postcommunist Courts.”
4. Bugarič and Kuhelj, “Varieties of Populism in Europe”; Sadurski, *Poland’s Constitutional Breakdown*.
5. Zielonka, “Counter-Revolution. Liberal Europe in Retreat.”
6. Gerring and Cojocaru, “Case-Selection: A Diversity of Methods and Criteria,” 397–8.
7. Burbank and Friedman, *Judicial Independence at the Crossroads*.
8. Helmke, *Courts Under Constraints*; Pereira, *Political (In) Justice*; Moustafa, *The Struggle for Constitutional Power*; Hilbink, *Judges Beyond Politics in Democracy and Dictatorship*; Ginsburg and Moustafa, *Rule by Law: The Politics of Courts*.
9. Bojarski, “Civil Society Organizations for and with the Courts and Judges”; Matthes, “Judges as Activists: How Polish Judges Mobilise.”
10. Gersdorf and Pilich “Judges and Representatives of the People.”
11. O’Donnel and Schmitter, *Transitions from Authoritarian Rule*, 1.
12. Goodin, *Institutions and Their Design*.
13. March and Olsen, “The New Institutionalism.”
14. *Ibid.*
15. Dahl, *Political Oppositions in Western Democracies*.
16. Brack and Weinblum, “Political Opposition: Towards a Renewed Research Agenda,” 74.
17. Segal, “What’s Law Got to Do With It.”
18. Dezaley and Garth, “Dealing with Virtue. International Commercial Arbitration.”
19. Ginsburg and Moustafa, “Rule by Law: The Politics of Courts,” 14–17.
20. Hilbink, *Judges Beyond Politics in Democracy and Dictatorship*, 27.
21. Pizzorno, “La Corruzione Nel Sistema Politico,” 63.
22. Segal, “Judicial Behaviour,” 277.
23. Hilbink, *Judges Beyond Politics in Democracy and Dictatorship*; Hilbink, “Agents of Anti-Politics: Courts in Pinochet’s Chile.”
24. For a recent application of the model see Bencze, “Judicial Populism and the Weberian Judge.”
25. Hilbink, “Agents of Anti-Politics,” 120.
26. Hay, “Good in a Crisis,” 107.
27. Burbank and Friedman, *Judicial Independence at the Crossroads*, 27; Pizzorno, “La Corruzione Nel Sistema Politico.”
28. Segal, “Judicial Behaviour,” 280.
29. Burbank and Friedman, *Judicial Independence at the Crossroads*, 28.
30. Hilbink, *Judges Beyond Politics in Democracy and Dictatorship*, 29.
31. Stone-Sweet, *The Judicial Construction of Europe*.
32. Piana and Dallara, *Networking the Rule of Law*; Jaremba and Mayoral, “The Europeanization of National Judiciaries.”
33. Jaremba and Mayoral, “The Europeanization of National Judiciaries.”
34. Piana and Dallara, *Networking the Rule of Law*.
35. Coman, “Quo Vadis Judicial Reforms?.”
36. Coman, *The Politics of the Rule of Law*.
37. Weinman and Vormann, “From a Politics of No Alternative.”
38. Halmai, “A Coup Against Constitutional Democracy”; Moraru, and Bercea, “The First Episode in the Romanian Rule”; Sadurski, *Poland’s Constitutional Breakdown*.
39. From March to July 2022, we conducted 12 representative semi-structured interviews with Hungarian, Polish and Romanian judges (4 interviews in Poland, 4 in Hungary, and 4 in Romania). The dates of the interviews and the association membership of the interviewees are reported in Appendix A1 (see online supplemental materiel). The semi-structured questionnaire is presented in Appendix A2 (see online supplemental materiel).
40. Jaspers, Lubbers and De Graaf, “Measuring Once Twice.”

41. According to Gersdorf and Pilich, judges who belong to professional associations account to 40% of their total number.
42. In Poland, we contacted Iustitia on 22 March 2022. The survey was distributed on 2 April 2022 and stayed opened from 4 April to 19 May. We received 175 completed questionnaires. In Romania both AFJR and UNJR agreed to distribute the survey, respectively, on 23 February and 15 April 2022. The survey stayed opened from 4 May to 19 June, and we received 67 completed questionnaires from AFJR and 11 from UNJR. Due to the limited number of respondents, we excluded UNJR responses from our analysis. Finally, in Hungary, MABIE accepted to distribute the survey on 2 May 2022 and to send it to judges in September 2022. The survey was opened by some members of MABIE but not answered.
43. Similar difficulties have been encountered by other organisations, like the ENCJ.
44. Dobbins et al., “Surveying Difficult Populations.”
45. Jolly et al., “Chapell Hill Expert Survey Trend File.”
46. Coppedge et al., “V-Dem [Country-Year/Country-Date] Dataset v13.”
47. Coman and Puleo, “Judges’ Associations in Hungary, Poland and Romania.”
48. UNJR, “Apel UNJR si AMR.”
49. AFJR, “Asociația Forumul Judecătorilor din România.”
50. Quoted in Raisz, “A Constitution’s Environment, Environment in the Constitution,” 56–7.
51. MABIE, “Visszaemlékező dr. Makai Lajos, az Egyesület Elnöke 2008–2018 között.”
52. Fleck, “Judicial Independence in Hungary,” 817.
53. Coman and Puleo, “Judges’ Associations in Hungary, Poland and Romania.”
54. MABIE, “Tájékoztató az EAJ jelentés kapcsán.”
55. Halmai, “A Coup Against Constitutional Democracy.”
56. Bánkuti, Halmai and Scheppele, “Hungary’s Illiberal Turn.”
57. Kovács and Scheppele, “The Fragility of an Independent Judiciary.”
58. Bodnar, “Polish Road Toward an Illiberal State.”
59. Kovács and Scheppele, “The Fragility of an Independent Judiciary,” 4.
60. Halmai, “A Coup Against Constitutional Democracy.”
61. For more details on OBH president’s power, see Amnesty International, “Status of the Hungarian Judiciary.”
62. Grabowska-Moroz and Szuleka, It starts with the personnel. Replacement of common court presidents and vice presidents from August 2017 to February 2018.
63. Sadurski, *Poland’s Constitutional Breakdown*.
64. Moliterno and Čuroš, “Recent Attacks on Judicial Independence,” 1176.
65. Kovács and Scheppele, “The Fragility of an Independent Judiciary,” 9.
66. Gajda-Roszczyńska and Markiewicz, “Disciplinary Proceedings as an Instrument.”
67. Sadurski, *Poland’s Constitutional Breakdown*.
68. Duncan and Macy, “The Collapse of Judicial Independence.”
69. Marcisz, “A Chamber of Certain Liability”; Sadurski, “The Disciplinary Chamber May Go.”
70. Moraru and Bercea, “The First Episode in the Romanian Rule.”
71. *Ibid.*, 89.
72. Seleşan-Guţan, “Romania: Perils of a ‘Perfect Euro-Model’.”
73. The question addressed by the V-Dem team to the country experts is the following: “When the high court in the judicial system is ruling in cases that are salient to the government, how often would you say that it makes decisions that merely reflect government wishes regardless of its sincere view of the legal record?” For more details see Coppedge et al., “V-Dem Codebook v13.”
74. Hilbink, *Judges Beyond Politics in Democracy and Dictatorship*.
75. Fleck, “Judicial Independence in Hungary,” 801.
76. *Ibid.*, 804–5.
77. Fleck, “Changes of the Judicial Structure in Hungary,” 851; Bencze, “Judicial Populism and the Weberian Judge,” 1287.
78. Călin, “Changes Brought to the ‘Justice Laws’.”
79. Sledzińska-Simon, “The Rise and Fall of Judicial Self-Government.”
80. Sadurski, “Poland’s Constitutional Breakdown.”
81. More specifically, we addressed the following questions to our sample: on ideological orientation (In political matters people refer to “the left” and “the right”. What is your position?

Please indicate your views using any number on an 11-point-scale. On this scale, where 0 means “left” and 10 means “right,” which number best describes your position?); on liberal values and on the EU, we first introduce the question asking respondents to locate their position on different issues (Now we would like you to have your views on the following issues. For each issue, we would like to ask you to position yourself on a scale from 0 to 10, where “0” means that you “fully agree with the statement at the top” and “10” means that you “fully agree with the statement at the bottom”. Then if your views are somewhere in between, you can choose any number that describes your position best). Then we introduced distinct poles for cultural issues (0. fully in favour of a policy that does NOT allow abortion under any circumstances/10. fully in favour of a policy that allows abortion under specific circumstances) and EU issue (0. unification has already gone too far/10. unification should be pushed further).

82. Coppedge et al., “V-Dem [Country–Year/Country–Date] Dataset v13”; Kelemen, “The European Union’s Authoritarian Equilibrium.”
83. Călin, “Changes Brought to the ‘Justice Laws’.”
84. Fleck, “Changes of the Judicial Structure in Hungary”; Bencze, “Judicial Populism and the Weberian Judge.”
85. Bencze, “Judicial Populism and the Weberian Judge.”
86. Pizzorno, “La Corruzione Nel Sistema Politico,” 63.
87. See also Gersdorf and Pilich, “Judges and Representatives of the People.”

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