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SPECIAL ISSUE ARTICLE

The Role of Judicial Associations in Resisting Rule of Law Backsliding: Hidden Pathways of Protecting Judicial Independence Amidst Rule of Law Decay

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Abstract
Both Hungary and Poland have been in the spotlight regarding their democratic backsliding, with Executives exerting control over supposedly independent pillars of democracy, such as courts or the media. While the concerns about these countries also voiced by leaders of European institutions were similar, the resistance against the systematic erosion of judicial independence comes in different forms. Using comparative longitudinal case study methodology, this article shows that a defining characteristic in the potential, visibility and feasibility of what judges did or could do under the current threats depends on the role judicial associations, understood as representative collegial judicial bodies. More precisely, the format, organisation and operative tools of judicial associations contribute to their influence on prior judicial reforms and their capacity to withstand ongoing efforts in curtailing their independence from political actors. Empirically, the article reviews multiple judicial changes in the 1992–2015 period in both countries and assesses how judicial associations then shaped the divergent responses to recent attempts at limiting judicial independence. The differences in the legal framework, organisation and network reliance explains variance in resistance. Overall, the article broadens the theoretical and empirical framework for studying the role of courts and judges with considerations regarding professional association organisation and co-ordination, as a potential layer of studying judicial resistance.

Keywords: rule of law; backsliding; Europe; judicial resistance; associations of judges; Hungary

1 Introduction

In the past decade both Hungary and Poland have been in the spotlight regarding their democratic backsliding, with Executives exerting control over supposedly independent pillars of democracy, such as courts or the media (Drinóczi and Bień-Kacała, 2022; Sájó, 2021; Sadurski, 2019). While the concerns about these countries also voiced by leaders of European institutions at the level of rhetoric were similar (Kelemen 2023; Uitz, 2019; Kochenov and Pech, 2015), the resistance among judges against the systematic erosion of judicial independence appeared in different forms. The Polish judiciary became an exemplary case of mobilisation, while judges in Hungary seemed to adopt restrained approaches. In the backsliding literature, judicial resistance is often overlooked. This article argues that in order to fully understand backsliding, we also have to look at social reactions to it, and factors that influence the extent and forms of resistance by looking at the case of Hungary.

Following legal changes affecting judicial independence in 2015, the Polish judiciary quickly mobilised and have become active in using their voice in national and European forums (Pech, Wachowiec and Mazur, 2021). Several judges publicly rejected the implementation of

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controversial national legislation, leading to some dramatic moments of individual resistance (Zabłudowska, 2022, pp. 35, 36). Further famous moments of contemporary Polish judicial resistance constituted public protests, such as the 'Chain of Lights Protests' and the 'March of a Thousand Robes' protests – where European judges demonstrated alongside their Polish colleagues (Zabłudowska, 2022, pp. 35, 36). Behind these actions stood judicial associations, most importantly the Polish Judicial Association 'IUSTITIA', which became quickly organised and started publicly raising attention to attacks against the judiciary (Puelo and Coman, 2024; Matthes, 2022). In addition, there was a record number of cases initiated at the Court of Justice of the European Union[1] and European Court of Human Rights by Polish judges and courts (Matthes, 2022). In 2022, the European Court of Human Rights (ECtHR) notified the Polish Government regarding thirty-seven pending cases concerning judicial independence introduced by judges.[2] These judicial actions were also galvanised with the support of judicial associations and civil society organisations. IUSTITIA intervened through *amicus curiae* briefs in several ECtHR cases. Furthermore, collaborative legal actions also extended to European Judicial Associations (Sessa, Marquies and Morijn, 2023).

In contrast, the public reactions by judges in Hungary against erosion of judicial independence guarantees taking place since 2010 appeared very restrained. Originally, public criticism was voiced by judge Baka in his capacity as former president of the Supreme Court and President of the National Judicial Council. However, this criticism was supressed by the removal of the President from office through legislative changes reorganising both the Supreme Court and central judicial administration. Furthermore, potential resistance was pre-empted by the forced removal of senior judges by the reduction of the retirement age (Scheppele and Kovács, 2018; Scheppele, 2018; Gyöngyi, 2019).

These initial legal changes propelled legal actions in front of the European Court of Human Rights (ECtHR) and the Court of Justice of the European Union (CJEU). The ECtHR case was introduced by judge Baka following his removal from office. With this case no reinstatement to office was considered and despite the European Court finding a breach of judge Baka's freedom of expression,[3] the case was never implemented. The CJEU case was initiated by the European Commission as an infringement proceeding.[4] However, the basis of that case was anti-discrimination law, and although the CJEU found the Hungarian legislation modifying the retirement age of judges discriminatory, there was no discussion of judicial independence (Belavusau, 2013). Thus, the CJEU judgment represented an important initial setback for protecting judicial independence and the rule of law in Hungary. Part of the EU contestation difficulty was also due to the fact that the case emerged before the landmark Portuguese judges' case, which opened the legal possibility for judges to contest judicial independence curtailment and on which the above-mentioned Polish cases relied (Bonelli and Claes, 2018). After these initial legal contestations, the main locus of resistance in Hungary appeared to remain civil society organisations (CSO) (Hungarian Helsinki Committee, Amnesty International, 2019; Eötvös Károly Institute, 2020), with only more recent partial public contestations emerging from the judiciary as it is discussed in this article. However, given the concerns over the shrinking legal space for CSOs in European democracies and especially in Hungary (Bolleyer, 2021), the effectiveness of CSO actions increasingly comes under threat.

Against this background, a fundamental question arose: what explains the differences in the reactions and resistance of judges in these two key countries for the EU rule of law decay? Looking

[1]E.g. Court of Justice of the European Union, C-558/18 *Miasto Łowicz* and C-563/18 *Prokuratura Okręgowa w Płocku.* With 37 registered requests in 2021, https://twitter.com/ProfPech/status/1460538183297474563.

[2]European Court of Human Rights, Notification of 37 cases concerning judicial independence in Poland, http://hudoc.echr.coe.int/eng-press#{%22fulltext%22:[%22Notification%20of%2037%20applications%20concerning%20judicial%20independence%20in%20Poland%22]}.

[3]European Court of Human Rights, *Baka v. Hungary* Application No 20261/12, Merits and Just Satisfaction, 23 June 2016; *Ermenyi v. Hungary* Application No 22254/14, Merits and Just Satisfaction, 22 February 2017.

[4]Court of Justice of the European Union, C-286/12 *Commission v. Hungary* of 6 November 2012.

at how judicial resistance mobilised in the EU rule of law decay context, key actors appear professional association of judges. Notwithstanding their compelling explanatory powers, the legal complex theories do not dedicate specific attention to the role of judicial associations, as a specific form of professional group (Bojarski, 2023, pp. 100–103).

For the purposes of the present article, judicial associations are defined as professional interest representation groups, with a main goal of protecting judicial independence of judges – as defined in their founding documents – and having at their disposal their own financial and legal resources, (either operating as a foundation or association, as a legal personality, registered under the law on civil associations or entirely informal). The Consultative Council of European Judges in Article 10 of their 2020 recommendation on the role of Judicial Associations in protecting judicial independence, defined judges' associations as 'self-governing non-profit organisations with or without legal personality composed of members who voluntarily apply for membership'.[5]

Using comparative longitudinal case study methodology, this article shows that a defining characteristic in the potential, visibility and feasibility of what judges did or could do under the current threats depends on the role judicial associations, understood as representative collegial judicial bodies. More precisely, the format, organisation and operative tools of judicial associations contribute to their influence on prior judicial reforms and their capacity to withstand ongoing efforts in curtailing their independence from political actors.

Empirically, the article reviews multiple judicial reforms in the 1992–2015 period and assesses how judicial associations then shaped the divergent responses and alternative pathways to recent attempts at limiting judicial independence. The differences in the legal framework, organisation and network reliance explains variance in resistance. Overall, the article broadens the theoretical and empirical framework for studying the role of courts and judges with considerations regarding professional association organisation and co-ordination, as a potential layer of studying judicial resistance and mobilisation.

The article proceeds as follows: I begin by defining the place of judicial professional associations in supporting collective judicial resistance and distinguish this approach from existing socio-legal and historical research. Then, the theoretical framework is further refined by first illustrating visible resistance strategies relying on the example of Poland (Section 3.1). Section 3.2. of the article explains hidden resistance strategies in the Hungarian rule of law decay context. The article concludes by highlighting how these findings advance our theoretical and empirical understanding of judicial resistance and rule of law resiliency.

2 Theorising judicial resistance and the place of professional judicial associations within the legal complex

This section makes two interconnected arguments. First, it positions judicial associations within understandings of judicial resistance, legal complex and EU judicial mobilisation. Second, it argues that judicial associations have a distinctive role in the legal complex for mobilising judicial resistance and they may also enable hidden pathways of resistance.

2.1 Judicial resistance and the legal complex

Judicial resistance is a well-established concept both theoretically and empirically in the socio-legal and historical literature studying attacks against judiciaries including authoritarian and historical contexts (Ginsburg and Moustafa, 2008; Moustafa, 2014; Graver, 2015). In general, resistance refers to actions by judges that go against authoritarian rulers' positive law that violate

[5]Consultative Council of European Judges, CCJE Opinion No. 23 (2020) 'The role of associations of judges in supporting judicial independence'.

commonly accepted rule of law standards. These actions materialise either through litigation or in collective actions that support judicial independence (Bojarski, 2023).

In the comparative socio-legal literature a general distinction is made between individual and collective forms of resistance (Karpik and Halliday, 2011; Feeley, 2012). The former may take the form of non-direct non-compliance and direct non-compliance by judges, and it is often associated with famous individual cases of judicial resistance and so-called judicial heroes (Bell, 1994; Widner, 2001; Graver, 2024). A main preoccupation for legal research is the individual and moral obligation of judges to uphold positive law but at the same time support the rule of law.

Apart from individual forms of resistance, collective judicial actions received most dedicated attention in Moustafa's research (Moustafa, 2007a) who refers to 'judicial support structures' comprising 'institutions and associations, both domestic and transnational, that facilitate the expansion of judicial power by actively initiating litigation and/or supporting the independence of judicial institutions when they come under attack'. Moustafa's research lists several groups that might engage courts, such as human rights organisations, opposition activists, legal professional associations and other organisations in civil society, as well as individuals (Moustafa, 2007b, p. 42). This work looked at the broader group of legal professional associations, including lawyers associations, judges' associations as well as law faculties and the like that help legal professionals advance their collective interests (Moustafa, 2007b, p. 45). In the scholarship Egypt appears as a key country to illustrate how legal professionals stood at times of the forefront of political struggles to expand rights provisions for more than a century.

More generally, the collective perspective envisions resistance as a long-term process behind which a 'legal complex' stands, including not only judges but also lawyers (also referring to bar associations), prosecutors, civil servants and/or legal academics, and considering the transnational legal complex (Halliday, 2023). The legal complex denotes 'legal occupations which mobilise on a given issue at a given historical moment, usually through collective action that is enabled through discernible structures of ties' (Karpik and Halliday, 2011).

A central tenet of research concerning legal complexes, is that judges interact with other legal professions in defence of political liberalism (Halliday, Karpik and Feeley, 2007; Karpik and Halliday, 2011; Feeley and Langford, 2021). One well-researched dynamic constitutes between lawyers and judges. A further differentiation is that judges act as part of domestic – and international legal complexes (Halliday, 2023, pp. 9–13). The domestic legal complex comprises of lawyers, judges, civil servants, prosecutors, academics and civil society. Here, there is a dedicated attention on the role of academics and civil society. The international legal complex specifically evokes the idea that legal complexes do not operate in isolation, but often in collaboration with international actors (Halliday, 2019).

These relations have been only more recently further delineated by differentiating between a collective of judges, judicial associations, judiciary as an institution (Halliday, 2023). Judges as collective actors refer to a group of judges that come together as an emergent social entity. It is a relational collectivity where the raison d'être for relationships is a common cause' (Halliday, 2023). Within this collective form, both formal judicial associations and informal grouping of judges find a place. Judges' associations have been defined as 'a self-governing body of judges purporting to represent the interests of judges and justice. As illustration, a collection of judges join together as a standing voluntary association for reasons of conditions of work, resources, and institutional development or protection, among others' (Halliday, 2023). Here, reference is made to the previously discussed research concerning Egypt, where, judges' association in the 1980s and 1990s became a consistent advocate for reforms in the administration of the courts, an advocate for the rule of law and a host for collective action by a wider legal complex (Moustafa, 2007a; Moustafa, 2007b).

A next category, judges as emergent social organisation, refers to a relation collectivity, an association of like-minded judges including formal and voluntary associations. This collective actor would showcase a strong associational leadership, hosting conferences and events,

addressing the public and communicating through publications. Examples referred to in Halliday's research include challenging attacks on legal syndicates in Egypt, the Taiwanese alliances between judges and lawyers in the 1980s and 1990s and the legal complex in Hong Kong joining forces with civil society to create legal defence funds for detained protesters.

Finally, in this categorisation, the judiciary is also viewed as an institution, referring to 'state-specified' court system, Supreme Court, Constitutional Court, courts of first instance. This category is hierarchically organised and differentiated and they can mobilise legal complex resistance and civil society, initiate constitutional cases, invoke international law standards and mobilise the international legal complex. The 2007–2009 Pakistan lawyers' movement is mentioned as an example. In Hong Kong the mass public marches with legal complex leadership against repatriation cases to the PRC are mentioned (Halliday, 2023). Further categories concern cases – referring to judicial decisions or opinions, critique by retired judges, legal complex affirmations and social media campaigns – and symbolic instances, where an ideal personified by the person of a judge, the role of judges and rule of law in a society is channelled for instance through the legal complex formulating ideals of justice, judicial independence and the rule of law, educating the public on the merits of judicial neutrality as well as the legal complex aligning with media and civil society.

Recent scholarship focusing on rule of law decay in Poland, defined judicial resistance as activities of judges undertaken individually or collectively, in court or out of court, against measures aiming at limiting judicial independence or, more comprehensively, backsliding the rule of law. Measures that we can characterise as breaching the rule of law standards accepted by the state and enshrined in the constitution, national and international law (Bojarski, 2021, 2023). Bojarski's work mapped in detail previous waves of judicial and civil society organisation co-operation in Poland, overall encapsulating the 1976–2020 period with the main aim to elucidate how CSOs support judicial resistance. His work included judicial associations as part of CSOs and overall argued for a more distinguished role of civil society.

This analysis discussed several ways in which CSOs contribute to judicial resistance and liberal-democracy building, such as informing the public or providing training for judges. He focused on instances where judges actively worked together with CSOs. This historical analysis also supports the claim that the current wave of resistance and mobilisation relies on previous instances of co-operation and well-established pathways. The article defined CSOs as groups of citizens who associate for a chosen purpose in the form of associations, foundations, or less formal initiatives, with the aim of protecting liberal-democracy and guaranteeing human rights. In the article, judges' associations were included in the notion of CSOs, based on these not being formal organisations but rather private, voluntary associations.

2.2 European judicial mobilisation

Another relevant strand of literature concerns EU judicial mobilisation referring to the process through which national courts engage with EU law. EU legal mobilisation literature has offered a broader range of mechanisms that encourage or temper lawyers or interest groups to ultimately bring legal actions to EU courts thus inducing policy change (Vauchez, 2013; Mayoral and Perez, 2018, p. 723) but also focused on broader questions of what drives (non-)reliance on EU law by national judges (Pavone, 2022). Research focused on examples of successful EU judicial mobilisation, such as the one in the Spanish housing crisis and austerity measures introduced following the Euro-crises, where Spanish courts introduced cases to the Court of Justice challenging national legislation and ultimately inducing policy change (Mayoral and Perez, 2018).

This sub-field has also highlighted the importance of individual judicial entrepreneurship behind successful judicial mobilisation within the EU. Drawing on the broader literature on legal mobilisation (Vanhala, 2017; Pavone, 2022), important consideration for EU judicial mobilisation, beyond legal and political opportunities and resources, are judicial entrepreneurship (Vauchez,

2013) behind these actions and the impact of how EU law issues have been framed (Mayoral and Perez, 2018, p. 725). Here, specifically, the insight regarding the importance of framing, aligns with findings emerging from studying the international legal complex.

Furthermore, the EU legal mobilisation literature also revealed that knowledge of individual judges on content and processes of EU law are relatively scarce (Pavone, 2022). In fact, looking at the broader historical development of EU law, existing research has highlighted that the role of entrepreneur EU lawyers behind some of the landmark CJEU cases should not be overlooked (Pavone, 2022). Pavone's research uncovered the essential role of lawyers specialised in EU law, whose work catapulted national judicial referrals for landmark CJEU judgments in the 1964–1980 period. By doing so, this line of research revealed the identifiable role of lawyers in the historical EU legal complex when judges were faced with limited knowledge or resources to bring EU legal actions (Pavone, 2022).

The above-mentioned observation on scarcity of EU law knowledge also aligns with previous socio-legal empirical research studying the knowledge and attitudes of national judges of EU law. Mayoral, Jaremba and Nowak have also concluded that the fulfilment of the role of national judges as decentralised EU law judges is in practice significantly limited by either the lack of awareness or interaction of national judges with EU law (Mayoral, Jaremba and Nowak, 2014). Thus, professional interest groups, such as judicial associations, with knowledge and resources may greatly enhance EU judicial mobilisation. Building on these theoretical foundations, this article explores in more detail the role of judicial professional associations in supporting or hindering judicial mobilisation in EU member states experiencing rule of law decay. Sharing knowledge regarding EU law among judges appears as an important concern for EU mobilisation and this is also an area where judicial associations can play an important role. Building on these insights important theoretical considerations will be how judicial associations facilitate sharing knowledge, possibly EU and ECHR law knowledge necessary to introduce cases or apply EU law.

2.3 Judicial associations and pathways of judicial resistance

This article views judicial resistance as a process with temporal, legal and extra-legal dimensions, and which can be deployed either individually or by a group as a response to attacks on judiciaries, to protect core rule of law judicial values, including but not limited to judicial independence. Given this nature, judicial resistance forms part ultimately of the resiliency of the rule of law framework and thus it is conceptually distinct from resistance against rule of law values, such as the ones exercised by hostile national Executives contesting European core values (Bojarski, 2023 pp. 90–96). This type of resistance is also distinct from specialised forms of resistance identified in international judicial politics, such as pushback and backlash as forms of resistance from individual states (Madsen, Cebulak and Weibusch, 2018; Voeten, 2020).

Theoretically, the article delimits legal (inside courts) or extra-judicial (outside courts) resistance techniques,[6] and the timing of resistance techniques matter in this sense (i.e. during legislative processes, following the adoption of controversial legislation). Judicial associations can be involved in both legal and extra-legal resistance, in all temporal dimensions. Associations can either support individual actions or organise group resistance. If not contested by individual judges, they can be successful in lending a voice to the entire judiciary and formulating their common values (Karpik and Halliday, 2011, p. 230). However, the goals of judicial associations might not immediately align with that of individual judges (Karpik and Halliday, 2011), as it will be empirically explored in the case of Hungary. In these instances, judges must find alternative ways to mobilise the judicial branch. These different channels might or might not be as visible as in the case of judicial associations-supported mobilisation.

[6]Resistance techniques, mechanisms and tactics are used interchangeably in this article.

Finally, judicial resistance does not occur only between two institutions: the Judiciary and Executive (supported by the Legislature), but its possibilities and limits also depend on a wider array of actors, such as civil society organisations (CSOs), international courts, international organisations, the legal epistemic community and international professional associations. Thus, while the article focuses on the Judiciary and the Executive as two central actors in these processes, resistance is also placed in the broader context of the legal complex. More specifically, regarding the Judiciary, a central concern for this article is the place of professional associations of judges in shaping judicial resistance. The article considers four attributes in detail: legislative possibilities, main role, internal level of organisation and participation in international networks.

This article argues that judicial associations uniquely contribute to resistance mobilisation by the possibility to employ at least six distinct mobilisation techniques: (1) internally appealing to common judicial consciousness and values, (2) playing a strategic role in internal judicial organisation, (3) drafting, initiating and supporting strategic litigation to international courts in co-operation with civil society and legal scholars, (4) strategic co-operation with civil society organisations, (5) direct co-operation with civil society at large, including the organisation of protests, lectures or contribution to films, (6) participating in international judicial networks. The article further argues that some of these strategies are more publicly visible. While others are more latent. Nonetheless, can contribute to mobilising judicial resistance.

As mentioned above, the resistance techniques can also be further delimited based on their timing. Preventative strategies include for instance participation in public debate regarding judicial changes, to the extent that is legally and factually possible, or issuing public legal opinions (similarly, provided the timing of the legislative process allows for it). Reactive strategies include for instance support for non-execution of judgments and referrals to European courts. European network co-operation techniques (i.e. participation in European networks of judicial associations) for instance can be deployed both preventatively or reactively.

Regarding the judicial association's support towards individual judicial resistance, this can be further broken down. For instance, the non-execution of judgments can be based on (legal) technical or factual grounds, by invoking traditional national legal doctrine or by direct reference to rule of law values. These coincide with classic delimitations in judicial resistance literature. There, indirect judicial non-compliance refers to instances when judges intentionally misinterpret the law or the facts of the case, without directly defying new legal doctrine. Whereas the alternative is overt non-compliance (Tokson, 2015, pp. 907–910).

Further individual judicial non-compliance techniques consist of invoking EU law grounds for non-compliance or referring a question to the Court of Justice of the European Union (CJEU) or the European Court of Human Rights (ECtHR). Other techniques also involve invoking the support of academic research or international epistemic communities and their recommendations. Here a question might be to what extent and how judicial associations support individual non-compliance and how that might relate to the deployment of specific individual resistance methods. The format and co-ordination may also become relevant here.

For specific pathways through which judicial associations contribute to maintaining judicial independence, the format and co-ordination of the association become relevant. Namely a composite national-regional format, with specific focus groups and high co-ordination within the association could quickly deploy expertise and opinions. These structural elements can also catalyse the development of novel techniques. Beyond format and co-ordination, a strong alignment between the mission of the association and judicial independence values can further aid maintaining judicial independence. Alignment between the framing of the missions and European values can be also beneficial. Overall, if not contested by judges, judicial associations can be effective in providing visibility for judicial independence concerns.

In case the format, co-ordination or alignment conditions are not in place, an alternative pathway may be necessary. This would entail finding an alternative platform, which would still require some form of format, co-ordination and alignment conditions. However, the visibility of

these mechanisms might be different, and the alternative platform may or not support the same array of mechanisms as an association. The next section will explain how the format, organisation and operational tools of judicial associations shape what judges can do in resisting Executive attacks.

3 Waves of judicial changes in Hungary and Poland and the role of judicial associations

This section illustrates how the visible strategies of resistance by the Polish judicial associations are connected to the structure and organisation of these professional groups as well as deeper historical continuities. The analysis of the role of judicial associations is then further refined by explaining hidden pathways of resistance in Hungary against the backsliding context. The analysis first introduces the aims and structure of judicial associations in the studied countries and contextualises them more broadly. Then, it presents an overview of activities during multiple waves of judicial reforms after the fall of communism and during the EU accession process. This will be contrasted with activities against legal changes contributing to rule of law backsliding.

3.1 Poland – high level of judicial and societal mobilisation

One of the main judicial association in Poland, Iustitia, has a long-established position on the Polish judicial platform. It was established in 1990 under the original name of Association of Judges adjudicating 'Iustitia'. Membership is open to all judges from ordinary, administrative, military courts as well as the Supreme Court. The association has a wide geographical coverage. It operates at a central level, but also with several local branches.

The activities of the association are widespread. They cover ten main 'problem teams' at the central level and further activities at local branches. The association emphasises that systemic questions are of central importance for their organisation, and they are particularly active in delivering feedback on legislative drafts. Members includes 30 percent of judges in Poland. The association itself approximates to have 3,500 members, organised in thirty-two branches – which is the equivalent of one third of the total number of judges in Poland (Iustitia, 2024).

The statutory aims of the Association are to represent the professional and social interests of the Judiciary, securing the authority of the judges and their position in society. A special role in this area is played by two teams: Information and Disciplinary Misbehaviour Monitoring. The association specifically mentions (1) improving the public image of judges and courts and (2) lending a public voice to judges viewed as an environment 'devoid of national representation' as main roles. It also emphasises that it actively supports judges in disciplinary proceedings and protects independence.

The association also publicly shows support on its website to judges in other countries where judicial independence is under threat. Furthermore, the association is a member of several main international organisations and networks, such as the International Association of Judges, the European Association of Judges and MEDEL, which also actively and publicly supported judicial independence.[7]

Another significant association is Themis, which shares a similar main goal and organisational structure and workgroups (Themis, 2023). Themis has been also active in supporting individual judges, publicly commenting on legal changes, providing visibility to European court decisions and co-ordinating with academic experts. More generally, the activities of these associations tie into an active national representative forum of judges, providing even more outreach to these associations. This further strengthens the overall possibilities for representing judicial interests.

[7]Letter to Frans Timmermans about the disciplinary proceedings against Judges in Poland (21 February 2019).

As a result, the Polish judicial association setup appears a very active one. The framing of the statutory goals strongly aligns with the individual, independence-related interests of judges. The language of EU judicial mobilisation also mirrors these main values. Through associations there is a strong entrepreneurial role in introducing cases to European courts. This is in contrast to Hungary, where as it will be shown, behind the limited EU judicial mobilisation there is an alignment between the values and interests of the National Judicial Council (in terms of appointment of court leaders and court presidents) and the individual CJEU case introduced. However, there is no strong entrepreneurial support.

Despite the successful judicial mobilisation in Poland, the prevailing opinion among judges appears to be that the organisation of the resistance has been a process even in the Polish context and it is the result of a several years of incremental actions. Through their activities the associations managed to break through one of the biggest barriers at the individual level, which was the perception that judges have to be apolitical, in line with the legal requirements for judicial activities. Furthermore, this process also moved past additional barriers due to the education of judges. Namely, that judges should speak the letter of the law, they should address litigants only in the court and that the court communicates with the public via designated spokespersons (Zabłudowska, 2022).

An important explanation for the high-level judicial mobilisation in Poland was historical in nature. Research traced the long-standing continuities and discontinuities in the co-operation between judges and civil society organisation, dating back to the 1976–1989 'Solidarity' era as a catalyst for the current organisation of sites of protest. For instance, Bojarski argued that the close co-operation between the judiciary and CSOs in Poland materialising since 2015 was not an *ad hoc* development. Rather, it builds on long standing continuities dating back to the 1976–1989 'Solidarity era', when a judicial branch of Solidarnośc was created (Bojarski, 2021). According to estimates by legal professionals and scholars this movement comprised approximately one thousand judges out of the total three thousand judges appointed in Poland in the relevant period. Even after the imposition of martial law in 1981 and until democratic transition period starting in 1989, judges participated in the underground civil society movement by publishing calls for judicial reforms in weekly circulars as part of the movement. After the establishment of the Polish Helsinki Foundation in 1982, discussions on judicial reforms became an integral part of the regular reports of this organisation, which were developed with the participation of judges (Bojarski, 2021, pp. 1348, 1350–1353).

Although relations between CSOs and judicial associations in Poland have undergone a period of discontinuity after 1989, this significant historical heritage of judicial resistance provided an important basis for the present co-operation. Furthermore, also as a historical legacy of the democratic transition period, the organisational documents of the main Polish judicial associations, Iustitia and Themis, explicitly mention the protection of judicial independence and the rule of law as one of the main goals of these associations. This made it possible to dedicate significant resources and the main time of these associations to the protection of judicial independence (Zabłudowska, 2022). The Polish example thus illustrates how historical continuities in terms of shared values of judicial independence, can become a useful resource to mobilise collective action, even after periods of discontinuities. It also serves as an example of how such deep-seated institutional values can help galvanise individual judges in taking active public actions, even in circumstances where individual judges were previously used to being restrained (Zabłudowska, 2022).

3.2 Hungary: Exploring hidden pathways of resistance

3.2.1 The surface: An apparent passivity of judicial associations of judges

Hungary is a country with a dispersed format of judicial associations. After the fall of communism, a main judicial association, the Association of Hungarian Judges was created in 1990 with the main purpose of safeguarding judicial independence and representing the interests of judges and having Act II of 1989 on the right to association as a legal basis. The membership was open to all

judges and the association operated as a national platform as well as through regional representatives. In doing so, it has become the largest association of judges in Hungary, a status which it maintains to date (MABIE, 2020). The association is registered as a foundation and participating judges contribute with a membership fee.

In terms of internal organisation, the association maintained its original format over the decades. Currently it is composed of a national president, vice president, main secretary and eleven members of the national presidency, with an additional four substitute members (MABIE, 2017). At the regional level, there are regional representatives for each county and one–five further members per region. Furthermore, there is currently one active supervisory committee with three members. Besides this committee, there are no committees specialised in different legal subfields.

The general regulation at the basis of the current operation of the association, was newly adopted in 2013, on the basis of the provisions of the new civil code and the civil society legislation (Act CLXXV of 2011). According to the regulation, the main goals of the association are the protection of judicial independence, contributing to the rule of law by improving the quality of justice and material conditions for quality judging; securing and strengthening the public's appreciation of the judicial profession; representing the interests related to the legal status of judges and judicial secretaries; as well as supporting and contributing to the development of efficient and democratic internal organisation of the judiciary.

In achieving these goals, the association may use (1) legislative mechanisms, (2) mechanisms representing the financial interest of judges and has (3) general outreach tools. Accordingly, the association can propose the adoption of new legislation, and in doing so may directly address the Ministry of Justice and National Assembly and can initiate the adoption of relevant internal regulations to the President of the National Judicial Office. The association expresses its opinion publicly on legal measures affecting judges, including outreach to the general public.

Apart from involvement in legislative processes, the other main group of mechanisms focuses on the financial interests of judges. The association views as one of its main tasks to represent the social and financial interests of judges in collaboration with other professional organisations. It offers an opinion on the annual budget of the Judiciary and it intervenes in instances of public attacks against judges – although this latter mechanism has not been activated recently in practice. More generally, the association organises trainings and conferences and contributes to the materialisation of the judicial code of ethics as well as collaborates with other judicial associations, including European and international ones (MABIE, 2020a). The association is a member of the International Association of Judges, European Association of Judges Regional Group (International Association of Judges, 2024).

In terms of long-term activities, the association actively participated in the development in legal changes between 1992–1997. This was the period leading up to the adoption of the first democratic legislative framework for the functioning of the judiciary and status and remuneration of judges in 1997. The main participants on behalf of the association were presidents of regional courts. They participated in meetings of the legislative committees and submitted their own proposals for the modifications of the legal framework. Notable examples concerned in 1992 the proposal to the Ministry of Justice on planned regulatory framework. Furthermore, a proposal was introduced to the modification of the 1972 Act on judicial functioning, which discussed: judicial selections, appointment of the President of the Highest Court with the approval of the judicial college, security of tenure, limited transfers (MABIE, 1992).

The resulting 1997 legislative framework favoured presidents of regional courts in terms of internal organisational tasks. Presidents of regional courts occupied the majority seats of the central administrative and managerial body of the Judiciary, the National Council for Justice. As such, they had influence over the central supervision and strategies related to the functioning of courts. Moreover, court presidents held important powers at the level of courts related to the selection of judges and case allocation. The legal-sociological literature attributed this outcome to the enhanced participation in the legislative processes of this professional level and overall strong

and influential position of regional court presidents within the internal judicial hierarchy (Fleck, 2008).

The 1997 legislative framework constituted the basis of the 2004 EU accession of Hungary, with legislative modifications in 2002. These changes mostly enhanced transparency rules, for instance concerning the judicial selection conditions and enhancing the transparency of the case allocation system at the level of courts. Overall, during the EU accession period there was a more active participation of civil society and legal experts, i.e. through the Open Society Institute rather than judicial professional associations.

In the subsequent period (2005–2014), the judicial association shifted focus towards the adoption and enforcement of the judicial code of ethics. Although the code of ethics was developed and adopted by the association, it was applicable to every judge in Hungary. Namely, any judge could raise an ethical question, also regarding a colleague (including non-members) to the ethical subcommittee of the association. The subcommittee then reflected on the concern and gave an anonymised opinion on the matter. However, the applicability of the ethical code to non-members created tensions among the judiciary. Specifically, non-members felt distanced from the ethical code and questioned the legitimacy of the ethical opinions. Ultimately, the power to adopt and enforce a judicial code of ethics was transferred to the National Judicial Council and a new ethical code adopted in 2015 (currently under revision) (Gyöngyi, 2019). But these previous tasks and main focus of the association explain the current remaining commitment of the association towards judicial ethics.

In relation to the legal changes taking place since 2010, the main actions of the association were centred on remuneration questions. The association established a strategic partnership with the Ministry of Justice and co-operated with the National Judicial Office in this sense. This is also a topic which the association raised at meetings of the International Association of Judges (MABIE, 2023). As a result, this is the main field in which the association had been the most active in recent years. Indeed, regarding attacks against judicial independence, the association made only indirect and general comments. For instance, in 2017 it released a general statement condemning public media attacks against individual judges, without specifying the events and their details addressed in the statement. In a similar vein, as an apparent support of individual judicial resistance, the association re-published the summary of the court proceedings written by a civil society organisation (TASZ) representing a judge who was repeatedly denied appointment by the President of the National Judicial Office despite being ranked first by the evaluation committee (MABIE, 2021; TASZ, 2021; MABIE, 2020b). The association did not formulate its own statement on this matter. Rather, when its members were directly targeted in the press, the association re-posted content addressing judicial independence questions.

Historically, this primary focus of the association on the financial welfare of judges is not surprising. The association considers as its direct predecessor The National Judicial and Prosecutorial Association, established in 1907. Originally, this association was meant to represent the interests of lower court judges with the purpose of catalysing overarching judicial reforms. However, the influence of lower court judges very quickly faded (starting from 1910) and gradually disappeared. Instead, court presidents started dominating the association. At this time, the focus of the association also shifted mainly to remuneration matters. During the 1920s, the association placed an emphasis on the welfare institutions of judges (i.e. establishing a boarding school for children of members) and operating its own financial institution covering benefits and pensions of judges (MABIE, 2020, pp. 4–5). Thus, there is a long-established tradition for Hungarian judicial associations to represent financial interests, and for such associations to be mainly driven by court presidents.

Next to this main judicial association, there are several smaller associations in Hungary – with a much more reduced membership and a specific focus on a given legal subfield. For instance, there is an Association of Female Judges (*Bírónők Egyesülete*) which works together with UNICEF and specialises in family law and children's rights (Bírónők Egyesülete, 2024). In addition, the

Association of Labor Law Judges also connects judges specialised in this sub-field. While these associations are also members of European networks of judicial associations, due to their substantive law specialisation, they did not become platforms supporting judicial independence.

3.2.2 Alternative pathways of resistance

Instead of judges associations, a main organised and visible centre for judicial resistance against some Executive attacks has been the National Judicial Council (NJC) since its second mandate. This is the formal representative body of Hungarian judges established in 2012 and responsible for the central supervision of courts in Hungary. Together with the National Judicial Office, it constitutes the central self-management organ of the judiciary. In terms of possible resistance techniques, formally, the National Judicial Council cannot directly propose legislation (Országos Bírói Tanács, Legislative Processes, 2024b). It can only suggest such proposals to the President of the National Judicial Office (Act CLXI of 2011, Sec. 103,1,b). However, the National Judicial Council has the legal power to supervise the administration activities of the President of the NJO (Act CLXI of 2011, Sec. 103,1,a), which has opened possibilities for resistance techniques.

The NJC has become an organisation active in practice – in fact, apart from civil society the most visibly active – in discussions concerning the functioning of the judiciary, including legal changes (Országos Bírói Tanács, 2024). Since 2018, and with its second term, the NJC has taken a leadership role in three important matters. A main successful resistance has concerned the appointment process of the President of the highest court (Kúria). This appears as a reemerging issue concerning the politicisation of the judiciary. After one of the first direct attack on the judiciary and judges has been the removal of the President of the Highest Court, judge Baka in 2012 via modified legal qualification conditions (Hungarian Helsinki Committee, 2021).[8] Another notable change occurred in 2020 when legislative changes allowed for the appointment of a political candidate. These changes took place despite the manifest objection by the NJC expressed during their meeting where thirteen out of fourteen members representing 3,000 judges did not support this appointment. In the report of their regular meeting, they expressed concerns over the lack of relevant practical experience as a judge as well as regarding the independence and impartiality of the candidate (Hungarian Helsinki Committee, 2020).

Furthermore, in this period, the NJC has actively criticised the non-appointment of judges and court presidents by the President of the NJO and continued to monitor these practices. In addition, the National Judicial Council has been critical of internal organisational measures employed by the previous President of the NJO. For example, the National Judicial Council was critical towards the internal questionnaire sent out by the National Judicial Office in support of changing the self-governance model of the judiciary, which would directly affect the organisation and reduce the operative tools of the National Judicial Council (National Judicial Council, 2024). Thirdly, an initiative of the NJC constitutes the amendment of the ethical code of judges in a way to highlight the possibilities of judges to express their opinion. This is a direct initiative to aid building judicial resilience and support individual resistance by judges.

Apart from national resistance techniques, the National Judicial Council is a member of the European Network of Councils for the Judiciary (Országos Bírói Tanács, International Relations, 2024a; European Network of Councils for the Judiciary, 2024), the Balkan and Euro-Mediterranean Network of Councils for the Judiciary. These all represent direct channels for support and co-ordination with European colleagues, albeit less visible. Importantly, the NCJ, together with civil society organisations supported judges to refer cases to the CJEU.

[8]Initially, this has led to a judgment by the ECtHR. However, the new legislative changes relying on the same methods, fundamentally questions the effectiveness of the ruling.

The first referral to the Court of Justice directly questioning judicial independence in Hungary originated from Judge Vasvári.[9] The case concerned criminal proceedings against a Swedish national at the Pest Central District Court. The case was suspended to address three questions to the CJEU. The first question concerned the quality of translations and interpretations in light of EU law requirements. Furthermore, the original referral contained two questions pertaining to judicial independence. In particular, the structural changes in the central administration of justice and the remuneration of judges were questioned in light of EU law guarantees for judicial independence.

Following the referral, the Prosecutor General commenced an examination of the order for the preliminary reference before the Kúria. They contended that the first question lacked relevance as the quality of the translations was not relevant for the case. Additionally, they argued that the second and third questions stray from the interpretation of EU law, are tangential to the case, and hold no sway over its outcome. The Kúria concurred with the motion and concluded that the disputed decision was unlawful. While the declaration of illegality did not directly impact the preliminary reference procedure at hand, it did curtail at the national level the possibility of judges to seek guidance from the Court of Justice, in line with their role as decentralised EU judges. Furthermore, the Acting President of the Metropolitan Court initiated disciplinary proceedings against the judge making the referral. The disciplinary proceedings were later withdrawn. Following these events, judge Vasvári appended two additional questions to the original reference, seeking clarification on whether the declaration of unlawfulness of the initial preliminary reference and the subsequent disciplinary action complied with EU law (Bárd, 2021).

In part of the judgment concerning judicial independence, the Court of Justice addressed the two supplementary questions. Regarding the declaration of unlawfulness by the Kúria, the Court of Justice held that even though the Kúria did not require the referring judge to withdraw the initial request for a preliminary ruling, the finding of illegality itself goes against EU law and it susceptible to undermine both the authority of the Court of Justice and the authority of the national court applying the answers given by the Court Justice. Furthermore, the Court of Justice held that the decision of the Kúria would be likely to prompt national courts to refrain from referring questions to the Court of Justice in order to prevent preliminary ruling being challenged by one of the parties on the basis of the Kúria decision or being subject to motion by the Prosecutor General. Concerning the disciplinary proceedings, the Court of Justice held that the mere prospect of being subject to disciplinary proceedings as a result of making a referral to the Court of Justice, undermines the effective application of EU law. Such disciplinary proceedings could deter national courts from making references. Thus, the judgment by the Court of Justice contained an important declaration that legal mechanisms were used in Hungary in a way which could have a chilling effect on judicial resistance. However, despite the importance of the findings, the effects of the judgment at the national level remain questionable. Retaliation due to a referral to the Court of Justice was also visible in another case.

The second case concerned professional evaluation and decision not to extend the temporary appointment of judge Gabriella Szabó.[10] In 2018 judge Gabriella Szabó was appointed for a temporary period of three years hearing administrative law cases at the Budapest Regional Court. Shortly after her appointment, judge Szabó heard a case from an asylum seeker who was rejected based on legal inadmissibility grounds. Judge Szabó stayed proceedings and requested a ruling from the Court of Justice on the compatibility of the admissibility grounds with EU law. The Court of Justice declared the Hungarian asylum rules incompatible with EU law and the referral also triggered an action by the European Commission resulting in further finding of unlawfulness of Hungarian rules from an EU law perspective. However, as a consequence, the president of the Budapest Central Court found judge Szabó unsuitable for the judicial office during her

[9]Court of Justice of the European Union, C-564/19 *IS*.
[10]Court of Justice of the European Union, C-564/18 *LH*.

performance evaluation at the end of her fixed term appointment as a junior judge, and her appointment as a judge was not finalised. This case was referred with the support of Hungarian civil society organisations to the European Court of Human Rights (Hungarian Helsinki Committee, 2022).

As it can be seen from the example above, there are also referrals by Hungarian judges, albeit more limited in number as compared to Poland. A possible explanation behind the comparatively reduced number of referrals, can be the view shared by the professional judicial circles that it is not the purpose of preliminary questions to bring to light and decide upon systemic judicial independence problems. Rather, that would be the role of infringement proceedings (Scheppele, Kochenov and Grabowska-Moroz, 2021). However, this puts more pressure on alternative pathways of resistance and draws attention to the fragility of these platforms.

As has been discussed above, the NJC has become a leading platform for internal criticism within the judiciary, only with the second mandate and new members of the National Judicial Council, since 2018 and operating with the current composition until 2022. This means, that with the election of a new NJC, the actively critical platform might disappear. This challenge is further confounded by a question of resources and internal attitudes of judges. In terms of resources, for instance, it must be mentioned that the NCJ operates its website out of the contribution by its members. The National Judicial Office does not allocate budget for a separate website for the NJC. Thus, an easily accessible and highly visible platform for resistance is essentially self-funded. Furthermore, support within the judiciary towards the actions by the NCJ cannot be taken for granted. For instance, recent research by the Hungarian Helsinki Committee based on interviews with judges, registered a low collegial support among judges towards the efforts by the National Judicial Council.

Ultimately, the emerging limiting factor appears to be that judges see themselves as well-trained state officials, leading to lack of mutual support and collegiality and overall reduced level of resilience and resistance (Bencze, 2021). Combined with lack of societal support of the efforts of protecting judicial independence, these can have an overall negative impact on the resiliency of the judiciary. At the same time, the activities of NCJ also resulted in a shift in the professional association landscape (Res Iudicata, 2024). In 2020 a new professional association was established, Res Iudicata. The specific aim of the new association is to raise societal awareness of rule of law values. The association has become member of MEDEL.

Historical explanations can also be useful in further understanding these emerging latent processes. For example, Fleck has argued that although in the three decades following democratic transition, relative autonomy of judges has become a practice, the skills and habits of professional self-defence could not fully stabilise, resulting in an institutional vulnerability (Fleck, 2021). Relative autonomy of judges started materialising in Hungary during the Kádár period of the communist rule, made possible through the legal-institutional changes after the 1956 Revolution and the end of telephone justice in the mid-1960s. As a result, individual judges could resist by noting down the influence and including it in the case file, or rendering the decision inadmissible. However, judges were still dependent on the supervision and sticks and carrots by court presidents as promotions, case allocation were monitored by court presidents. Furthermore, the outcomes of key cases were monitored and co-ordinated politically at higher institutional levels.

In these circumstances, beyond the possibility to resist direct political pressure, historically in Hungary mainly individual forms of resistance could be traced. These were also relatively moderate, rather than heroic and there are no observed forms of collective resistance during the Kádár regime (Fleck, 2021, p. 1311). Individual resistance appeared under the form of relying on mitigating circumstances to render milder sentences, especially in fields which were politically sanctioned. Furthermore, a documented passive form of resistance against political control was giving up on promotion possibilities within the judiciary (Fleck, 2021, p. 1312). While the autonomy of individual judges developing since the late communist period, was a useful basis for further strengthening judicial independence in the period following democratic transition, the

legacy of no established defence mechanisms explains the lack of immediately organised judicial resistance in Hungary in the backsliding context taking place since 2010. This background also helps to understand the more concealed channels of co-operation between judges and civil society organisation in Hungary as well as the difficulties in organising collective judicial resistance when broader institutional values are not readily available. Ultimately, the Hungarian example reveals a latent role of associations and strong judicial-civil society collaborations, albeit not always publicly visible.

4 Conclusion

This article has demonstrated that judicial associations need not have to publicly participate in organising judicial resistance against backsliding processes in Europe to contribute to these processes. The finding that seemingly dormant judicial associations can have a significant effect on judicial resistance, broadens our theoretical scope of understanding the role of judges in the legal complex.

The main conclusion of this article is that focusing on the multiple ways in which judicial associations can contribute and shape judicial resistance in a given context, broadens our empirical and theoretical understanding of not only judicial resistance, but also the functioning and mobilisation of the legal complex. This conclusion rests on the demonstrated importance of judicial associations in the current European rule of law decay context. Temporarily, we should focus more on less visible and more strategic mechanisms through which associations contribute to resistance. In terms of actors and dynamics, we should broaden our scope to study judicial associations interactions with (1) groups of judges, (2) forms of judiciaries operating as an institution (such as Councils for the Judiciary) and (3) civil society organisations and further delineate the separate and identifiable role of judicial associations. Identifying hidden pathways adds a more textural understanding to the apparent habitus of non-resistance and the habitus of non-collective actions in the Hungarian case. It also highlights that historical legacies of limited resistance might have ramifications in present circumstances.

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