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

# (No) Ghost in the Shell: The Role of Values Internalization in Judicial Empowerment in Slovakia

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## Abstract

This article uses the case study of Slovakia and its lackluster experience with a judge-dominated judicial council to demonstrate that formal institutions have only limited impact on the ideational level. We show that the transformation of the Slovak post-communist judiciary relied on the presumption that judges' interests are automatically complementary to principles of the rule of law. Therefore, the majority of implemented reforms insulated the judiciary from the political branches of power, but allowed strong hierarchical relationships inside the courts to exist. In contrast to international expectations, judicial authorities used judicial empowerment to create or strengthen competing informal practices, which helped them to maximize their power. We argue that the lack of internalization of judicial independence might explain why institutional self-governance reforms failed to trigger changes in the professional role conception of judges in regimes riddled with deeply embedded informal institutions. In order to tackle this problem, we propose that future research on the relationship between institutional safeguards and decisional judicial independence should focus on the process through which actors internalize new institutional incentives.

**Keywords:** Professional role conception; judicial independence; corruption; internalization; informal institutions; informal practices

## A. Introduction

In February 2018, the assassination of a young couple, the investigative journalist, Ján Kuciak, and his fiancée, Martina Kušnírová, shocked Slovak society. The investigation that followed uncovered a convoluted corruption network between oligarchs and state functionaries, including judges.<sup>1</sup> Public protests and mass demonstrations seemingly stirred up a new pro-democratic movement: The 2019 presidential elections brought about the surprising victory of a liberal candidate, lawyer and environmental activist Zuzana Čaputová. Foreign media celebrated a win for democracy over far-right sentiments in Central Europe.<sup>2</sup> The following 2020 parliamentary elections, which catapulted to power a small opposition movement with a very strong anti-corruption program,

<sup>1</sup>Michal Ovádek, *Deep Rot in Slovakia*, VERFASSUNGSBLOG (Oct. 15, 2019), <https://verfassungsblog.de/deep-rot-in-slovakia/>.

<sup>2</sup>Emily Tamkin, *Hailed by Liberals, Slovakia President is Under a Lot of Pressure to Turn the Tide of Populism*, WASHINGTON POST (Apr. 1, 2019), <https://www.washingtonpost.com/world/2019/04/01/hailed-by-liberals-slovakias-new-female-president-is-under-lot-pressure-turn-tide-populism/>; Paul Hockenos, *The End of Eastern Europe's Great Liberal Hope*, FOREIGN POLICY (Mar. 1, 2020), <https://foreignpolicy.com/2020/03/01/zuzana-caputova-slovakia-the-end-of-eastern-europes-great-liberal-hope/>.

seemed to confirm the trend.<sup>3</sup> The new government, led by a populist, Igor Matovič, promised to clean the system of old cadres, break corruption networks, and strengthen both judicial independence and the rule of law.<sup>4</sup> He was true to his word, as the investigations into the corruption continued and exposed a significant level of clientelism and politicization, reaching the highest ranks of the Slovak judiciary, the general prosecutor's office, and the Ministry of Justice.

This was, however, only the very tip of the iceberg. Increased media coverage soon documented the widespread use of informal practices interfering in decision-making and further compromising the public's perception of judicial independence. Communications between several judges and oligarchs accused of a variety of criminal offenses were published, more than twenty judges eventually ended up under investigation and were arrested.<sup>5</sup> Although the Slovak judiciary went through a substantive institutional transformation after the fall of the semi-authoritarian regime in the late 1990s, the new institutional setup overseen by European supranational bodies clearly failed to eradicate old informal patterns deeply embedded in its political culture.<sup>6</sup>

Slovakia in fact represents a cluster of Central and Eastern European (CEE) post-communist countries where entrepreneurial political elites established brokerage party systems and where new public policies and institutions developed only as a by-product of economic competition, with very little commitment to democratic values and primarily serving the exercise of private gains.<sup>7</sup> This can be seen in the Judicial Council, established in 2002, which transferred considerable powers to the judiciary, yet was swiftly hijacked by old judicial elites to serve corporatist interests present in the judicial ranks.<sup>8</sup> The rather loose commitment to principles of separation of powers was exhibited also in the so-called revolving door phenomenon. No rules—formal or informal—prevented the widespread practice of judges serving as high-ranking officials at the Ministry of Justice, just to eventually return to the judiciary.<sup>9</sup> One such judge-turned-official, Monika Jankovská, played a central role in the corruption networks uncovered in the aftermath of Ján Kuciak's murder.

In this article we examine the conflict between the intended and actual functioning of a strong, judge-dominated judicial council in the context of the Slovak judiciary. We do so using the concept of informality and describe how practices such as corruption, clientelism, and spatial travelling between judicial and political positions became institutionalized in a judicial governance system which provided judges with a relatively high level of institutional independence but low level of accountability.<sup>10</sup> Consequently, the reforms aimed at securing judicial independence

<sup>3</sup>It is, however, also important to stress that although Matovič's party embraced an anti-corruption agenda, it was not a liberal party, as is sometimes perceived by foreign media and commentators. The party in fact incorporated many smaller ultra-conservative and Christian movements.

<sup>4</sup>See IGOR MATOVIČ, OBYČAJNÍ LUDIA A NEZÁVISLÉ OSOBNOSTI, 'ÚPRIMNE, ODVÁŽNE PRE LUDÍ' [ORDINARY PEOPLE AND INDEPENDENT PERSONALITIES, 'HONESTLY, COURAGEOUSLY FOR THE PEOPLE'] (2020).

<sup>5</sup>Which is approximately 1% of the Slovak judiciary. *Kočner's judges charged and detained*, THE SLOVAK SPECTATOR (Mar. 11, 2020), <https://spectator.sme.sk/c/22355425/kocners-judges-charged-and-detained.html>; *Storm transforms into Gale. More Judges and an Influential Businessman Detained*, THE SLOVAK SPECTATOR, (Oct. 28, 2020), <https://spectator.sme.sk/c/22520635/storm-transforms-into-gale-more-judges-and-an-influential-businessman-detained.html>.

<sup>6</sup>Samuel Spáč, Katarína Šipulová, and Marína Urbániková, *Capturing the Judiciary from Inside: The Story of Judicial Self-Governance in Slovakia*, 19 GER. L.J. 1741, 1742–46 (2018); DAVID KOSAŘ, PERILS OF JUD. SELF-GOVERNMENT IN TRANSITIONAL SOCIETIES (2016).

<sup>7</sup>Abby Innes, *The Political Economy of State Capture in Central Europe*, 52 J. OF COMMON MKT. STUD. 88, 89 (2014).

<sup>8</sup>See Spáč et al., *supra* note 6; and KOSAŘ, *supra* note 6; Samuel Spáč, *The Illusion of Merit-Based Judicial Selection in Post-Communist Judiciary: Evidence from Slovakia*, 69 PROBLEMS OF POST-COMMUNISM 528, 533–63 (2020), David Kosař and Samuel Spáč, *Post-communist Chief Justices in Slovakia: From Transmission Belts to Semi-autonomous Actors?* 13 HAGUE J. RULE L. 107, 122–23 (2021).

<sup>9</sup>The most prominent representatives of this trend were Štefan Harabin, who served as a Minister of Justice between 2006 and 2009 prior to becoming Chairman of the Judicial Council, and Chief Justice of the Supreme Court (2009–2016), and Monika Jankovská, who was a Deputy Minister of Justice from 2012 until her forced removal in 2019 after numerous substantiated allegations of corruption.

<sup>10</sup>Michal Bobek & David Kosař, *Global Solutions, Local Damages: A Critical Study in Judicial Councils in Central and Eastern Europe*, 15 GER. L.J. 1257, 1270 (2014).

actually prevented the proper internalization of values typical of judicial systems in developed democracies and affected how independently courts decide.

In this respect, Slovakia sheds light on a more general scholarship on institution-building,<sup>11</sup> its ability to change the professional role conception,<sup>12</sup> and its relation with broader ideational changes in judicial culture. Why did the formal institutional reforms not provide sufficient incentives for judges to change their behavior? We show that the transformation of the Slovak post-communist judiciary relied on the presumption that judges' interests are automatically complementary to principles of the rule of law. Therefore, the majority of implemented reforms insulated the judiciary from the political branches of power, but allowed the existence of strong hierarchical relationships *inside* the courts. In contrast to international expectations, judicial authorities used their empowerment to create or strengthen competing informal practices, which helped them to maximize their power.

Slovak experience with the top-down implantation of a judicial council therefore echoes theories suggesting that formal institutions have only limited impact on the ideational level.<sup>13</sup> We postulate that alignment between formal and informal institutions is associated with the internalization of new roles, which is a necessary—but not sufficient—condition for the institutional reform to trigger behavioral change. In Slovakia, this relationship manifested itself in two processes which potentially reinforce each other.

First, despite the belief that the Slovak judiciary underwent a transformation after communism, the principle of judicial independence has not been properly internalized by judges. This lack of internalization followed partly from the tension between new formal and old informal institutions, but partly also from the very limited personal change in judicial ranks after the regime transition.<sup>14</sup> The combination of the deeply hierarchical structure and bureaucratic nature of the judiciary helped the competing informal institutions to survive the regime change and reduced the effect of new institutional incentives on actors' behavior.<sup>15</sup>

Second, the lack of internalization manifested itself in the fact that actors of judicial empowerment—both judges and politicians—eventually adopted a skewed understanding of judicial independence, leaning heavily towards the insulation of the judiciary from the political branches of power. The misunderstanding allowed the creation of new informal practices that later on institutionalized and turned formal reforms of judicial empowerment into empty shells with little substance.

In short, we argue that the lack of internalization of judicial independence might explain why institutional self-governance reforms fail to trigger intended changes in the professional role conception of judges in regimes riddled with deeply embedded informal institutions. The article proceeds as follows. First, we set the stage and explain the role of internalization in translating institutional changes into behavioral shifts in role conceptions. Second, we introduce the formal framework in which the Slovak judiciary operates and observe its conflicts with existing informal

<sup>11</sup> Antoaneta Dimitrova, *The New Member States of the EU in the Aftermath of Enlargement: Do new European Rules Remain Empty Shells?*, 17 J. OF EUR. PUB. POL'Y 137, 137 (2010); Attila Ágh, *The Bumpy Road of Civil Society in the New Member States: From State Capture to the Renewal of Civil Society*, 11 POL. IN CENT. EUR. 7, 7 (2015).

<sup>12</sup> Maria Popova, *Can a Leopard Change its Spots? Strategic Behaviour Versus Professional Role Conception During Ukraine's 2014 Court Chair Elections*, 42 LAW & POL'Y 365, 366 (2020); Lisa Hilbink, *Beyond Manicheism: Assessing the New Constitutionalism*, 65 MD. L. REV. 15 (2006); Lisa Hilbink, *The Origins of Positive Judicial Independence*, 64 WORLD POL. 587, 587 (2012); DIANA KAPISZEWSKI, *HIGH CTS. AND ECON. GOVERNANCE IN ARG. AND BRAZ.* (2012), Kim Lane Scheppele, *Guardians of the Constitution: Constitutional Court Presidents and the Struggle for the Rule of Law in Post-Soviet Europe*, 154 UNIV. OF PA. L. REV. 1757 (2006); Jennifer Widner, *Building Judicial Independence in Common Law Africa*, in *THE SELF-RESTRAINING STATE: POWER AND ACCOUNTABILITY IN NEW DEMOCRACIES* (Andreas Schedler et al. eds., 1999).

<sup>13</sup> Popova, *supra* note 12; Hilbink, *The Origins of Positive Judicial Independence*, *supra* note 12.

<sup>14</sup> David Kosář & Katarína Šipulová, *Purging the Judiciary After a Transition: Between a Rock and a Hard Place* (2023) (unpublished manuscript) (on file with authors).

<sup>15</sup> Peter Čuroš, *Panopticon of the Slovak Judiciary – Continuity of Power Centers and Mental Dependence*, 22 GER. L.J. 1247, 1251–55 (2021). See also Popova, *supra* note 12 (pointing out similar observations made on the Ukrainian judiciary).



practices. Third, we delve more deeply into selected episodes that shaped the Slovak judicial role conception and competed with the intended consequences behind the establishment of the Judicial Council. Fourth, we summarize the findings and discuss whether the observed practices occurred merely as isolated incidents or were institutionalized.

## B. The Role of Value Internalization in Institutional Design Reforms

When do institutional reforms trigger change in actors' behavior? Institutions, the rules of the game that structure our social and political life, seek to shape actors' behavior through incentive structures.<sup>16</sup> Institutional design typically creates expectations about how actors should behave, sets up rewards and sanctions, and tries to make non-compliant behavior costly. These institutions can be both formal and informal.<sup>17</sup> While formal institutions typically overlap with the legal and constitutional regulatory framework, informal institutions are created, communicated, and enforced mostly outside of officially sanctioned channels.<sup>18</sup>

Judicial systems, particularly in continental Europe, tend to be generally highly formalized and regulated, not leaving much space for behavior outside of formal institutional incentives.<sup>19</sup> Perhaps that is also why the scholarship on judicial governance long focused on institutional independence and the creation of institutional designs able to secure it.<sup>20</sup>

In the last decade we have heard the stronger voice of scholars leaning towards ideational explanations and suggesting that, apart from institutional designs, the behavior of judges is in fact shaped by historical path dependencies<sup>21</sup> and professional norms judges are socialized into.<sup>22</sup> Whether actors do or do not internalize values behind the (new) rules of behavior affects their professional role conception—in other words, how they understand their roles and duties in the system. In judiciaries, the role conception is closely intertwined with what scholarship addresses as the decisional independence of individual judges.<sup>23</sup> In other words, while institutional independence describes the regulatory design of judicial governance and decision-making, decisional independence relies on how individual judges decide in individual cases and how they address potential conflicts and biases.<sup>24</sup> If the formal and informal institutions compete,<sup>25</sup> such as in the scenario when institutional reforms in CEE judiciaries introduced new safeguards of merit-based judicial decision-making next to still existing corruption and clientelist networks, the non-alignment may eventually lead to a situation where actors create several competing role conceptions. Once a particular role conception prevails, it will impact the overall functioning of

<sup>16</sup>See David Kosař, Katarína Šipulová & Marína Urbániková, *Informality and Courts: Uneasy Partnership*, in this issue.

<sup>17</sup>GRETCHEN HELMKE & STEVEN LEVITSKY, INFORMAL INSTITUTIONS AND DEMOCRACY: LESSONS FROM LATIN AMERICA (2006); Gretchen Helmke & Steven Levitsky, *Informal Institutions and Comparative Politics: A Research Agenda*, 2 PERSPECTIVES ON POLITICS 725, 725 (2004); Bjoern Dressel, Raul Urribarri and Alexander Stroh, *The Informal Dimension of Judicial Politics: A Relational Perspective*, 13 ANN. REV. OF L. & SOC'Y 413, 413 (2017); Bjoern Dressel et al., *Courts and Informal Networks*, 39 SPECIAL ISSUE INT'L POL. SCI. REV. 573, 573 (2018).

<sup>18</sup>See *supra* note 16.

<sup>19</sup>See *supra* note 16.

<sup>20</sup>TOM GINSBURG, JUDICIAL REVIEW IN NEW DEMOCRACIES (2003); Tom Ginsburg & Nuno Garoupa, *Judicial Audiences and Reputation: Perspectives from Comparative Law*, 47 COLUM. J. OF TRANSNAT'L L. 451, 451 (2009); MARIA POPOVA, POLITICIZED JUSTICE IN EMERGING DEMOCRACIES (2012).

<sup>21</sup>Čuroš, *supra* note 15.

<sup>22</sup>Hilbink, *The Origins of Positive Judicial Independence*, *supra* note 12; KAPISZEWSKI, *supra* note 12, Popova, *supra* note 12. Pozas-Loyo & Figueroa also problematize the role of informal practices as one of the factors impacting the gap between what they call de jure and de facto judicial independence.

<sup>23</sup>David Kosař & Samuel Spáč, *Judicial Independence*, in CAMBRIDGE HANDBOOK TO CONSTITUTIONAL THEORY (Richard Bellamy & Jeff King eds.) (forthcoming 2024).

<sup>24</sup>Kosař & Spáč, *supra* note 23.

<sup>25</sup>VALERIE J. BUNCE & SHARON L. WOLCHIK, DEFEATING AUTHORITARIAN LEADERS IN POSTCOMMUNIST COUNTRIES 156 (2011); Helmke & Levitsky, *Informal Institutions and Comparative Politics: A Research Agenda*, *supra* note 17.



the judiciary. The prevalence may occur in a variety of ways, from becoming collectively shared by actors to being imposed by more dominant or influential groups within the system on all actors, including those who were not involved in their original formation.<sup>26</sup>

This article therefore extends the theories on institution-building and places the internalization of the value of judicial independence in the forefront of its attention as a necessary—but not sufficient—condition for any formal behavioral incentives to be effective. If judges do not internalize values protected by newly introduced institutional reforms, the existing role conception will allow them to participate in incongruent informal practices and eventually to institutionalize them.

The focus on the duality between formal institutional designs of judicial governance and informal institutions is therefore particularly important for understanding the performance of judiciaries in a post-transitioning setting. Although post-communist countries, such as Slovakia, have adopted a whole range of supranationally adorned institutional reforms, the combination of the role of law in the previous regime, limited judicial turnover after the transition, and the bureaucratic and hierarchical nature of socialization of new incomers all contributed to the non-internalization of new institutional incentives and, instead, allowed old patterns of behavior and belief structures to be passed on to a new generation of democratic judges.

### C. Unsuccessful Story of Slovak Judicial Transition

Since the establishment of its independence in 1993, judicial governance in Slovakia has undergone a series of turbulent changes reacting to the shortcomings, and at times outright failures, in its functioning. There are three distinguishable periods between 1993 and 2023,<sup>27</sup> yet it is not clear whether the core institutional design of judicial governance is going to be settled any time soon. First, after the division of Czechoslovakia, under a semi-authoritarian government led by prime minister Vladimír Mečiar, the judiciary was to a considerable extent controlled by the Ministry of Justice with the help of the parliament. Second, after Mečiar's defeat in 1998,<sup>28</sup> the new coalition made it its priority to ensure that Slovakia would be seen as a trustworthy partner with its Western allies in order to secure successful integration into NATO and the EU.<sup>29</sup> Due to these incentives, Slovakia somewhat swiftly established the 'Euro-model' of judicial governance,<sup>30</sup> including the new judge-dominated judicial council, and transferred substantive powers from the executive branch to the judiciary. Third, however, the performance of judge-dominated judicial governance was perceived by many as sub-optimal, and, consequently, Slovakia started to look for a new arrangement that would counterbalance the dominance of judicial actors, as well as bring a considerable level of transparency to judicial administration.

The common denominator of these paradigmatic shifts was the conflict between formal institutions and informal practices. Despite their internationally approved design, new institutions have not been able to deliver expected outcomes. The Slovak judiciary has for a long time suffered from low public confidence,<sup>31</sup> and has been perceived as corrupt by Slovak citizens.<sup>32</sup> Because of that, Slovakia has been on an almost three-decades-long search for a fool-proof design that would find a reasonable balance between judicial independence and accountability while securing the

<sup>26</sup>Renate E. Meyer, *A Processual View on Institutions: A Note from a Phenomenological Institutional Perspective*, in *INSTITUTIONS AND ORGANIZATIONS: A PROCESS VIEW* 33, 33 (Trish Reay et al. eds., 2019).

<sup>27</sup>Spáč et al., *supra* note 6.

<sup>28</sup>BUNCE & WOLCHIK, *supra* note 25, at 65.

<sup>29</sup>Samuel Spáč, *Judiciary Development After the Breakdown of Communism in the Czech Republic and Slovakia*, 3–4 *CEU POL. SCI. J.* 234, 246 (2014), Bobek & Kosař, *supra* note 10; Kosař & Spáč, *supra* note 23; Spáč et al., *supra* note 6.

<sup>30</sup>Bobek & Kosař, *supra* note 10.

<sup>31</sup>Spáč et al., *supra* note 6, at 1760–762.

<sup>32</sup>See generally *Global Corruption Barometer*, TRANSPARENCY INTERNATIONAL (2021), <https://www.transparency.org/en/gcb/eu/european-union-2021/results/svk>.

desired performance of the judiciary. In this section we briefly sketch three examples of how Slovakia experimented with different institutional setups, which failed to deliver what was expected due to the existence of surviving informal practices. We will look in more detail at the Judicial Council, and the disciplining, selection, and promotion of judges.

The Judicial Council of the Slovak Republic (“JCSR”) was established in 2002 in the wake of the EU integration process. It closely followed the recommendations of various international bodies suggesting that a judge-dominated-council model is well suited to insulating the judiciary from political influences and to securing merit-based decision-making regarding the issues falling under the umbrella of judicial governance.<sup>33</sup> The trust invested in a judge-dominated and internationally endorsed the JCSR resulted from the considerable pressure exerted on the judicial branch by the previous semi-authoritarian government. This was manifested mainly in the process of the selection of judges (who were elected and faced retention elections every four years), but also in massive verbal attacks on judges.<sup>34</sup>

However, just a few of years after its establishment, the JCSR was captured from the inside by actors close to Mečiar. Slovakia’s pro-integration optimism was quickly exchanged for harsh economic reforms, deepening the economic crisis and social inequalities, and eventually allowing Mečiar to return to government, although with his party as a smaller coalition party with Robert Fico’s Direction – Social Democracy (SMER). In 2006, Fico and Mečiar secured the nomination of Štefan Harabin, Chief Justice of the Supreme Court appointed under Mečiar, as the new Minister of Justice. Harabin then swiftly used his judicial influence as well as his new political connections to secure the packing of the JCSR with judges loyal to him, as well as to orchestrate his own re-election as the Chief Justice, and, hence, also the Chairman of the JCSR in 2009. This event marked an important milestone in the period when the JCSR played a particularly controversial role in the Slovak judiciary, heightened polarization among the judges, and turned the judicial system into one of the most salient issues of the 2010 elections.<sup>35</sup>

This was not the only example of the JCSR failing to protect the judiciary from political influences. As Kosař and Spáč have shown,<sup>36</sup> despite the JCSR’s role of insulating the judicial branch from politicians, parliamentary majorities were almost consistently able to secure the election of the Chief Justice of the Supreme Court in line with their preferences, which was particularly dangerous because of the dual role of Chief Justice and Chairman of the JCSR. All in all, it took almost 20 years for the JCSR to effectively curb the interests of judges and politicians which had in the past managed to circumvent formal institutions.

The second example of the conflict between formal institutions and informal practices concerns disciplinary procedures, mainly during the period when Štefan Harabin played the central role in the Slovak judiciary. The disciplining of judges was at that time carried out by disciplinary panels created by the JCSR. Despite the fact that the JCSR was designed to ensure a balance between judicial and political interests, the disciplinary procedures were often consciously left to the discretion of the judicial members of the Council. In turn, disciplinary competence was heavily misused, leading to numerous accountability perversions.<sup>37</sup>

Selective accountability and a policy of sticks and carrots became a prominent feature of Harabin’s era at the top of the judiciary.<sup>38</sup> At least fifteen judges faced disciplinary proceedings in retaliation after they openly criticized Harabin and the status quo of the Slovak judiciary. These disciplinary actions typically proposed to apply the harshest punishments, i.e., dismissal from

<sup>33</sup>Kosař, *supra* note 6; Spáč et al., *supra* note 6, at 1760–62.

<sup>34</sup>For instance, the then Minister of Justice referred to judges as “buggers and frats stupid as cues.” See Kosař, *supra* note 6, at 255.

<sup>35</sup>See, e.g., LUKASZ BOJARSKI & WERNER STEMKER KOSTER, *THE SLOVAK JUDICIARY: ITS CURRENT STATE AND CHALLENGES* (2011); Bobek & Kosař, *supra* note 10.

<sup>36</sup>Kosař & Spáč, *supra* note 8.

<sup>37</sup>See KOSAŘ, *supra* note 6, at 68–72 (describing more on accountability perversions).

<sup>38</sup>KOSAŘ, *supra* note 6, at 330–33; see also Pavol Žilincík & Samuel Spáč, *Selektívna zúčtovateľnosť: Príklady z disciplinárneho súdnictva*, in *NEDOTKNUTEĽNÍ? POLITIKA SUDCOVSKÝCH KARIÉR NA SLOVENSKU V ROKOCH 1993–2015* 154, (Erik Láštík & Samuel Spáč eds., 2017).

judicial office, accompanied by substantial salary cuts and the temporary suspension of individual judges.<sup>39</sup> To show how this mechanism worked, let us illustrate it using one example. A district court judge complained in 2008 in a letter to the President of the Republic about the conditions and atmosphere in the judiciary. The President forwarded the letter to the respective court president, who initiated disciplinary proceedings against the judge for violation of ethical obligations. The first instance panel decided to suspend the judge for the maximum period allowed of two years, and reduce his salary by fifty percent for six months. The suspension had been served before the judge's appeal reached the appeal court. The judge was punished for his intra-judicial criticism without the final decision of the disciplinary court.<sup>40</sup> In 2021, after the change in political establishment following the elections after Kuciak's murder, disciplinary powers were taken away from the JCSR and transferred into the hands of the newly created Supreme Administrative Court, following Czechia's example.

The third area illustrating the prevailing conflict between formal institutions and informal practices can be found in the selection and promotion of judges. Before the establishment of the JCSR, judges were elected by the parliament for a renewable four-year term.<sup>41</sup> This obviously troubling design was changed, and the power to appoint judges was transferred to the president of the Republic upon the nomination of the judge-dominated JCSR.<sup>42</sup> The re-delegation of selection competence from the political to the judicial branch via the JCSR, however, achieved the opposite extreme: Instead of a merit-based selection, new judges were mainly selected from the pool of "judicial aspirants" socialized within the system, while the power to assign individual judges to courts rested de facto in the hands of court presidents.<sup>43</sup> In 2011, political actors attempted to balance the extreme influence of court presidents and to secure more transparency and openness in the system by the creation of new selection committees. However, even this system did not manage to compete with existing informal institutions. As previous research has shown, candidates with connections to members of selection committees or candidates from "judicial families" enjoyed a greater chance of winning and being appointed to vacant positions.<sup>44</sup> Such results suggest that the judiciary preferred candidates who could be expected to share the beliefs, values, and practices that already prevailed in the judiciary. In addition, court presidents remained the crucial gatekeepers as it was they who were responsible for the creation of individual selection committees, and in this way controlled who was selected. As a consequence, in 2017 the selection of district court judges became one of the so-called mass selection procedures in which all judges for a given region are selected in one, centrally organized, procedure.

The process of the promotion of judges to higher courts was, and still remains, dominated by informal practices aimed at bypassing formal institutions designed to ensure open, transparent, and merit-based decision-making. Many judges are promoted via an informal path that starts with secondment to a higher court, which is eventually formalized through the selection procedure in which these candidates are often unopposed. The process of secondment, once again, empowers court presidents, who can propose the secondment of a particular judge chosen in a completely untransparent way, and the JCSR then, usually without much discussion or hesitation, approves such proposal.<sup>45</sup>

<sup>39</sup>See, e.g., BOJARSKI & STEMKER KOSTER, *supra* note 35.

<sup>40</sup>BOJARSKI & STEMKER KOSTER, *supra* note 35, at 104–05.

<sup>41</sup>ÚSTAVA SLOVENSKEJ REPUBLIKY [Constitution of the Slovak Republic] ch. 7, art. 145, para. 1 (repealed 2001) (Slovk.) (stating that a life tenure for judges followed the renewal of the original 4-year term of office).

<sup>42</sup>The judge-centred nature of the JCSR was further strengthened by the fact that although the legal regulation presumed the equal participation of the judiciary, parliament and president on the selection, in fact even political actors nominated judges to the JCSR.

<sup>43</sup>Juraj Palúš, *Právna úprava výberu sudcov na Slovensku*, in VÝBER SUDCOV 21, 9–13 (Kristína Babiaková ed., 2015).

<sup>44</sup>Spáč, *supra* note 8.

<sup>45</sup>Samuel Spáč, *Kariérny postup na vyššie súdy: Pod kontrolou predsedov súdov*, in NEDOTKNUTEĽNÍ? 106, 111 (Erik Láštík & Samuel Spáč eds., 2017).



## D. Competing Informal Institutions and Practices in the Slovak Judiciary

In this section we provide an overview of selected patterns of behavior observable in the Slovak judiciary which illustrate the conflict between the intentions behind the newly established formal institutions in judicial governance, portrayed mainly in the Judicial Council, and their interaction with existing informal practices. These patterns demonstrate particular professional role conceptions<sup>46</sup> shared by (parts of) the Slovak judiciary, which will be further discussed in the following section.

First, on the basis of medialized corruption cases in recent years (2019–2022), we argue that these were not isolated incidents, but rather constitute a pattern of behavior that can be seen as institutionalized. Second, we examine the willingness of the Slovak judiciary to condemn and hold accountable judges who misuse their powers and participate in corruption networks. In the third and fourth sub-sections we delve even deeper and focus on off-bench informal practices that contravene formal rules of judicial independence: Spatial traveling between the judicial and executive branches, and the behavior of judges towards the media and the public. In both cases we discuss the consequences and applicability of the existing accountability mechanisms.

### I. Corruption in the Slovak Judiciary

The political upheaval following the murder of journalist Ján Kuciak and his fiancée Martina Kušnírová led to an electoral result which gave significant leverage and salience to a specialized anti-corruption unit (the NAKA), of the Slovak police. When the investigation into the murder pointed to influential Slovak businessman and oligarch Marián Kočner, NAKA seized his mobile phone and, with the assistance of Europol, found and decoded his encrypted communication application, Threema, which he used to exchange messages and discuss salient judicial cases related to the investigation into his business activities or his broader business interests.

The Threema messages, sent between September 2017 and May 2018, were leaked to the public in Summer 2019. They suggested that Kočner operated a structured network of contacts among judges, politicians, prosecutors, journalists, and investigative policemen, who helped him to obtain sensitive information or manipulate individual judicial cases by bribing certain judges and prosecutors. Kočner relied on a few highly positioned actors of judicial governance, who served as a hook to persuade or pressurize random judges assigned to cases he was interested in.<sup>47</sup> Many of these contact nodes in his network were either judicial authorities<sup>48</sup> or people in senior positions in the government—such as the deputy Minister of Justice, Monika Jankovská,<sup>49</sup> a former judge and a candidate for a constitutional justice post. Kočner's links reached as high as to the Constitutional Court,<sup>50</sup> and his interests did not stop at his personal issues. Kočner clearly influenced investigations and cases related to individuals close to his business activities. Although the media and NGOs had long suspected that there was high-profile judicial corruption at Slovak courts, the vulgar language in which Kočner communicated with his contact nodes came across as

<sup>46</sup>Hilbink, *The Origins of Positive Judicial Independence*, *supra* note 12.

<sup>47</sup>Kočner, for example, discussed the pending disciplinary case of the former Chief Justice of the Supreme Court, Harabin. Veronika Prušová, *Harabin opäť vyhral. Ministerstvo spravodlivosti mu má vyplatiť takmer 90-tisíc eur*, DENNÍK N (Dec. 6, 2020), <https://dennikn.sk/2174879/harabin-opat-vyhral-ministerstvo-spravodlivosti-mu-ma-vyplatit-takmer-90-tisic-eur/?ref=list>.

<sup>48</sup>See Roman Pataj, *Plevel a Búrka odhalili najbytočnejšiu organizáciu na Slovensku*, DENNÍK N (Sept. 14, 2020), <https://dennikn.sk/2038915/plevel-a-burka-odhalili-najzbytočnejšiu-organizáciu-na-slovensku/> (noting example, Vladimír Sklenka, then the vice-president of the Bratislava district court, who eventually confessed and started cooperating with the police.); see also Veronika Prušová, *Politici a médiá nám kazia*, DENNÍK N (Mar. 27, 2020), <https://dennikn.sk/1823747/politici-a-media-nam-kazia-meno-cast-sudcov-po-operácii-burka-hlada-vinnikov-mimo-svojich-radov/>.

<sup>49</sup>Marian Kočner jí říkal opička. Slovenská tajemnice Jankovská rezignovala, IDNES.CZ (Sept. 3, 2019), [https://www.idnes.cz/zpravy/zahranicni/slovensko-monika-jankovska-rezignovala-tajemnice-ministerstvo-spravedlnosti-marian-kocner-threema-op.A190903\\_145715\\_zahranicni\\_kha](https://www.idnes.cz/zpravy/zahranicni/slovensko-monika-jankovska-rezignovala-tajemnice-ministerstvo-spravedlnosti-marian-kocner-threema-op.A190903_145715_zahranicni_kha).

<sup>50</sup>Eva Kubániová, *Kočnerovo svádění ústavního soudce*, INVESTIGACE.CZ (May 4, 2020), <https://www.investigace.cz/kocnerovo-svadeni-ustavniho-soudce/>.

shocking, demonstrating the considerable extent of the loyalties the oligarch enjoyed and the leverage he wielded over the judicial and political authorities.<sup>51</sup>

Leaked messages were just the start of the turmoil in the Slovak judiciary. In March 2020, the police investigative operation “Tempest” [Búrka] led to the arrest of and charges being made against thirteen Bratislava judges, including the regional and district court presidents and vice presidents.<sup>52</sup> In the meantime, the media continued to publish leaked text messages between judges, oligarchs, and politicians containing sensitive case file information, or even instructions on how to decide particularly salient cases. Later that year, operations “Gale” [Výchrica] and “Weeds” [Plevel] took place, leading to six more judges facing accusations of corruption and abuse of power. Operation “Weeds” continued in 2021 and focused on the corruption network at the regional court in Žilina, a city in northern Slovakia.<sup>53</sup> The network crumbled when one of the cases intended to be manipulated was assigned to a new judge<sup>54</sup> who, when approached by her colleague<sup>55</sup> with a note from a former mafia boss, refused to follow through and instead turned to the police.<sup>56</sup>

Interestingly, the two corruption groups existed independently of each other but operated very similarly. A regional businessmen and some oligarchs managed to develop a network of contactable judges, who received instructions from regional or district court presidents, but also from attorneys and prosecutors, or court personnel with family ties to oligarchs and local criminal groups.<sup>57</sup> Oligarchs did not use the network merely to influence their own judicial cases, but turned it into a profitable business of obtaining bribes to reduce sentences.<sup>58</sup> The bribes were handled by friendly attorneys, who were at times assigned ex officio to particular cases.<sup>59</sup>

<sup>51</sup>Kočner addressed the Deputy Minister as “his little monkey,” who did his bidding and made sure judges knew how to proceed and act in cases assigned to them. Recalcitrant judges who demonstrated any disloyalty got warnings suggesting “they will end up like Kuciak.” See *Marian Kočner ji říkal opička*, *supra* note 49.

<sup>52</sup>Accused judges included Jarmila Urbancová, deputy chairman of the JC (acting chief justice); Luboš Sádovský, judge and former president of the Regional court in Bratislava; Andrea Haitová, Jankovská’s sister and a judge of the Regional court in Bratislava; Denisa Cviková, judge of the Bratislava I District Court; Miriam Repáková, former judge of the Bratislava I District Court; Eva Timár Myjavcová, insolvency administrator; Richard Molnár, judge of the Regional court in Bratislava; Gabriela Bulubašová, judge of the Bratislava I District Court; Zuzana Maruniaková, judge of the Bratislava V District Court; Dušan Srogončík, judge of the Bratislava V District Court; Katarína Bartalská, insolvency judge and vice-president of the Bratislava I District Court; Dávid Lindtner, attorney and former president of the Bratislava III District Court; Eugen Palášthy, judge of the Regional court in Bratislava, and Angela Balázsová, judge of the Bratislava I District Court. See *Po búrke prišla Výchrica: Zadržali Zoroslava Kollára aj sudkyňu Urbancovú*, AKTUALITY.SK (Oct. 28, 2020), <https://www.aktuality.sk/clanok/834794/burka-ide-dalej-zadrzali-zoroslava-kollara/>; Peter Kováč, *Kočner o nej písal ako o Jarinke či Prútiku. Začne sa proces s ďalšou sudkyňou*, SME DOMOV (June 13, 2023), <https://domov.sme.sk/c/23181708/urbancova-kocner-sud-kauza-burka-vichrica.html>.

<sup>53</sup>Veronika Prušová, *Za štyri prípady si traja žilinskí sudcovia a ich vybavovač rozdelili 50-tisíc eur*, DENNÍK N (Jan. 21, 2021), <https://dennikn.sk/2235831/za-styri-pripady-si-traja-zilinski-sudcovia-a-ich-vybavovac-rozdelili-50-tisic-eur/?ref=list>.

<sup>54</sup>Judge Marcela Malatková.

<sup>55</sup>Veronika Prušová & Monika Tódová, *Už aj sudkyňa Najvyššieho súdu Wankeovej hrozí stíhanie, Šikuta s potrestaním váha*, DENNÍK N (Oct. 26, 2020), <https://dennikn.sk/2108050/uz-aj-sudkyňa-najvyššieho-sudu-wankeovej-hrozi-stihanie-sikuta-s-potrestanim-va-ha/?ref=inc>.

<sup>56</sup>Veronika Prušová, *Bývalý bos podsvetia Salinger sa pochválil priamymi kontaktmi na sudkyňu Kyselovú. Súd ju posielal do väzby*, DENNÍK N (Jan. 23, 2021), <https://dennikn.sk/2238356/byvaly-bos-podsvetia-salinger-sa-pochvalil-priamymi-kontaktmi-na-sudkyňa-kyselovu-sud-ju-posielal-do-vazby/?ref=list>.

<sup>57</sup>Some orders and instructions were delivered to individual judges by uncles employed as court drivers or via childhood friends. See Prušová, *supra* note 53; Veronika Prušová, *Žilinský sudca bral dlhé roky úplatky, môže vyviaznúť s podmienkou*, DENNÍK N (Feb. 23, 2021), <https://dennikn.sk/2283242/zilinsky-sudca-bral-dlhe-roky-uplatky-moze-vyviaznut-s-podmienkou/?ref=list>.

<sup>58</sup>Prušová, *supra* note 56; Prušová, *supra* note 53.

<sup>59</sup>The automated system of ex officio assignments was introduced only in 2019. Veronika Prušová, *Nemali medzi nimi robiť rozdiely, ale robili. Sudcovia v Žiline mali medzi advokátmi favoritov*, DENNÍK N (Jun. 22, 2021), <https://dennikn.sk/2440300/nemali-medzi-nimi-robit-rozdiely-ale-robili-sudcovia-v-ziline-mali-medzi-advokatmi-favoritov/?ref=list>.



Corruption networks seem to have operated on two levels. On the first, they incorporated ties between oligarchs, senior judges (typically court presidents or vice-presidents), and politicians, many of whom had close ties to the judiciary or had previously been judges. On the second, the institutionalized corruption network built around public authorities or court presidents allowed oligarchs to exert influence on rank-and-file judges and strategically place loyal or compliant judges in courts they were interested in. Some scholars interpret the susceptibility of the Slovak judiciary to corruption as a heritage of the communist regime, which makes judges open to influence and policing by powerful actors outside of the judiciary.<sup>60</sup> What these cases actually show is that judicial reforms aimed at increasing the involvement of judges in judicial governance have failed to eradicate hierarchical loyalty and subservience inside the judiciary.<sup>61</sup>

These networks would have been much less efficient had they not been supported by those involved in judicial governance—either in senior positions in the judiciary or within the state administration. This way they managed to secure the strategic placement of judges at courts, and created an atmosphere in which corrupt behavior simply became accepted, or at least tolerated, as a feature of the system, and consequently overlooked. This can be illustrated by one of Kočner’s highly salient cases related to promissory notes issued by the first Slovak private TV broadcaster, Markíza. The case was assigned to a judge of a district court in Bratislava, Zuzana Maruniaková. Maruniaková had previously served as an assistant to Deputy Minister of Justice Jankovská. In the text messages between Kočner and Jankovská, the Deputy Minister of Justice stated: “She promised. Multiple times. I made her what she is, it is time to pay the debt!”<sup>62</sup> The text message most probably referred to Jankovská’s role in the appointment of Maruniaková as a judge in 2013. While Maruniaková became a judge after she won the selection procedure in 2013, it was Deputy Minister Jankovská who nominated two out of five members of the respective selection committee (one of them, the president of a regional court in Bratislava, was later also arrested on corruption charges).<sup>63</sup>

While the era of chief justice Harabin, famous for leaving judges post-it notes with instructions on how to decide their cases,<sup>64</sup> was long gone, the new institutional rules failed to eradicate hierarchical loyalty and subservience inside the judiciary. It is also worth noting that the corruption allegations were not confined to the functioning of the courts but permeated the whole public sector.<sup>65</sup> The investigations targeted prosecutors, politicians, and ministers, including the president of the Slovak intelligence service, both the special prosecutor and former general

<sup>60</sup>Čuroš, *supra* note 15.

<sup>61</sup>This was well demonstrated by one judge who stood witness to the corruption practices of her two senior colleagues on the panel. The corruption involved the arbitrary reduction of sentences, in one case from 16 to 6 years. When asked whether she did not suspect ulterior motives, the witness-judge stated that the atmosphere in her chamber was one of mutual respect and trust, so she never even considered to question the drafts and reasonings of her colleagues. See Veronika Prušová, *Roky súdila iných, teraz je na lavici obžalovaných. Žilinská sudkyňa Kyselová vinu odmieta*, DENNÍK N (June 21, 2022), <https://dennikn.sk/2902401/roky-sudila-inych-teraz-je-na-lavici-obzalovanych-zilinska-sudkyňa-kyselova-vinu-odmieta/?ref=inc>; see also Prušová, *supra* note 53; see also Veronika Prušová, *Sudkyňa Najvyššieho súda sa vyhla disciplinárnemu konaniu vďaka tomu, že nefungujú disciplinárne senáty*, DENNÍK N (June 4, 2021) <https://dennikn.sk/2417279/sudkyňa-najvyššieho-sudu-sa-vyhla-disciplinárnemu-konaniu-vďaka-tomu-že-nefungujú-disciplinárne-senaty/>; see also Veronika Prušová, *Už aj sudkyňa Najvyššieho súdu Wankeovej hrozí stíhanie, Šikuta s potrestaním váha*, DENNÍK N (Oct. 26, 2020), <https://dennikn.sk/2108050/uz-aj-sudkyňa-najvyššieho-sudu-wankeovej-hrozí-stíhanie-sikuta-s-potrestanim-vaha/?ref=inc>.

<sup>62</sup>“Ja som z nej urobila to, čo je. Je čas splatiť dlh.” *Threema ukazuje, ako Kočner a Jankovská riadili*, HN ONLINE, (Oct. 3, 2019), <https://hnonline.sk/slovensko/2017306-ja-som-z-nej-urobila-to-co-je-je-cas-splatiť-dlh-threema-ukazuje-ako-kocner-a-jankovska-riadili-sudkyňa>.

<sup>63</sup>The selection process in Slovakia rested on the results of the written part and oral interview. What made Maruniaková’s selection suspicious was that, while she underperformed in the written part, the evaluation of her interview was so good that it allowed her to overtake her competitors. See Samuel Spáč, *Maruniakovú vybrali Sádovský a Sopoliga*, SME.SK (Oct. 4, 2019), <https://komentare.sme.sk/c/22228910/maruniakovu-vybrali-sadovsky-a-sopoliga.html>.

<sup>64</sup>Spáč et al., *supra* note 6.

<sup>65</sup>Monika Tódová, *Nie je to len Makó. K trestným činom sa priznalo už 26 vplyvných ľudí*, DENNÍK N (Sept. 21, 2021), <https://dennikn.sk/2516034/nie-je-to-len-mako-k-trestnym-cinom-sa-priznalo-uz-25-vplyvných-luďi/?ref=inc>.



prosecutor,<sup>66</sup> the head of the criminal office of the Financial Administration, former ministers of justice,<sup>67</sup> of the economy, and of the interior, and, last but not least, former prime minister Fico.<sup>68</sup>

In the next three subsections we approach the informality in the Slovak judiciary from a different perspective, which suggests that cases of corruption are not necessarily individual mistakes, but rather a pattern of behavior that suggests a deeper problem with the understanding and internalization of the substantive content of “judicial independence” by Slovak judges. In the aftermath of massive corruption scandals, it manifested itself in the defensive, or at least reluctant, stance of the Judicial Council towards these allegations, but it is also present in the lack of recognition of other problematic off-bench behavior of judges: Spatial traveling between political and judicial roles, and the public appearance of and communications from judges through (social) media.

## II. Internal judicial Accountability Mechanisms and the Lack of Reaction to Corruption Scandals

The extent of the corruption cases described above targeted a surprisingly large segment of the judiciary. The trust in the courts further deteriorated, among both the public<sup>69</sup> and legal professionals.<sup>70</sup> Yet, the Judicial Council, the core self-governance body, remained silent. It failed to recognize, acknowledge (when confronted by the media), and react to the corruption allegations. Furthermore, the Chairman of the Judicial Council first dismissed fears about the large-scale corruption present inside the judiciary,<sup>71</sup> and later, after the first round of group detentions and investigations, criticized politicians for attempting to interfere in the judiciary.<sup>72</sup> The majority of the judges in the Council supported this view and actively refused to take any action, suffocating attempts to engage in the discussion with the self-constrained, formalistic argument that the Judicial Council does not have any official authority to step into ongoing criminal proceedings.<sup>73</sup> But why did the judicial self-government body fail to react?

Indeed, aside from criminal proceedings, the Slovak judiciary has existing disciplinary mechanisms to address judges’ misbehavior. However, this proved to be rather ineffective in the aftermath of the ongoing investigations. For example, in October 2020, the chief justice of the Supreme Court initiated disciplinary proceedings against Dana Wänkeová, a judge of the Supreme

<sup>66</sup>See Mária Benedikovičová, *8 verzus 14 rokov, celý majetok alebo 100-tisíc eur. V čom sa súdy v prípade Kováčika*, DENNÍK N, (May 24, 2022), <https://dennikn.sk/2864009/8-verzus-14-rokov-cely-majetok-alebo-100-tisic-eur-v-com-sa-sudy-v-pripade-dusana-kovacika-nezhodli/?ref=list> (naming special prosecutor and general prosecutor as Dušan Kováčik and Maroš Žilinka).

<sup>67</sup>See Benedikovičová, *supra* note 66 (naming Former Minister of Justice, Gábor Gál).

<sup>68</sup>Roman Cuprik, *Vyšetrovanie sudcov vedie aj k Ficovi, ten pred otázkami o Kočnerovi*, SME (Mar. 27, 2020), <https://domov.sme.sk/c/22369604/vysetrovanie-sudcov-vedie-aj-k-ficovi-ten-pred-otazkami-o-kocnerovi-usiel.html>.

<sup>69</sup>*Eurobarometer: Public Opinion in the European Union*, EUROPEAN COMMISSION, <https://ec.europa.eu/comfrontoffice/publicopinion/index.cfm/Survey/getSurveyDetail/search/justice/surveyKy/2258>. See also *Perceived Independence of Courts and Judges in the EU Among the General Public*, EUROPEAN COMMISSION (July 2020), <https://europa.eu/eurobarometer/surveys/detail/2258>; *Perceived Independence of the National Justice Systems in the EU Among the General Public*, EUROPEAN COMMISSION (Jan. 2019), <https://europa.eu/eurobarometer/surveys/detail/2199>.

<sup>70</sup>Survey, *Independence and Accountability of the Judiciary*, ENCJ Survey on the independence of Judges 2019, EUROPEAN NETWORK OF COUNCILS FOR THE JUDICIARY (ENCJ) (2019); see also Čuroš, *supra* note 15; Lucia Berdisová et al., *Coping with Threema: How do Lawyers Perceive Their Biggest Corruption Scandal?*, 103 PRAVNÝ OBZOR 63, 67 (2020).

<sup>71</sup>*Predsedička súdnej rady reaguje na aktuálne dianie v slovenskej justícii*, SÚDNA RADA SLOVENSKEJ REPUBLIKY (Aug. 26, 2019), <https://www.sudnarada.gov.sk/predsedička-sudnej-rady-reaguje-na-aktualne-dianie-v-slovenskej-justicii/>.

<sup>72</sup>VYJADRENIE PREDSEDNÍČKY SÚDNEJ RADY K SITUÁCIÍ V JUSTÍCIÍ, SÚDNA RADA SLOVENSKEJ REPUBLIKY (Mar. 13, 2020), [https://www.sudnarada.gov.sk/data/files/1157\\_ts-english-16032020.pdf](https://www.sudnarada.gov.sk/data/files/1157_ts-english-16032020.pdf); see *Predsedička súdnej rady reaguje na aktuálne dianie v slovenskej justícii*, SÚDNA RADA SLOVENSKEJ REPUBLIKY (Aug. 26, 2019), <https://www.sudnarada.gov.sk/predsedička-sudnej-rady-reaguje-na-aktualne-dianie-v-slovenskej-justicii/>.

<sup>73</sup>While technically correct, the Judicial Council was supposed to play significant role in ethical dimension, signalling the awareness of the problem inside the judiciary and willingness to address it, to the public.

Court,<sup>74</sup> who allegedly attempted informally to pressure her colleague who was a witness in one of the ongoing criminal cases. Interestingly, the Chief Justice suggested reprimand as a sanction—and although he had the power personally to reprimand Wänkeová, he instead opted to rely on the disciplinary chamber. The recusal of one of its sitting judges required the case to be examined by an appellate chamber, which had long been non-functioning due to it having no presiding judge. In June 2021, the Chief Justice revoked his proposal, arguing that the non-activity of the disciplinary panel rendered the case ineffective. The new Minister of Justice began new disciplinary proceedings in 2022,<sup>75</sup> this time requesting Wänkeová's transfer from the Supreme Court to the regional level, in order to isolate her.<sup>76</sup> The Minister of Justice argued that she had failed “in the very core of her judicial duties by not recognizing her own biases and lack of independence.”<sup>77</sup> As of July 2023, the case of judge Wänkeová has still not been decided; she continues to work as a judge, and is even a member of the judicial board of the court.<sup>78</sup>

It was in this atmosphere that the Judicial Council faced a decision on how to react to decreasing public trust. In order to better understand its reactions we analyzed all plenary meetings in which the Council discussed corruption cases and disciplinary or criminal proceedings concerning judges involved in these networks, i.e. the seven meetings held between September 2019 and May 2022.<sup>79</sup> According to the Constitution, the Council is tasked with a duty to ensure that judges comply with requirements and personal qualities that allow them to execute their office justly.<sup>80</sup> The essence of these meetings therefore revolved around the question whether the Judicial Council should take any stance at all in the cases of judges under investigation of alleged corruption. The debates during meetings revolved around the following four topics: 1) Whether corruption cases represented individual failures or signaled a large-scale problem targeting the whole judiciary on the national level; 2) whether the Council had any formal authority to act; 3) whether the Council had a moral, ethical, or public responsibility to act, and, if so, 4) what the Council could do to address the situation.

Very early into the first meeting in September 2019, the members of the Council split into two camps. The conservatives—most of whom were judges, including the leadership of the Council,

<sup>74</sup>Veronika Prušová, *Sudkyňa Najvyššieho súda sa vyhla disciplinárniemu konaniu vďaka tomu, že nefungujú disciplinárne senáty*, DENNÍK N (June 4, 2021), <https://dennikn.sk/2417279/sudkyňa-najvyššieho-sudu-sa-vyhla-disciplinárnemu-konaniu-vďaka-tomu-že-nefungujú-disciplinárne-senáty/?ref=list>; Veronika Prušová, *Už aj sudkyňa Najvyššieho súdu Wänkeovej hrozí stíhanie, šikuta s potrestaním váha*, DENNÍK N (Oct. 26, 2020), <https://dennikn.sk/2108050/uz-aj-sudkyňa-najvyššieho-sudu-wankeovej-hrozi-stíhanie-sikuta-s-potrestaním-vaha/?ref=inc>.

<sup>75</sup>The new minister was Mária Kolíková, who had previously served at the ministry as a deputy and external advisor to Radičová's liberal government. She was responsible for one of the largest reform agendas of the Slovak judiciary.

<sup>76</sup>Veronika Prušová, *Ministerka o sudkyňa Najvyššieho súdu “Porušila všetko, čo robí sudcu sudcom*, DENNÍK N (Sept. 10, 2021), <https://dennikn.sk/2529933/ministerka-o-sudkyňa-najvyššieho-sudu-porušila-všetko-co-robí-sudcu-sudcom/?ref=list>.

<sup>77</sup>Prušová, *supra* note 76.

<sup>78</sup>A similar scenario occurred after the Minister Kolíková initiated disciplinary proceedings against another accused judge Oľívia Doláková. First instance did not find a reason to suspend her office and since the autumn of 2020 there has been no appeal chamber to decide the case. There are two appeal chambers, neither of which had a president. The Judicial Council repeatedly asked judges to propose a candidate, but there was little interest among the judges. Should be solved by the new SAC. Veronika Prušová, *Sudkyňa Najvyššieho súda sa vyhla disciplinárniemu konaniu vďaka tomu, že nefungujú disciplinárne senáty*, DENNÍK N (June 4, 2021), <https://dennikn.sk/2417279/sudkyňa-najvyššieho-sudu-sa-vyhla-disciplinárnemu-konaniu-vďaka-tomu-že-nefungujú-disciplinárne-senáty/?ref=list>.

<sup>79</sup>SÚDNA RADA SLOVENSKEJ REPUBLIKY, Meeting on September 30, 2019, <https://zasadnutia.sudnarada.sk/145669-sk/8-zasadnutie-sudnej-rady-sr/>, in relation to cooperation with the Office of the General Prosecutor in case of seizure of mobile phones and personal computers from judges under investigation. The case was further discussed during meetings on the results of the activities of the Ethical committee, October 28, 2019, November 26, 2019, December 16, 2019, January 28, 2020, February 24, 2020, and May 25–26, 2020. For additional information on meetings, see *Zasadnutia Súdnej rady Slovenskej republiky*, SÚDNA RADA SLOVENSKEJ REPUBLIKY, [https://zasadnutia.sudnarada.sk/zasadnutia-sudnej-rady-slovenskej-republiky/?art\\_rok=2019&ID=138352&frm\\_id\\_frm\\_filter\\_2=653139f69f9c2](https://zasadnutia.sudnarada.sk/zasadnutia-sudnej-rady-slovenskej-republiky/?art_rok=2019&ID=138352&frm_id_frm_filter_2=653139f69f9c2).

<sup>80</sup>ÚSTAVA SLOVENSKEJ REPUBLIKY [Constitution] ch. 7, art. 141a, para. 5; Act on the Judicial Council of the Slovak Republic, Act No. 185/2002 Coll.



later implicated as being close to Kočner's circles—<sup>81</sup>vehemently argued that corruption cases are mere examples of individual failures, not a systemic problem that would shed poor light on the whole Slovak judiciary, and stressed the need to differentiate between judges proven to have participated in corruption and the rest of the judiciary.

The very same group was also adamant that the Council does not have any powers, that there is no accountability mechanism, or any other tool for that matter, that could be used to address the crisis. It relied on a restrictive reading of the Council's competences and refused to recognize the matters discussed on any other than the criminal level. The core judicial members repeatedly argued that the Judicial Council has no further ethical or moral responsibility that would oblige or allow it to act against, question, or sanction judges, or to take any stance in the matter. When the Council met on January 28, 2020 to discuss the effect of criminal proceedings initiated by the Minister of Justice against two judges involved in corruption networks,<sup>82</sup> the Council failed to find an answer to whether it can technically temporarily remove one of them from office when that judge is on a maternity leave. Instead, this group shifted on to the media the blame for manipulating information from the prosecution and investigation of corruption networks. In turn, the majority of members suggested that the Council should actually protect the judiciary from the blame-shifting.

The second camp that formed inside the Council was open to a more creative interpretation of the Council's role in judicial accountability processes. This camp (consisting of judges and non-judges) pushed through a successful proposal to establish a new Ethical Committee tasked with investigating cases, but also with creating interpretative rules for the future.<sup>83</sup> In June 2020, after the Council's Chairman was forced to step down,<sup>84</sup> the atmosphere changed and the rhetoric shifted to a more critical position which argued that the independence of the Slovak judiciary is dysfunctional and devalues the rule of law. This criticism, however, triggered outrage in the Slovak judiciary, with some judges closely tied to the conservative camp in the Council publishing opinions on the Chairman's incompetence in major Slovak media.<sup>85</sup>

Compared to the lukewarm reaction of the Judicial Council, the Association of judges of Slovakia reacted only two weeks after special operation Tempest took place. It suspended the membership of accused judges and somewhat vaguely noted that corruption in the judiciary is one of the core challenges and threats to society and a democratic state: It undermines judicial integrity, which is the basis of the rule of law; and it significantly reduces public trust in the execution of justice.<sup>86</sup>

Similarly, the reaction of a couple of individual judges also stood in a stark contrast to that of the Judicial Council, lost in debates on the essence of its competence. A group of judges from Eastern Slovakia reacted to news about operation Tempest by issuing a memorandum titled "Screen us," stating that "the extent of the pathological activity of some of the representatives of the judicial power calls for another response next to the initiated criminal proceedings," stressing that the leadership of the judicial authorities does not seem properly to ensure the accountability

<sup>81</sup>Martin Hanus & Pavol Rábara, *Threema: Zabíjačka elitných advokátov a sudcov s Kočnerom*, POSTOJ (Oct. 15, 2019), <https://www.postoj.sk/48028/threema-zabijacka-elitnych-advokatov-a-sudcov-s-kocnerom>.

<sup>82</sup>Zuzana Marunikakova, judge for Bratislava v. District Court and Denisa Cvikova, judge for Bratislava I District Court.

<sup>83</sup>Interestingly, two judges (one of them the Chairman of the Council) who opposed any activity inside the Council, were nominated to this new committee. However, they had to resign within a month, since the media reported that they had attended a barbecue party with Kočner.

<sup>84</sup>Praženková, implicated by a relationship with Kočner, was succeeded by Ján Mazák, a former judge of the ECtHR, returning as an outsider with international experience.

<sup>85</sup>Patrik Števík, *Pôsobenie pána Mazáka vo funkcii predsedu súdnej rady je nedôstojné*, DENNÍK N (Jan. 19, 2021), <https://dennikn.sk/2232040/posobenie-pana-mazaka-vo-funkcii-predsedu-sudnej-rady-je-nedostojne/>; see Mária Tóthová et al., *K článku sudcu Števíka o predsedovi súdnej rady Mazákovi*, DENNÍK N (Jan. 21, 2021), <https://dennikn.sk/2235302/k-clanku-sudcu-stevika-o-predsedovi-sudnej-rady-mazakovi/> (providing a response of judges and ex-judges).

<sup>86</sup>Veronika Prušová, *Politici a médiá nám kazia meno*, DENNÍK N (Mar. 27, 2020), <https://dennikn.sk/1823747/politici-a-media-nam-kazia-meno-cast-sudcov-po-operacii-burka-hlada-vinnikov-mimo-svojich-radov/>.



of the judicial branch.<sup>87</sup> For these reasons, the authors of the memorandum argued that lustration or the screening of judges' integrity cannot be considered unconstitutional, but rather a potential step to end the drastic fall in public trust in the judiciary.<sup>88</sup>

Nevertheless, reactions calling for some kind of measures aimed at increasing the public accountability of judges were few and far between. When the discussion about the potential lustration of judges reached the Judicial Council, it acted as if it was horrified and labeled the step as an unprecedented interference in the independence of Slovak judges, and a mere "marketing tool." Many courts supported this position. Judges in Bratislava circulated a memorandum that called upon judges to protect their reputation, tarnished by attacks from the media and politicians. The memorandum was signed by seventy judges on the very first day of its publication.<sup>89</sup>

### III. Slovak Spatial Travelers: Revolving Doors Between Judicial and Political Careers

The phenomenon of spatial traveling or so-called "revolving doors," inter-institutional traveling between positions in the judicial and political branches of power, is one of the very common challenges political systems face on a global level.<sup>90</sup> Although spatial traveling raises concerns from the perspective of the separation of powers, in many systems it has been a fairly common occurrence. In some civil law judiciaries, judges routinely engage with the executive branch for limited periods of time, providing the expertise and first-hand experience to those involved in judicial governance.<sup>91</sup> Elsewhere, politicians serve on judicial bodies, such as in the French Conseil d'état. In countries with few judicial retirement strategies, former judges may be interested in serving as members of upper chambers of parliaments.<sup>92</sup> In other words, the challenges of spatial traveling are context-dependent. Besides traditions, the size of the country as well as the nature of the "traveling" comes into play. One-way career moves from the judiciary to politics may be acceptable, while traveling in the opposite direction may compromise perception of a judge's independence.

Spatial traveling in Slovakia, however, was in both directions, and, even more importantly, happened repeatedly. The prime example of cyclical spatial traveling is Štefan Harabin, who managed to serve for three years as the Minister of Justice, before becoming a Chief Justice of the Supreme Court and the Chairman of the JCSR, a position which he had already held in the past.<sup>93</sup> Harabin thus transitioned from the judiciary to the government and back within a short period of time, which raised questions about the independence of the court system, his impartiality as an individual judge, and the functional separation of powers. Harabin was, however, far from an isolated example. Traveling between judicial and governmental positions happened to even small district court judges, whose sudden political career intermezzos opened the door to swift promotion to the apex level. Several judges served as deputies at the Ministry of Justice while never

<sup>87</sup>Veronika Prušová, *Sudca, ktorý sa podpísal pod výzvu Prevertte nás: Bolo by naivné myslieť si, že problém je len v Bratislave*, DENNIK N (Mar. 19, 2020), <https://dennikn.sk/1808555/sudca-ktory-sa-podpisal-pod-vyzvu-prevertte-nas-bolo-by-naivne-si-mysliet-ze-problem-na-sudoch-je-len-v-bratislave/?ref=inc>.

<sup>88</sup>The proposal for in-depth screening refers to a previously held debate in the Slovak judiciary. In 2014, political actors were already attempting to push forward the screening of judges, which the Constitutional Court quashed down after more than 5 years of deliberation. See Tomáš Lalík, *The Slovak Constitutional Court on Unconstitutional Constitutional Amendment* (Pl. ÚS 21/2014), 16 EUR. CONST. L. REV. 328 (2020).

<sup>89</sup>The memorandum was created by a district court judge, Martin Smolko. Veronika Prušová, *Politici a médiá nám kazia meno*, DENNIK N (Mar. 27, 2020), <https://dennikn.sk/1823747/politici-a-media-nam-kazia-meno-cast-sudcov-po-operacii-burka-hlada-vinnikov-mimo-svojich-radov/>.

<sup>90</sup>Juan Wang & Sida Liu, *Institutional Proximity and Judicial Corruption: A Spatial Approach*, 35 GOVERNANCE 633 (2021).

<sup>91</sup>See Silvia Steininger, *Talks, Dinners, and Envelopes at Nightfall: The Politicization of Informality at the Bundesverfassungsgericht*, in this Issue.

<sup>92</sup>See Patrick O'Brien, *Informal Judicial Institutions in Ireland*, in this Issue. O'Brien and Yong, *The Judicial Afterlife*, (2023), <https://sites.google.com/brookes.ac.uk/the-judicial-afterlife>.

<sup>93</sup>Spáč et al., *supra* note 6; KOSAŘ, *supra* note 6; Spáč & Kosař, *supra* note 8.

resigning from their judicial office, smoothly returning to the judiciary once their political mandates were over.<sup>94</sup> As we described in Section III(a), judges with previous careers in politics had a huge impact on the formation of corruption networks.<sup>95</sup>

Ever since the major reform of the judiciary in 2000, judges' political activity has been restricted by law "to exclude any possible grounds for challenging their impartiality."<sup>96</sup> Judges who had run in elections, even if unsuccessfully, were forced into a three-month cooling-off period in order to limit the effects on their reputations and perceived impartiality. Yet, as judges continued to be involved in politics, in 2019 the Parliament passed a law requiring judges who wished to run in parliamentary elections to resign from office.<sup>97</sup> The law was labeled "Lex Harabin," referring to the fact that Harabin—a former Minister of Justice, Chief Justice, and Chairman of the Judicial Council—in 2018 ran for the Presidency as a judge, and returned to the judiciary after the campaign, only to establish his own, ethno-nationalistic, populist party to run in the parliamentary elections.

Nevertheless, the new regulation targets only judges' careers in Parliament and is silent on the presence of judges in bodies of the executive branch, including in Presidential elections, which are arguably just as political.<sup>98</sup> Furthermore, it completely disregards the other, potentially more dangerous direction of traveling from politics to the judiciary, which has already proved to be consequential in Slovak history.

These examples demonstrate that traveling between the judicial and executive branches has been a common practice in the Slovak judiciary. The judiciary's reactions, or rather the lack of them, then show that this practice has been tolerated, sympathized with, at times even encouraged. In 2009, Harabin was elected by the Judicial Council to the position of Chief Justice of the Supreme Court and Chairman of the Judicial Council. He ran for that office as a serving Minister of Justice, and the Council, in which at that time fifteen out of eighteen members were judges, elected him without any hesitation. In a similar fashion, judges inside the Judicial Council did not protest and re-elected another member of the Council, Daniel Hudák, who at the same time was serving as the Deputy Minister.<sup>99</sup> When in 2017 it was rumored that serving Deputy Minister Monika Jankovská might be nominated to the Council, judges' objections were not heard;<sup>100</sup> instead, she was later even nominated for a position at the Constitutional Court. It needs to be

<sup>94</sup>For example, this was the case of a judge in Žilina district, later Supreme Court judge and founder of the pro-Harabin Slovak union of independent judiciary, Daniel Hudák, former deputy at the Ministry of Justice in 2006–2010, under i.a. Harabin, and judge/deputy Minister Jankovská.

<sup>95</sup>For example, Monika Jankovská served under two ministers of justice from 2012 until her detention in 2020, while being still officially listed as a judge. Jankovská was even included in the list of party members of SMER-SD in the 2016 parliamentary elections. Other well-known judges also became involved in political competition. To mention just a couple of examples, Supreme Court judge Peter Paluda ran for office in the 2012 parliamentary elections, former judge Jana Dubovcová served as an MP between 2010 and 2012 before becoming the ombudsperson, and judge Radačovský was successfully elected as an MP to the European Parliament in 2019, just a few months after his resignation from the judiciary. Radačovský became famous for his avid criticism of President of the Republic Kiska, potentially helping him become visible later on in the campaign for the European Parliament elections.

<sup>96</sup>Memorandum to the Act on Judges and Lay Accessors No. 385/2000 Coll. (May 26, 2000), <https://www.nrsr.sk/dl/Browser/Document?documentId=137232>.

<sup>97</sup>A judge who loses judicial office because of the exercise of the right to be elected can re-enter the judiciary only through the regular route of an open call for applications. Šimon Drugda, *Judges Cannot Run in Parliamentary Elections in Slovakia Anymore*, I-CONNECT (Nov. 12, 2019), <http://www.iconnectblog.com/judges-cannot-run-in-parliamentary-elections-in-slovakia-anymore/>.

<sup>98</sup>The same applies to the position of a minister of government, although technically judges could be appointed to government as independent experts.

<sup>99</sup>After his initial term ended in 2007, he was nominated to the Council by the government and served there until 2011. This was, however, not the end of his career in the Council; In 2017 he was once again elected by the judges and remained a member until his death in 2018.

<sup>100</sup>Jankovská, nominee of the SMER-SD party at the Ministry, eventually withdrew her application after Minister Lucia Žitňanská from the junior coalition party, Most-Híd, threatened to resign if Jankovská were to be elected by the parliament.

mentioned that the most recent judge who served as the Deputy Minister, Michal Novotný, was severely criticized from within the judiciary. At the core of this criticism was the questioning of his independence, as he served as a member of a disciplinary panel at the newly established Supreme Administrative Court.<sup>101</sup> However, as some of the criticism aimed at his professional ability to serve at the Administrative Court, it showed traces of personal animosity as he served as a Deputy to the minister disliked by a considerable number of Slovak judges for her proposed, not well received, to reform the judicial map.

#### IV. Slovak Judges and Freedom of Expression

Judges everywhere have traditionally been expected to exercise considerable self-restraint in their freedom of expression.<sup>102</sup> Slovak judges in this area have skated dangerously close to the margins of what seems to be immediately acceptable. In the previous subsections we touched upon the reluctance of the Slovak judiciary to take a robust stance on corruption allegations, or on traveling between the branches of power. If we look at judges' off-bench behavior, particularly that related to the freedom of speech, we see another area in which the Slovak judiciary has failed to face the challenge and set some ground rules in order to protect the judicial branch's public image. The majority of the off-bench practices we identified target the media presence of judges: Communication via social media platforms, interviews, leaking information from live cases, or giving opinions on political issues. While some representatives of the judiciary (mostly chief justices and court presidents) may occasionally appear in the media and comment on issues of judicial governance, the Slovak cases discussed below do not come into this category, and instead raise concerns about limits on judges' public behavior.

At the time when the Slovak public was closely watching the ongoing investigations into the judiciary and when the media were publishing some of the communications between judges and oligarchs, the president of the criminal division of Bratislava regional court, Peter Šamko, extensively commented on the current events and frequently published parts of case files on his personal blog, "Legal Letters" [Právne listy]. Šamko explained his activity as an attempt to balance the incorrect reports produced by the media covering the investigation of Kuciak's case, and to offer the public a more objective picture of what was *really* happening in individual proceedings.<sup>103</sup> With a similar rationalization, Šamko intentionally published the whole of the leaked Threema communication, as well as several allegations of judicial purges led by political actors after Kuciak's assassination, while never submitting any evidence to back them up. For example, he suggested that the individual who had cooperated with the police in the murder investigation as one of the key witnesses was in fact coerced into doing so and should not be trusted.<sup>104</sup> His activities did not go unnoticed. His own court president sanctioned his behavior with a reprimand. The Judicial Council debated his case twice,<sup>105</sup> however with no substantive conclusion. Opinions raised during the Council meeting were mostly sympathetic, explaining that

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See Jankovská nebude kandidovať do Súdnej rady, z ministerstva neodchádza, TERAZ.SK (Dec. 5, 2017), <https://www.teraz.sk/slovensko/brief-m-jankovska-nebude-kandidovat/296124-clanok.html>.

<sup>101</sup>Letter from Michal Novotný, Judge of the Supreme Administrative Court of the Slovak Republic, to the Judicial Council (Mar. 14, 2023), <https://zasadnutia.sudnarada.sk/stanovisko-michala-novotneho-sudcu-najvyssieho-spravneho-sudu-slovenskej-republiky/> (arguing that in questionable cases he recused himself, although in some of these cases the court decided that his impartiality was not endangered).

<sup>102</sup>Anja Seibert-Fohr, *Judges and their Freedom of Expression: An Ambivalent Relationship*, 2 REVISTA FORUMUL JUDECATORILOR 1, 1 (2019).

<sup>103</sup>PRÁVNE LISTY, <http://www.pravnelisty.sk/uvod> (last visited Sept. 14, 2023).

<sup>104</sup>Monika Tódová, *Predseda súdnej rady Mazák: Je koniec vybavovania na súdoch*, DENNIK N (Jan. 28, 2022), <https://dennikn.sk/2697289/predseda-sudnej-rady-mazak-je-koniec-vybvavovania-na-sudoch-video/?ref=inc>.

<sup>105</sup>In 2018 and in 2022.



he was indeed bringing an objective voice into the public discourse which had been full of half-truths and misinterpretations. In 2023 Šamko was elected by the judges to the Judicial Council.

Another group of judges, some of them very active and influential members of the Judicial Council, started their own website, “Judicial Power” [Súdna moc], where they publish their unconstrained views on ongoing debates—from reacting to articles published in the media to commenting on political developments related to the judiciary and judicial governance, and offering largely subjective summaries of some of the debates that take place in the Judicial Council. On this website, a judge of Bratislava II District Court, Patrik Števík, in October 2022 published a political manifesto criticizing the President of the Republic, Zuzana Čaputová. The Judicial Council once again failed to take any action, and instead debated whether it even had the competence to interpret ethical standards (and their potential trespassing by Števík). The Council never reached any conclusion.<sup>106</sup>

Even more examples can be found in the presence of judges on social media, where they not only further share personal information and opinions, but sometimes participate in sharing common hoaxes or articles using hate-speech.<sup>107</sup> The most infamous representative of this group is Harabin. In 2016 he started a youtube channel, labeled Štefan Harabin The Judge, as the Chief Justice of the Supreme Court, only eventually to use it in his presidential campaign.<sup>108</sup> As of July 2023, Harabin, approaching viewers from his own living room, sharing his opinions on politics, court decisions, international affairs, or attempts to assassinate him, reached 44.6 thousand subscribers, with 320 videos and 17 million video views.<sup>109</sup> Harabin, who served as a judge until late 2019, when his tenure was terminated because he ran in the parliamentary elections, did not shy away from defamatory statements comparing the President of the Republic to a director of Guantanamo,<sup>110</sup> or suggesting that the new Chief Justice of the Supreme Court was mentally unstable.<sup>111</sup> Only after Harabin’s term of office was over did the new Supreme Court Chief Justice initiate eleven disciplinary motions against him.<sup>112</sup> However, the disciplinary panels found the language used in his public speeches inconclusive and unclear.<sup>113</sup> The Judicial Council remained largely passive against Harabin’s statements, and generally allowed judges to self-regulate their use of social media. In another case, the Council let slide the case of a media article in which a judge contested the decision-making practice of their appeal court.<sup>114</sup> In January 2021 the Council’s Ethical Committee identified the case as an expression of individual independence, found it not problematic, but stressed that judges needed to exercise a “great level of self-restraint, professionalism and support for the judicial authority as such”.<sup>115</sup>

<sup>106</sup>Meeting Minutes, Judicial Council of the Slovak Republic, Minutes from the 15th Session (Meeting of Nov. 15, 2022), <https://zasadnutia.sudnarada.sk/data/att/11676.pdf>.

<sup>107</sup>A somewhat separate story is that of Justice of the Constitutional Court Rastislav Kaššák. He used a false Facebook profile where he infamously called Putin a murderer, Trump a crook, and expressed his sympathy with Israel in the conflict in Gaza. He also publicly commented on a constitutional amendment he was supposed to review as a part of Constitutional Court chamber. The Judicial Council opened debate over his statements on behalf of Putin, Trump and Israel, however, once again without any concluding finding or position.

<sup>108</sup>But also Constitutional court justices Kaššák and Buchalová.

<sup>109</sup>Filip Struhárik, *YouTUBE zablokoval opäť obnovil Harabinov kanál. Daňovi zobrať možnosť zarábať*, DENNIK N (Feb. 21, 2020), <https://dennikn.sk/1766100/mediabrifing-youtube-zablokoval-a-obnovil-harabinov-kanal-danovi-zobrat-moznost-zarabat/?ref=list>.

<sup>110</sup>Veronika Prušová, *Švecová: Harabin dehonestuje justíciu. On oponuje, že predsedníčka je na liekoch*, DENNIK N (Mar. 1, 2017), <https://dennikn.sk/694344/svecova-harabin-dehonestuje-justiciu-on-oponuje-ze-predsednicka-je-na-liekoch/?ref=list>.

<sup>111</sup>Prušová, *supra* note 110.

<sup>112</sup>Prušová, *supra* note 110.

<sup>113</sup>Veronika Prušová, *Zatiahnúť do pojednávania osud detí sudkyne? Harabin to spravil*, DENNIK N (Dec. 11, 2019), <https://dennikn.sk/1683403/zatiahnut-do-pojednavania-osud-deti-sudkyne-harabin-to-spravil/?ref=list>.

<sup>114</sup>Meeting Minutes, Judicial Council of the Slovak Republic, Minutes from the 2d Session (Meeting on Jan. 26, 2021), <https://zasadnutia.sudnarada.sk/data/att/7677.pdf>.

<sup>115</sup>Judicial Council of the Slovak Republic, *supra* note 114.

All in all, the Slovak judiciary's approach to judges' freedom of expression is rather clear—anything goes. The Judicial Council formally set some boundaries, but these were developed and applied only in a case in which a judge spoke critically about his job. Every other discussion was inconclusive, with the Judicial Council willing to close its eyes to some of the trespasses (such as leaking file information) for the sake of correcting the picture of the courts offered by public media. In addition, Slovak judges signaled their views on ethical issues and limits of judicial independence when they elected to the Judicial Council a judge famous for commenting on legal and political cases on his personal website. The step showed that for the majority of judges similar behavior is appreciated and, perhaps, even encouraged. Such a development suggests that the lack of clear regulation has led to the creation of an informal practice of judicial protagonism,<sup>116</sup> and tolerance of judges' public appearances, in which they used the media to gain more visibility and the opportunity to address the public, almost as if speaking to an electorate.

#### D. Conclusion: Non-internalization as the Underlying Cause of Informality

As was shown in Section II, the Slovak judiciary enjoys a considerable amount of self-governance, with the judge-dominated Judicial Council playing a central role in the system.<sup>117</sup> This model is a direct result of supranational recommendations Slovakia followed at the turn of the millennium, in the hope of insulating the judiciary from political interferences by transferring key competences, particularly over judicial careers, into the hands of the judges themselves. As a consequence, Slovak judges are very sensitive to political interference with the judicial branch, yet, as we have shown, lack sensitivity to other possible sources of interference or pressure. In Section III we focused on recently revealed cases of corruption in the Slovak judiciary which included interferences coming from outside of the judiciary as well as from within and the reaction of the Slovak judiciary. This lack of sensitivity then results in the inability to recognize instances of problematic behavior—be it corruption, traveling between the judicial and political branches, or instances where judges' freedom of expression may have been taken too far. It further manifests itself in the avoidance of accountability processes designed with the intention of capturing informal practices undermining the formal safeguards of judicial independence, rendering past institutional changes essentially ineffective.

In this section we focus on possible explanations of why institutional changes aimed to increase judicial independence have failed to trigger the desired change. We argue that, due to problems with the understanding and internalization of judicial independence, they failed to create a change in the existing professional role conception shared among Slovak judges. Indeed, judicial independence is a fairly elusive term used with a variety of meanings. At times it is understood as the institutional insulation of the judiciary from the other branches; sometimes it is conceptualized as the individual discretion of a judge; in other instances it is approached as something that is perceived by judges themselves.<sup>118</sup> Independence can be understood as freedom from interference by actors outside of the judiciary—such as politicians, the media, organized

<sup>116</sup>LAWRENCE FRIEDMAN & ROGELIO PEREZ-PERDOMO, LEGAL CULTURE IN THE AGE OF GLOBALIZATION: LATIN AMERICA AND LATIN EUROPE 176 (2003).

<sup>117</sup>Katarína Šipulová et al., *Judicial Self-Governance Index: Towards Better Understanding of the Role of Judges in Governing the Judiciary*, 17 REGULATION AND GOVERNANCE 22, 33 (2023).

<sup>118</sup>See Stephen B. Burbank & Barry Friedman, *Reconsidering Judicial Independence*, in JUDICIAL INDEPENDENCE AT THE CROSSROADS 9 (Stephen B. Burbank & Barry Friedman eds., 2002) (introducing Impartiality as individual independence); Shimon Shetreet, *Judicial independence and Accountability: Core Values in Liberal Democracies*, in JUDICIARIES IN COMPARATIVE PERSPECTIVE 3 (H. P. Lee ed., 2011); Kate Malleson, *Safeguarding Judicial Impartiality*, 22 LEGAL STUDIES 53, 59 (2002); Charles G. Geyh, *The Dimensions of Judicial Impartiality*, 65 FLA. L. REV. 493, 499, 513 (2014). *But see* MARIA POPOVA, *POLITICIZED JUSTICE IN EMERGING DEMOCRACIES: A STUDY OF COURTS IN RUSSIA AND UKRAINE* (2014) (viewing insulation as a structural independence); THEODORE L. BECKER, *COMPARATIVE JUDICIAL POLITICS: THE POLITICAL FUNCTIONINGS OF COURTS* (1970) (Becker focusing on behavioral aspects).

interests, as well as from internal actors, mainly court presidents or senior judges.<sup>119</sup> The ambiguity of the concept, together with its normative power, provides, on the one hand, an opportunity for a strong rhetorical weapon, and, on the other, makes it so vague that it can become almost meaningless.

What the examples provided in Section III have in common is that the judiciary vigorously resisted any attempts at criticism or accountability coming from the outside, while remaining very benevolent towards the actors inside the system. What these examples also share is that the judiciary continuously used judicial independence, or its variations, as an ultimate argument shielding it from accountability, without properly addressing the meaning of the term or its margins. Even when faced with evidence of large-scale corruption and criminal investigations, the Judicial Council attempted to insulate judges from further public scrutiny, even accusing the media of harming public trust. The judiciary's reactions suggest that this attitude and the instrumental use of independence as a shield from public accountability were widely shared among many Slovak judges and eventually emptied the formal institutions designed to protect judicial independence. This allowed for the subsequent creation of new informal acts and practices that further undermined formal guarantees, and once they were institutionalized, they turned reforms of judicial empowerment into empty shells with little substance.

Based on these processes, we argue that internalization of values is a necessary (but not sufficient) condition of institutional reforms. In the case of judicial independence, the internalization happens in five steps. First, judges need to recognize the normative importance of judicial independence for the rule of law and democracy. Second, they need to understand the concept and its individual dimensions and nuances, vis-à-vis both external actors and internal pressures stemming from the judiciary. Ultimately, they also need to understand that independence is their individual responsibility. Third, judges need to be aware of structural safeguards provided by the formal contours of their own system, again in all dimensions and nuances. Fourth, judges need to be able to identify situations in which judicial independence may be under threat. And, finally, judges need to be willing to act within the demarcation lines provided by the concept.

These five steps eventually lead to the creation of what we label “mental maps of judicial independence,” which illustrate how judges navigate situations in their on-and-off bench behavioral practice, and recognize and potentially resist the threats to their independence.

The cases we described in Section III may appear to be examples of individual incidents. However, the protective and very corporatist reaction of the judiciary and the inability of the Judicial Council clearly to identify and condemn those instances where judges infringed principles of judicial independence indicate that the Slovak judiciary eventually institutionalized rules of behavior which were driven by a loose and instrumental understanding of judicial independence. In our understanding, the institutionalization of informal practices has two core aspects: A temporal requirement positing that a practice becomes a social fact when it is passed on to a new generation of actors, and the presence of sanctions for disobedience to institutionalized norms.<sup>120</sup> Both these defining features of institutionalization are present in the judicial behavior described in Section III. The longevity of these norms can also be supported by existing scholarship, some people tying these practices to the heritage of the communist regime,<sup>121</sup> and others showcasing deficiencies in the functioning of accountability mechanisms prior to as well as after the establishment of the Judicial Council.<sup>122</sup> Also, some of these patterns of behavior have occurred

<sup>119</sup>See, e.g., Peter H. Russell, *Toward a General Theory of Judicial Independence*, in *JUDICIAL INDEPENDENCE IN THE AGE OF DEMOCRACY: CRITICAL PERSPECTIVES FROM AROUND THE WORLD 1* (Peter H. Russell & David M. O'Brien eds., 2001).

<sup>120</sup>See David Kosař, Katarína Šipulová & Marína Urbániková, *Informality and Courts: Uneasy Partnership*, in this Special Issue.

<sup>121</sup>Čuroš, *supra* note 15; Spáč, *supra* note 8.

<sup>122</sup>KOSAŘ, *supra* note 6.



only recently. Acceptance of “spatial traveling” has been encouraged for almost two decades, as demonstrated, for example, in support of revolving doors for Harabin’s and Jankovská’s career choices. The sanctioning element is a little more tricky. However, what we can observe is that even in the most blatant cases that required a response from within the system, only a very few judges publicly condemned the behavior of their colleague. On the other hand, judges who were fairly vocal defenders of their fellow colleagues were rewarded by being elected by their peers to the Judicial Council.<sup>123</sup>

Of course, the judiciary, like any other collective body, consists of a variety of individuals. By no means do we intend to claim that all Slovak judges have the same concept of the role of a judge or share an understanding of judicial independence. There are instances, be they in the Judicial Council or in reactions from individual courts, that suggest that there is some disagreement over these issues. However, the consistency of the reactions of the most influential representatives of the judiciary, the fact that a similar approach has again and again been dominant in the Slovak judiciary, and the reality that this approach seems to be encouraged and rewarded give validity to the argument that it has been, in fact, institutionalized.

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<sup>123</sup>Such as judges Kosova, Dudzikova, Erenova and samko.

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