Exploring Backlash Terminology and National Judicial Resistance to the CJEU

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Abstract

The concept of 'backlash' has gained significant prominence in international legal discourse in understanding the dynamics between supranational legal and institutional regimes and their constituent states. When a state shows resistance towards an international legal regime and its court, the nature, extent, purpose, means, and actors involved in the process can vary significantly. As the term 'backlash' evolves from a colloquial expression to a technical term in international law, its consistent application to different forms of national resistance becomes increasingly important. As to how backlash can be distinguished from other forms of resistance against international courts, Madsen et al. have developed a comprehensive model that categorizes resistance as either stronger (backlash) or weaker (pushback) based on well-defined criteria. Putting the CJEU as a regional international court (although with distinct characteristics) into the focus, this paper examines where national resistance to the CJEU may be positioned within Madsen et al.'s conceptual framework. Of course, resistance or non-compliance with the CJEU varies dynamically across time and space and in terms of actors. However, in recent years, a form of resistance that had previously only been speculated about has become a reality: on a few occasions, national constitutional courts (or supreme courts) have ruled that a judgment of the CJEU exceeded the powers conferred upon it, overstepping its competences. This paper situates such instances of national judicial resistance within the conceptual framework established by Madsen et al. Additionally, it explores contextual factors that provide valuable insights for a comprehensive analysis.

Keywords: backlash, CJEU, constitutional courts, resistance, constitutional pluralism

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1. Introduction

The concept of 'backlash' has gained significant prominence in international legal discourse used to describe the dynamics between supranational legal and institutional regimes and their constituent states. When a state shows resistance towards an international legal regime and its court, the nature, extent, purpose, means, and actors involved in the process can vary significantly. As the term 'backlash' evolves from a colloquial expression to a technical term in international law, its consistent application to different forms of national resistance becomes increasingly important.

In this paper, I will first review what is meant by backlash and why the question of whether we can use this adjective to describe certain forms of resistance to the CJEU arises at all. While the term is frequently used with ideological connotations, there is a growing body of scholarship attempting to provide a more precise definition. I would like to present some of the more thorough definitions that have emerged so far in the field of political science and international legal scholarship, conceived for analytical purposes. With regard to resistance to international courts, Madsen *et al.* have developed a comprehensive model that categorizes resistance as either stronger ('backlash') or weaker ('pushback') based on well-defined criteria. Considering the CJEU as a regional international court (although with distinct characteristics), this paper examines where national resistance to the CJEU can be positioned within Madsen *et al.*'s conceptual framework.

Resistance or non-compliance with the CJEU varies dynamically across time and space and in terms of actors. However, in recent years, a form of resistance that had previously only been speculated about has become a reality: on a few occasions, national constitutional courts (or supreme courts) have ruled that a judgment of the CJEU exceeded the powers conferred upon it, overstepping its competences. This paper reviews the work of authors who have already addressed the question of whether the concept

of backlash can be applied to different patterns of resistance to the CJEU, mapping how *ultra vires* decisions can be situated within this conceptual framework.

2. Why Do We Talk About Backlash?

Why should we be concerned about the labels we give to certain court decisions? Does it make any difference if we refer to national courts' decisions taken to openly resist CJEU judgments as 'backlash' or otherwise?

The term 'backlash' is increasingly used in legal and political science literature and is often used to refer to certain types of opposition to international institutions, international law and international courts.[1] It has become one of the "buzzwords in present-day politics".[2] Many scholars are keen to apply the stamp of 'backlash' to certain actions and movements, but few do so by consistently applying a decided set of criteria. When scholarship uses the word backlash as a colloquialism, it often appears to be ideologically saturated: typically stronger actions against the progressive-liberal consensus and international order are labelled this way.[3]

1 *See e.g.* Karen J. Alter *et al.*, 'Backlash against International Courts in West, East and Southern Africa: Causes and Consequences', *European Journal of International Law*, Vol. 27, Issue 2, 2016, pp. 293–328; Erik Voeten, 'Populism and Backlashes against International Courts', *Perspectives on Politics*, Vol. 18, Issue 2, 2020, pp. 407–422; Jolyon Ford, 'Backlash against a Rules-Based International Human Rights Order? An Australian Perspective', *The Australian Year Book of International Law Online*, Vol. 38, Issue 1, 2020, pp. 175–198; Peter G Danchin *et al.*, 'Navigating the Backlash against Global Law and Institutions', *The Australian Year Book of International Law Online*, Vol. 38, Issue 1, 2020, pp. 33–77; Nicole Deitelhoff, 'What's in a Name? Contestation and Backlash against International Norms and Institutions', *The British Journal of Politics and International Relations*, Volume 22, Issue 4, 2020, pp. 715–727; Erik Voeten, 'Is the Public Backlash against Globalization a Backlash against Legalization and Judicialization?', *International Studies Review*, Vol. 24, Issue 2, 2022, pp. 1–17; Øyvind Stiansen & Erik Voeten, 'Backlash and Judicial Restraint: Evidence from the European Court of Human Rights', *International Studies Quarterly*, Vol. 64, Issue 4, 2020, pp. 770–784.

2 Deitelhoff 2020, p. 715.

3 *See e.g.* Bojan Bugarič, 'The Populist Backlash against Europe: Why Only Alternative Economic and Social Policies Can Stop the Rise of Populism in Europe', *in* Francesca Bignami (ed.), *EU Law in Populist Times,* Cambridge University Press, Cambridge, 2020, pp. 474–524; Aron Buzogány & Mihai Varga, 'The Ideational Foundations of the Illiberal Backlash in Central and Eastern Europe: The Case of Hungary', *Review of International Political Economy*, Vol. 25, Issue 6, 2018, pp. 811–828; Isabelle Hertner,

National opposition to the CJEU in the context of the colloquial, ideologically motivated usage of term would certainly qualify as backlash. There are, however, attempts to create a definition of backlash that is at least less dependent on ideology and politics, with the aim of developing a concept that could be a tool for analysis and not an ideologically driven labelling exercise.

National opposition to an international (supranational) institution or a legal regime primarily refers to a political reaction to a development in international law. However, some actors that are not typically considered to be political can also show resistance, such as courts. These institutions are seen as the ultimate guardians of the legal systems, having the final word on the interpretation of law and constitution. While the political will is fluid and subject to a barely predictable set of interests and ideologies, we tend to expect a certain constancy and consistency from the decisions of the high courts. At the very least, we like to think that a decision of a court is not a political project but the result of autonomous considerations of legal interpretation. Since some of these ideas have obviously been transferred onto international courts, there is no doubt that opposition from national courts creates a special situation. When a conflict arises between the ultimate judicial fora of two interacting and sometimes intertwined legal systems, it can bring to the fore difficult questions on some divisive issues such as hierarchy and jurisdiction. It is no coincidence that EU lawyers are seriously puzzled when a national supreme or constitutional court decides to openly oppose a judgment of the CJEU.

The division of competences between the EU and its Member States is a sensitive legal-political issue, which makes the question of who should have the last word in this respect even more sensitive. It is for the CJEU to inter-

'Gendering European Politics: A Story of Progress and Backlash', *Journal of European Integration*, Vol. 43, Issue 4, 2021, pp. 511–517; Andrea Pin, 'The Transnational Drivers of Populist Backlash in Europe: The Role of Courts', *German Law Journal*, Vol. 20, Issue 2, 2019, pp. 225–244; Diana Margarit, 'LGBTQ Rights, Conservative Backlash and the Constitutional Definition of Marriage in Romania', *Gender, Place & Culture*, Vol. 26, Issue 11, 2019, pp. 1570–1587; Stefanie Walter, 'The Backlash Against Globalization', *Annual Review of Political Science*, Vol. 24, Issue 1, 2021, pp. 421–442; Jacques Rupnik, 'Is East-Central Europe Backsliding? From Democracy Fatigue to Populist Backlash', *Journal of Democracy*, Vol. 18, Issue 4, 2007, pp. 17–25; Hendrik Schopmans & Jelena Cupać, 'Engines of Patriarchy: Ethical Artificial Intelligence in Times of Illiberal Backlash Politics', *Ethics & International Affairs*, Vol. 35, Issue 3, 2021, pp. 329–342; Petra Guasti & Lenka Bustikova, 'Varieties of Illiberal Backlash in Central Europe', *Problems of Post-Communism*, Vol. 70, Issue 2, 2023, pp. 130–142.

pret the Treaties authoritatively, so it is logical to conclude that it interprets the rules governing jurisdiction as they are laid down in the Treaties.[4] At this point, however, some constitutional courts also step forward, arguing that EU institutions exercise their powers by means of a constitutional conferral, and it is for the constitutional courts to verify the existence of such conferral, them being the final gatekeepers of the national legal systems. The possibility (and for a long time nothing more) of a constitutional court following this logic and declaring an EU judgement to have exceeded the powers conferred upon it has been seen by many as a nuclear weapon that could trigger a chain reaction and undermine the foundations of the integrated legal order of the EU.[5] It is therefore certainly one of the stronger forms of resistance to the CJEU from national courts.

Such resistance did not emerge for a long time, but since 2012 there have been four such cases. Therefore, it is reasonable to ask: can we talk about backlash in these cases? Can we justifiably use this term for these national judicial actions in a way that does not merely reflect a general ideologically motivated resentment towards dissenters to the European project?

3. Navigating Backlash Terminology

3.1. From Colloquialism to an Analytical Concept

The very first question we should clarify is what we are trying to describe when we refer to a 'backlash'. Clearly, 'backlash' is intended to describe some higher, stronger degree of resistance, contestation or non-compliance, and this stronger quality may rest in the form or the object of resistance, the identity of the resistor or the number of resisters, or even the social/political effects produced by the resistance. But what is the qualitative or quantitative factor that can consistently be said to turn resistance into backlash, thereby allowing us to attach a specific term to this more serious qualification?

First, it can be noted that the use of the term backlash is constantly changing and evolving, but a generally accepted definition is not yet avail-

4 Joseph H. H. Weiler & Ulrich R. Haltern, 'The Autonomy of the Community Legal Order – Through the Looking Glass', *Harvard International Law Journal*, Vol. 37, Issue 2, 1996, p. 446.

5 Id. pp. 445–446.

able for analysis. Danchin *et al.* also note that there is no consensus in international legal literature on the precise meaning of backlash.[6] Dietelhoff observes that the term is often used as an indicator of the liberal consensus and international regimes in crisis and is often applied to instances of resistance to them.[7] According to Alter and Zürn, there is a 'political pundit's version' of the concept, which can be roughly described as a strong and direct reaction, a counter-movement, to a policy that is defined by its opponents as overreaching or going too far.[8]

However, there are attempts to create generally acceptable definitions more fit for analytical purposes. In addition to the literature on constitutional law and international law, there are, of course, descriptions in political science and social sciences that seek to neutralize the concept, distancing it from its ideological use.

3.2. Public Backlash from a Constitutional Law Perspective

Sunstein puts it rather succinctly that, from a constitutional law perspective, 'public backlash' can be defined as an "intense and sustained public disapproval of a judicial ruling, accompanied by aggressive steps to resist that ruling and to remove its legal force".[9] The same definition is used by Caron and Shirlow, with the slight change that the term 'judicial ruling' is replaced by the more general term 'system'.[10] The question is: can this definition be used for judgments issued by courts? Since the definition basically gives a description of 'public backlash', it is not easy to transpose this to judicial decisions. Were we to remove the term 'public' from the definition (or replace it with 'judicial'), we are still left with a conundrum: even if the concept of disapproval and the removal of legal force are applicable in this context, adjectives such as 'intense and sustained' or 'aggressive' are more

6 Danchin *et al.* 2020, pp. 36–37.
7 Deitelhoff 2020, p. 715.
8 Karen J. Alter & Michael Zürn, 'Conceptualising Backlash Politics: Introduction to a Special Issue on Backlash Politics in Comparison', *The British Journal of Politics and International Relations*, Vol. 22, Issue 4, 2020, p. 563.
9 Cass R. Sunstein, 'Backlash's Travels', *Harvard Civil Rights – Civil Liberties Law Review*, Vol. 42, Issue 2, 2007, p. 435.
10 David D. Caron & Esme Shirlow, 'Dissecting Backlash: The Unarticulated Causes of Backlash and Its Unintended Consequences', *in* Andreas Follesdal & Geir Ulfstein (eds.), *The Judicilization of International Law: A Mixed Blessing?*, Oxford University Press, Oxford, 2018, p. 160.

difficult to apply to judicial rulings. What we can only deduce from this definition is what we had already suspected: that backlash, in the context of a judicial decision, is a kind of intense or extensive form of resistance.

3.3. Backlash as Power-grabbing

Similarly to Dietelhoff, Mansbridge and Shames note that the colloquial use of the term backlash in scholarship is often ideologically charged: it is used to refer to a more conservative political backlash against progressive-liberal policy developments.[11] Considering this definition inadequate for academic discourse, they also attempt to build a definition that is, so to speak, ideology-free, drawing on the political science and sociology literature. It should be noted that their study is not so much about resistance to international law and the courts, but rather resistance to various progressive movements. Nevertheless, progressive policy development is in many cases comes about by judicial decisions, a topic which they also touch on. They define backlash in terms of power (in the sense of capacity). In their view, there are three indispensable components to the concept: *(i)* conceptually, backlash can only be a reaction to something (based on the word 'back'); *(ii)* this reaction must somehow involve coercive (and not just persuasive) power; *(iii)* the aim of the reaction is for the backlashers to regain some power/capacity that they previously had.[12] They also admit that this definition will not be completely apolitical, as the political left is expected to initiate policy changes more frequently, so the resistance of the dissenting political right can be more often labeled as backlash.[13] Nonetheless, their arguments are also based on such examples. They juxtapose coercive force (the use of force or threat) with persuasive force, but at the same time acknowledge that it is often impossible to dismantle the two.[14] It could easily be argued that their third requirement is met in almost all cases when using a broad definition of power or capacity ("preferences and interests causing – or raising the probability of – outcomes") in the context of judicial resistance to jurisprudential or policy development. This definition therefore does not

11 Jane Mansbridge & Shauna L Shames, 'Toward a Theory of Backlash: Dynamic Resistance and the Central Role of Power', *Politics & Gender*, Vol. 4, Issue 4, 2008, p. 623.
12 Id. p. 627.
13 Id. p. 633.
14 Id. p. 631.

appear useful in answering our question, namely what makes a judicial decision a 'backlash', because in this context virtually any judicial decision that resists some progressive policy change or jurisprudential development will qualify as backlash.

3.4. Defining 'Backlash Politics'

In addition to the 'political pundit's version' already mentioned above, Alter and Zürn point out that the term 'backlash' is also applied rather loosely in political science or legal scholarship, which in fact usually means branding right-wing political goals, populism or simply opposition to judicial rulings in general as backlash.[15] Accordingly, they seek to provide a definition of what the politics of backlash is in a way that is more fit for analytical purposes and less dependent on ideological preferences. The question immediately arises, of course, as to how far the concept of backlash, if understood in a strictly political sense, will be applicable to judicial decisions. Three necessary components are identified: backlash politics must *(i)* have a retrograde objective; *(ii)* be characterized by the use of extraordinary goals and tactics; and *(iii)* reach the level of "mainstream public discourse".[16] The retrograde objective, as an essential conceptual element, is derived from the grammatical meaning of the word 'backlash': it implies a backward movement, which, according to them, means a return to a previous social or legal condition. They explicitly stress that it has no normative value, is not to be confused with regressive objectives, and may therefore be intended to cover a return to a better, more desirable state of affairs.[17] By extraordinary goals/tactics they mean challenging the 'dominant script'. This implies that the backlash challenges more than a specific policy: it is directed against common values and principles, established practices, and in a broader sense, the dominant narrative of how the world around us should work.[18] The third requirement should be interpreted as meaning that the backlash movement becomes backlash politics when its aims have gained some role in the mainstream of public life and discourse, they are not wholly

15 Alter & Zürn 2020, p. 565.
16 Id. p. 564.
17 Id. p. 566.
18 Id. pp. 566–567.

marginalized in political life.[19] Although this definition can certainly be applied to the analysis of resistance to courts/international courts,[20] in my view it can only be applied with significant distortions if the resistor is itself a court. In a broad understanding of the retrograde objective, if a court's judgment is a reversal of established practice/new jurisprudential development, or if (in the case of constitutional review, for example) it strikes down a law that is a step in the direction of social change (except, of course, if the norm itself being repealed has a retrograde aim) – the goal is always to return to the *status quo ante*. Therefore, all judgments, that represent resistance or contestation, have a retrograde objective. It can be difficult to tell whether the means/tactics used by a court for the purposes of resistance are extraordinary. Striking down a law or reversing judicial practice may seem like extraordinary measures, but at the same time are integral parts of the system. In the context of the EU, too, it depends on the conceptual basis on which we are operating: it is very rare indeed for a national court to openly challenge CJEU judgments, but in a framework of constitutional pluralism, this kind of action may be an intrinsic feature of the system. The question may arise as to what is considered a 'dominant script': one could take as a basis, for example, mainstream EU law scholarship, but then the definition of backlash would also lose its ideological neutrality. We can also apply the level of 'mainstream public discourse' to judicial decisions in this form, or even to the practical impact of the decision on jurisprudence. Here, however, too many factors would come into play that are not exclusively dependent on the content of the judgment in question, but rather on *e.g.* the prestige/influence of the court, the behavior of other courts, the attitude of the media, *etc.*

3.5. Resistance to International Courts – Backlash or Pushback?

When it comes to international law scholarship, Madsen *et al.* have attempted to establish a theoretical framework for a consistent application of the concept of backlash to resistance towards international courts. They also note that in much of the scholarship the term is used in a colloquial style to refer to resistance to international courts, which may be a way of expressing a stronger-than-usual form of resistance, but which we can no

19 Id. pp. 567–568.
20 *See* Deitelhoff 2020, pp. 715–727.

longer use to analyze these reactions substantially.[21] In fact, this is their justification for setting up a new theoretical framework to define backlash. An important difference from the definition of Alter and Zürn is that they emphasize that the object of analysis is only the process of resistance, and not the results that follow from this process (therefore, the repercussions of the resistance in public discourse or in scholarship cannot be a decisive factor in its normative evaluation).[22] Generally, they describe actions that can potentially be considered a backlash as "most often a reaction to new socio-political or legal developments – whether they are liberal, authoritarian or unidirectional is not decisive at the conceptual level", adding, that

> "resistance to ICs [international courts] can occur both as pointed reaction to a very specific judgment or court or as an expression of general resentment to a certain socio-political development, thereby reflecting more general cleavages in society, that is then projected to the practices of an IC."[23]

Of crucial importance in their definition of backlash is the distinction between *ordinary and extraordinary resistance*. According to the authors, in-system resistance occurs in all legal systems – in the case of international courts, ordinary resistance occurs when some part of the 'audience' is dissatisfied with the direction or content of legal interpretation and therefore 'pushes back' to achieve a previous or different legal status: this 'ordinary' form of resistance is what they refer to as 'pushback'. Resistance becomes 'extraordinary' when it is directed not only against the specific legal norm or its judicial interpretation, but also generally against the authority of the international court. The explicit aim of extraordinary resistance is therefore not only to reverse or change the legal substance, but also to transform or even abolish the international court. This extraordinary resistance is what they refer to as 'backlash'.[24]

But can this distinction be applied when the ordinary or extraordinary resistance comes from a court? Madsen *et al.* discuss the wide scale of actors alongside Member States that can be involved in resistance, *e.g.*

21 Mikael Rask Madsen *et al.*, 'Backlash against International Courts: Explaining the Forms and Patterns of Resistance to International Courts', *International Journal of Law in Context*, Vol. 14, Issue 2, 2018, p. 199.
22 Id. p. 199.
23 Id. p. 200.
24 Id. pp. 202–203.

domestic actors in national legal systems, such as politicians, NGOs and other organizations, the legal profession and academia, as well as of course national courts. Interestingly, it is precisely the resistance to the CJEU and the ECtHR that is cited as an example. However, according to the authors, a national court's decision cannot directly have an effect that would fall into the category of backlash, at most it can have a 'resembling' effect – which, however, can be transformed into a broader resistance as a result of a spillover process involving other (political) actors.[25]

4. Applying the Backlash/Pushback Distinction in EU Context

4.1. Backlash Against International Courts – by Judges?

This short summary shows that the most convenient starting point for the conceptual classification of resistance to the CJEU is the model developed by Madsen *et al.*, provided that we first address the authors' brief remark that national judicial resistance to international courts cannot, in itself, produce backlash outcomes. For if this is completely unthinkable, my brief analysis becomes somewhat redundant. I would like to argue that it is indeed conceivable that a court's decision could in itself fall into the category of backlash described by Madsen *et al.* My first point is that their argument is somewhat self-contradictory: they write that "resistance stemming from Member State courts, often the supreme or constitutional courts of the Member States, can strictly speaking not in itself produce backlash outcomes", whereas they have previously stated that "studying backlash, and more generally resistance to ICs, becomes first and foremost a study of the processes of opposing or challenging ICs, not of their outcomes".[26] It is strongly argued, therefore, that the analysis should distinguish sharply between process and outcome, even if there is otherwise a close causal link between the two. On the one hand, even if judicial decisions were incapable of producing backlash outcomes, the process itself could conceivably be a backlash. On the other hand, I would also argue that they can indeed possibly result in backlash outcomes. It is not inconceivable that a decision of a national constitutional court could explicitly denounce the authority of an international court, for example by declaring accession or membership to

25 Id. pp. 204–205.
26 Id. pp. 205. and 199.

an international court unconstitutional. However, it is true that it is worth distinguishing the process from the outcome: it is not certain, that such a judgment would automatically terminate membership in the international court, but it would be clear that the decision itself is no longer directed against a certain jurisprudential change, but more generally against the authority of the international court itself. Thus, for example, the CJEU obstructing the EU's accession to the ECHR, rejecting the authority of the ECtHR, defending its own monopoly on the interpretation of European law, could certainly qualify as backlash.[27]

4.2. Additions to the Backlash-Pushback Distinction

There are other authors who use distinctions similar to that of Madsen *et al.*, and they may provide additional support for the analysis. Sandholtz *et al.* distinguish between 'resistance' and 'backlash' by framing actions in a similar, dual division. They do not differentiate between actors, so they use these terms to refer to the activities of the states. State-action is considered to be merely 'resistance' if it *(i)* means criticism of one or more judgments of the international court; *(ii)* shows non-compliance with one or more judgments; *(iii)* does not cooperate on specific cases; or *(iv)* criticizes the court or its judgments in general. Conversely, 'backlash' occurs when a state *(i)* ceases to cooperate with the international court altogether; *(ii)* narrows the jurisdiction of the international court; *(iii)* tightens the access to the international court; *(iv)* leaves the jurisdiction of the international court, withdraws from the treaty; or *(v)* abolishes the international court.[28] Hence, the distinction in this case is similar: backlash is that which challenges the authority of the court, while the criticism or non-compliance directed at the jurisprudence is merely resistance. However, it should be added that they are concerned only with state actions, thus providing a significantly narrower interpretative framework.

Similarly, Soley and Steininger base their distinction on whether the action is directed against a specific judgment/jurisprudence or against the institution of the international court itself. However, they use different terms and apply a fourfold division, further nuancing the categories of Madsen *et*

27 *Opinion 2/13 of the Court of 18 December 2014,* ECLI:EU:C:2014:2454

28 Wayne Sandholtz *et al.*, 'Backlash and International Human Rights Courts', *in* Alison Brysk & Michael Stohl (eds.), *Contracting Human Rights: Crisis, Accountability, and Opportunity,* Edward Elgar, Cheltenham, 2018, p. 160.

al. They distinguish between two degrees of action against jurisprudence: objection and contestation. 'Objection' is any negative reaction or criticism, but importantly it remains in the rhetorical space without practical consequences. 'Contestation' may reach beyond a criticism of the substance of the judgment; they define it as

> "state organs or institutions engaging in it either criticize an order on the grounds of how judges have applied particular norms to the factual situation or they question the validity of the norms applied."

Actions against the institution of the international court are also twofold. 'Resistance' is when criticism is no longer directed against jurisprudence but against the institution itself, while the resistor still remains "invested in the institution and seeks to reform it from within". 'Backlash' is the next stage: it is defined as "systematic and consistent criticism as well as severe instances of non-compliance".[29] However, this is still a rather cryptic formulation, so it is important to stress that, following Caron and Shirlow, the aim of the act here is to leave/dismantle the institution or to establish an alternative institutional structure.[30]

5. National Judicial Resistance to the CJEU – Backlash or Something Less Severe?

There are now some authors who have made efforts to answer the question of whether we can apply this recently very popular adjective to given instances of resistance to the CJEU. Burchardt has analyzed how the German Federal Constitutional Court (*Bundesverfassungsgericht, BVerfG*) reacted when the CJEU's ever-expanding case law on fundamental rights led it to feel, in the author's view, marginalized. The question Burchardt poses is whether the two landmark decisions of the *BVerfG* in the 'right to be forgotten' cases, with which it put itself back on the map of European fundamental rights protection, can be considered as backlash (or pushback), or rather as merely fine examples of constructive judicial dialogue. Burchardt's

29 Ximena Soley & Silvia Steininger, 'Parting Ways or Lashing Back? Withdrawals, Backlash and the Inter-American Court of Human Rights', *International Journal of Law in Context*, Vol. 14, Issue 2, 2018, pp. 240–241.

30 David D. Caron & Esme Shirlow, 'Unpacking the Complexities of Backlash and Identifying Its Unintended Consequences', *EJIL:Talk!*, 25 August 2016.

concept of backlash is also based primarily on the criteria set out by Madsen *et al.* and additionally those described by Soley and Steininger and Sandholtz *et al.* Accordingly, she tries to answer the question whether the *BVerfG*, by seeking to limit the CJEU's fundamental rights adjudicatory function, is challenging the authority of the institution as a whole (as a court of fundamental rights), or whether it is merely attempting to set some jurisprudential limitations on it instead. According to Burchardt, the *BVerfG* went beyond contesting individual judgments with its 'right to be forgotten' decisions and showed a more structural resistance, but it did not question the authority of the CJEU, so there was no backlash.[31]

Hofmann provides a comprehensive analysis of whether the different forms and examples of resistance to the CJEU so far fit into the definition of backlash given by Madsen *et al.* He is thus not only concerned with specific cases of resistance by national courts, but analyses different patterns of political and even academic criticism. His aim is therefore to provide as comprehensive a mapping as possible of the various forms of resistance to the CJEU. His analysis concludes that, although there are sometimes instances of backlash from academia or the media, resistance most often falls into the category of pushback. However, his conclusion shows that pushback is in fact a fairly common occurrence, as resistance or non-compliance with individual judgments is not at all rare. He sees resistance to individual CJEU judgments not as a backlash but as a relatively strong form of pushback. Nevertheless, he thinks it is unlikely that backlash will become more frequent in the future, as long as the willingness to cooperate persists. Yet he believes that the examples of some Member States such as Poland and Hungary show that nothing can be taken for granted in this respect.[32]

31 Dana Burchardt, 'Backlash against the Court of Justice of the EU? The Recent Jurisprudence of the German Constitutional Court on EU Fundamental Rights as a Standard of Review', *German Law Journal*, Vol. 21, Issue S1, 2020, pp. 1–18.

32 Andreas Hofmann, 'Resistance against the Court of Justice of the European Union', *International Journal of Law in Context*, Vol. 14, Issue 2, 2018, pp. 258–274.

6. The Four Ultra Vires Decisions

6.1. Czech Republic: Landtová and Holubec

6.1.1. The Case of Slovak Pensions – Landtová

Following the break-up of Czechoslovakia, one of the issues to be settled was the payment of pensions, *i.e.* whether former Czechoslovak citizens would continue to receive their pensions from the Czech Republic or Slovakia. The agreement between the two successor states offered the solution that the country where the employer was located at the time of the break-up would be responsible for paying the pension.[33] This solution led to cases where some pensioners, even though they had lived life-long in the territory of one of the successor States, had their pension paid by the other successor State on the basis of the residence of the employer. In the late 1990s, this was particularly detrimental to those who, although living in the Czech Republic, received a Slovak pension, as the Slovak pension was lower. Their case was eventually referred to the Czech Constitutional Court (*Ústavni soud*, ÚS), which found that this situation violated the right to financial security in old age.[34] According to the court, pensioners who worked for an employer located in Slovakia should receive from the Czech authorities, in addition to their Slovak pension, an additional amount such that the two together would be equal to the amount they would otherwise receive as pensioners in the Czech Republic.[35]

The ensuing practice was not accepted by the Czech Supreme Administrative Court (SAC), which initiated a preliminary reference procedure before the CJEU on Slovak pensions following EU accession. In 2012, the CJEU found that the ÚS judgment discriminated against nationals of other EU Member States because the supplementary pension under the ÚS decision was granted to Czech nationals instead of being equally applicable to nationals of other EU Member States, and was therefore in violation of

33 Ivo Šlosarčík, 'Uniós jog a Cseh Köztársaságban: a cseh alkotmány „európaizált" értelmezésének korlátai és az ultra vires doktrína', *in* Nóra Chronowski (ed.), *Szuverenitás és államiság az Európai Unióban: Kortárs kérdések és kihívások,* ELTE Eötvös, Budapest, 2017, pp. 71–72.

34 Ústavní Soud České Republiky Dec. II. ÚS 405/02

35 Lenka Pítrová, 'The Judgment of the Czech Constitutional Court in the "Slovak Pensions" Case and Its Possible Consequences (in Light of the Fortiter in Re Suaviter in Modo Principle)', *The Lawyer Quarterly*, Vol. 3, Issue 2, 2013, p. 88.

EU law.[36] The CJEU's decision therefore did not seek to abolish the supplementary pension, but to ensure that Czech nationality is not a condition for the granting of the allowance. The CJEU's answer to the hypothetical question made by the referring court did not in fact establish a ban on the disbursement of the supplementary benefit in question. However, this was not how the SAC interpreted the judgment, instead it concluded that as the supplementary pension violated EU law, it is therefore inapplicable – and tried to provoke the ÚS into admitting that it could only uphold its own case law if it found that the relevant EU law was contrary to the essential core of the constitution.[37]

6.1.2. ÚS 5/12 – Holubec

The ÚS held that EU law was not applicable to the specific situation created by the break-up of Czechoslovakia.[38] It argued that the employment of those who were resident in the Czech Republic but had worked as Czechoslovak citizens in the territory of present day Slovakia, could not be retroactively found to have been engaged in cross-border employment. According to the ÚS, in absence of a cross-border element, the European Regulation on the coordination of pension schemes between Member States does not apply in the case. In the ÚS's viesw the dissolution of Czechoslovakia is not comparable to situations where EU citizens acquire their insurance time in different Member States, as the question is specifically about the consequences of a break-up of a federal state and how social security costs are to be shared between them.[39] Therefore, in addition to declaring the inapplicability of the Regulation to such cases, the ÚS also stated the following:

> "we cannot do otherwise than state, in connection with the effects of CJEU judgment of 22 June 2011, C-399/09 on analogous cases, that in that case there were excesses on the part of a European Union body, that a situation occurred in which an act by a European body exceeded

36 Judgment of 22 June 2011, *Case C-399/09, Landtová*, ECLI:EU:C:2011:415
37 Jan Komárek, 'Czech Constitutional Court Playing with Matches: the Czech Constitutional Court Declares a Judgment of the Court of Justice of the EU Ultra Vires: Judgmens of 31 January 2012, Pl. ÚS 5/12, Slovak Pensions XVII", *European Constitutional Law Review,* Vol. 8, Issue 2, 2012, p. 328.
38 Ústavní Soud České Republiky Dec. PL. ÚS 5/12.
39 Pítrová 2013, p. 89.

> the powers that the Czech Republic transferred to the European Union under Art. 10a of the Constitution; this exceeded the scope of the transferred powers, and was *ultra vires*."[40]

The judgment of the ÚS was the first decision in EU history by which a national constitutional court ruled that a CJEU judgment is *ultra vires* and inapplicable. Critics of the decision argue that this would not have been necessary at all, as the CJEU ruling would only require minor amendments to make the supplementing of Slovak pensions compliant with EU law, and that open confrontation could have been avoided by mutual dialogue. Others argue that both the CJEU and the ÚS made mistakes: confrontation could have been avoided through mutual respect, cooperation and self-restraint.[41]

6.2. Denmark: The Ajos Case

In the second instance of a national court declaring that a judgment of the ECJ is *ultra vires*, a similar theme emerged, centering once more on the issue of pensions and discrimination, albeit based on age rather than nationality. The crux of the matter lay in the Danish legislative provision, according to which a Danish individual, who was dismissed by his employer at the age of 60, was not entitled to severance pay as he was already entitled to old-age pension.[42] His complaint, arguing that the Danish legislation discriminates based on age, reached the CJEU.

As directives inherently lack horizontal effect, the CJEU refrained from invoking the non-discrimination clause of the Employment Directive. Instead, the Court predicated its *Dansk Industri* judgment on the broader,

40 PL. ÚS 5/12.

41 Richard Král, 'Questioning the Recent Challenge of the Czech Constitutional Court to the ECJ', *European Public Law*, Vol. 19, Issue 2, 2013, pp. 279–280; Komárek 2012, p. 336.

42 Mikael Rask Madsen *et al.*, 'Competing Supremacies and Clashing Institutional Rationalities: The Danish Supreme Court's Decision in the *Ajos* Case and the National Limits of Judicial Cooperation', *European Law Journal*, Vol. 23, Issue 1–2, 2017, p. 142; Urška Šadl & Sabine Mair, 'Mutual Disempowerment: Case C-441/14 Dansk Industri, Acting on Behalf of Ajos A/S v Estate of Karsten Eigil Rasmussen and Case No. 15/2014 Dansk Industri (DI) Acting for Ajos A/S v The Estate Left by A', *European Constitutional Law Review*, Vol. 13, Issue 2, 2017, p. 350.

unwritten principle of non-discrimination, declaring the Danish legislation to be, in essence, discriminatory.[43]

There was no conflict over whether the legislation was really discriminatory or not – soon after the *Dansk Industri* judgment, a legislative correction aimed at implementing the ruling was already underway. However, legal ethos in Denmark is characterized by a distinct aversion to judicial activism and a preference for ascertaining legislative intent when interpreting the law[44] – and the Danish Supreme Court stated in its Ajos judgment that the Danish EU-accession Act did not mention any possibility of nullifying national legislation based on unwritten judicial principles. Therefore, the Danish Supreme Court concluded that it would be beyond its competences to grant effect to, and apply the CJEU's judgment.[45]

6.3. Germany: Weiss and PSPP

Of all the *ultra vires* decisions of the national constitutional courts (or apex courts), it was clearly the PSPP judgment of the *BVerfG* that put the delicate 'equilibrium' between the national and the European judicial structures and particularly the scholarship concerned with European constitutionalism under the greatest stress.[46] The reason for this is perhaps not necessarily to be found in the content or legal consequence of the decision, but rather in the fact that the BVerfG is usually considered to be *primus inter pares* in the circle of European constitutional courts, its jurisprudence having effects beyond the borders of Germany.

The catalyst for the *BVerfG*'s decision was the European Central Bank's (ECB) public sector purchase program (PSPP), which essentially entails the purchasing of government bonds and bonds issued by various national and European institutions. The program was brought before the *BVerfG* by German petitioners on the grounds that it constitutes an overstepping of

43 Judgment of 19 April 2016, *Case C-441/14, Dansk Industri (DI),* ECLI:EU:C:2016:278 para. 22. While the Employment Directive (2000/78/EC) prohibited age-based discrimination, due to the lack of horizontal effect, the judicial principle had to be applied, as set out in the *Mangold* judgment. *See* Judgment of 22 November 2005, *Case C-144/04, Mangold*, ECLI:EU:C:2005:709 paras. 74–75.

44 Madsen *et al.* 2017, pp. 142 and 149; Šadl & Mair 2017, p. 361.

45 Højesteret Case no. 15/2014.

46 Arthur Dyevre, 'How Europe's Legal Equilibrium Unravelled', *EJIL:Talk!,* 28 May 2020.

powers by the EU, more specifically by the ECB. The *BVerfG* then referred the matter to the CJEU for a preliminary ruling in 2017, asking whether the PSPP constitutes a monetization of public debt (and therefore a possible infringement of Article 123 TEU, whether it breaches the non-bailout clause (Article 125 TFEU), whether it exceeds the ECB's powers, and also whether it infringes the principle of conferral of powers, the protection of national identity or the requirement of proportionality.[47]

The CJEU answered the questions raised in its *Weiss* judgment, in which it found, subject to a proportionality test, that the PSPP did not constitute any infringement of the EU Treaties.[48] The *BVerfG* was, however, unappeased by the answers and concluded that the test carried out by the CJEU was inadequate for checking the ECB and the PSPP against the criteria they had outlined. The CJEU did not take sufficient account of the *BVerfG*'s concerns and did not ask the ECB to provide adequate justification as for the necessity and proportionality of the program.[49] For all these reasons, the *BVerfG* held that the CJEU had breached the proportionality requirement with its *Weiss* judgment and by failing to properly examine whether the ECB had potentially exceeded its powers, it had itself acted *ultra vires*.[50] This meant that Germany would not be allowed to participate in the 'unconstitutional' PSPP. However, the German judges gave the ECB the opportunity to justify the necessity and proportionality of the program within three months, so in practice the implementation of the PSPP was not jeopardized, rendering the significance of the *BVerfG*'s decision to be more of symbolic than of a practical nature.

6.4. Poland: the Constitutional Judges' Quest Against the Ever-closer Union

6.4.1. The CJEU's 'Systemic Doubts'

In recent years, the Polish Constitutional Tribunal (*Trybunał Konstytucyjny*, TK) has delivered a number of decisions in open confrontation with the CJEU (or in some cases also the ECtHR), and it is difficult to predict for how long this series will continue.

47 Orlando Scarcello, *Radical Constitutional Pluralism in Europe,* Routledge, Abingdon/New York, 2023, p. 121.
48 Judgment of 11 December 2018, *C-493/17, Weiss*, ECLI:EU:C:2018:1000, para. 158.
49 Scarcello 2023, pp. 121–122.
50 BVerfG, 2 BvR 859/15.

In 2017, the Law and Justice government in Poland initiated a controversial reform of the National Council of the Judiciary (*Krajowa Rada Sądownictwa*, KRS), altering the appointment process for judges. One key change was shifting the majority of KRS members' election away from the judiciary to the Sejm (parliament), sparking concerns about the judiciary's independence.[51] A specific case emerged when judges contested rejections by the KRS for Supreme Court seats in 2018. Despite the appeal route to the Supreme Administrative Court (SAC), concerns arose about the lack of an effective remedy due to legislative changes. The changes meant that the TK intervened, deeming SAC's jurisdiction unconstitutional followed by a legislative amendment excluding remedy possibilities entirely.[52]

The CJEU concluded upon the SAC's referral that, although the lack of remedy for judicial appointments is not necessarily contrary to EU law (Article 19 TEU), the sudden elimination of previous remedies can give rise to 'systemic doubts'.[53] The CJEU further added that if a national court considers that a law infringes the principle of sincere cooperation under Article 4 TEU or the right to an effective remedy under Article 19 TEU, it shall disapply the national provision in question, holding also that

> "where it is proved that those articles have been infringed, the principle of primacy of EU law must be interpreted as requiring the referring court to disapply the amendments at issue, whether they are of a legislative or constitutional origin, and, consequently, to continue to assume the jurisdiction previously vested in it to hear disputes referred to it before those amendments were made."[54]

Reading between the lines, "assuming the jurisdiction previously vested in it" means for a Polish court to disregard the TK's decision that having such jurisdiction is unconstitutional.

51 *See e.g.* Commission Staff Working Document 2021 Rule of Law Report Country Chapter on the rule of law situation in Poland SWD/2021/722 final.

52 Márton Csapodi, 'Reconciling Jurisdictions in the European System of Constitutional Adjudication', *Hungarian Yearbook of International Law and European Law*, Vol. 10, 2022, p. 233.

53 Judgment of 2 March 2021, *Case C-824/18, A.B. and others*, ECLI:EU:C:2021:153 para. 129.

54 *Case C-824/18, A.B. and others,* paras. 140–142, and 150.

6.4.2. TK K 3/21 – The Ever-closer Union Entering a 'New Phase'

Subsequently, the Polish Prime Minister requested the TK to decide on the relationship between EU law and the Constitution, and the decision K 3/21 was issued – an abstract assessment of the compatibility and relationship of the EU treaties with the Constitution. While this meant that the TK did not decide on the applicability of the CJEU judgment, at the same time it in fact ruled out its applicability.[55]

The main findings of the TK can be highlighted as follows. The first and second paragraphs of Article 1 and the third paragraph of Article 4 TEU are contrary to Articles 2, 8 and 90 of the Polish Constitution. Article 90(1) insofar as the interpretation of EU law by the CJEU leads to a 'new phase' of the 'ever closer union' in which: *(i)* the EU institutions exceed the powers transferred by the Treaty; *(ii)* the Constitution, which shall have primacy in terms of binding force and application, is no longer the supreme law of Poland; *(iii)* Poland cannot function as a sovereign democratic state.[56] The remainder of the decision can be summarized as follows: according to the TK, the second paragraph of Article 19(1) TEU (on the CJEU) is contrary to the Constitution insofar as it allows Polish courts either to disregard the provisions of the Constitution or to rule on the basis of annulled provisions of law, or to review judicial appointments.[57]

Thus, although the decision did not review the constitutionality of the relevant judgment of the CJEU, it aimed to exclude its applicability, making it clear that it reaches beyond the just-established constitutional framework.[58]

55 Csapodi 2022, pp. 233–234.

56 Trybunał Konstytucyjny Dec. K 3/21.

57 Id.

58 The press release accompanying the decision also stresses that the TK cannot interpret EU law authentically, only the CJEU can do so. Their argumentation is based on the premises that the EU treaties and their interpretation given by the CJEU are inseparable: if the latter is beyond the limits of the Polish Constitution, so is the former. *See* at https://trybunal.gov.pl/en/news/press-releases/after-the-hearing/art/11664-ocena-zgodnosci-z-konstytucja-rp-wybranych-przepisow-traktatu-o-unii-europejskiej

6.4.3. The Saga Continues: K 8/21

More than a year later, in December 2023, the quest of the TK against the CJEU continued. The crux of the matter lay in the CJEU's imposition of fines on Poland as interim measures in the Turów coal mine case and the disciplinary chamber of the Supreme Court. The Minister of Justice, acting as the public prosecutor under the Law and Justice government, contested the legality of these fines, asserting Poland's refusal to remit payment. Consequently, recourse was sought from the TK.[59] The TK's task entailed an assessment of the compatibility of the CJEU's imposition of fines as interim measures with the Polish Constitution – therefore, similarly to the K 3/21 case, not an *in concreto* review of CJEU decisions.

In summary, the TK's *K 8/21* judgment arrived at the following findings. Within proceedings before the CJEU, penalty payments may be levied against a state under Article 260 TFEU. However, the wording of the TFEU does not imply that such penalty payments may be imposed in proceedings concerning the enforcement of compliance with interim measures. The TK posited that the basis for imposing penalty payments should stem from a judgment rendered by the CJEU, pursuant to the procedure delineated in the Treaty, rather than a provisional ruling issued by the President or another judge of the CJEU.[60]

The TK contended that the concept of penalty payments as interim measures, or penalty payments for non-compliance with interim measures, has been introduced by the CJEU itself through its case law, constituting a novel competence not explicitly delineated in EU treaties. This implicit expansion of CJEU competences entails circumventing the consent expressed by EU Member States through the constitutional procedure, thereby contravening the rule of law. According to the TK, this extension of CJEU competences without the consent of Member States runs counter to the principle of Poland's sovereignty and the Polish Constitution.[61]

59 *See* at https://notesfrompoland.com/2023/12/11/polish-constitutional-court-declares-eu-fines-against-poland-violated-constitution/.

60 Trybunał Konstytucyjny Dec. K 8/21.

61 *See* at https://trybunal.gov.pl/en/news/press-releases/after-the-hearing/art/12528-okresowa-kara-finansowa-lub-ryczalt-nakladany-przez-tsue-srodki-tymczasowe-odnosza ce-sie-do-ksztaltu-ustroju-i-funkcjonowania-konstytucyjnych-organow-rzeczypospolitej-polskiej.

7. Do Ultra Vires Decisions Qualify as Backlash?

Having provided an overview of various definitions of 'backlash' and described judgments from national constitutional or apex courts, the subsequent analysis delves into their interrelation, primarily through the lens of Madsen *et al.*'s definition. In their conceptualization of backlash, a critical differentiation lies between ordinary and extraordinary resistance. Ordinary resistance, prevalent in all legal systems including international courts, involves discontent with the trajectory or substance of legal development and interpretation, prompting efforts to revert to a previous state or alter a legal status, termed as 'pushback'. Extraordinary resistance, on the other hand, extends beyond challenging specific legal norms or interpretations to contesting the overarching authority of the international court. Unlike ordinary resistance, which aims at modifying legal content, backlash seeks to fundamentally alter or dismantle the international court concerned.

The application of this definition is not that easy, however. The fundamental question is that whether conceptually, the rejection of a judgment rendered by the CJEU based on its alleged unconstitutionality constitutes ordinary resistance (rejection of the judgment at hand) or extraordinary resistance (contestation of the authority or competences of the CJEU). One could argue, that rejecting a CJEU judgment because it is contrary to the national constitution means not only reversing a legal development, but rather an explicit or implicit systemic rejection of the CJEU's authority to have the final word in the system, to have *Kompetenz-Kompetenz*. However, whether the CJEU has (or should have) such *Kompetenz-Kompetenz* or not remains undecided, as some of the Member States (and their constitutional courts) seem to have reserved the right to have the final word for themselves.[62] These irreconcilable and opposing claims to final authority can be considered the catalysts of the idea of constitutional pluralism.[63] In a setting of constitutional pluralism, there is no pre-established hierarchy, therefore, cases where national law will prevail over supranational law, are undoubt-

62 *See e.g.* Gunnar Beck, 'The Lisbon Judgment of the German Constitutional Court, the Primacy of EU Law and the Problem of Kompetenz-Kompetenz: A Conflict between Right and Right in Which There is No Praetor', *European Law Journal*, Vol. 17, Issue 4, 2011, pp. 470–494.

63 Neil MacCormick, 'The Maastricht-Urteil: Sovereignty Now', *European Law Journal*, Vol. 1, Issue 3, 1995, pp. 259–266.

edly inherent features of the system.[64] Furthermore, if we were to view occasional non-compliance with individual court judgments as a general challenge to the authority of the court to make legally binding decisions, then there would be no point in definitions and categorization, since all non-compliance with any judgment would mean calling into question the most fundamental authority of the court, constituting therefore a backlash.

This paper argues that from among the cases that this paper examined, only the *K 8/21* decision of the Polish TK can be considered something more than 'ordinary resistance' in the framework established by Madsen *et al.*[65] Except for the TK's *K 8/21* decision, the national court decisions examined in this paper are instances of non-compliance with individual judgments, disagreement concerning legal interpretation, especially the interpretation of overarching legal principles such as non-discrimination or proportionality. Even labeling them as non-compliance is challenging due to their very limited practical significance, as conflicts in each case were satisfactorily resolved and compliance with European law was ensured by political mechanisms.[66] These decisions are therefore instances of 'pushback', where the audience – in these cases, a national constitutional/apex court – 'pushes back' to achieve a different legal status or interpretation, being dissatisfied with the content or direction of interpretation, but remaining nevertheless invested in the CJEU, without any explicit aim of transforming or abolishing it as an institution.

As previously noted, the exception lies in the *K 8/21* decision rendered by the TK, which, to a certain extent, arguably challenges the authority of the CJEU. However, its objective is not to abolish the CJEU or withdraw from its jurisdiction; rather, it aims to provide general criticism of its functioning and self-empowerment, while also seeking to confine it within boundaries defined by the TK. Consequently, this level of resistance also fails to meet the threshold required by Madsen *et al.*'s framework to qualify as backlash. However, a more nuanced classification can be achieved through the definitions proposed by Sandholtz *et al.* and Soley and Steininger.

64 Scarcello 2023, p. 45; Neil Walker, 'The Idea of Constitutional Pluralism', *The Modern Law Review*, Vol. 65, Issue 3, 2002, pp. 336–359; Matej Avbelj, 'The Right Question about the FCC Ultra Vires Decision', *Verfassungsblog*, 6 May 2020.

65 Madsen *et al.* 2018, pp. 202–203.

66 Scarcello 2023, pp. 115–135; Madsen *et al.* 2017, p. 142; Šadl and Mair 2017, p. 351; Komárek 2012, p. 327; Márton Sulyok, 'Is This Loyalty In Fact Disloyalty? On the Remarks of the German Government to the Commission after PSPP', *Constitutional Discourse*, 12 January 2022.

According to Sandholtz *et al.*, a state-action is considered to be merely resistance if it *(i)* means criticism of one or more judgments of the international court; *(ii)* shows non-compliance with one or more judgments; *(iii)* does not cooperate on specific cases; or *(iv)* criticizes the court or its judgments in general. Conversely, a backlash occurs when a state *(i)* ceases to cooperate with the international court altogether; *(ii)* narrows the jurisdiction of the international court; *(iii)* tightens the access to the international court; *(iv)* leaves the jurisdiction of the international court, withdraws from the treaty; or *(v)* abolishes the international court.[67] In this framework, the Polish TK is on the brink of backlash: while its actions can be considered to be only non-compliance or a lack of co-operation in specific cases or general criticism, it can also be argued that the TK is attempting to narrow the jurisdiction of the CJEU. As detailed above, Soley and Steininger apply a fourfold distinction (objection, contestation, resistance, backlash).[68] Against this framework, the TK's actions may be considered to amount to resistance, as they arguably go beyond a mere questioning of how the CJEU's judges applied particular legal norms (contestation), and they are more generally directed against the institution itself (resistance) – but still don't qualify as backlash, which requires systematic and consistent criticism and non-compliance.

8. Conclusions

While a national constitutional court explicitly resisting a judgment of the CJEU is (or at least was for a long time) considered to have a nuclear effect on the EU legal system,[69] this paper argues that these decisions of some European constitutional/apex courts would not qualify as backlash when weighed against available definitions. Even the classification of more impetuous judgments, such as those handed down by the Polish TC, is uncertain. On the one hand, this highlights the uniqueness and resilience of the EU's legal system – a system that is capable of coming with head-on judicial collisions, often through political resolution. On the other hand, it also highlights the difficulty of applying definitions from international law and political science to judicialized EU politics.

67 Sandholtz *et al.* 2018, p. 160.
68 Soley & Steininger 2018, pp. 240–241.
69 Weiler & Haltern 1996, p. 445.

This paper aimed to provide a comprehensive review of the available definitions in legal scholarship of the emerging concept of backlash. It has shown that although the literature is becoming broader and more precise in its definitions, some open questions remain. This is particularly true in the context of the European Union, since the literature on the concept of backlash emerged mostly in the field of classical international law and may not be applicable without modifications to a specific, *sui generis* supranational legal system such as that of the EU, where the CJEU has a number of features that distinguish it markedly from other international courts.

When *ultra vires* decisions of national constitutional/apex courts are weighed against the currently available definitions of what actions constitute a 'backlash', these definitional deficiencies are highlighted. One question that needs to be addressed is, first of all, how, and with what modifications, these definitions can be applied when a states' resistance to an international legal regime comes from the judicial branch. The question of constitutional pluralism must also be addressed: if the legal system of the EU is not a hierarchical but rather a heterarchical setup of national and supranational legal norms, and the occasional confrontation between national and supranational law is part of the normal functioning of the system, can we even apply concepts such as resistance and backlash in this framework?