Judges under Stress – the Breaking Point of Judicial Institutions

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Book of abstracts

Stream: Path dependence - how legal traditions and culture live on, transform and disappear

Ján Štiavnický (Constitutional Court of the Slovak Republic*) - Academia and history are to be blamed*

The Slovak story is different. Slovak state of judicial system is different than in the other central European transitive countries: In Slovakia, society is reacting to judiciary, not the judiciary is reacting to society/government.

The story of Special court and antidiscrimination law may be illustrative here.

In early 2000s Slovakia underwent very courageous economic and societal reforms which aim was to liberalize society and to enter EU. Not only liberal reforms were carried out. Law and order reforms were held in reaction to organized criminality from 90-s era. 2003 saw establishment of Special criminal Court which purpose was to deal with the organized criminality, corruption and crimes of high ranking officials.

To strengthen independence of Special court judges and their safety special high security zone for them and their families was build. Judges also had to undergo security screening. Their salary was fairly higher than salary of the other judges.

Many judges felt offended because according to their opinion two categories of judges emerged: One preferred, by political authorities and the second, non-privileged.

At the same time, 2004 saw adoption of Antidiscrimination Law, transposition of directive 2000/43/EC. During communist era, the society was very egalitarian and monolithic. So in 2000-s a few persons understand the practical purpose of antidiscrimination law. There was no massive intra societal conflict like the one, which led in the US to adoption of ´64 Civil Rights Act.

Only a few expert persons understood difference between vertical equality principle embedded in the Constitution acting on state actors on the one side, and horizontally, between private actors, working Antidiscrimination Law on the other side.

How Special Court and Antidiscrimination Law are linked? Hundreds of judges sued the Ministry of Justice on the basis on Antidiscrimination Law for paying difference between their salaries and salaries of Special Court judges.

So Antidiscrimination Law aimed to protect vulnerable persons (particularly discrete and insular minorities) was for the first time used as a tool to reveal identity issues of judges – power holders. Power holders felt discriminated and they used both legally and socially inappropriate mean to show it. Who started the "confrontation"? State/society by establishing the Special Court or judges with their "class action"?

But the point is, that strictly speaking, not the judges but academia and history are to be blamed. Slovakia was a member of Czechoslovak federation. Slovakia had a good modernization period between wars and partially also during communist era. Particularly on 80-s Slovakia strengthens its cultural identity. Urbanization and industrialization were important proto-democratic factors.

80-s modernization trends could not have influence on legal education and legal system, because legal system was tool of communist power. There was no personal and intellectual connection to rule-of-law system of pre-war Czechoslovakia.

The main feature of communist legal system was not the fact that ideologically it was anti-western. The main feature was its substantially less complicated structure. Simple society needs just simple laws. Simple

laws were simply educated. Accent was given to static learning of written laws, not to an interpretation and case-law. After ´89 revolution, academia got all the scientific freedom. But the academia was so afraid of an amount of a new knowledge that teachers teach in a same way as in 80-s era. No case law, no value orientation, no problem solving. Just naive picture of a law as a bunch of static sentences in Collection of Laws. And this substandard education was in 90-s and 2000-s accompanied by strong western narrative about judicial independence.

(This is contrasting with post Nazi judiciary era (Hans Peter 2008). Technically, post war German judiciary remained functional, judges perfectly knew their BGB and judiciary just had to be kept under value supervision of the Constitutional Court. Post-communist judiciary is not functional, because "BGB" experience is missing, and even good "BGB" codification itself is missing.)

The result is that lawyers in Slovakia did not share common language. To get minimum common thinking about legal system, it must be educated in a more sophisticated way. If law school alumnus enters judiciary this academia vacuum is fulfilled by informal traditions and improvisation. New judge does not bring new ideas to old colleagues, but old judges and judicial administration adjust the newcomer.

Judges are under pressure (stress) to quickly decide complicated cases, but they haven´t got any preparation for it. Constant improvisation is very exhausting and judiciary is then oversensitive to expectations of society. The result is low self-esteem of judges and their tendency to be in a tense relation with the government and civil society.

So situation in Slovakia is very influenced by path dependence and lack of ideology. Main problem is not political, but technical. I see solution in a constant subtle measures, for example preparing good practice manuals for judges. Reforming academia is a task for many years.

Denis Preshova (Assistant Professor, Ss. Cyril and Methodius University, Skopje, N. Macedonia) *From The Disconnect To The Detachment Problem Of The Eu Induced Judicial Reforms In The Western Balkans: The Case Of The European Model Of Judicial Self-Governance*

Reviewing and commenting on the role of the U.S. federal judiciary in shielding constitutional democracy Sujit Choudhry points out that partisan capture of the judiciary is probably a lesser concern compared to the indifference and self-interest of and within the judiciary. This represents another confirmation in the long line of arguments that the issue of judicial independence is not only a matter of structures and institutions but also of judicial culture, something that is frequently omitted in the approaches taken by the EU or international organizations. The Western Balkan countries provide an unambiguous case in which this has been clearly confirmed and where the issue of the (in)compatibility of the existing judicial culture, imbued with the remnants of the 'socialist' legal tradition, with judicial self-governance through strong judicial councils is raised.

One of the main lines of criticism of EU's approach towards the rule of law has been related to the so-called disconnect problem between membership obligations and accession conditions. While this problem is being addressed by the EU's nascent internal rule of law policy another 'disconnect' is surfacing and gaining importance. This new 'disconnect' problem, or more accurately a detach problem, is perceived through the existing gap between the formal rules and informal practices, especially in the EU's external rule of law policy. The assessment of the formal rules is frequently detached from their actual implementation which is heavily influenced by the informal practices. Taking the example of judicial (self)governance the detach

problem could be encapsulated in the notion of separate but not independent judiciary. This notion demonstrates the result of introducing a model of judicial self-governance amidst a judicial culture which is not characterized by a culture of independence as one its central pillars.

North Macedonia represents a paradigmatic case for the Western Balkans in this respect. It was the first country to initiate a large EU induced legislative reform already in 2005 by adopting a large package of constitutional amendments related to the judiciary. Despite the high level of alignment of the domestic legal framework with the European standards the implementation of these rules has neither brought an entrenchment of judicial independence nor created judges resilient to internal and external threats to their position and status. The dominant traits of the judicial culture seem to be rather intact and perpetuated firstly by the outdated formal legal education and judicial training as well as through the judicial socialization.

This paper detects the main traits of the dominant judicial culture and how they are relate to the existing model of judicial governance. In a nutshell, judicial autonomy did not translate into judicial independence in North Macedonia since the introduction of new formal rules has not been accompanied by pertinent changes and transformation of the judicial culture. Thus, the introduction of judicial self-governance has led to a situation under which the judiciary is being separated but not independent from the other branches of power resulting in a lack of genuine judicial ownership over the process of judicial governance. Choudhry's caveat on the threat to the judiciary posed by indifference and self-interest in the context of North Macedonia is translated into a judicial culture characterized by fear, apathy and clientelism. Such a conclusion is based above all on two examples: the election of judicial and lay members of the Judicial Council and the interesting case of a judicial clerk presiding over this body.

Fruzsina Gardos-Orosz (Institute for Legal Studies, Center for Social Sciences, ELTE Law School, Budapest, Hungary*) - How to become a judicial influencer? Hungarian step by step*

On 1 April 2020, the amendment to Act CLXI of 2011 on the Organization and Administration of Courts (Act CLXI of 2011) entered into force in Hungary, introducing the so-called limited precedent system. Judicial practice has always been attentive to the decisions of the higher courts, and the judges of the supreme court called Kúria have drafted non-compulsory collegial opinions with a view to unify judicial practice, moreover, the Kúria could bring decisions for the unification of the law (interpretation) obligatory for ordinary courts. However, while in the past, judges typically used previous decisions and collegial opinions to strengthen and support their arguments, from 2020, there is a more centralized level of legal unity, as the court must explain in its judgment if it intends to depart from a published court decision on a point of law or if it rejects a party's application to do so and a complaint procedure has opened for the unity of the law. The Curia decides on the publication of the most important decisions. Furthermore, apparently, based upon the opinion of the Venice Commission, the Parliament amended the relevant provisions of the Act CLXI of 2011 with effect from 1 January 2022. The amendment integrated the general and abstract unification of law (interpretation) procedure to the new individual complaint procedure for the unity of the law, as the latter was considered by the Venice Commission to be in line with the requirements of the rule of law. The President of the Kúria presides over the Appeal Boards. The Vice-President responsible for the adjudicative function is a member of both Boards.
On the last workshop of the project I talked about the influence of new constitutional concepts on judicial work. This time I would explain concerns related to the so-called constitutional (mis)borrowing (of the quasi-precedent system) and the selected (mis)reference to the international rule of law requirements in order to centralize not only the constitutional but also the judicial interpretation, in order to proceed one step further towards the political capturing of the state and law.

Bartosz Pilitowski (Nicolaus Copernicus University, Court Watch Poland Foundation) - *Did Politicians Ruin Poland's Judicial Appointments? A Comparative Empirical Analysis of the 2013–2020 Judicial Position Competitions Conducted by the National Council for Judiciar*y

The National Council for the Judiciary plays a crucial role in the process of selecting and promoting judges in Poland. In 2018 the term of judicial (15 of 25) members of the Council elected by assemblies of judges was terminated. New judicial members were chosen by the parliament. As a result, numerous judicial bodies (both national and international) proclaimed the new Council not to be independent from the executive and legislative branches and thus in danger of appointing judges who lack the independence and impartiality required of them.
The article analyzes data from 1632 judicial position competitions that Poland's National Council for Judiciary held between 2013 and 2020. It attempts to provide an answer to the question of what the observed variations in the Council's practices and competitions' outcomes were before and after the change in 2018. Finally, it discusses potential explanations for observable variations and continuities between the Council's actions before and after the shift.

Arnisa Tepelija (Doctoral Student in Comparative Constitutional Law at the Central European University, Hungary/Austria) - *Abusive recourse to a phantom Supreme Court: bad faith and the unbearable lightness of the backlog*

The extraordinary procedure of re-evaluation of judges and prosecutors, which started in Albania in 2016, has created vacancies that have stagnated the activity of the Supreme and Constitutional Court of Albania for roughly two years, from 2019 to 2021. This fact has only worsened the existing problem of the rising pending cases waiting for review, especially in front of the Supreme Court, now counting to 39.000 cases. This article aims to shed light on what happens when a highly overburdened Supreme Court meets the politics of recourse of the State, betting on outcomes, which due to the vulnerabilities of the system, amount to results in favor of the last one. The article will demonstrate how certain vulnerabilities of the system have been used in individual cases, when the interest of the State was to hinder access to the court for individuals and deprive them of effective judicial protection. By stressing the double role of the State as a bearer of the responsibility to resolve the backlog emergency, and its role of acting as a party in particular proceedings in front of the Court, the article conceptualizes on the resistance and resilience of the judicial system towards the judicial politics of interest groups after a disruption point, continuances and innovations to existing practices, while concluding with some remarks that will add to the lessons learned from other countries facing the same problems, such as Italy and Slovakia.

Valerija Dabetić (Teaching assistant, University of Belgrade, Serbia) - *The (Un)responsive Judiciary in Transition Countries – the Case of Serbia*

Like other countries of Central and Eastern Europe, Serbia has gone through a political and economic transition from the communist–socialist regime to liberal democracy. Transition societies often face democratic backsliding, as domestic political actors (so-called *gatekeepers elite*) tend to undermine democratic institutions in various ways. In this context, the paper explores how judges see themselves and

how they perceive their role in shaping the legal system. The interest for this question lies in the specifics of transition societies, where there is a strong collision between the heritage of the past times, legal education and, most importantly, the way judges think, on the one hand, and the European values, on the other hand. Prior empirical research has shown that judges in Serbia see themselves as a branch of government that has no real power and authority, but rather limit their role to the preservation of the Rule of law.

The paper is based on the empirical findings gathered through the large-scale study – 620 questionnaires and interviews with 52 judges. It appears that judges do not see themselves as bearers of the structural shifts in the society, but that their role is strictly formal – related only to the adjudication process. This suggest that judges in Serbia tend to have unresponsive attitude towards societal changes. In other words, not only they are reluctant to engage in some activities driving such changes, but they consider them inappropriate for the representatives of the judiciary. Therefore, the central question of the paper is to how to enable judges to become more responsive within their professional identity and improve the judicial culture in a broader sense with a particular focus on transition countries, such as Serbia.

Jan Zobec (Supreme Court Judge, former Constitutional Court Judge of Slovenia)- *The Basics of (Post)Socialist/Communist Judiciary – the Case of Slovenia*

The state of mind in the Slovene judiciary ten years after joining the EU and more than twenty years after the fall of communism and Slovenia's independence is still in transition. Slovenian judiciary could serve as a textbook example of an institutional independent judiciary comprised of dependent individual judges within their branch headed by handful of independent and unaccountable judicial oligarchs. I will demonstrate the Slovenian judicial story through seven anecdotes, forming an arch, all the way from the old communist regime up to the current state of Slovenian judiciary. Some of the most outstanding features of the Slovenian judiciary will be outlined, all together indicating serious deficiencies which may contribute to the overwhelming rule of law crisis. Even though displayed as a list of detached facts or 'selected issues' all those unpleasant truths about Slovenian judiciary are not only intertwined and interconnected, but they also hold a common reason. I presuppose that it lies in the legacy of the past and in the lack of the relevant professional (and policy) will of the judicial elites and oligarchies, which master judiciary, to let necessary changes be brought not only into judicial system as such but foremost into the mind-set of the judiciary.
First, I will briefly present a snapshot of the state and condition of the Slovenian judiciary at the times of collapsing the Yugoslav communist regime. Then I will continue with the anecdotes describing the characteristic traits of the judicial mentality and exposing some of the most critical moments of the life of Slovenian judiciary. After that the evaluation of the message of the said anecdotes will follow, pointing at the vicious circle of the continuation of these anecdotes. The presentation will then expose the lessons to be learnt from the Slovenian experience and will continue with the attempt to identify the main reasons of the flaws. Instead of final conclusions, the presentation will rather come up with some rudimentary and tentative proposals of how to contend with the described discouraging situation.

Julius Yam (Assistant Professor, Faculty of Law, University of Hong Kong**)** - *Judging Under Authoritarianism*

The number of nondemocratic regimes is on the rise, and these worrying signs of autocratization have significant impact on how judges should discharge their duties. How can judges confronting authoritarianism maintain institutional resilience while seeking to maximize their constitutional role face?

The article proposes a two-step framework to address this problem. The framework systematically incorporates judicial strategy into principled adjudication. It helps judges determine when it is permissible to consider extra-legalconsiderations and how these considerations should play out in the adjudicative process. The article also documents a wide range of judicial strategies and describes how they can be included in the framework to accommodate authoritarian pressures. The article hopes to offer scientific rigor to the strategic assessments judges in authoritarian regimes have to make and inspire ways to promote constitutional legal norms sustainably.

Ján Mazúr (assistant professor at Comenius University in Bratislava, Slovakia) - *Leaked from Threema: the Case of Judicial Corruption in Slovakia*

Judicial corruption represents a critical issue for proper functioning of the rule of law and thereby democracy. Even occasional cases of judicial corruption erode trust in justice and fairness, disrupts distribution of property and access to rights and ownership. In the paper, I explore the topic of judicial corruption and the role lawyers may play in corrupt practices in Slovakia. Judicial corruption is understood in a wide sense as a misuse of judicial power for private gains. The paper draws from yet-unpublished thesis, which included an empirical research, based on in-depth interviews with judges and lawyers.

In the thesis, I found that judicial corruption had two layers: internal, which allows certain judges to unduly influence their peers, and external, which represents an interaction of lawyers and the court officials and which is typically the driver of the internal corruption.

The main point of reflection is the leak of private communications of a prominent Slovak criminal with multiple judges and lawyers (so-called "Threema" scandal), which caused an upheaval among the politicians and judiciary in Slovakia. Before the Threema scandal, corrupt practices within Slovak judiciary were known to have existed, yet were never quite revealed publicly, nor investigated properly. However, the leak brought in serious evidence of wide-spread corruption and undue influence of private individuals and politicians, and consequently led to multiple criminal investigations and even successful prosecution of numerous individuals, including judges.

The contribution aims to compare the findings of the thesis (i. e. "how the judges and lawyers believe the judicial corruption works") and compare them with the revelations of the Threema scandal (i. e. "how the judicial corruption actually works" as based on investigative journalism and published criminal investigations). I also discuss the ties of contemporary judicial corruption to practices of the Communist judiciary

Jim Moliterno (Vincent Bradford Professor of Law, Washington & Lee University, Virginia, U.S,) **Sopho Verdzeuli** (Lawyer, editor of KOMENTARI, Group of Independent Lawyers, Georgia) **and Irakli Kordzakhia** (lawyer, partner of GRATA International Georgia Group of Independent Lawyers, Georgia) - *Control, Resistance, and Collaboration: Periods of Georgian Judicial Administration*

The experience of the Georgian judiciary during the three dominant governments since 1995 present a quite interesting story of government dominance, a period of judicial emergence to a co-equal status, and then reversion to judicial subservience. All of this has happened while some of the same leaders of the judiciary maintained their dominance in the judicial sphere. It tells an interesting story of elected but illiberal state actors' use the judiciary to serve their ends, and leading judges' maintenance of power within the judicial realm even as the judiciary was variously dominated by government or partnered with government to produce corrupt results.

The Georgian story tells little about individual judges' resistance and much about both failed resistance and capitulation and collaboration with government, always aimed at the same end: dominance of the judiciary for corrupt purposes by a relatively few leading judges, the clan.
Roughly speaking, the three periods are as follows:
1. ***Shevardnadze period 1995-2003*** : Corruption was systematic, majority of Judges were only partially independent on individual and institutional level.

2. ***Saakashvili period 2004-2012*** : There was *almost* no corruption moneywise, however Judges were mere "secretaries" of the Prosecutor's office. In addition, the ruling party had possibility to order them how to rule cases in civil and in admirative matters. Independent Judges were squeezed out of system. Almost no individual or institutional independence in Judiciary. The chairs of the court, and not parties of proceedings had "right of first night" over court rulings.

3. ***Dreamers/Oligarch period 2012-?*** : The small group of Judges ("clan") used to be in charge of forwarding will of Saakashvili party to individual Judges, unsurprisingly maintains influence over majority of Judges. Judges with dissenting opinions (most of them are members of Judge's union Ertoba) are squeezed out by the clan by not reappointing. The clan is successful to becoming in corrupt partnership with the ruling party. The ruling party gets possibility to obtain desired result in *any* court case. In turn the clan gets all support from the party in any legislative initiative and in tenure appointing of loyal to clan judges in all courts including the Supreme Court. The corruption is not systemic but is common in large disputes (the "big money chambers" are created for this purpose). After 4 waves of reforms, the Judiciary is regarded as independent on institutional level (bound only by above informal contract), but of individual independence of a Judge is suppressed by the clan and sometimes by the ruling party (if requested by the clan). So clan becomes independent player, bound only by rules of illegal agreement with politicians, supported by oligarch.

Dragoș Călin (judge at the Bucharest Court of Appeal, co-president of the Romanian Judges) **Alinel Bodnar(**judge at the Bucharest Sector 3 Local Court, general secretary of the Romanian Judges; Forum Association) - *Fighting for European Values. The Story of Romanian Judges and Prosecutors*

In Romania there is no serious tradition regarding the real dialogue between the powers. The judiciary has hardly been recognized as a real state power, with the executive and legislature trying, over the years, to undermine the independence of the judiciary. In less than two years (2017-2019), several amendments were made to the key laws governing the justice system, which have been argued by both domestic and international forums to be harmful to the progress on judicial independence, and rule of law. These laws were adopted in 2004, as part of the accession requirements undertaken by Romania to improve the independence and efficiency of the judicial system, a process which has been monitored by the European Commission since 2007, Decision 2006/928 on the occasion of Romania's accession to the European Union. The harmful amendments were hidden among other welcome amendments modernising certain human resources aspects, which made it difficult for non-experts to understand the cumulative negative effects of the reform. This is the historical context in which the judges and prosecutors staged unprecedented protests, largely supported by university professors and students, as well as civil society and actors of the National Theatre, in a form of spontaneous solidarity. In December 2017, more than one thousand Romanian judges, prosecutors, and trainee magistrates silently protested in front of their institutions, holding their robes or the Constitution, but most of them showing printed versions of the common oath they took when sworn into office at the beginning of their career. On 4 April 2019, for the first time in history, magistrates from a member state of the European Union other than Belgium protested in Brussels for the rule of law. 30 Romanian judges and prosecutors were applauded at the open

stage and encouraged by dozens of Belgian and German judges, as well as Belgian lawyers. In the absence of a rapid legislative solution, given both the adamant resistance of the political power to all criticism from relevant international bodies and the decisions of the Romanian Constitutional Court, which refused to take into account the opinions of the Venice Commission, under the argument of the control it performs exclusively by reference to national constitutional rules, the remedy for these deviations from the rule of law was to refer to the Court of Justice of the European Union with successive applications for preliminary ruling. The judgment of the Grand Chamber of the Court of Justice of the European Union, delivered in the joined cases C-83/19, C-127/19, C-195/19, C-291/19, C-355/19 and C-397/19, Asociația Forumul Judecătorilor din România și alții, on 18 May 2021, has caused a real earthquake in Romania. It was so intense that, in order to maintain the previous state of affairs, the Constitutional Court of Romania immediately intervened, by Decision no. 390/2021, contrary to the CJEU judgment, ordering that national ordinary judges may not
analyse the conformity of a national provision, which has already been found to be constitutional by a decision of the Constitutional Court, in relation to the provisions of European Union law. To a significant extent, the Romanian judicial system has stubbornly resisted the attacks below the belt, both from the outside and from the inside (the latter being the most complicated ones), and the judgments of the Court of Justice of the European Union brings rays of sunshine, as the system can still be rebuilt

Stream: Judicial Resistance – how judges can resist and postpone the breaking point of the rule of law

Judicial Resistance I

Łukasz Bojarski (Phd research scholar, University of Oslo, Norway) - *Judicial resistance against the rule of law backsliding – definition and typology (case study of Poland)*

Under the guise of 'judicial reform', Poland has witnessed a planned political attack on the independence of the judiciary and judges since late 2015. Scholars analyze different faces of this attack in detail and on an ongoing basis. However, what is exceptional and less studied, is that we also witness an unprecedented reaction and response to this political attack from the substantial part of Polish judges. This reaction of the Polish judiciary requires comprehensive examination. We can find concepts and ideas that are somehow relevant to the subject of judicial resistance in general, and to the Polish situation in particular, in many sources of a different kind, in the number of disciplines, including public and constitutional law, international and European law, socio-legal studies, sociology of law, theory and philosophy of law, political sciences. However, 'judicial resistance' on a scale that we witness in Poland was not so far, to the best of my knowledge, a separate subject of the investigations. Partly because there are not many examples of 'judicial resistance' in the world practice, and if they are, the scale of judicial resistance of Polish judges seems to be exceptional. The objective of the paper is to present the results of the research on the methods of judicial resistance of Polish judges in the years 2015-VII 2022. Firstly, referring to other terms proposed by the academia, I offer a definition of judicial resistance and a categorization of its forms according to advocated criteria – as concepts well illustrating the situation witnessed in Poland and having analytical and academic potential. Secondly, I present the wealth of methods of judicial resistance dividing them into group and individual resistance, as well as in-court and out-of-court resistance, and provide examples of

specific resistance activities. I also offer partial, preliminary, analysis of various forms of judicial resistance, and the formulation of questions that require further reflection.

Jan Petrov (Junior Research Fellow in Law, The Queen's College, University of Oxford)- *Countering Democratic Decay The Judicial Way: Is Resistance Futile?*

With democratic decay advancing around the globe, scholars deeply disagree about courts' ability to protect democracy. I argue that this extreme divergence is in part caused by conceptual deficiencies of the debate. The existing theories of courts' role in responding to democratic decay do not pay sufficient attention to the differences among courts and the environments in which they operate. As a conceptual innovation aiming to provide a common ground bridging the diverging theories, this article introduces the concept of judicial countering capacity. The concept recognizes courts' agency but emphasizes the constraints and resources stemming from the environment in which a court operates. I argue that the extent of a court's countering capacity rests on three pillars: institutional design, level of political pluralism, and political culture towards courts. The concept of judicial countering capacity invites empirically oriented agenda focusing on micro-mechanisms of judicial countering, their effectiveness, structural pre-conditions and plausibility of available judicial strategies.

Ramona Coman (President of the *Institut d'études européennes*, Professor in Political Science, Université libre de Bruxelles) and **Leonardo Puleo** (post-doctoral researcher, Université libre de Bruxelles) - *Judges' professional associations in Hungary, Poland and Romania. Repertoires d'action & discursive strategies against rule of law dismantlement*

Over the past decades, judicial institutions in Central and Eastern Europe have made the headlines in different parts of the world following governmental measures limiting their independence. This topic has been examined in different ways both in political science, law and in EU studies (Von Bogdandy 2014; Muller 2015; Pech and Scheppele 2017; Blokker 2019; Czarnota 2018; Bodnar 2021; Kelemen 2017; 2020; Closa 2018) as an illustration of autocratic legalism (Schepele 2018) or democratic backsliding (Bugaric and Ginsburg 2016), as an expression of the populist uprising (Bugaric and Kuhelj 2018; Sadurski 2019) or a counter-revolution (Zielonka 2018; 2019; Holmes and Krastev 2019). While this important body of research mainly focuses on governmental motivations and the role of party politics – looking mainly at the roles of the Law and Justice (PiS) party and Fidesz – little attention has been paid to forms of resistance(s) within the judiciary, when judicial independence is either under strain or undermined. Against this backdrop, we aim to contribute to this debate by addressing the following questions: how do judges resist reforms when not only their independence is undermined but also the democratic values of the political regimes are under strain? How do they defend judicial independence? To address this facet still underexplored in the literature, the paper examines judicial resistances in three national contexts (Poland, Hungary and Romania), arguing that while the adoption of measures limiting the independence of the judiciary in Poland by the PiS government has "unified" judges in defending their cause and led to the emergence of a diffuse pan-European network, in the case of Romania the debate has polarized the field, while the degree of mobilisation has been lower in Hungary. Drawing theoretically on the concept of resistance (Madsen, Cebulak and Wiebusch 2018; Blokker 2020; Coman and Lacroiw 2007; Crespy and Verschueren 2009; Della Porta 2001; Graver 2015), this paper seeks to shed light on the motivations inspiring judges' forms of resistance and to establish a typology of strategies and forms of resistances. The paper builds on an original survey on judicial independence distributed among Polish, Romanian, and Hungarian judges and semi-structured interviews in order to provide a comprehensive overview of the strategies used by professional associations in reaction to recent transformations.

Petra Gyöngyi (Associate Senior Lecturer, University in Lund, Sweden) - *Resistance by Association? Judicial Associations in Europe and pathways of protecting judicial independence*

TBA

Matyás Bencze (former judge, Professor of Law at the University of Győr Law School and a senior research fellow at Centre of Social Sciences Institute for Legal Studies, Hungary) **-** *The Role and the Origin of Judicial Populism in Authoritarian States*

In a paper I published within the framework of the project "Judges Under Stress" (*Judicial Populism and the Weberian Judge—The Strength of Judicial Resistance Against Governmental Influence in Hungary*) I have already made a reflection on the phenomenon of judicial populism (adjudication carried out in a populist manner) and described it as a form of deference to authoritarian regimes. In the present paper I provide a deeper analysis of judicial populism and its relation to authoritarian politics. First, I need to clarify the very concept of judicial populism because of its various understandings that occur in the literature. Then I analyse the role of judicial populism in democratic and authoritarian political regimes. I focus in a more detailed way on the authoritarian regimes which are facing with a specific challenge: on the one hand, for those regimes it is necessary to have deferential courts while, on the other, they have to preserve the appearance of independence regarding the administration of justice. This challenge can be answered by propagating the approach of populist adjudication amongst judges. Finally, by using the approach of Critical Legal Studies I explore the origin of judicial populism. My conclusion is that the emergence of judicial populism in Hungary has been generated partly by the "decline of expert authority", experienced world-wide, and it can also be conceived as a counter reaction to the judicial elitism which has been the dominant sentiment in the circles of the Hungarian judiciary in the first twenty years after the 1989/90 regime change.

Max Steuer (Assistant Professor at the Jindal Global Law School, India) **-** *Understanding the Reservoirs of Constitutional Court Resilience: The Role of Judicial Conceptions of Democracy*

Combinations of attitudinal and strategic models are the source of prevailing contemporary approaches to study the capacities (or lack thereof) of centralized constitutional courts (CCs) to defend democratic political regimes, primarily via preventing the deterioration of rule of law and fundamental rights standards. Yet, these approaches tend to neglect a close scrutiny of political concepts and ideas as they appear in CC case law and other CC communications towards the political community, as well as that community's reflection of the CC's decision making. This paper introduces an alternative approach to study CC resilience vis-à-vis autocratization, that is embedded in an institutional perspective and based on scrutinizing references to democracy in the CC output and its public reflections. This approach is sensitive to the multidimensionality of the concept of democracy, which it conceptualizes in a maximalist manner to accommodate a wide range of conceptions. The conceptualization encompasses both input-based features, such as elections and political participation, and output-based features, such as social justice and integration, found in the literature on the understandings of democracy. Furthermore, the approach is dynamic in accommodating the differentiated possibilities and constraints of conceptualizing democracy in the CCs' decision making depending on the type of political regime they are located in, using an ideal-typical distinction between semi-authoritarian, illiberal and democratic regimes. The paper argues that the approach is particularly useful when combined with comparative case studies, going beyond the 'usual suspects' of CCs operating in illiberal or semi-authoritarian regimes (as, for example, Hungary and Poland from among EU member states). Also, it is diachronic in allowing to trace changes over time, and avoiding the focus only on those periods in which some CCs have operated already under non-democratic regime conditions. To illustrate the applicability of the approach, the paper argues in support of comparing Slovakia

and Hungary, both with formally powerful CCs that seem to have taken a different trajectory, with the former, unlike the latter, retaining independent status. Both, however, have experienced illiberal or semi-authoritarian regimes: Slovakia between 1994-1998 and Hungary after 2010. The Slovak CC is conventionally considered as significant for the fall of the 'Mečiar' semi-authoritarianism regime after the 1998 general elections, while the Hungarian CC is rarely seen as playing an important role in preventing the rise of Viktor Orbán. The paper suggests that analysing the judicial conceptions of democracy by these two CCs' can advance our understanding of their role (if any) in preventing, or failing to prevent, autocratization in Slovakia and Hungary. It concludes with discussing a few caveats of the approach and avenues for addressing them.

Zoltán Fleck (Full Professor, Eötvös Loránd University, Hungary*)* - *Subordination, conformity and alignment - the birth of judicial autonomy in Hungary*

The judgment of the Court of Justice of the European Union in case C-132/20 raised the question of whether a judge who was not brought up in a democracy can be independent. The practical legal answer seems simple, since historical experience shows that the collapse of dictatorships does not involve a significant selection of judges. Sociologically, the question is not trivial. The current decline of democracies is clearly rooted in the mentality inherited from autocracies. But how is it possible, after more than three decades, that old routines are being revived? What is the difference between *generations (Mannheim)* and what role does *professional ethics (Durkheim)* play? The typical *figuration (Elias)* of modern societies is rule of law. Rule of law can not function without independent judiciary. Thus the judicial *habitus (Bourdieu)* stands at the core of the issue of consolidating democracy. It may be that we need to rethink the problem of change and continuities using these classic sociological concepts.
My study begins with finding and analyzing a historical file (documents) reporting from the past. This historical experience (*Ankersmit*) opens possibilities for redrawing the everyday context of being a judge in the middle of the 20th century in Hungary. From this point of departure judicial role, professional socialization and institutional development could gain different meanings.

Moa Bladini (Senior Lecturer, University of Gothenburg, Sweden) **Wanna Svedberg Andersson** (Senior lecturer in criminal law at the department of law, Gothenburg University) - *Autonomy of the judge in theory and practice - Strengthening the independent judiciary*

The starting point of this project is the predominant assumption that the independence of courts requires independent, and hence autonomous, judges. The traditional idea is represented by Rawls "veil of ignorance", where the judge is cut out of context and relations. As this idea of autonomy is defined and discussed as an ideal, we argue that autonomy should be explored in practice with another perception, lived autonomy, rooted in everyday life needs to be explored. The project aims to explore how autonomy of judges is described in legal procedural discourse and embodied and performed in practice by judges, using the traditional idea of autonomy and lived autonomy as theoretical tools. The project runs for three years, and addresses 3 research questions:

1) How is autonomy described normatively in legal discourse?

2) How do judges discursively (in interviews) perceive and interpret autonomy?

3) How is autonomy performed in practice?

Procedural legal doctrine will be analysed, 50-70 judges will be studied by shadowing and interviews on their perceptions and embodiment of autonomy. The project is the first to study the autonomy of the judge in procedural literature and performed in practice combined. In this way, it contributes to knowledge on the

judges' own perception of how to adopt, perform and display and embody autonomy in a reflexive and systematic way, that equip and prepare judges with increased resilience towards threats that targets the independence of the courts.

Tomasz Widłak (Associate Professor at the Department of Theory and Philosophy of Law and State of the University of Gdańsk) **-** *The virtues of judicial resistance*

Improper influence and measures by the government that undermine the legal standing of the judiciary do not necessarily compromise judges. Many stay independent in administering justice amid intense external pressures and personal hardships. Independence and impartiality are not merely constitutional features of judges as wielders of the State authority but ultimately boil down to individual judges' responses to challenges in particular cases. In other words, they are a matter of judicial character. This analysis will rest on the assumption that judicial independence is most importantly a personal feature, constitutive of the role of the judge itself. The following proposal is made by borrowing from pluralistic theories in virtue ethics literature. Dismantling the rule of law involves processes, decisions, or events that systematically challenge the individual judges by making demands on them. Adequately responding to these items requires certain dispositions or skills on the part of a judge, which are her virtues. These virtues become definitional of the form and degree of individual and general judicial independence. Only an entirely virtuous judge, possessing the traits necessary to respond adequately, can effectively resist the government and the measures that limit the rule of law. Judicial resistance in such cases is not a matter of right or obligation but of possessing particular virtues and acting upon them. Using examples of the Polish judiciary, this argument seeks to define the virtues of judicial resistance.

Martin Sunnqvist (Associate Professor of Legal History, Lund University, Sweden) **-** *Must a judge, who may not be influenced by fear, be brave?*

It is not acceptable that a judge because of 'fear' hands down a wrongful judgment. This was mentioned already by Isidore of Seville in his Sententiae and is part of the oaths of judges in many jurisdictions, from the 1230s onwards until this day. The 'fear' that is relevant could relate to one of the parties but also other persons in power. Thus, it relates not only to impartiality but – above all – to independence. Fear is often paired with favour, meaning that a judge should not try to please those in power through his judgments. What I would like to discuss in a paper is whether the obligation of the judge not to be influenced by fear is only to be understood in the negative sense, or also in the positive – that is, does a judge have to be brave and, for example, oppose actions by persons in power that aim at undermining independence and impartiality? In other words, what are the ethical requirements when a judge perceives a risk that only avoiding being influenced by fear in individual cases will not be enough to protect independence and impartiality for the future?

Bernard McCloskey (Lord Justiuce of Appeal, Supreme Court of Judicature of Northern Ireland) – *Judicial Independence and Judicial Responsibility: A Construct Under Stress?*

There can be a tendency to overemphasise judicial independence, vital though it is to the rule of law, a cornerstone of the rule of law in every democratic state. But an excessive insistence on judicial independence as an indelible right runs the risk of diluting, even neglecting, other indispensable elements of judicial office in a state governed by the rule of law. There is a duty on every judge to appreciate all of

the immutable tenets of judicial office, each of them rooted in the obligation and privilege of serving fellow members of the community, and to give effect to them daily. They embrace both the judge's public persona as judicial office holder and the judge as private citizen. Judicial independence and judicial responsibility are inseparable values. Threats to judicial independence proliferate. Judiciaries were unprepared for the various assaults on their independence which have materialised in recent times. They were too comfortable, complacent. Judges have little control over the conduct and statements of the executive, the media and others. However, judges exercise absolute control over judicial conduct in all of its aspects, both within and beyond the boundaries of judicial office. Everything that a judge says and does, in both public and private life, is a matter of conscious choice, with very few exceptions.

A stronger emphasis on judicial responsibility is needed throughout Europe and beyond. Judges, in this way, will create for themselves a potentially powerful shield against the improper intrusions and threats from the executive which have become sadly familiar. Judges need to see themselves as society sees them. An awakening is required. The response must be both individual and corporate. Judges must earn the respect and trust of the communities which they are appointed to serve in order to assert the right to judicial independence. Self – promotion, self – defence, self - awareness and self – help must become essential tools in the armoury of the modern judiciary.

Klaudia Lozyk (former judge in Poland, visiting scholar at the University of Western Australia in Perth) - *The political influence of the executive power on the work of judges*

As long, as the profession of judge exists, it is associated with both, enormous professional satisfaction and stress. I would like to discuss the latter factor. I would also like to focus on the sources of stress in relation to the specific situation, that is taking place in my country. It should be said that social and political situation constantly change. This phenomenon has a colossal impact on the condition of the rule of law in the state. The fall of rule of law often manifests itself in open war against judges. Authoritarian governments seek to subordinate courts and judges. I am particularly interested in this topic, because my colleagues and I are an example of "judges under stress". We used to work in the comfort zone. Now we are fighting for justice . Politicians are questioning primacy of the European Law. Authoritarian government is vilifying the image of judges. Disciplinary proceedings were initiating against judges who apply the European Law. We learn how to survive this situation. Therefore I am convinced that this topic should be interesting to a reader, because it is unique and interdisciplinary.

In my project I will use data about communism in Poland. Then I will focus on the time of greater freedom in Poland since 1989. I would like to present the main Polish changes of those years, including recent years. Finally I am going to discuss the authoritarian change in Poland, and it's aspect on European Law and national judiciary. All these aspects had a massive impact on the work of judges, and on the stability and safety of judges.

Stream – Approaches of critical legal theory

Judicial Ideology I.

Przemysław Tacik (Assistant Professor, Jagiellonian University in Kraków, Poland)- *Subject, Object, Sovereign. The Role of Judicial Self-Identification in Determining the Law*

In my paper I am going to look into the abyssal laboratory of populist governance which has been created by the far-right majority in Poland since 2015 in order to enquire how agency of judges is being created by the split legal system.
As of 2022, Polish law is in a *de facto* state of exception: norms of the 1997 liberal Constitution, albeit still in force, are to a certain extent inoperative due to adoption of unconstitutional statutory laws whose validity cannot be verified by the Constitutional Court, now under the total control of the ruling party. As a result, the Polish legal system is effectively bifurcated. The line of this bifurcation cuts through the law, but is decided and operated by courts. In a nutshell, at least in some of their decisions they need to decide whether to apply the Constitution – nominally still in force – or unconstitutional laws, whose application may be forced by a repressive disciplinary system built up by the populist majority. According to the so-called 'muzzle law' adopted in 2019, judges can be punished for questioning the status of illegal nominees to judicial posts as well as for requesting preliminary questions from the CJEU. This makes the very application of the law the matter of decision with personal repercussions.
To this challenge Polish judges have reacted differently. It seems that a majority has been trying to find a compromise position in order not to run the risk of disciplinary proceedings. Some, however, has become champions of the rule of law and bore acute personal consequences.

In my presentation I will demonstrate how a bifurcated legal system produces a paradoxical twofold interpellation of judges. What they need to decide is whether they stick with the law *as it should be* – or with the law that *there is*. Their self-identification is necessary and, to make it even more aporetical, it decides on which law is going to be applied. As a consequence, the result of interpellation entails which norms are going to be operative. Using an Althusserian and Lacanian apparatus I will strive to theorise the process of production of self-identification.

Dennis Wassouf (Phd. candidate, Masaryk University, Czech Republic) - *Forgetting Unforgettable, Finding Unfindable: Towards Theory of Juridico–Archival Ideology*

Juridical mechanism functions through archives. Through citations, references and links to the past, judges authoritatively construct reality. To engage in such a construction project, it is essential for judges to recall what has been forgotten or set aside. Laws, statutes, precedents, and doctrinal commentaries need to be opened in the archives and revisited. What is to be found in the archives are traces of legal origins that legitimize all further decision-making. Archives speak the language of tradition, of solid foundations and consistency, and judges easily succumb to this language, which becomes modus operandi of judicial ideology. This kind of juridico–archival ideology obscures the emptiness of the archive, masking its non-meaning and contingency as objective necessity. This essay aims to deconstruct the relationship between ideology, archive, judicial decision-making and memory. This will point out that the ideologically concealed emptiness of the archive – as a support for judicial decision-making – is also the cause for the emptiness of decisionmaking as such. It will show that this emptiness is not something negative or paralysing, but is instead what shapes the role of the judiciary.

Peter Čuroš (postdoktor, University of Oslo, Norway) – *Judicial Ideology in the Periphery*

The main incentive for this paper is the crisis of rule of law and the professional failures of lawyers and judges in Slovakia. In August 2019, Slovak newspapers first published transcripts of conversations that suggested far-reaching manipulation of court cases. At the time, twenty-one judges were accused of corruption, and several advocates faced charges of bribery and obstruction of justice. Since the original

news articles were published, even more professional failures among lawyers have been revealed. Surprisingly, the reaction of the professional bodies of lawyers, judges, and prosecutors was much weaker than the reaction of the state power. Was there a perception among professional fellows that no wrong had been committed? How do legal professionals perceive themselves, and what do they, consciously and unconsciously, perceive as normative? What constitutes their perception of their role in society?

Like the moon has bright and dark sides, law also has two sides. The bright side is the realm of Symbolic, a product of signification that establishes the meaning. If using the metaphor of the moon, it is the moon as we see it from the Earth. The dark side is the residuum – something that happened to be unsymbolizable – the remnant of the Real. It is a fantasy that complements the lack of our vision of the moon from the Earth. In the same way, it is the subjects' fantasy that constitutes the answer to the question *Che vuoi?* when the answer is missing. More the fantasy accommodates the meaning, less ideology we are talking about. It is a task for the ideology to keep the subject in the Symbolic – trying to give the law fullness – that the subject does not need to ask – *Che vuoi*? too often. The space for fantasy is reduced to a minimum, and the fantasy is be limited by the Symbolic. That is the role of ideology - to fix meanings. I claim that the authoritarian shift is rooted in the crisis of language and, therefore, a crisis of ideology.

The goal of ideology is to create and mold a subjects to perceive the social reality in a particular way. Ideology is integrated within the system of logic, and because subjects believe these ideas to be self-evident, they act upon them and reproduce the status quo. It resides in the Symbolic register of experience, however it is best to observe in the Imaginary register, where the subject tries to fill the hole within the Symbolic. We face the problem that seeing ideology presents a difficulty because it constitutes the very reality we live in.

My argument is that reason for the lack of ideology within legal profession is the consequence of transplantation of legal institutions from the Centre to the Periphery. As most of the institutes brought into professional ethics in Slovakia are transplants from various foreign systems, it is important to understand whether these "transplants" are effective in normalizing the subjects' behavior. When we look at the set of formal rules in the Slovak judicial profession, many of the issues that appeared in the professional failures in the last years are clear breach of professional duties. Hence the efficacy of the transplanted normative framework can be questioned.

It seems that the Slovak system of professional ethics, despite being coherent on the paper, is a collection of non-autonomous elements. Although the institution transplanted appears to signify the same, there is a very problematic and loose relationship between a transplanted form and its underlying substance. Jiří Příbáň calls it a spirit of the laws: "*The concept of the spirit of the laws has precisely the power to symbolize the transcendental origins and unity of the systems of positive law and politics ... it is taken as a symbol of the moral unity and collective identity of society,"*. The transplantation of legal form should be the last stage of social transformation and never the first one. The failed legal transplants are often referred to as institutional mimicking or cargo cult phenomenon. We should not expect that the legal transplant will work identically in varying conditions. If we suppose the law to be an autonomous system, then every transplant is destined to fail.

Tomáš Havlíček (PhD Candidate, Masaryk University in Brno, Czech Republic*) - The Meaning of the Meaningless – Fig Leaves of the Ideology.*

Legal and judicial systems elevate judges to the position of power. The current culture of reasoning then forces them to substantiate their decisions and, to a certain extent, does not allow the bias and ideological

thinking of the judge to be fully manifested. Ideology therefore appears secretly in decision-making, it is hidden behind fig leaves of vague expressions. At the time of emptying the meanings of words, terms such as "decency" or "common sense" appear in the discourse. These seemingly abstract expressions serve to depersonate the judge's bias and create the appearance of objective reality, where the judge puts himself in the role of a hegemon who decides what is right, wise, rational.. Those who rebel against the newly set reality are then displaced as fools who want to oppose the natural (or reasonable, rational) order of the world. "Proportionality" - the topic of my doctoral thesis - can then be by some people considered the ultimate fig leaf of ideology. In this paper, I will examine the use of vague terms in judicial decisions and their real power. I will use the works of authors such as Ernesto Laclau, Antonio Gramsci, Chantal Mouffe and Slavoj Žižek in the article. For the comparative contribution to this conference, I will base this paper primarily on the experience with vague expressions in the decision-making of the Czech Constitutional Court.

Teodora Miljojkovic (SJD candidate, Central European University, Hungary**) -** Rule of Law and Limits to Interference with Judicial Independence

The rise of illiberal regimes within the European Union in the last decade has shed light on the fragile nature of constitutional guarantees aiming to protect judicial independence. In the government's enterprise of capturing the state institutions, the judiciary has appeared to be one of the first targets. Despite the laudable attempts of the European Union, its institutions but also the scholarship to assess but also condemn the serious attacks on judiciary identified in Poland and Hungary as a violation of the rule of law, the remedy for the damage done to the judicial independence still seems to be missing. The claim of this abstract is that the cause of such state of play lies in the fact that an important piece of the rule of law puzzle seems to be missing. Namely, the techniques of interference with judicial independence violating the rule of law have not been invented by illiberal leaders, as their development follows the development of the concept of judicial independence itself. In order to understand the far-reaching implications of recent attacks on judiciary in the EU, it is necessary to expand the analysis beyond the illiberal democracies framework. This abstract calls for an effort to revisit and challenge the general theory on judicial independence through the rule of law framework, by offering a theoretical typology of techniques of interference with judicial appointments and dismissals, which could show what exactly is at stake when judicial independence is tempered with by other constitutional actors.

The specific phenomena which this research explores in a comparative outlook are court-packing and judicial vetting as specific means of interference with judicial independence. The assessment focuses on the aims, rationales but also the outcomes of the judicial reforms which resulted in the dismissal of judges through both court-packing and judicial vetting in Third Wave Democracies of Latin America and Central and Eastern Europe.

Both court-packing and judicial vetting have been present in both liberal and illiberal democracies long before the EU rule of law crisis escalated. Additionally, in some countries the 2

rule of law compliance was exactly the reason (or pretext) to pursue judicial reforms. Even today, in some contexts court-packing (e.g. in the US) and judicial vetting (e.g. in Ukraine, Moldova, Albania) are perceived as positive measures of strengthening the rule of law and judicial integrity. The question at stake is – are all of these instances of interference a rule of law violation or not? This research implies that the answer to that is in the assessment of the judicial reforms within the socio-political and historical context of every jurisdiction. However, the context-dependent analysis imposes a notable challenge to carving out clear, legal standards on limits to the interference of judicial independence. By exploring these questions, this research aims to open new lines of analysis in the broader rule of law and judicial independence scholarly debate.

Petr Agha (Assistant professor, Charles University in Prague, Czech Republic) - *Breaking Point of Judicial Institutions*

The paper looks at the importance of the historical legacy of the judicial institutions against the backdrop of the recent developments, we call the rule of law crisis / backsliding, in the CEE region – by examining a number of path dependencies. Firstly, the rule of law crisis tends to be situated within a specific vocabulary which build upon two slogans: "return to Europe" and the "end of ideology", both of which imply the superiority of the blueprint of western democracies. This vocabulary was solidified by the coalitions between old and new elites who have embraced the (neo)liberal consensus post 1989 under the banner of the rule of law. Secondly, the current European studies inherited from the early stages of integration a specific perception of transformations, during which the deep contradictions of the new society were transitory and would soon disappear automatically, today however, the very same deep contradictions form the pillars of the current institutional set-up of the European project. Thirdly, the European project is a project of integration by law (i.e. the court-driven constitutionalisation of the EU's founding treaties) and towards law (i.e. towards a closely integrated and legally bound union), therefore the paper will address the role of the legal system in the structure of domination and in the reproduction of hierarchies and peripheries.

The central claim of the paper is that, the social claim of the peripheries is mostly invisible within the current institutional set-up and that the layers and forms of domination and reproduction of hierarchies are blurred by the term populism. The crisis of the model that appeared after 89/90 and its most visible representatives – independent judiciary – is under pressure as the direct result of the combination of the normalizing vocabulary about expert leadership, the return to Europe as well se the continuous process of the peripheralization of CEE. Our analysis focuses on the respective socio-cultural equilibrium within the nation states, instead of focusing on the blueprint implemented post-1989 (which is never questioned).

Peter Techet (post-doc and lecturer at the Faculty of Law, University of Zurich (Switzerland) and Post-Doc / Research Assistant, Institute of Political Sciences and Philosophy of Law Albert-Ludwig-University Freiburg (Germany) - *Is there such a thing as "judicial activism"? Ideology of judges, or ideology against judges?*

The question of whether and how politics can be controlled by the courts was already raised in the famous dispute between Carl Schmitt and Hans Kelsen in 1929. While Kelsen, himself a constitutional judge in Austria, proved the possibility and necessity of constitutional jurisdiction by using legal theory and pluralist- democratic arguments, Schmitt stuck to an outdated concept according to which the judges applied the laws mechanically. Schmitt´s idea about the "apolitical" judiciary is still the main argument even today against the "judicial activism".
Kelsen argued that the law is not only made in legislation, i.e. the law is newly established at all stages of the legal concretization – as Kelsen said: there is no qualitative, only quantitative difference between the making of the law and the application of the law. He refuted the accusation of "activism": if the judges also pass the law, they are by definition "activist", even if they adhere to a restricted, textualist (or originalist) interpretation. "Judicial self-restraining" is therefore not opposed to "judicial activism" but a form of it. Accusing the judiciary of being "activist" is a tactic of the political rhetoric, i.e. "it appears to be a form of name-calling, a barely camouflaged way of saying »judge with whom I disagree«" (Keenan D. Kmiec).
Both pioneer institutes of the two main models of judicial review (the US Supreme Court and the Austrian Constitutional Court) have been accused of "activism" in their history. In the New Deal era, the US Supreme Court was considered by progressive lawyers as the "activist", "politicizing" guardian of neoliberal interests. From the 1960s onwards, the US Supreme Court was criticized mostly by conservative lawyers as being too progressive or by left-wing lawyers as being not very democratic. The Austrian Constitutional

Court, especially Hans Kelsen, was also accused of "seizing the legislative power" in the interwar period by both the social democratic and clerical sides as they did not agree with the verdicts. In view of today´s US-American, Italian or French theoretical debates about – and the current state policy (in Hungary or Poland) against – judicial review, I would like to present the theses (on the basis of Kelsen´s "Pure Theory of Law" and from the history of the "judicial review")
(1) that every application of the law is from the theoretical viewpoint necessarily political (i.e. law-making),
(2) therefore "activism" is not an antidemocratic, counter-majoritarian ideology of the judges, but an anti-democratic, populist rhetoric against them.

State of Exception

Marie Laur (doctoral candidate in the Legal Studies Department at the Central European University, Hungary/Austria) - *The necessary adaptation of judges to emergency as a new paradigm of government*

The proposed paper is part of a broader doctoral research project on the role of courts in times of emergency. The project takes a new approach based on the observation that the factual situations giving rise to emergency measures are increasingly varied and that the states of emergency have become ubiquitous. Based on this assessment, the research argues that the classic debate about the proper level of judicial deference in times of emergency needs to be redefined. Emergency – due to the concentration of powers, extraordinary limitations on fundamental rights, ... – constitutes a severe risk for the rule of law and a first step towards democratic backsliding. The proposed paper focuses on two specific means available to judges to resist the abuse of emergency mechanisms. First, it argues that, in order to oppose false claims of compliance with the rule of law, judges have to approach cases from a broader and systemic perspective. Second, the paper contends that judges have tools to address systemic issues and risks to democracy which they are often too hesitant to use. Among them, provisions regarding abuse of power, necessity test or the competence to check the very existence of an emergency. To illustrate this argument, the paper contrasts the approach of the European court of human rights (ECtHR) with that of the two French Councils (Constitutional Council and Council of State). It argues that the ECtHR is in the process of building a more protective case law by making new use of these existing tools. The French jurisdictions, on the other hand, remain trapped in the classic role of courts during emergency and refuse to make use of mechanisms they routinely wield in other domains, leaving the system vulnerable to executive overreach.

Fanny Anne Bardoz (Associate Defence Attorney, Oslo, Norway) - *States of Exception : the French Example*

Using empirical research from my thesis on the French state of emergency periods in 2015-2017 (terror-related) and 2020-2022 (health-related) I will examine the concept of states of emergency in a theoretical perspective developed by Carl Schmitt and Giorgio Agamben.

These periods of exceptional legal regimes serve as an example of contemporary Western-European challenges to the rule of law and indeed how normal such exceptional periods have become. Agamben stated (interview in Le Monde, 24.03.20) that the Covid state of emergency in France supported his theory that the exception has become the new normal.

The French example is an interesting one as France has a long history with the use of exceptional legal régimes, since revolutionary times. Furthermore, French democracy and 'l'État de droit' are considered

stable institutions, which is paradoxical considering the much criticized French use of state of emergency régimes.

The hope with this article is to consider these recent periods of state of emergency legal régimes from a theoretical viewpoint to understand how these periods can function within a rule of law perspective, and how these periods affect the stability of the French judicial system.

Cosmin Cercel (Assistant Research Professor at the Lazarski University in Warsaw) - *A culture of emergency? Romanian constitutionalism from a comparative legal historical perspective*

The proposed paper aims to assess critically the role of emergency in Romanian constitutional history with a view to revisit several salient theoretical and historical assumptions about the legal institution of emergency and the foundations of modern constitutionalism. Drawing on an analysis of the historical contexts that have generated emergency responses in the past century in Romania, I advance the hypothesis that emergency, rather than being a marginal and exceptional constitutional praxis, it has a disruptive and innovative potential. Traditionally, emergency has been perceived as a conservative institution aimed at protecting the formal constitutional status quo. As John Ferejohn and Pasquale Pasquino noted: 'rights are to be restored, legal processes resumed'. In contradistinction to this position, I aim to demonstrate using the Romanian case as an example that emergency is able to rewrite both legal and political arrangements and to produce long-lasting effects that subsist the real or political crisis that it was aimed to contain. Furthermore, I aim to inquire comparatively into the possibility of assessing legal and constitutional cultures in relation to the role emergency played within their legal historical trajectory. In a first part I shall briefly discuss the state-of-art of emergency within constitutional theory and jurisprudence. Second, I shall turn towards the Romanian historical contexts giving rise to emergency measures, with a focus on the interwar dictatorships, the turn towards national communism in 1968 and the post-communist emergency. Third, I shall explore theoretical conditions for analysing emergency as a structuring institution defining constitutional identity.

Zoltán Szente (Research Professor, Institute for Legal Studies, Centre for Social Sciences and Professor of Law, Department of Constitutional Law and Comparative Public Law, National University of Public Service, Budapest) - *Towards a moderate dual state?*

Ernst Fraenkel's book, *The Dual State*, first published in 1941, became famous not only because it described the political nature of the Nazi state, but also because the description of coexistence of the so-called "normative" and "prerogative" state, which on the one hand means the more or less normal functioning of the administration and judiciary, but on the other hand the parallel functioning of the Nazi party and the state terror organisation, free of any legal constraints, provides a useful analytical framework for the characterisation of other countries and eras.

This paper examines the continuous erosion of judicial independence in Hungary since 2010, based on the assumption that while the vast majority of day-to-day cases are handled by courts in accordance with the law and free from external, unauthorised interference, judicial independence in politically significant cases has been severely eroded. The paper describes the formal and informal instruments and processes that have combined to create this situation. Its central argument is that no single organisational or personnel change would have solely been sufficient to partially dismantle the former independence of the judiciary, but their cumulative effect led to the coexistence of normal operation of courts and adjudicating certain cases under political control.

The Hungarian example may be interesting not only because other countries have followed or may follow it, but because it illustrates that even while maintaining the formal framework of the rule of law, judicial independence can be seriously weakened. This is precisely the reason why the dual state in the sense of Fraenkel's theory operates only in a moderate version in contemporary Hungary, while the parallelism of politically independent and biased judiciary is still clearly observable.

Judiciaries in Global South

Stefanie Lemke (Senior Legal Adviser with an international organization, attending in a private capacity) - *Advocates for Silenced Voices: Lawyers, courts and politics in Europe and Central Asia*

This proposal explores the shrinking space for civil society activists and their defenders in the Eurasia region. Drawing from various case studies, it sheds light on the widespread judicial harassment of lawyers representing anti-government voices. The liberal order being undermined by populist politicians in many parts of the world, there is strong evidence that governments abuse their powers and use the judiciary to stigmatize and criminalize activists for their work. As a consequence, it became increasingly difficult for lawyers to exercise their profession. Lawyers report that they are given only little time to prepare the defence of their clients and are disbarred for complaining about the unjust course of proceedings. Azerbaijan and Russia, for instance, have a long history of politically motivated convictions against civil society activists and being reminded by the international community to comply with human rights standards. Yet local courts found the Azerbaijani lawyer Rasul Jafarov guilty of forgery and other offences after he had criticized the Azerbaijani government at a Council of Europe event and Team 29, a Russian NGO known for taking cases involving high-profile figures like the Russian opposition politician Alexei Navalny, was forced to close its association amid fears of prosecution. Against this backdrop, this contribution looks at the relationship between lawyers, courts and politics in Europe and Central Asia. It concludes with a critical assessment of the current international human rights system to tackle judicial wrongdoing more effectively. Published as Stefanie Lemke, 'Advocates for Silenced Voices: How Human Rights Lawyers in Europe and Latin America Defend the Rule of Law' in Richard L Abel, Ole Hammerslev, Hilary Sommerlad and Ulrike Schultz (eds.), *Lawyers in 21st-Century Societies: Vol: 2: Comparisons and Theories* (Oxford: Hart Publishing, forthcoming 2022). p. 353-369.

Monique Cardinal (Associate Professor of Islamic Studies, Université Laval, Québec, Canada) - *Judicial Resistance to Authoritarian Rule in Syria since the March Revolution of 2011*

This presentation is an empirical study of the acts of resistance carried out by members of the judiciary, both judges and prosecutors, who opposed legislation enacted by the regime of Bashar al-Assad to quell the popular uprising of 2011. The first part is a close analysis of case studies which demonstrate that the judiciary of the regular courts made daily decisions that favoured the release of the illegally detained, alleviated heavy fines imposed on demonstrators, dismissed evidence obtained under torture, carried out thorough investigations into suspicious deaths, etc. They also resisted the interference of state security officials in the workings of the courts and the prosecution office. There is even evidence that members of

the ordinary judiciary who were initially appointed to the newly established Counterterrorism Court did their best to dismiss cases against the wrongfully accused and to lessen the sentences of defendants.
The second part of the presentation will shed light on the actions of members of the judiciary who were no longer in office, who either publicly resigned or were dismissed by the state. Many scholars have qualified this form of opposition as "off-bench resistance". However, in the case of Syrian judges and prosecutors who continued to offer judicial services to the population in jurisdictions no longer under state control, they acted as judicial officers whose intent, for the most part, was to maintain the rule of law in order to secure a minimum of public order in an extremely unstable and volatile context. Soon these members of the judiciary were run out of office, this time not by the regime and its security forces, but by extremist Islamist armed groups who seized control of regions and set up their own courts and system of "justice".
In the conclusion, I argue that the actions of Syrian judges and prosecutors who opposed the politics of repression of the Syrian regime, and then defended the Syrian judicial system as best they could before being overtaken by armed Islamist groups were in fact waging the same battle of resistance: defending the rule of law in order to protect the rights of citizens, the safety of their persons and property.
This study on judicial resistance in Syria is predominantly based on online sources: Facebook accounts and websites of dissident judges, prosecutors and lawyers, news websites and journals of oppositional Syrian media, reports of Syrian human rights organisations, the Facebook accounts of the Ministry of Justice of Syria and the Syrian parliament, Syrian state media, etc. Interviews to be conducted with Syrian judges and prosecutors in the summer of 2022 aim to clarify certain issues and ascertain the accurateness of information obtained online.

Marina Slhessarenko Fraife Barreto (Master's student in Political Science from the Faculty of Philosophy, University of São Paulo, Brazil – *Rule of law without democracy: a study in the light of Franz Neumann's critical theory*

One of the present challenges is to understand the resurgence of authoritarianism in order to reverse it. Diagnoses on the current developments have been given in abundance, but many of them are not placed within a historical dimension, or, if they are, only in a partial way. In opposition to this, I propose a return to the work of a jurist of the first generation of Critical Theory, Franz Neumann, and its assessment based on a question posed by his successor, Jürgen Habermas. Neumann is known for his analysis on national socialism, but also on the fall of the Weimar Republic. In his framework, the judiciary branch is given a major role, in spite of the sociological and economical analysis that predominated within the inner circle of the Frankfurt School. Habermas, on his part, was responsible for shifting the register of Critical Theory to the terms of democracy and giving law a prominent role in the framework of his social theory. On the other hand, he seems to have rejected the legacy of Neumann, who, unlike most of his generation colleagues, made institutional analyses and was the first to break legal nihilism in the Marxist tradition, seeing in law not only an instrument of domination, but also a potential for emancipation. Habermas attributes this rejection expressly to Neumann's economicist bias, and Ingeborg Maus, a contemporary of his, also attributes it to his analysis of the self-interests of bureaucracies beyond the economic sphere. I argue that a reciprocal illumination of the authors may be able to elucidate aspects not revealed in the works of the two, paving a more robust path for diagnosis of time of the relationship between popular sovereignty and human rights, not only in historical terms but also in normative terms – tasks that both authors pursue.

Eduardo Chia (doctoral researcher, Goethe-Universität Frankfurt am Main , Rechtswissenschaft) - *Judges and ideology: some lessons from the case of the Chilean Constitutional Tribunal*

The Chilean Constitutional Court (2005) has acted as a check on democratic advances. In this case, not to implement or validate authoritarian programs but to block democratic decisions of the parliamentary or presidential branch. This juncture may be explained by the existence of a network of institutional design that combines mechanisms for appointing judges, reinforced types of counter-majoritarian laws and constitutional rigidity. From a comparative perspective, unlike recent Central and Eastern European (CEE) cases, General Augusto Pinochet's constitution (1980) could not have been a more paradigmatic case of the use of liberal legality in favor of the Chilean ruling class: the military, right- wing political parties and the oligarchy.

In historical development, the Chilean constitutional judiciary role played the opposite of some CEE countries. There was no direct pressure from particular exogenous forces; instead, it was effective judicial activism operating based on ideological tendencies. The purpose was to disguise and formally legitimize the continuity of General Augusto Pinochet's political legacy by appealing to legality either by action or omission. This movement means perpetuating the constitution's conservative matrix regarding traditional ethical values and promoting non-competitive capitalism in economics.

As this is the case, the direct beneficiaries have been the ruling classes. The situation has become untenable the last time because the interpretation applied by constitutional judges has made the constitutional text overly rigid. In the same way, it has made social change through institutionality static, as the Tribunal validates what its ideological objectives demand and annuls democratic advances promoted by progressive governments for the benefit of the subaltern classes.

In this presentation, I would like to draw some lessons that can be reflected upon in other contexts. Comparative experiences are indispensable for avoiding previous errors and learning about other developments to the extent that one keeps due distance and objectivity.

European Courts and their influence on judiciaries

Mauricio Mandujano Manriquez (PhD Fellow at ARENA Centre for European Studies, University of Oslo) - *Political Gains by Judicial Means: Institutional Conversion of the EU's Rule of Law Policy*

Poland and Hungary's ongoing rule of law crisis has been characterized as a foundational challenge to the European Union. Notably, studies have focused on how the European Commission, as the 'guardian of the treaties,' has addressed (or failed to) the systemic violations of EU fundamental values in both countries. However, the Commission's policy response towards the rule of law breaches has not remained static from its initial scope conditions and purpose; instead, developments in European case law have led to variation in outcomes in different instances of breaches across the Member States. This prompts the question: What have been the mechanisms for reshaping the EU's policy responses concerning the rule of law breaches? This article examines how the Commission, along with political entrepreneurs, capitalized on the independence of the Court of Justice of the European Union (CJEU), shifting the locus of political authority within the legal order of the Union. This research employs process tracing based on the relevant case law, official communications, policy documents and institutional developments within the European institutional landscape between 2000 and 2021. The findings reveal a two-fold mechanism that relies on a new interpretation of Art 19 (1) and a new line of case law issued by the CJEU, through which the Commission expanded its policy scope regarding the rule of law. These findings contribute to the broader literature on gradual institutional change within European Union Studies.

Marcin Mrowicki (Assistant Professor at the University of Warsaw, Poland) - *Impact of the Judicial Resistance against the Rule of Law Backsliding in Poland on Creating the Jurisprudence Against Authoritarianism by the Court of Justice of EU and the European Court of Human Rights*

The resistance of judges and its allies in Poland starting from 2015 to defend democratic rule of law and independence of the judiciary against the authoritarian blitzkrieg of the "right and justice" ruling party has been unprecedented in its mobilization scale, judges' activism on the streets and in the courtrooms, creativity of its resistance acts, shifts of the judicial culture towards more public and visible role that of people's judges and its successes. The strategy of Polish judges consisted of making use of all the possibilities offered by the legal procedures according to maxim "Not letting go of any case" - using every situation to challenge every decision so it ends in the Court of Justice of European Union or the European Court of Human Rights. Judges realised that legal paths are the most effective - thanks to them it was possible to obtain judgments of the CJEU and the ECtHR. As it was said by one of the interviewed judges "In the future, it gives room to build something on it - it will be easier to put the system in order". Thanks to the effort of Polish judges, the jurisprudence of the CJEU and the EctHR developed a standard for understanding the term "court"; and the use of interim measures in disciplinary cases. This is an achievement not only from the Polish perspective as populism can develop in any European country. This paper draws on analysis of the CJEU and the ECtHR case-law concerning Rule of Law backsliding in Poland, as well as semi-structured interviews with all actors involved (judges, lawyers, activists) to ask: has the idea that the court must be treated as a fundamental guarantee against authoritarianism been created? How effective this jurisprudence is?

Magdalena Konopacka (Associate Professor, University of Gdynia) - *Efficiency and Justice in International Judicial Conversations*

TBA

Inna Boyko (Associate Professor at the Maritime Law Department of the National University 'Odessa Maritime Academy', Ukraine) - *Cases on Claims of Ukraine Against the Russian Federation as Evidence of Violation the Rule of Law*

After 2014, when the Russian Federation occupied the Ukrainian Crimea and contributed to military operations in the territories of Donetsk and Lugansk regions of Ukraine, the international courts received applications from Ukraine against these acts of the Russian Federation. The ICJ, ECHR, ICC, ITLOS, arbitral tribunals proceedings were opened on claims from Ukraine. We propose to consider evidence of a violation of the rule of law based on the documents adopted in the ICJ and the ITLOS proceedings. Unfortunately, there are judges of international courts who perform their professional duties not only as lawyers, but also as politicians. We are talking about the judges of a national of the Russian Federation, the People's Republic of China. Analyzing the courts decisions, in particular: the Order 'Request for the Indication of Provisional Measures' of 19 April 2017 (ICJ, case №166 'Application of the International Convention for the Suppression of the Financing of Terrorism and the International Convention on the Elimination of All Forms of Racial Discrimination'); the Judgment of 8 November 2019 (Preliminary Objections in case № 166); the Order 'Request for the Indication of Provisional Measures' of 16 March 2022 (ICJ, case №182 'Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide'); the Order of 7 October 2022 (Preliminary Objections in case № 182); the Order 'Request for the Prescription of Provisional Measures' of 25 May 2019 (ITLOS, case №26 'The Detention of Three Ukrainian Naval Vessels') we argue that the judges who voted 'against', violate the rule of law.

The interpretation of the statements of these judges in their dissenting opinions or declarations also suggests that the judges are following the orders of their State or supporting the judge-colleague for political reasons.

Systemic challenges of judiciary

Fabrizio Cesareo (Postdoctoral Researcher and Contract Professor of Private Law, University of Milan-Bicocca) -*The European Context Of The Role Of The Italian Judge And Civil Process In The Emergency And New Technologies Law*

The Covid-19 pandemic had an undoubted impact, among other things, on the image and role of the judge in the functioning of the civil process, but also in terms of suspension of procedural terms, procedures for filing documents, forced execution and other categories. In this study, the refer is properly to the comparison between evolution vs. involution of certain cases that gravitate around this complex system. Specifically, Italy, among the various countries of the European Union, has seen the proliferation of ad hoc regulations on the subject, concerning for example the methods of conducting the hearing. In this regard, it seems appropriate to remember that there is a need to ensure social distancing in the conduct of the process.
The path now seems to be the one undertaken by technological innovations, which in some way facilitate certain material operations and here, today, the importance of the telematic civil process is emphasized above all. But the direct confrontation with the parties serves, above all, to the judge. Immediacy, understood in a subjective sense, is equivalent to the possibility for the judge to enhance the perception of the relationship with the contenders, to grasp nuances, to highlight contradictions, which does not mean emptying the fundamental contribution of written defenses, but certainly enriching all-round decision-making profiles. Immediacy means that the judge, even without anticipating the decision, can communicate an orientation or suggest an investigation plan and this is made almost impossible by the evolution/involution of this matter. One of the critical issues, in this sense, concerned: the principle of the reasonable duration of the process, guaranteed by art. 111, paragraph 2, of the Italian Constitution (which finds its expression in art. 702-bis of the Italian Code of Civil Procedure) and by art. 6 of the ECHR; a further increase in the workload for judges deriving from the so-called “covid litigation”. Furthermore, art. 15 of the European Convention, however, provides for a general derogation clause which takes the form of the possibility for States to adopt extraordinary measures in the event that it is necessary, in the general interest, to temporarily suspend the obligations assumed by virtue of the ratification of the Convention. The general objective is, certainly, to preserve the sacredness of the figure of the judge in the civil process, trying to follow the path of adaptation to phenomenal reality; while, the specific objective will be to make the forms of hearing coexist, with the enhancement of the consent expressed by the parties at the time of choosing one over the other.

Aleksandra Partyk (Assistant Professor at Andrzej Frycz Modrzewski Krakow University, Poland) - *Re-examining the civil case in the same court composition. When the decision making in a case may be problematic*

"According to art. 386 § 5 of Polish Civil Procedure Code where the judgment is set aside and the case is referred to be re-examined, the court examines it in the same composition, unless it is not possible or it

would cause excessive delay in the proceedings. Such a provision is controversial as, in principle, the judge will have to conduct the same civil case again - even if they already gave judgement in the case. The regulation is in force in Polish law since 2019. Previously it was impossible for a judge to examine the case for the second time when the judgement had been set aside and the case was referred to be re-examined.

To my mind the current Polish regulation in which the same judge is to adjudicate in the case for the second time is inappropriate in view of the content of another legal regulation. According to art. 386 § 6 of Polish Civil Procedure Code a legal assessment expressed in the statement of reasons for a judgment issued by the court of the second instance is binding on the court to which the case was referred and the court of the second instance in the case of re-examining the case. However, this does not apply to a situation when there was a change in facts or the legal situation, or when after the court of the second instance issued a judgment the Supreme Court of the Republic of Poland expressed a different legal assessment in a resolution settling a legal issue.

In my presentation I will pay attention to the regulation from the judges' perspective. I will present the results of my research on the topic. I would like to present some observations on the difficult role of a judge who is to pass the judgment in the case for the second time.

I will turn my attention to the issue of psychological mechanisms relating to the reconsideration of a decision that has been challenged.

Besides I would also like to examine if provision under consideration may be contrary to the rule of independent judiciary. A judge may be put in the position of having to make a ruling with which he or she disagrees because he or she is absolutely bound by the second instance court's assessment of the evidence, which may be different or even completely opposite to the one he or she had expressed when ruling the first time."

Tomasz Partyk (Judge, President of Civil Division in District Court for Kraków Podgórze in Kraków, Poland) - *Some remarks on practical problems of adjudicating in civil cases*

In my presentation I would like to address the most key problems of a procedural nature on the one hand, and of a systemic nature on the other, which in the practice of adjudicating civil cases are the most serious sources of stress for Polish judges. First, I would like to examine the issue of the overly broad spectrum of cases that a civil judge in Poland handles in the context of a lack of real specialisation among judges. In practice, this means that a judge simultaneously deals with payment cases, inheritance cases, division of assets, supervision of enforcement, and many others. Under the Polish Code of Civil Procedure the procedural rules in different categories of cases are different, sometimes significantly, which given the broad scope of the subject matter places a burden on the judge. A significant problem is also the scope of activities that the judge undertakes in each case he or she presides over, which is not limited only to resolving the merits of the case, but also e.g. checking whether the parties or attorneys have been properly notified of the hearing. It should be borne in mind that a Polish civil judge adjudicates approximately 1,000 cases in various categories each year. Second, an issue that I believe it is appropriate to raise is the lack of sufficient mechanisms to enable judges to effectively tackle obstruction of justice. The need for a judge to deal with cases that constitute litigation obstruction is a significant source of stress, given the number of other cases to be heard.