

Judges under Stress JuS - the Breaking Point of Judicial Institutions

1. Aspects relating to the research project

Primary and Secondary objectives of the project: The breaking point of judicial institutions

The primary objectives of the project are to obtain knowledge on:

- 1) how rulers seek judicial compliance with authoritarian measures,
- 2) how judges react to such measures,
- 3) the conditions under which an independent judiciary breaks down.

The main approach of the project is to look at the importance of the historical legacy of the judicial institutions for the answer to these questions. The project will explore how the conditions of an independent judiciary differ in countries with legal institutions of the western tradition from countries outside of this tradition. This will be studied by surveying differences in the fascist and communist approaches to law. Based on a historical comparison of different European countries, we will explore whether variances between different countries can be explained by differences in the long historical traditions of their legal institutions.

In its historical thesis and in its combination of historical, comparative and legal method in the comparison of judges under authoritarian conditions across different legal traditions, with a theoretical approach from institutional theory, the project aims to be cross-disciplinary, bold and innovative in the study of the functioning of courts and the judiciary. A historical comparison across different traditions will allow us to provide an analytical framework allowing critical assessments of the measures by which rulers seek to influence and control judges. The results of the project will represent new knowledge at the forefront of international research. Through these assessments, the project may also impact the discussions on the normative and legal questions of what constitutes improper influence and excessive control of judges and on the duty of the judge to resist measures even when they are framed within positive law.

Even in today's Europe there are courts that are facing powerful political forces calling for illiberal measures.¹ It is to be expected that the higher degrees of social concern and conflict that we experience in Europe today will challenge basic elements of the rule of law and thus put higher demands on the judiciary, both in the post-communist countries and in countries of Western Europe. In this situation, it is vital to have more knowledge and a better understanding of how our judicial institutions react under stress. A secondary objective is to benefit society by providing knowledge of essence to strengthen the ability of the judicial institutions to face challenges with social demands for authoritarian measures to protect society from threats such as international terrorism and conflicts over resources. These questions will be the primary objective of a follow-up project that will be sought funded by the ERC.

State of the art and status of knowledge

The different understandings of the rule of law

The project focuses on "the judiciary as a robust and independent branch of government with judges who are impartial, independent, and free from the improper external influences that, whatever their

¹ See Communication from the Commission to the European Parliament and the Council A New EU Framework to Strengthen the Rule of Law, COM(2014) 158 final/2 p. 6.

provenance, can no longer be tolerated” (Walker and Schuker 2012:44). It takes as its starting point the approach to the rule of law as entailed in the historical tradition of Western legal institutions. What most observers in the field point to, as a vital characteristic of the tradition, is the notion that law binds the ruler, that there exists a worldly authority higher than the authority of the sovereign. Douglass North accentuates the importance of that the state is bound by its commitments as a factor in explaining the development of western institutions of commerce in the middle ages. This became possible by the shackling of arbitrary powers of rulers and the development of impersonal rules (North 1991:107). In other words, also the rulers were bound by law.

This is also the approach taken by Fukuyama who states that “the rule of law is a separate component of political order that puts limitations on a state’s power” (Fukuyama 2011:246). Fukuyama emphasises that such limitations are something more than that the ruler respects property and enforces contracts, and thus provides for the possibility of foreseeable economic transactions in the market. Such restraint can be exercised by a ruler in self-interest without any implication that the ruler accepts being subject to any higher authority than his own. The rule of law in this sense is therefore something more than a mere practice of legal predictability.

“*The rule of law*” as an expression is part of the English common-law tradition. As a concept, it corresponds closely to what in the German tradition is referred to as “*Rechtsstat*” or in the Scandinavian tradition as “*rettssikkerhet*”. As terms these originate in the nineteenth century, but the notions that they entail are much older and form part of a common tradition. In the English tradition, the term was introduced by A.V Dicey in his Introduction to the Study of The Law of The Constitution in 1885. To Dicey, the rule of law was linked to the rights of individuals (Dicey 1915,1982:107). Dicey included the principles of law as a restriction on arbitrary power by the state, that no man, including officials, are above the law, and that the constitution is a result of judge-made law protecting individual rights (Dicey 1915,1982:110-122). This notion of the rule of law prevailed until it was challenged by the legal positivism of beginning of the last half of the twentieth century. Joseph Raz made the distinction between the rule of law and the rule of *good* laws, and included only the former in the concept of the rule of law (Raz 2009:211). Rule of law according to Raz entails that people should be ruled by law and obey it, and the law should be such that people can be guided by it. It does not include virtues such as democracy, justice, equality or fundamental rights. From the idea of the rule of law, Raz derives certain principles that require the law to conform to certain standards designed to enable it to effectively guide action, and to ensure effective legal institutions to supervise conformity to the rule of law (Raz 2009:218).

Contemporary writers on legal and political theory draw the distinction between the rule of law in either a formal or a more substantive sense (Waldron 2012:45, Tuori 2011:216). The formal, or minimalist, understanding restricts the rule of law to a procedural principle, which includes the primacy of rules enacted in the way prescribed by the legal order, and the guarding of this primacy by independent courts. The substantive, or broader, understanding includes various conceptions of individual rights subject to judicial protection. In its broadest sense, the rule of law is often referred to inseparable from democracy and human rights. It is this broad understanding that is predominant in international declarations on the rule of law by institutions such as the UN, Council of Europe and the EU. But even in a formal understanding of the rule of law it is common to include *some* notion of individual rights, whether they be the right to personal freedom, freedom of discussion and public meeting (Dicey 1915,1982), “basic legal freedoms” (Halliday, Karpic and Feeley 2007:10) or “a presumption of liberty or a presumption of human dignity” (Waldron 2012:47). Such qualifications are necessary to distinguish the rule *of* law from a rule *by* law, a rule that employs the legal form, but where the law is not binding upon the ruler, and which misses the very point of a characteristic feature of the Western legal tradition (Berman 1950:138).

Independent courts and support to authoritarian rulers

Rulers all over seek judicial compliance with their policies. A ruling power has a broad spectre of ways of ensuring the conformity of the judiciary (Rottleuthner 2011). Some of these, such as enactment of legislation and legal education, are compatible with judicial independence, while others, like interference in individual cases, are highly incompatible. Some measures, such as career advancement and allocation of cases to special judges are compatible with judicial independence under some circumstances and incompatible under others. The problem with authoritarian governments is not that they are exercising the power of government, but that their policies and measures are unacceptable. Independence is an inherently normative concept, as it is *improper* external influences judges should be protected against.

Independent and impartial judges are not something to be taken for granted. Courts in the whole of Europe are challenged in their ability to withstand pressure from the executive power. The European Commission states: “recent events in some Member States have demonstrated that a lack of respect for the rule of law and, as a consequence, also for the fundamental values which the rule of law aims to protect, can become a matter of serious concern”.² In order to meet the challenges of our time we need more knowledge and understanding about the character of our legal institutions, how they are influenced and controlled, and their ability to withstand pressure. This project builds on the assumption that knowledge of the institutional history is necessary in order to have this knowledge and understanding. We also need to understand the difference between legitimate influence and control over judicial decision-making and illegitimate influence and pressure by the state, and how the concept of legitimacy has developed over time within this field. This is the first objective of the project.

The second objective of the project is to find how judges react to measures from authoritarian rulers. From studies on courts under Nazism and fascism we know that there are basically four main types of contribution that courts offer in support of authoritarian rule, one by clearly departing from the law and the legal role, the other three ostensibly within the law. We will make these four forms the focus for our study of judicial support to communist rule and see whether there are variations between countries of different legal traditions.

The *first* focus is the extent and forms of outright departure from the law in order to accommodate the needs of the regime. Facts or rules may be distorted, overlooked or construed so that sanctions can be applied illegally to opponents of the regime. Such rulings may be the result of pressure that has been applied to the judge by interference from the executive or other organs of the state, or of an identification of the judge with the interests of the state in oppressing political opposition.

The *second* focus is on the acceptance of the legality of authoritarian measures and the lack of protest against measures that are formally legal, but are never the less clearly in breach with basic rule of law principles, thus accepting the creation of a “dual state” (Fraenkel 1941). A major effect is that the police and security forces can terrorise the population with impunity and that victims are deprived of any access to justice. The main criticism against the judiciary by the Truth and Reconciliation commissions of both South Africa and Chile was their lack of action against internment of persons without access to justice by the security forces (Graver 2015:21-22).

The *third* focus is on the unquestioning application of any measure dressed up in a legal form. The most notable examples of this can be found in the interpretation and application of anti-Jewish legislation by the French and Italian courts (Graver 2015:53-74). “The interpretive community”, writes Weisberg, “took up that work, made it its own, and on every level created an indigenous system of rationalized persecution” (Weisberg 1996 p. 48). This does not mean that the courts as a

² Communication from the Commission to the European Parliament and the Council A New EU Framework to Strengthen the Rule of Law, COM(2014) 158 final/2 introduction.

whole were unsympathetic to claims raised against the law by Jewish claimants. They tended, on the contrary, to be lenient to the few who went to court to claim relief from anti-Semitic laws. But by the simple fact of applying the laws, they validated them and thus participated in the general respect and execution of Vichy laws (Curran 1998 pp. 32-33). Such measures could often be questioned from the perspective of national or international legal standards. The communist constitutions recognised individual rights and freedoms, but this functioned only as a facade and did not impede a legal practice based on legislation or decrees in blatant contradiction with these rights.

The *fourth* focus is on the independent recreation of the existing body of law to accommodate the aims and interests of the authoritarian regime. The German courts' reinterpretation of the German civil code to deprive Jews of their status as legal subjects and holders of rights is illustrative of this.³ The judges "interpreted enacted law liberally when liberal interpretation furthered Nazi ideology, and strictly when strict interpretation furthered it" (Curran 2005 p. 511). We will study this by examining the legal techniques employed in the reinterpretation of laws enacted prior to the authoritarian regime in order to comply with the interests of the regime. Here it is also of interest to study the extent to which there existed a legal doctrine and a body of legal writing which represented continuity with the past legal tradition and the extent to which past legal concepts, methods and values were employed in legal writings under the authoritarian regime.

Judges do not have to change their method or approach to law to support authoritarian policies (Rüthers 2012:443, Fraser 2005:438). Accepting the authority of the legislator, applying legal techniques to sort out the fine details, and interpreting law in light of changed social and political circumstances are all part of a normal legal repertoire. But judges seem to give up any thought of independent judicial review under given conditions. Perhaps what develops is what Michal Bobek describes as some form of mental dependency of the judiciary on the hierarchy within the judiciary and on legislative and executive authorities, leading to a bureaucratic style of judging (Bobek 2008:108). This can be a result of extreme situations such as in the Nazi and Fascist dictatorships in the Twentieth century, or of legacies of the past such as in post-communist states in the Twenty-first century.

The third objective of the project is to explore the conditions under which an independent judiciary breaks down. The schism between loyalty, even to oppressive law, and at the same time commitment to the fundamental value of judicial independence has a long history in our legal and political orders. Comparative legal studies find common features in the legal tradition comprising the Romano-Germanic family and the Common-law family, and speak of a Western legal tradition. (Berman 1950:111, David and Brierley 1985:25, Zweigert and Kötz 1998:70). One such feature is the doctrine "that rulers must seek to effectuate their policies systematically through legal institutions and that they are themselves to be bound by the legal institutions through which they govern" (Berman 1983:527). This deeply ingrained ideal has not always been realised, and was fundamentally departed from in countries of Europe during the twentieth century.

Although much is known about the operation of the judiciary in many countries with authoritarian rule, there is little research trying to establish more general explanations based on comparisons across countries with different traditions and with different authoritarian ideologies. The two main authoritarian ideologies of Europe of the twentieth century, Nazism/ fascism and communism, were fundamentally different in their approaches to law and legal institutions. The Nazi and fascist regimes upheld an institution of independent judges and described themselves as a continuation of the deep legal historical past. The communist regime of Soviet Russia initially understood itself as a clear break with what was perceived as a bourgeois legal heritage, and placed the judges under direct control of the communist party (Conquest 1968:13,111-112, Kühn 2011:92-

³ The most thorough study of this is still Rüthers 2012 (first edition 1968), but see also Graver 2015:59-79.

94). In this light, it is illustrating that the GDR regime used law only in a marginal way to legitimize itself compared to its Nazi predecessors (Rottleuthner 1992:241). Given these differences between Nazism and communism, it is interesting to explore more closely under what circumstances authoritarian rulers resort to independent legal institutions as a means of repression and legitimation, and how they seek to obtain the compliance of these institutions with their policies of oppression. In the recent years, there has been some research on the countries under Nazi and Fascist rule (Graver 2015, Skinner 2015). The European countries under communism are less researched, and surprisingly little is known about the courts under communism in the Central and Eastern European states. Notwithstanding their roots in Roman law, the legal institutions of the countries of the Eastern European tradition followed a development differing from the one of the Western European states even before the communist period. (Berman 1950:159). Nazism and fascism were developed into state practise first and foremost in countries belonging to the Western legal tradition, notably Italy and Germany, whereas Communist rule was first established in Russia, a country with a different historical legacy.

Judicial independence and the rule of law

According to the Basic Principles on the Independence of the Judiciary endorsed by the United Nations General Assembly in 1985, the independence of the judiciary shall be guaranteed by law.⁴ The right to bring cases before an independent tribunal is stated in Article 10 of the Universal Declaration of Human Rights, guaranteed in ECHR Article 6, and is elaborated in cases by the ECtHR. Independent, impartial, efficient and accountable judicial systems are part of the Copenhagen criteria for EU membership.⁵

Judicial independence is comprised of several different components. One can distinguish between independence of the *judiciary* (institutional independence) and independence of *judges* (individual independence) (Helgesen 2014:111). The institutional independence is secured through legislative arrangements such as rules governing the appointment and dismissal of judges and judicial accountability, and institutional arrangements such as the remuneration of judges and establishment of independent bodies to appoint and oversee the judiciary. The individual independence is about the extent to which the judge is subject to external pressures on how to decide individual cases, be it from the leading judge of the court or judges in higher courts, the prosecutor, the executive, politicians or other external forces. Although there are important connections between institutional and individual independence, the relation is not simple and straight forward. The Nazi state of Germany abolished the institutional independence, but the independence of the judge to decide the individual case was respected. The same was the case in Italy and France under fascist rule. These examples show that respect for the right of the judge to decide the individual case is possible even in the most oppressive of societies.

Judicial support of the government and majoritarian policies is a normal state of affairs, also in stable democracies (Dahl 1959). Judicial deference continues despite the predominance of rights in our present legal culture (Tomkins 2011, Scheppele 2012). Commenting on national security cases in the wake of Guantanamo, Scheppele observes that the deference had taken a new form to accommodate the new legal culture. “While governments used to win national security cases by convincing the courts to decline any serious review of official conduct in wartime, now governments win first by losing these cases on principle and then by getting implicit permission to carry on the losing policy in concrete cases for a while longer, giving governments a victory in

⁴ For an overview of issues of particular importance to ensuring judicial independence, see European Commission for Democracy through Law (Venice Commission) Report on the Independence of the Judicial System Part 1: The Independence of Judges, Adopted by the Venice Commission at its 82nd Plenary Session, Venice 12-13 March 2010 and the Opinions of the Consultative Council of European Judges (CCJE), in particular Opinion No.1 (2001) on Standards Concerning the Independence of the Judiciary and the Irremovability of Judges.

⁵ Communication from the Commission to the European Parliament and the Council Enlargement Strategy and Main Challenges 2013-2014 COM(2013) 700 final p. 6.

practice” (Scheppelle 2012:93). It is still an uncompleted task for legal research to define the parameters of improper influence and excessive judicial control. Historical experiences from different regimes may throw light on these questions.

Excessive judicial control is not an ideal state of affairs (Santiso 2004), and it can be argued that courts even should allow for authoritarian measures in defence of democracy and the rule of law (Rossiter 1948:288). The judge must find and maintain the difficult position between being an organ in support of the state and an institution to hold the other organs of state accountable when they overstep the line of legitimate state power. This is what often fails under authoritarian conditions. Much can therefore be learnt about judicial independence and its relation to the rule of law by studying judges under different authoritarian circumstances. The project will here draw upon the theoretical and methodological insights of studies by Pauer Studer on “Distorted normativity” (Pauer Studer and Fink 2014) and Fraser on “a Jurisprudence of the Holocaust” (Fraser 2005) and build further on previous studies such as the ones by Kühn (Kühn 2011) and Markovits (Markovits 2006).

Work leading up to the proposal

The project lead Hans Petter Graver has a long-standing interest in the study of the judiciary under authoritarian circumstances. During his year as guest-researcher at the Heidelberg university 2012-2013, he did the basic research for his book *Judges against Justice* that was published with Springer in 2015. When he returned to Norway he did archival studies at Riksarkivet, that led to the book on judges in Norway during the German occupation, *Dommernes Krig*, published in 2015. He also published an article on the criminal liability of judges for participation in oppressive measures of authoritarian rulers, *Judging without Impunity: On the Criminal Responsibility of Authoritarian Judges*. He has participated in a project organized by associate professor Stephen Skinner, University of Exeter on fascism and law, which will lead to an edited volume published by Hart publishers. He also participated in a project organized by professor Malcolm Feeley, Berkeley, and professor Malcolm Langford, University of Oslo on the legal complex and Nordic exceptionalism. In 2017, He organized a workshop in Paris on judicial resistance which included leading scholars in the field from Austria, Czech Republic, Denmark, France, Hungary, Norway Poland, Sweden, UK and US. This was an important step in establishing the and network for the project with the aims of consolidating it into an expanded research group. Others of the group have also contributed substantially to the topic of the project in their previous research. Scharff Smith has researched on Danish collaboration during World War II and has co-authored two research monographs on the SS, including the legal services of the SS, “Under hagekors og Dannebrog. Danskere i Waffen-SS 1940-45” (1998) and “Waffen-SS. Europas nazistiske soldater” (Gyldendal 2015).

Approaches, hypotheses and choice of method

Theoretical Approach

The project will apply the theory of institutional development of Douglass C. North and the theory of Francis Fukuyama on the development of political order to the study of the development of law. The concept of institution is central to both theories. Crucial elements of North’s institutional approach are the conception of institutions as human creations, the idea that institutions are structure and thus separate from organisations and agency, the premise of a non-ergodic world, and the idea of path dependence.

There are many different strands of institutional theory, and many different theorists who label their theory “institutional” (Schaffer 2013). One basic division that can be made is between theories that seek to explain macro questions such as why certain societies have developed in specific ways and with questions such as how particular rules of the game emerge and change, and micro questions such as why particular institutional arrangements are preferred to others, and how these institutional

arrangements predict and explain actions. This article deals with legal institutions from the macro perspective.

In her review of the literature on explaining judicial reform in transitional countries, Cristina Dallara identifies three different theoretical approaches (Dallara 2014:loc 521). The first is the institutional approach that emphasises the importance of the institutional and cultural legacy of the previous regime. The second seeks the explanation in strategic action of the main political agents. The third combines the two, and also considers the role of international actors such as the EU and the Council of Europe. As implied by Ostrom, the difference between an institutional approach and an approach that focuses on individual action needs not be a difference between theoretical approaches, but is rather a difference in scale of the analysis (Ostrom 2005:32). In an institutional analysis, the action situation is taken as the dependent variable, whereas in an approach that focuses on strategic individual action, the action situation is the focal unit of analysis. Our main focus will be on how institutions affect agents and action, but we will also take into account strategic action.

The idea of path dependence is a main feature of institutional theory. Path dependence is, according to North, “a fact of history and one of the most enduring and significant lessons to be derived from studying the past. The difficulty of fundamentally altering the paths is evident and suggests that the learning process by which we arrive at today’s institutions constrains future choices” (North 2005:77). Path dependence is not, as claimed by some authors, an “inner dynamic” of institutions in the sense of “a determinate disposition to change (...) such that systematic forces set in motion at one stage are said to produce characteristic outcomes at another” (Nonet and Selznick 2001:20). The theoretical approach taken here is therefore different from the development model of law put forward by Philippe Nonet and Philip Selznick where repressive law is followed by autonomous law which then gives rise to responsive law. If we look at legal institutions in different societies, we see that there are no such inevitable paths of development. The approach therefore also differs from other development theories of law such as that presented by Günther Teubner (Teubner 1983). The development of Nazi law in Germany was not an inevitable dynamic produced by the liberal law of the Weimar republic, nor was the South-African development of social rights by the constitutional court an inevitable result of the demise of apartheid.

Path dependence is not about forces, but about people making choices and acting. Effects of such action are both results of organizations and people brought into an institutional matrix attempting to resist changes that affect their position and interests, and also of that the belief system underlying an institutional matrix deters radical change. Institutions give shape beliefs, values and the development of knowledge. According to North, “the whole structure that makes up the foundation of human interaction is a construct of the human mind and has evolved over time in an incremental process; the culture of a society is the cumulative aggregate of the surviving beliefs and institutions” (North 2005:83).

If legal institutions have their own path dependence, there must be discernible legal traditions where legal orders of different traditions can be traced back to differences in origins and legal orders of the same tradition to a common origin. This is an evolutionary approach to legal development, which also suggests that the legal institutions have their own path of development distinct from developments in political and social institutions of a given society. A consequence of this is that the legal institutions must be resistant to pressure from social and political forces. Institutional theory therefore suggests that law has an extent of autonomy in its development. This is, of course, a claim that has been made from many other theoretical perspectives. Applying institutional theory may, however, contribute to our knowledge of how the legal order resists outside pressures, and under what conditions this resistance breaks down. Gaining more insight into this is important under current circumstances when the legal institutions are under pressure and attack in many countries, even in the Western world.

The project will test the explanatory power of the theories mentioned above by applying them to the development of the Western legal tradition, and how the legal institutions of this tradition fared during the turbulent times of the twentieth century. More specifically, it will discuss the notion of a Western legal tradition and its main traits as seen in the light of the theories of North and Fukuyama. Applying these theories to careful empirical studies of legal institutions will contribute to development of institutional theory. Both North and Fukuyama apply their theories to the development of rule of law and the importance of the rule of law to political and economic development. Their treatment of the rule of law and legal development is, however, quite general, and they do not confront their theoretical statements to actual legal material. Institutional theory has been applied to judicial institutional building in the field of transitory justice, but here the concept of “institution” is often understood quite superficially (Harris 2011).

Research design

For the purpose of the project, we will group the European countries in three, based on their historical legacies and the form of authoritarian rule they experienced during the twentieth century. Group 1 comprises countries of present day Western Europe. Among these, some were subject to Nazi or fascist rule, either by internal political developments such as Germany and Italy, or imposed by foreign occupation such as the Benelux countries, France, Denmark and Norway. Others, notably Portugal and Spain, had dictatorships without clear fascist or Nazi ideologies. Group 2 comprises countries of the Western legal tradition that were subject to communist rule after World War II such as the Baltic States, Poland, Czech Republic, Slovenia, Hungary and the countries under Hungarian influence during the Austrian-Hungarian Empire. Group 3 comprises the countries with Byzantine and Orthodox tradition such as Bulgaria, Greece and Romania. Of these, Greece was subject to a dictatorship not of the Soviet, but of the fascist kind during the military junta.

Even after more than two decades, Europe is still struggling with the legacy of communism in many of the post-communist states. All Central and Eastern European EU Member States were subject to the same criteria regarding the organisation of the judiciary as requirements for membership. Any differences between them are thus not a result of different standards or policies. According to the World Justice Project Rule of Law Index 2015, seven out of the bottom ten EU-countries on the index are former communist states.⁶ In the top ten we find only one former communist state, Estonia.

A superficial comparison on the Rule of Law index of Italy and Spain, both countries of the Western legal tradition, and Greece, a country from outside of this tradition, suggests that the legal tradition is of importance. All three score low on the index. But whereas Italy scores relatively high on judicial independence and lack of undue influence on the courts, Greece scores substantially lower on these accounts. The score for Spain may be too low when it comes to undue influence and corruption of the judiciary, since this is probably much better than what the public believes (Bengoetxea 2011:11). On the other hand, the fact that Italy and Spain (and Portugal) score so much lower on the rule of law index than other western countries needs careful investigation. There are also indications that the influence of communism on the legal institutions varied with the legal past of the countries where it was imposed (David and Brierley 1985:168). If there were and are differences between CEECs during and after the communist rule according to whether they belong to the Western legal tradition or not, this may shed light on the question of the importance of the legal traditions on judicial independence.

Transparency International states that “despite several decades of reform efforts and international instruments protecting judicial independence, judges and court personnel around the world continue

⁶ <http://data.worldjusticeproject.org/#grid> accessed 24.02.2016.

to face pressure to rule in favour of powerful political or economic entities, rather than according to the law” (Transparency International 2007:xxii-xxiii). In many cases judges depend on observing obedience to the presidential office or the hierarchical structure within the judiciary. It has been observed that in such cases, “the caller may change, but the telephone calls continue” (Nußberger 2012:892). The history of the post-communist CEE states of the twentieth and twenty-first centuries shows that having the formal rules and institutions in place does not guarantee independent and accountable courts. Rather, improving the working of the judicial institutions requires getting right a broad range of political and cultural relationships between a state and society (Kleinfed 2012:position 3352), and a recognition of the way interests, persons and agencies interact in the process of transformation (Hammerslev 2007:153).

The Western European countries have their own legacies. During Nazi and fascist rule courts were deeply involved in the oppression of political opponents and in the persecution of Jews. Later, under the cold war, we find examples that courts in Western Europe abandoned principles of the rule of law in order to protect state interests. But as a whole, an independently functioning judiciary was quickly re-established after the fall of authoritarian rule. The differences between the old and new Member States of the EU may be an indication of fundamental differences between states of Western and Central and Eastern Europe when it comes to the establishment or reestablishment of independent judiciaries.

Performance of the judiciary correlates with national income and market economy, and countries with a high national income generally have more independent and better performing judicial institutions than countries with middle or low incomes (Rule of Law index 2015). This correlation in itself is not sufficient to establish the ways that judges are influenced to accommodate authoritarian measures, nor to understand how these influences operate. Efforts to improve and protect the judiciary suppose that it is possible to influence the performance of the judicial institutions by means other than influencing the economy of a particular state. It is therefore unsatisfactory from the point of view of the rule of law, merely to observe that the rule of law may suffer if the economy is in decline. We want to know how to avoid and resist deterioration of the rule of law in situations where the country is facing economic or other difficulties. For this it is of crucial importance to identify other factors than economic forces that influence judicial independence.

Ideally countries from all three groups should be studied in a parallel approach. Given the limited resources available this method is not possible, and a more qualitative approach must be taken. Group 1 is already covered by existing research. Given the limited resources available, the field work will be focussed on countries from group 2 and 3. The field work must be undertaken by scholars in command of the legal language of each country. As these scholars have not yet been recruited, we will choose countries to match the qualifications of the best applicants for the research positions. One of the countries will be Poland, where the studies will be led by Dr Magdalena Konopacka, University of Gdansk who will spend one year in Oslo as a visiting researcher. In her research, she will focus on Freie Stadt Danzig - its judiciary and jurisprudence, and on the installing of the Soviet court system in Poland – the Stalinist codification and organization of courts in the Communist Era. The aim of the project is to pick at least one country from groups 2 and 3 for in-depth studies. The results of these studies will be analysed and compared with available research on the functioning of the judiciary under authoritarian conditions in countries from group 1.

The studies will focus in particular on the extent to which authoritarian rulers seek judicial and legal support, how they go about to secure this, how the judiciary reacts and how they justify compliance. In addition, we will focus on continuities and discontinuities in the judicial institutions; the extent to which old institutions are disbanded and new institutions such as special courts are established, the degree of continuity of the judicial personnel and changes in the way judges are trained.

Research method and data

Methodology

The project is multidisciplinary in the intersection between law, legal theory, legal history and sociology of law. It will employ the normal tools of legal analysis on the legal material of the time of communism in the selected country studies. This part of the project will also engage with analyses of the concept of law and the explore possible criteria for determining circumstances under which the law is suspended as opposed to reinterpreted. It will also employ empirical studies by searching for evidence of the courts being used as mere mock trials in political cases and for evidence of rulings in political cases where judges acted independently and did not return the verdicts expected by the regime. We will search for and examine laws delimiting the jurisdiction of the courts in relation to security forces and detention regimes and to what extent such cases were brought to the courts and how they were dealt with. We will also see to what extent the operations of security forces and political police had a formal legal basis, and to what extent they operated in contradiction to formal legal requirements. We will study this by examining legal reasoning in court decisions and legal doctrine on issues and laws that are particularly oppressive in nature or questionable from the point of view of national and international standards.

We will perform an ideological analysis to investigate the extent to which the ideology of the authoritarian rulers was transformed into a legal ideology with implications for the interpretation and application of the law, and the extent to which this legal ideology was and is accepted into main-stream legal thinking. In a study of the relationship between legal ideology and judicial practise it is important to distinguish between prevailing legal ideologies as described in legal dominating legal theory, as the self-understanding of judges, as the way judges seek to legitimize their function and as a description of actual judicial behaviour. This part of the project will consist in legal and legal theoretical analysis, both at the level of jurisprudence and philosophy of law, and at the level of justifications for judicial decisions. The sources of this analysis are in particular writings of legal scholars and commentators in professional journals and other platforms, as well as the legal reasoning of the courts. Here we will perform historical, philosophical and legal analysis.

Data on continuities and discontinuities in the judiciary

Authoritarian measures may be applied by institutions taken over from the previous regime, or by new institutions or after a change of legal personnel. In some cases, a new regime takes over judiciary from the old regime, more or less intact. In other cases, old courts are abolished and new ones are established. We will study the courts both from an institutional perspective and the perspective of who the judges are, where they come from and how they are recruited. We will look at continuities and discontinuities in the institutional set up of the judicial system, in the persons engaged as judges, and in the rules and practices regarding the judiciary and their independence and accountability. Rules and practices of institutional and individual independence, criteria and practices for dismissal of judges are of particular interest. An authoritarian regime often establishes special courts or empowers military courts to deal with instances of opposition and political cases. We will look at the criteria for recruitment of judges and the requirements as to their qualifications. In this perspective, we will also study legal education.

In order to investigate the degree of political pressure on judges we will study personnel files regarding judges and instances of removal or reallocation of judges. We will look for reports on the reliability or unreliability of individual judges, and for measures that were taken against judges who were considered unreliable. We will also perform interviews of key persons; people who held positions within the judiciary during the communist regime and people instrumental in the transformation of the judicial system from an authoritarian setting to a setting based on the rule of law.

Other data

The data for the study will consist of information on courts and judges, the establishment and dismantling of courts, appointment and removal of judges in addition to laws, decrees and regulations establishing and organizing the judiciary. Court rulings will be an important source, in order to see how the courts ruled in cases concerning the interests of the state, and how the rulings were justified. High-profiled cases will be of interest here, and also more minor cases involving in particular political crimes. Censorship determined which cases were reported, so it is important to gain insight into both reported and non-reported cases.

In order to illuminate the relation between political ideology and law we will study legal writings in textbooks, journals, and commentaries, as well as the curriculum of the law schools. In particular we will look for continuities and discontinuities over main political transitions and for the ways in which new political ideologies were justified or employed in legal writing as a basis for criticism of non-complying judicial rulings.

Important challenges of the project

The ambitious objectives of the project make it subject to several challenges. The multidisciplinary approach requires the cooperation of researchers that master a scope of different disciplines. This challenge is met by the constitution of the research group with people with expertise within law, legal history, sociology of law and philosophy. The project leader has a broad background both in law and legal theory, sociology of law and legal history, and has done research and published in all these fields.

The project requires recruiting of young scholars who are familiar with the law and the language of the countries to be studied, and with an ability to work fluently in English. This challenge is met by having participation in the research group of researchers with academic affiliations in all the main countries that will be the object of the study. These researchers will participate in recruiting and supervision of the work of the young researchers.

Access to archives and material may be a challenge in some of the countries. Also to meet this challenge it is of importance that the research group includes scholars with experience in working with such material.

We are optimistic that the challenges can be met and that the project will be successful for the following reasons: First, the overall project is well structured and the goals and the scope of project is clearly defined and manageable. Second, a team of highly talented researchers will be formed; each team member will already have a strong expertise in the relevant field. These collaborations will contribute significantly to achieving the project's research goals. Third, the project manager already has expertise in managing complex projects and has experience with the tasks and challenges this involves.

2. The project plan, project management, organisation and cooperation

Project management

The project will be located at the Department of Private Law at the Faculty of Law, University of Oslo, with professor Hans Petter Graver as project manager. The law faculty has vibrant and strong groups of researchers doing works on courts and the judiciary, in legal sociology and legal history. An aim of the project is to build a group with a core of researchers from the faculty with the participation of researchers at other institutions abroad. In addition to the project manager they consist of professor Christoffer Eriksen and Malcolm Langford at the Department of public law and

professor Peter Scharff Smith at the Department of Criminology and Sociology of Law. Graver and Scharff Smith cooperate in the newly established course at the faculty on Law, Ideology and Human Rights Violations. The group will be joined by Dr Magdalena Konopacka, University of Gdansk who will spend one year in Oslo as a visiting researcher.

The project will recruit young scholars with qualifications in the legal language and traditions of the countries to be studied. Together with the project manager these will form the core project group at the Faculty of Law in Oslo. The project hinges on its ability to recruit young scholars with the necessary academic qualification and language abilities to undertake the in-depth country studies. Major efforts will be undertaken to ensure a broad international recruitment in cooperation with established academics in different countries. According to its policy of recruitment, the University of Oslo makes a special effort to improve the recruitment of groups that represent significant, unused potential for the university: women, various minority groups and international researchers at an early stage in their careers. In the employment of young researchers, and in introducing them into a research environment in collaboration with leading international researchers in the field, the project will provide excellent career opportunities for young research talents. It is an explicit goal of the project to qualify the young researchers to participate in an application for a follow-up project financed by the ERC.

The project team will also be joined by two international Guest Professors, Herlinde Pauer-Studer and David Korsar, who will join for one month each. The Guest Professors will provide critical feedback on the work-in-progress of the other team members; they will attend the weekly seminar in which work-in-progress will be discussed, they will also attend the workshops organised by the project. The feedback from such eminent scholars will be tremendously important for the overall success of the project.

Building an international research group

International cooperation is the very essence of the project in that it requires collaboration of researchers that are familiar with the specific legal traditions of a large number of European countries. The data must be studied in their original languages and therefore requires an international research group to supervise the work of young researchers from several countries. The core group will interact with a network of experienced international scholars with knowledge in the field of law and authoritarian rule. Since the main risk of the project is the ability to recruit competent researchers, this network has an important role in the assistance to recruit scholars and in the supervision of their work. The project manager has established contacts with colleagues with high academic knowledge and experience in the study of law and legal institutions under authoritarian conditions in Europe. These are *Joxerramon Bengoetxea*, Universidad del País Vasco (UPV/EHU); *Oñati International Institute for the Sociology of Law*, *Mátyás Bencze*, Hungarian Academy of Sciences Centre for Social Sciences Institute for Legal Studies, *Cosmin Cercel*, University of Nottingham, *David Fraser*, University of Nottingham, *Jaan Ginter*, University of Tartu, *Ole Hammerslev*, University of Southern Denmark, *Tomasz Tadeusz Koncewicz*, University of Gdansk, *David Kosar*, Masaryk University, *Agnes Kovacs Sofie Papaefthymiou*, University of Lyon, *Herlinde Pauer Studer*, University of Vienna, *Anna Wallermann*, University of Gothenburg and *Jerzy Zajadlo*, University of Gdansk. Together they will form an international network, contribute in the supervision of the young researchers and in seminars and discussions. Efforts will be made to expand the network, in particular with academics from institutions in the CEECs.

In order to establish main priorities and topics an international seminar will be held in the first year of the project. The network of partners will be core participants in this seminar, which will also include other scholars within the field. In the last year of the project an international conference will be held, where findings of the project will be analysed and evaluated.

Key perspectives and compliance with strategic documents

The project complies with the research strategy of The Faculty of law in that it is international, multidisciplinary, and includes a PhD candidate and two young researchers in the project. It raises central issues of law, society and historical change, and rights, individuals, culture and society which are central themes in the faculty's strategy.

Dissemination and communication of results

The results of the research will be published in normal academic channels as thesis monographs published by international publishers and articles in international peer reviewed journals. It is also an ambition that the network of partners will contribute into an edited volume on the theme of the project.

The network will meet for a workshop on the topics of the project during the first year. This workshop will discuss more specifically the work to be done by participants, and lay the ground for the writing of studies that will result in a joint publication. A research seminar is planned for the third year. The members of the project will here be given the opportunity to discuss their work with a broader community of scholars before their work is developed further for international publication.

Graver's work in the field has been published in two monographs, one in English with an international publisher and one in Norwegian. In addition, he has published several articles, mainly in edited volumes, where two are forthcoming at international publishers. For his work under the present project he intends to lay emphasis on presenting the results at international conferences such as the International Association for the Philosophy of Law and Social Philosophy, The Law and Society Association and the American Political Science Association, and on publishing in international journals. He also intends to write a monograph as a conclusion of the project, drawing upon the results of the studies. The monograph will be written in English and published with an international publisher.

The researchers working full time on the project will be encouraged to publish their work in articles in international journals. In line with the policy of the Research Council and the University of Oslo we will make sure that the results are available through open access channels.

Graver and Scharff Smith have collaborated in developing a course at the Faculty of Law on Law, Ideology and Human Rights Violations. This course will give a venue for disseminating results to students, and for including students in the research under the project. The project will include student research assistants.

An important part of Hans Petter Graver's project on the Norwegian Courts has been dissemination of the results to the public through interviews, newspaper articles, public lectures etc. The project will develop a plan and have activities to reach out to the public in Norway and in the countries chosen to be part of the study. The project has established cooperation with the Consultative Council of European Judges and the Norwegian Courts Administration to enhance the relevance and benefits of the research for the judiciary. It will seek to establish similar cooperation with the courts administration or the Council for the Judiciary in the countries that are made subject to in-depth studies. In addition to providing important reference groups to the researcher, this cooperation will give an opportunity to Communicate results to judges and members of the legal community, and to have the results implemented in the training of national judges as relevant. The project will have annual meetings with the Consultative Council of European Judges and the Norwegian Courts Administration to discuss results and specific ways to reach out with these to members of the judiciary.

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