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Judicial resistance and the virtues

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Abstract

This article concerns the concept of judicial resistance understood in connection with the individual, on-bench decisions undertaken by judges in view of upholding the rule of law and in defiance of measures introduced by authoritarian, semi-authoritarian, "illiberal", or otherwise oppressive regimes. The point of focus is the normative dimension of acts of judicial resistance and the contention that they constitute the rightful obligation of judges. The article claims that judicial resistance interpreted as a right or duty is objectionable. As it will be argued, the key reason is the inadequacy of the rule-oriented models (deontic and consequentialist) on which the categories of right and duty rest to address the descriptively and evaluatively thick notion of judicial resistance. Instead, the article will argue for a virtue-centred model which explains judicial resistance through the character strengths of a virtuous judge. After expounding the conception of judicial virtue and the approach of a virtuous judge, the analysis will argue how perceiving the capacity to resist in terms of virtue allows for overcoming difficulties connected with the claim that a judge has a right or duty to resist. In the last part, the analysis will propose a list of three virtues that may be especially adequate for judicial resistance based on selected examples.

Key words

Judicial resistance; virtue jurisprudence; virtue ethics; judiciary; courts

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Resumen

Este artículo aborda el concepto de resistencia judicial entendido en relación con las decisiones individuales, en el estrado, adoptadas por los jueces con el fin de defender el Estado de Derecho y desafiar las medidas introducidas por regímenes autoritarios, semiautoritarios, "antiliberales" u opresores de otro tipo. El punto central es la dimensión normativa de los actos de resistencia judicial y la afirmación de que constituyen una obligación legítima de los jueces. El artículo afirma que es objetable que la resistencia judicial sea interpretada como un derecho o un deber. Como se argumentará, la razón clave es la inadecuación de los modelos orientados a las normas (deónticos y consecuencialistas) en los que descansan las categorías de derecho y deber para abordar la noción descriptiva y evaluativamente espesa de la resistencia judicial. En su lugar, el artículo defenderá un modelo centrado en la virtud que explique la resistencia judicial a través de los puntos fuertes del carácter de un juez virtuoso. Tras exponer la concepción de la virtud judicial y el enfoque de un juez virtuoso, el análisis argumentará cómo el hecho de percibir la capacidad de resistencia en términos de virtud permite superar las dificultades relacionadas con la afirmación de que un juez tiene el derecho o el deber de resistir. En la última parte, basándose en ejemplos seleccionados, el análisis propondrá una lista de tres virtudes que pueden ser especialmente adecuadas para la resistencia judicial.

Palabras clave

Resistencia judicial; jurisprudencia de la virtud; ética de la virtud; judicatura; tribunales

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1. Introduction: judicial resistance

"Judicial resistance" is the case of judges setting themselves "against justice" while performing their judicial duties, which usually means undertaking steps in defiance of illegitimate measures introduced by authoritarian, semi-authoritarian, "illiberal", or otherwise oppressive regimes (Osiel 1995, Graver 2015, 2018). The literal meaning of "resistance" is an instance of active opposition, especially in the military or political sense,[1] which connotes an organized movement, one that perhaps even involves armed fighting[2] against an occupying power or an illegitimate regime to undermine it wholly or at least partially, often by any necessary and available means. However, this understanding hardly fits the description of historical cases of "judicial resistance" in literature. The most prominent examples so far cover Nazi Germany, the several Nazi-occupied European jurisdictions during World War II, the communist regimes of Eastern Europe, military juntas of Southern America and apartheid South Africa (Osiel 1995, Dyzenhaus 2010, Graver 2015). Judges may also be found to resist manifestly immoral laws in otherwise democratic, even liberal, legal-political systems; for instance, this was the case of some U.S. judges before the American Civil War who used creative strategies in their jurisprudence to subvert slave laws operating through the Fugitive Slave Clause (Cover 1984, Baker 2012, Zajadło 2019). In the current context, judicial resistance has been discussed in reference to modern Central European democracies that found themselves affected by the "rule of law backsliding" (Graver 2022). In theoretical legal debates, the notion of judicial resistance usually pertains to taking up action (or non-action) in defence of the rule of law and judicial independence by individual judges within their juridical capacities (Graver 2018, Zajadło 2022). This understanding of the notion is also adopted in the following argument. However, it is necessary to note studies of the off-bench resistance are also illuminative (see Trochev and Ellett 2014). The on-bench resistance actions range from a critical interpretation of the law through an obstruction or stringent formalism in applying legal provisions, non-compliance, or refusal to apply immoral law to open criticism and resignation from the office. Many of these strategies are carried out in secret, or at least the judges are not always open about the real motives of their actions. Judicial resistance often amounts to either opposition or dissent and results from an individual decision of a judge rather than a collective action or an organized group movement (Graver 2015). However, the recent studies of the on-bench cases of judicial resistance rightly underline the critical role of social-collegial aspects in the strengthening of judges' resolve (Fleck 2022), including the role of judicial associations and self-help in upholding judicial independence (Coman and Puleo 2022). Also, the figure of a resisting judge may be analyzed not only as a singular person but also in the context of a conglomeration of judges, as an institution or as a collective actor, among others (Halliday 2023). However, the judicial on-bench resistance ultimately boils down to an individual act, a decision each judge makes autonomously and independently. It is a direct consequence of the institutional position of judges as public officials exercising power and bearing individual responsibility under the judicial oath. Judicial dissent is not merely a rhetorical act or a declaration of private view and will but manifests itself internally within the practice of exercising juridical power. The on-

[1] *Resistance*, 2002, p. 1187.

[2] See two meanings of "resistance" as "fighting" or "an organization that secretly fights against an enemy that controls their country" (*Resistance*, 2003, p. 1400).

trial judicial decisions taken up in consideration of the need to resist become a vital part of the practice of the law and shape the legal system. With such grave consequences, resistance inevitably leads dissenting individuals to face professional and moral dilemmas. These characteristics make judicial resistance attractive from the legal-theoretical point of view and in ethical and political terms.

Judicial resistance, as a notion, is ethically ambivalent. On the face of it, the idea of judges resisting the law seems to be at odds with the essence of performing the judicial function. Should judges not be the primary guardians and defenders of the law and the legal order? U.S. Supreme Court judge Felix Frankfurter (1955) bluntly made this point in an opening address at a conference commemorating the 200th birthday of Chief Justice John Marshall, where Frankfurter concludes his reflection on the judiciary function:

> If judges want to be preachers, they should dedicate themselves to the pulpit; if judges want to be primary shapers of policy, the legislature is their place. Self-willed judges are the least defensible offenders against the government under the law. But since the grounds of decisions and their general direction suffuse the public mind and the operations of government, judges cannot free themselves from the responsibility of the inevitable effect of their opinions in constricting or promoting the force of law throughout government. Upon no functionaries is there a greater duty to promote the law.

A careful reading of this statement by the ardent supporter of judicial restraint (as opposed to judicial activism) reveals a more profound thought about the judiciary's role. A mere executor of the letter of the law, *la bouche de la loi*, does not usually carry a hefty burden of responsibility; if judges were only pronouncing the law, the lawmaker would be the only one to blame for the faults of the unfair law. Indeed, this may be a view held by many judges in the continental tradition, where they have been historically seen as neutral bureaucrats (Bencze 2021, Zobec 2022). The judges must stand invariable with the law, whatever its contents, with unwavering faith in legal justice guaranteed by a dose of formalism. The law carries justice within, and judges are barred from reinventing it by employing, for instance, purposive interpretation. However, we occasionally blame judges if they cannot constrict the law when it leads to unjustness in particular cases or when they cannot deal appropriately with its faults owing to poor quality or malicious legislation. Satisfying these expectations requires abandoning the positivist orthodoxy and adopting a different theory of judging that distinguishes the letter of the law, the positive *lex,* from the more intangible *jus* – the law as a system with its aims, ideals, and unyielding fundamental principles, of the sort captured by Lon L. Fuller (1969) in his concept of the "inner morality of law". Now, the judge becomes a guardian – not merely of the positive law of the land as it stands but instead – of the idea of law and the promise that it carries with itself. The promise may be at least that of law becoming the efficient tool for tempering the arbitrary power of the state (see Miljojkovic 2022). Under such a view, judicial resistance becomes a meaningful concept instead of being reduced to a mere conceptual oxymoron. Now, an act of judicial resistance constitutes a way of fulfilling the rightful duty of the judge to oppose cases of statutory lawlessness and to defend the core of the law itself and its autonomy against the poison of corrupt regulations and instrumentalization for political purposes. But what does such a far-reaching statement mean, and what are its normative consequences? Can judicial resistance be qualified as a right or duty?

Some are ready to propose that there is a *right* or even a *duty* of a judge to resist illiberal measures that limit the rule of law standards, including judicial independence, even if framed within a positive law.[3] Below, I offer an argument that judicial resistance interpreted as a right or duty is objectionable. I am not arguing against the admissibility of judicial resistance. Instead, I put forward for consideration that the categories of right and duty, as they are understood both in moral and legal theory, are problematic in explaining judicial resistance. As it will be argued, the key reason for that is the inadequacy of the rule-oriented models (deontic and consequentialist) on which the categories of right and duty rest to address the morally thick notion of judicial resistance. The term essentially involves descriptive and evaluative elements, which are inseparable or, in other words, impossible to disentangle (Clarke 2018, 40–41). Although a particular historical study of judicial resistance was done and supplies typologies (Graver 2018), it is a hopeless effort to define natural properties that all (and only) the cases of judicial resistance share. This makes the task of prospective and effective regulation of judicial resistance in terms of superimposed rights or duties (and even the prohibition of it) futile. Instead, I argue below for a virtue-centred model (Solum 2003) of explaining judicial resistance through the character strengths of a virtuous judge. After presenting the adequate conception of virtue and the approach of a virtuous judge, the analysis proposes a list of virtues that may be especially adequate for judicial resistance based on selected examples.

2. The rule-oriented approaches to judicial resistance

The morality of duty focuses on working out "the lowest common denominator" of moral rules to enable an ordered societal life to attain specific goals. Living up to its demands means merely not violating necessary rules. Law, in its normativity, mimics the morality of duty because it provides "workable standards of judgement", contrary to the morality of aspiration because the law cannot "compel a man to live up to the excellences of which he is capable" (Fuller 1969, 3). The rule-oriented approach has at least two species: deontic and consequentialist. The former is based explicitly on the judgement of the actions per moral duties, expressed in the form of deontic rules ("do not steal from others"). The latter defines right action in terms of good consequences to which it leads. Since law demands generality and comparability of judgement, the consequentialist reasoning it employs for defining rights and duties takes the form of rule consequentialism, according to which moral decision-making should be made regarding rules justified by their consequences (Hooker 2016).

The deontic model for judicial resistance involves the typical problems of the logic of positive rulemaking. A recognized duty or a right to resist, even if only a moral one, would require some sort of a ready decision-making procedure to be applied by a judge based on general rules and abstract principles. Characteristically, a duty is a norm that applies equally to every agent in given circumstances and assumes that these circumstances are somehow standardized or repeatable. As a result, claiming the right or duty to resist entails answering questions about how to define the concept of judicial resistance in the abstract and how to conceive of a standard circumstance of a critical

[3] Conference "Judges under Stress. The Breaking Point of Judicial Institutions", University of Oslo, 17th – 18th November 2022.

situation in which it applies. It also requires conceptualizing the means and forms of resistance available to the judge and the relevant thresholds for their application. This approach puts great weight on the rightness of the decision to resist, which may be justified only given that already existing predefined rules are in place based on somehow abstract and general criteria. There is no need to argue extensively that this approach may be viewed as self-defeating. The idea of judicial resistance viewed from the positivist stance is subversive towards the concept of positive legal order. Positing and defining the right or duty for judges to resist would require the law to outwardly admit and foresee the possibility of anomie within the normative system to occur, involving a stark value inconsistency. It would undermine the very premises on which the judicial function rests. Alternatively, a detailed regulation and definition of a duty of judicial resistance would need to be limited or even casuistic and, therefore, unlikely to be effective.

Problems also arise during the reconstruction of a consequentialist model for judicial resistance. Let us assume that a judge should or may resist, given that there is a case when a general utility rule is at play. For instance, a judge's act of resistance is justified if the consequences of her decision not to apply a legal rule in force leave the legal system at large or the judiciary better off by maximizing the realization of a given core value, such as justice, the rule of law or independence of the courts. In other words, consequentialist thinking is here determined by the rule that expects the judge to bring the greatest good (like lawfulness) to the greatest number of people (Van Zyl 2019, 3). It allows the judge to calculate, or in fact, to balance between her loyalty to the positive legal rule (even an unfair or evil one) on the one hand and defending a constitutional or moral value through an act of resistance on the other hand by the measure of the total amount of social (or juridical) good or harm involved in consequence of her decision. However, there are problems with such a consequentialist account. One of the most important is that a judicial decision to resist may have a multiplicity of consequences, which are unforeseen and may collide with each other in cases where different agents are involved (Van Zyl 2019, 4–5). Defying a statute, deferring to formalism, or establishing a controversial precedent through activist interpretation of a law may hypothetically serve some distant social good at the cost of more immediate and harmful consequences for the parties directly involved. In general, what leads to a "greater good" type of effect may have devastating implications in a particular case (Van Zyl 2019, 5). Thus, consequentialist thinking has the propensity to maximize a selected universalized value or good, often abstractly defined, at the cost of other values. A resisting judge may find herself, perhaps unwillingly, involved in a harmful value-paternalism.

3. Virtue-centred model of judicial resistance

The instances of judicial resistance and their consequences escape regulation by general prospective rules. The attempt by the law itself to auto-regulate the breaking point of the rule of law by defining judicial resistance in terms of a right or duty of a judge would be futile or at least self-defeating. First, attacks undermining the rule of law are highly context-dependent, and the particular measures undertaken for this purpose by illiberal rulers cannot be considered in isolation (Graver 2022). Second, decreeing the right to resist a specified action or practice would amount to another formalized institutional safety fuse, which could be circumvented by a bad-faith regime or – could block

otherwise legitimate reforms. The alternative proposal to judicial resistance as a duty/right model put forward by an aretaic theory of law (or virtue jurisprudence) asks to focus on the judges themselves and the qualities of their character instead (Amaya 2013, 56–58). According to a virtue-based model, whether judicial resistance is possible, necessary, and justified can only be assessed in a particular situation by a virtuous judge. The righteousness and correctness of the following decision result not from the controllable and copiable procedure or rule application but from the good character of the judge. In other words, the claim is that the act of judicial resistance to unjust law or government measures undermining the rule of law is justified if a virtuous judge performs it. But what is a virtue, and who is a virtuous judge?

4. The cognitive-affective concept of virtue and the virtuous judge

A virtuous judge is one whose good character perfects her sensitivity to legal and moral requirements (Clarke 2018, 36). The idea of good judicial character is tantamount to the cognitive-affective (rather than simply behavioural) conception of virtue (Szutta 2015). It means that a virtuous person is not merely one habituated or trained to act in line with the virtues, simply doing what a virtue substantively requires (for instance, one who always tells the truth), although, this may be an essential stage in moral development (Szutta 2015). In contrast to what a simplified behavioural view would have us believe about virtue as sheer willpower, an entirely virtuous person is one of the excellent cognitive capacities in identifying and conceiving situations in the light of what is morally (and legally) relevant about the case under consideration. In other words, good character allows the virtuous person to discern what is called for and deliberate the case more excellently because virtues of moral character shape how things appear to the virtuous agent (Clarke 2018, 38–39). The virtuous judge has a particular perception of the facts grounded in a superior grasp of a set of moral and legal concepts and sees clearly, sometimes immediately, through a complex and multi-dimensional situation (Clarke 2018, 42). This capacity allows the virtuous judge to sort out and deliberate well the factors morally and legally salient in every case. Strengths of character do not guarantee infallibility; however, a virtuous person is expected to be excellent in comprehending, evaluating, and acting upon complex situations in an appropriate manner, which effectuates well-considered and righteous decisions. To be virtuous in the way described above means also constantly refining one's perceptional abilities (Van Domselaar 2017). A virtuous person is always aware of the room for improvement of their perception and skills; they never grow self-indulgent and complacent. The capacity for critical self-reflection seems to be particularly important in the cases of judicial resistance because, in their essence, these situations often involve stalemate choices and value conflicts that depart from the regular administration of justice.

The cognitive aspect is a feature of practical reason; however, in the case of judicial decision-making, an ability to reason theoretically within the realm of values and norms is also crucial. The reason for that is not necessarily the applicability of a norm (value) as a rule but also the perception of its validity and salience as a prominent aspect of the situation. Such a perspective of the virtuous judge still allows her to apply standard reasoning about the interpretation of law and considerations of justice but, at the same time, brings judicial decision-making closer to particularism rather than rule-oriented universalism (see Schauer 2013, 265–275). Although rules or principles are undoubtedly

essential aspects to consider in the concrete case of a judge facing a dissenting decision, they are not necessarily determinative. It is especially true for considerations resulting in acts of judicial resistance as they are made in the realm of practical reasoning. These cases' normative and factual circumstances are often non-regular (as opposed to regular decisions under the rule of law), making them variable from context to context and hardly predictable by general prospective rules. As a result, some of the resisting judges had to confront the once-in-a-lifetime type of decisions they were not expected to face usually during their careers. Virtue-oriented perspective allows us to come to terms with the inescapable particularism of such situations. It recognizes the judge's effort to find the right path based not on following any special procedures but on their good character. It is precisely the well-developed, heightened, and perfected perception and sensitivity of the judge to all elements of the case (Clarke 2018), her consideration of particulars and her ability to critically judge the law itself, as well as the eyesight, focused on judicial excellence that guarantees the correct result. Suppose a virtuous judge decides to resist the law in one of the many forms available. In that case, the resistance may be considered both permissible and necessary. All things considered – it is justified because "[o]ccasion by occasion, one knows what to do, if one does, not by applying universal principles but by being a certain kind of person" (McDowell 1979, 73 as cited in Clarke 2018, 36).

5. Virtue and emotions

The rule-oriented approaches to legal reasoning hardly take account of the role of emotions in decision-making and responding to morally salient situations. The stereotypical misapprehension that emotions are obstacles to judicial reason, fairness of which is secured by a cold-hearted type of analysis of law and fact, still inhibits much of legal theory. In contrast, advancements in the science of the mind prompt theories going as far (perhaps even too far) as claiming that laborious moral reasoning is only second to instant moral judgement based on affective intuition (Haidt 2001, Pizarro and Bloom 2003). Virtue-oriented approaches embrace the role of emotional response, which is indispensable or even constitutive for virtuous deliberation (Amaya and Del Mar 2020, 11). The courageous, the compassionate, or the just must all be capable of the proper emotional response towards the demands of the world to be regarded as virtuous people. Most importantly, however, the virtuous life involves affective disposition, which is closely connected to cognitive and motivational aspects of virtue (Szutta 2015). Emotions are indispensable for the correct appreciation of social facts, and it would be tough for a person to consider any social situation if they cannot empathize. This truth is particularly important in the case of judges, and it was argued that judicial empathy is one of the critical conditions for a judge's perceptual abilities (Stępień 2021). Other emotions are also discussed in the context of the judicial role; for instance, admiration plays a central role in the process of the acquisition of virtue based on looking up to moral and professional exemplars (Amaya 2020, 25). Feeling the right emotions allows a virtuous judge to communicate well with those who rely on her judgment and works as a motivation or a constraint on undertaking an action. Only a deep emotional involvement with cornerstone values such as justice or the concept of good gives the judge the strength to carry the burden of difficult decisions. The judge must identify herself with moral good to become fully autonomous and independent in her decisions. Suppose that sort of proper emotional response does not move them. In that case, judges

risk turning opportunistic or – borrowing the language of Alasdair MacIntyre (2007, 187–189) – becoming influenced by goods external to the practice of judging (pursuing justice), such as money, influence, power or prestige. Being a virtuous judge must involve the joy of aiming at the right thing, which in the case of legal practice may take the form of striving for justice or giving a just judgement to the very best of one's abilities. Judicial resistance is, therefore, legitimate only when – in the words of MacIntyre (2007) – it is motivated by a pursuit of goods internal to the practice of judging itself.

6. Virtues and the non-resisting judges

Another vital advantage of viewing judicial resistance from the perspective of the virtuous personality of a judge is the ability to take account of the non-resisting or compliant judicial attitudes. Interpreting judicial resistance as a duty or a right of the judge inevitably leads to the conclusion that most non-resisting judges fall short of their judicial responsibility. Perhaps they even deserve moral condemnation or should face legal and professional consequences, sometimes for a single decision. It is because rule-oriented normativity views norms as creating commandments of practical necessity; if resistance is a duty or a legal right, the judge is compelled to take a dissenting action as the relevant norm clearly imposes itself as a first-order or exclusionary reason to act to the detriment of other, including personal, considerations. Again, this does not fit well with the exceptionality of the situations of judicial resistance and seems not to do justice to the noble goals of such acts, for instance, the defence of the rule of law. Judicial resistance seems more coherent ethically if the judge *wants* to defend the rule of law, not when she is compelled to do so. The virtue approach responds to that need by conceiving the agents' motivation as responsiveness to values (Van Hooft 2006, 17). Non-resisting attitudes or low intensity, perhaps merely rhetorical objections to oppressive measures, do not necessarily and not in every case indicate a failure in judicial duty. Perhaps legal and moral condemnation and formal liability should be reserved for essentially vicious judges whose motivation is outwardly malicious. For instance, this could be the case of zealous functionaries of the oppressive regime, who excel in pleasing their principals up to the point of committing judicial crimes by passing death sentences in political matters (Strzembosz and Stanowska 2005, 15–41). However, the judges who do not resist are not necessarily vicious. They may be simply not virtuous, which makes them unable to perceive the situations that demand resistance in the right way. They may be the quite common type of a lawyer who is defenceless because of being formed in the spirit of unconditional law-abidance like most German jurists were *vis-à-vis* the Nazi ideology, according to Gustav Radbruch's (2006) well-known and controversial claim. Even if a judge can perceive the situation correctly and is ready to take resisting action but in the end yields to threats, this sole fact is not necessarily a reason to morally condemn the judge. Given the complexity of a particular situation, such an approach would signify a lack of imagination and empathy to put oneself in the place of the judge. Again, rule-oriented approaches have the major weakness of analyzing selected actions, often out of context. A virtuous judge may very well act prudently and proceed strategically so that they oppose evil law or oppressive government in an appropriate, possible, and effective way by means available at the right moment while standing down on other occasions.

7. Acts of judicial resistance as supererogatory actions

A similar act undertaken in similar circumstances by two people may be virtuous in one case but not in another due to personal reasons of character or situation. For example, challenging the authoritarian government by stepping down from the judicial office may be courageous or even heroic in the case of a low-level district court judge who lacks political or financial backing and has a family to support. The same act performed by an internationally endorsed, distinguished chief justice, whose term in office is about to end anyway, may be perceived as less courageous or not entirely virtuous at all. The duty-based approach to judicial resistance fails to take account of the differences between these situations not only because it is focused on rules rather than agents. The morality of duties and rights has problems considering what is known in ethics as supererogatory actions, which are good to perform but not required by duty (Van Hooft 2006, 46–47). The morality of duty and the normative model of law based on it operate according to the rule of thumb: the action is either right or wrong, legal or illegal. However, in complex settings, such as the case of judicial resistance, the evaluation of people and the context of their actions should be multi-dimensional. It must be recognized that in difficult or extreme circumstances like those giving rise to hard cases, people may be good in different ways and to different degrees. Even under a totalitarian regime, breaking the law may be justified for specific reasons and not for others, depending on the circumstances. The virtuous judgement is comfortable with supererogatory actions by acknowledging that virtuous judges may be admired (or shamed) for a range of strengths and weaknesses of their character and to different degrees of intensity – beyond the call of duty. Isn't it true that judges are a group that democratic societies would like to hold accountable to the more stringent ethical standards and tend to condemn them not only for wrongdoing but especially for their shortcomings? (Fuller 1969, 5–9) They may be praised for aiming at perfection and showing their virtuous character strengths rather than merely living up to their professional duties. Judicial resistance may be placed predominantly in the realm of supererogatory actions. Therefore, a morality of aspiration and the consideration of judicial virtue is the model that best explains it.

8. The virtues of judicial resistance

The abovementioned understanding of virtue as a particular sensitivity and evaluative outlook is the cornerstone of the virtuous personality of a judge. There are no rules or procedures in the book, which followed by the non-virtuous would enable them to emulate and reproduce the virtuous judge's ability to perceive and comprehend things properly as they are and deliberate well about them. There are, however, aspects of the virtuous character that one can struggle to develop to gain virtuous insight. For instance, an honest person of integrity simply *sees* a different world, perhaps more accurate or truthful than the one experienced by someone who succumbs to self-deception or falls for cognitive heuristics. The traits or aspects of good character enable judges to respond well to the different aspects and demands of a crisis calling for resistance. Below, I offer a short discussion of three such character strengths or specific virtues with some examples. It is by no means an exhaustive or closed list, and neither does it aim to exclude or disregard the importance of other commonly considered judicial virtues, such as courage (Martineau 2018, Sunnqvist 2022). The virtues discussed below are not

analytically deducted from any foundational assumptions. Still, instead, following the Aristotelian approach of supporting one's reasoning by reference to "reputable beliefs", including those "accepted by everyone, by the majority or by the wise" (Roche 2014, 36), they summarize views on aspects of judicial resistance from an agent-based perspective. Below, I discuss three selected strengths of character that could be considered especially relevant in the case of judicial resistance: judicial integrity, inquisitiveness and perseverance. They are all bound together by the abovementioned cognitive-affective conception of virtue constituting their common core, which is sometimes identified as prudence or, as Aristotle would have it – *phronesis* (Russell 2014, 213). According to Stagirite, "with the presence of the one quality, practical wisdom, will be given all the virtues" (Aristotle 2009, 117).

8.1. Judicial integrity

Integrity understood as an ability to be always honest and genuine to oneself, forms a foundational strength of a virtuous judicial character. Peterson and Seligman (2004, 250) propose that integrity involves the following three aspects: (1) a regular pattern of behaviour that is consistent with espoused values (practising what one preaches); (2) public justification of moral convictions, even if those convictions are not widespread and (3) treatment of others with care, as evident by helping those in need; sensitivity to the needs of others. Such a broad understanding of integrity as honesty and authenticity encompasses personality's cognitive, affective and behavioural aspects. Only a judge of deep integrity will be capable of clearly discerning biased or unfair law and evaluating its level of harmfulness. Personal and professional integrity and truthfulness determine the heightened perception of law as a unitary system that demands a certain level of congruence between its values (aims) and the actions of the state apparatus. This trait requires that the judge ought to pursue the truth, be consistent in their judgement and even promote it publicly through their juridical actions and outside of the courtroom amid pressure and threats from the authorities. However, it is essential to underline that integrity does not signify any single-value fanaticism. As an aspect of a prudent character, this disposition allows one to stay truthful or give justice to many values that may be in play. For instance, a virtuous person of integrity may author a landmark ruling deciding that the rule of law or fairness demands to disregard or consciously misapply unjust law, but to stay truthful to the judicial oath or lawfulness, chooses to resign from judicial post afterwards or express regret for having violated the law. In this way, the virtue-oriented approach can analyze and consider multiple ends of every normative decision and secure multiple values worth protecting (e.g. fairness and fidelity to law), even if they starkly collide under particular circumstances (Cimino 2018). Judicial integrity stands out as the most characteristic one for many of the Warsaw court district "steadfast" judges during the Martial Law in Poland (1981–1983) and later in the 1980s, as pictured in the analysis of the state-driven repressions against the judiciary of the time authored by Adam Strzembosz and Maria Stanowska (2005). Adam Strzembosz was a dissident judge in communist Poland and the first President of the independent Supreme Court (1990–1998) after the fall of the regime. Dozens of names are listed in this publication. Some crucial examples should be mentioned here, like Judge Katarzyna Majewska-Litwińska, the Head of the IV Criminal Division of the Regional Court in Warsaw, for her unwavering integrity and unshakable resistance to any kind of pressure

up to the point of her removal from the function or judges Grażyna Ruiz, Wojciech Welman and Barbara Sierpińska. They resisted illegal proceedings of a "verification commission" operating in 1985 in Warsaw court to break or remove defiant judges. All these judges stayed true to their convictions on judicial independence and paid the price of being purged from the judicial profession by the communist regime (Strzembosz and Stanowska 2005, 67–76).

8.2. Judicial inquisitiveness

Inquisitiveness is not as self-evident and a major character trait as – for instance – courage, and not one that would *prima facie* come to mind when thinking about the cases of judicial dissent. However, a meticulous judge and, at the same time, open-minded one may be one of the most inconvenient and formidable types of judges for any oppressive or quasi-authoritarian regime. The reason for that is that most attempts at the rule of law and the constitutional rights of citizens produce measures that are usually technically defective at any point in a procedure, interpretation, application, or justification (see Kazai 2021, 295–316; Bień-Kacała 2021, 276–294). Authoritarian regimes in history often sought legal shortcuts for their policies to be implemented by circumventing the system of legal safety valves, which usually takes too long to dismantle. Enabling the change of legal practice rather than undertaking complex changes of the law (including constitutional law) is one of the reasons why authoritarian rulers often seek to intimidate judges so that they succumb to compliance with the regime's policies. Against this background, meticulous deconstruction of arguments, a thorough search for evidence, patient and careful analysis of the law and developing a mindset of the judge as a chronicler documenting the regime's actions are potent weapons of judicial resistance that tend to infuriate autocrats. Professional demonstration of errors, violations and crimes in official documents like court proceedings may also threaten the regime accomplices. Therefore, it is a truism that autocratic rulers prefer judges who are not only compliant but also average in their professional and intellectual skills because their role is anything but being independent in thinking and open-minded. It is evident from the history of the Polish judiciary in the Stalinist period (1944–1956), during which many of the most faithful regime's political officers dressed in judicial robes did not even have an academic degree (Strzembosz and Stanowska 2005). Similarly, in other CEE countries of that period, such as Czechoslovakia, there was a practice of establishing communist party-run special law "schools" to train new regime judges (Čuros 2023).

Among the recent examples of judicial inquisitiveness is Judge Paweł Juszczyszyn, one of the first Polish judges suspended by the now-abolished Disciplinary Chamber of the Supreme Court of Poland (*Izba Dyscyplinarna Sądu Najwyższego*). Recently, Judge Juszczyszyn won his case against the Polish government before the European Court of Human Rights (*Juszczyszyn v Poland* 2022) declaring, among others, a violation of Article 6§1 ECHR (right to an independent and impartial tribunal established by law). The Disciplinary Chamber was also declared not satisfying the conditions set forth for a court of law by the Court of Justice of the European Union (Gajda-Roszczynialska and Markiewicz 2020, 1-33). Judge Juszczyszyn's alleged offence was apparently his inquisitiveness in one of the appellate cases when he sought to obtain from the Sejm (lower chamber of the Polish Parliament) documents that would enable him to verify the

questioned status of a newly nominated judge adjudicating the case in the first instance. The judge was appointed by the National Council of the Judiciary (NCJ) recommendation. The legality of the new composition of the body was contested from the constitutional point of view and subject to public doubt. Among other things, the endorsement lists of judges supporting the candidates for the NCJ, a part of the procedure of NCJ members' appointments, were kept confidential. Judge Juszczyszyn ordered the Chancellery of the Sejm to provide him, among other documents, with the endorsement lists of citizens and lists of judges supporting the candidates to the NCJ who were subsequently elected to the NCJ by the resolution of the Sejm of 6 March 2018. The judge justified his motion, among other arguments, by referring to the CJEU judgement in the joint cases *A.K. v Krajowa Rada Sądownictwa*, *C.P. v Sąd Najwyższy* and *D.O. v Sąd Najwyższy* (2019). After issuing his order, judge Juszczyszyn was immediately suspended. After the suspension order was called off for a brief period, the judge immediately picked up his investigation from where it was stopped and repeated his demand until he became further suspended. The suspension was, in the end, revoked on 23 May 2022.

8.3. Judicial persistence

Judicial persistence or perseverance can be seen as a specific form of courage. Already Plato, in his early dialogue *Laches,* puts forward the idea that courage may be seen as "a kind of endurance of the soul" or a certain steadfastness (Frede 2017). Also, for Immanuel Kant, courage is a regulative virtue of the ethical sphere – it operates as self-mastery and the strength of will that enables us to fulfil our duties of the moral law (O'Neill 1996, 84). The ability to endure and withstand or persist hardships or suffering for the sake of the noble aim is, in fact, a common element of the accounts of courage. In contrast to bravery, captured by the popular imagination as a one-time heroic act, perseverance can be more readily identified as a *permanent* disposition or an attitude. It seems that resisting judges, save extreme cases, need precisely this kind of strength of character because their everyday effort to defend the authority of law likely meets with varying degrees of discontent from different directions. Perseverance enables judges to overcome sustained pressure over long periods and stay on a path to deliver the right decision amid threats, public slandering, or persecution. The methods of coercion used by the communist authorities in Poland in the 1980s after Martial Law was introduced amounted to persuasion and threat during individual "talks" by regime's functionaries with defiant or "politically hesitant" judges, a "control" of the contents of the judgement immediately after it was issued, and the use of a wide range of legal tools, such as initiating disciplinary proceedings, including transfer to another courts or departments (Strzembosz and Stanowska 2005, 67–76). Most of these measures aimed at exerting constant pressure on the whole judiciary. Some judges could not sustain it, and many resigned, leaving the court for other legal professional roles. Similar measures are also used in some Central and Eastern European countries currently experiencing progressive decomposition of judicial independence (see for Romania Călin and Bodnar 2022; for Hungary, see Bencze 2023). Persistence is especially useful in prolonged periods of resistance as a disposition to withstand setbacks, stay focused and determined, and keep up a positive mindset and faith in the professed values. Not surprisingly, it is one of the most widely admired personal traits; for instance, in sports,

we praise athletes not only when they keep winning but also when, despite failure, they persist and overcome hardships. Attitudes of perseverance draw public attention and make the persistent person earn respect with time, especially if their cause is worthy or motivated by values worth defending. In the typical language use, being persistent is often tantamount to "showing character". Therefore, judges who persevere in their resistance against government actions such as intimidation through disciplinary proceedings or transfers to other departments are problematic for the rulers since their persistence defies the intimidating or "freezing" effect on which the government counts. A report issued by the Polish Judges Association Iustitia (Kościerzyński 2019) details the situation of all repressed judges in Poland, the majority of which do not accept the legality of measures applied against them. Many have also persevered using all available legal means to defend themselves, including proceedings before the Luxembourg and Strasbourg courts.

9. Summary

It will be evident to any attentive reader that the abovementioned examples of the strengths of the character of a virtuous judge are closely connected, and their separate analysis is mainly due to conceptual and definitional reasons. Perseverance essentially presupposes the integrity of the judicial character. Professionalism, represented by strengths of inquisitiveness and meticulousness, rests on the ability to persevere. Adding up to this list, other strengths like temperance or humility would also show their essential unity because a person of virtue, as opposed to a person of many weaknesses or vices, stays integral rather than hypocritical or opportunist in the face of the demands of their life or profession.

This article claimed that the virtue-oriented explanation gives more illuminating insight into the concept of judicial resistance. In contrast to flat, one-dimensional analysis in terms of a rule-driven right or duty, the virtue model gives its due to judicial resistance as a thick normative-factual concept. The cognitive-affective model of virtue shows how virtue, as a perception or sensitivity to all relevant, morally, and legally salient aspects of an extraordinary situation where the question of resistance arises, allows the judge to deal with its complex nature. The agent-centred proposal to see the justification of judicial resistance through the lenses of the moral and intellectual properties of judicial character enables the capture problems of non-generalizability of resistance situations, their dependence on context, the inherent incommensurability of different values to be accounted for in each resistance situation, the relation of the decisions of judicial resistance to emotions and their cognitive and motivational functions and – last but not least – the supererogatory nature of resistance decisions and the problem of the non-resisting judges, hardly explainable by rule-based approach. At the end of the day, judicial resistance is justified if exercised by a virtuous judge – a person of integrity, perseverance, and open-mindedness. Rather than wholly depend on the institutional aspects, the search for the breaking point of the judicial system under illiberal regimes should also consider the quality of character of individual judges and the example they set for others.

References

Amaya, A., 2013. The Role of Virtue in Legal Justification. *In:* A. Amaya and H.L. Ho, eds., *Law, Virtue and Justice*. Oxford/Portland: Hart, 51–66.

Amaya, A., 2020. Admiration, Exemplarity and Judicial Virtue. *In*: A. Amaya and M. del Mar, eds., *Virtue, Emotion and Imagination in Law and Legal Reasoning* [online]. Oxford: Hart, 25–45. Available at: https://doi.org/10.5040/9781509925162.ch-002

Amaya, A., and Del Mar, M., eds., 2020. *Virtue, Emotion and Imagination in Law and Legal Reasoning* [online]. Oxford: Hart. Available at: https://doi.org/10.5040/9781509925162

Aristotle, 2009. *The Nicomachean Ethics*. Trans.: D. Ross. Oxford/New York: Oxford University Press.

Baker, H.R., 2012. The Fugitive Slave Clause and the Antebellum Constitution. *Law and History Review* [online], 30(4), 1133–1174. Available at: https://doi.org/10.1017/S0738248012000697

Bencze M., 2022. *There is no 'breaking point' - a governmental strategy to control adjudication in Hungary.* Paper presented at the Conference "Judges under Stress. The Breaking Point of Judicial Institutions", University of Oslo, 17th – 18th November 2022.

Bencze, M., 2021. Judicial Populism and the Weberian Judge—The Strength of Judicial Resistance Against Governmental Influence in Hungary. *German Law Journal* [online], 22(7), 1282–1297. Available at: https://doi.org/10.1017/glj.2021.67

Bień-Kacała, A., 2021. Legislation in Illiberal Poland. *The Theory and Practice of Legislation*, 9, 276–294.

Călin, D., and Bodnar, A., 2022. *Fighting for European Values. The Story of Romanian Judges and Prosecutors.* Paper presented at the Conference "Judges under Stress. The Breaking Point of Judicial Institutions", University of Oslo, 17th – 18th November 2022.

Cimino, C., 2018. Virtue Jurisprudence. *In*: N.E. Snow, ed., *The Oxford Handbook of Virtue* [online]. Oxford University Press, 621–639. Available at: https://doi.org/10.1093/oxfordhb/9780199385195.013.11

Clarke, B., 2018. Virtue as Sensitivity. *In*: N.E. Snow, ed., *The Oxford Handbook of Virtue* [online]. Oxford University Press, 35–56. Available at: https://doi.org/10.1093/oxfordhb/9780199385195.013.12

Coman, R., and Puleo, L., 2022. *Rule of Law and Limits to Interference with Judicial Independence.* Paper presented at the Conference "Judges under Stress. The Breaking Point of Judicial Institutions", University of Oslo, 17th – 18th November 2022.

Cover, R., 1984. *Justice Accused. Antislavery and the Judicial Process*. New Haven/London: Yale University Press.

Čuros P., 2023. Who Stands in the Mirror and Who Stares Back – Tradition Of Populism In Slovakia. *In:* R. Mańko *et al.* eds., *Law, Populism, and the Political in*

Central and Eastern Europe [online]. London: Birkbeck Law Press. Available at: https://doi.org/10.4324/9781032624464-9

Dyzenhaus, D., 2010. *Hard Cases in Wicked Legal Systems: Pathologies of Legality*. 2nd ed. Oxford/New York: Oxford University Press.

Fleck Z., 2022. *Subordination, conformity and alignment - the birth of judicial autonomy in Hungary.* Paper presented at the Conference "Judges under Stress. The Breaking Point of Judicial Institutions", University of Oslo, 17th – 18th November 2022.

Frankfurter, F., 1955. John Marshall and the Judicial Function. *Harvard Law Review* [online], 69(2), 217–238. Available at: https://doi.org/10.2307/1337866

Frede, D., 2017. Plato's Ethics: An Overview. *In:* E.N. Zalta, ed., *The Stanford Encyclopedia of Philosophy* [online]. Available at: https://plato.stanford.edu/archives/win2017/entries/plato-ethics/

Fuller, L.L., 1969. *Morality of law*. Revised ed. New Haven/London: Yale University Press.

Gajda-Roszczynialska, K., and Markiewicz, K., 2020. Disciplinary Proceedings as an Instrument for Breaking the Rule of Law in Poland. *Hague Journal on the Rule of Law* [online], 12, 451–483. Available at: https://doi.org/10.1007/s40803-020-00146-y

Graver, H.P., 2015. *Judges Against Justice. On Judges When the Rule of Law is Under Attack* [online]. Berlin/Heidelberg: Springer. Available at: https://doi.org/10.1007/978-3-662-44293-7

Graver, H.P., 2018. Why Adolf Hitler Spared the Judges: Judicial Opposition Against the Nazi State. *German Law Journal* [online], 19(4), 845–878. Available at: https://doi.org/10.1017/S2071832200022896

Graver, H.P., 2022. *Judges under Stress – On Judges when the Rule of Law is under Attack.* Paper presented at the Conference "Judges under Stress. The Breaking Point of Judicial Institutions", University of Oslo, 17th – 18th November 2022.

Haidt, J., 2001. The emotional dog and its rational tail. A social intuitionist approach to moral judgement. *Psychological Review* [online], 108(4), 814–834. https://doi.org/10.1037//0033-295X.108.4.814

Halliday, T.C., 2023. *Judges Under Stress: Legal Complexes and a Sociology of Hope* [online]. 16 June. Available at: https://doi.org/10.2139/ssrn.4482114

Hooker, B., 2016. Rule Consequentialism. *In*: E.N. Zalta, ed., *The Stanford Encyclopedia of Philosophy* [online]. Available at: https://plato.stanford.edu/archives/win2016/entries/consequentialism-rule/

Kazai, V.Z., 2021. The misuse of the legislative process as part of the illiberal toolkit. The case of Hungary. *The Theory and Practice of Legislation* [online], 9(3). Available at: https://doi.org/10.1080/20508840.2021.1942366

Kościerzyński, J., ed., 2019. *Justice under pressure – repressions as a means of attempting to take control over the judiciary and the prosecution in Poland. Years 2015–2019* [online]. Report. Iustitia. Available at: https://www.iustitia.pl/images/pliki/raport2020/Raport_EN.pdf

MacIntyre, A., 2007. *After Virtue. A Study in Moral Theory*. University of Notre Dame Press.

Martineau, L., 2018. Does Judicial Courage Exist, And If So, Is It Necessary in Democracy? *Western Journal of Legal Studies* [online], 8(2), Art. 6. Available at: https://ojs.lib.uwo.ca/index.php/uwojls/article/view/5733/4827

McDowell, J., 1979. *Virtue and Reason.* The Monist, 62(3), 331–350. https://doi.org/10.5840/monist197962319

Miljojkovic, T., 2022. *Rule of Law and Limits to Interference with Judicial Independence.* Paper presented at the Conference "Judges under Stress. The Breaking Point of Judicial Institutions", University of Oslo, 17th – 18th November 2022.

O'Neill, O., 1996. Kant's Virtues. *In*: R. Crisp, ed., *How Should One Live? Essays on the Virtues* [online]. Oxford: Clarendon Press, 77–97. Available at: https://doi.org/10.1093/0198752342.003.0005

Osiel, M.J., 1995. Dialogue with Dictators: Judicial Resistance in Argentina and Brazil. *Law and Social Inquiry* [online], 20, 481–560. Available at: https://doi.org/10.1111/j.1747-4469.1995.tb01069.x

Peterson, C., and Seligman, M.E.P., 2004. *Character Strengths and Virtues: A Handbook and Classification*. New York: Oxford University Press.

Pizarro, D.A., and Bloom, P., 2003, The Intelligence of the Moral Intuitions: Comment on Haidt. *Psychological Review* [online], 110, 193–196. Available at: https://doi.org/10.1037//0033-295X.110.1.193

Radbruch, G., 2006. Statutory Lawlessness and Supra-Statutory Law (1946). Trans.: B. Litschewski-Paulson and S.L. Paulson. *Oxford Journal of Legal Studies* [online], 26(1), 1–11. Available at: https://doi.org/10.1093/ojls/gqi041

Resistance, 2002. *In*: M. Rundell, ed., *Macmillan English Dictionary for Advanced Learners of American English*. London: Macmillan.

Resistance, 2003. *In:* D. Summers, ed., *Longman Contemporary English Dictionary.* London: Pearson.

Roche, T.D., 2014. Happiness and the External Goods. *In*: R. Polansky, ed., *The Cambridge Companion to Aristotle's Nicomachean Ethics* [online]. Cambridge University Press, 34–63. Available at: https://doi.org/10.1017/CCO9781139022484.003

Russell, D.C., 2014. Phronesis and the Virtues. *In*: R. Polansky, ed. *The Cambridge Companion to Aristotle's Nicomachean Ethics* [online]. Cambridge University Press, 203–220. Available at: https://doi.org/10.1017/CCO9781139022484.010

Schauer, F., 2013. Must Virtue be Particular? *In:* A. Amaya and H.L. Ho, eds., *Law, Virtue and Justice*. Oxford/Portland: Hart, 265–276.

Solum, L., 2003.Virtue Jurisprudence. A Virtue-Centred Theory of Judging. *Metaphilosophy* [online], 34(1/2), 178–213. Available at: https://www.jstor.org/stable/24439232

Stępień, M., 2021. On the Relationship between Judicial Empathy and the Integrity of Judges. *Krytyka Prawa. Niezależne Studia nad Prawem* [online], 13(3), 99–113. Available at: https://doi.org/10.7206/kp.2080-1084.474

Strzembosz, A., and Stanowska M., 2005. *Sędziowie warszawscy w czasie próby 1981–1988*. Warsaw: Instytut Pamięci Narodowej.

Sunnqvist, M., 2022. *Must a judge, who may not be influenced by fear, be brave?*, Paper presented at the Conference "Judges under Stress. The Breaking Point of Judicial Institutions", University of Oslo, 17th – 18th November 2022.

Szutta, N., 2015. Edukacja moralna z perspektywy etyki cnót [Moral Education from the Perspective of Virtue Ethics]. *Diametros* [online], 46, 111–133. Available at: https://doi.org/10.13153/diam.46.2015.839

Trochev, A., and Ellett, R., 2014. Judges and Their Allies. Rethinking Judicial Autonomy Through the Prism of Off-Bench Resistance. *Journal of Law and Courts* [online], 2(1), 67–91. Available at: https://doi.org/10.1086/674528

Van Domselaar, I., 2017. The perceptive judge. *Jurisprudence. An International Journal of Legal and Political Thought* [online], 9(1), 71–87. Available at: https://doi.org/10.1080/20403313.2017.1352319

Van Hooft, S., 2006. *Understanding virtue ethics* [online]. Chesham: Acumen. Available at: https://doi.org/10.1017/UPO9781844653706

Van Zyl, L., 2019. *Virtue Ethics. A Contemporary Introduction*. New York: Routledge.

Zajadło, J., 2019. *Judges and Slaves. Sketches from the Philosophy of Law*. Gdańsk University Press.

Zajadło, J., 2022. Judicial Disobedience, Justice Lemuel Shaw and Commonwealth v Aves. *Archiwum Filozofii Prawa I Filozofii Społecznej. Journal of the Polish Section of IVR* [online], 32(3). Available at: https://doi.org/10.36280/AFPiFS.2022.3.103

Zobec, J., 2022. *How Long is the Long Shadow of the Authoritarian Past – the Case of Slovenian Judiciary*. Paper presented at the Conference "Judges under Stress. The Breaking Point of Judicial Institutions", University of Oslo, 17th – 18th November 2022.

Case law

Joint cases *A.K. v Krajowa Rada Sądownictwa, C.P. v Sąd Najwyższy* and *D.O. v Sąd Najwyższy* (2019), joint cases C-585/18, C-624/18, C-625/18 ECLI:EU:C:2019:982.

Juszczyszyn v Poland (2022), app. No. 35599/20, Judgement of 6 October 2022, European Court of Human Rights.