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Judicial resistance: missing part of judicial independence? The case of Poland and beyond

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Abstract

This article critically examines the concept of judicial resistance in Poland between 2015-2023, drawing insights from both Polish and international legal frameworks, jurisprudence, empirical research and literature. The study aims to define and differentiate judicial resistance from other judicial attitudes, interrogate its legal character, and explore whether there exists judges' right or duty towards such resistance. The article posits a definition for judicial resistance, emphasizing actions—both collective and individual, in-court and out-of-court—taken by judges to counter political endeavours that infringe upon judicial independence and violate the law. A pivotal criterion proposed is that the breach of judicial independence must be illegitimate as per national standards and validated as such. To support this, the article references assessments from both national and international bodies. The findings indicate a potential necessity for a broader normative conceptualization of judicial resistance as an element of judicial independence, suggesting it as a possible safeguard against future erosions of the rule of law.

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Key words

Judicial resistance; judicial independence; judicial activism; judicial disobedience; Polish rule of law crisis

Resumen

Este artículo examina críticamente el concepto de resistencia judicial en Polonia entre 2015 y 2023, a partir de los marcos jurídicos polacos e internacionales, la jurisprudencia, la investigación empírica y la literatura. El estudio pretende definir y diferenciar la resistencia judicial de otras actitudes judiciales, cuestionar su carácter jurídico y explorar si existe el derecho o el deber de los jueces hacia dicha resistencia. El artículo propone una definición de la resistencia judicial, haciendo hincapié en las acciones -tanto colectivas como individuales, judiciales y extrajudiciales- emprendidas por los jueces para contrarrestar los intentos políticos que atentan contra la independencia judicial y violan la ley. Un criterio fundamental propuesto es que la violación de la independencia judicial debe ser ilegítima según las normas nacionales y validada como tal. Para apoyar este criterio, el artículo hace referencia a evaluaciones de organismos nacionales e internacionales. Las conclusiones indican la posible necesidad de una conceptualización normativa más amplia de la resistencia judicial como elemento de la independencia judicial, sugiriéndola como posible salvaguardia contra futuras erosiones del Estado de derecho.

Palabras clave

Resistencia judicial; independencia judicial; activismo judicial; desobediencia judicial; crisis del Estado de derecho en Polonia

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1. Introduction

Poland, under the banner of "judicial reform", has seen a concerted political assault on its judiciary in 2015–2023, with consequences lasting beyond this time.[1] The assault has been extensively examined by scholars (Bojarski *et al.* 2019, Zoll and Wortham 2019, Sadurski 2019a, Mazur *et al.* 2021, Scheppele *et al.* 2021). However, an under-studied aspect is the significant response by a considerable number of Polish judges, termed in this article as "Judicial Resistance".

Such widespread judicial resistance, as observed in Poland 2015–2023, lacks dedicated academic scrutiny. Few global instances of "judicial resistance" exist, and those that do pale in comparison to the Polish situation (Halliday *et al.* 2007, Trochev and Ellett 2014, Graver 2015). While there's a paucity of dedicated literature on the subject, academic interest is growing (Cardinal 2021, forthcoming 2024, Matthes 2022, Coman and Puleo 2022, Puleo and Coman 2024). It remains to be seen if judicial resistance will carve a separate niche in academic disciplines. Presently, especially in the Polish context, related discussions centre around the "rule of law backsliding" and broader concerns of "democratic decline" (Pech and Scheppele 2017). Yet, insights from sociological, philosophical, historical, and political science research are imperative.

Drawing from Polish and international law and jurisprudence, and the actions of Polish judges between 2015–2023, I argue in this article for the recognition (both formal and informal) of the right and duty of judges to resist attempts at dismantling the rule of law and judicial independence.[2] My preliminary stance, examined further, is that under certain conditions, judges possess both a right and duty – legally, professionally, and morally – to counter unwarranted threats to their independence. A compromised judiciary loses its basic attribute.

My hypotheses are the following. H1: It is possible to conceptualize and operationalize the term *judicial resistance*. H2: Normative standards of the judiciary in rule of law-conforming states demand that judges employ such an approach in the event of an attack on the rule of law and judicial independence.

Testing hypothesis 1: In section two of the article, I discuss the descriptive concept of judicial resistance. In section three, I use the empirical (descriptive) Polish material to demonstrate the working of the concept through discussion of the Polish examples and typologies. Testing hypothesis 2: In section four, I move to the normative discussion on right and duty to resist and analyze the normative standards relevant for Poland. In section five, I make a normative point and conclude with observations about the right and duty to resist, both in Polish and wider context.

[1] During two terms of the governing coalition of United Right (*Zjednoczona Prawica*), led by Law and Justice (*Prawo i Sprawiedliwość*), from late 2015 till late 2023. On Oct. 15, 2023, after completion of the text, Poland held parliamentary elections. Three electoral committees representing democratic opposition parties secured a combined total of 248 seats in the Sejm (out of 460) and 66 seats in the Senate (out of 100). As a result, they gained the necessary majorities to create a government (appointed on Dec. 13, 2024) and amend the law, except for overriding a presidential veto. These parties consistently emphasized the restoration of the rule of law in their programs and campaigns. If they deliver on this commitment, the 2015-2023 period of judicial resistance can be deemed concluded after 8 years.

[2] In other articles I assess the methods and effects of judicial resistance, and wider context of legal complex (Bojarski 2021, 2024).

2. Judicial resistance – defining the concept

Judges' actions, decisions, attitudes and behaviours that include but also go beyond their typical professional daily routine are labelled as judicial: activism, autonomy, disobedience, dissent, mobilization, obstruction, opposition, rebellion, resistance. As Graver (2018) notes, distinguishing between "criticism of the regime, defiance, oppositional activity, and active resistance" is challenging. Graver discusses *judicial resistance*, *obstruction*, and *dissent*, but focuses mainly on the *judicial opposition* of individual judges and concludes that there is no evidence of any organized judicial resistance in the Nazi Germany.

My primary focus is on the situation of transitions from liberal democracy to authoritarian regimes where the rule of law is jeopardised. I see judges as defenders of judicial independence, especially within the tripartite powers framework. It is critical to discern between resistance against new threats to established judicial independence and other situations, such as advocating for long-sought judicial independence. For instance, described as a *revolt*, the actions of Egyptian judges were undertaken over decades by majority of the judicial corps associated in Judges Clubs, but were primarily limited to lobbying for law guaranteeing the tri-partition of power (Said A. 2009).

While prior work often centred on individual judges' actions within courts and on their legal and moral choices of following or rejecting positive law as part of judicial activism and ethics, my approach highlights broader facets of the resistance phenomenon.[3] This requires going beyond the basic scheme: judges as adjudicators administering justice. Distinguishing between *judicial activism* against immoral laws (Pereira *et al.* 2015) and *resistance* against direct political threats to the judiciary is vital, even though judicial resistance, the way I see it, may encompass what is called judicial activism.

The phenomenon and term *judicial resistance* appears in legal literature in different languages: "judicial resistance" in English (Trochev and Ellett 2014), "opór sędziów", "sędziowski ruch oporu" in Polish (Zajadło 2019, Bojarski 2020), "la résistance judiciaire" in French (Israël 2001, 2005a, 2005b). It does not have one definition and appears in various meanings and contexts, including a context of judges' resistance to the legal change (Tokson 2015), or a context related to "resistance" during World War 2 (Kershaw 2015).

For Kershaw (2015, ch. 8) *resistance* is an organized activity aiming to undermine the regime and as such is a specific kind of *opposition*. And *dissent* is rather understood as a passive resentment, voicing attitudes.

Zajadło (2016, 2017), analysing Polish scene, focuses on *judicial conscience* and *judicial disobedience* as a possible form of *civil disobedience* and points to its potential forms/methods: escape of judges into formalism; rejection of the law and adjudicating *contra legem*; resignation from the office; escaping into judicial activism and dynamic interpretation of law.

Said M. (2009) analysing Egyptian *judges' revolt* claims that it is an example of the longest *protest* in defence of judicial independence, both in the Islam and Western world.

[3] Trochev and Ellett (2014) also analyse it in a broader sense, but are focused on hybrid regimes and highest courts.

Graver (2018) acknowledges that despite different loyalties of the judge, his first loyalty, as an "officer of the court", is to the law. But he admits that an unjust law cannot constitute valid law and therefore *judicial resistance to oppressive laws* can be considered *a moral obligation* for the judge. Recently Graver (2020, 2023) speaks about *legal heroes/valiant judges* and analyses different theoretical approaches to the judges' attitudes, focusing especially on virtues and virtue ethics.

Finally, political science researchers Coman and Puleo (2022) argue that judicial associations embrace the classical goals of the parliamentary opposition, and that *resistance* – an act of circumvention, goes beyond *judicial opposition* – an act of speech. Both reinforce each other, but "when opposition fails to deliver outcomes, resistance allows actors to pursue their goals".

Various concepts, while relevant in their specific contexts, can also apply to judicial resistance as I interpret it. For example, both *judicial disobedience*, which challenges reality, and *judicial activism*, which seeks to change the law, can be seen as forms of *judicial resistance*, but they might also represent distinct ideas.

Below, I propose a definition/characteristic of judicial resistance inspired by the analyses of the actions of the Polish judiciary during the specified period. It's worth questioning whether these insights extend beyond Poland. It's crucial to note, however, that judicial resistance is deeply influenced by a nation's unique legal, political, and historical context. Hence, each instance of judicial resistance must be evaluated individually, as seemingly similar situations can be distinct.

Judicial resistance encompasses actions of judges – individual and collective, in and out of court – undertaken to oppose various political activities that are aimed at undermining judicial independence and are in violation of the law.

Which political measures can be viewed as undermining judicial independence, and how do they differ from legitimate reform efforts? Four elements are key: (1) Political measures are designed to limit judicial independence; (2) These measures might be of different kind, such as legislative acts, executive decisions, or propaganda campaigns; (3) Such measures are executed in violation of law and/or rule of law standards accepted by the state itself and enshrined in its national and international law; (4) These breaches should eventually be verified by independent bodies, both national and international.

In representative democracies, governments often reform the judiciary. While there are critics of the courts' role in liberal democracy both in politics and academia (Parau 2012, 2018), those in power can implement changes. So, to justify judicial resistance, those measures curbing judicial independence must be illegitimate.

Determining whether undertaken actions are reformative or attacks on the judiciary is challenging. Judges themselves may not be the sole arbiters. Concept of judicial resistance can also be misused in the opposition to necessary reforms. Judges can be conservative, averse to change and innovation, or oversensitive seeing an attack in legitimate proposals for sensible changes (Bobek 2008). The Consultative Council of European Judges, CCJE (2015, pt 41), warns against judges dismissing all changes by "labelling it an attack on judicial independence".

The evaluation of both governmental actions and judicial reactions requires nuance. While some government actions are regular policy decisions, others may warrant judicial resistance. Similarly, some judicial resistance activities may be deemed acceptable, while others as overstepping boundaries.

For judicial resistance to be justified in proposed view, the government's actions must be illegal by the standards of that state, and this breach should be confirmed. To make an objective evaluation, it's helpful to refer to assessments from various formal bodies and institutions (see next section).

How does the proposed idea of judicial resistance compare with other ideas, such as "self-defence of the institutions" and the "virtue-centered model".

Barber's (2013) *self-defence of the institutions* concept, expanded upon by Matczak (2020) during the Polish crisis, has garnered both support and criticism (VerfBlog 2017). This concept differentiates between a *shield* to protect institutions and a *sword* to fend off attacks. Matczak (2020) rightly asserts that self-defence isn't sufficient; a shift is needed from the prevalent *formalistic legal mindset* among Polish lawyers. This mindset restricts interpretative freedom and favors rigid formalism over broad constitutional principles. Matczak believes defending the rule of law necessitates a more adaptive methodology, viewing judges' roles in light of constitutional values. It seems that the crisis is both a challenge and an opportunity, with an increasing number of judges adapting successfully.

The concept of court self-defence in my opinion aligns with judicial resistance, emphasizing institutional defense against attacks. Reflecting on the Polish Constitutional Tribunal's (CT), Supreme Court's (SC), and National Council of the Judiciary's (NCJ) confrontations with politicians, a well-articulated self-defence concept, bolstered by clear legal guidelines, would have been beneficial. Without prior experience or a solidified approach to self-defence or resistance, these institutions were left to improvise, attracting criticism of political engagement. While they tried to defend and resist, success was limited. Based on the recent crisis, a less formalistic, contextually-guided concept of self-defence should be further refined (acknowledging also the risk of overreaching juristocracy).

Widłak (2024) proposes a *virtue-centered model* that focuses on a judge's character strengths rather than a strict rule-driven duty or right to resist. He emphasizes on-bench resistance, aligned with judicial activism. While not against judicial resistance, he believes that the notions of right and duty fall short in capturing its essence. Widłak suggests that resistance is justified when performed by a virtuous judge. This shifts the focus to defining virtue and identifying a virtuous judge. Widłak critiques the idea of *deontic model* which would mandate judges to follow a predetermined procedure grounded in general rules and principles. Widłak's approach ensures that judges not engaging in resistance aren't deemed unprofessional or morally condemned. Instead, for him judicial resistance is ethically sound when chosen willingly rather than being enforced. Non-resisting judges, in this perspective, aren't malevolent but might simply lack the virtuous quality, as resistance is seen as a worthy, but not obligatory, action.

While *the concept of a virtuous judge*, one who responds perfectly to legal and moral demands and perceives complex situations clearly, is commendable, its relationship

with the judicial resistance based on right/duty is pivotal. I see them as complementary rather than mutually exclusive.

Widłak's notion focuses narrowly on on-bench decisions, differing from my broader perspective. Essentially, I already expect judges to be virtuous, albeit under different terminologies like *impeccable character* (see below). The virtues Widłak identifies, like integrity, inquisitiveness and perseverance, align with this model. Indeed, a deontic approach necessitates defining judicial resistance and its triggering situations. However, my proposed concept accommodates this. If one treats Widłak's model as an alternative, it has its limitations. It only addresses individual on-bench decisions, which is just one facet of the broader resistance framework. Moreover, virtues are more general recommendations than specific rights/duties to resist under certain conditions. Extending the concept of judicial resistance towards a right/duty seems a logical evolution of current processes.

Given the courts' duty as defenders of the rule of law and fundamental rights, it's unconvincing to accept judicial defense of core legal values as optional. Judicial independence isn't a mere privilege for judges but serves a greater purpose. Consequently, citizens should expect more from judges than just voluntary adherence to virtues; they should anticipate a sincere commitment to judicial resistance.

3. Judicial resistance – testing the concept

Below, based on the Polish example, we'll dissect both the *unjustified attack* on the rule of law and judicial independence and the *legitimate resistance* against it.

3.1. Reform or attack

The actions of the Polish government since late 2015 were touted by its proponents as reforms, yet vast majority of commentators view them as unconstitutional attacks. Key manifestations of these attacks include: (1) Legislative changes hindering judges' independence, impacting the CT, SC, NCJ, and common courts, limiting judicial review and the right of a judge to apply European law; (2) Executive decisions, including impacting judiciary appointments and dismissals, delegation and transfer of judges between courts and divisions (Grabowska-Moroz and Szuleka 2018); (3) Actions demeaning the judiciary, such as hate campaigns targeting judges[4] and personal attacks against judges by politicians and cooperating media (Gałczyńska and Jałoszewski 2022); (4) Targeted actions against individual judges, in the form of disciplinary measures and harassment, meant to intimidate or suppress them, to punish those "rebellious" and to create the chilling effect (Kościerzyński 2020, ch. 4, 2024).

Moliterno and Čuroš (2021) differentiate attacks on judicial independence into *systemic*, *vulgar*, and *insidious*. In their view, Poland exhibits *systemic attacks* "for a structural change that enables the government to control or heavily influence future judicial outcomes;" Czechia and Slovakia demonstrate *vulgar attacks* – "direct interferences with particular judges in particular cases and issues"; while the USA faces *insidious attacks* "directed at the legitimacy of the judiciary", "undermining public trust in the judiciary."

[4] The defamatory campaign of the Polish National Foundation (PFN) entitled "Just Courts", www.pfn.org.pl, otherwise, despite spending several million PLN, later unavailable on the PFN website.

While authors accurately point to the most characteristic features of each type of attack, in Polish reality, in my opinion, one witnessed in fact the mixture of all three, mainly systemic and insidious, but also elements of the vulgar attack.

Čuroš (2023) when differentiating between judicial reform and attack on judicial independence, proposes to focus on interference with the judicial impartiality as a core component: "element allowing manipulation of the decision-making", "legal possibility to interfere with the decision-making or to threaten judges with sanctions if they do not comply with the desired interpretation of the law". Čuroš criticizes other possible criteria as not satisfactory. In his view, the legislator's intention is not enough as "sincerity in announced goals cannot give a satisfactory answer in distinguishing legitimate from illegitimate interference". Test of compliance with international recommendations of the CCJE, the European Commission for the Efficiency of Justice (CEPEJ), and the European Network of Councils for the Judiciary (ENCJ) is not enough, since the compliance "on paper" might be far from reality. Finally, differentiation based on the case law of the European Court for Human Rights (ECHR) is not satisfactory, as ECHR's interpretation of the *independent and impartial tribunal established by law* is relevant rather for individual cases and does not require member state to comply with "any theoretical constitutional concept of interactions of state power branches". According to Čuroš (2023), for the interference to be called attack on judicial independence it must "rob the judiciary of its essential role", decision making. Other elements "may weaken the judiciary's independent position, but they do not establish an attack if applied separately".

While reaching to adjudication as the essence of judicial independence is convincing, the approach mentioned seems to be too restrictive. It is also not so much legal as theoretical in nature, and focuses more on the *kernel of judicial independence*, as Čuroš names it, than on the legality of actions limiting judicial independence, understood wider that just impartiality in a particular case. Čuroš points out to developments in Poland that meet his criteria of an attack on judicial independence: the enactment of *muzzle law* (Pech *et al.* 2020, Venice Comm. 2020), the creation of the Disciplinary Chamber of the Supreme Court (see i.a. European Comm. 2019), and certain powers of the Minister of Justice vis-à-vis courts presidents and judges (Grabowska-Moroz and Szuleka 2018). But according to this approach, the occurrences that have taken place in Poland since late 2015, including the attack on and *de facto* takeover of the CT and the NCJ, or the unleashing of a campaign of hatred against judges, both as a group and as individuals, should not be qualified as an attack on the independence. It is difficult to agree with this approach. The consequences of these changes, such as the lack of true judicial review by the CT (Sadurski 2019b), the elimination of the NCJ's role as a defender of judicial independence (Bojarski 2019b, Rakowska-Trela 2019), the intimidation of judges through smear campaigns and the introduction of a chilling effect (Sanders and von Danwitz 2017, *Żurek v. Poland* 2022), are definitely important elements of an attack on judicial independence.

3.2. Confirmation of unjustified attack

Proponents of the Polish "reform", including parts of the judiciary and academia, portray its opponents as defenders of the *ancien regime*, the *cast* defending its influence and synastry (Czarnota 2016, 2017, Morawski 2017). With heated debates from both

sides, can one say it's merely a difference in opinion? Not really. In case of Poland, there are multiple sources that, in one way or another, confirm an *illegal attack on judicial independence*. These assessments vary based on the specific body, its authority, and the basis for their evaluation. Below, I highlight key exemplary sources critical of Poland's "judicial reform" that began in late 2015.

The verdicts of both, Polish and European courts are binding and therefore play a special role.

The CT before it was finally politically captured in 2017, delivered rulings on unconstitutionality of laws (Białogłowski *et al.* 2017): inter alia on election process of CT justices and delaying the oath of office for the elected, on shortening the tenure of the President and Vice President of the CT (CT 2015), on legitimacy of the legislative process and rules on CT's adjudication procedure, on the disciplinary actions against CT justices and their removal (CT 2016).

The SC and Supreme Administrative Court (SAC) formulated several preliminary questions that resulted in the critical rulings of the Court of Justice of the European Union (CJEU) (Gregorczyk-Abram and Wawrykiewicz 2019). Three SC's chambers, 59 judges acting jointly, passed an extraordinary resolution, confirming that all new judges of new SC's Disciplinary, and Extraordinary Review and Public Affairs Chambers, introduced as part of the judicial "reform", were appointed defectively (SC 2020). There are also number of rulings of common courts, like ones referring to reinstatement of judges unduly suspended by, the declared as illegal, SC Disciplinary Chamber (Jałoszewski 2021a).

The CJEU in cases brought by the European Commission (EC), as well as in preliminary reference rulings, confirmed incompatibility of the elements of "judicial reform" with the European law, including: incompatibility of judges' new retirement rules with judicial independence and irremovability of judges (C-192/18, C-619/18); incompatibility of the new disciplinary procedure (C-791/19); lack of independence of the SC Disciplinary Chamber (C-585/18, C-624/18 and C-625/18); holding acts from irregularly appointed "judge" as null and void (C-487/19) and more – the relevant jurisprudence of the CJEU is analysed on an ongoing basis (Pech and Kochenov 2021, Pech 2023, Filipek and Taborowski 2024).

The ECHR also delivered a number of rulings (and interim measures) confirming non-compliance of the Polish "reform" with the European Convention (CoE 1950). Relevant cases (including: *Advance-Pharma*, *Broda and Bojara*, *Dolińska-Ficek and Ozimek*, *Grzęda*, *Juszczyszyn*, *Reczkowicz*, *Tuleya*, *Wałęsa*, *Żurek*) are analysed by academia (Kocjan 2023, Krzyżanowska-Mierzewska 2023). As of July 2024, there were 195 applications pending before the ECHR "relating to various aspects of the reform of the judicial system in Poland under laws that entered into force in 2017 and 2018" (ECHR 2024).

Besides courts' rulings, amid international reactions to Poland's rule of law decline and attacks on judicial independence, there are formal procedures, such as actions by the EC (EU 2016a, 2017a, 2017b), and less formal ones like opinions of the Venice Commission (Venice Comm. 2016-2020) and statements from other international entities within the EU (2021a, 2021b), Council of Europe (Mijatović 2019), United Nations (UN 2018) and OSCE (2017, 2020).

There are additionally number of auxiliary sources underlying attack of Polish government on judicial independence, often important symbolically even if legally not significant, like for instance: the decisions of the ENCJ to suspend, in Sept. 2017, and expel, in Oct. 2020, Polish NCJ from the network for not safeguarding the independence of and not defending the judiciary or individual judges;[5] scholarly analyses; open letters of the Polish and international academia (Pech *et al.* 2019); voices of renown judges and lawyers (Wiwinius *et al.* 2020), organizations representing them (Sessa 2019, Matos 2020, AEAJ *et al.* 2022), and civil society organizations (Szuleka, Wolny and Kalisz 2019).[6] Though non-binding, these sources are significant as they may influence formal decisions and are cited as expert opinions.

Concluding, per the CJEU guidelines, one must assess the collective impact of government actions on judicial independence (C-216/18). As shown, the diverse evaluations from various entities are consistently critical of the Polish "judicial reform".

3.3. Resistance methods

Once an *unjustified attack* on the rule of law and judicial independence is determined, let me explore the *legitimate resistance methods*. Three main considerations arise: (1) Resistance can be categorized by actions of *individual* judges or judge *groups*, further subdivided into *in-court* and *out-of-court* activities; (2) My examination covers judges' roles in adjudicating and justice administration but goes beyond; (3) I consider both *direct* and *indirect* resistance linked to actions curtailing judicial independence.

The proposed categorization is, in my view, natural and relatively simple, and aims to spotlight various facets of judicial resistance, even though other category proposals also highlight various crucial aspects of judicial actions (Bojarski 2024). For instance, Trochev and Ellett (2014) discuss *on-bench* and *off-bench* resistance, while Matthes (2022) examines *collective action*. Łętowska (2022) highlights resistance modes like *individual judges' complaints*, *symbolic gestures*, and *institutional resistance* of the CT and SC. Still, more distinctions arise from various scholars, such as *private-public*, *organized-spontaneous*, *defensive-offensive* (Kershaw 2015, ch. 8); *open-covert/secret*, *legal-illegal* (Graver 2018); *pro-active-reactive* (Gyongyi, personal communication).[7]

In my view, distinguishing between individual and group resistance illuminates the avenues available to individual judges and the potential of collective action. The separation of in-court, primarily law-governed actions, from out-of-court actions underscores judges as both office holders and ordinary citizens.

One might consider what connects and separates all four types of resistance, what the intended (or achieved) purpose of using each method is, what resistance produces,

[5] "The ENCJ has found that that the KRS does not comply with this statutory rule anymore. The KRS does not safeguard the independence of the Judiciary, it does not to defend the Judiciary, or individual judges, in a manner consistent with its role as guarantor, in the face of any measures which threaten to compromise the core values of independence and autonomy", see at: www.encj.eu.

[6] See also several publications of the Helsinki Foundation for Human Rights in Poland, at: https://hfhr.pl/en/publications-7798,7792:152111385

[7] Conference presentation, in possession of the author: conference *Servants of the law and servants of higher ideals – on judicial resistance when the rule of law is endangered* was organized within the project 'Judges under Stress (JUS) – the Breaking Point of Judicial Institutions'. Gdynia, Poland, 2021.

whether it blocks change, affects the content of change, or delays it. The nuances in differentiating between categories of resistance, such as individual versus collective, or in-court versus out-of-court, can also be intricate given their intertwined nature. The subsequent breakdown however, limits itself to listing main resistance methods employed by Polish judges and shows their richness vis-a-vis other concepts of judicial behaviour mentioned above. Detailed analyses of particular types and methods go beyond the scope of this paper (more in Bojarski 2024).

In court individual resistance arises when a judge serves as an adjudicator in specific cases, fulfils administrative duties related to court operations, or acts in their capacity as a court employee governed by labor laws. The examples include:

- Adjudication in 'political cases' that involves judges who sway judgments away from political anticipations despite facing pressures; judges who risk political backlash or just highlight broader judicial concerns in their verdicts pointing out the attack on the judiciary;
- Adjudication in form of referring to the CJEU preliminary questions relevant to judicial crisis, by SC, SAC, and common courts judges (Pech and Kochenov 2021). Several of them ended with important judgements, but also resulted in repressions towards asking judges (Kościerzyński 2020, 2024);
- Adjudication that involves judges upholding EU law, even when faced with governmental opposition to the "European interpretation" and the associated consequences;
- Refusals, boycotts – for instance refusals within disciplinary procedures to appear on the summons of the disciplinary prosecutor and providing publicly reasons (Kościerzyński 2020, 2024); boycott of the elections to the NCJ (Jałoszewski 2022), after unconstitutional changes of the law on NCJ (Ustawa 2017);
- Impact litigation – conscious participation of so-called "kamikaze judges" in legally flawed procedures, like competition to the SC, in order to expose irregularities, and challenge the procedure and its result using different legal strategies (Kościerzyński 2020).[8]

Out of court individual resistance entails judges acting privately, either asserting their rights as both judge and citizen or merely as an anonymous citizen. Such activities encompass:

- Judges' law suits against "the state" asserting their individual right to a court: seeking protection of "personal rights" against Minister of Justice (*B.M. v. Minister of Justice* 2019); labour and civil lawsuits for the reinstatement of suspended judges and contesting the legality of the SC Disciplinary Chamber that suspended them (Jałoszewski 2021a); filing criminal notices against court presidents for failing to enforce reinstatement orders (Jałoszewski 2021b); filing complaints to the ECHR;

[8] Such judges are colloquially called 'kamikaze' because they believe their efforts to gain office are doomed to failure.

- Naming and shaming, stigmatization and ostracism represent how some judges respond to colleagues they believe are undermining justice or seeking opportunistic promotions. Tactics include labeling these individuals with terms like "neo-judge" or "neo-NCJ", publicly documenting and broadcasting their infractions (Kościerzyński 2020, ch. III), and displaying personal disapprovals, such as not offering greetings or handshakes (Bojarski 2019a);
- Media appearances, awareness raising, education – judges became much more visible than before 2015, commenting on the rule of law crisis and independence of courts and judges. They engaged in number of activities of informational, educational and awareness raising character: hundreds of meetings with judges all over the country; individual media and social media appearances; participation in manifestations and protests (more in Bojarski 2021).

In court group resistance involves judges operating as legally recognized collective entities, such as a court's general assembly (GA), its college, or a specific division of judges. Their collective actions comprise:

- Resolutions and calls to action of courts' GAs that critique legislative actions and the Minister of Justice's efforts undermining judicial independence (NCJ 2016, Iustitia 2018); GAs resolutions refusing to opine on judge candidates (Jałoszewski 2018);
- General assemblies' resolutions in specific cases to show support for certain judges, highlight political assaults on them, and urge appropriate responses from public entities (Kościerzyński 2020, 2024);
- Defence by the court college – issuing opinions and resolutions on individual judges, as court employees, often in opposition to decisions by politically-appointed court presidents (*Żurek v. Poland* 2022).

Out of court group resistance involves judicial entities like the NCJ,[9] judges' associations, and forums like Judges Cooperation Forum. Their activities comprise:

- Monitoring and reporting on legislation concerning the judiciary and judges' situations through studies, presentations, and informing national and international entities (Iustitia 2021);[10]
- Issuing public statements, open letters, and calls for boycotts on judiciary matters or specific cases. This can range from statements signed by a few, through resolutions of judicial associations' (Iustitia 2017), to positions backed by thousands of judges (Forum 2020, Iustitia 2022);[11]
- Engaging in international outreach by updating different institutions on Poland's judicial situation, meetings with politicians, diplomats, and monitoring teams visiting Poland, meetings in embassies and headquarters

[9] Since the composition of the National Council of the Judiciary is mixed (includes representatives of legislative and executive powers) it is not strictly a judicial body.
[10] See: section 'Resolutions, positions and communications' (in Polish), at: https://forumfws.eu/uchwaly/.
[11] First appeal signed by almost 4000, second by 1200 judges.

of international organizations and inviting foreigners to common protests (Reuters 2020, Matthes 2022);

- Offering solidarity to victimized judges through legal, psychological, and financial aid. This includes pro bono legal services,[12] psychological assistance (KOS 2019), and financial assistance in the event of salary cuts by disciplinary courts (Iustitia 2020b);
- Participating in demonstrations, public protests, and solidarity campaigns. Judges have been involved in numerous events over eight years, ranging from social media campaigns (Iustitia 2020a) to large-scale protests with citizens and CSOs (Lyman 2017);
- Educating the public about the judiciary's role, its challenges, and countering misinformation. Methods include promotional materials, artistic projects (Wójcik 2022), participation of judges in public forums like "legal cafes", music festivals, Tour the Constitution, Tedx talks, and trial simulations (Gwizdak 2016, Gregorczyk-Abram 2017).

3.4. Legality of resistance

As shown, resistance extends beyond traditional adjudication to include activities such as impact litigation, boycotts, protests or solidarity campaigns. It also includes indirect resistance, like informational and educational projects tied to defending judicial independence. These actions aim to communicate with the public, reinforce the judiciary's legitimacy, and build trust in judges. In a context where political powers undermine these values, actions that highlight or counter these assaults are deemed judicial resistance.

Assessing whether specific actions undertaken by judges fall under *legitimate resistance methods* triggers the question of their legality (or compatibility with professional standards). While an exhaustive analyses of various resistance methods employed by Polish judges is outside this article's purview, some aspects merit mention.

In-court resistance, both individual and collective, typically appear in forms defined by laws, setting the overall procedure. However, specific decisions, like posing particular preliminary questions or applying certain EU laws, are up to judges' discretion. In case of out-of-court resistance, individual actions usually involve judges acting as citizens, exercising their fundamental rights. Out-of-court group activities that inform or educate directly follow numerous established recommendations (see next section).

Actions not directly grounded in regulations, such as boycotting certain procedures, strategic litigation by "kamikaze" judges, or group refusals to provide opinions on candidates for judicial posts by courts' general assemblies, require a case-by-case assessment, considering both the law and judges' rationales. For instance, simply deeming a judge's refusal to appear before the disciplinary prosecutor as illegal isn't adequate. In certain cases, a judge may provide a detailed written justification for their refusal, citing court rulings that challenge the disciplinary system's legality and stating

[12] Over four years of its operation Justice Defence Committee KOS secured 91 pro bono lawyers who took part in 156 proceedings against judges, represented judges in 33 cases before the ECHR and in 4 cases before the CJEU, see at: https://komitetobronysprawiedliwosci.pl/category/en/.

a willingness to comply if those rulings are enforced (Kościerzyński 2020). Potentially contentious are also unconventional protest forms, like public demonstrations in judicial robes, seen as reactions to unique situations that, in the judges' view, necessitate unique measures.

Two additional elements are relevant to the legality of judicial resistance: changes to the law brought about by resistance and disciplinary proceedings and rulings.

Facing judicial resistance, Polish authorities frequently amended laws to curb judges' actions. Constantly shifting laws mirrored a "legal jujitsu". The legislature amended laws in reaction to judges' actions, introducing swift changes without broader consultation (Kopińska 2019). Examples include (Ustawa 2019): a) the removal of judges' duty to provide opinions on judicial candidates following their refusal to do so; b) rapid legal changes in response to challenges by proactive *kamikaze* judges to slow rule of law erosion; c) the "muzzle law" (Ustawa 2019, Art. 107), curbing judges' freedom of speech and creating a chilling effect (Pech *et al.* 2020); and d) minor changes to the Rulebook on professional ethics of judges, which, though seemingly neutral, aimed to restrict symbols tied to judicial resistance, such as wearing t-shirts with the notice "Constitution" (NCJ 2018).

The dilemma arises: should judges comply with such changes that directly aim to suppress or force specific behaviors? How judges respond is crucial; adhering entirely might embolden further restrictions. Alternatively, should they resist to changes by invoking constitutional and international norms and risking repression? Resistance to such changes (akin to judicial disobedience) parallels the concept of civil disobedience.

When the right of judges to use the method of resistance (seen as questionable or controversial) is called into question, the appropriate forum for assessment is, inter alia, disciplinary proceedings and peer review. The condition, however, is the existence of an independent system of disciplinary responsibility. In past Polish experience, there were no cases (and thus no judgments) concerning judicial resistance; however disciplinary courts' addressed some limits on judicial freedom of speech (Wróblewski 2017). In contrast, disciplinary proceedings during the 2015-2023 crisis, conducted by bodies directly appointed by the Minister of Justice, were strictly political in nature. The cases that reached a resolution were few, the prolonged proceedings in most of cases served rather to create a chilling effect (Kalisz and Szuleka 2022). Therefore, there is no substantive, worthwhile output in this regard.

Finally, legitimate judicial resistance should not be directed against specific individuals (subjects), but rather against the undermining of judicial independence and the rule of law (content). It aims to weaken an illegal attack by any body of political or politically derived power and preserve judicial independence.

4. Judicial resistance – right and/or obligation?

To evaluate judicial resistance, it's vital to determine if judges have the right to such actions or if they're overstepping into political debates.

Łętowska (2022) outlines for instance three strategies regarding judges' decisions: obeying unaccepted laws, expressing demonstrative subversion, or using interpretive activism to protect judicial independence.

The three basic positions proposed below reflect a different, normative view as I see it:

- Judges should stay within their bounds, remain loyal to the state, and communicate only through judgments. This traditional view emphasizes limits on judges' public engagement.
- Judges can resist when facing threats to judicial independence or broader challenges to rule of law and democracy. This perspective, growing over recent decades, stresses judges' freedom of speech and public participation, as seen in ECHR case law and soft law.
- Judges not only have the right but are obligated to resist when significant threats to judicial independence arise. Though less common, this view emphasizes the duty of judges in specific scenarios and is especially evident in soft law.

To address the "right and duty" of judicial resistance, various sources need examination. This analysis prioritizes legally binding sources: a/ legislation, b/ jurisprudence, and significant yet non-binding c/ international soft law. Additionally, less legally impactful but symbolically vital sources are considered: d/ ethical and professional norms, and e/ other sources offering more moral than legal guidance. In the subsequent paragraphs I delve into these sources, with overarching conclusions and answers presented in the following, fifth section.

4.1. Binding sources – national and international legislation and case law

Under Polish law, is there a right or duty for judges to counteract political threats to judicial independence? No explicit legal clauses address this directly. However, three categories of provisions might be relevant: 1/ Those relating to the rule of law, power separation, and judiciary's systemic independence; 2/ Those detailing the status, obligations, and boundaries of judges; 3/ Those outlining judges' rights and freedoms as citizens, including access to court and freedom of expression, assembly, and association.

According to the **Constitution** (1997), the supreme law that shall apply directly, "Poland shall be a democratic state ruled by law" and the "organs of public authority shall function on the basis of, and within the limits of, the law", including binding international law (Articles 7, 8.1, 2 and 9). The principle that Poland is a rule of law state was established during the 1989 transition (Ustawa 1989, Article 1(4)). By the 1997 Constitution, which broadened rights and freedoms, the CT had developed robust jurisprudence drawing from the rule of law concept, and highlighting numerous principles, including judicial independence (Oniszczuk 1996). Previously unitary ("socialist rule of law" before 1989), the current system emphasizes a balance between legislative, executive, and judicial branches highlighted by four adjectives: separation, balance, distinctiveness, and independence (Articles 10.1, 173).[13] Furthermore, justice is administered by various courts, ensuring everyone's right to an impartial and independent court (Articles 175.1, 45.1).

Constitutional provisions also ensure judges' status, rights and obligations. Judges are independent, guided only by the Constitution and laws, and irremovable (Articles 178.1,

[13] In English translation of the Constitution, both "separation" (podział) and "distinctiveness" (odrębność) are translated as "separation". See at: https://www.sejm.gov.pl/prawo/konst/angielski/kon1.htm.

180.1). Their independence is protected by the NCJ (Article 186.1). Courts operate within legal limits, and judges, like all citizens, owe loyalty to the Republic and the law (Articles 7, 82, 83). As citizens, judges possess right to court, freedom of expression, assembly, and association, to acquire and to disseminate information (Articles 45, 54.1, 58.1, 57). However, they can't join political parties or engage in activities compromising their independence (Article 178.3).

Statutorily, the **Law on common courts** outlines a *judge's oath* and duties (Ustawa 2001, Art. 66 § 1, 82 § 1-2). Judges swear to faithfully serve Poland, uphold and administer justice by the law, act diligently and impartially, maintain legally protected secrets, and uphold dignity and honesty. They must act in line with their oath both on and off duty, maintaining the dignity and trustworthiness of their position. The legal significance of the oath isn't merely symbolic; it holds material importance, as emphasized by both jurisprudence and scholarly debate (see below).

To become a judge under the law on common courts, one must possess an *impeccable character* (Art. 61 § 1.2). This evaluative criterion, deemed archaic and undefined, according to Wagner (2019) encompasses, both historically and currently, meanings such as moral integrity, uprightness, self-reflection, honesty, balance, courage, independence, and a strong sense of justice.

Ratified international agreements form part of Poland's domestic law and are applied directly. For key agreements ratified with prior legislative consent, they take precedence over conflicting statutes. If an agreement establishing an international organization so provides, its laws apply directly and take precedence in case of conflicts, as seen with EU law (Constitution 1997, Articles 87.1, 91.1-3).

The idea of judicial resistance and its associated rights/obligations hasn't been commonly addressed in international regulations or debates. However, one can interpret provisions of international acts innovatively, both academically and in court jurisprudence. Key EU law provisions pertinent to evaluating Polish judicial "reforms" include those from the TEU, TFEU, and CFREU. The **TEU** (EU 2016b) emphasizes values like human dignity, democracy, and rule of law, requiring Member States to provide effective legal remedies under Union law (Articles 2, 19.1). The **CFREU** (EU 2012a) grants the right to a fair hearing by an independent tribunal (Article 47), while the **TFEU** (EU 2012b) allows national courts to seek CJEU preliminary rulings (Article 267).

When it comes to the **European Convention on Human Rights** (CoE 1950) the most relevant provisions for judicial resistance are Article 6 – right to an independent and impartial tribunal, as well as Articles 9-10-11 – freedom of thought, expression, assembly and association.

The above regulations gain specificity in the context of judicial resistance through case law, particularly stemming from Polish cases.

The **CJEU** has an expanding body of rulings on judicial independence, notably starting with the Portuguese judges' case (C-64/16), seen by many as more pertinent to Poland and viewed as the Court urging the EU Commission and Polish judges to address Poland's rule of law crisis (Bonelli and Claes 2018, Barcik 2018). Subsequent cases, though not directly about judicial resistance (and not mentioning *right* or *duty* of the judge to undertake resistance measures), address national judiciary systems and judicial

independence. These rulings (some were already mentoned above), which found several Polish judicial reforms incompatible with European law, indirectly support judges protesting these changes, potentially legitimizing judicial resistance. Some cases were initiated by resisting judges, exemplifying strategic litigation as a resistance method. Others, pursued by the EC, were influenced by advocacy of Polish circles, including judges (Taborowski 2019, Scheppele *et al.* 2021, Barcz *et al.* 2021).

The **ECHR's** jurisprudence has expanded in recent years regarding both judicial independence and judges' rights as citizens (Dijkstra 2017, Ploszka 2020). The Hungarian rule of law crisis was addressed in *Baka v. Hungary* (2016) where the Court recognized judges' need for impartiality, emphasized their role in democratic matters like judicial independence, but also underlined *right* of a judge and (due to position of *Baka* as the SC's president) a *duty* of a judge to express his opinions regarding the judicial reform (Krzyżanowska-Mierzewska 2016). Polish cases ensued, with complaints from notable figures in judicial resistance like Juszczyszyn, Morawiec, Tuleya, Żurek (ECHR 2022c, 2022d). For instance in *Żurek v. Poland* (2022), judge spokesperson, the ECHR stated he had a *right and duty* to critically assess the reform (§ 222). In *Tuleya v. Poland* (2023) the ECHR reaffirmed the duty of judges to speak out in defence of the rule of law and judicial independence when these fundamental values are threatened, reviewing broadly the standards and soft law (Łętowska 2023). In *Juszczyszyn v. Poland* (2022), the Court found Poland in breach of Articles 6.1, 8.1, 18, including by improper suspension of Juszczyszyn for scrutinizing judicial appointments, and actions of an irregularly established SC's Disciplinary Chamber. The ECHR has also issued interim measures advising the Polish Government against actions that could strip judges of their immunity, particularly in seemingly politically-driven disciplinary proceedings (ECHR 2022a, 2022b). The mentioned rulings, and many more, reflect the ECHR's commitment to ensuring justice for Polish judges, including by not punishing them for activities that at least in part constitute the judicial resistance (Spano 2021).

4.2. Soft law, professional standards and moral arguments

Soft law sources, though not directly legally binding, serve as vital references for courts and other institutions tackling rule of law issues (Barcik 2017, Kosar and Vincze 2022). They also guide individual judges on navigating complex situations. Key soft law sources address judges' roles in society and their independence, particularly their involvement in public debates about the judiciary (UN 1985, 2002, 2007, ICJ 1999, CoE 2010).

Notable documents come from European judicial organizations like the European Network of Councils for the Judiciary (ENCJ) and the Consultative Council of European Judges to the Council of Europe (CCJE). While other documents exist, none are as directly tied to judicial resistance as these.

The ENCJ's Judicial ethics report (ENCJ 2010)[14] stresses that judges should maintain conduct fostering trust in judiciary impartiality. While emphasizing values like independence and integrity, the report acknowledges a judge's *right to freedom of opinion* but advises caution in expression. It also underlines that the *obligation of reserve* should

[14] Words in *italics* underlined by the author. Page number in brackets.

not be treated as an *excuse for inactivity* since the judge is "*ideally placed to explain* the legal rules and their application" and "has an *educational role* to play in support of the law" (p. 6).

Importantly, the ENCJ suggests that in times *when democracy and fundamental freedoms are in peril*, a judge's usual restraint might be overridden by *a duty to speak out* (p. 6). This could be interpreted as an argument supporting Polish judges' right, or even duty, to voice concerns if they see threats to democracy and the rule of law.

The ENCJ clarifies that a judge's oath, or *promise of loyalty*, is primarily to the rule of law, encompassing the Constitution, democratic institutions, fundamental rights, and judicial organization (p. 12). However, when there's a clash between loyalty to these foundational values and state institutions or laws, the ENCJ suggests that loyalty to core values takes precedence. This is especially true when *democracy and freedoms are at risk*. The ENCJ also acknowledges the need for *judicial courage* amidst pressures from politics, society, media, and vested interests (p. 13). Notably, the ENCJ's emphasis on a judge's duty to speak out predates the recent rule of law crisis.

The CCJE subsequent opinions referred more and more frequently and strongly to the category of the judge's *right* and *duty* to take action. **Opinion No 3** (CCJE 2002)[15] traditionally advocates for judges to abstain from political activities to maintain impartiality (pt 33). However, they should actively participate in discussions about *national judicial policy* and contribute to relevant legislation (pt 34).

Recent years brought new approach. **Opinion No 18** (CCJE 2015)[16] recognizing the evolving power dynamics involving courts, emphasizes the need for judiciary independence, especially from undue influence by other state powers (pt 10-11). Opinion addresses potential threats to this independence, condemning critiques that weaken judicial authority or incite violence against judges (pt 35). Referring to *Baka v. Hungary*,[17] the CCJE assesses as not acceptable that *reasonable critical comments from the judiciary* should be answered by *removals from judicial office or other reprisals* (pt 42). Balancing its position, the CCJE recognises that the judiciary *must never encourage disobedience and disrespect* towards the executive and the legislature (pt 40, 42). But if threatened, or attacked, the judiciary *must defend its position fearlessly* (p. 41). The judicial power should fulfil both a *"normative"* and *"educative" role*, "providing citizens with relevant guidance, information and assurance as to the law and its practical application" (pt 22-23).

Opinion No 25 (CCJE 2022)[18] centers on a judge's legal and ethical *duty to speak out* for rule of law and democracy (pt 4). Opinion addresses situations where judges express themselves individually or on behalf of judicial entities (pt 60). It encompasses expressions at domestic, European, and international levels, both in and out of court, covering judiciary concerns and controversial public interest topics (pt 4, 6, 7). Authors of the Opinion took into account developments in Hungary and Poland referring to ECHR judgments *Baka* (2016)[19] and *Żurek* (2022). The Opinion recalls recommendations

[15] Words in *italics* underlined by the author. Number of relevant points in brackets.
[16] Words in *italics* underlined by the author. Number of relevant points in brackets.
[17] The first *Baka v. Hungary* judgment of 27 May 2015, available at the time.
[18] Words in *italics* underlined by the author. Number of relevant points and recommendations in brackets.
[19] The second *Baka v. Hungary* judgement of 23 June 2016 (Grand Chamber).

made earlier but uses language that clearly indicates practical, including Polish, inspiration.

Despite previous opinions, that individual judges should be reluctant to appear as a spokesperson in the media (ENCJ 2012), the CCJE takes the view that "individual judges with appropriate communication skills may also *explain the functioning and values of the judiciary*" on educational fora, in the media and social media, "as an excellent tool for outreach and *public education*" (pt 65). It is individual judge's "*ethical duty* to explain to the public the justice system, the functioning of the judiciary and its values" (rec. 3).

Judges' right to speak out is formulated broadly and besides the rule of law, human rights, separation of powers, administration of justice and judicial independence, it comprises also freedom to comment "on politically controversial topics, including legislative proposals or governmental policy" if they affect the operation of the courts (pt 48). The opinion includes stronger formulations than previous documents:

> In situations where democracy, the separation of powers or the rule of law are under threat, judges *must be resilient* and *have a duty* to speak out *in defence* of *judicial independence*, the *constitutional order* and the *restoration of democracy*, both at national and international level. This includes views and opinions on issues that are politically sensitive and extends to both internal and external independence of individual judges and the judiciary in general (rec. 2).

The Opinion No 25 details the previously (2015) formulated obligation of *fearless defence* by adding that "this *duty* particularly arises, when democracy is in a malfunctioning state, with its fundamental values disintegrating, and *judicial independence is under attack*" (pt 60). Also, following Polish developments and ECHR's ruling in *Żurek v. Poland* (2022), the CCJE warns relevant authorities about penalising judges, creating a *chilling effect* for other judges' exercise of freedom of expression, and underlines that judges' opinions "expressed in line with the recommendations of this Opinion should not be subject to disciplinary measures" (pt 35).

Finally, **Opinion No. 23** (CCJE 2020) is the first one devoted to judges' associations, arguably inspired by the key role played by these associations in the contemporary crisis. However, it does not specifically reference the challenges in particular countries or provides any new strong wording. The document simply underscores judges' associations' capacity to counter unwarranted criticisms (pt 17) and inform the public about the judiciary's workings (pt 44).

Professional standards for judges stem from the Rulebook on professional ethics of judges and disciplinary rulings (NCJ 2003). These standards intertwine with soft law and the statutory judicial oath, both shaping professional norms. The Polish SC views the judicial oath as more than symbolic, marking boundaries for professional conduct. The SC highlights the oath's connection to judicial ethics principles, emphasizing fidelity and dedication in service – the oath "is not only emblematic, symbolic, but also material", setting the boundaries "the crossing of which means committing a professional misconduct" and causes disciplinary responsibility (SC 2015a). In the oath, the judicial service is described as *faithful*, which SC interprets as, among other things, *dedication* and *full devotion*, and therefore *extraordinary conscientiousness*, *diligence* and *dutifulness.* And the Rulebook clarifies these requirements for a judge (SC 2015a, 2015b).

As Maroń (2011) puts it, the oath expresses *some kind of a sacred trust* that judges should keep inviolable regardless of circumstances, *a compass* pointing at the best path of judicial career. Maroń divides the oath's guidelines in two groups: relations between a judge and the Polish state (expressing patriotism toward homeland) and rules referring to principles of judicial deontology (*ibid*., p. 291).

The Rulebook on professional ethics of judges (NCJ 2003) lacks specific regulations for judicial resistance. It highlights general requirements for judges, like those found in soft law or the statutory obligations. According to these principles, judges should uphold integrity, dignity, honour, and duty, avoiding actions that discredit their position or compromise impartiality. They should also uphold *the systemic position of judicial power*.

As mentioned above, when it comes to the **disciplinary courts' jurisprudence** as a source of normative guidelines, there are not many final rulings that could be analysed (Kalisz and Szuleka 2022). Additionally, controversy over the legality of disciplinary organs (NCJ in its disciplinary competences, SC Disciplinary Chamber and disciplinary prosecutors appointed by the MoJ) limits the relevance of this body of work. Also, vast majority of disciplinary procedures, even if initiated some years before, were still pending as of beginning of 2024. However, at least potentially, it is in the context of the debate on professional standards before disciplinary bodies that an analysis of certain behaviours in the category of judicial resistance could be deepened. This subject, therefore, requires additional research.

Also other, **non-normative sources/references** directly or indirectly pertain to judicial resistance, impacting judges' expectations and attitudes, and influencing different bodies, like courts adjudicating judicial resistance cases, or bodies working on soft law or ethical standards. Examples include:

- Numerous documents, as outlined in Section three, highlighted the Polish government's illegitimate attacks on rule of law and judicial independence. These indirectly support the right to resist;
- Documents that make direct reference to the role of judges in times of crisis. The International Association of Judges, for example, released the statement quoted by the ECHR (*Tuleya v. Poland* 2023)[20] supporting judges in general:

> The IAJ confirms its support to all judges in Poland, the European Union and elsewhere who fearlessly uphold and apply the principles of law including where applicable European union law, human rights law and the principles of judicial independence reflected in other international rulings and authoritative statements. Indeed, it is their *duty* to do so; and to do so *fearlessly* and *without favour*. The confidence of the public is necessary undermined and eroded when that is not the case (§135);

- There was significant moral support for judicial resistance from various Polish social groups, spanning beyond legal circles and counted in hundreds. These groups not only supported judges but also hoped they persist in their roles;
- Civil Society Organizations (CSOs) actively supported judges, with some expressing expectations of them (e.g. 12 CSOs who addressed the

[20] Words in italics underlined by the author.

Extraordinary Congress of Polish Judges, emphasizing judicial independence's importance to citizens, vowing to defend judges, and expecting judges to protect constitutional rights, see Borkowski 2016);

- Authority figures respected by judges, such as esteemed lawyers, judges, and academics, backed them. This includes group efforts, like open letters, and individual comments in media. For example CJEU's Polish judge Marek Safjan when commenting on the letter of thousand judges, stressed that "the judge has the *right* to write to the OSCE. He has a *moral obligation* to criticize bad legislation" (Wysocka-Schnepf 2020);
- The societal support judges received, demonstrated through public displays like demonstrations, pickets, and other forms of protests. An example is the months-long citizens' defense of the Supreme Court and its president, Professor M. Gersdorf, starting in July 2017 (BIQdata 2017).

Moral arguments, though often ad hoc, hold symbolic value. They bolster the resolve of resisting judges and enlighten observers, helping them form informed opinions.

To sum up, do the sources identified for Polish judges' right or duty to resist offer a clear perspective? Does a legal analysis suffice? Should international initiatives be considered to assist judges globally during threats to their independence? Can Polish and current international insights, some influenced by Poland, be useful? These questions lead the upcoming section.

5. Judicial resistance – towards a common legal standard?

Recent years have seen developments in the rights and duties of judges amidst threats to the rule of law and judicial independence. Traditional norms in national laws and treaties are now accompanied by newer rulings and soft law. Together, these help address whether Polish judges had the right or duty to resist between 2015-2023.

This inquiry can be broad, questioning the general right to resist, or specific, examining individual methods of resistance and particular actions. While the legal sources analyzed above advocate defending the rule of law and judicial independence, detailed assessments should be case-specific (this is beyond the scope of this article). In contentious cases, it might also fall to either domestic (including disciplinary) or international courts to decide.

Generally, one might draw from legal values, principles, and the societal role of judges. From these constitutional, statutory, and treaty provisions springs the potential right or even obligation to resist. As judges must uphold the law, they arguably have the right to resist threats to foundational legal principles like the rule of law and judicial independence. Succumbing to external pressures could negate their very purpose. My assessment, grounded in the prior section, supports a judge's right to resist legally, professionally, and morally. Yet, whether it's a duty is a more intricate issue, elaborated upon below.

TABLE 1

	RIGHT	**OBLIGATION**
LEGAL	YES	NO/ partly YES
PROFESSIONAL	YES	YES
MORAL	YES	YES/NO

Table 1. Right/Obligation of Polish judges to undertake Judicial Resistance measures (2015-2023).

Legally, no direct provisions grant a judge's right to resist. However, from existing legislation and case law, one could infer an indirect right stemming from the law, subject to interpretation. While some judges embrace this potential "right to resistance," others don't.

While a *right* grants discretion to act, an *obligation* mandates action, with potential sanctions for non-compliance. There isn't a clear legal obligation for judges to resist. One could argue for a judge's accountability concerning misappropriation of the principle of judicial independence, but not necessarily for non-participation in protests. Still, the legal landscape is evolving. The recent opinion (CCJE 2022, pt 4) introduces the notion of a judge's *legal and ethical duty* to defend the rule of law and democracy. The absence of associated sanctions, however, clouds its weight. Yet, if judicial resistance counters illegal state actions against the judiciary, can one argue there isn't a legal duty for judges to reject illicit government directives? This could, in some way, imply a duty to resist.

Professionally, based on the examined sources, judges seem to have both the right and duty to resist. These sources contain clear stipulations: judges *must be resilient and have a duty to speak out* in defence of judicial independence, the constitutional order, and democracy, both nationally and internationally, when they're threatened. Judges owe *loyalty* to their nation's rule of law, Constitution, democratic institutions, and fundamental rights. While loyalty to the state is vital, it should be secondary when democracy and basic freedoms are at risk, compelling judges to *defend its position fearlessly*. But, as with the legal perspective, breaches of professional duty typically result in informal sanctions rather than formal disciplinary actions due to the principle of *nulla crimen sine lege*. Soft law sources and professional standards, though not as binding as formal law, still carry normative weight. Their significance arises from their permanence, general applicability to judges, and iterative development. Often produced by the judicial community or external experts under various entities, they set professional expectations. As the Polish SC (2014) noted, while the principles of judges' ethics aren't legally binding, violations are seen as *breaches of the office's dignity*.

On the moral ground, a right to resist exists, but an obligation is contingent on one's moral framework. Using international principles on the rule of law and fundamental rights as a moral benchmark, such a duty is evident. Moral arguments, unlike law or professional standards, are typically situational and unsanctioned, save for informal consequences. Yet, they guide judges significantly (Graver 2023).

In practical terms, how do these intertwined legal, professional, and moral rights/duties influence Polish judges? While obligated to uphold the law and avoid even the

semblance of legal disregard, should a judge do so blindly? All in a context of evolving laws that seem to curtail judicial power and are deemed unconstitutional by many. Given a judge's primary allegiance to the Constitution and Statutes, he has the prerogative to gauge a law's constitutionality when in doubt.

The analysis reveals a dichotomy faced by Polish judges. They had to reconcile national and international mandates on rule of law and judicial independence with the reality of shifting national laws, governmental pressure, and decisions from politically influenced entities, including courts, which often negated these principles. Laws reshaped under a *hostile constitutional interpretation* (Zajadło and Koncewicz 2023) aren't subjected to proper judicial review since the politically captured CT has shifted from oversight to endorsement. The procedure of questions to the CT in case of constitutional doubt, previously used by judges, has lost its raison d'être.[21] The CT also challenged international law and rulings of the CJEU (CT 2021a) and ECHR (CT 2021b, 2021c) deeming as unconstitutional both, provisions of the TEU and the European Convention. Thus, Polish judges faced a choice: uphold the Constitution, applying a decentralized constitutional review, or adhere to rapidly changed laws and rulings from the compromised CT (Wagner 2019). As Tacik (2024) observes, judges confronted a unique dilemma of choosing between two competing legal systems in Poland – *the legitimate one* versus *one upheld by the apparatus of the state*. Their choice also determines which system becomes predominant.

Given this, is such a scenario desirable for legal certainty, court trust, and civil rights protection? Does the absence of definitive legal provisions on political attacks and judicial resistance benefit or harm the system? Should actions remain primarily reactive, or is there a need for more precise regulations and a shared legal standard, transcending singular country experiences?

Recent events in countries like Poland, Hungary (Sajó 2021, Fleck 2023), Romania (Călin and Bodnar 2022), the USA (Kalb and Bannon 2018), and Israel (Weill 2023) highlight a need for international reflection on upholding rule of law and judicial independence. While many studies focus on the decline of democracy and the reasons behind it, fewer explore defending these principles and the role judges might play (and not just via judicial activism of supreme courts). Even though judges have historically taken actions indicative of judicial resistance, this aspect remains underexplored.

The Polish experience from 2015-2023 reveals the significant role judges can play in upholding the rule of law and judicial independence. What sets Polish judges apart is the magnitude and duration of their resistance, participation across all judicial levels, collaboration with CSOs and the entire legal complex, public support, strategy, and a diverse resistance toolbox. This phenomenon of Polish judicial resistance can serve as a foundation for reflections, discussions, and the development of more systematic solutions. Its influence is evident in current EU debates, rulings of the CJEU and ECHR (Kosar and Vincze 2022), and initiatives of international judicial organizations. Meanwhile, the study of judicial resistance has grown in recent years.

[21] The Constitutional Tribunal delivered 79 judgments in 2015 in response to legal questions from the courts. In 2022, CT issued one judgment in response to a legal question (received 14 questions). See CT statistical information at: https://trybunal.gov.pl.

While numerous sources beautifully elaborate on the judge's role in safeguarding the rule of law and fundamental rights, and scholars emphasize the moral obligations of judges, judicial conscience or judicial virtues, might there be a need for a stronger and more persuasive legal foundation?

The potential for judicial resistance, especially when the rule of law and courts are under threat, has often been overlooked. This article aims to suggests treating judicial resistance as a previously ignored aspect of judicial independence. I advocate for the advancement of the judicial resistance model and further exploration of its normative framework. The resistance displayed by Polish judges can guide this endeavour. Institutions and organizations like CCJE, ENCJ, or the Venice Commission should reflect upon this, as they have been already addressing Poland's situation and supporting its judges. They might expand their focus to standardize the concept of judicial resistance. CCJE (2022, pt 34, 36) has noted the potential need for guidance balancing judges' freedom of expression with the ethical restrictions and maintaining public trust, and advises that judges or judicial associations themselves elaborate the rules. Could such guidelines assist judges in future situations of potential resistance?

The actions of Polish judges are unique partly because they lack specific role models from their legal education. When inquiring about their resistance motivations, many point to their sense of justice, rule of law training, constitutional standards, international human rights norms, and a "Polish resistance gene". Should one address this gap? What if judicial education incorporated the principles of just and legal judicial resistance?

6. Conclusions

In situations where the judiciary isn't fully independent, there's an inherent risk of fundamental rights being violated. An independent judiciary should not easily succumb to authoritarian pressures. Its primary role is to impartially adjudicate on citizens' rights and freedoms and to control other powers, free from political influence. Historically, instances of judges defending their independence against authoritative onslaughts are so rare that those who do are termed *legal heroes* (Graver 2020).

Today, we're seeing the evolution of new European standards. Drawing from countries undergoing a rule of law crisis, European courts' interpretations are enabling an in-depth legal assessment of national justice systems. As highlighted by Kosar and Vincze (2022), there's a shift from soft law standards to hard law. This shift empowers judges in illiberal or transitional democracies and becomes increasingly pertinent for established ones. Enhancing these efforts is the concept of judicial resistance, which deserves recognition both socially and normatively.

The definition and categorization of judicial resistance proposed in the article are open to critique and refinement but merit consideration. There are various proposals for categorizing resistance, and while establishing a unified framework may be challenging, I believe it's a worthwhile endeavour. Central to the proposed concept of judicial resistance is the procedural element: for such resistance to be deemed legal and valid, a breach of law or standards by the government must be verified by independent entities.

Polish judges relied on constitutional and international standards to critically assess attempts by the Polish legislator to limit judicial independence. Soft law language has

become assertive about judges' obligations to act when democracy is threatened. They are seen not just to have the right, but a duty to defend the rule of law, and should engage in judiciary-related public debates and education of society. While Polish judges assert, they do this, their actions should still be evaluated. A mere focus on judicial freedom of speech may be insufficient. Developing the concept of judicial resistance could help guard against future rule of law challenges, as witnessed in the Polish crisis.

Exploring the potentials and risks of judicial resistance as a deontic, right/duty-based model is essential, as is understanding the judiciary's role, power relations, and judicial independence versus accountability. Concepts like the virtue-oriented model or institutional self-defence could complement or be integral parts of a broader judicial resistance model. A concerning alternative is witnessing judges who remain silent during challenging times. Merely excusing judges who don't resist or yield to political pressure has been standard, and the virtue-centered model seems to align with this.

The CCJE (2015, pt 35) suggests judges aren't responsible for past government politics, and "must not be subjected to criticism or a disciplinary process simply because they applied the law as laid down by a previous regime, unless they misapplied the law in bad faith". But is this too lenient? Judicial resistance, as argued in the article, also means the *application* of the law and upholding the rule of law and the right to an independent court, grounded in values found in constitutions and international law.

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