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Introduction – Judges under Stress: Institutions, ideology and resistance

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Abstract

This issue examines the evolving discourse surrounding judicial independence and the rule of law, mainly, but not only in Central and Eastern European countries facing authoritarian challenges. This introduction emphasizes the importance of examining specific judiciaries, their histories, and ideological perception of judges. It presents outcomes from the Judges under Stress research project and its final conference at the University of Oslo in November 2022. Through a multidisciplinary approach, it investigates institutional path dependence, judicial ideology, and judicial resistance across various countries. The research addresses why courts are a focus for those attacking liberal democracy, how judges perceive their role in the state power system, and whether they have a right or duty to contradict legislation. This issue aims to contribute to understanding the challenges that judiciaries face in maintaining independence and upholding the rule of law in the face of authoritarian pressures.

Key words

Institutions; judicial ideology; judicial resistance; judicial resilience; path dependence

Resumen

Este número examina la evolución del discurso en torno a la independencia judicial y el Estado de Derecho, principalmente, pero no sólo, en los países de Europa Central y Oriental que se enfrentan a desafíos autoritarios. Esta introducción subraya la importancia de examinar poderes judiciales concretos, sus historias y la percepción

On behalf of the Judges under Stress project, I would like to thank all authors contributing to this Special Issue, reviewers who dedicated their time and knowledge to improve these papers and finally to the fantastic people in Oñati Socio-Legal Series for their incredible enthusiasm and cooperation.
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ideológica de los jueces. Presenta los resultados del proyecto de investigación *Judges under Stress* y su conferencia final en la Universidad de Oslo en noviembre de 2022. A través de un enfoque multidisciplinar, investiga la dependencia institucional, la ideología judicial y la resistencia judicial en varios países. La investigación aborda por qué los tribunales son un foco de atención para quienes atacan la democracia liberal, cómo perciben los jueces su papel en el sistema de poder estatal y si tienen el derecho o el deber de contradecir la legislación. Este número pretende contribuir a la comprensión de los retos a los que se enfrentan los poderes judiciales para mantener la independencia y defender el Estado de Derecho frente a las presiones autoritarias.

Palabras clave

Instituciones; ideología judicial; resistencia judicial; resiliencia judicial; dependencia del camino

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1. Introduction

When we were starting the project Judges under Stress in 2019, the focus of the discourse was defined by reaction to the steps of executive and legislative power against the judiciary. We could observe extensive interventions to the judicial power in Hungary and Poland, which showed how vulnerable the third branch of state power is. We could track how this discourse moved from reactive to proactive. Step by step, emphasis on the government's steps, was slowly replaced by the discussion of which checks should be placed in the system to create a resilient judiciary that would resist occasional political interference. After this stage, the academic discourse shifted to focus on how the institutions function, how judges perceive themselves, and how the concept of ethics emerged from ashes. Seeing and mapping political power attacks on checks and balances was helpful, but it did not solve the problem of political influence on courts. Also, proposals for more independence checks based on what works in other countries may not succeed in another historical and cultural background. Similarly, like institutions are resilient to negative changes, they are resilient to all changes. It has become clear that it will be essential to look into particular judiciaries, their history, judicial culture, and the character qualities of the judges, and only then to approach the search for solutions.

Let's start with a crash course on the judiciary's role in the legal system. The primary objective of the legal order has been to ensure social peace. Regardless of the specific concept of justice employed—according to needs, labor, or equality—the key point is that individuals are not challenging the established order. Also, the judiciary aims to generate outcomes that preserve the status quo. Therefore, the judiciary has been tasked with resolving possible conflicts emerging from the application of rules.

The judiciary is not exclusive to liberal democratic order. It is also a valuable tool for authoritarian regimes. The common denominator of the various political regimes is that all prefer voluntary obedience of the population to the violence. Naturally, most individuals under the law do not wish to go to courts; fortunately, many will never face them. Despite their lack of firsthand experience and the relatively low likelihood of encountering the judicial system, people still need the assurance that as long as they adhere to legal regulations, they will not be sanctioned and that this commitment will be held by the judiciary, which will not be misused against them for political or personal agendas. The social order is sustained only if this precondition is provided, or at least it is perceived as provided. Any doubts about this precondition are dangerous. Therefore, liberal-democratic orders are very sensitive about political attacks on the judiciary, and authoritarian orders are highly concerned about public criticism against courts. The independence or the façade of the independence must be preserved.

The legal framework has also grown increasingly complex and challenging for the lay person. Remembering a few rules and acting honestly to meet legal obligations is not enough. In culturally diverse societies, the fundamental concept of values of justice is no longer effective. The intricate nature of a pluralist neoliberal society is such that no single moral framework can function effectively. The complicated legal system has been holding the conundrum of postmodern society together. As a result, social stability is now based on the verdicts of trustworthy professional arbiters. But how can we reach these two conditions of professionalism and trustworthiness? How do you convince the public that the decision was based on all expected standards?

A key element of this process is its integrity. It requires following established rules. This rule of law became a successful social archetype, so popular that even authoritarian leaders use the legal form as a necessary tool to prove the political system's legitimacy. It became a sine qua non for any collaboration on both the business and state levels.

However, having a formal set of rules enacted in legal form is just one aspect of gaining the trust and compliance of the subjects. The other crucial element is the actual application of these rules. The rule of law necessitates that these norms be enacted in practice, allowing individuals to challenge the legality of any decision or national measure in court. The court's responsibility is to deliver outcomes that will not be perceived as unjust. While judges deliver justice, they fundamentally enforce the rules established by a legislative authority. Thus, the essential condition is that the arbiter exercises their authority independently from anybody else's influence. This raises numerous questions: How independent should this individual be? Who selects them? Who funds their position? Should citizens have the right to know personal details about them, such as their relatives or assets? There must be something or someone independent who does all the tasks asked in the questions above. Hence, the origin of the judge's independence must come from the independence of the courts' administration. To demonstrate that the judge is independent and impartial, it is vital to show that the body responsible for selecting judges— which also oversees their promotions and disciplinary issues— operates independently. This ensures the ongoing assurance of judicial independence.

It might seem that convincing most of the population about the integrity and fairness of the decision-making process is the cure for trust and obedience. Although it gives us theoretical guidance, it has not succeeded in practice. Many countries that implemented one-size-fits-all solutions failed to bring the expected solutions. Providing transparency and predictability was not enough to secure the democratic order. Despite all these measures, people like to elect populists openly interfering in the judiciary and turning the judiciary into the tool of their politics. In a liberal democracy, the judiciary has gained the aura of a mythical power that can maintain the liberal democratic order, even in the face of strong authoritarian leaders. However, this faith in the judiciary omitted that it is still a branch of state power and therefore vulnerable to political change. While it can resist the interference of other executive and legislative power, it is unlikely that it could save the state from democratic backsliding. Hence, from this point, we aimed to ask questions that resulted from not having entirely successful social transitions.

2. The Judges under Stress project

We would like to invite the readers to the Special Issue of the research project Judges under Stress, which held the final conference that we held at the University of Oslo on November 17th - 18th, 2022. Our project aimed to uncover the specific events, policies, and changes in institutions that form these narratives, to follow tracks to the functioning of the institutions of the CEE countries nowadays, and to point out similarities in the characteristics of the institutions themselves. The Judges under Stress project elaborated on the judiciary and looked into processes within the judiciary in particular countries that are likely to face the authoritarian challenge.

For this special issue we planned to provide an original theoretical approach to problems of not only Central and Eastern European judiciaries, but also to bring a comparative view of judiciaries from Western Europe, South America and the Middle East. Through a multidisciplinary approach, we wanted to point out the legal, historical, sociological, and ideological aspects of the narrative of the judicial institutions, which lead to the position and condition of the judiciaries they are experiencing nowadays.

At the conference, seventy-five participants from over twenty countries discussed institutional path dependence in judiciaries, judicial ideology, and judicial resistance. The presented papers were multidisciplinary in the intersection between law, legal theory, legal history, and sociology of law. Some employed the tools of legal analysis on the legal material of the time of state communism, and nowadays, they are looking for continuities in the current state of affairs. Others engaged with studies of the concept of law and explored possible criteria for determining circumstances under which the law is suspended. Some built on empirical research. Others were developing a conceptual analysis. The common thread was an investigation of how authoritarian attempts transform the position and role of the judiciary. We have selected thirteen out of thirty submitted papers, which we are presenting in this issue. The main questions of the issue are why the courts and the judiciary are such a focus of those in power who attack liberal democracy today. How do judges see their role in the system of state power and finally, do they have a right or a duty to contradict the legislation?

The following papers will present studies on several countries, including Poland, Hungary, Slovakia, France, Norway, Sweden, Austria, United States, Chile, and Syria. Moreover, this special issue will provide a comparative view that focuses on both steps of executive power towards the judiciary and the perception of judges of these steps.

3. Overview of papers

The presented papers look at the challenges of the judiciary from three different points of view. The first group of articles investigates institutional path dependence and looks for the answer to how legal institutions and culture live on, transform, and disappear. They address hidden continuities and concealed discontinuities in judiciaries. They also connect to the current rule of law decay and illiberal attempts. They present an institutionalist perspective, broadly perceived, to historically, empirically, and theoretically address the breaking point of judicial institutions. The central concept is path dependence, which is not about forces but people making choices and acting. The effects of such action are both the results of organizations and people being brought into an institutional matrix attempting to resist changes that affect their position and interests and the belief system underlying an institutional matrix that deters radical change. Institutions give shape to beliefs, values, and the development of knowledge. Historical legacies are therefore crucial for institutions. However, in the same way, as path dependence works in the resilience of institutions, protecting them from erosion in critical periods, it also works against democratic change and slows down the democratic process.

Hans Petter Graver's article, *On judges when the rule of law is under attack*, analyzes the increasing targeting of judiciaries by political actors that undermine liberal democracy. The article establishes a strong connection between the decline of liberal democracy and

rule of law backsliding. Hans Petter defines rule of law backsliding as the deliberate weakening or dismantling of checks and balances within a liberal democratic state by those in power. He explores the nature of these attacks, methods of identifying them, and strategies for judicial resistance. Hans Petter argues that judiciaries are a primary target in attacks on liberal democracy because they represent essential checks on executive power and uphold the rule of law. He contrasts the present situation with historical examples of authoritarian and totalitarian regimes in 20th-century Europe. While coups and outright repression were more common historically, contemporary attacks are more subtle, often using legal means to undermine judicial independence. Graver elaborates on methods of autocratic rulers to limit or control judicial power. A crucial aspect of the analysis is distinguishing legitimate judicial reforms to improve efficiency and accountability from measures designed to undermine judicial independence. In the case of an intervention to the judiciary aimed at limiting judicial independence, Hans Petter emphasizes the importance of judicial resistance. This involves upholding the rule of law in individual cases and actively defending judicial independence against broader political attacks. He suggests also other strategies for countering attacks on the judiciary such as promoting public awareness of the attacks, utilizing international legal frameworks and institutions fostering strong professional solidarity within the judiciary, and engaging in strategic legal argumentation and advocacy. Hans Petter portrays historical examples and contemporary cases and proposes strategies for judges to resist and defend the rule of law.

Max Steuer presents his paper *Towards understanding constitutional court resilience vis-à-vis autocratization: An institutionalist approach*, in which he focuses on the independence of the constitutional judiciary and puts under criticism approaches that tend to neglect scrutiny of political concepts. He offers a new framework for analyzing the capacity of constitutional courts to withstand autocratization threats. It moves beyond existing models by emphasizing the role of constitutional judiciary in democracy. He argues that existing strategic thinking is insufficient for understanding resilience of constitutional courts, because it neglects their crucial role – interpretation of the concept of democracy. Steuer proposes an institutionalist approach, demonstrating that the constitutional courts' interpretation of democracy, combined with the prevailing political regime, significantly shapes its impact on the maintenance and advancement of democracy. For Max, the role of the constitutional courts is essential and very strong. Max also advocates for a maximalist reading of democracy to encompass various interpretations. He uses the distinction between democratic, illiberal, and semi-authoritarian regimes to analyze the impact of his approach within different political contexts. Max compares Hungary and Slovakia to demonstrate the framework's utility. Both countries have formally powerful constitutional courts that have experienced periods of authoritarian political tendencies. However, their trajectories since 2010 have differed substantially. This difference is explained by analyzing the contrasting conceptions of democracy embedded within each court's jurisprudence. Max proposes a model emphasizing path dependence, where past decisions constrain future choices, and the significance of time in shaping institutional trajectories. The conception of democracy embedded in the court's jurisprudence shapes how democracy is treated in the political system. Max's article significantly contributes to the idea that the constitutional court may be an agent of resilience in withstanding autocratization.

Eduardo Chia's article, *Authoritarian constitutionalism, judicial capture, or the ambivalence of modern law: The case of the Chilean Constitutional Tribunal,* explores the inherent tension between a reason and a will within modern law. Modern law inherently embodies a duality, simultaneously facilitating both freedom and repression. This ambivalence is not a temporary or accidental feature but a fundamental aspect of how law functions in modern societies. Eduardo argues that this tension, manifested differently across various legal and political systems, ultimately contributes to the possibility of authoritarian outcomes even within formally democratic frameworks. Chia argues that modern legal systems, while ostensibly based on reason and the rule of law, are fundamentally shaped by the interplay of *ratio* and *voluntas*. Eduardo starts by noticing the inherent tension between reason, rationality, and the rule of law, on the one hand, and will, political power, and sovereignty, on the other. He traces the tension back to classical jurisprudential debates and sees it as fundamental to the modern law. The balance between these two elements is not fixed but shifts depending on the prevailing social and political forces within a given system and can be exploited by authoritarian actors to achieve their goals, even within systems that are formally democratic. The Chilean case exemplifies how a formally powerful and independent constitutional court can nonetheless contribute to the persistence of an authoritarian-neoliberal model. Eduardo brands this setting as authoritarian constitutionalism. It highlights its paradoxical nature. While it practices constitutional and legal norms, it also uses them to achieve undemocratic ends. Eduardo uses the Chilean Constitutional Tribunal as a case study. Despite the court's formal independence, its practices and decisions are shown to have actively contributed to the entrenchment of an authoritarian-neoliberal model in Chile.

Ján Mazúr wrote the paper *Judges under corruption stress: Lessons from leaked files about corruption in Slovakia*, which talks about the case of judicial corruption revealed in Slovakia in 2019, popularly called the Threema scandal. He compares various perceptions of corruption from interviews with judges and lawyers to evidence revealed through leaked communications. In his paper, Ján distinguishes between low-stakes corruption relying on social capital and networks among judges, lawyers, and intermediaries, so-called fixers; and high-stakes corruption involving direct cash payments facilitated by the fixers. These fixers not only influenced court decisions on behalf of clients but also pursued their self-serving interests. The paper details various corrupt practices, including bribery mechanisms, and discusses the broader consequences of judicial corruption, including the erosion of public trust and implications for the rule of law. The analysis contrasts the relatively unsophisticated nature of corruption revealed in the leaks with the more nuanced perspectives of those interviewed. Judicial corruption in Slovakia manifested itself through the influence of social networks and direct financial transactions. The communication leaks between judges and fixers provided a more direct picture of corruption than perceptions from interviews, exposing vulnerabilities in the judicial system and the significant role of intermediaries. Ján used qualitative data gathered from in-depth interviews and an analysis of the leaked communication to prove the criminal conduct of some judges. Based on his findings, Ján proposes solutions for the Slovak situation, focusing on strengthening legal ethics education, improving accountability mechanisms within the judiciary, and implementing structural reforms to enhance transparency and reduce opportunities for corruption.

Marie Laur, in her paper *Applying old tools to new challenges: The necessary adaptation of the French and ECtHR judges to emergency as a new paradigm of government*, focuses on the state of emergency and the role of courts in it. Marie highlighted the ubiquity of the state of emergency in recent times and the instruments that judges possess to resist the emergency mechanisms. She examines the evolving judicial response to states of emergency, focusing on the European Court of Human Rights, the French Constitutional Council, and the French Council of State. Marie argues that traditional judicial deference to executive actions during emergencies is insufficient, as the frequency and duration of states of emergency increased. The study compares the approaches of the three courts, highlighting the European court's increasing vigilance and the French courts' more deferential stances. ECtHR has gradually moved away from extreme deference, showing increasing willingness to review whether the conditions for invoking emergency powers are met. The French courts demonstrate significant deference to executive decisions concerning states of emergency, with limited review of the initial justification and subsequent actions. For Marie, the necessary adaptation of judges at both national and regional levels is crucial to the effective oversight of emergency powers. Judicial deference to the executive during emergencies is outdated and inadequate. Courts ought to actively review the justification for states of emergency and employ existing legal tools to prevent abuses of power, rather than relying on potentially inadequate proportionality review. The national and European-level judges must adapt to the increased use of emergency powers. The paper emphasizes the need for a more robust judicial review of the justification for states of emergency and a greater focus on preventing abuses of power through a review of the intent behind the use of emergency powers.

In the second group of papers, we emphasized judicial ideology, looking for an answer to how judges see themselves and their role in the legal system. The concept of ideology has a long history. It started with the ideology as the science of ideas and their origins, followed by Marx's theory of ideology as false consciousness, and then Althusser's process of interpellation. As Althusser puts it, "the individual is interpellated as a (free) subject so that he shall submit freely to the commandments of the subject, so that he shall (freely) accept his subjection, i.e., so that he shall make the gestures and actions of his subjection 'all by himself." In our approach, the ideology represents the imaginary relationship of individuals to their actual conditions of existence. The goal of the ideology is to create and mold a subject for the benefit of whatever the power claims to be of value. Subjects do not perceive this influence as artificial or secondary but natural, true, or apparent. The focus is on judges as subjects and the ideology reflected in their speech and actions. It is mainly how judges see themselves and perceive their role in the legal system, depending on their social reality. We decided to use the concept of ideology instead of culture, emphasizing the change in material conditions.

Przemyslaw Tacik, in his article *Subject, sovereign, Antigone: Judicial subjectivity and determination of the law*, looks into how the populist government in Poland has influenced the agency of judges since 2015. He builds on the concepts of exception, which characterizes the Polish law, and a process of interpellation of judges that creates their self-identification, whether they stick with the law as it should be – or with the law as it is. Przemyslaw develops a Lacanian psychoanalytic theory of judicial subjectivity. He argues that the judge's subjectivity is linked to the law's "jouissance" (surplus

enjoyment). While speaking in the name of the law, a judge ultimately holds the power to acknowledge or reject its validity. This power is particularly pronounced in bifurcated legal systems where judges must navigate conflicting legal norms. The paper uses the example of Poland's judiciary to illustrate this concept, arguing that Polish judges function as "judicial Antigones," simultaneously heroes and victims of the law. The Polish example shows the complexities of a legal system divided by conflicting norms, where the judge is forced to choose between different legal orders, highlighting the inherently political nature of judicial decision-making. Judicial subjectivity, understood through a Lacanian lens, reveals the judge's inherent power in shaping the law's validity, especially in a divided or compromised legal system. The "judicial Antigone" concept highlights the inherent tension between the law's ideal and its practical application, particularly in political and legal division contexts. Despite the seemingly passive role, the judge is fundamentally crucial to both the creation and potential collapse of the legal system's integrity. The subjective act of the judge becomes the ultimate arbiter of the law's validity within this inherently unstable context.

Zoltán Fleck presents his paper *Subordination, conformity and alignment: Lack of professional community.* Zoltán talks about the issue of judicial independence, autonomy of the judiciary, and the reasons for the unsatisfactory situation of these concepts in the Hungarian judiciary. He is looking for an answer to the question of how crucial the judicial community is in providing the environment for the judges to fulfil their judicial virtues and what role path-dependence plays. Fleck's article offers a powerful and nuanced analysis of the Hungarian judiciary's failure to uphold the rule of law under autocratic rule. The article argues that this failure was an institutional weakness and originated from a profound lack of professional solidarity and a culture of subordination and conformity within the judiciary. Zoltán contends that the Hungarian judiciary's inability to resist the erosion of the rule of law is rooted in a combination of structural ambiguities and experienced disappointments from the unsuccessful strengthening of liberal constitutionalism. This culture is seen as a legacy of the communist era and the current authoritarian regime. Zoltán elaborates on the inherent structural ambiguities within the Hungarian judiciary. While formally independent, the judiciary is vulnerable to political influence due to its appointment processes and the lack of effective mechanisms for internal self-governance. The formal independence doesn't translate into de facto autonomy. He explains the past hopes for a strong, independent judiciary in post-communist Hungary, which were quashed by the subsequent erosion of the judiciary's internal culture and its relative powerlessness against political pressures. The post-2010 political reforms in Hungary caused severe damage to the judicial culture. Fleck demonstrates this deterioration on the chilling effect of government media on open discussion and the suppression of independent initiatives. The absence of a strong sense of professional community, marked by collegiality, shared values, and the capacity for collective action, is directly linked to the judiciary's passive response to autocratic rule.

Terence Halliday, in his paper *Judges under stress: Legal complexes and a sociology of hope,* focuses on the concept of legal complex and how the sociology of legal complexes contributes to understanding judges within legal-liberal political orders. The legal complex involves various legal professionals like judges, lawyers, and academics. Terence argues that focusing on the dynamics of legal complexes provides a more nuanced understanding of judicial resilience and vulnerabilities than static structural

analyses. He suggests that a "sociology of hope" focusing on structural resourcefulness and repertoires of action within legal complexes – offers a more optimistic perspective on the ability of judiciaries to resist stress and even contribute to positive political change. Halliday proposes that if we expect judges to resist the rule of law backsliding, the collective phenomenon of judicial complex might be the key. Judicial stressors vary depending on the context and the specific understanding of "judges." They include intimidation and attacks, atomization, manipulation of resources, marginalization, and attacks on the legitimacy and role of the judiciary itself. The resilience against these is more likely to stem from a collective approach visible in the legal complex. A legal complex encompasses all actors involved in legal practices, and their interactions. Legal complexes can adapt and resist stress through structural resourcefulness, such as leveraging existing resources and connections, and repertoires of action, such as innovative strategies and tactics. Ironically, authoritarian repression can strengthen the legal complex and enhance its capacity for future action. Halliday portrays the applicability of legal complexes in case studies from Egypt, Pakistan, Hong Kong, and Taiwan to illustrate its arguments and showcase different ways legal complexes respond to pressure.

Peter Techet, in his article *The role of the judiciary: Interpreting vs creating law – or how Hans Kelsen justified "judicial activism"*, examines Hans Kelsen's theory of law application within the context of his experience as a constitutional judge in the First Austrian Republic. The article implicitly raises the broader sociological question of how the judiciary's exercise of political power is perceived and challenged in the political arena. The article explores the accusations of judicial activism against the Austrian Constitutional Court and how Kelsen responded to them. Techet argues that Kelsen's theory of law application, particularly his emphasis on the inherently political and law-creating nature of judicial work, directly responded to the political attacks against the Austrian Constitutional Court during the interwar period. Kelsen countered these accusations by arguing that judicial work inherently creates law. He emphasized that even seemingly objective law application inevitably involves value judgments and choices, making it a political act. The article explores the Vienna School of legal theory debate between Merkl, who emphasized interpretation as primarily cognitive, and Sander, who viewed law application as a creative process. While oscillating between these perspectives, Kelsen's position ultimately aligned more with Sander's view of the judiciary's law-making capacity. Kelsen's radicalization of his theory, shifting from a focus on purely objective law application to recognizing the judiciary's law-making power, ultimately deconstructed the notion of objective judicial review. The political calls for "depoliticization" of the judiciary are framed as a misunderstanding of the judicial role. Techet captures Kelsen's unique position as a leading legal theorist and a practicing constitutional judge. This dual perspective informs his theoretical reflections on judicial activism. Kelsen's legal theory didn't merely justify specific judicial actions; instead, it functioned as a direct and nuanced response to the political realities of his time, ultimately transforming the understanding of the judiciary's role within the legal system itself.

The third group of papers focused on judicial resistance and how judges can resist and postpone the breaking point of the rule of law. Politicians have already done in the past, do currently, or might in the future, challenge the rule of law and judicial independence

and thus put political demands on the judiciary. Courts in different countries face forces calling for illiberal measures and 'reforming' the judiciary. Academia critically assesses the measures by which rulers in different regimes seek to influence judges. However, it is equally important to explore judicial individual and collective reactions to the rule of law backsliding. Is there 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 positive law? Are there any regulations on the countries level and international level (including drafts of just debate) regarding judicial resistance, proper/obligation of the judge to defend the rule of law, judicial independence, right/obligation of the judge to go public, to take part in the public debate (including in the media): legal provisions, ethical provisions, oaths and similar?

Monique Cardinal's article, *A case study of judicial resistance in northern Syria after the March Revolution of 2011*, focuses on Syrian judges and prosecutors who resisted the Assad regime's oppressive laws and policies during and after the 2011 uprising. The article sets the stage by describing the Assad regime's repressive legal measures enacted in response to the 2011 uprising. These measures, including widespread arrests, detention without trial, and the establishment of exceptional courts, created a climate of fear and repression. It focuses specifically on the Free Syrian Judicial Council highlighting its unique characteristics and the nature of its "judicial resistance." Cardinal defines "judicial resistance" as the actions taken by judges and prosecutors to challenge oppressive laws and policies. This resistance can take both public form, such as defiance, and covert form, such as concealed actions, to protect individuals or uphold the rule of law. The Free Syrian Judicial Council's actions are presented as a unique instance of judicial resistance, distinct from the more common practice of "insurgent justice" that operates independently of state-based legal frameworks. The Council was composed primarily of career judges and prosecutors who had resigned from state office to establish an independent judicial system in regions of Syria no longer under state control. Significant challenges faced by the FSJC include the ongoing armed conflict, lack of resources, and competition from other non-state judicial institutions. Cardinal demonstrates that even amidst the chaos and fragmentation of the Syrian civil war, Syrian judges and prosecutors engaged in a form of judicial resistance that went beyond individual acts of defiance to involve the creation and maintenance of independent judicial institutions aimed at upholding the rule of law and providing essential services to the population.

Tomasz Widłak, in his paper *Judicial resistance and the virtues*, discusses arguments against framing judicial resistance as a right or duty. Instead, he proposes to look at it from a virtue-ethics position, putting forward the character and motivations of the judge. Widlak doubts if rule-oriented models are sufficient for understanding judicial resistance because they cannot capture the complex, context-dependent nature of a judge's decision to defy unjust laws. He proposes to apply the virtue-ethics perspective which offers a more nuanced framework. This approach shifts the focus from the legality or morality of the act to the character strengths of the judge who performs the act. A judge's decision to resist should be evaluated based on whether it aligns with the virtues of a virtuous judge, not whether it fulfills a legal or moral obligation. Widlak defines judicial resistance as on-bench decisions by judges who uphold the rule of law in defiance of oppressive regimes. The resistance is a matter of an individual, despite the

possible collegial motivation. Both deontic and consequentialist perspectives cannot grasp the complexity of the resistance. Deontic models struggle with the inherent ambiguity and contextual variability of judicial resistance. On the other hand, consequentialist models focus only on the outcome of the action, which leads to failure to predict and weigh multiple sources of actions. Both models overlook the importance of the judge's character. However, the virtue-centered model of judicial resistance is evaluated based on whether it aligns with the virtues of a virtuous judge. The model focuses on the cognitive-affective aspects of virtue, highlighting the importance of sound judgment, informed by reason and emotion. This capacity enables a judge to identify a situation's salient features and make appropriate decisions. Their actions flow from a good character, not simply a calculation of rights or duties. To prove his point, Widlak proposes to look at the example of Polish judges who exhibited these virtues during the communist era.

Martin Sunnqvist, in his paper *A judge must not be influenced by fear: Must a judge be brave? The duty of judges to defend judicial independence and the rule of law*, focuses on a judge's personality and motivation. Does the judge have a duty to oppose the actions of persons in power that undermine his impartiality and independence? To answer the question, Martin Sunnqvist explores the evolving ethical duty of judges to resist pressure, particularly in times of rule-of-law crisis. He traces the historical development of this duty from antiquity to the present day and its evolution through medieval oaths and legal codes. He shows how this concept spread across Europe, highlighting its consistent presence in legal traditions, uncovering the historical roots of the ethical principle that judges must not be influenced by fear. The Norwegian legal code from the 13th century, detailing the concept of four "daughters" of God which must prevail over four "bastards" provides a particularly insightful example. While Martin focuses on the interplay between fear, courage, impartiality, and independence, he clarifies that "fear" relevant to judicial impartiality extends beyond fear of the parties involved in a case. It encompasses fear of those in power who might seek to influence judicial decisions or undermine the independence of the judiciary. Sunnqvist argues that the traditional prohibition against judges being influenced by fear needs to be supplemented by a positive obligation: judges must actively defend judicial independence and the rule of law, even when facing threats. To achieve this, positive obligation requires courage. Sunnqvist highlights the need for proactive engagement in upholding judicial integrity and the rule of law, referencing recent statements by the European Court of Human Rights and Consultative Council of European Judges to emphasize the duty of judges to speak out against attacks on judicial independence. This judicial duty reflects on the case *Żurek v. Poland* case, to show the increasing recognition of this positive duty for judges to actively defend the rule of law during a backsliding of the rule of law.

Łukasz Bojarski's article, *Judicial resistance: Missing part of judicial independence? The case of Poland and beyond,* examines the phenomenon of judicial resistance in Poland between 2015-2023. Bojarski argues for a broader conceptualization of judicial resistance as a crucial element of judicial independence, particularly in safeguarding the rule of law during political assault. The article contends that the existing legal frameworks inadequately address judicial resistance as a distinct concept of judicial independence. Bojarski proposes a definition of judicial resistance - encompassing actions taken by judges to counter political attempts to undermine judicial independence and violate the

rule of law. A crucial criterion is that the infringement on judicial independence must be illegitimate according to national and international standards. The article differentiates judicial resistance from other judicial behaviors, such as judicial activism, disobedience, or dissent. The distinguishing characteristic of judicial resistance is countering illegitimate attacks on judicial independence. A central argument is that judges possess both a right and a duty to engage in judicial resistance under specific conditions. Bojarski explains his argument on the examples of Polish law, which implicitly supports duty to resist through provisions relating to judicial independence, the rule of law, and judges' rights and obligations as citizens, and on the provisions of international law. According to Bojarski's argument, the judicial resistance is a fundamental aspect of judicial independence. This implies a need for legal frameworks and professional standards that explicitly recognize and regulate this form of judicial action, strengthening judicial independence as a safeguard against future erosion of the rule of law.

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