

## CONFERENCES AND REPORTS

### Judges under Stress Final Conference, University of Oslo, 17–18<sup>th</sup> November 2022

On the 17<sup>th</sup> and 18<sup>th</sup> of November, the project Judges under Stress held a final conference. Seventy-five participants from over twenty countries all over the world 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 standard tools of legal analysis on the legal material of the time of state communism in the selected country studies looking for continuities in the current state of affairs. Others engaged with analyses 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 rulers transformed the interpretation and application of the law.

The final conference of the project Judges under Stress – the Breaking Point of Judicial Institutions was the last out of four planned conferences (2019, 2020, 2021, 2022) held on the topic of the project, where the participants discussed the work to be done and laid the ground for the writing of studies that will result in a joint publication. In 2019, twenty invited participants and the team members met at the University of Oslo for the conference *Understanding Continuity and Discontinuity of Judicial Institutions of the CEE Countries*. The outcome of this seminar was published as a Special Issue in the German Law Journal.<sup>4</sup> In 2020, the seminar *Judges under Stress: Flavors of the backsliding* was held electronically due to Covid-19 restrictions. In 2021 the team Judges under Stress held a seminar in Gdansk, Poland. The seminar held the title: *Servants of the law and servants of higher ideals – on judicial resistance when the rule of law is endangered*.

The project has aimed to provide an original theoretical approach to problems of the Central and Eastern Europe judiciaries. Through a multidisciplinary approach, it wanted to point out legal, historical, sociological, and ideological aspects in the narrative of the judicial institutions in CEE countries, which lead to the position and condition judiciaries are experiencing nowadays.

In Oslo, the keynote speakers, Hans Petter Graver (University of Oslo), Renáta Uitz (Central European University), Terence Halliday (American Bar Foundation) Joxerramon Bengoetxea (University of the Basque Country), were talking about reacting to the attacks on the independence of the judiciary, legal complex and judicial dialogue. Firstly, **Hans Petter Graver**, the leader of the project Judges under Stress, opened the conference with his speech on *Judges when the Rule of Law is under Attack*. In his contribution, he presented the main insights gained by the research under the project. The main question of his paper is why the courts and the judiciary are such a primary focus of those in power who attack liberal democracy today. First, he addressed the connections between democratic decline and the rule of law backsliding. Then he presented some historical perspectives and compared the present situation to autocracies and totalitarian experiences in Europe in the twentieth century. Finally, Hans Petter discussed the different measures autocratic rulers took to limit judicial control, how to distinguish such measures from legitimate legal reform, and how to counter such measures. Secondly, **Terence Halliday** talked about *Legal Complexes for a Sociology of Hope*. Terry was looking for answers to the main questions: What stressors threaten judges? How do legal com-

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<sup>4</sup> Special Issue “Judges under Stress”, German Law Journal, published by Cambridge University Press, vol. 22, no.7, 1147–1384 (2021).

plexes influence the viability of robust, resilient, and independent judiciaries? How can a dynamic and structural approach to legal complexes contribute to a sociology of hope for judges under stress? He explained his stance on the stability of democratic institutions on the concept of a legal complex that represents interdisciplinary collaborations and primary research on the politics of lawyers and judges worldwide. Thirdly, Renata Uitz, in her keynote speech, answered the question: what should we do with jurisprudence produced by compromised, packed courts in hybrid, illiberal regimes? She reminded that the line between court-packing and judicial reform could be blurry. She sees the illiberal practices in three main areas: in contextually situated patterns of action and inaction, in the arrogation and self-perpetuation of executive powers, and in power concentration and the removal of external constraints. She explained how illiberalism shapeshifts into constitutional form and numbs the legal community during an illiberal transition. Finally, **Joxerramon Bengoetxea**, in his keynote, talked on the topic of *Courts Managing Stress through Judicial Dialogues when Facing the Primacy of Uniform Law and Constitutional Pluralism*. He focused on the issue of constitutional pluralism and how the tension between the uniform law of the EU and national law is being solved by judicial dialogue. He proposed reconciling the hierarchical structure of European legal theory with European law on the level of judicial decision-making.

The conference was divided into four streams. In the first stream, called *Path dependence - how legal traditions and culture live on, transform, and disappear*, participants from various countries shared their views and experience on the transition process. **Ján Štiavnický** from the Constitutional Court of the Slovak Republic opened the first panel with the case of Slovakia; *Academia and history are to be blamed*, claiming that the Slovak story differs from its neighbors. In Slovakia, society reacts to the judiciary, not the judiciary to society/government. **Denis Preshova** from Ss. Cyril and Methodius University in Skopje, in his article: *The (In)Compatibility of the Judicial Culture with Judicial Self-Governance in the Western Balkans: North Macedonia as the Paradigmatic Case*, presented an example of judicial (self)governance in which exists separate but not independent judiciary. **Fruzsina Gardos-Orosz** from ELTE Law School in Budapest presented her paper *How to become a judicial influencer? Hungarian step by step*. She talked about the case of Hungary after April 1st, 2020, about the amendment introducing the so-called limited precedent system. **Bartosz Pilitowski** from Court Watch Poland Foundation introduced his paper *Did Politicians Ruin Poland's Judicial Appointments?* He presented a comparative empirical analysis of the 2013–2020 judicial position competitions conducted by the national council for the judiciary in Poland. **Arnisa Tepelija** from the Central European University in Wien/Budapest talked about her paper, *Abusive recourse to a phantom Supreme Court: bad faith and the unbearable lightness of the backlog*. She focused on the case of Albania and the extraordinary procedure of re-evaluation of judges and prosecutors, which started in 2016. **Valerija Dabetić** from the University of Belgrade talked about *The (Un)responsive Judiciary in Transition Countries – the Case of Serbia*. She analyzed how Serbian judges see themselves and perceive their role in shaping the legal system based on extensive empirical research on judicial ideology gathered through interviews. **Jan Zobec** from the Supreme court of Slovenia presented his paper *The Basics of (Post)Socialist/Communist Judiciary – the Case of Slovenia*. He focused on the Slovenian judiciary, an example of an institutionally independent judiciary comprised of dependent individual judges led by a handful of independent and unaccountable judicial oligarchs. **Ján Mazúr** from Comenius University in Bratislava presented a paper, *Leaked from Threema: the Case of Judicial Corruption in Slovakia*. He talked about the case of judicial corruption revealed in Slovakia in 2019, popularly called the Threema scandal. He explores the topic of judicial corruption and the role lawyers may play in corrupt practices in Slovakia. **Jim Moliterno** from Washington & Lee University, **Sopho Verdzeuli**, and **Irakli Kordzakhia** from the Group of Independent Lawyers, Georgia, presented a paper, *Control, Resistance, and Collaboration: Periods of Georgian Judicial Administration*. They talked about the Georgian judiciary during the three dominant governments since 1995, presenting a pretty exciting

story of government dominance, a period of judicial emergence to a co-equal status, and then a reversion to judicial subservience. **Dragoş Călin and Alinel Bodnar** from Romanian Judges presented a paper, *Fighting for European Values. The Story of Romanian Judges and Prosecutors*, where they elaborated on the case study of Romania. They explained the inefficient dialogue between the powers. They elaborate on the amendments to laws governing the justice system between 2018–2019 that have been argued as harmful to the progress of judicial independence.

Simultaneously, a stream of judicial resistance was going on, where **Lukasz Bojarski** from the University of Oslo talked about *Judicial resistance against the rule of law backsliding – definition and typology*. He elaborated on how under the guise of ‘judicial reform,’ Poland has witnessed a planned political attack on the independence of the judiciary and judges since late 2015. **Jan Petrov** from the University of Oxford, in his paper, *Countering Democratic Decay The Judicial Way: Is Resistance Futile?* He argued that the existing theories of courts’ role in responding to democratic decay do not pay sufficient attention to the differences among courts and the environments in which they operate. **Ramona Coman and Leonardo Puleo** from Université libre de Bruxelles presented on *Judges’ professional associations in Hungary, Poland and Romania. Repertoires d’action & discursive strategies against rule of law dismantlement*. They provided insight and comparison of three CEE countries facing the rule of law backsliding. Their focus was on how the judges react to the authoritarian shifts and how they resist. **Petra Gyöngyi** from the University of Lund presented her paper *Resistance by Association? Judicial Associations in Europe and pathways of protecting judicial independence*, on how the resistance may be possible when done in a collective form of judicial association. **Matyás Bencze** from the University of Győr presented on *The Role and the Origin of Judicial Populism in Authoritarian States*. He provided a deeper analysis of judicial populism concerning authoritarian politics. **Max Steuer** from Jindal Global Law School in New Delhi presented a paper *Understanding the Reservoirs of Constitutional Court Resilience: The Role of Judicial Conceptions of Democracy*. Max wrote on the independence of the constitutional judiciary and criticized approaches that tend to neglect scrutiny of political concepts. **Zoltán Fleck** from Eötvös Loránd University in Budapest presented his paper *Subordination, conformity, and alignment - the birth of judicial autonomy in Hungary*. Zoltán spoke on the issue of judicial autonomy after the judgment of the Court of Justice of the European Union in case C-132/20 that, raised the question of whether a judge who was not brought up in a democracy can be independent. **Moa Bladini and Wanna Svedberg Andersson** from Gothenburg University presented a paper on the *Autonomy of the judge in theory and practice – Strengthening the independent judiciary. They presented their research done in their project on judges answering three questions*. They analyzed how autonomy is described normatively in legal discourse and how judges discursively perceive and interpret autonomy. **Tomasz Wiślak** from the University of Gdańsk talked about *The virtues of judicial resistance*. Tomasz wrote about Polish judges who, despite the improper influence of the government to undermine judicial independence, resisted this pressure and struggled for independence. Tomasz analyses judicial independence as a primarily personal trait. In his paper *Must a judge, who may not be influenced by fear, be brave?* **Martin Sunnqvist** from Lund University focused on a judge’s personality and motivation by fear. Does the judge have a duty to oppose the actions of persons in power that undermine his impartiality and independence? Finally, **Bernard McCloskey** from the Supreme Court of Judicature of Northern Ireland, in his paper *Judicial Independence and Judicial Responsibility: A Construct Under Stress*, talked about judicial independence and responsibility as inseparable values. Bernard emphasized that judges must earn respect and trust of the communities appointed to serve to assert the right to judicial independence.

On Friday, the conference followed the stream of Judicial Ideology, which started with the Lacanian panel, where **Przemysław Tacik** from Jagiellonian University in Kraków, presented a paper *Subject, Object, Sovereign. The Role of Judicial Self-Identification in Determining the Law*. Przemek looked into how the populist governance in Poland has influenced the agency of judges since 2015. **Dennis**

**Wassouf** from Masaryk University in Brno talked about his paper *Forgetting Unforgettable, Finding Unfindable: Towards Theory of Juridico–Archival Ideology*, in which he uses the concept of the archive that establishes how judges authoritatively construct reality. **Peter Čuroš** from the University of Oslo presented a paper *Judicial Ideology in the Periphery*, focusing on three main concepts – symptom, ideology, and periphery. He used these three concepts to explain the problems of the judiciaries in Visegrad’s four countries. **Tomáš Havlíček** from Masaryk University in Brno introduced a paper *The Meaning of the Meaningless – Fig Leaves of the Ideology*, where he brought to attention the crisis of the legal language and emptying of the meaning of words while giving more space to concepts like “decency” or “common sense”. **Teodora Miljojkovic** from Central European University presented a paper *Rule of Law and Limits to Interference with Judicial Independence*, writing on the judiciary as the first target of populist governments. She held that the technique of interference with judicial independence is not an invention of authoritarian leaders. **Petr Agha** from Charles University in Prague, in his paper *Breaking Point of Judicial Institutions*, looked at the importance of the historical legacy of the judicial institutions against the backdrop of recent developments by examining several path dependencies. His paper addressed the legal system’s role in the structure of domination and in the reproduction of hierarchies and peripheries. In the panel on the State of exception, **Marie Laur** from Central European University introduced her paper *The necessary adaptation of judges to emergency as a new paradigm of government*, focused 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 what instruments judges have to resist the emergency mechanisms. **Cosmin Cercel** from Lazarski University in Warsaw presented his paper *A culture of emergency? Romanian constitutionalism, from a comparative legal historical perspective*. Cosmin used the concept of emergency as a foundation of modern constitutionalism. As a case study, he uses the past century in Romania. **Zoltán Szente**, in his paper: *Towards a moderate dual state*, deals with the situation in Hungary and the continuous erosion of judicial independence in Hungary since 2010. He is applying the argument of Ernst Fraenkel and the idea of coexistence of the so-called “normative” and “prerogative” state.

In the miscellaneous stream, three panels were happening. Firstly, in the panel on Judiciaries in Global South, **Monique Cardinal** from Université Laval in Québec presented a paper *Judicial Resistance to Authoritarian Rule in Syria since the March Revolution of 2011*, where she provided an empirical study of the acts of resistance carried out by members of the judiciary, both judges and prosecutors, who opposed legislation enacted by the regime of Bashar al-Assad to quell the popular uprising of 2011. **Eduardo Chia** from Goethe-Universität in Frankfurt talked about *Judges and ideology: some lessons from the case of the Chilean Constitutional Tribunal*. Eduardo has described how the Chilean Constitutional Court has acted as a check on democratic advances. In this case, not to implement or validate authoritarian programs but to block democratic decisions of the parliamentary or presidential branch. Secondly, in the panel on European Courts and their influence on judiciaries, **Mauricio Mandujano Manriquez** from the University of Oslo introduced his paper *Political Gains by Judicial Means: Institutional Conversion of the EU’s Rule of Law Policy*, where he examined how the Commission, along with political entrepreneurs, capitalized on the independence of the Court of Justice of the European Union shifting the locus of political authority within the legal order of the Union. **Marcin Mrowicki** from the University of Warsaw presented a paper *Impact of the Judicial Resistance against the Rule of Law Backsliding in Poland on Creating the Jurisprudence Against Authoritarianism by the Court of Justice of EU and the European Court of Human Rights*. Marcin wrote on the issue of judges resisting via the judicial dialogue by questioning the policies of the Polish government by including CJEU and ECtHR in the dispute. **Magdalena Konopacka** from the University of Business and Administration in Gdynia talked about *Efficiency and Justice in International Judicial Conversations*. **Inna Boyko** from the National University Odesa Maritime Academy presented her paper *Cases on Claims of Ukraine Against the Russian Federation as Evidence of Violation of the Rule of Law*. Inna talked about the recent claims that international courts received from Ukraine

against acts of the Russian Federation. Finally, in the panel on Systemic challenges of the judiciary, **Fabrizio Cesareo** from the University of Milan-Bicocca talked about *The European Context Of The Role Of The Italian Judge, and Civil Process In The Emergency And New Technologies Law*, **Tomasz Partyk** from the District Court for Kraków presented on *Some remarks on practical problems of adjudicating in civil cases*. **Aleksandra Partyk** from Andrzej Frycz Modrzewski Krakow University talked about *Re-examining the civil case in the same court composition when the decision-making in a case may be problematic*.

The conference is the final of the project, and the organizers plan to publish two volumes of the presented papers. The first focused on critical approaches towards changes within judiciaries, and the second dedicated to the comparative view of the problems in judiciary systems. The Judges under Stress team will finish work on the project publications in 2023.

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