

From Scientific Life

Understanding Continuity and Discontinuity of Judicial Institutions of CEE Countries A Report from a Research Seminar, Oslo, 7-8 November 2019

The research project **Judges under Stress – the Breaking Point of Judicial Institutions** held a seminar: **Understanding Continuity and Discontinuity of Judicial Institutions of CEE Countries** at the University of Oslo on 7-8 November 2019. The goal of the project was to bring together the particular events, policies and changes in institutions in authoritarian and totalitarian regimes that have led to the subordination of judiciaries in Central and Eastern European (CEE) countries, and further, to trace the functioning of the institutions of CEE countries today and point out similarities in the characteristics of the institutions. The seminar was structured as a round table discussion of the invited participants from Poland, Czech Republic, Slovakia, Hungary, Romania, the UK and the United States, together with members of the JUS project research team.

The project is located at the Department of Private Law at the Faculty of Law, University of Oslo, with Professor Hans Petter Graver as the project manager. In addition, the project involves professor Christoffer Eriksen and Malcolm Langford from the Department of Public Law, professor Peter Scharff Smith from the Department of Criminology and Sociology of Law, and two postdocs, Petra Gyöngyi and Peter Čuroš, who focus specifically on institutional theory and path dependence in Hungary, Romania and the former Czechoslovakia. Finally, PhD. candidate Lukasz Bojarski focuses on resistance in the Polish judiciary.

The primary objectives of the invited papers were, firstly, to obtain knowledge on how rulers seek judicial compliance with authoritarian measures; secondly, how judges react to such measures; and thirdly, the conditions under which an independent

judiciary breaks down. The central approach of the project is to look at the importance of the historical legacy of judicial institutions for the answer to these three questions. The Judges under Stress project applies Douglass C. North's theory of institutional development and Francis Fukuyama's theory on the development of political order to study the development of law. The project objectives are also connected to contemporary Europe, where there are courts currently facing powerful political forces calling for illiberal measures. It is to be expected that the higher degrees of social concern and conflict that we are experiencing in Europe today will challenge essential elements of the rule of law and thus put higher demands on the judiciary, both in post-communist countries and countries of Western Europe. In this situation, it is vital to have more knowledge and a better understanding of how our judicial institutions react under stress.

The presented papers were multidisciplinary, at the intersection of law, legal theory, legal history and the sociology of law. The authors employed standard tools of legal analysis to legal material from the time of communism in the selected country studies. The red line connecting all the papers in the issue is the path to dependence of the institutions in the period 1939-1989 in CEE countries. The primary focus was on judicial institutions and how they were affected by decisions and policies either within the judiciary itself or outside the judicial structure.

In the first session, on Thursday, 7 November, devoted to **Methodology and Analytical Insights**, prof. Hans Petter Graver, the project manager, opened the seminar with a welcoming speech and introduced the project Judges under Stress – the Breaking Point of Judicial Institutions. He

presented this combination of the historical, comparative and legal methods of research of judges under authoritarian and totalitarian conditions across different legal traditions, with a theoretical approach from institutional theory, in order to provide a bigger picture of the functioning of courts and the judiciary and the measures by which rulers seek to influence and control judges. **Lukasz Bojarski** in his presentation on the paper *Judicial Resistance in Poland – History And Presence – Presentation of a Research Idea* proposed the methodology of his research on the resistance of judges in Poland at the beginning of the 1980s under martial law and focused on similarities with the current condition of Polish Rule of Law. **Dr. Peter Čuroš and Dr. Petra Gyöngyi** in the paper *Continuity and Discontinuity of Judicial Institutions of CEE Countries* provided a methodological and theoretical framework for understanding judicial functioning under communism in Central and Eastern Europe. They proposed the methodology of an institutional approach to better understand possible continuities and discontinuities in historical events in the region since the rise of the undemocratic regimes during and after World War II. Due to the focus on the communist regimes, the time scope of the paper is 1944-1989. **Dr. Fruzsina Gardos-Orosz**, an Associate Professor at the Institute for Legal Studies, Centre for Social Sciences, ELTE Law School in Budapest, focused in her paper *Judicial Administration Between 1949 and 1990* on the whole period not as one of uninterrupted development but, on the contrary, as a block divided into several stages. With the main focus on the pre-1972 period, she explained the development of institutions in the following periods: the establishment of the proletarian dictatorship followed by a totalitarian dictatorship, the revolution of 1956, and after its suppression, the Kádár regime. She examined the change of internal and external judicial administration in the mentioned periods. **Dr. Lucia Berdisova**, a research fellow at the Slovak Academy of Sciences and an Assistant Professor at Trnava University, in

her paper *Various Roads to Serfdom in the Judiciary* elaborated several ways the judiciary became obedient and dependent on the Communist Party in Czechoslovakia. She followed a path through the history of the Czechoslovak Socialist Republic and afterwards the Slovak Republic to highlight the socialist value-oriented interpretation and the interference of political agents in the decision-making of the courts.

The second session, titled **Threats to Independence of the Judiciary**, was chaired by **Lukasz Bojarski**. The first speaker, **Pavol Žilínčik**, a member of the Judicial Council of the Slovak Republic and lawyer at the Office of the Public Defender of Rights of the Czech Republic, introduced his paper *It Was Such a Time: Law as a Facade, Code as an Excuse, Judges at Service*, entering the subject of Law and Literature and highlighting an interesting connection with the narrative of George Orwell's novel *1984* as well as the case of Stanislav Fila and Miroslav Jambor, who were arrested and interrogated in 1984 because they lent Orwell's book to other people. In the second part, Žilínčik presented a comparison to the recent situation of the judiciary in Slovakia. **James Moliterno**, the Vincent Bradford Professor of Law at Washington and Lee University, Lexington, Virginia, presented his paper *Recent Attacks On Judicial Independence: The Clumsy And The Insidious*. His interest in the seminar lay in explaining similar patterns visible in the judiciaries of CEE countries and among judges in these countries. Notably, he focused on the current state of the Czech judiciary, attacks and protests of civil society and problems in Poland and Hungary in comparison to the U.S. – the recent attacks of Donald Trump in designating judges as Clinton judges, Obama judges or Mexican judges in an attempt to delegitimize them. He categorized these attacks into three groups – clumsy, structural and insidious. **Professor Matyas Bencze**, a research fellow at the Hungarian Academy of Sciences, Hungary, in his paper *The Impact Of Judicial Career Systems On Individual Judicial Independence* focused on

the judicial career systems and the institutional design of Hungarian courts in the pre-war and socialist era as well as an evaluation of the previous system, more recent measures and expected developments in the near future.

The third session, on Friday, 8 November, titled **Transition of the Judiciaries in the CEE**, was presided over by **Petra Gyöngyi**. In this session, **Dr. Ján Štiavnický**, a long-term advisor of the Constitutional Court of the Slovak Republic, presented his paper *To Stress or to Emphasize? Masaryk's Concept of the Tiny - Invisible Work and Justice in Transition*, commencing with the idea "The transition itself is connected to the transition of the judiciary." He elaborated on the path of the judiciary in Czechoslovakia and the Slovak Republic to point out the remnants of the socialist regime and path dependence of the de-simplification of the law during that period. His thesis was that to increase public confidence the judiciary needs to be more scholarly. **Prof. Dr. Zoltán Szente**, from National University of Public Service, Budapest, in his paper *Stepping Into The Same River Twice? Judicial Independence In Old And New Authoritarianism* presented on how the new authoritarian regime succeeded by systematically dismantling Western-type constitutional democracy and the rule of law in building an authoritative regime. Szente provided a comparison of the two periods, which may mirror very similar characteristics. Firstly, he focused on the place of the judiciary in the system of public authorities and constitutional standards and influence over the judiciary through the significant characteristics of socialist law in the post-1972 period; secondly, he considered the similarities to developments since 2010. **Dr. Magdalena Konopacka**, an Associate Professor at the University of Business and Administration in Gdynia, Poland, and a research fellow at the University of Oslo, in her paper *Strayed and Straight Paths of Pomeranian Judges and Prosecutors in the Dusk of Communism (1981-1989)* focused on institutional analysis as a tool for showing the building of a new social order. The paper aimed at tracing the roots of

development while also offering a comparative matrix of judicial behaviours as public servants under conditions of limited independence, guarantees and potentially also limited choices. The scope of the work was limited to the Pomerania region (lying today across the Germany/Poland border). **Dr. Bogdan Iancu**, an Associate Professor at the University of Bucharest, in his paper *Hidden Continuities? The Avatars of 'Judicial Lustration' in Post-communist Romania* addressed Lustration Law No. 187/1999, which the Constitutional Court declared unconstitutional in 2008. The law contained a general procedure by application of which persons who had collaborated with the former communist *Securitate* as political police were vetted, and lustration lies in their affidavits were sanctioned. His focus was on the hidden continuities with communist and post-communist lustration measures, declassification of the SIPA archives and the cooperation of judicial institutions with the Romanian Intelligence Service.

In the last session, on the topic **Paths of the Judiciaries** and chaired by **Peter Čuroš**, papers that focused on an historical view of the institutional change of the judicial institutions were presented. **Prof. Zdeněk Kühn**, a professor at Charles University in Prague and judge of the Supreme Administrative Court of the Czech Republic, in his paper *Why Do Judges Fail? The Decline of the Central European Judiciary in the Course of the 20th Century* searched for the reasons for the decline of the judiciary in CEE countries. While the structure of power in Austria-Hungary guaranteed strong independence for the judiciary, which was protected by the emperor after World War I, the situation changed, and events in the inter-war period contributed to a situation in which it was easier for communist dictatorships to take power over the judiciary. **Prof. Zoltán Fleck**, a professor from Eötvös Loránd University in Budapest, in his paper *Relative Autonomies Under Authoritarianism* focused on how the dynamics of Hungarian dictatorships brought the obedience of judges towards the politics of the Communist Party.

The study researched the means of political pressure and the changing methods of judicial reactions after World War II up to the present. Finally, **Dr. Cosmin Cercel**, from the University of Nottingham, UK, in his paper *Law, Politics and the Military: Towards a Theory of Authoritarian Adjudication* presented the period of King Carol II starting in 1938 and followed by the dictatorship of General Ion Antonescu and the communist takeover after WWII. His paper focused on the nexus between ideology, law and adjudication and was supported by Giorgio Agamben's and Carl Schmitt's theory of the State of Exception.

The seminar of the "Judges under Stress" project was the first of three planned seminars (2019, 2020, 2021) held on the topic of the project. The participants discussed their work

with a broader community of scholars on the research conducted in the field in previous years and research they are planning to undertake in the near future. Furthermore, the aim of the seminars is to inform about the activities of the research team among scholars from CEE countries and to bring together a group of International respected experts on the topics of Rule of Law, Independence of the Judiciary, Legal Ethics and Institutional Methodology in order for them to share their experiences and the outcomes of their research and practice regarding circumstances that are essential for keeping the judiciary independent even under the threat of authoritarian policies. The outcome of the proceedings will be published in 2020.

Č u r o š, P.*

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