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Seminar

The Authority of the Judiciary

Counteracting Challenges to Judicial Authority

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Judicial authority and independence face a number of challenges. Parliaments remove judges from office because they dislike their decisions. Governments cut court budgets. The media attack not only court decisions, but also judges on a personal level. This paper suggests that attacks on judicial independence are not a new phenomenon, but have a long tradition in history. Therefore, by refining their defence strategies judges can learn a lot from the wisdom and boldness of their earlier English counterparts. However, as the challenges today are numerous, one defence strategy alone does not suffice. Thus, this paper compares defending judicial independence to defending a medieval city on three levels. The Council of the Judiciary is the river floating around the city, the presidents of the courts form the outer wall, and the judges form the inner wall. Each of those three players has different tasks. They all have the same aim, namely the preservation of judicial independence.

(1) Early populist challenges

(a) "So called" judges then and now

Courts exercise power. So do governments. Thus, it is only natural that governments should challenge the power of the courts. The phenomenon is not new. Challenges surfaced long before leaders complained about "so-called judges"[2]. They started with the kings and queens of mediaeval England, who granted their courts authority to decide on disputes between individuals. The judges duly decided those disputes. The kings were happy, as they did not have to bother about everyday matters.

The kings, however, had to deal with other matters. One was drainage. England had many swamps at that time. Therefore, the monarchs sent out their servants to clear the swamps by

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[2] See https://www.washingtonpost.com/news/the-fix/wp/2017/02/04/trump-lashes-out-at-federal-judge-who-temporarily-blocked-travel-ban/?utm_term=.9a6de9821b93.

building drains through private property. The landowners were not happy about this. So they went to court[3].

Now the judges had a problem. Their jurisdiction extended to civil disputes and criminal law, but there was no such concept as a dispute between a private citizen and the public administration. So what could they do? They had a wonderful idea: what the officers of the King had done was trespass, they said, and trespassing is illegal. Therefore, the officers would have to leave the private land to its owners[4]. To enforce those judgments the courts derived their authority directly from the Crown. The judges were probably not aware that they were writing history.

(b) When kings and queens are not amused

At the beginning, the kings of England tolerated what the judges did. However, the courts became bolder. The kings were not amused. They dismissed the boldest judges from the bench. It took a civil war to grant the judges security of tenure.

The absolute powers of the kings of England disappeared. The tasks of the courts remained. It is our job to make sure that governments exercise their powers in accordance with the rule of law. This is something not everyone seems to appreciate. Some populist politicians seem to draw their inspiration from the former kings of England. When they do not like what judges decide, they send them to the remote corners of their country[5]. They make sure that the most unruly ones are not re-elected. Sometimes, they attack them openly. In 2015 the Ukrainian Prime Minister said in a press interview that judges were "incredibly corrupt and [did] not dream of administering justice"[6]. He also suggested replacing all of the 9,000 judges in his country. Others proposed that judges who "confused" the rule of law should be "thrown out of the window"[7]. The examples are numerous[8].

Just as past and present challenges by populists to the authority and independence of judges are comparable, today's judges can learn a lot from the boldness of their earlier counterparts who lived under the kings.

Populist leaders tend to think in black and white. Anyone who follows them is their friend. Anyone who stands in their way is their enemy. From a populist perspective, it is rather difficult to acknowledge that administrative judges just have a job to do, for instance checking whether government decisions are lawful. That can of course be rather tedious for government officials. On the other hand, getting rid of judicial review means going back to Tudor times, when kings were free from mind-numbing constraints such as the rule of law.

Boldness is therefore a prerequisite for the three players presented in the next chapters, in order to defend judicial authority and the independence of the administrative courts.

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3 See Louis L. Jaffe and Edith G. Henderson, "Judicial Review and the Rule of Law: Historical Origins"*, Law Quarterly Review* (1956) 72 pp. 345, 353.

4 See Edith G. Henderson, *Foundations of English Administrative Law* (1963), pp. 32–25 and 59-62.

5 See the Sofia Report by the Council of Europe, *Challenges for Judicial Independence and Impartiality in the Member States of the Council of Europe,* Document SG/Inf(2016)3rev (24 March 2016), paragraph 182.

6 Sofia Report (footnote 5), paragraph 196.

7 Sofia Report (footnote 5), paragraph 275.

8 See Sofia Report (footnote 5), paragraphs 26-27, see also Eric A. Posner, "Liberal Internationalism and the Populist Backlash", *Arizona State Law Journal* (2017) 49, p. 795-796.

(c) The "three lines of defence" model

It is not only populism which challenges the authority and the independence of today's judges[9]. There is also the media, Parliament[10] and private actors – to name just a few.[11] Therefore, boldness alone does not suffice. In fact, judicial authority and independence need three lines of defence. Accordingly, the defence of judicial authority and independence can be compared to the defence of a medieval city:

1. The *Council of the Judiciary* protects the integrity of the judicial system as a whole. It is the first line of defence, the river floating around the city. It guarantees the natural stability and essential functioning of the judicial system as a whole. The nature of its defence is strategic and conceptual.
2. The *presidents of the courts* form the second line of defence, the outer wall. They do the work of mayors, managing their courts by providing appropriate funding but also by coaching judges if needed. Their function can be either tactical or strategic, depending on the task at hand.
3. The third line of defence comprises the *judges*. Together, they form the inner wall. Their primary task is to guarantee their personal integrity and impartiality.

(2) The Council of the Judiciary

Most European countries have a Council of the Judiciary. It follows the French example of the *Conseil Supérieur de la Magistrature*[12]*.* The Council forms the first line of defence, responding whenever judicial authority is under direct attack.

In 2014 the Ukrainian police searched courtrooms, judges and court personnel, with the intention of intimidating them. In the same year judges were locked into courthouses[13] or assaulted, and court buildings were set on fire. One district judge and members of his family were murdered[14].

Only a strong Council can deal with serious attacks. There are many different types of Council. Despite those differences, three main tasks can be distinguished:

- First, the Council makes sure that Parliament and government appoint judges in a fair way.

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9 For a definition of populism and its impact on international law see the Report by the Secretary General of the Council of Europe, *State of democracy, human rights and the rule of law (2017), Populism – How strong are Europe's checks and balances?,* p. 6; see also Eric A. Posner (footnote 8), 796-797, 818.

10 See Attila Bado and Janos Boka, "Access to Justice and Judicial Independence: Is There a Role for the EU?", in *Strengthening the Rule of Law in Europe* (Werner Schroeder ed. 2016), pp. 46–60.

11 In an interview, Sabine Matejka, President of the Austrian Judicial Association, said that the media and politicians, when they are unhappy with a particular decision, are quick to attack the judicial review system as such; see https://kurier.at/chronik/oesterreich/wie-sich-richter-verhalten-sollten/303.158.793.

12 There are countless studies on the French Council of the Judiciary. Among the most recent works, see Michel Le Pogam, *Le Conseil supérieur de la magistrature* (2014) and Lea C. Faissner, *Die Gerichtsverwaltung der ordentlichen Gerichtsbarkeit in Frankreich und Deutschland* (2018).

13 Sofia Report (footnote 5), paragraph 275.

14 Sofia Report (footnote 5), paragraph 194.

- Second, the Council guarantees tenure. Judges have a right to remain in office if they perform their duties correctly.
- Third, the Council is responsible for the effective enforcement of judicial decisions.

(a) Protecting appointment procedures

The Council of the Judiciary guarantees fair and transparent appointment procedures. Those who choose candidates for judicial office must be independent from government. In addition, judges must be appointed on merit alone.

Government or Parliament may have a say in appointments. Whoever designates judges, it is the task of the Council to shield appointment procedures from political interference.

In 2015 the outgoing Polish Parliament appointed five judges. The new President of the Republic refused to allow the elected persons to take their oath of office[15]. The new Parliament annulled the elections conducted by the previous one. This is a typical situation where the Council of the Judiciary must intervene. It must step in *before* government blocks successful candidates from taking judicial office.

A Council of the Judiciary must also make sure that judges' salaries are adequate. The right people for the job will be recruited if they are paid well. Opening appointments to fair competition with the prospect of a good salary strengthens independence.

(b) Protecting re-election procedures

The Council must not only make sure that the right people get the job: it must also ensure that they remain there.

Dismissal comes in many shapes and forms. In 2011 the Hungarian government contemplated changing the retirement age of judges from 70 to 62[16]. In such a situation, the Council of the Judiciary has a preventive role. It must intervene *before* Parliament enacts restrictive laws on court organisation and tenure.

The Council of the Judiciary has one advantage compared with judges' organisations, in that it is the law that grants its powers. However, the power of the Council has to be effective.

In 2011 the Hungarian Council did not have sufficient powers. The President of the Supreme Court, András Baka, tried to overcome the institutional deficit and criticised legislative reforms affecting the judiciary. The new Law forced 274 judges and prosecutors to retire. The government dismissed President Baka from his position. It took a decision by the European Court of Justice[17] to give his colleagues the option to return[18].

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15 Sofia Report (footnote 5), paragraph 176.

16 Gábor Halmai, "The Early Retirement Age of the Hungarian Judges", in *EU Law Stories: Contextual and Critical Histories of European Jurisprudence* (Fernanda and Davis eds. 2017), pp. 472-474.

17 Judgment of the ECJ of 6 November 2012, Case C‑286/12 *European Commission v Hungary.*

18 Sofia Report (footnote 5), paragraph 166.

The Council of the Judiciary must also intervene during re-election procedures if needed. In some countries, judges must be re-elected after the expiry of their term of office. One such country is Switzerland[19].

In practice, Swiss judges are always re-elected. However, that does not solve the problem. In 2004 judges at the Swiss Supreme Court had to decide whether the singing of racist songs in a hut was a public event or not. They ruled that it was public, meaning that persons who performed racist songs could be punished for inciting hatred[20]. Many Members of the Swiss Parliament did not like that decision, arguing that the event was a private matter. They also maintained that freedom of speech allowed people to express racist opinions. They punished those judges who participated in the decision by voting against their re-election. In the end, the judges were re-elected, but with a poor result[21].

From an outside perspective, one might argue that the judges were intimidated. One might even say that Parliament taught those who were re-elected a lesson: "Look at your colleagues. This is what happens if your decisions are not in line with popular opinion". Thus, the *appearance* of judges' independence is at stake. Judges must not only be independent, they must also be *seen* as independent.

Switzerland is not the only example. Many European countries have reported judges not being reappointed or promoted[22]. Some governments openly recommend that a particular judge should not be re-elected. Some of those governments contend that their recommendations are based on merit alone. In reality, in most cases the governments concerned simply do not like a judge's decisions and make sure that progressive judges disappear from the bench.

Turkey, Georgia and Ukraine are just a few examples[23]. In Ukraine, judges have to go through a "vetting procedure" before they can be re-elected. According to the government, this vetting procedure is designed to make sure that a candidate is still fit for office[24]. Most observers doubt this official statement. The aim of such a procedure is to make sure that decision-making conforms to the official government line.

In Slovakia, judges have to go through "security clearance". The Slovakian Intelligence Service, the police and the National Security Office can gather information about a judge and his or her family. If a judge is perceived as "unreliable", he or she can be summoned before the Judicial Council, which can dismiss judges from office. Those who are accused of wrongdoing cannot consult the evidence being collected against them[25].

The Council of the Judiciary has to make sure that only independent persons can make proposals for re-election. It also has to guarantee that judges are re-elected on merit alone.

The most efficient counter-measure is appointment for life, or appointment for a fixed term as at the European Court of Human Rights. If the Council of the Judiciary cannot convince

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19 Gerold Steinmann, „Denkwürdige Wiederwahl der Bundesrichterinnen und Bundesrichter", in *Justice – Justiz – Giustizia* 2015/1, paragraphs 3-5.

20 Official Collection of the Decisions of the Swiss Supreme Court, vol. 130 IV, judgment of 27 May 2004, pp. 111, 119-120.

21 See Neue Zürcher Zeitung, *Richterliche Unabhängigkeit unter Druck,* 23 March 2006, https://www.nzz.ch/articleDOD16-1.20344.

22 See John Bell, *Judiciaries within Europe* (2006).

23 Sofia Report (footnote 5), paragraphs 180-186 (Turkey), 192-197 (Ukraine), and 269-273 (Georgia).

24 Sofia Report (footnote 5), paragraphs 189-191.

25 Sofia Report (footnote 5), paragraph 199. See European Commission for the Efficiency of Justice, *Report on the efficiency and quality of the Slovak judicial system* (2017), CEPEJ-COOP(2017)14, pp. 55-57.

Parliament to amend the legislation accordingly, it should at least make sure that the government cannot intervene in the re-election procedure.

(c) Protecting effective enforcement

There is one final task for the Council of the Judiciary: it must ensure that decisions are enforced. If judgments are mere theory, this undermines the credibility and authority of judges[26].

On 11 January 2018 the Constitutional Court of Turkey ruled that a journalist should be released from prison[27]. The criminal court simply refused to implement the decision, claiming that the Constitutional Court had overstepped its jurisdiction.

How can a Council of the Judiciary react? The first step is the introduction of remedies for non-execution. If a judgment is not enforced, any claimant can seek judicial review. A second tool is the training of enforcement officers. Enforcement requires not only an appropriate budget, but also expertise. As a third step, the Council of the Judiciary should ensure that enforcement officers have sufficient independence from politics.

Only a strong Council can make sure that our judgments are enforced and thus safeguard judicial appointments from political pressure. A Council has a strong position if it is independent from the executive[28]. The members of the Council should all be judges.

(3) Court presidents

The second line of defence are the presidents of the courts. They form the outer wall. They make sure that judges can work in peace and quiet. Court presidents have three main tasks:

- First, they manage budgets and engage in dialogue with Parliament and other actors.
- Second, they act as coaches and mediators, thereby guaranteeing stability.
- Third, they promote the independence and the authority of judges. Therefore, courts presidents must be independent from government.

(a) Good court management as a line of defence

The first task of the president is good court management. If a court is managed well, the government is less likely to interfere in its internal affairs.

In order to manage the court well, the president needs a budget. For that, the president needs to explain to Parliament what his or her court does. Many European countries face budget cuts. Governments also cut budgets. With fewer financial means, judges are not well equipped

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[26] ECtHR, *Oliari v Italy,* applications nos. 18766/11 and 36030/11, § 184, 21 July 2015. See the Report of the Secretary General of the Council of Europe (footnote 9), pp. 25-26; see also CCJE Opinion no. 13 (2010) on the enforcement of judicial decisions.

[27] http://www.france24.com/en/20180112-turkey-government-odds-with-top-court-writers-release.

[28] See the European Network of Councils for the Judiciary (ENCJ), *Councils for the Judiciary Report 2010-2011*, paragraph 1.2, with a definition in footnote 3.

to deal with a backlog of cases and lack the resources to deal with complex cases appropriately[29].

In Belgium, judges report that they are no longer able to maintain their court buildings properly. They also report computer systems not being modernised and reduced working hours of registries. In 2016 the Belgian courts had to postpone cases scheduled for hearing[30]. At the same time, France reported that experts could not be paid on time[31].

The judiciary of Malta is chronically under-staffed. One Maltese judge has to do the work of two judges[32]. Dutch judges say that they do not have enough staff to deliver high-quality work[33]. Judges from Albania describe their working conditions as "undignified"[34], and Lithuania is not able to provide adequate security in most of its courts[35].

Wherever there is insufficient funding, there is the risk of overemphasising "productivity"[36]. Many observers would say that productivity means producing an enormous number of decisions. In their view, a productive court decides swiftly and a productive judge can hear ten cases in an hour. Those who argue that way forget that some cases need more work than others. They also forget that decision-making is not just about quantity and speed, but also about quality[37]. Any president must be able to tell that story in simple words. Parliament might just listen.

Judges may frown upon public relations, but in an age of limited funds PR is necessary. It is not enough to say that judges need more funding: every court president must be able to tell Parliament what the court does with the money granted to it each year.

A good president will also explain to Parliament that judges are its natural allies. Parliament enacts laws that are not always observed. Judges make sure that those laws are properly interpreted. Parliament will then recognise that it is the natural ally of the courts. It will grant proper funding if court presidents are able to explain what their court does and why it is important. Therefore, court presidents must explain that role but also listen carefully and provide answers to critical questions. Parliament will only grant courts the appropriate financial means if it understands the tasks and role of judges. This requires a constant dialogue.

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29 See Sofia Report (footnote 5), paragraph 236: Slovakia reported on 27 May 2015 that the permanent lack of financial, technical and personal resources and increasing backlogs in the courts at all levels of jurisdiction had led to a strike by senior judicial staff and administrative employees in February 2015.

30 Sofia Report (footnote 5), paragraph 228.

31 Sofia Report (footnote 5), paragraph 230.

32 Sofia Report (footnote 5), paragraph 233.

33 Sofia Report (footnote 5), paragraph 234.

34 Sofia Report (footnote 5), paragraph 295.

35 Sofia Report (footnote 5), paragraph 232; however, see the Report of the Secretary General of the Council of Europe (footnote 9), p. 21, which highlights the overall financial efforts of Malta, Lithuania and other countries. On the other hand, the judicial systems of Ireland, Portugal, Spain and particularly Greece are under considerable budgetary restrictions.

36 See Sofia report (footnote 5), paragraph 25, with further references in footnote 86, and paragraph 72.

37 Sofia Report (footnote 5), paragraph 258; on the problematic consequences for access to justice when the focus shifts from quantity to quality see Janneke H. Gerards and Lize R. Glas, "Access to justice in the European Convention on Human Rights system", *Netherlands Quarterly of Human Rights* (2017) 35 (I), p. 24.

(b) Presidents as coaches and mediators

The second task of a president is coaching. Judges should be able to turn to their presidents for advice when facing challenges. Sometimes, the authority of judges is challenged from outside, by the media or the government. Sometimes, they face challenges from inside, from their own colleagues. A good president can be both: a good coach and a mediator.

Presidents can only be coaches and mediators if they understand their role. They are the first among equals, not the boss. Judges are not their employees but their colleagues. The president's role is thus comparable to that of the dean of a law faculty. Good presidents are conscious of that fact and lead with natural, not formal authority. At their best, they are self-confident, resilient to failure and proactive while not losing their humility[38].

By understanding their proper role, court presidents form the strong outer wall around the medieval city.

(c) Guarding the guardians

Court presidents must be independent from government. It is for a court to appoint its president, not for the government. Still, in many European countries, the government has a say.

A few years ago the Czech High Court was looking for a new vice-president. After an open competition, the court chose a well-respected and experienced judge. The latter had only one problem: the leader of the most powerful party and the Minister of Finance did not like him. The Ministry of Justice decided not to nominate him[39]. Government interfered in a matter that should have been left to the courts.

The presidents of the courts must have a fixed term which cannot be changed by government. As mentioned above, the President of the Hungarian Supreme Court at the time publicly criticised the new retirement age for judges[40]. The government made sure to change the law so that Judge Baka could no longer be president. He lost his post more than three years before the normal expiry of his term[41]. As he had no remedy at the domestic level he filed a complaint with this Court. In 2015 the European Court of Human Rights held that Hungary had violated the right to a fair trial. It also found a violation of freedom of expression[42].

When sitting on the bench, judges must be free to decide. If they can no longer criticise their governments, the independence of their institutions is at stake. The *Baka* judgement grants that freedom to judges, both as members of the courts and as court presidents.

(4) Judges

The last line of defence is formed by judges. Together, they form the inner wall around the city. Their main three tasks are the following:

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38 See Robert F. Bruner, "The 3 Qualities That Make a Good Dean"*, The Chronicle of Higher Education* (2017), https://www.chronicle.com/article/The-3-Qualities-That-Make-a/238883.

39 See the CCJE Situation Report, adopted during the 16th plenary meeting of the CCJE (London, 14-16 October 2015), updated version no. 2 (2015), paragraph 15.

40 See footnote 17.

41 Sofia Report (footnote 5), paragraph 167.

42 ECtHR, *Baka v. Hungary* [GC], no. 20261/12, §§ 168-176, ECHR 2016.

- First, they have to guarantee their impartiality and use judicial review of legislation only if there is no other way to react.
- Second, they must uphold their personal integrity, accept their limited powers and seek help from their network if needed.
- Third, in order to fulfil the first two tasks, judges must become resilient to attacks. This is the most challenging task, one which lasts a lifetime.

(a) Bending when laws are amended

The first example comes from the day-to-day business of judges. They decide on housing, divorce, civil liability and criminal law. Their judgments affect the litigants and perhaps certain sections of the population. Sometimes, however, the context becomes political. In those circumstances, their decisions may not please everyone.

Judges may face protests from government. The latter may claim that judges interpreted the law the wrong way. Most of the time, the government leave it at that. However, sometimes they change the law.

By passing a new law, government and Parliament are saying that the judges got it wrong. In such cases, judges have two options: they can insist on what they decided before the law was changed or they can give in.

Judges can learn a lot from the English judges. Their counterparts were not just bold when challenging the King's authority, they were also smart. They used the law as it stood at the time and applied it to new disputes. On that occasion, it was not about disputes between two private citizens, but about disputes between a private citizen and a public official. The judges simply claimed that the public official was not acting on behalf of the King, but as a private person. Thus, they had jurisdiction and the public official had to comply with their judgments.

When Parliament and government change the law, it makes sense to be smart. In most cases, judges should back down. The new Act of Parliament is often straightforward. Judges can only strike it down by using their most powerful weapon, judicial review of legislation. However, they should be careful not to use that weapon too often. There is no reason to use a sledgehammer to crack a nut. That just provokes tit-for-tat exchanges between Parliament and judges, arguing as to who should have the final say.

(b) Turning to third parties when attacked by the media

There are other occasions when judges should do nothing. Challenges originate not only from government – the media, for example, challenge judges too[43].

The Daily Mirror attacked the judges who took part in the Brexit decision, claiming that they were "out of touch". The Daily Mirror put their names and pictures on the front page,[44] calling them "enemies of the people".

When judges are being attacked by the media on a personal level, it is of crucial importance that they do nothing. As soon as judges counter-attack by means of press conferences or other means, they only fuel the existing turmoil. It is not the job of a judge to be entangled in

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[43] CCPE Opinion no 8 (2013), 9 October 2013.

[44] https://www.theguardian.com/politics/2016/nov/04/enemies-of-the-people-british-newspapers-react-judges-brexit-ruling.

political manoeuvring. The strongest weapon of judges with which to face challenges is both the spoken and the written word. Their authority derives from their independence, their credibility and their judgments.

Whenever the media challenge their credibility, it is important that they react with patience and calm. It is the duty of a judge to remain as detached as possible. By emphasising the authority of the written word, judges detach themselves from politics.

It does not help much to cling to the idea that the authority of judges should be undisputed. When the political atmosphere changes, judges tend to react by rejection and fear. That is entirely normal. However, remaining in a mindset of non-acceptance is not helpful. Only when judges embrace challenges to their authority are they capable of reacting in an appropriate way.

When being attacked, judges should turn to their network for help. Their president will help them to manage the situation. The Council of the Judiciary will raise its voice for them. The Council is the river, further away from the inner wall. The Council has the authority and the means to defend judges.

In seeking help, judges can learn quite a bit from their English counterparts mentioned at the beginning of this paper. When the King started to remove judges from office, they aligned with Parliament. Parliament was not happy with the King, neither were the judges. So, roughly speaking, they united in the civil war. At the end of the war, the kings had to grant the judges tenure. From then on, judges could not be removed from office. Hence, it is not a bad idea to make alliances. If judges are unable to seek help, they should stay put and carry on with their work.

It might be argued that judges can rely on their freedom of speech and turn to the media whenever they want to. However, judges have a special role. They must protect not only their independence, but also their impartiality. Being impartial means not taking sides. It means that judges must keep away from politics as best they can.

(c) Resilience as a line of defence

To sum up, judges must react in different ways. Sometimes they must act, and sometimes they must not do anything. Judges must react in a flexible way. Architects know about flexibility. When they build a wall, they provide doors to pass through it, and build it in a resilient way.

Resilience is the ability to bend in challenging situations. When judges remain stiff, they break. Therefore they can only address challenges when they are able to react in a flexible way, bending slightly forwards and backwards. A resilient wall adjusts slightly, so it does not break. This approach leaves room for other lines of defence, the presidents and the Council of the Judiciary, if needed.

The concept of resilience includes a number of powerful tools. It can help judges to accept challenges to their authority. By contrast, resilience does not encourage judges to cling to the idea that their authority should be undisputed. They can only change what they first accept.

Once judges accept that their authority may be challenged, it is important to distinguish between what they can change and what is beyond their sphere of influence. When facing challenges, judges often feel helpless and think that the situation is beyond their control. In fact, judges can only guarantee the quality of their own work and their own conduct. Thus, their control is sometimes quite limited. In those situations, it is important to focus on the small things which one *can* change. Turning to professional or private networks is one way to

respond. Staying put is another. Becoming overwhelmed by what one cannot change does not help.

Sometimes, judges must simply focus on their main task, the deciding of disputes. This is what successful athletes do. They zoom in on their role, they focus on what they can control and forget the rest. They build on their resilience, focusing on their long-term goals.

Judges often deal with difficult situations alone in their offices. That is what they are used to. They study the file, they dwell on the arguments of the parties. Much of their work consists of reflecting and deciding. When governments and other actors challenge their authority, they must rethink the way they work. They are not Robinson Crusoe. They must turn to their networks – not just other judges, but also legal officers and court officials. They should also focus on mental toughness[45]. The US Army has introduced resilience training for its officers[46]. Perhaps it is time for the courts to do the same.

(5) Learning from Groucho Marx

According to Groucho Marx,[47] *"politics is the art of looking for trouble, finding it everywhere, diagnosing it wrongly, and finding unsuitable remedies".* Many governments find trouble in the courts. This is not surprising. It is the job of every judge to insist on the rule of law. That is not always convenient for governments.

Some governments diagnose the problem not quite correctly. Most of the time, it is not the judiciary that causes the problem. Judges try to do a good job, delivering both quantity *and* quality. Governments might overlook that fact. Their remedy then is to cut courts' budgets, dismiss progressive judges from the bench or make sure that their decisions are not enforced. A Council of the Judiciary can explain why these remedies are not the right ones. Together with court presidents, it safeguards the independence and authority of judges by sheltering the appointment and re-election procedures from political interference and defending the budget. Three lines of defence are not always enough, but at least courts can master the art of keeping trouble away. With the help of the right diagnosis, courts can leave the art of looking for trouble to politics and politicians.

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45 Martin Seligman et al., "HBR's 10 Must Reads On Mental Toughness", *Harvard Business Review* (2018), provides a good starting-point.

46 Karen J. Reivich, Martin E. P. Seligman and Sharon McBride, "Master Resilience Training in the U.S. Army" (2011), *American Psychologist* (66) 1, pp. 25–34.

47 The original quote is attributed to Sir Ernest Benn. See Gyles Brandreth, *Word Play: A cornucopia of puns, anagrams and other contortions and curiosities of the English language* (2015).