

JUDGES AND JUSTICE. THE ROLES OF JUDGES IN A (POST-TRANSITIONAL) DEMOCRACY: PHILOSOPHICAL AND JURIDICAL PERSPECTIVES

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This dossier aims at contributing to the debate concerning the role of judges and courts in democratic states. While the American researchers have approached this topic many decades earlier, the role of judges and courts as political actors emerged recently in Europe. In Romania, this perspective is very rarely considered. However, this dossier has no intention to provide an overview of the investigations that have been done or that are pending.

When they invited philosophers and jurists to the international workshop “Judges and justice”, which took place in Cluj-Napoca on May 18th, 2016, the co-conveners had in mind a particular approach of the topic, namely that of justice. The guiding idea of the workshop was that judges in a democratic society are called to do justice. That does not mean that other topics, such as the analyses of the effects of judicial action, legal interpretation, rights and rule of law and so forth, are less relevant.

We basically agree with Brian Leiter when he says that

“A serious discussion about the roles of judges in democracies has to be *realistic* both about judges and about democracies. It has to acknowledge what judges really do and how democracies actually function, and it has to be clear about what judges can do against those backgrounds.”¹

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¹ https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2935415, pp. 4-5.

However, assuming that judges and the judicial system in its entirety have a decisive role in delivering justice or in making a society more just does not mean, in our view, that we place ourselves on the territory of “moralizing phantasies.”² It was not our intention to defend a certain philosophical claim, but to bring together, philosophers and practitioners of law in a common reflection on the goal of this particular activity which is that of judging in a court of law. The term “justice” is not meant, therefore, to separate us in arguing about some abstract meaning, but to bring to light what the professional behaviour of judges has (and should have) in view at any time: settling disputes in a just way.

Therefore, the use of the term “justice” has to be seen here not as an indication of the fact that we acknowledge the existence of a moral principle in the law – in fact, we do, but this is not the issue here –, but as a way to find a point of convergence between what judges do (and think they do) and what society expects from them. What it is at play here is a certain idea of collaboration. The act of justice generally requires a broad collaboration between various actors, each of them being attached to the meaning and the importance of their position. Moreover, in a post-transitional democracy, for which the danger of authoritarianism is still effective and the pressure on the judiciary is enormous, “participating in a joint institutional project”³ is of utmost importance for the judges. That requires a special attention to the values intrinsic to the work of the judges and the need to define, to keep in mind and to serve the public good.

The dossier is opened by **Monique Castillo** (Université Paris-Est), who put the work of the judge in a larger context. She discusses the phenomenon of judicialization, which has been seen so far either as ~~is~~ an irreversible one (a structural trait of postmodern democracies) or as a sign of a crisis of the European society. Both solution and problem, judicialization is the product of a society which is not able to counter its atomization. She concludes that, in order to disperse the feeling that democracy is a regime that is waging war on itself, we have to rely on our legal culture, which defends a particular vision of common life based on individual freedom, seen as a shared value. By no means should judicialization lead to separation.

In their paper, **Diana Richards** (University College London) and **Andrei Decu** (Polytechnic University of Bucharest) are studying an “old social phenomenon emerging in new environments”: social cooperation within virtual worlds, as it unravels in the area of

² Idem, p. 6.

³ Kyritsis, *Shared Authority*, p. 70.

justice. They bring forward the main reasons for which the virtual worlds provide a playground for social engineers, legal researchers and philosophers and conclude that this territory's faith is yet undecided but the debates hold a great importance for the future of the judiciary.

In the view expressed by **Jean-Jacques Sarfati** (Université Paris Dauphine), equity should be the fundamental value of post-modernity. However, it cannot become a reality unless it is applied by an elite which is able to retrieve the support of the people and of the intellectuals. From this standpoint, equity must be a concrete reality and at work. Without equity, we are in a deadlock; yet everyone feels that justice beyond the application of the norm remains essential and necessary.

Asking herself about the social role of the judge, **Roxana Dan** (Cluj-Napoca Court) finds that the primary task that a judge has in the process of his activity is to interpret the law according to every single given case. In her paper, she reflects upon the limits that a judge encounters in the process of interpretation, in particular regarding the question whether the law can be construed according to the social context contemporary with the judge. The interpretation of pre-established norms, the author concludes, cannot be limited to a purely passive application of general and abstract rules to particular cases; it always presupposes a part of innovation. The judge then becomes a sort of rival of the legislator, which engenders a real, if not inescapable, risk of arbitrariness.

Finally, **Ion Copoeru** and **Andrea-Annamaria Chiş**, both from Babeş-Bolyai University from Cluj-Napoca, use the perspectival view on justice in order to accommodate the transcendent view on justice to the adversarial practice of justice. They defend the idea that, before seeing justice as an administered process, it has to be seen in itself. Through a series of reflections upon the procedural aspects as they are operating in the Romanian judiciary, they show how the plurality of perspectives tends to converge and finds its resolution in the rule of law and Modern democracy.

