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THE ROLE OF A JUDGE IN UNCERTAIN TIMES

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ABSTRACT

A judge's mission is to protect the fundamental values of the liberal constitutional order: democracy, the rule of law, and human rights. The constitutional structure of democracy after the World War II is based on the presumption that the judges can fulfill this mission. The rise of populism and illiberal democracies, which challenge the liberal constitutional order, shows that judges are limited in the proper execution of this mission. Court packing is a crucial point in the building of illiberal democracies, and it should be avoided.

This article discusses and defines the mission of the judge in the liberal constitutional order and also addresses the main challenges for the liberal constitutional order in these uncertain times. Faced with challenges from illiberal democracy, judges should maintain this constitutional mission to protect democracy, the rule of law and human rights. For this reason, new approaches and strategies of the judiciary should be found. The legal tools for protecting the liberal constitutional order have their own limits and weaknesses. Additionally, the time for judges as cult figures of popular culture is gone. Current challenges require judges to exhibit humility, modesty, and optimism.

KEYWORDS

Judge, rule of law, democracy, decline of democracy, illiberal democracies

INTRODUCTION

1989 was an *annus mirabilis*, a turning point for Central and Eastern Europe and for Europe as a whole.¹ The collapse of the USSR and socialist regimes in Central and Eastern Europe marked the victory of democracy, the rule of law, and human rights. The liberal constitutional order was restored in the region, and Europe was unified again into one political and legal community.² The 1990s in Europe were a time when history had ended, quoting the title of the article by Francis Fukuyama.³ Fukuyama, with this title, characterized the sense of euphoria of that decade – the feeling of the irreversible victory of the liberal constitutional order.

But history did not end – not for the region, not for the world. The rise of illiberal democracies in the last decade is a specific contribution to the current development of the constitutional law in Central and Eastern Europe.⁴ The last decade of the 21st century was once again not the best times for the liberal constitutional order and the rule of law. For the characterization of this decade, a feeling from the first chapters of cult novel *A Game of Thrones* by George R.R. Martin, that winter is coming, would be precisely appropriate.⁵ Our age, again, is one of uncertain times.⁶

The aim of this article is to reflect on the role of a judge in these uncertain times in Central and Eastern Europe when the liberal constitutional order and the core principles of the rule of law are challenged by the concept of illiberal democracy. The concept of illiberal democracy is well elaborated by leading legal scholars from Central and Eastern Europe.⁷ It would be possible to recognize that legal analyzes of illiberal democracies are the most important contributions to comparative constitutional law from our region.⁸ But there is still a place for reflection on the judge's specific role in these circumstances.⁹

To reach the aim of this article, the author discusses and defines the role of the judge in the constitutional structure, addresses current challenges for the liberal constitutional order, and proposes potential strategies to overcome these challenges.

¹ See more: Victor Sebestyen, *Revolution 1989: The Fall of the Soviet Empire* (Sheffield: Phoenix, 2010).

² See also: Sanita Osipova, "Vice-president's of the Constitutional Court Sanita Osipova's speech at the international summit "World without Walls" dedicated to the 30th anniversary of the fall of the Berlin Wall" // <https://www.satv.tiesa.gov.lv/en/runas-un-raksti/vice-presidents-of-the-constitutional-court-sanita-osipovas-speech-at-the-international-summit-world-without-walls-dedicated-to-the-30th-anniversary-of-the-fall-of-the-ber/>

³ Francis Fukuyama, "The End of History?", *The National Interest* 16 (Summer 1989): 3–18.

⁴ András Sajó, *Ruling by Cheating: Governance in Illiberal Democracy* (Cambridge: Cambridge University Press, 2021).

⁵ George R. R. Martin, *A Game of Thrones. Book One of a Song of Ice and Fire* (New York, Toronto, London, Sydney, and Auckland: Bantam Books, 1997), 34. See also: Garry Kasparov, Mig Greengard, *Winter is coming. Why Vladimir Putin and the Enemies of the Free World must be stopped* (New York: Public Affairs, 2015).

⁶ Michelle Obama, *The Light We Carry: Overcoming in Uncertain Times* (New York: Crown Publishing, 2022).

⁷ For example: András Sajó, *Ruling by Cheating: Governance in Illiberal Democracy* (Cambridge: Cambridge University Press, 2021); Wojciech Sadurski, *Poland's Constitutional Breakdown* (Oxford: Oxford University Press, 2019); *Anti-Constitutional Populism*, ed. Martin Krygier, Adam Czarnota and Wojciech Sadurski (Cambridge: Cambridge University Press, 2022).

⁸ Gábor Halmai, "Illiberalism in East-Central Europe": 813–821; in: András Sajó, Renáta Uitz, and Stephen Holmes (eds.), *Routledge Handbook of Illiberalism* (New York and London: Routledge, 2022).

⁹ Mirosław Wyrzykowski and Michał Ziółkowski, "Illiberal Constitutionalism and the Judiciary": 517–532; in: András Sajó, Renáta Uitz, and Stephen Holmes (eds.), *Routledge Handbook of Illiberalism* (New York and London: Routledge, 2022).

1. THE JUDGE IN A CONSTITUTIONAL STRUCTURE

The liberal constitutional order, based on the principles of democracy, the rule of law, and human rights, is a fragile constitutional structure and should be carefully protected.¹⁰ As former president of the Supreme Court of Israel Aharon Barak stated: if democracy collapsed in the Germany of Kant, Beethoven, and Goethe, it could collapse everywhere.¹¹ Europe once experienced the decline of liberal democracies when almost all new democracies established after World War I collapsed and transformed to authoritarian and totalitarian regimes before World War II.¹²

After World War II, when democracies were rebuilt in Western Europe, lessons from the past were taken account. Europe recognized the necessity of legal protection of the liberal constitutional order. The principles of democracy, the rule of law, and human rights were acknowledged as the founding grounds of European democracies. As declared by the Statute of the Council of Europe, "every member of the Council of Europe must accept the principles of the rule of law and of the enjoyment by all persons within its jurisdiction of human rights and fundamental freedoms".¹³ Additionally, member states of the NATO approved the necessity "to safeguard the freedom, common heritage and civilization of their people, founded on the principles of democracy, individual liberty and the rule of law".¹⁴

Protection of the liberal constitutional order after World War II was based on legal tools. The main responsibility for the surveillance and development of democracy rested on the lawyers, mainly civil servants, and especially judges. This approach functionally changed the historical role of the judge in the legal systems of continental Europe. The creation of strong constitutional courts based on Hans Kelsen's concept,¹⁵ and legal safeguards of the constitution and human rights, changed the position of the judge in the constitutional structure.¹⁶ For continental Europe, almost from the French Revolution, there has been a traditional skepticism towards strong and influential judicial power.¹⁷ In continental Europe, for very long time, judges were seen only as the mouth of the law (*Le juge est la bouche de la loi*), following the famous metaphor of Charles Louis de Montesquieu.¹⁸ The function of judicial power was seen in the technical application of law, not the protection of the liberal constitutional order. These issues in the continental Europe were left for a long time to the political branches of power.¹⁹ After World War II, the role of the judge in continental Europe changed. Judges were thereafter expected not only to ensure justice and precise application of law, and solve

¹⁰ Egils Levits, *Guest lecture of the President of Latvia at the Waseda University in Japan* // <https://www.president.lv/en/article/guest-lecture-president-latvia-waseda-university-japan>. See more: Aharon Barak, *The Judge in a Democracy* (Princeton and Oxford: Princeton University Press, 2006).

¹¹ Aharon Barak, *The Judge in a Democracy* (Princeton and Oxford: Princeton University Press, 2006), 21.

¹² See more: Joseph Rothschild, *East Central Europe between the Two World Wars* (Seattle and London: University of Washington Press, 1998).

¹³ *Statute of the Council of Europe*, 5.V.1949, art.3 // <https://rm.coe.int/1680306052>

¹⁴ *The North Atlantic Treaty, Washington D. C. – 4 April 1949, preamble* // https://www.nato.int/cps/en/natohq/official_texts_17120.htm,

¹⁵ Hans Kelsen, "Kelsen on the nature and development of constitutional adjudication": 22–78, in: Lars Vinx (ed.), *The Guardian of the Constitution. Hans Kelsen and Carl Schmitt on the limits of constitutional law* (Cambridge: Cambridge University Press, 2015).

¹⁶ See more: Marcin Matczak, Matyas Bencze and Zdenek Kühn, "Constitutions, EU law and Judicial Strategies in the Czech Republic, Hungary and Poland", *Journal of Public Policy* 30 (April 2010): 81–99.

¹⁷ András Sajó and Renáta Uitz, *The Constitution of Freedom. An Introduction to Legal Constitutionalism* (Oxford: Oxford University Press, 2017), 331–332.

¹⁸ See more: Serge Dauchy, "Le juge, bouche de la loi. A propos de la célèbre métaphore de Montesquieu," *Nagoya University Journal of Law and Politics* 256 (2014): 325–343.

¹⁹ Zdenek Kühn, *The Judiciary in Central and Eastern Europe. Mechanical Jurisprudence in Transformation?* (Leiden and Boston: Martinus Nijhoff Publishers, 2011), 1–16.

concrete cases, but also to protect the principles of democracy, the rule of law, and human rights. This change in approach brought the judge closer to the Anglo-American legal tradition, where the political role of the judiciary has historically been recognized and well-known.²⁰ The example of the strong Supreme Court of the USA and judicial review, where issues concerning constitutional interpretation, separation of powers and human rights were decided by court, served as an inspirational role model for continental Europe.²¹

The principle of self-defending democracy (militant democracy), strong constitutional courts, judicial review mechanisms, and the renaissance of the natural law doctrine instead of the legal formalism became an effective foundation for the liberal constitutional order, allowing the stabilization and strengthening of democracies in Europe. These legal tools were successfully implemented in Western Germany, Austria, and Italy after World War II and later used as well-known tools in the other countries where democracy reborn, such as Spain, Portugal, and Greece.²² After the rebirth of democracy in Central and Eastern Europe, the same legal tools were implemented in the new constitutional orders. Initially, this approach yielded excellent results: transformation of legal systems and changes in legal reasoning and legal culture in the region in the 1990s were mostly driven by courts, especially constitutional courts.²³

Legal protection of the liberal constitutional order always implies that constitutional policy and constitutional law become more elitist, based on the specific expertise and knowledge of lawyers. In the end, the most important issues for society are decided not by democratically elected politicians but by professional judges.²⁴ On the one hand, judges have become more and more influential as leading figures of the constitutional order. The role of judges and their responsibilities have been extensively researched in numerous books.²⁵ Judges have also become idols and stars of popular culture. A leading example here is again the USA with figures like Richard Posner, Antonin Scalia, and, most importantly, RBG – Ruth Bader Ginsburg.²⁶ In Europe, similar trends emerged. Many judges of the constitutional courts who have driven democratic changes in their countries have become prominent public figures. However, on the other hand, skepticism against elitist constitutional policy has grown in society and among politicians. Speculations about the rule of judges, rather than the rule of law, and political analyses of potential government by judges have revealed this tension in the constitutional order.²⁷ It has resulted in the main populist argument of illiberal de-

²⁰ See more: Sandra Day O'Connor, *Out of Order. Stories from the history of the Supreme Court* (New York: Random House, 2014).

²¹ Alec Stone Sweet, "Constitutional Courts": 816–820, 826–827; in: Michel Rosenfeld, and András Sajó (eds.), *The Oxford Handbook of Comparative Constitutional Law* (Oxford: Oxford University Press, 2012).

²² Darius Butvilavičius, Juozas Žilys, "Siuolaikiniai konstitucijos modeliai," in *Lyginamoji konstitucinė teisė* (Vilnius: VĮ Registrų centras, 2016), 137–139.

²³ David Robertson, *The Judge as Political Theorist. Contemporary Constitutional Review* (Princeton and Oxford: Oxford University Press, 2010), 83–142.

²⁴ András Sajó, *Ruling by Cheating: Governance in Illiberal Democracy* (Cambridge: Cambridge University Press, 2021), 66–74, 123–124.

²⁵ For example: Aharon Barak, *The Judge in a Democracy* (Princeton and Oxford: Princeton University Press, 2006); Richard A. Posner, *How Judges Think* (Cambridge and London: Harvard University Press, 2010).

²⁶ Neil Gorsuch, Jane Nitze, and David Feder, *A Republic, if You can keep it* (New York: Crown Forum, 2020), 17–34. See also: Maxwell Bloomfield, "The Supreme Court in American Popular Culture," *Journal of American Culture* 4, (1981): 1–13.

²⁷ See more: Evgeni Tanchev, "Activism in Constitutional Review Revisited," in *Konstitucionālās tiesas aktīvisms demokrātiskā valstī. Satversmes tiesas 2016.gada konferences materiālu krājums. Judicial Activism of a Constitutional Court in a Democratic state. Proceedings of the 2016 Conference of the Constitutional Court of the Republic of Latvia* (Rīga: Latvijas Republikas Satversmes tiesa, 2016), 267–303; Sanita Osipova, "A State Governed by the Rule of Law or "a Judges' State"?" in *Konstitucionālās tiesas aktīvisms demokrātiskā valstī. Satversmes tiesas 2016.gada konferences materiālu krājums. Judicial Activism of a Constitutional Court in a Democratic state. Proceedings of the 2016 Conference of*

mocracies: to reduce the role of the judiciary and give back power to the electorate's political will. Those who feel unrepresented by the courts have called for limitations on the principles of the rule of law and human rights in favor of majority rule.²⁸ This has marked potential confrontation with the expectations of some parts of society and challenged sustainability of the liberal constitutional order.

2. CURRENT CHALLENGES FACING DEMOCRACY

The liberal constitutional order, based on the principles of democracy, the rule of law, and the protection of human rights, is under stress for many reasons.²⁹ Similar to the challenges faced in the 1920s and 1930s, Europe is once again grappling with crises or even the decline of democracies. During that historical period, democracies were challenged by authoritarian and totalitarian regimes, whereas today they face challenges from the concept of illiberal democracy.³⁰ This is a challenge not only for new democracies in Central and Eastern Europe but also for stable and longstanding Western democracies, which are confronted with the rise of populist and illiberal political agendas.³¹

Democracies almost everywhere, but particularly in the Baltics, face challenges that erode the feeling of security and confidence about the future in society, thus affecting the attractiveness of democracy. Uncertain and insecure times are not the best for democracy. When looking at the first two decades of this century, various and almost permanent crises, especially the fall in wealth growth, have eroded the appeal of the liberal constitutional order. It should also be noted that democracies have utilized extraordinary powers to manage crises, contributing to the popularity of strong authority.³²

First, the liberal constitutional order has not emerged as the only correct and universally appropriate model of government in the world. The early collapse of the seeds of democracy in Boris Yeltsin's Russia and the rapid emergence of authoritarian regimes in almost all the republics of the former USSR have clearly presented our region with a real political alternative. This is especially true considering Russia's imperial ambitions not to lose its political leadership in this part of Europe. In a global perspective, this shift has also been influenced by the strengthening of authoritarianism in the People's Republic of China under the rule of Xi Jinping and the disappointment of the hopes of the Arab Spring.³³ Vladimir Putin's Russia has openly challenged the existing international order based on the principles of democracy, the rule of law, and human rights. He has consistently tried to undermine European democracies from the outside by

the Constitutional Court of the Republic of Latvia (Rīga: Latvijas Republikas Satversmes tiesa, 2016), 304–314.

²⁸ Martin Krygier, "Illiberalism and the rule of law": 540–543; in: András Sajó, Renáta Uitz, and Stephen Holmes (eds.), *Routledge Handbook of Illiberalism* (New York and London: Routledge, 2022).

²⁹ See also: András Sajó and Renáta Uitz, *The Constitution of Freedom. An Introduction to Legal Constitutionalism* (Oxford: Oxford University Press, 2017), 416–418.

³⁰ András Sajó, *Ruling by Cheating: Governance in Illiberal Democracy* (Cambridge: Cambridge University Press, 2021), 23–27.

³¹ See also: Joe Biden, *Remarks by President Biden at the Summit for democracy opening session* // <https://www.whitehouse.gov/briefing-room/speeches-remarks/2021/12/09/remarks-by-president-biden-at-the-summit-for-democracy-opening-session/>

³² András Sajó and Renáta Uitz, *The Constitution of Freedom. An Introduction to Legal Constitutionalism* (Oxford: Oxford University Press, 2017), 440–445.

³³ Helena Rosenblatt, "The history of illiberalism": 23–25; in: András Sajó, Renáta Uitz, and Stephen Holmes (eds.), *Routledge Handbook of Illiberalism* (New York and London: Routledge, 2022).

manipulating public sentiment, openly supporting antidemocratic political forces, and corrupting key figures of the political elite.³⁴

Second, the attractiveness of illiberal democracies and the internal erosion of the liberal constitutional order are not solely phenomena in Central and Eastern Europe. Even old and stable democracies are corroding and are no less at risk. The building of illiberal democracies is supported by a significant portion of society, and this challenge has yet to be stabilized.³⁵

In many democracies, there is still a sense that regular elections may realistically become the final free elections, and the ability of the entire constitutional structure to withstand the menace of undemocratic politicians is no longer just a theoretical stress test but a social reality.

Third, economic crises and the recent global Covid-19 pandemic have shaken public demand for security and stability. Democracies, managing unknown crises and searching for the best exits without a safe roadmap, have not always proven successful in meeting societal expectations.³⁶ The challenges of climate change and the need to transform the existing economic model in the interests of environmental protection and future generations also do not contribute to the attractiveness of the liberal constitutional order. All previous generations after World War II lived with a sense of progress and growing prosperity. Now, it seems very likely that the highest level of the welfare state has been reached, and the question is not how to continue delivering growth but how to maintain the existing level of prosperity.³⁷

Fourth, Russian aggression and the war against Ukraine have confronted European democracies with a real threat of war, essentially maintaining the perspective of a permanent state of emergency. In a state of emergency, the principles of the rule of law and human rights yield and are subordinated to other constitutional values, posing a significant risk to the preservation of the liberal constitutional order.

Faced with the challenges to democracy, politicians almost everywhere capitulate first. The political branches of the constitutional structure are relatively the most vulnerable, as they directly depend on regular elections and voters' favor. Politicians are forced to subordinate their political agenda to voters' demands, or marginal politicians who are ready to represent the disgruntled voter's voice for security and stability engage in a political battle. A largely endangered and future-insecure voter creates the necessary drag on policy transformation and revision of the constitutional structure.

The threats to ordinary life and society's disappointment in their hopes undermine the value of the rule of law and human rights. These values are portrayed by populists as elitist, securing the interests of relatively small groups in society and not benefiting the vast majority. Politicians, from their positions, accordingly advocate for the interests of the supposed majority, undermining the protection of different minority groups. When it comes to choosing between perceived security and the rule of law, illiberal democracy places emphasis on a sense of security.³⁸

³⁴ See more: Garry Kasparov, Mig Greengard, *Winter is coming. Why Vladimir Putin and the Enemies of the Free World must be stopped* (New York: Public Affairs, 2015).

³⁵ See more: Anne Applebaum, *Twilight of Democracy: The Seductive Lure of Authoritarianism* (New York: Doubleday Publishing, 2020).

³⁶ See more: Timothy Garton Ash, *Homelands. A Personal History of Europe* (New Haven: Yale University Press, 2023).

³⁷ See also: Yanis Varoufakis, *Austerity* (London: Vintage Minis, 2016).

³⁸ Jennifer L. McCoy and Murat Somer, "Political parties, elections, and pernicious polarization in the rise of illiberalism": 487–493; in: András Sajó, Renáta Uitz, and Stephen Holmes (eds.), *Routledge Handbook of Illiberalism* (New York and London: Routledge, 2022).

The capitulation of politicians before the tendencies of illiberal democracies means that it is again time for judges to use all legal tools built into the constitutional structure to protect the liberal constitutional order. The protection of the principles of democracy, the rule of law, and human rights is no longer just a theoretical exercise; facing the threats of illiberal democracy, it is time for judges to actually defend democracy and stabilize the liberal constitutional order. This would also allow an evaluation of how effective all legal tools built into the constitutional structure after World War II are in protecting democracy.

3. A POTENTIAL STRATEGY FOR OVERCOMING CHALLENGES

Wojciech Sadurski recently endorsed Piero Calamandrei's thesis regarding the approach of the fascist regime in Italy: if there had been a rigid constitution and a constitutional court at that time in Italy, fascists would have, as their first move, attacked not the parliament but the court in an attempt to consolidate power and abolish democracy.³⁹

Judges can and should protect democracy and the rule of law, but it should be taken into account that judges themselves are just legal tools for the protection of the liberal constitutional order. The powers and authority of judges are constitutionally prescribed and limited, depending on the legal framework. Also, judges are appointed to their positions mostly through a political procedure prescribed by the constitution, usually by a decision of the parliament or the president.⁴⁰

The political procedure of judicial appointment may provide an opportunity for a political takeover and court packing. In this sense, a classic example is the US Supreme Court with the political dimension of judicial appointments. It is no longer as important to be able to pass constitutional amendments or new laws as the power to appoint judges is important. Packed courts make it possible to achieve better political goals and have been a tool used to build illiberal democracies. A legal tool for the protection of democracy and the rule of law may be used in bad faith to eliminate the liberal constitutional order. The judges, as guardians of the liberal constitutional order, are not invulnerable. Court-packing experiences in Hungary and Poland demonstrate this well.⁴¹

The fundamental issue for maintaining the liberal constitutional order in uncertain times is the question of the independence of courts and judges. The main function of the judiciary remains unchanged: the protection of the principles of democracy, the rule of law, and human rights. However, the political and social context has changed a little bit.

The judiciary is regularly confronted with public opinion and political critique, especially in complex cases that are based on value judgments. The protection of human rights and minorities may be interpreted as disregarding the interests of the majority.⁴²

³⁹ Wojciech Sadurski, *Extinguishing the Court. Why There Is No Salvation for the Current Polish Constitutional Tribunal* // <https://verfassungsblog.de/extinguishing-the-court/>

⁴⁰ Daniel Smilov, "The Judiciary: the least dangerous power": 871–872, in: Michel Rosenfeld, and András Sajó (eds.), *The Oxford Handbook of Comparative Constitutional Law* (Oxford: Oxford University Press, 2012). See also: Beatrice Monciunskaitė, "The Risks to Judicial Independence in Latvia: A View Eighteen Years Since EU Accession," *Croatian Yearbook of European Law and Policy* 18 (2022): 142–145.

⁴¹ Mirosław Wyrzykowski and Michał Ziółkowski, "Illiberal Constitutionalism and the Judiciary": 519–524; in: András Sajó, Renáta Uitz, and Stephen Holmes (eds.), *Routledge Handbook of Illiberalism* (New York and London: Routledge, 2022); David Kosař, Katarína Šipulová, "Comparative court-packing," *International Journal of Constitutional Law* 21 (2023): 80–126. See also: Tom Gerald Daly, "Good" Court-Packing? The Paradoxes of Constitutional Repair in Contexts of Democratic Decay," *German Law Journal* 23 (2022): 1071–1103.

⁴² For example: Beatrice Monciunskaitė, "The Risks to Judicial Independence in Latvia: A View Eighteen Years Since EU Accession," *Croatian Yearbook of European Law and Policy* 18 (2022): 136–142.

To a large extent, in the Baltics it is only in Lithuania where it is stressed that the constitution has an anti-majoritarian character.⁴³ That is to say, the purpose and mission of the constitution are to protect minority rights; the majority must be able to protect themselves through a vote in a political process. However, in reality, society and politicians are not always prepared to accept judgments that are unfavorable or unpleasant to themselves. A political debate about the outcome of court judgments gives the impression that the judge's decisions are politically determined, not based on the application of legal norms in proper legal reasoning, and that it is possible to change the outcome of a judgment by changing judges. In this way, the importance of precise legal methodology in the application of legal norms is being relativized in the public debate. The populist perception that court judgments are determined by the judge's personal values and political views rather than by legal norms and principles allows the legitimization of the idea of the politicization of the judiciary.

The authority and visibility in the public sphere of judges, which previously allowed the protection of the liberal constitutional order, are now working against the judiciary. Politicians have mastered the political benefits of court packing well. If there is an opportunity to secure a majority in the constitutional court, it is possible to secure long-term political dominance without formal changes to the constitutional structure. Furthermore, packed courts limit opportunities for the rapid restoration of the liberal constitutional order, as such courts are also protected by the constitution itself.

What should be the strategy of the judiciary in these new circumstances? As can be seen in the Baltics, the ideas of illiberal democracy are quite often popular and supported enough in society. Often, also a large number of lawyers are willing to contribute to the building of illiberal democracies. And it should be taken into account that illiberal democracy can be set up for a long enough time. So far, no one has yet offered a ready-made recipe against the dangers of illiberal democracy. But at least a few points can be highlighted.

First, the potential threat to the liberal constitutional order must be conscious and deliberate. The application of law in uncertain times requires those considerations to be taken into account. There is no need to provide justifiable reasons for court packing. This requires rational self-restraint and avoiding framing judging in the perspective of political "cultural wars".⁴⁴

Second, the application of law, judging cases by principled and independent judiciary, still remains necessary. Cases must be fairly judged, human rights secured and protected, and justice restored.⁴⁵

The only weapon of the judiciary is public trust and authority in society. Professional application of the law and restoration of justice through courts are the best grounds to strengthen public trust. Also, the execution of justice should be based on the humility and modesty of the judges. The age of the judge as a cult figure of popular culture is gone.

⁴³ See more: Egidijus Kūris, "Konstitucija, teismai ir demokratija," *Konstitucinė Jurisprudencija* 4 (2008): 254–267.

⁴⁴ See also: Gediminas Mesonis, "Judicial Activism in the Context of the Jurisprudence of the Constitutional Court," in *Konstitucionālās tiesas aktīvisms demokrātiskā valstī. Satversmes tiesas 2016.gada konferences materiālu krājums. Judicial Activism of a Constitutional Court in a Democratic state. Proceedings of the 2016 Conference of the Constitutional Court of the Republic of Latvia* (Rīga: Latvijas Republikas Satversmes tiesa, 2016), 342–361.

⁴⁵ Ineta Ziemeļe, *The rule of law of today serving the European citizen. Speech by the President Ineta Ziemeļe at the 7th International Scientific Conference of the University of Latvia Faculty of Law* // <https://www.satv.tiesa.gov.lv/en/runas-un-raksti/the-rule-of-law-of-today-serving-the-european-citizen/>

The courts must be open to the public and establish a dialogue with society on the aims and responsibilities of the judiciary. Strategic communication is important nowadays for every branch of power, including the judiciary.⁴⁶

Third, it is important for judges to remain optimistic. Optimism is essential in the application of law and the protection of the liberal constitutional order. Pessimists in uncertain times might not be able to overcome the current challenges. It is also the legacy of the first president of the Constitutional Court of Latvia, Aivars Endziņš. In his last interview, he stressed a few times that it is important to stay optimistic, and he has an optimistic view concerning the future of the liberal constitutional order and Europe.⁴⁷

CONCLUSIONS

Past experiences may provide good examples for today, but they don't contain ready-made answers to today's challenges. The right answers must be found each time a new generation of lawyers faces these challenges. The rise of illiberal democracies showed that the legal tools built into the constitutional structure are not always effective enough to defend and protect the liberal constitutional order. Judges were unable to adequately respond to illiberal threats and effectively prevent them. Instead, the opposite was evident, as populist political forces could pack courts and run them against the values of the liberal constitutional order. Despite this, judges still remain the most important legal tool for the defense of the liberal constitutional order. The main mission of the judiciary still is the protection of democracy, the rule of law, and human rights, even in uncertain times. But new approaches and perspectives should be sought to ensure this mission meets social reality in time when we face the threats of illiberal democracy.

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⁴⁶ See more: Veronika Krūmiņa, "Tiesnesis juridiskās kultūras telpā," in *Tiesas un mediju komunikācija. Sabiedriskā viedokļa un mediju ietekme uz taisnīgu tiesu* (Rīga: Latvijas Vēstnesis, 2019), 218–229.

⁴⁷ Arnis Krauze, Ilze Puncule-Aginta, *Būtiski Satversmes tiesas spriedumi, mēģinājumi ietekmēt tiesu. Saruna ar Aivaru Endziņu* // <https://lr1.lsm.lv/lv/raksts/laikmeta-krustpunkta/butiski-satversmes-tiesas-spriedumi-meginajumi-ietekmet-tiesu-.s.a156947/>

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