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**JUDICIAL TRANSFORMATIONS
IN POST-COMMUNIST SOCIETIES:
A STUDY IN INSTITUTIONS, ADMINISTRATION
AND INTERPRETATION**

ABSTRACT:

Twenty years after the fall of Communist regimes in Central Europe, one could fall prey to the conviction that the transformation of these societies was achieved. A new generation has grown up, unburdened with any direct personal Communist experience; new institutions have been built, tailored on the Western democratic models; the Central European countries have become members of the European Union and other international organisations, which are traditionally seen as being composed of established democratic countries, respecting the rule of law.

This paper demonstrates that as far as judiciaries are concerned, the transformation is still very much an ongoing process in Central European countries. The paper opens with a reflection on the evolution of the judicial self-portrait and the philosophy of the judicial function in the Central European states. It then examines the process of judicial transition in three areas: institutions, administration of courts and the judicial interpretation of law. In the context of the institutional set-up for a transition, the attention is paid to two elements: the inflation of legal remedies and the advent of constitutional courts as the guardians of the new constitutional settlement. As far as the issue of administration of courts is concerned, the paper contrasts the Czech and the Slovak experience in this area: the state administration of courts on the one hand and the self-administration of courts by a national judicial council on the other. On the basis of this example, it is argued that granting self-administration to a profession in transition can become highly problematic. Lastly, the paper examines how legal and societal transformation influences the interpretation of the law and what interpretative techniques are used in order to bring about societal change.

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1. OVERTURE:

THE CENTRAL EUROPEAN JUDICIAL (SELF-)PORTRAITS AND THEIR TRANSITION

Central European² judiciaries are built on a myth; the myth that judging and deciding cases is a clear-cut analytical exercise of a mechanical matching of facts with the applicable law. It is almost ‘legal arithmetic’. Judges do not pass ethical or moral judgments; rather, they just *find* (never create) the *applicable* (i.e. already extant) law strictly within the laws passed by the legislature.

This myth is, to a great part, a variety of the classical narrative concerning the judicial function construed on the continent after the French Revolution and the German 19th century exegesis.³ A dispute over constitutional primacy was resolved in favour of legislative power, be it by revolutionary means or by the imposition of an enlighten sovereign, originally the head of the executive as well as the supreme legislator. However, whereas the Western continental countries did gradually depart from these assumptions in the course of the 20th century, Central Europe did not; quite to the contrary. The perception of the judicial function in Central European countries after WWII moved in the opposite direction.

After WWII in Western (continental) Europe, one notes a certain retreat from the complete denial of creative power of the judges under the visions of the ‘French Deviation’⁴ and a gradual revaluation of the judicial function.⁵ Especially with the advent of constitutional courts, the various European and international courts and the legalistic and positivistic failure of WWII, various Western continental systems started again to recognise that judges do pass value judgements and do create new legal rules. The development in Communist Central Europe, however, went in the opposite direction: the legislative (by then the popular people’s) sovereign will was put on a pedestal and re-affirmed, against all the institutions in the state. In constitutional terms, Communist law operated with the notion of unity of state power, not the separation of powers.⁶ So whereas in the visions before WWII, in which Central European judges were left with a dogmatically limited space to manoeuvre within the law, under Communist rule judges had no discretion at all, even within the bounds of the law.

2 Without wishing to enter the endless debate as to what should geographically and culturally mean ‘Central Europe’, for the purposes of this paper, the notion ‘Central European countries’ refers to the Czech Republic, Slovakia, Poland and Hungary.

3 See also Dawson, J. P. *The Oracles of the Law*. Ann Arbor: The University of Michigan Law School, 1968, ch. 1.

4 Famously, Merryman, J. ‘The French Deviation’, 44 *American Journal of Comparative Law* 109 (1996).

5 Cf. the comparative study on the rise of the case law in civilian systems in MacCormick, D. N., Summers, R. S., eds., *Interpreting Precedents – A Comparative Study*. Dartmouth: Aldershot, 1997.

6 See Příbáň, J. ‘Na stráží jednoty světa: marxismus a právní teorie’. In: Bobek, M., Molek, P., Šimíček, V., eds., *Komunistické právo v Československu – Kapitoly z dějin bezpráví*. Brno: Masarykova univerzita, Mezinárodní politologický ústav, 2009, 39–59.

The pre-Communist judicial authority in Central Europe can be said to be *technical* and *bureaucratic*. The Austrian-Hungarian judiciary was construed as a skilled professional judiciary, strictly apolitical, whose authority was expertise-derived: the mandate of the judge was derived from his technical legal knowledge, acquired and tested in mandarin-like entrance examination and further fostered in a similar style of promotion and advancement.

Such expertise-derived authority restrains and protects the judge at the same time. The judge is not called to judge the others because he would be anything better in moral or ethical terms; the judge is called to judge the others because *he knows the law*, meaning he has the technical knowledge of the codes, the acts of the Parliament, the practice of the higher courts and the respective procedures to be followed.

This vision of judicial authority has even deeper roots. In relation to the construction of a judicial system, Mirjan R. Damaška distinguished two visions of officialdom: the hierarchical ideal and the coordinate ideal.⁷ The *hierarchical* ideal, which represents the model of classical bureaucracy, is characterized by a professional corps of officials who are organized into a clear hierarchical structure and who make decisions according to their technical knowledge. The system relies on extensive control and oversight of activities of the system's lower levels.

The *coordinate* system, on the other hand, is a more 'amorphous' machinery without such a strict hierarchy. Decision-making in the system is not based primarily on technical knowledge and expertise, but on experience—on shared visions and common understanding of ethical and political norms, supported by 'common sense'. The system does not require extensive control and review of individual decision—hence the term 'coordinate ideal'.

Continental judicial structures, especially the Latin ones (France, Italy, Spain), but to a considerable extent the Germanic ones as well, represent the hierarchical officialdom. Anglo-American legal systems and, more broadly, the common law countries can be associated with the coordinate officialdom model.

The Austrian and Germanic specificity is the bureaucratic element within the hierarchical model. The Austrian monarchy created and the Central European countries later inherited the image of the judge as a specific variety of civil servant. It is not without symbolical significance that, if one opens the first full-scale codification of the organization of courts in the Austrian monarchy, the 1896 Law on Courts,⁸ the law does not call a judge a 'judge' [*Richter*].

7 Damaška, M. R. *The Faces of Justice and State Authority; A Comparative Approach to the Legal Process*. New Haven: Yale University Press, 1986, 16.

8 Gesetz vom 27. November 1896, womit Vorschriften über die Besetzung, innere Einrichtung und Geschäftsordnung der Gerichte erlassen werden, RGBl. 217/1896 [Law of 27 November 1896,

Instead, § 1 of the Law specifies that the constitutional functions of a judge are to be exercised either by ‘independent judicial officials’ [*selbständige richterliche Beamten*] or ‘auxiliary judicial officials’ [*richterliche Hilfsbeamte*].

However, in the Austrian perception, to be a ‘public servant’ had a distinct positive ethos. The departure from this heritage came with the Communist regime. In a way, the new Communist regime quite welcomed the idea that judges are ‘public servants’. It was a good starting point for turning them into genuine servants of the system, who were there to realize greater aims of the system: the only necessary step was to redefine the ‘public’, to whom the judges were supposed to serve.

The new characteristics the Communist regimes added to the Central European judicial self-image were negative ones. Three should be mentioned: anonymity, collective irresponsibility and mediocrity. The reasons for implantation of such characteristics in a system which severely punishes any personal opinion and positive deviation and within which the most useful survival strategy was to be ‘a grey mouse’ are obvious. The promotion of such personal characteristics within the judiciary was, however, not just the issue of political power and control. The incentives were also economic in nature. Under Communist rule, the position of a judge was badly paid – the average judicial salary in the Czechoslovakia, Poland, Hungary or East Germany was at or below the average salary in the national industry.⁹ It is clear that, in addition to all the political aspects of the judicial work under Communist rule, a profession with low societal prestige and minimal salary could hardly attract any well-qualified candidates.

The judicial self-image that emerges after the fall of Communist rule in Central Europe is thus the image of judge as a public servant with a negative connotation. Instead of the bold Austrian ‘*I AM a public servant*’ comes the post-Communist defensive ‘*I am BUT a public servant*’. The Central European judicial Hercules seems to be an anonymous grey mouse, hidden behind piles of files and papers, unknown to the outside world, who does not wish to take any individual decision, surely not those s/he would have to defend publicly.

After the fall of Communism, the judicial self-image of judging as a mere technocratic and bureaucratic activity experienced a certain revival. In a way, the old Austrian approach is very useful for the self-justification of the Communist judges and their future survival under the new system.

whereby the Regulations on the Composition, Internal Establishment and the Rules of Procedure of the Courts are enacted].

9 Kühn, Z. *Aplikace práva soudcem v éře středoevropského komunismu a transformace Analýza příčin postkomunistické právní krize* [Judicial Application of Law in Central Europe in the Communist and Transformation Eras. An Analysis of the Post-Communist Legal Crisis]. Prague: C. H. Beck, 2005, 72–73.

Any new political regime faces a similar set of questions relating to institutional transition. Within the judiciary, the question is: what to do with the judges of the old system? The problem is not with the exposed few, for instance the ‘very red’ judges who presided over criminal cases in heavyweight political trials. These judges typically leave by themselves or else they are disposed of. The real problem is with the grey masses of servants, who did not expose themselves in any significant way, but were nonetheless clearly loyal to the previous system. They were formed under it, and they enforced its values.

The same issue arises in judicial transformations. To replace almost the entire judicial staff,¹⁰ as was to a great extent done after the German reunification with the importation of judges from the former *Bundesrepublik* into East Germany, was a unique historical opportunity not available in any of the other post-Communist states. To train and quickly put into place an entirely new corps of judges was a task that even the Communists themselves failed to achieve after their takeover in 1948.¹¹

All the judiciaries in post-Communist Central and Eastern Europe were thus, basically out of necessity, built on the principle of personal continuity. The ex-Communist judges used the myth of moral-free judging by technocratic judicial officials as a survival strategy and self-justification for their continuous existence within the judiciary. If put to the extreme, a good judicial official is able to work in any regime, irrespective of its internal values, precisely because s/he claims that all s/he is doing is the technical application of the will of the legislature. ‘Mechanical’ legal science and technocratic knowledge of the law (especially the procedural rules, which are, in the most post-Communist states, the object of a specific cult – precisely for these reasons) is thus a judicial self-portrait, which an immediately post-Communist judiciary cares very much to foster. It helps it to survive.

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- 10 Or, perhaps, to dispose of them in a more drastic way, as was suggested by a senior English judge. When asked, what should the Central European states do at the beginning of their transitions in 1990, his answer was ‘Hang all the judges!’ Tůma, Z. ‘Soudce nelze novelizovat’ [Judges cannot be amended]. In: Pospíšil, I., Kokeš, M., eds., *In dubio pro libertate. Úvahy nad ústavními hodnotami a právem. Pocta Elišky Wagnerové u příležitosti životního jubilea*. [In dubio pro libertate. Reflections on Constitutional Values and the Law. Liber Amicorum Eliška Wagnerová.] Brno: Masarykova univerzita, 2009, 247.
- 11 For instance, in Czechoslovakia in early 1950s, Communists established so-called ‘Law Schools for Labourers’ [*Právnícké školy pracujících*]. In these special evening schools, opened only to the ardent Communists, the Communist Party bred a ‘new type of socialist lawyers’. The course lasted one or two years and it equalled a university degree in law. The applicants did not even need to have secondary school education. The project itself was, however, discontinued after 4 years, in 1954 – the quality of the ‘graduates’ from these courses was too terrifying even for the Communist planners. Further, see Krystufek, Z. ‘Komunistické právo v Československu’. In: Bobek et al. (2009), 931–51.

2. THE INSTITUTIONS

Post-Communist Central European judiciaries were thus founded on staff and institutional continuity with the previous regime. There was also continuity in the area of positive law – the entire system of law, including its major codifications, remained, albeit numerous amended, in place. What changed, however, were the values and political foundations of the system, subsequently reflected in constitutional law. As will be explained further,¹² this change put some requirements on the way the old law was to be interpreted and applied.

Very little was nonetheless done in terms of the replacement of the judicial staff, essentially for the reasons outlined above. In some countries, so called lustration laws have been put in place.¹³ These laws were designed to weed out active proponents of the system, typically officials of the party or collaborators of the secret (state) police. These laws, however, left judges intact: as David Kosař argues, sitting judges typically had no incentives to become collaborators or informers of the secret police and they were thus outside the scope of the laws. That, in turn, meant that they, even if (passive) party members and silent collaborators of the system, received ‘negative’ lustration and were considered ‘clean’. As Kosař puts it: *‘In fact, the Lustration Acts put the issue of “dealing with the past” under the carpet since those with a negative lustration certificate are considered ‘crystal clear’ and those with a positive lustration certificate become so stigmatised that they refrain from speaking out.’*¹⁴

A commonly committed mistake in some of the transition countries was the opinion of the new democratic liberal rulers that should any staff changes within the judiciary be necessary, it should only be within the criminal courts. The belief was that it was the criminal courts and criminal ‘justice’, which were used as a tool for the persecution and the oppression of the opposition. This approach allowed quite a number of judges, who were active in other areas of law, to survive silently without their past decisions or activities being questioned.¹⁵

12 See below, section 4.

13 For more on lustration laws, see e.g. Schwartz, H. ‘Lustration in Eastern Europe’, 1 *Parker School Journal of East European Law* (1994), 141; Gillis, M. ‘Lustration and Decommunisation.’ In: Přibáň, J., Young, J., eds., *The Rule of Law in Central Europe: The Reconstruction of Legality, Constitutionalism and Civil Society in the Post-Communist Countries*. Aldershot: Ashgate, 1999, 59–66; Wagnerová, E., Gillis, M. ‘Justice and Memory: The Experience of the Czech Republic: 1989 to the Present.’ 8 *Journal of East European Law* 199 (2001). More specifically on Poland, see Safjan, M. ‘Transitional Justice: The Polish Example, the Case of Lustration.’ 1(2) *European Journal of Legal Studies* (2007). A fresh assessment of the Czech lustration laws and the recent case law of the ECHR is offered by Kosař, D. ‘Lustration and Lapse of Time: Dealing with the Past in the Czech Republic’, 4 (3) *European Constitutional Law Review*, 2008, 460–87, 2008.

14 Kosař (2008), 484.

15 As mentioned by one of the first Czech Ministers of Justice after the Revolution, Otakar Motejl, in his memoirs published as Kalenská, R. *LEXikon Otakara Motejla* [Otakar Motejl’s LEXicon], Prague: Nakladatelství Lidové noviny, 2006, 82–84.

To limit the questioning of past activities of judges to those active within criminal justice system however disregarded the logic of totalitarian systems. In a Communist regime, there was no private/public law divide;¹⁶ the public power, unlike in a ‘mere’ dictatorship, does not satisfy itself with dominating the public space and sanctioning, if necessary, the opposing individual by the means of public law (criminal, administrative). It permeates the entire legal system and all the branches of the law. The Communist law required that all of the law and any legal dispute were to be approached in a dialectic way, with the awareness of the social class, which basically meant that it mattered whether it was a labourer or a bourgeois who wanted to get a divorce or who was a party to a labour or social dispute. There was thus no area of judicial activity free of Communist interference: as well, labour, paternity or marital disputes were supposed to be decided respecting the basic tenets of the political system. For instance, a divorce petition filed with a civil court should be treated differently in cases where both husband and wife were communists or where just one was communist and the other, for instance, was a dissident or a large property owner.¹⁷

The judiciary thus entered the post-revolution transition period with very little or no public and professional credibility. Even today, distrust of the judicial system remains widespread. This is perhaps less true in Poland, where at least the judges sitting in the supreme jurisdictions were, to a large extent, replaced;¹⁸ it holds true, however, for most of the other post-Communist jurisdictions, most notably for the Czech Republic, Slovakia and Hungary. The pervasive distrust of the ordinary judiciary was evidenced by two broader institutional developments in the judicial systems, which will be examined here: firstly, the inflationary character of the number of legal remedies and, secondly, the advent of the constitutional courts.

2. 1. THE ENDLESS JUSTICE: THE INFLATION OF LEGAL REMEDIES

The first half of the 1990s witnessed a great boom in legal remedies. This was due to at least two factors. Firstly, the Austrian heritage in Central Europe has always nourished a culture of appeals and remedies, something that (not only) common law authors call ‘*Instanzenmentalität*’.¹⁹ Secondly, additional

16 The fact, that the official Communist doctrines denied any division into public/private law was of considerable practical significance in this respect. See Gábris, T. ‘Posilňovanie roly štátu a verejného práva v Československu.’ In: Bobek et al. (2009), 145–66.

17 A number of examples are offered by Ulč, O. *The Judge in a Communist State. A View from Within*. Ohio University Press: Columbus, 1972 or by Kühn (2005).

18 Sadurski, W. *Rights Before Courts. A Study of Constitutional Courts in Postcommunist States of Central and Eastern Europe*. Dordrecht: Springer, 2005, 43.

19 In this respect, Central Europe can indeed be said to be obsessed with a genuine ‘*Instanzenmentalität*’, which J. A. Jolowicz mentions as being very foreign to the English mind and to rest of the common-law-world mind. Jolowicz, J. A. ‘The Role of the Supreme Court at the National and International Level.’ In: Yessiou-Faltsi, P., ed., *The Role of the Supreme Courts at the National and*

remedies and special appeals were also a sign of judicial transition. These were put in place partly because of the introduced judicial ‘rehabilitations’, which were a way of re-opening final judgments from the Communist period that were rendered illegally, often many years ago. But the wave of remedies did not stop there. Other extraordinary remedies, extraordinary appeals, and complaints were put in place, based on the somewhat naive vision that more remedies would mean more justice and would avoid the illegality and injustice previously committed by the judicial system.²⁰

This created a veritable ‘running-through-instances’ litigation culture in the Central European countries. For instance, in the Czech Republic and Slovakia, it was not uncommon for a civil dispute to come before five courts: first instance, appeal, revision by the Supreme Court, constitutional complaint to the Constitutional Court, and finally an individual complaint to the European Court of Human Rights in Strasbourg. If any of the higher jurisdictions annulled the decision of the lower courts, the entire story started anew, this time accompanied by a parallel application for damages caused by the excessive length of the proceedings.

As I have argued elsewhere,²¹ the retreat from this ‘running-through-instances’ and reevaluation of the functions of each of the courts in the judicial system is a sign of a certain maturing of a legal system. It is also a sign of trust in the system and the effective dispute-resolution it should provide. Observing the development of the civil and administrative justice system in the Czech Republic over the last 10 years or so, one could see an intriguing clash of a post-transition institutional engineering with ongoing distrust in the judiciary, especially the judges at the Supreme Court. Repeatedly, the legislature has introduced tools to limit access to the Supreme Court, in order to allow the Court to select cases of legal significance and summarily (or without any reasoning) dismiss all the other cases. Repeatedly, the public distrust was voiced against any selection of the docket before the Supreme Court and repeatedly, the Czech Constitution Court has struck down these amendments.²²

The objections to any selection of the docket before the Supreme Court by the Constitutional Court were formulated in terms of constitutionality. There are, however, indications that one of the main reasons might be the distrust of the constitutional justices towards the members of the Supreme Court, most

International Level. Reports for the Thessaloniki International Colloquium (21 – 25 May 1997), Thessaloniki/Athens. Thessaloniki: Sakkoulas Publications, 1998, 59.

20 As observed by Otakar Motejl when reflecting on the legislative reforms of judicial procedure and of the role of supreme courts in the early 1990s, in which he participated. See in Motejl, O. ‘Nejvyšší soud – nejvyšší spravedlnost?’ [Supreme Court – Supreme Justice?]. In: Šimíček, V. (ed.), *Role nejvyšších soudů ve sjednocující se Evropě – čas pro změnu?* [The Role of Supreme Courts in Ever Closer Europe – Time for a Change?]. Brno: Mezinárodní politologický ústav, 2007, 87.

21 Bobek, M., ‘Quantity or Quality? Reassessing the Role of Supreme Jurisdictions’, in Central Europe. 57 (1) *American Journal of Comparative Law* 33, 66 (2009).

22 For details see *ibid.*, pp. 55–59.

of whom are former career-judges who started their judicial career under the Communist rule, typically in the 1970s and 80s. Such reasons were obviously never put in writing, with the striking exception of one concurring opinion of Justice Ivana Janů. It was the decision in which the Constitutional Court annulled as unconstitutional a provision of the Law on Courts and Judges, which allowed for the recall of a court president by the executive.²³ In relation to the members of the Supreme Court and their selection, Janů noted that *'reference must also be made [...] to the personal quality of the judicial corps of the SC in the conditions of the post-communist transformation of justice. In this connection, I have in mind the entirely unknown rule on the basis of which the selection of Justices of the Supreme Court has until now been practiced. A candidate's name is not made known in advance to the wider public, thus his integrity and expertise is not even discussed in the press, which is a quite common practice in the case of Constitutional Court Justices [...] Even the most capable Chief Justice will manage to do little with a court on which sit also judges who have not developed a high level of restraint and sense of responsibility'*.²⁴

2. 2. CONSTITUTIONALITY AS DISTRUST: CONSTITUTIONAL COURTS AS THE GUARDIANS OF THE NEW CONSTITUTIONAL SETTLEMENT

The second significant feature of the post-1989 institutional design of the Central European judiciaries is the rise of constitutional courts. All countries in this region established a freestanding, specialized, and concentrated constitutional judiciary. Why this model was adopted is open to debate: apart from the obvious historical roots²⁵ and a strong German influence, distrust of the old Communist judiciary was also voiced, at least in the case of former Czechoslovakia.

When writing about constitutional justice in the world, Michel Fremont distinguished three generations of constitutional jurisdictions in Europe: the first one was born after WWI, the second one after WWII and, finally, the third one after the fall of Communist rule in Central and Eastern Europe.²⁶ The crucial competences of the constitutional courts of the first generation (Austria and Czechoslovakia) were disputes over competences between state authorities and the abstract review of constitutionality. Constitutional courts of the second and third generation were introduced, with the notable exceptions

23 Decision of July 17, 2006, Pl. ÚS 18/06, published as č. 397/2006 Sb. (no. 397/2006 of the Collection of Laws).

24 Quoted from the English translation of the decision, which is freely available at <http://www.usoud.cz/file/2281> [last accessed in December 2010].

25 For instance, pre-Second World War Czechoslovakia had one of the first constitutional courts in the world, established in 1920.

26 Fremont, M. *La justice constitutionnelle dans le monde*. Paris: Dalloz, 1996, première partie, 17–26.

of France and Belgium, following a dictatorial experience.²⁷ These courts are (typically) still entrusted with hearing cases concerning the competences of state authorities. In federal states, they are also asked to adjudicate disputes between the federation and the member states, and vice-versa. Their primary function is, however, a different one: the specialised and concentrated model of judicial review created in these new democracies is, above all, a form of institutional distrust. The post-Second World War constitutional courts can be said to be tools of judicial transition. Their crucial function is to safeguard and enforce the provisions of the new constitution vis-à-vis the old governments and judiciaries (whether the earlier post-Nazi or the later post-Communist ones), and to prevent any future abuses of fundamental rights.²⁸

To a great extent, this transformation rationale also holds true for post-Communist Central Europe.²⁹ Under Communist rule, supreme jurisdictions were bastions of the Communist rule and the ‘system’. Their task was to keep the ordinary courts ‘in line’, to supervise and control them. The pre-existing hierarchical model of the organisation of the judiciary, inherited from the era of the Austrian monarchy, was, behind the Iron Curtain, converted into a tool of close supervision and control of the judiciary. Supreme jurisdictions under Communist rule were typically staffed with the more senior career judges, loyal to the Communist party, who ‘could be relied on’.³⁰

Roughly twenty years after the last round of institution building in Central and Eastern European countries, one can observe institutional mutation. What was originally put in place – a sort of revolutionary tribunal, set up to guard and enforce the reached constitutional settlement – is, at least in some institutional designs, mutating into a regular supreme court. The key element is the institutional design and whether or not the respective constitutional court was entrusted to hear individual constitutional complaints, i.e. complaints against final administrative and judicial decisions.

27 See Starck, Ch., Weber, A., eds., *Verfassungsgerichtsbarkeit in Westeuropa. Teilband I: Berichte*. Baden-Baden: Nomos Verlagsgesellschaft, 1986 and the reports on Germany (121–48), Italy (219–42), Spain (243–78).

28 Schwartz, H. *The Struggle for Constitutional Justice in Post-Communist Europe*. Chicago: The University of Chicago Press, 2000, 18–19.

29 The transition rationale would, in my point of view, also include Poland and the ex-Yugoslav countries. Although it is of course true that the constitutional courts in these countries were established before 1989, their establishment can nonetheless be traced back to the gradual liberalisation of the regime, i.e. a germ in transition, which was present in these countries already in the 1980s. See Verdussen, M. ‘La Justice Constitutionnelle en Europe Centrale : Essai de synthèse’. In: Verdussen, M., ed., *La Justice Constitutionnelle en Europe Centrale*. Bruxelles: Bruylant, 1997, 229–30. For an opposing view regarding the transformation distrust rationale, see Sadurski, W. ‘Constitutional Review after Communism’. In: Sadurski, W., ed., *Constitutional Justice, East and West*. The Hague: Kluwer Law International, 2002, 175.

30 As a former dissident lawyer and the post-1989 Chief Justice of the Czech Supreme Court and later Minister of Justice, Otakar Motejl, notes in his memoirs, that when he was appointed a justice to the then Czechoslovak Supreme Court for a short period during the so-called Prague Spring (1968), he was the only judge there who was not a member of the Communist Party. Kalenská (2006), 327.

The possibility of individual constitutional complaints, modelled on the Swiss legal system,³¹ were introduced after WWII, for instance in Germany (*Verfassungsbeschwerde*), Spain (*recurso d'amparo*), the Czech Republic (*ústavní stížnost*) and Slovakia (*ústavná sťažnosť*). A milder version of the same system is known in Hungary and Slovenia.³² This means that final judgments, from whatever echelon of the judicial hierarchy, can be reviewed by the constitutional court. This competence, together with the impossibility to demarcate the scope of constitutional review in the area of constitutional complaints, gradually turns a constitutional court into a regular supreme jurisdiction.

In theory, constitutional courts in Central Europe, modelled on the German *Bundesverfassungsgericht*, are supposed to act as the protectors of the new constitution and its values. Their jurisdiction should be limited to the question of constitutionality; the *Bundesverfassungsgericht* distinguishes in this respect between the level of the constitutional law (*Verfassungsrecht*) on the one hand and, somewhat dismissively denoted, the area of simple or mere law (*einfaches Recht*) on the other. Its proclaimed function is to interpret and apply the constitutional law; to interpret and apply simple law is the task of courts of general jurisdiction, i.e. ordinary courts. This distinction spills over in the area of protection of fundamental rights: not every breach of simple law (illegality) is, at the same time, unconstitutional. For an action of state authority to be an unconstitutional, the violation must be of constitutional significance, i.e. the violation must go beyond the mere illegality or procedural irregularity.

The division between constitutional and 'simple' law implies that there is a test or a set of criteria that would demarcate the borderline between the world of legality and the world of constitutionality.³³ There is none. To my knowledge, neither the German *Bundesverfassungsgericht*³⁴ nor its Central and Eastern European offspring³⁵ was ever able to come up with any plausible test or criteria for the distinction of these two worlds in the area of constitutional complaints. What is applied is the highly subjective 'I-know-it-when-I-see-it' test, which, of course, leads to uncertainty as to when there is an issue of constitutional significance at hand and where there is none.

31 Fremont (1996), 22.

32 Further on these systems, see Luchterlandt, O., ed., *Verfassungsgerichtsbarkeit in Mittel- und Osteuropa. Teilband I: Berichte*. Baden-Baden: Nomos, 2007.

33 See also critically Heuschling, L. 'Justice constitutionnelle et justice ordinaire. Épistémologie d'une distinction théorique'. In: Grewe, C., ed., *La notion de „justice constitutionnelle"*. Paris: Dalloz, 2005, 85–112.

34 See 'Entlastung des Bundesverfassungsgerichts; Bericht der Kommission'. Bundesministerium der Justiz (Moser Druck Verlag): Bonn, Januar 1998, pp. 137 and 138 and the literature cited therein.

35 See critical assessment in a collective volume *Hranice přezkumu rozhodnutí obecných soudů ústavním soudem v řízení o ústavní stížnosti. Sborník příspěvků z konference pořádané Ústavním soudem České republiky ve spolupráci s Benátskou komisí Rady Evropy v Brně 14.-15. listopadu 2005* [The Limits of the Constitutional Review of the Ordinary Courts' Decisions in the Proceedings on Constitutional Complaints. Collection of Contributions from the Conference held by the Constitutional Court of the Czech Republic in cooperation with the Venice Commission in Brno, 14–15 November, 2005]. Prague: Ústavní soud České republiky a nakladatelství Linde, 2005.

The identification of the borderline between the ‘simply legal’ and the constitutional is not one of mere academic indulgence; it is of great practical significance. Firstly, the fact that there is a constitutional issue at play forms the admissibility criteria for constitutional complaints of individuals. Secondly, the fact that there was a violation of fundamental constitutional rights and not a mere procedural irregularity resulting perhaps in illegality of the decision is the key finding in deciding a case before the constitutional court on merits.

Tens of individual decisions of the German, Czech or Slovak constitutional courts could be discussed at this point, arguing whether or not in the individual cases there was indeed an issue of constitutional significance at stake. This would not only entail cases in which judges of ordinary courts or academics writing case notes were of the opinion that there was no constitutional issue and that the respective constitutional court should not be deciding the case. There are also numerous examples in which various judges (or different chambers) within the same constitutional court differ as to whether or not there is an issue of constitutional significance; the procedural consequence of this difference is that one judge (or chamber) may reject an identical complaint for manifest inadmissibility, concluding that it has no constitutional significance, while the other can admit it and even allow the complaint and annul the final decision of the court of general jurisdiction.

The distinction between the merely legal and the constitutional resembles a Yeti. No one has ever seen it or has been able to describe it, yet there are some people who believe that it is out there. Rather than keep looking for the Yeti, it might perhaps be wiser to acknowledge that there is no borderline between the legal and the constitutional. Every case and every legal dispute can be rephrased in terms of constitutionality and the protection of fundamental human rights.³⁶ Every legal question can thus be made subject to a decision of the constitutional court.

Such development is clearly visible in the judicial statistics of the Czech and Slovak constitutional courts. For instance, the Czech Constitutional Court (CCC) is, according to the Constitution and the Act on the Constitutional Court,³⁷ entitled to conduct an abstract as well as concrete review of constitutionality. Concrete review in the form of the individual constitutional complaint can be directed against any ‘*final decision or any other interference by a public authority into constitutionally guaranteed rights and freedoms*’.³⁸

36 As one member of the CCC put it in a personal interview with the author, virtually everything can be a constitutional question provided the respective constitutional document contains at least the following three basic rights: human dignity, right to a fair trial and the equality guarantee.

37 Zákon č. 182/1993 Sb., o Ústavním soudu [Law no. 182/1992 Coll, Act on the Constitutional Court, as amended], hereinafter abbreviated as ACC.

38 Art. 87 (1) (d) Czech Constitution.

At first sight, individual constitutional complaints can be directed against any final decision taken by the executive or the judiciary. However, the Act on the Constitutional Court requires that before the matter can be dealt with by the CCC, the individual applicant must have exhausted all legal remedies, including a potential action before the civil or administrative courts.³⁹ This makes direct access and an action before the CCC almost impossible: an individual is obliged to submit the matter to civil or administrative courts first.

The vast majority of the CCC docket is composed of revisions of the final judicial decisions. The statistics of the total workload of the CCC show that, on average, more than 92% of the cases lodged before CCC are constitutional complaints attacking final decisions of courts. About 30% of the annual docket of the CCC, which has now risen to more than 3000 new cases every year, is constitutional complaints against the last decision rendered by one of the supreme courts.⁴⁰ More than 60% of the remaining docket is complaints against final decisions by other courts.⁴¹ Thus, in more than 92% of its activity, the CCC reviews final judicial decisions.

Arguably, this repartition of the docket does not differ from the docket of any normal supreme jurisdiction. It is clear that by far the greatest attention paid by the CCC goes to the revision of judicial decisions. By enforcing the strict requirement of the exhaustion of other legal remedies (be it within the administration or before courts), the CCC has virtually sealed itself off from the executive and the review of administrative decisions and started functioning as a *de facto* supreme court.

In sum, the constitutional courts in Central Europe, which were given the power to hear individual constitutional complaints, and which originally started as specialised, perhaps rather 'transitional' tribunals, gradually turned into general and permanent supreme courts. This development is due to several factors, the key ones being the inability to define the scope of the notion of constitutionality and the individual access to constitutional courts.

This functional shift fits well into the broader picture of the rise of constitutionalism after WWII and the omnipresent human rights discourse. It is, of course, not an isolated development and it is not a one-way street. By the

39 § 72 (3) ACC.

40 The figures obtained by the author on 9 August 2007 from the CCC's registry are as follows: in 2004, the total number of constitutional complaints filed was 2710, out of which 823 complaints (30%) were contesting last instance decisions of either the Supreme Court or the Supreme Administrative Court. In 2005, the numbers were 2981 (total number of complaints) with 989 complaints against both supreme courts' decision (33%). Finally, in 2006, the total number of complaints had risen to 3453, with 1082 complaints challenging final decisions of one of the supreme courts (31%).

41 In 2004, the number of constitutional complaints lodged against final decisions of courts of all instances with the exception of the both supreme courts (i.e. district, regional and high courts combined) was 1620 out of 2710 (60% of the total docket); in 2005, it was 1819 complaints out of 2981 (61%); in 2006, it was 2107 complaints out of 3456 (61%).

tools of the requirement of comfort interpretation and the radiating effect of constitutional rights into the entire legal system,⁴² constitutional courts change the structure of the judicial system⁴³ and shift the functional rhetoric of the judiciary. Fundamental rights and constitutionality can be found everywhere, provided one bothers to look.

The gradual change of the constitutional courts from the stronghold of institutional distrust into a regular supreme court is completed once the courts of ordinary jurisdiction accept their role as first instance guardians of constitutionality and do not hesitate to apply the constitution and the case-law of the constitutional court directly. This is not yet the case in the third generation of supreme courts in the post-Communist Europe. This might, however, be the case in some of the second-generation constitutional courts, most likely in Germany. In such system, it is not uncommon to see instances in which lower courts (first instance courts or appellate courts) render more ‘constitution-friendly’ decisions than eventually the Federal Constitutional Court itself. Here, the constitutionality loses its function as transitional distrust and becomes a permanent centre of legal discourse and reasoning.

3. THE ADMINISTRATION OF COURTS – IN SEARCH OF THE CONSTITUTIONAL BALANCE

The issue of administration of courts is characterised by an ongoing struggle between two competing interests: on the one hand, the independence of the judiciary must be safeguarded. On the other hand, there must be someone who is entrusted with the administration of the independent judges, in both the technical sense (building, equipments, courts staff, etc.) and the more judicial sense (overseeing the judicial business, detecting and preventing delays, assigning work to the individual judges, etc.).

This eternal tension reaches yet another depth in the context of judicial transitions in post-Communist societies. Following the historical momentum of change, new institutions and new models were needed quickly, without much consideration as to their suitability. In terms of administration of courts, the universal model taken over in a dozen countries across Central and Eastern Europe after the fall of Communist regimes was the administration of courts by a judicial council. Under the auspices of European institutions and a con-

42 See e.g. the famous cases of BVerfGE 7, 198 (207) – ‘Lüth’, BVerfGE 30, 173 (187) – ‘Mephisto’, BVerfGE 34, 269 (280) – ‘Soraya’. Generally see Dreier, H., ed., *Grundgesetz. Kommentar. Band I (Artikel 1–19)*. Mohr Siebeck, 1999, 66 and seq. or Von Münch, I., Kunig, P., eds, *Grundgesetz – Kommentar. Band I (Präambel bis Art. 19.)*. München: C.H.Beck’sche Verlagsbuchhandlung, 2000, 38 and seq.

43 On these issues in the context of West-European constitutionality, see Stone Sweet, A. *Governing with Judges: Constitutional Politics in Europe*. Oxford: Oxford University Press, 2000, 117 and 122

glomerate of entities one may call the international ‘rule-of-law-industry’, the establishment of an independent judicial council became the solution, an almost ‘ready-made-Euro-product’. The transition countries that established a judicial council were labelled the good pupils and praised; those few that failed to do so were reprimanded.

The transformation of a system of administration of justice is, however, primarily about the building of ethical consensus and responsibility, not about institutions. The fact that a country failed to establish a judicial council does not mean that the system of administration of justice would be less independent or less efficient. The case studies given here, in this respect, are the parallel developments in the Czech Republic and in Slovakia. Whereas Slovakia opted for a model of a relatively strong judicial council in 2002, the Czech Republic was continuously searching for a model that would be acceptable to all the constitutional powers. However, that is not necessarily a bad thing: somewhat clumsy but homegrown solutions may, in the long run, create a more viable and convincing solution than an imported ‘Euro-model’.

3. 1. THE TRADITIONAL MODEL: THE (STATE) ADMINISTRATION OF COURTS

The traditional model of administration of courts, which was in place not only in Central Europe, has been the state administration of courts. Historically, all courts were administered by the government. The particular institutional settings might vary; the administration of the courts would typically be the task for a ministry of justice or a similar governmental department.⁴⁴

With the gradual emancipation of the third power in the state, various self-administration bodies of the judiciary have been created, especially in the Romanic (Latin) countries.⁴⁵ They come in various shapes and sizes, their denomination typically being national or supreme council of the judiciary. Their general *raison d’être* appears to be the same: following a dictatorial experience, the new democracies seek to fully shield the judiciary from any potential political and executive influence.⁴⁶ The creation of a judicial council, however, did not necessarily mean a full ‘sealing-off’ of the judiciary from the executive control; there would typically remain some competence of the

44 For a good introduction, see Picardi, N. ‘La ministère de la justice et les autres modèles d’administration de la justice en Europe’. In: *L’indipendenza della giustizia, oggi. Liber Amicorum in onore di Giovanni E. Longo*. Milano: Dott. A. Guiffrè Editore, 1999, 269–94.

45 See Guarnieri, C. ‘Appointment and career of judges in continental Europe: the rise of judicial self-government’, *24 Legal Stud.* 169–87 (2004).

46 With the notable exception of post-WWII (West) Germany, where the judiciary expressly rejected the motion of creating an independent judicial council [*Richterrat*] at the time of the drafting of the German Law on Judges [*Richtergesetz*] in 1953. See also Schmidt-Räntsch, G., Schmidt-Räntsch, J., *Deutsches Richtergesetz – Kommentar*. München: C. H. Beck’sche Verlagsbuchhandlung, 1995, 51.

respective executive bodies (ministerial, budgetary, etc.) to oversee administrative decisions of presidents of courts and judges entrusted with administrative decisions.⁴⁷

The Central European tradition in the administration of courts is the Austrian or Austrian-German one. The common Austrian legacy is easily discerned: an almost identical model of state administration of courts to that currently in place can, for instance in the Czech Republic, be found in the Austrian codification of the law on this matter, in the Law on the Organisation of Courts of 1896.⁴⁸ The similarities are indeed striking: with little exaggeration, the only difference between the old Austrian codification and its current Czech successor⁴⁹ is the archaic language and the (much more) concise wording of the Austrian statute.

The historical Austrian model of state administration of courts might be called 'bureaucratic', without, however, any negative connotation in the use of that denomination. The courts and the judiciary were essentially run in the same way as other administrative authorities. There are some differences, allowing for the personal independence and impartiality of the judges, but the overall model is one of hierarchical bureaucracy. The body primarily entrusted with the administration of courts is the ministry of justice. The administration of courts is a two-tiered system: the central body of the administration of courts is the ministry, while on the local level the courts are administered by the presidents and vice-presidents of courts.

The organisation of justice is thus hierarchical and civil-service like: the president of a regional court (appellate court) does not administer only his or her own court and the judges assigned to it, but also all the district (first instance) courts within the jurisdiction of that regional court. A crucial element of the state administration of courts is also the power of supervision of the fluency of the distribution of justice: the president of the court is entitled to inspect, either through his or her own motion or following a complaint by an individual, whether delays occur in cases assigned to an individual judge. If the president finds that delays do indeed occur, s/he is obliged to remedy the situation, if necessary ultimately by initiating disciplinary proceedings against the respective judge. This latter function, i.e. the disciplining of judges, represents, however, the limit of the state administration of courts: the president

47 For a French perspective, see Lemaire, P. 'Le Contrôle Fonctionnel de Gestion (1)'. In: Canivet, G., Andenas, M., Fairgrieve, D., eds., *Independence, Accountability, and the Judiciary*. London: British Institute of International and Comparative Law, 2006, 323–42.

48 Gesetz vom 27. November 1896, womit Vorschriften über die Besetzung, innere Einrichtung und Geschäftsordnung der Gerichte erlassen werden, RGBl. 217/1896 [Law of 27 November 1896, whereby the Regulations on the Composition, Internal Establishment and the Rules of Procedure of the Courts were enacted]. On the administration of courts, see Section 4 of the Law, entitled 'Justizverwaltung und Aufsichtsrecht'.

49 Chapter III (§ 118 – 174a) of the zák. č. 6/2002 Sb., o soudech, soudcích, přísedících a státní správě soudů [law no. 6/2002 Coll., on Courts, Judges, Lay Judges, and the State Administration of Courts].

of the court as well as the ministry can only supervise and detect errors. They have, however, no disciplinary powers vis-à-vis the individual judges: judges can only be censured or removed following the decision of a disciplinary panel. Before the disciplinary panel, it is either the minister or, more frequently, the president of the court that act as prosecutors.

The presidents and vice-presidents of courts play an intriguing dual role: on the one hand, they are judges; at the same time, they are a kind of public servant. In the first role, they sit on the bench and decide cases. Within this aspect of their activity, they enjoy full independence. In the second role, they exercise the (state) administration of courts, they act as public servants and are bound by instructions issued by the ministry insofar as matters of budgetary discipline, salaries, supply of equipment, further education of court staff, the vetting of files and the supervision over the fluent exercise of justice and other tasks are concerned.

In such a bureaucratic model, it is evident that the position of a president of the court is very strong. In some of the countries, the position of the presidents of courts have been somewhat diluted by introducing various committees that are called to advise presidents of courts in staff or other matters. However, these committees, which are typically appointed or elected from the more senior members of the court, tend to have advisory powers only.⁵⁰

The dual function of the presidents and vice-presidents of courts, i.e. as judges and a type of public servant, is also reflected in the different avenues of their appointment and removal. Under Czech law, for instance, a judge is appointed by the president of the republic following a proposal from the minister of justice. A judge can only be removed following a disciplinary proceeding before a special disciplinary panel. A president of a court is typically chosen from judges assigned to the respective court and appointed by the minister of justice or by the president of the republic. Up until the recent decision of the Czech Constitutional Court, which is analysed below, presidents and vice-presidents of courts could be removed from their office by the person who appointed them.⁵¹ However, if a person was removed from the position of a president or vice-president of a court, they still remained (ordinary) judges of that court.

50 Cf. e.g. § 54 of the Deutsches Richtergesetz in der Fassung der Bekanntmachung vom 19. April 1972 (BGBl. I S. 713) [German Law on Judges], which provides for the establishment of *Präsidentenräte* [Presidential Committees] and the *Präsidiums* created at the German federal jurisdictions pursuant to § 21a of the Gerichtsverfassungsgesetz in der Fassung der Bekanntmachung vom 9. Mai 1975 (BGBl. I S. 1077) [Law on the Organisation of Courts]. Similar functions are carried out by small local judicial councils within the courts in the Czech Republic.

51 This competence of the minister of justice has been exercised in the past. In 1999, the then Minister of Justice, Otakar Motejl, removed 5 presidents of regional (i.e. appellate) courts. These decisions remained unchallenged. Removal of presidents of regional courts is current practice in Slovakia; a new minister of justice would typically replace some presidents of regional courts. For instance, in 2006, the then new Minister of Justice, Štefan Harabín, at once removed 7 presidents of regional and district courts, allegedly for irregularities in financial management.

3. 2. THE 'EURO' MODEL: SELF-ADMINISTRATION OF COURTS?

The above-outlined style of the administration of courts and justice has been subject to critique, most notably in relation to the situation in the Czech Republic.⁵² It has been repeatedly stated that such a model of administration of justice gives the executive an undue influence over the judiciary: the judiciary is not a fully-fledged third branch, a third power in the state, but just an adjunct of the executive. However, when censuring the Czech Republic together with some other new democracies for not having complied with the only 'correct' model of judicial self-administration,⁵³ some of the detractors omitted the fact that a model similar to the one used in the Czech Republic is still being used as an acceptable solution in its countries of origin, most notably in Austria and, to a large extent, in Germany.⁵⁴

The old Austrian model of state administration of courts has entered the post-1989 world with little or no public credit. The historical reasons for it are perhaps not entirely fair to that model – it is quite clear that no model of administration of justice could have guaranteed any degree of judicial independence or impartiality in a Communist dictatorship – but the model appeared discredited nevertheless. The immediate conclusion, which emerged as a somewhat unhappy argumentative shortcut, was that the adoption of a different model would prevent any similar misuse in the future.

Charmed by such promise, most of the Central European post-communist countries abandoned, at least on the surface, their Austrian heritage and opted for a pre-fabricated judicial council 'package'. It is hard to understand how this model, which is in itself quite problematic in the countries of its origin,⁵⁵ gained such support and expansion; this is perhaps because it offered a quick and visible action – namely, a new institution – and was attractive to the

52 Most notably in the pre-accession phase to the European Union. Cf. the Open Society Institute's comprehensive report, *Judicial Independence in the Czech Republic*, accessible online at <http://www.eumap.org/topics/judicial/reports>, pp. 112–13 and pp. 127–28; and, in somewhat more diplomatic fashion, in the European Commission's *Regular Report On Czech Republic's Progress Towards Accession*, the 2002 report published on 9 October 2002, document no. SEC(2002) 1402, pp. 22–24; the 2001 report published on 13 November 2001 as SEC(2001) 1746, pp. 18–20.

53 For a critical assessment, see Bobek, M. 'The Fortress of Judicial Independence and the Mental Transitions of the Central European Judiciaries', 14 (1) *European Public Law* 99–123 (2008).

54 It is to be mentioned, however, that also in these countries, the voices for a judicial self-administration are growing stronger, especially in Germany. See e.g. Beschluss 'Selbstverwaltung' der Bundesvertreterversammlung des Deutschen Richterbundes [Motion for Self-Administration by the Assembly of Federal Representatives of the German Association of Judges], adopted on 15 November 2002 in Kiel, summary of the motion published in *Neue Juristische Wochenschrift* 2002, Heft 42, p. XXVII – XXXIV, see also papers delivered by the then president of the *Bundesverfassungsgericht* [Federal Constitutional Court], Papier, H.-J. 'Zur Selbstverwaltung der Dritten Gewalt', *Neue Juristische Wochenschrift* 2585 (2002) and by the president of the German Judges' Association, Mackenroth, G. W., Teetzmann, H. 'Selbstverwaltung der Justiz: Markenzeichen zukunftsfähiger Rechtsstaaten', *Zeitschrift für Rechtspolitik* 337 (2002).

55 The Latin variety of judicial councils is often subject to critique. The most commonly mentioned faults are foreclosure, non-representatives, politicization, corruption, clientelism. For an overview and further links to literature, see e.g. Guarnieri, C., Pederzoli, P. *The Power of Judges: A Comparative Study of Courts and Democracy*. Oxford: Oxford University Press, 2002.

existing judicial power structures in the recipient country. Funded and supported by European organisations and the international ‘rule of law industry’ of NGOs and experts, judicial councils were created in Hungary, Poland, Slovakia, Bulgaria, Romania and many other states in the Central and Eastern European region.

In all, what was created was a new institution. The patterns, power relations and above all key persons within the judiciary remained the same. This assertion can be supported if one contrasts the situation in the Czech Republic, on the one hand, and in Slovakia, on the other. Both countries, which shared for more than 80 years the same statehood, have therefore had identical structures of administration of courts. In 2002 their approaches parted: whereas the Czech Republic remained without a judicial council, Slovakia established one. The developments over the last years have therefore offered a unique example of a legislative laboratory: two samples with very similar starting conditions are given different institutional frameworks and basically the same goal.

As will be discussed in the detail below, rather because of a political accident than any premeditated design, the Czech Republic did not establish a national judicial council. In 2000, a comprehensive reform of the Czech judicial system, including the establishment of the Supreme Council of Judiciary (hereinafter SJC), was submitted to the parliament.⁵⁶ The parliament rejected it. None of the political parties represented in the parliament was enthusiastic about the idea of giving any degree of self-administration to the judiciary. Voices that could be heard in the parliamentary debates preceding the rejection of the bill seeking to establish the SJC referred to the danger of judicial corporativism and elitism.⁵⁷ Conversely, bills, which were later introduced to strengthen the supervision and the responsibility of the judges and judicial officials, tended to be welcomed and swiftly approved by the chamber of deputies.⁵⁸ The system of state administration of courts thus remained in place, with the executive administering the court system through the ministry of justice and, indirectly, through the presidents and vice-presidents of courts.

56 Under the supervision of the then Minister of Justice, Otakar Motejl, the former chief justice. See the document entitled *Návrh koncepce reformy soudnictví* [The Conception of the Reform of the Judiciary] of 16 June 1999, (č.j. 1097/99-L), approved by the Czech Government by the decision no. 686 of 7 July 1999. An outline of the reform proposal was published in the law journal *Právní rozhledy* [Legal Horizons], special supplement to no. 5/1999, 1–8.

57 See the parliamentary debates on bill no. 539/0 of 10 February 2000, on Courts, accessible in full online at the Czech Parliamentary Archives at <http://www.psp.cz>. The threads of judicial corporativism and collective irresponsibility which would be brought about by the proposed Supreme Judicial Council were voiced on several instances, most clearly by the rapporteur of the bill in the Chamber of Deputies, Vlasta Parkanová, in the first reading of the bill on 28 June 2000 (27th session of the Chamber on 28th June 2000, point no 34 in the general discussion).

58 See, e.g. the vote in the Chamber of Deputies on a bill which, disregarding a previous decision of the Constitutional Court, re-enacted the power of the Minister of Justice to recall presidents of courts, on 13 May 2003 (Bill no. 299/0 of 23 April 2003). In a 200 member Chamber of Deputies, the bill was approved by 175 voices in favour against only 1 voice against (vote no 34 at the 16th session on 13 May 2003, available online at www.psp.cz).

Unlike its former federal counterpart, Slovakia opted for a strong judicial council following the fall of the autocratic Mečiar government. The Judicial Council of the Slovak Republic (JCSR) is a body with constitutional standing.⁵⁹ It is composed of 18 members: 8 judges elected from within the judiciary, 3 members elected by the Slovak Parliament, 3 members appointed by the President of the Slovak Republic and 3 members appointed by the Government. The last (or, more precisely, the first) member of the JCSR, which is at the same time *ex lege* its chairman, is the president of the Slovak Supreme Court. Professional judges thus always have a majority in the JCSR.⁶⁰

As from its creation, the JCSR had broad powers in the areas of staff matters, appointments, promotion and disciplinary proceedings against judges. In the area of budget and finances, its powers remained advisory and consultative. The Slovak Ministry of Justice also kept the power of selection and appointment of presidents of courts; as was already mentioned, the Slovak ministers of justice have made use of this competence repetitively.

As from 2002, the Slovak system of administration of courts has thus moved from the traditional state administration model to a great degree of self-administration by the judiciary. However, the change in the structure has not been matched by any visible rise in efficiency or performance of the judiciary. Nor has the public trust had any reason to be re-established; the number of judicial failures and scandals is still high. One thing did, however, change. Before the introduction of self-administration of the judiciary, one of the often-heard arguments was that the undue influence the executive has over the judiciary in terms of administration and management must be misused in influencing decision-making of the courts and the individual judges. Judicial self-administration was thus presented as a way of protecting judicial independence and preventing politicians from putting pressure on judges. Even now, with self-administration and the shielding off of the judges from political pressures, the instances of influencing judges and their individual decision-making still flourish. The only difference is that before, one could at least try to maintain that these things were carried out by the corrupt political elite and because of system deficiencies. Now, it is the judges themselves who run the show.

The ensuing Slovak disillusion with respect to judicial self-administration is not hard to understand. As discussed above, in the Central European visions of the judicial function, it has always been the technocratic judge and his bureaucratic competence that stood at the centre of his authority. Such a person

59 Art. 141a of the Constitution of the Slovak Republic and related legislation, especially zákon č. 185/2002 Z. z., o Súdnej rade Slovenskej republiky [Law no. 185/2002 Coll., on the Judicial Council of the Slovak Republic].

60 Nominally at least 9 members must be judges; in practice, however, even the other institutions appoint judges as members of the JCSR. Presently (August 2009), for instance, 14 out of 18 members of the JCSR are judges.

has been perceived as being above or beyond day-to-day disputes about money, salaries and politics. With a national judicial council coming into existence in these countries, judges entered the political arena as full-scale actors: they publicly squabbled about money, competence and powers. In a way, the traditional and somewhat protective self-conjured portrait has been blown away and what remains is a media torn picture of unduly privileged and paid civil servants who are hard to be distinguished from a ‘common politician’.

Of course, one may always argue that eight years are too early for any lasting changes to be detected. If there is one intermediate conclusion that could be made already at this stage, then it would be that new institutions without internal (mental) change are of little use for a judicial transition. Even more: they may actually be dangerous as well. Colloquially speaking, the state administration of courts is a ‘devil one knows’. After centuries of its use and decades of its misuse, one knows where its numerous shortcomings are. A wholly new institutional design, such as a national judicial council, however, poses new problems and has weaknesses that might be difficult to locate all at once. An especially dangerous mixture is the combination of an older judicial establishment, which considers the administration of justice as a sort of rent-seeking industry, and a new and untested institution, which is easy to play with.

Judicial self-administration is based on the understandable yet not always correct assumption that the more senior members of the profession have more experience, and therefore they should be better administrators. The institutional design of the judicial councils is such as to put the more senior members of the judiciary in the front – either directly, meaning for instance that some senior judges would be *ex offio* members of the council, or indirectly, by election. Evidently, there would also be very high requirements insofar as the personal integrity of such persons is concerned. And therein lies precisely the problem in transitional societies: the pool of such persons is very limited. The senior judges will typically be inherited from the Communist regime. It is hard to imagine that Communist-bred judges would overnight turn into independent and responsible judicial managers who would put the good of the justice system ahead their own interests. However, once a national self-administrative body is established, it is precisely the Communist-grown judges who, because of their standing and seniority, get hold of the key positions in the new institutional set-up.

The latest developments in Slovakia are again quite telling in this respect. Over the last years, the activities and the public image of the JCSR have been deeply distorted by a more or less overt political fight for the position of the president of the Supreme Court, which currently is the chairman of the Judicial Council. Media allegations have included instances of corruption, nepotism and incompetence levied especially against the former (Me iar-

appointed) president of the Supreme Court and later Minister of Justice, Štefan Harabín. After being appointed Minister of Justice in 2006, he publicly announced steps to limit the ‘undue power’ of the self-administration of the judges. However, later in 2008, when the position of the president of the Supreme Court (i.e. at the same time the chairman of the JCSR) fell vacant, his policy changed. In early 2009, the Slovak government and Parliament approved, following bills submitted by the Minister of Justice, Harabín, a series of amendments which broadened the scope of the self-administrative powers of the Judicial Council, adding most significantly some budgetary and inspection powers to the Council. Thus, the last remaining important competences of the Ministry of Justice were to be placed in the hands of the JCSR. In June 2009, Harabín, while still being the Minister of Justice, was unanimously elected by the Judicial Council to the position of the president of the Supreme Court and therefore the chairman of the JCSR.

Needless to say that such development does not encourage public confidence in the ability of the judiciary to administer itself and, above all, to put societal interests above the particular interests of few key persons. The overall impression in Slovakia can be said to be one of ‘institutional disenchantment’; the new institution has been taken over by judges, whose professional history dates back to the Communist times and is full of ‘question-marks’, and whose motives and ways are publicly questioned.⁶¹

3. 3. THE WAYWARD WAYS OF THE BLACK SHEEP

Absent any bold institutional changes, the development in the Czech Republic in the area of administration of courts over the last decade or so can be described as incremental and somewhat chaotic. It is represented by constant clashes between the legislature and the judiciary (the case law of the Constitutional Court and the administrative courts) as to what new legislative or executive schemes in the area of the administration of justice may be acceptable.

An additional (indirect) impetus for these developments also came from the president of the Czech Republic, Václav Klaus (elected in 2003 and re-elected in 2008), whose rather rash decisions regarding the judiciary allowed the outer limits of the constitutional system to be explored and helped the grey zones of the new Constitution to be defined.⁶²

61 Following the election of Harabín to the position of the President of the Slovak Supreme Court, a group of Slovak NGOs (Transparency International, Via Iuris and Aliance Fair-Play), symbolically ‘buried’ justice in Slovakia and launched a petition against his election. The petition together with a list of ‘problematic’ aspects of Harabín’s past can be viewed at www.cervenapreharabina.sk.

62 On the issue of the growing presidential elements in the Czech constitutional system under the current president Václav Klaus, see Kysela, J., Kühn, Z. ‘Presidential Elements in Government – The Czech Republic’, 3 *European Constitutional Law Review*, 91–113 (2007), with respect to the

3.3.1. Recall of a president of a court: reasons, please?

On February 3, 2005, the minister of justice removed the president of the District Court for Prague–West, Marie Drahokoupilová. In the written decision of the minister, only one, rather sketchy, reason for her removal from the office of the president of the court was given: her failure to prevent delays in one trusteeship dispute pending before the district court. Drahokoupilová challenged the minister’s decision before the Prague Municipal Court, which is the administrative court of first instance. She argued that when removing a president of a court from office, the minister acts as an administrative authority deciding on the duties and obligations of that individual. He is thus bound by the general principles of administrative procedure, including the duty to fully ascertain the facts of the case and to give reasons for the decision. She contended that the one-line decision of the minister failed to meet these requirements and that it should be annulled, as it infringes her subjective public rights.

The minister, on the other hand, submitted that the president of a court is a public servant. He suggested that presidents of courts act in a dual capacity: firstly, they are and remain independent judges who sit and decide individual cases. Secondly, as presidents of courts they are state officials, bearers of the administrative state authority. Within their latter capacity, they are part of the administrative hierarchy and subject to the authority of their superior, in this particular case the minister of justice. This dual function is supported by the fact that if removed from the office of the president of a court, they still remain judges of that court.

The Municipal Court allowed the action and annulled the decision of the minister.⁶³ The key issue in the reasoning of the court was the question of the competence of administrative courts to review decisions of the minister removing judicial officials. The Court generally stated that administrative courts are competent to review decisions provided that 1) the decision is a decision of an administrative authority issued in the area of public administration and 2) the decision touches upon the subjective public rights of the applicant.⁶⁴

Unfortunately, the Municipal Court does not dwell on either of the two conditions in any detail, especially on the issue of what ‘subjective public right’ of the applicant has been infringed. The decision proclaims that provided that the law⁶⁵ states the conditions under which the minister may remove a court official from office, the correlating right of the state official is not be removed

president’s action vis-à-vis the judiciary, 106–09.

63 Judgment of the Municipal Court in Prague (Administrative Division) of 24 July 2005, case no. 5 Ca 37/2005-42, unpublished (available upon request from the court’s registry). Case note: Springer, P. ‘Nové koště mete dobře – nebo snad jen jinak?’ [A New Besom Sweeps Well – or Perhaps Just Differently?] 9 *Právní rozhledy*, 335–36 (2005).

64 *Ibid.*, 5.

65 § 106 (1) ACJ.

from the office if the conditions are not met. At the same time, once the law provides for conditions under which the competence of the minister may be exercised, the principles of rule of law and legality require the competence to be exercised only once the conditions are met.⁶⁶ Although the Court expressly acknowledges that the Code of Administrative Procedure is not directly applicable to the dispute at hand,⁶⁷ it nonetheless insists that the principle of legality also requires the application of the basic principles of administrative procedure by analogy. One such basic principle is the duty of the administrative authority to give reasons for its decision.

Once the Municipal Court has concluded that the decision of the minister can be reviewed before administrative courts and that the basic principles of the administrative procedure apply by analogy, the remainder of the decision is quite straightforward: the decision of the minister does not meet even the most lenient standards for justification of administrative decision and is thus annulled. The striking feature of the decision is its surprising brevity and its somewhat underdeveloped reasoning, if one takes into account the depth and the seriousness of the constitutional question the court resolves. In one strike, the court assumes the jurisdiction of judicial review of decisions relating to the removal of court officials, thus altering the constitutional balance between the executive and the judiciary: although the law clearly provided for the executive competence to administer the courts and to recall their officials without further restraints, the court has made the exercise of this power subject to the ultimate supervision before administrative courts.

3.3.2. The president of the republic is a mere administrative authority

In the Czech constitutional system, the appointment of new judges is one of the powers of the president of the republic.⁶⁸ As mentioned above, the president appoints following the nominations made by the minister of justice. In the constitutional history of the Czech Republic, the presidential appointment has had a rather ceremonial function: all the judicial candidates had to pass an entrance examination, a three-year period of judicial apprenticeship and the final judicial (state) examination. If they were successful, their appointment was automatic.

In February 2005, the president refused to appoint a group of judicial apprentices who had all fulfilled the conditions for an appointment prescribed by the law and had passed the required length of practice as judicial apprentices

66 Case no. 5 Ca 37/2005-42, at p. 7.

67 Ibid., p. 7. § 2 (a) of the (then in force) Code of Administrative Procedure (zák. č. 71/1967 Sb.) expressly excludes from its scope procedures, in which administrative authorities decide on the legal status of officials which are subject to its authority.

68 Art. 63 (1) (i) of the Czech Constitution.

and the final state examination. The publicly announced reason the president gave for his refusal to appoint these judges was that all the candidates were too young for a judicial office – they were all in their late twenties. When he later specifically announced that he would only appoint candidates 30 years or older, the president added his ‘personal’ condition⁶⁹ for judicial appointments, not contained in the law itself.⁷⁰

Some of the rejected judicial candidates filed an action in administrative courts. They claimed, *inter alia*, the violation of their right to equal access to a public office, guaranteed by Art. 21 s. 4 of the Czech Charter of Fundamental Rights and Basic Freedoms; the right to human dignity and to equal protection of law, guaranteed in Art. 1 and Art. 3 s. 1 of the Charter; and the right to be heard and to have one’s case decided in a transparent and speedy way, provided for in Art. 38 s. 2 of the Charter. Moreover, the applicants argued the violation of the principle of legal certainty and legality of the exercise of the public power, inherent to any state governed by the rule of law. The administrative court of first instance, the Municipal Court in Prague, rejected the application. It held that the decision of the president is not an administrative act that could be reviewed before administrative courts.⁷¹

The Supreme Administrative Court (hereafter SAC), which was seized by a cassational complaint filed by the applicant, reversed the order of the Municipal Court.⁷² It held that in the constitutional system of the Czech Republic, the president has a dual function: on the one hand, he is the constitutional sovereign and the head of state; on the other hand, he also forms a part of the executive power and acts as an administrative authority of a special type. The president acts as an administrative authority if two conditions are met: firstly, the discretion of the president is clearly limited by law; secondly, his act affects the public subjective rights of individuals. The SAC stressed that

69 To be precise: there is now a 30 year age limit for the appointment of judges, which was adopted by the parliament. This limit, however, applies only to the appointment of future judicial apprentices, not those who were already, at the moment of the adoption of the law, enrolled as judicial apprentices and participating in the judicial training. See express derogating provisions for this group of people in Art. X of zákon č. 192/2003 Sb., kterým se mění zákon č. 6/2002 Sb., o soudech, soudcích, přísedících a státní správě soudů [Law no. 192/2003 Coll., amending the Law no. 6/2002 Coll., on Courts, Judges, Lay Judges, and the State Administration of Courts].

70 An intriguing issue, which needs still to be decided, is whether the setting of a minimal age limit for judicial function in similar circumstances could constitute discrimination on the grounds of age at all. There is a generally shared consensus that setting of a maximum age limit and automatically excluding elderly people (e.g. hiring only young people who are less than 40 years of age) may amount to discrimination. Less clarity is present as far as the question of minimal age limits is concerned: can a minimal age requirement (e.g. an 18 years age limit for obtaining a drivers licence) be viewed as discrimination on the basis of age? For an introduction into the debate on age discrimination in the European context, see e.g. Meenan, H. ‘Reflecting on Age Discrimination and Rights of the Elderly in the European Union and the Council of Europe’, 14 *Maastricht Journal of European and Comparative Law*, 39–83 (2007) or generally Fredman, S., Spencer, S., eds., *Age As An Equality Issue*. Oxford: Hart Publishing, 2003.

71 Order of the Municipal Court in Prague (Administrative Division) of 16 June 2005, case no. 5 Ca 148/2005-9, unpublished.

72 Judgment of the Supreme Administrative Court of 27 April 2006, case no. 4 Aps 3/2005 – 35, published as no. 905/2006 Sb. NSS [Collection of the Decision of the Supreme Administrative Court].

there is no subjective right to a judicial appointment. There is, however, a subjective public right to expect that the exercise of the public authority will remain within the legal constraints assigned to it. The president is under no duty to appoint an individual to the judicial office: accordingly, there is no subjective right of access to a judicial office. The individual does, however, have the right to be treated in an equal, non-discriminatory and lawful way. If the president decides not to appoint, he can do so only on grounds recognised by the law and he must give reasons for his decision.

The decision of the SAC is intriguing in many ways. Firstly, it attempts to draw a distinction between the president functioning as the constitutional sovereign, on the one hand, and a mere administrative authority, on the other. The two distinguishing criteria set by the SAC are, however, problematic: nearly all the presidential competences are somehow limited by the law and, almost invariably, a decision taken by the president will affect someone's rights. Will the (non-)ratification of international treaties⁷³ be subject to review in administrative courts? The (non-)promotion of generals?⁷⁴ The appointment and the recall of the prime minister and the members of the government?⁷⁵

The questionable implications of the decision are caused by the substance that the decision is trying to capture: the grey zone of constitutional conventions. Ever since 1993 – and even before, under the Czechoslovak constitutions – the role of the president in the process of judicial appointment was ceremonial only. It could thus be speculated that a constitutional convention in this respect has been established. At once, the perhaps already emerged constitutional convention is swept away. As noted by the SAC in the closing part of its reasoning, the act of the president is '*an unprecedented deviation from conventions of judicial appointments in the modern conditions of our democratic and rule of law based state*'.⁷⁶ The question that remains unanswered is whether constitutional conventions can be judicially enforced.

In its decision, the SAC only held that the refusal of the president to appoint a judge could be reviewed before the administrative courts. The substantive review has thus only begun: in June 2007, the Municipal Court in Prague⁷⁷ decided the case on merits. It held that the non-appointment of the judges by the president constitutes unlawful inactivity of the administrative authority and it therefore ordered the president to issue a decision within 6 months. It expressly refrained itself from stating that the president would be under any obligation to appoint a candidate; it only stated that the president is bound to decide and give reasons for his decision.

73 Art. 63 (1) (b) CCR.

74 Art. 63 (1) (g) CCR.

75 Art. 62 (a) CCR.

76 Case no. 4 Aps 3 /2005 – 35, at p. 49.

77 Case no. 5 Ca 127/2006 – 122, unpublished.

The President of the Republic lodged a cassational complaint to the SAC against the decision of the Municipal Court. In May 2008, the SAC upheld the decision of the Municipal Court and rejected the complaint.⁷⁸ Its reasoning stressed the requirement of legality for any decision or the absence thereof of the President of the Republic: the president is entitled not to appoint, but he must do so within the law and the conditions provided for in the law. He cannot add an additional ‘personal’ condition to a closed list provided for in the law.

The decision has been subject to considerable controversy and criticism. Although the period for the issue of a decision, provided for by the administrative courts, has lapsed, the President of the Republic never issued any decision on the matter.

3.3.3. *Recall of the Chief Justice Unconstitutional*

On January 30, 2006, the President of the Republic, Václav Klaus, addressed a letter to the Chief Justice of the Supreme Court, Iva Brožová. In one sentence and with no substantive reasoning, only with reference to § 106 (1) ACJ, the president removed the chief justice from her office of the President of the Supreme Court.⁷⁹ The chief justice filed a constitutional complaint with the Czech Constitutional Court (CCC), challenging the decision.

The question of whether or not the chief justice can be removed from the office has already been the subject of some academic and judicial debate. The outer limits of the 1993 Constitution have, however, never been tested. The Constitution only provides for the appointment⁸⁰ of the chief justice; it is silent on her removal. With no express grounding in the Constitution itself, the § 106 (1) ACJ provided generally in relation to all presidents of courts that ‘*The chief justice or deputy chief justice may be removed from office by the official who appointed her to that office if she violates, in a serious manner or repeatedly, her statutorily prescribed duties in the course of performing the state administration of courts*’.

The constitutional silence gives rise to two avenues of possible reasoning: firstly, without the express power to remove in the Constitution itself, the president cannot recall the chief justice from office. Secondly, notwithstanding the silence of the Constitution, the chief justice can be removed in the same way she was appointed, following the principle ‘*[H]e who appoints,*

78 Judgment of 21 May 2008, case no. 4 Ans 9/2007 – 197, www.nssoud.cz

79 It must be stressed that, as already indicated above, the removal from the office of the president of a court means that the judge remains a judge of that court, i.e. Brožová remained a supreme court judge.

80 Art. 62 (f) CCR provides that ‘*The President of the Republic [...] f) shall appoint from among judges the president and vice-presidents of the Supreme Court*’.

may remove'. The chief justice is appointed by the president of the republic and can thus be removed from the office by the president.

Basing its decision on the principles of the separation of powers and the independence of the judiciary, the CCC held that the former applies: *'A rule which provides that "he who appoints, may recall" is entirely logical in cases where a direct relationship of superiority and subordination is involved. However, no such relationship exists between the President of the Republic and the Chief Justice of the Supreme Court.'*⁸¹ The CCC continued that *'If the President of the Republic is entrusted with the power to appoint the Chief Justice of the Supreme Court, without concurrent action by any other state body, an entirely unlimited power to remove the Chief Justice of the Supreme Court cannot be found in the Constitution's silence. In the situation where the authority to remove the Chief Justice of the Supreme Court is not explicitly mentioned in the Constitution, to adopt an interpretation whereby the President's authority to appoint implicates also the possibility to remove the Chief Justice from office, was in conflict with the constitutionally protected value of the independence of the judiciary and its separation from the executive power. In this system, where the judiciary is not absolutely separated from the executive, the President of the Republic is thus entrusted solely with the authority to install the Chief Justice of the Supreme Court into office, whereas in terms of influencing his performance in office or the termination of that office, no power of the President is envisaged.'*⁸²

The CCC furthermore observed that the state administration of courts is not merely a part of the general (state) administration. Although the ACJ formally refers to the activity of the presidents and vice-presidents of courts as the 'state administration of courts', the CCC observed that materially, the activity is of a different character. According to the CCC, the power to set the work schedule, to vet court files, to oversee the quality of court hearings, to resolve complaints and other powers of a president of the court can indirectly influence the exercise of the judicial power. The CCC noticed that *'[...] in character, the performance of state administration of courts does not correspond to the general definition of the performance of state administration.'*⁸³ The CCC thus concluded that the state administration of courts does not form a part of the general administration. The CCC did not, however, specify any further what the administration of courts is if it is not state administration.

Finally, the CCC states that the office of a president of a court is inseparable from the office of a judge. If one person fills both of these offices, his or her protection against the removal from office must meet the standards of judi-

81 Judgment of the CCC (full court) of 17 July 2006, case no. Pl. ÚS 18/06, no. 397/2006 Collection of Laws, p. 5496. An English translation of the decision is available at <http://www.usoud.cz/file/2281> [last accessed in December 2010].

82 Ibid., p. 5496.

83 Ibid., p. 5498.

cial independence. These premises bring the CCC to the conclusion that a president or a vice-president of a court can be removed from office solely by a procedure which is carried out within the judiciary itself.

Guided by the consideration described above, the CCC annulled the § 106 ACJ, i.e. it declared that it was unconstitutional for the executive to recall the presidents and vice-presidents of courts. Following the decision of the full CCC on the constitutionality of the statute (abstract review of constitutionality), a chamber of the CCC subsequently annulled the decision of the president of the republic in which he sought to recall the chief justice.⁸⁴

3.3.4. *The 2008 Amendments to the Law on Courts and Judges*

Following the cases described above, the next move was with the Czech legislature. By annulling § 106 ACJ, the CCC removed the provision allowing the recall of presidents and vice-presidents of courts. Without any legal basis for their removal, court officials became, as of autumn 2006, irremovable. This fact seemed to cause some degree of uneasiness among the politicians and prompted a legislative solution.

The road to it was, nonetheless, longer than originally contemplated. In its sweeping opinion, the CCC declared that the recall of presidents and vice-presidents of courts by the executive was unconstitutional *per se*. Such holding is quite radical and it is fair to admit that it is not generally shared in other European countries.⁸⁵ Even if one may harbour doubts about the wisdom of such approach, the only way in which the legislature could have put the recall of presidents of courts into legislation again would be by a constitutional amendment, i.e. in fact outvoting the Constitutional Court. That in turn presented too a high threshold, even though one could speculate that such an amendment would have a very broad support in both chambers of the Parliament. In the absence of a national judicial council and the permanent unwillingness of basically all the Czech political powers to establish one, the question that arose was, who could then be asked to recall presidents and vice-presidents of courts?

The compromise solution, which required some adjustment on both sides, was to entrust this power to disciplinary panels. Disciplinary panels have traditionally been called to decide on the failures of judges, acting in their judicial capacity. Their problem has, however, been their low credit; composed exclusively of other judges, their proceedings and their results were said to be

84 Judgment of the CCC (II. chamber) of 12 September 2006, case no. II. ÚS 53/06, www.usoud.cz.

85 For instance, French law accepts that a president of a court can be recalled without his judicial capacity being called into question. This doctrine distinguishes between judicial acts [*actes à caractère judiciaire*] and administrative acts [*actes à caractère administratif*] of judicial officials. See Lemaire, P. 'Le Contrôle Fonctionnel de Gestion (1)'. In: Canivet et al. (2006), 335.

very corporatist and lenient. It is true that some of the decisions of the panels were indeed striking: a supreme court judge who had plagiarised hundreds of pages of criminal law textbook was allowed to stay in the office;⁸⁶ a district court judge who did not attend his own hearings and then faked reports from hearings only had his salary marginally reduced;⁸⁷ disciplinary proceedings against higher-ranking judges have been strangely discontinued or left pending for years.⁸⁸ It is thus understandable that the perspective of giving additional powers to these panels vis-à-vis the recall of presidents and vice-presidents of courts was not a very attractive proposition, not just for the executive.

The compromise solution that emerged was to make presidents and vice-presidents of the courts removable only following the decision of a disciplinary panel, albeit a substantively altered one insofar as its composition and procedures. In 2008, the old system of disciplinary proceedings was scrapped and a new one introduced.⁸⁹ Disciplinary panels, which sit at the Supreme Administrative Court, are competent to hear cases brought against judges as well as presidents and vice-presidents of the courts. They are composed of six members: only three of them are professional judges (one is member of the Supreme Court, one is member of the Supreme Administrative Court and one is a judge from a lower court); the remaining three of them are one public prosecutor, one barrister and one legal academic. All members are elected for a period of five years.

This solution caused an outcry within the Czech judiciary. The reason was that for the first time in the Czech judicial history, disciplinary proceedings against judges were ‘opened’ so as to include members of other legal professions, which means that members of other legal professions can pass judgement on judicial shortcomings. The reasons given by the Czech judges as to why they can be judged only by fellow judges are feeble. They include fears of retaliation by the other professions and alleged lack of understanding about what it means to be a judge, all voiced in terms of a threat to the independence of the judge. To an external critical observer, they only show how very distorted their mental self-image is and how socially irresponsible the judiciary became. It is evident that sooner or later, the new legislation will be challenged before the Constitutional Court.

86 Decision of the Supreme Court of 30 October 2008, case no. 1 Skno 10/2008, www.nsoud.cz.

87 Decision of the Supreme Court of 5 March 2008, case no. 1 Skno 9/2007, www.nsoud.cz.

88 A deterrent example here are the still pending disciplinary proceedings against the Vice President of the Supreme Court, P. Kučera, which has been repeatedly moved from one disciplinary court to another. By a decision on 28 July 2009, case no. Pl. ÚS 9/09, nyr., the Constitutional Court annulled the up-to-date decisions and the case has been referred back to the disciplinary senate, which means that 3 years after the launching of the disciplinary proceedings, none of the disciplinary senates has even started to deal with the merits of the case.

89 Zákon č. 314/2008 Sb., kterým se mění zákon č. 6/2002 Sb., o soudech, soudcích, přísedících a státní správě soudů [law no. 314/2008 Coll., amending the Law on Courts, Judges, Lay Judges, and the State Administration of Courts].

The 2008 Amendments to the Law on Court and Judges, however, did not stop with the compromise solution described above. To part of the political spectrum, this approach seemed too lenient and too capitulating to the Constitutional Court and the judiciary. In the second reading in the Chamber of Deputies, therefore, a complex modification of the bill was introduced, which contained a number of important changes.⁹⁰

The most important of these was the introduction of term limits for presidents and vice-presidents of courts. Traditionally, presidents of courts have been appointed for an indefinite period. As these tended to be more senior judges, the renewal of the managerial layer of the judiciary happened in a natural way. The 2008 Amendment, however, introduced a general time of office for all the presidents and vice-presidents of all courts – a period of 10 years for the presidents and vice-presidents of the Supreme Court and the Supreme Administrative Court and a general period of 7 years for the presidents and vice-presidents of all other courts. A series of complex transitional provisions in the law⁹¹ then sought to turn ‘life appointment’, which is the case of all the serving presidents and vice-presidents appointed under the old law, into the new system by a gradual re-appointment of the entire corps of judicial officials within the next 7 years. The allotted remaining length of appointment took into account the time already served as the president of the court; for instance, the time of office of a president of a district court who had been in the office for longer than 10 years would be to end in 4 years, whereas judicial officials appointed for life in the past 5 years would get a full seven-year period.

There was one notable exception to these rules: the remaining term of office of the president of the Supreme Court. The presidents of both supreme jurisdictions, i.e. the Supreme Court and the Supreme Administrative Court, were in a comparable position as far as their passed length of office was concerned. One was appointed in 2002, the other in 2003, which meant that at the moment of the adoption of the 2008 Amendment, both of them had already been in office for about 6 years. Nonetheless, they received a different length of ‘remaining’ term of office: 10 years for the president of the Supreme Administrative Court, but only 5 years for the president of the Supreme Court. It is hard to explain such a difference of treatment in objective terms. If one takes into account the past attempts by the executive and the President of the Republic to recall the president of the Supreme Court, however, the explanation becomes quite obvious; one cannot be but astonished by the bluntness with which the executive ‘retaliated’ against the unbending president of the Supreme Court.

It remains to be seen whether or not the executive will succeed. The introduction of the terms of office for presidents and vice-presidents of courts, and in particular the uneven remaining term of office of the president of the

90 Chamber of Deputies print no 425/1 of 2 June 2008, accessible online at <http://www.psp.cz>.

91 Art. II, points 1 – 11 of the Law no. 314/2008 Coll.

Supreme Court, has already been challenged before the Constitutional Court by a group of members of the Senate.⁹² The argument of the applicants is twofold: firstly, they point out a number of irregularities in the legislative process in the Chamber of Deputies, which amounted to ‘smuggling into’ a bill an entirely new proposal in the second reading in the Chamber without any substantive debate in the pre-Parliamentary stage and in the Chamber of Deputies itself. Secondly, they argue that the term of office for the presidents and vice-presidents of court is substantively unconstitutional. In the absence of clear selection mechanisms and conditions for the re-appointment of the judicial official, it would lay too much power into the hands of the executive. The decision of the Constitutional Court is pending.

3. 5. THE WAY AHEAD – HOMEGROWN TRIAL AND ERROR SOLUTIONS OR THE READY-MADE ‘EURO- PACKAGE’?

At first look, the Czech and Slovak examples discussed here show, in terms of institutional design, opposite approaches to the transformation of the administration of courts. On the one hand, there is Slovakia, the good pupil of the international ‘judicial transformation’, which put in place an exemplary model of a judicial council and followed all the good practices and recommendations. On the other hand, there is the Czech Republic, the black sheep of the region, traditionally pilloried because of its hopelessly outdated system of administration of courts.

It is, however, on second look that this becomes more telling. If one goes beyond the prophylactic language of various international reports, one discovers that despite the difference in institutional design, problems of administration of post-Communist courts are very similar in nature. Communist judicial cadres cannot, overnight, become responsible judicial administrators; corruption, incompetence, nepotism are unfortunately the defining elements of any system in transition. The same schemes, the same patterns and the same misuses are reproduced in both systems, irrespective of the institutional design.

This is not to say that institutions do not matter. They do, but perhaps to a lesser degree than often portrayed. It is precisely in the context of judicial transitions when the institutions are brought to the fore, and little attention is paid to their actual internal life and values. The example of judicial councils in the Central and Eastern European countries is a prime one. Not only did they not avoid the evils in the names of which they were put in place; they added some bad elements on their own – the most visible problem being the ‘hijacking’ of a new institution by the old Communist judicial elites and the sealing off of the institution behind the veil of judicial independence.

92 Submission by a group of senators on 15 December 2008, case no Pl. ÚS 39/08, pending.

Whereas before, one might have nourished the perhaps somewhat idealistic hope that one day there would be enough political will to do something with the administration of justice, the hopes for a new reform of a stillborn model, which has meanwhile acquired a constitutional status, are zero.

To be clear, the argument put forward here is not that judicial councils are *per se* a bad model of administration of justice, which should never be taken over in post-dictatorial societies; rather, the argument put forward is a different one: allowing for some time, diversity and in-field testing of homegrown solutions is not necessarily a bad thing. It is always better to develop, even at the cost of additional troubles and conflicts, a homegrown model of administration of justice, which is responsive to the local cultural and legal background, and respects the constitutional balance in its home state. Additionally, a somewhat 'wait and see' tactic after the fall of a dictatorial regime might also allow for at least some renewal of the judicial elites and should help prevent the 'sealing off' of the new institution and its 'hijacking' by the less scrupulous post-Communist judges.

The contrasting Czech and Slovak cases presented here demonstrate this very difference. In 2002, the Slovak Republic adopted a model-like version of a judicial council, however with the same people within the judiciary and more-or-less the same approach and internal values. The result is very questionable: instead of reducing undue influence and bureaucratization of the judiciary, the power patterns have just been transferred from one office (the Ministry of Justice) to another office (the Judicial Council), while the practice has remained the same. The 2009 developments are clearly negative: the institution has lost what little credit it already had and the judicial council is seen as a rent-seeking enterprise for the very few.

The Czech example, on the other hand, presents a different scenario. The old model is gradually being altered; in fact it is continuously being re-negotiated in a dialogue between the legislative and the executive on the one hand and the judiciary and the Constitutional court on the other. The recent line of case law described above might be seen as a sort of attempt to overcome the institutional deficiencies by a procedural fiat. The political power, represented by the legislature and, indirectly, by the government, refuses to share its entrenched competences with respect to the vital areas of the judicial administration. The (uncoordinated) reaction from part of the judiciary is to accept the political fact but to make this unfettered discretion of the executive as regards the judiciary itself subject to judicial review. More precisely: the discretion of the executive, insofar as the administration of courts is concerned, is made subject to review in the administrative courts; the discretion of the legislature, insofar as the range of conceivable legislative solutions is concerned, stands under the supervision of the Constitutional Court.

Eventually, therefore, and absent any future compromise as to sharing the administration of the judiciary in the form of a judicial council, the judiciary might gradually achieve similar co-decision powers that were present in the original 2000 legislative proposal, by simply reviewing and blocking executive intrusions. In the 2000 reform bill establishing the SJC, the powers which would be given to the SJC contained, *inter alia*, the power to propose and recall presidents and vice-presidents of the courts of first instance and appellate courts, and to manage the selection and apprenticeships of the candidates for a judicial office.⁹³ They would also empower the judicial council to suggest candidates for presidents and vice-presidents of courts.

In sum, the constitutional balance is thus shifting: originally, virtually all the decision-making powers were with the executive. Gradually, more and more areas are coming under the supervision of the courts in the form of judicial review. A legislature hostile to such development would be left with two options: either to change the constitutional framework altogether or to compromise. The former choice is difficult, as it requires high majorities and extensive debates. The example of the latter is the 2008 Amendment model for the recall of judicial officials in disciplinary proceedings only.

There is of course a third way, which is typical for younger and immature political systems: to 'solve' the constitutional dilemmas with blunt (legislative) power. That would be the example of the second part of the 2008 Amendment to the Law on Court and Judges, which weakened the compromise by suddenly introducing the term of office provisions for judicial officials, in addition to the possibility of their recall in disciplinary proceedings. In a way, one of the parties to the constitutional bargain is backsliding: the legislature is in fact saying that it does not trust its own new legal framework to be able to get rid of incompetent judicial managers, and that it wants additional tools. However, such behaviour again creates imbalance and begs for renegotiation, which is likely to come after a new decision of the Constitutional Court.

As for how to reform the administration of judiciary, it cannot be stated definitively which of the contrasting models is better or worse. A swift adoption of 'ready-made-Euro-models' might be as problematic as the endless national constitutional struggle for a viable model of the administration of justice. What this research and analysis cautions against is the false equivalency between 'new institution' and 'problem solved', or between 'no new institution' and 'underdeveloped, no rule-of-law country', as one may often find with the international rule of law industry and in various international reports. The only thing one may safely note after about twenty years of reform efforts in the Central European region, as far as the reform of administration of justice

93 Cf. the Bill no. 539/0, cit. above, note no 36, § 36 (a), (b), (c) with respect to the selection of judicial candidates and § 36 (e), (f), (g) with respect to the judicial officials.

in a post-Communist society is concerned, the genuine problem is definitely not the (in)existence of a judicial council.

4. INTERPRETATION AND JUDICIAL STYLE

Post-Communist lawyers are often accused of being dull legal formalists, who seek refuge in realms of mechanical jurisprudence and senseless adherence to procedures.⁹⁴ Afraid to decide on substance and afraid to pass any controversial judgments, they seek to dispose of cases on obscure points of procedure, in the observance of which they are meticulous.

As far as their approach to interpretation of law is concerned, they are said to be textualists. Literal interpretation of written rules dominates. Very little attention is paid to the other, still 'traditional' methods of interpretation (textual, logical, systematic and historical); and practically no attention is paid to the 'newer' methods, namely comparative and purposive reasoning.⁹⁵

If one assumes that such a judicial cultural pattern is a negative one,⁹⁶ then a vital part of a judicial transition in a post-Communist society is the change in the judicial mentality and approach to judicial interpretation of the law. The examination of a legal text is to be accompanied by a view of the context as well as the purpose of the interpreted text; the veneration of procedures and procedural disposal of the cases should yield to review on merits.

Such transition is an immensely complex enterprise, which cannot be fully examined in the remainder of this contribution. I will therefore focus on just two aspects of the change in judicial style as an evidence of legal transition: firstly, the function of purposive (teleological) reasoning in times of legal transitions will be examined. Secondly, a discussion of similar function of comparative reasoning and comparative legal analysis will be offered.

4. 1. PURPOSIVE REASONING AND LEGAL TRANSITIONS

Legal formalism and strict adherence to the text of the law in Central European countries have again their historical roots. Firstly, to some extent, they have always formed part of the Central European judicial self-portrait, which

94 See Kühn, Z. 'The Application of European Law in the New Member States: Several (Early) Predictions' 3 *German Law Journal* 565 (2005); similar remarks have been made, with respect to Croatia, by Čapeta, T. 'Courts, Legal Culture and EU Enlargement' 1 *Croatian Yearbook of European Law and Policy* 23 (2005).

95 For a 'canonical' account, see Von Savigny, F. C. *System des heutigen Römischen Rechts*. 2. Neudruck der Ausgabe Berlin 1840. Aalen: Scientia Verlag, 1981, I. Band, 4. Kapitel, 206–45.

96 An assumption that is not universally shared.

was discussed above: a technocratic judicial official is proud to master the law and the procedures. He derives his authority from detailed, expert knowledge. However, it is the second root of judicial formalism in Central Europe that is even more vital: the Communist heritage and the use of legal formalism under Communist rule as a sort of judicial defence against politicisation of the entire judicial work.

To understand this development, one has to look into the legal logic of revolutions, which has been the same in fascist Italy,⁹⁷ Nazi Germany⁹⁸ as well as Stalinist Central Europe.⁹⁹ A coup d'état typically happens overnight. Very soon thereafter, a new constitution or a sort of basic law is passed, thus changing the value foundation of the legal regime. However, the entire system of positive law lags behind for some time. No new ruler can replace within days or weeks an entire system of positive laws, including codifications like the criminal, civil, commercial and other codes. And it is precisely in this period after the revolution and before the system adopts its own laws, meaning laws that correspond with its values and visions of society, that administrators and judges are asked to be anti-formalists and to look materially at the law.

Marxist law required, at least in its early (Stalinist) phase, that judges disregard the remnants of the old bourgeois legal system in the interest of the victory of the working class and the communist revolution. Judges were supposed to apply the law in an anti-formalistic, teleological way, always directing their aim towards the victory of the working class and the dialectical approach. Open-ended clauses, typically of a constitutional or even political nature, took precedence over a textual interpretation of the existing written law. In a way, the 'faulty' old laws were, for some time, replaced by a direct 'application' of principles and slogans.¹⁰⁰

This stress on anti-formalism (or, in the period lingo, 'dialectic materialism') disappears once the new political system has established itself and replaced the corpus of positive law and the codes with its own codifications. From that moment, the requirements of the system vis-à-vis its officials changes; they are no longer required to be anti-formalistic and to question the correctness and the applicability of all the legal norms. Now they are just asked to fol-

97 Calabresi, G. 'Two Functions of Formalism' 67 *U Chi L Rev* (2000), 479–88.

98 Rùthers, B. *Die unbegrenzte Auslegung: Zum Wandel der Privatrechtsordnung im Nationalsozialismus*. Thübingen: Mohr Siebeck, 1968.

99 Kühn (2005), 86.

100 See e. g., Boura, F 'K otázce výkladu zákonů' [On the Question of Interpretation of Laws] (1949) *Právník* 292, who, shortly after the Communist takeover in the former Czechoslovakia, argued (at 297) that 'the fundamental canon of interpretation is that the interpretation of any legal provision must be in conformity with the nature and aims of the peoples' democratic order'. On the formalistic and purposive reasoning in Communist law, see Kühn, Z. 'Worlds Apart: Western and Central European Judicial Culture at the Onset of the European Enlargement' *American Journal of Comparative Law* (2004), 531.

low (formalistically), as the new legal order is already 'in line' with the new political system.

Legal formalism plays an intriguing dual role in the development described above. In the anti-formalistic (Stalinist) period, formalism and the recourse to a strict textual interpretation of the existing law became a natural line of defence against the anti-formalistic teleological style of judicial reasoning officially required by Party policy. In the early period, therefore, formalism helped to defeat the new system. This vision changed, however, in the second period of Communist law, when there were already new codifications; there formalism became the way to stay in line and not to expose oneself to any sort of critique because of rightist 'deviation'.

One may encounter both functions of legal positivism in the Central European Communist states. The fresher experience with formalism in the period immediately before the revolutions of 1989 is, however, one with formalism as capitulation. In most Central European Communist states, new codifications date back to the 1950s. From 1960s onwards, however, adherence to formalism was a good survival strategy for a judge: *'I am just applying what the Party put into laws; I am not passing any value judgments on my own'*.

Formalism as a judicial ideology sits very comfortably with the above described judicial self-portrait¹⁰¹ of a technocratic judicial official. Such a self-portrait and ideology do enhance each other so strongly that they can be considered twins.

It is with this ideological and cultural heritage Central European judiciaries enter the era of transition after 1989. The 1989 changes are, in a way, nothing else than yet another legal revolution in this region within the past 60 years. The same patterns develop again: there is a new constitution, a charter of fundamental rights and a new political order that claims to be based on democracy and the rule of law. However, the entire corpus of positive law is decades-old Communist codifications from early 1950s and 60s. Formalism is thus revived once again, again as a tool for defeating the new system.

This is the conflict which lies at heart of judicial conflicts and battles of the courts in some of the Central European countries in the 1990s, especially between the newly established constitutional courts, staffed with liberal lawyers or dissidents, and the higher ordinary jurisdictions, typically staffed with senior Communist judges. The constitutional courts, guardians of the new constitutional settlement in the new democracies, are actually asking the elder Communist judges to do the same as they were asked by Communist Party policy in the Stalinist period: to interpret the old Communist laws and the codes in the light of the new values and system. Here again, formalisms and

101 See above, section 1.

strictly textual interpretation of the existing rules mean that the elder judges do not wish follow the lines invited by the new system.

Interestingly, after the accession of the new Central and Eastern states to the European Union in 2004, quite similar patterns start to evolve insofar as the domestic application of EC law is concerned.

Much has been written about teleological reasoning in European law: from praising it as the key method in the interpretation of Community law, characteristic of the treaties establishing the Communities,¹⁰² to calling it the cause of the Court of Justice ‘running wild’.¹⁰³ Teleological reasoning in (not only) Community law is a sort of consequentialist reasoning, i.e. reasoning from a positive or a negative consequence.¹⁰⁴ The extensive use of teleological reasoning in Community law is a necessary consequence of the nature of the European legal order. Within a system of attributed competence and limited regulation that merely adds to the national legislative framework without, however, creating a complete regulatory system of its own, Community law, if viewed as a normative system of its own, is by definition incomplete. Furthermore, it often differs in regulatory style: especially in primary law, one often encounters simply result-oriented norms, which do not specify the way the aim is to be achieved.

In interpreting and applying Community law in the national legal order, national judges should consider Community objectives and the purpose that the relevant piece of Community legislation seeks to attain. This requirement is clearly visible in many areas of case law of the Court of Justice, most notably perhaps as concerns the principle of the effective protection on the national level of individual rights derived from Community law; in following this purpose (and seeking to achieve this consequence), national judges are entitled and required to do pretty much anything, including the disapplication of over-restrictive provisions of the national constitution.

Thus, after accession of the Central European countries to the European Union, the Community law imposed yet another requirement for the use of purposive reasoning by the national judges in the new Member States. In a way,

102 Pescatore, P. ‘Les objectifs de la Communauté européenne comme principes de l’interprétation dans la jurisprudence de la Cour de justice’, quoted from Dumon, F. ‘La jurisprudence de la Cour de justice—Examen critique des methods d’interprétation’, In: *Rencontre judiciaire et universitaire 27–28 septembre 1976*. Luxembourg: Office for Official Publications, 1976, III–80.

103 Rasmussen, H. *On Law and Policy in the European Court of Justice*. Dordrecht: Martinus Nijhoff Publishers, 1986.

104 The reasoning employed by the Court of Justice provides ample examples of both. For reasoning from a positive consequence see, eg. Case 26/62, *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration*, ECR English special edition I (‘[t]he Community is a new legal order of international and it thus must have the following characteristics’); for reasoning from a negative consequence see, e.g. Case C-453/99, *Courage Ltd and Others v Bernard Crehan* [2001] ECR I-6297 (‘[i]f we do not allow for damages for private breaches of Community competition rules, the effective enforcement of EC competition rules on the national level will be compromised’).

the requirements of the Court of Justice are quite similar to those the national constitutional courts that started imposing on the ordinary courts at the beginning of legal transitions in early 1990s. Heretical though it may sound, there are also some striking similarities between the communist/Marxist and Community approaches to legal reasoning, and the requirements of judicial activism placed on national judges. As already outlined above, Marxist law required, at least in its early (Stalinist) phase, that judges disregard the remnants of the old bourgeois legal system in the interest of the victory of the working class and the communist revolution. Judges were supposed to apply the law in an anti-formalistic, teleological way, always directing their aim towards the victory of the working class and the dialectic approach. EC law requires national judges to set aside all national law that is incompatible with the full effectiveness of directly effective Community law, via such open-ended principles and aims as the full effectiveness of EC law enforcement or the unity of EC law across the entire Union. In a way, both approaches are similar: open-ended clauses take precedence over textual interpretations of the written law. Often the desired result comes first, with a backwards style of reasoning being used to arrive at it. The only visible difference is that the universal 'all-purpose' argument has changed—from the victory of the working class to the full effectiveness of EC law.

This comparison is, of course, exaggerated; yet there is a grain of truth in it. In the logic of legal transitions described above, the penetration of Community law into the legal systems of the Member States is in fact a state of permanent transition. The legal transition is permanent because both actors, i.e. the European as well as the national legislatures, are still active and both pass claims to the ultimate constitutional authority within the European Union. This means that even if in one area or one specific legal question, the national law is 'set aside' in the interest of European law, new areas of potential clashes between EC law and national laws are created every day.

To sum up, greater stress on the use of purposive reasoning is a sign of a transforming legal order. Overnight, the focal point, the *Grundnorm* of a legal system, changed without there being immediate corresponding changes in the entire body of positive law. The reaction of the guardian of the new legal order (be it the newly established constitutional courts for the legal transitions in Central Europe after 1989 or the Court of Justice for European Union law) was to ask the administrators and especially the adjudicators to take the new values into account when interpreting the old laws. Against this context, formalism and textual interpretation of the existing rules serves, for some judges, as a tool for rejecting the claims made by the new system. Alternatively, textual interpretation of the existing laws is, in Central European countries, the learned wisdom of judges who wish to survive in any regime: it saves them from making any (visible) value judgments and passes on the responsibility for any legal and societal change to the legislature.

4. 2. COMPARATIVE REASONING AS A TOOL OF LEGAL TRANSITION

Comparative reasoning also helps to effect legal change. Similar to purposive reasoning, it represents an appeal to arguments beyond the text of a national legal provision. Unlike purposive reasoning, however, the use of a comparative argument is an appeal outside the national framework: to the values or to the technical legal experience of a different system, which strictly legalistically speaking is of no normative relevance to the domestic one.

By historic necessity, Central European constitutional and some of the (personally renewed) supreme courts became active courts, one of the avenues of societal change. The fall of communist rule in Central Europe left the judiciary with only limited inspiration from the law before the fall of the Iron Curtain.¹⁰⁵ The choice faced by these jurisdictions that were in need of a fast filling-up of gaps or legal updates in national legal systems was either to cherish the (national) law and the case law of the time before World War II or else to employ comparative analysis.

The drive for the use of comparative analysis was perhaps not the urge to conform to Western judicial practices.¹⁰⁶ There was of course a clear positioning as to where one wants to belong or wants to be perceived to belong; the verbal allegiance and authority was the Western (liberal) democracies. This positioning was, however, of rather internal character and persuasive force: it was primarily directed towards the domestic audience.

A fascinating topic still to be seriously researched is to what extent did the choice of model (Austrian-German judicial structure with German constitutional judiciary) determine the shape and style of the institution and the choice of arguments and reasoning. The issue is one of institutional isomorphism;¹⁰⁷ how much will institutions facing the same set of environmental conditions resemble each other? Institutional isomorphism may be brought about by coercion, normative constraints but also by mimetic processes. Mimetic processes (or simply modelling) are a response to uncertainty¹⁰⁸ and environmental hostility. This rationale would provide a credible explanation of the Central European constitutional copying and reliance on the successful German 'mother' constitutional court and its case law. All of these courts face similar, partly hostile political environments.¹⁰⁹ They are

105 For a detailed historical account, see Kühn, Z. 'Comparative Law in Central and Eastern Europe'. In: Reimann, M., Zimmermann, R., eds., *The Oxford Handbook of Comparative Law*. Oxford: Oxford University Press, 2006, 215–36.

106 As might have been the rationale in post-War Germany with the occupation forces still in the country – see Markesinis, B., Fedtke, J. *Judicial Recourse to Foreign Law. A New Source of Inspiration?* Abingdon: UCL Press and Taylor & Francis Group, 2006, 79.

107 Di Maggio, P. J., Powell, W. W., 'The Iron Cage Revisited: Institutional Isomorphism and Collective Rationality in Organisational Fields', In: Powell, W. W., DiMaggio, P. J., eds., *The New Institutionalism in Organizational Analysis*. Chicago: The University of Chicago Press, 1991, 63–82.

108 Ibid, 69.

109 For an introduction into the situation of the constitutional courts in the post-Communist 'space',

relatively new institutions, which means that uncertainty as to their status and functioning is still present. Mimicking and copying on the successful elder brother would be a natural response.

The post-Communist world is a world of change.¹¹⁰ As in every post-totalitarian¹¹¹ society, the legislation cannot keep pace with the sudden need for new legislation in various areas of law. The amount of societal ‘updates’ of the law done by judicial fiat is greater than anywhere else. There is no doubt that a substantive amount of judicial ‘copy and pasting’ has been going on and still is going on in Central Europe.¹¹² At the same time, it is quite evident that comparative methodology does not play such a substantive role as it could have; it tends to be restricted to the courts of last instance and the Constitutional Court.

The Central European legal systems have, during the first two decades of legal transition, relied on comparative arguments, silently or expressly. A recent Czech freedom of speech case might provide a good illustration of how comparative reasoning may be used as an avenue of legal change in the time of transition: the case *Vondráčková vs. Rejžek*¹¹³ involved a ‘popular’ singer, Helena Vondráčková, and a music critic, Jan Rejžek. The latter gave an interview to a widely read daily, *Lidové noviny*. In this interview, he uttered very critical remarks about the Czech pop-music scene. One of his observations was that the current pop scene is still packed with the same singers who have been ‘on stage’ from seventies and eighties onwards. He asserted that this is due to the fact that the Czech pop-music world is still run by the same Communist ‘managers’ who have not lost influence after the revolution and still dominate the scene. He then referred to Mrs. Vondráčková as one of the ‘out-going’ singers, whose charm and art has long faded and who is being kept ‘on stage’ thanks to her continuous connections to this pop-music mafia.

Mrs. Vondráčková brought a civil action against Mr. Rejžek for libel. The key issue became the interpretation of the notion ‘mafia’. Mrs. Vondráčková claimed that, through such public statements, she was being associated with a terrorist and criminal organisation (the mafia), which is obviously untrue and

see Sadurski (2005), ch. 2.

110 Vice-president of the CCC, Pavel Holländer, even calls the speed and frequency of the new legislation and amendments to the new legislation as ‘deconstruction’ of the legal order – in: Holländer, P. *Ústavněprávní argumentace* [Constitutional Legal Reasoning]. Prague: Linde Publishing, 2003, 11.

111 Or also post-democratic, i.e. freshly totalitarian. The defining element is the transition and the divergence between the original value judgments expressed in the still ‘positive’, i.e. valid law and the requirements of the new system and its new ‘values’. This divergence must be bridged by judicial interpretation. A fascinating study on this issue and the ‘free judicial decision-making’ is Rüthers (1968).

112 A solid review in the area of constitutional law is provided by Frowein, J. A., Marauhn, T., eds., *Grundfragen der Verfassungsgerichtsbarkeit in Mittel- und Osteuropa. Beiträge zum ausländischen öffentlichen Recht und Völkerrecht. Band 130*. Berlin: Springer Verlag, 1998.

113 Judgment of 15 March 2005, I. ÚS 367/03 (‘Vondráčková’), CCCR, vol. 33, no. 24, p. 465. Case note Bobek, M., *Soudní rozhledy*, 2005, vol. 10, pp. 357–64.

insulting. All the courts of civil jurisdiction (Municipal Court in Prague, High Court in Prague and the Supreme Court) allowed the action and obliged Mr. Rejžek to publish an apology in the same newspaper. The case then reached the CCC as a constitutional complaint filed by Mr. Rejžek. The CCC quashed the decisions of civil courts and, applying the horizontal effect of fundamental rights doctrine (which it borrowed earlier from the case law of the German Federal Constitutional Court), stated that civil courts must weight the fundamental rights that are in conflict here, namely the freedom of speech on the one hand and the right to personal integrity (human dignity) on the other.

The use of authority for reaching the various decisions is of interest. In holding that the reputation of Mrs. Vondráčková was harmed by the statements of Mr. Rejžek, civil courts relied on the case law of the then Czechoslovak Supreme Court of 1980s. The CCC indirectly scorned (especially) the Supreme Court for doing so. The CCC stressed that a free society gives different weight to different values and that freedom of speech occupies a central position in such a society. Accordingly, it enjoys a greater protection than in the Communist courts in 1980s, where a clear preference was given to personal rights. In the following reasoning, the CCC itself refers to U.S. and German case law¹¹⁴ and comes to the conclusion that in such case as this, freedom of speech shall prevail. The case is a lucid example how foreign law lends authority to domestic discourse and the eventual overruling of 'outdated' domestic law. In a way, foreign case law functions as a temporal 'replacement' and temporal help to judicial transition.

Similar rationales can be discerned in the case law of the Czech Supreme Administrative Court as well as other courts in the region, for example the Slovak Constitutional Court. The CSAC considers comparative legal analysis to be one of the interpretative tools that can correct an unacceptable result reached by literal interpretation. A literal and somewhat mechanical interpretation is often favoured by public authorities. When applied to elder statutes, often dating back to the Communist period, literal interpretation yields problematic results.¹¹⁵ Similarly as before the CCC, the recourse to foreign law is a welcome source of inspiration for the period of transition, a help for overcoming outdated national law and case law.

It is quite surprising that the use of foreign law in these and similar cases stirs no opposition. There is absolutely no discussion of the phenomenon in the academic forum and hardly any in the political or popular one, be it

114 *New York Times Co. v. Sullivan* 376 U.S. 254 (1964) and *Gertz v. Robert Welch, Inc.* 418 U.S. 323 (1974); BVerfGE 90, 241 and BVerfGE 90, 1 respectively.

115 For instance, judgment of the grand chamber of the CSAC of 26 October 2005, 1 Afs 86/2004-54, concerned the issue as to whether the decision of a tax authority discontinuing the proceedings for remission of tax is reviewable before administrative courts. The literal interpretation of the relevant passage of the Law on the Administration of Taxes and Duties would exclude such possibility. The CSAC pointed out to the changed social circumstances and allowed the action.

from the point of view of legal methodology or political implications. If any reservations are uttered, they limit themselves to the critique of ‘one-fits-all’ legislative solutions, ordained by some of the global or Western institutions in Central and Eastern Europe,¹¹⁶ not the judicial forum. The only objection to the use of comparative law I was able to identify in the Czech Republic in the last two years was a rather obscure article by an unsuccessful litigant in an electoral dispute, who attacked, *inter alia*, the fact that in a decision rejecting his application the CSAC relied on the case law of the *Bundesverfassungsgericht*.¹¹⁷

Perhaps to disperse similar claims with respect to Hungary, L. Sólyom, at the time an ex-Chief Justice of the Hungarian Constitutional Court and reflecting on the German influence in the Court’s case law, claimed: ‘*It is to be noted that the traditional German influence, though nearly overwhelming, has been consciously balanced by the experience of other courts, especially those of Italy [...], Portugal and Spain. The jurisprudence of the U.S. Supreme Court is also echoed in Hungarian decisions.*’¹¹⁸ Similar conscious comparative selectivity¹¹⁹ reflects the issues of *de facto* judicial diplomacy and further undermines the idea of comparative judicial methodology as a universal and objective tool of interpretation.

Bibliography

- Bobek, M, ‘The Fortress of Judicial Independence and the Mental Transitions of the Central European Judiciaries,’ 14 (1) *European Public Law*, 2008, 99–123.
- Bobek, M, ‘Quantity or Quality? Reassessing the Role of Supreme Jurisdictions in Central Europe,’ *American Journal of Comparative Law*, 57 (1), 2009, 33–66.
- Bobek, M., Molek, P., Šimíček, V., eds., *Komunistické právo v Československu – Kapitoly z dějin bezpráví*, Brno: Masarykova univerzita, Mezinárodní politologický ústav, 2009.
- Calabresi, G., ‘Two Functions of Formalism’ *U Chi L Rev*, 67, 2000, 479–88.

116 See e.g. Knieper, R. ‘Möglichkeiten und Grenzen der Verpfanzbarkeit von Recht. Juristische Zusammenarbeit aus der Sicht eines Beraters.’ *RabelsZ* Bd. 72 (2008), 88–113; and Weckerling, M. ‘Erfahrungen der IRZ-Stiftung in Mittel-, Ost- und Südeuropa.’ *RabelsZ* 72 (2008), 43–54.

117 Fleischer, P. Jak si koupit vysílací čas v ČT [*How to Buy Broadcasting Time in the Czech TV*], published in A2 Kulturní týdeník on 25 October 2006, 18. The case concerned the issue of equal access of all political parties running for election in public television. The CSAC held, referring to a series of decisions of the *Bundesverfassungsgericht* on ‘*Chancengleichheit*’ in elections that the right to equal TV time for all parties concerns only the emission of political spots, not a general equal access to all emissions (including debates, news etc.) of the public television. The disgruntled author concludes that ‘*The Czech law is, at least in electoral disputes, subordinated to German law, German doctrine and German case-law.*’

118 Sólyom, L., Brunner, G., *Constitutional Judiciary in a New Democracy. The Hungarian Constitutional Court*. Ann Arbor: The University of Michigan Press, 1999, 5.

119 It is fascinating to observe the marginal appearance of U.S. case law in Central European courts. With the exception of some freedom of speech cases, U.S. law is almost never invoked. This shows an intriguing disproportion between the considerable amount of money invested in the Central and Eastern European region by the U.S. Government and private actors (especially the American Bar Association through its CEELI branches, etc.) in terms of legal and judicial help and the minimal ‘output’ in legal and judicial terms.

- Canivet, G., Andenas, M., Fairgrieve, D., eds., *Independence, Accountability, and the Judiciary*, London: British Institute of International and Komparative Law, 2006.
- Damaška, M. R., *The Faces of Justice and State Authority; A Comparative Approach to the Legal Process*, New Heaven: Yale University Press, 1986.
- Dawson, J. P., *The Oracles of the Law*, Ann Arbor: The University of Michigan Law School, 1968.
- Entlastung des Bundesverfassungsgerichts; Bericht der Kommission*, Bundesministerium der Justiz (Moser Druck Verlag): Bonn, January 1998.
- Fremont, M., *La justice constitutionnelle dans le monde*, Paris: Dalloz, 1996.
- Frowein, J. A. and Marauhn, T., eds., *Grundfragen der Verfassungsgerichtsbarkeit in Mittel- und Osteuropa. Beiträge zum ausländischen öffentlichen Recht und Völkerrecht. Band 130*, Berlin: Springer Verlag, 1998.
- Gardner, J., 'Concerning Permissive Sources and Gaps', *Oxford Journal of Legal Studies*, 8 (3), 1988, 57–461.
- Grewe, C., ed., *La notion de 'justice constitutionnelle'*, Paris: Dalloz, 2005.
- Guarnieri, C., 'Appointment and career of judges in continental Europe: the rise of judicial self-government', *Legal Studies*, 24, 2004, 169–87.
- Guarnieri, C. and Pederzoli, P., *The Power of Judges: A Comparative Study of Courts and Democracy*, Oxford: Oxford University Press, 2002.
- Hart, H. L. A., *The Concept of Law*, 2nd ed., Oxford: Oxford University Press, 1994.
- Hranice přezkumu rozhodnutí obecných soudů ústavním soudem v řízení o ústavní stížnosti. Sborník příspěvků z konference pořádané Ústavním soudem České republiky ve spolupráci s Benátskou komisí Rady Evropy v Brně 14.–15. listopadu 2005*, Prague: Ústavní soud České republiky a nakladatelství Linde, 2005.
- Kalenská, R., *LEXikon Otakara Motejla*, Prague: Lidové noviny, 2006.
- Knieper, R., 'Möglichkeiten und Grenzen der Verpfanzbarkeit von Recht. Juristische Zusammenarbeit aus der Sicht eines Beraters', *RabelsZ Bd.*, 72, 2008, 88–113.
- Kosař, D., 'Lustration and Lapse of Time: Dealing with the Past in the Czech Republic', *European Constitutional Law Review*, 4 (3), 2008, 460–87.
- Kühn, Z., 'The Application of European Law in the New Member States: Several (Early) Predictions', *German Law Journal*, 3, 2005, 565.
- Kühn, Z., 'Worlds Apart: Western and Central European Judicial Culture at the Onset of the European Enlargement', *American Journal of Comparative Law*, 52, 2004, 531.
- Kühn, Z., *Aplikace práva soudcem v éře středoevropského komunismu a transformace Analýza příčin postkomunistické právní krize*, Prague: C. H. Beck, 2005.
- Lord Devlin, 'Judges and Lawmakers', *Modern Law Review*, 39, 1967, 1.
- Luchterlandt, O., ed., *Verfassungsgerichtsbarkeit in Mittel- und Osteuropa. Teilband I: Berichte*, Baden-Baden: Nomos, 2007.
- MacCormick, D. N., Summers, R. S., eds., *Interpreting Precedents – A Comparative Study*, Dartmouth: Aldershot, 1997.
- Markesinis, B. and Fedtke, J. *Judicial Recourse to Foreign Law. A New Source of Inspiration?* Abingdon: UCL Press and Taylor & Francis Group, 2006.
- Merryman, J., 'The French Deviation', *American Journal of Comparative Law*, 44, 1996, 109.
- Perelman, Ch., ed., *Le problème des lacunes en droit*. Travaux du Centre national de recherches de logique, Bruxelles: Bruylant, 1968.
- Picardi, N., 'La ministère de la justice et les autres modèles d'administration de la justice en Europe'. In: *L'indipendenza della giustizia, oggi. Liber Amicorum in onore di Giovanni E. Longo*. Milano: Dott. A. Guiffirè Editore, 1999.
- Pospíšil, I. and Kokeš, M., eds., *In dubio pro libertate. Úvahy nad ústavními hodnotami a právem. Pocta Elišce Wagnerové u příležitosti životního jubilea*. Brno: Masarykova univerzita, 2009.
- Rasmussen, H. *On Law and Policy in the European Court of Justice*, Dordrecht: Martinus Nijhoff

- Publishers, 1986.
- Reimann, M. and Zimmermann, R., eds., *The Oxford Handbook of Comparative Law*, Oxford: Oxford University Press, 2006.
- Rencontre judiciaire et universitaire 27–28 septembre 1976*, Luxembourg: Office for Official Publications, 1976.
- Rodin, S., 'Discourse and Authority in European and Post-Communist Legal Culture', *Croatian Yearbook of European Law & Policy*, 1, 2005, 1–22.
- Rüthers, B., *Die unbegrenzte Auslegung: Zum Wandel der Privatrechtsordnung im Nationalsozialismus*, Tübingen: Mohr Siebeck, 1968.
- Sadurski, W., *Rights Before Courts. A Study of Constitutional Courts in Postcommunist States of Central and Eastern Europe*, Dordrecht: Springer, 2005.
- Sadurski, W., ed., *Constitutional Justice, East and West*, The Hague: Kluwer Law International, 2002.
- Schmidt-Räntsch, G. and Schmidt-Räntsch, J., *Deutsches Richtergesetz – Kommentar*, München: C. H. Beck'sche Verlagsbuchhandlung, 1995.
- Schwartz, H., *The Struggle for Constitutional Justice in Post-Communist Europe*, Chicago: The University of Chicago Press, 2000.
- Šimíček, V., ed., *Role nejvyšších soudů ve sjednocující se Evropě – čas pro změnu?*, Brno: Mezinárodní politologický ústav, 2007.
- Sólyom, L. and Brunner, G., *Constitutional Judiciary in a New Democracy. The Hungarian Constitutional Court*, Ann Arbor: The University of Michigan Press, 1999.
- Starck, Ch. and Weber, A., eds., *Verfassungsgerichtsbarkeit in Westeuropa. Teilband I: Berichte*, Baden-Baden: Nomos, 1986.
- Stone Sweet, A., *Governing with Judges: Constitutional Politics in Europe*, Oxford: Oxford University Press, 2000.
- Ulč, O., *The Judge in a Communist State. A View from Within*, Ohio University Press: Columbus, 1972.
- Verdussen, M., ed., *La Justice Constitutionnelle en Europe Centrale*, Bruxelles: Bruylant, 1997.
- Von Savigny, F. C., *System des heutigen Römischen Rechts. 2. Neudruck der Ausgabe Berlin 1840*. Aalen: Scientia Verlag, 1981.
- Weckerling, M., 'Erfahrungen der IRZ-Stiftung in Mittel-, Ost- und Südeuropa', *RabelsZ*, 72, 2008, 43–54.
- Yessiou-Faltsi, P., ed., *The Role of the Supreme Courts at the National and International Level. Reports for the Thessaloniki International Colloquium (21 – 25 May 1997)*, Thessaloniki/Athens, Thessaloniki: Sakkoulas Publications, 1998.