PROSPECTIVE AND RETROSPECTIVE OVERRULING IN THE CZECH LEGAL SYSTEM

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Abstract: *The paper deals in great detail with the problem of prospective and retrospective overruling of case law in the Czech legal system. First, the paper explains the concept of precedent in the Czech legal system. It analyzes how precedent was approached in the 1990s and how this changed in the 21st century. Then the text discusses various options of temporal effects of the case law in general and in the Czech Republic in particular. The practice of general courts and the Constitutional Court is addressed first. Finally, the case law of the Supreme Administrative Court is dealt with. It provides possibly the most complex mechanism to deal with temporal effects of overruling in the Czech legal system.*

Keywords: *case law; precedent; overruling; temporal effects of overruling*

The problem of prospective overruling has become the issue at the end of the first decade of this century. The contrast between the situation of the 1990s and early 2000's is nicely visible if we compare two editions of the only Czech book dealing in detail with the problem of precedent and case law. Its first edition published in 2006 has not discussed the issue of prospective overruling, just briefly mentioned it. Instead, the most important idea of the book was to persuade its readers that case law matters, precedents shall be published, they shall be taken seriously and should be used before courts. Likewise, judges shall not ignore it.[1]

Within mere seven years, the situation has changed dramatically. In the second decade of this century, you can hardly find a Czech scholar who would continue to claim that case law has no law making function and no force whatsoever. Instead, new problems emerged, including temporal application of new precedents. That is why the second edition of the book published in 2013 includes the entire chapter on prospective overruling.[2] As nicely put by Michal Bobek, this issue belongs to the "second generation" of the problems relating to precedent in the Czech Republic:

Within [those seven years between publication of the first and second editions] the entire understanding of case law has undergone major transformation in the Czech legal system. Perhaps no major textbook on jurisprudence today continues to claim that case law has no lawmaking potential. However, while jurisprudence is slowly moving towards recognition of case law, legal practice has made a considerable move. Recently, legal practice has become to deal with the problems which we can call problems of the "second generation" relating to the rise of case law. The question today is not whether case law is binding and where we can find it. The questions of the second generation are more complex: when is it possible to overrule case law or deviate from it? By whom? What about temporal application of overruling? […]"[3]

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[1] See Zdeněk Kühn – Michal Bobek – Radim Polčák (eds.). *Judikatura a právní argumentace.* Praha: Auditorium, 2006.

[2] See sixth chapter, KÜHN, Z. Časová působnost judikatury. In: Michal Bobek, Zdeněk Kühn (eds.). *Judikatura a právní argumentace.* 2nd ed. Praha: Auditorium, 2013.

[3] See foreword to Michal Bobek, Zdeněk Kühn (eds.). *Judikatura a právní argumentace.* 2nd ed. Praha: Auditorium, 2013.

In the subsequent text I will first explain how and why this fast transformation in the Czech legal system happened. Then I will discuss various options of temporal effects of the case law. I will outline the basic models through which the legal system can deal with this issue. In the third section I will analyze the practice of general courts and the Constitutional Court. Finally, I deal with the case law of the Supreme Administrative Court, which provides possibly the most complex mechanism to deal with temporal effects of overruling in the Czech legal system.

1. THE BIRTH OF THE CZECH CONCEPTION OF PRECEDENT

Until the end of the 1990s overruling in the Czech legal system was usually invisible. It happened sometimes through sudden action of the high court, often through gradual modification of previous case law. The key problem of the 1990s was the predictability of case law and the fact that legal scholarship and many judges maintained that case law was not binding and that is why it did not matter.

The lack of any debate about temporal effects of overruling can be explained by multiple reasons. First, the mainstream opinion of postcommunist legal scholarship rejected the very notion that case law is also part of the law in a broader sense. If it were non-law, no one would need to discuss its temporal effects.[4] In addition, what mattered was the absence of any institutionalized overruling of the high court precedents.

The situation in the Czech legal culture in the 1990s was a direct continuation of a formalist model of legal reasoning, typical of the late Communist era. Its specific judicial ideology can be well described—in the words of a prominent contemporary Hungarian legal philosopher—as "the degeneration of legal positivism"[5] or "a dull rule-positivism".[6] Under the common perception, the work of a judge was thought of as primarily mechanical. It might be said that the quality of judicial and legal reasoning was poor.[7]

The typical post-Communist conception of judicial independence in the 1990s included the proposition that judges must decide only according to 'the [statutory] law', which, however, effectively meant that in hard cases—and even in some easy cases—where a simple logical syllogism could not be applied, they might decide in the way they see fit.[8] Judges guided by the ideology of textualism were not obliged to give consideration to precedents, legal writings, the intention of the legislature, the rationally reconstructed purpose of the law, all of which constitute something which was not 'law' in the ideology of bound judicial decision-making and textual positivism. They had to adhere only to the letter of the law; where the letter of the law did not offer any easy solution, pure arbitrariness and unpredictability could enter the scene.

[4] See generally KÜHN, Z. *The judiciary in Central and Eastern Europe. Mechanical Jurisprudence in Transformation?* Martinus Nijhoff 2011, p. 207 ff.

[5] VARGA, C. *Transition to Rule of Law. On the Democratic Transformation in Hungary.* Budapest 1995, p. 83.

[6] VARGA, C. *Transition to Rule of Law. On the Democratic Transformation in Hungary.* Budapest 1995, p. 142.

[7] Generally on this issue see KÜHN, Z. *The Judiciary in Central and Eastern Europe: Mechanical Jurisprudence in Transformation?* Martinus Nijhoff Publishers 2011.

[8] According to some authors, that is one the reason the independence of judges is "a concept often misunderstood" in the post-Communist region. Cf. EMMERT, F. The Independence of Judges – A Concept Often Misunderstood in Central and Eastern Europe. *European Journal of Law Reform*. 2002.

Even those judges who understood the value of persuasive sources of law did not usually acknowledge openly in their opinions that they make use of such sources. Yet, the problem relating to this reticence lied not only in the aesthetics of judicial opinions. The very fact that these persuasive authorities were not openly cited caused many other judges to think that persuasive authorities were without any merits. In a simplified intellectual world of post-Communist limited law, everything was either binding (therefore, legally relevant) or non-binding (and, therefore, legally irrelevant). Twenty or ten years ago it was not uncommon to find a judge who during trial rejected even any reference to precedent or legal science because she is not 'bound by them' and, therefore, they are without any importance for her reasoning, which remains independent of anything but the letter of the law.[9] Even though it was not admitted by those espousing the concept of limited law, this sort of judicial independence resulted in the antithesis of judges being 'bound' by law, as the law's inability to unequivocally determine for them a clearly obvious outcome results in them not being bound by anything at all.

Renewed discussion on the role of precedent appeared in Central Europe shortly after the fall of the Communist regimes. With the emergence of judicial review and the overall rise of the judiciary, the old clichés concerning the role of precedent in the legal system started to be questioned all over post-Communist Europe. Even today one might still plausibly claim that the issue of precedent is neglected in Central Europe. Law students for the most part do not study them; they are not used to working with them. Therefore, the existing education method is statutory rule-oriented, and many students have not encountered a single judicial decision throughout their entire program of university study. Though recently the emphasis on precedents in legal education is improving, they are approached in a peculiarly scholastic way—their headnotes are viewed as further material for students to memorize.

The most important reason for the fall of the old (post-Communist) conception of weightless precedent is, in my opinion, twofold. First, in the course of the first decade of this century all Czech high courts (Constitutional Court, Supreme Court, Supreme Administrative Court) launched on-line publication of their case law. Thus everyone has got the access to thousands of decisions.[10] Second, the law on courts and judges was amended in 2000[11] and grand chambers of the Supreme Court were created. Those grand chambers, one sitting for civil law issues, one for criminal law, are the only judicial body empowered to overrule previous precedents of the Supreme Court. It is prohibited for a small panel

[9] In the course of the late 1990s and early 2000s, while being a practitioner before Czech law courts, I encountered such an attitude many times.

[10] Supreme Court has published all its case law since 2000. All decisions of the Supreme Administrative Court (which started to operate in 2003) and the Constitutional Court (created in 1993) are now available on-line.

[11] The Law No. 335/1991 (all numbers of laws referred therein refer to the Official Gazette, in Czech *Sbírka zákonů*), on courts and judges, as amended by the law No. 30/2000. Today the same institution is in the Law No. 6/2002, on courts and judges (§ 20). The Czech law has been inspired by the German model. See ALEXY, R., DREIER, R. *Precedent in the Federal Republic of Germany, in: Interpreting Precedents - A Comparative Study, Dartmouth.* Aldershot 1997, p. 17. Cf. the *en banc* practice of US Federal Courts of Appeals which usually decide in three-judge panels, but one reason to transfer such a case to a larger composition is the fact that it is desired to depart from case law established in that particular circuit. For a general overview of this practice, see, e.g., GINSBURG, D., FALK, D. The D.C. Circuit Review, September 1989 – August 1990: The Court En Banc: 1981–1990. *Geo. Wash. L. Rev.* 1991.

composed of three judges which decides cases routinely to deviate from its earlier legal opinion. Instead it is obliged to send the issue to its respective grand chamber. Grand chambers have been made part of the Supreme Administrative Court from its very beginning in 2003.[12] To put it simply, any overruling today can take place only through a special body within the high court – grand chambers at the Supreme Court and the Supreme Administrative Court, or decision made *en banc* at the Constitutional Court. This strengthened the force of precedent and its weight in legal reasoning.

Last but not least the duty of both high courts to send the issue to the grand chamber has been sanctioned by the Constitutional Court's case law. According to the Constitutional Court, if the high court deviates from its previous case law without the approval of its grand chamber the party's fundamental right to a lawful judge is violated. This violation provides the Constitutional Court a very convenient avenue to quash the decision of the high court without addressing the substance of the dispute at stake.[13] Not surprisingly, within the first decade of the existence of grand chambers the issue prospective overruling emerged.

Now the consensus in Czech legal scholarship seems to be that case law really means, at least to some extent, also law making. The legal rule is not the text of the law but its meaning as interpreted by courts. The text of the law is the carrier of the rule, whose meaning must be interpreted and often developed by courts. Viewed by those bound by the law the rule is what has been interpreted by law courts from the text of the law. However, judicial law making is not identical to legislative law-making. Judges still struggle to find law, not to make it,[14] even though law making from the objective point of view is unavoidable.[15] A good example is the new interpretation of statute of limitation of defamation claims, as I shall discuss below. While the previous rule, as interpreted by the Supreme Court case law, gave the right to sue defamation claims without any statutory limitation, the Supreme Court grand chamber provided a contrary reading that those claims are subject to strict limit of three years.[16]

The Constitutional Court repeatedly emphasized that *"judikatura*" (term comparable to French *jurisprudence*, case law) is law in its substantive meaning. That is why courts have the duty to alter case law in a principled way, without hindering legitimate expectation of those at stake.[17] In its discourse with the ordinary courts in the 1990s,

[13] Cf. the Constitutional Court's judgments of 20 September 2006 No. II. ÚS 566/05, of 11 September 2009 No. IV. ÚS 738/09 (both with respect to the Supreme Court) or the judgment of 18 April 2007 No. IV. ÚS 613/06 (with respect to the Supreme Administrative Court).

[14] This seems to be the consensus of Czech legal scholarship, quite often influenced by German scholarship. Cf. MELZER, F. *Metodologie nalézání práva*. Praha: C. H. Beck, 2010.

[15] See generally KÜHN, Z. *Aplikace práva ve složitých případech: k úloze právních principů v judikatuře*. Praha: Karolinum, 2002.

[16] Cf. the Constitutional Court's judgment of 5 August 2010 No. II. ÚS 3168/09 and the text relating to the footnote 44 below.

[17] A good example of the theoretical problems relating to case law in the 1990s was the case referring to the sudden change of case law by the Supreme Court – judgment of the Constitutional Court of 18 February 1999, No. I. ÚS 526/98 (as translated at http://www.usoud.cz/en/decisions/): *"Consideration of the predictability of the law (its consequences) cannot be restricted only to its grammatical text. It is judicial decision making which – although it does not have a classical precedential nature –interprets the law, or completes it, as the case may be, and its relative constancy guarantees legal certainty and also insures general confidence in the law. This applies particularly to the Supreme Court, which is the supreme judicial body in the field of the general judiciary (cf. Art. 92 of the Constitution). This, of course, does not deny that judicial case law can develop and change with regard to a number of aspects, in particular with regard to changes in social conditions."*

the Czech Constitutional Court fashioned a new conception of precedent for the ordinary judiciary.[18]

On the one hand, the Constitutional Court emphasized that a judge is not bound by the case law of the Supreme Court and is entitled to deviate therefrom she finds good and legitimate reason to do so. Replying to the arguments of an ordinary judge that the decision is correct because the ordinary judge is bound by case law, the Czech Constitutional Court emphasized that the ordinary court must assess the validity of the established case law by taking into account societal and legal development.[19]

On the other hand, the Constitutional Court proclaimed in the late 1990s that ordinary court judgments are arbitrary and, therefore, unconstitutional, to the extent that the judge decides contrary to the 'established' case law of the Supreme Court unless she rationally explains why she disregarded the applicable jurisprudence.[20] The effects of the decision are far reaching. A precedent, although not binding, has a force of its own, and lower courts must give strong arguments for declining to follow it. The 'discursive' authority of precedent—as outlined by the Czech Constitutional Court—means that it is the *duty* of all judges to consider higher court precedents, and not just a matter of random judicial choice. At the top of the system, both supreme courts and the Constitutional Court are bound by their own precedent and must follow it unless *en banc* proceedings establish a new precedent.

In 2012, the legislature affirmed the conception of precedent envisaged by the Constitutional Court's case law. The Civil Code enacted in 2012[21] provides as one of its basic principles that everyone who seeks legal protection can expect that his case would be decided in the same way as another case decided by law courts which is similar in essential features; if her case is decided in a different way the party who seeks legal protection is entitled to persuasive explanation of reasons relating to this deviation (Section 13 of the Civil Code).

The conception of precedent in the Czech Republic is thereby discursive, not formally binding. We should not be surprised that Czech legal scholarship adamantly denies that judicial precedents have formally binding force. In most cases, lawyers avoid using the very word "precedent". Instead, as I have already mentioned above, the term "*judikatura*" (case law) is used. Putting aside other reasons, this is due to the fact that the Czech together with other Continental lawyers understand the term 'precedent' to mean something different and much more rigid than do their Common Law counterparts. The English doctrine that precedent cannot be overruled even by the highest court itself—although repudiated even in Britain in 1966—still has a huge impact on Continental legal thinking

[18] In fact what made the change of the Czech conception of precedent was not legal scholarship but the case law of the Czech Constitutional Court. It shall be noted that Constitutional Court in its first decade was composed of several legal philosophers who were trained in the West. One of the 'Founding Fathers' of the Czech Constitutional Court's jurisprudence was Pavel Holländer, a legal philosopher who served as justice between 1993 and 2013. In more detail see KÜHN, Z. *The Judiciary in Central and Eastern Europe: Mechanical Jurisprudence in Transformation?* Martinus Nijhoff Publishers 2011, chapter five.

[19] The judgment of 21 November 1996, No. IV. ÚS 200/96. Cf. similarly the German Federal Constitutional Court, BVerfGE 18, 224 (240) and BVerfGE 84, 212 (227).

[20] The first decision in that line is the judgment of 25 November 1999, No. III. ÚS 470/97.

[21] Civil Code. *Law.* 2012, č. 89.

which identifies the concept of precedent basically with this English notion. As Dawson put it:

"The hostility still shown in France toward the whole conception of judicial precedent may be due in part to dismay inspired by the English example. […] The extreme to which the English doctrine of precedent has been carried during the last seventy years [1898-1966] has helped, I believe, to perpetuate in Europe a basic misunderstanding, by obscuring a primary purpose of a system of precedent. That purpose is to restrict, not to enlarge, the powers of judges."[22]

Moreover, Continental judges, including post-Communist ones, operate within a judicial culture which approaches the hierarchical ideal of state authority, based on a strictly hierarchical ordering, specialization and a logically legalistic attitude, which stands in clear contrast to the less hierarchical, more pragmatic and more substance and problem-oriented common law judges.[23] Thus, it is very likely that establishing a rule of precedent in Continental systems—and above all in post-Communist systems—would entail the extension of mechanical textual positivism to the sphere of case law. These formalist and mechanical Continental predispositions are plainly seen in the growing number of complaints in the Czech Republic about the phenomenon of "case positivism", that is a too rigid observance of the judge-made rules as formulated in the earliest reported decisions while disregarding the entirely divergent facts of later cases.[24] When common lawyers praise the virtues of their system of precedents, they have in mind the flexibility of law; when their East European counterparts think about the same problem, they are always afraid of the law's rigidity. In the words of Mirjan Damaška, if precedent were recognized as legally binding in Continental Europe:

"decisional standards would in time become intolerably rigid, each new decision a drop in the formation of an ever longer stalactite of norms. In short, while a judicial organization composed of loosely hierarchical judges may require a doctrine of binding precedent as an internal ideological stabilizer, a hierarchical career judiciary may well be better off without it."[25]

Discursive vertical force of precedent combined with its binding nature at the high court (horizontal) level is a sort of response to this problem. Lower courts are supposed to follow precedents, at the same time they might provoke overruling by bringing new arguments and trying to persuade higher courts to change their legal opinions.

[22] DAWSON, J. P. *The Oracles of the Law*. The University of Michigan Law School, Ann Arbor 1968, pp. 413–414.

[23] Cf. DAMAŠKA, M. *The Faces of Justice and State Authority. A Comparative Approach to the Legal Process.* New Haven, London, Yale University Press 1986, p. 18 ff.

[24] In the Czech Republic e.g. DAVID, L. Co je precedent v rozhodnutí českých soudů? In: *Dny práva* Brno: Tribun 2008, p. 1240 ff.; BOBEK, M. KÜHN, Z. Judikatura a právní argumentace. 2nd ed. Praha: Auditorium, 2013, p. 175 ff. Cf. many reports in MACCORMICK, D. N., SUMMERS, R. S. (eds.). *Interpreting Precedents: a Comparative Study*. Darmouth, Aldershot 1997; especially ARNIO, A. Precedent in Finland. id., p. 93; TARUFFO, M., TORRE, M. Precedent in Italy, id., p. 182 ff.; MORAWSKI, L., ZIRK-SADOWSKI, M. Precedent in Poland, id., p. 231.

[25] DAMAŠKA, M. supra note 23, at 37, note 37.

2. RETROSPECTIVE AND PROSPECTIVE OVERRULING GENERALLY[26]

It is the principle in all civil law countries as well as in common law systems[27] to apply a new judge-made law rule to all cases before the courts. It does not matter whether or not those cases had been brought to courts before the high court made a new precedent. It does not matter when the action which would be the reason for the lawsuit took place. It does not matter whether a new precedent is a completely new interpretation of the law or whether it is the result of overruling previous case law. I call this situation *incidental retrospectivity*. A new legal opinion is applied *retrospectively*. Older cases which had meanwhile been finally decided cannot be reopened only because of subsequent decisions which overruled earlier precedents.[28] Adjective *"incidental"* implies that retrospective effects are to some extent accidental, i.e. the case had not been finished before the new opinion was made.

Both civil and common law is based on the premise that courts do not make law but just try to find the law in its sources, such as statutory law, customs, legal principles etc. (declaratory theory). Overruling of an earlier precedent is in this point of view just the correction of the previous mistake in interpretation of law. The nature of judicial law making rests in finding the correct meaning of the law, no matter how fictitious this might be in reality. As nicely summarized by Lord Reid in his fierce defense of retrospective application of a new judge-made law rule: *"We cannot say that the law was one thing yesterday but is to be something different tomorrow. If we decide that* [the existing rule] *is wrong we must decide that it always has been wrong, and that would mean that in many completed transactions owners have received too little compensation. But that often happens when an existing decision is reversed."*[29] A Czech judge would agree entirely with this assertion.

That is why it is not possible to apply the older (erroneous) legal opinions on older legal relations which had taken place before a new legal opinion was made by the competent judicial body, in the Czech Republic a grand chamber. The fiction of Czech law is that although case law finally determines the meaning of law it is never an autonomous and

[26] The following text is based on my Czech text quoted supra note 2 above.

[27] Cf. with regards to common law JURATOWITCH, B. *Retroactivity and the Common Law*. Hart, Oxford 2008, p. 199 ff. Cf. *Kleinwort Benson Ltd v Lincoln City Council* [1999] 2 AC 349, s. 379 (Lord Goff of Chieveley states that prospective overruling has no place in British common law). Recently, this strict legal opinion has been somewhat modified in the judgment of the House of Lords *National Westminster Bank plc v. Spectrum Plus Limited and others* [2005] UKHL 41 ("*Never say never*", noted in para 41 Lord Nicholls of Birkenhead after an in-depth analysis of US, Indian, ECHR and ECJ case law; cf. also para 74 of Lord Steyn opinion: *"I would not rule out the possibility that in a wholly exceptional case the interests of justice may require the House, in the context of a dispute about the state of the common law or even about the meaning or effect of a statute, to declare that its decision is not to operate retrospectively."*).

[28] It is the old rule that reopening of the proceedings is in such situations impossible. To put it simply, reopening could be possible only if new evidence arose. New evidence is a factual issue, that is why overruling earlier case law is never the issue of fact. Cf. already judgment of the Czechoslovak Supreme Administrative Court of 29 October 1937 No. 15043/37, recently judgment of 1 March 2004 No. IV. ÚS 792/02 ("different *(subsequent) interpretation of law, as made in the judgment of the Constitutional Court, is not the circumstance which would justify reopening of proceedings*"). The only exception to this rule is derogation of unconstitutional law by the Constitutional Court – according to Constitutional Court Act, Art. 71 para 1 (law No. 182/1993) if criminal judgment had been made according to the law which has been found unconstitutional, the proceedings shall be reopened if the actual judgment has not yet been served.

[29] *West Midland Baptist (Trust) Association Inc v Birmingham Corporation* [1970] AC 874, at 898.

original source of law. It never functions on its own. It always functions linked to another source of law, it interprets it, albeit the link is often very distant and almost invisible. It is true that this understanding is often fictitious. This fiction, however, stands as a foundational legitimizing narrative of Czech as well as Continental judiciary. That is why I do call the application of a new judge-made law rule "retrospectivity" rather than "retroactivity".

Only *modern* law in a formal sense (statutes as carriers of legal rules) is connected with the prohibition of retroactivity with all its consequences.[30] The development of law and its making in a formal sense is discontinuous, the beginning and end of its existence (validity) is fixed, its application is determined by complex temporal rules.

On the other hand, law in a broader, substantive sense cannot be reconciled with the ban on retroactivity. Law in a substantive meaning is a plethora of popular practices (commercial customs, but also those statutory rules which effectively delegate rule-making on some addressees who further define what is in some place and some time "usual" according the code, what is "without unnecessary delay" etc.), administrative practice (law making through decisions of administrative authorities in individual cases), last but not least case law. The development of this kind of law is continuous, gradual. For instance, the precise moment when the customary rule has been modified is hard to determine. If the case law is modified in a different way than through a formal decision of a grand chamber, it can be very complicated to say since when a previous precedent has been finally overruled. Such a change, if made by series of judgments gradually undermining previous opinion, is not linked to the exact date since when it becomes applicable. Rather, it is part of continuum within which it is more or less likely that a new rule would be applied.[31]

Continuous and gradual development of judge-made law is challenged by the institution of grand chambers. Grand chambers attempt at institutionalizing and rationalizing judicial modifications of case law. Rather than overruling through a number of judgments undermining previous legal opinion, grand chambers do overrule precedents by a single decision, binding on the entire high court. While making judge-made law explicit, modifications of case law made by grand chambers do call for more precise rules on its prospective or retrospective application.

Temporal rules on overruling do relate to the problem of legal certainty and confidence of the rules' addressees to the old interpretation. Formal and institutionalized overruling by grand chambers might still be quite surprising and unpredictable. That is why formal overruling by grand chamber shall be ideally product of previous trends visible to outsiders

[30] I emphasize modern as earlier civil law prior to 19th century did not satisfy those requirements. In Austrian Empire these formal requirements were stated for the first time by creation of Imperial code (*Reichsgesetzblatt*) in 1849. Cf. BOBEK, M. Publikace obecně závazných právních předpisů v historickém a srovnávacím pohledu. *Jurisprudence*. 2007, č. 1, p. 13–21, *Jurisprudence*. 2007, č. 2, p. 11–18.

[31] Cf. for instance Supreme Administrative Court's judgment of 20 August 2009, No. 1 Afs 33/2009 – 124, paras 25 and 26. The administrative courts in the Czech Republic accept case law of the Constitutional Court conflicting with their own case law without referring the case to the grand chamber. However, if there is conflicting case law of both courts for some time, it might be the problem to say when finally the Supreme Administrative Court accepted the constitutional case law. Quite often, the change takes place gradually, through a series of step by step judgments. In contrast, the Czech Supreme Court requires any change of its case law to take place through its grand chambers, so even though overruling is mandated by the Constitutional Court case law, it is still necessary to send the case to the grand chamber. The precise moment of overruling is obviously much more visible in the latter example.

or at least professionals in the legal field at stake, for instance value conflicts within the earlier case law, critical appraisal of the case law by legal scholarship, publication of the lower courts' judgment in the official case reporter despite the fact that it is in conflict with the Supreme Court's case law.[32] It can also happen that the high court would note in its decision its readiness to refer the issue to the grand chamber in the future. Those facts might matter while deciding about the level of trust in continuing application of the old case law.

I have already noted that in the Czech Republic a new judge-made law rule is applied to all cases before the courts no matter when they were brought to law courts (*incidental retrospectivity*). However, in some exceptional cases the application of a new rule would be too harsh. What is at stake, obviously, is legitimate expectation in continuing application of the old case law. Such situations call for limiting retrospective impact of the new rule. This can be achieved through several constructions.

One extreme, more or less theoretical, would be pure prospectivity. A new precedent would be applied only to the future relations which would emerge after a new rule was published by the court. The precedent would not be applied even to the case at stake. Therefore litigants who brought the case to the high court would not benefit from it. This doctrine is never applied in the Czech Republic.[33] The reasons for that are obvious. If that approach would prevail the legal development through courts would stop. Claimants, being aware that overruling cannot improve their situation, would have no incentive to sue or appeal, perhaps save repeated litigants. Last but not least purely prospective application of a new precedent is too explicit confirmation of judicial law-making, which would make most high court judges at least uncomfortable.

Another option is *limited pure prospectivity*. Judge-made law rule produced by overruling is applied only to the future cases, that is cases which emerged after a new legal opinion was announced. However, unlike pure prospectivity a new precedent is applied to the very case which initiated overruling. In fact, this is just a slightly modified pure prospectivity. As such, it is in conflict with the principle that equal cases shall be decided equally. Let us imagine example of two plaintiffs, both suffering damage from the same accident, both suing the same defendant. The high court would overrule its earlier precedent, but only the plaintiff whose case gave rise to this new precedent would benefit from it. The second plaintiff's case would end up according to the old rule.[34] That is why limited pure prospectivity is very rare in law.

Surprisingly, limited pure prospectivity has been applied recently by the Czech Constitutional Court in one type of cases. This relates to the impact of annulling the law for being unconstitutional by the Constitutional Court. Until 2010 the iron rule was to apply annulment in all cases still pending before the courts. However, since 2010 a new trend is clearly visible. It seems to limit the application of annulling only to those litigants which gave rise

[32] Thus happened before the Czech Supreme Court overruled its case law on statutory non/limitation of defamation claims. Before, the judgment of the High Court in Olomouc of 17 February 2004, No. 1 Co 63/2003, was published in the Supreme Court case reporter as No. 4/2008 [*Sbírka soudních rozhodnutí a stanovisek*].

[33] It seems that pure prospectivity is applied only in the USA, and there very exceptionally. In 1964 the US Supreme Court applied this doctrine in *England v. Medical Examiners*, 375 U.S. 411 (1964).

[34] REYNOLDS, W. L. *Judicial Process*. Minnesota: West Publishing, 1991, p. 181.

to annulling. Predictably this new approach opened hot debates about injustice caused by the fact that several cases were pending before the Constitutional Court, but just party to the only one case actually benefited from annulling the law. Others would have to sustain the application of the law which has been found unconstitutional. In fact, the parties can hardly influence who would be the lucky one as picking up the case which would initiate annulling the law is often influenced by the activity of constitutional justices themselves.[35]

Another option is *limited retrospectivity*. In this case a new legal opinion made by overruling is applied to 1) to the case which initiated overruling, 2) to all legal relations which emerged after the new precedent had been announced (prospective element), and 3) to all older cases, if lawsuits had been made prior to the moment when the new precedent was published (limited retrospective element). Unless someone had sued before the day overruling was announced, he cannot claim rights which he would get according to the new precedent. The only exception would be the situation in which violation of rights lasts beyond the day the new precedent was announced.

The advantage of this model is the fact that it protects legitimate expectation of those who trusted in the "correct" interpretation of law and that is why they had sued before case law has been changed. Those plaintiffs knew that case law is incorrect, therefore they based their legal opinion on a correct interpretation of law. In a way, those people were "smarter" than courts. This type of trust is often neglected by prospective models of overruling. There is no reason why we shall ignore those people who had interpreted law correctly from the very beginning, if this correct interpretation would be later confirmed by overruling. On the other hand, this model treats differently those who would sue only after overruling was announced, even though their claims had emerged before. This implies that they had no legitimate expectation in a correct interpretation of the law. In this case the argument in favor of prospective overruling and legitimate expectation of another party is much stronger.

Limited retrospectivity is occasionally applied by the Court of Justice of the European Union (ECJ). ECJ does not apply it in cases of overruling, but in other situations when it modifies law in a substantive sense. A good example is *Defrenne* case.[36] ECJ proclaimed direct effect of the ban of sex discrimination and the principle of equal pay according to Article 119 EEC Treaty. However, ECJ took into account a number of employer who might be affected and the fact that the Commission itself so far has not claimed direct effect of Article 119. Similarly the EEC member states claimed that Article 119 had no direct effect. Therefore ECJ summed up that

"[i]n view of the large number of people concerned such claims, which undertakings could not have foreseen, might seriously affect the financial situation of such undertakings and even drive some of them to bankruptcy. Although the practical consequences of any

[35] See the opinion of the Constitutional Court sitting *en banc* of 14 December 2010, No. Pl. ÚS-st. 31/10. The Constitutional Court proclaimed that search and seizure made according to the provision which was found unconstitutional by the Court cannot be challenged if it had happened before the publication of the Court's judgment. Cf. for critical debate KÜHN, Z. Intertemporální dopady zrušení právního předpisu Ústavním soudem. *Jurisprudence*. 2011, č. 4, p. 9 ff.

[36] Judgment *Defrenne II*, 43/75, ECR 455 (1976).

judicial decision must be carefully taken into account, it would be impossible to go so far as to diminish the objectivity of the law and compromise its future application on the ground of the possible repercussions which might result, as regards the past, from such a judicial decision. However, in the light of the conduct of several of the member states and the views adopted by the Commission and repeatedly brought to the notice of the circles concerned, it is appropriate to take exceptionally into account the fact that, over a prolonged period, the parties concerned have been led to continue with practices which were contrary to Article 119, although not yet prohibited under their national law. […] Therefore, the direct effect of Article 119 cannot be relied on in order to support claims concerning pay periods prior to the date of this judgment, except as regards those workers who have already brought legal proceedings or made an equivalent claim."[37]

3. TEMPORAL APPLICATION OF OVERRULING BEFORE THE CZECH SUPREME COURT AND THE CZECH CONSTITUTIONAL COURT

On the European continent high courts usually do not proclaim far reaching temporal rules relating to judgments overruling previous case law. Some outstanding scholars even stood up against the very possibility of doing so.[38] High courts prefer incidental retrospectivity combined with occasional temporal rules which protect legal certainty and legitimate expectations. This usually happens through the application of open-ended or like provisions, for instance the lack of fault, excusable error of law,[39] or abuse of rights with respect of those who want to benefit from overruling in a way which is in conflict with public order. Czech law follows this trend, although this happens mainly through case law, while legal scholarship is mostly silent.

As far as I know the first Czech judge who spoke up against retrospective overruling was Constitutional Court's Deputy Chief Justice Eliška Wagnerová in her dissenting opinion in 2005 *Kinský* case.[40] Prior to 2005 if the restitution laws did not provide the right to claim property nationalized by the communist regime, the claimants could still avoid the problem by suing directly according to the Civil Code. The Constitutional Court overruled its earlier case law and proclaimed as being unconstitutional if someone circumvents restitution laws by suing to determine ownership according to the Civil Code. Deputy Chief Justice highlighted that this novel opinion of the Court *"does not deal with the impact of overruling made after twelve years of the existence of case law relating to restitution. It did not address the question of equality before the law of those complainants whose cases would be decided after announcing this overruling, being aware of the fact that constitutional justices are bound by overruling."*

[37] Paras 70–75.

[38] For instance BYDLINSKI, F. *Gegen die „Zeitzündertheorien" bei der Rechtsprechungsänderung.* Juristische Blätter 2001, p. 19 ff.

[39] Cf. also § 19 of Czech Criminal Code, Error of law: (1) Who is not aware of unlawfulness of his action while committing criminal offence does not cause crime if he could not avoid this error. (2) Error could be avoided if the perpetrator shall know the law due to his statutory duties, decision of the administrative agency, contract, profession, position or function or if the perpetrator shall recognize unlawfulness without obvious problems.

[40] The opinion of the Constitutional Court of 1 November 2005, No. Pl. ÚS-st 21/05, published as No. 477/2005 Official Gazette.

The Czech Constitutional Court encountered this problem soon. It escaped the retrospective effect of overruling by highlighting legitimate expectations of those who had followed case law applicable before overruling. This line of case law has been approved by the Constitutional Court sitting en banc: "While reviewing abstract issues of constitutionality the Constitutional Court is not able to envisage or model all possible scenarios which could appear in the future."[41] The Constitutional Court had to face many situations in which case law of ordinary courts applied overruling mechanically, without taking into account sometimes even bizarre effects of application of newly interpreted rules. For instance, in case No. I. ÚS 428/06[42] the Constitutional Court was dealing with the case which was close to Catch 22 scenario. A claimant made originally claim before the administrative authority according to the restitution law. The authority was found not having jurisdiction over the case so the case was referred to the civil court deciding according to the Civil Code. He succeeded but after a series of decisions the last judgment was quashed by ordinary courts as being in conflict with the new Constitutional Court's precedent of 2005. The claimant was told that he shall make the claim according to the restitution law, that is exactly what he did at the very beginning, but now all the deadlines were long gone. The Constitutional Court rejected formalistic reasoning of the ordinary courts:

"The Constitutional Court considers self-evident and important for judicial law-finding that all individual aspects of every case shall be considered. Various cases and their specific circumstances might be quite complex and untypical; this does not free ordinary courts from making all efforts to find just solutions, no matter how difficult it might seem to be. Ordinary courts did not deal with all specifics of this case."

The Constitutional Court explained the difference which justified deviation from its 2005 precedent: *"It could not be disregarded (or suppressed) that this case was very different* [from 2005 precedent]. *It shall be highlighted that the complainant sued according to the restitution law; this is the first difference from the quoted precedent. His intent was not to "circumvent the meaning and purpose of restitution legislation", but legitimately ask to get the immovable property* […] *public authorities decided that* [the restitution law] *could not be applied; the complainant was asked to sue according to general rules* […]" The Court then explained how and why the complainant got into the dead road like Catch 22: *"The complainant might feel to be outmaneuvered into the situation without any solution; he claimed immovable according to the restitution law, his claim was rejected and he was sent to sue according to* [the Civil Code]; *then he made the lawsuit according to the Civil Code but his claim was rejected as he was supposed to sue according to the restitution law.*" Those steps of public authorities established *"legitimate expectations that public authorities would deal with the issue according to the* [Civil Code]." What is for the purpose of this paper most important, the Constitutional Court rejected the very idea that *"the complainant shall have guessed the future development of case law which has been modified in the course of solving his hard case […] The duty to predict future legislative and judicial development of law cannot be imposed on parties of any case.*"

[41] The judgment of 1 July 2010 No. Pl. ÚS 9/07, published as No. 242/2010 Official Gazette, para 54 (restitution of the Church property case).

[42] The judgment of 4 December 2008, No. I. ÚS 428/06.

In a series of similar decisions[43] the Constitutional Court narrowed the impact of the 2005 precedent. However, the analysis of the 2005 precedent always remained within the scope of distinguishing facts of the case from the binding precedent. That is why the first decision which deals openly and explicitly with the problem of retrospective application of overruling is the judgment written by Deputy Chief Justice Eliška Wagnerová in the case dealing with overruling earlier precedents on statutory limitation of defamation claims.[44] In this case plaintiffs sued the man who was driving drunken and killed their father and husband. This has been confirmed in criminal trial. The lawsuit has been made after the defendant's guilt had been established by criminal court and he had refused to pay damages. It could not be possible to bring the claim in the course of criminal proceedings and it would be too risky to bring civil lawsuit before the final criminal judgment has been made (the defendant continued to refuse any liability; in case he would be found not guilty the plaintiffs would risk paying him costs of civil litigation as well). At the end of the day, it was not necessary to sue immediately as the lawsuit was not subject to any statutory time limitation. However, in the course of civil litigation the case law of the Supreme Court has been overruled. Therefore, the Supreme Court rejected the lawsuit according to its new precedent which held that defamation claims are subject to three years statutory limitation. The plaintiffs filed a constitutional complaint criticizing the Supreme Court for violating their legitimate expectations and legal certainty.

First, the Constitutional Court emphasized that overruling made by the Supreme Court's grand chamber is not in conflict with the principles of legal certainty. That is why its new legal opinion is also applicable to all pending cases, retrospectively. On the other hand it is possible to imagine (albeit exceptional) cases in which retrospective application of the new legal opinion could be unconstitutional. If the defendant claims prescription of the rights made by the plaintiffs, it is possible to imagine that the defendant's argument might be contrary to *bonos mores* (good manners). Then using the defense of prescription is *"the abuse of this right at the expense of that party which did not cause passing the statutory limitation*".[45]

This judgment is the most important case with respect to retrospective and prospective overruling in private law relations. It says that the rule is incidental retrospectivity, that is to apply the legal opinion made by overruling to all pending proceedings. The only exception relates to those rare cases which meanwhile established legitimate expectations of addressees of rights and duties, whereas protecting another party according to a new judge-made law rule would be contrary to public policy. It is the duty of those who do not want to apply the new rule retrospectively to bring such arguments which would justify exceptional non-application of the new rule.[46] Exceptional non-application of the new legal opinion is made not through some judge-made law temporal rule by through statutory substantive rule, such as the prohibition to act contrary to public policy or *bonos mores* (good manners).

[43] Even if those argument do not persuade the court, the court would have to address them anyway and explain why they do not matter in this case.

[44] In his article (supra note 38), Bydlinski has asked cynically whether knowledge of case law would be tested and whether it matters for prospective application of case law whether or not the person knew the old case law.

[45] Para 21 of the judgment.

[46] Even if those argument do not persuade the court, the court would have to address them anyway and explain why they do not matter in this case.

The exceptional deviation from incidental retrospectivity shows the reality of private law relations. On the one hand, they protect trust of one party in the continuing interpretation of the law, on the other hand they shall not ignore legitimate expectation of another party that the incorrect interpretation would be overruled and new (correct) interpretation of the law established.[47] In a large number of average private law relations there is no reason why the trust of the former party shall prevail over the legitimate expectations of the latter. It must be something really specific (long criminal proceedings, rational and meaningful explanation why the plaintiffs did not sue earlier etc.) that would justify limiting retrospective application of overruling.

This explanation is consistent with both Central European scholarship[48] and the analyzed judgment of the Constitutional Court. Ironically, the Constitutional and Supreme Court did not get the message of the Constitutional Court. Quite the contrary, they started to apply the Constitutional Court's judgment broadly. Now both the Constitutional and the Supreme Court effectively changed the impact of overruling from incidental retrospectivity into purely prospective application of the new judge-made law rule. In fact, any older lawsuit is found subject to non-limitation, that is subject to the older (overruled) case law.[49]

4. PROSPECTIVE AND RETROSPECTIVE OVERRULING IN THE SUPREME ADMINISTRATIVE COURT

Of the Czech high courts, the Czech Supreme Administrative Court (SAC) has worked out the most complex methodology of temporality of overruling. The SAC is the high court in public law area, it protects public (as opposed to private) rights of individuals against the public power. It routinely decides the conflicts between individuals or corporations on the one hand, and the public authority, on the other. Overruling in its decision making capacity is quite frequent. The basic principle of the SAC is that change of case law cannot deprive the private party of her access to an administrative court. A typical example is the situation in which a new precedent states that the lawsuit should have been made earlier than according to the old case law, typically in a different (previous) stage of administrative proceedings. In this case the trust in the previous law in a substantive sense (law as interpreted by overruled case law) shall not be violated.

One of the first judgments in which the SAC addressed the issue of overruling and its temporal application was the case *Gaudea v. Czech National Bank*.[50] The SAC dealt with strict concentration of legal arguments before administrative courts which could be made only within sixty days since the receipt of administrative decision. This could be in conflict

[47] In his article (supra note 38), Bydlinski has asked cynically whether knowledge of case law would be tested and whether it matters for prospective application of case law whether or not the person knew the old case law.

[48] BYDLINSKI, F. supra note 38.

[49] Cf. e.g. Constitutional Court's judgment of 5 September 2012, No. II. ÚS 3/10.

[50] See the judgment of 17 December 2007, No. 2 Afs 57/2007-92. This judgment was originally met with some hesitation among justices of the SAC, so it was not published in the Official case reporter of the SAC. However, today no one disputes its validity. In fact, the SAC grand chamber soon took over its legal opinion in its decision of 15 January 2008, No. 2 As 34/2006-73, published as No. 1546/2008 SAC reporter, *AQUA SERVIS v. Ministry of environment.*

with the change of case law. Subsequent change of case law might bring new issues which no one might imagine while making original lawsuit. In some cases it might happen that the plaintiff did not bring an argument because he simply did not envisage it taking into account earlier case law. However, a new legal argument might appear facing the shift in the case law of the SAC, the Constitutional Court, the Court of Justice of the EU, or the European Court of Human Rights. If this new argument benefits the plaintiff, it seems too harsh to say that the plaintiff had to bring the argument on time within sixty days limit. If we follow this strict opinion, we would force the plaintiff to be smarter than courts of law themselves. That is why the SAC reached the conclusion that in such exceptional situation the court shall allow to bring a new argument even after sixty days had passed. The plaintiff can make an argument based on a new case law until the final judgment in her case is made. The SAC argued, inter alia:

"Article 95 para. 1 of the Constitution which states that judge is bound by the law [statute] shall be interpreted in a broader sense, that judge is bound by law. Being bound by law implies being bound both by law in a formal sense (statute) and by other sources of law including legal principles and precedents. Precedents shall also be considered sources of law, even in a written system of law, although only providing binding interpretation of written rules of law. To sum up the court deciding about some legal issue always interprets the rule at stake established in some law and this interpretation cannot ignore interpretation made by the court of the same or higher level."[51]

This legal opinion shows the application of the concept of law in a substantive sense. The text of law is rarely applied in isolation. It is always enriched by the meaning given by case law and legal practice generally.

A classical problem of prospective and retrospective overruling has been articulated in detail by the SAC grand chamber in 2008.[52] In this case the grand chamber allowed judicial review of a new type of administrative decisions, contrary to the older case law which did not allow it. The grand chamber then explained temporal application of its new opinion which fully equals to incidental retrospectivity: (1) overruling shall not be sufficient reason to reopen those administrative or judicial proceedings which had ended before a new legal opinion was made; (2) courts have the duty to respect a new legal opinion since its publication in all pending cases.[53] In para 56 the grand chamber made a mistake, though. First, it said that established case law of high courts represents legal rule in a substantive meaning. Then, however, being counterintuitive to its preceding text, it added that *"change or specifications of case law could be considered as an amendment to the legal statute in a functional sense including all temporal effects any amendment traditionally enjoys*." This is not true, though. In this paper I have tried to explain that we cannot apply traditional temporal rules relating to statutory (formal) law with respect to case law, which is law in a substantive sense.

[51] Judgment No. 2 Afs 57/2007-92. In this case SAC noticed that overruling had taken place before the lawsuit was made so there was no need to go beyond sixty days limit to make all arguments.
[52] See decisions of 21 October 2008, No. 8 As 47/2005-86 and No. 6 As 7/2005-97.
[53] See idem, paras 57.

Overruling made by the grand chamber soon created different sort of problems. The grand chamber addressed the issue what happens if the plaintiff did sue on time contrary to the old case law, however, consistent with a new precedent. It did not address the issue what happens if the plaintiff did not sue on time, consistently with the previous case law. Applying a new precedent mechanically, he could not sue later because he was supposed to sue sooner, as the new case law says. The SAC encountered this situation soon and made it clear that a new legal opinion cannot deprive plaintiff of his access to the court. Thus partially the precedent has prospective effects.[54]

The SAC thus combines classical incidental retrospectivity with purely prospective effect of its overruling. The rule is traditional incidental retrospectivity (full application of a new legal opinion to all pending proceedings). The incidental retrospective effect stops when it could hamper the plaintiff from her right to protect her public rights. If this new legal opinion deprives a party of her access to the administrative court, and if that party acted according to the old case law, a new legal opinion shall not be applied (pure prospectivity).

It is visible that the SAC provides temporal effects of its overruling which is much more rule-like than the Supreme Court or Constitutional Court. In part, it is caused by the purpose of the administrative judiciary which is to protect public rights of individuals and corporations. This makes some problems which do exist in horizontal (private) law relations much easier. That is why the SAC does not hesitate to leave incidental retrospectivity and goes in direction towards purely prospective effect of its precedents. It is true, however, that those considerations close eyes to the fact that even before administrative courts do exist horizontal relations between private individuals. For instance if the court deals with the lawsuit made by a neighbor against the decision of the authority to allow building a house, at stake is not just public right of the neighbor but also the public right of the builder. Simplicity of the SAC case law is thus based on ignoring these horizontal relations in primarily vertical relations state/individual.

[54] Judgment of 30 January 2009, No. 2 As 41/2008-77 (*Mostecká uhelná v. Krajský úřad Ústeckého kraje*).