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JUDICIAL INDEPENDENCE IN CENTRAL-EASTERN EUROPE: THE EXPERIENCE OF THE 1990S AND 2000S

Building a rule-of-law state to a certain extent also entails building a lawyers' state. This is to some extent also the case of Central-Eastern Europe after the fall of communism. Law is now one of the most prestigious and wanted fields of study; the legal profession is increasingly honoured both financially and in terms of prestige. Still, we can easily find that in Central-Eastern Europe the judiciary is one of the least popular professions among the general public; judges are distrusted, often seen as corrupt (which is usually a false image) and inefficient (which is quite often a correct perception).

It is difficult to explain what is the reason for this image of the judiciary. Partly, the media often spread the views which fit the image of the corruption and incompetence. Some judges by their acts provide the journalists a lot of food for their thoughts. Last but not least, the politicians quite often tend to fight their own judiciaries, which is, for instance, the case of repeated and never ending battles over the judicial salaries (attempts to lower judicial salaries which have started in the early 2000s). I think that the overall situation has been well articulated by Deputy Chief Justice of the Czech Constitutional Court Eliška Wagnerová. Writing her dissenting opinion in the case relating to judicial salaries, Wagnerová said:

> Generally emphasized distrust of judges which is practised in a substantial part of the society and above all in mass media is not rational; quite the contrary, it is counterproductive. Guarantees of the protection of the citizens' rights are declining. The distrust of judges can be best used for non-constitutional goals by those who are afraid of the strong and independent judiciary, i.e. judges resistant to political pressure and deciding constitutionally regardless of their popularity. On the other hand, no one doubts that it is necessary to punish all those judges who do not comply with the requirements of efficient justice. It is interesting that such measures are, unlike general cuts in judicial pay, very rare. However, this is another story.[1])

In this paper, I will show the trends in new laws on the judiciary in the 1990s

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[1]) The judgment Pl.ÚS 13/08 of No. 104/2010 Official Gazette.

and 2000s in the region of Central-Eastern Europe and introduce the post-communist judges. I will particularly emphasize the countries of the former Czechoslovakia, Poland and Hungary.

I. INSTITUTIONAL SETTINGS

The status of judges in Central-Eastern Europe began to deteriorate soon after 1914, to the extent that some scholars in the region now say that the longest and most stable period of judicial independence in the region was the era between 1867 and 1914, a period when the democratic institutions of the Austro-Hungarian monarchy functioned and the judiciary was guaranteed its independence by his *Imperial Majesty*. New parliamentarian or authoritarian regimes established in the region after 1918 had much less understanding of the need for the independence of the judiciary, because of either a natural autocratic disposition or a natural tendency of politicians in parliaments to claim all important decision making issues for themselves. Thus the judiciary faced serious and similar problems in both democratic inter-war Czechoslovakia and authoritative Poland, Romania or Hungary.[2])

After 1945, Central-Eastern Europe found itself in the Soviet zone of influence in which so-called *popular democracies* were invariably installed. The discourse on the judicial independence and the proper status of the judiciary was immediately interrupted by force. A revived though quite often old-fashioned discourse started in the course of the 1990s after the communist regimes had been finally overthrown.

The independence of judges was proclaimed in the constitutions of all post-communist countries, but its institutional implementations differ. Hungary, in the course of the 1990s, developed a system which gave judges extensive autonomy. The recruitment of the judiciary including setting all relevant criteria is now entirely up to the Hungarian judges themselves. Consequently, the Hungarian model is one of the most autonomous among European systems in the early 21st century.[3])

Far from the purely autonomous Hungarian model, Poland and Slovakia[4])

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[2]) Cf. E. WAGNEROVÁ, *The Position of judges in the Czech Republic*, in: J. Přibáň/P. Roberts/J. Young (eds.), Systems of Justice in Transition. Central European Experiences since 1989, 163 sqq. (2003) (claiming that "the longest period in which the judges in the Czech lands had the chance to establish themselves as independent was from 1867 to 1918"). This is the opinion I agree with.

[3]) On the creation and establishment of this model see also Z. Fleck, Judicial Independence and Its Environment in Hungary, in: J. Přibáň/P. Roberts/J. Young (eds.), Systems of Justice in Transition. Central European Experiences since 1989, 128 sqq. (2003); Open Society Institute 2002, Judicial Capacity in Hungary, available at <http://www.eumap.org/reports/2002/content/70>.

[4]) For a discussion of the Slovak Judicial Council see A. BRÖSTL, *At the Crossroads on the Way to an Independent Slovak Judiciary*, in: J. Přibáň/P. Roberts/J. Young (eds.), Systems of Justice in Transition. Central European Experiences since 1989, 141 sqq., 148 sqq. (2003).

implemented a model of shared powers, in which autonomous judicial organs share with the executive authority the recruitment of the judiciary. In Slovakia, a recently established Council is a very problematic and politicized institution, controlled by the judges close to one of the populist political parties. In fact, its activity has divided the judiciary and created a very hostile atmosphere among the Slovak judges. This is combined with disciplinary proceedings against those who do criticize the Council and benefits to those who support the judiciary's new elite.[5])

In Poland, the National Council of the Judiciary is the constitutional body which represents the judiciary as the third branch of the government. The Council was established as early as in 1989, and its existence was constitutionally guaranteed in the 1997 Polish Constitution.[6]) Among its main functions is to propose judicial candidates to the President based on its co-operation with the court colleges and general assemblies of judges of relevant courts, which assess candidates' qualifications and submit opinions to the National Council of the Judiciary through the Minister of Justice.[7]) In its first decade of existence, this body has generally been adjudged to be successful.[8])

In contrast, the Czech Republic (together with Latvia) has maintained the most extreme system of centralized management of the courts, performed by the Ministry of Justice. The Czech political elite rejected the very possibility of creating a national council of the judiciary, as well as any important autonomous elements in the judiciary. The proposals to establish such a judicial self-governing body were rejected, primarily with reference to the historical tradition of judicial administration before the communist era. Ironically, the old-fashioned and problematic system is defended just because of its age. In this view, the system has achieved its inherent value because it existed prior to the advent of the communist regime.[9])

Although the principle of judicial independence is guaranteed, the administration of the judiciary, including the selection of judicial candidates, is controlled by the Czech Ministry of Justice. The presiding judges of courts (chief

[5]) Cf. English pages at http://www.sudcovia.sk/ (visited 14 October 2010).

[6]) Article 186 of the Polish Constitution (proclaiming that the Council shall "safeguard the independence of courts and judges."). For literature in English see E. Letowska, Courts and Tribunals under the Constitution of Poland, St. Louis-Warsaw Journal of Transnational Law 69 (1997).

[7]) Article 179 of the Polish Constitution. The Minister of Justice has the power to submit candidates to the Council directly, but this seldom happens. See for details Open Society Institute 2002 Judicial Capacity in Poland, 158, available at <http://www.eumap.org/reports/2002/content/70>.

[8]) Letowska (note 7), at 69. In 2001, Poland passed two new important laws on the judiciary: Law on Ordinary Courts of 27 July 2001, Dziennik Ustaw (Official Journal) 2001, No. 98, item 1070, and Law on the National Council of the Judiciary of 27 July 2001, Dz.U. 2001, No. 100, item 1082.

[9]) In more detail see M. Bobek, The Fortress of Judicial Independence and the Mental Transitions of the Central European Judiciaries, 14 European Public Law 99 (2008).

judges) exercise their powers more as the representatives of the Ministry of Justice than as the representatives of the independent third branch of government. This situation is frequently criticized because of problems with the separation of powers and the facility with which the Ministry of Justice can manipulate the judiciary. One of the most renowned Czech judges, the honorary President of the Czech Judicial Union Jan Vyklický repeatedly criticizes the state administration of the judiciary which never functioned properly in the country, and argues that the system is used as a means to deflect blame from the state administration for the frequent delays in judicial proceedings.[10]) This criticism is not without merit. For instance, in a recent series of restitution court actions by a Czech aristocrat against the Czech Republic, the Ministry of Justice ordered chief judges to inform the ministry about all actions brought by that person in their courts including the names of judges who were supposed to decide such cases.[11])

II. DIFFICULT UNDERSTANDING OF THE SEPARATION OF POWERS

The Czech Constitutional Court recently criticized interferences by the executive power with the judicial branch. In 2006, the Czech President dismissed the Supreme Court Chief Justice Iva Brožová from her post. He did so without any justification by a letter of one single sentence. The Chief Justice challenged the dismissal before the Constitutional Court, claiming the violation of the principle of judicial independence. The President justified his action by his power to dismiss the chief justice which was implicit in the power to appoint. The Constitutional Court struck down the law which enabled the executive power to dismiss a chief judge from his/her post and criticized the Czech regulation of the judiciary.[12]) The Court reasoned, *inter alia*:

[O]ne of the basic preconditions to the rule of law is a strong and independent judiciary. In a state which should be considered a law-based state, the judiciary must be regarded as one of three powers which has the same weight as the executive and legislative powers, from which the judiciary must be independent to the greatest degree possible, whereas the judiciary is the only one of the three powers for which especial emphasis is placed on the constitutional protection of its independence. This principle has been broadly embodied in the majority of the world's constitutions; sometimes even in those states where the judiciary was (or is) not actually independent. The danger remains that this principle will remain a mere theoretical edifice, unless it is supplemented in special provisions

[10]) 'Rozhovory o pravu' (Discussions on the Law), *Soudce* 5/2002, at 2.

[11]) Cf. the website of the plaintiff, available at <http://www.knize-kinsky.cz>, including legal opinions for the plaintiff (in Czech). I do not think that the judges were or might have been influenced in their decision making. It is strange, however, why the ministry demands such information.

[12]) For the best description of the dismissal case and the administration of the Central European judiciaries generally see Bobek (note 9).

of the Constitution, or at least in the legal enactments governing the judiciary, by further principles which can be deduced from the constitutions of the majority of Western European states, just as from the most important international documents relating to the issue of the independence of the judiciary. […] It is an indispensable requirement for safeguarding the independence of the judiciary that the conditions influencing the selection, recruitment, appointment, career advancement or removal from office of judges allow for independence from the executive and legislative powers. […] In spite of the plurality of institutional models for court administration, one can discover common characteristics in [Europe]. [Judicial independence] is guaranteed either by transferring significant powers to the supreme council of the judiciary (Italy, France, and Spain), or by distinguishing judicial administration from state administration within the context of the classic model (Germany and Austria).[13])

Based on this reasoning the Court rebuffed the argument of the President (supported by the Czech government) that the power to dismiss a chief judge is vested in the hands of the same body which appoints judges:

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. *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* (who, according to Art. 92 of the Constitution, stands at the head of the highest judicial organ)." (Emphases added.)[14])

I doubt whether this argument would be praised by mainstream Czech legal academia. In fact, the most frequently claimed opinion prior to the Constitutional Court's judgment was the one close to the argument of the dissenting justice

[13]) The judgment of the Constitutional Court of 11 July 2006, Pl. US 18/06, quoted from the English version available at <http://angl.concourt.cz/angl_verze/doc/p-18-06.php>.

[14]) Id.

Vladimir Kůrka.[15]) He rejected the starting premises of the Court's majority that direct control of the executive power over courts' administration is not comparable to standard administrative relations within the executive branch:

"Thus, the court administration which (in contrast to state administration of courts) the Constitutional Court has been considering, is not, in content and regime, distinguished from state administration nor from administration as such; thus, *it is unjustifiable to assert that the principle of superiority and subordination, which is otherwise characteristic of administration, does not apply within its framework*. It is an untenable notion that where the Ministry performs the administration of courts through its chief judge, the court's chief judge is not in a relation of subordination towards the Ministry …." (Emphases added.)[16])

The case just mentioned, is more an example of the more troubling problem which involves the power of the courts' presidents. Courts' presidents are the most important actors of the judiciary in the post-communist environment. They *inter alia* allocate judges to relevant chambers, may decide on temporary relief in cases coming into an individual judge's case load, and may start disciplinary proceedings against their judges. They also have a strong incentive to retain their posts – their position is associated with monetary and non-monetary benefits. Thus it can be said that the one who controls the power to appoint and reappoint (or to dismiss) the presidents, in a system without a strong judicial council, controls the judiciary. Czech politicians are well aware of that.

A good example may be provided by the recent Czech amendment to the Judiciary Act.[17]) According to the Act, all presidents are appointed by the executive power (the President at the proposal of the Ministry of Justice). They are appointed for a limited period of time - ten years for the Supreme and Supreme Administrative Court's chief justices, seven years for all other presidents. What is important is the possibility of unlimited reappointment without any clear conditions.

The Czech example provides a nice case of a judiciary which has got under the control of the executive branch. The strong role of the courts' presidents combined with their dependence on the executive puts the independence of the judiciary into jeopardy. On the other hand, the earlier situation of strong presidents appointed for life, able to lose their posts only through disciplinary pro-

[15]) Cf. the brochure published in support of the President's action: M. LOUŽEK (ed.), *Soudcokracie v ČR: fikce nebo realita?* (Judgeocracy in the Czech Republic: fiction or reality?) CEP, 71 (2006). The little brochure was written in order to condemn the Constitutional Court's judgment, which in the view of all authors means the rise of "judgeocracy" (the term invented by President Klaus personally, close to the classic "government of judges" problem). Interestingly, some authors, lawyers close to the President, even call for the return of the communist principle according to which the term of all judges was limited, subject to repeated reappointments after a short period of time. It includes a foreword written by President Klaus personally.

[16]) See the dissenting opinion by V. Kůrka to the decision of the Constitutional Court (note 16).

[17]) See Law 6/2002 Official Gazette, Judiciary Act, as further amended.

ceedings (the law after the 2006 Brožová case) effectively hindered any change in a possibly dysfunctional court. The possible solutions are multiple. One is setting presidents' terms with no possible reappointment. This is the solution which the Czech Constitutional Court found constitutional and that is why it annulled the rule of reappointment.[18]) However, it can be argued that if the terms are too short (seven years is not a lot) smaller courts in particular may soon run out of candidates qualified for the post.[19]) Another theoretical possibility is to combine reappointment with the involvement of the supreme judicial council. This would effectively (depending on the Council's composition) guarantee the insulation of the process from political pressure.

III. BUDGETARY ISSUES

The dilemma of financing the judiciary can be nicely illustrated by the example which is far from being hypothetical: a judge is deciding the case brought by an individual against the state while at the same time the very same court is in need of money from the state (say to repair a broken roof or to update PCs at the court). The Czech Republic is one of several European states which still grant a monopoly over budgetary issues to the Ministry of Finance. Because there is no supreme judicial council in the Czech Republic, there is no one who would be able to state on behalf of the judiciary an opinion on the proposal of its general budget. The budget is drawn up by the ministry notwithstanding the opinion within the judiciary. The ministry independently distributes money among the courts. The main deficiency of the Czech system is that the judiciary, having no representation, simply cannot articulate its needs and concerns.

In some other states such as Slovakia or Poland, the supreme judicial council participates in drawing up the part of the budget relating to the judiciary. Unlike in the systems with no judicial council (where the judiciary has no *voice*) the opinion of the judiciary is heard during the process of drafting the budget. In Hungary, the supreme judicial council itself prepares the part relating to the judiciary in a budget bill. If the parliament does not agree with this, it must carefully justify its position. After the enactment of the budget the Hungarian council is fully responsible for the distribution of the money within the judiciary.

The problem in the council having too strong a role in drawing up the budget may be the politicization of judicial representation connected with its participation in an area which is traditionally one of party politics. If such competence is granted, judicial representation is condemned to challenge politics and be involved with politicians on a regular basis.[20]) This might lead to the inadequate

[18]) See the judgment of the Constitutional Court Pl. ÚS 39/08 of 6 October 2010.
[19]) This has been argued by dissenting judge I. Janů.
[20]) Cf. similarly the opinion of the President of the German Federal Constitutional Court H.-J. Papier, Zur Selbstverwaltung der Dritten Gewalt, 36 Neue Juristische Wochenschrift 2585 (2002).

financing of the judiciary if the judicial representation is not active enough or if it does not possess sufficient negotiating *weight*. That is why a reasonable solution seems to be a compromise based on co-operation between the judicial representation and the executive in establishing the budget and supervising how money is used by individual courts (the council's right to be consulted prior to the finalizing of the budget bill, for instance). Co-operation rather than the sole decision-making power being enjoyed by either the ministry or the council solves the problem of the accumulation of the power in one organ.

IV. SELECTION OF JUDGES

It can fairly be said that a basic precondition of any democratic judiciary is a transparent process by which one can be appointed a judge. If the process is secret, obscure, and without clear rules, it invites patronage, incompetence, nepotism, and exclusion of all sectors of lawyers. In my opinion, democratic judiciary must be open to anyone regardless of his age (save the minimum age set by the law), race, gender, former profession, class or social origins etc. However, it has been questioned to what extent this can be improved by creating a strong judicial council. With regard to the selection of judges of ordinary courts, the system with strong judicial councils (such as Hungary) and the system with a strong role for the executive (the Czech Republic) do not appear to work very differently. The judicial autonomy which increasingly pervades the post-communist systems seems to support the inclination towards a professional career judiciary. For instance, the judges who exercise decisive functions within the Hungarian judicial system, the most autonomous judicial system in the region and one of the most autonomous in Europe, openly prefer young candidates without experience in other legal professions over candidates with a professional practice outside the bench.[21])

The situation in the Czech Republic, the country with strong influence wielded by the Minister of Justice and no judicial council, is surprisingly going in the same direction. The real power in selecting judges is exercised by presidents of regional courts and the ministry's actual role is rarely more than purely formal. With the few exceptions of several regional courts, no real competition for a vacancy takes place. Instead, a good connection with the court's presidents is what really counts. The result is a perpetuation of the career judiciary model.

Although open politicization of the professional career model combined with extensive judicial autonomy is unlikely, the negative side of this model is the increasing isolation of the judiciary, which is generally considered unaccountable and unresponsive to the needs of practical life. Critical observers have remarked that, in fact, the six members of the National Judicial Council (out of a total of fifteen) who are representatives of non-judicial professions con-

[21]) Judicial Capacity in Hungary (note 3).

stitute the only link that Hungarian judges have to the rest of society.[22]) Moreover, it seems to support the tendency of law courts "to close ranks and resist substantive change", as Zoltán Fleck put it.[23]) Facing a uniform perspective on the proper personality of an ideal judge, the judges tend to be very similar in background and ability. Therefore, the judicial system lacks an enriching variety of experiences and insights. Selection of judges is often based on personal networking which tends to cement the existing hierarchies within the judicial system. What is even worse, non-transparent selection often inclines towards choosing relatives of sitting judges,[24]) a phenomenon quite well-known in medieval monarchies.

Nowadays, the overall process is openly based on the professional career model of the judiciary, where younger candidates are favoured and older candidates with professional experience outside the judicial branch are disadvantaged, or at least discouraged.[25]) This effectively means that at the level of trial courts cases are adjudicated on by the least experienced lawyers, recent graduates after a short period of preparation. Although it is an old continental tradition, even before communist rule ended the Hungarians began to question to what extent the system might continue to work in this way.[26]) In the view pronounced in Hungary three years before the fall of the communist system, a truly independent and reliable judiciary will be created only if the judiciary

[22]) The Hungarian National Judicial Council consists of 15 members: nine judges elected by secret ballot of the Judges' Conference, the President of the Supreme Court (who is also the president of the National Judicial Council), the Minister of Justice, the Attorney General, the President of the Hungarian Chamber of Attorneys, and representatives of the Parliament's Constitutional and Judiciary Committee and Budgetary and Financial Committee. Act on the Organisation and Administration of Courts, LXVI/1997, Article 35. See Judicial Capacity in Hungary (note 3), at 116.

[23]) See the interview with Z. Fleck, There is a curious alliance of interests, HVG hetilap, 28 June 2006, available at <http://hvg.hu/english/20060628zoltanfleckeng.aspx?s=24h>. Cf. also Z. Fleck, Architekti demokracie (Architects of Democracy), 4 Sociologický časopis (Czech Sociological Review) 601 (2005).

[24]) Cf. the country report on Hungary by Freedom House, with further references for Hungary, available at <http://www.freedomhouse.org/template.cfm?page=47&nit=453&year=2008>. Similarly Fleck (note 6), at 129 (discussing the "uncontrolled system tending towards *oligarchization*"). As far as I know, the situation is rather similar in both the Czech and Slovak Republics. Cf. Analysis of Current Situation in Slovak Judiciary, published at http://www.sudcovia.sk/ (click on English version, visited 14 October 2010): "*Publicly are discussed family relations in selection procedures for free judicial positions, also positions of higher court officials and candidate judges, we hear about "pre-defined selection procedures" for proceeding a judge to a higher instance Court*."

[25]) I can recollect from my personal experience, drawn from an interview conducted in 1997 at the Prague Municipal Court that the interviewer, a judge of the court, quite openly told us, all recent graduates, that personally he did not like experienced candidates, as they would be inclined to bring strange things into the judiciary. Facing this experience, I decided to join the legal academia instead.

[26]) Cf. critically C. KABÓDI, *La juridiction est-elle une prestation?,* 28 (1-2) Acta Juridica Academiae Scientiarum Hungaricae 149-162 (1986).

itself is composed of experienced lawyers who have had substantial life and legal experience off the bench.[27])

The classical continental paradigm of drawing judges from recent law school graduates is now increasingly questioned throughout the region.[28]) In my opinion, to some extent this paradigm contributes to the widespread distrust of judges throughout the post-communist region. The situation is slowly changing, mostly by statutory enactments. The minimum age at which a person is qualified to become a judge in the Czech Republic is now 30 (but until 2003 it was 25). In Slovakia since 2000 the minimum age for becoming a judge has been 30.[29]) Many judges appointed in the Czech Republic until 2003 were not much older than 25. In 2003, the Czech Minister of Justice (since 2003 Chief Justice of the Constitutional Court) wrote that when he saw "the kids at the Prague Castle who were taking the judicial oath", he became even more persuaded that the Czech legal order must abandon this harmful practice and opt instead for judges with sufficient life experience and at least ten or twenty years of previous legal experience.[30]) In the Czech Republic a minimum age of 40 is being considered for the future.[31])

The most severe criticism of the present situation has been written by Deputy Chief Justice of the Czech Constitutional Court, Eliška Wagnerová. In her view,

"Continental Europe has been abandoning exaggerated legal positivism in favour of sociologizing lines of thought which necessarily change the institutional framework. A judge untouched by life is no longer sought after. As the law ceased to be a science about itself but is about life then an exponent of the law must know life."[32])

In my opinion, a judge educated in the continental professional career model is the least suitable person to overcome the dogmatism and formalism typical of the Central European judicial profession. A young lawyer is from the very beginning of his/her professional career moulded by this outmoded system which thinks of itself as a bureaucratic machine and emphasizes formalism over substantive values, simplified solutions over more complex ones. Young Central European judges during the few years of their judicial appointment immediately following largely dogmatic law education at the university encoun-

[27]) Id. In Kabódi's opinion, a judge dealing with the issues of fact, that is, a judge at the lowest (trial) level, should be an experienced person, not a recent graduate.

[28]) Id., at 112.

[29]) Law No. 385/2000 Z.z., § 5(1.a). Cf. in English, CEELI, Judicial Reform Index for Slovakia, June 2002, at 7.

[30]) P. RYCHETSKÝ, *Reformu justice pro občany, ne pro soudce!* (The Reform of the Judiciary for Citizens, not for Judges!), the daily Právo, at 6, 12 April 2003.

[31]) Koncepce stabilizace justice (The Conception of the Stabilization of the Judiciary), a document of the Czech Ministry of Justice, at 10 (2004), available in Czech at <http://www.epravo.cz>.

[32]) Wagnerová (note 2), at 178. It is a translation of the article, which was originally published in Czech.

ter nothing other than the mores of their older colleagues. The values of dogmatism and formalism, omnipresent throughout their early professional years, will become firmly internalized because the young judges have never been exposed to anything but formalist and textual law application.[33])

However, if we want the judiciary to be more open to other legal professions the trends towards higher transparency of judicial appointments may be counterproductive if it means a formalized *maths-like* procedure of selection. In fact, too often the tests and exams are set to measure skills of recent law school graduates. Older judges' abilities to perform judicial functions involve value judgements and are hardly to be put into any mathematical formula. One example may be provided by the Romanian exams organized by the Superior Council of the Magistracy which is openly aimed at law school graduates.[34])

Judicial posts at the high courts in Central Europe are usually filled by career judges who have made the journey throughout the judicial ranks, beginning at the lowest judicial level and ending at the supreme court of the ordinary judiciary after twenty or more years on the bench. Most of these people have never had any career experience other than in the judiciary. This is a typical example of both the Czech and Slovak Supreme Courts, composed almost exclusively of professional career judges. The sole exception in former Czechoslovakia is the Czech Supreme Administrative Court, a body much more diverse than a typical post-communist high court, which, in addition to career judges, *inter alia* includes academics, former attorneys, tax specialists, and former public officials.

The Polish high courts, in contrast to a typical post-communist supreme court, have been transformed not just in terms of personnel; they have been changed professionally as well. After the end of communism the Polish Supreme Court and Supreme Administrative Court were restaffed with a considerable number of academics and other *outsiders* to the judicial echelons. Thereby the post-communist Polish judicial system to a considerable degree utilized the Polish academia, not so compromised by the former communist regime as was its Czecho-Slovak counterpart. In the summer of 2003, out of 29 judges of the civil section of the Supreme Court almost one quarter (seven) held professorial rank.[35]) One professor of the Warsaw University, himself a judge at the Supreme Court, noted that the composition of the court is shaped by academics,

[33]) Cf. this description of the Italian situation: "Law graduates become judges by way of a public examination. Once admitted to the judiciary they enter a bureaucratic culture lacking in a tradition of excellence and hard work. Excessive importance is given to formalities." A. A. S. Zuckerman, Justice in Crisis: Comparative Dimensions of Civil Procedure, in: A. A. S. Zuckerman (ed.), Civil Justice in Crisis. Comparative Perspectives of Civil Procedure, 3, at 24 (1999).

[34]) Cf. the website of the Romanian Superior Council of Judiciary http://www.csm1909.ro/csm/index.php?cmd=1001&lb=en.

[35]) According to the data provided by the Polish Supreme Court on its internet page, available at <http://www.sn.pl>.

most of them lacking previous judicial experience.[36]) One must bear these numbers in mind. They may explain why the Polish high courts often produce different results from their counterparts in other Central European legal systems. The Polish high courts were far more receptive to a new concept of law and a *New Constitutionalism* than the majority of other post-communist high courts.[37])

V. CONCLUSIONS

The experience of Central-Eastern Europe shows that selected rather than broad competences of the supreme council of the judiciary work. At the same time, the powers shared between the executive and the representation of the judiciary seem to be preferable to those powers which belong unilaterally to just one branch of the government. On the one hand, judicial councils which are too strong or omnipotent bring with them the tendency to insulate the judiciary from real life and avoid any accountability for the problems within the judiciary (Hungary). On the other hand, too strong an executive equipped with control over influential courts' presidents presents a clear danger of political control over the judiciary, which may be the case even in a relatively democratic system (the Czech Republic).

The judiciary must be effectively insulated from improper influences which may directly or (more often) indirectly touch its decision making powers. However, the ultimate responsibility for the proper functioning of the judiciary must be of a democratic nature connected with political responsibility. The ultimate responsibility includes the power to decide who will be an ideal type of judge (i.e. whether the state wants a purely career model of the judiciary or a career judiciary combined with the frequent appointment of *outsiders*, senior lawyers with experience from elsewhere), make a final decision on the judicial chapter in the state budget etc. That is why this must remain in the executive's or the legislature's hands.

[36]) W. SANETRA, *Sąd Najwyższy w systemie wymiaru sprawiedliwości* (The Supreme Court in the system of the judiciary), 9 (7-8) Przegląd Sądowy 3, at 15 (1999).

[37]) Cf. in more detail Z. KÜHN, *Making Constitutionalism Horizontal: Three Different Central European Strategies,* in: A. Sajó, Renata Uitz (eds.), The Constitution in Private Relations: Expanding Constitutionalism**,** Eleven International Publishing, 217 (2005).