JUDICIARY DEVELOPMENT AFTER THE BREAKDOWN OF COMMUNISM IN THE CZECH REPUBLIC AND SLOVAKIA

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ABSTRACT

After the breakdown of communism in Central and Eastern Europe one of the tasks the political elites faced was the adjustment of judiciaries to new democratic conditions. The aim of this comparative case-study is to explain different paths taken by the Czech Republic and Slovakia in establishing of the institutions of judiciary independence and to discuss the relationship between these developments and the actual performance of judiciaries. For the purpose of this research four interviews were conducted in order to examine the existence of socialist legacies in judges' behavior in the studied countries; and this research also includes a textual analysis of legal documents and parliamentary negotiations. The research showed that Slovakia created the Judicial Council in order to prove itself as a trustworthy candidate for the integration in the European Union after its semi democratic experience in the 1990s. This subsequently led to the encapsulation and politicization of the judiciary, because of persisting patterns in judges' behavior and an unbalanced composition of the Council. The development in the Czech Republic has been more gradual with the central role played by the Ministry of Justice and led to considerably better performance of the judiciary than in Slovakia.

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INTRODUCTION

The breakdown of communist regimes posed many challenges for transitional elites in Central and Eastern Europe. In addition to the transformation of economic system and the creation of a new competitive political system, the adjustment of judiciaries to the new democratic conditions became necessary. Partly discredited judiciaries that complied with undemocratic regimes had to be altered in order to function properly in the new conditions; yet, even after more than 20 years of experience with democracy in the region, the judiciaries are still considered as problems of ongoing consolidation.

Several scholars addressed the issue of judiciary reforms and judiciary performance in emerging democracies.[1] The focus is usually placed on the most visible, somewhat deviant cases such as Ukraine, Russia or Bulgaria, and countries that are considered to perform considerably well in terms of consolidation are often neglected, although they face noteworthy problems with their judiciaries too. This research looks into the development of judiciary institutions in two 'third wave' democracies – namely the Czech Republic and Slovakia – in order to examine how these countries dealt with the issue of communist legacies present in their judicial systems; how they coped with the requirement of independent judiciary, often emphasized by international institutions; and what role these international actors, mainly the European Union and countries' ambitions to be integrated into its structures, played in these processes. The research describes and explains different paths taken by the compared countries in establishing of independent judiciary and discusses the relationship between these paths and observed outcomes.

[1] E.g.: Schonfelder, Bruno. "Judicial Independence in Bulgaria: A Tale of Splendour and Misery." *Europe-Asia Studies*, no. Vol. 57, No. 1 (2005): 61-92; White, Brent T. "Putting Aside the Rule of Law Myth: Corruption and the Case for Juries in Emerging Democracies." *Cornell International Law Journal*, 2010: 307-363; Uzelac, Alan. „Survival of the Third Tradition?" *Supreme Court Law Review (49)*, 2010: 377-396. Kosař, David. „Judicial Accountability in the (Post)Transitional Context: A story of Czech Republic and Slovakia." In *Tranistional Justice, Rule of Law and Institutional Design*, editor Adam Czarnota a Parmentier, Stephan S. Antwerp: Intersentia Publishers, 2010. Popova, Maria. *Politicized Justice In Emerging Democracies: A Study of Courts in Russia and Ukraine.* (New York: Cambridge University Press, 2012)

The main advantage of comparing the cases of the Czech Republic and Slovakia is the fact that the countries in question share not only the communist past, but also the institutional design at the dawn of democracy. Therefore the effect of legacies can be controlled and it is reasonable to assume that their starting points were basically the same. In addition, there is a documented difference between the performances of the judiciaries of the two examined countries and it is more elaborated in Chapter 2. While the Czech Republic is by the World Justice Project considered to be one of the strongest performers in the region,[2] the Slovak judiciary seems to be, according to the report prepared for The Open Society Foundation in Slovakia, "in disarray and turmoil" and "there is hardly any country in the EU where public confidence in the judiciary is as low as in Slovakia".[3]

The study proceeds from a notion of democracy consolidation consequently followed by the discussion of one of its implicit condition – judicial independence. As the judiciary in communism could hardly be considered as independent there existed a need for establishing it *de nouveau*, although countries' possibilities were much restricted due to the specifics of the judiciary branch and there is a certain variance within the region with regard to the question how the states initially tried to overcome the problem of communist legacies.[4] Further, possible explanations of creation of independent judiciaries are introduced with the emphasis on the institutional independence and the role the European Union may have played in these matters in countries interested in the EU accession. In this section also several guidelines, which were available for the legislators at the time, are discussed. However, the call for independent judiciaries in newly democratic regimes created a tension with legacies

[2] *Rule of Law Index.* The World Justice Project, 2011.
[3] *The Slovak Judiciary: its current state and challenges.* Prepared for The Open Society Foundation, Slovakia, 2011.
[4] E.g.: Sajo, András, and Vera Losonci. "Rule by Law in East Central Europe: Is the Emperor's New Suit a Straightjacket?" In *Constitutionalism and Democracy. Transitions in the Contemporary World*, ed. D. Greenberg, 321 - 338. (Oxford: Oxford University Press, 1993)

inherited from the communist era. For that reason, the theory of socialist legal tradition is discussed together with a brief literature review on judiciary performance in post-communist countries with a focus on problems of Czech and Slovak judiciaries. In addition, an analysis of four interviews with Czech and Slovak judges and/or legal scholars will be included in order to better understand the link between observed outcomes and socialist legacies. The following chapter provides a textual analysis of legal arrangements regarding appointment, removal, disciplining and promotion of judges since the communist era until present. The analysis will help to identify crucial reforms in both countries' development and these will be further deeply examined using the textual analysis in order to understand why the countries took different paths through parliamentary documents, such as explanatory reports and discussion transcripts.

The research finds that the Slovak judiciary performs considerably worse because the created Judicial Council does not strengthen accountability of the judiciary mainly because of its design that allows judges themselves to have a clear majority, which is much dangerous for the self-administration because of the patterns of behavior inherited from the past. Moreover, the findings confirm that Slovakia established the council primarily in order to prove itself as a trustworthy candidate for the EU accession. The Czech counterpart did not face the same challenge as Slovakia, because its consolidation was rather gradual and not affected by the authoritarian period that followed the breakdown of communism.

1. JUDICIAL INDEPENDENCE: A SINE QUA NON FOR DEMOCRATIC CONSOLIDATION

For a democracy to be considered consolidated it is often assumed that the rule of law has to exist there, among other conditions.[5] According to Larkins, the rule of law helps newly democratized states to realize a break with the past, and to develop such a constitutional culture, "which teaches state actors, that legal bounds of the system cannot be transgressed for the achievement of partisan political gains".[6] Hence, the rule of law is often perceived as an ideal that guarantees certainty between the people and ensures that the change happens in a stringent way, thus minimizing the danger of one's unrestricted power. For these reasons, consolidating countries search for such arrangements that increase the level of the rule of law in order to establish a stable democratic regime.

However, the rule of law is not easily defined and there is not any consensus over its content but rather a variety of approaches to its definition. The definitions vary from the simplest ideas that the rule of law means in fact the rule of laws, not men. Further, some perceive it is any state of law, as opposed to anarchy – but, then including all kinds of dictatorships with more or less functioning legal systems. There are also approaches based on values – perceiving the rule of law as an instrument used to bring a society to a desired state, and institutional approaches defining institutions, which are necessary for the achievement of the ideal, such as courts, bars or parliaments.[7]

[5] E.g.: Linz, Juan J., and Alfred Stepan. *Problems of Democratic Transition and Consolidation: Southern Europe, South America, and Post-communist Europe.* (Baltimore: The John Hopkins University Press, 1996); O'Donnell, Guillermo. „Why the Rule of Law Matters." *Journal of Democracy 15(4)* (2004): 32-46.

[6] Larkins, Christopher M. „Judicial Independnece and Democratization: A Theoretical and Conceptual Analysis." *The American Journal of Comparative Law, Vol. 44* (1996): 606.

[7] In addition there is also a difference between Anglo-Saxon „Rule of Law" on one hand, and German „Rechtstaat" on the other, but for the purpose of this research I will not separate them and will continually use the term „rule of law", although I realize that „Rechtstaat" is perhaps closer to Czech and Slovak understanding of the context, as both countries use this expression – „právní stát" or „právny štát, respectively.

Among the institutional definitions of the rule of law, one of the most influential was presented by Joseph Raz consisting of eight points.[8] According to this definition, besides other conditions,[9] judiciary independence shall be guaranteed in order to have a state governed by the rule of law. However, even Raz himself acknowledges some shortcomings of such an approach when he admits that a non-democratic state may meet these requirements better than any democratic state despite a common infringement on its citizens' rights.[10] Walker supplements this approach with several principle-based criteria by which institutions shall be safeguarded in order to bring about a desired outcome.[11] His twelve-point definition also includes the requirement for independence of the judiciary, which shall be achieved by the existence of tenure and which ensures freedom from interference from other branches of the government. In his definition law enforcement agencies ought to be impartial, honest and not allowed to pervert the law in any sense. In addition, he claims that the law is highly dependent on people's attitudes and hence for the successful application of the Rule of law there needs to be commonly shared "attitude of legality", bringing in an attitudinal factor in achieving the rule of law.

Institutions of judiciary independence are commonly considered to be a pre-requisite of the rule of law.[12] Institutional approach – and the belief it can contribute to the establishment of a well-functioning democracy through the creation of the rule of law – has

[8] Raz, Jospeh. "The Rule of Law and Its Virtue." *The Law Quarterly Review*, Vol. 93 (1977), 195-211.

[9] Other conditions proposed by Raz are: laws should be prospective, open and clear; laws should be relatively stable; making of laws should be guided by open, stable, clear and general rules; courts should be open and not biased in their decision-making; judicial review should be allowed; courts should be accessible; and law-enforcement agencies must not pervert the law in any way.

[10] Raz, Jospeh. "The Rule of Law and Its Virtue." *The Law Quarterly Review*, no. 93 (1977): 211.

[11] Walker, G.Q. „The Rule of Law. Foundation of Constitutional Democracy." (Melbourne: Melbourne University Press, 1988), 1-42.

[12] Such a claim can be found, for example, in the Council of Europe's Recommendation on the independence, efficiency and the role of judges; the Bangalore Principles of Judicial Conduct; European Charter on the statute of judges;

been criticized in the past.[13] On the one hand, Carothers admits the importance of the concept, as it has been used as an ideal that solves problems of non-democratic or less-democratic countries; claiming that "[f]or the states grappling with democratic consolidation, fortifying usually weak rule of law appears to be a way of pushing patronage-ridden government institutions to better performance".[14] On the other, hand despite the emphasis on the role of independent judiciaries, the author argues that besides institutional reforms, an enlightened leadership and changes in values and attitudes of those in power will be required. Similarly, Krgyier argues that it is easier to define the values the rule of law shall serve, than to specify particular institutions that will promote it, hence we should refrain from reducing it to particular institutional arrangements.[15] On the other hand, Larkins emphasizes the role of independent judiciary as essential to the rule of law which runs contrariwise to Walker's cautious claim that institutions of judiciary independence are simply not sufficient, unless they are rooted in a proper cultural context.[16] Santos also highlights the role of the rule of law and the judicial system reform in the transformation to democracy claiming that they appear to be „ideal instruments of a depoliticized conception of social transformation".[17]

Indeed, it is possible that the conflict here is rather a fictitious one resting on different definitions of judiciary independence – independence to decide without any pressure from other branches of power on the one hand, and independence to administer judiciary matters solely within the judiciary itself on the other. All in all, it can be summarized that judiciary independence is a crucial element for the democracy consolidation; nevertheless it is only

[13] E.g.: Carothers, Thomas. „The End of the Transition Paradigm." *Journal of Democracy*, 2002: 5-21. Carothers, Thomas. "The Rule of Law Revival." *Foreign Policy Affairs 77(2)*, 1998: 95-106.
[14] Carothers, Thomas. "The Rule of Law Revival." *Foreign Policy Affairs 77(2)*, 1998: 98.
[15] Krygier, Martin. "Rethinking the Rule of Law after Communism." In *Rethinking the Rule of Law after Communism*, ed. Adam Czarnota, Martin Krygier and Wojciech Sadurski. (Budapest: CEU Press, 2005), , 266-278
[16] Larkins, Christopher M. „Judicial Independnece and Democratization: A Theoretical and Conceptual Analysis." *The American Journal of Comparative Law, Vol. 44*, 1996: 605-626; and Walker, G.Q. „The Rule of Law. Foundation of Constitutional Democracy." (Melbourne: Melbourne University Press, 1988), 1-42.
[17] Santos, Boaventura de Sousa. "The GATT of Law and Democracy: (Mis)Trusting the Global Reform of Courts." In *Globalization and Legal Cultures. Onati Summer Course 1997*, edited by Feest Johannes. (Euskadi: International Institute for the Sociology of Law), 1997, 49-86.

reasonable to establish it in such conditions, where the members of the judiciary branch are able to identify and interpret law and its fundamental assumptions properly.

1.1. Defining Judicial Independence

If we accept that for the consolidation of democracy it is necessary to successfully establish the rule of law, and the rule of law requires a judiciary independence to be guaranteed, we can expect all newly democratized countries to search for arrangements that would ensure it. But what does judicial independence mean? In general, we can distinguish between decisional, behavioral, institutional and, perhaps, financial or administrative independence. The ultimate goal is to ensure that cases are decided on its merits and not depend on any other factor than their merits. As Popova convincingly puts it in her study, there should be no observable pattern in decisions of the courts that clearly favors any group of people in order to be able to consider a judiciary as independent.[18]

However, this study focuses on the creation and development of institutions of judiciary independence, as institutions are states' means to deliver desired outcomes – in this case independent judicial decisions. Indeed, to decide independently is not the only requirement of a well-performing judiciary, but it should also treat everybody equally, giving them the same chances to succeed but also, for instance, the decisions should be delivered in an appropriate amount of time.

Conceptualization of independence based on judges' perceptions of their positions and adherence to their understanding of the law is usually referred to as "behavioral judicial independence". Herron and Randazzo offer three different views on the content of judiciary independence.[19] Firstly, it is an extent to which judges believe they can decide consistently

[18] Popova, Maria. *Politicized Justice In Emerging Democracies: A Study of Courts in Russia and Ukraine.* (New York: Cambridge University Press, 2012)
[19] Herron, Erik S, a Kirk A. Randazzo. „The Relationship Between Independence and Judicial review in Post-Communist Courts." *The Journal of Politics*, Vol.65, No. 2 (2003): 422-438.

according to their values, opinions and interpretations of particular rules, and their perception of the role of judiciary in the political system. Secondly, the judicial independence can be understood as the opposite, counterbalance of what power-holders think in particular cases, especially, in the cases when the decision that opposes desires of those accompanied by political power may cause retaliation against particular judges or the courts. This last idea highlights the authority to discipline judges which brings us to judicial self-administration. In general, if a judge is exposed to pressure and faces eventual repercussions affecting his or her career, he or she cannot be declared independent.

Another conception of judicial independence can be labeled as "decisional independence" which puts emphasis on the output of the judiciary.[20] This approach posits that judicial independence "exists if no actor can *consistently* secure judgments that are in line with his or her preferences".[21] Emphasis on consistently implies that judgments involving a certain particular actor would not show any pattern in decisions. In addition, according to O'Donnell, "[t]he judiciary must be free of undue influences from executive, legislative and private interests".[22] Indeed, there is a theoretical possibility that someone turns to the court only in cases where he or she wins (or loses, for that matter) without influencing the judge.[23]

Moreover, an "institutionally independent judiciary" is one that is formally separated from other branches of power, diminishing possible risks of affecting its performance through political offices. In Larkins' definition, independent judges are those that are impartial towards the involved parties, and hence cannot be manipulated for anybody's gain.[24] In an "ideal" case, an institutionally independent judiciary would decide about all of its personal,

[20] E.g.: Hanssen, F. Andrew. "Is There Politically Optimal Level of Judicial Independence?" *The American Economic Review*, Vol. 94, No.3 (2004): 712-729.
[21] Popova, Maria. *Politicized Justice In Emerging Democracies: A Study of Courts in Russia and Ukraine.* (New York: Cambridge University Press, 2012), 18 [emphasis in original]
[22] O'Donnell, Guillermo. „Why the Rule of Law Matters." *Journal of Democracy 15(4)*, 2004: 32-46.
[23] Assuming that any look at the descriptive statistics of courts decisions will show rather random results, we can claim that if the actual observation significantly deviates from such „randomness" we can expect there was some bias in the decisions made.
[24] Larkins, Christopher M. „Judicial Independnece and Democratization: A Theoretical and Conceptual Analysis." *The American Journal of Comparative Law, Vol. 44*, 1996: 611

financial and administrative matters so there would not exist a possibility for political elites to exercise any influence over the judges. This study focuses on the personal dimension of institutional independence, specifically on the matters of appointment, removal, disciplining and promotion of judges, and tries to evaluate the extent to which judiciary decides independently about its matters and who it is accountable to. If the judges were selected, appointed and promoted to higher offices solely by political elites, then it may be assumed that elites would choose only such judges that are "reliable" and that they would decide according to the desires of these elites when necessary. Dependence of the judges would be even strengthened in case political elites had right to remove judges whenever they please. As was mentioned above, and as Herron and Randazzo proposed, if the judges face possible consequences affecting their careers when they disobey the political will, we cannot talk about independent judges, and for that reason a look on the disciplinary procedures may clarify how independent the judges really are.[25]

Nevertheless, according to Larkins the insulation from political pressure is not sufficient for establishing independent judiciary; it is also important to be so within an institutional setting that grants certain authority to the judicial branch.[26] Peter H. Russell extends the idea of independence from political bodies by introducing two dimensions of possible dependency.[27] Firstly, there is independence from the government – external independence – and secondly, there is a possibility of a control over a judge exercised from within the judiciary itself, hence this may be perceived as an internal dimension of independence. Russell also distinguishes between independence of judiciary, as a body and independence of any particular judge arguing that there exist two sources of influence and

[25] Herron, Erik S, a Kirk A. Randazzo. „The Relationship Between Independence and Judicial review in Post-Communist Courts." *The Journal of Politics*, Vol.65 (2). vyd. (2003): 422-438.
[26] Larkins, Christopher M. „Judicial Independnece and Democratization: A Theoretical and Conceptual Analysis." *The American Journal of Comparative Law, Vol. 44*, 1996: 605-626
[27] Russell, Peter H. "Toward a General Theory of Judicial Independence." In *Judicial Independence in the Age of Democracy: Critical perspectives from around the World*, edited by Peter H Russell and David M. O'Brien. (Charlottesville: University Press of Virginia, 2001), 1-24.

control – collective and individual. These two dimensions surely overlap to certain extent as any control over judiciary as a whole implies some control over any particular judge. The distinctions between external and internal dependencies, and between collective and individual independence very importantly points to the fact that *there can be dependent judges in the judiciaries independent from other branches of government*.

Somewhat similar argument is made by Ferejohn, when he argues that the judicial independence, understood as "a feature of the institutional setting within which judging takes place", should not be valued in itself, as it cannot ensure independence of a judge.[28] Ishiyama Smithey and Ishiyama, in addition, provide an empirical evidence for the claim that institutional independence of the judiciary does not correlate with independent behavior of the judges.[29] Hence, it cannot be claimed that institutions of judiciary independence facilitate better performance of the judiciary, and consequently of the rule of law and of democracy. Kornhauser interprets such evidence as an argument against the usefulness of the concept of institutional judicial independence, and claims it should be abandoned as it proves to be neither necessary nor sufficient for the rule of law or good governance.[30] Popova proposes that such evidence should cause a shift from treating institutional arrangements of judiciary independence as an explanatory variable, to treating it as a response variable in the study of independence of the judicial branch.[31] In addition, O'Donnell argues that even if judiciary autonomy is established, it must not be used for the achievement of narrowly defined

[28] Ferejohn, John. „Independent Judges, Dependent Judiciary: Explaining Judicial Independence." *Southern California Law Review*, Vol.72(353). vyd. (1999): 353.
[29] Ishiyama Smithey, Shannon, and John Ishiyama. "Judicious Choices: designing courts in post-communist politics." *Communist and Post-Communist Studies*, no. 33 (2) (2000): 163-182.
[30] Kornhauser, Lewis A. "Is Judicial Independence a Useful Concept?" In *Judicial Independence at the Crossroads: An Interdisciplinary Approach*, edited by Stephen B Burbank and Barry Friedman, 45-55. Thousand Oaks: Sage Publications, 2002.
[31] Popova, Maria. *Politicized Justice In Emerging Democracies: A Study of Courts in Russia and Ukraine*. (New York: Cambridge University Press, 2012), 16.

corporate interests.[32] Hence, the judiciary must not only be independent from the political branches of power; it also must not serve the judiciary itself in accomplishing its own goals.

Moreover, no matter how independent the judiciary formally is, there always may exist certain informal ways of influencing any particular judge. Ledeneva describes, the so called, "telephone justice" and its presence in Russian legal system.[33] Based on both surveys and in-depth interviews with local experts, she concludes that there exists a consensus regarding the possibility to influence outcome of any given case. "[T]he pressure does not need to be pervasive, to be effective."[34] In the same line Popova distinguishes between politicians' capacity and willingness to affect the outcome of any case.[35] She proposes three explanations for the actual independent judicial outcomes: it may be caused either by politicians' lack of capacity to interfere; by politicians' decision not to interfere as the costs of such an interference may be higher than the costs of the possible gains; or by their strong support for the idea of independent courts and the consequent non-interference in its matters, even if they had the channels to exercise their will.

To sum up, the focus of this study is the examination of institutional independence and the creation and development of institutions of independent judiciary, which is on the one hand insufficient concept in order to secure outcomes favorable for democracy, and on the other hand the most available measure for the creation of actual independence of judiciary in emerging democracies. Furthermore, the institutional independence is not only insufficient, it may also cause outcomes contrary to those desired. If the judiciary is effectively separated from other branches of government, there is no support for claim that it cannot become dependent on, for instance, high judiciary personnel, which in turn may be dependent on any

[32] O'Donnell, Guillermo. „Why the Rule of Law Matters." *Journal of Democracy 15(4)*, 2004: 44.
[33] Ledeneva, Alena. „Telephone Justice in Russia." *Post-Soviet Affairs*, 24 (4). vyd. (2008): 324-350.
[34] Ibid., 347
[35] Popova, Maria. *Politicized Justice In Emerging Democracies: A Study of Courts in Russia and Ukraine*. (New York: Cambridge University Press, 2012).

other group of people, be it political elites, financial groups, or perhaps organized crime groups; or that it will serve its own corporatist interests. Such a judiciary would not be exposed to any kind of effective control provided by citizens, hence it will not be accountable to anyone but its own highest personnel, and any governmental attempt to intervene may be declared as anti-constitutional, breach of the rule of law and illegitimate attempt to influence judiciary, or simply anti-democratic. Based on that, it can be argued that there exists a reason to preserve elected, and *accountable*, officials to hold certain powers to influence the judiciaries; otherwise the judiciary personnel may become a privileged group – a caste protected from the outside world hidden behind the veil of such concepts as judiciary independence and the rule of law.

1.2. Why do Politicians create independent judiciaries?

The breakdown of the communist regimes in Central and Eastern Europe produced a need for the creation of independent judiciaries. However, the decision to support this independence remained in the hands of politicians who could decide, taking into consideration their ideals, their own interests, and also requirements of the international community, in this region mainly the European Union.

There are several reasons why the politicians would actually restrict their power by the creation of independent judiciary bodies. First of all, there is a possibility that politicians opt for the judiciary independence just because of their pro-democratic persuasion that such a change should be done simply in order to achieve the rule of law ideal or, for instance, a higher quality of democracy. However, there are also several other theories regarding the issue that provide more complex explanations. For example, Hanssen hypothesizes that uncertainty regarding continuation in an elected office leads politicians into making strategic

decisions that would ensure maximalization of gains and minimalization of losses.[36] Therefore, if a politician expects to be replaced in his office he would seek such changes that would make future change more difficult. Nevertheless, not only does it mean a lower capacity for the opponent, but it also decreases his or her capacity to control the judiciary in the case he or she is able to remain in the office. Empirical results provided by Hanssen supported his theory that changes in institutional arrangements take due account of eventual change. For the independence of ordinary judiciary it may mean that any given politician, or a group, may strengthen the independence not because of the fondness for the concept, but rather because of the fear it may turn against them.

Magalhaes offers a much similar opinion to Hanssesn's, based on his study of judicial reforms in the post-communist context, specifically in Bulgaria, Hungary and Poland.[37] He basically agrees with Hanssens's rational choice argument and claims that in emerging democracies the institutional setup of the judiciary is primarily shaped by the strategies of the most influential political actors who attempt to maximize their gains resulting from a responsive and reliable judiciary. In addition, according to the author, neither ideological legacies nor external pressures, such as the one from the EU, help to explain institutional outcomes.[38] In contrast, Santos argues that legal and judicial reforms in the region have been driven by strong international pressures, however not only as a result of the integration process, but they are also related to a broader issue of the "globalization of democracy and

[36] Hanssen, F. Andrew. "Is There Politically Optimal Level of Judicial Independence?" *The American Economic Review*, no. 94 (3) (2004): 712-729.
[37] Magalhaes, Pedro C. "The Politics of Judicial Reform in Eastern Europe." *Comparative Politics 32(1)*, 1999: 43-62.
[38] Magalhaes' conclusions should be considered very cautiously as his research was conducted in the late 1990's, hence before the period when CEE countries had conscientiously attempted to fulfill the requirements for the EU accession.

law" which is caused by the pressure induced by institutions, such as USAID or the World Bank.[39]

In addition to the rational choice explanations, Popova offers a „strategic pressure theory" which positis that, unlike in consolidated democracies, in newly competetive regimes political competition creates incentives for the politicization of justice.[40] She argues that the tighter the political competition is, the greater the benefits of pressuring the courts are. Therefore, in order to maximize their reelection odds by ensuring desired rulings, political elites exercise higher pressure on the courts. Also, in emerging democracies costs associated with pressure imposed on courts are not as big as in consolidated democracies, hence it is rational for political leaders in newly competetive regimes to politicize the judiciary.

In line with Santos' argument for establishing the judiciary independence this study proposes an explanation with the central role played by the European Union and the push-and-pull effect it has had on countries trying to be accepted into its structures. Especially on such countries that due to severe democratic shortcomings desperately needed to prove themselves as trustworthy candidates in order to be accepted. That would mainly apply to the countries that got stuck in the "grey zone" between authoritarianism and democracy, and were lagging behind their closest neighbors. This study looks particularly at the case of Slovakia; as contrasted by the Czech Republic, the former federal companion; but the hypothesis can be in the future applied to such cases as Bulgaria or Romania.

1.3. The Role of the EU in democracy consolidation

An important role in the early reforms in the post-communist world was played by the European Union, and the countries' desires to be integrated into its structures. Since the 1993

[39] Santos, Boaventura de Sousa. "The GATT of Law and Democracy: (Mis)Trusting the Global Reform of Courts." In *Globalization and Legal Cultures. Onati Summer Course 1997*, edited by Feest Johannes. (Euskadi: International Institute for the Sociology of Law, 1997), 49-86.
[40] Popova, Maria. *Politicized Justice In Emerging Democracies: A Study of Courts in Russia and Ukraine.(* New York: Cambridge University Press, 2012), 38-41.

Copenhagen Criteria reforms of the judicial systems became a crucial task for CEE countries interested in EU accession. The document postulates that in order to be accepted into the European Union the candidate countries need to has achieved "stability of *institutions guaranteeing democracy, the rule of law*, human rights and respect for protection of minorities, the existence of a functioning market economy as well as the capacity to cope with competitive pressure and market forces within the Union".[41]

However, the European integration as an incentive for democratizing efforts of the local elites has been a tool of the European community even before that, in cases such as Greece, Portugal or Spain. As Merkel puts it: "The European Commission had communicated to the accession countries a clearly formulated link: membership in exchange for a functioning democracy; the incentive of being admitted to the EC, with all the associated economic advantages and increase in prosperity, triggered a push-and-pull effect on the efforts of the three countries to consolidate their democracies".[42] These incentives, according to Merkel, are those that helped also Central and Eastern European countries to consolidate their democracies after the regime change quite quickly, despite many propositions to the contrary.[43] Perhaps, Merkel's optimism regarding the successful consolidation may be a little bit premature; it does not, however, change the fact that integration into the European community played a significant role in the alternation of post-communist polities.

The consolidation of the newly established democracies and the process of the integration in the European community were happening simultaneously and interdependently. On the one hand, for the integration to be successful the candidate countries had to show their

[41] European Council in Copenhagen. Conclusions of the Presidency. (21-22 June, SN 180/1/93). [emphasis added]
[42] Merkel, Wolfgang. "Plausible theory, unexpected results: the rapid democratic consolidation in Central and Eastern Europe." *International Politics and Society*, no. 2 (2008): 27.
[43] E.g.: Elster, Jon. "The Necessity and Impossibility of Simultaneous Economic and Political Reform." In *Constitutionalism and Democracy*, ed. Douglas Greenberg, Stanley N Katz, Steven C Wheatley and Melanie Beth Oliviero. (New York: Oxford University Press, 1993) , 267-74; and Offe, Claus. „Capitalism by Democratic Design? Democratic Theory Facing the Triple Transformation in East Central Europe." *Social Research 58(4)*, 1991: 865-92.

progress towards democratic consolidation. On the other, succesful integration in the EU was supposed to strengthen existing democratic regimes and to protect them from eventual anti-democratic shifts, as several of these countries ' democracies have appeared to be very fragile and vulnerable.[44]

In general, the EU promotes democracy on two levels and in two forms. As Casier writes, firstly, the EU creates incentives for the candidate states to create, what he refers to as, formal democracy.[45] This notion is connected to the creation of the institutions and procedures at the polity level that are necessary to secure formally free and fair elections, provide for separation of powers and checks and balances between these branches of government. The second goal, which is more difficult to achieve, is a substantive democracy that refers to principles and mechanisms that function in the certain polity and that encourage societal control over policy processes. Moreover, with regard to the form of democracy promotion by the EU, Pridham distinguishes between push and pull effect of the European Integration.[46] „Push" refers to the conditionality principle which means that states desiring to be invited to the negotiations and desiring to be accepted in the EU try to satisfy all the political requirements proposed by the EU, such as above mentioned Copenhagen criteria. Using conditionality as an incentive for the countries to consolidate their polities can also be found in some other scholars' works.[47] In addition there exists a „pull" effect of the integration process that helps politicians in particular states win the support in domestic political arena.

[44] Several of the post-communist countries that entered, or has attempted to enter the EU experienced governments of strong charismatic leaders that posed a threat to democratic order, such as Vladimír Mečiar, Franjo Tudjma, Leonid Kuchma or Viktor Orbán.

[45] Casier, Tom. "The EU's two-track approach to democracy promotion. the case of Ukraine." *Democratization 18(4)*, 2011: 956-977.

[46] Pridham, Geoffrey. "European Union Accession Dynamics and Democratization in Central and Eastern Europe: Past and Future Perspectives." *Government and Opposition 41(3)*, 2006: 373-400.

[47] E.g.: Borzel, Tanja A, and Thomas Risse. "One Size Fits All! EU Policies for the Promotion of Human Rights, Democracy and the Rule of Law." Prepared for the Workshop on Democracy Promotion, Oct 4-5, 2004, Center for Development, Democracy and the Rule of Law, Stanford University, 2004; and Merkel, Wolfgang. "Plausible theory, unexpected results: the rapid democratic consolidation in Central and Eastern Europe." *International Politics and Society*, no. 2 (2008): 11-29.

Casier, in his study of the Ukrainian case, finds that more progress has been made in „formal democracy" arena, because formal institutions and procedures are more visible, and perhaps easier to evaluate.[48] In addition, they can ensure legitimacy of the regime in the eyes of the EU and the whole international community, and hence secure their survival. Based on that it can be argued that highly visible democratic reforms, such as introduction of highly visible institutions of formal democracy, will be found especially in the countries actively seeking legitimacy and a kind of endorsement from the EU. With regard to the cases included in this study – the Czech Republic and Slovakia – we can assume it was Slovakia that was longing to prove itself as a trustworthy candidate for the EU accession after Mečiar's highly controversial government; hence, in Slovakia existed stronger incentives to establish such institutions that would closely follow formal requirements proposed by the EU. Another reason why Slovak post-Mečiar elites may have been highly motivated to concentrate their efforts on becoming legitimate and reliable partners of the EU was the fact that the EU membership was promising a variety of benefits – economic as well as political, that would help to secure survival of democracy and that would protect the country from a possible backlash. In short, the EU may have been perceived both as a goal and as a mean in order to secure democracy. Sadurski, Czarnota and Krygier takes the argument even a small step further when throughout their book they argue that countries' elites favored smooth integrative process into the EU more than was the EU interested in enlarging, and hence the EU could dictate its conditions and the states did not reflect on them critically enough and enacted them without a sufficient debate.[49]

[48] Casier, Tom. "The EU's two-track approach to democracy promotion. the case of Ukraine." *Democratization 18(4)*, 2011: 956-977.

[49] Sadurski, Wojciech, Adam Czarnota, and Martin Krygier. *Spreading Democracy and the Rule of Law? The Impact of EU Enlargement on the Rule of Law, Democracy and Constitutionalism in Post-Communist Legal Orders.(* Dordrecht: Springer, 2006)

The European Union has undoubtedly been a significant factor in consolidation of new democracies and establishment of the rule of law. The vision of succesful EU accession gives candidate countries at any point in time incentives to do large-scale reforms that probably would not have been done otherwise. However, these changes happen mainly in the arena of formal democracy, whereas substantive democracy does not progress at the same pace. In addition, it seems that the EU incentives are stronger in countries with rather fragile democracy, that strongly desire to prove themselves trustworthy as the EU membership provides fairly optimistic outlook for the preservation of democracy and, perhaps, improving its quality. With regard to the cases examined in this research it can be hypothesized that Slovakia followed the integration requirements more closely, because of its semi-democratic past, while the Czech Republic, as one of the best democratic performers in the region, moved towards the EU accession indubitably since the break-up of Czechoslovakia, and hence could have been much more cautious with the reforms and do them rather gradually with a concern to its specific context.

1.4. The Role of the EU in judiciary reforms

Despite the fact that the EU has never created its own definition of the independent judiciary there exist several other documents that provide guidelines for the candidate countries if these are interested in reforming their judiciaries. As Casier puts it: "the EU strategy of democracy promotion is mainly a reinforcement strategy. The EU does not create its own standards of democratization, but uses its bargaining power to back up the existing European organizations".[50] Documents that may have served as guidelines or, perhaps, an inspiration for the national elites interested in meeting the EU criteria, may be divided in two groups: one including documents that rather appeal to the essentiality of the judicial

[50] Casier, Tom. "The EU's two-track approach to democracy promotion. the case of Ukraine." *Democratization 18(4),* 2011: 960.

independence, but define it vaguely, if at all;[51] the other consisting of documents that actually provide certain requirements or recommendations for what is meant by judiciary independence and how to achieve it.

The Recommendation on the Independence, Efficiency and the Role of Judges adopted by the Committee of Ministers of the Council of Europe in 1994 provides quite a specific definition of judicial independence. Not only does it encourage executive and legislative powers to ensure that judges are independent and requires them not to take any steps that could endanger that independence;[52] it goes much further by recommending that the selection and career of the judges should be independent of the government and the administration;and they should be selected by the judiciary itself.[53] Moreover, a claim that "judges should not be obliged to report on the merits of their cases to anyone outside the judiciary" [54], which directly promotes that disciplinary measures regarding judges should also be taken by a body created within judiciary.

The European Charter on the Statute of Judges adopted in 1998 by the European Association of Judges provides the most elaborate guidelines for governments interested in judicial reform. With direct reference to the "profound changes that have taken place in Eastern Europe" the Charter attempts to contribute to the efforts to improve legal institutions as an essential element of the rule of law by ensuring the competence, independence and impartiality of the judiciary. With regard to the judiciary independence the most prominent part is the Article 1.3. that states:

[51] Among other documents to this group belong: the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms (Art.6), the 1966 International Covenant on Civil and Political Rights (Art.14), the UN Basic Principles on the Independence of the judiciary adopted in 1985, or the 2000 EU's Charter of Fundamental Rights of the European Union that became binding in 2009 when the Treaty of Lisbon came into power

[52] Committee of Ministers of Council of Europe. „Recommendation on the Independence, Efficiency and the Role of Judges." 1994, Art.2, b.

[53] Ibid. Art.2, c.

[54] Ibid. Art 2, d.

> In respect of every decision affecting the selection, recruitment, appointment, career progress or termination of office of a judge, the statute envisages the intervention of an authority independent of the executive and legislative powers within which at least one half of those who sit are judges elected by their peers following methods guaranteeing the widest representation of the judiciary.[55]

Most interestingly, the charter calls for the creation of a body that would administer personnel matters of the judiciary, and in addition requires that in such a body judges will not be a minority; however it does not demand the domination of members from the judiciary, so in this regard it gives a considerable freedom to the legislators.

Furthermore, the model presented in the Universal Charter of the Judge approved by the International Association of Judges in 1999, once again, very much favors considerable autonomy of the judiciary, as it states that selection of the judges and judicial administration and disciplinary actions should be decided within independent bodies that include substantial judicial representation.[56] Tthe judicial independence was also defined by the European Court of Human Rights (ECHR) in its jurisprudence. The court stated: "[i]n order to establish whether a body can be considered "independent", regard must be had, inter alia, to the manner of appointment of its members and to their term of office, to the existence of guarantees against outside pressures and to the question whether the body presents an appearance of independence".[57] The ECHR thus recommends such a constelation of the judiciary where the members are appointed in a manner that does not allow for the pressures from other branches of power.

To sum up, the EU itself has never issued and guidelines on how to establish the judiciary independence and never specified what does the term contain; However, this surely applies to many other dimensions of political systems. Nevertheless, the EU often uses its

[55] European Association of Judges. „The European Charter on the Statute of Judges." 1988, Art. 1.3.
[56] International Association of Judges. „Universal Charter of the Judge." 1997, Art.9.; Art.11; In addition, it deserves to be mentioned that both Czech and Slovak delegations did attend the meeting of the Central Council of the International Association of Judges where the document was approved unanimously, hence it may be assumed that judges and legislators in both countries were familiar with the content of the document, and may have used it in their legislative proposals.
[57] E.g.: *Langborger v. Sweden.* (European Court of Human Rights, June 22, 1989), par. 32.

bargaining power to reinforce other European or international organizations in the realm of democratization; and if some other international institution attempted to provide a recommendation on how to reform judiciaries in order to make them independent; it usually stressed the importance of a body which personnel would be independent from other branches of power to a large extent. In this way the desires for the EU integration created strong incentives for the post-communist countries to create institutions of independent judicaries, despite the context that was unfavorable to such changes.

2. *INDEPENDENCE IN THE POST-COMMUNIST CONTEXT: HAZARDOUS TRANSPLANTATIONS*

In order to consolidate their democracies, and in order to be accepted in the EU, the post-communist countries were driven to establish judiciaries that can be considered independent. As was showed in Chapter 1, if there were any recommendation on how to achieve it, they mainly focused on the institutional aspects of the independence. However, the context in which elites in these newly democratized countries operated was treacherous, because judiciaries they inherited were hardly ready for such a shift. The judiciaries in the communist regimes were deeply politicized as they de facto served as the extensions of their respective governments.[58] For this reason they were hardly prepared for the functioning in democratic regimes or for an effective independence. In addition, because of the specifics resulting from the nature of the regimes and their legal culture, these judiciaries shall be treated as different from the judiciaries in other "third wave" democracies; be it Latin American democracies or democracies of Southern Europe.

Legal tradition and legal culture in the countries governed for decades by Communist parties significantly differ from the democratic ones. According to John H. Merryman, there are three legal traditions in the world: civil law, common law and socialist law.[59] Existence of a separate socialist legal system different from civil law tradition is also recognized by several other authors such as Hazard.[60] Notwithstanding, for example, John Quigley admits there is a content to the term "socialist law"; however, he disagrees with the statement that

[58] David, René, and John E.C. Brierley. "Socialist Law." In *Major Legal Systems in the World Today*, 155-306. (London: Stevens & Sons, 1985); As they claim, most of the candidates applying for judicial positions were members of the Communist Party (at 246); and in application of the law they must had been sensitive to the instructions given by the Party (at 262)

[59] Merryman, John Henry. *The Civil Law Tradition: An Introduction of the Legal Systems of Western Europe and Latin America.* (Stanford: Stanford University Press, 1990)

[60] Hazard, John. *Communists and their Law: A Search for the Common Core of the Legal Systems of the Marxian Socialist States.* (Chicago: University of Chicago Press, 1969)

socialist legal tradition is different from civil law tradition in any significant way and hence does not create a separate family of law.[61] Accordingly, Wolfgang Friedmann does not find in Soviet Law any kind of new concepts or relationships markedly distinct from those present in civil law.[62]

According to Merryman, legal tradition should be understood not as a set of rules of law, but rather as a "set of deeply rooted, historically conditioned attitudes about the nature of law, about the role of law in the society and the polity, about the proper organization and operation of a legal system, and about the way law is or should be made, applied, studied, perfected and taught".[63] Of course, it may be objected that with the breakdown of the undemocratic socialist regime its legal tradition disappeared as well.[64] However, as Uzelac argues, the actual functioning under the socialism consisted of several features, such as routines, practices, values and attitudes that could exist independently from the ideological labels given by the ruling elites.[65] "[T]he socialist legal world was, by its nature, not that socialist" and the instrumental approach prevalent during the socialism was easily adaptable to the new conditions.[66]

This chapter provides a discussion of the challenges that the elites in the post-communist countries has faced with regard to judiciaries, and the possible solutions as offered by several scholars. In addition, the chapter looks at the possible legacies of the previous regimes, discusses their consequences as found in the literature; and, in addition clarifies their presence in the two parts of former Czechoslovakia through the analysis of

[61] Quigley, John. "Socialist Law and the Civil Law Tradition." *The American Journal of Comparative Law, Vol. 37, No. 4*, 1989: 781-808.
[62] Friedmann, Wolfgang. *Law in a Changing Society.* (Berkeley: University of California, 1959)
[63] Merryman, John Henry. *The Civil Law Tradition: An Introduction of the Legal Systems of Western Europe and Latin America.* (Stanford: Stanford University Press, 1990), 2.
[64] In the East European region the socialist legal culture was precede by civil law legal culture. On the one hand, this tradition affects the essentially hybrid nature of the socialist tradition (Merryman 1990, 4); on the other, it served as a reason for a belief that with the breakdown of socialism, the tradition would disappear as well.
[65] Uzelac, Alan. „Survival of the Third Tradition?" *Supreme Court Law Review (49)*, 2010: 380.
[66] Ibid., 388.

interviews with Czech and Slovak legal scholars / judges. Also, the chapter presents a brief overview of how did the countries in question deal with the partly discredited judiciary personnel; hence what was the effect of the lustration laws and what has been the overall change in the judiciary personnel.

2.1. Dependent judiciaries at the dawn of democracy

As Sajó and Losonci put it, to establish a judicial self-government in such conditions would maintain the position of communist party appointees, hence "if you support judicial self-government as part of creating Rechtstaat, you will be aiding the position of people who seem to be unresponsive to ideas of fairness, are unfamiliar with judicial independence, and resist responsibilities for creative procedures".[67] Furthermore, Uzelac claims that this kind of a reform in judiciary creates a closed circle of individuals with shared interests, often family interconnected, and causes perpetuation of the old attitudes and practices, as only those compatible with the old elites will be appointed, while the protective veil against lateral criticism is created. And for those reasons not only is the socialist legal tradition present at current times, but will be embedded for the future as well.[68] In addition, this is how one leading Bulgarian scholar evaluated the situation:

> The transition from a totalitarian principle of social organization towards a democratic principle, where the roles are clearly distinguished, is particularly painful for the third – judicial – power as it is unable to reform itself. It does not have the tools to adopt laws that would make it independent, nor does it have the resources needed to ensure the efficient functioning of the judicial system. In addition to these self-evident hurdles, very few members of the judiciary clearly realize the role of their system in a democratic society. The traditional education and understanding of lawyers in former socialist countries – that they should act

[67] Sajo, András, and Vera Losonci. "Rule by Law in East Central Europe: Is the Emperor's New Suit a Straightjacket?" In *Constitutionalism and Democracy. Transitions in the Contemporary World*, edited by D. Greenberg. (Oxford: Oxford University Press, 1993), 322.
[68] Uzelac, Alan. „Survival of the Third Tradition?" *Supreme Court Law Review (49)*, 2010: 394-396.

> as 'counsel for the state' – predetermines the lack of any concept for the reform among the members of the judiciary.[69]

What to do with the judiciary in the period of democratization is a very difficult task which offers a wide range of possible solutions, from the absolute change of judiciary personnel to basically no change at all. It must be pointed out that the judiciary during the process of democratization is historically dependent and its transformation from authoritarian conditions to the democratic ones takes place in often very unstable situation, where powerful actors from the past may still play significant roles. On the one hand, Larkins claims that in order for courts to develop properly there needs to be political and legal stability;[70] on the other, Owen Fiss maintains that whole judiciaries should be dismissed by the newly appointed democratic governments, and such a move should not be perceived as an action threatening the actual independence of the judiciary, as such a measure would include only judges who were not dedicated to democratic ideals.[71] Contrarily, Larkins suggests that the problem should be treated on a judge-by-judge basis, removing only those members of judicial power, who actively demonstrated their agreement with the old methods of governance or were responsible for some controversial decisions.[72] All in all, there was a variety of approaches to the change in the judiciary personnel that the governments could have chosen from, but none of them was simple and uncontroversial.

[69] Kalaydijeva, Zdravka. „An Independent Judicial System in the Context of EU Accession. In "Bulgaria's Progress towards EU Membership in 2000 - the NGOs' Perspective". Sofia: European Institute." In *Pridham, Geoffrey. "European Union Accession Dynamics and Democratization in Central and Eastern Europe: Past and Future Perspectives." Government and Opposition 41(3), 2006, 384.*

[70] Larkins, Christopher M. „Judicial Independnece and Democratization: A Theoretical and Conceptual Analysis." *The American Journal of Comparative Law, Vol. 44*, 1996: 620.

[71] Fiss, Owen. „The Limits of Judicial Independence." *U. Miami Inter-Am. L. Rev., 58*, 1993.

[72] Larkins, Christopher M. „Judicial Independnece and Democratization: A Theoretical and Conceptual Analysis." *The American Journal of Comparative Law, Vol. 44*, 1996: 623; There are several problems with such an approach. First of all, the sheer fact that a judge did not sign any controversial decision does not guarantee he or she would not do so given the case that caused other judge's removal. Second, in the former communist countries a considerable amount of citizens were members of Communist party (e.g. see Grzymała-Busse 2002, 32, 36, 43, 52). These became members for a variety of reasons, unconditional support for the party was certainly not the only one; not even the most important one, for that matter.

Furthermore, Magalhaes looks at the question what could be done in addition to the removal of the judges that served the old regime. He posits that the new elites "can attempt to change judicial institutions to increase responsiveness of judges to the political branches they now control".[73] If they are unsuccessful in doing so, and the ex-communist elites happen to be elected to the offices, then "the former Communist parties have every incentive to reinforce [judiciary's] insulation by all means available".[74] That paradoxically indicates that greater independence of judicial institutions, were they not purged from the judges appointed by communist governments, would be an objective of those who want to preserve the status quo within this branch.[75] In addition, Magalhaes claims that in such cases liberal and conservative parties push for higher responsiveness of the judiciary, despite the expectation that they would opt for more independence.

2.2. Socialist legacies in post-communist countries

The legacies of socialist judiciary have persisted in the new democracies, as not every country had a possibility to, basically, dismiss the whole judiciary personnel and appoint new judges.[76] Bobek argues that the establishment of the institutions of judiciary is not sufficient if the judicial independence is not based on the mentality of the judges and their self-image.[77] Therefore it may be claimed that the success of the judicial independence is culturally and

[73] Magalhaes, Pedro C. "The Politics of Judicial Reform in Eastern Europe." *Comparative Politics 32(1)*, 1999: 48.
[74] Ibid.
[75] Schonfelder, Bruno. "Judicial Independence in Bulgaria: A Tale of Splendour and Misery." *Europe-Asia Studies*, no. Vol. 57, No. 1 (2005): 61-92. (He looks at the case of Bulgaria and offers a much similar argument)
[76] It was only the case of Eastern Germany that had its resources from the Western part of the country. See, for example: Sajo, András, and Vera Losonci. "Rule by Law in East Central Europe: Is the Emperor's New Suit a Straightjacket?" In *Constitutionalism and Democracy. Transitions in the Contemporary World*, ed. D. Greenberg. (Oxford: Oxford University Press, 1993), 321-338; Blankenburg, Erhard. "The Purge of Lawyers after the Breakdown of the East German Communist Regime." *Law & Social Inquiry Vol. 20, No. 1*, 1995: 223-243; or Markovits, Inga. "CHildren of a Lesser God: GDR Lawyers in Post-Socialist Germany." *Michigan Law Review, Vol. 94, No. 7*, 1996: 2270-2308.
[77] Bobek, Michal. "The Fortress of Judicial Independence and the Mental Transitions of the Central European Judiciaries." *European Public Law, Forthcoming in Vol. 14*, no. 1 (2008): 1-20.

historically determined, and unless the context is not treated properly the necessary shift from civil servants to critical and independent judges is not likely. Despite the creation of the new institutions, values and patterns of behavior which are necessary for the proper functioning of independent judiciary remain hardly adjustable to the democratic requirements. For this reason the author claims that "the creation of a judicial council alone does not do the trick".[78]

One of the explanations why these legacies have persisted is the nature of judicial career in the countries with the hybrid tradition of socialist and civil law culture. As Merrman argues, it is common that judicial positions are open to students right after the graduation, and filling of the judicial positions outside of the judicial rank is very unusual, in contrast with the common law practices, where the judges are usually appointed after a succesful career in a different legal profession, as a "kind of crowning achievement relatively late in life".[79] Bobek argues along the same line, highlighting the importance of the supervision by senior judges and higher ranks judges, such as court presidents, in the training of younger judges; and this way imprinting their opinions and practices on them contributing to the survival of the past legacies.[80]

These legacies are extensively discussed by Uzelac and are elaborated further in this Chapter in the analysis of interviews conducted for the purpose of this research.[81] As Uzelac argues, in addition to the civil law tradition, where the judges' function is to find the right legislative provision and couple it with the actual case in order to make a decision; in the socialist legal tradition, judges often had to use their skills to find a proper regulation to justify the desired, and perhaps already known, outcome.[82] In the same manner Sajó and

[78] Bobek, Michal. "The Fortress of Judicial Independence and the Mental Transitions of the Central European Judiciaries." *European Public Law, Forthcoming in Vol. 14*, no. 1 (2008): 6.
[79] Merryman, John Henry. *The Civil Law Tradition: An Introduction of the Legal Systems of Western Europe and Latin America.* (Stanford: Stanford University Press, 1990), 34.
[80] Bobek, Michal. "The Fortress of Judicial Independence and the Mental Transitions of the Central European Judiciaries." *European Public Law, Forthcoming in Vol. 14*, no. 1 (2008).
[81] Uzelac, Alan. „Survival of the Third Tradition?" *Supreme Court Law Review (49)*, 2010: 377-396.
[82] Ibid., 382.

Losonci claim that: "Judges and courts acted as bureaucrats, and fulfilled the expectations that they would promote centrally determined public interests. The courts were declared independent; however, the career of judges was bureaucratic as was their remuneration and evaluation; all were based on political loyalty".[83] Judges were highly dependent on the system and the way to achieve personal benefits was based on their compliance with some higher authority, rather than on skills and moral preconditions. Therefore the judges in socialism were used to act as any other kind of bureaucrats – not guided by the sense of justice but by somebody else's will – and be rewarded for it.

The bureucratic nature of the judicial career certainly had its perks; however there was also a down-side to such a career in the case of misbehavior or an undesired decision. For that reason, judges strategically attempted to avoid final adjudications as the "safest way to go forward was to make no decision at all".[84] According to Uzelac, this strategy is supposed to be, in the new democratic regimes, the cause of ineffectivenes and delays of the courts. Moreover, the author argues that during the socialism the legal occupation became family-like business which led to the feminization of judiciaries, as women were usually responsible for taking care of households, and the judicial function was not that demanding. In addition, it may have created a network of interconnected families which shared the interest of presering the judiciary as it was. According to Bobek, the judges' persistent self-perceptions of civil servants, together with the tradition working in the judiciary for the entire career, are the reasons why structural independence does not bring the quality and a shift to "mental independence".[85]

[83] Sajo, András, and Vera Losonci. "Rule by Law in East Central Europe: Is the Emperor's New Suit a Straightjacket?" In *Constitutionalism and Democracy. Transitions in the Contemporary World*, edited by D. Greenberg. (Oxford: Oxford University Press, 1993), 324.
[84] Uzelac, Alan. „Survival of the Third Tradition?" *Supreme Court Law Review (49)*, 2010: 383.
[85] Bobek, Michal. "The Fortress of Judicial Independence and the Mental Transitions of the Central European Judiciaries." *European Public Law, Forthcoming in Vol. 14*, no. 1 (2008).

Contrary evidence to much skeptical literature on the judiciaries in the region is offered by Annus and Tavits in their study of court decisions in criminal justice cases in Estonian courts.[86] They did not find any statistical evidence for the claim that judges with working experience in communist regime act significantly differently from those who lack such experience. Based on the evidence, they suggest that it is not necessary to dismiss and replace most of the judges who had operated under the authoritarian regime in order to establish the judicial system of a satisfactory quality under a new regime. They rather suggest focusing on education and training of judges and supporting higher investments in the resources of courts.[87]

2.3. Institutional independence: consequences

The typical judicial institution that later became fairly common in post-communist region is a Judicial Council.[88] However, the implementation of foreign legal arrangements into domestic law is most commonly referred to as "legal transplantation", although there is no clear agreement upon the term.[89] Nevertheless, the metaphor "legal transplant" is very useful exactly for its simplicity in describing the relationship between the new legal setting and the host body – the domestic legal framework, domestic legal culture. As Nelken describes it "legal transplants, when they succeed, blossom, are fertile and set root, fail when

[86] Annus, Taavi, a Margit Tavits. „Judicial Behavior After a Change of Regime: The Effects of a Judge and Defendant Characteristics." *Law and Society Review*, Vol.38, no.4. (2004): 711-736.

[87] It may be objected that Estonia is a deviant case as other countries invested in the education and training as well, but without results comparable to those in Estonia. Estonia is considered to be the best performer in the post-communist region with accountable and effective courts, low level of corruption, and strong protection for fundamental rights. See: *Rule of Law Index.* The World Justice Project, 2011.

[88] These can be found with different powers, for example, in France, Portugal, Italy, Spain, Greece, Netherlands, Poland, Finland or Norway.

[89] For example, Teubner prefers the term „legal irritants" as the consequences of such implementation is often unpredictable mix of positives and negatives. According to him the term „legal transplants" suggests that such action is either success or failure. See: Teubner, Gunther. "Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Divergences." *Modern Law Review, Vol. 61*, 1998: 11-32.

the body recognizes them as 'incompatible'".[90] According to Cotterrell, an implemented law must be conformable with important aspects of society's heritage; otherwise it may lead to transplantation's failure.[91] The post-communist countries, with their efforts to be accepted into the structures of the European Union, may have suppressed such cautions and may have consciously borrowed law from very dissimilar kinds of societies in order to use such "law as a means overcoming existing problems by becoming more like the source of such law".[92] Then similarities and differences between cultures of the society – which is the source of law and the society which is attempting to implement it – may be essential for the success or failure of the specific legal transplant.

There does not exist a consensus regarding the usefulness of the councils administrating the judiciary. The evidence provided by Schonfelder or Frison-Roche and Sodev suggests that the council can contribute to the failure of judiciary, as it can be perceived as an oppressor, which manipulates and threatens judges through the disciplinary procedures; or it can become too corporatist, and consequently not able to effectively regulate itself in order to preclude politicization and corruption.[93] Likewise, Kühn argues that if these institutions are too strong, as was the case of Hungary, they tend to the separate judiciary from the world outside its boundaries, which in turn causes a steep decline in the accountability for the problems within the judiciary.[94] At the same time, when the judiciary is not sufficiently

[90] Nelken, David. "Towards a Sociology of Legal Adaptation." In *Adapting Legal Cultures*, edited by David Nelken and Johannes Feest. (Oxford: Hart Publishing, 2001), 16.; It should be stated that the failure of the transplant can be also cause by a certain influential group that would not allow for the successful implementation of such a change; in order to protect its own interests.
[91] Cotterrell, Roger. "Is There a Logic of Legal Transplants?" In *Adapting Legal Cultures*, edited by David Nelken and Johannes Feest. (Oxford: Hart Publishing, 2001), 70-92.
[92] Nelken, David. "Towards a Sociology of Legal Adaptation." In *Adapting Legal Cultures*, edited by David Nelken and Johannes Feest. (Oxford: Hart Publishing, 2001), 43.
[93] Schonfelder, Bruno. "Judicial Independence in Bulgaria: A Tale of Splendour and Misery." *Europe-Asia Studies*, no. Vol. 57, No. 1 (January 2005): 61-92; and Frison-Roche, Francois, a Spas-Dimitrov Sodev. „The issues involved in the reform of the Bulgarian judicial system." *International review of Administrative Sciences*, 71 (2005): 593-606.
[94] Kühn, Zdeněk. "Judicial Independence In Central-Eastern Europe: The Experience of the 1990s and 2000s." *The Lawyer Quarterly*, no. 1 (2011): 31-42.

separated from other branches of power, too strong executive represents a danger of too much political control over judiciary, even if the political system is considered democratic.

2.4. Judicial performance in the Czech Republic and Slovakia: the effect of socialist legacies

This section provides an analysis of the performance of both judiciaries in connection with the legacies of the previous regime, but also tries to control for other patterns in the judges' behavior; with regard to their decision-making and their general preparedness for functioning in democratic regimes. The analysis offers an overview of the current problems of both judiciaries, using comparable sources; and discusses these problems in the light of judges' patterns of behavior using the evidence collected in the interviews with judges and/or legal scholars from both countries.[95]

2.4.1. Dimension of decision-making

Both the Czech and the Slovak judiciaries enjoy very little trust among the citizens.[96] However, while the Czech Republic is considered to be one of the strongest performers in the region by the World Justice Project;[97] the Slovak judiciary seems to be, according to the report prepared for The Open Society Foundation in Slovakia, "in disarray and turmoil" and "there is hardly any country in the EU where public confidence in the judiciary is as low as in Slovakia".[98] In addition, in the Global Competitiveness Report both countries ranked badly in

[95] The respondents were: Eliška Wagnerová, current Senator, former President of the Supreme Court and the judge of the Czech Constitutional Court; Zdeněk Kühn, legal scholar, and a judge of the Czech Supreme Administrative Court; Ľudovít Bradáč, the judge and former President of the Regional court in Banská Bystrica, and honorable president of the Slovak Association of Judges; and Ján Svák, former judge, legal scholar and the rector of Paneuropean University in Bratislava.

[96] The survey conducted by the Institute for Public Affairs in June and July 2012 showed that only 28% of public trusts the judiciary; whereas only about 25% of Czechs trust their judiciary as documented by the SANEP agency in the survey conducted in February 2013.

[97] *Rule of Law Index.* The World Justice Project, 2011, 31.

[98] *The Slovak Judiciary: its current state and challenges.* Prepared for The Open Society Foundation, Slovakia, 2011, 117.

Efficiency of the Legal Framework in settling disputes, and challenging regulations, as the Czech Republic placed 115th; and Slovakia placed 140th, hence even worse than the Czech Republic, out of 144 countries.[99]

Also, the corruption is often perceived as a problem in the both countries, however it is not a specific problem of the judiciaries, but rather a problem present in all state activities. All of the interviewees admitted it is a problem, although rather marginal. Ľudovít Bradáč explains it as rather a cultural phenomenon, manifested not as large-scale corruption, but rather as small bribery, that is present in all kinds of activities, and considers it as typical for our region, as he compared it to the experiences of the fellow judges from the Western countries, such as Germany or Netherlands, where such patterns of behavior do not exist.

According to all the respondents, what appears to be the problem in both countries is the length of the proceedings, although as Kühn pointed out, it is getting better in the Czech Republic.[100] This trend is also documented in the CEPEJ (The Council of Europe Commission for the Evaluation of the Efficiency of Justice) report, where the Czech Republic appears to be the second best performer in the European Union in the time needed to resolve litigious civil and commercial cases, whereas Slovakia can be found among the worst countries.[101] The respondents provided a variety of reasons why this is the case: including bad legislation, causing some courts are overloaded; the problem of public prosecutors who are contributing to the delays by their own ineffectiveness; or unnecessarily long decisions and reasonings by the judges, as well as advocates, which were mentioned by both Slovak interviewees, and which lengthen the proceedings. Bradáč stated: "Formerly, four-page decisions were sufficient; today not even twenty is enough". According to Svák, the blame is

[99] Schwab, Klaus, Xavier Sala-i-Martin, and Borge Brende. *The Global Competitiveness Report 2012-2013: Full Data Edition, published by the World Economic Forum.* (Geneva: World Economic Forum, 2013)
[100] Both countries are among the top three countries in the EU in the number of Judges (per 100.000 inhabitants) according to the CEPEJ study.
[101] The Council of Europe Commission for the Evaluation of the Efficiency of Justice. "Evaluation of European Judicial Systems." 2012; see: Fig.9.12., at 184.

mainly on the side of advocates who have to prove themselves to their clients, hence creating overly elaborated statements that judges have to reply to. On the part of judges Svák explained it as their effort to justify their importance.

Of the socialist legacies that prolong the proceedings, all of the respondents agreed that avoiding the responsibility for final decisions is very common among the judges, manifested through excessive formalism or positivism. As Kühn put it: "[legal formalism] has its origin in communism, (…), judges attempted not to be entangled with the values of the communist regime; and because they could not decide on the merits, they had to shift to the form"; and the very same applies to the positivism. As Wagnerová argued it has been present in the Czech Republic, especially in the higher echelons of the hierarchy leading to such situations where a younger, lower court judge decided fairly, yet not as elaborated as the judge at the court of appeal, who by the use of "formalist pettifoggery" decided badly. All of them also agreed that the delays are caused by the overuse of appeals and the fact that higher court judges regularly dismiss these cases in order to avoid responsibility. Contrarily, Svák explained it as a simple "laziness" on the part of judges and not as a legacy of the socialism. The question remains whether it is truly not a legacy, considering that during socialism the judicial positions attracted not necessarily the best legal professionals, as the job was rather non-lucrative, enjoying minimal authority, thus creating a bureaucratic perception of judges by the public, as well as by themselves.

2.4.2. Dimension of democratic self-administration

In addition to the legacies observable in the decision-making of the judges, there are certain implications resulting from the changing statuses of the judiciaries. During the communist regime the judiciary was completely dependent on the government, and the change to democracy required a paradigmatic change, as Wagnerová noted, because their

position considerably changed and the judiciary became responsible for many matters regarding its administration.

Problems in this dimension are mainly present in Slovakia. The Czech trouble is rather opposite to the self-administration, as was pointed out by Kühn. According to him, the ministry has too broad powers over the judiciary and in the case when the minister is "assertive or aggressive" can influence quite a lot, which is currently not the case. In Slovakia, as the Open Society Foundation's report discusses, one can find, for instance: the politicization and polarization of the judiciary; the abuse of arbitrary disciplinary proceedings against the opponents of the president of the Supreme Court, some of which were "in conflict with the internationally accepted standards regarding the independence of the judiciary";[102] and the fact that approximately 700 judges filed a lawsuit against the state on the basis of wage discrimination, which were organized by senior judges supported by the President of the Supreme Court Štefan Harabin.[103] There are also several very recent controversies, such as non-appointment of the judges elected during Radičová's government by the body of judicial self-administration,[104] or revealed manipulation with the court's work plan by the president of the regional court in Bratislava, Helena Kožíková.[105] In addition, the judiciary is considered as absolutely closed to any outside influence creating a state, which was eloquently labeled by the Slovak constitutional lawyer Radoslav Procházka as "autism of the Slovak judiciary" referring to the fact that this branch communicates with the world outside of its borders less than other jurisdictions.[106]

[102] Ibid. 117, for a more elaborated discussion see: Ibid., 99-106,
[103] Ibid. 110
[104] For further information see, for example: Tódová, Monika. "SME.sk." *Súdna rada vyberá iba sudcov, čo uspeli až po voľbách [The Judicial Council selects only judges, who succeeded after the elections].* November 20, 2012. http://www.sme.sk
[105] For further information see, for example: Prušová, Veronika. "SME.sk." *Šéfka súdu pomohla náhode aj pri pridelení Harabinovej žaloby [The Chief of the Court helped the luck in assigning Harabin's lawsuit].* May 5, 2013. http://www.sme.sk
[106] Procházka, Radoslav. "Autizmus slovenskej justície" In *Výzvy slovenského súdnictva a možnosti zlepšenia existujúceho stavu.* by Transparency International Slovensko. (Bratislava: Transparency International Slovensko, 2010), 14-19.

These, like the previously discussed problems, have their roots in socialism. According to Alexander Bröstl, the former judge of the Slovak Constitutional Court and ex-member of the Judicial Council: "nowadays, at the courts, the generation of about 50-years old dominates. Their mentality, stereotypes, as well as education did not change".[107] He also emphasizes that the required paradigmatic shift, to the idea that state should protect its citizens and does not serve itself, has not happened yet. According to Bradáč this is traceable to the role that law had in socialism, and the fact it was interpreted by the political elites that subsequently enforced their interpretation upon the judges. In a democracy such a pattern of behavior implies that judges may be manipulated by powerful actors, eventually from within the judiciary. These legacies later even strengthened after the breakdown of communism at the beginning of democratic regimes in both countries. In the judiciary, according to three out of four interviewees, corporatist tendencies prevailed. According to Svák, the judges quickly realized that democracy means money, and they started to jointly ask for the improvement of their financial situation. This was also extensively discussed by Bradáč when he argues that in the Association of Judges of Slovakia has always existed a group of people with their primary focus on the financial aspects of the independence, who benefited from a broader call for more democracy for the judiciary pursued by the Association in the 1990s. According to him, this corporatist branch started to dominate approximately in the mid-2000s, lost its democratic ethos and caused the "revitalization of the old culture". Wagnerová also talks about corporatism when she claims that the general attitude in the judiciary, at the time of democratization of the judiciary, was to minimize the effect of lustrations and to avoid any purge. Such attitude was, as Wagnerová said, based on a "fake collegiality", and the general criticism resulted in the "encapsulation of the judiciary". As discussed, judicial corporatism is

[107] Hanus, Martin. ".týždeň." *Dominujú ľudia so zlou mentalitou: Interview with Alexander Brostl.* October 21, 2012. http://www.tyzden.sk

not directly a socialist legacy, but is rather a consequence of the little prestige the judiciary positions enjoyed in socialism and at the beginning of democratic regimes.

Such corporatist attitudes 'helped' in the departure of the judiciary from the society and contributed to its separation. Another factor that played a role here was described by Kühn and Bradáč. They claim that it is possible that certain informal structures developed as a consequence of the career-model of the judiciary, where the fresh graduates come right to the courts, and once they become judges they are judges for life. Especially if there existed a situation when the court presidents decided about the selection of the new judges, and perhaps when the court presidents had the right to grant bonuses and other material benefits. With regard to the selection of judges, Bradáč claims, such procedures allowed the judges to provide for their children, possible law graduates, and ensure they will have comparably comfortable life. As Kühn pointed out, these are the conditions favorable for the rise of informal structures, but claims this was not the case during the communism as a judicial career lacked prestige and financial benefits. In addition, as Wagnerová noted, both the Czech Republic and Slovakia are rather small countries where people know each other from their studies, which also favors the existence of informal structures, not only among the judges but also in their connections with advocates, prosecutors or notaries.

To clarify the connection between these patterns of behavior and the observed problems of the judiciary it is necessary to realize that the judges were used to exercise somebody else's will, what Bradáč labeled as "crooked personalities" of the judges after the breakdown of the old regime. This mass was hence in its substance manipulable, and therefore if someone was able to promise them personal benefits, in the form of higher salaries and prospective careers for the members of their families, the system was able to produce an informal network of personal loyalties that punishes outliers, such as critics or those who try to change the existing practices. According to the interviews, the judiciary in both countries

had tendencies for the creation of informal networks, which, if given power, may become dangerous for the rest of the polity. Also, it is important to note that any power, if it lacks accountability, may become encapsulated promoting mainly its own interests.

2.4.3. On the Effect of the Regime Change on the Judiciaries

In order to control the effect of these legacies in judicial behavior it is necessary to briefly discuss the change caused by the lustration laws on the judiciary personnel, and also the overall change. This issue has been researched insufficiently in the Czech Republic and Slovakia, hence there is a lack of comparable and reliable data.

Between the breakdown of communism and the separation of Czechoslovakia approximately one third of the Czech judges, 484 out of 1,460, left the judiciary.[108] According to the interview with Wagnerová, in the year 2000 it could have been around 40% of them, now it can be about 50%, but these numbers are just estimates. However, it is difficult to assess the effect of the lustration laws, because many judges left the judiciary for more lucrative jobs as advocates, retired or left for other legal professions. According to Kühn, only marginal part of the judicial personnel collaborated with the secret police, hence the effect of the lustration laws was minimal. In addition, Wagnerová also stated: "a lot of judges left, because they were aware of the new mechanisms of re-nomination. Those who made decisions in some well-known cases mostly left. But as a matter of fact, some remained too". According to Svák and Bradáč, the lustrations had only minimal impact on the judiciary in Slovakia. Bradáč claimed that at the time of the approval of the law he had expected a radical change on the courts, but nothing remarkable happened. For that reason he assumes that there were rather informal tools of the influence over the judges. There is a disagreement between the two Slovak respondents, whereas Ján Svák claims that the change could had

[108] Wagnerová, Eliška. "Position of Judges in the Czech Republic." In *Systems of Justice in Transition: Central European Experiences Since 1989*, ed. Jiří Přibáň, Pauline Roberts and James Young. (Aldershot: Ashgate Publishing Limited, 2003), 163-179.

been as large as in the Czech counterpart, about 40% in the year 2000; Ľudovít Bradáč thinks that it was rather smaller but did not specify his estimate.

Interestingly, Kühn warns that these numbers are not that important; partly for the reasons discussed earlier in this chapter such as the transfer of practices from the senior judges on the younger ones (hence preserving the legacies), and also for a reason that "the picture that someone who graduated from the Faculty of Law in 1988 is significantly the different from someone who graduated in 1992 is naïve. After all, they were taught by the very same people." Based on this it can be argued that to whatever extent the change of the regime changed the composition of the judiciary, the patterns of behavior persisted in the democracy, preserved also by the fact that most of the senior judges, and judges from the higher echelons were the judges from the communist era; or simply, as Eliška Wagnerová put it regarding the hierarchy of the judges: "the higher, the worse". Therefore, it can be argued that if political elites had aimed their efforts on the change in the highest echelons of judiciaries they may had fasten the necessary mental change. If this was true, than the Czech judiciary would have been more successful in achieving this mental shift as, for example, Eliška Wagnerová was appointed to the position of the president of the Supreme Court quite quickly after her return from emigration.

3. INSTITUTIONAL INDEPENDENCE OF JUDICIARY: THE CZECH AND THE SLOVAK PATH

The objective of this chapter is to provide a comprehensive overview of development of judiciary independence in Czechoslovakia and subsequently in independent Czech Republic and Slovakia, in order to understand different paths taken by the countries. Judiciary independence is analyzed with a respect to four crucial questions: *who elects and appoints judges?; who has the power to remove a judge from the office?; who has the power to initiate a disciplinary hearing of a judge, and who conducts that hearing?; and, who has the power to decide about the promotion of judges, including appointment and dismissal of presidents and vice-presidents of the courts?* To assess the extent to which the judiciaries decide independently about its matters, and who is the judiciary personnel accountable to – for matters such as poor decision-making or inappropriate behavior – a legal textual analysis of the passed legislation was conducted.[109] With regard to the role the EU integration played in consolidation of democracy and creation of proper institutional framework in candidate countries, as was discussed in Chapter 1 it can be hypothesized that *Slovakia, with the vision of smooth integration, and in order to proof itself as a trustworthy candidate for the EU accession established a greater institutional independence than the Czech counterpart*.

The overview of the legislative changes is divided into five parts, each looking at a different period in the development of Czech and Slovak Republic. Firstly, the institutional setup in socialist Czechoslovakia will be examined to provide a baseline for changes that came after the breakdown of regime in 1989. Further changes that took place in already

[109] Certainly, there are several possible shortcoming of the question selection. In order to assess judiciary independence as a whole one also needs to examine how courts are financed, what is the salary of judges and who has the right to change it, and what is the general practice in administration of courts. Also, another crucial matter is the education of judges, who makes decisions about the content and questions such as who is going to teach and who is going to attend.

democratic federation until the separation in 1993, will be examined, followed by a discussion of development in "transitional period" until 1998, when most of the institutions were created or re-created.[110] During this period, Czech Republic was considered to be a country undoubtedly heading towards democracy, while Slovakia got stuck somewhere in a "grey zone" and the future of its democracy was blurred. Despite the difference, both countries managed to access the EU in 2004, and exactly the period of EU integration – 1998-2004 – will be the fourth examined period and the one that will receive the most attention. Afterwards, the chapter looks at the changes in judiciary independence that took place after the countries became members of the EU until the end of 2012. The overview is quite detailed in order to identify how and when the powers over the discussed issues were transferred from political elites to judiciary (possibly vice-versa) as their scope and timing are crucial for understanding of how countries coped with socialist legacies, or whether they actually reinforced them and under what conditions institutions of judiciary independence were established.

3.1. Judiciary in the communist era

In this period, the process of selection and appointment of judges was highly politicized with major powers resting in the hands of political elites, especially the Minister of Justice, although with a democratic façade as the judges of local courts were elected by citizens of a municipality.[111] Since 1957 the law required a judge to be "loyal to popular democratic regime" hence legally ensured that only reliable judges can hold the office.[112] The 1960 Constitution established that judges of the Supreme Court were elected by National Assembly, judges of regional courts were elected by regional popular boards (krajský národní

[110] The demarcation line is drawn in the year of elections in both countries when governments of Václav Klaus and Vladimír Mečiar finished their terms in office.
[111] The Czechoslovak Constitutional Act no. 64/1952 Coll., on courts and procuracy of Oct 30, 1952
[112] The Czechoslovak Parliamentary Act 36/1957 Coll. on the election of popular judges of popular and regional courts of Jul 4, 1957

výbory), and judges of local courts by citizens *for a 4-year term*.[113] Candidates for the position of a professional judge were proposed by the Minister of Justice and they pledged to popular boards – local or regional, or in case of Supreme Court judges to the President of National Assembly.[114] After Czechoslovakia became a federation in 1968, there was even a short period of time, when judges were elected by Federal Assembly,[115] which remained the same afterwards, but only for the judges of Federal Supreme Court, while local, regional and national (Czech and Slovak) courts fell under the influence of local, regional and national governments [116]. The tenure was extended from four to ten years which also affected the independence of judges, as in order to be re-elected by political bodies they had to act reliably within the boundaries demarcated by the Party. Of course, one may argue that there were judges elected by the people, hence more democratically than is the current practice all around the world, but it needs to be remarked that these elections; as Kühn argued in the interview; just as any other elections in the communist world, did not offer any real options [117]. Moreover, even in the Assembly there was no discussion, as Kühn shows, and the judges were elected unanimously.[118]

No matter how seemingly democratic the election and appointment of judges was, the rules of judges' removal further strengthened the influence the political elites had. In Czechoslovak judiciary there was a rule that 'who has the power to appoint can dismiss', which threatened independence of the judges, especially after the 1957 *Act on election of*

[113] The Constitution of Czechoslovak Socialist Republic, 100/1960 Coll. of Jul 11, 1960
[114] The Czechoslovak Parliamentary Act on the organization of courts, 62/1961 Coll. of Jun 26 1961
[115] The Constitution of Czechoslovak Socialist Republic, 100/1960 Coll. of Jul 11, 1960
[116] The Czechoslovak Parliamentary Act 36/1964 on organization of courts and election of judges, as amended by the act 156/1969 Coll. of Dec 17, 1969
[117] To the contrary, Svák in the interview claimed that lower level judges were truly selected by popular boards without any pressure from the highest-ranks of the Party. However, he admitted that one reason for that was that they did not really matter much, as they could have been circumvented by the presidents of courts was the case in any sense important.
[118] Kühn, Zdeněk. "Socialistická justice". In *Komunistické právo v Československu: Kapitoly z dějin bezpráví*, ed. M. Bobek, P. Molek and V. Šimíček. (Brno: Masarykova Univerziza, 2009), 834-835.

popular judges introduced the requirement of loyalty to the regime.[119] Basically any misappropriation to the official policy may have led to immediate removal from the office, which may had been initiated also by Minister, so this way executive could influence composition of the judiciary. In addition, in 1968 after the Prague Spring, for a short period of time the power to remove judges rested in hands of the Federal Assembly, so it can be assumed that this power was used to "normalize" judiciary and to get rid of judges that collaborated with the more pro-democratic forces.

While appointment and removal of judges was mainly under the direct influence of political elites, arrangements of disciplinary proceedings gave the most powers to the courts' presidents, who were the most loyal of the judges. Disciplinary courts or senates were established on regional and higher courts, whereby the composition of the senates was highly dependent on the will of courts' presidents. The 1957 *Act on disciplinary liability of judge*s introduced that disciplinary senates consisted of the President of the court and two other judges, also selected by the President. This was changed in 1961 when the president was no longer a member of the senate; however he or she was the one who selected judges for the senate. Higher courts were responsible for deciding about judges from lower courts and in the hierarchy the Supreme court stood the highest – it was not possible to appeal after the Supreme court's decision. Minister and courtpresidents had the right to submit a proposal for disciplinary hearing.[120] The federal arrangement changed the process only in the sense that it separated jurisdiction of national ministers from the jurisdiction of federal minister, however

[119] The Czechoslovak Parliamentary Act 36/1957 Coll. on the election of popular judges of popular and regional courts of Jul 4, 1957; The Czechoslovak Parliamentary Act 36/1957 Coll. on the election of popular judges of popular and regional courts of Jul 4, 1957; The Czechoslovak Parliamentary Act 36/1964 on organization of courts and election of judges, as amended by the act 156/1969 Coll. of Dec 17, 1969; and The Czechoslovak Parliamentary Act 36/1964 on organization of courts and election of judges, as amended by the act 156/1969 Coll. of Dec 17, 1969

[120] The Czechoslovak Parliamentary Act on the disciplinary liability of professional judges, 142/1961 Coll. of Nov 29, 1961

the formal supremacy of court presidents remained.[121] Such a voluntary surrender of power can be explained also by the fact that disciplinary proceedings were not that crucial for a regime in order to sustain its power, as it held guarantees of loyalty through appointment and removal procedure.

The power to promote, appoint and dismiss presidents and vice-presidents of courts also lied in the hands of political elites. Presidents were established by local, regional or national parliaments and the power to dismiss them belonged to those that had the power to appoint.[122] The 1969 amendment slightly changed the rules as presidents of Federal and national Supreme courts were elected by federal and national parliaments respectively, and presidents of local and regional courts were appointed by national ministers.[123]

3.2. Czechoslovak judiciary after the "Velvet revolution"

Since 1991 the *life tenure* of judges was established. Judges of the Federal Supreme Court were appointed by the President of Czech and Slovak Federal Republic upon nomination of the President of the Supreme Court.[124] National ministers of justice kept their power as the Supreme Court's President's proposal had to be discussed with both national governments. Moreover, ministers remained their powers in appointing judges of the national supreme courts, as they had the right to propose candidates that were elected by national parliaments.

In the matters of the judges' removal, the powers of executive were restricted as a removal became possible only by a decision of the disciplinary court. However, the right to decide about a suspension of a judge rested in hands of the body that was responsible for

[121] The Czechoslovak Parliamentary Act 142/1961 on the disciplinary liability of professional judges, as amended by the act 157/1969 Coll. of Dec 18, 1969
[122] The Czechoslovak Parliamentary Act on the organization of courts, 62/1961 Coll. of Jun 26 1961
[123] The Czechoslovak Parliamentary Act 36/1964 on organization of courts and election of judges, as amended by the act 156/1969 Coll. of Dec 17, 1969
[124] The Czechoslovak Parliamentary Act on the judges and courts, 335/1991 Coll. of Jul 19, 1991

appointment and this way executive remained considerable powers. In addition, according to §67 of the aforementioned Act, a proposal for removal of a judge could have been submitted against a judge that between 1948 and 1989 had not acted as an independent judge or unjustifiably intervened in independent decisions of courts. This clause allowed executive to hold accountable judges for their past misconduct.[125]

Disciplinary proceedings remained formally under the influence of presidents of the courts, as it was them who appointed members of disciplinary senates that were created at regional, national and federal courts. The federal court decided only about the judges of the court, while national Supreme courts held the main power in each of the parts of the federation. The proposal for disciplinary hearing could have been submitted by courts' presidents and ministers of justice of Czech and Slovak Republic.[126]

The power to promote judges remained in the hands of political elites. It was the President of republic who appointed the President of Federal Supreme Court, and there were presidiums of national parliaments who had the right to appoint president and vice-president of national supreme courts. Presidents of local and regional courts were appointed by the ministers.[127]

3.3. Judiciary after separation: transition period (1993-1998)

In this period executives remained strong in the matters of judiciary personnel, yet indeed much weaker than they used to be during the communism. Czech model can be labeled as a model with central role of Ministry of Justice, whereas in Slovakia a wider variety of actors, including councils of judges, played their part. However, the most significant difference between the countries was the requirement of reelection of judges.

[125] As was argued earlier in Chapter 2, the effect of such a clause was marginal, and the judges that left the judiciary did so mainly because of material benefits offered by advocate practice.
[126] The Czechoslovak Parliamentary Act 412/1991 Coll. on the disciplinary liability of judges of Sep 27, 1991
[127] The Czechoslovak Parliamentary Act on the judges and courts, 335/1991 Coll. of Jul 19, 1991

In both countries a critical role in the appointment of judges was played by governments through the Minister of Justice, while court presidents also had some say in the process, mainly in Czech Republic; and councils of judges in Slovakia. In Czech Republic, since the 1993 Constitution, judges have enjoyed life tenure, and were been appointed by President of the Czech Republic upon nomination by the Minister of Justice.[128] An important role is played also by the presidents of courts, as at the time of appointment judges are assigned to the courts, which is not possible without president's consent.[129]

In Slovakia, after the break-up of Czechoslovakia, the appointment of judges was highly politicized as judges were elected by National Council upon nomination by the government for a *four year term* and only after reelection the tenure was not limited.[130] In addition, in 1995 councils of judges were created at regional (krajské) and Supreme (Najvyšší) courts, while there also existed The Council of judges of Slovak Republic, consisting of presidents and vice-presidents of courts that could have commented on candidates for judges of the Supreme Court and for judges elected for an office at an international organization.[131]

With regard to the removal of judges, no major changes were made in neither of the countries, as removal of judges was dependent on the result of disciplinary proceedings or a perpetrated / sentenced criminal offence. The major difference between the countries was that in Slovakia, executive remained its strong powers as it was necessary for a judge to be reelected after initial four years in the office.

Disciplinary hearings in the Czech Republic had been administered by the judges themselves at High and Supreme Court while the Minister and presidents of courts had the

[128] The Constitution of the Czech Republic, Act. 1/1993 of Dec 16, 1992
[129] Also, it is important to note that in addition to Supreme (Nejvyšší), regional (krajskí) and local (okresní) courts the Constitution introduces also High (vrchní) courts standing one step below the Supreme court, and also Supreme Administrative Court
[130] The Constitution of the Slovak Republic, Act 420/1992 Coll. of Sep 1, 1992
[131] The Slovak Parliamentary Act 335/1991 Coll. on the judges and courts, as amended by the act 307/1995 Coll. of Dec 14, 1995

power to initiate a hearing.[132] Slovak arrangement was very similar to the Czech one, as disciplinary hearings were held at courts by judges and initiated similarly to the Czech counterpart.[133]

The President and the vice-president of the Czech Supreme Court were appointed by the President of the Czech Republic while the power to appoint all other court presidents belonged to the Minister of Justice.[134] In Slovakia the President of the Supreme Court was elected by National Council for a five year term with maximum of two consecutive terms while other appointments of judicial officials remained in the hands of the Minister.[135] Also, powers of judiciary self-administration were strengthened in Slovakia by the 1995 amendment, as councils of judges had the right to comment on the promotion matters.[136]

3.4. EU Integration Period (1999 – 2004): Time of the reform attempts

The judicial independence was one of the essential conditions for the accession to the EU, which created a strong incentive for both countries to reform judiciaries; however these were supposedly stronger in Slovakia that after Mečiar's government needed to proof itself as a trustworthy candidate for the integration and hence went through a much more radical change transferring basically all the analyzed powers to the newly created Judicial Council, which significantly separated the judiciary from other branches of power.

In both countries there were attempts for a high scale reforms in judiciary, however the reform was successful only in Slovakia where the Judicial Council of Slovak Republic

[132] The Czechoslovak Parliamentary Act 412/1991 Coll. on the disciplinary liability of judges, as amended by the Czech Parliamentary Act 22/1993 of Dec 21, 1992
[133] The Slovak Parliamentary Act 335/1991 Coll. on the judges and courts, as amended by the act 307/1995 Coll. of Dec 14, 1995, §2(1)
[134] The Czechechoslovak Parliamentary Act 335/1991 on the judges and the courts, as amended by the Czech Parliamentary Act 17/1993 of Dec 21, 1992
[135] The Constitution of the Slovak Republic, Act 420/1992 Coll. of Sep 1, 1992
[136] The Slovak Parliamentary Act 335/1991 Coll. on the judges and courts, as amended by the act 307/1995 Coll. of Dec 14, 1995

was created in 2001.[137] The Judicial Council of Slovak Republic consists of 17 members and the President of the council, who is at the same time President of the Supreme Court. Of these 17 members 8 are elected by judges themselves while 3 are appointed by the President of the Slovak Republic, 3 are appointed by the government and 3 are elected by the parliament. Seemingly, members elected by judges have a majority in the council, however if President, government and parliament cooperate they can shift the balance. Moreover, members appointed by President and government, and those elected by the parliament are not required to be judges, but can come from advocacy, academy and so on, however they are not required to be non-judges either.

In the Czech counterpart, there was an attempt for a high scale reform in 2000 initiated by the Minister of Justice Otakar Motejl. The Supreme Council of the Judiciary was supposed to consist of 16 members – 8 judges and 8 members from other legal professions. From the 8 members from the judiciary, one was supposed to be the President of the Supreme Court and the remaining 7 were supposed to be elected by judges. Eight non-judicial members were supposed to be elected by both chambers of the parliament upon nomination by professional association of attorneys, notaries and by faculties of Law. If the council had been established it would have had considerable powers regarding selection and assignment of judges, their removal, disciplinary proceedings and also promotion of judges. All of the court presidents were supposed to be chosen by the council and only the president of the Supreme Court was supposed to be appointed by somebody else – the President of the republic, but selected by the council. The proposal also contained an idea of councils of

[137] The Constitution of the Slovak Republic 460/1992 Coll., as amended by the Slovak Constitutional Act 90/2001 Coll. of Feb 23, 2001, Article 141a; and The Slovak Parliamentary Act 185/2002 Coll. on the Judicial Council of Slovak Republic of Apr 11, 2002

judges that had already been present in Slovakia since 1995, but these were established only in 2002.[138]

Judges have been appointed by the president for life tenure upon nomination by the minister and also people outside of judiciary have been eligible for the office if they had previous experience with another legal profession, including academia. In addition, in 2002 the Supreme Administrative Court was finally created, even though it has been part of the judicial system since the 1993 Constitution.[139] Because of the creation of councils of judges the position of court presidents weakened, while the Ministry of Justice remained its powers.

In Slovakia, until the creation of the Judicial Council, political elites had kept considerable powers with regard to the judiciary personnel, as judges were elected by the National Council for a four-year term, and after that, upon nomination of the government for life tenure.[140] However, it is important to mention that there was no selection procedure if there was an aspirant (previously working on the court) for the vacant procedure. But, after the 2001 Constitutional Amendment the Judicial Council gained the power to elect judges which were subsequently appointed by the president of the Slovak Republic for life tenure. The Council started also to be in charge of defining guidelines for the selection of judges and this way the council got a central position in the selection and appointment of judges.[141]

The power to remove judges in both countries formally rested in hands of the minister, but the scope of this power was restricted only to enumerated cases such as criminal conduct and lawful judgment of a disciplinary court. With these arrangements the judges have been well protected from capriciousness of the government officials, although in Slovakia until 2001 judges were subject to reelection. The creation of the Judicial Council

[138] The Czech Parliamentary Act 6/2002 Coll. on the judges and the courts of Nov 30, 2001
[139] The Czech Parliamentary Act 150/2002 Coll., the administrative judicial order of Mar 21, 2002
[140] The Slovak Parliamentary Act 385/2000 Coll. on the judges and associates of Oct 5, 2000
[141] The Constitution of the Slovak Republic 460/1992 Coll., as amended by the Slovak Constitutional Act 90/2001 Coll. of Feb 23, 2001

transferred these powers to the hands of the president of the Council and marginalized the role of government officials in these matters.

With regard to disciplinary hearings, the Czech judiciary did not go through such a radical change as the Slovak one, therefore hearings were conducted by High courts of Prague and Olomouc, while the Supreme Court served as a court of appeal. Slovakia, on the other hand, because of creation of the Judicial Council, went through a significant change as the council became a body responsible for the creation of disciplinary senates, consisting of three judges elected by the council upon nomination by relevant council of judges, minister and National Council. Before 2002 the Supreme Court served as a disciplinary court and its members were elected by the Council of Judges of the Slovak Republic from all the three levels, whereas in case of appeal, the court consisted only of Supreme Court judges.

Also in the matter of the judges' promotion the countries separated, as in Czech Republic the presidents and vice-presidents of courts had been appointed by the president of the Czech Republic - in case of presidents of Supreme Court and Supreme Administrative Court -, and by the minister in all other cases. In this period there existed a rule that who appoints has also the right to dismiss, but this was later changed by the Constitutional court, but until that, the executive branch remained formally very strong in the matters of promotion of judges. The President of Slovak Supreme Court has been since the reform elected by the Judicial Council as he is at the same time the president of this council, and has been formally appointed by the President of the Slovak Republic for a 5-year term. All the other court presidents are selected by the Judicial Council too, and appointed by the minister for a 5-year term. The selection of presidents has been conducted by a committee consisting of two members appointed by the council of judges of the court in question, one member nominated by the Judicial Council, one member nominated by the Ministry and the president of a higher court. In addition, presidents of courts can be dismissed by the minister based on his/her

decision, or based on the proposal submitted by the Judicial council, councils of judges or presidents of higher courts.

3.5. Judiciary since the EU accession

After both countries successfully entered the European Union on May 1st 2004 the changes in the judiciary became less frequent and less radical. In Slovakia in 2011 the Minister of Justice Lucia Žitňanská proposed an amendment changing the composition of committees responsible for testing and selecting judges shifting the majority in favor of politically nominated members, and introduced a selection procedure for every emptied seat – hence they cannot be filled by aspirants anymore.[142] Since the 2012 Constitutional Court decision the President of Slovak Republic has the power not to appoint a candidate elected by the Judicial Council and the same decision granted him the power to dismiss judges and court presidents.[143]

With regard to disciplinary procedures both countries made noteworthy changes since the EU accession. In the Czech Republic the power to conduct disciplinary hearings was transferred to the Supreme Administrative Court, and is exercised by judges appointed by the president of the court granting this person a crucial role in disciplinary procedures.[144] According to Eliška Wagnerová, it is mainly thanks to Josef Baxa, the president of the court

[142] The Slovak Parliamentary Act 385/2000 Coll. on the judges and associates, as amendedy by the Act 467/2011 Coll. of Nov 29, 2011; After the fall of Radičová's government the Judicial Council refused to nominate judges elected in the period between the fall of the old government and appointment of the new one, hence they have not been appointed by the President yet.

[143] Resolution of the Constitutional Court of Slovak Republic, PL. ÚS 4/2012-77 of Oct 24, 2012; The court decided on the case of not appointing the General Attorney elected by the parliament vaguely arguing that the president may not appoint a candidate if there is a serious concern about the candidate's ability to exercise powers in such a manner that would not harm the authority of the Office. These reasons shall not be arbitrary; nevertheless the decision never specifies what is meant by "arbitrary". Appointment of the General Attorney can be found together with appointment of judges and presidents and vice-presidents of courts in Article 102, (1): t of the Constitution.

[144] The Czech Parliamentary Act 6/2002 Coll. on the courts and judges, as amended by the Act 314/2008 Coll. of Jul 16, 2008

that the court performs satisfactory, hence it can be claimed that the success is rather a matter of contingency than a well-working mechanism.[145]

In Slovakia after the EU accession disciplinary procedures became more open to the control from the outside of the judiciary. Since 2011 disciplinary senates have to consist of two judges and one non-judge, and the senates of appeal have to consist of three judges and two non-judicial members. These members are elected by the Judicial Council upon nomination by councils of judges, minister and the parliament, and each senate must consist of members nominated by each of the bodies.[146] Unlike in the Czech Republic where the composition of disciplinary senates rests mainly in the hands of the president of the Supreme Administrative Court, the amendment in Slovakia weakened the position of judiciary in the process and introduced a rather mixed model where the dominance of political nominees is counterweighted by senate members elected by councils of judges.

In the matters of appointment of judges to the positions of presidents and vice-presidents of courts Constitutional Courts played a significant role in both countries in this period. While in Czech Republic the court diminished the power of executive by the decision that presidents of courts cannot be dismissed by those who appointed them in order for ideals of the separation of powers and independence of the judiciary to be respected.[147] On the other hand it is possible to interpret the previously discussed decision of the Slovak Constitutional Court as granting considerable powers to the president of the republic.

3.6. Evaluation of findings

In two parts of former Czechoslovakia there can be observed two different paths in establishing institutions of the judiciary independence. On one hand, the Czech Republic

[145] Interview with Eliška Wagnerová, April 8 2013
[146] The Slovak Parliamentary Act 385/2000 Coll. on the judges and associates, as amendedy by the Act 467/2011 Coll. of Nov 29, 2011
[147] Resolution of the Czech Constitutional Court, 397/2006 Coll. of Jul 11, 2006

moves steadily and gradually towards higher independence with a few significant changes and with the central role of Ministry of Justice, while on the other, we can see Slovak turbulent development with decrease in the independence in the early years, through radical change of establishing the Judicial Council responsible for all personnel decisions, to empowering ministry again, as can be seen in Table 1.

	Appointment	Removal	Disciplining	Promotion
	Czechoslovakia			
1989	Political elites – ministers of justice	Restricted tenure + political elites	Court presidents	Political elites – parliaments on all levels
1993	Ministers of justice + court presidents	Restricted scope - political elites	Court presidents	Political elites – ministers
	Czech Republic			
1998	Minister + court presidents	minister	Courts	Political elites – minister
2004	Minister + court presidents / councils of judges	minister	Courts	Political elites – minister
2013	Minister + court presidents / councils of judges	minister	Supreme Administrative Court – president of the court	Political elites – minister
	Slovak Republic			
1998	Political elites	**Restricted tenure (!!!)**– parliament	Courts	Political elites – minister
2004	Judicial Council	Judicial Council	Judicial Council	Judicial Council / minister
2013	Judicial Council + political elites	Judicial Council	Judicial Council + political elites	Judicial Council

Table 1: An overview of who played the central role in selected matters – Czechoslovakia (1989-2013)

As was hypothesized earlier in this Chapter, Slovakia established a greater institutional independence than the Czech counterpart and did so in the period that preceded its EU accession. In addition, it is also important to evaluate these changes with regard to definitions and guidelines for establishing judiciary independence discussed in section 1.4. In at the time of EU accession all of the four examined powers were in the hands of the Council consisting of a majority of judges, hence in accordance with the guidelines provided by the European Association of Judges, the most specific of documents providing any

recommendations on how to secure independence of the judiciary. Contrariwise, in the Czech Republic only one of the four powers – disciplinary hearings – was handled solely within judiciary itself, whereas political elites remained their powers in appointment, removal and promotion of judges. If the Czech attempt for the introduction of the Supreme Council of the Judiciary succeeded, the Czech Republic would also meet the criteria for judiciary independence as suggested by the aforementioned organizations.

Even though the Czech Republic did not transfer most of the powers to a council, there are significant differences between the two proposed models of councils and each of them interacts with the context differently. If we accept that the socialist legacies in judicial behavior persist even after more than 20 years since the breakdown of the communism, it is important to assure that judges will not have clear majority in the council, and will be counterweighted by members from other legal professions. In this aspect the two proposed models are significantly different. The Czech model ensures the council consists of as many judges as of members from other legal professions, and in addition creates favorable conditions for a variance among these members as advocates, prosecutors and law faculties were eligible to nominate them. Contrarily, the Slovak model does not secure a balance between judicial and non-judicial members, in that 9 out of 18 members are judges, but possibly all of the members can come from the judiciary, depending on the will of political elites. As was argued by Ján Svák, the former member of the Judicial Council, at the time of his term (2002-2007) a vast majority of politically nominated members of the council came from other legal professions.[148] This ensured a wider discussion where judges are confronted with people least influenced by the legacies, possibly even aware of them, bringing them to attention, and counterbalancing them. This was later changed when in 2007 the government of Robert Fico, in coalition with Vladimír Mečiar; the parliament and the president Ivan

[148] Interview with Ján Svák, May 2 2013

Gašparovič elected or appointed such members that the bulk of them were judges creating a judges-dominated decision-making about the judiciary's affairs. This led to the election of Štefan Harabin, Mečiar's nominee for the ministerial position, to the position of the president of the Supreme Court.[149] Hence, it can be argued that the unbalanced composition of the council, in conjunction with the political will of Fico's government, allowed judges to become a clear majority in this body and led to the prevalence of corporatist behavior. Because of that the judiciary became encapsulated, attempting to protect the benefits of the judiciary, while fighting the openness and eventual criticism, as was discussed in the section 2.4..

[149] Štefan Harabin was elected by the Judicial Council in June 2009 when 15 out of 17 members of the council voted for him. At the same time he was still a minister, dismissed from the ministerial position and appointed to the presidency of the Supreme court just one day after the elections by the president Ivan Gašparovič. Hence, he was elected by a vast majority of the judges despite several controversies regarding his functioning both as a judge and as a minister. For further information see: www.cervenapreharabina.sk

4. WHY DIFFERENT PATHS? THE SUCCESS AND THE FAILURE OF THE COUNCIL MODEL

The analysis and evaluation of the legislative changes in Chapter 3 identified the crucial changes that had led to the establishment of different models of the administration of judiciary. On the one hand, the Czech attempt for the creation of a council failed; on the other, Slovakia successfully enacted legislation that introduced the Council. However, a question remains: why did the countries act differently in the time of the EU accession? This chapter will try to evaluate the hypothesis that *Slovak legislators used the power of Europeanization much more than the Czech elites, because of the controversial experience with Mečiar's government, which caused exclusion of Slovakia from the democratic community*. For that purpose, this chapter provides in-depth qualitative analysis of parliamentary negotiations regarding the creation of the Council: the unsuccessful reform introducing The Supreme Council of the Judiciary in the Czech Republic; and the Slovak Constitutional Act 90/2001 that besides other crucial changes introduced the Judicial Council of the Slovak Republic. Besides the analysis of reasons for proposing these reforms, also the debate about the composition of the council will be discussed as the previous chapters showed that this aspect can make a difference in the actual functioning of the council. The focus is placed on the question how did different political groups perceive the issue and what model did they propose. For this matter, it is also important to explain what political parties governed in both countries at the time, and also what parties were in opposition.

In the Czech Republic the governing party was Czech Social Democratic Party (ČSSD) that ruled with the support of the Civic Democratic Party (ODS) as a minority government in the period of the "opposition agreement". The rest of the opposition consisted of the Communist Party of Bohemia and Moravia (KSČM), Christian and Democratic Union

– Czechoslovak People's Party (KDU-ČSL), and Freedom Union – Democratic Union (US-DU).[150] In Slovakia a government with constitutional majority held the power, led by Slovak Democratic Coalition (SDK), and including Party of the Democratic Left (SDĽ), Party of the Hungarian Coalition (SMK), and Party of Civic Understanding (SOP).[151] The opposition consisted of Vladimír Mečiar's Movement for Democratic Slovakia (HZDS) and the Slovak National Party (SNS).

4.1. The analysis of parliamentary negotiations

At first the focus will be placed on the Czech unsuccessful attempt for the reform as it happened earlier than the Slovak one, which will be analyzed subsequently. The emphasis of the analysis will be on the arguments used by the submitters of reforms used to persuade their colleagues, in explanatory reports as well as in parliamentary discussions; and how did argue those who opposed the reforms. At the end of this section, the reasons of success and failure are evaluated, while the role of the EU and the concepts of rule of law and the independence of the judiciary in the argumentation are stressed.

4.1.1. The failure of the Czech reform

The Czech attempt for the reform of judiciary, and the introduction of the Supreme Council of the Judiciary, consisted of three different proposals submitted by the Minister of Justice Otakar Motejl.[152] Due to procedural reasons the constitutional amendment was discussed earlier than the rest on the parliamentary floor and because of its failure the two

[150] ČSSD won in the elections in 1998 74 seats, which is not enough for a majority in the Chamber of Deputies consisting of 200 MPs. Together with ODS they however had 137 seats, hence a sufficient number for the constitutional amendment.
[151] They altogether had 93 seats out of 150, which is 3 more than is required for the constitutional amendment.
[152] The Czech parliamentary material no. 539/2000: The governmental proposal of the act on the courts of Feb 2, 2000; The Czech parliamentary material no. 540/2000: The governmental proposal of the act on the judges and associates of Feb 2, 2000; and The Czech parliamentary material no. 541/2000: The governmental proposal of the act that amends the Constitution of the Czech Republic of Feb 2, 2000.

other proposals failed as well, as at that time they did not comply with the Constitution. Anyway, even though all of the proposals were discussed at the floor of the House of Deputies, the most attention in the analysis is dedicated to the constitutional amendment, as the following discussions became, to a large extent, repetitive.

According to the explanatory report, it was necessary to create such a system of the administration of the courts that would be in conformity with the documents issued by the Council of Europe; hence to create a system where the judges will not only have influence over the judicial power, but will be responsible for it as well. In addition, such an arrangement should provide guarantees for the independent functioning of the judiciary as the proposals gave the council mainly the powers regarding the personnel matters of the judiciary. The report further notes that: "It is enacted comparably in the majority of democratic European countries, which in various size and extent embed in their legal orders the influence of judges over the administration of the courts".[153] In addition, in the second reading on the parliamentary floor minister Motejl emphasized the importance of the reform from the perspective of the rule of law and European integration: "I consider it as really a crucial problem if we want to succeed (…) in the realm of the rule of law establishment (…) and at the same time in relatively critical and demanding evaluation in the European space(…)".[154]

The main critic of the proposal in the parliamentary discussion was the deputy Vlasta Parkanová (KDU-ČSL). She claimed that the reform is initiated by the judges; hence for particularistic reasons; and is not necessary. Also, she argued that, according to the experiences from Europe, the reform as proposed did not guarantee any improvement, as councils often create tensions between judiciaries and executives; moreover, it may not be

[153] The Czech parliamentary material no. 541/2000: The governmental proposal of the act that amends the Constitution of the Czech Republic of Feb 2, 2000, 6
[154] The transcript of 25th Parliamentary Session of the Czech Parliament, May 17 2000

compatible with the Czech tradition. Importantly, another crucial critique was raised with regard to the responsibility for the judiciary performance by Parkanová and Marek Benda (ODS). Benda argued: "Independence, which is without any doubt good, becomes an absolute possibility of its representatives' caprice if it does not go hand-in-hand with responsibility"; thus the council would be useful if it at least increased the accountability of the judges.[155] Moreover, and perhaps most importantly, Parkanová stressed that establishment of such a body is not a requirement of the European Community and "[the Czech] accession into the European Union is certainly not conditioned by accepting this conception of the judiciary administration, as some advocates of this model like to pretend".[156] According to her, the documents of the Council of Europe and European Union allow rather a variety of models of the judiciary independence and it is not necessary to focus only on the model with the central role of a council.

Despite the presented criticisms, the general atmosphere of the debate was rather non-conflicting, with the consent, or at least declared willingness to discuss the establishment of a body of judicial independence. Nevertheless, the proposed form of it was widely criticized, supposedly because of the lack of discussion that preceded the proposal, and lack of comparison with other available models.[157] Many of the deputies that participated in the discussion highlighted especially this problem of the proposed reform and called for a wider discussion about the composition of such council. Parkanová said: "It is important to note that the judiciary is always threatened by two extreme situations that need to be avoided. On the one hand it is politicization of the judiciary, and on the other it is elitism or corporatism. I suppose that the proposal is dangerously approaching the second state of affairs; hence the judicial corporatism and elitism".[158] Such a model would, according to her, shift all the

[155] The transcript of 22nd Parliamentary Session of the Czech Parliament, Mar 1 2000
[156] Ibid.
[157] Ibid.
[158] The transcript of 26th Parliamentary Session of the Czech Parliament, Jun 28 2000

responsibility for the judiciary performance on the judiciary itself, which is undesired as this way the political elites – accountable to citizens – cannot hide from the responsibility for the state of the judiciary. Furthermore, and very interestingly, the KSČM deputy Vojtěch Filip argues that if majority of the council was elected from the members of the judiciary, "it would create a danger of elitist separation of the judiciary from a real public life".[159] Also ODS deputies were critical of the proposed composition of the council. Deputy Marek Benda suggested that non-judicial members of the council should not be from other legal profession, but he would prefer a laic perspective to be included. ČSSD and its minister Motejl never actually replied to these concerns, they never justified the proposed council composition, and never actually discussed it with the opposition. They claimed they are open to discussion in the third hearing, but were never given a chance.

All in all, the introduction of the Supreme Council of the Judiciary was not successful in the Czech Republic for a variety of reasons. The call for the reform based on the reference to the EU accession was not convincing and successfully refuted by the critics in the parliament. Indeed, ČSSD was in a difficult position with this proposal as it had only a minority of seats in the House, and due to the lack of discussion and flexibility about the composition of the council it did not manage to persuade other political parties to support the proposal. For these reasons all of the proposals failed in the second hearing.[160]

4.1.2. The Slovak success: introduction of the Judicial Council

The introduction of the Judicial Council of the Slovak Republic was a part of a larger constitutional amendment that also included significant changes in the area of public

[159] The transcript of 25th Parliamentary Session of the Czech Parliament, May 16 2000
[160] ČSSD managed to persuade KSČM members about the importance of the reforms and this party supported two out of three proposals in second hearings. The only proposal KSČM did not support was the most important proposal for a constitutional amendment that in fact blocked adoption of the two subsequent proposals.

administration and the Constitutional Court. The bill was not proposed by the government, but by four deputies: Peter Kresák (SOP), Ladislav Orosz (SDĽ), Ivan Šimko (SDK) and Pavol Hrušovský (KDH); hence by the deputies of all the coalition parties. The debate on the parliamentary floor was much more heated and polarized including several dimensions that were utterly unimportant for the substance of the reforms, such as a nationalistic, or a personal one.[161]

Among the reasons for the reform, in the explanatory report to the proposal one can find: increase in the quality of democracy, strengthening independence and autonomy of the judiciary; or "an honest interest to became a member of the family of European states"[162]. In addition the report includes numerous references to the documents of the UN, the Council of Europe and also to the European Charter on the statute of judges (all discussed in the section 1.4.). Moreover, also the bad performance of the judiciary and the missing self-administration are stated as the problems that the proposed reform should solve.

Parliamentary discussions over the proposal were lengthy and, indeed, very repetitive and many of the arguments listed above appeared here as well. However, mainly the arguments relevant for the question proposed at the beginning of this chapter will be discussed here. Of course, their relevance for the question is not the only reason for such a decision, but also the fact that the importance of the reform for the EU accession was emphasized especially by the most important personnel of the coalition. For example, Jozef Migaš (SDĽ), the Speaker of the National Council at that time, argued in favor of the constitutional amendment claiming that it is necessary to constitutionally reform the public

[161] In the debate one can find arguments dividing between those „who wanted independent Slovakia" and those who did not, raised mainly by HZDS deputies. They were accusing the coalition of acting like saviors of Slovakia. For all the arguments that ilustrate the tone of the discussion Roman Hofbauer's (HZDS) statment suffices: „your proposal is missing one point – to change the name of the state to Presidential Constitutional-Court democradura of the Felvidék country." 45.schôdza, 20.február, ČPT 643

[162] The Slovak parliamentary material no. 643/2000: The proposal of a group of deputies of the National Council of the Slovak republic of the constitutional act that amends the Constitution of the Slovak Republic. The explanatory report.

administration and the judiciary independence in order to meet the requirements for an early accession in the EU.[163] Mikuláš Dzurinda, the prime minister also participated in the discussion:

> "There were opinions that the constitutional amendment is not necessary if we want to become members of the European Union. I want to declare that such statements are not true, they are false. If we want to successfully aspirate on the membership in the European Union – and let me remark that currently 70% of our citizens clearly support the Slovak accession in the EU – we need this amendment. We need to strengthen the domestic democratic background, to approximate it to the highly-developed European democratic countries." [164]

Another convincing speech, however a little contradicting to Dzurinda's one, was given by Peter Weiss (SDĽ) [165]: "I want to emphasize, the European Union and NATO are not forcing us to anything. It is our national interest, expressed in all the programs of all the government to the date, to be integrated. It is our concern, whether we meet the criteria for the accession into NATO and the EU. It is us, who decided to do these reforms in order to minimize the advantage our neighbors have in the matters of integration".[166] Because of that he argues it is necessary to pass this proposal even without a wide consensus across the political spectrum. In addition he states: "I am asking, will the trustworthiness of the country increase if we will not manage to pass it or we will postpone it indefinitely? Will the integration chances of the Slovak Republic increase?"[167] Therefore, it can be stated that not only Slovakia desperately attempted to be accepted into the EU, one of the reasons for such a goal was to get on the

[163] The transcript of 45th Parliamentary Session of the Slovak Parliament, Feb 6 2001
[164] The transcript of 45th Parliamentary Session of the Slovak Parliament, Feb 7 2001
[165] Peter Weiss was at that time the president of the Parliamentary Committee for Foreign Affairs, member of the Committee for the European integration, or the leader of the permanent delegation of the National Council of the Slovak Republic at the parliamentary assembly of the Council of Europe.
[166] The transcript of 45th Parliamentary Session of the Slovak Parliament, Feb 19 2001
[167] Ibid.

level of other, mainly Visegrad Group, countries. In addition, Ladislav Orosz (SDĽ) appreciated Weiss' contribution by saying that "[i]f after tens of years some legal historians would come back to these documents, they will be able to objectively review what was at stake in the debate regarding the amendment of the constitution in February 2001".[168]

The criticism against the proposal presented in the debates was mainly aimed at different aspects of the amendment than the creation of the Council. One of the important issues raised in the debate was the concern that the Council will not be strong enough and the fact that several significant powers, mainly regarding the appointment and removal of the president of regional and local courts, remained in the hands of the minister, which was by the opposition interpreted as minister Čarnogurský's attempt to control the judiciary. Another topic that fairly resonated in the debates was the matter of the composition of the council.

As was discussed in Chapter 3, one of the main problems that the Judicial Council has is that it can be easily dominated by the judges, which is dangerous because of the nature of their behavior discussed in Chapter 2. The proponents of the council actually proposed a much more balanced model than the one that was actually enacted. The explanatory reports suggests that the members nominated by political branches of power should be experts on the theory of law or the representatives of various association of other legal professions – such as advocates or attorneys. This should have protected from the one-sidedness in discussions and decisions of the council, and from the enforcement of particularistic interests.[169]

The first major criticism in the parliamentary debate was presented by Štefan Harabin, at that time the president of the Supreme Court appointed by HZDS. He expressed his surprise that it is often argued that many did not trust judges to be able to effectively govern themselves, even though they are trusted to make decisions in trials. In addition, he proposes

[168] Ibid.
[169] The Slovak parliamentary material no. 643/2000: The proposal of a group of deputies of the National Council of the Slovak republic of the constitutional act that amends the Constitution of the Slovak Republic. The explanatory report.

such a composition of the council where out of 16 members 10 would be elected by the judges and the remaining six by the National Council. According to him the proposed composition is "an undying effort [of the government] to paralyze the judiciary".[170] He proposes his own solution to the problem of "solidary voting of judges", concretely enactment of the rule that for the proposal to pass through the council at least some part of the members nominated by other branches of power will have to support it. Nevertheless he never specifies the number of these members, and it would be certainly crucial for the agreement upon such a rule. Interestingly, he proposes that from the judicial branch only the judges that are in the office for at least 10 years should be the members of the council. Taking into consideration that this session was held in June 2000 it basically shows that Harabin did not perceive the problem with socialist judges as a real one. Harabin's proposal was subsequently several times brought back into the debate by a variety of HZDS deputies and also by Robert Fico – the current prime minister of Slovakia at that time already an independent Member of the Parliament.[171] HZDS' Deputies Gustáv Krajči and Ján Gabriel accused the coalition of not-knowing the judiciary personnel and, especially Gabriel, claimed that the judges want the Judicial Council to be designed as proposed by Harabin;[172] despite the fact that the council was created after lengthy negotiations with the Association of Judges of Slovakia. Not only does this show a division within the Slovak judges – one group represented by the Association, another by the president of the Supreme Court – it also shows that HZDS, Robert Fico and the group of judges led by Harabin had very similar opinions about the self-administration of the judiciary; and later during the coalition led by SMER

[170] The transcript of 32nd Parliamentary Session of the Slovak Parliament, Jun 14 2000
[171] Robert Fico left SDĽ in December 1999 after several conflicts with the party. I tis generally assumed it happened because he expected to be awarded with some ministerial seat as he was the most popular member; and he also did not agree with the coalition with SMK. Later he founded his own party SMER and as its leader became prime minister in 2006 and 2012.
[172] The transcript of 45th Parliamentary Session of the Slovak Parliament, Feb 19 2001

with HZDS' nominee Štefan Harabin in the office of the Minister of Justice they fulfilled this aim.

To defend the proposal, Orosz claimed that the council establishes such a council where consensus between the judicial and other branches of power will be necessary, and the judges and other members should not be put automatically in counterpositions.[173] In addition, Kresák admitted that the proposed composition of the council is certainly not the only possibility, but said that no one will ever persuade him there is one right solution.[174]

The Slovak proposal for the introduction of the Judicial Council passed mainly because there was a consensus among the coalition with sufficient number of MPs about the importance of the reform. As was discussed, one of the main reasons why the proposal was successful was the agreement among the governing parties that the amendment is necessary in order to prove Slovakia as a trustworthy candidate for the EU accession, which confirms the hypothesis stated at the beginning of this chapter. Interestingly, the parties of the coalition were more aware of the fact that it is necessary to deal with the past with regard to the judiciary, and wanted to introduce such a model that would not allow the council to be dominated by the judges.[175]Notwithstanding, for unexplainable reasons they never enacted a clause that would ensure the politically nominated members of the council would be from other legal professions however they certainly intended it in the explanatory report.

[173] The transcript of 32nd Parliamentary Session of the Slovak Parliament, Jun 14 2000; and The transcript of 45th Parliamentary Session of the Slovak Parliament, Feb 20 2001
[174] The transcript of 45th Parliamentary Session of the Slovak Parliament, Feb 15 2001
[175] The attitude of Slovak elites towards dealing with the past goes along the same line as was presented in Kovanič, Martin. "Transitional Justice Dynamics in Slvakia: From Silence to the Nation's Memory Institute." *CEU Political Science Journal, Vol.7, No.4* (2012): 385-410.

4.2. Evaluation of the findings

The examination of parliamentary materials revealed that the hypothesis stated at beginning of this chapter was correct; in Slovakia the EU accession was used in the argumentation of the proponents of the council model more than in the Czech parliaments. In addition, the EU argument became so crucial because of the activism of Slovak political elites that wanted to prove themselves as trustworthy candidates for the integration, as it was them that actually included the reform of judiciary in the accession requirements. No such thing was applicable in the Czech Republic and even though minister Motejl argued to certain extent similarly, he was not successful, and his claims about the necessity of the reform in order to be integrated were refuted in the parliamentary debate. However, not only the question of EU integration makes the difference between the Slovak success, and the Czech failure. Slovakia was at that time governed by the coalition with constitutional majority, whereas the Czech government had only minority of parliamentary seats; hence it was much easier for Slovak elites to accomplish what they desired.

Therefore, for the confirmation of the hypothesis it is necessary to address at least two questions. First of all; would the Czech reform be successful, had it been in the similar situation as Slovakia after Mečiar? It can be argued that yes, because there in fact existed quite a consensus about the introduction of the council and the reform failed because of the lack of flexibility on the part of government and because of the lack of discussion regarding the composition of the council. If the reform was really crucial for the Czech elites it can be assumed that they would submit another proposal afterwards, which did not happen. The second question is: would such a reform be possible in Slovakia if the country was in a different position and did not need to prove itself as a trustworthy candidate? To answer this question it necessary to realize that the wide coalition – including Christian-democratic and social-democratic party – with constitutional majority – would not exist, had there not exist a

strong demand for the change of the government after Mečiar's period. Such coalition was rather a unique result of the elections held in 1998, that were later labeled as 'democratizing elections'.[176]

Also, as an interesting finding can be considered the extent to which the two parliaments realized potential dangers of establishing such a council. In the Czech Republic the distrust to the council with a majority of the judges was present in the proposal, as well as in the comments made by deputies, from Christian-democrats to communists. Contrarily, in Slovakia the proposal did not establish balance between the judicial and non-judicial members, although intended to; and the opposition suggested such a composition where the judges would dominate as well. This study does not provide any explanation for such a difference. One interpretation may be that the only outlier is the Slovak opposition, as the government in Slovakia and all of the parties in the Czech parliament more or less agree on some balanced model of the council. To explain why mainly HZDS preferred the council with unequivocal majority of the judges one can get on a slippery ground. However, if we assume that HZDS was in its substance rather undemocratical, driven by the desire to take control over the judiciary in order to protect its own members and principals from the repercussions a well-functioning system of justice could have caused,[177] we can argue that HZDS knew that the mass of judges can be controlled, as it was this party which appointed a vast majority of the judges, had its associate at the top of the judicial hierarchy, and maybe, as their members argued in the debate, they really knew the judiciary personnel quite well. But this argument is only a theoretical construct based on many assumptions that could be hardly ever proven.

[176] See Bunce, Valerie J, and Sharon L Wolchik. *Defeating Authoritarian Leaders in Postcommunist Countries.* (New York: Cambridge University Press, 2011)

[177] There were several cases that happened during the Mečiar's government and has never been properly investigated, such as the abduction of the son of president Michal Kováč, a murder of a journalist Robert Remiáš, or marred referendum in 1997.

CONCLUSIONS

After the breakdown of communist regimes in Central and Eastern Europe the countries had to, among other crucial tasks, reform their judiciaries to make them properly function in democratic regimes. The purpose of this research was to explain different paths in establishing the institutions of judiciary independence by the Czech Republic and Slovakia, and to discuss the relationship between these paths and observed performance of judiciaries; Czech Republic as one of the best performers in the region, Slovakia with a variety of problems in this arena of consolidation.

The research showed that the necessity of establishing of the independent judiciary, reinforced by countries' desires to be accepted in the European Union created a tension between the goal and the post-communist context. Judiciaries in the post-communist countries are severely affected by the patterns of behavior that existed in the previous regime, and moreover, some of them were reinforced at the dawn of democracy. This creates unfavorable conditions for the creation of institutions of judiciary independence, unless these legacies were sufficiently suppressed. For that reason, creation of judicial councils in such a culture may result in encapsulation of the judiciary and its complete separation from the society, because of elitist and corporatist tendencies that are here inherently present.

The legal textual analysis showed that the Czech and Slovak paths in establishing judiciary independence are different. On the one hand, the Czech Republic proceeded gradually without any radical changes and until the present day the central role in the administration of the judiciary is played by the ministry of justice. However, there was an unsuccessful proposal for the introduction of a council-model in 2000. On the other hand, the development of the judiciary independence in Slovakia was much more turbulent with a crucial change in 2001 when the Judicial Council was created. A bad arrangement of the

council that did not ensure balance between the members of the judiciary and non-judicial members facilitated encapsulation, and subsequent politicization, of the judiciary.

Further analysis of parliamentary negotiations revealed that Slovakia introduced the council mainly because of a desire of its political elites to integrate the country in the EU. The reason why the Czech proposal for similar change failed was that the Czech Republic did not need to desperately prove itself as a trustworthy candidate for the EU accession, unlike Slovakia, which was in a different position after Mečiar's semi-democratic government. Also, what contributed to different results of attempts for the reform is the fact that the Czech minority government actually needed to persuade rest of the parties in the parliament, while in Slovakia a coalition with constitutional majority governed; and hence could enact whatever it desired, despite the criticism in the parliament.

The research showed that a desire for the EU integration may create incentives that lead to the reforms that may actually prove themselves as dangerous to the consolidation of democracy. It also pointed out to the fact that for democratizing countries it is necessary to properly deal with their past in order to create well-functioning judiciary, independent from other branches of power. In addition, in case of Slovakia one may argue that it was not only necessary to deal with the communist past, but also with the possible consequences of another authoritarian regime that followed the breakdown of communism. Because as there exist socialist legacies in the behavior of the judges it is possible that some patterns of behavior are a result of another non-democratic regime. The research also revealed that it would be interesting to study how the post-communist countries dealt with discredited judiciaries, what was the extent of the changes in judiciary personnel, whether it happened in lower or higher echelons of the judiciary and what are the implications of various models.

Bibliography

Annus, Taavi, and Margit Tavits. "Judicial Behavior After a Change of Regime: The Effects of a Judge and Defendant Characteristics." *Law and Society Review*, no. Vol.38 (4) (2004): 711-736.

Blankenburg, Erhard. "The Purge of Lawyers after the Breakdown of the East German Communist Regime." *Law & Social Inquirym Vol. 20, No. 1*, 1995: 223-243.

Bobek, Michal. "The Fortress of Judicial Independence and the Mental Transitions of the Central European Judiciaries." *European Public Law, Forthcoming in Vol. 14*, no. 1 (2008): 1-20.

Borzel, Tanja A, and Thomas Risse. "One Size Fits All! EU Policies for the Promotion of Human Rights, Democracy and the Rule of Law." Prepared for the Workshop on Democracy Promotion, Oct 4-5, 2004, Center for Development, Democracy and the Rule of Law, Stanford University, 2004.

Bunce, Valerie J, and Sharon L Wolchik. *Defeating Authoritarian Leaders in Postcommunist Countries*. New York: Cambridge University Press, 2011.

Carothers, Thomas. „The End of the Transition Paradigm.“ *Journal of Democracy*, 2002: 5-21.

Carothers, Thomas. "The Rule of Law Revival." *Foreign Policy Affairs 77(2)*, 1998: 95-106.

Casier, Tom. "The EU's two-track approach to democracy promotion. the case of Ukraine." *Democratization 18(4)*, 2011: 956-977.

Cotterrell, Roger. "Is There a Logic of Legal Transplants?" In *Adapting Legal Cultures*, edited by David Nelken and Johannes Feest, 70-92. Oxford: Hart Publishing, 2001.

David, René, and John E.C. Brierley. "Socialist Law." In *Major Legal Systems in the World Today*, 155-306. London: Stevens & Sons, 1985.

Elster, Jon. "The Necessity and Impossibility of Simultaneous Economic and Political Reform." In *Constitutionalism and Democracy*, edited by Douglas Greenberg, Stanley N Katz, Steven C Wheatley and Melanie Beth Oliviero, 267-74. New York: Oxford University Press, 1993.

Ferejohn, John. „Independent Judges, Dependent Judiciary: Explaining Judicial Independence.“ *Southern California Law Review*, Vol.72(353). vyd. (1999): 353-384.

Fiss, Owen. „The Limits of Judicial Independence.“ *U. Miami Inter-Am. L. Rev., 58*, 1993.

Friedmann, Wolfgang. *Law in a Changing Society*. Berkeley: University of California, 1959.

Frison-Roche, Francois, a Spas-Dimitrov Sodev. „The issues involved in the reform of the Bulgarian judicial system.“ *International review of Administrative Sciences*, 71:593. vyd. (2005): 593-606.

Grzymala-Busse, Anna M. *Redeeming the Communist Past: The Regeneration of Communist Parties in East Central Europe*. Cambridge: Cambridge University Press, 2002.

Hanssen, F. Andrew. "Is There Politically Optimal Level of Judicial Independence?" *The American Economic Review*, no. 94 (3) (2004): 712-729.

Hanus, Martin. ".týždeň." *Dominujú ľudia so zlou mentalitou [People with bad mentality dominate]: Interview with Alexander Brostl.* October 21, 2012. http://www.tyzden.sk/casopis/2012/43/dominuju-ludia-so-zlou-mentalitou.html (accessed April 12, 2012).

Hazard, John. *Communists and their Law: A Search for the Common Core of the Legal Systems of the Marxian Socialist States.* Chicago: University of Chicago Press, 1969.

Herron, Erik S, a Kirk A. Randazzo. „The Relationship Between Independence and Judicial review in Post-Communist Courts.“ *The Journal of Politics*, Vol.65 (2). vyd. (2003): 422-438.

Ishiyama Smithey, Shannon, and John Ishiyama. "Judicious Choices: designing courts in post-communist politics." *Communist and Post-Communist Studies*, no. 33 (2) (2000): 163-182.

Kalaydijeva, Zdravka. „An Independent Judicial System in the Context of EU Accession. In "Bulgaria's Progress towards EU Membership in 2000 - the NGOs' Perspective". Sofia: European Institute.“ *Pridham, Geoffrey. "European Union Accession Dynamics and Democratization in Central and Eastern Europe: Past and Future Perspectives." Government and Opposition 41(3), 2006.*

Kornhauser, Lewis A. "Is Judicial Independence a Useful Concept?" In *Judicial Independence at the Crossroads: An Interdisciplinary Approach*, edited by Stephen B Burbank and Barry Friedman, 45-55. Thousand Oaks: Sage Publications, 2002.

Kovanič, Martin. "Transitional Justice Dynamics in Slvakia: From Silence to the Nation's Memory Institute." *CEU Political Science Journal, Vol.7, No.4*, 2012: 385-410.

Krygier, Martin. "Rethinking the Rule of Law after Communism." In *Rethinking the Rule of Law after Communism*, edited by Adam Czarnota, Martin Krygier and Wojciech Sadurski, 266-278. Budapest: CEU Press, 2005.

Kühn, Zdeněk. "Judicial Independence In Central-Eastern Europe: The Experience of the 1990s and 2000s." *The Lawyer Quarterly*, no. 1 (2011): 31-42.

Kühn, Zdeněk. "Socialistická justice [Socialist judiciary]." In *Komunistické právo v Československu: Kapitoly z dějin bezpráví [Communist law in Czechoslovakia: Chapters*

from the history of injustice], edited by M. Bobek, P. Molek and V. Šimíček, 822-847. Brno: Masarykova Univerziza, 2009.

Langborger v. Sweden. (European Court of Human Rights, June 22, 1989).

Larkins, Christopher M. „Judicial Independnece and Democratization: A Theoretical and Conceptual Analysis.“ *The American Journal of Comparative Law, Vol. 44,* 1996: 605-626.

Ledeneva, Alena. „Telephone Justice in Russia.“ *Post-Soviet Affairs*, 24 (4). vyd. (2008): 324-350.

Linz, Juan J., and Alfred Stepan. *Problems of Democratic Transition and Consolidation: Southern Europe, South America, and Post-communist Europe.* Baltimore: The John Hopkins University Press, 1996.

Magalhaes, Pedro C. "The Politics of Judicial Reform in Eastern Europe." *Comparative Politics 32(1),* 1999: 43-62.

Markovits, Inga. "CHildren of a Lesser God: GDR Lawyers in Post-Socialist Germany." *Michigan Law Review, Vol. 94, No. 7*, 1996: 2270-2308.

Merkel, Wolfgang. "Plausible theory, unexpected results: the rapid democratic consolidation in Central and Eastern Europe." *International Politics and Society*, no. 2 (2008): 11-29.

Merryman, John Henry. *The Civil Law Tradition: An Introduction of the Legal Systems of Western Europe and Latin America.* Stanford: Stanford University Press, 1990.

Nelken, David. "Towards a Sociology of Legal Adaptation." In *Adapting Legal Cultures*, edited by David Nelken and Johannes Feest, 7-54. Oxford: Hart Publishing, 2001.

O'Donnell, Guillermo. „Why the Rule of Law Matters.“ *Journal of Democracy 15(4),* 2004: 32-46.

Offe, Claus. „Capitalism by Democratic Design? Democratic Theory Facing the Triple Transformation in East Central Europe.“ *Social Research 58(4),* 1991: 865-92.

Popova, Maria. *Politicized Justice In Emerging Democracies: A Study of Courts in Russia and Ukraine.* New York: Cambridge University Press, 2012.

Pridham, Geoffrey. "European Union Accession Dynamics and Democratization in Central and Eastern Europe: Past and Future Perspectives." *Government and Opposition 41(3),* 2006: 373-400.

Procházka, Radoslav. "Autizmus slovenskej justície [The Autism of the Slovak judiciary]." In *Výzvy slovenského súdnictva a možnosti zlepšenia existujúceho stavu. [The challenges of the Slovak judiciary and the options for improving the current state]*, by Transparency International Slovensko, 14-19. Bratislava: Transparency International Slovensko, 2010.

Prušová, Veronika. "SME.sk." *Šéfka súdu pomohla náhode aj pri pridelení Harabinovej žaloby [The Chief of the Court helped the luck in assigning Harabin's lawsuit]*. May 5, 2013. http://www.sme.sk/c/6790835/sefka-sudu-pomohla-nahode-aj-pri-prideleni-harabinovej-zaloby.html (accessed May 5, 2013).

Quigley, John. "Socialist Law and the Civil Law Tradition." *The American Journal of Comparative Law, Vol. 37, No. 4*, 1989: 781-808.

Raz, Jospeh. "The Rule of Law and Its Virtue." *The Law Quarterly Review, Vol.93*, 1977: 195-211.

Rule of Law Index. The World Justice Project, 2011.

Russell, Peter H. "Toward a General Theory of Judicial Independence." In *Judicial Independence in the Age of Democracy: Critical perspectives from around the World*, edited by Peter H Russell and David M. O'Brien, 1-24. Charlottesville: University Press of Virginia, 2001.

Sadurski, Wojciech, Adam Czarnota, and Martin Krygier. *Spreading Democracy and the Rule of Law? The Impact of EU Enlargement on the Rule of Law, Democracy and Constitutionalism in Post-Communist Legal Orders*. Dordrecht: Springer, 2006.

Sajo, András, and Vera Losonci. "Rule by Law in East Central Europe: Is the Emperor's New Suit a Straightjacket?" In *Constitutionalism and Democracy. Transitions in the Contemporary World*, edited by D. Greenberg, 321 - 338. Oxford: Oxford University Press, 1993.

Santos, Boaventura de Sousa. "The GATT of Law and Democracy: (Mis)Trusting the Global Reform of Courts." In *Globalization and Legal Cultures. Onati Summer Course 1997*, edited by Feest Johannes, 49-86. Euskadi: International Institute for the Sociology of Law, 1997.

Schonfelder, Bruno. "Judicial Independence in Bulgaria: A Tale of Splendour and Misery." *Europe-Asia Studies*, no. Vol. 57, No. 1 (January 2005): 61-92.

Schwab, Klaus, Xavier Sala-i-Martin, and Borge Brende. *The Global Competitiveness Report 2012-2013: Full Data Edition, published by the World Economic Forum*. Geneva: World Economic Forum, 2013.

Teubner, Gunther. "Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Divergences." *Modern Law Review, Vol. 61*, 1998: 11-32.

Tódová, Monika. "SME.sk." *Súdna rada vyberá iba sudcov, čo uspeli až po voľbách [The Judicial Council selects only judges, who succeeded after the elections]*. November 20, 2012. http://www.sme.sk/c/6609693/sudna-rada-vybera-iba-sudcov-co-uspeli-az-po-volbach.html (accessed May 20, 2013).

United Nations General Assembly. „International Covenant on Civil and Political Rights.“ 1966.

Uzelac, Alan. „Survival of the Third Tradition?“ *Supreme Court Law Review (49)*, 2010: 377-396.

Wagnerová, Eliška. "Position of Judges in the Czech Republic." In *Systems of Justice in Transition: Central European Experiences Since 1989*, edited by Jiří Přibáň, Pauline Roberts and James Young, 163-179. Aldershot: Ashgate Publishing Limited, 2003.

Walker, G.Q. „The Rule of Law. Foundation of Constitutional Democracy.“ 1-42. Melbourne: Melbourne University Press, 1988.

White, Brent T. "Putting Aside the Rule of Law Myth: Corruption and the Case for Juries in Emerging Democracies." *Cornell International Law Journal*, 2010: 307-363.

Primary documents

Committee of Ministers of Council of Europe. „Recommendation on the Independence, Efficiency and the Role of Judges.“ 1994.

Council of Europe. "European Convention for the Protection of Human Rights and Fundamental Freedoms." 1950.

European Association of Judges. „The European Charter on the Statute of Judges.“ 1988.

"European Council in Copenhagen. Conclusions of the Presidency. (21-22 June, SN 180/1/93)."

European Union. "Charter of Fundamental Rights of the European Union." 2000.

Explanatory Memorandum to the European Charter on the statute of judges.

International Association of Judges. „Universal Charter of the Judge.“ 1997.

Interview with Eliška Wagnerová, April 8 2013 (authorized upon request).

Interview with Ján Svák, May 2 2013 (unrecorded upon request).

Interview with Ľudovít Bradáč, April 19 2013.

Interview with Zdeněk Kühn, April 17 2013.

Resolution of the Constitutional Court of Slovak Republic, PL. ÚS 4/2012-77 of Oct 24, 2012."

"Resolution of the Czech Constitutional Court, 397/2006 Coll. of Jul 11, 2006.

Seventh United Nations Congress. „Basic Principles on the Independence of the Judiciary.“ 1985.

The Constitution of Czechoslovak Socialist Republic, 100/1960 Coll. of Jul 11, 1960.

The Constitution of the Czech Republic, Act. 1/1993 of Dec 16, 1992.

The Constitution of the Slovak Republic 460/1992 Coll., as amended by the Slovak Constitutional Act 90/2001 Coll. of Feb 23, 2001.

The Constitution of the Slovak Republic, Act 420/1992 Coll. of Sep 1, 1992.

The Council of Europe Commission for the Evaluation of the Efficiency of Justice. "Evaluation of European Judicial Systems." 2012.

The Czech Parliamentary Act 150/2002 Coll., the administrative judicial order of Mar 21, 2002.

The Czech Parliamentary Act 6/2002 Coll. on the courts and judges, as amended by the Act 314/2008 Coll. of Jul 16, 2008.

The Czech Parliamentary Act 6/2002 Coll. on the judges and the courts of Nov 30, 2001.

The Czech parliamentary material no. 539/2000: The governmental proposal of the act on the courts of Feb 2, 2000.

The Czech parliamentary material no. 540/2000: The governmental proposal of the act on the judges and associates of Feb 2, 2000.

The Czech parliamentary material no. 541/2000: The governmental proposal of the act that amends the Constitution of the Czech Republic of Feb 2, 2000.

The Czechechoslovak Parliamentary Act 335/1991 on the judges and the courts, as amended by the Czech Parliamentary Act 17/1993 of Dec 21, 1992.

The Czechoslovak Constitutional Act no. 64/1952 Coll., on courts and procuracy of Oct 30, 1952.

The Czechoslovak Constitutional Act on Czechoslovak Federation, 143/1968 Coll. of Oct 27, 1968.

The Czechoslovak Parliamentary Act 142/1961 on the disciplinary liability of professional judges, as amended by the act 157/1969 Coll. of Dec 18, 1969.

The Czechoslovak Parliamentary Act 36/1957 Coll. on the election of popular judges of popular and regional courts of Jul 4, 1957.

The Czechoslovak Parliamentary Act 36/1964 on organization of courts and election of judges, as amended by the act 156/1969 Coll. of Dec 17, 1969.

The Czechoslovak Parliamentary Act 412/1991 Coll. on the disciplinary liability of judges of Sep 27, 1991.

The Czechoslovak Parliamentary Act 412/1991 Coll. on the disciplinary liability of judges, as amended by the Czech Parliamentary Act 22/1993 of Dec 21, 1992.

The Czechoslovak Parliamentary Act on the disciplinary liability of professional judges, 142/1961 Coll. of Nov 29, 1961.

The Czechoslovak Parliamentary Act on the judges and courts, 335/1991 Coll. of Jul 19, 1991.

The Czechoslovak Parliamentary Act on the organization of courts, 62/1961 Coll. of Jun 26 1961.

The Slovak Parliamentary Act 185/2002 Coll. on the Judicial Council of Slovak Republic of Apr 11, 2002.

The Slovak Parliamentary Act 335/1991 Coll. on the judges and courts, as amended by the act 307/1995 Coll. of Dec 14, 1995.

The Slovak Parliamentary Act 385/2000 Coll. on the judges and associates of Oct 5, 2000.

The Slovak Parliamentary Act 385/2000 Coll. on the judges and associates, as amendedy by the Act 467/2011 Coll. of Nov 29, 2011.

The Slovak parliamentary material no. 643/2000: The proposal of a group of deputies of the National Council of the Slovak republic of the constitutional act that amends the Constitution of the Slovak Republic. The explanatory report.

The transcript of 22nd Parliamentary Session of the Czech Parliament, Mar 1 2000. http://www.psp.cz/eknih/1998ps/stenprot/022schuz/22-6.html#788 (accessed May 15, 2013).

The transcript of 25th Parliamentary Session of the Czech Parliament, May 16 2000. http://www.psp.cz/eknih/1998ps/stenprot/025schuz/25-1.html#76 (accessed May 15, 2013).

The transcript of 25th Parliamentary Session of the Czech Parliament, May 17 2000. http://www.psp.cz/eknih/1998ps/stenprot/025schuz/25-2.html#118 (accessed May 15, 2013).

The transcript of 26th Parliamentary Session of the Czech Parliament, Jun 28 2000. http://www.psp.cz/eknih/1998ps/stenprot/026schuz/26-2.html#200 (accessed May 16, 2013).

The transcript of 32nd Parliamentary Session of the Slovak Parliament, Jun 14 2000.

The transcript of 45th Parliamentary Session of the Slovak Parliament, Feb 15 2001.

The transcript of 45th Parliamentary Session of the Slovak Parliament, Feb 19 2001.

The transcript of 45th Parliamentary Session of the Slovak Parliament, Feb 20 2001.

The transcript of 45th Parliamentary Session of the Slovak Parliament, Feb 6 2001.

The transcript of 45th Parliamentary Session of the Slovak Parliament, Feb 7 2001.