

# 3

---

## EU Law and Central European Judges: Administrative Judiciaries in the Czech Republic, Hungary and Poland Ten Years after the Accession

---

MARCIN MATCZAK, MÁTYÁS BENCZE AND ZDENĚK KÜHN\*

### I. Introduction

In 2010 we published a collaborative article in which we showed how the judiciary in three Central and Eastern European (CEE) countries reacted to the institutional changes that were made in these countries at the end of the 1990s and the beginning of the 2000s.<sup>1</sup> In that article we set out the results of an analysis of over 1000 judgments passed by Polish, Czech and Hungarian administrative courts in the years between 1999 and 2004, particularly the types of arguments or issues referred to by the judges in the judgments.

Our analysis led to the conclusion that the respective judiciaries did not change their adjudicating method in the years in question despite significant changes in the legal environment, particularly the new Constitutions of the 1990s, pre-accession commitments and accession itself. One of the features of judicial adjudications in the period in question is an unswerving reliance on formal law values<sup>2</sup> such

\* The authors would like to thank all the participants of the conference 'Central European Judges under the EU Influence: The Transformative Power of Europe Revised on the 10th Anniversary of the Enlargement', Florence, 12–13 May 2014, for their insightful comments to this chapter. Our special thanks go also to the members of our research team for their invaluable assistance in the research: Ágnes Kovács, Krisztina Ficsor, Zsolt Kumala, Olga Papp, Zsófia Zsoldics, Bartłomiej Osieka, Szymon Łajszczak, Aleksandra Orzeł, Tomasz Kwiatkowski, Krzysztof Kumala and Bartłomiej Dębski.

<sup>1</sup> M Matczak, M Bencze and Z Kühn, 'Constitutions, EU Law and Judicial Strategies in the Czech Republic, Hungary and Poland' (2010) 30 *Journal of Public Policy* 81.

<sup>2</sup> In this article we use the terms 'value' and 'argument' interchangeably. This is, in our view, reasonable, as we understand a law value (eg a EU law value) as a state of affairs stipulated by that law (eg free flow of goods and services) and an argument as affirmation of the need to implement the state of affairs set out by a judge in a judgment. We deem that for the purpose of our deliberations this interchangeable use of these terms is fully justified and does not give rise to confusion.



as a linguistic interpretation of a legal text and references to earlier judgments. Moreover, judges did not show any increased interest in constitutional values or EU law values despite these values having been introduced to the normative systems of each country by the legislators, or in values or arguments such as teleological or functional interpretations.

As we characterised the criticised judicial method as *formalistic adjudication* it is crucial to clarify what we exactly mean by the term ‘formalism’ and what are the consequences of applying this approach. Formalism is often depicted as the ‘most-locally-applicable-rule’ approach in deciding a legal case<sup>3</sup> or ‘bound’ judicial decision making.<sup>4</sup> At the most general level this means that practitioners try to solve a given legal problem by relying only on a limited set of arguments such as the above-mentioned text of the law, earlier cases, accepted legal doctrines and traditional interpretative methods *without taking into consideration the wider social and legal context* of the case. The judge presents the decision as a *simple logical deduction* from the general legal standards, as if no substantive value judgements have been added.<sup>5</sup>

This model represents a kind of judicial self-understanding to remain loyal to traditional legal ideology, which according to many lawyers serves best the idea of the rule of law. The other justifying principle of formalism is the separation of powers which requires a clear differentiation between the competence of the legislator and that of the judge. A judge therefore can back the judgment exclusively by those arguments which come from the legislative bodies or which are at least accepted by them.

For a better understanding of what formalism is we can contrast it with two other judicial approaches, namely the Dworkinian and the pragmatist model. The Dworkinian approach generally takes into consideration (besides the text of the law and previous precedents) the justifying moral and political principles of law in adjudication (wider legal context of cases).<sup>6</sup> Pragmatism, on the contrary, does not

<sup>3</sup> F Schauer, ‘Formalism’ (1988) 97 *Yale Law Journal* 509, 519.

<sup>4</sup> J Wróblewski, *The Judicial Application of Law* (Kluwer Law, 1992).

<sup>5</sup> Martin Stone, for instance, found in legal scholarship at least seven varieties of formalism. See M Stone, ‘Formalism’ in J Coleman and S Shapiro (eds), *The Oxford Handbook of Jurisprudence and Philosophy of Law* (Oxford University Press, 2002) 166–205, 170. cf also R Siltala, *A Theory of Precedent. From Analytical Positivism to a Post-Analytical Philosophy of Law* (Hart Publishing, 2000) 50. Siltala distinguishes five basic modes of formalism: 1) Constitutive formality (the formal relation of legal standard to its source, which gives the standard ideally a binary code valid/non-valid); 2) systemic formality, defined by internal coherence of the legal system and its standards; 3) mandatory formality, which relates to the formal binding force of the source of law (binary code binding/non-binding); 4) structural formality, which relates to the degree of closeness of operative facts of the rule (high degree of formalism relates to concrete clear rule); 5) methodological formality, which places emphasis on a literal reading of the law. Our analysis primarily deals with the last sense of formalism in Siltala’s understanding, though it relates to other notions of formalism as well.

<sup>6</sup> R Dworkin, *The Moral Reading of the Constitution* (1996), online at <<http://www.nybooks.com/articles/archives/1996/mar/21/the-moral-reading-of-the-constitution/?page=1>>, last visited 1 December 2014.

care much about the underlying moral principles. Pragmatist judges hold it more important to adequately reflect social needs behind the law (wider social context of the case). Several representatives of the pragmatist approach have a clear concept of the social function of law that adjudication should serve.<sup>7</sup>

Nonetheless, moderate use of formalist approach has its own advantages. Legal certainty and predictability are core elements of modern law, thus formalist decision making reduces the risks of social actions. This has been, perhaps, best explained by Max Weber, according to whom

[j]uridical formalism enables the legal system to operate like a technically rational machine. Thus it guarantees to individuals and groups within the system a relative maximum of freedom, and greatly increases for them the possibility of predicting the legal consequences of their actions. Procedure becomes a specific type of pacified contest, bound to fixed and inviolable 'rules of games'.<sup>8</sup>

However, excessive formalism makes the law very rigid and inflexible, therefore formalistic adjudication loses its connection to the moral and political values as well as the social needs which the law should otherwise serve.

In order to refine further this general picture we have to introduce a distinction between 'honest' and 'strategic' judicial formalism.<sup>9</sup> The former represents a judicial attitude to remain loyal to the text of the law, to the accepted legal doctrines and to the traditional interpretive methods at any cost. Although this judicial strategy works well in 'easy' or 'routine' cases, in 'hard' cases where the law is uncertain the formalist method simply fails: A judge cannot be bound to the text of the rule as the applicability of the 'most local rule' itself becomes questionable in difficult cases.

If a judge insists on presenting her or his argumentation as a logical deduction and denies that political, moral, social or other choices should be involved in any legal decision making even in hard cases,<sup>10</sup> she or he has to use the other (strategic) version of formalism. Under these circumstances formalism may function as a 'camouflage' of a hidden agenda of the judge. The judge's decision cannot be deduced from the traditional legal arguments that she or he presents in his or her opinion. The judge may be fully aware of this fact, but the judgment, seemingly, is based on appropriate and relevant legal reasons. As a consequence of applying this strategy the judge cannot be subject to the criticism of taking decisions based on illegitimate reasons.

<sup>7</sup> RA Posner, 'Pragmatic Adjudication' (1996) 18 *Cardozo Law Review* 1.

<sup>8</sup> M Weber, *Max Weber on Law in Economy and Society* (ed Max Rheinstein, trans E Shils) (Harvard University Press, 1969).

<sup>9</sup> This distinction is a reflection on our observation that authors do not always recognize that formalist judicial style does not necessarily equal to the rule based decision making. Judges many times only pretend that they decide on the basis of the text of the law. In these cases they only justify their decision by the text of the law. For a classical example of ignoring this distinction see HLA Hart, *The Concept of Law* (Oxford University Press, 1994) 124–54.

<sup>10</sup> Schauer (n 3) 511.

Strategic formalism has a detrimental effect on the quality of judicial practice. It prevents the parties and the public audiences from getting to know the real considerations driving the judge in the decision making process. The rule of law requires that judges explain in a plausible way and in a detailed manner *why* they decided a case in a certain way. Even if a court decides a case without delay and the society is satisfied with the result, the lack of reflective argumentative judicial style makes the decision hard to understand and ineligible for observance in subsequent cases.<sup>11</sup>

Strategic formalism can be plausibly explained by the public choice theory. In public choice models judges are players in the field of politics.<sup>12</sup> Courts are not only institutions with a special judicial function, but they have their own institutional goals, they may try to strengthen their political position. The formalist strategy may be appropriate to depict the court as a neutral law-applier agency which refrains from engaging in discussing hot political issues.

In our previous article we identified the probable other causes of formalist judicial style, among them the communist legacy, particularly in terms of judicial education, a phenomenon known as ‘escape into formalism’ arising from a huge workload and a lack of appropriate resources, and also the unwillingness to adjudicate based on general standards, arising from concerns over too far-reaching judicial discretion.

On the tenth anniversary of our countries joining the European Union, we have again attempted to analyse how administrative courts in Poland, the Czech Republic and Hungary adjudicate. Applying the same methodology, we analysed approximately 1000 judgments passed by administrative courts in the years between 2005 and 2013. In this chapter we set out the results of the analysis, juxtaposing it with the previous analysis to illustrate how the style of administrative court judges’ adjudications has altered over the past 15 years. Our aim is to show how the extensive institutional changes in Central and Eastern Europe at the turn of the century influenced judges’ method of adjudicating and also, more broadly, their thought processes and how they see their role. Does the judiciary continue to see itself as Montesquieu’s ‘mouth of the law’, bowing down before legal formalism? Or has the enormous load of the general rules and standards that accompanied the new Constitutions and European law forced them to play the Dworkinian judge Hercules? We attempt to answer these and other questions in this chapter.

We proceed as follows: In the first part, we discuss the research methodology applied in both the previous and the current analysis of administrative judicature. We then move on to show the results obtained in a manner enabling the 1999–2004 period to be compared with the period 2005–2013. In the third part, we interpret the results obtained, broken down into countries analysed and generally.

<sup>11</sup> See also above, ch 2 in this volume.

<sup>12</sup> For an overview of this approach see A Dyevre, ‘Unifying the Field of Comparative Judicial Politics: Towards a General Theory of Judicial Behaviour’ (2010) 2 *European Political Science Review* 304.

In the conclusion to the chapter we try to explain what we can learn from the CEE judges' behaviour since the turn of the millennium and what lessons can be drawn for the future.

## II. Research Methodology

We examined judgments passed in the years 1999 to 2004 and those passed in the years 2005 to 2013 applying the same methodology, based to a great extent on a quantitative analysis of the types of arguments used by judges in their statements of reasons. We assumed that judges could refer in their statements of reasons to four types of arguments, which we have also called values:

- 1) Internal law values,
- 2) external law values,
- 3) constitutional values and
- 4) European law values.

Having read through the statements of reasons we then drew up an Excel spreadsheet showing the number and types of references. We included in the first group of internal law values the traditional legal arguments used by the judiciary, including among others, linguistic interpretations, systemic interpretations, references to previous judgments, references to legal doctrine and the application of well-known legal themes, for example *argumentum a contrario*. We considered references to these values to be typical of the traditional model of legal adjudication in which a judge adjudicates on the basis of relatively clear rules. Reference to the values in this group does not require judicial activism or engagement in non-legal analyses (for example analyses of the political or economic purpose of a given law) or a balancing of rules and standards of a general, ambiguous nature.

In the second group, the group of external law values, we included values, any reference to which requires a judge to depart from the traditional adjudication model in the sense that any reference to these values requires an analysis of the effects of political, economic and social factors on the law. We included in the group of these values, for example arguments over the purpose or function of a law, reference to the public or a private interest, and arguments taking into account the social and economic changes made in the judicial environment that a judge deems important to the adjudication method. Although some of the values included in this second group have a place on the traditional list of legal arguments (for example functional interpretation), we deemed that referring to external values requires greater judicial activism and has an element about it of balancing values that are not present in argumentation based on internal law values.

We see the third group, the group of constitutional values, as encompassing any argument based on a Constitution, involving both a general reference to constitutional values, rights and principles, and a precise reference to a specific

constitutional principle, for example the principle of proportionality or the principle of the freedom of enterprise. As references to this group of values are a measure of something that can be called judges' constitutional awareness, we also included in this group pro-constitutional interpretations and particularly direct application of the Constitution admissible in some of the countries examined. We treated references to constitutional values as evidence of adjudication based on standards and the judge's willingness to depart from his or her traditional role, characteristic of judges in the communist era. Adjudication using the Constitution also goes against the formalistic approach, the features of which include a conviction that a judge should adjudicate based on the most locally applicable rule, which is a refinement of a more abstract higher ranking principle or a legal provision. Consequently, direct application of constitutional principles in legal formalism terms is at the least undesirable.

The fourth and last group of values covered in a broad sense values of EU law (primarily, we mean by 'European law' the laws of the EU, but we also refer the judgements of the European Court of Human Rights (ECtHR) by this term). In this group we included references to provisions of EU law (for example provisions of directives), references to EU legal principles (for example some of the fundamental freedoms), and also references to European Court of Justice (ECJ) law and general references to the idea of European integration. In the first study (1991–2001), the values in this group were in some ways similar to constitutional values, as judicial references in this period were a sure sign of activism. Although during the second study references to EU law values were similar in terms of character to internal values (for example in the case of highly detailed regulations of European tax law), they have to a great extent retained the character of references to legal principles and often require values to be balanced. This group of values is essential in assessing how the judicial adjudication method has changed as a result of EU accession. However, the number of references to the group of external and constitutional values could also be interpreted as a measure of how accession has indirectly affected judicial behaviour in Central and Eastern Europe, which we will try to show in the part dedicated to interpreting the results of our research.

As in our previous study, we carried out a quantitative analysis of references to the groups of values described above based on *published* judgments concerning issues *key to business activity*. We compiled published judgments based on their nature—important, often precedential, cases, that could therefore be treated as Dworkinian hard cases. Thus they also comprise an interesting field in which to analyse the spectrum of judicial argumentation which in such cases should, at least theoretically, be broader than in standard cases. Judgments published are also judgments selected for publication by the judiciary itself, so their statements of reasons were consequently deemed by judges to be worthy of dissemination. This feature has enabled us to state that these judgments reflect the judiciary's perception of how a case should be properly and correctly adjudicated.

We chose judgments concerning business activity, for example judgments in cases involving tax (VAT, excise), licences and concessions, the construction process and highly regulated areas of business activity (pharmaceutical, energy

and telecommunications law) as those in which the effect of European integration and the new, free market economy system introduced by the Constitution can be most clearly seen.

In the results given below, we indicate the number of randomly selected judgments that we examined and various configurations of the number of references and changes to them over time. We particularly show the number of references to individual groups, the change in number in each year and also the most frequent combination of references per judgment. Consequently, we are able to form several theses as regards changes in the spectrum of values used by judges in administrative case law in the countries examined.

In this article we do not justify our choice of administrative judgments as subject of our study (and not judgments in criminal or civil cases, for instance), we do not discuss the similarities and differences between how the administrative judiciary works in our countries, neither do we discuss the history of institutional changes that were made to them at the turn of the century. We refer readers who are interested in these issues to our previous article<sup>13</sup>—the considerations therein also apply to the current analysis.

### III. Research Results

Below we present the main results of our research for all three countries.

**Table 1. References to specific groups of standards in all examined judgments and comparison to the results of the previous analysis—Poland**

All PL (400)				
EU Law Topics	Constitutional Law Topics	Internal Values of Law	Values External to Law	Total
105	209	1637	231	2182
4.8%	9.6%	75.0%	10.6%	100.0%

	1999–2004	2005–2013	Change
EU Law Topics	0.9%	4.8%	433.3%
Constitutional Law Topics	7.4%	9.6%	29.7%
Internal Values of Law	81.5%	75.0%	–8.0%
Values External to Law	10.2%	10.6%	3.9%
	100.0%	100.0%	

<sup>13</sup> Above (n 1).

**Table 2. References to specific groups of standards in all examined judgments and comparison to the results of the previous analysis—Hungary**

All HU (358)				
EU Law Topics	Constitutional Law Topics	Internal Values of Law	Values External to Law	Total
97	39	799	128	1063
9.1%	3.7%	75.2%	12.0%	100%

	1999–2004	2005–2013	Change
EU Law Topics	0.8%	9.1%	1037.5%
Constitutional Law Topics	2.5%	3.7%	48.0%
Internal Values of Law	87.5%	75.2%	–14.06%
Values External to Law	9.3%	12.0%	29.03%
	100.0%	100.0%	

**Table 3. References to specific groups of standards in all examined judgments and comparison to the results of the previous analysis—Czech Republic**

All CZ (180)				
EU Law Topics	Constitutional Law Topics	Internal Values of Law	Values External to Law	Total
84	101	852	303	1340
6.3%	7.5%	63.6%	22.6%	100.0%

	1999–2004	2005–2013	Change
EU Law Topics	1.6%	6.3%	293.75%
Constitutional Law Topics	8.0%	7.5%	–6.25%
Internal Values of Law	71.9%	63.6%	–11.54%
Values External to Law	18.6%	22.6%	21.5%
	100.0%	100.0%	




## IV. Interpretation of Results

### A. Poland

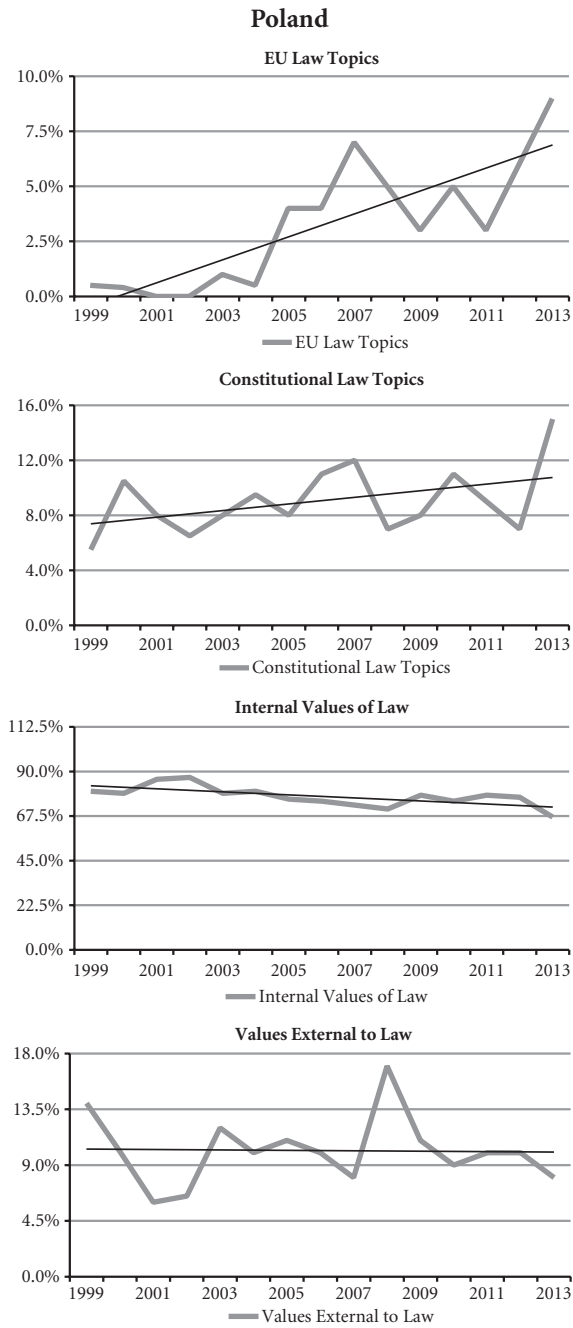
The results of an analysis of Polish court judgments are in keeping with the trends seen in all three countries examined. Since the period from 1999 to 2004 there has been a significant rise in references to EU law arguments (an increase of over 400 per cent) and a rise in references to constitutional arguments (of nearly 30 per cent). These increases were accompanied by a fall in the number of references to internal arguments (of 8 per cent). Such results, according to the assumptions made in the previous study, are clearly signs of deformalisation in the administrative adjudication. We had not encountered this deformalisation in the previous study, therefore the current results seem to confirm our thesis on a delayed impact of the institutional changes in CEE on judicial behaviour.

In comparison to the Czech Republic and Hungary, Polish judges most frequently interpret internal law in accordance with EU law—the pro-European interpretation principle constitutes over 60 per cent of all references to an EU law value applied by Polish judges. This phenomenon may be deemed a sign of judicial maturity in its approach to the use of EU law and a sign that judgments are becoming deformalised, though in the case of Poland it seems to be limited to judgments relating to tax and financial law. As already indicated, as opposed to automatic citation of particular provisions of EU law, interpreting the provisions of domestic law in accordance with EU law is never an action based on simple syllogism and as such is a more complex form of argumentation, characteristic of an informal manner of adjudicating.

 An interesting phenomenon that can be seen in citing constitutional values in judgments is that Polish judges generally do not make such analyses *ex officio*. The constitutional deliberations made by judges are usually due to the parties' attorney, who raise arguments of this type in appeals and consequently, as it were, force judges to enhance the spectrum of argumentation applied in a given judgment. A similar practice has been present in both Hungarian and Czech jurisdictions.

The results for Poland should be interpreted in light of a discussion that took place in Poland after the results of the first study for the years 1999 to 2004 were published in Poland in 2006. The conclusions of the previous study, and therefore the findings regarding far-reaching formalism in administrative court judgments, were fiercely criticised by judges.<sup>14</sup> Administrative court judges questioned both the research methodology and the results themselves, taking the stance that the statements of reasons for court judgments do not require all the arguments used to

<sup>14</sup> This criticism was raised particularly by judge B Gruszczyński, 'Czy formalizm orzeczeń sądów oznacza powierzchowne rozpoznanie sprawy?' [Does the formalism of administrative judiciary's decisions equate to superficial verdicts?] *Prawo i Podatki*, 2006, nr 4, 23–26.



**Chart 1: Trends of frequency of references to specific groups of standards between 1999 and 2013**

be cited and also that, as constitutional values have been taken into consideration by lawmakers while enacting more detailed provisions of law (for example at the statutory level), there is no need to consider them in each judgment that applies the statutory laws. The current study seems, however, to confirm the theory set out in the previous analysis, particularly that regarding the delayed effect of the constitutionalisation and Europeanisation of the law on judges' actions. Moreover, the qualitative analysis of Polish judgments suggests that the Polish judiciary is taking greater care to use deformed, including constitutional, arguments in judgments passed after 2005 and greater sensitivity to the sub-legal effects of judgments.

We believe that the discussion on the results of the first study on administrative judiciary that appeared in Poland<sup>15</sup> could play an important role in bringing judges' attention to the significance of recognising general principles as a valid source of judicial argumentation. This approach is clearly illustrated by a quotation from a judgment passed in 2009 by judge B Gruszczyński, one of the most active critics of the first study:

The axiological aspect of the issue examined is also important. The appellant loses the entry made if the court discontinues the proceedings as devoid of purpose ... It has been rightly noted in literature that, when a sense of justice deviates far from the desired model and is not built up widely in the minds of doctrinal and judicature representatives but is forged through the daily procedural reality of entities ..., then an interpretation of provisions that leads to the law colliding with generally accepted values, including justice, should be avoided.<sup>16</sup>

The direct reference to general axiological principles that can be seen in the quoted verdict is hard to reconcile with the previous position represented by the judges, and namely that those principles are already present in the detailed legal provisions and as such do not require any direct application from the judges. It is also difficult to regard the approach reflected in the quoted judgment as strongly formalistic and from the perspective of a comprehensive examination of cases it certainly deserves to be praised.

## B. Hungary

Since the 1 January 2012 Hungary has had a new Constitution ('Hungarian Fundamental Law') and therefore the structure of administrative courts has slightly changed since 1 of January 2013. They have been unified with the labour courts and they have been re-organised at a regional level extracting administrative (and labour) judges from the professional supervision of Division of Civil Cases of the

<sup>15</sup> D Galligan and M Matczak, *Strategie orzekania sadowego. O wykonywaniu wladzy dyskrecjonalnej przez sędziów sądów administracyjnych* (Warszawa, 2005); D Galligan and M Matczak, 'Formalism in Post-Communist Courts. Empirical Study on Judicial Discretion in Polish Administrative Courts Deciding Business Cases' in R Coman and J-M De Waele (eds), *Judicial Reforms in Central and Eastern European Countries* (Vanden Broele, 2007).

<sup>16</sup> Decision of the SN, Case No II GPS 3/09.

County Courts which they previously were subject to. This shift aimed at supporting the more efficient work of the affected branches of judicial administration (they currently have their own professional leaders who are experts of administrative law; they have trainings and meetings focusing on their own special problems etc). Although these changes may have a significant impact on the adjudicative quality and style in the long run, they took place only one year before the end of the examined period. Thus we do not need to take them into consideration in evaluating our research data.

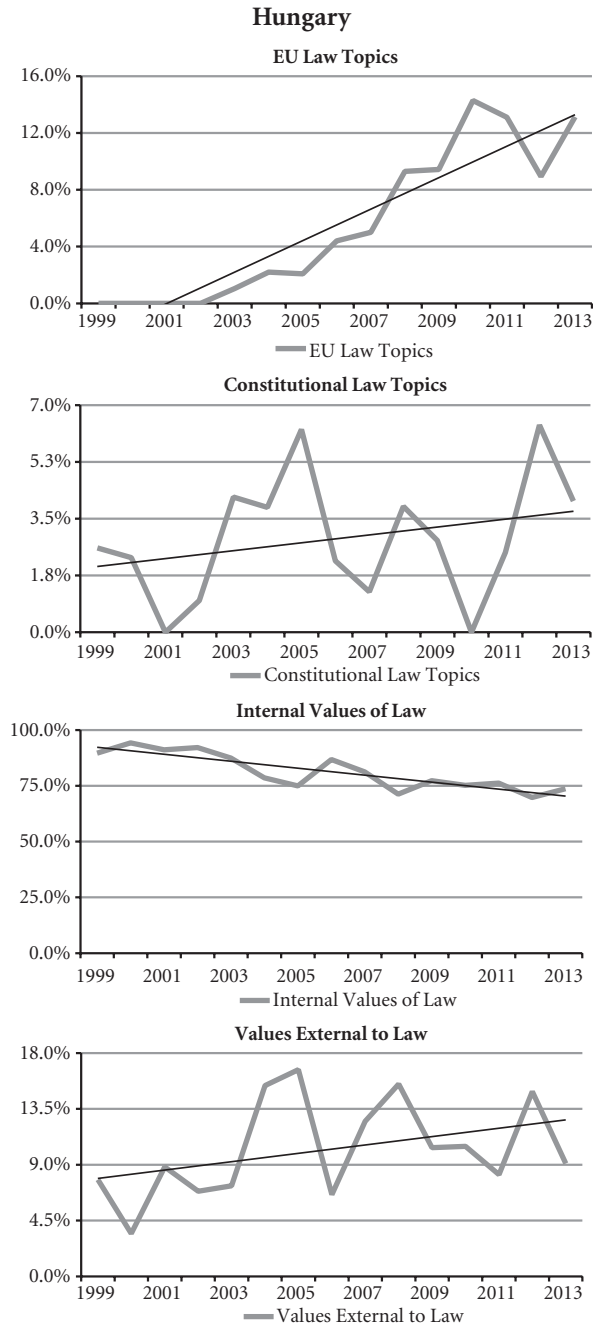
Based on the primary quantitative analysis of our data we can see that EU accession has had a strong direct impact on Hungarian administrative courts, in particular on the administrative division of the *Kúria* (Hungarian Supreme Court or Curia of Hungary). The proportion of references to EU law arguments has increased more than 10 times compared to the proportion of EU law references made by courts in the period of 1999 to 2004. The huge change in quantity can be the sign of change in quality, that is, our data can be interpreted as the first step of the Hungarian judiciary departing from the traditional model of adjudication.

That hypothesis is supported by two other facts as well. First, we can see an almost monotonous increase in the number of references to EU law topics year by year between 2005 and 2013 (see chart 3 below).

Given the date of the EU accession (2004) these figures can demonstrate that the Hungarian judiciary has learnt to use EU law as a reasoning tool gradually. Step by step acceptance of legal arguments derived from EU law indicates organic, 'bottom-up' development of judicial practice which may result in a reflected, well-reasoned decision making in cases where EU related issues emerge.

Second, we are also witnessing a significant increase in the proportion of references to constitutional arguments (48 per cent) and to values external to law (29 per cent, see chart 3 below). Although references to values internal to law have preserved their prevalence, this dropped more than 30 per cent and the more frequent use of non-traditional reasons can be evaluated as a new type of judicial thinking which is in line with the values and principles of the legal system of the EU. The new model of self-understanding of judges seems to be more sensitive to protection of rights than the one that existed before the EU accession.

Before declaring the Europeanisation of the judicial reasoning too soon we have to examine the deeper layers of the collected data. The reference to the category of 'other EU law' is the highest by far amongst all EU law arguments (82.3 per cent). References to particular provisions of EU directives, regulations and ECJ judgments (or references to the 'jurisprudence of ECJ') were included in this category. The character of these 'written' EU law arguments is very similar to the traditional domestic legal rules and judicial practice. In some cases a judge has to deal with 'black letter laws' of the EU that can be considered as the 'most locally applicable rules'. Applying the 'written EU law' is not a significant challenge for a trained judge; it does not require to be engaged in the discussions concerning legitimate policies, values and interest behind the text of (EU) law ('unwritten' elements of EU law). Products of EU legislation and ECJ judgments can be used




**Chart 2: Trends of frequency of references to specific groups of standards between 1999 and 2013**

‘mechanically’, that is, in a very formalistic manner even when the appropriate application of the particular EU legal materials demand the opposite (argumentative, reflective and consequence-orientated) judicial style.

Moreover, frequent references to EU law can be used for strategic reasons: The judge tries to present his or her controversial (or arbitrary) decision as a logical deduction from the written law. In doing so they may benefit from the new legal arguments (EU law) at hand.<sup>17</sup> Another point of strategic application of EU law amongst Hungarian judges may be that using the preliminary ruling procedure an ordinary judge can ‘skip’ the constitutional review of the *Alkotmánybíróság* (Hungarian Constitutional Court, hereinafter ‘AB’) which has the competence to review the judgments of ordinary courts since 2012. Ordinary courts may try to strengthen their position against the AB in this way.<sup>18</sup>

There is another reason for strategic use of EU values: According to an earlier study non-traditional arguments in the judge’s written opinion do not add any extra value to the line of classical legal reasons in many cases. The new model legal arguments serve as ‘ornaments’ or ‘decorum’ in the reasoning of the judgment.<sup>19</sup> EU law values may share this fate also.

Another striking figure is ‘zero reference’ to the EU law proportionality principle, since this principle is one of the key features of effective judicial review according to EU law and to the jurisprudence of ECtHR.<sup>20</sup> Although judges refer to the proportionality principle in cases without European context in 23.1 per cent of all pro-constitutional arguments, experts  that Hungarian courts do not use the proportionality test in the way the ECJ or ECtHR use it. Hungarian judges examine only whether the administrative agency exercises its discretionary power in a ‘reasonable’ way and they do not tend to judge the agency’s discretionary decision on merit. Where judges refer to the proportionality rule in the examined cases, they, predominantly, simply state that the administrative agency took (or did not take) all relevant circumstances of the case into consideration. They seem to ignore the broader policy and governance context of the case when making their decision in question of proportionality. As Kovács and Varju put it:

The introduction of [genuine] proportionality to replace unreasonableness as a general principle in determining the intensity of judicial review in Hungarian administrative law

<sup>17</sup> I Bartha and M Bencze, ‘Az európai jog alkalmazása a magyar bírói ítélkezésben 2004 és 2007 között’ [Enforcement of EU law in the Hungarian adjudication between 2004 and 2007] in P Máté (ed), *Európai jog és jogfilozófia. Konferenciatanulmányok az európai integráció ötvenedik évfordulójának ünnepére* (Szent István Társulat, 2008).

<sup>18</sup> Lively debates between the Legfelsőbb Bíróság (Hungarian Supreme Court before the establishment of the Kúria, hereinafter ‘LB’) and the AB on the question of ‘who determines the Hungarian judicial practice ultimately?’ have already taken place in the early 1990s in Hungary. See M Szabó, ‘Change of Legal Thought in Hungary 1990–2005’ in A Jakab, P Takács and AF Tatham (eds), *The Transformation of the Hungarian Legal Order 1985–2005* (Kluwer Law International, 2007) 600–01.

<sup>19</sup> M Bencze, ‘Diszítőelem, álcázóháló vagy tartóoszlop? A magyar büntetőbírói gyakorlat viszonya az alkotmányhoz’ [Enforcement of the Constitution in the Hungarian adjudication in criminal cases] (2007) *Fundamentum* 3, 5–21.

<sup>20</sup> See also below, ch 9 in this vol.

would require the reassessment of current doctrine and the reconsideration of the role of courts in the scrutiny of administrative discretion.<sup>21</sup>

### C. Czech Republic

The Czech Republic presents in some ways a unique case study for the period 2005 to 2013. Prior to 2003 the Czech administrative judiciary had been a plethora of eight regional courts without a high court at the top which would unify their conflicting case law. In 2003 the Czech administrative judicial system was transformed by establishing a new institution of the *Nejvyšší správní soud* (Supreme Administrative Court, hereinafter 'NSS'). In our previous analysis we covered the period until 2004; by then the number of decisions of the NSS in our sample remained pretty low and did not affect the overall results of our study. Unlike the previous study, the published case law between 2005 and 2013 is dominated by decisions of the NSS (they make approximately nine out of 10 cases in our sample). Our research therefore covers a decisive part of the development of the NSS in its first decade (2003–2013).

In its first few years, the NSS suffered from the flood of cases and many vacancies in the judicial personnel. The NSS started in 2003 with less than half the number of judges sitting in the NSS in 2014 (originally 13 as opposed to 30 today). In the first few months of 2003, judges were not supported by any law clerks. Not surprisingly, many delays and backlogs followed. This had an impact on the quality of the earliest judgments of the NSS. Judgments remained very short, they included just the very basic framework of textual analysis of the law. Purposive argumentation as well as any other argumentation external to law was largely missing.

In around 2006 the situation shifted. That year the NSS moved into a new modern building, judges were equipped with new technologies. The number of judges doubled and reached almost 30, thus making the workload more manageable. Every judge hired a second law clerk. A new comparative law section of the NSS was established, one of its functions preparing comparative analysis for judges when facing cases with EU or foreign law elements. This section is composed of young lawyers, recent law school graduates, fluent in many languages (besides those frequently spoken Polish, Spanish and Italian are also represented here). Interestingly, judges do not hesitate to use the output of the comparative analysis while justifying their verdicts.

The NSS, composed of 30 judges today (2014), is rather small if compared to its European counterparts. It includes both career judges and judges coming from other legal professions (bureaucracy, private firms, academia). The former group now makes less than half of the NSS. Being composed of judges with different

<sup>21</sup> Ibid.

professional backgrounds the NSS is much more diverse than the Czech *Nejvyšší soud* (Czech Supreme Court, hereinafter 'NS').

At the beginning of the twenty-first century it can be said that the Czech judiciary does not use a single style which would unite constitutional, administrative and general judiciary. Even within one single NSS one can find more styles, which do relate to personalities of judges who write the opinion. However, if we shall simplify, the civil and criminal judiciary represented by the NS stays closer to the cognitive and formalistic ideal of legalistic argumentation which used to dominate Czech law until the 1990s. This ideal is linked to openly formalistic and mostly brief opinion, without accepting interpretational alternatives. The disadvantage of this rather conservative style is a limited persuasiveness. Its reader does not know how the court addressed the arguments which called for an alternative approach. The decisions retain their legalistic façade, the judge presents his view as if he or she were a 'subsumption' automaton, without showing reasons why they chose one premise over another. The decisive reason of the correctness of judicial interpretation is the hierarchical position of the NS within a judicial system.

In contrast, the development of a different style of the administrative judiciary accelerated after 2004 (the year when we finished our first research). It followed the patterns developed in the 1990s by the *Ústavní soud* (Czech Constitutional Court, hereinafter 'ÚS'). After all, as we mentioned in the first study, it was the ÚS which effectively served as a substitute to the non-existent NSS until 2003, unifying the case law of regional administrative courts. That is why such a high percentage of constitutional reasoning in the administrative judiciary of the Czech Republic as early as the late 1990s.

Today the decisions of the NSS and often also regional administrative courts are written in a dialogical and discursive style, their length increases every year. Judges are often trying hard to deal with all alternatives of the interpretation of a particular legal problem. The nature of reasoning is quite often substantive, it is openly accepted that the law has more than just one possible meaning. Judges are seeking to find all the reasons why the interpretation chosen by the court is the correct one; sometimes judges are so open that they make it explicit that multiple interpretations are possible, and then they give their reasons why the outcome is the best one. Although the rank of the NSS within a judicial hierarchy matters (the court is correct because it is final), the NSS tries to legitimise its reasoning by sincere attempts to persuade the readers. The disadvantage of this style is its length and diffuseness.

Both styles, the legalistic style of the NS and dialogical of the NSS do coexist in the same legal culture. That is why it is premature to say which one would prevail in a longer run. It remains to be seen whether a longer decision with more reasons is more persuasive within a civilian legal culture, or whether the judiciary by doing this is not losing part of its (fictitious but publicly important) legitimacy of the institution endowed by the knowledge of the 'objective' truth of the law's interpretation.

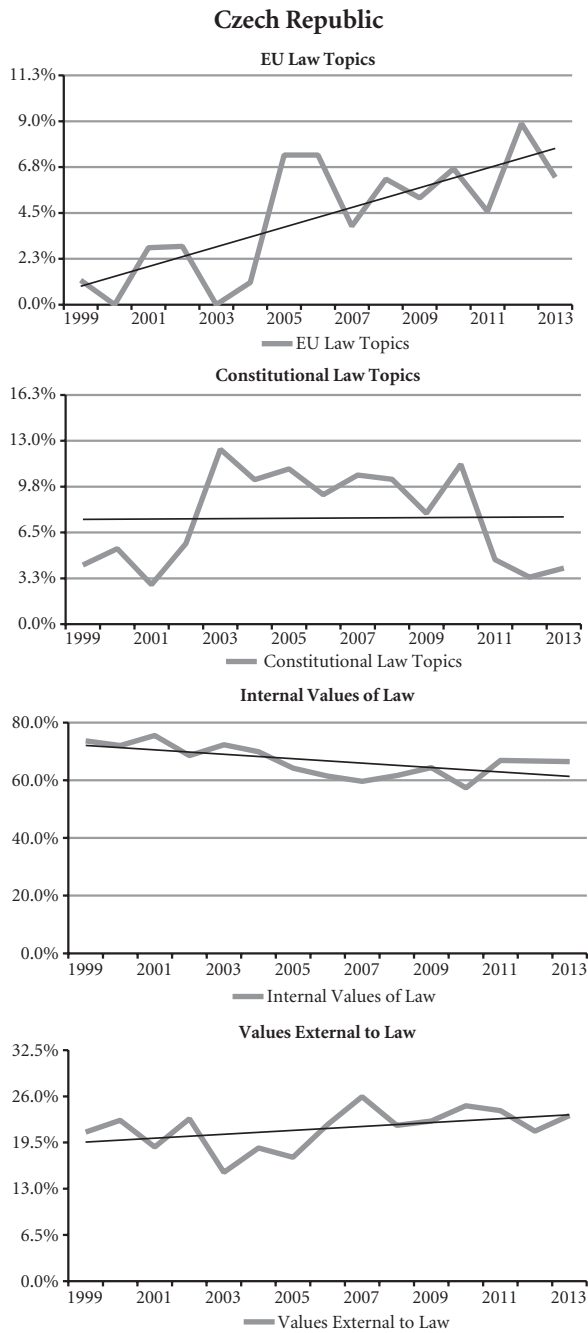


Against this backdrop one must interpret the changes visible in our sample data since 2007. The average length of the judgment multiplied, say from two or three pages in the 1990s and the early 2000s to 10 or 12 pages in the late 2000s and the early 2010s. The judgment is now supposed to address all arguments presented by all parties to the procedure. It is not just the judge's authority which decides the case. Instead this is the judicial authority combined with the sincere and open dialogue with both parties which both decide the case. If this is true for many decisions dealing with hard cases, it is even more applicable for the decisions of the grand chamber of the NSS, which is supposed to unify the case law of the NSS.<sup>22</sup> As a rule, decisions of the grand chamber are openly dialogical, they deal with all interpretational alternatives and are explicitly based on weighing substantive reasons.

Since the 1990s a rather frequent use of external arguments, especially if compared with Poland and Hungary, has continued. Those arguments are quite often substantive and value-driven. The more visible rise of non-formalist argumentation, as represented in our graphs through 'values external to law', started in 2006 and accelerated since 2007. Unlike the situation until 2006, more recent judgments do approach hard cases in a much more transparent way, using teleological or purposive argumentation routinely. The relatively smaller number of references to legislative history, especially if compared to Poland (a Czech judge is almost three times less likely to refer to legislative history than his Polish counterpart), relates to the fact that Czech *travaux préparatoires* are notoriously infamous for being of very poor quality, usually lacking any substantial information. In contrast, the use of purposive argumentation (often called objective teleological argumentation: The law's purpose as envisaged by the interpreter) is now a standard exercise of Czech administrative judges.

EU law arguments come most often from VAT cases, customs law, some areas of environmental law and competition law, which is also the case in the two other countries. Cases where EU law is directly applicable have been decided by the NSS since the end of the first decade of this century, taking into account the delay between facts of the case, subsequent administrative procedure and finally judicial proceedings. It is generally possible to say that the judges of the NSS, supported in their research by the numerous professional staff and comparative apparatus and two law clerks, are inclined to address EU law arguments more often than lower administrative judges. For the latter it is still in some way a luxury for which they often lack time, resources and energy. After all, almost all preliminary references to the Court of Justice were made by the NSS rather than by lower administrative courts. The use of EU law arguments is quite often urged by the parties. In some other cases the parties try to argue against the use of EU law if the result is

<sup>22</sup> The NSS routinely decides in three judges chambers. The grand chamber is composed of seven judges and is supposed to issue verdicts binding for the entire court if the case law is conflicting or a regular chamber wants to deviate from the earlier case law.



**Chart 3: Trends of frequency of references to specific groups of standards between 1999 and 2013**

unwelcome. Often the parties try to set aside EU law by referring to the domestic constitutional law which is allegedly in conflict with EU law (such as the abuse of rights, carousel frauds in VAT etc). And yet in some different cases ignorant parties do not argue by EU law and the judge would invoke the argument on her own motion (typically if the parties' submission brought the general legal argument which has also its EU law underpinning).

Whether or not the use of EU law is a sign of anti-formalism is difficult to say. The use of EU law is in many cases anti-formalistic (if general principles or other open-ended standards of EU law are applied as well as EU law harmonising arguments). However, as already discussed above in relation to Hungary, it can easily become the exercise of overt formalism, though, especially if judges unthinkably do recite some abstract or unrelated EU rules which then serve as a façade for the result reached in a different way.

Czech judges do tend to quote legal literature much less frequently than the Polish courts but much more frequently than their Hungarian counterparts. Among published cases 3.5 per cent of judgments did refer to scholarly work, whereas in Poland the number is more than three times higher (11.4 per cent). In contrast, Hungarian judges almost never quote legal literature (0.3 per cent). The Czech legal culture historically belongs to the Germanic legal family where the role of legal academia has been always very important (in Germany often referred to as professorial style of law). Thus, the current situation when the Czech judges do not view legal academics as a meaningful support for their task of interpreting the law is part of the continuing failure of the domestic legal academia to provide an impetus to judge-made law.

Recently (say since 2010 or 2011) we can see to some extent a reverse phenomenon and the return to a different style of formalism. Also this is visible in our tables as the rise of values internal to law after 2010. This rise of formalist arguments is not the move back to statutory textualism. Instead, it is accompanied by the rise of the role of the earlier case law (case law formalism).<sup>23</sup> Whereas in the earliest years the judgments seldom referred to precedent as there was literally nothing (we remind our readers that the NSS started to operate in 2003 and the first year it issued few judgments), recently one can hardly find a decision which would not quote at least one earlier precedent. In many judgments the number of cited precedents is much higher, though, and it often happens that the number of cases used and quoted is in two digits. Unlike Hungary, the NSS always gives a proper citation so the reader might find the source of argument. So far so good, the proper quotation of the arguments used by the NSS makes the judicial argumentation more transparent and open to criticism.

On the other hand, NSS's argumentation is becoming more self-referential and sometimes even sterile because all arguments seem to be embedded in the

<sup>23</sup> Signs of case law formalism are also present in Hungary, see Z Zódi, 'Analysis of Citation Patterns of Hungarian Judicial Decisions', online at <[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2410070](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2410070)>, 26.

earlier cases. The law's reason is often lost under the surface of texts separated from their factual environment in the earlier case law. Interestingly, this new wave of formalism sometimes buries even contrary text of the amended law—judges applying the earlier case law simply would not notice that the interpreted law itself had been amended. In fact, the way we conducted our research underestimates this new phenomenon as it includes cases which have been meant by their authors as being at least in some way novel. Many other cases which shall have been interpreted in a non-trivial fashion, all things considered, are often decided mechanically, just referring to the earlier case law which however was dealing with a different factual scenario. These cases would remain unpublished.

#### D. General Evaluation of Adjudicative Style of CEE Countries

##### *i. The Direct Impact of EU Accession*

The research results set out in the previous section point to several noticeable trends in CEE administrative courts' argumentation practice. First, an obvious trend is the significant rise in references to EU law arguments, which, in each of the countries examined, was several hundred per cent. This direct effect of the accession is easy to explain—together with the accession, EU law became an element of the internal legal system of Member States and references to this law have over time become similar to references to internal law values. This is particularly true in the case of adjudications relating to customs and tax law, especially in cases involving VAT or excise duty. The impact of the accession is not limited to EU law-related issues but it stretches also into purely domestic cases. In the case of Poland and the Czech Republic, the most frequently (in Hungary the second most frequently) cited argument in the EU law values group is the principle of interpretation of domestic law in accordance with EU law. This type of argument is not a typical internal or 'written' argument that is applied automatically, as it requires from the judge a complex process of argumentation which is unique in each case. The substantial rise in the application of pro-Union interpretations could therefore be regarded as a serious change in the adjudicating culture of judges in CEE. This type of argumentation is structurally different from the arguments used in the past and consequently is something new in judicial practice, which cannot be said of specific EU law regulations being applied in a manner similar to the current application of domestic provisions.

##### *ii. The Indirect Impact of the EU Accession*

In addition to the rather obvious direct impact of EU law on the spectrum of arguments used by judges in CEE, our research also shows the occurrence of an indirect impact. First, we observed a significant increase in the number of

referred reasons per judgments in comparison to the previously examined period (see table 4 below).

**Table 4. Comparison of number of arguments per judgment of the currently examined period to the previous period**

Number of arguments per judgment	Poland	Hungary	Czech
1999–2004	3.5	1.92	3.53
2005–2013	5.4	3	7.6
Change	54%	36%	115%

It can be assumed that the more reasons a judge uses in a case, the more persuasive his decision becomes. We believe this is a sign of a greater understanding of the needs of the external stakeholders, like the parties to the case, their representatives and wider public audience that can better understand the grounds of a particular verdict.

Second, compared to the results of the study carried out for the years 1999 to 2004, there has been a drop in the number of references to internal law arguments together with a change in the frequency of using non-formalistic arguments other than those of the EU law. This specifically applies to constitutional arguments, though to a lesser degree, arguments based on values external to a law, such as its aim or function of laws.

The fall in the number of references to internal arguments, particularly the lower proportion with which linguistic interpretation is used (a 10 to 15 per cent drop, depending on the country), may be an indication of the deformalisation of administrative court judgments. Of course, to a certain extent this change corresponds to the greater number of references to EU law arguments. These references have in many cases, especially in tax cases, replaced references to internal arguments. This is why, in order to show deformalisation tendencies in administrative case law, it is necessary to point out other changes, particularly as regards the frequency of references to constitutional and external arguments.

As indicated in the paper setting out our research for the years 1999 to 2004, constitutional argumentation shows that judges are willing, in a specific judgment, to apply principles of law understood to be general, unspecified standards. This willingness goes against the formalistic approach, which centres on the application of bright-line rules and is adverse to argumentation based on principles and standards thus requiring judges to take important axiological decisions. Under formalism these decisions are reserved for the legislator and it is deemed that the application of principles by a judge leads to a great risk of unbridled decision making discretion.

However, taking into account values such as the aim or function of law is, to our mind, proof that judges' awareness goes beyond the letter of the law to cover how application of the law affects society and the economy. In our view, the fact that EU law is clearly rooted in the idea of economic, social and even cultural integration naturally requires that in many cases related to EU law judges have to consider the relationship between the law and society and its development. There is no doubt that a functional and teleological interpretation based for example on the analysis of the themes in European directives, is a key element in applying European law. Consequently, it may be deemed that acceptance of this by judges leads to greater willingness to apply internal law functionally and teleologically. The application of values external to law is therefore proof of a departure from the formalistic tendencies that decry the use of extra-textual values in judicial argumentation.

In both areas of judicial activity discussed, our research shows that changes have taken place since our study of the years 1999 to 2004. In both Poland and Hungary the increase in the frequency of references to constitutional values is impressive—an almost 50 per cent rise in Hungary and a 30 per cent rise in Poland. Data on the Czech Republic do not support this trend, though it should be noted that in the 1999–2004 results judgments passed by Czech courts were the least formalist of the three countries examined (and were in direct interactions with the *Ústav soud* which served as a sort of substitute to the then non-existent high administrative court). Thus it could be said that the willingness to apply the Constitution, promoted by the influential *ÚS*, has remained stable and at a relatively high level in the Czech Republic.

Among the constitutional references in all the countries examined, at the forefront are references to generally understood constitutional rights and freedoms without them being specified by judges. This may show that the constitutional awareness of the judiciary in administrative courts is relatively low and is limited to an awareness that constitutional rights and freedoms should be taken into account in judgments, though this is not based on an in-depth analysis of the functions and relevance of individual constitutional principles. Hungarian judges are an exception in this respect. In their judgments almost quarter of all references to the Constitution are references to the proportionality principle. This principle plays a key role in assessing whether it is reasonable for the administration to interfere in the lives of citizens, thus it is also certain that this popularity among administrative court judges should become a role model. A similar role in the Czech case is played by the due process clause which guarantees the right to fair trial (Article 36 of the Czech Bill of Rights). This clause serves as a sort of default rule which generates constitutional reasoning if no more clear rights are available. When a Czech lawyer does not have another constitutional provision to use she would simply refer to Article 36. Both the Czech NSS and the *ÚS* use this fundamental right for both procedural and substantive law errors before the ordinary courts.

Although there has been an increase in the number of references to external values in Hungary and the Czech Republic (a rise of about 20–30 per cent in both countries), no such increase can be seen in Poland. The most popular of the external values are references to the aim and function of the law and also to the legislator's intent. Note should be taken of the occurrence in judicial argumentation of references to a principle that is of key importance for citizens—that of *in dubio pro libertate* (if in doubt, adjudicate in favour of freedom of permitted action), which we found little evidence of in our study of the years 1999 to 2004. Our current research shows that it is becoming increasingly popular to apply this principle in Hungary and in the Czech Republic.

A useful summary of the interpretation of our research results is given in one more table, illustrating the spectrum of values referred to by judges in a single judgment.

**Table 5. Combinations of arguments per judgment (proportions of the same combinations as found in the previously examined period are in brackets)**

All Poland (400)						
Intern	Const/ Intern	Intern/ Extern	Const/Intern/ Extern	EU/ Intern	Other	Total
165	60	60	45	30	39	399
41.4% (60.8%)	15.0% (10.0%)	15.0% (19.8%)	11.3% (5.6%)	7.5%	9.8%	100%

All Hungary (358)						
Intern	Intern/ Extern	EU/ Intern	Const/ Intern	EU/Intern/ Extern	Other	Total
187	63	50	15	22	21	358
52.2% (82.4%)	17.6% (12.2%)	14.0%	4.2% (3.0%)	6.1%	5.9%	100.0%

All Czech Republic (180)						
Intern	Intern/ Extern	Const/Intern/ Extern	EU/Intern/ Extern	EU/Const/ Intern/Extern	Other	Total
31	77	29	22	18	3	180
17.2% (41.8%)	42.8% (33%)	16.1% (9.4%)	12.2%	10.0%	1.7%	100.0%

This table shows, *inter alia*, how many administrative cases are adjudicated by judges solely on the basis of formalistic (internal) arguments, and in how many cases other values play a part. In our view, a good judgment should be justified using a whole range of interpretations and therefore the cogency of a linguistic interpretation should be supported by a functional, pro-Union and pro-constitutional interpretation. Thus the fall in the number of judgments based solely on internal values should be seen as a positive change in how administrative court judges adjudicate. The table above shows this fall—at present fewer than half of all administrative court judgments are based solely on internal argumentation, which we deem formalistic, while the study of the years 1999 to 2004 indicated that as many as two thirds of judgments did not use any external, constitutional or EU arguments (for example Poland). We regard this change as one of the most noticeable pieces of evidence of the evolution that administrative judgments have undergone in CEE due to the accession of countries in the region to the European Union.

### *iii. Some Doubts about Deformalisation*

We have been witnessing recently a considerable change in the proportion of EU law arguments in judgments delivered by CEE judges. Nonetheless, the higher proportion of using written EU law arguments in reasoning is a natural consequence of the EU accession and it is not necessary a sign of the Europeanisation of the judicial thought. As EU law is being more and more developed the number of its specific and directly applicable norms are increasing accordingly. Provisions of EU law therefore, as we indicated above, can also become the ‘most locally applicable rules’.<sup>24</sup> Besides that national higher courts gradually build a bunch of precedents around cases related to EU law which can determine the direction of adjudication in future cases and, at the same time, it can make judicial practice rigid and inflexible (‘case law formalism’). It is a realistic possibility that many judges choose the formalistic way of applying EU law without reflecting the policy considerations, values and purposes behind the text of EU law. Using the text of EU law without accepting the judicial thinking of the Court of Justice and the ECtHR will not serve the purpose of the deepening European integration.

Formalistic application of EU law is strengthened by one of the characteristic developments in the past two decades in CEE countries, namely the ‘politicisation of adjudication’. This means that courts played the role of the arbitrator, more and more frequently, in cases having political implications. It is obvious that it is the constitutional courts, in the first place, which represent this type of self-understanding. Nonetheless the effort of the courts to extend their political competence has caused heavy criticism amongst politicians and other stakeholders and statutory restriction of the power of constitutional courts has become a realistic

<sup>24</sup> It is worth noting that the question of correct interpretation of EU norms which frequently requires serious effort from the judge (exploring the social backgrounds and complex political aims behind the applicable norm) has to be differentiated from the problem of formalistic application of EU arguments which is also possible (there is no legal system fully protected from formalistic adjudication).



opportunity.<sup>25</sup> Ordinary courts may therefore hope they can avoid that kind of criticism if they show a minimalist approach in deciding issues having any political implications. A law-applier bureaucrat serves better this institutional goal than a Dworkinian ‘Hercules’ who protects the rights of the individual against state intervention under any circumstances. This sociological explanation also suggests that *under uncertain political circumstances*, particularly in young and relatively weak democracies, courts try to remain strictly minimalist and refrain themselves in discussing cases with political implication. This judicial strategy can support the formalistic judicial style.<sup>26</sup> To sum it up although formalist adjudicative strategy has a detrimental effect on the quality of the reasoning it still may have some positive impact on the institutional position of the courts in the political arena.

There is another factor which pushes judges toward treating EU law in a formalistic way. The workload of judges which is commonly considered as a heavy burden on them has not decreased significantly since our previously studied period (1999–2004). It goes without saying that there is a steady and strong pressure on judges from both public audience and courts leaders to resolve legal cases as fast as possible. As the time of finishing cases is a measurable and easily controllable criterion when evaluating judicial activities, judges pay more attention to timeliness than to construing a well-founded and reflective legal reasoning which would be essential in applying EU law otherwise. The reason we can still be optimistic about the future of CEE adjudication is that the increase in the number of EU law arguments was followed by a similar increase in the references to other non-traditional arguments (with the exception of constitutional law arguments in the Czech Republic). These data indicate that judges tend to take into consideration the wider legal (constitutional arguments) and social (values external to law) context of cases before them. This judicial approach necessarily presupposes a certain level of awareness of deeper layers of law even if non-traditional arguments are often referred first by involved parties and judges only reflect to those arguments in the reasoning.

#### *iv. Risks of Non-formalism and Strategic Formalism*

Examining and evaluating the developments of application of EU law in CEE countries cannot be completed without taking the broader context of enforcement of rule of law into consideration. From this aspect fidelity to traditional legal arguments has its own advantages. In easy cases where the content of the written law is obvious and it is clear what the law requires from the addressees (or where originally unclear law has been interpreted by established case law), it can

<sup>25</sup> Á Kovács, ‘Szükség van-e alkotmánybíróságra? Instrumentális érvek a törvényhozás bírói kontrollja mellett’ [Do we need constitutional courts? An instrumentalist approach on the judicial control of the legislature] (2013) 68 (5) *Jogtudományi Közlöny* 243.

<sup>26</sup> For detailed discussion of this sociological framework see PH Solomon, ‘Courts and Judges in Authoritarian Regimes’ (2007) 60 *World Politics* 122.

be dangerous to make judicial decisions based on uncertain and vague principles, values or extra-legal factors even if such a decision seems to be right. Some argue that in cases where we would have good reasons to deviate from the plain meaning of the text we should avoid doing this: A fallible human decision maker does better if she or he treats the legal text as a reliable indicator of the intention of legislator.<sup>27</sup>

Spreading of non-formalism and strategic formalism (in the latter case the decision, *per definitionem*, is not driven by the text of the law either) without reasonable limits on it certainly threatens the rule of law as it may violate the requirement of transparency and thus, it may expose the adjudication to illegitimate influencing factors (pressure group's interests, political party's intentions etc). In analysing the selected judgments we found some dubious arguments which may disguise the actual reasons behind the judgment.

As for the strategic formalism, we realised that Hungarian judges, unlike their Polish and Czech colleagues, prefer using the token argument of 'judicial practice' without any clarification and without mentioning any concrete previous decision. Furthermore, in certain Hungarian cases we found references to vague categories such as 'the conviction of the court' serving as the basis of the decision without any further specification. These kinds of arguments do not meet the requirement of transparent legal reasoning as neither the affected parties nor the wider public audience are aware of the true reasons behind the decision of the judge.<sup>28</sup> A serious disadvantage of such a style of legal reasoning is that it may weaken the convincing force of the judgments and consequently the public trust in courts as well.

As further evidence of this approach we found reference to the 'legal practice of the administrative agency' in a case where the very practice of the competent administrative agency was questionable. That is a good example of how judges, under the umbrella of a seemingly formalistic argumentation, can defend the so-called state-interest ('raison d'état') instead of protecting the right of conducting free commercial activities.<sup>29</sup> It is a commonly received view that one of the

<sup>27</sup> A Vermeule, *Judging Under Uncertainty: An Institutional Theory of Legal Interpretation* (Harvard University Press, 2006) 63–85.

<sup>28</sup> One telling example from Hungary is the case (BH 2006. 376) where the Custom Agency imposed a relatively high fine on a wine producer who failed to report, on time, officially that a part of their wine stock was ruined because of a leak in one of his wine tanks. According to the relevant law he should have reported the change 'at the time of the event [of the damage]'. The misfortune occurred at 8am and the producer wanted to report the event at the end of the working hours (after the necessary and urgent work, in order to reduce damages to the minimum, was done). LB said that the referred text of the law does not require immediate report from the plaintiff, but the court did not explain how it had come to that conclusion. In our opinion, the arguments would have been complete if the court had referred to the proportionality principle since, taking into consideration the special circumstances of the situation, the immediate obligation to report the damage would have put an extreme burden on the wine producer.

<sup>29</sup> This is not to question that legal practice of a governmental agency has been an established German category which is here primarily to protect interests of the parties to administrative proceedings. The corresponding principle prohibits deviating from this practice unless good reasons are offered.

main characteristics of the so-called Socialist legal system is the ‘reversed hierarchy of legal norms’. That means that judges and administrators prefer applying the most detailed directives (ordinances, opinions, circular letters etc), even if they did not count as ‘hard law’. As a consequence of this a ‘state-friendly’ approach was clearly detectable in two other cases, where the court held the disagreement of two administrative agencies against the business entity.<sup>30</sup>

Non-formalist argumentation also can go against the values of the rule of law. If a judge just refers to a certain constitutional principle or a human right (or as we saw it in one Hungarian case: To the ‘the moral judgments of the society’) as a reason for his decision and does not put that argument in its proper constitutional context or ignores the particular circumstances of the case when she or he delivers a judgment, this also can be a breach of his or her duty.<sup>31</sup>

The answer to the question of which adjudicative style serves better the enforcement of the rule of law and the interest of the whole political community may depend on the type of cases to be decided. A judge has to have the necessary ‘judicial wisdom’ to decide when she or he has to apply an innovative, new solution and when she or he has to remain loyal to the text of the law. Although judicial wisdom cannot be acquired from books, there are some institutional solutions which can help judges recognise the broader context of their decisions as well as making the process of judicial thinking more reflective. One of them is having more balanced courts, composed not only of career judges but also of the outsiders to the judiciary, having experience from other fields of life than the judiciary.

## V. Conclusions

In our previous study we stated that due to the strong formalist tradition CEE judges may need some time to fully adjust their judicial decision making style to the new legal environment resulting from the EU accession. In this chapter we presented the results of an analysis of more than 900 administrative judicial

<sup>30</sup> In one of these cases (BH 2006. 137) the Building Authority gave permission to an entrepreneur to build a factory on its own land. After that the Land Registry Agency imposed a fine on the entrepreneur because he did not ask for a licence to build premises in an agricultural area.

<sup>31</sup> We have a Hungarian example (LB Kfv.II.39.166/2007) for this attitude (this administrative judgment is not one of the examined cases): In the early 1990s a church building was built in the centre of a residential district of a Hungarian town. After its opening, residents were subject every morning—including weekends—to a long-lasting and very loud chiming starting at six o’clock. After some unsuccessful meetings with the representatives of the Catholic Church, the residents brought the case to the competent administrative agency which ordered reasonable decrease in chiming in terms of volume and period. The Church then challenged this decision before the court in 2007. The court quashed the decision of the agency stating that the expression of religious convictions is protected by the constitution and chiming, without any doubt, qualifies as such. The court did not make any effort to explain why residents’ right to a healthy environment was irrelevant in that case (ignoring the constitutional context), and also overlooked ‘the most locally applicable rule’, namely the ministerial decree on protecting citizens from noisy activities (ignoring the particular circumstances of the case).

decisions from three CEE countries, dated from 2005 to 2013. Based on our quantitative analysis we can certainly declare that significant changes have occurred in the judicial style of administrative courts since 2005. Our data clearly show that judges of the CEE countries have used more non-formalistic, non-traditional arguments (pro-constitutional, pro-EU reasons and values external to law) in the examined period than they used before the EU accession. These findings allowed us to argue that the EU accession has both direct and indirect influence on judicial behaviour in CEE countries.

This shift is a clear sign of departure from the classical 'French judicial style' to a reasoning which serves as genuine guidance for both the parties and other judges in deciding similar cases. Using non-formalistic arguments in an increasing number does not only result in a change of the 'language of judicial reasoning' but may be an indicator of a change of judicial thinking. The more arguments a judge considers in the reasoning the more the chance of socially sensitive, problem-orientated and open-minded decision making. This kind of judicial thinking is of special importance in administrative cases where there is an asymmetry in strength between the litigious parties.

One of the reasons for this shift is obviously the EU accession—together with EU membership, EU law became an element of the internal legal system of Member States and references to this law have over time become similar to references to internal law values.<sup>32</sup> In addition to that we could be witnesses of the process of 'internationalisation of adjudication'. In the past decades many international judicial associations, as well as formal and informal networks of judges have emerged. CEE judges, therefore, currently have many transborder opportunities to learn something new, educate themselves, take part in conferences and communicate to each other in various ways.

We cannot overestimate the impact of the information technology (especially that of the internet) on the everyday judicial work, as well. Numerous professional and open-access databases facilitate the exploration of the relevant case-law, literature or other necessary legal materials when a judge discusses a difficult case. The internet makes it also easier to ask for or give advice.

Besides that we must remember that since the political transition a brand new generation of lawyers (judges) has been growing up. Many of them speak foreign language(s), took part in the Erasmus program, learnt comparative law at the universities and they are familiar with the jurisprudence of the ECJ, ECtHR and their own national constitutional court, too. It is not a surprise therefore that, as opposed to their ancestors, they are willing to accept non-formalistic arguments in their legal reasoning.

<sup>32</sup> However, we were warned by senior judges that similarly significant changes might not occur in 'traditional' fields of the adjudication (civil and criminal cases). The reason for this is that administrative law is the legal branch most exposed to the influence of EU law while other branches of law preserve their own national characteristics.

However we have to be careful in relying on empirical data in evaluating the developments of the adjudicative style in CEE countries. Some findings of the qualitative content analysis have indicated that the spectacular increasing in the numbers is neither necessarily in straight correlation with improving the quality of adjudication nor does it mean the reception of self-understanding of Western judges.

We saw some cases of abusing of non-formalistic arguments. Vague categories, for example, as decisive reasons do not meet the requirement of transparent legal reasoning. Furthermore, a special version of formalism (strategic formalism) seems to survive or even acquire new forms (case law formalism). This causes problems if judges apply these kinds of formalist strategies systematically in deciding hard cases. Such a problem can be that formalism may strengthen the 'law-applier' mentality which does not take the protection of rights of the plaintiffs seriously. This attitude may lead to the emergence of a non-conscious state-friendly 'default setting' in deciding administrative cases.

To sum it up: Despite the above-described signs of deformalisation, the formalism of administrative judiciaries is not fully dead, especially in its new form—'case-law formalism'. A possible explanation of its persistence (besides the steady pressure on judges to finish their cases as fast as possible) may be that in young and relatively weak democracies courts try to remain strictly minimalist in discussing cases with political implications and administrative cases often have such implications.

