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Michal Bobek

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European Legal Studies/Etudes Européennes Juridiques
Dijver 11 | BE-8000 Brugge, Belgium | Tel. +32 (0)50 47 72 61 | Fax +32 (0)50 47 72 60
E-mail law.info@coleurope.eu | www.coleurope.eu

Judicial Selection, Lay Participation, and Judicial Culture in the Czech Republic: A Study in a Central European (Non)Transformation[*]

Michal Bobek[**]

1. Introduction

The idea that "merit" should be the guiding principle of judicial selections is a universal principle, unlikely to be contested in whatever legal system. What differs considerably across legal cultures, however, is the way in which "merit" is defined. For deeper cultural and historical reasons, the current definition of "merit" in the process of judicial selections in the Czech Republic, at least in the way it is implemented in the institutional settings, is an odd mongrel. The old technocratic Austrian judicial heritage has in some aspects merged with, in others was altered or destroyed, by the Communist past. After 1989, some aspects of the judicial organisation were amended, with the most problematic elements removed. Furthermore, several old as well as new provisions relating to the judiciary were struck down by the Constitutional Court. However, apart from these rather haphazard interventions, there has been neither a sustained discussion as to how a new judicial architecture and system of judicial appointments ought to look like nor much of broader, conceptual reform in this regard. Thus, some twenty five years after the Velvet Revolution of 1989, the guiding principles for judicial selection and appointments are still a debate to be had.

This report proceeds as follows. First, since institutional choices with regard to both of the key issues tabled by the general questionnaire, judicial selection and lay participation in judicial decision-making, are defined by history and prevailing ideological convictions present within a legal culture, section 2 of the report starts by setting out cultural vision of the judicial function in the Czech Republic that defines and helps to explain the institutions and their context addressed in the subsequent points. Next, section 3 outlines both, the formal requirements for judicial appointments to in particular higher courts in the Czech Republic as well as the genuine institutional practice. Section 4 focuses not only on the various forms of lay participation in the judicial decision-making processes as they exist today; it also explains why the post-1989 Czech judiciary remains reserved with regard to lay participation in the judicial process. Finally, section 5 concludes by connecting up lay-participation with judicial legitimacy, suggesting that judiciary that apparently does not trust its citizens can hardly expect much trust in judiciary being displayed by them in return.

2. Prologue: the Historical Image of a Judge

The Czech judiciary or more broadly Central European[1] judiciaries are built on a myth: the myth that judging and deciding cases is a clear-cut analytical exercise of

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[**] Professor of European Law, College of Europe, Bruges; research fellow, University of Oxford Institute of European and Comparative Law. Contact: Michal.Bobek@eui.eu.

[1] Without wishing to enter the lengthy debate as to what should geographically and culturally mean "Central Europe", for the purposes of this report, the notion "Central European countries" refers to the

mechanical matching of facts with the applicable law. It is almost "legal arithmetic". Judges do not pass value or moral judgments. They just *find* (never create) the *applicable* (i.e. already extant) law strictly within the bounds adopted by the legislature.

This myth is, to a great part, a variety of the classical narrative concerning the judicial function construed on the European Continent in the course of the 19th century.[2] However, whereas the Western Continental countries started gradually departing from these assumptions in the course of the second half of the 20th century,[3] Central Europe did not; quite to the contrary.

After the Second World War in Western Europe, one notes a certain retreat from the complete denial of creative power of the judges. In retrospect, denying that judges had always exercised some law-making function was referred to, even if in a bit one-dimensional narrative, as the "French Deviation".[4] However, after the Second Word War, the situation clearly changed, amongst other things also with the advent of powerful constitutional courts and the various European and international jurisdictions. Hesitantly but clearly, Western Continental systems started again recognising that judges do create new legal rules, at least to some extent.[5]

After 1948, the development in the Communist Central Europe, however, went in the opposite direction. The legislative (by then the popular people's) sovereign will was put on the pedestal and re-affirmed, against all the institutions in the state.[6] Thus, instead of re-evaluation and relaxation of the grip of the codes and legal positivism, as happened in Western Europe, Communism tied judges even more firmly than before. In the visions before the Second World War, Central European judges were left with dogmatically limited but still some space of manoeuvre within the law. Under Communist rule, there was in practical terms no discretion at all, certainly in the cases that mattered politically.[7]

The pre-Communist judicial authority in Central Europe can be said to be *technical* and *bureaucratic*. The Austrian-Hungarian judiciary was construed as a skilled

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Czech Republic, Slovakia, Poland and Hungary. There are, naturally, differences between the four countries: common past does not guarantee common present. However, because of shared Austrian and later Communist heritage, there are arguably some common elements in the perception of judicial function present in these four countries.

[2] Further e.g. JP Dawson, *The Oracles of the Law* (The University of Michigan Law School, 1968), ch 1 or J Krynen, *L'Etat de justice France, XIIIe–XXe siècle. Tome II: L'emprise contemporaine des juges* (Gallimard, 2012) 21 ff. For the jurisprudential account of such positivist interpretive ideology, see e.g. B Frydman, *Le sens des lois: histoire de l'interprétation et de la raison juridique*, 3rd edn (Brussels: Bruylant, 2011).

[3] Or, to be precise, they started departing from such official pictures and ideology; the reality might have always been different. For a critical discussion see eg: F Berenger, *La motivation des des arrêts de la Cour de cassation* (Presses universitaires d'Aix-Marseilles, 2003) or M Gläser, *Lehre und Rechtsprechung im französischen Zivilrecht des 19. Jahrhunderts* (Klostermann 1996), suggesting that French higher jurisdictions have in fact never given up their law-making power, even in the times of 19th century exegesis. They had just hidden it under the surface of the apparent formal legal syllogism.

[4] *Cf* the title of chapter 'IV.' in Dawson (n 2) 263, as later discussed by other authors, most notably JH Merryman, 'The French Deviation' (1996) 44 *American Journal of Comparative Law* 109.

[5] Further e.g. M Bobek, *Comparative Reasoning in European Supreme Courts* (Oxford University Press, 2013) 208-209 and 237-240.

[6] In constitutional terms, Communist law operated with the notion of unity of state power, not the separation of powers. See J Přibáň, 'Na stráži jednoty světa: marxismus a právní teorie' in M Bobek et al. (eds.), *Komunistické právo v Československu - Kapitoly z dějin bezpráví* (Masarykova univerzita, 2009) 39-59.

[7] For an overview of the day-to-day functioning of the system of "Socialist justice", see e.g. See generally: O Ulč, *Malá doznání okresního soudce* (68 Publishers, 1974) or I Markovits, *Justice in Lüritz: Experiencing Socialist Law in East Germany* (Princeton University Press, 2010).

professional career judiciary, an apolitical body, whose authority was expertise-based. The mandate of the judge was derived from his technical legal knowledge, acquired and tested in mandarin-like entrance examination and further fostered in similar style of promotion and advancement.

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

In terms of their institutional organisation and culture, the Czech and Central European judiciaries are a clear cut example of the hierarchical ideal of officialdom.[8] This ideal is characterized by a professional corps of officials who are organized into a hierarchical structure. The system relies on extensive control and oversight of activities of the system's lower levels.

The Austrian and perhaps more broadly Germanic specificity within the hierarchical model is the strong bureaucratic element in it. The Austrian monarchy created and the Central European countries later inherited the image of the judge as a specific variety of a civil servant. It is not without symbolical significance that, if one opens an early codification of the organization of courts in the Austrian Monarchy, the 1896 Law on Courts,[9] the law does not call a judge a "judge" [*Richter*]. Instead, § 1 of the Law specifies that the constitutional functions of a judge are to be exercised either by "independent judicial officials" [*selbständige richterliche Beamten*] or "auxiliary judicial officials" [*richterliche Hilfsbeamte*].

However, in the Austrian perception, to be a "(judicial) civil servant" had a distinctly positive ethos. The departure from this heritage comes with the Communist regime. In a way, the new Communist regime had no problem embracing the idea that judges are "civil servants", serving the "public". It was a good starting point for turning them into genuine servants of the system, which are there to realize greater aims of the system. The only necessary step was to redefine the "public", whom the judges were supposed to serve.[10]

The new characteristics the Communist regimes added to the Central European judicial self-image are predominantly negative ones. Perhaps the most important ones amongst them was the suppression of personal courage, activity, and responsibility. The reasons for promoting such characteristics within a system which punishes any positive deviation and within which the most useful survival strategy was to be "a grey mouse" or a "faceless official" are obvious. The promotion of such personal characteristics within the judiciary was, however, not just the issue of political control. The incentives were also of economic nature. Under the Communist rule, the position of a judge was badly paid – the average judicial salary in the Czechoslovakia, as well as in Poland, Hungary or Eastern Germany, was at or below

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[8] MR Damaška, *The Faces of Justice and State Authority; A Comparative Approach to the Legal Process* (Yale University Press, 1986) 16.

[9] *Gesetz vom 27. November 1896, womit Vorschriften über die Besetzung, innere Einrichtung und Geschäftsordnung der Gerichte erlassenwerden*, RGBl. 217/1896.

[10] As aptly pointed out by Otakar Motejl, former Czech Chief Justice and then Minister of Justice, this is why the new Communist rulers in 1948 in the then Czechoslovakia happily kept the system of administration of courts inherited from pre-WWII but in fact already Austrian times – cf. O Motejl, 'Soudnictví a jeho správa' in Bobek et al. (n 6) 813.

the average salary in the national industry.[11] It is clear that, in addition to all the political aspects of the judicial work under the Communist rule, a profession with low societal prestige and minimal salary was unlikely to attract top candidates to join its ranks.

The judicial self-image which emerges after the fall of the Communist rule in the Czech Republic and Central Europe more broadly is thus the image of judge as a type of civil servant with an implicitly defensive connotation. Instead of the older Austrian "*I AM a civil servant*" comes the post-Communist defensive "*I am BUT a civil servant*". The Central European judicial Hercules[12] seems to be an anonymous grey mouse, hidden behind piles of files and papers, unknown to the outside world, who does not wish to appear to take any contentious individual decision, surely not those s/he would have to defend publicly.

After 1989, the judicial self-image of judging as a mere technocratic and bureaucratic activity experiences a certain revival. In a way, the old Austrian approach is very useful for the self-justification of the Communist judges and the continuation of their career under the new system. Any new political regime faces similar set of questions relating to institutional transition. Within the judiciary, the question is: what to do with the judges of the old system? The problem is not with the exposed few, the openly discredited judges who presided over criminal cases in heavy-weight political trials. These typically leave by themselves or they are disposed of. The real problem is with the grey masses of system servants, who did not expose themselves in any significant way, but were nonetheless clearly loyal to the previous system. They were educated and formed under it, they enforced its values.

This issue arises in any judicial transformation. To replace almost the entire judicial staff,[13] as was to a great extent done after the German reunification with the importation of judges from the former *Bundesrepublik* into East Germany, is a unique historical opportunity which was not available in any of the other post-Communist states. To train and quickly put into place an entirely new corps of judges is a task so enormous that the Communists themselves failed to put it into operation after their take-over in 1948.[14]

All the judiciaries in the post-Communist Central and Eastern Europe were thus, basically out of necessity, build on the principle of personal continuity.[15] The former Communist judges would invoke the myth of moral-free judging by technocratic judicial officials as a sort of self-justification for their continuous existence within the

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[11] Z Kühn, *Aplikace práva soudcem v éře středoevropského komunismu a transformace Analýza příčin postkomunistické právní krize* (C. H. Beck, 2005) 72-73.

[12] See, for further elaboration of Dworkin's figure of the (ideal) judge Hercules, e.g. F Ost, 'Jupiter, Hercule, Hermès: Trois modèles du juge' in F Ost, *Dire le droit, faire justice* (Bruylant 2007) 33–60.

[13] Or, perhaps, to dispose of them in a more drastic way, as was suggested by a senior English judge. When asked, what should the Central European states do at the beginning of their transitions in 1990, his answer was "Hang all the judges!" – In Z Tůma, 'Soudce nelze novelizovat' in I Pospíšil & M Kokeš (eds.), *In dubio pro libertate. Úvahy nad ústavními hodnotami a právem. Pocta Elišce Wagnerové u příležitosti životního jubilee* (Masarykova univerzita, 2009) 247.

[14] For instance, in Czechoslovakia in early 1950s, Communists established so-called "Law Schools for Workers" [Právnické školy pracujících]. In these special evening schools, opened only to Communists cadres, Communist Party bred "new type of socialist lawyers". The course lasted one or two years and it equalled a university degree in law. The applicants did not even need to have secondary school education. The project itself was, however, discontinued after 4 years in 1954 – the quality of the "graduates" from these courses was apparently too terrifying even for the Communist planners. Further see Z Krystufek, 'Komunistické právo v Československu' in Bobek (n 6) 931-951.

[15] For further discussion of the array of problems this still generates today, see the individual contributions in M Bobek (ed), *Central European Judges under the European Influence: The Transformative Power of the EU Revisited* (Hart Publishing, 2015).

judiciary.[16] If push to the extreme, a good judicial official is able to work in any regime, irrespective of its internal values, precisely because s/he claims that all s/he is doing is the technical application of the will of the legislator. "Mechanical" legal science and technocratic knowledge of the law (especially the procedural rules, which are, in the most post-Communist states, tend to be the object of a specific cult – precisely for these reasons) is thus a judicial self-portrait which an immediately post-Communist judiciary cares very much to foster. It helps it to survive and justify oneself.

In sum therefore, the surviving image of a judge within the Czech judicial system that still informs the judicial selection is quite far from debates on the degree of social or community diversity. In this regard, the overall issues and debate are distant from the themes emerging in the Anglo-American driven debates on judicial selections and appointments. For historical reasons, *merit* has been defined as technocratic knowledge of the law. Thus, the up-to-date ways of selecting judges have focused on how to test the knowledge, coupled with technical skills perhaps (judgments drafting, conducting proceedings in open court, and so on). Conversely, to test values, opinions, convictions would be outside of such merit definition.

For similar reasons, there has been virtually no debate on community diversity or representation in both, judicial selections and judicial decision-making. Again, if the business of judging is a technical, expert exercise, then lay persons can neither test the competence/skills of judges-experts, nor contribute much to such expert decision-making. There is some lay participation in both, judicial appointments (the contribution of the political powers within the state, the government and the president of the republic) as well as judicial decision-making (the limited participation of lay persons in first instance judicial decision-making). However, these are more of exceptions which do not question the prevailing image and self-portrait.

Apart from the cultural tradition outlined above, there are also two factual circumstances that have accounted for the fact that the judicial diversity discussion that dominate much of the Anglo-American debates are of limited relevance in the Czech context. First, the population of the Czech Republic is very homogenous, with some 95% of all residents being ethnic Czechs.[17] Thus, the issues of the diversity of the judiciary, which might be topical in a number of other European countries today, with significant cultural, ethical, or other minorities, do not arise. Second, because of "imposed equality" in the Communist times as well as low salaries and social prestige, judiciaries in Central Europe, including the Czech Republic, tended to be a female profession. Thus, in spite of the balance redressing itself over the years, still in 2000s, over 60% of judges in the Czech judicial system were women.[18] For both of

[16] While down-playing the fact that within a totalitarian Communist state, the ideology and the ideological application of the law was omnipresent, not limited to just criminal trials. Thus, in a system of 'class-conscious' judging, it mattered also by whom a normal civil or administrative claim was brought. For example, a divorce and/or a child care dispute would be resolved very differently if the opposing parties were in one case two members of the Communist Party or, in another, a Party member and, by whatever game of chance, a dissident. For case examples, see Ulč or Markovits (n 7).

[17] According to the 2011 population census data made available by the Czech Statistical Office at http://www.scitani.cz, tables No. 111 and 153.

[18] Z Kühn, 'The Democratization and Modernization of Post-communist Judiciaries' in A Febbrajo and W Sadurski (eds.), *Central and Eastern Europe after Transition* (Ashgate, 2010) 178, 191. However, it should be noted that the "female majority" in the judiciary is unequally spread. Whereas at the lower courts, majority of judges are likely to be female, the ratio becomes reversed at higher and the supreme level. Thus, the male-female ratio at the Czech Constitutional Court, Supreme Court and Supreme Administrative Court is on average around 2:1. This has not been, however, at least so far, identified as a problem that ought to be addressed in any structured way.

these reasons, issues of diversity are not really being discussed in the Czech context.

3. Judicial Selection

The cultural and ideological starting points, outlined in the previous section, find their reflection in the institutional and legal provisions governing the judicial selection to the higher courts (appellate and supreme) in the Czech Republic. Traditionally, the process has been a closed one, lacking transparency and with limited public participation. Recently, however, there have been limited "inroads" into this closed world of judicial appointments.

3.1. Judicial Hierarchy

First, the structure of appellate and supreme courts ought to be outlined. The Czech Republic has, since 2003, a bifurcated judicial hierarchy, consisting of courts of general jurisdiction (civil, commercial, and criminal) and administrative courts. The courts of general jurisdiction form a four layer (but three instances) system of:

(i) District courts;
(ii) Regional courts;
(iii) High courts; and
(iv) the Supreme Court.

The administrative justice has been grafted onto this system in the form of an institutional compromise in 2002. Today, administrative courts consist of:

(i) regional courts; and
(ii) the Supreme Administrative Court.

Regional (administrative) courts are, however, not institutionally separate. Specialized administrative chambers within ordinary regional courts act as administrative courts of first instance. Against their decision, a cassational complaint may be heard before the Supreme Administrative Court, which is a separate, free-standing institution. Thus, the Czech judicial system resembles a beast with two heads, which is tweaked only at the very top, consisting of the Supreme Court and the Supreme Administrative Court, but sharing the same basis of regional courts.

Judicial appointments to the appellate and supreme level include judicial selections to the regional courts, high courts, Supreme Court and the Supreme Administrative Court. Furthermore, dogmatically beyond but functionally above both supreme courts is the Constitutional Court. On the one hand, the Constitutional Court insists on not being part of the courts of general jurisdiction, but forming a unique jurisdiction of its own. On the other hand, the Constitutional Court is entitled to hear individual constitutional complaints, modelled on the German *Verfassungsbeschwerde*. This means that the Constitutional Court is entitled to hear appeals against last instance decisions of any Czech court. Moreover, nobody was ever able to define a "constitutional law question" as opposed to an issue of "mere legality", i.e. to define the jurisdiction of the Constitutional Court on constitutional complaints *ratione materiae.* For all these reasons therefore, the Constitutional Court is in fact the supreme court within the Czech legal system.[19]

[19] Further see Bobek (n 5) 157-162 and 265-272.

3.2 Eligibility

The basic eligibility criteria for all judges of ordinary courts (general as well as administrative jurisdiction) are the same. The candidate must be:

(i) of Czech citizenship;
(ii) possess full legal capacity;
(iii) without a criminal record;
(iv) of at least 30 years of age at the date of appointment;
(v) a successful graduate of a five years full study of law (Masters) at a Czech university;
(vi) have successfully passed judicial examinations;
(vii) a person whose experience and moral characteristics guarantee due performance of the judicial office.[20]

All judges appointed to whatever court must meet these basic criteria. In order to advance to an appellate or one of the supreme courts, the candidate must meet additional criteria of:

(i) length of legal practice[21]
- at least 8 years of legal practice for the appointment to a regional[22] or high court (i.e. to the appellate level);
- at least 10 years of legal practice for the appointment to a supreme court (i.e. to the Supreme Court or the Supreme Administrative Court);

(ii) high level of erudition and demonstrated legal expertise.

It is clear from the listed appointment conditions that most of them are "technical" in their nature, not evaluative. The only evaluative criterion is the requirement of "experience and moral character" and "high level of erudition and demonstrated legal expertise". The latter requirements are, however, nowhere fleshed out in a greater detail. For a number of years, the character-related elements of a candidate have been reduced to the psychological, personal testing of judicial candidates.[23] The candidates were obliged to answer a number of standardized and/or open-ended psychometric testing questions. Their answers were compared with the standardized, expected answers with respect to a norm group. On the basis of such testing, the candidates were either recommended or non-recommended for a judicial appointment.

The problems of such tests were multiple. The most problematic one was the fact that such testing weeded out any candidate whose answer would not correspond with the average norm group. In this way, not only perhaps unsuitable candidates were excluded, but also those above average, who reacted in less conventional way to a set of standardized questions to which standardized answers were to be given, or saw different things when presented with various blurred pictures or shapes that were supposed to invoke certain types of visual associations. Recently, following a sustained critique of such testing, the result of the testing became indicative only.

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[20] Conditions are listed in § 60 of the Act no 6/2002 Coll., Law on Courts and Judges, as amended [zákon č. 6/2002 Sb., o soudech a soudcích].

[21] § 71 of the Law on Courts and Judges.

[22] § 121 of the Code of Administrative Justice [zákon č. 120/2002 Sb., soudní řád správní] contains differentiated provisions with respect to the candidate to be appointed to regional courts to sit in the specialised administrative chambers as administrative judges of first instance. It sets the required length of legal practice at only 5 years, taking into account that those judges act as first instance judges in administrative matters, although formally attached to the regional (i.e. in general appellate) courts.

[23] Introduced by a Ministry of Justice's circular of 4 December 1992. Further see J Kocourek & J Záruba, *Zákon o soudech a soudcích; Zákon o státním zastupitelství* (2nd ed., C. H. Beck, 2004) 227-230.

Although the psychological testing of judicial candidates still continues, the candidate may be nominated also in spite of a negative test outcome.

The practice of bluntly equating the only evaluative criterion with psychometric testing and making it a compulsory condition for a judicial appointment demonstrates a two-fold problem. First, in career judiciaries, appointment of young candidates to the bench for life without them having any previous professional track record will always mean, in a way, placing a bet on the character of the candidate. Second, to this adds the uneasiness that transforming society have with the notion of good character and, on the whole, with morality in the public space and office. On the one hand, what constitutes a "good character" is not a theme many people in power in a transforming society are ready to discuss. The reasons for this are obvious: in a judiciary based on the principle of personal continuity, the pre-1989 judges might not feel the necessary moral authority for defining such standards and advocating them publicly, since their own personal history might not be without past stains. On the other hand, once such a criterion for a judicial office has been established by the legislator, it needs to be filled with some content. Thus, instead of being evaluated on case by case basis with regard to individual candidates, what such categories and criteria would inevitably require, "character" and "morality" become psychometric categories better be 'left to the experts'. Incidentally, the issue of psychometric testing also indirectly but neatly describes the de facto desired "judicial standard" for new judges: nobody too deviant, in the negative but perhaps also in the positive sense.

After having listed and outlined the formal, statutory criteria for judicial appointments, it becomes clear that the list of criteria for judicial appointments is somewhat basic and rudimentary. Selections made solely on its basis would be quite difficult: there is no doubt always more interested candidates who meet all the technical criteria than there are free judicial offices. In face of such reality, it becomes apparent that what matters are the *criteria beyond the criteria* and the appointments procedures that are supposed to apply the criteria. Both of them will be discussed further on.[24]

At this stage, it should be underlined that on their face, the above listed formal criteria are "background blind". Thus, any qualified lawyer with the required professional examination and length of practice might become a judge at whatever level of judicial hierarchy, including the supreme level. The criteria speak of the "length of legal practice", not of the length of "judicial practice". In practice, however, only judges that already sit in the first instance courts advance, after the appropriate time, to the appellate or supreme level. There are just isolated exceptions to this iron rule of a career judiciary, which conceives of advancement in the judicial hierarchy as a type of promotion, based on merit and reserved generally to the immediately lower echelon of judicial hierarchy.

For the initial judicial appointments, the Czech judiciary would clearly voice a preference for appointments to first instance courts from within the ranks of judicial trainees, not other legal professions. Judicial trainees have traditionally been fresh law school graduates, who are hired by a court for the duration of their traineeship (3 years of full-time work in the courts, essentially working as a law clerk). If they pass judicial examinations successfully and their meet all the other eligibility criteria listed above for the judicial office, they may be appointed to a vacant judicial office. A distinct judicial preference for 'in-house' schooled candidates for vacant judicial offices tends to be publicly advocated by suggesting that such candidates, having followed the appropriate formation and practice in the courts, are well-prepared and

[24] Below, section 3.3. and 3.4. of this report.

genuinely 'ready' to take on a judicial office. Be it as it may, it is also quite clear that in sociological terms, if internal candidates are appointed to a judicial office, the judicial 'in-breeding' cycle becomes complete: it produces career judges who have never in their life worked anywhere else than within the judiciary, sometimes even within one and the same court.

The only notable exception to the preference for career judicial appointments and advancement in the past years has been the Supreme Administrative Court and its composition. Within the same eligibility criteria as those general ones listed above, the Supreme Administrative Court sought, since its establishment in 2003, to be composed of a more diverse judicial body in terms of professional background of its judges.[25] Approximately half of its judges came from outside of the career judiciary, from legal academia, higher civil service, and from the private practice. In September 2012, the president of the Supreme Administrative Court, acknowledging and further entrenching this practice, published a *Memorandum on the Selection of Candidates for Judicial Office at the Supreme Administrative Court*.[26] The Memorandum sets out a number of additional and "soft" criteria to those officially listed above that the candidate for judicial office at the Supreme Administrative Court should meet. They include:

- *personal qualities and character* (moral integrity; objectivity; courage, sound judgment, humility, decisiveness, ability and readiness to further study and personal development);
- *intellectual capacity* (general legal erudition, high level of knowledge in the area of public law; ability to quickly absorb and analyze information; independent thinking);
- *empathy and fairness* (ability to respect every individual without regard to her background; ability to listen patiently; courtesy and civility);
- *authority and communication skills* (ability to generate respect and trust; ability to maintain authority even in face of challenges; ability to clearly and concisely explain the procedure and decisions to all parties and other persons);
- *work-place efficiency* (ability to work in a speedy way and under pressure; time management; ability to draw up clearly reasoned opinions; constructive cooperation with other judges within a panel and within the court at large; leadership and ability to educate legal secretaries; managerial skills).

The outlined Memorandum is a proclamation of the court's president without any binding legal status. It represents, however, the first visible and serious attempt by the senior Czech judiciary to set out a more nuanced criteria as to who ought to be eligible to hold a judicial office at the supreme level, that would give information beyond the (for this type of appointment rather empty) official legal criteria stated in the law.

Finally, the eligibility criteria for the office of the justice at the Constitutional Court are provided for separately, in Article 84 of the Constitution of the Czech Republic. Art.

[25] The difference in the composition of the judicial body of the Supreme Administrative Court may be traced back firstly to slightly different wording of the § 121 s. 2 of the Code of Administrative Justice that in contrast to the general provisions applicable to the courts of general jurisdiction is more explicitly open to appointments to the Supreme Administrative Court from outside of the judicial hierarchy, but second, and no doubt more importantly, to the personal conviction of the first president of the Supreme Administrative Court, Mr. Josef Baxa, that a supreme court ought to be a diverse institution that reaches outside the career judiciary, and his willingness to put that conviction into practice.

[26] 'Memorandum o výběru kandidátů na soudce pro Nejvyšší správní soud' of 25 September 2012, accessible online at <www.nssoud.cz>.

84 (3) states that "*Any citizen who has a character beyond reproach, is eligible for election to the Senate, has a university legal education, and has been active in the legal profession for a minimum of ten years, may be appointed a Justice of the Constitutional Court*." To be eligible for election to the Senate signifies, most importantly, to be at least 40 years old.

3.3. The Appointment Process

All judges are appointed by the president of the republic. The appointment process for *new* judges is a multi-layered process. As most new judges are appointed to first instance courts, the initial step is typically done by the president of a regional court within whose circuit there is a vacancy at a district court. The president of the regional court suggests suitable candidate(s) to the Ministry of Justice. The minister of justice has the power to retain or reject a candidate. From those candidates retained, the Ministry of Justice draws up, typically twice a year, a list of candidates. As appointment of judges is a power for the exercise of which the president of the republic need the consent of the government (so called "countersignature" by the prime minister or the respective member of the government),[27] the list of candidates is then forwarded to the government of the Czech Republic. Once the government agrees with the list, the candidates on the list are appointed[28] by the president of the republic.

Once a judge has been duly appointed through the procedure outlined above and has taken the judicial oath, s/he can be transferred (re-assigned) within the entire judicial system with relative ease. The move to a higher court or to a different court at the same level of the judicial hierarchy is seen as a re-assignment of a judge, not a new appointment.[29] The re-assignment is carried out only within the judiciary, by an decision of the minister of justice, with the consent of the judge concerned and the president(s) of court(s) in question.

Thus, when speaking of judicial appointment to the appellate and supreme level in the Czech Republic, it should be born in mind that the vast majority of appellate and supreme courts' judges were not newly/specifically appointed to that court, but internally promoted (re-assigned) within the judiciary. In the Czech Republic, with the exception of the Supreme Administrative Court,[30] there is technically speaking very little direct appointment to appellate and supreme level.

This brings about a striking absence of any public debate, not to speak of scrutiny, as to who and how ought to and will be sitting at a supreme court or at appellate courts. Any criteria, with the recent exception of the Memorandum of the President of the

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[27] Art. 63 (1) (i) of the Constitution of the Czech Republic.

[28] The question of marginal interest for the purpose of this report but of considerable constitutional significance in general was whether or not the president of the republic may refuse to appoint a judge who has been approved by the courts presidents, the Ministry of Justice, and proposed by the government. The Supreme Administrative Court decided that the President may, under certain conditions, refuse a candidate. But the grounds are limited and reasons must be stated. Cf. judgment of the Supreme Administrative Court of 27 April 2006, Case 4 Aps 3/2005-35, published as 905/2006 Sb. NSS [Collection of the Decision of the Supreme Administrative Court]. Further see M Bobek, 'The Administration of Courts in the Czech Republic: In Search of a Constitutional Balance' (2010) 16 *European Public Law* 251, 260-263.

[29] With the exception of the appointment to the Constitutional Court or to an international court (Court of Justice of the EU; European Court of Human Rights; International Criminal Court etc.). In such cases, a sworn judge may request (and will be granted) unpaid leave of absence from his/her home jurisdiction for the duration of the mandate at the respective 'external' jurisdiction.

[30] Above, section 3.2.

Supreme Administrative Court,[31] which is applicable, however, only and exclusively to the Supreme Administrative Court, i.e. in quantitative terms a tiny fraction of the higher Czech judiciary, are virtually unknown. The enigmatic expression of "high level of erudition and demonstrated legal expertise", the only legally stated criterion to the appointment to the appellate/supreme level, tends to be reduced to "holding the proper line" at the lower echelons of the judicial hierarchy, i.e. writing good judgments, not having too many reversals on appeal/cassation, and being on the whole an adaptable and likeable person. The entire process is carried out only internally, within the respective court and in coordination with the Ministry of Justice.

Candidates for appointment (re-assignment) to appellate/supreme courts are additionally tested "in-house" at the appropriate court to which they may be potentially promoted. If considered a suitable candidate for a higher judicial office, a judge will be invited by the president of a higher court (appellate/supreme) for a secondment (stage) within the higher court. Such a candidate will be, again in agreement with the Ministry of Justice, seconded to the higher court for a period of typically six months up to one year. In the course of the secondment, the lower court judge sits as a (full) member of the higher jurisdiction. At the end of the secondment, s/he will be evaluated by the president(s) of chamber(s) s/he sat in. Upon their recommendation, and again with the consent of the presidents of courts involved and the Ministry of Justice, a lower court judge will be either promoted (re-assigned) to the higher court or sent back to his/her original court.

Finally, the appointment to the Constitutional Court follows a completely different path.[32] It is a more political appointment in nature: the president of the republic proposes candidates for the office to the Senate (the upper chamber of Parliament). If the Senate agrees, the president of the republic may appoint the candidate. Naturally therefore, the composition of the Constitutional Court and the profiles of the justices are much more varied: majority of them, in the past as well as today, were not previously judges at ordinary courts, but academics, former politicians, and civil servants.[33]

In sum therefore, there is a bifurcated or a two channel system of appointments: direct and indirect. Direct appointments of new judges are almost exclusively limited to first instance courts. Conversely, appellate and supreme courts are staffed nearly entirely by the way of "indirect appointments", i.e. by promotions within the judiciary. These are, however, formally no appointments, but mere re-assignments within the existing judicial body, as the candidate is already a sworn-in and sitting judge.

3.4. The Appointment Practice and Problems

The appointment process outlined in the previous section still largely reflects the notion of the judiciary as a sealed-off cast of independent 'civil servants'.[34] It was

[31] Above (n 26).

[32] The Czech Constitutional Court was established in 1993. The inspiration for selection and appointment of its justices, as well as the its composition and powers, were apparently drawn from several sources, including the 1920 Czechoslovak Constitution, the German Grundgesetz, with some further inspirational infusions from the United States' Constitution. Further e.g. T Němeček, *Vojtěch Cepl. Život právníka ve 20. století* (Leges, 2011).

[33] For a critical discussion of this process which led to the formation of the so called "Second" Constitutional Court in English see Z Kühn & J Kysela, 'Nomination of Constitutional Justices in Post-Communist Countries: Trial, Error, Conflict in the Czech Republic' (2006) 2 *European Constitutional Law Review* 183.

[34] In the sense of the Austrian mental heritage outlined above in section 2. Of course, all judges are appointed for life with constitutional guarantees of their tenure.

inherited from the times of Austrian monarchy and not altered much during the Communist rule in terms of the institutional model. It was naturally, as many other things, completely hollowed out internally between 1948 and 1989, but the institutional façade remained.

The same institutional set up continues after 1989. In the 1990s, it was not much attacked or contested, for a simple reason: the judiciary as a profession kept being unattractive and there were only few candidates. Most of lawyers at the time went into private practice. The situation changed in early 2000s due to two factors. First, with the private practice filling up quickly, being an attorney ceased to be an 'easy bonanza', as in 1990s. Second, with the rise of judicial salaries and professional prestige, judicial office started to be an interesting professional choice again. In the second half of 2000s (at the latest), the system came under considerable critique: new judicial places were scarce or non-existent and the procedure for selecting new judges opaque, non-transparent, and prone to nepotism.[35]

Today, the greatest problem still lies in the absence of any open, transparent and clear criteria according to which new judicial candidates will be picked up by the presidents of regional courts, as well as a predictable and common procedure. A court president has a great degree of discretion where to look: s/he can propose for appointment an excellent judicial trainee/law clerk who has been working at the court for a number of years. S/he can, however also suggest a local attorney, a state prosecutor, or whomever else who has passed the necessary examination and has the required length of practice. Needless to say that such unfettered discretion is problematic. It leaves an immense amount of discretion in the hands of presidents of courts, who, in extreme cases, if they secure the consent of the Ministry of Justice, are in the position to appoint whomever they propose, as it is rare that the government or the president of the republic would question the appointment of the selected candidates selected and proposed by the Ministry of Justice.

In the past years, the more open and progressive presidents of courts started filling up places within their districts on the basis of an open competition. However, this is just a practice established by some presidents and not necessarily followed by all of them. Furthermore, even if there is an open competition, the criteria according to which the judicial vacancy would be filled may not be spelled out entirely. Even if they are, they are likely to differ from a region to a region, as all this is the individual initiative of some court presidents. At the same time, there are also judicial vacancies in the circuit of some regional courts that would be filled without any open competition.

The situation is very unsatisfactory. It has been universally criticized from all quarters, judicial, academic, as well as by the public at large. In 2000, the Czech Parliament rejected the idea of creating a Supreme Council of Judiciary.[36] In retrospect, seeing the way in which a number of judicial councils created in the EU pre-accession wave in Central and Eastern European countries have evolved, this

[35] Further M Bobek, 'The Fortress of Judicial Independence and the Mental Transitions of the Central European Judiciaries' (2008) 14 *European Public Law* 99.

[36] See the parliamentary debates on the Bill no. 539/0 of 10 Feb. 2000, on Courts, accessible in full online at the Czech Parliamentary Archives at <www.psp.cz>. The reform has been drafted by the then Minister of Justice, Mr Otakar Motejl. See the document entitled 'Návrh koncepce reformy soudnictví' [The Conception of the Reform of the Judiciary] of 16 June 1999 (čj. 1097/99-L), approved by the Czech Government by the decision no. 686 of 7 July 1999. An outline of the reform proposal was published in *Právní rozhledy*, special supp. to no. 5/1999, 1–8.

might have been a blessing in disguise.[37] Selection and training of new judges has been, however, one of the competences that were to be assigned to the contemplated Supreme Council of Judiciary. Since then, the judicial selection process and its potential reform found itself in a sort of limbo. The status quo has been maintained, as there appears to be too many conflicting interests at stake which have prevented any reform so far. On the one hand, the Ministry of Justice would wish to centralize the selection process, to which the presidents of courts do not agree. On the other hand, ordinary judges would like the competence to pass on to some sort of judicial self-government of self-representation, which is universally rejected by all the political parties. The presidents of courts might be content with the status quo, which gives them considerable and decisive say in judicial selection and appointments.

The unsatisfactory state of judicial selections naturally contributes to the public dissatisfaction with the judiciary as such. If judicial office is perceived as something granted and controlled by a narrow clique of judicial officials, this certainly does not help fostering the idea that the best lawyers become judges. It naturally also undermines any idea of merit, unless "merit" would be defined by the excellent technical knowledge of the law and equally excellent acquaintance with a court president. It ought to be stressed that the actual results of the selection appear to be decent in most cases, at least to an interested professional. The point made here is, however, how the process appears to the outside world, even if it may get it right in (hopefully) most cases.

Finally, as may appear already from the description given, the ideas that judicial appointments should in any way reflect the diversity of the community are not really mirrored in the Czech practice. Equally, there is no direct involvement of lay members (non-judges) in the initial stages of the judicial selections. On the other hand, if politicians are to be understood as "lay-persons", they are at least somewhat involved later in the appointment process: the Ministry of Justice has to approve the list of candidates which is then passed on to the government. This role of non-judicial element in the selection is, however, limited to a type of very rarely exercise veto power over nominations made by the judiciary, not any genuine lay-participation in the selection itself. In sum, the entire section process runs apart from the community and without much of non-judicial participation.

4. Lay Participation in the Judicial Decision-Making Process

Lay participation[38] in the judicial decision-making process in the Czech Republic has rich history, questionable presence, and uncertain future. The rich history goes back to the periods of Austria-Hungary (before 1918) and the so-called 'first' Czechoslovak Republic (1918-1939), where lay participation in the judicial decision-making played a significant role. The idea and also the practice of lay-participation was, however, subsequently discredited under the Communist rule, during which "lay-participation" was used as the tool of the "popular control" of courts. Since 1989, the trend has been to push out the remnants of lay participation in judicial decision-making, today limited to just first instance decision-making in some labour law and criminal cases, out of the judicial system altogether.

[37] As in most of the post-Communist countries in Central and Eastern Europe, the establishment of Judicial Councils proved to be a problematic, if not outright disastrous step. Critically see M Bobek & D Kosař, 'Global Solutions, Local Damages: A Critical Study in Judicial Councils in Central and Eastern Europe' (2014) 15 *German Law Journal* No. 7.

[38] Throughout this section, with the exception of point 3.4., "lay participants" are understood as persons without a university degree in law, i.e. persons not being lawyers.

4.1. Historical Roots

Before 1948, i.e. the Communist take-over in Czechoslovakia, lay-participation in judicial decision-making was an important element of the gradual democratization of formerly absolutist Austrian monarchy. Most forms of lay participation appeared after 1867 with the new, liberal Austrian constitution. There were two forms of lay participation:

(i) jury;
(ii) lay-judges.

Trial by the jury of one's peers was one of the liberalisation demands since 1848 in Austria. Trial by jury was first introduced in 1869 for press cases (libel).[39] In 1873, a general law on juries was adopted, expanding trial by jury to all serious criminal cases.[40] The 1873 form of jury trial was later taken over by the Czechoslovak Republic after 1918, with just minor modifications.[41]

Jury was composed of 12 members. Eligible to sit on the jury was any regular citizen with at least one year of residence in the community in question, who has reached 35 years of age, was literate, and paid taxes on his own income. Citizens eligible to sit on the jury were selected from the register of voters each year and put into the annual jury list. From this annul jury list, the jury members for each individual case were selected randomly – by a lot.

The second form of lay participation in Austria and later in Czechoslovakia were lay-judges. A lay-judge sat together with a professional judge. He would be a full member of the judicial panel, entitled to ask questions, and vote with the professional judge(s). The office of lay-judge was created gradually in the last third of the 19th century for specific areas of judicial decision-making: work and labour;[42] press and censorship;[43] juvenile criminal justice;[44] mining, trade, and shipping law.[45] In all these areas, lay judges sat together with professional judges. Their numbers in the judicial panel differed, according to the area and the reason behind the introduction of lay participation. In labour disputes, where the driving idea appeared to be social justice and representation, a three member judicial panel was composed of a professional judge presiding and one lay judge nominated by the employers and another one by the employees. In matters of press and censorship, the driving idea was one of public control: thus, a five member panel was composed of three professional judges and two lay judges, selected from the public. In matters of juvenile justice and mining,

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[39] *Gesetz über die Bildung der Geschworenenlisten für die Pressgerichte*, RGsBl. 33/1869.

[40] *Gesetz betreffend die Bildung der Geschworenenlisten*, RGsBl. 121/1873.

[41] Zákon č. 278/1919 Sb. z. a n., *o sestavování seznamů porotců* and later č. 232/1946 Sb., *o porotních soudech*.

[42] See the Austrian *Gesetz über die Einrichtung der Gewerbegerichten*, RGsBl. 63/1869 and *Gesetz betreffend die Einführung von Gewerbegerichten und die Gerichstbarkeit in Streitigkeiten aus dem gewerblichen Arbeits-, Lehr- und Lohnverhältnisse*, RGsBl. 218/1896, which was more or less re-enacted in inter-war Czechoslovakia as zákon č. 131/1931 Sb. z. a n., *o soudnictví ve sporech z poměru pracovního, služebního a učebního.*

[43] See zákon č. 124/1924 Sb. z. a n., *o změně příslušnosti trestních soudů a odpovědnosti za obsah tiskopisu ve věcech křivého obvinění, utrhání a urážek na cti.*

[44] See zákon č. 48/1931 Sb. z. a n., *o trestním soudnictví nad mládeží*.

[45] See the Austrian *Gesetz vom 27. November 1896, womit Vorschriften über die Versetzung, innere Einrichtung und Geschäftsordnung der Gerichte erlassen werden*, RGsBl. 217/1896, fleshed out with respect to the specialised jurisdictions by the *Verordnung der Minister der Justiz und des Ackerbaues vom 1. Juni 1897 über die Ernennung der fachmännischen Laienrichter aus dem Kreise der Bergbaukundigen*, RGsBl. 128/1897, and *Verordnung der Minister der Justiz und des Handels vom 1. Juni 1897 über die Ernennung der fachmännischen Laienrichter aus dem Handesstande und aus dem Kreise der Schiffahrtsfundigen*, RGsBl. 129/1897.

trade, shipping cases, the driven idea was the external expertise of the lay judges qua professionals in their area of expertise or trade to be brought into the dispute resolution. Thus, the panels were composed half-half, or even, in some mining or shipping cases, the lay judge who was called as a recognised expert in the matter for a certain period of time, could even sit alone.

This rich Austrian and Czechoslovak tradition of lay participation in judicial decision-making was abruptly changed in 1948, soon after the Communist take-over. Law no 319/1948 Coll. that introduced the sweeping changes was called "Act on Popularisation of Justice". It brought about unprecedented lay participation in judicial decision-making: lay judges (then called "Judges from the People") *had majority* in all instances of judicial decision. In first instance cases, the panels were composed according to the formula 1 + 2; at the appellate and supreme level, the formula was 2 + 3. One or two professional judge(s), who were always presiding judges, sat together with two or three lay judges. All of them had one vote, i.e. the professional judge(s) could be outvoted by the lay members of the panel.[46]

The motives for such sweeping introduction of non-professionals into the judicial systems had, however, very little to do with community representation, unless the relevant "community" were not the members of the Communist party. It was a tool of control of the Communist party over the judicial system; needless to say that "Judges from the People" were carefully selected by the Communist Party. § 11 of the Law no 319/1948 Coll. even expressly stipulated that only Czechoslovak citizens who can be "*relied upon by the State and have given themselves fully to the idea of peoples democracy*" are eligible to sit as lay judges. The then Communist Minister of Justice, Mr. Alexej Čepička, openly acknowledged that the extensive "People's participation" in the judicial decision-making was a temporal solution, to be in place until new, socialist lawyers and judges have been formed, who could replace the pre-1948 judges.[47] The Communist Party started working on this task immediately after 1948, breeding the new Communist lawyers in specialised, dedicated schools running in parallel to universities.[48]

The task of "popularisation" or "democratisation" of the judicial system with the aid of "Judges from the People", or in reality the total control of the judicial system by the Communist party, appeared to have been achieved by 1964.[49] The new law on courts and judges from 1964[50] reduced the 1 + 2 model to first instance decision-making at district and regional courts. "Judges from the People" no longer participated in any appellate or supreme level decision-making. The model of 1 + 2 remained, however, the rule in all first instance cases, unless the professional judge was sitting alone.

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[46] At least in theory. In practice, however, the limited accounts from the judicial practice from 1950s suggest that the professional judges remained largely in control of the proceedings and their outcome, steering/manipulating the only occasionally sitting lay judge towards the desired result. See Ulč (n 7) 27-37.

[47] Ulč (n 7) 27.

[48] Above (n 14).

[49] The same aims and motives were, however, present also in other countries in the former Socialist block, including Poland or the German Democratic Republic. See e.g. S Pomorski, 'Lay Judges in the Polish Criminal Courts: A Legal and Empirical Description' (1974-1975) 7 *Case W. Res. J. Int'l L.* 198, 204.

[50] Zákon č. 36/1964 Sb., *o organizaci soudů a o volbách soudců.*

4.2. The Post-1989 Uncertainty

Against such historical and ideological background, it is perhaps not surprising that the idea of lay participation in judicial decision-making has not found greater support when shaping new laws after the fall of the Communist regime in 1989. Unfortunately, the new post-1989 legislation only continued the trend already set by the Communist regime in 1964. It pushed lay participation out of judicial decision-making even further.[51] Mostly with the arguments of judicial economies and procedural efficiency, lay participation gradually became the odd exception, even in first instance cases. Today, the remaining areas of lay participation in judicial decision-making are first instance labour disputes and some first instance criminal cases. In quantitative terms, it would appear that in criminal cases, lay judges sit in some 10% to 20% of the total cases heard. Labour law cases would amount to some 5% of all civil law cases.[52]

Most recently, further proposals to eliminate the office of lay judges altogether were tabled. It was suggested that in the future, judicial decision-making would become entirely professional, with all first instance cases decided by a professional judge sitting alone. The Ministry of Justice's proposal to this effect, which was prepared in cooperation with presidents of regional and district courts, was, however, rejected by the Legislative Council of the Czech Government in March 2011.[53] The key reasons given for suggesting the abolition of lay participation altogether were as follows:

(i) permanent lack of interest for the work of lay judges, who are not remunerated in any reasonable way. The office is thus of little interest to anybody but few retired persons;
(ii) the approach of the few members of the public who can be prevailed upon to sit as lay judges is somewhat unreliable, they fail to appear or to properly cooperate and this causes delays in proceedings;
(iii) the participation of lay judges in proceedings (oral hearings) is predominantly passive and formal, thus presenting no real contribution;
(iv) lack of education on the part of lay judges and absence of legal knowledge. The judges spend considerable time before and after the hearing explaining the law, case law, and the broader problem to the lay judges.
(v) overall judicial economy: as all the decision in cases when lay judges are sitting must be decided by the full panel, including procedural orders and other decisions not on merits, this considerably delays judicial proceedings, as the lay judges must always be called in, even for minor, non-merit decisions.[54]

The proposal to abolish lay participation demonstrates the considerable uncertainties and ideological fumbling about what lay participation in judicial decision-making ought to be and why. On the one hand, there is no doubt that the current participation of lay judges in the judicial decision-making is problematic in many respects. The 1 + 2 model introduced in 1948, with its historical rationale and justification, is clearly a

[51] Starting with zákon č. 335/1991 Sb., *o soudech a soudcích* and zákon č. 519/1991 Sb., *kterým se mění a doplňuje občanský soudní řád a notářský řád*, ve znění zákona č. 24/1993 Sb.

[52] Figures are an internal estimate by the Ministry of Justice of 3 March 2011, which were submitted to the Legislative Council of the Czech Government together with the proposal mentioned in the subsequent footnote (on file with the author).

[53] At the 73rd sitting of the Legislative Council of the Government of the Czech Republic on 3 March 2011.

[54] In: Reasoned Report of the Ministry of Justice accompanying the bill (unpublished, on file with the author). The reasons are, however, also largely reproduced in a journal article by D Prouza & M Hájek, 'Laický prvek při soudním rozhodování v trestních věcech aneb přísedící ano či ne?' *Trestněprávní revue* No 7/2010, 201.

matter of the past. It is also true that low interest and low prestige make lay participation difficult and plagued with practical problems outlined above. On the other hand, it would be most unfortunate to pick up on these, practical but largely technical problems, and on their basis seal off the judicial business completely from any lay participation. It is quite apparent that judges, represented by the presidents of courts and the Ministry of Justice, would welcome if judicial decision-making were to be left to professionals only. However, justice is perhaps too important to be left only to professional judges.

In sum, lay participation in judicial decision-making after 1989 finds itself in sort of no man's land. The Communist model of 1+2 has been largely discredited. Its continuation out of tradition poses a number of problems. It also faces ideological void: what values and principles should this type of lay participation uphold and why? What type of legitimacy is it supposed to generate: democratic, representative, expertise-derived, social, or other?[55] An answer to such ontological, ideological questions, once it has been given, could fuel the establishment of a new model of lay participation in judicial decision-making in the Czech Republic. This is, however, a debate which has yet to happen. The question of lay participation in judicial decision-making is a somewhat marginal issue that remained for a long time outside of political/legal attention. Most of the reforms in the past twenty years in the Czech judicial system would focus on the more pressing issues of day to day operation of the judicial system, its reform, the requirements flowing from the Accession to the European Union, and so on.

4.3. Eligibility and Selection

The current eligibility criteria for lay judges are:

(i) Czech citizenship;
(ii) full legal capacity;
(iii) no criminal record;
(iv) at least 30 years of age at the date of appointment;
(v) the candidate must be permanently resident or have the place of work in the judicial district with respect to which s/he wishes to be elected;
(vi) the candidate possesses experience and moral characteristics that guarantee due performance of the judicial office.[56]

Today, lay judges are elected for a (renewable) term of office of 4 years. The president of the district/regional court communicates to the respective local/regional assembly the number of lay judges that need to be elected for each term of office. The number of lay judges needed should be calculated in such a way as to ensure that one lay judge does not sit more than 20 days within a calendar year. Any member of the local assembly (local authority) may suggest a candidate for the office of a lay judge. Lay judges are then elected by the assembly corresponding to the level of the respective court: local (municipal) assemblies elect lay judges who are to sit at district courts and regional assemblies elect lay judges who are to sit at regional courts when the latter decide as criminal courts of first instance.

Once elected by the respective assembly, lay judge swear the same judicial oath as professional judges. They become members of a judicial panel and sit with a professional judge in the already described 1+2 formation, with the professional judge always presiding. However, all three members of the panel have one vote.

[55] For further discussion on these issues see e.g. M Malsch, *Democracy in Courts: Lay Participation in European Criminal Justice Systems* (Ashgate, 2009).

[56] Conditions are listed in § 60 of the Act no 6/2002 Coll., Law on Courts and Judges.

Thus, hypothetically, it could happen that the two lay judges outvote the professional judge. However, this is a very unlikely scenario, taking into account the huge knowledge and standing asymmetry between the professional, permanently sitting judge, and a lay person sitting in just few cases in up to 20 days a year.

In practice, the interest and motivation for becoming a lay judge are low. Although formally elected by the local assemblies, there is not much of a competition for the position. There is no duty to sit as a lay judge. The decision to put one's name forward for election by the local assembly is voluntary. There are no comprehensive data as to the social background and composition of the body of lay judges. It would nonetheless appear that a typical lay judge is a senior citizen, already retired, who does not mind the very low remuneration received for the service.[57]

4.4. Other Forms of Lay Participation

The discussion in this section so far understood "lay participation" as participation of non-lawyers by education in the judicial decision-making. It should be mentioned, however, that in 2008, a new and particular form of lay participation has been introduced with respect to disciplinary proceedings against judges, public prosecutors, and later also against court executors.[58] It foresees the participation of lay judges, who are, however lawyers but not professional judges.

Law no 314/2008 Coll.[59] which reformed disciplinary proceedings against judges, sought to establish a new balance and new legitimacy for disciplinary proceedings against judges in the Czech Republic. Under the previous system, disciplinary courts of first instance were specialised panels within the high courts. A specialised chamber of the Supreme Court acted as the court of appeal in disciplinary proceedings. This system was criticised for its leniency and social irresponsiveness: only judges could sanction other judges. Over the years, the outcome of a number of problematic cases discredited the entire system.[60]

The new system sought to involve other legal professionals than judges in the decision-making relating to judicial discipline. Special chambers attached to the Supreme Administrative Court were created. In matters of judicial discipline, each chamber is composed of six members. There are three judicial members of the disciplinary panel: a judge of the Supreme Administrative Court as presiding judge; a judge from the Supreme Court; and a judge from a lower court. There are also three non-judicial members of the panel sitting as "lay judges": one public prosecutor; one advocate; and one legal academic. All members of the disciplinary panel are selected randomly by a lot from a list of nominees submitted by their respective institutions, for a term of office of 5 years.

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[57] Regulation of the Ministry of Justice of 7 January 1992, no 44/1992 Coll., sets the flat fee remuneration for one day of sitting at CZK 150 (approx. EUR 5, 50). A lay judge who is in gainful employment may claim foregone daily earnings of up to CZK 680 (approx. EUR 25). Lay judges may also claim the reimbursement of travel and other necessary costs. However, it is clear that the remuneration received cannot be even conceived of as any type of compensation; the amount is entirely symbolic.

[58] Under Czech law, (Court) executor is a natural person that is entitled to perform forced execution of enforcement titles (final court judgments, administrative decisions) for a fee.

[59] Zákon č. 314/2008 Sb., kterým se mění zákon č. 6/2002 Sb., o soudech a soudcích, zákon č. 150/2002 Sb., soudní řád správní, zákon č. 7/2002 Sb., o řízení ve věcech státních zástupců a další předpisy. With respect to disciplinary proceedings against executioners, the amendments were made by zákon č. 183/2009 Sb. and zákon č. 286/2009 Sb.

[60] In detail M Bobek, 'Odpovědnost a disciplína soudce (v přerodu?)' *Právní rozhledy* no 14/2011, 502, 503-505.

The new system of disciplinary proceedings thus involved non-professional judges in judging judicial discipline. Naturally, the three non-judicial members of the disciplinary panel are strictly speaking not "lay persons": all of them are professionals from other legal professions, in most cases with many years of experience and expertise. Giving half of the votes in disciplinary panels to persons others than professional, career judges, was not welcomed with enthusiasm from within the career judiciary, to say the least. It went flatly against decades old traditions of only judges being allowed to discipline other judges.[61] The very idea that other legal professions might participate in disciplining judges was considered by some outright unconstitutional. With the first five years term of office of the first disciplinary panels already passed, it appears that it might be more the political forces and general public, longing for "judicial blood", that are dissatisfied with the "outcomes". The disciplinary sanctions imposed and severity do not differ that much from the previous disciplinary practice. What differs considerably, however, is the degree of inclusion and co-decision of the representatives of other legal professions, which makes any claims of "intra-judicial-brotherhood-leniency" being raised against the new system of disciplinary proceedings difficult.

There are currently no other forms of direct lay participation in the judicial decision-making in the Czech Republic. With respect to the two additional questions that were raised by the general reporter: there is (extensive) use of experts (i.e. expert witnesses) in judicial proceedings. Indeed, rightly or not, a number of judicial proceedings in the Czech Republic today might be aptly described as battles of expert opinions. Expert opinions might be requested by the court or submitted by the parties to the dispute. However, even if requested by a court on a non-legal, technical matter, an expert opinion can hardly be classified as lay participation in judicial decision-making. There will certainly be some influence exercised by the expert opinion on the judicial mind. The judge nonetheless hears and evaluates the information and knowledge received from the expert witness as any other evidence submitted to the court in the course of judicial proceedings.

Jury trials have not been used since 1948 in Czechoslovakia/the Czech Republic, when the already cited Law no 319/1948 Coll., Act on Popularisation of Justice, abolished any remnants of the old Austrian/First Czechoslovak Republic trial by jury. There is also no serious debate as to their re-introduction today. From the experience of other civilian countries, with their system of criminal justice also based on the more inquisitorial model, it would appear that it would be difficult or even ill-advised to seek re-inserting trial by jury into the system of criminal justice in a civilian country.[62]

5. Conclusions: Judicial Legitimacy and Lay Participation

The Czech judiciary does not score well on either of the two principal issues relating to lay participation addressed in this questionnaire: judicial selection and judicial decision-making. The picture emerging is one of detached, insulated judiciary. A

[61] Going back as far as 1868 to the first Austrian codification on the matter, which introduced the model widely shared in a number of continental career judiciaries, in which only senior judges are allow to discipline other judges – cf. *Gesetz vom 21. Mai 1868, betreffend die Disciplinarbehandlung richterlicher Beamten und die unfreiwillige Versetzung derselben auf eine andere Stelle oder in den Ruhestand*, RGBl. 46/1868.

[62] Cf. e.g. the experience of Spain or Russia that sought to (re)introduced trial by jury in the last two decades and which can be said to be problematic – further see N Vidmar (ed.), *World Jury Systems* (Oxford University Press, 2000) 319-351 or also Malsch (n 55) 52-53.

judiciary that does not trust the people much and, correspondingly, not that many people trust the courts.[63]

More than twenty years after the regime change in 1989, the Czech legal system has still to identify a useful and reasonable model of lay participation in the administration of justice. The old models have been largely outdated and/or discredited under the Communist rule. Far too often "lay participation" was equated with "Popular Justice", which was nothing else than a codename for the Communist control of the judiciary. The perhaps natural reaction after 1989 was therefore to take the opposite course: to cut the public participation in both, selection of judges as well as judicial decision-making, to a minimum, and to opt for a fully professional judiciary.

The logic of any legal revolution based on value discontinuity with the previous regime tends to be dialectic. If the previous regime claimed A, its successor, who defines and legitimizes itself by opposition, is bound to claim non-A. It is only with the passage of some time that the edges become less sharp and a more nuanced discussion may take place. Thus, only with the passage of time may be realised that the fact that "lay participation" was misused as a Communist tool for the control of the judicial system does not mean that the idea itself must be discredited forever and cannot provide legitimacy and a number of practical benefits for the administration of a rule of law based judicial system. For that, however, a serious discussion on the aims and purposes of lay participation in the judicial system ought to take place, a debate which has not yet even started.

A particular problem in potentially designing new models for lay participation in judicial selections and decision-making is where to look comparatively for inspiration. Often in the area of court administration and justice, inspiration is sought in own democratic past: in the period before 1939, in the first Czechoslovak Republic. The question is how much such models can still serve as inspiration decades later, in a society operating in a very different context. Moreover, such older models tend to proceeded from different ideological starting points. For instance, lay participation in the liberalizing Austrian Monarchy of late 19th century was driven by the interests of public control and expertise sharing. Ideas like social inclusion, community diversity, reflection of the society, and, in the end of the day also democracy, were not strongly represented, as they did not arise back then.

As already mentioned, the first twenty years after the Velvet Revolution in 1989 were mostly spent on what might be called "essential institution building". Quite understandably, looking at the situation in Czech courts in 1990s, the essential and basic reforms had to take precedence over more refined issues of lay participation. Issues of social inclusion and reflection of the community may also be quickly rendered moot if there are no skilled, professional judges who are able to decide in reasonable time and in a reasonable quality in an impartial way. However, with such first wave of the essential reforms finished, perhaps the time is ripe to start paying attention to the finer points of institutional design. Otherwise, the by then professional and decently operational judiciary might run the danger of becoming too detached. This danger is naturally even stronger in career-based, Continental judiciaries, into which judges enter in their late twenties or early thirties and are appointed for life.

[63] Although in contrast to the past, the popular trust into courts has increased considerably within the Czech society. In a survey concerning popular trust into institutions of public life, including courts, police, army, church, NGOs, press, television, and others, carried out by Sociological Institute of the Czech Academy of Science in September 2013, 50% of all respondents expressed their trust into courts (with 45 % expressing their distrust and 5 % not knowing). This is a considerable improvement, as in the second half of 1990s, the popular trust into courts lied around 25 or 30%. In: *Důvěra některým institucím veřejného života - září 2013*, Tisková zpráva PO131004, online at [http://cvvm.soc.cas.cz].

With a judge sitting some thirty to forty years on the bench, the dangers of social isolation, detachment, and irresponsiveness, are not merely hypothetical.

What precise values or interests should lay participation in judicial selections and/or judicial decision-making fulfil in the Czech legal system today is a discussion that is still to happen. It is nonetheless clear that deeper involvement of lay persons in judicial selection and/or judicial decision-making would also require, in the Czech Republic as well as more broadly in the neighbouring Central European countries sharing the same mental image of the judicial function, a redefinition of the image of judges and their legitimacy. If the judicial legitimacy is derived from technical knowledge of the law and its procedures, and judicial legitimacy is technocratic, as outlined in the opening of this report, what might be the contribution of lay persons to such judicial process? Unless and until this image is redefined and ready to acknowledge that judges pass value judgments to which lay persons may contribute both with their social experience and/or specific expertise, which in turn generates broader popular/diffuse support for the judiciary, then the involvement of lay persons in whatever stage of the judicial process will hardly be seen as useful or necessary.

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