"Transformation of V4 Judiciary"

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Judiciary in Visegrad states

The objective of this short paper is to address three elements of the judicial reform in Visegrad states. The first one is the formation of constitutional judiciary in the V4 countries and dilemmas that constitutional judges faced when searching for their role in judicial and political environment of V4 states. The second issue covered by this paper is gradual transformation of general judiciary, in particular the search for a balance between instruments focused at independence and efficiency of the courts' work. Finally, the paper covers several elements of the European Union's impact on the transformation of judiciary in Visegrad states, including its limitations.

Building-up constitutional judiciary in V4 countries

Constitutional judiciary is a relatively new phenomenon in V4 countries. With exception of Poland where a constitutional court was established in the last years of the communist regime, constitutional judiciary has been formed within the Visegrad states' transitions to democracy. New constitutional courts enabled to solve the (dis)continuity dilemma in the judiciary and at the same time to maintain a relative continuity in general judiciary and to create a new judicial "centre of excellence" outside old judicial structures; post-WWII Germany has provided an inspiration in that respect.

During the first years of their existence, new constitutional courts had to tune their relations to the general judiciary. At the most abstract level, constitutional courts are not "the most senior" courts in the respective countries but a special judicial body vested with the responsibility to protect the constitutional order. However, since constitutional complaints provided for an access route to the constitutional courts for individuals who were challenging judgments issued by general courts, constitutional courts were facing a temptation to act as de facto appellate courts "correcting" the general judiciary, albeit formally using constitution-focused argumentation.

Politicians of the V4 countries only gradually became aware of the importance of constitutional judiciary for practical politics. On some occasions, politicians' learning curve was accelerated when a constitutional court blocked a decision approved by broad (cross-party) political support – such as when the Czech constitutional court prevented the early elections (supported by a constitutional majority in the parliament) in 2009, or the electoral reform, strengthening majoritarian elements in the parliamentary elections, in 2001. The politicians' reaction was primarily twofold: more attention was given to the appointment of judges (including delays and politicization of the appointment process) and attempts of the parliamentary opposition to use

constitutional courts as the "third parliamentary chamber" in the legislation-making. Only exceptionally, such as in Hungary during second Orbán government, politicians opted for reduction of the constitutional courts' competencies.

Constitutional courts in V4 countries also tuned into significant actors in (non)application of the EU law. Analogously to their judicial counterparts in old EU member states, also V4 constitutional courts accepted the supremacy of the EU law only with reservations, demonstrated, for instance in "European Arrest Warrants" judgment of the Polish and Czech constitutional courts and the "Slovak pension" ruling of the Czech constitutional court, which rejected the EU law centric argumentation advocated by the Supreme Administrative Court[1].

General judiciary: managing judges while respecting their independence

In contrast to constitutional judiciary, transformation of general courts in the V4 states demonstrates strong elements of continuity. The workload of general judiciary expanded, primarily in domains of commercial law and judicial control of the executive power. Therefore, the issues of judicial efficiency, as well as the judicial independence, occupied central role in the debates on reform of the Visegrad courts.

None of the abovementioned issues – efficiency or independence – received clear priority. Instead, the Visegrad countries searched for a balance between both principles. V4 states tested several models of relations between the executive power and general courts, sometimes with involvement of the constitutional judiciary. For instance, the Czech constitutional court has established limits for discretion of the executive power to remove chairpersons of general courts from their posts, rejecting an argument that their role is purely managerial, and their dismissal is not violating judicial independence (since individuals concerned retain their judicial function). The result was a hybrid system when judicial functionaries can be dismissed from their posts only by decision by a disciplinary senate, composed of judges, public prosecutors, attorneys and representatives of other legal professions, acting under auspices of the Supreme Administrative Court. At the same time, judicial functionaries are appointed for limited period only (10 years for supreme courts, 7 years for other courts). In contrast, Slovakia demonstrated risks of excessive competencies vested to autonomous bodies, preventing the effective external control of efficiency of the courts' work and abuses of the self-governance[2].

The mobility of judges between judiciary and the executive powers represents another *leitmotiv* of judicial reform in Visegrad states. Temporal allocation of judges into ministry of justice or other executive agencies (while their judicial function is temporarily suspended) can enhance the awareness of the executive power regarding practical work of the judiciary. At the same time, too

[1] Decision Pl. ÚS 5/12 of January 31, 2012 where the CCC seems to ignore the case-law of the Court of Justice of the European Union on the EU's non-discrimination rules as formulated in a (similar but different) case referred earlier to the EU Court by the Czech Supreme Administrative Court. Cf. Šlosarčík, Ivo. Czech Republic 2009-2012: On Unconstitutional Amendment of Constitution, Limits of EU Law and Direct Presidential Elections. *European Public Law*, 2013, vol. 19, No. 3, 435-447.

[2] Cf. Němeček, Tomáš. Justice jako česká konkurenční výhoda. In Odkial a Kam. 20.rokov samostatnosti. Bratislava: Kaligram 2013, s. 251-252.

intimate experience with the executive branch can be perceived as a risk to judicial independence of the judges concerned and be considered to be an obstacle to their judicial career[3].

Limited and ambiguous EU influence on member states' judiciary

Copenhagen criteria of 1993, setting general political and economic benchmarks for states aspiring for the EU accession, declared that the EU membership *"requires that candidate country has achieved stability of institutions guaranteeing ….the rule of law…"*. The accession thus requires not just a political, constitutional and legislative framework guaranteeing the rule of law but also an establishment of sufficiently independent and effective judiciary.

However, the EU law contains relatively modest catalogue of norms regarding the judiciary. Judicial systems of the EU members differ significantly, including issues of judicial recruitment, judicial self-management or structure of the senior national courts. The EU "hard" law explicitly tackles only a limited number of judicial issues, in particular those linked with the judicial capacity to apply the EU law correctly, for instance by proper references to the Court of Justice of the European Union, direct application of selected EU norms in domestic procedures or effective sanctioning of violations of the EU rules by private parties. Regarding other, more general, aspects of national judiciary, the EU framework is relatively blurred or even non-existent. The EU Charter of Fundamental Rights contains several clauses tackling, albeit indirectly, national judiciary (ban of retroactive punishment, *ne bis in idem*, right to fair trial). Further, the founding treaties enable, by virtue of article 7 Treaty on the European Union, to suspend rights of a member state whose judicial system would "in a serious and persistent way" violate fundamental values of the European Union. However, article 7 procedure is aimed at situations of systemic collapse of democratic institutions in a member state and it is not to be activated in more frequent cases of inefficiency or other problems of the judicial activity.

In practice, however, the EU role of a guardian of independent and efficient judiciary in member states is limited, in particular when a problem lies beyond technicalities of the application of the EU law. For instance, when the second Viktor Orbán's government changed the Hungarian constitution and the respective legislation in a direction strengthening (party-based) executive and parliamentary control over Hungarian judiciary, the European Commission efficiently tackled (by infringement action) only a relatively modest and "technical" issue of mandatory early retirement of senior judges on basis of EU legislation banning age-based discrimination. Other issues, such as restricting competencies of the constitutional court or more politicized rules on judicial appointments, were only tackled by the Commission in a relatively soft political communication addressed to Hungarian authorities[4]. The response of the European Parliament

[3] In the Czech Republic, the problem of the executive – judicial mobility can be demonstrated by experience of Jaroslav Bureš. He was a judge of the High Court until 2001 when he was appointed as a minister of justice and, later, as vice-chairman of the Legislative Council of the Government. In 2006, he returned to the judiciary but his promotion to the position of deputy-chairman of the Supreme Court was prevented by the constitutional court. Even if the constitutional court formally justified its decision primarily by procedural errors during the appointment process, concerns regarding lack of Bureš' judicial independence played its role during court's deliberations. Jaroslav Bureš returned to the High Court in Prague and later, in 2013, was appointed to a position of its chairman.

[4] Dawson, Mark – Muir, Elise. Hungary and the Indirect Protection of EU Fundamental Rights and the Rule of Law. *German Law Journal*, Vol. 14. No.10, p. 1962-1963.

was more straightforward but also blurred by party-based competition and lack of efficient tools to enforce the parliament's position.[5]

Recently, the European Commission launched several initiatives aimed at general efficiency of member states' judiciaries. Vivian Reding, the EU commissioner for justice, fundamental rights and citizenship, launched its "EU Justice Scoreboard" in 2013 comparing selected elements of independence and efficiency of national judiciary in the EU member states, with objectives to promote exchange of best practices among the EU members and to impose a "peer pressure" on the worst performers. Further, judicial reform is tackled in six country specific recommendations prepared by the Commission (and approved by the Council) within the "European semester" focused primarily on competitiveness of member states' economies (from the V4 group this concerns Poland and Hungary). Judicial reform is also tackled in several national reform packages agreed within the EU and the IMF assistance to troubled eurozone states during the post-2010 eurozone crisis. Last but not least, the quality of judiciary and rule of law are covered by the Cooperation and Verification Mechanism operated by the European Commission regarding Bulgaria and Romania since their accession to the EU in 2007.

The EU is relatively more ambitious regarding transformation of judiciary in the candidate countries. Judiciary has been commented in the respective sections of Commission's regular progress reports mapping the progress (or absence thereof) of candidate countries towards the accession. Sometimes, the Commission's analysis suffered from the incoherence and lack of clear benchmarks. For instance, Kochenov's critical analysis of the EU's impact on the rule of law in the candidate states mentions a situation when Romania was asked (by the Commission) to establish a fully independent institution for training of judges (as guarantee of the judicial independence) while the Czech Republic's decision to concentrate judicial training within a semi-autonomous body under the auspices of the Ministry of Justice was evaluated as a positive step strengthening coherence of the training process[6]. In other situations, however, the European Union was able to send a strong message to the candidate countries. Governmental disrespect to the constitutional court's findings was one of the reasons behind delay in opening of Slovakia accession talks with the EU[7].

Therefore, the potential of the EU to trigger judicial reform is stronger in the pre-accession period but even there, the EU does not provide clear models or performance benchmarks. The European Union is aware of these shortcomings and launched several initiatives with the objective of boosting its role in the evaluation and improvement of judiciary both inside the EU and regarding its neighbours. As of the spring 2014, it is too early to make any evaluation of these actions or predictions on the future EU's role in this domain.

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[5] Cf. Šlosarčík, Ivo. Democracy fatigue in Central Europe and the absent EU response. V4 Revue. 5.11.2012. http://visegradrevue.eu/?p=1202.

[6] De Ridder, Eline – Kochenov, Dimitry. Democratic Conditionality in the Eastern Enlargement: Ambitious Window Dressing, European Foreign Affairs Review 16:589-605, 2011.

[7] In this context, a "Gaulieder case" attracted a particular attention abroad. František Gaulieder was elected to the Slovak National Council (Slovak parliament) in 1994 on party list of Movement for Democratic Slovakia ("Hnutie za demokratické Slovensko"). In 1996, Gaulieder left the parliamentary club due to disagreements with the Movement's leaders. Later, the chairman of the parliament received Gaulieder's resignation letter which was, however, declared to be fake by Gaulieder himself. Regardless Gaulieder's protest, the Slovak National Council declared his parliamentary mandate to be terminated. Gaulieder successfully challenged his expulsion from the parliament before Slovak Constitutional Court but despite Court's ruling from July 1997, he has not permitted to re-gain his parliamentary post until the end of Mečiar's government in 1998. Cf. Leška, Vladimír. Slovensko 1993-2004. Léta obav a nadějí. Praha:Ústav mezinárodních vztahů 2006, s. 60-61.

Conclusion: Three dilemmas of V4 judicial reform

Visegrad experience with judicial reform illustrates three dilemmas that must be tackled by experts, politicians and voters in transforming countries.

The first dilemma concerns the constitutional judiciary and its search of a legitimate position balancing between a judicial body and a political actor.

The second one deals with the intensity of the executive power's involvement in the management of general judiciary and its search for a proper cooperation design respecting the independence of the judiciary from political pressure while providing sufficient incentives for efficient judicial performance.

Finally, the third dilemma of the V4 judicial reform is connected with the European Union membership. Here, both the EU and Visegrad states have to cope with a discrepancy between expectations vested onto the EU's impact on quality of the V4 judiciary and relatively modest, albeit developing, EU's competencies and expertise in this filed.

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