ALL-PERVASIVE LEGACIES OF SOCIALIST CONSTITUTIONALISM? THE CASE OF JUDICIARY

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The success of the legal transitions occurring in the 1990s was quite dubious. Although, as a result of enlargement of the EU, much of the "other Europe" became part of the European Union, it would be too simplistic to assume that, with the fall of the Berlin Wall, the region became part of Western European political and legal landscape. While the books of the old era were discarded, legislation repealed and new institutions created, one should not underestimate the continuing strength of the old values, principles and legal thought in general. After all, the authors of those discarded books remained in the academia, even if they seemingly started to produce – virtually overnight – new works, while defending new values and principles. Alongside with the academics, the entire legal personnel of the old era survived the systemic change, and this contributed to the persisting spirit of old legal culture. That is why the philosophies of the old socialist legal system were able, not only to survive, but to govern a substantial portion of the post-socialist legal and judicial discourse. The deepest layers of the old legal culture are resistant to sudden changes by their very nature. They seldom have a direct connection to the former official political ideology, and they are often clothed in the new legal vocabulary. Furthermore, the most persistent features of socialist legal culture are often those linked to the region's illiberal pre-socialist past, although substantively modified during the era of socialism. I will show some examples of old socialist concepts which seem to be alive and well in the new legal system. First, I am going to deal with the authoritarian model of judicial process, which appears to prevail in the region of Central and Eastern Europe. The socialist conception of a judicial process continues to haunt the region even several decades after the fall of "existing socialism." The parties continue to be viewed as passive objects in the post-communist litigation. Second, I am going to explain a specific socialist novelty, the concept of supreme courts' interpretative statements, legislating from the bench without any real-life case pending before those courts. Last but not least, I will show the gradual decline

of the activist role of constitutional courts in the region and the return to the tradition of self-restrained judiciary influenced by politics and politicians.

Keywords: post-communism; transition to democracy; constitutional courts; judiciary; judicial process; judicial review; crisis of liberal democracy; illiberalism.

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1. Overture: The Dreams of Liberal Constitutionalism in the 1990s and the Downfall

At first glance, the fall of socialism in Central and Eastern Europe in the late 1980s meant total eradication of the former legal and constitutional values. New constitutions and laws were adopted, old textbooks discarded. Moreover, the collapse of communism in 1989/1990 was accompanied with the rise of the judicial branch, in general, and the creation of new constitutional courts, in particular, in virtually all countries of Central and Eastern Europe. In post-communist Europe, the 1990s saw a shift towards judicialization and the creation of a conflict society. The judiciary had its old competences restored, including the power to carry out judicial review of administrative acts.

Most importantly, however, constitutional courts were established in all post-communist states. Even in those few countries (Poland and former Yugoslavia) where the constitutional courts had existed before the fall of socialism, their role expanded after 1990. The actual functions of these constitutional courts were limited by authoritarian governments prior to 1990, and consequently, they lacked any significant political influence until the fall of the authoritarian regimes. It was only after the collapse of socialist dictatorships that the constitutional courts in Poland[1]

[1] In Poland, the Constitutional Tribunal was created by a law of 1982; it started to operate in 1986. For the description of the Polish Constitutional Tribunal prior to 1990, *see* Wojciech Sadurski, *Rights Before Courts: A Study of Constitutional Courts in Postcommunist States of Central and Eastern Europe* 4–13 (2nd ed. 2014).

and in successor states of former Yugoslavia[2] started to serve as genuine checks on the government.

The post-communist constitutional courts were designed as powerful institutions capable of protecting the rule of law and fundamental rights against the will of the parliamentary majority. Their most important powers include the review of constitutionality of the legislation and in some jurisdictions (the successor countries of former Yugoslavia, the Czech Republic, Slovakia, and recently Hungary[3]) also the review of constitutional conformity of decisions of state authorities, including the courts.

Initially, the post-socialist constitutional courts were viewed as successful examples of institutions introducing new conceptions of the rule of law, separation of powers and the notions of liberal democracy. The original practice of constitutional review of the 1990s and early 2000s was linked to judicial activism, unrestrained and seemingly unopposed judge-made law. Constitutional courts of Eastern Europe acted as the agents of a social change towards liberal capitalism in their respective national legal systems.[4] Moreover, in some of these systems, they attempted to transform the entire concept of law, Westernize the post-communist application of the law, and teach the new proper methods of approaching its application. They did so by mentoring and criticizing ordinary judges for not taking the Constitution and human rights seriously enough. In this role, the constitutional courts often effectively replaced the legal academia.[5]

When analyzing the early phase of post-communist constitutional courts in the course of the 1990s, one should not neglect the consensus on liberal constitutionalism prevailing among the elites of post-communist transition. The constitutional courts emphasized the primacy of an individual over the state.[6] There was a strong

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[2] The Federal Constitutional Court of Yugoslavia was established in 1963, along with the state constitutional courts of the individual republics. For an early socialist description of those courts, *see* Dimitrije Kulic, *The Constitutional Court of Yugoslavia in the Protection of Basic Human Rights*, 11(2) Osgoode Hall L.J. 275 (1973). The Federal Constitutional Court of Yugoslavia disappeared with the disintegration of Yugoslavia and the subsequent violent civil war of the 1990s.

[3] In Hungary, the Court was granted the power to review constitutional complaints as late as in 2012, within the new Constitution enacted at the beginning of the Orbán era. *See* the Constitution of Hungary of 2011 (Feb. 20, 2021), available at http://www.kormany.hu/en/news/the-new-fundamental-law-of-hungary. In Slovakia, the institute of constitutional complaint was introduced in 2001, following the successful Czech example. On Slovakia, *see* Radoslav Procházka, *Mission Accomplished: On Founding Constitutional Adjudication in Central Europe* 189 ff. (2002).

[4] For some early jubilant views, *see, e.g.*, *A megtalált alkotmány?: a magyar alapjogi bíráskodás első kilenc éve* [*The Constitution Found? The First Nine Years of Hungarian Constitutional Review on Fundamental Rights*] (Halmai Gábor ed., 2000); Procházka 2002; *Constitutional Justice, East and West: Democratic Legitimacy and Constitutional Courts in Post-Communist Europe in a Comparative Perspective* (Wojciech Sadurski ed., 2002).

[5] I tried to show this transformative potential of some constitutional courts in Zdenek Kühn, *The Judiciary in Central and Eastern Europe: Mechanical Jurisprudence in Transformation?* (2011), Ch. 5.

[6] E.g. judgment of the Czech Constitutional Court of 18 October 1995, no. Pl. ÚS 26/94.

consensus that new democratic constitutions should restrain parliamentary majority and the executive branch, and ensure adherence to the state's basic law through its counter-majoritarian functions. The law and its application were believed to be non-political and to be able to restrain crude politics.

The idea of "taking rights seriously" was accepted by the framers of the New Constitutionalism in Central Eastern Europe. The constitutional courts emphasized that they were not neutral in terms of ideology because they stood on the side of liberal democracy. The following judgment of the Czech Constitutional Court can perhaps serve as the best example of these early cases:

> Our new Constitution is not founded on value neutrality and is not simply a mere demarcation of institutions and processes; it rather also incorporates into its text certain governing ideas, expressing the fundamental, inviolable values of a democratic society. The Czech Constitution accepts and respects the principle of legality as part of the overall basic outline of the rule of law. That being said, positive law does not link it merely to formal legality; rather, the interpretation and application of legal norms are subordinated to their substantive purpose, the law is qualified by a respect for the basic enacted values of a democratic society, and it also weighs the application of legal norms against these values. This means that although there exists a continuity of "former laws," there is a discontinuity in values from the "former regime." […] Whatever the laws of the state are, in a state which is designated as democratic and which proclaims the principle of sovereignty of the people, no regime other than a democratic regime can be considered legitimate. Any sort of monopoly on power, in and of itself, rules out the possibility of democratic legitimacy.[7]

Constitutional liberalism of the 1990s was linked to the "The End of History" thesis, i.e. the ultimate triumph of liberal capitalism, often presented through its neoliberal array and a plethora of free market policies.[8] No one dared to question "the only possible" path to the future. In their neoliberal zealotry, the postcommunist constitutional courts' case law was often one sided, especially compared to the application of similar principles in Western jurisprudence.[9]

Moreover, the political elites of the 1990s seemed quite often unaware of the enormous political power vested in the courts exercising constitutional review. The

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[7] The case regarding the Act on the Lawlessness of the Communist Regime of 21 December 1993, no. Pl. ÚS 19/93. English translation is available at https://www.usoud.cz/en/decisions/19931221-pl-us-1993-lawlessness-1/.

[8] Adam Sulikowski, *Government of Judges and Neoliberal Ideology* in *Law and Critique in Central Europe: Questioning the Past, Resisting the Present* 16 (Rafał Mańko et al. eds., 2016).

[9] *Cf.*, for an analysis of the Hungarian Court, Catherine Dupré, *Importing the Law in Post-Communist Transitions: The Hungarian Constitutional Court and the Right to Human Dignity* 126–127 (2003).

concept of law was understood in a nonpolitical way, and the law was viewed as a logical set of rules and principles destined to be used by endowed professionals capable of following the law's logic. Constitutional courts initially faced little external criticism or opposition to their decision-making, which resulted in a situation described by some scholars as the "liberal government of judges." The mainstream legal ideology provided a protective veil for the constitutional courts' activities, concealing even the most radical examples of judicial law-making.[10] Although judicial activism was criticized by local legal academia and a majority of ordinary judges, it was relatively easy to downplay that sort of criticism as a reaction of conservative scholarship and judiciary, associated with the former regime.[11]

These circumstances often shaped the environment for unbound judicial activism of constitutional courts. The President of the Hungarian Constitutional Court in the 1990s Sólyom once (in)famously remarked that the genuine purpose of the Court was to read "*the invisible constitution*."[12] Although other constitutional courts were less open about their judicial legislating, judicial activism became a common phenomenon of the 1990s and 2000s.

The constitutional courts often styled themselves as the sole and indispensable guardians of the new constitutions, entering the scene as a *deus ex machina* to settle issues which cannot be decided by other bodies. As a consequence, one of the most fundamental problems which emerged after 1989 was the "over-centralization" of the constitutional review. By this, I mean that the continuing guarantee of the rule of law was entirely centralized and concentrated in the constitutional court, while the powers of the ordinary judiciary were limited accordingly.[13] If the constitutional court then gets under control of one political faction, as was the case in the Orbán Hungary after 2010 and in Poland after 2015, the gates for a systemic change are open, while guardians of the constitution are effectively missing.

The success of the legal transitions occurring in the 1990s was quite dubious. Although, as a result of enlargement of the EU, much of the "other Europe" became

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[10] Sulikowski 2016.

[11] *See* Kühn 2011, at 229 (and the sources quoted in fn. 143).

[12] *See* Sólyom's concurring opinion in the Death Penalty Case, decision 23/1990 of 31 October 1990 (translated in Laszlo Sólyom & Georg Brunner, *Constitutional Judiciary in a New Democracy: The Hungarian Constitutional Court* 126 (2000)). This conception has been criticized for blatant activism (What is "invisible constitution"; are judges above the lawmakers and are they the only legitimate power to read it?) and neither the Court nor its President has ever used this expression again. *Cf.* András Sajó, *Reading the Invisible Constitution: Judicial Review in Hungary*, 15(2) Oxf. J. Leg. Stud. 253 (1995). *Cf. also* Gábor A. Tóth, *Joint Symposium on "Towering Judges": László Sólyom's Constitutional Symphony for the Republic of Hungary*, I·CONnect, 3 April 2019 (Feb. 20, 2021), available at http://www.iconnectblog.com/2019/04/joint-symposium-on-"towering-judges":-laszlo-solyom's-constitutional-symphony-for-the-republic-of-hungary.

[13] *Cf.* Zdenek Kühn, *Making Constitutionalism Horizontal: Three Different Central European Strategies* in *The Constitution in Private Relations: Expanding Constitutionalism* 217 (András Sajó & Renáta Uitz eds., 2005).

part of the European Union, it would be too simplistic to assume that, with the fall of the Berlin Wall, the region became part of Western European political and legal landscape. Alas, the region disappeared from the scrutiny of comparative scholarship. The old "Socialist Legal Family," which most comparative law treatises had posited, was seemingly replaced by a legal black-hole.[14]

While the books of the old era were discarded, legislation repealed and new institutions created, we should not underestimate the continuing strength of the old values, principles and legal thought in general. After all, the authors of those discarded books remained in the academia, even if they seemingly started to produce – virtually overnight – new works, while defending new values and principles. Alongside with the academics, the entire legal personnel of the old era survived the systemic change, and this contributed to the persisting spirit of old legal culture.

That is why the philosophies of the old socialist legal system were able, not only to survive, but to govern a substantial portion of the post-socialist legal and judicial discourse. The deepest layers of the old legal culture are resistant to sudden changes by their very nature. They seldom have a direct connection to the former official political ideology, and they are often clothed in the new legal vocabulary. Furthermore, the most persistent features of socialist legal culture are often those linked to the region's illiberal pre-socialist (or, to be more precise, pre-communist) past, although substantively modified during the era of socialism.

To provide some examples, one can easily see that many lawyers and members of the public in general tend to overemphasize the importance of legislative enactments in the legal process, and underestimate the significance of their subsequent application by courts and public authorities. In the view of many scholars, legislation means everything and a precedent (case law) nothing. Ironically, this trend has been reinforced by the processes occurring in European integration, with their overproduction of directives and regulations.

In the following text, I will show some examples of old socialist concepts which seem to be alive and well in the new legal system. First, I am going to deal with the authoritarian model of judicial process, which appears to prevail in the region of Central and Eastern Europe. The classical civil-law (continental) principle of *Iura novit curia* – the maxim which tells us that it is the judge who knows the law – was reshaped by socialist legal culture. The socialist conception of a judicial process

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[14] *Cf.* Rafał Mańko, *The Culture of Private Law in Central Europe After Enlargement: A Polish Perspective*, 11(5) Eur. L.J. 527, 547–548 (2005), discussing the fact that the most recent edition of Zweigert and Kötz' treatise on comparative law simply discarded the Socialist Legal Family "without writing anything in their place." For more recent elaboration by the same author, *see* Rafał Mańko, *Survival of the Socialist Legal Tradition? A Polish Perspective*, 4(2) Comp. L. Rev. 1 (2014) (Feb. 20, 2021), also available at http://www.comparativelawreview.unipg.it/index.php/comparative/article/view/14/11. Some more recent treatises on comparative law started to take into account Eastern European legal culture again as a distinct entity. *See* Uwe Kischel, *Comparative Law* (2019), discussing at length specific features of Central and Eastern European legal systems (at 533–553).

continues to haunt the region even several decades after the fall of "the Soviet form of socialism." While the parties' activity and their close collaboration in discussing issues of law with their judges is an important driving force in applying the law in Western Europe, the parties continue to be viewed as passive objects in the post-communist litigation. Second, I am going to explain a specific socialist novelty, the concept of supreme courts' interpretative statements, legislating from the bench without any real-life case pending before those courts. Last but not least, I will show the gradual decline of the activist role of constitutional courts in the region and the return to the tradition of self-restrained judiciary influenced by politics and politicians.

2. Authoritarian Understanding of the Judicial Process

As a matter of fact, socialist regimes, just like any other dictatorship, necessarily generated an authoritarian understanding of the law. As explained by Professor Siniša Rodin:

> Instead of rational discourse that shaped legal and institutional landscape of Europe's West, the predominant discourse in Central and Eastern Europe was authoritarian. The main characteristic of such *authoritarian discourse* is the proclamation and imposition of one truth as universal and final. Such discourse was authoritarian since it purported to have a social monopoly over determining the meaning of legal and political language at the top of political hierarchy and communicating it downward. It was, nevertheless, a discourse, since communication of meaning defined in authoritarian way was indispensable to support the claim of universal acceptance, the maintenance of which is a condition of the system's integrity.[15]

Authoritarian judicial discourse must be distinguished from authoritative judicial discourse. The judicial discourse of *any* legal system is inherently authoritative. This is because 1) by definition, courts must rule as *if there were* only one correct answer to the questions presented to them (the judicial "one right answer" thesis), and 2) judicial decisions are final because of their authority within the judicial and legal system.[16] An authoritative judicial discourse does not preclude, but rather presupposes, a pluralism of opinions and the participation of all competent persons

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[15] Siniša Rodin, *Discourse and Authority in European and Post-Communist Legal Culture*, 1(1) Croat. Y.B. Eur. L. Pol'y 1, 7–8 (2005) (footnotes omitted).

[16] *See* the chapters in *Interpreting Statutes: A Comparative Study* (D. Neil MacCormick & Robert S. Summers eds., 1991) (although the degree of the discursive nature of judicial decisions differs, at one pole standing the common law system, and at the other French system, all courts work on the assumption that their decisions are objectively "right").

in the legal decision-making process. Plurality of opinions and the fact that the court takes all relevant opinions seriously provide the last-resort decision-maker with the legitimacy to provide the "right" answer, which is a necessary precondition for the discourse to remain authoritative.

I believe this argument has been best presented by the United States Supreme Court Associate Justice Robert Jackson. When evaluating judges of (any) supreme court, he famously declared: "*We are not final because we are infallible, but we are infallible only because we are final.*"[17]

In contrast, an authoritarian discourse means something very different, as it lacks any pluralism of opinions. The "right" answer is achieved through a "one-way" process and is backed entirely by an institutional power. Those to whom decisions are addressed cannot participate in finding the "right" answers; instead of being subjects, they are rather objects of authoritarian decision-making. An authoritarian discourse implies that legal meanings are produced from above and the existence of any dispute, questioning, legitimate disagreement, or construction of the law from the bottom up is unthinkable.[18]

An authoritarian discourse is combined with the maxim of *Iura novit curia* – the idealistic principle of civil (continental) law that the "judge knows the law" and must apply the appropriate legal rule regardless of whether either party has cited it to the court.[19] If taken too seriously and too literally, this principle deeply influences the self-perception of post-socialist judiciary.

One of the effects of this principle (*Iura novit curia*) is that, while the parties before a civil (continental) law court have the duty to deal with questions of fact, they are not obliged to raise questions of law because the court itself is required to do so even without the litigants' assistance. As a consequence, the pleadings presented to trial courts in most civil-law countries are quite brief, without any major excursus into legal issues; after all, the judge is the one who is supposed to supply the relevant rule. In contrast, judges play a more passive role in systems of common law culture (which is typically more pragmatic), while greater responsibility is placed on the parties, not only to raise questions of fact, but also to argue questions of law. This is so because, when constructing their opinions, Anglo-American judges draw heavily upon the parties' competing arguments as to the "correct" statement of the law.[20]

However, the principle that the judge knows the law is not taken literally in Western Europe. Appeals filed in Western Europe tend to be longer and more elaborate when

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17 *Brown v. Allen*, 344 U.S. 443, at 540 (1953), Justice Jackson concurring.

18 I draw my inspiration from Joseph Vining, *The Authoritative and the Authoritarian* (1986).

19 *Cf.*, in this regard, e.g., John A. Jolowicz, *Da mihi factum dabo tibi jus: A Problem of Demarcation in English and French Law* in *Multum non multa: Festschrift für Kurt Lipstein aus Anlass seines 70. Geburtstages* 79, 84 (Peter Feuerstein & Clive Parry eds., 1980).

20 For the rationale behind this, *cf.* Mirjan R. Damaška, *The Faces of Justice and State Authority: A Comparative Approach to the Legal Process* 139 (1986).

issues of law are controversial. This is so because the basic – and often the only – ground for an appeal, and accordingly the main focus of the appellant's brief, is to persuade the higher court that their interpretation of the law is correct and their opponent's (or the lower court's) is not. In the contemporary civil-law (continental) culture, judges technically 'know' the law, but they often need the parties' attorneys to help them find the relevant provision and to determine its best reading.

In Central and Eastern Europe, the maxim of *Iura novit curia* tends to be taken more seriously than in Western Europe. During the socialist era, idealistic readings of this principle drove legal arguments out of parties' pleadings. According to the leading Czechoslovak commentary on civil procedure of the 1970s and 1980s, the law cannot be subject to judicial recognition during court proceedings; it must be known to the court before the dispute arises. "The knowledge of the law must be obtained by the [judicial] body itself (one can say) *prior to* [civil] proceedings and *beyond* these proceedings."[21] No cooperation was required in finding the law; moreover, this would prove harmful, as the parties would interfere with the court's exclusive domain. An additional reason why no help was needed from the parties in constructing the law during the communist era lay in the fact that only a few parties were represented by a lawyer.[22] Moreover, the circumstance that scant attention was paid to the attorneys' arguments fit well within this picture of socialist application of the law because socialist legal systems claimed that no party should gain any advantage from having a better lawyer.[23]

This approach reflected the communist *authoritarian* approach to the law, which is in fundamental contradiction with the discursive authoritative approach to the law, which prevailed in Europe in the meantime. I should recall that, when referring to an authoritarian approach, I mean an approach where legal answers can only be constructed in a single way from the top to the bottom, where the top of the system holds "a social monopoly over determining the meaning of legal and political language" and "communicating it downward."[24]

An authoritarian approach to the law, combined with formalist textual positivism and the ideology of bound judicial application of the law, accords to the judge the exclusive role in constructing the meaning of the law. This is so because (1) application of the law is viewed conceptually as a resolution of easy cases by the court, which does not require the assistance of either party in the process (formalist aspect);[25] and

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21 Josef Rubeš et al., *Občanský soudní řád. Komentář* [*Code of Civil Procedure. Commentary*] 447 (1970) (emphases added).

22 *Id.* at 455, where a communist scholar does not seem even to expect that it might be possible for a party to be represented by a competent lawyer, who might provide a qualified legal opinion to the court.

23 Sbírka rozhodnutí československých soudů [Collection of Decisions of the Czechoslovak Courts], 1949, p. 1.

24 Rodin 2005, at 7.

25 Rubeš et al. 1970, at 455 (claiming that "as legal professionals, judges must know their legal order, and no one can claim that it would be impossible to know all the laws").

(2) construction of the law is the result of a top-down process, where the parties are the addressees of the result of construction rather than direct or indirect participants in this process (authoritarian aspect).

It is clear that an authoritarian approach to the law still governs the post-communist legal discourse. The principle of *Iura novit curia* appears to function as a barrier separating the parties before the court from their judges. An intriguing vicious circle is at work here. The legal arguments made by the parties' attorneys in their briefs rarely exceed a few paragraphs, and almost never include proper cites to literature and case law, thus providing the judge with little useful information. Perhaps because the legal arguments made by the parties are worthless, the judge will often ignore even those rare arguments which are valuable and might help him find the relevant case law, useful comparative materials from abroad, etc. Instead, the judge will only elaborate on the court's own legal theories.[26] Thus, when taken too seriously, the principle of *Iura novit curia* becomes self-fulfilling, discouraging parties from contributing to the court's legal reasoning and judges from drawing upon the attorneys' expertise.

3. Supreme Courts' Interpretative Statements and Guidelines: Their Emergence and Persistence in Central and Eastern Europe

A phenomenon almost unknown in the Western world appeared in the 1950s in the then socialist countries of Central Europe. Following the Soviet model of guiding explanations issued by the plenum of the supreme court,[27] the supreme courts of all Central European countries had, at times of the Communist rule, the power to issue guidelines and interpretative statements dealing with important legal questions. These statements were adopted *in abstracto*, without any real-life case pending before the court. In some states, such directives were formally binding on lower courts. Many of these directives were long treatises analyzing the correct and incorrect application of a specific law by lower courts over a certain period of time, without taking into account particulars of any case at hand.[28]

The socialist supreme courts prepared these documents as evaluations and appraisals of case law with a view to reacting promptly to the Communist Party

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[26] This approach is often criticized by the Czech Constitutional Court, which has repeatedly insisted that ordinary courts address every legal argument made by either party. *Cf.* the decision of 26 September 1996, III. ÚS 176/96.

[27] On Soviet interpretative statements, *cf.* Akmal Kh. Saidov, *Comparative Law* 206 (William E. Butler transl., 2003) (Russian original in 2000).

[28] In Hungary, *cf.* a critical evaluation from the viewpoint of the sources of law, *Шмидт П.* Конституционно-правовые вопросы системы источников права ВНР [Péter Schmidt, *Constitutional Problems of the Hungarian System of Sources of Law*], 27(1-2) Acta Juridica Academiae Scientiarum Hungaricae 133, 146–148 (1985). In Poland, *cf.* Andrzej Rzepliński, *Die Justiz in der Volksrepublik Polen* 163 ff. (Maria Jansen transl., 1996).

Congresses; at the beginning of these evaluations, they often emphasized the Party's policies of the respective time. In these official documents, the anti-formalism of the socialist judiciary always won out, at least rhetorically, against "capitalist" positivism and dogmatism. For instance, the "Report of the Chief Justice of the Czechoslovak Supreme Court on the Significance of Ideology in the Judiciary" instructed the judiciary to act as a reliable tool to strengthen the state's authority and the authority of state bodies, and also to serve as an effective "instrument" in the enforcement of socialist ideology.[29]

In Czechoslovakia, the very first interpretative statements in the history of this country were issued in 1953. Back then, they were called *guidelines for the proper interpretation of legislation and other laws* (*směrnice pro správný výklad zákonů a jiných právních předpisů*).[30] In the late 1960s, this designation was changed to *statements ensuring unified interpretation of law* (*stanoviska k zajištění jednotného výkladu zákona*).[31] The statements and guidelines, faithful to their birth at the peak of Czechoslovak Stalinism, were linked to a strong emphasis on centralized interpretation of the law, distrusting decentralized lawmaking powers of lower courts. Moreover, because of lacking proper interactions between legal scholarship and the judiciary, these statements served as a certain substitute for them, while being attached to a strong and – of course – centralized and formal authority.

One of the rare occasions when judges in socialist Central and Eastern Europe could speak freely (the 1968 Prague Spring, a short lived attempt to liberalize the Czechoslovak socialist regime) revealed that this very power of the supreme courts was considered to be a danger to judicial independence.[32] And it was soon after the Soviet invasion of 21 August 1968 when the communist apparatchiks started to criticize the weakened role of these interpretative statements as one of typical products of the 1968 "reactionary" movement.[33] Because the communist regime deeply distrusted the ability of its judges to apply the law based on their own reasoning and best judgment, it was necessary for the "socialist application of socialist law" to guide judges and direct them through the directives of the high courts.[34]

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[29] Zpráva předsedy Nejvyššího soudu Československé socialistické republiky o významu ideologické práce v justici [The Report of the Chief Justice of the Supreme Court of the Czechoslovak Socialist Republic on the Significance of Ideology in the Judiciary], Collection of Decisions 1974, at 439.

[30] Sec. 26(1) of Act No. 66/1952 Coll., on the organization of courts.

[31] *See* Act No. 156/1969 Coll., amending Act No. 36/1964 Coll., on the organization of courts and election of judges.

[32] Andrej Bajcura, *Výsledky ankety o postavení sudcov* [*The Results of the Poll on the Status of Judges*], 51 Právný obzor 834, 835 (1968).

[33] Jan Němec, *XIV. sjezd KSČ a úkoly justice* [*XIV Congress of the Communist Party of Czechoslovakia and the Task of the Judiciary*], 19 Socialistická zákonnost 385, 390 (1971).

[34] Oldřich Rolenc & Vladimír Rolenc, *K ústavní zásadě nezávislosti soudců* [*On the Constitutional Principle of the Independence of Judges*], 19 Socialistická zákonnost 391, 396 & 401 (1971).

The situation did not change much in this regard after 1989. Interpretative statements have become firmly internalized in the domestic legal cultures. Surprisingly enough, old-fashioned traditional ideas about precedents still dominate the judicial and legal discourse.[35] Instead of precedents, most Central and Eastern European legal systems continue using interpretative statements and various guidelines prepared by the high courts, as a specific instrument of unbound judicial law-making *par excellence*. Such statements are still issued by supreme courts on certain legal issues in order to unify conflicting case law, without any real-life case pending before the supreme court.

Unlike the situation in some countries prior to 1990, such statements are now usually not formally binding, though they naturally possess a high degree of force throughout the judicial system. The statements do not have any direct impact on any individual case, because they are decided *in abstracto*, on the proposal of the Supreme Court, minister of justice or like authorities, when these bodies conclude that the interest of uniform case law so demands.[36] In Hungary, as the only system with a pre-Communist tradition of this abstract judicial law-making, these so-called uniformity decisions are even formally binding and the lower courts must therefore follow the interpretative directions found therein.[37]

German judges faced this socialist institution with a combination of surprise and embarrassment,[38] because they view it as a conflict with their ideal that the judiciary makes law only by deciding cases, i.e. "interstitially,"[39] and not by making the law *in abstracto*. It can thus be argued that the continuing adherence to this concept confirms what the post-Communist systems understand by the notion of

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35 Frank Emmert, *The Independence of Judges – A Concept Often Misunderstood in Central and Eastern Europe*, 3(4) Eur. J. L. Reform 405 (2002). In more detail *see* Kühn 2011, at 207 ff.

36 In the Czech Republic, the competence to request such a statement is vested, *inter alia*, in the Minister of Justice, *see* Secs. 123(3) and 14(3) of the Act on the Judiciary of 30 November 2001, No. 6/2002 Coll. Similarly in Slovakia, *see* Secs. 21(3) and 23 of the Act on the Judiciary of 9 December 2004, No. 757/2004 Z.z. [Official Gazette]. In Poland, the Supreme Court's resolutions are requested, *inter alia*, by the Spokesman for Citizens' Rights, the Public Prosecutor General or, within his/her competence, by the Spokesman for the Insured. *See* Art. 60(2) of the Supreme Court Act of 23 November 2002, Dz.U. Nr. 101 of 2002, item 924, available in English at http://www.sn.pl/english/sadnajw/index.html.

37 *Cf.* Árpád Erdei, *Law of Criminal Procedure* in *Introduction to Hungarian Law* 211 (Attila Harmathy ed., 1998).

38 As did German judges in their reports on the Czech judiciary of 2003. All of them actually criticized this institution, which in their opinion, was a waste of the Supreme Court's energy. Moreover, they noted that it solved the question only *in abstracto*, without a proper judicial test at the lower levels. Souhrn návrhů pro českou justici v oblasti organizace soudnictví, civilního a trestního řízení [A Set of Proposals for the Czech Judiciary in the Area of Organization of the Judiciary and Civil and Criminal Procedure], Twinning Project CZ 01/IB/JH/01 Judicial Reform and Court Management Czech Republic – Germany – United Kingdom (not published, on file with the author).

39 As Justice Holmes once famously noted: *Southern Pac. Co. v. Jensen*, 244 U.S. 205, at 221 (1917) (Holmes, J., dissenting: "*I recognize without hesitation that judges must and do legislature, but they do so only interstitially; they are confined from molar to molecular motions*").

judicial law-making and demonstrates why they have difficulties understanding proper judicial law-making.

In the Czech Republic, both supreme courts have the power to adopt interpretative statements. Their actual practice differs, however. The Supreme Court, as the final court for civil, commercial and criminal cases, will use this power very often. In fact, these statements seem to be the most important tool for the unification of case law and judicial law making. The Supreme Court rarely convenes its grand chambers for this purpose.

Perhaps the conservative practice of the Supreme Court is influenced by the fact that this court is a direct continuation of the Supreme Court of the Czech Socialist Republic. In contrast, the Czech Supreme Administrative Court, as a new court established in 2003, has used this power only twice, both during the first two years of its existence. After 2005, it has never again used the power to adopt statements. The prevailing mood at this court is that such statements are an improper way of judicial decision making, some sort of unrestrained legislating from the bench, being in conflict with the separation of powers. Unlike the Supreme Court, the Supreme Administrative Court will convene its grand chamber to unify conflicting case law of its small chambers.[40]

I claim that one important reason, not only for the survival, but actually for the well-being of the imported concept of plenary interpretative statements is the continuing supremacy of an authoritarian conception of the law and legal discourse. An authoritarian discourse might face serious difficulties with attempting to internalize judicial law-making via a precedent proper, based on interactions between private parties and judges, both those at the lower echelons and those of the high courts, who possess the final authority to say what the law is in an individual case. That is why an authoritarian discourse has an open preference for centralized judicial law-making by supreme courts, without listening to anyone including the lower courts.

In political terms, interpretative statements might be a welcome tool for politicians to model their laws via judicial abstract statements. The ministerial power to request such a statement might be easily misused to intervene in politically sensitive cases pending in lower courts. The politicians do so by inviting judges to decide on a particular problem, while sometimes punishing those who do not follow the rules of the game. To provide one example, the former Chief Justice of the Czech Supreme Court was infamously dismissed in February 2006 by the President Václav Klaus. One of the crucial reasons was the fact that the said Chief Justice did not assure "unification of the law" via judicial interpretative statements. The President's dismissal was annulled by the Constitutional Court, which rebuffed all his arguments.[41]

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[40] I should point out that I am a judge of the Supreme Administrative Court.

[41] The judgment of the Constitutional Court of 11 July 2006, no. Pl. ÚS 18/06. For the best description of this case in English, *see* Michal Bobek, *The Fortress of Judicial Independence and the Mental Transitions of the Central European Judiciaries*, 14(1) Eur. Pub. L. 99 (2008).

The single most important added value of these statements is their speediness and clarification of the law without having to wait until a specific case arrives at the supreme court in the regular way, through appellate proceedings or cassation. On the other hand, these statements and guidelines tend to turn the supreme court into a weird quasi-academic institution, debating legal issues detached from the colorful circumstances of real-life cases. The legitimacy of judicial lawmaking is vested in the judicial duty to address the facts of a pending case, not to address any issue the judge considers worthy of their attention, while disregarding that no case bringing this issue before the bench has yet emerged.

The very procedure of adopting statements warrants yet another concern. They are usually adopted by a full court. However, judicial deliberation is and has to be different from parliamentary debates. The difference between judicial deliberation and political discussions is qualitative rather than quantitative. Debates in the legislature bring together a number of speakers from various political groups and, on top of that, dozens more or less disinterested listeners who would later follow the opinion of their political club on a particular issue.

In contrast, judicial deliberation is made through actual participation of all judges involved. Even though no one knows exactly the maximum number of people who could deliberate in this way, there can be no doubt that dozens of judges can hardly take part in rational judicial deliberation. The supreme courts, which make their decisions as full courts in the common law systems, rarely have more than nine justices. In the world of civil law, various grand chambers of supreme courts have never more than twenty judges. The same also applies to constitutional courts. Otherwise, there would be no time for all the judges to speak and it would be close to impossible to organize a rational legal debate in this way. Last but not least, it is not likely that dozens of judges involved in the adoption of statements could prepare well for debating complex issues of law. After all, if some of the judges were not prepared for the issue, this would not be visible in the assembly of dozens of people, most of whom must remain silent, just for the sake of time. At the end of the day, the entire "judicial" deliberation would shift towards a parliamentary debate, with many silent listeners who would then follow, in their voting, the opinions presented by the opinion leaders they trust the most.

When debating the issue of interpretative statements, we must always be aware that judges are the final *authoritative* interpreters, not because they are omniscient and infallible, but because of their function and status within the legal system. The authority of a judge to decide the case "correctly" will be ultimately tested by a real-life case. Judges are not free riders picking up legal questions they want to consider depending on their immediate will and changing mood. When understood from this perspective, abstract judicial interpretative statements are not only against the very core of an authoritative legal discourse, but are also in conflict with the basic tenets of the separation of powers.

4. Revival of the Concept of Defensive Legalism

The imported notion of judicial activism seems to be slowly dying away in the region. As I mentioned at the beginning, during the times of socialism, the region's conception of constitutional courts – if they existed at all (Poland, Hungary) – was the notion of self-restrained constitutional courts, with crude politics being supreme to the so-called socialist legality. This idea is again slowly gaining ground in the region. In contrast, the revival of activist constitutional courts in the 1990s could be viewed as a short-term deviation from the established rule.

Even in those countries where constitutional courts still operate autonomously and are not influenced by the executive branch, the level of judicial activism is not comparable to what it used to be during the first two decades after the fall of the Iron Curtain (the Czech Republic might serve as an example).

The degrees of political interference with the appointment or electoral process to the constitutional bench differed in the region. Interestingly enough, no system proved to be immune to malfunctions and judicial vacancies. In some countries, the appointment procedures failed, and this resulted in empty benches and courts' inability to perform their tasks (Hungary, already in the late 1990s; the Czech Republic, in the early 2000s; Slovakia, in 2019). In some countries, the courts are controlled, indirectly but effectively, by political forces which control all the branches of the government (Russia, Hungary after 2010). In some other countries, the constitutional court faced hostile takeover by the ruling political forces (the Polish Constitutional Tribunal's crisis in 2015/2016).

While an open disrespect to constitutional rulings is rare, even this can be encountered in the region. In Poland, the constitutional courts' decisions were openly disrespected, and the court was later taken over by the government through questionable judicial appointments and open violation of the electoral procedure (the Polish Constitutional Tribunal Crisis of 2015–2016). This occurred because while the Polish ruling illiberal party PiS won a simple majority of parliamentary seats, it was nevertheless far from obtaining a constitutional majority, and so it was necessary to take control of the body which could assess constitutionality of the new legislation.[42]

In yet other countries, the constitutional court fell under the control of illiberal majorities peacefully, due to a long-term dominance of one political party in the parliament, quite often combined with packing of the court, i. e. expanding the number of judges and appointing friendly ones to the bench (Russia, since the mid-1990s; Hungary, after 2010[43]). Be it one way or another, the common feature is that

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[42] For a detailed analysis of the Polish development after 2015, *see* Christian Davies, *Hostile Takeover: How Law and Justice Captured Poland's Courts*, Freedom House (May 2018) (Feb. 20, 2021), available at https://freedomhouse.org/sites/default/files/poland%20brief%20final.pdf.

[43] Sadurski 2014, at 10–13.

the constitutional court has become much more self-restrained when compared to the era of the 1990s.

In some countries, such as Poland, the captured court can become a welcome tool for the politicians in power in their efforts to dismantle constitutional guarantees and structures. When the Polish Constitutional Tribunal got under full control of the Law and Justice Party (PiS) in December 2016 (by very questionable means, most likely in direct conflict with the Constitution and the Constitutional Tribunal Act), the Tribunal immediately started to side with the ruling party. The new Chief Justice, who controls the case assignment, prevented the judges elected by the previous parliamentary majority from taking part in deciding important cases. Interestingly enough, the PiS deputies challenged several laws on the grounds of their unconstitutionality (although they could have easily annulled the laws themselves, in view of the majority they enjoyed in the parliament) and the Tribunal swiftly provided the answer the PiS needed.[44]

In contrast, the Hungarian ruling party does not need this sort of justification or legitimacy, because it has enjoyed a qualified majority in the parliament since 2010, necessary for adopting a new constitution, as well as electing the personnel of all important political institutions. The actual practice of the Hungarian Constitutional Court, after it has become fully dominated by people close to the ruling Fidesz party, is self-restraint with respect to the legislature. As W. Sadurski mentioned, this was nicely illustrated by an early decision made by the Constitutional Court before the Court was completely taken over by the new ruling elite. One of the Fidesz appointees, Justice Béla Pokol, argued in his dissenting opinion that the protection of fundamental rights as adjudicated earlier should be lowered when it is necessary to protect societal interests.[45] This fittingly shows a deviation from earlier judicial philosophies, which emphasized the primacy of an individual over the state, not *vice versa*.[46]

In yet another role, constitutional courts could also protect the national constitutional values and principles against encroachments by supranational courts. After all, it has much better style if verdicts of the Strasbourg Court or the Luxembourg Court of Justice are rejected by the national constitutional court defending the national constitutional identity than if the same is done by a domestic government.[47]

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[44] *See* Wojciech Sadurski, *Polish Constitutional Tribunal Under PiS: From an Activist Court, to a Paralysed Tribunal, to a Governmental Enabler*, 11(1) Hague J. Rule L. 63 (2018) (explaining how the Tribunal started to protect the government from laws enacted long before PiS took power).

[45] Sadurski 2014, at 12.

[46] *See* note 7 above and the accompanying text.

[47] For a nice example of Russia and its complex relations with the European Court of Human Rights *see* Alexei Trochev, *The Russian Constitutional Court and the Strasbourg Court: Judicial Pragmatism in a Dual State* in *Russia and the European Court of Human Rights: The Strasbourg Effect* 125 (Lauri Mälksoo & Wolfgang Benedek eds., 2017).

To sum up: it is not likely that the Central and Eastern European constitutional courts would be abolished altogether in the foreseeable future. The effects of the global rise of constitutional adjudication still control the mainstream political rhetoric. Even authoritarian regimes do not want to be viewed as autocrats running wild, unrestrained by any checks and balances. But the actual importance of constitutional courts is withering away. It is very likely that in many countries of the region, the actual political significance and real independence of the constitutional courts will resemble the situation prior to 1990. They will look very much like those politically loyal constitutional tribunals that operated in the few countries which practiced constitutional review under socialism.

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References

A megtalált alkotmány?: a magyar alapjogi bíráskodás első kilenc éve [*The Constitution Found? The First Nine Years of Hungarian Constitutional Review on Fundamental Rights*] (Halmai Gábor ed., 2000).

Bobek M. *The Fortress of Judicial Independence and the Mental Transitions of the Central European Judiciaries*, 14(1) Eur. Pub. L. 99 (2008).

Constitutional Justice, East and West: Democratic Legitimacy and Constitutional Courts in Post-Communist Europe in a Comparative Perspective (Wojciech Sadurski ed., 2002).

Damaška M.R. *The Faces of Justice and State Authority: A Comparative Approach to the Legal Process* (1986).

Davies Chr. *Hostile Takeover: How Law and Justice Captured Poland's Courts* (2018). https://doi.org/10.1163/2210-7975_hrd-1234-20180005

Dupré C. *Importing the Law in Post-Communist Transitions: The Hungarian Constitutional Court and the Right to Human Dignity* (2003). https://doi.org/10.5040/9781472562715

Emmert F. *The Independence of Judges – A Concept Often Misunderstood in Central and Eastern Europe*, 3(4) Eur. J. L. Reform 405 (2002).

Interpreting Statutes: A Comparative Study (D. Neil MacCormick & Robert S. Summers eds., 1991). https://doi.org/10.4324/9781315251882

Jolowicz J.A. *Da mihi factum dabo tibi jus: A Problem of Demarcation in English and French Law* in *Multum non multa: Festschrift für Kurt Lipstein aus Anlass seines 70. Geburtstages* 79 (Peter Feuerstein & Clive Parry eds., 1980).

Kischel U. *Comparative Law* (2019). https://doi.org/10.1093/oso/9780198791355.001.0001

Kühn Z. *Making Constitutionalism Horizontal: Three Different Central European Strategies* in *The Constitution in Private Relations: Expanding Constitutionalism* 217 (András Sajó & Renáta Uitz eds., 2005).

Kühn Z. *The Judiciary in Central and Eastern Europe: Mechanical Jurisprudence in Transformation?* (2011). https://doi.org/10.1163/9789047429005

Kulic D. *The Constitutional Court of Yugoslavia in the Protection of Basic Human Rights*, 11(2) Osgoode Hall L.J. 275 (1973).

Mańko R. *Survival of the Socialist Legal Tradition? A Polish Perspective*, 4(2) Comp. L. Rev. 1 (2014).

Mańko R. *The Culture of Private Law in Central Europe After Enlargement: A Polish Perspective*, 11(5) Eur. L.J. 527 (2005). https://doi.org/10.1111/j.1468-0386.2005.00275.x

Procházka R. *Mission Accomplished: On Founding Constitutional Adjudication in Central Europe* (2002).

Rodin S. *Discourse and Authority in European and Post-Communist Legal Culture*, 1(1) Croat. Y.B. Eur. L. Pol'y 1 (2005). https://doi.org/10.3935/cyelp.01.2005.01

Sadurski W. *Polish Constitutional Tribunal Under PiS: From an Activist Court, to a Paralysed Tribunal, to a Governmental Enabler*, 11(1) Hague J. Rule L. 63 (2018). https://doi.org/10.1007/s40803-018-0078-1

Sadurski W. *Rights Before Courts: A Study of Constitutional Courts in Postcommunist States of Central and Eastern Europe* (2nd ed. 2014).

Sólyom L. & Brunner G. *Constitutional Judiciary in a New Democracy: The Hungarian Constitutional Court* (2000). https://doi.org/10.3998/mpub.16423

Sulikowski A. *Government of Judges and Neoliberal Ideology* in *Law and Critique in Central Europe: Questioning the Past, Resisting the Present* 16 (Rafał Mańko et al. eds., 2016).

Trochev A. *The Russian Constitutional Court and the Strasbourg Court: Judicial Pragmatism in a Dual State* in *Russia and the European Court of Human Rights: The Strasbourg Effect* 125 (Lauri Mälksoo & Wolfgang Benedek eds., 2017). https://doi.org/10.1017/9781108235075.007

Vining J. *The Authoritative and the Authoritarian* (1986).

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