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Introduction: Revisiting the Transformative Power of Europe

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I. The Topic

Browsing through texts dealing with the judicial method and mentality in Central and Eastern Europe (CEE) at the onset of the 2004 enlargement of the European Union (EU), one acquired a mixed feeling. The mandatory institutional optimism of the various approximation and pre-accession reports stood in contrast with the rather sceptical tones voiced in some of the scholarly writings. 'We-shall-overcome-with-the-help-from-Europe' rhetoric became intertwined with scary images of CEE post-Communist judges that were depicted as limited formalists who seek refuge in the realms of mechanical jurisprudence and senseless sticking to procedures. Afraid to decide on substance and to pass any controversial judgments, they seek to dispose of cases on obscure points of procedure, in the observance of which they are very meticulous.

Such a description of the 'patient' resulted typically in one of the following two predictions. First, the gloomy one: Because of their ideological and methodological shortcomings, CEE judges would not be able to apply EU law properly. They would not be able to operate within the European legal space. Their world of limited (or formalist, textualist, hyper-positivistic or whatever other label was chosen by the respective author) law stood worlds apart from the mode dynamic and purpose oriented reasoning style required by European law. Second, on the more positive note, it was assumed that under the European lead, the CEE ideology and method was bound to change. CEE judges would have to adapt their approaches and re-adjust their judicial method once their respective states acceded to the European Union. The domestic application of EU law was bound to bring about a change in the judicial style.

Ten years have passed since the 2004 big bang enlargement of the European Union. Ten years may be seen as a relatively short but also as a quite long period

of time. The length-related relativity depends on our purpose. On the one hand, for confirming the occurrence and genuine persistence of any lasting changes in institutions, mentality, approaches or ideology, 10 years may be too short. On the other hand, for those who suggest the absence of any such useful change, 10 years might be unbearably long. In any case, it is certainly long enough for observing the absence of any positive change.

With the benefit of hindsight, this volume revisits the (non)transformation of CEE judges and judiciaries under the European influence on the tenth anniversary of the 2004 enlargement. It looks into two key overreaching themes. First, have the judges and judiciaries in the new Member States been able to cope with EU law? Is EU law being applied domestically? Is it being duly incorporated into the reasoning of national judges? Moreover, have the CEE judges been able to effectively join and contribute to the broader discourse in the European legal space? Or have they turned out to be a sort of a black passenger, or a poor relative, who just sits silently in the corner and does not dare to engage?

Second, the broader issue of judicial reform (or the absence thereof) in Central and Eastern Europe is re-opened. What is the state of judicial structures, procedures and culture in CEE after 10 years of membership in what is generally seen as quite a prestigious 'rule of law based club'? It ought to be stressed, however, that the transformation of most CEE judiciaries had not started on 1 May 2004. The process took off already in the early 1990s, with the fall of the Iron Curtain. It was further accelerated with the CEE countries applying for their membership of the EU, as well as by their accession to the Council of Europe and the simultaneous submission to the review by the European Court of Human Rights. It was in fact in the pre-2004 period, when the European Union, sometimes acting alone but frequently operating in synergy with other European or international institutions, applied effective transformative pressure onto the CEE candidate countries. With regard to this latter point therefore, the 'examination period' for judicial transformation in CEE is thus not just the last decade, but in fact the last 25 years since 1989.

II. The Structure

The volume is divided into three parts. The first part deals with judicial reasoning and judicial ideology. A lot has been written in the past about CEE judges being formalists and apparently operating on a different 'wavelength' than their Western counterparts from the other side of the former Iron Curtain. The seven chapters contained in the first part of the volume revisit some of this discussion. In chapter two, *Péter Cserne* provides a fresh and thought-provoking introduction into the normative side of the debates on formalism in CEE. Is CEE formalism really anything special? Or are the formalism accusations so widely used within the region just a variety of ideological and cultural wars? Chapters three and four, authored

by *Marcin Matczak, Mátyás Bencze & Zdeněk Kühn* and *Rafał Mańko* respectively, offer a quantitative assessment of the Central European reasoning style. What types of arguments do CEE judges in fact use and how often? How frequently do they work with arguments drawn from EU law? Chapter three provides an across the board study of administrative adjudication in Poland, the Czech Republic and Hungary, whereas chapter four presents a more in-depth study in the specific sector of the adjudication of the Polish Supreme Court on unfair terms in consumer contracts. In chapter five, *Aleš Galič* dissects a tremendously important issue encountered in a number of CEE countries: How distrust into the judiciary and its competence translates into legislation, more specifically the delimitation of the space of permissible judicial discretion. The case study relates primarily to judicial discretion in civil procedure. It has nonetheless much broader implications for the relationship between the legislature, the public and the judiciaries in transforming societies. Chapter six, authored by *Jan Zobec* and *Jernej Letnar Černič*, recounts the story of a failed (or at least considerably 'hibernated') judicial transition. Although their particular focus is on Slovenia, it is no secret that similar patterns at least in relation to some elements addressed in the chapter can be encountered throughout the CEE region. Chapter seven by *Boštjan Zalar* concludes the first part by critically engaging with the arguments, ideas and statements voiced in the first part of the volume. In particular, it offers a more nuanced view of the apparently problematic case of Slovenia.

Part two zooms in on the more direct interactions of CEE countries with the EU level and Europe-induced changes in national institutions, structures and procedures. In chapter eight, *Michal Bobek* and *David Kosař* offer a not entirely optimistic case study of 'institutional export' from the West (or rather from the South) to the East via the European level. They explain why an 'off-the-rack Euro-product' of a Latin-style judicial council that kept being offered or even imposed onto CEE candidate countries in the pre-accession period failed to deliver the goods in the name of which it was put in place. In chapters nine and 10, *Marton Varju & András György Kovács* and *Nina Półtorak* respectively look into Europe-induced changes in the national procedural framework following the 2004 enlargement in Hungary and Poland. The Polish example is perhaps more optimistic in tone than its Hungarian counterpart. Both chapters, however, confirm the fact that on the level of substantive and procedural law, both layers, the European and the national, are clearly engaging, with the former exercising some influence over the latter. In chapters 11 and 12, our attention turns to another type of engagement, this time a direct one—the preliminary rulings procedure. The Bulgarian case study offered by *Alexander Kornezov* in chapter 11 is fascinating: A group of younger, administrative Bulgarian judges, largely hired from outside the ranks of the established Bulgarian career judiciary, is effectively using the preliminary ruling procedure as a tool for their self-empowerment within the national judicial hierarchy. However, as a knowledgeable and seasoned observer of judicial behaviour within the EU, *Erhard Blankenburg* asks in his reply in chapter 12, are the patterns emerging from the Bulgarian case study indeed that new, if compared with judicial behaviour in

the former 'Western' countries? Chapter 13 authored by *Matej Avbelj* closes the second part with broader critical reflections on the process of legal and judicial transformation as such. The insightful and sharp questions posed therein are as important as they are vexing, dissecting in some detail the problematic cases of Hungary and Slovenia.

In part three, our attention turns to constitutional courts and the constitutional justice in Central Europe. At a first look, the inclusion of such a relatively 'narrow' topic into this volume might appear surprising. On a closer look, however, constitutional courts and constitutional judges are not only a significant element within the judicial landscape in Central Europe that simply cannot be omitted; their mutation since the 2004 enlargement has also been amidst the most striking ones. In the period after 1989 and before the 2004 enlargement, most of the newly created constitutional courts in CEE became the active agents of societal and legal change: Weeding out old Communist laws, pushing for positive change in legal style and method within their respective jurisdictions. After 2004, their reputation became somewhat more mixed, with more conservative and darker tones appearing. Most recently, the Czech Constitutional Court dared into a territory that no other European court has dared before by declaring a judgment of the Court of Justice *ultra vires*. The Polish Constitutional Tribunal has not gone so far, but appears to have stopped one step short of that mark, by 'just' submitting EU secondary law (a regulation) to a full national constitutional review. In chapters 14, 15 and 16, *Tomasz Tadeusz Koncewicz*, *Jiří Pribáň*, and *Allan F Tatham* respectively analyse some of these perturbing questions by looking at the Polish Constitutional Tribunal, the Czech Constitutional Court and the Hungarian Constitutional Court in turn. Their visions and the narratives they construe are then supplemented by a critical closing chapter authored by *Marek Safjan*, who, thanks to his eminent experience, is able to take a broader, evolutionary and diachronic look at the constitutional justice in the European legal space.

Finally, the conclusions in chapter 18 revisit the three main topics of the volume in turn: Judicial reasoning and the issue of formalism; structural changes under the European lead in both their quantitative as well as qualitative dimension; and the uneasy position of constitutional courts in the European legal space, in particular of those in Central Europe.

III. The Caveats

Several caveats ought to be made at this stage that should help the reader to understand what she might find in this volume and, perhaps more importantly, what she will not find here. There are three sets of caveats: Methodological, personal and geographical.

A. Methodological

The transversal focus of this volume is on *qualitative* change in judicial techniques, mentality and institutions. The volume is thus not offering a quantitative analysis of national (non-)implementation of EU law since 2004 in the new EU Member States. Furthermore, the volume can also not provide any comprehensive and objective assessment of the success or failure of the process of CEE judicial transformations, although there is naturally no shortage of individual, subjective assessment of either the process or its outcome in some of the chapters that follow.

The reasons for the inability to deliver such objective assessment are multiple. First of all, it is notoriously difficult to evaluate the process of 'Europeanisation', which, to start with, we are not even able to define.[1] Capturing the process or its outcome becomes even more difficult if what is being assessed is not the Europeanisation of individual policies, in law typically represented by a comparative study of the transposition and implementation of a directive or other specific piece of EU legislation, but the Europeanisation of politics or polity,[2] ie institutions, structures and procedures not directly flowing from any one single EU legal source. Against this background, to study the transformation of method, reasoning patterns or legal thinking,[3] and establishing a credible causal link or at least a correlation, becomes, certainly on a larger scale, a mission impossible.

Second, in the particular context of judicial transitions in CEE, 'Europeanisation' of judiciaries was, in a way, a journey into an unknown or even inexistent destination. There is no 'EU' model of judiciary that would encompass all the institutional, structural and procedural elements to which a national judicial system could approximate itself to. For example, there is no EU sample or blueprint on how to structure criminal appeals on the national level, how to flesh out their procedure while respecting all the necessary human rights elements, or how to effectively organise the appellate courts' level in criminal matters in a Member State. For these reasons, in the new Member States or the candidate countries, transforming a judicial system under the 'European' lead effectively meant horizontal 'copying' from another, established Western state, which the transforming country largely chose itself. True, the European Union as well as other international actors actively encouraged this practice by funding various 'twinning' and other programmes, but they could hardly serve as a model themselves.

[1] See eg K Featherstone, 'Introduction: In the Name of Europe' in K Featherstone and CM Radaelli (eds), *The Politics of Europeanization* (Oxford University Press, 2003) 12; P Graziano and MP Vink (eds), *Europeanization: New Research Agendas* (Palgrave Macmillan, 2007) 7–12, 36–39; S Saurugger, *Theoretical Approaches to European Integration* (Palgrave Macmillan, 2014) 124–29.

[2] eg TA Börzel and T Risse, 'Conceptualizing Domestic Impact of Europe' in Featherstone and Radaelli (n 1) 71 or U Sedelmeier, 'Europeanization' in E Jones, A Menon, and S Weatherill (eds), *The Oxford Handbook of the European Union* (Oxford University Press, 2012) 833.

[3] Recently see eg U Neergaard et al (eds), *European Legal Method: Paradoxes and Revitalization* (DJØF, 2011) and U Neergaard and R Nielsen (eds), *European Legal Method: In a Multi-Level Legal Order* (DJØF, 2012).

The absence of one clear model for judicial transformations in CEE meant, however, that it is difficult to evaluate the transiting countries as to whether 'they are there', whether they by now have in fact arrived at their desired destination. 'Back to Europe' became the omnipresent slogan in some of the CEE countries, in particular in the course of the 1990s. In terms of judicial organisation and performance, however, back to which concrete 'Europe'? Back to Germany? Sweden? Italy? Finland? Greece? Needless to say that the evaluation of the judicial performance of a particular CEE country might turn out quite differently depending on which of these countries would be taken as a yardstick. Furthermore, trying to overcome the model diversity by construing various model-free rules of law or judicial performance indexes and then quantifying the performance and change in the individual countries on their basis tends to lead to more additional problems than helpful answers.

Also for these reasons, this volume can offer no solid empirical answer whether in the CEE countries, all of them or individually, the judicial transition has been a 'success' or a 'failure'. What the volume nonetheless offers is a unique insight into the qualitative side of the process itself, its shortcomings and its discontents.

B. Personal

Can fish objectively comment on the state of fish? Even more importantly perhaps: Does the fish know that it is a fish? In the study of Central and Eastern Europe, its judicial and other transitions, similar questions relating to the potential introspection bias[4] may be raised with renewed importance. As Hans Micklitz diplomatically noted in his Prologue, the debate on CEE judicial transition tends to be dominated by authors and judges coming from that region. These authors naturally have certain visions of reality within which they operate, formed by their values, ideas and convictions. Are they always able to dissociate these values from their vision of the reality when crossing the borders to the 'West' and seeking to explain the state of affairs back home? This problem might become more acute when dealing with a fairly specific topic relating to a system that is difficult to access for an external observer. To put the same point more bluntly, hardly anybody is able to verify their vision of reality since nobody from the outside world tends to have much idea about what is going on in smaller countries in the East with typically an incomprehensible language. Thus, coming to the international fore, the authors might bring with them not only their undisputed knowledge, but also their normative visions and agendas that colour this knowledge. The bias potential grows even stronger if judges from the CEE region are asked to talk on … CEE judges and judiciaries.

Conscious of such potential one-sidedness, all efforts were made to at least minimise its impact. The debates in this volume and at the conference leading

[4] Further eg L Epstein and G King, 'The Rules of Inference' (2002) 69 *University of Chicago Law Review* 1, 93.

to it were conceived of as 'triangular' in nature, involving not only academics coming from the CEE region, but also academics from the 'West', as well as CEE judges. Moreover, within the academic stream, an inter-generational exchange was also stimulated. This volume therefore brings together more established and experienced researchers, who themselves contributed to creating the narratives of CEE judicial function before and around the 2004 Eastern enlargement, with the younger generation that joined the discourse in the past few years. In the end, the diversity in views and opinions between the individual 'representatives' of the various streams might be in itself of highest interest to an attentive reader.

C. Geographical

As the title of this volume already foreshadows, its main focus is on 'Central Europe' (CE), which is defined as including Poland, the Czech Republic, Slovakia, Hungary and Slovenia. Several individual chapters reach beyond this area, providing some insights on 'Central and Eastern Europe' (CEE), which, for the purpose of our discussions, might be seen as encompassing also the three Baltic States (Estonia, Latvia, Lithuania), as well as Bulgaria, Romania and perhaps also Croatia and the countries of Western Balkans. However, since the discussion of the latter countries in this volume is not genuinely representative, the title of the book was advisedly kept as referring to Central Europe. At the same time, however, no attempt was made at unifying the terminology across the volume in this regard. Freedom was left to the individual authors with regard to the geographical area they wish to refer to within their chapters.

Finally, partly out of habit, partly out of convenience, the term of 'new Member States' is being used throughout the volume in order to refer to the new states that joined the European Union in 2004, namely Poland, the Czech Republic, Slovakia, Hungary, Slovenia, Estonia, Latvia and Lithuania. Cyprus and Malta joined also in 2004, but since coming from a different cultural background, and more importantly from outside of the former 'Eastern Bloc', they are not specifically aimed at in this volume. On the other hand, the notion of 'new Member States' as used in this volume includes also Romania and Bulgaria that joined in 2007. The pertinent question naturally remains whether it is still correct to refer to these countries, in particular those from the 2004 enlargement, as 'new' Member States, since it has been 10 years and two further enlargements followed.

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