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The Reform of the Judiciary in the Czech Republic in the Context of EU Enlargement

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1. Introduction

Any reform of the judiciary is a very complex issue which affects one of the pillars of a democratic State based on the respect for the rule of law. Since such a reform concerns the organisation and the material competencies of courts, it has an important effect on the whole legal system providing for the enforcement of legal norms. Changes in the judicial system are, therefore, subject to thorough considerations and discussions on different levels.

It is understandable that the reform of the judiciary is an especially delicate problem in those States which have to overcome the structures of an authoritarian regime. Although Central and Eastern European States, in a natural way, share a common European heritage in the field of legal culture, allowing the implementation of the most distinctive principles, for instance respect for human rights and free elections, it is, nevertheless, extremely difficult to change comprehensive structures in the field of the judiciary resulting from development which has occurred over decades.

In the following article we will analyse the conditions for a successful reform of the judiciary in Central Europe. Looking at the example of the Czech Republic we will observe the guidelines for the reform of the judiciary which have been formulated by the EU bodies. In the context of a future EU enlargement, certain standards concerning the effectiveness of judicial structures have to be implemented in the candidate countries.

2. The framework for the EU enlargement process

In the last decade enlargement has become one of the central tasks on the EU’s agenda. The applications for membership, which have been filed by several Central and Eastern European States, can be considered as a starting point for this very ambitious project. The goal of enlargement is to integrate so-

The European Council has set certain conditions for EU enlargement. In 1993 in Copenhagen, three main criteria were formulated:

- the political criterion concerning democratic institutions, the rule of law, human rights and protection of minorities;
- the economic criterion with regard to a functioning market economy;
- the criterion concerning the adoption of the Community acquis.

In December 1994 the Essen European Council proposed the conclusion of Association Agreements (Europe Agreements) with countries which had shown interest in becoming EU members. In 1997 in Amsterdam, the Council decided that concrete accession negotiations would start in 1998.

In July 1997 the European Commission issued the so-called Agenda 2000 which defined a basis for measuring progress made in the candidate countries. The Agenda 2000 confirmed the importance of the three main criteria worked out in Copenhagen 1993 and offered a pre-accession strategy supporting the transformation in candidate countries by significant financial means. The Commission’s Agenda 2000 was approved by the Luxembourg European Council in December 1997.

In the course of the negotiations with a country asking for EU membership, the EU bodies examined the country’s ability to adopt all relevant EU standards and obligations. Accession negotiations were opened with six countries (the Czech Republic, Cyprus, Hungary, Poland, Estonia and Slovenia) in March 1998. As an additional means of preparation, accession partnerships with all candidate countries were designed, which contained concrete obligations such as the development of a national programme regarding the adoption of the Community acquis.

Following the Agenda 2000, the European Commission submits a progress report to the European Council each year. The development in the candidate countries is monitored by the Commission and the bodies set up in the European Agreements. The findings of the Commission are of key importance as far as a possible future EU membership of a candidate country is concerned.

3. The findings of the European Commission on the Czech Republic

The first Commission opinion on the Czech Republic’s application for membership in the European Union was issued in July 1997 (Agenda 2000). The report observed several shortcomings of the judiciary in the Czech Republic. The Commission even described the situation of Czech courts as “a major challenge for the country’s integration into the European Union.” According to the report, Czech courts were overloaded and numerous cases did not receive a judgment; e.g. the average length of commercial law proceedings exceeded 3 years. The reason for this deficiency was inadequate experience and qualification on the part of the judges.
The legislation, which they had to apply, was totally new for them. As a conclusion, the Commission identified a clear need for reform of the judiciary, especially with a view to the application of EC law by the Czech courts.

The Commission’s 1998 Regular Report on the Czech Republic’s progress towards accession was more critical than the 1997 opinion. The Commission criticised the fact that, in the year between the two reports, the functioning of the judiciary in the Czech Republic had not improved. The main causes for the delay were the large number of vacancies for judges (390 out of a total of 2726), the general lack of basic equipment in the courts and insufficient communication (within the Ministry of Justice and between the Ministry and the courts). For the first time, the report mentioned the lack of qualification on the part of state prosecutors. The best-qualified graduates evidently tended to seek employment outside the judiciary, since they received higher remuneration in the private sector (advocacy).

Until the adoption of the Commission’s next Regular Report in October 1999, the situation remained almost unchanged. The deficiencies in the field of the judiciary led to backlogs in all sectors. In 1997, the number of unresolved cases at the lowest instance (district courts) was 230,000; in 1998, 240,000 and in the first quarter of 1999, 230,000. Such delays represent a violation of human rights standards (right to equal and fair trial). According to the Commission, the training of judges (especially in fields such as international and Community law) continued to be insufficient. The Commission’s report further mentioned the weak performance of the judiciary in the fight against organised and economic crime.

In its Regular Report of October 2000, the Commission repeated most of the critical arguments which had been presented in the former reports. Some progress was observed regarding the adoption of important amendments to the Civil Procedure Code and the Commercial Code. However, the draft amendments to both the Criminal Code and the Criminal Procedure Code had been refused by the Parliament. The Commission issued the opinion that the reform of the judiciary could not be completed without constitutional amendments regarding judicial self-administration and the functional structure of the courts. The Regular Report 2000 also presented statistics showing the average length of procedure before district courts (563 days for civil cases, 252 days for criminal cases) and before regional courts (311 days for civil cases and 489 days for criminal cases). According to the Commission there was no change as far as the training of judges and state prosecutors was concerned. Specialisation in international and EC law and economic crime continued to be insufficient.

In the Commission’s reports, the length of judicial proceedings was, obviously, one of the main issues. The overall efficiency of the judiciary depends on court delays and backlogs. The overburdening of courts may lead to mistrust among people in the judiciary and, thus, in the whole legal system. The problems sometimes seem to deter people from making use of the justice system. The problems mentioned in the Commission’s report on the Czech Republic are typical for most former Socialist countries. A clear need for structural changes was found in Poland, Slovenia and Estonia. Only for Hungary was the situation of the judiciary considered to be satisfactory with the exception of the Supreme Court, which also was overloaded.

The second issue is the specialisation of judges in EC law. This refers to the ability of the judicial system to guarantee the application of EC law. Since judges in non-Member States do not have experience with jurisdiction in this field, the Commission could only look at special training programmes for judges. Of course, it would be also necessary to analyse the standard of instruction in EC law at law faculties in these countries.

4. Discussions in the Czech Republic

4.1 The concept of the reform

As the standards within the judiciary have a direct impact on the State’s ability to apply and enforce the law, consider-

able importance is attached to this matter within the Czech Republic. At its meeting on 14 April 1999, the Government discussed the judicial system reform topic and, as a result of this debate, the resolution called “The Principles of the Reform of the Judiciary” was passed. The Government entrusted the Ministry of Justice with the task of submitting a draft dealing with this issue by 15 June 1999. This comprehensive document called “The Concept of the Reform of the Judiciary” hereinafter referred to as “the Concept”) was discussed on different levels. In the light of the Concept, the reform should primarily focus on the organisation of the judiciary, the introduction of judicial self-administration and the fundamental re-codification of procedural as well as material law regulations.

The present judicial system in the Czech Republic comprises the Constitutional Court, the Supreme Court, two high courts, regional courts and district courts. The Czech Constitution of 1992 presumed the establishment of the Supreme Administrative Court which, however, has not yet been established. Since 1993, all of the governments concerned have shown no willingness to create such a court.

Judges are appointed by the President with the countersignature of the Prime Minister. For the appointment, they must

1 See the European Commission’s Regular Reports from 8 November 2000 on Poland’s, Slovenia’s and Estonia’s Progress Towards Accession. (Regular Reports from the Commission on Progress towards Accession by each of the candidate countries can be found online: http://europa.eu.int/comm/enlargement/report_11_00/index.htm).


meet specified conditions, *inter alia* the Czech citizenship, the minimum age of 25, a complete legal university education, moral integrity and at least 3 years of practice concluded by the successful completion of final judicial examinations. A special criterion is the negative certificate under the so-called “Lustration Act”, which excludes members of the former security service and the most zealous members of the Communist regime from the judiciary.

The Concept considered the substantial change to the judicial organisation as a long-term priority. Moreover, this process should be divided into more phases. The hierarchy of courts has to be made more transparent. The high courts should ultimately be abolished, district courts should automatically become courts of first instance, regional courts should act as appellate courts and the Supreme Court should guarantee the unification of judicial interpretation and application by virtue of deciding on extraordinary corrective remedies.

The judicial self-administration should be introduced. The Concept proposed the establishment of a system of judicial councils. The Supreme Judicial Council, with authority for all courts across the country, should be entitled to submit proposals for the appointment of judges to the President of the Republic, to appoint presiding judges and vice-presiding judges to individual courts, to select trainee judges, to manage their professional training as well as to act as a disciplinary body. Judicial councils of individual courts would perform functions of a deliberative nature and would be consulted by the presiding judge of the relevant court on many aspects concerning the court. In this context, it is worth noting that draft acts revising the judicial organisation and introducing judicial self-administration (including requisite draft amendments to the Constitution) have already been submitted, but did not pass. The Chamber of Deputies refused these bills in 2000. The Minister of Justice, Otakar Motejl, who had been leading preparatory works on the reform of the judiciary for more than two years, considered it a defeat and resigned in October 2000. His portfolio was provisionally taken over by the Deputy Prime Minister in charge of legislative activities, Pavel Rychetský.

From the point of view of the judicial system as a whole, the organisation and division of the work among the individual courts is not optimal at present and given that it may have an impact on the proceedings, it is necessary to focus on its improvement. In an attempt to speed up proceedings under the present arrangements, the judicial supervisory bodies (the Ministry of Justice and the presiding judges of district, regional and high courts) monitor and assess unnecessary protraction during proceedings in cases in progress, analysing the causes.

### 4.2 Amendments to procedural as well as material law

The main reason for the current problems of the judiciary is the fact that judicial proceedings in the Czech Republic are governed by principles adopted in the 1960s, which have been revised more than ten times since 1990. The last amendment to the Code of Civil Procedure, which was of cardinal importance, became effective on 1 January 2001. It simplified and sped up the judicial process by amending proceedings before courts of first instance and appeal proceedings, and by making certain changes to the courts’ material competence. It also brought certain changes to the procedure for executing decisions, including the legal arrangements for new ways of executing decisions. The last draft amendment to the Code of Criminal Procedure did not pass because of its radical nature. It intended to simplify and expedite all stages of criminal procedure, to strengthen the importance of the hearing of the case while reducing the pre-trial phase to collecting evidence, to emphasise the state prosecutor’s position while performing his supervisory capacity in the pre-trial phase and decisions at this stage of proceedings.

A draft amendment to the Civil Code setting a new regulation of consumer contracts and the right of lien has already been adopted and came into force on 1 January 2001. A special draft amendment to the Commercial Code intending to assure the compliance with the EC directives on company law was approved and the changes have been effective since 1 January 2001.

A draft Administrative Judiciary Act is being prepared. Its main task is to comply with European standards with respect to the principle of fair trial as laid down, for instance, in Article 6 of the European Convention on the Protection of Human Rights and Fundamental Freedoms. Courts or other tribunals dealing with these matters should decide in the so-called “full jurisdiction”, i.e. they may rule on merits as well as on facts of a case.

The existing administrative judiciary system is limited to controlling the legality of administrative bodies’ conduct. Courts are not entitled to gather, take or examine further evidence and thus find new facts of a given case. The competent court (as a rule the regional court) considers whether the respondent administrative body proceeded in accordance with the rules of procedure (set out in the Code of Administrative Procedure) and whether the decision under appeal was made pursuant to the relevant material rules. If these requirements are fulfilled, the court will dismiss the complaint. In the reverse case, the court quashes the decision and sends the case back to the respondent administrative body. The legal opinion in the judgment is binding upon the administrative body.

### 4.3 The view of the practising lawyers

While political concepts are focusing on structural problems, the Czech professional public understands the problem of the Czech judiciary rather from a different view – as the problem of the system’s agents. For many practising lawyers, the problem with regard to the people is much more important and sensible than that of the structural reform.

Advocates would say that the Czech judiciary is composed of three groups of judges:

The first, very large group is represented by those who have been working in the profession of a judge for decades and who were judges already before the year 1990. Unfortunately,
the professional experience of these judges is almost exclusively negative, as it, for the most part, was acquired in the times of Communism, which is not really compatible with the rules of democratic legal system. For these judges, it was very difficult to adapt to the new conditions of democracy, since the transition required a complete modification of their way of thinking and perception of the law as whole. Moreover, the majority of the adaptable and progressive ex-socialist judges has chosen the private sector (advocacy) which has offered them in the past decade a much better career than the judiciary.

Younger judges, educated in the nineties and mostly having international experience and therefore more open to democratic principles, represent the second group. However, these “new judges” still lack the experience of years of practice, and although they very often, after a short career, occupy higher positions at the courts, their lack of experience logically still manifests itself. Nevertheless, due to the continued lack of judges it is obvious that this group shall grow and shall play a major part in the future judiciary of the country.

The last group is, unfortunately, very small. This group is composed of the few judges of the Communist period who were able to absorb the new situation and to adapt to the new conditions, and at the same time did not choose to leave the judiciary for the more profitable private sector. Although these judges usually occupy positions at the highest levels of the judiciary and participate in the reform of the legislative process, their power is obviously not sufficient to influence positively the judiciary as a whole. For this reason, legislators have thought about opening the judiciary to experts of other sectors of legal practice (e.g. from the advocacy, state administration, universities).

According to practising lawyers, the practical application e.g. of the last crucial amendment of the Civil Procedure Code is – after only few weeks – rather a disappointment. The expectations of the professional public were not met, since the judges continue so far to apply the amended Code in the spirit of the last years. If the reform of judiciary shall have positive results, the legal framework reform has to be accompanied by a change of the people’s approach. And – regardless the EC statistics on quantitative criteria – this process shall likely last for at least another decade.

5. Conclusion

The reform of the judiciary is a key issue in almost all countries, which had to transform their political and legal systems after 1989, and which applied for EU membership. In its progress reports, the European Commission addressed some very important questions concerning the reform. According to the Commission, the main goal should be the raising of the judiciary’s efficiency and an improved education of judges in the field of EC law. To make it short, the reform should solve “technical problems” concerning the length of proceedings, but also material aspects such as the quality of the judgments.

The national institutions concerned with the drafting process are, obviously, influenced by the EU guidelines. However, their task seems to be much more complex. The reform of the judiciary affects many fields in which different experts are involved. Civil lawyers have sometimes a completely different orientation than specialists on penal procedure. The restructuring of hierarchical structures within the judiciary is a task for constitutional lawyers who, for instance, try to solve the division of competencies among ordinary courts, the Constitutional Court and a future Administrative Court. For this reason the theoretical aspects of the structural reform are very complex.

Moreover, many actual problems in the field of the judiciary are linked to the personal experience of many judges. Many of them were educated and acquired their practical experience in the times of the Communist regime. Since 1990, a great deal of legal changes have been adopted, especially in such crucial fields as civil law and commercial law. On the other hand, judges who were appointed in the 1990s often lack experience.

In general, our observations lead to the conclusion that it is extremely complicated to find adequate parameters for describing the most important features of the reform of the judicial system. Although a criterion such as the length of proceedings seems to be an objective one, the Commission’s reports are based mostly on statistics and do not look into concrete cases. Such an approach can be found in the decision-making process of the European Court of Human Rights. The reasonableness of the length of proceedings is assessed by the ECHR in the light of the particular circumstances of the case with regard to the criteria laid down in the Court’s case-law, in particular the complexity of the case, the applicant’s conduct and the conduct of the competent authorities. There is no clear given standard as to which length of civil or penal procedure would be regarded as reasonable. The material quality of judgments is even more problematic to ascertain.

While experts are aware of the fact that the crucial issues regarding a successful reform of the judiciary have to be formulated and enacted as long term priorities, the European Commission’s timetable is, naturally, more restrictive. On the one hand, it is clear that the implementation of EC law within the Czech legal order will not work smoothly without a judicial system ready to apply the relevant norms in a way that is in compliance with standards developed in more experienced Member States. On the other hand, a reform which will be realised under considerable time pressure could rather lead to unwanted problems.

4 So far, the ECHR has already delivered five judgments concerning the Czech Republic. The Puntelt case of 25 April 2000 (Appl. No. 31315/96), the Czˇeký case of 6 June 2000 (Appl. No. 33644/96) and the Barfuss case of 31 July 2000 (Appl. No. 35848/97) concerned the applicant’s detention on remand and the criminal proceedings brought against them. The ECHR, in deciding on the above mentioned cases, held that there had been a breach of Article 5 of the European Convention with respect to the length of the detention. A violation of Article 6 of the European Convention (length of proceedings) was found only in the Barfuss case.