Introduction

While one might still believe that the judicial power is "the least dangerous branch" of government,[1] it is no longer accepted that the judiciary wields only limited power. The evidence is clear. The power of courts has increased worldwide at an unprecedented pace in the last few decades. Judges often clash with the executive and interfere with the agendas of parliaments. As a result, virtually all developed legal cultures now accept that judges are *not* like umpires whose job is just "to call balls and strikes," to paraphrase the Chief Justice of the United States Supreme Court, John Roberts,[2] that they sometimes resort to judicial law-making and that they from time to time get involved in politics.

In addition to the normative issues about the role of judges in democratic society, there has always been a more mundane side of the coin. There is no doubt that judges are expected to be exemplary citizens. However, they may take bribes, accept problematic gifts from attorneys or foundations, attempt to evade taxes, commit perjury, or engage in other fraudulent and deceptive conduct. They may also commit reprehensible acts in their private lives. They can beat their wives, drive a car under the influence of alcohol or drugs, or take part in sadomasochistic practices.

These examples of judicial misconduct lead to the conclusion that judges should be held accountable. This is not a novel demand. All states acknowledged this need a long time ago and allowed for the disciplining of judges, via either impeachment or a specific procedure before disciplinary courts. Many countries devised additional mechanisms such as retention reviews, judicial performance evaluations, or complaint agencies. Civil

[1] The Federalist No. 78, 464 (Alexander Hamilton) (Clinton Rossiter ed., 2003). See also Alexander Bickel, *The Least Dangerous Branch* (Bobs-Merrill 1962).

[2] The precise statements made by Chief Justice Roberts are as follows: "Judges are like umpires. Umpires don't make the rules, they apply them" and "[m]y job is to call balls and strikes and not to pitch or bat" (*Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States Before the S. Comm. on the Judiciary*, 109th Cong. 55 (2005) [statement of John G. Roberts, Jr., Nominee to be Chief Justice of the United States]).

law countries hold their judges to account also by other means such as denying their promotion to a higher court or to the position of a chamber president.

However, judicial accountability inevitably clashes with judicial independence, a cornerstone of the rule of law. All democratic countries thus have to find the right equilibrium between these two principles. Even established democracies cannot escape this conundrum. But this clash of judicial accountability and judicial independence is particularly challenging for countries that are in the process of transition to democracy.

The postcommunist Central and Eastern Europe (CEE) serves as a prime example of how difficult the balancing of these two values may be. In a sense, the transitional justice setting functions as a magnifying glass for the ubiquitous underlying tensions. When the communist regimes in the CEE collapsed in the late 1980s, each state in that region was faced with the tasks of depoliticizing[3] the judiciary and restoring judicial independence. However, it was an uphill struggle for postcommunist political elites to reform their judiciaries as they faced many obstacles. First, the judiciary was kept on a short leash during the communist era. The so-called state administration of courts, which consisted of a rigorous oversight of courts by *prokuratura*, the Communist Party's tight control of regular retentions of judges and the careful selection of court presidents, who were handpicked by the officials of the Communist Party, made clear that the judiciary remained subservient.[4] Democratic politicians had to dismantle all of these pernicious mechanisms. In addition, the status of judges was very low in communist society. Judges earned less than miners or even bus drivers[5] and thus the best law school graduates opted for private practice or administrative jobs.[6] In fact, law as such was a rather marginal discipline during the communist era and did not attract the brightest

[3] By depoliticizing I mean reducing the level of political control exercised by the governing political party. It is important to emphasize the historical context, namely that this effort reacted to the omnipotent Communist Parties in the region.

[4] *See* John Hazard, *Communists and Their Law* (University of Chicago Press 1969); Attila Rácz, *Courts and Tribunals: A Comparative Study* (Akadémia Kiadó 1980), 41–100; or René David and John Brierley, *Major Legal Systems in the World Today* (3rd ed., Stevens 1985) 155–306. For a more recent exposition of this problem, *see* Zdeněk Kühn, *The Judiciary in Central and Eastern Europe: Mechanical Jurisprudence in Transformation?* (Brill 2011), in particular 52–62.

[5] Kühn 2011, above note 4, at 53.

[6] See Alan Uzelac, "Survival of the Third Legal Tradition?" (2010) 49 *South Carolina Law Review* 377, 385–387.

people, who preferred better paid and less politicized vocations.[7] Not surprisingly, the reputation and morale of the judiciary were low.

The postcommunist elites thus had to change not only the institutional setup of the judiciary but also the mindset and performance of judges.[8] The situation got even worse once the revolutionary moment passed. An already limited pool of available candidates for the position of a judge shrank further.[9] Communist hard-liners on the bench often retired voluntarily while top law graduates opted to enter booming private practice, and there was only a small number of "outsiders" such as lawyers from dissident movement or emigrants who could fill the resulting vacancies.[10] Therefore, most CEE countries had to rebuild their judiciaries with essentially the same personnel as before at the higher levels of the judicial hierarchy and with young and inexperienced graduates at its lower echelons.[11]

This "default configuration" of the CEE judiciaries in the early 1990s posed a significant challenge to judicial reforms in that region. Any reform in the CEE had to overcome personal continuity within the judiciary and facilitate not only the institutional but also the mental transition of the judiciary.[12] The "institutional transition" part of the equation required the restoration of judicial independence and the reform of the system of court administration. The "mental transition" part of the equation created, among other things, the need to avoid existing authoritarian

[7] For further details of this phenomenon, see ibid., at 52–55.

[8] See Michal Bobek, "The Fortress of Judicial Independence and the Mental Transitions of the Central European Judiciaries" (2008) 14 *European Public Law* 99.

[9] For a more specific account of this phenomenon, see Chapters 5 (on the Czech Republic) and 6 (on Slovakia).

[10] East Germany was an exception as there were plenty of available "outsiders" in West Germany, who could fill the abandoned posts within the judiciary on the territory of the former German Democratic Republic after the reunification of Germany. This fact also explains why the purges within the judiciary after the fall of the communist regime in East Germany were more thorough than in other CEE countries. For further details, *see* Erhard Blankenburg, "The Purge of Lawyers after the Breakdown of the East German Communist Regime" (1995) 20 *Law & Social Inquiry* 223; or Inga Markovits, "Children of a Lesser God: GDR Lawyers in Post-Socialist Germany" (1996) 94 *Michigan Law Review* 2270, 2271–2272.

[11] There are exceptions to this rule – East Germany and Poland. On East Germany, see note 10. Poland is an exception since most judges of the Polish Supreme Court (not of the lower courts) were removed from office after the fall of the communist regime. On purging the Supreme Court in Poland, see, for example, Lech Garlicki, "Politics and Political Independence of the Judiciary" in András Sajó and L. R. Bentch (eds.), *Judicial Integrity* (Brill Academic Publishers 2004) 125, 137–138; or Wojciech Sadurski, *Rights before Courts: A Study of Constitutional Courts in Postcommunist States of Central and Eastern Europe* (Springer 2005), 43.

[12] See also Bobek 2008, above note 8, at 107–111.

and hierarchical patterns within the judiciary, enhance professionalism of judges, increase their performance, eradicate corruption, and change their perception of judicial duties. Put differently, the CEE countries needed to find a new balance between judicial independence and judicial accountability.

The million-dollar question was how to achieve these opposing goals and find a proper equilibrium between them. Most policy makers did their best, and each CEE country eventually adopted its own set of measures in the first wave of judicial reforms immediately after the fall of communism (the so-called transition wave). In the 1990s, new actors emerged on the scene – the European Union and the Council of Europe – and pushed for the second wave of judicial reforms (the so-called pre-accession wave).[13] Their organs, supported by nongovernmental organizations (NGOs) and professional organizations of judges, came up with a universal solution. They enticed the CEE legislatures to create an independent body, the judicial council,[14] and transfer most powers affecting the judiciary from the Ministry of Justice to that newly established body.

Most CEE countries took advice from the European institutions and eventually adopted the judicial council model of court administration. Hungary[15] and Slovakia[16] established independent judicial councils with

[13] For the distinction between the "transition wave" and the "pre-accession wave" of judicial reforms in the CEE, see Daniela Piana, "The Power Knocks at the Courts' Back Door – Two Waves of Postcommunist Judicial Reforms" (2009) 42 *Comparative Political Studies* 816.

[14] Judicial councils can be roughly defined as intermediary bodies between the political branches and the judiciary that have advisory or decision-making powers mainly in the appointment, promotion, and discipline of judges. However, the European Union and the Council of Europe advocated a particular model of judicial council, which I identify in Section III of this chapter.

[15] For further details, see Károly Bárd, "Judicial Independence in the Accession Countries of Central and Eastern Europe and the Baltics" in András Sajó and Lorri Rutt Bentch (eds.), *Judicial Integrity* (Martinus Nijhoff 2004) 265; Zoltán Fleck, "Judicial Independence and Its Environment in Hungary" in Jiří Přibáň, Pauline Roberts, and James Young (eds.), *Systems of Justice in Transition: Central European Experiences since 1989* (Ashgate 2003); Béla Pokol, "Judicial Power and Democratization in Eastern Europe" in *Proceedings of the Conference Europeanisation and Democratisation: The Southern European Experience and the Perspective for the New Member States of the Enlarged Europe* (2005) 165; or Zoltán Fleck, "Judicial Independence in Hungary" in Anja Seibert-Fohr (ed.), *Judicial Independence in Transition* (Springer 2012) 793.

[16] For further details, see Ján Svák, "Slovenská skúsenosť s optimalizáciou modelu správy súdnictva" in Jan Kysela (ed.) *Hledání optimálního modelu správy soudnictví pro Českou republiku* (2008) 54; and David Kosař, "Transitional Justice and Judicial Accountability: Lessons from the Czech Republic and Slovakia" (2010) (unpublished manuscript, available at http://ssrn.com/abstract=1689260).

wide powers in 1997 and 2002, respectively. Slovenia set up its judicial council in 1997, Estonia and Lithuania did so in 2002, and Latvia joined the club in 2010. Poland, Romania, and Bulgaria witnessed a slightly different development as all three countries laid down the foundations of their judicial councils immediately after the democratic revolution, but most of them later reconfigured them in order to meet the requirements of the "Euro-template."[17] Poland adopted a moderate judicial council as early as in 1989 and constitutionalized it in 1997.[18] Romania established its judicial council in 1989 and revamped it according to pan-European standards in 2003–2004.[19] Bulgaria set up its judicial council with the enactment of the constitution of the Republic of Bulgaria in 1991 and expanded its powers in 2002.[20] In contrast, the Czech Republic retained the old Ministry of Justice model with a central role for the executive branch and became the "black sheep" among the CEE countries.[21]

To sum up, all but one country in the CEE eventually opted for the judicial council model of court administration.[22] The institutional design and political ideas underlining the judicial council model are thus clear. What is much less clear is by whom and how judges in the CEE were actually held to account in the postcommunist era and whether the judicial council model affected the use of mechanisms of judicial accountability. This is so because of several factors.

[17] For more details on this template, see Chapter 3.

[18] For further details, see Adam Bodnar and Lukasz Bojarski, "Judicial Independence in Poland" in Anja Seibert-Fohr (ed.), *Judicial Independence in Transition* (Springer 2012) 667.

[19] For further details, see Bogdan Iancu, "Constitutionalism in Perpetual Transition: The Case of Romania" in Bogdan Iancu (ed.), *The Law/Politics Distinction in Contemporary Public Law Adjudication* (2009) 187, 196–198; Cristina Parau, "The Drive for Judicial Supremacy" in Anja Seibert-Fohr (ed.), *Judicial Independence in Transition* (Springer 2012) 619; Ramona Coman and Cristina Dallara, "Judicial Independence in Romania" in Anja Seibert-Fohr (ed.), *Judicial Independence in Transition* (Springer 2012), 835; or Cristina Parau, "The Dormancy of Parliaments: The Invisible Cause of Judiciary Empowerment in Central and Eastern Europe" (2013) 49 *Representation – Journal of Representative Democracy* 267, 272.

[20] For further details, see Maria Popova, "Why the Bulgarian Judiciary Does Not Prosecute Corruption?" (2012) 59 *Problems of Post Communism* 35; or Thierry Delpeuch and Margarita Vassileva, "Lessons from the Bulgarian Judicial Reforms: Practical Ways to Exert Political Influence on a Formally Very Independent Judiciary" in Leny E. de Groot-van Leeuwen and Wannes Rombouts (eds.), *Separation of Powers in Theory and Practice: An International Perspective* (Wolf Legal Publishers 2010) 49.

[21] For explanation of this resistance in the Czech Republic, see Chapter 5.

[22] Many scholars have been perplexed about why the parliaments gave up their power so easily. See, for example, Parau 2013, above note 19.

First, most literature on courts in the CEE focuses primarily on the judicial independence side of the coin[23] and tends to address judicial accountability rather shortly. Piana's monograph on "Judicial Accountabilities in New Europe,"[24] which looks at judicial accountabilities[25] in five postcommunist countries (Bulgaria, the Czech Republic, Hungary, Poland, and Romania), is the most notable exception.[26] Piana provides several valuable insights about courts in the CEE. However, she provides an incomplete picture about the Czech judiciary, because, as I will explain in Chapter 5, she fails to fully acknowledge the real role and powers of court presidents in the Czech judicial system.

Second, the CEE judiciaries are known for their lack of transparency and thus it is very difficult to conduct an empirical study of most aspects of judicial accountability. Even the European Commission with its enormous resources, unmatched by those of any academic institution, managed to collect only limited empirical data about the CEE judiciaries during the Accession Process. Third, when we zero in on a narrower issue of the impact of judicial councils in the CEE, we can see that the policy documents on judicial councils produced by the European Union and the Council of Europe rarely mention judicial accountability,[27] despite the fact that scholars pointed out that judicial councils might sometimes enhance judicial accountability rather than judicial independence.[28] Hence, there is a gap in the literature, both on accountability of judges in the CEE and on the impact of the judicial councils on the use of accountability mechanisms.

[23] See, for example, Bobek 2008, above note 8; Frank Emmert, "The Independence of Judges – A Concept Often Misunderstood in Central and Eastern Europe" (2001) 3 *European Journal of Law Reform* 405; Daniel Ryan Koslosky, "Toward an Interpretive Model of Judicial Independence: A Case Study of Eastern Europe" (2009) 31 *University of Pennsylvania Journal of International Law* 203; Maria Popova, "Political Competition as an Obstacle to Judicial Independence: Evidence From Russia and Ukraine" (2010) 43 *Comparative Political Studies* 1202; Anja Seibert-Fohr (ed.), *Judicial Independence in Transition* (Springer 2012); or Markus Zimmer, "Judicial Independence in Central and East Europe: The Institutional Context" (2006) 14 *Tulsa Journal of Comparative and International Law* 53.

[24] Daniela Piana, *Judicial Accountabilities in New Europe: From Rule of Law to Quality of Justice* (Ashgate 2010).

[25] Piana distinguishes five types of accountability (legal, managerial, institutional, societal, and professional) and thus she speaks of "accountabilities" in plural.

[26] For other works, see Bobek 2008, above note 8; or chapters on the CEE countries in Seibert-Fohr 2012, above note 23.

[27] See CCJE, Opinion no.10 (2007), Part VI; or Budapest Resolution, para. 10.

[28] Nuno Garoupa and Tom Ginsburg, "Guarding the Guardians: Judicial Councils and Judicial Independence" (2009) 57 *American Journal of Comparative Law* 103, 110.

This brings me to the explanation of why I chose the Czech Republic and Slovakia for my case studies. Both these two countries had to find a new balance between judicial independence and judicial accountability after the fall of the Czechoslovak communist regime, and thus it is particularly important to analyze how Czech and Slovak judges are held to account. Two deliberate choices define the scope of this book. First, I study accountability as a mechanism and thus I focus on whether there are relations that can be called accountability mechanisms, how these mechanisms function, and what their effects are.[29] Second, I consider judges central to the functioning of the judicial branch and hence I narrow my analysis to accountability mechanisms applicable to individual judges. In sum, I study three core accountability issues:

(1) Who holds judges to account? Is it primarily the Minister of Justice, as the standard literature suggests, or someone else?
(2) How much are judges held to account? That is, how frequently (quantitative aspect) and how severely (qualitative aspect)?
(3) Do any judicial accountability perversions such as judicial accountability avoidance, simulating judicial accountability, output excesses of judicial accountability, and selective accountability emerge?

However, these two case studies promise more. They allow me to study not only patterns of judicial accountability in new democracies, but also the impact of different models of court administration on judicial accountability, because the comparison of these two countries is the closest we can get to a natural experiment. Czechs and Slovaks shared, almost uninterruptedly,[30] a common institutional structure from the independence of Czechoslovakia in 1918 until its dissolution in 1992. Their countries also have the same essential features: a communist past, a civil law system, a career model of the judiciary, a centralized model of constitutional review, and membership of the European Union and the Council of Europe. The natural experiment produced by the dissolution of Czechoslovakia in 1993 and the comparison of its two former federal states, characterized by identical (not just similar) "background conditions," is exceptionally

[29] For my definition of judicial accountability, see Chapter 1.
[30] The only exception is the period between 1939 and 1945, when the Third Reich occupied the Czech provinces and the so-called Slovak State (*Slovenský Štát)* was created on the territory of Slovakia. For further details about this period and its impact on the Slovak nation, see Nadya Nedelsky, "The Wartime Slovak State: A Case Study in the Relationship between Ethnic Nationalism and Authoritarian Patterns of Governance" (2001) 7 *Nations and Nationalism* 215.

useful when trying to hold constant certain crucial independent variables (the length of previous democratic experience, authoritarian break, and the year of political transformation).[31] Moreover, both countries retained the Ministry of Justice model of court administration immediately after the dissolution of Czechoslovakia. The Big Bang came in 2003, when the Judicial Council of the Slovak Republic (hereinafter "JCSR") started to operate in Slovakia.[32] Therefore, Czech and Slovak judiciaries are matched on all important variables, but since 2003 they have varied on one independent variable – the model of court administration. In other words, these two case studies provide a nearly ideal ground for identifying the consequences of the judicial self-government.

The core of this book is thus a paired comparison that is built on the "most similar cases" logic[33] – it compares the judicial council model in Slovakia with the Ministry of Justice model in the Czech Republic. More specifically, this book explores the use of mechanisms of judicial accountability in the Czech Republic and Slovakia between 1993 and 2010.[34] Two critical junctures delineate my case studies. The first took place in 1993, when Czechoslovakia split into two separate states, the Czech Republic and Slovakia. Both countries initially kept the Ministry of Justice model with a central role for the executive branch.[35] The second critical juncture occurred in 2003, when the JCSR started to operate in Slovakia, whereas the Czech Republic kept the Ministry of Justice model of court administration. This book exploits this opportunity and examines the impact of the JCSR on the use of mechanisms of judicial accountability.

For methodological clarity, it is helpful to break down the "Does the Judicial Council Euro-model of court administration increase accountability of individual judges?" question into two separate questions dealing

[31] For a similar argument, see Fernando Casal Bértoa, "Parties, Regime and Cleavages: Explaining Party System Institutionalization in East Central Europe" (2012) 28 *East European Politics* 452, 456.

[32] As I will explain subsequently, the JCSR was de jure established by the 2001 Constitutional Amendment, but it became fully operational only in 2003.

[33] On the "most similar cases" logic in comparative constitutional law, see Ran Hirschl, "The Question of Case Selection in Comparative Constitutional Law" (2005) 53 *American Journal of Comparative Law* 125, 133–139.

[34] The closing date (2010) results from a pragmatic consideration of the feasibility of the empirical study. It would simply be too difficult to cope with the most recent data. For instance, some disciplinary motions against judges have been pending before courts for years and other data (such as the amounts of salary bonuses in Slovakia) are not often immediately available.

[35] The features of this model will be presented in more detail in Chapter 3.

with the quantitative and qualitative aspects. Drawing on a systematic analysis of these two jurisdictions, I thus address four major questions:

(1) Does the Judicial Council Euro-model of court administration alter the allocation of power among actors who may hold judges to account? That is, does it empower regular judges, as suggested by advocates of judicial councils? Or does it empower someone else?
(2) Does the Judicial Council Euro-model decrease the frequency of uses of mechanisms of judicial accountability (quantitative aspect), or does it actually increase the usage and consequences of available mechanisms of judicial accountability?
(3) Does the Judicial Council Euro-model decrease the seriousness of its consequences (qualitative aspect), that is reduce the imposed sanctions and granted rewards, or vice versa?
(4) What is the impact of the Judicial Council Euro-model on judicial accountability perversions such as judicial accountability avoidance, simulating judicial accountability, output excesses of judicial accountability, and selective accountability? Does it reduce them? Or does it allow these perversions of judicial accountability to flourish?

In short, this book not only studies how judges are held to account but also puts the claims about judicial councils and their consequences regarding judicial accountability to the test.

I. The Puzzle

Holding judges to account in the Czech Republic and Slovakia presents several puzzles. The most intriguing one is that those Slovak judges who initially opposed the judicial council model took over the judicial council eventually. Štefan Harabin, the President of the Slovak Supreme Court in 1998–2003, was in fact the most vocal critic of the JCSR during the parliamentary debates in 2000–2001 and in the first years of its operation. He was not responsible for putting the model on. Yet he soon adjusted to the new model, managed to capture the JCSR in 2009, and started to use the mechanisms of judicial accountability at his disposal as a tool of power.

Nor was the JCSR created for the fear of future electoral loss by the ruling party who installed Harabin to the presidency of the Slovak Supreme Court in 1998. The Movement for Democratic Slovakia (HZDS), the party that ruled Slovakia since 1992 until 1998 and that elected Harabin to the position of the president of the Supreme Court, actually went into opposition few months after Harabin's installment. HZDS neither proposed nor

voted for[36] the judicial council model of court administration. It was the new centrist coalition, which opposed Harabin,[37] and passed the constitutional amendment in 2001[38] that erected the JCSR.

The creation of the JCSR thus cannot be explained by the hegemony preservation thesis[39] or the insurance theory.[40] It was not a skillfully executed plan of the pre-JCSR political or judicial elites adopted in order to preserve their powers. To the contrary, the beneficiary of the judicial council model was neither its author nor its proponent, but its major critic. The Slovak case study thus shows that the world of unintended consequences is strong and that developments in Slovakia cannot be explained by standard strategic theories.

The Slovak case study likewise does not fit in the "two-wave-theory" of judicial reforms in the CEE. The standard "two-wave-theory" of judicial suggests that there exist two types of judicial reforms in the CEE, the "transition wave" that took place immediately after the democratic revolution (i.e., between 1989 and 1997) and the "pre-accession" wave that covered reforms adopted during the pre-accession period (i.e., between 1998 and 2006), and argues that those actors who emerged as winners from the first wave of reforms (the Ministry of Justice or the judicial council) were better placed in the second wave and exploited the opportunities provided by the European Union to entrench existing domestic allocations of power.[41] In other words, these winners used their leverage from the "transition wave" to increase their own powers or at least to prevent the transferal of significant powers to other organ. This should, according to the "two-wave-theory," explain why there was little institutional innovation and policy change in the pre-accession period and why the influence of the European Union did not lead to common norms and values.

However, Slovak judicial reforms took the entirely opposite path. The Ministry of Justice who emerged as a winner from the "transition wave" reforms not only did not manage to maintain or improve its position

[36] In fact, all MPs from HZDS voted against the 2001 Constitutional Amendment in the National Council of the Slovak Republic (the legislature) on February 23, 2001. See Chapter 6, Section II.B.

[37] In fact, it attempted to impeach Harabin in 2000. For further details, see Chapter 6.

[38] The final vote on the Constitutional Bill on February 23, 2001 was ninety MPs for, fifty-seven MPs against, one MP abstained (two MPs were missing).

[39] See Ran Hirschl, *Towards Juristocracy: the Origins and Consequences of the New Constitutionalism* (Harvard University Press 2004).

[40] See Tom Ginsburg, *Judicial Review in New Democracies: Constitutional Courts in Asian Cases* (CUP 2003).

[41] See Piana 2009, above note 13; or Piana 2010, above note 24, at 162–165.