Nomination of Constitutional Justices in Post-Communist Countries: Trial, Error, Conflict in the Czech Republic

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Selection and nomination of constitutional justices – American model of judicial review in post-communist countries – Tensions between parliamentary supremacy and excessive activism of Constitutional Courts – Possibility of reappointment and the independence of justices – Lack of cooperation between President and Senate in the Czech Republic – Politicization of judicial nomination and democracy.

Introduction

When Judge John Roberts was nominated to the United States Supreme Court in summer 2005, it was a major media event. Subsequent coverage of the nomination process examined the nominee's personality, his background, his legal record, and his published opinions. Public disclosure of the nominee's records and briefs from his apprenticeship at the Department of Justice became a major political issue. The New York Times created a website exclusively dedicated to retiring Justice Sandra Day O'Connor and the new candidate for the post. Even women's magazines published articles about the Supreme Court's staffing.[1] The political importance of the United States Supreme Court and the American obsession with the law means that staffing the court has become a major political and media event.

At the same time, the Czech Republic experienced its own lengthy nomination process to the Constitutional Court. After the end of President Havel's second

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[1] 'The Supreme Court Bench Warmers', ELLE, Sept. 2005, p. 324.

European Constitutional Law Review, 2: 183–208, 2006
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doi: 101017/S1574019506001830

https://doi.org/10.1017/S1574019606001830 Published online by Cambridge University Press

term, a new President faced the challenge of the Constitutional Court's replacement in 2003. The Czech system of nomination is designed after the American example, with the President nominating Justices and the Senate confirming them. This article analyzes the recent process of staffing the Court in the Czech Republic and discusses how the transplanted American-styled procedures work in the entirely different conditions of a European post-communist country.

First, we will briefly explain the European models of selection of constitutional justices, with primary attention given to the methods selected by post-communist countries. After describing typical models in the post-communist region, we will pay particular attention to the case study of the nomination and confirmation of justices in the Czech Republic since 2003. More than thirty months after most former justices finished their ten-year term, in autumn 2005, the Constitutional Court was still not complete. Analyzing the Czech example, we will discuss whether the American model of judicial appointments works well in post-communist Europe.

In conclusion, we will argue that both the American model of co-operation between two different institutions (the President and the legislature), implemented in the Czech Republic and Slovakia, and the model of super-majority elections by Parliament (as found, for instance, in Hungary) proved to be less stable and less reliable than the simple model of the Polish appointment process. The latter model consistently generated a widely respected (and full) court despite the fact that the Polish political scene is notoriously less stable than Czech, Slovak or Hungarian politics. This is, however, only an empirical observation as it is true that the actual Polish practice might be the result of accident rather than of the normative superiority of the Polish appointment model. Our normative claim is that the highly publicized model of appointments to the bench is superior to the model lacking media attention. We claim that the European trend is clearly to settle the appointments behind closed doors, with the absence of any public discourse. This is the case even in the countries that adopted the American way of the nomination process, including the Czech Republic. In our view, substantial public discourse can force politicians to staff the bench, and public attention will provide the political actors with sufficient incentives not to ignore the question of constitutional judiciary. This is even much more important in immature democracies. Otherwise, post-communist nations would go through recurring crises when their constitutional courts exist on paper only. Thus constitutional adjudication would be absent when it is most needed.

https://doi.org/10.1017/S1574019606001830 Published online by Cambridge University Press

Basic models of staffing European constitutional courts[2]

The appointment of ordinary judges in Europe is usually an apolitical and technical process, related to the judiciary whose functioning is based on strong hierarchy, impersonality of law and logical legalism. Judicial echelons resemble bureaucracy in style, thinking and decision-making.[3] In contrast, appointments to European constitutional courts are openly political and interest laden. After all, this acknowledges that the latter courts are major actors of domestic politics. While in the former system, appointments are based on technical prerequisites and the typical appointee to become an ordinary judge is a young university graduate, in the latter system constitutional justices are scrutinized by the political process. Because constitutional justices are generally seasoned lawyers, scholars, or politicians, they have a clear background and a record of mature opinions, which allow for appointments to be made by major political parties in the hope of influencing the composition of the constitutional court in their favour. At the same time, however, this political nature gives justices the legitimacy needed to engage actively in decision-making and assert counter-majoritarian logic for the protection of basic rights.

It is possible to distinguish several basic models for the selection of constitutional justices in Europe. First, the power to appoint (elect) justices is divided between two or more bodies, which act separately and independently of each other. An example is the appointment of constitutional justices in France. The French President, President of the Senate and President of the National Assembly each appoint one justice every three years, which means that they appoint nine justices in the course of nine years. The French Constitutional Council is staffed by retired politicians or their close collaborators.[4] For instance, in the summer of 2005, seven of the nine French justices were either former top politicians (including two former ministers) or their close collaborators.[5]

[2] For an outline, although now already outdated is some respects, cf. European Commission for Democracy through Law, *The Composition of Constitutional Courts* (Council of Europe Publishing, Strasbourg 1997). For postcommunist systems cf. W. Sadurski, *Rights before Courts. A Study of Constitutional Courts in Postcommunist States of Central and Eastern Europe* (Dordrecht, Springer 2005), p. 14-18.

[3] For the theoretical background, see M. Damaška, *The Faces of Justice and State Authority. A Comparative Approach to the Legal Process* (New Haven, Yale Univ. Press 1986) p. 197 et seq. (distinguishing co-ordinate and hierarchical ideals of state authority). See also C. Guarnieri and P. Pederzoli, *The Power of Judges: A Comparative Study of Courts and Democracy* (C.A. Thomas (ed.) Oxford, Oxford Univ. Press 2002) p. 18-77.

[4] See A. Stone, *The Birth of Judicial Politics in France. The Constitutional Council in Comparative Perspective* (New York, Oxford Univ. Press 1992) p. 50 et seq.

[5] E.g., former advisors to the president of France; a law professor who was also, at the same time, director to the cabinet of the President of the National Assembly, and a director to the cabinet of the prime minister. The two were a professor of sociology and a former judge of the Conseil d'Etat, the supreme administrative tribunal. See the biographies available at the website of the French Constitutional Council: <www.conseil-constitutionnel.fr>, visited 23 June 2005.

https://doi.org/10.1017/S1574019606001830 Published online by Cambridge University Press

Although such an openly politicized court might serve well in France, it is very problematic in the unstable post-communist countries. This is the case in Romania, which follows the French example of staffing the court (the President appoints three justices, both the lower chamber of Parliament and the Senate elect three justices[6]). The Romanian Constitutional Court (RCC), as it was in the early 21st century, consisted mainly of retired socialist politicians (PSD) or their close collaborators. Out of nine justices in summer 2005, four were former senators (one of them also a former minister), another a former deputy and minister, another an ex-advisor to the ministry of justice, yet another a husband of a former minister of justice, etc.[7] When a political crisis erupted in 2005 after several controversial rulings of the constitutional court sided with the PSD, an editorial for a leading Romanian daily criticized the Court's composition:

> When the former ruling party strategically placed important PSD members and close relatives of its leaders by offering them very long terms in office and at the same time they reserved the majority of votes at the RCC, those who saw the danger were relatively few. The press wrote something, there were certain talks in Parliament too ... It was a big mistake made by the leadership that it left an institution that is extremely important for Romanian democracy in the hands of the PSD.[8]

A similar procedure divided between more organs is followed in many other European countries, although it often avoids appointing outspoken political figures. Examples are Italy, Spain, Austria,[9] and Ukraine.[10]

[6] See the website of the RCC, <www.ccr.ro> (in Romanian, French and English, visited 30 June 2005).

[7] Data provided ibid. See also 'Constitutional Watch: Romania' 10 (2-3) *East European Constitutional Review*, Spring-Summer 2001, available at <www.law.nyu.edu/eecr>, visited 13 March 2006.

[8] Editorial of Romania Libera, 11 July 2005, <www.daily-news.ro/article_detail.php?idarticle=13683> (in English, visited 11 March 2006).

[9] In Italy, the national government appoints five justices, a joint session of Parliament elects five by two thirds vote (if two attempts fail, three fifths is enough), the ordinary judiciary selects five; in Spain, the national government appoints two justices, the National Council of the Judiciary (the supreme organ of the judiciary's administration) elects two, both houses of Parliament elect four justices by three fifths vote; one third of Bulgarian twelve justices is appointed by the President, another third elected by Parliament and the final third elected by a joint session of judges of the Supreme Court and the Supreme Administrative Court; in Austria, the President appoints six justices, three justices are elected by the lower house of Parliament and three justices by the upper house of Parliament. Cf. Guarnieri and Pederzoli, *supra* n. 3, p. 138-142 or A. Stone Sweet, *Governing with Judges. Constitutional Politics in Europe* (Oxford, Oxford Univ. Press 2000) p. 48-49.

[10] See Art. 148 Constitution, according to which the President of Ukraine, the *Verkhovna Rada* of Ukraine (Parliament) and the Congress of Judges each appoint six judges to the Constitutional Court of Ukraine. Still, as we show below (n. 102 *infra*), even formal swearing in by the legislature caused a serious obstacle to staffing the Court in late 2005.

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The second possibility is the election of justices solely by Parliament. Examples are Germany and many post-communist countries, such as Poland or Hungary. In most countries, a qualified majority is required, which is typically the case for Germany or Hungary. In Germany, justices are elected directly by a two-thirds majority of the upper house of Parliament, the *Bundesrat*, which represents the German *Länder*. The lower house, the *Bundestag*, elects justices indirectly, through a special committee composed of twelve experts, who must reach consensus by a qualified vote of at least 8 out of 12.[11] In practice, the Federal Constitutional Court has been traditionally dominated by academics.[12]

In Poland, candidates are nominated by at least 50 deputies of the lower house (the *Sejm*) or by the presidium of the *Sejm*, and elected by a simple majority of votes in the *Sejm*.[13] Unlike Germany, where bargaining between the opposition and the coalition is necessary, the Polish law means that the coalition controlling a simple majority of the lower house can elect justices entirely, disregarding the opposition. The practice shows, however, that the process has selected the best Polish academics and that it avoided politicians. In August 2005, of the fifteen justices at the Polish Constitutional Tribunal, eleven were law professors.[14] Between 1985 and 2001, thirty-six Polish justices served at the Tribunal, which included twenty-four law professors (five of whom were also experienced practitioners), five ordinary judges, three prosecutors, and two practicing attorneys. It is fair to say that the Polish system, despite the absence of any checks and balances, generated the most respected post-communist constitutional court. Most Polish justices have foreign experience and, in their academic capacity, are visiting lecturers at the best universities worldwide.[15]

In Hungary, candidates are proposed by the special parliamentary committee consisting of one member each from the political groups represented in Parliament. Candidates must be elected by two thirds of parliamentarians. Although this system succeeded in having a primarily academic court, a considerable set-

[11] On staffing the Federal Constitutional Court cf. W.K. Geck, *Wahl und Amtsrecht der Bundesverfassungsrichter* (Baden-Baden 1986).

[12] As a matter of law, six justices are former ordinary judges. For further information see <www.bverfg.de>, visited 21 July 2005, (biographies of justices in German only). The debates relating to current nominations suggest that a high proportion of scholars might be problematic because these justices-academics continue to be burdened by academic duties, which impair their judicial activities. See R. Müller, 'Kochs Kandidat', *Frankfurter Allgemeine*, 14 July 2005.

[13] Cf. Art. 5 the Constitutional Tribunal Act, available in English at <www.tribunal.gov.pl>, visited 12 March 2006.

[14] The data according to the Tribunal's Internet site, *supra*, n. 13.

[15] See ibid. Cf. L.L. Garlicki, 'The Experience of the Polish Constitutional Court', in W. Sadurski (ed.), *Constitutional Justice, East and West. Democratic Legitimacy and Constitutional Courts in Postcommunist Europe in a Comparative Perspective* (The Hague, Kluwer Law International 2002) p. 265 at p. 269.

https://doi.org/10.1017/S1574019606001830 Published online by Cambridge University Press

back on the other hand is the qualified majority and the resulting enormous difficulties in electing any candidate whatsoever. Facing the impossibility of electing new justices, the constitutional amendment lowered the number of justices to 11 in the mid-1990s. Still, in summer 2005 there were only eight sitting justices out of the required eleven. In early 2006, after two new justices were elected, there was still one vacancy on the bench.[16] A deadlock in the sharply divided Hungarian politics can be very difficult to overcome.

The third possibility is the co-operation model, usually based on collaboration between the President and the legislature. Russia, Slovenia, Slovakia and the Czech Republic provide examples. In Russia and the Czech Republic, the President appoints and the upper house confirms a candidate.[17] In Slovenia, according to the law, the President nominates candidates and the lower house of Parliament elects them.[18] Yet, as a matter of practice, the President nominates the same number of candidates as the number of vacancies. The Slovak model seems to be an inverse model of the American one – here Parliament nominates twice as many candidates as the number of vacancies and the President selects between them.[19] The system of co-operation demands a high level of political culture. In Slovakia, for instance, there were two vacancies in early 2006. Both vacancies have lasted for several years because the Slovak Parliament has not submitted its proposals to the President.

Case study: Staffing the Czech Constitutional Court

The tradition of the first Czechoslovak Constitutional Court

Unlike other post-communist countries, constitutional review has had a long tradition in Czechoslovakia. Czechoslovakia was the first country in the world to incorporate in its Constitution (passed in February 1920) provisions on a constitutional court. The Czechoslovak Constitutional Court antedates its Austrian counterpart based on the Austrian Constitution of 1920.[20] Its establishment was the

[16] See the website of the Hungarian Constitutional Court: <www.mkab.hu> (the website, visited 1 July 2005, indicated only eight justices; in March 2006, after the election of two new justices in autumn 2005, the number of justices is 10, see ibid., visited 15 March 2006).

[17] See the Federal Constitutional Law on the Constitutional Court of the Russian Federation of 1994, Art. 9(2), available in English at <ks.rfnet.ru/english/ksangl.htm> (visited 25 July 2005). On Russia, see Sadurski, *supra* n. 2, at p. 18.

[18] See the website of the Slovenian Constitutional Court <www.us-rs.si> (in English).

[19] See the website of the Slovak Constitutional Court <www.concourt.sk> (in English).

[20] Cf. for the Austrian Constitutional Court S.L. Paulson, On Hans Kelsen's Role in the Formation of the Austrian Constitution, in W. Krawietz, et al. (eds.) *The Reasonable as Rational? On Legal Argumentation and Justification. Festschrift for Aulius Aarnio* (Berlin, Duncker & Humblot 2000) p. 385 at p. 390.

https://doi.org/10.1017/S1574019606001830 Published online by Cambridge University Press

result of the revolutionary atmosphere after World War I. As in Austria, the Czechoslovak Constitutional Court was a brainchild of the 'normativists', namely František Weyr, a close collaborator of Hans Kelsen. The Constitutional Court had seven members; the President appointed three of them on the proposal of both chambers of Parliament and government;[21] two of them were elected by the Supreme Court and two of them by the Supreme Administrative Court.

Although the first Czechoslovak Court was not entirely insignificant, it suffered from serious setbacks. The initial impetus to review a statute had to be given by either chamber of the Parliament, the Supreme Court or the Supreme Administrative Court. The high courts, however, did not have the power in relation to a pending case, but *in abstracto*, through the Court acting *en banc*.[22] Politics of the 1920s and 1930s were overly influenced by the conception of parliamentary supremacy; politicians in Parliament disliked the possibility that some judicial organ could review their legislative decisions and especially disliked several decisions of the Court made in the 1920s, which restricted the use of delegated legislation. Last but not least, one could find rivalry between both ordinary high courts and the Constitutional Court. That is why the legislature and both high courts delayed appointing new justices for seven years (until 1938) after the terms of the justices appointed in 1921 expired in 1931. It was understood generally that the reason for the delay was the hesitance to appoint a body which would exercise control over the legislature's own law or compete with the authority of ordinary courts. The new justices were appointed only a few months before the collapse of Czechoslovakia and the subsequent Nazi occupation and thus did not have time to decide important cases pending before the court.[23]

The nomination of justices by Václav Havel (1993-2003)

During communism, it was impossible to continue the Czechoslovak tradition of constitutional review. Only after the collapse of communism was a new constitutional court established in 1992. The Court, however, disappeared with the disso-

[21] The lower and the upper house of Parliament and the government nominated three times as many candidates, and the President selected from these nominees.

[22] See the decision of the Supreme Administrative Court, Boh.adm. 1097/22, 1757/22 (The Collection of Administrative Decisions of the First Czechoslovak Republic).

[23] Some scholars dealing with the issue preferred the decentralized system of constitutional review. Eventually, they proposed broadening the Constitutional Court's powers, improving the system for the selection of justices (e.g., the elimination of the role of political parties, or the limitation of eligibility to be a justice only to professors or former judges of the supreme courts) and increasing the number of persons entitled to initiate proceedings before that Court. See J. Krejčí, *Principy soudcovského zkoumání zákonů v právu československém* (The Principles of Judicial Review of Law in Czechoslovak Law) (Praha, Orbis 1932).

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lution of Czechoslovakia in 1992.[24] Both successor states then established new constitutional courts in 1993.

The task of the post-communist constitutional courts was to protect the newly emerging constitutionality, which made these court anti-structural elements within the legal system. As Ruti Teitel put it, '[l]aw in periods of radical upheaval is commonly conceived as antistructural, as eluding principle and defying paradigm. The period of normative shift is commonly thought to be antiparadigmatic'.[25] This 'antiparadigmatic' purpose could not be achieved by self-restrained constitutional courts. And activist constitutional courts might only develop if peopled by judges of a very different sort than those sitting in the ordinary judiciary.

The Czech Constitution written in 1992 opted for a strong constitutional court with the powers of both abstract and concrete constitutional review and a generous possibility of constitutional complaint.[26] The Court has fifteen members, which seems to be reasonable considering its wide powers.[27] An American system of justice selection was followed, and the Constitution gave the President the power of nomination and the Senate the power of confirmation.[28] The term is ten years, and it is, unlike most other European countries, renewable.[29]

The Czech Senate does not belong to the same group of upper houses as the United States Senate, however. It differs from the latter by the type of representation, its membership, its power, and especially its practical role within the political system.[30] The Czech system of political parties is fragmented much more than the US system. Although 81 Czech senators (unlike 200 deputies of the lower

[24] On the break-up of Czechoslovakia, see E. Stein, *Czecho-Slovakia, Ethnic Conflict, Constitutional Fissure, Negotiated Breakup* (Ann Arbor, Michigan Univ. Press 1997), including some remarks on the Federal Constitutional Court.

[25] R.G. Teitel, *Transitional Justice* (Oxford, Oxford Univ. Press 2000) p. 215.

[26] For the details in English see <www.concourt.cz>. See G. Brunner, et al., *Verfassungsgerichtsbarkeit in der Tschechischen Republik: Analysen und Sammlung ausgewählter Entscheidungen des Tschechischen Verfassungsgerichts* (Baden-Baden, Nomos 2001).

[27] See Art. 84(1), Czech Const. The Polish Constitutional Tribunal has also fifteen justices. See Art. 194(1) Polish Const.

[28] See Art. 84(2) Czech Const. In contrast with the United States system, the President has the power to appoint the Chief Justice and Deputy Chief Justice, in which he is entirely unrestrained by the Senate (see Art. 62 cl. (f) Czech Const). For US law cf. E.T. Swaine, 'Hail, No: Changing the Chief Justice', forthcoming in 154 *U. Pa. L. Rev.* issue 6 (2006), available at <ssrn.com/abstract=734804>.

[29] On this critically, J. Kysela and Z. Kühn, 'Kreace ústavních soudů ze srovnávací perspektivy' (The Creation of Constitutional Courts in Comparative Perspective), 11 (1) *Časopis pro právní vědu a praxi* (*The Journal for Legal Scholarship and Practice)* (2003) p. 1.

[30] The most detailed work on the Czech Senate including comparisons is J. Kysela, *Dvoukomorové systémy. Teorie, historie a srovnání dvoukomorových parlamentů* [Bicameralism. The Theory, History and Comparison of Bicameral Parliaments] (Praha, Eurolex Bohemia 2004). In English, see the basic information in P. Pelant and J. Kysela (eds.) *The Czech Senate: History and Presence* (Praha, HQ Kontakt 2003).

https://doi.org/10.1017/S1574019606001830 Published online by Cambridge University Press

house) are elected by majority vote, several major parties and a plethora of independent candidates are represented in the Senate.[31] The Czech Republic is not a federation, and the Senate is not representative of the regions or states.[32] The formal justification of its existence is its role within the system of checks and balances. The Senate is substantively weaker than the lower house in several respects: only the lower house decides about the fate of the government and can force the government to resign by a vote of non-confidence; the Senate has no say on the state budget and is much weaker in normal legislating activities (its veto can be overridden by a majority of all deputies). Its agreement is necessary only for constitutional amendments, some special laws (on election, some issues relating to armed forces, etc.) and the ratification of international treaties. From this perspective, the power to confirm the President's judicial nomination is one of the most important Senate's competences.

Nor is the Czech President comparable to his American counterpart. The President is elected by the Parliament, he is only a formal head of the state, his powers are limited, and most of them are subject to governmental approval. In fact, the power to appoint constitutional justices is one of the most important powers that he can exercise at his will.[33]

During Havel's presidency, the system of judicial nominations functioned smoothly. Before the President appointed the first slate of justices, he had collected a considerable amount of information on prospective candidates; responsible institutions were asked for advice (the Czech Bar Association, high courts, law schools). He also published advertisements in the press. The President appointed a special committee of legal experts who helped him to fulfil his task. As a result, fourteen justices were nominated by summer 1993. Because the Senate was not yet established, its role was exercised by the lower house. The House of Representatives approved thirteen candidates, while rejecting one, for reasons which have not been articulated publicly.[34] The process of appointment for the remaining vacancies was finished within several months.[35]

The Senate, which was finally established in 1996, was dealing with four Havel nominations to fill vacancies arising between 1999 and 2002. All four nominees

[31] Prior to elections in the autumn of 2004, there were several major political caucuses in the Senate and a caucus of independent senators.

[32] Considering the majority vote on senators in 81 small districts, with around 100,000 voters each, some link to the regions seems to be developing. For instance, in the last confirmation hearing, that of Ms Formánková (see below), many senators from the western part of the country considered this candidate as their 'own', coming from the same region.

[33] See Arts. 62 and 63 Czech Const.

[34] Parliamentary stenograms of the lower house of 8 July 1993. Available in Czech at the website of the House of Representatives <www.psp.cz>, visited 12 March 2006. One of the nominees stepped out of the process after new information about his communist past had leaked.

[35] Another two justices were appointed in Fall 1993 and the last one in Spring 1994.

https://doi.org/10.1017/S1574019606001830 Published online by Cambridge University Press

were not problematic, all of them had foreign experience, one being a widely respected scholar of international law, another a Czech émigré with legal experience in Canada and Germany, another a renowned judge of the Supreme Court speaking several languages who resigned his earlier judicial post in the late 1970's, and the last one a Czech representative at the Strasbourg Human Rights Commission.[36]

The President searched among lawyers with foreign experience, those who had left Czechoslovakia during the communist period and returned after the fall of the Iron Curtain, and those who studied abroad, or were persecuted during communism. The President avoided nominating people compromised by the former regime. He made, however, some exceptions with regards to the former regular members of the Communist Party, when he took into account academic excellence and less active communist membership. Still, the number of academics is considerably lower in both the Czech and Slovak Republics.[37] Perhaps, this reflects the difficulty of finding academics not compromised by the Czechoslovak communist regime.[38] In fact, Czechoslovak legal scholarship was compromised far more with the communist regime and much less competent and innovative than the academics in Poland or Hungary.[39]

Although judicial hearings had never been dramatic during his Presidency, President Havel was actively engaged in selecting new justices. The President got involved in methodological questions of judicial reasoning. This seems to be a direct

[36] Justices Mr. Jiří Malenovský (now a Justice of the European Court of Justice), approved by 68 votes out of 76 present, Ms. Eliška Wagnerová, 40 votes out of 72 total, Mr. František Duchoň 41 votes out of 56 present senators, and Mr. Jiří Mucha (68 out of 79 present) respectively.

[37] In 2003, after the Slovak Constitutional Court had been restaffed, it had only five law professors out of thirteen justices; in the Czech Republic in spring 2003, only one third of the bench, five of fifteen, was comprised of law professors. The data is according to the internet sites of both courts <www.concourt.sk>, <www.concourt.cz>.

[38] In this sense, the authoritarian Slovak Prime Minister, Vladimír Mečiar, was right when he remarked that it was impossible to deny that 'there were not even 10 experts on constitutional law in Slovakia' at the time when the required number of justices was 10. Quoted by H. Schwartz, *The Struggle for Constitutional Justice in Postcommunist Europe* (Chicago, Univ. of Chicago Press 2000) p. 201. Critically on the post-socialist legal scholarship Stein, *supra* n. 24, at p. 191 (describing the postcommunist legal education in Czechoslovakia), p. 334 (describing what is in his opinion '[i]gnorance of modern legal thought and attachment to obsolete positivist ideas').

[39] Cf. Chief Justice of the Constitutional Court Pavel Rychetský (prior to 2003 Justice Minister), appointed by the new President to the Court in 2003: 'When we look at legal theory today, we see a sort of wilderness. When looking at the fantastic professional background of the Constitutional Tribunal in Poland, we must realize that their law schools, law professors and academics have never lost contact with the world, they travelled around the world, and they published abroad. The same in Hungary. August 1968 and the following occupation had very negative consequences for social sciences in our country. In the area of law it was extraordinary. I was one of those who during the purges were fired from the Prague Law School. I remember that the extent of purges was so wide that even teachers of gymnastics were fired.' Interview with a new Chief Justice Pavel Rychetský, *Lidové noviny*, 16 Aug. 2003.

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consequence of the sometimes very dramatic and public controversies between the Czech Constitutional Court and the ordinary judiciary, which reached their peak in the late 1990's.[40] The worrisome concept of textual positivism was articulated clearly by the President in March 2002, on the occasion of the most controversial appointment he had ever made. In reaction to his nomination, the controversy between formalism and anti-formalism emerged from the limited doctrinal sphere into a wider public arena. Formalists in academia and politics, who themselves emphasized their adherence to what was in their view 'positivism', publicly criticized his nominee for being too unrestrained by the text of law. Because of this pressure, confirmation by the Senate was thrown into doubt. The President chose to attend the appointment hearing and defend his own conception of the law. This was the only time any Czech President attended the appointment hearing of a constitutional justice. The President harshly condemned the conception of law prevailing in the post-communist Czech Republic:

> It is a mechanical, I would like to say senseless, application of law, which almost becomes an object of some cult. … It is an approach towards the application of law which does not permit any control by ordinary common sense; neither does it allow for any consideration of the law's sense, meaning or circumstances, any consideration of the probable legislative intent or even the core of the law's value in a hard case. Although the law is a human product, it attains almost metaphysical authority.[41]

Considering the careful style of the President's selection, the Czech Constitutional Court did have some justices who were outstanding figures and able to point the Court's reasoning in the appropriate direction towards sophisticated Western-style adjudication.[42] Such exceptional figures were necessary, if we consider the very nature of the activity of the new courts: to introduce new concepts of constitutionalism to a society governed by very different ideals. Constitutionalism challenges the space in the legal system which, in Kahn-Freund's methodology, is more organic.[43] In law, the resistance to change can be very high 'when law is tightly coupled in binding arrangements to other social processes'.[44] The lead-

[40] See Z. Kühn, 'Worlds Apart. Western and Central European Judicial Culture at the Onset of the European Enlargement', 52 *Am. J. Comp. L.* (2004) p. 531.

[41] Speech of President Havel, the Senate of the Czech Republic, 14 March 2002, parliamentary stenograms: all stenograms of the Senate discussed in this article are available in Czech at <www.senat.cz>.

[42] One of 'Founding Fathers' of the Czech Constitutional Court's methodology is Professor Holländer, a legal theoretician and philosopher, one of few Czech academics with international reputation. He was reappointed for his second term by the new President in 2003.

[43] O. Kahn-Freund, 'On Use and Misuse of Comparative Law', 37 *Mod. L. Rev.* (1974) p. 1.

[44] G. Teubner, 'Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Divergences', 61 *Mod. L. Rev.* (1998) p. 11 at p. 19.

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ing figures of the post-communist constitutional courts were scholars who had a background in Western doctrine and were not compromised by relations with the former regime.[45] An important role was played also by charismatic lawyers who had emigrated during the communist rule[46] or were persecuted by the communist regime. The relative lack of such exceptional figures on the Slovak Constitutional Court throughout the 1990s very likely constitutes one of the reasons for this Court's rather rigid and formalist jurisprudence.[47]

During its first ten years, the Czech Constitutional Court was a much less activist tribunal than its Hungarian counterpart even though it made several extremely important decisions in the period of 2000-2002, including annulling the laws on reform of electoral and judicial systems and on the Czech National Bank.[48] Most of these politically far-reaching decisions were made after suggestions from President Havel, who actively participated on the Czech political scene from 1998-2002.

The big bang of 2003: The nomination of justices 2003-2005

One of failures of the Founding Fathers of the Czech Constitution was that the ten-year term of all justices appointed in 1993 expired in 2003, most of them in July. Unless the new justices were appointed by 15 July 2003, it would mean that the Court would be left with only six justices instead of the required fifteen. Yet another complication was that Havel's presidency was to expire in early 2003, so the appointments would have to be made before that time otherwise they would have to be done rapidly by a new President.

Considering these prospects, President Havel updated his list of possible judicial candidates. The President again asked various institutions ranging from the Czech Bar Association to law schools and the judiciary for likely candidates.[49] The President, unaware of who would become his successor, thus attempted to speed up the process of judicial nominations.

[45] In Hungary, it was the case of László Sólyom (the Court's President between 1990 and 1998, in 2005 elected the President of Hungary) or Attila Harmathy (on the bench since 1998); in Poland Justice Lech Garlicki (until 2001), an internationally renowned constitutional comparatist.

[46] Like Havel's appointees Vladimír Klokočka of the Czech Constitutional Court (1993-2003), who spent much of the 1970's and 1980's in Germany, and Eliška Wagnerová (on the bench since 2002).

[47] Cf. R. Procházka, *Mission Accomplished. On Founding Constitutional Adjudication in Central Europe* (Budapest CEU Press 2002) at p. 249, p. 262 (observing the presence of the former communist apparatchiks at the Slovak Constitutional Court in the 1990's).

[48] For the Czech Constitutional Court's best evaluation, see Procházka's book, ibid. One should take into account that the book was finished in 2000 and does not address the final two years of the first Constitutional Court during which it made its most important political decisions.

[49] At the Prague Law School, for instance, the Scientific Committee headed by the Dean discussed the Law School's recommendations.

https://doi.org/10.1017/S1574019606001830 Published online by Cambridge University Press

After the second term of the widely respected President Havel expired, there was no natural successor who would have the confidence of the political forces. After attempting for several weeks to elect a new President, Parliament finally elected Václav Klaus, a former Prime Minister and a leading politician since the fall of communism. In most aspects, the new President was Havel's least likely successor. Economist by profession, he mistrusted civil society, NGOs, former dissidents, and also lawyers.[50] While being the Czech Prime Minister between 1992 and 1997, his government de-emphasized the importance of legal reforms and lawyers. Faithful to his version of neoliberalism and the *laissez faire* ideology, he and his party repeatedly stressed the need to 'run away from lawyers' and develop a liberal economy without corresponding legal regulations.[51] Many suspected that he would leave politics after experiencing a series of failures in the late 1990s. Instead, due to the unexpected turnout for the presidential election in the Parliament, he emerged as the President on 7 March 2003.

Mr. Klaus has been an outspoken critic of the first Constitutional Court (1993-2003). He blamed the Court for its excessive activism and criticized former President Mr. Havel for his frequent complaints to the Constitutional Court. Shortly after his election, Mr Klaus gave the following evaluation of the justices of the first Court:

> The first constitutional justices were appointed in early post-communism. I think that they were people with special characteristics, either that they had been able to be judges or attorneys for some time prior to February 1948 [communist coup in Czechoslovakia], which is the older part of judges, or they had the chance to turn up the November political change [1989]. Both these groups were nonstandard, in many respects atypical and did not represent what I call a standard biography.[52]

[50] The New York Times issued a detailed, comparative analysis of both men. See Ian Fisher, 'Vaclav the Theorist vs. Vaclav the Politician', *N. Y. Times*, 14 June 2002 (quoting Klaus' warning that 'dissident intellectuals who believe in their exclusivity and elitism' are a grave danger to the Czech society), available at LEXIS.

[51] V. Žák, 'Economists or Lawyers? Institutional Foundations of Emerging Democracy: The Czechoslovak Example', in L.B. Sørensen and L.C. Eliason (eds.), *Fascism, Liberalism, and Social Democracy in Central Europe: Past and Present* (Aarhus UP, 2002) at p. 189, p. 195-7. For a comparison of Poland (with a main reformer L. Balcerowicz), the Czech Republic (Finance Minister and later Prime Minister V. Klaus) and Russia (Y. Gaidar), see C. Clement, P. Murrell, 'Assessing the Value of Law in Transition Economies: An Introduction', in P. Murrell (ed.), *Assessing the Value of Law in Transition Economies* 3 (Ann Arbor, University of Michigan Press 2001). The failure of these neo-liberal projects in the mid 1990s and the economic crisis developed by this kind of politics were followed by a virtual tidal wave of new legislation, ushered in by new governments determined to lead their countries into the European Union.

[52] 'Klaus chce jiný Ústavní soud' [Klaus wants another Constitutional Court], *Právo*, 15 July 2003. Some retiring justices refused to meet the new President during the farewell reception that day.

https://doi.org/10.1017/S1574019606001830 Published online by Cambridge University Press

The attitude of the new President to the selection of constitutional justices was very different from that of his predecessor. First, he denied that the list of possible judicial candidates prepared by his predecessor existed at all, which led to a curious disagreement between the retiring and new President. Claiming that finding suitable candidates would require a lot of time, he opted instead for a piecemeal method of appointment, testing the Senate's reaction to his candidates. The President's task was more difficult, because prior to late 2004 the Senate was composed of many politicians who were critical of him, as was proven by the fact that during the presidential election he scored worse in the Senate than in the lower house.[53]

The first important question faced by both the Senate and the President was whether formerly active politicians could become constitutional justices.[54] We have shown that, while this is the rule in France or Romania,[55] only a few justices are former politicians in Germany, Spain, Poland, or Hungary. The Czech Constitution, in its terse style, does not settle the issue since it requires only the minimum age of forty years, a legal education and practice in the legal profession for ten years.[56] President Havel appointed several lawyers who were former deputies; however, this was shortly after the 'Velvet Revolution' when many lawyers who were suitable for the function actively participated in politics. Moreover, none of Havel's appointees was a top politician. Havel's appointments in the late 1990s and early 2000s were those of legal professionals. This was consistent with Havel's distrust of party politics, which he developed while being a Czech dissident.[57]

In contrast, Mr Klaus, the professional politician, understood the constitutional court to be a primarily political tool, which necessarily requires top politicians. His first success in the appointment of new Justices was the nomination of three politicians, one a deputy belonging to the centre Christian Democratic Party, a co-drafter of the Czech Constitution, another a member of the Senate for the President's own Conservative Party, the last one a Justice Minister, a former legal scholar expelled from the academia after 1968, and a dissident in the 1970s and 1980s.[58] During the first nomination hearing, the issue of political appointees

[53] See the records of joint sessions of both houses of the Czech Parliament available in Czech at <www.senat.cz>.

[54] Czech legal scholarship rarely touched the issue. The paper published shortly before the beginning of the nomination process reluctantly approved the nomination of politicians, subject to the fact that only a few politicians would be nominated. See Kysela, Kühn, *supra*, n. 29.

[55] See text between n. 5 and n. 8 *supra*.

[56] Art. 84(3) Czech Const.

[57] See V. Havel, *The Power of the Powerless* (New York 1985) (Czech original in 1978).

[58] Mr Miloslav Výborný, Ms Dagmar Lastovecká and Mr Pavel Rychetský respectively. The legal expertise of the last one was not questioned even among his political opponents; the primary

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became very controversial. Most senators, especially from the President's own party, claimed that no one, including former top politicians, should be excluded from the bench; some, especially independent senators, were vehemently against having any politician on the bench. The former voice was far more dominant, although many senators cautioned for a limited political representation.[59] In balancing his appointment between three major political forces represented in the Senate, the President ensured that all of his political appointees succeeded and the nomination process went smoothly.

The second difficult issue was whether to reappoint some justices whose terms had expired. The fact that Czech law is, in this respect, unique in Europe called for self-restraint since the possibility of reappointment makes the independence of justices problematic, especially in a system with dissenting and concurring opinions.[60] On the other hand, faced with the extraordinary situation in 2003 in which the Court could have been incompetent to decide constitutional issues resulting in an abrupt discontinuity in decision-making, many senators were forced to confirm the President's appointees. In spring 2003, two former justices were nominated and confirmed by the Senate;[61] later another former justice also was confirmed.[62] Still, it is questionable on what basis those reappointed judges were

problem was that he as the head of the legislating council of the government was at least formally responsible for many laws of the early 1990s and 1998-2003 when he was in office.

[59] Cf. the Senate of the Czech Republic, 29 May 2003, parliamentary stenograms, when most speakers refused prima facie exclusion of politicians. See especially the speeches of Senator Liška (the President's Civic Democratic Party), who argued against 'discrimination' against politicians, on the one hand, and Senator Mejstřík (Independent), who refused to vote for any politician. Ibid. Senator Mejstřík, one of the leaders of the 1989 student run anti-communist revolution, maintained his position of not voting for anyone who was either a politician or closely associated with politics. He refused to vote for another candidate, *inter alia*, for supporting a politician in his run for the Senate. See the speech of Senator Mejstřík, the Senate of the Czech Republic, 4 Aug. 2005, parliamentary stenograms. Another independent senator rejected the position that an ideal candidate necessarily must be untouched by politics. Ibid., speech of senator Schwarzenberg.

[60] Cf. in English Sadurski, *supra* n. 2, p. 14 et seq. (noting, however, that the situation was not fundamentally different for those justices 'who do not have to enjoy the possibility of reappointment, and yet who attempt to secure a good position for themselves after their term at the court', ibid., at p. 15). For a critical analysis of the possibility of reappointment in Czech, cf. Kysela, Kühn, *supra*, n. 29. In the Czech system, unlike both Poland and Hungary, the author of the opinion (judge-reporter) is not revealed. Yet it is not difficult to determine who made the decision because the judge-reporter is usually the justice who announces the opinion publicly. Moreover, the Court has recently begun to publish an indication of the name of the judge-reporter (however, this is done rather haphazardly). In Slovakia, the 2001 amendment (in force since 2002) excluded reappointment, although several justices had been reappointed by then. See <ww.concourt.sk>, biographies of justices and Art. 134 Slovak Const. (as in force since 1 Jan. 2002).

[61] Mr Pavel Holländer and Mr Vojen Güttler. The reappointment of Justice Holländer, a widely-renowned scholar, helped to overcome the uneasiness some senators felt when they set a precedent and reappointed old justices. Holländer was appointed a Deputy Chief Justice.

[62] Ms Ivana Janů, who was meanwhile a sitting judge at the International Criminal Tribunal for the Former Yugoslavia.

https://doi.org/10.1017/S1574019606001830 Published online by Cambridge University Press

selected: age, their publications,[63] public appearance, or previous decision-making experience?

The first time that the Senate rejected a President's nominee was on July 16, 2003. The nominee was a prominent attorney who belonged to the President's group of consultants. The reason for his rejection was unclear as he faced only one question in the plenary hearings.[64] The President said that he was sorry that the Senate obstructed his attempt to create a 'diverse' court. The first big clash between the President and the Senate came a few days later, on 6 August 2003, when three[65] of four nominees were rejected by the Senate.

After 6 August 2003, the President's nominations slowed down. Claiming that he did not have more suitable candidates and was not obliged to nominate them anyway, the President continued nominating candidates sporadically, which incapacitated the Court. In summer 2003, the Court lost its power to decide the constitutionality of laws due to the fact that the number of justices dropped below twelve. The necessary minimum of twelve justices did not appear until autumn 2004. At the climax of this situation, one senator proposed the President's impeachment; in announcing this, however, he brought ridicule to himself as no one else wanted to support his proposal, which would have led to a direct conflict with, by then, an increasingly popular President.[66] The slowness of the President's nominations as well as several rejections (by the end of 2005, the Senate rejected seven nominations out of a total eighteen) caused the nomination process to remain open for almost three years: until December 2005, there was still one vacancy on the bench.

In the Czech Republic, both politicians and lawyers were divided on the question of on whom to put the blame. Some accused the President for his slowness in proposing new nominations as well as for picking questionable characters.[67] Others blamed the Senate for not confirming the President's nominees. In our opinion, the latter argument presents a strange logic because it devaluates the Senate's role as it has the power to control the judiciousness of Presidential choices. In the relationship between the President and the Senate, the former is an 'active' element, the latter rather 'passive', with the power of control and balance. For this

[63] Both these criteria do not seem to have been decisive. One of the candidates had a number of publications at home as well as abroad, others had not published; while some candidates were relatively younger (at their 50's), another was close to 70.

[64] The attorney who was rejected by a 32:39 vote had faced only one simple question in the plenum; the question gave little information about the reasons for his rejection.

[65] Two of them were also the President's legal consultants.

[66] See D. Spritzer, Senator Sees Treason in Court Delay, *The Prague Post*, 13 May 2004.

[67] This was emphasized especially with respect to the nomination of Ms Novotná who received only 11 votes of the 76 senators' votes (cf. text to n. 83 *infra*).

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partnership to fulfil its purpose, both partners must perform their duties: the President should search for high-quality candidates; the Senate should review and evaluate nominees. The Senate's power necessarily involves the possibility of rejection. Otherwise its role would have become a complete formality.[68]

The style of presidential appointments and the activity of the Senate

The frequent failures of the President in the Senate were caused by the lack of co-operation between them. The United States Constitution provides that judges are appointed 'with the Advice and Consent of the Senate'.[69] Although this rule is not taken literally and the United States President does not ask the Senate for its advice prior to nomination, the text invokes the sense of mutual co-operation. Consequently, informal negotiations usually take place both before and during the appointment process.[70] The terse style of the Czech Constitution, which demands a mere approval or disapproval by the Senate if interpreted literally, might create the image of both the President and the Senate as two rivals engaging in a destructive fight rather than two institutions co-operating on the common task of staffing the Court.

This danger was confirmed in autumn 2003 after a series of Presidential failures in the Senate during the summer. Then one of the President's candidates who failed to get the confidence of the Senate during the summer was nominated again. The President justified this extraordinary act by emphasizing the professional qualities of the nominee.[71] When the Senate again declined to approve the nominee, the President reacted with a harsh accusation of the Senate and proclaimed that the Senate decision-making was 'outrageous'. It seems that by then the level of hostility between both institutions hit the highest point. Thereafter, relations between the President and the Senate were normalized, which can be partially attributed to the fact that his political party (known for its unusual discipline and the support of the President) occupied almost half of the Senate's 81 seats after elections in autumn 2004.[72]

Unlike former President Havel, Mr Klaus has never attended a session of the Senate. President Klaus has complained since the very beginning of the nomina-

[68] Cf. in the European circumstances K. Loewenstein, *Verfassungslehre* 2nd edn. (Tübingen, JCB Mohr 1969) p. 47.

[69] U.S. Const. Art. II § 2 cl. 2.

[70] Guarnieri, Pederzoli, *supra*, n. 3, at p. 28; H.J. Abraham, *The Judicial Process* 7th edn. (New York, OUP 1998) p. 80 et seq.

[71] See the President's statement of 7 Aug. 2003, available at <www.hrad.cz>, visited 26 March 2006.

[72] The Czech system is based on elections for one third of the Senate's 81 seats every two years. See Art. 16(2) Czech Const.

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tion process that his task is very difficult because there are not enough suitable candidates. He has repeatedly emphasized that 'his' Court will be more diverse; he never has explained, however, what he means by such diversity. Likewise, it is unclear who would be his ideal candidate.

The selection process of possible nominees styled by the new President noticeably differs from his predecessor's style, who tried to imitate the United States' model of broad consultation with legal academia and the Bar.[73] According to unofficial reports, the actual current practice seems to be that employees of the President's Office approach possible nominees. If they agree to the nomination, they schedule a meeting with the President's close collaborators. Interestingly, none of these collaborators has a legal education: they otherwise serve as advisors on political questions. This meeting screens most candidates, and only those who go through it will meet the President, who then makes his final judgment. The real issue is how the list of potential candidates is made. The method of selection of candidates is doubtful, especially when considering the statement of the President's Chancellor in the constitutional committee of the Senate that nominees are selected depending on the President's good personal experience. One of the senators questioned whether it was possible to take into account all significant lawyers of the Czech Republic if only lawyers personally known to the President are selected.[74] Moreover, President Klaus never has asked legal institutions for their advice in the way President Havel did; it seems that the new President acts on the recommendations of his closest affiliates and friends.[75]

The Senate might be criticized as well. In order to understand our reservations, the process before the Senate must be described in full. During Klaus' Presidency, the practice, which had begun during Havel's Presidency, was firmly established and some of its features strengthened. After receiving the President's nomination, the matter is delegated to two committees of the Senate. Unlike the United States, there is no specialized Senate Judiciary Committee.[76] Each committee (one constitutional committee, another for science, education, culture and human rights)

[73] Cf. on the American style Abraham, *supra*, n. 70, p. 24 et seq.

[74] See the speech of senator Stodůlka, the Senate of the Czech Republic, 29 May 2003.

[75] As another senator remarked, '[w]hen President Havel was selecting candidates for constitutional justices, he asked public institutions, courts, universities and professional associations for advice. The Office of Mr President Klaus instead takes the phone and calls several friends.' See the speech of Senator Mejstřík, the Senate of Czech Republic, 4 Aug. 2005, parliamentary stenograms. After the President again and again justified delays for new nominations by the lack of candidates, the Senate's Vice-President offered several names of possible candidates for the President's consideration. The President did not react and instead nominated two other candidates recommended to him by senators of his own party.

[76] We must remember the fact that the United States Senate assists in the appointments of all federal judges while its Czech counterpart acts only in the appointment of fifteen constitutional justices.

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deals with a candidate in one open session, which usually lasts less than sixty minutes. The sessions in both committees are rather formal; a senator-rapporteur usually only summarizes those few documents which are sent from the President's office. Questions usually relate to the role of the constitutional judiciary and the candidates' opinions on the constitutional case-law. The questions call for a discussion on selected decisions, and relate to opinions on some touchy societal issues (euthanasia, gay marriage, drug policy), and eventually the nominee's past record, including (if applicable) the Communist Party membership.

The core of the nomination process lies neither in both committees' hearings nor in the final public plenary majority vote but is moved elsewhere. The 'European' tendency not to discuss controversial issues publicly is apparent in the Czech practice, which shifts most contested issues from public hearings to closed and secret hearings in political caucuses regarding the candidates. In fact, senators rarely ask questions in the plenum when the final vote is made (only the records of these hearings are publicly accessible via the Internet). Those who are denied an appointment sometimes have nothing to discuss in the absence of any question in the plenary session.[77] Likewise, most successful nominees face no questions, and the senators rarely explain what qualities they appreciated in a particular case. Exceptionally, however, in spring 2004 senators highly praised an attorney, (now Justice) Mr. Stanislav Balík. They emphasized that his law practice was free of any scandals, that he had widely published, was fluent in several languages and was also active in teaching. According to some senators, the nominee was an example of an ideal justice.[78]

The longest hearings were held on 6 August 2003, when the Senate rejected three of four nominees. The hearings on these four candidates in the whole Senate, including four senators' votes by secret ballot and candidates' welcome speeches, lasted less than five hours. In fact, these hearings received the widest media coverage as well. On that day, there were three rejected candidates: a constitutional law professor, a scholar dealing with international law, and a young attorney, known for her involvement with Roma rights. Typical of the vague style of Senatorial hearings, which avoid any discussion in public, some of the nominees faced no questions in the final plenary hearing. Thus, one might only speculate on the reasons for their rejection or confirmation.[79] A more substantive debate devel-

[77] One failed nominee (refused by a 25:45 vote), a professor of labour law at the Masaryk University Law School, faced no questions in the plenum, which resulted from the fact that he failed to introduce himself and make a speech in the plenum. See the Senate of the Czech Republic, 8 April 2004, parliamentary stenograms.

[78] See the Senate of the Czech Republic, 20 May 2004, parliamentary stenograms.

[79] The only successful nominee, by the way their fellow senator, was praised by several speakers. Another candidate, a young attorney who had barely reached forty, was refused due to her business affairs and those of her law firm.

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oped that day only with respect to one nominee, the constitutional law professor. The constitutional law professor of the Charles University Law School, rejected by 22:54 votes, faced several critics.[80] In the plenary session, several senators publicly questioned his behaviour in the early 1950s, when he as a teenager actively pursued purges at his high school during the era of Czechoslovak Stalinism. A senator quoted from his textbook of the early 1970s (written shortly before he was purged himself from the law school in the aftermath of the Soviet invasion of Czechoslovakia), which consisted of some ideas supportive of the communist regime.[81] However, it is questionable whether these reasons were really decisive in the actual outcome.[82]

The Senate reached near unanimity in rejecting a state prosecutor, Ms Novotná (11:65). This nominee became infamous for her letter to the President, a well-known Eurosceptic, in which she denounced the European Arrest Warrant, while at the same time she was writing articles celebrating this measure. Moreover, her long membership in the former Communist Party of Czechoslovakia contributed to her failure.[83]

The reluctance of most senators to participate during the hearings might be explained in many ways. It might be the result of different political cultures or the low number of senators who are lawyers by profession.[84] Another reason for the unnatural self-restraint of most senators could be the confusion during the hearings over what qualities of the nominees had been checked by the Senate.[85] It seems that what is often decisive is the senators' personal sympathy or aversion to the nominees as well as the charm of the nominee during hearings in the closed senatorial chambers. Senators justify their self-restraint in making public explanations of their rejections as a reluctance to harm nominees in their professional and personal life. One prominent senator attempted to explain it in this way:

[80] During the hearings, which started a long crisis in the nomination process in summer 2003, see text to n. 65 *supra*.

[81] See the Senate of the Czech Republic, 6 Aug. 2003, parliamentary stenograms.

[82] That law professor's viewpoints were considered outdated and incompatible with the modern rule of law. Unofficially, he was criticized by some for excessive formalism, the adherence to textual positivism and the absence of any link to contemporary constitutional thought. Some others viewed his strongly nationalist positions in some difficult issues of Czech history, including the post-war transfer of Czech Germans. Last, but not least, the law professor has a position critical to the existence of the Senate within the Czech constitutional system, which also might influence some senators.

[83] Cf. the Senate of the Czech Republic, 16 Dec. 2004, parliamentary stenograms.

[84] Of eighty-one senators, only three have law degrees. This presents a striking contrast with pre-communist Czechoslovakia when a deputy or senator with law degree was the rule.

[85] Some senators are thus persuaded by the mere fact that a nominee has a law degree and practices law. Therefore, they do not feel it necessary to examine the special professional qualities of the nominee, which entitle him to be appointed to the Court. The fact that professional qualities are neglected would have been defensible only if the presidential nomination itself had been a guarantee of a high professional prestige; unfortunately, that is not the case.

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> The Senate is often criticized for … inadequate justification of its voting. However, there are 81 senators who vote by secret ballot. They can hardly formulate some common grounds [for rejection]. Many arguments against nominees are of a very personal nature. If we state them openly, we might hurt the future career of unsuccessful candidates.[86]

Facing the Senate as a collective body, it is natural that there may not be one concrete reason for rejecting or approving a nominee. However, it seems plausible that at least some individual senators would reveal their own arguments to explain their final vote. Although this would not represent the reason for rejection or confirmation of the whole body, it would give both the President and nominees (and after all the public as such) at least some hint of how and why the Senate came to its decisions. The tendency to avoid making important statements publicly, illustrates the general attitude hindering public discourse and worsening the transparency of representative institutions. It is not entirely clear how nominees would be hurt by public explanations of senators' critiques. If one aspires to the highest judicial position in the country, it should mean that the nominee is willing to discuss publicly all of his alleged or real faults in the public arena.

Nonetheless, some lawyers and, above all, legal academics privately argue that they do not intend to undergo the 'merciless' treatment of what, in their opinion, are 'harsh' senatorial hearings. As a matter of practice, the most difficult issue for a typical legal scholar over 40 is his or her communist past and active involvement in the former communist regime.[87] This issue has also been the most frequent topic of the rare discussions conducted in the Senate's plenary session.

Senators are also passive in collecting information on nominees. In the United States Senate, candidates are carefully screened, and the Senate Judiciary Committee co-operates with the FBI and other organizations.[88] In the Czech Republic, senators generally presume that some problems relating to these nominees will be reported by someone outside the Senate. As an example, during the nomination hearings of 6 August 2003, one of the senators received a letter from his constituency stating that a nominated attorney, in the provision of legal services to the municipality, had charged more than she was entitled to; moreover, the nominee had also violated several other professional duties. Another senator was informed that the nominee used public transportation without paying for a ticket.[89]

[86] See the speech of senator Stodůlka, the Senate of the Czech Republic, 8 April 2004, parliamentary stenograms.

[87] The President complained about this as well. 'It is not easy today to find an expert above 40 with experience in top academia and court posts who has not been a member of the Communist Party of Czechoslovakia', he said as a reaction to failure of one of his nominees. See Spritzer, *supra*, n. 66.

[88] Guarnieri, Pederzoli, *supra*, n. 3, at p. 30.

[89] See the speeches of senators Mejstřík and Janata. The nominee was refused by a vote of 29:48. 6 Aug. 2003, parliamentary stenograms.

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When there is a clear possibility to study writings, judgments or other documents of nominees, the senators' inactivity is surprising. A striking example is provided by the confirmation hearings of Ms. Formánková. Shortly after her nomination, a leading daily newspaper received information that she, as a newly appointed judge in 1980, sentenced a bartender who publicly criticised communist meetings to ten months imprisonment. After the fall of communism, this judgment was reversed as a political prosecution. Despite the importance of the judgment, only a few senators visited the respective court and read the verdict.[90] While it was informally emphasized that the nominee had, in the interim, become a good judge specializing in the field of protection of privacy, it seemed that no one (and definitely none of senators) had read any judgments made by the nominee. The apparent absence of the senators' interest in her judgments is even more striking because the nominee had not published any articles, and she herself emphasized that her only publications were her judgments. Without anyone being aware of the content of these 'publications', she was confirmed by 43:33 votes.[91]

Few senators seem to be aware of the inadequacy of the senatorial hearings and the Senate's activities. One of those senators who was most involved in the nomination process said during the hearings:

> If we compare the process of selection of constitutional justices with the United States or Germany, we look like pure amateurs. The selection of nominees is shrouded by mystery and resembles magic. … Whereas in the United States as soon as the name of a nominee is announced the teams of specialists are gathered and check every word of that nominee, whereas full-page interviews with nominees and justices are published in Germany, we are excited about the selection of any minister who will perhaps disappear within several months. The constitutional justices stay in their posts the longest of all constitutional actors – ten years, and by their decision-making they set limits to legislative, executive and judicial powers. … Who of us takes time to examine – personally or through collaborators – books and articles of judicial nominees, or their judgments?[92]

In December 2005, the nomination process had finally concluded.[93] Of fifteen constitutional justices, the three remaining were President Havel's appointees (who occupied vacancies between 2000 and 2002). Another three of former Havel's justices were reappointed to the bench by President Klaus. Three justices includ-

[90] And the only one senator announced that publicly.

[91] Cf. Senator Mejstřík, who also publicly admitted that no one (including himself) had read any judgment of the nominee. The Senate of the Czech Republic, 4 Aug. 2005, parliamentary stenograms.

[92] Id., speech of senator Stodůlka.

[93] The former Supreme Court's Justice V. Kůrka appointed to the Constitutional Court in Dec. 2005.

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ing the Chief Justice were former top politicians, another three law professors, four former ordinary judges, two former attorneys and one was a former Czech representative at the European Commission of Human Rights.[94]

Public attention to the process of judicial selection in Europe and in the Czech Republic

The nomination process to constitutional courts in Europe, save some exceptions, is not a major media event. It seems that in Europe the public's view is that 'the court' decides, not its individual justices. The media usually presents judicial opinions in a very different way than it presents, for instance, the results of voting in Parliament. Unlike the latter political processes, judicial deliberation is mostly done in closed chambers and no one but the justices themselves know the often dramatic exchanges which occur on controversial issues. Judicial opinions are written on behalf of the court as a whole. Moreover, dissenting opinions which openly would reveal differences within the court are rarely used; in some European countries dissenting opinions are even prohibited (e.g., Austria or Italy). The names of justices are mostly unknown even to European lawyers.

In Germany, Hungary or Poland, public interest is discouraged by the very fact that political agreements on the names of justices are often made behind the closed doors of parliamentary committees and final parliamentary elections are usually entirely formal. Yet even the American-style process of the presidential nomination and parliamentary approval existing in Russia, Slovenia or the Czech Republic (or its turnaround in Slovakia) hardly ever attracts public attention. In fact, the law as well as actual practice in the latter group of countries make public control over the nomination process difficult. For instance, in Russia, the upper house is obliged to vote on a presidential nomination within two weeks[95] – the deadline virtually excludes both the serious discussion of nominees and any active investigatory role by the upper house of Parliament.

Although the Czech Constitution prescribes that Justices are appointed to the Court subject to the approval of the Senate, the law on the Constitutional Court states that unless the Senate rejects a candidate within 60 days, it is presumed that he or she has been confirmed.[96] The fact that a veto must be exercised within a

[94] The rest is difficult to specify.

[95] See Art. 9(2) Federal Constitutional Law on the Constitutional Court of the Russian Federation, *supra*, n. 17.

[96] Unlike Russia, the Senate's role has been narrowed down by a regular law. That is why some scholars consider this provision of the Constitutional Court Act unconstitutional. See J. Filip, 'Ústavní soud jako zákonný soudce a něco navíc' [The Constitutional Court as a Lawful Judge and Something Extra], in O. Novotný (ed.), *Pocta Vladimíru Mikule k 65. narozeninám* [*Festschrift* for Vladimír Mikule to his 65th Birthday] (Praha 2002) p. 114 at p. 115.

https://doi.org/10.1017/S1574019606001830 Published online by Cambridge University Press

relatively short time also hampers any serious public discussion. We have shown that the actual practice of constitutional nominations created other obstacles to the public openness of the process.

During Havel's Presidency, the mass media largely ignored nominations. Major papers usually dedicated one small paragraph to the news that a President's nominee was approved by the Senate. The nominations have never been the front-page topic in major dailies. Considering the uncontroversial nature of Havel's nominations, this fact is not surprising, although it might be striking for an American observer.

This seems to be changing very slowly. President Klaus' first nominations attracted public attention because of the publicly known names of the appointed figures. The subsequent rejections of these candidates attracted even more public attention. Legal history was made when both public and private TV channels began their main evening news by reporting on judicial nominations and the rejection of three nominees on 6 August 2003.[97] However, the media did not pursue the topic when it was at its most critical point – when the President stopped nominating new people and the Court became incapacitated. In fact, the topic disappeared altogether from public discourse in late 2003. Consequently, much of the public did not pay attention to the fact that due to the President's inaction the Constitutional Court was incapacitated for several months.[98]

Unlike the United States and many Western European countries, analyses of the judicial nominations are made only by journalists. Post-communist legal scholars are generally unwilling to express their opinions in the press.[99] Within a small academic community, a public criticism of one's colleague might make the position within legal academia much more difficult. Moreover, many academics are reluctant to comment on the President's nominees, perhaps with the fear that any critique might bury their hopes of becoming a justice or endanger their position in politics. Last but not least, the communist atmosphere, which disfavoured the public discussion of important issues and debilitated legal scholarship, is still around in the post-communist region. All this further lowers the level of public discourse.

Conclusion

The Czech experience after 2003 provides a warning that an inadequate political culture and the lack of mutual consensus on the basic constitutional and political

[97] A sceptic might explain this also by the fact that there was no other important event in Aug. 2003.

[98] For the only exception, see L. Navara, 'Dobrá zpráva o Ústavním soudu' [Good News about the Constitutional Court] *MF DNES* 9 Dec. 2005, p. 6 (a Czech journalist criticizing public inattention).

[99] Critically on this J. Blahož, *Soudní kontrola ústavnosti. Srovnávací pohled* [Judicial Review of Constitutionality. Comparative Study] (Praha, Codex 2001) p. 447.

https://doi.org/10.1017/S1574019606001830 Published online by Cambridge University Press

principles can obstruct the very nomination process of justices and consequently incapacitate the Constitutional Court. We have shown that this experience is not unique in post-communist Europe and that, under a different institutional background, a similar situation has existed in Slovakia and Hungary for several years. Both the model of co-operation between the President and the legislature (Slovakia, the Czech Republic) and the model of qualified election by the legislature (Hungary) require mutual assistance and compromises, as well as voluntary fulfilment of duties which cannot be enforced by law. Besides, the Czech system is based on the model that presupposes that the President will act and voluntarily nominate, especially if the previous candidate has been rejected. No system can put this into effect by force because the constitutional system of any democratic country is based on the presumption that some basic constitutional obligations are performed by politicians voluntarily, without the interference of legal sanctions.[100]

All relevant actors must share the basic aim of the whole process: staffing the constitutional court. However, the lack of political culture in the region causes politicians to act in an antagonistic way, without taking into account that their political battles inactivate one of the most important constitutional bodies.[101] Both the Czech Republic and Hungary suffer from irreconcilable relations between the opposition and the coalition, which engage in a destructive rather than constructive political dialogue. The most striking example is, however, Ukraine: instead of the required 18 justices, only 5 of them were on the bench in early 2006. The Court became inoperative for overtly political reasons and clashes within the Ukrainian Parliament.[102]

[100] Thus no constitutional system takes seriously Holmes' 'bad man' perspective. See O.W. Holmes, 'The Path of the Law', 10 *Harv. L. Rev.* (1897) p. 457 at p. 459 ('If you want to know the law and nothing else, you must look at it as a bad man, who cares only for the material consequences which such knowledge enables him to predict, not as a good one, who finds his reason for conduct, whether inside the law or outside of it, in the vaguer sanctions of conscience.'). A solitary proposal for the President's impeachment in the Czech Republic was not realizable, *inter alia*, because the Court did not have enough justices to exercise jurisdiction.

[101] This proves that immature political systems provide no guarantee that both institutions will act 'reasonably' (but see Sadurski, *supra* n. 2, at p. 18).

[102] Cf. n. 10 *supra*, explaining the methods of the appointment of Ukrainian justices. On 18 Oct. 2005, the term of office of ten justices of the 18-member Constitutional Court expired. Another three judges' posts have been vacant for some time. Thus, only five justices remained on the bench (at least twelve are necessary for the Court to function). See the declaration of the Monitoring Committee of the Council of Europe Parliamentary Assembly, adopted on 15 Dec. 2005, criticizing Ukrainian politicians that the *Verkhovna Rada* (the Parliament) 'has failed to carry out its duty and swear in the six justices appointed on 3 November by the Congress of Judges of Ukraine and three justices appointed on 14 November by the President of Ukraine, despite the fact that according to the Law the newly-appointed justices have to be sworn in within a month from the date of their appointment at the plenary meeting of the parliament. Nor has the parliament appointed the four justices under its own quota.' Taking into account that 'justice is held hostage to political interests', the Monitoring Committee 'urge[d] the Verkhovna Rada of Ukraine, and in particular its Speaker

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In contrast, in Poland, which has a much less stable political system, the very fact that a simple parliamentary majority can appoint its justices proves that the Polish system is surprisingly stable. What is even more intriguing, unlike the Czech system, the Polish parliamentarians avoided selecting overtly political figures to the bench. The remarkable stability of the Polish system of judicial nominations might have been caused by good luck; it proves, however, that unstable political systems in flux can often challenge the complex theories of political science which favour distribution of the power to appoint constitutional justices among more political actors.

Perhaps, the Czech and Polish examples prove that Bruce Ackerman is right that the American-style separation of powers does not fit emerging democracies and that constrained parliamentarianism performs its function far better in new democracies.[103] Although the system of separation of powers in the Czech Republic is based on constrained parliamentarianism, the American transplant made the office of President too powerful in enabling him to shape the composition of the nation's most important court. Considering the fact that the Constitutional Court is preordained to be restaffed every ten years, practically every President who serves both five-year mandates will have the possibility of creating his 'own' Court. Because of the unpredictable turnouts for presidential elections in post-communist countries, the quality of the Court would depend directly on the President in a way that is incomparable with the United States model.

It would be a mistake to lay the blame for the post-communist failures only on the institutional framework itself. The absence of a strong civil society in the post-communist region effectively means that political deadlock is not perturbed by other channels, for instance by citizens' pressure on relevant institutional actors, which would push them to reach compromise. The fact that the media does not discuss the issue makes most citizens unaware of the fact that one of their basic state bodies is incomplete or even incapacitated. Thus, although the American politicization of judicial nominations might be considered extreme, the very fact that the wider public gets involved in the nomination process might be considered healthy and good for democracy.[104]

Volodymyr Lytvyn, to carry out their constitutional duty and renew the composition of the Constitutional Court of Ukraine without any further delay.' See the press release of the monitoring committee of 15 Dec. 2005 (<assembly.coe.int>, visited 20 March 2006).

[103] B. Ackerman, 'The New Separation of Powers', 113 *Harv. L. Rev.* (2000) p. 633.

[104] After all, excessive politicization of judicial nomination does not deprive the Supreme Court of its legitimacy. Cf. data provided in J.L., Ginson, et al., 'On the Legitimacy of National High Courts', 92 *Am. Pol. Science Rev.* (1998) p. 343.

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