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Quantity or Quality?
Re-Assessing the Role of Supreme Jurisdictions in Central Europe

Michal Bobek

EUROPEAN UNIVERSITY INSTITUTE
DEPARTMENT OF LAW

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Abstract

Over the last decades, the ever growing caseload in supreme and constitutional jurisdictions all around Europe has forced some of them to reassess the role and functions they should be fulfilling. This article offers, on the example of the Czech Republic, a case study of this phenomenon and also an example of a legal transplant being implanted and partially rejected by the receiving system. This case study is, however, placed in the broader context of the role of supreme courts in the post-Communist Europe and the on-going Europe-wide debate.

The first part of this paper provides a general overview of the ideal models of supreme jurisdictions and the respective interests these models are predominantly called upon to realise in the various systems. The second part places the Czech example and other Central European systems into this broader picture and then discusses, using the example of civil and administrative justice, the selection mechanisms that have been put in place. The third part deals with tensions between supreme jurisdictions and the constitutional court in the same jurisdiction as far as the selection of cases is concerned. The final, fourth part, discusses broader policy issues and outlines some of the implications that the introduction of filtration devices in the access to supreme jurisdictions might have on the legal system as a whole.

Keywords

Legal issues
Judiciary – transition – access to supreme jurisdictions – civil appeals – leave to appeal - constitutionality – constitutional complaint – Czech Republic

Disciplinary background of the paper
Law

Quantity or Quality?

Re-Assessing the Role of Supreme Jurisdictions in Central Europe

Michal Bobek*

The Supreme Court of Volumia was deciding tens of thousands of cases every year. Hundreds of its judges, each of them deciding hundreds of cases, were permanently flooded with files. Most of the cases looked alike. For most of them, judges used standardised reasoning, often just copied and pasted from one decision into another. There was a minimal number of files that had to be disposed of every month. This permanent time pressure and the excessive workload meant that even in novel and complex cases, which would have required more detailed attention, the reasoning of the Court was very cryptic, often superficial and unconvincing. The decisions of the Court were freely accessible. However, no one really read them. Firstly, they were so many that nobody was physically able to study them. Secondly, everyone knew that there was no point in reading them – they did not contain anything novel or groundbreaking.

The Supreme Court of Selectia functioned in a different way. It was a much smaller court, for a start. Albeit its docket was also considerable, it did not decide more than one hundred cases every year. The court had the right to select the cases it would hear. The court used to select only novel, important or contentious issues for a decision on merits. The rest of the docket was summarily dismissed. The cases that the court selected for hearing were, however, studied and discussed in depth. The decisions of the court rendered every year were read and extensively commented upon. The lower courts recognised a clear line of case-law which they were then able to follow.

This article explores the problems a legal system and a supreme jurisdiction might encounter once it is attempting to migrate from Volumia to Selectia. The power to select the cases a court will hear[1] may be just one of more ingredients that are necessary for the transformation from a Volumia into a Selectia court. It is, nonetheless, the key one.

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* Department of Law, European University Institute; Supreme Administrative Court of the Czech Republic. All views expressed are strictly those of the author. I am much obliged to Jan Komárek, Jacques Ziller, Mark Gillis, Zdeněk Kühn, Veronika Korom, Matej Avbej, Vojtěch Šimíček and Pavel Molek for their useful comments and suggestions. Unless otherwise indicated, all translations are mine. Contact: Michal.Bobek@eui.eu

[1] Throughout this paper, the notion of the "selection of the cases" before the supreme jurisdiction will be used for describing an institutional setting in which a supreme jurisdiction a) has been explicitly given with the discretion to decide which cases it wishes to hear and b) if it decides not to deal with a case on merits, it is not obliged to give reasons for this decision (it may, however, to do so when it wishes to).

Over the last decades, the ever growing caseload in supreme and constitutional jurisdictions all around Europe has forced some of them to reassess the role and functions they should be fulfilling.[2] The same problems which have been, in Western Europe, gradually emerging over decades, have, in Central Europe,[3] materialised within one single decade following the fall of the Communist regime. This article offers a case study of this phenomenon. The primary subject of study is the Czech legal system and the efforts of the both of the supreme jurisdictions (the Supreme Court and the Supreme Administrative Court) to redefine their function, which could be aptly summarised with the leitmotiv "less quantity and more quality". This case study is, however, placed in the broader context of the role of supreme courts in the post-Communist Europe and the on-going Europe-wide debate. At the same time, the article provides an example of a legal transplant being implanted and partially rejected by the receiving system.

The first part of this paper provides a general overview of the ideal models of supreme jurisdictions and the respective interests these models are predominantly called upon to realise in the various systems. The second part places the Czech example and other Central European systems into this broader picture and then discusses, using the example of civil and administrative justice, the selection mechanisms that have been put in place. The third part deals with tensions between supreme jurisdictions and the constitutional court in the same jurisdiction as far as the selection of cases is concerned. The discussion is two-layered: firstly, is the selection of cases before supreme jurisdictions constitutional? Secondly, should constitutional courts select the cases they will hear as well? The final, fourth part, discusses broader policy issues and outlines some of the implications that the move from Volumia to Selectia might have on the legal system as a whole.

Supreme Jurisdictions and their Functions in a Comparative Prospective

Supreme jurisdictions are called upon to exercise various functions. The fact whether or not a supreme jurisdiction has the privilege of selecting cases it will hear is just one of external manifestation of considerably deeper differences in the judicial structure and culture. In order to be able to place the Czech and the other Central European jurisdictions into a broader picture, two levels of introductory analysis will be offered: the *"micro-level"* analysis, which focuses on the type and the conditions of access to

[2] See an excellent comparative study on this subject in *Yessiou-Faltsi, P. (ed.)* The Role of the Supreme Courts at the National and International Level. Reports for the Thessaloniki International Colloquium (21 – 25 May 1997), Thessaloniki/Athens. Sakkoulas Publications : Thessaloniki, 1998. A more survey-like review of civil appeal procedures is provided by *Platto, Ch. (ed.)* Civil Appeal Procedures Worldwide. International Bar Association : London, 1992 and *Jolowicz, J.A., Rhee, C.H. (eds.)* Recourse against Judgments in the European Union. Kluwer Law International: The Hague, 1999. Functions and competences of supreme jurisdictions in the post-Communist Europe were the subject of discussion in the framework of the Second meeting of presidents of supreme courts of Central and Eastern European Countries, Pärnu, Estonia, 22 – 25 October 1996, published as „*The Competences of Supreme Courts*". Council of Europe Publishing: Strasbourg, 1998.

[3] For the purposes of this article, the notion of „Central European" refers to the Czech Republic, the Slovak Republic, Hungary and Poland.

the supreme jurisdictions when functioning as courts of last resort[4] and the *"macro-level"* analysis, which, on the other hand, places the conditions of access to the respective supreme jurisdiction into a broader picture of the overall judicial structure.

Micro level: The Access to the Supreme Jurisdiction

The Three Models

When functioning as courts of last instance, i.e. reviewing first instance or appellate decisions, supreme courts can be subdivided into 3 basic (ideal) models:

(i) the "appeal" model;

(ii) the "cassation" model;

(iii) the "revision" model.[5]

Under the ***appeal model*** (represented e. g. by the English Appellate Committee of the House of Lords and many other common law countries, but also Finland and Sweden for instance[6]) the supreme (appellate) court has the power to set aside the judgment of the lower court and enter a new judgment on its own, i.e. without having to remand the case back to the lower court. Under the ***cassation model*** (represented typically by the French *Cour de cassation* and present in other countries of "roman" legal culture, for instance Italy and Spain[7]) the court can either affirm the decision rendered by the lower instance court or quash the decision and remand the case to the lower court for a fresh assessment. It cannot, however, replace lower court's decision with its own. The last conventional model is the ***revision model***, which is typical for the access to supreme jurisdictions in the Germanic legal circle (Germany, Austria, Switzerland,[8] but as will be discussed in detail below, also the general original model in the post-communist Central Europe). Similarly to the cassation model, the supreme jurisdiction under the revision model is typically supposed to either quash or to affirm. If the facts have not been sufficiently resolved by the lower courts, the supreme court can only quash the decision and remit the case. Provided, however, that the questions of facts are

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[4] Other potential functions of supreme jurisdictions, for instance, cases heard in the original jurisdiction, advisory and consultative functions of some State Councils, as well as the special functions that the supreme courts are called to exercise in federal states, are outside the scope of this paper. For the purposes of this paper, a court of last instance signifies a court against whose decision there is no ordinary remedy, i.e. any appeal of whatever sort (cassation, revision etc.), which is normally open to the parties.

[5] *Jolowicz, J. A.* The Role of the Supreme Court at the National and International Level. In: *Yessiou-Faltsi, P. (ed.),* cit. above, n. 2, pp. 37 – 63, at p. 50.

[6] Cf. the regional reports by *S. Goldstein* (common law countries) and *P. H. Lindblom* (Scandinavian countries) in *Yessiou-Faltsi, P. (ed.),* cit. above, n. 2, pp. 279 – 360 and 223 – 278 respectively. With respect to the Swedish system, cf. also *Bohdan, M. (ed.)* Swedish Law in the New Millenium. Norstedts juridik: Stockholm 2000, p. 105 and f. or *Strömholm, S. (ed.)* An Introduction to Swedish Law. 2nd Ed. Norstedts: Stockholm 1988, p. 84 and f.

[7] *Taruffo, M.* The Role of Supreme Courts at the National and International Level: Civil Law Countries. In *Yessiou-Faltsi, P. (ed.),* cit. above, n. 2, pp. 101 – 126.

[8] *Stürmer, R., Schumacher, R.* Die Rolle der obersten Gerichtshöfe auf nationaler und internationaler Ebene: Landesbericht für Deutschland, Österreich, die Schweiz und Ungarn. *Ibid*, pp. 171 – 203.

sufficiently ascertained, i.e. no new evidence is necessary, the supreme court may enter a judgment on its own, replacing the decision of the lower court(s).

The above sketched models are of course ideal models that might not be always present in their pure form.[9] The ideal models are, however, instructive for introducing the differences in access to the various models of supreme courts and the (im)permissibility of selection of cases to the heard in the respective systems.

Selection of Cases to be Heard

Selection of cases, typically in the form of various "leaves to appeal", "petitions for hearing", or "writ of certiorari" differs from the admissibility of an appeal. The issue of admissibility is one of procedure. It requires that certain procedural prerequisites are met for a court to deal with a case, such as that the appeal must be filed within a specified period following the decision of the appellate court, that a party must be legally represented before the supreme jurisdiction, that court fees have been paid etc. If these procedural prerequisites have not been met, the court will refuse to deal with the case at all. Selection of cases is different in nature: it already examines, albeit in a preliminary and partial manner, the merits of the case. Is the nature of the case, the legal question presented by it, sufficiently important as to be dealt with fully and in depth by the supreme jurisdiction? Admissibility and the selection of a case for hearing are thus two distinct and different steps. The former is the necessary precondition for the latter, but the satisfaction of the former is not a sufficient condition for the latter.

Again, the distinction between admissibility and a decision to hear the case before the supreme jurisdiction is an ideal one. Two caveats should be added at this stage, however. Firstly, not all the systems include both stages. In some systems, such as in the cassation model, which does not provide for any selection of cases *per se*, a case will be dealt with provided that all the criteria of admissibility are met. On the other hand, in purely selection based systems (the appeal system in its ideal form), admissibility, although it exists, is not such an important issue. Provided that a supreme jurisdiction is free to choose from a given pool of cases only those it wishes to hear, the requirement of strict compliance with admissibility criteria is not crucial: if some of these criteria are not met, the supreme jurisdiction will simply not select the case for hearing. This is not to say that admissibility requirements do not exist in these systems; there just do not play as critical a function as in the cassation or the revision systems, where the procedural admissibility criteria function as the only filtration device for appeals to the supreme jurisdiction. Both stages, i.e. the satisfaction of the admissibility criteria as well as the granting of the permission to appeal, are present in the revision systems.

Secondly, in some jurisdictions that are to outward appearances not endowed with the power to select cases to hear, the (over)extensive interpretation of the admissibility criteria might be sometimes misused in order to dispose of substantial parts of the

[9] As *J. A. Jolowicz* notes (cit. above, n. 5, at p. 53), exceptions have been introduced in France and Italy into the originally "pure" cassation model, which now allows that if a final decision can be given by the court of cassation without the need for remanding the case to a lower court, that should be done. Similarly, as will be discussed later, access to the German *Bundesgerichtshof* and other German supreme courts (especially the *Bundesfinanzhof*) under the original revision model is gradually sliding towards a more restrictive appeal model with greater judicial discretion in selecting cases to be heard.

docket. This is especially the case with somewhat "hybrid" admissibility criteria, which do not only contain purely procedural conditions for appeals/complaints etc., such as time period for lodging appeals or the obligation to be represented by an attorney, but also some "subjective" criteria, for instance the requirement that the appeal/complaint would not be dealt with if it is "manifestly inadmissible" or "manifestly ill-founded". When considering some of the judicial statistics and the ratio between cases lodged and case heard, which in some instances reveals that more than 90% of the appeals/complaints lodged are rejected as "manifestly unfounded",[10] one realises that admissibility criteria with broad and imprecise legal terms might be effectively used as a filtration device in systems where no filtration was originally foreseen.

How do the three ideal models outlined above deal with selection of cases before supreme jurisdictions? The broadest access and no selection of the cases are characteristic for the ***cassation model***. In these systems, access to the supreme jurisdiction is conceived of as one of right.[11] Unfettered access to the supreme judicial level has as its consequence that supreme courts in these systems tend to be large institutions with hundreds of judges and deciding tens of thousands of cases a year.[12]

The ***revision model*** partially limits access to the supreme jurisdiction. It does so by coupling access to the supreme jurisdiction with "objective" criteria of access. The idea is that once these, allegedly objective, criteria are met, the supreme jurisdiction will be obliged to deal with the case. These criteria vary slightly,[13] but they can be grouped into the following overarching categories:

(i) the case at hand is of fundamental (legal) significance;

(ii) the case is of importance for the further development of the law (a "quasi" legislative need);

(iii) there is a divergence of opinion on the question among the lower courts, typically among the various courts of appeal;

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[10] The Czech Constitutional Court for instance rejects, as "manifestly unfounded", on average 90 – 95 % of every year's docket of constitutional complaints (www.usoud.cz), the *Bundesverfassungsgericht* summarily rejects more than 96% of its docket (2006 figures available at www.bverfg.de). A category in itself is the (mis-)use of Art. 35 (3) of the Convention for the Protection of Human Rights and Fundamental Freedoms and the possibility to summarily reject complaints which are "*manifestly ill-founded*" by the European Court of Human Rights to dispose of thousands of cases every year (cf. the statistical figures in 2006 Survey of Activities of the ECHR at http://www.echr.coe.int).

[11] Cf. Art. 111 sections 7 and 8 of the Italian Constitution. Further see *Jolowicz*, cit. above, n. 5, at p. 57 and 58.

[12] The extreme example here is the Italian *Corte di Cassazione* with more than 350 judges and more than 40, 000 decisions rendered every year (civil, labour as well as criminal cases combined) – *Taruffo, M.* Precedent in Italy. In: *MacCormick, N., Summers, R. S. (eds.)* Interpreting Precedents: a comparative study. Dartmouth Publishing: Aldershot, 1997, pp. 141 – 188, at p. 144. The French *Cour de cassation* decides, with its more than 100 judges (including *juges référendaires*), about 30.000 cases every year (criminal and civil combined) – *Troper, M., Grzegorczyk, C*h., Precedent in France. *Ibid*, pp. 103 – 140, at p. 105, supplemented with new figures from the "*Rapport annuel de la Cour de cassation*", available at http://www.courdecassation.fr.

[13] Cf., e.g. § 543 of the German *Zivilprozessordnung* [Code of Civil Procedure], BGBl 1950, 455, 512, 533, hereinafter "ZPO"; § 115 of the German *Finanzgerichtsordnung* [Code of Justice in Financial Matters], BGBl. I S 1477, hereinafter "FGO"; § 132 (2) of the German *Verwaltungsgerichtsordnung* [Code of Administrative Justice], BGBl I 1960, 17, hereinafter „VwGo", but also for instance § 502 of the Austrian Code of Civil Procedure.

(iv) some of the procedural codes also contain a certain "left-over" category of significant and grave faults in procedure, provided that this fault was sufficiently serious that it have had effect on the substantive outcome of the case.[14]

The size of supreme jurisdictions in the countries following the revision model is smaller than those following the cassation one, but still considerable. The number of judges is counted in tens, but is normally not greater than one hundred. The amount of cases runs to thousands every year.[15]

The ***appeal model*** limits access to the supreme jurisdiction to the greatest extent. Appeal to the supreme jurisdiction is not a matter of individual right, but one of the discretion of the supreme jurisdiction. The granting of permission/leave is dealt with separately from the (possibly later) examination of the case on merits. The discretion given to the supreme jurisdiction is framed very broadly: clear preference is given to cases of general interest and significant legal questions.[16] Courts of this type, typically the Appellate Committee of the House of Lords or the United States Supreme Court, but also the Supreme Courts of Canada or Israel, tend to be small institutions (normally up to ten or fifteen judges[17]). There are generally under one hundred cases decided on the merits every year.[18]

Private vs. Public Interest in Supreme Adjudication

The different choices made in the respective systems reflect the different stress put on the purposes a supreme jurisdiction should be serving. These can be designated in different ways: private vs. public,[19] individual vs. societal. Both purposes are present in all national and international adjudication bodies; the question is how much preference is given to each of them. The private purpose can be said to focus on dispute resolution

[14] The "*grave faults in procedure*" category can either be part of the conditions for revision as such or can, as for instance in the ZPO, form a separate category of "mandatory" criterion of admissibility for revision – cf. e.g. the "absolute grounds for revision" (*Absolute Revisionsgründe*) in § 547 ZPO or, for instance, § 119 FGO. This special category of mandatory revision in fact splits the admissibility of the revision into a two channel system: the general revision model where an express admission of the revision is necessary (*zulassungsbedürftige Revision*) and the special channel where no admission *per se* is needed (apart from, of course, convincing the deciding judges that such a case of grave faults in procedure is genuinely at hand).

[15] The *Bundesgerichtshof*, the German supreme jurisdiction in civil and criminal matters, is composed of 126 judges deciding about 3300 cases every year (statistics available at http://www.bundesgerichtshof.de); the *Bundesverwaltungsgericht* [Federal Administrative Court], which is the supreme jurisdiction in some of the administrative matters, is composed of more than 40 judges and decides under 2000 cases a year (http://www.bverwg.de).

[16] Cf., e.g. Rules of the Supreme Court of the United States adopted on March 14, 2005 and effective from May 2, 2005, rule 10 (Considerations Governing the Review on Certiorari). For civil jurisdiction in the United Kingdom, see Practice Directions and Standing Orders Applicable to Civil Appeals, 2007 edition, approved by the House of Lords on 4 December 2006, part I. 1. and the applicable legislation cited therein.

[17] The only exception in this category would be the Appellate Committee of the House of Lords, where the number of Law Lords eligible to hear appeal is higher; this is a historical exception.

[18] See *Goldstein, S.* The Role of Supreme Courts at the National and International Level: Common Law Countries. In: *Yessiou-Faltsi, P. (ed.),* cit. above, n. 2, pp. 279 – 360.

[19] *Jolowicz, J. A.* cit. above, n. 5, pp. 37 – 63, at p. 39 and f.

in the individual case. It is driven by the private interest of the individual applicant: the applicant brings the matter to the court and if not "satisfied" with the decision rendered by the court, s/he wishes to appeal as long as possible. The public purpose, on the other hand, puts more stress on the societal or community stakes in the adjudication process. The public purpose of a court tends to come to the foreground at the level of supreme jurisdictions. The tasks assigned to the supreme jurisdictions are typically public in nature: safeguarding of the unity of the national (federal) legal system, its clarification, the overall legality of judicial decision-making and the further development of the law.

It is clear that these two functions can never be truly separated: doing individual justice serves the broader communitarian functions of legality and often other aims as well, such as the clarification of the law or its further development. On the other hand, clear, comprehensive and predictable interpretation of the law, managed and overseen by the supreme jurisdiction, is in the best interest of every individual. Clear and predictable case law generated by the supreme jurisdiction diminishes legal uncertainty as to what the law is. It gives clear guidance to lower courts, so that the individual does not need to arrive always at the supreme court level to know what the resolution of his/her case should be.

The three systems outlined above differ in the stress they put on the respective purposes and interests a supreme jurisdiction should be serving. As well noted by *J. A. Jolowicz*,[20] it is somewhat paradoxical that the cassation system, in which the supreme jurisdictions were originally designed as purely public purpose serving institutions,[21] has gradually been sliding towards private purposes in supreme adjudication. The cassation courts in Italy and France, which were originally conceived of as guardians of general legality, have gradually shifted towards a purely "private" function: hardly any public purpose in the intentions defined above is served by ten thousand cases produced annually, the vast majority of which bring nothing new to the law, with decisions so short as to be almost incomprehensible. With this number of cases rendered every year and the hundreds of judges deciding them, internal contradiction among the cases are inevitable.[22] The supreme jurisdictions in these countries are reduced to a third instance in the individual dispute, with hardly any "public" function of the courts being discernable.

The other end of the virtual spectrum would be the appeal model. Here stress is clearly placed on the public function a supreme court is supposed to fulfil. Access to the supreme jurisdiction and the selection of cases is done exclusively on the basis of the importance and novelty of the legal issue involved in the case, i.e. criteria reaching beyond the interest of the individual dissatisfied applicant seeking yet another review of

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[20] *Ibid*, p. 56.

[21] *Ibid*, p. 52. *Jolowicz* traces the origin of the French *Cour de cassation* to the post-revolutionary *Tribunal de cassation*, which was perceived as an emanation of the legislature, called upon to give the authoritative ("authentic") interpretation of the new laws. The purpose of the Tribunal was purely public. M. Taruffo adds, with respect to the cassation courts in the civil law countries (France, Italy, Spain), that these institutions have alienated themselves from their original public purpose and become full "third instance" courts. *Taruffo, M.* The Role of Supreme Courts at the National and International Level: Civil Law Countries. In: *Yessiou-Faltsi, P. (ed.),* cit. above, n. 2, pp. 101 – 126, at p. 107 and 108.

[22] M. Taruffo suggests, with respect to the Italian *Corte di Cassazione,* that its case law contradicts itself hundreds of times per year – *Ibid*, at p. 110.

her case. Individual justice has little to do in these deliberations. An example of this vision is the U.S. certiorari procedure, where the review on certiorari is in the interest of the law, not the interest of the parties.[23] To provide individual justice is not the task of the Court. This was put quite sharply by one observer of the U. S. Supreme Court's practice in the 1958 Term. In this term, the Court dealt with an extensive number of employer liability cases, in which it was forced to collect evidence (which was not properly done by lower federal courts) and solve individual disputes. To engage in such practices for the Supreme Court was called a "*misuse of power*" and a "*grievous flittering away of the judicial resources of the nation*".[24]

Macro-level: the Structure and Hierarchy of the Judicial System

The difference in access to the supreme court and the (im)permissibility to select cases to be heard has even deeper roots than the above-described difference in the accentuation of various purposes in the role of supreme courts. This difference can be traced back to the very principles of functioning of the judicial system and the role of the judge. In his insightful analysis of judicial and state authority, M. R. Damaška distinguishes two visions of officialdom: the hierarchical ideal and the coordinate ideal.[25] The *hierarchical* ideal represents the model of the classical bureaucracy: it is characterised by a professional corps of officials, organised into a clear hierarchical structure and making decisions according to their technical knowledge. The system relies on extensive control and overseeing of activities of the lower levels of the system. The *coordinate* system, on the other hand, is one of a more "amorphous" machinery with not such a strict hierarchy. Decision-making in the system is not primarily based on technical knowledge and expertise, but on experience, on shared visions and common understanding of ethical and political norms, supported by the "common sense". The system does not require extensive control and review of individual decision, hence the "coordinate" ideal.

Continental judicial structures, especially the Latin ones (France, Italy, Spain), but to a great extent also the Germanic ones, represent the hierarchical officialdom. Anglo-American legal systems and more broadly the common law countries can be associated with the coordinate officialdom model. This difference has *inter alia* profound impact on the access to, and the role of, the supreme courts.

In a coordinate model, supreme courts can rely not only on shared values, but also on more important systematic tools that have developed alongside this ideal: the continuous observance of the already decided by virtue of the *stare decisis* doctrine and the force of precedents. With these tools, the coordination of activities of lower courts requires much less activity on the part of the supreme jurisdiction. The system does not require extensive review of individual decision of lower courts, but just the creation of the overall guidance that tends to be followed automatically. In these settings, supreme

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[23] *Hart, H.M.* The Time Chart of the Justice – The Supreme Court 1958 Term, 73 [1959] Harvard Law Review 84, at p. 97. For general reflections on the certiorari review, see *Hartnett, E. A.* Questioning Certiorari: Some Reflections Seventy-Five Years after the Judges´ Bill, 100 Columbia Law Review 1643 (2000).

[24] *Hart,* cit. above, n. 23*,* p. 98.

[25] *Damaška, M. R.* The Faces of Justice and State Authority; A Comparative Approach to the Legal Process. Yale University Press : New Heaven, 1986, at p. 16 and f.

jurisdictions can therefore select cases and go more into depth in the areas of law involved in these cases. Their primary function is to create new precedents, i.e. to solve a given legal problem for the future. The orientation of supreme judicial law-making is prospective: cases are selected with the view that they will create a precedent and regulate future legal relationships.

The task of supreme jurisdictions under the hierarchical model is a different one. It is primarily to review individual decisions of the lower courts as to their correctness. The jurisprudential "production" of a supreme court in the hierarchical system is mostly concerned with errors in law in the individual cases, not the creation of any "precedents". If any "precedents" are being created, typically in the form of "established case law",[26] this happens only as a "by-product" amongst the thousands or the ten of thousands of decisions rendered by the supreme jurisdiction every year. The orientation of the decision-making of these courts is mostly retrospective: they review and correct tens of thousands of past individual decisions.

Again, these two are pure and opposing models. They are nonetheless instructive in discerning some overarching principles of the functioning of supreme jurisdictions in each of the systems. The Germanic and Central European revision model of supreme jurisdictions is a certain hybrid between these two pure ideals of officialdom. It surely does not come anywhere near the establishment of a fully-fledged *stare decisis* doctrine or a system of precedent known in the common law systems. On the other hand, it cannot be said that decisions of supreme jurisdictions especially (general jurisdictions, but also and especially constitutional courts) would have no binding force outside the individual case.[27]

This hybrid form is somewhat reflected in the access and selection of cases before the supreme courts within the cultural circle of the Germanic revision model. As is already apparent from the general set of criteria of access to supreme courts under this model described above, the conditions are mixed. On the one hand, the system partially behaves as a prospective one, as a precedent-like system: a supreme jurisdiction will only deal with cases where there is a question of fundamental legal importance, where there is the need to develop the law further or where there is inconsistency between the opinions of the appellate courts. On the other hand, the typical presence of a last, fourth, "left-over" category as to when access to the supreme jurisdiction will be granted, represented by criteria such as the manifest misapplication of the law in the individual case, grave faults in the procedure before lower courts etc. acts as the Trojan horse of the hierarchical, extensive individual revision model. These systems thus often appear as systems that are, on the one hand, moving toward the coordinate model, but, on the other hand, are unable to renounce the idea of individual review and individualised justice before the supreme jurisdiction.

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[26] *„Jurisprudence établie", „giurisprudenza constante" „gesicherte Rechtsprechung", "ustálená judikatura"* etc.

[27] An excellent comparative study on the importance and the gradual rise of case-law in the civil legal systems is *MacCormick, N., Summers, R. S. (eds.)* Interpreting Precedents; A Comparative Study. Ashgate : Dartmouth, 1997. On Germany, see the study contained therein authored by *Robert Alexy* and *Ralf Dreier* (pp. 17 – 64).

The Key Elements of the Three Models

The key elements pertinent to the three models in relation to the possibility to select cases by the supreme jurisdiction introduced in this section could be summarised as follows:

(i) ***"Cassation" models*** are fully open, i.e. there is no selection of cases. The private purpose of the supreme jurisdiction has supplanted the public one. The orientation of the decision making is purely retrospective and the review of individual decisions is extensive.

(ii) ***"Revision" models*** are "objectively-open", i.e. access to the supreme jurisdiction is granted if certain "objective" criteria are met. Why the adjective "objective" is put in quotation marks is evident at this stage: the broadly-framed vague criteria of "fundamental importance" or the "need" for further development of the law in the given area are of course not objective criteria. Depending on the strictness of the interpretation of these criteria by the supreme jurisdiction, they can represent anything from a completely open system to an almost closed one. In practice, taking into account especially the amount of cases decided by these supreme jurisdictions, these systems tend to be semi-open. The model insists on balancing the two broader interests, i.e. the public as well as the private one. The point of departure is retrospective decision making, but some prospective features are added.

(iii) ***"Appeal" models*** are "subjectively-open". It is clearly and openly stated that access to the supreme jurisdiction is not one of right, but one of discretion. Individual purposes or "doing justice" in the individual case is of no interest to the supreme jurisdiction. What counts is prospective decision making and the creation of precedent.

The Czech and Other Central European Systems

Central European post-communist supreme jurisdictions and judiciaries generally find themselves in a difficult position. To assess the problems of the general transformation of these judiciaries is not the aim of this article.[28] Our focus is only on the role and functions that supreme jurisdictions are called to exercise in these systems. However, to understand the societal and historical position of the supreme courts in the region, some broader observations should be made at the outset.

Under Communist rule, supreme jurisdictions were bastions of the Communist rule and the "system". Their task was to keep the ordinary courts "in line", to supervise and control them. The pre-existing hierarchical model of the organisation of the judiciary,

[28] For a general discussion, see two reports on the state and the transformation of the judiciaries in Central and Eastern Europe, compiled by the Open Society Institute (Judicial Independence (2001) and Judicial Capacity (2002)), accessible in full at http://www.eumap.org/topics/judicial/reports [1.11.2006]. See also *Sajó, A. (ed.)* Judicial Integrity. Leiden: Koninklijke Brill NV, 2004. A limited contribution to this debate with respect to Central Europe is forthcoming as *Bobek, M.* The Fortress of Judicial Independence and the Mental Transitions of the Central European Judiciaries. Vol. 14 (2008), Issue 1, European Public Law.

inherited from the era of the Austrian monarchy, was, behind the Iron Curtain, converted into a tool of close supervision and control of the judiciary. Supreme jurisdictions under Communist rule were typically staffed with the more senior career judges, loyal to the Communist party, who "could be relied on".[29]

The supervisory powers of supreme jurisdictions in Central Europe went beyond the extensive review of individual decisions of lower courts. A feature which, following the Soviet model, was introduced in these systems in the 1950's was the power of the supreme jurisdiction to issue binding guidelines, interpretative statements concerning important legal questions.[30] This power could be exercised completely *in abstracto*, i.e. with no relation whatsoever to an individual case pending before the supreme, or any other, jurisdiction. The adoption of a guideline could be suggested by the judges but also by the minister of justice. Interestingly, quite a few of the supreme jurisdictions in the region have kept these "quasi-legislative functions", highly questionable in terms of the separation of powers, even after the 1989 revolution.[31]

Supreme courts and the judiciary generally entered the post-revolution transformation times with very little or no credit. The distrust towards the judicial system is wide-spread. This might not be fully applicable in the case of Poland, where the supreme judicial corps was to a large extent replaced,[32] it holds true, however, for most of the other post-Communist jurisdictions, most notably for the Czech Republic and Slovakia. A wide-spread distrust towards the ordinary judiciary was evidenced by two broader developments in the judicial systems.

Firstly, the first half of the 1990's witnessed a great "boom" in legal remedies. These were put in place partly because of the introduced judicial "rehabilitations", which was a way of re-opening final judgments from the Communist times that were adopted illegally, often many years before. But the wave of remedies did not stop there. Other extraordinary remedies, extraordinary appeals and complaints were put in place, in the somewhat naive vision that more remedies will mean more justice and will avoid

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[29] As a former dissident lawyer and the post-1989 Chief Justice of the Czech Supreme Court and later Minister of Justice, Dr. Otakar Motejl, notes in his memoirs, that when he was appointed a justice to the then Czechoslovak Supreme Court for a short period during the so-called Prague Spring (1968), he was the only judge there who was not a member of the Communist Party. In: *Kalenská, R.* LEXikon Otakara Motejla [Otakar Motejl´s LEXicon]. Nakladatelství Lidové noviny: Prague, 2006, at p. 327.

[30] Further see *Kühn, Z., Bobek, M., Polčák, R. (eds.)* Judikatura a právní argumentace [Case law and Legal Reasoning]. Auditorium: Prague, 2006, at p. 49 and f.; *Kühn, Z.* The Authoritarian Legal Culture at Work: The Passivity of Parties and the Interpretational Statements of Supreme Courts. Vol. 2 [2006] Croatian Yearbook of European Law & Policy 19, at p. 23 – 25. Interestingly, other jurisdictions, most notably France, have returned to the possibility for supreme jurisdiction to issue binding guidelines for lower courts following a request from the lower court judges ("*saisine pour avis*"). See In: *Yessiou-Faltsi, P. (ed.),* cit. above, n. 2, p. 52.

[31] The Czech Supreme Court as well as the Czech Supreme Administrative Court are still entitled to adopt interpretative statements in the interest of "the unity of decisional practice of lower courts" - § 14 s. 3 of the zák. č. 6/2002 Sb., *o soudech a soudcích* [Law no. 6/2002 Coll., on Courts and Judges] and § 12 s. 2 of the zák. č. 150/2002 Sb., *soudní řád správní* [Law no. 150/2002 Coll., the Code of Administrative Justice].

[32] *Sadurski, W.* Rights Before Courts. A Study of Constitutional Courts in Postcommunist States of Central and Eastern Europe. Springer: Dordrecht, 2005, p. 43.

illegality and injustice done by the judicial system in the previous years.[33] This entailed, *inter alia*, very broad access to the supreme court(s): the courts could be seized not only by appeals for revision by the individuals, but also by extraordinary appeals lodged by the minister of justice "in the interest of legality" or by special complaints of illegality.

The second significant feature for the position of supreme jurisdictions in the Central European region is the advent of constitutional courts. All the countries in the region established a free-standing, specialised and concentrated constitutional judiciary/court. Why this model was adopted is open to debate: apart from the obvious historical roots[34] and a strong German influence, distrust towards the old Communist judiciary was also voiced, at least in the case of the then Czechoslovakia. The post-Second World War constitutional courts can be said to be tools of judicial transition. Their crucial function is to safeguard and enforce the provisions of the new constitution vis-à-vis the old, be it post-Communist or somewhat earlier post-Nazi government as well as judiciary. These constitutional courts were often given the power to review individual judicial decisions, including final decisions of supreme courts, by means of individual constitutional complaints. As will be discussed further below on the example of the Czech Republic, this power turns the constitutional courts into powerful actors that can greatly influence the role and functions of (until then) supreme jurisdictions within the legal system.

Access to the Supreme Court in the Matters of Civil Justice

With the notable exception of Estonia,[35] most of the post-communist countries after the 1989 revolution find themselves coming back to variations of the German revision model.[36] This is not surprising – at least the Central European countries can be said to belong to the Germanic/Austrian legal family and other countries in the region are under a distinct Germanic influence.

The same is true of access to the Czech Supreme Court (hereinafter also the "CSC") in matters of civil justice. The original model adopted in a major reform of civil justice in 1991[37] was a strange mixture of the cassation and revision model. On the one hand,

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[33] As observed by Otakar Motejl when reflecting on the legislative reforms of judicial procedure and role of supreme courts in the early 1990's, in which he participated, In: *Motejl, O.* Nejvyšší soud – nejvyšší spravedlnost? [Supreme Court – Supreme Justice?] In: *Šimíček, V. (ed.)* Role nejvyšších soudů ve sjednocující se Evropě - čas pro změnu? Mezinárodní politologický ústav, Masarykova univerzita: Brno, 2007, p. 87.

[34] For instance, the pre-Second World War Czechoslovakia had one of the first constitutional courts in the world, established, under the clear influence of Hans Kelsen, already in 1920.

[35] Estonia has, perhaps under the Finnish and Swedish influence, opted for a quite particular model of supreme jurisdiction. The Estonian Supreme Court (*Riigikohus*) is composed of four chambers (Civil, Criminal, Administrative and Constitutional), and leave to appeal is required for bringing a case before the court. According to the statistics available on the website of the Court (www.nc.ee), in 2003, the leave was granted in 22 % of civil petitions and in 17,5% of administrative petitions.

[36] Cf. a solid overview of the functions and competences of supreme jurisdictions in the post-Communist Europe in the proceedings of Second meeting of presidents of supreme courts of Central and Eastern European Countries, Pärnu, Estonia, 22 – 25 October 1996, published as „*The Competences of Supreme Courts*". Council of Europe Publishing: Strasbourg, 1998 and also the respective national reports in: „*Judicial Organisation in Europe*". Council of Europe Publishing: Strasbourg, 2000.

[37] Done in a fragmentary fashion by numerous partial amendments over the years following the revolution, the major amongst them being zák. č. 519/1991 Sb., *kterým se mění a doplňuje občanský*

access to the CSC in civil appeals (revision) was limited to casuistic categories, which, however, still resembled the German revision model: once one of the objective conditions was met, access to the CSC was granted. The conditions included various types of grave faults in procedure,[38] divergences in legal assessment of a case between the first instance court and the court of appeal and a broader category of cases where the appellate court certified that the case is of fundamental legal importance.[39] This latter category thus included the germ of some subjective assessment of the legal significance of the appeal to the CSC. On the other hand, however, the powers of the CSC were limited to either affirming or quashing the decision of the appellate court: the CSC could not, as in the ideal revision model described above, replace an appellate court judgment by its own.[40]

A major reform of civil revisions to the CSC was carried out in the year 2000. The newly framed § 237 o. s. ř., which stands with only minor amendments until today, provides for two general scenarios in which a revision against a judgment of a court of appeal is admissible:

(i) there is a *divergence in legal opinions* between the decisions of the court of first instance and the appellate court in the individual case at hand;

(ii) the Supreme Court reaches the decision that the legal question raised is of *fundamental legal significance*.

The broad category of a question of "fundamental legal significance" is narrowed down by the legal definition of this concept found in § 237 s. 3 o. s. ř. : *"The decision of the appellate court is of fundamental legal significance especially if it deals with a legal issue that has not yet been resolved in the decisions of the Supreme Court or if it deals with a legal issue on which opinions of the appellate courts and the Supreme Court diverge, or if it resolves a legal question in contradiction with the substantive law."*

At first glance, the overall impression is one of a classical revision model: conflicts in legal opinions of lower courts, novelty and/or fundamental importance of the legal question seem to be the guiding principles. The public functions, advanced by these categories, are, however, somewhat undermined by the last category: a revision shall be admissible if the decision of the appellate court is in "*contradiction with the substantive law*". This category goes in the opposite direction from all the other ones. It is about private interests and the review of the correct application of the law in the individual case. The wording of this category is, additionally, extremely broad: it is hard to find anything that, provided the legal opinions of the appellate court and the CSC diverge, cannot be said to be "*in contradiction with the substantive law*".

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soudní řád a notářský řád [Law no. 519/1991 Coll., Law Amending the Code of Civil Justice and the Notary Code].

[38] The then § 237 of the zák. č. 99/1963 Sb., *občanský soudní řád* [Law no. 99/1963 Coll., the Code of Civil Justice, hereinafter o.s.ř.].

[39] The then §§ 238 and 239 o.s.ř.

[40] The then § 243b o.s.ř.

Since 2000, the last category has been the genuine "Achilles' heel"[41] of the original intent to bring about a stronger filtration of revisions to the CSC and to accentuate the public purpose of the civil revision. What is or is not in contradiction with the substantive law can be interpreted very broadly. The debate on the presence of broader (public) purposes of a revision gets soon diluted by mechanical considerations as to whether or not the appellate court applied the law "correctly". The CSC soon started to exercise an almost full appellate jurisdiction.

In broader contextual terms, the fate of revisions in civil matters demonstrates the uneasiness the continental, or more precisely Germanic, legal cultures might have with fully and openly recognising that the task of supreme jurisdictions is public and not private in nature. They often try, in the search for a compromise, to reconcile both by mixing public and private purposes in the conditions for admission to the supreme judicial level. This never works: the supreme jurisdiction is soon swamped with revision of individual cases and the public purpose gets submerged. This has been the fate of the Czech revisions in civil matters as well: in the last three years, the CSC rendered approximately 3000 decisions annually in requests for civil revisions every year.[42]

This number would not be that fatal if the number of decisions indicated just the number of requests for a revision to be heard, but did not represent the number of cases in which the court was obliged to give reasons for its decisions. This number, however, includes also orders denying the revision, which form some 90 % of the total number of decisions rendered. However, even in cases when the revision was denied, the CSC gave reasons in its order disposing of the case as to why the revision was denied. Such an order is typically 8 – 10 pages long, the longest part of which is devoted to recounting the previous procedure, which is then followed by a rather standardised explanation as to why the issue raised is of no fundamental legal significance and, more importantly, why the appellate court did not err in its assessment of the substantive law.

This is yet another weak point of the revision system as currently in place in the Czech legal system. In a system where access to the CSC is conceived as one of a subjective right, provided that some "objective" conditions are met, there is a correlating duty of the court to give reasons why it came to the conclusion that these objective conditions were not met. The cassation system understands access to the supreme jurisdiction as one of right. Contrastingly, the appeal model clearly does not. The position of the revision system with respect to this question is somewhat ambiguous: the predominant answer might be that there indeed is, subject perhaps to statutory limitation, a right of access to the supreme jurisdiction.

This statement, however, conflicts with the overarching interests and purposes of the supreme jurisdictions under the revision model. On the one hand, one can clearly see a gradual strengthening of the public purposes orientation of the conditions for access to

[41] Cf. some of the calls for a narrower interpretation of what is in contradiction with the substantive law, made, *inter alia*, by the members of the Supreme Court, most notably *David, L.* Řešení právní otázky v rozporu s hmotným právem – Achillova pata přípustnosti dovolání [A Legal Solution in Contradiction with Substantive Law – The Achilles´ Heel of the Admissibility of a Revision]. Právník, 2003, vol. 10, pp. 990 and f.

[42] 2778 in 2004; 3131 in 2005; 3014 in 2006, with an overall deadlock of pending cases rising from 1400 in March 2004 to 2211 in December 2006 – statistics of the Supreme Court's judicial activity, accessible at www.nsoud.cz [last visited 20. 2. 2007].

the CSC. This draws the revision model closer and closer towards the appeal one. On the other hand, the procedural basis before the supreme jurisdiction remains trapped in the subjective right perception of access to it: this pulls the system back in the contrary direction, towards the cassation model. This is precisely the current weak spot of the Czech revision model, which could otherwise be seen as a compromise between the two "extreme" solutions: the drive towards the appeal model is undermined by the procedural roots of the cassation one. This means, in practical terms, that albeit the CSC might nominally have some discretion in selecting the cases under the revision model, most notably in the form of interpreting what is a question of fundamental legal significance and so on, the realisation of this discretion is compromised by the fact that it has to give reasons for its decision to deal with case A and not to deal with cases B, C or D. Within the procedural framework of the Czech civil revisions, the CSC judges and their law clerks spend the vast majority of their time writing reasoned orders in those 90 % of cases, where they decide not to grant a revision, i.e. in cases, which have zero public purpose.

A logical step at this point would be to dispense with the duty to state reasons in cases when the revision is not granted. The time and resources of the court would then not be spent on useless reasoning as to why a revision is not admissible and would instead be channelled into a more in depth analysis of those cases which are admissible. This is, however, a more fundamental step than it appears at first glance. This very step might be seen as genuinely crossing the line between the revision and the appeal model. It would give the supreme jurisdiction complete discretion as to what cases it wishes to hear. Once the reasoning requirement is abandoned, one also lets fall the notion that access to the supreme jurisdiction is based on "objective" criteria set out in the law, which can be said to correspond with a "subjective" individual right of access, which then in turn requires reasons to be given explaining why, under the circumstances, the claimant's case does not qualify for revision.

This final step was attempted. One of the amendments to the Code of Civil Justice in 2000,[43] passed at the same time that the above-described new criteria for civil revisions to the CSC were adopted, provided also that an order denying revision because the application raises no question of fundamental legal importance need not be reasoned. This amendment was struck down by the Czech Constitutional Court (hereinafter also the "CCC"). In a sweeping (plenary) decision,[44] the CCC held that the abolition of the duty to give reasons as to why a revision is not admissible constitutes an unconstitutional violation of the individual right to the judicial protection, guaranteed by Art. 36 s. 1 of the Czech Charter of Fundamental Rights and Basic Freedoms.[45] The main arguments levelled by the CCC against the selection of cases in civil revisions generally and the abolition of the duty to give reasons for a denial of a revision specifically can be regrouped into the following categories:

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[43] § 243c s. 2 o.s.ř., introduced by zák. č. 30/2000 Sb., *kterým se mění zákon č. 99/1963 Sb., občanský soudní řád* [Law no. 30/2000 Coll., Law Amending the Code of Civil Justice].

[44] Judgment of the Constitutional Court of 11 February 2004, case no. Pl. ÚS 1/03, Sb. n. u. US, sv. 32, č. 15, str. 131 [Collection of the Decisions of the Constitutional Court, hereinafter also CDCC, vol. 32., no. 15, p. 131] published also in the Collection of Laws as no. 153/2004.

[45] Art. 36 (1) Charter provides that *"Everyone may assert, through the legally prescribed procedure, his rights before an independent and impartial court or, in specified cases, before another body."*

(i) It denies the fundamental right of access to court.

(ii) It violates the principle of equality between individual applicants.

(iii) The absence of the duty to give reasons negates the private purpose of the revision and reduces the individual applicant to a "supplier of material" for the unification of the case-law.

(iv) The absence of the duty to give reasons may lead to arbitrary judicial decision-making. It might be misused as a tool for less responsible judges in their efforts to dispose of cases.

These arguments will be subject of a detailed discussion below.[46] What is important at this stage is to highlight the repeatedly uncompromising stance of the CCC to the Supreme Court's and also the legislature's effort to limit access to the CSC, be it in terms of procedure (absence of reasons given for a refusal to hear a revision), or in terms of the substantive criteria of selection. The CSC efforts of a more restrictive interpretation of the revision admissibility criteria, be it in civil as well as criminal revisions, have also been repeatedly rejected by the CCC.[47]

Access to the Supreme Administrative Court

Another attempt to redefine the role of a supreme jurisdiction came from the Czech Supreme Administrative Court (hereinafter also the "SAC"). Czech administrative justice as a separate jurisdiction is a new one.[48] It is a two-instance system: special administrative divisions of regional courts act as administrative courts of first instance; the SAC is the court of last instance. The cassational complaint (*kasační stížnost*) is the remedy against a final decision of a regional court. Despite its name and its label as an "extraordinary remedy", the cassational complaint is in fact a very "open" remedy, being much closer to a full appeal than to a civil revision.

This broadly conceived access to the SAC resulted, soon after the creation of the Court, in a considerable influx of cases.[49] The most troublesome was the exponential increase of cassational complaints in cases concerning asylum seekers, which soon reached thousands of new cassational complaints every year.[50] Most of these complaints had not other purpose than to prolong the stay of the asylum seeker in the country: as long as the

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[46] See below, point III. 1.

[47] Apart from the judgments no. Pl. ÚS 1/03, quoted above, n 44, see also judgment of 15 July 2004, case no. II. ÚS 594/02, CDCC, vol. 34, no. 99, p. 57; judgment of 23 June 2004, case no. I. ÚS 492/03, CDCC, vol. 33, no. 82, p. 297; judgment of 28 July 2004, case no. I. ÚS 599/03, CDCC, vol. 34, no. 105, p. 107 and the judgment of 18 August 2004, case no. I. ÚS 55/04, CDCC, vol. 34, no. 114, p. 187.

[48] As from 1. 1. 2003, with the entry into force of zák. č. 150/2002 Sb., *soudní řád správní* [law no. 150/2002 Coll., Code of Administrative Justice]. However, even before the establishment of the separate system of administrative justice, limited judicial review was performed by civil courts.

[49] About 3000 cases in 2003, 4722 cases in 2004, 4550 in 2005 (SAC´s statistics available at www.nssoud.cz).

[50] From 409 cassational complaints in asylum matters in 2003 to 3124 complaints in 2004. Futher see *Baxa, J., Mazanec, M.*, Správní soudnictví ve věcech azylových. Rozbor recentního a současného stavu u Nejvyššího správního soudu [Administrative Justice in Asylum Matters. Analysis of the Recent Situation before the Supreme Administrative Court]. Soudce, 2005, vol. 4, pp. 23 – 30.

decision of the Court was pending, the asylum seeker could not be deported.[51] The area of cassational complaints in asylum matters thus called for a speedy reform of access to the SAC. From amongst the models contemplated, a quite radical solution was eventually adopted. The new § 104a of the Code of Administrative Justice[52] provides that:

> *(1) The Supreme Administrative Court shall reject a cassational complaint in asylum matters, if its significance does not extend substantially beyond the individual interest of the complainant.*
>
> *(2) An order rejecting a cassational complaint under section 1 requires the unanimity of all members of the chamber.*
>
> *(3) An order under section 1 need not be reasoned.*

This new provision clearly departs from the traditional revision model: the "objective" conditions are replaced by one very broad criterion to assess whether the complaint goes "*substantially beyond the individual interest of the complainant*". This signifies a clear recognition of the public purpose component in the model of access to the SAC. A mere private individual interest to further litigate is not sufficient: there must be a "public" dimension to the individual complaint. The departure from the duty to give reasons is also significant, as is the requirement that, in rejecting a complaint, the chamber must act unanimously.

In a series of recent decisions, the SAC laid down the categories as to when an individual cassational complaint will go "substantially beyond the individual interest of the complainant". These will be typically the case in which:

(i) The question of law raised by the complaint has not yet been resolved by a decision of the SAC (novelty of the question).

(ii) There is divergence in the case-law on the question of law raised.

(iii) There is established case-law on the question of law raised, but the SAC intends to change its case-law.

(iv) The decision of the regional court suffers from a fundamental error in the legal assessment of the case, which had impact on the substantive outcome of the case. This excludes mere faults in procedure with no impact on the outcome of the case.[53]

In the up-to-date practice of the SAC, the Court generally gives reasons for rejecting the cassational complaint. This means that so far, it has not realised the opportunity given to it by the s. 3 of the § 104a s.ř.s. This practice of the SAC is striking: albeit the legislature has expressly granted it the right to select the cases to be heard, in a fashion

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[51] Similar problems with judicial protection in asylum matters are common to many Member States of the European Union – cf. the proceeding of the colloquium of the Association of the Councils of State and the Supreme Administrative Jurisdictions of the European Union, held on 20 – 21 June 2005 in Brussels with the title: *„Procédures judiciaires en matiére de contentieux des etrangers et des réfugiés"*, available online at http://www.juradmin.eu/seminars/q_a_2005.pdf [last visited 3. 3. 2007].

[52] Zák. č. 150/2002 Sb., *soudní řád správní* [Law no. 150/2002 Coll., Code of Administrative Justice], hereinafter also „s.ř.s.".

[53] Cf. e.g. order of the SAC of 26 April 2006, case no. 1 Azs 13/2006-39, č. 933/2006 Sb. NSS or order of 4 May 2006, case no. 2 Azs 40/2006-57, both accessible at www.nssoud.cz.

similar to the appeal model, the SAC has judicially re-interpreted this model as meaning in fact the revision one. The categories as to when an individual complaint extends substantially beyond the individual interest of the complainant, as interpreted by the SAC, strongly resemble the classical revision categories, especially the fourth category: fundamental error in law committed by the lower court. Why is the SAC acting in this strange way, which negates the change in the law adopted by the legislature? Why is it pushing the envisaged appeal model back into the revision box?

The answer is apparent from the above-outlined history of civil revisions. The Czech Constitutional Court clearly stated that the CSC must give reasons for its denial of revision, be it in a very brief form. Absence of reasons for rejecting an application for revision to the CSC is unconstitutional. It is clear that the SAC, by giving at least some, albeit sometimes rather concise reasons, is protecting itself against a similar reaction by the CCC as far as the selection of cassational complaints in asylum matters is concerned. It is thus the legal opinion of the CCC that prevents any change in this area, and both Czech supreme courts are mindful of that.

Constitutional Courts: How Do They Fit into the System?

The advent of constitutional courts in the 1990s in the former Soviet bloc meant that a new institution was created within the established system of the organisation of justice. Some supreme jurisdictions accepted the new institution fairly well.[54] Others had and are still having some difficulties accepting the strange new "political" body calling itself a court. The latter category includes also the Czech Republic.[55]

In theory, constitutional courts in Central Europe, modelled on the German *Bundesverfassungsgericht*, are supposed to act as the protectors of the new constitution and its values. Their jurisdiction should be limited to the question of constitutionality. The practice is, however, somewhat different: there are two institutional factors which gradually turn the Constitutional Courts in Central Europe into genuine supreme jurisdictions for all areas of law.

Firstly, some of the Central European constitutional courts have been given the power of hearing individual constitutional complaints against last instance decisions of ordinary courts.[56] This means that final judgments, from whatever echelon of the judicial hierarchy, can be reviewed by the Constitutional Court. Secondly, none of the Constitutional Courts in Central Europe, including its forebear, the German *Bundesverfassungsgericht,* was ever able to define what is a question of constitutional

[54] The one example of "success" being Poland and the "positive" competition between the three Polish highest jurisdictions which one of them will be more "activist" in constitutional interpretation. See *Garlicki, L.* Constitutional Courts versus Supreme Courts. I•CON, Vol. 5, no. 1, 2007, pp. 44–68, at p. 58 and 59.

[55] The CSC has repeatedly declined to follow some of the CCC's case-law. Further on this point, see e.g. *Kühn, Z.* Making Constitutionalism Horizontal: Three Different Central European Strategies. In: *Sajó, A., Uitz, R.* The Constitution in Private Relations: Expanding Constitutionalism. Eleven International: Utrecht, 2005, pp. 236–240.

[56] Most notably the CCC (Art. 87 (1) (d) of the Constitution of the Czech Republic) and the Slovak Constitutional Court (Art. 127 of the Slovak Constitution)

significance, i.e. to define the scope of its own review. Every case and legal dispute can be rephrased in terms of constitutionality and fundamental human rights.[57]

These two factors turn the constitutional courts into de facto courts of last instance for all branches of law. About 30% of the annual docket of the CCC, which has now risen to more than 3000 new cases every year, are constitutional complaints against the last instance decision rendered by one of the supreme courts.[58] More than 60% of the remaining docket are complaints against final decisions by other courts.[59] Thus, in more than 90% of its activity, the CCC reviews final judgments of courts.

The negative position of the CCC in relation to the efforts of the CSC to regulate its docket in civil revisions can be traced back to this functional shift: it is evident that a *de facto* supreme jurisdiction, which has itself no formal filtration device of cases before it, would hardly allow its appellate courts to filter their docket. The underlying fear is that the cases rejected by both of the supreme courts would eventually arrive before the CCC and increase its already considerable and not manageable docket. These concerns are not clearly voiced in the case-law of the CCC,[60] but expressed in the terms of constitutionality and the legal protection of the individual. The following section will firstly examine these claims. It then turns to the broader question as to whether the selection of cases before the CCC itself might be the solution to some of these problems.

Constitutionality of the Selection of Cases

In its decision declaring the section of the Code of Civil Justice, which allowed the CSC to reject applications for revision without reasoning, unconstitutional, the CCC gave four reasons. The first and perhaps the strongest claim is that this power deprives the individual of the right of access to court. At the same time, the CCC admits that there is no right of access to the CSC *per se*: the revision is framed as an extraordinary judicial remedy. On the other hand, once such access is generally possible under the national legal system, the individual access to it must be guaranteed on a fair, equal and non-arbitrary basis. This means, *inter alia*, that in the interpretation and the practice of the

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[57] As one member of the CCC put it in a personal interview with the author, virtually everything can be a constitutional question provided the respective constitutional document contains at least the following three basic rights: human dignity, right to a fair trial and the equality guarantee.

[58] The figures obtained by the author on 20 March 2007 from the CCC´s registry are as follows: in 2004, the total number of constitutional complaints filed was 2710, out of which 823 complaints (i.e. 30%) were contesting last instance decisions of either CSC or SAC. In 2005, the numbers were 2981 (total number of complaints) with 989 complaints against both supreme courts' decision (i.e. 33%). Finally, in 2006, the total number of complaints has risen to 3453 with 1082 complaints challenging final decisions of one of the supreme courts (i.e. 31%).

[59] In 2004, the number of constitutional complaints lodged against final decisions of courts of all instances with the exception of the both supreme courts (i.e. district, regional and high courts combined) was 1620 out of 2710 (i.e. 60% of the total docket); in 2005, it was 1819 complaints out of 2981 (i.e. 61%); in 2006, it was 2107 complaints out of 3456 (i.e. 61%).

[60] They are, however, voiced by some of the members of the CCC speaking extra-judicially, most notably by the Chief Justice of the CCC, Mr. Pavel Rychetský (for instance at a conference entitled „*Zákon o Ústavním soudu po třinácti letech: vznik, vývoj, problémy a úvahy de lege ferenda*" [The Law on the Constitutional Court 13 Years Later: the Origin, Development, Problems and Reflections on the Future], held in the Czech Senate on 18 May 2006).

extraordinary remedy, the CSC must also take into account the protection of subjective rights of the individual.[61]

This reasoning is problematic: on the one hand, the CCC agrees on the surface with the general proposition that there is no right of access to the CSC.[62] But then, instead of logically concluding that where there is no right, there is no correlating duty on the part of CSC to state reasons, the CCC takes a step to the side and argues that once there is an extraordinary remedy in place, the individuals will pursue their private purpose in using this remedy and the CSC must protect their subjective rights of equal and fair access. This conclusion negates the starting proposition and creates a *de facto* subjective right of access to the CSC. It just rhetorically shifts the right from a clear right of access to a right to have the individual application for access processed in a fair and equal way, which includes providing reasons why the access was not granted.

An issue in its own right is also the question what really constitutes a right of access to a supreme court. Is it the right to submit a case for consideration or the right to have every case examined on merits by the supreme jurisdiction? If one were to argue that a genuine right to access requires the latter, then it is obvious that such a "right" is already being violated by the CSC as well as by the CCC itself on a daily basis: more than 90% of all applications to the CSC as well as constitutional complaints to the CCC are already today being rejected as manifestly inadmissible/unfounded, with often very summary reasoning that mostly recounts the previous procedure. One might really wonder what kind of individual protection is being offered by a superficial and skimming-like review of thousands of cases.

The equality argument is an intriguing one: does the selection of cases create inequality among individual applicants? The underlying question here would be what type of equality a judicial system is supposed to guarantee. Is it a formal or a more substantive vision of equality? The right of access of every individual to the supreme jurisdiction is a formalised vision of equality: irrespective of the importance and complexity of the legal questions raised, the application of every individual will be examined. A more material vision of equality might take into consideration the difference in the complexity of the dispute: to accord all cases the exact same treatment and to review again and again a trivial case of a bounced cheque as well as a complex wrongful birth dispute might in the end negate the very ideal of justice toward which a judicial system is supposed to strive: not all cases are alike and to treat them in that way would violate the requirement of (material) equality.

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[61] Most strongly put in the judgment of 10 May 2005, case no. IV. ÚS 128/05, unpublished, available online at www.judikatura.cz, where the CCC stresses that the individual cannot be reduced to a "supplier of material" for the unification of the case-law.

[62] Referring also to the case-law of the European Court of Human Rights, which stated as far as the obligations of the Contracting Parties under Art. 6 (1) and Art. 13 of the European Convention are concerned that firstly, Contracting Parties are not obliged to provide more than one instance of judicial protection and, secondly, that limiting access to higher or supreme jurisdiction through a "leave to appeal" or other filtration devices is not contrary to the European Convention. See e.g. judgment of 17 January 1970, *Delcourt v. Belgium*, Series A no. 11, points 25 and 26; judgment of 13 July 1995, *Tolstoy Miloslavsky v. United Kingdom*, Series A no. 316, point 59; judgment of 16 October 2001, *Eliazer v. the Netherlands*, no. 38055/97, CEDH 2001-X, point 31; judgment of 5 November 2002, *Wynen et Centre hospitalier interrégional Edith-Cavell v. Belgium*, CEDH 2002-VIII, point 32 or judgment of 23 October 1996, *Levages Prestations Services v. France*, CEDH 1996-V, points 44 and 48.

The crucial and perhaps also the starting point in the equality debate is the recognition that a supreme jurisdiction is called upon to perform at least some public functions. The public dimension of an individual case (novelty, complexity and/or divergence of the case-law) is the distinguishing factor that prevents treating all cases alike. Once such a reasonable difference is recognised, even an individual striving for a more formal vision of equality is obliged to accept that such two cases are in fact not alike. This means that they are not comparable and do not qualify for equal treatment.

Another argument contained in the case-law of the CCC is that the absence of the duty to give reasons negates the private purpose of the revision and reduces the individual applicant to a "supplier of material" for the unification of the case-law. What the CCC requires is that in the access to the Supreme Court, a reasonable balance must be struck between the public and the private purpose in the functioning of the supreme jurisdictions. The decision calls for a sound balance and the "reconciliation" of private and public interest in the adjudication process at the supreme level. According to the CCC, which is on this particular issue under the distinct influence of the German *Bundesverfassungsgericht*,[63] civil revision to the CSC must realise both purposes: the individual applicant cannot be reduced to a mere "supplier of material" for the unification of the case-law! Such a requirement, however appealing it might sound in theory, is in practice unworkable: the purpose is either predominantly public or private. Once private concerns and "individual justice" are allowed for consideration before the supreme jurisdiction, the cases that will be dealt with inevitably jump to the thousands.

This issue is of fundamental importance. It is precisely at this stage that the CCC gets to the crux of the question – all the other arguments given by the CCC are in fact secondary. This is a value-laden choice which finds itself at the beginning of the chain of reasoning on the issue. Some of the broader policy arguments as to why this choice might be re-assessed are the subject of the closing debate below.[64] Similar value choice might be expected from a judicial body the inherent function, rhetoric and *raison d´être* of which is the protection of individual rights. The only objection to this choice is that the main purpose of the CCC need not necessarily coincide with the main purpose of the both supreme courts.

The final group of arguments, namely that the absence of the duty to give reasons may lead to arbitrary judicial decisions and that might be misused as a tool for less responsible judges in their efforts to dispose of cases, brings one back to some of the issues already outlined above. These objections are naturally not expressly formulated in the case-law of the CCC.[65] They remain on the abstract level of prevention of

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[63] The German Federal Constitutional Court which dealt with the same issue in the 1970's - see order (2nd Senate) of 9. August 1978, -2 BvR 831/76-, published as BVerfGE 49, 148 and order (full court) of 11. June 1980, -1 PBvU 1/79-, published as BVerfGE 54, 277. Here the *Bundesverfassungsgericht* dealt with a very similar provision which allowed the *Bundesgerichtshof* to not give reasons for rejecting a civil revision in disputes of minor value ("bagatelle" disputes).

[64] Point IV.

[65] With the exception of a striking concurring opinion of a member of the CCC, Dr. Ivana Janů, to the decision of 17 July 2006, case no. Pl. ÚS 18/06, published as č. 397/2006 Sb. Mrs. Janů noted that "*[...] reference must also be made […] to the personal quality of the judicial corps of the SC in the conditions of the post-communist transformation of justice. In this connection, I have in mind the entirely unknown rule on the basis of which the selection of Justices of the Supreme Court has until now been practiced. A candidate's name is not made known in advance to the wider public, thus his*

"arbitrary" decisions taken by the CSC judges. There is hardly any sound argument to be put against the first concern, namely that a fully-fledged selection procedure with no duty to give reasons might be misused by some judges to more easily dispose of their docket. Some procedural safeguards can be put in place, such as the unanimity of a full chamber of five judges requirement or a self-imposed duty of the court to clearly identify the already existing case-law which deals with the legal questions raised by the application for revision or the cassational complaint.[66] It is nonetheless clear that in a system that does not trust its own supreme court judges to do their work in a responsible manner, no procedural tool, however elaborate, would be of any avail.

There are two approaches to this problem: the optimistic would be to hope that with the gradual generational turnover of the judicial corps at the supreme level, perhaps the degree of trust might increase as well. The cynical approach, on the other hand, might be that the system as a whole would still be better off even if the right to select and not to give reasons for it would be given to the current, "unreliable" supreme court judges. Even the "unreliable" judges are bound to decide at least some cases on the merits, for which they now would have the appropriate time and resources.

It might be suggested that there are no constitutional obstacles to the full selection of cases before both of the Czech supreme jurisdictions and the introduction of an appeal model. The real points of divergence are firstly a different vision on the part of the CCC as to what purposes both supreme courts should be fulfilling and a portion of supreme judicial politics, hidden behind the veil of the "constitutional protection of the individual".

Selection of Cases before the Constitutional Courts

This article deals with the role of supreme jurisdictions. As has, however, become apparent by now, the function and role of supreme jurisdictions cannot be seen in isolation from the constitutional courts, which are in fact the genuine supreme courts. The constitutional courts themselves are plagued by the quality versus quantity dichotomy and the need for the re-assessment of their own role. The post-Second World War model of concentrated and specialised constitutional review has been created as a tool of legal transition. At the same time, the primary function of these bodies is to provide protection of individual constitutional rights.[67] This initial institutional set up already creates an inherent tension within the same institution: is the role of a constitutional jurisdiction a more public or a private one?

The first obvious objection to any sort of selection of cases before the constitutional courts is that these are specialised and concentrated courts. In a way, they are the courts

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integrity and expertise is not even discussed in the press, which is a quite common practice in the case of Constitutional Court Justices [...] Even the most capable Chief Justice will manage to do little with a court on which sits also judges who have not developed a high level of restraint and sense of responsibility.". (Quoted from the English translation of the decision available at http://test.concourt.cz/angl_verze/doc/p-18-06.html).

[66] As is the case for cassational complaints in asylum matters before the SAC.

[67] Not only vis-à-vis the courts, but also the Parliament in the form of abstract review of statutes as far as their constitutionality is concerned. On this function of constitutional courts, see e.g. *Stone Sweet, A.* Governing with Judges. Constitutional Politics in Europe. Oxford University Press : Oxford, 2000, ch. 3 (pp. 31 – 60).

of first and last instance in constitutional litigation. Such an approach, however, disregards the gradual change in the position of constitutional courts in Europe. What was originally conceived of as a concentrated review became gradually decentralised by the fiat of the requirement of constitutionally-conform interpretation. First devised by the *Bundesverfassungsgericht,*[68] this approach was followed by all the constitutional courts in the Central European region.[69] Through the "*Ausstrahlungswirking"* and the duty of the court of general jurisdiction to interpret "ordinary law" ("*einfaches Recht*") in conformity with the Constitution (and, by implication, with the case-law of the constitutional court), courts of general jurisdiction were turned into miniature constitutional courts.[70] Once these doctrines are put in place, constitutional review is no longer a specialised and concentrated review and the Constitutional Court is no longer a single jurisdiction. It turns itself into a Supreme (Constitutional) Court.[71]

This of course presupposes that the courts of general jurisdiction have genuinely accepted their role as constitutional courts (of first instance) and also accepted the doctrines and the case-law of their domestic constitutional court. This is already the case in the "homeland" of this perception of the function of constitutional courts, namely in Germany. This might be perhaps also true of some countries, where the constitutional courts where created in the "second generation", such as Spain. The situation of the post-Communist Central Europe is more problematic: it is open to debate whether all the ordinary courts and judges have accepted and internalised their role as constitutional judges. It is however apparent that with the gradual acceptance of the constitutional role by the courts of general jurisdiction, the public purpose in the functioning of a constitutional court is becoming central. Individual protection of the constitutional rights is guaranteed by ordinary courts, private purpose driven litigation before the constitutional court loses its significance. Against these institutional settings, limitation of access to the constitutional court via a "leave to appeal" or similar procedure is reasonable. Similar arguments as for the introduction before other supreme jurisdictions apply fully here as well: quality should take precedence over quantity and there is hardly any sense in a constitutional court adjudicating on thousands of complaints every year.

The role of constitutional courts and possible limitation of access to them is the subject of an ongoing debate Europe-wide, especially with the view of the no longer manageable case-load of the constitutional courts in proceedings that allow for access of individuals in the form of an individual constitutional complaint

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[68] See e.g. the famous cases of BverfGE 7, 198 (207) – *"Lüth"*, BVerfGE 30, 173 (187) – *„Mephisto"*, BverfGE 34, 269 (280) – *„Soraya"*. Generally see *Dreier, H. (Hrsg.)* Grundgesetz. Kommentar. Band I (Artikel 1-19). Mohr Siebeck 1999, p. 66 and f. or *Von Münch, I., Kunig, P. (Hrsg.)* Grundgesetz – Kommentar. Band I (Präambel bis Art. 19.). München : C.H.Beck´sche Verlagsbuchhandlung 2000, p. 38 and f.

[69] In the case of the CCC, see e.g. judgment of 24 September 1998, case no. III. ÚS 139/98, CDCC, vol. 12, no. 106, p. 93; judgment of 10 November 1999, case no. I. ÚS 315/99, CDCC, vol. 16, no. 157, p. 165; judgment of 12 May 2004, case no. I. ÚS 367/03, CDCC, vol. 36, no. 57, p. 605.

[70] On the development of similar issues in the context of Western Europe, see *Stone Sweet, A.,* cit. above, n. 67, pp. 114 – 126.

[71] With the notable exception that the courts of general jurisdiction cannot invalidate statutes if they conflict with the Constitution. On the other hand, a lot can be achieved by the requirement of a „conforming" interpretation and, eventually, judges in these systems are also generally entitled to refer a statute for invalidation to the constitutional court.

(*Verfassungsbeschwerde, recurso d´amparo, ústavní stížnost*). In these systems, constitutional complaints filed by individuals account for more than 90% of cases and represent, in quantitative terms, several thousand complaints every year. Such a docket is of course beyond the capacity of any single court to dispose of, typically one comprised of no more than 20 judges. As was also indicated above,[72] these constitutional court developed disguised mechanisms on how to dispose of the docket: albeit most of them do not have a clear mandate to filter/select cases to be heard, it is current practice that more than 90% of all cases are rejected by an order as manifestly inadmissible, manifestly unfounded etc. The orders rejecting a constitutional complaint must again be reasoned. What develops is a very similar pattern to the already discussed practice of some of the supreme jurisdictions in the Central European region: most of the time and energy of the court is spent on these reasoned orders, which are of little or no significance to the legal system as a whole. Conversely, the court then lacks the time resources for the elaboration of real important issues, especially once novel and/or complex issues come up, which would require an in-depth analysis.

In Germany, the ever growing case-load of the *Bundesverfassungsgericht* has led to repeated amendments of the Law on the Federal Constitutional Court. When also the fifth amendment to the Law in early 1990's proved unsuccessful in restricting access to the Court,[73] the Federal Ministry of Justice set up a special committee under the chairmanship of Mr. Ernst Benda, the former president of the *Bundesverfassungsgericht*, whose task it was to suggest ways in which access to the court could be reformed.[74] The committee, after having discussed various ways how to reduce the caseload of the *Bundesverfassungsgericht*, came to an unequivocal conclusion: it recommended, by 10 votes to 1, to give to the *Bundesverfassungsgericht* the power to select freely the cases it will hear ("*Annahme nach Ermessen*"), which would be almost identical to that exercised by the U.S. Supreme Court with the certiorari procedure.[75] The proposals made by the committee were, however, not followed. The *Bundesverfassungsgericht* keeps disposing of the vast majority of its docket by very summarily reasoned chamber orders.[76]

A similar debate is present in other European states. Quite a particular approach was chosen by the Spanish legislator. The Spanish *Tribunal Constitucional* already has the power to reject manifestly inadmissible constitutional complaints (*amparo*) by an order which does not need to be reasoned. This power, however, was not being used by the constitutional judges, who still insisted on giving reasons also for rejecting manifestly

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[72] See above, n. 10.

[73] Cf. the key provision of § 93a of the Law on the Federal Constitutional Court as amended by the *Fünftes Gesetz zur Änderung des Gesetzes über das Bundesverfassungsgericht* [Fifth Law Amending the Law on the Federal Constitutional Court], BGBl I 1993, 1442.

[74] The proceeding of the committee were published in a report that represents perhaps the most in-depth discussion of the topic under the title *„Entlastung des Bundesverfassungsgerichts; Bericht der Kommission."* [Lightening the Federal Constitutional Court; The Report of the Commission], Bundesministerium der Justiz (Moser Druck Verlag): Bonn, (Januar) 1998.

[75] *Ibid*, at p. 15.

[76] Albeit the ensuing amendments to the German *Bundesverfassungsgesetz* [Law on the Constitutional Court] indirectly follow the recommendations made by the Benda Committee – see the current wording of § 93a of the Law on the Constitutional Court, which makes the constitutional complaint subject to leave to appeal (*Annahme*) and § 93d s. 1, which provides that the refusal to grand the leave to appeal need not to be reasoned.

inadmissible complaints. The legislator thus felt obliged to have recourse to a more drastic solution: a recent legislative proposal would expressly prohibit the *Tribunal Constitucional* to give reasons once it is rejecting an *amparo* for manifest inadmissibility.[77]

Similar issues have also been discussed in relation to the Czech Constitutional Court.[78] Apart from the arguments already mentioned above, additional arguments voiced in the debate are twofold: the requirements of transparency, reasonableness and judicial economy. The transparency argument simply suggests that it might be proper to openly recognise what the CCC is already doing secretly: namely the disguised selection of cases by means of the tool of admissibility. The second argument is one of efficient/effective use of scarce judicial resources. Instead of wasting the energy of judges on explaining why a complaint is manifestly inadmissible,[79] the time and energy of the CCC should be channelled to decisions on the merits.

Quantity, Quality, the Role of Supreme Jurisdictions and Beyond

The overall judicialisation of social life entails a greater workload for the courts. Under the Communist rule in Central Europe, the courts were not the preferred forum for dispute settlement. This has changed since the 1989-revolution as the amount of litigation has been growing exponentially. A strong "regional" factor in Central Europe is also the embedded culture of appeals and recourse to all remedies at least theoretically open to the litigant.[80] Finally, as was already mentioned above, the years following the revolution were characterised by building up new avenues of judicial protection, new appeals and new complaints. These and perhaps also other factors create a veritable "running-through-instances" litigation culture in the Czech Republic: it not uncommon for a civil dispute to go all the way up to the Supreme Court (first instance, appeal and the revision), then to be submitted as a constitutional complaint to the Constitutional Court and finally to be sent as an individual complaint to the European Court of Human Rights in Strasbourg. If any of the higher jurisdictions annuls the decision of the lower courts, the entire story starts anew, this time accompanied by a parallel application for damages caused by the excessive length of proceedings.

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[77] See a pending bill in the Spanish Parliament of 25 November 2005, bill no. 121/000060 Orgánica por la que se modifica la Ley Orgánica 2/1979, de 3 de octubre, del Tribunal Constitucional, Boletín Oficial de las Cortes Generales, VIII Legislatura, Séria A., Núm. 60-1, 25 de noviembre de 2005.

[78] Most notably by a senior member of the CCC, currently vice-president of the Court, Pavel Holländer in *Holländer, P.* Legislativní reflexe dosavadního působení Ústavního soudu [A Legislative Reflection of the Up-to-day Activity of the Constitutional Court] In: *Dančák, B., Šimíček, V. (eds.)* Aktuálnost změn Ústavy ČR. Mezinárodní politologický ústav, Masarykova Univerzita: Brno, 1999, pp. 178 – 186. Justice Holländer suggested that the model recommended by the Benda Committee should be adopted and that the CCC should be given a wide discretion in selecting cases to hear.

[79] Which is, in itself, a logical contradiction: if a complaint was indeed manifestly inadmissible, one normally does not need to spend 8 to 10 pages explaining why, if this is so manifest. This is, however, the problem of the system of selection itself, where the „manifest inadmissible" category, originally conceived as a narrow category for indeed spurious and empty complaints, is transformed into a *de facto* filtration device.

[80] In this respect, Central Europe can be said to be obsessed with a genuine „*Instanzmentalität*", which J. A. Jolowicz mentions as being a very foreign to an English and the common law world mind when observing the Germanic legal culture. *Jolowicz, J. A.* cit. above, n. 5, at p. 59.

This litigation culture is nourished by somewhat problematic belief that more instances equals greater protection of the subjective rights of the individual. It is, however, hard to see how five rounds of litigation (first instance, appeal, revision, constitutional complaint, Strasbourg) increase the protection of the individual. No system of remedies can be construed as involving a process without end. Moreover, as commonly stressed, justice delayed is justice denied. What is the purpose of delivering a final decision that comes more than a decade after the dispute started before the court of first instance? To provide the applicant with a judicial certificate as to what might have been the law fifteen or so years ago?

In the constitutional culture that developed in Europe following the Second World War, the protection of individual rights is in the centre of the legal discourse. There is no doubt that also supreme jurisdictions are called upon to protect these rights. This does not, however, mean that they would be doing so by reviewing and reassessing every individual case that comes before them. That would negate the logic of a system of courts and judicial remedies. To provide individual protection in every individual case is the task of the lower courts, especially the courts of first instance. Their duty is indeed to deal in detail with every case and every legal issue presented before them. The duty of supreme jurisdictions is, however, a different one: their role is to authoritatively settle contentious issues and divergences in legal opinions of the lower courts, to develop the law further and to provide clear guidance in the form of settled case law to the lower courts. The supreme jurisdictions protect the individual far more by providing clear guidance in the form of predictable case-law than if they were to feign individual review of every application: they save the individual from the necessity of a repetitive passage through the judicial system in order to know what the law is. In the dichotomy introduced in the first part of this paper, the role of the court of first instance can be said to be predominantly a private-purpose one. On appeal, some public-purpose features (rectification of errors and the overall interest in legality) come into play. On the appellate level, both purposes are thus mixed. The purpose of the supreme judicial level is, conversely, a public one. Only in this balanced interplay does the judicial system provide an optimum protection of the individual rights.

Another already addressed issue is that one of transparency and certain "honesty" of the system. If one takes the individual rights protection talk seriously, what is genuinely in the interest of an individual? Should the individual be let to believe that a supreme jurisdiction has indeed the means and the intent to deal with her case, which is just one of a thousand other cases that has no chance of success, and then, one or two years later, receive a standardised "copy and paste" decision, typically rejecting the application as (manifestly) unfounded? Or might it be perhaps better for the individual to be told, within one or two months following her application that the application has no chance of success and the court will not deal with it at all?

By churning out thousand or even tens of thousands of decisions every year, supreme jurisdictions just depreciate the value of their work. What suffers is not just the quality and the persuasiveness of the decisions, but also the guiding role the case law of a supreme court should be realising. Such amount of case law inevitably produces contradictions. In practical terms, furthermore, no one is really able to follow such huge "production" of cases, including the lower courts. The problem becomes circular: the more case-law the supreme jurisdiction produces, the more chaotic the case-law

becomes, which then means that more and more cases arrive before the court, as the lower courts have no clear guidance.

Finally, it is clear that the problem of exponentially growing docket cannot be solved by the increase of the number of judges, but only by the change in the system of access to the court.[81] As is obvious from the practice of numerous supreme and constitutional courts across Europe, the question really is not whether or not to regulate the access to the supreme jurisdictions, but rather whether to do it covertly or overtly. A supreme jurisdiction that is swamped with cases it cannot handle invariably develops covert ways of disposing of the case-law. Under such circumstances, it is perhaps better to acknowledge the fact and to adapt to the new role and circumstance than to insist on an already empty facade.

The Czech case study on the introduction of greater selection elements into the originally conceived revision model of the access to the Supreme Court demonstrated the constitutional difficulties this move might provoke. The fate of the second attempt to implant an even stronger version of a selection system by the Supreme Administrative Court remains open. The SAC has been conscious of the problems the implant is experiencing. It has therefore kept it for the time being in an isolation ward, i.e. intentionally not using the instrument in its original meaning but replacing it by a *de facto* revision model. It is, however, clear that renewed attempts for a greater selection of cases before both supreme courts will eventually be made, this time perhaps accompanied by some reform proposals for the CCC itself. Are these doomed to fail?

They may be not. One of the explanations for the failure of the new model for civil revisions before the CSC might be simple indeed: wrong time, wrong place. The principle reasons might be summarised into three points:

(i) ongoing distrust towards the (supreme) judiciary;

(ii) ongoing uneasiness of ordinary courts to act as "constitutional courts of first instance";

(iii) inconsistent and lacking case-law in some areas.

As was already mentioned above, the general distrust vis-à-vis the judiciary is still quite strong in Central Europe. The distrust of the CCC towards the CSC is also well known. The second point has been also addressed above: in the "New Constitutionalism" settlement, all courts of general jurisdiction are constitutional courts. They are called upon to protect constitutional rights in their "general" adjudication capacity and interpret "ordinary" law in the light of the Constitution. Presumably, once all the courts of general jurisdiction, or at least those at the appellate and the supreme level, accepts this role the CCC adjudication has assigned to them, the CCC might see less reasons for its interventions into their sphere and might pull back in certain way, leaving the supreme jurisdictions more latitude in the selection of cases they wish to hear. Finally, the third point relates to the fact that the democratic legal order of the Czech Republic is a young one. In many areas of law, there is only little case-law of the CSC or of the

[81] In terms of economic analysis of the judicial function, the increase in the offer of timely settlement of judicial disputes will only increase the demand. The newly created capacities will then be quickly filled and the problem starts anew – see an interesting analysis in this respect provided by *Posner, R. A*. The Federal Courts – Challenge and Reforms. Harvard University Press, Cambridge 1999, pp. 53 –87 (part II).

SAC that would be consistent with the new constitutional order, i.e. which would be post-1989 and which could provide guidance for the lower courts.

All of these issues are issues of legal and judicial transition and will be settled in the upcoming years. Once they do, there is nothing which would prevent the legal system from limiting access to the supreme jurisdictions and reassessing their role in the light of the above-made remarks. Should the Czech and other Central European legal systems decide to do so, it is clear that this will have impact on the entire legal and judicial system. Three of the most significant consequences of a similar change will be mentioned here.

In the terms of the judicial structure, the limitation of access to the supreme judicial level would have for the consequence a certain "renaissance" or revaluation of the lower courts, especially of the courts of first instance. The above-described run through the instances practice reduces the courts of first instance into rather expensive "judicial file assembly points", which no one takes seriously. The judicial file is put together by the court of the first instance, but the "real" reasoning and the genuine arguments are often revealed only on appeal or before the supreme or constitutional court. If, on the other hand, the run through the instance would be stopped and the disputes necessarily limited to one, maximum to two levels of adjudication, the courts of first instance would become the main judicial forum, as it would be clear that the vast majority of cases starts and finishes there.

Perhaps the greatest change in the legal culture the selection of cases before the supreme jurisdiction would bring about would be the rise of the case-law and its role in the legal order. It is clear that already today, naive versions of legal positivism, which would deny any broader normative function to judicial decisions, are, with respect to the Central European legal systems, no longer tenable. Supreme and constitutional courts do make law, even if not it the form of single precedents, but in the form of established case-law. With the introduction of selection of cases before the supreme jurisdiction, the role of the case-law rises even further: the knowledge of and the argument from the case-law of the supreme jurisdiction becomes the key in access to it. An individual applicant will need to demonstrate, on the basis of a detailed argument from the court's previous jurisprudence, what is novel, fundamental or contentious about the issues and why it should be dealt with on the supreme judicial level. To a common-law lawyer, who is used to detailed analysis and the work with precedent before the courts, this observation may seem trivial. It is not trivial from the point of view of current practice in the jurisdiction in Central Europe: many of the filings to (also supreme or constitutional) courts in the region are just simple restatements of facts, with no or minimal reference to the applicable legislation, not to mention references to the case-law.

Eventually, the move towards selection of cases to be heard before the supreme jurisdiction in the Central Europe may also indicate a certain maturing and coming of age of a transforming society as a whole. Distrust might be replaced by recognition, extensive supervision and hierarchy by a more coordinative model of the judicial function.