Ten years after...

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Michal Bobek (ed.), *Central European Judges Under the European Influence. The Transformative Power of the EU Revisited* (Hart 2015) 449 pp.

The enlargement of the European Union towards the East had a number of special features compared to earlier accessions. The Central and Eastern European countries arrived from the periphery of Europe, and they had spent four decades with non-market economies, under one party regimes, and without a meaningful manifestation of the rule of law in their legal systems. Their transformation into market economies and liberal constitutional democracies, which led to their eventual accession to the EU, triggered much attention towards this group of countries.[1] One of the basic questions was how their law enforcement systems, especially public administration and the judiciaries, would be able to face the challenges of the correct application of EU law.

On the tenth anniversary of EU accession the authors of this edited volume were invited to look at the 'Europeanisation' of the judiciaries (in a broad sense, because the constitutional courts were also scrutinised) in four 2004 accession States: the Czech Republic, Hungary, Poland and Slovenia. Bulgaria is also present, even though it entered the Union in 2007 and it forms part of Eastern Europe rather than the historical Central Europe. The book might be well completed by the study on two Baltic States (Estonia and Latvia) by Evas.[2] Most of the authors are 'Ossis' and 'Wessis' at the same time; they come from Central and Eastern European countries, but lived and studied in the West. The authors constitute a special group from another perspective as well: they are academics and/or actual or former practitioners. The combination of experience and expertise enabled the book to use a modern theoretical framework and language and to

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[1] A. Łazowski (ed.), *The Application of EU Law in the New Member States: Brave New World* (TMC Asser Press 2010).

[2] T. Evas, *Judicial Application of European Union Law in Post-Communist Countries. The Cases of Estonia and Latvia* (Ashgate 2012). *See also* M. Varju and E. Várnay (eds.), *The Law of the European Union in Hungary* (HVG-Orac 2014).

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produce an insider's view on the judiciaries in question. The volume, which is the fruit of a conference held at the European University Institute, is structured into three parts: judicial reasoning, institutions and procedures, and constitutional courts.

Judicial reasoning – the issue of formalism

The basic reproach *vis-à-vis* the judiciaries in Central and Eastern European countries has been – and is – their strong formalism (textualism), which may cause problems in the correct application of EU law.[3] A hidden hypothesis of the authors is that being part of the EU constitutional-legal system should render the judicial reasoning more open towards factors beyond the text of the legal rules. The constitutional courts must produce a serious, realistic perception of the new constitutional constellation, perhaps in the framework of constitutional dialogue with the European Court of Justice. This idea is based on the principle of indirect effect and the *acte clair* doctrine of the European Court of Justice. In the preliminary ruling procedure, the Court's answers are often based on teleological and contextual arguments that the national judge must follow. The European Court of Justice invites national judges to apply the proportionality test, which cannot be done on a textual basis.

Maybe the most powerful contribution concerning the formalism question is from Matczak, Bencze and Kühn (Chapter 3). The authors analyse the changes in the legal reasoning of the administrative judiciaries in the Czech Republic, Hungary and Poland based on a very large amount of empirical data (more than 900 judgments were examined). They conclude that judges used more non-formalistic, non-traditional arguments in the period 2005-2013 than before EU accession. This development, according to them, was influenced directly and indirectly by EU accession. This is not to say that the formalism of judges has fully disappeared. The study reveals that there are differences within this relatively homogenous group of newcomers, and that the interpretation of the results of the quantitative analysis requires further qualitative research. Zalar (Chapter 7) is of the same opinion, but refuses the argument based on the 'authoritarian mentality' of the Slovenian judiciary (strongly suggested by Zobec and Černič in Chapter 6). He emphasises that the analysis of the excessively text-oriented judicial reasoning in Central and Eastern European countries should be supplemented by a thorough evaluation of the quality of judgments from the perspective of the proper application of (European) law.[4]

[3] Z. Kühn, 'World Apart: Western and Central European Judicial Culture at the Outset of the European Enlargement', 52 *American Journal of Comparative Law* (2004) p. 531.

[4] At p. 161.

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The study on the case law of the Polish Supreme Court on unfair terms in consumer contracts produced by Mańko (Chapter 4) combines both quantitative and qualitative analysis. This methodology renders the author's final remark highly convincing. It states that

> (t)he practice of the [Polish Supreme Court], at least with regard to interpretation of national implementing provisions to the Unfair Terms Directive, could be described as falling somewhat short of the EU law obligation stemming from the principle of harmonious interpretation and indirect effect.[5]

Readers note that while the Polish Supreme Court has not made a preliminary reference to the European Court of Justice, Hungarian courts have submitted seven preliminary questions concerning the interpretation of the same directive.

Bobek concludes that the textualism of Central and Eastern European judiciaries has deep historical roots and gives a dual explanation. The cultural explanation lies in the myth that judging is a clear-cut analytical exercise of mechanical matching of facts with the applicable law. According to the functional explanation, on the other hand, textualism serves as a tool of judicial self-preservation in unstable political environments.[6] This goes far beyond the thesis that claims that textualism is simply a persistent heritage of the communist or socialist past.

There are other challenges to the traditional approach to the textualism-formalism attitude of the Central European judiciaries. Cserne (Chapter 2) suggests that formalism is far from being a unique feature of the Central and Eastern European judges but it is a much more general judicial attitude. This is a clear invitation to extend the field of future comparative studies to the 'old' Member States. Maybe the most striking point here is that textualism may actually have positive outcomes for the unity and effectivity of the application of EU law.[7]

Institutions and procedures

Part 2 offers an insight into very different aspects of the relationship between Central European judiciaries and EU law.

The accommodation process (Europeanisation) of Polish administrative law is scrutinised from the point of view of effective judicial protection. Półtorak (Chapter 10) presents the process through examples of the broad interpretation

[5] At p. 97.

[6] At p. 401.

[7] Bobek, pp. 404-406. This point was also raised by T. Čapeta in 'Courts, Legal Culture and EU Enlargement', 1 *Croatian Yearbook of European Law and Policy* (2005) p. 23.

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of *locus standi,* a pro-European measure providing for a direct possibility to re-open proceedings that ended with a decision contrary to EU law, the acceptance of State liability for the violation of EU law, and amendments of the procedural codes. All in all, the Polish situation seems rather positive, which is unfortunately not fully reflected in the Hungarian judicial and legislative mentality. Hungarian administrative justice is analysed by Varju and Kovács (Chapter 9), who argue that for the administrative judges in Hungary, it is not always easy to be a national judge and an EU judge at the same time. This is particularly so when the national constitutional order does not allow the administrative judge to review the proportionality of administrative decisions. It remains to be seen how the new Act on administrative procedure, which is in preparation, will regulate this matter. The limited transformative power of EU law is presented also on the institutional framework of national judiciaries. Bobek and Kosař (Chapter 8) recall the EU requirement towards Central and Eastern European candidate countries to establish a Judicial Council with the aim of reinforcing the independence of the judiciary. The accurate investigation into the functioning of these bodies reveals that the Judicial Council model is unsuitable for countries in transition where internal ethical culture and a strong sense of judicial duty are still lacking.

Experiences on the preliminary ruling procedure are presented in the Bulgarian example. Kornezov (Chapter 11) warns that the impressive number of preliminary references from Bulgarian courts to the Eureopean Court of Justice must be assessed with care. While some lower courts have truly engaged with EU law, supreme and appellate courts have only marginally participated in this kind of European discourse. As one possible explanation, the author points to the generational aspect of the judiciary in Bulgaria: younger judges, more familiar with EU law, may use the preliminary ruling procedure in order to strengthen their position against the supreme courts.

Constitutional courts

The third part of the volume scrutinises constitutional justice in Central and Eastern European countries, with special regard to Poland, the Czech Republic and Hungary. The papers contain several comparative references to other (Western and Central) European constitutional courts' case law, especially the one of the German Federal Constitutional Court. These chapters seem to verify the idea known as the 'democracy paradox',[8] or as Safjan puts it in his synthesising paper, the Central and Eastern European constitutional courts' wish to reconcile

[8] W. Sadurski, 'Solange, Chapter 3: Constitutional Courts in Central Europe Democracy European Union', 1 *ELJ* (2008) p. 1.

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'tensions between the growing sentiment for "constitutional sovereignty" and the will to join the EU'[9].

The Polish Constitutional Tribunal's case law is presented by Konczewicz (Chapter 14) through a very detailed analysis of the famous *Supronowicz* case, delivered in November 2011. In this decision, the Polish Constitutional Tribunal made clear that EU secondary legislation may be subject to a constitutional complaint and the Tribunal may declare the EU act invalid. However, the declaration of invalidity becomes an *ultima ratio* and prior to adjudication, the content of the EU act may be clarified by referring questions to the European Court of Justice for a preliminary ruling. The explicit *final arbiter* status of the Polish Constitutional Tribunal, and at the same time the utmost respect for EU law, places the judgment in a position between *Solange I* and *Honeywell*. The author argues, however, that the Polish Constitutional Tribunal must give up its position as a defensive guardian of the Polish constitution and engage in cooperative constitutionalism.

The analysis of the jurisprudence of the Czech Constitutional Court is built around the different, evolving concepts of sovereignty. The Czech Constitutional Court's EU-related case law has always been determined by the conceptualisations of sovereignty, where the arguments moved from basic concepts to more complex definitions applied to global society and politics. Přibáň (Chapter 15) analyses mostly the decisions concerning the ratification of the Lisbon Treaty (*Lisbon I* and *II*).The chapter contains a briefer evaluation of the (in)famous, unprecedented judgment in *Holubec* (*'Slovak Pensions'*, January 2012) when the Czech Constitutional Court, taking the German Federal Constitutional Court's case law one step further, declared a judgment of the European Court of Justice *ultra vires*. According to the author's interpretation, the *Lisbon I* and *II* decisions are based on a very modern and pragmatic perception of sovereignty, adapted better to the age of globalisation than the concept applied by the German Federal Constitutional Court in its own Lisbon ruling. The Czech Constitutional Court considers sovereignty an instrument of achieving the post-national rule of law beyond state organisation, but, as affirmed by *Holubec,* it uses also this concept to reassert its powers against the EU.

The Czech Constitutional Court's decisions are in sharp contrast with those of the Hungarian Constitutional Court. Tatham (Chapter 16) points out that since EU accession the Hungarian Constitutional Court has done its best to avoid deep and clear statements on EU-related issues, even in the two major and most detailed judgments (*Lisbon Treaty* and *Fiscal Compact*). The laconic case law seems to follow the German Federal Constitutional Court's approach on its possible competence of an *ultra vires* and a constitutional identity review of EU law.

[9] At p. 379.

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This observation, however, is based more on hints than the explicit reasoning of Hungarian Constitutional Court decisions. Contrary to the interpretation given in this chapter[10], the Hungarian Constitutional Court has never annulled a Supreme Court (or other court) judgment on the basis that it neglected to observe European Court of Justice case law. The author observes that the amendments in the Hungarian Constitutional Court's competences in 2011, which make Parliament and government the major protector of national sovereignty instead of the Hungarian Constitutional Court, make it more difficult to bring EU matters to the court. The study might have been even more explicit when pointing out the dramatic changes in the powers, composition and *esprit de corps* of the Hungarian Constitutional Court, which is partly responsible for the constitutional crisis in Hungary.[11]

Conclusions regarding Central and Eastern European constitutional justice are formulated by former President of the Polish Constitutional Tribunal, Safjan, and editor Bobek. Safjan outlines the background of the complex relations of Central and Eastern European constitutional courts with the European legal space from a historical perspective. According to his interpretation of Central and Eastern European constitutional case law, it is important to distinguish between the purely theoretical arguments with harsh constitutional language and the very moderated outcomes of the decisions. (It is somewhat regrettable that this chapter's findings are based mainly on Polish constitutional jurisprudence, and comparisons are made mostly with the 'old' Member States' constitutional court rulings rather than with those in other Central and Eastern European Member States.) Safjan emphasises that constitutional court judges should not be expected to guarantee the protection of European law instead of their own constitution; all we should require is the proper application of the national constitution with attention to the European legal environment. As a forward-looking suggestion, he maintains that European federalism is the only way to handle the growing number of conflicts between national and European legal orders.

Bobek observes a radical U-turn in the evolution in minds of some Central and Eastern European constitutional courts. Before the 2004 accession the Polish and the Czech constitutional courts were the pro-active champions of 'Europeanisation'. 'However, only seven or eight years later, the same courts started assertively reviewing the compatibility of an EU regulation with the national constitution, or even declared an EU act to be *ultra vires*.'[12] In our view, the above observation is true as regards the Polish and Czech constitutional courts

[10] At p. 371.

[11] A. von Bogdandy and P. Sonnevend (eds.), *Constitutional Crisis in the European Constitutional Area. Theory, Law and Politics in Hungary and Romania* (Hart 2015).

[12] At p. 414.

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but not featured in the Hungarian constitutional court's case law, since the latter has not showed such significant changes after EU accession.[13]

Conclusions

In his final conclusions, Bobek argues that in contrast to the contributions of the book, the transition of Central and Eastern European countries (judiciaries) ended without fully achieving the intended aims. The transformation reformist moment is lost, and the systemic deficiencies of the State, including those of judiciaries simply became normalcy.[14] The revisiting of the transformative power of the European Union, as promised by the title of the book, led to the conclusion that the transformative power of European Union (law) has proved limited. These rather pessimistic, or perhaps realistic, views are underlined by the recent backsliding of democracy in each of these countries.

The readers find that in some contributions the development of democracy (the process of back-sliding) and changes (or on the contrary a kind of path-dependence) in the judiciary is not differentiated clearly enough. It is not emphasised enough that while the newly-established constitutional courts (and the constitutions) in these countries are strongly exposed to changes in the political arena, the behaviour of judges at ordinary courts are determined mostly by historical, generational and perhaps institutional factors. The observations of Avbelj on the Slovenian case (the judiciary is still widely regarded as a strong ally of the post-communist elite; it is unable to withstand the strong political pressure; through legal enforcement it furthered not the rule of law but partisan political interests,[15] is not generally valid with regard to all of the Central and Eastern European countries. As Bobek and Kosař state, individual judicial independence and performance might be much better in the Czech Republic than in Slovakia.[16]

Undoubtedly the volume is very well written and coherently structured. Not only the set of insider analyses but also the lessons for future research make it an excellent contribution to the literature on the legal-constitutional Europeanisation of the Central and Eastern European Member States. However, the need for a deeper analysis is evident from numerous perspectives. The researcher has to be cautious with figures, the statistics may hide important details of reality.[17] The quantitative investigation has to be completed with a qualitative analysis.

[13] A.F. Tatham, *Central European Constitutional Courts in the Face of EU Membership. The Influence of the German Model in Hungary and Poland* (Martinus Nijhoff 2013).

[14] At p. 417.

[15] At p. 288.

[16] At p. 195.

[17] Matczak, Bencze and Kühn, ch. 3; Korzenov, ch. 11.

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This is certainly so in the study of the legal reasoning of the judiciaries.[18] It is not always easy to identify the epicentre of legal Europeanisation: Is it the EU legal order, the European Court of Human Rights and other Council of Europe bodies (the Venice Commission) or an 'old' Member State (e.g. the German Federal Constitutional Court) that had an important influence on the Polish or Hungarian constitutional system?[19]

It is evident that the administrative courts are on the frontline of the application of the EU law, so it is highly understandable that the research is focused on them.[20] However, the experience of civil and criminal courts is also worth looking into.[21] The institutional-organisational aspect may also deserve more attention. (The importance of institutional settlements has been brilliantly demonstrated by Bobek and Kosař: the famous *Holubec* judgment of the Czech Constitutional Court certainly would not have been delivered without overt tension between the supreme administrative court and the constitutional court.) National procedural regulations – including rules on jurisdiction – also play a decisive role in applying EU law.[22]

Finally, the readers argue that the labels 'new Member States' or Central and Eastern European Member States do not seem to be productive enough, since these states are not really 'new' anymore; indeed, this bloc of countries show almost more differences than similarities. (This statement is also reinforced by Evas' investigation into the two 'Baltic States': Estonia and Latvia differ in so many respects.) Maybe it is time to undertake comparative studies covering both 'new' and 'old' Member States.

[18] Matczak, Bencze and Kühn, ch. 3; Zalar, ch. 7; Mańko, ch. 4.

[19] Tatham, *supra* n. 13.

[20] Matczak, Bencze and Kühn, ch. 3, Varju and Kovács, ch. 9; Półtorak, ch. 10. *See also* U. Jaremba, 'The Impact of EU law pn National Judiciaries: Polish Adminstrative Courts and their Participation in the Process of Legal Integration in the EU', 3 *German Law Journal* (2011) p. 930.

[21] Mańko, ch. 4; Galič, ch. 5.

[22] Varju and Kovács, ch. 9; Półtorak ch. 10.