What Role for Courts in Transforming a Society? A Central European Cautionary Tale

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Abstract:
This chapter analyses the role of courts in social transitions in the specific Central European judicial context. It explains why, for the reasons embedded in the historical experience of Central European judiciaries throughout the 20th century, the idea of courts-driven transformations is not likely to find that many enthusiastic supporters in ordinary courts within that region. There is nonetheless a notable exception in the form of the much more active, not to say potentially activist, constitutional courts and their contributions to societal transformation. The chapter concludes with a few moderate suggestions what then might be expected of ordinary courts in terms of transitions in the Central European settings.
Keywords: courts enforcing values; value discontinuity; formalism; textualism; teleological reasoning; transformative constitutionalism; Constitutional Courts; separation of powers; Central Europe; national application of EU law; European Convention

I. Introduction

In the moment of rule of law back-sliding and crises, who do we turn to for help? The courts. When musing over re-establishing rule of law constitutional democracy one day, who do we turn to again? The courts. The argument of this contribution is simple: because of their prevailing judicial culture, shaped by historical experience, the (ordinary)[1] courts in

1 Unless expressly stated otherwise, the term 'courts' used in this contribution refers essentially to all 'ordinary' courts, i.e. excluding constitutional courts. The special role

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Central Europe[2] might for at least some time, certainly before their judges themselves are replaced, carry out that first function with dignity. The courts can indeed help in defending the rule of law and liberal status quo for some time. However, to expect and exhort them to a pro-active (not to say 'activist') contribution to a societal change, once 'the regime' changes, yet again, is, in the historical context and the ensuing collective memory and self-perception of the Central European judiciaries, an endeavour unlikely to succeed.

This contribution is structured as follows: it starts by setting the scenes as regards the calls for a more active judicial role in societal transformations (section II). It then explains why the idea of courts-driven transformations is likely to fall on deaf ears in Central Europe, be it in the past (section III), but equally later on within the domestic application of EU law that remains at the level of abstract values or principles, but has been nowhere clearly articulated in the posited law (section IV). There is nonetheless a notable exception in the form of the much more active, not to say potentially activist, constitutional courts and their contributions to societal transformation (section V). Section VI concludes with a few moderate suggestions what then might be expected of ordinary courts in terms of transitions in the Central European settings.

II. The Enchantment and the Promise

(Il) Liberal scholars tend to be in love with courts and judicial power. But that affection is of a different kind than the umbilical cord that connects legal scholars and judges in the more positivist, mostly continental legal systems in Europe.[3] In the latter tradition, it is the predominantly practice-

played by constitutional courts is acknowledged and discussed below, in section V of this contribution.

2 For the purpose of this contribution, I use 'Central Europe' as shorthand for Poland, the Czech Republic, Slovakia, and Hungary. However, a number of statements made, certainly with regard to the perception of the judicial function and a number of historical connotations, might equally apply to Austria, Slovenia, as well as Germany.

3 For a traditional account in English, see Raoul Van Caenegem, *Judges, Legislators and Professors* (Cambridge: Cambridge University Press 1987), 53–65; or Stefan Vogenauer, 'An Empire of Light? Learning and Lawmaking in the History of German Law', Cambridge Law Journal 64 (2005), 481 and Stefan Vogenauer, 'An Empire of Light? II: Learning and Lawmaking in Germany Today', Oxford Journal of Legal Studies 26 (2006), 627.

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oriented and equally practice-driven scholarship that builds upon and systemizes the practice, offering tools and conceptualisation in return. Those approaches and tools are then used by courts, only to be then commented upon by the scholarship again. There is an ongoing intellectual exchange in both directions.

There is, however, a different type of scholarly enchantment with judicial power. It is when courts are not called upon only to adjudicate, in the old, good, often perhaps ridiculed, but by the positivist scholarship construed and expected, 'methodologically sound way'. The scholars want the courts to do more: not just to police the rules of the game, fairness and primarily procedural justice, but to bring about certain outcomes, to implement a given substantive vision of justice. The judicial reasoning style is supposed to change. So should the language of judicial prose. Such legal scholarship is no longer interested primarily in systemizing, explaining, or understanding. It is interested in mobilizing, transforming, in reaching certain outcomes. The keywords and self-description of the academic contribution to law change accordingly: from setting limits or making a prediction about judicial behaviour to mobilizing for change or societal transformation.

Such different perceptions are certainly not new. They keep surfacing in national and international legal discourse under various names in different periods. Their common denominator is that the new visions and their proponents label the established ones as 'old', 'outdated', 'formalist', or, in the more ideologically aggressive varieties as outright 'oppressive', just petrifying the previous societal structures under the guise of 'impartial judging'. The language employed is one of overcoming the traditional 'formalism' in legal reasoning and embracing a more purpose-driven reasoning style, implementing values and objectives in the process of adjudication.

A more recent strand of similar types of calls would come under the fashionable label of transformative constitutionalism,[4] a notion emanating from the South African post-apartheid experience, further elaborated upon with regard to the experience of a number of Latin American countries. A notable article to which a number of contributions invoking transformative constitutionalism as a recipe refer is Karl Klare´s 'Legal Culture and Trans-

4 It ought to be underlined that there is in fact little agreement on the exact content of the notion of 'transformative constitutionalism'. For an overview with further references to the various literature, see e.g. Michaela Hailbronner, 'Transformative Constitutionalism: Not Only in the Global South', The American Journal of Comparative Law 65 (2017), 527.

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formative Constitutionalism'.[5] There, transformative constitutionalism was defined as '*a long-term project of constitutional enactment, interpretation and enforcement committed […] to transforming a country´s political and social institutions and power relationship in a democratic, participatory, and egalitarian direction. Transformative constitutionalism connotes enterprise of inducing large-scale social change through non-violent political process grounded in law. I have in mind a transformation vast enough to be inadequately captured by the phrase 'reform', but something short of or different from 'revolution' in any traditional sense of the word.*'[6]

But what does all that mean in concrete terms for judicial work? What are courts supposed to do? Klare´s contribution gives some indications in that regard. It starts with a robust deconstruction of virtually all traditionally perceived limits to the judicial function, in the best tradition of critical legal studies.[7] Any and all constraints to the judicial function are briskly set aside: textual constraints in interpreting a legal text are just 'culturally construed'; there is no real boundary between law and politics in adjudication; judges and other participants in adjudication constantly make conscious or unconscious choices of values, perceptions and institutions external to the legal materials interpreted; there are value-laden choices even in routine cases of legal interpretation. All that leads to the classical 'denial' on the part of the judges of what they actually do: they believe themselves constrained by legal materials where they are actually not.[8]

Having deconstructed all the tenets of the previous legal culture as 'formalistic',[9] the real aim of which is, by '*the fiction of politically and morally neutral adjudication*',[10] to just preserve the status quo, what is created is a legal void to be filled by the values of the new constitution.[11] Those values are then to be pro-actively implemented in judicial decisions. They are no longer to be hidden in legalistic, formal reasoning, but are to be openly and

5 Karl E. Klare, 'Legal Culture and Transformative Constitutionalism', South African Journal on Human Rights 14 (1998), 146.
6 Klare (n. 5), 150.
7 It is no accident that the works of Duncan Kennedy and thinking of Critical Legal Studies feature prominently in the entire contribution.
8 Klare (n. 5), 156–166.
9 Klare (n. 5), 188.
10 Klare (n. 5), 166.
11 Klare (n. 5), 153–156, including social rights and substantive conception of equality; affirmative state duties; participatory governance; multi-culturalism; historical self-consciousness.

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pro-actively embraced: *rights discourse and legal reasoning need to be more candid and self-conscious about the politics of adjudication*.[12]

In all that enterprise, a key role is assigned to courts in progressing towards democratic transition. The examples of how courts ought to go about their new role are given with closing illustrations from the case law of the South African Constitutional Court in the 1990s, citing, in particular *Makwanyane,*[13] *Ferreira,*[14] and *Du Plessis*.[15] Klare disagrees, on merits, perhaps not surprisingly, with *Du Plessis*, but embraces *Makwanyane* and mostly also *Ferreira*. The bottom line is, however, that in all those cases, the South African Constitutional Court was less legally constrained and had more room for maneuver than it understood or acknowledged.[16] The results of the process of adjudication were just the outcome of 'good' (*Makwanyane* and *Ferreira*) and 'bad' (*Du Plessis*) value choices by the judges.

To a lawyer from Central Europe, all this sounds oddly familiar. The judges are asked to set aside their 'formalist' heritage, that is supposed to manifest itself by the textual adherence to the 'old rule' and the 'old system' of law. The judges shall embrace a more open, purposive reasoning style instead, which should take into account and incorporate, perhaps be even based on, the new values, goals and objectives projected into and guiding the process of adjudication.

Abstracting for the moment *from the content of the values promoted* and focusing *exclusively on the approach advocated*, there are indeed some uncanny parallels that come to mind from rather recent Central European history. Essentially, similar calls and exhortations for changed approaches in judicial method and the imperative for embracing the 'new values' had been made within the same geographical space around 2004, in the 1990s, but also in 1950 and in the late 1930s. Equally, there is a rather vivid historical memory that those judges who did not follow the Syren's call for 'changing their ideological tune' in the respective period, were removed.

12 Klare (n. 5), 187.

13 *State v Makwanyane,* 1995 (6) BCLR 665 (CC). The case concerned the issue of the constitutionality of the death penalty.

14 *Ferreira v Levin*, 1996 (4) BCLR 441 (CC). The case concerned the issue whether companies, that are unable to pay their debts, should be compulsorily wound up.

15 *Du Plessis v De Klerk*, 1996 (5) BCLR 658 (CC). The constitutional issue raised in this case was the question of horizontal applicability of the rights and freedoms proclaimed in the freshly adopted Bill of Rights (i.e. essentially horizontal direct applicability of fundamental rights).

16 Klare (n. 5), 172.

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Those who followed those calls were removed soon afterwards, when new Syrens came to town.

All that contributed to a rather conservative judicial outlook within the ordinary courts, that is not too enthusiastic about stepping out of the confines of valid laws. That tendency might be called by various names. The classic insult is one of 'formalism', but that is incorrect.[17] Perhaps the more apt description is one of 'textualism'. Where did the tendency, assuming there is one, of Central European judges to 'sail closer to the text of the law', i.e. towards indeed a more textual approach to legal interpretation, come from?[18]

III. The Central European Experience: A Couple of Revolutions Too Many?

There might be a dual explanation: *cultural* and *functional*. On the side of legal culture, to some extent, textualism has always formed a part of the Central European judicial self-portrait. Germanic, or in this legal space rather post-Austrian, judiciaries start from the assumption that judging is a clear-cut analytical exercise of mechanical matching of facts with the applicable law. It is almost 'legal arithmetic'. Judges do not pass any ethical or moral judgments. That is for legislators to do. Judges just find (never create) the applicable (i.e. already extant) law strictly within the laws passed by the legislature. The judicial authority is derived from such technical legal knowledge, acquired and tested in a mandarin-like entrance examination and further fostered in a similar style of promotion and advancement.[19]

17 The only agreement there apparently is on what it means to be a 'formalist' is that it serves as an universal insult. For the rest, the notion is remarkably vague – see e.g. critically Martin Stone, 'Formalism' in: Jules Coleman and Scott J. Shapiro (eds), *The Oxford Handbook of Jurisprudence and Philosophy of Law* (Oxford: Oxford University Press 2002).

18 The argument in section II of this contribution is based on Michal Bobek, 'Conclusions: Of Form and Substance in Central European Judicial Transitions' in Michal Bobek (ed.), *Central European Judges under the European Influence: The Transformative Power of the EU Revisited* (Oxford: Hart 2015), 400–404.

19 Which is certainly, in the broader cultural parallel, the self-perception of large parts of traditional Continental (civil) career judiciaries – see e.g. John Bell, *Judiciaries Within Europe* (Cambridge: Cambridge University Press 2009) or Sophie Turenne (ed.), *Fair Reflection of Society in Judicial Systems – A Comparative Study* (Berlin: Springer 2015).

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Certainly, such a self-perception is, certainly partially, not an adequate description of the situation. But such expertise-derived authority restrains and *protects judges* at the same time. Judges are not called to judge others because they would be better in moral or ethical terms. Judges are called to judge others because *they know the law*, meaning that they have the technical knowledge of the codes, the acts of the Parliament, the case-law of the higher courts and the respective procedures to be followed. The text of the binding law is what decides. Judges are (often equally self-) presented as invisible, grey mice, devoid of any personal values, choices and personality.

Apart from this cultural judicial self-portrait, in itself again not too dissimilar to other civilian continental countries,[20] there is arguably another, *functional* reason for a greater inclination towards textualism in Central Europe. In a nutshell, textualism serves as a *tool of judicial self-preservation in unstable political environments*, within which legal values that normally ought to guide the contextual and purposive reasoning of judges change a bit too often.

To understand this functional reason, one has to look into the logic of revolutions, which has been the same in fascist Italy,[21] Nazi Germany[22] as well as Stalinist Central Europe.[23] All of these examples have one thing in common: as a number of other revolutions in modern history, they were based on *value discontinuity* with the previous regime *and continuity in the body of positive law*.[24] A revolution often happens overnight. Very soon thereafter, a new constitution or a sort of basic law is passed, thus refocus-

20 Further e.g. John P. Dawson, *The Oracles of the Law* (Ann Arbour: The University of Michigan Law School 1968), ch 1 or Jacques Krynen, *L'Etat de justice France, XIIIe–XXe siècle. Tome II: L'emprise contemporaine des juges* (Paris: Gallimard 2012), 21–42. For the jurisprudential account of such positivist interpretive ideology, see e.g. B Frydman, *Le sens des lois: histoire de l'interprétation et de la raison juridique* (3rd edn, Brussels: Bruylant 2011).

21 Guido Calabresi, 'Two Functions of Formalism', University of Chicago Law Review 67 (2000), 479.

22 Bernd Rüthers, *Die unbegrenzte Auslegung: Zum Wandel der Privatrechtsordnung im Nationalsozialismus* (Tübingen: Mohr Siebeck 1968) or Bernd Rüthers 'Recht als Waffe des Unrechts – Juristische Instrumente im Dienst des NS Rassenwahns', NJW (1988), 2825 (2833–2835).

23 Zdeněk Kühn, *The Judiciary in Central and Eastern Europe: Mechanical Jurisprudence in Transformation?* (Leiden: Martinus Nijhoff 2011).

24 Together with other examples, such as Vichy France – see the collected essays in 'Juger sous Vichy', Le genre human, No 28, November 1994. With regard to the administrative judiciary, see Pierre Fabre, *Le Conseil d´Etat et Vichy: Le contentieux de l´antisémitisme* (Paris: Publications de la Sorbonne 2001) or Jean Massot, 'Le

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ing the value foundation of the legal regime. However, the entire system of positive law, for some time, lags behind. No new regime is able to replace within weeks or even months the entire system of positive laws including codifications like the criminal, civil, commercial and other codes.[25] That takes years.

It is precisely in this period *after the revolution but before the system adopts its own laws*, i.e. laws that correspond with the new values of the society, that adjudicators (judges as well as administrative authorities, in fact) are asked to 'remedy' the deficient old laws via interpretation. Marxist law required, at least in its early (Stalinist) phase, that judges disregard the remnants of the old bourgeois legal system in the interest of the victory of the working class and the communist revolution. Judges were supposed to apply the law in a teleological way, always directing its purpose towards the victory of the working class and the dialectic approach.[26] Open-ended clauses, typically of constitutional or even political nature, took precedence over a textual interpretation of the existing written law, typically at the statutory and sub-statutory layer. In a way, the 'faulty' old laws were, for some time, replaced by a direct application of principles and slogans, disguised as 'value' of the new regime. Building on that logic, one of the vocal 'theoretical proponents' of the new approaches to the law shortly after the Communist take-over in former Czechoslovakia, argued for instance that: '*the fundamental canon of interpretation is that the interpretation of any legal provision must be in conformity with the nature and aims of the peoples' democratic order*'.[27]

Conseil d'Etat et le régime de Vichy', Vingtième Siècle – Revue d'histoire 58 (1998), 83.

25 The French Revolution 1789 and the Bolshevik Revolution in 1917 came as close as possible to a complete legal discontinuity, discarding most of the earlier laws. On a closer inspection, however, also they were just gradual revolutions with longer or shorter interim periods, in which the previous laws were still in force. Further see Harold J. Berman, *Law and Revolution* (Harvard: Harvard University Press 1983), 28ff.

26 See generally: Otto Ulč, *Malá doznání okresního soudce* [Small Confessions of a District Court Judge] (Toronto: 68 Publishers 1974), 39–58. Otto Ulč was an émigré Czech lawyer who worked as a judge in a District Court (court of first instance) in Western Bohemia in 1950s. See also the excellent 'ground-level' account in Inga Markovits, *Justice in Lüritz: Experiencing Socialist Law in East Germany* (Princeton: Princeton University Press 2010).

27 See, e.g. František Boura, 'K otázce výkladu zákonů' (On the Question of Interpretation of Laws), Právník 88 (1949), 292 (297).

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This accent on anti-textualism (or, in the period lingo, dialectical materialism) disappears once the new political system established itself and replaced the corpus of positive law and the codes with its own codifications. From that moment on the requirements of the system vis-à-vis its officials, including the judges, change. They are no longer required to be activists, anti-textualists and question the correctness and the applicability of the legal norms. Now they are just asked to (textually) follow, as the new legal order is already in line with the new political system. Purposive reasoning in the age of a 'stabilized regime' becomes in fact disruptive and dangerous.

Textualism, therefore, played an intriguing dual role in the developments described above. In the anti-textual (Stalinist) period, recourse to a textual interpretation of the existing (old) law became a line of defence against the anti-formalistic teleological style of judicial reasoning officially required by Party policy. In the *early period,* therefore, *textualism helped to defeat the new system*: if a judge textually followed the still liberal pre-Communist laws, which would have guaranteed basic procedural rights for every accused, it could for instance lead to an acquittal of an enemy of the new regime. This vision changed, however, in the later period of Communist law, when there were already new codifications. Then textualism became the way to stay in line and not expose oneself by making any personal value judgments. Textualism thus turned from the way of challenging the new regime into a philosophy of hiding.

It is with this heritage that Central European judiciaries entered the era of transformation after 1989, in the logic of this volume 'Transition 1.0'. The post-1989 changes were, in a way, nothing less than yet another legal revolution in this region, with respect to the Czech Republic or Slovakia already a *third* or *fourth* one within the 20th century.[28] This time around, there was again formal legal continuity (positive law and legal relationships stand as before), but (certainly politically proclaimed) value discontinuity with the previous regime. The same patterns thus developed again: there is a new constitution, a charter of fundamental rights and a new political

28 Legal continuity with clear value discontinuity were certainly present in late 1930s (during the Nazi *Protektorat Böhmen und Mähren*), and then in later 1940s and early 1950s (Communist take over). The transition from the Austrian Empire to the (First) Czechoslovak Republic in 1918 is a more complex story. Although that one was supposed to go down, at least in the Czechoslovak official history textbooks, as an instance of another discontinuity with the previous regime, there was, in terms of legal values, reasoning, and thinking, almost complete continuity: the overall regime remained (for that period) liberal, constitutional state.

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order which claims to be based on democracy and the rule of law. However, the entire mass of positive law is composed of decades-old Communist codifications, in the case of Czechoslovakia originating mostly from the early 1960s, with the provisions naturally bearing a deep ideological imprint of the era in which they were adopted.

The newly established Central European Constitutional Courts, therefore, command all the institutions (in particular judicial and administrative), to bring the old laws as well as the new ones in line with the new constitution and its values by the fiat of interpretation. The new interpretative command is to indeed transform the understanding and interpretation of the old Communist codes by imbuing them with new democratic values in the process of adjudication.[29]

Within such settings, if textualism is revived once again, it becomes a tool for defying the new system. This is the tension which lies at the heart of judicial conflicts in some of the Central European countries in the 1990s, especially between the newly established and newly staffed Constitutional Courts and the ordinary Supreme Courts. The Constitutional Courts, guardians of the new constitutional settlement in the new democracies, demand for the judges to do (*on the level of judicial method*) essentially the same as what the Communist Party asked them to do before in the Stalinist period: to interpret the old Communist laws and codes in the light of new values, disregarding their text. The more seasoned judges may be reluctant if not outright hostile to do so. Some of them might indeed be using textualism as a tool for rejecting the new system and its values. Others, however, might not be hostile towards the system at all. Their historical experience, accumulated within the behavioural patterns and a sort of a 'collective memory' of the judiciary, nonetheless advises them to be very careful with openly projecting value choices within their decision-making.

It is to be stressed again that all the analogies previously made relate *exclusively to the 'methods'* advanced for the 'correct' approach to the law in the process of adjudication in the new regime. There naturally is an incommensurable difference in the quality of values and the content of

29 Cf. the early decision of the constitutional courts in the Central European region, proclaiming the duty of all other bodies in the State, including the ordinary courts, to (re)interpret old Communist laws in line with the new constitutional values. See the decision of the Czech Ústavní soud of 21 December 1993, Pl. ÚS 19/93 ('on the lawlessness of the Communist regime'), No 14/1994 Coll., or the decision of the Hungarian Alkotmánybíróság of 15 March 1992, 11/1992 ('on retroactive criminal legislation'), AB (ABH 1992, 77).

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what was being advanced and defended. However, unless one goes for the argumentative shortcut that *noble ends justify whatever means*, or that messianic legitimacy[30] is to override whatever concerns one might have about getting to that noble end,[31] at the level of approach and method, there is indeed an analogy.

Seen from this vantage point, it is the learned wisdom of the Central European judiciaries that those who were seduced by the luring of transcendental values of whatever origin and stepped outside of the textual box are likely to be quickly dismissed once the nature of the political transcendental changes again. Textual interpretation thus helps to survive in any regime. It saves judges from making any visible value judgments and passes on the responsibility for any legal change to the legislator. Connected to that is often the problem of legal certainty and clarity of the law: how is one to apply abstract values and principles that are inherently vague, after a regime change, often to the detriment of a group of individuals?

IV. The Euro-Wave: From Euro-Timidity to the Judicial Self-Defence

With such cultural, not to say ideological, heritage, the Central European judiciaries joined the European Union in 2004. There were a number of predictions about that moment and the early performance of Central European courts within the European judicial structures, analysing the national approaches to law and legal interpretation and making advised predictions.[32] The terms used were, perhaps not surprisingly, again most commonly 'formalism', 'limited', 'mechanical' and in general 'problematic'.[33] The predictions made would mostly revolve around the argument that first, either the accession of the Central European judicial systems and

30 Joseph H.H. Weiler, 'The Political and Legal Culture of European Integration: An Exploratory Essay', ICON 9 (2011), 678 (682).

31 A theme featuring prominently also when discussing the challenges to the (im)proper legal methodology employed by the Court of Justice of the European Union – in detail see Michal Bobek, 'Legal Reasoning of the Court of Justice of the EU', European Law Review 39 (2014), 418.

32 Cf. for instance Zdeněk Kühn, 'The Application of European Law in the New Member States: Several (Early) Predictions', German Law Journal 3 (2005), 565; or T Ćapeta, 'Courts, Legal Culture and EU Enlargement', Croatian Yearbook of European Law and Policy (2005), 23.

33 See, for example, Kühn (n. 23); Rafał Mańko, 'The Culture of Private Law in Central Europe after Enlargement: A Polish Perspective', European Law Journal 11 (2005),

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their courts to the European Union will bring about a steep learning curve for those judges, or second, if not, the domestic application of EU laws, requiring a different, more systematic and purposive style of reasoning, will inevitably result into failure because Central European judges will not be able to act as EU judges.[34]

The reality of the first twenty years has perhaps not been that gloomy. It is certainly true that there has been considerable reticence towards teleological reasoning, seeking to pro-actively plug in vague and general interests of the Union in order to reach results that have no support whatsoever in the text of (national or European) law. Most of the Central European judges have kept sailing 'closer to the wind' of the text of the law, unwilling to embark on the high seas of foggy *effet utile*. From this vantage point, the textualist heritage could indeed be seen as resisting the 'proper and full' application of EU law. On the other hand, hidden within that proposition is a much broader, unspoken assumption about the proper role one can reasonably expect from national judges, including lower court judges, to play in applying EU law to the cases before them. Are they indeed expected to know, constantly seek out, and pro-actively apply EU law in all cases brought before them?[35] Apart from the issue of knowledge, the often articulated reservation has again been one of vagueness and clarity of the law, coupled with a reticence to apply directly values and principles that are in dire need of further legislative articulation in order to be effectively justiciable.

Leaving that normative discussion aside, it may be perhaps suggested that some of that reticence on the part of some of the national courts diminished once those systems started sliding towards rule of law crisis. Embracing EU law and the European Convention, or other various 'international standards', institutions, and organisations, became the external life support line for domestic judicial resistance. For the first time in the

527; Siniša Rodin, 'Discourse and Authority in European and Post-Communist Legal Culture', Croatian Yearbook of European Law 1 (2005), 12.

34 See e.g. Zdeněk Kühn, 'Worlds Apart: Western and Central European Judicial Culture at the Onset of the European Enlargement', American Journal of Comparative Law 52 (2004), 531. For first empirical studies after the Enlargement, see e.g. Marcin Matczak, Matyas Bencze and Zdeněk Kühn, 'Constitutions, EU Law and Judicial Strategies in the Czech Republic, Hungary and Poland', Journal of Public Policy 30 (2010), 81.

35 Critically see Michal Bobek, 'On the Application of European Law in (Not Only) the Court of the New Member States: Don´t Do as I Say?', Cambridge Yearbook of European Legal Studies 10 (2007–2008), 1 (20–25).

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outlined historical antagonism between (defensive) textualism and (transformative) purposive reasoning, it is no longer just the story of textualist defence against the new domestic 'masters' and their 'values'. It became the story about the choice of competing values, competing purposes and telos: the national and the European.

From this vantage point, there has been quite some degree of judicial 'restorative constitutionalism' going on in the past couple of years, seeking to defend the status quo by the combination of national textualism (since statutes and written laws remained the same) with European values acting as alternative constitutional foundations (that are supposed to guide the overall interpretation instead of the national ones). A number of preliminary rulings being made in the last years, which could be put under the heading of structural or institutional 'judicial self-defence', demonstrate a greater willingness to refer to European values, aims and purposes than before. Intriguingly, such cases have one in common: there are not only, or sometimes not at all, about vindicating rights of individual litigants, but rather instances of judges defending themselves against the efforts of the new political masters of intimidation or outright subjugation of courts. Cases of similar sort come from Poland,[36] Hungary,[37] but recently also Romania.[38]

The peak of the latter line of cases of judicial 'self-defence' was arguably *Miasto Łowicz*.[39] Castigated and approached by some,[40] the Court of Justice

36 Such as ECJ, judgments of 19 November 2019, *A.K. and Others (Independence of the Disciplinary Chamber of the Supreme Court)* (C-585/18, C-624/18 and C-625/18, EU:C:2019:982) of 2 March 2021, *A.B. and Others (Appointment of judges to the Supreme Court – Actions)* (C-824/18, EU:C:2021:153); of 16 November 2021, *Criminal Proceedings Against WB and Others* (Joined Cases C-748/19 to C-754/19, EU:C:2021:931).

37 Cf. e.g. ECJ, judgments of 29 July 2019, *Torubarov* (C-556/17, EU:C:2019:626) or of 23 November 2021, *IS* (C-564/19, EU:C:2021:949).

38 Starting with ECJ, judgments of 18 May 2021, *Asociaţia 'Forumul Judecătorilor din România'* (Joined Cases C-83/19, C-127/19, C-195/19, C-291/19, C-355/19 and C-397/19, EU:C:2021:393) and of 21 December 2021, *Criminal proceedings against PM and Others* (Joined Cases C-357/19, C-379/19, C-547/19, C-811/19 and C-840/19, EU:C:2021:1034).

39 ECJ, judgement of 26 March 2020, *Miasto Łowicz and Prokurator Generalny* (C-558/18 and C-563/18, EU:C:2020:234).

40 For instance Sébastien Platon, 'Court of Justice, Preliminary references and rule of law: Another case of mixed signals from the Court of Justice regarding the independence of national courts: Miasto Lowicz', Common Market Law Review 57 (2020), 1843.

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was forced to set some outer limits to what national courts can reasonably be said to carry out in the name of EU law: one cannot seek to transform or to challenge the entire institutional practice of disciplinary proceedings against judges under Polish law, even if it might in fact be abused, in proceedings that, on their merits, *have nothing to do with judicial discipline*. Such a 'transformation' in the name of EU values is somewhat far-fetched, even for the otherwise liberal and open stance concerning the admissibility of rule of law cases displayed by the Court of Justice,[41] if such cases are coming as requests for preliminary rulings under Article 267 TFEU.[42]

In sum, the initial phase of domestic application of EU law in Central Europe after the 2004 enlargement was rather on the side of textual restraint, with judges reluctant to go out of their way in openly embracing yet another telos, not written down anywhere in posited law. The situation has changed considerably in the backsliding Member States, where the newly dissident judges started using more systemic and purposive reasoning beyond the text of national law, in relying on EU laws and values, as a tool of judicial self-defence against the 'new values' and 'visions' advocated by the new regime.

V. The Revolutionary Tribunals (in Whatever Direction the Next Revolution Goes)

Most, or rather all of what has been stated so far, is the case for judges at ordinary (i.e. civil, administrative, or criminal) courts. By contrast, Central European Constitutional Courts, certainly those in the Czech Republic and Slovakia, but partially also those in Hungary and Poland, would much better fit the bill of 'court-driven transformation'. In a way, that was their assumed or even articulated raison d´être after 1989,[43] but in a similar

41 As further explained in my Opinion of 20 May 2021, *Prokuratura Rejonowa w Mińsku Mazowieckim* (Joined Cases C-748/19 to C-754/19, EU:C:2021:403), points 102 to 121.

42 While of course the same question could certainly be put by the Commission in the Article 258 TFEU infringement proceedings.

43 See e.g. Herman Schwartz, *The Struggle for Constitutional Justice in Post-Communist Europe* (Chicago: The University of Chicago Press 2000), 18–19 or Marc Verdussen, 'La Justice Constitutionnelle en Europe Centrale: Essai de synthèse' in: Marc Verdussen (ed.), *La Justice Constitutionnelle en Europe Centrale* (Brussels: Bruylant 1997), 229 and 230. For a partially opposing view see, however, Wojciech Sadurski, 'Constitutional Review after Communism' in: Wojciech Sadurski (ed.), *Constitutional Justice, East and West* (The Hague: Kluwer Law International 2002), 175.

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vein already before that in the West and South of Europe:[44] to act as the guardians and the enforcers of the new constitutional order, of its new values, and by the fiat of adjudication, make the new constitution a living reality in the transiting countries, where the 'old' judges could neither be trusted nor really replaced overnight.[45]

Certainly, there were institutional differences amongst the individual countries. In the Czech Republic and Slovakia, the constitutional courts were given from their very inception the competence to hear individual constitutional complaints.[46] They thus became not only a 'third chamber of the Parliament' (being able to carry out an abstract review of constitutionality), but also 'de facto Supreme Courts' (carrying out an equally concrete review of constitutionality via individual constitutional complaints). By contrast, the Hungarian Constitutional Court acquired the latter competence only later on, with its Polish counterpart never being called, at least formally, to carry out a direct review of last instance judicial decisions. In political terms, there was also a clear scale, with the first Hungarian Constitutional Court being arguably the most 'activist' one in the region, with its Czech counterpart being slightly more moderate, but still robust in its transformative case law, while the Slovak and Polish ones being perhaps more restraint (in relative terms) in the 1990s.[47]

In any case, the 1990s created the narrative, nourished heavily by liberal-minded international academia, of 'good, progressive' Constitutional Courts, staffed with 'enlightened', often previously dissident, lawyers, who are bringing change and light to the Communist backwaters. In such a world of clearly defined good and evil, having a Constitutional Court became a 'must', one of the blueprints that should bring about a successful societal transition in a post-Communist State. From this vantage point, it is fascinating to see the subsequent evolution of those institutions in the

44 See Christian Starck and Albrecht Weber (eds), *Verfassungsgerichtsbarkeit in Westeuropa. Teilband I: Berichte* (Baden-Baden: Nomos 1986) and the reports on Germany (121–148), Italy (219–242), Spain (243–278).

45 With the notable exception of former East Germany, there was 'no spare judiciary' available in reserve – see Inga Markovits, 'Children of a Lesser God: GDR Lawyers in Post-Socialist Germany', Michigan Law Review 94 (1996), 2270.

46 For further detail see e.g. Otto Luchterhandt and others (eds), *Verfassungsgerichtsbarkeit in Mittel – und Osteuropa: Teilband I* (Baden-Baden: Nomos 2007) and the individual country studies contained therein.

47 For a comparative study, see e.g. Radoslav Procházka, *Mission Accomplished: on Founding Constitutional Adjudication in Central Europe* (Budapest: Central European University Press 2002).

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backsliding Member States, where the Constitutional Courts again became 'tools of transformation', this time around into a wholly different direction. It became very clear that constitutional review is far from a guaranteed institutional ticket to the destination called liberal rule of law based State. What, by contrast, has shown much greater resistance to 'hostile takeover' are the ordinary courts, once heralded as the backward-looking formalists.

In terms of institutional analysis, that is entirely logical: concentrated constitutional review, embodied by one single, but all powerful Constitutional Court, is the worst possible institutional set up for resisting hostile take-overs of a judicial system. All that the new regime needs is to take over the one centre, the all-powerful head. Having captured that one centre, the new regime is in control of the judicial process (via individual constitutional complaints) and of much of the political arena (via the abstract review of constitutionality). By contrast, by its nature hierarchical but still much more diffused system of ordinary courts is much more resilient to sudden changes, of course provided that there was at least some time for personal renewal in the meantime.

In general terms, therefore, relying on Constitutional Courts as being the institutional guardians of the democratic, liberal, and rule of law oriented legal order is misplaced. There is nothing in their institutional design or inner set up that would prevent those institutions from being turned around and abused in the completely opposite value direction than they were originally created. With tongue in cheek, hijacked constitutional courts can still be entrusted with quite some degree of 'transformative constitutionalism', unfortunately of course in the completely wrong direction. But again, it is not the value underpinning, but the method and tools employed that are of interest here.

What might be of some interest potentially in the 'Transition 2.0' is a debate about the future role of Constitutional Courts. But the same issue might be also raised in more established systems, that did not for the moment succumb to any rule of law backsliding, but are concerned, for the future, about the stability and robustness of their institutional structures. Seeing what those institutions can do in the wrong hands, do they represent a good institutional blueprint? Is it wise to keep an all-powerful Trojan Horse within a judicial system? With societal transformation being over within as legal system, why should one keep within the constitutional system a dedicated and all-powerful 'revolutionary tribunal'?

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Perhaps a way forward in this regard, assuming that one wishes to keep a Constitutional Court at all, might be reverting back to the truly Kelsenian model of a concentrated abstract review of constitutionality,[48] where the Constitutional Court would only adjudicate if explicitly asked by a limited pool of political actors, with its competence being restricted to essentially 'Organstreitigkeiten' and competence policing. The Karlsruhe model of a 'limitless court',[49] or rather outright 'constitutionalism on steroids' is simply too much of a structural danger if falling in the wrong hands. As with any excessive concentration of power, it is not a constitutionally resilient model.

VI. The Way Forward for Courts: Moderate Nudging Within the Bounds of the Constitutional Settlement?

What role for courts in societal transitions? Stated in a nutshell, there certainly is one, but it should not be overestimated. This article sought to explain why, in the Central European judicial traditions, the idea of 'court-driven-transformation' may not meet with universal acclaim, certainly not from the side of judges themselves. Judges are poor revolutionaries. That is not because they would be that (intellectually) limited. It is because being conservative in the sense of upholding the rules of the game currently being played is part of their job description that directly translates into their authority and legitimacy.

On the social or societal side, 'court-driven-transformation' that would be carried out in the longer run against the moral perceptions of the majoritarian population is a recipe for tensions, problems, and backlash. Courts, including constitutional courts, might be successful in occasionally nudging the law and perhaps the society by a not universally supported decision in what is believed the right direction. If logically explained and reasoned, that new direction might even become the new social norm. But such cases must remain rare. What cannot be sustained in the longer run are repetitive and too assertive decisions made against the moral percep-

48 H. Kelsen, *Wesen und Entwicklung der Staatsgerichtsbarkeit. Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer* (vol. 5, Berlin und Leipzig: de Gruyter & Co. 1929).

49 To use the turn of the phrase of the critique in Matthias Jestaedt, Oliver Lepsius, Christoph Möllers and Christoph Schönberger, *Das entgrenzte Gericht: Eine kritische Bilanz nach sechzig Jahren Bundesverfassungsgericht* (Berlin: Suhrkamp 2011).

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tions of majority of the population with regard to issues that can reasonably be subject to the normal political process.[50]

Stated in constitutional terms, the issue is nothing else than the well-known separation of powers. Adhering, as much as reasonably possible, to that normative ideal is not only justified by the virtues of an abstract constitutional principle. It is equally imperative in terms of (longer term) judicial self-preservation. The underlying social problem and consequence of an 'excessive degree of judicial creativity' in interpreting the law is the lack of social acceptance and the inherent elitism by governing a society by decrees from an 'enlightened' Supreme or Constitutional Court. Such 'elitist constitutionalism'[51] is not only unable to genuinely penetrate deeper layers of social structures and induce lasting change in the life of daily law on the ground,[52] and prone to hostilities and challenges by the permanently loosing side. It is also likely to be quickly disposed off once the regime changes again. One does not need to go far for an example by recalling the universal praise that the first Hungarian Constitutional Court, presided by László Sólyom, was receiving from a number of Western liberal scholars, in particular in the later 1990s, for its readings of the 'invisible constitution' of Hungary.[53] But it remains indeed just a matter of unsubstantiated historical conjecture how such arguably excessive constitutional judicialization and overreach helped to pave the way for the new regime that did not meet with much resistance when it wished to reign in the judges.

On the constitutional and systemic side, there is something scary about the notion that, at *the level of method*, it is supposed to be the inherently illiberal and undemocratic judicial imposition of values that is apparently to become the chief avenue for bringing about the rule of law and democ-

50 By contrast to 'discreet, insular minorities' of *Caroline Products* finding their later reflection at the systemic level notably in John H. Ely, *Democracy and Distrust: A Theory of Judicial Review* (Cambridge, MA: Harvard University Press 1980).

51 See, more broadly, Bruce Ackerman, 'Three Paths to Constitutionalism – and the Crisis of the European Union', British Journal of Political Science 45 (2015), 705.

52 With such limits apparently equally visible in some of the Latin American countries – see e.g. Sandra Botero, Daniel M. Brinks and Ezequiel A. Gonzales-Ocantos (eds), *The Limits of Judicialization: From Progress to Backlash in Latin America* (Cambridge: Cambridge University Press 2022).

53 Further see e.g. Lázsló Sólyom and Georg Brunner, *Constitutional Judiciary in a New Democracy: The Hungarian Constitutional Court* (Ann Arbor: The University of Michigan Press 1999), in particular the notions of 'invisible constitution' and the reflection on the proper role of a constitutional judge when interpreting it.

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racy.[54] Again, if the judicial mandate was to maintain the *status quo ante*, the problem is less acute, because in terms of constitution-making, there was at least once the choice expressed in favour of a model. The question then becomes one of the unalterable constitutional core and whether a given society can vote itself out of democracy. However, the more assertive visions of transformative constitutionalism, that would wish to mobilise and advance causes never previously democratically approved, or even outrightly rejected, reveal much more directly the naked truth: 'the liberal democrats' might be as illiberal as their adversaries since both wish to bypass the democratic process by a judicial shortcut.

The relationship between the two extremes is not a line, but a circle. It leads right back to the endless discussions about judicial legitimacy and authority, as well as the division of powers. 'Judicial activism' is not only an empty notion, but above all one with irregular declination: if a court does what I like, it is the 'good/new/transformative constitutionalism'. If it does something you like, but I do not, it becomes impermissible 'judicial activism'. If it is something that neither I or you like, but a third person perhaps does, it might even amount to an 'ultra vires' decision. But that is precisely the problem: what credibility can be put into judging that has no method, but depends exclusively on personal political convictions and the (dis)like of the particular outcome reached? *Roe v Wade*[55] was the 'good constitutionalism', but *Dobbs v Jackson Women's Health Organization*[56] is the 'blatant usurping of political power by unelected judges'? In terms of approaches and methods, both decisions were 'activist' in the sense that at their time, they assumingly departed from the majoritarian perception of what the law ought to be.

Time is perhaps ripe to re-evaluate the more positivistic visions of judicial function, traditionally ridiculed and then discarded by the 'realists' of whatever ideological outlook. But there are quite a number of pragmatic virtues to a reasonably self-restrained judiciary, which at least partially believes in what is being preached in terms of maintaining some division of powers, and accordingly sees its role as settling social conflicts instead

54 Unless of course, the paradox of Brechtian proportion of 'we who fight for democracy cannot ourselves be democratic' is equally not of application here – see Timothy Garton Ash, *The Magic Lantern: The Revolution of '89 Witnessed in Warsaw, Budapest, Berlin and Prague* (New York: Vintage Books 1993), 89.

55 410 U.S. 113 (1973).

56 597 U.S. ____(2022).

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of further inflaming them. If nothing else, such a judiciary has some independent foundation to stand on and authority to build upon, advisedly not competing with political power for the outcome or outright popular legitimacy.[57]

All in all, is it then that surprising that (certainly most) judges do not wish to be perceived as legitimized essentially by political outcomes, but rather by enforcing the extant rules? The key argument of this article has been that, in addition to the constitutional and structural challenges, there is an additional historical explanation for enhanced Central European reticence towards excessive 'value-oriented', purposive adjudication, under whatever label it might be packaged and sold at the given moment.

That is not to say that courts and judges do not have a role in societal transformations. They certainly do. But it is arguably a more moderate one. It could be better captured by correcting, nudging and helping, but hardly leading the way.

First of all, a political problem created in political polls will only be resolved in polls again. A society will hardly be saved by courts only, or even predominantly.

Second, in backsliding Member States, as long as reasonably possible, courts can help keep *status quo ante* alive. Within that period, external support is crucial. Having such avenues of external support and communication channels open,[58] continuously manifesting and materialising the embeddedness in larger structures, such as the European Union or the Council of Europe, is of paramount importance. In this regard, the current situation is indeed unique, unparalleled to any in the past within the same region before, where the (only temporal) defence against the new regime was formalism, with that one having a natural expiration date by the moment the given judge would be disposed of.

Third, 're-transition' back to constitutional, rule of law governed democracy, or indeed the 'Transition 2.0', can again be aided by courts, but hardly led by them, or even primarily carried out by them. There again, (ordinary) courts are likely to be more of a break than the vanguard. But is that necessarily a negative phenomenon? The judicial power may, in the name of decency and moderation, help assuaging the excesses of sudden rush and

57 See Michal Bobek, *Comparative Reasoning in European Supreme Courts* (Oxford: Oxford University Press 2013), 278–280.

58 See, more broadly, but in similar vein, my Opinion of 8 July 2021, *Getin Noble Bank* (Case C-132/20, EU:C:2021:557).

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desire for retribution. That might indeed, in the eyes of some, fall short of the expectation of swift 'victor´s justice', or rather just revenge, but might in turn help create a more lasting reconciliation within a given society.

To the discontent and disagreement of many, the phrase famously coined by Václav Havel in 1989 and shortly thereafter in reply to widespread social demands for retribution against the proponents of the Communist regime was 'We are not like them'. This has only put the new, democratic regime on a distinct moral high-ground, but also arguably helped a peaceful surrender of power, and allowed for better future reconciliation. Certainly, such an approach is unlikely to be welcome by persons oppressed or prosecuted by the regime. It equally does not mean that anything and everything may be forgiven or forgotten. But a society trapped in an endless wheel of retribution is unlikely to be facing a happy future.

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