Perils of Sloganised Constitutional Concepts Notably that of 'Judicial Independence'

Bogdan Iancu*

David Kosař, *Perils of Judicial Self-Government in Transitional Societies* (Cambridge University Press 2016) 470pp.

Variable geometries at the Eastern borders

In the age of prêt-à-porter or 'Ikea' constitutionalism, fundamental concepts, norms, and institutions are prepackaged and delivered expeditiously across nation-state borders. Accelerated migration of constitutional ideas is a more general phenomenon.[1] Its implications are significantly enhanced within relatively close-knit international systems, such as the European Union or the Council of Europe. Theoretical discourses and language as such have become contested and evasive, many – if not most – European scholars preferring nowadays to refer to the Union or even to the Council of Europe in constitutional-sounding or quasi-constitutional parlance. Thus, the very use of certain definitional labels, such as 'international organisation', or the framing of arguments in more subdued undertones when they relate to 'Europe', are choices that already stake a claim and indicate a standpoint along grander doctrinal and ideological divides.[2]

In Central and Eastern Europe, EU enlargement has generated not only theoretical debates and jurisdictional skirmishes among higher courts, as in the West, but also substantial constitutional changes, both at the textual level (amendments extending far beyond the usual EU-related clauses) and the

*Associate Professor, Dr. iur, LL.M. (CEU) (Comparative Constitutional Law and Constitutional Theory), Faculty of Political Science, University of Bucharest, bogdan.iancu@fspub.unibuc.ro.

[1] On Ikea constitutionalism, *see* Günter Frankenberg, *Autorität und Integration. Zur Grammatik von Recht und Verfassung* (Frankfurt am Main 2003) and 'Constitutional Transfer: The Ikea Theory Revisited', 8(3) *International Journal of Constitutional Law* (2010) p. 563. On migration of constitutional concepts and ideas, *see*, *e.g.*, Sujit Choudhry (ed.), *The Migration of Constitutional Ideas* (Cambridge University Press 2006).

[2] *Cf.* Peter L. Lindseth, 'The Perils of "As If" European Constitutionalism', 22(5) *European Law Journal* (2016) p. 696.

European Constitutional Law Review, 13: 582–599, 2017

doi:10.1017/S1574019617000177

infra-constitutional level (organic legislation overhauls, institution-building). The fledgling constitutional systems of the Central and Eastern European jurisdictions have been revamped, under the guidance of the EU Commission, during the pre-accession negotiations, in order to bring these countries into line with the Copenhagen criteria. Conversely, the 'civilisational' mandate of the enlargement has reflexively enhanced the Union and the Council of Europe's constitutional narratives and mythologies, and – to a more limited extent – has also resulted in pragmatic, structural changes.[3] In what concerns the Union, the 2004 enlargement and the signing of the ill-fated Constitution Treaty are after all near-simultaneous events.

Political conditionality under the Copenhagen criteria is cast in broad terms. The benchmark 'stability of institutions guaranteeing democracy, the rule of law, human rights, respect for and protection of minorities' is phrased in ostensibly constitutional language but the wording is pitched at an Olympian level. Such open-ended formulas can bring under their sweep a myriad of policy consequences. The Commission, as master of the conditionality, must flesh out practical advice with respect to actual reforms, bearing on judicial organisation, rights guarantees, media regulation, nondiscrimination, autonomous institutions, and the like. Reforms must in turn be adapted to a congeries of contexts. All the Eastern countries must have seemed alike in 1993 to their future EU peers, that is, relatively backward, poor, and of course 'post-communist'; much of this poise subsists nowadays, camouflaged in finer, subtler, 'multiple-speed Europe' formulations. There are, however, increasingly significant differences between, for example, Romania and Poland, Hungary and the Czech Republic, Latvia and Slovakia. The more time passes, the less proxies such as 'post-communism' are useful to capture commonality, as all these countries go their separate ways and other contextual determinations gain the upper hand. Confrontation with the communist past, lustration and restitution, were for good reasons the political and academic fads and fashions of the late 1990s and early 2000s, but such topics hold little epistemological and policy currency nowadays. Sometimes it can be still useful in internal battles to swing the pendulum back to communism, for naming, shaming, and scapegoating purposes, but even strategic ways of dealing with the past are losing their lustre. Lustration, to take the most obvious example, has limited effects after 28 years; nature has already run its course in the case of most former secret police collaborators and high Communist Party officials.

The Commission had therefore a difficult task, for contextual, institutional, and epistemological reasons. In what concerns the institutional limitations, the

[3] Wojciech Sadurski, *Constitutionalism and the Enlargement of Europe* (Oxford University Press 2012).

https://doi.org/10.1017/S1574019617000177 Published online by Cambridge University Press

EU Commission is in essence a sophisticated supranational bureaucracy, which, albeit superbly adapted to some purposes, such as implementation of competition policy or initiating infringement proceedings, is less adroit when it comes to comparative constitutional expertise and constitutional design. Constitutional law focuses on grand value choices, rather than fact-finding and making technocratic policies. Knowledge-wise, in order to implement policy consistently and legitimately in sensitive fields such as fundamental law, one needs to be able to rely on a common standard, which, at the practical policy level, simply does not exist. To wit, all the legal systems of the then-EU 15 Member States respect the value of judicial independence. But this minimal degree of commonality was of little help to Commission delegations undertaking to counsel and admonish, say, Slovakia and Slovenia, on how to refurbish their judiciaries. The judicial systems of the UK, Germany, and Spain are too wildly different to warrant the distillation of a common denominator as 'good practice' for the purpose of transplanting it to the Western Balkans or further.

Over time, the Commission adopted distinct strategies in order to tackle this general conundrum. It began by distinguishing contextually, implicitly or explicitly, in order to justify variations in its country reports. But the practice of contextual variation, if pursued too strenuously, is vulnerable to criticism as being inconsistent and unprincipled. According to Daniel Smilov's quip, at some point, if 'a Martian anthropologist on a field trip to Earth' were to have studied the country reports 'it might have appeared that the principle of judicial independence [was] a convenient rhetorical instrument to reconcile positions which [did] not fit well together.'[4] In time, recognising these problems, Brussels started to rely increasingly on standardisation. Furthermore, once a standard was crystallised into policy, this resulted in 'reflexivity' and generated path dependencies with respect to the way in which further legal systems were approached by the Commission. Certain policies became panaceas and certain institutional templates solidified into orthodoxies. For instance, anticorruption was initially proffered to the 2004 accession countries as an important but not paramount element of the political *acquis*. But once it became apparent that corruption regarded as a cause rather than an effect is an excellent and polite proxy for all Eastern shortcomings and evils, whereas anticorruption serves as a wieldy master key for all kinds of otherwise unrelated problems and reforms, the matter took complete hold of the Commission's imagination.[5] Combatting corruption became therefore a pillar of

[4] Daniel Smilov, 'EU Enlargement and the Constitutional Principle of Judicial Independence', in Wojciech Sadurski, Adam Czarnota and Martin Krygier (eds.), *Spreading Democracy and the Rule of Law? The Impact of EU Enlargement on the Rule of Law, Democracy and Constitutionalism in Post-Communist Legal Orders* (Dordrecht Springer 2006) p. 313 at p. 314.

[5] *See, generally*, on the evolution of anticorruption policies as a pillar of the conditionality, Patrycja Szarek-Mason, *The European Union's Fight Against Corruption-The Evolving Policy Towards*

pre- and post-accession political monitoring of Romania, Bulgaria, Croatia, and is now also embedded into a chapter of the hard *acquis* in what concerns the current candidates. Judicial reforms were similarly streamlined. The Commission proceeded initially, with respect to the 2004 entrants, in a more tentative, somewhat adaptive way. But once the adoption of the 'Judiciary Council model' could be defined as a necessary corollary of the principle of judicial independence, it was presented as a 'take it or leave it' element of the 'common constitutional area' to Romania and Bulgaria.[6] True, these two countries, as well as Croatia and the current candidates have also been in a weaker bargaining position than the class of 2004.

Since the distillation of templates, good practices, and recommendations must be made from the pulpit of authority rather than from the desk of bureaucracy, the EU Commission began an industrious campaign of cross-hybridisation with the Council of Europe. Among international organisations, the Council of Europe as such and its consultative expert body, the European Commission for Democracy through Law (or 'Venice Commission') are more legitimate constitutional oracles for the purposes of divining and advocating authoritative fundamental law blueprints. Consequently, cross-referencing between the two Commissions in Brussels and Venice/Strasbourg has generated ratchet effects and brought about mutual reputational perks. In what concerns the latter effect, this synergy has allowed the EU Commission to footnote its constitutional policies with enhanced credibility and – conversely – it has significantly boosted the policy relevance of the Venice Commission reports and recommendations in the European outposts.

The germane phenomena of international 'constitutional policy' standardisation and network collaboration produce undoubted benefits but have also a darker flip-side, insofar as procrustean solutions reduce contextual complexity and generate dysfunctions. Sometimes, reductionism comes at a significant price, especially since constitutional entrenchment, newly-created vested interests, and path dependencies make it hard, sometimes impossible, to adjust or roll back reforms once

Member States and Candidate Countries (Cambridge University Press 2010) and Peter W. Schroth and Ana Daniela Bostan, 'International Constitutional Law and Anti-Corruption Measures in the European Union's Accession Negotiations – Romania in Comparative Perspective', 52 *American Journal of Comparative Law* (2004) p. 625.

[6] *See*, on this evolution, Michal Bobek and David Kosař, 'Global Solutions, Local Damages: A Critical Study in Judicial Councils in Central and Eastern Europe', 15(7) *German Law Journal* (2014) p. 1257 at p. 1261: 'The European Commission went even further in the 2007 enlargement wave by basically requiring Romania and Bulgaria to adopt the JC model "as it is"'. *See also*, on Romanian pre-Accession judicial reforms at the behest of the Commission, Cristina E. Parau, 'The Drive for Judicial Supremacy', in A. Seibert-Fohr, *Judicial Independence in Transition. Beiträge zum ausländischen öffentlichen Recht und Völkerrecht* (Springer 2012) p. 619.

developments are under way.[7] The less desirable implications of EU-induced reforms in an area that is crucial to a constitutional system, namely the organisation and functioning of the judiciary, are at the heart of David Kosař's recent book, *Perils of Judicial Self-Government in Transitional Societies.*

Judicial virtues and self-government of the judiciary

Kosař's argument is in essence that the EU Commission, in tandem with the Council of Europe, has reduced the traditional complexity of judicial organisation in the constitutional state and the values underlying a professional, accountable and impartial judiciary to a single variable: independence. The value of judicial independence has in turn been oversimplified and equated wholesale to the autonomy from political influence of the judiciary as a corporate body. Furthermore, in order to vindicate the corporate independence of the judiciary from majoritarian democracy and from society, the EU has pandered to all accession countries a prefabricated solution. The Commission has been exporting to Eastern Europe the constitutionally entrenched, autonomous judicial council, composed predominantly of elected members (judges and in some cases also prosecutors elected by their peers) and endowed with significant attributions with respect to the selection, training, promotion, and discipline of judges (magistrates). This model, roughly patterned after the Italian *Consiglio Superiore della Magistratura*, if generalised as a universal 'good practice', does conceptual violence to the sophisticated way in which the constitutional traditions view 'the least dangerous branch' and its proper role in the architecture of separation of powers. Moreover, in the unsettled, post-communist constitutional environment, the functioning of the model advocated by the Commission can be shown to produce perverse effects. It does so by generating the evils it was supposed to cure, namely, by empowering factions and judicial mandarins and allowing them to place undue pressures on the ordinary judges. Thus, paradoxically, judicial independence is undermined by an independent (read: unaccountable) judiciary: '[T]he autonomous model of the judiciary advocated by the European Union and

[7] On path dependencies, *see* Mariana Mota Prado, 'The Paradox of Rule of Law Reforms: How Early Reforms Can Create Obstacles to Future Ones', 60 *University of Toronto Law Journal* (2010) p. 555. I extrapolate the main intuition from Prado's study, which focuses on the dangers of piecemeal reforms, exemplified with the case of judicial reforms in Brazil. The intuition underlying her argument is valid in this context, insofar as the top-down, cavalier imposition of institutional changes functions as a piecemeal reform of the judiciary (in the sense of inchoate and abrupt, with unforeseeable consequences, albeit the Commission thought of the matter as a one-time deal). Constitutional entrenchment makes its effects significantly more deleterious and places additional hurdles on future adjustments and corrections.

the Council of Europe may lead to "the system of dependent judges within independent judiciary"'.[8] Criticism of the orthodoxy is ignored or deflected, whereas the council model has continued to be presented as a 'universal good', due to path and reputational dependencies at the international/supranational level: '[T]he EU and the [Council of Europe] have too much to lose if the rosy picture of the Judicial Council Euro-model falls apart, because they presented [it] as a "universal good" and if they are proven wrong their credibility will suffer.'[9] The author illustrates his thesis by comparing Slovakia (a legal system that has adopted the 'Judicial Council Euro-model') and the Czech Republic, a country that resisted supranational pressures to conform and has preserved its traditional arrangement, which relies on balancing the prerogatives of the Ministry of Justice and those of the court presidents. Slovakia and the Czech Republic are comparable since, from a methodological point of view, the two countries fit 'the most similar cases' logic of comparison.[10] Otherwise put, these countries share an almost identical context and have followed, up to a point, the same patterns of development: pre-communist statehood until World War II, communist past, post-communist union until 1992, application for membership to the EU in the same wave, perpetuation of the same institutional configuration for 10 more years after the break-up of Czechoslovakia. Therefore, the effects of transplanting the Council model in one of them (Slovakia, in 2002-2003) can be identified and dissected with the utmost degree of accuracy attainable in social sciences. Under such conditions, the comparison allows a laboratory-like observation of the cause-effect relationship. As the author puts it, '[it] is the closest we can get to a natural experiment.'[11]

The book consists of three parts, a theoretical framework, a comparative section, and a conclusion. Kosař is methodical, at times almost punctilious, about going through all the minute analytical hoops and hurdles of his thesis, thus one must provide a more careful rendition of the actual argument, in order to do it full justice. The bulk of the book is taken by the first two parts. These differ significantly in methodology: the first part or section, on judicial accountability, is an exercise in analytical constitutional theory, whereas the second, a case study section, is built primarily around a legal-sociological, quantitative comparison of judicial accountability mechanisms in the Czech Republic and Slovakia, respectively.

Judicial accountability matters more in an age of legal indeterminacy. Unlike their 'recognition judiciary' brethren in the Anglo-Saxon world, European career judges still like to present themselves as neutral technicians, 'mouthpieces of the law'

[8] At p. 19.

[9] At p. 136.

[10] Kosař builds on the methodological taxonomy in Ran Hirschl, 'The Question of Case Selection in Comparative Constitutional Law', 53 *American Journal of Comparative Law* (2005) p. 125. This particular comparative methodology ('most similar cases') is described at p. 133-140.

[11] At p. 7.

https://doi.org/10.1017/S1574019617000177 Published online by Cambridge University Press

or Weberian 'automatons of paragraphs'. By the same token, European legal doctrine is still tributary to positivism, with its pseudo-scientific mystification of judicial interpretive powers; this is particularly true in Eastern Europe, where legal scholarship lags behind and belief in positivism embraces cruder overtones. Caveat aside, the reality of the overlapping and intertwining legal orders (national law, EU law, the European Convention on Human Rights) and the ensuing possibilities of 'normative order'-shopping[12] make it increasingly difficult to deny that European judges do not just apply but also 'make' interstitial law. Law-making judges must be held to account: 'With great power, comes great responsibility.'[13] Since accountability, like independence, is in itself an empty, amorphous catchphrase or 'buzz word',[14] Kosař unpacks its meanings and implications. For the purposes of his argument, judicial accountability is defined as 'a negative or positive consequence that an individual judge expects to face from one or more principals (from the executive and/or from the legislature and/or from the court presidents and/or from other actors) in the event that his behavior and/or decisions deviate too much from a generally recognised standard.'[15] Accountability is thus not used in the argument as a virtue, against a normative background and related to an ideal-typical vision of the good judge, but in a descriptive and utilitarian sense.

Accountability encompasses the set of mechanisms that attain negative (sticks) and positive (carrots) consequences for *individual sitting* judges.[16] The sticks comprise i. impeachment of judges (US, Canada, Germany), ii. disciplinary motions, iii. complaints mechanisms, iv. retention reviews, where applicable (e.g., US states, Japan, communist systems, early retention review in Germany (*Richter auf Probe*) or end of career retention in the Czech Republic, for judges who have reached the age of 65), v. reassignment to a different panel, vi. relocation to another court, vii. demotion, viii. civil and criminal liability. The category of carrots includes mechanisms such as i. promotion (to a higher court or to a higher position within a court), ii. secondment to a higher court, and iii. temporary transfer outside the judiciary (e.g., temporary assignment to the Ministry of Justice). Some mechanisms are dual in nature, i.e., can work either way, and can therefore be used selectively by principals to punish

[12] For a practical exemplification of such trends, Joined cases C-188/10 and C-189/10 *Melki and Abdeli* [2010] ECR I-05667. *See also*, for an insightful theoretical account of the effects of 'Europeanisation' on constitutional adjudication and on the upset relationship between constitutional and ordinary courts, J. Komárek, 'National Constitutional Courts in the European Constitutional Democracy', 12(3) *International Journal of Constitutional Law* (2014) p. 525.

[13] Voltaire, cited by Kosař at p. 30.

[14] At p. 20, 57.

[15] At p. 73.

[16] Hence, *ex ante* mechanisms (selection or appointment) and preconditions of accountability (transparency, publication of judgments) are not covered by the definition (p. 51).

or reward: i. non-random case assignment, ii. performance evaluations, iii. volatile salaries and bonuses, and iv. Non-monetary perks (such as subsidised housing).[17] This taxonomy, targeting individual judges, leaves out all legislative measures that affect the judiciary as a whole and across the board (such as the Orbán government reduction of the retirement age from 70 to 62, in order to purge the Hungarian judiciary of regime undesirables), screening mechanisms, transparency, appellate or quasi-appellate procedures (e.g., interpretive guidelines, appeal in the interest of the law, other extraordinary appeals), and criminal and pathological forms of accountability ('telephone justice' and the like).[18]

The introduction of judicial councils in the Central and Eastern Europe countries, at the behest of the Commission, with the encouragement of the Council of Europe, represented an important paradigm shift, since the newly-created council became the primary – if not sole – principal within the judiciary. According to Kosař, the 'Judicial Council Euro-model' has a number of components, namely, i. constitutional entrenchment, ii. a significantly 'corporatist' element (at least 50% of the membership ought to be judges elected by judges), iii. significant *decision-making* powers over all aspects of judicial careers, from entry to retirement (i.e., selection, training, appointment, promotion, transfer, dismissal, and disciplining), and iv. the council must be chaired by the Chief Justice or – in parliamentary systems – by the neutral head of state.[19] The transplant was ostensibly predicated as a corollary of judicial independence, although, as the author insightfully points out, underlying the preference for autonomous bodies is an unstated 'distrust in politicians and *discomfort with the idea of democracy in general*.'[20] According to David Kosař, the promotion of the independence of the judiciary *and* of the individual judges is the common denominator of all international documents rooting for the council model. Efficiency (of judges and/or of justice) and the quality of justice were added to the benefits supposedly promoted by such institutions, somewhat as an afterthought.[21]

The second part of the argument (the case studies) analyses comparatively the use of accountability mechanisms in the two systems. The reason for using comparative quantitative analysis, in what could have been a classically analytical tract, is the dearth of empirical evidence in the literature. According to Kosař, critics of judicial councils have not been able to substantiate with hard facts their assertions concerning the negative effects the introduction of judicial councils may have had. Thus, all

[17] At p. 76-92.

[18] At p. 92-113.

[19] At p. 128-129. The author lists five elements, an additional feature in his enumeration being that the council's attributions ought to be decisional rather than advisory. This addition is, in my view, redundant, once one enumerates attributions and qualifies them as decisional.

[20] At p. 130 [emphasis supplied].

[21] At p. 138.

voices diverging from the mainstream international/supranational consensus can be dismissed as biased or relying on unscientific (anecdotal) evidence.[22]

The comparison is temporally divided in four micro-studies of court administration and mechanisms of judicial accountability in the Czech Republic and Slovakia, in 1993-2002 (after the split, before the introduction of the Judicial Council of the Slovak Republic) and 2003-2010 (once the systems began to diverge, with the Czech Republic preserving its mixed model and Slovakia introducing the Judicial Council of the Slovak Republic). The comparison factors in slight differences after the break-up of Czechoslovakia, for example the fact that Slovakia perpetuated a communist practice, the one-time retention review for new judges, which served as an effective stick until 2001, and its legal system provides for an additional, particularly alluring carrot in salary bonuses. Introductory sections at the beginning of each case study provide the reader with contextual, introductory accounts of the political, constitutional, and judicial systems. These 'law in context' micro-studies, which in the economy of the larger case study part of the argument are incidental, are little gems that make for extremely informative reading. In point of fact, many of Kosař's Part II cameo digressions from empirical tables and charts open wide avenues for research. For instance, the adamant insistence of the Commission to force the Judicial Council of the Slovak Republic (and Latvia, Romania, Estonia, etc.), under the banner of judicial independence, while concluding from the onset, in 1997, that 'there was nothing wrong with judicial independence in the Czech Republic',[23] speaks volumes about the rule-bound nature, professionalism, and general consistency of the Commission's 'Eastern Bloc' strategies.

Statistical charts show that the introduction of the Judicial Council of the Slovak Republic (the institution was entrenched by constitutional amendment in 2001 but became fully operational in 2003) resulted in a massive shift of power to the Council and in effect to the President of the Slovak Supreme Court and his allies in the court administration. Mechanisms of accountability located in the Council were used in a vexatious manner (sticks) to harass independents or opponents or, carrot-like, in a feudal way, to reward partisans with perks such as moneys (bonuses) and easier or more interesting cases. This claim is substantiated by the statistics, which reveal for instance a sudden spike in the number of disciplinary motions in the Slovak Republic, as soon as the Judicial Council began to function at full throttle.[24]

The Czech Republic, whose judicial organisation has remained tributary to the legacy of its historic, Austro-Hungarian and pre-communist traditional structure

[22] At p. 125-126.
[23] At p. 165-166.
[24] At p. 353-354 (2003-2010) and comparative tables for the period 1993-2002, at p. 342-345.

of court administration, centered on the Ministry of Justice, features favorably in the comparison. As Kosař shows, the ministerial label is at any rate deceitful. Due to some post-communist peculiarities (vetting by psychological testing), actual constitutional division of powers (such as appointment powers of the Czech President with respect to the Supreme Court and the Supreme Administrative Court), and the factual displacement of authority towards court presidents, the resulting picture is more nuanced and fine-grained. Even though the minister of justice had formal authority to dismiss court presidents, the dismissal of five officials by Otakar Motejl (President of the Supreme Court 1993-1998, Minister of Justice 1998-2000) resulted in a significant reputational backlash and – according to Kosař – backfired when Motejl's attempt to introduce the Judicial Council in the Czech Republic was scuttled by the court officials he had previously antagonised.[25] Revealingly, the response of an incumbent is cited to the effect that: '[the personal politics of the minister of justice is] the one that fulfills the wishes of the regional court presidents.'[26] The argument in what concerns Czech evolutions is (supporting statistics aside) that a system which grows organically and balances out different institutions as 'principals' serves judicial independence, judicial accountability, and thus the democratic rule of law state much better than a parachuted institutional graft relying on the sloganised understanding of a complex principle:

> In contrast to Slovakia, where court presidents preserved their powers from the pre-Judicial Council of the Slovak Republic era and controlled the powers previously held by the Slovak Ministry of Justice via the Judicial Council, there was always a balance of powers between Czech court presidents and the Czech Ministry of Justice and neither could get the upper hand. The Czech Ministry of Justice model, modified by interventions of the Czech Constitutional Court and growing emancipation of court presidents, was perhaps more clumsy and full of tensions, but it was more resistant to capture and resulted in a constitutional balance.[27]

There is an undertone of Eastern European irritation with Western (where the term effectively includes the EU Commission delegations) missionary formulas, with all their attendant baggage of condescension neatly packaged under do-gooder motivations. We find out, for instance, that Western lecturers ('experts') invited to the Czech Judicial Academy held 'primitive' seminars, assuming 'that Czech judges [had] just "climbed down from trees"'.[28] In the same vein, it is opined by Kosař that his nuanced argument regarding the balance of powers and

[25] At p. 210.
[26] At p. 208.
[27] At p. 377.
[28] At p. 194.

https://doi.org/10.1017/S1574019617000177 Published online by Cambridge University Press

the beneficial use of some democratic checks via the Justice Ministry 'must sound like science fiction to the European Commission and the Council of Europe'.[29] It is hard not to empathise. For two decades after 1989, droves of experts flocked to the CEE region, most of them fully oblivious of the needs and impervious to the thoughts of the 'good postcommunist savage', each of them with a different Western institutional or legislative gospel at hand, all of these ready for transplant.[30] One such miracle solution was the Judicial Council Euro-model.

Sloganised Constitutionalism and Its Perils

David Kosař has written an important and courageous (i.e., unconventional) book. This is not, however, necessarily true in terms of what he considers to be the predictive value of his judicial leadership theory, namely that 'the introduction of a strong judicial council into a hierarchical civil law judiciary will likely in the medium term empower judicial leadership who will pursue their own interests and strive for preserving their privileges and influence.'[31] This theory and its predictive value are perhaps hewed too closely to the case of Slovakia and its idiosyncratic features; more comparative work is needed to substantiate the claims in the case of other transplants of the 'Judicial Council Euro-model'. The author's more general thesis, however, about the perils of 'sloganising' principles such as judicial independence[32] and extracting from the slogans themselves ready-made, procrustean policy solutions to staggeringly complex questions of value and context is masterfully exemplified and therefore of significant value to comparatists.

The case of Romania is an apposite counter-example to Kosař's narrow judicial leadership theory predictions but – by the same token – illustrates well the general arguments and themes of the book. The author himself considers Romania to be an ideal case study to prove or disprove his thesis.[33] In point of actual fact, the Romanian version of the 'Judicial Council Euro-model', the Superior Council of Magistracy (*Consiliul Superior al Magistraturii*), does not fit by its very design the exact definition proposed by the author. One of the features is lacking, since the Romanian council is not presided by the Supreme Court (in Romania, High Court of Cassation and Justice) President.

The post-communist Constitution of 1991 provided for a Superior Council of Magistracy composed of judges and prosecutors elected by the two Houses of Parliament in joint session, for terms of four years (Article 131). The Council's

[29] At p. 409.

[30] *See* András Sajó's still current, 'Universal Rights, Missionaries, Converts, and "Local Savages"', 6 *East European Constitutional Review* (1997) p. 44.

[31] At p. 405.

[32] At p. 426-427.

[33] At p. 404.

https://doi.org/10.1017/S1574019617000177 Published online by Cambridge University Press

main attribution was to propose judicial and prosecutorial appointments to the President, presided over in such case by the Minister of Justice (who had no right to vote on appointments). It also served as a disciplinary court for judges only (in such formation, presided over by the President of the Supreme Court) (Article 132). This configuration was a partial nod to tradition, since a council attached to the Ministry of Justice had existed in the pre-communist Kingdom of Romania (since 1909). An institutional ambivalence, which has lingered on until today, ensued from the uncertain position of prosecutors. Some members of the Constituent Assembly opined that prosecutors ought to have been excluded from the category of magistrates, as a conscious break with the legacy of Communist *Prokuratura* past, whereas others argued that there was no incompatibility with the rule of law state if one were to preserve the Public Ministry as 'a functionally autonomous organ within judicial authority.'[34] The end solution was a weaker council that would accommodate both prosecutors and judges but would tilt the scale toward the judiciary proper. The term 'judicial authority' was meant to bridge nominally this compromise; courts, the judicial power, are a part of the judicial authority, which comprises the courts of law, the Public Ministry, *and* the Superior Council of Magistracy. The prosecutors (as *Public Ministry, Ministerul Public*), were left, however, in a sort of organisational limbo, under two hats, executive as well as judicial, being also placed 'under the authority of the Minister of Justice' (Article 131(1)).

In 2003, Romania adopted, at the behest of the Commission, the Judicial Council Euro-model. The articles of Chapter VI, Section III of the third title (Superior Council of Magistracy, *Consiliul Superior al Magistraturii*) were formally only amended and renumbered but what resulted from the revision was in all respects and purposes a completely new institution. The current, post-2003 council has little connection, nominal identity aside, to either its historical precursor[35] or the original, 1991 constitutional organ. The Superior Council of Magistracy now exercises the full gamut of attributions bearing on judicial and prosecutorial training and careers. It is composed predominantly of elected members (9 judges and 5 prosecutors). The three *ex officio* members (Minister of Justice, President of the High Court of Cassation and Justice, Prosecutor General of the General Prosecutor's Office attached to the High Court of Cassation and Justice) have no right to vote in the two sections, which serve as first instance disciplinary courts for judges and prosecutors, respectively. Two 'representatives of

[34] In A. Iorgovan, *Odiseea elaborării Constitu iei-fapte i documente, oameni i caractere; -cronică i explica ii, dezvăluiri i medita ii* (Editura Uniunii Vatra Românească, Târgu Mureș 1998) p. 43 (Nicolae Cochinescu and Teofil Pop).

[35] The online platform of the Superior Council of Magistracy (www.csm1909.ro) indicates continuity with the pre-communist body.

https://doi.org/10.1017/S1574019617000177 Published online by Cambridge University Press

the civil society', elected by the Senate, can only take part in plenary sessions, i.e., cannot even attend section meetings. The term of office was extended to six years but the president of the Council is elected for a term of *one year, which cannot be renewed*, from among the 14 elected magistrates (Article 133(3)). The President of the Council can seise the Constitutional Court with *Organstreit*-proceedings, i.e., can lodge a request 'to solve legal disputes of a constitutional nature between public authorities' (Article 146(e)). The Superior Council of Magistracy supervises judicial training, oversees the Judicial Inspection, the disciplinary 'prosecutor', and must be consulted with respect to any amendment to its own organic law, the statute on judges and prosecutors, and the judicial organisation law, respectively (Laws 317/2004, 303/2014, 304/2004). The Romanian Superior Council of Magistracy had from the beginning a strongly corporative, anti-hierarchical tilt: the system is autonomous, the institution representing the system is constitutionally entrenched and has significant powers but no propensity towards hierarchy. The organic law of the Council, 317/2004, emphasised this innate heterarchical tendency, since, according to its provisions, three out of five elected prosecutors and four out of nine elected judges represent the lowest jurisdictional tiers, trial courts (*judecătorii*) and county courts (tribunals, *tribunale*).

This is one of the – if not the – most autonomous judicial councils in the world. The Italian Council, the prototype of the current international 'good practice', comprises a much weaker corporative element among its elective membership (16 elected judges and prosecutors, 8 lay members (*membri laici*), selected by the Parliament). As already indicated, the Romanian Council is also one of the most 'democratic', insofar as hierarchy is discouraged by design. In practice, its most vocal members and a number of recent Superior Council of Magistracy presidents represented the lower jurisdictional tiers. Few were court presidents and the presidents of the highest court and the highest prosecutorial office, as members of right, are disqualified *de jure*. In 2015, a trial court president was, for instance, elected President, but this court leadership position has to be put in perspective: according to the Judicial Organization Law (Law No. 304/2004) there are 176 *judecătorii* (courts of first instance, trial courts of general jurisdiction) in Romania, six in Bucharest alone, one for each district of the city.

Lack of hierarchy notwithstanding, the body as such is insulated from almost any kind of external control. Romanian commentators have described this situation as 'extreme' and 'absolute'.[36] Against the grain of reality, once the institution was entrenched, claims for ever-wider autonomy were made. The Constitutional Court joined the sloganisation bandwagon, insofar as a series of decisions entrenched the current institutional configuration in perpetuity. The

[36] B. Dima and E.S. Tănăsescu, 'Puterea judecătorească' (*The judicial power*), 1 *Revista de Drept Public* (2013) p. 121.

provisions of the Constitution with respect to the independence of justice are part of the general limits of revision, according to the 'eternity clause' of Article 152. The Court decided on two amendment initiatives seeking to change the configuration of the Superior Council of Magistracy. One revision initiative, sponsored by the Presidency, sought to reduce the number of council judges from nine to five and increase the number of political appointees to six, allowing the latter to sit in the sections: this is similar to the current French institutional makeup. The Court held that amendments resulting in an offset between the correlative ratios of elected and politically-appointed members would endanger judicial independence: 'an alteration of the representation proportion in the Council [to the detriment of career magistrates], [is] susceptible to produce negative effects on the activity of the judicial system.'[37] The second amendment bill, sponsored by the Parliament, was more timid, attempting to leave the institution essentially the same but marginally increase the number of appointed 'civil society representatives', from the current two to four. This time, the Court held curtly that *any* increase in the number of politically-appointed members would be unconstitutional if the number of elected magistrates would not be proportionally raised as well.[38] Thus, whereas the first decision attempted to provide a reasoning, including also some selective citation of foreign practices, the second was apodictic. Conjuring the principle (now slogan) of independence was considered by the Constitutional Court enough to ground the holding. Furthermore, an article that allowed judicial general assemblies to recall 'their' representatives (i.e., judges and prosecutors elected in respect of a certain jurisdictional tier) by referendum was also declared unconstitutional, since Superior Council of Magistracy members hold, according to the Constitutional Court, representative rather than imperative mandates.[39] References to fair trial guarantees were also added, for good measure, to the reasoning. The immediate result was that the impugned article, once abrogated, was left as such since 2013. It is hard to imagine how an amendment to the law could reinstate any kind of effective recall procedure, since such 'democratic', vote-based accountability instruments are not meant to function analogously to a criminal trial. The more unsettling consequence is that the Romanian council, a corporative institution already fully insulated from majoritarian checks, has now become immune to constitutional amendments and even to peer, internal professional censure.

Kosař's thesis is that the introduction of such institutions is detrimental, insofar as system independence increases the power of judicial mandarins, with the effect

[37] Decizia Nr. 799 din 17 iunie 2011, M. Of. Nr. 440 din 23.06.2011.
[38] Decizia Nr. 80 din 16 februarie 2014, M.Of. Nr. 246 din 07.04.2014.
[39] Decizia Nr. 196 din 4 aprilie 2013, M. Of. Nr. 231 din 22.04.2013.

that the independence that really matters, that of the individual judges, is imperiled. His method of substantiating this claim is the measurement of mechanisms of accountability, as used by the judicial leadership to stifle dissent and aggrandise the powers of court presidents. Neither of these claims can be validated by the Romanian case. The main problem with the functioning of the Romanian judicial system seems to be that it is hard to understand what happens inside it, from a lay perspective. There are some indications that the general situation is not rosy. Two 'civil society representatives' have criticised the institution, one resigning before the end of her term, accusing 'cabals' and hidden agendas[40] in the Superior Council of Magistracy, another criticising the Council in a particularly acid law review article, after the end of her term.[41] The referendum initiated to revoke two sitting Council members was also indicative of troubles in the judicial paradise (its positive result was invalidated by the Constitutional Court decision that declared the recall procedure unconstitutional). Some positions taken by professional associations are also upsetting, for instance recent accusations of interventions in the justice system by the powerful Romanian Intelligence Service (*Serviciul Român de Informa ii*, SRI) and allegations regarding the existence of undercover SRI members among judges and prosecutors.[42] The collaboration of the Service with the anticorruption prosecutors was based on institutional protocols, adopted on the basis of classified decisions by the Supreme Council of National Defense (*Consiliul Suprem de Apărare a ării,* CSAT) declaring corruption a danger to national security; this *sub rosa* interpretation brought the fight against corruption under the scope of the Law on National Security 51/1991 and thus within the competence of the SRI. The former director of the SRI legal department stoked the fire, giving an interview and declaring verbatim that the criminal justice system, from anticorruption indictments up to the rendering of a conviction judgment, was 'a tactical field'

[40] A civil society representative (Georgiana Iorgulescu) resigned in 2012, accusing occult cabals (*jocuri de culise*) and the by-passing of the Plenum by unilateral SCM leadership action. Alina Neagu, 'Georgiana Iorgulescu, civil society representative, has resigned from SCM', *Hotnews.ro* (23 August 2012), available at <www.hotnews.ro/stiri-esential-13081356-georgiana-iorgulescu-reprezentant-societatii-civile-demisionat-din-csm-ceea-intamplat-ultimele-saptamani-umplut-paharul-nu-pot-iau-parte-tot-felul-jocuri-culise.htm>, visited 10 July 2017. 'I cannot take part in cabals (*jocuri de culise*), deferrals, decisions taken without consulting the Plenum and decisions taken unilaterally by the [Superior Council of Magistracy] leadership.'

[41] E.S. Tănăsescu, 'Reforma Consiliului Superior al Magistraturii între analogia dreptului şi nimicuri etice' (*The Reform of the Superior Council of the Magistracy between Legal Analogy and Ethical Trifles*), 2 *Pandectele Române* (2011) p. 19.

[42] <www.unjr.ro/2017/01/16/document-csat-privind-relatia-dintre-serviciile-de-informatii-si-justitie/>; <www.unjr.ro/2017/01/31/magistratii-solicita-csat-declasificarea-hotararilor-in-baza-carora-s-au-semnat-protocoalele-intre-serviciile-de-informatii-si-parchet/>, both visited 10 July 2017.

for the internal intelligence service.[43] Press scandals occasionally erupt. Romanian 'super-judges' and 'super-prosecutors' are exclusively anticorruption heroes and do not travel between branches, as in Kosař's Czech-Slovak tale. Sometimes, anticorruption heroes become villains. A couple of well-known DNA prosecutors were, for instance, excluded from the profession, one of them currently undergoing trial on a corruption charge. The Superior Council of Magistracy recently excluded, by unanimous decision of the judicial section, a Court of Appeals judge famous for taking part in a high-profile corruption case panel. But the raw facts are in and of themselves meaningless, since this could either mean that anticorruption does not function well or that the system is healthy and has produced its own antibodies.

In Kosař's paradigm (which is social-scientifically correct), all of the above are either anecdotal or unsubstantiated information. The problem is, figures as such tell us very little as well without internal knowledge. Given the already high informational asymmetry of the system, it is hard to interpret even the limited data one *can* collect. Indeed, this is also to a certain extent the Achilles' heel of the book's argument. Without extensive references to 'anecdotal' information, the effects of the Council's use of accountability mechanisms on individual judges in Slovakia would be hard to understand. It would be difficult to understand, for instance, why relatively few disciplinary actions resulted in the imposition of harsh sanctions, in spite of the avalanche of actions promoted after 2003. As the author points out, sanctions, including the exclusion from the profession, were imposed in the Czech Republic, which had preserved its Minister of Justice judicial organisation system. 'Anecdotes' shed light on the fact that, in Slovakia, most actions were simply promoted in order to harass rather than effectively sanction, and anecdotal information explains how salary bonuses were awarded. In Romania, the extreme insulation of the judicial system generates fewer hard facts and fewer anecdotes.

To be sure, Romania is to some degree a case apart. In Hirschl's methodological taxonomy, used also by the author, Romania would make a standalone 'most difficult' case to test the judicial leadership theory and predictive prowess of Profesor Kosař's theory.[44] Not only did the Commission impose a 'take it or leave it' judicial organisation model on the country, but Romania (like Bulgaria) is also subject to *post-Accession* monitoring, through the Cooperation and Verification Mechanism (CVM). This Mechanism was initially scheduled to lapse three years after the Accession but has in the meanwhile been extended *sine die* and expanded, from its four initial benchmarks (essentially related to combatting corruption and

[43] See <www.juridice.ro/373666/dumitru-dumbrava-sri-este-unul-dintre-anticorpii-bine-dezvoltati-si-echipati-pentru-insanatosirea-societatii-si-eliminarea-coruptiei.html>, visited 10 July 2017.

[44] Hirschl, *supra* n. 10, p. 144-146.

judicial reform) to the monitoring of virtually the entire functioning of the local political and constitutional system.[45] Romanian developments are singled out also by the emphasis on combatting corruption, an EU-induced political and policy imperative that is germane to judicial independence. The two concepts interrelate, since, in the systemic logic created by the institutional structures and the two imperatives, corruption can only be combatted by an independent judiciary. By the same token, ever-more judicial and prosecutorial independence is justified by reference to the role of the judiciary and the anticorruption prosecutors in combatting political corruption. This has created a number of constitutional paradoxes and a cascade of autonomy claims. To wit, the National Anticorruption Directorate is formally a division of the General Prosecutor's Office attached to the high court, but in all respects and purposes fully autonomous from the latter, since both officials are appointed in the same way, for three years, at the proposal of the Minister of Justice, by the President, with the advisory opinion of the Superior Council of Magistracy. Prosecutors (the Public Ministry) exercise their functions, according to the Constitution 'under the authority of the Minister of Justice' but the latter has no effective leverage, aside from nominations to high prosecutorial positions (which can be rejected by the President) and disciplinary initiatives (which can be disposed of by the Judicial Inspection and the Superior Council of Magistracy).

The peculiarity of the Romanian case is reflected also in the unyielding, Manichean character of the Commission's positions, as expressed in the Cooperation and Verification Mechanism progress reports. Kosař does point out the general reluctance of the Commission to accept criticism of the rosy Judicial Council Euro-model picture, which he attributes, in various parts of his book, to path and reputational dependency or naiveté. All negative aspects overshadowing the functioning of the judicial system (academic criticism, press scandals, allegations regarding intelligence service involvement, resignations from the Council) have been ignored, blotted out or explained by insufficient protections of judicial independence. The Commission repeatedly suggested, for instance, that the Superior Council of Magistracy and the Venice Commission be involved in future attempts to revise the Constitution (consent to amendments purporting to 'curtail judicial independence'), advocated for the adoption of a parliamentary Code of Conduct, in order to mollify political speech critical of the judiciary,[46] and – most upsetting – opined that financial means should be found to counter press criticism of judges. In a country where judicial emoluments exceed exponentially the salaries of any other category of public employees, the

[45] See <ec.europa.eu/info/effective-justice/rule-law/assistance-bulgaria-and-romania-under-cvm/cooperation-and-verification-mechanism-bulgaria-and-romania_en>, visited 10 July 2017.

[46] COM (2017) 44 final.

Commission implied for example that a special fund should exist, to be used by judges and prosecutors attacked by the press (read: subjected to any form of criticism), in order to pay for expert counsel representation and court fees related to actions in torts against journalists.[47] The problem is not that punctual Commission recommendations or observations would not be correct but that the unique solution to all problems (and many problems are obfuscated or blotted out) is seen to be more judicial independence: from legislative changes, from constitutional amendments, from political forms of appointment, from the press, from political speeches, and so on. This discourse reinforces and legitimises internal factional demands (and vice versa). Judicial independence has been transformed therefore into a Romanian/European network Münchhausen story or, in Kosař's polite terms, into a slogan.

The Romanian example shows that the translation of this institutional form may just as well produce different abnormalities. In Slovakia the Council strengthened judicial notables, allowing them to use accountability mechanisms in perverted forms and to aggrandise their own positions of influence by persecuting the dissenting rank-and-file and rewarding personal and factional loyalty. In Romania, entrenched systemic influence resulted in an opaque corporatist structure which makes, in an impersonal, almost Luhmannian manner, ever-greater demands for autonomy and de-politicisation, not only of the judiciary but of the political system as such. In both countries, the instrumental use of the Council form and the invocation (both by the Commission, maybe out of naïveté, and by local groups, out of interest) of judicial independence were predetermined by the abrupt transposition of a ready-made institutional blueprint, in cavalier disregard of both comparative constitutional lessons and local context. *Perils of Judicial Self-Government in Transitional Societies* serves as a fine cautionary tale about unforeseen consequences and about the perils of sloganising the sophisticated semantics of constitutionalism and imposing top-down, ready-made policy solutions adopted on the basis of such slogans.

[47] COM (2016) 41 final: 'There continue to be several examples notified to the SCM of attacks in the media and by politicians, and the SCM has had to issue many critical conclusions as a result. But the SCM cannot secure an equivalent level of coverage for its press statements compared to the initial criticism; and beyond this moral support, the SCM offers no financial or legal help for magistrates seeking redress in court.'

https://doi.org/10.1017/S1574019617000177 Published online by Cambridge University Press