

BELARUS'S JOURNEY to Europe

law, the economy
and politics
in the context
of the process
of European
integration

Anthology

2006



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The Process of Transforming a Totalitarian System into a Democracy

VOJTĚCH CEPL

Superficially, transformation of a totalitarian state into a democracy would seem to be a fairly simple matter since a democracy is a higher level system and its objective is to let people lead better lives. And, when an angry revolutionary from Dostoevsky's „Brothers Karamazov” wants to fight for a better world, someone tells him that the best thing for him to do would be to sit in a library, read books and thus multiply his powers. Nothing could be truer – especially in today's world.

If you want to improve yourself, you should sit in a library and carefully select your reading material from amongst the world's greatest books. There are many of them. However, likely as not, most of them were never translated into Belarusian or even Russian and thus, as a first step towards self-improvement, you should start to learn English. And not just learn it, but learn it well; and, most importantly, do it in English. When you start feeling that you have learned it all, learn even more! Because this is the language in which the greatest books have been written and these books will teach you what a modern, sophisticated and democratic society should look like.

In the Czech Republic, we completed the process of transforming a totalitarian system into a democracy rather unsuccessfully over the course of the last seventeen years and looking back, we now know what we did wrong. It has been good experience and, should there be a next time, we are likely to be able to do it better.

At this point, I would like to recall a memorable statement by Lord Ralph Dahrendorf from Oxford. In an article he wrote after the fall of the Berlin

Wall he stated, „Eastern Europeans will need only 6 months to change their political system, 6 years to change their economy but 60 years to change their normative system and their rules of behavior.” I would like to take advantage of this elegant quote and use it as the framework for my further presentation.

Every society starts out by changing its political system – in other words, by establishing a democracy.

And, before going further, we should perhaps briefly give ourselves something to refresh our recall of the characteristic aspects of a democratic political system.

On one hand, the term ‚democracy’ has a fairly narrow definition – which is the ‚rule of the people’ (majoritarian rule). This was the original meaning of democracy at the time when Aristotle was defining different forms of government running from rule by a monarch, by an aristocracy and oligarchy through to rule by the people. Only this definition – ‚the rule of the people’ – should be used as a description of the term ‚democracy’.

Notwithstanding, the term has been broadened to such an extent today that the term ‚democracy’ is practically synonymous with the phrase ‚good government’. In other words, everything that is good is a democracy and we can fit in whatever other particulars happen to suit us. This would be the other extreme.

The ‚rule of the people’ – the rule by the majority – that is the first sign of democracy. It requires equality among people in order to give an equal voice and the chance to participate in free elections to as many people as possible. This is the first thing that no longer seems to apply in modern times. This is because today, free and fair elections can easily lead to the rise of a dictator. A good example is Belarus. I bet that if Belarus held free, fair and internationally monitored elections tomorrow, Lukashenko would win again. It is a great disappointment but the fact is that most of the time, the majority is wrong and it happens quite often.



It is extremely important that the majority be well-informed. Elections must be preceded by a long period of public debate in a free press. People must be educated to understand the principles that must be discussed. Unless the majority of the people understand what it is that they really want, there can be no such thing as really 'free elections'. I would like to take it even further by saying that elections should be preceded by a period of time during which we learn about these things.

The second popular concept in today's world is that of a 'market economy'. An open market is of course a prerequisite for a democracy.

The introduction of a market economy is basically the restoration of private ownership. The market is nothing more than the trading of goods and services among free, protected and clearly defined private owners.

Instead of having a discussion about the establishment of an open market, we should talk about the introduction of private ownership and do so in its most extreme, most precise and most clear-cut form, which is protected by the government. This is a cultural invention and it lies at the foundation of our civilization – the Judeo-Christian civilization on both sides of the Atlantic.

I have recently been categorizing civilizations based on a book by Samuel P. Huntington, titled „The Clash of Civilizations“. The book was translated into all major languages and, if it was not published in Belarusian, it was a big mistake, because, an intelligent person from Belarus should not be spending time thinking about this situation – he or she should be studying and translating this other work.

This is because of the fact that there is no specific Czech or Belarusian way to do this. All of the principles of a free and democratic society are already known and they have been repeated and resurrected again and again. They have all been written down and to believe in the discovery of a newly reinvented concept, driven by national pride is nonsense.

From time to time, similar types of national and nationalistic initiatives crop up because nationalistic fervor has an enormous mobilizing ability. But, it is a dangerous evil!

Why don't you stop being patriots and become Europeans instead? Look at me. I don't call myself a Czech. I will however state that I am of Slavic origin. That is something one just has to understand in order to get out from under where one is now and to move to the West. That is because our Western civilization is the highest, most superior civilization on this planet.

You might notice that I am not a multiculturalist and I don't believe that all civilizations are equal. Along this path Samuel Huntington calls out approximately seven different civilizations in his book. The first of these is the Judeo-Christian civilization and the second is the Russian Orthodox civilization.

In order to become a part of this civilization, a society must first introduce all of the typical attributes of this civilization's political systems, followed by the attributes of its economic system and last but not least and often ignored, the most important change is the change in the values of the society – in other words, a change in the normative system.

To briefly recap the prerequisites of a democracy, they include the possession of a political system in which there is a freedom of information, political parties that are pluralistic, free elections, the rule of the majority, clearly defined basic human rights, a separation of powers, a constitution built around this separation of powers, a political system based upon a constitutional and a determination to sit down and collectively put together the rules that will then be followed by all.

I won't try and go through an extensive list of individual human rights. However, if we want to think of an equivalent set of basic human rights, the 'European Charter on Human Rights' could be used as a good example.

The Czech Republic became a signatory to this Charter after November 1989. But at that time, the country was run by the group of left-leaning members of the 1968 reform movement whose goal was to transform our political system into socialism with a human face. As a result, our charter includes a number of social rights, which are unrealistic.



A government that wanted more than to just reform socialism and use it as an ongoing political system didn't come into power until later. We didn't want to 'reform' socialism; we wanted to get rid of it. And, we wanted to build an open and free society. That is the political system that you are given 6 months to create.

A change of the economic system means privatization and we could spend the entire semester discussing the different ways one could make privatization happen. However, the key requirement is that each possession must have a clearly defined owner or co-owner.

That is a concept which is heavily represented in the Russian tradition. When Russia was under the influence of the Tartar-Mongol cultures, it abandoned the model of private ownership for centuries and replaced this model with one having collective ownership. The tradition of the Slavic villages and community ownership was combined with a confused Marxist philosophy, creating a poisonous environment, which led to the impoverishment of its people.

The ownership of land is the fundamental building block of freedom. This is because a person that doesn't own anything is basically a serf.

The most important book that should be translated and handed to every young person is Friedrich von Hayek's „The Road to Serfdom“. It discusses the following basic principle: Ownership is an extension of every person. When a person is deprived of ownership, he or she loses their freedom and becomes totally dependent on those in authority. Even a minor degree of ownership can be the basis of someone's freedom. It has to be respected. Because that is what a free society and an open market and democracy are built upon.

Just like ours, your society has been deformed in the sense that it thinks mostly about its economy. Economists always were and always will be instigators of change because Marxism is basically nothing more than economic theory. It is still widely believed that a platform is a platform,

that the government should be directing the economists and that it is the government's job to ensure that people live well. In reality, this should not be the responsibility of the government at all. It should be part of the private sector.

All that government should be doing is to first create a legal framework in which the different economic processes can operate and then to protect this framework. The concept of the government as a caretaker, as the parent and as the one that should take care of things and provide for everyone is hugely biased and you will be confronted with it for another ten years. The real purpose of government is very different.

In the Czech Republic, we have seen several different methods of privatization used. You have heard about the 'coupon' system, about the selling of businesses to foreign investors and you've heard about the 'small' privatization (where businesses were sold at auction).

You should beware of the Russian privatization system, which can also be referred to as the 'switch-off-the-light' model. Here, the light is first turned off and then, when the light is turned back on, whatever people are holding belongs to them. If this system is used, the results would be the same as those we saw in Russia where corporate executives, the old government bureaucrats and party officials turned into oligarchs and they ended up owning everything.

In your case, a restitution model wouldn't apply because in restitution, private property is turned back into the hands of the 'original' owners or their heirs. Belarus has gone through a very long period in which private ownership was not supported and, partly as a result, there is a lack of reliable historic land ownership information. It would be absurd to return to the period prior to 1913 or to otherwise try and resurrect the past.

The only other option that would remain would be to somehow divide up everything among all of the citizens. That is because the only logical definition of common ownership or state ownership would be 'ownership shared by all citizens'. Under such a system, some type of coupons or



vouchers would be used to give everyone a portion of an abstract co-ownership interest that would later become more defined or specified. All of this brings us back to a ‚coupon‘ privatization, which you should be able to complete with greater success than that of ours here in the Czech Republic. You can do this by learning from our mistakes. The risk faced in such a situation is the scenario in which a number of people end up enriching themselves by treating others unfairly. And, the only thing that can prevent this from happening is a well-designed, robust legal system.

What you need to have are Western-style lawyers instead of corporate executives or economists. A culture of law is what has suffered the most in Belarus in the past. The same happened in our country. If it was up to me, I would take 10,000 young people and send them to get law degrees in the United States of America. This is because without a good legal system, the monumental task of converting to capitalism can simply not be achieved. Looking back, we notice that the biggest mistake that happened in our privatization was a lack of order and clear rules. That is the primary function of the State – the cultivation of rules.

Every society has certain rules – a system which allows its members to coexist and to cooperate with one another. We are not just talking about laws here. Informal and moral codes are also included – what one can and cannot do; what one should and should not do; what is normally done and what is normally not done; and, what is good and what is wrong. In the past, this issue was closely associated with religion. This is what we refer to as a society’s normative system.

It is the factor that sets apart the different civilizations, as defined by Samuel Huntington. Different societies have different normative systems. Even the most primitive societies have systems of rules and legal anthropologists have been studying the ‚laws‘ of primitive tribes. They have discovered that even the most primitive tribes have some type of ownership system, some type of concept equivalent to a contract and

some type of structure of laws (or rules) – because without these, they wouldn't be able to exist.

Even animals living in groups have their own sets of rules. There is a fascinating book on animal behavior titled „Das sogenannt Böse“ (On Aggression) that was written by the Austrian sociologist, Konrad Lorenz, a Nobel prize winner. The book describes issues such as animal behavior, the defining of territory, etc. No society could function and prosper without rules, without legal, moral and ethical codes. The greatest treasure and asset of every society is its moral or normative code, which has to be nurtured through parenting, education, the family, literature, societies and associations and the media. Everything has to lead to the creation of a system of rules, based on which the society can function.

Having such a system of rules can also be a financial asset. They say that a ‚rich‘ society is one with an abundance of physical assets and natural resources. But that is wrong! Some societies sitting on mounds of gold and diamonds and oil are impoverished.

In the richest oil countries, there are people who live in poverty and there is a new theory that states that if a country is rich in natural resources, the ruling class ends up using these resources to silence the population and keep it from a revolution, which of course would prevent the ruling class from remaining in power.

In such systems, the country slowly falls apart and, when the natural resources run out, everything collapses. The fact that the population was brainwashed by the ruling class leads to the disappearance of the system of rules that we have talked about before and instead, a corrupt, sick and malignant society is created in its stead.

Let's talk about financial capital. An economy couldn't grow without having financial capital. However, the one thing that is often not discussed is moral and social capital – something that I previously touched upon and would now like to continue discussing.



When a society reaches a high degree of development and it has an effective set of rules that allows it to live with freedom, dignity and well-being, life is simply better – even without natural resources or financial capital. This is the latest in social theory.

The securing of liabilities, a range of different types of legal instruments, the concepts of collateral, guarantees and sanctions for failing to meet deadlines – all of these are very expensive considerations. Those societies that don't function on the basis of some system to effectuate mutual trust lose out to their competition because they will end up lacking social and moral capital. These are the only things that one can get for free.

People have to be brought up and the society and its elite have to behave in such a way as to set an example for others. This is because people like to emulate whatever is mainstream – the etiquette, ethical standards and the trust in the society are a society's greatest treasures. After financial capital comes human capital – education, professional skills and work ethic – and all of this has an economic impact.

In the spring of 1990, a group was set up to start the study of the developments going on in Eastern Europe at the University of Chicago in the US. The group got substantial funding from a number of private foundations and its members started the publication of a magazine titled the „East European Constitutional Review“. For 15 years, the group monitored and compared the developments going on in 29 post-communist countries. Well-known professors of political science, law and economics from the US and both Western and Eastern Europe contributed to this publication. The magazine can be found in a number of libraries and it was also published in Russian. I highly recommend that you take a look at it.

In 1990, the magazine published an article in which leading experts presented a theory stating that the conversion to democratic systems in

Eastern Europe could never take place and that in the future there would be a great deal of disappointment.

This very skeptical theory put forth the following scenario: The first step would be the introduction of a democratic political system by the reform leaders (i.e. free elections and so on). In this way, the number of people involved in the running of the country would increase.

At the same time, the country would have to undergo an economic transformation (i.e. privatization and a conversion to capitalism) and this process would take at least 6 years to complete and it would cost an enormous sum of money.

The question that then arose was who would pay for all of this? The only way to fund this transformation would be to mobilize the country's own funds, which would mean a tightening of people's belts along with the promotion of the idea that we all have to go through some hard times now in order to live better in the future.

After a first wave of enthusiasm, people would continue to go with the flow provided they wanted things to change. However, after a period of time, people would get tired of it and start to miss the 'good old days' – times when things were secure and they had a secure income (even though small).

Along with a nostalgia for the 'old' times and a resistance to the new changes, there would be hidden tensions such as nationalism. In your part of the world, this could include problems with Russian minorities and language problems. This type of nationalism is something to be expected and you will have to be prepared to face it.





An Independent Judiciary, the Key to the Existence of a Modern European State

MARIE BENEŠOVÁ

The rule of law is a nice sounding concept, but creating a system that is governed by the rule of law is extremely difficult. The Czech Republic is a young democracy and, just like your country, we have undergone many historic changes. These have all had an impact on the overall legal system in our country. 1989 was an important milestone in the establishment of the rule of law. It was the year of the so-called ‘Velvet Revolution’, which ended the era of totalitarian rule, and it marked the beginning of a new era of democracy.

These changes naturally affected the justice system because, until that time, the courts, the prosecutor’s office and even the legal profession itself were all subordinate to the rule of the Communist Party. Among other things, the party controlled judicial affairs and people were always having to face the decision of whether or not to play ‘nice’. After the 1989 turnover of power, our country had to cleanse itself of the people who participated in all of the illegal conduct that had been going on and we had to rebuild the entire justice system. It was an enormously difficult task because the judicial workers didn’t wear colored hats that would indicate which of them had been playing by the rules and which of them had not been.

In the period that followed the Velvet Revolution, our prosecutorial system underwent a major transformation. Our political leaders reached the conclusion that this institution would have to be rebuilt from the ground up and should change its name. A decision was made to call this

part of the justice system the 'State Prosecutor's Office' and in late 1993, early 1994, the system was transformed and the State Prosecutor's Office was born.

It was an extraordinary process during which the system had to get rid of those people who had worked for it and participated in the various types of illegal activities perpetrated there. The hope was for the State Prosecutor's Office to consist only of uncorrupted, clean lawyers and the office was to be oriented in a new direction.

Prior to this transformation, the old prosecutor's office was an extremely powerful institution and it didn't just prosecute criminal offenses. It also had general monitoring and oversight functions, it reached out into civil and other administrative areas and it was able to issue warnings that were referred to as 'prosecutorial objections'.

This civil aspect of the prosecutor's office was completely eliminated and the office was transformed into a body that now only deals with criminal matters. All other functions, such as the monitoring of those serving a jail sentence, other tasks such as dealing with those whose privacy has been violated and intervening in civil and administrative proceedings – all of these jobs were assigned to a different part of the justice system.

These changes were closely related to the launch of the privatization program in the Czech Republic. It was at a time when the government wanted to make sure that the privatization process would proceed in a smooth manner. One of the ministers serving at the time even said that we should complete the privatization process as quickly as possible before the lawyers could get a chance to intervene.

This was a great mistake because although the idea of avoiding litigation might have sounded logical, such major changes in property ownership require a healthy legal environment with a good legislative framework. At the time, lights were simply switched off and things got stolen. As a result, we are still today dealing with cases such as those of Radovan Krejčíř, Viktor Kožený and others.



Today, we already know that everything didn't go smoothly in this country in the 1990's and we didn't have the right legislative framework to facilitate such an enormous set of changes to property ownership and this lack of a good legal system resulted in fraud, the stealing of property using various types of schemes and a large amount of State money ended up being tunneled out into tax havens all over the world.

The actual transformation of the justice system ended with the setting up of screening committees. The job of these committees was to determine whether or not the prosecutors had done anything wrong and to determine whether it was possible to reform such prosecutors if they had. Unfortunately, those were hectic times and the sleaziest party members were quick to put themselves onto these screening committees.

As a result, I myself ended up being screened by a panel made up of ex-party members, despite the fact that I myself was never a member of the Communist Party. With all these problems, the transformation didn't manage to cleanse the justice system of its old evils; and, even today, both the court system and the prosecutorial system employ people who should not be there. Since under the law (on courts, judges and state prosecution), the only way to get rid of a judge or a state prosecutor is through a disciplinary hearing. Thus, unless they commit some type of professional misconduct, those former red party members, who should have never passed through the screening process, are basically untouchable.

When I served as Chief State Prosecutor, I was approached by former political prisoners and signatories of Charter 77 who told me that my office employed people who should never have been working there. But there was nothing that could be done because the law protected their jobs and there was no way to work around it. The reason we never ended up passing an amendment that would specifically address and change the existing situation was the fact that judges are independent and such a step would have violated their judicial autonomy.

There are three different types of power – the legislative, the executive and the judicial – each of which comprise a branch of government. They balance one another out and oversee each other in order to maintain a balance of power. In our country's situation, when the system was transformed, the State Prosecutor's Office became a part of the executive branch and we ended up being dependent on the Minister of Justice. It is the Minister of Justice who appoints state prosecutors and who nominates and removes the Chief State Prosecutor. This gives the Minister basically unlimited power, since the Chief State Prosecutor can be removed at will without giving a reason.

In 2002, we concluded that the original act on the State Prosecutor's Office was totally unacceptable and we tried to update it in order to make it compatible with our coming entry into the EU. These efforts were met with opposition from the Czech political scene when we called for at least a system in which the removal of the Chief State Prosecutor from his or her post would have to be supported by a specific reason. This was because every regional state prosecutor, every senior state prosecutor and every district state prosecutor already could only be removed from his or her post for specific reasons as defined under the law.

Such grounds for dismissal are specifically defined under the law and include reasons such as an inability to perform assigned duties or being absent from work for longer than 6 months for health-related reasons.

In the case of the Chief State Prosecutor, the politicians did not want to let go of the idea of being able to remove a state prosecutor at any time and at will. This is one part of the system which puts an enormous amount of constraint on the Office of the State Prosecutor. This is because the Chief State Prosecutor's office has an impact on everything else within this branch of government, including the atmosphere which takes over the State Prosecutor's Office whenever it is put under pressure by the Minister.

The judiciary's independence is guaranteed under the Charter of Fundamental Rights and the Constitution. But in reality, this independence



is compromised by the fact that the court system is financially dependent on the Ministry of Justice.

This is a fundamental problem and one which has yet to be addressed. It effectively allows the Ministry of Justice to intervene with the judiciary. The Ministry gets a certain amount of government funding from the State Budget and the Ministry of Justice then distributes these resources into the justice system – in other words, the court system and the state prosecution system.

If the Chief State Prosecutor is not completely loyal to the political leadership, he or she can find him or herself in an unpleasant situation in which their independent standing as the Chief State Prosecutor is in jeopardy.

In the past, we have had to deal with situations such as one in which the Minister refused to pay the gas bill for the offices of the Chief State Prosecutor. When facing a situation in which your utilities will be cut off and you won't have heat, it can be a huge problem. Although such an incident may seem minor, it is still unconscionable and is an obvious warning or threat. I myself had to deal with many much more complex situations where I had first hand experience with how unfortunate it is to be financially independent on the Minister of Justice, who basically has control over you.

If we want to establish a system governed by the rule of law, we must get rid of financial dependency. The justice system – in other words the court system and the state prosecution system – has to have and control its own budget. Until this happens, we cannot speak of a fully independent justice system.

You surely know that we are part of a continental type court system, which consists of courts of general jurisdiction, administrative courts and the Constitutional Court. The Constitutional Court was set up after the Velvet Revolution in 1989.

The administrative courts are the youngest part of our court system and the presiding judge of the Supreme Administrative Court was appointed by the former President, Václav Havel. The Constitutional Court has the straight forward task of protecting the Constitution, whereas the courts of general jurisdiction dispense justice. The primary tools and prerequisites that these courts possess, in order to fulfill their function, are their independence and neutrality.

Regardless of the things mentioned elsewhere, we still have a lot to do to improve our justice system. In terms of neutrality, everything depends on the individual judges. They have to decide how to approach a specific matter. There are clear examples in which the judge has proceeded in a totally unbiased manner and I can verify that there are many judges like that and it is great to have one of them to try your case. On the other hand, there are judges who are more self-interested and career-minded and they abuse the system by weighing whether the judgment rendered will bring them some type of personal benefit, a career opportunity or in fact just the opposite—it might harm their career.

It really isn't an easy task for a judge to try a high profile case that is receiving broad media coverage with four different news crews are crammed into the court room. This is because the judge is being asked to take an absolutely unbiased approach, yet the judge knows full well that an unbiased judgment could be met with a negative public outcry because the public's opinion of what the expected outcome should be may well not be the proper legal rendering of the matter.

If we look at the issue of neutrality with respect to a judge, then neutrality is a purely subjective state. After all, we are all people and not machines and people do make mistakes. In other words, it is a highly sensitive matter and it requires a lot of personal courage on the part of each judge and it requires a maximum effort on the part of the judge. It is a state of mind in which the judge cannot lean in one direction or the other and succumb to thoughts about how he or she will be personally affected by the outcome of the case. There aren't very many people who can remain truly unbiased.



With respect to the Czech Constitutional Court, the court has undergone a series of complex changes; and, if I was to offer my own opinion, today's constitutional court is truly able to protect the constitution in accordance with its Article 83, which delineates the Constitutional Court as the body responsible for the protection of fundamental rights and freedoms.

While the Constitutional Court's powers are quite narrowly defined, the powers of the courts of general jurisdiction are quite broad. Under the current system, these courts are making their decisions not just by applying the existing Constitutional rules and the law but, in addition, they are basically being asked to foresee the impact of their actions and they have to work with an interpretation of the law.

The courts themselves have to make a judgment as to what is the norm of a higher legal power and they must also do so with respect to various international obligations. The courts' mission is very important because the rendering of justice is an extremely complex process, which puts an enormous amount of emphasis on the role of the judge. This is because what are the things that a judge must do and what are the things that a judge cannot do?

Even though the judge is independent and must take a neutral position, there are still certain rules by which the judge is personally bound. The judge can't have a second job – with the exception of work related to the management of his or her own assets or his or her own publication and lecturing activities.

I recall a situation in which a judge was also a talented musician and requested permission to become part of an artistic group in which he was active as a singer. The presiding judge of the regional court under which this other judge served reached a decision that such conduct would be inconsistent with the role of a judge and that it would diminish the judge's status. The argument of the judge requesting permission was that he would use different costumes during the intended respective performances and that the performances involved dancing. After lengthy, strenuous discussions

about whether what the judge wanted to engage in could be regarded as artistic, it was decided not to grant him permission because such conduct would harm his status as a judge. Feeling hurt and insulted, the judge appealed the decision to the Minister. Notwithstanding, the administrative authorities did not change the decision and the original verdict was affirmed.

A judge is also a public official, which means that if someone attacks a judge, the act is regarded as a crime. This gives the judge increased protection by making any attack on his or her person punishable as a crime.

Judges are paid an above-average salary. Such a remuneration system was introduced after the 1989 Velvet Revolution and its objective was not to 'spoil' the judges but rather to avoid the risk that the judge would be tempted to accept a bribe. Some recent cases however have shown that even an above-average salary won't prevent all judges from giving in to such a temptation. Some mafia-type groups operating in our country have no problem putting down millions as a bribe and that can become very tempting.

When speaking of existing gaps in the laws on courts, judges and the state prosecution system, we have realized over the course of the past few years (since these institutions came into existence) that there is a need for some type of independent institution designed to deal with situations in which judges, who are required to maintain an unbiased approach, are compromised. There is no defense mechanism that would step into a situation in which the lack of bias on the part of the judge has been compromised.

The only institutions dealing with this issue at this time are professional organizations such as the State Prosecutors' Union and the Judges' Union. However, these organizations lack any real power in the system and they cannot make decisions in such matters.

In England and in Germany, there is a senior panel of judges acting as a disciplinary tribunal and the time has come for the Czech Republic to be



thinking of the creation of a similar type of institution for our country. It would act as the body dealing with the type of issues mentioned above. Up until now, there has been no political will to give our judges such an institution. But nothing is gained without taking risks and I believe that giving our judges a system in which they would be able to make decisions about themselves and assume the responsibility for lazy or bad judges is a good idea.

The public's opinion is currently highly critical of Czech judges because of the time it takes to get a judgment and because of the wide belief in the lack of enforceability of the law. Notwithstanding, the prevention of the creation of an institution, as discussed above, would discriminate against the Czech court system.

A similar problem is the fact that under the current system, the administrative officers of high courts, regional courts, district courts and even the Supreme Court are appointed for an indefinite term of office. This means that the presiding judge of a high court could theoretically remain in his or her position until retirement.

In my opinion such a system is flawed because over time, the person can become influenced by any number of distinct local factors. (This is also something for which we were criticized in the review reports prepared by the EU.) And the Czech Republic is literally swarming with such influential factors.

What we need in order to protect the neutrality of our court system is some type of limit on the term of appointment of our courts' administrative officers – perhaps a five-year appointment term. This is a system that is used in a number of countries, including other countries in Eastern Europe. A system such as this exists in Poland, Slovakia, Hungary and other neighboring countries. I also believe that we will see the day when such a system exists in our country – it is just a matter of time.

The Role of the Constitutional Court in a Modern Judicial System

ELIŠKA WAGNEROVÁ

There is no question but that a court system must have an independent status. The independence and neutrality of our courts is specifically called out in the Czech Constitution. Yet, even if this had not been directly addressed in the Constitution, the requirement for an independent and neutral judiciary is implied by the very nature of a system governed by the rule of law.

One of the key characteristics of such a system is the fact that if a specific country wants to call itself a state governed by the rule of law, it must have a court system that is given an independent and neutral status. If we should think about the actual functioning of a court as such, we might say that the purpose of a court is to protect the rights of the citizens and to primarily protect these rights against any intervention against these rights by the state.

One has to realize that a judge's job is to apply the law and the law in itself can be excessively conceived and the law in itself can intervene with people's rights. It is then up to the judge to apply the law in a manner that will avoid such an intervention into the individual's rights. To put it another way, a judge is the party that protects people against any arbitrary infringement of their rights and the excessive actions of the state. In order to be able to perform this duty, the judge's independence has to be assured by the system.

When speaking of the independence of the court system and its judges, we can break our considerations down into two areas. The first consideration is the independence of the court system as a state institution and the second is the matter of the guaranteeing of the independence of the individual judges.



In terms of the independence of the court system – in other words, the independence of our judiciary as an institution – we will be asking questions such as how are judges selected, who appoints them, who can remove them and under what conditions they can be removed from office. We will be asking about the criteria, based on which judges build their professional careers or, in other words, the process which takes place as the judge advances and moves up in the hierarchy of the court system – possibly as far as having a seat on the Supreme Court.

In looking at the issue of how the individual judges are guaranteed their independence, we must ask ourselves questions such as, „Are the judges adequately provided for on the material side?“ „Are their salaries adequate?“ (Since being underpaid might open one up to being corrupted, etc.)

Along this line of thought, we also need to think about the incompatibility of the judge's role with the performance of other activities, functions, professions, etc. Part of the issues surrounding the guarantee of judicial independence is also the question of whether or not judges should be allowed to be members of political parties and to become involved with political bodies – even if only in an advisory role. Should this be allowed or not? These are questions that must be considered.

For example, in the Czech Republic, judges serving courts of general jurisdiction (that is, district, regional and higher courts and the Supreme Court) can become members of a political party and there is no law that would prevent them from having such a membership.

On the other hand, judges serving on the Constitutional Court, which acts as separate institution, which is not part of the regular court system, are not allowed to be members of a political party.

The question one might ask is whether this differentiation has some deeper meaning or whether it is a result of a simple omission on the part of the lawmakers who simply forgot to ban judges from the courts of general jurisdiction from membership in political parties?

I believe that it was not a mistake and that the lawmakers clearly intended to draw a line between the judges serving courts of general jurisdiction and the judges serving the Constitutional Court. I would think that the reason for this differentiation would be the fact that only the Constitutional Court is allowed to review the conformity of the law with our constitution and to find the law unconstitutional (and thus void). Courts of general jurisdiction do not have the power to judge the constitutionality of legislation and to void the law, if it should be found to be unconstitutional.

When we speak about the definition of the law itself then in the end, the law becomes nothing more than the results of a clash of the interests of the different political parties. The results of a cross-section of different views as it was agreed upon and approved by the majority.

In consideration of the fact that the law represents the intersection of different interests and points of views, as represented by the different political parties, it would be very dangerous if the judges of the constitutional court were allowed to have a membership in a political party.

This could lead to a situation in which, as a member of a political party, a person would have to take on certain responsibilities – such as to attend meetings of the respective political party, etc. By attending to such responsibilities, one could not guarantee that the judge would not be exposed to direct pressure from that political party in terms of how to treat different laws.

One could argue that a similar situation could arise in relation to a specific case that was being tried before a court of general jurisdiction. However, in such a situation, such an influence exerted by a political party with respect to a specific case in which two parties that have an equal standing in a case are suing one another would be regarded not just as a breach of independence but, more importantly, a violation of neutrality, which would be a criminal act.



In comparison, in a situation in which a law is being reviewed in terms of its constitutionality, it does not involve two parties trying to prevail one over the other. Although no individual interests would be involved in such a situation, there is still the public's interest, which is articulated through political parties.

Prior to 1989, our country had a system in which the prosecutor's office oversaw the practices of the courts and effectively, the practices of all of us. This system was abandoned because it is inconsistent with a democracy, which is governed by the rule of law. In the civilized world, the prosecutor's only job is to prosecute crimes. The area outside of this jurisdiction is governed by the freedom of an individual and the prosecutor's office can't intervene.

And, whenever an administrative body or authority makes a decision, which people view as illegal or improper, we have the administrative court system that was set up in the Czech Republic after 1989 as the branch of the judiciary handling such matters. Under no circumstances should similar matters be taken up by the prosecutor's office.

Regarding the issues surrounding the selection of judges, the Czech Republic uses a different system for the appointment of judges to courts of general jurisdiction and for the appointment of judges to the Constitutional Court. The difference between these two methods of appointment is substantial and very important.

A judge for a court of general jurisdiction can be appointed through the Minister of Justice, who submits a recommendation to the President; and, if the President approves, the person is appointed as a judge and remains in this position until the age of 70. The minimum age for becoming a judge is 30. This means that if a person is at least 30 years old, has completed the necessary judicial exams, has been recommended for appointment by the Minister of Justice and if the recommendation has been approved by the President, the person becomes a judge and can remain in this office until their 70th birthday.

In other words, you can see that in the case of the courts of general jurisdiction, the executive part of the government is the only branch of government reviewing the professional and moral qualifications of a candidate for a position as judge and determining whether or not the candidate meets these requirements.

In my opinion, such a model – where the executive branch is the only party deciding on the qualifications of the judge in terms of their ability to serve in the justice system – is rather unfortunate; and, this point of view is shared by the entire Constitutional Court, which (by the way) the Court has indicated in several of its decisions.

The system used for the selection and appointment of Constitutional Court judges is completely different. The judges of the Constitutional Court are selected and appointed by the President of the Republic. However, before their appointment can take effect, they must be confirmed by the second chamber of the Czech Parliament – the Senate. A majority vote of the Senate is necessary to confirm an appointment. Unless the candidate that was selected by the President receives a majority vote in the Senate, the President cannot appoint that person as a judge of the Constitutional Court.

I believe that this model, in which a chamber of the Parliament becomes involved in the selection process, gives the judges a greater degree of credibility. We should also note that the model used in the Czech Republic for the appointment of judges to the Constitutional Court is based on the US model, with the only difference being that the judges of the US Supreme Court are appointed to their posts for life. Here in the Czech Republic, the judges are appointed to the Constitutional Court for a limited term of 10 years.

Even in the early stages of creating a new constitution, one should try to avoid the problems that could possibly arise as a result of limited terms of appointment. A judge, whose 10-year term is about to be over and who would like to remain in his or her position, might be inclined to shape his or her decisions in a way which would appeal to the President and



a majority of the Senate, in order to secure a reappointment for another term. Situations such as this are wrong and they should never be a part of the system. This is because, in such situations, the independent status of our judges could end up being compromised.

We should also note that in most European countries, judges cannot be appointed for another term and, unfortunately, the Czech Republic has so far failed to introduce such a system.

Under our constitution, the rulings issued by the Constitutional Court are binding on everyone – all administrative bodies, authorities and persons. When a law is abolished, the decision normally takes effect immediately and it becomes enforceable once the decision has been published in the Czech Collection of Laws.

The Constitutional Court may also delay the effective date of a ruling by deciding that the ruling shall come into effect in six-months or even in year's time after it has been issued. We have also had situations in which the ruling has taken effect on the date of its verbal announcement by the court – in other words, the decision becomes effective earlier than would normally be the case.

The interesting question that remains is whether we could abolish a law and make its abolition applicable retroactively or, in other words, abolish the law as if it had never been passed? So far, we have never encountered such a situation.

It is not always the case that the authorities listen to the opinions of the Constitutional Court. This applies specifically to the Parliament. When the Constitutional Court abolishes a specific law and delays the effective date by, for example, one year, it is expected that the Parliament will pass a new replacement law, which will conform to the constitution. Such a situation therefore results in the creation of a gap in the legal system.

Our Constitutional Court has encountered such situations in the past and the court had to respond by having to fill in the void in the legal

system with its own interpretation of the law. The court was forced to create a statute that could fill the gap. The Constitutional Court believes that in such a situation, the courts of general jurisdiction should be given the same power – in other words, the ability to come up with their own interpretations.

The last time such a situation occurred was during the cancellation of rent control in the Czech Republic. In this situation, the Constitutional Court repeatedly made rulings to cancel rent control in the Czech Republic. When, after the court had issued approximately its third ruling and the government and the parliament had still failed to act and there was no statute governing the situation, the Constitutional Court responded by stating that in such a situation, the courts of general jurisdiction must make their own decisions and determine the rent and its amount individually for each specific case. This was all the result of an obvious gap in the legal system created by the Parliament's failure to act.

And this takes us back to the idea that the courts are the ones responsible for the guarding of the law and even more so, the fundamental rights of each individual; and, in similar types of situations, the courts should be able to act by coming up with an acceptable statutory treatment on their own.



The Position of the Legal Profession in the Czech Judicial System

KLÁRA VESELÁ-SAMKOVÁ

In the Czech Republic, the legal profession is a so-called 'free profession' – in other words, every attorney is an entrepreneur. Attorneys may associate in various ways.

An attorney is also liable to his client to the full extent of the attorney's assets. If the attorney makes a mistake and the client proves that the attorney made a mistake and failed to properly defend the client, the attorney will have to indemnify the client from the attorney's own assets. This leads a person to a relative view of life's value; or, at least it leads me to that type of position, because I know that I am sitting on a branch hanging over an abyss, which can break from under me at any time.

An attorney operates a business with his own license and can engage in this business using various business forms. Although he an entrepreneur, an attorney also provides a type of public service and, as such, the attorney is not exclusively an entrepreneur, he or she is also a type of public person who is tied to the law in a certain way.

This is a schizophrenic approach, which undermines the legal profession. In this dualism, the legal profession functions as a business on one hand and, on the other, performs certain roles of the state.

The role of the state consists, above all, in its obligation to ensure law and order for all persons, regardless of their financial position. The right to justice is not a right depending on one's amount of property or social position – it is a right to which one is entitled regardless of merit – as such it falls within the definition of being a 'public good'.

A public good has one special characteristic – it operates not just with respect to those for whom its benefits were designed, it also works to benefit those who are not concerned by it at all at first glance.

The fact that the law is being adhered to and that every individual can obtain justice benefits not only the one person directly concerned with the case, but also the entire society. Hence, the guarantee that the entire society follows a certain legal standard and that contracts are concluded in accord with that standard brings about a general positive economic benefit.

I will give you an example. The fact that everyone can read and write doesn't just exclusively benefit the person who can read something, it benefits the entire society. This is because all of society's communications with its citizens can therefore take place on a certain level – on a literate level – which then elevates the society as a whole to a higher level. This is why primary education is a public good from which everyone benefits.

Sometimes, the benefit is questionable, for example in the case of a public good such as foreign policy. Although you may deeply disagree with the foreign policy of Belarus, you are included in the public good brought about by Belarus' foreign policy.

And you can say whatever you want: I do not want to have anything to do with it or I disagree and I want to distance myself from it. Nevertheless, you depend on it to a certain extent. It will still have an impact on your life. And, you cannot get rid of it.

Even if you emigrate, you cannot get rid of it: you will be an émigré from Belarus in some other country and you will start out by washing dishes in the US in order to make money for your studies and move on. That is simply a fate from which there is not escaping.

The legal profession plays a certain role in the operation of state. It assists the state with the production of a public good – in other words, the adherence to the laws and justice. An attorney is charged to render his



services as a court-appointed legal representative and the state guarantees that in certain situations – especially if the accused is in material need – a lawyer will still be obliged to represent him.

I would briefly like to mention other ways in which an attorney can practice their profession. The category sometime referred to as an ‘in-house counsel’ is again beginning to appear and to develop – that is a company lawyer. This is someone who directly employed (full time) by a company – in other words, they are not an entrepreneurial attorney practicing on their own.

Other independent professions in the Czech Republic include notaries and court executors. In the case of notaries, the component of their work that represents a delegation of the state power is much stronger than in the case of attorneys. A notary acts as a so-called court commissioner who deals with all inheritance matters (i.e., property transfers arising from a person’s death). Notaries officially certify that deeds correspond to one another, meaning a copy and the original; and, they verify the identity of persons on deeds (i.e. they verify that the person whose signature appears on a document had his identity checked and verified by the notary from official identity documents).

Aside from the above, notaries also verify certain types of legal acts, especially in commercial law. Here notaries play a very significant role in the actions of a company. They verify that a general meeting has been held, that someone has been elected a senior executive officer or that business interests have been transferred.

Another legal profession is that of the court executor. This is also referred to as a free profession. The task of court executors is to effect collections from debtors in cases where a court has already ruled that they are obliged to pay.

In terms of the functioning of the law, there is one key area, which is the treatment of the registration of real property – the land registry.

To understand why the way in which real property is registered is so important, let us ask a few questions centered around the issue of where

capital comes from. For example, where would the money come from that would allow you to open your own law firm? Where would it come from to allow you to open your first practice? Where would it come from to allow you to start your own business and work at your own desk – where you can put your own computer and close your first business deal?

You have to have a place to work out of and a place where people can call you and where your phone will be ringing. Such a place is your private property. It is your own place, your home, the place where you live or the place that you own.

How do you get a business going, from a practical point of view? This problem is addressed by private ownership. The foundation of everything is having a place to start your business. Aside from that, private property is the only source of initial capital in the sense that it is essentially the only way to be able to qualify to get a loan.

If you own something, you can sell it and obtain initial capital. If however you only own a house, you cannot sell it, because you would have nowhere else to live. But if you can prove that you own it, you can use it as collateral for a loan. And, with this loan you can start your business. This is the secondary positive effect of the private ownership of real property and that is why it is so important to have an easily verified and transparent registry of real property ownership.

The Nobel Prize for economics was awarded one time to economists who had searched for the sources of poverty. They considered why countries which have gigantic financial resources, such as Namibia, which extracts about half of the world's diamonds, still have great financial problems. They wanted to try and understand why such countries are poor in spite of having great mineral resources? They compared and studied a number of African and Latin America countries and arrived at the conclusion that the richness of a country and the development of its economy depends directly on the level of transparency of its ownership of real property.



In Peru, if one family has been farming a corn field for 300 years, everyone knows that the field belongs to them and no-one else sows seed in it. If the family decides to leave the field, it stops being its apparent owner and a neighbor immediately occupies it and sows his corn there. So this is not ownership, but rather, a sort of quasi-possession.

When you are able to influence the functioning of the Belarusian economy, Belarusian government, Belarusian regulation or legal relations, please do not forget about the land registry. That is the first thing you need to reform. You may feel that there are many other priorities, but trust me, the transparency of the ownership of real property is the foundation of success in business.

If real property ownership is not clear, if you must struggle to achieve a fast registration of a change in ownership, enormous room for corruption is opened up, and it is not within human powers to keep it under control.

Once corruption settles, it doesn't just affect those who must pay bribes, it affects the general mindset. If there is corruption at the land registry, a certain standard is set which will soon reflect itself in all other areas of the society. It is not possible for one part of the society to be corrupt and another one not. It will spill out over the country like water. The entire carpet of society will soak it up.

The transparency of relationships, the introduction of the so-called 'intabulation' (recording) principle, which means that the transfer of the title of ownership occurs not at the moment that everything is written up by the notary but at the moment when the respective purchase contract is filed with a registry, which has to put it into the system within two days. (This is unlike Prague, where we now have to wait, only 4-5 months.)

Another important area to address is the Bankruptcy and Settlement Act. If an entrepreneur goes bankrupt, a thick line is drawn. All of his or her property is totaled up and he or she is not allowed to engage in business, for example for 5 years.

In most cases, the value of the property is less than the sum of the bankrupt entrepreneur's debts and it is usually over-indebted people who are forced into bankruptcy. In this case, a so-called proportionate settlement of the debt takes place. (For example: Lets say the debtor has 100 dollars, but owes a total of a 1,000 dollars to all of his or her creditors. If there are 10 creditors, each will get 10 dollars. The punishment for the entrepreneur may be a 10 year ban on assuming the position of an officer of a company along with a ban on managing their own finances.) With a bankruptcy law in place, nobody will have to worry about a non-recoverable debt sitting in their accounts indefinitely.

The road to this model was long and arduous but to a greater or lesser extent, this is how the way business works today.

In the Czech Republic, we have absolutely underestimated the level of private indebtedness. It has taken us over 15 years to fully understand the urgency of having an act dealing with private bankruptcies.

We have wasted many years when many people fell into artificial debt only because the state was not able to protect them from the raids of financing companies which attacked the poorest classes by offering seemingly inexpensive and easily obtained loans.

The poorer people are, the more they pay because they are not able to step out of the vicious cycle in which they find themselves. Currently, the new act on private bankruptcies will be starting to take effect. It is designed to address this problem. But it took far too long and many people have been cast into a never-ending spiral of debt and forced to the very bottom of society.

In closing, let me add one more remark. Come to terms with the fact that if you are studying law, your studies will be useless in the event of changes in Belarus, and you will have to learn everything anew – everything will be completely different. This is what happened to us in the former Czechoslovakia after 1989.





The Role of Bureaucracy and the Context of its Reform in a Transition from Socialism to Capitalism

VIKTOR DOBAL, IVANA VAJNEROVÁ

If we are to inquire into the system of public administration and its broader relationships, we should first stop to think about the terms ‚bureaucrat‘ and ‚bureaucracy‘. The roots of the term ‚bureaucracy‘ stem from the time when the ruler was no longer able to administer his own lands himself and he needed an agent to administer the lands that were in more remote locations.

These initial agents that represented their ruler in a particular territory were given rather broad powers to act until the ruler decided otherwise or issued various orders, decrees, and acts to assist with the administer of his lands in a more uniform fashion. Hence, the agent started to lose his own initiative in deference to obedience to the laws and orders of his ruler. As such, the agent became the progenitor of the bureaucrat.

For a democratic government, the supremacy of law and the budget is important – all of which the bureaucracy must fully respect. In a democratic society, the most important matters are not decided by a ruler or one party, or in fact by officials or bureaucrats, but rather by the representatives of citizens, who are elected into their positions in a free election or as citizens directly, through a referendum.

Elected representatives should, through laws and other legal norms, protect the freedom of citizens and limit the arbitrary power of officials and other public actors.

These protections are usually embodied in two principles. One applies to citizens and is expressed as the right of the citizen to do anything that is not prohibited by the law. The other applies to bureaucrats and the state apparatus, which, conversely, may only do the things that it is authorized to do under the law. The law stipulates the extent of their powers.

It is evident that a reform of public administration, in what is an essentially revolutionary transition from a directive socialist state to a free market system, is a hectic and radical process. It is attended, among other things, by a legislative, personnel and organizational earthquake. The advantage is that most inhabitants are favorable to the changes, at least in the beginning.

One of the main tasks which public administration should take up in a newly established democratic society is the **protection of private property**. All civilized societies respect that a person has an inherent right to the sole use and control of their private property and it cannot be taken away from him or her or interfered with without a clear justification.

In communist countries, on the contrary, there was essentially no protection of property rights. A return to the protection of individual rights to property, as opposed to ownership of property by the state, necessitates the restitution and privatization of property, which the new Central and Eastern European democracies undertook to a greater or lesser degree.

It is logical that restitution and privatization processes evoke certain conflicting moods in society – these processes lead to and deepen the differences in the levels of property ownership, create opportunities for corruption and, for those who lose the use of property which is subject to restitution, there can be the feeling of hurt, resentment, etc.

Furthermore, it must be remembered that entirely new tasks arise for public administrators and hence, various procedural and other errors can occur which only serve to undermine the public's faith in these new principles and in the attendant new political and public-administration arrangements.



The third aspect, which should accompany good public administration and will be one of the guarantors of its proper functioning and provide control over it, is the establishment of a civil society. That is, to establish the sovereign position of the citizen and civic institutions.

In a situation which has depended on distrust, the passivity and resignation of citizens makes such a check impossible. Thus, we enter a chain of events where corruption, distrust, and the passivity of citizens make room for more corruption.

This just reinforces the necessity to be on guard and to strive for the maximum degree of transparency in transformational processes.

Civil society plays two central roles in public administration. The first is the general attitude of the public towards political institutions and authorities. But equally important is the activist role that civic associations and their initiatives should represent.

Civic associations represent specific groups of citizens and these associations should act as partners, supervisors and, if necessary, opponents of administrative institutions. Of course, this presumes that citizens are actively engaged in their society in the positive sense.

Again, we get back to the importance of building, nurturing and caring for the trust of the citizens in the political process and their involvement in public policy as the foundation for their civic engagement. Without this involvement, the door is open to abuses of power and corruption, which can paralyze the entire democratic system. Undoubtedly, legislative conditions establish a necessary foundation, but in themselves, they are not sufficient to build respect for the law and ensure transparent approaches.

We have inherited a rich civil society from the first Czechoslovak republic. There were all sorts of civil associations, foundations, charities, etc. With the arrival of communism, nearly all of these organizations were abolished. Nearly all independent and free activity was centralized in an official structure under the collective name „The National Front“.

The Front associated all permitted political parties as well as various interest groups and professional associations, all giving the appearance of an active civil society. However, all of these associations were led by people approved by the regime, so that through them, the regime continued to maintain control over the entire society. To protect the rights of the workers, there was a union organization led by prominent figures of the communist regime.

The regime also tried to put up the facade of a democratic society and freedom – after a fashion – for the benefit of the Western world. That is why it tolerated those associations, albeit in a manipulated form.

An even worse ‘pseudo-tolerance’ was manifested towards churches. At first, the regime tried to entirely destroy religious organizations and their representatives – by a harsh oppression and laws with which it bound them to absolute dependency on the state. It took over the responsibility for the payment of the clergy. It took over all church buildings and nationalized many of them, especially those anything that had anything to do with the so-called ‘means of production’, including monasteries.

Thus, the regime first absolutely decimated the churches and then only permitted a few to continue to exist with a so-called ‘official’ sanction. These were able to continue to run certain charitable activities and to a very limited extent they were also able to publish. But, of course, all was subject to a strict censorship. Aside from that, the state controlled churches through certain organizations, which it established, and for which it engaged clergymen who were willing to collaborate with the regime.

Presently, a large number of various non-governmental organizations are again active in the Czech Republic and their work is again firmly based on a legal foundation. A special body of the government has been set up charged with the development of legislative and other ways to support the rapid establishment of non-profit organizations. Of course, some of



these non-profit organizations encounter problems – for example with respect to the transparency of their financing, etc. – but many of them do lots of useful work and do it much better than the state ever could.

Today, some 40 – 50,000 civic associations are registered at the Ministry of the Interior. Registration is not a difficult. It just involves an approval of the organizational statutes of the respective non-profit, checking that they do not run counter to democratic principles.

The important thing is that many non-governmental organizations focused on national minorities have been established. Historically, the Czech lands have been very multicultural, all of which the communists of course tried to suppress. Nevertheless, respect for the minorities – and this respect needn't be limited to just national minorities – is certainly one of the prerequisites for the proper functioning of a strong and decent society.

For example, publishing a magazine for a smaller group – whether nationality based or just for poetry enthusiasts – will always be a problem, because such a magazine hasn't much of a chance of surviving with a small target market.

Thus, it will always be necessary for the society to show respect for its weaker members and for those with differing opinions. That is why the article of the Constitution, which says that the majority shall rule, but also protect the interests of minorities, is so important.

This also needs to be kept in mind in the formulation of governmental budgets.

Comparing the conditions of the struggle for democracy in Belarus and in our country, you enjoy – in spite of your difficult situation – an advantage over our situation in 1989. The world has changed, the possibility of outside contacts is much greater and you are able to travel and to get to know about both democratic and non-democratic systems.

So one of the fundamental things is to develop international contacts, giving support to and making use of foreign pressure.

In our country, the totalitarian era can be divided into two parts. The first part began with the 1950s – a very cruel period, with a great deal of capital punishment and many people were imprisoned for extended periods of time.

The second part, the so-called ‚normalization‘ period in the 1970s was perhaps worse. It was worse than open aggression in one thing – it used ‚guile‘ to destroy opponents and any free thought.

The first great wave of resistance was tied to the so-called ‚Charter 77‘ in 1977. It was a declaration of significant figures, not just dissidents, who pointed out the illegal aspects of communism, especially the breach of human rights, as guaranteed by the Helsinki declaration.

In spite of being immediately oppressed, the Charter entered into the consciousness and awareness of people both in the Czech Republic and internationally. Many significant foreign figures started to in various ways critically turn to the representatives of the communist regime on a regular basis.

Out of the Charter, certain activities got started, which the secret police monitored and oppressed, but many deeds succeeded and Charter members sustained and spread the hope that one day, the social conditions would have to change. In terms of spreading hope, secretly self-published ‚samizdat‘ books played a strong positive role. There were also foreign publishing houses where Czech émigrés published contemporary Czech authors and testimonials about the era.

Additionally, there was the so-called ‚silent majority‘ – people who no longer needed to be afraid for their lives, as in the 1950s; and, in their work, their positions and in their children’s education, they collaborated with the opponents of regime by their silence.

With respect to the situation in Belarus, it cannot be argued that the international community and institutions are always immediately and convincingly standing on the side of the struggle against the breach of basic human rights and the struggle for democracy. It is indeed somewhat



surprising that the European Union, which puts such an emphasis on an adherence to human rights and makes it the criterion number one for accepting a country into the European Communities, does not take more forceful steps in this regard.

In many respects, Russian gas appears to be ‚more interesting‘ than human rights in Belarus. In spite of this, it does make a difference if – aside from other activities – systematic pressure is exerted and those segments of society which can help one another are connected, even if only internationally, and if greater pressure is jointly put on significant institutions.

We too realize that Lukashenko’s regime is extremely dangerous precisely because it is hard to point to any really harsh oppressive and violent acts, because it makes it appear as though many freedoms are in place. The oppression is more hidden, but that much more treacherous.

This situation naturally enhances the potential of the silent majority which we have mentioned earlier. These are people who think that they are living relatively happily and it is difficult to rouse them to any significant resistance.

In terms of any sort of oppression of people who speak up against the regime, the so-called ‚Committee for the Protection of the Unjustly Prosecuted‘ worked very well in our country. It was a group of people, led by Václav Havel, Václav Benda and others, who mapped, through its network, any oppression which the regime perpetrated against people in connection with their political views or civil stands. This information helped attract international attention and support. In Belarus, too, these things should be known.

Notwithstanding, in the Czech Republic, we have noted an interest in Belarus, both among certain journalists and among certain representatives in the Parliament. Many senators have been willing to support the opposition in Belarus. The Czech government did not invite Lukashenko to certain

important events, for example to the plenary meeting of the North Atlantic Alliance in Prague, and it refused to grant a visa to the representatives of similar oppressive regimes. Many websites provide relatively true information about Belarus and the opposition. And many people are ready to help your country to establish a true democracy and a government which will be based on respect for human dignity and human rights.

In the Czech Republic, the last triggering mechanism was the violent repression of a student demonstration. This ended up rousing many other people. Overall, however, it was the confluence of a number of factors that brought about what no one was really expecting at that point. One of these factors was the thinking of the young generation, which had spent all of its life in the dim light of 'normalization', without any apparent hope for change.

In spite of that, young people gradually realized how twisted the society was in which they lived and many recognized the message of the dissident movement, that the education which was provided officially was insufficient. They accumulated the power to stand up in the face of absurd situations which most of the society had grown accustomed to and had started to consider as normal.

Naturally, no social change could occur without other factors existing at the same time. There were warnings about the changes in the economy, which had been essentially collapsing, although the communists didn't want to admit it. There was an increasingly courageous dissident movement and an increasingly disgusted public.

In concluding, I must note that a significant moment, not in terms of the revolution, but in terms of the real introduction of democracy, is when the public – the citizens – start behaving democratically and start being aware of their rights.

The media play a not insignificant role in this. At a time of democratization, the media develop and change very quickly. At first, they are marked by



the fact that all of them were run by the state and all journalists had to cooperate with the regime to a greater or lesser extent. But here in the Czech Republic, they quickly joined the revolution, although their awareness of the democratic rule of law, market economics, etc. was not great.

Now, the media is gradually changing. It is immensely important for journalists to be able to uncover when a politician is lying and when he is interpreting the laws or economic rules to suit his or her own purposes. These are things which not every citizen necessarily understands, but the media should understand what is going on and inform the public about it.

Hence, you too should try to understand as best as you can economic and legal principles, which will logically go up against those of your present regime. It is necessary to follow these mechanisms, point to them and use them against the regime. The argument can be convincing because it is objective.

It is necessary to influence decision-makers, especially elected representatives in the parliament and in municipalities. It is possible that they will not be willing to hear you, but you should introduce a situation, if you have enough strength and enough people willing to take the risk, in which you will monitor any breach of human rights or formally applicable laws and the constitution.

You will monitor these activities and say when their actions are unconstitutional in this or that respect. You will note activities that go against the values of the civilized worlds. You must put these elected representatives into a situation in which the decisions they make are theirs, not Lukashenko's.

In general, it pays to put focus one's energies and put collective pressure on one specific matter, on one specific petition, gaining as much support as possible so that it can get some media attention and in this way, suppressing it or ignoring it will not be possible without attracting the increased interest of the public.

In concluding, let me add a few remarks on the road to freedom. Biblical stories are not mere history or dead literature. They are evidence of the general human condition. The second book of Moses talks about the exodus and about the flight of the Hebrew nation from Egyptian bondage. Under the leadership of Moses and Aaron, the nation traveled for 40 years through the desert before it reached its destination. The road to freedom is not and cannot be short. Perhaps, the 40 years symbolize two generations which needed to forget their original enslavement and have the will for freedom. This story also embodies hope, as we know that in the end, the Hebrews did reach the 'Promised Land' even if without their original leader.





The Normative Order of Society – a Necessary Condition

VOJTĚCH CEPL

I will only focus on one special part of transformation – the normative order of society. I consider this part of transformation to be the most fundamental and most important although it is not an economic or even a political transformation. Like most authors, I divide transformation into three spheres – the rebuilding of the political system, the rebuilding of the economic system, and the rebuilding of the normative system.

Every normative system is composed of a number of various parts. These are the mutually accepted rules of human conduct in society. There are formal rules – rules of the State – or in other words ,laws‘ which are enforced by the power of the State; and, there are other, much more important rules, which are not spoken of much – the moral rules. Moral rules do not belong to the state, but to the society.

Each society of animals which live in groups, which includes people, must have certain rules for their coexistence and coordination. Otherwise the group as such cannot survive.

Even animals living in groups have their own rules. Primitive tribes also have their own sorts of laws. Moral rules resemble laws, but are not enforceable by the power of the State. Only the society puts pressure on people to behave a certain way.

There are also a still finer set of rules, called virtues – rules of aspiration, things we aspire to or would like to emulate. These are rules, or even conduct, which is desirable, but not compulsory. The giving of charity or the providing of help to the handicapped would be examples; or, for instance when you treat someone nicely who is in a state of misfortune. Therefore we have three invisible spheres – comprised of laws, moral rules and virtues.

In our type of modern societies, those three spheres have been emancipated from the power of the churches and have even been erased. There is little talk about them, especially about the last one, which is very elusive.

The most important two sentences of the entire lecture: **These three systems must support one another and be in harmony. They must be in harmony because the mechanism which imprints these three systems into people's minds allows them to learn legal rules through moral rules.**

These moral rules are only seen through simplified, abstract principles which resemble, let us say, the Ten Commandments. In this way, man knows that he should not steal; and thereby, as long as he adheres to the rules, he shouldn't run into conflict with the law. Sufficient attention is not paid to this invisible system of rules. And it is this system which is harmed the most by totalitarian regimes.

After a change of regime, a type of a negative view is taken with respect to the ideas about morals and the law which I have hinted at. This is because in the 50, 60, 70, or 100 years of the type of regime in which our societies have lived, State power and the establishment have entirely usurped the creation of those moral rules and virtues previously held by the society and everything that I have mentioned was replaced with orders from above.

The entire normative system was used by the establishment to make other people obey it. In that lies the substance and the horror of the system. A natural system of spontaneously developed rules was replaced by orders from the establishment.

The term 'socialist legality' was developed. It means strict adherence to the rules set by the establishment. And obedience was pronounced the greatest of virtues and debates about whether the rules are functional or correct have disappeared. And the belief that all (or any) rules can be enforced prevailed.

But such beliefs are naive. This is because the system does not function well unless people adopt the rules voluntarily. Otherwise, they do not



internalize them. That forces you to have a system in which controllers check on controllers. Super-police must be over the police, and the one that is to judge the judges. In the end, there needs to be some kind of a centre, some political council, which has absolute power over the entire society and that is a totalitarian regime.

An even greater horror for you lies in the fact that a centralized system is practically the only tradition in Russia. It has developed over the many centuries of fighting with the Tatars and Mongols and other eastern invaders.

Now I mean the Russians, who have essentially saved European civilization in the past, did so at the price of having their sets of rules deformed and they ended up adopting many elements of the rules used by their enemies. Long-time enemies regularly influence one another.

The normative system adopted the lack of a relationship to land from the eastern nomadic tribes of Asia which rode horses and lived a nomadic existence. For them, it was natural. Land was something over which one rides and which belongs to all. And, there is lots of it. There is no shortage of it – unlike for example in Central Europe, where each piece of land belongs to someone and where registries have been kept since early medieval times of where yours ends and mine starts.

In the vast steppes of Russia and the Ukraine, naturally communal, collective, and general types of ownership developed. Essentially, all of it belonged to the supreme owner, the czar. The society was also centralized to partake of the constant struggle, because only a pyramidal military type of organization is effective in combat.

For the military or a mafia to be effective, it must be organized as a pyramid, with one leader at the top who is considered nearly god-like. Only then is it possible to win and survive in war. An individual must sacrifice himself for the group in order for the group to survive.

It is considered natural and right to have a strong leader who leads us well, who owns everything and only lends out ownership of the land – which is, by the way, the most important of all types of ownership. The

leader selects lower nobles in an aristocratic hierarchy and makes them his subjects. Note that for example in feudalism, relative importance is defined not by hectares of land, as was the case in Central and Western Europe, but only by the number of serfs. These are systems in which rules related to private ownership are not sufficiently respected.

The judiciary in such feudalistic systems is absolutely devastated, because it has also become an instrument of the government's power. Lawyers and judges in our part of the world were educated according to Lenin's definition of law, which means that the law is a tool of the governing group through which it controls society. He had bourgeois law in mind, but in reality, it applied to the communist block.

Lawyers, judges and prosecutors were the main instruments for the oppressing of people and for advancing the rules of the 'establishment', so it is no surprise that people in Prague and further east do not like the law. The difference is striking. Imagine that the English love their law. Just like the Czechs love their dumplings, pork and cabbage, they love the common law. They identify with it. In our country, every prosecutor and judge is a potential enemy. Changing this will be the greatest challenge. The first thing that must be done is to change the law, which in our country is traditionally written in books – as legislation. A complicating factor is that there are important traditions and there is national pride. Patriotism is a great mobilizing power which has, however, negative effects on this sphere.

When a society is in the process of becoming free, it naturally returns to its traditions. But those traditions are not a good foundation for building a modern capitalist society. Traditions must be brought in from the outside; that is, the best that exists in the West must be copied. It is the same as in technology. When you are putting together a new model of a car, you also have to study the most modern carburetors and then select the best one and put it in your model. It is the same in medicine – the best operating techniques should be copied, as they already exist out there.



A new constitution must be written. There are two types of modern constitution. One is referred to as the ‚Soviet-type‘ constitution and the other the ‚Western-type‘ constitution. The tendency that will prevail in your country may well want to draft a new constitution in somewhat this way: We will put together an attractive charter of fundamental human rights which will enshrine the right to work, to have free healthcare, free education, the right to a healthy environment, to well-deserved vacation time, to fair pay and all those social rights, which are called aspirational rights, which we, too, have in our constitution. In this way, you hope that you can go to a court in Northern Bohemia, to the Ústí nad Labem District Court, and say, „According to the constitution, I am entitled to a healthy environment, but if I open my window for two hours, my child will suffocate.“ But the court cannot change that.

This means that these rules are not enforceable. That these are only populist, politically attractive rules which make a constitution into an instrument for gaining votes. The last Soviet constitution, called the ‚Brezhnev Constitution‘, promised everyone the right to an adequate apartment as a constitutional right. All that sounds good, but a constitution must not contain things that the state can’t reasonably deliver or enforce. A constitution must be realistic. Otherwise, the entire legal system, order or structure will be put into question and people will understand the constitution as just a promotional pamphlet. Each rule of the constitution must be realistically enforceable by state power and the courts. If the state cannot do that, the rule must not be written in the constitution. This is because the constitution is a part of, if not the very foundation of, the legal order.

There will be voices saying that you must proudly walk your own specific way, in the spirit of your traditions. But that is wrong. On the contrary, the tendency should be counter-nationalistic. Only those things that are good enough for my Belarus, which are the best everywhere else in the world, are those things that we will copy and take over for ourselves. That is the way of progress in a global society. Legislation must be copied.

I engage in comparative law – that is, the study of foreign legal systems. The best legal codes must be chosen and the best things from anywhere and these we should copy, incorporate and emulate. Expressing this in a vulgar way – the Belarusian intellectual of the next era must not invent anything himself, he must translate and copy.

I am intentionally exaggerating what I am saying in order to express the idea that the history of the development of the law is a history of the migration of legal doctrines. In the Middle Ages, itinerant professors from the oldest universities in Northern Italy went to even more northern universities, such as Charles University and Heidelberg, Krakow and the Sorbonne and they lectured on the Roman law, which was the most developed legal framework at the time. All strongly nationalistic societies, which took their own roots as a source of advancement and development, had lagged behind.

Try to find all Belarusian professors who ever left the country. In my situation, I found eleven Czechoslovak professors who had left the country and I invited all of them to come back and teach. However, most of them were ousted by the then existing academic establishment, which saw them as competition. My bringing them back didn't work and so they left the country again.

Translate, translate, translate! That is the task of the intelligent person. Opening oneself up to the wider world is the fastest route to gaining knowledge. All of the rules for the organizing of a democratic society are well known. They exist in the West; they are written down; and, they are taught. Hardly anything new can be invented here. It is naïve to think that we can devise a better electoral system. It is naïve to think that our own traditions are our greatest treasure.

In such situations, a society always reverts back to its traditions. But this is extremely dangerous. Quickly send as many students abroad as possible! A set of rules must service the market. Our lawyers keep returning to the first Czechoslovak republic – the golden era between 1918 and 1938 and even to the Austrian empire. For example bankruptcy law – that is the law



for winding down companies (entirely extinct during socialism, because no socialist production or trade organization needed to cease to exist). In the West, this field of law developed greatly over the last forty years, but our lawyers copied from an 1873 act! There are many areas in both our and your legal order which were newly formed in the West over the last fifty to seventy years. We can take them over. We do not even have time to translate them into our own languages. Look at such words as ,leasing', ,franchising', ,outsourcing', ,condominium' – all of which have already become Czech words. There are all sorts of specialized legal terms; there is the whole area of anti-trust law; there are entire subject areas taught at law schools that do not exist in our legal system. Without them, however, it is not possible to effect an economic transformation and introduce market capitalism.

We made a terrible mistake in believing that the market would resolve all problems by self-regulation. That is not true. The second most important statement of this lecture is that **first a robust legal order and a strong set of modern rules must be created and only then can a capitalistic system be launched. Otherwise, a great thieving capitalism will arise, when many people will get rich quickly and many people will quickly become poor.** Social tensions will increase. There will be dissatisfaction and nostalgic feelings about returning to the good old times of Lukashenko. That is the most likely the second wave which will come – stronger or weaker – if you win. The initial excitement about freedom will soon vanish with the tremendous problems which will arise.

I do really believe that there should be one vote per person. By the way, this theory comes out of Christianity, from monotheism, because it has one god, one reference system, to which every child of god reaches. From that understanding arose the principle of equality before the law; and, this requirement for equality was then transformed into politics what was referred to as the 18th century Era of Enlightenment.

You are right that the poor auntie from the mountains (which is a general

term for us) does not know who to vote for; and, she doesn't know which shares to buy in the transformation privatization; but, after five years, she does know who she doesn't want. At least this stage has to be reached by most of the inhabitants.

People must be educated at least to the extent that most of them will at least be able to vote negatively. To say „I no longer want to vote for this politician and his government, I want someone else“. Who that is, only the elite can tell them; but, that elite has the obligation to explain things to people and to enlighten them.

This system is very imperfect. There is a theory which states that if members of parliament were chosen by lot, the results would be roughly the same or better. That is, provided the society has a developed social order – or, in other words, those three spheres – the laws, morals and virtues. And, provided they are not just legislated (written down and enforced by the courts and the State) but also voluntarily accepted by most of the inhabitants.

In other words, the rule of law and a positive social order is more important than the rule of the majority, but there must be a combination of these. This means that any decision of the majority which goes against the social order must be abolishable by the constitutional court. In reality, the constitutional court is the greatest invention of American civilization – that is, aside from the electric lamp and suspenders – it is a very practical invention.

Statistically speaking, there are roughly one hundred countries which have a constitutional court or a supreme court entitled to carry out a judicial review of the constitutionality of laws, where there exists the option of abolishing a decision of the majority. In practice, however, this only functions in about one-third of the countries. This can be measured by examining the number of conflicts that have arisen between the constitutional court and the legislative or executive power. If there is harmony, a system where ‚everything is wonderful‘; it means that there is only an imitation of a true constitutional judiciary.



A fundamental question is also whether you are a mere object of a game being played between larger powers. The Czechs were occupied by precisely the same question. The developments in this country did not depend on us, because larger European powers were directing their own concert. They were at war every twenty years and we were always a place through which they swept, because we lay at an intersection of a road between them.

Even if Czech patriots stood on their heads, they could influence nothing. They had to wait for a suitable situation and nurture the idea throughout the world. There are theorists who say that for example the personal friendship between Professor Wilson and Professor Masaryk after World War I was, in fact, a major reason for the establishment of the independence of Czechoslovakia after 1918. By the way, the independence of most small 10-million population countries which want to achieve autonomy, independence and freedom, is due to the lobbying of large superpowers. That is why it is necessary for Byelorussians to engage with the West. Externalize your political views and promote your country. Explaining and making yourselves more visible to the rest of the world makes great sense.

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