

WORKING DOCUMENTS

W 111

LEGAL CULTURE IN FIVE CENTRAL EUROPEAN COUNTRIES

*Erhard Blankenburg,
in cooperation with:
Nena Tromp, Airi Kana, Michiel Notten,
Laszlo Maracz, Hank Geerts*

The Hague, December 2000

THE EU ENLARGEMENT SERIES

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PREFACE

This study reports on the strength of the 'rule of law' in five Central European candidate countries. The author evaluates their legal cultures and legal capacities by examining a range of indicators: legal education, the legal profession, civil and criminal justice, and the institutions of administrative and constitutional review. His conclusion is that, given their level of development, these countries have achieved an impressive record of institution building.

This working document has been written for the project 'Enlargement of the EU to Central and Eastern Europe', which the Netherlands Scientific Council for Government Policy (WRR) is currently undertaking. As such, it contributes to answering the central questions of this project: to what extent will enlargement increase (disruptive) diversity within the Union, and, hence, to what extent will reform of the existing institutions and practices be needed to maintain their effectiveness, legitimacy and cohesion?

The author of the study, Erhard Blankenburg, is Professor for the Sociology of Law at the Free University of Amsterdam. For this study he co-operated with Hank Geerts (Amsterdam), Airi Kana (Estonian Business Centre Schiphol), Laszlo Maracz (Institute for East European Studies, Amsterdam), Michiel Notten (Amsterdam) and Nena Tromp (Institute for East European Studies, Amsterdam).

Prof. Michiel Scheltema
Chairman WRR.

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INTRODUCTION

It is not only rhetoric when the new states in Central Europe solemnly pledge democracy and the rule of law as foundations of their statehood. Their parliaments have amended and passed constitutions, they have revised codes of civil and penal law and they have introduced entirely new bodies of administrative law and regulation. The yearly progress reports made by the European Commission evaluation teams show legislation projects in all fields which are high on the agenda of the *acquis communautaire*. They routinely emphasise the gap in implementation of the new laws, however, and they especially stress that the judicial infrastructure is sorely lacking in effectiveness. Without denying this critique, my argument will be that it would be unrealistic to expect otherwise. All five countries on which we are able to report have achieved an impressive record of institution building, and show a determination to continue with it.

Nevertheless, the gaps of efficacy require an analysis which is not solely focused on the benchmarks of achievement as set by the European Union, the World Bank, or others. Benchmarks are useful for keeping a record of the process of transformation and maintaining pressure on it. But they also lead to the construction of façades: legislation of economically significant statutes is pushed without sufficient infrastructure to guarantee their implementation, and institutions are set up when trained personnel to run them are not yet available. Legal language is used by the forces of reform as well as restitution, procedures are used for blocking decisions and for winning time and institutions are set up without the necessary means or the personnel. In an attempt to push development, expectations are raised which cannot be fulfilled. Especially in the legal field which, by virtue of its professional standards and by its independence, needs to close ranks somewhat against political and economic pressures, overly high expectations are to be expected.

Designing a legal framework for the modern state is a professional enterprise as well as a political project. The very professionalism implies that institution building comes from above. This is more than apparent in the Netherlands which in the past 15 years has gone through a profound change in its legal culture, as reflected in the policy of the legal profession. The general public is watching the external effects of legal changes but can only participate in its internal process in parts and certain sectors. This is even more apparent in post-communist transformation where reforms, even of political institutions, have largely been designed from above. It would be unrealistic to expect active and legally informed participation on a broad scale in these nascent democracies. Instead the general sentiment amongst the people of the transformation countries is that local institutions have failed. Also to foreign investors and entrepreneurs who implicitly measure the process by the yardstick of doing business at home, the process of transformation always seems too slow. If all of these accounts are taken together with stories of rising crime, new forms of corruption, and often non-decisive discussions among

political parties, cynicism is easily evoked together with a sobering loss of legitimacy. Underestimation of the changes achieved results from excessive expectations concerning the reform promises.

One cure from the shifting messages of understating and overstating can be found in an examination of comparative indicators. The comparisons which will support my argument characterise the different starting points of the Central European countries that are first in line for membership of the EU: Estonia, Poland, the Czech Republic, Hungary and Slovenia. They shall be compared with the Netherlands which – with its much more stable legal institutions – had to adapt its traditionally rather *informal state under the rule of law or rechtsstaat* by enlarging the judicial capacities, satisfying more legal claims and introducing greater judicial review. At the same time that post-communist countries were undertaking the revolution of their regimes, the Netherlands was undergoing a more silent change of its legal culture.

1 LEGAL CULTURES

Communist regimes left different marks on the five Central European countries under scrutiny. The timing depended on the chances and restrictions of the revolution. Slovenia already enjoyed open access to its Western neighbours in Yugoslav times, Poland and Hungary had a long period of change which gave them the chance to prepare for institution building, while in Czechoslovakia and Estonia the changes came rather quickly and suddenly. In the early 1980s it was hard to imagine that Slovenia, as part of Yugoslavia, and Estonia, as part of the Soviet Union, would be heading for a similar future of transformation – but at the end of the 1990s these small countries are both frontrunners in the institution of the rule of law.

Legal institutions form an element of the historical identity of Central European countries. Older generation lawyers have still been trained in pre-war systems, especially in civil law and criminal law, parliaments use the legitimacy of pre-war constitutions in designing the new legal order and law faculties and chambers of advocates and notaries refer to precedents that can be re-established. Looking at the new formation of the rule of law, it is apparent that Slovenia, Hungary and the Czech Republic share their legacy with Austrian traditions, Poland has in the past looked to French institutions as a model and in Estonia the influence of German and Scandinavian law has been paramount. While these traditional ties are taken up in renewed contact with Western lawyers, new elements of post-Communism are common to all of them:

- in reaction to the past political dependence of the judiciary they establish self-governing *judicial councils* guaranteeing the independence of the judiciary more rigidly than in the West;
- in reaction to the repression of the past, they introduce constitutional review which is separate from regular judicial practice while at the same time binding regular courts to the constitutional courts' interpretation of statute law;
- and in reaction to the lack of remedies against public administrations in the all-encompassing communist states, they develop a dual system of formal action before administrative courts on the one hand, and informal complaints with an ombudsman institution on the other.

The emerging Central European model combines a double ambition of ideals which are often seen as opposites: on the one hand a rather legalistic *rechtsstaat* in which public administration is strictly bound to statute law and compliance is bound to judicial review; and, on the other, informal mechanisms to enhance the responsiveness of public services. It follows the solemn pledge of the European Commission in its 1993 Copenhagen declaration to put “the rule of law, Human Rights and the protection of minorities” on the list of common values of the Union. Filling in this pledge with operational criteria, however, is not so easy: legal cultures in Western Europe differ from each other significantly, and none of them could dare to declare their judicial infrastructure to be the benchmark to be

achieved by all others. Certainly not the Netherlands, which prides itself on its con-social legal tradition and democracy embedded in an effectively functioning civil society: as far as the judicial review of its public administration is concerned, in the last twenty years it has had to adapt its informal institutional traditions thoroughly in order to conform to the formal legalistic criteria of Art.6 of the Treaty of Rome. On the other hand, there is many a Dutch social lawyer who has thought of invoking the Strasbourg Court for the Protection of Human Rights with a claim on maintaining legal aid provisions in the country. But looking at the level of legal aid in other European countries on the Continent, they had to assume that judges from other European countries might not easily understand their qualms. Looking for benchmarks for aspirant members to the EU, the annual progress reports of the European Commission offer no more than impressionistic evaluations.

Criteria can be more easily found when using the evaluations of the Council of Europe, which has defined a number of hard criteria (such as the ban on capital punishment, access to the courts, procedural fairness and minimum standards of prisons). Their evaluation commissions remain lenient, however, in applying these in a strict nominal way: the inclination of countries to implement Human Rights standards is evaluated in the context of their overall legal cultures and future expectations. Inclinations and hopes that membership might increase the pressure of future compliance often suffice. The European Commission has largely been content to check the legislative fulfilment of the *acquis communautaire*, but remains imprecise as to defining benchmarks in implementing standards for the rule of law. The yearly progress reports do not report much more than general observations on implementation deficits, complaints about the protracted nature of court procedures and the lack of accountability of public administrations. Occasional scandalisation by Human Rights watch institutions helps keep up the pressure for improved judicial scrutiny, but they cannot substitute more analytical and empirical analyses of the functioning of judicial institutions.

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Our evaluation is subject to similar limitations. It tries to form comparative indicators for institutions of legal culture: legal education, the legal profession, civil and criminal justice and the institutions of administrative and constitutional review. In doing so, it has to depend on data provided by these legal institutions themselves, interpreted with the help of interviews and a survey of the literature. The result is an overview of subjective evaluations which often reflects (high) expectations more than (realistic) comparative assessments. In the following we shall try to relate these expectations to some empirical reference points by referring to the same indicators for Dutch legal culture. This may have the advantage of highlighting the normalcy of some of the problems that judicial organisations are battling with among the member countries as well as candidate members of the EU. Of course, a comparison with a rich country such as the Netherlands, having a favourable history of unbroken identity, with that of Central European countries after a succession of repressive regimes is not intended in any way to patronise these countries. It shows rather that in the process of European convergence,

Western legal cultures are put under pressure to change as well, instigated partly by the same formal standards which European courts prescribe in criticising the informal practice of Dutch institutions, and partly by the same global trends of economic interdependence, urbanisation and increasing mobility (to name just a few explanatory variables) that force these cultures into similar patterns of judicial growth.

Table 1.1 A comparison between The Netherlands and five Central Eastern European countries

| | Nether Lands | Estonia | Poland | Czech Republic | Hungary | Slovenia |
|-----------------------------|----------------------------|----------------|--|---------------------------|-------------------------------|-----------------|
| Population in mill. (1998) | 15,8 | 1,4 | 38,7 | 10,3 | 10,2 | 2,0 |
| US\$ per capita GDP (1998)* | 22,200 | 5,500 | 6,800 | 11,300 | 7,400 | 10,300 |
| Constitution | Major amendment 1983 | 1992 | 'small' Constitution 1992 New Constitution 1997 | 1992 | Amended since 1989/1990 | 1991 |

*Estimates according to CIA – The World Factbook

It should be sobering for all those who read and write on the many implementation gaps of the legal infrastructure in aspirant member countries to compare them with the Western European discussions on the alleged 'crisis of their judicial systems'.¹ In the Netherlands, the increasing demand for judicial services, growing claims consciousness and the challenge of legal remedies towards public policy have recently become the subject of professional concern, at the same time that public reactions to justice scandals lead to media alarms about a "general loss of trust in legal institutions."²

National surveys (which have been shown to us in Poland, the Czech Republic and Hungary) report similarly devastating scores of distrust of courts, which are often lumped together with distrust of government in general. The population's general dissatisfaction with reform achievements is reinforced by the disappointment of many foreigners, especially those in the business community, who find their high expectations are not met. Though it is only small minorities who are nostalgic about better times under Communist rule, general opinion on the whole concurs that the new institutions cannot live up to their high aspirations. Signals like these, however, often stem from short-term dissatisfaction with actual events, which has to be weighed up against the long-term legitimacy of institutions. Long-term expressions of legitimacy support and short-term satisfaction with policy outcomes have been measured by Eurostat surveys.³ They show marked differences between all Central Europeans (including East Germans) and West Europeans on any aspect of trust in government and especially that in their respective supreme courts. The Dutch, together with the Danish and followed by the West Germans,

express the highest legitimacy of and satisfaction with their national high courts, while Central Europeans such as Poles and Hungarians range well below all other West European scores, but clearly higher than Eastern Europeans such as Russians and Bulgarians (other countries are not included in these surveys).

If it seems that complaining about lack of achievement and distrust in justice is a widespread attitude in post-communist countries, the reasons for this may be found in the separate concerns of each country. Before examining some of the comparative indicators which might provide a measure for the relative weight of achievements, as well as specific dissatisfactions in each country, we need to outline the starting position in the late Communist days, as this forms the background for the strategy chosen by each country in its transformation process.

1.1 SLOVENIA

Like all federal units of Yugoslavia, Slovenia has been able to maintain its own judicial system, and it was able to follow a reform course throughout the 1980s. It had a Constitutional Court since 1963, it did not follow the communist *prokuratorska* system of a politically directed guardianship over legality, it had a divided system of regular courts and self-management courts which attracted the admiration of many leftists in the West, and it had an Administrative Disputes Act which allowed for an internal procedure of formal complaints. The very low incarceration rate already under communist rule (and even more so in the 1990s) also indicates that repression was considerably less than in countries under Soviet influence. When the 1991 Constitution introduced a strict principle of separation of powers, self-management courts were terminated and a uniform, independent judicial system was re-established. With borders to Western countries open, the legal profession could anticipate and implement a progressive transition from the old to the new legal system.

With a relatively strong economy – Slovenia has the highest GDP of the countries in question – a second university has taken up legal education, the law profession is growing, a Judicial Council nominates judges and the courts are independent, with their budgets being administered by the High (revision) Court, which is also undergoing a process of reform. Problems do arise with implementation. The EU progress reports (again as of 13 October 1999) have repeatedly criticised court backlogs. The caseload of courts is rising but positions for judges are hard to fill as young jurists can easily find better paid private employment. However, all of these shortcomings are not new to Slovenian policy makers, while the ombudsman is also repeatedly hammering away at the shortcomings of legal aid, courts, and prisons. As he is a politically prominent figure (once second in candidacy for the President), the suggestions of his office are taken seriously. The same holds true for judges of the Constitutional Court, whose positions were hard to fill in 1998 because of the political ambitions of certain parties in Parliament. The size of the

legal profession is limited, and the relevant candidates sometimes know each other too well. As the court is regularly consulted in the legislative process, it is perceived as soothing some of the political controversies of the transitional process.

What else could one say about a small country where the language minorities of all of the surrounding countries have been historically well integrated, so that only parts of the twelve per cent minorities are faced with citizenship problems (an attempt to solve them is made by the Statute on Foreigners enacted in 1999)? It should perhaps be noted that the recorded crime rate in Slovenia is considerably lower than that in the Netherlands and that the prison population ratio today is as low as the Dutch ratio was twenty years ago.

1.2 ESTONIA

Having had only a short history of statehood of its own, it was especially difficult for Estonia to define a blueprint for establishing a democratic state based on the rule of law. Throughout its political and legal evolution, Estonia had been a province of imperial states, lacking the tradition of domestic law and institutions, such as other Central European states have, to fall back upon. Institutions of government and administration, border defence and national armed forces had to be built from scratch. On the other hand, the weakness of the Soviet-type structures made it easier to detach administrative structures from the past. Strong feelings of identity centre around the Estonian language, with pressure on the Russian-speaking minority to either adapt or remain excluded.

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Immediately after the approval of the declaration of independence in the autumn of 1988 Estonia's own legal system began to take shape. Estonian legal life has since experienced a tremendous increase in new legislation. While the first idea in 1991 was to re-enact the law of the independence years of 1918-1940 (1922 Constitution), it soon became clear that with the requirements of a modern economy a thorough re-evaluation was necessary. The civil code, which is at present based on the Code of 1936, has to be completely revised. Company law and bankruptcy law have already been revised. Legislation for a penal code (which is at present based on the laws valid before 1940) is also being drafted.

While the transformation is pushed with great determination, there has been much discussion as to which model to choose. Due to the historical background of the legal development codes, especially in civil law, institutions are mainly influenced by the German legal tradition. At the same time the Estonian Constitution, adopted by referendum on June 28, 1992, opened the gates for legal activism, carried forward by international Human Rights movements and returning emigrants from Common Law countries. Of course there are still many remnants of the Soviet system. The three legal cultures often coalesce and mix, because they are bound together by a strong sense of constitutional identity.

The legal language became Estonian in 1991. It had been Russian since 1850 until the first independence years from 1920-1939, and after that until 1991. Many terms of modern law now have to be created anew. The Estonian language is a prerequisite for participating in the legal system and for acquiring citizenship. For the foreseeable future it will remain a barrier that divides the population of the state into groups with different political status. Of the total population of Estonia, nearly one in four is a 'non-citizen'. This large group is divided into the status categories of: 'permanent resident', 'temporary resident', 'refugee' or simply 'alien'. While economic and cultural participation is available to everyone in Estonia (even the purchase of land does not necessarily presuppose Estonian citizenship), there is considerable political alienation among non-citizens with restricted political rights. Non-citizen residents are allowed to participate in local elections only. The most important thing is the fact that a person with a permanent residence permit can compete freely in the labour market, but the holder of a temporary permit also needs a work permit, obtaining which involves a complex bureaucratic procedure.

Nearly twenty per cent of the non-citizens (who receive an alien passport) lack a residence permit, while nearly two-thirds do not have a work permit or have any intention of acquiring one. Only twelve per cent of the non-citizens have permanent residence. Thus a marked number of laws that regulate the relations of non-citizens and the state cannot be applied because of the lack of experience or tradition for their institutionalisation. One of the reasons for non-registration is that population registers are inadequate and fail to embrace large population groups. According to estimates, nearly 17 per cent of non-citizens (about 60,000 people) reside in Estonia without any legal basis whatsoever, i.e. without a residence permit, social support or medical services, et cetera. The consistent application of Estonian law to residence and work permits for non-citizens (up to the deportation of illegal people) would be accompanied by a sharp rise in instability.

Considering the seriousness of ethnic divisions, international evaluations concur that the Estonian authorities are making a remarkable attempt to cope with them. The criteria for citizenship are stiff but clear, especially for becoming a member of the legal profession. Progress reports continuously keep track of the implementation of these criteria. The same might be said about how the legal system is set up. The capacity for legal education is limited, but inflation by lowering quality criteria is shunned. The transformation of the judiciary is directly controlled by the Ministry of Justice, and the professional self-regulation of advocates and notaries is effectively in place. Allowing the time for a generational change to usher in young graduates, all judicial institutions see to it that entrance examinations maintain a high standard of professionalism.

It will require some time before the new legal order based on civil liberties and human rights will take root. Whilst civil liberties have gained strength, the morality of paying taxes, serving in the defence forces, and the social control ordained by law have all weakened. Fragmentation into two communities is leading to civic

apathy. Sociological studies warn of a ghetto-like exclusion of the de-industrialising territories of north-eastern Estonia with its mainly Russian-speaking population. There are precarious indications that the state is not the only body to collect taxes, and criminal organisations compete with the police in enforcing order. Many people feel that they live in an ‘alternative society’ whose norms and institutions exist outside of formal society.

1.3 POLAND

The promise of the rule of law is not new to Poland. The Polish constitution of 1952 was amended in Article 1 by the formula that “the Republic of Poland is a democratic state, *based on the rule of law* and implementing the principles of social justice.” But judicial institutions that gave some guarantee to that effect began to be built only in the 1980s. Amazingly enough this occurred under the martial law declared by Jaruzelski’s regime in its attempt to accommodate the protests and strikes initiated by the trade union *Solidarnosz*. Poland was the first of the Communist regimes to install legal institutions such as the High Administrative Court in 1980, a Constitutional Tribunal in 1985 and a Commissioner for Civil Rights in 1987. In the 1980s these institutions were not entirely independent in their actions, nor were their decisions always binding, but were used rather as a façade for the legitimacy of the regime. Still, they laid the foundations for a system of independent judicial institutions as it functions today.

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Poland was also the first Communist country to establish a National Council of the Judiciary in 1989. It was an attempt to establish firmly independence of the judiciary from political interference by giving it the prerogative to propose to the President of the Republic all nominations for judges and promotions. It is composed of parliamentary representatives, the Minister of Justice, and the Presidents of the High (revision) Courts, but elected judges hold the majority.

There is a system of judicial review of public administration, while the position of the Commissioner of Civil Rights became very strong due to its central role in the early 1990s. Advocates have organised strict professional self-regulation, keeping their distance from the large number of legal counsellors (who are not admitted to court representation).

However, the delays in court procedures are a source of great concern (all the way up to the high rate of complaints taken to the Court of Human Rights in the Council of Europe). Waiting lists in courts and court registers open opportunities for corruption and so, too, did the privatisation of court executors and public notaries. Although prisons were relieved by generous amnesties in the early 1990s, inmate conditions are now still waiting for the necessary improvements. Procedural guarantees can also be used to prolong decisions to the detriment of ‘justice’. Courts are often too weak to counter the local networks. All these complaints led to a slide

in the public esteem in which the judiciary is held. Low pay increases the problems of the judiciary; with the more ambitious lawyers switching to the private sector. Lawyers are out for their own interest and it is hard to engage them in public interest activities or even NGO groups.

Judicial policy in Poland is heavily politicised: legislative drafts come from Parliament as often as they are proposed by the Government. With the strong polarisation of the political parties, there is a real danger of the instrumentalisation of law for special interest groups. Trade unions, the Peasant Party and the Catholic Church – the traditional pillars of civil society in Poland – are interested in their own power basis.

These problems are well known among the elite. There is a consensus about the need to strengthen the capacity of control institutions, but such determination often ends in the inertia (and the independence) of executive institutions. The top level is committed to democracy and rule of law, but local elites often run a very opportunistic course.

1.4 HUNGARY

Hungarians are said to be a people of law with a strong legalistic tradition. In building new institutions, academics as well as high court judges frequently refer to pre-war Hungary. This is worth noting, since most law in Hungary before 1945 had been case law; for example, the body of civil law was not built on a uniform civil code but was formed by a multitude of legal regulations and court decisions. Nevertheless, a strong principle of the unity of judicial interpretation was applied. High Court decisions were considered to be binding in all regular courts. In 1959 the High (revision) Court was given the power of codification of Hungarian civil law. Being trained in terms of legal positivism, judges were able to maintain a standard of legality that rendered them immune to many ad hoc interventions in the form of government directives and Communist Party policies. Members of the Communist Party in fact already prepared in the 1980s for the return to an independent judiciary.

This made the return to Hungarian legal traditions easier for the new regime after 1989. The independence of the judiciary was re-established by the Constitution and institutionalised with the National Judiciary Council (established in 1997). Judicial autonomy is now defined more strongly than in any Western legal system. Not only all organisational competence, but also the entire budget of the judiciary was in the hands of a professional self-governing body. Also, with the introduction of a Constitutional Court a new element of judicial hierarchy came into play. Independently of the regular judiciary, it could strike down any legal ruling as unconstitutional. Invoked by the President, members of Parliament or other organs of the state, it guards the constitutionality of the entire programme of legislation.

In the first years of the transformation, with its many legislative projects, the Hungarian courts became famous for risking conflicts with groups in Parliament by repeatedly asking for reconsideration and amendments. Furthermore, following the German model, it can be invoked by anyone affected by Hungarian law; which opens the gates for a multitude of political issues to be brought to a legal forum. But a third form of access to regular courts (questioning whether binding law would violate constitutional norms) might be the most important avenue for constitutionalising the Hungarian tradition of legal positivism. As under the principle of continuity, all provisions of law remained valid after the revolution unless either changed by legislative act or challenged before the Constitutional Court. The Court's review maintains a central position in the process of transformation.

The result is a plurality of High Court institutions. The Constitutional Court frequently corrects the legislator and risks opposition to the High (revision) Court, which follows the line of traditional positivist jurisprudence. To many Hungarian jurists judicial decision-making gets so fragmented that they miss the *certainty of law* which is a central value in positivist jurisprudence. However, it is quite clear that such controversies of legal culture remain confined to the professionals; the public still perceives judicial institutions as *part of the state powers* which are best distrusted for all practical purposes.

1.5 CZECH REPUBLIC

Reformers in the Czech Republic look back on thirty years of falling over and getting back up again. After the euphoria of the 1968 upheaval, repression was severe. Many Czechs left the country, whilst those who stayed knew who the enemy was, and the enemy knew them. The legal profession did not play a major role on either side: the reformers who took over after 1989 were economists and intellectuals, not lawyers. Professors at the law faculties who in the 1980s saw a change coming went on teaching the system of positive law which, even under Communism, was a body of more or less coherent rules, not mere repression. They were able easily to incorporate the new constitution and legislation in the 1990s, as these were built upon the foundations of the Mazaryk constitution and codes of law from before the World War. Political fighting and the division of the country into a Czech and a Slovak republic postponed legislation and institution building, but the pace of economic development in the first half of the 1990s kept the process under pressure. There were few obstacles to the adoption of European concepts of economic law, privatisation was pushed and purging old communists by a 'lustration' law could wait until 1997. The Czech Republic with its avowed neo-liberal government was the favourite among Western investors. Consequently, it also became the greatest disappointment with the economic and currency crisis of 1997 and the fall of the neo-liberal government. The Czech mood plunged from high hopes into deep cynicism, dragging foreign observers and even the economic indicators with it.

However, while the drama was played out on the main stage, off-stage reforms of judicial institutions were pursued further. Law faculties tried to satisfy the growing demand and enlarged their capacities. Books and teaching materials were written to integrate new legislation and the judiciary established its independence, even though the formation of a Council of the Judiciary is still on the shelf as far as the legal reform plans are concerned. Shelving has in fact been the trademark of many reform projects in the Czech Republic – not because of apathy but because of different reformers pulling in opposite directions.

A dramatic example of the zeal of the opposing forces of reform is what has been labelled ‘the war of the High Courts’. Even more so than in Hungary, justices at regular courts see the professionalism of their traditional schooling in strict positivism; and it may be granted that under changing political regimes the fortress of resistance is made from the bricks of a strict interpretation of statute law. This is what the justices of the High Court (in English publications usually translated as the *Supreme Court*) with its tradition of civil and criminal jurisprudence hold against their colleagues of the Constitutional Court (who sit across the street from each other in the small justice capital of Brno): constitutional interpretation of valid law has to remain within the framework of the wording of statutes, otherwise they refuse to abide by the decisions of the constitutionalists. Positive law resistance also spread to lower courts throughout the country: in 1997 the Superior (appeals) Court in Prague disregarded a ruling of the Constitutional Court which led the latter to release a statement to the press that “the Superior Court is subverting the constitutional order.”⁴ Since this time, the mobilisation of the media has become a weapon often used in the war between positivists and constitutionalists among the Czech Republic’s highest justices. This is highlighted by a fundamental case concerning a Jehovah’s Witness who had been sentenced twice for repeated objection to military as well as civilian service. The Constitutional Court rejected an appeal lodged on the grounds of double jeopardy (i.e. a violation of the principle of *ne bis in idem*), but the High Court held that it only followed statute law, and thus would not obey the instructions of another court. Aside from the fact that there might also be factional political controversy in the background, the case – now lingering in its third year – represents a struggle for supremacy. Clearly, the experienced justices at the High Court who had upheld their identity as professionals through Communist times might see constitutional supremacy as just another form of political manipulation. Jurisprudential positivism demands that they insist stubbornly on Parliament having to amend statute law first before they can apply the constitutional principle.

Of course, in Western eyes, they will have to surrender. Czech law is in accordance with the Treaty of Rome and its membership in the European Council also accepts the supremacy of the Strasbourg Court of Human Rights (explicitly affirmed in EECR 1999: 18). But the task of integrating its jurisprudence into the interpretation and application of statute law in regular courts has still to be achieved. Dutch law-

yers, who do not even have a constitutional review to refer to, might understand that this will take time.

So far a number of characteristics that highlight the continuity and the transformation of legal cultures in Central Europe have been outlined. They provide the background for a more systematic approach based on comparative indicators.

NOTES

- ¹ Zuckerman, A. (1999) *Civil justice in Crisis*, Oxford.
- ² *Trouw* survey, February 1999
- ³ Gibson/Caldeira (1998) 'On the Legitimacy of National High Courts', *American Political Science Review* 92: 354–358
- ⁴ Constitutional Watch, *East European Constitutional Review* 1997: 11.

2 LEGAL EDUCATION

Legal education did not have the central status in Communist times that it has at universities in Western countries. Universities in Central Europe, therefore, placed special emphasis on rebuilding their law faculties, often with the help of exchange programmes for sending students abroad and inviting Western colleagues to join them. But even before capacity was built up, students flocked in, leaving no choice but to limit the number of students per individual faculty and often also in the entire educational system of the transforming countries. The faculties reacted with stiff entry standards, often selecting less than ten per cent of the applicants for law courses.

While each institution tried to keep up a *numerus clausus* for itself, the countries as a whole made different choices. Law schools are not as free to react to labour market demand as are other university faculties: their final examinations define professional standards together with an entitlement to enter the legal profession. For this reason, all the countries adopt examination rules before accrediting a legal education facility, and many regulate the examinations together with the faculties, along the lines of the German institution of ‘state examinations’. The divergent strategies are represented by Poland at one end of a scale of openness and Estonia at the other. Poland threw open the education market by admitting great numbers of students to its faculties and at the same time allowing private schools, which often provide correspondence courses, to cater to students already in the workforce; Estonia opted for quality rather than quantity. Tough entrance examinations (including, of course, the language requirement for Estonian law), high standards of lectures and small classes are designed to breed a lawyer elite rather than a quick and broad expansion. Private schools specialising in commercial and European law are welcome, but before their graduates are admitted to the profession they have to pass a certification procedure which should equal Continental European standards (thus including Western scholars in the evaluation). Other countries pursue a course somewhere between the two extremes. In Hungary new law faculties have sprung up with fears that some might have to close after a few years; Slovenia started a second faculty by upgrading the courses of a former occupational school; while the Czech profession is still undecided as to whether or not private schools should be accredited.

The results of open access or closed shop can be seen in the table below. While the strategies chosen are clearly policy alternatives, expanding the capacity of legal training is not always a free choice. Finding competent teachers has been a problem everywhere, especially as the salaries of university professors by no means match the opportunities offered by the private sector. As a result, the capacity of legal education cannot meet the demands of students, even though their expectation of ‘law’ as the optimal long term choice on the job market might be unwarranted and overdone – even more so as the scarcity of student places increases the attractiveness.

Table 2.1 Number of law students (1998, per 100,000 inhabitants)

| | Netherlands | Estonia | Poland | Czech Republic | Hungary | Slovenia |
|----------------------------------|-------------------------|---------------------------------|----------------------|-----------------------|----------------------|-----------------|
| Regular law faculties | 160 | 32 | 228 | > 120* | > 130* | 107 |
| Evening schools, private schools | Open University courses | 8 accredited by strict criteria | 107 explosive growth | not accredited so far | many private schools | |

Source: Own survey; * partly based on interview estimates

Comparing student numbers to those in the Netherlands, however, lawyers in Central Europe need not be afraid of any lack of future job prospects. Not only will the need to fill the profession with a new generation persist for years in post-communist countries, but with growing economies there will also be more jobs for lawyers who do not want to enter a judicial career. The Netherlands, which in the 1980s experienced an increase in the number of law students (at the expense of social sciences and language studies), has learnt that the placement of lawyers (and economists) has been easier than that of other academics. The country still has fewer lawyers than its neighbouring countries; and when law graduates do not replace someone in the older generation, they have been able to create new positions for themselves.

3 THE LEGAL PROFESSION

Increasingly, however, the jobs for lawyers are no longer defined around their judicial careers. The dominance of private lawyers has been the tradition of Common Law countries throughout, but it has also become the pattern for the recent generation on the Continent in Western Europe. There is little job growth for purely judicial careers, but much more so in advocacy and other sectors. The Central European professions see a similar trend, even before the demands of teaching and judicial positions are satisfied: the private sector offers far more attractive activities and better pay for ambitious law graduates than any public sector and has done so since the days of the revolution, when academics, judges and prosecutors fled to the private profession. (They did not always change just for the better pay, though, as every lustration expert knows.) Most recently the ministers of justice in all of the countries under review have tried to counteract the negative slide by raising the pay of judges and by stressing the advantages of job security, but it remains a fact that the advantages of a judicial career are more attractive for women than for men. Whatever the combined effect of discriminatory opportunities and motivation, the pattern remains that two-thirds of the judges are women, while more than two-thirds of advocates and consultants (and in communist times also prosecutors) are men.

Table 3.1 Number of professionals (per 100,000 inhabitants)

| | Netherlands | Estonia | Poland | Czech Republic | Hungary | Slovenia |
|----------------|-------------|---------|-----------|----------------|---------|----------|
| Attorneys | | | | | | |
| 1990 | 40 | <10* | 18 | 20 ** | 17 | 23 |
| 1998 | 65 | 25 | 19 (1995) | 60 | 31 | 40 |
| Legal consults | | | | | | |
| 1990 | | | 47 | 25** | | |
| 1998 | | | 50 | - | | |

Source: Own survey; * partly based on interview estimates; ** including Slovakia

Legal consults in Central Europe are remnants of communist times. In communist countries the majority of all jurists used to be in-house counsel in collective enterprises; in Poland and in Czechoslovakia the chambers of advocates did not make it easy for them to join their professional organisation, meaning that (except for commercial or labour law specialities) they may not represent in court. The Czech Chamber now admits them, whilst in Poland both professions have formed their own organisations and agreed on a state of peaceful competition. Chambers in other countries, like Estonia, maintain their stiff criteria. Admission is regulated by entrance examinations, comparable to the American Bar examination, which are designed to maintain control over the standard of professional skills. All of the Chambers in Central Europe require candidates to undertake two and a half to three years practical training before entering the advocacy and they ensure that competition and ethical standards are safeguarded by professional peers. The consequences have never been experienced so sharply in Western countries because of

their, for the most part, liberal practice of admission: the stricter the quality controls, the more lawyers perform their consultancy jobs outside.

4 ACCESS TO LAW AND LEGAL AID

There is another ethical standard of public responsibility, however, which would allow the Dutch advocates to score very highly. As a legacy of the Western *perestroika* after 1968, Common law countries invested in systems of subsidised legal aid which in Great Britain grew to become a substantial part of the solicitors' income. On the Continent, only the Netherlands and Scandinavian countries followed the example, with an understanding that the growing dependence on the welfare state would make it imperative to provide those on low incomes with subsidised access to the law. Other Continental countries have not invested on any scale, mostly because of advocates' lobbies, who were afraid of a socialised profession. They extended the 19th century guarantee of legal access for the poor by lowering the thresholds of waivers for court and lawyer fees and provided duty lawyers in criminal courts (in so far as legal representation is required), but they did not agree to build an infrastructure of legal aid and out-of-court consultation like the aforementioned welfare states. To date the systems of legal aid in these countries have been squeezed by austerity policies, while some others (like France) move in the direction of providing more generous legal aid to some of the most needy groups. The European standard, however, which is relevant for the members of the Council of Europe and the Strasbourg court, remains rather austere.

This also defined the starting point for the new post-communist members of the Council of Europe. Of course, they are not in the economic position of committing their state budgets to more expenditure than strictly necessary, and it is highly implausible that the advocacy would lobby for anything other than a neo-liberal policy.

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Present day legal aid in Central Europe is comparable to the modest lawyer and court fee waivers in southern Europe that are granted under strict judicial control in order to prevent legal aid from being wasted on hazardous claims (usually with a pre-procedure to assess the likelihood of success). This is all the more dismal as the general population would need far more legal information and consultation under the new laws and institutions before ever thinking of invoking lawyers and courts. Legal consultation in communist times had been one of the judges' tasks which has obviously now been terminated, and for the rest it was integrated into the overall party organisations and planning bureaucracy. Citizens in the meantime had few legal remedies; in communist social commissions and complaint institutions the result was notoriously unpredictable. Nowadays, with more law and justice, people must have the means if they are to afford access to it.

There are, however, some exceptions, most of them sponsored by non-governmental organisations (NGOs). In the Czech Republic, British *Citizens' Advice Bureaus* helped to set up a number of offices for social and legal consultation. In Hungary there are five active groups (sponsored by the Ford and Soros Foundations) giving consumer advice and others rendering services to people in closed

institutions, hospitals and homes; similar public interest projects are sponsored in Poland. In Hungary and Estonia there are even (private) universities which train their students in a legal clinic. NGOs usually restrict themselves to monitoring compliance with Human Rights principles and to flagrant violations. They also work together with the ombudsman institutions so that the impact of both is reinforced. In some countries legal advice is given by trade unions and to a lesser degree by consumer organisations or automobile clubs. There is also the usual pledge of advocates' organisations to engage in *pro bono* legal aid, but these are hardly on a significant enough scale to warrant reference as an effective source of compensation for the barriers in the way of access to the law.

5 CIVIL JUSTICE

Independence of the judiciary is one of the promises to which all post-communist countries have given high priority and which they are safeguarding firmly in their constitutions. True to the Continental idea of life-long judicial careers, they guarantee security from dismissal, displacement of judges only by consent and nomination procedures by peers rather than Ministers of Justice. Slovenia, Hungary and Poland have strengthened the independence by giving personnel matters to a National Judicial Council, while in the Czech Republic the idea is on the list of reform projects that are to be realised soon. As a rule, these Councils include members of parliament and representatives of political parties and social organisations, but guarantee a majority of judges, with the Minister of Justice taking a seat *ex officio*. In 1998 Hungary gave the Council extraordinary power: it is directly responsible to Parliament, administers the entire judicial budget and controls the administration of the court system. Slovenia has also taken the judicial budget away from the Ministry, handing it to the High (revision) Court for administration. Czech judges are still fighting for a system of councils in every single court, with a National Council to co-ordinate them, but the different models that have been proposed would appear to have delayed the legislation, which is still pending.

The discussions often reveal that the institutions of independence of the judiciary are used for more mundane interests than the mere political interference in the jurisprudence of finding justice under the law. Magistrates in all countries try to secure responsibility for recruitment and the organisation of courts under their own authority rather than being dependent on central decisions of Departments of Justice. Dutch justices are also discussing the possible instalment of a Judicial Council even though in this country nobody until recently ever thought that similar institutional safeguards of their independence would be necessary. Dutch justices – even those judging in first instance cases – enjoy a tradition of judicial discretion which they could repeatedly use for innovative interpretations of law (such as have presidents of district courts in building a body of case law on strikes, squatting in empty houses or liability in public administration). Controversy may exist about the decisions they take in each case, but there is not much public or professional controversy about the legitimacy of taking them. Generally speaking, consensus about the professional competence of the judiciary as a whole is sufficient for keeping justices out of political turmoil.

In our interviews with representatives of judges' associations in Central European countries, similar interests in self-government have been articulated. Several presidents of High Courts (in Poland and the Czech Republic as well as observers in Hungary) complain, however, that this also brings about resistance to any kind of modernisation of the judicial organisation. In their view the simple interests of working traditions are hiding under the heading of 'judicial independence'. Legitimate institutions of political independence easily mix with self-interest in a way that would be worthy of trade-union representation.

Dutch justices might in any case become envious if they realise how many more judges Central European countries have relative to the size of their population. The ratio of Hungarian and Slovenian judges is about equal to that of Austria, whilst only German courts have more judges (currently 27 per 100,000 inhabitants). The Dutch rate would be slightly higher if the time devoted by a large number of substitute judges on the bench were to be added but, even taking such pragmatic ways of mastering the workload into account, the size of the Dutch judiciary remains far below the Central European norm. For a long time, the organisation of the courts lay in the hands of presidents of (especially regional) courts, directed in a consensual way by the Ministry of Justice. In the last 15 years, however, court organisations have grown very large, which has led to a series of experiments with special 'court managers', management directorates and most recently a plan to introduce a Judicial Council. It is obvious that there is a European convergence towards the idea, even though the different legal cultures are coming from opposite ends of the spectrum.

Table 5.1 Number of judges (1995, per 100,000 inhabitants)

| Netherlands | Estonia | Poland | Czech Republic | Hungary | Slovenia |
|-------------|---------|--------|----------------|---------|----------|
| 9,8 | 12 | 16 | 21 | 20 | 20 |

If the number of judges per capita are rather high in the Central European tradition (including Austria and Germany), this cannot be accounted for by higher civil litigation rates. Litigation caseloads have been rising steeply in post-communist countries but are still below those in Western Europe (where the Netherlands still ranges among the less litigious). This may be accounted for by the general correlation of civil litigation with economic activity. But it is less plausible in labour law cases, which mirror dismissal rates more than any other type of labour conflict: post-communist courts have been involved to a very limited extent in the mass dismissals of the 1990s (which may in some countries – like Estonia – be partly explained by the continuing existence of labour arbitration boards).

Table 5.2 First instance adversary claims incoming (1995, per 100.000 inhabitants)

| | Netherlands | Estonia (1997) | Poland | Czech Republic (1998) | Hungary | Slovenia |
|------------|-------------|-------------------|--------|--------------------------|---------|----------|
| Civil law | 1,955* | 1,292 | 1,108 | 2120 | 1,842 | 1,659 |
| Divorce | 241** | incl. | 229 | 39 | incl. | incl. |
| Labour law | 450** | 63 | 136 | 16 | 142 | 378 |

Source: Own survey Netherlands include *référé* without request procedures;

** including request procedures

Nevertheless, even though the magistracy in Central Europe is sizeable by Western standards, the general image is one of being overloaded and that delays in court are the order of the day. The many hearsay reports about the backlog of courts do

not show up in average duration and indicators comparing the caseload of incoming cases to those pending at the end of the year do not corroborate the general impression (except for Slovenia and Poland). Scandalous stories of two years waiting time before an adversary case is decided are commonplace in Western courts. Looking at statistics with a Western eye, the medium duration of procedures does not seem extraordinary, but there are undoubtedly alarming reports about certain courts and certain types of cases, especially those in commercial (and administrative) courts. Hearsay also refers to waiting lists for land registers or company registers. While waiting in the queue, clients often try detour routes, including minor bribery of court clerks.

But while in the Netherlands such stories of scandal are limited to the local problems of certain courts that have fallen badly behind (the ubiquitous problem of certain judges getting ‘swamped’, while the rest of the system functions at a relatively normal pace), it affects entire court branches such as commercial and administrative courts in most Central European countries. Reports from Poland, the Czech Republic and Slovenia speak of court backlogs increasing so much that many have given up relying on the use of courts. The backlogs usually find their explanation in the fact that many post-communist judges are inexperienced and insecure with new commercial and public law (and the activism of advocates in these cases). That is the reason why ministers of justice in several countries (Czech Republic, Poland, Slovenia) have recently gone public (with direct reference to the embarrassing number of complaints – concerning mainly criminal procedures – before the Strasbourg Committee on Human Rights for not fulfilling the conditions of Art 6.1 ECHR) in an attempt to improve their budgets for more and better paid judges and for court reform. Looking at the comparative productivity of judges, however, it strikes the observer (especially in the Netherlands) that the recipe for mastering the caseloads of courts may not lie in increasing the number of judges but rather in improving equipment and providing more court clerks and support services. As seen from the Netherlands (as a country with traditionally low but also increasing litigation rates) there might also be reservations about the scarcity of legitimate alternative forums for the out-of-court settlement of conflicts. Arbitration is often shunned because of its ideological tradition in communist times, and the Czech and Hungarian procedural codes do not therefore foresee the regulation of arbitration; Estonia and Slovenia, however, do envision this.

It is worth mentioning too that many complaints about malfunctioning relate to ineffective instruments for implementing court decisions.¹ It was overlooked for a long time that the efficacy of bailiffs capable of executing titles for debt enforcement or seizure is a vital element in any court reform. When this did dawn on the policymakers they started with legislation on the execution of debts, asking for Western help in building up the profession. French *huissiers* are currently active in bilateral contacts with Estonia, Poland and the Czech Republic to show the way towards the professional control and modernisation of bailiffs’ instruments. However, they were unable to prevent the fact that in some countries court clients

get so desperate to jump the queues that they pay court clerks and bailiffs small bribes.

NOTES

- ¹ For official information entirely devoid of practical problems see the multilateral seminar of the Council of Europe on 'The execution of court decisions in civil cases', Strasbourg 1997.

6 CRIMINAL JUSTICE

If the magistrates ‘sitting’ on the bench throughout Central Europe seem numerous by Dutch standards, the numbers of ‘standing magistrates’ are even more amazing. In communist times the *prokuratura* had a much larger apparatus, which in addition to criminal investigation also fulfilled the task of ‘guarding the legality’ of all public bodies, including the state-owned and collective economy – in other words much of all public life. It was responsible for the implementation of law and of directives, it had standing in civil procedures and had surveillance responsibility for political obedience. In political affairs it relied on the secret police for investigation and referred cases it deemed appropriate to criminal courts. The *prokuratura* also covered clandestine operations at the behest of the party or secret police. It is no wonder then that the *prokuratura* was for many synonymous with the apparatus of repression. All communist countries had procurators with wide-ranging powers – some more, some less, in accordance with the Soviet model. Yugoslavia, and thus Slovenia, did not.¹

Of course, they were the first to be dismantled after the overthrow of communism; in fact this was already happening *de facto* before the overthrow. When the velvet revolutions took place, many prosecutors had already left in fear of a purge. Those who stayed had to be cleared and were restricted to criminal investigations and representation of the state in criminal procedures. Their status was severely curtailed and their numbers shrunk. Nevertheless, to Western eyes, an amazingly wide range of competence remained. The Polish Law on the Procuracy gives them the task of ‘ensuring respect for the law’ and ‘monitoring the legality of administrative procedures’, rendering opinions on legislative drafts and appearing before all courts of law, including the Constitutional Court. It is quite unclear what all this means in practice, but the Constitutional subcommittee of the *Sejm* in 1995 could not agree on a coherent definition of these competences and Parliament refused to incorporate them in the Polish constitution.² Prosecutors who are on an equal footing with the ‘sitting magistrates’ in having to satisfy the same professional requirements, and who receive a similar level of pay (even though throughout the career somewhat less and with fewer pension benefits), are subjected to the hierarchical control of a General Prosecutor who, in Poland, is the same person as the Minister of Justice.

Dutch prosecutors, having established a prosecution directorate just a few years ago, know that this means fighting a battle of independence from political management. For observers of post-communism who see the extent of the task prosecutors have in “dealing with crime and corruption” it is clear that they cannot but “fail to fulfil such large on-paper authority.”³ It might also be added that in the West the vigilance of prosecution with respect to corruption has so far been greater in Latin countries, where investigations are either in the hands of investigative judges or prosecutors who enjoy similar judicial independence.

Table 6.1 Number of prosecutors (1995, per 100.000 inhabitants)

| Netherlands | Estonia | Poland | Czech Republic | Hungary | Slovenia |
|-------------|---------|--------|----------------|---------|----------|
| 2.7 | 9 | 12 | 8 | 11 | 7 |

Source: Own survey

In post-communist countries, whilst judicial prosecution services are generously staffed, the police forces are even more so. The communist states, which relied upon police control inside and on the borders, left a big force which was fairly disciplined internally and trained in maintaining rules externally. After the overthrow, the police forces entered into a negative spiral in the large post-communist states. Their better pay and the many fringe benefits in the form of housing and organised vacations, et cetera, vanished. Experienced policemen were lured away by better pay in the private security industry and replaced by young policemen. Training programmes were set up – often with the help of Western colleagues – but many of the more qualified police recruits took their training skills with them. Turnover remained high and there was constant reorganisation.

As professionalism and discipline in the police forces deteriorated, the need arose to improve the meagre pay by accepting minor bribes. Surveys in all the countries under review (except Slovenia) have verified the many stories of minor police corruption, and both the press and sociological studies have reported on the links between minor police bribery and bigger deals involving customs officers, border guards and judicial prosecutors.⁴ It may be that the scandal value of hearsay leads many to overestimate the true dimensions of the problem, but as the negative image has also spread to the self-image of the forces themselves, the damage has tended to escalate. Occasional clean-ups (like in Estonia in 1991 and again in 1994) were easily stopped by vested interests within the big forces (thus the Estonian Minister in 1999 announced another round of dismissals together with a pay increase for those who remained).

Table 6.2 Number of police (1995)

| | Netherlands | Estonia | Poland | Czech Republic | Hungary | Slovenia |
|--|-------------|---------|--------|----------------|---------|----------|
| Officers | 197 | 333 | 258 | 463 | 368 | 260 |
| Civilian staff (rate per 100,000 inhabitants) | 3 | 81 | 45 | 118 | 118 | 157 |
| Running costs | 13,339 | 1,753 | 1,583 | 932 | 2,541 | 1,091 |
| Capital costs (in 1,000 ECU, per 100,000 pop.) | 542 | 53 | 55 | 480 | * | 1,030 |

Source: European Sourcebook of Crime and Criminal Justice Data, Council of Europe, Strasbourg 1999

Stories abound of police corruption. They do, however, fall short of the popular image of a crime wave raging through Eastern and Central Europe. The West European visitor who meets personal friends often gets the impression that in personal life a Dutch metropolis looks more unruly than the big cities further east. A look at representative victim surveys which mirror the everyday experiences people have with crime, teaches the same lesson: victims experience most types of crime slightly less frequently in Slovenia than in the Netherlands, slightly more often in Hungary and in the Czech Republic, significantly more often in Poland and considerably more often and more seriously in Estonia. Only motor vehicle theft stands out as being more frequent in all Central (and even more so Eastern) countries (but as far as crime patterns cross borders, some of the stolen car trade has also victimised the Western countries). Of course, these frequencies vary depending on the type of crime, but they are measured with reliable comparative survey methods, thus presenting a fairly consistent pattern.

Table 6.3 Number of victims reporting crime (per 100,000 inhabitants)

| | Netherlands | Estonia | Poland | Czech Republic | Hungary * | Slovenia |
|----------------------|-------------|---------|--------|----------------|-----------|----------|
| % households burgled | 2.3 | 5.0 | 2.0 | 3.1 | 2.5 | 1.9 |
| car thefts | 0.4 | 1.3 | 1.5 | 1.1 | 1.8 | 0.3 |
| % of persons robbed | 0.8 | 3.3 | 1.8 | 1.2 | 0.7 | 0.8 |
| assaulted | 3.8 | 5.4 | 3.9 | 3.0 | 1.7 | 4.6 |

Source: Van Dijk, Mayhew and Killias (1996); * only urban

Evidently, victim reports do not measure the type of crime that captures the headlines in the media. The level of public crime might be much higher than that which touches private lives. But it might nevertheless be the media coverage more than personal encounters which is responsible for creating the image. That being said, we should not ignore how serious it is if the problems of crime in Central Europe have grown to proportions similar to those in the West. But it is the surprise impact of new phenomena and the change of perceptions which means they are felt more acutely – an experience which the Dutch had 25 years ago when their crime rate started to rise spectacularly.

The next step is to look at how the judicial bodies cope with the volume of crime. Progress reports on Central Europe keep focusing on the clear-up rates of the police, which range somewhere between twenty per cent and forty per cent. Once again: they do so in Western countries too. The Netherlands with an average clear-up rate of eighteen per cent has long been at the bottom end of the table but, in their defence, they could rightly argue that their police reports are inflated by petty property crime (like the notorious bicycle thefts), which people have to register with the police in order to make an insurance claim. Thus, it is necessary to look at clear-up rates separately by type of crime and to distinguish between procedures in the chain from prosecution to a final sentence in court. This will show:

- police registration of criminal incidents which politicians and the media use as indicators for gauging how serious crime is in their country;
- the identification of suspect offenders, which indicates the clear-up rate which the police have managed to achieve;
- court convictions, which indicate the success of the criminal justice system in punishing offenders.

Each of these indicators depends on definitions which the police, prosecution and courts use for their own ends. Looking at them individually by type of crime makes it clear that lumping them together as a general rate does not make sense. Evaluating the entire pattern, however, enables us to evaluate how the criminal justice system works.

The overall result is beyond doubt: Estonia clearly has the highest crime rate out of the countries compared and Slovenia the lowest. In the middle group the Netherlands ranks the highest. For our analysis of comparing legal cultures, we are not so much interested in the rate of crime, but in the reaction of the police and the courts. The differences are remarkable: while victim surveys would show the Netherlands in a middle position if placed among the Central European countries, police figures put them at a low level with respect to the homicide rate, but at high levels with regard to rape, robbery, assault and burglary, and certainly also with regard to drug trafficking. The explanation can only lie in disparate reporting rates: Central Europeans apparently do not believe that reporting a crime to the police would help and maybe do not trust their police at all, while Dutch victims report crimes with greater frequency (either because they feel more confident about doing so or because they need to file a report for insurance purposes). If we look further to the rates of court convictions the discrepancies become even wider: the expectation that registered crime leads to punishment by the courts is significantly lower in all Central European countries than in the Netherlands.

This might partly be due to the greater variety of diversion measures applied by the Dutch judiciary, especially with respect to juvenile crime. The reaction to the high rates of delinquency, especially juvenile delinquency, in the last twenty years has so far been unique to Western countries: the law of criminal procedure allows prosecutors the discretion to apply their own sanctions (if the suspects do not contradict them). As far as juveniles are concerned there exists a whole range of alternative sanctions which are applied with the help of a network of social help institutions. As far as adults are concerned, however, the bulk of the prosecution 'settlements' (*transacties*) consists of monetary fines. These fines represent a trend towards the 'monetisation' of prosecuting everyday crime: they spare suspects a formal conviction and they spare the courts from having to handle a massive volume of minor cases. Monetary fines even produce considerable revenues for the budget of the judicial system: fifteen per cent of the courts' budget is earned by fees and fines. Economists might consider these as an increase in pro-

ductivity. In post-communist thinking, which has just achieved the strict separation of prosecution and criminal justice, it might be hard to duplicate the recipe.

Table 6.4 Police recorded crime per 100,000 inhabitants

| | Netherlands | Estonia | Poland | Czech Republic | Hungary | Slovenia |
|--|-------------|---------|------------|----------------|---------|----------|
| Deliberate homicide Incl. attempt recorded as completed by police | 19.3 | 20.6 | 3.5 | 2.7 | 5.1 | 5.0 |
| health service | 1.8 | 16.7 | 2.3 | 1.8 | 2.6 | 1.8 |
| | 1.1 (1994) | 22.3 | 2.8 (1994) | 1.8 (1991) | 2.4 | 1.8 |
| Court convictions | 5.8 | 13.6 | 1.7 | 1.3 | 2.8 | 1.9 |
| Murder and homicide are often used as comparative indicators, even though they are notoriously misrepresentative. The problem lies with the police definition of 'attempt': the Dutch have 'fooled' international comparisons by using a very broad definition, thus showing a rate almost equal to that of Estonia. If we look at completed homicides, however, this ranks them at the same low level as Hungary and Slovenia, as do the more reliable data of clinics and health services. | | | | | | |
| Rape incidents | 8.9 | 6.9 | 6.1 | 7.0 | 4.1 | 6.2 |
| offenders | 7 | 6 | 5 | 7 | 3 | 6 |
| Court convictions | 2.1 | 3.7 | 2.5 | 1.8 | 2.3 | 2.1 |
| Rape incidents are taken seriously everywhere. The sensitivity and the willingness to report to the police, however, has increased with the activity of women's groups. Once rapes are reported, conviction rates are high everywhere. | | | | | | |
| Robbery incidents | 102 | 211 | 52 | 39 | 26 | 17 |
| offenders | 44 | 20 | 33 | 24 | 19 | 20 |
| Court convictions | 22 | 61 | 14 | * | 15 | 2 |
| Robbery might be a good indicator of serious crime, were it not that some police include minor incidents such as pick-pocketing. This often shows up in court: if the acquittal rate of known offenders here is high, police might be overreporting. | | | | | | |
| Assault incidents | 181 | 28 | 48 | 78 | 102 | 24 |
| offenders | 117 | 18 | 30 | 65 | 64 | 26 |
| Court convictions | 35 | 17 | 18 | 12 | 61 | 15 |
| Assault mostly occurs among people who know each other. Again, sensitivity might be higher in the West, but the overall rate remains much higher than in Central Europe. | | | | | | |
| Burglary incidents | 3,058 | 1,349 | 790 | 969 | 799 | 288 |
| offenders | 302 | 246 | 167 | 191 | 148 | 126 |
| Court convictions | * | * | 85 | 22 | 197 | 14 |
| Burglary might be the most reliable comparative indicator of crime; the relationship to known offenders is the best indicator of clear-up success. | | | | | | |
| Drug offences | 22 | 3 | 13 | 11 | 4 | 23 |
| offenders | 57 | 1 | 9 | 4 | 4 | 27 |
| Court convictions | 2.9 | 1 | 5 | 2 | 2 | 2 |
| Drug offences are registered in very different ways. The Netherlands and Slovenia only register trafficking and not user offences. In post-communist countries drug use initially did not rise as quickly as many feared; after 1995, however, it has risen very rapidly. | | | | | | |

* No data

Source: European Sourcebook of Crime and Criminal Justice Data, Council of Europe, Strasbourg 1999

The final test of criminal justice in international comparison is the prison system. The reaction to the political use of criminal prosecution in communist times was for post-communist regimes to release prisoners and to put prison reforms on the agenda. Minimum standards for human conditions were adopted with the

membership of the Council of Europe. Even though these standards are admittedly lower in Central than in Western Europe, they are under the scrutiny of the Commission for the Prevention of Torture of the Council of Europe. Prisons (including those in the Netherlands) have repeatedly been inspected, with the reports being published on all countries except Estonia.⁵

In the 1990s rising crime rates have quickly filled the prisons again. Neither the recorded rates of crime nor the conviction rates of the courts fully explains the variations in the rates of incarceration among our countries. This holds especially true for the Netherlands, which for a long time had a prison population far below that of other West European countries. However, it has worked its way up to the average within the last fifteen years. The increase cannot fully be accounted for by an overall increase in crime: it is partly due to certain types of crime being on the increase, especially violent crime related to drug trafficking, but it is also partly due to the stiffer sentencing by the courts. However, the priority given to high treatment standards of prisoners can be judged by comparing the financial resources spent in the Netherlands on the prison system (covering forty per cent of the entire judicial budget).⁶

Table 6.5 Prison population and operating costs

| | Netherlands | Estonia | Poland | Czech Republic | Hungary | Slovenia |
|---|-------------|---------|------------|----------------|------------|----------|
| Population | | | | | | |
| 1990 | 44 | | | | 146 (1991) | 42 |
| 1995 | 55 (1994) | | 163 (1994) | 188 | 122 | 33 |
| 1997 | 87 | 300 | 148 | 209 | 136 | 39 |
| Operating costs prisons (1995, 1,000 ECU per 100,000 inhabitants) | 4,257 | 691 | 466 | 888 | 478 | 793 |

Source: European Sourcebook of Crime and Criminal Justice Data, Council of Europe, Strasbourg 1999

NOTES

- ¹ Cf. the Multilateral seminar of the Council of Europe on 'The transformation of the Prokuratura into a body compatible with the democratic principles of law', Strasbourg, 1994
- ² Czeszejko-Sochcki, Z. in: *East European Constitutional Review* 1999: 92
- ³ Holmes, S. (1999) in: *East European Constitutional Review* 8,1/2:76
- ⁴ Collected conference papers, Central European University Nov. 1999
- ⁵ www.cpt.coe.fr.
- ⁶ Of course, the cost comparison would be grossly distorted if it were not related to the different wage levels: as in the case of all labour, prison wardens and treatment personnel are much more expensive in the Netherlands, but this is mitigated by the lower imprisonment rates: Slovenia and the Netherlands would rank much higher if operating costs were calculated per prisoner, and not – as here – per inhabitant.

7 ADMINISTRATIVE REVIEW

For reformers in the late days of the communist regimes, one of the chief goals was to make state administrations, party bureaucracies and trade unions more responsive to the public. However, the idea of establishing courts for administrative, fiscal and social security matters was ranged against the official ideology of participation within these allegedly self-governing entities. Formal court procedures to deal with complaints concerning administrative acts would have been contrary to all the idealistic self-images of communist bureaucracies. After the overthrow of communism, however, they became a major project in the pledge to introduce the *rechtsstaat* or state under the rule of law. However, administrative review had to be introduced together with the reform of the respective administrations themselves. This, of course, was not the only difference from traditionally responsive bureaucracies in the Netherlands, but they also waited until the early 1980s before introducing formal complaint procedures and they had to be forced by the European Court on Human Rights to change the paternalistic control by the State Council (*Raad van State*), giving it full judicial format. Purely on paper, Poland had introduced a court-like administrative review a few years earlier.

The problem lies in doubts as to whether or not judicial control would offer the most effective avenue for citizens to make their complaints heard. Formal complaint might make bureaucrats defensive; the result might be more formalism, but less responsiveness.¹ Evaluating judicial review should therefore include some data on how people experience public administration control – a research goal which is far from being achieved anywhere (let alone in a comparative way). The argument can therefore only compare which institutions have been established for the control of public administration. Two directions of examining the question seem the most relevant:

- firstly, which measures of internal control does an administration have, for example auditing the budgets and keeping public procurement free of patronage?
- and secondly, to what extent do citizens have remedies against decisions taken by the system of public administration, and in particular how far do these satisfy the criteria of an independent judicial review?

On the side of the success of internal controls we can offer only one (easily over-estimated) indicator which measures the perceptions of the international business community, namely the extent to which they experience relations in a country as conducive to corruption or being relatively corruption-free. It is an indicator designed to stigmatise, in order to motivate countries to take effective counter-measures, and as such it should only be considered in relation to more formal data.

Table 7.1 Transparency Index Perception (1999) of Corruption

| | Netherlands | Estonia | Poland | Czech Republic | Hungary | Slovenia |
|---------------------------------|--------------------|----------------|---------------|-----------------------|----------------|-----------------|
| Place among 99 country rankings | 9 | 27 | 44 | 39 | 31 | 25 |
| Range 10=low/ 0=high | 9.0 | 5.7 | 4.2 | 4.6 | 5.2 | 6.0 |

Source: Transparency International (www.transparency.de)

The result is rather positive for the countries in our comparison: not only are the Netherlands among the 'cleanest' on the perception index, also the Central European countries compare positively in the post-communist hemisphere. Western business people (and with them the general public, which is also weighed in the more recent, methodologically improved versions of the index) meet the conditions in Eastern Europe with extreme suspicion; compared to the 'real East', Central European transformation societies fare considerably better. Nevertheless, corruption plays a role at all levels in all post-communist countries. This can partly be attributed to the new opportunities of the privatised economies and partly to old networks of people continuing their shadow economy under the façade of new rules. Evidently, it is the combination of the two which is most damaging to the legitimacy of reform policies.

On the second criterion, the judicial remedies against administrative decisions, we can again only compare the progress made in establishing institutions and procedures. Administrative complaints usually have to be lodged first with the higher hierarchy in the administration concerned. If rejected all countries have introduced judicial remedies, either in a single instance with possible recourse to a constitutional review or in a parallel two-tier system respectively integrated into the regular court system. Rising litigation rates before these courts show that people quickly get used to using the idea of challenging public decisions. The experience of a quick learning process as soon as the offer of judicial remedies is made has impressed (and annoyed) administrators in the Netherlands during the last sixteen years too – it seems that post-communist countries will catch up in the near future, with Hungary already surpassing the Netherlands. Nevertheless, it remains amazing that social security disputes, which are very numerous and serious among populations that were used to the all-round social institutions of communist welfare systems, do not lead to more first instance litigation (while the austerity measures of the welfare state have throughout the 1990s kept parliaments and Constitutional courts busy).

Table 7.2 First instance court procedures (1995) per 100.000 inhabitants

| | Netherlands | Estonia | Poland | Czech Republic | Hungary | Slovenia |
|------------------|-------------|---------|--------|----------------|---------|----------|
| Administrative | 260 | 123 | 102 | 2 | 269 | 97 |
| Social insurance | 320 | * | 332 | * | 84 | 78 |
| Fiscal | 60 | * | * | * | 22 | * |

Source: Own survey;

* No data, usually because cases are listed among other court procedures

Lawyers trained in legal positivism might have been content with supplying a judicial review of administrative acts. The reformers, however, asked for more when they demanded “responsiveness of public institutions” at the time of the revolution. As in the Netherlands, the introduction of administrative court procedures was accompanied by an informal institution along the lines of the Scandinavian ombudsman model. Complaints here can be lodged without much further ado, leaving it to the Ombudsman institutions to select those where they have competence, usually to the exclusion of claims which have to be brought forth in administrative courts. The Polish ombudsman went even further. Here, any complaint against public agencies will be dealt with, even if a parallel administrative procedure is pending. It shows the character of the first and most successful ombudsman institutions in Central Europe. Due to the very active first Ombudsman, Ewa Letowska, and her successors, the Polish Commissioner for Human Rights became an effective counterweight in the checks and balances of the Polish political system.

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Table 7.3 Administrative courts and ombudsman institutions

| | Netherlands | Estonia | Poland | Czech Republic | Hungary | Slovenia |
|--|--|---|--|--|--|---|
| Administrative courts | Single instance 1984 Two tier with chambers in district courts/ appeal State Council 1994 | Admin. Panels in district courts/ Supreme (revision) Court 1991 | Single Admin. Court 1980 revised Act 1995 | Admin. Panels in district / regional courts No Supreme admin. court | Cases before civil courts (incl. appeal/ revision) | High (revision) Court limited jurisdiction 1991 |
| Ombudsman institutions in function since | Effective 1982 | Legal Chancellor/ Ombudsman 1993/1999 | Effective Major political influence 1987 | Starting in 2000 | Three effective institutions 1993 | Effective 1993 |

The Netherlands has very recently realised a similar double ambition: judicial independence of administrative review before the Council of State was introduced in 1984, with a two-tier procedure allowing for appeal no earlier than 1994. In the same period a National Ombudsman was installed together with ombudsman institutions of local government and various public entities functioning as a compensatory access for complaints lacking the basis for formal legal remedy.

NOTES

- ¹ A.J.G Verheijen – in this series, working document no. W 107 – also stresses that “the current corruption allegations .. will not help the process of creating more flexible management.”

8 CONSTITUTIONAL REVIEW

Much of the attention of observers of the post-communist transformations has been pre-occupied with the role of Constitutional Courts. In Poland and Slovenia, where they already existed before the rejection of communism, they quickly adopted a role as guardians vis-à-vis the rapid legislation of the transition period after the overthrow. The Hungarian Constitutional Court in its first years developed a very active policy of reviewing new legislation, vetoing some and proposing amendments to some forty per cent of all legislative projects. The Polish court managed to resolve major political controversies when parliamentary factions were unable to find a compromise. The Slovenian and Estonian courts kept an eye on the guaranteed legality of all public action, when local and provincial bodies were particularly easy to overlook. In all countries regular courts can invoke the Constitutional Court in order to receive an authoritative interpretation, especially where quick reform legislation has left gaps in the new laws. All the Constitutional courts offer two basic procedures:

- performing the function of abstract norm control initiated by political office-holders and parliamentary groups (in Poland and Slovenia including social organisations such as trade unions, employers and religious organisations);
- the function of concrete norm control initiated by regular courts requesting a ruling on constitutional issues arising in pending procedures (in Estonia designed as constitutional appeal after the regular court has decided).

In addition, the popular constitutional complaints open the gates of constitutional review in Hungary, the Czech Republic and Slovenia to anyone who is affected by violations of Human Rights by action of the government or any other public body.

It should not come as a surprise that the economic reforms in the course of the restitution of property and of privatisation in all post-communist countries in the 1990s led to profound disputes which the political elites were glad to leave to Constitutional Courts rather than to fight them out in the political forum.

Even though Slovenia and Poland had established Constitutional Courts before the overthrow, and whilst the Czech Republic had been able to refer to a predecessor of a Constitutional Court dating to the 1920s (which was, however, discontinued during communist times), post-communist constitutionalism forms an entirely new element of Central European legal culture. This is especially due to the possibility of lodging constitutional complaints for violations of human rights which can be raised by popular complaint in the Czech Republic, Hungary and Slovenia. With the exception of Estonia, these courts are set apart from the legal review of High (revision) Courts. Judges are nominated in a political process with the participation of Parliament and appointed by the President for a limited time. It is no accident that these constitutional remedies are largely shaped according to the model of the German *Verfassungsgericht* which was set up in a similar attempt to overcome the misuse of legal power after the Nazi regime. In this vein, it is significant

that this element of post-repressive law is (still) missing in the Netherlands, where there have never been any strong inclinations to introduce any form of constitutional review. Dutch judges can set statutory law aside if they consider it to be in violation of international treaties, including the human rights norms of the Council of Europe. But they cannot refer these and other constitutional issues to any domestic court; their objection can only be reviewed by a European court.

9 SOME CONCLUSIONS

- 1 All the Central European countries under scrutiny – Estonia, Poland, the Czech Republic, Hungary and Slovenia – quickly transformed their legal institutions after the overthrow of communist rule. The legitimacy of new constitutions, courts and the independence of legal professions was helped by a process of building upon national pre-war legal traditions. It was also possible for civil as well as penal law to be restored quickly as much of the systematic codification had survived both the communist and the fascist times, even though their political use and application had been different under different regimes. The integration of substantive and procedural criteria for human rights established by the Council of Europe was facilitated by being part of a Central European legal tradition which is also speeding up the process of adaptation of statutes according to the *acquis communautaire* of the European Union. The relative ease of this transformation (relative to countries which never shared the Continental codes and institutions) may come as a surprising verification of the thesis of relative autonomy of legal systems. Even under communist (and earlier on fascist) regimes the misuse of legal legitimacy for political ends was restricted to certain (repressive, racist or simply politicised) parts of the law, while the rest of the legal institutions continued to punish ordinary criminals, enforce bad debts and divorce broken families. In breaking with communism, the emerging Central European legal systems adopted the Council of Europe standards of independence of judges, due process of law and minimal conditions of arrest and prisons. Their institutions which guarantee these standards show a variety of legal cultures, but certainly not more than those of West European and Mediterranean EU member states. As far as the formal benchmarks of the rule of law are concerned, the EU may leave it to the Council of Europe to evaluate how far they are maintained.

- 2 There are common problems of the transformation, however, which ask for special attention, among them certainly those regarding meeting the requirements of the European *acquis communautaire*. Communist regimes (in contrast to fascist ones) followed an ideology of minimizing the rule of legal institutions. The planned economy regulated mischief and internal conflicts by renegotiation, arbitration and political decisions, leaving the correction of breakdowns to a barter shadow economy. Thus, civil courts had a very low caseload of economic or labour disputes. Family courts were easy on divorce as the social and financial consequences were largely regulated by the widespread participation of women in the labour force, child care and the welfare system.¹ Penal courts had to lend legitimacy to some (but not all) of the political repression, but for the rest they were confronted with less regular crime, partly because social control was effectively tighter, partly because slight forms (e.g. of juvenile delinquency) were treated as social, not criminal problems.

All in all, under communism (at its peak) the justice system was of minor importance.² The body of judges was small, the number of advocates even smaller, the study of law discouraged and the majority of law graduates were needed for consultant jobs in economic enterprises and administrations. Even though in the 1980s such idealistic Marxist erosion of the law had already been watered down with legal training and legal institutions gaining in importance in the reform nomenclature, the legal profession was far too small to fill the institutional needs and the positions which the re-establishment of the rule of law asked for after the overthrow at the beginning of the 1990s. Law schools had to be enlarged, new ones founded, quick courses had to teach the new law to all those who in professional positions – especially of course advocates and judicial personnel who had remained after the overthrow. All of these tasks were successfully tackled in the 1990s with – as we have seen – different approaches under the various post-communist conditions and national legal cultures. All of them, however, need time to be effective. The first law students of post-communist law schools graduated and started to receive their in-practice training at the end of the 1990s. The numbers of young lawyers is just starting to grow, with many of them being attracted by job opportunities as advocates and by private employment, which leaves the judiciary offering less ambitious but more secure careers.

It is – and should be – a concern of the EU to intensify exchanges of both students and teachers of legal education at university level as well as of diverse professional training facilities for advocates, judicial institutions and the police.

- 3 If the constitutional transformation can be considered to be a rapid success, the process of modernisation of legal institutions is only the start of it. Compared with West European countries (especially the immediate neighbours Austria and Germany), litigation figures in Central Europe are still low but can be expected to continue increasing quickly. Whilst litigation caseloads are rising steeply, the personnel of judges, court clerks and executioners is scarcely increasing. This is widely seen as one of the reasons that delays in court are commonplace and it seen as a good sign that several ministers of justice (Czech Republic, Poland, Slovenia) have promised to increase the number of judges (with direct reference to the embarrassing number of complaints before the Strasbourg Committee on Human Rights for not fulfilling the conditions of Art 6.1 ECHR). However, seeking improvement by increasing the number of personnel is met with some reservation in the Netherlands (as a country with considerably less judicial personnel and much higher caseloads of judges and prosecutors). It would certainly be necessary to follow the plans of Central European Ministers of Justice for improving their judicial organisations, which presuppose an increase in their budgets. But court reforms might be more effective than extending present administrative structures at the level of administrative modernisation and controls. Dutch court reform is in the middle of such a process itself, and it will certainly not pretend to have found

perfect solutions. But it should be prepared to share the learning process by the intensive bilateral exchange of all professional organisations. This should include the active exchange of the rich Dutch experience with legitimate alternatives for the out-of-court settlement of disputes.

- 4 Support and mutual learning could certainly also help advocates and NGOs that are engaged in providing diverse forms of legal aid. It is obvious that the change of regime and the increasing relevance of legal regulations means that people in their private lives, as well as small businesses, would need better access to legal information and advice and in many instances more effective legal aid regulations than those based on strict means and merits tests. Present day legal aid in Central Europe (with some remarkable exceptions when financed by Western foundations) bears more resemblance to the modest court fee waivers in Southern Europe than to the more social schemes in the Netherlands and Scandinavian countries. Chambers of Advocates in some countries are willing to fulfil actively their professional public interest obligations, but they can hardly expect their members to engage effectively in *pro bono* engagements as long as they have more than sufficient opportunities for better paid activities.

- 5 In the view of ordinary members of the public the responsiveness of the system of public administration suffers from similar limitations. The rule of law attempts to replace the multitude of ways of dealing informally with communist parties, trade unions and public ministries and shadow economies by formalised, objective and foreseeable procedures. At a local or provincial level this does not always work; many see old networks reoccurring and some of the former political currency being replaced by outright corruption. Considering the size of transactions and the interests involved, it is not surprising that the procedures of re-instatement and privatisation have, in particular, raised suspicions of clientele patterns and quick profit-making. The result in many parts of Central Europe has been the long-term loss of legitimacy of the new public order. In so far as this is seen as large-scale corruption it has to be viewed as the primary task of politics, but at the level of small-scale administrative corruption, legalistic administrative checks and audit controls can certainly help. The EU institutions have made it a primary task to watch the progress of legislation and institution-building in this respect, but as far as the judiciary is involved at a practical level, bilateral exchanges could certainly support these efforts.

- 6 As far as the new constitutional courts in Central Europe are concerned, the Netherlands might be the last country to consider making any comment. In a country without constitutional review, the European Court for Human Rights, and to a certain degree the European Court of Justice at Luxembourg, fulfil a similar function of reviewing national legislation in terms of the standards of supreme norms. The Netherlands was the first country to introduce the prin-

ciple of the supremacy of international treaties in their Constitution. Dutch parties frequently file complaints with the Human Rights Committee and Court in Strasbourg and so are Dutch judges among those who use the preliminary reference procedure at the Luxembourg court to have the compatibility of national legislation with Community law reviewed. Only the latter, however, might be stimulated by judges lacking a forum for constitutional review; complaints before the Human Rights forum in Strasbourg are initiated in the first place by parties and their advocates who complain about the (alleged) failures of their national system of justice. The big Central European countries, (primarily Poland and the Czech Republic) figure prominently among them. The Strasbourg court has reacted to the increasing caseload from new member countries by extending its capacity for admission tests and pre-procedures, while keeping down the size of the bench responsible for new jurisprudence.

The Luxembourg court might have fewer caseload problems. As far as the infringement procedures of the European Commission are concerned, the Commission itself has generally been known to resolve conflicts in pre-court letters and negotiations, using the court only after its own gatekeeper function has been exhausted. As far as referrals by judges of national courts are concerned it might follow a similar strategy of lustration cases by means of admission procedures. It may be postulated that national constitutional review takes care of those who try to test national legislation in the light of superior legal principles, so that referrals to the European Court would largely be dependent on issues concerning the economic order and cross-border trade. It might therefore be expected that the frequency of referral to the European Court will grow in line with the international economic growth of the new members.

NOTES

- ¹ Markovits, I. (1995) *Imperfect Justice; An East-West German Diary*.
- ² Rottleuthner, H. (1994,/95) 'Das Ende der Fasadeforschung: Recht in der DDR', *Zeitschrift für Rechtssoziologie* 94/2 and 95/1.

COUNTRY REPORTS

EDITED BY ERHARD BLANKENBURG

REPUBLIC OF SLOVENIA – NENA TROMP

ESTONIA – AIRI KANA

POLAND – MICHIEL NOTTEN

HUNGARY – LASZLO MARACZ

CZECH REPUBLIC – HANK GEERTS

10 REPUBLIC OF SLOVENIA

Facts and figures

Population: 1,992,000; growth: 0.1%

88% Slovenians, 3% Croats; 2.4% Serbs; 1.4% Bosnians and small minorities of Italians and Hungarians

Language: Slovenian

National capital: Ljubljana

Constitution adopted and effective 23 December 1991

Parliament: National Assembly with 90 delegates; National Council (Državni Svet) with 40 councillors from local and regional bodies, with advisory capacity in respect of legislative proposals and a limited veto in the legislative process

President of the Republic represents Slovenia and is the commander-in-chief of the defence forces.

The Government, Prime Minister and Ministers are directly responsible to the National Assembly.

Regional division: 136 municipalities and 11 urban municipalities

GDP per head in 1998: US \$ 10,300

GDP per sector (1997): services 60%, industry 35, agriculture; 5%

Currency: tolar (SIT)

10.1 INTRODUCTION

In 1991 Slovenia became an independent state for the first time in its history. Slovenia had been part of the Habsburg monarchy for about eight centuries. Yet unlike other Slavic nations under Habsburg rule, the Slovenes never desired to form an independent state. Over these centuries Slovenia was ruled by Austrian laws with no form of local governance. German was the official language and save for a few exceptions there was no education in Slovene. However, Slovenes did not lose their ethnic identity under foreign rule. They preserved their culture and, above all, their language. During the Habsburg rule the Slovene-speaking population was not administered as a unit on their own but were dispersed over four provinces: Carinthia, Styria, Carniola and Gorizia. After the First World War Slovenia became a part of the Kingdom of the Serbs, Croats and Slovenes (renamed the Kingdom of Yugoslavia in 1929). For the first time in history, the Slovene people were united in one geographical unit, as we know it today.

As part of a centralised Yugoslav state (1918-1941), Slovenia had no local autonomy. However, as part of a Yugoslav state, huge progress was made with regard to cultural autonomy. The Slovenian language was introduced into local schools and in 1919 the first Slovene-language University was opened in the capital of Ljubljana. Nevertheless the influence of the many centuries of Austrian rule remained evident. The population remained bilingual and, due to their geographical position, the Slovenes never lost touch with the West European world to which

they had once belonged. This remained the case even after the Second World War when Slovenia became one of six federal units in the Yugoslav federation. The Slovenes could travel to Western Europe easily and were exposed to the Western media, especially to radio and television.

According to the final communist Constitution of 1974, Yugoslavia was moving towards greater autonomy for the members in a confederation. Due to this constitution Slovenia already enjoyed independent legislation and jurisdiction in areas such as education, science, culture, and the environment. At the end of the eighties, when the political leaders of the Yugoslav Republics could not agree on the direction in which the federation had to move, the liberal-minded Slovene intellectuals played a crucial role in the promotion of the reforms towards a loose confederation. In 1988 a group of Slovene intellectuals who had gathered in the Slovene Writers Association instigated a public debate about the need for constitutional reforms in the Yugoslav federal system. The Association brought together a group of lawyers and sociologists to work in co-operation with their own members on an alternative constitution. Their efforts ended in a draft document, known as "Theses for a Constitution of the Republic of Slovenia" (Rupel 1999). They developed the idea that each of the Yugoslav nation/republics should first formulate its own constitutional text.

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This would serve as a basis for 'international' negotiations that would eventually produce a common (federal) constitutional text (*ibid.*). This method of association with the other Yugoslav republics was a counter-proposal to the Serbian demands to change the existing Constitution in order to centralise the federation in accordance with Serbian political and economic interests. The leadership of the Slovene liberal and western-oriented intellectuals paved the way for the Slovene communists who later took a firm stand against the dictates from Serbia. Slovene communist leadership was responsible for the organisation of the first multi-party elections after 1945. The other Yugoslav republics followed after the elections in Slovenia in April 1990. These elections led to the end of the communist system. A year later (1991) the Slovenian Parliament declared Slovenia an independent state.

Over a very short period of time, between 1991 and 1992, Slovenia made the transition from a federal unit to an independent and internationally recognised state. The Slovenian government was busy introducing new legislation in the months before the declaration of independence.

The most pressing legislative matters concerned foreign affairs, foreign trade, citizenship, customs, defence, banking, fiscal and monetary reforms as Slovenia had to prepare to participate in international politics (*ibid.*). The new Constitution of Slovenia as a sovereign state became effective at the end of 1991. It introduced a commitment to the protection of human rights safeguarded by the Constitutional Court and a national Ombudsman, and a strict principle of separation of powers.

Later on it simplified and cleared electoral proceedings, thus ending the monopolistic role the political organisations had held under Communism.

Between 1991 and 1994 Slovenia adopted new legislation on the most important issues of government administration. In the years that followed, the legislation addressed less controversial issues (Tratnik 1999). This process brought about new practical problems. The general complaints are that the preparation and adoption of the necessary laws take too long, and that harmonisation with the Constitution is far from satisfactory. Frequently even the cases of unconstitutionality identified by the Constitutional Court are not resolved within the deadline.¹ On the other hand, Slovenian legislation has a strong tendency towards over-regulation, inherited from the Yugoslav 'socialist self-management' system. These tendencies result in very long statutes and attempts to micro-manage everything, so that there is almost no space left for subordinated regulations and for the judiciary to apply the law in practice. The excessiveness of regulation, and voluminous statutes passed within a short period of time, lead to the frequent correction of flawed legislation. The statutes are very often amended on technicalities (Tratnik 1999). In 1997 there was a significant change in the priorities of Slovenian legislation: harmonisation with EU-standards became a priority.

10.2 LEGAL EDUCATION

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Law studies were already very popular during the communist period. The future political, administrative and business elite often studied law. The vast majority of law students did not therefore practice law, nor did they work as advocates or judges, but instead pursued a career as administrative functionaries in the 'self-management' legal system. According to the 'self-management' system every public institution (schools, hospitals, municipal offices) as well as business enterprises employed lawyers (*pravnik*) to supervise the 'self-management' regulations. It was standard practice for law graduates to become members of the Communist Party in order to get a job. However, it was certainly possible to study law and find a suitable job without party membership. Private advocate practices were also allowed. This was made possible through the law on small private enterprises, introduced in Yugoslavia in the sixties.

This law, however, limited the number of employees in such enterprises. It was not unusual for such an advocate office to consist of just one advocate who was also the owner. Most advocate offices were located in the cities of Ljubljana and Maribor, although almost every provincial town had an advocate's office.

During the communist period Slovenia had only one law faculty, situated in the Slovenian capital of Ljubljana. Since 1960 the city of Maribor had had a law college designed for two-year programs of education for lower-level civil servants. In 1994, three years after Slovene independence, the Maribor College was transformed into

a university. Both universities are state universities, with free education for everybody who passes the required qualification examination.

The curriculum for law education has changed only slightly since the communist period. The basic juridical subjects have retained the same titles (Constitutional Law, Public Law, Criminal Law and Civil Law). However, the substance has changed due to the large-scale reforms of the judicial system carried out after 1991. These curriculum changes had already started in the mid-eighties when the Slovenian political and intellectual elites began to challenge the communist concept of society. After the fall of communism, only those subjects which were very bound up in the regime were abolished, such as Self-Management Law, Associated Labour Law or Social Property Law. The subjects added to the curriculum reflect Slovenia's new political realities; they include European Legislation and Regional and Local Administration (Igličar 1999).

There is continuity in the use of literature as well. Books written by certain authors from Serbia, Bosnia-Herzegovina and Croatia in the seventies and eighties are still used, but most of the literature is quite recent and written by Slovenian scholars. Foreign languages (German, French or English) are compulsory subjects. Students learn legal vocabulary, but there is no compulsory Western literature for undergraduates.²

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Table 10.1 Number of law students

| | 1980/81 | 1990/1991 | 1996/1997 | 1999/2000 |
|-----------|---------|-----------|-----------|-----------|
| Ljubljana | 1,148 | 1,050 | 1,640 | 2,049 |
| Maribor | * | * | 1,404 | 1,793 |
| Total | 1,148 | 1,050 | 3,044 | 3,842 |

* 776 college students in Maribor in 1990 are not regarded here as law students because the University of Maribor was founded in 1994/1995.

Source: University of Ljubljana; University of Maribor; Slovenian Ministry of Education

An entrance examination is compulsory and takes place in two terms: in the first term most places for regular students are taken up immediately and in the second term those who did not succeed in enrolling as regular students try to enrol as irregular students. Irregular students are supposed to work and are not required to attend all the lectures and seminars, but they must pay a tuition fee of about DM 2,000 for the first academic year, and DM 1,500 for subsequent years (Interview Ramšak 1999).

The faculty of law in Ljubljana admits 300 regular and 300 irregular students per year whilst in Maribor the numerous clauses is set at 170 regular and 170 irregular students. Approximately 250 law students graduate from Ljubljana, and about 150 from Maribor annually.

The normal duration of the undergraduate law degree is four years. In the first three years students follow a general program and in the last year they can choose a specialisation. Graduates are awarded a Bachelor's degree in law and a further specialisation is required for the following legal professions: advocates, notaries, judges, public prosecutors and civil servants.

For an academic career in the field of law, both universities offer a two-year Master's degree (one can choose from three specialisations) after which one can work towards a doctorate in law (Mavčič 1999).

Since 1998 Slovenia has taken part in the European Socrates and Erasmus exchange programs. Slovenian students have ample opportunity to study abroad. Maribor University makes use of the Fulbright exchange programs for lecturers and every year an American scholar teaches a course on various subjects. The problem of the exchange programs is that no foreign students come to study in Slovenia because of the language (not many courses are available in foreign languages) and the incompatibility of the credit system (grades). Slovenian students also have the opportunity to get practical knowledge abroad through the international organisation AIESEC. Furthermore, there are the student-organised programs of AEGEE (for all students regardless of the type of study) and ELSA (European Law Students' Association): law students from Ljubljana joined in 1986 and those from Maribor in 1994 (Interview Radmilovič 1999).

University staff has to cope with the larger number of students and with the new teaching demands caused by the rapid changes in Slovenian legislation and juridical practice. There are very clear restrictions about whether or not members of the university staff can engage in other legal activities: professors are allowed to combine their teaching positions with a few other legal responsibilities (as judges in the Constitutional and Supreme Court for example). The salaries at the university vary from DM 1,200 for a beginning assistant to DM 3,000 for a full professorship (Interview Tičar 1999).

10.3 THE LEGAL PROFESSION

Advocates/odvetniki

In Slovenia the number of advocates has increased continuously since the 1980s. Candidates must have graduated from a law school, and have to have undertaken two years of training in either the courts, the department of justice, an advocate's office or a notary firm.

A general State Examination follows (*pravnički državni ispit*). Before taking the qualifying State Examination they work as an advocate apprentice (*odvetnički pripravnik*). After the State Examination there follow two years of general practice and an official position in an advocate firm is required.

There is also advocate candidate status (*odvetnički kandidat*) which refers to a lawyer who has already graduated but has not fulfilled the requirement of four years of practice. The advocate candidate is allowed to handle all cases except for representing clients at the High Court or the Constitutional Court. Altogether four years of practical experience are required before a candidate can take the qualifying examination set by the Slovenian Chamber of Advocates.

The number of apprentices and candidate advocates is dependent upon the places available at law firms. The average salary of a candidate advocate is about DM 800 per month (Interview Matijačič 1999). Many law graduates are inclined to become advocates, but because they cannot find an advocate office to complete their internships, are forced to choose another career. This experience is related to the fact that the law firms in Slovenia are usually very small, with up to ten advocates (partners). Many advocates run one-person businesses and there are some cases of family business. Most of the advocates are situated in Ljubljana and Maribor (Igličar 1997: 240).

Table 10.2 Number of registered advocates

| 1980 | 1990 | 1995 | 1999 |
|------|------|------|------|
| 236 | 460 | 806 | 852 |

Source: Slovenian Ministry of Justice

The Law Society of Slovenia determines lawyers' fees in agreement with the Department of Justice. Negotiated fees, and even contingency fees of up to fifteen per cent of the amount awarded, are allowed. It is significant that many judges went to work as lawyers at the beginning of the nineties, but this has changed recently when judges' salaries were increased. Recently advocates have started to seek positions in the judiciary, as the salary is steady and there are more social benefits.

Practising lawyers have to be registered with the Chamber of Advocates of Slovenia and in one of the nine Regional Lawyers Assemblies. In addition, the Law Society represents the professional and social interests of the advocates, offering practical help such as information on the job market, office organisers and professional indemnity insurance.³

Notaries/ notar

Public notaries were unknown to the communist judiciary and were introduced into the existing system in 1994. As distinct from practising lawyers, notaries hold a public office and are vested with public powers. In accordance with this, notaries draw up documents on legal transactions, statements of will or facts from which rights may arise, or accept documents for safekeeping.

Notary documents (notary records, notary certificates, notary minutes) are made public. A notary may, at the client's request, draw up private documents – in which case the notary has the rights and duties of a lawyer. Notaries are appointed by the minister responsible for justice at the proposal of the Notaries Chamber of Slovenia (membership mandatory), after they have fulfilled the required state exams. There is a numerous clauses for this profession.

Table 10.3. Number of registered notaries

| 1980 | 1990 | 1995 | 1998 |
|------|------|------|------|
| * | * | 30 | 68 |

Source: Slovenian Ministry of Justice

In 1997 the Parliament recommended a reduction of fees for lawyers and notaries, but, in September 1998, the Minister of Justice contradicted this by giving his consent to an increase in fees. The price of a notary's service is measured by taking into account the value of the point such that the amount of points for an individual notary's service is multiplied by the value of the point. The value of the point is therefore one of the elements used for setting the notary's fee. The Notaries Association of Slovenia has the legal right to rule on the changes of the notary fee, but the law also requires the consent of the Minister of Justice.⁴

10.4 ACCESS TO LAW AND LEGAL AID

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10.4.1 LEGAL AID

In the new Slovenian legislation legal aid has not yet been regulated. The Slovenian Ombudsman for Human Rights has been engaged for several years in a campaign for legislation for free legal aid. In March 1998 the Ministry of Justice informed the Ombudsman's office that they had begun work on a law for free legal aid. The law is still not finished and there are no indications as to when it will be adopted. It created a legal vacuum in the area of realising peoples' constitutionally guaranteed right to legal protection. The Ombudsman's office warns that almost every day people are faced with cases where individuals do not choose legal protection of their rights and interests simply because they cannot afford the high costs of legal representation. However, there is an exception.

In the amending statute of Criminal Law (par. 3, art. 65) it is stated that a juvenile injured party, in criminal proceedings relating to certain criminal offences against sexual inviolability and the criminal offences of neglect of a minor and/or brutal treatment, must have an authorised representative. If the juvenile injured party does not have an authorised representative the court must appoint a lawyer *ex officio*. If the costs of criminal proceedings are not charged to the defendant, they are borne out of the budget.⁵

The Court can also instruct a lawyer to represent a client and in these circumstances the lawyer cannot decline to take the case. Article 32 of the Code reminds lawyers that they are bound by their social function to provide legal services to clients and that a client's incapacity to pay should not be a good reason for refusal to act in an emergency. Article 37 states that representation of the 'socially weak' should be perceived as an honourable task and that they are expected to perform this task with special understanding. However, this is mostly applied to criminal cases, and in practice it does not always work out. Legal counsel appointed in this way may have a profound impact on the quality of the legal service performed when the defence costs are covered by the budget.

The lack of legislation on legal aid leads to improvisation even in the courts. The Maribor County Court judges took the initiative of granting legal aid every Wednesday during office hours for parties unskilled in law and involved in enforcement proceedings related to the collection of maintenance payments (alimony).⁶

10.4.2 NON-GOVERNMENTAL ORGANISATIONS (NGOS)

In Slovenia there are several NGOs that are active in monitoring the protection of human rights and the rule of law. The most numerous NGOs are those dealing with environmental issues, since a healthy environment was guaranteed by the Constitution. The Regional Environment Centre reports about 120 registered NGOs dealing with environmental issues. Most of them are regional organisations with a small membership and usually unpaid staff. However their influence in lobbying for the changes in legislation was significant. The Slovenian government has no regulations for financial support for the NGOs. Most of the NGOs lack financial support and generate no income. They are generally dependent on financial support from abroad. But Slovenia's favourable image concerning the human rights situation, press freedom, and the development of the rule of law has meant that a lot of foreign organisations have withdrawn from Slovenia. The exception is the *Open Society Fund* and a number of human rights organisations, such as *Amnesty International* and *The Helsinki Monitor for Human Rights*.

The Helsinki Monitor for Human Rights was founded in Slovenia in 1994, but it had a very bad start. The initial difficulties were attributed to the passivity of the first president, Stane Stanič, a former journalist and former minister. After his dismissal, the Helsinki Monitor of Slovenia was very active and visible. On its initiative a lot of fundamental human rights issues were given proper attention. Among the most publicised cases were those that involved the forced evictions of the families of the former officers and employees of the Yugoslav Peoples Army (JNA), whose evictions were executed on the demand of the Ministry of Defence of Slovenia. After the withdrawal of the JNA from Slovenia, the Slovenian government planned to empty 1,200 flats of their inhabitants by force.

It is not publicly known how many families were forced to leave. It is significant that often these people were not ethnic-Slovenes and belonged to one of the other Yugoslav nationalities. In the Slovenian extreme-nationalist rhetoric they were referred to as 'southerners' (*južnjaki*). Most of these people moved to Slovenia as employees of federal institutions such as the army and had been working for years in Slovenia before Yugoslavia ceased to exist. Ethnic Slovenes were also among those evicted from their apartments. They were blamed for staying in the JNA for too long or were accused of activities against the Slovene state during the short-lived war in June and July 1991. Some left because of the court order, some were driven away by threatening anonymous telephone calls and other psychological pressures by the secret police. About 130,000 former Slovenian citizens were stripped of their status as permanent residents and their status was only regulated by the new laws in 1999.

But according to an EU report almost 90,000 of these 130,000 cases left Slovenia, seeking refuge abroad. It was not until 1999 that the status of the remaining 40,000 was finally regulated. Criticism of the human rights situation in Slovenia was underlined in the European Parliament Report on Human Rights in Slovenia, put together under the supervision of Maggie Gullian Grace in 1997.⁷

The pressing problem of the resolution of citizenship for thousands of people and the deprivation of the basic rights of the applicants (right to education, health insurance, retirement, living space) was the main reason for concern. The rights of minorities for the Serbo-Croatian speaking residents of Slovenia were violated when the only primary school in Slovenia with its curriculum in Serbo-Croatian, which had existed since communist times, was shut down. It is certain that this problem would have remained neglected and legislation delayed without the lobbying and public exposure of these unruly activities undertaken by Slovenian state institutions. In many ways the activities of the NGOs for human rights overlap with the activities of the Slovenian Ombudsman of Human Rights.

10.5 COURTS, JUDGES AND CIVIL JUSTICE

10.5.1 THE COURT SYSTEM

Until 1991 the court system was divided into regular courts, as bodies of state authority, and self-management courts. The assemblies of socio-political communities elected the judges for a limited tenure period of eight years with the possibility of re-election (Interview Mavčič 1999). Self-management courts were terminated with the re-establishment of a uniform, independent judicial system based on the Constitution of 1991. The principles of a professional and independent judiciary were institutionalised by appointing judges for life and by granting far reaching personnel rights to a Judicial Council (among them a central role in

proposing candidates for judgeship). Judges enjoy judicial immunity and their office is incompatible with other offices and political activities.

The Judicial Council was founded in 1990; it consists of eleven members, five of whom are elected from among law professors by the National Assembly at the proposal of the President of the Republic, while the rest is elected from among their own ranks by judges in office.

According to the Constitution no extraordinary courts or military tribunals can be established in peacetime.⁸ The jurisdiction of local centres, which under Communism had had authority over child support, adoption and other family matters, was re-allocated to the courts. Court proceedings are public and provide for the participation of lay people as referees in judicial procedures.

The organisation of the courts is laid down by statute;⁹ details are regulated by judicial order. A distinction is drawn between courts of general and courts of specialised jurisdiction. Courts of general jurisdiction are vested by the Courts Act with jurisdiction in civil and criminal matters. There are 47 district and 12 circuit courts; four higher courts pass sentence in appeal. Revision on the legal merit is the task of a Supreme Court, which in certain civil and criminal cases also decides in the first instance. Furthermore, there is one higher labour and social court which rules and administers justice in labour and social disputes in the appeals procedure. The Supreme Court rules in the last instance on labour disputes. The Supreme Court can rule in certain administrative disputes: it has the jurisdiction to rule in the first instance, and then again in appeal. The Supreme Court also rules on the use of extraordinary legal remedies in all these types of disputes.

10.5.2 COURT ADMINISTRATION

According to the recent amendment of the Courts Act, the judiciary is an independent budgetary user through the Supreme Court. The Court of Auditors supervises state accounts, the budget and all public spending. The Ministry of Justice is in charge of court administration.

Organisational control of the judiciary is performed by the Ministry of Justice, with most tasks of daily management delegated to the presidents of the courts and personnel councils composed of judges.

Table 10.4 Budget of the judiciary for 1999 (courts, public prosecutor's offices, attorney-general's office, misdemeanours judges)

| Technological modernisation | Maintenance office buildings | Purchase of offices for for judicial bodies |
|------------------------------------|-------------------------------------|--|
| SIT* 981 million | SIT 264.5 million | SIT 508.6 million |

* SIT stands for Slovenian tolar

Source: Slovenian Ministry of Justice

Table 10.5 Administrative and technical staff, technical advisers, court assistants

| 1980 | 1990 | 1995 |
|-------|-------|-------|
| 1,340 | 1,560 | 1,780 |

Source: Slovenian Ministry of Justice

Judges/sodnik

During the communist period judges were members of the Yugoslav Communist Bond and were part of a politicised system with no judicial remedy for claiming basic human rights. In the first years of transition from 1991-1995 many judges left their positions: they became lawyers or notaries and two dozen went into early retirement. The number of judges decreased and in 1995, despite repeated invitations to the candidates to apply, there were 124 unoccupied posts.

One of the reasons for this shortage was that judges, in communist times, took part in controversial decisions where the political arguments prevailed above the letter of the law. Many were involved when the opposition politicians proposed the so-called lustration provisions that were meant to prevent former communist officials from performing public duties in the independent and democratic Slovenia. The Constitutional Court came up with the ruling that judges who had passed judgement or took part in other decisions in court proceedings which violated fundamental human rights and freedoms would no longer be considered for re-appointment after the expiry of their eight-year tenure dating from communist times. This decision immediately led to problems, as it was feared that it would make every single judge a potential target for personal attacks. The Judicial Council was regularly exposed to public embarrassment when Parliament started to question their choices for the re-appointment of judges whose eight-year tenure had expired.

The incident shows the tensions which can arise between the independent Judicial Council which nominates candidates for vacant positions of judgeship and Parliament which has to confirm the nominations. What was designed as a standard procedure under normal circumstances led to a conflict of authority. The parliamentary commission for appointments went as far as to start its own re-investigation of candidates. Eventually all candidates were re-appointed, but the Judicial Council felt damaged by this lack of confidence and considered it as proof of a dangerous tendency of disrespect for the division between executive (political) and judicial power. Under the political climate of latent 'purges', a number of judges resented the procedures as intimidating and changed career or sought early retirement (Ogrizek 1995: 33-35).

It was not easy to find jurists for the position of judges in the 1990s as salaries and social status remained low. The ambitious and talented law graduates in particular preferred a career as an advocate or a notary. The trend was only slightly reversed recently when the salaries for judges improved and the age requirements for a

judge applicant were lowered to 30 years. Furthermore, the permanent social security of judgeship increases the position's attractiveness.

The Constitution determines judges to be approved by the National Assembly on the proposal of the Judicial Council. The conditions for appointing judges are laid down in the Judicial Service Act, which sets not only the general conditions but also conditions for individual categories of judges. Judges of general jurisdiction can be promoted from district judges, to circuit judges and Higher Court and Supreme Court judges. Judges may be promoted within wage classes to a higher judicial office or to the position of counsellor. Judges hold office permanently until their retirement and may be dismissed only if they infringe upon the Constitution or commit a major violation of the law.

The office of judge is incompatible with office in any other state body, local community body, or political party and enjoys judicial immunity. Judges are employed by the Republic of Slovenia.¹⁰

Table 10.6 Number of judges

| | 1980 | 1990 | 1995 | 1999 |
|------------------|-------------|-------------|-------------|-------------|
| Number of judges | 674 | 555 | 537 | 868 |
| By gender | | | Female: 314 | |

Source: Slovenian Ministry of Justice

Judges fall into three wage groups and these in turn fall into wage classes expressed in a point system. Judicial salaries are calculated by a point system similar to that of deputies of the National Assembly. The basic points are multiplied by the wage class coefficient; a bonus for incompatibility of judicial office is then added and in the end a percentage for years of service is added to the total. There may also be special bonuses (e.g. for managerial functions, duty investigation work). The salaries in 1999 were as follows: the lowest salary before taxes without any supplements (such as a supplement of 0.5% for the president of the court or senate) is DM 3,480 and the highest DM 6,482 (Krivec-Tavčar 1999b).

A judge who commits a criminal offence intentionally by abusing his judicial function is not only held criminally responsible, but the National Assembly must also dismiss him. If the judge, in the course of performing judicial functions, violates the Constitution or the law, the National Assembly, at the proposal of the Judicial Council, dismisses him. This can also happen if he has committed certain other criminal offences (depending on the type of offence and the prescribed penalty).

The corresponding staff office assesses the performance of individual judges and if it is established that the judge is unsuitable for his office, his employment as a judge is terminated. A disciplinary procedure may also be instigated against a

judge. Disciplinary penalties include transfer to a different court, suspension of promotion and a wage cut.

10.5.3 WORKLOAD OF COURTS

Since the introduction of the new court system, courts have accumulated backlogs of several years. The workload has been progressively accumulating, so that a number of procedural amendments were passed by Parliament in order to speed up the procedures. Nevertheless, civil courts still complain that Parliament produced the new procedural law too late. Criminal courts are concerned about the lack of efficiency of the police and public prosecutors, who block court practice. The Supreme Court, not equipped to take over the increasing load of administrative disputes in the early 1990s, is still waiting for the effects of the reform of administrative law which has introduced an administrative first instance court. The state has also established special courts in order to help with the efficiency of the courts.

Nevertheless, at the beginning of 1999, the administrative department of the Supreme Court was dealing with almost 900 cases dating from 1995. The average waiting period is four years. At the Labour and Social Court in Ljubljana, for example, the waiting time for the commencement of treatment of a suit dealing with the termination of employment is about two years. In 1998 this court often dealt with the cases which had been brought to them in 1995.

Explanations for the overload of work differ. Some blame the inefficiency of courts and the judges. As a consequence, people try to be put before others on the schedule to be heard and complaints about irregularities, including reproaches against some judges who are said to give preferential treatment can be heard. Many judges blame the slow transition. The old legal system gradually disintegrated and the new legal system has not been able to satisfy the expectations of an efficient build-up. They put some hope in the new procedural law, but stress that it was long overdue.

Another explanation for the workload is the shortage of judges. It improved slightly when the government improved the pay and thereby the social status: recently a few more young jurists have decided to pursue the career of judge. The judiciary suggests that the current criticism of the judiciary should have been addressed to the parliament and the government. They see a solution in improvement of the relations between judiciary, legislative and executive power (Ogrizek 1995).

Table 10.7 Civil courts: number of incoming cases, decisions and appeals

| | 1980 | 1990 | 1995 |
|---|---------|---------|---------|
| Incoming cases first instance | 356,021 | 450,311 | 330,221 |
| Procedures of first instance pending at the beginning of the year | 30,737 | 96,288 | 182,614 |
| Decided | 45,679 | 290,408 | 265,740 |
| Number of higher courts cases | 5,319 | 9,566 | 9,498 |
| Decided: second instance | 10,234 | 10,023 | 10,234 |

Source: Slovenian Ministry of Justice

Table 10.8 Labour court cases: number of incoming cases, decisions and appeals

| | 1980 | 1990 | 1995 |
|---------------------------------|-------|-------|-------|
| Number of cases first instance | 5,991 | 5,284 | 7,555 |
| Decided | 5,920 | 5,211 | 5,768 |
| Number of cases second instance | 1,701 | 2,233 | 1,409 |
| Decided | 1,644 | 2,187 | 1,084 |

Source: Slovenian Ministry of Justice

Professional debt collectors/sodni izvršitelj

An important contribution to the enforcement of decisions of the court of law was made by the introduction of the new Execution and Interim Protection of Claims Act, in force since 15 October 1998. In practice, court executors (bailiffs) have not yet become established, but this is expected in the course of the year 2000. The court executors will be appointed by the Minister of Justice. The candidates apply on invitation and a selection will be made from the applicants who satisfy the legally prescribed conditions.

10.6 CRIMINAL JUSTICE***Prosecutors/tožilec***

The function of the Public Prosecutor remains pursuant to the Constitution and the law, which limits the hierarchical dependence compared with that under the communist system. In the new Constitution the Public Prosecutor is an independent State body coming under to the Ministry of the Judiciary. Its organisation is parallel to that of the courts, established on three levels: Public Prosecutor's Office of the Republic of Slovenia (8), Higher Public Prosecutor's Offices (16), Basic Public Prosecutor's Offices (118) (Mavčič 1999). State prosecutors have the greatest jurisdiction in criminal procedures (filing and representing criminal charges).

Table 10.9 Number of prosecutors

| 1980 | 1990 | 1995 | 1999/2000 |
|------|------|------|-----------|
| 137 | 151 | 167 | 171 |

Source: Slovenian Ministry of Justice; Public Prosecutor's Office

The Slovene Government appoints state prosecutors at the proposal of the Ministry of Justice; the National Assembly at the proposal of the Government appoints the State Prosecutor General. The salary of a state prosecutor is calculated in the same manner as the salary of a judge in a corresponding office (Supreme Court state prosecutor – Supreme Court judge, higher state prosecutor – higher court judge, circuit state prosecutor – circuit judge). Disciplinary sanctions are laid down in the law: dismissal from the office of state prosecutor, suspension of promotion and wage cuts can all be imposed by disciplinary procedure.

10.6.1 PENAL PROCEDURE

Under the provisions of the Criminal Procedure Act, a first-instance penal procedure has several stages. The first is the preliminary procedure stage (which incorporates the procedure of filing a criminal charge, the investigation procedure and the procedure of reading the charge and possible examination of the charge); the second stage is the stage of the main hearing and the handing down of a sentence; the third is the stage when legal remedies (regular and extraordinary) may be exercised.

In addition to the regular criminal procedure, there is also the fast-track or summary procedure, which in the first instance runs before district courts. In this procedure, the ruling for a criminal offence, for which a fine or imprisonment of up to three years is prescribed, is passed (with the exception of some criminal offences defined by law). The Criminal Procedure Act also lays down other special provisions for issuing a court admonition, the procedure against minors, and provisions on certain special procedures.

Criminal procedures in Slovenia follow the continental system of inquisitorial hearings. Single judges of the district courts decide on petty crime; lay judges participate as referees in circuit courts which sit in the first instance on most misdemeanours. Serious crime within the jurisdiction of a circuit court is handled by a panel composed of one judge and two lay referees; while for very serious cases (with a penalty of up to fifteen years imprisonment pending) the verdict is given by a panel of two professional judges and three lay referees.

Table 10.10 Number of lay-judges who can be appointed as referees

| 1980 | 1990 | 1995 |
|-------|-------|-------|
| 6,197 | 7,639 | 3,976 |

Source: Slovenian Ministry of Justice

For the prosecutor in a criminal procedure the type of criminal offence is very important. If the criminal offence is prosecuted on the basis of a private suit, the case

prosecutor is a private prosecutor; if the criminal offence is such that it is prosecuted *ex officio*, then the case prosecutor is a state prosecutor.

If the criminal offence is prosecuted upon a proposal, then the case prosecutor is the state prosecutor, but only after the injured party has submitted the proposal to initiate prosecution. In the last two instances, the injured party may assume prosecution under legally defined conditions, in which case he becomes a subsidiary prosecutor.

A regular criminal procedure runs as follows: where there is justified suspicion that a criminal offence has been committed, the court, upon the proposal of the case prosecutor, initiates an investigation and, after the investigation has been completed, the case prosecutor presses charges, but a direct charge may also be filed. Once the charges become legally binding, the court carries out the main procedure and passes the sentence at the end. An appeal may be lodged against this sentence as a regular legal remedy with an appellate court (higher court). In instances specified by law, an appeal may be filed with the Supreme Court as a regular legal remedy against its decision (Krivec-Tavčar 1999a).

Table 10.11 Criminal justice

| | 1980 | 1990 | 1995 | 1999 |
|--|--------|--------|--------|--------|
| Police crime figures | 28,998 | 38,353 | 38,178 | 62,836 |
| Courts: | | | | |
| First instance incoming cases | 26,261 | 22,016 | 23,348 | * |
| Decided | 13,729 | 12,691 | 6,752 | * |
| Number of persons with Prison sentence | 6,917 | 7,265 | 4,392 | * |
| Number of acquittals | | | | * |
| Juveniles | 447 | 701 | 471 | |
| Adults | 1,386 | 1,229 | 876 | |
| Number of cases: second instance cases | 3,689 | 3,402 | 2,185 | * |
| Decided | 3,968 | 3,945 | 2,272 | * |

Source: Slovenian Ministry of Justice

Table 10.12 Type of crime: homicide and theft, policemen, detention rates

| | 1980 | 1990 | 1995 | 1999 |
|----------------------------|--------|--------|-------|--------|
| Number of homicides | 46 | 44 | 97 | 78 |
| Crime against property | 11,548 | 14,080 | 9,200 | 18,340 |
| Number of policemen | * | 5,809 | 6,756 | 6,466 |
| Number of prison detainees | 1,395 | 838 | 635 | 1,036 |

Source: Slovenian Ministry of Interior Justice; Slovenian Ministry of Justice

Prisons

Slovenia has a comparatively small prison population. However, the number of incarcerated persons has increased steadily since 1996 and at the moment exceeds the capacities of the Slovenian penal institutions for custodial sentences. All the penal institutions are overcrowded.

One of the reasons is the relatively low imposition of sentences for crime. Another reason lies in the fact that many sentences are conditional suspended sentences and many are in the form of fines and discharged penalties, all of these totalling up to 25 per cent of all annually imposed sentences.

New penal legislation was passed in the year 1999, according to which the sentence for the worst criminal offences was increased from twenty to thirty years, while more recently higher sentences have been imposed, particularly for more serious crimes (Krivec-Tavčar 1999c).

Alternative punishment

Under Article 107 of the Penal Code, a sentence of imprisonment of up to three months may be replaced by community service. Under community service the offender performs work for a period of no more than six months for the benefit of humanitarian organisations or a local community for no less than 80 hours and no more than 240 hours.

10.7 ADMINISTRATIVE REVIEW

A specialised administrative court has been set up for the purposes of administrative review. It has the jurisdiction to decide on administrative disputes in first instance; appeals and certain administrative disputes in first instance are under the jurisdiction of the Supreme Court.

Table 10.13 Administrative review: number of incoming cases, decisions and appeals

| | 1980 | 1990 | 1995 |
|----------------|-------------|-------------|-------------|
| First instance | | | |
| Incoming | 628 | 593 | 1,930 |
| Decided | 665 | 570 | 1,090 |
| Appeals | | | |
| Incoming | 12 | 10 | 11 |
| Decided | 7 | 8 | 1 |

Source: Slovenian Ministry of Justice

Table 10.14 Social court cases: number of incoming cases, decisions and appeals

| | 1980 | 1990 | 1995 |
|----------------|-------------|-------------|-------------|
| First instance | | | |
| Incoming | 1,646 | 1,392 | 1,567 |
| Decided | 1,988 | 1,414 | 794 |
| Appeals | | | |
| Incoming | 739 | 568 | 268 |
| Decided | 671 | 584 | 296 |

Source: Slovenian Ministry of Justice

10.7.1 OMBUDSMAN

The Ombudsman institution has no precedent in Slovenian tradition. It compensates for the problems of justice not dealt with in court concerning the protection of human rights and fundamental freedoms involving state bodies, local government bodies and statutory authorities.¹¹

The basis for the foundation of the institution of Human Rights Ombudsman in the Republic of Slovenia is in the Constitution of the Republic of Slovenia, which was adopted on 23 December 1991. Article 159 of the Constitution prescribes that the institution of ombudsman for human rights and basic freedoms should be founded in relation to various state bodies, local self-management bodies and bodies in which public authority is invested.

The Human Rights Ombudsman Law was passed in December 1993. In 1994 Mr. Ivan Bizjak became the first Slovene Ombudsman for Human Rights. He was elected for a period of six years by a two-thirds majority of all deputies in the National Assembly. Mr. Bizjak had been a candidate for the presidency of the Slovene Christian-Democratic Party. He held several important positions in government before being elected as Ombudsman.

He enjoys a high reputation with all political sides in the country and he has been very active in the European network of national ombudsmen.

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The Ombudsman has three Deputies, appointed also for six years by the National Assembly on the proposal of the Ombudsman. In the past five years the Ombudsman has built up a very favourable reputation. It contributed more than any other institution in Slovenia to the restoration of trust in the rule of law.

The duties and competencies of the ombudsman are based on the classical Scandinavian model. The organisation and work methods of the Human Rights Ombudsman and the division of fields of work and procedures and roles are determined in the Rules of Procedure of the Human Rights Ombudsman. The Ombudsman may initiate an investigation on his own. By law, the Human Rights Ombudsman has above all the authority to obtain from state and other bodies which he is able to monitor any data without regard to the degree of confidentiality, to perform investigations and in this capacity to call witnesses for questioning. At any time he may perform an inspection of any state body or institution which restricts personal freedom, e.g. psychiatric institutions. He does not have the authority to monitor the work of judges and courts except in cases of improper delay of procedures or clear abuse of power. He can also address the Constitutional Court with proposals for the assessment of the constitutionality of regulations.¹² The investigation is confidential and free of charge.

The Ombudsman can also turn down an initiative if it is beyond any doubt that no violation of human rights or any other rights is involved; in cases where the com-

plaint is incomplete and was not completed upon request by the Ombudsman; if there is a juridical procedure pending in that case; if there is a parliamentary investigation going on; if the legal remedies are not exhausted; and if the investigation could not result in an appropriate remedy (Tratnik 1999).

Table 10.15 Number of complaints received by the Ombudsman 1995-1998

| 1995 | 1996 | 1997 | 1998 |
|------|------|------|------|
| 2352 | 2513 | 2886 | 3448 |

Source: Annual Report Slovenian Ombudsman for Human Rights (1998)

Table 10.16 Complaint categories handled by the Ombudsman in 1998

| | |
|---------------------------------|-----|
| Court and police procedures | 881 |
| Administrative affairs | 697 |
| Restriction of personal freedom | 213 |
| Labour relations | 221 |
| Environmental issues | 56 |

Source: Annual Report Slovenian Ombudsman 1998

10.8 CONSTITUTIONAL REVIEW

The Constitutional Court was introduced in 1963. However, in the beginning the Court mainly fulfilled the formal functions of the protection of constitutionality and guarding socialist legality. Its functions were strengthened somewhat with the Constitution of 1974 and became significant when Slovenia became an independent, internationally recognised state with the new Constitution adopted in 1991. It added an important guardianship with the constitutional complaint against violations of human rights. The new constitutional order is based on the principle of the separation of powers between the legislature, the executive and the judiciary.

The Constitutional Court rules on conflicts of competence among organs of the state and against violations of the Constitution and international treaties by legislative acts as well as local regulations. It can be invoked by a number of procedures:

- Injunctions on competence conflicts and on review of the constitutionality of public acts can be lodged by the President, by both houses of Parliament or at least one third of the representatives, by the government, by the National Auditor and by the State Bank;
- Abstract norm control can be invoked the Ombudsman, by local authorities, mayors and by trade unions;
- Concrete norm control relevant for pending judicial procedures can be lodged by any court and by the General Public Prosecutor;
- Constitutional complaints can be invoked by individual complaint by any person as well as religious organisations and political parties for violations by public action of human rights and basic freedoms.

The Constitutional Court regulates its own internal organisation in the exercise of its administrative autonomy. Its budget is independent and part of the budget of the Republic of Slovenia.¹³ The Court consists of nine judges who are appointed for a period of nine years and cannot be re-elected. The President of the Court is elected among them for a period of three years.

The Court has the power to abrogate unconstitutional statutes and to decide upon constitutional complaints regarding violations of human rights. In the transition period the Constitutional Court played a very important role because the legislative bodies were not always able to impose clear legal standards. Interpretative decisions taken by the Constitutional Court were therefore necessary instructions to the legislature on how to settle specific issues.

Table 10.17 Constitutional Court: incoming cases and decisions

| | 1985 | 1990 | 1995 |
|--------------------------|------|------|------|
| Number of incoming cases | 205 | 99 | 643 |
| Decided | 182 | 111 | 446 |

Source: Statistical Book of Slovenia 1999

Table 10.18 Constitutional Court: types of procedures 1991-2000

| | |
|-----------------------------------|-------|
| Constitutional review injunctions | |
| by the President | 0 |
| by Parliament | 16 |
| by government | 37 |
| Abstract norm control | |
| by the Ombudsman | 3 |
| by local authorities/ mayors | 109 |
| by trade unions | 39 |
| Concrete norm control | |
| by courts | 37 |
| by the Public Prosecutor | 6 |
| Constitutional complaints | |
| by religious organisations | 2 |
| by political parties | 31 |
| by individuals | 1,246 |

The Constitutional Court played a crucial role in restoring the trust in law among the non-ethnic Slovenes the lack of which had resulted from the failure of the state to regulate their legal status.

The amendment on the Law on Foreigners, which was passed in July 1997, changed the requirements for the period of years the applicant had to live in Slovenia before applying for permanent resident status. The previously required three years were changed to eight years, with retroactive power for the applicants who had already filled in the application before the amendment came into effect. In June 1998 the Constitutional Court annulled this amendment after a petitioner challenged this extension of the waiting period for those applicants who had al-

ready fulfilled the three-year requirement at the time that they filed their applications. The petitioner asserted that the amendment was contrary to the Constitution, because it was retroactive and it violated the principle of trust in law. The government responded that these amendments were necessary in the public interest to protect property, as only permanent residents may acquire real estate in Slovenia, and to ensure that permanent resident status is given only to those applicants who intend to live in Slovenia permanently. The government had its own agenda and was actually trying to lower government expenses because permanent residents are eligible for certain benefits such as social security.

The Constitutional Court referred to an assessment theory of German jurisprudence concerning conflicts of trust in the binding power of legal norms on the one hand and the necessity of re-interpreting them due to social changes on the other. In this case the Court found that the trust in the legal system must prevail and the amendments were pronounced unconstitutional. It led to the new Law on Foreigners that was passed in the summer of 1999. This ruling was essential for the new legislation that regulated the status of the citizens of former Yugoslav republics. All citizens who had permanent residency in Slovenia before 23 December 1990 automatically became permanent residents, as well as others who were living in Slovenia at the moment of Slovenian independence (25 June 1991) and have lived there since then without interruption.

Another important issue concerns the harmonisation with European legislation. In 1996 the European Union acted already on the Slovenian legislation on land ownership by foreigners. Article 68 of the Slovenian Constitution states that the foreigners may not acquire title to land except by inheritance in circumstances where reciprocity of such rights is recognised. The government asked the Constitutional Court to decide whether the Constitution can be amended before the ratification of the agreement with the EU about the gradual deregulation of land ownership regulations takes place. The amendment that followed allows foreigners to own property in accordance with the law or international agreement ratified by Parliament. But in each case the principle of reciprocity must be respected.¹⁴

NOTES

- ¹ Annual Report Ombudsman, 1998.
- ² <http://www.uni-lj.si>; <http://www.uni-mb.si>.
- ³ EU Compendium of a Legal Practice for Lawyers in Central and Eastern Europe, p. 226.
- ⁴ Annual Report Ombudsman, 1998.
- ⁵ Ibid.
- ⁶ Ibid.
- ⁷ Annual Report IHF, 1999.
- ⁸ Judiciary Act, Official Gazette of the Republic of Slovenia, Nos. 19/94, 45/95.
- ⁹ Act on the Courts, Civil Procedure Act of 1999 as well criminal and administrative disputes acts which were amended in the late 1990s.
- ¹⁰ Judicial Office Act, Official Gazette of the Republic of Slovenia, No. 33/91.
- ¹¹ Article 159 of the Constitution; Ombudsman Act, Official Gazette of the Republic of Slovenia, Nos. 71/93, 15/94.
- ¹² Article 23, 50 and 52 of the Law on the Constitutional Court.
- ¹³ Para. 2 of Article 2 and Article 8 of the Constitutional Court Act.
- ¹⁴ See East European Constitutional Review Watch 1997.

11 ESTONIA

Facts and figures

Population: 1980: 1,472,000

1990: 1,571,000

1999: 1,445,580

Total area: 45,227 km²

Ethnic groups: Estonian 65.2%, Russian 28.1%, Ukrainian 2.5%, Byelorussian 1.5%,
Finnish 0.9% and others 1.8%

Just under 1 million are citizens, 1/3 are 'aliens'. There are 510,000 registered Russian speakers, 140,000 of them have received citizenship, 370,000 did not apply

Capital: Tallinn (population: 411,594)

The Constitution of the Estonian Republic was approved at the referendum held on 28 June 1992 and enforced on 3 July 1992.

The legislative power is vested in the Parliament of the Republic (Riigikogu), which is elected for four years.

The President of the Republic is elected by Parliament and acts as head of state and supreme commander of the Estonian defence forces. The President's duties include declaration of the regular sessions of the Riigikogu, convoking and opening the first session of Parliament and appointing the government authorised by the Parliament, et cetera. The President also approves laws adopted by the Parliament; he may, however, refuse such approval and insist on the amendment of enactments. Failure to alter the legislation may result in an application to the Supreme Court to review whether or not the measure is constitutional.

The Government of the Republic consists of the Prime Minister and up to 15 ministers. It submits legislative drafts and the state budget to Parliament and it issues decrees and regulations in so far as it is empowered by statutory law.

The independence of judges is guaranteed by the Constitution, the judiciary is administered by the Ministry of Justice.

GDP (1998) per person : 5,500 US \$

GDP by sector: services 70%; industry 24%, agriculture 6.2%

Labour force (1996): services 47%, industry 42%; agriculture/forestry 11%

Inflation (1999): 3.3%

Rate of unemployment (1999): 11.7%

11.1 INTRODUCTION

Establishing a democratic state based on the rule of law was especially difficult in Estonia as it had only a short history of independent statehood. Throughout its political and legal evolution, Estonia had been a province of imperial states, thereby lacking the tradition of domestic law and institutions which other Central European states could fall back upon. Institutions such as government and administra-

tion, border defence and national armed forces had to be built up from scratch. However, the weakness of the Soviet-type structures made the detachment from past administrative structures easier to carry out. Due to the strong feelings of national identity associated with the Estonian language the Russian-speaking minority was forced to either adapt or remain excluded.

The construction of Estonia's own legal system started immediately after its declaration of independence was approved in the autumn of 1988. Estonian legal life has since experienced a tremendous increase in new legislation. The first proposal in 1991 was to re-enact the law of the independence years dating from 1918-1940 (1922 Constitution), but it was soon apparent that the requirements of a modern economy necessitated a thorough legal re-evaluation. The civil code, which at present is based on the Code of 1936, had to be revised totally. Company law and bankruptcy law had already been revised whilst legislation for a penal code (which is nowadays based on the laws valid before 1940) was in process.

Whilst the transformation was pushed with great determination, much discussion was spent on the question of which model to choose. Due to the historical background of the legal development codes, especially in civil law, institutions were mainly influenced by the German legal tradition. At the same time the liberal Estonian Constitution, adopted by referendum on 28 June 1992, opened the gates for legal activism carried forward by international Human Rights movements and returning emigrants from Common Law countries. Naturally, many remnants of the Soviet system still remain. The three legal cultures often coalesce and mix due to the fact that they are bound together by a strong sense of constitutional identity.

The legal language became Estonian in 1991. It had been Russian since 1850 until the first independence years from 1920 to 1939 and after that until independence was re-established in 1991. Many terms of modern law now have to be created anew. The Estonian language is a prerequisite both for participating in the legal system and for acquiring citizenship. It will, for the foreseeable future, remain a barrier that divides the population of the state into groups with different political status. Of the total population of Estonia, nearly one in four is a 'non-citizen' holding the status of 'permanent resident', 'temporary resident', 'refugee' or simply 'alien', which divides them into large groups of different status. Economic and cultural participation is available to everyone in Estonia (even the purchase of land does not necessarily presuppose Estonian citizenship) but political rights are considerably restricted for non-citizens. Non-citizens may only participate in local elections. Most importantly, a person with a permanent residence permit can compete freely on the labour market, yet the possessor of a temporary permit must also obtain a work permit, which involves a complex bureaucratic procedure.

Nearly twenty per cent of the non-citizens (who receive an alien passport) do not possess a residence permit and nearly two thirds do not have a work permit, nor do they have any intention of acquiring one. Only twelve per cent of non-citizens

have permanent residence. Thus a marked number of laws regulating the relations of non-citizens and the state cannot be applied because of the lack of experience or tradition concerning their institutionalisation.

One of the reasons for non-registration is that population registers are inadequate and fail to embrace large population groups. According to estimates, nearly 17 per cent of non-citizens (about 60,000 people) reside in Estonia without any legal basis whatsoever, i.e. without a residence permit, social support or medical service. A sharp rise in instability would result if Estonian laws on residence and working permits for non-citizens (up to and including the deportation of illegals) were to be persistently implemented.

Trust in the political system has a different integrative effect for different ethnic groups. General trust in the state has been growing due to economic success. A large majority of Estonian citizens (92%) as well as non-citizens (75%) appreciate that the Republic of Estonia guarantees civil rights and freedoms. However, trust in the parliamentary system is weak among Estonians as a whole. 39 per cent of Estonian citizens and as many as 51 per cent of non-citizens would be willing to exchange the existing parliamentary system for the policy of an 'iron hand'. Even more unsettling is the fact that the gap between Estonian citizens and the Russian-speaking population is widening: in surveys (1997) twenty per cent of Estonian citizens, as opposed to two thirds of the non-citizens, say that their living conditions in Soviet times were better than in the Republic of Estonia. However, only ten per cent in total would want the Soviet Union back. Amongst the Russian-speaking population, the political support for the Republic of Estonia is based upon a negative comparison with the conditions of neighbouring Russian life.¹

International evaluations are in agreement that the Estonian authorities are making a remarkable attempt at coping with such serious ethnic divisions. Criteria for citizenship are stiff but clear, especially for those wishing to become a member of the legal profession. Progress reports continuously record the implementation of these criteria. The legal system is similar in that the capacity for legal education is small and the criteria are strict. Any possibility of increasing this capacity with the introduction of less stiff criteria is shunned. Judiciary transformation is directly controlled by the Ministry of Justice and the professional self-regulation of advocates and notaries is effectively in place. Taking the time for a generational change to bring in young graduates, all judicial institutions see to it that entrance examinations maintain a high standard of professionalism.

It will be some time before the new legal order based on civil liberties and human rights becomes a firm expectation. With civil liberties strengthened, the morality of paying taxes, serving in the defence forces, and the social control ordained by law have all weakened. Fragmentation into two communities leads to civic apathy. Sociological studies warn of a ghetto-like exclusion of the de-industrialising territories of north-eastern Estonia, Maardu and Lasnamäe with its mainly Russian-

speaking population. There are deeply concerning indications that the state is not the only one to collect taxes and that criminal organisations are competing with the police in the enforcement of order. Many people feel that they are living in an 'alternative society' whose norms and institutions exist outside of formal society.

11.2 LEGAL EDUCATION

Estonian academic legal education has traditionally been provided by the University of Tartu, the *alma mater* for the entire educational system in the country. The faculty of law is known for its long and rich tradition. Established in 1632, it is as old as the university itself. The University offers Bachelor's, Master's and doctoral degree programs. The Bachelor's degree takes four years, the Master's degree (MA, MSc) is awarded after two years and a doctorate (PhD) by thesis after a further four years of research. The University of Tartu not only offers basic legal education but also takes part in the formation of the legal system and complementary education.

The capacity of the law faculty is strictly limited: while 400 candidates ask for a stipend every year and about 350 self-paying students apply, only 60 student stipends are awarded each year together with about the same number of students who pay for themselves. With the *numerus clausus* working strictly on the basis of high school grades, it grants a premium for the classical *gymnasium* education. Courses are taught in Estonian, which 90 per cent of students speak at home. Students who speak Russian at home are welcome but must fulfil all language requirements. For language courses (also for Ugri-Russians) an additional year is recommended.

In the light of the Faculty of Law's limited capacity, it is hardly surprising that several private educational institutions also try to offer legal education. They focus on training in economic and international law, but have to fulfil the requirements of general legal education. Accreditation has been a major obstacle. Only those documents proving the successful completion of higher education in a course of study with an accredited curriculum are recognised by the state. The accreditation is carried out by an international committee (currently some German, Austrian and Lithuanian members serve on it with the Estonian members).

Conditional accreditation for undergraduate studies (BA) has been received by the Institute of Law in Tallinn (in 1998 the first students took the final examination, two of whom graduated). Another private academy, Concordia International University Estonia (CIUE), established in 1992, offers legal studies on the domestic legal systems of the Baltic States and on international, comparative, and European Union law. It is an American-style institution of higher learning and all courses are taught in English except the courses on Baltic law. The majority of the academic staff come from colleges and universities in the United States and Western Europe.

The Institute of Law also gives classes in English, mainly in business law. Overall the enrolment in private schools consists of about 100 day students, 100 in the evening and 100 by mail/correspondence. They will be evaluated in 2001 for prolongation and possibly graduate degrees. Russian language schools did not participate in the competition for accreditation (Interview with Prof. Narits)

Table 11.1 Number of law students*

| | 1999 |
|----------------------------------|-------------|
| Tartu law faculty | 450 |
| Evening schools, private schools | 300 |

*Estimated on the basis of admittance figures, *Juridica International III* 1998, p.146

After graduation from law school two years of practice follow, working either in courts or with a lawyer. So far there is no state examination, so the professions are responsible for admission. New legislation on their membership criteria is underway. Students from the Law Institute are admitted and, when two passed the test in 1998, it was considered a breakthrough for other educational facilities apart from the Tartu faculty.

11.3 THE LEGAL PROFESSION

11.3.1 ADVOCATES

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In order to become a member of the Advocacy, a person must have a *patroon*, e.g. an experienced attorney-supervisor. The candidate must represent a party in 25 cases (a so-called mandatory appearance) and take two exams.

Before their admission as an advocate, candidates are required to work as junior assistants, pass another examination to become senior assistants and finally take a Bar examination in all areas of law. In addition they must, of course, speak and write Estonian. The practice of admission is rather restrictive and a fee scheme for forensic cases keeps fees under control. In an attempt to maintain ethical standards, a code of conduct was adopted in 1998 along the lines of the American Bar Association code. However, the Honorary Committee treats only a few cases per year, most of them pertaining to violations of the advertising rules, although last year the committee was required to reprimand a lawyer for being drunk in court.

Law firms still remain small but a new generation of lawyers is quickly growing with company clients and commercial business. Many of them build up foreign relations. Two Finnish firms have established themselves in the capital, but they are not members of the Advocacy. Competition among lawyers is tougher, but still remains friendly. Outside of Tallinn there are still many solo lawyers. So far most attorneys are men, but soon there will be more women lawyers, for many are already among the candidates. In 1999, 17 out of 28 new lawyers were women.

Next to the new advocacy there are Russian-language advocates catering for a clientele confronted with the problems of labour dismissals and citizenship as well as criminal defence cases. Of course, they must speak and write Estonian in court. But they are few; a comparison of the lawyer density in Narva with that of Tartu leaves the impression of two different legal worlds. About 500 Russian-speaking lawyers are working outside of the Advocacy, partly as in-house lawyers with companies and associations specialising in labour law, still heavily based on the tradition of Soviet times, and partly on all sorts of odd jobs.

Legal aid is given on the order of judges as a *pro bono* obligation of the Advocacy. For criminal defence, in serious cases and civil court cases which require lawyer representation, there is a scheme granting court fee waivers and advocate's fees. But as these are moderate (105 kroons per hour), lawyers are not very keen to get involved with them. A law which proposed subsidies for out of court consultation remained a draft; it was rejected in Parliament.

The culture of legal activism law is represented by non-governmental organisations working under the label of human rights. Labour unions, being generally weak in Estonia, do not engage in legal consultation. Some lawyer groups (including the Concordia University) engage in legal consultation for people with citizenship problems, prisoners and asylum-seekers. The Open Estonian Foundation (funded by the Soros Foundation), the Jaan Tõnisson Institute and the Institute of Human Rights engage mainly in training and some of their projects receive government funds. The Legal Information Centre for Human Rights, funded by a Danish Human Rights Centre and also Norwegian and Dutch Helsinki groups, mainly consults with Russian-speaking clients. They would like more action in court, but not being members of the Advocacy, they are restricted to courts of first instance. The Centre would need offices in the poverty areas of the Russian-speaking population, but they remain dependent on foreign funding. Human Rights funds and international funding is phasing out, since the transformation period is said to be over (Interview with Semjonov).

Table 11.2 Number of advocates and notaries

| | 1992 | 1999 |
|-----------|------|------|
| Advocates | 183 | 359 |
| Notaries | 40 | 58 |

11.3.2 NOTARIES

A generational change is also to be expected among notaries. Being engaged in censorship tasks in Soviet times, it was not an attractive job. Most notaries were female (in 1993, 3 out of 40, nowadays 7 out of 58) whilst men did not consider it an appealing career. But with privatisation, real estate business and with banks as their main clients, they nowadays earn a considerable amount of money. Conse-

quently, there is a long waiting list for admission. Notaries, however, remain a closed shop. They would rather work with employees than accept more candidates. Admission is determined on the basis of the benchmarks for demand. The Ministry of Justice wants to set it at 4,000 cases per year. They plead for a quicker (though controlled) increase, as the continuity so far has led to lack of dynamics among notaries (Interview with Dr. Tiivel).

On advice of their German colleagues, Estonia took over the scheme of the 'exclusive notary' in 1993. They are selected by a special commission, trained by the Ministry of Justice and appointed by the Minister of Justice. During the transformation period intensive schooling courses were given and they still remain necessary. In 2001 all notaries shall be certified again.

11.3.3 JUDGES

In the initial years of court reform, all judges had to be reappointed by the President of Estonia. A number of judges and prosecutors who were deeply involved in the Soviet system had left in the late 1980s and already 17 per cent were refused re-instatement. 190 former judges and prosecutors were put forward for re-instatement and appointed for life. Since then it has been difficult to bring about generational change due to the small number of new law graduates, who also often consider opportunities to be more attractive in the private sector. Those who spoke only Russian (in Narva and north-west), had to take language courses. Nowadays 94 per cent of all judges are Estonian-speaking and graduated from Tartu, while 6 per cent have Soviet diplomas and are Russian-speaking. Sixty-two per cent of judges are women, whilst in the High Court there are 4 women out of 17. There will be no further increase in the number of judges. At present, judges for bankruptcy cases and prosecutors for Narva are hard to find (they would have to speak both languages: Estonian for the law, Russian for the people).

In order to improve the judiciary and to fill vacant positions, judges' salaries were increased by 19 per cent in 1999. Pay is now above the average in public administration and four times (4x 4,724 kroons) the average Estonian salary. Salary is related by law to the prime minister's pay. The salary of the Chief Justice of the Supreme Court is equal to that of the Prime Minister.

Considerable efforts are being made to implement further training schemes for judges and prosecutors. With 82 per cent of the 220 judges having graduated before 1990, the handling of new legislation in the fields of consumer protection, competition law, intellectual and industrial property rights and the relevance of European Community law has to be learned while on the job. A Continuation Schooling Centre for court personnel was established at the Supreme Court in Tartu. A five-year post-training programme for judges and prosecutors began in April 1999. In the first stage of the programme the trainers were trained. In a later

stage, 55 judges and prosecutors will train their colleagues. For many judges, however, an increasing workload in the courts makes participation in such training difficult.

One hundred and forty judges are members of the Association of Judges, which represents the interests of judges and prosecutors. In the beginning, some members spoke Russian in assembly, yet now it is only Estonian. In the younger generation Russian is no longer spoken by everyone (Interview with Allar Jõks).

11.3.4 PROSECUTORS

Formerly the prosecutor's office was a first step for 80 per cent of judges but nowadays it is a career in its own right. One hundred and ninety positions for prosecutors are available but 19 of them are not filled. A prosecutor's salary is equal to that of a judge's. A person of at least 21 years of age who is capable of legal action and has an academic degree in law, whose command of the Estonian language is of the level required by the law or an act adopted on the basis of the law and who has high moral values and personal qualities can be appointed a prosecutor.

The prosecutor's office admits that the limitation of their competence to criminal investigations is not clearly recognised in the eyes of the public. The public is aware of neither the functions nor the organisation of prosecution. Respect for prosecutors might be especially low given the fact that of the 43,105 cases initiated by the public prosecutor's office in 1998, only 5,727 could be brought to court.

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Table 11.3 Number of judges and prosecutors

| | 1980 | 1990 | 1995 | 1999 |
|----------------------------------|------|------|------------|------------|
| Supreme Court | 19 | 16 | 16 | 17 |
| District, city and county courts | 70 | 85 | 134 | 165 |
| Administrative judges | | | 27 | 36 |
| Total judges | | | 177 | 218 |
| Prosecutors | | | | 171 |

11.4 THE COURT SYSTEM

Court reform in Estonia began in 1991 following the adoption of the Law on Courts which was implemented in 1992-1993. It

- established the Estonian Supreme Court (whose first session was held on 27 May 1993 and as of 1 October 1993 assumed its historical location at Tartu);
- introduced the supervision of constitutionality for the first time in the history of the Estonian jurisprudence;
- revived administrative court proceedings;

- and started a three-instance court system as of 15 September 1993.

There are 22 courts in the first instance (including the 3 administrative courts), 3 appellate courts and the Supreme Court. The Ministry of Justice is responsible for the budget and administration of the courts of first and second instance. The Supreme Court, conversely, is independent from the Ministry of Justice in all respects.

Judges are appointed for life by the Riigikogu after nomination by the Chief Justice. They may not work in fields outside the administration of justice, with the exception of teaching or scholarly research. Recruitment of justices for the Supreme Court is a professional, and not a political process. Amongst its twelve revision justices are university professors, judges and advocates. Only the Chief Justice is appointed by parliament (the Riigikogu) on nomination by the President of the Republic.

Also, in 1991, an arbitration court of the Estonian Chamber of Commerce and Industry was immediately instituted. As decisions of arbitration are final and not subject to appeal proceedings, it offers a popular way of settling commercial disputes. The Estonian Law on the Enforcement of court decisions lays down that the enforcement of arbitration court decisions is equal to court decisions.

11.5 CIVIL JUSTICE

Judging from official statistics, the average procedures do not seem to take overly long. In Tallinn a first hearing usually takes place within three months and the average duration of the proceedings is three months and 24 days for civil cases. Judges take an average of 27 decisions per month. Nevertheless, complaints are being lodged about delays, especially in commercial court cases. Backlogs are growing due to the inexperience of many judges in new legal fields. Considering the low appeal rate (less than 10 per cent) before the three appeal courts in Tallinn, Tartu and Viru, the small number of cases in which higher courts revoked judgements is even more astonishing (ten per cent all appeals fully successful and about 30 per cent partly successful).

Table 11.4 Caseload of civil courts

| | 1997 |
|----------------------------|-------------|
| Civil court first instance | |
| incoming | 20,128 |
| among them labour | 892 |
| decided | 18,878 |
| Appeals lodged | 1,762 |
| Supreme Court | |
| incoming | 637 |
| decided | 168 |

Debt collection is in the hands of 167 court executors, who will be separate from courts by 2001. They will be independent and hold office privately, and will be set their own fees. The working structure of the French court executors (*huissiers*) has been taken as an example. Fears of corruption raised in regard to their private remuneration have so far not been substantiated .

11.6 CRIMINAL JUSTICE

The police force, the size of which is 4,200, reflects the ethnic tensions in Estonia more than any other institution. While the leading officers speak Estonian, 50 per cent of the policemen are Russian-speaking. Eight hundred posts remain vacant. About half of the 545 officers left the police, mainly because of low pay (with an average salary of 387 euros a month) and a lack of adequate training. Consequently corruption, especially in the lower ranks of the police, remains an everyday occurrence. A salary reform is gradually being introduced in order to tackle the personnel problems (salaries have increased 26% as compared to 1998) and a Police Development Programme was announced for the years 1999-2000. It is designed to raise the professional level by, on the one hand, reducing the police force considerably and, on the other, raising the pay of those who remain.

Cases of corruption, organised crime, arms trade and drug crimes by senior officials are handled by the Security Police Board. A new Anti-Corruption Act, containing measures to prevent corruption, came into force in February 1999. The most important amendments to the new law affect the contents of the declaration of economic interests by civil servants and members of parliament. Disciplinary, criminal and administrative liability have been introduced. A specialised police unit, the Data Bureau on Money Laundering (3 police officers and 1 banker), has been established following the new (July 1999) Money Laundering Prevention Act. Its tasks include gathering, registration and processing of data, supplying information to investigators of money laundering cases, co-operation with credit institutions and investigation of money laundering.

Crime figures are very high on all accounts. The high level of robbery and homicides in some parts of the country is frightening and reports speak of a considerable increase in economic crime against which the police lack the necessary techniques and capacity for research. Frequent violent power struggles between rival gangs hit the newspaper headlines together with growing concern about a clear-up rate of 29 per cent in the country as a whole and only 14.7 per cent in the area around Tallinn, where 51.5 per cent of all offences are committed.² Drug offences are also on the increase but still at a low level. Nevertheless a Special Anti-Drug Unit was set up and reinforced in 1998, focusing mainly on the drug trade. The decrease in seizures of marijuana is explained as a result of the increased use of heroin and other harder drugs.

Some prosecution and prison data give an indication as to the ethnic tensions hiding behind the crime rate: of 9,950 persons under prosecution in 1998, 3,464 were charged for an offence committed in a group, 3,464 for being drunk or intoxicated. A high number of illegal persons get caught in a cycle of poverty, drinking and drugs, leading to many of them being put in camps; while they await deportation they are not allowed to work (whereas prisoners are.)

But while the crime problems in parts of the country are truly staggering, the public prosecutors and criminal courts are pursuing a strategy of professional normality. In so far as the police can solve crimes, prosecutors prepare criminal cases speedily and represent the State in criminal proceedings.

Table 11.5 Crime recorded by the police and the caseload of criminal courts

| | 1985 | 1990 | 1995 | 1998 |
|--|-------|-------|--------|--------|
| Police-recorded crime | | | 39,570 | 45,721 |
| Among these: first degree offences | | | 1,638 | 1,120 |
| property offences | | | 32,887 | 37,504 |
| drug-related offenses | | | 51 | 235 |
| Criminal court convictions | 6,680 | 3,532 | 8,006 | 8,267 |
| Among them juveniles under 18 | 704 | 914 | 1,400 | 2,688 |
| Persons detained in penal institutions | | | 4,224 | 4,379 |
| Prisoners | | | 2,515 | 2,999 |
| of whom Estonian citizens | | | 1,253 | 1,298 |

Criminal cases take four months and 22 days on average, but 33 per cent of all verdicts are appealed. Of these, however, only 105 judgements (1.8% of all cases) were fully revoked by higher courts and 11.6 per cent partly revoked. There is no participation of lay judges as was common under Soviet law, but it is possible to invite two lay judges to assist the presiding judge.

11.7 ADMINISTRATIVE REVIEW

Building a reliable, efficient body of civil servants has been a problem which many say has to wait for a new generation. Estonian administration lacks technical staff and qualified staff in the middle ranks of the civil service. Young, motivated professionals can easily find better paid prospects in the private sector, but the recent slowdown of the economy has slightly reversed this trend. The public service often serves as a career start for young people but, as it is not sufficiently attractive in the long run, staff turnover is high.

There are 421 state organisations in Estonia, excluding constitutional institutions and local governments (253). Estonian administration is composed of around 150,000 employees, including ministries (10%), government agencies, police, border guards and prison staff (83%) and county governments (8%). In addition local governments employ around 3,300 persons. The layoffs have started already

in the police forces, in Tallinn City Government and in various ministries. Currently there is a hot debate about decreasing the number of civil servants by 125,000 to 25,000.

An Office of Public Administration Reform (OPAR) was established in January 1999 in the State Chancellery under the responsibility of the Prime Minister. However, progress has been slow and mainly carried out by individual Ministries or other public bodies. Homogeneous standards applicable to all public administration settings are unlikely under present arrangements. Coordinating and monitoring mechanisms for personnel management are not sufficiently developed. Staffing and career conditions are up to each ministry and institution (EU 1999).

In Tallinn, Tartu and Pärnu there are separate administrative courts – in all other city and county courts there are separate judges – handling administrative cases.

Table 11.6 Caseload of administrative courts

| | 1997 |
|---------------------------------------|-------------|
| Administrative courts, first instance | |
| incoming | 1,767 |
| decided | 1,637 |
| Appeals lodged | 523 |
| High court: incoming cases | 37 |

11.7.1 LEGAL CHANCELLOR/OMBUDSMAN

The legal chancellor is charged with notifying the parliament, ministers and local governments of any non-conformities in their legislative acts. He acts independently of government in advising on new legislation at the draft level, and again on request of the President before signing statutes. He can initiate investigations on his own initiative or at the President's request. If a local body does not act upon the Chancellor's suggestions, the Chancellor may turn to the Constitutional Chamber of the Supreme Court. The Chancellor is nominated by the President, elected by parliament and holds office for 7 years.

Since June 1999 the Chancellor has officially been a complaints institution, thus serving as ombudsman. The new law legalises the function of treating complaints, which he had in fact already been doing since the office began in 1993. It allows the Chancellor to initiate investigations.

The issues treated are similar to those of administrative courts, but the ombudsman does *not* deal with property questions, labour problems, or liability claims. For all other complaints about public administration, complainants may choose which institution to invoke. However, an ombudsman cannot be called upon if a court procedure is already pending, while the administrative court can be invoked

30 days after the ombudsman has given his advice. Complaints about courts are not treated because the ombudsman cannot function as an appeal instance, but information about malfunctioning courts is provided to the appeals court. This particularly concerns complaints about the administrative tasks of courts such as land and business registers, for which there are long waiting periods.

The advice of the ombudsman is not binding, but is almost always followed by administrative action. The Annual Report to Parliament is accompanied by a press conference, which the media always cover. Sometimes the press requests that certain problems be examined, which the Chancellor will follow up if possible. Press coverage is an important ingredient in success.

The Chancellor is nominated by the President, elected by Parliament and holds office for seven years. There are 1,200 –1,500 complaints per year, which is a considerable number for a small country (cf. a Finnish colleague who reports 2,000 complaints for a population of 5 million). Russian and Estonian speakers are treated equally, but there are only 4 to 5 complaints a year from the Russian-speaking population. As the ombudsman himself interprets it, the actual practice of citizenship rights after liberation is not as big a problem as some groups would make out; seen from the outside, however, it is apparent that there are few legal remedies in their situation.

As is usual with complaint institutions as open as this one, about half the complaints are unfounded or have come to the wrong address. About half of them are dealt with. Typical agencies are closed institutions such as prisons, defence forces, police, mental hospitals and senior citizens' homes. If a complaint seems well-grounded it is handled by first contacting the agency concerned in order to reduce potential tension with that agency; that is, if a prisoner complains, the prosecutor is asked for an explanation and if the answer is not satisfactory, a procedure is instigated (Interviews with E.J. Truuvälli and Aare Reenumägi).

11.8 CONSTITUTIONAL REVIEW

The Constitutional Review Chamber of the Supreme Court has the power to nullify any law or other legislative act if it is in conflict with the letter or intent of the constitution. Its five members form a chamber elected from the civil, criminal and administrative law chambers by the Supreme Court *en banc* on proposal by the Chief Justice, for a term of five years. The Chairman of the Constitutional Review Chamber is the Chief Justice of the Supreme Court.

Constitutional issues can be raised by the President in the case of disagreement with parliament in the course of legislation (Art. 107 Const.), by the Legal Chancellor in the event of disagreement with legislation or with a local government body (Art. 142 Const.) and by any court if it has in its decision declared a law or

other legislation unconstitutional and has not applied it. Contrary to revision procedures, the Supreme Court has no discretion not to accept such a petition. However, even though it should not be difficult for any constitutional conflict to find access to review, only 3 (1997) or 4 (1995) cases per year are submitted. The most active originator is the Legal Chancellor, but local courts and appeal courts also refer to constitutional review to receive approval for decisions of principle importance.

A few significant cases might illustrate the range of issues brought forward:³

- In 1996 the Legal Chancellor protested against a housing privatisation law which forced former state-owned co-operatives to surrender private apartments to privatisation. The Constitutional Review Chamber sent Parliament back to the drawing board to ameliorate the law, but the political compromise of the amendments satisfied neither the co-operatives nor the Legal Chancellor, to the extent that, towards the end of 1997, a new appeal was filed with the Review Chamber.
- In 1997 a government decree was introduced involving a ban on the import of brands of vodka without prior registration with government health authorities; lower courts had for three years convicted people and confiscated the contraband vodkas. Some importers appealed conviction before the Administrative Chamber of the Supreme Court, which successfully challenged the decree because it lacked a basis in law and was therefore unconstitutional. Parliament had already corrected the mistake by amending the Consumer Protection Act. The Constitutional Review Chamber thus only needed to rule that this could not be applied retroactively.
- In 1998 two decisions by lower courts not to apply government decrees due to their lack of basis in statutory law, thus being unconstitutional, came before the Review Chamber. One concerned non-citizen discrimination in not issuing a seaman's passport, the other one raised a tax issue in a decree on timber products. In such cases of lower courts invoking constitutional standards, the constitutional review procedure prescribes an automatic case appeal before the Review Chamber.

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INTERVIEWS (SEPTEMBER 1999)

Ülle Anton, legislation department, Ministry of Justice

Allar Jõks, judge at Tallinn district court and president of the Judges' Association

Martti Kalas, Tallinn advocate

Prof. Raul Narits, Tartu University

E.J Truuväli, Legal Chancellor, since June 1999 also ombudsman

Aare Reenumägi, Deputy Legal Chancellor

Aleksei Semjonov, Andrei Arjupin, Legal information Centre for Human Rights,
Tallinn

Dr. Tiivel, in charge of legal professions, Ministry of Justice

Age Väriv, legislation department, Ministry of Justice

NOTES

- ¹ Estonian Review Nov. 5, 1999.
- ² EU (1990), Human Rights report 1999/Estonian Police Board.
- ³ See annual updates of the East European Constitutional Review 6 (1), 7 (3), and 7 (4).

12 POLAND

Facts and figures

Area: 311,900 km²

Population (1995): 38.6 million

Ethnic composition: 98% Poles; Lithuanian, Byelorussian, Ukrainian and German minor ties

Religion: 95% Roman Catholic (75% practising)

Capital: Warsaw

Bicameral system, with Sejm and Senat

First Constitution of the 1990's approved 1992, called 'Little Constitution'. On April 2, 1997 a new constitution was adopted in Parliament and approved in a referendum on May 23

Administrative divisions: 16 województwo's. Reduced from 49 in 1998.

GDP per capita (PPP 1998est): US\$ 6.800

GDP by sector: services 68%; industry 27%; agriculture 5.1%

Labour force : services 44%; industry 30%; agriculture 26%

Rate of unemployment (1998): 10%

12.1 INTRODUCTION

The promise of the *rule of law* is not new to Poland. The Polish constitution of 1952 was amended in Article 1 by the formula that "the Republic of Poland is a democratic state, *based on the rule of law* and implementing the principles of social justice." Yet it was not until the 1980s that the judicial institutions needed to guarantee this began to appear, amazingly enough under the martial law declared by Jaruzelski when the regime attempted to stifle the protests and strikes initiated by the trade union *Solidarity*. Poland was the first of the Communist regimes to install legal institutions such as the High Administrative Court in 1980, a Constitutional Tribunal in 1985 and a Commissioner for Civil Rights in 1987. In the 1980s these institutions were not entirely independent in their actions nor were their decisions always binding; their existence served more to prove the legitimacy of the regime (Krygier and Czarnota 1999). Nonetheless, they laid the foundations for the present day system of independent judicial institutions.

In 1989 Poland was also the first Communist country to establish a National Council of the Judiciary. The Council was given the prerogative of proposing all nominations for judges and all promotions to the President of the Republic in an attempt to establish firmly the judiciary's independence from political interference. It is composed of parliamentary representatives, the Minister of Justice, Presidents of the high courts but a representation of elected judges holds a majority.

During the early 1990s, a judicial review of public administration was carried out whilst the central role of the Commissioner of Civil Rights became very strong. Advocates employed strict professional self-control, maintaining their distance from the large number of legal counsellors (who are not admitted to court representation).

However, the delay in court procedures caused great concern (as demonstrated by the high rate of complaints before the Human Rights Court at the Council of Europe). Waiting queues in courts and court registers led to corruption as did the privatisation of court executors and public notaries. While at the beginning of the 1990s prisons received generous amnesties, the necessary improvements to inmate conditions have still not been carried out. All of these complaints have led to a slide in public opinion about the judiciary. Low payment increases the problems of the judiciary because the more ambitious professionals change to the private profession.

Law-making policy in Poland is quite politicised: legislative drafts come from Parliament as often as they are proposed by the Government. With the strong polarisation of the political parties, there is a real danger of instrumentalising law for special interest groups. It must also be recognised that procedural guarantees can be used to prolong decisions to the detriment of 'justice'.

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Courts are often too weak to counter the local networks. Trade unions, parties and the Catholic Church are interested in their own power basis whilst also lawyers look to their self-interest. Few public interest firms and NGOs exist and civil society does not seem to get off the ground.

These problems are well known at the level of the national elites. Whilst there is a consensus on the need to strengthen the capacity of control institutions, determination to do so often runs into the inertia (and the independence) of implementing institutions. Those at the top are committed to democracy and the rule of law, but local elites often run a very opportunistic course.

12.2 LEGAL EDUCATION

Since 1989 the number of universities offering law has grown rapidly. All twelve Polish universities have Law and Administration departments. Law is also offered by a growing number of private universities. More and more of these private universities are allowed to offer full magister programs. In the past ten years the total number of students in the various Law and Administration faculties has tripled and in the last five years about half as many students of private universities can be added. Many of the private universities are evening schools where students enrol for further training. In 1998/1999 almost a third of the number of law students were enrolled in private universities.

Table 12.1 Number of law students

| | 1989/1990 | 1994/1995 | 1998/1999 |
|-----------------------------|-----------|-----------|-----------|
| State universities | | | |
| Licencjat | 23,727 | 54,516 | 79,499 |
| Magister | 2,538 | 3,584 | 8,598 |
| Total number | 26,295 | 58,100 | 88,097 |
| Private universities | | | |
| Licencjat | -- | 1,467 | 32,398 |
| Magister | -- | 0 | 1,913 |
| Total number | -- | 1,467 | 41,536 |
| Total | 26,295 | 59,567 | 121,035 |

Source: Ministry of National Education

However, the growing number of students is not matched by teaching staff. The number of teaching staff rose only slightly from 994 to 1006 in the period 1987-1995 in public universities, only to fall back to 958 in 1998.¹ Some of the teachers teach at private universities in addition to their posts at the public universities.

With the growing number of students, teaching remains quite traditional. It is mainly based on lectures although attempts are made to offer more seminars and exercises in smaller groups. The university course lasts five years: three years for the *licencjat* and two more years to pass the examination as *magister*. In order to achieve a uniform level of examination for all students in the country, the programme consists of the same basic courses at all universities, with limited scope for differentiation in the later years of study. Schools try to improve their own profile by offering courses on European, International and Trade law. Also active knowledge of foreign languages is emphasised. The exchange programmes for studying abroad have increased since 1989.

12.3 LEGAL PROFESSION

After graduation, between two and almost four years have to be spent at in-practice trainings, specialising for the careers of judges, prosecutors or court enforcement officers on the one hand and for advocates and public notaries on the other. All of these training courses require entrance examinations. The programme usually consists of four days a week spent either at a court, a prosecutor's office, a law firm or a notary's office and one day a week devoted to in-depth courses on a specific part of the legal system.

12.3.1 ADVOCATES

The advocate's training period is 3.5 years and also starts with an entrance examination. The exams and training itself are arranged by the Chamber of Advocates (*Izba Adwokacka*). During this training period the student can specialise in one or

more specific areas of law. The Chamber also appoints someone as an advocate (*advokat*), but the Minister of Justice has the formal right to object to a nominated advocate. Most advocates are self-employed or work in relatively small offices, although big international firms are getting more popular with young advocates just starting their career. Although the government does not control the income, it does set minimum fees for various kinds of cases. A young advocate often earns more than a judge (interview with Kalinowski).

There are almost no social advocates and the Chamber remains uninterested in creating a form of social advocacy (interview with Siemaszko). In serious criminal cases the court can appoint a defence advocate and it is considered a professional obligation to take the case. In civil cases an advocate may reject the appointment. The judge can then turn to the local chamber and ask its president to oblige the advocate to take the case (interview with Grajdura).

Table 12.2 Number of advocates and legal advisors

| | 1980 | 1990 | 1995 |
|-------------------|-------|--------|--------|
| Advocates | 4,411 | 6,902 | 7,277 |
| of which active | NA | NA | 5,500 |
| Legal Counsellors | NA | 17,732 | 19,163 |
| of which active | NA | NA | 16,184 |

Source: Ministry of Justice, Polish Chamber of Advocates and National Legal Advisors Council

12.3.2 LEGAL COUNSELLOR

Legal counsellors (*radca prawny*) form a professional group that might be considered a heritage of the in-house lawyers of state-owned enterprises (KRRP). According to the 1961 law on legal advisors they may, besides giving legal advice, draw up drafts of legal documents and prepare legal opinions. However, they may not represent clients in court in all cases, as the Chamber of Advocates refused to admit them in their midst.

Nevertheless, legal counsellors managed to arrange their own professional training with a training period of 3.5 years and are associated in the National Legal Advisors Council (*Krajowa Rada Radców Prawnych*). Their numbers are far bigger than those of advocates. Hesitantly, during the last decade, both organisations started to work more closely together, especially in matters of international cooperation and integration into the European Union. In November 1999 the National Legal Advisors Council was admitted to the Council of the Bars and Law Societies in the European Union as the second Polish professional organisation.

12.3.3 PUBLIC NOTARIES

In communist times the office of public notary (*notariusz*) included real estate and other registers. Being rather bureaucratic and highly regulated, it was performed mainly by women. The situation changed rapidly during the transformation period; the volume of business grew and with it the attraction of the career. At first, however, the number of offices remained restricted and the growth was managed by taking on assistant notaries, trainees and additional staff. In 1991, following the amended Law on the notary public (*notariusz*), State Notarial Offices were abolished and notaries were allowed to run their offices privately. The process of setting up new offices therefore speeded up. The notaries' volume of business grew further through consulting and other kinds of business, even though the number of public deeds lessened after the privatisation and registration of companies and real estate peaked in the early 1990s.

However, as it is still performing public duties (although no longer those of the land register), the profession remains regulated. The Minister of Justice (in consultation with the Chamber of Notaries) appoints notaries, designates their seats and sets their maximum fees. Disciplinary control is in the hands of the Chamber of Notaries. Like advocates they receive a professional training of two years and after this another two-year period of practice as an assistant-notary. Education and examinations are the responsibility of the Chamber of Notaries (Warsaw Chamber of Notaries).

Table 12.3 Number of notaries and volume of cases

| | 1980 | 1990 | 1998 |
|---|-----------|-----------|-----------|
| Number of notaries and assistant-notaries | 500 | 862 | 1341 |
| Trainees | 70 | 116 | 300* |
| Number of offices | 283 | 312 | 1150 |
| Number of notarial deeds | 1,018,000 | 2,069,000 | 1,019,000 |

*1998 both assistant-notaries and trainees.

Sources: Ministry of Justice and Warsaw Chamber of Notaries

12.3.4 JUDGES

The early start made by Poland in establishing independent judicial institutions under the martial law of President Jaruzelski may have prevented a radical generational change in the courts of justice. It is one of the reasons why in 1989/90 a veto of the Sejm (with a majority of Solidarność members) formed a barrier to pursuing the screening of public officials, so that the issue lingered until 1997 when, at a rather late stage, a 'lustration' statute was passed. It was not until 1998 that the Minister of Justice acted upon a number of allegations against prosecutors concerning involvement in espionage activities in Communist times.

The late purging attempts indicate that in the present circumstances the independence of the judiciary is being taken especially seriously in Poland. Judges (*sędzia*) may not be members of a political party or become otherwise politically active. Their career, remuneration and conditions of work are regulated through the negotiations of the Ministry of Justice with the *National Judiciary Council* (NJC). Several years of training and experience are required to become a judge (or prosecutor). Candidates have to complete two and a half years' training after which they may start to work as an assistant judge. During this period specialisation in one or more fields of law is expected. As an assistant they can go on to apply for judgeship with the Council of the Judiciary. The selection is competitive and the formal appointment upon nomination is made by the President of the Republic. Judgeship is designed to be a lifelong career; judges must be over 26 years of age at their first appointment and may serve up to the age of 65, although the NJC may grant permission to stay on until the age of 70. Candidates are predominantly women, for whom the working time and conditions are conducive.

Judges' salaries are regulated by a points system based on a factor multiplying the average salary for public servants. In 1999 this average was set by the government on PLN 1135.40 giving the various positions of judges the following salary rights (interview with Pawlicka):

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Table 12.4 Salary rights

| | |
|--|-----|
| Trainee | 0.9 |
| Assistant judge: | 2.0 |
| Judge | |
| District court | 2.7 |
| Regional court | 3.2 |
| Court of Appeal | 4.0 |
| Supreme Court and High Administrative Court | 5.7 |

With the lower echelons in these pay scales being rather modest, lawyers in the private profession can easily earn more. The problems of high caseloads and court delay do not lead to a streamlining of the organisation, but to a demand for more judges. Even though the number of judges has almost doubled over the last years, the Minister of Justice had to ask Parliament for a further increase in personnel.

Table 12.5 Number of judges, assistant judges and trainees

| | 1980 | 1990 | 1995 |
|---------------------------|-------|-------|-------|
| District Courts | 2,169 | 3,367 | 4,090 |
| Regional Courts | 849 | 1,261 | 1,751 |
| Courts of Appeal | -- | 211 | 252 |
| High Administrative Court | -- | 165 | 172 |
| Supreme Court | -- | 85 | 76 |
| Professional judges total | 3,018 | 5,089 | 6,341 |
| Assistant Judges | 439 | 657 | 809 |
| Trainees | -- | NA | 1,018 |

Source: Ministry of Justice

Besides these career judges, Poland also has lay judges who sit as referees on the criminal bench for more serious crimes, in social courts and in labour courts. They are nominated for four years by the municipalities and civil organisations and designated by the presidents of courts of appeal. Each of them participates in only a few (about 12) cases a year (Ministry of Justice data).

12.3.5 PUBLIC PROSECUTORS

It is evident that working in the judiciary is not the most ambitious career for a young law graduate. Hierarchically dependent, public prosecutors (*prokurator*) are appointed by the Attorney General (who is also the Minister of Justice). During communist times prosecutors were restricted largely to investigation and prosecution in criminal justice. The turnover of prosecutors is high due to their lower reputation and modest income whilst the number of vacant positions results in even more working stress for those who do remain. Nevertheless, many people still use prosecutors' positions as a stepping stone to other legal occupations. Change to another job is possible after three years of working experience.

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Table 12.6 Number of prosecutors, assistant prosecutors and trainees

| | 1980 | 1990 | 1995 |
|-----------------------|-------|-------|-------|
| Prosecutors total | 2,944 | 3,149 | 3,978 |
| General | 124 | NA | 168 |
| Court of Appeal | - | NA | 168 |
| idem, Regional Court | 785 | 3,149 | 1,167 |
| idem, District Court | 2,034 | | 2,475 |
| Assistant prosecutors | 212 | 422 | 613 |
| Trainees | 287 | 1,101 | 1,064 |

Source: Ministry of Justice

12.3.6 BAILIFFS

Debt collectors (*komornik*) also belong to the group of legal professions for whom a university degree in law is compulsory. They form an important part of the legal system since they are the ones responsible for enforcing penalties. They prepare

claims, enforce them and lead public auctions. After university and the practical training of two years it is possible to become an assistant court enforcement officer. Later the Minister of Justice can appoint the assistant to become court enforcement officer upon a motion of the National Enforcement Officers Council (*Krajowa Rada Komornicza*). Poland has 546 districts in which these officers are active. They receive both a fixed remuneration and a commission based on a percentage of the fees collected.

Since the privatisation of the profession, bailiffs have been accused of only taking up big cases, leaving small creditors without legal protection (interviews with Meijknecht and Siemaszko). Moreover the lack of self-regulation in the bailiff's profession has been strongly criticised.

12.4 ACCESS TO LAW

Post-communist social organisation in Poland rests on three pillars, each of which actively distinguishes itself from the others: the political parties, a strong *Solidarność* trade union and the Roman Catholic church. An indicator of their everyday importance might be that an estimated 25,000 people are active in membership organisations. However, many of these are only locally active and very small. Charitable and humanitarian organisations are not tax-exempt; although they may receive tax concessions (Karatnycky et al. 1998: 444).

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Few of these organisations have any impact on the legal culture. Except for the trade unions in labour related matters, none of them provide legal consultation to people of low means. Legal aid is restricted to waivers of court and lawyers' fees after means testing by the court. It seems unlikely that non-profit organisations will be able to provide legal aid without some form of state subsidy or preferential tax treatment (interview with Kurczewski). Long waiting lists in court and the prevailing traditional attitude of judges are a contributing factor to the virtual absence of politically active lawyers and public interest litigation. (interview with Osiatyński).

Most legally active Non-Governmental Organisations (NGO) are financially supported by their Western counterparts. The best-known NGOs are the International Helsinki Federation of Human Rights (IHF) and Human Rights Watch (HRW). The Helsinki Federation established an office in Poland five years ago whose reports focus on freedom of expression, the functioning of the judicial system, equal access to law and so on. Apart from the poor conditions in Polish courts as described before, their last annual report criticised the behaviour of Polish police and other law enforcing officials. Reference is made to various cases of serious police brutality in 1998. The plan to ban juveniles from the streets in the evening and at night in some Polish cities has also been criticised by the IHF as a violation of human rights. The IHF supported the Polish Ombudsman by stating that this was

“an illegal and purely preventive act of group detention without sufficient suspicion of a crime” (IHF 1998:169). The IHF also remarks in its report ‘Human Rights Developments in Helsinki Signatory States’ that “many Polish authorities expand powers to the extent that they tap and monitor citizens without the prior consent of a judge” (IHF 1998).

12.5 COURTS

The independence of the legal system in Poland is guaranteed in the Constitution and safeguarded by the National Council of the Judiciary. The Constitution also prescribes the various kinds of courts: the Supreme Court, the common courts, administrative courts and military courts. All court procedures should have at least two stages.

Poland has three levels of Common Court. The lowest level is that of the 286 Regional Courts (*Sąd Rejonowy*) of first instance. They are usually made up of six divisions: civil, criminal, family & juvenile, commercial, labour & social security and land & property law. Smaller courts have four divisions in which the above divisions are combined. In criminal cases three judges usually adjudge in regional courts, only one of whom is a career judge. In non-criminal cases only one career judge presides (Jankowski and Siemaszko 1999: 20).

On the next level, 44 District Courts (*Sąd Okręgowy*) deal with first instance cases with higher stakes or appeals reviewing the decisions made by the Regional Courts. They have civil, criminal, family & juvenile, commercial, labour & social security and supervisory divisions. In first instance cases a bench of three judges decides: one career and two lay judges. In criminal cases the bench may be enlarged to five judges. In second instance cases three career judges adjudge. District courts are also responsible for land and property registers and registers for legal persons.

Twelve Courts of Appeal (*Sąd Apelacyjny*) form the highest level within the common courts. These courts were only established in 1990 in order to reconsider the decisions made in the lower courts. The bench is composed of at least 3 career judges; there are no lay judges on the bench.

Poland still has misdemeanour boards (*kolegium ds. wykroczeń*), which rule in non-criminal cases. These boards may impose a fine, issue a reprimand or custodial sentence. Members of these boards are appointed for four years by the municipal council. The Polish constitution, adopted in 1997, does not, however, provide for these boards so they will have to be abolished within four years of the day the constitution came into force. Courts of the lowest level will take over these cases.

The Supreme Court (*Sąd Najwyższy*) has the task of supervising all the courts and has “a controlling function over public administration” (Wierzbowski 1997: 322). Though it is not a part of the system of common courts, it has jurisdiction over all such courts. The Supreme Court is the highest court in Poland. Judges of this court are nominated by the National Judiciary Council and appointed by the President of Poland. The President of the court is in office for six years and can hold office for one period. The current president of the Supreme Court is Professor Lech Gardocki. The Supreme Court has four divisions: Civil Law, Criminal Law, Administrative, Labour & Social Security Law and Military Law. Each division has about 15 members.

The phenomenon of high working pressure is felt in all courts. Although the number of cases has increased only a little during the last decade – from 441 for each judge in 1989 to 504 in 1997 (Siemaszko 1999: 126) – the average time a criminal case is in court rose from 1.2 months in 1989 to 5.1 months in 1997. These figures apply to regional courts. In district courts cases in appeal are in court even longer: 3.2 months in 1989 and 8.0 months in 1997 (Siemaszko 1999: 122). Court delay may vary regionally. The absence of pre-court settlements is another reason for court delays. It is not that these periods are exceptionally long, but that the previous periods were too short: the expectations may have been unrealistic.

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The main reasons for this are the completely outdated working conditions and shortage of auxiliary staff. As the International Helsinki Federation (IHF) for Human Rights puts it: “practical, technical, and organisational conditions in district courts were poor, and called for urgent and thorough improvements” (IHF 1999: 199). The report elaborates by stating that, “courts had too few rooms for conducting trials and for the deliberation of judges and witnesses. The secretariats were badly equipped due to lack of funds.” (IHF 1999: 198-199).

On various occasions the European Court of Human Rights in Strasbourg also criticised “the poor operation of the Polish judiciary: (ECHR 1999). Poland ranks number four among complaints lodged with this court; most concern the lengthy court delays.

12.5.1 NATIONAL JUDICIARY COUNCIL

The National Judiciary Council (*Krajowa Rada Sądownictwa*) was set up in 1989 to safeguard the independence of the judicial system in the new republic. It nominates new judges for the Common Courts, Supreme Court, High Administrative Court and Military Courts. After nomination the President of Poland appoints the new judges. The members of the National Judiciary Council hold office for four years and may hold office for only two periods in a row. In the NJC judges of all courts are represented, in addition to the Minister of Justice, the presidents of the

Supreme Court and the High Administrative Court, a representative of the President, four members of the Sejm and two members of the Senate.

Besides nominating judges the NJC is also responsible for transferring judges to other posts and deals with many matters concerning the courts. It adopts a position on and takes notice of new laws and acts concerning the courts.

The NJC forms an important part of the Polish legal system, since it prevents politics from becoming too involved in the judiciary. It has been successful in the last ten years, but its influence is nevertheless limited, because the NJC cannot initiate the procedure for the appointment of a new judge. On the other hand the NJC may issue opinions on all major changes in the judicial system (Council of Europe: 72-73).

12.6 CIVIL JUSTICE

The civil and labour courts caseload increased over the past decade, especially during the early years. This increase has led to high working pressure and court delays.

Table 12.7 Caseload of Civil Courts

| Cases terminated | 1980 | 1990 | 1995 |
|---------------------------------------|-------------|-------------|-------------|
| First instance regional Courts | | | |
| Family court | | | |
| 1. adversarial cases | 202,381 | 406,354 | 299,090 |
| 2. non adversarial cases | 126,325 | 123,462 | 183,859 |
| Civil cases | | | |
| 1. adversarial cases | 240,988 | 145,660 | 270,777 |
| 2. non adversarial cases | 130,204 | 220,394 | 271,101 |
| First instance district Courts | | | |
| Civil cases | | | |
| 1. adversarial cases | 15,501 | 31,001 | 157,087 |
| 2. non adversarial cases | 2,417 | 3,419 | 6,323 |
| Appeals | | | |
| 1. from regional court | 32,190 | 31,149 | ? |
| 2. from district court | | 2,433 | 6,289 |
| Supreme Court | | | |
| Revision | 1711 | 2609 | 636 |
| Exceptional Revision | 336 | 518 | --- |

Data: Ministry of Justice

Table 12.8 Caseload of Labour and Social Security Courts

| | 1980 | | 1990 | | 1995 | |
|------------------------|-----------|------------|-----------|------------|-----------|------------|
| | Labour C. | Soc.Sec.C. | Labour C. | Soc.Sec.C. | Labour C. | Soc.Sec.C. |
| First Instance | 74,752 | 213,878 | 114,534 | 52,206 | 191,435 | 128,462 |
| Taken in regard | 18,856 | 79,740 | 31,686 | 15,845 | 42,032 | 32,045 |
| Settled | 18,760 | NA | 10,685 | NA | 11,644 | NA |
| Dismissed | 27,963 | 129,764 | 26,382 | 29,701 | 29,157 | 59,892 |
| Taken to higher appeal | 6,280 | 52 | | NA | | NA |
| Taken to higher courts | 21,893 | 45,110 | | 2,695 | | 2,830 |
| Taken to Supreme Court | | 2,117 | | 945 | | 391 |

Data: Ministry of Justice

12.7 CRIMINAL JUSTICE

A new Criminal Code and Code of Criminal Procedure came into effect in September 1998, as the culmination of an eight-year effort to restructure the criminal justice system. In accordance with the standards of the Council of Europe, it no longer allows the death penalty but relies instead on a range of penalties such as imprisonment and parole, fines and accessory penalties. Poland, as a member of the Council of Europe since 1991, takes its obligations very seriously. The high number of complaints about delays in criminal courts before the Human Rights Commission is of real concern to the government.

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12.7.1 POLICE

During the Communist era the police force and civic militia were almost militarily organised. Though the average level of education of police officers was not particularly high, the profession was attractive because of the many privileges it offered. The existence of these privileges did not prevent corruption, but complaints of corruption and bribery were not widespread. The negative image of the militia in this era can be explained by the harsh actions of the force during demonstrations (Łajtar: 1-2).

After 1989 many experienced officers left the force and started working for private security firms. The new officers are both young and inexperienced. This, together with relatively low payment (the average police officer earns approximately PLN 800-1,000), makes them more susceptible to corruption. Some officers have a sense of impunity in whatever they are (and are not) doing. The many changes in administrative structure and reorganisations have meant that the powers of the force are not clear or sharply defined. The division and hierarchy of the police force should become clearer in conjunction with the new administrative division of the country.

Table 12.9 Number of police officers (permanent positions)

| 1980 | 1990 | 1995 |
|--------|---------|--------|
| 83,928 | 121,707 | 99,239 |

Data: Ministry of Interior and Administration

The Polish police force is widely mistrusted because of the many reported cases of corruption. In various reports and surveys the police force is regarded as one of the most corrupt elements of public administration. Most cases reported concern traffic offences, when there was either no actual offence or the officer tries to benefit personally from it. The widespread, old idea of corrupt officers reflects on society. Officers are often offered bribes, and as many drivers say that the most honest policeman is the one accepting a smaller bribe instead of imposing a bigger fine, the issue has two sides to it and it will take time before accepting a bribe (and offering one) becomes unacceptable. Corruption is likely to be much more widespread and bigger than the figures show. Both high fluctuations and low payment contribute to the continuation of corruption.

The other point both international organisations and the European Union often refer to is the (ill-) treatment of suspects and prisoners. The Ombudsman, Human Rights organisations as well as the European Court of Human rights in Strasbourg have written cases in their annual reports.

In January 1998 the police in Słupsk (northern Poland) ill-treated supporters of a local basketball team, returning home after a game. During the riots a police officer hit a teenager who attempted to escape from the police several times on the back of the head. The boy died on the spot. The police officer was first charged with accidental killing, later with killing (IHF 1999: 203).

In May 1998 two sisters, 19 and 20 years old, alleged that they were raped in a police hotel in Warsaw. The police had caught them selling minor items at a railway station in Warsaw without a proper licence. The officers fined them, and threatened to file a case with the penal administrative board. The young women went with the officers to 'settle the case' and get 'proper medical care' for one of them, who was mentally unstable, but were instead raped several times by the officers. Criminal proceedings were initiated against both officers (*ibidem*).

Though these reports are of course true and serious, they form a small part percentage of the work done by the police. It is hard to say whether the Polish police systematically use unnecessary violence towards suspects or prisoners.

The number of offences reported in the last decades has almost tripled, as can be seen in table 12.10. The biggest growth is evident in the initial years of the transition period: relatively early compared with other countries. This growth made the work of the police even harder and the caseload of the courts bigger.

Table 12.10 Caseload of the Criminal Courts

| | 1980 | 1990 | 1995 |
|---|---------|---------|---------|
| Police-recorded crime | 337,935 | 883,346 | 974,941 |
| Indictment by the prosecution | 125,421 | 304,905 | 498,724 |
| Decisions of courts for adults | | | |
| Innocent/ acquittal | 7,094 | 4,334 | 9,303 |
| Fine | 21,551 | 19,487 | 49,997 |
| Imprisonment | 102,602 | 81,170 | 138,120 |
| Number of cases in first instance in Regional Courts: | 130,976 | 139,807 | 335,140 |
| of public accusation | | | |
| of private accusation | 42,364 | 36 188 | 30,266 |
| Number of cases in first instance in District Courts | 3,173 | 2,474 | 18,232 |
| Appeals to Second instance District Courts | 31,771 | 14,670 | 30,970 |
| Appeals to Second instance Courts of Appeal | --- | 173 | 4,167 |
| Cases taken to the Supreme Court | | | |
| revised | 1,690 | 1,579 | 548 |
| exceptional revision | 376 | 1,445 | --- |
| Decisions of courts for juveniles (<18 y.) | | | |
| Educational sentence | 14,220 | 14,250 | 12,750 |
| Placement under surveillance | 9,085 | 9,779 | 8,706 |
| Placement in educational facility | 3,904 | 1,223 | 689 |
| Placement in corrective facility | 750 | 1,878 | 586 |
| Custodial sentence | 21 | 3 | 4 |
| Other | 406 | 3,129 | 3,281 |

Data: Ministry of Justice

12.7.2 PRISONS AND PRISONERS

Prison reforms in 1990 promised to be quite successful as far as the change of the regime and of personnel were concerned. The prison doors were opened for many prisoners of the Communist era and the institutions were submitted to the scrutiny of the ombudsman and the public. Treatment programmes were introduced.

However, with the crime rate rising the prisons very soon filled again. The material conditions of prisons remained very bad. Most of the 156 penal institutions were built before the Second World War. Only one was built during the Communist era, another one was opened in autumn 1998. The Prison Service of the Ministry of Justice, which manages all institutions, is now facing some 100 prisons requiring immediate repair or modernisation.

Due to the lack of maintenance in the last decades, many penal institutions even lack a central heating system (Markiewicz 1998).

The Ombudsman has criticised the state of prisons in various reports. Most prisons are overcrowded, many inmates have to share their cells, and even more often the minimum three square meter space for each prisoner is not guaranteed (Golik and Wysocka 1998). On October 30, 1999 two rulings of the European Court of Human Rights in Strasbourg confirmed the poor operation of the Polish judiciary.

The Court found that overextended judicial proceedings violated Article 6 of the ECHR (IHF 1999: 199). The share of the budget of the Ministry of Justice spent on prisons fell from 43.5 per cent in 1991 to 30.9 per cent in 1997 (Markiewicz 1998: 6). At the same time the total budget of the ministry grew by 6.1 per cent between 1989 and 1997 (Siemaszko 1999: 135).

The total number of prisoners in Poland has been fluctuating last decades. The main reason for this fluctuation is amnesties granted to large groups of convicts. In 1980 280 Poles per 100,000 inhabitants were in prison, but in 1990 – shortly after a massive amnesty in the end of 1989 – only 131. Last decade the number was somewhere around 155 (Siemaszko 1999: 103). The prison population is overwhelmingly male, at 97.5 per cent, though the share of female prisoners is increasing faster.

12.8 ADMINISTRATIVE REVIEW

Administrative procedure was regulated in Polish Code of Administrative Procedure as early as 1980. The competences of the High Administrative Court overlap with those of the Commissioner of Civil Rights. They may both receive complaints directly from citizens, and they both advise on administrative decisions, though the Commissioner may not hand down judgements. The difference in the number of cases taken up by them is remarkable: while the former takes up more than eighty per cent of the cases lodged, the latter considers only slightly over thirty per cent.

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The Administrative Court is still suffering from a lack of confidence among the public, so that many citizens also lodge their complaints with the Commissioner of Civil Rights Protection, which usually works faster. However, decisions taken by the Ombudsman can only serve as advice to the institutions concerned; legally they are not binding.

12.8.1 HIGH ADMINISTRATIVE COURTS

Together with the Code of Administrative Procedure, Poland was the first Communist country to establish a High Administrative Court (*Naczelny Sąd Administracyjny*), also in 1980. Its main office is in Warsaw but it also has branch offices in the main big cities. The court decides “about citizens’ claims in almost all individual administrative cases” and it controls the performance of public administration (Galligan and Smilov 1999: 215). The court has one instance and takes action on the claim of individuals, and only in relation to acts by central administrative or territorial bodies, communes and other public organs.

Judges of the High Administrative Court are nominated by the Judicial Service Commission and appointed by the President of Poland. The President of the court is also appointed by the President and holds office for six years.

Table 12.11 Caseload of the High Administrative Court

| | 1980 | 1990 | 1995 |
|------------------|------|--------|--------|
| Total number | 927 | 12,504 | 39,741 |
| Considered cases | 804 | 13,304 | 33,030 |
| Settled | 160 | 10,003 | 22,007 |

Source: Ministry of Justice

As may be seen from table 12.11 the caseload of complaints has increased steadily. However, 63.8 per cent (in 1996) of the complaints are dismissed, mostly because the issue at stake is excluded from jurisdiction (Galligan and Smilov 1999: 240). These include: elements of the social security system (where jurisdiction lies with the common courts), decisions on citizenship and foreigners residing in Poland. The court may not judge on general acts, decrees and orders, but only on specific cases. Most of the 36.2 per cent admitted complaints were lodged in respect of tax and custom cases, but also on territorial planning, housing, ownership and management of land.

12.8.2 COMMISSIONER OF CIVIL RIGHTS PROTECTION

In July 1987 a bill was passed in Poland on the institution of a Commissioner of Civil Rights Protection (*Rzecznik Praw Obywatelskich*). A proposition for such an institution in Poland was made as early as 1956, but the real discussion on this theme did not intensify until the late 1980s. At the beginning this institution was not a constitutional one. It was assembled within the existing political-legal system without the ability either to touch the competence of other organs or to change the procedure of protecting civic rights and freedoms. In April 1989 the office of the Commissioner was given a constitutional rank. The first Commissioner, Professor Ewa Łętowska, elected in November 1987 and the second, Professor Tadeusz Zieliński, elected in February 1992, worked very hard to make an authority of the Office of the Commissioner in Poland. They turned out to form a counterweight to the *Solidarność* Government. In May 1996 Professor Adam Zieliński took office as Commissioner, and he still is in post (Oliwa-Radzikowska 1998). At the end of 1988 the Bureau of the Commissioner had a staff of 55, of which 28 were administrative staff and 27 directly engaged in legal operations. In 1995 the office of the Commissioner had a total of 181 positions. Of these 181 persons, 61 were office personnel and 120 analysts (Zieliński 1998).

The new Constitution of April 1997 strengthened the institution of Commissioner for Civil Rights Protection. The act states that the Commissioner for Civil Rights Protection shall guard human and other civic freedoms and rights specified in the

constitution and other legal acts. The Commissioner gained full autonomy and independence from other state bodies and is responsible only before the Sejm as stipulated by the law. The Commissioner is appointed by the Sejm with the Senate's approval. The Commissioner's term of office was lengthened to five years, with a view to increasing his independence from the parliament elected every four years. The Commissioner shall present information yearly to the Sejm and Senate about his activities and the state of the observance of human and civic freedoms and rights. The Commissioner gained constitutional immunity. The Commissioner may not serve for more than two terms of office and he cannot occupy other positions, with the exception of that of university professor, nor can he carry out other professional commitments. He may not be affiliated to any political party or trade union, nor can he perform any public activities that might be incompatible with the dignity of his office.

The Commissioner for Civil Rights Protection is a monocratic body. The position of Commissioner is significantly influenced by the personality of the Commissioner due to the wide scope for deciding whether or not to take up a case since those decisions are not subject to appeal. Due to this moral position and social sensitivity the Commissioner must be a Polish citizen of outstanding legal knowledge, professional experience and high prestige. The salary of the Commissioner of Civil Rights Protection is equal to that of a Chief of Chancellery of Sejm and Senate, although less than the salary of a Minister.

According to the Constitution, any subject of the Republic of Poland is entitled to address the Commissioner with a request for his assistance in protecting their liberties and rights whenever those are breached by public authorities. The Commissioner shall take action at the request of citizens or their organisations, of local governments and on the Commissioner's own initiative, the latter resulting mainly from field visits and media reports. From the very beginning the Commissioner was addressed many times, see table 12.12.

Table 12.12 Number of new requests

| | 1988 | 1990 | 1995* |
|-------------------------------------|-------------|-------------|--------------|
| Number of new requests | 44, 936 | 18, 114 | 29, 260 |
| Taken up for examination | 3, 286 | 4, 838 | 9, 463 |
| Number of replies from institutions | NA | NA | 15437 |
| Cases pending | NA | 3533 | 11189 |
| Proceedings completed | 1015 | 3748 | 7257 |

* Data 1995 from 1 February 1995 until 31 January 1996

Source: Commissioner for Civil Rights, Annual Reports 1990, 1991, and 1996

The Commissioner may take up the case or leave it, having acquainted the applicant with the possible actions available, or refer the case to the jurisdiction of a specific authority, or decide not to take up the case. A refusal to take up a case must be made known to the applicant, including the Commissioner's reasons for such a decision. Having taken up a case because civic rights have been infringed by

government administration, the Commissioner may request that the case or part of it be explained by the relevant authorities, such as the Prosecutor's Office. He may also ask the Sejm to have the case examined by the Supreme Chamber of Control. He may initiate his own proceedings in which case he has the right to:

- examine each case on the spot;
- demand explanation or presentation of files for each case dealt with by various authorities;
- demand information on the status of a case dealt with by a court or the Prosecutor's Office or other law enforcement agencies;
- employ experts to present opinions and analyses.

The agency, organisation or institution that the Commissioner approaches is obliged to co-operate with the Commissioner and provide proper assistance. Full access to files and documents has to be provided as well as any explanation and information required by the Commissioner.

When the activity of the agency, organisation or institution violated civic rights or liberties the Commissioner may refer to them. The Commissioner, though not capable of taking legislative initiatives, may present opinions and conclusions aimed at ensuring the effective protection of civic rights and liberties to the relevant agencies, organisations and institutions and facilitate the procedures such cases may involve. He may also demand that disciplinary proceedings be instituted or official sanctions imposed. The agency, organisation or institution must inform the Commissioner within 30 days of the action or view that has been taken. Should the Commissioner disagree with such a view, he can approach the relevant superior entity for necessary action. The Commissioner may approach the Constitutional Tribunal in order to reaffirm that legal provisions issued by a central government agency are not in conformity with a law of superior rank, primarily the Constitution. This includes the possibility of instituting action before the High Administrative Court in order to declare a local law invalid for the same reason. Each filed constitutional complaint is confirmed by the Constitutional Tribunal; the Commissioner may then participate in the proceedings before the Tribunal.

The Commissioner may take court action in civil and administrative matters on behalf of a citizen or take part in such proceedings, as well as apply for punishment of an offence. The Commissioner himself cannot institute criminal proceedings. In the event of the crime prosecuted *ex officio* he may, however, ask the Prosecutor to take relevant action. An important right of the Commissioner is the possibility of applying to the Supreme Court for cassation in a civil criminal case, or for an extraordinary appeal against a final sentence by the High Administrative Court. The Commissioner may also approach court administration authorities with interventions not infringing the judge's sovereignty, e.g. concerning the protraction of proceedings or failure to execute court judgements. He is also entitled to approach the Supreme Court with a request to pass a resolution explaining vague regulations.

Table 12.13 Termination of cases

| | 1990 | 1995 |
|---|-------|-------|
| Positive solutions reached | 33% | 23.4% |
| No positive solutions reached due to: | | |
| -no confirmation of charge/insufficient grounds | 65.6% | 57.2% |
| -objective reasons: lapse of time, no evidence | 2.9% | 11.0% |
| -rejection of Commissioner's standpoint | -- | 0.1% |
| -loss of immediate interest | 7.0% | -- |

NB: The term 'positive solution' means a solution to the individual problem according to the petitioner's expectations.

Source: Commissioner for Civil Rights, Annual Reports 1990, 1991, 1996

12.8.3 SUPREME CHAMBER OF CONTROL

The Supreme Chamber of Control (*Najwyższa Izba Kontroli*) is the main audit office in Poland. The first audit office was established in 1808. During the Communist era an audit office also existed and regulations on the current office were stipulated both in a law from 1994 and in the Constitution. The Chamber is subordinate to the Sejm, to which it has to report on a yearly basis. The Chamber controls the central government, the National Bank of Poland and the various local governments. Lastly it may audit other organisations concerning the extent to which they utilise state resources. In the reports the Chamber describes activities according to legality, economic prudence and diligence. In recent years the Chamber has also focused on the privatisation process. The Chamber also receives complaints from citizens, organisations and members of Parliament. During the period January–September 1996 the Chamber received 1,963 complaints, mainly on alleged corruption or waste of public property. The Chamber may direct cases to prosecutors.

Members of the Chamber are in office for six years and they can only hold office for one period. They may not hold other positions (except for holding a university chair), nor may they be members of a political party. Members are appointed by the Sejm, with the consent of the Senate.

12.8.4 GENERAL INSPECTOR FOR THE PROTECTION OF PERSONAL DATA

An inspector for privacy protection (*Generalny Inspektor Ochrony Danych*) was set up in 1998 and has the following duties:

- to check compliance of data processing with the data protection act;
- to issue administrative decisions and to examine complaints connected with such protection;
- to manage the register of databases and to provide information on these;
- to give opinions on draft laws and regulations concerning his field of competence;

- to initiate action aimed at the protection of personal data (Jankowski and Siemaszko: 46).

The inspector is appointed by the Sejm, with the consent of Senate, and annually reports to the Sejm.

12.9 CONSTITUTIONAL REVIEW

The Constitutional Tribunal (*Trybunał Konstytucyjny*) was established in December 1985, although it was already discussed in 1980-1981 but then blocked by the declaration of martial law. The Constitutional Tribunal consists of fifteen members, elected by the Sejm and holding office for nine years. The President of Poland appoints the President and the Vice-President of the Tribunal. The judges should be “distinguished by their achievements in the field of law” (Jankowski and Siemaszko 1999: 8). Members cannot be re-elected. Judges of the Constitutional Tribunal receive the same salary as the Vice-Chairman of the Sejm.

The Constitutional Court, according to the Polish Constitution, has jurisdiction regarding the following matters:

- the conformity of legislation and international agreements with the Constitution;
- the conformity of legislation with ratified international agreements whose ratification required prior consent granted by statute;
- the conformity of legal provisions issued by central State organs with the Constitution, ratified international agreements and statutes;
- the conformity with the Constitution of the objects or activities of political parties;
- complaints concerning constitutional infringements.

Moreover the Constitutional Tribunal settles demarcation disputes between central constitutional organs of the State. After a transitional period of two years in which the Sejm could overrule decisions taken by the Constitutional Court, these decisions are now binding.

Motions to the Constitutional Tribunal may be submitted by the President and the Council of Ministers of the Republic, the Presidium and commissions of the Sejm or Senate. The Commissioner for Civil Rights, as well the Presidents of various courts and the NJC, can also apply. However, there is no popular complaint by citizens, but both trade unions and employers’ organisations, religious and other organisations can lodge complaints. Thus, there is a channelled access whereby the Constitution of Poland grants “everyone whose constitutional freedoms or rights have been infringed, (...) the right to appeal to the Constitutional Tribunal for its judgement on the conformity with the Constitution of a statute or another normative act upon which basis a court or organ of public administration has made a final decision on his freedoms or rights or on his obligations specified in the Con-

stitution.” This shows in the caseload figures, which are low compared to those constitutional courts which allow popular complaints. Since the beginning of its activity in 1986 the Constitutional Tribunal has investigated:

- 128 cases concerning adjudication of conformity of laws with the Constitution;
- 60 cases concerning adjudication of conformity of other normative acts with the laws and the Constitution;
- 17 cases concerning questions as to the law;
- cases initiated on the Tribunal’s own initiative;

Moreover, between 1986 and 1995, the Constitutional Tribunal passed 84 resolutions establishing generally binding interpretation of the laws and more than 112 decisions, including many signalling decisions addressed to the Sejm.

As Professor Marek Safjan, the current Chairman of the Tribunal, points out, the court has already played a major role in preparing the way for the rule of law in the 1980s by declaring valid the “implicit standards of good law” and thus applying legal principles which could only later be made explicit in the Constitution (with reference in particular to the amendment of December 1989). Since the beginning of the 1990s the tribunal has developed a jurisprudence of Human Rights norms which sought a compromise between the social rights of the population with the demands of liberalising the economy. Through its principle of not applying law retroactively, it has attracted criticisms for settling accounts with former communists; and by ruling that the vested social rights of the communist welfare state had to be respected – as far as the economic conditions and the state budget would legitimately allow – it was reproached for delaying the process of economic change. However, the compromises which the Tribunal pursued allowed for a continuous policy of implementing and even anticipating constitutional principles which were finally laid down in the Constitution of 1997. As an indicator of the impact of the process, Safjan points to the observation that references to the Constitution have since then become standard practice in the reasoning of court decisions and in the legal literature (Safjan 1999).

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- Igor Działuk; Deputy Director of judicial assistance & European law.
- Professor Tadeusz Ereciński; President of the Supreme Court, Civil Chamber.
- Wojciech Grajdura; Judge at the Regional Court in Tarnów
- Maciej Kalinowski; Advocate-trainee.
- Professor Jacek Kurczewski; Warszawa

Maria Pawlicka; Judge at the Regional Court in Płock.

Professor Paul Meijknecht; currently consultant of the Polish Ministry of Justice

Professor W. Osiatyński; University Professor, Central European University.

Professor Marek Safjan; President Constitutional Court

Professor hab. Andrzej Siemaszko; Director Institute of Justice, Ministry of
Justice.

Dr. Hanna Suchocka; Minister of Justice

Professor dr Adam Zieliński; Commissioner of Civil Rights.

NOTES

- ¹ Ministry of Education data.

13 HUNGARY

Facts and figures

Population: 10,245,700

Ethnic groups: Hungarian 89.9%, Romany 4%, German 2.6%, Serb 2%, Slovak 0.8%, Romanian 0.7%

Total area: 93,030 sq. Km

National capital: Budapest

National Parliament (*országház*): One assembly with 365 seats

Administrative divisions: 19 counties (*megyék*, singular: *megye*).

Constitution: 18 August 1949, effective 20 August 1949, revised 19 April 1972; 18 October 1989 revision ensured legal rights for individuals, constitutional checks on the authority of the prime minister and also established the principle of parliamentary oversight; 1997 amendment: streamlined the judicial system.

GDP per capita in 1998 US\$ 7,400

GDP per sector: services 67%, industry 30%, agriculture 3%

Labour force per sector(1996): services 65%, industry 27%, agriculture 8.3%

13.1 INTRODUCTION

Hungarians are said to be a people of lawyers with a strong legalistic tradition. In building new institutions, academics, as well as high court judges, frequently refer to pre-war Hungary. This is all the more astounding in view of the fact that before 1945 courts had to base their decisions on case law with a draft civil code pending. The Austrian civil code which had been valid in 19th century Hungary formed the backbone of civil law; but in the Republic the draft for a new uniform civil code remained pending, thus the amendment of civil law had to be built on a multitude of legal regulations and court decisions (Varga, 1995). Nevertheless, a strong principle of the unity of judicial interpretation was applied. High Court decisions were considered to be binding for all regular courts. In 1959 the Supreme Court gained the codification competence for Hungarian civil law. Being trained in terms of legal positivism, judges could maintain a standard of legality which rendered them immune from many ad hoc interventions by means of government directives and Communist Party policies. It was in fact members of the Communist Party who prepared the return to an independent judiciary in the 1980s.

This made the return to Hungarian legal traditions easier for the new regime after 1989. Independence of the judiciary was re-established in an amendment to the Constitution (Act LXIII of 1990, Act LXVII of 1991 and later Act XCI of 1993). The latter two Acts formulate strong principles of political non-involvement in the recruitment and professional performance of judges and institutions, while the National Judiciary Council established in 1997 defines judicial autonomy more strongly than any Western legal system. Not only all organisational competence,

but also the entire budget of the judiciary was put in the hands of a professional self-governing body.

On the other hand, the introduction of a Constitutional Court brought a new element of judicial hierarchy into play. Independently of the regular judiciary, it can strike down any legal rule as unconstitutional. Invoked by the President, members of Parliament or other organs of the state, it guards the constitutionality of the entire programme of legislation. In the first years of the transformation with its many legislative projects, the Hungarian Court became famous for risking conflicts with groups in Parliament by repeatedly asking for reconsideration and amendments. Furthermore, following the German model, it can be invoked by anyone affected by Hungarian law, thereby opening the gates for a multitude of political issues to be brought to a legal forum. But a third access of regular courts asking whether binding law would violate constitutional norms might be the most important avenue for constitutionalising the Hungarian tradition of legal positivism. As all provisions of law remained valid after the end of communism under the principle of continuity (unless they had been changed by legislative act or challenged before the Constitutional Court), its review obtains a central position in the transformation process.

The resulting plurality of high court institutions, with the Constitutional Court frequently correcting the legislator as well as standing judicial interpretations, risks contradictions with the Supreme Court, which follows the line of traditional positivist jurisprudence. To many Hungarian jurists, judicial decision-making gets so fragmented that they miss the certainty of law which is a central value in positivist jurisprudence. However, it is quite clear that while such controversies of legal culture remain among the professionals, the public still perceives judicial institutions to be part of the state powers which might best be distrusted for all practical purposes.

13.2 LEGAL EDUCATION

Law studies were at the centre of university education during the first part of the century in Hungary: although by 1938 humanities had gained in popularity, still almost forty per cent of all students were law students. It was impossible to get a job in public administration without having successfully completed the law examinations (interview with Prof. Herczegh). Communist policy tried to shift the emphasis away from law studies, and engineering was promoted instead. Law studies were not considered to be important. Subsequently, some traditional law faculties were closed (e.g. at the University of Debrecen). Throughout the communist period, there were specialist legal courses for each of the occupations such as judges, public prosecutors or advocates. Various examinations had to be passed after a university education of 4.5 years, followed by two years of practical training, and finally a professional entrance examination for a judicial career. There

was a fixed quota of law students and all students had to pass an entrance examination in order to enrol for university education. In the 1980s, however, there was a surplus of engineers on the labour market along with a lack of a legal elite. Consequently, candidates from the communist nomenclatura began entering the programme, sometimes receiving better scores in the entrance examination (Interview with Prof. Herczegh).

After the political revolution of 1989 uniform legal education was reintroduced in accordance with Act LXXX of 1993 on Higher Education (Kengyel 1999). The five-year course of study leads to a comprehensive examination which is given and graded by the respective faculties of law but has to meet uniform criteria (therefore called 'state examination'). Legal studies at the universities are followed by three years of training in either courts, prosecution, public administration or with practising advocates. A second, uniform state examination follows which is formulated by the Ministry of Justice and taken before a special committee nominated by the Ministry (decree 5/1991).

Student numbers at law faculties grew quickly. Four university law faculties – Budapest, Pécs, Szeged and Miskolc – offer a full range of legal studies. Specialised law studies can be followed at the Pázmány Péter, the Catholic University of Budapest and the University of Debrecen, at Kecskemét and Gyôr. The regular programme in law (*jogász szak*) takes five years. After the first year of mandatory courses in constitutional law, history of Hungarian law, Roman law and Latin, ethics, philosophy, and economics, three years are devoted to classical training in all fields of substantive and procedural law. Recently, courses in the law of the European Union were included in the core of obligatory courses, replacing the former mandatory Marxist courses. The fifth year is devoted to preparing for the final state examination consisting of civil and criminal law, public and constitutional law, philosophy of law and political science (Eötvös Loránd Tudományegyetem Budapest 1999, Kengyel 1999, Máthé 1996). The number of students at the Faculty of Public Administration and Law of the ELTE University should give an impression of the growth:

Table 13.1 Estimated number of law students (ELTE Budapest only)

| | 1990/1991 | 1994/1995 | 1998/1999 |
|--------------------------|-----------|-----------|-----------|
| ELTE University Budapest | 750 | 1,750 | 2,250 |

Source: Interview with Gátos

While 2,000 applicants apply to ELTE University each year, a *numerus clausus* is fixed at 450 new students. Law faculties are burdened by overcrowded lecture halls and overpopulated examinations. Moreover, the growth of the teaching staff lags behind the growth of the number of students. Apart from the regular generational change, there have been few changes in the teaching staff. Nevertheless, students feel pressured to keep up with new law. Because the legal situation is

changing quickly, they tackle the flood of new legislation on their own. Since law books quickly become out-dated, they favour new media such as CD-ROM subscriptions that furnish new copies at least once a year (interview with Zsombay).

Companies also require their employees to monitor recent legal developments. Special courses in law are offered at the Economic University of Budapest and the Agricultural University of Gödöllő as well as at institutions of higher education, like police academies and academies of public administration. They do not qualify for judicial professions, which is a privilege of the State Examinations. Evening and correspondence courses are popular. Recently, most universities have introduced postgraduate courses of one or two academic years. They try to meet the demand for courses in new fields of law and legislation leading to legal expert diplomas in banking and company law, insurance law, European law, traffic law, economic criminal law, and environmental protection law (interviews with Tari and Muhi).

13.3 LEGAL PROFESSION

Advocates/ügyvéd

Most law graduates nowadays choose to apply for candidacy at a lawyers' office. Candidates have to register with the Hungarian Advocates' Chamber (*magyar ügyvédi kamara*) with a contract for three years (until recently two years). Within a year, after concluding the training period, the candidate lawyer has to pass a professional examination. After doing so they can practise as individual lawyers or as a partner in a law office or can take a salaried position. Foreign lawyers can be registered for consultation and for acting in domestic law, European and international law (Act XI of 1998).

In the past decade, the number of practising lawyers has grown enormously. Immediately after the overthrow of Communism, many former law-advisors (*jogtanácsos*) of state companies (about 8,000 before privatisation) requested registration with the Hungarian Chamber of Advocates after passing the relevant examinations.¹ This growth continued as a result of the lucrative business under the new political and economic conditions. In 1999, 8,400 advocates were registered with the Hungarian Chamber of Advocates, many of them women. Half the lawyers have their offices in and around the capital of Budapest.

Table 13.2 Number of advocates

| | 1980 | 1990 | 1995 | 1999 |
|--|-------|-------|-------|-------|
| Total number of registered advocates * | 1,600 | 1,800 | 5,500 | 8,400 |
| of whom female | 320 | 600 | 2,200 | |

Source: Hungarian Chamber of advocates.

* Access to the profession was liberalised by Act No. XXII of 1991.

With much of the modern law business in the hands of large, foreign firms, the President of the Hungarian Chamber of Advocates, Dr. Jenô Horváth, is concerned about the rapid growth in the number of advocates. He maintains that private legal problems as well as economic life do not require the high number of practising lawyers [Letter from Hung. Bar Assoc.] Like Horváth, many professional lawyers warn of a surplus of law graduates and argue in favour of limiting the educational capacity.

Notary public/közjegyzô

Notaries managed to keep their numbers small, even though privatisation and real estate are sky-rocketing. In theory, candidates who have worked as an assistant notary for three years can apply, but in reality they have to wait until a position falls vacant. The Chamber of Notaries (*közjegyzô kamara*) determines the qualifications of the candidate, often by oral examination.

Table 13.3 Number of notaries

| | 1980 | 1990 | 1995 |
|---------------------------------------|-------------|-------------|-------------|
| total number of registered notaries * | 206 | 210 | 228 |

Source: Office of the National Council of the Judiciary

* Fundamental changes in their status was effected by Act No. XLII of 1991

Judges/bíró

Under the communist regime, judges in leading positions had to be members of the Hungarian Socialist Workers Party. Promotion was a matter of political reliability, and the prestige of the judiciary was low. But since it offered favourable working conditions and an intrinsic quality of professional work, judgeship under communism became a mostly female profession. After the political turnover of 1989 all judges in leading positions – court presidents and members of constitutional courts – were examined for their commitment to the communist past. The Constitutional Court rejected initiatives to widen the circle of personal activities falling under ‘lustration’ law (*átvilágítás*). Thus, the replacement of judges in Hungary is dependent upon a slow generational change.² According to the rules, professional judges must be Hungarian citizens aged over 24, must have graduated from a law faculty, possess the right to vote and have no criminal record. They are eligible for appointment after passing the professional examination. They may not be members of political parties, nor are they allowed to carry out political activities. They are, however, allowed to join associations for the protection of interests and other social organisations. Except for teaching and professional research, they are not allowed to perform any other jobs.

Aspiring judges work as court secretaries for two years before they can apply for a position as judge. Recommendations for candidacy will be made by the presidents of regional courts in agreement with a competent body of judges. The Minister of Justice makes nominations with the approval of the National Judiciary Council

(NJC). The final appointment remains the prerogative of the President of the Republic.

Act LXVIII on the Legal Status and Remuneration of Judges of 1997 marks an important step towards the professional, as well as organisational, independence of judges and courts. Candidates for judgeship have to participate in a competition. Their first appointment is for a period of three years; tenured appointments are only granted after their performance during the first three years has been assessed. Once appointed, judges may stay in their positions until the age of 70. They are, however, evaluated under the supervision of the National Council every three years and their promotion depends on the result of these evaluations.

With the new law there also came a rise in judges' salaries in order to ensure their independence. The system of remuneration is regulated by a statute enacted on 1 July 1998. Advancement should be based on seniority and merit and should exclude any possibility that would restrict the independence of the judges by modifying their remuneration.

The salary of judges is no longer dependent on the salary of civil servants. The Act sets the basic salary of a beginning judge at HUF 160,000 (NLG 1,600). Supplements will be expressed as a percentage of the basic salary. Judges are entitled to supplements according to their assignment (to a regional court or high court of justice or to the Supreme Court). After having spent six years at the same court level, judges with an outstanding record may be scaled by the NJC to a higher salary-grade corresponding to the salary of a higher court. Advancement is exclusively based on length of service. Judges advance to a higher grade every three years. Promotion to a higher level for exceptional efficiency can be effected twice during a judge's career. Under the new salary system a local court judge who has served for 12 years will earn HUF 200,000 (NLG 2,000), while a regional court judge with the same length of service will earn HUF 232,000 (NLG 2,320). After thirty years of service the salary of a Supreme Court judge will be HUF 344,000 (NLG 3,440). Although this new system improved the pay of judges, their salaries still fall below the top incomes of notaries or advocates.

Thus, general opinion still holds that judges are not well paid. They compare the salary of a beginning judge at the start of his career (HUF 160,000, or NLG 1,600) with that of a police officer (HUF 150,000, or NLG 1,500) or the salary of a university (law) professor (HUF 200,000, or NLG 2,000), who can usually take on additional jobs to increase their income (interview with Gátos).

The introduction of a National Council of the Judiciary (NJC) also ensures organisational independence. First of all, the budget is directly responsible to Parliament, which renders the NJC independent from the executive branch of government. Secondly, the promotion and remuneration of judges is determined by statute law. Termination of judgeship can take place at one's own request or

after one is found guilty of professional misconduct by a disciplinary council, or if one is pronounced incapable by one's peers. Finally, unless the President of the Republic determines otherwise, judges enjoy immunity from prosecution and therefore cannot be arrested and detained or be subject to criminal proceedings (Karatnycky et al. 1998).

Table 13.4 Judges

| | 1980 | 1990 | 1995 |
|-------------------------------|-------|-------|-------|
| Number of professional judges | 1,351 | 1,816 | 2,325 |
| by type : | | | |
| criminal | | 567 | 694 |
| other | | 1,249 | 1,631 |
| by gender | | | |
| male | | | 849 |
| female | | | 1,476 |

Source: Office of the National Council of the Judiciary

In the 1980s, the number of professional judges had already increased considerably. But even though at present 2,500 judges are active in Hungary (64% of them are women), there are many complaints about the long delays in court. The procedures at each court level take an average of two years. Respondents explain this by the flood of litigation since 1989 and by the enlargement of the jurisdiction of the courts. The subject matter of cases requires factually and legally complex expertise not held by the present sitting judges. This leads to many appeals in complicated cases (Interviews with Gátos and Herczegh). Furthermore, judges of the old generation hardly make use of new technology such as computers, so that backlogs accumulate without activities for relief. Nevertheless, all Hungarian judges have been required since 1999 to follow courses on the legal system of the European Union (interview with Gátos).

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Lay judges/ülnök

The function of lay judges has become less important under post-communist law. They act as referees on the bench in penal courts of first instance. Lay judges are elected; they do not need a legal degree (Act LXVI of 1997).

Table 13.5 Number of lay judges

| 1980 | 1990 | 1995 |
|-------|--------|-------|
| 9,725 | 11,398 | 9,956 |

Source: Office of the National Council of the Judiciary

Prosecutors| ügyész

Of all the legal professionals, prosecutors experienced the biggest loss of positions compared with communist institutions. The *prokuratura's* task of guarding the legality of the entire public administration, including parts of the collective economy, has largely been curtailed, and their functions in civil procedure have been

reduced to acting on behalf of persons incapable of protecting their own rights; they may also apply for legal remedy (insofar as Act v of 1972 on the Prokuratura is still valid). The prosecutors' remit is now largely reduced to criminal investigation and prosecuting in criminal courts. Here they enjoy the 'prerogative of accusation', unless the law entitles victims to initiate private prosecution. In the tradition of the legality principle this hardly entails any policy functions.

As far as recruitment is concerned, conditions are similar to those of judges. After passing the entrance exam for a judicial career they are required to practice for at least three years. Prosecutors must perform their office full-time and may not be members of political parties. The Chief Public Prosecutor is elected for six years by Parliament upon the recommendation of the President of the Republic. His deputies are appointed by the President of the Republic for an indefinite period. All other public prosecutors are appointed by the Chief Public Prosecutor in accordance with the opinion of the Public Prosecutor Board for an initial three-year term, and thereafter for an indefinite term.

Unlike a number of West European countries, criminal prosecution in Hungary is not under the auspices of the Minister of Justice and is thus not part of the executive branch. The Constitution provides for the Chief Public Prosecutor to be accountable to Parliament; prosecution performs its task independently of all other organs of the state as a centrally organised, hierarchical institution. The Chief Public Prosecutor's Office also frequently advises on draft laws and may even propose legal regulations.

Table 13.6 Number of prosecutors

| | 1980 | 1990 | 1995 |
|--------------|------|------|-------|
| total number | 998 | 966 | 1,103 |
| female | 321 | 441 | 581 |

Source: Supreme Prosecutor's Office

One of the first changes brought about by the 1990 amendment to the Constitution on judicial organisation was to curtail the mandate of the *Procuratura*, which had had the authority to supervise the public administrative system. Now Public Prosecution is to perform criminal investigations in cases determined by law.³ Nevertheless, the increase in the number of prosecutors in the 1990s was officially justified as an attempt to cope with the increase in crime.

Professional debt collectors/végrehajtók

A frequent complaint has been the lack of support staff that undermines the efficacy of the growing number of courts. With the increase in debt collection one might have expected a rapid increase in the number of debt collectors. However, up until 1998 their numbers had remained remarkably stable: 265 money collection professionals were active of which 207 were independent debt collectors and 58 regional debt collection professionals.

Since the 1989 turnover the money collection profession was privatised. About 70 per cent of the collection offices presently operating – most of them employing two or three persons – are identical to the offices operative before 1989.

The volume of money collection in 1998 was HUF 45,401,347,000. Of these a total of HUF 37,101,212,000 was effectively collected (Vavró 1999).

Table 13.7 Number of registered professional debt collectors*

| 1980 | 1990 | 1995 |
|------|------|------|
| 222 | 229 | 218 |

Source: Office of the National Council of the Judiciary.

* Fundamental changes in their status was effected by Act NO. LII of 1994.

13.4 ACCESS TO LAW AND LEGAL AID

13.4.1 LEGAL AID

In communist times law may not have played the central role in peoples' lives that it does now, but legal consultation was provided for all. Representation by a lawyer in a civil court was not required, but requests for public defence in serious criminal cases were granted. Nowadays, all parties in court have a right to representation by a lawyer but, with the exception of labour or family cases, the claimant has to pay a court fee in advance. Legal aid for lawyer and court fees is granted to the very poor after passing a means test, even though many more people would need to consult lawyers for the many problems related to new regulations, housing problems and unemployment. The court has to apply a merits test to determine whether legal aid can be granted. In the end, all court and lawyer costs have to be covered by the losing side. In criminal cases, the court will nominate a public defender (*kirendelt védő*), with the state covering the costs. Except for the activities of some NGOs, there is no legal aid for out-of-court consultation.

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Table 13.8 Expenditure on legal aid

| | 1980 | 1990 | 1995 |
|-----------------------------|-----------|------------|------------|
| costs of in-court legal aid | 1,753,000 | 21,627,000 | 82,459,000 |
| of these: | | | |
| civil law | 0 | 418,000 | 1,342,000 |
| criminal law | 1,753,000 | 21,209,000 | 81,117,000 |

Source: Office of the National Council of the Judiciary.

13.4.2 NON-GOVERNMENTAL ORGANISATIONS (NGOS)

Hungary has about five NGOs active in monitoring the rule of law. All of them are located in Budapest, including the Hungarian Helsinki Committee (HHC), the

Hungarian Civil Liberties Union (HCLU), the Legal Defence Bureau for National and Ethnic Minorities (LDBNEM), and the Roma Rights Foundation (RRF). For financial and efficiency reasons they have divided their target issues. The HHC is involved with refugee cases, the HCLU is involved with the rights of psychiatric and other patients and the LDBNEM and RRF are involved with the rights of ethnic minorities (Fridli, 1997).

Another field of activities has been access to public information. Information is only given by the state when lawyers explicitly refer in their claim to the Act on the right to access to public information of 1992. But even then, authorities like to use tricks to get rid of lawyers, like maintaining that 'the file is closed' or 'the notes are not ready yet'. In concrete cases this is a matter for the courts to decide. The fact that 'access to public information' had to be explained to the authorities illustrates the problems of effectively implementing the many new laws (Interview with Tari and Muhi).

Apart from these NGOs there are some national watchdog organisations sponsored by the State. An organisation for medical patients, HCLU, deals with the costs of hospitals, treatments and medicine. They are represented in hospitals and enjoy an advisory status with the government, advising on draft laws and presenting comments before Parliament.

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NGOs operating in the field of legal consultation are small working groups of five to ten persons, mostly young trainees, recently graduated from university. Most of them work voluntarily or are affiliated part-time to these NGOs. They collaborate with a network of legal aid lawyers and represent cases in court because, according to the law, only lawyers may defend a case in court. In cases of police arrest, the police authorities appoint a lawyer. NGOs, however, may not officially be appointed, because the Hungarian Chamber of advocates is monitoring its monopoly and will give a disciplinary punishment to lawyers who work under the name of organisations.

Nevertheless, the co-operative networks of NGOs are growing. MPs have the right to hear NGOs when legislation is being prepared. The Ministries involved regularly organise a hearing to which the relevant NGOs are invited. In cases of national and ethnic minorities NGOs collaborate with the representative of the so-called minority self-government. The LDBNEM has supported the Ombudsman for the Rights of National and Ethnic Minorities in his efforts to improve the poor infrastructure of the hamlet Istvánmajor, in the council of Emöd, inhabited by citizens of Polish origin. The HCLU has collaborated with the Ombudsman for the Protection of Data and Freedom of Information in order to prevent the police from consulting the files of drug users and psychiatric patients without legal grounds to do so. The HCLU has also addressed the Constitutional Court, sent in law initiatives and organised press campaigns.

In addition to providing a wide range of basic information for citizens on where to go for legal services, NGOs felt a special need for activities in closed institutions such as hospitals, mental institutions and prisons. By providing medical patients with information on their rights, propagating free abortion and rights to euthanasia and demanding free speech and free information for inmates, the HCLU was able to exert pressure on official policy. In May 1997, the Hungarian parliament passed Law No. XLII/1997 on the processing and protection of medical and related personal data. On the other side, the law grants patients access to their own medical data and the right to request a second opinion. Another result of their activities has been that drug users who consent to treatment for at least six months may not be prosecuted (Interview with Helsinki Federation, 1999).

The success of NGOs is largely determined by their financial means, political contacts and media interest. International contacts are often crucial, as the sensitivity of the authorities to campaigns by Human Rights Watch and the Hungarian Helsinki Committee has repeatedly demonstrated.

13.5 COURTS

13.5.1 NATIONAL JUDICIARY COUNCIL (*ORSZÁGOS IGAZSÁGÜGYI TANÁCS*)

Since 1 October 1997 the National Judiciary Council, an independent organ, has supervised the organisation of the judicial system, the administration of the courts and the budget of the judiciary. Because of the NJC, the independence of judges is strongly institutionalised. Hence, the Ministry of Justice will basically only be involved in legislation, such as amendments concerning the entire civil law code and the judicial preparation of Hungary's accession to the EU.

The NJC consists of fifteen members. Its president is the president of the Supreme Court who is elected on the recommendation of the President of the Republic by a two-thirds majority vote of all members of parliament for a period of six years. Nine members are elected by the courts through delegates: the Minister of Justice, the Chief Public Prosecutor, the President of the National Chamber of advocates and two members of Parliament (appointed by the Constitutional and Juridical Committee, as well as by the Budget and Financial Committee) who are *ex officio* members of the Council. The principal functions of the NJC are:

- to prepare and submit to the Government its proposals concerning the next annual budget with respect to the courts. Should the bill on the budget, prepared and submitted to Parliament, differ from the proposals of the NJC, the Government must indicate in detail the Council's original proposals, stating the reasons for not accepting them;
- to appoint and dismiss the presidents of the high courts of justice and the regional courts, as well as the vice-presidents, the heads of the colleges, and the heads of its own Office;

- to orient and control the administrative activity of the court presidents;
- to determine the principles of the organisational and functional regulations of the courts and to approve the organisational and functional regulations of the high courts of justice and of the regional courts;
- to create regulations binding on the courts, to make recommendations and to supervise their implementation;
- the President of the NJC submits a report to Parliament every year on the overall situation of the courts and the activities of the Council.

13.6 COURT SYSTEM

Before the Second World War Hungary had a four-tier court system. From bottom to top: local (*járás*), county (*megye*), higher court of justice (*ítélőtábla*) and supreme court (*kuria*). During the communist period the Higher Court of Justice was abolished. At present, there is a three-tier court system. At the local level, there are 111 local or city courts dealing with civil and criminal matters (*helyi bíróság*) and twenty labour courts. The second level is a network of 20 regional courts (*megyei bíróság*), including the Metropolitan Court of Budapest. They primarily hear appeals lodged against the decisions handed down by the local courts, but in cases specified by the laws of procedure they act as courts of first instance.

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The Supreme Court (*a legfelsőbb bíróság*) reviews court petitions on their legal merit.⁴ It also carries out the task of conceptually guiding lower courts.

The workload of the civil courts has not increased as much during the past decade as it has in the neighbouring post-communist countries. At local and regional court level however it did increase substantially in the criminal courts and upon the introduction of administrative review in administrative courts (Office of the National Council of the Judiciary).

Table 13.9 Civil courts: number of incoming cases, decisions and appeals

| | 1980 | 1990 | 1995 |
|---|---------|---------|---------|
| first instance, local and county courts | | | |
| incoming | 161,005 | 177,87 | 187,890 |
| decided | 163,985 | 161,782 | 183,669 |
| appeals lodged | 26,155 | 22,014 | 24,172 |
| +non-contentious | 3,888 | 3,512 | 4,200 |
| high court cases per year * | | | |
| incoming | 960 | 462 | 2,546 |
| decided | 973 | 479 | 2,382 |

Source: Office of the National Council of Judiciary

* Cases before the High Court until 1990 concern protests of legality (*törvényességi óvás*) (1980, 1990) which were dependent on the discretionary power of the Supreme Public Prosecutor. Since 1995 there have been requests for revision (*felülvizsgálati kérelem*). See Act No. LXVIII of 1992.

Table 13.10 Labour law cases: number of incoming cases, decisions and appeals

| | 1980 | 1990 | 1995 |
|---------------------------------------|--------|--------|--------|
| First instance local and county court | | | |
| incoming | 17,801 | 12,438 | 14,458 |
| decided | 18,271 | 11,706 | 17,736 |
| Number of incoming appeals | 3,424 | 1,535 | 4,734 |
| High court * | | | |
| incoming | 349 | 228 | 909 |
| decided | 343 | 311 | 883 |

Source: Office of the National Council of the Judiciary

* Cases of protest of legality (1980, 1990), respectively request for revision(1995).

Table 13.11 Social insurance cases: number of incoming cases, decisions and appeals

| | 1980 | 1990 |
|----------------------------|-------|-------|
| First instance | | |
| incoming | 5,738 | 8,521 |
| decided | 5,614 | 7,958 |
| Number of incoming appeals | 243 | 1,109 |

Source: Office of the National Council of the Judiciary

Although budgets allocated to the administration of justice have increased somewhat over the last few years, there is still a widespread shortage of both staff and equipment.⁵ Complaints about the slowness of judicial procedures abounded with the working conditions at courts still lacking efficiency, judges often at a loss with complicated new subject matters and parties using appeals more often (two levels of appeal and revision have been offered by the system since 1990). In order to reduce the workload of the courts and to establish clear lines of authority, the Horn government (1994-1998) planned to introduce an additional level between the county courts and the Supreme Court. The former government decided to establish a level including four High Courts of Justice (*ítélőtáblák*) in order to take over the appellate functions of the Supreme Court and allow it to concentrate on issues of legal principle. So far, however, qualified judges for such High Courts have not been available. The present Orbán government considered it better to postpone the issue.⁶

13.7 CRIMINAL JUSTICE

A comparison of the rise of crime according to police registration with the caseload of the criminal courts shows the growing gap typical of modern crime which consists mainly of property offences that cannot easily be cleared up by the police. As a consequence, the caseload of criminal courts has not increased nearly as much as the police figures might lead to expect, while the prison population even decreased. The unsatisfactory state of many prisons and lack of cell capacity might also keep judges from imposing prison sentences (Interview with Vavro).

Table 13.12 Criminal justice

| | 1980 | 1990 | 1995 |
|---|-------------|-------------|-------------|
| Police crime figures | 130,470 | 341,061 | 502,036 |
| Courts | | | |
| First instance | | | |
| incoming | 87,215 | 95,552 | 119,347 |
| decided | 86,121 | 98,926 | 126,686 |
| Appeals lodged | 18,273 | 15,570 | 25,995 |
| High Court | | | |
| incoming | 477 | 305 | 494 |
| decided | 457 | 278 | 562 |
| Number of persons sentenced to imprisonment | | | |
| adult | 24,972 | 16,104 | 22,954 |
| juvenile | 1,553 | 1,771 | 2,091 |

Source: Office of the National Council of the Judiciary

Table 13.13 Number of crimes

| | 1980 | 1990 | 1995 |
|--|-------------|-------------|-------------|
| Number of homicides | 200 | 201 | 296 |
| Incidence of theft (crimes against property) | 78,643 | 265,937 | 391,062 |
| Number of policemen | 21,605 | 24,329 | 28,110 |
| Number of prison detainees | | 12,319 | 12,455 |

Source: Office of the National Council of the Judiciary

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With the greater liberty of movement in the 1980s, the incidence of crime started to rise and continued to do so steadily throughout the 1990s. While in the 1980s most of the increase was accounted for by property crime, in recent times the rise has also included violent crime.

Nevertheless, the number of people in prison has not increased. The capacity of prisons is rather limited and the quality of prisons does not conform to EU standards (Interview with Vavró).

13.8 ADMINISTRATIVE REVIEW

Continuity of law is apparent in the rules of administrative procedure which still rest on Act IV of 1957. However, in 1990 an amendment established administrative review. With proceedings according to the law of civil procedure, a sizeable volume of cases was soon reached, mainly caused by numerous claims in respect of social insurance and pension rights.

Table 13.14 Administrative review: number of incoming cases, decisions and appeals

| | 1980 | 1990 | 1995 * |
|---------------------|-------|-------|--------|
| first instance | | | |
| incoming | 1,315 | 1,518 | 27,441 |
| decided | 1,331 | 1,430 | 26,589 |
| appeals | 543 | 592 | 3,547 |
| High court cases ** | | 115 | 591 |
| | | 59 | 500 |

Source: Office of the National Council of the Judiciary

* Includes social insurance cases. The significant increase in the number of cases is due to Act No. XXVI of 1991 extending the scope of the judicial review of administrative decisions.

** Cases of protest of legality (*törvényességi óvás*) (1980, 1990) and request for review (*felülvizsgálati kérelem*) (1995). See Act No. LXVIII of 1992.

13.8.1 THE STATE AUDIT OFFICE

The State Audit Office (SAO) is the financial/economic control authority of Parliament.⁷ The SAO has the right to supervise the state budget and its operation in terms of legality and effectiveness. The SAO reports the results of its investigations to Parliament. Reports must be published in each case. The SAO has the right to investigate any organisation holding state property. The SAO can supervise the economic activity of the political parties too, but only from the viewpoint of legality (Galligan and Smilov 1999).

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The SAO, as the institution of legislative power specialising in financial and economic audits, operates under the constitution and other relevant laws, independently of the executive authority. Its independence is guaranteed by the following:

- its President and Vice-Presidents are elected by Parliament, a two-thirds majority of the vote is required;
- its duties are exclusively assigned by Parliament;
- its reports are disclosed to the public (with the laws on the protection of private information duly observed);
- the regime of the publication of its reports, the audit plan, the focal point and frequency of the audits and the methods of the examinations are established by the Office itself, within the law defined framework.⁸

One of the important tasks of the SAO is to examine cases of corruption and organised crime in post-communist society.⁹ According to the President of the SAO, Árpád Kovács, one of the main sources of corruption is the fact that “the construction of the managing and administrative institution system was slow to start and is still lagging behind the change in the structure of ownership but the deficiencies of legal compliance and the intermingling of organisations, persons and entities are also related to the fact that income processes have been restructured.” The President of the SAO has also stated that the findings of the Hungarian Audit Office have indirectly proven the existence of an extensive black market economy

and its connections with corruption. The black market economy is estimated at about thirty per cent of GDP.¹⁰

13.8.2 OMBUDSMAN INSTITUTIONS

In 1989, a round table conference on the political future of Hungary discussed the unsatisfactory working of the complaints institution of the Communist Party (*központi népi ellenőrző bizottság*) and proposed to establish the institution of an ombudsman differing from the former complaint institutions in its legal status, with wider tasks, independent authority and the power to introduce measures as well as the entitlement to pursue and initiate judicial procedures. The democratic opposition was afraid that the successor party of the Communist Party would win the first elections. Hence they were interested in establishing a system of checks and balances in society. The institution of a national ombudsman would not only satisfy a social function but also a political one.

It took until 1993 for the National Assembly to pass the statutory basis for establishing a Parliamentary Commissioner for Civil Rights (Ombudsman). The Hungarian Parliament was helped by the success of the Polish ombudsman, who also offered practical help in establishing the Office. The Commissioner is elected for a period of six years by a two-thirds majority vote of all members of Parliament and has to be fully independent.¹¹ The operational costs of staff and office organisation are determined in a special chapter of the state budget.¹² She or he cannot be a member of a political party. For this reason, an academic is usually sought. The Commissioner has to report annually to Parliament and has the right to comment on decisions taken by Parliament and to forward recommendations to government ministers. But care has to be taken not to slip into exercising the function of abstract norm control, which is the privilege of the Constitutional Court: the Ombudsman can check on the application of law and possibly criticise the abuse of basic rights as a consequence thereof, but she may not assess its constitutionality (Polt 1999). In such cases the Ombudsman can ask the Constitutional Court for the ex-post facto examination of legal rule, but has no right to bring a case before a regular court. There must be legal grounds for the complaint and all regular legal remedies have to have been exhausted before the Ombudsman will deal with it. It excludes any right to examine the functioning of courts of justice, even though judicial procedures give rise to a great number of complaints.

The office of the Ombudsman receives a great number of complaints for which there is no competence or legal ground, so that 75-80 per cent of the requests are denied. Two-thirds of the remaining 20-25 per cent are rejected on their merits. Finally, about 80 per cent of the remaining cases end with a recommendation. It is formulated as advice to the institution concerned and political and public pressure is sometimes needed to make them effective.

Prof. Gönczöl, the first to fill the position, has quickly given the office a reputation of taking problem situations up by means of investigative reports. Frequently called upon by prisons, orphanages and mental institutions, she has made *ex officio* examinations in closed institutions one of her priorities. The Deputy Commissioner, Dr. Polt, has also issued a general report on the situation of conscripts in the army. The impact of such reports remains dependent on the support of the media, which in general support her quite willingly.

Apart from the Parliamentary Commissioner for the Protection of Human and Civil Rights, two special ombudsman institutions have been established, at present elected by Parliament under Act No. LIX of 1993 section 2/(2). One special ombudsman has the right to 'take independent measures' in the field of the protection of privacy. Another Parliamentary Commissioner is charged with the protection of the rights of ethnic and national minorities. He is concerned in particular with violations of rights of the Romanians, who make up four percent of the population and are denied rights on a wide scale by official bodies as well as suffering private discrimination (Human Rights Watch, 1996). Taking the side of socially weak groups such as victims quickly brings the Commissioner into conflict with public opinion.¹³ On the other hand, success in the media has led other groups, such as students and military service personnel, to ask for a parliamentary commissioner for their rights. This again raises the concerns in the established Ombudsman institutions that an inflation of such offices could weaken them all.¹⁴

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Publicity has made the institutions of Ombudsman well known among Human Rights groups, but it has also met with some reservations among traditional Hungarian jurists, who wonder whether the institution of Ombudsman fits into the system of judicial review, i.e. the administrative courts. The sceptical attitude is often expressed in terms of a critique of such an office in general (Interview with Prof. Herczegh). In 1998 members of Parliament attacked the institution of Ombudsman with concerns that it could easily be drawn into political disputes. An indication of this may be the critical discussions in Parliament before accepting the 1999 report of the Parliamentary Commissioner for Data Protection and Freedom of Information on the content of police videotapes.

13.9 CONSTITUTIONAL REVIEW

13.9.1 THE CONSTITUTION

Instead of entering the debate concerning an entirely new constitution, Parliament decided to introduce a series of amendments in 1989 and 1990. The patchwork which resulted from this process virtually altered the entire constitution of the communist era. Many legal experts found its wording vague. As László Sólyom, the former President of the Constitutional Court, expressed it in an interview, "undoubtedly, the Constitution is not a fully coherent document" (Mink 1997: 73).

This situation led to jurisdictional disputes among government institutions and offices. In 1995, a newly-formed constitutional committee reached agreement on procedural rules for drafting and approving a new constitution. The coalition parties agreed that the opposition would contribute substantially to the process. The coalition also agreed that the constitutional committee would have 24 members, or four members from each party represented in the parliament. The National Assembly then amended the constitution to state that the new rules in the Standing Order could only be enforced by a four-fifths majority. A new draft constitution has yet to be approved (Karatnycky et al. 1998: 287)

The Constitution declares that the state is responsible for ensuring the observance of Human Rights. Individual and human rights, freedom of speech and assembly, and social and property rights are extensively covered in the Constitution. In 1996, the National Assembly passed a number of Penal Code amendments, including laws regulating freedom of the press, defamation, defence of minorities and in particular laws governing business and property rights quickly brought into with Western standards (Karatnycky et al. 1998: 287).

On 7 July 1993 the parliament passed Act No. LXXVII on National and Ethnic Minority Rights after nearly two years of preparatory work and several draft texts. The law bans discrimination against minorities, whose rights to national and ethnic self-identity are considered to be universal human rights and basic freedoms. The law recognises all ethnic peoples who have lived in Hungary for at least a century and who are Hungarian citizens with their own language, culture and traditions. These groups include Armenians, Bulgarians, Croatians, Germans, Greeks, Poles, Romanies, Romanians, Ruthenians, Serbs, Slovaks, Slovenes and Ukrainians. Nevertheless, Hungary's estimated 500,000 Romanies continue to suffer severely from the effects of the economic restructuring of the country. They have also been the victims of attacks by skinheads and vigilantes.

In March 1996, after the acquittals of a number of perpetrators of hate crimes, Parliament passed a penal code amendment that provides up to three years of imprisonment for anyone who incites hatred or acts in any other way that is capable of inciting hatred against the Hungarian nation or any other national, ethnic or religious minority or race (Karatnycky et al. 1998: 289).

13.9.2 CONSTITUTIONAL COURT

In 1989, Parliament modified the Constitution of 1949. Formally, the Constitution of 1949 was not suspended but rather modified in essential parts in order to abolish the totalitarian past. It turned out to be a pragmatic solution in the light of the deep divisions between the political parties. The formulation of an entirely new constitution would have led to lengthy disputes on highly charged issues such as the abolition of the death penalty which Parliament might not have been able to resolve (Interview with Prof. Herczegh).

After the political revolution of 1989 the constitutional court (*alkotmánybíróság*) played a major role. In a country with a long positivist tradition of jurisprudence, constitutional principles introduced a new element. According to the European Community Studies Association (ECSA):

In the Hungarian case, the most important change has undoubtedly been the establishment of an independent Constitutional Court, which began to work at the beginning of 1990. The Court's competencies are widely defined: it can examine the constitutionality of all pieces of parliamentary legislation as well as secondary legal regulations, and, in certain cases, individual decisions by governmental and administrative institutions. Importantly, the Court can exercise both different forms of ex-post concrete control and an abstract control of norms. The Court can annul a piece of legislation, a secondary legal act or a governmental or administrative decision, where it finds that it violates the Constitution. (ECSA 1993: 33)

Constitutional review of parliamentary legislation as well as secondary legal regulations is especially important in a period of transition. The Constitutional Court not only decides whether legislation violates the Constitution; it can also declare it "not in agreement with the Constitution with instance of omission (*mulasztás*)." In this vein it returned forty per cent of all pieces of legislation to Parliament for revision within certain time limits. In many cases, political differences were so fundamental that Parliament could not fulfil this task.

Apart from the legislative function, the Hungarian Constitution grants the court an extensive right of constitutional complaint to everybody affected by Hungarian law.¹⁵ The formal prerequisite is a 60-day period after exhaustion of all legal remedies. As a consequence of this very wide definition of access, the court is loaded with a high number of constitutional complaints.

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The first president of the Constitutional Court, László Sólyo, who fulfilled this position from 1989 until 1998, played a very active role which brought him and the court into many a principled conflict with the legislative process. At the same time, the first president of the Supreme Court, Pál Solt, was pushing for the supremacy of positive law in regular courts.¹⁶ President Sólyom set his stakes high by constantly correcting Parliament legislation. Forty per cent of all new statutes was sent back, sometimes on minor points. The new president, Németh János, has the reputation of sticking more positively to the letter of the law.

The most important qualifications for being appointed to the Constitutional Court are professional merits. Most of the judges have been university professors. As a rule, the political antecedents of the nominee are examined – lustration (*átvilágítás*) as it is called. This principle was not applied to the first five judges. The members of the Constitutional Court are nominated for a period of nine years. A judge can cease to perform his duties after being declared unqualified by his peers. Judges should not be above the age of 70 at the time of their appointment.

At present, the Constitutional Court has fourteen members of which eleven are judges and three attorneys. They are elected by a two-thirds majority vote of all members of Parliament. The president of the Constitutional Court is elected by the members of the Constitutional Court itself. The president is elected for a period of three years and can be re-elected once.¹⁷

On average, the court rules on approximately 150 cases annually. Of these, about 35 percent find some grounds for constitutional reclamation (Karatnycky et al. 1998: 267).

In view of the many objections to new legislation the question has been raised as to whether there should not be more prior consultation with Parliament. This was however rejected, because it would muddle the functional separation of powers: constitutional review has to remain limited to concrete questions and it cannot be consulted for an entire statute (interview with Paczalai). Among conventional jurists it is generally felt that the statute on the Constitutional Court granted too much discretion by wording its authority too abstractly. Importing the constitutional jurisprudence of other European countries often surprised professors and justices with novel interpretations.

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NOTES

- ¹ Letter from Hungarian Bar Association.
- ² Napi Magyarország, 1999, 30 June. Figures from the US Freedom House that 45 per cent of the judges appointed during the communist period have been replaced seem too high to our respondents (interview with Gátos).
- ³ Act LXIII of 1990 on the Amendment to the Constitution, par. 51-53.
- ⁴ Council of Europe, National Report, Hungary, p. 213-219.
- ⁵ Ibid. p.171.
- ⁶ Népszabadság, 28 May 1999 and 1 June 1999.
- ⁷ Regulated by Act No. XXXVIII of 1989.
- ⁸ State Audit Office (1998).
- ⁹ Interview Katona (1997) in East European Constitutional Review, 6 (4).
- ¹⁰ State Audit Office, 1999.
- ¹¹ Act LIX of 1993 on the Parliamentary Commissioner for Civil Rights [Section 28/(2)].
- ¹² Act LIX of 1993, [section 28/(3)]
- ¹³ Napi Magyarország, 4 June 1999; Népszabadság, 8 September 1999.
- ¹⁴ Napi Magyarország, 4 June 1999.
- ¹⁵ Act xxxii of 1989 on the Constitutional Court, 48 §.
- ¹⁶ Council of Europe, National Report, Hungary, p. 213-219.
- ¹⁷ Napi Magyarország, 1999, 23 June.

14 CZECH REPUBLIC

Facts and figures

Area: 78,866 km²

Population (1999): 10,294,943

Ethnic composition: Czech 94.4%, Slovak 3%, Polish 0.6%, German 0.5%, Romanies 0.3% (of an estimated 150,000 to 200,000 Romanies in the Czech Republic, only 32,903 claimed Romanian nationality in 1991, but the actual percentage is much higher), Hungarian 0.2%, other 1%

Religion: atheist 39.8%, Roman Catholic 39.2%, Protestant 4.6%, Orthodox 3%, other 13.4%

Capital: Prague (inhabitants: 1,214,000)

Parliament: Chamber of deputies or lower house (*Poslanecká sněmovna*; 200 members) and an upper house (*Senát*; 81 members, established in 1996)

Constitution: After the decision to divide Czechoslovakia into the Czech Republic and the Slovak Republic, a new Constitution was drawn up, so the actual Constitution of the Czech Republic dates from the 16 December 1992 and came into force on 1 January 1993.

Administrative divisions: 76 districts (*okresy*), 4 municipalities: Prague, Brno, Plzeň and Ostrava.

GDP – per capita (1998 est.) US \$ 11,300

GDP by sector: services 61%; industry: 34%; agriculture: 5%

Labour force: services: 61%; industry 33%; agriculture 6.9%

14.1 INTRODUCTION

Reformers in the Czech Republic can look back on 30 years of falling over and getting back up again. Severe repression followed the euphoria of the 1968 upheaval. Many Czechs left the country, whilst those who stayed knew who the enemy was, and the enemy knew who they were. The legal profession did not play a major role on either side: the reformers who took over after the Velvet Revolution in 1989 were economists and intellectuals, not lawyers. Professors at the law faculties who saw change coming in the eighties went on teaching the system of positive law to the youngsters of the nomenclatura which, under communism, was not just repression, but followed a body of more or less coherent rules. The new constitution and legalisation were easily incorporated in the 1990s, as these grew from the foundations of the Masaryk constitution and codes of law from before the world war. Legislation and the building of institutions had to be postponed due to political fights and the separation of the country into a Czech and Slovak Republic, but the pace of economic development in the first half of the 1990s kept the process under pressure. There were few obstacles to the adoption of European concepts of economic law and privatisation was encouraged, although the purging of old communists, initiated by the 'lustration' law of 1991, was not effective until 1997. Among Western investors, the Czech Republic, with its avowedly neo-liberal government, was the favourite. Consequently, it also became the greatest disap-

pointment to them with the economic and currency crisis in 1997 and the fall of the neo-liberal government. The Czech mood of high hopes was dashed and plunged into one of deep cynicism, dragging foreign observers and even the economic indicators with it.

However, while drama ensued on the main stage, the reform of judicial institutions was pursued further off-stage. Law faculties enlarged their capacities in an attempt to satisfy the growing demand. Books and teaching materials were written or rewritten to integrate new legislation, and the judiciary established its independence, even though a formation of a Council of the Judiciary still remains on the shelf as far as the legal reform plans are concerned. Shelving has in fact been the trademark of many reform projects in the Czech Republic – not because of apathy but because of different reformers pulling in opposite directions.

A dramatic example of the zeal of opposing forces in reform is what has been labeled ‘the war of the High Courts’. Justices at regular courts see the professionalism of their traditional schooling in strict positivism, more so even than in Hungary. Under changing political regimes, the fortress of resistance is made from the bricks of strict interpretation of statute law. This is what the justices of the High Court (usually translated as the Supreme Court in English publications), with its tradition of civil and criminal jurisprudence, hold against their colleagues of the Constitutional Court (just one km away in the small justice capital of Brno): the constitutional interpretation of valid law has to remain within the framework of the wording of statutes, otherwise the High Court will not obey the decisions of the constitutionalists.

14.2 LEGAL EDUCATION

Higher legal education is provided by four universities with law faculties: *Univerzita Karlova* (Charles University) Prague, *Masarykova Univerzita* (Masaryk University) in Brno, *Univerzita Palackého* in Olomouc (Palacky University) and the *Západočeská Univerzita* (West-Bohemian University) in Plzeň. There are no private schools offering a state-recognised degree in law.

Charles University, one of the oldest in Europe (1348), has had an independent Faculty of Law since 1373. The law faculty at Charles University has almost always been the largest of the faculties in the Charles University (with approximately 4,660 students in 1933-1934 and approximately 3,000 students in the seventies). A second law faculty was founded in Brno after the fall of the Austro-Hungarian Empire and the birth of Czechoslovakia as an independent state in 1918. The law faculties in Olomouc and Plzeň were established after the Velvet Revolution in the early nineties. They are, to a certain degree, dependent on Charles University for the supply of university teachers. (A third of the Plzeň professors are employees of Charles University in Prague).

Certain historical events deeply affected the creation of new generations of the intelligentsia: during the Second World War, the universities of Prague and Brno were closed down (from 17 November 1939 until the liberation in 1945), professors were dismissed and many did not return from the concentration camps. Students had to resume their studies after the war and soon after there followed a period of harsh Stalinist purges. There was an exodus of the next generation of the intelligentsia after 1968, followed by a second wave in the late seventies, which left behind a 'Biafra of the mind', as Czechoslovakia was called in the early eighties. After the Second World War it was not until the sixties that the Law Faculty in Brno was re-established. The change of name (from Masaryk University to Purkyňe University) indicated yet again the ideological pressure on Brno University to sever its connections with the democratic features of the pre-war period. (After 1989 the University of Brno reverted to its former name).

The Velvet Revolution in November 1989 again instigated a reshaping of university courses whereby the communist ideology of the last 40 years was left behind, with a resultant boom in law studies. The number of students in the law faculties increased enormously, though the budgetary capacity of the faculties put a limit on the influx. *A numerus clausus* and entrance examinations were therefore employed. Lack of money to expand the number of teachers and technical staff forces both the Prague and Brno Law Faculties to accept only one in ten applicants. With such limited access to law studies, the scandal about fraud in entrance examinations at the Prague Faculty of Law in June 1999 did not come as a surprise, with widespread press coverage and public debate.

Table 14.1 Prague University, Faculty of Law

| | 1988 | 1990 | 1994 | 1998 |
|-----------------------------------|-------|-------|-------|-------|
| Applicants | 4,065 | 3,489 | 6,202 | 6,594 |
| Registered 1st year students | 646 | 635 | 673 | 638 |
| Total students at the law faculty | 2,667 | 2,938 | 3,552 | 4,211 |
| Graduates | * | * | 476 | 514 |

Source: Prague Law Faculty

Table 14.2 Student numbers at the Czech Faculties of Law

| | UK, Prague | MU, Brno | UP, Olomouc | zu, Plzeň |
|--------------------------------|------------|----------|-------------|-----------|
| Newly accepted applicants 1997 | 638 | 472 | 117 | 664 |
| Czech citizens | | | | |
| foreigners | 21 | 63 | 15 | 0 |
| Newly accepted applicants 1998 | 587 | 486 | 129 | 709 |
| Czech citizens | | | | |
| foreigners | 37 | 0 | 24 | 0 |

Source: Czech Ministry of Education

Before the Velvet Revolution, law studies took four years to complete (5 years if combined with employment). In 1990/1991 a fifth year was introduced. The five-year course, which has to be completed by anyone who aspires to become a profes-

sional lawyer, is considered the theoretical basis for any profession in law, be it in the sphere of the judiciary (judge, advocate, notary, public prosecutor), as an academic, or a function in the state administration, management, the ministries, or legal advice services. After these five years, which are followed by state examinations and the defence of a thesis, one receives the title of *Magister* (Mgr).

There have been systemic changes in the courses in Prague as well as in Brno. Each university has worked out its own curriculum. Since 1995/1996 the courses have become more or less fixed. Subjects, such as Marxist-Leninist theory, scientific communism, Russian language, history of the Communist Party, defence of the socialist state (as a substitute for anybody who did not or was not required to do military service) disappeared from the list. Other subjects like Roman law, family law, criminal law, et cetera, did not alter their content and some new subjects were added to the list. More emphasis was placed on the knowledge of foreign languages (German, English). Greater emphasis was also placed on exchange programmes and studying abroad (Tempus-scholarships etc.), especially in order to get the students better acquainted with German, French and English legal traditions (i.e. the introduction of optional subjects as 'Administrative law in the European countries', 'Protection of civil and human rights' etc.). Guest professors are invited for lectures as far as the budgets can stretch for such initiatives. (The Faculty of Law in Brno hosted 42 foreign visitors in the academic year 1998-1999; it has also built up close links with the John Marshall Law School in Chicago and the Faculty of Law in Paris XI). The 'Soviet-past' was relegated to the archives (scripts, textbooks), new manuals were written, and the universities strove to accommodate the new reality of the Czech Republic as a member of NATO and the European Union.

The universities differ slightly:

Brno sticks to a syllabus organised in 'blocks' (Block A – theoretical-historical, lasting three semesters, Block B – Private law, lasting three semesters, Block C – Public law, lasting three semesters with one semester for writing a thesis), whereas in September 1997 Prague returned to the 'annual' or 'year' structure, abandoning its experiment of the 'block-system' introduced in 1991. Both faculties offer a wide range of optional subjects. Doctoral degrees can be obtained after an individual study programme which takes two to three years and after defending a doctoral thesis (title JUDR.). Postgraduate courses from one to four semesters are given by *Juridikum* at the Prague Law Faculty.

In Brno a special six semester *baccalaureate* law course is organised, granting the candidate the title of Bachelor (*bakalár*). It consists mainly of seminars, individual consultations and written tasks and is comparable to a distance course. It does not grant the right to transfer to or to continue with the law studies in order to obtain the title of Magister. In Prague there is also a *University of the Third Age* for the elderly.

University teaching is not popular as a professional career because of the rather low salaries. There is a shortage of good, well-trained, up-to-date, flexible professors and assistants. The newest generation of assistants are too young and inexperienced to be good teachers, while the older generation is struggling with shortcomings in language skills (interview with Baršová and Boučková).

A professor's monthly salary ranges from 17,500 Czech crowns at the Philosophy Faculty to 33,000 at the Medical Faculty: these differences are caused by the way the budget of the faculties is divided: (medicine is considered a far more expensive study, so the faculty receives more money per student.) The Law Faculty is comparable to the Philosophical Faculty with salaries corresponding to 1,000 guilders a month (interview with Říha).

Table 14.3 Average income of teaching personal at the Prague Faculty of Law (in Czech crowns)

| 1988 | 1990 | 1994 | 1998 |
|-------|-------|--------|--------|
| 4,750 | 5,012 | 11,468 | 15,935 |

Source: Prague Faculty of Law

In spite of the screening which has been in force since 1991, a thorough purge had to wait at the universities. Many reform professors criticise the fact that a positive attitude towards the democratic changes was sufficient in order to be allowed to stay (interview with Říha). Many professors, especially the middle generation, left the university voluntarily in order to find better paid jobs as attorneys (which was possible at that time without passing the Bar Examination). As a result, nowadays there are either people from the older generation or very young teachers at the Prague Faculty of Law (interview with Boučková).

Table 14.4 Numbers of staff at Law Faculties in 1998

| | Brno | Prague |
|--------------------------|----------------------------|--------|
| teaching staff | 32 (of which 4 professors) | 129 |
| total number of employed | 147 | 220 |

Source: Masaryk University (Brno) Faculty of Law and Charles University (Prague) Faculty of Law.

The budget for the universities is set by the Ministry of Education. Universities complain about the shortage of money but there is no way to expand capacity. The major sponsors of the Charles University 650th Anniversary in Prague were the Česká Spořitelna (Czech Savingsbank) and Unipetrol (Krasnický 1999: 23-25). With respect to the Prague Law Faculty, the Komerční Banka, the CCS and the Česká Spořitelna were of considerable help in sponsoring the renovation of the library in 1996.

Based on law no. 189/1994 a Special School for Higher Personnel of the Courts has been established in Kroměříž (*Justiční škola v Kroměříži*). This School is under

the aegis of the Ministry of Justice. It has been functioning since 1 January 1995 and provides theoretical and practical education and training for higher personnel of the courts in a three-year programme. Courses are internal (with lodging and meals provided) and the practical training takes place at a court where the future graduate is employed, i.e. has a work contract. After they have completed secondary school education, candidates have to pass an entrance test and entrance examination. An employer's contract with a district court (*obvodní* or *okresní soud*) or a state procurators' office (*státní zastupitelství*) is an entrance requirement. During the study, the minimum wage is paid by the Ministry of Justice. Switching courts during the educational period is not allowed. Graduates will work at district and regional courts and regional commercial courts administering affairs of enforcement proceedings in family law, civil law, and criminal law executive matters (Ministry of Justice).

The first graduates finished in 1998, and in September 1999 the second group wrote its final papers. In 1999 there were 776 applicants, but only 58 could be accepted. In 1998, 48 'normal' students graduated; the others were students attending the shortened programme because of previous work experience. The amount of places is dependent on the demand of the courts. A list of vacant jobs can be found at any court. The first applicant in line has the first choice from the list of vacancies and the last in line has to accept whatever vacancy is left. In 1999-2000 they will be able to accept approximately 50 candidates (telephone interview with the school administration).

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According to J. Vítová, judge at the regional court in Prague, this school is quite popular, because of the pay (compared with the income a student has to live on at university). During the training period the *čekatel* receives 5,700 Czech crowns a month. From 2003 on, only graduates of the *Justiční škola* from Kroměříž will be allowed to work as higher court clerks. The latter mainly do work in the field of civil law and often develop a high level of competence. Since they are able to take over a great deal of work from the judges, the effectiveness and speed of handling routine procedures in courts will increase (interview with Vítová).

Last but not least, the Institute for Further Education of Judges and State Prosecutors (*Institut pro další vzdělání soudců a státních zástupců*) and the Institute for Criminology and Social Prevention (*Institut pro kriminologii a sociální prevenci*) should be mentioned.

14.3 LEGAL PROFESSION

Since 1989 university law studies have been considered to be a general and uniform legal preparation, after which graduates do practical training for three years. The training programmes differ for the different judicial careers of advocate, judge, notary or public defender.

14.3.1 ADVOCATES

One may become an advocate (*advokát*) after having graduated from a law faculty of a university and after having accomplished an apprenticeship of three years as a *koncipient*. The apprenticeship ends with the Advocate Examination (*advokátní zkouška*). Both the training and the exam are organised and supervised by the Chamber of Advocates (officially translated as *Czech Bar Association*). According to Mrs. Wurstová, spokeswoman for the Czech Chamber of Advocates in Prague (*Česká Advokátní Komora*), future advocates have to pass more rigorous exams than other law professionals. In some cases the Czech Chamber of Advocates may recognise other professional examinations in the field of legal practice as adequate substitutes; this happened on a large scale shortly after the fall of Communism in 1989, when many judges and university professors left their – relatively – poorly paid jobs to move to the more lucrative job of a lawyer. Having passed the Advocate Examination, it is necessary to register as a member of the Chamber of Advocates (the members of the examination commission are nominated by the Minister of Justice). There the future lawyer has to take an oath before the Chairman of the Chamber of Lawyers.¹ After payment of a fee (no more than 3,000 Czech crowns) the Chamber will issue the candidate lawyer a certificate of registration on the List of Advocates. A lawyer may then start practising. The Chamber of Advocates is an independent professional organisation and a legal entity. All lawyers have the right to take part in the *sněm*, the highest organ of the Chamber.

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Foreign lawyers may register after having passed a recognition examination (*uznávací zkouška*), but are not allowed to practise Czech law unless they graduate from a Czech University. They may only practise the law of their own country and international law (this is a new provision in the 1996 law, this restriction was not mentioned previously). The recognition examination is taken in the area of regulations governing the provision of legal services, the fundamentals of Czech Constitutional Law and the fundamentals of Czech Private Law.

Lawyers candidates who graduated from a Slovak University (Bratislava or Košice) before the Czechoslovakian Republic split are allowed to practise their profession in the Czech Republic. If they graduated after the split, this question has to be resolved individually, taking into account the transitional character of the situation and agreements between the Slovak and the Czech Republic about the recognition and equality of educational degrees (Schelleová 1997).

The number of lawyers in the Czech Republic grew rapidly after the Velvet Revolution. One of the reasons is the profitability of working in that sector; even a *koncipient* earns 15,000 – 17,000 crowns a month, and *koncipienti* working for foreign firms may earn up to 30,000 crowns a month. In comparison a university lecturer has a starting monthly salary of 10,000-15,000 crowns (before taxes), while a teacher with the title of Professor earns up to 25,000 crowns (interview with Olmrová-Nykodymová).

Table 14.5 Number of advocates and candidates registered with the Chamber of Advocates

| | 1990 | 1991 | 1992 | 1993 | 1994 | 1996 | 1997 | 1998 |
|--------------------------------------|------|-------|-------|-------|-------|-------|-------|-------|
| Total advocates | 762 | 1,002 | 1,440 | 2,299 | 3,044 | 6,093 | 6,299 | 6,542 |
| Removed from the register | * | * | * | * | * | 151 | 60 | 77 |
| Foreign lawyers newly inscribed | * | * | * | * | * | 0 | 96 | 29 |
| Candidates (<i>koncipienti</i>) | 117 | | | | 530 | 945 | 1,316 | 1,548 |

Source: Czech Chamber of Advocates (Additional data: From 1/7/90 to 28/2/94, 2,364 people applied for registration, 2,282 were accepted, 82 were refused and in that same period 86 were removed from the registration list).

The national Chamber of Advocates also functions as a disciplinary body (part of its structure is the independent disciplinary committee) and can remove people from the register if they contradict the legal ethics of the profession. There are about 500 cases a year involved a breach of professional practice norms (often in the field of advertising, which is very restricted). In disciplinary proceedings the Ministry of Justice may act as a disciplinary prosecutor, implying that the executive power has some supervision over the activities of the advocacy. In contrast to the former law on advocacy, the 1996 law asks the Chamber to give the Ministry insight into all professional regulations accepted by the organs of the Chamber in order to be able to control their legality. The Ministry may ask an administrative court for a revision (according to civil law proceedings) of the regulations if it has any doubts about their legality. Similarly the Ministry has the right to ask for the removal of a lawyer from registration or for suspension of his professional practice.

The Czech Chamber of Advocates is an Observer member of the CCBE (Council of Bars and Law Societies of the European Community, located in Brussels), a status it shares with, among others, Austria, Switzerland, Finland, Norway, Sweden, Cyprus, Turkey, and the Slovak Republic. The Code of Conduct of the CCBE is part of the statutes of the Czech Chamber of Advocates. Attorney's fees are regulated by the 4 June 1996 decree of the Ministry of Justice on Attorneys' Fees and Compensation for the Provision of Legal Services. Lawyers may work with contractual fees (hourly fees) or with an estimated total fee. Non-contractual fees are defined by the aforementioned Decree of the Ministry of Justice.

14.3.2 LEGAL CONSULTANTS

Legal consultants or employed lawyers (*komerční právník*) who had worked in collective enterprises under Communism achieved a status equal to advocates under the Act on the Legal Profession 85/1996 Sb., effective on 1 July 1996. The Act says (Section 2):

(1) Legal services may be provided only by advocates and only on the terms and conditions and in the manner stipulated by this Act. (2) The provisions under paragraph (1) do not affect the authorisation of a) [...] and b) employees of a legal or natural person or a co-operative member to provide legal services to a person with whom they have a labour contract or similar relationship as long as the provision of legal services is one of the obligations under said relationship.

14.3.3 PUBLIC NOTARIES

To become a notary (*notář*) one must be a Czech citizen, have a full law degree from a Czech law faculty, be of solid reputation (i.e. without a criminal record), have at least five years of practical work at a notary's office and have passed the Notary Examination. After the Examination the Chamber of Notaries (*Notářská komora České Republiky*) will put forward the future notary to the Minister of Justice, who nominates the notary.

Since the number of notaries is set by the Ministry of Justice (*numerus clausus*), one must wait until there is a vacancy (a competition (*konkurz*) is announced) and then one may apply. The nomination is thus linked to a specific notary office. If a notary wants to be placed in a different notary office, he must again apply for the vacancy and pass the competition. After nomination the future notary must be sworn in, order his personal notary stamp and take out indemnity insurance. Before becoming a notary one works as a *notářský koncipient* or as a *notářský kandidát* (the latter after having worked for at least three years at a notary). Notary offices are connected to the territory of the district courts (*okresní soud*). In the Czech Republic there are eight Notary Chambers, organised according to the territorial division of the regions (*kraje*). The Czech Chamber of Notaries is a member of the UINL and notary fees are regulated by the Ministry of Justice.

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Table 14.6 Number of notaries

| 1980 | 1990 | 1995 | 1998 |
|------|------|------|-----------|
| * | * | * | circa 430 |

Source: Czech Chamber of Notaries
(N.B.: the counting is based on their list of addresses of registered notaries.)

14.4 ACCESS TO LAW

14.4.1 LEGAL AID

In criminal cases legal representation in court is compulsory. If the accused cannot pay a lawyer, the judge has to appoint a lawyer *ex officio*. In civil and administrative procedures procedural law, a judge is allowed but not obliged to appoint a lawyer. The client has to provide evidence for a means and a merits test. As the

current standards are handled very restrictively, many lawyers suggest that a complaint at the Human Rights Court of the European Council might be successful (interview with Wurstová). Amendments to the civil procedure are pending.

The Czech Chamber of Advocates is very active in the field of legal aid; they participated in the preparation of the Draft Bill of the Legal Aid Act and its Payment by the State and on the Amendment of Certain Laws (Legal Aid Act), since they see it as the task of the State to provide legal aid, and not as something to be left to NGOs and legal aid offices (the main argument being that legal counsel, in contrast to lawyers, are not obliged to have indemnity insurance). This Act should become effective on 1 January 2001, but financing is a problem. The main concerns of the Ministry (interview with Ms. Cvrčková) are that the institute of free legal aid might be abused by lawyers and their clients, and would lead to a disproportionate load on the state budget. Moreover, there is the threat of unnecessarily prolonged judicial proceedings through the creation of a prior proceeding with decisions to be taken on admission to legal aid, appointment of a lawyer, eventual change of lawyers and so forth.

The Chamber of Advocates is considering the possibility of administering a fund as a resource for free legal aid. The plan is to give the Chamber the task of providing legal aid on the basis of a lump sum paid by the Ministry. In co-operation with the Dutch Hugo Grotius Foundation, the Chamber of Advocates organised a conference on Legal Aid in September 1999, which was attended by some parliamentarians.

The Czech Chamber of Advocates provides free legal advice once a week for half a day, in Prague as well as in other cities, such as Ostrava, Brno, Ústí n/L, České Budějovice, Plzeň. The public is becoming more and more informed about this possibility, though it exists mainly in Prague. It is not yet a widely known practice. The Chamber of Advocates (not the lawyer) may take an ad hoc decision to give someone free legal aid, though it is the exception rather than the rule. Currently free legal aid cases provided by the Chamber of Advocates average 600 a year (interview with Wurstová).

Table 14.7 Legal aid cases

| | 1980 | 1990 | 1995 |
|--|--------------|--------------|--------------|
| Number of legal aid cases during the year | 2,294 | 7,211 | 2,424 |
| leading to a procedure in court/ not leading to procedure | 2,704 220 | 6,496 715 | 2,452 272 |
| By matter | | | |
| civil | 1,530 | 4,911 | 1,816 |
| criminal | 764 | 2,300 | 908 |

Source: Czech Ministry of Justice

14.4.2 NON-GOVERNMENTAL ORGANISATIONS (NGOS)

In the communist era any legally recognised socio-political and voluntary work was incorporated into the umbrella organisation of the National Front (*Národní Fronta*). National Front organisations included hobby, sports and cultural groups. They were structured according to the principles of ‘democratic centralism’ with a ‘politically reliable’ leader at the top and were funded out of the state budget. The activities of opposition groups such as Charta 77, the Committee to Defend the Unjustly Prosecuted (*VONS*) and the Czech Helsinki Citizen’s Assembly had, of course, no chance of acceptance by the National Front, and so were harassed as illegal. They supported people and prisoners who had been persecuted politically and published pamphlets and reports on the defence of human rights, civic freedoms, social questions and minority issues illegally and on a small scale. By building up networks of people after the ‘glasnost-era’, they were able to develop activities in the spheres of protection of the environment, education, science, culture and publishing. Many of today’s organisations in the field of legal aid, defence of human rights, defending ethnic minorities and engaging in environmental issues are carried forward by the same activists as the reform initiatives. Often they use their reform knowledge of networking and small-scale activism. Even though it is often lamented that many of these initiatives are too dependent on foreign financial support, there is quite a ‘human and mental potential’ to be activated among the Czechs (see Frič 1998: 43).

A very important development is the continuous pressure and demand from below for a dialogue with the government on the part of the NGOs and non-profit organisations. They want to be taken seriously and considered as future partners for the local government and local state administration. It should be noted that one of the main complaints of many NGOs and non-profit organisations is the denial by the Klaus government to see the capacity and potential available in this sector and to pay any attention to such organisations. The introduction of legal regulations (including tax relief for gifts and sponsorship) could be an important step to a wider range in financial support for this sector.

According to representatives of government political parties, preventing the misuse of non-profit organisations for dishonest purposes was of prime importance as far as the rules for their operation are concerned. The government politicians’ clamour for clearer laws was transformed into a requirement to pass perfect laws, i.e. laws that could not be abused. However, this effort to achieve normative perfection slowed the process of development of the non-profit sector rather than supporting it. (Frič 1999: 8)

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The main actors concerned with building the institutions of a civil society are financed by foundations. *NROS* (Civil Society Development Foundation, Prague) and the Open Society Institute (Soros Foundation) are quite visible with their publications and teaching programmes. The *NROS*, established in 1993 and partly funded by a PHARE programme of the European Union, supports civil associations, foundations and charitable religious organisations operating in the field of health and social policy, the environment, the protection of human rights and minorities. It is active in the development of the non-profit sector as a whole through publishing studies and reports. It supports the networking and professional competence of activists.

Cooperation is considered an important factor in the empowerment of the NGOs, which still form a very fragmented sector. The Information Centre for Foundations (*ICN*) and *AGNES* play an important role in networking. Both are non-profit organisations based in the centre of Prague and are highly frequented by people looking for information on how to develop and manage their activities. The *ICN* has a well stocked library and database available to the public. (In 1998 the Information Department received 3,690 visitors and handled 5,629 telephone inquiries. This represents an increase of 47 per cent in personal visits and 12 per cent in telephone inquiries in 1997. Four regional *ICN* offices are operating actively in Olomouc, Hradec Králové, Strakonice and Český Krumlov (since 1997 and 1998) and are successfully co-operating with local public libraries. The *ICN* offers professional consultation with legal and accounting specialists; mostly about the law on foundations and foundation funds, founding procedures, bookkeeping, payroll and human resources administration and taxes, as well as courses on cooperation with businesses, state authorities and universities. A search through the *ICN* database yielded a list of 50 NGOs or non-profit organisations which explicitly mention the provision of legal aid and advice as one of their aims and activities. The list includes organisations for the ill or handicapped and for human rights (refugees, homosexuals), environmental movements, tenants, consumer organisations, children groups, religious and welfare groups, but this is not to say that it provides a complete overview (e.g., Citizens Advice Bureaus are not mentioned).

One of the most hopeful initiatives in building a civil society is the establishment of non-governmental information centres for citizens, created on the model of the British Citizens Advice Bureau. The pilot project started two years ago with the help of the British Know How Fund, aimed at a joint development together with Czech Funds such as *NROS* (though itself heavily sponsored by PHARE), and some local institutions (by providing office-rooms or office equipment for free or at a very low rent). The information databases were financed by the Ministry of Labour and Social Affairs. Furthermore, its right to exist is confirmed in a Law on Social

Intervention (according to this law the Citizens Advice Bureaus are considered to be a form of 'social service'), but this will only come into force in 2002. After the acceptance of this law every municipality with more than 20,000 inhabitants will be required to provide and finance citizens advice bureaus.

The idea of the project is supported by the Office of the President, the Ministry of Labour and Social Affairs, the Masaryk University in Brno, the Know How Fund, ICN, CHV and NROS. One of the co-founders is Petra Francová, an economist and sociologist (see interview in *Literární noviny*), previously active as a member of the ecological movement *Pražské matky* (Prague Mothers).

At present seven *Obcanské poradny* (Citizens Advice Bureaus) are active in the Czech Republic (in Brno, Decín, Havírov, Jihlava, Plzeň, Prague Southern City and Prague 1). The aim of the bureaus is to help citizens in difficult life situations. The bureaus offer free and impartial advice, but try not to influence clients' decision-making. They form a network, co-ordinated by the Co-ordination Centre in Prague. This centre is responsible for controlling the basic principles and guarantees the education of the future workers and the uniformity of working methods. It also takes decisions with regard to expansion and the setting up of new offices (the project will be evaluated and the expansion plans discussed before the end of 1999).

The main problems of clients of the *poradny* are about social security or welfare benefits, labour-contracts and labour-relations, housing, family or relational problems, legislation and human rights. As the Citizens Advice Bureaus look at the client's problem in context, they have an advantage over local authorities. The people working in the offices are mostly graduates or students in the social sciences and/or social legal science. The majority of the offices work with volunteers and two permanent or paid employees.

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In 1999, seven offices were active and they had 1,843 clients (21% male, 59% women), and they handled 3,453 queries and 2,821 consultations, with an average number of consultations per client of 1.5. In the first half of 1999 the category breakdown of the queries and consultations in question was: 18 per cent housing, 16 per cent family problems, 13 per cent labour relations, 11 per cent social benefits, 9 per cent property issues, 8 per cent other, 5 per cent insurance, 4 per cent financial problems, 4 per cent social aid, 2 per cent consumer questions, 1 per cent health care, 0 per cent educational problems (Rozhovor s Petrou Francovou 1999, and interview Stehlíková).

In comparison with Britain, where about 2,000 bureaus offer advice annually to 6 million clients, the Czech capacity is still very limited, but public interest in them is considerable. For the expansion competition in October, 40 candidates showed interest and 20 submitted a project proposal, but only a few will be admitted to the network as the co-ordinators are afraid of expanding too fast. Training and uni-

formity of working methods are high priorities in order to keep to the original concept.

There are other signs indicative of a great potential willingness amongst Czech citizens to participate in the building of a civil society: the manifesto of *IMPULS*, which was initiated by a number of groups, including one called *občanská společnost*, was signed by 3,000 people of all ages; they explicitly declared their willingness to use their professional skills for voluntary participation in civic activities.

14.5 COURTS, JUDGES AND CIVIL JUSTICE

14.5.1 JUDGES

Judges still struggle with the hangover of the communist days, when they were seen as representatives of the regime. In communist times politically disloyal judges could be dismissed, and they had to be elected at least four times during their careers. The Constitution of 1960 gave priority to party discipline over judicial independence. Since 1991 judges have been nominated for life so as to guarantee their independence from political pressure. (*Přisedící soudce*, associate judges are nominated for 4 years).

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Although the initiative has been taken to form the *soudcovská samospráva* (an autonomous judicial organ, which is to bear the name *Nejvyšší soudcovská rada*, Supreme Judicial Council), it has not yet come into existence. In July 1999 the law passed the first steps of the legislative process (interview with Vítová). The Council should take over some of the current tasks of the Ministry of Justice, such as decisions about promotions and transfers of judges and disciplinary measures, thus creating greater independence of the judiciary from the executive (Němeček 1999d). The judges strongly advocate a completely independent organ consisting solely of members of the judiciary – a view reinforced by the following events. In March 1999 Minister of Justice Motejl announced changes to five Regional Court Presidents, saying that there was a need for a new generation to take over. When he was President of the Supreme Court Motejl had severely criticised the power of the Minister to interfere in the functioning of judges, yet as soon as he was in office he was the first to use this power to that end. His actions were directed at judges who had been practising for more than eight years, and he argued that reforms should start promptly and that waiting for a change in the law would take too long. His successor as President of the Supreme Court protested against this and the President of the High Court in Prague, A. Mokry, tendered his resignation by way of protest (interviews with judges and Němeček 1999b).

Before 1989 there were about 1,500 judges in Czechoslovakia; nowadays their number has increased to around 2,500. But this number is still insufficient ac-

according to the judges, who struggle with an overload of work, old equipment, a lack of computers, a shortage of court clerks and other personnel and a growing caseload. This shortage of judges makes it a priority to strengthen the staff of judges: 390 of the 2,726 positions are unfilled (interviews with judges and Němeček 1999a).

Table 14.8 Number of judges

| | 1980 | 1990 | 1995 | 1998 |
|----------------------------|-------|-------|-------|------------------|
| Total | 1,326 | 1,430 | 2,178 | see text comment |
| of whom women | 628 | 798 | 1,362 | |
| District Courts | 1,000 | 1,051 | 1,373 | |
| Regional Courts | 326 | 379 | 507 | |
| Regional Commercial Courts | | | 139 | |
| High Courts | | | 113 | |
| Supreme Court | | | 46 | |

Source: Czech Ministry of Justice

Table 14.9 Other court staff

| 1980 | 1990 | 1995 | 1998 |
|-------|-------|------|------|
| 2,504 | 3,079 | NA | NA |

Source: Czech Ministry of Justice. (The figures for 1980 and 1990 include Slovakia)

The greatest shortage of judges and the biggest backlogs are in the Regional Courts of North and West Bohemia (IHF 1998). The figures for proceedings at district courts in criminal law in Northern Bohemian towns that took more than two years are: Teplice 51 per cent, Chomutov 38 per cent, Ústí nad Labem 31 per cent, Most 25 per cent, and Znojmo 25 per cent (Southern Moravia). The average is 14 per cent for the Czech Republic as a whole, although some courts never have such long proceedings. The average for Southern Bohemia, for example, is 2.47 per cent (1999). The problem in Northern Bohemia may partly be explained by the fact that the region is a very unpopular place to live because of the pollution and severely affected environment (from intensive coal and uranium mining). Extra bonuses were already paid to certain professions in communist times (teachers, doctors, etc.) to encourage people to live there, because of the shortages of skilled people.

One may become a judge after graduation from a law faculty and three years of practice as a *justiční čekatel* followed by a state examination. This term of three years may be shortened to two years in exceptional cases (since there is a shortage of judges this actually happens quite often; interview with Sarlinger). After this period of practice, in which the *justiční čekatel* is employed at a Regional Court, he or she has to pass the judge examination. During his or her apprenticeship a *justiční čekatel* is on the court's payroll. At the beginning of his apprenticeship he/she has to take the oath before a judge. A judge must be at least 25 years old and have no criminal record. A judge usually begins at a District Court. Transfer to a higher court is arranged by the Minister of Justice, but only with the consent of

the judge. Transfer to a lower or another court of the same level is also only possible with the consent of the judge.

Judges cannot be withdrawn or moved from one court to another (the principle of non-transferability), except in disciplinary cases, which are part of the measures taken to guarantee the independence of the judiciary. Other measures taken are the separation of legislative, executive and legal powers, codified in the Constitution. The independence of courts and judges is expressed in Articles 81 and 82, Part 1 of the Constitution. But the law does not provide any regulations for the promotion of judges. In order to guarantee the independence of the judicial authority a judge may not have any other duty or paid activity, or fulfil any other function in public office. A judge may administer only his own possessions and perform scientific, educational, literary, publicity or artistic activities if this does not threaten trust in the impartiality and independence of the judiciary.

Judges are appointed by the government on the proposal of the Minister of Justice. Nomination proposals for the Presidents of Superior, Regional and District Courts are prepared by the Minister of Justice. The presidents and deputies of the Superior, Regional and District Courts are appointed by the Minister of Justice from the judges of all the Czech Republic's courts. Presidents of the senates of regional and district courts are appointed by the president of that same court.

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The presidents of the collegium and senate of the Supreme Court and Superior Courts are nominated from the judges of that same court, proposed by Government but appointed by the President of the Republic. This constitutional regulation, however, has recently (autumn 1999) been challenged: the governing political parties, the CSSD (Social Democrats) and ODS (Civic Democrats), approved an amendment to the Constitution which will take this responsibility away from the President of the State. Approval of the amendments by both houses of Parliament was still pending at the end of 1999.

Judges' salaries are statutorily fixed on a scale system (*tarifní platy*). A new judge can earn 27,000 Czech crowns a month and judges holding the highest positions (Constitutional Court and Supreme Court) up to 80,000 crowns (interviews with Czech judges Vítová and Wagnerová). With regard to the question of the independence of the judiciary and their salaries, the Czech Helsinki Committee makes an interesting remark in its 1999 report: "There is no constitutional standard which could impose a ban on the reduction of the salary of a judge for his term of office as one of the special guarantees of the independence of judges" (p. 108). In other words, if the Minister of Justice decides to lower the salary of a judge by way of a disciplinary measure, there is no way for the judge to complain.

After the Velvet Revolution a Union of Judges was created with its seat in Prague, though it has no power and is only joined by judges voluntarily. For the time being it is a voice in the debate about the judiciary. For the past three years they have

published a monthly journal, called Judge (*Soudce*), an important independent source for the judges on issues of relevance to their profession (interview with Vítová).

14.5.2 THE COURTS

The court system (based on Law no. 335, 1991 plus some amendments) includes the following types of courts:

- 85 District Courts (*okresní soud*);
- Regional Courts (*krajský soud*);
- 3 Regional Commercial Courts (*obchodní krajský soud*) in Prague, Brno, and Ostrava;
- 3 Arbitration Courts (permanent) (*arbitrážní soud*);
- 2 High or Superior Courts (*Vyšší soud*) one in Prague (continuation of the former Supreme Court of the Czechoslovak Federation) and one in Olomouc (the latter since 1996);
- 1 Supreme Court (*Nejvyšší soud*); in Brno (revision court dealing with appeals on their legal merits only; successor of the former Federal Supreme Court, which had its seat in Prague);
- 1 Constitutional Court (*Ústavní soud*) established in July 1993 and seated in Brno.

In addition there are 3 special permanent Arbitration Courts: the Stock Exchange Arbitration Court, the Arbitration Court of the Czech Economic Chamber and the Czech Agricultural Chamber. The permanent arbitration courts can hear property disputes except for disputes arising from the enforcement of a judgement and disputes due to bankruptcy proceedings which would otherwise be subject to the competence of the judicial courts. The parties must sign a written arbitration agreement.

Military courts were integrated into the general court system at the end of 1993. Administrative and commercial courts are part of the general court system. (This is also noticeable from the fact that the Czech Ministry of Justice does not keep separate statistics for the administrative proceedings; they are mentioned as a part of the agenda of civil law.) A Supreme Administrative Court has not yet been established, although its foundation has been anchored in the Constitution (Art. 91). Civil courts handle cases of civil law, family law, labour law, and cooperation law, as well as commercial questions, including company and economic relations, as long as they do not by law fall under the competence of other institutions.

The situation of the courts in Prague is as follows. The Prague City Court (*Městský soud Praha*) has the competence of a Regional Court and the 10 local or Circuit Courts (*obvodní soudy*) for the 10 subdivisions of Prague have the competence of District Courts. They are especially important in administrative law remedies. The Regional Court in Prague (*Krajský soud Praha*) is the Regional Court for the Central Bohemian Region. For the city of Brno, the Brno City Court functions as a Dis-

district Court, while there is also a Regional Court. Some district and regional courts have branches. The territorial competence of the District Courts is in principle identical to the administrative division of the districts (law of 1960). The 3 Regional Commercial Courts (*obchodní krajské soudy*) are only established in Prague, Brno and Ostrava, as these are the places with a high concentration of commercial litigation.

The judiciary is based on a three-tier system of remedies. The district courts are first instance and exercise jurisdiction in the majority of civil and criminal matters. At the same time they also perform an administrative justice function through the investigation of decisions on offences and their decisions on cases determined by the special law. As a rule, decisions in civil courts are taken by a single judge (*samosoudce*) and two lay people act as referees. In civil as well as in criminal courts decisions are taken by a single judge in the first instance (*samosoudce*), and in exceptional cases by a *senát* and always by a bench of three judges in higher instances (*senát*) (Schelleová, 1997).

The regional courts are second-instance courts in ordinary remedies against decisions of the district courts. At the same time, they are first-instance courts in criminal proceedings regarding extraordinarily serious offences (carrying a sentence of at least five years imprisonment); in the sphere of civil law they exercise jurisdiction in certain legally complicated and grave areas of civil litigation, e.g. protection of personality, protection against the publication of information representing the abuse of freedom of expression, speech and the press, causes related to copyright and the majority of causes resulting from commercial relations, including bankruptcy and failure. In addition the regional courts decide on complaints concerning certain authoritative decisions taken by state authorities and decide legal remedies against illegitimate decisions by administrative bodies, namely in cases regarding health insurance and old-age pension schemes.

High Courts are, on the one hand, Courts of Appeal in cases where a decision was taken by the Regional Courts as courts of first instance and, on the other, courts of judicial review of decisions taken by central administrative authorities (cases of administrative justice; Motejl 1995:203).

Table 14.10 Caseload of Civil Courts (excl. divorce)

| | 1980 | 1990 | 1995 | 1998 |
|------------------------------|---------|---------|---------|---------|
| All cases | 109,067 | 148,175 | 202,232 | 234,829 |
| Of which labour cases | 19.5% | 12.7% | 8.3% | 5.3% |
| Of which pension regulations | 3.6% | 3.2% | 4.2% | 4.7% |

Source: Czech Ministry of Justice

Table 14.11 Caseload in Civil Courts (divorce)

| 1980 | 1990 | 1995 | 1998 |
|--------|--------|--------|--------|
| 36,720 | 41,639 | 38,766 | 39,616 |

Source: Czech Ministry of Justice

In civil law cases (citizen against citizen) the proceedings can easily take more than three years: for example in Ústí nad Labem 31 per cent of cases, in Nymburk 26 and in Teplice 22 per cent (the average for the Czech Republic as a whole is 10%) (Němeček 1999a). In 1999 there was a slight reduction in the backlog: Ústí nad Labem: 25.21 per cent, Teplice 14.11 per cent, Chomutov 15.25 per cent. Even so, many cases take longer than five years (the statistics on Ústí nad Labem still show 12.55 % there). But the average in the Czech Republic as a whole for cases taking longer than five years is 3.25 per cent. The very fact that statistics are kept for 'more than five years' speaks for itself (Ministry of Justice, 1999).

These factors create a lack of faith in the justice system among citizens. The relationship between the judges and the Ministry is also poor: in 1997 the Ministry accused the judges of functioning poorly and wanted to create disciplinary measures and prescribe how many cases a month a judge should handle (this proposal was withdrawn; IHC Annual report 1998); the judges complain that the Ministry does not provide them with enough personnel, up-to-date equipment, et cetera. (interviews with Judge Summer 1999). The Regional Court in Prague 4 has one computer for four or five judges and even the Supreme Court is lacking in such technology. A PHARE 99 Project aimed at 'strengthening the functioning of judges by perfecting the technical equipment' has focused on this problem.

New changes concerning judicial proceedings are being prepared by a team of authors and judges under the guidance of the current Minister of Justice, Judr. Otakar Motejl (formerly a lawyer and after the Velvet Revolution the first presiding judge of the Supreme Court); these changes should free the judges from a great deal of paperwork. One of the side-effects would be a reduction in the actual long pre-trial detention periods. But as the EU said of its report on 1998 "It does not take account of promises or what is supposed to be in the pipeline" (Chris Johnstone 1999). The main problem with the Czech reforms of the judiciary is slackness and the slow speed with which they are implemented.

A problem for all judges, especially young ones, is the continuous load of new legislation and amendments, which renders the creation of a useful jurisprudence extremely difficult. Judges consequently have very few precedents to refer to. This increases the tendency to disregard jurisprudence and to uphold the letter of the law instead. The basis of this tradition of legal positivism is already laid at the universities, where the analysis of precedents is rare. This is even more true of the relationship between lower courts and the Constitutional Court. Judges very often

ignore rulings of the ‘constitutional watchdog’ (interviews with Vítová and Wagnerová).

14.5.3 BAILIFFS

A bill has been drawn up concerning the privatisation of the bailiff’s profession. Up to now, money collectors (*vykonavatel*) have been state functionaries connected to a court. The bailiff system is often called the weak point or Achilles’ heel of the judicial system. No more than a third of debts are collected by the bailiffs, whereas in a situation with private bailiffs at least two-thirds of the debts could be collected – as is the case nowadays in Slovakia (Němeček 1999d and Ministry of Justice 1999). In a privatised system, the bailiff could earn a percentage of the money to be collected, although there would need to be an obligation to take on minor cases as well. The Ministry of Justice also stated that “whereas before 1989 enforcement usually took the form of deductions from pay and other methods were exceptional and of marginal importance, the need arose after 1989 to apply the execution order to other incomes or property of the debtor” (1999: 22).

The problem of claims not being collected in combination with the huge delay or slow proceedings at the courts makes it often impossible to locate the debtors (for example a bankrupt firm) in time; often the subject leaves the coop the moment the bailiff knocks at the door. Privatisation might also lead to the quicker and more efficient completion of the execution procedure.

Table 14.12 illustrates the difficulties with debt collection. It shows very clearly that the highest national percentage of pending cases in the category ‘waiting up to three years’ is in Prague. Next in line, with a problematic backlog, is the region of Central Bohemia (15.29% of pending cases waiting between one and three years).

Table 14.12 Backlog of court proceedings concerning protests against payment orders

| | caseload (1999) | handled (1999) | not handled (1999) | not handled/ from 0.5-1 year | not handled/ from 1-3 year |
|-----------------------|----------------------------|---------------------------|-------------------------------|---|---------------------------------------|
| Prague | 72,063 | 89,022 | 156,749 | 1,717 (=1.1%) | 140,422 (=89.58%) |
| Czech Republic(total) | 260,262 | 272,781 | 186,098 | 6,717 (=3,61%) | 141,396 (=75,98%) |

Source: Czech Ministry of Justice, Statistical Overview 1999 (p. 68).

14.6 CRIMINAL JUSTICE

14.6.1 POLICE

In 1998, 585 local police departments were active in the territory of the Czech Republic (divided into three categories) in addition to 79 police stations, 20 more

than the previous year. The police registered 149,899 offences against public order and 135,600 property offences. Alcohol and drug cases amounted to 20,628 cases. 35,533 persons were placed in custody at the request of prosecutors, judges or customs authorities (Ministry of Interior).

The police arrested 136,889 persons, 36,555 for 'refusal or inability to show an ID'. The relatively high number of arrests might be interpreted in the context of the problems encountered by many Romanians in receiving their Czech citizenship (and thus a valid ID) after the split-up of the Republic in 1993. They are an easy target for the police, who still have the tradition of checking IDs as a hangover from communist times.

Table 14.13 Number of *porádková policie* (ordinary police officers)

| 1980 | 1990 | 1995 | 1998 |
|------|------|------|--------|
| | | | 14,827 |

Source: Czech Ministry of Interior

On the reverse side of the coin are criminal offences committed by policemen. The Ministry of Justice states (on the Internet):

A reality we do not want to hide from the public. On the contrary, the management of the Police of the Czech Republic will inform the public in detail as much as possible about developments in this field.

Of 193 (detected) criminal offences, abuse of power is the highest (84 cases), followed by traffic violations (17). The majority of acts are committed by ordinary policemen (49.4%). Young policemen are more involved than older ones (42.9% of the under-30 age group). Police President J. Kolár is taking these incidents very seriously, as the police force is aware of the long-term nature of this phenomenon. (Ministry of Interior: figures for the first half year of 1999).

In recent years, police publicity has focussed mainly on the fight against corruption and organised crime. In reality, however, they are preoccupied with the rising toll of ordinary delinquency. In *Lidové Noviny* of 20 May 1999 a front page article focused on the crime statistics in the Czech Republic, announcing that "crime in the Czech Republic has reached a record high." It based its figures on the Ministry of Interior. Homicide and robbery had the highest growth rate. In 1998 313 homicides were registered, out of which 276 were solved.

14.6.2 PUBLIC PROSECUTORS

The administrative division coincides with the territorial division of court competencies, that is the territorial division of the Czech Republic into Districts and Regions; there are eight Regional Public Prosecutor Offices (*okresní státní zastupitelství*), and 86 District and Local Public Prosecutor Offices. The Highest or

Superior Public Prosecutor Offices are located respectively in Prague (for Bohemia) and Olomouc (for Moravia). The Supreme Public Prosecutor's Office has its seat in Brno.²

Table 14.14 Number of state prosecutors

| 1980 | 1990 | 1995 | 1998 |
|------|------|-----------------------------|------|
| NA | NA | 843 (of which 467 women) | 860 |

Sources: Czech Ministry of Justice and Council of Europe Report (the Ministry of Justice has no figures for the years before 1994).

State prosecutors (*státní zastupitel* or *prokurátor*) are appointed by the Ministry of Justice; they are part of the executive authority, but are independent, bound solely by law. A state prosecutor is nominated by the Minister of Justice for an unlimited period having been proposed by the Highest State Prosecutor. The promotion of state prosecutors is not laid down by law. Salaries are set by the Ministry (*tarifní platy*). State prosecutors act mainly in cases of criminal law and in certain limited cases of civil law (in proceedings already started and in cases of legal capacity, validation of death and in cases of entry in the Commercial Register). They are not allowed to act in cases of administrative law.

In 1994, a transformation of the organs of the public prosecutors took place and together with the intended reforms in the judiciary, it was ruled that the profession of public prosecutor should undergo some changes.

An amendment has been proposed on procedural rules – in this context on the criminal proceedings code – which as well as strengthening the position of the state prosecutor will promote his efficiency.

The Supreme State Prosecutor was recently (1998) replaced on the initiative of Minister of Justice Motejl (Němeček 1999b).

Table 14.15 Caseload of the criminal courts

| | 1980 | 1990 | 1995 | 1996 |
|------------------------|------------------|-----------------|-------------------|-------------------|
| Prosecuted persons * | 66,702 | 55,317 | 108,680 | 109,204 |
| Convicted persons | 60,861 | 18,871 | 54,957 | 57,947 |
| Among which: juveniles | 4,121 (=6.8%) | 2,256 (=12%) | 6,192 (=11.3%) | 6,239 (=10.8%) |
| Among which: women | 7,927 (=13%) | 1,866 (9.9%) | 4,588 (=8.3%) | 4,696 (=8.3%) |

* Number of persons prosecuted under section 160 of the Criminal Code.

Source: Czech Ministry of Justice on the basis of statistical data from state attorneys and the courts.

A comparison between prosecutions and convictions illustrates the different patterns of selection followed by the different regimes. In 1980 over 90 per cent of all suspects brought to trial were convicted, but in later years half of all prosecution cases ended without a judicial verdict. This may indicate the decreasing chance of

clearance by the police (especially due to a rise in property crime), but it might also be indicative of the reluctance of the authorities in communist times to disclose fully the number of investigations which were not followed by judicial procedure. In 1990, in any case, the low registration figures of both the police and the prosecution are clearly a consequence of the revolutionary turmoil. Police as well as judicial data from those days indicates nothing but the absence of effective bureaucratic control during the time of the revolution.

Table 14.16 Appeals in criminal law cases

| | 1980 | 1990 | 1995 | 1998 |
|--|--------|--------|--------|--------|
| First instance cases decided by District courts | 70,908 | 37,456 | 71,227 | 81,847 |
| Appeals lodged at the Regional Courts (in persons) | 14,320 | 5,347 | 11,420 | 14,106 |

Source: Czech Ministry of Justice: Statistical Overview (NB From 1981 the result of the appeal agenda is followed in persons)

Table 14.17 Appeals in criminal cases at the High Courts

| | 1981 (1980 NA) | 1990 | 1995 | 1998 |
|---------------------------------|-------------------|------|-------|-------|
| Persons before Regional Courts | 644 | 431 | 2,477 | 2,759 |
| Decided by appeal at High Court | 295 | 240 | 949 | 1471 |

Source: Czech Ministry of Justice Statistical Overview
(N.B. Until 1992: Supreme Court of Czech Republic, from 1993 High Court in Prague, from 1996 High Courts in Prague and Olomouc)

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Table 14.18 Number of homicide cases (intentional)

| | 1980 | 1990 | 1995 | 1998 |
|--|------|------|------|------|
| Sentenced for homicide (persons para. 219) | 67 | 73 | 134 | 188 |

Source: Ministry of Justice

Table 14.19 Detention caseload at district and regional courts

| | 1980 | 1990 | 1995 | 1998 |
|--|--------|-------|--------|--------|
| District court caseload | 11,971 | 5,893 | 10,047 | 11,046 |
| handled | 11,902 | 5,439 | 9,978 | 11,235 |
| not handled before 31.12 | 1,605 | 1,731 | 3,171 | 3,314 |
| Regional court first instance caseload | 355 | 316 | 1,291 | 909 |
| handled | 356 | 327 | 1,209 | 1,006 |
| not handled before 31.12 | 173 | 137 | 960 | 618 |

Source: Czech Ministry of Justice Statistical Overview 1999 (p.203)

Another main problem faced by the criminal courts is that of backlogs. The sheer volume of cases waiting for their day in court in 1999 may demonstrate the situation.

Table 14.20 Proceedings and backlogs at criminal courts by district (%)

| | 1998 | 1999 |
|------------------------------|------|-------|
| (Northern Bohemia) Teplice | 51 | 52.17 |
| Chomutov | 38 | 38.10 |
| Ústí nad Labem | 31 | 30.06 |
| Most | 25 | 30.01 |
| Southern Moravia Znojmo | 25 | 14.35 |
| Cheb | NA | 24.79 |
| Plzeň-town | NA | 23.21 |
| Western Bohemia Karlovy Vary | NA | 20.55 |
| Sokolov | NA | 20.56 |

Source: Czech Ministry of Justice: Statistical Overview 1999

14.6.3 PRISONS AND PRISONERS

The Czech Republic has 33 prisons with a total capacity of 19,356. In October 1998 there were 22,067 inmates. In terms of prison service, the Ministry of Justice's budget covers the expenditure of the General Management of the Czech Republic's Prison Service, 33 sentence and remand prisons of all types, the Training Institute for the Czech Prison Service Officers and four recreational facilities partially funded by the Ministry budget.

Table 14.21 Budget connected to the Prison Service System: (in thousands of Crowns)

| | 1995 (real) | 1998 (budget) |
|---------------------------------------|-------------|---------------|
| Revenue (prison work) | 71,389 | 147,234 |
| Expenses related to the prison system | 3,992,417 | 4,573,846 |

Source: Czech Ministry of Justice

The Czech Helsinki Committee has a separate division which concentrates on prisoners' human rights. One of the main criticisms of the current Czech Prison system is the chronically overcrowded prisons, where there is an average of 116 per cent occupation of space; the norm is 3.5 square metres per person. This is partly a result of old legislation where many petty crimes and smaller misdemeanours are punished with relatively high sentences and long pre-detention periods of up to eight months. Other major criticisms concern the lack of work or other occupation for the prisoners (nothing to do, no money, no recreation), the lack of any external control organ over the functioning of the Prison Service System, the almost complete lack of alternative punishments (the existing options are badly organised), absence of possibilities to treat alcohol or drug habits under medical guidance, lack of any forms of house arrest, bad food, insufficient medical and psychological care and the lack of social workers. In addition many members of staff are former policemen and very few have special training in psychology or social work (interview with Zamboj).

To cite some examples noted in the CHC Report of 1998: "Even in prisons housing long-term prisoners (such as the Mírov prison), each cell accommodates over ten

inmates, thus totally ruling out any privacy.” In this connection it should be mentioned that the number of suicides in prison in 1996 was 16 (100% more than in 1995). In 1996, not including suicide cases, another 16 people died. An average of 8,000 persons are currently detained pending trial (CHC 1998:60).

Representatives of the Foundation Key (*Nadace Klíč*) continue to observe that nearly one-third of the approximately 22,000 inmates are young people under the age of 24 (CHC 1998:65). The Foundation strives for a better system of alternative punishments.

The Helsinki Committee has a co-operation agreement with the Prison Service. One of the current campaigns launched by the Citizenship Centre section of the CHC is to provide social workers in prisons with the right information about the new regulations concerning the acquisition of Czech citizenship (and thus an ID) for people in detention. This is to help them with the paperwork required for the acquisition of citizenship and hence a legal basis for a new life upon release from prison. Many Romanies in prison still do not have Czech citizenship and thus lack the papers to start a new life as a citizen in the Czech Republic. Most Romanies in the Czech Republic are considered to be Slovak (even if they were born already in the Czech part of the country), because their parents were both Slovak. The definition Slovak or Czech was an ethnic identity with separate registry (*‘národnost’*), while state citizenship (*státní příslusnost*) was ‘Czechoslovak’ before 1989. However, in the former situation the *‘národnost’* did not play a very important role because the place of permanent residence was the decisive factor in most questions of housing, education, the right to vote and social welfare, et cetera. The issue of the acquisition of Czech citizenship after the split of the Republic is a complicated matter and cannot be explained in detail here. The original law contained some barriers which were internationally discussed and criticised (such as the requirement of a clean criminal record for the five years before the split-up. This requirement was finally abolished in an amendment to the Law on Citizenship (law no. 40/1993 Coll.) in April 1996. The absurdity of this condition is illustrated by the following example: an applicant who was sentenced to life imprisonment for a murder six years prior to the adoption of the law would be able to apply for Czech citizenship, while an applicant who was convicted of an offence two years before the disintegration of the federation would not (Šiklová 1998). However, even after the latest simplifications (from autumn 1999 and the new possibility to apply for dual citizenship) the process of acquiring Czech citizenship demands skill in handling the bureaucracy – a skill most Romanies do not possess. This, combined with the often reluctant and unwilling attitude of the people in the state administration, their own lack of correct current information, and the lack of state-sponsored informative brochures with clear prescriptions, decreases the chances of bringing the paperwork to an effective conclusion. The help of such NGOs as the Citizenship Centre of the Czech Helsinki Committee in this matter is vital.

Although this is not the place to expound upon this issue, it should be mentioned that this problem also exists for (Slovak or Romani) children in Czech foster

homes, who very often do not have their citizenship sorted out and, due to a lack of parental presence, do not have any identity card or registered permanent residence – a problem that comes to the fore the moment they leave the foster homes (interview Zamboj and Czech Helsinki Annual Report 1999).

14.7 ADMINISTRATIVE REVIEW

The Czech Republic is (still) a centralised state; a reform bill establishing ‘self-governing’ regions with elected assemblies as envisaged in the Constitution was recently passed after years of heated debate. The self-government of municipalities is also guaranteed by the Constitution but still suffers from the multitude of small local units (there are 6,275 municipalities or *obce*, whereas for example Hungary, with a more or less the same population, has 3,200 municipalities).³ A process of merging small municipalities into bigger administrative units is underway. Local administration is supervised by 76 State District Offices (*Okresní Úřady*; local branches of the central state administration) but local autonomy is guaranteed by the Constitution. This occasionally leads to controversial situations such as the widely scandalised dispute concerning the North Bohemian town of Ústí /nad Labem, where the local mayor had a ceramic wall erected in order to separate a Romani street from other (white or Czech) people. The District office (*okresní urad*) declared the building permit invalid at the end of August 1999. In June the building had already been stopped by government intervention. Nevertheless, after an unsuccessful attempt to find a compromise, the construction of the wall was started in October 1999 at 4 or 5 a.m. under police protection. Numerous protests were organised on the spot, and the wall was demolished again by Romani activists as fast as it was built. In October the case was discussed at a high level in Parliament. Petr Uhl, the Governmental Commissioner for Human Rights (an office institutionalised after the elections of 1998), went to the spot several times in an effort to find a solution. But the last word has yet to be spoken. After October 1999, two political representatives from the Union of Freedom (*Unie svobody*) thought of lodging the case with the Constitutional Court. Marta Miklušáková (Human Rights Commission of the Czech Republic) also stated that only a court could decide about the legality of the wall. Nelson Mandela sent a fax to O. Gina, one of the Romani leaders, calling for a positive solution. The problem attracted widespread attention abroad because of the exodus of Czech and Slovak Romanies to Western European countries, such as Britain and Belgium, in the autumn of 1999. The main complaints of Romanies fleeing the Czech Republic are discrimination, no hope of a human future and feeling unsafe in their own country. Apart from the illustrative value of this story with regard to racist and discriminatory attitudes at an institutional level, it is a clear example of how local municipal policy comes into conflict with state authority. State authority tries to keep up the standards of a modern democracy respecting the human rights of minorities while the mayors of some towns simply want ‘to protect its residents’ and care neither about inter-

national agreements and foreign policy nor about the reputation of the Czech Republic abroad.

Since there is no separate system of administrative courts, administrative law cases are decided by courts of general jurisdiction and partly by the Constitutional Court. The right to seek judicial review of administrative action is provided for in the Charter of Fundamental Rights and Liberties, Article 36 (2). But exceptions to the right to seek judicial review (specified in Section 248 of the Code of Civil Procedures) are quite numerous, a fact that has been criticised by the Czech Helsinki Committee and others.

District, Circuit (*obvodní*) and High Courts review (*přezkoumání*) the administrative acts of local and state institutions. As previously mentioned, a Supreme Administrative Court has not yet been introduced. The Supreme Court functions as a court of appeals for specific categories of administrative decisions, such as the decisions of the Central Electoral Committee (Galligan and Smilov 1999:51). District Courts review decisions taken concerning administrative offences, although the main actors in this field are the Circuit Courts. The High Courts review decisions taken by the central bodies of state administration (i.e. Ministries) with the exception of decisions related to pensions, employment and invalidity insurance, which are examined by Regional Courts.

Since the Czech judicial system has no separate administrative court system, it is hard to determine the total caseload in the specific field of administrative review from the statistics held by the courts.

The following excerpts may provide some indications.

Table 14.22 'Review of decisions made by other administrative organs' at District and Regional Courts)

| | 1995 | 1996 | 1997 | 1998 |
|------------------------------|------|------|------|------|
| Administrative review | 572 | 922 | 1037 | 1306 |
| Review of arbitration organs | 37 | 29 | 7 | 6 |

Table 14.23 Duration of first instance procedures in days

| | 1995 | 1996 | 1997 | 1998 |
|----------------------------------|------|------|------|------|
| Administrative review procedures | 243 | 253 | 284 | 293 |
| Arbitration | 297 | 393 | 632 | 237 |

Source: Czech Ministry of Justice Statistical Overview 1999

Table 14.24 Caseload of cases concerning pensions at the Regional Courts

| | 1980 | 1990 | 1995 | 1998 |
|--|-------|-------|-------|--------|
| | 4,146 | 5,657 | 7,754 | 10,282 |

Source: Czech Ministry of Justice Statistical Overview 1999

The jurisdiction of the courts when:

- a exercising judicial review of administrative action or
- b deciding on the 'remedies against decisions of public authorities'

is regulated by Title 5 of the Code of Civil Procedures. In first case the administrative decision remains effective after the beginning of the proceedings, in the latter it does not (Galligan and Smilov 1999: 52).

Courts are called upon to review the 'legality' of decisions already taken, which means they can only decide on matters of law. According to Galligan and Smilov (1999:52): "In any case, it is generally agreed that the courts do not have full jurisdiction to review administrative law cases on their merits." If one wants to apply for judicial review, it should be done within two months of the delivery of the final administrative decision and should specify what constitutes the 'illegality' of the disputed decision and the proposed remedy. Unless a claimant has a law degree, he should be represented by a lawyer. In cases where the claimant has the right to seek remedies from the court, the procedures are slightly different and representation by a lawyer is not mandatory (Galligan and Smilov 1999: 54). If a court decides that the decision made by the state authority in question was incorrect, the case will be returned to the responsible authority; whereupon that authority is bound by the legal opinion of the court. But if it continues to issue illegal decisions, the only possibility is an administrative suit and acknowledgment of reimbursement of the costs by the administrative authority.

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The administrative judiciary is crippled by huge backlogs – even more than in other fields of law. Parties complain that no deadlines are given for the termination of a case and, furthermore, that the compliance of the administrative authorities with court decisions remains uncertain. This gave rise to a request from the Helsinki Committee for strict public service standards, including a statutory regulation of sanctions for non-compliance by the public services (CHC 1999;108).

It has been a long time since the institution of National Ombudsman has been a priority in the Czech Republic. The fact that petitions could be lodged with the President of the Republic fuelled the arguments that an ombudsman would duplicate expensive institutions, that its competence (state administration) would be limited and that its findings would not be binding. Expectations would be high, but the practical impact or efficacy rather low; complaints concerning non-state institutions such as insurance companies, radio and television stations would have more impact (interview with Baršová). Nevertheless, on 1 January 2000, an ombudsman was introduced, taking over the petition competence of the president's office.

14.8 CONSTITUTIONAL REVIEW

The First Republic, under T.G.M. Masaryk, had a Constitutional Court in addition to a Supreme Administrative Court and an Electoral Court similar to those in Austria. The Constitutional Court became functional in November 1921, but disappeared after a ten-year period. It began to function again in 1938, but was interrupted on 23 March 1939 with the outbreak of the Second World War. After the communist takeover in 1948 the Constitutional Court was dropped from the Constitution.

After 1968, the institution of a Constitutional Court was, on paper, reintroduced into the Czechoslovak Constitution, which regulated the federalisation of the country. Its existence remained however theoretical and it never became a reality. The political changes of 1989 made the Constitutional Court inherent to the judicial system once again (law no. 91/1991). The Constitutional Court of the Czechoslovak Federal Republic was made up of 12 judges, appointed at the proposal of the three parliaments (the Federal Parliament, the Czech National Parliament and the Slovak National Parliament). Out of the eight candidates from each republic the president could elect six from each group. Its period of functioning was to be seven years, beginning on 31 January 1992 (though its practical functioning started only in March). The existence of this court, however, was short-lived, since the Republic split up into two independent states in January 1993. However, the concept of a Constitutional Court remained in the constitution of the newly created Czech Republic.

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The Constitutional Court came into being in July 1993 after the appointment of the judges. The court has its seat in Brno, the capital of Moravia, and has 15 judges, appointed for a period of ten years and nominated by the President of the state together with the agreement of the Senate. A Constitutional Court judge must have been in the legal profession for at least ten years before entering the Constitutional Court. The Court can review the constitutionality (abstract norm control) of both Acts of Parliaments and regulations (secondary legislation). The Court can act independently or at the initiative of the President, government and groups of Deputies or Senators.

In addition, all ordinary courts can refer the question of a statute's constitutionality to the Constitutional Court (concrete norm control).

The Act on the Constitutional Court also allows for complaints with the widest possible access to the Court. Any natural or legal person (including local government bodies) may submit a constitutional complaint if they consider that a public authority has infringed their basic rights or freedoms as guaranteed by the constitution or an international treaty and may ask that the action of the public authority be annulled as unconstitutional. Persons submitting such a complaint are also permitted to attach a petition for the Court to annul the provisions of a statute or regulation if it served as the legal basis for the action taken by the public

authority (a nexus requirement). The Court has no authority whatsoever to judge the constitutionality of or annul international treaties.

In its first five years of existence the Constitutional Court had a caseload of 232 procedures of abstract review (submitted mostly by local and regional authorities, some by groups of parliamentary delegates and in a few cases by the President. The cases challenged both statute law and rules and directives issued by semi-government authorities). There was an increase in constitutional complaints from those considering themselves to be deprived of their basic constitutional rights: a total of 7,496 individual complaints were received during this time. The Court, after having judged the merits of the cases, admitted about 6 per cent for decision, of which, on average, about a third were (at last partly) successful (Gillis 1999). Matters concerning the restitution of property formed a major part of the agenda in 1998 (CHC Annual Report 1999:109). Most of them were decided by four three-member benches. Forty-six of the cases were discussed in plenary sessions.

The decisions (in Czech legal language called '*findings*') of the Constitutional Court can be published in two different reports:

- 1 the *Collection of Laws*, where all general norms are published – a little less than 50 per cent of all decisions qualify for being reported here, and
- 2 the Court's own reporter, which publishes all decisions taken on the merits of cases including the full reasoning and dissenting opinions.

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The Court's own publication is also put on the Internet, although only with very considerable delay. The high caseload led to procedural attempts to decide on which complaints to accept in a pre-procedure. The case overload was heightened by criticisms of the power of an Advocate General (*Rapporteur*) to reject constitutional complaints. The Law no. 77/1998 Coll took this power away and transferred rejection to the three-member Senate (CHC 1998:109); in a counter-criticism the Constitutional Court complained that its opinion on the amendment had not been heard. The statute binds the Court to its constitutional jurisprudence; a special procedure requiring at least nine votes (of the 15 justices) would have to be initiated in order to overrule its own precedence. Nevertheless, some commentators are sceptical about such flexibility: "The Senate and the judge are not bound by legal views of the Constitutional Court expressed in its previous findings or resolutions which means – at least at a theoretical level – there is a danger of disunity of the judiciary" (CHC 1998:109).

The Czech judiciary struggles with such discretion in constitutional jurisprudence and with conflicts of jurisdiction between the High Courts. Not party politics but the policy-oriented jurisprudence of the Constitutional Court was contradicted openly by ordinary courts and by the justices of the Supreme Court (Interview Wágnerová; Němeček 1999c). The 'war of the courts' is being fought by regular courts at all levels in the name of positive law and resists any constitutional re-interpretation of statutory rules. In 1997 the Superior (appeal) Court in Prague disregarded a ruling of the Constitutional Court which led the latter to disclose to

the press that the “Superior Court is subverting the constitutional order” (EECR 1997: 11). Since then mobilisation of the media has become a frequent weapon in the war between the positivists and the constitutionalists among the Czech Republic’s highest justices, highlighted in a case of fundamental law (of which there were several) about a Jehovah’s witness who was sentenced twice for his repeated objection to military as well as civil service.

In the early nineties Mr. Choděra was sentenced to 14 months of prison because of his refusal to serve in the army or undertake a substitute form of civilian service. The military authority did not take into account the fact that he had been in prison for this reason and arrested him again after he was released from prison. The court sentenced him again. The then Minister of Justice, J. Novák, did send a complaint to the Supreme Court stating that a person cannot be sentenced twice for the same offence. The case came before the Senate of the Supreme Court, where two former military judges, J. Malík and J. Hendrych, upheld the judgement of the lower court. Choděra submitted a complaint to the Constitutional Court which, in March 1997, decided that the sentence contradicted the Constitution. Although the ruling of the Constitutional Court is absolute, both the judges from the Supreme Court refused to take this into account and repeated their previous point of view. The story was repeated; the Constitutional Court ruled again that the verdict of the Supreme Court was unconstitutional and that it should be reconsidered (for the third time). Then, in October 1998, the two judges declared that they were not able to pass a judgement in this case as they were prejudiced. (The law normally talks about prejudice in cases of kinship or strong friendship, which here was absolutely excluded). It was only in February 1999 that the President of the Supreme Court, E. Wagnerová, reprimanded the two judges in public, but giving them a second chance (whereas her predecessor actually had not taken action regarding disciplinary measures; interviews and Němeček 1999c).

This case of a Jehovah’s witness refusing military service has been analysed in the EECR, *Constitutional Watch* (Vol. 6, nos. 2-3), which comments on the skirmishing between the two courts as follows:

Subsequently, while making no express reference to its earlier decision (nor to the Supreme Court’s refusal to respect it), the Constitutional Court reiterated its earlier position and held that the Supreme Court had violated the petitioner’s constitutional rights. This is an important case in the transformation process, as ordinary courts (legitimising it under the guise of favourable academic opinion) were continuing the old practice (common in other socialist countries) of coercing military service by repeated punishment until the person gave in. [...] In part, the lack of co-ordination between the two courts is caused by the view that ordinary courts, including the Supreme Court, are not empowered to consider the Constitution when disposing of cases. As a result, the Supreme Court does not incorporate the jurisprudence of the Constitutional Court into its own.

It was with this exact argument (“I have to explain the law. I cannot decide if it is in contradiction with the constitution or not”) that the judges of the Supreme Court defended their attitude in the case of Mr. Choděra (Němeček 1999c).

Thus, even though the Constitutional Court had ruled against double jeopardy (*ne bis in idem*), the Supreme Court upheld that it only followed statute law and would not respect the instructions of another court. Leaving aside possible background controversies between political factions, the case represents a struggle for supremacy. It could be that the experienced judges at the Supreme Court who have upheld their identity as professionals through communist times see constitutional supremacy as just another form of political manipulation. Jurisprudential positivism demands that they stubbornly insist on the need for Parliament to amend statute law first before they can apply the constitutional principle.

Of course in Western eyes they will have to give in. Czech law is in accordance with the European Convention on Human Rights, and its membership in the Council of Europe also accepts the supremacy of the Strasbourg Court of Human Rights (explicitly affirmed in EECR 1999,18). But the integration of its jurisprudence into the interpretation and application of statutory law of regular courts has yet to be achieved.

The Czech Constitutional Court is still vigorously building up its tradition, along the lines of the German Constitutional Court. Dutch lawyers, who do not even have a constitutional review to refer to, might have some understanding that this will take time.

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INTERVIEWS

- A.Baršová, previously legal advisor at the Ministry of Interior, now at the Office of the Government
- Mgr. P. Bílek, Deputy Director of the Czech Helsinki Committee, Prague
- J. Bodečková, Ministry of Justice, Department of European Integration, Prague
- P. Boučková, law student and office manager of the Citizenship Counselling Center, Czech Helsinki Committee, Prague
- JUDr. V. Cepl, drafter of the Constitution, judge at the Constitutional Court, Brno
- JUDr. K. Čermák, President of the Czech Chamber of Lawyers, Prague
- JUDr. L.Cvrčková, Ministry of Justice, Head of the Department of European Intergration, Prague
- Jef Helmer, director of SPOLU project in the Czech and Slovak Republic and ex-chairman of Charta '77 Nederland
- M. Koning, publisher EMP, Prague, and European Legal Research Services, Utrecht
- R.J.Ph. Koning, a resident lawyer at the office of De Brauw Blackstone Westbroek in Prague (from August 1997 – July 1999), now candidate civil law notary at the office of the same company in Amsterdam
- JUDr. M. Kasíková, Prague
- Mgr. P. Olmrová-Nykodymová, junior lawyer (*koncipient*), Prague
- JUDr. E. Rejchrtová, judge at the Regional Court, Prague
- L. Richterová, librarian of the Czech Helsinki Committee Library, Prague
- JUDr. O. Ríha, dean of the study department, Charles University, Prague
- Doc.dr. N. Rozehnalová, Csc., Faculty of Law, University of Brno
- JUDr. M. Šarlinger, judge (civil law) at District Court, Nový Jičín
- Dr. H. Šilhanová, sociologist and project director of NROS, Prague

H. Stehlíková, financial manager of the Coordination Centre of Citizens Advice
Bureaux,
JUDr. J. Vítová, judge at Regional Court, Prague
JUDr. J. Wurstová, Head of the International Department of the Chamber of
Advocates, Prague
L. Zamboj, social worker in the Citizenship Counselling Center, Czech Helsinki
Committee, Prague
JUDr. E. Wagnerová Ph.D., President of the Supreme Court, Brno

NOTES

- ¹ Act no. 85/1996 Coll. on Advocacy, part two.
- ² The position of State Prosecutor is formulated in law no. 283/1993 Coll.
- ³ According to the Deputy Minister of the Interior Prof. Y. Strecková in an interview with Listy no. 5 1999: p. 34).