Articles

Global Solutions, Local Damages: A Critical Study in Judicial Councils in Central and Eastern Europe

By Michal Bobek[*] *& David Kosař*[**]

A. Introduction

Judicial independence appears on most laundry lists of all bodies or institutions engaged with the rule of law. It is considered an unqualified public good. As a result, all major players engaged in legal reform and building a rule of law have diverted significant resources to this issue. For instance, the United Nations created the office of Special Rapporteur on the Independence of Judges and Lawyers in 1994. The World Bank has been investing heavily in judicial reforms in Latin America and Asia. In Europe, the Council of Europe has been pushing for judicial independence and judicial reform throughout the continent. Additionally, the European Union included judicial independence among its core requirements for the accession countries. Both organizations, the European Union and the Council of Europe, then jointly encouraged legal and judicial reforms in Central and Eastern Europe (CEE). A number of non-governmental organizations have likewise paid considerable attention to this issue.

The question of how to achieve judicial independence, particularly in CEE countries and other countries in transition, tends to be frequently reduced to just one aspect: The institutional reform. Furthermore, the institutional reform itself is typically limited to promoting one particular model of court administration: The Judicial Council model. The model has been suggested to be the universal and "right" solution that will eradicate the vices of previous models, particularly the administration of courts by a Ministry of Justice. The new Judicial Council model ought to enhance judicial independence, insulate the judiciary from political tumult, and improve the overall performance of judges.

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The new model thus came with the promise of independent, better functioning judiciaries. The main argument of this paper is that for CEE countries in transition, the universally promoted "Euro-model" of the court administration in the form of a Judicial Council has not lived up to that promise. It has not delivered the goods it was supposed to deliver. In fact, in a number of countries in the region, the situation has been made worse following the establishment of a Judicial Council. In those countries, the new institution typically halted further reforms of the judiciary and soon negated the values in the name of which it has been put in place. This evolution seriously questions not only the further promotion of the Judicial Council model elsewhere in the world, but also the very international process of standards setting that put in place and promoted such a model.

The argument of this paper proceeds as follows: Sections B and C critically examine how the international and European "soft standard," which was later pushed onto the CEE transition countries, emerged. Who designed these standards and how? Section D offers a suggestion as to why, in the end, the Judicial Council model prevailed over all competing alternatives of court administration in Europe and also as to why international actors have promoted this model. Section E analyzes normative shortcomings of such "European" or "global" models in terms of democracy and legitimacy. Section F shows with which incentives and by which actors the Judicial Council model has been imposed onto most of the CEE countries in the course of their transitions. Sections G and H stand in contrast to each other: Section G outlines the outcomes that the Judicial Council model was supposed to deliver, while Section H looks at the outcomes that it in fact delivered and the reality of how it has been operating in the CEE states. Conclusions in Section I are humble. It is suggested that when transforming judiciaries, it is essential to focus first on personal renewal and small-scale function-related court reforms rather than on grand schemes of irreversible and constitutionally entrenched institutional designs. Making a post-totalitarian judiciary a self-administrative body before any genuine internal change and renewal has taken place may result—formally and constitutionally—in establishing institutionally independent judiciary without many individually independent judges in it.[1]

B. How Do European Standards of Court Administration Emerge?

Where do European and global[2] standards regarding the "proper" way of administering courts come from? Two questions are essential in this respect: Who drafts these standards

[1] *Contra* John Ferejohn, *Independent Judges, Dependent Judiciary: Explaining Judicial Independence*, 72 S. CAL. L. REV. 353, 362 (1999) (referring to the U.S. judiciary as "[the] system of independent judges within a dependent judiciary").

[2] Throughout this paper, we look primarily at the European judicial standards. However, a number of suggestions and arguments made with respect to the European standards are also applicable with respect to worldwide or "global" standards, as far as such can genuinely exist, thus, warranting to use the adverb "global." *See, e.g.*, VIOLAINE AUTHEMAN & SANDRA ELENA, GLOBAL BEST PRACTICES: JUDICIAL COUNCILS: LESSONS LEARNED FROM EUROPE AND LATIN AMERICA (2004); Linn Hammergren, *Do Judicial Councils Further Judicial Reform? Lessons from Latin America* (Carnegie Endowment for Int'l Peace, Working Paper No. 28, 2002); Brent T. White, *Rotten to the Core: Project*

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and according to what processes? The answer to the former question is straightforward: It is typically judges themselves. The answer to the latter question is more complicated. The processes of creating European or "global" standards of court administration vary from one international organization to another. Furthermore, the processes tend to be quite opaque, with only limited access to information regarding their rules and design.

At the United Nations level, it was the General Assembly that, in 1985, adopted the Basic Principles on the Independence of the Judiciary ("UN Basic Principles").[3] Although the UN Basic Principles addressed several aspects of court administration in the broader sense,[4] they merely set the goals. The States were left to choose the means of how to meet those goals.[5] The 2002 Bangalore Principles of Judicial Conduct ("Bangalore Principles")[6] took a similar approach. These principles explicitly called for enhancing "institutional independence of the judiciary."[7] However, they stopped short of advocating for a particular model of court administration. They instead zeroed in on six general values that ought to be pursued: Independence, impartiality, integrity, propriety, equality, competence, and diligence.[8]

The process that led to the drafting of the 2002 Bangalore Principles of Judicial Conduct clearly illuminates the shift towards a greater role of judges in defining standards of court administration. The Bangalore Principles' origin dates back to the meeting of the Judicial Group on Strengthening Judicial Integrity in Bangalore, India in February 2001 (therefore, the Bangalore Principles). The meeting united eight chief justices from Asia and Africa. At the meeting, they drafted a code of judicial conduct that was supposed to complement the

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Capture and the Failure of Judicial Reform in Mongolia, 4 E. ASIA L. REFORM 209 (2009). Seen from a different angle, it might be also suggested that European judicial standards are the most developed subset of a worldwide standardization trend.

[3] Adopted at the Seventh UN Congress on the Prevention of Crime and the Treatment of Offenders held in Milan in 1985 and endorsed by G.A. Res. 40/32, U.N. Doc. A/RES/40/35 (Nov. 29, 1985) and G.A. Res. 40/146, U.N. Doc. A/RES/40/32 (Dec. 13, 1985).

[4] Note that the term "court administration" has a broader meaning in Europe than in the United States. In Europe, it also includes selection, promotion, and discipline of judges.

[5] *See, e.g.*, U.N. Basic Principle No. 10 ("Any method of judicial selection shall safeguard against judicial appointments for improper motives."); U.N. Basic Principle No. 13 ("Promotion of judges, wherever such a system exists, should be based on objective factors, in particular ability, integrity and experience."); U.N. Basic Principle No. 17 ("A charge or complaint made against a judge in his/her judicial and professional capacity shall be processed expeditiously and fairly under an appropriate procedure.").

[6] *See* Bangalore Principles of Judicial Conduct of 2002, Nov. 25–26, 2002, U.N. Doc. E/CN.4/2003/65 Annex (Jan. 10, 2003).

[7] *Id.* at para. 1.5.

[8] *See id.* at paras. 1.1–6.7.

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UN Basic Principles "[i]n light of increasing reports of judicial corruption, and sensing a lack of guidance on measures of judicial accountability."[9] The UN Special Rapporteur Param Cumaraswamy subsequently adopted a partly revised version of this code.[10]

Thus, the UN ex post provided this private initiative with a "veil of legitimacy" in the form of institutional approval. However, the input from law professionals other than judges—for example, from government officials, scholars, and other stakeholders—in the drafting process was minimal. What is even more striking is that despite the clear motivation behind this code, there is not a single mention of the words "corruption" or "accountability" in the Bangalore Principles. Instead, the Bangalore Principles start with a bold paragraph, which, if taken in its fullness, would represent an antithesis to judicial accountability:

> A judge shall exercise the judicial function independently on the basis of the judge's assessment of the facts and in accordance with a conscientious understanding of the law, free of any extraneous influences, inducements, pressures, threats or interference, direct or indirect, from any quarter or for any reason.[11]

In contrast to the UN level, the process of standardization of court administration in Europe went much further and deeper. This process can be roughly divided into two periods. The first period spans from the 1950s until the early 1990s. The second period lasts from the early 1990s until today. Until the early 1990s, neither the European Union (EU) nor the Council of Europe (CoE) paid significant attention to the models of court administration. The turning point was the adoption of the EU Copenhagen criteria in 1993 and the ensuing EU accession process and its conditionality vis-à-vis the candidate countries.[12] Since then, the EU and the CoE considerably increased their resources devoted to setting the standards of court administration. The synergic effect of the activities of these two international organizations in turn placed strong pressure on the CEE States[13] to

[9] Lorne Neudorf, *Promoting Independent Justice in a Changing World*, 12 HUM. RTS. L. REV. 107, 112 (2012).

[10] *See* Bangalore Principles, *supra* note 6.

[11] *Id.* at para. 1.1.

[12] *See* Cristina Parau, *The Drive for Judicial Supremacy*, *in* JUDICIAL INDEPENDENCE IN TRANSITION 619, 643 (Anja Seibert-Fohr ed., 2012).

[13] But note that the pushing for one JC Euro-model is by now no longer limited to the CEE. For instance, the Parliamentary Assembly of the CoE has recently criticized Germany for not having a judicial council. *See* Eur. Parl. Ass., *Allegations of Politically Motivated Abuses of the Criminal Justice System in Council of Europe Member States*, para. 5.4.1, 32nd Sess., Res. 1685 (Sept. 30, 2009). For further details, see also Anja Seibert-Fohr, *European Perspective on the Rule of Law and Independent Courts,* 20 J. FÜR RECHTSPOLITIK 161, 166 (2012) (arguing that the

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bring their models of court administration in sync with the promoted European Judicial Council model (JC model).

On the one hand, the CoE gave a preference to the JC model of court administration as early as 1994.[14] On the other hand, at that period, a diversity of models across Europe was still acknowledged. The CoE refrained from proposing to change the alternative systems of court administration that "in practice work[ed] well."[15] However, over the years, both the EU and the CoE have abandoned their initial flexibility and become staunch advocates of the JC model. During the 2004 enlargement wave that primarily involved former communist Central European and Baltic States,[16] the European Commission used the so-called "pre-accession conditionality"[17] to exert significant pressure on Estonia, Latvia, and Slovakia and to entice them to adopt the JC model. In Slovakia, the European Commission succeeded and the Judicial Council of the Slovak Republic came into being in 2002. Estonia adopted a somewhat modified Judicial Council "Euro-model" in the same year. Latvia resisted the pressure and did not create its judicial council until 2010.[18] The European Commission went even further in the 2007 enlargement wave by basically requiring Romania and Bulgaria to adopt the JC model "as it is."[19]

The eventual creation of the Judicial Council "Euro-model" presents a puzzle. Neither the EU nor the CoE have ever laid down any normative underpinnings of this model. There has never been any process of review or discussion of the model similar to those that occur in adopting EU legislation or in drafting an international treaty. Both organizations simply internalized the recommendations of various judicial consultative bodies without really addressing or assessing their content.

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problem of recent documents produced by the CoE is that they have gradually shifted the emphasis from obligations of *results* to obligations of *means*).

[14] *Recommendation No. R (94) 12 to Member States on the Independence, Efficiency and Role of Judges*, 1994 Y.B. EUR. CONV. ON H.R. 453, Principle I(2)(c).

[15] *Id.* at para. 16 (Explanatory Memorandum).

[16] Namely, Poland, the Czech Republic, Slovakia, Hungary, Slovenia, Estonia, Latvia, and Lithuania. The other two countries that joined the EU in the 2004 enlargement were Malta and Cyprus.

[17] *See infra* Section F.

[18] Generally on the double or even multiple standards in the accession process, see, for example, DIMITRY KOCHENOV, EU ENLARGEMENT AND THE FAILURE OF CONDITIONALITY 264–66, 271–90 (2008).

[19] *See, e.g.*, Daniel Smilov, *EU Enlargement and the Constitutional Principle of Judicial Independence*, *in* SPREADING DEMOCRACY AND THE RULE OF LAW: THE IMPACT OF EU ENLARGEMENT ON THE RULE OF LAW, DEMOCRACY, AND CONSTITUTIONALISM IN POST-COMMUNIST LEGAL ORDERS 313, 323–25 (Adam Czarnota, Martin Krygier & Wojciech Sadurski eds., 2006); Parau, *supra* note 12.

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The intricate web of different consultative bodies that have played major roles in setting this standard is in itself difficult to disentangle.[20] Nonetheless, there is one thing that all of these consultative bodies have in common: Judges have a significant and often even a decisive voice therein. For instance, the Consultative Council of European Judges (CCJE), an advisory body of the CoE on issues related to the independence, impartiality, and competence of judges, is composed exclusively of judges. Similarly, the Lisbon Network, the consultative body of the CoE in the field of judicial education, consists exclusively of judges—namely, judges who are directors or deputy directors of national judicial schools. The European Network for Councils for the Judiciary, an independent body that is politically and financially supported by the European Commission—which is particularly active in setting the standards of court administration—is open to representatives of other professions, but judges have a majority there too. Even in the Venice Commission, the CoE's advisory body on constitutional matters writ large, whose composition is most diverse, judges have an upper hand.

In other words, judges control virtually all European bodies that deal with issues of court administration. Given the fact that judges themselves create the European standards of court administration, it is not surprising that these standards are based on the belief that the rule of law is best served by judicial autonomy.[21] This belief materializes in the vision of a very robust institutional separation of the judiciary from the rest of legal and political institutions within the national state.

C. What Was in the Package? The Core Requirements of the Euro-Model

Officially, there is no formal document that defines any required "Euro-model" or even "global" model of court administration. Therefore, we must excavate the parameters of this model from various documents originating from diverse bodies of the United Nations, the European Union, and the Council of Europe, with further impetus coming from the World Bank and other international organizations. One may object that there is no single model of judicial council jointly advocated by these international and supranational bodies and that these organizations do not necessarily agree on the requirements of such a model. This may be true with respect to a "global" model. However, on the European level, a number of EU documents[22] and the institutional dialogue between the relevant bodies of the EU and the CoE[23] rebut this objection and reveal that there is mutual agreement on this issue.

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[20] *See* DANIELA PIANA, JUDICIAL ACCOUNTABILITIES IN NEW EUROPE: FROM RULE OF LAW TO QUALITY OF JUSTICE 49–88 (2010) (providing a comprehensive overview of these bodies).

[21] *See* Parau, *supra* note 12, at 646–47.

[22] *See, e.g.*, Anja Seibert-Fohr, *Judicial Independence in European Union Accessions: The Emergence of a European Basic Principle,* 52 GERMAN Y.B. INT'L L. 405 (2009).

[23] *See* PIANA, *supra* note 20.

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There are five key requirements of the JC Euro-model that may be distilled from the plethora of documents produced by numerous organs and affiliated bodies of the EU and the CoE, namely: (1) A judicial council should have constitutional status;[24] (2) at least 50% of the members of the judicial council must be judges and these judicial members must be selected by their peers, for example, by other judges;[25] (3) a judicial council ought to be vested with decision making and not merely advisory powers;[26] (4) a judicial council should have substantial competences in all matters concerning the career of a judge including selection, appointment, promotion, transfer, dismissal, and disciplining;[27] and (5) a judicial council must be chaired either by the President or Chief Justice of the Highest Court or the neutral head of state.[28]

This set of five criteria is by no means the definitive or exhaustive list of requirements and recommendations proposed by the EU and the CoE. Many documents produced by these two organizations demand more stringent criteria and additional requirements.[29] The above-mentioned set is, rather, the highest common denominator of what is expected and what the EU and the CoE advocate for.

It is clear from the "should" language of the documents that these criteria may not always be framed as "must" requirements. However, the language should not obfuscate the obligatory nature of these requirements for the so-called "new democracies" in Central and Eastern Europe. In fact, most of the EU and the CoE documents use the "should"

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[24] *See* EUR. NETWORK OF COUNCILS FOR THE JUDICIARY (ENCJ), Councils for the Judiciary Report 2010–2011 para. 1.4; CONSULTATIVE COUNCIL OF EUROPEAN JUDGES (CCJE), Opinion no. 10 (2007) para. 11 (Nov. 23, 2007). *See also* European Charter on the Statute for Judges para. 1.2 (July 8–10, 1998).

[25] *See* ENCJ, *supra* note 24, at para. 2.1; CCJE *supra* note 24, at para. 18. *See also* European Charter on the Statute for Judges, *supra* note 24, at para. 1.3; General Assembly of the European Network Councils for the Judiciary, *Self Governance for the Judiciary: Balancing Independence and Accountability*, para. 4(b) (May 2008), http://www.encj.eu/images/stories/pdf/resolutionbudapestfinal.pdf [hereinafter *Budapest Resolution*]; *Recommendation CM/Rec (2010) 12 of the Committee of Ministers to Member States on Judges: Independence, Efficiency, and Responsibilities*, para. 27 (Nov. 17, 2010), https://wcd.coe.int/ViewDoc.jsp?id=1707137.

[26] *See* ENCJ, *supra* note 24, at paras. 3.4, 3.13; CCJE, *supra* note 24, at paras. 48, 49, 60. *See also* European Charter on the Statute for Judges, *supra* note 24, at paras. 3.1, 4.1, 7.2; *Recommendation CM/Rec (2010) 12*, *supra* note 25, at para. 46.

[27] *See* ENCJ, *supra* note 24, at para. 3.1; CCJE, *supra* note 24, at para. 42. *See also* European Charter on the Statute for Judges, *supra* note 24, at para. 1.3.

[28] *See* ENCJ, *supra* note 24, at para. 4.1; CCJE, *supra* note 24, at para. 33.

[29] For instance, some documents preclude the participation of the Minister of Justice in the judicial council or require judicial councils to have budgetary powers, oversee judicial training, process complaints from the users of courts, comment on bills affecting the judiciary, or propose new legislation. *See, e.g.*, ENCJ, *supra* note 24, at paras. 3.5–3.9, 3.14–3.18; CCJE, *supra* note 24, at paras. 65–90.

language for two reasons: First, the "should" language carves out exceptions for the so-called "old democracies" in Europe, which are not willing to modify their current models of court administration. Second, the "should" language is employed in order to make these documents as inclusive as possible and also to speak to the bodies in some European states that represent different styles of court administration, such as the Court Service model[30] or hybrid models of court administration.[31]

As is apparent from the five requirements listed, the "self-government" of judges represents a golden thread running through all five criteria.[32] Some documents make this claim more explicit by stressing that the judicial council must "secure the independence of the judiciary 'from every *other* power;'" that is, from the executive and the legislature—not from the judiciary—and "ensure effective self-governance."[33]

Interestingly, the JC Euro-model completely overlooks the threats from within the judiciary and does not stipulate any checks against the capture of this model by a narrow group of judicial leadership. More specifically, court presidents and vice presidents are not precluded from becoming members of the judicial council and no maximum ratio of these judicial officials among judicial members of the judicial council is generally set.[34] Similarly, any rule ensuring the representation of all echelons of the judiciary in the judicial council is missing. This omission means that there are no check and balances between the judicial leadership and regular judges. Internal independence of an individual judge vis-à-vis the judicial leadership who may decide through the JC Euro-model on their careers is thus left unprotected.

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[30] The Court Service model is sometimes referred to as a "Northern European Model" of judicial council. *See, e.g.*, WIM VOERMANS & PIM ALBERS, EUR. COUNCIL FOR THE EFFICIENCY OF JUSTICE, COUNCILS FOR THE JUDICIARY IN EU COUNTRIES (2003). We reject this label as unhelpful and misleading. *See also* Nuno Garoupa & Tom Ginsburg, *Guarding the Guardians: Judicial Councils and Judicial Independence*, 57 AM. J. COMP. L. 103, 109, n. 20 (2009).

[31] These different models are described immediately below in Section D.

[32] It could be suggested that the term "self-government model" should be used instead of the "judicial council model." In our opinion, however, the term "judicial council model" better captures the nature of the institutional design in question of which the judicial self-government is an important, but not the sole, component. Furthermore, the "judicial council model" is also the term under which the model has been promoted and marketed in the CEE.

[33] ENCJ, *supra* note 24, at para. 1.4.

[34] *See* CCJE, *supra* note 24, at para. 26. *Contra* ENCJ, *supra* note 24, at para. 2; European Charter on the Statute for Judges, *supra* note 24, at para. 1.3; *Budapest Resolution*, *supra* note 25, at para. 4(b); *Recommendation CM/Rec (2010) 12*, *supra* note 25, at para. 27. Similarly, the JC Euro-model does not set any limit on the number of senior judges of appellate and top courts.

D. What Was Not Included? Competing Models of Court Administration

In order to see the specific features of the promoted JC Euro-model of court administration more clearly, it is helpful to juxtapose this model with its alternatives. This short detour should also save this paper from a common vice in the scholarship on judicial systems: Namely, that scholars tend to compare only countries *with* judicial councils and debates therein while ignoring countries *without* judicial councils and debates therein.[35] We will start with the models of court administration that exist in Europe and then locate the JC model among these alternatives. Subsequently, we will also briefly look beyond Europe.

There are broadly speaking five models of court administration in use in Europe:[36] (1) The Ministry of Justice model, (2) the judicial council model, (3) the courts service model, (4) hybrid models, and (5) the socialist model.

The Ministry of Justice model is the longest-standing model. Under this framework, the Ministry of Justice plays a key role in both the appointment and promotion of judges and in the administration of courts and court management. This model is in place in Germany, Austria, the Czech Republic, and Finland, among others.

Still, it is misleading to claim that judges themselves play no role in the appointment and promotion of judges or in the administration of courts and court management in this model and that the national Ministry of Justice controls all these processes unilaterally. In the ministerial model, it is also other bodies, such as the legislature, the President of a given country, judicial boards, and the ombudsman or professional organizations, which often play a significant role or at least have their influence as well. Moreover, a crucial role in these systems is in fact played by presidents of appellate and supreme courts, who are consulted regarding judicial promotion, appointments and other key issues. Some of the appointments or promotions cannot even be carried out without their consent. Thus, albeit called the "Ministry of Justice model," it does not mean that the executive runs it all exclusively. The strong criticism one may encounter with respect to this model in a number of international documents and academic writings, and which the proponents of the judicial council model often criticize with fervor, is a parody of the Minister of Justice model that no longer exists in Europe.[37]

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[35] A rare exception is the synthesis report on states without judicial councils, see LORD JUSTICE THOMAS, COUNCIL OF EUROPE, COUNCILS FOR THE JUDICIARY PRELIMINARY REPORT: STATES WITHOUT A HIGH COUNCIL 4 (Mar. 19, 2007).

[36] Different classifications are equally plausible. Our classification relies on Nicola Picardi, *La Ministère de la Justice et les autres modèles d´administration de la justice en Europe*, *in* L'INDIPENDENZA DELLA GIUSTIZIA, OGGI. JUDICIAL INDEPENDENCE, TODAY: LIBER AMICORUM IN ONORE DI GIOVANNI E. LONGO (Philippe Abravanel et al. eds., 1999).

[37] What many critics attacked in the CEE was in fact the "state administration of courts," which was based on the socialist model—discussed immediately below in this section—rather than the current Ministry of Justice model.

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The judicial council model is a model where an independent intermediary organization is positioned between the judiciary and the politically responsible administrators in the executive or the parliament. The judicial council is given significant powers primarily in appointing and promoting judges and/or in exercising disciplinary powers vis-à-vis judges. While judicial councils may also play a role in the areas of administration, court management and budgeting of the courts, these powers are only secondary to their competences relating to judges and personnel generally. Belgium, Bulgaria, France, Hungary (until 2011), Italy, Lithuania, the Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, and Spain can be said to belong to this group. As will be shown below, however, not all of these judicial councils meet the criteria of the JC "Euro-model."[38]

In contrast, in the court service model, the primary function of an independent intermediary organization is in the area of administration (supervision of judicial registry offices, case loads and case stocks, flow rates, the promotion of legal uniformity, quality care etc.), court management (housing, automation, recruitment, training, etc.), and budgeting the courts. In contrast to judicial councils, the court services have a limited role in the appointment and promotion of judges and do not exercise disciplinary powers vis-à-vis judges. These powers are sometimes vested in independent organs—such as judicial appointment commissions—that operate separately from the court service. Denmark, Ireland, Norway and Sweden are examples of countries that have adopted the court service model.

By hybrid models, we mean any model that combines various components of the previous three models in such a way that it is significantly distinct from each of them. Hybrid models operate in England and Wales, Estonia, Hungary (since 2011), Iceland, Switzerland, and in European micro-states. These models are so specific that one cannot generalize about them in order to create one clear box. They include judicial appointment commissions that deal only with the selection of judges up to a certain tier of the judicial system, whereas the rest of the court administration is vested in another organ (England and Wales), countries where the judicial council coexists with another strong nationwide body responsible for court administration (Hungary since 2011), countries where the Minister of Justice shares power with judges of the Supreme Court (Cyprus), federal countries where the court administration varies from one state to another (Switzerland), and micro-states that have peculiar systems of court administration tailored to their specific needs (Lichtenstein and Luxembourg).

Finally, the socialist model of court administration concentrated the power over judges and the judicial system generally in three institutions—the General Prosecutor (procurator), the Supreme Court and court presidents—which are themselves then

[38] Moreover, the classification of several judicial councils is open to debate. For instance, one may reasonably claim that the Dutch judicial council is in fact closer to the Court Service model.

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controlled by the Communist Party. Therefore, it is the Party controlling the courts through these institutions. Specific features of this model varied from one Communist country to another and changed with time. The following mechanisms were nonetheless quite common: The relocation and demotion of judges without a decision of the disciplinary court, arbitrary assignment of cases by court presidents, the reassignment at will of judges within their courts or deciding on salary bonuses of judges, and the Supreme Court could remove any case from the lower courts and decide it itself.[39] Apart from these mechanisms available within the judiciary, judges were subject to frequent retention reviews, the Communist Party had a residual power to dismiss judges who did not exercise judicial office in line with the Party policies and the General Prosecutor had the right to ask for the review of any judicial decision, including those that had already become final. The pure socialist model of court administration no longer exists in Europe.[40] Still, it is important to mention this model[41] in the European context, as some of the post-communist countries in CEE have still not gotten rid of all features of the socialist model. Even more importantly, in a number of these countries, the legacy of the omnipotent Supreme Court and court presidents is lasting until today.

A quick glance at the models of court administration in Europe suggests that great number of current EU Member States have opted for the judicial council model. This does not, however, mean that all of them would have indeed taken on board and introduced the promoted JC Euro-model outlined above and advocated by the EU and the CoE. The composition—competences as well as the power of judicial councils—vary considerably even among European countries that established some sort of judicial council and could thus be said to represent the judicial council model.[42] Many of these judicial councils do not even meet the criteria of the Euro-model we identified above. For instance, French,

[39] For descriptions of the office of the Procurator and its functions in English, see GORDON B. SMITH, THE SOVIET PROCURACY AND THE SUPERVISION OF ADMINISTRATION (1978); G.G. MORGAN, SOVIET ADMINISTRATIVE LEGALITY: THE ROLE OF ATTORNEY GENERAL'S OFFICE (1962). For a comparative East/West assessment, see MAURO CAPPELLETTI & J.A. JOLOWICZ, PUBLIC INTEREST PARTIES AND THE ACTIVE ROLE OF THE JUDGE IN CIVIL LITIGATION (1974).

[40] Only the Belarusian model of court administration gets close. On the state of the Belarusian judiciary, see Alezander Vashkevich, *Judicial Independence in the Republic of Belarus*, *in* JUDICIAL INDEPENDENCE IN TRANSITION 1065, 1068–71, 1101–03, 1109–10, 1115–18 (Anja Seibert-Fohr ed., 2012). However, the socialist model is still alive outside Europe, in China for instance. *See* Peter H. Solomon, *Authoritarian Legality and Informal Practices: Judges, Lawyers and the State in Russia and China*, 43 COMMUNIST & POST-COMMUNIST STUD. 351 (2010); Xin He, *Black Hole of Responsibility: The Adjudication Committee's Role in a Chinese Court*, 46 L. & SOC'Y REV. 681 (2012); Ling Li, *The "Production" of Corruption in China's Courts: Judicial Politics and Decision Making in a One-Party State*, 37 L. & SOC. INQUIRY 848 (2012).

[41] Alternatively, we may perceive the socialist model of the administration of courts as a perverse version of the classic Ministry of Justice model. Still, the merging of these two models into one would ignore important differences between them.

[42] For a helpful taxonomy of judicial councils, see Garoupa & Ginsburg, *supra* note 30, at 122; LES CONSEILS SUPERIEURS DE LA MAGISTRATURE EN EUROPE (Thierry S. Renoux ed., 1999).

Dutch and Portuguese judges are in the minority on the judicial councils in their countries. In Spain, judicial members of the judicial council are not selected by their peers. In Belgium, Poland, and Slovenia, judicial councils do not play any role in disciplining judges. Finally, the Hungarian Judicial Council met the requirements of the EU/CoE Judicial Council Model only until Orbán's government passed the 2011 judicial reform that took many powers from the Hungarian High Council for the Judiciary (*Magyar Köztársaság Bíróságai*) and transferred them to the newly established National Judicial Office.[43]

Therefore, the JC Euro-model is in fact only a subset of judicial councils that exist in Europe. The key feature that distinguishes the promoted Euro-model from its competing alternatives, including other types of judicial councils, is that it centralizes competences affecting virtually *all* matters of the career of judges at one place and grants control over this body to the judges. The Euro-model is built on the premise that judges are reliable, solid actors who know their duties and are able to administer it. It is therefore considered wise to insulate the judiciary from the political process.

If we compare the Euro-model with the existing judicial councils in the EU Member States, it is evident that the Euro-model had been heavily inspired by the Italian judicial council rather than that of France, Spain, or Portugal. In the latter countries, the national Ministries of Justice have preserved some influence over judicial recruitment.[44] Given the prominent position of Italians in the relevant Pan-European bodies, the preference for absolute judicial autonomy is not surprising.

Finally, if we take a global perspective and look for a world-wide alternative to the JC model, there is an even greater variety of models of court administration. The JC model is widespread in Latin America, due in part to the pressure from international actors,[45] but also due to the influence of Latin Europe exercised in these countries. The executive models can be found in Canada or Japan. Hard-core socialist models of court administration still exist in China, Cuba, North Korea, Vietnam, and in many former Soviet republics. In addition to the five models of court administration we can find in Europe, peculiar models exist in many countries in the Middle East, where religious institutions play a crucial role in judicial governance. In Africa, models of court administration are even

[43] Thus, the Hungarian model of court administration after the 2011 judicial reforms belongs to the category of "hybrid models."

[44] *See* Parau, *supra* note 12, at 643–44; LES CONSEILS SUPERIEURS DE LA MAGISTRATURE EN EUROPE (Thierry S. Renoux ed., 1999); Jean-Francois Weber, *Conseil supérieur de la magistrature (CSM)*, *in* LA JUSTICE EN FRANCE 219, 221–22 (Thierry S. Renoux ed., 2013).

[45] *See* LINN HAMMERGREN, ENVISIONING REFORM: CONCEPTUAL AND PRACTICAL OBSTACLES TO IMPROVING JUDICIAL PERFORMANCE IN LATIN AMERICA (2007); Javier Couso, *Judicial Independence in Latin America: The Lessons of History in the Search for an Always Elusive Ideal*, *in* INSTITUTIONS & PUBLIC LAW: COMPARATIVE APPROACHES (Tom Ginsburg & Robert A. Kagan eds., 2005).

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more diverse, as they often combine colonial legacies with local specifics. From the European perspective, even the United States' model of court administration that puts a great emphasis on the democratic process—in particular by electing judges[46]—represents a distinct model that does not have an equivalent in Europe. Despite this diversity, the "global" JC model also argues for complete judicial control over court administration.[47] The only difference is that the "global" JC model is less developed and perhaps less outspoken than its European counterpart.

E. One Size Fits All? A Critique of Global or Euro-Models

Based on the previous three subsections, we can start pinpointing some of the deficits of the Euro-model—or even the "global" model—of court administration. Five points of critique will be raised in this section, largely from a normative point of view. Some of these points of critique will be elaborated further on in the ensuing sections of this paper from an empirical point of view.

First and foremost, the major objection to the Euro-model of court administration is that it suffers from the *lack of democratic legitimacy*. It disempowers elected branches of the government and transfers virtually all personal competences over judicial career to the judiciary. To paraphrase Roberto Unger, one of the little secrets of the Euro-model is its discomfort with democracy.[48]

Moreover, the lack of output—content—legitimacy of the JC Euro-model can certainly not be substituted by its input—process—derived legitimacy.[49] As has already been suggested,[50] the process of setting the standards of a Euro-model of court administration is opaque. It sidesteps democratic process and relies exclusively on a narrow group of judges and high-ranking officials of international and supranational bodies. The drafting process of

[46] Note that most U.S. judges on the state level are elected and often face regular retention review. In addition, non-Art III federal judges—such as magistrate judges, bankruptcy judges or administrative judges—are usually appointed for the specified terms of office and face additional forms of accountability. Only the "Article III judges" (judges of district courts and circuit courts and Justices of the Supreme Court of the United States), the tiny minority of the U.S. judiciary, are appointed for life (by the U.S. Senate upon nomination of the President) and enjoy the full set of safeguards. In sum, the elected branches have a major say in the career of judges at all levels of the judicial hierarchy in the United States.

[47] *See supra* Section B.

[48] *See* ROBERTO UNGER, WHAT SHOULD LEGAL ANALYSIS BECOME 72–73 (1998); Jeremy Waldron, *Dirty Little Secrets*, 98 COLUM. L. REV. 510 (1998).

[49] For the discussion of this traditional distinction, see FRITZ W. SCHARPF, GOVERNING IN EUROPE: EFFECTIVE AND DEMOCRATIC? 6–30 (1999); Fritz W. Scharpf, *Legitimacy in the Multilevel European Polity*, 1 EUR. POL. SCI. REV. 173 (2009).

[50] *See supra* Section B.

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reports of these bodies lacks openness and transparency. Other stakeholders can rarely comment on or influence the wording of the proposed standards.

Even if one were to assume that such standards were to be drafted by judges only, the lack of input legitimacy is further exacerbated by the *problem of representation.* This lack of representation has two dimensions: State-internal and trans-European. With respect to the former, it is questionable how far the judicial members of the current European or international consultative bodies really represent the national judiciaries as a whole and not rather the particular interests of a narrow group of court presidents and senior judges. One might even suggest, with a certain degree of simplification, that a narrow coterie of judicial officials meets few times a year in a closed session and once in a while announces a standard that defines the desired contours of their own power.

With the respect to the latter, there is the trans-European representativeness problem within the consultative and advisory judicial bodies. How far and how strongly are the various judicial and legal cultures present within Europe indeed represented? More narrowly, why is it that the JC Euro-model so closely resembles the Italian model of judicial council? How was it possible that the Italian model found so widespread support among judges from other European states and became translated into a "Euro-model"? True, the Italian *Consiglio superiore della magistratura* (CSM) is considered a success in Italy and is one of the oldest judicial councils in Europe. Arguably, it might therefore enjoy a privileged status based on its seniority. Still, the Italian CSM has also been repeatedly criticized for corporativism, a lack of judicial accountability, and suboptimal efficiency.[51] Moreover, there were other templates to choose from that range from a different model of judicial council such as the one at place in France to the Court Service model or the German Ministry of Justice model.[52] One must thus search for additional explanations. As one commentator suggested, the success of CSM as a European model "is also the result of the international presence and activism of the Consiglio superiore della magistratura and its members (it is not by chance that the ENCJ was formally established at the General Assembly of 20–21 May 2004 in Rome, and that [its] first President was Italian)."[53]

[51] *See* CARLO GUARNIERI & PATRIZIA PEDERZOLI, THE POWER OF JUDGES: A COMPARATIVE STUDY OF COURTS AND DEMOCRACY 54–59, 174–77 (2002); M. L. Volcansek, *Judicial Selection in Italy: A Civil Service Model with Partisan Results*, *in* APPOINTING JUDGES IN AN AGE OF JUDICIAL POWER: CRITICAL PERSPECTIVES FROM AROUND THE WORLD 159 (Kate Malleson & Peter R. Russell eds., 2006).

[52] *See supra* Section D.

[53] *See* Simone Benvenuti, Presentation at the XXII World Congress of Political Science on 'Challenges of Contemporary Governance' (July 19–24, 2012): The French and the Italian High Councils for the Judiciary Observations Drawn from the Analysis of Their Staff and Activity (1947–2011). *See infra* Section H (explaining the strong influence of Italian and Latin-style judicial councils within the European structures and their ensuing ideological domination in elaborating common standards therein).

Second, the Euro-model ignores the worldwide rise of power of courts—which calls for greater accountability of judges—hardly for their increased insulation behind the veil of a fully self-administering judicial council. Furthermore, while *l'esprit de corps* and ethical standards may be higher in established democracies, it is not necessarily so in developing or transforming countries. Leaving the judiciary unchecked by external actors in the latter countries might easily lead to corruption and judicial accountability avoidance.[54]

Third, even if we assume that the judiciary should even be granted further autonomy under such conditions, the Euro-model is not really able to deliver it with respect to individual judicial decision-making. It neglects the internal threats coming from within the judiciary. The Euro-model shields the judiciary from external influence, but it pays little attention to the improper pressure on individual judges exercised by senior judges and court presidents. It is important to remember that the judiciary is not "it" but "they."[55] The Euro-model empowers only a narrow group of judges who in turn may favor their allies and shape the judiciary according to their views.[56] They may even use their newly accrued power to settle the score with their competitors, critics or opponents *within* the judiciary.[57]

This is a significant failure of the JC Euro-model, which is embedded in its institutional design. The omission of the JC Euro-model we identified above[58] ought to be recalled at this stage: Court presidents and vice-presidents are generally not precluded from becoming members of the judicial council. There is typically no set maximum number of these judicial officials among members of the judicial council. Similarly, the JC Euro-model does not set any limit on the number of senior judges of appellate and top courts that can sit in the judicial council. Thus, the judicial council does not need to be representative of all echelons of the judicial hierarchy. This means that lower court judges may also elect appellate judges or court presidents as their representatives in the judicial council.

As a result, court presidents may have a majority on the judicial council. The model previously advocated as "self-governance" of judges quickly becomes nothing else than unbounded administration by senior judicial officials. This is particularly troubling in the CEE region, where court presidents have strong powers within their courts—the meso-

[54] On judicial accountability avoidance and other negative accountability phenomena, see David Kosař, *The Least Accountable Branch*, 11 INT'L J. CONST. L. 234, 259–60 (2013).

[55] *See* Adrian Vermeule, *The Judiciary Is a They, Not an It: Interpretive Theory and the Fallacy Of Division*, 14 J. CONTEMP. LEGAL ISSUES 549 (2009).

[56] *See* Béla Pokol, *Judicial Power and Democratization in Eastern Europe*, *in* EUROPEANISATIONS AND DEMOCRATISATION: THE SOUTHERN EUROPEAN EXPERIENCE AND THE PERSPECTIVE FOR THE NEW MEMBER STATES OF THE ENLARGED EUROPE 165, 182, 188 (2005).

[57] *See infra* Section H (discussing the Slovak case study).

[58] *See* THOMAS, *supra* note 35.

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level.[59] If they are allowed to combine their powers at the meso-level with additional powers at the meta-level (within the judicial council), they accumulate considerable power within the judicial system.

One might even wonder, with tongue-in-cheek, whether the silence of the JC Euro-model regarding the selection of the representatives of the judiciary was not intentional. The Euro standards were created under the auspices of various consultative bodies of the EU and the CoE. In these bodies, national judiciaries are usually represented by the Supreme Court president or prominent appellate judges.[60] This narrow group of court presidents and senior judges would hardly be inclined to share or even to yield their own extant powers. When they advocated the transfer of the competences from the Ministry of Justice to the judiciary, what they likely had in mind was in fact the transfer of this power to *them* acting as the judicial council. That might explain why the Euro-model leaves great latitude regarding the electoral laws of the judicial members of the judicial councils. Put differently, the silence of the JC Euro-model on the eligibility of court presidents to become members of the judicial council and on the ratio of senior judges on the judicial council is its critical component.[61] Without it, there might have been far less support for the JC Euro-model among judicial officials in power.

Fourth, it is confusing or even suspicious that international and supranational bodies in which representatives of established democracies still have a major say advocate for the model of court administration that most established democracies themselves have been either reluctant to introduce so far or outright rejected. Thus, the already outlined lack of democratic legitimacy was further multiplied. Not only was the way in which such recommendations have been adopted at the international/European forum and their content highly problematic, but in those established countries, where democratic control of the incoming international standards was possible, they were not taken on board. Thus, such standards could not have gained any further or substitute legitimacy through the national levels, by being embraced in established democracies and thus providing certain "leading by example" for the transforming countries.

Fifth, the Euro-model is portrayed as an "off-the-shelf" product that will produce the promised results in any environment. It does not account for the specifics of each judicial

[59] *See* PIANA, *supra* note 20, at 43–44; Solomon, *supra* note 40, at 354; Michal Bobek, *The Administration of Courts in the Czech Republic: In Search of a Constitutional Balance*, 16 EUR. PUB. L. 251, 253–54 (2010); Kosař, *supra* note 54.

[60] *See supra* Section B.

[61] *See* THOMAS, *supra* note 35. We will explain how this electoral law, or its deficiencies, can influence the functioning of the judicial council in Section H, where we discuss the Slovak case study. The mode of selection of judicial members had great consequences also on the operation of the Hungarian judicial council (before Orbán's 2011 judicial reform). *See* Pokol, *supra* note 56, at 188–89.

system, its vices and virtues, the legal culture the relevant judiciary is embedded in and its historical legacies and path-dependency. In this sense, the Euro-model is unhistorical.

However, in reply to such normative critique, a realist might suggest that in "going international" and projecting their own ideas and wishes onto the international forum, judges of the last few decades just started copying the behavior of national executives. The executive "escape" from the national parliamentary control towards the international or the European level is by now a well-known phenomenon in post-WWII Europe and beyond.[62] In Europe and in particular within the European Union, it just reached quantitatively new dimensions. National governments, which are facing unpopular but necessary measures to be taken on the national level, which would be either harmful to their reputation or could not be even pushed through the national parliament, take these issues to the European or international level. There they find sympathetic colleagues from other national administrations, frequently facing similar set of problems in their respective countries. After reaching a mutually beneficial agreement and adopting a new treaty or a new EU measure, they return to the national constituency with the impenetrable argument "Brussels wills it" in case of a EU measure and with reference to "our international obligations" with respect to international treaties.

Thus, is there anything surprising or strange with judges starting copying the same behavior as the national administrations? Both of them are at odds with democracy and accountability. This development, however, may not necessarily mean that judges would immediately become an "international priesthood" which would seek to "impose upon our free and independent citizens supra-national values that contradict their own."[63] On the international level, judges meet in public. The outcomes of the meetings are known and published. At the same time, there is indeed a qualitative leap: Judges became an internationally organized force.[64]

[62] Traditionally, governments do not have a strong record for willingly keeping the national parliaments informed about international affairs. Even if they inform national parliaments, the parliamentary control tends to be carried out only *ex post* and limited to the (non)ratification of treaties negotiated by the executive. Within the EU context, see NATIONAL PARLIAMENTS ON THEIR WAYS TO EUROPE: LOSERS OR LATECOMERS? (A. Maurer & W. Wessels eds., 2001); John Fitzmaurice, *National Parliamentary Control of EU Policy in the Three New Member States*, 19 W. EUR. POL. 88 (1996).

[63] Antonin Scalia, *Commentary*, 40 ST. LOUIS U. L.J. 1119, 1122 (1996).

[64] The buzzword of the last 10 years or so in Europe is "judicial networks." *See* Monica Claes & Maartje de Visser, *Are You Networked Yet? On Dialogues in European Judicial Networks*, 8 UTRECHT L. REV. 100 (2012); ALEXIS LE QUINIO, RECHERCHE SUR LA CIRCULATION DES SOLUTIONS JURIDIQUES: LE RECOURS AU DROIT COMPARÉ PAR LES JURIDICTIONS CONSTITUTIONNELLES 179–87 (2011). *See also* Arjen W.H. Meij, *Circles of Coherence: On Unity of Case-Law in the Context of Globalisation,* 6 EUR. CONST. LAW REV. 84 (2010).

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F. Promoting the Euro-Model in the New Europe

The story of the importation of the judicial council Euro-model of court administration into the New Europe (e.g., the post-communist countries in Central and Eastern Europe) is one of indirect, diagonal law exportation through the pan-European level. The JC model has been exported through the European institutions and marketed as the "Euro-solution" for the judicial reform across the CEE. The puzzling question pertains to how it was possible that a model of a strong and insulated judicial council, which might be said to generate certainly less than optimal results in terms of judicial performance in the countries of its origin,[65] has been able to become the dominant model, and in fact the "Euro-model," pushed forward and advocated by the European institutions.

There are several factors that were crucial in this marketing success: Structural as well as circumstantial. Structurally speaking, genuine reform and transformation is a lengthy and tiresome process.[66] It is therefore not much favored by national or international political actors, who wish for visible and quick solutions. What tends to be preferred is the establishment of a new, grand institution over the reform of the old one(s). In terms of a judicial reform, a new national council of the judiciary as the symbol of a new era might be more visible politically and better internationally as a sign of "progress" than the tedious small-scale work on the ground, such as, for instance, issues of work management, auxiliary court staff, systems of random case assignment, publicly accessible online search engines of national case law, reasonable judicial performance evaluation, and so on.

This is not to suggest that these two issues, macro- and micro-level reform, are not connected. Rather, what is suggested is that once the "grand design" in the form of a new umbrella institution of a judicial council has been created, the appropriate box on the international compliance sheet has been checked. This invariably meant, in terms of judicial reform in the CEE, that once a new judicial council based on the best Euro-standards was established, the "mission accomplished" flag was flung. Attention quickly moved to other policy areas and other institutions. However, as evidenced in a number of countries in the CEE, the real problems were just about to start.

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[65] *See, e.g.*, sources cited *supra* note 51 (quoting the critical voices on the state and performance of the Italian CSM). The same model has delivered rather questionable results also in Latin America. *See* sources cited *supra* note 45.

[66] The question is also when it is over, if ever. A legal transformation may be conceived of at different levels. In the narrow sense, it just means the shift from one regime to another, a mere change in the constitutional structure. In the broader sense, it means much more: Not just a constitutional shift, but also change in values, their enforcement and the real life of the new institutions. *See, e.g.*, CSABA VARGA, TRANSITION TO RULE OF LAW: ON THE DEMOCRATIC TRANSFORMATION IN HUNGARY 74 (1995). Varga quotes the former president of the Hungarian Constitutional Court, L Sólyom, who claimed that for him, the "transition" was, from the legal point of view, finished in October 1989. From then on, Hungary has been a law-governed state and there is no further stage to which to transit. *Id.*

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Structural preference for institutional novelty to the detriment of genuine internal reform was met with ideal *circumstantial* conditions, both external and internal. Internally, those in favor of a partial or full self-administration of the judiciary by the fiat of a judicial council tended to be judges themselves, particularly senior judges. Their suggestions would often be supported by non-governmental organizations as well as parts of legal scholarship. To be sure, politicians and administrators tend not to welcome the idea of a self-administering judiciary. However, in systems of transition, their voices tend to be weakened, especially if external pressure is being put on them.[67] The pressure was particularly strong in the EU pre-accession stage. Potential national political disagreement was considerably weakened by the EU conditionality, and the "alliance of interests" in favor of the establishment of robust judicial councils was the strongest. The national judicial, non-governmental, and academic demands were boosted by external support, both governmental and non-governmental.

On the governmental level, both the CoE and the EU were, in terms of standards, suggesting the introduction of the judicial council Euro-model as the model for the transition countries in the CEE.[68] This overall and general "soft" suggestion as to the best practice started becoming a de facto requirement with respect to the CEE candidate countries for EU membership. In 1993, in the so-called Copenhagen criteria,[69] the EU set a number of conditions a candidate country must fulfill in order to become a new Member State of the EU. The first of the criteria required that the candidate country achieve stability of institutions guaranteeing democracy, the rule of law, human rights, and respect for and protection of minorities.[70]

The Copenhagen criteria were later fleshed out in Agenda 2000.[71] Therein, the European Commission announced that it would report regularly to the European Council on progress made by each of the candidate CEE countries in preparations for membership and that it would submit its first Report at the end of 1998. Requirements as to the quality of the

[67] Many scholars have been perplexed about why the CEE parliaments gave up their power so easily. *See, e.g.*, Cristina Parau, *The Dormancy of Parliaments: The Invisible Cause of Judiciary Empowerment in Central and Eastern Europe*, 49 REPRESENTATION 267 (2013).

[68] *See supra* Section B.

[69] CONCLUSIONS OF THE PRESIDENCY, EUROPEAN COUNCIL IN COPENHAGEN 13 (June 21–22, 1993), http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/en/ec/72921.pdf.

[70] *See, e.g.*, KOCHENOV, *supra* note 18; Kirstyn Inglis, *EU Enlargement: Membership Conditions Applied to Future and Potential Member States*, *in* THE EUROPEAN UNION AND ITS NEIGHBOURS: LEGAL APPRAISAL OF THE EU'S POLICIES OF STABILISATION, PARTNERSHIP AND INTEGRATION (Steven Blockmans & Adam Lazowski eds., 2006).

[71] *Agenda 2000 - Vol. I: For a Stronger and Wider Union,* COM (2000) 97 final (July 13, 1997); *Vol. II: The Challenge of Enlargement*, COM (2000) 97 final (July 15, 1997).

judicial system in the candidate countries were included under the heading "Democracy and the Rule of Law." One of the clearly stated requirements included in the Commission's regular monitoring reports was the "independence and self-government of the judiciary."[72]

The message sent from the European institutions in this respect was quite clear: If you wish to join the "Euro club," you ought to introduce (at least some features of) self-government of the judiciary.[73] This external pressure and conditionality were further amplified by a set of transnational actors, which could be aptly labeled as the international "rule-of-law industry." These transnational actors would include a heterogeneous set of non-governmental organizations, development agencies, and international scholars who would invariably also push for the establishment of judicial self-administration in the form of a judicial council. A notable example from this set of actors with respect to the EU candidate countries in late 1990s and early 2000s would be the Open Society Institute. It compiled a series of comparative reports on the state of the judiciary in Central and Eastern Europe that, among other things, reprimanded those countries that would not have adopted court self-administration.[74]

However, while it is open to debate which of the two factors, external or internal, played the key role in a given CEE country, it is clear that some domestic actors greeted the JC Euro-model with open arms. External pressure met with partial internal demand. Several scholars have even suggested that domestic judicial institutions, rather than supranational influences, have been the major factor in judicial policymaking and agenda setting in this region. For instance, Daniela Piana argues in her book about judicial governance in five post-communist countries in CEE (Bulgaria, the Czech Republic, Hungary, Poland, and Romania) that the actors (the Ministry of Justice or the Judicial Council) who emerged as

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[72] *See, e.g.*, *European Commission's Regular Report On Czech Republic's Progress Towards Accession*, at 18–20, SEC (2001) 1746 final (Nov. 13, 2001); at 22–24, SEC (2002) 1402 final (Oct. 9, 2002).

[73] For example, mostly in the period before the EU Accession. The two new Member States that joined the EU in 2007, Romania and Bulgaria, represent in this respect a special case of *de facto* extending the pre-accession conditionality to the period after the Accession. Although, the EU's input has been crucial in these countries. Diana Bozhilova, *Measuring Success and Failure of EU-Europeanization in the Eastern Enlargement: Judicial Reform in Bulgaria*, 9 EUR. J. OF LEGAL REFORM 285 (2007). Parau*, supra* note 12, at 655, states:

> Ironically, it was the Commission who imposed on Romania the formal institutions designed to autonomise the Romanian judiciary. Without such pressure it is highly unlikely that the SCM would have been given so much power and autonomy: 'The 2004 reform would probably not have happened without pressure from the Commission and pressures associated with wanting to join the EU . . . or it might have taken longer, it might not have followed the same path . . . . The European Commission was strongly associated with it.'

[74] *Cf.* OPEN SOCIETY INSTITUTE, MONITORING THE EU ACCESSION PROCESS: JUDICIAL INDEPENDENCE 112–13, 127–28 (Central European University Press 2001).

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winners from the first transitional wave of reforms were better placed in the second pre-accession wave. They accordingly exploited the opportunities provided by the looming EU accession to entrench existing domestic allocations of powers.[75] These winners used their leverage from the first transition wave to increase their own powers or to at least prevent the transferal of significant powers to other organs. Cristina Parau puts forth a different argument,[76] but she also posits that the supranational origin of the JC Euro-model does not adequately explain the success of this design template. She argues that an equally important but far less observable cause for their success was the "dormancy" of the CEE parliaments. In particular, it was the puzzling lack of resistance by the majority of elected representatives to their own correlative disempowerment.[77]

Against such supranational and domestic demand for a new institution for the judiciary, the Latin-styled Judicial Council model clearly emerged as the model for the CEE countries. The imposition of this model through the European institutions yet again confirms the fact that, as in the business, the product that sells in the end is not necessarily the best one in terms of quality, but the product that has the better marketing. In contrast to other models of judicial administration,[78] the advantage of the Latin-styled judicial council model is that it presents an advanced structure with dedicated force to entertaining "foreign relations" within the national judicial council structures. The model is thus much better able to "reproduce" itself internationally. In the words of the previously introduced marketing parallel, there is an in-house (international) "sales department." One may only contrast this with the (Germanic) Ministry of Justice model or the much more restrained and pragmatic quality-oriented court services model in Northern Europe, which does not dispose of means and tools for self-propagation on the international level. In other words, such models are arguably more concerned with internal quality and efficiency than with entertaining flamboyant external relations.[79]

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[75] PIANA, *supra* note 20, at 162–63.

[76] Parau, *supra* note 67. *See also* Cristina Parau, *Explaining Judiciary Governance in Central and Eastern Europe: External Incentives, Transnational Elites and Parliament Inaction*, (67) 2 EUROPE-ASIA STUDIES (forthcoming 2015).

[77] In Slovakia, which is covered neither by Piana's nor Parau's research and which we discuss in more detail below (Section H), the internal factors prevailed as well. The major rationale for the introduction of the JC Euro-model in Slovakia was "anti-Mečiarism." The period of "mečiarism" refers to years between 1992 and 1998, when Vladimír Mečiar was the Prime Minister of Slovakia. Mečiar was known for his autocratic style of government. In 1998, after the democratic centrist coalition won the general elections, it wanted to ensure that "Mečiar-style interferences" with the judiciary could not be repeated. In order to prevent these interferences, the centrist coalition founded a new institution, the Judicial Council of the Slovak Republic, which meets all the criteria of the Euro-model.

[78] *See supra* section D.

[79] *See supra* notes 51–52 and accompanying text.

Thus, in contrast to the complex variety of national models of administration of the judiciary extant across Europe, the Latin-style judicial council model provided an ideal off-the-rack and ready-made product available at the right place in the right time. Apart from this, the model was also alluring in its seemingly elegant simplicity: A clear-cut, new institution will be introduced, whose task is to redress the deficiencies of the previous model. Before entering into the discussion of the genuine life and sociological impact of judicial councils in CEE, a glance at the (normative) promise of what the model was supposed to deliver in the first place is nonetheless necessary.

G. What Was the Euro-Model Supposed to Deliver?

If we want to identify the goals the JC Euro-model was supposed to achieve, we must search through the documents of the Council of Europe and the European Union. Two caveats must be added at the very beginning. First, it goes without saying that goals set by the "founding fathers" and advocates of the JC Euro-model may somewhat differ from the actual effects of this model. Some sort of standard functional deviation is thus inevitable, certainly in the short- or mid-term. It is clear, however, that if the ensuing reality of a model denies its founding values and promises completely, one can hardly talk of any permissible deviation or modification. Second, in our search for the effects of the introduction of the Euro-model, we focus only on institutional and personal consequences for the judiciary and judges. We thus leave aside the potential impact of this model on various values external to the judiciary such as "the rule of law, the promotion of civil liberties, individual freedoms [and] basic human rights. . . ."[80] This is intentional: As important and grandiose as these values are, they are also either contested terms and/or so vague that they are in practice impossible to measure to any reasonable degree.[81]

We can therefore narrow down the question to be answered in this section as follows: Which values or characteristics of the judiciary were the introduction of the Euro-model supposed to enhance? There is one particular value which stands out in the policy documents produced under the auspices of the CoE and the EU: Judicial independence. In fact, virtually all of the documents of these two bodies claim that the JC model improves judicial independence.[82] Unfortunately, none of these documents spell out what they mean by judicial independence. They usually acknowledge the difference between the independence of individual judges and the independence of the judiciary and claim that

[80] *See, e.g.*, ENCJ, *supra* note 24, at 2.

[81] *See, e.g.*, Tom Ginsburg, *Pitfalls of Measuring the Rule of Law,* 3 HAGUE J. RULE L. 269 (2011); Jeremy Waldron, *Is the Rule of Law an Essentially Contested Concept?*, 21 L. & PHIL. 137 (2002) (regarding the rule of law). These challenges apply, *mutatis mutandis*, to other values mentioned in ENCJ, *supra* note 24.

[82] *See* ENCJ, *supra* note 24, at para. 1.7; CCJE, *supra* note 24, at para. 8; *Budapest Resolution*, *supra* note 25, at para. 1; European Charter on the Statute for Judges, *supra* note 24, at para. 1.3; *Recommendation CM/Rec (2010) 12*, *supra* note 25, at para. 26.

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judicial councils enhance both of these facets of judicial independence.[83] It would appear, nonetheless, that the documents clearly prioritize the latter aspect, the autonomy of the judiciary.[84]

Other potential values or goals of the JC model are mentioned far less frequently. As early as 1994, the CoE stressed the importance of the efficiency of judges.[85] Later on, both the Council of Europe and the European Union contended that the JC model improves the efficiency of the judiciary.[86] In fact, speeding up judicial procedures and reducing workloads became a mantra of the EU Accession Reports. Eventually, the quality of justice was added as a separate value, which the JC model is also supposed to deliver.[87]

Surprisingly, much less attention has been paid, until very recently, to other generally acceptable values such as transparency, participation, and accountability. During the accession process, the European Commission was mostly preoccupied with judicial independence and the efficiency of the judiciary and side-lined transparency mechanisms.[88] So was the CoE.[89] Recently, both of these international organizations have stressed the importance of transparency in their documents on judicial councils.[90] They nonetheless tend to focus on the transparency of the judicial council itself and not on the transparency of the judiciary.[91] Participation has undergone similar development. The EU and the CoE, after initial reluctance, relaxed their position on the composition of the judicial council and accepted the parity between judges and non-judges.[92]

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[83] *See* CCJE, *supra* note 24, at para. 8; *Recommendation CM/Rec (2010) 12*, *supra* note 25, at para. 26.

[84] *See, e.g.*, ENCJ, *supra* note 24, at para. 2.2; CCJE, *supra* note 24, at paras. 12–13; *Recommendation CM/Rec (2010) 12*, *supra* note 25, at para. 4.

[85] *See Recommendation No. R (94)*, *supra* note 14.

[86] *See Budapest Resolution*, *supra* note 25, at para. 1; ENCJ, *supra* note 24, at para. 1.7; CCJE, *supra* note 24, at para. 10; *Recommendation CM/Rec (2010) 12*, *supra* note 25, at para. 26.

[87] *See* ENCJ, *supra* note 24, at para. 1.7; CCJE, *supra* note 24, at para. 10.

[88] Compare in particular, the pre-Accession Reports with respect to the individual CEE countries, put together by the European Commission. *See* sources cited *supra* notes 71, 72.

[89] *See, e.g.*, *Recommendation No. R (94)*, *supra* note 14; European Charter on the Statute for Judges, *supra* note 24 (observing that there is no mention to transparency at all).

[90] *See, e.g.*, ENCJ, *supra* note 24, at paras. 1.7, 7.2; *Budapest Resolution*, *supra* note 25.

[91] *See* CCJE *supra* note 24, at Part VI; ENCJ, *supra* note 24, at para. 2.5.

[92] *Compare* ENCJ, *supra* note 24, at para. 2.2, *or Recommendation CM/Rec (2010) 12*, *supra* note 25, at para. 27 (referring to the most recent documents that accept "only" 50% of judicial members in the judicial council), *with* CCJE, *supra* note 24, at para. 18 (referring to older documents that claim that "a substantial majority of the members should be judges").

What is most striking, given the well-known problems of venality of CEE judiciaries and their low ethical standards, is how little attention the EU and the CoE paid to judicial accountability. The relevant policy documents that define the JC Euro-model do not mention this value at all; despite the fact that judicial accountability has gradually emerged as the second most important goal of judicial councils in scholarly literature, competing with judicial independence.[93] The relevant policy documents focus on (limited) accountability of the judicial council instead of accountability of the judiciary and/or individual judges,[94] or make clear that "the accountability of the judiciary can in no way call into question the independence of the judge when making judicial decisions."[95]

The fact that not a single document of the consultative organs of the CoE or the EU produced over the years sets standards for how judicial councils and self-administrating judiciaries ought to address corruption of judges is also quite telling. All in all, the values promoted and goals set deeply reflect the way in which the standards were created—by (senior) judges and for (largely also senior) judges. Thus, great attention is being paid to institutional and power-enhancing elements, whereas somewhat meager attention has been paid to the less comfortable—but for the functional judiciary—extremely important "housekeeping" elements.

In sum, the declared "general mission"[96] of the JC Euro-model has been to safeguard and enhance judicial independence, which was primarily viewed in its macro- or institutional dimension. Besides judicial independence, the Euro-model was also supposed to, according to its "founding fathers," deliver the following "goods": (1) To increase the efficiency of the judicial system; (2) to enhance the quality of justice; (3) to depoliticize the judiciary; and, according to most recent documents, (4) to increase the transparency of the judicial system.

H. What Did the Euro-Model In Fact Deliver?

Stated in a nutshell, the constitutional independence of the judicial power in the form of a judicial council might work in the case of mature political environments, where decent ethical standards extant and embedded in the judiciary guarantee that the elected or appointed judges or administrators will put the common good before their own. However, the same constitutional insulation of the judicial power in countries in transition in the New Europe has been either awkward or has had outright disastrous consequences for

[93] *See* Garoupa & Ginsburg, *supra* note 30, at 110.

[94] *See* CCJE, *supra* note 24, at Part VI. *But cf.* ENCJ, *supra* note 24, at para. 2.2.

[95] *Budapest Resolution*, *supra* note 25, at para. 10.

[96] CCJE, *supra* note 24, at Part II Title.

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judicial independence and for the general state and reform of judiciaries in these countries.

Judicial self-administration in the form of a judicial council is based on the (generally understandable) assumption that the more senior members of the profession have more experience. They should thus be better administrators. The judicial councils are designed to bring the more senior members of the judiciary to the fore, either directly, making some senior judges *ex lege* members of the JC (chief justice, presidents of other supreme court, and so on), or indirectly, by election.

However, in transitional societies, which experience value discontinuity, there is always an inherent discrepancy between experience and values. Those with experience will typically adhere to the old system and other values. Senior judges will be inherited from the communist regime. Given the lack of purges within the judiciary and the shortage of judges after the fall of communist regimes, the number of judges from the communist era is particularly high at the upper echelons of the CEE judiciaries. One may speak of an "inverse pyramid." As Zdeněk Kühn put it, "the higher one goes in the structure of the judiciary, the higher the percentage of ex-communists."[97]

It is hard to imagine communist-era judges turning overnight into independent and responsible judicial managers, who are willing to put the good of the justice system before their own. However, if a national self-administrative body of the judiciary is established soon after the regime change, it is precisely the communist-era judges who, because of their standing and seniority, will be given the key positions in the new institutional setup.

In the CEE countries that introduced the JC Euro-model,[98] this scenario kept repeating itself in practice. Judicial councils and the self-administration of the judiciary came simply too early, before much or genuine structural reform and, above all, the natural renewal of judges could take place. Once established, the senior—often Communism-inherited—judicial cadres took over, either halting or sometimes reversing the reforms already carried

[97] Zdeněk Kühn, *The Democratization and Modernization of Post-Communist Judiciaries*, *in* CENTRAL AND EASTERN EUROPE AFTER TRANSITION 177, 181 (Alberto Febbrajo & Wojciech Sadurski eds., 2010).

[98] Note that not all CEE countries adopted the JC Euro-model. For instance, the Czech Republic retained its Ministry of Justice model. Although, the Czech Republic is not alone. Some countries that introduced the judicial council model did not opt for the JC Euro-model. For instance, Poland never transferred virtually all powers regarding the career of judges to its National Council of the Judiciary (NCJ) and, moreover, in 2007 it banned court presidents from membership in the NCJ. *See* Adam Bodnar & Lukasz Bojarski, *Judicial Independence in Poland*, *in* JUDICIAL INDEPENDENCE IN TRANSITION 667, 669–79 (Anja Seibert-Fohr ed., 2012). Estonia also preferred the co-operative model of court administration where judicial councils share many powers with the Ministry of Justice. *See* Timo Ligi, *Judicial Independence in Estonia*, *in* JUDICIAL INDEPENDENCE IN TRANSITION 739, 741–55 (Anja Seibert-Fohr ed., 2012). In contrast, Slovakian, Romanian, Bulgarian and Hungarian (until Orban's judicial reforms in 2011) judicial councils are examples of the JC Euro-model.

out. However, this time around, the political process cannot say much in this respect, because a constitutionally entrenched judicial council runs the show.

The resulting picture is negative and differs solely in the degree. From somewhat silly, but in their nature harmless, façades of judicial independence, which still hide some promise of becoming functional and indeed independent system one day, to judicial councils turning into mafia-like structures of judges seeking personal gain and using the new institutional structure for power oppression.

The fact that the Euro-model for the creation of the "right" form of a judicial council came with only the institutional skeleton and little or no internal judicial virtues was understandable and predictable to a certain degree. Law importation is typically limited to the importation of the structure—hardly to simultaneous importation of its internal culture and conventions.[99] What is being exported is the institutional exoskeleton, not the flesh that in the end forms the genuine life of the institution. There was, however, a further problem with the skeleton itself: The institutional structure created and recommended[100] has in fact no genuine equal in the national states.

How could a model be so strongly recommended if it in fact had no genuine parallel in reality? The point to remember in this respect is the way in which the recommended Euro-model was created, described in the previous sections of this article; it was created by national judges meeting in various European and national fora and conjuring a model that they themselves would like. Such a model, apart from the obvious normative problems associated with its creation,[101] is also flawed from a functional point of view. The end product is in fact a *mélange* of judicial wishes, but the model was never genuinely tested in a real legal environment.

One may even ask why the CEE countries, most of which were heavily influenced by the German and Austrian legal tradition, were asked to opt for the Italian model of court administration. Had the choice been phrased as either the German/Austrian model or the Italian model instead of either the German/Austrian model or the "European" model, the answer of the CEE governments could have been different. With respect to the latter option, it has been fascinating to see how the key stakeholders (the community of professional networks of judges, top academic jurists, NGOs and legally trained politicians interlocked with the CoE and the EU organs) managed to label their model as "European," despite the fact that such model solely existed in one EU Member State, and how the

[99] *See also* MICHAL BOBEK, COMPARATIVE REASONING IN EUROPEAN SUPREME COURTS 255–72 (2013).

[100] See in particular the judicial council model envisaged by ENCJ, *supra* note 24 and CCJE, *supra* note 24.

[101] *See supra* Section E.

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wishes of these stakeholders, typically put together in a sort of soft-law instrument, became the binding norm.

To clarify, we do not claim that the Italian model of court administration is by nature problematic and does not work in Italy.[102] Maybe it is even the best model for Italy. We are neutral regarding this claim. What we argue is that the Italian model, marketed as the "European" model in the CEE, has had deleterious effects in the CEE and should not have been transplanted to CEE countries. The reason is not only the time factor outlined above (i.e. that extensive self-administration of the judiciary before its international reform provides for a problem), but also the fact that certain "Italian" preconditions are not met in the CEE. For instance, in Italy judges are promoted on the basis of seniority. Therefore, there is no opportunity to use this mechanism selectively to promote the allies of the current establishment at the *Consiglio superiore della magistratura* and deny the promotion of their critics. Similarly, Italian court presidents do not have such vast powers as their CEE counterparts. In contrast to post-communist countries, Italy also has no tradition of rigging case assignment by court presidents and certain mechanisms such as discretionary salary bonuses for judges are not available there.[103] Finally, the homogeneity and *l'esprit de corps* of the Italian judiciary is certainly higher than in CEE judiciaries.

All of the abovementioned factors account for the emergence of façades of judicial independence with respect to the newly established judicial councils in transition countries in the CEE. Unfortunately, there might also be more pathological developments within such a new institution, in which senior judicial cadres coming from the communist period are given the chief say. This may even amount to "hijacking" the new institution by the communist-era judicial elites, and sealing it off behind a veil of judicial independence.

The Slovak National Judicial Council might be a sad example in this respect.[104] In 2001, Slovakia opted for the JC Euro-model following the fall of the autocratic Mečiar's government. The Judicial Council of the Slovak Republic (JCSR) is a body with constitutional standing.[105] It is composed of eighteen members: Eight judges are elected from within the judiciary, three members are elected by the Slovak Parliament, three members are appointed by the President of the Slovak Republic, and three members are appointed by

[102] On the functioning of Italian judicial council, *Consiglio superiore della magistratura*, see DANIELA PIANA & ANTOINE VAUCHEZ, IL CONSIGLIO SUPERIORE DELLA MAGISTRATURA (2012).

[103] *Id.*

[104] We do not intend to provide a deep level empirical study of the impact of the JCSR on the Slovak judiciary. However, we believe that the ensuing snapshot at what has been happening after the introduction of the JCSR clearly support the main arguments of our article.

[105] Art. 141a of the Constitution of the Slovak Republic and related legislation, especially zákon č. 185/2002 Z. z., o Súdnej rade Slovenskej republiky (Law no. 185/2002 Coll., on the Judicial Council of the Slovak Republic).

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the Government. The last (or, more precisely, the first) member of the JCSR, which is at the same time *ex lege* its chairman, is the President of the Slovak Supreme Court. In practice, professional judges were always in the majority in the JCSR. The "first" JCSR (2002–2007) was composed of twelve judges and six non-judges. The "second" JCSR (2008–2013) even consists of sixteen judges and two non-judges.[106] This development shows how important it is to decide who selects judicial members of the judicial council and how the electoral law to the judicial council is designed.[107]

Nonetheless, the importation of this new Euro-model has been unmatched by any visible rise in efficiency of the judiciary or the quality of justice. Depoliticization of the Slovak judiciary was also a rather wishful thinking. Every election of the JCSR's chairman led to protracted constitutional litigation that attracted comments from all segments of the Slovak political scene. The new regime also allowed judges to become ministers without losing judicial office. Mr. Štefan Harabin exploited this option in 2006, when he became the Minister of Justice. In 2007, judges avowedly called for and accepted nominations to the JCSR from politicians. The election of the new president of the Supreme Court in 2008–2009 became a political theatre. However, the politicization of the judiciary reached its apex in 2010, when centrist parties won the parliamentary elections. The new government had little understanding of Harabin's methods, and war broke out between the Minister of Justice, Mrs. Lucia Žitňanská, and Mr. Harabin. Not a single week passed without ferocious attacks waged by Harabin,[108] especially when Žitňanská announced her judicial reform that was supposed to reduce the influence of the president of the Supreme Court and the JCSR on the Slovak judiciary. Harabin's critics have been very vocal as well. All sides had another thing in common: They wanted to get as much support as possible from their political allies. Hence, the JCSR gradually brought the judiciary to the forefront of Slovak politics rather than insulating it from political tumult.

Similarly, the JCSR did little to enhance the transparency of the Slovak judiciary.[109] Appointment as well as promotion of judges remained as opaque as under the Ministry of Justice model. It may have become even more nepotistic than before. The access to judicial decisions did not improve until the Ministry of Justice, not the JCSR, started to publish

[106] Nominally at least 9 members must be judges; in practice, however, even the other institutions appoint judges as members of the JCSR.

[107] *See supra* Section E and notes 58–61.

[108] For instance, he referred to Žitňanská as a "liar." *See* Günter Woratsch, *Zpráva o stavu slovenské justice – fenomén Štefan Harabin*, Pecs (Apr. 23, 2011).

[109] *See id.; see, e.g.*, Jana Dubovcová, *Umožňuje súčasný stav súdnictva zneužívanie disciplinárneho konania voči sudcom, zneužívanie výberových konaní a dáva výkonnej moci oprávnenie zasiahnuť do súdnej moci?*, *in* VÝZVY SLOVENSKÉHO SÚDNICTVA A MOŽNOSTI ZLEPŠENIA EXISTUJÚCEHO STAVU 53–56 (Transparency International Slovensko ed., 2010); LUKASZ BOJARSKI & WERNER STEMKER KÖSTER, THE SLOVAK JUDICIARY: ITS CURRENT STATE AND CHALLENGES 94, 107–09 (2011).

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online all decisions of district and regional courts in civil and commercial law cases in 2006, and passed a law that required online publication of all judgments of Slovak courts in 2011.[110] To the contrary, the JCSR hindered transparency. The JCSR has been accused of *per rollam* voting,[111] secretiveness, and holding its meetings in awkward locations that dissuaded the public and journalists from attending them.

The introduction the JCSR had even more negative effects on the public confidence in the Slovak judiciary. To be fair, the situation was far from bright in 2002, when the JCSR began to operate. The results of the 2002 Transparency International poll speak for themselves: 60% of the respondents stated that corruption at courts and *prokuratura* existed and was widespread; 25% of the respondents stated that corruption at courts and *prokuratura* existed but they did not know how widespread it was; and only 1% stated that corruption at courts and *prokuratura* did not exist.[112] At that time, it was generally thought that the judiciary reached a low point during Mečiar's rule and that the situation could not get any worse.

However, nine years after the JCSR began its functions, confidence in the judiciary reached its lowest ebb in Slovak history. The 2011 poll of the Institute for Public Affairs, which provided separate results for three categories of respondents—lay people, legal experts, and judges—shows the deleterious impact of the JC Euro-model. As to lay people, 35% of respondents trusted the Supreme Court of Slovakia and only 26% of respondents trusted the judiciary as a whole,[113] whereas 59% did not trust the Supreme Court and 70% did not trust the judiciary.[114] The judiciary ranked last among all public institutions. The view of experts was similar regarding the judiciary, but it differed significantly as to the Supreme Court. While 21% of experts trusted the judiciary, only 10% trusted the Supreme Court. The level of distrust vis-à-vis the judiciary was very high (79%), but the distrust of the Supreme Court reached an astonishing number (86%).[115] What is most shocking is the view of judges themselves. Only 68% of respondent judges trusted the judiciary, whereas 32%

[110] *See* Art. 82a of Law No. 757/2004 Z. z., as amended by Law No. 33/2011 Z. z. & Law No. 467/2011 Z. z.

[111] Voting done by the so called "*per rollam*" (by letter) means that it is a voting without calling a meeting (e.g., by correspondence), which meant that nobody could attend the JCSR's meetings.

[112] Katarína Staroňová, *Projekt "Súdný manažment" ako protikorupčný nástroj*, *in* JEDENÁSŤ STATOČNÝCH: PRÍPADOVÉ STUDIE PROTIKORUPČNÝCH NÁSTROJOV NA SLOVENSKU 215, 217 (Emília Sičáková-Beblavá & Miroslav Beblavý eds., 2008) (quoting the Transparency International Slovakia poll from 2004).

[113] Note that the Constitutional Court of Slovakia is not considered to be a part of the system of general courts in Slovakia and thus it was not covered by this question.

[114] INSTITUTE FOR PUBLIC AFFAIRS (IVO), SLOVENSKÁ JUSTÍCIA OČAMI VEREJNOSTI, ODBORNÍKOV A SUDCOV 1 (2011). Note that the remaining responses (up to 100%) was "I do not know."

[115] *Id.* at 2.

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indicated that they did not trust the Slovak courts.[116] The results of the poll regarding the Supreme Court are even more revealing. As many as 54% of judges in the survey responded that they did not trust the Supreme Court, while only 46% indicated that they trusted the Supreme Court.[117] This meant that judges themselves considered the Supreme Court the least trustworthy institution in Slovakia.

One thing has changed, however. Before the introduction of self-administration by the judiciary and the judicial council, one of the most frequently heard arguments was that any influence that the executive has over the judiciary would be misused in influencing the decision-making of the courts and individual judges. Judicial self-administration was thus presented as a way of protecting judicial independence and as preventing politicians from putting pressure on judges. However, even with self-administration and the shielding of judges from political pressures, instances of influencing judges and their individual decision-making still flourished and perhaps increased between 2002 and 2009. The only difference was that before it could at least be maintained that these things were carried out by the corrupt political elite, and because of system deficiencies. Now it was plainly the judges themselves who were to blame.

Moreover, in 2009, with the election of Mr. Štefan Harabin to the presidency of the JCSR, the idea of judicial self-administration had lost any remaining credit in Slovak society. So did the idea that a judicial council of the Euro-model type could guarantee even a basic degree of judicial independence. Already the advent of Harabin to the head of the JCSR was quite telling: Harabin, after being appointed as the minister of justice in 2006, publicly announced steps which would be aimed at limiting the "undue power" of the self-administration of the judges. In 2008, when the position of President of the Supreme Court (and, by virtue of that position, also chairman of the JCSR) fell vacant, his policy changed. In early 2009, the Slovak government and parliament approved bills submitted by the minister of justice, Harabin. They carried out a series of amendments which broadened the scope of the self-administrative powers of the (already strong) JCSR, most significantly adding some budgetary and inspection powers. By this legislative change, the last remaining important competences of the ministry of justice were placed in the hands of the JCSR. In June 2009, as the Minister of Justice, Harabin sent a list of his preferred candidates to the JCSR, which pressured the electors. According to a 2011 Woratsch report, due to this pressure, several of his allies, many of them court presidents, became members of the JCSR.[118] Given this orchestrated support, Harabin was elected unanimously by the JCSR to the position of the President of the Supreme Court and thereby, to the position of the chairman of the JCSR as well.

[116] *Id.*

[117] *Id.*

[118] *See* Woratsch, *supra* note 108.

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Since then, media allegations have included instances of corruption, nepotism and incompetence, abuse of the powers of the Supreme Court president and the misuse of the JCSR's disciplinary powers against Harabin's critics.[119] Harabin was particularly eager to silence his critics at the Supreme Court. He himself initiated twelve disciplinary motions against Supreme Court judges in 2009 and 2010. The JCSR chaired by Harabin triggered one more motion.[120] Several lower court judges who dared to criticize Harabin also faced disciplinary trials, as a result of which they were often suspended and their salaries were significantly reduced during this interim period.[121]

Harabin started to use other sticks too. Soon after he became the President of the Supreme Court, he reshuffled the composition of the Supreme Court chambers. He placed "recalcitrant" judges who did not agree with him in two chambers of the administrative division of the Supreme Court. He also made sure that these two chambers could decide on only certain categories of cases (such as detention cases, asylum, social security cases). All cases with a significant monetary aspect such as competition law or tax law cases went to other chambers. Harabin adopted the same approach to assigning individual cases. He bypassed the random case assignment by selective reassigning of cases, allegedly on efficiency grounds. Sometimes he changed the work schedule, which determines general rules for case assignment, as frequently as twenty-five times per year. It was reported that recalcitrant judges were given an extra workload, approximately sixty cases more than obedient judges. As an additional burden, these recalcitrant judges were forced to decide all detention cases that had to be decided within a statutory limit of seven days. These detention cases were initially supposed to be evenly distributed among all chambers.[122]

Harabin also offered some carrots. He awarded generous salary bonuses to his allies and denied them to his critics.[123] According to a Supreme Court judge, the salary bonuses of the Supreme Court judges in 2009 and 2010 varied from fifty euro per annum for recalcitrant judges to tens of thousands of euros for obedient judges.[124] The differences

[119] *See* BOJARSKI & KÖSTER, *supra* note 109; Dubovcová, *supra* note 109, at 54–56; Woratsch, *supra* note 108.

[120] Some of these cases are reported in BOJARSKI & KÖSTER, *supra* note 109, at 102–05.

[121] Dubovcová, *supra* note 109, at 54–55.

[122] The listed examples of Harabin´s judicial "administration" originate from Eva Mihočková, *Šikanovanie v talári*, PLUS 7 DNÍ (Dec. 12, 2011). *See also* Pavol Kubík & František Múčka, *Ako úraduje Štefan I. Čistič: Pôsobenie nového šéfa Najvyššieho súdu SR varuje pred rozširovaním jeho kompetencií*, TREND (Sept. 30, 2009); Pavol Kubík, *Keď losuje Štefan Harabin: Na Najvyššom súde majú rozhodnutia predsedu občas väčšiu váhu ako paragrafy*, TREND (Mar. 11, 2010).

[123] For further details, see BOJARSKI & KÖSTER, *supra* note 109, at 111–12; Ľuboš Kostelanský & Vanda Vavrová, *Harabinovi sudcovia zarobili viac ako premiér*, PRAVDA (Aug. 12, 2010); Mihočková, *supra* note 122.

[124] *See* Mihočková, *supra* note 122; *See also* Kubík & Múčka, *supra* note 122.

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between the salary bonuses of obedient and recalcitrant judges widened exponentially. Further, all promotions became available only to "loyal" judges.

In sum, the Slovak Judicial Council, created following the best practices of the Euro-model, has turned gradually into a "mafia-like" structure of intra-judicial oppression, run in the name of "judicial independence" by judges who started their judicial careers in the communist period. Whereas before, one might have nourished a somewhat idealistic hope that one day there would be enough political will to reform the administration of justice, the hopes for a new reform of a stillborn model, which meanwhile had acquired a constitutional status, are now close to zero.

Similar negative examples from other countries in the New Europe that established strong judicial councils, such as Hungary,[125] Bulgaria,[126] or Romania,[127] keep telling the same story: Granting extensive self-administration powers to the judiciary before genuine internal reform is dangerous. In a better scenario, the new institution will be a somewhat empty shell for a few years or decades to come. In a bad case scenario, which unfortunately appears more frequently, behavior and patterns start emerging which are very distant from anything the model was supposed to deliver: Individual judicial independence and impartiality is not only unprotected, it may be suppressed by judicial bosses. To speak of efficiency, quality, or transparency—other values apart from the judicial independence the system promised to deliver—would amount to idealism bordering on naivety.

Conversely, there is the example of the Czech Republic. Castigated in a number of international reports,[128] the Czech Republic was considered, in terms of institutional reform of the judiciary, the "black sheep" of the CEE region. By a historical accident rather than premeditated design, no judicial council was ever established in the Czech Republic, in spite of the EU pre-accession pressure. However, the post-communist Ministry of Justice model started evolving gradually over the years: More and more powers have been shared between the Ministry and court presidents.[129] Today, the Czech judiciary, in particular through the court presidents, have a considerable say in the administration of courts. However, the power is shared between the Ministry and the presidents of courts. The system has thus been generating a different balance, which is perhaps more sound than

[125] Pokol, *supra* note 56; Z. Fleck, *Judicial Independence and its Environment in Hungary*, *in* SYSTEMS OF JUSTICE IN TRANSITION: CENTRAL EUROPEAN EXPERIENCES SINCE 1989, 12 (J. Přibáň, P. Roberts & J. Young eds., 2003).

[126] *See, e.g.*, Smilov, *supra* note 19, at 313.

[127] Parau, *supra* note 12; Ramona Coman & Cristina Dallara, *Judicial Independence in Romania*, *in* JUDICIAL INDEPENDENCE IN TRANSITION (Anja Seibert-Fohr ed., 2012).

[128] *See, e.g.*, OPEN SOCIETY INSTITUTE, *supra* note 74.

[129] For detailed discussion, see Bobek, *supra* note 59.

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judicial unilateralism and isolation in a judicial council: Mutual checks and balances between the executive, controlled by the Parliament, and senior members of the judiciary.

In the face of the above outlined experience with judicial councils (questionable if not outright negative), what one may see today in the CEE are somewhat extreme political reactions and measures being taken against judicial councils and judicial bosses running them. A number of these measures are plainly inappropriate and extreme, being later censured by European institutions and/or the international community: The recent evolution in Hungary and the 2011 Hungarian constitutional reform is a case in point here.[130] Some of the measures taken by the new Hungarian constitutional majority included radical reforms of the Hungarian judicial council and the judiciary as such.[131] In spite of some of these measures being extreme, they should be read and understood in their context, which is not that dissimilar to other countries in the CEE. Politicians, lawyers, as well as the general public became increasingly frustrated with the judicial non-performance in the institutional context of judicial brotherhoods or even mafia-like structures declaring themselves to be untouchable due to their "constitutionally guaranteed" institutional independence.

Extreme problems may unfortunately generate extreme reactions. But before censoring or praising either side, it is always essential to acquaint oneself with the genuine state of affairs on the ground. With respect to the judiciary and its non-reform, it would be useful for a number of international academics, who tend to publicly censure reform proposals on paper, to have a closer look at the genuine state of a number of judiciaries in the CEE. Perhaps they could go and try to get a case through one of those judicial systems. They could also acquaint themselves with persons in, and the style in which, the institutions they are about to fervently advocate for are in fact run. This is in no way a blind defense of problematic and often rather populist measures recently taken by a number of the CEE governments with respect to judges and the judiciary. It is rather a classical reminder that in any comparative study, understanding the context matters considerably.

Finally, it should also be born in mind that with respect to already "hijacked" judicial councils in Slovakia as well as other CEE countries, time becomes of essence. Judicial councils in these countries were given considerable personal powers related to the promotion, salaries, and discipline of judges. Thus, potential dissenters within the judiciary

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[130] *See, e.g.*, András Jakab, *On the Legitimacy of a New Constitution - Remarks on the Occasion of the New Hungarian Basic Law of 2011*, *in* CRISIS AND QUALITY OF DEMOCRACY IN EASTERN EUROPE 61 (MA Jovanović & Đorđe Pavićević eds., 2012); *see also* László Salamon, *Debates Surrounding the Concepts of the New Constitution,* 3 HUNGARIAN R. 1522 (2011).

[131] Including the lowering of the compulsory retirement age for judges, which has been subsequently declared unconstitutional by the Hungarian Constitutional Court (Decision 33/2012. (VII. 17.)) AB, published also in the Magyar Közlöny 2012/95. The new law was also declared to be in violation of EU law. *See* Comm'n v. Hungary, CJEU Case C-286/12 (Nov. 6, 2012), ECLI:EU:C:2012:687.

are gradually weeded out (in disciplinary proceedings, by non-promotion, and various other tools of oppression), and, by definition, no potential dissenters are allowed to enter the judiciary. The councils, or rather to say the judicial bosses running them, control the appointment of new judges as well. Personal control is translated into a full "inbreeding" of the existent structures: Sub-optimal judges choose docile and sub-optimal judicial trainees as their "off-spring." In even the least inventive scenario, judicial offices become de facto hereditary, with nepotistic family appointments of new judges becoming the rule.

This evolution and this reality gives the final blow to suggestions that condemning judicial councils as an unsuitable institutional design for states in transition some ten or fifteen years after their establishment in these countries is premature and too rush. True, no institution is perfect in its beginnings. Its positive elements may show only with time, once the environment and the people in it have matured. However, such pious wishes are completely off point once the entire institution of the judicial council has not only been hijacked (which could be temporal), but the hijackers are also given the power to reproduce themselves, thus being able to impose themselves permanently and ensure their own continuation. One can always hope for positive changes in the future. However, due to flawed institutional design, these have been delayed for years; or more realistically, for decades.

I. Conclusions

The authors of this contribution are in favor of international standards and the European exchange of best practices. However, this paper and the case study concerning the spread of judicial councils in the New Europe, under the influence of European institutions outlined therein, unfortunately provided the textbook example of a case against international standards and best practices.

The case study has shown that if unconstrained by a democratic process, negotiation and compromise-making with other branches of the government, the judiciary might be tempted to promote constitutionally separate, even insulated models of judicial administration. Such models evidence a strong favor for institutional independence of judges (or rather judicial leadership and the court presidents in particular), to the detriment of individual judicial independence and impartiality of judges. If politically unchecked, judicial wishes adopted on an international/European level are then put into various non-binding instruments, which are then de facto imposed onto even less politically stable systems. The effects might be problematic if not outright tragic.

To be precise, there is no problem with judges meeting on the international level and making recommendations, devising best practices, and so on. Quite to the contrary, it is the people with expertise who should devise expert solutions. However, such outcomes must be made subject to democratic discussion and critical scrutiny by other actors on the international level itself; failing that, then on the national level. Democratic parliamentary

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scrutiny might be available in only some environments, such as within the European Union, with directly elected European Parliament. At a minimum, executive scrutiny should be possible. In particular, national government representatives should be granted the voice in these matters so that they can critically examine the proposals adopted by judges in the transnational networks.

Such critical review at different levels ought to be available under normal circumstances. The particular case of the exportation of the JC Euro-model to the New Europe in the EU pre-accession period demonstrated that sometimes, such scrutiny may get lost in the cracks of multi-layered international environments. In the old Member States, where such recommendations were indeed just recommendations—that is, international soft law—no one cared much. That was because this was something primarily concerned with reforms in the "East."[132] Being well aware of strong political resistance, no one seriously thought of imposing these standards on the old Member States. Such neglect might eventually backfire onto the old Member States, as international organizations now push them to adopt the same model.[133] In the new Member States, with political processes weakened, there was not much serious democratic discussion that would not be quickly overridden by the all-powerful argument: "Europe wills it." Thus, as this case study further demonstrated, the label "soft law" or "recommendations only" might be quite misleading with respect to a number of instruments adopted on the international level. As far as their capacity permits, other branches of government, national or supranational, would be well-advised to monitor soft law production very closely. The "soft" rules might become "hard" rules quite quickly.

Finally, in view of the evidence emerging from the CEE countries, it is suggested that the Euro JC model is an unsuitable institutional design for countries in transition. Judicial councils should cease to be promoted as "the solution" to judicial reform in Europe and on the global scale. If adopting grand new institutions is not the best way forward for a judiciary in transition, what is? With respect to transition countries, we believe that cultural change and personal renewal must precede institutional changes. The "micro" independence, that is, the independence and impartiality of individual judges, must be established and guaranteed first, before any grand and irreversible steps towards more "macro" constitutional independence of the judicial power as such are taken. But this can in fact be achieved without a judicial council; or even, with tongue-in-cheek, *especially* if there is no judicial council, as a number of European countries demonstrate daily. Equally,

[132] One can only speculate whether some "Western" judges, who have been active in various European organizations that gave birth to the JC model qua "European standard," tried to implement this model in the "East" so that they could later use it as leverage in their home countries. *See, e.g.*, STRENGTHEN THE JUDICIARY'S INDEPENDENCE IN EUROPE! INTERNATIONAL RECOMMENDATIONS FOR AN INDEPENDENT JUDICIAL POWER (Peter-Alexis Albrecht & John Thomas eds., 2009) (containing contributions of several Western judges).

[133] For instance, Germany has been recently criticized by the CoE for not having a judicial council. *See* sources cited *supra* note 13 and accompanying text.

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with respect to individual judicial independence and performance, the "black sheep" of the CEE transition region, the Czech Republic, might be now and certainly will be in the nearest future much better off than Slovakia, the exemplary pupil of the JC Euro-model. Both countries, however, started from fairly similar settings with their negotiated break-up in 1993.

Put differently, the JC model is unsuitable for countries in transition, where internal ethical culture and strong sense of judicial duty are still lacking. Yet the "do as you please" tactic may not be helpful either. What we suggest is, in the first years and decade or two of transition, to divert effort from large-scale institutional design to smaller scale reforms, particularly by putting emphasis on enhancing efficiency and transparency within the judiciary and on writ-small mechanisms. These steps may include, among other things, open and transparent procedures for appointment and promotion of judges within the existing system of judicial appointments; openness to middle and senior level judicial appointments to the candidates from outside the professional judiciary; education and formation of judges, including foreign languages and international experience; expanding auxiliary judicial staff in courts, thus unburdening judges from administrative duties; professionalism in case and court management; publication of all judicial decisions online; uploading biographies of judges on the website of the relevant court(s); providing real-time information about how each case file is handled; strictly random case assignment; and so on.

Among all the avenues of smaller scale reforms mentioned, one clearly stands out in terms of importance: The issue of open, transparent and competitive access to the judicial profession. If a transition country is able to establish and maintain that, half the battle for judicial reform will have already been won. Unfortunately, the JC model as practiced in the CEE countries as well as in a number of Latin countries of its origin has precisely the opposite the tendency: Corporativism, mental closure, and even favoritism and nepotism in the selection of new judges, if done only by the judges themselves. The quality and performance of any judicial body selected in this way will always be highly questionable, to say the least.

On a deeper level, it is apparent that our yardsticks for a successful judicial transformation are more rooted in the focus on the quintessential nature of judging: Independent and impartial decision-making in an individual case, delivered in a speedy way, and of a reasonable quality. For that, individual guarantees on a micro-level together with strong individual judges are essential. Unfortunately, what the Euro-model of judicial councils brings about in transition countries is strong institutional independence of the sum of judges; or rather, the complete lack of control over a few senior judicial officials, but little individual judicial independence and courage.