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The Right to Justice and Effective Justice[1]

The relationship between morals and law has been a fundamental question since the time legal norms were first created as a product and, at the same time, as instruments for managing human civilisation on the face of the Earth. Legal theory usually answers the question thus: "The law is the minimum of morals."[2] A fundamental aspect of law, as that minimum of morals, is its *enforceability*. Enforcement is entrusted to the State. Its role, however, does not lie solely in the enforcement of law, but in the realisation of the entire legal order of a society. It is the universal ability of the State to enforce, throughout its territory, a general will, expressed in the legal order (including the means of enforcement) that is at the root of state power[3], a fundamental attribute of the State. If that state power is not exercised, one of the main functions of the State is threatened, and it starts being disputable as to whether the State is indeed a state at all, within the meaning of a sovereign ruler, or whether its territory is only one seized by the self-ruling interests of one oligarchic group or another. The execution of justice cannot be seen as merely a matter for an individual who happens to be in the territory of a given country, but as an attribute of the existence of the State as such.

The Macro- and Micro-Views of Justice

The functioning of justice, seen as one of the components of state power, entrusted with the execution of the state's constitutional rights, thus assumes a completely different dimension. In the event of an inefficient

1 The article is based on the author's dissertation entitled "The Defence of Human Rights", submitted to the Department of Legal Theory of the Law Faculty of Masaryk University in Brno in the academic year 2007/2008.

2 Harvánek, J., Teorie práva, Masarykova Universita, Brno 2004, p. 29.

3 Pavlíček, V., Ústavní právo a státověda, Linde, Prague 1998, p. 67.

execution of the law, inefficient justice, the State may find itself in a situation when its own position is weakened to the extent that questions could be raised as to the functioning of the other two components of state power: the legislative and judiciary. The functioning of justice must, therefore, be seen in two ways: one could be called the micro-view, and the other the macro-view. The micro-view of the work and effectiveness of the justice system is the view of its users, or clients. Primarily this means those who turn to the courts with requests for the evaluation of their matters, i.e., plaintiffs in civil proceedings and defendants. The secondary users of the justice system are persons appearing alongside the parties, i.e., their lawyers. Their work, too, is fundamentally touched by the work of the justice system, as their possibility to do their work well, and hence their own financial position, depends directly on the functioning of the justice system. A client of the justice system, *sui generis,* is the State, as a party to criminal proceedings, and prosecutors, who are incorrectly seen by the general public as a component of the judiciary, must also have an interest in the proper functioning of the justice system in these proceedings. The purpose of civil procedure is to ensure and enforce the rights of individual subjects of the law. By applying the law, the subject tangibly comes under the execution of state power in the territory of the State. Here, he assures himself that he will receive protection and fair assistance in matters that he cannot or may not resolve himself. With an effective justice system, he is shown every day that he can rely on the relations that the State set out to realise through its legislative activity. Should the subject not obtain such protection, he starts to question not only the state of the law, but the state of the State, qua State. Criminal proceedings are of a somewhat different nature, for the State, by exercising justice in this field, not only punishes the culprit, but also, through that punishment, provides protection to all other entities in its jurisdiction. By imposing a punishment, the State shows that it will not tolerate a certain type of conduct and behaviour

in its territory, and hence that the entities need not fear it, and can rely on their own integrity being maintained. The need to punish those who transgress the law, as a guarantee of the functioning of a society, is deeply rooted in the genetic matter of the human species, as it is an extreme manner of maintaining the functioning of a society.

The macro-view is the view of the State, as the carrier of state power in a given territory. Adherence to the law and its enforceability for individual entities in the society is of utmost interest to the State, as without the due realisation of court power, the functioning of the State, and a whole third of its power, would be at stake – and it is too much for a State to give up the due exercise of this component of its power.

In this situation, it is evident that the functioning and effectiveness of the justice system is one of the fundamental issues for a State. It is about more than the State "granting" its citizens and other entities within its jurisdiction a just evaluation of their matters; it is a question of the very existence or non-existence of a State, as a State. The judiciary therefore cannot be viewed as a section of the Ministry of Justice, i.e., one ministry which has the same position as any other ministry; it must be viewed through the same lens through which we view the government and the parliament, i.e., the bearers of the executive and legislative power. Seen from this angle, we get an entirely different picture of the quarrels over the budget, where the Ministry of Justice, and hence, the judiciary, is traditionally considered a "small" ministry, with its budget being lower by an order than the budgets of the "large" ministries. The 2008 budget of the Ministry of Justice plans for CZK 22 billion[4], having been increased by a full two billion over 2007, whereas the budget of the Ministry of

4 According to the information provided by the Minister of Justice, JUDr. Jiří Pospíšil, at a conference held in Prague, 6 November 2007, on the topic of an Effective Justice System.

Education traditionally ranges around CZK 110 billion, and the budgets of the "power" ministries also approach the one hundred billion figure. As the justice system is one of the three pillars of the State, we must ask an entirely pragmatic question as to the priorities of a State in supporting its own power, its own existence.

The very fact that we are thinking about the effectiveness of the justice system suggests that we are criticising it for its ineffectiveness. If the justice system *were* effective, the topic would not be raised. Hence, let the following considerations be built on the premise that our justice system is not efficient, and on the awareness that this situation is not desirable, and that, on the contrary, for the reasons outlined above, it is vital for the State itself to have the justice system functioning as well as possible.

The Sources of the Ineffectiveness of the Justice System

The quality of the functioning of the justice system is traditionally related to several factors, which the author will attempt to analyse below. The following factors are usually identified:

1) Inadequate legislation: The laws applied by the justice system are traditionally seen to be poor, hindering the execution of the law, a factor which retards the work of the justice system and makes it less effective.

2) Inadequate selection of judges as persons: Who should be a judge, and under what conditions, is one of the great topics of the judiciary. There is an objective side to the identification of the required "soft skills", the personal profile of a candidate, which has not yet been fully discussed.

3) Inadequate organisational structure of the courts: The inadequate structure of the courts is manifest in two ways. The first is the currently discussed problem of the judicial system, which is defined as a three-tier arrangement, but the system of courts is so complex that this three-tier structure starts and ends on different levels and seems obscure not only to a layman, but often even to a professional. A separate problem is the

self-organisation of the judiciary, which is virtually non-existent in the Czech Republic.

The individual sources of these "sins", in which lies – as is becoming evident – the non-functionality of our justice system, must be studied in detail. It seems that we pin vain and unsubstantiated expectations on some of its seemingly functional instruments. Hence, an attempt to make those instruments more effective can hardly bring an improvement in the effectiveness of the justice system.

ad 1) Inadequate Legislation

Legislation is the source of all hope. Should it improve, the wording of acts will improve, and everything will run smoothly. Legislation is, however, only formed by the will of political parties, i.e., the political art of the possible, rather than the best. Let us then call in the best legislators, let us make the best experts available to them, and we will have the best legislation, which will resolve most of the problems causing the ineffectiveness of the justice system. Certainly, the content of legal norms is very important and the "correct" wording of an act may make the application of the law significantly easier. In spite of that, this view of legislation as a panacea is not right. Legislation in itself cannot bring a major relief, as by its nature it cannot resolve these problems. The nature of legislation, which makes it impossible for it to grasp problems absolutely, is reflected in the following facts:

a) Legislation is of a fractal nature

b) Legislation is a meme

c) Legislation is an open, computational system, to which Kurt Gödel's theorems of incompleteness apply

All these aspects of legislation are so new that in order to make progress in the area, they must be studied in detail.

A) The Fractal Nature of Legislation

Certain mathematical formulas, when transformed into geometry, form shapes called "monsters".[5] The curves, displayed in various ratios, have the same shape. These forms are called fractals. They are shapes the detail of which reproduces a part, and that part is a reproduction of the whole.[6] The fractal structure is natural in nature. Fragments of rocks resemble rock formations, a snail's shell curves in the same way, the branches of a tree branch out in the same way as the whole tree, a snowflake has identical, and increasingly smaller and smaller crystals, and the coastline is the same, regardless of the ratio. Each fractal object represents essentially the same structure, regardless of how much it is magnified. The quality when, we see motifs running into infinity inside other motifs, is called *self-similarity*.[7] Self-similar shapes contain self-similar elements, are infinite, and can never be limited or terminated, and, hence, also not described in their entirety. Moreover, for fractals, a slight difference in the definition of the initial conditions would lead to a fundamental change in the resulting curve. A slight change in the initial conditions may produce entirely different results. Because this phenomenon was first discovered in weather forecasts, it is called the "butterfly wing effect",[8] based on the parallel saying that the beat of a butterfly's wings in Brazil may cause a tornado in Texas. The consequences of the slightest initial divergence grow exponentially. The result is that any prediction of the final state is practically impossible, even with a very precise knowledge of the initial state. A relatively very precise knowledge of the initial state is never *complete*, so the precision of the prediction is spoiled.

5 Mandelbrot, B., Fráktály. Translated by Jiří Fiala. Nakladatelství Mladá Fronta, Prague 2003, p. 5.

6 Ibid, p. 7.

7 Coveney, P., Highfield, R., Mezi chaosem a řádem. Translated by František Slanina. Mladá Fronta, Prague, 2003, p. 196

8 Ibid, p. 194.

From the theory of a "sensitive dependence on initial conditions"[9] mathematicians derived the theory of chaos, which says, among other things, that all of life around us is full of critical points, in which slight changes may be magnified to a degree that make the resulting effect entirely unpredictable. Depending on the nature of each slight change, entirely different, or even opposite results may be achieved. Only if we knew the initial state with perfect and absolute precision, would we be able to describe it with a deterministic equation and estimate precisely how the curve depicting it, and the entire situation, will develop.[10] But the initial conditions *cannot* be described perfectly, as each description of the situation entails some self-similar formations, which are infinite, and hence, not capable of a perfect description.

Naturally, fractals appear in the law, as well. If we view the traditional three-component structure of legal norms (consisting of a hypothesis, disposition, and sanction) from the point of view of their local and material effects, we get an idea of the structure which has all of the attributes of a self-similar formation: it only depends on the ratio in which we see the legal norm. Its structure is always identical, regardless of the ratio, and theoretically, it can expand infinitely in both directions: on the one extremity is the Constitution and international treaties, on the other municipal regulations or company by-laws. Legal norms are *self-similar formations,* to which all of the principles applying to those formations apply, and especially their infiniteness; no matter the effort expended, legislative bodies cannot achieve a situation when the law-making process is nearly finished and perfectly suitable. It is evident from the definition of self-similar formations that this illusion is only just that – an illusion.

9 Gleick, J., Chaos – vznik nové vědy. Translated by Jaroslav Sedlář a Renata Kamenická. Ando publishing, Brno, 1996, p. 28.

10 Barrow, J.D., Teorie všeho. Translated by Jan Novotný. Mladá Fronta, Prague 2003, p. 157.

B) Legislation is a meme.

All living nature is created with the aid of a gene, a replicator, which is, on the basis of coincidence, able to point to certain variants of a certain aspect. If that aspect or feature "works", then it is fixed, and can mutate into other changes; that change, again, either works, or not[11]. This was the principle of biological evolution, the product of which is, among other things, man. With the ascent of cultural evolution, the second known replicator[12] has occurred, the *word*[13]. The word also has replicatory functions, and analogically to the gene, the name "meme" has been established for it. The meme is not only a word in itself, it is any unit of cultural transference. British psychologist Susan Blackmore, who developed the meme theory in the field of cultural science, describes the meme as a fundamental aspect of culture: it is a unit of an arbitrary size, which can be said to be hereditary by a *non-genetic route*. Memes, just like genes, are effected by selection, which selects from all of the memes available, i.e., from the meme-pool. Memes can unite in so-called "meme-plexes", in which they do much better than each of them would do on its own. Memes spread without distinguishing whether they are useful, neutral, or demonstrably harmful. A meme can only be stopped from spreading if it endangers the physical existence of its genetically formed bearer; however, that happens only rarely.

The American psychologist Donald Campbell[14] described memes as: Instructions for various types of conduct; they are retained in brains and transferred through imitation. Their competition propels the evolution of the human mind. Genes form a sort of hardware, and memes are the software. A logical conclusion of the above characteristic of memes is the statement that all legislation is, in each of its parts and in its entirety,

11 R. Dawkins, Slepý hodinář. Paseka, Litomyšl 2002, p. 54.

12 R. Dawkins, Sobecký gen. Mladá Fronta, Prague 1998, p. 172 and ff.

13 S. Blackmore, Teorie memů. Portál, Prague 1999, p. 11.

14 Ibid, p. 40.

a meme. That means that we must view statutes and sub-statutory norms from the point of view of the meme theory, and their creation must be necessarily seen from the point of view of the general properties of memes. That means, above all, the following properties:

1/ **Memes spread without distinguishing whether they are useful for us, neutral, or demonstrably harmful.**

We ourselves are not always able to see whether they are useful or harmful. Memes are memes because they are copied, and they behave as if they were an entity with a living will, whose only purpose is to be copied. We must, therefore, stop thinking of the legislative activity as one which is fully under our control, and about the existence of which we, and only we, decide, in a manner which we ourselves have determined and set out – with the aid of other memes. The legal regulation governing how memes will spread is in itself a meme. Naturally, it is very difficult to admit that we are being dragged along by an ever-growing mound of paper, entitled the Collection of Statutes. On the general level of the broadest social consensus, the opinion clearly prevails that the current legislation is excessive, that its volume does not correspond to the needs of its users, that legal regulation creates chaos in the life of a society, due to the incomprehensibility of regulatory norms, and that its intended effect is not achieved. A simplification of legislation, a reduction in the number of legal norms, and their simplification, is regularly a part of the electoral platform of nearly all Czech political parties. A similar situation is seen elsewhere in the world, in countries with a continental legal system as well in countries with the Anglo-Saxon legal tradition. Although everyone declares that they want to cut down on the boom of legislative norms, they cannot find a mechanism to achieve it.

2/ **Memes have an interest in their preservation and spreading.**

Each meme set has an interest in spreading itself, in multiplying, and branching. The nature of memplexes is that the memes of which the set

is composed will more likely copy when united, than if they each worked on their own. How many times has the Civil Code been copied, and in how many broadly available publications has it been published? The call for copying is often contained in the meme itself: a legal norm usually takes effect on the date of its publication. The availability of all legal norms, their unlimited distribution, unlimited replication for the needs of everyone, is a request brought up with increasing frequency by the regulated entities. That is why commercial publications contain the complete versions of acts, and that is why the ASPI system and other full-text search engines have been created. The publication of legal memes is an activity on which one cannot loose money. The people who are to abide by the content of the memes then – perhaps ironically – contribute to the spreading of the memes themselves, regardless of the actual interest of the regulated entities. No lawyer will admit that, but there are certain legal norms designed for the needs of an everyday life, of which one would rather not know; however, on the other hand, there is the fundamental memetic command that "ignorance of the law is no excuse".
Richard Dawkins[15] called certain memplexes *mind viruses*. Can we rule out that the Collection of Statutes, the Financial Journal, the collections of the methodological guidelines of executive bodies, the Collection of International Treaties, and others, are not mere virus memplexes that only make our lives difficult, but they appear as if they are vitally necessary?

C) Legislation is an open commutative system, and Kurt Gödel's theorems of incompleteness apply to it.

Gödel's theorem of incompleteness is usually summed up in the following statement: "For any consistent, formal, computably enumerable theory that proves basic arithmetical truths, an arithmetical statement that is

15 See Blackmore, S., Teorie memů. Portál, Prague 2000, p. 45. (Theory of Memes)

true, but not provable in the theory, can be constructed". Gödel showed that mathematics has unsolvable problems and hence it will never be possible to formalise it into a complete system. Regardless of what axioms mathematics accepts, there will always be some truths that cannot be proven. In Gödel's incompleteness, we hit the limits given by our character traits, and state of our mind, and with the manner in which we perceive reality. The consequences arising from Gödel's theorem of incompleteness are very bad for lawyers, because they concern the very substance of truth, knowledge, and legal certainty. Incompleteness points to the limits of *computational models* of the human mind, i.e., models that reduce all thinking to acting according to rules. Law is a computational model. In it, too (according to Gödel's logic) there are truths that cannot be proven in a formal system, provided that the system is consistent. Either, there are simply statements that cannot be proven, or the system, in which everything is proven, is inconsistent. We must choose whether we want an inconsistent system or improvable statements – law with holes, or legal statements which cannot be proven. On the basis of this mathematical logical construction Kurt Gödel concluded that in certain cases there is nothing else to do but be guided by intuition. If mathematics is governed by intuition, then it would be entirely nonsensical to presume that the law should not be governed by it. This intuition is called judicial discretion; and this takes us to another alleged sin of the judicial system – the poor selection of judges.

In concluding, it must be said that it cannot be expected on the basis of the findings outlined above that the situation in legislation would ever improve in any significant way. It would therefore be suitable to discuss the imperfection of legislation and to only concern ourselves with legislation as a tool leading to the improvement of the work of the justice system. A technical improvement of individual norms may bring

an improvement in the enforcement of law in individual areas, but not across the entire system.

ad 2) Inadequate selection of judges as persons.

In order to be able to analyse who *should be* a judge, we must first find out who is a judge and *according to what criteria* he became one. On the basis of the Act on Free Access to Information, No. 106/1999 Coll., the author of this article approached the Ministry of Justice and obtained the following information, applicable as at 31 July 2007:[16]

As at 31 July 2007, 3,016 judges had been appointed in the Czech Republic.

In the first half of 1992, in line with the new Act No. 335/1991 Coll., on Judges and Courts, existing judges were re-appointed once their activities to that date had been verified and evaluated. 1,175 judges were appointed then. The total number of these judges, with practice before 1989, is decreasing, as most of them were longer-serving, older judges, who are gradually leaving the system. In 2002, there were only 1,064 of them, and in 2005 approximately 1,000; presently, the number of judges with pre-1989 experience ranges between 900 and 950, accounting for some 31% of the total count.

The count at higher-level courts is as follows:

At the Supreme Court, 51 of the 61 justices have pre-1989 experience,

At the High Court in Prague, 47 out of 91 have experience from before 1989,

At the High Court in Olomouc, 26 out of 48 have pre-1989 experience.

16 Letter addressed to JUDr. Klára Veselá Samková, dated 31 July 2007, from JUDr. Helena Formánková, acting as the Deputy Director of the Judicial Department of the Ministry of Justice.

It is true that, from the point of view of a lawyer and his clients, the judiciary is filled with "old cadres", of whom the parties, especially in civil cases, automatically presume a connection to the previous regime. This fact is viewed by those citizens of the Czech Republic who have anything to do with the courts as one of the main reasons as to why courts' decision-making is ineffective and "partisan", and why they do not trust them. The above numbers show that this suspicion is justified. The numbers do not give a precise and even picture of the situation in all courts, but it is evident that the percentage of judges installed during the communist regime rises, the higher we go in the judicial hierarchy. At the Supreme Court, whose legal opinion is binding for lower-level courts, not only in terms of judgements, but also with respect to the general obligation of the Supreme Court to unify the jurisprudence of lower-level courts, the ratio of judges with a pre-November judicial past is evident. The cleansing of courts, which was to have been achieved by the above-mentioned Act No. 335/1991 Coll., is seen to have been entirely insufficient by the general public.

In line with the Constitutional Court Decision No. IV ÚS 23/05, of 17 July 2007, we can expect that judges will be requested to reveal further personal information, which has thus far been found irrelevant for evaluating whether a judge should or should not be excluded from deliberating on a case due to a personal relationship to the matter at hand. In that decision, a judge is seen as a person who is under public supervision:

"All matters of concern to state institutions, as well as the activities of persons active in public life, hence, e.g., the work of local as well a national politicians, officials, judges [emphasis by author], *lawyers, or candidates or trainees for these positions, constitute public matters; public matters are, however, also art, including show-business, as well as anything that draws public attention. These public matters, or the public activities of individuals, may be evaluated*

publicly. To the criticism of public matters carried out by publicly active persons applies, in constitutional terms, a presumption that this criticism is permitted. It is an expression of the democratic principle, an expression of the participation of civil society in public matters."

An example of when the past, or a personal position, of a judge could compromise his decision-making is, traditionally, disputes concerning apartment rental relations. Certain building owners have, in disputes with their tenants with controlled rent, objected to judges being prejudiced, until they confirm that they themselves are not renting a rent-controlled apartment.[17] Judges refused to speak on such personal matters, whereby they necessarily fed the impression that they are not disclosing these circumstances, because they are indeed prejudiced, enjoying the same privilege as one of the parties to the dispute. The names of several such judges are published on the website of the Movement for the Defence of Real Property Owners www.homr.cz.

Another area in which judges are suspected of prejudice *en masse* is family disputes concerning the custody of children, or contact with children after the divorce or break-up of their parents. According to official statistics, in at least 90% of cases, the custody of children is given to the mother. There are fathers who have been pointing for a number of years to the significant feminisation of the judiciary, primarily the judiciary deciding custody cases, and infer from that feminisation the prejudice of female judges, to the detriment of fathers.

In this situation, we can see how the media use with increasing frequency expressions such as "judicial state", "courtocracy", etc. It is not the counterparty in the dispute, but the courts, that are beginning to be seen as the archenemy, preventing the achievement of justice.

17 According to a consultation and review of judicial decisions in the database of the Civic Association of Owners of Buildings, Apartments, and Other Real Property, see www.osmd.cz.

This view is often multiplied by the differing perceptions of the law held by the legal counsel of the parties to the dispute and the judges. It would certainly be a great simplification to see the problem of understanding between judges and lawyers only through the optics of time, and their relationship to the previous regime. Yet still, these factors can explain the dispute between at least some judges and lawyers; both groups of lawyers share the same legal space, but often differ diametrically in their legal views.

To objectify the situation outlined, let us attempt to compare the numbers concerning pre-1989 judges with those of lawyers. Before November 1989, there were about 700 lawyers active in the legal profession. The first number on which we can actually rest is the number of 1,136 lawyers registered in the electronic records of the Czech Law Society, as at 31 December 1990; 19 of them had their licence suspended. As at 24 July 2007, 7,882 active lawyers were registered, and another 834 suspended. Because numbers are assigned to lawyers in an ascending order and, once assigned, a number is never re-assigned to anyone else, we can ascertain from the electronic records of the Law Society, at www.cak.cz how many lawyers from among those with the registration numbers 1 to 1,000 are still active: it is about one-third of them, or slightly over 300. Compared to the number of "old judges", especially at the Supreme Court, the number of "old attorneys" who are still active is only a small fraction. The younger lawyers, who have, unlike the prevailing number of judges, never heard of Marxism-Leninism, and who, instead of undergoing an examination in the history of the State and law of socialist countries, took examinations in European law, find it particularly hard to understand the argumentation of older judges, based, nearly without exception, on a positivist approach. On the other hand, natural-law ideas are too remote for the understanding of the "old judges". One of

the sources of the ineffectiveness of the Czech judicial system is the ideological dispute in the legal community; but, the Czech judicial system will have to face this problem sooner or later.

Having studied the personal background of the actors in the Czech justice system, as to the impact of newly educated judges, let us try to found out what a judge *should be* like, to be equipped with the right "soft skills", i.e., as personnel managers would say, those personal qualities that are desirable, or even required for the work of a judge.

Let us start out from the thesis that the "law is the minimum of morals," and hence that morals and ethical thinking is a professional prerequisite for the discharge of the function of a judge. The educational psychologist Lawrence Kohlberg[18] identified and described six stages of ethical thinking, through which any person passes during his/her normal mental development, as he/she develops from a child into an adult. They include:

1) Simple obedience to rules and authorities, in order to avoid a punishment;

2) Adaptation to group behaviour in order to obtain rewards and to trade services;

3) Achieving conformity, in order to avoid reproach, misfortune, and rejection by others;

4) Focus on obligation and conformity, in order to avoid reproach by an authority for disrupting order, and the resulting feelings of guilt;

5) Legalistic focus, recognition of the value of agreements, and a certain arbitrariness in creating rules, in order to maintain a general good;

18 L. Kohlberg, Stage and Sequence: The Cognitive Developmental Approach to Socialization. In: D. A. Bodlin (ed.), Handbook of Socialization Tutoring and Research. Rand- McNally Co., Chicago 1969. Citation taken from E. O. Wilson, O lidské přirozenosti. Nakladatelství Lidové noviny, Prague 1993, p. 160.

6) Focus on conscience or principles, primary faithfulness to selected principles, which can even prevail over law in cases when the judgement says that the law is causing more harm than good.

The same author arrives at the conclusion that most of the population reach the third or fourth level; on the fifth level, morals appear in full, into which human social evolution was probably included. The sixth point is the place where a significant diversity of opinions may occur, given the difference of individual experience and diversity of the cultural development of a society. But it is at this sixth level of a state of mind and moral development where those into whose hands we entrust decisions about our actions according to level five should be – i.e., judges. They should be fully qualified to speak on that, and to be over and above the legalistic focus of the society; they should modify it using judicial discretion, so that the interpretation of the laws would be in line with "general justice". Naturally, the issue of judicial discretion is one of the hottest issues related to the judiciary, because this term is often mistaken for arbitrariness. But judicial discretion is directly related to the issue of a natural-law view of justice and the law, with which even the decisive judges, i.e., Supreme Court justices, may have problems.

It is evident that aside from legal education (hard skills), a necessary qualification of a judge is a high level of emotional intelligence. Under this term, experts include the following types of emotional intelligence:[19]

1. Intrapersonal: self-respect, emotional self-realisation, assertiveness, independence, self-actualisation;

2. Interpersonal: empathy, social responsibility, and interpersonal relations.

3. Stress management, controlling impulses;

4. Adaptability, ability to evaluate reality, flexibility in addressing problems;

19 Koukolík, F., Sociální mozek. Karolinum, Prague 2006, p. 138.

5. Mood, optimism, feeling of happiness.

It remains to be asked how to resolve today's situation in the judiciary, and how to change the adverse ratio between conservative judges at the Supreme Court and young lawyers, many of whom have been educated abroad. Their emotional scale is usually very different than that of the "old judges", whose self-respect was brutally quashed during the long decades of their service to the totalitarian regime. Young, educated people with a high level of personal integrity, however, usually find their application in legal practice, and do not strive to become judges. They are not able to meet the level of conformity required, until recently exclusively ensured by two appointed psychologists, who performed for the Ministry of Justice a psychological selection of applicants for the positions of judges-in-training. That widens the gap between the concept of the law and life reality by judges – especially the "old ones" – and attorneys, up to the point when the points of contacts set out by positive legal norms no longer form a platform sufficient for shared work on the building of a State governed by the rule of law.

Steps leading to making the judiciary more trustworthy.

The task we must set for ourselves is primarily the necessity to renew the public's trust in the judiciary and in judges. To create or renew the trust of the public in courts, judges, and in the judicial system as such, several painful steps must be taken – painful primarily for judges, because when those steps are implemented, they will have to give up many aspects of their privileged position. What then needs to be done to renew trust? The most important steps include:

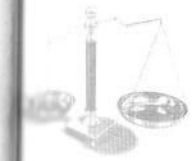
1) **Doing away with the appointment of judges for life;**
2) **Changing the manner by which judges are appointed;**
3) **Installing transparent disciplinary responsibility;**

4) **Systemise and make transparent the education of judges.**

ad 1 – Doing away with appointment of judges for life

The first condition is to abolish tenure in the judicial profession. In the future, no judge should be able to rely – save for very improbable cases of criticism from within the profession – on his inability to be recalled. All people in the world suffer, more or less, form uncertainty, and the frustration arising from that is a significant corrector of their own life positions and opinions. By sparing judges these feelings, we cut them off from this important and natural feedback. To citizens, this tenure appears to be a form of unsubstantiated self-elevation, and as the main disqualifying factor to the finding of justice. If someone is spared his own existential tensions, how can he judge the existential positions of others? In abolishing judicial tenure, we naturally encounter the same problems as those that arise in relation to abolishing the extensive immunity of the elected representatives of the people – Members of Parliament and Senators. This immunity and tenure certainly had their reason in the historical time-period in which they were established, i.e., in the late nineteenth century. Then, there could be no talk of a just process, of a medial society overseeing public matters, or international legal structure correcting national law and the execution of justice. Naturally, even today, a just process is not one hundred percent guaranteed, but the situation is qualitatively different than in the 19th century, as has already been mentioned. We can say that that this overgrown form of protecting publicly active persons has become obsolete, and in its effect counterproductive. It is, naturally, only up to the judges whether they will succumb to it or not. If they wish to achieve a situation in which they are seen to be honourable persons by the public, this change will probably be the first necessary step to achieving that goal.

Related to the problem of tenure is the problem of judicial self-



governance. It is undoubtedly desirable for judges to have a far greater opportunity for self-governance than they have today, but there is strong resistance to establishing that kind of self-governance, not only among the general public, but also in the executive. The source of that resistance can be found in the intuitive fears of the judiciary not being subject to control, in installing an actual "courtocracy". The executive and legislative powers are exposed to a test in the form of elections every four or six years. This election provides them with that feedback of which we spoke, which is albeit not perfect, but still, functional in the long-term. Presently, it seems that the establishment of judicial self-governance in combination with the existing definite mandate of judges is a matter which is not politically or medially feasible. Regardless of whether the accusations of "courtocracy" are true, that arrangement evokes absolutist power structures, the internal organisation of which is incompatible with a democratic society. Hence, it is up to judges to choose their priorities and decide what they want: tenure, or self-governance.

ad 2 – Changing the manner by which judges are appointed.

The manner of the appointment of new judges is clearly related to the issue of judicial tenure. Age is the primary qualification requirement of a judge. The qualification of a judge does not consist exclusively of his legal skills and education, but also of life wisdom, personal integrity, self-certainty, an ability to withstand external pressure, life experience, and last, but not least, tolerance and understanding for human weaknesses, which the parties to the proceedings probably have not worked out and managed in their lives. In short, a judge must *respect* the parties to the proceedings. Naturally, this respect does not mean any fear of parties or fear to adjudicate. Respect means an unconditional respect for human

dignity, for accepting the differences of human individuals, whatever their nature.[20] Very different from this kind of respect is *reverence*. By that, we indicate that we value someone for being the kind of person he is, and for conducting himself in the way he does. Respect is what remains, with respect to a person for whom we have no reverence whatsoever. Even a criminal can be treated respectfully, which naturally does not mean approving of his actions. Basic respect is something that should remain among people even when one has no reverence for the other. Basic respect is something that a judge should feel towards all parties in proceedings. But achieving that measure of objectiveness and emotional empathy is extremely difficult, perhaps more so than obtaining a legal education. Such balanced empathy cannot be gained, other than with age. That is why a higher age is a necessary qualification of a judge, unlike for the highest executive positions, where empathy and personal maturity are desirable, but not essential. Following an extensive debate in the media related to the dispute of the president with the nominated but not yet appointed judges, it is clear that the requirement of the age of thirty for the appointment of judges is the minimum that can and must be respected. Setting any age limit, however, is very difficult and always disputable. From the author's own experience as a member of the Federal Assembly, in 1990 – 1992, she can attest as to how the age limit of 35 years was set for the justices of the Czechoslovak Constitutional Court. Through political negotiations, the thirty-eight-year-old JUDr. Ernest Valko was identified as the Chairman of the new Constitutional Court. Hence, the age limit was set so that he could be appointed. This utilitarian determination of the age limit is absolutely unacceptable, especially given the relative difficulty of finding an objective means of establishing any age limit for personal

20 Kopřiva, P., Nováčková, J., Nevolová, D., Kopřivová, T., Respektovat a být respektován. Spirála, Kroměříž, 2007, s. 15.

maturity. The central nervous system – the brain – is finally mature in the twenty-first year of life.[21] Another milestone is "Christ's year", i.e., the age of thirty three. Significant logic can be seen in a Rosicrucian Masonic division of stages of life[22], traced to the mystical number seven and its multiples – twenty-one:

Until the age of twenty-one, a man is an apprentice.
Until forty-two, he is a journeyman.
And over forty-two, he is a master.

From this point of view, the age of forty two is that threshold beyond which we can reasonably expect not only professional, but also emotional and human maturity, even among judges.

As the esoteric aspects of the determination of the age for applying to be a judge will probably not find sufficient support in today's rationalistic society, it would be good to see how age limits for assuming the position of a judge are applied in other countries. The English judicial model seems to offer a highly relevant way of setting qualification requirements. In Great Britain, the judicial system is opened primarily to those members of the legal professions active as barristers (i.e., court procedures). (It cannot be a lawyer – solicitor, who only communicates with his client by e-mail and has never attended a court hearing, as does happen in legal practice, especially in large law firms of solicitors). After many years' experience in court as a defence lawyer, the abilities and legal erudition of a candidate are well apparent. A lawyer can apply to the lowest English courts after seven years of legal practice. (Presently, even solicitors may appear

21 This information was obtained in the author's personal consultations with doc. MUDr. Václav Mikota, Chairman of the Czech Psychoanalytical Society.

22 E.g., in: Steiner, R., Filosofie svobody. Baltazar, Prague 1991. - Steiner, R., Tajné učení Rosenkruciánů. Sophia, Břeclav 1998

in court, especially in the lower courts, so that both of the traditional roles of English lawyers, which we could describe as substantive-law and procedural-law functions, are beginning to merge to a large extent). A judge may advance to a higher court either on the basis of a selection process from the position of a barrister, or through internal professional advancement within the court hierarchy. Due to the fact that in Great Britain (including the jurisdictions of England and Wales, Scotland, and Northern Ireland), all lawyers cannot defend in all types of court, but to defend in higher courts, further qualifying examinations must be passed (similar to medical board examinations), a lawyer can only become a judge after several years of practice in a given court. For example, with the Court of Appeal (approximately our High Court), one can apply after twelve years of practice at that level. Because a barrister is only permitted to take an examination in order to defend at the appeal court level after several years of practice in the lower courts, it is evident that a judicial position at a court of this level cannot be assumed faster than after many years of practice, i.e., at a easily calculable age. The peak of the career of any barrister is when the honourable judges of a given court conclude, having observed his legal practice, that he would be a good and honourable colleague of theirs. As an act of their judicial self-governance, they will then make an offer to such a lawyer, and "call him to the bench". Hence, some of the problems of judicial self-governance and the issue of the appointment of new judges are resolved. In the lands of the former Bohemian Crown, a similar model would immediately give rise to suspicions of there being an impermissible interference, and that certain people are being favoured, and thus it would probably be necessary to enhance this manner of appointment with extra-judicial elements, but a share of judges in the selection of a judicial candidate can be, in principle, considered a step in the right direction.

ad 3 – Installing transparent disciplinary responsibility

Disciplinary panels offer the only possibility of depriving a judge of his robes. Disciplinary proceedings are closely watched, but we must admit, that the results of these disciplinary proceedings, as published in the media, have a grossly devastating impact. The notoriously known case of the drunk and plagiarising Judge Sovák, who was not duly punished and expelled from the judicial profession, worsened the situation of the Czech judiciary, so much so that it will have to work for several years to repair its reputation – if any repair is possible, at all. Non-transparent ways of dealing with the disciplinary responsibility of judges make the Czech public feel that the judiciary is in essence a secret brotherhood: impenetrable, non-recallable, and beyond any control. We must add that the lack of transparency, to the same extent as with judicial disciplinary panels, is a disease of the Czech Law Society's disciplinary committee, and probably also disciplinary committees of notaries and executors. Because transparency is the basic requirement of democratic structures, it would probably be suitable to set up joint disciplinary committees of all legal professions, or to introduce an academic or laymen element, thus resolving the issue of transparency, oversight, and hence also of the democracy of disciplinary procedures, for all legal professions at one time.

ad 4 – Systemise judicial education and make it more transparent

The basic level of the education of judges is guaranteed by the requirements for the position: legal training and the successful completion of a judicial examination, with the bar examination or the notary examination being recognised as equivalent. Further education is provided by the Judicial Academy, as the *"... central institution of the justice sector for the education of judges and state prosecutors (including those in training), and other target groups of the Ministry of Justice".*[23] Aside from judges, the Judicial Academy provides education to state prosecutors, the managers of courts and state prosecutors' offices, future judges and state prosecutors (judges-in-training and prosecutors-in-training), higher court officials, court assistants, probators, and mediators. Aside from organising educational events, the Academy analyses and studies the needs and requirements of judges, state prosecutors, and other professional groups, informs them about upcoming educational events, and publishes the results of the evaluations of educational events. [24] According to the current programme, the Judicial Academy focuses primarily on educating judges in psychology, which is more than commendable. But if we look at how full the courses are, it is evident that the demand exceeds supply. A separate question is the further professional education of judges, especially in the sphere of theory and law, in judicial discretion, and in similar topics, which specific judicial practice necessarily brings. A look at the currently offered programmes – and with a view to the programmes and projects offered by the Judicial Academy in the past – clearly shows that the Academy does not by any means serve as a substitute for ongoing or academic education. A list of judges shows, however, that nearly all of them have given up pursuing further academic education. It is primarily the older judges who hold the title of JUDr. (in the past it was not especially hard to obtain it), and the academic title PhD is a rarity behind a judge's name.[25] A study of the list of judges yields the following results:

23 See www.portal.justice.cz – link to the Judicial Academy, Statutes of the Academy. Visited 10 November 2007.

24 http://portal.justice.cz/soud/soud.aspx?j=17&o=7&k=221&d=36083, visited 10 November 2007

25 See list of judges at http://www.justice.cz/cgi-bin/sqw1250.cgi/zresortu/soudci.html#202, visited 10 November 2007

Of the total number of judges – 3,016 – there are the following numbers of judges who have earned titles higher than the masters (Mgr.) or doctoral (JUDr.) degree:

Title				Number
JUDr.	CSc.			7
JUDr.	CSc.	Doc.		2
JUDr.	PhD.	Doc.		1
JUDr.	PhD.	Prof.		1
JUDr.	PhD.	PhD.	Ing.	1
JUDr.	PhD.	LLM.	Ing.	1
JUDr.	PhD.	LLM.		2
JUDr.	PhD.	Ing.		2
JUDr.	PhD.			38
JUDr.	Dr.			2
JUDr.	LLM			2
Mgr.	PhD.			4
Higher academic legal education was completed by				63 judges

Title				Number
JUDr.	Ing.			5
JUDr.	Mgr.			2
Mgr.	PhDr.			1
Mgr.	Ing.			7
Mgr.	Mgr.			1
Mgr.	Bc.			3
Education other than legal education was completed by				19 judges

That means that of the total number of 3,016 judges, about **2%** have higher legal education. This number in itself shows the pathetic situation with regard to their further education. Furthermore, no career advancement rules evidently apply to the education of judges; the greatest number of judges with higher education is concentrated at the Supreme Court and the Supreme Administrative Court, and then, strangely enough, at District Courts.

The following judges earned the highest number of academic titles:

JUDr. Ing. Petr Slunský, PhD., PhD. (DC of Znojmo)

JUDr. Ing. Radka Zahradníková, PhD.,LLM (DC of Prague – West)

The above shows that the further education of judges is their private matter, in no way supported or required by the justice system.

To improve the adverse situation in this respect, the following steps must be taken:

1) Develop career advancement rules, so that the further advancement of a judge would be related to his/her education achieved.

2) Develop a recommended process of achieving academic education within the specialisation of a judge, in cooperation with the faculties of law.

3) Start making use of the education achieved by judges, by accelerating their career advancement.

4) Create a systemic programme in non-legal areas, which would be best done in cooperation with the relevant faculties, both in doctoral programmes and in other forms of post-graduate education. This could be, for example, in the following disciplines:

aa) Psychology (for all, especially "Ps")

bb) Economics (for commercial and civil-law judges, and for judges dealing with economic crime)

Worth considering is support for specialised MBA studies for lawyers, which the corporation e-právo has started to organise, and which apply primarily to the chairmen and vice-chairmen of courts, as the courts' managers.

The question remains as to what role the Judicial Academy should have in this structure. It is clear that the task of the Supreme Court in

harmonising jurisprudence cannot be fulfilled merely by publishing statements and major decisions. The Judicial Academy could be the place where issues related not only to positive law, but also to the specific activity of judges could be addressed, i.e., primarily having to do with judicial discretion. This could be the end of the mysterious meetings called "the committees", of which a judicial outsider hears a bit now and then, but which, as its seems, are of fundamental importance to the decision-making in individual cases, and in individual types of identical cases.

3) Inadequate organisational structure of the courts.

The last sphere of problems relating to the functioning of the judiciary is the organisational structure of the courts, especially of civil-law ones. They can be specified as follows:

a) Unclear structure of the three-tier court system.
b) Lack of specialised panels.
c) Inability of parties to elect their judge by agreement.

ad a) – Unclear structure of the three-tier court system.

The present division of courts and the material competence of courts must be viewed from the point of view of the historical development of courts – from arbitration to commercial courts, and later, the merging of commercial courts with regional courts. The Ministry of Justice is considering changing the structure of courts to a real three-tier system, to eliminate High Courts and to unify administrative and court districts. Anyone who has ever read Sec. 9 of the Civil Procedures Code must welcome this initiative. We cannot but point to the main motto of the work of Henry David Thoreau: "Simplify, simplify!"[26] Because the thing

26 See http://blog.aktualne.centrum.cz/blogy/martin-c-putna.php?itemid=2010, visited 10 November 2007

that sets (according to Jan Patočka's terminology) a spiritual person apart from an intellectual is the fact that a spiritual person is able to simplify the volume of knowledge amassed, whereas an intellectual only gathers it. It is high time to stop piling up exceptions, and to start to simplify. That applies 100% to local jurisdiction, which should be established clearly and without exceptions, especially in family matters.

ad b) – Lack of specialised panels.

Presently, there are specialised labour-law and family-law panels. The substantive jurisdiction of the courts could lead to a commercial-law specialisation, but that is not always the case. In any event, the specialisation on corporate law should be retained. Criminal-law panels are absolutely unspecialised, which poses a serious problem in an era of increasing economic crime. At least some basic specialisation on violent and economic crime would certainly contribute to a deepening of judges' knowledge in a certain field, and make the judicial system more effective.

ad c) - Inability of parties to elect their judge by agreement.

The legal awareness of a Czech "litigator" is, strangely enough, formed the most by American fictional legal television dramas. Each lawyer certainly has a supply of stories about how clients demanded actions from him, in the style of Perry Mason, and were grossly disappointed when he refused them. In spite of that, it would be suitable to ask in this place whether some aspects of these condemned American TV shows should not be adopted; especially in such a situation as when the parties to an agreement would like to agree that, in the event of a dispute, their matter should be resolved by a specific judge, named in the agreement. Certainly, many questions arise, especially one concerning Art. 38 of the Charter of Fundamental Rights and Freedoms, according to which

"no-one may be deprived of his judge, as determined in line with the law". But as to who is a "judge determined by the law", that is a matter determined by a statute, and the only question is how the statute determines him. Probably nothing prevents the statute from specifying that a judge can be selected by agreement. The ability to stipulate this in an agreement would enhance the legal awareness of contractual parties and their own responsibility; at the same time, it would enhance the prestige of the judicial system. It is indisputable that the mere ability to make that choice could lead to a great improvement in the work of judges, as there would be an objective qualifying factor of their work – that is, the number of people pinning their trust to him. In this context, we must bear in mind the classic thinker of economic science, Adam Smith, who wrote the following on the issue of the effectiveness of the judiciary:[27]

"Each court endeavoured to draw to itself as much business as it could, and was, upon that account, willing to take cognisance of many suits which were not originally intended to fall under its jurisdiction. The court of king's bench, instituted for the trial of criminal causes only, took cognisance of civil suits; the plaintiff pretending that the defendant, in not doing him justice, had been guilty of some trespass or misdemeanour. The court of exchequer, instituted for the levying of the king's revenue, and for enforcing the payment of such debts only as were due to the king, took cognisance of all other contract debts; the plaintiff alleging that he could not pay the king because the defendant would not pay him... The present admirable constitution of the courts of justice in England was, perhaps, originally in a great measure formed by this emulation which anciently took place between their respective judges; each judge endeavouring to give, in his own court, the speediest and most effectual remedy which the law would admit for every sort of injustice."

27 Smith, A., Pojednání o podstatě a původu bohatství národů. Liberální institut, Prague, 2001, s. 639

Naturally, no such chaos in the local jurisdiction of courts can be tolerated, but contractual freedom must be supported by all means. It represents a certain step in the direction of mediation, and to arbitration even in civil matters; this is the route on which modern justice has set out in developed countries.

Conclusion

In order to be able to evaluate *why* we should strive to establish an effective judicial system, we must note the very reasons for its existence. The first is that the judiciary is one of the three pillars of power in a democratic country. To undercut its authority means to disrupt the democratic system of the State, and to cast doubt on the existence of elections. But judges must follow the example of the role of lawmakers. They must stop considering themselves to be the officials of the State, and rather see themselves as a body with several thousand members, which decides about the rights and obligations of citizens, to the same extent as the legislative assembly.

The second reason for the existence of the judiciary is the economic impact of its activity on the development of society. It is entirely wrong to consider the judiciary as a parasite that only asks the State to pay for its work, without giving anything back to the State. Economic studies show that the most stimulating foundation for the development of any business activity is the certainty of ownership relations, especially the certainty of the ownership of real property. Real property is the most frequently used collateral for obtaining the initial capital at the birth of a real company (the so-called "garage phenomenon", when a company is started in the owner's garage. Among the globally famous companies that were started up in this manner, we could name Hewlett-Packard or Harley-Davidson, and in the Czech Republic Ivan Drbohlav and his Mountfield, or Ryor Cosmetics).

Legal stability, enforceability of the law within a reasonable time-frame, and the foreseeability of the law: these are factors to which economic value could be attributed. In their effect, they can bring such positive value that all economic incentives or other economic instruments can seem irrelevant, and of only local impact on a small fragment of the economy. Because documenting such economic thoughts is beyond the scope of the author's knowledge and time available, she will try to document this with an example close to her own legal practice, that is, family law:

Some 31,000 marriages end in divorce each year.

A dispute over custody occurs in approximately one-quarter of divorces, i.e., in 7,750 cases.

Disputes over custody drag on for approximately two years (optimistic assumption), so that each year, 15,500 cases are heard.

If every father suing for the custody of his children spends a mere hour per week on his case, which he would otherwise devote to work, i.e., 53 hours per year, then in the 15,500 cases, fathers neglect work for 821,500 work hours. If the average hourly pay is around CZK 100, then the annual loss in income represents CZK 82,150,000.(To the day of Dec. 15th 2007 it is about 3.159.615 Euro). To that we must add the costs of the functioning of the judiciary, the lost income of the mother (which can be a similar number as for fathers), the costs of child-care authorities, the costs of court expert opinions, etc., which easily leads us to the conclusion that ineffective work of the justice system in securing a father's right to have contact with his children costs our society at least CZK 100 million (about 3.800.000 Euro) each year. This number indicates the magnitude of savings that could be achieved by ensuring a fast and just process in all other areas in which citizens turn to courts.

These economic considerations remain, next to all of the theoretical and legal aspects, a little-used argument. They demonstrate that the "right to justice" is not a self-serving invention of naïve intellectuals, but one of the most important tasks of any State, and one of the most powerful tools of the economic and democratic development of a country. It is unquestionable that the judiciary has in its hands – both overall and through each individual judge – immense power. The effectiveness or ineffectiveness of the judicial system can either elevate a society and a State to unforeseen heights, or cast it into deep condemnation. We do realise that the load put on the shoulders of judges may be excessively great, with too much of an impact on all of the inhabitants of the Czech Republic, but undoubtedly the present situation does suit the society as a whole or many judges.

It is up to the legal profession and the general public to assist their judiciary, and their judges, in their difficult task. Such efforts were the guiding principles of all of the above thoughts, in the conviction that naming the problems and proposing ways to mitigate them, at least partially, will reflect positively in the effectiveness of the judicial system. There is no doubt that the route to a major improvement of the situation will be long, but what matters is that it has already been set out on.