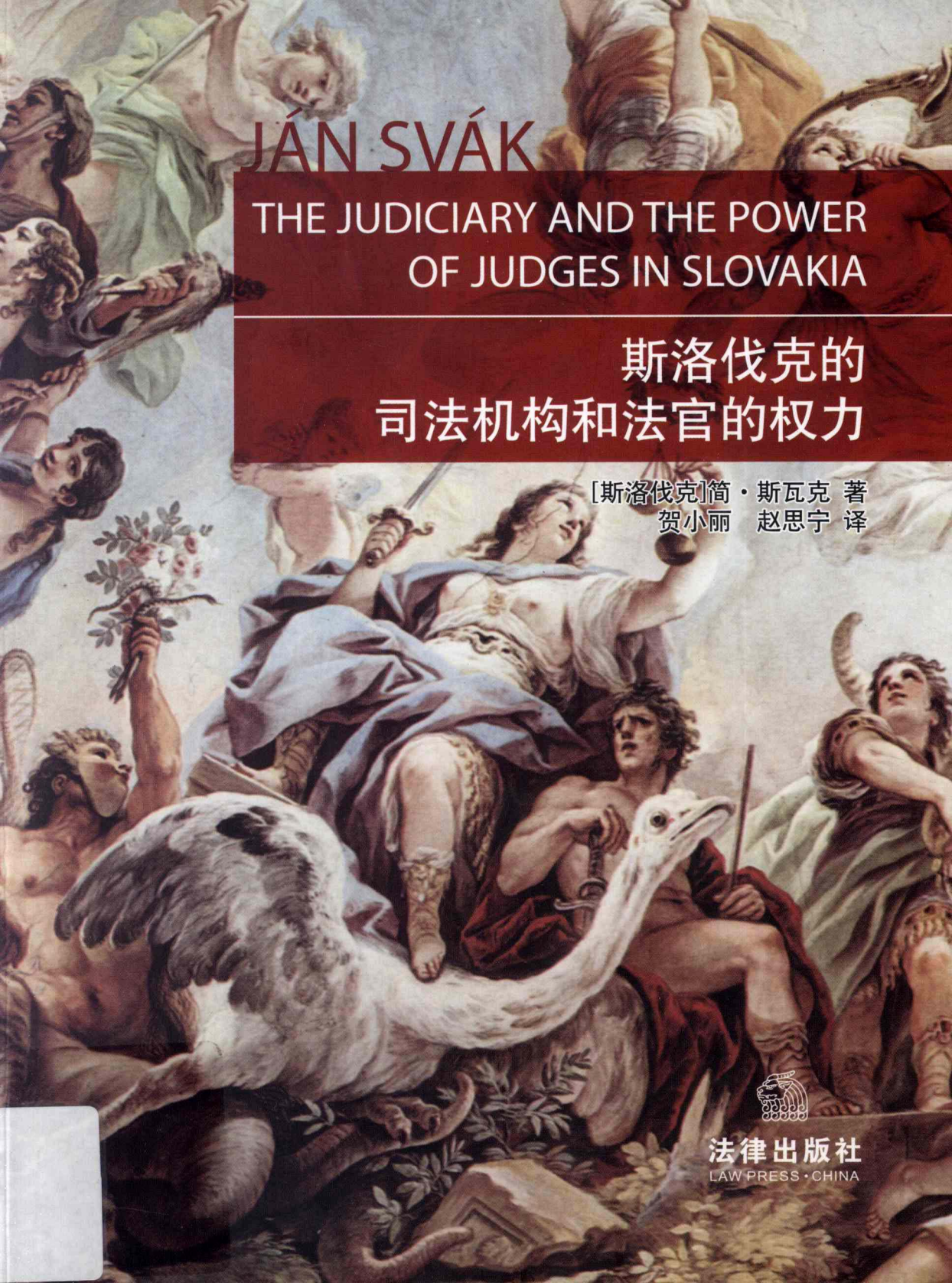

# JÁN SVÁK

# THE JUDICIARY AND THE POWER OF JUDGES IN SLOVAKIA

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[斯洛伐克]简·斯瓦克 著
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THE JUDICIARY AND THE POWER
OF JUDGES IN SLOVAKIA
By Ján Svák

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# 序

《斯洛伐克的司法机构和法官的权力》的作者Jan Svak教授是著名的宪法学家。出生于前捷克斯洛伐克，他自己亲身经历了国家的巨变：先是从传统的社会主义国家转化成西方式的共和制政体，然后斯洛伐克又从原捷克斯洛伐克独立出来。在这一巨大社会变革中，Svak教授也从法官走上学者之路，丰富的实践经验、细腻的思考逻辑、严格的治学精神、勤奋的工作态度很快使其成为斯洛伐克最杰出的宪法学大家，成为欧洲首屈一指的宪法学家。正如维也纳大学法学院院长Mayer教授在一次致词中所称道，Svak教授是斯洛伐克的大脑。

我于三年前有幸结识了Svak教授，很快就被他的真诚和热情所打动。在短短的几年时间里，Svak教授给我留下深刻印象之处在于：他工作时一丝不苟，只要看到他工作的样子，人们都会放心，都会深信不疑——作品一定是一流者；工作之余，Svak教授马上变成一个有说有笑、幽默诙谐，又不失大雅的普通人；对朋友他可以倾注满腔的热忱，甚至不需要语言的表述也能感受到他的诚挚。

不平凡的作品必然出自不平凡之手。Svak教授的《斯洛伐克的司法机构和法官的权力》就是这样一部非凡之作。因为宪法学不是我着重研究的方向，故当Svak教授将《斯洛伐克的司法机构和法官的权力》交到我手上时，我并没有准备仔细阅读。也许是看出了我的漫不经心，Svak教授认真向我介绍该书每一幅画面的意涵。这种以图说法，以法论图的研究方法，堪称法学界首创！不自觉地，我对《斯洛伐克的司法机构和法官的权力》产生了浓厚的兴趣，同时想到应该将之介绍给中国法学界。

贺小丽和赵思宁同学帮我达成了心愿。她/他们都有繁重的学习任务，然而在学习之余，小丽和思宁通过艰辛的劳动，很快将《斯洛伐克的司法机构和法官的权力》一书译成中文。王超博士并对之进行了修改。在此，谨向几位同学表示感谢。

此书的出版得到法律出版社黄闽社长、吕山副总编辑、分社社长朱宁女士等鼎力相助。黄琳佳女士负责编辑，工作兢兢业业。对他/她们的指导与帮助，谨代表本人及Svak教授深表谢忱。

2012年5月20日于香港

王贵国

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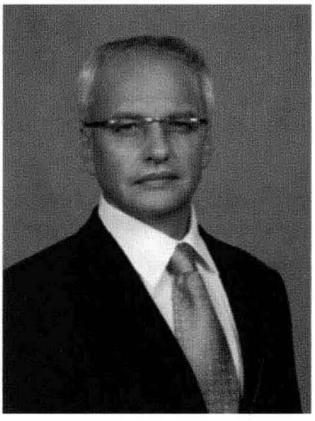

斯瓦克教授1960年5月26日出生在斯洛伐克Lu enec市。在从夸美纽斯大学(University of Comenius)布拉迪斯拉发分校法学院毕业后，他先是在布拉迪斯拉发地方法院任法官。通过司法考试后，他开始为司法部法学研究所工作，并在1990年成为该研究所所长。自1995年起，为司法部编辑活动部主任。2002年至2007年期间担任斯洛伐克共和国司法委员会委员。

斯瓦克教授学术经历丰富，曾在许多大学讲学或担任其科研委员会的委员，如香港城市大学、布尔诺的马萨里克大学、布拉格的查尔斯大学等。他目前是国际比较法研究院(IACL)斯洛伐克国家委员会的主席，泛欧大学的校长，并在特尔纳瓦大学(Trnava University)、夸美纽斯大学以及警察学院等都有教职。1994~1995年还曾任教于加拿大渥太华大学。斯瓦克教授持有斯洛伐克科学院国家和法学研究所颁发的CSc学位(等同于哲学博士学位)。在出版专著《行政司法的行政选定原则》后，获聘为夸美纽斯大学法学院宪法学副教授。2006年由斯洛伐克共和国总统委任为宪法学教授。

自1990年起，斯瓦克教授担任Justi ná Revue和Notitiae ex Academia Bratislavensi Jurisprudentiae这两个期刊的主编。他还是其他一些刊物，如Právny obzor, Policajná teória a prax 和 Acta Universitatis Carolinae等的编委。

斯瓦克教授目前独著或合著有13本专著和16本教科书，并在国内外发表逾160篇文章。其最为重要的著作是：专著《人权保护》(分三部分、两千余页)；教材《斯洛伐克共和国宪法》(总论)以及《斯洛伐克共和国宪法》(专论)。他曾参加了许多国内外学术会议。1997年获得Právnik学报奖，2003年和2010年获得Karol Plank奖。斯瓦克教授广泛参与人权保护方面的理论和实践。他是斯洛伐克赫尔辛基委员会的共同创始人，后成为该委员会的常任执行主任。他与斯洛伐克足球协会也保持着合作关系。

# author / prof. JUDr. Jan Svak, DrSc.

Professor Svak was born on 26 May 1960 in Lučenec. After graduating from University of Comenius' Faculty of Law in Bratislava he started working at the Regional Court in Bratislava as a judicial candidate. After passing the judicial exams he started working for the Law Institute of the Ministry of Justice and in 1990 became the director of the Institute. Since 1995 he has served as the Director General of the Editorial Activities Department of the Ministry of Justice. Between 2002 - 2007 he was a member of the Judicial Council of the Slovak Republic.

Professor Svak has extensive academic experience lecturing at a number of universities where he is also a member of their scientific councils, for example the City University of Hong Kong, Masaryk University in Brno, Charles University in Prague. He is the president of the Slovak National Committee of the International Academy of Comparative Law - IACL. Currently, he is the rector of the Paneuropean University; he holds a teaching position also at Trnava University, Comenius University in Bratislava and the Police Academy. Between 1994 - 1995 he held a teaching position at Universite d´Ottawa in Canada. He was awarded the CSc. degree (candidatus scientarium degree which is the present equivalent of PhD. degree) by the Institute of State and Law of the Slovak Academy of Sciences. Following publication of his book entitled "Selected Principles of Administration of Administration of Justice" he was awarded "associate professor in constitutional law" position at the Department of Constitutional Law of the Faculty of Law of the Comenius University in Bratislava. In 2006, he was appointed professor in constitutional law by the President of the Slovak Republic.

Since 1990 Professor Svak has held the position of editor-in-chief of both the Justičná Revue journal and Notitiae ex Academia Bratislavensi Jurisprudentiae journal. He is also on the editorial board of the following journals: Právny obzor, Policajná teória a prax and Acta Universitatis Carolinae.

He has authored or co-authored thirteen monographs, sixteen textbooks and more than 160 articles in domestic and foreign journals. Among his most important works count a two-thousand-page monograph entitled *Protection of Human Rights* in three parts (2011) and textbooks entitled *Constitutional Law of the Slovak Republic (General Part)* and *Constitutional Law of the Slovak Republic (Special Part)*. He participated at numerous international and national conferences. In 1997, he was awarded a prize by Právnik journal and in 2003 and 2010 he was nominated for the Karol Plank prize. He is involved with both theoretical and practical issues concerning the protection of human rights. He is a co-founder of the Slovak Helsinki Committee and later he became its long-standing executive director. He cooperates with the Slovak Football Association.

贺小丽，女，汉族，1980年生于陕西，西北政法大学讲师。西北政法大学文学学士，西北政法大学经济法法学硕士，香港城市大学中国法与比较法法学硕士，香港城市大学国际经济法法学博士生。研究方向主要涉及国际投资法，国际金融法，争端解决机制。2012年2月受邀参加韩国商事仲裁局和高丽大学法学院主办的亚洲调解学术会议，并做了“中国调解传统与国际投资”的主题发言，该合作论文将在缅因州大学《法学评论》期刊上发表。另，受作者Svak教授的邀请，于2012年3月前往斯洛伐克泛欧大学访问。曾发表论文：“口译特点与口译教学”，载《中国学校教育研究》2004年第3期；“On the Nature of ESP”，载《环球论丛》2006年第4期；“论金斯堡对惠特曼的继承与发展”，载《高校教育研究》2008年第7期；“对我国证券监管体制的评析”，载《大众商务》2010年4月下半期，总第112期；“Comment on the Liability of ISP in Protection of Internet Copyright”，载《商品与质量》2011年11月。

赵思宁，男，汉族，1987年出生于山东青岛，中国海洋大学经济学学士，香港城市大学法学硕士，维也纳大学法学硕士，香港城市大学法学博士生。研究方向主要涉及争端解决，比较法，国际经济法，法理学等。曾受韩国高丽大学法学院邀请参加亚洲调解学术会议，就香港民事司法改革中的调解问题发表演讲。译者亦曾于2012年前往斯洛伐克泛欧大学访问。

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*“法官是神”——多玛*

*(Domat),1660*



# 序言

很少有人类活动像执行正义那样具有神话般的根基。在民主以及不十分民主的体制下,法官被赋予了前所未有的权力。法官有权并且通常是最终的话语权来决定一个人的命运,包括所有对这个人的重要事项。从极端的角度讲,法官判决一个人死刑的权力堪比正义之神的权力。这种观念并没有被职业群体所排斥,本文开篇所引用的伟大的法国法学家让·多玛(J.Domat)的名言对此就做了最好的注解。[1]

现代社会带来的普遍民主化是影响法官地位的首要因素,这是很自然的事情。法官作为“旧政权”(ancienne régime)象征的代表,不仅仅是因为他们与君主和贵族关系紧密。法国大革命前期伟大的政治哲学家孟德斯鸠,在其代表作《论法的精神》中,曾称法官在分权中的作用仅仅是“宣讲法律”。[2]在其书的第六章,他得出结论称“在前述的三种权力中,司法机构差不多什么都没有”。[3]孟德斯鸠的著作或遗产在1989年的斯洛伐克构筑关于法官和司法权的新身份和使命时,成为了很有说服力的权威,这似乎是个历史性的悖论。

这一悖论并非是理解当今法官和司法机构地位及重要性有矛盾的唯一例举。更为明显的是不同主体在理解法官和司法机构地位上所呈现的差异:一方面,是普通大众(在很大程度上也为专业人士)的理解;另一方面,是法官自己的理解。法官认为其职业面临着

1) DOMAT,J.:Les Lois civiles dans leur ordre naturel:le droit public,Ed. chez la Veuve Savoye,Paris,1777,I. part,p.282.

2) 此处的语言虽然相对温和,但其他一些地方却言辞激烈,如他表述道:“这个国家的法官只不过是表述法律词语的喉舌,仅仅是消极地存在,不能控制自己的权力和过于严厉的行为。”参见DE SECONDAT MONTESQUIEU:Spirit of Laws,Tatran,1989,p.211。

3) DE SECONDAT MONTESQUIEU:Spirit of Laws,Tatran,1989,p.209.

*„Les juges sont des Dieux"*

Domat, 1660



# Introduction

Few human activities have such mythological roots as the administration of justice. In democratic, as well as less democratic regimes, the judge is endowed with unprecedented powers. The judge has the authority, and, generally, also the last word in determining the man's fate, involving all of its essential aspects. The judge's power to sentence a person to death competes, in most extreme cases, with the Justice of God on Earth. Especially in the eyes of medieval people, the judge became the embodiment of God on Earth. Such perception was not ruled out by professional communities; which is best illustrated by the introductory quotation by J. Domat, the great French jurisconsult.[1)]

Quite naturally, the general democratization brought by the modern period hit the judges among the first. Not only for the close links to the monarch and the nobility did the judges represent the *„Ancien Régime"* symbol. The great political philosopher of the French pre-revolutionary period, Ch. L. Montesquieu, in his famous work *De l´esprit des lois*, ascribed the judges in the separation of powers only the role of *„la bouche qui prononce les paroles de la loi"*.[2)] In his 6th chapter of the XI book he concluded that *„of the three powers above mentioned, the judiciary is next to nothing."*[3)] It is a historical paradox that Ch. L. de Montesquieu' s work or legacy served as a persuasive authority in shaping the new status and mission of judges and the judicial power in Slovakia after 1989.

This paradox is not the only one that may be associated with the current understanding of the place and significance of judges and the judiciary. Even more evident are the differences in understanding of the position of judges and the judiciary presented, on the one hand, by the general public (and to a great extent also by the professionals) and by

1) DOMAT, M.: Les Lois civiles dans leur ordre naturel: le droit public, Ed. chez la Veuve Savoye, Paris, 1777, I. part, p. 282.
2) These relatively mild words were expressed strongly in some parts, e.g. he stated that *„the judges of the nation are no more than the mouth that pronounces the words of the law, mere passive beings, incapable of moderating either its force or rigour."* DE SECONDAT MONTESQUIEU, CH.: The Duch zákonov, Tatran, 1989, p. 211.
3) DE SECONDAT MONTESQUIEU: Spirit of Laws, Tatran, 1989, p. 209.



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很大的风险，而大众则对法官的过于独立表现敏感，他们认为法官的过度独立性正逐渐发展为在人权幌子下宪法为保护司法而赋予法官的一种特权。当然，这一现象并不是斯洛伐克所专有，也不是与历史发展的转折有关。



可以说，每个国家及每个时代（现代以及后现代）都存在这个问题；浏览一下《比利时法院》（*La Belgique judiciaire*）杂志的早先版本就足够了。1919年10月，时任首席检察官卡利尔（Callier）撰写了一篇题为"法官危机"的文章；[4]四年后他的继任者查尔斯·莫斯（Charles Mons）[5]以及50年之后的首席检察官马修斯（M. J. Matthijs），[6]都持有与卡利尔（Callier）相同的观点。1973年，当时的首席检察官甘修夫·米尔斯（Ganshof van der Meersch）在文章中指出当时司法系统存在的问题，并督促不要忽视这些威胁法官及法院的巨大风险。[7]

历史上的司法机构曾经历过多次危机，通常都与整个社会及政治危机有关，尤其是在社会变革时。在斯洛伐克历史上，该危机出现在20世纪末的时候。在20世纪90年代，斯洛伐克的国家体制发生了深刻变化，一个崭新的独立国家应运而生，随之而来的是司法系统出现了两种相平行的现象，其结果不管是正面的还是负面的，在今天仍然可以感知。这两个现象是：

——为法官独立创造事实的保障；
——司法机构内的变革。

法官独立一直以来都是一个政治议题，1989年后更发展成为政治运动的一项内容。除了在宪法和法律方面进行一些实质性的修改，实行法官独立不仅需要物质方面的，也需要社会及政治方面的条件。[8]近年来已经出现了一些对法官独立的法律保障，例如：

——法官任期不确定期限；
——法官不转任原则；
——消除司法行政干涉公正之可能性；

4） CALLIER: La crise de la magistrature, La Belgique judiciaire, 1919, col 130.
5） MONS, CH.: La crise de la magistrature, La Belgique judiciaire, 1923, col.193.
6） MATTHIJS, J.: L' avenir de la magistrature au tournant, J. T., 1971, p.245.
7） GANSHOF van der MEERSCH, W. J.: Réflexions sur l' art de juger et l' exercice de la fonction judiciaire, J. T. 1973, p.509.
8） 在所有颁布的新法中，最重要的是关于法院和法官修正法案No.335、1991，Coll.，该法案在20世纪末之前都具有效力。21世纪初，经过修正并颁布的法律有："关于职业法官和非职业法官法案"No.385/2000 Coll，"关于法院法案"No. 757/20004，从而取代了前述法律。

**Thémis / Themis**
» autor: Johann Jonas Drentwett (?) » Stará radnica Bratislava, foto T. Mišura

the judges themselves, on the other hand. Judges see the judicial profession in critical danger, while the public reacts sensitively to the excessive independence of judges, which in their eyes, is increasingly becoming a privilege of judges as part of the constitutional right to judicial protection under the heading of human rights. This phenomenon is, however, not only a Slovak specialty, nor is it associated with the turning point in the historical development.

Instances can be found in all countries and in any modern or postmodern period; it may suffice to skim the articles published in the older issues of *La Belgique judiciaire*. In October 1919, the then Attorney General Callier wrote an article entitled „La crise de la magistrature"[4]. Four years later, his successor, Charles Mons[5] followed the same model, and half a century later, also M. J. Matthijs[6], the Attorney General. In 1973, the then Attorney General, Ganshof van der Meersch, wrote about the existencial problems of the judiciary and urged not to ignore the great danger threatening the judges and the courts.[7]

There will be times when the judiciary will be in crisis. This will usually be related to the overall social and political crisis, particularly in the times of change. In Slovak history such was the period at the end of 20th century, when in the 90s there was a radical change of the state regime and subsequently a new independent state came into existence. Two parallel phenomena were happening in the judiciary, the consequences of which, whether positive or negative, can be felt in the present. They were:

- creation of factual guarantees of independence of judges,
- variations in the judiciary.

Independence of judges has been on the political agenda of civil and later on also political movements since 1989. Not only material but also social and political conditions for application of independence of judges were adopted, in addition to some substantial constitutional and statutory changes.[8] Legal guarantees of independence of judges have sprung up, for example:

- indefinite term of judicial office,
- principle of non-transferability of the judge,
- removing possibilities of statutory interference of administration of courts into administration of justice,

4) CALLIER: La crise de la magistrature, La Belgique judiciaire, 1919, col. 1329 ff.

5) MONS, CH.: La crise de la magistrature, La Belgique judiciaire, 1923, col. 193 ff.

6) MATTHIJS, J.: L´avenir de la magistrature au tournant, J. T., 1971, p. 245 ff.

7) GANSHOF van der MEERSCH, W. J.: Réflexions sur l'art de juger et l'exercice de la fonction judiciaire, J. T. 1973, p. 509.

8) New statutes were passed, the most important one was the Act No. 335/1991 Coll. on Courts and Judges, as amended, which was effective until the end of 20th century. At the beginning of 21st century, new statutes were passed, namely the Act No. 385/2000 Coll. on Judges and Lay Judges, as amended, and Act No. 757/2004 on Courts, as amended, replacing the previously mentioned statute.

——司法自治权和为保护法官权利的结社自由权；
——强化司法豁免与行使司法职责不相容原则；
——提高法官的物质和生活条件；
——在诉讼程序中强化法官之独立程序地位。



除了这些与法官相关的法律及司法机构功能方面的积极变化外，法官队伍也发生了一些不容忽视的变化。出乎意料的是，其原因不在于清除"旧体制"法官的政治压力（像东德等许多前东欧国家里的情况那样），而是法官本身自愿进入私领域工作的倾向。这种法官外流的现象，不但从数量上而且从质量上都削弱了法官队伍，并恶化了缺乏或没有法官继任者的状况。

1989年之前，法律专业的毕业生响应所谓"国家灭亡"的政治主张以建立共产主义社会。根据马克思列宁主义学说，法律是国家的产物，所以法律会伴随国家的消亡而灭失；从逻辑上讲律师业也会不复存在。这就造成了律师极度匮乏而导致无法重塑法治环境及适用法律。相对于公领域而言，社会需求在私领域更能得到满足。一些法官和检察官纷纷辞职去从事律师实务工作，因此20世纪90年代的上半叶可以被看作是司法职业的一段关键时期。当然，司法正当性理论的内容以及意义就成为了关注的焦点。有那么一段时间，法官的挑选和任命过程甚至有点类似于征兵过程。因此在研究司法机构和法官权力时，研究司法正当性开始变得更加重要。

# 1.司法正当性

作出判决的权力以及该种权力的渊源，是对司法机构甚至整个人类社会都很重要的问题。《圣经》中也涉及此类问题，这并非巧合。摩西选拔法官可以被看作是"政治权威"的选拔。另一种方式是从雅典自由市民中进行挑选，但通过此种方式选拔的法官的能力和任职资格也受到了最有名的罪犯——苏格拉底的质疑。[9]

9） 苏格拉底被501名法官判处死刑，这些法官是从雅典公民中随机选出。280名法官确定苏格拉底有罪（211名法官持反对意见），有360名法官（陪审员）宣判苏格拉底有罪。苏格拉底交由法官裁定的资料可以在柏拉图的著作《苏格拉底的申辩》中找到。BRÖSTL, A.:《雅典人民与苏格拉底公民》。KALLIGRAM, Bratislava, 2006, pps.53–88.

- the right to judicial self-government and the right to freedom of association for the protection of judges´s rights,
- strengthening of judicial immunity and the principle of incompatibility with the exercise of judicial duties,
- prerequisites for increasing the material and social conditions of judges,
- reinforcing the independent procedural position of the judge in the proceedings.

Despite the large positive changes in the statute of judges and functioning of the judiciary, quite significant alterations in judicial stature of judges occurred. Paradoxically, the reasons were not political pressures to remove the judges who served during the "old regime", as was the case in many former Eastern European countries such as Germany, but a voluntary departure of judges to the private sector. This outflow, which weakened the judicial profession not only quantitatively but also qualitatively, worsened the situation due to the lack/absence of successors to judicial offices.

Before 1989, the number of law graduates corresponded with the political notion of state dying in order to create a communist society. According to Marxist-Leninist teachings, the law dies with the state because the law is a product of the state, so logically, lawyers are excluded, too. This resulted in an acute shortage of lawyers to reshape the regulatory environment and apply the law. The social demand was satisfied more in the private sector than in the public sector. Judges and also prosecutors were leaving to practice law as advocates; the first half of the 90s can, therefore, be described as critical in terms of the judicial profession. Quite logically, the issue of judicial legitimacy became central, but in a paradoxical antipole in terms of meaning and significance. For a temporary period, selection and recruitment process of judges became more like enrollment. When analysing the judiciary and the power of judges, it is even more important to start with judicial legitimacy.

# 1. Judicial Legitimacy

The right to pass judgments and the source from which this right arose are crucial issues for both the judiciary and the entire mankind. It is no coincidence that we do come across these issues in the Bible; and the selection of judges by Moses may be considered selection by „political authority." Another alternative was to select judges from among free citizens of Athens, but the abilities and qualifications of such judges were questioned also by the most famous convict – Socrates.[9)]

9) Socrates was sentenced to death by 501 judges drawn by lottery from among Athenian citizens. His guilt was determined by 280 judges (211 voted against) and 360 judges (jurors) voted to convict him. Socrates' s references to the judges can be found in Plato' s work. PLATO: Apology. In. BRŐSTL, A.: Aténsky ľud proti občanovi Sokratovi. KALLIGRAM, Bratislava, 2006, pps. 53 – 88.





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