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THE EVOLUTION AND GESTALT OF THE CZECH CONSTITUTION

David Kosař and Ladislav Vyhnánek

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Masaryk University, Faculty of Law
Veveří 70, Brno 611 70
Czech Republic

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Abstract
This chapter provides a condensed look at the Czech constitutional *Gestalt*. It argues that in order to understand it, it is necessary to go beyond the text of the 1993 Czech Constitution and view it also as a historical, political and social phenomenon. More specifically, we show that the Czech constitutional system has been built on liberal democratic values and on the legacy of the first Czechoslovak Republic. The key institutions and the general constitutional design have followed well tested constitutional patterns and the early experience with the functioning of the new constitutional system lent themselves to optimistic interpretations. At the same time, we stress some dangerous subtones of the Czech constitutional development that are often neglected by constitutional law scholars.

Keywords
Czech Constitutional Court, Constitution of Czechia, Constitutional identity

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General Information

Abbreviations

BVerfG	*Bundesverfassungsgericht* (German Federal Constitutional Court)
CCC	Czech Constitutional Court
Charter	Czech Charter of Fundamental Rights and Freedoms
CJDCC	Collection of Judgments and Decisions of the Constitutional Court
CJEU	Court of Justice of the European Union
EU Charter	Charter of Fundamental Rights of the European Union
ECtHR	European Court of Human Rights
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms
EU	European Union
FCCC	Constitutional Court of the Czech and Slovak Federal Republic
ICCC	Interwar Czechoslovak Constitutional Court
LCC	Law on the Constitutional Court of 16 June 1993 (see below).

Rulings of the Czech Constitutional Court

Important rulings (all judgments and some decisions) of *Ústavní soud České republiky* (the Czech Constitutional Court) are published in the printed publication called the 'Collection of Judgments and Decisions of the Constitutional Court'. All rulings (judgments, decisions as well as opinions) of the Czech Constitutional Court are available at its website: http://www.usoud.cz/.

THE EVOLUTION AND *GESTALT* OF THE CZECH CONSTITUTION

David Kosař and Ladislav Vyhnánek[1]

1. Introduction

In 2018, Czechia celebrated 25 years of its own statehood and a century since Czechoslovakia came into being. The latter anniversary was by far the more important as all Czech leaders, unlike their Slovak counterparts,[2] have always considered Czechoslovakia as their own state[3] and viewed Czechia as a natural successor state.[4] In fact, the number '8' has a special place in Czech history.[5] In 1918 Czechoslovakia gained independence from Austria-Hungary in the wake of World War I. In 1938 the Western powers (France, Britain and Italy) met Hitler in Munich and eventually consented to the annexation of Czechoslovakia's *Sudetenland* (mostly Western Bohemia) by Hitler's Germany.[6] A few days later, German troops marched into the *Sudetenland*, which became officially a part of the Third Reich. This marked an end to democratic statehood in the Czech lands for almost 50 years, as in February 1948 the

[1] David Kosař (david.kosar@law.muni.cz) is the Director of the Judicial Studies Institute and Associate Professor at the Faculty of Law, Masaryk University. Ladislav Vyhnánek (ladislav.vyhnanek@law.muni.cz) is an Assistant Professor of Constitutional Law at the Faculty of Law, Masaryk University, and a Law Clerk to a Justice of the Czech Constitutional Court.

[2] It is telling that Vladimír Mečiar, the first Slovak Prime Minister (1992–1998), deleted October 28—the most important national holiday in Czechoslovakia and in the Czech Republic, which marks the beginning of an independent Czechoslovak state in 1918—from the list of national holidays (see Law No. 241/1993 Z. Z., on National Holidays, Days of Rest, and Memorial Days). But note that October 28 was added to the list of Memorial Days (not to the list of National Holidays) in Slovakia only in 1999, that is, after the end of Mečiar's rule.

[3] Czechoslovakia has historically been seen by a significant proportion of Slovak society as a 'Czech project' and the 1992 Slovak Constitution builds more on the ethnic understanding of the Slovak nation. See: Juraj Marušiak. 'Ústavy SR a ČR a ich úloha v procese konštruovania národných identít'. In ČESKO-SLOVENSKÁ HISTORICKÁ ROČENKA (Vladimír Goněc ed., 2013), at 96. In Czechia, there is an overwhelming consensus that views Czechoslovakia as a basis for modern Czech statehood. Generally, see also Eric Stein. CZECHO/SLOVAKIA: ETHNIC CONFLICT, CONSTITUTIONAL FISSURE, NEGOTIATED BREAKUP (1997).

[4] Even though this view in not a correct one under public international law as both new states, Czechia and Slovakia, had to undertake a procedure of admission (as new member states) to international organizations Czechoslovakia had been a member prior to dissolution. For further details, see, e.g., Tomáš Dumbrovský and Kristýna Urbanová. 'From Velvet Revolution to Purple Dissolution: Dismantling of Czechoslovakia From Above'. In RESEARCH HANDBOOK ON SECESSION (Sara McGibbon, Lea Raible and Jure Vidmar eds., 2020); Mahulena Hofmann. 'Czechoslovakia, Dissolution of'. In MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW (MPEPIL), Rüdiger Wolfrum ed., https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1024 (last accessed on Dec. 28, 2020); and Patrick Dumberry. A GUIDE TO STATE SUCCESSION IN INTERNATIONAL INVESTMENT LAW (2018), at 143–55.

[5] The importance of the years ending with '8' is generally accepted in the Czech popular literature, see, e.g., František Emmert. OSUDOVÉ OSMIČKY V NAŠICH DĚJINÁCH (2008). On the other hand, many important events took place also in other years and many historians have warned against overemphasizing and oversymbolizing the years ending with '8' (see, e.g., František Šulc. 'Osudové české osmičky.' LIDOVKY.CZ [Dec. 29, 2007], https://www.lidovky.cz/noviny/osudove-ceske-osmicky.A071229_000110_ln_noviny_sko (last accessed on 28 December 2020); and Martin Janda. 'České osudové osmičky 20. Století'. 21.STOLETI.CZ [Mar. 19, 2008], https://21stoleti.cz/2008/03/19/ceske-osudove-osmicky-20-stoleti/ [last accessed on Dec. 28, 2020]).

[6] See the Munich Agreement (Sep. 30, 1938), the settlement reached by Germany, Great Britain, France and Italy that permitted German annexation of the Sudetenland in western Czechoslovakia.

Communist Party successfully completed a coup d'état and in 1968, when the Czechs wanted to liberalize their communist regime, the Soviet Union and its allies invaded Czechoslovakia. All of these events left a deep imprint on the Czech constitutional *Gestalt*.

This chapter provides a condensed look at the Czech constitutional *Gestalt*.[7] It argues that in order to understand it, it is necessary to go beyond the text of the 1993 Czech Constitution and view it also as a historical, political and social phenomenon. More specifically, we show that the Czech constitutional system has been built on liberal democratic values and on the legacy of the first Czechoslovak Republic. The key institutions and the general constitutional design have followed well tested constitutional patterns and the early experience with the functioning of the new constitutional system lent themselves to optimistic interpretations. At the same time, we stress some dangerous subtones of the Czech constitutional development that are often neglected by constitutional law scholars.

While the system still seems to be in a relatively good shape, its future is hard to predict and even the evaluation of constitutional-political and social developments within the last decade is an uneasy task. Even though the Czech constitutional landscape has not been subject to changes and challenges of the same magnitude as some of its Visegrad counterparts (Slovakia[8] in the 1990s and Hungary[9] and Poland[10] in the 2010s), there are clear signs of its fragility and susceptibility to democratic backsliding. The reasons of the fragility do not lie in the structure of the constitutional system itself, but rather in the social underpinning of the key constitutional values. This makes Czechia a particularly interesting case as it is arguably an outlier among the Visegrad countries, but we do not know for how long.

We may thus ask what explains the differences between the Visegrad countries when just sixteen years ago, when they joined the European Union, they were seen as a bloc and as the good pupils of democratic transition? Are the Czech constitutional values rooted deeply enough to withstand a real earthquake? Will Czechia follow the path that Hungary and Poland now seem to be taking? Are the recent events in Czechia just a necessary child illness of the constitutional system taken out of proportion by their observers and the outlier status of Czechia as a democratic outpost in Central Europe still holds? We cannot claim that we know

[7] By 'Czech constitutional *Gestalt*' we mean an overall picture of the Czech constitutional landscape that encompasses constitutional doctrines, normative constitutional theories, as well as constitutional narratives.

[8] See, e.g., Herbert Kitschelt. POST-COMMUNIST PARTY SYSTEMS: COMPETITION, REPRESENTATION, AND INTER-PARTY COOPERATION (1999), at 42; and Valerie Bunce and Sharon Wolchik. 'The 1998 Elections in Slovakia and the 2000 Elections in Croatia: The Model Solidifies and Is Transferred'. In DEFEATING AUTHORITARIAN LEADERS IN POST-COMMUNIST COUNTRIES (Valerie Bunce and Sharon Wolchik eds., 2011), at 53–84.

[9] See, e.g., Gábor Halmai. 'From the 'Rule of Law Revolution' to the Constitutional Counter-Revolution in Hungary'. In EUROPEAN YEARBOOK OF HUMAN RIGHTS (Wolfgang Bedenek ed., 2012), at 367; Renáta Uitz. 'Can You Tell When an Illiberal Democracy Is in the Making? An Appeal to Comparative Constitutional Scholarship from Hungary'. 13 INTERNATIONAL JOURNAL OF COMPARATIVE LAW 279 (2015).

[10] See Wojciech Sadurski. POLAND'S CONSTITUTIONAL BREAKDOWN (2019); and Fryderyk Zoll and Leah Wortham. 'Judicial Independence and Accountability: Withstanding Political Stress in Poland'. 42 FORDHAM INTERNATIONAL LAW JOURNAL 875 (2019).

the answers, but a careful analysis of the Czech constitutional *Gestalt* can bring us closer to them.

The structure of this chapter is as follows. Section 2 analyses the historical, political and social context of the 1993 Constitution with an emphasis on the drafting process and the sources that inspired the new Czech constitutional system. Section 3 then identifies critical junctures of the post-1993 constitutional development as well as new challenges the Czech constitutional system faces. These two Sections are crucial building blocks for understanding the Czech constitutional *Gestalt* as they explain key constitutional narratives. The following two sections zero in on constitutional doctrines and theories. Section 4 analyses the basic structural aspects of the Czech constitutional system and its key principles. Section 5 then critically analyses the Czech constitutional identity. Section 6 concludes.

2. The Origins of the Current Constitution

The 1993 Constitution came into being as a direct consequence of the dissolution of Czechoslovakia,[11] but the context of its origins is much more complex. Four direct factors have arguably influenced the drafting process and the future constitutional system more than anything else. Besides that, some older indirect sources of inspiration have to be mentioned in order to fully appreciate the complex nature of the Czech constitutional thought.

First, even though it is, strictly speaking, not a revolutionary constitution,[12] the 1993 Czech Constitution has several revolutionary features. The process of its drafting and its resulting content were inevitably shaped by the 1989 Velvet Revolution. At the time of the drafting of the 1993 Constitution the communist regime and its injustices were still fresh in the memories of the key stakeholders as the Velvet Revolution had taken place less than three years before. The deeply rooted desire that power should be exercised in a different way from in the past reflected 'the fears originating in, and related to, the previous political regime',[13] in which power was monopolized by Communists. This reflection on the communist past became so imprinted on the Czech Constitution's DNA that it shaped not only the constitutional text itself, but its further development and constitutional practice. The 1993 constitutional system thus should be understood as a reaction to the totalitarian past of the Czech nation. This was, of course, most clearly visible in the initial phases of the Czech constitutional development in the 1990s, but it has remained a strong factor influencing the functioning of the constitutional system until today.

Second, the division of Czechoslovakia surprised many, including constitutional drafters and scholars, and resulted in a hasty drafting process within a rather narrow circle of experts.

[11] For a concise description of the negotiated break-up of Czechoslovakia see Stein, *supra* n. 3.
[12] A series of amendments of the Czechoslovak socialist federative constitution was adopted as an immediate reaction to the 1989 Velvet revolution.
[13] András Sajó. LIMITING GOVERNMENT (1999), at 2.

Unlike in Poland (1997) and Hungary (2011), the Czech constitutional drafters thus had little time to scrutinize the most institutional choices, some of which were made 'on the way' and without much consideration. While the major political parties of that time had their say in the final shape of the 1993 Czech Constitution, they often had to defer to the expert drafting group. There was simply not time to come up with alternative solutions, as virtually all the work had to be done within less than six months between July and December 1992.

Third, Czechs have always viewed the First Czechoslovak Republic (1918–1938) as the golden era of Czech constitutionalism,[14] and hence the 1920 Czechoslovak Constitution served as a template for drafting the new one. While the golden era view might be considered an idealisation of an imperfect political community and constitutional system,[15] it was still the only era which could reasonably provide a historical foundation for Czech modern democratic statehood.[16]

Last but not least, following decades of isolation from the Western world in terms of values, economy and even very basic inter-personal relationships, there was a strong sense of 'coming back to Europe', to the cultural space where Czech society thought it belonged and from which it was violently torn. Czechoslovakia thus soon after the Velvet Revolution became a member of the Council of Europe. Czechia then yearned to join the NATO and the European Union. To make the latter happen, it even happily embraced the 1993 Copenhagen Criteria[17] and initiated the cumbersome accession process.[18]

In sum, each of these four major factors has left a mark, each in its own way, on the constitutional *Gestalt* of newly independent Czechia.[19] However, the process of drafting the Czech Constitution was affected also by foreign sources, the practical exigencies and the

[14] This view dates to the First Czechoslovak Republic. Tellingly, first two Czechoslovak presidents, Tomáš Garrigue Masaryk and Edvard Beneš, portrayed Czechoslovakia as the 'Switzerland of the East', see Andrea Orzoff. BATTLE FOR THE CASTLE: THE MYTH OF CZECHOSLOVAKIA IN EUROPE, 1914–1948 (2009) .

[15] This is not an isolated view. See for example Mary Heiman. CZECHOSLOVAKIA: THE STATE THAT FAILED (2009); and Orzoff, *supra* n. 14.

[16] For further details see Stein, *supra* n. 3; Abby Innes. CZECHOSLOVAKIA: THE SHORT GOODBYE (2001); Veronika Svoboda. VZNIK ÚSTAVY ČESKÉ REPUBLIKY (PhD thesis, 2018), at 107, available at:140066181.pdf (cuni.cz) (last accessed on Jan. 11, 2021); and David Kosař, Jiří Baroš, and Pavel Dufek. 'The Twin Challenges to Separation of Powers in Central Europe: Technocratic Governance and Populism'. 15 EUCONST 427 (2019), at 442–3.

[17] The Copenhagen criteria (after the European Council in Copenhagen in 1993 which defined them) are the essential conditions all candidate countries must satisfy to become EU member states (see PRESIDENCY CONCLUSIONS, Copenhagen European Council 1993).

[18] For further details see Dimitry Kochenov. EU ENLARGEMENT AND THE FAILURE OF CONDITIONALITY: PRE-ACCESSION CONDITIONALITY IN THE FIELDS OF DEMOCRACY AND THE RULE OF LAW (2008).

[19] The name 'Czechia' is new, approved in 2016 by the Czech Cabinet as the official short name of the Czech Republic. We use the name Czechia to describe the Czech Republic (1993–today) and the Czech part of Czechoslovakia (1918–1992) in order to avoid confusion as the term 'Czech Republic' meant different things in Czech modern history. In 1918–1968 the 'Czech Republic' did not officially exist (a more common term in that era was 'Czech lands' [*České země*]), after the federalisation of Czechoslovakia the term 'Czech Republic' referred to the Czech subunit in the federation (1969–1992), and only after the division of Czechoslovakia did it become the official title of the independent Czech state.

politics of the day. In particular, the tensions between Czechoslovak President Václav Havel and the Czech Prime Minister Václav Klaus framed the drafting as well as the implementation of the Czech Constitution for more than a decade. We will discuss these influences in more depth in the subsections that follow.

Besides these rather direct influences, the origins of the Czech Constitution (and even more the origins of some later tensions) cannot be fully understood without appreciating some older crossroads of the Czech statehood. These are still represented in the Czech popular conscience and represent – in the minds of many – the main determinants of the Czech constitutional project. The impact on popular conscience of the Hussite movement and the following Czech branch of reformation (especially the Czech Brethren) cannot be understated. The evaluation of the Hussite movement and the values it represented was at the very heart of the later identity defining debates of 20th century. These debates raged especially during the first Czechoslovak Republic, but even the Communist regime "borrowed" the Hussite movement in order to justify its identity and trace its roots to the defining moments of the Czech statehood. Even though seemingly forgotten history, the Hussite movement (or often its modern and often self-serving interpretations) has not lost its ties to the Czech statehood. On the one hand, it can be used to argue that equality and social justice have always been key Czech national values. On the other hand, the value of independence or even nationalist arguments and distrust towards the foreign can also be tied to interpretation of the Hussite period. One cannot forget that after the end of the 15th century, the Czech lands have been gradually integrated in the Habsburg monarchy (the important dates being 1526 and 1620). The perception of subjugation to foreign powers (sometimes referred to as "The Darkness Period") has also persisted in the Czech popular conscience. The notion of the Czech "Hussite statehood" was thus a semi-direct predecessor of the first Czechoslovak Republic. Czechia – willingly or not – has inherited perceptions and debates about "the purpose of the Czech history". Is the purpose of existence of the Czech(oslovak) state simply to pursue the ideals of humanity, as Masaryk claimed? [20] Or should we define our statehood in nationalist terms and search for the specific values of the *Czech* nation? Conflicting attitudes towards this central problem are still at the heart of Czech constitutional-political tensions.[21]

2. 1. Sources of Inspiration

One must concede that the Czech constitutional system is not an entirely an original one. Even though it possesses a few distinctive features, it is still rather a mixture of several historical and foreign sources of inspiration. While a pinnacle position amongst these sources belongs arguably to the 1920 Czechoslovak Constitution,[22] foreign and international sources were also

[20] Tomáš Garrigue Masaryk. ČESKÁ OTÁZKA (2013), at 250.
[21] See part E below.
[22] Svoboda, *supra* n. 16, at 107. It is important to note that even the 1920 Constitutional Charter was not an entirely original document as it had been partially inspired by the constitution of the Third French Republic.

very significant. In particular, the European Convention on Human Rights[23] and the German constitutional system with the strong position of its constitutional court deserve a special mention as they heavily influenced the final shape of the Czech constitutional system.

In fact, German influence can be traced in many areas. Entrenchment of the Eternity Clause in article 9 para 2 of the Constitution,[24] many features of the original position of the President,[25] and the aforementioned strong position and extensive competences[26] of the Czech Constitutional Court (hereinafter: the 'CCC') are amongst the most important examples. Czech post-communist political leaders also intended to create a short and general constitution, and in this regard they were heavily influenced by the US Constitution.[27] The position of the Senate and its features, in particular the model of the partial replacement of a third of the Senators every two years, are clearly inspired by the US and French constitutions.[28] A specific inspiration from the US model can also be traced in the procedure for the appointment of CCC Justices, which copies the US federal judges' appointment procedure.[29]

Jan Filip, a prominent Czech constitutionalist and CCC Justice, emphasizes that besides the often mentioned 'grand ideas' sources (such as the ECHR, Germany and the United States of America), some 'lesser known' constitutions served as sources of inspiration. He mentions that some parliamentary rules of procedure were influenced by the Spanish and the then Polish constitutions.[30]

While the influence of foreign sources is indisputable, foreign international experts had very little impact on the drafting process and the final product.[31] The foreign inspiration was thus provided mainly by domestic experts with ties to or extensive knowledge of other constitutional systems,[32] by direct use of translated constitutional documents, and by trips to other countries and consultations.

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[23] The UN International Covenants (ICCPR66 and ICESCR66) should also be mentioned.

[24] A more detailed account of the Eternity Clause and its importance is provided in Sections 3 and 4 below.

[25] Cyril Svoboda. 'Komentář k čl. 54'. In ÚSTAVA ČESKÉ REPUBLIKY: KOMENTÁŘ (Cyril Svoboda and Dušan Hendrych eds., 1997), at 82.

[26] Including—unlike many other CEE constitutional systems—the existence of a constitutional complaints procedure.

[27] Svoboda, *supra* n. 16, at 107. It is important to note that even the 1920 Constitutional Charter was not an entirely original document as it had been partly inspired by the constitution of the third French Republic.

[28] Jan Filip. 'Zapomenuté inspirace Ústavy ČR: k 10. výročí přijetí Ústavy ČR'. 10 ČASOPIS PRO PRÁVNÍ VĚDU A PRAXI 295 (2002), at 300–01.

[29] See David Kosař and Ladislav Vyhnánek. 'The Constitutional Court of Czechia'. In THE MAX PLANCK HANDBOOKS IN EUROPEAN PUBLIC LAW, VOL. III: CONSTITUTIONAL ADJUDICATION: INSTITUTIONS (Armin von Bogdandy, Peter Huber, and Christoph Grabenwarter eds., 2020), at 119–82.

[30] Filip, *supra* n. 28, at 300–01.

[31] Svoboda, *supra* n. 16, at 89–90.

[32] Future Justices of the CCC Vladimír Klokočka and Vojtěch Cepl were particularly important in this regard. Vladimír Klokočka was academically active in Germany and Vojtěch Cepl provided his knowledge of US law and other common law sources. This tendency to rely on comparative materials can also be traced in their subsequent judicial activities.

2.2. Between Klaus and Havel: Drafting the Constitution

The drafting process itself has not until recently been comprehensively documented[33] and some of its aspects acquired an almost mythological dimension. Some partial accounts have been published in commentaries on the Constitution and several law review articles.[34] The most comprehensive document is probably the unpublished diary of Miroslav Sylla, one of the drafters. Parts of this diary have been quoted in other publications,[35] but many aspects of the drafting process have remained in the realm of oral history.[36] Very recently, Veronika Svoboda finalized her dissertation which offers the most comprehensive account of the Constitution's creation.[37]

As we have already mentioned above, the drafting process was marked by its haste and relative secrecy. Unlike in some other CEE countries, which were drafting their constitutions at roughly the same time, there was no constitutional assembly (such as in Romania[38]) nor referendum (such as in Estonia or Lithuania).[39] Instead, the major portion of drafting the Czech Constitution was done in executive-style commissions.

The governmental commission that was entrusted with drafting the constitutional proposal was established by a decision of the Government in July 1992. The creation of this commission was initiated by the Prime Minister, Václav Klaus, and is considered one of his most important contributions to the drafting process. The members of the commission represented the relevant political parties,[40] the expert community and the government itself. Besides the formally appointed members, other experts and members of the Czech National Council (the then Czech Chamber of the Federal Czechoslovak Parliament) attended the commission's meetings, despite opposition from Václav Klaus.[41]

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[33] The most comprehensive set of the relevant documents is Jindřiška Syllová and Miroslav Sylla. ÚSTAVA ČESKÉ REPUBLIKY 1992: DOKUMENTY A OHLASY (2018).

[34] The texts by Jan Broz (Jan Broz. 'Vznik návrhu Ústavy ČR pohledem členů vládní a parlamentní komise'. In POHLED ZA OPONU: STUDIE O VZNIKU ÚSTAVY ČESKÉ REPUBLIKY A O KONTEXTU JEJÍ INTERPRETACE [Jan Broz and Jan Chmel eds., 2017], at 11) and Miloslav Výborný (Miloslav Výborný. 'K okolnostem přípravy Ústavy ČR z parlamentní perspektivy'. In DESET LET ÚSTAVY ČR: VÝCHODISKA, STAV, PERSPEKTIVY [Jan Kysela ed., 2003], at 60 deserve a special mention.

[35] See, e.g, Syllová and Sylla, *supra n.* 33.

[36] See, e.g., interviews with and biographies of influential CCC Justices: Tomáš Němeček. VOJTĚCH CEPL: ŽIVOT PRÁVNÍKA VE 20. STOLETÍ (2010); Tomáš Němeček. DISKRÉTNÍ ZÓNA (2012); Tomáš Němeček. PADNI KOMU PADNI: ŽIVOT A PŘÍPADY ELIŠKY WAGNEROVÉ (2014); Jiří Baroš ed., VLADIMÍR ČERMÁK: ČLOVĚK – FILOZOF – SOUDCE (2009); Antonín Procházka. V BOJI ZA ÚSTAVNOST: ZE VZPOMÍNEK BÝVALÉHO ÚSTAVNÍHO SOUDCE (2008).

[37] Svoboda, *supra* n. 16.

[38] See Anneli Albi, EU ENLARGEMENT AND THE CONSTITUTIONS OF CENTRAL AND EASTERN EUROPE (2001), at 21.

[39] *Ibid.,* at 22.

[40] Interestingly enough, future Justices of the CCC Vojtěch Cepl and Miloslav Výborný were amongst the members, representing two small political parties.

[41] Svoboda, *supra* n. 16, at 58.

At the same time, there was a parliamentary commission[42] whose task was to reflect the development of the governmental commission's work and provide it with recommendations and general feedback. The Constitution itself, after all, had to be eventually adopted by the Parliament. The constitutional committee of the Czech National Council intervened in the process as well.

Finally, President Václav Havel was indirectly involved in the drafting process. His influence was mainly channelled through his personal relationships with many members of the respective commissions (for example Václav Benda and Vojtěch Cepl).[43] In addition, he authored several texts that he sent to the commissions in which he made clear his opinions on several constitutional issues.[44] Some people from the close circle of Havel's advisors, such as the future CCC Justice Vladimír Klokočka, exerted their influence through these channels as well.

The drafters of the Constitution unanimously agree that public opinion and the media had little to no impact on their work. Even the broader community of experts (lawyers, political scientists and other scholars) had virtually no say in the drafting process, although some state institutions and non-governmental organisations sent their suggestions to the Czech National Council.[45] Frankly speaking, the Czech Constitution was drafted in a hasty manner by a narrow group of constitutional lawyers within few weeks in 1992. This hastiness and under-inclusiveness has been criticised ever since[46] and it arguably still has a noticeable impact on the Constitution, its limited social acceptance and even on less tangible phenomena such as constitutional sentiments and constitutional identity.[47]

It is well beyond the scope and ambitions of this text to discuss all the debates and clashes surrounding the drafting of the Constitution. Therefore, we will focus only on the most significant and far-reaching ones. Moreover, it is important to emphasize that the drafters themselves have conceded that, in order to make sure that the Constitution would be adopted, many controversial issues have been omitted from the final text or intentionally addressed only vaguely.

The sources of inspiration discussed above in Part B.1. provided a set of limits for the drafters. It was thus reasonably clear that the new constitutional system must be a standard democratic one. More specifically, the model of a parliamentary republic was an obvious choice. But

[42] It was actually established just three days after the governmental commission.
[43] Svoboda, *supra* n. 16, at 58.
[44] Brigita Chrastilová and Petr Mikeš. PREZIDENT REPUBLIKY VÁCLAV HAVEL A JEHO VLIV NA ČESKOSLOVENSKÝ A ČESKÝ PRÁVNÍ ŘÁD (2003), at 371.
[45] Svoboda, *supra* n. 16, at 89.
[46] Jiří Malenovský. 'O legitimitě a výkladu české ústavy na konci století existence moderního českého státu'. 152 PRÁVNÍK 745 (2013).
[47] See parts C.7. and E below.

beyond that, serious discussions concerned many of the Constitution's features that we now consider axiomatic. Issues such as the existence of an upper legislative chamber (bi-cameralism), the electoral system (majoritarian or proportionate) to be used, the position of a constitutional court and the protection of fundamental rights (whether to have an 'incorporated' charter of rights or a separate Charter) have generated hot debates between the participants in the drafting process.

One of the important sources of the disagreements was the growing tension between (then Czechoslovak President) Václav Havel and (then Czech Prime Minister) Václav Klaus and their conflicting visions of society, politics and law. Václav Klaus is an economist who believes in the free market. He did not have much belief in legal institutions and consequently he underestimated their importance.[48] At the same time, he viewed democracy in narrow Schumpeterian terms and thus he was hostile towards certain constitutional institutions and principles, such as the separation of powers, the protection of fundamental rights and constitutional review, as they, in his opinion, unnecessarily complicate democratic procedures.[49] On a more pragmatic level, his goal was to weaken the position of the President. While Václav Klaus succeeded in reducing the power of the President,[50] even his influence was not great enough to prevent the inclusion of the aforementioned key principles of modern constitutionalism.

After roughly five months, in November 1992, the government proposal was finalized. On December 16, 1992, the proposal was to be discussed in the Czech National Council. Following a crucial political agreement, in accordance with which the representatives of the coalition parties promised not to propose or support any kind of amendment,[51] the Constitution was adopted by a convincing majority: 172 out of 198 MPs present voted in its favour.

2.3. The Final Product: A Fragile Compromise

Thus, despite all the tensions and conflicting opinions, a compromise was reached. The drafters as well as MPs have preferred the model of multiple constitutional documents, omitting the Charter from the Constitution (see below Part C and Part D.2.a)). The Constitution itself consists of eight parts: (1) Basic Provisions, (2) Legislative Power, (3) Executive Power, (4) Judicial Power, (5) The Supreme Auditing Office, (6) The Czech National Bank, (7) Territorial Self-Government, and (8) Final and Inter-Temporal Provisions. In addition, the Constitution

[48] Václav Benda, a member of the governmental commission, recounted a funny and symptomatic story in this regard. Václav Klaus, unimpressed by the commission's progress and not appreciating the importance of its constitutional discussions, repeatedly 'threatened' (not as a joke) that he would clear one weekend in his schedule and draft the constitution on his own: Svoboda, *supra,* n. 16, at 70.

[49] *Ibid.*

[50] Most importantly, the Constitution does not give the President the competence to propose legislation (*legislative initiative*).

[51] Svoboda, *supra* n. 16, at 123–4. Some minor amendments were proposed and accepted, though (and numerous other amendments were proposed and rejected).

contains a Preamble which refers to its value inspirations and provides helpful assistance in interpreting it.

The first part, despite Václav Klaus's aforementioned scepticism, emphasized liberal democratic values, such as democracy, the separation of powers, the rule of law and fundamental rights protection. The principle of the separation of powers was adopted in its classical tripartite form, but the Constitution also created two specific independent institutions, namely the Supreme Auditing Office and the Czech National Bank. In addition, it defined Czechia as a sovereign and unitary state. Interestingly, the basic provisions also include environmental protection, one of the traceable legacies of Václav Havel. Some of those basic principles were further entrenched by the Eternity Clause.[52]

After heated debate, the concept of a two-chamber Parliament has won. However, the upper chamber, the Senate, is significantly weaker. The weakness lies in the fact that it can be outvoted in cases of ordinary laws, even though an absolute majority in the Chamber of Deputies is necessary for that to happen. The Senate's consent is necessary only in the case of constitutional laws, organic laws in accordance with article 40 of the Constitution, and international treaties.[53] On the other hand, the Senate's practical significance is heightened by its asymmetrical composition. While elections to the Chamber of Deputies take place every four years[54] on the basis of a proportionate electoral system, Senators are elected in staggered elections (one third of the Senate every two years) for a six-year mandate in a two-round first-past-the-post voting system. This often leads to the two chambers being made up of contrasting proportions of the political spectrum. As a result, the governing coalition rarely enjoys a safe majority in both houses. This institutional feature, coupled with the notoriously unstable position of governments in the Czech constitutional system,[55] makes the Senate stronger than the constitutional text would suggest. Additionally, the Senate has been entrusted with the important competence of confirming the appointment of CCC Justices.

The executive branch consists of the Government, which is considered the highest executive body, and the President, who is the Head of State.[56] On paper, the President is much weaker, but in practice that is not necessarily so, especially since the introduction of the direct election of the President in 2012. In fact, the relatively strong position of the President,[57] the notorious instability of the governments and their mutual relationship have always posed a significant

[52] Art. 9 Para. 2 of the Czech Constitution. A further analysis of the basic principles and the Eternity Clause follows in Section 4.
[53] There are additional non-legislative areas in which the Senate's consent is required.
[54] Even though snap elections have been quite common in the short Czech constitutional history.
[55] See also Section 3.5.
[56] Prosecutors' Offices are also mentioned as part of the executive branch (Art. 80 of the Constitution), but the constitutional regulation has little normative significance.
[57] Which was later boosted by the introduction of the direct election of the President.

institutional challenge.[58] Moreover, the President has a major say in staffing the Constitutional Court as he is the only body that can nominate its Justices.[59]

Judicial power was entrusted to the ordinary courts and the Czech Constitutional Court. The very strong position of the CCC is one of the most important features of the Czech constitutional *Gestalt*, as several parts of this chapter will make clear.[60] Interestingly, from the comparative perspective, the Czech Constitution prohibits establishment of any special court[61] and explicitly abolished military justice for good.[62]

Finally, the Constitution also includes a basic framework of territorial self-government. The position of self-governmental units has been one of the more dynamic aspects of the Czech constitutional system, in terms of both legislative activity and the CCC's case law. Most importantly, the Czech Parliament created Higher Self-Governmental Units in 1997 and the CCC has gradually empowered municipal authorities vis-à-vis the central state organs.[63]

3. The Evolution of the Constitution (Post-1993 Development of the Czech Constitutional *Gestalt* and Major Challenges)

The previous parts have sketched the origins, sources of inspiration and the final shaping of the 1993 Czech constitutional system. Before we turn to the substantive features of the Czech constitutional *Gestalt*, we must discuss the milestones of the post-1993 constitutional development and the main challenges that the young Czech constitutional system has faced. In fact, reflection on these challenges by the Czech constitutional actors has been at least as important for the resulting constitutional system as the context of its creation.

We identified eight major post-1993 challenges that affected the Czech constitutional *Gestalt*. First, the new Czech state had to deliver on its constitutional promises. It had to establish in practice a new liberal democratic legal system, deal with the past injustices and create the institutions envisaged by the Constitution. Second, the 1998 Opposition Agreement between the two then dominant political parties (Civic Democratic Party and the Social Democratic Party) challenged the Czech electoral system and led to disillusionment of the people with traditional political parties and politics more generally. Third, Czechia had to prepare for accession to the European Union and cope with the internal legal effects of EU law. Fourth, the financial crisis forced the government to adopt controversial austerity measures and subsequently brought a new kind of cases concerning social and economic issues before the CCC. These cases, which reflected the unequal wealth distribution and other deep tensions in

[58] For further details see Section 3.5.
[59] The Senate then affirms the Justices. Czechia thus adopted the American model of selecting Justices, which is rather unusual for a parliamentary democracy. For more details, see Kosař and Vyhnánek, *supra* n. 29.
[60] See Sections 3.6 and 4.1.
[61] Art. 91 Para. 1(1) of the Constitution.
[62] Art. 110 of the Constitution.
[63] For further details see Section 3.5.

Czech society, turned what had been until then purely political issues into constitutional questions. The genie was out of the bottle and the CCC has inevitably been drawn into the political clashes. Fifth, the introduction of the direct election of the President in 2012 further divided Czech society and weakened an already fragile government. Sixth, the CCC arguably over-judicialized the Constitution. It adopted the 'unconstitutional constitutional amendment' doctrine, judicialized issues that had been left to the political process in the 1990s (such as intraparty democracy) and started to impose its value solutions in a more aggressive way. Seventh, the rise of populism in Central Europe did not leave Czechia untouched. The ordinary people felt that they had little say about the direction of the country and thus they started to call for strong leaders, improving direct democracy and curtailing experts and technocratic institutions. As a result, there is an inherent danger of democratic backsliding in Czechia, even though this eighth challenge has not materialized yet.

3.1. Dealing with the Past and Building the Material Rechtsstaat

As mentioned above, one of the important aspects that influenced the nature of the 1993 Czech constitutional system was the relationship of the new regime with its communist, non-democratic past. It is important to note, however, that this influence did not stop on January 1 1993. On the contrary, much of the 1990s 'everyday constitutional work' consisted of dealing with the past in one way or another.

Most of the legislative work in this regard had been done during the federal intermezzo between 1989 and 1992. In this period, the Federal Assembly adopted numerous laws aimed at dealing with past injustices. These included laws concerning restitution,[64] lustration[65] and rehabilitation.[66] Secondly, it adopted extensive new fundamental rights legislation, including laws concerning the right to peaceful assembly,[67] the right to associate in political parties,[68] the right to petition,[69] and significant reforms of criminal and civil law.

While the legislative work was not over, much of it was done already during the federal democratic period, especially in 1991 and 1992. However, implementation of these federal laws, and thus also the responsibility for dealing with the past and building the *Rechtsstaat,* became a major task of the new Czech state and the CCC in particular.[70] Consequently, the

[64] A notable exception was—until recently—the question of church restitutions. The process of restitution of church property began only in 2013, after the adoption of Law n. 428/2012 Coll. The delay may be explained by the fact that this question was—and still remains—a rather explosive politically sensitive one. This can be illustrated *inter alia* by the recent (2019) adoption of a law that introduces a new tax on property transferred during church restitutions and thus limits the church restitutions' effect.

[65] In detail, see David Kosař. '*Lustration* and Lapse of Time: 'Dealing with the Past' in the Czech Republic'. 4 EUCONST 460 (2008).

[66] No. 119/1990 Coll.

[67] No. 84/1990 Coll.

[68] No. 424/1991 Coll.

[69] No. 85/1990 Coll.

[70] See Francesco Biagi. EUROPEAN CONSTITUTIONAL COURTS AND TRANSITIONS TO DEMOCRACY (2020).

first decade of the CCC's operation is generally viewed as an era in which the CCC fought firmly to establish the basic constitutional values in the Czech legal order and to remedy past injustices. It is important in this regard that the CCC was, with a few exceptions,[71] not involved in first-order political battles with the executive and legislative branches. Instead, most of its hard 'transitional justice' work consisted of dealing with constitutional complaints against the decisions of ordinary courts.[72]

In this regard, the CCC adopted[73] and developed several constitutional doctrines and introduced them into Czech legal practice. The principle of proportionality, indirect horizontal application of fundamental rights (*Drittwirkung*), the priority of human-rights-friendly interpretation (*in dubio pro libertate*),[74] and prohibition of 'excessive formalism' in statutory interpretation are amongst the most important principles that the CCC fought to establish. On many occasions it had to overcome the stiff resistance of the ordinary courts, and the Supreme Court in particular.

The contrast between the CCC's purposive and value-laden reasoning and the rather strict formalist Supreme Court's interpretation techniques even led to the so-called 'war of the courts' (*válka soudů*). The major battleground turned out to be the interpretation of article 269 para 1 of the Criminal Code concerning the conscientious objector status of Jehovah's Witnesses. While the Supreme Court held that every single evasion of military service was a new criminal act, the CCC found this position unconstitutional for violation of freedom of conscience and the principle of *ne bis in idem*.[75] The Supreme Court refused to follow the CCC's judgments until 1999, when it eventually buckled under the growing pressure.[76] The scars have remained though, and the relationship between these two courts has always been tense.

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[71] The most important exceptions include some of the CCC judgments concerning electoral law and the financing of political parties. In the 2001 *Grand Election* judgment (judgment of January 24, 2001, Pl. ÚS 42/2000) the CCC declared unconstitutional some changes in the electoral system of the Parliament's lower chamber because they introduced too many majoritarian elements into the Czech 'system of proportional representation'. In a similar vein, the CCC has generally supported equality of the chances of smaller political parties in issues like campaign or political party financing—much to the chagrin of the two major political parties led by Václav Klaus and Miloš Zeman.

[72] See Biagi, *supra* n. 70.

[73] Many of these doctrines were 'borrowed' from the case law of the German Constitutional Court. Two of the most influential Justices of the CCC in the 1990s, Vladimír Klokočka and Pavel Holländer, were particularly keen on searching for inspiration in Germany. As a result, there are more than 60 references to the BVerfG's jurisprudence in the CCC's case law. Moreover, the significance of the BVerfG's case law is greater than the mere number of references suggests, as it shaped key constitutional doctrines in the early phases of the CCC's existence. The CCC has transplanted, among other things, the German proportionality test, and has been heavily inspired by the German approach to basic constitutional principles, such as democracy and the *Rechtsstaat*.

[74] A special variation of this principle is the preference for interpretation that favours an individual entitled to restitution of property (*in favorem restitutionis*); see, e.g., Judgment of the CCC of June 21, 2017, III. ÚS 1862/16.

[75] See, e.g., Judgment of the CCC of September 18, 1995, IV. ÚS 81/95, and Judgment of the CCC of March 4, 1998, I. ÚS 400/97.

[76] Including pressure from the newly appointed President of the Supreme Court (and a future Vice-President of the CCC), Eliška Wagnerová.

While the CCC assumed its intended role as the guardian of the Constitution with vigour and emerged as the key player in substantive transition to democracy,[77] the involvement of other institutions was rather mixed. The executive and legislative branches obviously did their part in the continuous reform of the Czech constitutional order, but they also ignored some constitutional promises made by the 1993 Constitution.

The Senate's position is particularly important in this regard. The inclusion of the upper chamber in the Constitution was not universally applauded by politicians.[78] The resentment towards the Senate postponed its creation until 1996. Thus, for almost four years, the lower chamber of the Parliament (the Chamber of Deputies) was unchecked and even assumed the specific powers of the Senate, such as the confirmation of CCC Justices.[79]

The Supreme Administrative Court shared a similar fate. The Constitution, inspired by the First Czechoslovak Republic as well as by Austria and Germany, envisaged the Supreme Administrative Court as a top court in administrative law matters and implicitly expected that a fully-fledged system of administrative justice would be established. Despite this clear textual guidance, the Supreme Administrative Court came into being only in 2003. Moreover, politicians fulfilled this constitutional promise only after the CCC held that the previous incomplete system of administrative justice was unconstitutional, because it did not offer a 'full review' of administrative acts within the meaning of article 6 ECHR.[80] Without this nudge by the CCC, the creation of the Supreme Administrative Court could have taken even longer.

3.2. The 1998 Opposition Agreement and the Growing Distrust in Traditional Political Parties

The so-called 'Opposition Agreement'—a political pact between the two dominant political parties in the 1990s—has had a great and long-lasting impact on the Czech political and constitutional landscape. While the events leading to the conclusion of the Opposition Agreement are very complex, few moments stand out.

Following an internal split in the then ruling Civic Democratic Party in 1997, the Czech party system had been rewritten. Next to the two dominant parties (Civic Democratic Party 'CDP' and the Social Democratic Party 'SDP') a new and potentially powerful bloc of four smaller centre-right parties emerged after the 1998 parliamentary elections—the 'Coalition of Four'.[81]

[77] See Biagi, *supra* n. 70.
[78] The most important opponent was Václav Klaus, whose political power in the 1990s cannot be overstated. The members of the lower chamber of the Parliament, especially the members of the parliamentary majority, also had little reason to support the Senate, as it limits their power by definition.
[79] The first wave of Justices in 1993 was thus confirmed by the Chamber of Deputies.
[80] Judgment of the CCC of June 27, 2001, Pl. ÚS 16/99.
[81] The 'Coalition of Four' included also two parliamentary parties at the time—Christian Democrats and the Freedom Union.

The new coalition, heavily supported by the then President Václav Havel, ran in the 1998 parliamentary election. However, the election resulted in a political deadlock. Neither the CDP nor the SDP could form a government on its own and neither could nor wanted[82] to form a coalition with the parties involved in the Coalition of Four. Thus, the idea of the Opposition Agreement was born. SDP and CDP, the natural ideological opponents, formed an agreement with the following major consequences. First, the SDP could form a minority Government supported by the CDP. But even more importantly, attempts were made to rewrite the Czech political landscape in order to allow the two biggest parties to form strong Governments in the future, weaken smaller parties and curtail some of the pluralistic aspects of the Czech political system.[83]

Perhaps the most important constitutional challenge of the Opposition Agreement was the attempt to change the electoral system by introducing many majoritarian elements to the previously very proportional system. This attempt was halted by the CCC, which found the major elements of the electoral reform to be unconstitutional.[84] The boldest reform by the Opposition Agreement parties was thus unsuccessful. However, the legacy of the agreement itself is still alive in the public political consciousness and manifests the split between the 'pragmatic' political forces vying for strong and effective Governments and the 'idealistic, Havelian' forces (the latter often being referred to scornfully as 'truth-and-lovers' or 'snowlakes'). Some authors even claim that the Opposition Agreement betrayed the voters of both parties and contributed to the growing distrust in traditional political parties and politics in general.[85] This disillusionment in turn planted the seed for the meltdown of both CDP and SDP in the 2010s and the rise of business parties and populist political movements[86] that may present a danger for the Czech constitutional democracy.[87] One may object that CDP and SDP were still at the peak of their power after the 2006 parliamentary elections, but the distrust in politics and traditional parties was already there.

3.3. Accession to the European Union

[82] Especially the relationship between the later Coalition of Four member (the Freedom Union) and the CDP was soured by the internal split. The head of the CDP (future President Václav Klaus) saw it as a betrayal and the Freedom Union had great reservations concerning Václav Klaus.

[83] Among other things, the two biggest parties tried to exert their influence by controlling the Council of the Czech Television (Česká televize).

[84] Judgment of the CCC of January 24, 2001, Pl. ÚS 42/2000, *Grand Election* judgment. For further details on this judgment see *infra* n. 134.

[85] See Lukáš Linek. ZRAZENÍ SNU? (2010). See also a journalistic account of this Agreement: Erik Tabery. VLÁDNEME, NERUŠIT: OPOZIČNÍ SMLOUVA A JEJÍ DĚDICTVÍ (2006).

[86] See Sean Hanley. 'Dynamics of new party formation in the Czech Republic 1996–2010: Looking for the origins of a 'political earthquake''. 28 EAST EUROPEAN POLITICS 119 (2012) (; and see Tim Haughton, Vlastimil Havlik, and Kevin Deegan-Krause. 'Czech elections have become really volatile. This year was no exception'. Washington Post [Oct. 24 2017], https://www.washingtonpost.com/news/monkey-cage/wp/2017/10/24/czech-elections-have-become-really-volatile-this-year-was-no-exception [last accessed on Dec. 28, 2020]).

[87] See Sean Hanley and Milada Anna Vachudová. 'Understanding the illiberal turn: democratic backsliding in the Czech Republic' 34 East EUROPEAN POLITICS 8 (2018), at 276. See also Sections 3.7 and 3.8 below.

Few factors, if any, have had a greater impact on the Czech constitutional landscape than Czechia's accession to the EU, as this was arguably a once-in-a-lifetime constitutional moment. Even though the accession to the NATO was considered a key political goal of the 1990s, the European Union was considered a practically more important step. As some contemporary commentators put it, the NATO was the silver, the EU was the gold.[88]

The EU's constitutional importance can be traced in at least four relatively separate dimensions. First, as already mentioned, the political goal of 'coming back to Europe' was an important factor that influenced the drafting process of the Czech constitutional documents. While the adoption of liberal democratic values by the Czech constitution is not exclusively attributable to the EU and the prospect of accession, it surely played a role.

At a more specific level, the Czech Government and Parliament had to negotiate, prepare and adopt extensive changes to legislation as well as some structural constitutional changes (the so called 'Euro-Amendment' of the Constitution) that were supposed to prepare Czechia for accession and the subsequent operation of EU law within the domestic legal order. The most important constitutional changes in this regard concerned revising article 10 of the Constitution (concerning the status of international treaties in the Czech constitutional order) and adding a new article 10a (which allows the transfer of power to international organisation such as the EU). These changes made Czechia a fully monist state and created constitutional conditions for the direct effect of EU law in cases where EU law calls for it.

Third, the Constitution had to account for the act of accession itself. A special constitutional law was adopted which provided that a referendum must take place.[89] The actual referendum, which is the only referendum so far in Czech history, took place on June 13 and 14 2003. The decisive majority (77 % of the voters) eventually supported accession to the EU.

Finally, the fourth dimension concerns the specific position of EU law within the Czech legal order. It is this fourth dimension that has generated the most controversy and has been hotly debated right up to today. It was again the CCC that played the most active role in determining the relationship between domestic law and EU law. The opportunity came quite early. In 2006, less than two years after the accession, the CCC issued its *Solange*-like judgment, *Sugar Quotas III.*[90] While generally accepting the supremacy of EU law, it explicitly rejected the possibility of its *unconditional* supremacy.[91] More specifically, it opined that:

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[88] Václav Bartuška. 'Jsme členem NATO, alliance má nyní 19 členů'. iDNES.cz, (Mar. 14, 1999) https://www.idnes.cz/zpravy/domaci/jsme-clenem-nato-aliance-ma-nyni-19-clenu.A_990311_200409_domaci_jkl (last accessed on Dec. 28, 2020).

[89] Constitutional Law No. 515/2002 Coll.

[90] Judgment of the CCC of 8 March 2006, Pl. ÚS 50/04, *Sugar Quotas III*.

[91] Due to this aspect the *Sugar Quotas III* judgment is considered the Czech cousin of the famous judgments of the German Federal Constitutional Court in *Solange I*, *Solange II* and *Maastricht*. See Pavel Holländer. 'Soumrak moderního státu'. 152 PRÁVNÍK 1 (2013). In English, see Darinka Piqani. 'Constitutional Courts in Central and Eastern Europe and their Attitude towards European Integration'. 1 EJLS 213 (2007).

> There is no doubt that the Czech Republic's accession to the European Communities (EC), or European Union (EU), brought about a fundamental change within the Czech legal order, as at that moment the Czech Republic incorporated into its national law the entire mass of European law. This undoubtedly caused a shift in the legal environment formed by sub-constitutional legal norms, and this shift must necessarily influence the understanding of the entire existing legal order, including its constitutional principles and maxims, naturally on the condition that the factors influencing the national legal environment are not, in and of themselves, in conflict with the principle of a democratic state based on the rule of law, or, in other words, that the interpretation of these factors must not endanger this democratic state based on the rule of law. Such a shift would come into conflict with Article 9(2) or Article 9(3) of the Constitution of the Czech Republic.

In the event that the European Union and its legal order ceased to fulfil the 'conditions of conferral', the CCC hinted that it would feel obliged to ensure that the competences previously conferred on the European Union were retrieved:

> The Czech Republic has conferred these powers upon EC institutions. In the Constitutional Court's view, this conferral of a part of its powers is naturally a conditional conferral, as the original bearer of sovereignty, as well as the powers flowing therefrom, still remains the Czech Republic, whose sovereignty still stems from Article 1(1) of the Constitution of the Czech Republic. In the Constitutional Court's view, the conditional nature of the delegation of these powers is manifested on two planes: the formal and the substantive plane. The first of these planes concerns the power attributes of state sovereignty itself, the second plane concerns the substantive component of the exercise of state power. In other words, the delegation of a part of the powers of national organs may persist only so long as these powers are exercised in a manner that is compatible with the preservation of the foundations of state sovereignty of the Czech Republic, and in a manner which does not threaten the very essence of the substantive law-based state. In such determination the Constitutional Court is called upon to protect constitutionalism (Article 83 of the Constitution of the Czech Republic). According to Article 9(2) of the Constitution of the Czech Republic, the essential attributes of

> a democratic state governed by the rule of law, remain beyond the reach of the Constituent Assembly itself.[92]

This warning did not remain isolated in the case law of the CCC. In the *Lisbon I* judgment the Court reiterated that in the event of a clear conflict between the Czech Constitution and EU law that could not be overcome by any reasonable interpretation, the constitutional order of the Czech Republic, in particular its substantive core,[93] had to take precedence.[94] The CCC thus held that the core parts of the constitutional order (basically the Eternity Clause[95]) are absolutely protected not only from domestic interferences, but also from changes stemming from international and European obligations. Thus, for the CCC, at least rhetorically, the obligation to respect the primacy of EU law was never considered an unconditional one.[96]

Despite these vociferous warnings, the CCC's practical stance towards EU law has been rather welcoming and accommodating. In the European Arrest Warrant judgment[97] the CCC held that there is an obligation[98] to interpret domestic law in a manner consistent with EU law which applies even with regard to the constitutional rules. The compatibility of the European Arrest Warrant with the Charter of Fundamental Rights and Freedoms was objectively questionable, because article 14 para 4 of the Charter explicitly guarantees that no citizen may be forced to leave her homeland. The outcome of the case was to a great extent influenced by the way the Czech Constitutional Court formulated the starting point of its approach:

> if the Constitution … can be interpreted in several ways, only certain of which lead to the attainment of an obligation which the Czech Republic undertook in connection with its membership of the EU, then an interpretation must be selected which supports the carrying out of that obligation, and not an interpretation which precludes it.[99]

In accordance with this attitude, the CCC went to great lengths to find an interpretation of the Charter that would be compatible with the European Arrest Warrant framework decision or, more precisely, with the law implementing it. This approach is all the more noteworthy in view of the fact that other European constitutional courts did not employ as euro-friendly an

[92] Judgment of the CCC of 8 March 2006, Pl. ÚS 50/04, *Sugar Quotas III*.
[93] It is not entirely clear whether the CCC used the term 'substantive core' as an equivalent to the more developed (by the CCC) Eternity Clause but we believe that that is the case, as Pavel Holländer, the (then future) judge-rapporteur in *Melčák,* published an influential law review article which connected Art. 9 Para. 2 of the Czech Constitution with the concept of 'substantive core'. See Pavel Holländer. 'Materiální ohnisko ústavy a diskrece ústavodárce'. 144 PRÁVNÍK 313 (2005).
[94] Judgment of the CCC of 26 November 2008, Pl. ÚS 19/08 *Lisbon I*, Para. 85.
[95] See below Section 4.1.b).
[96] See below Section 5.
[97] Judgment of the CCC of 3 May 2006, Pl. ÚS 66/04, *European Arrest Warrant*.
[98] The Czech Constitutional Court drew the obligation not only from Art. 1 Para. 2 of the Czech Constitution but also from the former art 10 of the EC Treaty; see Judgment of the CCC of 3 May 2006, Pl. ÚS 66/04, Para 61.
[99] Judgment of the CCC of 3 May 2006, Pl. ÚS 66/04, *European Arrest Warrant*.

interpretation as the Czech one.[100] This led even foreign authors to note that '[i]n contrast to its Polish (and especially German) counterpart, the CCC tried to minimize any kind of possibility of a clash between its constitutional fundamentals and the European legal order' and that 'i[t] did not engage in any kind of sovereignty discourse, which would be typical in the context of extradition procedures that usually trigger serious concerns for the protection by the state of its own citizens'.[101]

In its subsequent case law, the CCC applied the welcoming and accommodating 'EU friendly' interpretation even with regard to the basic principles of the Czech Constitution. The interpretation of 'sovereignty' in the *Lisbon I* judgment[102] may serve as a fine example of this trend. In this case, the Czech President claimed, *inter alia*, that the Lisbon Treaty (or rather the Treaties after its ratification) calls into question the basic meaning of state sovereignty and thus threatens the very nature of the Czech Republic as a sovereign state. The CCC once again showed its readiness to accept paradigmatic changes brought about by European integration. It claimed that—paradoxically—the key expression of state sovereignty is the ability to dispose of one's sovereignty (or part of it), or temporarily or even permanently to cede certain competences.[103] It followed by emphasising that the concept of sovereignty can no longer be understood in a traditional sense as 'a rigid legal concept, but also as a concept with a practical, moral, and existential dimension'.[104] The Court also appreciated that the EU's integration process was not changing the nature and understanding of sovereignty in a radical manner and that it was 'an evolutionary process and, among other things, a reaction to the increasing globalization in the world'.[105]

Still, the CCC did not completely let go of the 'national' dimension of sovereignty. It emphasized that article 10a of the Czech Constitution does not permit the transfer of all the state's powers to the European Union. In other words, an 'unlimited transfer of sovereignty' cannot take place. However, the CCC has shown some judicial restraint in stating that the limits of this transfer are predominantly a political question, and judicial interference should come into consideration only in the event of clear violation of the core constitutional principles.[106]

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[100] Germany and Poland, for example, had to find other (legislative) ways to accept the effects of the framework decision. See, e.g., Jan Komárek. 'European Constitutionalism and the European Arrest Warrant: In Search of the Limits of 'Contrapunctual Principles'. 44 CMLR 9 (2007); and Oreste Pollicino. 'European Arrest Warrant and Constitutional Principles of the Member States: a Case Law-Based Outline in the Attempt to Strike the Right Balance between Interacting Legal Systems'. 9 GLJ 1313 (2008), at 1353.

[101] Piqani, *supra* n. 91, at 225 (both citations).

[102] For a succinct commentary on this judgment see Petr Bříza. 'The Czech Republic: The Constitutional Court on the Lisbon Treaty Decision of 26 November 2008'. 5 EUCONST 143 (2009).

[103] *Lisbon I* judgment, Para 104.

[104] *Lisbon I* judgment, Para 107.

[105] *Lisbon I* judgment, Para 108.

[106] *Lisbon I* judgment, Para 109.

Similar conclusions can be made as regards the CCC's approach to the concept of democracy. In its *Lisbon II* judgment, the Court rejected the idea that representative democracy, as protected by the Eternity Clause, is by definition tied to the level of nation states. It affirmatively quoted the opinion of Advocate General Maduro in Case C-411/06 *Commission v Parliament and Council*[107] and held that the democratic processes on the Union level and the domestic level supplement each other and are mutually dependent. Therefore, the CCC does not view European integration and the strengthening of democratic processes at the EU level as a prima facie challenge to democracy at the national level: '[t]he principle of representative democracy is one of the standard principles for the organisation of larger entities, both inter-state and non-state organisations. The existence of elements of representative democracy on the Union level does not rule out implementation of those same elements presupposed by the constitutional order of the Czech Republic, nor does it mean exceeding the limits of the transfer of powers established by Article 10a of the Constitution'.[108]

The only clear exception to the generally euro-friendly attitude of the CCC is the judgment in the *Holubec* case.[109] In this case, the CCC held that the CJEU acted *ultra vires* when it issued its ruling in the *Landtová* case.[110] This ruling impugned the previous case law of the CCC relating to the pension benefits of people adversely affected by the dissolution of Czechoslovakia.[111] However, the importance of this judgment for the future evolution of the case law should not be overestimated. It can be argued that this exception was motivated by predominantly domestic reasons and not by an aspiration to take on the Court of Justice of the European Union. The CCC's act of defiance was merely a flashpoint in its long-lasting and somewhat bitter struggle with the Supreme Administrative Court, which refused to follow the Constitutional Court's case law and in the end decided to drag the Court of Justice into the battlefield.[112] The two courts have fought over the outcome of the Slovak pensions saga for many years and the intensity (one could even say 'emotional charge') is evident in many of the Constitutional Court's actions over the years.[113]

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[107] Opinion of Advocate General Maduro in ECJ Case C-411/06, *Commission v Parliament and Council* (ECLI:EU:C:2009:189).

[108] Judgment of the CCC of 3 November 2009, Pl ÚS 29/09, *Lisbon II*, Para 139.

[109] Judgment of the CCC of 31 January 2012, Pl. ÚS 5/12, *Holubec*.

[110] ECJ, Case C-399/09, *Landtová* (ECLI:EU:C:2011:415).

[111] For further details of this complex problem see Jan Komárek. 'Playing with matches: The Czech Constitutional Court declares a judgment of the Court of Justice of the EU ultra vires'. 8 EUCONST 323 (2012); Robert Zbíral. 'Czech Constitutional Court, Judgment of 31 January 2012, Pl. ÚS 5/12: A Legal Revolution or Negligible Episode? Court of Justice Decision Proclaimed Ultra Vires'. 49 CMLREV 1475 (2012); Michal Bobek. 'Landtová, Holubec, and the Problem of an Uncooperative Court: Implications for the Preliminary Rulings Procedure'. 10 EUCONST 54 (2014); and Zdeněk Kühn. 'Ultra Vires Review and the Demise of Constitutional Pluralism: The Czecho-Slovak Pension Saga, and the Dangers of State Courts' Defiance of EU Law'. 23 MJECL 185 (2016).

[112] As Zbíral puts it, '[the Constitutional Court's] prime target was the SAC, and the ECJ was used as a mere accessory, whose exemplary rebuke was necessary in order to sentence the main culprit' (Zbíral, *supra* n. 111, at 1488).

[113] Only the unique nature of this case can explain the fact that the Czech Constitutional Court harshly criticized the Supreme Administrative Court for triggering the preliminary reference procedure before the CJEU (Judgment

Despite being interesting for both EU and constitutional scholars, this unique case can hardly be seen as a true reflection of the Czech Constitutional Court's attitude towards EU law. Moreover, this struggle and its personal dimension were strongly tied to the composition of the so-called 'second'[114] Czech Constitutional Court (2003–2012), while the 'third' Czech Constitutional Court (2013–now) has so far taken up only the more euro-friendly aspects of the second CCC's case law.[115] However, from the comparative perspective this judgment is no longer an outlier case or material for 'footnotes of EU law textbooks', as suggested by some commentators.[116] The recent case law of the captured Polish Constitutional Tribunal,[117] the Danish Supreme Court's *Ajos* judgment[118] and especially the *PSPP* ruling of the German Federal Constitutional Court[119] show that the *ultra vires* doctrine is no longer a dormant nuclear weapon in the domestic constitutional courts' arsenal. The CCC's *Holubec* judgment, however inconsequential in the European space, was the first *ultra vires* ruling by a domestic apex court which started the debate that will surely continue for quite some time.

3.4. Economic Crisis and the Constitutional Dimension of Social Conflicts

An important feature of Central and Eastern constitutionalism in general and the Czech constitutional system in particular is the inclusion of an extensive list of social, economic and cultural rights. On the other hand, the Czech constitutional order, unlike that in Germany, does not include an explicit entrenchment of the 'welfare state' principle.[120] Nevertheless, social rights protection in the Charter can be interpreted as indirect constitutionalization of this principle. The extensive protection of economic, social and cultural rights can be attributed both to the time of the Charter's adoption and to the sentiments of the Czech people, who

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of the CCC of 12 August 2010, III. ÚS 1012/10). In other cases, the Constitutional Court chastized ordinary courts for doing the opposite (as not asking a preliminary question, where it was appropriate, violates the principle of a 'legal judge') and sometimes even forced them to ask a preliminary question (see, e.g., Judgment of the CCC of 8 January 2009, II. ÚS 1009/08).

[114] This term is used to describe the members of the CCC between 2003 and 2013. See Kosař and Vyhnánek, *supra* n. 29, at 119.

[115] Even though the recent changes in the composition of the CCC cannot serve as conclusive evidence of this presumption, some of them may prove important. For example, Pavel Holländer (judge rapporteur of the CCC's opinions in the *Melčák* and *Landtová* cases and a strong proponent of an expansive interpretation of the Eternity Clause) left the CCC in 2013, whereas Jiří Zemánek (a prominent advocate of the euro-friendly attitude of the CCC) was appointed in 2014. Zemánek's euro-friendliness became clear in particular in his majority opinion in the *EP Threshold* judgment, in which he vigorously defended the 5% threshold in the European Parliament elections. See also Hubert Smekal and Ladislav Vyhnánek. 'Equal voting power under scrutiny: Czech Constitutional Court on the 5% threshold in the 2014 European Parliament Elections'. 12 EUCONST 148 (2016), at 149 and 163.

[116] Zbíral, *supra* n. 111, at 1490.

[117] See Wintold Zontek. 'You Can't Forbid Judges to Think'. VERFASSUNGSBLOG *(*Feb. 5, 2020), https://verfassungsblog.de/you-cant-forbid-judges-to-think (last accessed Dec. 28, 2020).

[118] See Mikael Rask Madsen, Henrik Palmer Olsen, and Urška Šadl. 'Competing Supremacies and Clashing Institutional Rationalities: the Danish Supreme Court's Decision in the Ajos Case and the National Limits of Judicial Cooperation'. 23 EUROPEAN LAW JOURNAL 140 (2017).

[119] German Federal Constitutional Court, Judgment of the Second Senate of 5 May 2020, 2 BvR 859/15.

[120] Unlike—for example—art 20 para 1 of the German Basic Law.

have traditionally placed a lot of emphasis on social rights and equality. In fact, Czechia is one of the most economically egalitarian countries in the World. The World Bank currently ranks Czechia as the second most income egalitarian country in the world, which – especially when coupled with a relatively high level of GDP per capita – suggests that social and economic equality is considered an important value. Despite this, social justice and equality has faced considerable challenges in the last decades, as we are showing in the following paragraphs.

The inclusion of these rights attracted significant criticism from foreign scholars,[121] but in the Czech case the social rights clauses remained mostly dormant in the 1990s and early 2000s. It was only in the wake of the financial and economic crisis of the late 2000s that the question of social rights rose to prominence.

After the Topolánek Government (2006–2009) adopted a series of legislative austerity measures, the political battle between the left and the right was transferred to the CCC. The CCC had to take a stance on vexing issues such as the justiciability of social rights, their scope and the degree of deference to be given to the legislature in these issues. The resulting case law can be seen as a compromise. The CCC adopted a deferential 'rationality test'[122] which left wide room for manoeuvre for the legislature, but it did not hesitate to annul several statutes that excessively limited the scope or the core of social rights.[123] However, the CCC has not hitherto delivered a judgment such as the German *Hartz IV*, which would comment on the actual amount of benefits from the social welfare system.

While the constitutional dimension of socio-economic issues rose to prominence around the time of the economic crisis, the constitutionalization of socio-economic issues should not be seen as a closed chapter of the Czech constitutional development. First, the legacy of the economic crisis is still evident. The last decade of the CCC's functioning has been marked by reviews of socio-economic legislation. Both legislation limiting the extent of the welfare state and legislation regulating the economic activity of individuals now form a major part of political and consequently often legal battles.

Second, other constitutional issues concerning social problems are on the horizon. Most importantly, around 900,000 people in Czechia are affected by writs of execution and find themselves in bankruptcy or close to a debt-trap. This issue offers more than one constitutional challenge. Besides the obvious constitutional dimension of the problem, there

[121] See *inter ali,* Sunstein, who called constitutionalisation of positive socio-economic rights a big mistake, possibly a catastrophe: Cass R Sunstein. 'Against Positive Rights'. In WESTERN RIGHTS? POST-COMMUNIST APPLICATION (András Sajó ed., 1996), at 225.

[122] See, e.g., Judgment of the CCC of May 20, 2008, Pl. ÚS 1/08, *Healthcare fees*; or see, e.g., Marek Antoš. 'The Czech Constitutional Court and Social Rights: Analysis of the Case Law'. In *International and Internal Mechanisms of Fundamental Rights Effectiveness* (Pavel Šturma and Narciso Leandro Xavier Baez eds., 2015), at 187.

[123] See, most notably, Judgment of the CCC of November 27, 2012, Pl. ÚS 1/12, *Public service.* Here, the legislator established an obligation for unemployed people to work in the so-called 'public service' in order to retain the corresponding social benefits.

is an undeniable political dimension. People affected by these problems may quickly lose, or in the worst-case scenario have already lost, trust in the constitutional system's ability to address *their* problems. Under such conditions, it is challenging to promote any meaningful version of constitutional patriotism[124] and to expect that a decisive majority of the people will identify with the basic constitutional values.[125] The consequences are already discernible. The Czech constitutional system suffers from a relatively low level of trust,[126] and at the same time populist and authoritarian parties, such as the Freedom and Direct Democracy movement and the Communist Party, are enjoying strong support among the people most affected. This challenge, however, is not a secret one. It is a hotly debated topic and, for example, the Government's Human Rights Council has recently identified the problem of debt-traps and property repossessions as a top human rights priority.[127]

3.5. The Two-Headed Executive: Weak Governments and Trouble-Making Presidents

As emphasized in Part B, Czechia was from the start of the drafting process envisaged as a parliamentary republic. The basic outline of the executive branch thus followed the established model. The Government, headed by a Prime Minister, was responsible to the Parliament and it was put at the top of the executive branch. The President was elected by the Parliament, held few purely executive powers, and served as a representative Head of State.

From the very outset, however, the structure of the executive branch and the position of the President became contested issues. On the one hand, some scholars have argued that the President is not actually part of the executive branch, but rather a constitutional body *sui generis*, a *pouvoir neutre*. This opinion, advocated for example by Václav Pavlíček,[128] was based on the analysis of the President's powers, but it was obviously also formed by comparative influences. While this position had a certain logic, it was difficult to defend the assertion that the President is not an executive body, because the Constitution explicitly puts the President in the part entitled 'The Executive Power'. On the other hand, some authors have put forward arguments which could move the position of the President closer to the semi-presidential model.[129] One of the main arguments in this regard was that the President, unlike the stereotypically weak presidents in many parliamentary models, enjoyed numerous

[124] In general, we understand constitutional patriotism as a sense of civic attachment to constitutional values and principles—a sense that those values and principles are essential for forming and upholding a political community. For further details see Jürgen Habermas. BETWEEN FACTS AND NORMS: CONTRIBUTION TO A DISCOURSE THEORY OF LAW AND DEMOCRACY (1996), at 491–515 and 566–7; and Jan-Werner Müller. CONSTITUTIONAL PATRIOTISM (2007).

[125] See below Section 4.1.

[126] For further details see Sections 3.6 and 4.1 below.

[127] See the Human Rights Council of the Czech Government. 2018 REPORT ON THE STATE OF HUMAN RIGHTS IN CZECHIA, https://www.vlada.cz/cz/ppov/rlp/dokumenty/zpravy-lidska-prava-cr/zprava-o-stavu-lidskych-prav-v-ceske-republice-v-roce-2018-175718/ (last accessed on Dec. 28, 2020).

[128] See Marek Antoš. 'Pravomoci prezidenta republiky po zavedení přímé volby'. 57 ACTA UNIVERSITATIS CAROLINAE 30 (2011).

[129] Jan Kysela and Zdeněk Kühn. 'Presidential Elements in Government. The Czech Republic'. 3 EUCONST 91 (2007).

powers that could be used without counter-signature. Still, if nothing else, the indirect election of the President at a joint session of both chambers of the Parliament prevented the Czech model being labelled as semi-presidential.

These discussions were not purely academic. The position of the President was contested in practical political life and it also became an important question in several CCC cases. In the case concerning the appointment of the Governor of the Czech National Bank, the CCC had to decide whether such appointment requires a counter-signature. The majority of the court preferred the interpretation that left the matter entirely in the President's hands. Their key argument was that a neutral and non-partisan President better serves the purpose of protecting the Czech National Bank's independence. The dissenting minority, in retrospect quite fittingly, countered that the majority emphasized the position of the then President Václav Havel too much and that the neutrality and non-partisan nature of the office of President is wishful thinking rather than an objective reading of the Constitution. Interestingly, the notion of a non-partisan and neutral President was dealt a blow just a few years later in the midst of President Václav Klaus's clash with Iva Brožová, the President of the Supreme Court. After the first direct election of the President in 2013, which immediately split Czech citizens into two halves, this notion was definitely abandoned.

The peculiar position of the President has also had an important political dimension. The office was always held by a significant political figure. In fact, the three Czech Presidents so far have been members of the 'triumvirate' of the most important politicians of modern Czech history: Václav Havel, Václav Klaus and Miloš Zeman. Not surprisingly, once they assumed presidential office, they often used their authority at the expense of weak and unstable governments. This is nothing new in the Czech lands though. The special position of the President, which is de facto much stronger than the Constitution would suggest, dates back to the First Czechoslovak Republic. Although the 1920 Czechoslovak Constitution contained a nuanced system of separation of powers,[130] this principle was side-lined in national political life. Most importantly, the first president of the country and a towering figure of the entire interwar period, Tomáš Garrigue Masaryk, was deeply distrustful of political parties, parliamentary leaders and the Parliament itself. He created an informal political organisation known as *Hrad* ('The Castle'), a powerful coalition of intellectuals, journalists, businessmen, religious leaders and World War I veterans.[131] Due to his charisma, the fractured political scene and support of the *Hrad*, Masaryk *de facto* set the country's political agenda until his death in 1937.[132]

[130] Some commentators of that time even claimed that it was too nuanced and contained so many checks and balances that it could hardly function in practice. See the discussion in Jana Osterkamp. 'Ústavní soudnictví v meziválečném Československu'. 146 PRÁVNÍK 585 (2007), at 616.
[131] Orzoff, *supra* n. 14.
[132] This has significant repercussions for the interwar separation of powers. See Kosař et al., *supra* n. 16, at 442–3.

Governmental weakness and resulting instability are the second important piece of the puzzle, an understanding of which is necessary for one properly to assess the functioning of the Czech executive branch. There have been no fewer than 15 governments in the relatively short (1993–2019) Czech constitutional history. Out of these, three were so-called 'caretaker governments', three were minority governments tolerated by (at least nominally) opposition parties and many others have governed with just a very small majority, so that just a handful (even as few as one or two) of rebellious coalition members of the Chamber of Deputies could put the Government under pressure or even cause its fall.[133]

Many politicians and several academics have attributed governmental weakness to an electoral system that does not consistently produce stable majorities in the Chamber of Deputies, to which the Government is responsible. However, all attempts to significantly change the electoral system have failed, partly also due to the CCC which put a halt to introducing majoritarian elements into the election of the Chamber of Deputies. Most importantly, in the 2001 *Grand Election* judgment, the CCC declared unconstitutional the Election Law amendment that increased the number of voting districts, introduced a modified D'Hondt method and abolished the second scrutiny.[134] It did so because, according to the CCC's Justices, that amendment introduced too many majoritarian elements into the Czech 'system of proportional representation' in the Chamber of Deputies,[135] which is explicitly entrenched in the Czech Constitution.[136]

Further half-hearted attempts to strengthen the Governments by changing the electoral system were made later. In the period between 2006 and 2009, the Government considered introducing some elements which would favour the winner of the elections, such as a certain form of winner's bonus. These ideas have never materialized, though. Similarly, a later proposed solution introducing some German elements of rationalized parliamentarism[137] never got past the rhetorical stage.[138]

Ironically, instead of rationalising Czech parliamentarism the 2012 Constitutional Amendment[139] did the opposite. It introduced, among other things, direct election of the President. This step has weakened the Government even further, as the directly legitimated

[133] Attempts to negotiate with these rebels have at times caused further political and legal problems, such as the 2012/2013 attempted criminal prosecution of coalition MPs who had been promised well-paid positions in exchange for their resignations from the Parliament.
[134] Judgment of the CCC of January 24, 2001, Pl. ÚS 42/2000, *Grand Election* judgment.
[135] *Ibid.*
[136] The CCC used a similar 'cumulative effects doctrine' again in 2021, when it annulled the legal threshold for the coalitions and, much more importantly, held that the combination of 14 district and the system of allocation of seats (D'Hondt formula used at the level of electoral districts) causes unequal and disproportional (Judgement of the CCC of 2 February 2021, Pl. ÚS 44/17, *Grand Election II* judgment).
[137] Such as the constructive vote of no confidence.
[138] No proposal to amend the Constitution in this regard has ever materialized and the attempts to install 'the chancellor system' have stopped after a couple of roundtables with experts in the Chamber of Deputies.
[139] Constitutional Law No. 71/2012 Coll.

President, who has historically enjoyed a special status in Czech society,[140] can exert even greater pressure on an unstable government and use his political resources to submit it to his will. This was clearly shown during the 'co-habitation' of President Miloš Zeman and the 2014–2017 Sobotka Government.

3.6. An Over-Judicialized Constitution

Drafters of the Czech Constitution vested broad powers in the CCC.[141] It is generally assumed that 'when drafting the provisions concerning the Constitutional Court in 1992, [they] were also significantly inspired by the German Basic Law and constitutional system'.[142] With a certain degree of simplification, it is possible to state that the jurisdiction of the CCC mirrors that of the German Federal Constitutional Court (hereinafter: the 'BVerfG'). The CCC has almost all the powers the constitutional court can think of. It decides on (1) abstract constitutional review, (2) concrete constitutional review, (3) individual constitutional complaints, (4) horizontal as well as vertical separation of powers disputes, and (5) conformity of international treaties with the Czech constitutional order before their ratification.[143]

In addition, the CCC has various ancillary powers regarding electoral disputes, the dissolution of political parties, removal of the President, and the implementation of decisions of international tribunals.[144] The CCC has also been very creative in searching for its 'implied powers'. In this vein, it embraced the doctrine of unconstitutional constitutional amendment[145] and suggested that it might review even amnesties.[146] As a result, there are very few acts (if any) that escape review by the CCC.[147] The only competence which the CCC has lost, in comparison to its federal predecessor, is the power to issue advisory opinions. Furthermore, as should become clear from the following paragraphs, the CCC does not hesitate to interpret its powers extensively.[148] Still, it would be hasty to label the CCC as a very activist court. Its rise as an important political actor, which everybody must take seriously, was incremental and its activism is often more of a verbal or symbolic nature rather than real political-landscape-changing brushstrokes. On the one hand, the CCC invented the power to review constitutional amendments and ruled that the ECJ has ruled *ultra vires* in the *Holubec* case.[149] On the other hand it has shown restraint in other cases (e.g. in social rights cases and

[140] See the discussion of the position of Masaryk, Havel, Klaus and Zeman above.
[141] For further details see Kosař and Vyhnánek, *supra* n. 29.
[142] Jiří Přibáň. 'Judicial Power vs. Democratic Representation: The Culture of Constitutionalism and Human Rights in the Czech Legal System'. In CONSTITUTIONAL JUSTICE, EAST AND WEST: DEMOCRATIC LEGITIMACY AND CONSTITUTIONAL COURTS IN POST-COMMUNIST EUROPE IN A COMPARATIVE PERSPECTIVE (Wojciech Sadurski ed., 2002), at 374 and 379.
[143] See Art. 87 of the Czech Constitution. For further details see Kosař and Vyhnánek, *supra* n. 29.
[144] *Ibid.*
[145] Judgment of the CCC of 10 September 2009, Pl. ÚS 27/09, *Melčák*.
[146] Judgment of the CCC of March 5, 2013, Pl. ÚS 4/13, *Amnesty of Václav Klaus*, Para 42.
[147] The Czech constitutional law does not know any form of *actio popularis* though.
[148] See, e.g., Marek Antoš, *supra* n. 122.
[149] See also Section 5.

in reviewing the presidential amnesty[150]) and generally has not rendered bold substantive judgments that would attract wide international interest such as the Hungarian death penalty judgment.[151] Put differently, the CCC has been creative and activist in expanding its jurisdiction, but rather reluctant to exploit it to pursue substantive policies against the will of the political majority.

In terms of its impact on Czech society, the CCC has steadily risen to prominence. While it delivered several important judgments in the 1990s, few of them shook up the political establishment in Prague. The only exception was the abovementioned 2001 *Grand Election* judgment,[152] which de facto prevented the creation of a two-party state.[153] The CCC started showing its teeth only in the early 2000s. For instance, in the 2002 *Euro-Amendment* judgment[154] it effectively disregarded a major part of constitutional amendment adopted by the Parliament and interpreted the Czech Constitution as if such amendment had never taken place.

The proverbial big bang came only a few years later. In the 2009 *Melčák* judgment[155] the CCC adopted the doctrine of unconstitutional constitutional amendments and annulled the constitutional law shortening the fifth term of office of the Chamber of Deputies, which was adopted in order to find the quickest way to hold snap elections. By doing so, it effectively postponed the parliamentary elections and reshuffled the cards in Prague. In 2010–2012 it struck down several austerity measures adopted by the centre-right coalition in the wake of the global financial crisis. Finally, in 2012 the CCC showed its teeth also towards the Court of Justice of the EU as it found the CJEU's *Landtová* judgment *ultra vires*.[156]

The series of these judgments in 2009–2012 makes clear that the CCC has become a powerful institution to be taken seriously by all political and judicial actors, on both the domestic and European levels. However, in order to understand the position of the CCC properly, one must look at several dimensions, including the CCC's relationship with the ECtHR and the CJEU and even at the CCC's own self-image.

More specifically, the position of the CCC in the Czech political and constitutional system is determined not only by its institutional design, but also by the dynamics of its relationship with other constitutional bodies, the public, and with supranational and international courts.

[150] Decision of the CCC of 5 March 2013, Pl. ÚS 4/13.
[151] See Judgment of the Hungarian Constitutional Court of October 24 1990 (Decision 23/1990 (X.31) AB).
[152] See Judgement of the CCC of 24 January 2001, Pl. ÚS 42/2000, *Grand Election* judgment.
[153] This was an attempt by the two (then) strongest parties (the Social Democratic Party and the centre-right Civic Democratic Party) to entrench their positions during the so-called 'Opposition Agreement' period. For further details on the Opposition Agreement see Section 3.2.
[154] Judgment of the CCC of 25 June 2002, Pl. ÚS 36/01, *Euro-Amendment*.
[155] Judgment of the CCC of 10 September 2009, Pl. ÚS 27/09, *Melčák*.
[156] Judgment of the CCC of 31 January 2012, Pl. ÚS 5/12, *Holubec* (in the Czech context this judgment is often referred to also as *Slovak Pensions XVII* to show that it is a part of the much longer 'Slovak Pension Saga').

Given its broad array of powers, the CCC has had ideal conditions for shaping the evolution of the constitutional and political landscape of Czechia since the 1990s. The fact that the CCC has enjoyed considerable public support—especially for a country where state institutions are generally viewed with suspicion[157]—surely helped too.

The relationship between the CCC and the Parliament is quite intensive. Besides the obvious fact that the CCC reviews laws adopted by the Parliament, the abstract review of legislation might be initiated by a group of members of the Parliament (usually opposition members) which influences the political dynamics of the use of these proceedings.[158] However, over the last 25 years, the relationship between the CCC and the Parliament has obviously evolved beyond what is discernible from the constitutional text. Regarding this relationship several developments stand out.

First, the already mentioned *Melčák* case made clear that the CCC has claimed the competence to review constitutional amendments[159] and the Parliament has not stood up to this assertion of power. This has shifted the balance between the CCC and the Parliament quite significantly, since the CCC has effectively proclaimed itself the Czech '*Grenzorgan*'[160] that has the last word in questions of constitutional order.

However, the *Melčák* case, although important, concerned an exceptional problem. The CCC's relationship with the Parliament has been shaped primarily by day-to-day issues. While it is not surprising that the CCC—when reviewing legislation—places some substantive constitutional limits on the legislature, it has become involved in the legislative process as well. There is now an established doctrine according to which the CCC can review the internal procedure in the Parliament and annul statutory law for failing to follow the correct procedure. Especially in the 2000s, the CCC has attempted to stop the use of so-called

[157] For example in 2012, while the CCC enjoyed the strong or moderate support of approximately 60 % of the population (which reflected the general trend from previous years), the political institutions such as the Parliament or the government received much lower numbers (even below 20 %, hardly ever exceeding 40 %). See empirical researches available at https://www.stem.cz/duvera-nejvyssim-soudnim-institucim/ and https://www.stem.cz/duvera-v-nejvyssi-politicke-instituce-prosinec-2012/ (both last accessed on Dec. 28, 2020).

[158] Petrov and Kopeček have shown that the ability to initiate review is an important political tool of the opposition, especially when the government enjoys a stable majority: see Lubomír Kopeček and Jan Petrov. 'From Parliament to Courtroom: Judicial Review of Legislation as a Political Tool in the Czech Republic'. 30 EAST EUROPEAN POLITICS AND SOCIETIES AND CULTURES 120 (2016).

[159] For further analysis see also Yaniv Roznai. 'Legisprudence Limitations on Constitutional Amendments? Reflections on the Czech Constitutional Court's Declaration of Unconstitutional Constitutional Act'. 8 ICL JOURNAL 29 (2014); and Ivo Šlosarčík. 'Czech Republic 2009–2012: On Unconstitutional Amendment of the Constitution, Limits of EU Law and Direct Presidential Elections'. 3 EPL 435 (2013).

[160] By this we refer to the Verdross/Kelsen concept of 'border organs'. See Alfred Verdross. VÖLKERRECHT (1950). See also Franz C Mayer. 'Europäische Verfassungsgerichtsbarkeit'. In EUROPÄISCHES VERFASSUNGSRECHT: THEORETISCHE UND DOGMATISCHE GRUNDZÜGE (Armin von Bogdandy ed., 2003), at 260–1; and Theodor Schilling. 'Alec Stone Sweet's 'Juridical Coup d'État' Revisited: Coups d'État, Revolutions, Grenzorgane, and Constituent Power'. 13 GLJ 287 (2012).

'legislative riders'[161] and to set rules for the use of procedures that limit the ability of a parliamentary minority to 'obstruct' the legislative process.[162] However, this case law has not been settled yet[163] and thus it is still not entirely clear what are the constitutional limits of 'purity' of the legislative process.

3.7. Where Are the People?

While the CCC has—at least so far—enjoyed a very strong position, there is one institutional element that is strangely lacking in the Czech constitutional practice: namely the people. This statement is obviously and intentionally quite provocative and deserves a more detailed explanation.[164]

While the Constitution is based on the principle of popular sovereignty, the 'operational sovereignty' of the people is kept to the minimum and the Czech people are thus a perfect example of the 'dormant sovereign'. Czechia is actually one of the few European Union countries that has no general regulation of referenda. The only existing example was the ad hoc constitutional law concerning a referendum on the Czech Republic's accession to the European Union.[165]

Furthermore, the prioritisation of legal over political[166] and civic constitutionalism and the consequent limitation of participatory elements in democratic government are blamed by some authors as a cause of political and constitutional crises in Czechia as well as in other CEE countries.[167] While this is a rather abstract and debatable statement, there are certainly indicators of the detachment of the people from constitutional institutions and basic values. Relatively low voters' turnouts,[168] a lack of trust in key institutions (including the Parliament), and the rise of populist political parties[169] hint that the level of the people's identification with

[161] See Judgment of the CCC of 15 February 2007, Pl. ÚS 77/06.
[162] Judgment of the CCC of 1 March 2011, Pl. ÚS 53/10, available in English at Decisions | The Constitutional Court (usoud.cz) (last accessed on Jan. 11, 2021).
[163] The judge rapporteur of the *Legislative riders* judgments, Eliška Wagnerová, has even opined that one of the following judgments (Judgment of the CCC of 31 January 2008, Pl. ÚS 24/07) effectively overruled some of the main principles stemming from *Legislative riders.* See Wagnerová's dissenting opinion to this judgment, available in English at Decisions | The Constitutional Court (usoud.cz) (last accessed on Jan. 11, 2021).
[164] See also Section 4 and 5.
[165] Constitutional Law No. 515/2002 Coll., on the Referendum on the Accession to the European Union.
[166] The best analysis of the differences between legal and political constitutionalism can be found in Richard Bellamy. POLITICAL CONSTITUTIONALISM: A REPUBLICAN DEFENCE OF THE CONSTITUTIONALITY OF DEMOCRACY (2007).
[167] See Paul Blokker. NEW DEMOCRACIES IN CRISIS? A COMPARATIVE CONSTITUTIONAL STUDY OF THE CZECH REPUBLIC, HUNGARY, POLAND, ROMANIA AND SLOVAKIA (2013).
[168] Especially in the case of institutions with a low level of diffuse support such as the Senate.
[169] See Section 3.8 below.

the constitutional and political system is quite low and that constitutional patriotism in the Czech case is more a theoretical idea than lived reality.[170]

3.8. A Danger of Democratic Backsliding

So far in this section, we have addressed only issues and events that happened or have been happening for quite some time. But given the youth of the Czech constitutional system, it would be a mistake to overlook certain challenges that have appeared only recently. Even though it is too soon for an evaluation, it begs the question whether some of the developments of the last five or six years cannot be interpreted as signs or forewarnings of some form of backsliding from the liberal democratic nature of the Czech constitutional system.[171] The question becomes even more pressing if we put the Czech development in the context of the developments in the Visegrad countries or—even more broadly—in the CEE region.[172]

The possible forewarnings of backsliding can be divided in two categories. The first one is simply a matter of instability of the party system and the rise in importance of populist parties.[173] This process is not specifically a Czech problem or even a problem of Central and Eastern Europe. In the Czech context, however, this is coupled with convictions of substantial parts of population[174] that democracy is not important for them or that undemocratic regimes are or may be better than democratic.[175] Still, a stable majority of people considers democracy important and is generally content with the political system. The bigger problem thus may be that a strong majority of the Czech population seems to think that 'politicians do not care about the opinions of ordinary people' and that it is not possible for the ordinary people to influence political decision-making.[176] Not only those people who do not identify with (liberal)

[170] See David Kosař and Ladislav Vyhnánek. 'Constitutional Identity in the Czech Republic: A New Twist On An Old Fashioned Idea'. In CONSTITUTIONAL IDENTITY IN A EUROPE OF MULTILEVEL CONSTITUTIONALISM (Christian Calliess and Gerhard van der Schyff eds., 2019), at 85. On constitutional patriotism see also *supra* n. 124.

[171] This subsection should be read in conjunction with the previous parts (especially the 'Where are the people' subsection), but we also develop these issues in Section 5 dedicated to constitutional identity and in the conclusion.

[172] See Kosař et al., *supra* n. 16.

[173] See Hanley, *supra* n. 86; Vlastimil Havlík. 'Populism as a threat to liberal democracy in East Central Europe'. In CHALLENGES TO DEMOCRACIES IN EAST CENTRAL EUROPE (Jan Holzer and Miroslav Mareš eds., 2016), at 36–55; Vlastimil Havlík and Petr Kaniok. 'Populism and Euroskepticism in the Czech Republic: Meeting Friends or Passing By' 16 ROMANIAN JOURNAL OF EUROPEAN AFFAIRS 20 (2016).

[174] See also Section 5.

[175] In the polls conducted by a branch of the Sociological Institute of the Czech Academy of Science in the last 15 years, it is shown that roughly 20–30 percent of the respondents support the 'undemocratic regimes may be better' thesis and roughly 15–25 percent of the respondents do not think the regime matters. See the document from Mar. 5 2020, available at https://cvvm.soc.cas.cz/media/com_form2content/documents/c2/a5155/f9/pd200305.pdf (last accessed on Dec. 28, 2020).

[176] See another set of polls by the same institute from March 2020, available here: https://cvvm.soc.cas.cz/media/com_form2content/documents/c2/a5169/f9/pd200313.pdf (last accessed on Dec. 28, 2020).

democratic values can be targeted by a populist or downright anti-system party. As the Visegrad experience shows, people who support democracy but who are disillusioned by its current form may be susceptible to promises of 'another form of democracy' in the style of Viktor Orbán. Still, we present these phenomena more as a potential breeding ground for future development rather than signs of backsliding in themselves.

The second category includes more tangible signs of disagreement with the course of constitutional development in the first two decades of the modern Czech constitutional history. In this regard, we can refer to attacks by the winner of the 2017 parliamentary elections and current Prime Minister Andrej Babiš[177] and current President Miloš Zeman on the upper chamber of the Parliament, the Senate. Both of them have expressed their desire to abolish the Senate, because it—in their opinion—unnecessarily complicates the process.[178] Andrej Babiš went even further as he has also pledged to reduce the number of MPs in the lower chamber from 200 to 101[179] and abolish municipal assemblies.[180] He openly prefers to 'run the state like a firm',[181] implying that any checks and balances as well as complex procedural rules are but a nuisance.[182] The vision of Andrej Babiš and Miloš Zeman thus seems follow the 'pragmatic' and 'strong and effective governments' narratives that we have mentioned with regard to the Opposition Agreement.[183]

More recently, we have also witnessed more specific warning signs of democratic decay in terms of actions of individual office holders. For instance, a recently elected Ombudsman openly denies the existence of discrimination and questions the CCC's case law as well as meaningfulness of 'new rights' such as the right of fathers to be present at childbirth.[184] Even

[177] See Haughton et al, *supra* n. 86.

[178] Andrej Babiš has even incorporated this idea (and other ideas) in his book O ČEM SNÍM KDYŽ NÁHODOU SPÍM *[What do I dream about when I am accidentally asleep]* (2017), available here https://www.anobudelip.cz/file/edee/2017/o-cem-snim-kdyz-nahodou-spim.pdf (last accessed on 28 December 2020).

[179] This change would seriously skew the electoral rules against smaller political parties. Viktor Orbán did actually the same in Hungary (see Miklós Bánkuti et al. 'Hungary's Illiberal Turn: Disabling the Constitution'. 23 JOURNAL OF DEMOCRACY 138 [2012]).

[180] See Babiš, *supra* n. 178.

[181] See, e.g., Jan Jandourek. 'Babiš chce řídit stat jako firmu. To asi nepůjde, stát není firma'. REFLEX ON-LINE (Sep. 6, 2013), www.reflex.cz/clanek/info-x/51716/babis-chce-ridit-stat-jako-firmu-to-asi-nepujde-stat-neni-firma.html (last accessed on Dec. 28, 2020). For a scholarly analysis of Babiš's entrepreneurial party see Lubomír Kopeček. 'I'm Paying, So I Decide – Czech ANO as an Extreme Form of a Business-Firm Party'. 30 EAST EUROPEAN POLITICS AND SOCIETIES 725 (2016); Vít Hloušek and Lubomír Kopeček. 'Entrepreneurial Parties: A Basic Conceptual Framework'. 24 CZECH JOURNAL OF POLITICAL SCIENCE 83 (2017).

[182] See, e.g., Rick Lyman. 'The Trump-Like Figures Popping Up in Central Europe'. NEW YORK TIMES (Feb. 24, 2017), www.nytimes.com/2017/02/24/world/europe/zbigniew-stonoga-andrej-babis.html (last accessed 28 December 2020).

[183] See Section 3.2 above.

[184] See Ivana Svobodová. 'Přes 300 právníků apeluje na ombudsmana, aby se přestal řídit dojmy'. RESPEKT.CZ (Apr. 14, 2020), https://www.respekt.cz/agenda/pres-300-akademiku-apeluje-na-ombudsmana-aby-se-prestal-ridit-dojmy (last accessed on Dec. 28 2020); and Tereza Kučerová. 'Právníci zaslali Křečkovi otevřený dopis. Neplníte svou funkci řádně, míní. IDNES.CZ (Apr. 14, 2020), https://www.idnes.cz/zpravy/domaci/otevreny-dopis-pravnici-ombudsman-stanislav-krecek.A200414_093505_domaci_kuce (last accessed on Dec. 28, 2020).

more importantly, several judges of the Czech Constitutional Court and the Supreme Administrative Court alleged that the Chancellor of President Miloš Zeman attempted to persuade judges of these two courts to decide high-profile political cases in line with Zeman's preferences.[185] Such events were simply unheard of in the 1990s and 2000s and their emergence should not be underestimated. If such actions become numerous and go unpunished legally or politically, they may gradually erode the current Czech constitutional *Gestalt* and, in the worst-case scenario, pave the way for the Hungarian or Polish paths.[186]

4. Basic Structures and Concepts

In the last two parts we discussed the broader political and social context of drafting the Czech Constitution in the early 1990s and the major critical junctures and challenges of the Czech constitutional *Gestalt*. In this part we will identify and analyse the basic structural aspects of the Czech constitutional system and its key concepts that arose from the aforementioned processes.

4.1. Formal Aspects of the Czech Constitutional Gestalt

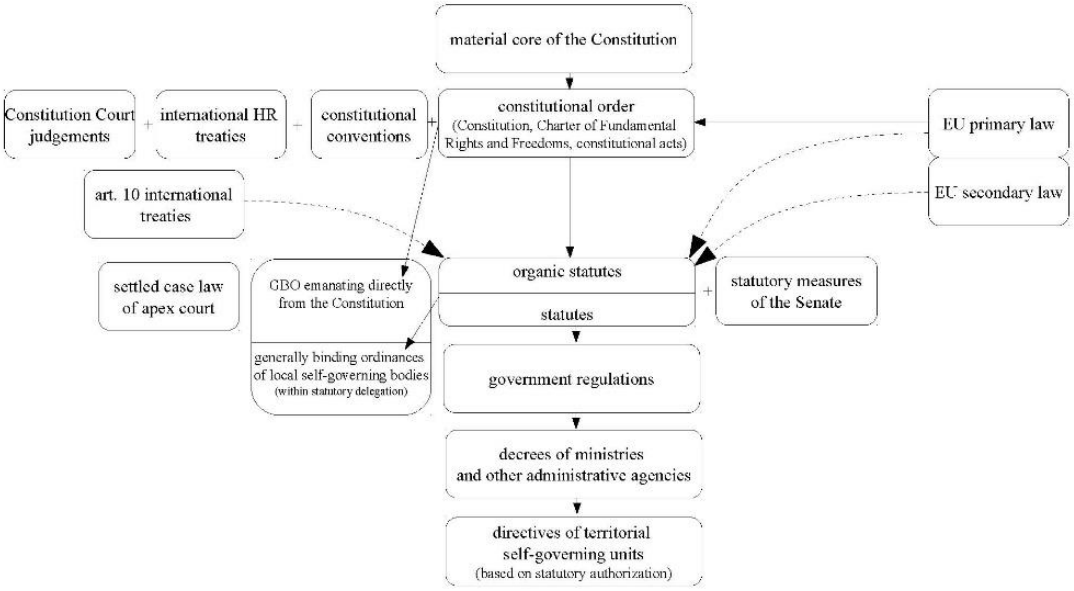
In order to understand the key substantive concepts of the Czech constitutional *Gestalt* and the dynamics of the constitutional system's evolution, it is necessary to understand the more technical and formal aspects of the Czech constitutional system which shape its structure. Therefore, we will first explain the polycentric nature of the Czech Constitution, identify the complex web of sources of Czech constitutional law, and discuss the repercussions of the rigidity of the Czech Constitution.

a) The Polycentric Constitution and Sources of Constitutional Law

Figure 1: The Czech Constitutional Order and the Hierarchy of Norms

[185] See Ondřej Kundra and Andrea Procházková. 'Mynář se pokusil ovlivnit vysoce postavené soudce'. RESPEKT (Jan. 6, 2019), https://www.respekt.cz/politika/mynar-se-pokusil-ovlivnit-vysoce-postavene-soudce (last accessed on 4 January 2021); Renata Kalenská. 'Soudcova výpověď o Zemanově útoku na justici: Dával mi jasně najevo, jak máme rozhodnout, říká Baxa'. DENÍK N (Jan. 16, 2019), https://denikn.cz/54570/soudcova-vypoved-o-zemanove-utoku-na-justici-daval-mi-jasne-najevo-jak-mame-rozhodnout-rika-baxa/ (last accessed on Jan. 4, 2021); and Ondřej Kundra. 'Mynář prozradil před poslanci o kontaktech se soudci víc, než chtěl'. RESPEKT (Jan. 23, 2019), https://www.respekt.cz/politika/hradni-pokus-o-ovlivnovani-soudcu-mynar-prozradil-vic-nez-chtel (last accessed on 4 January 2021).

[186] See also Kosař et al, *supra* n. 16.



As we have already mentioned above, the value clash between the proponents and opponents of an entrenched charter of rights has resulted in the division of the constitutional text into two basic documents, the Constitution itself and the Charter of Rights and Freedoms.

This fact is reflected by the Constitution itself in its article 112, which creates the concept of 'constitutional order'. According to this provision, the constitutional order of the Czech Republic consists of:

> this Constitution, the Charter of Fundamental Rights and Basic Freedoms, constitutional acts adopted pursuant to this Constitution, and those constitutional acts of the National Assembly of the Czechoslovak Republic, the Federal Assembly of the Czechoslovak Socialist Republic, and the Czech National Council defining the state borders of the Czech Republic, as well as constitutional acts of the Czech National Council adopted after the sixth of June 1992.

The Czech Constitution thus consists of a set of constitutional laws rather than a single comprehensive document. Besides the Constitution,[187] the Charter[188] and the constitutional laws defining the state borders of the Czech Republic there are currently three other constitutional laws. First, there is the Constitutional Law on the Security of the Czech

[187] Constitutional Law No. 1/1993 Coll.
[188] Decision No. 2/1993 Coll.

Republic[189] which contains a basic regulation of states of emergency. Secondly, there is a Constitutional Law Establishing the Higher Self Governmental Units.[190] Finally, the Constitutional Law on the Referendum on the Accession to the European Union[191] is a rather peculiar part of the constitutional order within the meaning of article 112 para 1 of the Constitution. Its peculiarity lies in the fact that it is an ad hoc Constitutional Law that—though still formally valid—became normatively exhausted after the actual referendum had taken place.

It is however crucial to mention that the concept of constitutional order—or rather its precise content—has been contested. Most importantly, the CCC has interpreted it in an extensive manner. In the so-called '*Euro-Amendment* Judgment',[192] it has ruled that *international human rights treaties*, a category that is not explicitly mentioned in the Constitution after 2001, also form part of the constitutional order, and it has treated them as such ever since.[193] At the same time ECtHR case-law is considered to have normative precedential power.

After this judgment, it is important to distinguish between international human rights treaties meeting the requirements of article 10 of the Czech Constitution on the one hand, and 'other' article 10 treaties. The former have constitutional rank and belong to the Czech constitutional order, while the latter have merely application priority before statutory law.[194] This constitutionalisation of international human rights treaties has had a far-reaching impact on the Czech legal system and has significantly shaped the Czech human rights jurisprudence.

Some CCC rulings[195] and constitutional conventions[196] are also considered binding sources of constitutional law, even though the exact extent of their importance remains slightly unclear. Of these two supplementary sources, the position of the CCC's judgments has been analysed more thoroughly.

The key constitutional provision regulating the effects of the CCC's rulings can be found in article 89 para 2 of the Constitution which reads as follows: '[e]nforceable rulings of the Constitutional Court are binding on all authorities and persons.' However, this provision gives very few answers to practical questions and various issues surrounding the rulings' effects.

On the one hand, interpretation of the term 'enforceable' has caused few problems so far. According to article 89 para 1 of the Constitution, rulings of the CCC are enforceable as soon

[189] Constitutional Law No. 110/1998 Coll.
[190] Constitutional Law No. 347/1997 Coll.
[191] Constitutional Law No. 515/2002 Coll.
[192] Judgment of the CCC of 25 June 2002, Pl. ÚS 36/01 *Euro-Amendment*.
[193] The context and analysis of this decision follows in section 4.1.b).
[194] See the text after the semi-colon in Art. 10 of the Czech Constitution.
[195] See for example Judgment of the CCC of 13 November 2007, IV. ÚS 301/05.
[196] See for example Judgment of the CCC of 20 June 2001, Pl. ÚS 14/01.

as they are announced in the manner provided for by statute unless the CCC decides otherwise. On the other hand, two general questions concerning article 89 para 2 have been particularly controversial. First, it has been debated which rulings (and which parts of an individual ruling) are considered binding. Second, there are various opinions on the nature and extent of the binding power itself.

The direct effects of the CCC's rulings are less controversial and generally accepted. Even though article 89 para 2 of the Constitution mentions 'rulings' generally, only judgments can have any meaningful direct effects (i.e. annulment of a piece legislation or an ordinary court's decision).[197] In contrast, the debate on precedential effects has not yet been settled. The main issue is what exactly has the *erga omnes* effect (*are binding on all authorities and persons)* anticipated by article 89 para 2 of the Constitution. An 'anti-precedential' part of literature suggested, mainly in the 1990s,[198] that only the operative part of a ruling and not its reasoning could have *erga omnes* effects. However, the case law of the Constitutional Court soon asserted that the main reasons (*tragende Gründe*) for the ruling have certain precedential effects.[199] According to the CCC, the ordinary courts[200] as well as other state organs have a constitutional duty to follow the main reasoning of the CCC's rulings in similar cases.[201] The other constitutional actors have gradually accepted the notion of precedential effect,[202] even though in some cases we may still encounter some resistance from the ordinary courts.[203]

The status of constitutional conventions is perhaps the most contested aspect of the Czech constitutional system. Even though the binding nature of constitutional conventions has been confirmed by the Czech courts on several occasions,[204] not all the relevant constitutional actors have internalized this position. Quite recently, for example, Czech president Miloš Zeman has labelled the concept of constitutional convention as 'idiotic' and made clear that he will not let himself be bound by unwritten rules.[205]

To complete the picture, the Constitution also defines the hierarchy of sub-constitutional sources of law. The status of statutes (*zákony*), the Senate's statutory measures (*zákonná*

[197] A decision does not even create *res iudicata* (Art. 35 Para 1 LCC *a contrario*).
[198] See the debate reproduced in Přibáň, *supra* n. 142, at 381.
[199] Judgment of the CCC of 13 November 2007, IV. ÚS 301/05, Paras 55 ff.
[200] In the individual constitutional complaints proceeding the 'precedential' binding power vis-à-vis the legislature is yet another issue.
[201] This obviously gives rise —though indirectly—to an obligation to know the CCC's case law.
[202] See the discussion in Ladislav Vyhnánek. 'Judikatura v ústavním právu'. In JUDIKATURA A PRÁVNÍ ARGUMENTACE (Michal Bobek and Zdeněk Kühn eds., 2013), at 353.
[203] Perhaps the best example of such resistance is the 'Slovak pensions' saga which involved a conflict between the Supreme Administrative Court and the CCC. See Zbíral, *supra* n. 111 and other literature cited above in n. 111. Both the civil and the criminal branch of the Supreme Court had similar encounters with the CCC (*ne bis idem*, reception of the Judgment of the CCC of 19 September 1995, IV. ÚS 81/95).
[204] For example, in the Judgment of 20 June 2000, Pl. ÚS 14/01, *Appointment of the CNB Governor.*
[205] See Lukáš Werner and Jan Wirnitzer. 'Pojem ústavní zvyklosti je idiotský, řekl Zeman. Němcové nechal naději'. IDNES.CZ (Jul. 11, 2013), https://www.idnes.cz/zpravy/domaci/zeman-sance-na-vladu-pro-cssd-a-byvalou-koalici.A130711_071534_domaci_wlk (last accessed on Jan. 4, 2021).

opatření), government regulations (*nařízení vlády*),[206] ministerial decrees (*vyhlášky ministerstev*)[207] and directives of territorial self-governing units issued in the area of assigned public administration (*nařízení obce* or *nařízení kraje*)[208] is clear as these sources of law follow a clear hierarchical order.[209] Regarding statutes, it is also important to emphasize that those statutes that must be passed by both chambers of the Parliament[210] and those that directly implement the Czech Constitution, such as the Municipalities Act, are often referred to as 'organic laws'.[211]

b) A Rigid Constitution

The Czech constitution is a rigid one and this choice has never been seriously questioned. The notion of an entrenched constitution protected by procedural rules against hasty change and guarded by a strong specialized constitutional court is, of course, an important aspect of the German constitutionalism which was a crucial source of inspiration for the Czech constitution.[212] This being said, the Czech constitutional order is not amongst the most rigid constitutions in the world. First, Czechia, being a unitary state, obviously lacks the safeguards known from federal countries, such as ratification by states or lands. Second, the people are not included in the process of constitutional change.

The formal aspect of rigidity thus consist only of (1) the heightened three-fifths majorities required in the two chambers of the Parliament to adopt a constitutional law,[213] (2) the mandatory consent of the Senate, which cannot be overruled by the Chamber of Deputies in the case of constitutional laws, and (3) the Eternity Clause.[214]

The Czech Constitution is thus rigid, but not overly so. The practical rigidity of the constitutional order is yet another issue. In addition to the constitutional laws listed above,[215] the Parliament has adopted six constitutional laws that amended the Constitution and one that amended the Charter.[216] While several of these amendments have been rather minor,[217]

[206] See Art. 78 of the Czech Constitution.
[207] See Art. 79 Para. 3 of the Czech Constitution.
[208] See Art. 79 Para. 3 in conjunction with Art. 105 of the Czech Constitution.
[209] Note that in order to avoid unnecessary confusion in English I depart from literal translation and use a different term for each of these sources of law, even though the original Czech wording of the Czech Constitution employs the same term 'nařízení' for several sources of law.
[210] See Art. 40 of the Constitution.
[211] Karel Klíma. ODPOVĚDNOST ÚZEMNÍ SAMOSPRÁVY (2014), at 25.
[212] See supra Section 2.1.
[213] According to Art. 39 Para. 4 of the Constitution a three-fifths majority of *all* Deputies and *present* Senators is necessary to adopt a constitutional law.
[214] On the Eternity Clause see Part E below.
[215] See *supra* Section 4.1.
[216] There have been several amendments of the constitutional laws defining the state's borders or the Constitutional Law on Higher Self-Governing Units, but these have been rather technical and not of great import.
[217] Such as the amendment limiting the immunities of members of the Parliament and Constitutional Justices or the one that increased the maximum length of detention under art 8 para 3 of the Charter from 24 to 48 hours.

two of them have had significant repercussions for the Czech constitutional *Gestalt*. The 2002 Euro-Amendment,[218] aimed at preparing the Czech constitutional system for accession to the European Union, reshaped the Czech constitutional system and arguably also its material core. The 2012 Amendment, which introduced the direct election of the President and modified other elements of President's constitutional status, has brought Czechia closer to a semi-presidential system.[219]

Other possible changes in the Czech constitutional order have so far remained only in the rhetorical realm. Proposals to introduce referenda to the Czech constitutional system and thus widen the area of popular participation are prominent in this regard,[220] but significant discussion has also taken place as regards the effectiveness of the executive branch and the position of the Government.

The Czech Constitution also includes the so-called 'Eternity Clause' in its article 9 para 2 , which provides that '[a]ny changes in the essential requirements of a democratic state governed by the rule of law are impermissible'. This Eternity Clause has been interpreted as having supra-constitutional status and cannot be changed even by a constitutional amendment. Thus, it adds another ultra-rigid layer to the constitutional structure.

Despite earlier uses of the Eternity Clause in the CCC's case law,[221] it was its *Euro-Amendment* judgment[222] that identified the full potential of the Eternity Clause in the Czech Constitution. In this case the CCC effectively disregarded a key aspect of the 2001 constitutional amendment and interpreted the Czech Constitution as if such an amendment had never been made—all of this based on article 9 para 2 of the Czech Constitution.

In this case the CCC was confronted with constitutional changes introduced by Constitutional Law No. 395/2001.[223] Prior to the Law's adoption, the Czech Constitution had basically adhered to the dualist concept of the relationship between international and national law. At the same time, it recognized one important exception, namely so-called 'international human rights treaties.' This category of international treaties enjoyed direct effect in national law[224] and the CCC had the authority to annul legislation that was not in conformity with such international human rights treaties.

[218] Constitutional Law No. 395/2001 Coll.
[219] Constitutional Law No. 71/2012 Coll.
[220] On the problem of popular participation see also Sections 3.7. and 6.
[221] Judgment of the CCC of 21 December 1993, Pl. ÚS 19/93.
[222] Judgment of the CCC of 25 June 2002, Pl. ÚS 36/01.
[223] The so-called 'Euro-amendment'; this name is derived from the fact that this amendment was meant to prepare the Czech Constitution for the Czech Republic's accession to the European Union.
[224] See Art. 10 of the Czech Constitution prior to changes introduced by Constitutional Law No. 395/2001: '[r]*atified and promulgated international human rights treaties, by which the Czech Republic is bound, are directly binding and take precedence over statutes*'.

Following the aforementioned constitutional amendment, the situation changed considerably. First, the Czech Constitution adopted a monist approach to international treaties, declaring that all promulgated treaties to the ratification of which Parliament has given its consent and by which the Czech Republic is bound form a part of the Czech legal order and take precedence over statutes (article 10 of the Czech Constitution). Secondly, since international human rights treaties have ceased—from the constitutional point of view—to form a special category of international treaties, the CCC has lost its authority to review whether national legislation conforms to standards set by them. This competence of the CCC was functionally replaced by the authority of general courts directly to apply any international treaty (including, but not limited to, international human rights treaties) in cases where it conflicted with a domestic statute.

However, the CCC refused to acknowledge the effects of the Euro-Amendment and interpreted the Czech Constitution as if the CCC was still allowed to review domestic legislation from the point of view of its conformity with international human rights treaties. It claimed that such a change would lower the procedural level of human rights protection and that it would—as such—contradict the very basic constitutional principles protected by the Eternity Clause. This heavily criticized[225] judgment indicated the resolve of the CCC to draw very concrete practical implications from the Eternity Clause.

Therefore, few experts were genuinely surprised when— in 2009—the CCC in the *Melčák* judgment[226] took yet another step and made it clear that it has, or thinks it has, the authority to annul constitutional laws. The constitutional law in question[227] was adopted in the middle of a political crisis and was supposed to solve the crisis by a once and for all shortening of the fifth term of office of the Chamber of Deputies, thus finding the quickest way to arrive at snap elections. Even though article 35 of the Czech Constitution provided for several opportunities to dissolve the Chamber of Deputies, the deputies did not find them acceptable and opted for an ad hoc constitutional law that allowed this singular shortening of the electoral term. Most scholars considered this solution to be in conformity with the Czech Constitution as the same solution had been successfully employed in a similar political impasse in 1998.[228] However, the CCC thought otherwise and annulled the constitutional law in question because

[225] Cf Zdeněk Kühn and Jan Kysela. 'Je ústavou vždy to, co Ústavní soud řekne, že ústava je?' 10 ČASOPIS PRO PRÁVNÍ VĚDU A PRAXI 199 (2002); and Jan Filip, 'Nález č. 403/2002 Sb. jako rukavice hozená ústavodárci Ústavním soudem'. 11 PRÁVNÍ ZPRAVODAJ 11 (2002).

[226] Judgment of the CCC of 10 September 2009, Pl. ÚS 27/09, *Melčák*. For further analysis see also Yaniv Roznai, 'Legisprudence Limitations on Constitutional Amendments? Reflections on the Czech Constitutional Court's Declaration of Unconstitutional Constitutional Act' (2014) 8 VIENNA JOURNAL ON INTERNATIONAL CONSTITUTIONAL LAW 29; and Ivo Šlosarčík, 'Czech Republic 2009–2012: On Unconstitutional Amendment of the Constitution, Limits of EU Law and Direct Presidential Elections' 3 EUROPEAN PUBLIC LAW 435 (2013).

[227] Constitutional Law No. 195/2009 Coll.

[228] See Constitutional Law No. 69/1998 Coll. of 19 March 1998, on Shortening the Term of the Chamber of Deputies.

it was a one-time solution that contravened the principle of generality of law and the prohibition of retroactivity.[229]

Both the aforementioned examples show that the CCC is not shy of using the Eternity Clause to drastically reinterpret or even annul constitutional laws. Moreover, it has not exercised much restraint and has done so even in cases where the violation of the Eternity Clause was far from obvious.[230]

4.2. Substantive Aspects of the Czech Constitutional Gestalt

Having explained the polycentric nature and rigidity of the Czech Constitution, we may turn our attention to the substantive aspects of the Czech constitutional system, namely human rights constitutionalism, the principle of democracy, the principle of (material) *Rechtsstaat*, the principle of separation of powers and the principle of territorial self-governance.

a) Human Rights Constitutionalism

Fundamental rights and their protection hold a special place in the Czech constitutional *Gestalt*. Even Charter 77, the most important dissident project of the communist era,[231] was actually a project concerning human rights, challenging the communist regime's failure to deliver on its promises after the ratification of the ICCPR. Hence, the new Czech post-1989 and post-1993 constitutional project put significant emphasis on the effective protection of human rights.[232]

There are several important questions in this regard. First, the Charter is a very ambitious document that contains virtually all human rights protected by the ECHR as well as an extensive list of social, economic and cultural rights. Second, the Constitution has created a robust system of fundamental rights protection. Its article 4 stipulates that '[f]undamental rights and basic freedoms shall enjoy the protection of judicial bodies'. Apart from that, a very strong CCC has been established with an extensive set of powers, including the power to review individual decisions in the constitutional complaints procedure.[233]

The CCC soon after its creation adopted important fundamental rights doctrines that have created a doctrinal framework of fundamental rights protection. Three of the most influential Justices of the CCC in the 1990s and 2000s, Vladimír Klokočka, Pavel Holländer and Eliška Wagnerová, were particularly keen on searching for inspiration in Germany. As a result, there

[229] See *supra* n. 226.
[230] For a more sober application of the Eternity Clause, see *Lisbon I* judgment, Para 93.
[231] See Jonathan Bolton. WORLDS OF DISSENT: CHARTER 77, THE PLASTIC PEOPLE OF THE UNIVERSE, AND CZECH CULTURE UNDER COMMUNISM (2012).
[232] Despite the aforementioned scepticism of some important political figures, such as Václav Klaus.
[233] See *supra* Section 3.6.

are more than 60 references to the BVerfG's jurisprudence in the CCC's case law.[234] Moreover, the significance of the BVerfG's case law is greater than the mere number of references suggests, as it shaped key constitutional doctrines in the early phases of the CCC's existence. The CCC has transplanted, among other things, the German proportionality test,[235] the doctrine of 'fundamental rights as objective values', and the concept of *Drittwirkung*.[236]

Another layer of the Czech human rights constitutionalism concerns the importance of international human rights law. The CCC has been considered a champion in the application of the ECHR in Czechia and relied heavily on the ECtHR's case law when interpreting the Constitution and the Charter.[237] It quotes the Strasbourg jurisprudence on a regular basis and in an extensive manner.[238] This trend is not surprising since the catalogue of human rights adopted in Czechia was to a significant degree influenced by the ECHR. In fact, several definitions of human rights in the Czech Charter mirror almost word for word their equivalents in the ECHR.[239]

In general, the case law of the CCC has been very 'ECHR-friendly'.[240] It has been heavily influenced by the Strasbourg Court's jurisprudence in areas such as freedom of speech, the right to privacy[241] and positive obligations under articles 2, 3 and 4 ECHR.[242] It can be argued, that the CCC acts as the ECHR's ally that helps to enforce the ECHR jurisprudence domestically, especially vis-à-vis the ordinary courts and the Parliament.[243]

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[234] See Vyhnánek, *supra* n. 202, at 349; and Jana Ondřejková, Kristina Blažková, and Jan Chmel. 'The Use of Foreign Legal Materials by the Constitutional Court of the Czech Republic'. In JUDICIAL COSMOPOLITANISM THE USE OF FOREIGN LAW IN CONTEMPORARY CONSTITUTIONAL SYSTEMS (Giuseppe Franco Ferrari ed., 2019), at 599 ff.

[235] See Judgment of the CCC of 12 October 1994, Pl. ÚS 4/94.

[236] Judgment of the CCC of 14 July 2004, I. ÚS 185/04.

[237] See, e.g., Michal Bobek and David Kosař. 'The Application of European Union Law and the Law of the European Convention of Human Rights in the Czech Republiv and Slovakia: An Overview'. In NATIONAL JUDGES AND SUPRANATIONAL LAWS. A COMPARATIVE VIEW ON THE NATIONAL TREATMENT OF EU LAW AND THE ECHR (Giuseppe Matinico and Oreste Pollicino, eds., 2010), at 157; Lubomír Majerčík. 'Czech Republic: Strasbourg Case Law Undisputed'. In CRITICISM OF THE EUROPEAN COURT OF HUMAN RIGHTS (Patricia Popelier, Sarah Lambrecht and Koen Lemmens eds., 2016), at 131 ff; and Ladislav vyhnánek, 'A Holistic View of the Czech Constitutional Court Approach to the ECtHR's Case Law' 77 ZAÖRV 715 (2017).

[238] David Kosař et al., DOMESTIC JUDICIAL TREATMENT OF EUROPEAN COURT OF HUMAN RIGHTS CASE LAW: BEYOND COMPLIANCE (2020).

[239] See David Kosař, 'Conflicts between Fundamental Rights in the Jurisprudence of the Czech Constitutional Court'. In CONFLICTS BETWEEN FUNDAMENTAL RIGHTS (Eva Brems ed., 2008), at 349.

[240] For this reason, we could not trace any opposition to the more activist approach shown recently by the ECtHR. Both constitutional courts seem to be 'touchy' only if the ECtHR criticizes *their* practice. See, e.g., the reaction of the CCC to the ECtHR's ruling in *Krčmář and Others v the Czech Republic,* App. No. 35376/97, 3 March 2000, described in Jiří Malenovský, 'Obnova řízení před ústavním soudem v důsledku rozsudku Evropského soudu pro lidská práva'. 140 PRÁVNÍK 1241 (2001), at 1242.

[241] Judgment of the CCC of 15 March 2005, I. ÚS 367/03.

[242] See, e.g., Judgment of the CCC of 2 March 2015, I. ÚS 1565/14.

[243] See David Kosař and Jan Petrov, 'The Architecture of the Strasbourg System of Human Rights: The Crucial Role of the Domestic Level and the Constitutional Courts in Particular'. 77 ZAÖRV 585 (2017).

Due to its 'ECHR-friendly' approach, the CCC also carefully avoided or brushed aside any potential conflict between the Czech constitutional laws and the ECHR. Instead, it tried to read the ECHR into the Czech constitutional order and, if necessary, stretched the human rights provisions in the Czech Charter of Fundamental Rights to their limits. For instance, the CCC sometimes quashed the decisions of the ordinary courts with the use of highly contestable conclusions based on a very expansive reading of the ECHR and the ECtHR's case law. For instance, the CCC[244] literally 'created' the right to monetary relief for non-pecuniary injuries.[245] This is not an uncommon move for a European constitutional court.[246] However, the CCC did not rely on the Czech Charter of Fundamental Rights at all. Instead, it arrived at this conclusion *solely* on the ground of interpretation of article 5 para 5 ECHR[247] and argued that the notion of 'an enforceable right to compensation' (*droit à réparation*) in article 5 para 5 ECHR has an autonomous meaning which entails the right to compensation for both pecuniary and non-pecuniary injury. Unfortunately, the ECtHR has, to our knowledge, never held so.

The CCC has also addressed the relationship between the ECHR and other, non-human rights, international treaties. For instance, when it faced a conflict between the obligations stemming from the ECHR on the one hand and the European Convention on Extradition on the other, it relied on its earlier *Euro-Amendment* judgment[248] and held that the ECHR must prevail as it is a human rights treaty.[249] In sum, the CCC again confirmed its generous 'pro-ECHR stance'. However, the CCC has not yet had to deal with more difficult cases such as conflicts between the ECHR and UN Security Council Resolutions. Under the logic of the CCC reasoning, the ECHR should prevail over *any* 'non-human rights treaty', which is not only a problematic position vis-à-vis article 103 of the UN Charter, but also a more generous reading of the ECHR than the one provided by the ECtHR itself.[250]

b) Democratic Principle and Popular Sovereignty

The principle of popular sovereignty is not explicitly mentioned in the Constitution, but it is still implicitly protected by article 2 para 1 which states that the people are 'the source of all

[244] Judgment of the CCC of 13 July 2006, Pl. ÚS 85/04, available in English at 1-85-04.pdf (usoud.cz) (last accessed on Jan. 11, 2021).
[245] Judgment of the CCC of 13 July 2006, Pl. ÚS 85/04. For a detailed discussion of this judgment see Michal Bobek. 'Ústavní soud: Má srovnávací argumentace přednost před českým zákonodárcem, judikaturou i doktrínou anebo je císař nahý?. 12 SOUDNÍ ROZHLEDY 415 (2006).
[246] See, e.g., the famous *Princess Soraya* case of the German Federal Constitutional Court (34 BVerfGE 269, 1973). Cf. Donald Kommers. THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY (1997), at 124–8.
[247] And with the use of comparative argument 'read into' Art. 5 Para. 5 ECHR.
[248] Judgment of the CCC of June 25, 2002, Pl. ÚS 36/01 *Euro-Amendment*.
[249] Judgment of the CCC of April 15, 2003, Pl. ÚS 752/02. For further details see Eliška Wagnerová. 'The Direct Applicability of Human Rights Treaties'. In THE STATUS OF INTERNATIONAL TREATIES ON HUMAN RIGHTS (Venice Commission, 2006), at 117.
[250] See *Behrami v France*, App. No. 71412/01, and *Saramati v France, Germany and Norway*, App. No. 78166/01, admissibility decisions of the ECtHR (GC) of May 2, 2007.

power in the State'. In other words, in the Czech Republic there is no source of state power other than the people and state power can be exercised only through bodies of the state which are derived from the people either directly or indirectly, and thereby legitimized to exercise the power. The only exception is the direct exercise of state power by the people in accordance with the provisions of Article 2 para 2 of the Constitution, which reads as follows: '[a] Constitutional Law may define when the people exercise state power directly'. The only existing example of this is constitutional law on a referendum on the Czech Republic's accession to the European Union.[251]

This constitutional principle is strongly attached to the principle of democracy as articulated mainly in article 1 para 1 of the Constitution and article 2 para 1of the Charter: '(1) The State is founded on democratic values and must not be bound either by an exclusive ideology or by a particular religion'. The principle of democracy is also mirrored in article 23 of the Charter which sets out the right to resistance and which reads as follows: '[c]itizens have the right to resist anybody who would do away with the democratic order of human rights and fundamental freedoms, established by the Charter, if the work of the constitutional organs and an effective use of legal means are frustrated'.

The principle of consensus is implicitly stated in article 5 of the Constitution, and according to it all participants in political competition must accept basic democratic precepts and reject violence as a means of asserting their interests, otherwise this non-violent, open and pluralistic competition would not be possible at all. This is safeguarded in the Political Parties Act[252] with its mechanism of dissolution of political parties and movements disregarding these basic consented-to principles of democracy, non-violence and respect for the human rights of all.

The principle of majority is stated in article 6 of the Constitution together with the closely connected principle of the protection of minorities: '[p]olitical decisions shall proceed from the will of the majority, expressed by free vote. Majority decisions shall respect the protection of minorities'. Another important aspect of the principle of democracy is the time-limited terms of office of the Government, the President and the Parliament and consequently the regular holding of elections.[253]

The principle of democracy must be respected not only during the law-making process, but also when laws are interpreted. The rule maintaining democracy and that prohibiting the misuse of interpretation are contained in Article 9 para 3 of the Constitution which provides

[251] Constitutional Law No. 515/2002 Coll., on the Referendum on the Accession to the European Union. See also supra Section 3.3.
[252] Law No. 424/1991 Coll., on Political Parties.
[253] Art. 21 Para. 1 of the Charter.

that '[l]egal norms may not be interpreted so as to authorize anyone to remove or jeopardize the democratic foundations of the state'.

The protection of political rights and safeguards of plurality are inseparably linked to the principle of democracy. The principle of plurality is understood to mean that the State is not bound by any concrete ideology or religion,[254] and conflicts of opinions are solved by discussion and voting or elections. The free competition of political forces is set out in article 22 of the Charter and in article 5 of the Constitution.[255] This plurality is represented by a wide scale of mass media, civic associations and especially political and election parties which can challenge each other in free and fair elections in which at least two parties must take part. Additionally, the protection of, *inter alia,* the freedom of expression and information, the freedoms of assembly, association in political parties or equal access to public offices are considered basic building blocks of the democratic principle and often invoked by the CCC.

On the other hand, the Czech constitutional system embraces the concept of 'militant democracy'. [256] This is discernible even from statutory law that allows for the dissolution of political parties[257] and criminalisation of hate speech. Furthermore, both the ordinary courts and the CCC seem to accept the militant democracy approach. Important cases in this regard include the dissolution of the Workers' Party by the Supreme Administrative Court[258] and the CCC's approach to verbal crimes.[259]

c) The Rechtsstaat Principle

The Constitution explicitly embraces the *Rechtsstaat* principle in its very first article.[260] What is more, the essential requirements of that principle are protected by the Eternity Clause.[261] That makes the *Rechtsstaat* principle, along with the democratic principle arguably one of the two most important principles of Czech constitutionalism.

As a result, conceptualisation of this principle is crucial. Before we delve into the CCC's understanding of the *Rechtsstaat* principle and the doctrine, we must add three caveats. First, the Constitution defines neither the principle nor its essential components. This de facto left significant room for the CCC to pad this vague principle with more precise content. Second,

[254] See Art. 2 Para. 1 of the Charter.
[255] 'The political system is based on free and voluntary formation of and free competition between political parties respecting the basic democratic precepts and rejecting violence as a means of asserting their interests'.
[256] Judgment of the Supreme Administrative Court of 17 February 2010, Pst 1/2009-348. For a broader context see Miroslav Mareš. 'Czech Militant Democracy in Action Dissolution of the Workers' Party and the Wider Context of This Act'. 26 EAST EUROPEAN POLITICS AND SOCIETIES: AND CULTURES 33 (2012).
[257] Law No. 424/1991, Paras 12–16a.
[258] Judgment of the Supreme Administrative Court of 17 February 2010, Pst 1/2009-348.
[259] Notably the judgment of the CCC of 28 February 2011, IV. ÚS 2011/10 that explicitly invokes the concept of militant democracy and declares it a constitutional principle.
[260] Art. 1 Para. 1 of the Constitution.
[261] Art. 1 Para. 2 of the Constitution.

the Czech Constitution explicitly refers to the '*Rechtsstaat*' (*právní stát*) and not to the 'rule of law' (*vláda práva*).[262] While these concepts are often used interchangeably, there are significant differences between them. Most importantly, '*Rechtsstaat* rests on some sort of connection of between the legal system and the state, [whereas] the rule of law is a quality of, or theory about, a legal order'.[263] The choice of the wording in the Czech Constitution thus implies a strong connection between the state and the legal system and makes clear that the state (not just the legal norms) must be of a certain quality to qualify as *Rechtsstaat*. It also explains a peculiar understanding of the Czech *Rechtsstaat* principle, which is very broad and includes several procedural and organisational principles of constitutionalism. Finally, the Czech *Rechtsstaat* principle is a reactive and value-laden concept, because it reflects the Czech totalitarian past and perhaps also the constitutional identity of Czechia.[264]

Now we can move to the conceptualisation of the *Rechtsstaat* principle. The CCC early on rejected the purely formal reading of the principle and made clear that the Constitution presupposes a material *Rechtsstaat*. In its understanding of material *Rechtsstaat* the CCC built on the reasoning of its federal predecessor, which spelled out its perception of the material *Rechtsstaat* in the *Lustration I* judgment:[265]

> In contrast to the totalitarian system, which was founded on the basis of the goals of the moment and was never bound by legal principles, much less principles of constitutional law, a democratic state proceeds from quite different values and criteria.
> …
> Each state, or rather those which were compelled over a period of forty years to endure the violation of fundamental rights and basic freedoms by a totalitarian regime, has the right to [en]throne democratic leadership and to apply such legal measures as are apt to avert the risk of subversion or of a possible relapse into totalitarianism, or at least to limit those risks.
> …
> As one of the basic concepts and requirements of a law-based state [*Rechtsstaat*], legal certainty must, therefore, consist [of] certainty with regard to its substantive values. Thus, the contemporary construction of a

[262] On the differences between the principle of the rule of law and the *Rechtstaat* principle see Rainer Grote. 'Rule of law, Rechtsstaat and 'État de droit''. In CONSTITUTIONALISM, UNIVERSALISM, AND DEMOCRACY: A COMPARATIVE ANALYSIS (Christian Starck ed., 1999), at 270; Michael Rosenfeld. 'Rule of Law Versus Rechtsstaat'. In MENSCHENRECHTE UND BÜRGERRECHTE IN EINER VIELGESTALTIGEN WELT (Peter Häberle and Jörg P Müller eds., 2000), at 49; Nicholas W Barber. 'Review: The Rechtsstaat and the Rule of Law'. 53 THE UNIVERSITY OF TORONTO LAW JOURNAL 443 (2003), at 444.

[263] Barber, *supra* n. 262, at 444.

[264] On the Czech constitutional identity see David Kosař and Ladislav Vyhnánek. 'Ústavní identita České republiky'. 157 PRÁVNÍK 854 (2018).

[265] Pl. 03/92 *Lustration I*. This judgment has been widely cited in comparative constitutional law casebooks. For further details see also Zdeněk Kühn. 'České lustrační rozhodnutí – role srovnávacího práva a nedostatky v soudcovské argumentaci'. In POCTA VLADIMÍRU MIKULE K 65. NAROZENINÁM (Oto Novotný ed., 2002), at 361, 369.

> law-based state [*Rechtsstaat*], which has for its starting point a discontinuity with the totalitarian regime as concerns values, may not adopt ... criteria of formal-legal and material-legal continuity which is based on a differing value system, not even under the circumstances that the formal normative continuity of the legal order makes it possible. Respect for continuity with the old value system would not be a guarantee of legal certainty but, on the contrary, by calling into question the values of the new system, legal certainty would be threatened in society and eventually the citizens' faith in the credibility of the democratic system would be shaken.[266]

The CCC accepted this conceptualisation of material *Rechtsstaat* in its first judgment concerning the Act on the Lawlessness of the Communist Regime:

> However, the [pre-World War II] positivist tradition … in its later development many times exposed its weakness. … in Germany the National Socialist domination was accepted as legal, even though it gnawed out the substance and in the end destroyed the basic foundations of the Weimar democracy. After the war, this legalistic conception of political legitimacy made it possible for Klement Gottwald [the first Communist Czechoslovak president] to 'fill old casks with new wine'. Then in 1948 he was able, by the formal observance of constitutional procedures, to 'legitimate' the February Putsch. In the face of injustice, the principle that 'law is law' revealed itself to be powerless.[267]

Since then the CCC has repeatedly invoked the material reading of *Rechtsstaat* and this reading is supported by virtually all scholars.[268]

There is much less agreement regarding the individual components of the *Rechtsstaat* principle. As mentioned above, the concept of *Rechtsstaat* is understood broadly and its components can be divided into five categories: (1) formal *Rechtsstaat* safeguards, (2) procedural *Rechtsstaat* safeguards, (3) organisational *Rechtsstaat* safeguards, (4) rights-oriented *Rechtsstaat* safeguards, and (5) other substantive *Rechtsstaat* safeguards.[269] In what follows we will discuss only the most important ones.

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[266] English translation of the judgement available at: *czechoslovakia_lustration_1992.pdf (csic.es), specifically pages 12 f (last accessed on Jan. 11, 2021).

[267] Judgment of 21 December 1993, Pl. ÚS 19/93, *Lawlessness of the Communist Regime.*

[268] For an overview of the relevant case law and literature, see Maxim Tomoszek. PODSTATNÉ NÁLEŽITOSTI DEMOKRATICKÉHO PRÁVNÍHO STÁTU (2015), at 40–5 and 56–94.

[269] We build on the categorisation provided by Tomoszek (Maxim Tomoszek. PODSTATNÉ NÁLEŽITOSTI DEMOKRATICKÉHO PRÁVNÍHO STÁTU (2015), at 72–80), but we categorize the *Rechtsstaat* principles slightly differently for the international audience.

The formal dimension of the *Rechtsstaat* principle stems from explicit provisions of the Constitution as well as from the general *Rechtsstaat* clauses in articles 1 and 2 of the Constitution and articles 1–4 of the Charter. The formal *Rechtsstaat* includes basically all eight of Fuller's formal-rule-of-law principles,[270] but it goes well beyond that. More specifically, the CCC held that legal rules must be general,[271] publicly promulgated,[272] prospective,[273] sufficiently clear and intelligible,[274] free of inconsistencies,[275] relatively stable,[276] non-arbitrary and thus obeyable,[277] and administered in a way that does not wildly diverge from their obvious or apparent meaning.[278] Of these eight principles, the CCC is particularly vigilant in guarding the prohibition of retroactivity and legal certainty. In addition to these well-established formal rule of law principles, the CCC's conception of *Rechtsstaat* also encompasses a general principle of legality which contains several safeguards: state authority may be asserted only in the cases and within the bounds provided for by law and in the manner prescribed by law;[279] everyone may act in a way that is not prohibited by law, nobody may be compelled to do what is not imposed on them by statutory law, and only statutory law may define what constitutes a crime and the penalties that may be imposed for committing it;[280] and the prohibition of the excessive or superfluous application of otherwise rationally and non-arbitrarily selected instruments of regulation.[281]

In addition, the CCC spelt out several procedural *Rechtsstaat* safeguards that roughly correspond to what Jeremy Waldron refers to as the procedural characteristics of the rule of law.[282] These safeguards develop the guarantees in the Constitution and Charter[283] and include in particular the right to an effective judicial protection of fundamental rights and

[270] Lon L Fuller. THE MORALITY OF LAW (1969), at 33–94.
[271] See, e.g., Judgment of the CCC of 17 March 2009, Pl. ÚS 24/08, *Prague Airport*, and the aforementioned *Melčák* case.
[272] Judgment of the CCC of 3 June 3009, I. ÚS 420/09, Para. 25.
[273] *Melčák* case; and Judgment of the CCC of 12 August 2014, I. ÚS 3849/11, Para. 28.
[274] Judgment of the CCC of 16 June 1997, IV. US 167/97, and Judgment of the CCC of 12 November 2013, Pl. ÚS 22/13, Para. 24.
[275] Judgment of the CCC of 6 February 2007, IV. ÚS 38/06, Part IV, and Judgment of the CCC of 20 May 2014, II. ÚS 2560/13, Para. 28.
[276] Judgment of the CCC of 6 March 2014, II. ÚS 3764/12, Para. 23.
[277] Judgment of the CCC of 19 June 2014, III. ÚS 980/13, Para. 29.
[278] Judgment of the CCC of 6 March 2014, II. ÚS 3764/12, paras 23–24, and Judgment of the CCC of 31 March 2015, Pl. ÚS 1/14, Para. 62.
[279] Judgment of the CCC of 5 November 1996, Pl. ÚS 14/96, Art. 2 Para. 3 of the Constitution and Art. 2 Para. 2 of the Charter.
[280] Judgment of the CCC of 23 October 2008, III. ÚS 487/07, Part IV. See also Arts 39 and 40 Para. 6 of the Charter.
[281] Judgment of the CCC of 1 August 2005, IV. ÚS 31/05.
[282] Jeremy Waldron. 'The rule of law and the importance of procedure'. In NOMOS L: GETTING TO THE RULE OF LAW (James E Fleming ed., 2011), at 3–31.
[283] See in particular Art. 3 Para. 3 of the Charter, Art. 4 of the Constitution, Art. 36 Para. 1 of the Charter, Arts 36 Para. 1 and 37 of the Charter, Art. 81 of the Constitution, Art. 38 Para. 1 of the Charter, Arts 1, 3, 36 Para. 1 and 37 Para. 3 of the Charter.

freedoms,[284] the right to access a court,[285] the right to a lawful judge,[286] the right to a fair trial[287] before an independent[288] court, the presumption of innocence,[289] and reasonable length of the judicial proceedings.[290] Moreover it also includes a principle that compensation for damages may be demanded from the state if such damage is caused by the unlawful decision of a court or a public administrative authority, or as the result of an incorrect official procedure.[291]

As mentioned above, the Czech concept of *Rechtsstaat* requires a certain quality from the State, and thus it also encompasses several safeguards that belong to the framework-of-government part of the Constitution. These organisational *Rechtsstaat* safeguards include the separation of powers,[292] territorial self-government,[293] the democratic nature of the legislative process,[294] an independent[295] judiciary, the democratic accountability of political decision-making and free competition of political parties,[296] the enforceability of rights,[297] and maintaining an effective system of the investigation and prosecution of crime.[298] Some authors argue that the organisational dimension of the *Rechtsstaat* includes even the existence of a specialized 'Kelsenian' Constitutional Court, respect for the international obligations of the Czech Republic and the incorporation of all international treaties ratified by the Parliament into the domestic law with priority application over domestic laws.[299]

The remaining two dimensions of the *Rechtsstaat* principle concern, with a certain degree of simplification,[300] what is in common law often referred to as substantive rule of law. We decided to divide these substantive *Rechtsstaat* safeguards into two categories, substantive *Rechtsstaat* safeguards aimed at protecting fundamental rights (rights-oriented substantive *Rechtsstaat* safeguards) and other substantive *Rechtsstaat* safeguards that reflect moral and specific Czech constitutional values.

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[284] See, e.g., the *Euro-Amendment* judgment of the CCC.
[285] Judgment of the CCC of 26 April 2005, Pl. ÚS 11/04.
[286]Judgment of the CCC of 18 October 2001, III. ÚS 29/01.
[287] Judgment of the CCC of 26 April 2005, Pl. ÚS 11/04, Judgment of the CCC of 21 February 2007, II. ÚS 490/04 and many others.
[288] Judgment of the CCC of 18 June 2002, Pl. ÚS 7/02, or Judgment of the CCC of 29 September 2009, Pl. ÚS 33/09.
[289] Judgment of the CCC of 12 January 2009, II. ÚS 1975/08.
[290] Judgment of the CCC of 22 January 2004, IV. ÚS 475/03.
[291] Judgment of the CCC of 6 December 2011, Pl. ÚS 35/09.
[292] Judgment of the CCC of 15 February 2007, Pl. ÚS 77/06.
[293] Judgment of the CCC of 2 April 2013, Pl. ÚS 6/13, *Klatovy*, para 27. For further details see Section 4.2.e).
[294] Judgment of the CCC of 15 February 2007, Pl. ÚS 77/06. See also Art. 59 Para. 2, Art. 69 Para. 2, Arts 78 and 79, Art. 87, Art. 95 Paras 1, 2, Art. 105, Arts 39–52 of the Constitution.
[295] Judgment of the CCC of 18 June 2002, Pl. ÚS 7/02. See also Arts 87 and 95 Para. 1, Arts 81 and 82 Para. 1 of the Constitution, Art. 36 Para. 1 of the Charter.
[296] Judgment of the CCC of 10 September 2009, Pl. ÚS 27/09, *Melčák*.
[297] Judgment of the CCC of 12 October 2009, IV. ÚS 380/09.
[298] Judgment of the CCC of 28 June 2011, Pl. ÚS 17/10, Para. 62.
[299] See, e.g., Vojtěch Šimíček. 'Komentář k čl. 1'. In ÚSTAVA ČESKÉ REPUBLIKY – KOMENTÁŘ (Lenka Bahýlová et al., 2010), at 28.
[300] Grote, *supra* n. 262; Rosenfeld, *supra* n. 262; Barber, *supra* n. 262, at 444.

Rights-oriented *Rechtsstaat* safeguards include respect of the State towards fundamental rights and freedoms, the protection of individual autonomy, equality and the prohibition of discrimination, the prohibition of arbitrariness, the principle of proportionality. Other substantive *Rechtsstaat* safeguards include value discontinuity with the communist regime, human dignity, liberty, and fairness. These very broad substantive values serve as a potential safety net that the CCC can rely on in addressing apparent injustice that cannot be remedied by a more specific *Rechtsstaat* component.

In sum, the *Rechtsstaat* principle is a crucial principle of Czech constitutionalism. It encompasses not only a broad set of formal, procedural and organisational principles, but also envisages a state based on substantive values such as fundamental rights and fairness. Therefore, it has an undeniable moral dimension.[301] Its breadth has both advantages and drawbacks. On the one hand, it is a flexible concept that can serve as a trump card that the CCC can use if a clear violation of a more specific provision is not apparent. On the other hand, it might be so broad that it loses analytical clarity and separate meaning. If the rule of law encompasses almost everything in the Constitution, then it may well be nothing. Therefore, it would be better if the CCC used it more sparingly in future and prevented the inflation of the uses of this concept in its case law.

d) Separation of Powers

The principle of the separation of powers is a cornerstone of the Czech Constitution. Some scholars even claim that it is the 'jolly joker' of Czech constitutionalism.[302] The principle of horizontal separation of powers stems from article 2 para 1 of the Czech Constitution, which reads as follows: '[a]ll state authority emanates from the people; they exercise it through legislative, executive, and judicial bodies', whereas the principle of vertical separation of powers is enshrined in article 8 of the Czech Constitution, which stipulates that '[t]he right of self-governing territorial units to self-government is guaranteed'.

The key organ that decides on most separation of powers issues is the CCC.[303] It decides on both intra-branch[304] and inter-branch[305] competence conflicts. It conceives its power to decide on the competence disputes[306] broadly so as to cover not only (1) disputes about the competence to issue the decision (classical competence disputes), but also (2) disputes about

[301] See, e.g., Judgment of the CCC of 19 January 2017, I. ÚS 3308/16.
[302] Jan Grinc. 'Rozhodování sporů o rozsah kompetencí jako žolík čl. 87 Ústavy'. 23 JURISPRUDENCE 5 (2014).
[303] For the sake of brevity, I leave aside the potential delegation of competence to decide some separation of powers issues to the SAC (as envisaged by Art. 87 Para. 3 of the Czech Constitution) and peculiar disputes under Law No. 131/2002 Coll., on Deciding Selected Competence Disputes.
[304] See Judgment of the CCC of 20 June 2001, Pl. ÚS 14/01, *Appointment of the Governor and the Vice-Governor of the Czech National Bank*.
[305] See, e.g., Judgment of the CCC of 28 June 2005, Pl. ÚS 24/04, *Elbe Weirs*.
[306] Art. 87 Para. 1(k) of the Czech Constitution.

taking other measures, and (3) the so-called 'joint competence' disputes.[307]

The classical competence conflicts include both positive[308] and negative[309] conflicts about competence to hand down a decision. The CCC also held, building on the German doctrine, that conflicts of competence can be initiated also by the part of the constitutional organ (*Teilorgan*)[310] which significantly broadened the standing in this type of proceedings before the CCC. The disputes about taking other measures vary from territorial disputes between municipalities[311] to negative competence conflicts regarding the provision of first aid.[312] The CCC also decides on vertical separation of powers disputes between the central organs and the territorial self-governing units.[313]

According to the CCC, the principle of separation of powers is part of the concept of the rule of law. This applies both to horizontal separation of powers[314] as well as to vertical.[315] The basic tenets of the rule of law are protected by the Czech Eternity Clause, which reads as follows: '[a]ny changes in the essential requirements for a democratic state governed by the rule of law are impermissible'.[316] As mentioned above,[317] the CCC found this provision justiciable[318] and adopted the doctrine of unconstitutional constitutional amendments.[319] In other words, the Czech Eternity Clause has supra-constitutional status and it thus prevails over 'ordinary constitutional law'.

Several scholars have argued that the principle of horizontal separation of powers as well as basic features of territorial self-government are protected by the Czech Eternity Clause. For instance, Karel Klíma argues that territorial self-government is an 'essential requirement for a democratic state governed by the rule of law',[320] which means that it has supra-constitutional

[307] For further details see Jan Filip, Pavel Holländer, and Vojtěch Šimíček eds. ZÁKON O ÚSTAVNÍM SOUDU: KOMENTÁŘ (2007), at 765 ff; and Grinc, *supra* n. 302.
[308] See, e.g., Judgment of the CCC of 20 June 2001, Pl. ÚS 14/01.
[309] See, e.g., Judgment of the CCC of 27 September 2007, Pl. ÚS 5/04, *Emergency Health Care*.
[310] See, e.g., Judgment of the CCC of 28 July 2009, Pl. ÚS 9/09.
[311] See, e.g., Judgment of the CCC of 11 March 1999, IV. ÚS 361/98, and Judgment of the CCC of 3 June 2008, Pl. ÚS 18/08.
[312] See, e.g., *Emergency Health Care*, *supra* n. 309.
[313] On territorial self-governance see below Section 4.2.e).
[314] See, e.g., Judgment of the CCC of 28 June 2005, Pl. ÚS 24/04, *Elbe Weirs,* and Judgment of the CCC of 17 March 2009, Pl. ÚS 24/08, *Airport Ruzyně.*
[315] See, e.g., Judgment of the CCC of 30 September 2002, IV.ÚS 331/02; Judgment of the CCC of 7 May 2013, III. ÚS 1669/11; Judgment of the CCC of 2 April 2013, Pl. ÚS 6/13, *Klatovy*, Para. 27; Judgment of the CCC of 22 November 2016, III.ÚS 2200/15, Para. 16; and Judgment of the CCC of 20 February 2018, Pl. ÚS 6/17, Para. 82.
[316] Art. 9 Para. 2 of the Czech Constitution.
[317] See *supra* n. 221 and the text that follows.
[318] See, e.g., Judgment of the CCC of 25 June 2002, Pl. ÚS 36/01, *Euro-Amendment*; Judgment of the CCC of 10 September 2009, Pl. ÚS 27/09, *Melčák*.
[319] See, e.g., Roznai, *supra* n. 226.
[320] Klíma, *supra* n. 211, at 20–1.

status. Other constitutional scholars and judges concur.[321]

Importantly, it is generally accepted in the CCC's case law that separation of powers is a legitimate constitutional limitation to fundamental rights.[322] Even if we assume for now that separation of powers is not a part of the Czech Eternity Clause,[323] it is a constitutional value and thus the principles of separation of powers and fundamental rights are legal norms of the same legal force. If there is a conflict between two constitutional values, it requires careful balancing, a task which is vested primarily in the CCC.

e) Unity and Decentralisation

Even though Czechia is a unitary and not a federative state, it has a territorial structure and self-governmental units. The principle of territorial self-government is a cornerstone of the Czech constitutional order. It is explicitly mentioned among the 'fundamental principles' in Chapter One of the Czech Constitution (article 8) and the Constitution then devotes the whole of its Chapter Seven (articles 99–105) to territorial self-government. Territorial self-governing units are sometimes referred to as the 'sixth power' (the self-governing power) of the State.[324] Several scholars have even argued that the principle of territorial self-government is protected by the Czech Eternity Clause.[325]

The key provisions of the Czech Constitution concerning territorial self-government are the following. Article 8 stipulates that '[t]he right of self-governing territorial units to self-government is guaranteed'. Article 100 para 1 provides that '[t]erritorial self-governing units are territorial communities of citizens with the right to self-government'. Finally, article 104 para 3 stipulates that '[r]epresentative bodies [of territorial self-governing units] may, within the limits of their jurisdiction, issue generally binding ordinances'.

The power of self-governing units has increased since 1993, both quantitatively and qualitatively. First, besides the already existing municipal self-government, higher self-governing units (regions) were established by the Constitutional Law Establishing Higher Territorial Self-governing Units,[326] which came into force on January 1 2000. In the Czech

[321] Vojtěch Šimíček. 'Komentář k čl. 9'. In ÚSTAVA ČESKÉ REPUBLIKY—KOMENTÁŘ (Lenka Bahýlová et al., 2010), at 156 ff; Pavel Molek. *Materiální ohnisko jako věčný limit evropské integrace?* (2014), at 138; and Pavel Rychetský et al. ÚSTAVA ČESKÉ REPUBLIKY: ÚSTAVNÍ ZÁKON O BEZPEČNOSTI ČESKÉ REPUBLIKY. KOMENTÁŘ (2015), at 87.

[322] See, e.g., Judgment of the CCC of 2 April 2013, Pl. ÚS 6/13, *Klatovy* (striking down the linked slot machines statutory regulation on the vertical separation of powers grounds); and Decision of the CCC of 13 January 2015, Pl. ÚS 17/14, *Senator Dryml*, Paras 45–51 (which ruled out judicial review of a disciplinary decision of the Parliament on the horizontal separation of powers grounds).

[323] See *supra* n. 216 and the text that follows.

[324] Karel Klíma. 'Územní samospráva jako 'šestá' moc podle Ústavy ČR?' In POCTA PETRU PRŮCHOVI (Stanislav Kadečka ed., 2009), at 103.

[325] Šimíček, *supra* n. 321, 156 ff; Molek, *supra* n. 321); and Rychetský et al., *supra* n. 321, at 87.

[326] Law No. 347/1997 Coll.

territory, 14 higher territorial self-governing units were established. One of them is Prague, which is a higher self-governing unit, as well as a municipality and the capital of the Republic.[327] The Constitutional Law Establishing Higher Territorial Self-governing Units delimits the territory of regions according to the territory of districts[328] and builds on administrative division of the State.[329] However, the newly established 14 self-governing regions differ territorially and organisational from the eight administrative regions in which the Regional National Committees operated until 1990, and which even now are the territorial districts for a number of specialized authorities of the state administration.[330] From the territorial point of view, regions established by the 1997 Constitutional Law closely follow the regions that existed in 1949–1960, and thus generally respect all the regional centres at the medium level.

Furthermore, the scope of self-governing power has been gradually increased, mainly through judicial interpretation of the Constitution. Importantly, entrenchment of territorial self-government in the Czech Constitution was an antidote to the communist doctrine of centralisation of state power and marked a clear discontinuity with the communist regime.[331] The 1993 Czech Constitution clearly opted for the decentralisation of state power and treated territorial self-government as one of the cornerstones of the new democratic regime. By doing so it emphasized the subsidiarity of the state power in the matters of local interest.[332]

Until the creation of the regions and the adoption of the new Municipalities Act,[333] the principle of territorial self-government was unfulfilled and often neglected by the central organs. Given the fact that the first term of regional councils (2000–2004) was the era of learning by trial and error and of 'regional and municipal institution-building', the territorial self-governing units (both the municipalities and the regions) started to be truly assertive and challenge the encroachment of the central authorities upon the constitutional principle of territorial self-government only in 2004–2008. This in turn led to the significant development in the CCC's case law on vertical separation of powers and the scope of municipal authority.

The CCC's early case law was relatively restrictive regarding the autonomy of territorial self-governing units and the scope of municipal authority. However, the CCC gradually expanded the scope of municipal authority in a series of judgments in 2005–2007[334] in which the CCC

[327] Art. 13 of the Constitution and a special Law on the Capital City of Praha No. 131/2000 Coll.
[328] Formerly the basic type of division of the state, recently only some state authorities have been organized on a district basis, e.g. tax offices and labour offices.
[329] Law No. 36/1960 Coll. on Territorial Division of the State.
[330] The most important example is the structure of ordinary courts in accordance with the Law on Courts and Judges No. 6/2002 Coll.
[331] See Judgment of the CCC of 11 December 2007, Pl. ÚS 45/06, *Jirkov,* Para. 24; Pavel Zářecký. 'K některým otázkám ústavního zakotvení územní samosprávy'. 51 SPRÁVNÍ PRÁVO 14 (2008), in particular at 14–6.
[332] See also Judgment of the CCC of 7 May 2013, Pl. ÚS 20/16, Para. 15.
[333] Law n. 128/2000 Coll.
[334] See Judgment of the CCC of 22 March 2005, Pl. ÚS 63/04, *Prostějov*; Judgment of the CCC of 13 September 2006, Pl. ÚS 57/05, *Nový Bor*; Judgment of the CCC of 22 May 2007, Pl. ÚS 30/06, *Ostrov*.

developed the four-step test for review of generally binding ordinances that it has applied ever since.[335] This four-step test consists of the following prongs: (1) whether the municipality had the competence to issue a given generally binding ordinance, (2) whether the municipality, by issuing a given generally binding ordinance, exceeded its material competence stipulated by law (that is whether it acted *ultra vires*), (3) whether the municipality, by issuing a given generally binding ordinance, abused its competence entrusted to it by the statute, and (4) whether a given generally binding ordinance is manifestly unreasonable.[336]

The CCC confirmed and explicitly explained this decisive shift[337] in its case law in its *Jirkov* judgment,[338] where it held, among other things, that (1) the municipal independent (self-governing) competence flows directly from the Constitution and thus municipalities do not require express authorisation by the statute to issue a generally binding ordinance,[339] and that (2) municipalities may issue a generally binding ordinance even in the area already regulated by the statute, if the object and purpose of the given ordinance is different from the object and purpose of a statute.[340] Since then it has become a settled case law.

The CCC later held that territorial self-government units are key elements of the separation of powers, which guarantees greater liberty to individuals,[341] and that '[s]elf-governing municipalities guarantee the principle of subsidiarity [of state power], according to which decision-making and responsibility in public matters should be executed at the lowest level of public authority, which is the nearest one to the citizens'.[342] In defining the scope of the constitutional right to territorial self-government, it is thus 'impossible to proceed solely from the wording of the statute, since the right to self-government also has a material aspect (or its own constitutional content) [and …] the implementing statute cannot empty or in effect eliminate the content of the constitutionally guaranteed right to territorial self-

[335] See Rychetský et al., *supra* n. 321, at 1073 ff (and especially Para. 8 of the commentary on Art .104); Lenka Bahýlová et al. ÚSTAVA ČESKÉ REPUBLIKY—KOMENTÁŘ (2010), at 1427 ff, and in particular 1435 (commentary on Art. 104); Vladimír Sládeček et al. ÚSTAVA ČESKÉ REPUBLIKY. KOMENTÁŘ. (2016), at 1222 ff.

[336] See Judgment of the CCC of 22 March 2005, Pl. ÚS 63/04, *Prostějov*; Judgment of the CCC of 13 September 2006, Pl. ÚS 57/05, *Nový Bor*; Judgment of the CCC of 22 May 2007, Pl. ÚS 30/06, *Ostrov*.

[337] Several commentators have discussed and approved this shift in the CCC's case law. See Pavel Holländer. 'Otazníky ústavnosti obecně závazných vyhlášek'. 16 PRÁVNÍ ROZHLEDY 693 (2008); Tomáš Langášek. 'Obrat v nazírání Ústavního soudu na obecně závazné vyhlášky'. PRÁVNÍ ROZHLEDY 356 (2008); Ivo Pospíšil. 'Nejnovější judikatura Ústavního soudu k obecně závazným vyhláškám'. 18 ČASOPIS PRO PRÁVNÍ VĚDU A PRAXI 51 (2010); Ivo Pospíšil. 'Regulace hazardu jako rukavice hozená před Ústavním soudem: ústavní limity 'kontroly' územních samosprávných celků a jejich dotváření judikaturou Ústavního soudu'. 20 ČASOPIS PRO PRÁVNÍ VĚDU A PRAXI 111 (2012); and Jan Brož. 'Obecně závazné vyhlášky (veřejný pořádek deset let od jirkovského nálezu)'. 26 PRÁVNÍ ROZHLEDY 310 (2018).

[338] Judgment of the CCC of 11 December 2007, Pl. ÚS 45/06, *Jirkov*.

[339] *Ibid.*, Paras 26–7 (referring to the CCC's earlier case law).

[340] *Ibid.*, Para, 34 (referring to the CCC's earlier case law).

[341] Judgment of the CCC of 9 August 2016, Pl. ÚS 20/16, Para. 15.

[342] *Ibid.*

government'.[343] This has two repercussions. First, the scope of territorial self-government 'cannot be dependent just on the legislation, because it could lead to arbitrariness of the legislature and the violation of the principle of territorial self-government itself, which is one of the basic values of a democratic state based on the rule of law'.[344] Second, any limitations to the constitutional principle of territorial self-government must be applied restrictively.[345]

The CCC actually upheld several generally binding ordinances adopted under article 10(a) of the Municipalities Act which regulated matters of public order that were regulated by a statute. More specifically, the CCC upheld generally binding ordinances concerning regulation of lottery terminals and linked slot machines,[346] regulation of the use of pyrotechnics,[347] the regulation of prostitution,[348] the consumption of alcohol in public spaces,[349] and accepted the generally binding ordinance regulating the opening hours of restaurants and bars.[350]

5. Constitutional Identity[351]

In the previous part we aimed to introduce the basic structural substantive features of the Czech constitutional system. The question remains, however, what is the pure essence of the Czech constitutional *Gestalt*, what is its identity and how was it formed. Thus, in this section we are attempting to present the substantive essence of the Czech constitutional system. In order to do that, we will build on the theoretical concept of constitutional identity[352] and try to discern the Czech constitutional identity. Afterwards, we will offer a closer look at the very basic substantive principles that are tied to the Czech constitutional identity and form the core of the Czech constitutional project.

[343] Judgment of the CCC of 20 February 2018, Pl. ÚS 6/17, Para. 82.
[344] Judgment of the CCC of 7 May 2013, III.ÚS 1669/11. See also Judgment of the CCC of 22 November 2016, III.ÚS 2200/15, Paras 16–8.
[345] Judgment of the CCC of 22 November 2016, III.ÚS 2200/15, Para. 16.
[346] See Judgment of the CCC of 14 June 2011, Pl. ÚS 29/10 *Chrastava*; Judgment of the CCC of 7 September 2011, Pl. ÚS 56/10 *Františkovy Lázně*; Judgment of the CCC of 27 September 2011, Pl. ÚS 22/11 *Kladno*; Judgment of the CCC of 2 April 2013, Pl. ÚS 6/13, *Klatovy*.
[347] Judgment of the CCC of 13 September 2006, Pl. ÚS 57/05, *Nový Bor*.
[348] See Judgment of the CCC of 13 March 2007, Pl. ÚS 10/06, *Plzeň*.
[349] See Judgment of the CCC of 7 September 2010, Pl. ÚS 11/09, *Jeseník*.
[350] See Judgment of the CCC of 2 November 2010, Pl. ÚS 28/09, *Břeclav*, Paras 33–41. Note that the CCC eventually struck down this ordinance for another reason.
[351] We published our earlier thoughts on this subject in Kosař and Vyhnánek, *supra* n. 170.
[352] Specifically, we refer to the understanding of identity of Gary Jacobsohn who stresses the identity 'beyond text' and who influenced our attempts to see potential rifts between the 'legal story' and the 'people's story' of identity. Jacobsohn claims that '[a] constitution acquires an identity through experience; this identity exists neither as a discrete object of invention, nor as a heavily encrusted essence embedded in a society's culture, requiring only to be discovered. Rather, identity emerges dialogically and represents a mix of political aspirations and commitments that are expressive of a nation's past, as well as the determination of those within the society who seek in some ways to transcend that past.' See Gary J Jacobsohn. 'The formation of constitutional identities'. In COMPARATIVE CONSTITUTIONAL LAW (Rosalind Dixon and Tom Ginsburg eds., 2011), at 129–30.

The single most important actor in defining the contours of the Czech constitutional identity in the public sphere is the CCC. Even though it has not used the 'constitutional identity' language explicitly, it has built a considerable amount of 'identity fabric' over the last two decades that we can build on. For this reason, we will first discuss the relevant provisions of the Czech Constitution that served as a point of departure for the CCC. Then, we will explain how the CCC interprets the Eternity Clause and what implications this may have for the construction of the Czech constitutional identity. However, we will also show that the legal conception(s) of the Czech constitutional identity may clash with its popular conception(s).

The logical point of departure in the search for constitutional identity is the constitutional text. However, the Czech Constitution does not explicitly mention the concept of constitutional identity. Nevertheless, it contains two provisions that are quite useful for constructing one: (1) the set of basic principles that define the nature of Czech statehood in article 1(1), and (2) the 'Eternity Clause' in article 9(2) which immunizes some of those principles. As von Bogdandy and Schill note, the very fact of deep entrenchment of eternity clauses can be understood as evidence of their importance in the context of national constitutional identity.[353] We will thus first analyse the content of the Eternity Clause and then try to extrapolate from it the concept of Czech constitutional identity.

According to article 1 para 1 , '[t]*he Czech Republic is a sovereign, unitary,* and *democratic* state governed by the *rule of law* [[354]]*,* founded on respect for the *rights and freedoms of men and of citizens*'. article 9 para 2 then further entrenches some of the principles set out in article 1 para 1 . More specifically, the Eternity Clause provides that '[a]ny changes in the essential requirements of a *democratic* state governed by the *rule of law* are impermissible'.[355] Even a quick glance at the text of these provisions reveals that article 1para 1 of the Czech Constitution and the Eternity Clause are interrelated and have two concepts in common, namely the principles of democracy and the rule of law. The other principles mentioned in article 1 para 1 of the Czech Constitution (unitary state, sovereignty and respect for human rights) are not explicitly protected by the Eternity Clause, but that does not necessarily mean that they are not significant for its interpretation.

[353] Armin von Bogdandy and Stephan Schill. 'Overcoming absolute primacy: Respect for national identity under the Lisbon Treaty'. 48 CMLREV 1417 (2011), 1432.

[354] More precisely, neither provision mentions the 'rule of law' in the proper sense. It is based on the notion of 'právní stát', which is the literal translation of the German 'Rechtsstaat'. There are some conceptual differences between 'Rechtsstaat' and 'rule of law', mostly related to the substantive aspects of the respective concepts. See *supra* n. 262.

[355] The Eternity Clause could obviously (as a matter of fact) be replaced or modified by a revolution, i.e. outside the existing constitutional system. As a matter of law (within the existing constitutional system), the Eternity Clause is arguably untouchable by any institution acting within the Constitution (Judgment of the CCC of 10 September 2009, Pl. ÚS 27/09, *Melčák*). In theory, both Orbán's (brand new constitution) and Erdogan's (ad hoc constitutional referendum) scenarios are thus possible, but they would be considered extra-constitutional and it is unclear how the CCC would react to such change if it were to touch the Eternity Clause.

Unlike some other constitutions,[356] the Czech Constitution does not include a more detailed list of values and principles entrenched in the Eternity Clause. Therefore, in order to understand the substantive content and meaning of this clause we must analyse the relevant case law of the CCC as well as the doctrinal efforts to make sense of it.

Before doing that, however, it is important to understand the logic and consequences of inclusion of the aforementioned abstract principles in the very core of the Czech constitutional project. First, these principles are not unique or specific to the Czech Republic as a political community. The concept of sovereignty (notwithstanding the disputes about its content and evolution) has been a definitional sign of a state ever since the Westphalian consensus.[357] Democracy, the rule of law and respect for human rights are considered core principles of western liberal democracies. Even the principle of a unitary state is hardly something that would make the Czech Constitution specific and recognisable.

The Eternity Clause, or at least its abstract textual expression, thus emphasizes not the 'unique features' of the Czech Republic and its aspirations, but rather the values and aspirations it shares with other states, especially with the Western and Central European ones.[358] The preamble to the Czech Constitution bolsters this understanding by referring to the Czech Republic as 'a part of the family of democracies in Europe and around the world'.

Such a concept should not come as a surprise if we consider the origins of the Czech constitutional project. As we have already emphasized above, after the fall of the communist regime and the short intermezzo before the dissolution of Czechoslovakia, the Czech Republic aimed to deal with its past and then 'return to Europe'[359] where it thought it belonged. The constitutional emphasis on the shared values of liberal democracies was a logical choice from both points of view.

As we have suggested above, the more precise content of the Eternity Clause and its relation to Article 1 para 1 of the Constitution were developed in the CCC's case law. In fact, the CCC has been the single most important player in both developing the content of the Eternity Clause and giving it some bite and practical effect.

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[356] See, e.g., Art. 79 Para. 3 of the German Basic Law; and Art. 288 of the Portuguese Constitution.

[357] See, e.g., José E Alvarez. 'State Sovereignty Is Not Withering Away: A Few Lessons for the Future.' In REALIZING UTOPIA: THE FUTURE OF INTERNATIONAL LAW (Antonio Cassese ed., 2012), at 12.

[358] A similar trend is recognisable even in the case law of the Czech Constitutional Court, which seems to be quite open to foreign and supranational inspirations. See also Vyhnánek, *supra* n. 237.

[359] The main Czech political goals of the 1990s were to finish the political transformation (i.e. to establish a liberal democracy), economic transformation (to entrench free market economy) and to join the 'western structures' such as the EU, the Council of Europe and NATO. For the popular reflection of this phenomenon see Pavel Maršálek. 'Evropská integrace, unijní občanství a česká národní identita'. 60 ACTA UNIVERSITATIS CAROLINAE 73 (2014), at 77.

First, the CCC does not limit the extent of the Eternity Clause to the values and principles explicitly mentioned in the text of Article 9 para 2 of the Czech Constitution. Relying on Article 1 para 1 of the Czech Constitution, the Court recognized protection of the fundamental rights[360] and state sovereignty[361] as integral parts of the Eternity Clause and thus expanded its scope.

Furthermore, the CCC had several opportunities to concretize the meaning of the principles protected by the Eternity Clause. It interpreted the rule of law principle as including several more specific components such as the prohibition of the arbitrary overruling of previous case law,[362] the prohibition of retroactivity,[363] and the principle of the generality of law.[364] The democratic principle then includes popular sovereignty and representative democracy[365] as well as some basic principles of electoral law.[366] As regards the protection of fundamental rights, the CCC has even held that 'limiting an already achieved procedural level of protection of fundamental rights and freedoms' is inconsistent with the Eternity Clause.[367]

A similar—but slightly wider—understanding of the Eternity Clause can be found in doctrinal literature. In the commentary on the Constitution, Šimíček included the following principles within the scope of the Eternity Clause: the sovereignty of the people, the entrenchment and protection of fundamental rights, the rule of law, free competition among political parties, majority rule complemented by the protection of minorities, limited terms of office, basic principles of election law, judicial independence, the separation of powers and basic features of self-government.[368]

Some authors have suggested that the Czech Constitution—just like any other constitution—has a certain 'substantive core' that reflects its inner logic and integrity and that the existence and importance of these core principles is not dependent on the Eternity Clause.[369] In the event of a change or a removal of the substantive core, the integrity of the affected constitution would be destroyed and consequently the old constitution would be replaced by a new one with a new substantive core.[370] Molek argues that the Czech Eternity Clause is an attempt to express the constitution's substantive core but that it fulfils this aim (like any other

[360] Judgment of the CCC of 29 May 1997, III. ÚS 31/97.
[361] *Lisbon I* judgment, in particular para 97.
[362] Judgment of the CCC of 11 June 2003, Pl. ÚS 11/02.
[363] Judgment of the CCC of 10 September 2009, Pl. ÚS 27/09, *Melčák*.
[364] *Ibid.*
[365] Judgment of the CCC of 21 December 1993, Pl. ÚS 19/93.
[366] Judgment of the CCC of 6 February 2001, Pl. ÚS 42/2000.
[367] Judgment of the CCC of 25 June 2002, Pl. ÚS 36/01.
[368] Šimíček, *supra* n. 321, at 156 ff.
[369] See Molek, *supra* n. 321.
[370] *Ibid.* The concept of the substantive core is very similar to the understanding of the eternity clause in the Norwegian constitution (the 'spirit' and 'principles' of the Norwegian constitution cannot be amended). See Eivind Smith. 'Old and Protected? On the 'Supra-constitutional' Clause in the Constitution of Norway'. 44 ISRAELI LAW REVIEW 369 (2011).

such attempt) only approximately. He claims that the scope of the Eternity Clause is in some respects narrower than the substantive core. For example the republican form of government forms a part of the Czech Constitution's substantive core even though it is not covered by the Eternity Clause.[371] In other words, substantive core is an ideal compressed essence that each constitution logically possesses, whereas the Eternity Clause is just an explicit prohibition on altering certain basic principles of the Czech Constitution. Despite significant overlaps between the two concepts, they are not identical. Preuss[372] further develops the concept of substantive core and links it to that of constitutional identity. At the same time, he advises against frequent practical use of these concepts as they are not sufficiently defined by any authority and we even lack meaningful criteria for establishing such a definition.[373]

On a general level, these judicial and doctrinal lists of values and principles protected by the Eternity Clause and the substantive core seem to support our previous argument that the Czech constitutional project is centred around the shared values of European liberal democracies. Still, it would be hasty to conclude that the Czech constitutional conception of these principles and values does not include *anything* unique. This is mainly due to the fact that the aforementioned formative historical events (or rather the constitutional engagement with those events) gave the CCC as well as the political bodies opportunities to shed some light on their understanding of the basic constitutional principles, such as the rule of law, equality, and protection of fundamental rights.

Perhaps the most significant judgment in this regard was issued in the *Dreithaler* case.[374] In this judgment, the CCC refused to annul a decree of President Beneš[375] that provided for the confiscation of enemy (mainly German and Hungarian) property after World War II based on the principle of collective guilt. The CCC opined that, given the extraordinary nature of World War II and its aftermath, it was impossible to look at the legal problems arising purely through the lens of a modern liberal democracy and impose the current values on a problem that was half a century old. The judgment's reasoning also clearly reflects a notion of collective responsibility of the German (and to a lesser extent the Hungarian) people that is very problematic from the point of view of the contemporary understanding of individual responsibility and the dignity of a human being. It is not without interest that the aftermath of World War II and the Beneš decrees have played a role in yet another episode of the Czech constitutional identity. The fear—realistic or not—that the EU Charter of Fundamental Rights

[371] Molek, *supra* n. 321, at 91.
[372] Ondřej Preuss. 'Demokratický právní stát tesaný do pískovce'. 24 ČASOPIS PRO PRÁVNÍ VĚDU A PRAXI 365 (2016). Preuss for example claims that the nature of the Czech Republic as a unitary state as opposed to a federation might be understood as a part of the constitution's substantive core despite not being mentioned by Art. 9 Para. Czech Constitution.
[373] *Ibid.*, at 367.
[374] Judgment of the CCC of 8 March 1995, Pl. ÚS 14/94, *Dreithaler.*
[375] Decree No. 108/1945, on the confiscation of enemy property and the National Restoration Fund.

might jeopardize the Beneš decrees was arguably the reason for the Czech insistence on joining Protocol No 30 to the Lisbon Treaty.[376]

We can thus feel an inherent tension in the conception of the Czech constitutional identity. The normative Eternity Clause and substantive core emphasize the shared values of European liberal democracies. On the other hand, the last two examples have shown that the Czech constitutional institutions may be willing to adjust the interpretation and acceptance of these values, especially if they threaten to influence the status quo that was brought about by the formative historical events of the modern Czech constitutional history.

Still, the question remains—in the absence of an authoritative definition—whether we should base our tentative conception of the Czech constitutional identity (1) on the Eternity Clause (as developed by the CCC) or (2) on the less defined yet theoretically founded concept of substantive core or (3) develop the Czech constitutional identity as a completely distinct concept. Each of these three approaches has its own merit. Unamendable provisions surely have something to do with polity's identity, and according to some scholars form 'the genetic code of the constitution'.[377] Thus, the Eternity Clause is a natural starting point for the construction of constitutional identity, if only for practical reasons.[378] At the same time, several Czech scholars have argued persuasively that the Eternity Clause does not contain the entire basic structure of the Czech Constitution, and hence it provides an incomplete picture of the Czech constitutional identity.[379] Faced with these two options, we are inclined to link the Czech constitutional identity to the broader of these conceptions: that is to the conception of 'substantive core'. In our opinion, it paints a more complete picture of the foundational values and principles of the Czech constitutional *Gestalt*.

There is however yet another approach to the Czech constitutional identity that goes beyond the mere normative concept of the Eternity Clause and substantive core and that leads from the 'shared European values of democracy, rule of law and human rights' to something with a more specific 'Czech flavour'. Besides the *Dreithaler* case and the *Lisbon* saga, it is supported by a short dictum in the *Holubec* judgment, in which the CCC opined that 70 years of the Czechoslovak statehood and the subsequent peaceful dissolution of Czechoslovakia are building blocks of the Czech constitutional identity.[380] Interestingly, this approach goes beyond the text and legal values of the Czech Constitution, and incorporates a reflection of the Czech nation's past into the concept of constitutional identity.

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[376] For more information and the importance of this episode for the Czech constitutional identity see Pietro Faraguna. 'Taking Constitutional Identities Away from the Courts'. 41 BROOKLYN JOURNAL OF INTERNATIONAL LAW 492 (2016), at 548 ff.

[377] See Yaniv Roznai. UNCONSTITUTIONAL CONSTITUTIONAL AMENDMENTS. THE LIMITS OF AMENDMENT POWERS (2017), Chapter 1, at 15-39.

[378] As we show in the next part, the CCC intends to protect the Eternity Clause against all possible threats and has equipped it with far-reaching effects.

[379] See *in particular* Preuss, *supra* n. 372, at 367.

[380] Judgment of the CCC of 31 January 2012, Pl. ÚS 5/12, *Holubec.*

From this point of view, it begs the question whether the strictly normative and aspirational approach to the concept of constitutional identity, based almost exclusively on the text of the Czech constitution and further refined by the CCC, is soundly rooted in Czech society and shared by the people. The answer to this question has no direct or immediate normative consequences for the Czech constitution and its identity. It is however crucial for the longevity and stability of the Czech constitutional identity in the long run.

In the ideal scenario, the normative concept of the substantive constitutional core and 'constitutional sentiments' of the Czech people would converge and forge a strong sense of constitutional patriotism[381] and consequently a robust and hopefully long-lasting constitutional identity.[382] However, given the exclusion of the people and even of most of the political institutions from the formation of Czech constitutional identity,[383] there is limited interaction between these two dimensions of constitutional identity. The lack of these dynamic factors may stall the process of development of the Czech constitutional identity shared by the wider public and even increase the gap between the constitutional values and the socio-political reality, which in turn may alienate the legal elites from their people.

As we have already suggested, domestic institutions other than the CCC have remained rather passive, even though there are some notable exceptions. Apart from President Václav Klaus's aforementioned insistence on joining Protocol No 30 to the Lisbon Treaty, the biggest contributions by other institutions to the development of the constitutional identity are probably the petitions of the Senate and Senators in the *Lisbon I* and *Lisbon II* cases. The petitioners in these cases formulated a list of questions concerning the content of the Eternity Clause and its effects, which in turn pushed the CCC to formulate its own position. Yet another example of the political institutions engaging with the formative events of Czech constitutional history and thus attempting to contribute to the formation of the Czech constitutional identity, was the adoption of the so-called 'Lex Beneš'.[384] The legislative intent of this law was not only to acknowledge the accomplishments of Edvard Beneš prior to and during World War II, but also partly to legitimize the controversial choices made in the wake of that war, in particular the expulsion of Sudeten Germans and Hungarians from the then Czechoslovak territory. However, the 'identity-forming' importance of Lex Beneš is reduced by the fact that both the Senate and the President rejected the bill and it was adopted only once the Chamber of Deputies overrode the Senate's and President's vetoes.[385]

[381] For our understanding of constitutional patriotism see n. 124.
[382] See Kosař and Vyhnánek, *supra* n. 264.
[383] And from the formation of the Czech constitution – see supra Section 3.7 of this chapter.
[384] Law No. 292/2004 Coll. The only provision (except that governing its entry into force) of Lex Beneš is section 1 which reads as follows: 'Edvard Beneš has made contributions towards the State'.
[385] As Lex Beneš was an ordinary statute, the Chamber of Deputies could override the Senate's position as well as the presidential veto.

Similarly, legal scholars have, until recently,[386] also devoted little attention to the identity issues and the concepts of the Eternity Clause and the material core of the constitution. Only since the *Melčák* judgment has the academic literature caught up and, recently, several academics have helped to map the existing conceptual framework and developed it further.[387]

Thus, the people and even the political institutions have so far generally been left out of the process of formation of constitutional identity.[388] Even the dissolution of Czechoslovakia itself was prepared in a non-transparent manner by the executive leaders without a referendum or any substantial involvement of the people whose country was being prepared for burial. The ever strengthening voices that support the traditional understanding of state sovereignty[389] or the calls for strengthening the role of the 'nation' in the Czech Constitution[390] might soon be the driving force of a process that 'takes the constitution away from courts' and reshapes the understanding of the Czech constitutional identity. Even though constitutional scholars view these recent proposals with suspicion, they struck a chord with many people and exposed significant tensions between the elites and the rest of society. These tensions have been present since the very beginning of the independence of the Czech Republic,[391] but they were, to a large extent, hidden behind the post-Velvet euphoria, joining the European Union and 'catching up' with the West.[392] Only the financial and migration crises exposed them fully.

This brings us back to the importance of popular feelings and their reflection of the formative events of Czech history. Since the people have been excluded from the formation of the Czech normative aspects of constitutional identity and there has been no discussion on the extent

[386] The most important exception is perhaps an article by Pavel Holländer, Justice of the CCC in 1993–2003, the Vice-President of the CCC in 2003–2013 and a judge-rapporteur in the *Melčák* case concerning the constitutional core and its effects. See Holländer, *supra* n. 93.

[387] See, e.g., Molek, *supra* n. 321; and Preuss, *supra* n. 372.

[388] See also *supra* part B.2.

[389] A typical proponent of such view is Václav Pavlíček, a Professor of Constitutional Law at the Charles University: see Václav Pavlíček. 'Kdo je v České republice ústavodárcem a problém suverenity'. In NA KŘIŽOVATKÁCH PRÁVA: POCTA JANU MUSILOVI K SEDMDESÁTÝM NAROZENINÁM (Marie Vanduchová and Jaromír Hořák eds., 2011), at 21–38; and, more recently, Jan Kovařík. 'Ústavní právník k migrační krizi: Stát rozhoduje, komu umožní vstup'. NOVINKY.CZ (Jul. 11, 2016) https://www.novinky.cz/domaci/408830-ustavni-pravnik-k-migracni-krizi-stat-rozhoduje-komu-umozni-vstup.html (last accessed Jan. 4, 2021).

[390] Such an idea was proposed by Aleš Gerloch, the former Dean and Head of the Constitutional Law Department at the Charles University: see Jindřich Ginter. 'Ústavní právník Gerloch chce vrátit do ústavy národ'. NOVINKY.CZ (Nov. 14 2016), https://www.novinky.cz/domaci/420565-ustavni-pravnik-gerloch-chce-vratit-do-ustavy-narod.html (last accessed 4 January 2021). It is important in this regard that the Czech constitution, unlike the Slovak one, has consciously opted for the 'citizen-based' rather than 'ethnic/nation-based' approach to the people. See also Marušiak, *supra* n. 3.

[391] Note that the Czech people were not given an opportunity to express their opinion on the dissolution of Czechoslovakia in a referendum, played no role in the drafting of the Czech Constitution, and many of them had a limited understanding of the nature of the capitalist regime they ended up in. A recently published oral history of the Velvet Revolution is telling in this respect: see Miroslav Vanek and Pavel Mücke. VELVET REVOLUTIONS: AN ORAL HISTORY OF CZECH SOCIETY (2016).

[392] However, 'catching up' is not a natural development; see, e.g., Jan Komárek. 'The Struggle for Legal Reform after Communism: Zdeněk Kühn, The Judiciary in Central and Eastern Europe: Mechanical Jurisprudence in Transformation? (Martinus Nijhoff, 2011)'. 63 AJCL 285 (2015).

to which this elitist view of constitutional identity reflects the public's view of constitutional identity, social acceptance of the main constitutional values and principles—and consequently of the normative construction of constitutional identity—is uncertain.

We cannot delve into all the details of the Czech formative historical and social events that still influence the popular conscience. However, the basic overview includes the Hussite movement, the following Germanisation and Catholicization politics as well as suppression of the autonomy of Czech lands under the Austrian Empire (1620–1918), the creation of an independent Czechoslovakia in 1918, the Great Depression in the late 1920s and early 1930s, the Munich Treaty of 1938 and the subsequent annexation of Czech lands by the Third Reich in 1939, the 1946 semi-free parliamentary elections and the subsequent communist coup d'état in 1948, the Prague Spring of 1968, the Velvet Revolution of 1989 and the dissolution of Czechoslovakia in 1993.

Even though these historical milestones as such do not form part of the constitutional identity,[393] they translated into specific constitutional narratives that cannot easily be discerned from the constitutional text. For instance, the Great Depression and communist rule resulted in a strong emphasis on eradicating socio-economic inequalities, but significantly less so on socio-cultural inequalities.[394] Even though this has been translated 'only' into the protection of social and economic rights in the Czech Charter of Fundamental Rights and Freedoms and not into the Eternity Clause (unlike in Germany), the principle of the welfare state is arguably one of the key components of Czech society's understanding of what the basic functions of the constitution and the state are. Yet another example concerns the evaluation of the "general humanist" heritage of Tomáš Garrigue Masaryk (and perhaps dating even back to the Hussite movement and its interpretations)[395] and revolves around the question: "What is the purpose of the Czech Constitution". Is its purpose to protect the Czech nation specifically? Or is the "Czech question" simply a question of humanity and morality, as Masaryk claimed? These questions are not rhetorical and do not raise purely abstract debates. Solutions of practical constitutional dilemmas[396] depend on the answers to these questions. Quite interestingly, this identity question has been even manifested by Václav Havel who was the figurehead of an informal post-Velvet movement that had its roots in certain parts of the dissent during the communist era. This pro-Havel humanist movement was eventually labelled by its opponents and detractors as the 'truth-and-lovers'. This label is a clear reference to Havel's famous quotation, 'Truth and love shall prevail over lies and hatred'.[397] An emphasis

[393] But cf Václav Pavlíček who claims that the guarantees of Czech statehood must be found in the historical context and experiences Czech society has lived through (see Václav Pavlíček. O ČESKÉ STÁTNOSTI: ÚVAHY A POLEMIKY, ČÁST 3., DEMOKRATICKÝ A LAICKÝ STÁT [2009]).

[394] See Barbara Havelková. 'Resistance to Anti-Discrimination Law in Central and Eastern Europe—a Post-Communist Legacy?'. 17 GLJ 627 (2016).

[395] See *supra* part B.

[396] These dilemmas include various topics such as sovereignty and independence vs. international co-operation and the EU; refugees' rights; but also generally the emphasis on the liberal democratic values.

[397] This quotation itself is a wordplay on 'The truth prevails' from the Czech Presidential Flag.

on universal values, such as human rights and universal morality (clearly building on Masaryk's legacy), was typical for this stream of Czech politics. Zeman's and Klaus's contrasting approach has been more pragmatic, nation-state and state-interest oriented. In other words, these three men significantly contributed to the emergence of two distinct camps in emerging Czech politics. Despite Havel's death, these camps are clearly present even today and shape some of the most important cleavages in Czech constitutional politics. Their conflicting legacies are still shaping the search for Czech constitutional identity.

These examples show that the Czech popular approach to constitutional identity may have a different pedigree from the normative conception developed by the CCC and based on the constitutional text. However, the main point is that the lack of any discourse between proponents of legal and popular constitutional identity deprives this concept of the dynamic aspect that could reduce the gap between these conceptions and forge a widely shared conception of constitutional identity that stands on firm ground. This neglect of the popular input is in fact a typical trait of Czech constitutionalism. Legal constitutionalism has been prioritized over political constitutionalism,[398] which undermined popular constitutionalism and severely limited participatory elements in democratic government.[399] As a result, Czechia does not have a developed understanding of its constitutional identity and its constitution does not seem to be as important to its self-understanding as those in Germany or France.[400]

Therefore, the main task for the elites in the coming years is to initiate the discussion about the Czech constitutional identity and to find common ground, not necessarily in the lowest common denominator, between the legalistic approaches and the popular constitutional narratives. This debate should ideally in the long run develop into the sense of political belonging and constitutional patriotism that would complement the ethnic and religious (in the Czech context largely atheist) identities of the Czech people. Unfortunately, Czech public intellectuals have so far failed to even start reconciling these two positions and forging them into the constitutional identity that would find robust support among Czech citizens.[401] This is a pity since constitutional identity is a double-edged sword. If grasped properly, it is an opportunity to build a new foundation of Czech statehood and glue the polarized segments of Czech society together. However, constitutional identity can also be abused, as we can see in Viktor Orbán's disingenuous attempts at nurturing national constitutional identity as a counter-concept to European constitutional identity.[402]

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[398] The best analysis of the differences between legal and political constitutionalism can be found in Bellamy, *supra* n. 166.

[399] See Blokker, *supra* n. 167.

[400] For a succinct study of the German conception of *Verfassungsidentität* and its French equivalent of *identité constitutionnelle de la France* see Jan-Herman Reestman. 'The Franco-German Constitutional Divide. Reflections on National and Constitutional Identity'. 5 EUCONST 374 (2009).

[401] See Kosař and Vyhnánek, *supra* n. 264.

[402] See Renáta Uitz. 'National Constitutional Identity in the European Constitutional Project: A Recipe for Exposing Cover Ups and Masquerades'. VERFASSUNGSBLOG (Nov. 11, 2016), http://verfassungsblog.de/national-

6. Conclusion

Throughout this chapter we have shown that the Czech constitutional system is still in relatively good shape. However, it is also very fragile and susceptible to democratic backsliding.[403] In fact, Czechia may well have got closer to its clinical death in the 2017 parliamentary elections. Had the three established political parties, which barely passed the 5 % hurdle, finished beneath the electoral threshold, Czechia could have followed Poland and Hungary and might have celebrated another dark year with the number '8' in 2018.[404] Fortunately, that did not happen.

However, the sources of discontent in Czech society have not disappeared. Intensifying internal social conflicts (such as growing income disparity, the debt-trap of one tenth of Czech citizens which indirectly affects a quarter of society and increasing cultural differences between cosmopolitan urban population and conservative majority in smaller cities and villages), animosity towards foreigners caused by the migration crisis, and growing disagreement with the overly fast liberalisation of values imposed by the European Union and the Council of Europe, still present a danger for the current Czech constitutional *Gestalt*. Several recent events such as the alleged attempts to influence the outcome of judicial proceedings by politicians[405] already show that this danger is real.

In other words, Czechia has not yet reached the safe zone. The successful development of the Czech constitutional *Gestalt* is thus dependent on many endogenous and exogenous factors. But, in our opinion, by far the most important challenge is the debt-trap that paralyses a significant segment of Czech society. These people see no bright future. And if they do not have a future, they do not care about taking the right decisions. These have-nots may simply want to punish the haves and vote for an authoritarian leader who will go after the liberal and allegedly 'rotten' elite.

However, at the moment of writing this chapter, Czechia seems to be more resistant to an illiberal turn than its Visegrad neighbours. But the reasons for this are more sociological than legal. In contrast to some other Central European countries, Czechia has not witnessed significant depopulation.[406] In fact, the elites stay in the Czech lands and contribute to Czech

constitutional-identity-in-the-european-constitutional-project-a-recipe-for-exposing-cover-ups-and-masquerades/ (last accessed on Jan. 4, 2021).

[403] See Section 3.8.

[404] To be sure, the Senate, a stronghold of traditional parties, could have blocked constitutional amendments, but we know from Poland that strong majorities in the lower chamber can, with the help of President, adopt major policy changes even without changing the big-C constitution.

[405] See Section 3.8.

[406] Ivan Krastev and Stephen Holmes. 'How liberalism became 'the god that failed' in eastern Europe'. THE GUARDIAN (Oct. 24, 2019), https://www.theguardian.com/world/2019/oct/24/western-liberalism-failed-post-communist-eastern-europe?CMP=Share_iOSApp_Other&fbclid=IwAR2qQzavjnBy-UxjNys2UBVEr9lg271CQNR4PEZy2HdjifkPOYklKfhsnjU/ (last accessed on Jan. 4, 2021).

public life rather than fleeing to the United Kingdom or Germany. Hence, Czechia is not on the verge of democratic collapse. Yet this state cannot be taken for granted. Only the future will tell us whether liberalism became 'the god that failed'[407] in Czechia as well.

[407] *Ibid.*