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Working Paper Series

2021.02

THE JUDICIAL BRANCH

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Faculty of Law

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JUSTIN Working Paper Series (formerly MUNI Law Working Paper Series)
David Kosař & Katarína Šipulová, Co-Editors in Chief
ISSN 2336-4947 (print), 2336-4785 (online)
Copy Editor: Adam Blisa

2021

MUNI

Masarykova univerzita, Právnická fakulta
Veveří 70, Brno 611 70
Česká republika

The final version of this chapter will be published in Kosař, David and Vyhnánek, Ladislav. *The Constitution of Czechia: A Contextual Analysis*. Oxford: Hart Publishing, 2021.

Abstract

This chapter provides a description of the Czech judicial branch, introducing both the institutional setting and the key players within Czech judicial politics as well as their historical background. After setting the domestic scene, the chapter provides an overview of the Czech courts' relationship with the supra- and international courts and discusses the judiciary's politicization.

Keywords

courts, judicial branch, Czech judiciary, Czech courts, politicisation, judicialisation

Suggested citation:
Kosař, David, Vyhnánek, Ladislav, 'The Judicial Branch' (2021), MUNI Law Working Paper No. 2021.02, available at: http://workingpapers.law.muni.cz/dokumenty/54957.

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CHAPTER 7: THE JUDICIAL BRANCH[1]

David Kosař & Ladislav Vyhnánek[2]

The European Network of Councils for the Judiciary (hereinafter "ENCJ") launched its ambitious project to develop indicators for measuring the independence and accountability of the European judicial system in 2013. It published its first report in 2014 and soon initiated its survey among judges to study perceptions of judicial independence. Then it fine-tuned the performance indicators of independence and accountability, and managed to received responses from 11,712 judges across Europe in its 2016-2017 edition of the survey. During those years the ENCJ worked hard to improve its understanding of judicial independence and accountability and, in doing so, greatly advanced our knowledge of European judicial systems.

In order to understand judicial power in the Czech Republic it is necessary to know where it comes from, where it is now and where it is heading. Most importantly, there has been significant path-dependence within the Czech judicial system. The following formative events have shaped the Czech judiciary.

First, before Czechoslovakia's independence in 1918 the Czech lands had been part of the Habsburg Empire for almost three centuries. After World War I, the Austro-Hungarian monarchy collapsed and Czechs and Slovaks together formed an independent state, Czechoslovakia. That means that Czechs inherited the Austrian court system (and Slovaks the Hungarian one). The Czechs decided to retain the Austrian system of court administration, with the central role played by the Ministry of Justice, and created just two new apex courts, the Supreme Court and the Supreme Administrative Court. This model has prevailed, with

[1] The research leading to this chapter has received funding from the European Research Council (ERC) under the European Union's Horizon 2020 research and innovation programme (grant no. 678375-JUDI-ARCH-ERC-2015-STG).

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few changes, until today.

Secondly, Czechs consider inter-war Czechoslovakia to have been a 'golden era', and thus after the division of Czechoslovakia they have tended to resort to the inter-war judicial structures.[3] This explains why Czechia revived the Supreme Administrative Court (while Slovakia did not), re-established the third tier of courts – the so-called 'high courts' (while Slovakia did not), and vested significant appointment powers regarding ordinary judges, court presidents as well as justices of the Constitutional Court in the Czech President. The shadow of the inter-war era may also explain why Czechia opted for a stronger Constitutional Court than Slovakia and vested in it almost as many powers as the *Bundesverfassungsgerichtshof*.

Thirdly, the Communist Party of Czechoslovakia abused virtually all judicial accountability mechanisms during its reign (1948–1989). It abolished the inter-war Constitutional Court, the Supreme Administrative Court and the third tier of high courts; created the Special Court to settle the score with its political opponents and put 'show trials' under firm control; stripped ordinary courts of their jurisdiction over commercial cases and transferred those cases to the separate system of arbitrage courts; dismissed the sitting court presidents and replaced them with its own protégés; and packed the ordinary courts with 'its' lay judges. In order to maintain control over the judicial branch, the Communists subordinated the judiciary to the General Prosecutor, kept sitting judges on a short leash by forcing them to stand for retention election every four years, created an atmosphere of fear by sending 'recalcitrant' judges to jail to serve long prison sentences, and threatened others with relocation to remote areas and denial of promotion. This abuse not only created the impetus for many constitutional rules in the wake of the Velvet Revolution (such as unlimited term of judicial office, prohibition of the relocation of judges without their consent, prohibition of impeachment and dismissal of a judge only upon a decision of the disciplinary court, the complete separation of judges and prosecutors, and the prohibition of special courts), but also – with a certain simplification – explains the almost paranoid feelings with regard to the executive power among judges. Moreover, the memory of how the Communists rigged the courts also explains the Czech Constitutional Court's active stance on judicial reform.

Fourthly, there has been deep distrust between the political branches and the judiciary, which has hampered any judicial reform since the dissolution of Czechoslovakia. It is no coincidence that Czechia is the only post-communist country in the CEE which has not established a high council of the judiciary and instead retained the 'old-fashioned' model of court administration with a central role for the Ministry of Justice. The Czech Parliament firmly rejected the constitutional bill which was supposed to introduce the judicial council model of court administration at its the first reading in 2000 and no one has tried again since. At the same time the Czech Constitutional Court struck down several judicial reforms that would be considered constitutional in many (even neighbouring) European countries, such as the compulsory education of judges, the temporary assignment of judges to the Ministry of Justice and court presidents serving two consecutive terms of office.

All of those factors resulted in a fragile balance within the Czech judicial system. Regarding the ordinary courts, Czechia entered a new era of bargaining between court presidents and

[3] See Chapter 1, Section D.

the Ministry of Justice in the shadow of the law.[4] As regards the Constitutional Court, a lot hinges on the personality of the President. While the Senate has rejected several candidates for the Constitutional Court, it is the President who primarily shapes the Court's composition.

A. Setting the Scene: Key Players within Czech Judicial Politics

In order to understand Czech judicial politics it is necessary to identify its de facto key players. As will be shown, it is not enough to look at the Constitution and the statutory law, as some of those players are rather informal bodies. Moreover, even with regard to formal organs written law does not tell us much about their real powers and mutual relations.

In a nutshell, following the fall of the Austro-Hungarian Empire the Czechoslovak model of court administration always rested on two pillars – the Ministry of Justice and the court presidents.[5] These two pillars did not change after the division of Czechoslovakia, since Czechia has not established a nationwide judicial council.[6] In addition to the Ministry of Justice and the court presidents six more actors play parts in Czech judicial politics – the Czech President, the Government, the Parliament, the Constitutional Court, the judicial boards and the Judicial Union. This section will briefly sketch the roles of these eight players.

Czech court presidents have accumulated significant powers over individual judges. They have the best overview of what is going on within the judiciary, may initiate disciplinary motions against individual judges, have a major say in the promotion of judges, and have gradually become gatekeepers to the judiciary as they also hand-pick new judges. Court presidents play an intriguing dual role within the Czech judiciary – they act as both managers vested with the abovementioned administrative tasks and judges who decide cases like any other judge. Court presidents can thus exploit this 'functional schizophrenia' and portray any action against them by the executive as an attack on their judicial function and not just on their administrative role.[7]

The Ministry of Justice is the second key player. It has historically played the most important role in court administration and in holding judges to account. The inter-war Czechoslovak judiciary, based on the Austrian bureaucratic model, was strictly hierarchical and the Minister of Justice sat at the top of this hierarchy. During the communist era the Ministry became subservient to the General Prosecutor and the Communist Party. However, after the Velvet Revolution Czechia soon returned to the inter-war model and vested significant powers in the Ministry. The Minister of Justice formally plays a crucial role in selecting new judges, but due to their high turnover and information asymmetry most ministers outsourced the actual selection of new judges to court presidents. Similarly, the Minister of Justice de jure decides on many judicial career issues (such as promotion), but court presidents have de facto taken control of these mechanisms as well.[8]

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[4] See Kosař, 'Politics of Judicial Independence and Judicial Accountability in Czechia'.

[5] See Michal Bobek, 'The Administration of Courts in the Czech Republic – In Search of a Constitutional Balance', *European Public Law* 16, no. 2 (2010): 251–70, 252–4.

[6] For an explanation of why it is so see David Kosař, *Perils of Judicial Self-Government* (New York: Cambridge University Press, 2016), 182–5.

[7] Ibid.

[8] See Kosař, 'Politics of Judicial Independence'.

The President of the Czech Republic also has his say in Czech judicial politics as he de jure wields wide powers as regards the judiciary. According to the Czech Constitution, he appoints all judges of the ordinary courts, presidents and vice-presidents of the Supreme Court and Supreme Administrative Court and, upon approval by the Senate, all judges of the Constitutional Court. Thus, he de jure exercises a significant influence over both the ordinary courts and the Constitutional Court.

In contrast to the Minister of Justice and the President, the Czech Government has very few powers regarding the judiciary. It has just one real power, and that is to approve the list of candidates for judicial office compiled by the Minister of Justice before that list is submitted to the President who formally appoints all judges in the Czech Republic. In practice, the Government has only rarely interfered with the Minister's list. The Czech Parliament has even fewer powers over the careers of ordinary judges as it does not play any role in their selection, promotion or disciplining.

The Czech Constitutional Court, based upon the German centralised model of constitutional adjudication, is another important player. The fragmented political scene in Czechia makes the Constitutional Court even stronger. Judicial boards are 'self-governing' bodies as they consist of judges of a given court, but they have only advisory powers and court presidents are not bound by their advice. In sum, the powers of judicial boards are narrow and limited to a particular court. These boards thus should not be confused with a country-wide judicial council[9] that exists in virtually all Central and Eastern European countries.[10]

Finally, the Judicial Union is a professional association of judges which represents approximately one third of Czech judges, most of whom come from lower courts. It has been particularly vocal in promoting the judicial council model of court administration and its members have taken a leading role in challenging judicial reforms before the Constitutional Court.

These eight institutional players interact in many ways. Sometimes they cooperate, sometimes they fight each other. Their powers are not static. Their strength has been tested in many political battles and influenced by judgments of the Constitutional Court as well as by statutory amendments.

B. Who Are the Czech Judges?

The judiciary is a 'they', not an 'it'.[11] In order to understand the Czech judicial reforms, conflicts between the Supreme Court and the Constitutional Court, the distrust between politicians and judges, and Czech judicial politics in general it is necessary to know who Czech judges are. To answer this question, we need to go back to the turbulent era after the Velvet Revolution.

[9] Adam Blisa, Tereza Papoušková and Marína Urbániková, 'Judicial Self-Government in Czechia: Europe's Black Sheep?' *German Law Journal* 19, no. 7 (2018): 1951–76.

[10] See David Kosař, 'Beyond Judicial Councils: Forms, Rationales and Impact of Judicial Self Governance in Europe', *German Law Journal* 19, no. 7 (2018): 1567–1612.

[11] See Adrian Vermeule, 'The Judiciary Is a They, Not an It: Interpretive Theory and the Fallacy of Division', *Journal of Contemporary. Legal Issues* 14, no. 2 (2004–2005): 549–84.

Soon after the Velvet Revolution, the Czechoslovak political leaders created the Federal Constitutional Court, which was supposed to serve as a guardian of the new democratic order. After the dissolution of Czechoslovakia, the Czech Constitutional Court, with even greater powers than its federal predecessor,[12] fulfilled the same role.

With the ordinary judiciary Czech post-communist political leaders faced a dilemma about whether or not to purge it. Despite the severe shortage of lawyers untainted by cooperation with the previous regime, they eventually implemented almost every known purging mechanism leading to judicial turnover. These measures ranged from lustration and retention elections to disciplinary proceedings for violating judicial duty and the criminal prosecution of judges implicated in judicial murders in the 1950s. However, these mechanisms proved to be rather ineffective, due to a lack of evidence (criminal prosecution), rigid protectionist interpretation by the Supreme Court of the violation of the judicial duty (transitional disciplinary motions), a shortage of judges (retention elections), or because they came into play only after the affected judges had left the judiciary (lustration). In sum, purges within the Czech judiciary after the Velvet Revolution were minimal.

As a result, Czechia, like many other transitional countries in Central and Eastern Europe, has witnessed the phenomenon called a 'sandwich scenario'.[13] After the Velvet Revolution it established a specialised constitutional court and filled it with former dissidents, emigrants and lawyers who had not collaborated with the Communist regime. This brand new court then acted as an agent of change and a 'downstream consolidator of democracy'.[14] In contrast to the dissident-packed Constitutional Court, the ordinary judiciary faced only limited purges. Judges who were active during the Communist era thus not only remained on the bench, but also held positions in the higher echelons of the judiciary due to their seniority.

More specifically, in 2018 the presidents of the Supreme Court and Supreme Administrative Court and of the High Court in Prague were still former members of or candidates for the Communist Party. The numbers of Communist-era judges at top courts are also striking. In 2018 the updated list published by the Ministry showed that 13.5 per cent of all active members of the judiciary had joined the Communist Party prior to 1989. [15] Most of the judges with acommunist past were on the benches of the Supreme Court (37 per cent), the High Court in Olomouc (34 per cent) and the Regional Court in Prague (27 per cent).[16] In contrast, the percentage of ex-communists among judges of district courts has been relatively low. In 2018 most district courts had fewer than 15 per cent of judges with a communist partisan. Such relatively high number of the former Communist Party members among judges results from the design of Czech transitional justice mechanisms. While all post-Velvet Revolution judges had to undergo lustration, mere membership of the

[12] See Kosař and Vyhnánek, 'The Constitutional Court of Czechia'.

[13] Kosař, *Perils of Judicial Self-Government*, 107.

[14] See Tom Ginsburg, 'Courts and New Democracies: Recent Works', *Law & Social Inquiry* 37, no. 3 (2012): 720–42, 729–35.

[15] Ministry of Justice, list of judges – former members of the Communist Party of Czechoslovakia, first published on 7 January 2011, updated on 17 November 20108. Available at: https://www.justice.cz/web/msp/clenstvi-v-ksc1.

[16] Ibid., and iRozhlas, 'Každý sedmý současný soudce byl před rokem 1989 členem KSČ', *iRozhlas*, 17 November 2018, https://www.irozhlas.cz/zpravy-domov/soudci-clenstvi-v-ksc_1811170600_pek.

Communist Party of Czechoslovakia has not been an obstacle to holding judicial office according to the Large Lustration Law.[17]

Slowly but surely new judges who graduated from post-communist law schools, some of whom had also studied law abroad, started to fill the lower echelons of the judiciary. This means that judges appointed after the fall of communism sat in the lower courts and in the constitutional court, whereas judges who were appointed in the communist era occupied the seats at appellate courts and at the Supreme Court. In other words, communist old timers were 'sandwiched' by the new blood, especially in the 1990s and 2000s.

It is not difficult to guess what often happened in this configuration. First, alliances between natural partners emerged. Progressive decisions of lower courts were often reversed by the appellate courts and decisions of the appellate courts were often affirmed by the Supreme Court, but the Constitutional Court often stepped in and sided with the lower courts. Secondly, it explains a conflict, usually called the war on courts, between the Constitutional Court and the Supreme Court.[18] Thirdly, the sandwich scenario also explains why Czech politicians have been unwilling to accept a strong judicial self-governance and create a judicial council. They simply did not want to give significant powers to the unreformed judiciary from the communist era.

The sandwich was eroded only in the late 2010s and the early 2020s. As many communist-era judges retired, post-communist judges started to penetrate the higher echelons of the Czech judiciary as well as the key positions of court presidents. At the same time, the recruitment process was also modified. In contrast to the 1990s and 2000s, Czechia no longer faces a shortage of judges and only a few vacancies emerge each year. The selection of new judges became more competitive and transparent, which in turn increased the importance of merit as well as the quality of new judges. These concurrent trends have steadily affected the composition of the Czech judiciary.

C. The Constitutional Court

The Constitutional Court was established in 1993 after the short life of the Constitutional Court of the Czech and Slovak Federal Republic (hereinafter the 'Federal Court') had come to an end due to the dissolution of Czechoslovakia. The Constitutional Court began work in July 1993 and delivered its first decision in December 1993.

The Constitutional Court is not part of the system of ordinary courts. It is based upon the centralised model of constitutional review, and its sole task[19] is the review of constitutionality (as opposed to the review of legality exercised by ordinary courts). It is seated in Brno, a city 200 km from Prague, which ensures a healthy 'geographic separation of powers'.

[17] On transitional justice mechanisms, see Chapter 1, Section E.

[18] See below.

[19] Apart from specific procedures such as separation of powers issues, election disputes, impeachment of the President etc. See generally Tom Ginsburg and Zachary Elkins, 'Ancillary Powers of Constitutional Courts', *Texas Law Review* 87, (2008–2009): 1431–61.

The Court is composed of 15 Justices, who are appointed by the President upon the approval of the Senate. The length of their term of office is ten years and is renewable. The combination of these two features, the 'American model' of selection of Justices coupled with the renewable term, is unique in Europe. As regards procedure, the Constitutional Court acts either in plenary session (*Plénum*) or in four panels, each consisting of three Associate Justices. Its jurisdiction is broad. It is generally assumed that when drafting the provisions concerning the Constitutional Court in 1992 the Czech constitution-makers were also significantly inspired by the German Basic Law and constitutional system. Thus, it is possible, with a certain degree of simplification, to state that the jurisdiction of the Constitutional Court mirrors that of the German Federal Constitutional Court.

For the purposes of this book it is sufficient to mention the three most important spheres of its jurisdiction: (1) abstract constitutional review; (2) concrete constitutional review; and (3) individual constitutional complaints. Both in the abstract and concrete reviews of constitutionality the Constitutional Court reviews the compatibility of an Act of Parliament (or other legal norm of lesser rank), or individual provisions thereof, with the constitutional order of the Czech Republic. The first distinction lies in the fact that, in contrast to the concrete constitutional review, the abstract review is not incidental to a specific dispute before ordinary courts. In other words, using the terminology of common law systems, abstract review does not require a 'case and controversy'. Secondly, the right of audience in abstract review is limited to 'privileged dignitaries', such as the President, groups of MPs or senators and the Government.

In concrete review any court that reaches the conclusion that a legal norm upon which its decision depends is not compatible with the constitutional order must discontinue the proceedings and certify the question of compatibility of the law with the constitutional order to the Constitutional Court. Therefore, the Constitutional Court passes judgment only on the validity of the law and remits the case to the ordinary court. The ordinary court then delivers the concrete ruling on the matter in the light of the Constitutional Court's conclusions.

In contrast to abstract and concrete constitutional review discussed above, a constitutional complaint can be lodged by any person asserting that their fundamental rights and basic freedoms guaranteed in the constitutional order have been violated. An individual constitutional complaint can be lodged against any act of a public authority, including court decisions and measures taken by administrative agencies.

As regards the nature and effect of the Constitutional Court's decisions it is necessary to distinguish between abstract review, concrete review and individual complaints. In abstract review, if the Constitutional Court finds that a petition proposing the annulment of a statute (or a provision thereof) is well founded, it annuls the contested statute in whole or in part. Generally, the provision is annulled from the day the decision is published in the Collection of Laws (i.e., with *ex nunc* effect), unless the Constitutional Court decides otherwise. As stated above, in concrete review of constitutionality, a decision of the Constitutional Court finding incompatibility with the constitutional order is followed by the remission of the case file to the ordinary court. Similarly, in the individual constitutional complaint procedure, if the decision of the ordinary courts is quashed the case file is remitted to the ordinary court.

In order to understand which rulings of the Constitutional Court have precedential effects, it is crucial to remind that the Law on the Constitutional Court recognises two basic forms of ruling: a judgment (*nález*) and a decision in a narrow sense (*usnesení*). In addition, the Court

may adopt an opinion (*stanovisko*), which is however not considered to be a ruling in the proper sense. A judgment is issued if the Court rules on the merits of the case, i.e., typically when it decides on the conformity of the challenged judicial decision or a piece of legislation with the constitutional order. Judgments are therefore a more important, but much less often used, form of a ruling. Decisions are employed in virtually all other cases, most importantly for procedural reasons (staying the proceeding, recusing a Justice etc.) or when the Court dismisses a petition pursuant as 'manifestly ill-founded'. The latter category of decisions is often called 'quasi-meritorious rulings',[20] but the Court strictly distinguishes between judgments and decisions irrespective of the fact that some decisions (quasi-meritorious rulings) are functionally very similar to judgments. Finally, opinions are adopted by the whole court (plénum) in case there is divergent case-law (but if the divergence concerns judgements) which needs to be unified and settled.

All the Constitutional Court's judgments are binding on all governmental bodies, courts and persons. This means that they have *erga omnes* effect. However, there has been an ongoing debate about which part of the Constitutional Court's judgments is actually binding. While some commentators still claim that only the finding of the judgment is binding on the lower courts and other entities, the prevailing view is that both the finding and the reasoning of the Constitutional Court are binding. The Court itself vigorously defends this view and refers to it as the 'precedential effects' (*precedenční účinky*) of its judgments.[21]

In sum, apart from the mode of appointment of Justices the basic features of the Constitutional Court resemble those of the German Federal Constitutional Court.[22] Most importantly, the Constitutional Court is entitled not only to exercise concrete review of constitutionality and to decide on individual constitutional complaints, but also to review legislation in the abstract. However, the 'American model' of selection of the Constitutional Court's Justices makes a huge difference. The fact that the Czech President is the only nominating organ means that he de facto creates his 'own' Court. His position is further strengthened by the fact that there is no staggered system of appointing Justices, and thus virtually the entire Constitutional Court is replaced every ten years. Moreover, the Czech President also unilaterally decides who, from among the Justices, become the Constitutional Court's President and the Vice-Presidents.

As a result of this peculiar institutional design, every Czech president (Václav Havel, Václav Klaus and Miloš Zeman) has appointed almost the entire Constitutional Court at the beginning of his first term.[23] Not surprisingly, the first Constitutional Court (1993–2002) is often referred to as 'Havel's Court', the second (2003–2012) as 'Klaus's Court' and the third (2013–now) as 'Zeman's Court'. Despite these labels, none of the abovementioned three Presidents fully utilised his powers and each relied on his advisors who have so far always proposed a relatively balanced and diverse Court. Moreover, the Senate has rejected the most controversial candidates, sometimes even repeatedly, and thus effectively constrained

[20] Jaroslav Benák, 'K povaze usnesení Ústavního soudu, jímž se odmítá ústavní stížnost jako zjevně neopodstatněná*', Soudní rozhledy* 15, no. 4 (2009): 126–9.

[21] See Chapter 2, Section F.

[22] See Werner Heun., *The Constitution of Germany: A Contextual Analysis* (Oxford: Hart, 2011).

[23] Note that while Václav Havel and Miloš Zeman appointed all 15 Justices, Václav Klaus (due to the death in office of the Chief Justice of the 'Havel's Court' and the early resignations of two more judges) 'inherited' three of Havel's appointees and himself appointed only 12 Justices.

the Czech President.

In terms of its impact on Czech society, the Constitutional Court 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 Court showed its teeth in the 2002 *Euro Amendment* judgment (Pl. ÚS 36/01), in which it effectively disregarded a constitutional amendment adopted by the Parliament and interpreted the Czech Constitution as if such amendment had never taken place. However, it showed its full potential only a few years later. In the 2009 *Melčák* judgment the Constitutional Court 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.[24] In 2010–2012 it struck down several austerity measures adopted by the centre-right coalition in the wake of the global financial crisis. In 2012 the Constitutional Court showed its teeth also towards the Court of Justice of the EU by finding the CJEU's *Landtová* judgment *ultra vires*. This series of judgments in 2009–2012 makes it clear that the Constitutional Court has become a powerful institution that all actors need to take seriously. We discuss these cases and their consequences in more detail in Chapter 2 and the Conclusion of this book.

D. Basic Features of the Ordinary Judiciary

Apart from the Constitutional Court, the Czech judicial system consists of the ordinary courts and the administrative courts (see Scheme No. 1). Czechia faced a shortage of judges during the 1990s, but this problem has resolved itself due to the significant increase in judicial salaries in the 2000s, and there are currently approximately 3,000 judges in Czechia. Judges are by far the best paid public servants, partly due to their successful litigation on judicial salaries before the Constitutional Court, and there is fierce competition for every vacancy in the judiciary.

The Czech judicial system is recognised as having a professional career judiciary. There is no trial by jury. However, laypeople sit as judges in chambers (two lay judges sit with a professional judge) in a limited number of disputes, hearing cases at first instance in criminal and labour law. Those laypeople are elected by municipal assemblies. Appellate and Supreme courts' chambers are composed of professional judges only, with the exception of the Disciplinary Court.

Judges of ordinary courts are appointed by the President of the Republic. They must be at least 30 years of age at the time of appointment, must have completed an M.A. degree in law and three years of practising law. Judges are appointed indefinitely, but they must step down once they reach compulsory retirement age, which is currently set at 70. Until they turn 70, they can be removed only following disciplinary proceedings conducted by the Disciplinary Court.

On paper, there is limited judicial self-governance. The state administration of the courts is formally exercised by the Ministry of Justice and involves such crucial elements as the courts' budgeting, the selection and promotion of judges, and the appointment of presidents and

[24] See Yaniv Roznai, 'Legisprudence Limitations on Constitutional Amendments? Reflections on the Czech Constitutional Court's Declaration of Unconstitutional Constitutional Act', *Vienna Journal on International Constitutional Law* 8, no. 1 (2014): 29–57.

vice-presidents of the courts. This form of court administration has repeatedly been criticised on the international as well as the domestic stage. In practice, though, the Ministry of Justice outsourced many decisions concerning court administration to court presidents. This eventually led to a peculiar Czech model of judicial self-governance.[25]

E. Civil and Criminal Courts

Civil and criminal courts share the same judicial structure. Together, they form the courts of general jurisdiction (*obecné soudnictví*) and are competent in all types of disputes, with the exception of those expressly reserved for the administrative courts or the Constitutional Court. The system of civil and criminal courts forms the backbone of the Czech judicial order. It consists of four tiers: 86 district courts, eight regional courts, twohigh courts (one located in Prague with jurisdiction over Bohemia and the other in Olomouc with jurisdiction over Moravia) and the Supreme Court. As a rule, there is a three-tier procedure. Most cases start at the district courts, the decisions of which can be appealed (*odvolání*) on points of both law and fact before the regional courts. Subsequently, any of the parties to the dispute may lodge an extraordinary appeal (*dovolání*) to the Supreme Court, which decides only on points of law. The most complex civil and commercial disputes as well as criminal trials concerning most serious crimes (punishable by at least five years' imprisonment) start at the regional court level and the two high courts serve as the courts of appeal. Decisions of the high courts can then also be challenged before the Supreme Court.

This four-tier system is rather complex, given the fact that Czechia is a relatively small country and a unitary state. Moreover, the communist regime, under the banner of the 'simplification of law' agenda,[26] had abolished the high court tier soon after the communist coup d'état in 1948 and high courts were revived only by the 1993 Czech Constitution. This begs the question why the Czech parliament revived two high courts then at all. A careful contextual analysis of the events in the early 1990s shows that the reintroduction of high courts was driven primarily by the need to create a new office for a key pro-Havel figure within the ordinary judiciary and was not a carefully engineered and thought-out institutional change.[27] Not surprisingly, this unsystematic reintroduction of the high court tier into the Czech judicial system has met with strong criticism and many politicians have tried to abolish the high courts. However, given the practical implications, the need to amend the Constitution and the lack of will of the parliamentary majority to engage with a complex restructuring of the Czech judicial system, this proposal has never found enough support to take effect.

F. Administrative Courts

The inter-war Supreme Administrative Court of Czechoslovakia significantly shaped Czechoslovak public law. After the 1948 *coup d'état* the Communist regime abolished it because the Communist Party did not intend to have its acts reviewed by an independent court. The drafters of the democratic 1993 Constitution of the Czech Republic built on the

[25] See Blisa, Adam, Tereza Papoušková and Marína Urbániková. 'Judicial Self-Government in Czechia: Europe's Black Sheep?'. *German Law Journal* 19, no. 7 (2018): 1951–76.

[26] On the ideal of the simplicity of law in the communist legal theory see John Hazard, *Communists and Their Law* (Chicago, IL, and London: University of Chicago Press, 1969), 103–26.

[27] For further details see Kosař, *Perils of Judicial Self-Government*, 163–4.

inter-war tradition and explicitly envisaged the creation of the Supreme Administrative Court. However, it was ten years before the Czech Supreme Administrative Court came into being. Politicians had other priorities in the 1990s and it was only the judgment of the Czech Constitutional Court that struck down as insufficient the part of the Civil Code of Procedure dealing with judicial review of administrative action[28] which forced them to act. As a result, the Supreme Administrative Court was eventually established on 1 January 2003.

The 2002 Code of Administrative Justice set up a two-tier system of administrative courts. Specialised administrative chambers or specialised judges sitting alone at regional courts decide administrative law cases at first instance. The Supreme Administrative Court (*Nejvyšší správní soud*) decides primarily on cassation complaints against the decisions of regional courts in administrative law matters. Apart from ruling on cassation complaints the Supreme Administrative Court, among other things, also decides on electoral issues, the dissolution of and other matters relating to political parties, and on some conflicts of competence between administrative authorities. Moreover, the Supreme Administrative Court hosts two special judicial bodies, the 'Disciplinary Court' and the 'Competence Chamber'.

The task of the administrative courts is to protect individual rights in the area of public law. They provide protection not only against decisions of an administrative authority, but also against inaction and unlawful interference by an administrative authority.

The creation of the Supreme Administrative Court resulted in a double-headed judiciary and led to healthy rivalry between the Supreme Court and the Supreme Administrative Court, both seated in Brno. Each court has adopted a different hiring strategy, built a different public image and developed a distinct identity. The Supreme Court is more conservative, prioritises professional judges from lower courts, sticks to legal formalism and its judges communicate with the media rather reluctantly. In contrast, the Supreme Administrative Court has been more open to 'lateral' appointment from among advocates and law professors, stressed discursive reasoning and worked with EU law on a regular basis, and has been very open to the media as well as the public. The Supreme Administrative Court is also sometimes referred to as the 'Constitutional Court light' and is one of the main pools from which Constitutional Court Justices are selected.[29]

In terms of its impact on the lower courts, the Supreme Administrative Court's influence has however been limited. While the Supreme Administrative Court specialises exclusively in administrative law, there are no special lower administrative tribunals. The specialised chambers of regional courts deciding on administrative matters operate within the civil and criminal courts and are under their governance. It is also necessary to add that the number of administrative judges at the regional courts is much lower (approximately 10 per cent) than the number of criminal law (approximately 23 per cent) and civil law (approximately 67 per cent) judges. Overall, administrative judges form only 4 per cent of the Czech judiciary. Given their increased case load and the importance of the disputes against the State,

[28] Judgement of the Constitutional Court of 27 June 2001, n. Pl. ÚS 16/99. Quite interestingly, the Constitutional Court relied on the ECtHR case law concerning Article 6 ECHR, as Article 36(2) of the Charter, which lays down the constitutional foundation of administrative judiciary, does not require the 'full jurisdiction' with regard to review of administrative acts.

[29] While only two former Supreme Court judges sit on the 'Third' Constitutional Court, there are three former Supreme Administrative Court judges (including the Vice-President of the Constitutional Court).

especially in the new Covid-19 era, the role of administrative courts has increased. Administrative judges at the regional court level decide well over 10,000 cases per year and the Supreme Administrative Court disposes more than 4,000 cases per year.[30]

G. Prohibition of Special Courts and Tribunals

There are no special courts and no military tribunals in the Czech Republic. What is more, the Czech Constitution prohibits the creation of any special tribunal, as its Article 91(1) explicitly stipulates what courts the Czech court system consists of.[31] This is a direct response to the abuse of special courts, in particular the so-called 'State Court' (*Státní soud*), by the Communist regime.[32] Military courts were abolished a year after the division of Czechoslovakia[33] and likewise cannot be revived without constitutional amendment.

The current constitutional framework thus blocks several potential reforms of the Czech judicial system. For instance, the current system of administrative courts cannot be complemented by the specialised tribunals in asylum or competition law. Similarly, the Czech Parliament, unless it musters a constitutional majority, is unable to create military courts, arguably even in times of war. Finally, the constitutional prohibition of special courts also challenges the existence of two special judicial bodies that are formally attached to the Supreme Administrative Court but have a different status and different composition from the standard Supreme Administrative Court chambers. The 'Disciplinary Court' (*kárný soud*) decides on disciplinary motions against judges, public prosecutors and enforcement agents. The composition of its chambers varies, but these chambers always consist of both judges and non-judges, which is a unique feature of the Czech apex courts. The 'Competence Chamber' *(zvláštní senát)* is called upon to decide jurisdictional disputes between the civil courts on the one hand and the administrative courts on the other. It consists of three judges of the Supreme Court (representing the civil law viewpoint) and three judges of the Supreme Administrative Court (representing the public law viewpoint). Without explicit constitutional amendment, the constitutional status of these two judicial bodies remains dubious.

H. The War(s) of the Courts

The introduction of the Constitutional Court with its purposive interpretation and value-laden reasoning immediately led to a clash with the Supreme Court. The main battleground of the so-called 'war of the courts' (*válka soudů*) became the interpretation of Article 269(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 is a new criminal act, the Constitutional Court found this position unconstitutional for violation of the freedom of conscience and the principle of ne bis in idem. The Supreme Court refused to apply the Constitutional Court's judgments until 1999, when it eventually buckled under the growing pressure. The scars have remained though, and the relationship between these two

[30] All data taken from the 2019 Annual Statistical Report on the Czech Judiciary compiled by the Ministry of Justice.

[31] See Article 91(1) of the Czech Constitution.

[32] For further details see Kühn, *The Judiciary in Central and Eastern Europe*, 26–7, 98–9 and 102–3.

[33] See Article 110 of the Czech Constitution.

courts has always been tense.

The Supreme Administrative Court has generally been far more receptive of the Constitutional Court's case law. However, the two soon ended up waging another 'war of the courts', this time with a European dimension. In a seemingly technical issue the two courts disagreed on the calculation of the pensions of Czech citizens who (before the division of Czechoslovakia) had worked on the territory of Slovakia. In the 2000s their pensions were lower than those of Czech citizens who had worked in Czech territory before the split. The Supreme Administrative Court traced through the relevant statutes and found this pension gap, however unfortunate, to be in conformity with the applicable Czech law, EU law and international social security treaties. The Constitutional Court found this situation unjust and repeatedly held that the pensions had to be equalised by reason of the specific circumstances of the dissolution of Slovakia. The Supreme Administrative Court refused to follow this case law and kept giving other reasons for its original position. The rupture was further exacerbated when the Constitutional Court in one of its judgments in the so-called 'Slovak Pension Saga' suggested that judges of the Supreme Administrative Court who failed to apply its case law should be disciplined. This seemingly technical dispute touched upon much deeper disagreements. What was at stake in the Czech discourse was the conceptualization of the division of Czechoslovakia and defining the contours of Czech constitutional identity.[34]

However, most European scholars know of only a later sequel in the 'Slovak Pension Saga'. The Supreme Administrative Court thought that it had found a winner in 2009 and submitted a preliminary reference to the CJEU suggesting that levelling the pensions of Czechs working in the pre-split Slovakia violated only the principle of non-discrimination guaranteed by the EU Directives. The CJEU in the *Landtova* judgment (C-399/09) agreed with the Supreme Administrative Court and thus became (perhaps unknowingly) a proxy in the domestic war of the courts. However, the Constitutional Court fought back and found the CJEU's judgment ultra vires. The Supreme Administrative Court submitted another preliminary reference to the CJEU, but this time Czech politicians stepped in. In order to prevent further embarrassment at the EU level and stop this litigation for good, they resolved this issue by out-of-court settlement.

In sum, the support of the Constitutional Court by the two apex ordinary courts is not unconditional, and both the Supreme Court and the Supreme Administrative Court have had strained relationships with the Constitutional Court at times. The rifts are deep and it will not be easy to overcome them. Both wars of the courts also show that the Constitutional Court is powerful and often has the last word, but its position is more fragile than it seems.

I. Czech Courts and European Courts: A Complicated Relationship

All Czech courts, including the Constitutional Court, have to engage with ECHR and EU law. Therefore, they must also inevitably work with the case law of the ECtHR and CJEU. The Strasbourg jurisprudence has heavily influenced the Constitutional Court, whereas the CJEU has affected primarily ordinary courts, and the administrative courts in particular. However, both supranational courts have also met with some resistance.

[34] See also Chapter 1, Section G.

Czech judges became acquainted with the ECtHR's reasoning a decade before the CJEU came into the picture. They started to work with the Strasbourg case law in 1992, when the then Czechoslovakia ratified the ECHR. In general, Czech courts have embraced the Strasbourg jurisprudence, but two problems emerged, one concerning apex courts and another permeating the lower courts. The apex courts have been particularly keen on using the ECtHR's case law to expand their mandate and legitimise their actions against the political branches. The Constitutional Court even constitutionalised the Convention in 2002 and has used it as a benchmark for the constitutional review of statutes ever since.[35] Yet it has very reluctantly accepted the Strasbourg case law in the areas of discrimination law and custody of children. The problem affecting the lower courts is of a different kind – they tend to ignore the Convention and the ECtHR's case law, sometimes due to the language barrier, sometimes due to the sense that this task is for the higher courts and sometimes due to the belief that domestic norms are prima facie Convention-conforming. As a result, the Strasbourg jurisprudence has radiated to the lower courts only to a limited extent.[36]

EU law started to penetrate the Czech legal order well before formal accession, but the CJEU's case law became binding and widely used only in 2004.[37] In general, the Czech ordinary courts have adopted a euro-friendly interpretation of Czech law and followed the Luxembourg jurisprudence. Even the Constitutional Court initially showed significant openness to EU law. The Constitutional Court's 2006 *European Arrest Warrant* judgment is a typical example of its euro-friendliness. In that judgment the Court made it clear that the obligation to interpret domestic law in a manner consistent with EU law applies even to interpretation of the Czech constitutional order. More specifically, the Constitutional Court found the European Arrest Warrant framework constitutional despite the clear wording of Article 14(4) of the Charter of Fundamental Rights and Freedoms, which explicitly guarantees that no citizen may be forced to leave their homeland. Similarly, in the 2009 *Lisbon Treaty II* judgment the Constitutional Court adopted a very euro-friendly interpretation of the Czech constitutional order, and in doing so it distanced itself from the rather assertive *Lissabon-Urteil* of the *Bundesverfassungsgericht*. It eventually found the Lisbon Treaty to be in conformity with the Czech constitutional order and thereby lifted the last major obstacle to the entry into force of the Lisbon Treaty.

However, just two years later the Constitutional Court made it to the headlines of virtually all European newspapers as it dropped a bombshell onto the European constitutional landscape. In the *Holubec* judgment, delivered in reaction to the *Landtová* judgment of the Court of Justice of the EU of June 2011, the Constitutional Court found the *Landtová* judgment *ultra vires*. In doing so the Constitutional Court for the first time in the history of European integration clearly and openly declared an EU act *ultra vires* and thus not applicable on national territory.[38] Since then the Constitutional Court has danced around the CJEU and EU law more generally. After the reshuffle of its Justices in 2013 the new 'Zeman Court' seems to be more euro-friendly, but the Constitutional Court still has not submitted a

[35] Kosař et al., *Domestic Judicial Treatment.*

[36] Jan Kratochvíl, 'Subsidiarity of Human Rights in Practice: The Relationship between the Constitutional Court and Lower Courts in Czechia', *Netherlands Quarterly of Human Rights* 31, no. 1 (2019): 69–84.

[37] See also Chapter 1, Section H.

[38] See Komárek, 'Playing with matches'; and Zbíral, 'Czech Constitutional Court, Judgment of 31 January 2012'.

single preliminary reference to the CJEU and has avoided discussion about the constitutional rank of the EU Charter of Fundamental Rights.

J. Constitutional Politics of the Judicial Branch

There has been no consensus on structuring the Czech judiciary since the early 1990s. In fact, the relationship between politicians and judges has grown more hostile over time. As a result, virtually any 'judicial design issue' thus ends up before the Constitutional Court and that Court has adopted the most stringent level of judicial review in these matters. The interferences of the Constitutional Court in 'judicial design issues' are so numerous that it is impossible to deal with all of them here.[39] However, three areas have been particularly contested: (1) the appointment and dismissal of court presidents; (2) the (non-)establishment of a judicial council; and (3) judicial salaries.

The single most contested issue concerning the judicial branch has been the power of the Ministry of Justice and the Czech President to dismiss court presidents. This is not surprising, given the role of court presidents under communism and due to their significant powers nowadays. During the communist era, court presidents operated as the 'transmission belts' of the Communist Party, and their main role was to 'transmit' orders to individual judges in sensitive cases. This was in theory possible until the early 2000s as well, since Czech Ministers of Justice[40] could, *de jure*, dismiss court presidents without providing any reason for so doing. However, even in the 1990s the political costs of dismissing court presidents became extremely high and every Minister of Justice actually needed court presidents in order to carry out meaningful policy decisions and to make well-informed decisions on promotions and other personnel matters. The 'transmission belt' argument thus de facto did not work.

But that was not the end of the emancipation process. Czech court presidents started to challenge their dismissal before administrative courts and the Constitutional Court, and eventually won. When in 2006 the then Czech President, Václav Klaus, dismissed Iva Brožová from the position of President of the Supreme Court, the Constitutional Court not only found this dismissal unconstitutional and de facto reinstated Iva Brožová into the helm of the Supreme Court, but also struck down Article 106 of the Czech Law on Courts and Judges, declaring that it was unconstitutional for the executive to dismiss court presidents. However, the Czech Parliament fought back and introduced limited terms for all court presidents (ten years for the presidents of apex courts and seven years for other court presidents). This means that the Minister of Justice and the Czech President lost their power to dismiss court presidents, but they can reshuffle court presidents every seven (ten) years. Czech judicial politics have thus entered a new era characterised by a fragile balance and bargaining between court presidents and the Ministry of Justice in the shadow of the law.

The second and related contested ground has been the model of court administration in general. As mentioned above, the attempt to create the judicial council failed in 2000. Since then the Constitutional Court has repeatedly stressed that the current model of state

[39] For a snapshot of these interventions see Bobek, 'The Administration of Courts'.

[40] Note that the 'transmission belt' argument has a different twist regarding the apex courts, where it was the Czech President (and not the Minister of Justice) who could, *de jure*, recall the presidents of the Supreme Court and the Supreme Administrative Court. However, the logic remains the same.

administration of the courts is deficient and pushed for the establishment of the judicial council. More specifically, it has held that as long as there is no judicial council there can be no judicial performance evaluation and the assignment of any judge to the Supreme Court is subject to the consent of the Supreme Court president. This fear of executive influence on the judiciary also led the Constitutional Court to the conclusion that the temporary assignment of judges to the Ministry of Justice, a mechanism common in many continental legal systems including France and Germany, is unconstitutional in the Czech context. In these judgments the Constitutional Court nudged the Parliament to amend the Constitution and transfer the current powers of the Minister of Justice and the Czech President to the newly created judicial council. However, this appeal has not so far found support among politicians.

The third heavily contested issue is judicial salaries. In fact, the Constitutional Court issued 16 judgments concerning judicial salaries between 1999 and 2016. While it is true that the Czech Parliament reduced, froze or changed the calculation of judicial salaries many times, it often did so for legitimate reasons, such as the severe floods in the late 1990s and the financial crisis in the late 2000s. Moreover, to the credit of the Czech Parliament, it has never targeted just judges even though judges are the highest paid civil servants in Czechia. It has always adopted the across-the-board pay-cuts that affected virtually all civil servants and, on several occasions, it applied smaller reductions (5 per cent) to judges than to the rest of the civil service (10 per cent). However, the Constitutional Court has always sided with judges and found all judicial salary reductions unconstitutional irrespective of their purpose and context. What is more, it has adopted such bold position despite the fact that the Czech Constitution is silent on this issue and does not, in contrast to those of the United States and many other jurisdictions, contain any explicit prohibition on reducing judicial salaries.

This case law on judicial salaries had two main effects. On the one hand, the salaries of Czech judges rose incrementally even in times when the salaries of other civil servants (including prosecutors) decreased, which makes judicial office a significantly more lucrative position than most legal professions, with the sole exception of international law firms and celebrity advocates. This in turn attracts the top talent to the judiciary. On the other hand, this controversial case law has led to resentment of judges not only among politicians, but also within the civil service and the public. Even a district court judge at the beginning of her career in her early thirties now earns more than a long-serving civil servant who is responsible for hundreds of employees or runs the entire state organ. Not surprisingly, top civil servants find the gap between their salaries and those of judges unjustifiable. This resentment might eventually backfire against judges if a constitutional crisis, similar to the one in Orbán's Hungary and *Kaczyński*'s Poland, occurred.

K. Conclusion: From the Judicialisation of Politics to the Politicisation of the Judiciary

Czech courts have grown in power over the last 25 years. To name just a few examples, in 2002 the Constitutional Court reinterpreted the Euro Amendment of the Constitution and constitutionalised the ECHR. Seven years later it adopted the doctrine of unconstitutional constitutional amendment and struck down the constitutional law calling for a snap parliamentary election. In doing so it postponed the election and altered the entire Czech political scene. In 2010 the Supreme Administrative Court dissolved the Workers Party for

violating the Czech democratic order, and between 2010 and 2012 the Constitutional Court struck down several austerity measures adopted by the centre-right coalition in the wake of the global financial crisis. As in many other countries, the Czech courts have judicialised virtually every aspect of Czech politics.

At the same time, the Czech judiciary has gradually become emancipated from the executive. Court presidents challenged their dismissal before administrative courts and the Constitutional Court and they eventually won. They took control over the selection as well as the promotion of judges. Judges themselves then successfully prevented any cut to their salaries, even in times of financial crisis.

Such rise of judicial power could not go unnoticed in Prague. Savvy politicians soon realised that the Constitutional Court and ordinary courts are important players and they took action. The growing importance of the Constitutional Court led to the severe politicisation of appointments of its Justices in the 2010s, at a level unparalleled in comparison to the 2000s.[41] The last reshuffle of Constitutional Court membership in 2013–2015 also showed that voting in individual cases affects Justices' career prospects. Those Justices who voted against the church restitution rightly assuming the rise of social democrats to power in the upcoming parliamentary elections were reappointed, whereas those who voted to uphold church restitution were rejected by the Senate controlled by the social democrats. Similarly, the fact that court presidents wield significant power over the rank-and-file judges within the ordinary courts became widely known and, as a result, any appointment of a court president (from the level of the regional courts and above) became politicised and closely followed by the media. Finally, Czechia has also witnessed first attempts of interference with judicial independence by politicians.[42]

[41] For a detailed account of the relatively calm appointment process in the 1990s and the 2000s see Zdeněk Kühn and Jan Kysela, 'Nomination of Constitutional Justices in Post-Communist Countries: Trial, Error, Conflict in the Czech Republic' *European Constitutional Law Review* 2, no. 2 (2006): 183–208.

[42] See Conclusion, Section E.

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