



## The Rule of Law – the Czech Perspective

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In July 2023, the European Commission published a report on the situation of the rule of law in Czechia.<sup>1</sup> Instead of reformulating its conclusions, the aim of this conference paper is to briefly describe how the concept of the rule of law has evolved in Czech legal doctrine and in the case law of the Constitutional Court of the Czech Republic before the introduction of rule of law checklists at the international and EU level.

In the conclusion, I would like to summarise how this Czech experience, representing one of the constitutional traditions of the EU member states,<sup>2</sup> relates to the current EU rule of law mechanisms, which focus on the independence of courts and judicial systems, media freedom and pluralism, anti-corruption frameworks, and institutional issues related to checks and balances.

### ***I. A specific Czech pre-understanding?***

In the general legal doctrine, the essence of the rule of law is usually considered in a formal and procedural way as a tool that allows citizens to check whether their elected representatives are using the power they have been entrusted with in the general public interest, or whether they are in fact serving particular private interests.<sup>3</sup> M. Tomoszek observes that this may be a reflection of the

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<sup>1</sup> European Commission. 2023. 2023 Rule of Law Report. Country Chapter on the rule of law situation in Czechia. [https://commission.europa.eu/publications/2023-rule-law-report-communication-and-country-chapters\\_en](https://commission.europa.eu/publications/2023-rule-law-report-communication-and-country-chapters_en). Accessed 06 Nov 2023

<sup>2</sup> For an overview of these constitutional traditions see Pech, Laurent and Joelle Grogan et al. 2020. Unity and Diversity in National Understandings of the Rule of Law in the EU. RECONNECT. <https://reconnect-europe.eu/blog/unity-and-diversity-in-national-understandings-of-the-rule-of-law-in-the-eu/>. Accessed 06 Nov 2023

<sup>3</sup> For an overview of the formal, procedural and substantive aspects of the rule of law theories see Waldron, Jeremy. 2016. The Rule of Law. The Stanford Encyclopedia of Philosophy. <https://plato.stanford.edu/archives/fall2023/entries/rule-of-law/>. Accessed 06 Nov 2023

changing challenges we want to face with the rule of law – whether it is the threat of arbitrariness, violations of human rights or equality, or “*abuses of state power, poor lawmaking, and lack of compliance with or enforcement of legal rules.*”<sup>4</sup>

Czech legal doctrine is also developing in this way, but not as a result of deep analytical reasoning, but due to many contextual influences, such as the closeness to German legal doctrine regarding the concept of Rechtsstaat or the fact that the Charter of Fundamental Rights and Freedoms, which became part of the constitutional law of the Czech Republic in 1993, contains a relatively broad catalogue of fundamental rights, which allows these rights and their protection to be treated in relative autonomy from the very notion of the rule of law. Authors who emphasise the substantive (in the Czech context the word “material” is more frequently used) understanding of the rule of law, which includes the protection of human rights, subsequently limit themselves to the fundamental rights as enshrined by the constitution of the Czech Republic. It is therefore questionable whether the material understanding of the rule of law alone could add or change anything with regard to the constitutional provisions on fundamental rights in the Czech Republic, since the requirements of legality, legal certainty or impartial judicial decision-making are already contained in the formal and procedural aspects of the rule of law. Another option is to perceive the substantive rule of law as explicitly incorporating the need for external constraints on the formal rule of law, thereby implicitly narrowing the notion of formal and procedural aspects of the rule of law by referring to other constitutional values, particularly human rights and democracy, which do not need to be (and for many scholars are not) part of the concept of the rule of law itself.<sup>5</sup> Other closely related concepts, such as the material core of the Constitution, are also treated separately for the sake of conceptual clarity.<sup>6</sup> Last but not least, in the Czech legal theory, the works of L. L. Fuller on the inner morality of law are still very popular.<sup>7</sup>

Similarly, the second attribute of the rule of law – the link to fair competitive democracy, as analysed in recent works by Rosalind Dixon, David Landau and others<sup>8</sup> – has its parallel in the Czech Republic. We will see that the wording of the Czech Constitution, which in its Article 1 uses the adjectives “democratic” and “rule of law” in close proximity, led the Constitutional Court to several legally and politically very influential decisions on respect for fair political competition some 20–25 years ago.

However, legal theory and the case law of the Constitutional Court strictly distinguish between the rule of law and a defensive or resilient democracy. This means that, in the extreme case, the rule of law cannot prevent the success of a political party inclined towards an illiberal type of democracy or an authoritarian type of political party in fair democratic elections. All the rule of law can do is to insist

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<sup>4</sup> Tomoszek, Maxim. 2015. Využitelnost pojmu rule of law pro výklad pojmu podstatné náležitosti demokratického právního státu. *Časopis pro právní vědu a praxi* 23(2): 71–80.

<sup>5</sup> I thank Jan Kysela for this comment.

<sup>6</sup> See also Kosař, David and Ladislav Vyhnánek. 2023. The Evolution and Gestalt of the Czech Constitution. In *The Max Planck Handbooks in European Public Law: Volume II: Constitutional Foundations*, ed Admin von Bogdandy, Peter M. Huber and Sabrina Ragone, 55-108. Oxford: Oxford University Press or Wintr, Jan. 2023. *Principy českého ústavního práva*. Prague: Aleš Čeněk

<sup>7</sup> Quotes from Lon Fuller’s book *The Morality of Law* can also be found in four decisions of the Czech Constitutional Court: I. ÚS 3438/11, I. ÚS 420/09, II. ÚS 3764/12 and Pl. ÚS 77/06.

<sup>8</sup> In particular Dixon, Rosalind and David E. Landau. 2021. *Abusive Constitutional Borrowing: Legal Globalization and the Subversion of Liberal Democracy*. Oxford: Oxford University Press, p.25 and Dixon, Rosalind and David E. Landau. 2016. Competitive Democracy and the Constitutional Minimum Core. In *Assessing Constitutional Performance*, ed Ginsburg, Tom and Aziz Huq, 268-292. Cambridge: Cambridge University Press, p.268

that as long as such a political party is in power, the rule of law in the above-mentioned narrow sense is respected and rules of the game for the political opposition remain fair. If the activities of such a political party are to be legally restricted beyond the requirements of the rule of law already mentioned, then the tools of “defensive democracy” will be used.

And, of course, ideally, the general constitutional requirements of democracy and the rule of law are consistent with each other. However, in several cases where these two concepts have conflicted, the Constitutional Court has preferred the rule of law argument.

## **II. Theoretical, judicial and political approaches to the rule of law in the Czech Republic**

The Velvet Revolution in 1989 was also a turning point for Czech legal theory, which began to deal with the concept of the rule of law in the context of democracy. Multiple articles and book chapters on the contested theoretical nature of the (core of the) rule of law and its relation to the concept of Rechtsstaat were published and debated in the literature over the coming decades.<sup>9</sup> However, given the recent experience of the post-totalitarian regime, two formal aspects of the rule of law were unquestionable, and these were emphasised especially by theorists who were forced out of academia after 1968 and were not allowed to teach until late 1989: the rule of law means not only that the state and the actions of persons exercising state power (i.e. not only governmental or executive power but also judicial functions) are bound by law, but also that the law covers all cases of the application of state power.<sup>10</sup> The aim was clearly to minimise what Ernst Fraenkel analysed as the duality between the normative and the prerogative state,<sup>11</sup> which was also the practice in Czechoslovakia under the Communist Party reign. Furthermore, there is a clear link to interwar democratic Czechoslovakia and the influence of the work of the then Viennese professor Adolf Merkel on administrative law.<sup>12</sup>

The substantive, material limitation of state power at the constitutional level was introduced in 1991 with the adoption of the Charter of Fundamental Rights and Freedoms, and effective control of the state was made possible by the establishment of the Constitutional Court – in the summer of 1992 the Constitutional Court of the former Czechoslovakia and then the Constitutional Court of the Czech Republic in 1993.

As already mentioned, the first article of the Constitution of the Czech Republic states that “*The Czech Republic is a sovereign, unitary, and democratic state governed by the rule of law...*” This English translation provided by the Constitute Project<sup>13</sup> is accurate and captures the meaning of the article, but what is not apparent due to the different syntax is that in the Czech original the terms “democratic” and “rule of law” are found side by side without the conjunction “and” or a comma. We therefore interpret them as an intertwined directive for state authorities and those exercising state power to act in accordance with the principles of the democratic rule of law. This article lacks any predecessor in previous Czechoslovak constitutions, but had its justification in the aforementioned consensus in Czech

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<sup>9</sup> See e.g. Tomoszek, Maxim. 2016. *Podstatné náležitosti demokratického právního státu*. Prague: Leges and Bílková, Veronika. 2016. Když vládne právo – koncept ‘rule of law’ v národním a mezinárodním právu. In: *Pocta prof. JUDr. Květoslavu Růžičkovi, CSc., k 70. narozeninám*, ed Poláček, Bohumil, 65–71. Prague: Wolters Kluwer

<sup>10</sup> See e.g. Boguszak, Jiří, Jiří Čapek, and Aleš Gerloch. 2004. *Teorie práva*. Prague: Wolters Kluwer/ASPI, p. 208.

<sup>11</sup> Fraenkel, Ernst. 2017. *The Dual State*. Oxford: Oxford University Press

<sup>12</sup> Czech translation of his Allgemeines Verwaltungsrecht was published as Merkl, Adolf. 1931 (1<sup>st</sup> part)/ 1932 (2<sup>nd</sup> part). *Obecné právo správní*. Prague: Orbis. For more details see Sládeček, Vladimír, et al. 2016. *Ústava České republiky: komentář*. Prague: CH Beck, p. 9–17.

<sup>13</sup> Available at: [https://www.constituteproject.org/constitution/Czech\\_Republic\\_2013](https://www.constituteproject.org/constitution/Czech_Republic_2013). Accessed 06 Nov 2023

legal theory. Furthermore, Article 9 of the Czech Constitution, concerning amendments to the Constitution, states in its paragraph 2 that “*Any changes in the essential requirements for a democratic state governed by the rule of law are impermissible.*” It was now up to the Czech Constitutional Court to decide how its judges would apply these articles.

The opportunity arose shortly thereafter in the first decision of the Czech Constitutional Court. In September 1993, a group of MPs, mostly from the Czech Communist Party (which was then the second strongest political party after the 1992 elections), initiated a constitutional review of the Act on the Lawlessness of the Communist Regime (Act No. 198/1993 Coll.) with regard to some of its provisions, including the suspension of the statute of limitations for crimes where the perpetrator has not been convicted or the charges against him have been dismissed for political reasons incompatible with the fundamental principles of the rule of law in a democratic state. In other words, unlawful acts that were not prosecuted as crimes because they were commissioned or approved by the then communist regime. In Hungary, a similar law, called the Zetenyi–Takacs Act after its drafters, was passed in 1991 and was limited specifically to the crimes of treason and murder, but the Hungarian Constitutional Court declared it unconstitutional because “*the law was held to be a form of retroactive legislation, and thus violating the rule of law.*”<sup>14</sup>

The Czech Constitutional Court, on the contrary, attempted to distinguish between a formalistic understanding of the rule of law, which is (according to the Constitutional Court) limited to the rule by law and what the Court called material Rechtsstaat, or in its own translation: “*the substantive-rational conception of legitimacy and the law-based state.*” Therefore, quoting again, “*The Czech Constitution accepts and respects the principle of legality as a part of the overall basic outline of a law-based state; positive law does not, however, bind it merely to formal legality, rather the interpretation and application of legal norms are subordinated to their substantive purpose, law is qualified by respect for the basic enacted values of a democratic society and also measures the application of legal norms by these values.*”<sup>15</sup>

The subsequent practice of the self-referrals of the Czech Constitutional Court to these broadly defined “*basic enacted values of a democratic society*” has gone in at least two directions: 1.) focusing on democratic procedures prescribed or foreseen by the Constitution and the Charter of Fundamental Rights and Freedoms and 2.) focusing on the content of legal norms beyond the requirements explicitly set forth by the Constitution or the Charter of Fundamental Rights only on the basis of a broad understanding of the rule of law.

The first vein turned out to be very useful for the good functioning of democracy. Somewhat in the style of John Hart Ely, the Constitutional Court has helped to clear the channels of change by lowering the financial costs and lowering the thresholds for participation of smaller political parties in national parliamentary elections.<sup>16</sup> The Constitutional Court has also issued several rulings on limits of public

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<sup>14</sup> See e.g. Sadurski, Wojciech. 2008. ‘Solange, chapter 3’: Constitutional Courts in Central Europe—Democracy—European Union. *European Law Journal* 14(1): 1–35

<sup>15</sup> Judgment of the Constitutional Court Pl. ÚS 19/93 of 21 December 1993. English translation is available at the Czech Constitutional Court website: <https://www.usoud.cz/en/decisions/1993-12-21-pl-us-19-93-lawlessness>

<sup>16</sup> See e.g. judgment of the Constitutional Court Pl. ÚS 30/98 on election contribution <https://www.usoud.cz/en/decisions/1999-10-13-pl-us-30-98-election-contribution> and partially also in the judgment of the Constitutional Court Pl. ÚS 42/2000 on Electoral Act <https://www.usoud.cz/en/decisions/2001-01-24-pl-us-42-00-elections-act>

funding for the largest political parties<sup>17</sup> and has even reviewed election laws and twice struck down specific provisions of the Electoral Act on the grounds of their disproportionate effect against smaller political parties.<sup>18</sup>

With regard to lawmaking, the Constitutional Court refers to the principle of the rule of law when the Constitutional Court annuls laws or provisions that are not of a general nature and are equivalent in content to individual administrative decisions, which, according to the Constitutional Court, do not respect the separation of powers.<sup>19</sup> The principle of the rule of law was also examined in the context of the fast-track legislative procedure and other cases of possible interference with the rights of the opposition in Parliament.<sup>20</sup>

In 2020, the Constitutional Court explicitly referred to the principle of the rule of law when considering new legislation on conflicts of interest, which prohibits specified public officials from owning or operating television and radio broadcasters or publishing periodicals. The law was directed against Prime Minister Andrej Babiš, who bought the largest publishing house in the Czech Republic a few months before the 2013 parliamentary elections. According to the Constitutional Court however, *“the duty of a democratic state governed by the rule of law (Article 1(1) of the Constitution) is not only to create the conditions for a public official to properly exercise his or her public office, coupled with the duty to act in the public interest, but also to prevent him or her from using the power entrusted to him or her to promote his or her own (personal) interests to the detriment of the public interest, as well as the interests of other participants in political or economic competition, and the public trust. In a democratic state governed by the rule of law, elections are, according to the constitutional order, a properly conducted competition (Article 1(1), Article 2(1) and Article 5 of the Constitution) for the trust and mandate of the electorate, not for the control of the state in order to exploit or even abuse its capacities and resources by the winner, using every possible means...”*<sup>21</sup>

Most of the relevant decisions taken in the last 30 years are in line with the current EU annual rule of law reports, which were introduced in 2020, and some of them even go beyond them as they relate to electoral laws.

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<sup>17</sup> See e.g. judgment of the Constitutional Court Pl. ÚS 53/2000 on uneven distribution of state budgetary resources to political parties (English translation not available), or judgment of the Constitutional Court Pl. ÚS 11/17: Financing of Political Parties and Movements and Political Institutes <https://www.usoud.cz/en/decisions/2017-12-12-pl-us-11-17-financing-of-political-parties-and-movements-and-political-institutes>

<sup>18</sup> Judgment of the Constitutional Court Pl. ÚS 42/2000 on Electoral Act <https://www.usoud.cz/en/decisions/2001-01-24-pl-us-42-00-elections-act> and judgment of the Constitutional Court Pl. ÚS 44/17 (English translation not available). For more details see Antoš, Marek, and Filip Horák. 2021. Proportionality Means Proportionality: Czech Constitutional Court, 2 February 2021, Pl. ÚS 44/17. *European Constitutional Law Review* 17(3): 538–552. <https://doi.org/10.1017/S1574019621000328>

<sup>19</sup> See e.g. judgment of the Constitutional Court Pl. ÚS 24/04 on weirs on the Elbe (declaration of public interest by the law) (English translation not available).

<sup>20</sup> See e.g. judgment of the Constitutional Court Pl. ÚS 77/06 on legislative riders <https://www.usoud.cz/en/decisions/2007-02-15-pl-us-77-06-legislative-riders>, judgment of the Constitutional Court Pl. ÚS 55/10 on State of Legislative Emergency <https://www.usoud.cz/en/decisions/2011-03-01-pl-us-55-10-state-of-legislative-emergency> or in particular Wintr, Jan. 2015. Legislative Process and Principles of the Rule of Law. In *Rule of Law and Mechanisms of its Protection. Czech Perspective*, ed Lenka Pítrová, 33–45. Passau/Berlin/Prag: RWW Science and New Media Passau-Berlin-Prague

<sup>21</sup> Judgment of the Constitutional Court Pl. ÚS 4/17 on Act on Conflict of Interest (lex Babiš), para 89 (English translation not available).



However, other decisions of the Constitutional Court contain very specific understandings of the rule of law. In 2002, the Constitutional Court judicially amended the Czech Constitution and retained the power to assess the compatibility of laws with international human rights treaties. This power was to be decentralised to all courts, as it is for them to review the conformity of the laws of parliament with the self-executing provisions of international treaties ratified with the consent of Parliament.<sup>22</sup> According to the Czech Constitutional Court, “*The inadmissibility of changing the substantive requirements of a democratic state based on the rule of law also contains an instruction to the Constitutional Court, that no amendment to the Constitution can be interpreted in such a way that it would result in limiting an already achieved procedural level of protection for fundamental rights and freedoms.*”<sup>23</sup> The question remained not only whether the procedural level of protection of fundamental rights would actually be reduced if lower courts could directly apply the provisions of international human rights treaties instead of conflicting provisions of domestic law without having to refer the case to the Constitutional Court, but also whether the Constitutional Court can explicitly amend the Constitution.

In 2009, the Constitutional Court, again referring to the essential elements of a democratic state governed by the rule of law, annulled a constitutional law that shortened the term of office of the Chamber of Deputies and provided for pre-term elections.<sup>24</sup> The Constitutional Court argued that this retroactive ad hoc constitutional law lacked generality and constituted an impermissible interference with the rule of law. Legal scholars were not very convinced by these arguments, but they agreed that the form of a constitutional law alone does not prevent the Constitutional Court from reviewing the constitutionality of such a law with the material core of the Constitution.<sup>25</sup>

We also have 16 decisions of the Constitutional Court of the Czech Republic where, with the exception of two cases from 2000, the Constitutional Court prohibited the temporary reduction of the coefficient for calculating the salary base for judges, which is three times the average gross nominal monthly wage of employees in the national economy according to the Czech Statistical Office for the previous calendar year.<sup>26</sup> After 2015, Parliament seemingly gave up and has not attempted to temporarily reduce the salary of judges since then, but these decisions are highly controversial in legal doctrine, both because of the inconsistent reasoning of the Constitutional Court and because of whether a temporary reduction of the coefficient for calculating the salary base of public officials, including judges, in times of financial austerity measures would violate judicial independence.

<sup>22</sup> See e.g. Malíř, Jan, and Jana Ondřejková. 2020. Law-making activity of the Czech Constitutional Court. In *Judicial Law-Making in European Constitutional Courts*, ed Monika Florczak-Wątor, 111-127. London: Routledge

<sup>23</sup> Judgment of the Constitutional Court Pl. ÚS 36/01 on bankruptcy trustee, <https://www.usoud.cz/en/decisions/2002-06-25-pl-us-36-01-bankruptcy-trustee>

<sup>24</sup> Judgment of the Constitutional Court Pl. ÚS 27/09 on Constitutional Act on Shortening the Term of Office of the Chamber of Deputies, <https://www.usoud.cz/en/decisions/2009-09-10-pl-us-27-09-constitutional-act-on-shortening-the-term-of-office-of-the-chamber-of-deputies>

<sup>25</sup> For more details see e.g. Malíř, Jan, and Jana Ondřejková. 2020. Law-making activity of the Czech Constitutional Court. In *Judicial Law-Making in European Constitutional Courts*, ed Monika Florczak-Wątor, 122. London: Routledge

<sup>26</sup> Some of these judgments were translated into English: Pl. ÚS 11/02 <https://www.usoud.cz/en/decisions/2003-06-11-pl-us-11-02-judgessalaries>, Pl. ÚS 34/04 <https://www.usoud.cz/en/decisions/2005-07-14-pl-us-34-04-judgessalaries>, Pl. ÚS 12/10 <https://www.usoud.cz/en/decisions/2010-09-07-pl-us-12-10-judges-pay-2010>, Pl. ÚS 33/11 <https://www.usoud.cz/en/decisions/2012-05-03-pl-us-33-11-judgespay-xiii>, Pl. ÚS 28/13 <https://www.usoud.cz/en/decisions/2014-07-10-pl-us-28-13-judgespay-xv>

Regarding the independence of judges, in two decisions, the first in 2002 and the second four years later,<sup>27</sup> the Constitutional Court explicitly called for the establishment of an independent Judicial Council to replace the Ministry of Justice in its role as the supreme body for the administration of the courts. These formal and informal attempts continued for several years until 2014, when Michal Bobek and David Kosař published their article dealing with the negative effects of the establishment of judicial councils in Slovakia and Hungary.<sup>28</sup>

Just to illustrate how the Czech Constitutional Court has tried to broaden the concept of the rule of law in order to correct various injustices, we can point to ten decisions (ranging from 2005 to 2015)<sup>29</sup> that do not mention the material Rechtsstaat, which would literally translate into Czech as “the legal state”, but instead use the literal Czech translation of the rule of law. Some of these decisions curiously refer to the rule of law in the context of a quotation from John Rawls’ book *A Theory of Justice* and most of them seek to protect very broadly defined property interests and legitimate expectations.

We can conclude that Czech legal doctrine incorporated a large part of the Czech Constitutional Court’s argumentation into its original understanding of the rule of law in 1989. Even where academics disagree, they still quote the decisions of the Constitutional Court, because the Constitutional Court is very self-referential and considers its jurisprudence as precedential unless it itself ceases to refer to certain types of arguments (in the words of Ronald Dworkin, they lose their gravitational force).

The political reaction has been much more varied. It includes the acceptance of the Constitutional Court’s understanding of the rule of law requirements in cases where laws are annulled for non-compliance with human rights treaties, Parliament adopting a new constitutional procedure for pre-term parliamentary elections, and political parties holding a majority in the Chamber of Deputies being more cautious in their use of fast-track legislative procedures and more open to the rights of parliamentary opposition, resulting in, among other things, extremely long filibustering.<sup>30</sup>

In the cases concerning the rules for parliamentary elections and public funding of political parties, Parliament has only partially followed the Constitutional Court’s reasoning by amending the laws as the Constitutional Court suggested, but has not fully adopted its opinion.

However, there are also examples of open disregard for the Constitutional Court’s reasoning. The most obvious were the repeated attempts to temporarily reduce the coefficient for calculating public officials’ salaries, including judges’ salaries, during the financial crisis, or when MPs reduced the coefficient for public officials in order to limit the state’s fiscal deficit.

The strongest opposition concerns the establishment of an independent Supreme Judicial Council as a self-governing body of the judiciary. Most tasks related to the administration of the courts, such as proposals for the appointment of judges or financial issues, remain formally in the hands of the

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<sup>27</sup> Judgment of the Constitutional Court Pl. ÚS 7/02 on Judiciary Act <https://www.usoud.cz/en/decisions/2002-06-18-pl-us-7-02-judiciary-act> and Judgment of the Constitutional Court Pl. ÚS 18/06 on Removal of Chief Judges <https://www.usoud.cz/en/decisions/2006-07-11-pl-us-18-06-removal-of-chief-judges>

<sup>28</sup> Bobek, Michal, and David Kosař. 2014. Global Solutions, Local Damages: A Critical Study in Judicial Councils in Central and Eastern Europe. *German Law Journal* 15(7): 1257–1292. <https://doi.org/10.1017/S2071832200019362>

<sup>29</sup> Judgments of the Constitutional Court IV. ÚS 167/05, Pl. ÚS 38/04, Pl. ÚS 18/06, II. ÚS 300/06, Pl. ÚS 51/06, III. ÚS 555/06, IV. ÚS 814/06, II. ÚS 531/06, Pl. ÚS 9/07, Pl. ÚS 55/13

<sup>30</sup> Wintr, Jan. *Problems of Obstruction and Inefficiency in the Czech Parliament and the Need to Reform the Rules of Procedure (Proměny parlamentní kultury, Auditorium, Praha 2021 - short version in English)*. <https://www.wintr.cz/index.php/publikace/prehled-publikacni-cinnosti-i>. Accessed 06 Nov 2023

Minister of Justice. However, the most influential persons in the Czech judiciary are in fact the presidents of the courts.<sup>31</sup> It is therefore questionable whether greater formal independence of the judiciary would actually improve the real independence of judges in deciding legal cases.<sup>32</sup>

Last but not least, the more politicians consider the Constitutional Court's reasoning in these cases to be based on individual judicial preferences rather than on any generally accepted concept of the rule of law, the more they tend to evaluate the Constitutional Court judges from a political perspective, which is very dangerous for the good functioning of democracy. In other words, the judicialisation of politics through broad substantial understanding of the rule of law leads to the danger of politicisation of the judiciary.

### ***III. A few conclusions***

The elaboration of the EU rule of law checklist and the introduction of the monitoring mechanism have helped the EU to clarify the concept of the rule of law itself and how it can enable citizens to exercise more effective control over the use of public power. The EU rule of law checklist can also guide the Czech Constitutional Court's reasoning on contentious issues, and politicians may be less inclined to view the Constitutional Court's rule of law reasoning as a matter of political preference.

On the example of the Czech Republic, we can observe that the acceptance of individual requirements of the rule of law is more likely if these requirements are presented in a procedurally and politically neutral manner. Conversely, the inclusion of specific substantive requirements, such as the insistence on the establishment of judicial councils and their mechanical control or even sanction, without reference to the objective of better control of the use of public power that they should bring, may be questionable in specific cases.

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<sup>31</sup> Kosař, David. 2017. Politics of Judicial Independence and Judicial Accountability in Czechia: Bargaining in the Shadow of the Law between Court Presidents and the Ministry of Justice. *European Constitutional Law Review* 13(1): 96–123. <https://doi.org/10.1017/S1574019616000419>

<sup>32</sup> For the current arguments for the establishment of the Supreme Judicial Council in Czechia see Němec, Jan. 2023. Judicial Independence in the Czech Republic – Walking on a Tightrope. In *The Rule of Law and the Judiciary*, ed Katja Meier, Astrid Lorenz, and Matthias Wendel, 79–98. Baden-Baden: Nomos