

## Part II: Scholarly Perspectives on Judicial Independence



# Judicial independence in the Czech Republic – Walking on a tightrope

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## 1 Introduction

The independence of the judiciary in the EU Member States of East Central Europe has recently come to the fore, most notably in the context of the controversies in Poland and Hungary. The considerable media, scholarly and political attention received by the disputes between the governments there and parts of the judiciary and the EU institutions has largely overshadowed developments in other countries of the region. The proverbial darkness under the candlestick may play into the hands of attempts to limit the independence of the judiciary also in other still young democracies such as the Czech Republic, mainly as there exists no independent body of judicial self-government in the country.

Recent events show that Czech politicians sought to influence the judicial branch. The alleged attempt by high-ranking aides of President of the Republic Miloš Zeman to trade the power to appoint judicial officials for favours in certain court proceedings was on the agenda of the parliamentary subcommittee on justice,<sup>1</sup> and it eventually became one of the arguments of the Senate, the second chamber of the parliament, for initiating the ultimately unsuccessful procedure of removing Zeman from office.<sup>2</sup> However, since the Ministry of Justice, an institution of the executive branch, is the supreme body of the state administration of the judiciary, influence can also be exerted more discreetly and subtly, well beyond such highly medialized events.

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1 See Brian Kenety, 'MPs hear testimony over alleged attempts by Zeman, president's chancellor to sway judges' (*Radio Prague International*, 24 January 2019) <<https://english.radio.cz/mps-hear-testimony-over-alleged-attempts-zeman-presidents-chancellor-sway-judges-8140379>> accessed 1 March 2023.

2 Reuters, 'Czech opposition lawmakers fail in bid to remove president' (*Reuters*, 26 September 2019) <<https://www.reuters.com/article/us-czech-president-idUSKBN1WB2NC>> accessed 1 March 2023.

Against this background, this chapter seeks to enrich the mosaic of judicial independence in Central Europe by shedding light – in its first section – on the institutional guarantees and practice of judicial independence in the Czech Republic. It focuses mainly on the relationship between the legislative and executive powers on the one hand and the judiciary on the other. The relations within the bench, most notably between its hierarchical levels, are omitted because of limited space. Afterwards, it is determined whether the judiciary enjoys public confidence. In the third section, the chapter informs about the views of politicians and judges on the state of judicial independence in Czechia. This section is based on original research within the project “Rule of Law in East Central Europe” at Leipzig University.<sup>3</sup> In sum, the chapter will show that judicial independence in the Czech Republic, although institutionalized on paper, cannot be taken for granted. It is like walking on a tightrope, a delicate balance depending on the attitudes and behaviour of different actors, including the general public.

## *2 Institutional guarantees and practice of judicial independence in the Czech Republic*

The structure of the Czech judicial system and the basic requirements for exercising judicial functions are enshrined in Part Four of the Constitution of the Czech Republic.<sup>4</sup> Judicial independence as a fundamental characteristic of the judiciary is regulated in Article 81: “The judicial power shall be exercised in the name of the Republic by independent courts.” Article 82 then guarantees the individual independence of each judge, stating in paragraph 1 that “Judges shall be independent in the exercise of their functions. Their impartiality shall not be compromised by anyone.” Thus, the Constitution guarantees the dual independence of the judiciary, namely of the courts as judicial bodies (external independence) on the one hand and individual judges on the other (internal independence, impartiality). These two dimensions of judicial independence are interrelated and interdependent; it is difficult to imagine the long-term existence of one in the absence of the other.

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3 Project funded by the German Federal Ministry of Education and Science (2021–2024; Grant number 01UC2103), Project Team Leader Prof. Astrid Lorenz, Leipzig University.

4 Constitutional Act No. 1/1993 Coll., Constitution of the Czech Republic.

Notwithstanding the constitutional provision, indirectly – through the administration of the courts as state bodies – the judiciary is linked to the executive branch, namely the Ministry of Justice. This model has its roots in the system used in the Habsburg monarchy, of which the Czech lands were a part. This model persisted through dramatic changes in the legal system and the political regime, and the executive can influence the functioning of the judiciary, e.g. in terms of budget and judicial appointments. However, the government is not the only actor with the power under the Constitution or special laws to intervene in administering justice and judicial appointments. The President of the Republic and, to some extent, the second parliamentary chamber also play a significant role concerning judicial independence.

## 2.1 Government, the minister of justice, and their counterparts

As mentioned above, the executive, namely the minister of justice, interferes with the independence of the Czech judiciary under powers and duties defined by a specific law. The government nominates all judges formally appointed by the president, subject to the countersignature of the prime minister or the minister in charge. The same applies to the majority of judicial officials. Except for constitutional judges and the President and Vice President of the Supreme Court, judicial officials are appointed by the head of state upon the government's proposal, sometimes with the concurrent countersignature of the prime minister or the minister of justice. In the case of district courts, the presidents and vice presidents are appointed directly by the minister of justice. Table 1 offers a summary of the appointing powers concerning court officials.

In everyday practice, the linkage of the judiciary to the executive goes beyond judicial appointments. In the absence of a statutory supreme representative of the judicial power, such as the Judicial Council, several informal platforms have been created to fulfil this role *de facto*. The first platform is the Collegium of Presidents of Regional Courts, established in 2001 to discuss issues affecting regional courts while playing an active role in the judiciary and the Ministry of Justice relationship.

Another collective body that, by definition, defends the interests of judges is the professional association, the Judges' Union. It was founded in 1990 and is still the only professional association of judges in the Czech Republic.

lic. Since membership is optional for judges, it brings together slightly over 30 % of judges.<sup>5</sup> Despite this, it receives appropriate attention, especially from the media, on the functioning of the judiciary.

*Table 1: Overview of powers to appoint judicial officers under the Constitution and special laws*

Court	Position	Proposes	Countersignature/ approval required?	Appoints	
<i>Constitutional Court</i>	Justices	President of the Republic	Senate majority vote	President of the Republic	
	President	-	-		
	Vice presidents				
<i>Supreme Court</i>	President	-	-		
	Vice president				
<i>Supreme Administrative Court</i>	President	-	Prime minister or designated minister		
	Vice president				
<i>High courts</i>	President	Minister of justice	-		Minister of justice
	Vice presidents	President of the high court concerned			
<i>Regional courts</i>	President	Minister of justice	Prime minister or designated minister		President of the Republic
	Vice presidents	President of the regional court concerned	-		
<i>District courts</i>	President	President of the regional court in charge		-	Minister of justice
	Vice presidents	President of the district court concerned			

Source: Own elaboration based on the Constitution of the Czech Republic (Constitutional Act No. 1/1993 Coll.), the Act on Courts and Judges (Act No. 6/2002 Coll.), and the Administrative Procedure Code (Act No. 150/2002 Coll.).

An informal grouping, however, which does not have such a long history and is highly dependent on the personal relationships of its members is the trio of presidents of the highest judicial instances, i.e. the Constitutional Court, the Supreme Court and the Supreme Administrative Court. Such a constellation emerged in 2015 with the then Presidents Pavel Rychetský,

5 Interview with Libor Vávra, President of the Judges' Union, 27 October 2021.

Pavel Šámal and Josef Baxa, respectively, who, in 2017, together with the then Supreme State Prosecutor and the Public Defender of Rights (Ombudsman), published a joint statement on government interference in the judicial independence in Poland.<sup>6</sup> Beyond all doubts, this message was also directed to the domestic audience – politicians and the general public. However, with the personnel changes in these positions (only Rychetský holds the office today), this platform has faded into the background.

As mentioned, the minister of justice, the highest authority of the courts' state administration, is a crucial figure within the government. However, his or her role is to mediate between the political sphere and the bench. Considering that judicial officials are appointed for seven or ten years, while the position of the Czech Minister of Justice is one of the less stable ones,<sup>7</sup> it is mainly the presidents of regional courts who, both as a result of their relatively long mandates and primarily due to the influence of information superiority, decide on the functioning of justice in the area of the jurisdiction of a given court.<sup>8</sup>

## 2.2 President of the Republic

According to the Constitution, the Czech Republic is a parliamentary system where the centre of executive power lies in the government, accountable to the Chamber of Deputies. However, it is significant for the functioning of the separation of powers that the president has always been largely autonomous from the government or the ruling parliamentary majority in the three decades of the Czech Republic's existence. Although two of the three Czech presidents were former prime ministers and leaders of principal political parties, they acted independently from their former party fellows.

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6 See the joint statement "We cannot remain silent" published on 21 July 2017 on the website of the Constitutional Court <<https://www.usoud.cz/aktualne/spolecne-prohlaseni-k-situaci-v-polsku>> accessed 1 March 2023.

7 Between 2010 and 2022, there were six governments, in which a minister of justice was appointed nine times. Although several politicians held this position repeatedly in different governments, still there were seven different ministers. See Ministry of Justice of the Czech Republic, Gallery of Ministers of Justice from 1989 to the present <<https://justice.cz/web/msp/historie?clanek=galerie-ministru-spravedlnosti>> accessed 1 March 2023.

8 David Kosař, 'Politics of Judicial Independence and Judicial Accountability in Czechia. Bargaining in the Shadow of the Law Between Court Presidents and the Ministry of Justice' (2017) 13 *European Constitutional Law Review* 96.

The introduction of the popular election of the president in 2012 (before, the head of state was elected by the parliament) moved the Czech political system closer to the model of semi-presidentialism or at least opened space for the reinterpretation of relations between constitutional powers. Even the two presidents elected by the parliament were influential political players; nevertheless, the first president elected by the people in 2013 made it clear that he intended to exercise his mandate differently. In an interview with a leading Czech daily, he stated that “the notion of constitutional conventions is totally idiotic, because if they really were constitutional, then they would be somehow enshrined in the Constitution. They are only conventions. The president, despite being directly elected, cannot change the Constitution; however, he certainly has an inviolate right to change conventions that are not enshrined in the Constitution.”<sup>9</sup>

The self-perceived autonomy of the head of state is crucial since the Constitution confers some elemental powers on the president in judicial appointments. Starting from the bottom of the judicial structure, the president appoints all judges at the beginning of their professional careers. The formal appointments on the government’s proposal need the countersignature of either the prime minister or the minister in charge. Although the head of state usually appoints nominated candidates automatically, there has been a situation in the past where the president refused a group of nominees, citing their young age, and ignored a subsequent adverse court decision.

Moreover, the President of the Republic appoints heads of eight regional courts, two high courts and the President and Vice President of the Supreme Administrative Court. These appointments are subject to the countersignature of the prime minister or a minister authorized by him. At his or her discretion, the head of state shall appoint the President and the Vice President of the Supreme Court from among its judges.

Last but not least, the President of the Republic appoints all judges to the Constitutional Court under the prior approval of the Senate. Here, the American model was incorporated into the Czech Constitution, where the head of state selects possible candidates at his or her discretion and then has to win the support of the second chamber of parliament. From among

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9 The English translation taken from Jan Wintr, Marek Antoř and Jan Kysela, ‘Direct election of the president and its constitutional and political consequences’ (2016) 8 *Acta Politologica* 145, 149.



the members of the Constitutional Court, the head of state also appoints its president and vice presidents, this time freely, at his or her discretion.

The fact that the judges of the newly created Constitutional Court of the Czech Republic were almost all appointed in 1993 for a constitutionally defined ten-year term of office has led to the situation that most of the seats are replaced at approximately the same time. Considering that all Czech presidents were re-elected for a consecutive five-year term, each could appoint all the Constitutional Court judges and shape its internal composition entirely.

Every president pursued a different strategy for selecting candidates for constitutional judges. Václav Havel (1993–2003) strived for a relatively homogeneous Constitutional Court that would contribute to implementing democratic values and human rights policies in the political and legal framework of the transforming society. At the same time, in his search for suitable candidates, he turned to expert institutions for their recommendations and opinions. Václav Klaus (2003–2013) purposefully sought a more diverse composition of the Constitutional Court in terms of professional experience and ideological background. As a long-time politician (before being elected President of the Republic, Klaus was Prime Minister and Speaker of the Chamber of Deputies, among others), he considered the Constitutional Court to be a political institution, which is why he appointed several people with careers in top politics to its ranks.<sup>10</sup> At the same time, he cooperated much less with the professional public in selecting suitable candidates, which, according to critics of this approach, has contributed to the low quality of the nominees and, thus, to the higher rejection rate by the Senate. Miloš Zeman (2013–2023), in the early years of his term, relied on the recommendation of the President of the Constitutional Court, Pavel Rychetský (appointed in 2003 by Václav Klaus), who had previously

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10 This was primarily Pavel Rychetský, a former interior minister, deputy prime minister and senator elected as a member of the Social Democratic Party, the party in opposition to Klaus. Alongside him, Miloslav Výborný, a long-time member of the Christian Democratic Party and former defence minister in Klaus's government, and Dagmar Lastovecká, former mayor of Brno and senator for Klaus's Civic Democratic Party, were also appointed Constitutional Court judges. It should be noted that none of them has been questioned as to their readiness to serve as a constitutional judge. On the other hand, it is worth mentioning that all three of them were involved in the drafting of legislation as members of parliament (Rychetský and Výborný, moreover, from ministerial positions), whose conformity with the Constitution they were subsequently supposed to test.

been the deputy prime minister of Zeman's cabinet and a high-profile party politician. It was only in 2016 that Zeman decided to select candidates based on the recommendations of his office staff, again non-transparently, "behind closed doors".<sup>11</sup>

All three Czech presidents had to deal with rejection from part of the parliamentary chamber. In the case of Václav Klaus, the stand-off culminated in a situation where the number of members of the Constitutional Court fell below the legal minimum required for plenary decision-making. This situation lasted for several months and harmed the Constitutional Court's ability to rule, for example, on the incompatibility of legislation with the Constitution. Based on this experience, it is evident that the president sets the pace for filling vacant seats and, in extreme cases, can block the Constitutional Court from making some of its decisions.

### 2.3 The Senate

Although the Czech Republic is a relatively homogenous unitary state, the Constitution of 1992 re-established the second parliamentary chamber. The Senate was part of the constitutional architecture of the first Czechoslovak Republic (until 1938), but at that time, it only copied and reproduced existing power relations due to its excessive institutional similarity to the first parliamentary chamber. The Czech Constitution builds on the tradition of bicameralism. However, it emphasizes the dispersion of power; thus, the second chamber serves as a possible counterbalance to the first chamber and, to some extent, to the executive power. Indirectly, through its interaction with the Chamber of Deputies, it has check powers towards the government backed by the majority in the first chamber. Towards the President of the Republic that is also part of the executive power according to the Constitution the Senate has direct scrutiny powers in selected nomination and appointment processes.

The guiding concept of the arrangement of the Czech Parliament is indeed asymmetrical bicameralism, i.e. the first chamber has the upper

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11 Zdeněk Kühn and Jan Kysela, 'Nomination of Constitutional Justices in Post-Communist countries: Trial, Error, Conflict in the Czech Republic' (2006) 2 *European Constitutional Law Review* 183; Zdeněk Kühn, 'The Czech Constitutional Court in times of populism. From judicial activism to judicial self-restraint' in Fruzsina Gárdos-Orosz and Zoltán Szente (eds), *Populist Challenges to Constitutional Interpretation in Europe and Beyond* (Routledge 2021).

hand in the legislative process (most importantly, it can override any vetoes or amendments by the Senate, and the Senate is also excluded from the consideration of the national budget). However, in some critical areas for the functioning of the constitutional system, the Senate is relatively strong. These include amendments to the Constitution, where the Senate has to approve such proposals by a qualified majority, and specific laws (e.g. the Electoral Law), where explicit consent of the Senate is needed, and the Chamber of Deputies cannot override it.

Since the elections to the Senate are held every two years, with a third of seats being renewed each time, the second parliamentary chamber is the most frequently reshuffled of all constitutional institutions. On the other hand, the individual senators have the most extended term of all elected offices: six years, compared to four years for the members of the first chamber and five years for the president. Thus, they are disconnected from these electoral cycles. In addition, senators are relatively free from party pressure as a consequence of the fact that the majority voting system is used for the Senate election. This voting system emphasizes the personalization of the vote instead of the party affiliation, a more important feature of the proportional representation voting system used for election to the Chamber of Deputies. Last but not least, the government arises from the Chamber of Deputies, to which it is also formally accountable but, at the same time, enforces the voting discipline of the parliamentary party groups supporting the government. Such attempts are less frequent and often unsuccessful towards senators.

The president, who has some powers over the government and can thus indirectly influence the governing majority in the Chamber of Deputies, has no leverage on the Senate. Thus, *vis-à-vis* the president, the Senate acts as an equal actor when considering nominations for constitutional judges. In addition, to the Senate, the president has little to offer as a reward for senators' potential willingness to accommodate his personal preferences. That is also why, after the Senate was established in 1996, Presidents Václav Klaus and Miloš Zeman suffered several rejections of their nominees (Klaus nine, Zeman five out of twenty-one nominations each)<sup>12</sup>.

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12 Jana Ondřejková, 'Výběr soudců Ústavního soudu ČR' (2016) 11 *Právník* 945. Figures updated according to data available in the database of the Senate of the Czech Republic as of 31 December 2022.

### 3 Public trust in the judiciary as a protective shield?

The correlation between the general public trust in the judiciary and judicial independence has often been researched and eventually confirmed.<sup>13</sup> The leading argument is that judicial independence and its public perception contribute to trust-building. Therefore, since public confidence in the bench is a desired outcome, judicial independence should serve as a means to achieve that outcome. However, the relationship between these two aspects is of mutual influence. Attacks on the independence of the judiciary are indeed easier to launch if the judiciary does not enjoy significant public confidence, for instance due to general negative experiences with the functioning of the courts (e.g. slowness of their decision-making) or as a result of medialized corruption cases of individual judges.

Similarly, suppose more organizations act as spokespersons for the judiciary vis-à-vis the political sphere and the general public, and these organizations may compete with each other. In that case, it may reinforce the public perception of disorder in an institution that should be exemplarily flawless by the logic of its role. Although public perception may not reflect the reality of the functioning of the judiciary, if a critical part of the general public is in favour of reforming the bench, it opens a window of opportunity for systematically limiting its independence.

In the case of the Czech Republic, the judiciary had to fight for public trust for a long time. The initial low level of public confidence in the judiciary stemmed mainly from the requirements of the process of transforming the judiciary from a non-democratic system to a democratic state governed by the rule of law. After the collapse of the authoritarian regime, a crucial issue was the renewal of the judicial staff in a way that showed as few links to the previous regime as possible. The undemocratic regime endured more than 40 years, so filling the judiciary with judges with no professional history and no links with the previous regime was practically impossible.

The lustration laws, adopted in 1991 and repeatedly extended after that, prevented the continuation in office of judges who directly collaborated with the repressive apparatus of the authoritarian regime. Nevertheless, in the context of the high degree of institutional continuity and the rejection of a broad application of the principle of collective guilt, it was not

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13 See, for instance, Frans van Dijk, *Perceptions of the Independence of Judges in Europe. Congruence of Society and Judiciary* (Palgrave Macmillan 2021).

feasible to remove from office all judges who had been members of the authoritarian Communist Party. Although it has been reported that approximately 70 % of judges left the judiciary during the years of transition,<sup>14</sup> a significant number of them did so for economic reasons, as the remuneration of judges was extremely low compared to, for instance, private law practice. The subsequent understaffing and a dramatic increase in court cases associated with the change in social, economic and legal conditions linked to the system transformation in the 1990s and the resulting delays in decision-making affected the public perception of the judiciary. Some also questioned the independence of judges' decision-making given their possible linkage to former authoritarian structures.<sup>15</sup>

Despite the adverse starting conditions mentioned above, the Czech judiciary's independence thirty years after its transformation is perceived as good by most of the general public.<sup>16</sup> Public confidence in the judiciary has gradually increased over the past 20 years. As shown in Figure 1, from around 40 % in 2002, it steadily rose to 60 % in 2021. Trust in the Constitutional Court followed a similar trend. Unlike ordinary courts, the Constitutional Court has established itself relatively quickly as one of the most trusted central constitutional institutions. Although occasional fluctuations can be observed, mainly due to controversial decisions (such as the annulment of the early elections in 2009 due to the unconstitutionality of the parliamentary procedure used for calling them), an upward trajectory and generally more than 50 % public confidence can be observed.

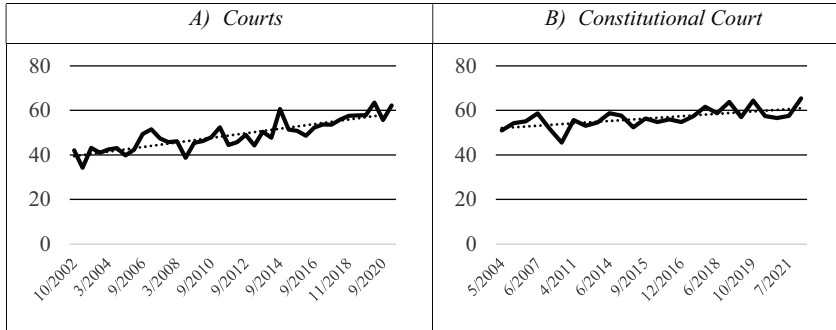
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14 Daniela Piana, 'The Power Knocks at the Courts' Back Door. Two Waves of Postcommunist Judicial Reforms' (2009) 42 *Comparative Political Studies* 816, 822.

15 In relation to this, since 2011 the Ministry of Justice has made public information about membership of judges and state prosecutors in the Communist Party before 1990. It was forced to change its initially reluctant approach due to the decision of the Constitutional Court from 2010 that gave the right of access to this information a higher level of public interest than the protection of privacy. See Nález Ústavního soudu ze dne 15. listopadu 2010, sp. zn. I. ÚS 517/10.

16 See European Commission, *Perceived independence of the national justice systems in the EU among the general public: report* (Publications Office of the European Union 2022) <<https://data.europa.eu/doi/10.2838/685657>> accessed 1 March 2023.

Figure 1: Development of the Czech public's trust in the courts between 2002 and 2021, % of respondents

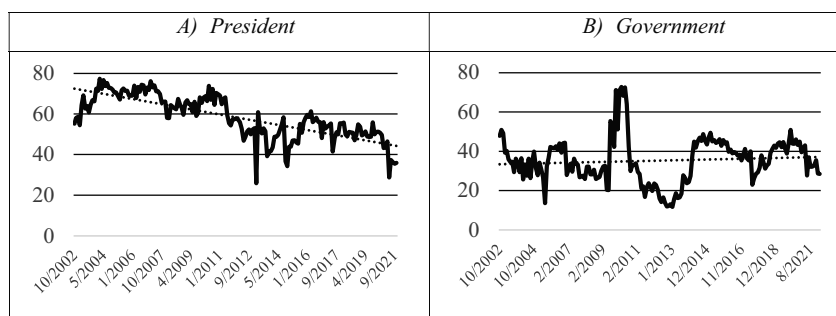


Source: Centre for Public Opinion Research, Academy of Sciences of the Czech Republic. <https://cvvmapp.soc.cas.cz>

Note: Trustworthiness ratings for the courts have been tracked since October 2002 and for the Constitutional Court since May 2004. Graphical representation of the sum of “definitely trust” and “rather trust” responses to the question “Please tell me, do you trust the courts/Constitutional Court: definitely trust, rather trust, rather distrust, definitely distrust?”

These data and, in particular, the trends contrast with the evolution of trust in the institutions of the executive branch, i.e. the president and the government – see Figure 2. In particular, confidence in the president had declined significantly in recent years, which may have been contributed to by the introduction of direct election of the head of state, when the presidency became the subject of polarized electoral competition. In addition, trust in the president also reflects the current assessment of the incumbent’s performance. In any case, confidence in the president has fluctuated from relatively high levels of over 60 % since 2013 to between 60 % and 30 %. Similarly, low levels of trust are usually experienced by governments, which rarely, and usually only in the short term, manage to convince more than 50 % of the public. Most often, however, it has oscillated between 20 % and 40 %.

Figure 2: Development of the Czech public's trust in the institutions of the executive branch between 2002 and 2021, % of respondents



Source: Centre for Public Opinion Research, Academy of Sciences of the Czech Republic. <https://cvvmapp.soc.cas.cz>

Note: In order to make the data comparable with Figure 1, the ratings of the trustworthiness of the president and the government since October 2002 are shown. Graphical representation of the sum of the responses “strongly trust” and “rather trust” to the question “Please tell me, do you trust the president/government of the Czech Republic: strongly trust, rather trust, rather distrust, strongly distrust?”

Given this considerably high level of trust in the courts, encroachments on the independence of the judiciary would face resistance from the society that would be supportive of judges and their protection from outside pressures. Recently, the most prominent expression of public awareness regarding the rule of law in the Czech Republic was the series of protests against Prime Minister Andrej Babiš and Justice Minister Marie Benešová, one of which was the largest demonstration since 1989.<sup>17</sup> Ultimately, the fact that criminal proceedings were brought against the acting prime minister has contributed to an increase in public interest in the functioning of the rule of law institutions while significantly lowering the threshold of sensitivity to any, even suspected, political interference in its structures.

Nevertheless, relying solely on the strength of public trust and support would be naive. Generally speaking, if “attacking” the independence of the judiciary in a pluralist democratic system, political actors can adopt differ-

17 See, for instance, Siegfried Morkowith, ‘Czechs march in biggest anti-government protest since communism’ (*Politico.eu*, 23 June 2019) <<https://www.politico.eu/article/czech-republic-czechs-prague-stage-biggest-protest-since-communism-against-prim-e-minister-andrej-babis/>> accessed 1 March 2023.

ent strategies that will naturally consider their objectives and especially the political costs of such a move. For instance, when the ruling power seeks to limit or outright remove obstacles to pushing its agenda through legislation, it will focus primarily on the Constitutional Court, which often stands outside the general structure of the judicial system. Thus, it would probably leave the judicial system intact; however, such a move would not escape public attention. In contrast, the political parties systematically involved in corruption will seek to neutralize the criminal justice apparatus. Moreover, in countries with decentralized politics and court system structures, the latter may only be the case locally, again without affecting the institutional independence of the judiciary on a systemic level. Thus, undermining judicial independence can be subtle and limited in scale, not always raising public awareness.

As outlined in the following section, many Czech politicians are not opposed in principle to interference in the judiciary if – in their perspective – it would improve the quality of its performance. On the other hand, some judges mentioned the many pressures and temptations they are exposed to, particularly concerning the appointment processes within the judiciary. A relatively high and stable level of public confidence in the judiciary is probably the most appropriate environment to establish mechanisms and institutions for strengthening its independence from the President of the Republic or the Ministry of Justice as bodies of executive power.

#### *4 Judicial independence in views of Czech judges and politicians*

To understand the practice of judicial independence better, one needs to know how judges and politicians perceive the rule of law as a concept and their mutual relationship. This is explored in the mentioned “Rule of Law in East Central Europe” research project at Leipzig University. As part of this project, the author conducted semi-structured interviews with ten representatives of the Czech judiciary and ten politicians from different political parties. In the case of the party representatives, the main objective was to obtain the most diverse picture of perceptions of the rule of law possible while deliberately approaching, on the one hand, politicians with an educational and professional background in law and, on the other hand, members of parliament with different qualifications and specializations.



Similarly, long-serving members of parliament and politicians with relatively short parliamentary experience were purposively selected.<sup>18</sup>

The representatives of the judicial power were selected to reflect both functional differences, i.e. to include judges of the highest judicial instances (two judges of the Constitutional Court, the President of the Supreme Court, and the former president of the Supreme Administrative Court), as well as judges from different regions (four regional courts – Prague, Ústí nad Labem, Ostrava and České Budějovice, two high courts – Prague and Olomouc). In the case of the regional courts, the interviewees were mainly their former or sitting presidents, i.e. court officials who combine two roles in their person: an independent judge who is involved in decision-making activities and a manager who is responsible for the state administration of the courts within his or her jurisdiction. An interview was also held with the President of the Judges' Union, the only professional association of judges in the Czech Republic.

During the semi-structured interview, open questions were also raised about the independence of the judiciary, the evaluation of the transformation of the bench after 1990, and, if applicable, the problems the Czech judiciary is currently facing. Besides this, respondents were asked to fill in a one-page questionnaire with a prepared list of twenty-five possible attributes of the rule of law. Among others, the independence of judges in their decision-making and the possibility of dismissing them were included. The interviewees were also asked to assess how important a respective attribute is for the rule of law.

There was a cross-cutting and clear consensus on the necessity of having a separation of powers and independent judges. The statement “Judges decide independently of political, religious and economic influences” was considered as reflecting the typical feature of the rule of law by all interviewees and assessed as “essential” by all judges and nine of ten politicians (one MP considered this to be “rather important”). Similarly, the separation of powers as a state power arrangement was considered essential for the rule of law by all politicians and nine judges (one judge considered this “rather important”).

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18 The respondents include two members of the Chamber of Deputies elected for ANO2011, one for ODS, TOP09, KDU-ČSL, SPD, STAN, and at the time of the interview soon after the 2021 elections, former MPs elected for the ČSSD, KSČM and the Pirate Party.

However, when it comes to the possibility of dismissing a judge from office (expressed by the statement “Judges may be dismissed only in exceptional cases”), half of the politicians assessed this feature as “rather important” or “rather unimportant”. In contrast, 80 per cent of judges considered this an “essential” element of the rule of law. The interviewed MPs usually mentioned corruption or misconduct of judges as a possible reason for their removal from office. Still, the fact that politicians give lower importance to the inviolability of the judicial office indicates their understanding of interventions in the judicial system if there is an acceptable reason for such a move.

Nevertheless, all respondents expressed the opinion that the justice system in the Czech Republic is so systemically and institutionally set up that it can face possible pressures on its independence. According to the President of the Supreme Court, this independence is accepted by other actors.<sup>19</sup> According to the former speaker of the Chamber of Deputies and the current chairman of its Constitutional Law Committee, “there is no political entity in the Czech Republic that could claim to have any influence on the judiciary”.<sup>20</sup> The former president of the Municipal Court in Prague and sitting President of the Judges’ Union noted that “compared to some neighbouring countries, we are perhaps lucky (...) that no one here has dared to go after the judiciary systemically. And the longer it goes on, the harder it will be to get started.”<sup>21</sup>

Although the independence of the judiciary seems to be generally recognized as a desirable element and a de facto state of affairs, some respondents criticized judges as individual decision makers. They pointed out that the judicial system cannot be completely immune to the possible entry of individuals who “fail” for various reasons, even though in material terms (the level of remuneration) or concerning the prestige<sup>22</sup> and security of the

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19 Interview with Peter Angyalossy, President of the Supreme Court, 3 November 2021.

20 Interview with Radek Vondráček, Chairman of the Constitutional and Legal Committee of the Chamber of Deputies of the Parliament of the Czech Republic, 23 February 2022, citation translated.

21 Interview with Libor Vávra, President of the Judges’ Union, 27 October 2021, citation translated.

22 According to a public opinion poll, the profession of judge has long been among the ten most prestigious professions, see CVVM, ‘Tisková zpráva Prestiž povolání – červen 2019’ (*Centrum pro výzkum veřejného mínění*, 27 April 2019) <[https://cvvm.soc.cas.cz/media/com\\_form2content/documents/c2/a4986/f9/eu190724.pdf](https://cvvm.soc.cas.cz/media/com_form2content/documents/c2/a4986/f9/eu190724.pdf)> accessed 1 March 2023.

job,<sup>23</sup> there is no “need” for judges to get involved in corruption. Therefore, the critical interviewees linked the potential corrupt behaviour of individual judges to their immaturity.

Some judges pointed out that the appointment powers of the President of the Republic or the government may create incentives for seeking proximity to political actors who can ensure individual career advancement. In the words of a former president of the Supreme Administrative Court, “the normal ordinary judge, when well organized, is very immune to this. The problem arises when that judge looks where he would climb up some of those ladders and who would help him. (...) And these are the cracks in that independence.”<sup>24</sup>

In countries with supreme bodies of judicial autonomy (so-called judicial councils), the issue of career advancement and the selection of judicial officials is the responsibility of such institutions. In the Czech Republic, such a body has not been established, despite many judicial officials calling for its creation – for instance, the President of the Supreme Court: “Historically, from the times of the Austro-Hungarian Empire, we have adopted the model of the management of the judiciary by the Ministry of Justice. Maybe it is more comfortable for the judiciary to some extent to have someone taking care of it. (...) The Supreme Council of the Judiciary will even better ensure the independence of the judiciary from the executive, from the Ministry of Justice, absolute independence.”<sup>25</sup> The President of the Regional Court in Ústí nad Labem specifically mentioned the issue of influence on judges’ careers: “I would never have thought that I would say this publicly, but it is so... that I see a real handicap in the fact that there is no self-governing body of justice here. In that sense, the judiciary setting in relation to the executive, where the Ministry of Justice determines the material conditions for the administration of justice, is problematic. (...) Moreover, the second problematic element is, of course, who influences the selection of judicial officials.”<sup>26</sup>

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23 Judges are appointed for life, and by law their judicial mandate expires at the end of the year in which they reach the age of 70, five years above the standard retirement age.

24 Interview with Josef Baxa, former president of the Supreme Administrative Court, 20 October 2021, citation translated.

25 Interview with Peter Angyalossy, President of the Supreme Court, 3 November 2021, citation translated.

26 Interview with Lenka Ceplová, President of the Regional Court in Ústí nad Labem, 4 November 2021, citation translated.

On the other hand, the President of the Regional Court in České Budějovice believed that the function of a body like the Judicial Council is already being fulfilled by representatives of the highest judicial instances who act as spokespersons for the judiciary. She also described the College of Presidents of Regional Courts as an essential platform: “Perhaps we do not need to start by establishing the Supreme Judicial Council, but we need to formalize the structures that we have and are functioning and somehow make them representative. I think it is already informally taking shape, but it is very fragile. It always depends on how much the executive wants to respect those unofficial representatives of the judiciary, to listen to them, if there is not some of that solid organizational structure.”<sup>27</sup>

The former minister of justice also expressed her support for the creation of a body representing the judiciary, albeit to facilitate communication between the ministry and the bench and, in particular, to overcome the substantial decentralization of state administration of the courts, which, in her opinion, negatively affects the functioning of the judiciary as a whole: “So, as a minister, you have to talk to every president of a regional court in the Czech Republic, at most you invite them to a joint meeting because they are the real decision makers in their ‘gubernia’, because one ‘gubernia’ is different in Karlovy Vary, another is in Zlín, which should not be. It is just against the rule of law.”<sup>28</sup>

The former president of the Supreme Administrative Court sees the problem of the unfinished reform of the judiciary on the part of politicians: “I blame it on the state of politics here, the instability in politics (...) There is no continuity; there is no institutional memory (...) Politicians are aware of their limited time – in the best case, it is the election cycle, four years, but experience shows that it does not have to be four years – so they are not interested in long-term things. (...) We do not have these ministers of justice here whom we knew many years ago that they are potential ministers of justice, that they are preparing for it, that they have their programmes, their visions, and when they get the political influence, they will start to

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27 Interview with Martina Flanderová, President of the Regional Court in České Budějovice, 21 October 2021, citation translated.

28 Interview with Helena Válková, Member of the Parliament of the Czech Republic and former minister of justice, 25 October 2021, citation translated.

implement them. It is always starting from scratch, and unfortunately, it affects the state of the justice system.”<sup>29</sup>

The fact that a supreme body of judicial autonomy has not yet been established is interpreted by judicial actors as the reluctance of political parties. For example, the Vice President of the High Court in Prague commented: “The ruling party, or the one that has the majority in parliament or the government, always says, you do not need it that much, the supreme council of the judiciary, and very often it happens that the political party that is in opposition calls for it. (...) When the parties change and the opposition party starts to rule, it no longer wants to hand over part of its powers to the judiciary.”<sup>30</sup> The chair of the regional court in Ústí nad Labem also perceived the absence of a political will and commented on the possible reasons: “I think it is fear. I think it is the fear of politicians that we will get away from them.”<sup>31</sup>

Nevertheless, the fact that it is ultimately the structure of the judiciary that has the main influence, for example, on personnel policy, was confirmed by the President of the Judges’ Union: “The presidents of regional courts play a key role in selecting judges. I did that for seven years and introduced a system of selection procedures that was not even regulated by law. (...) None of the five or so ministers who have been replaced has ever said a word. All they had to do was to say, look, here is how it is, here was one step, the second step, these people saw it, these people checked it. And by the way, the president never spoke up either. (...) The justice system actually proposes these people *de facto*, although formally the minister of justice.”<sup>32</sup>

## *5 Concluding remarks*

The institutional independence of the judiciary in the Czech Republic is a delicate balance that has been established despite the legal framework that grants strong powers to the executive. This balance is determined primarily

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29 Interview with Josef Baxa, former president of the Supreme Administrative Court, 20 October 2021, citation translated.

30 Interview with Jan Sváček, Vice President of the High Court in Prague, 18 October 2021, citation translated.

31 Interview with Lenka Ceplová, President of the Regional Court in Ústí nad Labem, 4 November 2021, citation translated.

32 Interview with Libor Vávra, President of the Judges’ Union, 27 October 2021, citation translated.

by the current strength or weaknesses of the executive. The fact that the minister of justice is one of the less stable government positions contributes to the informational superiority of the judiciary, particularly in appointing judges and some judicial officials.

It is mainly the presidents of regional courts who have a decisive influence on the running of the judiciary. Although this might be assessed as a positive outcome of searching for mechanisms that protect judicial independence and provides it with a certain degree of de facto administrative autonomy, the concentration of powers in the hands of a few judicial officials poses several risks, starting with the potential for individual abuse of power and reaching a systemic hijacking of the judiciary by a coordinated action.

Based on the information from the interviews with selected judicial officials, the solid material background and social prestige of the profession, as well as the relatively high and growing public trust, play an essential role in the resistance of the judiciary to potential political pressures. Undoubtedly, it affects the individual independence of judges in their decision-making. However, the institutional independence of the judicial branch is still highly fragile, even though judicial independence has become a prominent topic of political and public debate in the context of the criminal prosecution of the former prime minister during his term. It has significantly increased the general public awareness of the problems of the functioning of the institutions of the rule of law or possible political interference in their activities.

When the relationship between political power and the judiciary is depicted as fundamentally correct by many interviewed interlocutors, it can be the right moment to establish a supreme judicial independence body or institutionalize judicial self-administration in another way. It would potentially enhance the transparency of the selection of judges and judicial officials and decrease the risk of political influence on such processes. In this way, the judiciary would ultimately achieve its institutional independence and the Czech walking on a tightrope would probably end.