COMMON CONSTITUTIONAL TRADITIONS: REPORT IN RESPECT OF THE CZECH REPUBLIC

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1. Historical background[2]

Having regard to the history of the country, the Czech Republic aims to distance itself from the communist regime. Even though the current Czech Constitution is characterized by discontinuity with the communist regime, it is, nevertheless, inspired, in its approach to some issues by the Socialist Constitution. It is so in the area of the constitutional position of the president of the Republic, in particular, as regards his competences and his (ir)responsibility[3]. It is, though, mostly the tradition of the so-called First Czechoslovak Republic which existed from 1918 to 1938 and even the Austro-Hungarian tradition that is followed[4].

It is undisputed that the Constitution has been inspired particularly by the constitutional charter of the Czechoslovak Republic of 1920, hereafter "Constitution 1920"[5]. The reasons for such a strong inspiration by the Constitution 1920 are rather prosaic. The decision was largely influenced by lack of time for the preparation of a new constitution of the newly formed independent Czech Republic. It was also the idea of an ideal document of idyllic times that led to an extensive inspiration by the Constitution 1920. It is also unclear to what extent the Constitution 1920 which served as inspiration has been subject to critical reception and to what extent it was just mechanically copied[6]. It is also virtually impossible to research and reconstruct the process of the preparation of the Constitution as only very little activity of the preparatory commission has been documented.[7]

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[2] For a detailed overview of the Czechoslovak constitutional and political history, break-up of socialism and restoration of pluralistic democracy see V. Pavlíček, M. Kindlová, *The Czech Republic*, in L. Besselnik et al. (eds.) *Constitutional Law of the EU Member States* (2014).

[3] V. Pavlíček, *Teoretická koncepce Ústavy ČR.*, in P. Mlsna et al. (eds.), *Ústava ČR – vznik, vývoj a perspektivy* (2011).

[4] M. Kindlová, *Formal and informal constitutional amendment in the Czech Republic*, 8 *The Lawyer Quarterly* 4 (2008).

[5] V. Pavlíček, *Ústavní právo a státověda. II. Díl* (2008).

[6] J. Kysela, *Prosincová Ústava v kontextu diachronní komparatistiky*, 156 *Právník* 12 (2017).

[7] For further details regarding the preparation of the Constitution, see J. Filip, *Zapomenuté inspirace a aspirace Ústavy ČR (K 10. výročí přijetí Ústavy ČR). Časopis pro právní vědu a praxi, [online] (IV)*, 295 (2002), available at: *https://journals.muni.cz/cpvp/article/view/8211*, and K. Marková, *Obraz první Československé republiky při projednávání Ústavy ČR.*, 18 (2-3) Středoevropské politické studie 197 (2016).

The preamble of the Constitution in its current wording refers to the *"good old traditions of the statehood of the Lands of the Czech Crown and the Czechoslovak statehood"* and declares the loyalty of the citizens to such traditions. Even though the preamble does not enact any specific rights and obligations, it does serve as an interpretative tool and serves to better understand the sources and origins of the text of the Constitution[8]. The explanatory report to the Constitution further specifies that the traditions having their origins in the era of the First Republic are to be followed. The question remains what such traditions encompass.

2 General issues

3 Foundations

3.1.1 Does your legal system have a specific term for 'constitutional tradition'? If yes, does the term used in the national version of the TEU differ from the English term 'tradition'? If no, do legal traditions exist in other areas of your system (private, criminal or administrative law)? Does your system draw distinctions between values, principles and traditions? What can constitute a constitutional tradition in your legal system – parts of a constitutional text, case law, legal theory, conventions, collective constitutional experience and/or long-standing public perception?

"Legal principles" are, in general, basic rules of a specific law, a body of law or a legal order as a whole[9] . They may be explicitly enshrined in written law, may stem implicitly from the written law or may have a source in an extra-legal system such as morality, ethics or politics[10]. Legal principles are typically abstract, broad and unspecific. That is why unlike norms which are mutually exclusive and, thus, the same one always prevails over another, legal principles are complementary. They may clash and be balanced against each other. In each case, one of the principles prevails to some extent and the other is, thus, to some extent limited. When deciding which of the two principles that clash prevails, the conclusion may be different, considering different factual background, even though the same two principles are at stake.

The typical examples of constitutional principles are human rights. The clash of two human rights is a clash of two principles.

[8] L. Bahýľová et al., *Ústava České republiky: Komentář* (2010).
[9] Z. Kühn, J. Boguszak, *Právní principy*, 999 Pelhřimov Vydavatelství 91 (1999).
[10] J. Wintr, *Říše principů. Obecné a odvětvové principy současného českého práva* (2006).

For a resolution of such clash, the proportionality test is usually used[11]. The CCC has taken into account, in its case-law, even unwritten legal principles inferred from the Constitution. The typical example of such principles is the principle of legal certainty or the principle of protection of legitimate expectations which are not enshrined explicitly in the Constitution but were inferred from the Article 1 of the Constitution and applied by the CCC in its decisions (Pl. ÚS 53/10).

Turning to the core question of the research of how is the notion of the constitutional tradition used in the Czech Republic, how is it understood and whether it is given (within the Czech legal practice) any autonomous meaning in the context of the EU law, it is to be noted at the outset that unlike (apparently) in some other European cultures, in the Czech legal system the notion of constitutional traditions, does not have an unambiguous meaning. It is therefore impossible to come up with an exhaustive, indisputable and generally accepted definition of the Czech constitutional tradition or a list of Czech national constitutional traditions.

The notion of a "constitutional tradition" mostly refers, in the Czech legal theory, to a broader concept or framework and denotes a certain legacy of earlier times which is followed. The constitutional tradition manifests itself in different rules, written or unwritten, binding or not, which are part of the constitutional order or constitutional and political culture. A certain constitutional tradition is often claimed to be a reason for enshrinement of a particular provision in the Constitution[12] especially in cases where there is no apparent reason for such provision and any explanation lacks in the explanatory report. It is also referred to when a particular (constitutional) rule is respected; even though it is not explicitly enacted in any relevant legislation[13] Constitutional

[11] J. Wintr, *Principy českého ústavního práva* (2018).

[12] M. Tuláček, *Vliv Senátu na veřejné rozpočty*, 8 Správní parvo 144 (2018). In his paper, Tuláček claims that it is the Czech federative constitutional tradition that is at the origin of a provision according to which Senate may not adopt a state budget in the form of a "legal measure", a specific form of a law that Senate may otherwise adopt in times when the Chamber of Deputies is dissolved.

[13] I. Pospíšil, *Sledování souladu legislativy s ústavním pořádkem při tvorbě práva*. 3 Správní parvo 4 (2017). Pospíšil asserts (in line with the case-law of the CCC, see below) that the principle of proportionality used in the decision-making of the CCC has its origins in the European constitutional tradition.

traditions are also indicated as a reason for a certain approach of the State to a certain social phenomenon[14].

At the time of the ratification of the Treaty of Lisbon, several academic papers commenting on the relevance and effect of the Article 6 of the consolidated version of the Treaty on European Union (hereafter "TEU") appeared in the Czech Republic. Jan Komárek asserts in his paper that the constitutional traditions common to the Member States are yet another source of fundamental rights besides those enshrined in the Charter of Fundamental Rights of the European Union (hereafter "CFR") and the founding treaties. He further notes that some international academics interpret Article 6 para. 3 TEU as an empowerment of the Court of Justice of the European Union (hereafter "CJEU") to creatively formulate new rights based on the listed sources but mainly on the common constitutional traditions of Member States[15]. Other authors were, nonetheless, of a different view.

Jindřiška Syllová claims that, on the contrary, the notion of constitutional traditions common to Member States serves to a possible restrictive interpretation of the CFR and the rights enacted therein. She alleges that the notion has been enshrined in the cited article in to satisfy the Eurosceptic Member States and imposes an obligation to interpret the human rights in line with the constitutional traditions of the Member States. Once certain constitutional tradition has been recognized (in principle by the CJEU) as common to the Member States, the rights enshrined by the EU law should be interpreted in compliance with such tradition[16].

Miluše Kindlová and Ondřej Preuss, in their paper concerning conscientious objections in the context of compulsory vaccination touch upon the topic of the relevance of the constitutional traditions common to the Member States in cases of an unclear scope and content of a particular fundamental right enshrined in the Charter. It is precisely the case of Article 10 para. 2 of the CFR which has a

[14] For example, Kateřina Šimáčková claims that two different constitutional traditions which have been established within Europe are behind different approaches to religions and religious symbols in Europe. She further notes that any future European constitutionality should allow for both traditions to complement. K. Šimáčková, *Česká ústavnost jako hodnotový rámec integrace cizinců*, 2 Acta Universitatis Carolinae/Iuridica, Karolinum 20 (2018).

[15] J. Komárek, *Česká „výjimka" z Listiny základních práv Evropské unie*, 9 Právní rozhledy 322 (2010).

[16] J. Syllová, *„Scope of the Treaty", dekrety a český polisabonský protocol*, 20 Právní rozhledy 743 (2010).

slightly different meaning in different official language versions. Whereas the German or the Czech version only refers to conscientious objection in the context of mandatory military service, other versions, such as the English, French or Italian one, do not specify any restriction to a particular context in which the right to a conscientious objection applies. Having regard to the explanatory note to the CFR which states that "the right enshrined in the para. 2 corresponds to the constitutional traditions of Member States", the authors note that it is possible that the notion of a conscientious objection may, in the Anglo-Saxon context be associated exclusively with military service[17]. It would be, hence, necessary to know the constitutional traditions of different Member States to establish the scope and the content of the right to a conscientious objection as enshrined in the Charter.

3.1.2 What is the relationship between constitutional traditions and customary constitutional law?

Constitutional convention *(ústavní zvyklost)*, sometimes but rather rarely also denoted as a constitutional tradition *(ústavní tradice)*[18] describes a certain manner in which the competences of a certain national authority or more specifically a constitutional authority, i.e. an authority established by the constitution,[19] is ordinarily (customarily) carried out. Those are, therefore, specific procedures that are spontaneously and universally respected for a certain amount of time by those holding a certain function (typically ever since the specific situation first occurred since a constitution entered into force).

A dispute regarding the question whether a constitutional convention is or is not binding persists; the role and the position of the constitutional conventions in the Czech legal system remain, thus, unclear[20]. The CCC itself referred to constitutional conventions in several cases it dealt with. Those cases mostly concerned competences of constitutional authorities (Pl ÚS 36/17;

[17] M. Kindlová, O. Preuss, *Výhrada svědomí v kontextu povinného očkování a mimo něj*, 3 Jurisprudence 17 (2017).

[18] For example, in the dissenting opinion of judges Holländer and Kurka to the plenary judgment of the CCC of 20 June 2001, no. Pl. US 14/01.

[19] The notion of "constitution" (with a lower-case letter) is used for any constitution in general, whereas the notion of "Constitution" (with an upper case letter) is used for the Constitution of the Czech Republic currently in force.

[20] M. Kindlová, *Formal and informal constitutional amendment in the Czech Republic*, 8 (4) The Lawyer Quarterly 521 (2008).

Pl. ÚS 14/13; Pl. ÚS 47/10). In these cases, constitutional conventions were regarded as important, yet not binding and served as an instrument of interpretation. It, therefore, follows that the courts admit that constitutional conventions may influence their decisions. Henčeková[21] asserts that the same decisions would be rendered without the existence of such conventions. In my opinion, it is rather questionable whether it would be the case. It is to be emphasised in this context that in all of the cited cases, the CCC ruled in compliance with the established constitutional convention. Having regard to the existing long-standing case-law of the Constitutional Court,[22] it would probably be far-fetched to argue for a legal normative force of the conventions[23]. However, different judges of the CCC expressed, over the time, in their concurring or dissenting opinions their conviction that constitutional conventions are indeed a binding source of constitutional law which should be applied and followed in the proceedings before the CCC[24].

According to Miluše Kindlová[25], it is just as ambiguous *'what prerequisites must be fulfilled before the existence of a convention is recognised, how long a required practice must last and whether its existence requires the following of the same practice by constitutional bodies with different persons in office (e.g. two Presidents of the Republic), whether they are sources of constitutional law and in what ways courts can employ them in their decision-making'* (p. 521). It is, moreover, unclear whether a certain practice formed under a previous constitution may be relevant.

The relation and difference between constitutional conventions and customs *(obyčej)* are just as confusing. Some use

[21] S. Henčeková, *The Normative Force of the Factual, As Derived from Examples in Czech Case-Law*, 1(4) SSRN Electronic Journal 7 (2019).

[22] Even though the question of constitutional conventions had been only addressed in a handful of cases, the position of the CC had not changed over time.

[23] S. Henčeková, *The Normative Force of the Factual,* cit. at. 7.

[24] K. Klíma and J. Jirásek (eds.) *Ústavní principy, ústavní konvence a ústavní inženýrství* (2008), and M. Kindlová, *Ústavní zvyklosti jako součást ústavy (komparace commonwealthského přístupu a judikatury Ústavního soudu*, in K. Klíma and J. Jirásek (eds.), *Pocta Jánu Gronskému* (2008).

[25] M. Kindlová, *Formal and informal constitutional amendment in the Czech Republic*, cit. at. 521.

both terms as synonyms[2627] whereas others see a constitutional convention as having an important but informal role in the legal order and a custom as a binding rule. The latter view complies with the general approach of a Czech legal theory which defines custom as a binding unwritten rule. A custom is not created by the State who only recognises it in the process of the application of the law. It is usually considered to be the oldest source of law and is characterised by two elements: 1) *usus longoevus*, i.e. its long-term use and 2) *opinion necessitatis,* i.e. necessity of the existence of a general conviction that the customary rule is binding[28]. The term custom is, though, mostly used in the context of customary international law or when referring to the Anglo-Saxon legal system. The term of a constitutional custom is not, hence, attribute with a specific definition or content.

3.1.3 Can institutional arrangements, for example a bicameral legislature or a federal infrastructure, be an expression of constitutional tradition in your system? Can legal techniques such as constitutional and statutory interpretation or – within the principle of proportionality – a balancing of clashing interests qualify as a constitutional tradition in your system?

In its judgment of 16 October 2001, no. Pl. US 5/01, the CCC stated that even though the Czech Republic had not been a Member State of the EU at the time, the case-law of the CJEU had been relevant for the decision-making of the CCC. It held, in particular, that one of the sources of the EU law are legal principles excerpted from constitutional traditions common to the Member States containing basic values common to all Member States, i.e. fulfilling the concepts of the rule of law, including the fundamental rights and freedoms and a right to a fair trial. The CCC proclaimed in this connection that it endorses the European legal culture and its traditions.

In its judgment of 29 September 2005, no. III. US 350/03,[29] the CCC (Pl. ÚS 33/97) reiterated that it had repeatedly applied the

[26] M. Kindlová, *Formal and informal constitutional amendment in the Czech Republic*, cit. at. 521.

[27] See also the dissenting opinion of judges Holländer and Kurka to the plenary judgment of the CCC of 20 June 2001, no. Pl. US 14/01.

[28] M. Škop, P. Machač, *Základy právní nauky* (2011).

[29] The constitutional appeal has been lodged before the Czech Republic became an EU Member State but the judgment has been only delivered afterwards.

principle of proportionality, a modern constitutional unwritten rule accepted in European legal culture. In the cited judgment (unlike in the original one in which the principle has been first introduced to the case-law of the CCC), the CCC further stated that by applying the relevant principle, it endorses the European legal culture and its traditions. The CCC has, thus, implied that it considers the principle of the proportionality to be part of the constitutional traditions common to the Member States.

It follows from the cited case-law of the CCC that both institutional arrangements and legal techniques may form part of the constitutional tradition.

3.1.4 How does time factor into constitutional traditions in your system? The phrase (and especially the term used in the German text of the Treaty on European Union (Überlieferung) suggests that constitutional traditions are of some vintage – but how old must they be? A comparison between the English and German texts of the TEU raises the question whether traditions can develop (and possibly end) within a single constitutional regime. The English response is very likely to be positive, given the absence of clear breaks in English constitutional history over the past several centuries, while the German notion of Überlieferungen indicates that something may have to pass on from one regime to the next (or survive some other form of regime change or transition) in order to be an Überlieferung. What is the response to this question in your legal system? Must constitutional traditions be rooted both in history and in contemporary law?

Constitutional traditions are delimited by core values stemming from the history of the State but may evolve as to its content. The tradition itself forms throughout the history of the State, or in case of the constitutional traditions common to the Member States throughout the history of the EU but the separate elements that are part of it may be quite recent.

3.1.5 How detailed are constitutional traditions in your system (broad concepts and ideas, particular norms and precise rules, or both)?

A constitutional tradition is understood to be more of a general frame recalling historical tradition upon which the current constitutional system is built. It encompasses different

constitutional rules, norms, conventions, principles (including legal techniques), and institutional arrangements that form the core aspects of the specific constitutional tradition, define it. It does not have a stable and definite content.

3.1.6 Are constitutional traditions considered typical, distinctive or unique to your system?

Some are whereas others are not. For example in its judgment no. Pl. US 42/2000 concerning changes to the existing system of parliamentary elections, the CCC referred to the Czechoslovak constitutional tradition when explaining the origins of the proportional electoral system typical for the Czech Republic. On the other hand, in its judgment no. III. US 350/03, the CCC stated that the principle of proportionality is a modern constitutional unwritten rule accepted in European legal culture.

3.2 Subject/content of constitutional traditions

3.2.1 What is the subject/content of constitutional traditions in your system? Are they limited to the area of human rights protection or can they include institutional arrangements? Can you list the principles that are considered to be part of the constitutional traditions, and provide a short description of them?

The Czech constitutional order is based in several elementary principles which are characteristic for the Czech Republic and any change of the provisions encompassing such principles would not be seen as a mere amendment of the Constitution but rather as it revision. Those are: the democracy, respect for human rights and freedoms, the form of a republic, the principle of a parliamentary democracy, the principle of the rule of law, the protection of property, the form of a unitary state, the principle of a social state and the openness towards international and supranational law[30].

Having regard to the conception of the Constitution 1920, the preamble of the current Constitution,[31] as well as the Czech

[30] J. Filip, *Ústavní právo České republiky. Základní pojmy a instituty. Ústavní základy ČR.* (2011).

[31] The Preamble reads as follows (bold added by the author of the present paper): *"We, the citizens of the Czech Republic in Bohemia, in Moravia, and in Silesia, At the time of the restoration of an independent Czech state, Faithful to all good traditions of the long-existing statehood of the lands of the Czech Crown, as well as of Czechoslovak statehood, Resolved to build, safeguard, and develop the Czech Republic in the spirit of the sanctity of human dignity and liberty, As the homeland of free citizens enjoying equal rights, conscious of their duties towards others and their responsibility towards the*

constitutional law theory and the history of the Czech constitutionalism, I assert that the Czech constitutional tradition may be characterised by several elements:

- the Czech Republic is a democratic, liberal, social state;
- the Czech Republic is a pluralistic society;
- the Czech Republic is governed by the rule of law;
- the Czech Republic respects human rights;
- the Czech Republic is a parliamentary democracy;
- the Czech Republic has a poly-legal and rigid constitution.

I do not allege that such a list is exhaustive or undisputable. On the contrary, I doubt that any such list may be produced in respect of the Czech Republic. Not only there would most probably be certain disagreement among both academics and practitioner as to what qualifies as part of a Czech constitutional tradition, moreover, in my view, the tradition necessarily evolves as time passes. And it is particularly so in the area of fundamental human rights. As reiterates Eliška Wagnerová[32], the concept of human rights has significantly shifted from the concept of rights accorded to citizens by the sovereign to a naturalistic concept having consequences not only for the list of rights enacted but particularly for their significance and effectivity of legal guarantees. That being said, hereafter I aim to give a short overview and a brief definition of the elements listed above that are, in my opinion, core to the Czech constitutional tradition.

3.2.1.1 Democratic state

The Czech Republic is often defined as a *democratic, liberal and social state governed by the rule of law*[33]. A democratic state relies on the sovereignty of its people and is based on the principle of the rule of the majority. The people are the source of all state power. All state representatives are elected directly or indirectly by the people[34]. The democratic nature of the Czech Republic has its basis

community, As a free and democratic state founded on respect for human rights and on the principles of civic society, As a part of the family of democracies in Europe and around the world, Resolved to guard and develop together the natural and cultural, material and spiritual wealth handed down to us, Resolved to abide by all proven principles of a state governed by the rule of law, Through our freely-elected representatives, do adopt this Constitution of the Czech Republic."

[32] E. Wagnerová, *Základní práva*, in M. Bobek, P. Molek, V. Šimíček, (eds.), *Komunistické právo v Československu. Kapitoly z dějin bezpráví* (2009).

[33] J. Wintr, *Principy českého ústavního parvo*, cit.

[34] J. Wintr, *Principy českého ústavního práva*, cit. at 10, 26-27.

in Art. 2[35] and 6[36] of the Constitution as well as Art. 21 of the Czech Charter of Fundamental Rights and Freedoms (hereafter "Charter")[37].

3.2.1.2 Liberal state

The democracy is closely connected with the characteristics of a liberal state safeguarding that the rule of the majority does not become a tyranny of the majority; the minority is, hence, protected. The Czech Republic as a liberal state is characterised, in particular, by separation of powers, respect for fundamental human rights and freedoms and institutional measures giving the minority the possibility to influence decision-making process[38]. Such measures are, among others, the necessity to reach a qualified majority for adoption of certain decisions, necessary consent of both chambers of the Parliament for adoption of certain decisions and possibility of a minority to lodge a constitutional complaint in order to review the decision of the majority[39].

3.2.1.3 Separation of powers

The state powers in the Czech Republic are separated; their separation is though not absolute. Legislative, executive and judicial powers are independent; it is reflected in the structure of the Constitution. The separation of powers is complemented by the system of checks and balances. In the Czech Republic, which is a parliamentary republic, the separation of legislative and executive

[35] Article 2 of the Constitution reads as follows: "*(1) All state authority emanates from the people; they exercise it through legislative, executive, and judicial bodies. (2) A constitutional act may designate the conditions under which the people may exercise state authority directly. (3) State authority is to serve all citizens and may be asserted only in cases, within the bounds, and in the manner provided for by law. (4) All citizens may do that which is not prohibited by law and nobody may be compelled to do that which is not imposed upon them by law.*"

[36] Article 6 of the Constitution reads as follows: "*Political decisions emerge from the will of the majority manifested in free voting. The decision-making of the majority shall take into consideration the interests of minorities.*"

[37] Article 21 of the Charter reads as follows: "*(1) Citizens have the right to participate in the administration of public affairs either directly or through the free election of their representatives. (2) Elections shall be held within terms not exceeding statutory electoral terms. (3) The right to vote is universal and equal and shall be exercised by secret ballot. The conditions under which the right to vote are exercised are set by law. (4) Citizens shall have access to any elective and other public offices under equal conditions.*"

[38] J. Wintr, *Principy českého ústavního parvo*, cit. at 10, 74.

[39] J. Wintr, *Principy českého ústavního parvo*, cit. at 67.

power is weakened. The legislative power is represented by a bicameral Parliament consisting of Chamber of Deputies and Senate. The bicameralism serves as one of the checks, ensuring that the rule of the majority does not become the tyranny of the majority. Each of the chambers has a different election period and the members are elected in different electoral system[40]. The executive power is represented by the Government and the President. The Government is the supreme authority of the executive. The president, on the other hand, has a moderating role and is rather a symbol of the State[41].

The judiciary is represented by the system of general courts and the Constitutional Court. The organisation of justice is based on the principle of the independence of both the courts and judges. The independence is ensured by the impossibility to dismiss a judge, the principle of incompatibility of functions and by the specific procedure of their appointment governed by a strong requirement of professionality and independence of judges. As emphasised by the CCC (Pl. ÚS 13/99), the remuneration is also one of the important and strong guarantees of the independence of judges.

3.2.1.4 Parliamentary republic

The Czech Republic is a parliamentary democracy.[42] The Parliament is the centrepiece of the political system. Even after the amendment of the Constitution (No. 71/2012 Coll.) by which the direct election of the President and modification of his competences were enacted, the Czech Republic still fulfils most of the characteristic elements of a parliamentary republic. It is characterised by a dualistic executive power and the Prime Minister is appointed by the President. The Government must have the confidence of the Chamber of Deputies. The President is not politically responsible and most of his acts must be countersigned. The legislative and executive powers are interconnected; the

[40] J. Wintr, *Principy českého ústavního parvo*, cit. at 86.
[41] J. Filip, *Ústavní právo České republiky*, cit. at. 78.
[42] Recently it is, though, discussed whether the Czech Republic is or is not moving towards a semi-presidential republic as the position of the President had considerably strengthened having regard to the introduction of the direct election of the President in 2013 and to the way the current President exercises his powers (A. Gerloch, *Ústava a ústavnost v České republice po dvaceti letech*, in A. Gerloch, J. Kysela, (eds.), *20 let Ústavy České republiky. Ohlédnutí zpět a pohled vpřed* (2013).

President may dissolve the Chamber of Deputies which may, on the other hand, vote on no-confidence in the Government. The system of checks and balances is in place not only between different powers but also within the Parliament between the Senate and the Chamber of Deputies[43].

3.2.1.5 Respect for human rights

In the Czech Republic, the catalogue of human rights is not enshrined directly in the Constitution but is enacted in a separate document, the Charter, which is part of the constitutional order. Apart from the Charter, all international conventions on human rights are also part of the constitutional order of the Czech Republic, hence being just as relevant source of human rights (Pl. ÚS 36/01). These international conventions amend and supplement the catalogue of human rights as provided for in the Charter. The judgment in which the CCC adopted such interpretation of the Constitution has been criticised by some academics (Kysela, 2002, pp. 199-215) but has been cited and followed in the case-law of the CCC ever since[44] and such interpretation has, thus, become undisputed.

The conception of human rights in the Czech Republic refers to their natural character. Therefore, the legislator used in the Charter the formulation "is/are guaranteed" rather than "the State guarantees" to introduce provisions on human rights, thus emphasising that the fundamental rights and freedoms are not a result of a power decision and their origins lie elsewhere. Our constitutional system is based on principles of a pluralistic society built on respect to every human being and her freedom, dignity and equality[45]. Furthermore, having regard to the analysed case-law of the CCC in respect of the constitutional traditions (see above), a right to judicial review and a right to an independent tribunal should also be emphasised.

As follows from the introductory provisions of the Charter (Art. 1-4) titled as "General Provisions", the equality, dignity and

[43] J. Filip, *Ústavní právo České republiky*, cit. at. 77.

[44] The CCC quashed different decisions of lower courts and also provisions of laws based on human rights enshrined in the international conventions (e.g. Pl. ÚS 45/04).

[45] K. Šimáčková, *Česká ústavnost jako hodnotový rámec integrace cizinců*, cit. at. 9.

freedom are the core values on which the rest of the Charter is based. Also, further basic principles of the Charter follow from the general provisions. Fundamental human rights are inherent, inalienable, illimitable, and irrepealable. Democracy, religious neutrality and prohibition of all totalitarian ideologies as well as discrimination are also highlighted. Freedom, dignity and equality may be, thus, underlined as core constitutional values.[46] Having regard to the totalitarian history of the state, the Czech Republic highly values these rights. The CCC repeatedly stated that it considers the human dignity to be the core value of the whole legislation on fundamental rights and freedoms (Pl. ÚS 7/15). In its judgment no. Pl. US 83/06, the CCC stated that human dignity is in the very centre of our legal order and represents the very essence of the "humanity" itself. The principle of equality in dignity and rights is the basis of the recognition of the value of each human being irrespective of his or her characteristics[47].

The Czech Republic is also defined as a social state. It ensures social rights for its citizens, i.e. right to work, social security, health care and education. Those are, though, only typical for the period after the Second World War and, thus, do not stem from the tradition of the Constitution 1920[48]. They do, nevertheless, form an integral part of the human rights respected nowadays by the Czech Republic.

3.2.1.6 Rule of law

The principle of the rule of law is enshrined in the Art. 2 paras 3 and 4 of the Constitution. The rule of law is characterised by the obligation of the State to follow its law and by the complementary rule that citizens may do anything that is not explicitly prohibited by law. The State does not have full power over the law. It is also subject to the law and must respect it. Even though it may change the law, it may only do so in a predetermined manner (Škop and Machač, 2011, p. 15). The law defines when the state power may

[46] Similarly Jan Wintr alleges that the fundamental rights are mostly derived from the principles of the protection of integrity, privacy, dignity and freedom (J. Wintr, *Principy českého ústavního parvo*, cit. at 149) and Jan Filip asserts that the values that form the basis of the respect for human rights are dignity, freedom, equality and solidarity (J. Filip, *Ústavní právo České republiky*, cit. at. 41).

[47] Similarly E. Wagnerová, *Čl. 17: Svobodný projev a právo na informace*, in E. Wagnerová (eds.), *Listina základních práv a svobod: Komentář* (2012).

[48] J. Wintr, *Principy českého ústavního parvo*, cit. at 67.

intervene, to what extent and by which measures. The core of the rule of law is the principle of legal certainty characterised, in particular, by the requirement of clarity and foreseeability of law, by the protection of rights acquired and by the protection of legitimate expectations[49]. Any law must also be general – i.e. not targeted on a specific person or group of persons (Pl. ÚS 27/09.), clear and non-contradictory (Pl. ÚS 77/06), publicly accessible (I. ÚS 420/09) and may not be retroactive (Pl. ÚS 22/13).

3.2.2 Does your system draw a clear distinction between administrative and constitutional law given that concepts such as proportionality, distinct techniques of statutory interpretation or principles of judicial review developed in administrative law but have crept into and strongly affected constitutional thinking over time?

Yes. Even though the administrative law is sometimes referred to as "concretized constitutional law" both branches of law are clearly distinguished both in theory and practice.

3.3 Constitutional traditions and society

3.3.1 What is the relationship between traditions and national identity?

The concept of national (or constitutional) identity of the Czech Republic is not used by the CCC in its case-law and it is rarely discussed in the Czech legal doctrine. Two papers on the Czech constitutional identity were published by David Kosař and Ladislav Vyhnánek[50]. The authors put forward three possible concepts of the Czech constitutional identity based on a) the Eternity Clause as developed by the CCC; b) a theoretically founded concept of the substantive core of the Constitution which is similar but broader and less defined than the Eternity Clause as interpreted by the CCC and c) a completely distinct concept. According to the authors the first two concepts (referred to as "legal concepts" by the authors) encompass protection of fundamental rights, sovereignty of the State, foreseeability of case-law, prohibition of retroactivity, principle of general validity of law,

[49] J. Wintr, *Principy českého ústavního parvo*, cit. at 20, 24.

[50] D. Kosař, L. Vyhnánek, *Ústavní identita České republiky*, 157(10) Právník 854, and D. Kosař, L. Vyhnánek, *Constitutional Identity in the Czech Republic: A New Twist on the Old Fashioned Idea? MUNI Law Working Paper Series*, [online] (2017.05). Available at: http://workingpapers.law.muni.cz/dokumenty/42064 (2017).

sovereignty of people, principle of representative democracy, certain basic principles of electoral law, achieved level of the procedural protection of fundamental law and possibly certain other principles.

It may, thus, be summed up that the Czech national identity is based on the Czech national traditions and may serve as a certain counterbalance to the constitutional traditions common to the Member States.

3.4 Practical application of national constitutional traditions and European influence

3.4.1 Do courts in your system utilize constitutional traditions when dealing with purely national disputes? If so, in what types of cases/disputes? Why?

The notion of constitutional tradition is used both in the context of the resolution of purely national issues as well as in the context of the EU law. The CCC referred to constitutional traditions both in cases where it adopted principles commonly accepted among the Member States, as well as in cases where the Czech (or Czechoslovak) constitutional tradition served as an argument for specific distinct legislation; to underline the specific situation of the State, having regard to its history.

On three occasions, the CCC used the notion of "constitutional tradition" in a completely EU unrelated context. In its judgment no. Pl. US 42/2000 concerning changes to the existing system of parliamentary elections, the CCC referred to the Czechoslovak constitutional tradition when explaining the origins of the proportional electoral system. Similarly, in its judgment no. Pl. US 5/12, the CCC criticised the CJEU for failing to take into account the constitutional traditions the Czech Republic shares with Slovakia after more than 70 years of a common history. In one case, the term "constitutional tradition" was only referred to in a dissenting opinion and the term was used as a synonym to a constitutional convention[51].

[51] See dissenting opinion of judges Holländer and Kurka to the plenary judgment of the CCC of 20 June 2001, no. Pl. US 14/01.

3.4.2 Are the constitutional traditions recognized in your system purely national concepts or (also) the result of European influence (Council of Europe/ECHR or EU)? Is it possible to keep these two levels apart after decades of interaction and cross-pollination between systems?

The CCC views the notion of constitutional traditions common to the Member States as referring to what is common to different traditions of different European countries and not what is inherent to a specific constitutional tradition of different Member States. It sees the notion as a unifying criterion, comparable, in my view, to a "European consensus" within the meaning of the long-standing case-law of the ECtHR. It is, therefore, decisive whether such understanding of a certain principle, right, value or convention is shared among all (or most) the Member States. It, however, recognises as well certain national constitutional traditions which stem from the history of our country.

3.4.3 Have courts referred to Art. 6 (3) TEU or the jurisprudence of the CJEU on constitutional traditions?

The term constitutional tradition was used in 54 different judgments of the CCC. However, in two of them, the notion only appeared in the summary of the arguments raised by one of the (third) parties to the proceedings and, thus, has not been referred to by the CCC itself. Moreover, in another 39 judgments, the notion was contained in a standardised copy-pasted paragraph enclosed in judgments concerning the lack of jurisdiction of the CJEU to decide preliminary questions in cases unrelated to the EU. It these judgments the notion of constitutional traditions only figured as a part of the citation of the Article 6 TEU without any specific relevance for the cases and, thus, without any further explanation or application of the notion. Similarly in its judgment on antidiscrimination law (Pl. ÚS 37/04), the CCC only referred to the constitutional traditions common to the Member States without further working with the notion. Those were excluded from the analysis.

Among the remaining 12 judgements working with the relevant notion, five concerned a similar issue of the application of the principle of proportionality. The four later ones, thus, only cited a paragraph containing the notion of a "constitutional tradition" used in the first judgment. For this paper, it, therefore, suffices to examine the original judgement containing the repetitive

paragraph. There are, hence, eight judgments to be analysed. In three of the analysed judgments the term constitutional tradition has been used when referring to EU legislation or CJEU judgment and in six of them, the term was used in a different context. In those judgments, either a definition or examples of "constitutional traditions common to the Member States" within the meaning of Article 6 para 3 TEU and/or Article 52 para 4 CFR were given.

3.4.4 Have national constitutional traditions been used by courts as an argument to protect the system from European influence or referred to as a driver of integration, or both?

As follows from the above-cited judgments, the CCC referred on several occasions to constitutional traditions common to the Member States and explicitly stated that it has adopted certain principles to its case-law to endorse the European legal culture and its traditions (III. ÚS 350/03). On the other hand, the CCC also called for taking into account the specific and unique constitutional tradition of the Czech Republic (Pl. ÚS 5/12.)

4 Selected Fundamental Rights

4.1 Free speech

4.1.1 Is free speech subject to a proportionality analysis? What are the constitutional standards of scrutiny for free speech?

The right to a free speech is enshrined in Article 17 of the Czech Charter of Fundamental Rights and Freedoms (hereafter "Charter").[52] A general para 1 guaranteeing the freedom of expression is specified in the para 2 which specifically states that such right is not limited to freedom of speech but encompasses all other forms of expression – verbal or non-verbal, oral or written. Para 3 then reacts on the communist era when massive censorship of all media existed. Article 17 para 4 mentions certain limits of

[52] Article 17 reads as follows: "*(1) The freedom of expression and the right to information are guaranteed. (2) Everyone has the right to express her opinion in speech, in writing, in the press, in pictures, or any other form, as well as to seek, receive and disseminate freely ideas and information irrespective of the frontiers of the State. (3) Censorship is not permitted. (4) The freedom of expression and the right to seek and disseminate information may be limited by law in the case of measures necessary in a democratic society for protecting the rights and freedoms of others, the security of the State, public security, public health, and morals. (5) State bodies and territorial self-governing bodies are obliged, in an appropriate manner, to provide information on their activities. Conditions therefore and the implementation thereof shall be provided for by law.*"

freedom of expression. It may only be limited by law and the Charter foresees five different aims that may be sought by such limitations: 1) protection of the rights and freedoms of others, 2) protection of the security of the State, 3) protection of public security, 4) protection of public health and 5) protection of morals. Such measures must be necessary in a democratic society.

Freedom of speech is subject to a proportionality analysis. It is regularly balanced, in decisions and judgments of the Czech Constitutional Court (hereinafter "the CCC"), against other fundamental rights with which it clashes and which fall within the categories listed above. The approach of the CCC is largely similar to the one adopted by the European Court for Human Rights (hereinafter "the ECtHR"). As in case of the clash of most fundamental rights or a fundamental right with a public interest, the CCC uses the proportionality analysis similar to the one established in the case-law of the ECtHR. Permissibility of an interference with the fundamental right at issue depends on the following circumstances: 1) whether it was in compliance with law; 2) whether it followed a legitimate aim; 3) whether the interference constituted a measure suitable for achieving such aim; 4) whether the interference was necessary (i.e. whether no less intrusive measure existed); 5) whether it is appropriate to give priority to achieving such legitimate aim over the protection of the fundamental right at issue (II. ÚS 577/13, § 22).

4.1.2 Are there any particular types of speech that enjoy special protection? Or on the other hand, are there any types of speech that are ruled out by the law or by the constitution? Are there limitations of free speech due on ethical grounds?

4.1.2.1 Special protection of particular types of speech

In the Czech Republic, political speech enjoys enhanced protection. According to Article 27 para. 2 of the Constitution, deputies and senators may not be prosecuted for their speeches in the Chamber of Deputies or the Senate or bodies thereof. They may only be subject to the disciplinary authority of the chamber of which they are a member. According to Article 65 of the Constitution may not be prosecuted while in office. Hence, it is impossible to prosecute him for any speech. Similarly, according to Article 86 of the Constitution, judges of the CCC may be prosecuted only with the consent of the Senate. Consequently, consent of a Senate would be necessary to prosecute a judge of the CCC for any statement.

However, the politicians and judges may be sued in civil proceedings for their statements. Senators and deputies may also be prosecuted for any speech outside of the Chamber of Deputies or the Senate and the bodies thereof.

According to the established case-law of the CCC, the aim of the Parliamentary immunity aims at providing to the elected members certain guarantees for an effective exercise of their democratic mandate without fear of being prosecuted (I. ÚS 3018/14). The elected member of the Parliament should not fear to be punished by powerful for bringing up uncomfortable subjects[53]. Under no circumstance should the immunity be interpreted as any kind of personal privilege of deputies and senators (Venice Commission, 2014). The CCC inferred that the protected speech (or rather expressions) must fulfil the following conditions:

1. communication of information in writing, orally, by an image or any other way;

2. on the meeting of the Chamber of Deputies and the Senate or of the committees, subcommittees and commissions thereof, on the common meeting of both chambers of the Parliament;

3. directed at the participants of the meeting and not merely at television viewers or radio listeners; reportages given to media at the meetings are, therefore, not covered (Kysela, 2015, p. 836).

4.1.2.2 Types of speech limited or ruled out by law

First of all, it is to be emphasised that the CCC – just like the ECtHR (*E.S. v. Austria*) recognises two categories of speech. Those categories are value judgments and statements of facts. Statements of facts are amenable to proof; the existence of facts can be demonstrated. The CCC does not award any protection to knowingly false statements of facts (I. ÚS 453/03). Value judgments are not susceptible to proof; the requirement to prove the truth of a value judgment is impossible to fulfil. Even value judgments do not, though, enjoy unlimited protection since even a value judgment without any factual basis to support it may be excessive.[54]

[53] J. Kysela, *Glosa k výkladu čl. 27 Ústavy Nejvyšším soudem*, 5 Státní zastupitelství 29 (2013).

[54] Whereas in its earlier case-law the CCC stated that value judgments are completely unchallengeable (I. ÚS 367/03), in its later judgments the CCC clarified, in line with the case-law of the ECtHR, that even value judgments must have a certain factual basis (I. ÚS 823/11).

Therefore, any value judgments having purely defamatory purpose are not covered by the freedom of speech[55].

Freedom of speech may be limited for the sake of the protection of other fundamental rights which may, under a particular circumstance, prevail. According to Article 17 para. 4 of the Charter, freedom of speech may also be "*limited by law in the case of measures necessary in a democratic society for protecting the rights and freedoms of others, the security of the State, public security, public health, and morals.*" There are several provisions in different acts that effectively limit the freedom of speech pursuing different aims, e.g.:

−protection of personality rights;

The CCC decided a number of cases concerning civil proceedings[56] in which one of the parties sought protection of his or her personality rights (allegedly) damaged by a defamatory statement (II. ÚS 357/96; I. ÚS 156/99; I. ÚS 367/03; IV. ÚS 146/04, II. ÚS 94/05, IV. ÚS 1511/13, I. ÚS 2051/14; II. ÚS 2296/14 or I. ÚS 4022/17).[57] Moreover, defamatory statements may also be qualified, under certain circumstances, as crimes. According to Article 184 of the Criminal Code whoever makes a false statement about another capable of significantly threaten his/her reputation among fellow citizens, especially harm him/her in employment, disrupt his/her family relations or cause another serious detriment, shall be sentenced to imprisonment for up to one year. If such a statement is made publicly accessible in mass media the offender may be sentenced to up to two years of imprisonment.

When deciding such cases, the CCC takes into account the following criteria (I. ÚS 2051/14): a) nature of the statement (value judgment or statement of facts)

b) content of the statement (political, commercial, artistic etc.)

c) form of the statement (decent, expressive, vulgar etc.)

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[55] E. Wagnerová, *Čl. 17: Svobodný projev a právo na informace*, in E. Wagnerová (eds.), *Listina základních práv a svobod: Komentář* (2012).

[56] According to Article 81 of the Civil Code "*[p]ersonality of an individual including all his natural rights is protected. Every person is obliged to respect the free choice of an individual to live as he pleases. Life and dignity of an individual, his health and the right to live in a favourable environment, his respect, honour, privacy and expressions of personal nature enjoy particular protection.*"

[57] Judgments of the CCC of 10 December 1997, No. II. ÚS 357/96; of 8 February 2000, No. I. ÚS 156/99; of 15 March 2005, No. I. ÚS 367/03; of 4 April 2005, No. IV. ÚS 146/04, of 7 May 2008, No. II. ÚS 94/05, of 20 May 2014, No. IV. ÚS 1511/13, of 3 February 2015, No. I. ÚS 2051/14; of 14 April 2015, No. II. ÚS 2296/14 or of 11 June 2018, No. I. ÚS 4022/17 etc.

d) position of the criticised person (politician, public figure etc.)

e) whether the statement comments on a private or public sphere of life of the criticised person

f) conducted of the criticised person (whether the statement at issue was a reaction provoked by the criticised person, whether the person herself provided certain information, a reaction of the criticised person etc.)

g) position of the originator of the statement (journalist, politician, public figure, ordinary citizen etc.)

h) other circumstances of the statement (what information the originator of the statement had or could have had etc.).

–presumption of innocence;

The notion of a presumption of innocence has in the Czech law much broader meaning that how it is interpreted by the ECtHR. The principle of presumption of innocence under Article 6 § 2 of the Convention applies to persons subject to a "criminal charge". It may also apply to court decisions rendered in proceedings that were not directed against an applicant as "accused" but concerned and had link with criminal proceedings simultaneously pending against him or her, when they imply a premature assessment of his or her guilt (*Böhmer v. Germany*, § 67; *Diamantides v. Greece (no. 2)*, § 35; *Ismailov and Others v. Russia*, §§ 162-167; *Eshonkulov v. Russia*, § 74-76). According to the Court's case-law, the presumption of innocence also protects individuals who have been acquitted of a criminal charge, or in respect of whom criminal proceedings have been discontinued, from being treated by public officials and authorities as though they are in fact guilty of the offence with which they have been charged (*Allen v. the United Kingdom* [GC], § 94).

Whereas in the case-law of the ECtHR the presumption of innocence is mainly interpreted as one of the guarantees of a fair trial, in the Czech Republic the role of the principle in protection of personality rights is seen as equally important.[58] In the Czech Republic, the presumption of innocence does not only oblige the authorities to consider everyone innocent until it is proven otherwise, but it also encompasses obligation for every person, such as the obligation to inform about ongoing criminal proceedings in

[58] In the ECtHR case-law such cases are rather handled under Article 8 of the Convention (see e.g. *Mikolajová v. Slovakia*).

a manner that does not excessively interfere with personality rights of the suspect. The principle of the presumption of innocence is one of the recognized reasons for limitation of the freedom of speech (II. ÚS 577/13).

–protection of the security of others;

The freedom of speech may also be limited for the sake of the security of others which is the aim of the criminalisation of certain types of speech. Czech Criminal Code enshrines the following crimes limiting free speech:

a) abetment to crime which was later committed (Article 24 para. 1 of the Criminal Code);

b) defamation (Article 184 of the Criminal Code)

c) incitement to, approval of or praise of an act of terrorism (Article 312e para.1 of the Criminal Code);

d) threats to commit an act of terrorism (Article 312f para. 1 of the Criminal Code);

e) threats of death, bodily harm or extensive damage (Articles 352 and 353 of the Criminal Code);

f) defamation of nation, race, ethnic or another group of people (Article 355 of the Criminal Code);

g) incitement to hatred towards a group of people or suppression of their rights and freedoms (Article 356 of the Criminal Code);

h) establishment, support and promotion of movement aimed at suppression of human rights and freedoms (Article 403 of the Criminal Code);

i) expressing sympathies for movements seeking to suppress human rights and freedoms (Article 404 of the Criminal Code);

j)denial, impugnation, approval and justification of genocide (Article 405 of the Criminal Code).

–an effective exercise of certain professions.

Certain professionals, such as lawyers (Art. 21 para 1 Act on the Legal Profession), judges (Art. 81 Act on Courts and Judges) or doctors (Art. 51 Act on Health Services) must keep confidential they learnt in the course of the exercise of their profession.

4.1.3 To what extent is anonymous speech protected? Is commercial speech an autonomous category?

Neither anonymous nor commercial speech enjoys specific protection (broader or narrower) but (as in case of any other speech)

such circumstances may be important when deciding whether specific speech should be protected. For example in its recent judgment no. II. ÚS 3212/18, the CCC dealt with the issue of free speech in the context of business. The case concerned a hotel on which its managers posted an announcement that any citizens of Russia would only be accommodated on condition that they sign a proclamation that they disagree with the occupation of Crimea. An administrative authority qualified such conduct as discrimination of a consumer and obliged the company to pay a fine of 50 000 CZK (approx. 2 000 EUR). The fine was further reduced in the course of proceedings before administrative courts to 5 000 CZK (approx. 200 EUR).

The CCC then found in favour of the applicant company (the hotel). It concluded that the hotel had not discriminated any consumer because the reasons for which it conditioned the accommodation were not prohibited by law, hateful, degrading or irrational but, on the contrary, clearly motivated by a direct reaction to an unlawful act of the annexe of Crimea and the applicant aimed to demonstrated its disagreement with the occupation. The CCC took into account the time frame (immediacy of the reaction), the fact that the annexe of Crimea had been conducted clearly in breach of international law, that the condition was foreseeable, that there were a number of other hotels of similar category in the proximity and that the formulation of the condition had not been hateful or degrading. The CCC, though, emphasised the unique circumstances of the case and it follows that any similar expressions would have to be assessed in the context of all relevant circumstances. The judgment provoked strong reactions and has been criticised and also largely misinterpreted[59] by many.

[59] Pejchalová Grünwaldová, V. (2019). Co se stalo a co se může stát – několik poznámek k nálezu Ústavního soudu ČR II.ÚS 3212/18 [online] *Česká justice*. Available at: https://www.ceska-justice.cz/blog/se-stalo-se-muze-stat-nekolik-poznamek-k-nalezu-ustavniho-soudu-cr-ii-us-321218/ [Accessed 15 Aug. 2019].

4.1.4 Does free speech prevail over minority rights? Is hate speech excluded from the area of constitutionally protected speech, or is it included? If it is included, can it still be punishable if it constitutes a specific crime (defamation, incitement to race hatred, etc.)? How is the interplay fleshed out between free speech and anti-discrimination law?

It is neither the freedom of speech nor minority rights that prevail in general. Minority rights are, just as the freedom of speech, protected by the Charter (Art. 24-25) and discrimination is prohibited (Art. 1 Charter). It is, therefore, to be determined on a case by case basis which of the rights prevail in specific circumstances. The proportionality analysis is used to balance these rights. Even though hate speech is not explicitly excluded by the Constitution from the right to free speech, it would not be protected having regard to the relevant provisions of the criminal law (as described above) which, in compliance with Article 17 of the Charter, limit freedom of speech.

4.1.5 Do crimes of opinion exist in your country? In particular, how about blasphemy, contempt of the authorities or a religion?

As follows from the above list of criminalised speeches limiting the freedom of expression, certain crimes of opinion exist in the Czech Republic. Those would be approval of or praise of an act of terrorism, expressing sympathies for movements seeking to suppress human rights and freedoms and denial, impugnation, approval and justification of genocide. The blasphemy is, however, not criminalised since 1950. On the other hand, according to Articles 355 and 356 of the Criminal Code, defamation of or incitement to hatred towards a group of people, *inter alia*, on the grounds of their religion constitutes a crime. The threshold is though stricter than in case of a crime of blasphemy as commonly understood.

As follows from the absence of any mention of religion in the preamble of the constitution, the Czech Republic is a secular state[60]. It is to be noted at the outset that our country is the most atheist one in Europe and one of the most atheist in the world (Win-gallup International, 2012). Lately, a theatre performance in which Jesus

[60] (Bahýľová, L. et al (2010). *Ústava České republiky: Komentář.* Praha: Linde, 2010, p. 23)

Christ raping a Muslim woman had been depicted caused strong emotions. Cardinal Dominik Duka had filed an action seeking for protection of personality rights. The court, however, dismissed his action stating that the State may not privilege any religion and the faith in Jesus Christ should be respected just as the decision not to believe in Jesus Christ.

4.1.6 Is apology of a crime in itself a crime?

An approval or praise of certain most serious crimes (such as an act of terrorism or genocide) is considered a crime (see above).

4.1.7 How is holocaust denial handled?

Holocaust denial is criminalised under Czech law and a sentence of up to 3 years of imprisonment may be imposed (Art. 405 Criminal Code).

4.1.8 How is the matter of the display of religious symbols handled? How are religious issues handled in certain sensitive environments such as schools, courtrooms, hospitals, etc.? How is conscientious objection handled?

It is to be noted at the outset that matters concerning religious expression fall under Article 15 of the Charter which enshrines the freedom of thought, conscience and religious conviction and under Article 16 of the Charter which guarantees the right to freely manifest religion or faith, rather than under Article 17 of the Charter (freedom of speech). Cases concerning religious symbols and other religious issues as well as cases concerning conscientious objections would not, hence, be handled as free speech matters.

As mentioned above, the Czech Republic is one of the most atheist countries in the world. Religious matters, such as display of religious symbols, do not, therefore, receive much attention. However, a case of a Muslim girl who had not been allowed to wear a hijab at nursing school attracted a lot of attention. The girl sued the school for discrimination, but the courts dismissed her action. The appellate court stated that the prohibition to wear a hijab in the school had been justified because the Czech Republic is a secular state and schools must remain neutral.

Turning to the conscientious objections, two types of cases arose in the Czech Republic. First, at the time of compulsory military service, several cases of men opposing to it were handled by the CCC (under Article 15 of the Charter). According to the CCC,

the right to refuse to military service for conflict with one's conscience or religious conviction is part of a *forum externum* of the right to freedom of thought, conscience and religious conviction and as a *forum externum* may, hence, be limited by law in line with general principles set by the Constitution and the Charter (Pl.ÚS 18/98).

Lately, several cases of conscientious objection against compulsory vaccination emerged. The CCC ruled that compulsory vaccination is an interference which is necessary in a democratic society for the protection of public security, health and rights and freedoms of others. However, the obligation to be vaccinated may not be absolute. One of the reasons justifying a refusal to undergo vaccination is the conscientious objection (III. ÚS 449/06). In its later judgment no. I. ÚS 1253/14, the CCC formulated a test of the legitimacy of a secular conscientious objection. Four criteria must be fulfilled: 1) the content of the conscientious objection must be relevant for the constitutional law; 2) the arguments put forward must be overriding; 3) the conviction of the person must be consistent and persuasive and 4) social impacts must be taken into account. Refusal of compulsory vaccination must, however, remain a restrictive exception and may be applied in extraordinary cases only. Several Czech applications before the ECtHR concerning conscientious objections against vaccination await decision (*Vavřička and Others v. the Czech Republic)*.

4.1.9 What is the interplay between free speech and freedom of association? Are they constitutionally separate rights, or is the latter included in the scope of the former?

Freedom of speech and freedom of association are separate fundamental rights enshrined in different Articles of the Constitution (Art. 17 and 20 Constitution). Both of the rights are classified as political rights and are, therefore, connected to some extent.

4.1.10 Is burning the national flag, foreign flags or a political party's flag allowed?

Burning the national flag is not allowed in the Czech Republic. According to Article 13 of the Act No. 352/2001 Coll., on the use of state symbols of the Czech Republic and the amendment of other acts, anyone who misuses, degrades, destroys, damages or alienates Czech state symbol (including the Czech national flag) may be

imposed a fine of up to 30 000 CZK (approx. 1 200 EUR). The use of foreign flags or political party's flags is not explicitly regulated by Czech law. Burning of a foreign flag could, however, amount to certain crimes, such as incitement to, approval of or praise of an act of terrorism, defamation of nation, race, ethnic or other group of people or incitement to hatred towards a group of people or to suppression of their rights and freedoms, having regard to the circumstances of such act.

4.1.11 How have new technologies shaped the evolution of free speech law?

The new technologies had rather only begun to shape the evolution of freedom of speech. Freedom of expression on social media is an international issue that has not yet been resolved and is evolving spontaneously.[61] These issues may not, though, be approached from a national point of view only as social media know no borders.

Nonetheless, the national courts must in the meantime take a position on cases brought before them. The CCC is no exception; it already dealt with several cases concerning speech on internet platforms. In its judgment of 30 October 2014, No. III. ÚS 3844/13, the CCC dealt with a case of a fine imposed on an applicant for his private posts on his Facebook profile in which he used vulgarisms towards a police officer. The CCC found the fine unconstitutional having regard to the private nature of the applicant's post and to the fact that a post on the Facebook may not be seen as offensive conduct *in the course of criminal proceedings* for which such fine could be imposed.

In another case (No. I.ÚS 3018/14; 16 June 2015) the CCC dealt with the question whether a deputy's post on Facebook may fall within the protected political speech. The CCC concluded that such expression does not fall within the scope of protected political speech because it is directed exclusively outside of the Parliament and not towards other participants in the debate.

[61] See for example a great and exhaustive paper on social media as garants of free speech: M. Hanych, *M. Pivoda, Facebook, Twitter a YouTube jako garanti svobodného projevu? Kritika současného systému notice-and-takedown*, 8(16) Revue pro právo a technologie 177 (2017).

4.1.12 Have there been any particular "hard cases" that have helped define the scope of this right?

Several judgments of the CCC helped to shape the understanding of the freedom of speech. Some of the most important were cited in the paper. To sum up, an overview of some of the key judgments follows:

–Vondráčková vs Rejžek (I.ÚS 367/03)– balancing free speech and personality rights of public figures

– I. ÚS 2051/14 – criteria to be taken into account when resolving cases concerning clash of personality rights and free speech

–I. ÚS 823/11 – value judgments and statements of facts

–I. ÚS 3018/14 – the protection of political speech and its limits

–Pl. ÚS 18/98 – the right to refuse compulsory military service on grounds of a conviction

–I. ÚS 1253/14 – the test of the legitimacy of a secular conscientious objection

–II. ÚS 3212/18 – the right to free speech in the context of business

4.1.13 Are there other areas covered by free speech?

As described above, freedom of speech is closely connected with the right on information and prohibition of censorship.

4.1.14 Can you say on which of these questions in your country there is an established legal tradition? How would you state in normative terms the legal traditions in this area?

Having regard to the above, it may be concluded that in the Czech Republic free speech:

–is understood as one of the fundamental political rights closely connected with the right to information and the prohibition of censorship;

–may be balanced against other fundamental rights with which is clashes using the proportionality assessment which consists of the following steps:

- whether it was in compliance with the law,
- whether it followed a legitimate aim,
- whether the interference constituted a measure suitable for achieving such aim,

- whether the interference was necessary,
- whether it is appropriate to give priority to achieving such legitimate aim over the protection of the fundamental right at issue;

–may be limited by law in order to achieve the following aims:

- protection of the rights and freedoms of others,
- protection of the security of the State,
- protection of public security,
- protection of public health,
- protection of morals;

–does not encompass religious expressions which are covered by different Articles of the Constitution (Article 15 and 16) which are *lex specialis* to the freedom of speech;

–enjoys enhanced protection when it qualifies as political speech, i.e. when the following conditions are fulfilled:

- communication of information in writing, orally, by an image or any other way,
- on the meeting of the Chamber of Deputies and the Senate or of the committees, subcommittees and commissions thereof, on the common meeting of both chambers of the Parliament,
- directed at the participants of the meeting and not merely at television viewers or radio listeners;

–is more limited in case of statements of facts (which the originator must be able to prove accurate) than in case of value judgment (which merely must have at least some factual basis);

–may clash with personality rights in which case the following criteria must be taken into account:

- nature of the statement (value judgment or statement of facts)
- content of the statement (political, commercial, artistic etc.)
- form of the statement (decent, expressive, vulgar etc.)
- position of the criticised person (politician, public figure etc.)
- whether the statement comments of a private or public sphere of life of the criticised person
- conducted of the criticised person (whether the statement at issue was a reaction provoked by the criticised person, whether the person herself provided certain information, a reaction of the criticised person etc.)
- position of the originator of the statement (journalist, politician, public figure, ordinary citizen etc.)

- other circumstances of the statement (what information the originator of the statement had or could have had etc.);

–is limited by several provisions of the Criminal Code according to which the following types of speech are criminalised:

- abetment to crime which was later committed,
- defamation,
- incitement to, approval of or praise of an act of terrorism,
- threats to commit an act of terrorism,
- threats of death, bodily harm or extensive damage,
- defamation of nation, race, ethnic or another group of people,
- incitement to hatred towards a group of people or suppression of their rights and freedoms,
- establishment, support and promotion of movement aimed at suppression of human rights and freedoms,
- expressing sympathies for movements seeking to suppress human rights and freedoms,
- denial, impugnation, approval and justification of genocide;

–is limited in case of exercise of certain professions.

4.2 Freedom of movement

4.2.1 Is freedom of movement subject to a proportionality analysis? What are the constitutional standards of scrutiny for this right?

In the Czech Republic, freedom of movement is enshrined in Article 14 of the Charter.[62] The cited Article guarantees freedom of movement and residence. It concerns both movement within the borders of the Czech Republic and over the boarders and applies (to a different extent) to citizens and foreigners. It also provides for justifiable reasons for interference with this right which are as follows: a) the security of the state, b) the maintenance of public order, c) the protection of the rights and freedoms of others or d)

[62] Article 14 reads as follows: "*(1) The freedom of movement and residence is guaranteed. (2) Everyone who is legitimately staying within the territory of the Czech and Slovak Federal Republic has the right freely to leave it. (3) These freedoms may be limited by law if such is necessary for the security of the state, the maintenance of public order, the protection of the rights and freedoms of others or, in designated areas, to protect nature. (4) Every citizen is free to enter the territory of the Czech and Slovak Federal Republic. No citizen may be forced to leave her homeland. (5) An alien may be expelled only in cases specified by the law.*"

the protection of nature. Freedoms guaranteed by Article 14 of the Charter may only be limited by law. The enshrinement of the right of the citizens to leave and to return to the Czech Republic (Article 14 para. 2 and 4) is mostly a reaction to the totalitarian socialist history of the Czech Republic[63].

The freedom of movement is subject to a proportionality analysis. It may be balanced against other fundamental rights with or public interests with which it clashes and which fall within the categories listed above. As in the case of the clash of most fundamental rights or a fundamental right with a public interest, the CCC uses the proportionality analysis.[64]

4.2.2 What scope is left for the national regulation of this right, considering the EU's competence on the subject?

The scope for national regulation of this right is currently highly limited given the EU's competence. There are, however, still quite a few issues left to be covered by national legislation:

–movement from and to foreign countries outside of the EU;

–movement of non-EU citizens on the territory of the Czech Republic;

–conditions of expulsion and deportation (criminal and administrative) and extradition;

–limitation of the freedom of movement within the Czech Republic in the following situations:

- state of emergency – freedom of movement may be limited in a designated area (Art. 5 c) Crisis Act),
- risk of infection – infectious persons may be subject to isolation and quarantine (Art. 64 a) Act No. 258/2000 Coll.),
- domestic violence – expulsion from common home (Art. 44 Act No. 273/2008 Coll.; Art. 76b Civil Procedure Code,
- endangering of health or life – prohibition to enter certain premises (Art. 15 Act No. 553/1991 Coll.,
- protection of nature – limitation of access to national parks and reservations (Art. 14 and 64 Act No. 114/1992 Coll.,
- imprisonment and house arrest (Criminal Code);

[63] P. Molek, *Čl. 14: Svoboda pohybu a pobytu*, in E. Wagnerová et al. (eds.), *Listina základních práv a svobod: Komentář* (2012).

[64] For details, see 4.1.1 above where proportionality analysis used by the CCC is explained.

–prohibition to leave the Czech Republic for the sake of criminal proceedings.

4.2.3 Are there different standards between goods/services/capital/people?

In the Czech Republic, only freedom of movement of people is explicitly enshrined in the Constitution. Freedom of movement of goods, services or capital may be to some extent deduce from it but is rather mostly regulated by the EU law and related regular (not constitutional) national acts. The different standards of movement between these areas all reflect their respective regulations by EU law.

4.2.4 How is the subject handled towards non-EU countries?

Non-EU citizens do not have a right to enter the Czech Republic guaranteed by the constitutional law and they neither enjoy right of residence on the territory of the Czech Republic. Only those who are legitimately staying on the territory of the Czech Republic enjoy the right to freely move within it and to freely leave it.

4.2.5 Are there any forms of resistance to the supranational push towards an EU-wide guarantee of freedom of movement? On what ground? What other constitutional provisions are invoked to resist the widespread protection of this right?

There are no forms of resistance against the EU-wide guarantee of freedom of movement. Whereas the Czech society is very critical towards migration from outside of Europe, especially from Muslim countries, there are no strong emotions regarding free movement within Europe.

4.2.6 How are social and environmental considerations factored in the freedom of movement jurisprudence? Are there rules in place against the so-called social dumping or eco-dumping?

There is no specific legislation covering these issues.

4.2.7 Are there rules in place against industrial relocation abroad? Are these rules compatible with the constitution?

No, any company may relocate abroad if such relocation does not contradict public order (Art. 139 Civil Code)

4.2.8 Are there any sectors where the freedom of movement is not applied? Are there rules in place protecting the so-called national champions in certain economic areas? Are there rules in place preventing foreign capitals to take control of so-called strategic businesses? Are these rules constitutional (or would they be)?

No.

4.2.9 Have there been any particular "hard cases" that have helped define the scope of this right?

–Constitutionality of legislation providing for the possibility of deprivation of liberty of a foreigner in the view of her expulsion (Pl. ÚS 10/08): The CCC found the contested legislation constitutional. It noted that the Convention in its Article 5 para. 1 f) explicitly provides for such possibility.

–Refusal to issue a passport for a criminally prosecuted citizen (Pl. ÚS 18/07 and Pl. ÚS 12/07): In its two judgments the CCC found unconstitutional two different provisions then in force which set conditions under which a criminally prosecuted citizen was refused to be issued a passport but did not provide for effective judicial review of the proportionality of such measure.

–Limitation of the possibility to change permanent residence in the view of influencing elections (Pl. ÚS 6/11 Pl. ÚS 59/10): The CCC stated that the regional courts when reviewing whether the change of permanent residence of a significant number of citizens immediately before elections rendered the electoral result invalid must take into account the following: 1) what was the aim of the change of permanent residence; 2) whether there is a causal link between the contested conduct of the citizens before elections and the electoral result and 3) whether the change of residence has been driven by the aim of bypassing the law and the intensity of the interference.

4.2.10 Are there other areas covered by freedom of movement?

The right to freedom of movement under Czech law is not limited to the movement to/from the territory of the State (see the answer concerning the scope above).

4.2.11 Can you say on which of these questions in your country there is an established legal tradition? How would you state in normative terms the legal traditions in this area?

In the Czech Republic, the constitutional freedom of movement is primarily understood as a freedom of each individual who stays legally on the territory of the Czech Republic to freely move within its borders and to freely leave it at any time. It also encompasses the right of the citizens to return to the Czech Republic once they left it. Only freedom of movement of people is explicitly enshrined in the Constitution. Freedom of movement of goods, services or capital may be to some extent deduce from it but is rather mostly regulated by the EU law and related regular (not constitutional) national acts. Freedom of movement may only be limited by law and in the view of justifiable reasons which are as follows: a) the security of the state, b) the maintenance of public order, c) the protection of the rights and freedoms of others or d) the protection of nature.

4.3 Judicial Independence

4.3.1 How are judges selected, at the various levels? Is there room for political interference in the process?

The basis of the selection process is set in the Constitution itself. As for the Constitutional Court, according to Article 84 of the Convention, judges of the CCC are appointed by the President of the Republic with the consent of the Senate for the term of 10 years. The appointed person assumes her duties by taking the prescribed oath (Article 85 of the Convention). Having regard to the nature of the appointment process involving the President and the Senate, it is to be seen as highly political. According to Article 84 para. 3 of the Constitution, any citizen who has a character beyond reproach, is eligible for election to the Senate,[65] has a university legal education, and has been active in the legal profession for a

[65] According to Article 19 para. 2 of the Constitution, any citizen of the Czech Republic who has the right to vote and has attained the age of forty is eligible for election to the Senate.

minimum of ten years, may be appointed a judge of the Constitutional Court.

The whole process (especially the consent-giving part in the Senate) is very complex and changes to some extent with each new president. For example, the first President of the Czech Republic, Václav Havel, established a commission which helped him to search for and to assess the suitability of the candidates[66]. The choices of the second President, Václav Klaus, the choices were more political; he deliberately decided to proceed differently than the first president[67]. The third President, Miloš Zeman, declared at the very beginning his intention to consult his choices with the President of the CCC, Pavel Rychetský and he consulted also with presidents of the Supreme Court and the Supreme Administrative Court. However, it is to be noted that the influence of Pavel Rychetský on the president significantly decreased over the years[68].

Several factors may come into play in the Senate when deciding whether to consent or not to the appointment of a particular candidate suggested by the President of the Republic. According to a brilliant and comprehensive analysis of Štěpán Janků[69] those were, in the past, as follows: 1) philosophical and political background (membership in political party, political engagement, conduct during the first term served as judges of the CCC), 2) their communist past, 4) their professional qualification, 5) their expertise and erudition, 6) their past and their professional and personal failures, 7) their approach to the interpretation of law, 8) requirement of the variability of the CCC and 9) their personal qualities/characteristics.

As for the ordinary courts, according to Article 93, judges are appointed to their office for an unlimited term by the President of the Republic. They assume their duties upon taking the oath. According to Article 93 para. 2 of the Constitution, any citizen who has a character beyond reproach and a university legal education may be appointed a judge. Further qualifications and procedures shall be provided for by statute. However, it is to be noted that even though formally it is the Minister of Justice who selects judges and the President of the Republic who appoints them, in the reality, the

[66] J. Kysela, K. Blažková, J. Chmel, *Právnický Olymp* (2015).
[67] P. Rychetský, T. Němeček, *Diskrétní zóna* (2012).
[68] J. Kysela, K. Blažková, J. Chmel, *Právnický Olymp*, cit. at. 241.
[69] Š. Janků, *Ústavní soudce v očích Senátu: souhlas jako pouhá formalita, důsledný filtr?* (2018).

court presidents have increasing power in this area[70]. It is the court presidents of regional and high courts who pick the judges for the courts within their jurisdiction. This allows the court presidents to significantly influence the jurisdiction as they may pick the candidates who share their views. The newly appointed judges may, moreover, feel that they owe loyalty to the court president who picked them[71].

Judges are assigned to a particular ordinary court by the Minister of Justice; in order to be assigned to a regional or a high court, the judge must have exercised legal profession for at least 8 years and in order to be assigned to the Supreme Court, the judge must have exercised legal profession for at least 10 years (Art. 67 para. 1 Act on Courts and Judges. A similar condition is set for the judges of the Supreme Administrative Court, the Code of Administrative Justice, however, further specifies that the experience must be gained in the area of constitutional, administrative or financial law and explicitly stipulates that the profession may have been of practical, scientific or pedagogical nature (Art. 121 para. 2 Code of Administrative Justice). This discrepancy may be explained by the fact that at the time when the Act on courts and judges was adopted, the Supreme Administrative Court had not yet existed.

4.3.2 What remedies are in place against the attempt of the political bodies to interfere with the selection and with the day-to-day activity of the courts?

There are general measures in place which aim at guaranteeing the judicial independence but there are no specific formal remedies in place against the attempts of the political bodies to interfere with the selection and with the day-to-day activity of the courts. The general measures are as follows: 1) the judges (with the exception of the judges of the CCC) are appointed for an unlimited term (Art. 93 para. 1 Constitution); 2) they may not be dismissed (with the exception of specified most serious disciplinary offences); 3) they may be transferred to another court only with their consent (Art. 82 para. 2 Constitution); 4) the incompatibly of

[70] D. Kosař, L. Vyhnánek, *Constitutional Identity in the Czech Republic: A New Twist on the Old Fashioned Idea? MUNI Law Working Paper Series*, [online] (2017.05). Available at: http://workingpapers.law.muni.cz/dokumenty/42064 (2017).
[71] A. Blisa, D. Kosař, C*ourt Presidents: The Missing Piece in the Puzzle of Judicial Governance*, 19(7) *German Law Journal* 2031 (2018).

the office of the judge with any other public office or any paid work, apart from pedagogical, scientific etc. (Art. 83 para 3 Constitution, Art. 74 Act on Courts and Judges and Art. 4 Act on the Constitutional Court); 5) material security (Art. 75 Act on Courts and Judges); 6) immunity of the judges of the CCC.[72]

In January 2019, several judges of the CCC and the President of the Supreme Administrative Court spoke publicly about the attempts of the President of the Republic to influence them in their decision-making. There are no measures to be employed in such situations, the Czech legal order is based on the assumption that the general measures should suffice to prevent the judges from being influenced by any such attempts.

4.3.3 Are some judges selected through an election process? If so, how is the campaign regulated? How about, in particular, the issue of campaign finance for judicial elections?

Judges are not elected in the Czech Republic.

4.3.4 What instruments can outside groups legitimately employ to exert pressure on courts?

Under circumstances specified by law, third parties may express their opinion in the proceedings. The status of the third party is usually accorded to those who are not parties to the proceedings but have a legitimate interest in the result of the proceedings (Art. 93 Civil Procedure Code; Art. 27 para 2 Code of Administrative Justice; Art. 76 para 3 Act on the Constitutional Court). The Czech legal order does not explicitly provide for the institute of the *amicus curiae* but both the Supreme Administrative

[72] Article 86 of the Constitution reads as follows: "*(1) A Justice of the Constitutional Court may be criminally prosecuted only with the consent of the Senate. If the Senate withholds its consent, such criminal prosecution shall be foreclosed for the duration of the mandate of the Justice of the Constitutional Court. (2) A Justice of the Constitutional Court may be arrested only if he has been apprehended while committing a criminal act or immediately thereafter. The arresting authority must immediately inform the President of the Senate of the arrest; if within twenty-four hours of the arrest, the President of the Senate does not grant consent to hand the detained Justice over to a court, the arresting authority is obliged to release him. At the very next meeting of the Senate, it shall make the definitive decision as to whether he may be criminally prosecuted. (3) A Justice of the Constitutional Court has the right to refuse to give evidence as to facts about which she learned in connection with the performance of his or her duties, and this privilege continues in effect even after she has ceased to be a Justice of the Constitutional Court.*"

Court[73] and the CCC[74] have, in the past, accepted the filing of documents of such nature.

There are no other instruments that may be used to exert pressure on courts. On the contrary, Article 18 para. 2 of the Charter explicitly prohibits to use a petition as an instrument to put pressure on courts.

4.3.5 Is a guarantee of judicial independence explicitly provided for in the constitution or can it be derived from other provisions?

Judicial independence is explicitly provided for in the constitution, namely in Articles 81 and 82 para 1 of the Convention and in Article 36 para 1 of the Charter. It is also stated in Article 1 (institutional independence of courts) and Article 79 (personal independence of judges) of the Act on the courts and judges.

4.3.6 Are there special rules in place when the constitutional court (or equivalent body, for that matter) adjudicates disputes involving the highest authorities of the state? Do such authorities enjoy special constitutional guarantees?

No, there are no specific rules or guarantees in place for cases involving the highest authorities of the State.

4.3.7 Is the subject particularly topical, or the matter is relatively settled, with no relevant developments in recent years?

The subject is very topical in the Czech Republic. In 2015, the renowned Czech constitutional lawyer, David Kosař, has received an ERC grant and he, subsequently, established a research department called Judicial Studies Institute, at the Faculty of Law, Masaryk University. The team of academics conducts research focusing on judicial self-governance and judicial independence.

[73] The Supreme Administrative Court stated, in its judgment No. 5 As 65/2015-52 that an *amicus curiae* is acceptable as long as it expresses a legal opinion and does not comment on the facts of the case.

[74] In its decision no. IV. ÚS 1378/16, the CCC refused to grant a group of people the status of a third party as it found that they do not have any legal interest in the case at issue but suggested that they may lodge an *amicus curiae*.

4.3.8 Have there been any particular "hard cases" that have helped define the scope of this guarantee?

Yes, those are, in particular, the following judgments of the CCC:

–series of judgments concerning salaries of the judges (Pl. ÚS 13/99; Pl. ÚS 18/99; of 3 July 2000; Pl. ÚS 16/2000; Pl. ÚS 11/02; Pl. ÚS 34/04; Pl. ÚS 43/04; Pl. ÚS 9/05; Pl. ÚS 55/05; Pl. ÚS 13/08; Pl. ÚS 12/10; Pl. ÚS 16/11; Pl. ÚS 33/11; Pl. ÚS 23/09 and Pl. ÚS 28/13, 10);

The first set of judgments concerned withholding and reduction of additional salaries. In this respect, the CCC found in its first judgment a violation of the principle of judicial independence which requires material security of judges. In its second judgment, it eased its approach and found the withholding of the additional salaries constitutional. Nevertheless, the CCC concluded that an interference with judicial remuneration must not be arbitrary and established a three-step test to assess the constitutionality of any such interference. The test was then followed in the CCC's following ruling on that matter. However, the CCC later abandoned this mitigated approach and in the following judgment found the withholding of additional salaries again unconstitutional. In its following judgment, the CCC adopted more comprehensive reasoning and clarified that prohibition of arbitrary interference with judicial remuneration excludes the possibility of improper pressure exerted by the legislature on the judiciary. Any reduction of judicial remuneration must, therefore, comply with the three-step proportionality test.

The second set of judgments concerned salary freezes, salary reductions and reductions of the coefficient for calculation of salaries. In the case of freezes of salaries, the CCC found that as the salaries were not decreased such freeze is constitutional and stated that there is no guarantee of a permanent annual increase in salaries. In its judgments on a reduction of salaries, the CCC found repeatedly violation of the principle of independence. In its judgments, the CCC stressed that the reductions were aimed at judiciary only and not at the whole public sector. Also, a reduction of the coefficient for the calculation of judicial salaries was found unconstitutional. The latest judgment concerned the fact that judges were no longer entitled to salary during sick leave. Such

amendment was not seen by the CCC as a restriction of salaries and it had not granted it any constitutional protection.[75]

–periodic assessment of professional competence of judges: In its judgment no. Pl. Pl. ÚS 7/02, the CCC found unconstitutional a provision of the Act on courts and judges which prescribed periodic assessment of professional competence of judges. Based on the result of such assessment judge could have been dismissed from his function.

–internships of judges on the Ministry of Justice and terms of presidents and vice-presidents of courts: On 6 October 2010 the CCC issued the judgment no. Pl. ÚS 39/08 which dealt with several crucial issues of the legislation on the judiciary. In the cited judgment, the CCC found unconstitutional the possibility to temporarily assign a judge to the Ministry of Justice. The judges were assigned to the Ministry to help with the drafting of laws which they later applied and interpreted as judges. Such practice was found in breach of the principle of separation of powers and the principle of judicial independence. The CCC further found constitutional that the term of presidents and vice-presidents of the courts has been limited but concluded, on the other hand, that the possibility to repeatedly assigned the same judge to the office of (vice-)president of the court unconstitutional;

–dismissal of the President of the Supreme Court by the President of the Republic: On 11 July 2006, in its judgment no. Pl. ÚS 18/06, the CCC found unconstitutional the dismissal of Iva Brožová, judge and president of the Supreme Court, from her office of the president by the President of the Republic, Václav Klaus. According to the Act on courts and judges, the presidents and vice-presidents of the courts might have been dismissed for a serious breach of her obligations set by law by the person who appointed her. The CCC found the dismissal of a President of the Supreme Court by a member of executive power unacceptable and annulled the President's dismissal of Iva Brožová from her function of President of the Supreme Court.

[75] For a comprehensive analysis of the CCC's case-law on judicial salaries, see A. Blisa, *Judicial Salaries as a Component of Judicial Independence*. *Diploma thesis*, Available at: https://is.muni.cz/auth/th/i5igf/ (2016).

4.3.9 Are there other areas covered by judicial independence?

No.

4.3.10 Can you say on which of these questions in your country there is an established legal tradition? How would you state in normative terms the legal traditions in this area?

In the Czech Republic, judicial independence is understood as an institutional principle, a guarantee of the rule of law and separation of powers, as well as a procedural right of an individual to have a case adjudicated by an independent tribunal which is a procedural safeguard aiming at ensuring a fair trial.

The general measures in place securing judicial independence are as follows:

1) the judges (except for the judges of the CCC) are appointed for an unlimited term;

2) they may not be dismissed (except for specified most serious disciplinary offences);

3) they may be transferred to another court only with their consent;

4) the office of the judge is incompatible with any other public office or any paid work (apart from pedagogical, scientific etc.);

5) material security of judges is ensured;

6) the judges of the CCC enjoy immunity.