

The Constitution
of Czechia
A Contextual Analysis

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Introduction

Central Europe – Czechoslovakia – Czechia – European Union – Historical Narratives – Constitutional Identity – Sociological Constitutionalism – Constitutional Sentiments – Populism – Democratic Careening

MODERN CZECHIA IS still a young state, as it came into being only after the dissolution of Czechoslovakia in 1993. However, most Czechs have considered Czechoslovakia to be their own state¹ and viewed Czechia as a continuation of the Czechoslovak statehood and its natural successor. In order to understand Czech constitutionalism it is thus important to engage with key constitutional moments of Czechoslovak statehood.

Czechoslovakia gained independence from Austria-Hungary in the wake of World War I in 1918. Therefore, in 2018 Czechia celebrated a century since Czechoslovakia came into being. In fact, the number ‘eight’ has a special place in Czech history.² In 1938 the Western powers (France, Britain and Italy) met Hitler in Munich and eventually consented to the annexation of Czechoslovakia’s *Sudetenland* (mostly border regions in Bohemia) by Hitler’s Germany.³ A few days later, German troops marched into the *Sudetenland*, which became officially a part of the Third Reich. This marked an end of democratic statehood in the Czech lands for almost 50 years, as in February 1948 the Communist Party successfully completed a coup d’état. In 1968, when the Czechs wanted to liberalise their communist regime, the Soviet Union and its allies invaded Czechoslovakia and put an abrupt end to the Prague Spring. All of these events left a deep imprint on Czech constitutionalism.

¹ See Eric Stein, *Czecho/Slovakia: Ethnic Conflict, Constitutional Fissure, Negotiated Breakup* (Ann Arbor, MI: Michigan University Press, 1997).

² The importance of the years ending with ‘eight’ is generally accepted in Czech popular literature, see eg František Emmert, *Osudové osmičky v našich dějinách* (Prague: Computer Press, 2008). Other authors have warned against over-emphasising and over-symbolising the years ending with ‘eight’ (see eg František Šulc, ‘Osudové české osmičky’, *Lidovky.cz*, 29 December 2007).

³ See the Munich Agreement (30 September 1938) – the settlement reached by Germany, Great Britain, France and Italy that permitted German annexation of the Sudetenland in western Czechoslovakia.

2 *Introduction*

The three national and constitutional catastrophes (1938, 1948 and 1968), each in its own way, eroded trust of the Czech people in constitutionalism and its practical capability to counter the rise of or relapse into totalitarian regime. These events also remind us that the Czech constitutionalism has its dark side that includes collaboration of key constitutional actors with the Nazi and communist regimes, long periods of lawlessness under both the Nazi and the Communist rule, and also some highly controversial policies of pro-Western post-World War II elites such as the decrees of President Edvard Beneš that led to deportation of roughly 2.4 million ethnic Germans from the Czechoslovak territory in 1945–1946.

What is perhaps even more important is the popular interpretation of these historical events that informs Czech constitutional identity. The prevailing Czech narrative about the Czech history is that Czechs were usually victims of forces beyond their control, and everything wrong came from the outside. In this narrative, just the identity of the ‘bad guys’ changed – the Habsburgs, the Nazis and then the Soviets. The reality was always significantly more complicated. The Bohemian nobility itself elected a zealous catholic, Ferdinand II, to the Bohemian throne, three years before losing to him at the Battle of White Mountain. During the First Czechoslovak Republic, Czechs failed to reflect Slovak calls for greater autonomy and then, during the Protectorate, helped Nazis to get rid of Jews and Roma people. An even less well-known fact is that the Communist Party won the parliamentary elections in Czechia in 1946, which paved the way to the 1948 communist coup d’état. Hence, Czechs, unlike Slovaks and actually unlike any other Central European country, voted the Communists to power in relatively free elections.

Such issues, including mainly the core question of victim mentality and the complicated relationship with international and supranational entities, thus were arguably key determinants of the Czech statehood and its reflection by the Czech elites and the general population. As we argue throughout this book, we think that this continues to be the case. The growing Euroscepticism in Czechia, the inherent tension between competing accounts of Czech constitutional identity, and the very understanding of Czech national interest seem to be informed by these past events.

That said, the most important constitutional events for understanding the current Czech constitutional system took place in 1989, when the Velvet Revolution marked an end of the four-decade-long communist rule in Czechoslovakia, and in 1993, when Czechoslovakia split into two independent states. The Czech post-Velvet constitutional project

was from the very beginning designed as a liberal democratic one, with firm roots in the Western constitutional tradition. After these formative years, everything looked rosy for some time. With the exception of a few bumpier years, the Czech economy flourished in the 1990s and especially in the 2000s – before the worldwide economic crisis. Czechia was represented abroad primarily by President Václav Havel, a former dissident and playwright who became internationally visible and well-known for his support of human rights, liberal values and global responsibility. In 1999, Czechia joined NATO. Four years later, Czechs decided in its so far only constitutional referendum to accede to the European Union. Czechia officially became an EU Member State in 2004. It seemed that a bright future lay ahead.

This optimistic view was not just an internal one. At this point Czechia was generally viewed as a role model for successful transformation into a democracy and a counterpoint to the sceptics who viewed an export of western democracy and liberal democratic values to the east as a naive endeavour.⁴ However, this seemingly smooth and direct transition to liberal democracy has turned into a winding road.

Since the 2010s, signs of crises of confidence in the post-1989 development and traditional political parties have started showing more visibly and Havel's humanistic tradition, liberal values and support for supranational engagement have been increasingly challenged. To be sure, the first disillusionment with the traditional political parties had taken place in 1998, when the two dominant political parties and natural ideological opponents, Social Democrats and the centrist Civic Democratic Party, signed the so-called Opposition Agreement, according to which they divided the state power in exchange for tacit support of the governing Social Democrats by the Civic Democratic Party.⁵ Yet the political system witnessed real turmoil only in the wake of the corruption scandals and the financial crisis of 2007–08, which reopened existing wounds as they affected the Czech people unevenly. As a result, the Czech people are deeply divided. The four major crises of recent years – (1) the financial and later economic crisis of 2007–2008, (2) a series of corruption scandals in Czech governmental circles, (3) the European migrant crisis, and (4) the Covid-19 pandemic – have exacerbated this division.

⁴Petr Kopecký and Cas Mudde, 'Explaining different paths of democratization: The Czech and Slovak republics', *Journal of Communist Studies and Transition Politics* 16, no 3 (2000), 63–84.

⁵See Tomáš Linek, *Zrazení snu?* (Prague: SLON, 2010) and Erik Tabery, *Vládne, nerušit: opoziční smlouva a její dědictví* (Prague: Paseka, 2006).

4 Introduction

The main dividing line follows the different visions of the three Czech Presidents: Václav Havel on the one hand and the duo of Václav Klaus and Miloš Zeman on the other. With some degree of simplification, there is the Havelian ‘truth and love’ bloc with emphasis on universal moral values, liberal democratic values, human rights, and a thick concept of the rule of law and the civic society. In contrast, the Klaus-Zeman bloc stresses a more ‘realistic’, nation-state-based understanding of the Czech political-constitutional project and shares a more cynical stance as regards those ‘Havelian’ universal values and idealism. More recently, Prime Minister and billionaire Andrej Babiš, who left his business and entered politics in 2011, has joined the Klaus-Zeman camp.

Supporters of current President Miloš Zeman (2013–now) in particular are often disillusioned by the current form of Czech democracy and the growing inequality gap in highly egalitarian society.⁶ They call for a change to the current system and prefer short-term fixes rather than addressing complex problems’. However, their views are not laughable nor without any support. At the end of 2017, 863,000 Czechs – nearly 10 per cent of the adult population – faced at least one seizure order, meaning their income above a legal minimum could be redirected to cover debts and fees.⁷ Half of them faced four or more orders. These ‘debt traps’ are the result of poor financial awareness, years of loose regulation of lenders, costly repossessions, and tough laws on bankruptcy, and help fuel support for extremist politicians in poorer areas. This is further exacerbated by the opaque education system, unreformed since the Austrian era, worrying divergence in the quality of public schools and discrimination towards Roma children in schooling.⁸ Many Czechs, who have been traditionally liberal towards the LGBTQ movement and were the first Central European country to adopt a same-sex union law in 2006, have even recently started to question the rights of transsexuals.

Zeman and Babiš have understood this situation well. They have responded to changing attitudes and have already announced that they intend to reform the Czech constitutional system if they are given that opportunity. Both of them have expressed their desire to abolish the

⁶World Inequality Database, ‘Czech Republic’, <https://wid.world/country/czech-republic/>.

⁷Robert Muller, ‘Debt-trapped Czechs excluded as economy grows’, *Reuters*, 13 December 2018, <https://www.reuters.com/article/us-czech-debt-idUSKBN1IOC1NM>.

⁸Hubert Smekal and Katarína Šipulová, ‘*DH v Czech Republic* Six Years Later: On the Power of an International Human Rights Court to Push Through Systemic Change’, *Netherlands Quarterly of Human Rights* 32, no 3 (2014), 288–321.

upper chamber of the Parliament, the Senate, because it unnecessarily complicates the legislative process. Babiš has also pledged to reduce the number of MPs in the lower chamber and abolish municipal assemblies. He stresses that he prefers to ‘run the state like a firm’,⁹ implying that any checks and balances as well as complex procedural rules are no more than a nuisance. None of these threats have materialised. However, there are visible signs of democratic decay in actions of individual office holders who work with or were elected with the support of Zeman and Babiš. For instance, one recently elected Ombudsman openly adopts an extremely narrow concept of discrimination. Even more dangerously, several judges of the Constitutional Court and the Supreme Administrative Court have alleged that President Miloš Zeman’s Chancellor had attempted to persuade the judges of these two courts to decide high-profile political cases in line with Zeman’s preferences.¹⁰ Such events were simply unheard of in the 1990s and 2000s.

Some authors have claimed¹¹ that these tensions are not surprising and that the aforementioned crises of confidence are in fact a logical consequence of the chosen constitutional design: an over-reliance on the legal aspects of constitutionalism and the ignoring of the constitutional sentiments of the people and the corresponding necessity to nurture the social roots of constitutionalism. According to this narrative, the transition was only successful on the surface and it did not come in hand in hand with a transition as regards the population’s constitutional values, which in turn has to lead to tensions and perhaps even constitutional crises. These obstacles can hardly be overcome without institutional reform or at least without a focused constitutional-political campaign aimed at strengthening the position of liberal democratic constitutional values in Czech society and increasing the post-1989 regime’s legitimacy.

In sum, while the Czech constitutional system still seems to be in a relatively good shape, we can see the first cracks in it, and thus its future is hard to predict. Even though the Czech constitutional landscape has not been subject to change and challenge of the same magnitude as some

⁹ See eg Jan Jandourek, ‘Babiš chce řídit stát jako firmu. To asi nepůjde, stát není firma’, *Reflex on-line*, 6 September 2013, www.reflex.cz/clanek/info-x/51716/babis-chce-ridit-sta-t-jako-firmu-to-asi-nepujde-stat-neni-firma.html.

¹⁰ See Ondřej Kundra and Andrea Procházková, ‘Mynář se pokusil ovlivnit vysoce postavené soudce’, *Respekt*, 6 January 2019, <https://www.respekt.cz/politika/mynar-se-pokusil-ovlivnit-vysoce-postavene-soudce>.

¹¹ See eg Paul Blokker, *New Democracies in Crisis? A Comparative Constitutional Study of the Czech Republic, Hungary, Poland, Romania and Slovakia* (Abingdon: Routledge, 2013).

6 Introduction

of its Visegrad counterparts' (Slovakia¹² in the 1990s and Hungary¹³ and Poland¹⁴ in the 2010s and early 2020s), there are clear signs of its fragility and susceptibility to democratic backsliding. We argue in this book that the reasons for the fragility lie not in the formal structure of the constitutional system itself, but rather in the social underpinning of the key constitutional values and deep disagreement within the Czech people over these values.

This makes Czechia a particularly interesting case as it is arguably an outlier among the backsliding Visegrad countries.¹⁵ The Czech constitutional institutions seem fairly robust and no clear turn along the Polish or Hungarian lines seems imminent, but we do not know for how long. We may thus ask what explains the differences between the Visegrad countries when just 16 years ago, on joining the European Union, they were seen as a unified bloc of attentive pupils of democratic transition? Are the Czech constitutional values rooted deeply enough to withstand a real earthquake? Will Czechia follow the path that Hungary and Poland now seem to be taking? Or do the 'Hungarian' and 'Polish' paradigms fit Czechia only loosely, as the major challenge lies elsewhere? Are the recent events in Czechia just a necessary 'childhood illness' of the constitutional system blown out of proportion by observers and does Czechia's outlier status as a democratic outpost in Central Europe still hold? What institutions have been most effective in countering democratic decay?

This book attempts to answer some of these questions. It provides a condensed contextual look at Czech constitutionalism and its underlying social development. We show that the Czech constitutional system has been built on liberal democratic values and on the legacy of the First Czechoslovak Republic (1918–1938), which has been portrayed as a success by Czechs. The key institutions and the standard constitutional design have followed well-tested constitutional patterns and early experiences with the functioning of the new constitutional system

¹² See eg Valerie Bunce and Sharon Wolchik, 'The 1998 Elections in Slovakia and the 2000 Elections in Croatia: The Model Solidifies and Is Transferred', in Valerie Bunce and Sharon Wolchik (eds), *Defeating Authoritarian Leaders in Post-Communist Countries*, (New York: Cambridge University Press, 2011).

¹³ See eg Renáta Uitz, 'Can You Tell When an Illiberal Democracy Is in the Making? An Appeal to Comparative Constitutional Scholarship from Hungary', *International Journal of Comparative Law* 13, no 1 (2015), 279–300.

¹⁴ See Wojciech Sadurski, *Poland's Constitutional Breakdown* (Oxford: Oxford University Press, 2019).

¹⁵ See Elisabeth Bakke and Nick Sitter, 'The EU's Enfants Terribles: Democratic Backsliding in Central Europe since 2010', *Perspectives on Politics* (2020).

lent themselves to optimistic interpretations. At the same time, we stress some dangerous undertones beneath Czech constitutional development that are often neglected by constitutional law scholars. In sum, we argue that Czechia is not in the state of ‘democratic careening’, as the democratic game has changed in decisive ways since the 1990s even though democracy neither collapsed nor became more firmly consolidated in the process.¹⁶ More specifically, the Czech constitutional system is fragile, but it can be made to fit the ‘Hungarian’ or ‘Polish’ paradigm only very loosely as the major challenge has not been creeping capture of existing institutions, but rather the entrenchment of private interests in the state and in party politics.

Here we must add two caveats. First, it is clear that throughout the book we define constitutionalism broadly and not merely as the set of written norms that form the Czech constitutional order, formal institutions and the Constitutional Court’s case law. Instead, we study the Czech constitutionalism as a lived experience. By doing so we adopt a sociological understanding of constitutionalism that incorporates also narratives, informal institutions and political context. When relevant, we also address comparative and supranational influences on Czech constitutionalism, including the crucial role of EU law. This view is not shared by many scholars in Czechia, who tend to focus almost exclusively on Czech law, but it is the only way to understand Czech constitutionalism in a European and global context.

Second, throughout the book we use the term ‘Czechia’, a new name approved in 2016 by the Czech Cabinet as the official short name of the Czech Republic. We use the name Czechia to describe the Czech Republic (1993–today) and the Czech part of Czechoslovakia (1918–1992) in order to avoid confusion, as the term ‘Czech Republic’ has meant different things in Czech modern history. In 1918–1968 the ‘Czech Republic’ did not officially exist and the more common term in that era was ‘Czech lands’ (*České země*). After the federalisation of Czechoslovakia, the term ‘Czech Republic’ referred to the Czech subunit in the federation (1969–1992) and only after the division of Czechoslovakia did it become the official title of the independent Czech state. To make things even more complicated, during the Middle Ages, the Czech lands were referred to as Bohemia, even though the Kingdom of Bohemia often covered a much greater territory.

¹⁶ See Chapter 9.

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