The Czech Republic: From a Euro-Friendly Approach of the Constitutional Court to Proclaiming a Court of Justice Judgment *Ultra Vires*

Zdeněk Kühn

Abstract The Czech Constitution of 1992, associated with the revolutionary fervour of the 1989 Velvet Revolution, attempted to annihilate the Communist, totalitarian heritage. According to the judgments of the Constitutional Court (CCC), this meant that the rule of law in a constitutional state has not only a formal but also a substantive side, expressing the fundamental, inviolable values of a democratic society. There was a break from an approach that had seen the judiciary as a submissive and unthinking instrument of enforcement. In relation to EU law, several measures have been subject to constitutional challenges, including domestic acts implementing the European Arrest Warrant, the Data Retention Directive, and EU sugar quotas. The Czech Constitutional Court, which has a strong position, has underlined its EU-friendly approach. At the same time, for exceptional, flagrant cases, the CCC has retained the constitutional limits based on the democratic, rule-of-law-based state (unamendable provision under Art. 9(2) of the Constitution) and the protection of fundamental rights. Notably, in *Landtová*, the CCC declared an ECJ judgment *ultra vires*. In general, the reasoning of the CCC often follows that of the German Constitutional Court. In the practice of the ordinary courts, it emerges from the report that the Czech courts have adopted a rights-protective approach and carry out judicial review, including in European Arrest Warrant cases and other mutual recognition cases. The EU amendments in the Constitution are considered brief but sufficient.

Keywords The Czech Constitution • Constitutional amendments regarding EU and international co-operation • The Czech Constitutional Court
Constitutional review statistics • Fundamental rights and the rule of law

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Data Retention Directive and surveillance • European Arrest Warrant, defence rights and judicial review • *Sugar Quotas* cases, property rights and the principles of legal certainty and legitimate expectations • Unamendable constitutional provision on the democratic, rule-of-law-based state • Constitutional limits *Landtová* and *ultra vires* review • *Skoma-Lux* and publication of laws

1 Constitutional Amendments Regarding EU Membership

1.1 Constitutional Culture

1.1.1 The Czech Constitution of 1992 was adopted as a response to the totalitarian past of Czechoslovakia. It was enacted three years after the fall of the Czechoslovak Communist regime and must be interpreted against this backdrop.¹ The drafters of the Constitution did not strive for continuity with the old regime; quite the contrary, the Constitution was associated with the revolutionary fervour of the 1989 Velvet Revolution and attempted to annihilate the Communist heritage.

The text of the Constitution is rather brief. The Constitution seems to be less detailed than its Central European counterparts, e.g. the Polish Constitution of 1997 or the Hungarian Constitution of 2011. Let us keep this in mind when analysing the relative brevity of the 2001 Euro-amendment to the Constitution (Sect. 2 below).

The Constitution created a strong Constitutional Court (hereinafter CCC) which soon became its most powerful protector. The CCC started with almost a total absence of constitutional conventions and tradition.² Its doctrine is therefore unoriginal, as it mostly copies the German approach (sometimes quite unsystematically and simplistically). The principle of adherence to the letter of the law endorsed via a ‘weak’ judiciary that is unable to interpret general constitutional clauses (textual positivism) is said to be discredited by the fact that law might sometimes be grossly unjust, as happened during the Communist era. The CCC has stated that:

The history of the Twentieth Century relating to the existence of totalitarian states proved that mechanical identification of the law with legal texts had become a welcome tool of totalitarian manipulation. It made the judiciary a submissive and unthinking instrument in the enforcement of totalitarian power.³

¹ In order to be accurate, I shall add that the immediate reason for adopting the Constitution in fall 1992 was the break-up of the Czechoslovak federation.

² Hungarian legal philosopher and comparatist Csaba Varga has noted that ‘[i]n want of constitutional precedents, conventions, and customs, in short, of established practice, the field where the political and legal game is played is rather empty. The transition period now is the dramatic high time for Central and Eastern Europe nations to set the style for their future’. Varga 1995, p. 75.

³ See the judgment of 17 December 1997, file No. Pl. ÚS 33/97 (translation by the author). Translations of some important judgments of the CCC are available at <http://www.usoud.cz/en/decisions/>. I have used the translations available at this website unless indicated otherwise. All decisions in Czech are available at <http://nalus.usoud.cz/Search/Search.aspx>.

The CCC made the same point already in its first judgment on the Act on the Lawlessness of the Communist Regime:

However, the [pre-WW II] positivist tradition ... in its later development many times exposed its weakness. ... in Germany the National Socialist domination was accepted as legal, even though it gnawed out the substance and in the end destroyed the basic foundations of the Weimar democracy. After the war, this legalistic conception of political legitimacy made it possible for Klement Gottwald [the first Communist Czechoslovak president] to 'fill up old casks with new wine'. Then in 1948 he was able, by the formal observance of constitutional procedures, to 'legitimate' the February Putsch. In the face of injustice, the principle that 'law is law' revealed itself to be powerless.⁴

Although these claims are now generally considered overstated in Europe,⁵ a growth in the role of the judiciary, 'the least dangerous branch', was none the less supported as a result of such claims. Therefore, a strong judicial power was no longer viewed as a danger to democracy, but rather as an enhancement of democracy. Weak judges came to be considered dangerous for democracy. Moreover, virtually overnight, Eastern Europe joined the trend in which law replaced 'old' ideologies (especially religion, which was already weak in ex-Socialist countries, save some exceptions).⁶

1.1.2 The Czech Constitution includes only organisational matters and almost completely leaves out the substance of fundamental rights. This was caused, at the time of drafting in fall 1992, by political disagreement over the content of the bill of rights. As a sort of compromise, the federal Czechoslovak Charter of Fundamental Rights was reaffirmed as part of the Czech legal system, and the Constitution referred to it as a part of the 'constitutional order'. Despite some initial doubts about the status of the Charter, the CCC applied it effectively as constitutional law. Fundamental rights dominate much of the workload of the CCC. It is therefore fair to say that even though the Constitution itself deals strictly with organisational matters, fundamental rights protection is a central element in the broader constitutional culture of the Czech Republic.

1.2 The Amendment of the Constitution in Relation to the European Union

1.2.1, 1.2.3 The Czech Constitution enacted in 1992 did not allow for any transfer of competences. At the same time, it maintained, with the exception of the limited

⁴ Judgment of 21 December 1993, file No. Pl. ÚS 19/93.

⁵ Müller 1991, pp. 220 et seq., claiming that post-war references to positivism served as an excuse for the entire German legal profession: 'These falsehoods and distortions of history were intended to exculpate an entire profession and to discredit the reputation of the democrats on law school faculties' (pp. 222–223).

⁶ Generally on the trend in which law replaces old ideologies including religion cf. Badinter and Breyer 2004.

area of international human rights treaties, the dualist model of the relation between municipal and international law.⁷ The first major article criticising the closed attitude of the Constitution to international law and its inability to give a constitutional basis for EU membership was published by Eric Stein in the United States as early as 1994.⁸ However, the domestic debate on the future status of international and EU law did not begin before the second part of the 1990s.⁹ This reflects the reality of the legal order which originally did not care about international law or the European Union. Instead, the concept of sovereignty was praised at the moment of regaining independence.

In 2001 the Czech Republic enacted the so-called ‘Euro-amendment’ to its Constitution.¹⁰ Czech politicians preferred a brief and relatively simple clause about the transfer of competences, which is consistent with the generally brief and succinct style of the Czech Constitution (see Sect. 1.1.1 above). Interestingly, the original bill also included a primacy clause for EU law, but after this issue was debated in Parliament, this part of the amendment was omitted, perhaps because of its controversial nature for some Eurosceptic deputies.

The 2001 amendment served two basic functions. First, it made international law directly enforceable within the domestic legal system. Secondly, the amendment made possible the transfer of powers of the Czech state to the EU. Article 10a now reads as follows:

- (1) Certain powers of Czech Republic authorities may be transferred by treaty to an international organization or institution.
- (2) The ratification of a treaty under paragraph 1 requires the consent of Parliament, unless a constitutional act provides that such ratification requires the approval obtained in a referendum.

In addition to this provision, should a treaty mentioned in Art. 10a be ratified by Parliament, Art. 39(4) provides that Parliament must give its consent by a three-fifths majority of its deputies and three-fifths of the votes of senators present. The President cannot veto parliamentary ratification; however, the CCC, prior to the ratification of a treaty, has jurisdiction to decide on the treaty’s conformity with the Constitution (Art. 87(2), see also *infra*) and the President is amongst the bodies empowered to bring such an issue to the CCC.

⁷ For details, see Stein 1994 and Stein 1997, pp. 358 et seq.

⁸ See Stein 1994. Eric Stein was a Czech émigré and University of Michigan Law School Professor who took part in preparing the Czechoslovak federal constitution in the early 1990s. At the end of the day his work was not used: due to the break-up of the federation, no federal constitution was needed.

⁹ The leading figure to have influenced the Czech internationalist doctrine is Jiří Malenovský, who is currently a judge of the European Court of Justice. He was also the most important thinker behind the ‘Euro-amendment’ to the Constitution in 2001. At that time he was a judge of the Czech Constitutional Court (appointed in 2000, in 2004 he left for the CJEU).

¹⁰ The Constitutional Act No. 395/2001 Sb. (*Sbírka a zákonů*, the Official Gazette). The English version of the Constitution as amended in 2001 is available at <http://www.usoud.cz/en/legal-basis/>. All translations of the Constitution are taken from this website unless indicated otherwise.

1.2.2 The amendment procedure is addressed in Sect. 1.5.

1.2.4 The Constitution's EU-related provisions, despite their brevity (or because of it?) are now generally considered sufficient and there are no proposals for their further amendment.

1.3 Conceptualising Sovereignty and the Limits to the Transfer of Powers

1.3.1 Article 10a, quoted supra Sect. 1.2., means that there were essentially two ways to join the EU or to ratify any other treaty which further transferred powers to the EU (such as the Lisbon Treaty). The first was parliamentary consent by a qualified majority of both chambers of Parliament (three-fifths of votes, the so-called 'constitutional supermajority'). The second was approval by referendum. It must be highlighted that the Czech Republic does not have a general law on referendums.

As I have indicated above (Sect. 1.2), the original provision on the supremacy of EU law was not enacted because of doubts among some deputies in Parliament. It was not until 8 March 2006 that the Constitutional Court explained the relation between national and EU law. The case was the *Sugar Quota Case III*, where the question at stake was whether the EU sugar quotas were contrary to the Constitution.¹¹ In its reasoning, the CCC summarised that the direct effect of EU law and its primacy over national (although not necessarily constitutional) law has its origins in EU law. The national Constitution and its Art. 10a are just the bridge through which EU law flows into the national legal order:

Direct applicability in national law and the applicational precedence of a regulation follow from Community law doctrine itself, as it has emerged from the case-law of the CJEU [Court of Justice of the European Union]. If membership in the EC brings with it a certain limitation on the powers of the national organs in favor of Community organs, one of the manifestations of such limitation must necessarily also be a restriction on Member States' freedom to designate the effect of Community law in their national legal orders. Art. 10a of the Constitution of the Czech Republic thus operates in both directions: it forms the normative basis for the transfer of powers and is simultaneously the provision of the Czech Constitution which opens up the national legal order to the operation of Community law, including rules relating to its effects within the legal order.

1.3.2 The CCC has interpreted sovereignty and its transfer in a flexible way. This is best visible in two judgments relating to the constitutionality of the Lisbon Treaty. In the first judgment (*Lisbon I*), the Court rebuffed the argument of Eurosceptic president Václav Klaus that the Lisbon Treaty would be incompatible with the sovereignty of the Czech Republic. The Court ridiculed the President's notion (that

¹¹ Judgment of 8 March 2006, file No. Pl.ÚS 50/04, *Sugar Quota Case III*.

had been supported at the time by the mainstream Czech scholarship) that sovereignty implies ‘independence of the state power from any other power, both externally (in foreign relations), and in internal matters’. Strictly speaking, the Court remarked, no country, not even the United States of America, would fulfil the elements of sovereignty. Sovereignty, in the Court’s view, should not be understood only as a rigid legal concept, but

also as a concept with a practical, moral, and existential dimension. In practice, national sovereignty is always limited by objective conditions, including the reactions of neighboring states. Under these conditions, national sovereignty means above all a legitimate government that has at its disposal the formal power to choose between available alternatives, and not to pursue an alternative dictated by a foreign power. In other words, for a nation-state just as for an individual within a society, practical freedom means being an actor, not an object. For a state that is in a tightly mutually interdependent system, practical sovereignty consists in being understood as a player to whom neighboring states listen, with whom they actively negotiate, and whose national interests are taken into consideration.¹²

The CCC also stated that the European Union had advanced by far the furthest in the concept of shared, ‘pooled’ sovereignty, and at that time already formed an entity *sui generis*, which is difficult to classify under classical political science categories. A key manifestation of a state’s sovereignty is the ability to continue to manage its sovereignty (or part of it), or to cede certain powers temporarily or permanently.¹³

The Court added in its second Lisbon judgment that this concept is nothing new in Czech political theory and practice. President Klaus criticised the recent and relatively frequent use, but only in ‘non-rigorous debate’, of the concept of shared sovereignty, which according to the President is ‘a contradiction in terms’. Responding to this argument, the CCC quoted from the 1995 memorandum attached to the Czech Republic’s application to join the EU, signed by the then Prime Minister Klaus:

The government of the Czech Republic has irrevocably reached the same conclusion as that reached in the past by today’s Member states, that in modern European evolution, the exchange of part of one’s own state sovereignty for a share in a supra-state sovereignty and shared responsibility is unavoidable, both for the prosperity of one’s own country, and for all of Europe.

Thus, there was no doubt, in the Court’s view, that the concept of shared sovereignty had been familiar to leading Czech politicians since the mid-1990s.¹⁴

1.3.3 The Constitution in its Art. 10a provides for the transfer of ‘certain’ powers to the European Union. From the text it is clear that it is not possible to transfer *all* of the powers of the Czech Republic. This cannot not happen in any way, including not by referendum.

¹² Judgment of 26 November 2008, file No. Pl. ÚS 19/08, *Lisbon Treaty I*, para. 107 (referring to David P. Calleo, *Rethinking Europe’s Future*, Princeton/Oxford, at 141, 2001).

¹³ *Ibid.*, para. 104.

¹⁴ Judgment of 3 November 2009, file No. Pl. ÚS 29/09, *Lisbon Treaty II*, paras. 147–148.

The Court has faced repeated attempts by Eurosceptic politicians to demand that the Court delineate the powers which can never be delegated to the Union. The CCC has declined to do so. According to the Court, '[t]hese limits should be left primarily to the legislature to specify, because this is a priori a political question, which provides the legislature wide discretion'.¹⁵ The CCC stressed that responsibility for these political decisions cannot be transferred to the judicial branch; the Court can review them only at the point when they have actually been made on the political level.¹⁶ The Court emphasised its judicial restraint and judicial minimalism,

which is perceived as a means of limiting the judicial power in favour of political processes, and which outweighs the requirement of absolute legal certainty. ... The attempt to define the term 'sovereign, unitary and democratic state governed by the rule of law, founded on respect for the rights and freedoms of the man and of citizens' once and for all (as the petitioners, supported by the president, request) would, in contrast, be seen as an expression of judicial activism, which is, incidentally, consistently criticized by certain other political figures.¹⁷

1.3.4 The CCC has never accepted the supremacy of EU law over the national constitution. Quite the contrary, following its German archetype, the Court from the very beginning has emphasised that the Constitution is the supreme law of the land. The primacy of EU law is thus conditional on the fact that EU law must not be in conflict with the basic requirements of the national constitution:

There is no doubt that, as a result of the Czech Republic's accession to the EU, a fundamental change occurred within the Czech legal order, as at that moment the Czech Republic took over into its national law the entire mass of European law. [This necessarily must influence the meaning of the entire existing legal order], constitutional principles and maxims included, naturally on the condition that the factors which influence the national legal environment are not, in and of themselves, in conflict with the principle of the democratic law-based state or that the interpretation of these factors may not lead to a threat to the democratic law-based state. Such a shift would come into conflict with [the unchangeable core of the Constitution]. The current standard within the European Union for the protection of fundamental rights cannot give rise to the assumption that this standard ... is of a lower quality than the protection accorded in the Czech Republic, or that the standard of protection markedly diverges from the standard up till now provided in the domestic setting by the Constitutional Court.¹⁸

The CCC emphasised that the national constitution shall be interpreted in conformity with the Czech Republic's obligations resulting from its membership in the European Union. This EU friendly interpretation maxim (itself a constitutional principle) is limited by the range of interpretations possible under the Constitution. Therefore, it shall not be used to amend any express constitutional provision, since '[i]f the national methodology for the interpretation of constitutional law does not

¹⁵ *Lisbon Treaty I*, supra n. 12, para. 109.

¹⁶ *Lisbon Treaty II*, supra n. 14, para. 111.

¹⁷ *Ibid.*, para. 113.

¹⁸ *Sugar Quotas III*, supra n. 11.

enable a relevant norm to be interpreted in harmony with European Law, it is solely within the Constituent Assembly's prerogative to amend the Constitution'.¹⁹

Therefore, EU friendly interpretation is only a soft metarule. It is to be applied if more than one interpretation is possible, with both or all of them being plausible interpretative outcomes of the constitutional text:

A constitutional principle can be derived from Article 1 para. 2 of the Constitution, in conjunction with the principle of cooperation laid down in Art. 10 of the EC Treaty, according to which domestic legal enactments, including the constitution, should be interpreted in conformity with the principles of European integration and the cooperation between Community and Member State organs. If the Constitution, of which the Charter of Fundamental Rights and Basic Freedoms forms a part, can be interpreted in several manners, only certain of which lead to the attainment of an obligation which the Czech Republic undertook in connection with its membership in the EU, then an interpretation must be selected with supports the carrying out of that obligation, and not an interpretation which precludes it.²⁰

This line of case law was summarised in the second judgment on the Lisbon Treaty. The Court emphasised that

- it generally recognises the functionality of the EU institutional framework to ensure review of the scope of exercise of transferred powers; however, its position may change in the future if it appears that this framework is demonstrably non-functional;
- in terms of the constitutional order of the Czech Republic—and within it especially in view of the essential core of the Constitution—what is important is not only the actual text and content of the Treaty of Lisbon, but also its future concrete application; and finally, that
- the CCC too will (may) – although in view of the foregoing principles – function as an *ultima ratio* and may review whether any act by Union bodies has exceeded the powers that the Czech Republic transferred to the European Union pursuant to Art. 10a of the Constitution. However, the CCC assumes that such a situation can occur only in quite exceptional cases; these could include, in particular, abandoning the identity of values and, as already cited, exceeding of the scope of conferred competences.²¹

Ironically, it soon became clear that a situation where the CCC would intervene and proclaim EU law *ultra vires* would not necessarily be 'quite exceptional'. From the very beginning one might have wondered what really limits the application of EU law in the Czech Republic. Is it really only a clash with the super-core of the Constitution, those unalterable basic principles that are beyond the power of the legislature? Or is it also the case where the CCC simply reaches a different opinion than the CJEU? I have consistently warned that the overall rhetoric of the CCC,

¹⁹ Judgment of 3 May 2006, file No. Pl. ÚS 66/04, *European Arrest Warrant*, paras. 79–83 (translation on the Court's website revised by the author).

²⁰ *Ibid.*, para. 61.

²¹ *Lisbon Treaty II*, supra n. 14, para. 150, summarising *Lisbon Treaty I*, supra n. 12, partly quoting its para. 120.

despite having its basis in German case law, tends to the latter solution rather than to the former.²²

This was dramatically confirmed in early 2012 when the CCC for the first time in European history declared a judgment of the CJEU *ultra vires*.²³ The CCC did not struggle to explain why the CJEU was in conflict with the basic core of the Constitution. Rather, it simply remarked that the CJEU judgment was in conflict with the established case law of the CCC. It then condemned the CJEU for ignoring European history.²⁴ Thus it seems that, using the wording of the CCC itself, ‘a situation in which an act by a European body exceeded the powers that the Czech Republic transferred to the European Union under Art. 10a of the Constitution’ and therefore being beyond the scope of the transferred powers (*ultra vires*) could occur anytime the CCC does not like the result of a CJEU judgment. The noble idea of the CCC protecting the national constitution against undue encroachments by EU law turned into the sad reality of the CCC protecting the ‘judicial egos’ of the respective national constitutional justices.²⁵

1.4 Democratic Control

1.4.1 The Constitution is very brief with regard to the rules that govern the participation of the national parliament in the EU decision-making processes. Article 10b merely provides that the Government shall inform the Parliament, regularly and in advance, on issues connected to obligations resulting from the Czech Republic’s membership in an international organisation or institution referred to in Art. 10a para. 1. The chambers of Parliament shall give their views on prepared decisions of such international organisation or institution in the manner laid down in their rules of procedure.

The details of parliamentary participation are included in the rules of proceedings of both chambers of Parliament. Here I will give as an example the rules of proceedings of the lower chamber, the Assembly of Deputies.²⁶ The rules of proceedings state that the Government shall submit draft acts of the EU to the

²² See Kühn 2004.

²³ At stake was Case C-399/09 *Landtová* [2011] ECR I-05573.

²⁴ Judgment of 31 January 2012, file No. Pl. ÚS 5/12, *Slovak Pensions XVII* (‘Failure to distinguish the legal relationships arising from the dissolution of a state with a uniform social security system from the legal relationships arising for social security from the free movement of persons in the European Communities, or the European Union, is a failure to respect European history, it is comparing things that are not comparable.’).

²⁵ The judgment received considerable attention in European scholarship. Cf. e.g. Zbiral 2012; Komárek 2012; Bobek 2014; Kühn 2016 (papers written in English by Czech scholars of EU law who are critical of the CCC’s judgment). Conversely, on the Czech national level the judgment and its Europe-wide impact was largely ignored, save by a few EU law scholars.

²⁶ Law No. 90/1995, as amended by law No. 282/2004.

Assembly via the Committee for European Affairs. The Government shall submit its preliminary opinion on the draft acts. The Government shall submit legal acts of the EU to the Assembly at the same time they are submitted to the Council of the EU. The Government shall also submit other acts and documents of the EU if it so decides or if requested by the Assembly or its bodies (Art. 109a).

Members of the Government might and, if requested by the Committee, must take part in the Committee's deliberation. With the exception of acts or other documents of considerable urgency, the Government shall not adopt its final opinion in the Council deliberations until the procedure in the Chamber pursuant to the preceding paragraphs has been completed (Art. 109b).

In fact, parliamentary control is mostly formal. The sessions of the parliamentary committee are poorly attended, and the deputies generally prefer to sit in the different committees that deal with domestic issues. To many politicians, EU issues seem too difficult and detached from daily political life.

1.4.2 The Czech Constitution is hostile to referendums. It highlights that the people shall exercise their power through the legislative, executive and judicial branches (Art. 2 para. 1) while it does not provide for any referendums. This notion reflects the rightist and conservative political majority of the 1990s which was very cautious with respect to direct democracy. As a result of compromise, the Constitution just briefly mentions the possibility of enacting a new constitutional law on referendums in Art. 2 para. 2. This effectively means that regulation of the issue of referendums was left for a constitutional law with a required supermajority in both chambers of Parliament. Consequently, within the first twenty years of Czech democracy no general law on referendums has ever been enacted.

Article 10a, already discussed above (see Sect. 1.3.1), provides that the ratification of a treaty which transfers certain powers to an international organisation or an institution requires the consent of Parliament, *unless a constitutional act provides that such ratification requires that the approval be obtained in a referendum*. This effectively means that it would be necessary to enact a special constitutional law even to hold a referendum relating to the transfer of powers to the EU. To put it differently, without a new constitutional act on referendums, no referendum can take place.

So far, the only state-wide referendum that has ever taken place in the Czech Republic was the referendum on EU Accession in 2003, based on a special constitutional act enacted only for this specific purpose.²⁷ The law required the approval of the majority of the participants in the referendum. The referendum took place on 13 and 14 June 2003, with a turnout of 55% of eligible voters, of whom 77.3% voted in favour of accession, and 22.7% voted against.

There has been some debate concerning referendums on some other EU treaties, most notably on the Lisbon Treaty. However, no agreement on the proper mode of ratification of the treaties amending EU primary law has ever been reached. As early as in May 2004, former Czech President Václav Havel criticised the idea of a

²⁷ No. 515/2002 Sb.

referendum on such a complex document as the Treaty establishing a Constitution for Europe, which was in his opinion unsuitable for wide public discourse.²⁸ Yet some politicians preferred a referendum on the Treaty, and there were several unsuccessful bills submitted to Parliament to enact either a law on general referendums or on a special referendum on the Constitutional Treaty.

Legal scholarship mostly opposed this referendum. One of the most influential Czech figures in this field, CJEU judge Jiří Malenovský, reasoned that under the Czech Constitution the only constitutional means of ratifying the Constitutional Treaty would be through parliamentary approval. His argument was that the Treaty was more an authoritative restatement of EU law than a novel document. Taking into account the then recent referendum on EU accession, the proposed referendum was 'highly problematic from the point of view of its constitutionality',²⁹ while a consultative referendum would be a 'possible way of reconciliation of constitutional requirements with political demand'.³⁰

After the failure of the Constitutional Treaty in France and the Netherlands in 2005, the Czech debate on the ratification slowly died away. The Lisbon Treaty was subsequently ratified without a referendum, based on the approval of a constitutional supermajority in Parliament. The former opposition party, the Civic Democrats (ODS), who in the meanwhile became the senior coalition party of a new centre-right Government, were not excited about the Lisbon Treaty. They rather emphasised that it was a result of a rational compromise. Most of the Civic Democrats did not insist on a referendum. They emphasised that unlike the Constitutional Treaty (which they opposed), the most important difference in the Lisbon Treaty was that it lacked any constitutional symbols and, as such, did not aspire to create 'a European superstate'.³¹ Upon signing the Lisbon Treaty on behalf of the Czech Republic, Czech Premier Topolánek (ODS) said that he personally would prefer ratification by Parliament. The Treaty, in his opinion, did not interfere with the Constitution, thus no referendum was needed. Some of his party members were more reserved, however, as they emphasised that the issue of constitutionality of the Treaty must be resolved by the Constitutional Court.³² The only political party that called for a referendum was thus the Czech Communist Party.

To summarise, it is fair to say that the role of referendums with respect to the EU has been close to zero, if we set aside the initial vote on EU accession.

²⁸ See Kramer, A. (2004, May 15), *Nahrážkové vlastenectví hospodských fanoušků je mi cizí, říká Václav Havel* (I do not share the fake patriotism of our pub guys, Václav Havel says). *Právo*. http://www.vaclavhavel.cz/showtrans.php?cat=rozhovory&val=1557_rozhovory.html&typ=HTML).

²⁹ See Malenovský 2005, p. 350.

³⁰ Ibid., p. 357 (translation by the author).

³¹ Cf. the article by Deputy Premier of the Czech Government responsible for European matters: Vondra, A. (2007, October 19) *Evropský sňatek z rozumu* (European marriage out of reason). *Hospodářské noviny*. <http://archiv.ihned.cz/c1-22254960-evropsky-snatek-z-rozumu>.

³² See the opinion of the leadership of ODS of 20 October 2007, available at www.euroskop.cz.

1.5 *The Reasons for, and the Role of, EU Amendments*

As I have already indicated, the Constitution has only one EU amendment from 2003, which is very limited in its scope. EU matters are regulated by only two very short articles (Art. 10a and 10b, already discussed above). The reason for this brevity is above all the Czech constitutional culture. The Constitution of 1992 was written in simple language, and was originally composed of 113 provisions (articles). The brevity of the Constitution is appreciated by many scholars, including this author. The EU amendment thus fits the general image of the Constitution.

In addition, it is hard to amend the Constitution: the approval of three-fifths of all deputies (120 out of 200) and three-fifths of senators present (the number of senators is 81) is required. Thus, amendments to the Constitution are rare. Interestingly, after 2003, no amendments related to EU law have been seriously debated.

Last but not least, the Eurosceptic nature of Czech politicians might have also played a role in the final version of the EU amendment. As I have already noted above, the original draft submitted by the EU-friendly Government in 2003 also included a clause on primacy of EU law. This was eventually dropped during the debate in the Assembly of Deputies, perhaps because of the distaste of many deputies over the fact that EU law has priority over national law and the ambiguity of this relation with respect to the national constitution.

I do not think that the brevity of the Constitution with respect to the EU is necessarily bad or that it would make the Constitution somewhat obsolete. First, the Czech Republic is not unique among the EU Member States. Although both France and Germany do have detailed provisions on the EU and its functioning, many other states have much shorter provisions on the same issue (Spain, Italy, etc.). In the Czech Republic, the scholarly reason for this is that the functioning of the EU is something which is to be dealt with by EU treaties, whereas the Constitution is to deal with domestic issues and procedures. It is useless for the Constitution to regulate issues regarding the functioning of the EU, its effects on national law, etc. This has also repeatedly been emphasised by the CCC.³³ From its case law, it does not appear that the short constitutional text makes the CCC powerless with respect to EU law. The CCC has always described its role as that of the guardian of the

³³ See already *Sugar Quotas III*, supra n. 11. In debating what the basis is for direct effect and primacy of EU law, the CCC remarked that those doctrines must not be fixed in the national constitution because they are flexible on the EU level. Thus the CCC applauded the approach of the national constitution which did not 'permanently fix doctrine as to the effects of Community law in the national legal order'. The competence to control the flexible development of these doctrines is, however, at the end of the day vested in the CCC itself. For the sake of argument, I shall add that in debating this issue, I am not entirely neutral. This has been the thesis I have supported for a long time, and the CCC openly took over my claim in *Sugar Quotas III*, quoting my earlier articles on this issue.

bridge through which the domestic constitution allows EU law to enter the national legal system.³⁴ Last but not least, concerns about the Constitution's brevity with respect to the EU are almost completely missing from the Czech legal discourse.

2 Constitutional Rights, the Rule of Law and EU Law

2.1 *The Position of Constitutional Rights and the Rule of Law in the Constitution*

2.1.1 The Czech Constitution itself deals only with the organisational matters of the state and the separation of powers. While drafting the constitutional text in the summer of 1992, the founding fathers intentionally left fundamental rights out of the Constitution. The reason was a sharp disagreement over social rights in the Constitution. As a sort of compromise, the Czechoslovak Charter of Fundamental Rights of 1991 was separately reaffirmed as being part of the Czech legal system, and the Constitution referred to it as the part of the 'constitutional order'. In reality, this technicality does not really matter, as the Charter has equal force with the Constitution itself.

The text of the Charter has been influenced by a plethora of European and international constitutional texts, most importantly by the European Convention on Human Rights. It includes all traditional fundamental and political rights as well as social rights. The general principles of law which are not expressly codified (e.g. legal certainty and legitimate expectations, non-retroactivity, proportionality) have been interpreted by the CCC as arising from the Constitution and now form an undisputed part of the Czech constitutional system. The Constitution itself declares that fundamental rights are subject to judicial protection (Art. 4) which makes constitutional rights and general principles enforceable through courts. This self-executing nature of fundamental rights seems to be an inviolable part of the Constitution, beyond the reach of the constitution-maker.³⁵

2.1.2 The issue of defining the restrictions which can be imposed on rights has been much debated by the framers of the Charter in 1990 and 1991. The result is the mixture of a general provision on limitation combined with specific restrictions included in special provisions on individual rights.

The general provision (Art. 4 of the Czech Charter) provides that limitations may be placed upon fundamental rights and freedoms only by law and under the conditions prescribed in the Charter. Any statutory limitation upon fundamental rights and freedoms must apply in the same way to all cases which meet the

³⁴ Cf. especially the (in)famous Judgment of 31 January 2012, file No. Pl. ÚS 5/12, *Slovak Pensions XVII*, declaring the CJEU's judgment *ultra vires*.

³⁵ See especially Judgment of 25 June 2002, file No. Pl. ÚS 36/01 in which this has been associated with centralised review of legislation.

specified conditions. When employing the provisions concerning limitations upon fundamental rights and freedoms, the essence and significance of these rights and freedoms must be preserved. Such limitations shall not be misused for purposes other than those for which they were enacted.

Certain specific fundamental rights provisions have separate limitation clauses. For instance, the right to free exercise of religion may be limited by law in the case of measures necessary in a democratic society for the protection of public safety and order, health and morals, or the rights and freedoms of others (Art. 16 of the Czech Charter). Provisions on other rights simply refer to the law as the source of limitations (like the right to confidentiality of correspondence in Art. 13 of the Czech Charter), which are of course subject to the general limitation set out in Art. 4. Some rights are defined as unconditional and subject to no limitations (for instance the ban on torture and cruel, inhuman or degrading punishments).

2.1.3 The Constitution is based on the principle of the rule of law (in Czech *právní stát*, a concept identical to *Rechtsstaat*). Indeed, this is the very first principle of the Constitution, mentioned already in Art. 1. The CCC has been framing this principle from the very beginning. Already in its first, ‘foundational’ judgment which dealt with transitional issues and the punishment of Communist crimes, the CCC emphasised that the rule of law principle was not only about formalities, but also had an important substantive and value-laden content. The substantive content was based, above all, on the requirements of human rights protection, the impossibility to derogate from fundamental rights provisions and respect for human dignity. This ‘substantive rule of law’ principle is in stark contrast with the formal conception of the rule of law prior to 1945:

Our new Constitution is not founded on neutrality with regard to values, it is not simply a mere demarcation of institutions and processes, rather it incorporates into its text also certain governing ideas, expressing the fundamental, inviolable values of a democratic society. ... Positive law does not, however, bind it merely to formal legality, rather the interpretation and application of legal norms are subordinated to their substantive purpose, law is qualified by respect for the basic enacted values of a democratic society and also measures the application of legal norms by these values. This means that even while there is continuity of ‘old laws’ there is a discontinuity in values from the ‘old regime’. This conception of the constitutional state rejects the formal-rational legitimacy of a regime and the formal law-based state. Whatever the laws of a state are, in a state which is designated as democratic and which proclaims the principle of the sovereignty of the people, no regime other than a democratic regime may be considered as legitimate.³⁶

The rule of law principle is justiciable and is often used by the Constitutional Court. In fact, in the argumentation of the Court it often serves (together with the due process clause) as a default maxim, if more concrete provisions are not applicable to the case at hand. Moreover, it also serves as a starting point for the deduction of more concrete requirements. Thus, the CCC has inferred the general ban on retroactivity, the principle of legal certainty and legitimate expectations, etc.,

³⁶ Judgment of 21 December 1993, file No. Pl. ÚS 19/93, *Lawlessness of the Communist Regime*.

from the rule of law principle. Non-retroactivity is part of the inviolable core of the Constitution (even though there are some limited exceptions to the strict ban on retroactivity in Czech law). According to the Court,

[t]he basic principles defining a law-based state include the principle of protecting the confidence of citizens in the law, and the related principle of the prohibition on retroactivity of legal norms. ... Thus, with true retroactivity, a *lex posterior* annuls (does not recognize) legal effects at a time when a *lex prior* was in effect, or calls forth or connects the rights and obligations of subjects with facts that were not legal facts when the *lex prior* was in effect.³⁷

Similarly, the notion that only published laws can be applicable is one requirement of the rule of law. Czech courts seem to be very formalistic in this regard (see for more detail Sect. 2.5 below).

2.2 *The Balancing of Fundamental Rights and Economic Freedoms in EU Law*

2.2.1 According to the CCC's early case law, fundamental rights could be limited without an explicit constitutional provision only because of another conflicting fundamental right. As the CCC declared in its first important judgment on this issue:

Fundamental rights and basic freedoms may be restricted, despite the fact the constitutional text makes no provision therefor, only in the case that two such rights come into conflict with each other. There is a rudimentary maxim that a fundamental right or basic freedom may be restricted only for the sake of another fundamental right or basic freedom. Should the Court reach the conclusion that it is reasonable to give priority to one of the two conflicting fundamental rights, it is necessary, as a condition of the final decision, to take all possible steps to minimize the impingement of one upon the other. This principle can be inferred from Article 4 para. 4 of the Charter of Fundamental Rights and Basic Freedoms, (1) namely to the effect that fundamental rights and basic freedoms must be preserved not only when applying provisions on the limits of the fundamental rights and basic freedoms, but also analogously in the case that they are bounded as the result of a conflict between two rights.³⁸

Later, the CCC accepted that a compelling public interest (public good) might provide another legitimate reason for a limitation of a fundamental right without an explicit constitutional basis.³⁹

Generally, the CCC gives priority to classical fundamental rights in its case law. The weight given to conflicting protection of the public good and economic considerations seems to be much weaker. Yet I have not noticed a direct clash with CJEU case law. The closest issue was the saga regarding sugar quotas. In its earlier

³⁷ See Judgment of 10 September 2009, file No. Pl. ÚS 27/09, *Melčák*, part VI/b. (summarising its earlier case law).

³⁸ Judgment of 12 October 1994, file No. Pl. ÚS 4/94, *Anonymous Witness*.

³⁹ Judgment of 21 March 2002, file No. III.ÚS 256/01, *Recognition*.

case law prior to EU accession, the CCC was generally willing to rule against the constitutionality of sugar quotas as provided by national legislation. After the 2004 accession, this line of case law came into conflict with the CJEU's case law, which generally approved various types of EU quotas, including sugar quotas. The CCC openly acknowledged the force of CJEU case law and overruled its previous jurisprudence:

After full consideration of the constant jurisprudence of the CJEU and the CCC's own current jurisprudence, the CCC weighed whether this case does not present facts which would justify a departure from the CCC's existing holdings. As was already mentioned above, there is no doubt that, as a result of the Czech Republic's accession to the EC, or EU, a fundamental change occurred within the Czech legal order, as at that moment the Czech Republic took over into its national law the entire mass of European law. ...

In other words, in the case currently before it, as far as concerns measures of an economic nature pursuing an aim that flows directly from the Community policy of the EC, the Constitutional Court cannot avoid the conclusions which flow directly from the case-law of the CJEU and from which a definite principle of constitutional self-restraint can be inferred. For that matter, the Constitutional Court was also aware of this point when it adopted judgment No. Pl. US 39/01, since it stated in its reasoning that, as concerns the extent of its review powers, such a conclusion may not be reached which would afterwards present an obstacle to the Czech Republic's membership in the European Union, albeit by its holding it traversed that self-restraint to a certain extent.⁴⁰

Apart from this case, the balancing of fundamental rights with economic free movement rights has not yet raised any real dilemma in the CCC's jurisprudence.⁴¹ Thus it is difficult to say whether the national courts have adjusted their balancing to match the CJEU's approach. Potentially, however, this balancing represents future potential conflict between the CCC and the CJEU.

2.3 *Constitutional Rights, the European Arrest Warrant and EU Criminal Law*

The relevant provisions are contained in Chapter 5 of the Czech Charter of Fundamental Rights entitled 'The Right to Judicial and other Legal Protection'. The main provisions include the following:

Article 36

(1) Everyone may assert, through the prescribed procedure, her rights before an independent and impartial court or, in specified cases, before another body.

⁴⁰ *Sugar Quotas III*, supra n. 11.

⁴¹ I have already discussed the case proclaiming the CJEU's judgment *ultra vires*. See Sect. 1.3.4. But I do not view this case as balancing fundamental rights against economic freedoms. There is nothing like this mentioned in the short judgment of the CCC. Instead, the case seems to be a simple insistence by the CCC of its previous case law without even discussing conflicting economic interests stemming from EU legislation relating to EU-wide pensions.

(2) Unless a law provides otherwise, a person who claims that her rights were curtailed by a decision of a public administrative authority may turn to a court for review of the legality of that decision. However, judicial review of decisions affecting the fundamental rights and freedoms listed in this Charter may not be removed from the jurisdiction of courts.

(3) Everybody is entitled to compensation for damage caused her by an unlawful decision of a court, other State bodies, or public administrative authorities, or as the result of an incorrect official procedure.

...

Article 37

...

(2) In proceedings before courts, other State bodies, or public administrative authorities, everyone shall have the right to legal assistance from the very beginning of such proceedings.

...

(4) Anyone who declares that she does not speak the language in which a proceeding is being conducted has the right to the services of an interpreter.

Article 38

(1) No one may be removed from the jurisdiction of her lawful judge. The jurisdiction of courts and the competence of judges shall be provided for by law.

(2) Everyone has the right to have her case considered in public, without unnecessary delay, and in her presence, as well as to express her opinion on all of the admitted evidence. The public may be excluded only in cases specified by law.

Article 39

Only a law may designate which acts constitute a crime and what penalties, or other detriments to rights or property, may be imposed for committing them.

Article 40

(1) Only a court may decide on guilt and on the punishment for criminal offences.

(2) A person against whom a criminal proceeding has been brought shall be considered innocent until her guilt is declared in a court's final judgment of conviction.

(3) The accused has the right to be given the time and opportunity to prepare a defence and to be able to defend herself, either pro se or with the assistance of counsel. If she fails to choose counsel even though the law requires her to have one, she shall be appointed counsel by the court. The law shall set down the cases in which the accused is entitled to counsel free of charge.

...

(5) No one may be criminally prosecuted for an act for which she has already been finally convicted or acquitted. This rule shall not preclude the application, in conformity with law, of extraordinary procedures of legal redress.

(6) The question whether an act is punishable or not shall be considered, and penalties shall be imposed, in accordance with the law in effect at the time the act was committed. A subsequent law shall be applied if it is more favourable for the offender.

2.3.1 The Presumption of Innocence

2.3.1.1 Various issues relating to the constitutionality of the European Arrest Warrant (EAW) have been raised in the Czech Republic. However, as far as I know, there have been no concerns with regard to the presumption of innocence. I think this is because persons subject to any criminal proceeding have some disadvantages compared with people who are not under investigation or prosecution. The presumption of innocence does not go so far as to require that nothing uncomfortable can happen to anyone unless there is a guilty verdict. Surrender of a person suspected of a crime to a requesting country can therefore hardly collide with this principle. Moreover, those who would argue otherwise are trapped in a circular argument: a person cannot be treated to his disadvantage unless some formal decision has been made, but in fact a formal decision supported by some hard facts has been made by the requesting country.

2.3.1.2 It is hard to say what the prevailing practice for judges is with respect to the EAW. In some cases they indeed just rubber-stamp extradition requests. On the other hand, a suspect is granted procedural rights to defend himself or herself against surrender. In reality, it depends on the suspect to what extent he or she is willing to fight surrender or whether, in contrast, the person agrees to be surrendered to the requesting state (in which case a shortened procedure according to Art. 413 of the Code of Criminal Procedure follows).

An assessment of how the courts handle specific cases can be made based on the statistics. For instance, in 2006 the Czech Republic received 99 EAW requests and surrendered 49 persons. Of these 49, 34 persons agreed to the surrender and 15 disagreed. In 2007, there were 176 EAW requests and 108 persons were surrendered. Of those surrendered, 81 agreed to the procedure. That the courts do not just rubber-stamp requests is illustrated by the fact that in 2006 and 2007, Czech courts refused to surrender 11 persons.⁴²

2.3.2 *Nullum crimen, nulla poena sine lege*

2.3.2.1 Unlike the presumption of innocence, abolition of the rule of double criminality caused a lot of debate in the Czech Republic. Lifting the double criminality rule seems after all to be one of the most controversial novelties introduced by the EAW Framework Decision.⁴³ When Eurosceptic deputies

⁴² See the statistics of the Ministry of Justice available at www.justice.cz.

⁴³ Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (2002/584/JHA), [2002] OJ L 190/1, Art. 2(2), covering a very broad list of vaguely named offences which are not subject to double criminality including 'computer-related crimes' and 'racism and xenophobia'. For instance, Tomuschat calls this a 'list of horrors'. See Tomuschat 2006, p. 218. Personally, I find the explanation of Advocate General Colomer far from satisfactory on this point. See the Opinion of Advocate General Colomer of 12

challenged the national implementation of the EAW Framework Decision, they also criticised the fact that the law derogated from the double criminality rule and thus endangered the *nullum crimen sine lege* principle. The CCC rejected their argument while trying to interpret EU law in a manner which would be consistent with the Constitution. At the same time, the elimination of the double criminality requirement was overcome by ostensible formalism:

The enumeration of criminal offences which do not require dual criminality is not given due to the fact that it would otherwise be presumed that some of these categories of conduct do not qualify as criminal offences in one or more of the Member States; rather the exact opposite, that *it is conduct which, in view of the values shared by the EU Member States, is criminal in all of them*. The reason for enumerating them in this fashion is to speed up the execution of European Arrest Warrants, as the proceeding for ascertaining the criminality of such acts under Czech law has been dropped. In addition, in adopting this Framework Decision each EU Member State expressed its agreement that all criminal conduct coming within the categories defined in this way will also be criminally prosecuted.⁴⁴

At first glance, the Czech Constitutional Court's premises relating to the degree of harmonisation of substantive criminal law are plainly wrong⁴⁵ and even contrary to the opinion of the Court of Justice.⁴⁶ Another reading of that provision might be, however, that this claim is not descriptive but rather normative. This reading is confirmed by the Czech Constitutional Court's concession 'that, under quite exceptional circumstances', the application of the EAW might be in conflict with the Czech Constitution, especially if the offence 'would qualify as a criminal act under the law of the requesting state, but would not qualify as such under Czech criminal law, and perhaps would even enjoy constitutional protection in the Czech Republic (e.g. within the framework of the constitutional protection of free expression)'. Then the arrest warrant would not be executed.⁴⁷

This conclusion, however, raises more questions than it settles. What would happen, for instance, if a person who was arrested for a crime regarding which dual criminality shall not be verified were to argue that the crime did not have a Czech equivalent? The CCC does not explicitly say. I suppose that such a case would force the Czech authorities to check double criminality; its absence would perhaps

September 2006 in Case C-303/05 *Advocaten voor de Wereld* [2007] ECR I-03633, paras. 100–107. The Court in the same case touched upon the issue in its judgment even less satisfactorily.

⁴⁴ Czech *European Arrest Warrant* case, supra n. 19, para. 103 (emphasis added).

⁴⁵ See for a very different logic the *European Arrest Warrant Act case* of the Federal Constitutional Court of Germany, BVerfG, 2 BvR 2236/04 – vom 18.07.2005, Rn. (1–203), available at <http://www.bverfg.de/entscheidungen/rs200507182bvr223604.html>, para. 77, emphasising that 'the cooperation that is put into practice in the 'Third Pillar' of the European Union in the shape of limited mutual recognition, which *does not provide for a general harmonisation* of the Member States' systems of criminal law, *is a way of preserving national identity and statehood* in a single European judicial area' (emphasis added).

⁴⁶ Cf. C-303/05 *Advocaten voor de Wereld*, supra n. 43, para. 52: 'The Framework Decision does not seek to harmonise the criminal offences in question in respect of their constituent elements or of the penalties which they attract.'

⁴⁷ The Czech *European Arrest Warrant* case, supra n. 19, para. 114.

establish a ground for refusal to surrender because of conflict with the Constitution. Whether this would only be the case vis-à-vis distance offences (i.e. acts committed within Czech territory but investigated abroad), as the Court seems to point at, or also with regard to some offences committed abroad, remains to be seen (e.g. an improbable case where Ireland would seek the surrender of a Czech woman who underwent an abortion in Ireland, for the crime of homicide).

The problem of double criminality was in some countries at least partly solved by the legislature (for instance in Germany as instructed by the German Constitutional Court).⁴⁸ In contrast, the CCC attempted to solve this problem but its decision stopped short of any clear statement. However, it seems fair to say that the principle of *nullum crimen sine lege, nulla poena sine lege* is granted the same level of protection as before, at least for actions committed on the territory of the Czech Republic, thanks to the judgment of the CCC. The CCC clearly indicated that in actions committed at home and investigated elsewhere execution of an EAW might be refused on constitutional grounds.

2.3.3 Fair Trial and *In Absentia* Judgments

2.3.3.1 Foreign *in absentia* criminal judgments could hardly raise constitutional issues in the Czech Republic, as the Czech Code of Criminal Procedure recognises this type of judgment as well. Article 302 et seq. of the Code gives prosecutors the power to initiate proceedings against an accused person as a fugitive if he or she avoids criminal proceedings by being abroad or in hiding. In such cases the accused person must be represented by an attorney. If the person appears before the Czech authorities after the final guilty verdict has been made, the person has the right to a new trial (which will take place if the person requests it). A new trial will also be granted if an international treaty so requires.

However, if a person who is about to be surrendered were to argue that he was sentenced *in absentia* in the requesting country and no new trial could be granted there, this would very likely provide a good ground for a constitutional complaint. This is even more likely if one considers the willingness of the CCC to protect (through envisioned judicial review of the constitutionality of individual arrest warrants) both the trust of Czech citizens in Czech law *and* the trust and legal certainty of 'other persons, authorized to stay within the territory of the Czech Republic'.⁴⁹

⁴⁸ The German Federal Constitutional Court addressed the problem of lifting the double criminality rule extensively. The legislature shall ensure that '[c]harges of criminal acts with such a significant domestic connecting factor are, in principle, to be investigated in the domestic territory by German investigation authorities if those suspected of the criminal act are German citizens'. The German *European Arrest Warrant case*, supra n. 45, para. 85.

⁴⁹ The Czech *European Arrest Warrant*, supra n. 19, para. 113. One cannot but compare this part to a dissenting opinion by Justice Lübke-Wolff in the corresponding German case, especially part

2.3.4 The Right to a Fair Trial – Practical Challenges Regarding a Trial Abroad

2.3.4.1 The Czech Republic does not provide any assistance beyond standard consular assistance to its surrendered or extradited citizens or residents. On the other hand, Czech law is rather generous towards persons who do not speak Czech in the course of criminal proceedings (the right to an interpreter, the right to receive a translation of the court's reasoning, the right to an attorney for persons of low income, etc.). It is very likely that the Czech legal system simply expects the same to be provided to persons surrendered under an EAW.

I am not aware of any NGOs that provide assistance to persons extradited from the Czech Republic. In fact, the number of nationals surrendered pursuant to an EAW (outside the scope of an EAW, no national can be extradited) is very low.

I do not think that any state assistance to residents who are involved in trials abroad is needed. Instead, I would rather prefer an increase in the common procedural rights for foreigners in EU Member States.

2.3.4.2 Compensation for persons who have been tried and subsequently found innocent has been a sensitive issue in many high-profile domestic criminal proceedings. In contrast, with respect to the EAW, the Czech authorities have indicated that so far no such claims have been made.⁵⁰

Media coverage of EAW application is light. According to what I have read in both the printed and online media, most reports just consist of information about someone surrendered based on an EAW. As such, these surrenders are 'success stories'. I have never read anything about someone who was surrendered and later acquitted.

2.3.5 The Right to Effective Judicial Protection: The Principle of Mutual Recognition in EU Criminal Law and Abolition of the Exequatur in Civil and Commercial Matters

2.3.5.1–2.3.5.3 With regard to mutual recognition of civil judgments, the Czech Constitutional Court has already held that their recognition is not automatic. In fact, fulfilment of the basic constitutional principles of fair trial by a foreign court is indispensable for the recognition of its judgment according to Council Regulation 44/2001.⁵¹ In one case the complainant, a Czech corporation, lost a lawsuit in Italy. The Italian court decided that the Czech corporation must pay 16,686 EUR plus

1.(a) of her dissenting opinion, where the said Justice criticised the majority for protecting German nationals only and ignoring the legitimate expectations of others.

⁵⁰ See for instance <http://register.consilium.europa.eu/doc/srv?l=CS&f=ST%2015691%202008%20REV%202>.

⁵¹ Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, [2001] OJ L12/1.

interest. The Italian judgment was recognised by the Czech courts, despite the fact that the complainant argued that the Italian court ignored the corporation's motions, did not order hearings and decided the case without allowing the Czech party to be heard. Although the Czech civil court rebuffed these arguments, the CCC disagreed. It highlighted:

Insisting on the protection of fundamental rights is without any question one of the very basic principles of the Czech legal order. In other words, recognition of a decision which does not comply with human rights protection would be in conflict with the public order of the Czech Republic and at the end of the day with the constitutional order of the Czech Republic.⁵²

The CCC therefore quashed the judgment of the civil court and ordered the civil court to consider the reasons claimed by the complainant for not recognising the Italian judgment. Although the judgment of the CCC might seem to be a principled defence of fundamental rights on the EU level, it opens Pandora's box, in my opinion. It effectively pushes the Czech civil courts into scrutinising the lawfulness of the procedure before the foreign court. I am wondering on what basis and how a Czech court could review the procedural steps of the court of another EU Member State.

In the same way, but much more vigorously, the CCC emphasised the role of law courts in protecting nationals and others against (however it would be *unlikely*, in the view of the CCC) abuse of the EAW. The CCC was in a different position than the German Constitutional Court because the Czech act did not exclude judicial review of the decision to surrender. The CCC founded the ultimate justification of its decision on this fact and held that although the implementation of an EAW is not unconstitutional as such, individual arrest warrants might be unconstitutional in exceptional cases due to conflict with the Constitution,⁵³ as predicted by Art. 377 of the Code of Criminal Procedure.⁵⁴

Considering the previous examples, and because the CCC reserves the right to have the ultimate word in exceptional (unconstitutional) situations, I do not think that the principle of the rule of law is no longer fully granted the same level of protection as prior to the introduction of the mutual recognition rule in criminal law

⁵² Judgment of 25 April 2006, file No. I. ÚS 709/05.

⁵³ Paragraph 115 of the Czech *European Arrest Warrant* case, supra n. 19, 'Even though the contested provisions ... might be applied in an unconstitutional manner, such a hypothetical and unlikely situation does not provide grounds for their annulment. [The Court's case law says] that "theoretically every provision of a legal enactment can naturally be applied incorrectly, hence even in conflict with constitutional acts, which in and of itself does not constitute grounds for the annulment of a provision which can conceivably be incorrectly applied". [The purpose of this proceeding] is not, however, to resolve every single hypothetical situation which has not as yet come to pass, even though it may occur at some point [because] it would ... supplant the protection of fundamental rights which, in the nature of things, the ordinary ... courts must also provide.'

⁵⁴ According to Art. 377 of the Criminal Procedure Code, the request of a foreign state's organ may not be granted if, inter alia, this would constitute a violation of the Constitution of the Czech Republic.

and the abolition of the *exequatur* in civil and commercial matters. Moreover, in my view, removing old-fashioned obstacles in criminal co-operation between states serves justice better than did the previous lengthy procedures.

2.3.5.4 I would personally disagree with any legal amendment which would make surrender or recognition of civil judgments more difficult. In my opinion, this very nature of the EU with its free movement of people, goods, services and capital requires that the old notions of state supremacy and difficult cross-border legal arrangements must be abandoned in favour of more efficient and speedy procedures. Moreover, similar ideas have been put forward by the CCC as well. The Court rightly reasoned that if one enjoys EU rights of movement, the exercise of those rights must also entail some responsibilities.⁵⁵ This idea is in my view also fully applicable to civil law. If one does not travel or does not engage in business with a foreign partner, one need not worry about the EAW or foreign civil judgments being imposed.

Last but not least, we must not forget the rights of victims. Criminal proceedings are after all not only about the protection of accused persons. The legitimate rights and interests of victims should also be considered.⁵⁶

2.4 The EU Data Retention Directive

2.4.1 The EU Data Retention Directive 2006/24⁵⁷ or, to put it better, its national implementation, has seen a constitutional challenge also in the Czech Republic. The

⁵⁵ Cf. *Czech European Arrest Warrant* case, supra n. 19, paras. 70–71:

‘70. It cannot be overlooked that the current period is connected with an extraordinarily high mobility of people, ever-increasing international cooperation and growing confidence among the democratic states of the EU, which places new demands on the arrangements for extradition within the framework of the Union. A qualitatively new situation exists in the EU. Citizens of the Member States enjoy, in addition to the rights arising from citizenship in their own state, also rights arising from EU citizenship, which guarantees, among other things, free movement within the province of the entire Union. ...’

71. If Czech citizens enjoy certain advantages, connected with the status of EU citizenship, then it is naturally in this context that a certain degree of responsibility must be accepted along with these advantages. The investigation and suppression of criminality which takes place in the European area, cannot be successfully accomplished within the framework of individual Member States, but requires extensive international cooperation. ...’

⁵⁶ Cf. *Czech European Arrest Warrant* case, supra n. 19, para. 96: ‘It can generally be said that, in view of the evidence that will be found in the state where the criminal act occurred, a criminal proceeding there will be quicker, more effective and, at the same time, more reliable and just both for the defendant and for any victim of the criminal act.’

⁵⁷ Directive 2006/24/EC of the European Parliament and of the Council of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks and amending Directive 2002/58/EC, [2006] OJ L 105/54.

action was brought to the Constitutional Court by a group of deputies of the lower chamber. They argued that the retention of data on communication constitutes interference with the private life of persons whose data are stored, and that such data, moreover, are vulnerable to potential abuse or misuse.

The CCC based its lengthy and somewhat chaotic reasoning mostly on the previous judgment of its German counterpart.⁵⁸ First, the CCC rejected the option of making a preliminary reference to the Court of Justice. In the CCC's view, the content of the Data Retention Directive provided the Czech Republic with sufficient room to implement it in conformity with the constitutional order, since its individual provisions in fact only define the obligation to retain data. For the purposes of implementation, the objective defined by the Directive must be met, but Czech law must also follow the domestic constitution.⁵⁹ To put it differently, the problem of constitutionality lay in the national implementation, not within the Directive itself.

With regard to the merits of the case, the CCC first criticised the domestic implementation for its vagueness⁶⁰ including the vaguely defined purpose for which traffic and location data are to be provided to the competent authorities (the limitation of privacy shall not be made through vague and unclear provisions).⁶¹ The Court criticised the vague law for providing incentive to use requests for data even in less serious crimes. For instance, in 2008, the total number of criminal offences recorded on the territory of the Czech Republic amounted to 343,799, while at the same time the number of requests to provide traffic and location data made by the competent public authorities reached 131,560.⁶² The CCC concluded:

The legal regulation contested by the applicant fails to define sufficiently, or fails to define at all, unambiguous and detailed rules containing minimum requirements concerning the security of the retained data, in particular, taking the form of restricting third-party access, the procedure of maintaining data integrity and credibility, or the removal procedure. Furthermore, the contested regulation does not provide individuals with sufficient guarantees against the risk of data abuse and arbitrariness. ... the need to have such guarantees available is becoming even more important to the individual owing to the current enormous and fast-moving development and occurrence of new and more complex information technologies, systems and communication tools, which unavoidably results in the borders between private and public space being blurred to the benefit of the public sphere, since in the virtual environment of information technologies and electronic communications (in the so-called cyberspace), every single minute, especially owing to the development of the Internet and mobile communication, thousands or even millions of items of data and information are recorded, collected and virtually made accessible, interfering with the

⁵⁸ Judgment of the Federal Constitutional Court of Germany, BVerfG, 1 BvR 256/08 of 02.03.2010, Rn. (1–345), available at http://www.bverfg.de/e/rs20100302_1bvr025608.html.

⁵⁹ Judgment of 22 March 2011, file No. Pl. ÚS 24/10, *Data Retention in Telecommunications Services*, para. 25.

⁶⁰ *Ibid.*, para. 46.

⁶¹ *Ibid.*, paras. 47–48.

⁶² *Ibid.*, para. 49.

private (personality) sphere of the individual, yet if asked, they would probably be reluctant to knowingly let someone else in.⁶³

What is more interesting, in an *obiter dictum* the CCC expressed its doubt that the very existence of the instrument of global and preventive retention of location and traffic data on almost all electronic communications is justified. It referred to similar criticism in other European countries. The CCC also doubted whether it could be an effective tool, mainly due to the existence of so-called anonymous SIM cards, which in up to 70% of cases are used to commit a criminal offence. Last but not least, the CCC doubted whether it was at all desirable that private persons (service providers) should be entitled to retain all data on the communications provided by them, as well as on customers to whom services are provided.⁶⁴

This part of the CCC's judgment, being *obiter dictum* only, is not, however, binding. Moreover, it has been met with severe criticism from leading Czech experts on IT law.⁶⁵ Furthermore, the public mood, supported by several high profile cases in which the retention of telecommunications data helped to find the perpetrators of violent crimes, seems to be in favour of some sort of data retention. Similarly, the police have lamented their lack of power to obtain data, which could help only criminals. Accordingly, the legislature reacted swiftly, adopting an amendment to the law which made the rules more detailed as required by the CCC. The fact that the Court of Justice later found part of the Directive to be unlawful⁶⁶ does not have a direct impact on the Czech law.

2.5 Unpublished or Secret Legislation

2.5.1 The insistence on officially published law is one of the primary features of civil law countries.⁶⁷ Publication is the ultimate step in making law valid. It is also one of the key principles of the Czech legal order (see also Sect. 2.2 above). It was after all a Czech court which initiated the CJEU's *Skoma-Lux* case.⁶⁸

The CJEU's approach, according to which unpublished law is not invalid (or even null or non-existent) but rather inapplicable, is more pragmatic than the traditionalist approach. The Czech courts live well with this approach. Expanding on *Skoma-Lux* further, the Supreme Administrative Court held that the fact that the act of EU law had not been published at the moment when the customs tax was due had

⁶³ Ibid., para. 50.

⁶⁴ Ibid., paras. 55–57.

⁶⁵ See Polčák 2012, p. 363.

⁶⁶ Joined cases C-293/12 and Case C-594/12 *Digital Rights Ireland and Seitlinger and Others* [2014] ECLI:EU:C:2014:238.

⁶⁷ Actually, such an approach would be too formalistic or even shocking for a lawyer coming from a common law tradition. See Damaška 1968.

⁶⁸ Case C-339/09 *Skoma-Lux* [2010] ECR I-13251.

to be taken into account by the courts *ex officio*, even though none of the parties made this argument (and even though it was actually clear that the complainant knew the disputed law very well).⁶⁹ This approach, however, following *Skoma-Lux*, shall be used in pending cases only. It is therefore not applied to cases where final decisions have been made.

2.6 *Rights and General Principles of Law in the Context of Market Regulation: Property Rights, Legal Certainty, Non-retroactivity and Proportionality*

2.6.1 The most important cases dealing with the impact of EU law on the national standard of protection of property rights in the adjudication of the validity of EU measures or measures implementing EU law in the field of market regulation are the numerous cases dealing with various quotas imposed by EU law on national producers.

The CCC has dealt with sugar and milk quotas in a series of judgments, with the first dating back long before EU accession. Whereas some of its earlier judgments seemed to be more in favour of property rights and the right to do business unrestrained by any governmental regulation, post-accession case law has changed in direction. In March 2006 the CCC summarised the approach taken by the Court of Justice in relation to quotas, emphasising that

[i]n the field of the Common Agricultural Policy, and especially as regards the setting of production quotas, there is such an extensive, consistent and long-term settled case-law of the CJEU as to, without any doubt, enable the Constitutional Court to review the key to the allocation of the production quotas from the perspective of national constitutional law interpreted in light of Community law itself, or in light of its conformity with the general principles of Community law. In that process, the Constitutional Court allows the general principles of Community law, expressed in the existing CJEU jurisprudence, to radiate through its interpretation of constitutional law.⁷⁰

The CCC approved the high margin of discretion left by the CJEU to the Union legislature; indeed, as regards the principle of proportionality, it noted that fundamental rights may be subject ‘*even to significant limitation*’. The Court then referred to its own previous judgments in the field of production quotas. These might be considered ‘*excessive*’ because the Constitutional Court ventured out onto the relatively ‘thin ice’ of assessing economic quantities, which it later projected onto its constitutional law assessment. Therefore, in the case currently before it, the

⁶⁹ Judgment of the Supreme Administrative Court of 18 June 2008, file No. 1 Afs 21/2008, *TV PRODUCTS CZ, s.r.o.* Therefore the outcome of the case was that the customs tax was imposed on the complainant facing a complete absence of the law. Note that I was the judge-rapporteur of this case.

⁷⁰ *Sugar Quotas III*, supra n. 11.

CCC did not consider itself competent to examine the actual key for the allocation of quotas in the abstract. I find this new approach more persuasive than the older approach which guided the CCC to review the complex math formulas for the quota allocation.⁷¹

The Court's judgment does not, however, mean that unconstitutional situations would not be remedied by the courts. The Court 'does not rule out the possibility that the ordinary courts address, in specific cases of individual producers, the fairness of this key, assuming that specific facts will be established on the basis of which such inequality is alleged'.⁷²

This approach has been followed in many subsequent cases, whether governed by EU law or not. It effectively means that in making complex economic policies, the legislature shall have a wide margin of appreciation.⁷³ This was the case in the past as well. This was after all exactly what the CCC tried to say when it noted that its earlier judgment was in conflict with its own case law. As early as 1997, the CCC was willing to take the interpretation of EU antitrust law by the European bodies into account as a valuable source for the interpretation of national law. That is why the CCC confirmed the constitutionality of the decision of the Ministry of Finance and of the ordinary court.⁷⁴ Later, the CCC has deepened this logic. In 2001 in a case dealing with the possibility of the executive power to impose quotas on producers of milk, the senators claimed that this was a breach of the right to free enterprise. The Constitutional Court denied the claim, and argued, *inter alia*, that certain types of regulation are also permitted under EU law and the GATT. Further, the regulation that was subject to constitutional review was a step towards approximation with EU law. The petitioners, however, argued that European law was not applicable, because it was not binding at that time (three years before accession). The CCC rebuffed this idea. It emphasised the existence of general principles of law, common to all EU Member States. The content of these principles is formed by the common European values, and the general principles fill the abstract concept of the rule of law, including human rights. The CCC had to apply such principles, thus to follow European legal culture and its constitutional tradition: 'Primary law of the EU is not foreign law for the Constitutional Court; it

⁷¹ Ibid.

⁷² Ibid.

⁷³ Cf. for instance Judgment of 15 May 2012, file No. Pl. ÚS 17/11, *Photovoltaic Power Plants*. The petitioners argued that the Czech legislative measures imposing new tariffs on photovoltaic power plants harmed the power producers and violated the ban on retroactivity. The CCC rebuffed this argument, emphasising that 'the choice of statutory provisions aimed at limiting state support for the production of solar energy is in the hands of the legislature, provided the guarantees are preserved. The principle of legal certainty cannot be considered to be a requirement for an absolute absence of change in the legislative framework; that is also subject to other social-economic changes and demands on the stability of the state budget' (para. 85). On the other hand, the CCC left open the possibility for finding unconstitutionality in real life cases based on the facts of the respective producers.

⁷⁴ Judgment of 29 May 1997, file No. III. ÚS 31/97, *Škoda Auto*.

radiates, mainly as the general principles of European law, into the Court's adjudication.⁷⁵

2.7 The ESM Treaty, Austerity Programmes and the Democratic, Rule-of-Law-Based State

As the Czech Republic has not joined the Treaty Establishing the European Stability Mechanism, this Treaty has been an issue for political clashes rather than a subject of legal debate in the Czech Republic.

2.8 Judicial Review of EU Measures: Access to Justice and the Standard of Review

2.8.1 There are no statistics which would indicate the number of cases in the Czech Republic in which a party has requested a preliminary ruling with regard to the validity of an EU measure. Neither the Ministry of Justice nor the judiciary collect data on this. It is my rough estimate, based on my judicial practice, that such requests are very rare. Personally, I have never seen any challenge to an EU measure before the Czech courts. I can also surely say that there have been no preliminary references in this regard either, with the only exception being the challenge to the applicability of EU measures before they have been officially published in the Czech language.⁷⁶

2.8.2 The standard of judicial review by the EU Courts is not often debated in the Czech scholarship. If it is debated, quite often it is discussed by Eurosceptic lawyers who use misleading and basically non-legal arguments (such as xenophobic claims, etc.). I do not view the standards used by EU Courts as substantially lower than the standards used by the CCC in reviewing the Czech Constitution. Moreover, this has generally been approved by the CCC itself.⁷⁷ Likewise, the CCC gives more room for political judgments in cases dealing with laws relating to economic policy and taxation.⁷⁸

⁷⁵ Judgment of 16 October 2001, file No. Pl. ÚS 5/01, *Milk Quotas*.

⁷⁶ See Sect. 2.5.

⁷⁷ See Sect. 2.6.1.

⁷⁸ With some haphazard exceptions to this rule: see recently Judgment of 10 July 2014, file No. Pl. ÚS 31/13, *Tax Deductions for Employed Pensioners* (the CCC interfered with a technicality of tax law due to alleged age discrimination; the Court's majority was strongly criticised by the dissenting justices for its flagrant deviation from self-restraint in economic and tax law issues. I concur with the dissenting justices and find this case to be an overt deviation from the established case law.).

2.8.3 There are two basic types of judicial review in the Czech Republic. The first is the judicial review of regulatory acts of the executive branch that is performed by all courts. The second type is constitutional review of legislation by the CCC. There are no statistics on the former. With regards to the latter, the frequency of annulment of legislation varies based on the type of petitioner.

On the one hand, abstract referrals by politicians are successful in about half of the total number of petitions. Such referrals are, however, rare: between 1993 and 2013, they accounted for five cases per year on average. In the middle are referrals made by the general courts in the course of their proceedings. The general courts have initiated over 250 proceedings between 1993 and 2013, and almost half of them were decided by the Court on the merits, while the rest were rejected for procedural reasons or for being manifestly unfounded. The courts were successful in about one-fourth of their referrals. Individual petitioners are the least likely to succeed in having a law annulled for its unconstitutionality. Although individuals make hundreds of petitions to annul legislation annually (among thousands of complaints which just claim the unconstitutionality of a judicial decision), they will succeed with actual annulment very exceptionally (perhaps less than once in five hundred petitions).⁷⁹

The typical reasons for annulment of legislation are general principles and default constitutional rules, like substantive due process, the rule of law (although the latter usually combined with more specific constitutional principles), the ban on discrimination (although applied very broadly, beyond traditional reasons such as gender, race, etc.), the right to a judicial remedy (annulling various exceptions to judicial review), etc.

2.8.4 I have already indicated that if we put aside the applicability of EU measures that have not been published in the Czech language, I have never encountered any challenge to an EU measure in the Czech Republic. What is far more common, however, is disputing the national implementation of EU law. The CCC is not entirely clear as to the limits of its review of national implementation acts. Constitutional review of European laws is in principle excluded in the Czech Republic. The *Sugar Quota III* judgment approved the current standard within the EU for the protection of fundamental rights, which neither is ‘of a lower quality than the protection accorded in the Czech Republic’, nor does the standard ‘markedly diverge from the standard up till now provided in the domestic setting by the Constitutional Court’. The CCC emphasised that the delegation of part of the powers of national organs to the EU is conditional and ‘may persist only so long as these powers are exercised in a manner that is compatible with the preservation of the foundations of state sovereignty of the Czech Republic’, and should not threaten the basic principles of the Czech Constitution which are not subject to revision (eternal law). If these conditions were threatened, the CCC would be ‘called upon to

⁷⁹ In more detail see Kühn 2013, pp. 246 et seq.

protect constitutionalism⁸⁰ and to exercise constitutional review. The CCC thus rephrased the famous German *Solange II*⁸¹ decision.

The crucial question in both the *Sugar Quotas III* and the *EAW* case was whether the Constitutional Court should review domestic laws which implement EU obligations. In *Sugar Quotas III*, the CCC held that if ‘the Community delegates powers back to the Member States for the purpose of implementing certain Community law acts, or it leaves certain issues unregulated’, the respective rules take the form of national law, and as such they must be in conformity with both EU law and the Czech Constitution. The domestic law (whether or not EU law gives the national legislature any discretion) is thus subject to full constitutional review, even though the maxim of European conform interpretation applies.⁸²

The *EAW* case does not seem to fit easily into this line of thought. While *Sugar Quotas III* relied on full (though Euro-friendly) constitutional review of domestic acts implementing EU law, a few weeks later in the *EAW* case, the Court said:

In areas where Community law applies exclusively, it is supreme, so that it cannot be contested by means of national law referential criteria, not even on the constitutional level. According to this doctrine the Constitutional Court would have no competence to decide on the constitutionality of a European Law norm, not even in the case that they are contained in legal enactments of the Czech Republic. Its competence to adjudicate the constitutionality of Czech norms is, thus, restricted in the same respect. ... [W]here the delegation of authority leaves the member states no room for discretion ... the doctrine of primacy of Community law in principle does not permit the Constitutional Court to review such Czech norm in terms of its conformity with the constitutional order of the Czech Republic, naturally with the exception [of the alleged conflict with the very core of the Constitution] [emphasis added].⁸³

Interestingly, this opinion was criticised as an unjustified ‘shift’ by the Justice-Rapporteur of the *Sugar Quota III* judgment, who dissented in the *EAW* case.⁸⁴ This doctrinal difference, however, did not make a significant difference in practice, because the CCC, despite its alleged self-restraint, did engage in a *complete* review of the implementing law. The CCC preached self-restraint (claimed that it would review the domestic implementation only with respect to conflicts with the constitutional core), but in reality reviewed the domestic implementation of EU law completely. In my opinion, the only way to explain the difference between what the CCC said and what it really did is to presume that all arguments made by the petitioners were based on the ‘eternal’ constitutional core, which is why all of them were used in constitutional review.⁸⁵

⁸⁰ *Sugar Quotas III*, supra n. 11, part VI.B.

⁸¹ 19 BVerfGE 73, 339 [1986] (*Solange II*).

⁸² *Ibid.*, VI.A.

⁸³ *Czech European Arrest Warrant* case, supra n. 19, paras. 52 and 54 (emphasis added).

⁸⁴ See the dissenting opinion of Justice Wagnerová in the *Czech European Arrest Warrant* case, supra n. 19.

⁸⁵ See *Czech European Arrest Warrant* case, supra n. 19, para. 53, last sentence: ‘In this matter, however, the petitioners asserted that, by adopting the European Arrest Warrant, just such a

In any case, notwithstanding some doctrinal inconsistencies in its case law, in practice the CCC has always reviewed the national implementation of EU law. I would therefore not agree that national implementing laws are shielded against review by the CCC only because they are ‘European’ in nature. What is more troublesome is the question of whether the CCC is obliged to make a preliminary reference in such situations. The CCC is very reluctant to accept its duty to make a reference, even though this might be useful in cases where the CCC indirectly reviews EU law.

2.9 *Other Constitutional Rights and Principles*

Not applicable.

2.10 *Common Constitutional Traditions*

When making a preliminary reference, the Czech administrative courts try to take the ‘common constitutional traditions’ seriously. A typical preliminary reference highlights both the domestic constitutional rights and comparative constitutional case law on the established standards in different Member States (in so doing the courts after all take the *CILFIT* line of case law seriously).

For instance, in a case regarding the scope of the Personal Data Directive,⁸⁶ in making a reference requesting the definition of what constitutes processing of personal data ‘by a natural person in the course of a purely personal or household activity’, in my capacity as a judge, I emphasised the relevant domestic constitutional principles and at the same time made a number of comparisons between several EU states. I then argued that the Directive did not in fact embody any Europe-wide principle, which is why the Court of Justice should leave the residual meaning of that provision for the national courts to decide.⁸⁷ If courts wanted to proceed in this way, they would need a comparative law unit that could search and locate comparative materials. If courts were to begin to work with and quote their foreign counterparts, this would be an important step towards bringing common constitutional traditions closer to reality.

conflict with the essential attributes of a democratic law-based state has come about’ (emphasis added). In more detail see Kühn 2007.

⁸⁶ Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data [1995] OJ L 281/31.

⁸⁷ The Court of Justice did not, however, follow this opinion. Case C-212/13 *Ryneš* [2014] ECLI:EU:C:2014:2428.

2.11 *Article 53 of the Charter and the Issue of Stricter Constitutional Standards*

2.11.1 It is questionable to what extent the doctrine of margin of appreciation as employed by the European Court of Human Rights is workable at the EU law level. The Court of Justice faces a legal arena with almost half the number of states of its Strasbourg counterpart. Moreover, some of its areas of jurisdiction require more consistency, especially because of the freedoms protected by EU law and the danger that these freedoms might otherwise become illusory. On the other hand, it is not true that the Court of Justice leaves no space whatsoever for heightened national standards. In cases like *Omega*,⁸⁸ the Court of Justice has applied a sort of margin of appreciation, effectively leaving the final word to the Member States and their constitutional courts. Likewise, in some other cases, strengthening the fundamental rights of some has at the same times weakened the rights of someone else (cases of *Drittwirkung*, the horizontal application of fundamental rights).⁸⁹

2.12 *Democratic Debate on Constitutional Rights and Values*

2.12.1 No public debate about the European Arrest Warrant Framework Decision took place in the Czech Republic at the time of its adoption. This absence is easy to explain: the Czech Republic was not an EU member state back in 2002. Later, however, the debate became quite extensive. At the moment the EAW Framework Decision was implemented into the national legal order, Eurosceptic deputies and above all the Eurosceptic President Vaclav Klaus started a fierce and manipulative public debate. The picture of the EAW they presented was far from the real EAW. The President and some of his like-minded emulators shared their view of the horrors which the Czech Republic would face if the EAW were to come into effect. For instance, the President argued that the EAW, if applied, would mean criminalisation of all those who criticised the EU. Some authors, including me, tried to argue rationally and to explain what the EAW was really about, including some of its problems. I doubt, though, that the opposing camp was willing to listen to those

⁸⁸ Case C-36/02 *Omega* [2004] ECLI:EU:C:2004:614.

⁸⁹ In this line of argument I cautioned against a country-by-country application of fundamental rights, ignoring or weakening corresponding EU law arguments. See Kühn 2004.

arguments.⁹⁰ The debate effectively ended with the decision of the Constitutional Court which rejected all the arguments promoted by the President's camp.⁹¹

No similar debate took place in relation to the national implementation of the Data Retention Directive. It is hard to say why (perhaps the topic was not that attractive for the Eurosceptics), but save for a few specialists in privacy law, no one debated either this directive or its implementation.⁹²

2.12.2 Reference to the domestic debate with regards to the implementation of EU law reminds me of the prolonged debates surrounding the EU anti-discrimination directives in the Czech Republic. It would be too risky to use extensive political debate as an excuse for non-implementation. The Czech debate about anti-discrimination, for instance, was effectively caused by the disagreement among a substantial portion of the population, including the political elite, with the very idea of non-discrimination and equality before the law. At the end of the day, the EU discrimination directives were implemented because of the threat of infringement proceedings. It is true that the disadvantage of this approach is the fact the values surrounding equality and non-discrimination have not really been internalised in the Czech Republic and the respective laws are rarely applied in practice. The alternative, however, would be to have no law at all.

2.12.3 In my opinion, if important constitutional issues have been identified by a constitutional court in an EU-related case, the court should make a preliminary reference to the Court of Justice. I understand that many constitutional tribunals hesitate to openly accept their duty to make a reference, perhaps because they feel that they would thereby recognise a sort of hierarchy between them and the Court of Justice. This might not, however, necessarily be so.

Since constitutional courts cannot identify such problems extrajudicially, there is no danger that they would not be able to make a reference. Therefore, I see no reason to create new institutional mechanisms in addition to those which already exist (especially if informal mechanisms are also considered, like the participation of judges of high courts and the CJEU at scholarly conferences and like events).

As a matter of principle, I would be against a Member State submitting as a defence in an infringement proceeding that the unconstitutionality of an EU measure has been identified in domestic proceedings. If that were the case, the domestic

⁹⁰ For a summary of the arguments of the President's camp and my own arguments, see Drda, A. (2004, September 25) *Týden v České republice* (A week in the Czech Republic). BBC. http://www.bbc.co.uk/czech/domesticnews/story/2004/09/040925_tyden_v_cr.shtml.

⁹¹ Interestingly, the President did not initiate proceedings before the CCC despite the fact that he had the power to do so. This was in line with his conservative approach to constitutional review and his criticism of the so-called 'judgeocracy', a term close to the Western concept of 'juristocracy'.

⁹² In particular, several NGOs, and above all, Iuridicum remedium. See the article written by its director, Vobořil, J. (2014, June 3), *Jaké budou dopady zrušení směrnice o data retention?* (What will be the effects of annulment of the data retention directive?). <http://www.epravo.cz/top/clanky/jake-budou-dopady-zruseni-smernice-o-data-retention-94415.html>. For a summary of the debate, see Polčák 2008.

court should have made a reference to the Court of Justice with respect to the lawfulness of the EU measure in the first place. If this were an issue relating to the domestic constitution only (so the lawfulness of the EU measure could not be questioned), it would be the duty of the domestic lawmaker to amend the constitution. I am well aware of the possibility of a (systemic) conflict between a constitutional court and the Court of Justice with respect to some particular issue, but in such an unlikely case, the Court of Justice should accept the defence of the Member State, and base its reasoning on the EU Treaty and respect by the EU of the identities of the national legal orders.⁹³

2.13 *Experts' Analysis on the Protection of Constitutional Rights in EU Law*

I do not share concerns about an overall reduction in the standard of protection of constitutional rights and the rule of law in the context of EU law. I think that both EU law and activist constitutional courts capable of protecting domestic constitutional identities are able to further enhance the protection of fundamental rights in the EU legal arena.

There is a gradual process in the Central European legal systems towards more discursive and elaborative judicial decisions.⁹⁴ Compared to this, the cryptic style of the EU courts' judgments might become more problematic in Central Europe than it used to be just a few years ago. On the other hand, the opinions of Advocates General might serve precisely the purpose of making judicial reasoning more transparent.

The responsiveness of the Court of Justice with regard to Czech national constitutional concerns is a tricky issue. The most prominent case in which this responsiveness could be expressed was the Slovak pension saga. In the *Landtová* case mentioned in Sect. 1.3.4, however, it was difficult for the EU Court to assess the national constitutional concern. Both the Government of the Czech Republic and the Supreme Administrative Court, the court making the reference, argued in the direction eventually followed by the Court of Justice as well. At the same time, the CJEU knew very well that its decision went against the established case law of the CCC. A personal letter from the Chief Justice of the Constitutional Court was after all (in)famously returned by the CJEU's staff to the Chief Justice and excluded from the proceedings. Ironically, the CCC did not hesitate to express its frustration over this, and noted a sort of violation of its right to be heard in the proceedings before the CJEU. Instead of remedying this and giving the CJEU a chance to weigh the CCC's principled arguments, the CCC went on to proclaim the CJEU's

⁹³ Article 4 para. 2 TEU: 'The Union shall respect [Member States'] national identities, inherent in their fundamental structures, political and constitutional ...'.

⁹⁴ See Matczak et al. 2015.

judgment to be *ultra vires*. I consider this a major flaw in the CCC's approach, effectively forfeiting the chance to debate the importance of the national case law at EU level.⁹⁵

3 Constitutional Issues in Global Governance

3.1 *Constitutional Rules on International Organisations and the Ratification of Treaties*

3.1.1 The constitutional provisions that regulate the transfer of powers to international organisations or institutions, such as the International Criminal Court, are identical with those which govern the transfer of powers to the EU. The relevant provision is of a very general nature and contains no reference to the objectives sought by international co-operation, to limits to the delegation of powers, etc. Likewise, provisions on the ratification of treaties are very general and just provide that the consent of both chambers of Parliament is needed for selected categories of treaties that are to be ratified by the head of state (generally the most important treaties).

3.1.2 The 2001 'Euro-amendment' to the Constitution⁹⁶ changed the original Czechoslovak and then Czech approach to international law from a dualist system into a system closer to the monist ideal. At the beginning of the 1990s, only international human rights treaties were incorporated and became part of the law of the land. The Czechoslovak approach of 1991 was followed by the Czech and Slovak constitution-makers.⁹⁷ While the first major article criticising the hostile attitude of both constitutions had been published by Eric Stein in the United States in a prominent law journal already in 1994,⁹⁸ the domestic discussion on the future status of international law did not start until 1997.⁹⁹

The amendment was driven by domestic academic criticism, especially from international law circles. This opening of the door to international law was rather a by-product of the constitutional EU clause. The scholars who took part in writing the EU clause were also in favour of opening the Constitution to international treaties. In a way, many domestic politicians 'bought' the change of perspective towards international law because of their (false) belief that this was something which was required by the future EU accession.

⁹⁵ In more detail see Sect. 1.3.4 above.

⁹⁶ In more detail see Sect. 1.2 above.

⁹⁷ See Art. 10 of the Czech Constitution before 2002.

⁹⁸ See Stein 1994.

⁹⁹ The leading figure to influence the Czech internationalist doctrine by his doctrinal writings was Jiří Malenovský, current Czech judge at the Court of Justice. See Malenovský 2000 and Malenovský 2002.

3.2 *The Position of International Law in National Law*

3.2.1 According to Art. 10 of the Czech Constitution, as amended by the ‘Euro-amendment’, international treaties, the ratification of which has been approved by Parliament, and which bind the Czech Republic, are part of the legal order. If an international treaty provides something different than a statute, the former shall be applied.¹⁰⁰

3.2.2 Mainstream Czech scholarship agrees that neither dualism nor monism in their traditional form are able to capture the diversity of the processes of globalisation and the current relation between domestic and international law.¹⁰¹ My opinion is that these concepts are just ideals, through which legal systems can be explained, although they never materialise in practice in their pure forms.

3.3 *Democratic Control*

3.3.1 The most important treaties, including all that impose duties on individuals, on membership in international organisations, economic treaties of a general nature, etc., require ratification by the legislature (Art. 49 of the Constitution). Unlike normal law-making, in which the position of the Senate is much weaker, the Senate and the Assembly of Deputies have an equal role in giving consent to the ratification of treaties. Consent of the Assembly requires two readings of the treaty, during which deputies are supposed to debate the treaty and its content. The details are regulated in the rules of proceedings of the Assembly. The proceedings start in the committee responsible for the area of government which is most closely related to the substance of the treaty. The committee then makes a recommendation to the Assembly on whether or not ratification is advised.¹⁰² According to what I know from parliamentary debates, issues relating to international obligations are mostly neglected in parliamentary debates, as the deputies and senators prefer discussing domestic laws over international obligations.

3.3.2 As of the time of writing the report, only one nation-wide referendum has been held in the Czech Republic, i.e. the referendum dealing with EU accession. In order to hold a referendum, the Constitution requires that a constitutional act be enacted. While in theory a referendum can be held in any case, in reality politicians are very sceptical about direct democracy. There were some indications in 2014 that

¹⁰⁰ Many less important treaties, signed by the ministries, are not ratified subject to approval by Parliament (Art. 49 of the Czech Constitution). Article 10 is not applicable to these treaties.

¹⁰¹ See, most importantly, Malenovský 2008.

¹⁰² §108 and §109 of the Rules of Proceedings of the Assembly of Deputies, Law No. 90/1995 Sb.

this political position, which had been firm since 1993, might change in the future because the rightist and conservative parties that were opposed to referendums lost their ground in the early 2010s, and centrist and leftist parties that are more friendly towards direct democracy might want to enact a general constitutional law on referendums.

3.4 Judicial Review

3.4.1 The Constitution is silent on the issue of constitutional review of international treaties. The only exception is *ex ante* review before the ratification of an international treaty by the Constitutional Court (Art. 87 para. 2 of the Constitution). However, it is unclear what would happen if a ratified treaty were in conflict with the Constitution.

Shortly after the opening of the Constitution to international law in 2002, Jan Kysela and I wrote an article in which we argued in favour of the constitutional review of ratified international treaties on a case-by-case basis. We argued that ratified international treaties cannot exclude the application of constitutional rights. In the case of a conflict, the Constitution must set aside conflicting international treaty provisions.¹⁰³ This argument was followed in the case law of the CCC. In the never-ending saga of Czecho-Slovak pensions, the CCC repeatedly set aside the provision of the Czecho-Slovak Pension Treaty which in the CCC's view was in conflict with the ban on discrimination of Czech citizens. The CCC reasoned that even if international treaties have precedence over national law based on the maxim *lex specialis derogat legi generali*, a treaty cannot be applied if it is in conflict with higher law, that is, the Constitution.¹⁰⁴

Opposition to this claim came from the Supreme Administrative Court (SAC), the Constitutional Court's 'arch-enemy' in the Slovak pension saga. The SAC held that no court in the Czech Republic is empowered to review the constitutionality of ratified treaties. Neither the Constitution nor the law gives such power to the CCC. This argument has been repeatedly rebuffed by the CCC.¹⁰⁵

Apart from the Czecho-Slovak pension saga, there is no other judgment which has set aside an international treaty for its unconstitutionality.

¹⁰³ Kysela and Kühn 2002, p. 301.

¹⁰⁴ Judgment of 22 May 2008, file No. I. ÚS 366/05, *Slovak pensions XI*, para. 15. Cf. also *Lisbon Treaty I*, supra n. 12, para. 84.

¹⁰⁵ See Judgment of the SAC of 23 February 2005, file No. 6 Ads 62/2003, quashed by Judgment of the CCC of 13 November 2007, file No. IV. ÚS 301/05, *Slovak pensions VI*.

3.5 *The Social Welfare Dimension of the Constitution*

Social rights are constitutionally protected in the Czech Republic. However, their enforcement via judicial process is limited in scope through Art. 41(1) of the Charter which provides that social rights are justiciable only in connection with the laws which implement them. The question of whether a law can be annulled because of conflict with social rights has been explained by the CCC through its doctrine of the hard core of social rights. In 2008, the Court explained that the core or essential content of social rights shall be protected against legislative encroachments. According to the Court, '[i]t follows from the nature of social rights that the legislature cannot deny their existence and implementation, although it otherwise has wide scope for discretion.'¹⁰⁶

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¹⁰⁶ Judgment of 23 September 2008, file No. Pl. ÚS 1/08, *Health Care Fees*, paras. 103 and 105.

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