



The Experience of Certain Central European Countries with the Rule of Law Procedures. The Case of the Czech Republic

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Abstract. This article examines the issue of the rule of law in the Czech Republic in the context of European law. It analyses of Czech constitutional law and its relationship to the European Union (EU) concept of the rule of law, focusing on relevant constitutional provisions and the case-law of the Constitutional Court. The study also examines EU mechanisms for protecting the rule of law, including the Rule of Law Review Cycle and EU Justice Scoreboard and their application to the Czech Republic. The article further assesses the findings of the European Semester in relation to rule of law issues. It concludes that while the Czech Republic does not currently face a systemic problem with the rule of law, it is deficient in its constitutional regulation of the relationship between the Czech and EU conceptions of this principle. The study identifies key problems, including the Czech judiciary's passive approach to EU rule of law standards, the absence of explicit constitutional rules for resolving conflicts between Czech and European law, and shortcomings in the functioning of public administration. Although no fundamental problems require EU intervention, the article highlights the need for deeper scholarly reflection and analysis in the Czech academic discourse.

Keywords: rule of law, Czech Republic, constitutional law, European Union, Constitutional Court, Rule of Law Review Cycle, EU Justice Scoreboard, European Semester, EU law, rule of law in the EU

1. Introduction

The notion of the rule of law protection has recently garnered significant attention, including in the context of the Czech Republic. The primary objective of this institution is to safeguard fundamental values and interests across three

distinct domains. First, ensuring the protection of individual rights and freedoms against state encroachment is essential. Second, safeguarding the integrity of state institutions from internal threats is crucial, thereby ensuring the protection of the system as a whole. Third, the institute's mission extends to the external realm, where it aims to thwart any external interference, particularly from other states or international organizations, regardless of whether they are intergovernmental or supranational in nature. The primary focus in the first two scenarios is on the relevance of the European Union's (EU) concept of the rule of law in Czech constitutional law either in conjunction with the principle of Czech law or in a competitive manner. Meanwhile, the third scenario emphasizes the conflict between domestic and foreign interpretations of the principle. Such conflicts should be avoided. Given the supranational nature of the EU, it can be reasonably assumed that domestic law will adopt the necessary 'accommodative' approach to prevent such conflicts. The institutions and mechanisms of constitutional law will be pivotal in this regard. The primary objective of this article is to examine and analyse the Czech domestic scientific standpoints regarding the EU's interpretation of the rule of law. The focus is on constitutional provisions and/or Constitutional Court decisions pertaining to the rule of law within the EU context. The secondary objective is to present and evaluate the relevant documents connected to the EU's Rule of Law Review Cycle and the EU Justice Scoreboard, specifically related to the Czech Republic. Finally, given the significant relation between the rule of law and European Semester, the final objective of this article is to evaluate whether there are rule-of-law-related findings in the European Semester documents specifically addressed to the Czech Republic.

2. Czech Constitutional Provisions and Constitutional Court Decisions Relating to the Rule of Law in the EU Context

A review of the literature reveals a striking paucity of discourse on the question of whether the Czech Republic is fulfilling its defining characteristics of the rule of law. Instead, the focus of such scientific publications is on the question of whether the rule of law is being undermined by cases from neighbouring countries such as Poland, Hungary, and Slovakia. These cases are typically presented as examples of what not to do rather than as examples of best practices. A similar lack of scholarly discourse exists in Czech legal scholarship on the question of whether the EU itself is also guaranteeing sufficient protection of the rule of law.¹

1 A certain exception in this sense is the master's thesis written by a student supervised by me, published in the Czech Republic at Masaryk University but written in German; see Neubauer, 2024.

The Czech Republic has adopted a passive approach in the constitutional regulation of this issue. The Czech Constitution underwent certain changes with its accession to the EU, which should have enabled it to become a member of this organization. However, these changes were minimalist and only concerned EU membership (i.e. the question of accession to the EU). Notably, from 1 May 2004 to the present, the EU has undergone substantial transformations, particularly regarding upholding the rule of law. The EU now offers a 'service' to its Member States that was not available at the time of accession. Constitutional law has not yet adapted to this development. Thus, it merely formally endorses what was necessary at the turn of the millennium to join the EU. Specifically, Article 10a, which pertains to the EU, has been incorporated into the Constitution in the relevant domain, facilitating the transfer of competences from Czech authorities to international (EU) institutions. The rule of law, being a fundamental principle, is undoubtedly among the areas of concern. Nevertheless, the extent to which the Czech Republic has formally entrusted the EU with regulatory authority in this domain remains a subject of deliberation. However, the absence of any regulatory provision governing the Czech Republic's exit from the EU underscores a potential vulnerability in the event of interference by EU institutions in the national safeguards of the rule of law (see point 3 in the classification outlined in the previous paragraph).² The most significant shortcoming of this passive minimalist approach, as it pertains to this article, is the absence of a definition of the relationship between the Czech Constitutional Court and EU law in instances of conflict between EU supranational regulation and Czech regulation embedded in constitutional law. Note that the EU concept of the rule of law and the rule of law as defined by the Czech Constitution are two distinct legal concepts and may not always be synonymous. Consequently, the Czech authorities can apply

2 I hope that it is evident that my prevailing sentiment is one of reluctance to depart from the EU. Consequently, I argue that such a provision should not be regarded as a definitive guide but rather as an insurance policy to ensure that the eventual move is made in a politically and legally tenable manner. Although the Constitution stipulates stricter conditions for the approval of such a decision in Parliament (the consent of a three-fifths majority of both all members of Parliament and the majority of senators present), the consent of Parliament can be replaced by a referendum. However, the parameters of such a referendum are not defined in any way. Meanwhile, in the case of a decision to withdraw, this is a serious decision with generational consequences. The conditions for approving a referendum should be set such that there is no doubt that withdrawal is the clear and unequivocal wish of the vast majority of Czech citizens. Simultaneously, it would be appropriate to consider a time test. This can prevent a situation where the decision of the people could be a simple consequence of current and, therefore, temporary dissatisfaction with political representation or the situation in the Czech Republic. Indeed, without specific and strict regulation, there is a risk that the matter may be dealt with ad hoc according to the prevailing political situation, which may be subject to highly unpredictable changes. This may ultimately result in procedures that inequitably favour one solution over another. However, one must recognize that we are operating within the domain of constitutional law, where stability and predictability are paramount.

these two concepts in parallel, where one concept supports the other, or in competition with each other when their specific manifestations differ. However, Czech constitutional law does not provide an explicit solution for these conflict scenarios although neighbouring states have demonstrated and proven that such scenarios can arise. Notably, the Czech Republic has fortunately not yet encountered a scenario analogous to the one precipitated by Poland's judicial reform, which brought about divergent interpretations of democracy and the rule of law within the state and from an external (EU in particular) perspective.

The Czech constitutional law contains mechanisms that favour a harmonious (parallel, i.e. non-competitive) approach to the EU rule of law. The most significant of these mechanisms is codified in Article 1(2) of the Constitution, which underscores the Czech Republic's commitment to its international legal obligations. This provision has been interpreted as applicable not only to public international law but also to EU law.³ However, the application of this obligation is not without its limits, which poses a significant challenge in instances of conflict between Czech constitutional and EU laws. In such cases, the absence of the aforementioned regulation of the content of the Czech Republic's EU membership in the Czech Constitution becomes fully evident. Consequently, in the realm of justice, particularly in the context of judicial decision-making, challenges related to the rule of law do not emerge. Any issues identified in the Rule of Law Review have pertained to related issues such as the appointment of judges, their salaries, or the quality and expediency of decision-making.

Article 1 of the Constitution delineates the Czech Republic as *a democratic state governed by the rule of law*,⁴ a provision that is closely related to Article 9, which governs constitutional amendments. Concurrently, paragraph 2 of Article 9 stipulates that the 'essential elements of a democratic state governed by the rule of law' are inviolable and cannot be amended (the *Ewigkeitsklausel*). In the context of EU law, this provision may present certain challenges. Specifically, the Constitutional Court is empowered to review primary law and its amendments before the Czech Republic's ratification, providing it with the authority to reject amendments deemed incompatible with the nation's constitutional order. However, following ratification, EU law, in its capacity as supranational law, assumes an independent existence. Consequently, the potential for conflict with

3 In Czech jurisprudence, such a cooperative approach can be demonstrated by a decision of the Constitutional Court in the case of the European Arrest Warrant. Despite the clear wording of the Charter of Fundamental Rights and Freedoms, this court came to a conclusion compatible with EU law. See Judgment of the Constitutional Court of 3 May 2006 European Arrest Warrant (Euro Warrant) Pl.ÚS 66/04 and Sehnálek, 2021, p. 217.

4 Any discussion of whether a state that is not democratic can also be a state governed by the rule of law is usually resolved by stating that it does not really matter. Alternatively, the complementarity of the two values is suggested and that the rule of law also extends into the sphere of political will making. See Molek and Šimíček, 2010, p. 24 et seq. or Rychetský, 2015, p. 5 et seq.

the Czech Constitution arises due to the possibility of unforeseen developments. The latter, as previously mentioned, lacks the capacity to address such contingencies due to the absence of specific provisions.

Such a situation manifested in the Czech Republic in the past due to the well-known conflict over the primacy of EU law in decisions concerning the Slovak pensions.⁵ The question of the primacy of EU law over the national constitution arose in a dispute concerning social security, specifically a compensatory allowance that had been granted in the Czech Republic solely to Czech nationals residing in the country who, because of the dissolution of the Czechoslovak Federation, were receiving a lower Slovak pension. Both these criteria were problematic from the perspective of EU law, as they constituted direct and indirect discrimination.

The Supreme Administrative Court assessed the problem considering the social security law and in accordance with the conclusions of the Court of Justice of the European Union (CJEU) in *Case C-399/09 Marie Landtová v Česká správa sociálního zabezpečení* (judgment of 22 June 2011). The Constitutional Court, however, rejected this legal opinion, considering the decision of the CJEU to be *ultra vires* as one specifically linked to the dissolution of Czechoslovakia. This meant that it refused to follow EU law as interpreted by the CJEU. In doing so, it became the first constitutional court to not only rhetorically oppose the case-law of the CJEU but to actually make such a harsh ruling.

The absence of explicit provisions in the Czech Constitution on the relationship between national and EU laws made such conclusions possible. The case was the first of its kind, and, therefore, it attracted the attention of legal scholarship. However, to the best of my knowledge, EU institutions themselves apparently did not address it. In my view, the reason lies in the fact that it was a wholly exceptional decision concerning a very specific matter (notably, of a transitional nature). The Constitutional Court did not generalize its conclusions; the dispute was narrowly defined in subject matter. Further, the consequences were negligible, since the grounds for granting the compensatory allowance meanwhile ceased to exist.⁶

In the Czech Republic, the decision is rather interpreted as the culmination of an internal dispute between domestic institutions (courts in particular) than as a deliberate act of defiance vis-à-vis the EU.⁷ I myself am inclined to this interpretation.

5 See Judgment of the Czech Constitutional Court, of 31 January 2012, in the Holubec (Slovak pensions) case. Pl. Pl. ÚS 5/12. The issues raised attention in many articles; see, for example, Hamulák, 2014, p. 128 or Křepelka, 2012, pp. 278–294, and Stehlík, Sehnálek, and Hamulák, 2020, pp. 151–168.

6 A detailed comparison of the decisions of those supreme and constitutional courts that have ruled against the primacy of EU law is available in Sehnálek, 2024, p. 214.

7 Petr, 2023, p. 158.

The absence of specific rules regarding the relationship between EU law and the rule of law in the concept of EU law in the Constitution does not imply the complete absence of these rules, as they can be derived from case-law. The Constitutional Court has previously had the opportunity to clarify its position in relation to EU law in general and the rule of law in particular. Nevertheless, the solution chosen is not entirely clear. Still, in its general aspect, EU law evidently does not constitute an integral component of the constitutional framework or the framework for review provided by the Constitutional Court. The prevailing approach can thus be characterized as a ‘shining through’ (*prozařování*) of EU law into the Constitution, through which it is integrated via a consistent interpretation of Czech law in conjunction with EU law.⁸ However, in EU law, the EU rule of law principle stands at the borderline between ‘general’ EU law (as it is enshrined in Article 2 TEU) and human rights law (due to its nature). The distinction is important, as the Constitutional Court takes a different approach to the Charter than to general (substantive) EU law. This court considers the Charter to be part of the frame of reference in constitutional complaint proceedings.⁹ This approach opens the way for the EU concept of the rule of law to be incorporated into the Czech constitutional order. Thus, I argue that, materially, the EU rule of law belongs to the reference framework of law reflected and enforced by the Constitutional Court.

The EU principle of the rule of law, therefore, has dual paths into the Czech legal sphere and Constitutional Court’s decision-making. On the one hand, it is direct, as it is an independent part of the frame of reference according to which the Constitutional Court decides. On the other hand, it is also indirect: on the principle of loyalty, the principle of democratic rule of law enshrined in the Czech Constitution can be interpreted in the light of the EU principle. However, I reject the assertion that these concepts (the EU and Czech rules of law) are synonymous. While their abstract definitions may align, discrepancies may emerge when they are examined in an ad hoc manner and conceptualized. Consequently, the question of the Constitutional Court’s capacity to implement the EU principle becomes pertinent. My conclusion is that the application of the EU principle of the rule of law is generally feasible both directly and indirectly.

The preceding paragraph contained an optimistic statement that I feel necessary to contextualize. In practice, the Constitutional Court rarely proceeds in the indicated manner regarding EU law. This may be due to the distinct personal

8 Individual decisions of the Constitutional Court are discussed in detail in the publication Bobek, Bříza, and Hubková, 2022, pp. 158–173. Due to the specific character of the EU Charter and position in the Czech constitutional order granted by the Constitutional Court to the European Convention, its position in Czech law is discussed separately in the same publication on pages 532–539. The issue of the relationship between EU law and Czech constitutional law has also long been dealt with in Czech literature, such as by Hamulák. Therefore, I refer to his publications, particularly Hamulák, 2020, pp. 108–124.

9 Sehnálek, 2024, pp. 195–196.

characteristics of the judges-rapporteurs.¹⁰ Judge Šimáčková, who has since become a judge of the European Court of Human Rights (ECtHR), demonstrated the highest degree of alignment with the EU value standard and external sources of human rights protection in general. In contrast, the use of external sources to support arguments is clearly less prevalent among other judges. If they are to use them, the court is more likely to rely on ECtHR standards rather than on EU law. The European Convention is an integral part of the Czech constitutional order, making its application more natural and prevalent in practice.

In practical terms, the Constitutional Court pragmatically disregards EU standards for protecting the rule of law, including even in cases where it could bolster its position. For instance, in cases pertaining to the reduction of judges' salaries, the CJEU directly engaged with the principle of the rule of law as articulated in Article 2 TEU, forming the foundation of its legal argumentation in conjunction with Article 19(1) of the Treaty.¹¹ Notably, the Czech Constitutional Court refrained from invoking EU law in a comparable case, opting instead for an internal, purely national justification. The reasoning in decision Pl. ÚS 5/24, as of 15 May 2024, is based exclusively on the national dimension of the matter, and thus solely on Czech national law. The subsidiary argument that 'salaries cannot be reduced because we are also EU judges and therefore such a procedure is also prevented by EU law' would be legally quite appropriate. Yet, the Constitutional court has not raised it. In my opinion, there are two possible explanations. First, the CJEU adopts a more liberal stance than the Constitutional Court regarding the possibility of reducing judges' salaries. Meanwhile, the Constitutional Court's rigid requirements are practically impossible to comply with.¹² Referring to the EU's interpretation of the independence of judges in the context of the rule of law and their material security could potentially draw unnecessary attention to this discrepancy. Second, the Czech Republic's system for safeguarding the rule of law is robust. No significant conflict exists between the branches of power, as was the case in, say, Poland. The reduction in judges' salaries in the Czech Republic was not due to an attempt by the executive branch to interfere with or weaken the judiciary; it was driven by the desire to systematically address the dangerously growing public budget deficits in the Czech Republic. Consequently, Czech institutions have no compelling rationale to seek external support or solutions that extend beyond the confines of Czech constitutional law. Indeed, utilizing such external support or solutions, while potentially beneficial in this particular instance, can paradoxically result in adverse consequences for the Constitutional Court in other cases.

Notably, the aforementioned points do not imply any form of opposition on the part of the Czech Constitutional Court to the EU's concept of the rule of law, or

10 See Sehnálek, 2021, p. 245–230.

11 C-64/16 – *Associação Sindical dos Juizes Portugueses*.

12 Judges Jan Wintr and Josef Fiala pointed this out in their dissent.

its commitment to protecting human rights and freedoms. Rather, the court has demonstrated a willingness to accommodate, albeit within the confines of Czech constitutional law. However, note that the Constitutional Court does not employ the argument of the protection of the rule of law within the framework of EU law. Moreover, references to the EU Justice Scoreboard or the conclusions of the Rule of Law Review Report are conspicuously absent from its case-law.

3. Presentation and Evaluation of the Relevant Documents Connected to the EU's Rule of Law Review Cycle and the EU Justice Scoreboard Related to the Czech Republic

As demonstrated earlier, the Czech Republic is a state governed by the rule of law in the context of the EU. It is a stable country with regular changes between centre-left and centre-right governments.¹³ The assertive role of the Constitutional Court, which is guided by the standards primarily established by the ECtHR in the realm of the rule of law, is instrumental in preventing potential excesses, albeit these occur infrequently. Consequently, the rule of law in the Czech Republic, particularly within the judiciary, is regarded within the context of the Council of Europe system rather than that of the EU. The effectiveness with which the Constitutional Court protects the rule of law has been demonstrated in cases where politicians have deliberately altered the Constitution itself. In such instances, the court is formally bound by the Constitution, and consequently, in principle, its amendments should fall outside the scope of its review. Nevertheless, the substantive aspect has consistently been a priority for the Constitutional Court. I felt it necessary to emphasize this point, as it elucidates the Czech approach to the whole EU system's protection of the EU rule of law. In circumstances with minimal risk and truly effective national systems of protection, the pursuit of external solutions is rendered somewhat superfluous.

This study analyses individual documents connected to the EU's Rule of Law Review Cycle and the EU Justice Scoreboard related to the Czech Republic, stressing that the Czech literature does not analytically deal with these documents. In the event of their citation, it is solely for substantiating commonly acknowledged realities such as the Czech justice system lagging in digitalization

13 This thesis has been weakened in the last decade by the fact that Andrej Babiš's ANO movement has disrupted the traditional division between left and right, as it has rather profiled itself as a catch-all movement with populist elements, combining elements of both left- and right-wing politics. The left-right polarity has thus loosened, and the classic alternation of left-wing and right-wing governments has been interrupted. Nevertheless, governments still continue to alternate on a regular basis.

compared with the EU's overall progress or identifying favourable developments in procedural duration.¹⁴ Consequently, the extant literature typically assumes the form of a rudimentary recapitulation of statistical data pertaining to the Czech justice system.¹⁵

The latest Rule of Law Report of 2024 is based on the following targeted stakeholder consultations: a) International Press Institute, which highlighted the possibilities and limits of public access to public information, particularly the time-consuming nature and the need to seek information through the courts in partial cases; b) Constitutional Court, which described the methods of appointing and dismissing judges (no errors occurred here); c) Rekonstrukce státu, z. s. 'Reconstruction of the State', when this non-government organization (NGO) criticized the planned possibility of dismissing the Prosecutor General on the proposal of the Minister without providing reasons. The NGO also criticized the possibility of appointing a person with no direct experience in the prosecution service and the fact that the term of office of the Chief Prosecutor was fixed at seven years. The NGO also expressed concern about how judges are appointed to the Constitutional Court. Indeed, there is talk of 'generations' of Constitutional Court judges (in relation to their replacement every 10 years).¹⁶ Clearly, the risk of politicization exists if the plurality of judges in the Czech Republic is not reflected. However, I would like to emphasize that it is the current president who has done his utmost for transparency and plurality in the election of constitutional judges. Additionally, the procedure he has introduced has a chance to become a new constitutional practice.¹⁷ The contacts of the Minister of Justice, Mr Blažek, with the judiciary were also criticized on the grounds that they could jeopardize the independence of the judiciary.¹⁸ Rekonstrukce státu z. s. also criticized the mandatory introduction of data boxes. In my opinion, however, the question here is whether digitalization is undesirable for entrepreneurs affected by this

14 This is also the case in otherwise very detailed publications such as Visinger, 2019, p. 42 et seq.

15 See, for instance, Paseková, 2024. Articles on this topic are published annually in *Advokátní deník* (in 2024, a contribution published under the title *Evropská komise: česká justice patří v Evropě mezi nejrychlejší* ['European Commission: Czech justice is among the fastest in Europe']), and in the past also in *Právní rozhledy*.

16 Aleš Gerloch, professor of constitutional law and Dean Emeritus of the Faculty of Law at Charles University in Prague, characterized these generations as follows: 'The first Constitutional Court after 1993 consisted partly of people who had received their legal education and experience before 1948. The second generation was sometimes referred to as the "Bar Court". The third generation is beginning to emerge as a combination of academics and Supreme Court judges.' Gerloch, 2013.

17 President Pavel formulated in advance the criteria for the selection and nomination of new constitutional court judges and established a consultative panel whose recommendations were subsequently followed. See *Kancelář prezidenta republiky*, 2023 and a general article of earlier date: Ondřejková, 2016, pp. 646 et seq.

18 For the sake of accuracy, I would like to point out that Mr Blažek is no longer a minister, as he has resigned for reasons not directly related to the issues raised in this study.

obligation. In my opinion, the advantages clearly outweigh the disadvantages, as the state is generally not in a position to respond to the phenomenon of virtual residences and deliver parcels by traditional mail in situations where the addressees have not voluntarily accepted such parcels themselves. The situation would have been different if we had forced the entire population, including the most disadvantaged or vulnerable, to communicate with the State digitally via these data boxes, and without any exemption. However, this has not happened. Thus, I do not see any negative constitutional consequences of such regulation. Meanwhile, the criticism of the slow or non-existent publication of the decisions of courts other than the highest courts was quite justified. This is an ongoing problem, as these courts have no legal obligation to publish their decisions. Similarly, the lack of protection against whistleblowing,¹⁹ corruption, and lobbying continues, as the necessary legislative measures have not been adopted. The regulation of online media and the issue of media ownership transparency were also criticized. d) The last stakeholder was Glopolis, an independent think-tank, which largely highlights similar shortcomings of the Czech Republic as *Rekonstrukce státu* z. s. Among the more significant ones, it adds the persistent discrimination against Roma in the Czech society and the absence of an independent National Human Rights Institution (NHRI), points to the introduction of financial support to improve the status of LGBTQI+ persons, and calls for the introduction of marriage for all.

In summary, the above reports do not objectively reveal any fundamental deficiency in the functioning of the rule of law in the Czech Republic that would require intervention by the ECtHR, European Commission, or Court of Justice in any way. Some potentially problematic systemic deficiencies are present in the Czech Republic, notably in the judiciary or in the fight against corruption, or in relation to a functioning civil society, which requires active citizen participation and the ability to accept a pluralism of opinion. However, the rule of law as such is not under threat.

In the context of the Rule of Law Review Cycle, the Council of Europe's conclusions on the Czech Republic were presented. The latter focused on the issue of Roma children and their continued discrimination due to the lack of recognition of their possible 'mild mental disabilities' (or the overuse of this diagnosis). Additionally, it focused on the conclusions of GRECO, which noted that its recommendations were implemented only in a minimal number of cases, and in most cases inadequately or not at all. However, the above cannot be interpreted as a serious violation of the rule of law. The first case of discrimination is undoubtedly serious in relation to the children concerned, and subsequently it deserves a just solution. Still, it does not constitute a systemic risk threatening

19 The criticism was justified at the time, as whistleblower protection was not implemented in the Czech Republic in a timely manner. However, this has now been remedied.

the functioning of the rule of law in the Czech Republic as such. However, the measures taken need to be carefully evaluated. I would just like to add in passing that while the elites in the Czech Republic generally (and, I stress, rightly) oppose the segregation of children from excluded localities, they themselves practise segregation on the other side of the spectrum by placing their children in elite, usually fee-paying, schools. This is a failure of the system that evaluation reports are unable to identify. Further, the elites themselves will not admit it or change it of their own accord. Issues related to corruption and the fight against it are the culprits in most relevant reports on the rule of law in the Czech Republic. Here too, however, the problem is not systemic, threatening the rule of law as such. Rather, corruption is at a level that hinders the effective functioning of the state and probably has negative economic effects. However, I dare not judge this without data and as a lawyer. In this context, I am afraid that it may be a general mental problem linked to the structure of society. This has its origins in the previous political system, the one before 1989, and it will take generations to change it. Changes in the legal framework will only help this change more or less, but will not put an end to corruption. The advantage of EU membership in this context is not only that the Czech Republic must criminalize certain acts in its legal system if they affect the EU's financial interests but also that they can be prosecuted by the European Public Prosecutor's Office. Consequently, even those cases are prosecuted for which there would be no political will in our country.

The Rule of Law Report – Country Chapter on the rule of law situation in the Czech Republic²⁰ mainly focused on the reform of the public prosecutor's office in the Czech Republic, reflecting the concerns expressed by the aforementioned NGO, and on corruption investigations, particularly their length, which has been a long-standing problem in the Czech Republic. The report also addresses the issue of the regulation of lobbying, transparency of media ownership, and shortcomings in the functioning of the public administration, which has long been unable to function effectively in the Czech Republic and suffers from a lack of qualified specialists. The establishment of a new body, the National Human Rights Institution, is also recommended. None of the assessments are critical of the situation in the Czech Republic. The report also notes several improvements compared to the previous situation. I note that the evaluation shows that the situation is not ideal, not even remotely, but is gradually improving.

Notably, the report recommends, *inter alia*, that the Czech Republic '[t]ake measures to address the remuneration of judges, and judicial and prosecutorial staff, taking into account European standards on resources and remuneration for the justice system.'²¹ This statement is in line with the above-quoted Constitutional

20 European Commission, 2024a.

21 *Idem*, p. 2.

Court decision of 2024 on judges' salaries and its earlier case-law. Indeed, in 2022, this Court stated,

In fact, judicial salaries in the Czech Republic are close to the average, for in the Council of Europe [European Commission for the Efficiency of the Judiciary (CEPEJ)], Report on European Judicial Systems 2022, part two, p. 40, <https://rm.coe.int/cepej-fiche-pays-2020-22-e-web/1680a86276>], only the ratio of the salary of judges at the end of their career compared to the average salary deviates significantly from the average values. At the same time, judicial salaries reach the average values thanks to the case-law of the Constitutional Court, which has repeatedly been forced to abolish unconstitutional interference with judicial salaries in the past.²²

In the dissenting opinion of judges Wintr and Fiala, the same fact, which the Constitutional Court itself considers a success of its work, is interpreted differently. Thus, there is room for salary reductions. Both judges state,

The salaries of judges are certainly not at a level that would significantly hinder or prevent the functioning of the judiciary (which is indirectly acknowledged by the judgment in Case No. Pl. ÚS 15/22 at paragraph 200). Indeed, the Report on European Judicial Systems of the European Commission for the Efficiency of the Judiciary (CEPEJ, <https://rm.coe.int/cepej-fiche-pays-2020-22-e-web/1680a86276>), cited in paragraph 197 of the judgment in Case Pl. ÚS 15/22, shows that the salaries of Czech judges stand up well in European comparison.²³

I have quite deliberately quoted the above conclusions contained in the Constitutional Court decisions. They point to the limits of the reports produced by supranational bodies. These reports are based on ones supplied by Member States and actors from those States and are, by their very nature, general. At the level of processing by supranational institutions, what is already simplistic may be further simplified. The result is a description of a certain situation that, in my opinion, may well indicate trends and potential risks and show improvements but is not capable of comprehensively and accurately describing the reality in its entirety. A similar example is the situation in which the Czech Republic is accused of not being a party to the Council of Europe Convention on preventing and combating violence against women and domestic violence. Indeed, the country's communist past shows that it is possible to be a party to human rights instruments without this having any real impact on practice. Therefore,

22 Para. 197. Ústavní soud České republiky, 2024.

23 The dissenting opinion of Judge Jan Wintr, joined by Judge Josef Fiala Pl. ÚS 5/24. Paragraph 3.

the actual situation should rather be relevant. Fortunately, problems have not been identified here. Further, I have already mentioned the absence of relevant articles in the Czech literature that either critically work with the data contained in all aforementioned transnational reports or use it critically and analytically to improve the situation inside the country.

According to the EU Justice Scoreboard²⁴ in the Czech Republic, the number of incoming civil, commercial, administrative, and other cases remains stable and does not significantly change between 2012 and 2022. This observation is indicative of a prevailing inclination among the Czech populace to utilize court proceedings as a primary means of dispute resolution. This preference stands in contrast to the tendency observed among individuals residing in Western European countries. My hypothesis is that the rationale may be partly attributable to the adverse experiences associated with the misuse of arbitration in the past. While the speed of court proceedings has improved in the Czech Republic, it still ranks 14th out of all Member States. However, in contract disputes, the Czech Republic ranks an excellent third on the speed of resolution.²⁵ The Czech Republic shows a similar, though less excellent, performance in speed in the other court proceedings monitored. Relatedly, the number of pending cases has also decreased in all monitored areas. Conversely, the EU Justice Scoreboard reveals a marginal decline in the domains of money laundering and anti-corruption proceedings.

According to the EU Justice Scoreboard, the Czech Republic differs from most EU Member States in that recipients of legal aid are not automatically exempt from paying court fees. However, I believe that this is not a problem if the courts do indeed assess the situation of applicants for the waiver of court fees on an individual basis. Nothing indicates that this is not the case. Nevertheless, the question remains regarding whether this system places an excessive administrative burden on the courts. Unfortunately, I do not have the data to answer this question. For the sake of completeness, further note that the Czech Bar Association can help the indigent by appointing a lawyer to provide free legal advice or free legal service to the person in need. Consequently, one may conclude that individuals requiring legal aid will indeed receive it.

According to the EU Justice Scoreboard, the Czech Republic also shows shortcomings in the area of protecting the rights of vulnerable and disadvantaged persons, including in the very specific area of supporting the participation of

²⁴ European Commission, 2024b.

²⁵ However, the question here is what metric has been chosen in the case of the EU. For example, Michálek notes, in relation to a similar assessment of the speed of court proceedings by the World Bank, 'However, the average proceedings times are somewhat distorted by the rapid agendas of payment orders and the exclusion of pending cases (backlogs) from the calculation. A relevant set of metrics for the speed of court proceedings is, for example, the average length of proceedings and the number of backlogs older than two years.' Michálek, 2020, p. 31.

persons with disabilities as professionals in the justice system. This is despite that general measures to support the employment of this category of persons have long existed in Czech law. Consumer and child protection also lag behind compared to other Member States. The proportion of female professionals in the Supreme Court is also shamefully low, with the Czech Republic ranking third lowest in this value, as it does not even reach 30%. Encouragingly, the gradual improvement in this value is positive. The same tragic value is also achieved by the Czech Republic in the area of online information about the judicial system for the general public. However, this is a long-standing problem of the Czech Republic, which has been consistently and correctly identified by the EU institutions. It is unable to cheaply and effectively introduce modern IT technologies into the functioning of public administration in general. This area also has the greatest scope for corruption, the punishment of which has long been difficult. However, at least in the judiciary, the Czech Republic has been relatively successful in introducing rules allowing digital technology in courts. However, it seems to be limited just to rules and the real practice.²⁶ The EU Justice Scoreboard data shows a very low (second lowest in the EU) use of digital technology by courts and prosecution services. The Czech Republic has limits in other areas of digitalization of justice. Only judgments of highest instances are made accessible online;²⁷ in all other cases, access to judgments is problematic, if not impossible. Thus, searching and investigation can only be made based on the costly and time-consuming Freedom of Information Act.²⁸

26 Loutocký states that according to statistics, the Czech Republic is surprisingly at the top of the European countries in the use of modern technologies in the judiciary. However, he notes that these are either very general categories or categories related to communication with the courts, and not categories related to specific court processes and deeper computerization. According to Loutocký, it is therefore different from the official statistics (the opposite) and completely unsatisfactory, as even after long efforts, the introduction of an electronic case file system has not been achieved. See Loutocký, 2020, p. 157. Loutocký wrote his critique in 2020; however, a relatively recent statement by the Ministry of Justice (made in late 2024) shows that the trivial state of the digitalization of the judiciary still persists. Řepka, 2024.

27 Only the Constitutional, Supreme, and Supreme Administrative Courts are obliged to publish their own collection of court decisions. Other courts also publish some of their decisions, but only to a negligible extent. In this context, Novotný points out, 'the form of publication of court decisions requires a very active approach and often great patience on the part of the potential consumer of legal information. By the nature of the matter, this creates requirements for the recipients that include a certain legal awareness and basic skills of orientation in the legal system. As a result, this significantly narrows the range of subjects who come into contact with the decision-making activities of a given court, and thus leads to a greater closedness of the courts to the outside world, which is in many respects undesirable for the reasons set out above.' Novotný, 2022, p. 13.

28 Act No. 106/1999 Coll. Free access to information.

3. Presentation and Evaluation of the Rule-of-Law-Related Findings in the European Semester Documents in Relation to the Czech Republic

The European Semester is not an instrument designed to primarily address rule of law issues. I have stated above and supported my arguments that the Czech Republic has no fundamental problem with the rule of law as defined by the EU and verified by its mechanisms, as evidenced by both the statistical EU Justice Scoreboard and the more analytical Rule of Law Review Cycle. In contrast, the Czech Republic has several problems in the economic sphere in general and the energy sphere in particular. These concerns are addressed within the framework of the European Semester Documents.

In 2024, the European Commission, under the European Semester, recommended the Czech Republic to limit the growth in net expenditure, maintain the government debt within the limits, and strengthen administrative capacity to manage the recovery and resilience planning, including the REPowerEU chapter. Recommendations also covered public administration employment to make it sufficiently attractive for talent and IT professionals. Finally, it called for more support for innovation and technology.²⁹ In doing so, this report followed the 2021 and 2022 recommendations, which also primarily addressed the economic situation in the country and how it could be improved by stimulating investment, and thus growth,³⁰ or measures to diversify energy sources or ensure affordable housing.³¹

Evidently, all recommendations are primarily related to economic issues, with topics related to the rule of law being addressed only indirectly, if at all. This absence of topics directly related to the rule of law is also confirmed by the country-specific recommendations database.³² This observation is valid for all years under review. The closest the European Semester Documents ever came to addressing the rule of law issue was in assessing the effectiveness of justice. In this particular area, the assessment is based on the EU Justice Scoreboard, where the Czech Republic has consistently received high ratings, thus affirming the positive evaluation in this specific domain.³³

29 European Commission, 2024c.

30 European Commission, 2021.

31 European Commission, 2022.

32 European Commission, no date.

33 European Commission, 2024d, p. 64.

4. Conclusions

This study set out to achieve three primary objectives. On constitutional law and decision-making, it noted that Czech constitutional law is in general inadequate in its alignment with EU law due to its failure to address the realities of membership in a supranational organization such as the EU. This inadequacy may pose a challenge in the future. This is attributable to two factors. First, the absence of a framework for addressing such discrepancies between EU and Czech conceptions of the rule of law hinders the capacity to make reliable predictions regarding their resolution. Second, the absence of legal regulation in the Constitution necessitates that the solution to this issue must be derived through interpretation by the Constitutional Court, thus rendering it contingent on the prevailing composition and perspective of this institution. Furthermore, the Czech Constitutional Court, at least at present, serves as an effective bulwark for ensuring a commendable level of protection of the rule of law. Until now, the EU rule of law standard has not been considered as part of a frame of reference under which the Constitutional court has made direct decisions. However, regarding human rights, the court has subscribed to the EU human rights standard and the need to protect it when necessary. A similar approach can also be assumed in the case of the rule of law, although this has not yet been the case. Such a need has not yet arisen, as the Czech Republic is a stable state within which power struggles do not take place between the various parts of the public authorities, as was the case not so long ago in, for example, Poland.

As demonstrated by the data contained within the individual reports, the Czech Republic is not currently experiencing significant issues with the functioning of the rule of law regarding either its national or the EU concept. The identified shortcomings cannot be considered critical errors posing a threat to the system within the Czech Republic, nor do they have negative effects on other Member States or the EU. Conversely, note that none of the aforementioned shortcomings necessarily has to be classified as part of the ‘rule of law’. Indeed, many shortcomings are only loosely related to the rule of law itself. For example, a fair and swift justice system is possible even without digitalization. Conversely, if digitalization is not carried out properly, it can reduce efficiency and, moreover, expose a country to the risk of cyber-terrorism. After meticulously examining all data and reports of the independent actors on which the Commission has based itself, I do not concur with the European Parliament’s criticism.³⁴ Indeed, this body stated that it was ‘concerned that the Commission, in its effort to be factual and even-handed, sometimes ends up being too diplomatic and imprecise when identifying rule of law problems in Member States; regrets the use of euphemistic language’³⁵.

34 European Parliament, 2024, point 83.

35 *Ibid.*

Conversely, it is this author's opinion that the relevant actors have delineated the situation with a high degree of fidelity and in a manner consistent with their own perspective, focusing on issues that are of particular concern to them.

The biggest problem in my opinion is that all tools discussed above provide only a general and somewhat superficial picture of the situation in the Czech Republic. They reveal trends and point out some partial shortcomings. However, they lack a scientific basis, which is not complemented by literature that would build on them. In fact, I have come across what I believe to be the only major criticism of these instruments. Paulík, in his article primarily concerning the earlier situation in Poland and secondarily Hungary, states that the Rule of Law Framework 'was only effective in its information-gathering function. It failed in eliciting almost any change in law or the political practice of a Member State'.³⁶ He also states, 'What is perhaps even more striking is the Commission's lack of self-reflection and overreliance on soft-law dialogue-based mechanisms, given their apparent ineffectiveness.'³⁷ This criticism completely overlooks the purpose of these assessments, the EU's limited competence in this area, the role and functions of the Council of Europe, and the quite deliberate decision of EU Member States to exclusively deal with certain issues through the procedures of Article 7 TEU and the reasons that have led them to do so. The reality is that even if Member States were to agree on another mechanism to enforce the rule of law besides the existing ones, collecting data on Member States from non-state actors and various statistical data in general would be necessary. The positive aspect of this activity is undeniable. Hence, there is no point in overly criticizing it. Anything new would therefore necessarily have to complement rather than replace what exists. However, the core of the problem remains: How to make the data truly comparable and objectively indicative of what is truly happening in the Member States? Moreover, these data are not being effectively used in the professional discourse to improve things. If they are, they only serve to support the internal debate in the Czech Republic. Their potential remains unexploited. Yet, it must be an enormously time-consuming and labour-intensive, and therefore extremely costly, process.

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36 Paulík, 2021, p. 25.

37 *Ibid.*

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