

# THE PRACTICE OF NATIONAL CONSTITUTIONAL COURTS CONCERNING MIGRATION AND REFUGEE AFFAIRS – THE CZECH REPUBLIC

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## ABSTRACT

*This article focuses on the relationship between the Czech Constitutional Court and European Union law, with an emphasis on asylum and migration policies. After introducing the Czech Constitutional Court, the article focuses on its relevant case laws in relation to European Union law and the transfer of powers from the Czech Republic to the Community institutions. Thereafter, it explores whether the Czech Constitutional Court perceives asylum and migration issues as part of the Czech constitutional identity, which the European Community must not interfere with, and presents the basic legal framework within which the Constitutional Court considers these issues. Finally, it examines the comparative method of interpretation in the case law of the Constitutional Court, supplemented by extensive citations of relevant decisions of the Constitutional Court.*

## KEYWORDS

*Constitutional Court of the Czech Republic  
European Union  
migration  
asylum  
comparative method*

## 1. Introduction

Although in its early years, the activities of the Constitutional Court were not frequent or significant in the Czech state, the Czech constitutional judiciary has a rich historical tradition. The first Constitutional Court in the Czech (then

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Czechoslovak) state was already enshrined in the 1920 Constitution.<sup>2</sup> However, during the period of the First Republic,<sup>3</sup> the Constitutional Court never received support and the supremacy was held by the Supreme Administrative Court. After the early years of the Second World War and communist dictatorship, a full-fledged constitutional judiciary returned to the Czech Republic with the establishment of an independent state.<sup>4</sup> Despite its difficult beginnings and historical period, the Constitutional Court is today an inseparable part of the Czech state that enjoys a consistently high level of support and credibility among the population.<sup>5</sup>

This article focuses on the position of the Czech Constitutional Court in relation to asylum and migration policies and its influence by European Union (EU) legislation, particularly whether the Czech Constitutional Court considers asylum and migration issues as part of the Czech constitutional identity, which the EU should not interfere with in any way. Next, it presents the basic jurisprudence of the Constitutional Court on these issues. Finally, it examines the comparative interpretation and its use in the jurisprudence of the Czech Constitutional Court.

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## 2. General Provisions of the Constitutional Court of the Czech Republic

The position of the Constitutional Court of the Czech Republic is regulated primarily by two legal provisions – the Constitution of the Czech Republic<sup>6</sup> and Act No. 182/1993 Coll., on the Constitutional Court.

### | 2.1. Constitution of the Czech Republic

Provisions regulating the position of the Constitutional Court are found primarily in its Title Four regulating judicial power, specifically in Articles 83–89. According to Article 81, independent courts exercise judicial power on behalf of the Republic. Under Article 83, the Constitutional Court is a judicial organ for the protection of constitutionality. Although fundamental rights and freedoms are under the protection of the judicial power (Article 4), which is exercised on behalf of the Republic by independent courts (Article 81) – all courts in the Czech

2 | Constitutional Charter of the Czechoslovak Republic of 29 February 1920, No. 121/1920 Coll.

3 | The period of the First Republic in the history of the Czech (then Czechoslovak) Republic was 1918–1938.

4 | For the history of constitutional justice in the Czech Republic, see e.g. Langášek, 2011, p. 319; Krejčí, 1948, pp. 121 et seq.; Blahož, 1995, pp. 419 et seq.

5 | The Constitutional Court has long been ranked in public opinion polls as the most trusted state institution in the Czech Republic – cf. *Největší důvěru mají Češi dlouhodobě v Ústavní soud, BIS věří méně než polovina*, 2021.

The current Justice Minister stated in a recent interview that he considers the Constitutional Court 'the most powerful public authority in the country'. Blažek, 2023.

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

Republic<sup>7</sup> – only the Constitutional Court has the status of a special body (court) for the protection of constitutionality, which deals with the control of constitutionality and performs certain other decision-making functions of constitutional importance.<sup>8</sup> It is clear from the composition of Title Four of the Constitution that the Constitutional Court is not part of the system of courts under Article 91; that is, it is separate from the system of courts for civil, criminal, and administrative matters (which it repeatedly states in its decisions).<sup>9</sup> The Constitutional Court, the only state body of its type in the Czech Republic, is an application of a model of concentrated and specialised constitutional justice.

Although the Constitutional Court is not part of the system of civil, criminal, and administrative courts, it belongs to the judiciary in terms of the classical separation of powers; nevertheless, it occupies a special, autonomous, and, to some extent, superior position within it. It is entitled to review their decisions (including those of the Supreme Court and the Supreme Administrative Court), however, only from the constitutionality perspective and, particularly, compliance with constitutionally guaranteed procedural rules. In its rulings, the Constitutional Court promotes the idea of minimising interference in the decision-making of courts (and public authorities in general) or emphasises the principle of subsidiarity in its decision-making.<sup>10</sup>

Article 87 of the Constitution of the Czech Republic contains an exhaustive list of proceedings in which the Constitutional Court decides. Article 87(1) states: a) repeal of laws or their individual provisions; b) repeal of other legislation or individual provisions thereof; c) constitutional complaints by local authorities against unlawful state intervention; d) constitutional complaints against final decisions and other interference by public authorities with constitutionally guaranteed fundamental rights and freedoms; e) an appeal against a decision on the verification of the election of a deputy or senator, doubts about the loss of eligibility and the incompatibility of the performance of the duties of a deputy or senator under Article 25; f) a constitutional action by the Senate against the president of the Republic under Article 65(2); g) a motion by the president of the Republic to annul a resolution of the Chamber of Deputies and the Senate under Article 66; h) measures necessary for the implementation of a decision of an international court which is binding on the Czech Republic, if it cannot be implemented otherwise; i) whether a

7 | The system of courts of the Czech Republic is regulated by Article 91(1) of the Constitution, according to which 'The system of courts consists of the Supreme Court, the Supreme Administrative Court, supreme, regional and district courts'.

8 | Sládeček et al., 2016, pp. 909–910.

9 | E.g. Resolution of the Constitutional Court of 24 November 2015, Case No. II.ÚS 2711/15, Paragraph 11, Resolution of the Constitutional Court of 25 February 2016, Case No. I.ÚS 1897/15, Paragraph 11, ruling of the Constitutional Court of 23 February 2021, Case No. IV.ÚS 2732/20, Paragraph 14.

10 | In this respect, cf. e.g. the Constitutional Court's ruling of 25 September 1997, Case No. III ÚS 148/97, the Constitutional Court's ruling of 4 June 1998, Case No. III ÚS 142/98, the Constitutional Court's ruling of 7 February 2001, Case No. II ÚS 158/99. Logically, this thesis appears in the vast majority of refusal resolutions – cf. e.g. the Constitutional Court's resolution of 26 May 2015, Case No. IV ÚS 3583/14 and the Constitutional Court's resolution of 3 June 2015, Case No. IV ÚS 1213/15.

decision to dissolve a political party or any other decision concerning the activities of a political party is in conformity with the Constitution or other laws; j) disputes concerning the scope of competences of state authorities and bodies of territorial self-government, if they do not fall within the competence of another authority under the law.

Pursuant to Article 87(2) of the Constitution, the Constitutional Court also decides on the compatibility of an international treaty under Articles 10a and 49 with the constitutional order prior to its ratification. Pending the decision of the Constitutional Court, the treaty cannot be ratified.

Article 84 of the Constitution determines the composition of the Constitutional Court, which comprises 15 judges appointed for a period of ten years. They are appointed by the president of the Republic with the consent of the Senate. A citizen of suitable character who is eligible for election to the Senate, has a university degree in law, and has been engaged in the legal profession for at least 10 years may be appointed as a judge of the Constitutional Court.

## | 2.2. *Constitutional Court Act*

The position of the Constitutional Court is regulated primarily by the Constitution and Constitutional Court Act. This Act primarily implements the basic provisions of the Constitution and the following section presents only the most important facts.

The Act specifies the composition of the court. The Constitutional Court, comprising 15 judges, has a president and two vice presidents.<sup>11</sup> The president represents the Constitutional Court externally, administers the Constitutional Court, convenes meetings of the full court, sets the agenda for its deliberations, directs its proceedings, appoints presidents of the Chambers, and performs other tasks assigned by the law. He is represented by his or her vice president, who may, with the consent of the plenary of the Constitutional Court, perform certain tasks assigned to them by the president.<sup>12</sup>

Further, the Act specifies the manner in which the Constitutional Court decides, either in plenary<sup>13</sup> or in individual chambers.<sup>14</sup> The plenary chamber comprises all judges. Unless otherwise provided by law, the plenary session may act and deliberate if at least ten judges are present. In the plenary session, the Constitutional Court decides on the most important proceedings such as the repeal of laws, the Senate's constitutional action against the president of the Republic, or whether a decision to dissolve a political party or another decision concerning the activities of a political party conforms to the Constitution or other laws. The Constitutional Court also rules over four three-member chambers. Individual

11 | Paragraph 2 of the Act.

12 | Paragraph 3 of the Act.

13 | Paragraphs 11–14 of the Act. It should be noted that the Constitutional Court may, by its own decision pursuant to Section Paragraph 11(2)(k) of the Constitutional Court Act, decides on the so-called attraction of other decision-making by the plenary.

14 | Paragraphs 15–24 of the Act.

chambers primarily decide on individual constitutional complaints;<sup>15</sup> therefore, most decision-making activities occur in these chambers.

The Constitutional Court decides in the form of rulings or resolutions.<sup>16</sup> It decides on the merits of the case by way of ruling and on other matters by way of resolution. In the vast majority of cases, it does not decide on the merits. Most of its work comprises individual constitutional complaints, which it rejects in approximately 90%<sup>17</sup> of cases for one of the reasons provided for in the Constitutional Court Act.<sup>18</sup> In the remaining cases, it decides on the merits, either by ruling in favour or rejecting the complaint.

### 3. General comments on the review of European law by the Czech Constitutional Court

#### | 3.1. Case Sugar quotas

The relationship between EU law and the constitutional order<sup>19</sup> (or the constitutional limits of the effect of European law in the Czech legal system) was first defined by the Constitutional Court in its ruling of 8 March 2006 Pl. ÚS 50/04, which is better known in the Czech Republic as ‘Sugar Quotas’. In this ruling, the Constitutional Court assessed the compatibility of several provisions of the government regulation on the establishment of certain conditions for the implementation of measures of the common organisation of markets in the sugar sector with

15 | The procedure for individual constitutional complaints is regulated by Article 87(1) (d) of the Constitution, according to which the Constitutional Court decides on constitutional complaints against final decisions and other interference by public authorities with constitutionally guaranteed fundamental rights and freedoms. This procedure is further specified in Sections 72 to 84 of the Constitutional Court Act.

16 | Paragraph 54 of the Act.

17 | Statistical data on the decision-making activity of the Constitutional Court [Online]. Available at: <https://www.usoud.cz/statistika> (Accessed: 7 November 2023).

18 | § 43 of the Act, according to which the Constitutional Court rejects the petition:

- if the petitioner has not remedied the defects in the petition within the time limit set for that purpose, or
- if the petition is filed after the time limit set for its submission by this Act, or
- if the application is filed by someone manifestly not entitled to file it; or
- if the application is one which the Constitutional Court does not have jurisdiction to hear; or
- if the application is inadmissible, unless otherwise provided for in this Act, or
- if the application is manifestly unfounded.

19 | The concept of constitutional order is a specific concept of the Czech legal order. This concept is enshrined primarily in Article 112 of the Constitution and means the unenclosed set of all valid constitutional laws which together constitute the Constitution of the Czech Republic in a broader sense. Therefore, this term expresses that in addition to the Constitution of the Czech Republic, other constitutional laws in the legal order of the Czech Republic stand alongside the Constitution and together with it constitute the Constitution in the broader sense. Pavlíček et al., 2015, p. 332.

the constitutional order. Here, the Constitutional Court adopted an open approach in principle in relation to EU law, limiting the effect of EU law, particularly through the principle of primacy and direct effect, based on the delegation of powers (referring to the similar practice of other national supreme courts) as follows:

Article 10a,<sup>20</sup> which was inserted into the Constitution by Constitutional Act No. 395/2001 Coll. (the so-called Euronovella of the Constitution), is a provision allowing the transfer of certain powers of the Czech Republic's authorities to an international organisation or institution, i.e. primarily the EU and its institutions. At the moment when the Treaty establishing the EC, as amended and as amended by the Accession Treaty, became binding on the Czech Republic, the powers of national authorities which, under primary EC law, are exercised by the EC institutions were transferred to those institutions.

In other words, at the moment of the Czech Republic's accession to the EC, the transfer of these powers was implemented by the Czech Republic granting these powers to the EC institutions. The scope of these powers exercised by the EC institutions then limited the powers of all competent national authorities, regardless of whether they are normative or individual decision-making powers.

However, according to the Constitutional Court, this grant of part of the powers is a conditional grant, since the original holder of sovereignty and the resulting powers remains the Czech Republic, whose sovereignty continues to be constituted by Article 1(1) of the Constitution of the Czech Republic, according to which the Czech Republic is a sovereign, unitary and democratic state governed by the rule of law based on respect for the rights and freedoms of man and the citizen. According to the Constitutional Court, the conditionality of the delegation of these powers is manifested at two levels: at the formal level and at the material level. The first of these planes concerns the very attributes of state sovereignty, while the second plane concerns the substantive components of the exercise of state power. In other words, the delegation of a part of the powers of national authorities can last as long as these powers are exercised by the EC authorities in a manner compatible with the preservation of the foundations of the state sovereignty of the Czech Republic and in a manner that does not threaten the very essence of the substantive rule of law. If one of these conditions for the implementation of the transfer of powers is not fulfilled, i.e. if the developments in the EC or the EU threaten the very essence of the state sovereignty of the Czech Republic or the essential elements of the democratic rule of law, it would be necessary to insist that these powers be reassumed by the national authorities of the Czech Republic, while it is true that the Constitutional Court is called upon to protect constitutionality (Article 83 of the Constitution of the Czech Republic). The above applies in the formal dimension within the framework of the current constitutional regulation. As far as

20 | Article 10a of the Constitution:

- (1) An international treaty may delegate certain powers of the authorities of the Czech Republic to an international organisation or institution.
- (2) The ratification of an international treaty referred to in subsection (1) requires the consent of Parliament, unless a constitutional law provides that ratification requires the consent of a referendum.

the essential elements of a democratic state governed by the rule of law are concerned, these, according to Article 9(2) of the Constitution of the Czech Republic, lie even beyond the disposal of the Constitution itself.

Therefore, the Constitutional Court conditions the transfer of powers on two correctives: formal and material. The formal corrective limits the transfer of powers to its compatibility 'with the preservation of the foundations of the state sovereignty of the Czech Republic'. In this respect, the formal aspect is linked to Article 1(1) of the Constitution. The substantive aspect concerns the manner in which delegated powers are exercised, which must not jeopardise 'the very essence of the substantive rule of law'. This limitation is based on Article 9(2).<sup>21</sup> The material limits of the delegation of powers are even, as the Constitutional Court has indicated, 'beyond the disposal of the constitution-maker himself.' Thus, the Constitutional Court appeared to accept the primacy of EU law, even over the provisions of the constitutional order, only with the exceptions formulated above.<sup>22</sup>

The following paragraph of the ruling is also important, according to which:

if, therefore, the exercise of delegated powers by the EC institutions were implemented in a manner regressive to the existing notion of the essential elements of a democratic state governed by the rule of law, this would be an implementation contrary to the constitutional order of the Czech Republic, which would require the re-assumption of these powers by the national authorities of the Czech Republic.

In the paragraph, the Constitutional Court for the first time expressed its view on the delegation of powers to the EC institutions, which has since been referred to in the Czech Republic as 'as long as'. The Constitutional Court has thus clearly followed the case law of the German Federal Constitutional Court,<sup>23</sup> which had previously reserved the right to assess whether the development of European law is compatible with the democratic requirements of the Federal Republic of Germany.<sup>24</sup>

### | 3.2. Case Euro Warrant

The Constitutional Court's ruling of 3 May 2006 Pl. ÚS 66/04, which is known in the Czech Republic as 'Euro Warrant' and in which the Constitutional Court dealt with the provisions of the Criminal Procedure Code which introduced the European Arrest Warrant<sup>25</sup> from EU law into the Czech legal system, issued shortly after the ruling in the sugar quota case, reinforces the general conclusions of this

21 | Article 9(2) of the Constitution: alteration of the essential elements of a democratic state governed by the rule of law is inadmissible.

22 | Bobek et al., 2022, pp. 136–137.

23 | Solange I, BVerfGE 37, pp. 271 et seq.; Solange II, BVerfGE 73, pp. 399 et seq.; Vielleicht, BVerfGE 52, pp. 187 et seq.; Eurocontrol, BVerfGE 58, pp. 1 et seq.

24 | Pavlíček et al., 2015, pp. 1108–1009.

25 | 2002/584/JHA: Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States – Statements made by certain Member States on the adoption of the Framework Decision.

initial ruling. This speaks of the exclusion of the review of individual norms of community law unless developments in the EU threaten the material core of the Constitution. Moreover, the ruling emphasises that this was an exceptional and highly unlikely situation.<sup>26</sup>

But as Bobek points out,<sup>27</sup> despite the rhetoric to the contrary,<sup>28</sup> the Constitutional Court is willing to consider the constitutionality of a particular EU act if it is challenged to be contrary to the essential elements of the democratic rule of law; that is, it is not necessary that developments in the EU threaten those essential elements; it is sufficient that one particular EU norm violates them.

At a subsequent point in the ruling, the Constitutional Court recalled in what respect its review jurisdiction is limited in relation to the legislation adopted to implement EU law. Where,

the delegation of power does not give the Member State any discretion as to the choice of means, i.e. where Czech legislation reflects a binding norm of European law, the doctrine of the primacy of Community law does not, in principle, allow the Constitutional Court to review such a Czech norm in terms of its conformity with the constitutional order of the Czech Republic, subject, however, to the exception set out in paragraph 53.<sup>29</sup>

### | 3.3. Case Treaty of Lisbon I

The above conclusions were not changed in principle by the ruling of the Constitutional Court in the case of the first review of the Lisbon Treaty — the ruling of the Constitutional Court of 26 November 2008, Pl. ÚS 19/08. In this decision, the Constitutional Court reviewed the compliance of the Lisbon Treaty with the entire constitutional order and not only with the limited standard of Sugar Quota Case. However, this fact could not affect the question of the primacy of EU law in the Czech Republic, because, as the Constitutional Court stated:

EU law, which has been applied as an autonomous legal order alongside the legal order of the Czech Republic since [the Czech Republic's accession to the EU] on the basis of Article 10a of the Constitution, [...] bases (its) priority application only on the existence of valid and effective norms, which the provisions of the Lisbon Treaty are not yet.<sup>30</sup>

This key fact needs to be emphasised here. There is clearly a difference between reviewing an effective international law obligation on the basis of a transfer of competence under Article 10a of the Constitution, the provisions of

26 | Paragraph 53 of the ruling.

27 | Bobek et al., 2022, pp. 137–138.

28 | In this regard, cf. paragraph 53 of the ruling, in which the Constitutional Court referred to a passage of the Sugar Quotas ruling in which it ruled out a review of individual norms of Community law in terms of their compatibility with the Czech constitutional order in the event that developments in the EU do not threaten the essential elements of the Czech Republic.

29 | Paragraph 54 of the ruling.

30 | Paragraph 90 of the ruling.

which are given priority and direct effect (as the Constitutional Court recognised in Sugar Quotas), and an unratified international treaty (such as the Lisbon Treaty at the time of the Constitutional Court’s decision), which in itself cannot even have the quality of an obligation within the meaning of Article 1(2) of the Constitution and through which, of course, no delegation of powers under Article 10a of the Constitution has yet occurred. In this respect, the standard applied by the Constitutional Court to the preliminary review of the Lisbon Treaty is, therefore, not transferable to the review of the constitutionality of valid and effective EU rules, which should continue to be guided by the principles set out in the Sugar Quota and Euro Warrant judgements. However, this does not imply that the Constitutional Court’s Lisbon I ruling is not relevant to these issues, not least because the Constitutional Court addressed the question of control over the exercise of delegated powers.<sup>31</sup>

Moreover, passages in this award could potentially affect the application of the Sugar Quota Standard. Certainly, the more detailed definition of the content of the concept of ‘essential elements of a democratic state governed by the rule of law’ may facilitate the application of the material focus criterion of the Constitution in the future when reviewing the constitutionality of EU law. Although the Constitutional Court refused to provide any exhaustive list of what constitutes the essential elements of a democratic state governed by the rule of law, it did state, among other examples, that:

the guiding principle is undoubtedly the principle of inalienable, non-transferable, non-excludable and irrevocable fundamental rights and freedoms of individuals, equal in dignity and rights; to protect them, a system is built on the principles of democracy, the sovereignty of the people, the separation of powers, respecting in particular the aforementioned material concept of the rule of law.<sup>32</sup>

However, the Constitutional Court emphasised that the more detailed content of the essential elements of a democratic state governed by the rule of law, which is usually of a general nature, is, in specific cases, the result of the interpretation of the authorities applying the Constitution.<sup>33</sup>

### | 3.4. Case *Holubec*

In relation to EU law, the Czech Constitutional Court was the first constitutional court of a Member State to defy the Court of Justice and describe its decision as *ultra vires*, which did not have an effect in the Czech Republic. This happened in the *Holubec* case – Constitutional Court ruling of 31 January 2012, Pl. ÚS 5/12. The significance of the *Holubec* ruling for the relationship between Czech Republic and EU law and the constitutional anchorage of the Czech Republic in the EU is marginal. Subsequent developments confirm that this ruling represents a peculiar and excessive ‘fencing in’ of the Constitutional Court’s jurisprudence, having

31 | Bobek et al., 2022, pp. 139–140.

32 | Paragraph 93 of the ruling.

33 | *Ibid.*

its origins in the political and judicial circumstances of the Czech Republic rather than being a well-thought-out and future-proof contribution shaping the Constitutional Court's position on EU law.

Moreover, the Holubec case materialised a several-year dispute between the Constitutional Court and the Supreme Administrative Court regarding how pensions will be paid after the breakup of Czechoslovakia to citizens who previously worked (at least partially) for employers from another state. This question was regulated by an international treaty concluded with the dissolution of the federation between the Czech and Slovak Republics.<sup>34</sup> Under this treaty, pensions were always to be paid to Czech and Slovak citizens by the state in which the citizen's employer was established on the date of the division of the federation or before that date (if the citizen was no longer working at the time of the division of the federation).<sup>35</sup> In the 1990s, the Slovak koruna was weaker than the Czech koruna. Pension indexation was sporadic in Slovakia, in contrast to the Czech Republic. Both led to the fact that Czech citizens who used to work for Slovak employers often had significantly lower pensions than their neighbours or friends who worked for Czech employers. Soon after, the complainants challenged the system as discriminatory. In a series of judgements, the Constitutional Court repeatedly held<sup>36</sup> that the provision in question violated Article 30 of the Charter of Fundamental Rights and Freedoms, which regulates the right to material security in old age.<sup>37</sup> Therefore, the citizens concerned should be entitled to a compensatory allowance from the Czech State to compensate for their disadvantages. Thus, citizens of the Czech Republic could ask the social security administration to pay them the difference between their 'Slovak' pension and the pension to which they would be entitled if the Czech pension scheme was applied to them.

The administrative courts in the Czech Republic have disagreed with this case law of the Constitutional Court, and the Supreme Administrative Court itself, as the highest judicial body of administrative justice in the Czech Republic,<sup>38</sup> has led this resistance to the Constitutional Court. After several years of argumentation through mutually disagreeing court decisions, this grew into a personal dispute between judges of the Supreme Administrative Court and those of the

34 | Treaty between the Czech Republic and the Slovak Republic concluded on 29 October 1992 within the framework of measures intended to resolve the situation following the division of the Czech and Slovak Federative Republic on 31 December 1992 (promulgated under No 228/1993 Coll.).

35 | Cf. particularly Article 20 of the treaty in question.

36 | The first was the ruling of the Constitutional Court of 3 June 2003, Case No. II ÚS 405/02, Slovak Pensions I.

37 | Article 30(1) of the Charter of Fundamental Rights and Freedoms: 'Citizens have the right to adequate material security in old age and in the event of incapacity for work, as well as in the event of the loss of a breadwinner.'

38 | Paragraph 12(1) of the Administrative Procedure Act: The Supreme Administrative Court, as the supreme judicial authority in matters falling within the jurisdiction of the courts in the administrative justice system, shall ensure uniformity and legality of decision-making by deciding on cassation complaints in cases provided for by this Act and by deciding in other cases provided for by this Act or by special law.

Constitutional Court.<sup>39</sup> As the Supreme Administrative Court could not win this fight, it decided to involve the Court of Justice in this confrontation with the top Czech courts, in the Landtová case.<sup>40</sup> In that case, the Supreme Administrative Court asked the Court of Justice whether the case law of the Constitutional Court and the resulting preferential treatment of Czech nationals were compatible with Regulation No. 1408/71 coordinating social security systems, particularly, with the principle of equal treatment set out in Article 3(1) of that regulation and with the requirement of non-discrimination on grounds of nationality prohibited by EU law. The Court of Justice determined that the mere existence of the old-age allowance, as established by the Constitutional Court, does not infringe on EU law.<sup>41</sup> However, the fact that the case law of the Constitutional Court allowed payment of this allowance only to persons of Czech nationality, and residents in the Czech Republic were contrary to EU law.<sup>42</sup>

After receiving the Court's reply, the Supreme Administrative Court decided<sup>43</sup> that the rule established by the Constitutional Court would not apply, owing to its conflict with EU law, to the assessment of all claims for benefits arising from the date of the Czech Republic's accession to the EU (when Regulation No 1408/71 was applied). However, the Supreme Administrative Court also acknowledged that the Constitutional Court, as the supreme guardian of constitutionality, is entitled to declare that it maintains its case law despite the judgement of the Court of Justice, which would imply concluding, as in the Sugar Quota case law, that the powers delegated to the EU have been exceeded.

The Constitutional Court did not evaluate the implications of the Landtová case. Instead, it returned the blow with vengeance. This was done by means of another parallel constitutional complaint concerning Slovak pensions, specifically brought by Mr Holubec, who also did not ask the Court of Justice for a preliminary ruling, as EU law requires it to do in such a case. Instead, it described the Court's decision in Landtová as an *ultra vires* act. The Constitutional Court specifically faulted the Court for not considering the history of the Czechoslovak Federation and the circumstances of its division. Thus, the Constitutional Court applied Regulation No. 1408/71 to a situation which does not have a cross-border element since it relates to the situation of nationals of the formerly unitary state. The Constitutional Court emphasised:

not to distinguish between the legal situation resulting from the break-up of a State with a unified social security system and the legal situation resulting from the free movement of persons in the European Communities or the European Union in the field of social security is to disregard European history and to compare incomparable situations.

39 | This culminated in the Constitutional Court's ruling of 3 August 2010, Case No. III ÚS 939/10, Slovak Pensions XV, in which the Constitutional Court stated that 'disobedient' judges of the Supreme Administrative Court should face disciplinary proceedings.

40 | Judgement of 22 June 2011, Landt, C-399/09, EU:C:2011:415.

41 | Paragraphs 31–40 of the judgement.

42 | Paragraphs 41–49 of the judgement.

43 | Judgement of the Supreme Administrative Court of 25 August 2011, No. 3 Ads 130/2008-204.

Thus, in the Constitutional Court's opinion, the Court of Justice acted *ultra vires* when, by applying Regulation No. 1408/71, it departed from the powers which the Czech Republic had delegated to the EU under Article 10a of the Constitution.

The Constitutional Court's ruling in Holubec must be evaluated considering extra-legal facts, rather than sophisticated legal reasoning. The real reasons for the position of the Constitutional Court are not found in the unconvincing argument about the absence of a foreign element and the impossibility of applying the regulation but rather in the personal prejudice of the judges of the Constitutional Court by the procedure of the Supreme Administrative Court, which, through the Court, was settling accounts in a domestic jurisprudential skirmish.<sup>44</sup> The Czech government's adherence to the opinion of the Supreme Administrative Court, and the 'insensitive' rhetoric of the Court in the Landtová case and its refusal to deal with the Constitutional Court's opinion appears to have only increased the frustration that was subsequently reflected in the ruling of the full Constitutional Court.

### | 3.5. After the Holubec case

In the case law of the Constitutional Court issued after the Holubec ruling, either immediately or in the long-term, it is not possible to identify a decision that would subscribe to this ruling, at least as far as its anti-EU argumentation is concerned. Contrarily, 'pro-EU' rulings following the line of the Sugar Quotas began to reappear in the case law of the Constitutional Court, almost as if the Holubec ruling had never even been issued.<sup>45</sup>

This trend has been confirmed in other decisions of the Constitutional Court, for example, when the Constitutional Court (again) stated that 'only the Court of Justice gives a binding interpretation of EU law'<sup>46</sup> and that the Constitutional Court is also obliged, if the interpretation of EU law is not clear within the meaning of the CILFIT judgement, to refer a preliminary question to the Court of Justice.<sup>47</sup> Can thus be summarized that the Constitutional Court has consistently maintained a friendly approach to EU law, which operates within the Czech legal system directly based on powers delegated to the EU under Article 10a of the Constitution. The Constitutional Court has assumed the position of a kind of 'watchdog', reserving to itself the final word in cases where the boundaries entrusted to the European Union and its law are abandoned. Against this background, the Holubec case cannot be regarded as a relevant precedent. Rather, it is an aberration caused by personal disputes and extra-legal circumstances which the Constitutional Court did not follow. Contrarily, in other decisions issued in recent years, the Constitutional Court has demonstrated a friendly and pro-EU face.<sup>48</sup>

44 | Kosař and Vyhnánek, 2018, pp. 854–872.

45 | Bobek et al., 2022, p. 150.

46 | The Constitutional Court's ruling of 3 November 2020, Pl. ÚS 10/17, Paragraph 53.

47 | The Constitutional Court's ruling of 7 April 2020, Pl. ÚS 30/16, Paragraph 159.

48 | Bobek et al., 2022, p. 151.

## 4. The position of the Czech Constitutional Court in relation to asylum and migration policy and its influence on EU legislation

This article examines whether the Czech Constitutional Court has connected the issues of migration and asylum to the issue of constitutional identity. In the European legal area, the concept of constitutional identity has been invoked, particularly in the context of the Lisbon Treaty, which enshrined the obligation to respect national (and within that framework, constitutional) identity in Article 4 (2) of the Treaty on European Union. This Article defines national identity as a basic political and constitutional system that includes local and regional governments. In the Czech legal environment, the notion of constitutional identity has been addressed primarily by Kosař and Vyhnaněk, who identified three possible conceptions of Czech constitutional identity: (1) a narrow version of 'legal' constitutional identity that corresponds to the Czech eternity clause as interpreted by the Constitutional Court, (2) a broader version of 'legal' constitutional identity based on the material focus of the constitution that goes beyond the Czech eternity clause in many aspects, and (3) a 'popular' constitutional identity that relies primarily on traditional narratives concerning formative events in the history of Czech statehood as perceived by Czech citizens and their elected representatives.<sup>49</sup>

The Czech Constitutional Court has not yet dealt with the relationship between the competencies of the EU and the Czech Republic in the areas of migration and asylum. The most significant comment on this issue was made by the Constitutional Court in its second ruling, which assessed the compatibility of the Lisbon Treaty with the Czech constitutional order.<sup>50</sup> Here, a group of Senators sought to assess the compatibility of the Lisbon Treaty as a whole and its selected provisions with the Czech constitutional order. The Constitutional Court concluded that the Lisbon Treaty and its ratification were in accordance with the Czech constitutional order, thus allowing for ratification by the president of the Republic.

In these proceedings, a group of senators challenged the compatibility of selected provisions of the 'Treaty of Rome' (i.e. the TFEU): Articles 78(3) and 79(1) [with the constitutional order].<sup>51</sup> According to them, these provisions imply that the Czech Republic will no longer always decide the composition and number of refugees in its territory. Thus, the EU will obtain the power to participate in

49 | Kosař and Vyhnaněk, 2018, p. 855.

50 | The Constitutional Court's ruling of 3 November 2009, Pl. ÚS 29/09.

51 | Article 78(3) of the TFEU: Where one or more Member States are in a state of emergency resulting from a sudden influx of third-country nationals, the Council, acting on a proposal from the Commission, may adopt temporary measures in favour of the Member States concerned. The Council decides after consulting the European Parliament.

Article 79(1) of the TFEU: the Union shall develop a common immigration policy aimed at ensuring at all stages the effective management of migration flows, fair treatment of third-country nationals legally residing in the Member States, and the prevention and strengthening of the fight against illegal immigration and trafficking in human beings.

decisions which may have a significant impact on the composition of the Czech population and its cultural and social character. This contradicts the principle that is enshrined in Articles 1(1) and 10a of the Constitution – powers relating to decision-making in matters of exceptional cultural or social impact are not transferable and must always remain entirely within the competence of the Czech Republic's institutions. Their transfer to an international organisation or institution would be contrary to the characteristics of the Czech Republic as a sovereign state. Additionally, the senators argued that these provisions of the TFEU only vaguely defined the conditions under which the EU Council may act. Therefore, Article 78(3) of the TFEU also contravenes the principles of reasonable generality and, consequently, of sufficient clarity of the legal provision. Consequently, it is contrary to the principle of legal certainty as a prerequisite for the existence of the rule of law.<sup>52</sup>

The Constitutional Court did not share the concerns of the group of senators, indicating only briefly that Articles 78(3) and 79(1) of the TFEU essentially represent a transposition of the existing Article 64(2) of the Treaty establishing the European Community, with the change brought about by the Lisbon Treaty, which comprises strengthening the participation of the European Parliament in EU decisions. Furthermore, Article 79(5) of the TFEU explicitly grants Member States the right to determine the volume of entries of third-country nationals entering their territory to seek work or engage in business, so that the Lisbon Treaty instead leaves the regulatory mechanism for the movement of third-country nationals to Member States. Therefore, the contested provisions constitute a specific form of common regulation through temporary measures in the event of a sudden influx of asylum seekers. The Constitutional Court regards the specification of that mechanism as a largely political question, which is primarily a matter for the government which negotiated the treaty and the chambers of parliament which agreed to its ratification. The Constitutional Court considers such an arrangement permissible under Article 10a of the Constitution and not contrary to the constitutional order.<sup>53</sup>

No other decision in which the Constitutional Court dealt with the regulation of migration by the EU and possible interference with the constitutional identity of the Czech Republic was issued in the Czech Republic. Although the Czech Republic has been a rather harsh critic of European migration quotas, particularly under the government of Prime Minister Andrej Babiš, and the Court of Justice<sup>54</sup> has found in one of its judgements that the Czech Republic has not fulfilled its obligations under EU law by refusing to comply with the temporary mechanism for relocating applicants for international protection, no other case of this nature has yet reached the Constitutional Court.

52 | Paragraphs 19–20 of the ruling.

53 | Paragraph 154 of the ruling.

54 | Judgement in Joined Cases C-715/17, C-718/17 and C-719/17 *Commission v. Poland, Hungary and Czech Republic*, of 2 April 2020, ECLI:EU:C:2020:257.

## 5. Other key decisions of the Czech Constitutional Court on migration and asylum issues

It is difficult to select representative cases regarding the individual key decisions of the Czech Constitutional Court on migration and asylum. The Czech Constitutional Court does not often comment on these areas; moreover, individual decisions do not represent any overall treatise in these areas, however, are connected either with an individual constitutional complaint of foreigners or asylum seekers or concern the abolition of a statutory provision, typically from the Asylum Act<sup>55</sup> or the Act on the Residence of Foreigners on the Territory of the Czech Republic.<sup>56</sup>

The above conclusions can be summarised on statistical grounds. The case law of the Constitutional Court searched on the official search engine using the keyword 'migration' yielded only 36 results. Of these, 26 were complaints made by natural persons. In these proceedings, 21 cases resulted in the rejection of the constitutional complaint, mostly for a manifest lack of merit, and a smaller number for inadmissibility. The rejection of a constitutional complaint meant that the Constitutional Court did not deal with the substantive assessment of the case.

However, the keyword asylum yielded 325 results. Considering the 30-year existence of the Constitutional Court, this is not a high number, and the vast majority of cases are individual constitutional complaints of individual asylum seekers, in which the Constitutional Court typically focuses on the specific case at hand and its facts without stating any general conclusion.

### 5.1. *Effective control of migration can be a legitimate objective of the adopted legislation*

The Constitutional Court has concluded that the legitimate aim of certain adopted legislations is the effective control of migration in the Czech Republic. It reached this conclusion in a ruling assessing the compatibility of several amended provisions of the Asylum Act with a constitutional order.<sup>57</sup> Specifically, the Constitutional Court stated:

52. The framework thus constructed was to examine first whether the impugned provision pursued a specific (and defensible) legitimate aim. In the light of the sources outlined above, the legitimate aim here was to be the effective control of migration (cf., for example, the judgment of the European Court of Human Rights of 14 June 2011 in *Osman v. Denmark*, Application No. 38058/09, § 58). Particular regard was paid to the prevention of illegal stays of foreigners and to the increased efficiency of the administrative procedure, since the subsequent departure of a foreigner without a residence

55 | Act No. 325/1999 Coll., on Asylum.

56 | Act No. 326/1999 Coll., on the Residence of Foreigners in the Territory of the Czech Republic.

57 | The Constitutional Court's ruling of 27 November 2018, Pl. ÚS 41/17.

permit from the territory of the State rendered the continuation of the residence permit procedure meaningless, according to the legislator. The Minister of the Interior, in his comments on the proposal, emphasised that a number of foreigners abuse the application for a temporary or permanent residence permit to temporarily legalise their stay in the territory of the Czech Republic or to avert imminent deportation without a real family relationship with a citizen of the Czech Republic. The contested provision is intended to prevent this purposeful practice.

57. The legitimate objectives of the contested legislation are effective control of migration and undoubtedly also compliance with the laws of the Czech Republic. However, these objectives are pursued by means of a procedural device (the institution of the stay of proceedings) which absolutizes the public interest and ignores the individual interest. The expulsion of a foreign national of a Czech citizen is carried out while denying him or her the right to enjoy the fundamental rights and freedoms guaranteed by the Charter on the territory of the State (Article 42(2)). If such an applicant for a residence permit wishes to assert his or her right after the termination of the proceedings on his or her application, he or she has no choice but to re-enter the Czech Republic and resubmit the application. If the case-law in the case of restrictions on the right of access to a court postulates the way of weighing values and principles in the search for a reasonable balance between the means employed and the aim of the legal regulation (paragraph 47), it is not possible to find that this requirement is met in the given situation.

Although the Constitutional Court struck down the contested provision of the law because several provisions of the constitutional order had been violated, it also acknowledged that the legitimate aim of certain adopted legislation may be the effective control of migration in the Czech Republic. However, the Constitutional Court also weighs this legitimate aim against other fundamental rights and compares whether it is in accordance with the constitutional order and thus the fundamental rights guaranteed by it.

### **| 5.2. General views on the right to asylum and its international anchorage**

The Constitutional Court expressed its opinion on the right to asylum in its ruling of 30 January 2007, IV. ÚS 553/06. The Constitutional Court examined a constitutional complaint from a Russian citizen who had not been granted asylum in the Czech Republic. The Russian citizen sought asylum because he was allegedly subject to politically motivated criminal prosecution in his home state. However, according to the administrative authorities, and subsequently the courts, the complainant failed to prove that fact. In his constitutional complaint, the complainant alleged, *inter alia*, a violation of Article 43 of the Charter of Fundamental Rights and Freedoms, according to which 'the Czech Republic grants asylum to foreigners persecuted for exercising political rights and freedoms. Asylum may be refused to those who have acted in violation of fundamental human rights and freedoms'. The Constitutional Court stated the following regarding the constitutional enshrinement of the right to asylum in the Czech Republic.

In the Universal Declaration of Human Rights, the right to asylum is enshrined in Article 14, which reads as follows:

'Article 14

- (1) Everyone has the right to seek refuge from persecution in other countries and to enjoy asylum there.
- (2) This right shall not be invoked in cases of persecution genuinely justified by non-political crimes or acts contrary to the purposes and principles of the United Nations.'

Despite its exceptional historical and political significance, the Universal Declaration has the same legal nature as other UN General Assembly resolutions. It is a recommendation and therefore does not create obligations for States nor is it a direct source of law. It is not legally binding on national courts as it is not an international treaty. Consequently, the Universal Declaration of Human Rights cannot be effectively invoked in an application before the national courts (nor does the applicant do so). According to the publication 'Refugee Protection – A Guide to International Refugee Law' published by the United Nations High Commissioner for Refugees and the Inter-Parliamentary Union (available in English translation at <http://www.unhcr.cz/>), 'The term asylum is not defined in international law; however, it has become a unifying term for the totality of protection granted by a country to refugees on its territory. Asylum implies, at the very least, basic protection – i.e. a prohibition of forcible return (refoulement) to the borders of an area where the refugee's freedom or life could be threatened – for a temporary period, with the possibility of remaining in the host country until a solution can be found outside that country. In many countries, however, the term asylum means much more than this and includes the rights set out in the 1951 Convention and sometimes goes beyond them.' Neither the International Covenant on Civil and Political Rights nor the International Covenant on Economic, Social and Cultural Rights explicitly mention the right to asylum.

Neither the Convention nor its Protocols provide for a right to political asylum. Nor is the principle of 'non-refoulement' explicitly expressed in the Convention.

The existence of an analogy of 'non-refoulement' is only inferred from the case-law of the European Court of Human Rights ('the European Court'). However, it is a fact that, within the Council of Europe, the Parliamentary Assembly had already adopted Recommendation 293 (1961) on the right of asylum in 1961, according to which the Committee of Ministers should have included in the Second Appendix to the Convention a right to asylum from persecution, except for persecution for non-political offences, which was not done. This recommendation is also referred to by the Parliamentary Assembly of the Council of Europe in Recommendation 1236 (1994) on the right to asylum, where it states, *inter alia*, that the Council of Europe, although it has never incorporated the right to asylum into a legally binding document, has always asked its members to treat refugees and asylum seekers 'in a particularly liberal and humanitarian spirit', in full respect of the principle of 'non-refoulement'. The Parliamentary Assembly has repeatedly recommended that the Convention be amended to guarantee the right to asylum.

The right to asylum is not explicitly mentioned in the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (published by Decree No. 143/1988 Coll.).

The Geneva Convention (published by Decree No. 208/1993 Coll.), including its 1967 Protocol, does not provide for the right to asylum.

It follows from the foregoing that there is no international instrument binding the Czech Republic to accept and decide on an application for refugee status or asylum, still less to accept such an application.

The Charter of Fundamental Rights and Freedoms explicitly mentions political asylum in Article 43 (which is systematically included in Title Six – Common Provisions), which reads: 'The Czech and Slovak Federal Republic shall grant asylum to foreigners persecuted for exercising political rights and freedoms. Asylum may be refused to those who have acted in violation of fundamental human rights and freedoms'. The Constitutional Court is of the opinion that the quoted article cannot be regarded as a constitutional enshrinement of the fundamental (i.e., inalienable, non-transferable and irrevocable within the meaning of Article 1 of the Charter) right to political asylum; in other words, the right to asylum cannot be regarded as a natural human right.

However, it does not follow from the above that Article 43 of the Charter is merely proclamatory and not directly applicable (cf. Article 41(1) of the Charter), i.e. that a foreigner persecuted for exercising political rights and freedoms could only claim political asylum within the framework of a statutory regulation.

On the other hand, the right of asylum cannot be regarded as a right of entitlement; neither the Charter nor the international human rights treaties to which the Czech Republic is bound guarantee that the right of asylum must be granted to the applicant alien. A decision not to grant political asylum to an alien need not therefore be incompatible with Article 43 of the Charter.

In the present case, the Constitutional Court has found nothing to suggest that the wording of the contested decision is inconsistent with Article 43 of the Charter.

In general terms, the Constitutional Court stated four basic conclusions in this ruling:

The right to asylum cannot be considered a right of entitlement. Neither the Charter of Fundamental Rights and Freedoms nor the international human rights treaties by which the Czech Republic is bound guarantee that the right to asylum must be granted to applicants. The decision not to grant political asylum to an alien, therefore, need not be incompatible with Article 43 of the Charter of Fundamental Rights and Freedoms.

However, a constitutional complaint alleging that asylum has not been granted may be examined by the Constitutional Court considering other provisions protecting fundamental human rights and freedoms, particularly in cases where the complainant is to be subject to administrative expulsion from the Czech Republic, to the penalty of expulsion or to extradition abroad under the Criminal Procedure Code.

A decision to expel an alien asylum seeker may raise a problem in terms of Article 3 of the Convention for the Protection of Human Rights and Fundamental Freedoms (with which Article 7(2) of the Charter of Fundamental Rights and Freedoms corresponds) if there are serious and verified grounds for believing that the person concerned is exposed to a real risk of being subjected to torture or inhuman or degrading treatment or punishment.

A judicial review of the lawfulness of decisions issued by public authorities in matters of the international protection of refugees must meet the requirements of a fair trial under the relevant provisions of Title 5 of the Charter of Fundamental Rights and Freedoms.

**| 5.3. Foreigners do not have a constitutionally guaranteed fundamental right to enter and reside in the Czech Republic**

According to the constant jurisprudential conclusion of the Constitutional Court, there is no subjective, constitutionally guaranteed right of foreigners to reside in the Czech Republic or to enter it, since it is a matter of the sovereign state, what (non-discriminatory) conditions allow foreigners to reside in its territory.<sup>58,59</sup> This conclusion implies a stricter review of certain rights of foreigners, for example, when the Constitutional Court considers this conclusion when reviewing deportation sentences imposed on foreigners and their proportionality. As there is no constitutionally guaranteed right of foreigners to enter and stay in the Czech Republic, the Constitutional Court concluded that the Czech legislature had much more discretion in setting the expulsion penalty, and the Constitutional Court determined that expulsion penalties imposed on foreigners for an indefinite period (i.e. essentially for life) were in accordance with the constitutional order.<sup>60</sup> According to the Constitutional Court:

9. It is essential, first of all, that the penalty of expulsion constitutes, in terms of constitutionally guaranteed rights, a special type of punishment applied in relation to persons who do not enjoy the fundamental right to reside on the territory of the State or to enter its territory. It is thus one of the manifestations of the sovereignty of the State which, by imposing it, decides to prevent, in future, the entry into its territory of those foreign nationals for whom the legal (and, of course, constitutional and international law) conditions are met. However, the constitutional right of a foreign national convicted of a criminal offence to return to the territory of the Czech Republic after a certain period of time following expulsion (Article 14(4) of the Charter *a contrario*) This means that the state, and thus the legislator, has much greater discretion in determining the conditions for the execution of this sentence, unlike penalties that affect rights explicitly enshrined in the constitutional order. This does not relieve the courts of the obligation to consider the existence of exceptional circumstances as an exception to this rule arising from the constitutional order, which may be specific circumstances arising, for example, from the family status of the convicted person or the humanitarian and political situation in the country to which the offender has been or is to be deported. However, such circumstances must be the subject of evidence in individual court proceedings, and the legal system of the Czech Republic provides

58 | Cf. a long series of decisions of the Constitutional Court – e.g. already III.ÚS 219/04 of 23 June 2004, or the ruling of the Constitutional Court of 9 December 2008, Case No. Pl.ÚS 26/07, Point 37 with citation of other decisions.

59 | The opposite conclusion applies to citizens of the Czech Republic, who, according to Article 14(4) of the LZPS, have the right to free entry into the Czech and Slovak Federal Republic. Nor can a citizen be forced to leave his or her homeland.

60 | The Constitutional Court's ruling of 18 September 2014, Case No. III ÚS 3101/13.

for such exceptions. Therefore, although the execution of the sentence of indefinite deportation is undoubtedly an interference with the liberty of the individual within the meaning of Article 1 of the Charter, it does not constitute an unjustified interference. From the above-mentioned point of view of the protection of the dignity of the individual, it is essential that that value is not violated *a priori* by his expulsion. The increased discretion of the legislator is also logical in that the Czech Republic may have only minimal factual and legal means to assess the circumstances which might argue for the abolition of the expulsion sentence, unlike in the case of imprisonment. It is very difficult to imagine that the Czech authorities could, in certain geographical areas, carry out any effective examination of the offenders of serious criminal offences for which the penalty of indefinite expulsion is imposed, with regard to their rehabilitation or other purpose of the sentence imposed. It should be emphasized here that the focus of the assessment of the need for such a penalty may be in its imposition, since the purpose is to prevent further negative impact of the offender on the population of the State in its territory, as well as to warn other potential alien offenders that they may face such an irremovable penalty.

## 6. Comparative interpretation

In Czech legal theory, comparative interpretation is classified as one of the six methods of interpreting law. Methods of interpreting law are distinguished into standard methods and non-standard methods. Standard methods include linguistic, logical, and systematic interpretations. Non-standard methods include historical, teleological, and comparative interpretations.<sup>61</sup> Non-standard methods of interpreting law have in common that they go beyond the letter of the law and argue *e ratione legis*.<sup>62</sup> In summary, comparative interpretation involves comparing similar legal institutions in different legal systems.<sup>63</sup>

In the case law of the Czech Constitutional Court, a comparative interpretation appears occasionally. Using 'comparative' while searching for the case law of the Constitutional Court yields 124 results; 'comparative interpretation' yields 101 results. However, the lower frequency of use of this method is compensated by the fact that the Constitutional Court often uses it in its major decisions, in which it primarily comments on new or hitherto unaddressed legal issues for which it seeks inspiration in the legislation of other countries.

61 | Gerloch, 2013, p. 134.

62 | Ibid.

63 | Ibid., p. 138.

## 6.1. Examples of the use of comparative interpretation by the Constitutional Court

### 6.1.1. Essential elements of a democratic law state

For example, the Constitutional Court used the comparative method in a case law, as early as 1997.<sup>64</sup> In a ruling in which the Constitutional Court primarily assessed the imposition of fines on competitors under the Competition Protection Act, it had to comment on the content of one of the unclear legal concepts of the Czech legal system, the content of the concept of ‘essential elements of a democratic state governed by the rule of law’. Using the comparative method, it illustrated, inter alia, which facts fall under the above concept within the meaning of Articles 9(2) and (3) of the Constitution. From a comparative perspective, the Constitutional Court selected three European states which have been positively defined in their Constitutions: the Federal Republic of Germany, the Hellenic Republic, and the Portuguese Republic. The Constitutional Court stated:

From a comparative point of view, we can mention Article 79(3) of the Basic Law of the Federal Republic of Germany, which, in addition to the principle of federation, also includes under the constitutional and therefore immutable elements of the Constitution the fundamental rights and the binding of the legislature, the executive and the judiciary by these rights, as well as the principles of a democratic and social state, the sovereignty of the people, representative democracy, constitutionality and the binding of the executive and the judiciary by law and the law, and the right of resistance. Similarly, the Constitution of the Hellenic Republic, in Article 110(1), provides for the immutability of the foundations of the State, its parliamentary form, and a number of explicitly mentioned fundamental rights and freedoms. In an extensive casuistic manner, the Constitution of the Portuguese Republic, in Article 110(1), defines the fundamental rights and freedoms of the State. Article 288 of the Portuguese Constitution, which sets out, in particular, the sovereignty of the State, its unitary structure, its republican form, the separation of State and Church, the rights, freedoms and guarantees of citizens, political pluralism, the separation of powers, the protection of constitutionalism, the independence of the courts and local self-government.

### 6.1.2. Case *Melčák*

The ruling of the Constitutional Court in the *Melčák* case<sup>65</sup> is a popular example depicting the use of comparative interpretation. For the first time, the Constitutional Court addressed whether it was entitled to review constitutional laws for compliance with the constitutional order, or only ‘ordinary’ laws.<sup>66</sup> Moreover, the Constitutional Court described the immutability of the material focus

64 | The Constitutional Court’s ruling of 29 May 1997, Case No. III. ÚS 31/97.

65 | The Constitutional Court’s ruling of 10 September 2009, Case No. Pl.ÚS 27/09.

66 | Article 87(1)(a) of the Constitution states that the Constitutional Court decides to repeal laws or their individual provisions if they are contrary to the constitutional order. Therefore, the question was whether the Constitutional Court, by an expansive interpretation, would extend the interpretation of this provision and acquire the power to review constitutional laws as well.

of the Constitution in relation to its impact on Article 87(1)(a). The Constitutional Court concluded that the term 'law' used in Article 87(1)(a) should be interpreted extensively and include constitutional law; it used comparative inspiration from the Federal Republic of Germany along with the Republic of Austria, since both of these states confer on their constitutional courts the power to review constitutional laws. The Constitutional Court stated:

The drafters of the Basic Law of the Federal Republic of Germany of 1949 reacted to the German history of 1919 to 1945 by, among other things, removing the 'material focus of the constitution' from the disposition of the constitution-maker, in other words, by enshrining the 'imperative of immutability' (*Ewigkeitsklausel*). According to him, the amendment of the Basic Law concerning the fundamental principles of the federal system, the basic principles of the protection of human rights, the rule of law, the sovereignty of the people and the right to civil disobedience is inadmissible (Article 79(3) of the Basic Law). According to the doctrine and case-law of the Federal Constitutional Court, the consequence of the regulation of the inviolability of the 'material core' of the Constitution is a procedure whereby the Federal Constitutional Court would finally decide on the conflict of a 'constitutional law' with the material core of the Constitution, including the alternative of declaring the amendment to the Basic Law legally null and void. (5) The doctrinal view that it was for the Federal Constitutional Court to rule that a constitutional law amending the Basic Law in contravention of Article 79(3) of the Basic Law was invalid was established shortly after the Basic Law came into force (footnote 6) and was subsequently confirmed by the case-law of the Federal Constitutional Court itself (BVerfGE, 30, 1/24).

The Constitution of the Republic of Austria defines the procedural limitations of the constitution-maker for the area of its material focus and at the same time establishes the competence of the Constitutional Court in this respect. According to Austrian constitutional law, 'the subject of the Constitutional Court's review competence are federal and state laws, both simple and constitutional laws' (footnote 7). Article 140 of the Federal Constitution, which generally establishes the court's competence to review norms, read in conjunction with Article 44(3) of the Federal Constitution, according to which a complete revision of the Constitution, or even a partial revision if one third of the members of the National Council or the Federal Council so request, must be approved by referendum. The doctrine takes the view that it is for the Constitutional Court to assess, including by means of an *a posteriori* review of the norms, compliance with that procedure from the point of view of the constitution-modifying intervention of the constitution-maker in the 'material focus of the constitution'. He also bases his view on the legal opinion of the Austrian Constitutional Court expressed in decisions VfSlg. 11.584, 11.756, 11.827, 11.916, 11.918, 11.927 and 11.972. Drawing on the criticism of legislative practice which, by adopting constitutional laws in areas of simple law, circumvents the reviewing power of the Constitutional Court, the Court concludes that such a procedure by the constitutional legislator 'cannot aim' at breaking the fundamental principles of the Federal Constitution.

[...]

Just as in the German case Article 79(3) of the Basic Law is a reaction to the undemocratic developments and Nazi rule in the period before 1945 (and similarly Article 44(3)

of the Federal Constitution of the Austrian Republic), Article 9(2) of the Constitution is a consequence of the experience of the decline of legal culture and the trampling of fundamental rights during the forty years of Communist rule in Czechoslovakia. As a consequence of this analogy, the interpretation of Article 79(3) of the Basic Law by the Federal Constitutional Court of Germany and similar practices in other democratic countries are therefore deeply inspiring for the Constitutional Court of the Czech Republic.

*6.1.3. Anchoring the right to housing in the Czech constitutional order and the use of the comparative method also for 'non-legal' arguments*

Finally, in the recent ruling of the Constitutional Court in May this year,<sup>67</sup> the Constitutional Court dealt with the enshrinement of the right to housing in the Czech constitutional order, its nature, the absence of statutory regulation of social housing in the Czech Republic and its impact on the fundamental rights of socially disadvantaged persons. The Constitutional Court applied a rather extensive comparative passage, which was, to some extent, unconventional compared with the comparisons that it presented in its case laws in the past.

The Constitutional Court used its own comparative analysis of social housing in five European countries: France, Ireland, Germany, Spain, and Slovakia. This comparative analysis is interesting primarily because the Constitutional Court did not focus only on legal institutions (as it did in previous years – cf.). However, in the commented ruling, it did not interpret only an isolated legal institution through the comparative method but comprehensively the entire legal regulation of social housing in selected European countries, considering non-legal facts such as the volume of state investments directed to support social housing or the proportion of social housing in individual municipalities. The Constitutional Court stated:

31. The fact that countries with different systems of housing policy (unlike the Czech Republic) have been addressing the issue of housing for a long time and, above all, in an active manner, is evident from the comparative analysis of the Constitutional Court. Comparative analysis of social housing in Europe

32. For the purposes of assessing the applicants' constitutional complaint, the Constitutional Court commissioned an analysis of social housing systems in five European countries: France, Ireland, Germany, Spain and Slovakia. In doing so, it drew on the publicly available research results of the Ministry of Labour and Social Affairs, Overview of social housing systems in selected European countries and their comparison, 2018. In: Social Housing of the Ministry of Labour and Social Affairs [online]. Ministry of Labour and Social Affairs of the Czech Republic [cited 2022-01-01]. Available from: <http://socialnibydeni.mpsv.cz/cs/novinky/143-prehled-systemu-socialniho-bydleni-ve-vybranych-evropskych-zemich-a-jejich-komparace>, updated by the Constitutional Court as of November 2022. The selected countries are characterised by mutually different social housing systems, whether in terms of the concept of social housing, the breadth of the target group, the type of providers, or the way it is financed. There is their proximity to the Czech Republic's environment, and thus the potential

67 | The Constitutional Court's ruling of 25 April 2023, Case No. II. ÚS 2533/20.

applicability of the procedures to our territory. From the analysis of 22.11.2022, No. A 2022-9-DU, the following is clear.

33. In France, the Housing Development, Development and Digitalisation Act was promulgated on 23 November 2018 with the aim of building more, better and cheaper and changing the social housing system. The law regulated the system of awarding social housing and reviewing the occupancy status. It provides new social housing opportunities by making it easier to share low-cost housing. It has also made it possible to set aside rental housing from the social housing stock for young people under 30 years of age, as they are also affected by poverty. Like many other countries, France has responded to the housing needs of its citizens following the COVID-19 pandemic. In 2021, a protocol of commitment was signed between the government and social housing stakeholders to build 250,000 social housing units between 2021 and 2022. The Law on Differentiation, Decentralization, Deconcentration and Various Measures to Simplify Public Action was promulgated on 21 February 2022. This law maintains the social housing construction targets of the municipalities covered by the Solidarity and Urban Renewal Law beyond 2025. In France, municipalities will thus (still) have to have at least 20% or 25% of social housing and thus be obliged to manage a relatively significant housing stock for the poorest persons (municipalities that are late in complying with this obligation will be given more time to do so).

34. Ireland has agreed to the Government's new housing policy for Ireland to 2030. This is a multi-year housing plan with the largest ever budget in excess of €20 billion to fund it, with the aim of improving Ireland's housing system and providing more housing for people with different needs. The updated housing plan responds to emergencies, notably the war in Ukraine, the energy crisis and rising interest rates. At the same time, Ireland is taking steps to eradicate homelessness in the context of the signing of the Lisbon Declaration on a European Platform to Combat Homelessness. The Government's policy to reduce homelessness by taking a person-centred approach to enable people sleeping rough or in long-term emergency accommodation with complex needs to access permanent safe accommodation, while providing intensive support and associated access to health services. The Housing for All programme is supported by €20 billion of public investment in housing by the end of 2025 and is also primarily targeted at middle-income households. Under this model, rents are set to cover only the costs of financing, construction, management and maintenance of housing. Cost rents are aimed at achieving rents that are at least 25 % lower than what they would be on the open market.

[...]

38. As the comparative analysis of the Constitutional Court and the Ministry of Labour and Social Affairs shows, all states have either adopted a long-term housing plan or are developing existing housing laws, regardless of whether or not the right to housing is explicitly constitutionally enshrined in the state. Specific legislative approaches vary from state to state. In a number of cases, housing law also takes into account middle-income groups or young people who, for various reasons, find market housing unaffordable or financially unsustainable in the long term. States are also reflecting the current situation in Ukraine and the pandemic situation, with links to existing housing legislation. The strategy to reduce homelessness and the efforts to comprehensively address the issue of these particularly vulnerable people is no exception.

Although Slovakia, as our closest historical neighbour, has the smallest social housing fund of the developed countries (together with the Czech Republic), it is still larger than ours.

39. The present case, although the Constitutional Court could not uphold it, pointed to the unfortunate fact that the Czech Republic has not yet adopted adequate legal regulation of social housing. This state of affairs is unsustainable in the long term; the availability of social housing in accordance with the Czech Republic's international obligations cannot be left to the discretion of local authorities, or to non-profit organisations, charities or volunteers. It cannot be overlooked that in the present case (or in any other case) it is above all the absence of statutory regulation which predetermines the procedural failure of the complainants within the limits of an action for intervention under the Administrative Justice Procedure Code.

## 7. Conclusion

This article examines the position of the Czech Constitutional Court in relation to asylum and migration policies and its influence by EU legislation, particularly whether the Czech Constitutional Court considers asylum and migration issues as part of the Czech constitutional identity, which the EU should not interfere with in any way. Next, it presents the basic case law of the Constitutional Court on these issues, and finally answers whether the Czech Constitutional Court uses the comparative method of interpretation in its decision-making and, if necessary, demonstrates its use in practice.

The article concludes that the Constitutional Court has not yet commented on the issue of migration or asylum as part of Czech constitutional identity. In the second review of the compliance of the Lisbon Treaty with the Czech constitutional order, the Constitutional Court briefly addressed this issue; however, it was not a comprehensive assessment or even a delimitation of the EU. The Constitutional Court merely stated that the new provisions contained in the Lisbon Treaty were essentially built on older provisions already enshrined in primary European law and which, by being implemented in the Lisbon Treaty, did not represent any substantive change in content. Therefore, this article focuses more on the general approach of the Czech Constitutional Court to the transfer of competences from the Czech Republic to the EU and the control of this transfer by the Constitutional Court. The article concludes that the Czech Constitutional Court is generally open to the transfer of powers from the Czech Republic to the EU and respects the primacy of European law; however, it monitors this transfer from the background and is prepared to intervene if the EU exceeds its limits and guarantees and threatens the essential requirements of the Czech Republic as a democratic state governed by the rule of law. However, as the Constitutional Court has stated, it cannot imagine the circumstances under which this would have happened. These conclusions are not altered by the fact that the Czech Constitutional Court is the first constitutional court of a Member State to declare a judgement of the Court of Justice *ultra vires*, which cannot, therefore, have an effect in the Czech Republic.

However, this was a specific situation caused by a domestic dispute between the Constitutional Court and the Supreme Administrative Court. Moreover, this isolated decision by the Constitutional Court has not been followed up since then, and there is no indication that it will occur again.

Further, the article presented the primary decisions of the Constitutional Court, which reflected its view on asylum and migration issues.

Finally, the article explored the comparative method and its use in the decision-making practices of the Constitutional Court. Although the comparative method of interpretation is occasionally used in the practice of the Constitutional Court, it is used by the Constitutional Court in its substantive decisions, in which it often provides new legal interpretations that are based precisely on arguments on foreign legislation. Therefore, it can be concluded that the Constitutional Court applies a comparative method of interpretation in its decisions and seeks inspiration for it from foreign legislation. However, the Constitutional Court emphasises that it applies such legislation comparatively, emerging mostly from European (or American) legal doctrine and having its origin primarily in democratic legal states in which fundamental rights are respected and, therefore, have the same value base as the Czech Republic.

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