ATTACKS ON JUSTICE – CZECH REPUBLIC

Highlights

The 1992 Czech Constitution was amended in 2001 with the goal of conforming to the obligations of future EU membership, which occurred on 1 May 2004. The 'European amendment' introduced changes in the application of international treaties and revised the powers of Parliament, the Constitutional Court and ordinary courts. Judicial reforms in 2002 were followed by the creation of the Supreme Administrative Court, the Judicial Academy and judicial councils, and an increase in the powers of prosecutors through amendments to the Law on State Prosecution and the Criminal Procedure Code. However, the judicial system still has a significant problem with regard to lengthy proceedings. Executive interference within the judiciary has been reported.

BACKGROUND

A successor state to former Czechoslovakia since 1993, the Czech Republic is organized as a parliamentary democracy. The 1992 Constitution proclaims it to be a unitary state, divided into 14 administrative regions in accordance with *Law No. 347/1997 Coll. On the Creation of Higher Territorial Autonomous Units*. The Czech Republic is a member of the United Nations, the Organization for Security and Co-operation in Europe (OSCE) and the Council of Europe. It ratified the European Convention on Human Rights on 18 March 1992. It entered the North Atlantic Treaty Organisation (NATO) on 12 March 1999. On 13-14 June 2003, 77 per cent of voters agreed to entry into the European Union, of which the Czech Republic became a member on 1 May 2004.

Legislative power is vested in a bicameral Parliament comprising the Senate and the Chamber of Deputies. The centre-left Czech Social Democratic Party (ČSSD) won the 2002 parliamentary elections, which 'met international standards and commitments for democratic elections', according to the OSCE. In cooperation with the right-wing Union of Liberty (US) and centre-right Christian Democratic Party-Czech People's Party (KDU-ČSL), it was able to form a government with a narrow parliamentary majority (101 members in the 200-member Chamber of Deputies). The Civic Democratic Party (ODS) and the Communist Party of Bohemia and Moravia (KSČM) went into opposition. Prime Minister Vladimir Špidla (ČSSD), nominated in 2002, resigned at the end of June 2004 after his party's lack of success in the European Parliament elections. President Klaus approved a new cabinet led by Prime Minister Stanislav Gross (ČSSD) on 4 August 2004. Gross resigned in May 2005 and was replaced by Jiří Paroubek (ČSSD). The Cabinet continues to govern based on a three-party coalition with a one-vote majority.

Executive power is vested in the Government, comprised of Prime Minister, Vice Prime Ministers and Ministers, and the President, who is elected for a term of five years at a joint meeting of both chambers of Parliament. The President may hold office for a maximum of two successive terms. Václav Klaus (ODS) was elected

President on 28 February 2003 and sworn into office on 7 March 2003. The Government is accountable to the Chamber of Deputies. The President appoints the Prime Minister and, following his suggestion, appoints other members of the Government.

Constitutional law on the EU referendum

Changes in the constitutional order of the Czech Republic (and the Constitution itself) were brought about by *Constitutional Law 515/2002 Coll. of 15 November 2002* "*On the Referendum on the Accession of the Czech Republic to the European Union and on Amendment to the Constitutional Act No.1/1993, Constitution of the Czech Republic*". The Referendum Act was drafted specifically for the vote on accession to the EU. The Czech Republic does not yet have a general law on referendums, even though such a law is foreseen by its Constitution. According to the Act, the results of the referendum are directly binding and replace ratification of the accession treaty by Parliament. The major controversial issue, discussed during the preparation of the Referendum Act, was the quorum. The final version of the Referendum Act contained no quorum requirement; hence no minimum number of voters was necessary for the validity of the referendum (in contrast to the 50 per cent quorum in Poland and the Slovak Republic).

JUDICIARY

The Czech Republic has over 2,900 judges, the largest number per capita in OECD countries. They are distributed among the Supreme Court, the Supreme Administrative Court and high, regional and district courts. Pursuant to Article 63(1)(i) of the Constitution, the President appoints all judges of ordinary courts. Pursuant to Article 62 read in combination with article 84, the President appoints, with the approval of the Senate, the judges of the Constitutional Court, its Chief Justice and the Assistant Chief Justices. According to the Constitution, judges of the Supreme Court, its Chief Justice and Assistant Chief Justices are appointed by the President of the Republic. The Constitutional Court, which consists of 15 justices, is a judicial body charged with the protection of the constitutional order. It does not, therefore, form a part of the system of ordinary courts and possesses its specific jurisdiction (Article 87 of the Constitution).

Legal and judicial reforms

Constitutional amendment ('European amendment')

By the **Constitutional amendment,** *Law no. 395/2001 Coll.*, the so-called "*European amendment*" adopted in 2001 and effective on 1 June 2002, a set of new constitutional articles were inserted into the text of the 1992 Constitution, with two main goals: to create the legal framework allowing for the transfer of competencies to sub-national organs and international organizations (such as the EU), and to define more clearly the Czech Republic's legal approach towards international law.

New Article 1 (*Introductory clause*) includes the "international clause", which declares that the Czech Republic respects its obligations arising from international law.

New Article 10 (*International treaties*) expands the former regime – where international human rights treaties had a direct application and precedence over ordinary legislation – to all international treaties approved by Parliament and ratified by the President. Such treaties form an integral part of the Czech legal system (incorporation) and in case of conflict with ordinary legislation, they should be applied primarily (priority of application).

New Article 10a (*Transfer of powers to an international organization or institution*) enables Czech institutions to transfer powers to an international organization or institution. The European Union is not mentioned explicitly and Article 10a can also be used for accession to other international institutions such as the International Criminal Court (the Rome Statute has not, however, yet been ratified by the Czech Republic). The transfer of powers requires a decision of Parliament to be made by the majorities required for the adoption of a constitutional law (two-thirds majorities in both chambers of Parliament), or it can be subject to popular referendum.

New Article 10b (*Powers of Parliament*) regulates the involvement of Parliament in affairs relating to membership of the Czech Republic in the institutions covered by Article 10a, such as the European Union. The government is obliged to inform Parliament on a regular basis about questions related to the obligations resulting from that membership and Parliament can react in the form of resolutions.

New Article 87 (*Powers of the Constitutional Court*) enlarges the powers of the Constitutional Court to allow it to review preliminarily the compatibility of international treaties under Articles 10 and 10a (for example the accession treaty to the EU) with the constitutional order of the Czech Republic. If a treaty is subject to such a procedure, it cannot be ratified before (and unless) the Constitutional Court declares it compatible with the constitutional order. The '"European amendment' does not, however, solve the problem of how to proceed in cases where incompatibility between an international treaty and the constitutional order is discovered after a ratification. Unlike with the European Amendment, the Constitutional Court does not now have the formal right to review the compatibility of ordinary laws with international treaties, as this question is regulated by the priority of application given to the treaties.

The reluctance of the Constitutional Court to accept this new state of affairs is reflected in its decision No. 403/2002 from 2002 where, in rather unclear terms referring to the new wording of Article 1, it reserved its right to review the compatibility of Czech laws with international treaties on human rights. This decision has been criticized by academics.

New Article 95 (*Ordinary Courts*) authorizes judges of ordinary courts to evaluate the compatibility of laws applied in a particular case under the Czech constitutional order with treaties ratified by the Czech Republic. In the case of any alleged incompatibility with the constitutional order, the court refers the case to the Constitutional Court for the final decision. The conflict between the law and an international treaty should be,

in contrast, decided by ordinary courts themselves. If the court finds the law incompatible with the treaty, it has to apply the international treaty (priority of application).

New law on courts and judges

A new *Law on Courts and Judges* (*Law no. 6/2002 Coll.*) took effect on 1 April 2002. It introduced several elements which, according to the legislature, should have enhanced the efficiency of the work of Czech ordinary courts and improved the quality of judges. The law was already controversial during the drafting period, with a number of judges criticizing it as an interference with the independence of the judiciary.

The most disputed features were the merging of the judicial and administrative functions of presidents and vice-presidents of courts, the compulsory education of judges in a Justice Academy run by the executive and periodical qualification examinations for all judges conducted by a board composed of judges' representatives, legal experts and the advocates' bar or the state prosecution service. Failure to pass the periodic exam could lead to a termination of the judicial office, subject to a review by the Supreme Court. The evaluation criteria were formulated in rather vague terms and even included activities not directly linked to a judge's decision-making.

The law was challenged on 1 March 2002 by the President of the Republic because it established too close a relationship between the executive power (the Ministry of Justice) and the judiciary and threatened judicial independence. In June 2002, the Constitutional Court declared the provisions of the law relating to the periodic examination of judges, the compulsory character of education in the Judicial Academy and the merging of the judicial and administrative functions of court presidents and vice-presidents to be unconstitutional (Finding No. 349/2002 Coll.), on the grounds that they did not respect the constitutional principle of the separation of powers nor the principle of the independence of the judiciary.

New Code of Administrative Justice

The Constitutional Court decision No. 276/2001 Coll. of June 2001 quashed the section of the *Civil Procedure Code* concerning the judicial review of administrative acts by general courts. Because of the impact that this would have had on the functioning of the administration of justice, the effects of the decision were postponed until 31 December 2002. The decision of the Constitutional Court advanced the creation of a specialized Supreme Administrative Court, which does not represent a new judicial branch but together with the Supreme Court forms the highest level of the general jurisdictional courts system. The *Administrative Court Proceedings Code* and the *Act for Solving Some Questions of Jurisdiction* were adopted in March 2002 and entered into force on 1 January 2003. They introduce a new, modern system of administrative justice, in which regional courts act as first-instance courts for all administrative matters and the Supreme Administrative Court acts as the second and ultimate instance. Furthermore, the *Administrative Court Proceedings Code* extends the possibility of free legal aid in administrative justice.

Creation of Judicial Academy

The *2002 Law on Courts and Judges* created a new Judicial Academy, which began operating in September 2002. The academy provides lifelong training for all judges and prosecutors. Its training is provided by professors and assistant professors at faculties of law and other generally recognized legal authorities. The Ministry of Justice has revised the curricula for the training of judges and state prosecutors, covering all relevant areas including human rights as well as international civil and criminal judicial cooperation. Representatives of the judiciary are involved in the functioning of the Judicial Academy.

Enforcement of judgments

On the basis of the *Law on Judicial Executors and Execution Activity* (Execution Code), adopted in 2001 (Law No. 120/2001 Coll), 103 judicial executive offices have been created and the Chamber of Judicial Executors began to operate on 30 October 2001. This was regarded as an important step forward, improving the speed and efficiency of the enforcement of civil judgments.

Independence

Security of tenure

The European Commission, in its 2002 Regular Report on Czech Republic's progress towards accession noted that judges are nominated by the Minister of Justice and appointed for life by the President of the Republic. Certain state prosecutors are subject to a security vetting procedure. The commission observed that though the Constitution enshrines the independence of judges, the Minister of Justice is responsible in practice for the appointment, transfer and dismissal of court presidents and vice-presidents.

Jaromir Jirsa, the chairman of the Judges' Union, stated at the beginning of the union's conference on 21 November 2004, that 'the independence of the judicial power from the executive and the legislative powers is not well ensured'. He complained about the excessive dependence of court officials and judges on the Ministry of Justice or the Minister of Justice's political will. Unlike in other European countries (with the exception of Latvia), there is no independent judicial body in the Czech Republic responsible for the appointment of judges and the Judges' Union is currently considering establishing such a judicial body, which would thus limit the interference of the executive.

In March 2005, President Klaus refused to appoint 32 trainee judges to become fully-fledged judges because they had not yet reached the age of 30. An age limit of 30 had been set by an amendment to the *Law on Courts and Judges* (see above), which took effect in July 2003 but allowed for exceptions in the case of trainee judges who had already begun working towards their future judicial career. Although under the Constitution, the head of state cannot refuse to appoint a proposed judge, President Klaus affirmed that with his decision, he wanted to start a debate on whether the time had come to postpone the age limit for the work of a judge. The President's decision not to appoint the young trainees as judges on the basis of age only has caused uproar

among the judiciary, as the Judges' Union has been trying for a long time to establish a judges' self-governing body that would participate in the appointment of judiciary officials.

Internal independence

The above-mentioned European Commission report noted the creation of Judicial Councils with consultative body status at all court levels, introduced in the *2002 Law on Courts and Judges*, as a positive step towards the judiciary's self-government.

Corruption

According to the European Commission, by 2003 the legal instruments required by the *acquis communautaire* were for the most part in place and the necessary structures had been created within law enforcement agencies and the judiciary. However, it was also acknowledged that abuse of power and bribery were still widespread, affecting the state administration, immigration police, traffic police, health care, banking, politics and the judiciary.

There is little evidence of systematic corruption in the Czech judiciary, with one exception: bankruptcy proceedings. Current bankruptcy legislation lacks transparent criteria for the appointment and removal of bankruptcy administrators by judges. This has provided opportunities for corruption in which bankruptcy judges and bankruptcy administrators collude. Legislation is reportedly under way which will entrust agents other than bankruptcy judges (such as a creditors' committee) with the power of assigning bankruptcy administrators to individual cases in order to introduce arms-length relations between bankruptcy judges and administrators. The envisaged legislation further aims to impose stricter requirements for entering into bankruptcy administration and to establish a body to monitor the conduct of bankruptcy administrators.

In January 2004 the justice ministry introduced an anti-corruption hotline to be used by the public to report misconduct or suspected corruption in the judiciary. By establishing the service, the ministry followed other government's bodies that had launched similar services shortly before, to no great effect.

Cases

One case illustrating the potential for corruption due to the collusion between judges and administrators in bankruptcy procedures is the ongoing police investigation of **Judge Jiří Berka**, a bankruptcy judge in the Ústí nad Labem regional court. Police inquiries from 2002 to 2004 revealed that several bankruptcy cases had demonstrated a pattern of judicial corrupt practice. Apparently, Berka's accomplices identified an indebted company with its head office under his jurisdiction and, after buying out the company's debts, filed a bankruptcy petition. Judge Berka would then declare the company bankrupt and appoint a colluding administrator. The administrator's task was to satisfy the claims of those who had bought the debts and, allegedly, in cooperation with the court-appointed appraiser, to siphon off bankruptcy assets. Berka was accused of criminal conspiracy and the misuse of his official position.

PROSECUTORS

The amendments to the *Criminal Procedure Code* and to the *Law on State Prosecution* adopted in December 2001 began to be implemented in January 2002 and March 2002 respectively. Both amendments strengthened the power of state prosecutors, who are directly responsible for investigating all criminal offences, including economic crimes, money laundering, organized crime, corruption and misuse of powers. The amendments to the *Criminal Procedure Code* and the reforms of the system of criminal prosecution have had a very beneficial effect on the efficient preparation and organization of criminal trials and have reduced delays in the criminal trial system. Cases appear to be better prepared for trial, pre-trial proceedings are faster than before and the incidence of guilty pleas before trial has increased.

ACCESS TO JUSTICE

The judiciary has been criticized by the European Commission for protracted court proceedings, particularly under criminal law (see *Ceska Tiskova Kancelar Business News*, 15 March 2004). The Czech Republic loses a huge amount of cases before the European Court of Human Rights for this reason.

Cases

In the case of **Dostal v. Czech Republic** (application no. 52859/99) the Court established on 25 May 2004 the violation of Article 6.1 (the right to a fair hearing within a reasonable time) of the *European Convention of Human Rights* (ECHR). The applicant had complained of the excessive length of eight sets of civil proceedings to which he was a party (which lasted between five years, two months and 25 days and eight years, two months and 28 days) and the lack of an effective judicial remedy.

In the cases of **Houfova v. Czech Republic,** no. 1 (application no. 58177/00) and no. 2 (application no. 58178/00) the applicant complained of the excessive length and the unfairness of the proceedings in question, which lasted seven years and six years, respectively. In both cases, the court held unanimously on 15 June 2004 that there were violations of Article 6.1 of the ECHR.

In the case of **Bartl v. Czech Republic** (application no. 50262/99) the complainant alleged that the length of proceedings – concerning the division of jointly owned property and the dissolution of co-ownership – had been excessive, contrary to Article 6.1 of the ECHR. He further submitted that he had not enjoyed an effective remedy for his complaint. The court unanimously held on 22 June 2004 that there had been a breach of Article 6.1 of the ECHR.

On 27 July 2004 the European Court of Human Rights decided in the case of **Pfleger v. Czech Republic** (application no. 58116/00) that there had been a violation of Art. 6.1 of the ECHR in that the complainant had faced unreasonably lengthy proceedings (four years and over nine months) for extortion brought against his ex-partner; he had joined a civil party seeking damages.

LEGAL REFORMS DURING THE PERIOD

1 April 2002: *Law on Courts and Judges* (Law No. 6/2002 Coll.) took effect.

1 June 2002: *Constitutional amendment* (Law no. 395/2001 Coll., the so called 'European amendment'), adopted in 2001, became effective.

15 November 2002: *Constitutional Law No. 515/2002 Coll.*, '*On the Referendum on the Accession of the Czech Republic to the European Union and on Amendment to the Constitutional Act No.1/1993, Constitution of the Czech Republic*'.

1 January 2003: *Administrative Court Proceedings Code* and the *Act for Solving Some Questions of Jurisdiction*, adopted in March 2002, entered into force.