

# “Small, but Ours”: The Czech Features of Authoritarian Methods of Governance

Helena Hofmannová\*

I. INTRODUCTION.....	180
<i>A. The Structure of the Text</i>	
II. THE SPECIFICS OF THE CZECH PATH TO THE BRINK OF AUTHORITARIANISM.....	185
III. THE FIRST VISIBLE MANIFESTATION OF THE CURRENT CRISIS .....	191
<i>A. The Decline of Traditional Partyism</i>	
<i>B. Running the State as a Private Enterprise</i>	
IV. ATTACKS ON THE SYSTEM OF DIVISION OF POWER.....	199
<i>A. Weakening of the Parliamentary Form of Government</i>	
<i>B. The Concentration and Abuse of Executive Power</i>	
<i>C. Interference with the Independence and Impartiality of Judiciary</i>	
V. SOCIAL CONTEXT OF POLITICAL CRISIS .....	214
VI. CONCLUSION .....	216

## I. INTRODUCTION

One of the most pressing problems of the present time is undoubtedly the development of authoritarian methods of governance in many countries around the world.<sup>1</sup> Many authors focus their attention on processes such as

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\* The Author is a lawyer and an associate professor of constitutional law and theory of State at the Faculty of Law of the Charles University in Prague. She also serves as an advisor to the Judge of the Constitutional Court of the Czech Republic. From 2012-2016, the Author was a member of the Advisory Committee on the Framework Convention for the Protection of National Minorities of the Council of Europe. She was also a fellow and visiting professor at the New York University School of Law and the Michigan University School of Law. She teaches and writes about Czech constitutional law, comparative constitutional law, human rights, minority law, and the issues of democratic governance.

Cite as 65 ATENEO L.J. 180 (2020).

1. See Garry Kasparov & Thor Halvorssen, *Why the rise of authoritarianism is a global catastrophe*, WASH. POST, Feb. 1, 2017, available at

those in Hungary, Poland, or Turkey.<sup>2</sup> International organizations, such as the European Union (EU) and the Council of Europe in the European context, also warn against the increase in authoritarian means of governance as well as against the rise of nationalism leading to negative interference in fundamental rights.<sup>3</sup>

In September 2018, the European Parliament (EP) issued a resolution calling on the EU Member States to decide under Article 7 of the EU Treaty on European Union whether there is a clear risk of serious violation of the EU's core values in Hungary.<sup>4</sup> The response of the Czech Republic was remarkable. The EP's decision provoked emotions in the spirit of solidarity with Hungary and defense of national sovereignty that were manifested by the majority of political and constitutional actors in various forms.

On 2 October 2018, the Chamber of Deputies of the Parliament of the Czech Republic (when discussing the EU Multiannual Financial Framework) adopted a resolution stating that it “considers the European Parliament's voting against the sovereign State of Hungary to be an erroneous and unfortunate vote in terms of activating Article 7 of the Lisbon Treaty. This procedure will only deepen the trenches and distrust between the old and the new member States of the European Union.”<sup>5</sup>

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<https://www.washingtonpost.com/news/democracy-post/wp/2017/02/13/why-the-rise-of-authoritarianism-is-a-global-catastrophe> (last accessed Sep. 30, 2020).

2. See Steven A. Cook, *Strongmen Die, but Authoritarianism Is Forever*, available at <https://www.cfr.org/blog/strongmen-die-authoritarianism-forever> (last accessed Sep. 30, 2020).
3. See Emmanuel Macron, President of the Republic of France, *Speech to the European Parliament* (Apr. 17, 2018) (transcript available at <https://is.ambafrance.org/President-warns-against-authoritarianism-in-Europe>) (last accessed Sep. 30, 2020).
4. European Parliament resolution of 12 September 2018 on a proposal calling on the Council to determine, pursuant to Article 7 (1) of the Treaty on European Union, the existence of a clear risk of a serious breach by Hungary of the values on which the Union is founded, 2017/2131(INL), ¶ 4 (Sep. 12, 2018).
5. Parliament of the Czech Republic, *Report on the Activities of the Control Board of the Technology Agency of the Czech Republic in 2017 / Parliamentary Press 145 / first reading*, available at <http://www.psp.cz/eknih/2017ps/stenprot/o19schuz/so19312.htm#h195> (last accessed Sep. 30, 2020) (citing 2007 O.J. (C 306) 1-271)).

The resolution was adopted by 97 of the 153 members of parliament present.<sup>6</sup> Voting in support of Hungary overcame party differences. It was voted for by members of all Czech political parties (Czech traditional left and right, including conservatives, communists and new political entities (ANO 2011 and SPD) except for the core liberal parties (Pirates, TOP 09).<sup>7</sup>

Czech President Miloš Zeman<sup>8</sup> condemned the EP's decision as an unacceptable attempt to interfere with the internal affairs of the Visegrád Four (V4) countries and criticized the vote of Czech members of the European Parliament (MEP) for lack of solidarity with Hungary.<sup>9</sup> During a press conference at the V4 presidency meeting in October 2018, Zeman said —

Together we are strong. We [cannot] get through much being isolated. That is why I was very pleased to inform you that a few days ago, the Czech Parliament adopted a resolution condemning the European Parliament's

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6. *Id.*

7. Ninety-seven of the 153 members of the parliament present were in favor of the resolution; 24 Members were against. All deputies of ANO 2011, ODS, SPD, KSČM, and KDU-ČSL present voted for the resolution; all Pirates and TOP09 members present were against it. Of the five members present for the ČSSD two voted for and three against the resolution; STAN was one for and two against. See Parliament of the Czech Republic, 19th Meeting, 195th Vote, 2 October 2018, 17:41 EU Multiannual Financial Framework 2021 - 2027, available at <http://www.psp.cz/sqw/hlasy.sqw?g=68248&l=cz> (last accessed Sep. 30, 2020).

8. Miloš Zeman is a long-term influential political figure. He was the leader of the social democrats in the 90's and he served as Prime Minister between 1998 - 2002. Since 2013 he has been in office as the President of Czech Republic (as he managed to win his second term in 2018). Pavla Horáková, Milos Zeman - outgoing prime minister, available at <https://english.radio.cz/milos-zeman-outgoing-prime-minister-8063040> (last accessed Sep. 30, 2020); Dan Bilefsky, *Formal Prime Minister Is Elected President of Czech Republic*, N.Y. TIMES, Jan. 26, 2013, available at <https://www.nytimes.com/2013/01/27/world/europe/former-prime-minister-is-elected-president-of-czech-republic.html> (last accessed Sep. 30, 2020); & Robert Tait, *Czech Republic re-elects far-right president Miloš Zeman*, GUARDIAN, Jan. 27, 2018, available at <https://www.theguardian.com/world/2018/jan/27/czech-republic-far-right-president-reelected> (last accessed Sep. 30, 2020).

9. Nijat Eldarov, Bulgaria and Czech Republic vow to defend Hungary against Article 7, available at <https://emerging-europe.com/news/bulgaria-and-czech-republic-vow-to-defend-hungary-against-article-7> (last accessed Sep. 30, 2020).

resolution on Hungary. I hope this will please my friend János Ádera as well as my absent friend Viktor Orbán.<sup>10</sup>

Prime Minister Andrej Babiš distanced himself from the positive vote of the Czech MEPs coming from the same party (ANO 2011).<sup>11</sup> Babiš stated that this vote “would not change our position within the V4”<sup>12</sup> and that the European Council’s decision would be different from EP.<sup>13</sup>

The support of Hungary, specifically Victor Orbán, from the side of the President and Prime Minister is not surprising. Both frequently claim close political ties and friendship. Zeman has recently stressed the idea of close friendship and support for Orbán at almost every opportunity.<sup>14</sup> During his visit with the Hungarian Prime Minister in November 2018, Zeman highly praised the role of Orbán in *defending the values of European civilization*<sup>15</sup> and stated that Hungary is the State with the highest political importance for the Czech Republic.<sup>16</sup> Orbán is also a friend of the Czech Prime Minister who considers their relationship as truly exceptional.<sup>17</sup> They became close political allies due to the same approach to quotas and illegal migration, and they jointly

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10. Miloš Zeman, President of the Czech Republic, Speech of the President of the Republic during a meeting with the press on the occasion of the meeting of the V4 Presidents (Oct. 12, 2018) (transcript *available at* <https://www.hrad.cz/cs/prezident-cr/soucasny-prezident-cr/vybrane-projevy-a-rozhovory/projev-prezidenta-republiky-pri-setkani-s-tiskem-u-prilezitosti-setkani-prezidentu-zemi-v4-14321> (last accessed Sep. 30, 2020)).
  11. Josef Kopecký, Babiš distanced himself from the attitude of the MEPs towards Hungary, Zeman rebuked them Zdroj, *available at* [https://www.idnes.cz/zpravy/domaci/babis-europoslanci-ano-madarsko-v4.A180913\\_134241\\_domaci\\_kop](https://www.idnes.cz/zpravy/domaci/babis-europoslanci-ano-madarsko-v4.A180913_134241_domaci_kop) (last accessed Sep. 30, 2020).
  12. *Id.*
  13. *Id.*
  14. See Tom McEnchroe, Victor Orbán and Andrej Babiš praise friendship in Prague, *available at* <https://english.radio.cz/viktor-orban-and-andrej-babis-praise-friendship-prague-8144589> (last accessed Sep. 30, 2020).
  15. See Thierry Chopin & Lukáš Macek, In the face of the European Union’s political crisis: the vital cultural struggle over values, *available at* <https://www.robertschuman.eu/en/european-issues/0479-in-the-face-of-the-european-union-s-political-crisis-the-vital-cultural-struggle-over-values> (last accessed Sep. 30, 2020).
  16. PM Orbán strengthens ties with Czech Republic, *available at* <http://abouthungary.hu/news-in-brief/pm-orban-strengthens-ties-with-czech-republic> (last accessed Sep. 30, 2020).
  17. *Id.*

declared that “together with the support of Slovakia and Poland in Brussels they did suppress any quotas.”<sup>18</sup>

However, their friendship is no longer only about bilateral cooperation aimed against quotas and migration on the EU level. A strong alliance between Czech executives and Orbán exists in a broader context of V4, in which they see the future of Europe: “Czechs, Slovaks, Hungarians[,] and Poles are the engine driving the European locomotive as rail workers.”<sup>19</sup>

It is no coincidence that the strategic cooperation between the Czech Republic and Hungary emerged. It is a symptom of fundamental changes in Czech political and constitutional discourse that logically allows this form of political cooperation on EU level.

Although the authoritarian transformation of the political regime in the Czech Republic is not occurring on the basis of formal changes of the constitutional system (such as in Hungary), the dominant political forces follow similar political aims and values as other autocrats. They prefer executive decision-making with limited elements of control and separation of powers. In doing so, they use the authoritarian methods of governance, such as the concentration of power and the weakening of parliamentarianism, the removal of institutional and procedural safeguards of the constitutional system such as the bicameral parliament, attacks on the principle of protection of minorities, pluralism of political partyism, weakening of the independence of judiciary, attacks on critical civil society and media independence as well as on the principle of civil equality and non-discrimination, and interference with other constitutional rights and freedoms such as the right to information and academic freedoms.

#### *A. The Structure of the Text*

The Article maps the use of political methods and values described in the paragraph above on intra-national level of the Czech Republic. The first Chapter provides an overview of the use of authoritarian practices describing the general tendencies and specifics from other countries.

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18. Radek Bartoníček, ČTK, My friend, Babiš praised Orbán, who was waiting for several demonstrators, *available at* <https://zpravy.aktualne.cz/domaci/politika/do-ceska-priletel-orban-ceka-na-nej-babis-zeman-vondracek-du/r~d4256122f41c11e8a446ac1f6b220ee8> (last accessed Sep. 30, 2020) (emphasis supplied).

19. Interview by Jaromir Soukup with Viktor Orbán, Prime Minister, Hungary, through Barrondov.tv (Nov. 30, 2018).

The second Chapter traces the recent developments back to the creation of the system of political parties after the fall of communism. The first part outlines the process of decay of the traditional party system and the rise of non-traditional political parties in the Czech Republic. Secondly, it explains the origin and the character of the current Prime Minister's movement "ANO 2011" that was founded as an opposition to the political style of traditional parties while introducing a managerial method of running the State as a private business company.

The third Chapter focuses on the political changes in the division of power mechanism with focus on the axis of legislative — the executive. The Chapter begins by describing the contempt for the basic principles of parliamentary form of government in the Czech Republic from the side of President Zeman and Prime Minister Babiš. The next part attempts to explain the problem of concentration of executive power based on the alliance between the President and the Prime Minister. The last sub-chapter deals with the interference in the independence of judiciary by various acts of the President.

Finally, the last Chapter takes a broader look at the general societal and political background of the current constitutional situation.

## II. THE SPECIFICS OF THE CZECH PATH TO THE BRINK OF AUTHORITARIANISM

Several authors analyzing current authoritarian processes emphasize the variety of their causes and forms.<sup>20</sup> If we were to generalize the basic methods used to establish the authoritarian way of governance in conditions of pro forma normative liberal democratic regime, they could be defined in particular by the following characteristics: limiting parliamentarism; destruction of a pluralistic political system; suppression of political and civil opposition and political rights; weakening of vertical and horizontal separation of powers; interference with independent judiciary; restraint of independent media; and interference with civil rights. They also include creation of a unified

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20. See, e.g., Kim Lane Scheppele, *Autocratic Legalism*, 85 U. CHI. L. REV. 545, 579 (2018); Steven Levitsky & Lucan A. Way, *The Rise of Competitive Authoritarianism*, 13 J. DEMOCR. 51, 63 (2002); & JASON BROWNLEE, *AUTHORITARIANISM IN AN AGE OF DEMOCRATIZATION* 14 (2017).

transcendental sovereign as a means of strengthening power and legitimizing it.<sup>21</sup>

In this Chapter, the general characteristics of the use of authoritarian practices in the Czech Republic will be briefly presented, along with its similarities with other autocrats and, above all, the fact that the dominant Czech political forces simplify democracy to the mere rule of the people and derive the legitimacy of their unconstitutional decisions from the majority they gained in the elections. In order to consolidate power, an image of an enemy is created, capable of endangering the very essence of national existence. This propaganda, allowing the responsibility for the country's internal problems to be transferred to imaginary enemies, is very popular among the population and manifests itself in the increasing support of Czech authoritarians.

While the use of authoritarian methods in the Czech Republic has some of the typical material characteristics listed above, it occurs in a form that is specific and different in many respects from Hungary or Poland, primarily because their implementation is not based on a formal change of the constitutional system and legal order, but rather on the grounds of circumvention of the Constitution. Thus, authoritarian political methods have long been permeating the political practice without pro forma legal change. This is partly because in the Czech Republic, the Prime Minister's movement and the President (or other potential political forces) do not have the necessary parliamentary majority to enforce changes to the Constitution.

The application of authoritarian practices in the Czech Republic is realized based on gradual violations and circumvention of the Constitution leading to permeation of authoritarian political practice into the usual way of governance. Overall, the political climate in the country allows for a way of governance that uses authoritarian means without any need of normative change of the constitutional system.

These tendencies are relatively long-lived, and they manifest more strongly when they take place in connection with an exceptional procedure

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21. This way was characteristic for the development of the political regime in the Weimar Republic not only in its final phase. Hitler then followed the authoritarian executive way of governance and developed these methods in order to establish a totalitarian State. A similar method was applied in the Second Czechoslovak Republic (1938) as well as the during the failure of the restoration of Czechoslovak democracy after the Second World War followed by the establishment of the communist regime in 1948. These methods are also used today in a number of authoritarian regimes. For their use and comparison, See Levitsky & Way, *supra* note 20, at 59 & Scheppele, *supra* note 20, at 547.

anticipated by constitutional or European law. For that reason, it was the EP's proposal to initiate proceedings against Hungary that was one of those events that prompted repeated attacks by Czech politicians and constitutional officials against the "dictates of Brussels" while calling for the defense of national sovereignty.<sup>22</sup> The EP's decision was compared with the invasion of Soviet troops in Czechoslovakia in 1968. The defense of Orbán as the ruler of Hungary became a defense of the Czech Republic's sovereignty, including the instigation of nationalism and its other side — xenophobia.

On the other hand, there are many similarities with European "legal autocrats" (i.e., with political forces that have managed to produce visible normative authoritarian changes in constitutional systems).<sup>23</sup> The Czech President and Prime Minister, who can be considered to be the politically strongest representatives of the authoritarian means, derive the legitimacy of their actions from the majority they gained in elections, and by this plain fact they justify everything they do. This fact has been often expressed by President Zeman, such as when he objected to the constitutional procedure in relation to the Government's responsibility to the Chamber of Deputies or to the exercise of the constitutional freedoms of citizens.<sup>24</sup> In the first case, he expressed that he would not dissolve the Chamber of Deputies, even if the Government failed to receive the confidence of the Chamber of Deputies after the third failed attempt, as politicians were to "play with the cards voters gave out."<sup>25</sup> In the latter case, he described the demonstration for the resignation of Government as a "contempt of the will of voters" participating in elections.<sup>26</sup>

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22. See MEP J. Kohlíček, Senator J. Doubrava, MP J. Foldyna, MP V. Klaus, & Candidate for Senator L. Jakl, *Orbán za nás, my za Orbána*, Address at Prague 6, Střešovice, Pod Hradbami Street (Sep. 20, 2018), available at <http://hejobcane.cz/domains/hejobcane.cz/2018/09/17/orban-za-nas-my-za-orbana> (last accessed Sep. 30, 2020).

23. See Scheppele, *supra* note 20, at 571.

24. Miloš Brunclík, The Czech President and Constitutional Conventions in Government Formation, available at <https://presidential-power.net/?p=10997> (last accessed Sep. 30, 2020).

25. Novinky.cz, I don't have to dissolve the House, Zeman introduced a "creative" interpretation of the Constitution, available at <https://www.novinky.cz/domaci/453833-snemovnu-rozpustit-nemusim-predstavil-zeman-tvurci-vyklad-ustavy.html> (last accessed Sep. 30, 2020).

26. Interview by Frekvenci 1 with Miloš Zeman, President, Czech Republic (Feb. 10, 2019).



Voters under the prism of President Zeman are only his voters or the voters that elected political parties supporting the President. In this way, Zeman reduces democracy to the principle of majority rule while justifying any of his decisions and promoting his particular interests. The mechanisms of division of power and the rights of political minorities are considered to be the “contempt for the will of the voters.”<sup>27</sup> Similarly, Prime Minister Babiš approaches democracy with his motto “We are not politicians[;] we work hard[.]”<sup>28</sup> In his view, any expression of political opposition is an illegitimate obstacle in realization of his alleged “apolitical” aims.<sup>29</sup>

This absolutization of the majority neglects the key principle of liberal democracies without which they would be mere tyrannies of the majority (i.e., the principle of protection of minorities). This ignorance is a typical feature of the authoritarian way of governance present recently in the Czech Republic that more or less openly seeks to eliminate political minorities forming the opposition.

Furthermore, for the purposes of political persuasion, the concept of a standardized enemy — a migrant who is able to threaten the very existence of a particular political community — is created, regardless of the broad national, religious, and racial variability of contemporary Western civilization. With this phenomenon, efforts are made to use the democratic political discourse to negate the general value of human dignity and to oust the enemy from the political space. The argument based on the idea of a dangerous enemy without human dignity is a widespread ultimate anti-liberal political method used in Czech political discourse nowadays. The declared purposes of this method usually range from the desire to protect cultural identity to the ultimate Schmittian notion of the existential political danger behind the clash of civilizations. This tendency is not limited to any specific part of the political spectrum. On the contrary, it penetrates the political spectrum from anti-establishment to traditional political parties.

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27. This term was used by Zeman on several occasions, for example at his speech at the SPD Congress, when he supported Okamura’s referendum proposals under an argument that politicians fear their voters. *See* Facebook MZ, on December 9, 2017.

28. Jan Lopatka, Czech tycoon to enter parliament on wave of voter anger, *available at* <https://www.reuters.com/article/us-czech-election-babis/czech-tycoon-to-enter-parliament-on-wave-of-voter-anger-idUSBRE98OoQG20130925> (last accessed Sep. 30, 2020).

29. Motto of the 2013 election campaign of ANO 2011.

The anti-immigration reaction has also intensified the long-term negative attitude towards other minority groups defined on grounds of ethnicity or religion as well as towards the concept of inclusive education.<sup>30</sup> Disabled children have thus also become the victims of political hatred of minorities. The image of the inner enemy is complemented by political “dwarves,” as President Zeman calls opposition political parties.<sup>31</sup>

The EU has become the external enemy and is being accused of interfering with the country’s internal affairs.<sup>32</sup> This idea was initiated in its current form mainly by the Migration Crisis, as well as by the idea of migration quotas.<sup>33</sup> Even though the quotas are not proposed as policy anymore, the idea of a major institutional external enemy has expanded into the requirement for radical change in the EU. This tendency is manifested on a wide scale — from the promotion of the referendum on EU withdrawal (SPD) to the Prime Minister’s bipolarity in adopting an anti-EU position at home and a pro-EU position abroad.<sup>34</sup>

The Prime Minister is more cautious in terms of Euroscepticism when compared with President Zeman. He does not want to be a European outsider when participating in EU deliberations and he is not close to Zeman’s orientation on China and Russia. On the other hand, he supports Orban’s opposition to the EU with an emphasis on national interests.<sup>35</sup> As a result of

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30. See Robert Muller & Jason Hovet, Czech President Zeman re-elected with anti-immigration message, *available at* <https://www.reuters.com/article/us-czech-election-president/czech-president-zeman-re-elected-with-anti-immigration-message-idUSKBN1FGooC> (last accessed Sep. 30, 2020).
  31. See ČTK, Zeman’s Zemanites: Total Flop, Biggest Dwarves Of Them All?, *available at* <https://praguebusinessjournal.com/zemans-zemanites-total-flop-biggest-dwarves-of-them-all/> (last accessed Sep. 30, 2020).
  32. Daniela Lazarová, Czech president says EU should not interfere in internal affairs of member states, *available at* <https://english.radio.cz/czech-president-says-eu-should-not-interfere-internal-affairs-member-states-8148823> (last accessed Sep. 30, 2020).
  33. James Kanter, *E.U. Countries Must Accept Their Share of Migrants, Court Rules*, N.Y. TIMES, Sep. 6, 2017, *available at* <https://www.nytimes.com/2017/09/06/world/europe/eu-migrants-hungary-slovakia.html> (last accessed Sep. 30, 2020).
  34. Richard Rose, *Referendum challenges to the EU’s policy legitimacy – and how the EU responds*, 26 J. EUR. PUB. POL’Y. 207, 216 (2019).
  35. See Yasmeen Serhan, The EU Watches as Hungary Kills Democracy, *available at* <https://www.theatlantic.com/international/archive/2020/04/europe-hungary-viktor-orban-coronavirus-covid19-democracy/609313> (last accessed Sep. 30, 2020).

proceedings against him on suspicion of EU subsidy fraud, he disagrees with linking decisions on European subsidies with the requirements of the rule of law.<sup>36</sup>

The attribution of responsibility for the country's internal problems to an external culprit finds a great positive response among the population. Therefore, the coexistence of authoritarian political tendencies with the current constitutional system is quite "problem-free" as it is not marked by any significant backlash from the population. It allows proponents of authoritarian methods to build the impression of legitimacy of their actions and above that they can attribute any political failures not to their decisions but to the existing EU system.

Electoral manipulation and legislative changes may not be necessary methods in the transformation of the regime, as historical and current examples show that this transformation often takes place with wide support of the population and the implementation of measures is based on the interpretation of existing regulations. However, these ways are signs of an already consolidated authoritarian regime.

It is precisely the different forms of processes that can lead to underestimation of methods that are less obvious or less vigorously opposed to the existing constitutional system. This is because it is typical for the holders of authoritarian methods to present themselves as democrats whose main goal is public welfare. Since achieving this goal requires a concentration of power, power control mechanisms are said to be obstacles to fragmenting national interest. Efforts to guide them in the implementation of authoritarian methods in the sense of unconstitutional practice are declared as totalitarian methods.

The current situation has been characterized by lawyer and sociologist J. Přebáň as that parliamentarism in the Czech Republic no longer operates on

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36. At the time of negotiating support for his Government, he was willing to compromise on such a referendum — in relation to the radical views of the Communists and the SPD; recently, he has been more cautious after gaining confidence (i.e., supporting a constitutional law introducing general referendum, but not on foreign obligations and taxes). See Josef Koukal, Okamura: We can agree on a referendum with Babiš, *available at* <https://www.novinky.cz/domaci/452684-okamura-s-babisem-se-muzeme-shodnout-na-referendu.html> (last accessed Sep. 30, 2020) & ČTK, Babiš: Referendum yes, but not on foreign affairs and taxes. The government is neutral about the SPD proposal, *available at* <https://zpravy.aktualne.cz/domaci/babis-referendum-ano-ale-ne-o-zahranicnich-zavazcich-a-danic/r~e7f1942afb8711e7aabeac1f6b220ee8> (last accessed Sep. 30, 2020).

the political level, while there are still chances of maintaining it on the constitutional level.<sup>37</sup> The current regime is called “benevolent authoritarianism” (i.e., one where those in power decide to allocate vital resources in society — whether it is economic power, power in the media or constitutional bodies — and allocate it to loyal groups to control their own government and limit the possibilities of opposition).<sup>38</sup>

Czech constitutional theorist J. Kysela finds a parallel to the crisis of Czech parliamentarism with the Weimar Republic.<sup>39</sup> He sees the similarities in relation to the specific role of the President, respectively to the expectations associated with it, in the crisis of political partyism and the absence of sufficient support for the republican form of government from both the population and the political representation.<sup>40</sup> They also draw attention to the fact that the current social and political context in the Czech Republic deviates from the regimes and tendencies that are taking place in Hungary and Poland, which can be characterized by the normative deconstruction of the division of power.

### III. THE FIRST VISIBLE MANIFESTATION OF THE CURRENT CRISIS

The next Chapter introduces the problems following the creation of a pluralist party political system after the Velvet Revolution in 1989. The first part describes the process of the decay of the traditional party system and the rise of non-traditional political parties. Given the fact that the Czech Republic is a parliamentary democracy, the consequences of these changes strongly influenced the relationship between the legislative and the executive branch.

In the second part, the origin and character of the Prime minister’s “apolitical” political movement — “ANO 2011” — promoting discontinuity with the political style of traditional political parties and replacing it with the managerial method of corporate governance, will be explained.

#### A. *The Decline of Traditional Partyism*

If we were to summarize the causes of the current political situation and find the beginning of the route to the current political crisis in the Czech Republic,

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37. Jiri Priban, *Reconstituting Paradise Lost: Temporality, Civility and Ethnicity in Post-Communist Constitution-Making*, 38 L. & SOC. REV. 407, 409 (2004).

38. Peter Juviler, *Prospects for Soviet Society by Allen Kassof*, 28 RUSS. REV. 236, 236-37 (1969).

39. Jan Kysela, et al., *Narrow Gate? The Process Of Entering International And Eu Agreements Into The Constitutional Order Of An Eu Member State: The Example Of The Czech Republic*, 7 CROATIAN Y.B. EUR. L. & POL’Y. 225, 255 (2011).

40. *Id.* at 225.

the journey would lead us through the historical development of Czechoslovak Statehood long before 1989.<sup>41</sup> From the perspective of more recent historical developments the change of the structure of the partyism system that has taken place around 2010 stands out. The change was one of the prerequisites for modifying the functioning of the parliamentary system and, at the same time, represented the transformation of the general political climate during 2008 to 2010.<sup>42</sup>

The period from the fall of communism in November 1989 until the demise of Czechoslovakia in 1993 was characterized by the gradual creation of a pluralist party system.<sup>43</sup> Already in the first elections to the Chamber of Deputies of the independent Czech Republic in 1996, the results of the created party system were firmly evident and lasted almost identically until 2010 (i.e., elections 1996, 1998, 2002, 2006).

This period was characterized by the establishment and relatively stable existence of a pluralist party political system characterized by the existence of the dominant social democratic left-wing (ČSSD) and economically liberal right-wing (ODS) parties.<sup>44</sup> The center of the spectrum was then represented by, in the European context traditional, Christian Democratic Party (KDU-CSL). In the post-revolutionary period, there were also discussions about banning the Communist Party.<sup>45</sup> However, such approach was not implemented. The Communist Party (KSČM) has thus formed a stable entity in the extreme left from the beginning of the independent Czech Republic to the present.<sup>46</sup>

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41. See Jiří Příbán, Jiří Příbán: Change of Regime?, *available at* <https://www.novinky.cz/kultura/salon/459739-jiri-priban-promena-rezimu.html> (last accessed Sep. 30, 2020). A preview of this development is provided in this source.

42. Peter Spáč, *New Political Parties in Czech Republic: Anti-politics or Mainstream?*, in *ALTERNATIVE POLITICS? THE RISE OF NEW POLITICAL PARTIES IN CENTRAL EUROPE* 138 (Grigorij Mesežnikov, et al., eds. 2013).

43. Andy Kopsa, *Czechoslovakia's Velvet Revolution Started 30 Years Ago — But It Was Decades in the Making*, *available at* <https://time.com/5730106/velvet-revolution-history> (last accessed Sep. 30, 2020).

44. William H. Luers, *Czechoslovakia: Road to Revolution*, 69 *FOREIGN AFFAIRS* 77, 98 (1990).

45. *Id.* at 97.

46. The above outlined conclusion is not undermined by the fact that each of the electoral periods was marked by a presence of a small number of minority political

However, the instability of established Governments was typical throughout the pluralist party political system (1992 to 2010). The natural degree of instability of the Government in the parliamentary republic has been multiplied by a number of corruption scandals of Prime Ministers that have generally led to respective premature demises of the Government.<sup>47</sup>

The attempts to radically change the constitution go back to the period of a so-called “opposition agreement” between ODS and ČSSD at the turn of the millennium (1998 to 2002).<sup>48</sup> The opposition agreement established a friendly cooperation between the major left (ČSSD) and the major right (ODS) political parties.<sup>49</sup> In principle, it ended the parliamentary control of the Government by the opposition due to the division of economic spheres of influence between the government party and the strongest opposition party.<sup>50</sup>

The last term of the political party system created in the 90’s was marked by a stalemate in the electoral distribution of mandates (2006) that did not allow for the creation of a stable left-wing or right-wing Government with the participation of central entities (at that time the Green party and Christian

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entities (one to two), which soon proved to be non-viable in the medium term. Thus, in the 1996 elections, the smaller right-wing ODA party, which played an important role in the transformation processes prior to the establishment of the Czech Republic, also succeeded. The same was the fate of the far-right nationalist party SPR-RS. The next two terms (1998 and 2002) saw the right-wing Union of Freedom (US, or later US-DEU). In the last election of the pluralist system (2006), the Green Party (SZ) was successful but failed to defend the position again.

47. See Thomas Sedelius & Olga Mashtaler, *Two decades of semi-presidentialism: issues of intra-executive conflict in Central and Eastern Europe 1991–2011*, 29 EAST EUR. POLITICS 109, 119 (2013).
48. Markéta Sedláčková & Jiří Šafr, *Trust in Transition: Culturalist and Institutional Debate Reflected in the Democratization Process in the Czech Republic, 1991–2008*, in TRUST IN CONTEMPORARY SOCIETY 116 (Masamichi Sasaki ed. 2019).
49. The opposition agreement was signed by Miloš Zeman (ČSSD) and Václav Klaus (ODS) in 1998.
50. See the characteristics of J. Přibáň. Andrea Procházková, *The Direction of the Czech Republic will be Decided Definitively During the Election of the President*, available at <https://www.respekt.cz/politika/o-smerovani-ceske-republiky-se-definitivne-rozhodne-pri-volbe-prezidenta> (last accessed Sep. 30, 2020).

Democrats).<sup>51</sup> Mirek Topolánek's two Governments were followed by Jan Fischer's clerical (administrative) Government.<sup>52</sup>

The demise of the existing political party system began with the elections in 2010, when two new right-wing entities expanded the right-wing scene, originally represented only by traditional ODS. TOP 09 is characterized in its statutes as a conservative right-wing party (but rather is a liberal middle-right party).<sup>53</sup> Public Affairs (VV), a party that presented itself as an economically liberal party, was founded by people originating from the private business sphere and its main declared political objective was to increase citizens' participation in public affairs through referendums. The absence of actual policies, scandals pointing to intentional privatization of the public sphere and resources, as well as internal political disputes led to its real disappearance. TOP 09 prevails as a small parliamentary party until today.

The foreshadowed trend of fragmentation of the political spectrum was confirmed and accelerated in subsequent elections (2013 and 2017) and thus definitively facilitated the decline of the system of traditional political parties and the emergence of new political entities.

The reason for the emergence of new political entities can be divided into external and internal phenomena. *External* influences include the economic crisis of 2008 and the ensuing Euro Area Debt Crisis which has negatively affected the Czech Republic's economic development, and the subsequent Migration Crisis in 2015<sup>54</sup> which revived nationalist political tendencies, particularly directed against the EU. *Internal* long-term factors were the

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51. Eva van de Rakt, After the elections in the Czech Republic: The end of liberal democracy in Central Europe?, available at <https://www.boell.de/en/2017/11/07/after-elections-czech-republic-end-liberal-democracy-central-europe> (last accessed Sep. 30, 2020).

52. Jan Fischer appointed as the new Czech prime minister, available at <https://www.dw.com/en/jan-fischer-appointed-as-the-new-czech-prime-minister/a-4166940> (last accessed Sep. 30, 2020).

53. TOP 09 is a "liberal-conservative political party" whose name is derived from *Tradice Odpovědnost Prosperita*, which means "Tradition Responsibility Prosperity." Jirí Málek, Czechia: Results of EU Elections 2019, available at <https://www.transform-network.net/en/focus/overview/article/ep-2019-the-european-left-one-mouth-many-voices/czechia-results-of-eu-elections-2019> (last accessed Sep. 30, 2020).

54. The Czech Republic: Migration trends and political dynamics, available at <https://www.globsec.org/publications/czech-republic-migration-trends-political-dynamics> (last accessed Sep. 30, 2020).

economic-political oligarchization of indigenous political entities and the loss of ability of political parties to restore voters' confidence and generate new leaders. Representatives of well-established political parties were considered by a significant part of society to be corrupted representatives who were unable to offer solutions to social and economic problems and face the Migration Crisis. These phenomena were also reflected in the low level of membership and participation of citizens in the activities of traditional political parties.<sup>55</sup>

The political party system from 2013 is characterized by two basic phenomena. The first is the establishment of almost previously non-existent extreme right nationalist parties. The original representative of the extreme right nationalist part of the spectrum was the Workers' Party (DSSS), openly following Nazi ideology, which was dissolved in 2010 by a decision of the Supreme Administrative Court on grounds of being a party threatening the democratic foundations of the rule of law.<sup>56</sup> However, its place was taken by the Dawn movement (election 2013) and later its successor SPD (election 2017). The initially purely populist appeal of the introduction of elements of direct democracy, with the onset of the migration crisis, changed sharply into chauvinistic identity rhetoric, directed mainly against immigrants and the EU as an external enemy of Czech national interests. The main representative of this stream is Tomio Okamura, chairman of the SPD movement and of Japanese origin, who is the most known and popular promoter of the idea of national purity of the Czech nation.<sup>57</sup>

However, elements of nationalism and Euroscepticism have been adopted to some extent by all political parties during and in the aftermath of the Migration Crisis. While traditional right-wing ODS has intensified its

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55. Idnes.cz, The left is troubled by the loss of members. The KSČM has lost thousands, on the contrary, it is "pulling" the SPD, *available at* [https://www.idnes.cz/zpravy/domaci/politika-politicke-strany-snemovna-clenove-pirati-spd-kscm-cssd-ano.A180212\\_171920\\_domaci\\_bja](https://www.idnes.cz/zpravy/domaci/politika-politicke-strany-snemovna-clenove-pirati-spd-kscm-cssd-ano.A180212_171920_domaci_bja) (last accessed Sep. 30, 2020).

56. Rozsudek Jménem Republiky, 117 C 23/2012 (2013) (Czech).

57. Besides the absurdity of the fact that the purity of the Czech nation is pursued by a politician of Japanese origin, Okamura claims that he cannot be a racist because he is Japanese. Daniel McLaughlin, *Tokyo-born Czech nationalist revels in his rising influence*, IRISH TIMES, Dec. 9, 2017, *available at* <https://www.irishtimes.com/news/world/europe/tokyo-born-czech-nationalist-revels-in-his-rising-influence-1.3320699> (last accessed Sep. 30, 2020) & Nathan Siegel, THE CZECH IMMIGRANT ... WHO OPPOSES IMMIGRANTS, *available at* <https://www.ozy.com/news-and-politics/the-czech-immigrant-who-opposes-immigrants/41659> (last accessed Sep. 30, 2020).



historically inherent Eurosceptic stance, in left-wing social democracy the rise of nationalism and Euroscepticism has led to a split between supporters of socialist universalism and social nationalism. On the one hand, the penetration of nationalism reduced the electoral attractiveness of the far right. However, it integrated nationalist sentiment into the daily political life of the entire political system.

The second feature is the dominant emergence of brand-new non-traditional parties: Pirates (10.7% — elections 2017) and ANO 2011 (18.6% — elections 2013; 29.6% — elections 2017).<sup>58</sup> The Pirates' policy focuses on modern information technologies (e.g., public administration), copyright, drug use, public administration transparency, shared economics, and such. It is a relatively diverse group of left-wing, right-wing, liberal, and conservative politicians when viewed in the prism of social questions (e.g., in relation to migration or gay rights).<sup>59</sup> Their typical target electorate is the younger urban population. With ANO 2011, they share an appeal to reject previous forms of corrupt politics, but unlike ANO 2011, their rule has so far been confined only to opposition.

### *B. Running the State as a Private Enterprise*

The ANO 2011 movement was founded as a declared “*apolitical*” movement that was supposed to represent a complete discontinuity with the political style of traditional political parties (the abbreviation ANO means “*Action of Dissatisfied Citizens*” and “*Yes*”).<sup>60</sup> These were portrayed as corrupt and oligarchic structures whose aim was not to seek public interest, but to preserve the existence of partial political spheres of influence aimed to hold power *per se* or to achieve private political interests. The traditional concept of politics in the sense of competing concepts of public good was replaced by the ANO 2011 movement with the idea of depoliticization of its own political existence. Any negative evaluation of the activities of ANO 2011 is considered by its members as “*campaign*” and “*political attack*,” thus successfully preventing a

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58. See Election Results and Referendum, available at <https://www.volby.cz> (last accessed Sep. 30, 2020).

59. Pirátská Strana, Long Term Program, available at <https://www.pirati.cz/program/strana.html> (last accessed Sep. 30, 2020).

60. Alliance of Liberals and Democrats for Europe Party, ANO 2011, available at [https://www.aldeparty.eu/ano\\_2011](https://www.aldeparty.eu/ano_2011) & Pascale Joannin, Andrej Babis's party ANO wins the Czech elections, available at <https://www.robert-schuman.eu/en/eem/1735-andrej-babis-s-party-ano-wins-the-czech-elections> (last accessed Sep. 30, 2020).

rational form of discussion of relevant public issues. A traditional political deliberation based on the formulation of specific sub-policies in favor of certain traditional electoral type groups (e.g., employees, entrepreneurs, conservatives) was replaced by ANO 2011 with the private-management method and is judged solely through the prism of corporate effectivity.<sup>61</sup> Thus, the State is viewed as a private enterprise. The ANO 2011 movement has the character of a party based on the person of its founder, entrepreneur A. Babiš, who has significantly concentrated power in the party.<sup>62</sup>

A. Babiš, who was a member of the Communist Party of Czechoslovakia in the 1980s, worked before 1989 as a sales representative for the State-controlled company Chemapol in Morocco.<sup>63</sup> At that time, he registered as a confidant and later as an agent of the Communist Secret State Police.<sup>64</sup> Although Babiš refuses the accusations of cooperation with the Secret State Police, several court decisions confirmed the authenticity of the evidence against him.<sup>65</sup> In the 1990s he started his entrepreneurship Agrofert, which is now the fourth largest company in the Czech Republic.<sup>66</sup> Up to today, he has

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61. Babiš (ANO): To run the state as a company? And why not, *available at* <https://www.parlamentnilisty.cz/politika/politici-volicum/Babis-ANO-Ridit-stat-jako-firmu-A-proc-ne-499512> (last accessed Sep. 30, 2020).

62. According to the current wording of the ANO 2011 Statute, Babiš may interfere with candidate lists at all levels of election (originally only the Movement Committee had this power). *See* STANOVY POLITICKÉHO HNUTÍ ANO 2011, *available at* <https://www.anobudelip.cz/file/edee/2017/stanovy-schvalene-iv.-celostatnim-snemem.pdf> (last accessed Sep. 30, 2020).

63. Louise Nordstrom, Andrej Babis, the Czech Republic's own 'Donald Trump', *available at* <https://www.france24.com/en/20171022-czech-republic-andrej-babis-election-billionaire-scandals-donald-trump-media> (last accessed Sep. 30, 2020).

64. Tatiana Jancarikova, Court rejects Czech PM's bid to clear himself of past secret police links, *available at* <https://www.reuters.com/article/us-czech-politics/court-rejects-czech-pms-bid-to-clear-himself-of-past-secret-police-links-idUSKCN1FX1TU> (last accessed Sep. 30, 2020).

65. *See* The new evidence supports the thesis of Babiš's cooperation with the StB, *available at* <https://zpravy.aktualne.cz/domaci/nove-dukazy-usvedcuji-babise-ze-spoluprace-s-stb/r~f98dcda43afa11e38f380025900feao4> (last accessed Sep. 30, 2020).

66. #616 Andrej Babis, *available at* <https://www.forbes.com/profile/andrej-babis/#2de72e8721ee> (last accessed Sep. 30, 2020).

also become owner of major media companies operating in the Czech Republic.<sup>67</sup>

Babiš's entry into politics was characterized by a sharp demarcation against traditional forms of politics and partyism. In his role, he stylized himself as the guardian of the public interest against a corrupt party system. Since then, he has acted as the guarantor of an "apolitical" political party in which he enjoys unquestionable authority. The managerial principle of subordination of employees is applied to its entire political organization. Thus, this political method leads him to prefer executive power as a means of achieving political goals while at the same time undermining the role of the Parliament which he considers unnecessary "chewing-up," incoherent with the guiding motto of his political activity — "We work hard!"<sup>68</sup> In the public sphere, he presents himself as an ordinary citizen who is in no way different from the average citizen of the Czech Republic and shares their life joys and sorrows, although he is one of the wealthiest citizens of the Czech Republic. The electoral success of ANO 2011 secured its participation in the socialist-led Government and, after a major election victory in 2017, qualified Babiš to be the Prime Minister.

Moreover, Babiš's entry into politics is accompanied by a number of problematic circumstances connected with his business activities. Babiš was investigated for suspicion of committing subsidy fraud when drawing on EU funds.<sup>69</sup> In addition, the circumstances of the case indicate an active effort to influence the police investigation by Babiš himself through his influence as Prime Minister.<sup>70</sup> Although no one has been indicted in the present case as

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67. See ANDREJ BABIŠ AND AGROFERT, available at <https://web.archive.org/web/20190729223337/http://www.mapovani.cz/tema/andrej-babis-a-agrofert/70> (last accessed Sep. 30, 2020).

68. Cf. I will not be in opposition and sit in the dressing room, I would rather go away, says Babiš, available at [https://www.idnes.cz/zpravy/domaci/nebudu-v-opozici-a-sedet-ve-zvanirne-radi-odejdu-pryc-rika-babis.A160621\\_104408\\_domaci\\_kop](https://www.idnes.cz/zpravy/domaci/nebudu-v-opozici-a-sedet-ve-zvanirne-radi-odejdu-pryc-rika-babis.A160621_104408_domaci_kop) (last accessed Sep. 30, 2020).

69. Czech Prime Minister Andrej Babis fraud investigation reopened, available at <https://www.dw.com/en/czech-prime-minister-andrej-babis-fraud-investigation-reopened/a-51534062> (last accessed Sep. 30, 2020).

70. See Jaroslav Spurný, Long Shadows of a Stork's Nest, available at <https://www.respekt.cz/politika/dlouhe-stiny-capiho-hnizda> (last accessed Sep. 30, 2020).

the investigation is ongoing, a separate investigation by the EU supervisory authorities has confirmed the illegal treatment of EU funds.<sup>71</sup>

The conflicts of interest include not only the question of the aforementioned investigation, but also the issue of ownership of Agrofert and media companies. Following the entry of Babiš into politics, an amendment to the Statute on Conflict of Interest was adopted, which prohibits members of the executive branch to own media and receive State subsidies through their companies.<sup>72</sup> Subsequently, Babiš transferred his companies to trust funds.<sup>73</sup> Extensive disputes persist to this day as to whether Babiš is the controlling entity of the trust funds.<sup>74</sup> Such position would mean a violation of national and European subsidy rules.<sup>75</sup> However, the ongoing proceedings at national and European institutions have not yet been finalized.

#### IV. ATTACKS ON THE SYSTEM OF DIVISION OF POWER

This Chapter puts the political ideas of Prime Minister Babiš into the wider context of his real political practice. It is most notably marked by deep cooperation with the President, together with whom he managed to push through his Government without regard to the constitutional position of the Parliament.

To understand how their actions violate the rules of the constitutional system and the rule of law in the Czech Republic, it is useful to summarize the basic principles of the constitutional mechanism. According to their Constitution, the Czech Republic is a parliamentary democracy characterized by the Government's political responsibility to the Chamber of Deputies

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71. Aktualne.cz, We publish the complete text of the OLAF final report on the investigation of the Stork's Nest Farm subsidy, *available at* <https://zpravy.aktualne.cz/domaci/zprava-olaf-capi-hnizdo-kompletni-andrej-babis/r~e4e4d5c8f62111e7984d0cc47ab5f122/> (last accessed Sep. 30, 2020) & Jaroslav Spurný, Andrej Babis Will Almost Certainly go to Court for the Stork's Nest, *available at* <https://www.respekt.cz/politika/andrej-babis-pujde-za-capi-hnizdo-skoro-jiste-pred-soud> (last accessed Sep. 30, 2020).

72. Hana Čáková, Lex Babiš. What is the Czech Prime Minister's Interest in EU Subsidies, *available at* <https://www.investigace.eu/lex-babis-what-is-the-czech-prime-ministers-interest-in-eu-subsidies> (last accessed Sep. 30, 2020).

73. Robert Muller, Rich Czech finance minister shifts businesses to trust funds to heed new law, *available at* <https://www.reuters.com/article/czech-babis/rich-czech-finance-minister-shifts-businesses-to-trust-funds-to-heed-new-law-idUSL5N1FO3R8> (last accessed Sep. 30, 2020).

74. Čáková, *supra* note 72.

75. *See* Čáková, *supra* note 72.

(Parliament's lower house).<sup>76</sup> The responsibility of the Government is manifested primarily through the institute of political confidence: the establishment and duration of the Government depends on gaining and retaining of the confidence of the Chamber of Deputies.<sup>77</sup>

The executive power is shared between the President of the Republic and the Government. The President is the head of State, elected directly by citizens.<sup>78</sup> The functions of the head of State are mostly representative;<sup>79</sup> the highest body of executive power is the Government.<sup>80</sup>

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76. CZECH CONST. art. 10 (b) (1).

77. The detailed procedure and its variations are set forth in Article 68 of the Czech Constitution:

- (1) The Government is responsible to the Chamber of Deputies.
- (2) The President of the Republic shall appoint the Prime Minister and, on the basis of the Prime Minister's proposal, the other members of the Government and entrust them with the management of the ministries or other offices.
- (3) Within thirty days of its appointment, the Government shall go before the Chamber of Deputies and ask it for a vote of confidence.
- (4) If the newly appointed Government does not receive a vote of confidence from the Chamber of Deputies, the process in paragraphs 2 and 3 shall be repeated. If the Government appointed on this second attempt does not receive a vote of confidence from the Chamber of Deputies either, the President of the Republic shall appoint the Prime Minister on the basis of a proposal by the President of the Chamber of Deputies.
- (5) In other cases, on the basis of the Prime Minister's proposal, the President of the Republic shall appoint and recall other members of the Government and entrust them with the management of the ministries or other offices.

CZECH CONST. art. 68.

78. He or she was originally elected by the Parliament. After the constitutional amendment of 2013, he or she is elected directly by citizens.

79. There are a small number of powers the President is entitled to realize acting alone (without the consent of the other constitutional organ). These are contained in Article 62 of the Czech Constitution. The President's powers contained in Article 63 of the Czech Constitution and those established by law do, however, require the countersignature of the Prime Minister or of a member of the Government designated by him. In the case of the exercise of these powers, which are more numerous than those of the President acting alone, the Government is politically responsible for the decisions of the President.

80. CZECH CONST. art. 67.

The President is not responsible for the performance of his duties. The only possibility way to prosecute him is a constitutional charge against him for high treason or gross violation of the constitutional order before the Constitutional Court (i.e., impeachment procedure).<sup>81</sup>

The first part of this Chapter will analyze the authoritarian methods of the representatives of the executive power in which they disregard the fundamental principles of parliamentarism. The President and Prime Minister's unconstitutional proposals for institutional constraints of Parliament will also be assessed in this section. In the next part, the Article will attempt to explain the problem of the concentration and abuse of the executive power outside of its constitutional framework. Finally, the President's interference with the independence and impartiality of the judiciary will be described.

#### *A. Weakening of the Parliamentary Form of Government*

The personal circumstances of Babiš and the political controversy that exists around him led to a fundamental break in the formation of a parliamentary majority capable of establishing a new Government after the 2017 elections. In this situation, however, Babiš found a significant political ally, re-elected President Miloš Zeman.<sup>82</sup> Their political alliance has led to efforts to push

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81. Article 65 (2) and (3) of the Czech Constitution provides —

(2) Senate may, with the consent of the Chamber of Deputies, file a constitutional charge against the President of the Republic for high treason, gross violation of the Constitution or other segment of the constitutional order before the Constitutional Court; treason is deemed to mean any conduct of the President of the Republic directed against the sovereignty and integrality of the Republic as well as against the democratic order of the republic. Based on the constitutional action the Constitutional Court may hold that the President shall lose the Presidency office and any further eligibility for the office.

(3) For the Senate to approve the filing of a constitutional charge, the consent of a three-fifths majority of the votes of present senators is required. For the Chamber of Deputies to consent with the filing of the constitutional charge, the consent of a three-fifths majority of all deputies is required: if the Chamber of Deputies fails to grant the consent within three months from the day that the Senate sought such consent, the consent shall be deemed to have been withheld.

CZECH CONST. art. 65, (2)-(3).

82. Robert Muller & Jan Lopatka, Police charge Czech PM candidate Babis with subsidy fraud, *available at* <https://www.reuters.com/article/us-czech-election-babis/police-charge-czech-pm-candidate-babis-with-subsidy-fraud>

Babiš's Government at all costs, regardless of constitutional rules. Thus, the constitutional system was pushed to a critical state in which the political union of the President and Prime Minister not only violated constitutional rules, but by doing so fundamentally damaged the position of the Parliament.

From the point of view of the Constitution, acting as a stabilizing (moderating) influence (function) in the course of the political processes is at the heart of the President's political function.<sup>83</sup> This is particularly relevant in political changes of constitutional quality, such as in situations of formation of a new Government or changes in its composition. In the event of the demise of the Government, the President appoints the Prime Minister and other members of the Government seeking to receive the trust of the Chamber of Deputies.<sup>84</sup> Although the Constitution does not explicitly stipulate the principles that the President should follow when choosing a Prime Minister, he should not be guided by his own political preferences, but rather his choice is subordinate to rationality to establish a Government that will gain the confidence of the Chamber of Deputies. It is for this reason that the head of the strongest political party is usually appointed after the elections. If the first attempt to form a Government fails, the second attempt is repeated with the identical mechanism. In the event of a third attempt, the President is limited by the proposal of the Chairman of the Chamber of Deputies.<sup>85</sup>

The political alliance of the President and the Prime Minister was evident for the first time during the Government crisis in 2017. The beginning of the crisis was the accusation against Babiš of receiving European subsidies.<sup>86</sup> Prime Minister B. Sobotka (ČSSD) decided to recall Finance Minister Babiš from the Government.<sup>87</sup> However, the President did not do so until after a protracted hesitation and the threat of constitutional charge. While the President has a stabilizing role at the time of the Government's creation, from the Government's inception, the Prime Minister is the main guarantor of its

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idUSKBNICEIQF (last accessed Sep. 30, 2020). See also Rob Cameron, Czech election: The politically incorrect president dividing a nation, *available at* <https://www.bbc.com/news/world-europe-42619538> (last accessed Sep. 30, 2020).

83. CZECH CONST. art. 66.

84. CZECH CONST. art. 35.

85. CZECH CONST. art. 68.

86. See Muller & Lopatka, *supra* note 82.

87. Jan Marchal, Czech PM withdraws resignation, wants finance minister sacked, *available at* <https://www.businessinsider.com/afp-czech-pm-withdraws-resignation-wants-finance-minister-sacked-2017-5> (last accessed Sep. 30, 2020).

functioning as long as his Government enjoys the confidence of the Chamber of Deputies. Based on the Constitution, the President shall recall members of the Government if the Prime Minister proposes so.<sup>88</sup> Thus, from a doctrinal point of view, there was no doubt about the president's obligation to recall a member of the Government on the proposal of the prime minister.<sup>89</sup>

Failure to respect constitutional processes continued after the elections in 2017. Although Babiš was appointed as the prime minister for being the chairman of the winning political party, it was clear from the outset that he would not be able to form a majority Government. Other political parties refused to take part in the Government, especially by referring to the ongoing criminal proceedings for subsidy fraud. After the first attempt, the Babiš Government was unable to gain the confidence of the Chamber of Deputies.

However, the President, instead of making a second attempt to appoint a Prime Minister, as it is foreseen by the Constitution, refused to proceed and declared his will to support the already existing Government for any length of time.<sup>90</sup> The State executive power thus functioned for more than half a year without the confidence of the Chamber of Deputies and without the existence of a convincing will to remedy a constitutionally exceptional situation. Babiš

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88. CZECH CONST. art. 67.

89. The President said that the resignation of the Government announced by the Prime minister as a result of the Chairman refusing to continue to co-operate with the then Finance Minister Babiš as a result of uncertainties about his economic activities would only be a “personal” resignation and the Government will continue the same composition with the newly appointed chairman. Given that such a procedure would make the demise meaningless, as the President intends to recall only the Prime Minister and Finance Minister Babiš would remain in the Government, the Prime Minister announced that he would not eventually bring the resignation. Instead, he proposed to the President to recall Babiš. Here, another round began, in which the President, in spite of his obligations under the Constitution, delayed the adoption of the proposal and made it conditional on constitutionally irrelevant requirements. Three weeks after the petition was filed, the President finally accepted the proposal to recall Babiš, when in the meantime there was an agreement between the Government parties on the new Finance Minister. According to the predominant interpretation of the Constitution, the resignation of the Prime Minister is the resignation of the entire Government. Regarding the second problem — not recalling the Finance Minister— this obligation arises from Article 74 of the Constitution and it is assumed that the President will do so without undue delay (which has not happened in this case). See Jan Kysela & Jan Wintr, *The Constitutional Dimension of the Government Crisis of May 2017*, in PRÁVNÍ ROZHLEDY 457 (2013).

90. CZECH CONST. art. 68.



did not feel affected by the situation and declared that the Government “*works hard*” and does not need the confidence — “*People expect the cabinet to function here, and they honestly don’t care whether it will be a coalition, minority, demise or cabinet without confidence. People want the government to rule and solve their problems. And we are ready for that responsibility.*”<sup>91</sup>

Moreover, in this period, the Government did not feel the duty of any restraint in the execution of serious executive functions, despite the consensus of constitutional theory on the obligation to limit its activities to strictly necessary actions. Mere days after his appointment, he pushed through significant changes in the State administration as well as personnel changes in major State-related institutions and businesses.<sup>92</sup>

The constitutionally critical situation was a result of the common conviction of the President and the Prime Minister about the uselessness of the parliamentary form of government. Thus, with his Government’s guarantee, the President modified the constitutionally foreseen system of political trust between the Chamber of Deputies and the Government into a position of trust between the President and the Prime Minister.<sup>93</sup> The normative instability of this fundamental political framework was further intensified by the presidential election. The election took place when the President unconstitutionally guaranteed the existence of the Government. The re-election of the President can be thus seen as the political legitimation of his policy that was outside the framework of the Constitution. The election of the President was also a choice about the actual interpretation of the

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91. Jindřich Šídlo, We are not like the constitution, we are working, *available at* [https://www.irozhlas.cz/komentare/nejsme-jako-ustava-makame\\_1712121757\\_mos](https://www.irozhlas.cz/komentare/nejsme-jako-ustava-makame_1712121757_mos) (last accessed Sep. 30, 2020) (emphasis supplied).

92. Thus, systemization was carried out under the slogans of “efficiency and rationalization of management,” “innovative approaches,” and “improving communication.” “The Service Statute, which is very difficult to enforce and whose form is not ideal, is completely dismantled by the government. It is outrageous that the ministers in resignation, after a few days of governance, started to ‘systematize’ without having the time to know the situation in the ministries,” political scientist V. Dvořáková said. *Cf.* Jiří Sezemský, Prime Minister Babiš: People don’t care that we rule without trust, *available at* <https://www.forum24.cz/premier-babis-lidem-je-jedno-ze-budeme-vladnout-bez-duvery> (last accessed Sep. 30, 2020).

93. The International Institute for Democracy and Electoral Assistance, Dissolution of Parliament (A Primer Published on May 2016) at 8, *available at* [http://constitutionnet.org/sites/default/files/dissolution\\_of\\_parliament\\_final.pdf](http://constitutionnet.org/sites/default/files/dissolution_of_parliament_final.pdf) (last accessed Sep. 30, 2020).

Constitution, and so the victory of the president in the following election is viewed by his supporters as a form of constitutional amendment.

The negative approach of the President and the Prime Minister to parliamentarism is also reflected in their proposals for institutional constraints of the Parliament. Both the President and the Prime Minister are proposing to reduce the number of deputies and senators from 281 to 101.<sup>94</sup> They justify it on the grounds that it will increase the efficiency of the Parliament, by forcing it to *act instead of discuss*.<sup>95</sup> Babiš would also like to push for a change in the House's Rules of Procedure which would limit the possibility of interpellations — as another means for the parliamentary control of Government — because he does not see a reason why MEPs should interrogate him instead of “*letting him work*.”<sup>96</sup> Among the proposals of Prime Minister Babiš is also the introduction of a majority electoral system of the Chamber of Deputies — instead of the current proportional system which is laid down in the Constitution<sup>97</sup> —

Of course, the majority system would be the best for the Czech Republic, because [S]tate administration would be easier. But other politicians will not want that, because the current system suits them. In fact, [we are] working on it, because you have the ANO movement on the one hand and all the other parties that are against us on the other. So maybe [there is] no need to

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94. CZECH CONST. art. 16.

95. For a long time, Babiš has declared aversion to parliamentary deliberation as a form of “*chattering*.” See Veronika Neprašová & Luboš Kreč, There are too many deputies and the Senate is useless, Babiš explains to voters. But he is not going to change the political system, *available at* <https://zpravy.aktualne.cz/domaci/poslancu-je-moc-a-senat-je-zbytecnost-vyklada-babis-volicum/r~c582711c66ee11e7832f0025900feao4> (last accessed Sep. 30, 2020).

96. Article 53 of the Czech Constitution provides —

- (1) Each Deputy has the right to interpellate the Government or members of it concerning matters within their competence.
- (2) Interpellated members of the Government shall respond to an interpellation within thirty days of its submission.

CZECH CONST. art. 53.

97. Based on Article 18, paragraph 1 of the Constitution, elections to the Chamber of Deputies shall be held by secret ballot on the basis of a universal, equal, and direct right to vote, according to the principle of proportional representation. CZECH CONST. art. 18 (1).

change anything. Now [it is] a question of who wins the parliamentary elections.<sup>98</sup>

As for the Second Chamber, the Senate, the Prime Minister and the President call for its abolition. They argue this on the grounds of low voter turnout, its weaker position in the legislative process, as opposed to the Chamber of Deputies, and its needlessness. According to Zeman, the Senate “*as a so-called insurance of democracy can only work in the case of constitutional and electoral laws, but every clever government will, when necessary, make sure that neither electoral nor constitutional laws change. Well, in this case, you [do not] need the Senate at all.*”<sup>99</sup> Similarly, Babiš said after the failure of his movement in the Senate elections in 2016 that he considers the Senate unnecessary.<sup>100</sup>

In fact, the role of the Senate in the constitutional and political system is much more important for it is the Senate which can be the important safeguard against the elimination of parliamentarism. It is also of key importance as a guarantee against “*regressive twists of democracy in the tyranny of the majority.*”<sup>101</sup>

It is at a time of a fragile border between political and constitutional transformation of the liberal democratic regime that the Senate’s role is crucial. Without the existence of the upper chamber, the Czech Republic would be much closer to the Hungarian path of transition to an authoritarian regime through constitutional and legal changes promoted by the ruling movement. The role of the Senate in the legislative process, including the constitutional requirement of qualified majority in both chambers for constitutional change,

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98. Martin Fendrych, Grandma can’t lose. He would interrupt the Senate, he cries and lies on Facebook, as he made Sobotka prime minister, *available at* <https://nazory.aktualne.cz/komentare/babis-neumi-prohrat-rusil-by-senat-na-facebooku-breci/r~8f25aed945011e6bbf10025900fea04> (last accessed Sep. 30, 2020).

99. Interview by Jan Pokorný with Miloš Zeman, President, Czech Republic, *through* Radiožurnál (Oct. 15, 2018) (emphasis supplied).

100. Fendrych, *supra* note 98. “The Senate is unnecessary, slows down the legislative process, costs 600 million crowns a year, and has lost the power to elect the president” said Babiš. *Id.* Babiš also came up with a proposal whose implementation would establish a Senate mandate according to voter participation in the Senate elections and therefore some constituencies, depending on voter participation, would be without senators (if at least 30% of voters do not attend the elections).

101. P. Pithart, Senate as a Stabilizing Element of the Political System. In: Senate in the Czech Constitutional and Political System, *available at* [https://www.senat.cz/information/z\\_historie/studie/sbornik/sbornik1.php?ke\\_dni=18.1.2017&o=11](https://www.senat.cz/information/z_historie/studie/sbornik/sbornik1.php?ke_dni=18.1.2017&o=11) (last accessed Sep. 30, 2020).

is one of the safeguards maintaining the current state of normative constitutionality. An important prerequisite of this function is also maintaining a different electoral system (i.e., a majority system, where every two years, one-third of the Senate is elected), which protects the Senate from temporal extreme swings in the political mood of the electorate.<sup>102</sup>

The Senate also has significant competences in relation to the President (e.g., the Senate's consent is required to appoint Constitutional Court judges proposed by the President). Above all, the Senate is the only body that can file a constitutional complaint against the President (i.e., impeachment procedure) and thus initiate proceedings before the Constitutional Court on whether the President has committed a gross violation of the Constitution (or treason).<sup>103</sup> Although the design of such a proposal is complicated due to the requirement of constitutional majority in both chambers (and in fact the current composition of the Chamber of Deputies), it is the only means of prosecuting the President in terms of respect for constitutionality (the sanction is loss of the presidency and the ability to reclaim it).

It is this stabilizing role in the political and constitutional system that limits the possibility of radical reversals promoted by the current political majority, which is one of the reasons why the Senate has been attacked by those who push for a de facto change of political regime. When Zeman called on MEPs to “*starve the Senate*” in 2018, that is, to limit its budget and thus effectively prevent its activities, it is another attack on the current constitutional system aiming at a de facto change of the Constitution.<sup>104</sup>

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102. CZECH CONST. art. 18:

- (1) Elections to the Chamber of Deputies shall be held by secret ballot on the basis of a universal, equal, and direct right to vote, according to the principle of proportional representation.
- (2) Elections to the Senate shall be held by secret ballot on the basis of a universal, equal, and direct right to vote, according to the principle of majority rule.

CZECH CONST. art. 18

103. According to Article 65, paragraph 2 of the Constitution, “treason is deemed to mean any conduct of the President of the Republic directed against the sovereignty and integrity of the Republic as well as against the democratic order of the republic.” The characteristic of a “gross violation of the Constitution” depends on the interpretation of the Constitutional Court in the concrete case. CZECH CONST. art. 65 (2).

104. Jan Kysela compares this President's call to a constitutional coup in authoritarian states. Radek Dragoun, Kysela: Zeman's proposal has signs of a coup, the

The President does not have constitutional competence to initiate such changes and Babiš's movement does not have the qualified majority necessary to push through constitutional changes in the current parliamentary composition. However, reduction in the number of deputies and abolition of the Senate is also being promoted by Okamura's SPD movement as well as by the Communists.<sup>105</sup>

*B. The Concentration and Abuse of Executive Power*

The position of the President is a long-term source of instability in the political and constitutional system. Extensive interpretation and exercise of presidential competences in a number of areas, such as the implementation of foreign policy or the exercise of appointment powers, is often considered to be on the border of constitutionality. This approach has become a standard characteristic of the performance of the office of previous Presidents of the Czech Republic. Under normal conditions, the constitutional and political system has been more or less successful in keeping its stability even though the position of President was highly contradictory.

At a time of wider political crisis and the rise of anti-systemic parties reflecting a deeper crisis of democratic values, the President's arbitrary approach to influencing the form of government turned into a direct attack on the very essence of parliamentary form of government. As a result, the fundamental premise of the parliamentary system in which individual policies are not intended to be the result of a unilateral decision by an irresponsible monocratic authority but are in line with the principles of democratic rule of law based on pluralistic parliamentary debate or governmental decision under parliamentary control, has been negated. It is to say that the case of appointing

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starvation of the Senate is reminiscent of Bolshevik practices, *available at* <https://zpravy.aktualne.cz/domaci/zemanovi-se-libi-jak-vladnou-v-rusku-nelze-ocekavat-ze-bude/r~c112604cd12d11e890ecac1f6b220ee8> (last accessed Sep. 30, 2020).

105. See KSCM, We should talk about the abolition of the Senate. People do not take him as a representative of their opinions, Filip Zachariáš told ČRo Plus, *available at* <https://www.kscm.cz/cs/aktualne/aktuality/meli-bychom-se-bavit-o-zruseni-senatu-lide-ho-neberou-jako-reprezentanta-svych> (last accessed Sep. 30, 2020). But even with their support, ANO 2011 does not have the necessary constitutional majority: ANO 2011, KSČM, and SPD do not have the constitutional majority in the Chamber of Deputies. They lack five votes from a minimum of 120. If they really wanted to make such fundamental changes to the constitution, they would also have to get 41 senators, which they also do not have right now.

the Government of Babiš, referred to above, points to a completely unprecedented contempt for the fundamental mechanism of parliamentary democracy and its system of division of power.

The concentration of political power in the hands of the executive branch not only reinforces the expansion of the executive center of power to legislative power, but it also contradicts other guarantees of the rule of law. This concentration of political power has been pointed out by J. Příbání, according to whom it is an example of creating an oligopoly that is supposed to provide access to resources for the newly formed oligarchy, similar to what was happening at the time of the opposition agreement.<sup>106</sup>

In the Zeman-Babiš relationship, V. Dvořáková predicts a fight of oligarchs, mainly due to different “*economic*” interests and diverging European and foreign policy.<sup>107</sup> So far, however, a strong common interest prevails in the political connection between the President and the Prime minister which is the consolidation and concentration of executive power and the elimination of mechanisms that limit the realization of their power interests.

Even though Babiš’s Government gained the confidence of the Chamber of Deputies on the second attempt, the 2017 political crisis has had serious conceptual consequences. In particular, it represents a de facto weakening of the division of power mechanisms. After the autumn elections of 2017, it is clear that the President sees his role in the system of separation of powers, irrespective of constitutional arrangements, as semi-presidential rather than parliamentary and his concept of governance rests on authoritarian methods such as limiting parliamentarianism and removing other safeguards of the constitutional system.

It is important to stress that it is not the individual actions or excesses of the President but a long-term approach to the institutional, procedural, and material values of liberal democracy and their constitutional guarantees.<sup>108</sup>

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106. Týdeník Respekt, Video, Jiří Příbání • Klub Respektu, Nov. 12, 2018, YOUTUBE, available at <https://www.youtube.com/watch?v=2fyGfwJzBCE> (last accessed Sep. 30, 2020).

107. Vladimíra Dvořáková, Zeman versus Babiš. Will we see a conflict between the oligarchs?, available at <http://denikreferendum.cz/clanek/27007-zeman-versus-babis-dockame-se-konfliktu-oligarchu> (last accessed Sep. 30, 2020) (emphasis supplied).

108. A similar approach is taken in the forthcoming proposal for a constitutional lawsuit (i.e., impeachment) against the President, which is being prepared by Senator V. Láska. See Daniela Lazarová, Opposition bid to remove Czech

Zeman's extensive and contra-constitution actions extend to the Government's activities throughout his whole presidency. Already after his first election as President in 2013, he stated that the head of State can dismiss the Prime Minister without any conditions, and that such a possibility results from an extensive but acceptable interpretation of the Constitution.<sup>109</sup> The President also pursued his interests at the expense of constitutional procedure when appointing a clerical (administrative) Government in 2013, without respecting the consensus emerging from the Chamber of Deputies on the new Prime Minister, and subsequently keeping the clerical (administrative) Government long after the elections.<sup>110</sup>

The President also went beyond his other competences by interfering with academic freedom through arbitrary decisions not to appoint professors while disregarding several court rulings which held that it is not in his statutory discretion to stop the procedure.<sup>111</sup>

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president from office for "breach of constitution" fails, *available at* <https://english.radio.cz/opposition-bid-remove-czech-president-office-breach-constitution-fails-8119649> (last accessed Sep. 30, 2020).

109. Jan Lopatka, Czech president angers parties with power grab, *available at* <https://www.reuters.com/article/us-czech-zeman/czech-president-angers-parties-with-power-grab-idUSBRE9670NT20130708> (last accessed Sep. 30, 2020).

110. It was the case of Rusnok's Government. See Petr Topič, Nemcova has 101 signatures for the government, she would care about it on the second try, *available at* [https://www.idnes.cz/zpravy/domaci/miroslava-nemcova-ziskala-podporu-nemovny.A130625\\_134040\\_domaci\\_kop](https://www.idnes.cz/zpravy/domaci/miroslava-nemcova-ziskala-podporu-nemovny.A130625_134040_domaci_kop) (last accessed Sep. 30, 2020). Six members of this clerical Government had ties to the Party of Friends — SPOZ, of which Zeman was an honorary chairman and for which he stood for ... It was a distinction from the bureaucratic Governments in the past that ruled with confidence and were based on the composition of the House. The Zeman assembled clerical Government did not gain confidence, and the President said he would let her continue to rule without trust and appoint no one else to be Prime Minister.

111. See Josef Kopecký & Čeněk Třeček, Sobotka brought Zeman biographies of candidates for ministers to Lány, *available at* [https://www.idnes.cz/zpravy/domaci/sobotka-jel-za-zemanem-se-sech-kandidatu-na-ministry.A140103\\_163435\\_domaci\\_cen](https://www.idnes.cz/zpravy/domaci/sobotka-jel-za-zemanem-se-sech-kandidatu-na-ministry.A140103_163435_domaci_cen) (last accessed Sep. 30, 2020). In the case of the appointment of Prime Minister Sobotka, Zeman claimed that he does not have to appoint all ministers proposed by the Prime Minister or Zeman's advance in the Government crisis in May 2017, when the President was going to take the resignation of the Government only as a resignation of its Prime minister. In

In all cases, it is an act that is in direct contradiction with the constitutional arrangements: above all, as it was already mentioned, it is contrary to the Constitution that the Government would operate without the confidence of the Chamber of Deputies, depending only on the confidence of the President. Under the Constitution, the President further cannot dismiss the Prime Minister of a Government who enjoys the confidence of the Chamber of Deputies. The President can do so only under specific constitutionally foreseen situations (e.g., after a parliamentary election). The composition of the Government is fully in the competence of the Prime Minister and the President appoints and recalls members of the Government only on the basis of the Prime Minister's proposal.<sup>112</sup>

As for the appointment of professors, it is a representative (prerogative) act of the President, since the decision on this matter belongs to university authorities. No executive authority is entitled to reassess whether a candidate fulfills the criteria after the decision of a university is made. It would unacceptably interfere with the autonomy of universities.<sup>113</sup> The President does not respect the decisions of the court that have confirmed that the decision to appoint or not to appoint professors is not in the President's discretion.

The problem is that the President cannot be prosecuted for these acts. The only way to prosecute the President is a constitutional complaint (i.e., impeachment procedure) against him, which is very complicated due to the requirement of constitutional majority in both chambers. However, currently, a group of senators is preparing a constitutional lawsuit against President

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drawing up Babiš's rule in spring 2018, Zeman announced that he did not accept the Prime Minister's proposed Foreign Minister, although the Prime Minister was responsible for the selection of Government members. See Robert Muller & Jan Lopatka, *New Czech government has shaky support, strong anti-migration stance*, available at <https://www.reuters.com/article/us-czech-government/new-czech-government-has-shaky-support-strong-anti-migration-stance-idUSKBN1JNoR9> (last accessed Sep. 30, 2020).

112. See CZECH CONST. art. 74 ("The President of the Republic shall recall members of the Government if the Prime Minister so proposes.") & CZECH CONST. art. 68 (5) ("on the basis of the Prime Minister's proposal, the President of the Republic shall appoint and recall other members of the Government and entrust them with the management of the ministries or other offices.").

113. See CZECH CONST. art. 53 & Act on Higher Education Institutions and on Amendments and Supplements to Some Other Acts [The Higher Education Act], Act No. 111/1998 Coll, § 6 (i) (2017) (Czech). The provision states that the procedure for appointing a professor belongs to the public authority of a public higher education institution. The Higher Education Act, § 6 (i).



Zeman on the grounds of gross violation of the Constitution.<sup>114</sup> This form of constitutional complaint stems precisely from the fact that the Constitution does not assume that the President will exercise significant executive power.

In case of a dispute over the dismissal of a member of Government, it is also possible to consider a jurisdictional complaint before the Constitutional Court, which has not yet been filed.<sup>115</sup>

In the current situation, therefore, there is essentially no means in the Czech legal system that could limit the President in his violation of constitutional rules and prevent him from abusing his executive power.

### *C. Interference with the Independence and Impartiality of Judiciary*

Another way to enforce authoritarian power and to prevent an effective defense against executive decisions is through attacks on the judiciary. Although the situation in the Czech Republic is not as serious in this respect as in Hungary or Poland, any efforts to interfere with the independence and impartiality of the judiciary should be viewed with great vigilance.

President Zeman strives to influence the courts in several ways. First, he directly expresses his opinions on specific cases, both through the media and in his speeches when appointing new judges. Thus, for example, when speaking during the appointment of judges of general courts, he stated that he hoped that the Constitutional Court “*will, of course, comply with an appeal or a constitutional complaint against the politicians’ crime, which he filed.*” He purposefully undermines the independence of the judiciary by declaring that a prosecution can be ordered or bought. Zeman also condemns the criminal

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114. A constitutional complaint against the President was used only once, against President V. Klaus for serious breach of the Constitution in 2013, and the Constitutional Court stopped the proceedings on the grounds that after the constitutional action was filed, the President’s mandate ended after lapse of the general constitutional time limit. Josef Kopecký, Klaus will confess out of high treason. Senators are suing him before the Constitutional Court, *available at* [https://www.idnes.cz/zpravy/domaci/senat-podal-ustavni-zalobu-na-prezidenta-klause.A130304\\_094103\\_domaci\\_kop](https://www.idnes.cz/zpravy/domaci/senat-podal-ustavni-zalobu-na-prezidenta-klause.A130304_094103_domaci_kop) (last accessed Sep. 30, 2020) & Jan Jiříčka & Josef Kopecký, Klaus will not be tried for high treason, the Constitutional Court has stopped the proceedings, *available at* [https://www.idnes.cz/zpravy/domaci/ustavni-soud-rozhodl-o-zalobe-na-klause.A130327\\_163151\\_domaci\\_jj](https://www.idnes.cz/zpravy/domaci/ustavni-soud-rozhodl-o-zalobe-na-klause.A130327_163151_domaci_jj) (last accessed Sep. 30, 2020).

115. Based on Article 87 (k) of the Czech Constitution, the Constitutional Court has jurisdiction to decide jurisdictional disputes between state bodies and bodies of self-governing regions, unless that power is given by statute to another body. CZECH CONST. art. 87 (1) (k).

prosecution of Babiš for tax and subsidy fraud, stating that he is interested in “*only things worth more than a billion crowns.*”

Another method of the President’s interference with the independence of the judiciary is trying to directly influence judges, either by written notification (specifically to the Constitutional Court, which is also problematic in the Czech legal system as the *amicus curiae* is not a typical instrument in the legal order), or even worse by trying to personally consult specific cases.<sup>116</sup> In doing so, the President makes clear that court officials should instruct judges how to decide in specific cases.

In regard to the President’s actions, he allegedly made an illicit offer (“*I will give you a post, you will make a decision*”)<sup>117</sup> to the former President of the Supreme Administrative Court, to whom he indicated that he could, if the judge agrees, appoint the judge to the Constitutional Court.

The Chamber of Deputies for Justice and Judicial Self-Government concluded that, after discussing this affair, the independence of the Supreme Administrative Court and the Constitutional Court had not been compromised. It also recommended that the executive should refrain from any activity that could lead to influencing judges’ decisions in specific cases.

The President of the Union of Judges, who called on the executive to “respect the Czech Republic’s legal order and the principles of separation of powers, according to which it is unacceptable to jeopardize the independence of the courts by attempting to intervene in impartial decision-making,” strongly opposed the President’s conduct. This case also raised considerations about the possibility of a constitutional appeal against the President for a gross violation of the Constitution.<sup>118</sup>

Interference with the independence and impartiality of the judiciary constitutes a fundamental violation of the principle of separation of powers and the rule of law. At the same time, such interference reduces confidence in

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116. See Tom McEnchroe, President’s chancellor under fire for alleged attempts to influence judiciary, *available at* <https://english.radio.cz/presidents-chancellor-under-fire-alleged-attempts-influence-judiciary-8141546> (last accessed Sep. 30, 2020) & Kafkadesk, Czech President Milos Zeman faces threat of impeachment, *available at* <https://kafkadesk.org/2019/02/15/czech-president-milos-zeman-faces-threat-of-impeachment> (last accessed Sep. 30, 2020).

117. See Brian Kenety, Justice Minister: President Zeman may have “committed” a crime relating to judicial independence, *available at* <https://english.radio.cz/justice-minister-president-zeman-may-have-committed-a-crime-relating-judicial-8140259> (last accessed Sep. 30, 2020).

118. See Kafkadesk, *supra* note 116.

the judiciary and gives the impression that the executive, respectively the President, has privileged access to the courts with power to influence their decisions.<sup>119</sup>

#### V. SOCIAL CONTEXT OF POLITICAL CRISIS

The abovementioned constitutional and political developments need to be viewed in a broader social context. This Chapter captures the political and social atmosphere of the current Czech Republic, in which there is a lack of respect for political plurality and protection of political minorities, attacks on active civil society as well as on media independence, wide rise in nationalism, xenophobia, and increasing disintegration tendencies.

These tendencies manifest in everyday deliberations of the Parliament. The political atmosphere can be characterized by the fact that nationalism and xenophobia together with an anti-European attitude is a program not only of the extremist movement of SPD but is spread across the political spectrum. SPD, known as the Patriotic Movement, promotes a radical change in the constitutional and political system. One of the main goals of SPD is to announce a referendum on the Czech Republic's withdrawal from the EU.<sup>120</sup> Under the motto of fighting Islamization and illegal immigrants, the movement promotes open and offensive nationalism. Some SPD members face criminal prosecutions for statements aimed at suppressing minority rights and challenging the existence of the Holocaust.

However, SPD is not isolated in its extremist program. It is supported by President Zeman, who sympathizes with most of their agenda, including the rejection of inclusion in education. Indeed, the President often expresses his xenophobic attitudes towards Roma, whom he has described as 90% maladjusted,<sup>121</sup> and has played down the genocide of Roma during World War II. He has criticized the inclusion of children with disabilities in

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119. See Daniela Lazarová, Czech Union of Judges preparing new ethical codex, *available at* <https://english.radio.cz/czech-union-judges-preparing-new-ethical-codex-8140219> (last accessed Sep. 30, 2020).

120. Jason Hovet & Jan Lopatka, Czech ruling party aims to keep Czexit out of debate on referendum law, *available at* <https://www.reuters.com/article/us-czech-lawmaking-referendum/czech-ruling-party-aims-to-keep-czexit-out-of-debate-on-referendum-law-idUSKBN1FQ2TM> (last accessed Sep. 30, 2020).

121. Misha Ketchell, Anti-Roma stigma of Czech president Miloš Zeman threatens progress over Romani rights, *available at* <https://theconversation.com/anti-roma-stigma-of-czech-president-milos-zeman-threatens-progress-over-romani-rights-88437> (last accessed Sep. 30, 2020).

mainstream schools by using this metaphor: the speed of the class would be determined by the speed of the slowest vehicle at the expense of talented children.<sup>122</sup>

Attacks on political minorities, LGBT rights, civil society, non-profit organizations as well as sporadic threats of violence are also a common part of the political discourse. These attacks aim to divide the society between “ordinary” citizens and so-called “Prague café” citizens, a pejorative designation especially for urban publicly active intellectuals or “right-wingers” (i.e., those seeking to build on Havel’s policy).<sup>123</sup> This definition has become part of the power propaganda of dividing society into “us” and “privileged snobbish intellectuals” or “welcomers,” as those who are not sharply defined as being against receiving refugees.

The political and social environment in the Czech Republic is also characterized by the strengthening of new forms of anti-liberal identity policy. The problem of identity policy now generally based on the long tradition of European nationalism brings a new anti-liberal dynamism to the political space. Its strengthening is mainly related to the Migration Crisis. In constructing anti-liberal identity based on national, religious, cultural, or racial unity, fear becomes the most effective policy instrument. Migration is thus unequivocally identified with the notion of the existential threat that is happening in the counter position of Islamic and European civilizations. Fear prevails over reason and shows its ability to polarize the political space present in the State beyond the bounds of liberal policy.

The concept of the nation state in terms of its not only national and religious but also political unity and the restoration of national sovereignty in the sense of emancipation from a subordinate position in the EU celebrate

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122. Jan Velinger, President comes under fire for words on inclusive education, handicapped children, *available at* <https://english.radio.cz/president-comes-under-fire-words-inclusive-education-handicapped-children-8271877> (last accessed Sep. 30, 2020) & Zdeněk Ryšavý, Czech President Zeman wants disabled children educated separately, experts sharply criticize him, *available at* <http://www.romea.cz/en/news/czech-president-zeman-wants-disabled-children-educated-separately-experts-sharply-criticize-him> (last accessed Sep. 30, 2020).

123. See Jan Hornát, The Prague Café: a brief incursion into Czech presidential discourse, *available at* <https://www.opendemocracy.net/en/can-europe-make-it/prague-caf-brief-incursion-into-czech-presidential-discourse> (last accessed Sep. 30, 2020).

success. Emphasis on national interests and national sovereignty is a popular motto of politicians across the political spectrum.

Finally, the overall situation aims to attack the independent work of journalists as traitors of national interests and totalitarians of truth as they attempt to fight against fake news and hoaxes, spread by the public or international actors such as Russia.<sup>124</sup> One way of reducing the quality of the work of journalists is via privatization of big media houses by the most influential political figures (e.g., Babiš).<sup>125</sup> Recently, there have also been attempts to influence the independent public service media by regaining the statutory control mechanisms by anti-establishment parties such as SPD, KSCM, and ANO 2011.<sup>126</sup>

## VI. CONCLUSION

Critical evaluation of political dynamics may seem disproportionate from the point of view of constitutional law, because in every constitutional system we find certain phenomena that can be considered to be within the boundary of acceptability. At the same time, the situation of the Czech Republic does not reach the seriousness of neighboring countries, such as Hungary or Poland, because there are no negative normative changes to the constitutional order. However, in relation to both arguments, the analysis of constitutional risks stemming from political programs aspiring to authoritarian forms of government should be highly critical. The risks to the constitutional system cannot be underestimated, especially with regard to the values at stake and the knowledge that the possible deconstruction of democratic rule of law is a very difficult process to remedy.

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124. See generally Czech Republic's shrinking media landscape reflects declining press freedom, available at <https://www.dw.com/en/czech-republics-shrinking-media-landscape-reflects-declining-press-freedom/a-43645917> (last accessed Sep. 30, 2020) & Lucie Sykorova, Public insulting of journalists by Czech leaders at \*3, available at <https://njc.dk/wp-content/uploads/2018/02/Public-insulting-of-journalists-by-Czech-leaders-.pdf> (last accessed Sep. 30, 2020).

125. See, e.g., Janosch Troehler, The Decline of Czech's Press Freedom, available at <https://medium.com/@janoschtroehler/the-decline-of-czech-s-press-freedom-54eaffa85958> (last accessed Sep. 30, 2020) & Sykorova, *supra* note 124, at 2.

126. Sykorova, *supra* note 124, at 3.