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The Protection of Human Rights under the ECHR and Central Europe: the Czech Republic**

ABSTRACT: This paper examines the protection of human rights under the ECHR in the Czech Republic, emphasizing the historical evolution of human rights protection in the territory of the present-day Czech Republic, constitutional aspects of the application of the ECHR, the nation's relationship with the Council of Europe (CoE) and landmark cases involving the Czech Republic before the ECtHR. Czechoslovakia was the first post-communist country that ratified the ECHR. However, the process of readmission of the independent Czech Republic to the Council of Europe after the dissolution of Czechoslovakia and the subsequent retroactive binding of the ECHR on the Czech Republic has been associated with several problematic issues from the perspective of public international law doctrine. This article points out that this retroactive application of the ECHR effectively violated Art. 59 (1) of the ECHR [former Art. 66 (1)], which provides that the ECHR shall be open to the signature of the members of the Council of Europe only. The paper also discusses in more detail a position of the ECHR in the Czech legal order and, above all, the constitutional background to its application. It draws attention to the problematic jurisprudence of the Czech Constitutional Court, according to which human rights treaties, including the ECHR, are not only part of the Czech legal order, but even of the "constitutional order". This conclusion is contrary to Article 10 and Article 112(1) of the Czech Constitution. Landmark cases involving the Czech Republic before ECtHR reveal its evolving legal landscape. Notable cases include D.H. and Others v. Czech Republic, concerning alleged discrimination against Roma children in education. It is one of the first cases ever decided (not unanimously) by the Grand Chamber.

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1. Introduction

The political changes associated with the so-called Velvet Revolution (1989), the subsequent ratification (1992) of the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter referred to as "ECHR") and the establishment of the independent Czech Republic (1993) marked major milestones in the development of the rule of law and the protection of human rights and freedoms in the territory of the present-day Czech Republic. Czechoslovakia was the first post-communist country that ratified the ECHR. The historical framework provides a basic context for understanding the country's current approach to human rights, including its commitment to the ECHR. Therefore, the development of human rights in the area of the contemporary Czech Republic is first discussed in this paper, with an emphasis on the historical constitutional catalogues of human rights. The next chapter deals with the membership of the Czech Republic in the Council of Europe (from the perspective of the protection of human rights). This chapter also mentions the various CoE human rights conventions to which the Czech Republic is a State Party, underscoring its broader commitments beyond ECHR. In the subsequent section, we discuss the process of ratification of the ECHR by Czechoslovakia and the Czech Republic, its position in the Czech legal order and, above all, the constitutional background to its application, in more detail. Moreover, obligations derived from the ECHR have also inspired significant legal reforms, fostering a more robust protection of individual rights. Finally, this paper provides an in-depth review of landmark cases brought by the Czech Republic before the European Court of Human Rights (hereinafter referred to as "ECtHR").

2. Historical development of human rights in the Czech Republic

2.1. The period up to 1918

The creation of the first catalogues of fundamental rights in the territory of the present-day Czech Republic is inextricably linked to the development of law in the Austrian (later Austro-Hungarian) Empire. Probably the most

significant legislative step taken before the constitutionalist movement in the Monarchy (besides extending certain fundamental rights[1] by the monarch's patents) can be considered the adoption of the General civil code – ABGB[2] (1811). This code, which was in force in Czechoslovakia until 1950,[3] established, among other matters, the legal personality of every person and the prohibition of slavery or the prohibition of retroactivity of the law.[4] Simultaneously, the ABGB subscribes to the concept of natural human rights and *"natural principles of law",* which were to be applied when the text of the law could not be used even by analogy.[5] In the area of criminal law, the first indications of the enshrinement of fundamental rights can be observed in *Constitutio criminalis Josephina* (1787), which fully respected the application of the *nullum crimen sice lege* and *nulla poena sine lege*.[6]

The first constitution which contained a catalogue of some fundamental rights (personal and religious freedom, freedom of speech and press, national equality, publicity of court proceedings etc.)[7] was the so-called Pillersdorf Constitution (April 1848). However, it was never implemented; only the *Reichstag* was convened on the basis of it.[8] The so-called Stadion Constitution (March 1849) had a similar misfortune, as only some of its provisions were implemented by patents.[9] The Schmerling Constitution (February 1861) did not contain a catalogue of human rights. The polylegal December Constitution (1867), which also included the *Basic Law on the General Rights of Nationals*,[10] marked a significant breakthrough. This constitution established many "classical" human rights

[1] See for example *The Patent of Toleration* (1781) or the *Serfdom Patent* (1781) issued by the Joseph II.
[2] From German words *Allgemeines bürgerliches Gesetzbuch.*
[3] The ABGB (1811) was replaced in Czechoslovakia by the Civil Code of 1950, which was highly ideological and written in the spirit of socialism. In many ways (legal equality between the subjects of law, protection of property rights etc.) it meant a reduction in the protection of fundamental rights. See Dvořák In Malý and Soukup., 2004, pp. 472-492.
[4] The interpretation of the fundamental § 5 of the ABGB has been in the interest of legal doctrine in our country, in particular, the publication Procházka, 1928 can be referred to.
[5] Tilsch, 1925, p. 68.
[6] Malý, 2010, pp. 193-194.
[7] Social rights and, with certain exceptions (e.g., freedom of speech), political rights were not guaranteed. Kühn, 2022, p. 24.
[8] Malý, 2010, p. 212.
[9] Ibid., p. 214.
[10] No. 142/1867 Coll.

(1st generation of human rights), including selected political rights. It should be emphasised that the author of the (much later formulated) theory of three generations of human rights[11] is a French lawyer of Czech origin Karel Vašák (see also chapter 2.3 *in fine*).

2.2. The period 1918-1948

The independent Czechoslovak Republic was established on 28 October 1918. The first Czechoslovak law adopted after the collapse of the Austro-Hungarian Empire was the so-called Reception Norm[12], which left the existing land and empire laws and regulations into force for the time being.[13] On 13 November 1918, the so-called provisional constitution was adopted, but it did not contain a bill of fundamental rights and freedoms. This was changed by the Czechoslovak Constitution of 1920,[14] which contained a broad catalogue of fundamental rights, particularly in Title V.[15] and in Title VI. The Constitution of 1920 also formally established the world's first independent Constitutional Court built on the model of a concentrated constitutional judiciary, partly following the ideas of Hans Kelsen.[16] In fact, it was then established as the second concentrated constitutional court in the world after the Austrian Constitutional Court *(Verfassungsgerichtshof)*.[17] Nevertheless, its practical significance during this period was small and the results of its activities were, for a number of reasons, quite marginal.[18]

Compared to many other foreign constitutions of the same period, the Constitution of 1920 can be highlighted,[19] for example, by the establishment of an universal equal and secret voting right for all citizens without distinction of sex (in case of elections to the Chamber of Deputies), the

[11] See Domaradzki, Khvostova and Pupovac, 2019, pp. 423-443.
[12] Coll. means „Collection of Laws" (the main source of law in the Czechoslovakia and the Czech Republic).
[13] For details, see Vojáček, 2018, pp. 157-184; Schelle, p. 41.
[14] Formally "Constitutional Charter of the Czechoslovak Republic (Act No 121/1920 Coll.).
[15] An example is the duty to defend the state (§ 127). For details, see Weyr, 1937, pp. 276-277.
[16] Sládeček In Pavlíček et al., 2011, p. 938.
[17] For a detailed discussion of the development of Czechoslovak constitutional justice, see the monograph Langášek, 2011.
[18] Schelle, 2019, p. 112.
[19] For a comparison of contemporary constitutions, see e.g., Broková, 2020, pp. 89-102.

abolition of the privilege of noble birth,[20] or the broad guarantee of freedom of religion.[21] It was explicitly mentioned that all religions were equal. The protection of marriage, family, and motherhood was also explicitly mentioned.[22] However, the Constitution of 1920 did not yet provide for social rights in any way.[23]

In relation to the rights of national minorities, the Constitution of 1920 and laws were largely based on the requirements of the minor Treaty of Saint-Germain.[24] Nevertheless, the entirety of Title VI of the Constitution was later considerably affected by Constitutional Decree No. 33/1945 issued by the President of the Czechoslovak Republic.[25] For the rest, the bill of rights in the Constitution of 1920 was broadly comparable to most other European constitutions of the same period. On the other hand, it is significant that the constitutional regulation of fundamental rights was (and had to be) was followed by a number of sub-acts which implemented the individual constitutional rights.[26] Notably, according to the prevailing view of legal theory and practice at the time,[27] the provisions of the Constitution on fundamental rights and freedoms were not directly applicable.[28] Overall, from our point of view, Constitution of 1920 was a very accomplished constitutional text, which was in many ways a source of inspiration[29] for the current Constitution of the Czech Republic and the Czech Charter of Fundamental Rights and Freedoms.

2.3. The period 1948-1989

After the Communist Party came to power in Czechoslovakia, a new Constitution, which also included a catalogue of fundamental rights and

[20] Weyr, 1937, p. 251. In this sense, the Constitution of 1920 [§ 106 (3)] was ideologically related to the earlier Law 61/1918.
[21] For a contemporary critique of the theoretical ambiguity of the relationship between the state and the religious denominations, see Weyr, 1937, pp. 272-274.
[22] However, according to František Weyr, the most renowned Czechoslovak constitutionalist of the time, this provision of the constitution had no normative significance. Rather, it was a political emphasis on the importance of family and marriage. The Weimar Constitution of 1919 was probably the reference model. Weyr, 1937, p. 275.
[23] Critically, see e.g. Kühn, 2022, pp. 26-27.
[24] Gronský, 2005, p. 104.
[25] *Ibid.*
[26] See Gronský, 2005, pp. 99-104.
[27] Weyr, 1937, pp. 248-250.
[28] Critically, see Kühn, 2022, pp. 27-28.
[29] Jirásková In Pavlíček et al., 2011, p. 322.

freedoms, was adopted on 9 May 1948. The text of the Constitution of 1948 and the regulation of human rights were in many ways related to the Constitution of 1920,[30] but the regulation of social rights was added. On the other hand, the Constitution of 1948 no longer provided for the protection of national and ethnic minorities. The new Constitution was not yet substantially influenced by the Marxist theory of the state and law and differed in its formal democratic conception from many constitutions of Eastern European states of the time, which often followed the Soviet Constitution (1936).[31] The difference between the text of the Constitution and the actual (real) level of human rights protection was all the more noticeable. In the words of German legal theory, it was a fictitious constitution, where the constitutional reality *(Verfassungswirklichkeit)* differed from the text of the Constitution. In practice, the period after 1948 was associated with the suppression of many human rights, especially property rights (large-scale collectivisation and expropriation) and political rights. A number of laws, especially from 1948-1951 (e.g., the law on forced labour camps,[32] the law for the protection of the people's democratic republic, the law on population reporting etc. were in a flagrant contradiction with the constitutional principles and human rights enshrined in the Constitution of 1948.[33] The political trials against the opponents of the communist regime should also be mentioned in this context.[34]

On 11 July 1960, the new socialist Constitution of the Czechoslovak Socialist Republic was adopted. Constitution of 1960 regulated fundamental rights and duties in Articles 19 to 38. While the text of the 1948 Constitution still conformed to democratic traditions, the 1960 Constitution was already a highly ideological text that enshrined the leading role of the Communist Party in the State.[35] Judges were obliged to interpret legislation *"in accordance with socialist legal consciousness"*.[36] One may also point to the hitherto unusual systematics of human rights regulation in the Constitution.[37] In the first place, economic, social, and cultural rights were regulated. It must be emphasised that all cultural policy, education, and

[30] Gronský In Pavlíček et al., 2011, p. 222.
[31] Gronský, 2006, p. 329.
[32] In detail, e. g. Soukup In Malý and Soukup, 2004, pp. 415-427.
[33] Gronský, 2006, p. 334.
[34] See the monograph [11] Bláhová et al., 2015.
[35] Article 4.
[36] Article 102(2).
[37] Gronský, 2007, p. 27.

training had to be conducted according to the Marxist-Leninist philosophy. Subsequently, political rights were regulated. Freedom of speech and freedom of assembly were guaranteed only "*in accordance with the interests of the working people"*, which in practice allowed for substantial restrictions on these rights. Political rights were only provided for at the end of the catalog of fundamental rights. Moreover, the legislation on the protection of the property right succumbed to strong ideological pressure; state ownership and (socialistic) cooperative ownership were preferred.

At this time, the constitutional theory in Czechoslovakia was influenced by the Marxist theory of the state and law. However, some outstanding constitutional lawyers of Czech origin worked in exile and contributed to the development of human rights even on an international scale. Karel Vašák (1929 – 2015), who emigrated to France, obtained French citizenship and later became the first Secretary-General of the International Institute of Human Rights (Strasbourg) founded by René Cassin, has already been referenced.[38] In addition to being the author of the above-mentioned generation of human rights (see chapter 2.1), he was, among other things, the general editor of the publication *Dimensions internationales des droits de l'homme* (The International dimensions of human rights).[39]

2.4. Post-1989 period

Shortly after the Velvet Revolution (November 1989), Article 4 on the leading role of the Communist Party was removed from the Constitution of 1960, followed by a change in the name of the state (removal of the word "socialist") and the equalisation of all forms (of protection) of property rights. In January 1991, the Charter of Fundamental Rights and Freedoms was adopted (as a constitutional Act No. 23/1991), which is still in force in the Czech Republic. The Charter of Fundamental Rights and Freedoms is in many aspects based on international human rights treaties,[40] particularly the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), International Covenant on Civil and Political Rights (ICCPR), and

[38] Radio Prague International (2025) Trois générations de droits humains: retour sur le parcours du juriste tchéco-français Karel Vašák. [Online]. Available at: https://francais.radio.cz/trois-generations-de-droits-humains-retour-sur-le-parcours-du-juriste-tcheco-8850260 (Accessed: 15 July 2025).

[39] Vasak and Philip, 1982. Electronic version. [Online]. Available at: https://unesdoc.unesco.org/ark:/48223/pf0000056230 (Accessed: 15 July 2025).

[40] Filip, 2010, p. 316.

The International Covenant on Economic, Social, and Cultural Rights (ICESCR). Considering the length of the paper, the content of the Charter of Fundamental Rights and Freedoms will not be discussed in detail; its English translation is available on the website of the Constitutional Court of the Czech Republic.[41] Compared to the previous regulation of the socialist Constitution of 1960, the following should be emphasised: adequate protection of the right to property (expropriation is permitted in the public interest, on the basis of law, and for compensation only),[42] the right to judicial and other legal protection, the rights of national and ethnic minorities or the right to a favourable environment. The 2021 amendment[43] to the Charter of Fundamental Rights and Freedoms provides that everyone *'has the right to defend his or her life or the life of another person, even with a weapon, under conditions established by law'.* Of note is the guarantee of political rights,[44] with limitations possible in essentially the same situations as under the ECHR. Compared to many other foreign constitutions, there is a specific prohibition of censorship or a guarantee of the right of assembly, whereby assemblies are not dependent on state authorisation[45] Outside the political rights area, the prohibition on forcing a citizen to leave the territory of the homeland or the provision that *''inheritance is guaranteed''* should be mentioned.[46] In these matters, the regulation goes beyond the requirements of the ECHR.

The independent Czech Republic was established on 1 January 1993 by the defederalisation of Czechoslovakia. By a constitutional norm[47], the existing Czechoslovak legislation was transferred into the legal system of the newly established Czech Republic. On 1 January 1993, the Constitution of the Czech Republic (Constitutional Act No. 1/1993 Coll.) also entered into force, which regulated the relations between the constitutional organs of

[41] Constitutional Court (2020) Charter of Fundamental Rights and Freedoms – english ver. [Online]. Available at:https://www.usoud.cz/fileadmin/user_upload/ustavni_soud_www/Pravni_uprava/AJ/Listina_English_version.pdf (Accessed: 7 August 2024).
[42] For details, see Grygar et al., 2020, pp. 29-43.
[43] Constitutional act No. 295/2021 Coll.
[44] For detail, see the monograph: Molek, 2014.
[45] Assemblies are merely notifiable and not authorised by the State. For more details, see: Grygar, 2022, pp. 151-175.
[46] The interpretation of this right has been particularly problematic in relation to the so-called European Arrest Warrant and has also been the subject of the Constitutional Court's decision-making.
[47] Constitutional Act No. 4/1993 Coll.

the State and, *inter alia*, the relationship of Czech law to international law, in particular. The regulation of human rights continued to be contained in the Charter of Fundamental Rights and Freedoms (see above), which was re-enacted as part of the constitutional order (semi-legal constitution *sensu lato*) under No. 2/1993 Coll.

3. Czech Republic as a member of the Council of Europe: a human rights perspective

3.1. In general

The Czech and Slovak Federal Republic (the name of Czechoslovakia in 1990-1992) was admitted as a member of the Council of Europe at the Committee of Ministers meeting in Madrid on 21 February 1991. However, due to the establishment of the independent Czech Republic and the independent Slovak Republic (through the defederalisation of the common Czechoslovak state), both countries had to formally reapply for admission to the Council of Europe. The Council of Europe has not used the possibility of "succession" of membership in the international organisation to newly created states,[48] which would not have to go through a new admission procedure. Although "automatic succession" was not possible because of the need to decide again on the number of newly acceded States represented in the Parliamentary Assembly or on the level of membership fees, the re-assessment of the conditions for membership in the Council of Europe was not avoided.[49] This practice has been heavily criticised in the legal doctrine of international law.[50]

The Czech Republic was admitted as a member of the Council of Europe on 30 June 1993 (the meeting of the Committee of Ministers was held in Strasbourg).[51] Together with the European Union (EU) and the North Atlantic Treaty Organisation (NATO), the Council of Europe is the most important international organisation of which the Czech Republic is a member. As will be pointed out in Chapter 4 of this paper, the Czech Republic was still obligated by the ECHR in the period between 1 January

[48] In the case of the possibility of "succession" of membership in an international organisation, the membership of Egypt and Syria in the United Nations, which together formed the United Arab Republic in 1958, is referenced. See Malenovský In Kmec et al., 2013, p. 13.
[49] *Ibid*.
[50] *Ibid.*
[51] Resolution (93)32.

1993 (the establishment of the independent Czech Republic) and 30 June 1993, although the ECHR *"shall be open to the signature of the members of the Council of Europe"*.[52]

3.2 The Czech Republic and the human rights treaties of the Council of Europe

The Czech Republic has ratified the following treaties of the Council of Europe, their annexes and protocols (each annex and protocol is counted and listed separately), which the Office of the Council of Europe[53] categorises as human rights treaties (in order from most recent):

- Protocol No. 15 amending the ECHR (CETS No. 213)
- Council of Europe Convention on Action against Trafficking in Human Beings (CETS No. 197)
- Protocol No. 14 to the ECHR, amending the control system of the Convention (CETS No. 194)
- Additional Protocol to the Convention on Cybercrime, concerning the criminalisation of acts of racist and xenophobic nature committed through computer systems (ETS No. 189)
- Protocol No. 13 to the ECHR, concerning the abolition of the death penalty in all circumstances (ETS No. 187)
- European Agreement relating to persons participating in proceedings of the European Court of Human Rights (ETS No. 161)
- Additional Protocol to the European Social Charter Providing for a System of Collective Complaints (ETS No. 158)
- Framework Convention for the Protection of National Minorities (ETS No. 157)
- Protocol No. 11 to the ECHR, restructuring the control machinery established thereby (ETS No. 155)
- Protocol No. 2 to the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (ETS No. 152)

[52] Art. 59 (1) of the ECHR; former Art. 66 (1).

[53] Treaty Office – Council of Europe (2024). Treaty list for a specific State: the Czech Republic. [Online]. Available at: https://www.coe.int/en/web/conventions/by-member-states-of-the-council-of-europe?module=treaties-full-list-signature&CodePays=CZE&CodeSignatureEnum=&DateStatus=07-23-2024&CodeMatieres=44 (Accessed: 12 August 2024).

- Protocol No. 1 to the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (ETS No. 151)
- European Charter for Regional or Minority Languages (ETS No. 148)
- Protocol No. 9 to the ECHR (ETS No. 140)
- Additional Protocol to the European Social Charter (ETS No. 128)
- European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (ETS No. 126)
- Protocol No. 8 to the ECHR (ETS No. 118)
- Protocol No. 7 to the ECHR (ETS No. 117)
- Protocol No. 6 to the ECHR concerning the Abolition of the Death Penalty (ETS No. 114)
- European Agreement relating to Persons participating in the Proceedings of the European Commission and Court of Human Rights
- Protocol No. 5 to the ECHR, amending Articles 22 and 40 of the Convention
- Protocol No. 4 to the ECHR, securing certain rights and freedoms other than those already included in the Convention and in the first Protocol thereto (ETS No. 046)
- Protocol No. 3 to the ECHR, amending Articles 29, 30 and 34 of the Convention (ETS No. 045)
- Protocol No. 2 to the ECHR, conferring the right to give advisory opinions upon the European Court of Human Rights (ETS No. 044)
- European Social Charter (ETS No. 035)
- Protocol (No. 1) to the ECHR (ETS No. 009)
- Convention for the Protection of Human Rights and Fundamental Freedoms - ECHR (ETS No. 005)

The Czech Republic has also ratified Protocol No. 10 to the ECHR, but this has never entered into force.[54]

Several treaties have been negotiated (signed) by the Czech Republic but have not yet been ratified and are therefore not legally binding on the Czech Republic. A recent example is the so-called Istanbul Convention (Convention on preventing and combating violence against women and domestic violence – CEST No 210). The ratification of international treaties in the Czech Republic is carried out by the President of the Republic. However, in order to ratify certain international treaties (see the next part of

[54] Kmec et al., 2012, p. 9.

this article for more details), he needs the consent of both chambers of the Parliament. The Senate of the Parliament of the Czech Republic refused to give its consent to ratify the Istanbul Convention. Thus, the ratification process of the already negotiated treaty had to be stopped. The Czech Republic has still not ratified the Protocol No. 12 to ECHR. When ratifying some treaties, the Czech Republic made reservations, or stipulated that it would commit itself to respecting only certain provisions of the treaty (e.g., the European Social Charter).[55]

It should be noted that the scope of human rights is, of course, also influenced by a number of other international treaties that are not primarily classified as human rights treaties and are therefore not listed above (e.g., treaties in the field of biomedicine, environmental protection, etc.). A complete list of treaties with the date of signature and ratification by the Czech Republic is available on the website of the Office of the Council of Europe.[56]

3.3 National reports

In relation to the legal framework for the monitoring of the Czech Republic's membership obligations in the Council of Europe, Recommendation No. 1338 (1997) of the Parliamentary Assembly on the obligations and commitments of the Czech Republic as a member state should be referenced. The Commissioner for Human Rights of the Council of Europe carried out three monitoring visits to the Czech Republic, namely in 2003, 2010 and 2012. Since the report on the last visit to the Czech Republic is more than 10 years old, providing a detailed overview of its content is not worthwhile. Many of the problematic issues mentioned in these reports have, in our opinion, already been remedied by the Czech Republic.

Even in the first national report (2003), the Czech Republic was already criticised for the situation of the Roma (Gypsy) community, which represents an ethnic minority, comprising an estimated 2 % of the

[55] In the Czech Republic published under No. 14/2000 Coll.

[56] Treaty Office – Council of Europe (2024). Treaty list for a specific State: the Czech Republic. [Online]. Available at: https://www.coe.int/en/web/conventions/by-member-states-of-the-council-of-europe?module=treaties-full-list-signature&CodePays=CZE&CodeSignatureEnum=&DateStatus=07-23-2024&CodeMatieres=44 (Accessed: 12 August 2024).

population.[57] This criticism was repeated in some way in later reports from 2010 and 2012. The main issues raised were problems in the area of education, compensation for forced sterilisation in the past, access to housing, or violence[58] towards the Roma community. Alleged violations of the rights of the members of the Roma community were mentioned in all the national reports and was the one that received the most attention. The national report from 2010 concerned only the situation of the Roma and did not point out any other problematic areas in the protection of human rights in the Czech Republic.

According to the national report (2003) *'the young members of the Roma/Gypsy community were drastically over-represented in special schools and classes for children suffering from slight mental disability'.*[59] National reports have warned that the excessive placement of Romani children in "special schools" may have the hallmarks of racial segregation. This is particularly relevant to education in so-called socially excluded localities (North Bohemia, North Moravia). This was confirmed in principle by the ECtHR in its landmark judgment in D. H. and Others v. Czech Republic (2007),[60] which found a violation of Article 14 (Prohibition of Discrimination), in conjunction with Article 2 of Protocol No. 1 (Right to Education) of the ECHR. In this case, according to the ECtHR, 18 children of Roma origin had been placed in schools for children with intellectual disabilities because of their ethnic origin. In fact, the ECtHR has not been uniform in its assessment of the issue of a discrimination against Roma children, as it was one of only 25 cases in which the Grand Chamber of the ECtHR reversed a previous decision on the merits during the first eight years of the 11th Protocol to the European Convention.[61] On the other hand, there has been a noticeable inclusion of socially excluded and mildly

[57] Government of the Czech Republic (2018). Zpráva o stavu romské menšiny v České republice za rok 2017, p. 4. [Online]. Available at: https://vlada.gov.cz/assets/ppov/zalezitosti-romske-komunity/dokumenty/Zprava-o-stavu-romske-mensiny-2017.pdf (Accessed: 27 August 2024).

[58] For the sake of completeness, we must emphasise that *„from a total of 313 387 offences detected on the territory of the Czech Republic in 2010, only 252 had an extremist subtext, i. e. 0.08 % of the total number of offences"* . See Comments of the Czech Republic on the Report by the Commissioner for Human Rights of the Council of Europe, following his visit to the Czech Republic from 17 to 19 November 2010, p. 23.

[59] Report by Alvaro Gil-Robles, Commissioner For Human Rights, on his visit to the Czech Republic from 24 to 26 February 2003, CommDH (2003)10, p. 4.

[60] *Case of D.H. and Others v. the Czech Republic*, App. No. 57325/00, 13 November 2007.

[61] Malenovský, 2008, p. 300.

mentally disabled children in mainstream schools in recent years. Simultaneously, national reports have acknowledged that *'the authorities have implemented a series of measures in order to remedy this unfortunate situation, in particular the introduction of Roma/Gypsies as assistant teachers in regular classes and the provision of preliminary classes',*[62] although the situation was not satisfactory even in the last monitoring visit in 2012.[63]

The 2010 and 2012 national reports also mentioned the frequent placement of Roma children in institutional care, mainly due to the unsuitable family background (financial and housing problems etc. Therefore, the ECtHR found a violation of Article 8 (Private and Family Life) of the ECHR in its judgement Wallová and Walla v. the Czech Republic (2006).[64] The 2010 national report highlighted the recommendation that *'in accordance with the judgments of the Strasbourg Court, the Czech authorities should ensure that no child is placed in institutional care solely on grounds relating to the poor housing conditions or financial situation of his or her family'.*[65]

In one of his reports, the Commissioner for Human Rights drew attention to the issue of compensation for (mostly Roma) women who have been forcibly sterilised since 1966. The Commissioner emphasised that women affected by this sterilisation were

> *without an effective remedy to obtain reparation, including compensation, a situation that should be urgently remedied in line with international law standards. In order to prevent the re-occurrence of coercive sterilisations, the Commissioner also calls on the Czech authorities to ensure that healthcare legislation clearly defining the requirements of free, prior and*

[62] Report by Alvaro Gil-Robles, Commissioner For Human Rights, on his visit to the Czech Republic from 24 to 26 February 2003, CommDH (2003)10, p. 4.
[63] Report by Nils Muižnieks Commissioner for Human Rights of the Council of Europe, following his visit to the Czech Republic from 12 to 15 November 2012, CommDH (2013)1.
[64] *Wallová and Walla v. the Czech Republic*, App. Nos. 23848/04 and 33571/04, 26 October 2006.
[65] Report by Thomas Hammarberg Commissioner for Human Rights of the Council of Europe, following his visit to the Czech Republic from 17 to 19 November 2010, CommDH (2011)3, p. 22, point 103.

informed consent with regard to sterilisation is in place by mid-2011.[66]

For the sake of completeness, it should be noted that in the Czech Republic, Act No. 297/2021 Coll., on the provision of compensation to women sterilised in violation of the law, entered into force in 2021.[67]

In relation to the judicial system (delays in proceedings, access to the Constitutional Court etc., comments were made only in the 2003 national report.[68] On the current length of court proceedings in the Czech Republic, it can be noted that the estimated time required to resolve civil, commercial, administrative, and other cases, is not out of line with the EU average. According to the CEPEJ study and EU Justice Scoreboard (2024) the Czech Republic even ranks third best place in the category, "estimated time needed to resolve litigious civil and commercial cases at first instance".[69] Regarding access to the Constitutional Court and the counting of the time limit for submitting a constitutional complaint, the criticism contained in the 2003 national report referring to the ECtHR judgments (Běleš and others v. Czech Republic[70] and Zvolský and Zvolská v. Czech Republic[71]) is, from our point of view, incorrect. In this cases, it was a misapplication of national law in specific cases, not a systemic error in the legislation.

In addition to the Commissioner's national reports, thematic monitoring of the Czech Republic's commitments is also carried out periodically, especially by the individual Council of Europe committees (Committee for the Prevention of Torture, European Commission against Racism and Intolerance, European Committee of Social Rights, European Commission for the efficiency of justice...). A link to these sub-monitorings

[66] *Ibid.*
[67] The Supreme Administrative Court of the Czech Republic has already commented on the interpretation of the law in the case of missing (lost) medical records in favour of women in its judgment of 4 July 2024 No. 9 As 61/2023-65.
[68] Report by Alvaro Gil-Robles, Commissioner For Human Rights, on his visit to the Czech Republic from 24 to 26 February 2003, CommDH (2003)10, p. 9-10. These comments no longer appear in subsequent national reports.
[69] *Ibid.*
[70] *Case of Běleš and others v. Czech Republic*, App. No. 47273/99, 12 November 2002.
[71] *Case of Zvolský and Zvolská v. Czech Republic,* App. No. 46129/99, 12 November 2002.

can be obtained via the website of the Permanent Representation of the Czech Republic to the Council of Europe in Strasbourg.[72]

4. The ECHR and Czech national law

4.1. Ratification of the ECHR

Even before the ratification of the ECHR, the State had to become a member of the Council of Europe, as the Art. 59 (1) of the ECHR provides that the ECHR *'shall be open to the signature of the members of the Council of Europe'* (see chap. 3.1). The Czech and Slovak Federal Republic signed the ECHR on 21 February 1991, the ratification followed 13 months after its signing, on 18 March 1992.[73] On the same date, the ECHR as amended by Protocols 3, 5 and 8, as well as Protocols 1, 2 and 4, became effective for the Czech and Slovak Federal Republic.[74] Czechoslovakia was the first post-communist country to ratify the ECHR.[75]

Shortly before the defederalisation of Czechoslovakia (see Chapter 2.4), the Czech National Council approved a resolution that the newly formed State would consider the ECHR, including all the protocols ratified by the Czech and Slovak Federal Republic, to be effective and binding since 1 January 1993 (the date of the establishment of the independent Czech Republic).[76] However, this unilateral declaration is not legally binding on third parties.[77] As mentioned in Chapter 3.1, the Committee of Ministers of the Council of Europe decided that the two successor states of Czechoslovakia (the independent Czech Republic and the independent Slovak Republic) would have to submit to a new accession procedure and that there would be no succession of membership in the international organisation. However, together with the admission of the Czech Republic as a member of the Council of Europe on 30 June 1993, the Committee of Ministers, considering the abovementioned statement of the Czech National

[72] Permanent Representation of the Czech Republic to the Council of Europe in Strasbourg (2024). [Online] Available at: https://mzv.gov.cz/coe.strasbourg/cz/ceska_republika_a_rada_evropy/index_1.html. (Accessed: 2 September 2024).
[73] Malenovský, 2013, p. 6.
[74] Kmec et al., 2012, p. 146.
[75] Smekal, 2016, p. 87; Malenovský, 2013, p. 6.
[76] Malenovský, 2013, p. 6.
[77] Hohenveldern, 2006, p. 246.

Council, decided that the ECHR would apply retroactively to the Czech Republic since 1 January 1993.

One of the most prominent Czech experts on public international law and former judge of the Court of Justice of the EU, J. Malenovský[78], criticises that the Committee of Ministers of the Council of Europe, by its retroactive resolution, effectively allowed the ECHR to also bind states which were not members of the Council of Europe, contrary to its Article 59(1) (see above). Malenovský points out that, consequently, the Czech Republic was clearly in a worse position than the other signatory states to the ECHR in the first half of 1993.[79] The Czech Republic was subject to all the obligations arising from the ECHR between 1 January 1993 and 30 June 1993, but as a result of its lack of membership of the Council of Europe it did not enjoy any rights and did not even have its own judge at the ECtHR.[80]

4.2 Status of the ECHR under the Czech law

Czech constitutional law distinguishes three categories of international treaties in relation to their ratification and effects in national law. These are international treaties 1) governmental, 2) ministerial, and 3) presidential (parliamentary).[81] While in the first two cases the President of the Republic has delegated their negotiation to the Prime Minister (governmental treaties) or to the minister responsible for the department (departmental treaties) by a general decision,[82] there is no such general delegation in the case of presidential (parliamentary) international treaties; moreover, the approval of both chambers of the Parliament is required before ratification by the President of the Republic.

The presidential (parliamentary) international treaties are defined in Article 48 of the Czech Constitution, according to which

> *the assent of both chambers of Parliament is required for the ratification of treaties: a) affecting the rights or duties of persons; b) of alliance, peace, or other political nature; c) by which the Czech Republic becomes a member of an*

[78] *Ibid.*
[79] *Ibid.*
[80] *Ibid.*
[81] Koudelka, 2018, pp. 124-128.
[82] Decisions of the President of the Republic No. 144/1993 Coll.

> *international organisation; d) of a general economic nature; e) concerning additional matters, the regulation of which is reserved to statute.*

It should be emphasised that the ratification of international treaties is always carried out by the President of the Republic [Art. 63 (2) (a) of the Constitution]; the consent of Parliament is only a condition for ratification for this group of international treaties, not "ratification itself".

The ECHR is (from the point of view of the Czech constitutional law), a presidential international treaty affecting the rights of persons. As a presidential international treaty, it holds a special status under the Constitution. According to Article 10 of the Constitution:

> *Promulgated treaties, to the ratification of which Parliament has given its consent and by which the Czech Republic is bound, form a part of the legal order; if a treaty provides something other than that which a statute provides, the treaty shall apply.*

Therefore, ECHR takes precedence ("supremacy") in application over the "ordinary" law in case of a conflict between the law and the ECHR.[83] Therefore, the principle of *pactum derogat legi*[84] shall apply (the so-called "direct effect" of international treaties). The factual condition for giving a "direct effect" to the relevant provision of a presidential international treaty (ECHR) is that it is *self-executing*.[85] Because the ECHR, as a presidential international treaty, is part of the legal order, the judge (of any court except the Constitutional Court) is bound by the treaty when making decisions.[86]

However, in a very controversial decision from 2002,[87] the Constitutional Court of the Czech Republic went further and stated that so-called human rights treaties (which undoubtedly include the ECHR) are not only part of the national "legal order", but even of the "constitutional order" (i.e., the body of legal norms of the highest legal force). According to Bobek and Kosař

[83] See also Bobek, 2010, p. 133.
[84] Mlsna and Knežínek, 2009, pp. 185-186.
[85] Rychetský et al., 2015, pp. 109-112.
[86] Art. 95(1) of the Constitution.
[87] Judgment of the Constitucional Court of the Czech Republic of 25 June 2002, Pl. ÚS 36/01 (N 80/26 SbNU 317).

> *what happened in the fact was that the Constitutional Court of the Czech Republic constitutionalised the international human rights treaties, including the ECHR. Furthermore, the Czech Constitutional Court held that the ordinary courts still must refer a clash between an applicable statue and the ECHR to the Constitutional Court under the concrete review of constitutionality*.[88]

We disagree with this decision of the Constitutional Court, as does most legal scholarship.[89] What is a part of the constitutional order is defined in Article 112(1) of the Constitution, while (any) international treaties are not mentioned here. The list contained in Article 112(1) is exhaustive (strictly enumerated). The Constitutional Court is not empowered to redefine the term *"constitutional order"*, because under the Constitution it is itself bound by the constitutional order. [90]

Leaving aside theoretical discussions and academic considerations, in legal practice, if the provisions in the Czech Charter of Fundamental Rights and Freedoms on the one hand and the ECHR (or any human rights catalogue) on the other hand diverge, the provision that guarantees a higher standard of human rights protection is applied. Despite the fact that the ECHR, in our opinion, is not a part of the Czech constitutional order, it should be still respected that *"the Czech Republic shall observe its obligations resulting from international law"* [Art. 1 (2) of the Constitution]. However, in the vast majority of cases, the Czech Charter of Fundamental Rights and Freedoms provides the same or higher standard of protection than the ECHR.

4.3. Impact of the ECHR on national legislation

The obligations for the Czech Republic from international organisations, including the Council of Europe, are necessarily reflected in the adopted legislation. Although the influence of membership in the Council of Europe and the ECHR on legislation is not as great as in the case of the Czech

[88] Bobek, 2010, p. 135.
[89] See e. g. Mikule and Suchánek In Sládeček et al., 2016, p. 128, p. 1261; Kühn and Kysela, 2002.
[90] Art. 59(1) of the ECHR; former Art. 66(1).

Republic's membership in the EU, a high degree of emphasis is placed on compatibility with the ECHR when drafting laws in the Czech Republic.

The substantive plan of the law as well as the general part of the explanatory memorandum to the draft law, must contain an assessment of their compatibility with international treaties, in particular with the ECHR. Article 4(4) of the Legislative Rules of the Czech Government explicitly states that

> *the compatibility of the proposed solution with international treaties to which the Czech Republic is bound shall be demonstrated by the body which has drawn up the substantive plan. In the substantive plan, it shall indicate which international treaties apply to the area in question, what their content and purpose are, and how the proposed solution affects the fulfilment of the obligations arising from these international treaties, and shall explain in detail whether it is compatible with these obligations; in doing so, it shall also take into account the international treaties to which the Czech Republic will be bound once these treaties enter into force. In doing so, it shall always separately assess the compatibility of the proposed solution with international treaties on human rights and fundamental freedoms, in particular the ECHR and its Protocols, as well as with the case-law of the European Court of Human Rights and the legal opinions of international bodies established to monitor compliance with the obligations arising from such treaties which are relevant to the area in question; in doing so, it shall summarise the relevant case-law of the European Court of Human Rights and explain and justify in detail whether the proposed solution is compatible with those treaties.*

It is probably not possible to conclude that some of the new laws in the Czech Republic have been adopted only owing to the ECHR. However, in at least a few cases, new laws have been adopted, or existing laws have been amended, *inter alia*, in accordance with the case law of the ECtHR. The following are a few examples.

First, we should mention the Anti-Discrimination Act of 2009,[91] which both transposes the relevant EU directives and reflects the prohibition of discrimination under Article 14 of the ECHR and its interpretation by the ECtHR. The law defines what is considered unequal treatment and discrimination, distinguishes between a direct and indirect discrimination, and provides legal remedies against discrimination. In the area of education, Section 2(1)(a) of the Education Act[92] is key to the prohibition of discrimination, according to which education is based on the principle of *'equal access to education for every citizen of the Czech Republic or another Member State of the European Union without any discrimination on the grounds of race, colour, sex, language, faith and religion, nationality, ethnic or social origin, property, birth and health status or any other status of a citizen'.* The amended Section 16 of the Education Act then expanded the elements of the so-called inclusive education in the Czech school system. The adoption of these laws, or their amendments, was also essential in connection with the case of D.H. and others against the Czech Republic (see below).

The influence of the case law of the ECtHR and national reports is clearly visible in the in the above mentioned (see Chapter 3.3.) law on the provision of a single amount of money to women sterilised in violation of the law.[93]

Regarding freedom of assembly, the amendment to the Assembly Act,[94] – which, in relation to the case law of the ECtHR,[95] regulated, among other things, the issue of the conflict between two assemblies, also in relation to the new institute of "setting the conditions for the organisation of an assembly", which represents a modest remedy than the prohibition of holding an assembly – should be mentioned.[96]

[91] Act No. 198/2009 Coll., on Equal Treatment and Legal Remedies against Discrimination and on Amendments to Certain Acts (Anti-Discrimination Act), as amended.
[92] Act No. 561/2004 Coll., on pre-school, primary secondary, higher vocational and other education (Education Act), as amended.
[93] Act No. 297/2021 Coll., on the provision of a single amount of money to women sterilised in violation of the law and amending certain related acts.
[94] Act No. 252/2016 Coll., amending Act No. 84/1990 Coll., on the Right of Assembly, as amended.
[95] *Case of Öllinger v. Austria*, App. No. 76900/01, 29 June 2006.
[96] Grygar, 2022, pp. 162-172.

In relation to Article 6 of the ECHR, many amendments to procedural rules, particularly to the Code of Civil Procedure[97] and the Code of Criminal Procedure,[98] should be mentioned. In both of them, the legislation was adopted in the 1960s under the influence of the Marxist theory of the state and law and did not correspond at all to the requirements of a fair trial. As a result of the Velvet Revolution in 1989 (see Chapter 2.4) and the adoption of the ECHR, logically, numerous amendments to these procedural rules had to be made. Finally, let us mention the Act on Compensation for Damage Caused by Public Authority,[99] which, in contrast with the previous regulation, also explicitly enshrines the right to compensation for non-pecuniary damage caused by an unlawful decision or an incorrect official procedure.

5. Landmark cases of the Czech Republic before the ECtHR

This chapter aims to present the key judgments of the ECtHR relating to the Czech Republic. Notably, the most frequent violation against the Czech Republic is the violation of the right to a fair trial (Art. 6), particularly the violation of the right to a hearing within a reasonable time.[100] Although national reports have particularly pointed to the Czech Republic's violation of the prohibition of discrimination (Art. 14), and this issue is simultaneously highly "sensational" in the media, these are rare cases in the context of complaints to the ECtHR. Violations of the prohibition of discrimination have only been found in a handful of cases.

5.1. Janáček v. Czech Republic (2023)[101]

Violation of: Article 6 (1) of the ECHR - Fair hearing Adversarial trial.

The complainant submitted a constitutional complaint, which the Constitutional Court rejected as manifestly unfounded. In the proceedings on the constitutional complaint, the Court also requested statements (comments) on the constitutional complaint from the parties to the proceedings (the courts that decided the case before). The Constitutional

[97] Act No. 99/1963 Coll., Code of Civil Procedure, as amended.
[98] Act No. 141/1961 Coll., on Criminal Procedure (Criminal Procedure Code), as amended.
[99] Act No. 82/1998 Coll., on Compensation for Damage Caused by Public Authority, as amended.
[100] Kmec et al., 2012, p. 169.
[101] *Case of Janáček v. Czech Republic*, App. No. 9634/17, 2 February 2023.

Court did not send these statements to the complainant for reply or for his attention, although they contained new reasons on which the Constitutional Court based its decision against the complainant. This procedure violates the complainant's right to a fair trial[102]

The ECtHR stated that

> *despite the fact that the general courts' written comments were not limited to a mere reference to their respective decisions adopted in the case but went beyond the reasons adduced in those decisions … they were not communicated to the applicant, who certainly had a legitimate interest in reacting to them. Moreover, the Constitutional Court formulated its conclusions in a manner indicating that it had actually based its decision on those comments… The principles underlying its case-law on equality of arms and fairness of proceedings must be seen as requiring the Constitutional Court, in all cases in which it decides that there is no need to communicate one party's observations to the other parties in proceedings before it, to state clearly in its decision the reasons for reaching such a conclusion. Having regard to the Court's case-law according to which it is only for the party concerned to judge whether or not a particular document calls for their comments … very weighty reasons must be given for omitting to communicate observations that have been accepted and included in the file for consideration of the deciding court. Indeed, a decision not to communicate must be duly motivated and can only be based on the fact that the other parties in their observations did strictly nothing more than referring to their own publicly available decisions, without raising any arguments beyond those that had already been explicitly expressed in those decisions, and on the Constitutional Court's clear intention not to use those observations in reaching its decision on the dispute before it.*

5.2. Grosam v. Czech Republic (2023)[103]

This case concerns the disciplinary proceedings conducted against an enforcement officer, by the disciplinary chamber of the Supreme

[102] Art. 6(1) ECHR.
[103] *Case of Grosam v. Czech Republic*, App. No. 19750/13, 25 June 2023.

Administrative Court of the Czech Republic acting as the disciplinary court. In addition to the professional judges, the case is also decided by presiding judges, who even form a majority. Moreover, no appeal is permitted against the decision of this disciplinary court.

In 2016, the Group of States against Corruption (GRECO) published reservations about the Czech system of disciplinary proceedings against judges, prosecutors, and enforcement officers.[104]

In its judgment of 23. June 2022, the ECtHR first noted that the case is covered by Article 6(1) of the ECHR because

> *disciplinary proceedings where, as in the present case, the right to continue to practise a liberal profession is at stake, can give rise to disputes over civil rights"* (§ 89). The *ECtHR "cannot regard the pre-selection process (of presiding judges) as transparent and clear, giving sufficient procedural guarantees of independence. In addition, it is concerned as the manner of the appointment of lay assessors in the present case completely differed from the general arrangements for the appointment of lay assessors in the Czech legal system, as they were not elected or selected following an established procedure… Moreover, the appearance of independence was also affected by the lack of guarantees against outside pressure and the close proximity to the Minister of Justice of at least some of the lay assessors"*. The Court concluded that *"the legal regulation concerning the establishment of the disciplinary chamber for enforcement officers which heard and decided the applicant's case did not offer sufficient safeguards guaranteeing the independence and impartiality of lay assessors, and, thus, of the disciplinary chamber as a whole*.[105]

The case was subsequently referred to the Grand Chamber, which, by the judgment of 25 June 2023, declared the complaint inadmissible. Particularly, the Grand Chamber noted that the complainant had not raised the objection of the absence of independence of the Czech disciplinary court in the proceedings before the national authorities or in his complaint to the

[104] GRECO, 2016. Evaluation Report – Czech Republic, 72th Plenary Meeting 27 June – 1 July 2016.
[105] § 140.

ECtHR. He did so only in a subsequent submission after the expiry of the prescribed period of six months. It was therefore not possible to deal with that complaint. Despite the Grand Chamber's decision, there is a fundamental doubt whether the current legislation on the Czech disciplinary court in the cases of judges, prosecutors, and enforcement officers meets the requirements of Article 6 (1) of the ECHR.

5.3. Pálka and Others v. Czech Republic (2022)[106]

Violation of: Article 1 of Protocol No. 1 of the ECHR (Protection of property rights).

The complainants were expropriated land for the construction of a road. Under the legislation in force in 2004, they were awarded compensation for the expropriated land in the amount of the so-called "administrative price" (this price is *'determined according to the pricing regulation without taking into account the price which can be achieve on the free market'* - § 7). According to the complainants, the compensation awarded for expropriation amounted to only 13 % of the market value of the expropriated land. In other similar cases decided after the *Pálka decision* at the national level, the Constitutional Court found that such a disproportion between the compensation awarded and the market value of the expropriated land was unconstitutional.[107]

The ECtHR found that

> *domestic law that provides a rigid system of determining compensation which disregards factors other than administratively fixed prices risks upsetting the fair balance required by that provision… the domestic proceedings in the applicants' case were conducted on the basis of a flawed approach, not ensuring an overall assessment of the consequences of the expropriation. Such an approach was recognised later by the Constitutional Court to be incompatible with Article 1 of Protocol No. 1* (§ 60, § 64).

[106] *Case of Pálka and Others v. Czech Republic*, App. No. 30262/13, 24 March 2022.
[107] Frumarová, 2021, p. 89.

5.4. Tempel v. Czech Republic (2020)[108]

Violation of: Article 6 (1) of the ECHR - on account of the lack of a fair trial, in respect of the length of the proceedings.

The complainant, Mr. Tempel, was arraigned for several offences, including double murder. The Regional Court in Plzeň (Court of the First Instance) acquitted the complainant of the offence of murder, finding that a key witness speaking against the complainant was untrustworthy. The acquittal was appealed by the public prosecutor, and the High Court in Prague (Court of the Second Instance) annulled the acquittal and remanded the case for a new hearing. The situation repeated itself three more times: the Regional Court acquitted the complainant each time, the High Court insisted on the complainant's guilt and reproached the first instance court for allegedly incorrect evaluation of evidence (especially witness testimony). Simultaneously, the High Court could not itself overrule Mr. Tempel; therefore, it repeatedly overruled the judgments of the Regional Court in Plzeň, once ordering the replacement of the judges on the grounds that they had repeatedly downplayed the evidence against the complainant and failed to follow the legal opinion of the higher court. However, even the change of judges at the Regional Court in Plzeň did not lead to a change, as the Regional Court acquitted the complainant of the crime of murder for the fourth time.

The High Court in Prague also cancelled the fourth acquittal of the Regional Court in Pilsen and referred the case to the Regional Court in Prague for a new hearing. In doing so, it used Section 262 of the Czech Criminal Procedure Code, which provides that *'when an appellate court remits a case back to the first-instance court for a new examination, it may order that the case be assigned to another chamber of the first-instance court. If there are important reasons to do so, it may also order that the case be assigned to another first-instance court'.* The Regional Court in Prague then found Mr. Tempel guilty of murder and sentenced him to life imprisonment. The complainant was unsuccessful in his appeals and his constitutional complaint was also rejected. The criminal proceedings lasted over 10 years.

The ECtHR found Mr. Tempel's complaint to be reasonable, emphasising that

[108] *Case of Janáček v. Czech Republic*, App. No. 44151/12, 1 June 2020.

> *repeated remittals as a result of the poor and incomplete assessment of evidence and parties' submissions, and procedural errors for which courts are responsible, may amount to a violation of the rights enshrined in Article 6 § 1 of the ECHR… In this regard, the Court points out that the repeated remittals to the court of first instance did substantially increase the overall length of the criminal proceedings in question, and that if the High Court had made use of the procedural possibility to question the witness … itself, then this could certainly have reduced the duration of the proceedings".* In addition, *"the length of the proceedings is attributable mainly to the case being repeatedly remitted to the court of first instance. The applicant in no way contributed to the delays, and it was mostly the public prosecutor who lodged the appeals".* In the Court's view, *"the particular succession of events in the present case strongly indicates a dysfunction in the operation of the judiciary, vitiating the overall fairness of the proceedings*.

The ECtHR also notes that other complaints (in addition to the length of the proceedings) were not manifestly ill-founded and were not inadmissible on any other grounds. On the other hand, the ECtHT stated *'that there is no need to examine separately the merits of the remaining complaints'* (§ 93). For the sake of completeness, it should be noted that the Constitutional Court of the Czech Republic itself has stated in other cases[109] that the *de facto* imposition of a guilty verdict (by an appeal or appellate court against a court of first instance) is contrary to the principle of free evaluation of evidence and may be unconstitutional. As a result of the ECtHR's intervention and the subsequent retrial before the Constitutional Court, Mr. Tempel was released after approximately 20 years and is currently pursuing damages against the state for his unlawful imprisonment.

5.5. D.H. and Others v. Czech Republic (2007)[110]

Violation of: Article 14 (Prohibition of Discrimination) in conjunction with Article 2 of Protocol No. 1 (Right to Education) of the ECHR.

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[109] Judgment of the Constitutional Court of the Czech Republic of 5 February 2019, No. IV. ÚS 4091/18, § 40.

[110] *Case of D.H. and Others v. the Czech Republic*, App. No. 57325/00, 13 November 2007.

D.H. and Others case is probably the most famous and also one the most controversial judgment of the ECtHR against the Czech Republic (see chap. 3.3 above). The applicants were 18 Roma children who argued that they were disproportionately placed in "special schools" for children with intellectual disabilities. As already mentioned above, it was one of 25 first cases in which the Grand Chamber of the ECtHR reversed a previous decision on the merits during the first eight years of the 11th Protocol to the ECHR. [111]

In its judgment of 7. January 2006, the ECtHR (second section) did not share the complainants' claims of discrimination and violation of their rights guaranteed by the ECHR. According to the Court

> *the applicants' parents had consented to and in some instances expressly requested their children's placement in a special school. A written decision in the appropriate form was issued by the head teachers of the schools concerned and the applicants' parents were notified of it. The decisions contained instructions on the right to appeal, a right which none of those concerned exercised"*. Moreover *"the Government have nevertheless succeeded in establishing that the system of special schools in the Czech Republic was not introduced solely to cater for Roma children and that considerable efforts are made in these schools to help certain categories of pupils to acquire a basic education. The Government said that the criterion for selecting the applicants was not their race or ethnic origin but their learning disabilities as revealed in the psychological tests*. [112]

In its judgment of 13 November 2007, the Grand Chamber found indirect discrimination against the applicants and a violation of their right to education. According to the Grand Chamber,

> *there is a danger that the tests were biased and that the results were not analysed in the light of the particularities and special characteristics of the Roma children who sat them. In these circumstances, the tests in question cannot serve as justification for the impugned difference in treatment… The Court is not*

[111] Malenovský, 2008, p. 300.
[112] § 48.

> *satisfied that the parents of the Roma children, who were members of a disadvantaged community and often poorly educated, were capable of weighing up all the aspects of the situation and the consequences of giving their consent*.

The judgment of the Grand Chamber was not adopted unanimously and 4 judges dissented. A number of scholarly articles have been published on the judgment with different points of view on it.[113] Partly similar was the judgment of the ECtHR of 29. January 2013, Horváth and Kiss v. Hungary.

5.6. Exel v. Czech Republic (2005)[114]

Violation of: Article 6 (1) of the ECHR - on account of the lack of fair and public hearing.

The complainant's property was declared bankrupt. The case was decided by the courts of three instances, but no court ordered a public hearing in the case. In his appeal against the decision declaring him bankrupt, the complainant objected to the lack of an appeal hearing and provided his reasons for the same.

The ECtHR concluded that it found no circumstances justifying the failure to hold a public hearing. The declaration of bankruptcy over the applicant's property did not fall within the category of cases of a highly technical matter which could be decided in a purely written procedure. According to the ECtHR, a hearing should have been ordered at least in one instance of the judicial system. The declaration of bankruptcy had significant economic consequences for the applicant and, in the present case, an oral hearing would have been "important and useful".

5.7 Credit and Industrial Bank v. Czech Republic (2003)[115]

Violation of: Article 6 (1) of the ECHR - on account of the lack of a fair trial.

The applicant was a bank (a joint stock company) which was placed under receivership (compulsory administration) by the Czech National Bank (central bank), on the grounds that *'the financial situation and liquidity of*

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[113] See e.g. Windischer, 2010; Devroye, 2009; Goodwin, 2006.

[114] *Case of Exel v. the Czech Republic*. App. No. 48962/99, 5 July 2005.

[115] *Case of Credit and Industrial Bank (Kreditní a průmyslová banka) v. Czech Republic,* App. No. 29010/95, 21 October 2003.

the applicant bank had repeatedly been unsatisfactory and that the previous measures had not remedied the situation'.

The ECtHR agreed that

> *the proceedings relating to the compulsory administration imposed on the applicant bank and the subsequent entry in the Companies Register concerned the civil rights of the bank, in that it involved a restriction on the bank's ability to administer its possessions and that the proceedings accordingly fell within the scope of Article 6* (§ 64).

At the time, the Banking Act did not respect the requirements of Article 6 (1) of the ECHR and the bank did not have access to effective judicial protection against the Central Bank's decision.

6. Conclusion

Hundreds of pages could undoubtedly be written on issues relating to the development of human rights in Czechoslovakia and the Czech Republic and its relationship with the Council of Europe and the ECHR. This article has presented at least basic insights into the areas defined in its introduction. As Montesquieu wrote in his book *The Spirit of Law (De l'esprit des lois), "it is never a good idea to exhaust the topic of a publication and leave nothing to the reader. The aim should not be to make the reader read, but to think"*.[116]

The Czech Republic's integration into the European human rights system, particularly under the ECHR, marks a significant milestone in its post-communist transformation. Czechoslovakia was the first post-communist country that ratified the ECHR. However, the process of readmission of the independent Czech Republic to the Council of Europe after the dissolution of Czechoslovakia and the subsequent retroactive binding of the ECHR on the Czech Republic has been associated with several problematic issues from the perspective of public international law doctrine. The article points out that this retroactive application of the ECHR effectively violated Art. 59 (1) of the ECHR, which provides that the ECHR shall be open to the signature of the members of the Council of Europe only. It draws attention to the problematic jurisprudence of the Czech

[116] Montesquieu, 2010, p. 214.

Constitutional Court, according to which human rights treaties, including the ECHR, are not only part of the Czech legal order, but even of the constitutional order. This conclusion is contrary to Article 10 and Article 112(1) of the Czech Constitution. The article provided a more detailed review of some key judgments of the ECtHR against the Czech Republic, in particular: Janáček (2023), Grosam (2023), Tempel (2020) or D.H. and Others (2007). Two of them were even decided by the Grand Chamber, and partial conclusions in some of the analysed cases may be transferable to other states.

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