How to Form the Czech Constitutional Court?

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Politically, summers in the Czech Republic are often quiet. This year is different. A newly elected president, Petr Pavel, is selecting almost all of the fifteen members of the Czech Constitutional Court ("CCC") during the next two years. Unexpectedly, Pavel's selection process has sparked a great deal of controversy and discussion about how a president should choose constitutional judges. What happened? And what are the main lessons to be learned from the current situation in the Czech Republic?

New president, new rules

Former Czech President Miloš Zeman, who left office in March this year, had a very complicated relationship with the judiciary. Simply put, Zeman's nomination process for the CCC was neither transparent nor predictable. The Czech Constitution says that Justices of the CCC are appointed by the President after confirmation by the Senate (Article 84(2) of the Czech Constitution). This means that the President should propose the name of a potential candidate, which is then submitted to the upper chamber of the Parliament, the Senate. The President needs the approval of a simple majority of senators (votes of more than half of those present) to appoint his nominee to a ten-year term.

Miloš Zeman had no publicly known rules for the selection of candidates for the CCC before submitting them to the Senate, and often came up with controversial and inappropriate proposals to complete the Court. This was not the case during the entire ten years of Zeman's rule. The former President had a few appointments of constitutional judges of high quality. This was due to his good relationship with the President of the CCC, Pavel Rychetský, whom he knew very well from domestic politics (they sat together in the government when Zeman was prime minister in 1998-2002).

But in 2015, towards the end of Zeman's first presidential term, a personal conflict arose between Pavel Rychetský and Miloš Zeman, mainly over Zeman's increasingly populist statements on the migration crisis and his support for pro-Russian policies. President Zeman stopped listening to his former friend and started proposing his own candidates. Who made it to the Court (or at least received a nomination) often depended on the relationship between the President and a candidate and whether the views of potential candidates suited the head of state, who often acted unconstitutionally or on the edge of the Czech Constitution. On the basis of these criteria, the person in question could be included in the list of jurists under consideration.

After the election of Petr Pavel in early 2023, Czech society and especially the legal community expected change. Academics and political commentators called for a transparent, open and inclusive process of nominating future constitutional judges. Moreover, a part of the Czech legal community, which has been among the critics of President Zeman's unconstitutional behavior, saw an opportunity to propose the names of respected lawyers who were not considered during Miloš Zeman's presidential term because of their opinions or active defense of the Constitution against his political pressure. A new president, who at the same time said he wanted to be the opposite of his predecessor, promised to introduce new rules. And that's exactly what happened.

Two weeks after Pavel's inauguration, the Office of the President announced a process of selecting new members of the CCC. Quick action was needed. President Pavel faced a difficult task: to select and appoint seven constitutional judges by the end of the year, and six more the following year. Petr Pavel created an "Advisory Board" of six highly respected lawyers, headed by constitutional law professor Jan Kysela.

However, there are also other well-known figures, such as former constitutional judges Eliška Wagnerová and Ivana Janů, former ombudsman and dissident Anna Šabatová (Šabatová left the Board when her son got an interview date as a possible candidate), and a two leading scholars specializing in constitutional law from Czech law faculties with international experience, David Kosař and Marek Antoš. The Board also includes a former member of the Senate as a link to the political reality of the upper house of the Czech Parliament.

The published document contains new criteria for the selection of future constitutional judges appointed by Petr Pavel. The Advisory Board should transform the CCC to be more diverse in terms of professional background, opinion orientation, and also more balanced in terms of gender representation. The task of the Board was first to draw up a list of potential candidates. The President also asked 23 professional institutions, such as Czech law faculties, the Czech Bar Association, the Union of State Attorneys, the Supreme Courts, and the Academy of Sciences of the Czech Republic, to suggest specific names.

Power struggle

The first three nominations in May 2023 already aroused great emotions among politicians and the professional public. Not so much because of the personalities of the proposed jurists, but because of the way they were selected. And these emotions did not go away with the next batch of nominations which were introduced during the summer. There are two main reasons why the new rules have been questioned in recent months.

First, critics of the selection process – mainly from the ranks of the Czech senators – have argued that although the selection of constitutional judges is a presidential prerogative, it is in fact carried out by the Advisory Board. The Advisory Board invites potential candidates for an initial interview and recommends whether the President should meet with them and formally nominate them. The will of the selected experts is therefore expressed in two stages – when the list of potential nominees is drawn up and before the final interview with the President. Nevertheless, some lawyers have met with Petr Pavel even though they were not recommended by the Advisory Board, and one candidate even became a constitutional judge without being "approved" by the experts. Critics say the new procedure bypasses the will of the head of state, who in this case merely confirms a choice de facto made by experts on the Advisory Board.

Some academics describe the new rules as "technopopulism". For example, according to Jan Komárek, a professor in Copenhagen who is originally from the Czech Republic, Petr Pavel is trying to remove the political aspect from the selection of constitutional judges. Komárek also argues that in Germany or the United States, the selection of future members of the Constitutional Court is not seen as a purely professional process, but as a matter of party politics.

On the other hand, there is no unified political line among the critical senators. Traditionally, party affiliation does not play a significant role in voting on nominees. The influence of party politics has generally played a smaller role in the Czech political system than in Germany or the United States. This is mainly due to a record level of public distrust in the ability of political parties to govern the country, which is not only a consequence of the COVID pandemic, but also long-standing inability to address basic social problems such as pension reform or the digitalization of the state.

Secondly, the ideological and power conflict between the President and the Senate also plays a role in the debate about the current model for selecting constitutional judges. According to critics, the Advisory Board is "too leftist" and the President "too progressive". By contrast, the Senate is now considered a highly conservative institution, especially when it comes to ideological beliefs. This is also why senators would like to have a say in how the CCC should be composed and how the potential judges should think about certain constitutional issues. The senators had hoped that, with a new president whom the majority of the Senat publicly supported in the presidential election, they would have a greater say in the pre-selection of constitutional judges. Some of them have said in the past that they wanted to suggest names themselves.

But with the creation of the Advisory Board, they feel robbed of that role.

Their criticism should therefore be understood as an attempt to push through nominees to the CCC. The power struggle arose as a result of setting limits after the election of a new head of state and is manifested in the Senate's attempt to put like-minded people on the Court.

The next task

Despite this loud criticism, all nominations have so far been approved by the Senate. But it turns out that the debate about the future judges of the CCC is not over yet. There are still too many unresolved but crucial questions on the table. What should be required of constitutional judges? What are the qualities that we consider essential and that make us forgive other shortcomings? There is no clear consensus on who should be a constitutional judge and what are the main and most important requirements for this role. Neither the senators nor the Advisory Body have a clear position on the issue. This is due to a lack of professional and political debate.

For many years, candidates for the CCC were not in the public eye. This is now changing, as more and more people – politicians and citizens alike – are becoming aware of the importance and power of the constitutional court's decisions. And at the same time, looking abroad, constitutional courts seem to be the place where important social issues are decided, especially when the political scene is blocked or too conservative compared to the rest of society. We recognize the far-reaching nature and significance of the United States Supreme Court's decision.

It is fair to say that the CCC operates in a legal and political environment different from that of the Supreme Court of the United States. Although Czech constitutional judges have also decided socially sensitive cases, such as last year's transgender case, they make up only a small part of the CCC's caseload. The same applies to judicial decisions that are likely to affect the political system. Nevertheless, there is a perception in some parts of society and political representation that the constitutional courts are the place where some future disputes will be decided.

To sum up, the introduction of a model for the selection of constitutional judges is certainly a good step for the CCC. Especially when President Petr Pavel has no legal background. At the same time, the critics of the process are right on some points. The President says the new rules are more transparent. In fact, they are not. We may know the general rules of selection, but who makes the final list of candidates is already decided behind the scenes. In practice, there is no other way. But it is not credible to claim otherwise in public.

Nor do general criteria for an ideal nominee provide a satisfactory answer to the question of what we require of constitutional judges. This is evident not only in the deliberations over proposed names, but also in the power struggle between the Senate and the President, who have different ideas about the content of these criteria and which jurists embody them. Clarifying what we actually want from constitutional judges should now be the main task of the actors. This will be useful not only for other candidates for the position, but above all for the legitimacy of the CCC.

The initial version of this text contained some factual errors regarding the Advisory Board which have been corrected in this version.

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