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Through selective activism towards greater resilience: the Czech Constitutional Court's interventions into high politics in the age of populism

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ABSTRACT

With technocratic populist Andrej Babiš leading the Czech government coalition, the country has experienced some democratic backsliding. In contrast to its Hungarian and Polish counterparts, however, the Czech Constitutional Court has been spared from executive capture. This article argues that resilient constitutional courts may act as one of the key safeguards against illiberal populism. We demonstrate that resilient constitutional courts are products of an institutional framework, which prevents court-packing by loyal allies of populist leaders, and of courts' activities that increase their reputation with the public, thus making political attacks against them overly costly. We argue that the Czech Constitutional Court has exercised an approach of selective judicial activism that focuses on keeping political competition fair while avoiding involvement in controversial socially transformative judicial decision-making which would outrage large parts of the population. Moreover, by acting as a guardian of fair political competition, the Court contributed to the further fragmentation of the political landscape, which in turn prevented the accumulation of political power, and hence the Court shielded itself from political attacks.

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Introduction

Czechia, Hungary, and Poland, once considered frontrunners in the post-communist transition,¹ have experienced a bumpy ride on the road to fully consolidated democracy in the last decade. The remaining Visegrád Four country – Slovakia – took an authoritative turn under Prime Minister Mečiar as early as the mid-1990s.² Slovakia witnessed, for example, the abduction of a President's son and still struggles with clientelistic networks – not even stopping short of killing an investigative journalist and his fiancée. Hungary and Poland currently face political proceedings for alleged breaches of the European Union's values. Despite experiencing some symptoms of illiberal populism recently, Czechia stands as the only country in the region spared from grave democratic excesses. We argue that an

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essential part of the explanation of Czechia's liberal democratic survival is provided by its Constitutional Court, which has remained, unlike its Hungarian, Polish, and Slovak counterparts, relatively free of political capture. Such a position has enabled the Court to employ a selectively activist approach that occasionally interferes in highly political issues. The Court focuses on the protection of fair political competition and separation of powers while remaining hesitant to push forward socially divisive values issues.

Central European constitutional courts, endowed with the hope to prevent illiberal democratic backsliding, have played an important part in democratic transitions.³ However, in Hungary and, more recently in Poland, the constitutional courts have been largely packed by loyalists of the populist regime and do not fully exercise their function as a vital constraint on political power.⁴ In contrast, the Czech Constitutional Court (hereinafter also 'the Court') has continued to maintain an image of an independent tribunal. This is especially noteworthy, given the Court's occasional interventions into the realm of 'mega-politics'. Hence, we ask how the Court remained resilient, able and willing to challenge democratic backsliding.

This article contributes to the literature on the role of constitutional courts in countries experiencing democratic backsliding. While most of the scholarship has analysed spectacular cases of populists' capture of the courts, we identify elements that support constitutional courts' resilience. In an environment of worsening quality of democracy both in the region (Hungary and Poland) and at home, the Czech Constitutional Court has remained surprisingly resilient. We argue that it results from an interplay between structural political elements and the Court's behaviour. Nevertheless, the picture is not all rosy – we analyse a number of issues of concern. Understanding the elements supporting and undermining constitutional courts' resilience contributes to the democratic regime's ability to face the populist challenge.

The case study of the Czech Constitutional Court's resistance to strengthening populism builds on elite interviews with the Court's judges themselves. The article uncovers how Czech constitutional judges perceive the influence of other branches of power and of the public, and judges' coping strategies with such influence. We build on extensive literature that has identified variables affecting a court's position in the political system, and discuss the impact of those variables in the Czech context.

After this introduction, a review of literature on constitutional courts and the populist challenge follows. Then, we zoom in on the Czech case and examine the twofold relationship between the Czech Constitutional Court and the populist challenge. First, we scrutinise structural factors that have contributed to the Court's relative resilience, thus contributing to its independent position even amidst the surge of populist attacks on Central European courts. At the same time, we recognise that the Court has played an active role in preserving those factors. We argue that the Court's activist judgements concerning the separation of powers and political process have contributed to political fragmentation in Czechia and bolstered judicial independence. This, in turn, has helped to sustain a relatively reasonable level of liberal democracy of a country in a tested region. In this regard, we elaborate more deeply on a string of activist 'mega-politics' judgements culminating with a 2021 election judgment, whereby the Court dramatically intervened in the political competition field by striking down crucial parts of the Electoral Law eight months before the general election. Finally, in the Conclusion, we draw broader lessons from the Czech case.

Making constitutional courts resilient

The dichotomy between democratic and authoritarian regimes has become increasingly blurred, and so has the role of courts.⁵ On the one hand, judges in authoritarian regimes can become relatively independent and show some degree of assertiveness vis-à-vis the ruling elites. On the other hand, courts in hitherto democratic regimes can prove instrumental in abetting democratic backsliding once they are packed by loyal judges.⁶ Courts can act as important actors in shaping the nature of a polity, but they are not a panacea. Democratic erosion results from a complex interplay between underlying economic, political, social, and cultural macrostructures, embedded in an international context. Current scholarship points both to successful and unsuccessful examples of courts countering democratic backsliding and has emphasised the importance of carefully thinking through and timing political interventions by judges.⁷ Even though courts might enjoy momentary public support, elected actors typically have better access to media and can mobilise public opinion more easily.⁸

In the European Union context, democratic backsliding can be judicially resisted not only by litigation in national courts, but also by the European Commission or by another Member State starting infringement proceedings, or by a national court sending a preliminary question to the Court of Justice. However, supranational judicial interventions have so far been unable to turn the tide of democratic backsliding in Hungary and Poland. Moreover, overreliance on supranational judicial intervention to defend democracy risks politicising the EU judiciary and also creates an alibi for the lack of political will to intervene in EU Member States’ governance of their judiciaries.⁹

The prospect of a successful defence against a populist government depends partly on a court’s institutional design. A constitutional court needs to have the necessary powers as well as the opportunity to use them. This opportunity is very closely associated with the design of access to a court. For example, the Czechoslovak Constitutional Court established in 1920 had the authority to review legislation, but only very few state organs could initiate the proceedings, and petitions from the public were not allowed at all. This diminished the importance of the Court to such a level that the German occupation forces in 1939 did not bother to dissolve the court, seize its building, or arrest its personnel.¹⁰

Another crucial element includes the willingness of judges to protect liberal democracy. As Aziz Huq has pointed out, ‘the robustness of democratic institutions under the rule of law cannot be disentangled from the character and motivations of those elected or appointed to high office’.¹¹ Even the most powerful court will refrain from taking any action if staffed with judges loyal to a government or sympathetic to the government’s political ideology.

The two factors – ability and willingness to protect liberal democracy under the rule of law – combined will produce a 2 × 2 matrix of court positions, as indicated in [Table 1](#).

Table 1. Court’s positions towards the protection of democracy.

willing and able	willing but unable
unwilling but able	unwilling and unable

Source: the authors.

Courts unwilling and unable to protect democracy are entirely harmless for a populist government, as, for example, the Constitutional Court of Belarus shows. The President appoints all its judges, and also many members of the state bodies that have standing before the Court. As a consequence, the Court grants only few petitions. Apparently, none of the authorised petitioners wants to break the illusion of the rule of law in Belarus, and neither do the judges themselves, as they have considered even very problematic practices compliant with the Belarusian Constitution.¹²

Both ‘hybrid situations’ (i.e. willing but unable and unwilling but able) can arise independently from populism and serve as a reason why the court will be deemed harmless and thus left intact by a government. However, such situations may also come as a result of court-curbing attempts from a populist government. Some courts have been stripped of their powers, or their decisions were systematically overridden by constitutional revisions,¹³ making these courts unable to constrain a government anymore. This happened to the Hungarian Constitutional Court in the first phase of Orbán’s takeover. Alternatively, populist governments packed courts with their loyalists, thus shifting their power balances.¹⁴ The Polish Constitutional Tribunal represents a prominent example of this latter trajectory.¹⁵

This article analyses how some courts have managed to stay willing and able to protect liberal democracy. Caserte and Cebulak use the concept of ‘resilience’ and define it as the ‘capacity of courts to maintain the legal, political, and ideological ideas that justify their own existence’.¹⁶

A good starting position for creating a resilient court comprises its institutional design, including its powers and internal procedures, and personal composition.¹⁷ The real challenge is to keep the courts able and willing to protect democracy, and prevent them from slipping either towards inability or unwillingness.

Some authors connect the greater success of Western democracies at fending off attacks on liberal institutions with better-developed traditions of independence and professionalism of Western courts, media, human-rights organisations, and ombudspersons, which all mutually reinforce one another. Conversely, weak and underdeveloped institutions invite a drift toward ‘illiberal democracy’.¹⁸ The illiberal approach to constitutional courts displays traits such as opportunistic instrumentalism (first framing courts as elitist bodies constraining popular will, and then exploiting them after coming to power), the transformation of a constitutional constraint into a legitimising tool (leverage of the ruling party over constitutional judges, the selective restriction of court powers), their use as tools of constitutional mutation (a new interpretation of the constitution), and the creation of perverse constitutional incentives (after court-packing occurs, the opposition does not trust it and stops using it).¹⁹ In illiberal constitutionalism, constitutional interpretation shifts from the constitutional court towards the executive, who has leverage over the court. This allows the government to act without proper constraints while it can declare its actions fully constitutional, and, therefore, legitimate.²⁰

Generally, populist governments do not welcome any constraints on their power, particularly not from independent courts. Hence, such governments seek to diminish judicial review or turn it to their advantage. The situation becomes especially worrying when the populist majority is large enough to revise the constitution. The government can then change both the court’s design (the number of judges, terms of office, rules of appointment, voting rules, etc.) as well as the constitutional framework providing the yardstick

for the review. The possibility to change the constitution allows the government to override unwelcome court decisions, making the court an unattractive option for exercising effective oversight. Political fragmentation preventing the formation of governments able to change constitutions is thus crucial for courts’ resilience.²¹ But as the Polish case shows, it might not be enough to shield the judiciary completely.

Direct attacks against courts usually get a lot of public attention, and tactics such as violent threats, forced resignations, or harassing judges can easily harm the government’s reputation. Strong public support for the court considerably increases reputation costs for assaults on courts. On the contrary, unpopular courts invite political attacks.²²

Table 2 summarises findings from the literature on various factors that affect courts’ resilience. These factors usually have a synergic effect. The court’s legal design offers little protection if all potential veto players side with the populist government, which can thus easily change the design. Similarly, even a relatively weak populist party can pack the court with loyal judges in the case of an improper institutional design. Finally, a robust design and fragmented political landscape do not necessarily prevent willing judges from becoming government allies. Courts’s independence can be boosted by the public’s backing. Courts build the reservoir of public trust by their decision-making and PR activities gradually, hence increasing the costs of potential political attacks. High judicial legitimacy can embolden courts to make more assertive decisions.²³

Determinants of the Czech Constitutional Court’s resilience

The previous section outlined the main findings of existing literature concerning the relationship of (constitutional) courts and their capacity and willingness to make assertive independent decisions on the one hand, and the attempts of populist regimes to subjugate independent courts on the other hand. Our introduction asserted that despite the Czech populist backsliding and the widespread experience of political attacks on other Central European courts, the Czech Constitutional Court has not (yet) been deprived of capacity and willingness to behave independently.

This section explains why the Court proved resilient to populist assaults, especially compared to its Polish and Hungarian counterparts, and how the resilient Court has contributed to a comparatively better quality of democracy, despite its recent deterioration. First, we briefly introduce the Czech constitutional-political context, focusing on the populist leanings of the current political leadership. Next, we discuss the nature of the Court’s activism and how it has been influenced by the changing political landscape. Obviously, if the Court was extremely self-restrained, it would hardly present any challenge to the political

Table 2. Key factors affecting a court’s resilience.

Political factors
• Level of political fragmentation ⁷⁰ • Public support of the court ⁷¹
The court’s design
• Jurisdiction ⁷² • Framework for review (the conception of the constitution, the role of international law and/or EU law) ⁷³ • Access to the court ⁷⁴ • Legal effects of decisions ⁷⁵ • Terms of office and their renewability ⁷⁶ • Appointment and removal procedures ⁷⁷
Intra-court factors
• Preferences and attitudes of individual judges ⁷⁸ • The ability of judges to persuade their colleagues ⁷⁹

Source: the authors.

institutions such as the Government or the Parliament, and the key question of this article (*How has the Czech Constitutional Court remained resilient, able and willing to challenge the political institutions?*) would lose much of its meaning. The Court has shown relatively high levels of activism and assertiveness towards other branches, and has continued to do so even in the last couple of years under populist Prime Minister Babiš.

Therefore, we follow up with an analysis of the determinants of the Court's resilience to populist influences. In this regard, we build on the existing literature and focus on the institutional design of the Court and the political fragmentation as the main explanatory factors. However, we go beyond the claims made in the literature and argue that the Court's ability to resist populist influences is not solely shaped by external factors. On the contrary, the Court's willingness to make activist decisions and to actively use its reservoir of public support for this purpose has played a significant role in keeping these external factors favourable.

The constitutional-political context of the Court's functioning

Czechia has tried to dissociate itself from the Visegrád Four label of democratically backsliding countries. Although Czechia has performed significantly better than Hungary and Poland on indices of democracy and human rights in the last decade,²⁴ the literature has pointed out a decisive shift towards a form of populist democracy,²⁵ characterised by a dominant party with a populist ideology, the decline of the traditional left, and the rise of minor parties on both fringes of the cultural spectrum.²⁶ Compared to the conservative national populism of Viktor Orbán and Jarosław Kaczyński, Andrej Babiš – a billionaire, leader of the ANO 2011 movement and the Czech Prime Minister since 2017 – has resorted to technocratic populism, which strategically uses the appeal of technocratic competence, anti-corruption rhetoric, and the ideology of expertise with a populist political appeal to ordinary people.²⁷ Babiš succeeded in constructing an image of corrupt, power-seeking and incompetent politicians undermining the hard work of ordinary people, who could instead rely on a successful businessman able to 'manage the state like a company'.²⁸

The different nature of populism in Hungary and Poland on one side and in Czechia on the other side²⁹ has significant repercussions. Babiš's ANO 2011 counts among valence populist parties, overwhelmingly emphasising non-positional issues such as, e.g. performance, transparency and the fight against corruption.³⁰ Babiš's technocratic approach, with its thin ideology, arguably will not mobilise and polarise the public as much as Orbán's and Kaczyński's invocations of their nations' greatness. Moreover, Babiš clashing with expert institutions, such as the Constitutional Court and the Czech National Bank, would undermine his own emphasis on the technocratic rule.

The Czech Parliament consists of the Chamber of Deputies and the Senate, with the Chamber of Deputies holding the position of the main political battlefield and the Senate of a stabilising factor with partial veto powers. The political composition of both parliamentary chambers usually does not correspond because a proportional election system determines the composition of the Chamber of Deputies (200 deputies elected for four years as members of political parties), while 81 senators earn their seats for six years in a two-round majority staggered election (one-third of the Senate every two years). Moreover, the Senate is staffed not only by political parties' cadres but also by

independent regional personalities outside mainstream parties or representatives of fringe parties. For these senators, a petition to the Constitutional Court represents one of the very few options how to achieve a substantive change.³¹ The bicameral Parliament with often very different partisan compositions makes it difficult for populists to change the Constitution, which was the case in Hungary. The second important fragmentation occurs in both parliamentary chambers with a multitude of parties in the lower chamber and individual senators in the Senate, thus hindering a prospect of an easy compromise. The diverse composition of the Senate plays a crucial role in the appointment process of constitutional judges. This distinguishes Czechia from Poland, where Sejm, the lower chamber of the Polish Parliament, associated with the ruling Government, elects constitutional judges. The overall Czech constitutional structure hence contains more safeguards against the populist takeover, but at the expense of decision-making readiness.

Political institutions operate in the environment of diversified public trust, which we examine more in detail below. Generally, the public tends to support expert political bodies, such as the Court, and distrust central political institutions, such as the Parliament and the Government.

The Czech Constitutional Court as an activist court

Before analysing the relationship between the Court's activism and the potential threat to its independence from populist political forces, we have to answer the question to what extent is the Court activist. Only then we can turn to examine how its activism was influenced by populist threats to its independence.

Judicial activism, in general, is a contested concept, lacking a single dominant definition or approach.³² For the purposes of labelling a judgement as 'activist', we work with several criteria. First, we take into account only politically significant cases. Furthermore, we consider whether the Court relied on a reasonably foreseeable constitutional standard. If the Court delivers a salient judgement with a politically significant impact and the judgment is based only on a vague constitutional standard (rather than a clear wording of the Constitution), we consider it an activist judgement. This is especially true if the Court relied on a purposive interpretation of the constitutional provision in question. As Lino Graglia put it: 'By judicial activism I mean, quite simply and specifically, the practice by judges of disallowing policy choices by other governmental officials or institutions that the Constitution does not clearly prohibit'.³³ The cases discussed below (such as *Melčák* or the *Grand Election* judgements) clearly fall within this category. Another important signal of activism is a judgement that in fact creates new rules and may be labelled as 'legislating from the bench', thus encroaching on the competences of other constitutional bodies, mainly parliaments.³⁴ Finally, we take into account the measure of comparative activism of a constitutional court (i.e. whether the Court stands out from a comparative point of view).

In comparative literature, activist constitutional courts tend to attract considerable attention. In this regard, the Czech Constitutional Court's case-law has never really made as big a splash as the Hungarian Constitutional Court did when it abolished capital punishment, or the South African Constitutional Court that was considered very activist and interventionist in its early days.³⁵ The most intriguing activist judgements of the Czech Constitutional Court have concerned issues of organisational

constitutional law such as separation of powers or electoral process. With regard to substantive fundamental rights' interpretation, the Court has been relatively restrained. In the Czech context, powerful politicians and interest groups, seeking their own political agendas, have often accused the Court of undue activism. In 2006, for example, a think-tank founded by President Václav Klaus published a volume entitled 'Judgeocracy in the Czech Republic: Fiction, or reality', condemning various decisions of the Court and judicial review in general.³⁶ In 2011, Prime Minister Nečas criticised the allegedly activist *Building Savings* judgement³⁷ and accused some members of the Court of being biased.³⁸ Similar instances of politically motivated labelling abound.

Despite not being as famous as some other courts with judicial review powers, the Court has, in fact, shown a decent degree of activism. Its activism, however, seems to be rather selective. The Court has tended to lash out in certain types of cases, yet it has remained deferential in other areas.

It is important to note that the Czech Constitutional Court is endowed with virtually all the powers that a constitutional court can have.³⁹ Amongst other things, it can hear individual constitutional complaints, review all sorts of legislative acts, decide on competence conflicts, conduct a preventive review of international treaties, or try a President for high treason or gross violation of the constitutional order. Most of the Court's case-load consists of constitutional complaints that are heard by three-member chambers. However, the most significant cases, such as the review of legislation, are assigned to a 'plenum' consisting of all fifteen judges. For the purposes of our article, we must distinguish between the Court's activism in the individual constitutional complaint procedure from its activist approach in plenary cases, particularly plenary cases involving a review of the constitutionality of legislation. Even though the Court has been at times very activist when deciding on individual constitutional complaints, we will largely ignore these cases, as they are less relevant in the discussion concerning populism. In the individual constitutional complaint procedure, even activist judgements directly communicate only with the parties to the proceedings; they are usually not seen as a challenge to the ruling political powers, and thus typically fly under the radar. Consequently, we focus mainly on the activist plenary judgements in which the Court directly challenged the ruling majority and entered the political arena.

A further distinction can be made between cases involving substantive human rights issues, such as politically controversial cases concerning the rights of minorities, and cases dealing with organisational constitutional law issues, such as separation of powers, independence of the judiciary and the general rule-of-law issues. The Court has perhaps retreated towards self-restraint in substantive human rights cases,⁴⁰ but it does not seem to be the case in organisational constitutional law cases and electoral matters, which are of utmost importance for the purposes of our article. The latter category included the most prominent examples of the Court's activism, which we present here (*Euro-Amendment*, *Melčák*, the *Grand Election Judgements* and a line of case law concerning judicial independence, such as the *Brožová* judgement and the *Judicial Salaries* saga).

In the 2002 *Euro-Amendment* judgement,⁴¹ the Court refused to acknowledge the impact of a constitutional amendment and unilaterally included international human rights treaties in the concept of constitutional order.

In 2009, in the midst of a political crisis, virtually all relevant political parties concluded that the best solution would be to shorten the term of office of the lower chamber of the Parliament and organise snap elections as soon as possible. They considered the standard constitutional procedure too slow. Therefore, copying the solution used almost 12 years earlier, the Parliament adopted an *ad hoc* constitutional act that would allow a unique reduction in the electoral term. However, this time, a member of the Chamber of Deputies used a constitutional complaint to challenge the constitutional act and the President's consequent decision to call snap elections. The Court's plenum (all fifteen judges sitting *en banc*) annulled the constitutional act in question by the *Melčák* judgment⁴² because it was a non-general solution that contravened the principle of the generality of law and the prohibition of retroactivity. This judgment has had far-reaching consequences because it was the first time that the Court explicitly held that it had the power to review even constitutional amendments adopted by the Parliament. The judgment was thus a clear challenge to the Parliament's authority, and its competence to decide what is (and is not) part of the constitutional order. Arguably, the judgement influenced the outcome of the following 2010 parliamentary election. In response to the judgment, some senior members of the Parliament publicly suggested that it should be disregarded as an *ultra vires* exercise of the Court's power.⁴³ Still, the brewing constitutional crisis eventually petered out, and other constitutional actors accepted the judgment.

The 2001 *Grand Election Judgement*⁴⁴ did not deal with a constitutional amendment, but its political significance might be even greater. The Court declared unconstitutional an Election Law amendment that increased the number of voting districts, introduced a modified D'Hondt method and abolished the second scrutiny. The modifications to the electoral system, sponsored by the two strongest political parties at that time, would have drastically weakened smaller political parties and allowed the two strongest parties to control the Chamber of Deputies. Interestingly, the case was brought before the Court by President Václav Havel. The Court declared the reform unconstitutional because the amendment in question introduced too many majoritarian elements, although the Constitution prescribes for elections to the Chamber of Deputies a 'system of proportional representation'. This was a significant blow to the two strongest political parties and arguably started the animosity towards the Court on the part of Václav Klaus and Miloš Zeman, two of the most important political leaders in the post-1993 Czechia.

Finally, a series of cases concerning judicial independence has evidenced the Court's activism in the pre-2010 period. In addition to numerous judgements defending judicial salaries against an (allegedly) arbitrary reduction,⁴⁵ the Court delivered a string of decisions concerning a conflict between President Václav Klaus and Supreme Court President Iva Brožová. In 2006, when Václav Klaus dismissed Iva Brožová from the position of Supreme Court President, the Constitutional Court not only found this dismissal unconstitutional and *de facto* reinstated Iva Brožová at the helm of the Supreme Court, but also struck down Article 106 of the Czech Law on Courts and Judges, declaring that it was unconstitutional for the executive to dismiss court presidents.⁴⁶ However, the Czech Parliament fought back and introduced limited terms for all court presidents (ten years for presidents of apex courts and seven years for presidents of other courts).⁴⁷

All the aforementioned judgements predate the populist turn in Czech politics, which is typically associated with Babiš's becoming the Prime Minister in 2017. They show the Court's determination to interfere with high politics, even up to invalidating a constitutional amendment. Even though the Court did not produce many judgements of a similar magnitude in the last decade, one clearly stands out – the 2021 *Grand Election Judgement II*.⁴⁸ The Court held that a particular combination of the key elements of the electoral system adopted in the aftermath of the *Grand Election Judgement I* violated the constitutional principle of proportional representation as well as the principle of equality of the right to vote. It annulled *inter alia* the legal threshold for coalitions. But much more importantly, it held that the combination of fourteen districts and the system of allocating seats (D'Hondt formula used at the level of districts) causes unequal and disproportionate seat allocation. However, the Court only formally annulled the system of seat allocation and not the existence of districts. It thus left the Parliament the task of coming up with a constitutionally valid solution. The *Grand Election Judgement II* went even further than the *Grand Election Judgement* 20 years ago, making it virtually impossible for any future electoral system to significantly favour stronger political parties. It took the Court three years to deliver the ruling, which was announced merely eight months before the election. Prime Minister Babiš responded furiously, accusing the Court of 'overstepping all boundaries' and not acting impartially.⁴⁹ Nevertheless, even this outburst eventually petered out and there have not seemed to be any consequences for the Court yet.

The presented Court's activist judgments concern mainly structural constitutional issues. Unlike its Polish and Hungarian counterparts, the Court has stayed away from the 'cultural wars', including, e.g. LGBT rights.⁵⁰ The Court can thus portray itself rather as a guardian of fair political competition that at the same time avoids dividing Czech society by advancing sensitive agendas. The *Grand Election Judgement II* shows that even in the current environment, the Court is not afraid to issue far-reaching judgements that might invite the ire of (populist) top political figures. We do not claim that the Court's emphasis on separation of powers, judicial independence and electoral process is a result of a conscious strategy. The Court simply reacted to emerging challenges to the young Czech constitutional system and the most significant challenges happened to concern these issues. Thus, as we develop in the following section, even without a clear strategy, the Court contributed to the resilience of the Czech constitutional system and arguably shielded itself from potential court-curbing. This would not be possible without the willingness of the Court to make these decisions at critical times. The composition of the Court proved crucial, which points to the importance of the appointment mechanism. New entrants then experience institutional socialisation and internalise the ethos of the Court.

What makes the Czech Constitutional Court resilient?

As shown above, the Court does not operate in an environment devoid of populist tendencies. At the same time, it does not share the headlines with its Polish and Hungarian counterparts as a victim of populist capture. Even after coming into power in 2017, Babiš's coalition government has not stripped the Court's powers, cut its budget, appointed a loyalist, or employed any other big trick from the populist repertoire.⁵¹

Following the structure presented in Table 2, we elaborate on reasons why the Court has remained resilient. We assume that Babiš, as a businessman used to managing and making decisions, prefers his governing not constrained by any checks, including judicial.

First of all, the Court's resilience might be partly explained by its institutional design and the inability of the appointing actors to exploit its inherent weaknesses we analyse below. Secondly, the Czech parliamentary majorities and governments, including the current populist-dominated coalition, are in a weak position to mount such an attack due to the significant fragmentation of the Czech political landscape. Moreover, the Court has accumulated a fair deal of public support that helps in shielding it from political attacks. Finally, the diverse composition of the Court and its persisting ethos of the original dissident Court safeguarding liberal democracy further strengthen resilience to populist assaults.

In general, the Court's design strongly builds on a template from the German Federal Constitutional Court in combination with a US-style appointment process. The Court consists of fifteen judges appointed by the Czech President upon approval of the Senate. Subsequently, out of these fifteen judges, the Czech President unilaterally⁵² appoints the Court President and two Vice Presidents. Judges serve for ten years, and their term is, by convention, renewable. The pure 'American model', with a President nominating all judges and the Senate confirming all of them, is alien to parliamentary democracy and does not exist anywhere else in the European Union or even in the Council of Europe.⁵³ One of the 1993 Constitution drafters⁵⁴ suggested that the institutional setup of the Court was approved behind closed doors at the very last moments of the constitution drafting to increase the powers of Václav Havel, who was widely expected to be elected the first President of independent Czechia.⁵⁵

Unless the Senate works as a real safeguard, the Czech President as the only nominating organ could *de facto* create his 'own' Court. The President's position is further strengthened by the fact that there is no staggered system of appointing judges, and thus virtually the entire Court is replaced every ten years. As a result of this peculiar institutional design, every Czech President (Václav Havel, Václav Klaus, and Miloš Zeman) appointed almost the entire Court at the beginning of his first five-year term.⁵⁶ Accordingly, the first Court (1993–2002) is often referred to as the 'Havel Court', the second (2003–2012) as the 'Klaus Court' and the third Court (2013–now) as the 'Zeman Court'. Despite these labels, none of the three Czech Presidents fully took advantage of his powers. Each of them relied on his advisors, who have always proposed a relatively balanced and diverse Court, including representatives of different legal professions, careers and political leanings.⁵⁷ Moreover, the Senate has worked as a reliable safeguard so far and rejected the most controversial candidates, sometimes even repeatedly, and thus effectively constrained the Czech President. As a result, the Court has never turned out to be a body consisting purely of the President's ideological allies.

The dynamics of selecting the Court's judges have changed profoundly over time. Anti-communist sentiments characterised the selection of the Havel Court. The appointment of the Havel Court went on relatively smoothly; still, two candidates were rejected due to ties with the communist regime, and one resigned during the appointment process after a critical press campaign pointing out his problematic writings during the communist era.

The formation of the Klaus Court ten years later turned out to be more difficult. The Senate had been established in the meantime and wanted to show that it had to be taken seriously. Moreover, the composition of the Senate was relatively hostile to Klaus during the first two years of his mandate. At the same time, Havel's era was coming to an end, and dissidents had lost their influence in Czech politics. The Senate rejected as many as eight Klaus' candidates.⁵⁸ This prompted severe tensions between the Senate and President Klaus, who became so frustrated that he refused to propose further candidates.⁵⁹ The first standoff occurred at the beginning of Klaus' first term in 2003. The Senate approved the first three candidates proposed by Klaus,⁶⁰ but in July 2003, it showed its teeth for the first time by rejecting Klaus' legal advisor, Aleš Pejchal. In the next confirmation round, the Senate rejected three out of four of Klaus' nominees. After this bitter defeat, Klaus slowed down in making further nominations, which incapacitated the Court deciding on the constitutionality of laws. Klaus became so desperate that he even nominated Pejchal for the second time, with the same negative outcome. The second impasse took place towards the end of Klaus's second term in 2012, as the term of the last Havel Justices was ending. This time, after the Senate rejected two of Klaus's candidates, Klaus proclaimed that he would not nominate anyone else and would leave this duty to the new President. The main victim was again the Court, which was short two Justices for a year.

Zeman's role was arguably easier than Klaus's for several reasons. Zeman became the first directly elected Czech President, which boosted his democratic legitimacy, and faced a friendly Senate, in which his former colleagues from the Social Democratic Party had the majority. Moreover, Zeman could discuss his choices with the Court's President, Pavel Rychetský, who had served in Zeman Government in 1998–2002. Despite these favourable circumstances, the Senate rejected three of Zeman's candidates and restaffing the Court eventually took almost three years.

In sum, while the law governing the selection of Court's judges has remained intact, the dynamics of this process, as well as external circumstances, have changed profoundly. During Havel's presidency, the public and the media largely ignored judicial nominations, but this started to change during Klaus's presidency and eventually resulted in a public spectacle during Zeman's term. Both Havel and Zeman faced a rather cooperative parliamentary chamber, while Klaus initially had to persuade a quite hostile Senate. Each Czech President also picked from a different pool of candidates and relied on different advisors. Havel discussed his choices broadly and listened to dissidents, Klaus relied exclusively on his friends and political advisors, and Zeman, to a large extent, outsourced the shortlisting to his friend, the Court's President, Rychetský. Miloš Zeman, however, either did not intend or failed to exploit the favourable situations fully and, in fact, helped in creating a court that has proven to be anything but his ally.

Even though the Court's composition has always turned out fairly balanced ideologically, its institutional design has some inherent weak spots that could be exploited in the future. The crucial one concerns the process of appointments. The Czech system allows – under a certain constellation – the President and the Senate to seize the whole Court with a carefully selected group of fifteen judges. So far, this scenario has not materialised. This is partly due to the second resilience factor, i.e. the existing political fragmentation in the Senate, whose diverse composition prevents a monochromatic Court, built solely on President's preferences.

For a Czech populist leader bent on getting the Court out of the way, the following scenario would be a dream one. First of all, populists would dominate the Chamber of Deputies and consequently the Government. Second, the President would be their ally. Finally, they would have at least a strong plurality in the Senate. The fulfilment of the first condition would allow the hypothetical leader to enforce her policies, while the President and the Senate would appoint a sympathetic Court. However, such conditions have never occurred, mainly because of two factors. The first one is the intentional constitutional design of the separation of powers; the second one is tied to the fragmented nature of the Czech political party system. The Senate was intentionally designed as a counterweight to the Chamber of Deputies, which is tied to the Government and everyday politics. This was one of the reasons why the Senate, rather than the Chamber, approves judicial candidates. In countries with a unicameral parliament, such as Hungary, the hijacking of a constitutional court is much easier. In unicameral systems, it is not only easier to change the constitution and important statutory law specifying the design of the political process, but usually also the appointments to a constitutional court will be dominated by the current majority.

At the same time, political fragmentation is not only apparent in the Chamber of Deputies – Senate relationship, but also in the composition of the Chamber of Deputies itself. With five to nine political parties sitting in the Chamber of Deputies, Czechia qualifies as an example of extreme pluralism⁶¹ characterised by the notorious instability of the Governments.⁶² For an unstable government in a pluralist system of checks and balances, it is a very complicated task to try and tame a constitutional court. Knowing this allows us to see the *Grand Election Judgements* in a new light. By emphasising the principle of proportional representation and forcing the Parliament to adopt closely proportional electoral systems, the Court contributed to political fragmentation and made it more difficult for future Governments and Parliaments to curb that fragmentation. The fact that the Court's activism manifested itself predominantly in the area of separation of powers, judicial independence, and electoral competition has had long-term consequences for the way the political process operates in Czechia and for the conditions in which the Court works. While substantive human rights activism by a non-resilient constitutional court might be easily countered by strong populist governments, as the Polish and Hungarian cases show, judicial activism that contributes to that court's own actual resilience makes this considerably more difficult.

Other possible weak spots in the Court's institutional design might impair its independence, but they are arguably manageable. The possibility of reappointment potentially undermines the independence of incumbent judges, who may want to increase their chances to be reappointed by strategic manoeuvring towards the end of their term. The problems burst out fully in the following Court's overhaul in 2013–2015 as four incumbent judges from the Klaus Court ran for reappointment to the Zeman Court, and two of them failed. Voting in the Senate followed a clear pattern. Those incumbent judges who voted on key judgments towards the end of their term along the lines with the Senate's majority were eventually rewarded by reappointment. In contrast, those who voted against the Senate's majority were *de facto* punished for their decision-making, and the Senate rejected them. This sends a clear signal to the current judges of the Zeman Court about what they are supposed to do if they want to have their term renewed in the early 2020s. Nevertheless, in our interviews, many current judges openly expressed their dislike for reappointment. If they

stick to their words and voluntarily do not run for a second term, such practice might evolve into a constitutional convention.

Another possible problem is that even without a constitutional supermajority in both parliamentary chambers, the ruling majority in the Chamber of Deputies might change the statutory rules of the Court's procedure to limit its powers.⁶³ But with the *Melčák* judgement in mind, it is very probable that a mere statutory amendment would be annulled by the Court if it felt that such legislation would hinder its role as a guardian of the Constitution.

Finally, any aggressive steps towards the Court by political actors would have to overcome the fact that the Court enjoys a good deal of public trust, and that the voters tend to trust the Court and other expert public bodies more than the Government and the President, to say nothing about the notoriously unpopular Parliament. In July 2020, 57% of respondents trusted, and 31% mistrusted, the Court, which are comparable figures to other expert public bodies, such as the Supreme Audit Office or the Ombudsperson.⁶⁴ This trend has stretched from the 1990s until today. The Court carries a good deal of its legitimacy from its infancy in the 1990s, when the Havel Court built on the dissident ethos. The Court has repeatedly bolstered its legitimacy by its ability to correct the excesses of the lower courts and mainly by standing up to rather unpopular Governments and parliamentary majorities. While doing this, the Court was viewed by the public as an impartial expert institution. The loss of the appearance of impartiality might have a devastating effect on the Court's public support. Not surprisingly, the alleged lack of impartiality was the main rhetorical weapon that Prime Minister Babiš used against the Court after the 2021 *Grand Election Judgement II*. He relied on some political remarks of the Court's President Pavel Rychetský directed against Babiš and President Miloš Zeman.⁶⁵ It is extremely advisable that the Court's representatives stay away from politics in their public appearances because otherwise, they threaten their reputation as impartial experts, which has earned them public trust.

Our semi-structured interviews with Czech constitutional judges further support the argument that the Court judges do not (have to) take into account the possible threat of populist retribution. The interviews provided us with crucial information on the judicial perception of public and political influence on judicial decision-making. We interviewed ten out of fifteen constitutional judges. The remaining three explicitly refused to participate, and two repeatedly reported scheduling conflicts. The interviews were conducted between the years 2017 and 2019, usually lasted one hour and consisted of fifteen open questions, which enabled further probing. The project concerned generally extra-legal influences on judicial decision-making. We promised the interview partners strict confidentiality in order to facilitate their sincerity in answers.

The most fruitful question on the judicial perception of public pressure concerned a separate opinion by a Slovak constitutional judge, Ivetta Macejková, concerning a very closely watched case in which Slovak Prime Minister Mečiar gave amnesty to the kidnappers of the Slovak President's son. Asking about a case from a different jurisdiction should contribute to greater openness in the answers of Czech judges. Judge Macejková, President of the Slovak Constitutional Court at the time, composed a separate opinion in which she contemplated the position of a judge in modern society. A judge does not live in isolation and is well aware of public opinion polls, political and media discussions etc. However, wrote Macejková, judges should not follow public opinion but decide according to law;

this way, judges will be seen as independent, impartial and objective. Only then the public will respect the judgments, even though it may disagree with them.⁶⁶

We asked Czech constitutional judges what they thought about Macejková's position. Two groups of respondents emerged. The first group rejected the idea of any influence of public opinion, while the second acknowledged its existence and reflected on it but also has tried to mitigate it. A good example of the first group's respondents was the statement: 'I would not be interested in [public opinion polls] at all. For example, when we decided on the restitution of churches' properties, 80% of respondents or so were against it. [Public opinion polls] do not play such a role here as it might seem from the outside. Being at the Constitutional Court is like being in an ivory tower'. Another judge pointed to the fact that he sometimes hears criticism of Court's decisions but strictly decides how he thinks the case should be decided. Yet another judge stressed that Constitutional Court judges have to be immune against public opinion. However, he conceded that, unlike its Slovak counterpart, the Czech Constitutional Court has been spared long-term media attacks, has enjoyed a great deal of respect and has never faced public resistance against its decision. Judges rationalised their resistance to public opinion by noting that 'vox populi is not always vox dei', and also pointed out to the majority society's bias against minorities.

The second group acknowledged pressure from the public; however, these judges have tried to actively mitigate its impact. They anticipate potential adverse reactions from the public and adjust their reasoning style or its presentation accordingly. This group of judges 'does not live in a bubble' (as opposed to the first group, which works in an 'ivory tower') and tries to be especially persuasive when they fear a popular backlash. Moreover, in case of very important judgments, these judges felt that it was vital to communicate actively with the public and explain the decision, because in such cases, 'to sell the decision to the public is as important as to issue a good decision'.

Regarding perceptions of political pressures, Czech constitutional judges see the potential risk in the possibility of renewable terms and point to past examples when Senators penalised the judges with whom they disagreed in the case of restitution of churches' properties by not approving them for a second term. On the other hand, Czech judges stated that they greatly appreciated the lack of political attacks on the Court for its judgments in highly political cases. Especially compared to other Visegrád countries, the judges praised politicians for staying away from the Court's powers, composition and budget. Some judges mentioned a certain basic level of political culture that, with certain exceptions, especially from the far-right, prevents politicians from contravening the Court. Judges explained politicians' restraint as a consequence of public support for the Court, which discourages politicians from open attacks. Judges also emphasised that they did not succumb to political pressure and, in return, they had striven to stay away from politics. Therefore, some disliked the lack of political restraint from Court President Rychetský, an ex-Minister of Justice with a long history in Czech politics, who does not hesitate to comment on political issues in his media appearances.

To sum up, Czech constitutional judges enjoy the support of the public, which makes open political attacks against them a risky option. Judges did not perceive any pressure from politicians and have also tried not to provoke any. Some judges, for this reason, criticised Court President Rychetský for unnecessary political comments for the media. As regards pressure from the public, some judges stated they did not consider it at all, while

others tried to work strategically with the reasoning and its media presentation in order to persuade the public about their reasoning.

Conclusion

The Czech case serves as a significant counter-example to the cases of Poland or Hungary. Despite sharing a similar trajectory in the 1990s and the 2000s, all three countries have taken dramatically different turns in the last decade regarding the rule of law and the independence of top courts. The Polish and Hungarian constitutional courts have faced successful attacks by the ruling political powers. Czechia has also experienced populist turn and democratic backsliding; however, the situation differs in relation to its Constitutional Court. The Court does not shy away from activist rulings and has shown determination to challenge ruling majorities with populist leanings, yet, it has not faced any significant repercussions. Hence, the Court continues to perform its function as a check on other branches and contributes to preventing further backsliding of the Polish or Hungarian magnitude.

The case study of the Czech Constitutional Court and its comparison to the Hungarian and Polish cases allows us to formulate a few cautious conclusions. First of all, a sound institutional design, with a variety of actors who are differently constituted, contributes to shielding the Court from populist capture. Even though it contains some flaws, such as possible abuse of the (re)appointment procedure or the possibility of the ruling majority to amend the statutory regulation of the Court, these weak spots are tough to exploit. The Court is able to shield itself from any challenge mounted by amendments to the statutory law, such as limiting access to the Court or introducing an absurd quorum, by annulling such a law. Given the very broad access to the Court, it would hardly be a problem to ‘find’ a suitable petitioner. All the remaining court-curbing strategies would have a hard time overcoming the challenges posed by political fragmentation and the public support that the Court enjoys.

The fragmentation of the Czech political system makes it hard for any ruling Government or President to gain a strong enough position to mount a sustained attack on the Court. Bicameralism and supermajorities needed to change the Constitution prevent an overhaul of Court’s powers via a constitutional revision. The appointment system requires the cooperation of the Czech President and the politically diverse Senate, which largely forestalls the establishment of a politically homogenous Court, fully cooperative with the Government and the lower chamber.

Presidents and Prime Ministers have occasionally verbally challenged the Court. However, these verbal challenges were rarely more than immediate opportunistic reactions to a particular judgement, and fizzled out very quickly. This is not purely accidental. The Czech political landscape’s fairly competitive and fragmented nature makes it very difficult for the ruling powers to concentrate their efforts on the Court or the courts in general. In military terms, such a campaign would require a secure rear. But even Babiš’s ANO 2011 party at its most dominant or President Zeman have always had the parliamentary opposition or the Senate to contend with, not even mentioning the notorious internal fragility of Czech coalition governments. These observations are in line with the existing literature on political fragmentation.⁶⁷

Furthermore, the Czech technocratic populism of Andrej Babiš differs substantially from the ethnopopulism of Viktor Orbán or Jarosław Kaczyński. Hungarian and Polish versions of populism, with their significant nationalist emphasis and portrayal of various external enemies, has a higher mobilisation potential than general boilerplate about corruption and state-management by experts. The Czech Constitutional Court has not been subject to intense and sustained pressure of the Hungarian or Polish sort. This might be a case of self-censorship on the part of the Czech populist leaders, who have a certain respect for expert bodies. An assault on an independent court with a fairly deep reservoir of public support represents a risky endeavour that might alienate parts of their very diverse voter base.

Moreover, the Court is not a mere passive object in the political game but actively engages in supervising political competition. Its judgments have so far contributed to the preservation of a fragmented political system incapable of creating solid majorities and stable governments. The Court has managed to build on its reputation from the 1990s and has maintained an image as an independent expert legal institution. The Court has on several occasions dramatically intervened in the political competition while portraying its far-reaching judgments as a necessary exercise in its role as a guardian of fair political competition. The Court typically does not actively engage in a radical social transformation that would divide public opinion and polarise the Court's audiences. The close examination of the Czech Constitutional Court case offers a list of ingredients that, when appropriately combined, helps in building resistant constitutional courts, and hence also liberal democracy. We admit that it is fairly easy to present the Czech Constitutional Court as a resilient one, since it never came under an attack of the Polish or Hungarian kind. We also concede that we cannot predict with infallibility what would happen if such an attack would materialise in the future. But our argument is that for the reasons that we present in our article, such a scenario is much less likely to play out in Czechia than in Hungary or Poland. Resilience does not need to be understood only as an ability to withstand an actual attack; it can also be rooted in conditions that make an attack unlikely, especially when the Court itself contributes to such conditions.

Distinguishing between judicial activism in the separation of powers and political competition on the one hand and in human-rights-related sensitive issues on the other hand in relation to a court's resilience represents an important finding of this article. It nicely contributes to the recently renewed interest in John Hart Ely's *Democracy and Distrust*.⁶⁸ Although Ely's process-based theory turned out to be more influential in common law jurisdictions,⁶⁹ the Czech case shows that also continental jurisdictions might exercise the bravest judicial activism in the area of fair political competition, and not in rights review. Without even mentioning Ely, of course.

Notes

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15. Wojciech Sadurski, *Poland's Constitutional Breakdown* (Oxford: Oxford University Press 2019); Tomasz Tadeusz Koncewicz, 'The Capture of the Polish Constitutional Tribunal and Beyond: Of Institution(s), Fidelities and the Rule of Law in Flux', *Review of Central and East European Law* 43, no. 2 (2018). For examples of different court-packing tactics, see David Kosař and Katarína Šipulová, 'How to Fight Court-Packing?', *Constitutional Studies* 6, no. 1 (2020): 133–64.
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24. For example, the 2020 Bertelsmann Transformation Index puts Czechia ahead of Poland and Hungary both in the Political Transformation and the Governance index (<https://www.bti-project.org/en/home.html?&d=G&cb=00000>). The same applies for the 2021 Freedom House Index in both the Global Freedom and the Democracy Status (<https://freedomhouse.org/explore-the-map?type=nit&year=2021>).
25. Stanley groups all three countries under the label of 'backsliding democracies', although he admits that Czechia has performed better than Hungary and Poland (Ben Stanley, 'Backsliding Away? The Quality of Democracy in Central and Eastern Europe', *Journal of Contemporary European Research* 15, no. 4 (13 December 2019): 348–50, doi:10.30950/jcer.v15i4.1122).
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29. Czechia further differs from Poland and Hungary in the sequence of the concentration of power. While Babiš accumulated his economic and media power before entering politics, Orbán developed oligarchic networks only after (Hanley and Vachudova, 'Understanding the Illiberal Turn', 283–7).
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35. Nathan J. Brown and Julian G. Waller, 'Constitutional Courts and Political Uncertainty: Constitutional Ruptures and the Rule of Judges', *International Journal of Constitutional Law* 14, no. 4 (1 October 2016): 829–30.
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39. For further details, see David Kosař and Ladislav Vyhnaněk, 'The Constitutional Court of Czechia', in *Constitutional Adjudication: Institutions*, eds. Armin von Bogdandy, Peter Huber and Christoph Grabenwarter (Oxford: Oxford University Press, 2020), 119–79.
40. In this regard, we accept the argument put forward in Kühn, 95–108.
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46. These cases were analyzed in greater detail by David Kosař, *Perils of Judicial Self-Government in Transitional Societies* (New York: Cambridge University Press, 2016), 174–5.
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50. The Court has heard a couple of cases involving LGBTQ rights and has decided in a rather self-restrained and conservative manner. But bearing in mind the *Grand Election Judgement II*, this should not be attributed to any strategic deference to populist governments, but to the honest constitutional and ideological preferences of the current judges.
51. An interference with judicial independence occurred when the Chancellor of President Zeman contacted various judges and informed them about preferred outcomes of pending cases.
52. In other words, the Senate has no say in selecting the President and Vice Presidents of the Court. There is also no constitutional rule requiring e.g. gender, geographical, political or professional diversity and the Czech President thus enjoys unlimited discretion.
53. The same system works in Belarus, considered the last dictatorship in Europe, and hence a Member State of neither the European Union nor the Council of Europe.
54. See Jindřiška Syllová, 'Komora minimálních funkcí, nebo komora „odlišného ohledu“?' in *Dvacet let Senátu Parlamentu České republiky v souvislostech*, ed. Jan Kysela (Praha: Leges, 2016), 60.
55. Václav Havel was the President of Czechoslovakia (1989–1992) and during the drafting of the Czech Constitution, it was clear that he would become the first President of Czechia as well.
56. While Václav Havel and Miloš Zeman appointed all fifteen Justices, Václav Klaus (due to the death of the Chief Justice of the Havel Court in office and early resignations of two more judges, all three of which were replaced by Havel) 'inherited' three Havel appointees and appointed only twelve judges himself.
57. The Court has not been gender-diverse, though. The bench has been always dominated by men who has also held the positions of the Court Presidents.
58. One of them, Aleš Pejchal, was even rejected twice, which has not prevented him from becoming later the Czech judge at the European Court of Human Rights.
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