Jiří
Přibáň

The Defence of Constitutionalism

The Czech Question in Post-national Europe

KAROLINUM PRESS VÁCLAV HAVEL SERIES

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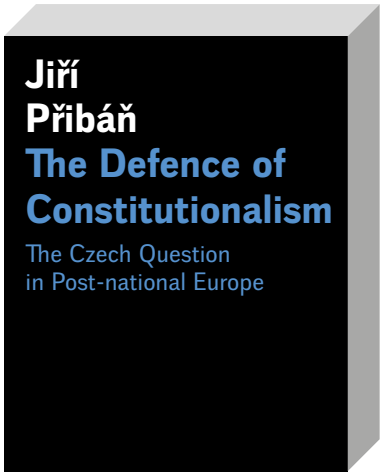

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JIŘÍ PŘIBÁŇ'S SOCRATIC WARNINGS

A book has entered the Czech market that feels like an ominous harbinger of what is to unfold in and beyond the Czech Republic. Politics, which we thought may have been occasionally inefficient, lame and slow… and yet an irreplaceable pluralist vehicle for the free to settle their differences, is losing its prestige, respectability and credibility far and wide – not only in many places in Europe, but also in the United States – before our very eyes. It is as though the West were losing confidence in itself, as though, in all sorts of areas, it were shedding the belief that the only possible answer to humanity's problems lies in jockeying for power and in its constitutionally guaranteed distribution rather than its concentration. It is not only Přibáň's homeland, but also Central Europe and, indeed, many places in America that harbour a fascination, whether overt or cloaked, with the monolith of power in the authoritarian regimes of Russia and China. Politics as procedurally governed appeasement is turning into a pet hate of populist parties and movements. The Constitution as a fortress in which politics can yield generally viable solutions is perceived as a distasteful inconvenience that needs to be circumvented.

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Přibáň completed his law studies in 1989 and stayed on at the faculty in Prague as a teacher, where his brilliance quickly shone through. This bright light, however, soon began to forge links with Cardiff Law School in Wales. I remember many people in his circle bemoaning the fact that they had found their own charismatic thinker at long last, only to see him immediately slip from their grasp. Přibáň continued to whittle away at his duties in Prague in order to take on a fuller engagement in Cardiff. These days, he is but a frequent guest in the Czech capital.

A while ago, opportunity came knocking for Jiří Přibáň in the form of a constitutional judgeship. If he had wanted the job, it was probably his. However, he is determined to think, lecture and write in the midst of lively discourse among the world's doyens of legal philosophy and sociology of law.

Besides, it is a long time since he last thought solely along the lines of a lawyer. To be sure, jurisprudence – especially the constitutional sort, bare of philosophical reflection and the insights imbibed by sociology of law and political science – is a useful and lucrative craft, but society is not to be understood by paragraphs of written law.

Physically, then, Jiří Přibáň is now just a guest in Prague, but, courtesy of all kinds of networks, he has remained with us in his receptive spirit, one of only a handful of our people across the world to do so. And thus, having worked his way over time to the Socratic position of someone obliged to no one, a rival to nobody, no man's vassal, he is free to speak his mind.

His actions would by no means mark him out as an academic alone: with his prolific journalism, he acts like Socrates walking the streets of Athens as he ropes passers-by into discussion over and over again without letting up. He has a tendency to ask the uncomfortable, provoke thought, warn us. In doing so, he unwittingly betrays that globalisation also has a salubrious side: we can now live far from home, yet maintain a strong relationship of personal responsibility towards it.

What is more, Přibáň safeguards his independence from the world of politics by cultivating personal relationships with a number of figures from the modern Czech art scene. Their work plainly spurs him on towards a peculiar understanding of our time that is moulded by more than just words – newspapers, television and the rhetoric of politicians.

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This "triple-lock" independence – physical remoteness, separation from the world of politics, and a keen relationship with the domain

of shapes and colours – is now bearing extra fruit in the form of essays originally gracing the pages of Czech periodicals.

I am bursting to say: brace yourself, reader, for the pure joy of intelligent, clear and provocative reading awaits you! Such a plethora of precise, brutal, witty observations, what a slew of allusions to startling contexts! As many a lesson as is or ever was elsewhere in the world. Yet joy, sadly, is not the word that best describes the reader's feelings.

Reports on the state of Czech and European society are extremely unsettling in Přibáň's interpretation. And by no means just those that concern local politicians, political parties, and the parliamentary life of the country. If the Czech public were healthier, especially "more civil", and were it not so intellectually complacent, some of its elected representatives would not be able to get away with as much as they do. In particular, they could not afford to purge politics, bit by bit, of all content, disputes on priorities, ideas and ideals, or even deny or disown politics per se.

Přibáň's attitude is explicitly "anti-populist" – a populist summarily condemns politicians and politics and agrees with the "people", pure and fair, in everything up front… We find ourselves today in a dangerous situation of "heightened political uncertainty, where everyone shares common concerns but is unable to agree on either specific risks or political threats".

In the absence of politics, i.e. without the Right and the Left, the free competition of political parties, or free will and the ability to distinguish and separate politics from economics, morality, and religion, slowly but surely everything "up there" will henceforth be nothing more than wheeling and dealing between the heads of major economic groupings. This is already the case to some extent, though most are blind to it. In fact, the public has no wish to see any of this! Instead, it rejoices, glad that someone is finally granting it absolution, offering it respite from dirty politics by vindicating its intellectual indolence.

Civil society is starting to be assailed from above (not just in the Czech Republic, where this is exemplified by the president) as parasitic, useless structures sponging effortlessly and mindlessly off the government (some receive subsidies) and above all, it is claimed, scrounging cash "from foreigners" . To wit, from those meddling in the internal affairs of our country. For those that remember, there is incredible resonance here with the language of the regimes collapsing in 1989. This situation is even more advanced in Orbán's Hungary, no doubt directly inspired by Putin's Russia, where NGOs must register themselves or, more accurately, denounce themselves as "agents of a foreign power" in a move tantamount to their muffled extermination.

Přibáň warns: "The civil public has no choice but to bypass the party (and power) apparatus and protest directly in campaigns of civil disobedience or open revolt. This is the only way of reminding parties that their politics also have a non-political plane and importance. Otherwise, the voice of the people soon mutates into the hollow cries of a fanaticised, deaf mass allowing itself to be led anywhere by anyone. And it would appear that there are more than enough candidates to take on the role of such a leader!"

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According to Přibáň, the frontlines in the defence of constitutionalism in his homeland (but also in Orbán's Hungary and Kaczyński's Poland) can be found where the independence of the weakest of the three branches sharing total power in the state is being undermined. As justice (in the loose sense) is the most obscure, it is the judiciary that is the most vulnerable in many countries. For Přibáň, then, the nub is the independence of the courts, prosecutors and the police.

To make sense of this book, it ought to be added that, in Přibáň's opinion, the outposts of this defensive line should now be watching closely the fate of the public prosecutors bill in his

homeland. For several years, it has been hanging like hope, but also perhaps – in another interpretation – as a threat. In my view, the European Union should not leave unchallenged the ominous changes made to the status of the judiciary in the member states of the Visegrad Group (the grouping of countries in the middle of Europe that extricated themselves from the Soviet Bloc and, on Václav Havel's initiative, appointed themselves as custodians maintaining the legacy of the tragic ordeals experienced under two totalitarian regimes). It is a cruel paradox that this legacy is now denied in two of them.

Fresh experience of Trump's America, however, renders the author's concern for the judiciary a universal warning. The courts must be strictly apolitical, but only insofar as they protect the sphere of politics simply as its outer walls. So that the walls are all the stronger for everyone.

Petr Pithart
Dissident, historian, former prime minister
and president of the Senate
(This preface is based on a review of the original Czech edition, published in Lidové noviny on 9 February 2015)

NOTE TO THE READER

There are momentous occasions when we bear witness to the march of history. Sometimes they seem anxious to please – witness the fall of the Berlin Wall, soon followed by the outbreak of the Velvet Revolution in Prague, in 1989. Other times, they trample underfoot everything we dreamt of and thought important. One such occasion occurred in the early hours of Friday 24 June 2016, when the results of the British referendum on whether the United Kingdom should remain in the EU were announced. The dream of a common Europe, politically liberal, built on a market economy and solidarity, and culturally open and tolerant, effectively began to melt away. To all intents and purposes, the immediate response by the European Parliament's president, Martin Schulz, who maintained that Brexit was not a harbinger of European crisis, merely confirmed the growing conviction that Europe today is in the hands of sleepwalkers blind to the gravity and profundity of the current crisis.

Besides the war in Ukraine, heralding the resumption of geopolitical strife between Russia and Europe, the first two decades of the new millennium on our continent have been scarred most of all by the wash-out that was the Union's constitutional project and by the global economic crisis, which hit the whole European economy hard and – with certain countries in the eurozone on the brink of national bankruptcy – cast doubt on the point and functioning of the common currency. Parallel to this, we felt the extraordinary force of not only the economic, political, technological and media interconnectedness, but also the general social connectivity, of a world in which Europe, with its EU and the member states thereof, though still a force to be reckoned with, hardly took centre stage.

Moreover, the present European crisis has turned out to be not just economic and political, but also intellectual. The cynicism of experts seesaws with the hollering of the multitudes, while political feebleness simply exacerbates civil outrage. Brexit was one of the

manifestations of this crisis. It was a protest against the elite by the masses condemned to present-day poverty. Yet, paradoxically, those masses were sold a pup by that part of the elite which campaigned for Britain to leave the EU. Though the spotlight was on immigration, more general differences in values, life chances, expectations and hopes loomed large in the background. Old against young, cosmopolitan metropoles against traditional villages, England and Wales against Scotland, students against factory workers, and on and on. In this peculiar referendum, then, the general antithesis between the accelerating transformation of society and the conservative nature of culture came to the fore.

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Unlike the early modern notion of linear history, which does not march so much as barrel at revolutionary speed towards the universal ideals of humanism, today we know that history likes to pause, retrace its steps, and sometimes vanish in the confusion for a moment, to the extent that some may feel it has ended. In such a globally entwined society and integrated yet disintegrating Europe in the early 21st century, how might we formulate the *Czech question*, which for two centuries has defined our political and social development and has always dwelt on the stature of our country and nation in Europe?

In the wake of 1989, this question took on the form of a seemingly simple paradox in which the process of building a constitutionally sovereign and democratic state was also meant to beat a path to the European Union, in which member states voluntarily limit their sovereignty, allowing some of it to be exercised instead by European institutions. Consequently, the possibility of establishing democratic constitutionalism also translated into the opportunity to become a part of a historically unique transnational union of democratic states cooperating and socially integrated on an unprecedented scale.

However, ever since the germination of Czech statehood, Czech society and its political representatives have been split on Europe and, especially, the European Union. One part viewed "Brussels" as just another in a long line of "invaders", while another hoped that the ever-democratic Union would protect Czech citizens from their own political elite, which was corrupt and knew no bounds. This division is emblematic of the right and left wings of our political scene. Some still haughtily argue that "we are Europe" and that we will not let anyone lecture us on anything, whereas others are always worrying that "Europe is drifting away from us" because we have blotted our copybook of EU diligence.

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The Czech question, then, is still routinely couched as an existential question when we should, at long last, be grasping it – in today's global society – as the pragmatic matter of nurturing constitutionalism and a civilly strong democratic society that extends far beyond any opportunity for national distinctiveness. With this in mind, this book is not limited to the defence of constitutionalism and constitutional democracy *per se*, but is also structured around a defence of the pragmatic concept of democratic politics. Closely linked to this is criticism of political existentialism, which steadfastly converts problems of policy-making and constitutionalism into questions of cultural existence and national destiny. As though the main, if not sole, task of building a constitutional state should be national self-determination and the quest for some sort of authentic being, rather than the creation of a representative government limited by civil rights and liberties.

Politics becomes an existential issue only in exceptional situations exposed to the risk of social catastrophe, as witnessed in Camus's *The Plague*. Political existentialism, however, has very little in common with such philosophical and ethical existentialism. It is a particular type of political thought that regards even everyday decision-making

as a series of exceptional situations always concerning the being and non-being of society. This total view of politics is a dangerous political existentialism.

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Tensions between democracy as a form of life and the political system cannot be converted into issues of cultural identity and existence. On the contrary, since politics – as claimed by Masaryk, his peers, and many others after him – is a job, it must inherently combine both the technical exercise of power and the critical question of its meaning.

It is disturbing that, despite the Čapekesque literary and intellectual tradition in the Czech cultural landscape, the idea still persists that pragmatism is a hollow, if not downright mean and unfair, sort of thinking and acting. As though pragmatic action were just another way of saying "cunning". Yet political pragmatism also corroborates the sociological observation that politics cannot regulate society in its totality because it is only one of many areas of social reality. Thus it is that the fate of society is never fully in the hands of any politician, and democracy must defend itself in particular against those who would pass themselves off as such leaders hand-picked by fate.

To critique political existentialism is to deal not only with, say, the work of the influential German philosopher of politics and law Carl Schmitt and his Czech epigones, but also with the ideas and concepts underlying modern democratic government, as set out in the works of Jean-Jacques Rousseau in particular. Both names therefore crop up in different contexts in the various essays in this book. In Schmitt's philosophy, the contradictions of modern law and politics are concentrated as in perhaps no other 20th-century work, hence it remains a provocative challenge even for all of his critics. Rousseau's life is the subject of *Intellectuals*, an essay in which this man's philosophy and life story are pitted against the moderate scep-

ticism of David Hume, characterised by the power of honest debate and the public world of politics.

It has been my intention to draw on the contrasting lives of these two thinkers to demonstrate the belief that democracy is primarily a convention and the associated ability to permanently self-correct and to address unexpected turmoil and crisis. Its advantage over every other political regime is the flexibility with which it is able to respond to the challenges of contemporary complex society, whose evolution is not etched in stone, as speculative philosophers thought, but is contingent, as shown, for example, by the German sociologist Niklas Luhmann in the social theory of autopoietic systems, in which, among other things, he expounded on the need for "sociological enlightenment".

According to this theory, modern society is functionally differentiated into various systems, so that neither politics nor science, economics, law or religion has the ability to describe and regulate such a society in its totality. These days, sociological knowledge and techniques are critical for legal, political and economic theory. However, any politician, economist or scientist keen to claim that he has a cure for all social ills is a charlatan and a liar. There is no total politics, just as there is no critical theory that can rid us of social malaise and pathologies and restore peace and tranquillity to our hearts and social existence. Even the biggest of crises is ultimately just a specific social operation, not a total meltdown or social apocalypse. Compared with all sorts of projects of morally and politically critical philosophy and cultural theory, Luhmann's theory of autopoietic systems is a much more radical break with anthropocentric humanism that preserves the critical power of thought.

Sociological enlightenment is not a theoretical panacea of modern society, but rather a sceptical reminder that it is impossible to medicate society with theoretical knowledge. In that context, the Czech question can be rephrased as a critical analysis of how law and politics work in our country, and what relationship this country

has shaped with European and global society. This is a pragmatic question on a specific political culture and on "how to do it" that cannot be framed by strong words about "historical destiny", "national spirit" or "historical mission".

Such an approach requires a radical rethink of the concept of *political culture*. Here, this term is taken not to mean the totality of national culture, from which the specific legal and political culture must have emerged, but only particular political practices and methods used, for instance, to define the relationship between the government and opposition, the workings of party politics or election campaigning. In this culture, there is also constant tension between principled disputes and day-to-day political operations, so we can include here the ability, in this particular time and in post-national politics, to promote and defend in our country the principles of civil liberties and rights, limited government, the constitutional state and representative democracy, the validity and cogency of which has been, is and will be – always and everywhere – at stake.

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This is one of the reasons why, for example, the final part of the book includes essays on Václav Havel and my generation of eighty-niners, as well as a personal hymn to Wales, where I have found a second home. Despite their more personal tone, even in these texts I have concentrated on the general issues and problems of constitutional democracy mentioned above.

Although the book is divided into several logically and substantively uniform parts, certain major topics, such as the role of the nation state in a global society, the purpose of democracy and elections, the importance of constitutionally limited government and fundamental rights, the relationship between Czech politics and the European Union, and the general crisis of society and thinking, permeate all the texts. Likewise, certain names and opinions surface repeatedly.