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THE CZECH CONSTITUTIONAL COURT: THE INCONSPICUOUS CONSTRAINER

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Abstract
Compared to its Central European counterparts, the Czech Constitutional Court (CCC) represents an interesting example of a court spared from the executive capture by a (populist) government. This chapter argues that part of this resilience comes down to selective, self-constrained behaviour of the Constitutional Court. While being a crucial actor of the democratic transition in the early 1990s, the CCC typically left a wide margin for compliance to the political sovereign. Drawing on the JUDICON-EU data, the chapter explains how the combination of procedural constraints (high voting quorum and supermajority in constitutional review) made frequent heavily constraining rulings in politically and socially salient topics unlikely. Instead, activist judges started relying on a less direct method of constitutional requirement (binding constitutionally conform interpretation of reviewed legislation) both in constitutional review and individual petition cases. In hindsight, this technique might have helped to shield the CCC from strong political backlash.

Keywords
Czech Constitutional Court, judicial constraints, constitutional review, judicial network

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THE CZECH CONSTITUTIONAL COURT: THE INCONSPICUOUS CONSTRAINER[1]

Katarína Šipulová and Alžbeta Králová

1. Introduction

The judicialisation of mega-politics,[2] i.e. the engagement and active shaping of crucial and politically salient issues by the decision-making activity of constitutional and apex courts, has been drawing the attention of both lawyers and political scientists for several decades.[3] Despite the increased interest in the topic since the early 2000s, the concept of judicial activism remains very much contested.[4] Scholars typically disagree on what behaviour amounts to activism, using the term to describe a) any judicial (constitutional) review leading to the court quashing a piece of legislation,[5] b) courts actively engaging in borderline cases, c) courts stretching the interpretation of their competence or the Constitution in order to disallow legislation,[6] and d) courts actively creating new rules and appropriating the role of an active legislator.[7] The label "activist courts" has been typically associated with the U.S. Supreme Court, the South African Constitutional Court, the German *Bundesverfassungsgericht*, the Polish Constitutional Tribunal, (particularly during Kaczynski's government in 2007), or the Hungarian Constitutional Court in the 1990s.[8]

However, as Pócza et al. have argued,[9] constitutional courts differ quite profoundly both in their competences and in their willingness to become involved in mega-politics or politics with significant budgetary impacts. While in some countries' constitutional courts exhibit a significant level of self-restraint,[10] in others, they do not shy away from constraining other

[1] The authors are grateful to Jaroslav Benák, Hubert Smekal and Ondřej Kadlec for insightful comments and consultations provided during the work on this chapter.

[2] Ran Hirschl. 'The judicialization of mega-politics and the rise of political courts.' 11 ANNUAL REVIEW OF POLITICAL SCIENCE 93 (2008).

[3] *Ibid.*;Tom Ginsburg and Tamir Moustafa eds. RULE BY LAW: THE POLITICS OF COURTS IN AUTHORITARIAN REGIMES (2008); Wojciech Sadurski. A STUDY OF CONSTITUTIONAL COURTS IN POSTCOMMUNIST STATES OF CENTRAL AND EASTERN EUROPE (2014); Doreen Lustig and J. H.H. Weiler. 'Judicial review in the contemporary world – Retrospective and prospective'. 16 INTERNATIONAL JOURNAL OF CONSTITUTIONAL LAW 315 (2018).

[4] Keenan D. Kmiec. 'The Origin and Current Meanings of 'Judicial Activism'. 92 CALIFORNIA LAW REVIEW 1441 (2004).

[5] Lino A. Graglia. 'It's Not Constitutionalism, It's Judicial Activism'. 19 HARVARD JOURNAL OF LAW & PUBLIC POLICY 293 (1996); Ran Hirschl, *supra* n. 2.

[6] Stefanie A. Lindquist and Frank B. Cross. 'The Scientific Study of Judicial Activism'. 91 MINNESOTA LAW REVIEW 1752 (2007).

[7] Kmiec, *supra* n. 4.

[8] Kim Lane Scheppele. 'Constitutional Negotiations: Political Contexts of Judicial Activism in Post-Soviet Europe'. 18 INTERNATIONAL SOCIOLOGY 219 (2003).; Tom Ginsburg. JUDICIAL REVIEW IN NEW DEMOCRACIES: CONSTITUTIONAL COURTS IN ASIAN CONSTITUTIONALISM (2003); Lucky Mathebe. 'The Constitutional Court of South Africa: Thoughts on its 25-Year-Long Legacy of Judicial Activism'. 56 JOURNAL OF ASIAN AND AFRICAN STUDIES (2021); Sadurski, *supra* n. 3.

[9] Kálmán Pócza ed. CONSTITUTIONAL POLITICS AND THE JUDICIARY: DECISION-MAKING IN CENTRAL AND EASTERN EUROPE (2019).

[10] Jeff King. JUDGING SOCIAL RIGHTS (2012); Kári Hólmar Ragnarsson. 'The counter-majoritarian difficulty in a neoliberal world: Socio-economic rights and deference in post-2008 austerity cases'. 6 GLOBAL CONSTITUTIONALISM 605 (2019).

political branches of power.[11] The conceptual disagreement is reflected in the simplified binary logic which political science scholarship traditionally applies when exploring the relationship between constitutional courts and parliaments. Given the lack of agreement on the meaning of the term "judicial activism", political scientists traditionally equate any invalidation of contested legislation with an act of judicial activism. Such simplified logic is very much contested by legal scholars – and rightly so.

This chapter builds on the scholarship on judicial activism, while extending the conceptualisation of the relationship between constitutional courts and parliaments beyond the binary logic mentioned above. Using the dataset and methodology developed under the JUDICON-EU project, it will offer a more nuanced view of the interaction between these two actors. It argues that the overall picture is much more vibrant: sometimes constitutional courts invalidate legislation, yet leave the parliaments broad room for manoeuvre as to how to proceed with new regulation. In other cases, decisions confirming the constitutionality of a legal rule can in fact significantly constrain the legislator by imposing an interpretation which far exceeds the original intent.

Constitutional courts in Central and Eastern European (CEE) occupy a particularly important place among the CEE political actors. They have shaped regimes changes, overseen processes of democratization and installed new paradigms of individual human rights protection. Nevertheless, some of them proved inefficient as bulwarks against illiberal regime changes since the 2010s.[12] In this respect, the Czech Constitutional Court (CCC) is notable as one of the very few fully independent constitutional courts in the region, despite several historical attempts to hijack it.[13] This has led some scholars to portray the CCC as an institution that has successfully withstood populist illiberal pressure.[14] However, the government of Andrej Babiš (2017–2021), a wealthy businessman and the leader of catch-all centrist party ANO,[15] represented a different type of populism, leaning closely towards a traditional catch-all party using populist narratives for electoral gains. In terms of ideology, Babiš's government leant to the centre, with a rather technocratic style of governance. Neither Babiš himself, nor his party, substantially challenged the legitimacy of core constitutional or international organisations. On the contrary, he remained rhetorically committed to Western Europe and the EU.[16]

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[11] Nathan J. Brown and Julian G. Waller. 'Constitutional Courts and Political Uncertainty: Constitutional Ruptures and the Rule of Judges'. 14 INTERNATIONAL JOURNAL OF CONSTITUTIONAL LAW 817 (2016).

[12] Armin Von Bogdandy and Pál Sonnevend eds. CONSTITUTIONAL CRISIS IN THE EUROPEAN CONSTITUTIONAL AREA: THEORY, LAW AND POLITICS IN HUNGARY AND ROMANIA. (2015); David Kosař and Katarína Šipulová. 'The Strasbourg Court Meets Abusive Constitutionalism: Baka v. Hungary and the Rule of Law'. 2 HAGUE JOURNAL ON THE RULE OF LAW 83 (2018).

[13] David Kosař and Ladislav Vyhnánek. 'The Constitutional Court of Czechia'. In THE MAX PLANCK HANDBOOKS IN EUROPEAN PUBLIC LAW VOLUME III: CONSTITUTIONAL ADJUDICATION: INSTITUTIONS 119 (Armin Von Bogdandy, Peter Huber and Christoph Grabenwarter eds., 2020).

[14] Hubert Smekal, Jaroslav Benák and Ladislav Vyhnánek 'Through selective activism towards greater resilience: the Czech Constitutional Court's interventions into high politics in the age of populism'. 26 THE INTERNATIONAL JOURNAL OF HUMAN RIGHTS 1230 (2022).

[15] Lukáš Hájek. 'Left, Right, Left, Right… Centre: Ideological Position of Andrej Babiš's ANO'. 26 POLITOLOGICKÝ ČASOPIS – CZECH JOURNAL OF POLITICAL SCIENCE 275 (2017).

[16] The only exception being Babiš's book "What I dream of when I happen to sleep" (in Czech original "O čem sním, když náhodou spím" (2017), where Babiš pondered on a potential abolition of the upper chamber of the parliament. This has never been translated into his practical policies or political aims, however, and, apart from a couple of speeches questioning the independence of the judiciary, mostly in relation to his own criminal prosecution related to misuse of EU funds, he did not attempt serious interference in the legitimacy of the

On the other hand, the CCC has faced periods of increased political pressure, often in retaliation for its decision-making. In 2006, President Klaus criticised the Court for undue activism.[17] In 2011, Prime Minister Nečas also criticized the negative effects of judicial activism after the CCC issued a judgment on the *Building Savings* case,[18] where it found the use of a state of legislative emergency, to push through a new regulation decreasing the state subsidy and increasing its taxation, to be unconstitutional (Pl. ÚS 53/10). In 2021, the CCC faced its most serious criticism thus far, after it annulled the electoral law a mere eight months before the parliamentary elections. Since the petition originally reached the CCC in 2017, the judgment, which put additional pressure on the lower chamber of the Parliament, triggered questions over whether its timing was not strategic or politicised (Pl. ÚS 44/17).

Drawing on the categorisation of different types of contestation faced by courts developed by Madsen et al.,[19] the review of electoral laws has proved to be one of the rare areas where political actors not only normatively pushed back against the CCC, but also questioned its legitimacy. However, historically the greatest source of pressure exerted on the CCC came from presidents of the republic, who occasionally attempted to disempower the Court through the appointment process. None of these attempts, however, generated long-term pressure that would significantly endanger the court.

In the last decade, law and political science scholarship have extensively explored various legal,[20] and extra-legal factors[21] affecting the results of the CCC decision-making. Less attention has been paid to the relationship between the CCC and the Czech parliament,[22] particularly regarding the extent to which the CCC constraints the Czech legislator and how this practice reflects its overall position on the political map. This chapter thus aims to contribute to the global debate on constitutional courts and judicial activism and show that even self-restrained constitutional courts can indirectly limit the discretion of parliament. In contrast to annulments, which may have significant consequences for democratic legitimacy, constitutional courts can tie the hands of elected political actors without risking such ramifications by offering a specific interpretation of the law under review. In other words, they can reinvent the applicability of the legislation in question in a way that actually changes the effect of the adopted legislation beyond the legislator's original intent.

The chapter proceeds as follows. Section 2 offers a bird's eye view of the competences of the CCC and its overall position in the political arena. Section 3 summarises the methodology used

political system and its institutional actors. It is worth noting that Babiš's rhetoric in 2023 presidential elections changed and shifted closer to the traditional rhetoric of illiberal populism.

[17] Václav Klaus and Marek Loužek eds. SOUDCOKRACIE V ČR: FIKCE, NEBO REALITA?: SBORNÍK TEXTŮ (2006).

[18] Smekal et al., *supra* n. 14.

[19] Mikael Rask Madsen, Pola Cebulak and Micha Wiebusch. 'Backlash against international courts: Explaining the forms and patterns of resistance to international courts'. 14 INTERNATIONAL JOURNAL OF LAW IN CONTEXT 197 (2018).

[20] Jan Petrov. 'Legislativní reakce ČR na judikaturu ESLP'. In BEYOND COMPLIANCE – IMPLEMENTACE ROZHODNUTÍ MEZINÁRODNÍCH LIDSKOPRÁVNÍCH TĚLES NA NÁRODNÍ ÚROVNI 137 (Hubert Smekal and Ladislav Vyhnánek eds., 2018); David Kosař et al. DOMESTIC JUDICIAL TREATMENT OF EUROPEAN COURT OF HUMAN RIGHTS CASE LAW: BEYOND COMPLIANCE (2020).

[21] Jan Chmel. CO OVLIVŇUJE ÚSTAVNÍ SOUD A JEHO SOUDCE? (2021); Jan Wintr. TŘETÍ ÚSTAVNÍ SOUD (2022). Smekal et al., *supra* n. 14.

[22] *Cf.* Lubomír Kopeček and Jan Petrov. 'From Parliament to Courtroom: Judicial Review of Legislation as a Political Tool in the Czech Republic'. 30 EAST EUROPEAN POLITICS AND SOCIETIES AND CULTURES 120 (2016).

to evaluate the CCC's relationship with the legislator and discusses the most important characteristics of the CCC. Section 4 begins the analysis with a quantitative overview of the core trends in the 1993–2020 era. Section 5 explores these trends with a qualitative discussion of the most important cases. Section 6 shifts the attention from the CCC as a unitary actor to the voting behaviour of individual judges. It explains how a combination of procedural constraints (a high voting quorum and the requirement of supermajority in constitutional review) have made frequent strongly constraining rulings on politically and socially salient topics unlikely. Instead, activist judges started relying on a less direct method of constitutional requirement (binding interpretation of reviewed legislation) both in constitutional review and in individual petition cases. In hindsight, this technique might have helped to shield the CCC from a strong political backlash. Section 7 concludes.

2. The position of the Czech Constitutional Court within the constitutional setting

The CCC operates in a political system typically described as a parliamentary democracy[23] with some elements of semi-presidentialism, a situation introduced after the direct election of the President of the Republic in 2012. Its core political institution is the bicameral parliament consisting of the Chamber of Deputies (lower chamber, 200 members) and the Senate (upper chamber, 81 senators, formally established only in 1996). The Senate plays an important role in the selection of constitutional judges.

The Czech political system has been marked by chronic inefficiency and the instability of its cabinets, caused by unclear and inconsistent parliamentary majorities and shaky coalitions.[24] Since 1993, there have been 16 cabinets have lasted on average less than two years. While the Czech Republic has not remained completely immune to the illiberal populist tendencies that have emerged in the CEE region, its character differed from conservative national populism of Hungary and Poland, leaning more closely toward centrist and technocratic populism.[25] The 2021 elections ended the government of the populist party ANO. The Czech Republic hence remains the only country in the region which did not experience a significant erosion of the institutional system or grave democratic excesses.[26]

The Constitutional Court, with its concentrated model of constitutional review, is definitely one of the most influential political actors in the Czech Republic, having shaped the democratic transition,[27] ensured individual human rights and compliance with international human rights norms[28] and secured the legitimacy of the Czech judiciary, which underwent only very limited

[23] Lubomír Kopeček and Max Strmiska. POLITICKÉ STRANY A STRANICKÉ SYSTÉMY VE SROVNÁVACÍ PERSPEKTIVĚ (2005).

[24] Miloš Brunclík and Michal Kubát. 'Český demokratický režim po roce 2012: přechod k poloprezidencialismu?' 52 SOCIOLOGICKÝ ČASOPIS/CZECH SOCIOLOGICAL REVIEW 625 (2016); Miloš Brunclík and Michal Kubát. 'The Czech Parliamentary Regime After 1989: Origins, Developments and Challenges'. 8 ACTA POLITOLOGICA 5 (2016).

[25] Vlastimil Havlík. 'Technocratic Populism and Political Illiberalism in Central Europe'. 66 PROBLEMS OF POST-COMMUNISM (2019).

[26] Smekal et al. *supra* n. 14.

[27] Katarína Šipulová and Hubert Smekal. 'Between Human Rights and Transitional Justice: The Dilemma of Constitutional Courts in Post-Communist Central Europe'. 73 EUROPE-ASIA STUDIES 101 (2021); Zdeněk Kühn. 'The Czech Constitutional Court in Times of Populism from Judicial Activism to Judicial Self-Restraint'. In POPULIST CHALLENGES TO CONSTITUTIONAL INTERPRETATION IN EUROPE AND BEYOND 95 (Fruzsina Gárdos-Orosz and Zoltán Szente eds., 2021); Zdeněk Kühn. 'The Judiciary in Illiberal States'. 22 GERMAN LAW JOURNAL 1231 (2021).

[28] Kosař et al., *supra* n. 20.

purging after 1989[29]. The CCC has traditionally been among the public institutions enjoying the highest levels of public trust.[30]

The high legitimacy of the CCC builds on its stability (juxtaposed with the Chamber of Deputies), as well as the strong legacy of the Czech and Slovak Federal Constitutional Court (CSFCC), one of the symbols of the 1989 transition and the break from the Communist regime.[31] The CSFCC defined the normative character and values underlying the new democracy, engaging with its identity and nationhood and shaping key elements of transitional justice policies, while often significantly departing from the original intent of the young federal parliament.[32] It laid down some of the fundamental principles that were further developed by its successor, including the doctrine of the substantive core of the constitution.[33]

The CCC, established in 1993, has taken up this legacy, retaining the institutional structure and some of the (Czech) federal judges. Its scope of jurisdiction is quite broad, including both abstract and concrete constitutional review, review of individual complaints, review of complaints on the results and process of presidential and parliamentary elections and competence disputes between other constitutional bodies, as well as deciding on the compatibility of international treaties with the Czech Constitution.[34] In practice, 98 percent of its caseload consists of review of individual complaints.[35]

The Court is composed of 15 judges selected and appointed by the President of the Republic upon the approval of the Senate.[36] The length of their term of office is ten years and their mandate can be renewed once. The renewal of mandates has been criticised by some Czech academics,[37] as leading to an increased politicisation of judges shortly before the end of their first term.[38] Even more controversially, the system of selection is not staggered (meaning that the whole bench is changed within a short timeframe) and overlaps with presidential elections. As all Czech presidents so far have served two consecutive five-year terms, this creates quite a conundrum. Each president of the republic has thus so far been able to

[29] David Kosař and Katarína Šipulová. 'Comparative Court-Packing'. 21 INTERNATIONAL JOURNAL OF CONSTITUTIONAL LAW (2023); Eliška Wagnerová. 'Position of Czech Judges in the Czech Republic'. In SYSTEMS OF JUSTICE IN TRANSITION: CENTRAL EUROPEAN EXPERIENCE SINCE 1989 163 (Jiří Přibáň, Pauline Roberts and James Young eds., 2003).
[30] 'Důvěra v instituce v červnu 2022.' STEM, 11 July 2022), https://www.stem.cz/category/instituce/.
[31] Lubomír Kopeček. 'Czech political institutions and the problems of parliamentary democracy'. In CZECH POLITICS: FROM WEST TO EAST AND BACK AGAIN 115 (Stanislav Balík et al., 2017).
[32] Šipulová and Smekal, *supra* n. 27.
[33] David Kosař and Ladislav Vyhnánek. THE CONSTITUTION OF CZECHIA: A CONTEXTUAL ANALYSIS (2021).
[34] Art. 87 of the Constitutional Act No. 1/1993 Coll.
[35] Kosař and Vyhnánek, *supra* n. 13.
[36] Although the Constitution presumes unconditional approval of the Senate (Art. 84/2), the Act on the Czech Constitutional Court No. 182/1993 Coll. stipulates that if the Senate does not approve the nominee within the 60 days from nomination due to its inactivity, there is a presumption of its approval and the nominee becomes a judge.
[37] 'Rozmanitost, přesah, víc žen. Nevybírat ústavní soudce jako králíky z klobouku.' RESPEKT (Feb 20, 2022), RESPEKT. 20 February 2022. https://www.respekt.cz/newsletter/rozmanitost-presah-vic-zen-nevybirat-ustavni-soudce-jako-kraliky-z-klobouku.
[38] Zdeněk Kühn and Jan Kysela. 'Kreace ústavních soudů ze srovnávací perspektivy'. 11 ČASOPIS PRO PRÁVNÍ VĚDU A PRAXU 1 (2003).; Kosař and Vyhnánek. 'Senát a výběr soudců Ústavního soudu'. In DVACET LET SENÁTU PARLAMENTU ČESKÉ REPUBLIKY V SOUVISLOSTECH 2 (Jan Kysela ed., 2016).

determine "his own" composition of the CCC[39] in his first years in office. This is very much visible at the time of writing (2023) when the new President, Petr Pavel, elected in February 2023, will have the chance to appoint 13 of out 15 constitutional judges within the first two years of his term. The President also gains informal leverage since (s)he also unilaterally selects the President of the CCC from among the sitting judges.

Accordingly, the individual generations of the CCC's bench are sometimes familiarly labelled after the respective presidents who appointed them: the first being Havel's Court (1993–2002), the second, Klaus's Court (2003–2012), and the third, Zeman's Court (2013–2022). Nevertheless, thanks to a combination of the Senate's gatekeeping role, and initial underestimation of CCC's impact, none of the Presidents have so far succeeded in fully utilising this power and instead, they created a relatively balanced Court.[40] However, as we demonstrate later on, the CCC also experienced isolated incidents when both President Klaus and President Zeman attempted to paralyse it by refusing to propose new candidates after the Senate rejected several of their nominees in a row. [41]

The CCC decides in chambers of three judges or in a plenary session of all judges. Constitutional review cases are always decided in plenary sessions. The key factor that shapes its dynamics is the combination of a voting quorum (ten judges)[42] and a supermajority (i.e. nine out of 15 votes) requirement in certain types of proceedings – including the constitutional review of legislation.[43] The wording of the relevant provision does not provide a clear answer to the question of whether the requirement for a qualified majority applies both to rulings granting a petition or rejecting one. The CCC resolved this issue in Pl. ÚS 36/93 by leaning towards the need for a qualified majority only for cases of substantive unconstitutionality, while requiring a simple majority for rejections. Although this conclusion provoked a vivid debate among judges[44] it was eventually accepted as a pragmatic safeguard against a deadlock in decision-making.

3. Methodological particularities of the Czech case

Drawing on the methodology adopted by the JUDICON-EU project, this section offers a quick overview of the core research design and discusses the elements unique to the CCC.

The quantitative research on the relationship between the CCC and the Czech parliament covers the period from 1993 to 2020, analysing altogether 361 decisions containing a total of 437 individual rulings.

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[39] David Kosař and Katarína Šipulová. 'How to Fight Court-Packing'. 6 CONSTITUTIONAL STUDIES 133 (2020). Kosař and Šipulová. s*upra* n. 29. Kosař and Vyhnánek. *Supra* n. 33.

[40] Kosař and Vyhnánek. *Supra* n. 33.

[41] Vojtěch Šimíček. 'Výběr kandidátů na soudce Ústavního soudu a jejich schvalování Senátem'. In DVACET LET SENÁTU PARLAMENTU ČESKÉ REPUBLIKY V SOUVISLOSTECH 225 (Jan Kysela ed., 2016). It is worth mentioning that the Senate did not approve only two of Havel´s nominations, although the number of rejected nominees was significantly higher for president Klaus (with eight nominees rejected, one of them rejected even twice) and for Zeman (with five rejections, one of them unsuccessfully nominated by Klaus).

[42] The CCC refuses, however, to hold plenary sessions if there are less than 12 judges on the bench. See more in Section 6.

[43] Section 13 of the Constitutional Act No. 182/1993 Coll., on the Constitutional Court.

[44] Kosař and Vyhnánek, *Supra* n. 33.

Except for the constitutional interpretation *in abstracto*, the CCC is endowed with quite a wide range of competences[45] and it significantly increased its influence on the political scene in the Czech Republic by appropriating the competence to review constitutional acts (see Section 5 for more details on case *Melčák*). The majority of cases in our dataset arose from abstract constitutional review that can be initiated only by a privileged group of actors: the President of the Republic, a group of MPs or senators, or the government. In the relevant period, the majority of decisions originated from petitions initiated by the members of the Parliament.[46] This is an interesting observation, suggesting that the Parliament is a Janus-faced arena of constitutional review: on the one hand, it is mostly the lower chamber which bears the impact of constitutional review. On the other hand, the majority of proceedings have been initiated by members of the Senate, allowing for a fragile dynamic between the parliament and the CCC. Although JUDICON-EU focuses mostly on constitutional review cases, Czech scholars typically argue that the majority of CCC's judicial activism stems from individual petitions, in the area of human and fundamental rights protection.

Before beginning the overview of the general patterns of the case law and its relationship with the parliament, we need to note four caveats which slightly adjust the project's methodology. First, the *ex tunc* temporal effect of prescriptions is a concept highly contested among Czech scholars and generally perceived as contravening the principle of non-retroactivity.[47] The CCC does not use *ex tunc* prescriptions. A vast majority of rulings have *ex nunc* effect and become binding immediately after their publication in the Collection. From time to time, the CCC authorises *pro futuro* effect of its decisions,[48] although such rulings are limited to occasions when the immediate application would further increase the existing violation of constitutional principles. It is worth noting that, informally, we can sometimes find binding *pro futuro* prescriptions outside of the operative part of the ruling, i.e. in the reasoning of the decision. A typical example would be a prescription as to how the parliament should legislate or what should be done if it remains inactive.[49] These situations are very rare, however.

Second, the above-mentioned unique feature of the CCC's reasonings relates to the formal structure of its decisions. The rulings in the CCC's decisions are very formalised. They usually follow the wording of the petition and merely state whether the contested legislation violates the relevant constitutional provisions. The effect as well as the binding prescription of the Court might therefore appear in the reasoning and not in the operative part.[50] As we later demonstrate in section 5, this is particularly the case for decisions which declare a constitutional requirement or which reject the petitions.

Third, the scope of ruling types issued by the CCC is narrower than the general categorisation developed by the JUDICON-EU project (see Chapter 1 in the volume). The CCC might be

[45] Katarína Šipulová. 'The Czech Constitutional Court: Far away from political influence'. In CONSTITUTIONAL POLITICS AND THE JUDICIARY DECISION-MAKING IN CENTRAL AND EASTERN EUROPE 32 (Kálmán Pócza ed., 2019).
[46] Kosař and Vyhnánek, *supra* n. 13.
[47] Jan Filip et al. ZÁKON O ÚSTAVNÍM SOUDU. KOMENTÁŘ (2007).
[48] E.g. Pl. ÚS 28/13. The CCC can postpone the effect in a situation where the *ex nunc,* immediate effect of annulment of the norm would lead to even graver interference and violation of constitutional rules.
[49] Zdeněk Kühn. THE JUDICIARY IN CENTRAL AND EASTERN EUROPE: MECHANICAL JURISPRUDENCE IN TRANSFORMATION? (2011). E. g. Pl. ÚS 8/02; Pl. ÚS 16/09 and Pl. ÚS 24/11.
[50] Kühn, *supra* n. 49.

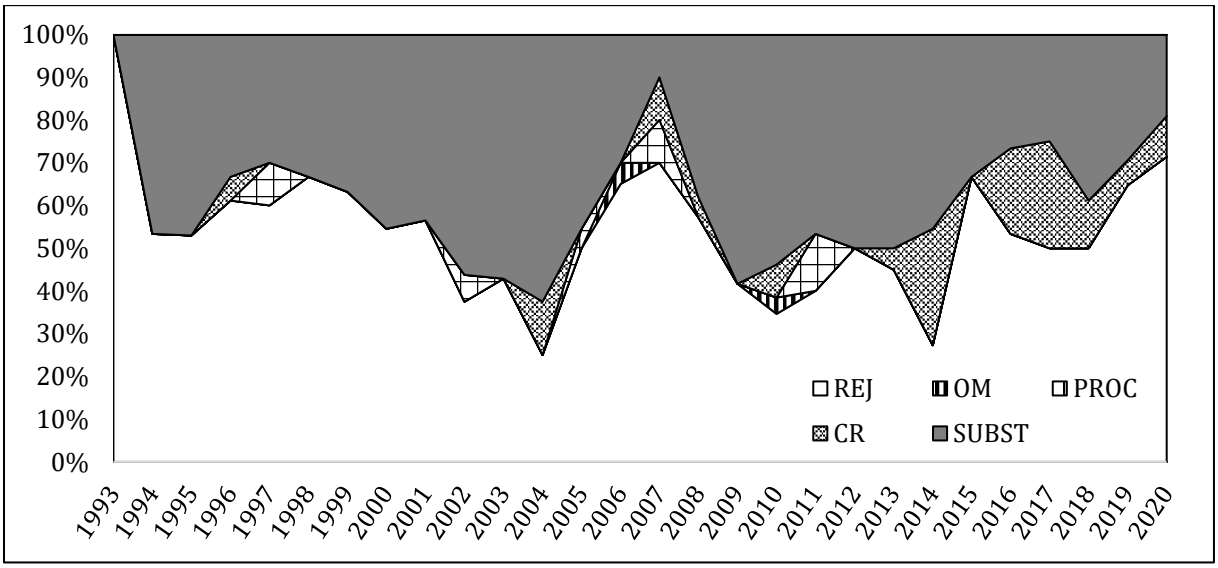
considered weak compared to some of its European counterparts since it does not use some of the more stringent instruments described in the JUDICON methodology. Apart from the constitutional interpretation *in abstracto,* the CCC is quite hesitant to push against the parliament with "unconstitutionality by legislative omission". Historically, the Czech doctrine has perceived this category as contradictory to the principle of the separation of powers: the Constitution does not allow an unelected body to issue a prescription to the directly elected parliament to act or to pass a particular norm.[51] The CCC has mostly respected this principle and abandoned this position only twice, both times in cases related to the economic and democratic transition.[52] It is worth noting that while the CCC interfered with the legislator's unique competence, it nevertheless limited itself by declaring inaction unconstitutional, but did not prescribe any particular remedy to the legislator.

Fourth, as we already mentioned, the legislator constrained the CCC by setting a higher quorum and requiring a supermajority for voting in constitutional review proceedings. According to the CCC's own interpretation, the nine vote supermajority is required only in cases where the CCC finds substantive unconstitutionality. In contrast, cases leading to a rejection of petitions or to a constitutional requirements will still be decided by a simple majority of the judges present at the sitting. The CCC justified this reduction of consensual deliberation as a pragmatic step, which still respects constrains imposed by the legislator, while it also avoids the risk of decision-making deadlock.[53] Nevertheless, as a consequence, it is significantly more difficult to achieve a vote of substantive unconstitutionality than to reject a case or to decide by constitutional requirement. We expect to see this inequality of voting pattern reflected in the lower strength of rulings.

All in all, these four caveats suggest that the Court would typically act as more of a self-constrained actor, mostly respecting the parliament's legislative authority. This is well demonstrated also by the variability of different rulings used by the CCC, that has evolved only marginally over time (Figure 1).

[51] Jan Malíř. ODPOVĚDNOST ČLENSKÝCH STÁTŮ ZA ŠKODU V PRÁVU EVROPSKÉ UNIE: STUDIE ZE SOUDCOVSKÉ TVORBY PRÁVA (2008).
[52] See Pl. ÚS 20/05 on the non-activity of the parliament in the question of regulated rents in apartments and Pl. ÚS 9/07, on the non-activity of parliament concerning legislation on the church restitution – the return of church property that was nationalized by the Communist Party.
[53] Eliška Wagnerová et al. ZÁKON O ÚSTAVNÍM SOUDU S KOMENTÁŘEM (2007).

Figure 1: Stratification of rulings with different constraining effects towards the parliament



Note: REJ – rejection, OM – legislative omission, PROC – procedural requirement, CR – constitutional requirement, SUBST – substantive unconstitutionality.
Source: JUDICON-EU.

Shortly after its establishment, the CCC operated in a binary fashion of either rejecting the petition or finding a substantive unconstitutionality (1993–1995). Proportionally, these two types of rulings have dominated the case law in all three decades. Since 2006, the variability has somewhat increased, although the use of other types has still been limited, as the number of different ruling types has remained quite low.

Since 2012 we can observe two interesting trends: (1) procedural unconstitutionality has disappeared completely; (2) the use of constitutional requirement has increased. The disappearance of procedural unconstitutionality might be explained by the increasing auto-limitation of the parliament,[54] which started incorporating a pre-emptive review of constitutional and international law compliance as an integral part of the legislative process. Although there have only been five cases of procedural unconstitutionally, their effect on the legislative practice of the parliament was immense. These cases reshaped the role of the actors in the legislative process,[55] and established strict lines for the parliament to follow. In particular, the CCC rejected various forms of abuse and shortening of legislative debate on the pretext of legislative emergency (fast-track legislative procedure in case when fundamental rights are at risk, Pl. ÚS 53/10), or the random addition of partial amendments of provisions of acts unrelated to the given legislative proceedings at the very end of the last reading (Pl. ÚS 77/06, so called "legislative riders").

The second visible trend is the increasing use of the constitutional requirement, starting from the era of the second Court, before becoming a fully established practice in the third CCC. The starting point correlates with the accession of the Czech Republic to the EU, an era when, due

[54] Petrov, *supra* n. 20.

[55] For example, case Pl. ÚS 33/97, related to the calculation of time-limits for the application of the presidential veto.

to various training programmes, general knowledge of and interest in international law increased among both judges and lawyers in general.[56] The increasing imposition of constitutional requirement to the detriment of finding substantive unconstitutionality might therefore be seen as a result of better pre-emptive control of constitutionality in the legislative process on the one hand, and more leverage in creative interpretation and inspiration from the European Court of Human Rights' case law on the other hand. It was during this period that the CCC accepted the European Convention of Human Rights as a part of the framework for constitutionality review. The significant increase in its use in the CCC's case law[57] may have allowed the Court more scope for creative interpretation and given it more leverage. However, the increasing use of constitutional requirement rulings might also suggest an internal split among the judges of the CCC. While judges typically characterise constitutional requirement as being in line with the principle of minimalist intervention, we argue that it might pose as a hidden finding of unconstitutionality with even stronger repercussions on the legislator – masking the lacking momentum of the Court, or actively shielding it from political backlash (Section 6).

4. General observations: selective constraints on the Czech Parliament

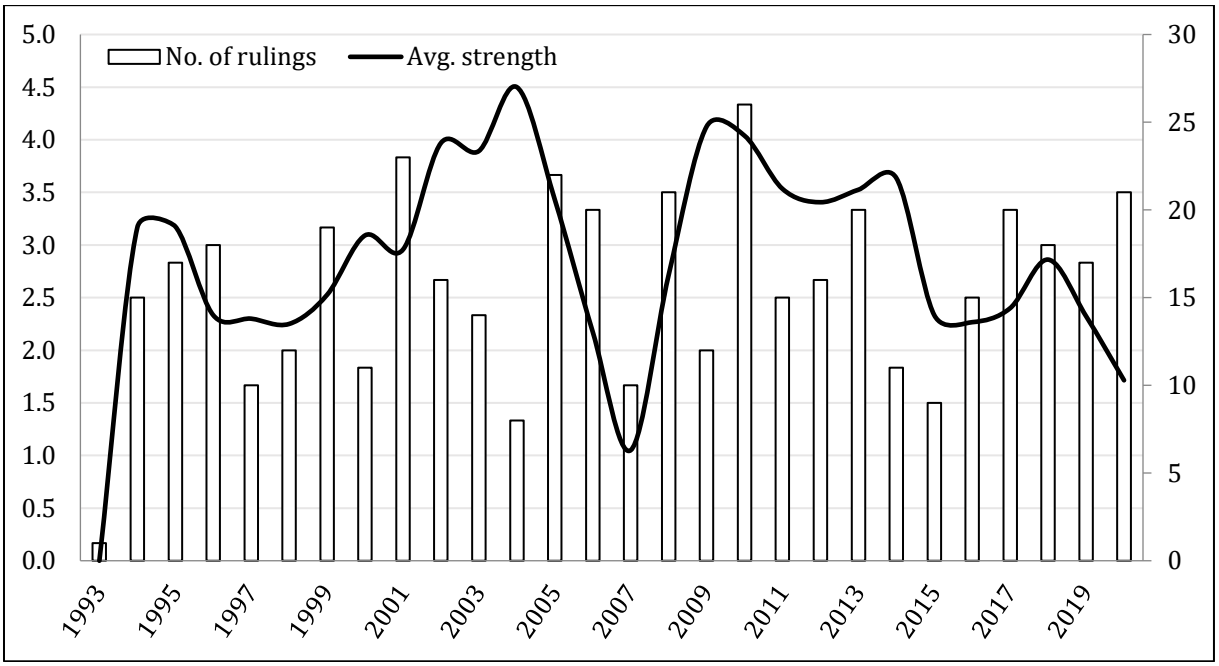
This section offers a bird's eye view of the general patterns present in the CCC's performance between 1993 and 2020 and explains its behaviour towards the parliament in line with the concept of the inconspicuous constrainer.[58] In comparison to other constitutional courts in the CEE region (see Chapters 5 and 8 in the volume), the CCC's overall performance can be characterised as average. Apart from two peaks in 2004 and 2009, and an abrupt drop in 2007, the strength of the CCC's rulings oscillated around 2.5–3.5, with a median value of 2.5, suggesting consistency in the CCC's reluctance to significantly constrain the legislator. Since 2009, the strength of the CCC's rulings has demonstrated a decreasing trend, dropping to 1.71 in 2020 (Figure 2).

[56] Kosař et al., *supra* n. 20.

[57] Hubert Smekal and Ladislav Vyhnánek. 'Beyond Compliance – Implementace rozhodnutí mezinárodních lidskoprávních těles na národní úrovni' (2018).

[58] Šipulová, *supra* n. 45.

Figure 2: Average strength of the CCC's rulings over time



Note: the right axis suggests the number of judgments and decisions examined in every year, portrayed in the figure by bars. The left axis suggests the strength of the decision (the black line).
Source: JUDICON-EU.

This decreasing tendency needs to be analysed against the background of the growing caseload of the Court (and the growing number of rejections in mundane cases), which essentially dilutes the longitudinal effect of politically salient rulings. This is well demonstrated by Table 3.1. The caseload of the CCC has gradually increased from 523 petitions in 1993 to 4915 petitions in 2012. Between 2013 and 2019 the number of petitions remained around 4100 per year, dropping to 3718 during the covid pandemic of 2020. Turning to petitions for constitutional review cases, the overall development is much more even. Starting at 47 petitions in 1993, we can observe significant increases in 2006 (94) and in 2020 (113). The increase in the number of cases roughly corresponds to the decrease in the average strength of rulings. The same logic, however, does not apply to the drops in 1996, 2007 or 2015. Interestingly, since 2015, the CCC has decided on 76 constitutional review cases delivering 91 rulings – which is a higher number than the overall average.

Table 1: Caseload of the Czech Constitutional Court

YEAR	A number of petitions to be decided in panels	A number of petitions to be decided in a plenary session (constitutional review)	All (various) petitions
1993	476	47	523
1994	829	33	862
1995	1224	47	1271
1996	1462	41	1503
1997	1975	46	2021
1998	2169	29	2198
1999	2543	24	2567
2000	3077	60	3137
2001	3006	38	4
2002	3140	44	3184
2003	2496	52	2548
2004	2713	75	2788
2005	2982	58	3040
2006	3455	94	3549
2007	3302	29	3331
2008	3208	42	3250
2009	3394	38	3432
2010	3726	60	3786
2011	3967	38	4005
2012	4915	31	4946
2013	4022	56	4078
2014	4057	27	4084
2015	3858	34	3892
2016	4256	36	4292
2017	4133	47	4180
2018	4331	48	4379
2019	4172	28	4200
2020	3605	113	3718

Source: Czech Constitutional Court, https://concourt.cz/.

As we explain further along, these changes (the gradual increase until 2002, then a steep drop in 2005–2007 and a gradual decrease from 2010 onwards) correlate with (a) the changing agenda of the CCC (i.e. mainly the changing character of the contested legislative acts), (b) the political and economic background and (c) the different composition of the Court and the change in the coalition potential among the judges.

4.1. Key trends and critical junctures

The first era of the CCC in the 1990s was characterised by a rather low, even decreasing strength of rulings, with the average strength oscillating between 2.5–3 points. The low values from the 1990s are somewhat surprising given that the existing literature identifies the first CCC as a powerful actor in mega-politics,[59] particularly in issues related to the democratic transition, transitional justice and electoral law.[60] Although the CCC annulled several key legislative acts in the 1990s,[61] it did not bind the legislator with a particular form of prescription. Instead, the CCC actually "concealed" part of its strength in proceedings on individual petitions. The weak rulings of the early CCC also correlate with the evolving style of its reasonings, which, in 1990s were still rather short, lacking broader elaboration or guidelines for the legislator. The first CCC mostly acted as a partner, respecting the political legitimacy and accountability of the young Parliament.

The second era of the CCC (2002–2012) brought a high volatility of ruling strength, reaching both the absolute peak (4.5) in 2004, then dropping to its lowest level (1) in 2007, before gradually regaining the strength of rulings back to values from the beginning of 2000s. The initial growth in strength from 2002–2006 correlated with the period of EU law approximation before the 2004 accession. The trend of Europeanization was also reflected in the CCC's case law (Kosař et al. 2020), which delivered several strong rulings that can be interpreted as activist decisions. The emancipation of the CCC is particularly visible in its relationship towards the EU law. Inspired by the German tradition, the CCC carefully analysed what position the EU law should play within the Czech constitutional order, going to considerable lengths to show that it cannot have primacy over the material core of the Czech Constitution.[62] On the other hand, it did not shy away from a pro-active approach when it came to the effects of the EU law on the legislator, urging the parliament to incorporate the requirements of EU law months before they became formally binding (e. g. Pl. ÚS 39/01). The leading example of these controversial and highly debated decisions was the case Pl. ÚS 36/01 which addressed the effects of the so-called Euro-amendment of the Czech Constitution. The Euro-amendment, adopted in 2001 as part of the preparation for EU integration, inserted two new principles into the Czech Constitution. First, it recognised the conferral of sovereignty on an international organisation. Second, it formalised a shift from the dualistic tradition to a monistic incorporation of ratified international treaties, which were to become an integral part of the Czech (constitutional) legal order. In a seminal case, the CCC attempted to mitigate the effect of the monistic shift, appropriating the sole authority to review the compatibility of Czech legislative acts with ratified international human rights treaties. In other words, the CCC conditioned the direct applicability of these treaties on its own judicial review. It is worth

[59] Ran Hirschl. TOWARDS JURISTOCRACY (2004).

[60] Zdeněk Kühn. 'The Democratization and Modernization of Post-communist Judiciaries'. In CENTRAL AND EASTERN EUROPE AFTER TRANSITION 177 (Alberto Febbrajo and Wojciech Sadurski eds., 2010); Kopeček and Petrov, *supra* n. 22.

[61] Šipulová, *supra* n. 45.

[62] Jan Komárek. 'Czech Constitutional Court Playing with Matches: the Czech Constitutional Court Declares a Judgment of the Court of Justice of the EU Ultra Vires; Judgment of 31 January 2012, Pl. ÚS 5/12, Slovak Pensions XVII'. 8 EUROPEAN CONSTITUTIONAL LAW REVIEW 323 (2012); Ana Bobić. 'Constitutional pluralism is not dead: an analysis of interactions between constitutional courts of Member States and the European Court of Justice'. 18 GERMAN LAW JOURNAL 1395 (2017).

noting that in practice this ruling was poorly followed by general (and in particular apex) courts, and later more or less abandoned as too centralised and impractical.[63]

Interestingly, the peak of the strength of rulings in 2004 also correlated with a lower number of decisions delivered that year. The drop was most probably influenced by controversies linked to the appointment of new judges by President Václav Klaus, who was elected in 2003. As we indicated above, the Czech President typically appoints almost the full bench of the constitutional court within one or two years of entering into office. Klaus openly criticised the CCC as too activist and wished to change this trend by appointing of judges who were more aligned to his political preferences. After the Senate rejected several of his nominees as politicised or not competent, he attempted to starve the Court by not providing any new candidates for the Senate's confirmation. By the end of 2004, four out of 15 seats had been left vacant and were filled only at the end of 2005. This put the constitutional review competence of the CCC in great danger. The combination of a requirement of a quorum of ten judges and a supermajority of nine votes posed a risk that the CCC would be unable to achieve a ruling on substantive unconstitutionality by default. Court President Rychetský therefore introduced an informal rule that the plenary session would be held only if the CCC has more than 12 sitting judges.

Interestingly, the strength of rulings achieved its peak around the year 2004. Substantively however, most of those cases did not touch upon any politically salient issues and targeted mostly formal requirements of judicial proceedings, the breadth and length of judicial reasonings (Pl. ÚS 1/03), the judicial review of classified information (Pl. ÚS 11/04) or the right to be heard in criminal proceedings (Pl. ÚS 45/04). The only exception was the series of decisions related to the restrictions put on judicial salaries,[64] where the CCC found freezing the salaries of public officials (a measure meant to reduce public expenses during an economic crisis) to be in violation of the principle of judicial independence.

The strength of the court's rulings reached its lowest value in 2007. The steep drop needs to be interpreted in the context of the Court – which, by 2007, sat in a largely new composition, after facing several years of criticism for being overly activist.[65] After 2008, the strength of the CCC's ruling rose again until 2010 and remained at the same level as it had been at the turn of the 1990s/2000s. Even though the average strength of its rulings did not radically differ from the first CCC, it was the second CCC that triggered a critical debate on the judicialization of politics. The prime and most controversial example was the case *Melčák,* Pl. ÚS 27/09, in

[63] Jan Filip. 'Nález č. 403/2002 Sb. Jako rukavice hozená ústavodárci Ústavním soudem'. 11 PRÁVNÍ ZPRAVODAJ 9 (2002); Jan Petrov and Katarína Šipulová. 'International Human Rights Treaties in the Case Law of Domestic Courts" Supreme Court and Supreme Administrative Court.' In MAKING SENSE OF HUMAN RIGHTS COMMITMENTS: A STUDY OF TWO EMERGING EUROPEAN DEMOCRACIES 183 (Hubert Smekal et al. eds., 2016); David Kosař and Jan Petrov. 'The Domestic Judiciary in the Architecture of the Strasbourg System of Human Rights'. In HOW INTERNATIONAL LAW WORKS IN TIMES OF CRISIS 255 (George Ulrich and Ineta Ziemele eds., 2019); Zdeněk Kühn and Jan Kysela. 'Je Ústavou vždy to, co Ústavní soud řekne, že Ústava je?'. 10 ČASOPIS PRO PRÁVNÍ VĚDU A PRAXU 199 (2002).

[64] Pl. ÚS 34/04, Pl. ÚS 43/04, Pl. ÚS 9/05.

[65] The CCC triggered criticism for shifting towards judicialization and juristocracy mostly from President Klaus (Klaus and Loužek 2006) but the debate related to the "judgeocracy" became a part of broader discourse (see for example Smekal and Pospíšil 2013).

which the CCC annulled a Constitutional Act[66] shortening the electoral term of the current Chamber of Deputies as a preparation for pre-emptive elections. The impact of *Melčák* is multi-layered and we discuss it in more detail in Section 5 of this chapter. From the longitudinal perspective, *Melčák* redefined the position of the CCC among Czech political actors since the CCC controversially awarded itself the competence to review constitutional acts, pushing its role of negative legislator to another dimension.

Since 2011 the strength of the CCC's rulings have gradually decreased, approaching the minimum value of 1.71 in 2020. This extreme drop correlated with a sudden jump in the court's caseload, which almost doubled in 2020, partly due to an increase of COVID-19 related cases, where the CCC adopted a self-constrained attitude.[67] Five out of 11 rejections in 2020 were related to Covid-19 emergency measures. The overall decrease since 2011, however, calls for several more complex interpretations. First, the trend might suggest that the auto-limitation of the Czech parliament was indeed successful.[68] Second, the scope of the CCC's agenda shifted. While the first Court dealt with fundamental aspects of the democratization process and transitional justice and the second CCC decided on cases related to electoral issues, judicial independence and fundamental human rights, the third CCC focused more on social issues. There might be a correlation between the increasing number of social issues and the decreasing strength of its rulings due to the implementation of the so-called "reasonability test". Compared to the standard proportionality test, well known also from the ECtHR's case law, the reasonability test weighs the severity of interference in social rights against the reasonable competing interest and grants the legislator much greater deference.[69] In other words, the social rights agenda allowed the Court to be less constraining vis-á-vis the parliament. Third, the decreasing strength of the rulings at this time might correlate with the increasing diversity (particularly in terms of career background) and cleavages existing among the judges of "Zeman's Court", as well as the approaching end of the mandate of constitutional judges, which could be reflected in decision-making that is more responsive to the current political climate.

Overall, the longitudinal trends paint a portrait that contrasts with the traditional scholarship depicting the CCC as a strong and relatively activist constitutional actor.[70] Compared to its CEE counterparts, the CCC leaves the parliament considerable room for manoeuvre and does not issue particularly constraining rulings. We address this anomaly later, in Sections 5 and 6, arguing that due to a combination of procedural and ideological factors, the CCC judges developed more indirect methods of shaping the interpretation of legislation and binding the legislator to follow it.

5. Outliers and most interesting cases

[66] In Czech legal doctrine, constitutional acts are considered to be a part of the Constitution in a wider sense. They need to be approved by 3/5th of all MPs and 3/5th of present senators. The Constitution does not explicitly give the CCC a competence to review constitutional acts.

[67] Šimon Chvojka and Michal Kovalčík. 'Judicial Review of COVID-19 Restrictive Measures in the Czech Republic'. 2 INSTITUTIONES ADMINISTRATIONIS – JOURNAL OF ADMINISTRATIVE SCIENCES 112 (2022).

[68] Marián Kokeš. 'Pojistky ústavní konformity zákonodárného procesu – funkční nástroje či zmetky?'. In DNY PRÁVA 2014 (Pavel Molek, Pavel Kandalec and Jiří Valdhans eds., 2015); Petrov, *supra* n. 20.

[69] Jan Kratochvíl. 'Test racionality: skutečně vhodný test pro sociální práva?'. 139 PRÁVNÍK 1052 (2015).

[70] Kosař and Vyhnánek, *supra* n. 13.; Smekal et al., *supra* n. 14.

When looking at the role of the CCC and its influence on the formation of Czech legislation, the scholarship typically identifies three areas where the CCC has exerted intense pressure on the Parliament: transitional justice, electoral cases, and social rights.

As previously mentioned, the first CCC built its legitimacy on an agenda related to transitional justice, the regulation of rents, a transformation of the economy and private ownership. While there were some landmark constitutional review cases, much of the substantive change in the transitional legislation also happened via individual petition cases, particularly those addressing reparations and damages paid to victims of the communist regime, or the privatisation and restitution of property.[71] The transitional jurisprudence has, however, already almost entirely been concluded, with crucial restitution of church property cases finished at the end of the second CCC.[72]

The second group of cases where the CCC particularly strongly interfered in the autonomy of the parliament concerned electoral matters. The Czech Constitution prescribes the proportional electoral system for the Chamber of Deputies,[73] and leaves its precise form to be determined by the legislator. Nevertheless, the CCC has repeatedly used the proportionality principle to intervene and to set boundaries for the parliament. The first opportunity arrived in 1997 with a constitutional complaint related to the 5 percent electoral threshold (Pl. ÚS 25/96). The CCC, however, remained self-constrained. It emphasised that absolute proportionality is unachievable and rejected the case, arguing that the distortion of proportionality due to the existence of an electoral threshold does not contravene the principle of democratic representation.

In 2000, a significant change to the electoral system occurred as a consequence of "the Opposition Agreement", an informal pact between the two biggest political parties, the Social Democrats and Civic Democratic Party, which allowed the Social Democrats to assume power as a single-party minority government with the support of the Civic Democratic Party. In return for its support, the opposition Civic Democratic Party was promised far-reaching electoral reforms, which were meant to reinforce the position of both major parties by raising the electoral threshold for partisan coalitions, changing the formula for allocations of votes to seats, and creating 35 relatively small constituencies. In 2001, in a closely scrutinised *Grand Electoral Judgment I*, Pl. ÚS 42/2000,[74] the CCC found these elements unconstitutional. Despite several harsh dissenting opinions, the CCC argued that the cumulative effect of the amendments breached the principle of proportional representation required by the Constitution. It upheld only the higher electoral threshold for coalitions, referring to the margin of appreciation left to the legislator. Given the extensive impact of the judgment on the political system, it spurred intense reactions mostly from the representatives of the leading actors behind the reform, future presidents Václav Klaus and Miloš Zeman. According

[71] Šipulová and Smekal, *supra* n. 27.
[72] Šipulová, *supra* n. 45.
[73] Art. 18 of the Constitutional Act No. 1/1993 Coll.: "Elections to the Chamber of Deputies shall be held by secret ballot on the basis of a universal, equal, and direct right to vote, according to the principle of proportional representation."
[74] Interestingly, the petition was brought to the CCC by President Havel.

to some authors, the judgment shaped the attitudes of both upcoming presidents and deepened their animosity towards the CCC.[75]

The electoral system created as a reaction to the *Grand electoral Judgment I* became the subject of several individual constitutional complaints. However, until the complaint of a group of senators in 2017, none of them was successful (due to the lack of interference with the complainant's individual fundamental rights or manifest unfoundedness).[76] It is worth mentioning that a group of senators challenged the electoral system as early as 2006, but the CCC (deciding by refusal in three-judge panel) considered their complaint as manifestly ill-founded (Pl. ÚS 57/06). In the meantime, the CCC delivered another ground-breaking judgment, in *Melčák* (Pl. ÚS 27/09). The case arose from a petition by an MP against a Constitutional Act that was meant to shorten the electoral term of the Chamber of Deputies and trigger an early election (which would favour the governing parties). Melčák argued that shortening the term violated his political rights and legitimate expectations. While the CCC did not endorse this interpretation, it annulled the Act due to procedural and formal mistakes in the legislative process. The decision triggered a heated public debate and sparked criticisms of the CCC, partly strengthening and partly damaging its reputation and relationship with the Chamber of Deputies.[77]

Almost 12 years after *Grand electoral judgment I*, the CCC returned to a review of the proportional representativeness of the electoral system and delivered another important judgment that reshaped the distribution of powers in the political arena. Although *Grand electoral judgment II* (Pl. ÚS 44/17) falls outside the timeframe of the JUDICON-EU project, as the CCC finally decided on the case in February 2021, it is without doubt a clear demonstration of the Court's willingness to interfere in the realm of mega-politics. It confirms that the court's first intervention in the electoral system was not related to specific circumstances nor was it an example of isolated activism. The Court seems to take its role as protector of the principle of proportional representation very seriously and does not perceive particular elements of the electoral system as the legislator's discretionary space. The CCC has repeatedly emphasised that it is not its role to present alternatives to the current system or to deliver precise instructions to the legislator, even if the claimant explicitly asked the Court to do so.[78] It therefore "merely" annulled the threshold for coalitions (i.e. the feature that survived the first election judgment) and the combination of the D'Hondt formula used for allocation of seats with their division into 14 constituencies. According to the CCC, the these two mechanisms operating together caused unequal and disproportionate effects and possible disadvantages for smaller political parties. The judgment provoked emotional reactions across the political spectrum, with Prime Minister Babiš accusing the Court of overstepping all boundaries and not acting impartially. The reason for the controversies lay in the combination of both the result and its timing. The decision was issued three years after the senators had lodged the complaint, but more importantly, only eight months before upcoming elections planned for

[75] Smekal et al., *supra* n. 14. However, it should be stressed that Zeman respected the CCC at the beginning of his term, mostly thanks to the presidency of Pavel Rychetský, whom he respected and trusted. Prior to joining the CCC, Rychetský served as a Minister of Justice in Zeman's government.

[76] See cases Pl. ÚS 76/06, I. ÚS 537/06, Pl. ÚS 57/06, III. ÚS 663/06, Pl. ÚS 2/14 or Pl. ÚS 42/17.

[77] Yaniv Roznai. 'Legisprudence Limitations on Constitutional Amendments? Reflections on the Czech Constitutional Court's Declaration of Unconstitutional Constitutional Act'. 8 ICL JOURNAL 29 (2014).

[78] See for example par. 52, 175 or 204.

October 2021. It therefore left the Parliament with little time to enact the necessary amendments to the electoral system. Despite the initially intense reactions, the political scene seemed to calm down relatively quickly and the legislator managed to adopt an amendment in due time before the planned elections. In the end, the decision did not manifest in a backlash against the Court.

The third group of cases which are often on the agenda of the CCC are a mix of social rights that represent very diverse areas, but have a common denominator in the form of a ruling delivered by the CCC. Particularly in the third era of the CCC, a clear increase can be observed in the use of constitutional requirements. Although we provided some explanations for their emergence in Section 3, the impact of constitutional requirements deserves a deeper qualitative analysis.

Constitutional requirements found their way into the CCC adjudication rather gradually (Figure 1 in section 3). The first case prioritising the conforming interpretation appeared in 1996. It took another seven years until the CCC came to another milestone which turned the constitutional requirement into a commonly used technique. According to the CCC case law, the binding part of the decision is represented not only by the ruling itself but also by the reasoning, more precisely by the parts of it containing substantial reasons.[79] Although legal theory disagreed on the binding effect of the *ratio decidendi,*[80] the CCC reversed this in case Pl. ÚS 2/03 related to regulated rents. It openly criticised the government for disrespecting the substantial reasoning of its previous decisions, arguing that they have a binding effect. This interpretation was repeatedly confirmed. The CCC argued that any other interpretation (i.e. narrowing down the binding effect to the operative parts only) would force it to abandon its previous self-restraint towards the legislator and annul legal provisions at the slightest sign of unconstitutional interpretation. In the CCC's own interpretation, it is the binding effect of its legal interpretation that allows the CCC to prioritize interpretations that are in harmony with the constitution over the annulment of potentially problematic provisions.[81] Compared to the core methodology of the JUDICON-EU project, the constitutional requirement (i.e. binding constitutionally conforming interpretation) is therefore not limited to the operative part of judgments but frequently also appears in the reasoning as an *obiter dictum*. If the CCC includes constitutionally conforming interpretation in a ruling, it uses the label "interpretative ruling", i.e. a ruling equal to a legal norm.[82] Although the CCC considers the reasoning to be the binding part, this is probably because it has reflected on the controversies of its approach and wanted to reinforce the binding effect by including the substantial reasons directly into a ruling (i.e. it created an interpretative ruling). The CCC used interpretative rulings especially in the second half of the second CCC era and at the beginning of the third CCC era. Without any explicit explanation, it later abandoned this practice, replacing it with placing constitutional requirements in the decision's reasonings. Both variations are, however, considered binding by Czech legal doctrine.

Although the CCC portrays its use of interpretative rulings as a self-constraining step, the practice is not without controversy and, on the contrary, it is instead criticised for being overly

[79] See cases Pl. ÚS 2/03 or III. ÚS 200/2000.
[80] Zdeněk Kühn. 'Je Parlament ČR vázán odůvodněním nálezů Ústavního soudu ČR?'. 139 PRÁVNÍK 721 (2000).
[81] Pl. ÚS 41/02.
[82] As explicitly explained by the CCC for example in Pl. ÚS 45/04 or Pl. ÚS 39/13.

activist, if not *ultra vires*.[83] In fact, setting constitutional requirements might restrain the legislator far more than finding substantive unconstitutionality, as it provides a legally binding interpretation addressed to all public bodies and individuals,[84] without giving the parliament any opportunity to legislate on the matter. In the end, the CCC itself indirectly admits this when tying the constitutional requirement to its own authoritative interpretation of the Constitution, and not to the intent of the legislator.

Looking back at the frequency of use of the constitutional requirements, in general, the presence of constitutional requirements increased from 2015–2020. For a long time, the CCC did not apply constitutional requirements in the politically most salient cases. This somehow changed in 2017, when the CCC applied a constitutional requirement to address more controversial issues, such as blocking illegal online gambling (Pl. ÚS 28/16), the financing of political parties (Pl. ÚS 11/17) or debt brakes on self-governing regions (Pl. ÚS 6/17). The changing character of constitutional requirements and their increasing use might signal various things. The CCC might use this strategy deliberately, in order to shield itself from potential political backlash. That would allow it to consciously avoid making constraining rulings too frequent that might trigger a reaction from political actors. However, the constitutional requirement might also indicate that the CCC prefers fast-track rectification of justice, without further relying on often lengthy legislative process. Or, as we argue in the following section, it might simply follow from the procedural constraints inherent in constitutional review proceedings and the increasing inability of CCC judges to receive a supermajority of votes.

6. Voting Coalitions, Supermajority and Indirect Constraints of the Parliament

How does a constitutional court arrive at a decision? Does the court act as a unilateral actor vis-à-vis parliament? What motivates its judges to opt for a more or less constraining approach towards the legislature?

Bearing in mind the significantly high threshold needed to annul legislation (a supermajority of nine judges out of at least ten judges present), this section shifts the attention from the CCC as a unitary actor to the voting behaviour of its individual judges. Here, we therefore refocus on the extra-legal factors affecting the CCC's decision-making, searching mostly for the differences between individual judges and their abilities to form voting coalitions: based on ideology, partisanship, gender, or professional background.

Information on the ideological or partisan preferences of constitutional judges is inaccessible in the Czech Republic. As we previously explained, judges are nominated and appointed by the President and approved by the Senate, which plays a gatekeeping role and safeguards the quality of candidates. Neither the President nor the Senate are directly involved in party politics, although all three presidents were initially party leaders. Although the majority of the

[83] The mixed views were present also within the CCC, as demonstrated i.e. by a dissenting opinion of judge Güttler in Pl. ÚS 41/02.

[84] One of the examples is case Pl. ÚS 15/16 dealing with an accountability of a driver, where CCC found a discrepancy between the constitutional protection of individual rights and the administrative ordinance regulating traffic offences. The CCC put forward a conforming interpretation but addressed it directly to administrative courts dealing with this and similar cases.

CCC's judges come from the judiciary, some judges had also had previous political experience, particularly in the eras of the first and second CCC. Nevertheless, the dominance of judges from the pool of the general judiciary with a strict career model prevents any open connection or ideological alignment with political parties, as this is perceived as suspicious and detrimental to judicial independence.[85]

This does not, of course, mean that sitting judges do not differ in their left-right preferences, or that we do not have at least indirect indicators of which position they will be leaning towards once they join the Court. Transparency in this regard is traditionally higher in the case of judges nominated from academia or apex courts. However, the ideology judges ascribe to is almost never directly linked to partisan preferences and the evidence of their ideological distribution is too fuzzy to deliver a clear conclusion.

The low mediatization of constitutional judges' selection further complicates predictions of their political ideologies. In fact, even some presidents initially underestimated the power and impact of their selection. President Zeman initially completely relied on the advice of the CCC's own president Rychetský. Pavel Rychetský, a former dissident, started his career in 1990s as a politician and was the Deputy prime minister of the Federal assembly. Coincidentally, he also served as a Deputy prime minister and Minister of Justice in Miloš Zeman's government in 1998–2002. Rychetský capitalised on his past political experience, since Zeman initially trusted his advice on the majority of nominations to the third CCC. Their cooperation only ended in 2015 when they fell out over disputes on the appointment of a new President of the Supreme Court. Since then, Zeman has purposefully selected three new judges who were ideologically further away from Rychetský's preferences.[86]

It is also worth noting that considerations of proportional composition play a very minor role in the selection of Czech constitutional judges, perhaps apart from their professional background. For example, when it comes to gender, the first democratic CCC had only two women on its bench. Overall, of 19 judges appointed by Havel, only three were women (Iva Brožová, Eva Zarembová, Eliška Wagnerová). The majority of the first CCC judges were recruited from among dissidents and people close to Havel personally.

The second CCC was a little better balanced in terms of gender (five female judges, one appointed by Havel, four by Klaus). The third CCC has only one female judge, after the second one, Kateřina Šimáčková, was appointed to the European Court of Human Rights in 2021. The lack of women in the CCC results from a combination of the phenomena of glass ceilings and of sticky ladders.[87] Similarly to other post-communist countries of CEE, the Czech Republic has a decent representation of female judges at lower instances,[88] although the vast majority of these female judges never advance to appeal or apex courts, effectively limiting their chances to be appointed to the CCC.

[85] David Kosař. 'Politics of Judicial Independence and Judicial Accountability in Czechia: Bargaining in the Shadow of the Law between Court Presidents and the Ministry of Justice'. 13 EUROPEAN CONSTITUTIONAL LAW REVIEW 96 (2017); David Kosař and Samuel Spáč. 'Post-communist Chief Justices in Slovakia: From Transmission Belts to Semi-autonomous Actors?' 13 HAGUE JOURNAL ON THE RULE OF LAW 107 (2021).
[86] Kosař and Vyhnánek, *supra* n. 33.
[87] Barbora Havelková et al. 'The Family Friendliness That Wasn't: Access, but Not Progress, for Women in the Czech Judiciary'. 47 LAW & SOCIAL INQUIRY 1106 (2022)
[88] *Ibid.*

Similar observations could be raised in respect of other extra-legal factors such as age (the CCC is progressively getting "older"), educational experience abroad (mostly lacking), or the representation of minorities (there has been no judge who could have been openly associated with any minority). Regarding professional background, the majority of the judges advance to the CCC from the general courts (Table 3.2.). The rest were selected from the pools of academia, politics, or practice (mostly from attorneys). Particularly surprising might be the number of judges who pursued a career in politics (here we mean active MPs, not experts sitting in the legislative body, otherwise, the number would be even higher). As Table 3.2. demonstrates, this practice was common in the first and second CCC. However, while the first CCC comprised mostly former dissidents who briefly joined newly formed movements or parliament before being appointed to the CCC, the judges selected from the ranks of politicians by Klaus had already had extensive political careers. Outsiders are clearly in minority, represented almost solely by attorneys. Other groups and sectors (lawyers engaged in the NGO sector) are completely missing.

Table 2: Professions of judges of the CCC across 3 constitutional courts

GENERATION	Judge	Politician	Academic	Lawyer
I.	**7**	**7**	4	2
II.	3	**5**	3	3
III.	6	2	**7**	3
SUM	**16**	**14**	**14**	**8**

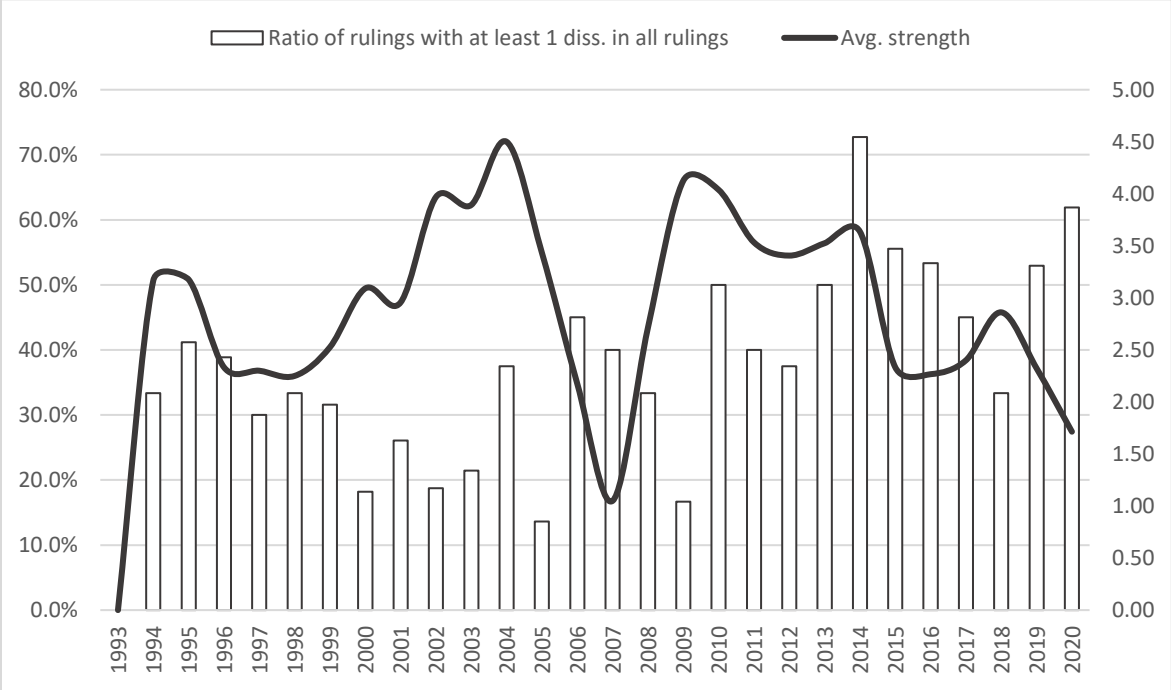
Note: the sum of rows is higher than 15 due to some judges having background in two disciplines, or due to small fluctuation at the Court.
Source: authors.

In sum, while some determinants of the CCC portray it as a rather monolithic institution, the members' allegiance to professional groups (and related informal networks surrounding these groups) is the most visible line dividing the court. How is this composition reflected in the court's decision-making and, given the high procedural threshold for constitutional review, its ability to form voting coalitions? In order to answer this question, we looked deeper at the dissenting practice of judges.

The CCC does not have public records of individual judges' votes. The only data we have at our disposal are dissenting opinions, which are, obviously facultative. It is important to stress the findings of existing scholarship, which suggests that there are also a lot of "silent" instances of dissent, as some judges use dissent strategically, or for internal purposes only, and do not perceive the need to publish them as a mandatory part of the decisions (Smekal et al. 2021). In the following figures, we tried to dissect the practice in the formation of dissenting coalitions and their correlation with the behaviour of the CCC in constitutional review cases.

Figure 3 juxtaposes the average strength of the rulings against the ratio of those rulings with at least one dissenting opinion, and offers four compelling observations.

Figure 3: Longitudinal demonstration of practice related to dissenting opinions



Note: the columns (left axis) show the ratio of rulings with at least one dissent. The line (right axis) shows the average strength of rulings.
Source: JUDICON-EU**.**

First, we can observe a very clear trend of an increasing ratio of rulings with at least one dissent, which demonstrates an increasing dissonance between the judges, particularly from the second half of Klaus' CCC onwards. Two caveats have to be however mentioned here: both the scope of constitutional review cases and the composition of the CCC have significantly diversified over the years. While the first CCC was a court composed of former dissidents adjudicating mostly on the character of the democratic regime, its value embeddedness, or the implementation of transitional justice, the second CCC faced issues related mostly to the economic and social transformation of the country and attempts to manipulate the electoral and party system. It was towards the end of this era that the CCC fell behind in terms of internal communication and deliberation. The third CCC was the most diversified, both in terms of topics, the range of actors petitioning the court and the profiles and ideological distance between the judges (particularly after Rychetský and Zeman fell out).

Second, it seems that in the years 1998–2004 and 2008–2009 the CCC was able to achieve a more unanimous voice, while the lower number of dissents interestingly correlates with a higher strength of constraining rulings issued in these years.

Third, in contrast, in 2005–2007, the lower strength correlates with an increase in the proportion of dissents, which adds yet another interpretation to the most significant period of CCC's self-constraining behaviour (see also Section 3 and 4).

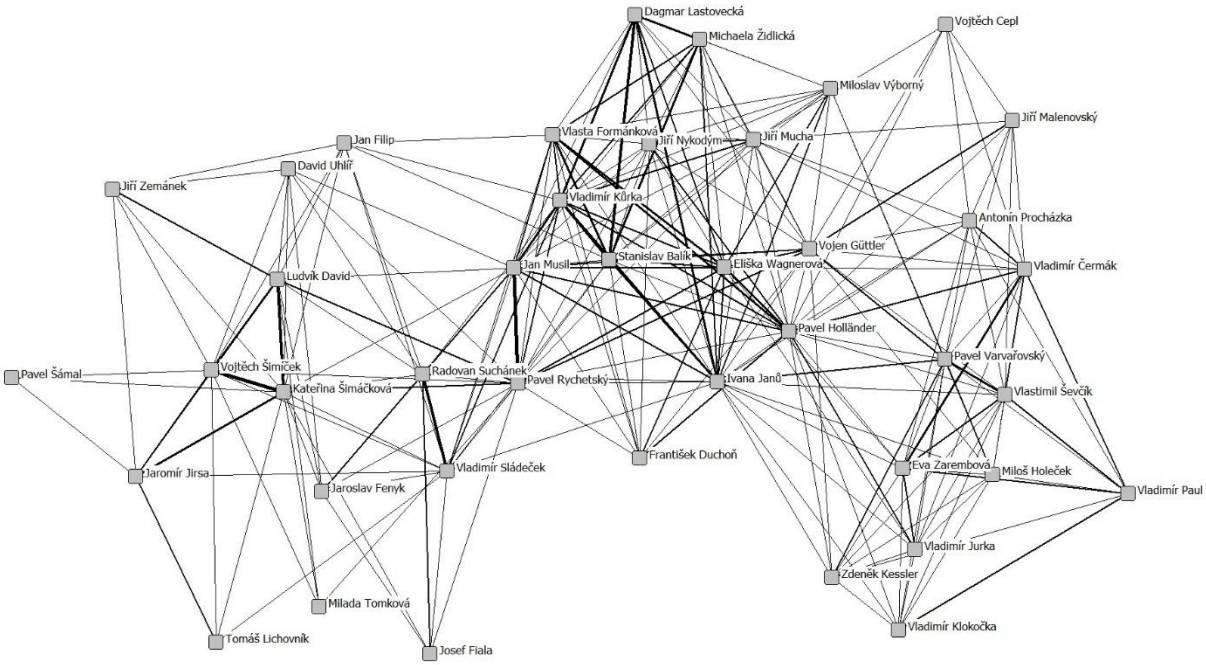
Similar observations can be made about Figure 4, which shows the complex network of all the CCC judges and their dissenting coalitions. The right side of the network is the first CCC. The

judges of this era interacted intensively across the whole court, with only a few stable coalitions typically replicating the compositions of small panels. The visualisation of the network corresponds with the existing narrative according to which the first CCC held very open deliberations across the whole bench. The middle of the network represents the second CCC and demonstrates a significant increase in the interactions between judges. As we discuss further in relation to Figure 4, this also correlates with the increasing trend of issuing dissenting opinions. The second CCC, particularly in the second half of its term, is often described as having been rather polarised, with deep cleavages and problems in communication.[89] The strongest coalitions within the triangle Balík-Kůrka-Lastovecká, or Wagnerová-Holländer-Formánková-Kůrka copied both small chambers[90] as well as the left-right alignment, and activist-self-constraint positions of the individual judges (with Holländer and Wagnerová representing the activist wing). The left part of the Figure 4represents the dissenting network among the judges of the third CCC. Although the number of dissenting opinions increased from 2013–2020, the coalitions became more stratified (possibly also partly impacted by the new system of rotations, changing the compositions of the small chambers every two years), typically around judges with the same background (judges coming from apex courts, the Law Faculty, etc.). Interestingly, the highest coalition potential can be identified with Court President Rychetský, and with Kateřina Šimáčková, who is generally seen as one of the most liberal judges. Compared to the first CCC, coalitions rarely copy the patterns of the small chambers. Generally, the network calls for more in-depth research on the judicial leadership and ability of judges who are either perceived as jurisprudential authorities (Filip, Holländer, Čermák, Klokočka), judges who strongly lean towards liberal or conservative ideology (Balík vs Wagnerová, or Šimáčková) and judges who enjoy high political legitimacy (Rychetský, Wagnerová, Varvařovský, Klokočka) to attract large coalition potential.

[89] 'Ústavní soudci, mluvíte spolu?'. JINÉ PRÁVO (May 2, 2010), http://jinepravo.blogspot.cz/2010/05/ustavni-soudci-mluvite-spolu.html.

[90] Up until 2016, the composition of small chambers was stable. Since 2016, the CCC has had a system of rotation, which also might have led to more variability and less stable coalitions at the end of the third CCC.

Figure 4: Dissenting coalitions in the CCC's constitutional review cases



Source: JUDICON-EU.

Finally, the interaction between the average strength and dissenting behaviour of the CCC changes from 2010 onwards. The overall usage of dissents is on the rise (despite the isolated drop in 2018). Incidentally, in the very same period, the CCC started to hold back more often, and issues what our data identifies as less constraining rulings. On the other hand, in the very same era, we also identified a gradual increase in constitutional requirements, used to the detriment of substantive unconstitutionality (Figure 1). These factors tell us the following: Dissenting opinions are a good indicator of coalition potential inside the CCC for cases of substantive unconstitutionality. Moreover, they strengthen our hypothesis that once the internal dissonance among judges increased (by the end of the second CCC and during the third CCC), the CCC judges who could not reach the required supermajority for the annulment of the reviewed legislation started to strategically rely on constitutional requirement as a means of altering the binding constitutional interpretation of reviewed provisions, eventually indirectly binding the legislator.

7. Concluding remarks

The Czech scholarship traditionally categorises the CCC as one of the strong constitutional courts in the region,[91] having made several formative interventions in partisan competition or on the separation of powers, but only rarely engaging in direct social transformation and human rights review.[92] Smekal et al. argued that such a selective judicial activism made the Court an unlikely target of political interventions. Yet, as the authors admit, the CCC, on the other hand, was particularly strong in intervening on human rights violations in individual

[91] Kosař and Vyhnánek, *supra* n. 13.
[92] Smekal et al., *supra* n. 14.

petitions, frequently forcing administrative bodies to adopt a new progressive approach allowing for higher human rights protection.[93]

This chapter, while analysing the relationship of the CCC with the parliament through the optic of constraining rulings, attempted to explain this interesting phenomenon. We argued that while the CCC remained formally self-restrained in its relationship with the parliament and allowed it considerable room for manoeuvre, this position was largely dependent on procedural constraints which the legislator imposed on the ability of the CCC to achieve supermajorities in constitutional review decisions. The combination of procedural constraints and increasing polarisation inside the Court made frequent constraining rulings on politically and socially salient topics unlikely. Instead, activist judges started relying on a less direct method of constitutional requirement (binding interpretation of reviewed legislation) both in constitutional review and in individual petition cases. In hindsight, this technique might have helped to shield the CCC from strong political backlash and delegitimization. The Czech case adds important nuance to scholarship, suggesting that the success of democratic transition correlates with the constitutional courts constraining the legislator (Smith 2017) – as we have argued, constraint might take different forms and does not necessarily involve active prescription of the precise future form of legislation.

[93] *Ibid*.