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THE CONSTITUTIONAL COURT OF CZECHIA

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Abstract

This chapter provides a complex picture of the Czech Constitutional Court (CCC). In the first place, it situates the CCC in the broader historical and political context and depicts its institutional design and powers. The chapter then moves to its internal judicial pracices and key procedural rules and establishes a taxonomy of the court's rulings. Finally, the chapter identifies and discusses political determinants of the CCC's functioning and focuses on the interaction of the CCC with other domestic as well as supranational actors.

Keywords

Czech Constitutional Court, historical and political context, constitutional law, constitutional adjudication, case law

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THE CONSTITUTIONAL COURT OF CZECHIA

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General Information

Abbreviations

BVerfG	*Bundesverfassungsgericht* (German Federal Constitutional Court
CCC	Czech Constitutional Court
Charter	Czech Charter of Fundamental Rights and Freedoms
CJDCC	Collection of Judgments and Decisions of the Constitutional Court
CJEU	Court of Justice of the European Union
EU Charter	Charter of Fundamental Rights of the European Union
ECtHR	European Court of Human Rights
ECHR	European Convention for Protection of Human Rights and Fundamental Freedoms
EU	European Union
FCCC	Constitutional Court of the Czech and Slovak Federal Republic
ICCC	Interwar Czechoslovak Constitutional Court
LCC	Law on the Constitutional Court of 16 June 1993 (see below).

Constitution

Ústava České republiky (Constitution of the Czech Republic), of 16 December 1992, published under No. 1/1993 Coll.

Listina základních práv a svobod (Charter of Fundamental Rights and Freedoms) of 16 December 1992, published under No. 2/1993 Coll.

Statutes

Law on the Constitutional Court of 16 June 1993, published under No. 182/1993 Sb. Coll.

Rulings of the Czech Constitutional Court

Important rulings (all judgments and some decisions) of *Ústavní soud České republiky* (the Czech Constitutional Court) are published in the print publication called "Collection of Judgments and Decisions of the Constitutional Court". All rulings (judgments, decisions as well as opinions) of the Czech Constitutional Court are available at its website: http://www.usoud.cz/.

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Introduction

In November 2009 the whole of Europe watched the Czech Constitutional Court closely since the future of the Lisbon Treaty and with it of the European Union hinged upon the judgment of the Czech Court.[2] The Czech Constitutional Court (hereinafter also as "CCC") has eventually found the Lisbon Treaty to be in conformity with the Czech constitutional order and thereby lifted the last major obstacle to the entry into force of the Lisbon Treaty. In its *Lisbon II* judgement, the CCC adopted a very euro-friendly interpretation of the Czech constitutional order[3] and by doing so it distanced itself from the rather assertive *Lissabon-Urteil* (*Lisbon* judgement) of the German Federal Constitutional Court (hereinafter also as "BVerfG").[4]

However, just two years later the CCC dropped a bombshell onto the European constitutional landscape. In the *Holubec* judgment,[5] delivered in reaction to the *Landtová* judgment[6] of the Court of Justice of the European Union (hereinafter also as "CJEU"), the CCC for the first time in the history of European integration clearly and openly declared an act of the European Union (hereinafter also as "EU") *ultra vires* and thus not applicable on the national territory.[7]

These two judgments brought the CCC to the European limelight, which it deserved for a while. The CCC started as a relatively low-key constitutional court in the region, especially in comparison with the bold Hungarian and Polish constitutional courts in the 1990s era.[8] However, it steadily increased its powers and gravitas in domestic politics. The CCC began to show its teeth already in the early 2000s. Its 2001 *Grand Election* judgment[9] de facto prevented turning Czechia into a two-party state, because it quashed down the amendment to election laws that would have prioritized the two largest political parties, the Social Democrats and the Civic Democratic Party, to such an extent that, if kept alive, it would have eliminated most small parties. One year later, the CCC constitutionalized international human rights treaties, despite a clear textual wording of the Czech Constitution to the contrary.[10] The CCC's appetite grew further with eating. In 2009, its *Melčák* judgment[11] not only

[2] See, for instance, Czech court to hear legal challenge to Lisbon treaty, Guardian, 27 October 2009, available at https://www.theguardian.com/world/2009/oct/27/czech-republic-lisbon-treaty.

[3] Judgement of the CCC of 3 November 2009, Pl. ÚS 29/09, *Lisbon II*.

[4] Judgement of the Federal German Constitutional Court of 30 June 2009, BVerfG, 2 Be 2/08/

[5] Judgement of the CCC of 31 January 2012, Pl. ÚS, 5/12 *Holubec* (in the Czech context this judgment is often referred to as *Slovak Pensions XVII* to show that it is a part of the much longer "Slovak Pension Saga").

[6] CJEU, Case C-399/09 Landtova [2011] ECR I-5573.

[7] See Jan Komárek, 'Playing with matches: The Czech Constitutional Court declares a judgment of the Court of Justice of the EU ultra vires.' (2012) 8 EuConst 323; Robert Zbíral, 'Czech Constitutional Court, Judgement of 31 January 2012, Pl. ÚS 5/12: A Legal Revolution or Negligible Episode? Court of Justice Decision Proclaimed Ultra Vires' (2012) 49 CMLR 1475; Michal Bobek, 'Landtová, Holubec, and the Problem of an Uncooperative Court: Implications for the Preliminary Rulings Procedure' (2014) 10 EUConst 54; and Zdeněk Kühn, 'Ultra Vires Review and the Demise of Constitutional Pluralism: The Czecho-Slovak Pension Saga, and the Dangers of State Courts' Defiance of EU Law' (2016) 23 MJECL 185.

[8] For a similar assessment, see Zdeněk Kühn and Jan Kysela, 'Nomination of Constitutional Justices in Post-Communist Countries: Trial, Error, Conflict in the Czech Republic' (2006) 2 EuConst 183, 194.

[9] Judgement of the CCC of 24. January 2001, Pl. ÚS 42/2000.

[10] Judgement of the CCC of 25 June 2002, Pl. ÚS 36/01, *Euro-Amendment*.

[11] Judgement of the CCC of 10 September 2009, Pl. ÚS 27/09, *Melčák*. For further analysis, see also Yaniv Roznai, 'Legisprudence Limitations on Constitutional Amendments? Reflections on the Czech Constitutional

accepted the "unconstitutional constitutional amendment" doctrine,[12] but also de facto postponed the parliamentary elections for seven months, which changed the Czech political landscape and probably also the victor of the elections.[13] Soon after the *Melčák* judgment, the CCC issued the abovementioned *Lisbon II* judgment,[14] struck down some of the austerity measures adopted by the centrist government in the wake of financial crisis,[15] and even crossed swords with the CJEU.[16] As a result, by the late 2010s the CCC became by far the most powerful constitutional court in the region. To be sure, this is partly due to the court packing strategies used against the Hungarian, Polish and Slovak constitutional courts.[17] However, this is only one half of the story as the CCC's increased its political power by its own making in the meantime.

This chapter will show on the one hand how the CCC has so far skilfully navigated through the Czech political ups and downs and has risen to prominence in the Czech politics. On the other hand, it also suggests that the CCC, despite its current wide powers, is a rather fragile institution.

The structure of this chapter is as follows. In Section I we argue that the creation of the CCC must be understood in the broader historical and political context.[18] Section II sketches the institutional design of the CCC and Section III discusses the CCC's powers. Subsequently, Section IV analyses the internal judicial practices of the CCC and the key procedural rules. Section V then provides the taxonomy of the CCC's rulings as well as their style, effects and publication. It also shows the modalities of constitutional interpretation in the CCC's reasoning. Sections II-V thus set the stage for Section VI, which identifies and discusses political determinants of the CCC's functioning and focuses on the interaction of the CCC with other domestic as well as supranational actors.

Court's Declaration of Unconstitutional Constitutional Act' (2014) 8 ICL Journal 29; and Ivo Šlosarčík, 'Czech Republic 2009–2012: On Unconstitutional Amendment of the Constitution, Limits of EU Law and Direct Presidential Elections' (2013) 3 EPL 435.

[12] For further details on this doctrine, see Part III.7. below.

[13] By striking down the constitutional law that shortened the term of the Chamber of Deputies the CCC de facto postponed the election to this chamber of parliament for almost a year. Instead of early October of 2009 the elections took place only in late May of 2010. It is generally accepted that this delay heavily harmed the Social Democrats who were frontrunners in the polls in 2009 and also allowed the rise of new "business political parties" such as Public Affairs (*Věci veřejné*) in the 2010 elections.

[14] See above note 3.

[15] Judgement of the CCC of 23 April 2008, Pl. ÚS 2/08.

[16] See above notes 5, 6 and 7.

[17] See David Landau, 'Abusive Constitutionalism' (2013) 47 UCDavisLRev 189, 208-211; Mark Tushnet, 'Authoritarian Constitutionalism' (2015) 100 Cornell L. Rev. 391, 433-435; Gábor Halmai, 'From the "Rule of Law Revolution" to the Constitutional Counter-Revolution in Hungary' in Wolfgang Bedenek et al. (eds.), *European Yearbook of Human Rights* (2012), 367; Renata Uitz 'Can you tell when an illiberal democracy is in the making? An appeal to comparative constitutional scholarship from Hungary.' (2015) 13 ICON 279; Tomasz Koncewicz 'Of institutions, democracy, constitutional self-defence and the rule of law: The judgments of the Polish Constitutional Tribunal in Cases K 34/15, K 35/15 and beyond' (2016) 53 CMLR 1753; and David Kosař and Katarína Šipulová. 'The Strasbourg Court Meets Abusive Constitutionalism: Baka v. Hungary and the Rule of Law' (2018) 10 Hague Journal on the Rule of Law 83.

[18] Stanislav Balík et al., *Czech Politics: From the West to East and Back Again* (Barbara Budrich Publishers, 2018).

I. The Historical Context

The CCC came into being after the dissolution of Czechoslovakia in 1993. However, it was not the first constitutional court operating on the Czech territory. As early as in 1920, Czechoslovakia created the constitutional court, which operated, albeit for the most part just on the paper, until the World War II. The second Czechoslovak Constitutional Court was established in the wake of the Velvet Revolution and came to an end after the split of Czechoslovakia. Each of these two episodes, as well as the lengthy communist rule that annihilated constitutional adjudication, have left a mark, each in its own way, on the CCC that emerged in the newly independent Czechia.[19]

1. The Interwar Era (1920-1939): A Lost Opportunity

Czechoslovakia emerged from the ashes of World War I and gained independence in 1918. It adopted its first full-fledged constitution two years later. The 1920 Constitution included also a new institution, the Constitutional Court of Czechoslovakia (hereinafter only "Interwar Czechoslovak Constitutional Court" or "ICCC"),[20] and conferred upon it the power to annul the statutes[21] and temporal ordinances[22] which the ICCC had found to be unconstitutional. The ICCC followed a *Kelsenian* model of centralized judicial review of legislation, which means that it operated outside the system of ordinary courts. It consisted of seven Justices[23] who served a 10-year mandate.[24]

Czechoslovakia was thus the first country in the world[25] to incorporate in its Constitution provisions on the specialized constitutional court with the power to review statutes.[26] However, the ICCC eventually started operating later than its Austrian "younger brother" and had much less impact, primarily due to the different construction of the right to file an application.[27]

[19] The name "Czechia" is new, approved in 2016 by the Czech Cabinet as the official short name of the Czech Republic. We use the name Czechia to describe the Czech Republic (1993 – today) and the Czech part of Czechoslovakia (1918 – 1992) in order to avoid confusion as the term "Czech Republic" meant different things in the Czech modern history. In 1918-1968 "Czech Republic" did not officially exist [a more common term at that era was "Czech lands" (*České země*)], after federalization of Czechoslovakia the term "Czech Republic" referred to the Czech subunit in the federation (1969-1992), and only after the split of Czechoslovakia it became the official title of the independent Czech state.

[20] See Arts. II and III of the 1920 Constitution.

[21] Art. II of the 1920 Constitution.

[22] Art. 7(b) of Law No. 162/1920 Coll., on the Constitutional Court.

[23] The Supreme Court and the Supreme Administrative Court (sitting en banc) elected each two Justices, while the President of Czechoslovakia appointed the remaining three Justices, including the President of the ICCC, from the list of candidates nominated by the Chamber of Deputies, the Senate and the Government [Art. III(1) of the1920 Constitution in conjunction with Art. 1 of Law No. 162/1920 Coll., on the Constitutional Court].

[24] Art. 3 of Law No. 162/1920 Coll., on the Constitutional Court.

[25] Note that the Austrian Constitutional Court was established earlier (in 1919), but was vested with the power of constitutional review of statutes only by the 1920 Austrian Constitution, which was adopted half a year later than the 1920 Czechoslovak Constitution.

[26] See Kühn and Kysela (n 8) 188.

[27] See, mutatis mutandis, Theo Öhlinger, 'The Genesis of the Austrian Model of Constitutional Review of Legislation' (2003) 16 Ratio Legis 206.

However, the peculiar design of the right to file an application was not the only problem. The reasons why the ICCC had little impact on the Czechoslovak society,[28] in particular in contrast to the Austrian Constitutional Court operating in the same era,[29] are in fact three-fold: the peculiar institutional design of the ICCC, the interwar Czechoslovak politics and the lacking federal rationale.[30]

The key reason was the peculiar institutional design of the ICCC, and the limited standing in particular. Only five bodies could challenge a statute before the ICCC (the Chamber of Deputies, the Senate, the Supreme Court, the Supreme Administrative Court, and the Election Court)[31] and each of them had to act *en banc*. Therefore, parliamentary minority could not challenge the statute before the ICCC. Nor there was a concrete review of constitutionality. Chambers of the three apex courts did not have the power to submit a petition to the ICCC to review the applicable statute in a pending case. The courts could do so only *in abstracto* in the *en banc* session.[32] The incentives of the parliamentary majority to challenge the statute it had passed before was close to zero and that is why none of the chambers ever attempted to do so in the interwar era. The motivation of the apex courts to trigger the ICCC was stifled by the rivalry between the Supreme Court and the Supreme Administrative Court that preferred to solve their problems internally and had little incentive to create another strong judicial institution.[33] These two courts used their power to file a petition to the ICCC only at the end of the interwar era. Tellingly, they challenged the statutes that negatively affected "judicial perks", the law that intensified disciplining of judges[34] and the law that allowed reduction of judicial salaries.[35] Moreover, parliamentarians introduced a temporal limitation that weakened the ICCC – the statute could not be reviewed if it had been promulgated more than three years ago.[36] This peculiar combination of the narrow standing, temporal limitation, and the lack of individual constitutional complaint,[37] severely limited the scope of the ICCC's action.

The Czechoslovak interwar politics also did not work in the ICCC's favour. Major political parties perceived the new institution with suspicion and often hampered its functioning. After adopting the 1920 Constitution, it took more than a year to select Justices. Subsequently, politicians provided little

[28] Zděnek Kühn, 'The Constitutional Court of the Czech Republic' in András Jakab, Arthur Dyevre and Giulio Itzcovich, *Comparative Constitutional Reasoning* (CUP 2017), 202.

[29] On the latter, see Hans Kelsen, 'Judicial Review of Legislation: A Comparative Study of the Austrian and the American Constitution' (1942) 4 The Journal of Politics 183; and a special issue in Ratio Juris (2003, Vol. 16, No. 2).

[30] For a detailed study of the constitutional adjudication in Czechoslovakia in the First and the Second Czechoslovak Republics, see Jana Osterkamp, *Verfassungsgerichtsbarkeit in der Tschechoslowakei (1920–1939)* (Klostermann, Frankfurt am Main 2009); and Pedro Cruz Villalon, 'Dos Modos de Regulacion Del Control de Constitucionalidad: Checoslovaquia (1920-1938) y Espaňa (1931-1936)' (1982) 2 Revista Espaňola de Derecho Constitucional 115.

[31] Art. 9 of Law No. 162/1920 Coll., on the Constitutional Court. The sixth body, the parliament of Carpathian Rhutenia, has never come to being.

[32] See decision of the Supreme Administrative Court of Czechoslovakia, Boh. Adm. 1097/22, 1757/22.

[33] See Jana Osterkamp, 'Ústavní soudnictví v meziválečném Československu' 146 Právník 598, n57.

[34] Judgement of the ICCC of 28 June 1939, Úst. 264/39-27/14 (published as Governmental Regulation No. 187/1939 Coll.). This is the only statute struck down by the ICCC during its existence.

[35] This proceedings was still pending when the ICCC was de facto dismantled in 1939.

[36] Art. 12 of Law No. 162/1920 Coll., on the Constitutional Court.

[37] In contrast to Austria, the ICCC could not decide on individual complaints (which became a major part of the docket of the interwar Austrian Constitutional Court) and had only the power of abstract judicial review (see notes 16 and 17).

material support to the ICCC and vocally criticized the first judgment of the ICCC regarding the power of the Government to issue ordinances. Things got even worse. After the term of the first Justices, who had been appointed in 1921, expired in 1931, the legislature delayed appointing new Justices for seven years. Politicians knew that the ICCC could limit the use of delegated legislation, which they deemed necessary to address the financial crisis and the growing ethnic conflict, and thus they wanted to pick restrained justices, but they could not agree on the names.[38] As a result, the ICCC was dysfunctional between 1931 and 1938. It was eventually revived in May 1938, but the rejuvenated ICCC had a short life span. In March 1939 Hitler's army marched into the Czech lands and his regime suspended the ICCC few months later.

Finally, one more aspect might have weakened the role of the ICCC. Given the fact that Czechoslovakia was a unitary state in the interwar period,[39] there was no need to settle the disputes between the federation and its components, which was the driving force of judicial review in Austria[40] and considered by many scholars of that era as the main rationale for constitutional adjudication.[41] In contrast to Austria, the only aim of the ICCC was to guard the unity and consistence of the legal order through abstract review of legislation, which politicians considered as interference in their turf.

In sum, despite its broad powers the ICCC had little impact on the Czechoslovak society,[42] in particular in contrast to the Austrian Constitutional Court operating in the same era.[43] The ICCC did make some impact by reviewing ordinances[44] and its first judgment in this area stirred an interesting academic debate regarding the delegating power of the parliament, [45] but it did not manage to become an important public institution in the interwar era, primarily due to the limited access to the ICCC. The rest is history. When the ICCC finally started to show its teeth in the late 1930s, Hitler's occupation of Czechoslovakia and the Protectorate put an end to it.

2. Reichsprotektorat Böhmen und Mähren (1939-1945): *An Abrupt End*

In September 1938 Western powers (France, Britain and Italy) met with Hitler in Munich and eventually consented to annexation of Czechoslovakia's *Sudetenland* (Western Bohemia) by Hitler's Germany.[46] Few days later, German troops marched into *Sudetenland*, which became officially a part of the Third Reich. On the territory remaining after division of the Czechoslovakia by the Munich

[38] See Osterkamp (n 33) 601-616.

[39] It became a federation only after the crushing of the 1968 Prague Spring.

[40] Provincial Governments significantly contributed to the docket of the interwar Austrian Constitutional Court, see Öhlinger (n 27) 208.

[41] See Osterkamp (n 33) 592-593.

[42] Kühn (n 28) 202.

[43] On the latter, see Kelsen (n 29); and a special issue in Ratio Juris (2003, Vol. 16, No. 2).

[44] These ordinances were reviewed ex officio upon the petition of the Government (see Art. 21 of Law No. 162/1920 Coll., on the Constitutional Court).

[45] See Osterkamp (n 33) 594-595.

[46] See The Munich Agreement (30 September 1938), the settlement reached by Germany, Great Britain, France, and Italy that permitted German annexation of the Sudetenland in western Czechoslovakia.

Treaty of 1938, the so-called "Second Czechoslovak Republic" was created.[47] This geopolitical development took place at the period when the ICCC became particularly active.[48] The ICCC kept on going even shortly after the collapse Second Czechoslovak Republic on 15 March 1939, when Hitler's troops invaded the rest of the Czech provinces (Bohemia and Moravia),[49] and even issued its most important judgment.[50] However, it was ICCC's swan song. After invading the Czech provinces Adolf Hitler proclaimed Bohemia and Moravia a German protectorate (*Reichsprotektorat Böhmen und Mähren*, Protectorate of Bohemia and Moravia), created two parallel court systems,[51] and soon disbanded the ICCC. As a result, the ICCC did not exist between late 1939 and 1945.

3. The Post-War Desuetudo (1945-1989): Non-Justiciable Constitution

Even though according to the so-called "theory of legal continuity", advocated by the once-and-future President Edvard Beneš, Czechoslovakia's laws applied throughout the occupation to all of the dismembered country's citizens[52] and most pre-World-War-Two institutions continued operating after 1945, as if nothing had happened, this was not the case of the ICCC.

The ICCC was never reactivated. Between 1945 and 1948 it existed on paper only. After the 1948 communist coup d'état, the fate of ICCC was clear. Communists had no interest in having their laws and actions reviewed by an independent institution, let alone by the constitutional court. They dismantled all check and balances within the judicial branch[53] and their 1948 Constitution abolished the ICCC. Interestingly, the Constitutional Act on Czechoslovak Federation[54] adopted in the wake of the suppressed Prague Spring of 1968 envisaged creation of a federal constitutional court as well as constitutional courts of both republics.[55] However, none of these constitutional courts was eventually established and, in contrast to some other communist countries,[56] constitutional adjudication remained on paper until the end of the communist era in Czechoslovakia.

[47] The territory remaining after division of the Czechoslovakia by the Munich Treaty of 1938 is often referred to as a "rump Czechoslovakia". See e.g. Ingo Müller, *Hitler's Justice: The Courts of the Third Reich* (Harvard University Press, 1992), at 144.

[48] See subsection I.1 above.

[49] Hungarian army seized the eastern part of Czechoslovakia (Subcarpathian Ukraine) and Southern Slovakia, while Slovaks declared independence and created the Slovak State (*Slovenský Štát*), a *de iure* independent state under the patronage of Hitler's Germany.

[50] See n 34 above.

[51] With a significant degree of simplification, the German court system had jurisdiction over Germans as well as over serious crimes against the Third Reich and against German officials, whereas the Czech "autonomous" court system had jurisdiction over Czechs.

[52] For more details, see Benjamin Frommer, *National Cleansing: Retribution Against Nazi Collaborators in Postwar Czechoslovakia* (CUP, Cambridge 2005) 80.

[53] Zdeněk Kühn, *The Judiciary in Central and Eastern Europe. Mechanical Jurisprudence in Transformation?* (Martinus Nijhoff, Leiden 2011).

[54] Constitutional Act No. 143/1968 Coll., on Czechoslovak Federation.

[55] See Arts. 86-101 of Constitutional Act No. 143/1968 Coll., on Czechoslovak Federation.

[56] See e.g. Dimitrije Kulic,'The Constitutional Court of Yugoslavia in the Protection of Basic Human Rights' (1973) Osgoode Hall LJ 275-284.

3. The Federal Intermezzo (1989-1992): Setting the Stage

After the 1989 Velvet Revolution, the talks about establishing a constitutional court emerged soon. However, it took more than a year to adopt the constitutional law[57] that laid down foundations for the Constitutional Court of the Czech and Slovak Federal Republic (hereinafter the "Federal Czechoslovak Constitutional Court" or just "FCCC"). The FCCC started functioning in February 1992, but it operated only for 10 months, as the dissolution of Czechoslovakia in December 1992 brought an early end to its promising future.

Composition of the FCCC reflected the federal structure of Czechoslovakia. It consisted of 12 Justices[58] appointed by the President of Czechoslovakia upon the nomination of the Federal Assembly and the parliaments of both republics[59] for seven years.[60] There was a strict parity on the FCCC as 6 Justices had to be Slovaks and 6 Justices were recruited from Czech lawyers.[61] The FCCC decided either in the plenary session or in four-member chambers.[62]

In response to the totalitarian regime, politicians vested broad powers with the FCCC. The FCCC's pouvoir to conduct abstract review of legislation allowed it strike down both federal and republican legislation, if it contravened federal constitutional law or international human rights treaties.[63] The FCCC also decided on horizontal separation of powers disputes between federal organs, vertical separation of powers disputes between the federal and republican organs, as well as competence disputes between both republics.[64] Moreover, individual constitutional complaint was introduced,[65] which significantly widened standing and secured the access of individuals to the FCCC. In contrast to its interwar predecessor,[66] the FCCC was thus no longer dependent on petitions of privileged dignitaries. Finally, the FCCC had two other auxiliary powers – it decided on dissolution of political parties[67] and could also issue an advisory opinion that provided a binding interpretation of Czechoslovak Constitution.[68]

Despite its short life-span, the FCCC quickly emerged on the political scene as an important player and made clear that constitutional adjudication should be taken seriously. It received 1128 petitions and issued one advisory opinions and nine judgments,[69] including the seminal "lustration judgment"[70] that transplanted the principle of *Material Rechtstaat* into Czechoslovak legal culture.[71]

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[57] Constitutional Law No. 91/1991.

[58] Art 10(1) of Constitutional Law No. 91/1991.

[59] Each of these three legislative bodies nominated 4 candidates.

[60] Art 10(2) of Constitutional Law No. 91/1991.

[61] Art 10(2) of Constitutional Law No. 91/1991.

[62] Art 14(1) of Constitutional Law No. 91/1991.

[63] Art 3 of Constitutional Law No. 91/1991.

[64] Art 4 of Constitutional Law No. 91/1991.

[65] Art 6 of Constitutional Law No. 91/1991.

[66] See Part I.1.

[67] Art 7 of Constitutional Law No. 91/1991.

[68] Art 5 of Constitutional Law No. 91/1991.

[69] For a complete statistics, see https://www.usoud.cz/aktualne/dnes-uplynulo-25-let-od-zahajeni-cinnosti-ustavniho-soudu-csfr/

[70] Judgement of the FCCC of 26 November 1992, Pl. ÚS 1/92.

[71] This judgment upheld the major parts of the Lustration Law (that barred persons who collaborated with the communist regime to hold selected public positions in the post-Velvet Revolution democratic regime) against

Many interpretative techniques and constitutional principles developed by the FCCC were subsequently adopted by the Czech Constitutional Court and thus the FCCC's case law served as an important building block of Czech constitutionalism.

When the FCCC disappeared with the dissolution of Czechoslovakia in December 1992,[72] both successor states established their own constitutional courts in 1993. Yet the successors took different paths. In Czechia, the continuity with the FCCC was ensured by appointing the majority of FCCC's "Czech Justices" to the new Czech Constitutional Court,[73] whereas Slovak politicians created a brand new court without a single Justice from the federal era.

4. The Czech Constitutional Court (1993-now): The Rise to Power

The Czech Constitutional Court was established in 1993 after the short life of the Federal Czechoslovak Court had come to an end due to the dissolution of the Czech and Slovak Federal Republic.[74] The CCC followed the footsteps of its federal predecessor and retained most of its powers.[75] It commenced its work in July 1993 and rendered its first decision in December 1993.[76] In contrast to other constitutional courts in the region,[77] it started slowly and attracted little attention abroad. However, it increased its powers steadily and after 25 years of its existence it emerged as one of the strongest post-communist constitutional courts. The following section will explain how it managed to do so.

II. The Institutional Design of the Czech Constitutional Court

Although the provisions both on the CCC and on ordinary courts are included under the same heading of the Constitution,[78] the CCC is not a part of the system of ordinary courts.[79] Like its Czechoslovak predecessors, the CCC is based upon the "centralized" *Kelsenian* model of

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the challenges of the alleged group liability and retroactivity. For further details on this adjudication, see David Kosař, 'Lustration and Lapse of Time: Dealing with the Past in the Czech Republic' (2008) 4EuConst 460.

[72] For further details, see Eric Stein, *Czecho/Slovakia. Ethnic Conflict, Constitutional Fissure, Negotiated Breakup* (University of Michigan Press, Ann Arbor 1997); and Abby Innes, *Czechoslovakia. The Short Goodbye* (YUP, New Haven 2001).

[73] Four out of six FCCC's "Czech Justices" eventually became Justices of the newly created Czech Constitutional Court. See David Kosař and Ladislav Vyhnánek, 'Senát a výběr soudců Ústavního soudu' In Jan Kysela, *Dvacet let Senátu Parlamentu České republiky v souvislostech* (Leges, Praha 2016), .

[74] Vladimír Sládeček, 'The Protection of Human Rights in the Czech Republic' in Jiří Přibáň and James Young (eds.), *The Rule of Law in Central Europe: The Reconstruction of Legality, Constitutionalism and Civil Society in the Post-Communist Countries* (Ashgate, Aldershot 1999), 82-100, at 85-86.

[75] The only competence which the CCC lost, in comparison to its federal predecessor, is the power to issue advisory opinions.

[76] Judgement of the CCC of 21 December 1993, Pl. ÚS 19/93, *Lawlessness.*

[77] See Laszlo Solyom, *Constitutional Judiciary in a New Democracy: The Hungarian Constitutional Court* (University of Michigan Press, Ann Arbor 2000).

[78] Heading Four – Judicial Branch, Art. 81-96 of the Constitution.

[79] After establishment of the separate branch of administrative courts in 2003, the judicial power consists of (1) the courts of general jurisdiction (civil and criminal), (2) administrative courts and (3) the CCC. We will refer to (1) and (2) collectively as to "ordinary courts". For a good starting point for exploring the Czech legal system, see Michal Bobek, *Introduction to the Czech legal system and legal resources online*, website (last visited, March 17, 2018), available at http://www.nyulawglobal.org/globalex/czech_republic.htm.

constitutional review[80] and its major task[81] is the review of constitutionality, as opposed to review of legality exercised by ordinary courts. Therefore, the CCC does not operate as the highest appellate court, nor is it in most cases[82] entitled to a review of legality. But before we delve into a detailed account of the CCC's powers, we will focus on the CCC's institutional design, namely on its composition, profile of Justices and law clerks, the role of the Secretariat, and on the safeguards of CCC's independence.

1. Composition

The CCC consists of 15 Justices:[83] the President of the CCC, two Vice-Presidents of the CCC, and 12 "Associate Justices".[84] All of these 15 Justices must be appointed by the Czech President upon approval of the Senate.[85] Subsequently, out of these 15 Justices the President unilaterally[86] appoints the President of the CCC and the two Vice-Presidents of the CCC. The length of the term of CCC's Justices is ten years and is, by convention, renewable. Justices must meet the following requirements: the Czech citizenship, a clean criminal record, a law degree, at least 10 years of practice, and the minimum age limit of 40 years. Interestingly, in contrast to several other constitutional courts in the region, the Czech Constitution does not prescribe any maximum age limit. There is also no formal[87] quota on the CCC for any legal profession, such as judges of ordinary courts (the so-called "*Richter-Richter*") or law professors (the so-called "*Professor-Richter*").

For a full understanding of the composition of the CCC it is also important to stress in what formations the CCC adopts its rulings. The CCC acts either in the Plenary (*plénum*) or in the three-judge chambers (*senáty*). The Plenary comprises all Justices. There are four chambers, each of which consists of three "Associate Justices". The President and both Vice-Presidents are not permanent members of any chamber. Instead, they rotate among the chambers as judge rapporteurs,[88] albeit

[80] The constitutional framework of the functioning of the CCC is contained in Arts. 83-89 of the Constitution and detailed provisions on its operation are stipulated in Law on the Constitutional Court.

[81] Apart from specific procedures such as election disputes, impeachment of the President etc.

[82] For exceptions, see Part III.

[83] In Czech the same term "judge" (*soudce*) is used to refer to both judges of the ordinary courts and to judges of the CCC. However, in order to distinguish these "two types of judges" as well as the different background of CCC's judges (out of which only some were judges of ordinary courts prior to their appointment to the CCC) we refer to throughout this chapter.

[84] The term "Associate Justice" is not used in the Czech context, but we prefer this term to the rather despicable term "rank-and-file Justices".

[85] Article 84 of the Czech Constitution. However, there is an interesting inconsistency between the constitutional and the statutory regulation. While the Constitution unconditionally requires the Senate's approval (see Art. 84(2)), Law on the Constitutional Court (see Art. 6(2)) stipulates that the candidate proposed by the President automatically becomes a CCC Justice if the Senate does not vote on his nomination within 60 days of the proposal. This statutory provision was never applied, but it is – despite its anti-blocking rationale – considered unconstitutional by the doctrine. See Eliška Wagnerová et al., 'Komentář k § 6' in *Zákon o Ústavním soudu. Komentář* (ASPI, Praha 2007).

[86] This means that the Senate has no say in selecting the President and Vice-Presidents of the CCC. There is not even any constitutional convention (requiring e.g. gender, geographical, political or professional diversity) and the Czech President thus enjoys an unlimited discretion.

[87] There are some informal rules though, which we will discuss below in Part II.3.

[88] Hence, the CCC's President and the Vice-Presidents never sit as mere "voting members" of the three-Justice chambers; they are always judge-rapporteurs.

with a limited caseload.[89] To make things even more complex, the CCC approved a complex "rotation scheme" in 2016.[90] This means that from 2016 on the composition of all four CCC's chambers will be reshuffled every two years.[91]

After a quick glance at the composition of the CCC, it becomes clear that the CCC is unique in many aspects. The reason why the drafters of the Czech Constitution eventually opted for 15 Justices and the "American model" of their selection is unclear.[92] The pure "American model" (the President nominates all Justices, and then the Senate confirms all of them) is alien to a parliamentary system of democracy, and as such does not exist anywhere else in the European Union or even in the Council of Europe. One of the drafters of the 1993 Constitution[93] suggested that the eventual institutional setup of the CCC was approved behind closed doors at the very last moments of the constitution drafting and its rationale was to increase the powers of the then incumbent-president Václav Havel.[94] Since the early 1990s this selection model has become a "sticky" norm[95] and no serious proposal[96] to amend it has been submitted.[97]

2. Selection of Justices

The six key features affect the selection of Justices: (1) there is only one nominator (the Czech President); (2) there is only one confirmation body (the Senate); (3) there is no staggered system of appointment of Justices,[98] which means that virtually all Justices are appointed in a very short time frame;[99] (4) infinitely[100] renewable term is allowed; (5) minimum age requirement of 40 years; and (6) no maximum age requirement.

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[89] For further details, see *infra* note 332.

[90] See Resolution of the CCC's Plenary of 8 December 2015, No. Org. 60/15.

[91] Until 2015 the composition of all chambers was fixed, unless there was a change in the composition of the CCC as such.

[92] For the brief discussion of this issue, see Jan Filip, 'Komentář k čl. 84' in Lenka Bahýlová et al., *Ústava České republiky. Komentář*. (Linde, Praha 2010) 1037; or Vladimí Sládeček et al., *Ústava České republiky: komentář (2n ed)* (C.H. Beck, Praha 2016) 921-22.

[93] See Jindřiška Syllová, 'Komora minimálních funkcí, nebo komora „odlišného ohledu"?' in Jan Kysela, *Dvacet let Senátu Parlamentu České republiky v souvislostech* (Leges, Praha 2016) 60.

[94] Note that Václav Havel was the President of Czechoslovakia (1989-1992) and during the drafting of the Czech Constitution it was clear that he would become the first President of Czechia as well.

[95] On the sticky social norms in general, see Dan Kahan, 'Gentle Nudges vs. Hard Shoves: Solving the Sticky Norms Problem', (2000) 67 University of Chicago Law Review 607.

[96] This is so despite the heavy criticism of this model by legal scholars. See amongst others Jan Filip (n 92) 1042; Kosař and Vyhnánek (n 73) 191-195; or Michal Klíma, 'Zvažování rekonstrukce ústavního a politického systému' in Aleš Gerloch and Jan Kysela (eds), *20 let Ústavy České republiky: ohlédnutí zpět a pohled vpřed* (Aleš Čeněk, Plzeň 2013).

[97] There have been several proposals to amend Article 84 of the Czech Constitution, but all of them failed in the early stages. See the following prints (all available at www.psp.cz) of the Chamber of Deputies (2000 – print n. 541; 2001 – print n. 1134; 2013 – print n. 907; 2014 – print n. 233; 2015 – print n. 506).

[98] This is so despite the fact that the staggered system of selecting constitutional organs is well known in Czechia. The Senate itself is a prime example, as each two years a one third of Senators is elected (see Art. 16(2) of the Constitution.

[99] All Justices of "Havel's Court" were appointed between July 1993 and March 1994 and 12 out of them were appointed on the very same day (15 July 1993). Most Justices of "Klaus' Court" (11 of 15) were appointed

Most importantly, the fact that the Czech President is the only nominating organ means that – unless the Senate works as a real safeguard – he could de facto create his "own" Court. His position is further strengthened by the fact that there is no staggered system of appointing Justices and thus the virtually entire CCC is replaced every 10 years. As a result of this peculiar institutional design, every Czech president (Václav Havel, Václav Klaus and Miloš Zeman) appointed almost the entire CCC at the beginning of his first term.[101] Not surprisingly, the first CCC (1993-2002) is often referred to as "Havel's Court", the second CCC (2003-2012) as "Klaus' Court" and the third CCC (2013-now) as "Zeman's Court". However, despite these labels, none of the abovementioned three Presidents fully exploited his powers and each of them relied on his advisors who have so far always proposed a relatively balanced and diverse CCC. Moreover, the Senate has rejected the most controversial candidates, sometimes even repeatedly,[102] and thus effectively constrained the Czech President.

That said, it must be added that the dynamics of selecting the CCC's Justices have changed profoundly over time. The selection of Havel's Court was highly peculiar due to several factors. First, the Senate did not exist in 1993 at all.[103] Hence, politicians of that era had to improvise and, in the absence of the upper chamber, the consent was granted by the Chamber of Deputies.[104] Second, the first selection took place shortly after the Velvet Revolution, when dissidents still had an upper hand. While Havel consulted law schools, the Bar and other bodies in the process of creating his list of potential nominees, it was dissidents and Havel's close advisors who screened the candidates regarding their level of cooperation with the communist regime and helped him with shortlisting the candidates. The real vetting thus took place behind the closed doors well before the nomination was submitted to the Chamber of Deputies.[105] Third, Havel held the Federal Czechoslovak Constitutional Court in high esteem and thus nominated most of its "Czech Justices" to the newly created CCC.[106] Fourth, politicians had little experience with constitutional courts[107] and only few emigrants realized how influential this institution can eventually be. Hence, no one really checked substantive position of candidates on vexing constitutional issues, their preferred mode of interpretation and their degree of activism. The major criterion was simply the behaviour of candidates during the communist era, not their ideologies.[108] Finally, apart from one candidate[109] the media paid little attention to selection of Justices.

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between February 2003 and September 2004). Similarly, 13 out of 15 Justices of "Zeman's Court" were appointed within 13 months between May 2013 and June 2014.

[100] So far no Justice has served more than two terms, but there is no formal limit of the number of allowed terms.

[101] Note that while Václav Havel and Miloš Zeman appointed all 15 Justices, Václav Klaus (due to death of the Chief Justice of the "Havel's Court" in office and early resignations of two more judges, all three of which being replaced by Havel) "inherited" three Havel's appointees and himself appointed only 12 Justices.

[102] See below notes 123 and 126.

[103] It was established only in 1996.

[104] See Antonín Procházka, *V boji za ústavnost* (CDK, Brno 2008) 130-131.

[105] See Kosař and Vyhnánek (n 73).

[106] See note 73 above.

[107] The Federal Czechoslovak Constitutional Court operated only for ten months and was designed primarily as a guardian of federalism. The Interwar Czechoslovak Constitutional Court stopped operating in 1939 and it was largely dysfunctional anyways. See Part I. above for further details.

[108] Hence, it was less important whether the candidates were on the left or right side of the political spectrum or which method of constitutional interpretation they prefer.

Due to these factors, the appointment of Havel's Court went on relatively smoothly.[110] Only two candidates, Irena Pelikánová[111] and Ivan Průša,[112] were rejected by the Chamber of Deputies[113] and one more candidate, Pavel Mates, resigned during the appointment process after a critical press campaign pointing out his problematic writings[114] during the communist era.[115] Other than that only minor issues occurred.[116] In sum, Havel's Court was a staunch anti-communist court and in this sense it was political.[117] However, it was a different type of politicization than Klaus' and especially Zeman's Court, as the latter two Presidents selected primarily judges who were ideologically close to their own views. As a result, Havel's Court was ideologically more diverse as its Justices had little in common apart from their dissident or anti-communist background.

The formation of Klaus' Court ten years later turned out to be more difficult. The Senate had been established in the meantime and wanted to show that it must be taken seriously. Moreover, the composition of the Senate was relatively hostile to Klaus during the first two years of his mandate. At the same time, Havel's era was coming to an end and dissidents had lost their influence in Czech politics. Hence, the anti-communist card still played a role,[118] but in a much more relaxed way.[119] Klaus also had different pool of candidates in mind and had no intention to reappoint most of the incumbent Justices[120] as he was an outspoken critic of Havel's Court.[121] He scrapped Havel's list of potential nominees, soon dissolved his advisory panel of lawyers, and, in choosing his candidates, relied exclusively on his political advisors. Moreover, Klaus, Czech prime minister in 1992-1997, as well as other politicians in Prague started to realize that the Constitutional Court, albeit still a relatively low-key institution, had become an important political player. On the other hand, media attention still remained relatively low.[122]

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[109] This candidate was Vojtěch Cepl. During his "grilling" in the Chamber of Deputies one MP accused Cepl of collaborating with the State Security Police during the communist era. However, several dissidents rebuked this accusation and Cepl was eventually confirmed. For more details, see Kosař and Vyhnánek (n 73) 201; and Jana Ondřejková, 'Výběr soudců Ústavního soudu' (2016) 155 Právník 945, 949.

[110] For further details, see Kühn and Kysela (n 8) 191-192.

[111] She is nowadays one of the two Czech judges at the EU's General Court, which confirms the shifting priorities and the declining influence of the "anti-communist" criterion.

[112] The reasons behind the rejection of this candidate are not publicly known; see Ondřejková (n 109) 949-950.

[113] According to available sources, she was rejected primarily due to the activities of her husband (who taught Soviet law) at the Charles University Law School before the Velvet Revolution; see Ondřejková (n 109) 949.

[114] By problematic writings we mean papers that were deemed too supportive of the communist regime and its practices.

[115] See Kosař and Vyhnánek (n 73) 202; and Ondřejková (n 109) 949.

[116] For instance, Vojtěch Cepl was criticized for his alleged ties to the communist State Security Police, but he managed to clear his name and was eventually appointed; see Kosař and Vyhnánek (n 73) 202.

[117] Note that several members of Havel's Court were members of political parties prior to their appointment to the CCC, but that was an era of great civic engagement and membership of political parties was not so ideological as later on.

[118] See Kühn and Kysela (n 8) 202.

[119] See Kühn and Kysela (n 8) 204.

[120] Only two incumbent Justices, Vojen Güttler and Pavel Holländer, were reappointed immediately. One more Justice of Havel's Court, Ivana Janů, was reappointed later on, but her case is rather special as she served as a Judge of the International Criminal Tribunal for Former Yugoslavia between her two terms at the CCC.

[121] For further details, see Kühn and Kysela (n 8) 195.

[122] See Kühn and Kysela (n 8) 205-206.

This set of contingent circumstances changed the game. The Senate rejected as many as eight Klaus' candidates.[123] This prompted severe tensions between the Senate and President Klaus, who became so frustrated that he refused to propose further candidates. The first tension occurred at the beginning of Klaus' first term in 2003.[124] The Senate approved the first three candidates[125] proposed by Klaus, but in July 2003 it showed its teeth for the first time by rejecting Klaus' legal advisor, Aleš Pejchal, the current Czech judge of the ECtHR. But this was just a prologue to a much bigger clash. On 6 August 2003, the Senate rejected three out of four Klaus' nominees. After this bitter defeat, Klaus slowed down in making further nominations, which incapacitated the CCC as it no longer had 12 Justices necessary for deciding on constitutionality of laws. Klaus became so desperate that he even nominated Aleš Pejchal, already rejected by the Senate, again.[126] As a result of this tussle, it took more than two years before the CCC could sit at full composition again. The second tension took place towards the end of Klaus' second term in 2012, when the mandate of the last Havel's Justices ended. This time, after the Senate rejected two of Klaus' candidates, Klaus proclaimed that he would not nominate anyone else and would leave this duty to the new President. The main culprit was again the CCC, which was short of two Justices for a year.

One may thus say that selection of Justices during Klaus' presidency became more politicized, contested, prolonged and intertwined with periods of inaction. Both Klaus and Senators blamed each other for this state of affairs, but made little effort to find a reasonable modus operandi. Due to this bickering, when Miloš Zeman became the Czech President in 2013, he could nominate all 15 Justices and create his "own" Court entirely.

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

Three features dominated the transition from Klaus' Court to Zeman's Court. First, the selection of CCC's Justices became a politically very salient issue and the mass media covered every aspect of this process, including the bios of candidates and their performance at the Senate committees, and even speculated about the possible next candidates. Second, it is a public secret that Zeman outsourced shortlisting of most nominees to Pavel Rychetský,[127] the incumbent President of Klaus' Court who eventually was reappointed for the second term and thus serves also as the President of Zeman's Court. Some authors even refer to the third CCC as to Rychetský's Court rather than Zeman's Court.[128] Third, selection of Justices of Zeman's Court fully exposed the corrosive effect of the renewable term of CCC's Justices. Four Justices of Klaus' Court sought reappointment, but only two

[123] One of them, Aleš Pejchal (the current Czech judge at the European Court of Human Rights), was even rejected twice.

[124] For further details of the transition between Havel's Court and Klaus' Court in 2003-2005, see Kühn and Kysela (n 8) 194-205.

[125] But note that these three candidates included two reappointed judges from Havel's Court.

[126] Not surprisingly Klaus failed and the Senate rejected Pejchal again.

[127] Vojtěch Šimíček, 'Výběr kandidátů na soudce Ústavního soudu a jejich schvalování Senátem' in Jan Kysela, *Dvacet let Senátu Parlamentu České republiky v souvislostech* (Leges, Praha 2016) 230-231

[128] Šimíček (n 127) 230.

succeeded. The voting pattern in the Senate as well as public comments of senators made clear that Social Democratic senators, who had the majority in the Senate at that time, punished the other two candidates for their votes in the high-profile cases towards the end of their first term. Senators thus sent a clear signal to incumbent Justices that if they want to get reappointed they should cast their votes strategically and adjust their views according to the current majority of the Senate. This in turn has severe repercussions on the independence of these Justices as well as on the CCC as a whole.

In sum, while the law governing selection of CCC's Justices remained intact, the dynamics of this process as well as external circumstances have changed profoundly. Whereas during Havel's presidency the public as well as the media largely ignored nominations to the CCC, this started to change during Klaus' reign and eventually resulted in public spectacle during Zeman's term. Havel as well as Zeman faced a friendly chamber of parliament, while Klaus initially had to persuade a rather hostile Senate. Each president also picked from a different pool of candidates and relied on different whisperers. Havel consulted his choices broadly and listened to dissidents, Klaus relied exclusively on his friends and political advisors, and Zeman to a large extent outsourced the shortlisting to his friend, the CCC's President. The final selection of the candidate was shrouded in secrecy.[129] The procedure before the Senate has also evolved and eventually resulted in an established custom.[130] After the Senate received the nomination from the President, it delegates the matter to two Senate's committees: the constitutional committee and the committee for science, education, culture and human rights. Each committee then invites the candidate and poses her questions, mainly regarding the role of constitutional adjudication and CCC's case law, in an open session. Subsequently each committee casts a vote.[131] Few days later the final vote in the plenary hearing takes place. However, the core of the debate does not take place in the committees, where the questions are rather formal and simple, nor in the plenary session, where senators rarely ask questions. Senators form their opinion primarily at the meeting of the Senate's fractions with the candidate, which takes place behind closed doors.

3. Profile of Justices

There is no typical profile or ideal career path of a CCC Justice. Nor is there any minimal quorum of judges of ordinary courts on the CCC. We cannot even speak of any custom regarding the ratio of practitioners and law professors on the CCC's bench. The consensus on these issues is missing and no custom has emerged yet. This is partly due to the strong personalities of Czech presidents[132] and partly due to the changing pool of candidates, especially within legal academia.[133] For instance, while Havel picked several Justices from among dissidents born in the interwar Czechoslovakia, Klaus and Zeman had not such choice as most of these dissidents were already dead or too old. Klaus himself

[129] Sometimes Presidents invited the shortlisted candidates to a personal interview, sometimes they did not, but it is not known whether they made the decision by themselves or consulted also other people.

[130] For more details, see Kühn and Kysela (n 8) 199-205; and Kosař and Vyhnánek (n 73) 197-202.

[131] While this vote is not in any way binding on senators, it is a good predictor of the candidate's chances in the final plenary vote; Kosař and Vyhnánek (n 73) 199.

[132] Of course, the reason why the "strong personalities" of Czech presidents become salient in the first place are the peculiar rules for the selection of Justices.

[133] Note that purges among legal scholars after crushing the 1968 Prague Spring were ruthless and Czech legal academia remained debilitated (much more than in Poland or Hungary) until the Velvet Revolution. See Kühn and Kysela (n 8) 192; and Aviezer Tucker 'Reproducing Incompetence: The Constitution of Czech Higher Education' (2000) 9 EEurConstRev 94.

repeatedly lamented that "it is not easy today to find an expert above 40 with experience in top academia and court posts who has not been a member of the Communist Party of Czechoslovakia".[134] The available pool of candidates not compromised by their communist past has increased only gradually, but Zeman already could add a couple of apex court judges and law professors trained in the post-communist era to the mix on the CCC's bench.

Categorization of professional background of CCC's Justices is further complicated by the fact that many Justices worked in various legal professions during the career, either consecutively or even simultaneously.[135] However, certain trends have already emerged. Havel's position in 1993 was unique. Being an icon of the Velvet Revolution he could create a staunch anti-communist court, composed primarily of legal practitioners who either emigrated after the 1968 Prague Spring or were persecuted by the communist regime. He preferred candidates who had foreign experience and were not compromised during the communist period. This was particularly difficult among legal scholars as virtually every scholar who did not emigrate got entangled with the communist regime. Even Havel thus had to make some concessions and nominated several former regular members of the Communist Party. Havel's Court eventually consisted of 7 legal practitioners, 4 judges of lower ordinary courts and 4 law professors. Importantly, there was no active high-profile politician,[136] which was in line with Havel's distrust in party politics, and not a single Supreme Court judge, as virtually all of them were compromised by their communist past.[137]

When Klaus became the Czech President, he called this group of Havel's judges "nonstandard", "atypical" and lacking "standard biography" of a CCC Justice.[138] He wanted a CCC with more political experience and hence he nominated three high-profile active politicians, including the Vice-Prime Minister in Zeman's Government (1998-2002), Pavel Rychetský.[139] This stirred a debate in the Senate whether active high-profile politicians could become constitutional Justices,[140] but the majority of Senators eventually adopted the view that politicians should not be excluded from CCC's bench.[141] The second controversy arose when Klaus decided to reappoint two Justices from Havel's Court, but he won this debate as well.[142] Based on this success, Klaus reappointed one more Justice from Havel's Court.[143] As a result, Klaus de facto chose only 9 new Justices, as he "inherited" three Justices

[134] Kühn and Kysela (n 8) 203.

[135] For instance, some law professors work in law firms and some judges of ordinary courts teach part-time at law schools.

[136] Some Havel's candidates were regular deputies, but only for a short time. See Kühn and Kysela (n 8) 196.

[137] This has changed only in the early 2000s when Havel nominated two judges of the Supreme Court to the CCC.

[138] Kühn and Kysela (n 8) 195, note 52.

[139] It could have been a politically savvy move from Klaus since Rychetský was often mentioned as a presidential candidate in 2003 (see interview with Pavel Rychetský available at https://www.irozhlas.cz/zpravy-domov/pavel-rychetskymilos-zemanjiri-ovcacek_1801080600_ogo) and could run against Klaus in 2008. By nominating Rychetský to the position of the CCC's President Klaus made sure that this would not happen.

[140] See, in particular, stenographic record from the 3rd day of the 6th meeting of the Senate on 29 May 2003.

[141] Kühn and Kysela (n 8) 196-197.

[142] Kühn and Kysela (n 8) 197-198.

[143] See note 120 above.

appointed towards the end of Havel's presidency[144] and himself reappointed 3 more Justices from Havel's Court.[145] This new batch of Justices consisted of three high-profile politicians and a rather eclectic mix of candidates recommended by his friends and advisors. This led to a quite diverse Klaus' Court, which was composed of 4 legal practitioners, 4 judges of ordinary courts (3 out of them came from the Supreme Court), 3 law professors, 3 politicians and one diplomat (a permanent representative at the Council of Europe).

When Zeman became the Czech President in 2013, he could pick Justices from much wider pool than Klaus. First, the Supreme Administrative Court, sometimes referred to as "constitutional court light", was established in the meantime. Second, the number of apex court judges and law professors trained in the post-communist era increased and, at the same, the communist past of candidates became a less important factor. In some aspects, Zeman followed the footsteps of Klaus, as Zeman wanted to reappoint four incumbent Justices from Klaus' Court. Yet he was less successful with this move in the Senate than Klaus since only two of the incumbent Justices eventually made it to Zeman's Court.[146] However, Zeman, most likely being influenced by the advice of Pavel Rychetský,[147] reduced the number of high-profile politicians on the CCC's bench to one[148] and searched, similarly to Havel, primarily among legal professionals. Zeman's Court eventually comprises of 6 judges of ordinary courts (3 Supreme Administrative Court judges, 1 Supreme Court judge, and two lower court judges who are both former presidents of the Judicial Union), 6 law professors, 2 legal practitioners and 1 politician. In a sense, Zeman brought the composition of the CCC closer to the German model.[149] We will see whether this model persists and whether law professors together with judges of the apex courts will manage to keep the upper hand at the CCC, but many commentators think that it would be a natural development.[150]

However, in order to get a broader picture of the profile of CCC's Justices, it is important to go beyond professional background and look also at other criteria, namely age, gender, political affiliation and ideology, and the level of activism of Justices.[151] The three Czech Presidents, Havel, Klaus and Zeman, aimed for more or less the same age diversity[152] as each of them nominated Justices in their early forties as well as in their late sixties. For instance, Pavel Holländer became Justice of Havel's Court few months after he reached 40, while Vojen Güttler finished his second

[144] See note 101 above.

[145] See note 120 above.

[146] Pavel Rychetský (the President of the CCC) and Jan Musil. Other two former Justices (Výborný and Nykodým) were rejected by the Senate; see also supra the text after note 128.

[147] See also supra Part II.2.

[148] Note that the only former high-profile politician on Zeman's Court is Rychetský himself.

[149] Cite to the German chapter in this book.

[150] This is so because the CCC's work has become more specialized and professionalized (which prioritizes specialists in constitutional law), the caseload of the CCC has increased significantly (which reduced "transition" time of "non-judges" to adjust to a new role of a Justice), requirements regarding the knowledge of the Strasbourg case law and the EU law are becoming a barrier for politicians, and procedural rules have formalized (which prioritizes judges). See Kosař and Vyhnánek (n 73) 196; Šimíček (n 127) 233; and Ondřejková (n 109).

[151] Given the fact that Czechia is one of the most atheist countries in the world, the religious affiliation does not play much role. Similarly, as Czechia is a very homogenous state from the ethnic and language perspectives, ethnic background and language have not been an issue so far.

[152] Note that given the fact that the Czech Constitution does not set the maximum age for Justices, the age diversity on the CCC can vary quite a lot.

term in the age of 79. However, Havel, Klaus and Zeman have disagreed regarding the remaining three criteria (the level of activism, political affiliation/ideology, and gender balance).

Regarding the level of activism of Justices, Havel stands out as he openly chose staunchly anti-communist and anti-legalist candidates who could implement the paradigmatic shifts in law in the transitional era.[153] In contrast, both Klaus and Zeman opted for a more conservative and restrained set of Justices. Interestingly, regarding political affiliation and ideology it is Zeman who stands out. Both Havel and Klaus, each in his own way,[154] nominated candidates from the left as well as the right part of the political spectrum and thus created an ideologically very diverse CCC, while Zeman picked primarily Justices with the Social Democratic leaning, and by doing so, significantly reduced ideological diversity on the CCC's bench. Perhaps even more surprisingly, from the gender perspective, it is Klaus, a vocal critic of gender studies, who paid more attention to gender diversity on the CCC's bench than Havel and Zeman. While Havel's Court was a predominantly male court as there were no more than three female Justices at the same time, during Klaus's presidency the number of female Justices rose to five, only to drop to two on Zeman's Court. This alarming development, which is in stark contrast to the predominantly female ordinary judiciary[155] in Czechia and goes against the trend in established democracies, has attracted little attention so far.

4. Judicial Independence

The Czech Constitution erected strong safeguards of independence of the CCC. Most importantly, it makes criminal prosecution of Justices cumbersome. Justices cannot be subject to criminal prosecution without the consent of the Senate, and if the Senate does not approve criminal prosecution, a given Justice cannot be prosecuted until the end of her term.[156] Moreover, a Justice cannot be taken into custody unless she is caught during or immediately after committing the criminal offense, and even in such case it must be approved by the Senate within 24 hours.[157] While these constitutional provisions have been dormant as no one has ever tried to prosecute a CCC's Justice so far, they serve as an important barrier against potential intimidation of Justices through the threat of criminal prosecution.[158]

As impeachment does not exist in Czechia, the only way how to dismiss a Justice is through the disciplinary proceedings. However, the disciplining of Justices is vested with the CCC itself and additional safeguards were added in order to prevent the abuse of this mechanism. First, only the

[153] Kühn and Kysela (n 8) 192-194.

[154] In Havel's case this move was consistent with his distrust in party politics and his view that the personal character and the behavior of candidates during the communist regime (rather than their political views) mattered. Klaus' rationale is more difficult to decipher, but most probably there was a lot of strategic thinking at play (see also note 112 above).

[155] Kühn (n 53), at 54 and 169-170.

[156] Art. 86(1) of the Constitution.

[157] Art. 86(2) of the Constitution.

[158] See the attempt to prosecute the President of Polish Constitutional Tribunal, Andrzej Rzeplinski, referred to in 'Polish prosecutors open investigation of head of top court', Reuters, 18 August 2016, available at https://www.reuters.com/article/us-poland-politics-constitution/polish-prosecutors-open-investigation-of-head-of-top-court-idUSKCN10T1SZ.

CCC's President can initiate a disciplinary motion against a Justice[159] and he can do so only within one year from the commission of the disciplinary offence.[160] Second, this motion is submitted to the Plenary which decides whether the motion can go forward. Only if the Plenary finds the motion substantiated, it creates the five-member Disciplinary Chamber, composed entirely of CCC's Justices.[161] Third, the Disciplinary Chamber can only discontinue the proceedings, if the disciplinary offence was not proved, or reprimand a given Justice.[162] Fourth, the reprimanded Justice can appeal this decision of the Disciplinary Chamber to the Plenary, which decides on this appeal by a simple majority.[163] Finally, only the chairman of the Disciplinary Chamber may, if the gravity of the disciplinary offence requires it, submit a motion to the Plenary to dismiss a given Justice.[164] The Plenary must then approve the dismissal of Justice by a supermajority of 9 out of 15 Justices.[165] The same rules apply also if a Justice violated the prohibition to be a member of the political party[166] and if she is unable to take part in deliberation of the CCC for more than one year, typically due to serious illness.[167]

This cumbersome procedure creates many veto points and makes dismissal of CCC Justices very difficult. Until now, no one has ever tried to formally[168] dismiss a Justice. Hence, we do not know how this procedure would operate in practice nor what gravity is required to trigger the ultimate sanction of dismissal. So far the Disciplinary Chamber has decided only on relatively minor administrative offences such as speeding, where it found a reprimand sufficient.[169]

From the institutional perspective, few more factors contribute to the CCC's independence. Importantly, Justices cannot be members of a political party while on the bench.[170] This provision became crucial as several Justices have joined the CCC directly from their political functions. While their prior party affiliation is widely known, leaving the "party coat" at the CCC's front door increases perception of impartiality among the public. The CCC is also financially independent as it has, in contrast to the Supreme Court and the Supreme Administrative Court, its own chapter in the state budget and is not dependent on the whim of the Minister of Justice. Finally, the very fact that the CCC is seated in Brno, which is 200 kilometres far from Prague, also arguably increases CCC's independence as it created a healthy "geographical separation of powers" and reduced mingling between Justices and Prague politicians.

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[159] Art. 134(1) LCC. Disciplinary motion against the CCC's President can be triggered only by the Plenary upon the motion of at least three Justices (Art. 134(2) of LCC).

[160] Art. 134(3) LCC.

[161] Art. 139(2) LCC.

[162] Art. 141 LCC.

[163] Art. 142(3) LCC.

[164] Art. 144(1) LCC.

[165] Art. 144(2) LCC.

[166] Art. 143(b) LCC in conjunction with Art. 4(4) of LCC. See also note 103 below.

[167] Art. 143(c) LCC.

[168] Note that in July 2003 the lame-duck CCC's President Miloš Holeček publicly called for resignation of the CCC's Vice-President, Eliška Wagnerová, for her alleged failure to recuse herself in one of the CCC's cases. However, this call has never materialized into a formal disciplinary motion. See Kosař and Vyhnánek (n 73) 192.

[169] See David Kosař and Tereza Papoušková, *Kárná odpovědnost soudce v přerodu: Ponaučení z České republiky* (Wolters Kluwer, Praha 2017), 60-62.

[170] Art. 4(4) LCC.

Despite these numerous safeguards, if we conduct a "judicial stress test"[171] at least two problems arise. First, renewable term of CCC's Justices undermines their judicial independence as incumbent Justices may want to increase their chances to be reappointed by strategic manoeuvring towards the end of their term. Already at the very first turnover of the CCC in 2003, two Justices of Havel's Court who sought reappointment to Klaus' Court have adjusted their behaviour towards the end of their term,[172] but the corrosive effect was not yet visible, as both of them were eventually reappointed. The problems burst out fully in the next CCC's overhaul in 2013-2015 as far more incumbent Justices from Klaus' Court ran for reappointment to Zeman's Court and several of them failed. The voting in the Senate showed a clear pattern. It made clear that those incumbent Justices who voted on key judgments towards the end of their term along the lines with the majority of the Senate (at that time with Social Democrats) were eventually rewarded by reappointment. In contrast, those who voted against the views of Social Democratic senators were de facto "punished" for their decision-making and the Senate rejected them.[173] This sends a clear signal to the current Justices of Zeman's Court what they are supposed to do if they want to have their term renewed in the early 2020s. No doubt, some Justices will find it difficult to resist this siren call.[174]

Given the recent experience with attacks on constitutional courts and their justices in Hungary and Poland, we have identified one more dormant problem. Despite the fact that the disciplining of CCC's Justices is heavy-handed and complicated, there is one neuralgic point in the disciplining proceedings – the creation of the Disciplinary Chamber. As mentioned above, the Plenary chooses five Justices to sit on the Disciplinary Chamber. The problem is that the Disciplinary Chamber is created ad hoc for each disciplinary offence and there are no rules governing this procedure, which may in turn allow tinkering with the composition of the Disciplinary Chamber in order to reach the "desired" decision of the Disciplinary Chamber. Until now, this has not been an issue in Czechia, but the ad hoc creation of disciplinary chambers is prone to abuse and should be replaced by a permanent Disciplinary Chamber created pro future, whose composition will be known ex ante.

5. Law Clerks

Law clerks (*asistenti*) have played a vital, if unappreciated, role in the CCC's decision-making. The initial idea of the legislature was to grant each Justice one law clerk,[175] who would take administrative burden unrelated to substantive decision-making off Justices' shoulders.[176] Yet, the reality is different. First, due to the growing case load, the number of law clerks per Justice increased gradually and each Justice has three law clerks right now. Moreover, law clerks de facto prepare drafts of most CCC's judgments and decisions and the real administrative burden has been "outsourced" to secretaries of the cabinets.[177] This is not to say that law clerks are CCC's "ghost-writers". It is just to stress that their role is far more important than what the initial conception of law clerks adopted by the Czech legislature in 1993 envisaged. In a sense, the role of Czech law clerk

[171] http://verfassungsblog.de/a-stress-test-for-europes-judiciaries/

[172] See Tomáš Němeček, 'Klaus vybírá do Brna' *Respekt*, n. 22/2003; and Tomáš Němeček, 'Sbohem, ctihodnosti, vítejte' *Respekt,* n. 30/2003.

[173] For further details, see Kosař and Vyhnánek (n 73) 193-195.

[174] Even one of the current CCC's Justice, Vojtěch Šimíček, admits that; see Šimíček (n 127) 231-233.

[175] According to Art. 8(1) LCC, each Justice is entitled to "at least one personal law clerk".

[176] See explanatory memorandum to Art. 8 LCC from 14 April 1993.

[177] See Eliška Wagnerová et al., 'Komentář k § 8' in *Zákon o Ústavním soudu. Komentář* (ASPI, Praha 2007)

is much closer to that of a law clerk at the Supreme Court of the United States or a référendaire at the CJEU. Both of them are "personal" law clerks attached to the "cabinet" of a given Justice and work exclusively with her, not the court as a whole.[178] Both of them also prepare the first draft of the decision for her Justice, who then modifies it as she pleases.

There are de facto three pools from which CCC law clerks are recruited:[179] (1) law school graduates; (2) senior lawyers; and (3) law professors. The first group resembles the U.S. law clerk model. The second group comprises senior lawyers who want to get acquainted with constitutional adjudication and the CCC's functioning before they enter legal practice or before they become judges at ordinary courts.[180] Members of the third group typically work only part-time and they operate rather as advisors to Justices on difficult cases.[181] The fact that part-time clerkship is allowed and even favoured[182] allows each Justice to build her "cabinet" according to her expertise and needs. Justices have in fact three full time law clerk positions at their disposal and it is up to them how many law clerks they hire.[183] Some Justices prefer three law clerks all of whom work full time. Other Justices hire two full time law clerks and then they split the third law clerk position among law professors who complement Justice's language skills or expertise.[184] Few Justices go even further and intentionally hire former members of the ECtHR's Registry,[185] which gives them a clear competitive edge regarding the knowledge of the Strasbourg case law.[186] More recently, some Justices started looking for law clerks with the EU law expertise, but it is still rare[187] and to our knowledge no CJEU référendaire has ever joined the CCC.

In sum, law clerks operate outside the limelight, but they form a backbone of the CCC as they draft a majority of CCC's rulings. While Czech media pay little attention to law clerks, their names are well-known in the legal community. All law clerks, the current as well as the past ones, are named on the CCC's website. What is more, the clerkship is personalized in the sense that, similarly to U.S., it matters whom you clerked for.[188] The importance of clerkship will arguably even increase, as it is

[178] On the CCC's "advisors" (*poradci*) who work for the CCC as a whole, see below note 190.

[179] There is no legal rule governing how many law clerks should come from each pool. LCC stipulates only generic requirements (a university degree in law and a clean criminal record) and it is up to each Justice to create her own team and select her own law clerks.

[180] In contrast to Germany, Czech judges of ordinary courts cannot be temporarily assigned to the CCC.

[181] By clerking at the CCC, these law professors may also increase their chances to become themselves Justices in future as they may claim that they have hands-on experience with the CCC's functioning and do not need any transition period if they are eventually appointed.

[182] This is in contrast to the other two apex courts, the Supreme Court and the Supreme Administrative Court, where part-time clerkship is rare and discouraged.

[183] However, they rarely have more than five law clerks as it becomes logistically difficult to stay in charge of a larger "cabinet".

[184] Typically, Justice with a civil law background hires a professor of criminal law and vice versa.

[185] For instance, Associate Justice Kateřina Šimáčková has had at least one law clerk who previously worked at the ECtHR's Registry in her team since her appointment in 2013.

[186] For further details regarding the role of law clerks in implementing the Strasbourg case law, see David Kosař and Jan Petrov, 'The Architecture of the Strasbourg System of Human Rights: The Crucial Role of the Domestic Level and the Constitutional Courts in Particular' (2017) 77 ZAÖRV 585, 613-614.

[187] There is a general understanding at the CCC that too few cases have a significant EU element and, moreover, these cases usually end up before the Plenary.

[188] This information is explicitly mentioned on the CCC's website.

increasingly becoming an asset in selection of new CCC's Justices.[189] Apart from personal law clerks assigned to individual Justices, the CCC also occasionally hires "advisors" (*poradce*) who are attached to the CCC as a whole and work primarily for the CCC's President.[190]

6. The Secretariat

The CCC's Secretariat is even less known to the public than law clerks. Yet it has played an increasingly important role in the CCC's functioning. The Secretariat employs 82 persons[191] and is headed by the Secretary General. The Secretary General is an important figure at the CCC and, taken with a pinch of salt, he has become the "sixteenth Justice". He regularly attends and speaks at the plenary sessions, including deliberation of Justices, presents memos prepared by the Analytical Department to Justices, handles international visits to the CCC, and often speaks on behalf of the CCC to the media. The fact that the last two Secretary Generals served as long-term law clerks to the CCC's President and Vice-President prior to their appointment further enhance their informal role as both of them have had impeccable knowledge of the CCC's case law and its internal functioning.

The Secretariat consists of two sections: the administrative section and the judicial section. The administrative section takes care about daily operation of the CCC, which does not affect CCC's decision-making.[192] The role of the judicial section is far more important as it provides research support to the CCC as well as for individual Justices, monitors the Strasbourg case law and important case law of other European constitutional courts, developed and runs the electronic database of the CCC's case law (the so-called "NALUS"),[193] is responsible for publishing the print "Collection of Judgments and Decisions of the Constitutional Court",[194] prepares conferences and handles international visits at the CCC, assigns cases to Justices according to the work schedule, and also contributes to forming CCC's public image via social media such as Facebook and Twitter.

Importantly, the judicial section includes the "Analytical Department" (*analytický odbor*)[195] that focuses primarily[196] on the analysis of international law, the ECtHR's case law, European Union law and comparative constitutional law. Apart from its major analytical tasks, the Analytical Department

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[189] As of 15 June 2018, four out of fifteen Justices are former law clerks.

[190] The role of advisors was more important in the 1990s and the early 2000s when they provided the CCC with advice on the EU law and comparative law matters. Once the CCC established its own "analytical department" (see *below*), it has handled these issues "in-house" and the role of advisors has decreased significantly. Right now, the CCC has 3 part-time advisors.

[191] Approximately two thirds out of these 82 persons are lawyers who work primarily in the judicial section of the Secretariat. They take care of the NALUS database, work in the analytical department, handle external relations and international affairs of the CCC and provide information upon request pursuant to the Information Act. Some lawyers also work in the administrative section of the Secretariat, in particular in human resources unit. The remaining "non-lawyer" members of the Secretariat include IT specialist, engineers, investment and human resources specialists, drivers, cleaners and technical support.

[192] It provides, among other things, IT services, advises on investment and HR issues, and solves technical issues.

[193] Available at http://nalus.usoud.cz (Czech only).

[194] On the publication of CCC's case law, see below in Part V.3.

[195] The other two departments are the "department of external relations and protocol" and the "department of judicial administration".

[196] Apart from its major analytical tasks, the Analytical Department also runs the CCC's library and is responsible for publishing the official Collection of Judgements and Decisions of the Constitutional Court.

also runs the library of the Czech Constitutional Court and is responsible for publishing the official Collection of Judgments and Decisions of the Constitutional Court. It was established in 2006 and employs several analysts,[197] who are purposefully selected from different backgrounds[198] to ensure language diversity.[199] The Analytical Department plays a particularly important role in "translating" the Strasbourg case law into the Czech constitutional context: it alerts Justices when a new Strasbourg judgment against Czechia is issued, provides Justices with monthly summaries of the new Strasbourg judgments against other countries, and, at the request of an individual Justice, conducts individualised research on the Strasbourg jurisprudence or comparative analysis tailored to a particular case.[200] By doing so, the Analytical Department has significantly raised awareness of the Strasbourg case law among CCC's Justices.[201]

III. The Powers of the Czech Constitutional Court

Drafters of the Czech Constitution vested broad powers with the CCC. It is generally assumed that "when drafting the provisions concerning the Constitutional Court in 1992, [they] were also significantly inspired by the German Basic Law and constitutional system".[202] With a certain degree of simplification, it is possible to state that the jurisdiction of the CCC mirrors the jurisdiction of the German Federal Constitutional Court. The CCC has almost all powers the constitutional court can think of. It decides on (1) abstract constitutional review; (2) concrete constitutional review, (3) individual constitutional complaints, (4) horizontal as well as vertical separation of powers disputes, and (5) conformity of international treaties with the Czech constitutional order before their ratification.[203]

In addition, the CCC has various ancillary powers regarding electoral disputes, dissolution of political parties, removal of the President, and implementation of decisions of international tribunals. The CCC has also been very creative in searching for its "implied powers". In this vein, it embraced the

[197] As of 31 December 2017, the Analytical Department consisted of the head of the department, six analysts, three librarians, two people working on the official Collection of Judgements, one administrative assistant and one assistant responsible for anonymising CCC's rulings.

[198] The members of the Analytical Department include academics, former members of the ECtHR's Registry, former law clerks to CCC's Justices, former law clerks at top ordinary courts, as well as lawyers who practised law in Czechia.

[199] This means that English, French, German and Spanish must be covered all the time. However, members of the Analytical Department often speak several other languages.

[200] For further details, see Kosař and Petrov (n 186) 611-612.

[201] Note that many CCC's Justices have not been taught human rights law during their studies in communist Czechoslovakia and, what is more, do not speak foreign languages fluently. On the repercussions of this phenomenon in Central and Eastern Europe, see Jiří Malenovský, 'L'indépendance des juges internationaux' (2011) 349 Recueil des Cours de l'Académie de Droit International 1, 187 et seq.; and David Kosař, 'Selecting Strasbourg Judges: A Critique' in Michal Bobek (ed), *Selecting Europe's Judges A Critical Review of the Appointment Procedures to the European Courts* (OUP, Oxford 2015) 120 et seq., 143 et seq.

[202] Jiří Přibáň, 'Judicial Power vs. Democratic Representation: The Culture of Constitutionalism and Human Rights in the Czech Legal System' in Wojciech Sadurski (ed.), *Constitutional Justice, East and West: Democratic Legitimacy and Constitutional Courts in Post-Communist Europe in a Comparative Perspective* (Kluwer Law International, The Hague 2002), 374-382, at 379.

[203] See Art. 87 of the Czech Constitution.

doctrine of unconstitutional constitutional amendment[204] and suggested that it might review even amnesties. As a result, there are very few acts, if any, that escape the review by the CCC.[205] The only competence which the CCC lost, in comparison to its federal predecessor,[206] is the power to issue advisory opinions.

1. Abstract Review

In abstract review, the CCC reviews the compatibility of an Act of Parliament (or other legal norms),[207] or individual provisions thereof, with the Czech constitutional order.[208] In many aspects, abstract review is similar to concrete review of constitutionality.[209] However, these two procedures differ in two major aspects. The first distinction lies in the fact that in contrast to the concrete constitutional review, the abstract review is not incidental to a specific dispute before ordinary courts. In other words, using the terminology of the common law systems, abstract review does not require a "case and controversy". Second, standing in abstract review is limited to the "privileged dignitaries", such as the President, group of MPs or senators or the Government.[210]

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[204] For further details on this doctrine, see note 286 below.

[205] The Czech constitutional law also does not know any form of *actio popularis* though.

[206] On the Federal Constitutional Court of Czechoslovakia, see Part I.3 above.

[207] The most important "sub-statutory" acts that can be reviewed by the CCC include *governmental orders* (Art. 78 of the Czech Constitution), *regulations* issued by ministries and other administrative offices (Art. 79 para. 3 of the Czech Constitution) and *generally binding ordinances* issued by territorial self-government units (Art. 104 para. 3 of the Czech Constitution).

[208] Which, in addition to the Constitution, includes also the Charter of Fundamental Rights and Basic Freedoms, several other constitutional acts stipulated by Art. 112 of the Czech Constitution, and international human rights treaties (see Judgement of the CCC of 25 June 2002, Pl. ÚS 36/01 *Euro-Amendment*); see also Part III.3 below.

[209] See Part III.2.

[210] More concretely, an Act of Parliament can be reviewed based on petition by (a) the President; (b) a group of at least 41 Deputies or a group of at least 17 Senators; (c) a chamber of the CCC in connection with deciding an individual constitutional complaint; (d) the government, under the conditions stated in Article 118 of the LCC; or (e) anyone who submits an individual constitutional complaint under the conditions stated in Article 74 of the LCC or who submits a petition for rehearing under the conditions stated in Article 119 para. 4 of the LCC (see Article 64 para. 1 of the LCC). Only the cases under letters a), b) and d) can be considered "abstract review". The standing in cases concerning sub-statutory acts is granted to a wider circle of petitioners (see Article 64 para. 2 of the LCC), namely (a) the government; (b) a group of at least 25 Deputies or a group of at least 10 Senators; (c) a chamber of the CCC in connection with deciding an individual constitutional complaint; (d) anyone who submits an individual constitutional complaint under the conditions stated in Article 74 of the LCC or who submits a petition for rehearing under the conditions stated in Article 119 para. 4 of the LCC; (e) the representative body of a region; (f) the Public Protector of Rights (Ombudsman); (g) the Interior Minister, in cases concerning petitions proposing the annulment of a generally binding municipal ordinances, of regional ordinances, or ordinances of the capital city of Prague, under the conditions laid down in the acts governing territorial self-government; (h) the competent ministry or other central administrative office, in cases concerning petitions proposing the annulment of orders of a region or of the capital city of Prague, under the conditions laid down in the acts governing territorial self-government); (i) the director of a regional office, in cases concerning petitions proposing the annulment of municipal orders, under the conditions laid down in the acts governing territorial self-government); (j) representative body of a municipality, in cases concerning petitions proposing the annulment of a legal enactment of a region within the territory of which the

Practically speaking, the members of the Parliament (MPs and senators) initiate a vast majority of abstract review proceedings. As of 31 December 2017, the parliamentarians have submitted 187 such petitions,[211] while the Presidents have done so only in 14 cases and the Government has never used this possibility.[212] Within this context, it is not surprising, that abstract review of legislation often (though not nearly always) follows a heated political battle in the Parliament, after which the minority transfers the battleground to the CCC.[213] Regarding sub-statutory acts, the most common petitioner is the Ministry of Interior that oversees the territorial self-governmental units and can thus also challenge their generally binding ordinances before the CCC. So far, it has submitted 86 such petitions.

2. Concrete Review

The concrete review of constitutionality requires a cooperation between the CCC and an ordinary court. More specifically, any court that reaches the conclusion that a legal norm, upon which its decision depends, is not compatible with the constitutional order, must discontinue the proceedings and certify the question of compatibility of the law with the constitutional order to the CCC.[214] As Sadurski stated, the CCC "considers such a 'concrete' case in an 'abstract' fashion".[215] In other words, the CCC passes only the judgment on the validity of the law and remits the case back to the ordinary court. The ordinary court then renders the concrete ruling on the matter in light of the conclusions of the CCC.

However, there is an ongoing discussion regarding two issues. First, Justices themselves disagree whether they can take into account individual aspects of the case before the ordinary court when assessing the validity of the law in concrete review proceedings.[216] Second, the CCC in the concrete review at times[217] issues the so-called "interpretative verdict" [218], which pronounces what interpretation of the given law is constitutionally conforming, even though there is no explicit legal basis to include such interpretations in the operative part of the judgement.[219] Such "interpretative verdicts" have legal effect beyond the individual case and may de facto change interpretation of the

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municipality lies. In this case, only petitioners under letters (c) and (d) do not initiate an abstract, but rather a concrete review of legislation.

[211] Concrete review of Acts of Parliament is more frequent. For example, the ordinary courts have challenged a piece of legislation in 284 cases so far (on average, more than 10 legislative acts per year).

[212] It has to be stressed, though, that the Government can challenge an Act of Parliament only under very specific circumstances, namely only after an international court finds that an obligation resulting for Czechia from an international treaty has been infringed (as a result of application of the act in question).

[213] For a detailed analysis of this political context, see Lubomír Kopeček and Jan Petrov, 'From Parliament to Courtroom: Judicial Review of Legislation as a Political Tool in the Czech Republic' (2016) 30 East European Politics and Societies and Cultures 120.

[214] See Art 95(2) of the Czech Constitution.

[215] Wojciech Sadurski, *Rights before Courts: A Study of Constitutional Courts in Postcommunist States of Central and Eastern Europe* (Springer, Dordrecht 2005) 65.

[216] See e.g. the diverging views of the majority and the dissenting opinion of Justice Wagnerova in Judgement the CCC of 11 February 2004, Pl. ÚS 31/03, *Duty to Provide Information*.

[217] As of 1 June 2018, the CCC has issued 22 such verdicts in the concrete review procedure.

[218] See Ladislav Vyhnánek, 'Judikatura v ústavním právu' in Michal. Bobek and Zdeněk Kühn (eds)*, Judikatura a právní argumentace* (Auditorium, Praha 2013) 373.

[219] The practice of interpretative verdcits has been repeatedly criticized by some dissenting Justices – precisely for its lack of legal basis. See *inter alia* Judgement of the CCC 7 October 2014, Pl. ÚS 39/13 or Judgement of the CCC of 13 May 2014, Pl. ÚS 35/11.

challenged law. The CCC uses those verdicts to emphasize its interpretation and impose it on the ordinary courts, even though – as the doctrine goes – interpretation in the *ratio decidendi* should have the same normative effects.[220]

3. Individual Constitutional Complaints

In contrast to abstract and concrete constitutional review discussed above, an individual constitutional complaint can be lodged by any person[221] asserting[222] that her fundamental rights and basic freedoms guaranteed in the constitutional order have been violated.[223] Such person can challenge any decision of public authorities, including court decisions and measures taken by administrative agencies, as well as their omissions to act or any other interference with fundamental rights.[224] Individual complaints amount to more than 98 % of the CCC's docket, but only a fraction of those cases (less than 7 %) are decided by a judgment or have any substantial impact.[225]

Importantly, fundamental rights and basic freedoms guaranteed in the constitutional order complainants include both the rights protected by the Czech Charter of Fundamental Rights and Freedoms (that has constitutional status[226]) and the rights protected by "international human rights treaties", which are also (controversially) considered a part of the Czech constitutional order after the CCC's *Euro-Amendment Judgment*.[227] This means that complainants may rely on the Czech Charter or international human rights treaty, or both.

The individual complaint is generally designed as the last resort recourse against fundamental rights violations and the CCC stresses the importance of the subsidiarity principle: all public authorities and especially the courts are entrusted with fundamental rights protection and the CCC is therefore not the only one, but the last one to hear a case concerning fundamental rights violations. The subsidiarity principle closely tied to the requirement of "exhaustion of other remedies"[228] which stipulates that the individual complaint can only be lodged after all other legal remedies have been exhausted.

The question which remedies *exactly* must be exhausted has consistently been the most problematic procedural issue of the CCC and just the description of the development would amount to an independent article. Generally speaking, however, several trends could have been observed in the CCC's case law. First, a remedy needs to be "available" to the complainant. Only such remedies that can be used directly by the complainant have to be exhausted. For example the "Violation of Law

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[220] Vyhnánek (n 218) 373.

[221] Art. 72 LCC clarifies that this can mean both legal and natural persons. The CCC's case law acknowledges that even the state itself may file an individual constitutional complaint, though only in cases where it acts as a corporation (typically private law cases) and not from the position of public authority. See Opinion of the CCC of 9 November, Pl. ÚS-st. 9/99.

[222] Such assertion should be substantiated, but there is no "sifting" registry (in contrast to the German Federal Constitutional Court, see chapter on German Constitutional Court) that would apply the uniform threshold. The approach of Justices to the threshold issue varies significantly.

[223] Art. 87(1)(d) of the Czech Constitution.

[224] Art. 87(1)(d) of the Czech Constitution in conjunction with Art. 72(1)(a) LCC.

[225] For further details, see Part. V.1,2.

[226] See Art 3 of the Czech Constitution.

[227] Judgement of the CCC of 25 June 2002, Pl. ÚS 36/01 *Euro-Amendment*.

[228] See Art. 75 of the LCC.

Complaint" can be filed even in favour of the defendant in criminal proceedings by the Minister of Justice. Because the Minister has a discretion as to using this power, the Violation of Law Complaint does not need to be exhausted prior to filing an individual constitutional complaint. A very specific problem in this regard concerns of some extraordinary remedies that can be dismissed based on the discretion of the public authority. The "extraordinary appeal" to the Supreme Court is a perfect example. After some ECtHR judgments, the CCC has moved towards a system in which it demands that even such remedies have to be exhausted, but the delicate relationship between the individual constitutional complaint and the extraordinary remedy still remains a problematic one. The second important trend in the CCC's case law is that it generally does not assess (unlike the ECtHR) the practical effectiveness of the remedy in question; it demands that even practically ineffective but theoretically available remedies are exhausted.

That said, the boundary between the abstract constitutional review on the one hand, and individual constitutional complaints on the other is partly diminished by three factors: (1) an individual complainant may submit, together with her individual complaint, a petition proposing the annulment of a legal norm if she alleges the norm, applicable to her case, to be in conflict with the constitutional order;[229] (2) the CCC's chamber that hears an individual complaint may itself *proprio moto* discontinue the proceedings before the chamber and certify the question of compatibility with the constitutional order to the Plenary;[230] and (3) if the "significance of the complaint extends substantially beyond the personal interests of the complainant", she is not obliged to exhaust all available remedies before the ordinary courts and thus she has as fast access to the CCC as the "privileged dignitaries".[231]

4. Separation of Powers Disputes

Horizontal separation of powers disputes are relatively rare in the CCC' case law, but they touch upon the most vexing issues of the part of the Czech Constitution dealing with the framework of the government and often have profound political consequences. That is why some commentators referred to these disputes as to "jolly-jokers" of Czech constitutional adjudication.[232]

The CCC decides on both intra-branch[233] and inter-branch[234] competence conflicts. It conceives its power to decide on the competence disputes[235] broadly so as to cover not only (1) the disputes about the competence to issue the decision (classical competence disputes), but also (2) the disputes to take other measures, and (3) the so-called "joint competence" disputes.[236] The classical competence conflicts include both positive[237] and negative[238] competence conflicts to render the decision. The CCC

[229] Art. 74 LCC.

[230] Art. 78(2) LCC. This is the second limb of the concrete review of constitutionality.

[231] Art. 75(2)(a) LCC. This provision is however very rarely used and even if it is eventually applied, the incidental nature of the proceedings is strictly observed (i. e. there is no de facto *actio popularis*).

[232] Jan Grinc, 'Rozhodování sporů o rozsah kompetencí jako žolík čl. 87 Ústavy' 23 Jurisprudence 5, 15.

[233] See Judgement of the CCC of 20 June 2001, Pl. ÚS 14/01. See also Part VI.2. and the text surrounding note 403.

[234] See e.g. Judgement of the CCC of 28 June 2005, Pl. ÚS 24/04, *Elbe Weirs*.

[235] Art. 87(1)(k) of the Czech Constitution.

[236] For further details, see Jan Filip, Pavel Holländer and Vojtěch Šimíček, *Zákon o Ústavním soudu: Komentář* (C. H. Beck, 2nd edition, 2007), 765ff; and Grinc (n 232).

[237] See e.g. Judgement of the CCC of 20 June 2001, Pl. ÚS 14/01.

also held, building on the German doctrine, that competence conflict can be initiated also by the part of the constitutional organ (*Teilorgan*),[239] which significantly broadened the standing in this type of proceedings before the CCC. The disputes to take other measures vary from territorial disputes between municipalities[240] to negative competence conflicts regarding the provision of the first aid.[241]

The third category, "joint competence" disputes, is the most controversial category. Here the CCC creatively interpreted its powers to decide the competence conflict between the Czech President and the Government regarding appointment of the board members of the Czech National Bank,[242] and between the Czech President and the Chief Justice of the Supreme Court.[243] In the former case the CCC held that the President may act unilaterally and appoint all board members of the Czech National Bank without Prime Minister's countersignature. In the latter series of cases it forced the respective constitutional organs (the President, the Minister of Justice, and the Chief Justice of the Supreme Court) to constructive cooperation.

In other words, the CCC interprets its competence to decide horizontal separation of powers disputes much more broadly than what is typical for standard competence disputes between public organs in administrative law. [244] It stipulated only two limits in this area. First, the CCC is not willing to decide on abstract questions pro futuro and always requires a real and present conflict.[245] Second, the CCC requires the affected organs to act without undue delay in order to avoid legal uncertainty.[246] Apart from these two limitations, the CCC emphasises its role as a guardian of the Czech constitutionalism[247] and enforces the implicit duty of the Czech constitutional organs to prioritize constructive cooperation over open conflicts. This brings the CCC's position closer to the German practice, but it lacks any textual hook in the Czech Constitution.[248]

Despite the fact that Czechia is a unitary state, the CCC also decides on vertical separation of powers. Since the Czech Constitution grants some autonomy to territorial self-governing units (regions and municipalities),[249] both of which have been vested with law-making capacity and may issue the so-called "generally binding ordinances" (*obecně závazné vyhlášky*).[250] This naturally leads to conflicts between the central legislation and autonomous regional and municipal laws. These conflicts have been further fuelled by the growing tensions between the central organs and regional leaders.[251] As a

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[238] See e.g. Judgement of the CCC of 27 September 2007, Pl. ÚS 5/04 *Emergency Health Care*.

[239] See e.g. Judgement of the CCC of 28 July 2009, Pl. ÚS 9/09.

[240] See e.g. Judgement of the CCC of 11 March 1999, IV. ÚS 361/98 and Judgement of the CCC of 3 June 2008, Pl. ÚS 18/08.

[241] See e.g. *Emergency Health Care* (n 238).

[242] See Judgement of the CCC of 20 June 2001, Pl. ÚS 14/01.

[243] Judgement of the CCC of 11 July 2007, Pl. ÚS 18/06 or Judgement of the CCC of 12 September 2007, Pl. ÚS 87/06, both available in English at https://www.usoud.cz/en/decisions/.

[244] See e.g. Pl. ÚS 5/04 *Emergency Health Care*; and Grinc (n 232) 14.

[245] See Judgement of 20 March 2001, Pl. ÚS 58/2000.

[246] See Pl. ÚS 9/09 (n 239); and Filip, Holländer and Šimíček (n 236), at 767.

[247] See Art. 83 of the Czech Constitution; and Judgement No. Pl. ÚS 17/06, paras. 40-49.

[248] This is why such approach has been heavily criticized; see e.g. Grinc (n 232) 14.

[249] Arts. 99-105 of the Czech Constitution.

[250] Art. 104(3) of the Czech Constitution.

[251] Note that regional elections often take place in the middle of the term of the Chamber of Deputies and often result in a specific form of cohabitation, when the opposition political party on the central level secures a

result, the CCC has been increasingly called upon to decide on compatibility of generally binding ordinances with statutory law in the abstract review of legality.[252] In general, one may say that the CCC has relaxed its standard of review of generally binding ordinances with the statutory law and thus de facto expanded the autonomy the self-governing territorial units.[253] In addition, municipalities as well as regions may also lodge the so-called "communal complaint" against any unlawful interference of state organs into territorial self-government.[254]

5. Ex Ante Review of International Treaties

The CCC also plays an important role in reviewing conformity of international treaties, including EU treaties, with the Czech constitutional order. In contrast to constitutional review of statutes, the CCC conducts the ex ante review of international treaties, that is before their formal ratification.[255] Only the privileged dignitaries – the President, each chamber of parliament, 41 deputies or 17 senators – can initiate this review.[256] If the CCC finds any provision of the challenged international treaty incompatible with the Czech constitutional order, the ratification of such treaty is blocked,[257] unless the Czech Parliament amends the relevant constitutional law or renegotiates the treaty itself.

The CCC has not found any international treaty incompatible with the Czech constitutional order yet and thus we do not know the precise threshold required to suspend the ratification process of an international treaty. However, the CCC's constitutional review conformity of international treaties seems to be less stringent than constitutional review of statutes, since international treaties are by their nature usually more abstract and indeterminate and thus they cannot be subject to the same requirements as domestic laws.[258]

6. Ancillary Powers

The CCC's ancillary powers[259] can be divided into two groups. The first group concerns issues in which the CCC operates as a "double-check" on other decision-making bodies, namely on the Parliament and on the Supreme Administrative Court. Regarding the Parliament, it reviews the joint decision of

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sweeping victory in all regions and subsequently attempts to reduce the impact of statutes adopted on the central level.

[252] Art. 87(1)(b) of the Czech Constitution. Note that in abstract review of *legality* of generally binding ordinances the rules applicable to abstract review of *constitutionality* of statutes apply mutatis mutandis (see note 207 above).

[253] See Judgement of the CCC of 24 April 2012, Pl. ÚS 12/11 and Judgement of the CCC of 7 September 2011, Pl. ÚS 56/10.

[254] Art. 87(1)(c) of the Czech Constitution. For further details, see Filip, Holländer and Šimíček (n 236).

[255] Art. 87(2) of the Czech Constitution.

[256] Art. 71a(1) LCC.

[257] Art. 87(2) of the Czech Constitution.

[258] Judgement of the CCC of 3 November 2009, Pl. ÚS 29/09, *Lisbon II*, § 133.

[259] On ancillary powers of constitutional courts in general, see Tom Ginsburg and Zachary Elkins, 'Ancillary powers of constitutional courts' (2008) 87 Texas LR 1431.

the Chamber of Deputies and the Senate that the President lost the capacity to hold his office,[260] even though this has never happened in the modern Czech history.[261]

More importantly, the CCC also reviews the judgments of the Supreme Administrative Court[262] on dissolution of political parties[263] and on the validity of election of MPs and Senators.[264] The CCC had the opportunity to use the former power and review the Supreme Administrative Court's judgment, in which the Supreme Administrative Court dissolved the political party for violating the Czech democratic order,[265] only once, but it failed to do so.[266] Regarding the validity of election of MPs and Senators, the CCC has been more active and issued two judgments, both of which had a significant impact. In 1999, the CCC quashed the decision of the Supreme Court,[267] which found the election of Senator Lastovecká invalid for unfair political campaigning.[268] Five years later, the CCC struck down a similar judgment of the Supreme Administrative Court concerning Senator Nádvorník.[269] In both judgments the CCC held that it acts primarily as a guardian of objective constitutionality and only secondarily as a protector of fundamental rights of the candidate who lost the senator elections.[270] This de facto means that unfair political campaigning is unconstitutional only if it is highly likely that it affected the result of the given election, which is a threshold that is very difficult to meet. As a result, both Senator Lastovecká and Senator Nádvorník were restored to their functions and repeated elections were stopped.

The second group covers issues on which the CCC decides as a primary decision-maker. This is the case of the removal of the President,[271] removal of MPs and Senators for the failure to meet the eligibility requirements or for incompatibility of their mandate with other functions,[272] disciplining of the CCC's Justices,[273] and implementing the rulings of international tribunals.[274] Disciplining of Justices is discussed elsewhere in this chapter,[275] no one has ever tried to removal of MPs and

[260] See Art. 87(h) of the Czech Constitution.

[261] This provision was introduced into the Czechoslovak Constitution by the so-called "Lex Svoboda" in 1975, after the then Czechoslovak President, Ludvík Svoboda, refused to resign despite being unfit for this function for more than a year. Interestingly, even the Communist Party at the peak of its power was not able to force him to resign.

[262] Note that in contrast to Germany, in Czech Republic the Supreme Administrative Court decides on dissolution of political parties and the CCC only reviews the Supreme Administrative Court's judgments.

[263] See Art. 87(j) of the Czech Constitution.

[264] See Art. 87(e) of the Czech Constitution.

[265] Judgement of Supreme Administrative Court of 17 February 2010, Pst 1/2009-348. For broader context, see Miroslav Mareš, 'Czech Militant Democracy in Action Dissolution of the Workers' Party and the Wider Context of This Act', (2012) 26 East European Politics and Societies: and Cultures 33.

[266] Decision of CCC of 27 May 2010, Pl. ÚS 13/10 *Dissolution of Workers' Party*. This decision has been heavily criticized (see e.g. Eliška Wagnerová et al., 'Komentář k § 87' in *Zákon o Ústavním soudu. Komentář* (ASPI, Praha 2007), at § 103).

[267] Note that at that time the Supreme Administrative Court did not exist yet.

[268] Judgement of the CCC of 18 February 1999, I. ÚS 526/98, *Senator Lastovecká*.

[269] Judgement of the CCC of 26 January 2005, Pl. ÚS 73/04, *Senator Nádvorník*.

[270] Ibid.

[271] See Art. 65(2) in conjunction with Art. 87(1)(g) of the Czech Constitution.

[272] See Arts. 22 and 25 in conjunction with Art. 87(1)(f) of the Czech Constitution.

[273] See Art. 82(2) of the Czech Constitution.

[274] See Art. 87(1)(i) of the Czech Constitution.

[275] See Part II.4.

Senators for failing the eligibility and incompatibility rules,[276] and the broadly conceived CCC's power to implement decisions of international tribunals has been severely curtailed by the Law on Constitutional Court,[277] Hence, we will discuss in more detail only the impeachment of the President.

The CCC is the only body that can dismiss the Czech President[278] for "a high treason or a gross violation of the Constitution or other component of the constitutional order".[279] Such constitutional motion can be initiated by three fifths of present Senators, with the consent of three fifths of all members of the Chamber of Deputies.[280] If the two chambers lodge such a motion, the CCC may hold that the President loses his office and the eligibility for holding it in future.[281] The Senate has triggered this motion only once in 2013, under much more relaxed standing rules,[282] against the indirectly elected President Václav Klaus towards the very end of his second term, but it was dismissed by the CCC since the CCC controversially held that it cannot continue in this proceedings after the end of Klaus' mandate.[283] Given the increased quorum and the introduction of the direct election of the President which arguably boosts his democratic legitimacy, it is very unlikely that such a motion will be triggered in the near future.

7. Implied Powers

As mentioned above, the CCC has been very creative in expanding its *pouvoir*. Some authors[284] derive these implied powers from Article 83 of the Czech Constitution, which stipulates that the CCC is a "guardian of constitutionality". However, the CCC prefers to creatively interpret its explicit powers. Most importantly, in the *Melčák* judgment[285] it accepted the doctrine of unconstitutional constitutional amendment[286] and struck down the constitutional law,[287] which was supposed to solve the long-term political crisis by a one-time shortening of the fifth term of office of the Chamber of Deputies, thus finding the quickest way to snap elections. Most scholars considered this ad hoc constitutional law to be in conformity with the Czech Constitution as the same solution had been successfully employed in a similar political impasse in 1998.[288] However, the CCC thought otherwise and annulled the constitutional law in question because it was a one-time solution that contravened

[276] See Eliška Wagnerová et al., 'Komentář k § 87(1)(f)' in *Zákon o Ústavním soudu. Komentář* (ASPI, Praha 2007). See also Filip, Holländer and Šimíček (n 236).

[277] See Eliška Wagnerová et al., 'Komentář k § 87(1)(i)' in *Zákon o Ústavním soudu. Komentář* (ASPI, Praha 2007). See also Filip, Holländer and Šimíček (n 236).

[278] Art. 65(2) in conjunction with Art. 87(1)(g) of the Czech Constitution.

[279] Art. 65(2) of the Czech Constitution.

[280] Art. 65(3) of the Czech Constitution.

[281] Art. 65(2) of the Czech Constitution.

[282] Prior to 2013, this motion could be triggered by the simple majority of Senators. No consent of the Chamber of Deputies was required at that time.

[283] Decision of the CCC of 27 March 2013, Pl. ÚS 17/13, *Treason of Václav Klaus*.

[284] Jan Filip, 'Komentář k čl. 83' in Bahýľová et al., *Ústava České republiky. Komentář.* (Linde, Praha 2010) 1025, 1068.

[285] See note 11.

[286] For further sources, see note 291.

[287] Constitutional act no. 195/2009 Coll.

[288] See Constitutional Act No. 69/1998 Coll. of 19 March 1998, on Shortening the Term of the Chamber of Deputies.

the principles of generality of law and the prohibition of retroactivity,[289] which are protected by the Czech "Eternity Clause".[290] By holding so, the CCC de facto postponed the parliamentary elections for one year, which changed the political landscape completely. The *Melčák* judgment, probably the most widely discussed CCC's judgment ever,[291] has met with fierce criticism from politicians as well as legal scholars since it is not only normatively controversial, but also poorly written and internally inconsistent.[292]

However, the CCC has not stopped there. It has also suggested that it can, under certain circumstances, review even amnesties. While it eventually rejected the challenge against the 2013 amnesty of Václav Klaus, it opined that it may review amnesties in future if they violate the substantive core[293] of the Czech Constitution.[294]

IV. The Proceedings before the Czech Constitutional Court

The previous part listed and discussed the CCC's powers. The variety of powers naturally translates into a complex web of specific procedural rules. For instance, the proceedings concerning review of legislation are regulated very differently from the individual constitutional complaint proceedings. In this part, however, we will discuss primarily the general problems (both empirical and normative) of the CCC's proceedings.

1. Basic Principles and Basic Data

The proceedings before the CCC are without an exception initiated by a petition.[295] The requirements for submitting a petition vary greatly amongst the different types of proceedings and even the

[289] Judgement of CCC of 10 September 2009, Pl. ÚS 27/09 *Melčák*. For further analysis, see also Roznai (n 11); and Ivo Šlosarčík, 'Czech Republic 2009–2012: On Unconstitutional Amendment of the Constitution, Limits of EU Law and Direct Presidential Elections' (2013) 3 EPL 435.

[290] The Czech 'Eternity Clause' is stipulated in Article 9(2) of the Czech Constitution that reads as follows: "*Any changes in the essential requirements of a democratic state governed by the rule of law are impermissible*".

[291] See amongst others Roznai (n 11), Šlosarčík (n 289), Pavel Molek, Materiální ohnisko jako věčný limit evropské integrace? (MUNI Press, Brno 2014) or Vojtěch Šimíček, 'Materiální ohnisko ústavního pořádku, jeho ochrana a nález Ústavního soudu ve věci M. Melčáka' in Ivo Pospíšil and Eliška Wagnerová (eds), *Vladimír Klokočka Liber Amicorum* (Linde, Praha 2009).

[292] The CCC, or some of its Justices, were perhaps too eager to make this "contribution" to the Czech constitutionalism that they even ignored its own procedural rules. The problems concerning inconsistency and style are quite understandable, given the fact that the case was decided (and the judgment published) within two weeks from the commencement of the proceedings. The time pressure was caused by the fact that the CCC effectively had to decide before the snap election.

[293] The Czech Eternity Clause and the concept of the "substantive core of the Czech Constitution" are often used as synonyms. However, some authors argue that there are significant differences between them; see David Kosař and Ladislav Vyhnánek, 'Constitutional Identity in the Czech Republic: A New Twist on the Old Fashioned Idea?' (2017) 4 MUNI Law Working Paper Series, vol. 5, 4-22; and Molek (n 291).

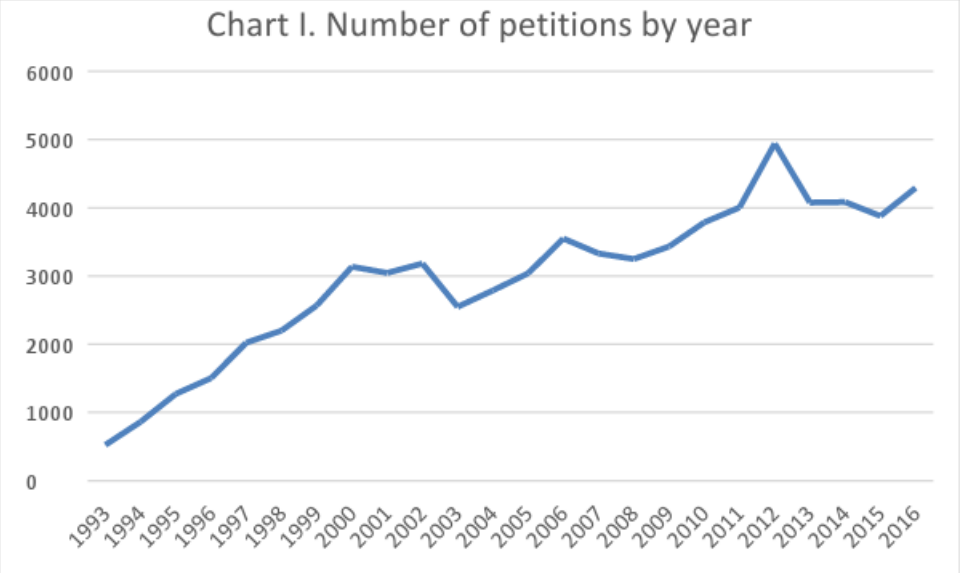
[294] Judgement of the CCC of 5 March 2013, Pl. ÚS 4/13, *Amnesty of Václav Klaus*, § 42.

[295] However, in some specific types of proceedings, the petition can originate within the CCC. The most notable example is perhaps the competence of a chamber to initiate a concrete review of legislation [Article 64(1)(c) LCC], but it is limited to situations where the chamber already deals with an individual constitutional complaint and the supposedly unconstitutional legislative provision has been applied in the complainant's case. The President's competence to initiate disciplinary proceedings [Article 133(1) LCC] can serve as another example.

general rules that are shared by the different types of proceedings can have very different practical impact.

The set of authorized petitioners is delimited differently for each type of proceedings, but LCC generally requires that each petitioner, with the exception of the State and its bodies, is represented by an attorney.[296] The representation requirement should theoretically serve as means of regulation of the quality of the petitions and possibly also of the CCC's case-load, but while it fulfils the former purpose to some extent, it is doubtful whether it succeeds in the latter task. Petitioners who cannot afford legal representation can be assigned an attorney by the Czech Bar Association, so that social and economic position of the petitioner should not create an unsurmountable barrier for submitting a petition. Quite importantly, the petitioner is not required to pay a court fee and there is no specific provision concerning fees for frivolous petitions or abuse of rights.[297]

The combination of these rules creates an environment in which it is relatively less costly (taking into account previous stages of the judicial proceedings) to submit a petition to the CCC. Consequently, the case-load of the CCC can be considered quite high, especially when it comes to individual constitutional complaints which amount to more than 98 % of the CCC's case-load. The basic statistical data concerning the case-load, its composition and evolution are presented in the following charts.[298]

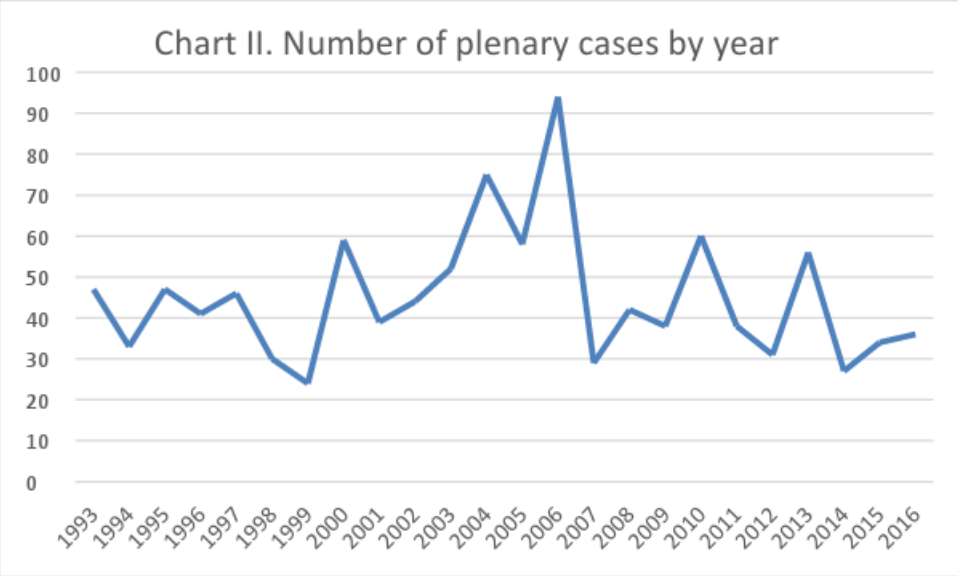


Source: Authors

[296] Article 30 LCC.

[297] In Germany, such a provision may be found in Article 34(2) BVerfGG. However, Article 61 LCC allows the CCC to charge up to 100.000 CZK to a petitioner that submits a grossly offensive petition.

[298] The following charts were compiled by the authors using data from the Czech Constitutional Court's Yearbook.



Source: Authors

As we can see, the total number of petitions per year has risen dramatically since the early 1990s, and, more recently, it has oscillated around four thousand per year (with the peak of 4943[299] petitions in 2012). As regards the plenary cases, the number of petitions (mostly review of legislation or sub-statutory acts), there are no general observable trends, even though the ups and downs can be explained by taking into account the context in which the potential petitioners operate.[300]

2. Voting Quorum

Four types of bodies can issue the CCC's rulings: (1) an individual Justice acting as a judge rapporteur, (2) the chambers, (3) the Plenary and (rarely) (4) the special disciplinary chamber. With the natural exception of (1) the judge rapporteur, determining the quorum is one of the key problems and the choices made by the Czech legislature have had considerable impact on the dynamics of the CCC's proceedings.

The rules determining quorum in (2) chamber cases are contained in Article 19(2) LCC. Generally speaking, two votes (i. e. the majority) are necessary to adopt a ruling. This rule, without any modification,[301] is applied when the chamber issues judgements. In reality, however, most chamber judgments appear to be adopted unanimously, as dissenting opinions occur in chamber cases only rarely.[302]

[299] However, this extraordinarily high number of petitions in 2012 was caused by the fact that several hundred "copy and paste" petitions were filed one particular company.

[300] Many of the plenary cases concern an abstract review of legislation and the political cycle influences the activity of petitioners (often members of the parliamentary opposition). See also Kopeček and Petrov (n 213).

[301] For the differences between a decision and a judgement, see Part V.1.

[302] Formally speaking, the near nonexistence of dissenting opinions in chamber cases is an unreliable indicator of unanimity, as the minority Justice has the right and not the obligation to draft a dissenting opinion. However, we do not have a reason to believe that "silent dissents" are excessively frequent (see also below Part IV. 3.).

Theoretically, a situation can occur in which no proposal for a ruling on merits receives the majority of votes. Such a case shall be submitted by the chamber president to the Plenary.[303] However, this provision has – to our knowledge – never been used in the CCC's history and there are doubts as to whether its application is even foreseeable.[304]

A special unanimity rule is reserved for adopting a decision that dismisses a petition as manifestly ill-founded. The unanimity rule was introduced in 1998 together with the competence of chambers to dismiss petitions as manifestly ill-founded. Prior to 1998, petitions could be dismissed as manifestly ill-founded by judges-rapporteurs, even in plenary cases. Considering the blurred line between a *decision that dismisses the petition as manifestly ill-founded* and a *judgment that rejects the petition*,[305] the differences between judges rapporteurs were too great and the procedural regulation was perceived as a threat to consistency and predictability of the CCC's case law.[306] Still, while the 1998 amendment's[307] decision-making rules created better conditions for a consistent development of the CCC's case-law, the unanimity requirement did by no means solve the issue.

The difference between the respective quorums for adopting a judgment (majority) and decision that dismisses the petition as manifestly ill-founded (unanimity) paired with the different effects of judgments and decisions[308] has a potential "strategic" impact that can be illustrated in a following way: If a Justice does not support the chamber majority's proposal to dismiss a petition as manifestly ill-founded, such decision may not be adopted and a (rejecting) judgment must be issued instead. This judgment, unlike a decision, would have a precedential effect[309] and would thus influence the interpretation of law in a direction that is not consistent with the minority Justice's preferences. Therefore, the Justice may be strategically inclined to side with the majority and let the petition be dismissed, since the outcome for the parties is virtually the same and the decision would have no precedential effect. This "strategy", together with the easier procedure for issuing decisions, may be the reason for the very low number of rejecting judgments.

The basic rule stipulated in (3) the plenary cases is that a simple majority of present Justices is required to adopt a ruling.[310] One should bear in mind that the Plenary is legally[311] quorate when at

[303] Article 20 LCC.

[304] The answer to this question hinges on the interpretation of what the term "the proposal for ruling on the merits" means. Is it considered to be a binary variable (reject of grant) or does it allow for a more practical interpretation? In a hypothetical scenario, where one Justice would vote to reject the petition, one would vote to grant it and one would vote to grant it partially and reject it as to the rest, the proposals could be seen as three separate proposals (and the case would be submitted to the Plenary). But even in this situation, we would consider it more practical (and even formally "clearer") to claim that the compromise solution has achieved majority, albeit in different part from different Justices.

[305] See also Part V.1.

[306] One of the better known examples (that later served as a motivation to amend LCC) of judge rapporteur controversially dismissing a petition is the case n. Pl. ÚS 16/94. In this case, judge rapporteur Vlastimil Ševčík dismissed a petition as manifestly ill-founded, because the challenged "provision" consisted of only one word (an adjective). Later case-law of the CCC has made it clear that even such provisions can be reviewed on merits (cf. Judgement of the CCC of 15 September 2001, Pl. ÚS 13/99).

[307] Act n. 77/1998 Sb.

[308] See Part V.2.

[309] See Part V.2.

[310] Article 11 of LCC.

[311] Practically speaking, the Plenary will not hear certain cases unless 12 Justices are present (*see infra*).

least ten Justices are present and therefore, legally, a minimum of six Justices can adopt a plenary ruling when only ten or eleven Justices are present at the plenary session. In case of a tie, the President does not have the decisive vote and the petition would be rejected by default.[312]

However, in some types of plenary proceedings the quorum required for adopting a ruling is set to nine. These proceedings include the review of legislation, the "presidential" cases[313] and the review of international treaties. Additionally, a judgment that departs from the previous case-law of the CCC has to be adopted by nine votes. Practically speaking, the most important of these cases are the review of legislation and overruling a previous judgement.

The qualified majority requirement and its application by the CCC have proven quite problematic. First, in the 1990s it was not entirely clear whether both "positive" and "negative" rulings (i. e. both rulings granting a petition or rejecting it) must be adopted by the qualified majority.[314] If that was the case, a situation could arise where neither of those would achieve the necessary nine votes. The CCC had to resolve this issue quite early after its establishment, in the case n. Pl. ÚS 36/93. The majority of the CCC held that in such a case, the petition is rejected by default,[315] even though some dissenting opinions stressed that LCC requires the qualified majority for either ruling to be adopted and rejecting the petition by default is contrary to LCC. Later scholarly discussion generally accepted the arguments of the majority[316] and pointed out that the minority opinion could lead to absurd conclusions, because if the CCC does not find the qualified majority to adopt either ruling, it would inevitably lead to denial of justice (*denegatio iustitiae*). Moreover, there are some substantive arguments that offer additional support for the majority opinion. Generally, it has been claimed that the "default rejection" of a petition respects the *status quo*, or – more concretely – upholds the presumption of constitutionality of the reviewed legal acts.

Practically speaking, if there is a situation where a majority of Justices (but less than nine) vote for granting a petition, a member of the minority drafts the reasoning of the judgement. If the original judge rapporteur voted with majority, the President appoints a new judge rapporteur from the minority Justices.

In this context, the "default rejection" approach highlighted some other procedural problems. As we have indicated above, the Plenary is quorate when a minimum of 10 Justices are present at the plenary session, meaning that 2 Justices could effectively "win" the vote against an eight-member majority and author the opinion of the CCC. This led the Plenary of the CCC to deal with the question of whether the quorum is met well beyond the text of Article 11 LCC. In 2004, when the number of Justices dropped to 11,[317] the Plenary stayed the proceedings until the twelfth Justice assumes office. The problem still remains, however, whether a default judgement adopted by a "qualified minority" constitutes *res iudicata* or whether it even has some precedential binding power.

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[312] See Part IV.5.

[313] See Part III.

[314] A similar problem can naturally occur in other cases as well – if the vote is tied. Practically, however, it was much more likely to arise in one of the qualified majority cases, which it did (see the next footnote).

[315] Judgement of the CCC of 14 May 1994, Pl. ÚS 36/93.

[316] Vojtěch Šimíček, 'Poznámky k proceduře rozhodování pléna Ústavního soudu' (1997) 5 Časopis pro právní vědu a praxi 458.

[317] The reasons for the drop are explained in Part I.4.

Besides the competences laid out in Article 87 of the Constitution, the CCC also serves (4) as a disciplinary body in relation to its Justices. A special five-member chamber leads the proceedings and a simple majority rule applies to its decision-making. However, if the disciplinary chamber holds that a Justice has engaged in conduct such that his continuance in office would be incompatible with the mission of the CCC and with the stature of its Justices, and if no objections were submitted to the disciplinary chamber's ruling reprimanding the Justice for his conduct or if the Plenary confirmed that ruling, the Plenary shall decide whether to terminate the Justice's office. Just as in some previously mentioned plenary cases, the qualified majority of at least nine Justices is required to adopt such a ruling and moreover, the minimum number of present Justices is explicitly set to 12, rather than 10.

3. Separate Opinions

The Constitutional Court is the only Czech court that generally allows for dissenting or concurring opinions (hereinafter also cumulatively "separate opinions") to be published.[318] According to Article 14 LCC, each Justice is entitled to author a separate opinion that shall be published with the CCC's ruling. As drafting a separate opinion is considered a right, not an obligation of a Justice, a Justice voting against the majority opinion, is not obliged to draft a dissenting opinion.[319]

Generally speaking, separate opinions are quite frequent in plenary cases. As of January 2018, 210 out of 1150 plenary rulings were accompanied by a separate opinion. On the other hand, separate opinions in chamber cases are extremely rare and are often connected to a specific situation in a certain chamber.[320] Only 144 separate opinions (in tens of thousands of chamber rulings) have been written in the history of the CCC. The following text therefore deals mainly with separate opinions in plenary cases.

While the format and style of majority opinions has generally converged during the functioning of the CCC, separate opinions vary significantly. They can be divided into three categories. First, there are separate opinions that constitute a complete alternative to the majority opinion. Very often, these opinions are authored by the original judge rapporteur whose opinion did not gain majority of votes. Alternatively, such separate opinions might be co-authored (or joined) by a minority coalition.[321] These separate opinions generally have the biggest potential impact on the evolution of the CCC's future case-law. Second, there are separate opinions that are focused on a narrow (often

[318] But note that judges of the Supreme Administrative Court can draft and publish separate opinions in some types of proceedings (see Article 55a of the Law n. 150/2002 Sb.).

[319] Therefore, a Court's ruling without that is not accompanied by a dissenting opinion does not necessarily have to be unanimous. It is however quite common that Justices who voted against the majority either draft their own dissenting opinion or join a dissenting opinion of a fellow minority member. On the other hand, interviews with Justices of the "Zeman's Court" show, that while some Justices write or join a separate opinion every time they dissent/concur, there are also some Justices that have refrained from doing so in a significant number of cases.

[320] During the "Klaus' Court", Ivana Janů authored by far the most separate opinions in chamber cases, usually when Eliška Wagnerová acted as a judge-rapporteur in the case.

[321] Sometimes, however, even Justices who form a strong minority prefer to write the separate opinion on their own. Judgement of the CCC of 20 May 2008, Pl. ÚS 1/08, *Regulation fees* serves as a perfect example of such an approach: the final vote was 8:7, but the each of the seven minority Justices wrote a separate opinion. "Lone wolf" separate opinions concerning the merits of the case are rather rare, but we can find several examples (mainly dissenting opinions of Eliška Wagnerová during the era of the "second" court.

procedural) issue. Finally, the third category of separate opinions consists of rather "free style" separate opinions that serve an expressive rather than purely legal function. Quite often these dissenting and concurring opinions express some frustration. Separate opinions of Justice Balík of the second Court are an illustrative example.[322]

4. Case Assignment and the Role of Judge Rapporteur

Pursuant to Article 40 LCC every case shall be assigned to a judge rapporteur and (in case of chamber proceedings) to a particular chamber, but the details are regulated by the "work schedule". Quite importantly, the work schedule is adopted by the Plenary[323] and not by the President alone. The work schedule is seen as a guarantee of the principle of a "legal judge"[324] as it creates an algorithm of case assignment that is transparent and does not allow for a judge rapporteur and a chamber to be hand-picked by the President.

Therefore, each case is assigned to a judge-rapporteur (and in most cases, a chamber) according to the work schedule. The assigned judge-rapporteur as well as the voting member of the chamber or Plenary may be recused.[325] In such a case, the recused Justice is replaced by another Justice, who is also specified in the work schedule.

The CCC's President (in plenary cases) or the president of the chamber (in chamber cases) may assign a case to a different judge-rapporteur than the one determined by the work schedule only in rare cases.[326] More specifically, the presiding Justice (either in plenary or in chamber cases) assigns the case to a new judge-rapporteur if the draft opinion by the original judge-rapporteur did not receive a majority of votes. Practically speaking, this situation occurs mostly in plenary cases, but the CCC does not keep any statistics concerning the use of this power by the Court/chamber presidents.

5. Role of the Constitutional Court President

The President of the CCC is appointed by the President of the Republic from the CCC's Justices. While the appointment of a person as a Justice of the CCC requires a consent of the Senate, the appointments of the President and the Vice-Presidents of the CCC fall entirely in the discretion of the President of the Republic. The CCC's officials cannot be removed by the President of the Republic and

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[322] In his dissenting opinions, Justice Balík occasionally utilized elements of free prose (including original short stories) and foreign languages. See for example his dissenting opinion to the *European Arrest Warrant* (Judgement of the CCC of 3 May 2006, Pl. ÚS 66/04), available in English at https://www.usoud.cz/en/decisions/20060503-pl-us-6604-european-arrest-warrant-1/: *"He is placed in a cell with a Portuguese prisoner. The exchange of 'Bom*
Dia' for 'topry ten', occasionally 'tekuji' or 'obrigado', otherwise a pair in silence. Where will be that Ptahotepa 'relief' brought on 'when a person is at least listened to'? (Papyrus versus Ptahotepa, translated by Z. Žába, Prague 1971, p. 35). For lunch there will be alfődi gulásleves. It will not be a problem with 'paprika', but how to conjure up the drawback/antithesis and add the little Hungarian word, 'gall bladder'."

[323] Article 11(2)(m) LCC.

[324] Cf. David Kosař, *Perils of Judicial Self-Government in Transitional* Societies (CUP, New York 2016) 91. The legal judge principle is explicitly protected by Art. 38(1) of the Charter.

[325] Alžběta Nemeškalová Rosinová, 'Vyloučení soudce pro podjatost v rozhodovací praxi "třetího" Ústavního soudu'(2017) 156 Právník 321.

[326] Article 55 LCC.

their term of office as the President or the Vice-President generally expires together with their term of office as a Justice.

Three court presidents have served at the CCC so far: Zdeněk Kessler (1993 - 2003), Miloš Holeček (2003) and Pavel Rychetský (2003 – present; with reappointment in 2013). Pavel Rychetský has been by far the most influential president of the CCC, not only because his reappointment, but also because of his previous governmental functions and the resulting political gravitas in Czechia.[327]

The CCC's President plays several roles and has vast formal as well as informal powers.[328] First, the President is a Justice of the CCC and as such he has responsibilities of a Justice. In this role, the President is considered a *primus inter pares* without any special powers such as breaking a tied vote.[329] Still, the President enjoys significant jurisprudential power as he shapes CCC's internal judicial practices. Most importantly, he convenes and chairs the plenary meetings,[330] reassigns a case to a new judge rapporteur in a plenary case after the proposal of the original judge rapporteur failed to achieve a majority,[331] frames the debate among Justices and determines the rules of this debate. He can also focus on plenary cases more than Associate Justices, as his chamber case-load burden is reduced. More specifically, in chamber cases, which amount to more than 98 % of the CCC's cases, the CCC's President is assigned only 50 % of the Associate Justice's standard "judge rapporteur case-load".[332]

Second, the CCC's President is also vested with vast administrative power, as he is responsible for the CCC's general administration, including its property and the employees, including the employees of the non-judicial sections of the CCC. Even though the CCC's President is aided in these duties by the Secretary General and other administrative personnel,[333] he has the ultimate managerial responsibility and also the final word.

Third, the CCC's President also plays an important ambassadorial role. He represents the CCC both at the national and the international level. For instance, Pavel Rychetský has become a head of the Conference of European Constitutional Courts for 2017-2020. He is also considered by the Czech media and the general public as a representative and speaker of the institution,[334] who discusses not only "judicial matters" concerning the CCC, but also regularly comments on the vexing legal issues of the day and on the Czech political situation. Hence, the CCC's President also wields significant media power.

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[327] See in particular notes 127, 139 and 148 above.

[328] For a taxonomy of powers of court presidents in the European legal space, see David Kosař, 'Court Presidents: The Missing Piece in the Puzzle of Judicial Self-Governance' (2018) 19 German Law Journal (Issue 7, forthcoming).

[329] As opposed to - for example - the president of the Italian Constitutional Court.

[330] Article 3(1)(c) LCC.

[331] Article 55 LCC.

[332] Art. 1 of the work schedule as of 30. 6. 2017. One of the Vice-Presidents enjoys the same alleviation, while the other's case-load in chamber cases set to 2/3. This difference is due to the fact that one of the Vice-Presidents was assigned more administrative duties. The work schedule can be changed quite flexibly to account for factors like this.

[333] The President may also delegate some of his managerial powers to the Vice-Presidents.

[334] But note that the Secretariat plays an important role in the representation of the CCC as well (see Part II.6.)

Finally, Pavel Rychetský had also influenced the selection of Justices of Zeman's Court. As mentioned above, the Czech President Miloš Zeman, given his long-time friendship with Pavel Rychetský, outsourced shortlisting of most nominees in 2013-2015 to Pavel Rychetský. However, such power over judicial careers of other CCC's Justices has been the result of a unique personal situation and CCC's President has formally no say in selecting CCC's Justices. One should thus be careful and not to mix the *institution* of the CCC's president with its particular *holder*.

V. The Taxonomy of the Rulings of the Czech Constitutional Court and their Features

Discussing the taxonomy of constitutional court rulings and their nuances might be deemed a boring and purely theoretical one, but in Czechia nothing could be further from the truth. Actually, some of the most controversial phenomena regarding the CCC concern formal, structural or systemic features of the CCC's rulings. For instance, problems such as normative effects of the CCC's rulings have become catalysts of tensions between the CCC and other state bodies (especially with the apex ordinary courts). Even broad and complex issues, such as the importance of foreign and international law in the CCC's jurisprudence must be contextualized.

1. A Brief Taxonomy of Rulings and Verdicts

LCC recognizes two basic forms of a ruling,[335] a judgment (*nález*) and a decision in a narrow sense (*usnesení*). In addition to that, the CCC may adopt an opinion (*stanovisko*), which is however not considered a ruling in a proper sense.

A judgment (*nález*) is issued if the CCC rules on the merits of the case, i. e. typically when it decides on the conformity of the challenged decision or a piece of legislation with the constitutional order. Judgments are therefore the more important,[336] but much less employed[337] form of a ruling. Decisions (*usnesení*) are employed in virtually all other cases, most importantly for procedural reasons (staying the proceeding, recusing a Justice etc.) or when the CCC dismisses a petition either for formal or procedural reasons[338] or for being "manifestly ill-founded".[339]

This possibility to dismiss manifestly ill-founded petitions by a decision rather complicates the above painted picture that suggests there is a clear distinction between the purpose and use of judgments and decisions respectively. Decisions that dismiss a petition as manifestly ill-founded have been traditionally labelled by the Czech doctrine as "quasi-substantive rulings" for two reasons. First, it makes little difference for the petitioners whether the CCC rejects their petition by judgment or

[335] This formal distinction is based on Article 54(1) LCC.

[336] *See also* the discussion of precedential binding power of the rulings of the CCC.

[337] As of 30. 6. 2017, the number of judgments published in the CCC's NALUS database was 4.580 in comparison to 60.827 decisions that dismiss a petition.

[338] According to Article 43(1) LCC, the CCC, acting by Judge-Rapporteur, dismisses a petition, if:
a) the petitioner fails to cure defects in the petition by the deadline designated therefore;
b) the petition was submitted after the deadline for its submission laid down by the LCC;
c) the petition was submitted by a person who is clearly not authorized to submit it;
d) it is a petition over which the CCC has no jurisdiction; or
e) the submitted petition is inadmissible, unless this Statute provides otherwise

[339] Article 43 LCC.

dismisses it by a decision.[340] Second, since the process of drafting, adopting and announcing the judgment is much more complicated and time-consuming than that of a decision,[341] the CCC virtually stopped using the form of judgment to reject petitions.[342]

Finally, the opinion (*stanovisko*) is not a ruling in a proper sense, but rather a result of a procedure designed to ensure the consistency of the CCC's case law. According to Article 23 LCC, a Constitutional Court's chamber[343] itself cannot depart from a CCC's previous judgment.[344] Therefore, if the chamber wishes to overrule the judgment, it is obliged to ask the Plenary to adopt an opinion to this effect.[345] After the adoption and publication of the opinion, the case itself is decided by the original chamber which is bound by the opinion instead of the previous judgment.

2. Effects of Constitutional Court's Rulings

The key constitutional provision regulating the effects of the CCC's rulings can be found in Article 89(2) of the Constitution that reads as follows: "*Enforceable rulings of the Constitutional Court are binding on all authorities and persons.*" However, this provision provides very few answers to practical questions and various issues surrounding the rulings' effects have.

On the one hand, interpretation of the term "enforceable" has caused little problems so far. According to Article 89(1) of the Constitution, rulings of the CCC are enforceable as soon as they are announced in the manner provided for by statute, unless the CCC decides otherwise. LCC accordingly includes rules for enforceability of a ruling for each type of proceedings.[346]

On the other hand, two general questions concerning Article 89(2) have been particularly controversial. First, it has been debated which rulings (and which parts of an individual ruling) are

[340] However, there are some important systemic differences to keep in mind. The most important one concerns the general binding power of the respective forms of rulings (see infra *V.2*). Whereas judgments and their reasoning (irrespective of whether they reject or grant the petition) are considered generally binding and possess some sort of precedential value, the normative effects of decisions are close to non-existent.

[341] The customary view is that the reasoning of a judgment should be much more detailed, a judgment has to be announced publicly in a courtroom, a judgment has to be prepared for publication in an official collection etc.

[342] Vyhnánek (n 218) 335 et seq. This holds true especially in the case of individual constitutional complaints that amount to almost 99% of the CCC's case law. In plenary proceedings (mostly review of legislation) judgments are used to reject petitions quite often.

[343] The Plenary can casually overrule any previous judgment casually, but 9 votes are necessary to do that. According to judgment n. Pl. 11/02, such a change of the CCC's case law cannot occur unless certain substantive conditions are met (basically it requires that the legal of factual context must have changed significantly in order to justify such a change), but this doctrine of the CCC remains controversial and it is doubtful whether it still is "good law".

[344] The Plenary, on the other hand, can overrule an existing judgment directly, without having to initiate a special proceeding (bearing in mind that a qualified majority is still necessary in order to overrule the previous judgement.

[345] As a matter of fact, the opinion is only adopted and published if the previous judgment has been overruled. If the Plenary does not vote to change the case law, the chamber in which the case originated simply decides bound by the previous judgment.

[346] Enforceability is usually tied to 1) publication in the Collection of Laws, 2) announcement of the ruling or 3) its delivery to the parties to the proceedings.

considered binding. Second, there are various opinions on the nature and extent of the binding power itself. Practically speaking, answers to these questions are most important for two types of proceedings: First, review of legislation[347] and second, individual constitutional complaint.[348] Moreover, in both of types of proceedings, the distinction between "direct" legal effects and potential precedential effects becomes critical.[349]

The direct effects of the CCC's rulings are less controversial and generally accepted. Even though Article 89(2) of the Constitution mentions generally "rulings", only judgments can have any meaningful direct effects (i. e. annulment of a piece legislation or an ordinary court's decision).[350] In case of a review of legislation, if the CCC finds that a petition proposing the annulment of a statute or sub-statutory regulation (or a provision thereof) is well-founded, it annuls the contested legal act in whole or in part. Generally, the provision shall be annulled from the day the decision is published in the Collection of Laws (i.e. with *ex nunc* effect), unless the CCC decides otherwise.[351] In the individual constitutional complaint procedure, if the decision of the ordinary courts is quashed, the case file is remitted to the ordinary court. The ordinary court then has the duty to decide the case again and it is bound not only by the operative part of the judgment,[352] but also by some parts of the ruling's reasoning.[353]

In contrast, the debate on precedential effects has not been settled yet. The first issue is what exactly has the *erga omnes* effect ("*are binding on all authorities and persons")* anticipated by Article 89(2) of the Constitution. An "anti-precedential" part of literature suggested, mainly in the 1990s,[354] that only the operative part of a ruling and not its reasoning can have *erga omnes* effects. However, the case law of the Constitutional Court has soon asserted that the main reasons (*tragende Gründe*) of the ruling have certain precedential effects.[355] According to the CCC, the ordinary courts[356] have a constitutional duty to follow the main reasons of the CCC's rulings in similar cases.[357] The ordinary

[347] Article 87(1)(a)-(b) of the Constitution. See also Parts III.1 and III.2.

[348] Article 87(1)(d) of the Constitution. See also Part III.3.

[349] See the Judgement of the CCC of 13 November 2007, IV. ÚS 301/05. This judgment is now considered to be the leading case concerning the binding power of the CCC's rulings and will be frequently referred to throughout the chapter.

[350] A decision does not even create *res iudicata* (Article 35(1) LCC *a contrario*).

[351] As stated above, in concrete review of constitutionality, a judgment of the CCC finding an incompatibility with the constitutional order is followed by remanding the case file back to the ordinary court.

[352] The operative part of the judgment in individual constitutional complaint proceedings contains 1) a declaration of violation of certain fundamental rights and 2) a ruling specifying which decisions are quashed.

[353] This effect of the CCC's rulings has been less controversial among the ordinary court judges partly because it is based on a subsidiary application of the Code of Civil Procedure. According to the Code, a lower court is bound by the "legal opinion" of the higher court that quashes its decision. In the CCC's case, the binding part of the reasoning is considered to be equivalent with the so called "nosné důvody" ("main reasons", a translation of the German "tragende Gründe").

[354] See the debate reproduced in Přibáň (n 202) 381.

[355] Judgement of the CCC, IV. ÚS 301/05 (n 349) paras. 55 et seq.

[356] In the individual constitutional complaint proceedings, the "precedential" binding power vis-à-vis the legislature is yet another issue.

[357] This obviously gives rise - though indirectly - to an obligation to know the CCC's case law.

courts, at least on the surface, have gradually accepted the notion of precedential effect,[358] even though in some cases we may still encounter some resistance from the ordinary courts.[359]

A more open question is the strength of the CCC's rulings' precedential effect. It is clear that not even the CCC supports a rigid *stare-decisis*-like doctrine. It has held that, besides *distinguishing*, the ordinary courts even have an (exceptional) option to directly oppose the precedential effect of the CCC's ruling.[360] However, even if the ordinary court resorts to this option of the last resort, it must fulfil several conditions. First, the ordinary court has a duty to *reflect*, in good faith, the ruling in question. More specifically, if the ordinary court wishes to depart from a CCC's ruling, it must do so only after careful analysis of the ruling in question, it is obliged to present a persuasive alternative constitutional interpretation and – as a rule – may do so only once in a given issue. Despite this being a rather exceptional option, the CCC has already overruled its previous judgment after such a challenge from the ordinary court.[361]

The CCC itself has limited the doctrine of precedential effect of its rulings to judgments only and has considered decisions unfit to have a similar effect.[362] However, as we have mentioned above, decisions that dismiss a petition as manifestly ill-founded often serve as a functional equivalent of the nearly extinct category of judgements that reject a petition. This raises the question of whether there are any substantive reasons to deny the precedential effect to all decisions. Historically, this distinction made sense in light of the fact that decisions were rarely published.[363] Nowadays, with all CCC's rulings being freely available, the practical difference between those two categories of rulings have further decreased, but the CCC has not yet departed from its judgment-only doctrine.[364]

3. Publication of the Constitutional Court's Rulings

The precedential binding power of the CCC's rulings (judgments) can naturally be enforced only if these rulings are duly published and accessible, which signifies the importance of the rules and practices concerning publication of the CCC's rulings. As of 2017, there are three principal means of publication: (1) the official Collection of Laws, (2) the print publication "Collection of Judgments and Decisions of the Constitutional Court" (hereinafter only "CJDCC"), and (3) the electronic NALUS database.[365] Each of these publication channels has a slightly different scope and purpose.

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[358] See the discussion in Vyhnánek (n 218) 353 et seq.

[359] Perhaps the best example of such resistance is the „Slovak pensions" saga which involved a conflict between the Supreme Administrative Court and the CCC. See Komárek (n 7). The Supreme Court had similar encounters with the CCC both as regards the civil and criminal branch (*ne bis idem*, reception of the Judgement of the CCC of 19 September 1995, IV. ÚS 81/95).

[360] Judgement of the CCC IV. ÚS 301/05 (n 349), para. 68 et seq.

[361] It happened after a challenge coming from the Supreme Administrative Court concerning the legality of tax controls. Opinion of the CCC of 8 November 2011, Pl.ÚS-st. 33/11.

[362] This is a case law based doctrine. See Judgement of the CCC IV. ÚS 301/05 (n 349).

[363] See Part. V.3.

[364] There might be some pragmatic considerations involved, too. With decisions forming a vast majority of the CCC's rulings (and at the same time receiving much less attention), it is more challenging to keep the case law consistent. If decisions would be considered precedents, it would give potential rebelling ordinary courts an opportunity to disregard a precedential judgment by referring to a decision that seems inconsistent with the judgment and asserting that the case law is unclear.

[365] See also Part II.6.

The Collection of Laws, while quantitatively the least employed channel of publication, has crucial legal effects. Certain judgments[366] are mandatorily published in the Collection of Laws. The judgments concerning constitutionality of statutes and constitutionality/legality of other regulations have no legal effects unless they are published in the Collection of Laws.[367]

In addition to the Collection of Laws, all judgments and some decisions[368] are published in the CJDCC. LCC provides that the CJDCC shall be published by the CCC[369], but in reality, the CCC has partially outsourced the publication to a private publishing house.[370] In contrast to the Collection of Law, the publication of a ruling in the CJDCC has no legal effects. The practical importance of the CJDCC has been greatly diminished by the establishment of the electronic NALUS database.[371]

Finally, the NALUS database has been created in 2006 and managed by the CCC's Analytical Department.[372] It contains all the CCC's rulings since 1993[373] and it is updated on a daily basis. It is equipped with an advanced search engine that allows a full-text search within all rulings as well as tailored searching through various indexes.[374]

Practically speaking, the NALUS database is now the most important channel of publication of the CCC's rulings and it can be assumed that a vast majority of individuals who wish to access a CCC's ruling use it instead of the CJDCC (which is print only and rather expensive) or the Collection of Laws (which contains only a small fraction of the rulings).

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[366] Article 57(1) LCC lists the cases in which judgments are mandatorily published in the Collection of Laws. Besides the already obsolete types proceedings connected to the Czechia's accession to the EU, the list comprises judgments on the constitutionality of statutes and constitutionality/legality of other regulations [Art. 87(1) (a,b) of the Constitution; however, publication of these judgments is mandatory only in cases concerning regulations that have been published in the Collection themselves], on the impeachment of the President of the Republic [Art. 87(1) (g) of the Constitution], on the legality of the Parliament's resolution declaring the President of the Republic unfit for office [Art. 87(1) (h) of the Constitution], and on the review of international treaties [Art. 87(2) of the Constitution].

[367] However, the CCC may set a later date of enforceability than the date of publication. This option is typically used in order to provide the legislature with some time to amend the constitutional deficiencies. In this regard, it is important to note that the CCC does not have the power to declare laws unconstitutional with *ex tunc* effects, but only to annul an unconstitutional statute or regulation prospectively, *ex nunc* (see supra Part III.1). In the concrete review of legislation, however, some retrospective effects are naturally present, as the CCC's judgment normatively influences an already initiated legal dispute (see also Part III.2.)

[368] The Plenary decides which decisions shall be published in the CJDCC [Article59 (4) LCC]. There are no formal criteria for including a decision in the CJDCC, but the CCC generally selects for publication those decisions that deal with an important (usually procedural) question that has not yet been addressed in a judgment.

[369] Article 59(1) LCC.

[370] The CJDCC is published by the Czech mutation of C. H. Beck, see the last volume available at http://www.beck.cz/sbirka-nalezu-a-usneseni-us-cr-svazek-78-vc-cd (as of 30. 6. 2017).

[371] Available at http://nalus.usoud.cz (Czech only).

[372] See *supra* II.6.

[373] As of 30 June 2017, there are over 68.000 documents (judgments, decisions, opinions) in the database, but individual omissions are conceivable. This might be the case of some rulings from the 1990's, as these decisions were retrospectively converted and uploaded in the database after 2006.

[374] Perhaps most importantly, rulings are indexed as regards the legal act/its provision that they interpret or even mention. It is thus fairly easy and fast to collect a set of rulings concerning interpretation of a certain legal provision.

4. Style, Form and References

The style and form of the rulings of the Constitutional Court has developed significantly since the 1990s. While it is still true that the individual style of a judge-rapporteur or her assistants has a significant influence on the final ruling, many aspects of form and style have been unified in the 2000s and 2010s, mainly thanks to the available technology and the work of the Analytical Department.[375]

Each ruling (a judgment or a decision) contains the state symbol, specification of the case and the parties to the proceedings, the operative part of the ruling, the reasoning and the appeal instructions (stating that no legal recourse is available).[376] With the important exception of the reasoning, the other parts of the rulings are unified and mostly provided for by LCC. While the reasoning virtually always comprises of a statement of facts and application of law, its style and to some extent even form are more variable and as indicated, it is heavily dependent on the person drafting the reasoning.

As regards the form, there have been some attempts to make the ruling's appearance more uniform. Despite resistance form certain Justices, the CCC has gradually introduced numbered paragraphs and uniform internal structuring of judgments. Decisions, especially the shorter ones, have not yet been unified in the same way. In the 2000s, the CCC also issued a manual concerning style and references, but followed closely only in plenary cases. Cases decided by chambers or judges-rapporteurs stick to this manual only partially. Stylistic choices, including the language or the length of a ruling are mostly left to judges-rapporteurs to make. Therefore, we may find short judgments written in a very elliptical style as well as excessively long and eclectic judgments.

Finally, it is also worthy of mentioning that the CCC (or rather some of its Justices[377]) commonly refers to case law (including case law of foreign courts) and legal literature[378] in it rulings. When it comes to "comparative references", the CCC has used the case law of the German Federal Constitutional Court as the main source of inspiration. Two of the most influential Justices of the CCC in the 1990s, Vladimír Klokočka and Pavel Holländer, were particularly keen on searching for inspiration in Germany. As a result, there are more than 60 references to BVerfG's jurisprudence in the CCC's case law. Moreover, the significance of the BVerfG case law is greater than the mere number of references suggests, as it shaped key constitutional doctrines in the early phases of the CCC's existence. The CCC has transplanted, among other things, the German proportionality test,[379]

[375] See *supra* II.6.

[376] In the Czech legal order, such instructions are considered a vital part of a ruling, even if the information provided by them is that „no recourse is available". As a rule, LCC states that rulings of the CCC are final and cannot be appealed. In a narrow set of cases, however, there is a possibility of reopening the proceedings. This is the case of the proceeding concerning removal of the President of the Republic (Article 105 LCC, see also part III.6.) and also in case where – after the CCC's ruling – an international court found a violation of international human rights treaty (Article 119 LCC)

[377] There is an ongoing debate on whether it is acceptable to quote legal literature in rulings.

[378] Mainly the leading commentaries, but also classical theorists or law review articles.

[379] See Judgement of the CCC of 12 October 1994, Pl. ÚS 4/94.

and has been heavily inspired by the German approach to basic constitutional principles, such as democracy and the *Rechtstaat*.[380]

VI. The Interaction of the Czech Constitutional Court with Domestic and Supranational Actors

In terms of its impact on Czech society, the CCC has steadily risen to prominence. While it delivered several important judgments in the 1990s, few of them shook up the political establishment in Prague.[381] The CCC started showing its teeth only in the early 2000s. For instance, in the 2002 *Euro-Amendment* judgment[382] it effectively disregarded a constitutional amendment adopted by the Parliament and interpreted the Czech Constitution as if such an amendment has never taken place.

The proverbial big bang came only a few years later. In the 2009 *Melčák* judgment[383] the CCC adopted the doctrine of "unconstitutional constitutional amendment"[384] and annulled the constitutional law shortening the fifth term of office of the Chamber of Deputies, which was adopted in order to find the quickest way to hold snap elections.[385] By doing so, it effectively postponed the parliamentary elections and reshuffled the cards in Prague. In 2010-2012 it struck down several austerity measures adopted by the centre-right coalition in the wake of the global financial crisis.[386] Finally, in 2012 the CCC showed its teeth also towards the Court of Justice of the EU found the CJEU's *Landtová* judgment *ultra vires*.

The series of these judgments in 2009-2012 make clear that the CCC has become a powerful institution to be taken seriously by all political and judicial actors, both on the domestic as well as European levels. However, in order to understand the position of the Czech Constitutional Court's properly, one has to look at several dimensions, including the CCC's relationship with the ECtHR and the CJEU and even at the CCC's own self-image.

More specifically, the position of the CCC in the Czech political and constitutional system is determined not only by its institutional design, but also by the dynamics of its relationship with other constitutional bodies, the public, and with supranational and international courts. Given its broad array of powers,[387] the CCC has had ideal conditions for shaping the evolution of the constitutional and political landscape of Czechia since the 1990s. The fact that the CCC has enjoyed fairly high

[380] See for example Judgement of the CCC of 18 October 1995, Pl. ÚS 26/94, or the Judgement of the CCC of 2 April 1997, Pl. ÚS 25/96.

[381] The only exception was the Judgement of the CCC of 24 January 2001, Pl. ÚS Pl.ÚS 42/2000, *Electoral system*., available in English at https://www.usoud.cz/en/decisions/20010124-pl-us-4200-elections-act-1/.

[382] Judgement of the CCC of 25 June 2002, Pl. ÚS 36/01, *Euro-Amendment*.

[383] See also Part III.7.

[384] See note 286 above.

[385] See Roznai (n 11).

[386] See e.g. Marek Antoš, 'The Czech Constitutional Court and Social Rights: Analysis of the Case Law' in Pavel Šturma and Narciso Leandro Xavier Baez (eds). *International and Internal Mechanisms of Fundamental Rights Effectiveness*. (RW&W Science & New Media, Passau-Berlin-Prague 2015) pp. 187-196.

[387] See part III.

public support – especially for a country where state institutions are generally viewed with suspicion[388] – surely helped too.

1. Constitutional Court and the Parliament

The relationship between the CCC and the Parliament is quite intensive. Besides the obvious fact that the CCC reviews legislation adopted by the Parliament, the abstract review might be initiated by a group of members of the Parliament (usually by the opposition members) which influences the political dynamics of the use of these proceedings.[389] However, over the last 25 years, the relationship between the CCC and the Parliament has obviously evolved beyond what is discernible from the constitutional text. With regard to this relationship, several of developments stand out.

First, the already mentioned *Melčák* case made clear that the CCC has claimed the competence to review constitutional amendments[390] and the Parliament (as well as the executive bodies) has not stood up to this assertion of power. This has shifted the balance between the CCC and the Parliament quite significantly, since the CCC has effectively proclaimed itself as the Czech "*Grenzorgan*"[391] that has the last word in questions of constitutional order.

However, the *Melčák* case, although important, concerned an exceptional problem. The CCC's relationship with the Parliament has been shaped primarily by the day-to-day issues. While it is not surprising that the CCC – when reviewing legislation – places some substantive constitutional limits on the legislature, it is has also become involved in the legislative process as well. Especially in the 2000s, the CCC has attempted to stop the use of so called "legislative riders"[392] and to set rules for the use of procedures that limit the parliamentary minority to "obstruct" the legislative process.[393] However, this case law has not been settled yet[394] and it is still not entirely clear, how stringent standards for the legislative process CCC applies.

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[388] For example in 2012, while the CCC enjoyed strong or moderate support of approx. 60 % of the population (which reflected the general trend from previous years), the political institutional such as the Parliament or the government had to be content with much lower numbers (even below 20 %, hardly ever stepping over 40 %) . See empirical researches available at https://www.stem.cz/duvera-nejvyssim-soudnim-institucim/ and https://www.stem.cz/duvera-v-nejvyssi-politicke-instituce-prosinec-2012/.

[389] Petrov and Kopeček have shown that the possibility to initiate review is an important political tool of the opposition, especially when the government enjoys stable majority, see Kopeček and Petrov (n 213).

[390] Roznai (n 11).

[391] By this, we refer to the Verdross/Kelsen conception of „border organs". See Alfred Verdross, *Völkerrecht, (2nd ed)* (Springer, Wien 1950); see also Franz C. Mayer, 'Europäische Verfassungsgerichtsbarkeit' in Armin von Bogdandy (ed), Europäisches Verfassungsrecht: Theoretische und dogmatische Grundzüge (Springer, Heidelberg 2003) 260-261 or Theodor Schilling, 'Alec Stone Sweet's "Juridical Coup d'État" Revisited: Coups d'État, Revolutions, Grenzorgane, and Constituent Power' (2012) 13 GLJ 287.

[392] See Judgement of the CCC of 15 February 2007, Pl. ÚS 77/06.

[393] Judgement of the CCC 1 March 2011, Pl. ÚS 53/10, available in English at http://www.usoud.cz/en/decisions/20110301-pl-us-5510-state-of-legislative-emergency-1/.

[394] The judge rapporteur of the *Legislative riders* judgments, Eliška Wagnerová, has even opined that one of the following judgments (Judgement of the CCC of 31 January 2008, Pl. ÚS 24/07) effectively overruled some of the main principles stemming from the *Legislative riders.* See Wagnerová's dissenting opinion to this judgement, available in English at http://www.usoud.cz/en/decisions/20080131-pl-us-2407-stabilization-of-public-budget-tax-amendments-1/.

Another dimension to the already complex and colourful relationship between the Parliament and the CCC has been added by the latter's involvement in the shaping of the electoral system. In the 2001 *Grand Election* judgment[395] the CCC has declared unconstitutional some changes in the electoral system of the lower chamber of the Parliament, because they introduced too many majoritarian elements into the Czech "system of proportional representation".[396] In a similar vein, the CCC has generally supported equality of chances of smaller political parties in issues like campaign or political parties financing,[397] often to the disappointment of the leading political parties.

2. Constitutional Court and the Executive

The CCC's relationship with the executive bodies is also significantly influenced by the competences of the CCC, but also by the powers of the Executive towards the CCC. The power of the President of the Republic to appoint (with the approval of the Senate) the Justices is obviously a very important factor. In fact, the CCC in its composition is even often named after the President who nominated majority of Justices.[398] However, while each President may try to pack the CCC with loyal Justices with a similar political leaning to his own, there are two significant limiting factors. First, the Senate has already rejected several candidates for political, moral as well as professional reasons. Second, so far it does not seem that CCC's Justices themselves would be following the wishes of the President who appointed them.[399]

While the Czech President shapes the CCC's composition, CCC has also several competences that concern specifically the President of the Republic, most notably the impeachment proceedings (for high treason or gross violation of the constitutional order). However, the impeachment procedure has been initiated only once in the Czech history (against the President Klaus) and the charges were dismissed on procedural grounds.[400]

While the government seems to have less direct ties to the CCC,[401] its relationship with the CCC is far from non-existent. First, in the Czech system of parliamentary democracy, the government is tied to the majority in the lower chamber of the Parliament. As we have noted above, the minority members of Parliament often use the proceedings before the CCC to challenge the government's

[395] Judgement of the CCC of 24. January 2001, Pl. ÚS 42/2000.

[396] This was an attempt by the two (then) strongest parties (the social democrats and the right-wing Civic Democratic Party) to entrench their positions during the so called "opposition agreement" period. The elements included sizing down the electoral districts and changing the formula.

[397] Cf. Judgement of the CCC 13 October 1999, Pl. ÚS 30/98 or Judgement of the CCC of 27 February 2001, Pl. ÚS 53/2000.

[398] See Part II.2.

[399] The "Klaus' Constitutional Court" (2003-2012), for example, did not rule in favour of the President in important cases concerning judicial independence, most importantly Judgement of the CCC of 11 July 2007, Pl. ÚS 18/06 or Judgement of the CCC of 12 September 2007, Pl. ÚS 87/06 (see also Part VI.4.) It also decided clearly contrary to the wishes of the President in the cases *Lisbon I* (Judgement of the CCC of 26 November 2008, Pl. ÚS 19/08) and *Lisbon II* case (n 3). A similar defiance has emerged soon at the "Zeman's Constitutional Court" (2013-now).

[400] Judgement of the CCC of 27 March 2013, Pl. ÚS 17/13. See also supra Part III.6.

[401] The government is not directly involved in the selection and appointment of the Justices, review of governmental regulations is not as important as review of legislations, the government can propose an annulment of a statute only in exceptional circumstances etc.

policy when the government enjoys strong majority (especially) in the lower chamber. While such a situation *legally speaking* involves a relationship with the parliament,[402] *politically speaking* it is a governmental issue.

The CCC has also had several opportunities to deal with the relationship between the government and the President of the Republic. In the case concerning appointment of the Governor of the Czech Central Bank,[403] the CCC was faced with the question of whether the Prime minister has to counter-sign the President's decision to appoint the Central Bank's Governor. The CCC held that while the legal text is not exactly clear, it must side with the interpretation that best serves the independence of the central bank (which is a constitutional value). In the CCC's opinion, the President of the Republic, being "non-partisan and beyond-partisan" was a better guarantee of independence of the central bank, and thus the counter-signature by the "partisan" Prime Minister was not required.

However, the CCC's case law on the nature and powers of the President of the Republic has changed considerably since early 2000s. For example, in the already mentioned case concerning the removal of the Chief Justice of the Supreme Court by the Czech President,[404] the CCC treated the President more as a traditional executive organ and the expressions like "beyond-partisan" and "non-partisan" have disappeared from the CCC's case law.

3. Constitutional Court and Ordinary Courts

The relationship between the CCC and the ordinary courts is a very complex one. As the CCC itself often repeats in its rulings, it is neither a part of the system of general judiciary, nor the only body responsible for upholding the constitutional order. The CCC therefore understands its role as a subsidiary one and treats itself as the ultimate (but not the only) guardian of the constitution.

From the procedural point of view, this division of labour is most pronounced in the individual constitutional complaint proceedings,[405] in which the CCC reviews almost exclusively decisions of ordinary courts. It is often emphasized that protection of fundamental rights is the task of the whole judicial power.[406] Naturally, such a system could not work without a meaningful doctrine of general binding power (or precedential power) of the CCC's judgments.[407]

Since the 1990s, the introduction of the CCC with its purposive interpretation and value-laden reasoning immediately led to a clash with the Supreme Court. The main battleground of the so-called "war of the courts" (*válka soudů*) became the interpretation of Article 269(1) of the Criminal Code concerning the conscientious objector status of Jehovah's Witnesses. While the Supreme Court held

[402] The chambers of the Parliament are parties to the proceedings as the authors of the challenged act and the petitioner are members of the Parliaments

[403] Judgement of the CCC of 20 June 2001, Pl. ÚS 14/01, available in English at http://www.usoud.cz/en/decisions/20010620-pl-us-1401-czech-national-bank-1/.

[404] Judgement of the CCC of 11 July 2007, Pl. ÚS 18/06.

[405] Another important types of proceedings in which the ordinary court may become a party to the proceedings is the so called concrete review of legislation (see supra part III.2). Pursuant to Art. 95(2) of the Constitution, a ordinary court may propose an annulment (or declaration of unconstitutionality, cf. judgment) of a statute if it there is a statute 1) which is applicable in a pending case of that ordinary court and 2) the ordinary court considers the statute unconstitutional.

[406] Article 4 of the Czech Constitution.

[407] See Part V.2.

that every single evasion of military service is a new criminal act, the CCC found this position unconstitutional for the violation of freedom of conscience and the principle of *ne bis in idem*.[408] The Supreme Court refused to apply the CCC's judgments until 1999, when it eventually buckled under the growing pressure.[409] The scars have remained though, and the relationship between these two courts has always been tense. This has been revealed for example in a recent clash over the private law problem of acquisition of property from a "non-owner".[410]

The Supreme Administrative Court has generally been more receptive of the CCC's case law. However, the two soon ended up waging another "war of the courts", this time with a European dimension. In a seemingly technical issue the two courts disagreed on the calculation of the pensions of Czech citizens who (before the division of Czechoslovakia) had worked on the territory of Slovakia. In the 2000s their pensions were lower than those of Czech citizens who had worked in the Czech territory before the split. The Supreme Administrative Court followed the relevant statutes and found this pension gap, however unfortunate, to be in conformity with the applicable Czech law, EU law and international social security treaties. However, the CCC found this situation unjust and repeatedly held that the pensions had to be levelled due to specific circumstances of the dissolution of Slovakia. The Supreme Administrative Court refused to follow this case law and kept providing other reasons for its original position. The rupture was further exacerbated when the CCC in one of its judgments in the so-called "Slovak Pension Saga" suggested that judges of the Supreme Administrative Court who resist its case law should be disciplined.[411]

Most European scholars know only a later sequel in the "Slovak Pension Saga". The Supreme Administrative Court thought that it found a winner in 2009 and submitted a preliminary reference to the CJEU, suggesting that levelling pensions of Czechs working in the pre-split Slovakia only violates the principle of non-discrimination guaranteed by the EU Directives. The CJEU in the *Landtova* judgment[412] agreed with the Supreme Administrative Court and thus became (perhaps not knowingly) a proxy in the domestic war of courts.

However, the CCC fought back and found the CJEU's judgment *ultra vires*. The Supreme Administrative Court submitted another preliminary reference to the CJEU, but this time Czech politicians stepped in. In order to prevent further embarrassment on the EU level and stop this litigation for good, they solved this issue by off-the-courts settlement with the petitioner in the case, so that the proceedings might be discontinued.

In sum, the support of the CCC by the two apex ordinary courts is not unconditional and both the Supreme Court and the Supreme Administrative Court have had strained relationship with the CCC at times. The trenches are deep and it will not be easy to overcome them. Both "wars of courts" also

[408] See for example Judgement of the CCC of 18 September 1995, IV. ÚS 81/95, and Judgement of the CCC of 4 March 1998, I. ÚS 400/97.
[409] Including pressure from the newly appointed President of the Supreme Court (and a future Vice-President of the CCC) Eliška Wagnerová.
[410] Simply put, the Supreme Court held for several years its position – despite a series of CCC's judgments to the contrary – that one cannot acquire property from a non-owner, even though one is in good faith. The Supreme Court finally capitulated only in 2016, by its Grand Chamber Judgement of 9 March 2016, 31 Cdo 353/2016. As to the CCC's position, see for example Judgement of the CCC of 11 May 2011, II. ÚS 165/11.
[411] Judgement of the CCC of 3 August 2010, III.ÚS 939/10.
[412] CJEU, Case C-399/09 Landtova [2011] ECR I-5573.

show that the CCC is powerful and usually has the last word, but its position is more fragile than it seems.

The relationship between the CCC and the ordinary courts has at least one further important dimension, namely the CCC's case-law concerning judicial independence which has been an extremely important factor shaping the Czech judicial landscape.[413] Most importantly, the CCC did not hesitate to clash with the Czech President over the removal of the Chief Justice of the Supreme Court and the appointment of the Supreme Court Vice-President.[414] In both cases, the CCC stressed the importance of separation of powers and found the arbitrary dismissal of court presidents unconstitutional. By holding so, it put a halt to a widespread practice that plagued the Czech as well as other Central European judiciaries.[415]

A similar logic underlined the slightly controversial line of case law concerning the judges' salaries.[416] The CCC held that the Parliament had a very limited discretion in determining (practically speaking in lowering or freezing) the judges' salaries. The CCC has built this series of judgments on the notion that stability and a certain level of judges' salaries is crucial for judicial independence. Accordingly, any interference with judicial salaries must be proportionate and justified by extraordinary circumstances.

5. Constitutional Court and the ECHR

All Czech courts have to engage with ECHR and the Strasbourg court. The CCC, has been particularly keen on using the ECtHR case law and has generally embraced the Strasbourg jurisprudence.[417] In 2002 the CCC even constitutionalized international human rights treaties, including the European Convention on Human Rights,[418] and has used these treaties as a benchmark for constitutional review of statutes ever since.

After the dissolution of Czechoslovakia, both the Czech and the Slovak constitutions introduced provisions determining the status of the ECHR. The Czech Constitution provided that "[r]*atified and promulgated international treaties on human rights […], by which the Czech Republic is bound, are immediately binding and have priority over statutes*".[419] This article should be read in conjunction with Article 87(1)(a) of the Czech Constitution (before the Euro-Amendment) which stipulated that "[the CCC] *has jurisdiction ... to annul statutes or individual provisions thereof if they are in conflicts*

[413] See Michal Bobek, 'The Administration of Courts in the Czech Republic – In Search of a Constitutional Balance' (2010) 16 EPL 251; Kosař (n 324); and 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'. (2017) 13 EuConst 96.

[414] See supra note 399.

[415] See Kosař and Šipulová (n 17).

[416] See e.g. Judgement of the CCC 14 July 2005, Pl. ÚS 34/04, available in English at http://www.usoud.cz/en/decisions/20050714-pl-us-3404-judgessalaries/.

[417] See Lubomír Majerčík, 'Czech Republic: Strasbourg Case Law Undisputed' in Patricia Popelier, Sarah Lambrecht and Koen Lemmens, *Criticism of the European Court of Human Rights* (Intersentia, Cambridge 2016) 131 et seq; and Ladislav Vyhnánek, 'A Holistic View of the Czech Constitutional Court Approach to the ECtHR's Case Law' (2017) 77 ZAÖRV 715.

[418] See also supra part III.3.

[419] Article 10 of the Czech Constitution

with the constitutional act or international treaty under Article 10".[420] Article 87(1)(a) of the Czech Constitution thus made clear that international human rights treaties, including the ECHR, enjoyed a higher position in the hierarchy of the Czech legal order than statutes and the CCC could annul statutes *solely* for their lack of conformity with such a treaty. This provision also suggested that if ordinary courts find that a statute violates an international human rights treaty, they should not apply the treaty by themselves, but they should refer this issue to the CCC under the concrete review of constitutionality.[421] However, the Constitution did not address whether these treaties belong to the "constitutional order". Not surprisingly, the CCC carefully avoided expressing its view on this issue.[422]

The Czech "Euro-amendment" completely abolished the specific category of "international human rights treaties" and replaced the former Article 10 of the Czech Constitution with the following wording: "*Promulgated treaties, to the ratification of which Parliament has given its consent and by which the Czech Republic is bound, form a part of the legal order;* if a treaty provides something else than the statute, the international treaty shall apply".[423] In addition to amending Article 10 of the Czech Constitution, the reference to international human rights treaties was deleted.[424] Its revised wording reads as follows: "[The CCC] *has jurisdiction ... to annul statutes or individual provisions thereof if they are in conflicts with the constitutional order*". This was supposed to mean that the "Article 10 treaties" would no longer be reference norms for the CCC.[425]

This constitutional amendment thus established a general clause that gave priority to all international treaties, provided that they fulfil the criteria mentioned in Article 10 of the Czech Constitution. As a result, the "international human rights treaties" were supposed to cease to exist as a separate category of international treaties. Furthermore, the "Euro-amendment" clarified the issue of whether the ECHR belongs to the constitutional order. It clearly said no, *all* international treaties under Article 10 of the Czech Constitution, including international human rights treaties, enjoy "only" the application priority. Finally, it made clear that the CCC no longer has the power to review the conformity of statutes with the international human rights treaties. It became the task of ordinary courts to apply the international treaties instead of the statute if conditions under Article 10 of the Czech Constitution were met.

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[420] Emphasis added.

[421] On the concrete review of constitutionality before the CCC, see Part III. 2.

[422] See Eliška Wagnerová, 'The Direct Applicability of Human Rights Treaties' in Venice Commission, *The status of international treaties on human rights* (Council of Europe Press, 2006) 117. Legal academia was, not surprisingly, divided on this issue; see e.g. Mahulena Hoffmanová and Dalibor Jílek, 'Czech Republic' in Robert Blackburn and Jörg Polakiewicz. *Fundamental Rights in Europe: The European Convention on Human Rights and its Member States, 1950-2000*. (OUP, Oxford 2001) 250-251.

[423] Emphasis added.

[424] From Art. 87(1)(a) where it originally had been.

[425] This conclusion is firmly supported by the debates on the "Euro-amendment" in the Czech Parliament. The original proposal of "Euro-amendment" included the international human rights treaties among the reference norms for the CCC (but even in this proposal, the international human rights treaties were not given a constitutional status), but this provision was subsequently revised and reference to the international human rights treaties was omitted.

However, the CCC completely reinterpreted this part of the "Euro-amendment". In its landmark *Euro-Amendment Judgment*[426] the CCC held that "[t]*he inadmissibility of changing the substantive requirements of a democratic state based on the rule of law also contains an instruction to the* [CCC]*, that no amendment to the Constitution can be interpreted in such a way that it would result in limiting an* already achieved procedural level of protection for fundamental rights and freedoms".[427] Therefore, the CCC concluded that the international human rights treaties have *retained* their constitutional status.[428] However, what happened in fact was that the CCC 'constitutionalized' the international human rights treaties, including the ECHR. Furthermore, the CCC held that the ordinary courts still must refer a clash between an applicable statute and the ECHR to the CCC under the concrete review of constitutionality.

This judgment of the CCC was met not only with fierce criticism from the legal academy[429] and the Czech Agent before the ECtHR,[430] but also with occasional resistance from ordinary courts. But despite this criticism the CCC has repeatedly upheld its position,[431] and thus the ECHR enjoys a higher position in the national hierarchy of sources than envisaged by the text of the Czech Constitution.

The CCC has been considered a champion in the application of the ECHR in Czechia and relied heavily on the ECtHR case law when interpreting the Constitution and the Charter.[432] It quotes the Strasbourg jurisprudence on a regular basis and in an extensive manner. This trend is not surprising since the catalogues of human rights adopted in Czechia was to a significant degree influenced by the ECHR. In fact, several definitions of human rights in the Czech Charter of Fundamental Rights mirror almost word by word their equivalents in the ECHR.[433]

In general, the case law of the CCC has been very "ECHR-friendly".[434] Due to its "ECHR-friendly" approach, the CCC also carefully avoided or brushed away any potential conflict between the

[426] Judgement of the CCC of 25 June 2002, Pl. ÚS 36/01 *Euro-Amendment*.

[427] Emphasis added.

[428] Note that, in fact, the international human rights treaties had *never* had the constitutional status before. See Wagnerová (n 422) 117; and Vít Alexandr Schorm, 'Evropský soud pro lidská práva, Ústavní soud a Nejvyšší soud' in Vít Hloušek and Vojtěch Šimíček (eds), *Dělba soudní moci v České republice* (Masarykova Univerzita, Brno 2004) 74-75.

[429] See e.g. Zdeněk Kühn and Jan Kysela*,* 'Je ústavou vždy to, co Ústavní soud řekne, že ústava je? (Euronovela Ústavy ve světle překvapivého nálezu Ústavního soudu)' (2002) 10 Časopis pro právní vědu a praxi 199. For an opposing view, see Jiří Malenovský, 'Postavení mezinárodních smluv o lidských právech v českém právu po 1. červnu 2002' (2002) 141 Právník 917.

[430] See V. A. Schorm, "Evropský soud pro lidská práva, Ústavní soud a Nejvyšší soud" (The ECtHR, the Constitutional Court and the Supreme Court), In V. Hloušek and V. Šimíček (eds.), Dělba soudní moci v České republice (Brno, 2004) 68-79.

[431] See e.g. Judgement of the CCC of 15 April 2003, I. ÚS 752/02, available in English at https://www.usoud.cz/en/decisions/20030415-i-us-75202-danger-of-torture-1/.

[432] See for example Michal Bobek and David Kosař, 'The Application of European Union Law and the Law of the European Convention of Human Rights in the Czech Republic and Slovakia: An Overview' in Giuseppe Martinico and Oreste Pollicino (eds), *National Judges and Supranational laws. A comparative verview on the national treatment of EU law and the ECHR* (Europa Law Publishing, 2010) 157-190; Majerčík (n 417) and Vyhnánek (n 417).

[433] See David Kosař, 'Conflicts between Fundamental Rights in the Jurisprudence of the Czech Constitutional Court' in Eva Brems. *Conflicts Between Fundamental Rights* (Intersentia, Oxford 2008) 349.

[434] For this reason, we could not trace any opposition to the more activist approach shown recently by the ECtHR. Both constitutional courts seem to be "touchy" only if the ECtHR criticizes *their* practice. See e.g. reaction of the CCC to the ECtHR's ruling in *Krčmář and Others v. the Czech Republic* (Judgement of 3 March

Constitution and the ECHR. Instead, it tried to read the ECHR into the Czech constitutional order and, if necessary, stretched the human rights provisions in the Czech Charter of Fundamental Rights to their limits. For instance, the CCC sometimes quashed the decisions of the ordinary courts with the use of highly contestable conclusions based on a very expansive reading of the ECHR and ECtHR's case law. For instance, the CCC in its judgement of 13 July 2006, I. ÚS 85/04[435], literally "created" the right to monetary relief for non-pecuniary injuries.[436] This is not an uncommon move for a European constitutional court.[437] However, the CCC did not rely on the Czech Charter of Fundamental Rights at all. Instead, it arrived to this conclusion *solely* on the ground of interpretation of Article 5(5) ECHR[438] and argued that the notion "an enforceable right to compensation" (*droit à réparation*) in Article 5(5) ECHR has an autonomous meaning which entails the right to compensation for both pecuniary and non-pecuniary injury. Unfortunately, the ECtHR has, to our knowledge, never held so.

The CCC has also addressed the relationship between the ECHR and other, non-human-rights, international treaties.[439] In its Judgment of 15 April 2003 (I. ÚS 752/02), the CCC faced a conflict between the obligations stemming from the ECHR on the one hand, and the European Convention on Extradition on the other. It relied on its earlier *Euro-Amendment Judgment*[440] and held that the ECHR must prevail as it is a human rights treaty.[441] In sum, the CCC again confirmed its generous "pro-ECHR stance". However, the CCC has not had to deal with more difficult cases such as conflicts between the ECHR and the UN Security Council Resolutions yet. Under the logic of the CCC reasoning, the ECHR should prevail over *any* "non-human-rights treaty" which is not only a problematic position vis-à-vis Article 103 UN Charter, but also a more generous reading of the ECHR than by the ECtHR itself.[442]

6. Constitutional Court and EU law

The relationship between the CCC and the EU law is arguably even more complex than the issues surrounding the ECHR. Potential avenues for dialogue or conflict include review of EU law or review of acts implementing the EU law, use of EU law as a benchmark of constitutionality or the relationship between the "substantive core" of the constitutional order and the primacy of EU. In

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2000, Appl. no. 35376/97), described in Jiří Malenovský. 'Obnova řízení před ústavním soudem v důsledku rozsudku Evropského soudu pro lidská práva' (2001) 140 Právník 1241, 1242.

[435] Available in English at https://www.usoud.cz/en/decisions/20060713-i-us-8504-non-pecuniary-damage-compensation-1/.

[436] For a detailed discussion of this judgment, see Michal Bobek , 'Ústavní soud: Má srovnávací argumentace přednost před českým zákonodárcem, judikaturou i doktrínou anebo je císař nahý?'(2006) 12 *Soudní rozhledy* 415.

[437] See e.g. a famous *Princess Soraya* case of the German Federal Constitutional Court (34 BverfGE 269, 1973). *Cf.* Donald Kommers, *The Constitutional Jurisprudence of the Federal Republic of Germany* (Duke University Press, London 1997) 124-128.

[438] And with the use of comparative argumentation "read into" Art. 5(5) ECHR.

[439] We are not aware of any ruling of the SCC that would explicitly address the conflict between the ECHR and the other (non-human-rights) international treaty.

[440] Judgement of the CCC of 25 June 2002, Pl. ÚS 36/01 *Euro-Amendment*.

[441] For further details, see Wagnerová (n 422) 122-123.

[442] See *Behrami v. France* (Appl. no. 71412/01), and *Saramati v. France, Germany and Norway* (Appl. no.78166/01), admissibility decisions of the ECtHR (GC) of 2 May 2007.

procedural terms, the most salient issue has been the question whether the CCC considers itself a court that has a duty to ask the CJEU for a preliminary ruling under Article 267(3) TFEU.

In general, the Czech ordinary courts have adopted a euro-friendly interpretation of the Czech law and followed the Luxembourg jurisprudence.[443] The CCC initially followed the suit and showed significant openness to the EU law. In March 2006, in the *Sugar Quota III* case,[444] the CCC generally accepted the EU regulation of the sugar market sector, although the opposition parliamentarians argued that it was a violation of the right to unrestrained business activities. The CCC, however, quashed the national implementing measure on procedural grounds. As far as the relationship between the Czech Constitution and European Union law, the CCC rephrased to a great extent the approach of the German Federal Constitutional Court: "*In the Constitutional Court's view, the conditional nature of the delegation of these powers is manifested on two planes: the formal and the substantive plane. The first of these planes concerns the power attributes of state sovereignty itself, the second plane concerns the substantive component of the exercise of state power. In other words, the delegation of a part of the powers of national organs may persist only so long as these powers are exercised in a manner that is compatible with the preservation of the foundations of state sovereignty of the Czech Republic, and in a manner which does not threaten the very essence of the substantive law-based state.*"[445]

In the *Sugar Quota III* case, the CCC also accepted the notion that the membership of Czechia in the European Union may force a national constitutional court to revise its previous case law. In the *Sugar Quota III* judgment, the de facto overruling concerned case law involving production quotas for sugar[446] and milk,[447] cases in which the CCC had previously taken a critical stance towards governmental regulation of these production sectors before the accession to the EU. However, in the *Sugar Quota III* decision, the CCC noted that "*[…] as regards measures of an economic nature pursuing an aim that flows directly from the Community policy of the EC, the Constitutional Court cannot avoid the conclusions which flow directly from the case-law of the ECJ and from which a definite principle of constitutional self-restraint can be inferred.*"[448] The CCC's so-called "constitutional self-restraint" in economic matters led it to refrain from any review of the sugar quota regulation based on European Union law.

Even though the *Sugar quotas III* judgment introduced a *Solange*-like doctrine that refused to acknowledge the unconditional primacy of the EU law, the subsequent case law, with one notable exception, adopted a friendly stance towards the EU law. The CCC's 2006 *European Arrest Warrant* judgment is a typical example of this euro-friendliness. In that judgment the CCC made clear that the obligation to interpret domestic law in a manner consistent with EU law applies even to the interpretation of the Czech constitutional order. More specifically, the CCC found the European

[443] Kosař and Bobek (n 432) 190 or Ladislav Vyhnánek, 'The Eternity Clause in the Czech Constitution as Limit to European Integration' (2015) 9 ICL Journal 240.

[444] Judgement of the CCC of 8 March 2006, Pl. ÚS 50/04, *Sugar Quotas III*, available in English at https://www.usoud.cz/en/decisions/20060308-pl-us-5004-sugar-quotas-iii-1/.

[445] Ibid., section VI. B of the judgement.

[446] Judgement of the CCC of 30 October 2002, Pl. ÚS 39/01, *Sugar Quota II*, available online in English at https://www.usoud.cz/en/decisions/20021030-pl-us-3901-sugar-quotas-ii-1/.

[447] Judgement of the CCC of 16 October 2001, Pl. ÚS 5/01, *Milk Quota Regulation*, available in in English at https://www.usoud.cz/en/decisions/20011016-pl-us-501-milk-quota-regulation-1/.

[448] *Sugar Quotas III* (n 444) part VI.A-3.

Arrest Warrant framework constitutional despite the clear wording of Article 14(4) of the Charter, which explicitly guarantees that no citizen may be forced to leave her homeland.[449] Similarly, in the 2009 *Lisbon II* judgement[450], the CCC adopted a very euro-friendly interpretation of the Czech constitutional order, and by doing so it distanced itself from the rather assertive *Lisbon* judgement (*Lissabon-Urteil)* of the German Federal Constitutional Court. It has eventually found the Lisbon Treaty to be in conformity with the Czech constitutional order and thereby lifted the last major obstacle to the entry into force of the Lisbon Treaty.[451]

However, only two years later, the CCC showed that its euro-friendliness has its limits. In the *Holubec* judgment[452] the CCC found the CJEU's *Landtová* judgment[453] to be *ultra vires*. By this decision, the CCC for the first time in the history of European integration clearly and openly declared an EU act *ultra vires* and thus not applicable on the national territory.[454] Nevertheless, as we have stated elsewhere,[455] the importance of this judgment for future evolution of the CCC's case-law should not be overestimated. It can be argued that this exception was motivated by predominantly domestic reasons – the CCC's long and bitter dispute with the Supreme Administrative Court in the Slovak Pensions saga[456] – and not by an aspiration to take on the CJEU. Other authors have also downplayed the long term significance of this judgment, relegating it to future material for "footnotes in EU law text-books".[457]

Later development has confirmed this view. After the turnover of its Justices in 2013 the new Zeman's Court soon returned to the earlier euro-friendly position.[458] In 2015, for example, the CCC has refused to strike down the 5% legal threshold applicable in the European Parliament elections.[459] While the BVerfG (that decided virtually the same case in the German context with a different conclusion) viewed the problem through the traditional lens of democracy at the national level and the protection of political rights, the CCC did not hesitate to adopt a "euro-friendly" attitude that assigns greater importance to the smooth functioning of the European Parliament.[460]

In sum, the CCC has acknowledged a conditional (*Solange*-like) primacy of the EU law. Therefore, it had also generally excluded the possibility of the CCC reviewing the sources of EU law as regards

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[449] Judgement of the CCC of 3 May 2006, Pl. ÚS 66/04 (see also n 322), available in English at https://www.usoud.cz/en/decisions/20060503-pl-us-6604-european-arrest-warrant-1/.

[450] See supra note 3.

[451] See also *supra* the introduction.

[452] Judgement of the CCC of 31 January 2012, Pl. ÚS 5/12 *Holubec* (in the Czech context this judgment is often referred to also as *Slovak Pensions XVII* to show that it is a part of the much longer "Slovak Pension Saga").

[453] CJEU, Case C-399/09 Landtova [2011] ECR I-5573.

[454] See Komárek (n 7); and Zbíral (n 7)

[455] Vyhnánek (n 443).

[456] See Part VI.3 above.

[457] Zbíral (n 7).

[458] This is probably tied to the personal dimension in more than one way. First of all, the main actor of the Landtová/Holubec escalation and an extremely influential Justice of the CCC's first two decades, Pavel Holländer, has left the court in 2013. On the other hand, Jiří Zemánek, a Justice with a very euro-friendly attitude, has become part of the CCC in 2014.

[459] Judgement of the CCC of 19 May 2015, Pl. ÚS 14/14.

[460] See also Hubert Smekal and Ladislav Vyhnánek, 'Equal voting power under scrutiny: Czech Constitutional Court on the 5% threshold in the 2014 European Parliament Elections: Czech Constitutional Court 19 May 2015, Pl. ÚS 14/14' (2016) 12 EuConst 148, 163.

their conformity with the Czech constitutional order.[461] The potential for a clash between the "substantive core" of the Czech constitutional order and the EU law is further diminished by the fact that the CCC generally interprets even the key provisions and concepts of the Czech constitutional order (such as democracy or sovereignty) in a euro-friendly manner.[462]

The precise position of the EU law in the Czech constitutional order is unclear though.[463] For now, EU law does not serve as a benchmark or yardstick[464] for review of constitutionality by the CCC, as according to Article 87 and 88 of the Czech Constitution the standard for constitutional review is the "constitutional order" (which does not include EU law).[465] On the other hand, the practice of euro-friendly interpretation of the constitutional order effectively means that EU law indirectly, through interpretation, enters the constitutional order and thus influences the standard of constitutional review.

In procedural terms, the CCC still has not submitted a single preliminary reference to the CJEU, but it has consistently held that it does not exclude such a possibility.[466] Moreover, the CCC has adopted the BVerfG's approach[467] towards policing the lower courts' references for preliminary rulings and has held that by not asking for a preliminary ruling or by not addressing this issue properly in a decision's reasoning, an ordinary court may violate fundamental rights protected by the Charter.[468]

VII. The Future of the Czech Constitutional Court – Winter is Coming

Forecasting the CCC's future, due to the recent developments in Central Europe, is a tricky task. In the previous parts of this chapter, we showed that the CCC's stature and political salience has evolved slowly and incrementally since 1993. Despite the fact that the CCC's major powers have been entrenched in the Constitution since its adoption, it took almost two decades for the CCC to really test the boundaries of its powers and to show its full potential.

The CCC has used the last 25 years to demonstrate that it considers itself the ultimate guardian of the Czech Constitution that might even annul a constitutional amendment,[469] that can curb the prerogative powers of the President regarding appointment of the Supreme Court Vice-President[470]

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[461] See supra the discussion of the *Sugar Quotas III* judgment. Still, the CCC may review the domestic act implementing EU law, especially as regards the use of discretion by the national lawmaker.
[462] Cf. Vyhnánek (n 409).
[463] This applies to EU law in general. The CCC has so far avoided specific discussion about the rank of the EU Charter within the Czech constitutional order. There are judgments which declare that the EU Charter was violated, but they never address the issue of its position within the Czech constitutional order. See for example Judgement of the CCC of 26 February, III. ÚS 3808/14, para. 31. However, one might infer from the judgement's context (and from the fact that reference to the EU Charter is missing in the operative part of the judgement) that the CCC does not consider EU Charter a part of the constitutional order.
[464] Davide Paris, 'Constitutional courts as European Union courts. The current and potential use of EU law as a yardstick for constitutional review' (2017) 24 MJECL 792.
[465] See also Paris (n 464) 801.
[466] For example in *Sugar Quotas III* (n 444) of in the decision of the CCC of 30 May 2008, IV. ÚS 154/08.
[467] See 2 BvR 2419/06.
[468] Namely the right to legal judge or the right to fair trial. See for example Judgement of the CCC of 8 January 2009, II. ÚS 1009/08.
[469] See *supra* the discussion of the *Melčák* case in Part III.7).
[470] Judgement of the CCC of 12 September 2007, Pl. ÚS 87/06, *Brožová vs. Klaus IV.*

and perhaps even review the presidential amnesties,[471] that can engage in the left-right political struggles concerning social rights,[472] that shapes the relationship between the Czech and the European law,[473] and lately, that it is not shy of pushing for a large-scale social changes by issuing "socially progressive" judgments in family law.[474] Many doctrines originating in these judgments have by now become settled case-law and it is likely that, *ceteris paribus*, the CCC would stay true to them in the future. Therefore, the CCC is a very powerful institution and the other constitutional bodies as well as political players are well aware of that.

However, "the times they are a-changing" in Central Europe. The recent wave of populism has not left Czechia untouched. The results of the 2017 parliamentary elections as well as the 2018 presidential election showed that the country is deeply divided and that the populist camp has an upper hand for now.[475] This rise of anti-elitist and anti-pluralistic forces will sooner or later end up in a collision with the CCC, arguably the most elitist institution in Czechia.

The million-dollar question is thus whether, and for what price, can the CCC withstand this pressure. The bright side is that it is relatively difficult to amend the Czech Constitution, as the qualified majority of both parliamentary chambers is required.[476] In addition, the term of the first Justice of "Zeman's Court" will finish only in 2023. Even more importantly, all current Justices were appointed by the recently re-elected president Miloš Zeman. The turnover of Justices is thus off-the-table in the short-term[477] and it would be rather difficult for President Zeman to claim that his own picks fell short of his expectations.[478]

On the other hand, this institutional setting will increase the pressure by informal and perhaps even extra-legal means.[479] On the personal side, some Justices are in their late 60s or even 70s and may not be willing or capable to work under stress for several years. Justices who are in their 40s might think about what will be after their stint at the CCC. Other Justices may keep an eye on the position on one of the supranational or international courts. Some Justices might be thus willing to resign "voluntarily" in exchange for another position or a good retirement package.[480] On the procedural

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[471] Judgement of the CCC of 5 March 2013, Pl. ÚS 4/13*, Amnesty of Václav Klaus*, para. 42.

[472] See judgments of the CCC of 20 May 2008, Pl. ÚS 1/08; of 23 April 2008, Pl. ÚS 2/08; or of 27 November 2012 Pl. ÚS 1/12.

[473] See *supra* judgments *Sugar quotas III* (n 444) or *Lisbon I* (n 399) *and Lisbon II* (n 3).

[474] See Judgement of the CCC of 29 June 2017, I. ÚS 3226/16, *Recognition of Parenthood in Same-Sex Marriage that Took Place Abroad*.

[475] The populist billionaire Andrej Babiš won the 2017 parliamentary elections by a landslide, while the traditionally dominant political parties on the right (the Civic Democratic Party) as well as on the left (Social Democrats) suffered heavy blows. To make things worse, the Communist Party and the right-wing anti-immigration party made it to the Parliament too. This resulted in a stalemate; see Tim Haughton, Vlastimil Havlik and Kevin Deegan-Krause, 'Czech elections have become really volatile. This year was no exception.' *Washington Post* (October 24, 2017), available at https://www.washingtonpost.com/news/monkey-cage/wp/2017/10/24/czech-elections-have-become-really-volatile-this-year-was-no-exception.

[476] But see note 485 below.

[477] This is in contrast to the Polish situation after Kaczinski's Law and Justice won the elections in 2016.

[478] This is in contrast to both the Polish and Hungarian scenarios.

[479] See the Polish scenario after 2016.

[480] For a recent example of such resignation, see resignation of Andrzej Wróbel, Justice of the Polish Constitutional Tribunal, whose resignation in January 2017 allowed the governing Law and Justice Party to appoint the eight Justice and gain the majority on the 15-member Tribunal. See Ewa Siedlecka, Sędzia Andrzej Wróbel odchodzi z Trybunału Konstytucyjnego. PiS obsadzi kolejne miejsce, *Gazetta Wyborcza*, 25 January

side, many rules regarding the necessary quorum and majorities in different types of proceedings are stipulated only in Law on the Constitutional Court, which is an ordinary statute that can be amended by a simple parliamentary majority. The recent developments in Poland attest that such amendment may de facto paralyze the constitutional court.[481] The CCC's internal rule regarding case assignment,[482] the creation of the disciplinary chambers,[483] and the attraction of cases by the Plenary[484] are also full of loopholes that can be exploited easily. On the financial side, the parliamentary majority can also cut the CCC's funds or reduce the number of law clerks, both of which would seriously impede the CCC's functioning. Finally, from Poland we learned that the ruling parties may even resort to non-implementation techniques, for instance by refusing to publish constitutional court's judgments they do not like. All of this is possible without touching the single word of the Czech Constitution.[485]

More importantly, the CCC's resilience has not been really (politically) tested yet. Unlike the constitutional courts in Poland,[486] Hungary[487] and to some extent even in contrast to Slovakia,[488] the CCC has never operated in a hostile political environment. The CCC has never been seriously challenged[489] and has never clashed with a strong and unified political bloc in the Czech Parliament. Instead, it has to a large extent done what it wanted. "Skating on a thin ice" is thus not the most developed skill of the CCC and its Justices. To the contrary, the CCC has often acted as an elephant in the cupboard, both domestically[490] as well as vis-à-vis the supranational actors such as the CJEU.[491] In a sense, the CCC has been a *Schmittian* Court as it acted as if it was the "sovereign who decides on exception".[492] This has worked until now, because the CCC has operated in a politically unstable environment without a strong majority in the Parliament and with two pro-European parties (Social Democrats and the Civic Democratic Party) alternating at the helm of the country.

This is no longer the case.[493] The arguably most difficult task for CCC Justices will be to change their mind-set. They will have to undergo a mental transition and act with self-restraint. They simply will

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2017, available at http://wyborcza.pl/7,75398,21289466,sedzia-andrzej-wrobel-odchodzi-z-trybunalu-konstytucyjnego.html?disableRedirects=true

[481] See e.g. Koncewicz (n 17).

[482] See Part IV.4.

[483] See Parts TI.4 and IV.2.

[484] See Part IV.4.

[485] Note that the populist parties in the 2017 parliamentary elections almost won the constitutional majority in the lower chamber of the Czech Parliament, as the three democratic parties (Christian Democrats, TOP09, and the Association of Mayors and the Independents) barely surpassed the 5% electoral threshold.

[486] Cite to the Polish chapter in this book. See also the 2005-2007 era in Poland (during the rule of both brothers Kaczinskis); and, for more recent events, Koncewicz (n 17).

[487] See Halmai (n 17); Uitz (n 17); and Kosař and Šipulová (n 17).

[488] See the Mečiar era (1993-1998) discussed in Radoslav Procházka, *Mission Accomplished: On Founding Constitutional Adjudication in Central Europe* (CEU Press, Budapest 2002).

[489] The rather philosophical arguments about "juristocracy" used by president Klaus and his supporters (Václav Klaus et al., *Soudcokracie. Fikce nebo realita?* (CEP, Praha 2006)) does not count as "hostile" or "a real political test" in our eyes.

[490] See Part VI.3.

[491] See Part VI.6.

[492] Carl Schmitt, *Political Theology*, p. TBA.

[493] See Sean Hanley, 'Dynamics of new party formation in the Czech Republic 1996-2010: Looking for the origins of a 'political earthquake' (2012) 28 East European Politics 119; Vlastimil Havlík, 'Populism as a threat to liberal democracy in East Central Europe' in Jan Holzer and Miroslav Mareš (eds), *Challenges to Democracies in East Central Europe* (Routledge 2016) 36-55; Vlastimil Havlík and Petr Kaniok, 'Populism and Euroskepticism in the

have to realize that they do not work in Karlsruhe and the stature of the CCC in Czechia is not necessarily the same as the stature of BVerfG in Germany. If Czech Justices and their law clerks fail to act strategically and keep on waging cultural wars regarding the definition of family,[494] thwarting the major legislative achievements of the current strong political majorities,[495] and overzealously challenging the directly elected president, they will invite backlash. The recent political attacks on constitutional courts in Hungary and Poland should be treated as reminders that it is not easy to survive a frontal political attack, even within the European Union.

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Czech Republic: Meeting Friends or Passing By' (2016) 16 Romanian Journal of European Affairs 20; Haughton, Havlík and Kevin Deegan-Krause (n 475).

[494] See above note 474.

[495] See Judgement of the CCC of 12 December 2017, No. Pl. ÚS 26/16 *Electronic Evidence of Takings (EET)*, and especially the viral joint dissenting opinion.

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