6 The Czech Constitutional Court in times of populism

From judicial activism to judicial self-restraint

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6.1 The legal design of the Czech Constitutional Court and the rise of populism in Czech politics

The Czech Constitutional Court (CCC) is one of the strongest constitutional tribunals anywhere in the world. Its design is framed after the German model of the Federal Constitutional Court. It combines, on the one hand, classical constitutional review (review of the constitutionality of legislation, both concrete, initiated by general courts or the parties, and abstract, initiated by legislators), and on the other hand, a review of the constitutionality of decisions made by public authorities, including general courts (constitutional complaints).

This makes the CCC not only the only Czech court capable of annulling legislation because of its unconstitutionality, but also a sort of 'super-supreme' court, standing *in fact* above the two Czech supreme courts (Supreme Court and Supreme Administrative Court). Although the two supreme courts technically have a final say on the interpretation of the law, the CCC has a final say on the issue of whether or not that interpretation is constitutional. This provides two different avenues for the CCC. Firstly, it has a comfortable way with which it can dispose of the majority of constitutional complaints (by simply saying that the case does not have a constitutional significance and the CCC has no jurisdiction on interpreting the 'ordinary' or 'simple' law). In this way approximately 95% of constitutional complaints could be resolved. Secondly, there is always the possibility that the CCC would pick up the case and proclaim it to be of constitutional importance. In this way, the CCC is able to confirm or modify the case law of the general courts. What is a constitutional or an unconstitutional interpretation of 'ordinary' laws is, after all, ambiguous and provides a substantial leeway for the justices of the CCC to pick up those cases they want to decide on.[1]

1 Interestingly, this is exactly the reason why the law on the South African Constitutional Court which originally enjoyed similar powers was amended and the difference between the issue of lawfulness (the domain of ordinary courts) and constitutionality (the domain of the constitutional court) was abolished. See Christa Rautenbach and Lourens du Plessis, 'Constitutional Court of South Africa' in András Jakab, Arthur Dyevre, and Giulio Itzcovich (eds.), *Comparative Constitutional Reasoning* (Cambridge University Press 2017) 560.

In this chapter, I intend to subject the CCC to an analysis in view of the transformations it has undergone over the three decades of its existence. My aim will be, in particular, to examine to what extent there has been continuity or discontinuity in its decision-making, taking into account an essential institutional issue which the CCC has faced since the very beginning of its existence. The 15 justices of the CCC are appointed by the President of the Czech Republic, subject to the consent of the Senate, for ten years (renewable). Consequently, the constitutional foundations of the CCC already encompass a significant element of discontinuity: the 'ten-year' personnel settings of the court. That is why a major proportion of the constitutional judges is replaced at ten-year intervals (1993, 2003, 2013, 2023, etc.).

As a result of this unfortunately conceived ten-year period, which prevented a gradual replacement of the justices – one-third of the court every three years, for example – the CCC has been subject to regular 'personnel earthquakes' throughout its existence. Moreover, literally every President of the Republic 'models' the Constitutional Court 'to his liking' at the beginning of his mandate. In this regard, the Czech situation differs dramatically from its American archetype. While the latter is also characterized by the co-operation between the Senate and the President, justices are appointed for an indefinite term in the United States. The incumbent U.S. President thus usually gets to appoint two, exceptionally three, justices out of the total number of nine during his one or two terms in presidential office.

One possible way of maintaining at least some continuity is to have a justice re-appointed, but this is basically unheard of in comparative terms as this would impair the judge's independence towards the end of his/her mandate. Nonetheless, both President Klaus and Zeman used this option – three justices were thus serving a second term in office during the 'second' CCC (2003–2013) and two justices during the 'third' CCC (2013–2023, including the Chief Justice).

Moreover, this unfortunate design seems to make the court particularly vulnerable to a rapidly changing political climate and fully dependent on the political ideology of the President of the Republic, and these circumstances can be only partially controlled by the Senate. Between 1993 and 2020, the political landscape of the Czech Republic has changed significantly. The strategies and the nature of presidential appointments have differed, depending on the president in question.

Initially, the first ten years of the Court were defined by the Presidency of Václav Havel (1993–2003). President Havel appointed all justices within a few months (most in 1993, with two in 1994), having little trouble persuading parliamentarians to approve his nominees. In fact, in the early 1990s nominations of justices to the CCC took place beyond public attention because only a few people then realized the potentially enormous political impact of the CCC. Moreover, one should not forget the consensus of liberal constitutionalism (and, economically speaking, neoliberalism and a minimal state) which prevailed among the elites of the post-communist transitions

in the 1990s.[2] The CCC emphasized the primacy of an individual over the state.[3] There was a wide consensus that the new democratic constitutions should restrain the parliamentary majority and the executive branch and ensure adherence to the state's basic law through its counter-majoritarian functions.

In contrast, conservative President Klaus (2003–2013) was very sceptical of a strong judiciary. Elected to the Presidency by the Parliament after the 'champion' of Czech liberals, Havel, Klaus tried to change the course of the CCC. So, he adopted a different strategy; he tried to undermine the court by sending people of mediocre quality to the bench. Indeed, some of his nominees were so awkward, to say the least, that many of them were rejected by the Senate. A very painful process followed, when the Court had a number of vacancies and for some time was even unable to sit in full court.[4]

Although President Klaus was a premature messenger of the subsequent Czech populist policies of the 2010s, his effective strength was undermined by the fact that during much of his presidency the Czech political system remained relatively stable. It was only in the second decade of this century that cracks appeared in the system and new populist parties emerged. That is why the only lasting impact President Klaus had on the CCC was that he opened the bench to a much more diverse judicial body. And despite the President's strong belief in judicial self-restraint, it was 'his' judges who took the Court to a peak of judicial activism (as we will see later in this chapter).

Yet another scenario is that of President Miloš Zeman. In 2013 he was a retired politician (a former Prime Minister of the Social Democratic government from 1998 to 2002) who was elected to the presidential office by running an openly nationalist (anti-German) and xenophobic campaign in the very first direct election of the President in Czech history. In 2018 he was re-elected, this time running a populist anti-refugee campaign. According to many, he was able to shift the Czech political system to an unprecedented level of populism.[5] The end of the classical Czech political system and the rise of new populism was confirmed by the electoral victory of Andrej Babiš (a billionaire and a leader of the ANO movement) to the House of Representatives, who formed his cabinet in 2017 with the silent approval of the Czech Communist Party.

Interestingly, the impact of this political storm on the CCC was very limited. There are several reasons for this. First, the Senate, the upper house of

2 Adam Sulikowski, 'Government of Judges and Neoliberal Ideology' in Rafał Mańko, Cosmin Sebastian Cercel, and Adam Sulikowski (eds.), *Law and Critique in Central Europe: Questioning the Past, Resisting the Present* (Counterpress 2016) 16–31.

3 For example, Judgment of 18 October 1995, no. Pl. ÚS 26/94.

4 In English, see J. Kühn and J. Kysela 'Nomination of Constitutional Justices in Post-Communist Countries: Trial, Error, Conflict in the Czech Republic' (2006) 2 European Constitutional Law Review 183.

5 Vladimír Naxera and Petr Krčál, '"This is a Controlled Invasion": The Czech President Miloš Zeman's Populist Perception of Islam and Immigration as Security Threats' (2018) 12 Journal of Nationalism, Memory and Language Politics 192–215.

the legislature, is more resistant to the populist factions than the House of Representatives. This is due to the different electoral systems operating in the two chambers: senators are elected on the basis of the majoritarian system, representatives through a system of proportional representation. The majoritarian system (the winner takes all) effectively reduces political radicalism in the Senate. Even though the House is a much more powerful body, the Senate has effective veto power over the President's choices for the CCC. The Senate can also block any constitutional amendments or changes.

The second reason is accidental and relates to the originally close relations between the President and the Chief Justice of the CCC. Even though President Zeman was able to create the new Court in 2013 to his liking, he voluntarily delegated the selection of new judges to the team of legal experts (the chief judges of both the Supreme and the Supreme Administrative Courts, the Prosecutor General, and especially the Chief Justice, whom the President reappointed to the CCC in 2013). Thanks to his friendly relations with the Constitutional Court's Chief Justice, Rychetský (in office since 2003), the President consulted on most of his nominations in advance with the Chief Justice at the beginning of the President's mandate (2013 and 2014).

It appears that many justices appointed in 2013 and 2014 have been the choices of the Chief Justice rather than the President. The Chief Justice preferred legal wisdom over political ideology. It was only when the President realized that the CCC was not functioning in the way he would like that he interrupted his consultations with the Chief Justice. The President made the few remaining nominations after 2016 according to his own political tastes, trying to find nominees who would deliver his political (populist) message. But in this he faced a hostile Senate which refused one of his nominees in Spring 2019.[6]

As I have said, there has been little methodological or doctrinal impact on the Court's activity in the last ten years which could be plausibly called the impact of political populism. However, I will argue there is at least one such instance of this. In this chapter I intend to pay particular attention to the degree of activism of the 'first' CCC in 1993–2003 and the 'second' and the 'third' CCC in 2003–2013 and post 2013, respectively. I will do so with regard to the two most important functions of the CCC – its reviewing of the constitutionality of legislation (both general and specific) and its reviewing of the constitutionality of judicial decisions (proceedings on constitutional complaints). My argument will be that rising populism has affected the level of judicial activism vis-à-vis the legislature. Populist policies stress that it is the legislature which makes the law, and the Court should not try to change the people's will. Moreover, this is also a natural reaction to

6 The nomination was that of Aleš Gerloch, Professor of the Law School in Prague. Professor Gerloch was criticized by some senators for being too close to the President, for being his political ally or even for being virtually his puppet. Gerloch received only 19 out of 64 votes cast, and his nomination failed. See 'Senate Rejects Ales Gerloch's Nomination to Constitutional Court' Prague Daily Monitor, 21 March 2019.

the overtly activist Court at the end of the first decade of this century (see later in this chapter). In this regard, the 'third' CCC is historically the most self-restrained tribunal since 1989. In contrast, the level of activism of the CCC vis-à-vis the general judiciary has remained pretty stable throughout the Court's existence.

The concepts of judicial activism and self-restraint should therefore be defined at this point. I generally understand judicial self-restraint as a strategy on the part of a judge who tends to accept decisions made by other actors when in doubt in hard cases,[7] whether this relates to laws enacted by the legislature or judicial decisions made by general courts. In this regard, a judge exercising self-restraint will usually give priority to values embraced by those who adopted the decision under review, over his/her own values.[8]

6.2 The two decades of expansion of the powers of the Constitutional Court and the decade of slow retreat

The institutional position of the CCC has been markedly strengthened by its own decision-making in the first two decades of its existence (1993–2012). This case law has undoubtedly made it the strongest constitutional tribunal in Europe, at least on paper. The first three judgements, made by the CCC appointed by President Havel (the CCC in 1993–2003), reinforced its position vis-à-vis the general courts. The fourth and fifth judgements were decided by the court composed of judges appointed by the second president, Klaus (2003–2013). The fourth (and partially also the third) improved its standing in relation to the legislature and the constitutional legislature. Finally, in its fifth judgement, the CCC clearly marked its status over the Court of Justice of the European Union.

The first two judgements were the least disputable in terms of jurisprudence. The first judgement, already adopted during the first year of the CCC's work, excluded any possible existence of a decentralized (diffuse) review of the constitutionality of legislation. The High Court of Prague claimed its power to set aside the legislation adopted by the 'undemocratic' legislature during the communist era (1948–1989). Such an interpretation was possible under the 1991 Charter of Fundamental Rights and Freedoms.[9] However, the CCC rebuffed any attempt to take away part of its exclusive powers. The Czech Constitution (cf. Article 95, which established the duty of the general court to

7 I stress that these must be hard cases of the application of law where there is no consensus in the relevant legal community as to the correct interpretation of the law.

8 It is possible, of course, that a judge will adopt the strategy of self-restraint only because he/she actually agrees with the values behind the object under review, whether it is a law or a court decision. But if a judge can be seen to exercise self-restraint over the longer term, certain conclusions can already be inferred from his/her decisions because it does not seem likely that such a judge would agree with all or most of the acts being reviewed in terms of the values behind them.

9 It makes little sense to protect laws adopted by a non-democratic legislator on equal terms to laws enacted by a parliament genuinely constituted based on the people's will.

present the law to the CCC if the general court was of the opinion that the law is unconstitutional) 'must be understood as a general clause which lays down, without any exceptions, the procedure for assessment of all cases where the courts reach the conclusion that a law is in conflict with constitutional law'.[10]

The second significant extension of the powers of the CCC followed from its judgement of 2001, when the CCC claimed for itself, beyond the scope of what was explicitly stated by the law, the power to determine the unconstitutionality of laws that have already been repealed in the meantime.[11] The CCC reasoned that otherwise there would be no protection whatsoever against unconstitutional laws which had been applied in a case and then later abolished. But it failed to give any consideration whatsoever to the option that equivalent protection could also be provided by the general judiciary.

If the first two judgements did not provoke any scholarly debate,[12] this was not so with the third judgement. Here the CCC expanded the notion of the 'constitutional order' to include international treaties on 'human rights'. The CCC expanded the concept despite the fact that the constitution provided an exhaustive list of what counts as part of the 'constitutional order' (which is essentially the constitution, the Charter of Fundamental Rights and Freedoms and few other constitutional laws) and no international treaties are on that list. This judgement met with strong criticism from scholars who argued that the CCC cannot simply expand the constitution itself. These scholars criticized the idea that according to this novel reading, the CCC is not only involved in interpreting the constitution but also enjoys the ultimate power to say what counts as the constitution.[13] This judgement, too, is intertwined with scepticism towards general courts and their ability to protect international commitments against the legislature.[14]

Seven years later, the CCC strengthened its position towards the constitutional legislature.[15] The case was about the power of the CCC to annul part of the constitution. In this case the CCC annulled the constitutional law which shortened the term of the lower house of the parliament. Acting on the constitutional complaint of one member of parliament (Mr Melčák), the CCC stressed that the constitution provides for a term of four years of the House of Representatives, which is why this general rule cannot be

10 Judgement of 23 June 1994, No. Pl. ÚS 35/94.

11 Judgement of 10 January 2001, No. Pl. ÚS 33/2000.

12 In contrast, the CCC itself was divided in the second case (Pl. ÚS 33/2000) and as many as six constitutional justices wrote their dissenting opinions with regard to such an arrogation of powers.

13 Unlike the previous judgement, this judgement was adopted unanimously. See Judgement of 25 June 2002, File No. Pl. ÚS 36/01.

14 For criticism of the judgement, see Jan Filip, 'Nález č. 403/2002 Sb. jako rukavice hozená ústavodárci Ústavním soudem' (2002) Právní zpravodaj 12–15; or Zdeněnek 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 199–214.

15 Judgement File No. Pl. ÚS 27/09 of 10 September 2009 (so-called *Melčák* case).

violated by a specific law. The CCC seemed to be saying that 'ad hoc' laws (created for a particular purpose) are in conflict with the 'substantive core' of the constitution. The very concept of 'constitutional laws contrary to the Constitution' is in no way exceptional from a comparative point of view. As a matter of fact, the CCC already embraced this idea in its very first judgement enacted in 1994. But the exercise of the constitutional tribunal's competence to annul a constitutional law on the grounds of its conflict with the 'substantive core' of the constitution remains mostly a matter of theory across Europe.[16] Indeed, it was precisely the exercise of this very power to annul constitutional laws which was so questionable in the *Melčák* case.

Similarly awkward was the 2012 judgement of the CCC, where a ruling of the EU Court of Justice was declared *ultra vires* – the very first time something like this had happened in European history.[17] The existence of this power is broadly shared among European courts.[18] But what is surprising about the judgement of the CCC is the incredible lightness of the argumentation on the basis of which the constitutional court declared the given ruling of the Court of Justice null and void. The EU Court fell victim to the internal struggle over the interpretation of the Czech constitution between the CCC and the Supreme Administrative Court, in which the Court of Justice acted only as an intermediary, being invited to decide the case via preliminary reference.[19]

However, the 2012 case also marked the zenith of the judicial expansion of the powers of the CCC. Already the 2009 'unconstitutional constitutional law case' (or *Melčák* case) had provoked very heavy political criticism of the CCC, for 'running too wild' and being completely unrestrained. At the same time, and this was typical of the first two decades of the existence of the Czech state governed by the rule of law (and the then still-prevailing notions of liberal constitutionalism), political voices suggesting that this judgement should be ignored were in the minority. In substance, the entire political elite, despite gnashing their teeth, accepted the *Melčák* judgement.[20]

16 Comparative arguments referring to the case law of the Austrian Constitutional Court can be quite confusing for many reasons. Cf. in this regard: Kieran Williams, 'When a Constitutional Amendment Violates the "Substantive Core": the Czech Constitutional Court's September 2009 Early Elections Decision' (2011) 36 Review of Central and East European Law 33–51.

17 Judgement File No. Pl. ÚS 5/12 of 31 January 2012 (*Slovak Pensions XVII*).

18 See a recent German Judgement of 5 May 2020, 2 BvR 859/15, 2 BvR 980/16, 2 BvR 2006/15, 2 BvR 1651/15, relating to the powers of European Central Bank.

19 See 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 Maastricht Journal of European and Comparative Law 185–194.

20 The then-incumbent head of the Czech Social Democratic Party, Jiří Paroubek, and President Václav Klaus expressed the strongest opposition. Paroubek described the judgement as unconstitutional (Jiří Paroubek, 'Respekt, či překročení pravomocí? Politiky verdikt soudu rozdělil' iDNES.cz, 10 September 2009). The President of the Republic Václav Klaus even called for a major restriction of the Constitutional Court's powers. (Václav Klaus, 'Ústavní soud vědomě prohlubuje krizi, je třeba mu určit nové pravomoce' iDNES.cz, 10 September 2009. However, even President Klaus did not ask that the judgement be ignored at that time.

The second decade of this century brought a new wave of populism into Czech politics. Populism is linked to a deep scepticism about strong constitutional courts which might easily turn into an unrestrained 'government of judges' or judicial supremacy. The justices of the CCC were obviously sensitive to this development. It was already the 'second' court which hit the brakes and stopped an unrestrictive extension of its powers. Some of its decisions are questionable and obviously not in line with the earlier case law.

For instance, facing the dilemma of highly questionable amnesty at the end of the term of the second President of the Republic, Václav Klaus, the CCC proclaimed that the act of a president regarding an amnesty is not subject to a constitutional review[21] (making a clear deviation from the previous case law which had systematically expanded the powers of the court). Furthermore, within a few weeks the CCC refused to deal with the impeachment of the same President because his term of office had expired, despite the fact that the text of the constitution seemed to indicate such an action was possible.[22]

The new ('third') court appointed by the third President, Zeman, continued on this newly opened path of judicial self-restraint. The peak of this case law came with the coronavirus pandemic and the state of emergency imposed all over the country in March–April 2020. The CCC held (faced with strong dissenting opinions) that the declaration of a state of emergency is not justiciable, which is why it could not be challenged before the CCC. And this was not all. The subsequent acts of the government (such as the ban on entry and exit from the country, etc.) are not only beyond constitutional review; they are also beyond the judicial review of the administrative judiciary, the CCC concluded.[23]

The original extremely broad conception of the Court's powers and the subsequent strong and visible limitation of the same powers is just part of the story of the overall political climate. The robust narratives of constitutional liberalism of the 1990s are all but dead. The CCC has not faced similar challenges to its Hungarian or Polish counterparts. However, its judges were able to see that the original idealist conceptions of judicial activism do not fit the age of the great crisis of European liberalism and a new wave of populism.

So far, we have seen the trends. Let us now move to consider the actual numbers relating to the constitutional review of legislation.

6.3 Review of the constitutionality of legislation

In the period from 1993 to the summer of 2003, the 'first' CCC (justices appointed by President Havel) annulled – at least partly – a total of 64 laws (acts of parliament), of which almost one half (26) were annulled on the basis of applications filed by political institutional applicants (i.e. groups of Deputies or Senators of the Parliament, the President of the Republic). From

21 Judgement of 5 March 2013, no. Pl. ÚS 4/13.
22 Judgement of 27 March 2013, no. Pl. ÚS 17/13
23 Judgement of 22 April 2020, no. Pl. ÚS 8/20 (*State of emergency I*).

February 2004[24] to March 2013, the 'second' CCC (justices appointed by President Klaus) annulled a comparable number of laws, a total of 60 laws or their provisions. But only fewer than a third (17) were annulled following applications by political actors. And between April 2013 and June 2020 (the current court, composed of justices appointed by President Zeman), the 'third' CCC annulled only 33 laws (15 laws in the proceedings initiated by political actors).

The Constitutional Court's activities over the course of the first two decades thus appear – at first glance – to exhibit a relative continuity. But this impression does not survive closer scrutiny, primarily because one half (13) of the annulling judgements rendered on the basis of applications from political actors were issued by the 'first' Constitutional Court during the last two and a half years of its work. This highly activist stage began with its judgement regarding a change in the electoral system in January 2001 – probably the most important judgement of the first Constitutional Court in terms of its political impact.[25] Before 2001, the court had issued such judgements only twice a year on average; this changed fundamentally in the period from January 2001 to the summer of 2003. A major part of these judgements was accumulated in a period basically connected with the era of the 'opposition agreement' (on the formation of the Government). A substantial part of these judgements was linked to applications filed by the President of the Republic. The 'second' Constitutional Court thus followed on, in its work in relation to the legislature, from the activist constitutional tribunal operating from 2001 to 2003.

This conclusion does not seem to be supported by statistics. However, we should not neglect one markedly different aspect of the work carried out by the 'second' Constitutional Court. The President of the Republic almost completely disappeared from the ranks of applicants for the annulment of laws.[26] In some of the key cases, President Václav Klaus tended to assume the position of 'defendant' before the constitutional tribunal, rather than being an active applicant. In contrast, President Havel was behind seven at least partially successful applications for the annulment of a law or part of a

24 In the late summer of 2003, the number of constitutional judges decreased below the minimum limit, enabling the court's Plenum to decide on the constitutionality of laws.

25 Judgement of 24 January 2001, no. Pl. ÚS 42/2000. In this case, the CCC rebuffed the attempt of two leading political parties of that time to shift the electoral laws towards majoritarian voting, despite the explicit provision of the constitution which held that the elections to the House of Representatives (unlike the elections to the Senate) are based on proportional representation.

26 Over ten years of his mandate, President Klaus filed a single application with the Constitutional Court for annulling a part of the law. And this was rather a curiosity. Indeed, the President sought annulment of a part of the Judiciary Act, according to which the Supreme Court consists of its President and Vice-President (i.e. not, as the Constitution states, Vice-Presidents in the plural). President Klaus thus wanted to address a certain personal issue connected with a person he wanted to install as a second deputy chief justice. After the Judiciary Act was amended, the CCC discontinued the proceedings. See the resolution of 7 October 2008, File No. Pl. ÚS 17/07.

law during the term in office of the 'first' Constitutional Court. Eight applications filed by Václav Havel were rejected by the 'second' Constitutional Court in April 2004,[27] and two of his applications were unsuccessful before the 'first' tribunal.[28]

If we omit from the statistics ten applications filed by President Havel and one by President Klaus, we will be able to see several peaks in the activities of the Deputies and Senators. During the first three years, the Constitutional Court dealt with a total of 24 applications filed by a group of Deputies and annulled the legislation in 8 cases. At that time, the newly established constitutional tribunal was used, especially by left-wing Deputies, often represented by renowned leftist lawyers. The right-wing CCC of the 1990s was openly hostile to leftist arguments at that the time. This contributed to a significant decrease in the number of applications in the following four years (1996–1999). In total, Deputies and Senators filed only eight applications over these four years. Only one of them was eventually granted.

A sudden change then occurred in 2000, during the third year of the 'opposition agreement' (a *de facto* coalition between the socialists and the conservatives, which was loathed by the liberals who still controlled much of the mainstream media discourse). A total of 21 privileged applications were filed by the Deputies and Senators from 2000 to 2002, and the CCC granted almost one half of them (9). Together with a further four applications made by President Havel, which were successful, the period from 2000 to 2002 was thus the era of the greatest judicial activism, at least in numbers (the Constitutional Court satisfied 13 out of 25 applications filed by Deputies, Senators or the President of the Republic).

In view of the preceding, I consider the first eight years of work by the Constitutional Court an era of relative self-restraint towards the legislature.[29] The judgements which are the most significant for understanding the philosophy of the first CCC are those in which the court dismissed the application – the Unlawfulness of the Communist Regime Act, and both judgements regarding the 'Lustration Act'.[30]

The situation began changing only in 2001, in response to certain constitutional excesses by the parliamentary majority. In 2001–2002, the CCC granted more than one half of the applications. But the success rate started

27 Judgement of 30 June 2004, No. Pl. ÚS 23/02.

28 Judgement of 29 November 1993, File No. Pl. ÚS 41/93, Judgement of 7 June 1995, File No. Pl. ÚS 4/95, No. 168/1995 Coll.

29 This is also noted by Radoslav Procházka in his comparison of constitutional tribunals in the Czech Republic, Hungary, Poland and Slovakia in the 1990s. See Radoslav Procházka, *Mission Accomplished: On Founding Constitutional Adjudication* (Central European University Press 2002).

30 Paradoxically, both judgements regarding the Lustration Act are among the successful applications in my list. However, only a marginal detail was granted within these applications. The substance of these two judgements lies in the dismissal of the key part of each application.

dropping again in 2003.[31] In contrast with the media image of the Constitutional Court as a litigator for political issues, the number of applications made by Deputies and Senators for the annulment of a law has been decreasing, approximately since 2007. Another significant drop in the success rate came after 2014, when the 'third' CCC started to adopt an even more restrained policy towards the legislature. Sensing the overall political atmosphere and a new rising consensus that law should be made by politicians in the parliament, not by judges in their chambers, the CCC voluntarily left the arena.

6.4 Activism of the Constitutional Court in relation to the general judiciary (constitutional complaints)

The second aspect I chose for the purposes of this analysis is the issue of the continuity or discontinuity of the Constitutional Court's case law in matters of constitutional complaints. In my opinion, the basic doctrines followed by the Constitutional Court in matters of constitutional complaints were already formed during the first decade of its existence. Nonetheless, statistics show that, compared to the first decade, the number of judgements annulling decisions of the common courts doubled between 2003 and 2012. We can see, specifically, that the CCC annulled approximately 1,030 judgements of the ordinary courts between 1993 and March 2003, approximately 1,800 were annulled by the second CCC (April 2003–March 2013) and approximately 1,400 by the third CCC (April 2014–June 2020).

The number of annulling judgements thus does not decrease with the knowledge of case law of the CCC. Quite the contrary, it has been rising. The number of judgements of general courts annulled by the CCC is immune to the increasing judicial self-restraint towards the legislature. The explanation seems to me to be clear: the rising populism restrains the CCC with regards to the legislature, but the same logic of judicial self-restraint does not apply to the general judiciary. At the same time this proves that the self-understanding of the CCC remains judicial: the CCC identifies itself primarily as a judicial body. Therefore, the CCC's role is close to something I would call a 'super-supreme' court.

From the doctrinal point of view this self-understanding is questionable, but it remains the reality. It is also an interesting example that the formally Kelsenian model of centralized constitutional review in the Czech Republic is applied in a substantively non-Kelsenian way. Hans Kelsen never anticipated (and would not have been in favour of) an activist constitutional judiciary, such as those which appeared in Europe after World War II. His model was based on the constitutional court as the guardian of the constitution in cases where a breach of constitutional provisions was clear and evident. Kelsen did not envision a constitutional tribunal which would intrude into individual cases decided by ordinary judges; individual cases were within the

31 Of course, my statistics do not include some key judgements of the Constitutional Court, e.g. in the *Melčák* case, which was formally a constitutional complaint.

competence of ordinary judges, and constitutional justices were empowered solely to determine the constitutionality of general norms – not of individual judicial decisions.[32]

This Czech Court's novel self-understanding is also reflected in the constant increase in the number of constitutional complaints. Their numbers are growing – basically every year. While only fewer than 500 constitutional complaints were filed in 1993, their number already exceeded 1,200 two years later, 2,000 in 1998 and 3,000 in 2000. In 2011, the number of constitutional complaints stopped just short of 4,000. In 2012 over 4,900 constitutional complaints were filed, which has been so far the record number in the history of the CCC. Since 2013 the number has remained relatively stable, at around 4,000 complaints annually.

The CCC is thus becoming a victim of its own success, as the first decade of its existence undoubtedly contributed to the cultivation of Czech justice and legal discourse in general.[33] At the same time, however, the CCC is being pushed into a role that does not belong to it – that of some sort of super-review court, eventually assessing the correctness and fairness of each individual decision made by general courts.

This approach brings a clear risk, however. The constitutional courts in the wider region did their best to centralize constitutional review of the legislation, and they limited the power of ordinary courts in this respect. The constitutional courts insisted that they alone have the power to review the constitutionality of the legislation.[34] In doing so, they deprived the general judiciary of its most effective power to resist any legislation which would be in sharp conflict with the rule of law. Having an ultimate say in the review of the decisions of the general judiciary might have helped the overall transformation of the Czech judiciary.[35] On the other hand, for any rising authoritarians it is much easier to take control of the constitutional tribunal with its few judges than to take over an entire judicial system (cf. Hungary or Poland).[36] To sum up, the Czech system could provide a welcome tool for controlling the decentralized judicial decision-making of ordinary (general) courts within one single body comprised of a few judges who have been ideologically scrutinized through political appointments (unlike the much less ideologically predictable echelons of ordinary judges).

32 On the description of Kelsen's model of constitutional judiciary as implemented in 1920 in Austria and Czechoslovakia, see in English Hans Kelsen, 'Judicial Review of Legislation. A Comparative Study of the Austrian and the American Constitution' (1942) 4 The Journal of Politics 183–200.

33 Cf. on this generally Zdeněk Kühn, *The Judiciary in Central and Eastern Europe: Mechanical Jurisprudence in Transformation?* (Brill 2011).

34 Wojciech Sadurski, *Rights before Courts: A Study of Constitutional Courts in Postcommunist States of Central and Eastern Europe* (2nd edition, Springer 2014) 35.

35 See on this for a positive account, Kühn (n 33), chapter 5.

36 Wojciech Sadurski, *Poland's Constitutional Breakdown* (Oxford University Press 2019).

6.5 The personal homogeneity of the first Constitutional Court and the heterogeneity of the second and third court?

The statistics also indicate one further difference between the three decades of the CCC. The first CCC showed a relatively significant right wing – and, in its decisions regarding values, also an anti-communist – ethos. The relatively homogeneous composition of the court and the uniform profiles of the judges can explain why dissenting opinions were expressed only with regard to 73 judgements issued during the first decade of the CCC, whether they were genuine, directed against the operative part, or concurring, i.e. disagreeing with the reasoning.

In contrast, a more balanced representation of various values among judges, including left-wing opinions, within the CCC after 2003, led to a doubling of the number of dissenting opinions (such opinions were issued with regard to a total of 135 judgements by the second CCC between 2003 and 2013 and in 114 cases by the third CCC between 2013 and 2020). The composition of the second and third CCC was substantially more varied in terms of values; its judges not only belong to various political streams but also maintain a wide variety of methodological approaches to the law. The case of the (un)constitutionality of the Institute for the Study of Totalitarian Regimes Act can serve as an example of such conflicts of opinions and values.[37] The arguments and dissenting opinions in this case are all the more remarkable when compared with the case of the 'Lustration', involving a similar conflict of ethical principles and values. Indeed, there were practically no dissenting opinions with respect to the latter case in 2002.[38]

However, the diversity in the composition of the 'second' and 'third' Constitutional Court has also had other, more negative repercussions. The different personalities and ideologies of the individual judges have been manifested in the dramatically different decision-making of individual judges in matters of constitutional complaints. But the simple statistics become even more remarkable if we exclude pre-adjudicated cases, where judges have no real margin for considerations. These are typically cases that follow a prior precedent and are thus, in substance, only a matter of mechanically repeating what has already been stated numerous times (a chamber could make a different decision only if the given question were presented to the Plenum with a view to changing the legal opinion). If these cases are disregarded, we can see that the success rates vary dramatically for individual judges. For instance, while Eliška Wagnerová has been the most forthcoming as judge-rapporteur of the second Court, Vladimír Kůrka stands on the opposite pole as he, in

37 Judgement of 13 March 2008, File No. Pl. ÚS 25/07 (N 56/48 SbNU 791; 160/2008 Coll.).

38 See Judgement File No. Pl. ÚS 9/01 of 5 December 2001 (N 192/24 SbNU 419; 35/2002 Coll.)

fact, has made no contribution at all to the creation of case law concerning constitutional complaints.[39]

There were no such high discrepancies in the first CCC. At the same time, such differences can impair the citizens' trust in the CCC as a single institution. However, there is no simple way of resolving the problem.[40]

6.6 Conclusions

The Czech system of constitutional review has so far been resistant to the rising populism. The reasons for this are partly institutional and partly purely haphazard. The institutional reasons lie in a unique model of judicial appointments to the constitutional court which takes inspiration from the United States (the President appoints subject to the consent of the Senate). This model (especially the Senate which has traditionally been sceptical of Czech Presidents and their attempts to expand their power) has made it difficult for populist presidents since 2003 to appoint judges of their ideology who would be subservient to the demands of the rulers.

Additionally, the second (2003–2013) and the third President (elected in 2013) were not able or even willing to create a court which would reflect their own political agenda. This meant that the judicial personnel were formed on the basis of their merits and not just their political ideology. Interestingly, the only president who created an ideologically homogenous court was Václav Havel in the early 1990s. His court was robustly anti-communist, politically liberal and economically neoliberal.

This does not mean that nothing has changed over the three decades of the Constitutional Court's existence. The Czech political system has changed dramatically, the classical political parties have faded, and new populist movements have taken their place. Even the current Czech President, Miloš Zeman, a classic politician of the 1990s (Prime Minister for the Social Democrats), shifted his political ideology and started to act as a populist. The dramatic political change has left a lasting impact on the judicial behaviour of judges of the CCC. The majority of judges have started to emphasize judicial self-restraint vis-à-vis the legislature. On the other hand, they continue to be very active with regards to the decision-making of the ordinary judiciary. This attitude and the existing institutional settings present a sort of ticking time bomb in the Czech constitutional system. If any other future Czech President were to be more successful in creating a tribunal full of servile judges, the takeover of the independent judicial system could be a very rapid one.

39 Cf., in this respect, an extraordinarily interesting thesis by Ondřej Kadlec, *Metodologie interpretace práva v judikatuře Ústavního soudu ČR* (Charles University, Faculty of Law 2013).

40 In this respect, see Zdeněk Kühn, 'Konzistence judikatury jako problém právní kultury' in Jan Kysela (ed.), *Zákon o Ústavním soudu po třinácti letech* (Eurolex Bohemia 2006) 106ff.