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From Parliament to Courtroom:

Judicial Review of Legislation as a Political Tool in the Czech Republic

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The Czech Constitutional Court has gained a strong position within the political system. This article examines the judicial review of legislation from the point of view of the relation between the court and the parliament. The authors analyze trends in the use of petitions proposing the annulment of statutes, who makes use of the petitions, how successful the petitioners are, and what issues the petitions concern. The article pairs a quantitative view with a qualitative analysis of key selected decisions by the court, especially in the sphere of mega-politics. The authors test whether judicial review of legislation serves as a tool for parliamentary opposition. The results show the decisive effects of a legislative majority in the lower house of the parliament. If the government lacks a majority, the use of judicial review of legislation as an oppositional tool fades. Also important is the weakness of the upper house, which makes senators more likely to resort to using judicial review of legislation. An especially crucial factor is the presence of independent and semi-independent senators who, without broader political backing, see judicial review of legislation as a welcome tool. The most frequent topics of the petitions were transitional justice, social policy, and the legislative process.

Keywords: *Czech Constitutional Court; parliamentary opposition; judicial review of legislation; transitional justice*

Introduction

The clash of opinions between government and opposition on the floor of parliament lies at the heart of modern democracy.[1] However, with the global spread of a constitutional judiciary,[2] a new tool has become available to parliamentary minorities: the right to petition a constitutional court to judge the constitutionality of adopted legislation. After losing in parliament, the minority can try to overturn the majority decision by asking the constitutional court to declare the law unconstitutional.

This article will look at the way judicial review of legislation has been used in the Czech Republic in terms of the relationship between the Czech Constitutional Court (hereinafter "CCC") and the parliament: the way its usage has developed over time, who has made use of the instrument, the success rate of petitions, and what topics are

most often at issue. We work from the presumption that judicial review of legislation serves as a tool for the parliamentary opposition, which is often noted in the literature.[3] First, we discuss the relationship between the constitutional judiciary and politics, followed by a short excursion into Czech parliamentarianism and the CCC, and an outline of our research design. The core of the article is an analysis of the petitions for abstract review of legislation emerging from parliament during the existence of the Czech Republic. Six complete electoral terms (1993–2013) provide good material for diachronic comparison, enough to capture basic trends. This is supplemented by qualitative analyses of selected cases that were especially important, or which can illustrate some of the phenomena characteristic of the Czech situation.

The Constitutional Judiciary, Parliamentary Opposition, and the Judicialization of Politics

The beginning of judicial protection of constitutionality is traditionally considered to be the *Marbury v. Madison* decision by the Supreme Court in the United States in 1803. This case became the foundation of the American model combining diffused and concrete controls on constitutionality. The European constitutional judiciary is predominantly based on a different tradition, associated with the name of Hans Kelsen. Under the influence of this legal theoretician, the first constitutional court (hereinafter "CC") was formed in Austria in 1920 with the power of abstract control of constitutionality. This gave birth to the tradition of a specialized court with one main purpose: to rule on the constitutionality of the laws adopted by parliament, along with the exclusive power to quash laws that are in conflict with the constitution, without relation to any specific case. The wider spread of the constitutional judiciary in Europe was influenced by the horrors of the Second World War and the Holocaust, which led to the enforcement of basic human rights being entrusted to constitutional courts, launching an era of new constitutionalism.[4]

Alec Stone Sweet[5] observes that the transition to the new constitutionalism meant replacing parliamentary sovereignty with a system under which governments and parliaments are subject to checks by the constitutional judiciary, which is to a certain extent independent of them. The result has undermined the concept of the sovereignty of parliament, because it is assumed that parliament can make a mistake that must be corrected, through the protection of basic rights and the clarification of constitutional norms. Logically, this has led to an increased power of the courts to intervene in the sphere of politics; many countries have followed in the footsteps of the USA where this phenomenon first appeared, and where the debate over political engagement by the courts began much earlier.[6] Courts, especially those of higher instance, have become actors that, for example, decide about electoral procedures and economic, social, foreign, and even security policies.[7] CCs thus find themselves in an environment that is neither purely judicial nor purely

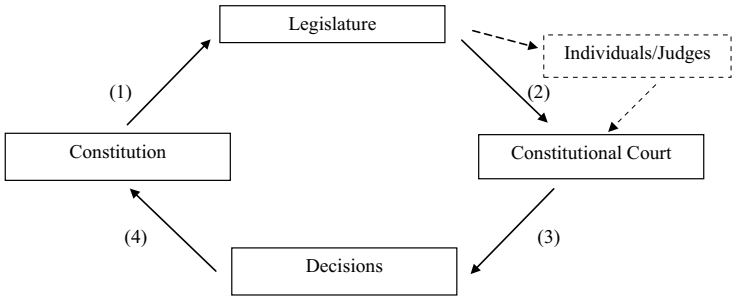
political.[8] This is true even for the "new" democracies of Central and Eastern Europe, where CCs have become important actors, thanks especially to inspiration from Germany, though there was no debate about the limits of their legitimacy as they were being instituted since they were regarded as a natural part of the design of liberal democracy.[9]

In this context we must also consider the judicialization of politics, which Torbjörn Vallinder defines as "either (1) the expansion of the province of the courts or the judges at the expense of the politicians and/or the administrators, that is, the transfer of decision-making rights from the legislature, the cabinet, or the civil service to the courts or, at least, (2) the spread of judicial decision-making methods outside the judicial province proper."[10] Ran Hirschl identifies several levels of judicialization, of which the most important is *mega-politics*, that is, the key conflicts that define the political system.[11] In real terms, these are electoral processes, national security, coming to terms with a nondemocratic past, or shaping the collective identity of a nation. As will be discussed, mega-politics have appeared before the CC quite prominently in the Czech environment.

The degree of judicialization is augmented by various factors; among the basic ones Hirschl ranks institutional factors (e.g., the existence of a catalogue of constitutionally guaranteed basic rights, models for protecting constitutionality, or open access to the courts), the behavior of judges (the degree of judicial activism in a given system), and political determinants. Judicial review is implicitly limited by the need for an initiative to begin the process. Thus Hirschl emphasizes that the judicialization of politics depends on politicians and their strategies. This is true for governing politicians seeking legitimization from the court for their decisions (or the chance to dodge their own political responsibility), as well as for opposition politicians for whom continuing the political struggle in the courts presents an opportunity to obstruct policies and gain media attention. Likewise, Wojciech Sadurski sees the political landscape as the most important factor influencing the relationship of the courts to other constitutional institutions in Central and Eastern Europe, for "the greater the tensions between political forces, the greater the possibility that . . . adversaries will turn to the constitutional court to contest the policy choices of political opponents."[12]

The factor of media attention mentioned by Hirschl is noticeable in the Czech situation, where newspaper headlines about the rulings of the CC are common. Dotan Yoav and Menachem Hofnung, who examined the motivations of Israeli lawmakers in appealing to the courts, confirmed the importance of the media factor, also pointing out the importance of politicians' previous successes before the court. These authors find that the so-far low rate of success of these appeals may not lead to decreased interest by politicians in making them.[13] There is also the strategic aspect, where the legislative process may be influenced in the medium and long term by the mere possibility of a future challenge to adopted legislation.

Figure 1
The evolution of constitutional politics



Source: A. Stone Sweet, Governing with the Judges: Constitutional Politics in Europe, 195.

Another factor may be how the public perceives the transfer of political disputes to the province of the constitutional courts. Sometimes, the continuation of the conflict before the court is seen not only as a right but as a completely legitimate and altogether expected pattern of behavior by the opposition, which applies for example in Poland, while in Portugal an appeal to the constitutional court is seen as disrespectful of majority rule and democratic principles.[14]

According to Stone Sweet, the judicialization of politics has led to the creation of the sphere of constitutional politics, which "comprises the relationship, as mediated by the rule-making of constitutional judges, between constitutional rules (the macro-level) and the decision-making of public officials and other individuals (the micro-level)."[15] Interdependence of legislating and constitutional adjudication is described by that author in four stages outlined in Figure 1.

The right half of the figure, stages 2 and 3, depict the politicization of constitutional justice. The left half, stages 4 and 1, depict the judicialization of law making, by which Stone Sweet means the production by constitutional judges of a formal normative discourse that serves to clarify the constitutional rules governing the exercise of legislative power, and the acceptance of these rules and terms of discourse by legislators. While the court decision itself has a direct effect, the reasoning of the decision may have a significant influence on the adoption of future laws and the way those laws are written, producing a feedback effect. Politicization thus leads to judicialization. The process looks like this: constitutional conflict → delegation to the constitutional court→ decision-making/rule-making → judicialization.

Key for this article is stage 2, the transfer of arguments from parliamentary politics to the constitutional courts.[16] This transfer significantly alters the previous positions; government officials find themselves on the defensive as they are forced to participate in a process that they can neither decide themselves nor block, on an equal level with the process's initiators, that is, the opposition, according to our presupposition.

Judicial review features some important differences from the other instruments available to the opposition, which apply mainly to the parliamentary arena. First and foremost, the responsibility for finding a solution for the political dispute is placed in the hands of an actor standing outside the framework of government-opposition.[17] It is also true that constitutional justices do not just make rulings, but conduct the whole procedure including possible oral arguments, while all of the participants are subject to the rules of procedure, which gives the opposition a formally equal position relative to the government. In a hearing before the CC, the character of the discourse changes as well. While on the floor of parliament or in the media political arguments are important, before the CC the politicians-petitioners must make constitutional arguments that the court can address. This situation has an old tradition, as we learn from Alexis de Tocqueville, who wrote that "scarcely any political question arises in the United States that is not resolved, sooner or later, into a judicial question."[18] Likewise, the former Chief Justice of the Israeli Supreme Court Aharon Barak claimed that "nothing falls beyond the purview of judicial review; the world is filled with law; anything and everything is justiciable."[19]

From the standpoint of cost and benefit, a motion proposing the annulment of a statute can be very advantageous to the opposition, at least for a short time. The costs of legal representation are usually low compared to the potential gains: reversing the decision of the majority. Long-term, however, a paradox may emerge: when the opposition gets into power, it may find its own tactics turned against itself.

Czech Parliamentarianism, the Constitutional Court, and Procedural Practice

The Czech Republic is usually regarded as a parliamentary system, although there are frequent debates pointing out the relatively strong position of the president, which results mainly from historical tradition and some significant powers. These debates intensified after the introduction of direct presidential elections in 2012, which increased the doubts about the parliamentary character of Czech democracy.[20] Still, the Czech parliament can be seen as "a central institution among democratic institutions of governance."[21] While the parliament is bicameral, the literature commonly speaks of weak bicameralism.[22] It is only the lower house, the Chamber of Deputies, that votes confidence (or non-confidence) in the government. Article 68 of the Constitution also explicitly states that the government is only accountable to this chamber. That is why the lower house is generally considered the main arena of political combat between the governing and opposition parties and the key political forum. The Czech Republic is no exception in Central Europe, with a similar case of weak bicameralism existing, for example, in Poland (where the president also has a relatively strong position).

The poor reputation and unpopularity of the upper house, the Senate, was influenced by the situation when the Czech Constitution was adopted in 1992. The upper house was included, but the first elections to the Senate were not held until the end of 1996. This weakened the prestige of the upper house and fueled a debate that continues even today over whether this chamber is even necessary.[23] The Senate can be overridden by the Chamber of Deputies in case of regular bills, and it has no say in questions of the state budget. However, within the process of adoption of constitutional and electoral laws, the chambers are principally equal.

Some features of current Czech parliamentarianism are similar to what Giovanni Sartori calls *Assembly Government*. Coalition governments are not very stable (see Table 2); they are often not able to act and speak with a single, clear voice; and they have difficulty pushing through their legislative agenda. Prime ministers cannot act quickly and decisively. However, the Czech situation is better than Sartori's typical example of an Assembly Government, the French Third Republic, because the stability and cohesion of parliamentary parties are relatively strong, even though there were several cases of party switching of deputies in every term, and sometimes even a party group has broken up.[24]

While the parliamentary institution has deep roots in Czech conditions, and continuity for almost the whole twentieth century, including the communist era, the constitutional judiciary developed fully only after 1989. In the period between the world wars, the CC was part of the institutional design of Czechoslovakia, but its workings were limited. Under the communist regime, the CC did not function, even though the constitutional amendment adopted in the late 1960s provided for one. Only in 1991, after the birth of the democratic regime, was a CC instituted, but its existence was cut short when Czechoslovakia fell apart soon after. However, the CCC started work as early as 1993.[25]

The jurisdiction of the CCC is rather broad as it includes, among other powers, abstract constitutional review, concrete constitutional review, and individual constitutional complaints. In general, it can be stated that the powers of the CCC, to a large extent, resemble the German Federal CC.[26] This article is primarily concerned with the abstract review of legislation, or more precisely, only with "petitions proposing the annulment of a statute or its individual provisions" (hereafter also "petition") filed by members of Parliament (see Art. 87 para.1a of the Czech Constitution).

The petition may be submitted by a group of at least 41 deputies or 17 senators, [27] reflecting the bicameral parliament and the fact that the lower house has more members than the upper house (200 deputies and 81 senators). In either chamber, more than a fifth of the members are required. Besides members of parliament, petitions can be made by the president, and under certain conditions other actors including citizens. For reasons of space and topical limitation, we will leave aside here the activity of the president[28] and other petitioners, and we will likewise ignore petitions against secondary legislation (government decrees, ministerial regulations, etc.), or international treaties. Another reason for reducing our scope is the fact that primary

legislation, as the normative product of parliament, is the expression of key political decisions.[29]

The CCC rules on whether the law conforms to the constitution,[30] and also examines whether the law was adopted and implemented within the bounds of constitutional powers and in a constitutionally stipulated manner. A majority of at least nine judges is required to quash a law. The ruling is final; there is no further avenue of recourse.

During its examination, the CCC may either declare a challenged provision of a law unconstitutional, or declare the law to be in conformity with the constitution and reject the petition. The first possibility brings the opposition a result they were unable to achieve in parliament; the second means defeat. Another possible defeat for the opposition is a refusal by the CCC to hear the petition, if it has formal defects, or if the petition is found to be manifestly ill-founded. Or the proceedings can be halted in the event a challenged provision of the law ceases to be in effect before the Constitutional Court proceedings end.

Research Design

The data we will use, the petitions from parliament to revoke a law or part of a law, were acquired from the database of findings and resolutions of the CCC (NALUS) and from court documents. We will begin our analysis with the question of how frequent these petitions proposing the annulment of a statute have been. We work with periods matching the term of office of the lower house of parliament because of its key significance. Table 1 gives an overview of electoral results and Table 2 of the electoral terms, governments, their backing, and the nature of the opposition. Which electoral term a petition falls under in our analysis depends on when the petition was submitted, not on the date of the court decision.

Considering the bicameral structure of the parliament, we will also analyze whether it is the deputies or the senators who are more active in submitting petitions. The Constitutional Court Act does not rule out a petition submitted jointly by members of both houses; therefore, we will not work with two, but three, categories of petitioners: deputies, senators, and a joint petition.

For the focus of this article, the most important question is whether the petitions come predominantly from the parliamentary opposition, or whether politicians from the ruling parties make use of this tool as well. We base our classification of the petitioning deputies or senators on their membership in a parliamentary party group on the day the petition is submitted. If that party group is in the government, the deputy or senator is regarded as pro-government; or they are ranked in the opposition if the group is an opposition party. This method is not as obvious as it seems, however. In the Chamber of Deputies, membership in a party group and membership in the party almost always overlap, due to the proportional representation system based on party

Table 1
Electoral Results in the Czech Republic (Main Parties; Chamber of Deputies)

	1992		1996		1998		2002		2006		2010	
	Votes (%)	Seats	Votes (%)	Seats	Votes (%)	Seats	Votes (%)	Seats	Votes (%)	Seats	Votes (%)	Seats
ODS	29.7[a]	76	29.6	68	27.7	63	24.5	58	35.4	81	20.2	53
ČSSD	6.5	16	26.4	61	32.3	74	30.2	70	32.3	74	22.1	56
KSČM	14.1[b]	35	10.3	22	11.0	24	18.5	41	12.8	26	11.3	26
KDU-ČSL	6.3	15	8.1	18	9.0	20	14.3[d]	31	7.2	13	4.4	-
US	–	–	–	–	8.6	19			0.3	–	–	–
SPR-RSČ	6.0	14	8.0	18	3.9	–	–	–	–	–	–	–
ODA	5.9	14	6.4	13	–	–	–	–	–	–	–	–
SZ	6.5[c]	16 (3)	–	–	1.1	–	2.4	–	6.3	6	2.4	–
TOP 09	–	–	–	–	–	–	–	–	–	–	16.7	41
VV	–	–	–	–	–	–	–	–	–	–	10.9	24
Other parties	25	14	11.2	–	7.5	–	11	–	5.7		12	–

Source: www.volby.cz
a. Formally a coalition of the ODS and the small Christian Democratic Party.
b. Formally a wider grouping where the KSČM was absolutely dominant.
c. The SZ ran in the 1992 elections as a part of a wider alliance of small parties called Liberal Social Union, and received three of sixteen seats.
d. Coalition of the KDU-ČSL and the US.

lists. But in the upper chamber, the situation is different because of the single-seat two-round electoral system. If no candidate wins an absolute majority of votes in the first round, a second round takes place in which the top two compete.[31] This majoritarian system allows candidacy by independent or semi-independent politicians; these are senators without party affiliation, elected for a coalition of several parties, or without ties to any party. In the first decade of the twenty-first century, there were even temporarily existing parliamentary groups for this type of senators. This produced cases in which relationship to a government cannot be clearly determined; therefore, we regard these as unclassifiable.[32]

Another problem is posed by the cases of cooperation between government and opposition members of parliament in submitting a petition for review. For this, there is no optimal solution. After deliberation, we decided not to take into account the type of cooperation in which there is such "deviant" behavior by one member of parliament: given the need for a larger number of supporters to submit a petition proposing the annulment of a statute, the above situation can be safely disregarded. Other mixed cases, for example, when at least two deputies or senators from the other side support a petition, we place in the category "across the political spectrum"—and again here the relationship to the government cannot be determined.[33]

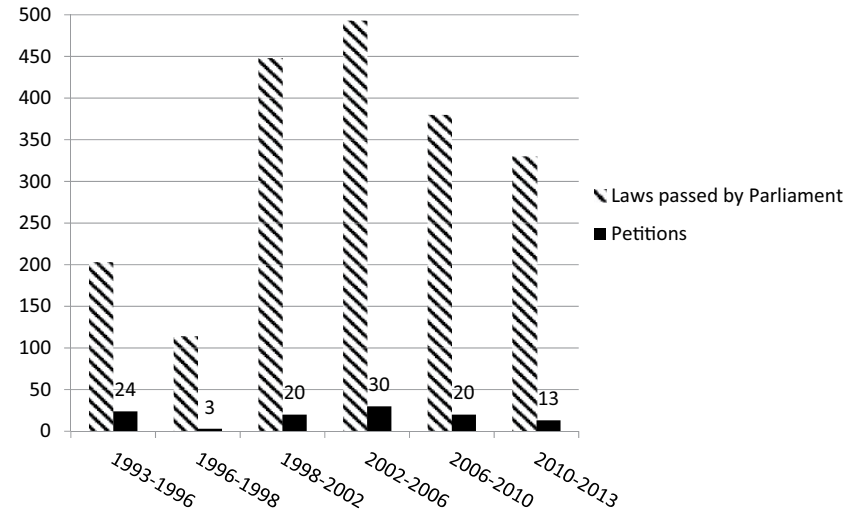
Table 2
Czech Cabinets and the Opposition in the Chamber of Deputies

Electoral Term	Prime Ministers	Governments and their backing in the Chamber of Deputies at the time of their formation	Character of the Opposition in the Chamber of Deputies
1992-1996	Václav Klaus	Four-member center-right coalition led by the ODS (105 mandates, majority government)	Several small parties, party clubs falling apart and regrouping
1996-1998	Václav Klaus	Three-member center-right coalition led by the ODS (99 mandates, minority government)	ČSSD, KSČM, far-right SPR-RSČ
	Josef Tošovský	Semi-technocratic government (partly non-party members)	Partially unclear boundary between government and opposition parties
1998-2002	Miloš Zeman	ČSSD (74 mandates, minority government backed by agreement of the ODS)	ODS, KDU-ČSL, US, KSČM
2002-2006	Three ČSSD prime ministers	ČSSD, KDU-ČSL, US (101 mandates, bare majority coalition)	ODS and KSČM
2006-2010	Mirek Topolánek[a]	ODS, KDU-ČSL, SZ (100 mandates, exactly half of the Chamber of Deputies, dependence on agreement with independent deputies)	ČSSD and KSČM
	Jan Fischer	Technocratic government, formally backed at the outset by the ODS, ČSSD, and SZ	Blurring of the line between government and opposition
2010-2013	Petr Nečas[b]	ODS, TOP 09, and VV (118 mandates, majority government; later the VV went to the opposition while a fragment of the party remained in the government; government majority in the chamber shrinks)	ČSSD and KSČM

a. After the 2006 elections, a minority, single-party government headed by Mirek Topolánek was in power for a short time but did not gain the confidence of parliament.
b. The Chamber of Deputies was dissolved and early elections called after the resignation of Petr Nečas as a result of scandal in June 2013.

Our next question is how often petitions to overturn a law are successful. This is important in order to judge the effectiveness of this instrument, as well as for verifying the thesis that the success of one petition reinforces interest in this instrument during subsequent electoral terms. We therefore track success (petition completely or partially approved) and failure (not approved).[34] Under the heading of failed, we place rejected and dismissed petitions. Proceedings that were halted, and therefore cannot be classified as successful or failed, we take as a special category.

Figure 2
Judicial review of legislation and number of laws passed



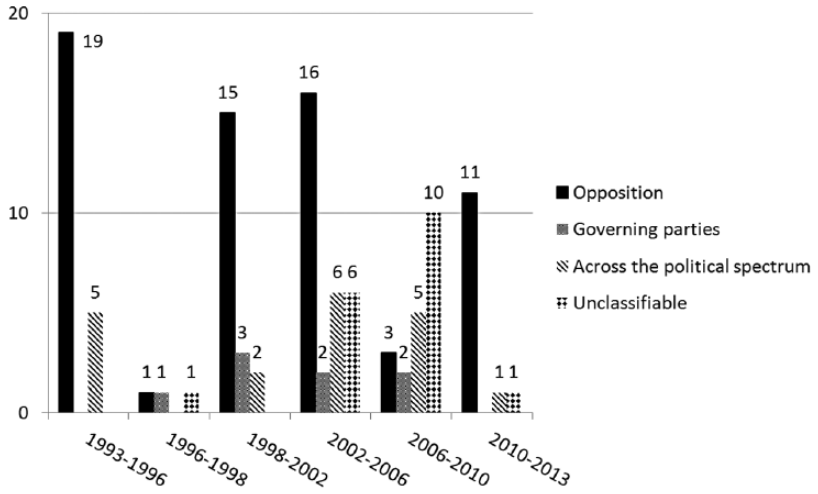
Finally, we examine the most frequent topics of judicial review, and whether they have changed over time. We go down the list of common public policies, and add the topic of transitional justice, which is important for every society that has experienced a long era of dictatorship.[35]

Judicial Review of Legislation in the 1990s

Between 1993 and 2013, a total of 110 petitions submitted by deputies or senators came to the CCC.[36] On average, the court dealt with 5.24 such cases a year; over six terms of office, there were just under twenty such cases per term. As Figure 2 shows, they quickly caught on to the use of this instrument. In the first electoral term, by 1996 there were already 24 petitions submitted, the second highest number among the electoral terms—even though at that time the upper house of parliament had not yet been established, so the high number came from the Chamber of Deputies alone. Their readiness to use it was probably helped by the previous experience with the Czechoslovak federal constitutional court and, primarily, the fact that at that time they were dealing with topics with a fundamental impact, what Hirschl calls mega-politics, especially in the area of dealing with the communist past, which activated the opposition (more below).

A look at Figure 3 shows the predominance of opposition petitions to the CCC, which verifies our presumption that this was an important tool for the opposition

Figure 3
Initiators of judicial review of legislation (number of petitions)

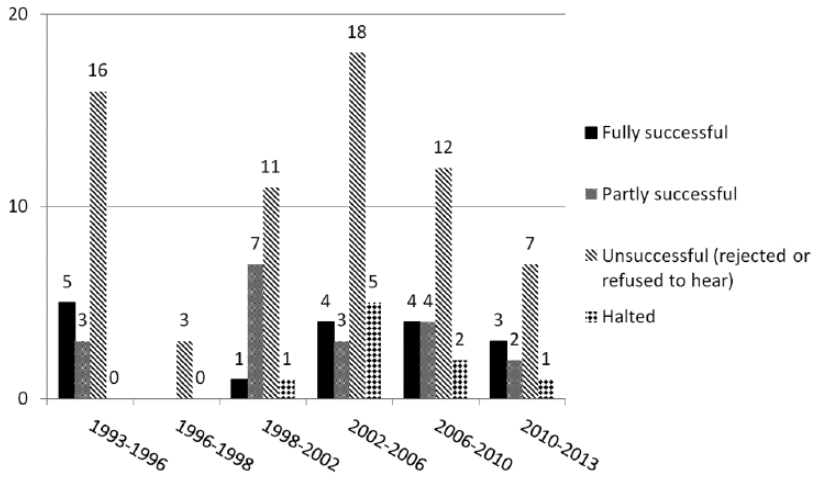


during that period. A major role in this regard is played by the distribution of forces in the Chamber of Deputies, where the center-right government of Václav Klaus enjoyed a solid legislative majority. The marginalized and constantly splitting opposition had little chance to stop a decision if the pro-government deputies stayed unified, so their resort to judicial review of legislation was logical. The radical stance of part of the opposition during that era was reflected by the words of then chairman of the Social Democrats (ČSSD) Miloš Zeman—who was trying to become the main leader of the opposition—about a country destroyed by the right, plundered state enterprises, and wringing the government's neck.[37]

Interesting for this period is the significant number of joint petitions submitted by opposition and government members of parliament. Upon closer inspection, we see that 4 of 5 petitions had to do with restitution, that is, the return of private property seized by the state during the communist era. There was an ongoing, angry political debate over the extent of restitution, to whom it should and should not apply, etc. The core of restitution legislation was written before 1993, and there were many differing opinions about it even among the right and center-right parties. For example, the CCC on the initiative of deputies across the political spectrum overturned the original condition of permanent residence in the Czech Republic for people asking for their property back.[38]

Overall between 1993 and 1996, petitioners were fully or partially successful in a third of the cases, which should—according to the above-mentioned theoretical assumption—work to increase the use of review during the subsequent electoral term (Figure 4).

Figure 4
Success rate of petitions (number of petitions)



Surprisingly, then, there was a sharp drop in its use during the next electoral term (1996–1998), with only three petitions being submitted, and only one of them by the opposition. Even though this was probably partly due to the shorter length of the electoral term ending in early elections (in which only half the number of laws were passed compared to the previous term), this does not explain the minimal use of the instrument of judicial review.

We can find the reasons by looking at the 1996 election result. After these elections, the center-right coalition led by Václav Klaus continued in a modified form, but its main problem was now its minority status. The government won its vote of confidence in the Chamber of Deputies by an agreement with Zeman's opposition party, the ČSSD, but there the amenability of the ČSSD ended. The opposition, which also included two radical parties, the Communist Party of Bohemia and Moravia (KSČM) and the extreme-right Republican Party (SPR-RSČ), took advantage of the government's weak backing in parliament, and the government's term in office was marked by close-run voting battles between government and opposition. In the midst of this struggle, two deputies suddenly left the ČSSD, one of whom went over to the government camp, while the other remained independent. The parliamentary arena provided plenty of chances to block the government's proposals; thus the opposition lost interest in using the review procedure. The lack of petitions coming from the Senate (the first senators were elected at the end of 1996) can be explained by their having to "getting settled" into their new role and, primarily, by the composition of the Senate, which was dominated by politicians from the ruling parties—the only opposition parliamentary party group was the ČSSD.

Table 3
Initiators of Judicial Review of Legislation According to Chamber of Parliament (Number of Petitions)

Electoral Terms	Group of Deputies	Group of Senators	Deputies and Senators
1993–1996	24	0	0
1996–1998	3	0	0
1998–2002	9	9	2
2002–2006	10	14	6
2006–2010	6	14	0
2010–2013	9	4	0

Another role was played during this period by the fact that the rising tension within the Klaus government led to its breakup in November 1997, with the Christian Democrats (KDU-ČSL) and the one other liberal-conservative departing; moreover, the ODS broke up as well.[39] The Klaus government was replaced by a temporary semi-technocratic cabinet, which was supported in the vote of confidence by some of the previous deputies from the governing parties as well as some from the ČSSD, who in exchange received a promise (fulfilled) of early elections. Preoccupation with the political crisis, internal party conflicts, and last but not least a partial blurring of the line between government and opposition pushed judicial review of legislation to the margin of politicians' interest. Weak parliamentary support for the second Klaus government also explains the first petition, submitted by government deputies when it proved impossible to change a particular law in parliament.

The Puzzle of Opposition Agreement

The next electoral term (1998–2002) was remarkable not only for the sharp rise in interest in judicial review of legislation but also because nine of the twenty petitions were submitted by senators (and two more jointly with deputies), which brought the upper house even with the lower house in terms of activity (Table 3). Among petitions from senators, the greatest attention was drawn by the review of the election reform law, a reform that could have radically changed the structure of the party system. The majority of petition initiators were opposition KDU-ČSL senators: the electoral reform had been pressed by Klaus's opposition party, the ODS, in cooperation with Zeman's government party, the ČSSD. This paradox is explained by the political configuration, in which talks over forming a government after the 1998 elections led to an agreement between the two big parties, the ČSSD and the ODS. This agreement was opposed by the smaller parties, and included an especially strong element of tension between the party leaders after the bitter

breakup of Klaus's governing coalition in late 1997, and the verbal confrontations of the 1998 campaign. The so-called Opposition Agreement allowed the Social Democrats to form a one-party minority government, while the ODS gained certain concessions, among them positions in parliament and a promise of extensive reforms to political institutions, of which the most important was reform of the electoral system. In this context, the ODS is considered to have been an opposition party but one with a special relationship to the government.[40]

The other opposition parties saw electoral reform as a threat, and rejected it along with the Opposition Agreement. The dispute over electoral reform, closely followed by the media, climaxed in summer 2000 in the Senate, where it passed by a very small margin, in contrast to the Chamber of Deputies, thanks to resistance by some social democratic senators. This reflected the much weaker party discipline in general among senators as opposed to deputies in the lower house.[41] Senators who objected to the Opposition Agreement spoke out on the floor of Parliament, arguing that "political plurality is at stake," and recalling post-war Czechoslovakia with its "closed plurality, which gave birth to (communist) monopoly."[42]

The electoral law was so controversial that its review by the CCC was supported not only by opposition senators but by two social democrats. Even President Václav Havel submitted a petition (the constitutional court merged the parliamentary and presidential petitions into a single case). The fundamental argument against the law was that it violated the constitutional principle of proportional representation for elections to the Chamber of Deputies, especially the way it created small electoral districts (thirty-five instead of eight), and introduced a new method of converting number of votes into number of seats.[43] The Constitutional Court's overturning of these elements represented the most important and in the long run most consequential check on parliamentary overreach in the history of the Czech Republic: not only did the court head off a fundamental institutional change in the political system but it strictly limited such electoral engineering in the future. In this sense, we can observe a very strong feedback effect—and another example of Hirschl's mega-politics.[44]

However, the petition's initiators were not completely successful, as the CCC refused to overturn the law's new legal thresholds for coalitions (10 percent for election coalitions of two parties, 15 percent for coalitions of three parties, and 20 percent for four or more parties; the original thresholds had been lower: 5, 7, 9, and 11 percent). This aspect contributed to the breakup of the alliance of small "anti-agreement" parties (Quad-Coalition), which would be placed at a disadvantage in the next elections by the new legal thresholds. Paradoxically, then, the court's ruling not only prevented implementation of the Opposition Agreement, but also impacted the opposition that initiated the review.

The large number of petitions coming from the Senate in 2000–2002 was evidently another result of the weakness of the "anti-agreement" parties in the Chamber of Deputies, where the KDU-ČSL and the Freedom Union (US) could not put together enough deputies to submit a petition, while they refused to cooperate with

the KSČM, another opposition party, for ideological and historical reasons. Instead, over time the Senate became their new bastion: after the supplemental elections in 2000, the "anti-agreement" parties even had a majority in the Senate.

The era of the Opposition Agreement had one more remarkable aspect: three petitions submitted by the ruling ČSSD, the largest number of petitions from the government in the period 1993–2013. The explanation, as with the similar case from the previous electoral term, was the fact that the government did not have a legislative majority—cooperation from the ODS was limited for ideological reasons, and was uncertain from the other parties.[45] Thus, politicians from the ruling party resorted to the procedure of judicial review of legislation.

Judicial Review of Legislation in the Czech Republic's Second Decade

The historically largest number of petitions (30) submitted to the Constitutional Court in 2002–2006 was undoubtedly influenced by the large number of laws being passed at the time (Figure 2) as a part of the mass adoption of European legislation as the country joined the EU.[46] But a closer look at who initiated the petitions shows a number of important phenomena that evidently contributed to this large number of petitions. After the Opposition Agreement, the court began to be seen more and more by politicians as a welcome "emergency brake." This is shown by the behavior of the ODS; they were the CCC's biggest critics during the era of the Opposition Agreement, but after 2002 their politicians became far and away the biggest "suppliers" of petitions to the court, part of their political strategy of "no tolerance" for the government of the ČSSD, KDU-ČSL, and US, which enjoyed a parliamentary majority. It is remarkable that the Communists, the second opposition party in the Chamber after the ODS, avoided using judicial review of legislation during this period, even though their parliamentary party group had a sufficient number of members to get them submitted. A probable explanation is that the mildly center-left government was closer to the KSČM ideologically than the center-right Klaus governments of the 1990s.

Toward the end of the electoral term, the ČSSD, under their new leader and Prime Minister Jiří Paroubek, became willing to work together in parliament with the KSČM even as the government coalition continued to exist.[47] This cooperation naturally produced a backlash, so in this period we see for example a petition by KDU-ČSL senators, formally part of the government, together with senators from the ODS and several independent senators, against the provisions of a law on the legal status of the church.

When we look at the origin of the petitioners, we see unusual activity on the part of senators, evidently related to the experience of the previous electoral term when the upper house "found out" how useful judicial review of legislation was in

augmenting its otherwise weak powers. Also very active, besides the ODS, was a group of (semi)independent senators elected on the "anti-opposition-agreement" wave of the previous electoral term, who came together in 2002 to form the Club for Open Democracy. Later, two other senate parliamentary groups formed, with titles including the word "independent," and ambiguous stances toward the government. Petitions initiated by these senators are labeled in Figure 3 as "unclassifiable" (with the exception of cases when a few independents joined a main group of clearly profiled petitioners).

In the next electoral term (2006–2010), there were more petitions from parliamentary groups with an unclassifiable stance toward the government, which is evidently one of the factors contributing to the continuing predominance of the upper house in terms of petitions (Table 3). Independent or semi-independent senators who lacked broader structural support outside the upper house evidently saw judicial review of legislation as one of the few effective political instruments at their disposal, and four petitions came from these groups in this period (these senators have almost completely disappeared from the upper house in the second decade of the twenty-first century, and in consequence independently submitted petitions have also nearly disappeared). A problem with classifying some of the petitions from 2006 to 2010 are the episodes of political turbulence, when at the end of the electoral term, as in 1998, the dividing line between government and opposition became blurred under a technocratic cabinet: six of ten unclassifiable petitions fall into the term of that government.

Major turbulence influencing the submission of petitions to CCC during this electoral term had appeared even before the technocratic cabinet came in. This was the result of the stalemated 2006 elections, when the ČSSD and the KSČM on the left won exactly half the seats, with the other half going to the parties on the right. After six months of extended life for the previous cabinet, along with such complications as an unsuccessful attempt to assemble a minority, one-party government of the ODS, a government with the confidence of the Chamber was finally sworn in, led by chief of the ODS Mirek Topolánek. Ideologically, the new Topolánek government was heterogeneous (including both the ODS and the ideologically distant Greens), but importantly it did not enjoy a legislative majority in the Chamber of Deputies. The result was a number of government petitions to the CCC, the most visible (and partially successful) a review of the new Labor Code, a law pushed through by the left just before the 2006 elections. The government initiators of the review simply did not have enough votes to change the Labor Code in parliament themselves.

Topolánek's coalition government hung in the Chamber of Deputies on the favor of a few former Social Democrats who had left the ČSSD or been expelled; nevertheless, because of the disloyalty of some of its own deputies the government fell after losing a vote of confidence. The political disarray was impacted even further by decisions of the CCC, which overturned as unconstitutional a constitutional law (!) shortening the electoral term of the Chamber of Deputies, thus forcing an end to plans for early elections in the fall of 2009.[48] This decision, although it had the potential to become a case of

mega-politics by dramatically altering the political arena, goes beyond the range of this study because it was initiated by a single deputy in the context of his individual constitutional complaint (a different type of process than that examined here).

The lack of a government majority in the Chamber, the clouding of the line between government and opposition, and a severe economic crisis for most of the electoral term kept politicians occupied and evidently contributed to a lower number of petitions coming from the lower house (though not the upper).

The last electoral term, that of 2010–2013, was completely different. The great majority of petitions came from the opposition, which is natural considering that there was now a center-right government with a legislative majority, and clear differences between the government coalition and the opposition, at least for most of the term (in summer 2013 the center-right government fell, and after the subsequent failure of the technocratic cabinet to win its vote of confidence, early elections were called). The below-average number of review petitions also relates to the shorter electoral term and the lower number of laws passed.

A look at the success rate of petitions after 2002 shows basically a constant trend, with only a minority of petitions being completely, or partially successful, just as in the 1990s. Nevertheless, the victories of the majority were more than a few, as is clear from the electoral terms 2002–2006 and 2010–2013, when governments with legislative majorities were in power, and the vast majority of initiatives for review of constitutionality came from a clearly identifiable opposition.

Long-Term Trends

Let us now look at the initiators of petitions. We can see that around three-fifths of all petitions were initiated by the opposition. Almost a fifth of the petitions were submitted by parliamentarians of both government and opposition parties, and there was also a significant number of petitions submitted by politicians from the governing parties (Figure 5).

In looking at the overall success rate (Figure 6), we see that in just under a third of the cases the process resulted in complete or partial success for the petitioners. From the standpoint of judicial review of legislation as a tool for the opposition, there is no fundamental deviation between opposition and other petitions. In that context, we ought to mention the court's proclaimed adherence to the doctrine of judicial restraint, or "a maximum effort to minimize its intervention in the activities of other branches of government, the legislative not excepted. . . . Even in a case where the Constitutional Court sees the text of a law as problematic, before it intervenes it will try to find an alternative interpretation that would be in accordance with the constitutional order."[49] Externally, then, the court shows restraint; on the other hand, there have been cases where it intervened quite decisively, provoking major debate: for example, the case when it quashed most of the key elements in the electoral reform of 2001.

Figure 5
Initiators of judicial review of legislation (1993–2013)

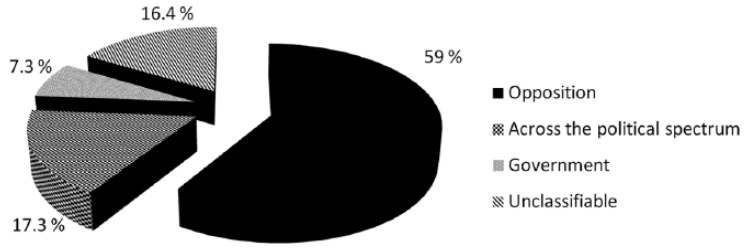
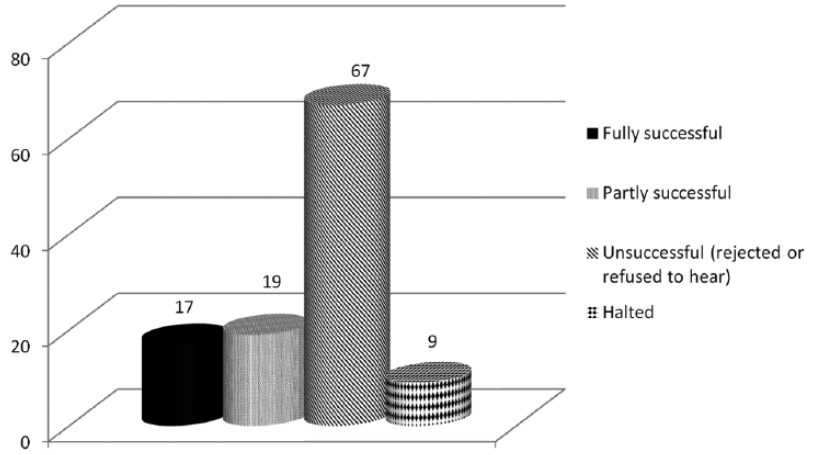


Figure 6
Overall success rate of petitions (1993–2013, number of petitions)

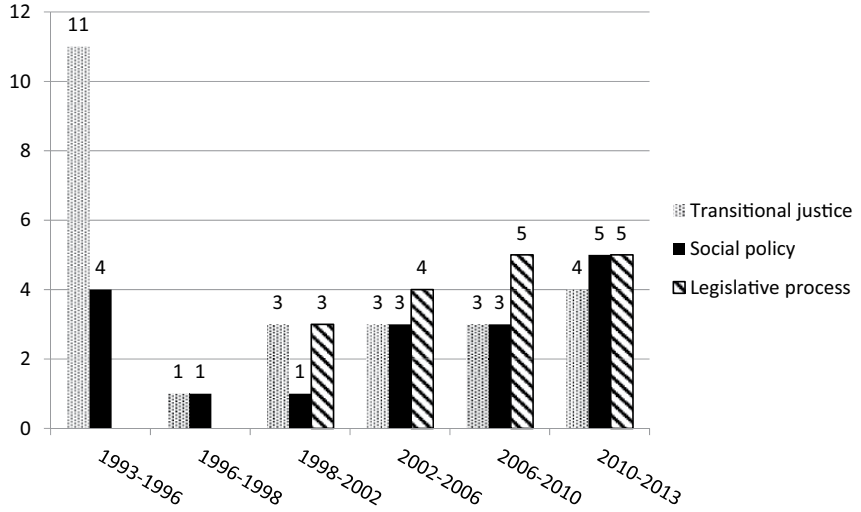


Note: The total number of the CCC' s decisions in this figure is higher than the total number of petitions proposing the annulment of a statute due to a very complex petition which was subject to three decisions.

The Pivotal Issues

Over time, the petitions proposing the annulment of statutes touched on a diverse spectrum of themes, the most frequent of which was transitional justice (twenty-five, of which twenty were about property restitution), followed by social policy (seventeen) and the legislative process (seventeen).[50] The occurrence of the first two themes was constant, and appeared in every electoral term (Figure 7).

Figure 7
Most frequent issues of judicial review of legislation (number of petitions)



Note: In a few cases belonged to a petition of more than one category.

Among the most frequently debated norms of transitional justice was the law on the criminal nature of the Communist regime and resistance to it, passed in 1993, under which the communist regime was condemned as criminal, illegitimate, and deplorable. Immediately after adoption of this law, Communist deputies attacked it through the CCC. The court rejected their petition, saying that the constitution "is not based on value neutrality . . . but includes in its text certain regulative ideas expressing the basic, inviolable values of democratic society."[51] In practice, then, the CCC fundamentally ruled in the full spirit of Hirschl's mega-politics. The CCC again commented on the topic of coming to terms with the communist regime in a similar vein later. For example, in 2001 there was an effort by the then-ruling ČSSD to overturn the lustration law, a norm formerly adopted under Czechoslovakia, which banned officials of the Communist Party before 1989, personnel and agents of the Communist secret police, etc. from holding certain state functions (in the army, intelligence services, etc.). The main argument of the petition's initiators was that the democratization process had been completed, and that the lustration law was therefore no longer necessary to protect the democratic system. But the CCC upheld the law's key points, ruling that lustration represents "the active protection of a democratic state from the dangers that could be brought to it by insufficiently loyal and little-trustworthy public services."[52]

Under the heading of transitional justice, the largest share of the cases concerned property restitution; unlike other countries of the former East Bloc, the Czechs returned a relatively large share of property confiscated by the former regime. The

issue of restitution peaked in the mid-1990s, but went on to become a standard part of the political debate, as well as a subject for review of constitutionality. This was illustrated by the law on property restitution to the church, passed by the center-right government in 2012, which among other things included large financial transfers to the churches. The reaction was four petitions for review of the constitutionality of the law. The persistence of the restitution issue shows how the dispute over the communist past continues, and how it is being addressed.

The democratic transition also affects the character of social issues, another frequent area of review. The economic transformation from a centrally planned to a market economy naturally produces social conflict. The occurrence of this issue over time trends in the opposite direction from that of transitional justice, that is, sharply upward over the last few electoral terms. Today in practice it is mostly a reflection of the classic conflict between right and left. Interesting is the proclaimed restraint of the CCC, which should conduct its review of constitutionality in a limited manner, observing the so-called rationality test. According to this argument, the constitutional court is to use this standard to uphold "such laws as can be seen to follow some legitimate goal, and do so in such a way that can be considered a sensible means in which to achieve it, even though it may not be the best, most suitable, effective, or wise"; this standard was first formulated as part of a dispute over the right to strike.[53] Petitioners from the right were successful in 2006, when the court, for example, partially upheld a petition against some of the provisions of the new Labor Code, while left-wing petitioners were successful in 2012 when the court overturned an amendment to the law, according to which persons who had refused to do public works without serious reason were to be removed from the list of those seeking employment.

The third most frequent issue dealt with the legislative process. More petitions of this kind appeared almost a decade after the Czech Republic was formed, and originated in the upper house's unclarified role in the legislative process.[54] Another topic was found in petitions by senators objecting to certain kinds of amendments, similar to those known in the United States as "riders."[55] These amendments are tacked onto bills during the legislative process and have nothing to do with the original proposal. The CCC ruled this practice unconstitutional, pointing to the need for a clean legislative process, and to protect people's trust in the law.[56] The high number of disputes related to the legislative process also stemmed partly from controversy over the speed and manner in which some laws were being adopted, as when the opposition tried in this way to block legislation proposed during a state of legislative emergency.

Conclusion

The article presents clear evidence of the importance of constitutional review in new democracies. Its analysis has shown that judicial review of legislation became

a regular instrument in the Czech system almost immediately after the creation of the Czech Republic, is used today by politicians of every party stripe, and is often considered a continuation of the political struggle. This primarily holds true in cases involving the key political values represented by the given parties. This is clearly visible in the sphere of social policy where the traditional economic dispute between the left and the right became evident.

Our study confirms the assumption that it is the parliamentary opposition which most often resorts to judicial review of legislation. It submitted petitions most frequently. But at the same time, it must be emphasized that it is not their tool alone. Joint petitions by both government and opposition deputies and senators make up a considerable number. Nor are petitions connected only with government parties exceptional. The analysis shows that judicial review of legislation serves as a tool for the opposition in a situation when elections produce a government with a legislative majority (it is not important whether the majority is small or large). Petitions for judicial review of constitutionality coming from governing parties are in that case practically nonexistent, and it matters little whether the government is center-left or center-right, or what the composition of the opposition is: judicial review really is regarded as the opposition's "last resort." However, *if* the government does not have a legislative majority, the character of the petitions changes: the interest of opposition politicians in judicial review of legislation drops, because they now have a good chance of success directly in parliament. In these situations, we see a greater initiative on the part of members of governing parties, who try to deal in this way with the increased difficulty of getting laws through parliament. A specific situation in which we do not see judicial review of legislation as a tool for the opposition is the case of the technocratic or semi-technocratic government, where the line between the government and opposition becomes blurred.

Increased cooperation across the political spectrum in submitting petitions is linked to problems within the government coalition, which can lead politicians of some of the governing parties to work with the opposition on issues where it disagrees with its governing partners. Usually, however, this type of cooperation appears in the upper house, where the dividing line between the government and opposition is less clear than in the lower house, as there is looser party discipline among senators.

The factor indirectly supporting cooperation across the spectrum in the Senate is the institution's weak position within the political system. This motivates senators to make use of judicial review of legislation as one of their few effective powers. An especially important factor increasing the upper house's activity is the presence of independent and semi-independent senators, without broader political backing, who see judicial review of legislation as a welcome tool. There is a clear relationship between a higher number of independent and semi-independent senators and the increasing number of petitions from the Senate, while the disappearance of such senators after 2010 coincides with a decline in petitions from the upper house.

In looking at the overall success rate, we see that there is no fundamental deviation between opposition and other petitions. From the standpoint of the results of petitions, it is important that the success rate of the petition in the individual electoral terms is generally similar. According to the statistics it seems, then, that the CCC is relatively consistent in overturning laws, regardless of whether the government is center-right or center-left, or who makes up the opposition. This aspect may be deserving of special analysis, however.

Thematically, at the outset judicial review of legislation was most often used in relation to the phenomenon of transitional justice and the related impact of democratic transition, for which the CCC became a significant forum. Especially in the case of transitional justice, justices openly rejected the merely formal conception of the rule of law as well as value neutrality. As time went by, however, this type of case became less frequent, although it has still not completely disappeared. On the other hand, the instance of cases connected to classic socioeconomic conflicts typical of "everyday democratic practice" and the problem of respecting the opposition within the framework of the legislative process, and the transparency of that process, has grown.

This article has shed light on the practice of using petitions for the judicial review of legislation by parliamentary politicians in the Czech Republic. Within this case, some general trends were identified. In further research, the Czech case could be compared with other Central and Eastern European countries to test the validity of these trends outside the context of Czech politics.

Appendix

List of Party Abbreviations

ODS, Civic Democratic Party; ČSSD, Czech Social Democratic Party; KSČM, Communist Party of Bohemia and Moravia; KDU-ČSL, Christian and Democratic Union–Czechoslovak People's Party; US, Freedom Union; SPR-RSČ, Association for the Republic–Republican Party of Czechoslovakia; ODA, Civic Democratic Alliance; SZ, Green Party; TOP 09, the name is derived from *Tradice, odpovědnost, prosperita*, meaning "Tradition, Responsibility, Prosperity"; VV, Public Affairs.

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Notes

1. R. A. Dahl, ed., *Political Oppositions in Western Democracies* (New Haven, CT: Yale University Press, 1966).

2. T. Ginsburg, "The Global Spread of Constitutional Review," in *The Oxford Handbook of Law and Politics*, ed. K. E. Whittington, D. R. Kelemen, and G. A. Caldeira (Oxford: Oxford University Press, 2008), 81–87.

3. See generally C. N. Tate, "Why the Expansion of Judicial Power?," in *The Global Expansion of Judicial Power*, ed. N. C. Tate and T. Vallinder (New York: New York University Press, 1995), 31; A. Stone Sweet, *Governing with the Judges: Constitutional Politics in Europe* (New York: Oxford University Press, 2000), 198–99; W. Sadurski, *Rights before Courts: A Study of Constitutional Courts in Postcommunist States of Central and Eastern Europe* (Dordrecht: Springer, 2005), 93; D. Robertson, *The Judge as Political Theorist: Contemporary Constitutional Review* (Princeton, NJ: Princeton University Press, 2010), 13. For individual countries: A. Stone, *The Birth of Judicial Politics in France: The Constitutional Council in Comparative Perspective* (New York: Oxford University Press, 1992), or S. Brouard, "The Politics of Constitutional Veto in France: Constitutional Council, Legislative Majority and Electoral Competition," *West European Politics* 32 (2009): 384–403, for France; G. Vanberg, *The Politics of Constitutional Review in Germany* (Cambridge: Cambridge University Press, 2005), for Germany; Y. Hazama, "Constitutional Review and Parliamentary Opposition in Turkey," *Developing Economies* 34 (1996): 316–38 or S. Gülener and İ. Haşlak, "Relations between Politics and Constitutional Review in Turkey with Special Reference to the Referrals of Republican People's Party: 2002–2010 Period," *Turkish Journal of International Relations* 10 (2011): 2–19 for Turkey; D. Yoav and M. Hofnung, "Legal Defeats–Political Wins: Why Do Elected Representatives Go to Court?," *Comparative Political Studies* 38 (2005): 75–103, for Israel. In the Czech literature, the problem of judicial review of legislation as a tool for the opposition has been cited by M. Kubát, *Politická opozice v teorii a středoevropské praxi* (Prague: Dokořán, 2010), 104; or J. Wintr, "Co mají chránit ústavní soudy?," in *Právo a dobro v ústavní demokracii*, ed. J. Přibáň and P. Holländer (Prague: SLON, 2011), 198.

4. See, e.g., A. Stone Sweet, "Constitutional Courts and Parliamentary Democracy," *West European Politics* 25 (2002): 77–100; A. Stone Sweet, "Constitutional Courts," in *The Oxford Handbook of Comparative Constitutional Law*, ed. M. Rosenfeld and A. Sajó (Oxford: Oxford University Press, 2012), 813–30; J. Ferejohn and P. Pasquino, "Constitutional Adjudication: Lessons from Europe," *Texas Law Review* 82 (2004): 1671–1704; R. Hirschl, *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism* (Cambridge: Harvard University Press, 2004); H. Smekal, "Soudcokracie, nebo judicializace politiky?," in *Soudcokracie nebo judicializace politiky? Vztah práva a politiky (nejen) v časech krize*, ed. H. Smekal and I. Pospíšil (Brno: MU, 2013), 12–33.

5. A. Stone Sweet, "Constitutional Courts and Parliamentary Democracy," 88.

6. See, e.g., R. A. Dahl, "Decision-Making in a Democracy: The Supreme Court as a National Policymaker," *Journal of Public Law* 6 (1957): 279–95.

7. D. Haubrich, "September 11, Anti-Terror Laws and Civil Liberties: Britain, France and Germany Compared," *Government and Opposition* 38 (2003): 3–28; R. Hirschl, "The Judicialization of Mega-Politics and the Rise of Political Courts," *Annual Review of Political Science* 11 (2008): 93–118.

8. M. Shapiro and A. Stone Sweet, *On Law, Politics and Judicialization* (New York: Oxford University Press, 2002), 344; C. Guarnieri and P. Pederzoli, *The Power of Judges: A Comparative Study of Courts and Democracy* (Oxford: Oxford University Press, 2002), 138. On the influence of the German Constitutional Court, see, e.g., Ch. Landfried, "The Impact of the Federal Constitutional Court on Politics and Policy Outputs," *Government and Opposition* 20 (1985): 522–42.

9. W. Sadurski, "Judicial Review in Central and Eastern Europe: Rationales or Rationalizations?" *Israel Law Review* 42 (2009): 500–27; Sadurski, *Rights before Courts*. Another study for Poland where CC was founded shortly before 1989 can be found, e.g., in M. F. Brzezinski, "The Emergence of Judicial

Review in Eastern Europe: The Case of Poland," *American Journal of Comparative Law* 41 (1993): 153–200; M. F. Brzezinski and L. Garlicki, "Judicial Review in Post-Communist Poland: The Emergence of a Rechtsstaat?," *Stanford Journal of International Law* 31 (1995): 13–59.

10. T. Vallinder, "When the Courts Go Marching In," in *The Global Expansion of Judicial Power*, ed. N. C. Tate and T. Vallinder (New York: New York University Press, 1995), 13.

11. R. Hirschl, "The Judicialization of Politics," in *The Oxford Handbook of Law and Politics*, ed. K. E. Whittington, D. R. Kelemen, and G. A. Caldeira (Oxford: Oxford University Press, 2008), 119–41.

12. W. Sadurski, "Constitutional Courts and Constitutional Culture in Central and Eastern European Countries," in *Central and Eastern Europe after Transition: Towards a New Socio-Legal Semantics*, ed. A. Febbrajo and W. Sadurski (Farnham: Ashgate, 2010), 105.

13. Yoav and Hofnung, "Legal Defeats–Political Wins"; cf. Stone Sweet, *Governing with the Judges*.

14. Sadurski, *Rights before Courts*, and Sadurski, "Constitutional Courts and Constitutional Culture."

15. Stone Sweet, *Governing with the Judges*, 21–22.

16. Figure 1 illustrates that judicial review of legislation can also be initiated on the appeal of an individual or a court in relation to a specific case, which applies in the Czech Republic as well.

17. On the more general theoretical debate on the role of the courts, see M. Shapiro, *Courts: A Comparative and Political Analysis* (Chicago: University of Chicago Press, 1981).

18. A. Tocqueville, *Democracy in America* (New York: Vintage Classics, 1990), 280.

19. Hirschl, "Judicialization of Politics."

20. See, e.g., J. Kysela and Z. Kühn, "Presidential Elements in Government: The Czech Republic," *European Constitutional Law Review* 3 (2007): 91–113; M. Brunclík, "Mezi Berlínem a Paříží: Kam kráčí politický režim České republiky," in *O komparativní politologii a současné české politice*, ed. M. Kubát and T. Lebeda (Prague: Karolinum, 2014), 57–77.

21. P. Kopecký, *Parliaments in the Czech and Slovak Republics. Party Competition and Parliamentary Institutionalization* (Aldershot: Ashgate, 2001), 2.

22. See P. Kopecký, "Structures of Representation," in *Developments in Central and East European Politics*, ed. S. White, J. Batt, and P. G. Lewis (Houndmills: Palgrave Macmillan, 2007), 146. For the structure and functioning of the Czech parliament, see also, e.g., Kopecký, *Parliaments in the Czech and Slovak Republics*; J. Reschová and J. Syllová, "The Legislature of the Czech Republic," *Journal of Legislative Studies* 2 (1996): 82–107; L. Linek and Z. Mansfeldová, "The Parliament of the Czech Republic, 1993–2004," *Journal of Legislative Studies* 13 (2007): 12–37. For a wider comparison of parliaments of the former Eastern Bloc, see, e.g., D. Olson and P. Norton, "Post-Communist and Post-Soviet Parliaments," *Journal of Legislative Studies* 13 (2007): 164–96; Z. Mansfeldova, "Central European Parliaments over Two Decades—Diminishing Stability? Parliaments in Czech Republic, Hungary, Poland, and Slovenia," *Journal of Legislative Studies* 17 (2011): 128–46.

23. When the Czech Constitution was being created, most of the opposition and some government politicians were against the Senate. Nevertheless, the Senate did make it into the Constitution in the end, thanks to its advocates referring, among other things, to historical tradition (Czechoslovakia had an upper chamber between the wars) and its existence in a number of western democracies. The aversion to this institution led to its limited powers and postponed its formation. For this complicated history, see E. Stein, *Česko-Slovensko. Konflikt, roztržka, rozpad* (Prague: Academia, 2000), 218–20; L. Kopeček, *Éra nevinnosti. Česká politika 1989-1997* (Brno: Barrister & Principal, 2010), 156–61. For more details on the specifics of the Czech Senate in comparative framework, see J. Kysela, *Senát parlamentu České republiky v historickém a mezinárodním kontextu: příspěvek ke studiu dvoukomorových soustav* (Prague: Parlament České republiky, 2000).

24. G. Sartori, *Comparative Constitutional Engineering* (Houndmills: Palgrave MacMillan, 1994), 110–11. For the Czech situation see M. Kubát, *Současná česká politika. Co s neefektivním režimem?* (Brno: Barrister & Principal, 2013).

25. J. Přibáň, "Judicial Power v. Democratic Representation: Culture of Constitutionalism and Human Rights in the Czech Legal System," in *Constitutional Justice: East and West*, ed. W. Sadurski

and J. Zielonka (Dordrecht: Kluwer Academic, 2002), 373–94; H. Schwartz, *The Struggle for Constitutional Justice in Post-Communist Europe* (Chicago: Chicago University Press, 2000), 17–18; S. Balík, V. Hloušek, J. Holzer, and J. Šedo, *Politický systém českých zemí 1848-1989* (Brno: MU, 2003), 64.

26. D. Kosař, "Conflicts between Fundamental Rights in the Jurisprudence of the Constitutional Court of the Czech Republic," in *Conflicts between Fundamental Rights*, ed. E. Brems (Oxford: Intersentia, 2008), 348.

27. Constitutional Court Act no. 182/1993 Sb., para. 64.

28. Briefly we might mention that while the first Czech president Václav Havel (1993–2003) used this instrument very often, his successor Václav Klaus (2003–2013) completely ignored it, as he basically disapproved of the Constitutional Court and higher courts in general. Klaus introduced into the Czech political discourse the pejorative expression *soudcokracie* (courtocracy), the sway held by courts over politics, and this produced much debate; likewise he often referred to the Constitutional Court as the "third house of parliament." See Smekal and Pospíšil, eds., *Soudcokracie nebo judicializace politiky?*; and Z. Kühn and J. Kysela, "Nomination of Constitutional Justices in Post-Communist Countries: Trial, Error, Conflict in the Czech Republic," *European Constitutional Law Review* 2 (2006): 183–208.

29. F. V. Comella, *Constitutional Courts and Democratic Values* (New Haven, CT: Yale University Press, 2009), 57–58.

30. In the Czech system, a term used is "constitutional order," which encompasses the actual constitutional document from 1992, other constitutional laws, the Bill of Human Rights and Freedoms, and according to the CCC also the international human rights treaties that the Czech Republic has ratified.

31. See, e.g., M. Gallagher, "Elections and Referendums," in *Comparative Politics*, ed. D. Caramani (Oxford: Oxford University Press, 2010), 241–50; S. Birch, F. Millard, M. Popescu, and K. Williams, *Embodying Democracy. Electoral System Design in Post-Communist Europe* (Houndmills: Palgrave MacMillan 2002), 67–89. For the results and specifics of Senate elections, see R. Chytilek, J. Šedo, T. Lebeda, and D. Čaloud, *Volební systémy* (Prague: Portál, 2009), 304–9, and T. Lebeda, K. Malcová, and T. Lacina, *Volby do Senátu 1996 až 2008* (Prague: Sociologický ústav, 2009).

32. In Czech terminology, the term "parliamentary party group" is not used. Instead, the terms "parliamentary club" (*parlamentní klub*) or "club of deputies" (*poslanecký klub*) and "club of senators" (*senátorský klub*) are commonly used. The term "club of senators" is also commonly used for groups consisting of senators not belonging to any party.

33. Results would not differ significantly, if we set a slightly higher number of deputies or senators (three or four) from the other "camp" as a condition for petitions "across the political spectrum."

34. It is good to be aware of a certain distortion caused by the selected quantitative method when classifying partly approved petitions, as this does not always mean partial success for the petition's initiator. As an extreme example, we can point to a decision in the matter of church restitution from 2013, where the petition was approved only in the sense of a single word: the court struck out the word "fair" from the statute, according to which nationalization or confiscation of property without fair compensation is a property injustice; this was of almost no importance for the petitioner (Constitutional Court judgment of 29 May 2013, file no. Pl. ÚS 10/13).

35. Transitional justice, or dealing with the nondemocratic (communist) past, is the subject of extensive literature. See, e.g., H. Welsh, "Dealing with the Communist Past: Central and East European Experiences after 1990," *Europe-Asia Studies* 48 (1996): 413–29; V. Tismaneanu, *Fantasies of Salvation. Democracy, Nationalism and Myth in Post-Communist Europe* (Princeton, NJ: University Press Princeton, 1998); H. Appel, "Anti-Communist Justice and Founding the Post-Communist Order: Lustration and Restitution in Central Europe," *East European Politics and Society* 19 (2005): 379–405; K. Williams, B. Fowler, and A. Szczerbiak, "Explaining Lustration in Central Europe: A 'Post-communist Politics' Approach," *Democratization* 12 (2005): 22–43; K. Šipulová and V. Hloušek, "Rozdielne cesty tranzitívnej spravodlivosti—prípady Českej republiky, Slovenska a Poľska," *Středoevropské politické studie*

14 (2012): 55–89. Here we classify, on a working basis, trials and assignment of responsibility for human rights violations, lustration, access to secret archives, symbolic condemnations of the regime, reparations, and property restitution.

36. The analysis included two petitions submitted in December 1992, just before the birth of the independent Czech Republic, but when the lower house of parliament already existed; and also all of the cases submitted prior to the dissolution of the Chamber of Deputies in August 2013 and decided by the CCC by the end of 2013.

37. A. Mitrofanov, *Za fasádou Lidového domu* (Prague: Aurora, 1998).

38. Constitutional Court judgment of 12 July 1994, file no. Pl. ÚS 3/94.

39. V. Havlík, "Česká republika," in *Koaliční vládnutí ve střední Evropě*, ed. S. Balík and V. Havlík (Brno: MU, 2012), 39–90.

40. Cf. A. Roberts, "Demythologising the Czech Opposition Agreement," *Europe-Asia Studies* 55 (2003): 1273–1303; C. Nikolenyi, "Coordination Problem and Grand Coalition: The Puzzle of the Government Formative Game in the Czech Republic, 1998," *Communist and Post-Communist Studies* 36 (2003): 325–44; S. Hanley, "The Rise and Decline of the New Czech Right," *Journal of Communist Studies and Transition Politics* 20 (2004): 28–54; M. Novák, "Typy vlád a jejich utváření: ČR v komparativní perspektivě," in *Volební a stranické systémy*, ed. M. Novák and T. Lebeda (Dobrá Voda: Aleš Čeněk, 2004), 311–45; P. Fiala and F. Mikš, "ODS a opoziční smlouva," in *Občanská demokratická strana a česká politika*, S. Balík et al (Brno: CDK, 2006), 38–65.

41. Cf. Sadurski, *Rights before Courts*, 93.

42. Senát, 23 June 2000, *Společná česko-slovenská digitální parlamentní knihovna*, http://www.senat.cz (accessed 5 May 2014).

43. The original Hagenbach-Bischoff formula was supposed to be replaced by the new modified d'Hondt formula which was more advantageous for bigger parties in the given district. For details on the electoral reform and its failure, see Birch et al., *Embodying Democracy*, 81–86; C. Nikolenyi, "When Electoral Reform Fails: The Stability of Proportional Representation in Post-Communist Democracies," *West European Politics* 34 (2011): 607–25. For possible impacts of the electoral reform on the Czech party system, see T. Lebeda: "Přiblížení vybraných aspektů reformy volebního systému," *Politologický časopis* 7 (2000): 245–47.

44. The CCC's decision became in the Czech environment the subject of one of the biggest post-1989 academic debates, see, e.g., ed. M. Novák and T. Lebeda, *Volební a stranické systémy* (Dobrá Voda: Aleš Čeněk, 2004); J. Šedo, "Reforma volebního systému v ČR—20 let diskusí," *Evropská volební studia*, 4 (2009): 142–53.

45. Roberts, "Demythologising the Czech Opposition Agreement"; M. Pink, "ODS a její opoziční role v systému v letech 1998-2005," in *Občanská demokratická strana a česká politika*, S. Balík et al. (Brno: CDK, 2006), 66–86.

46. European legislation was of course adopted not only in the Czech Republic but also in other countries in East-Central Europe. See, e.g., W. Czapliński, "Harmonisation of Laws in the European Community and Approximation of Polish Legislation to Community Law," *Polish Yearbook of International Law* 25 (2001): 45–56.

47. O. Černý, "Koaliční vládnutí v České republice ve volebním období 2002-2006," in *Koalice a koaliční vztahy*, ed. L. Cabada (Plzeň: Aleš Čeněk, 2006), 84–108.

48. S. Balík, "Neuskutečněné předčasné volby 2009," in *Volby do Poslanecké sněmovny v roce 2010*, ed. S. Balík (Brno: CDK, 2010), 39–68.

49. Constitutional Court judgment of 22 January 2008, file no. Pl. ÚS 54/05.

50. Other issues were regional government (eight), health care policy (eight), issues of land-law and environment (seven), and criminal policy (six); other topics appeared only sporadically. Several times we were unable to classify a given case under a single category, and had to place it under more than one, but this did not alter the overall picture.

51. Constitutional Court judgment of 21 December 1993, file no. Pl. ÚS 19/93; cf. R. Procházka, *Mission Accomplished: On Founding Constitutional Adjudication in Central Europe* (New York: Central European University Press, 2002), 145–47.

52. Constitutional Court judgment of 5 December 2001, file no. Pl. ÚS 9/01; cf. D. Kosař, "Lustration and Lapse of Time: 'Dealing with the Past' in the Czech Republic," *European Constitutional Law Review* 4 (2008): 460–87.

53. Constitutional Court judgment of 5 October 2006, file no. Pl. ÚS 61/04.

54. Robertson, *Judge as Political Theorist*, 86–87.

55. See S. J. Wayne, G. C. Mackenzie, and R. Cole, *Conflict and Consensus in American Politics* (Belmont, CA: Thomson Wadsworth, 2006), 387.

56. Constitutional Court judgment of 15 February 2007, file no. Pl. ÚS 77/06; cf. J. Kysela, "Zákonodárný proces v České republice jako forma racionálního právního diskursu?" *Právník* 145 (2005): 587–610.

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