BRILL
NIJHOFF

REVIEW OF CENTRAL AND EAST EUROPEAN LAW
48 (2023) 445–472

Review of Central and East European Law
brill.com/rela

Responsive Judicial Review "Light" in Central and Eastern Europe – A New Sheriff in Town?

David Kosař | ORCID: 0000-0001-5025-1367
Associate Professor of Constitutional Law, Faculty of Law, Masaryk University, Brno, Czech Republic
david.kosar@law.muni.cz

Sarah Ouředníčková | ORCID: 0000-0002-1014-2059
DPhil in Law candidate, Faculty of Law, University of Oxford, Oxford, UK
sarah.ourednickova@law.ox.ac.uk

Received 11 January 2023 | Accepted 5 October 2023 |
Published online 21 December 2023

Abstract

This article engages with Ros Dixon's theory of "Responsive Judicial Review" (OUP, 2023). It argues that Central and Eastern European jurisdictions with specialized constitutional courts face two major obstacles to engage fully in responsive judicial review – legal formalism and the very fact that constitutional review is centralized into one institution, which discourages pluralistic debates about the constitution and limits the room for dialogue between the constitutional court and other actors. Even the Czech Constitutional Court that meets all three Dixon's preconditions for courts' ability to engage in responsive judicial review (judicial independence, political support, and remedial power) and is probably the most Elyan constitutional court in CEE faces several obstacles to responsive judging. As a result, its responsiveness has been selective. Nevertheless, although full-fledged responsive judicial review is difficult to achieve in CEE countries in the short term, their constitutional courts can, as the Czech Constitutional Court shows, exercise responsive judicial review "light". We argue that such "light version" of responsive judicial review would still be a great improvement and we provide several proposals how to increase the likelihood that it happens.

Keywords

judicial review – constitutional courts – Ros Dixon – John Ely – democracy – representation – LGBTQ+ – Central and Eastern Europe – Czechia

In *Responsive Judicial Review* (Oxford University Press, 2023) Rosalind Dixon argues for representation-reinforcing judicial review that can help to counter three types of democratic dysfunction – anti-democratic monopoly, democratic blind spots and democratic burdens of inertia – that may threaten the responsiveness of constitutional systems to both minority rights claims and majoritarian constitutional understandings. She knows that courts can exercise such judicial review successfully only if they enjoy sufficient independence, political support and remedial power. She is also aware that some constitutional systems are better prepared to embrace responsive judging, whereas others face significant obstacles ranging from a peculiar constitutional design to a legal culture that is hostile to what representation-reinforcing judicial review entails. Hence, she argues, courts should be flexible, choose the judge rapporteur, tone and narrative carefully, and adjust the intensity of their judicial review on the weak-strong continuum accordingly. In doing so, she takes the limits of judicial capacity seriously and takes into account the real-world examples when judicial supremacy or overly strong judicial review has led to democratic backlash and further dysfunctions.

Only rarely does a theory of judicial review written by a common law scholar step out of its comfort zone and engage with experience beyond that of the common law countries to such an extent as does Dixon's. While most of her key jurisdictions discussed in *Responsive Judicial Review* (*RJR*) belong to the Commonwealth, she cites examples from civil law jurisdictions as well and does not avoid identifying the potential limits to responsive judicial review as a global model. This symposium on *Responsive Judicial Review* in the Review of Central and East European Law is yet another example of her openness to different legal traditions and her perseverance in finding the crucial elements of the success of responsive judging.

This contribution argues that Central and Eastern European jurisdictions with specialised constitutional courts face several obstacles to engaging fully in responsive judicial review. Some of the limitations stem from the very fact that constitutional review is centralised into one institution, which discourages pluralistic debates about the constitution and limits the room for dialogue between the constitutional court and other actors. Other limitations

are peculiar to judicial and legal culture in Central and Eastern Europe, where formalism still prevails and which discourages judges from being responsive to the people.

We show that even the Czech Constitutional Court (hereinafter the CCC), which meets all three of Dixon's preconditions for courts' ability to engage in RJR (judicial independence, political support and remedial power) and is probably the most Elyan constitutional court in CEE faces several obstacles to responsive judging. The major impediments are the limited diversity of the CCC Justices, their lack of judicial statesmanship and an insufficient number of interlocutors (such as scholars, journalists and NGOs) who would translate the CCC's judgments into the political realm and exercise pressure on constitutional justices to become more responsive. This is coupled with the peculiar feature of the selection of the CCC's Justices – for a renewable 10-year term – that makes Justices risk-averse towards the end of their term as they may seek reappointment. Nevertheless, we argue that even if fully-fledged responsive judicial review is difficult to achieve in CEE in the short term, constitutional courts can, as the CCC shows, exercise "responsive judicial review light". Even the "light version" of responsive judicial review would be a great improvement in CEE and we make several proposals for how to increase the likelihood of its happening.

This contribution proceeds as follows. Part 1 shows that diffuse judicial review has several features that make responsive judicial review more likely to be successful than it is in the system with centralised constitutional review. Some of the latter's limitations can be overcome, however, and we offer ways to do so. Part 2 pinpoints the specifics of CEE legal and judicial culture that are particularly alien to responsive judging. Part 3 shows how these challenges affect responsive judicial review in Czechia. It argues that while the Czech Constitutional Court is arguably the most Elyan constitutional court in CEE, its responsiveness has been selective. More specifically, it has exercised an "responsive judicial review light" (hereinafter also "RJR light") in relation to keeping clear the channels of political change (the first limb of Ely´s representation-reinforcing theory), but it has failed to do so in Ely´s second limb (minority rights protection). Part 4 discusses broader repercussions of the Czech case study. Part 5 concludes.

1 Is a Diffuse Judicial Review a Precondition for a Meaningful Responsive Judicial Review?

Virtually all CEE countries have created specialised constitutional courts[1] that are detached from the general judiciary.[2] That is understandable, as the new democratic regimes that came into power after the fall of the Berlin Wall could not trust the communist-era judges with their formalist mentality,[3] and they did not have enough skilled jurists among emigrants and dissidents to replace them immediately.[4] Apart from this pragmatic consideration, CEE countries drew inspiration from the German Federal Constitutional Court that served as a post-fascist success story to be emulated in the post-communist context as well.

The specialised constitutional courts[5] have several advantages such as a higher degree of legal certainty,[6] which is highly praised in the civil law context and in the Germanic legal culture in particular.[7] However, the very fact that judicial review is centralized in one institution means that other actors have a limited opportunity to contribute to resolving constitutional issues and little incentive to engage thoroughly in judicial reasoning. This drawback, alongside

1 We intentionally avoid the term "Kelsenian constitutional court" as centralised constitutional review is not necessarily limited to Kelsen's original idea that the exclusive competence of the constitutional court is to decide on the constitutionality/validity of legislation and not to engage with the fundamental rights (see Gruev in this symposium, Ivan Gruev, "Responsive Judicial Review in Kelsenian Constitutional Courts: The Impeding Effects of Limited Standing and Formalism").

2 See Wojciech Sadurski, *Rights Before Courts: A Study of Constitutional Courts in Postcommunist States of Central and Eastern Europe* (Springer Netherlands, 2014); Armin von Bogdandy, Peter Huber and Christoph Grabenwarter (eds), *Constitutional Adjudication: Institutions*, The Max Planck Handbooks in European Public Law, III (Oxford University Press, Oxford, 2020); and Maartje de Visser and Monica Claes, *Constitutional Review in Europe: A Comparative Analysis* (Hart Publishing, Oxford, 2015).

3 See Michal Bobek, "The Fortress of Judicial Independence and the Mental Transitions of the Central European Judiciaries," 14(1) *European Public Law* (2008), 99–123.

4 See Zdeněk Kühn, *The Judiciary in Central and Eastern Europe: Mechanical Jurisprudence in Transformation?* (Brill 2011), 163; and David Kosař, "The Least Accountable Branch," 11(1) *International Journal of Constitutional Law* (2013), 234–60, at 254.

5 See John Ferejohn and Pasquale Pasquino, "Constitutional Adjudication: Lessons from Europe" 82 *Texas Law Review* (2004) 1671, and Pasquale Pasquino, "Constitutional Adjudication and Democracy. Comparative Perspectives: USA, France, Italy", 11(1) *Ratio Juris* (1998), 38–50.

6 See Víctor Ferreres Comella, *Constitutional Courts and Democratic Values: A European Perspective* (Yale University Press, New Haven, 2009).

7 See below in Part 2.

other features of specialised constitutional courts, may limit the application of a fully-fledged responsive judicial review in civil law countries.

One may thus wonder whether a standard diffuse judicial review in common law countries has several features that make responsive judicial review more likely to be successful than it is in the system with centralised constitutional review. In what follows we argue that there are at least five reasons why this is so. Yet then we also show that there are several ways to mitigate the limitations of centralised judicial review. This list of remedies is neither exhaustive nor necessarily able to address all the shortcomings of centralised judicial review mentioned before, but it shows that responsive judicial review is a matter of degree and even civil law countries with centralised judicial review can embrace it to a significant extent.

First, the common law supreme courts that engage in judicial review within the diffuse judicial review systems are neither the first nor the only courts to address the constitutional issues. They enjoy the benefit of lapse of time (from the adoption of the challenged statute to the actual judicial decision) and collecting the (often diverse) views of lower courts. In contrast, centralised constitutional review requires the constitutional court to decide quickly and substantially limits[8] one important layer of a dialogue on constitutional issues – that between the ("lower"[9]) general courts and the constitutional court. These two factors make responsive judicial review more difficult.

Secondly and relatedly, diffuse judicial review contributes to the embeddedness of the constitution, as not only the constitutional court but also other courts must engage with constitutional reasoning. Think of Poland, how all of a sudden the Supreme Court judges discovered the constitution[10] and learned "on the way" how to use it effectively. However, they did so only

8 It does not abolish it completely, as general courts in a system with a specialised constitutional court can communicate with the constitutional court via other means, such as submissions under the concrete judicial review. However, these other means are in no way close to a dialogue between lower courts and the supreme court in a common law system where the lower courts issue fully-fledged decisions on constitutional issues.

9 Note that the specialised constitutional courts are not considered part of the general judiciary and thus the general courts cannot formally be referred to as "lower" courts, but de facto they are because they hear most cases (apart from abstract review and separation of powers cases) first.

10 See Radziewicz Piotr: Review of Statutes in Poland, *Utrecht Law Review*, Igitur, Utrecht Publishing and Archiving Services, vol. 18, no. 1, 2022, pp. 29–44; and Tomasz Tadeusz Koncewicz "The Court is dead, long live the courts? On judicial review in Poland in 2017 and „judicial space" beyond," *Verfassungsblog* (8 March 2018), available at https://verfassungsblog.de/the-court-is-dead-long-live-the-courts-on-judicial-review-in-poland-in-2017-and-judicial-space-beyond/.

after the packing of the Polish Constitutional Tribunal by the Law and Justice government.[11] Until the capture of the Constitutional Tribunal, the Supreme Court did not care much about the Polish Constitution, because it was not possible directly to challenge Supreme Court judgments before the Polish Constitutional Tribunal. The Supreme Court judges simply knew that their judgments would usually escape the scrutiny of the Constitutional Tribunal and thus did not have the incentive to engage in thorough constitutional reasoning.

Thirdly, since only the constitutional court speaks the constitutional language in the centralised constitutional review systems, that inevitably leads to the "war of courts,"[12] usually between the Constitutional Court and the Supreme Court. When apex courts engage in these skirmishes, courts do not speak with one voice and responsive judicial review is nearly impossible. While such conflicts may also arise in common law countries with diffuse judicial review, they rarely turn into a clash of judicial culture. Moreover, the common law Supreme Court, which is the top court in both constitutional and statutory issues, enjoys greater legitimacy in sorting out these conflicts hierarchically.

This brings us to the fourth feature of a diffuse judicial review that is beneficial to responsive judicial review – the supreme courts in common law countries that engage in judicial review have an additional layer of legitimacy as they also decide non-constitutional cases. As a result, they can build their reputation and trust also on legal craftsmanship in deciding "ordinary" cases rather than just constitutional cases.[13] Smart supreme courts have also developed various constitutional avoidance techniques that can help them to stay away from political turmoil. Specialised constitutional courts do not have this luxury. They can sometimes avoid deciding salient political disputes by creative interpretation of admissibility criteria, but they cannot build their legitimacy on "ordinary" cases, as these are outside their jurisdiction. This

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

12 See Lech Garlicki, "Constitutional Courts versus Supreme Courts," 5(1) *International Journal of Constitutional Law* (2007), 44–68; and David Kosař and Ladislav Vyhnánek, *The Constitution of Czechia: A Contextual Analysis* (Hart Publishing, Oxford, New York, 2021), 158–159. See also Suteu in this symposium, Silvia Suteu, "Between Dialogue, Conflict, and Competition: The Limits of Responsive Judicial Review in the Case of the Romanian Constitutional Court").

13 In Europe, think of the difference between the ECtHR and the CJEU. The ECtHR has no chance to build its legitimacy on "ordinary cases" and can thus easily be attacked as an activist court. The CJEU, apart from big rule-of-law cases going to the heart of the EU's values, also decides "mundane" (competition law, tax law, trade mark law) cases, in which it builds its additional layer of legitimacy.

feature also makes the specialised constitutional courts more vulnerable to democratic backlash than supreme courts.

Fifthly, meaningful responsive judicial review requires the continuity and path-dependence of the court(s) that engages in it. This is much easier for a diffuse-style judicial review system, where judges, including those at the Supreme Court, are appointed for life, than for centralised constitutional review systems where constitutional justices are appointed for only a limited term which is often non-renewable. Moreover, the composition of the specialised constitutional courts often changes abruptly as most of them do not have a staggered system of judicial appointments and thus most justices are replaced within a short time frame.[14]

Finally, the competences of constitutional courts vary significantly from one country to another, and some institutional designs are more favourable to responsive judicial review than are others.[15] Typical modes of activating a constitutional court are by official, legislative or judicial reference or with an individual petition (constitutional complaint).[16] Those constitutional courts that can be activated by all four modes are more likely to be responsive, because they can accept cases from a variety of actors and can choose their audience when responding. How the individual constitutional complaint is designed and how wide an access to the constitutional court it ensures also matter. When we speak about CEE, only some countries – such as Czechia, Hungary and Slovakia – allow all four routes to their constitutional courts and follow the broad German model of constitutional complaint, which can be lodged against any final decision of the ordinary court.[17] Other jurisdictions,

14 See e.g. David Kosař and Ladislav Vyhnánek. "The Constitutional Court of Czechia," in Armin von Bogdandy, Peter Huber, Christoph Grabenwarter (ed.), *The Max Planck Handbooks in European Public Law, Vol. III: Constitutional Adjudication: Institution*s (Oxford University Press, Oxford, 2020), 119–179 (on Czechia).

15 See, mutatis mutandis, Jan Petrov, "Unpacking the partnership: typology of constitutional courts' roles in implementation of the European Court of Human Rights' case law," 14 *European Constitutional Law Review* (2018), 499–531, at 521–525.

16 A. Harding et al., "Constitutional Courts: Forms, Functions and Practice in Comparative Perspective," 3 *Journal of Comparative Law* (2008), 1, at 7. "Official reference" denotes cases referred by a named official (president, ombudsman) or agency. Other authors use a simpler typology: "abstract review" (which merges official and legislative references), "concrete review" (or preliminary references) and "individual complaints" (see, e.g., M. De Visser and M. Claes, *Constitutional Review in Europe: A Comparative Analysis* (Hart Publishing, Oxford, 2015) and Gruev in this symposium, *op.cit.* note 1).

17 Attila Vincze, Herbert Küpper and Claudia Fuchs, "Die Beziehungen zwischen der Verfassungsgerichtsbarkeit und den Obergerichten in Mitteleuropa: Eine vergleichende Analyse," in Susanne Baer et al. (eds.), *Jahrbuch des öffentlichen Rechts der Gegenwart* (Mohr Siebeck, 2019), 601–658, at 608–612.

such as Poland, also allow all four routes to their constitutional courts, but have adopted a narrower Austrian model of constitutional complaint, which can be lodged against the final decision of the ordinary courts only if the statute applied is unconstitutional.[18] Finally, in some Baltic states and Bulgaria individual constitutional complaint is not available at all and the constitutional courts can be reached only via abstract review, which significantly narrows their capacity to engage in responsive judicial review.[19]

However, we believe that there are ways of remedying some of these drawbacks of centralised constitutional review. First, constitutional courts can nudge and reward the ordinary courts for engaging in the interpretation of the statutes that conforms with the constitution. Constitutional courts can and should be responsive to ordinary courts that submit constitutional issues to them under the concrete review limb and engage with their arguments thoroughly. These constitutional referrals by ordinary courts (sometimes referred to as "judicial references"[20]) should be approached as a platform for dialogue between the constitutional tribunal and ordinary courts on constitutional issues rather than a paternalistic explanation by the constitutional tribunal of what the constitution is.

Some constitutional courts, which do not have the power to decide on the individual constitutional complaints and the abstract review motions, know this very well.[21] For instance, the Italian Constitutional Court, which must rely primarily on constitutional referrals by ordinary courts in order to be able to give its view on constitutional matters, must be responsive to the arguments of

18 Ibid, at 612–618. See also Jan Petrov, "Unpacking the partnership: typology of constitutional courts' roles in implementation of the European Court of Human Rights' case law," 14 *European Constitutional Law Review* (2018), 499–531, at 524.

19 See Gruev in this symposium, *op.cit.* note 1.

20 Jan Petrov, "Unpacking the partnership: typology of constitutional courts' roles in implementation of the European Court of Human Rights' case law," 14 *European Constitutional Law Review* (2018), 499–531, at 521–522. See also Olivier Jouanjan. "Constitutional Justice in France". In: Armin von Bogdandy, Peter Huber, and Christoph Grabenwarter (eds.), *The Max Planck Handbooks in European Public Law, Volume III: Constitutional Adjudication: Institutions*. Oxford University Press, 2020, 223–278, at 259; and Visser, M. de, Claes, M. *Constitutional Review in Europe: A Comparative Analysis* (Hart Publishing, Oxford, 2015), 132–135.

21 See Tania Groppi, "The Italian Constitutional Court: Towards a 'Multilevel System' of Constitutional Review?," 3 Journal of Comparative Law (2008), 100, at 104 and 106–108. See also, more generally, Marta Cartabia et al., *Italian Constitutional Justice in Global Context* (Oxford University Press, Oxford, 2015); and Olivier Jouanjan. "Constitutional Justice in Italy". In: Armin von Bogdandy, Peter Huber, and Christoph Grabenwarter (eds.), *The Max Planck Handbooks in European Public Law, Volume III: Constitutional Adjudication: Institutions* (Oxford University Press, 2020), pp. 447–504.

the ordinary courts, because if the latter come to the conclusion that the Italian Constitutional Court is treating them as pupils or condescendingly they might stop sending it constitutional referrals.[22] As a result, the constitutional court will have nothing to decide (or rather be unable to decide on the important constitutional matters of the day) and may become increasingly irrelevant.[23] Other constitutional courts with broader jurisdiction should learn from the Italians too. The same applies to individual constitutional complaints. If the constitutional courts treat constitutional complaints properly and act "nicely" vis-à-vis the individual petitioners, even if they eventually reject their claims, that will motivate litigants to engage in thorough constitutional reasoning and to come up with new innovative solutions. Of course, this is possible only in those CEE countries in which these two additional avenues to the constitutional court – concrete judicial review and individual complaint – exist, which is not always the case.[24]

Secondly, to reduce the chasm between the specialised constitutional court and ordinary courts, ordinary court judges should be allowed to be temporarily assigned to the constitutional court to see how it works and then "radiate" the constitutional thinking within ordinary courts.[25] Such temporary assignment works well in Germany where it has contributed to the wide acceptance of the case law of the Federal Constitutional Court among ordinary judges.[26] Another tool to mitigate the tensions between the constitutional court on the one hand and ordinary courts and the supreme courts in particular on the other is to make sure that a significant proportion of constitutional justices is recruited from the ranks of apex ordinary courts. Germany may again serve as a good example, as at least three of the eight justices in each of the two

22 Ibid. See also, more generally, Jan Petrov, "Unpacking the partnership: typology of constitutional courts' roles in implementation of the European Court of Human Rights' case law," 14 *European Constitutional Law Review* (2018), 499–531, at 522.

23 See John Ferejohn and Pasquale Pasquino, "Constitutional Adjudication: Lessons from Europe." 82(1671) *Texas Law Review* (2004); and Pasquale Pasquino, "Constitutional Adjudication and Democracy. Comparative Perspectives: USA, France, Italy", 11(1) *Ratio Juris* (1998), 38–50.

24 See Gruev on Bulgaria in this symposium, *op.cit.* note 1.

25 See Alec Stone Sweet and Giacinto della Cananea, "A Conversation with Dieter Grimm," 22(4) *German Law Journal* (2021),1541–1554, at 1548.

26 See Hans Lechner and Rüdiger Zuck, *Bundesverfassungsgerichtsgesetz* (*BVerfGG): Kommentar* 6th edition, 2010, § 2, p. 103, marg. 11. Note that in 2021 the presidents of all five Supreme Courts in Germany were former law clerks of the Federal Constitutional Court (see Alec Stone Sweet and Giacinto della Cananea, "A Conversation with Dieter Grimm," 22(4) *German Law Journal* (2021),1541–54, at 1548).

senates of the Federal Constitutional Court must be former federal judges.[27] This design feature ensures that the constitutional court is not perceived by ordinary judges as too political, too academic and not skilled in traditional (non-constitutional) methods of legal reasoning.

Thirdly, it is crucial to make sure that judicial examinations and continuous judicial education include modules on constitutional reasoning and case law. Judicial examinations in civil law countries usually set the expectations of what a judge should know. If these examinations do not include constitutional reasoning and case law, they convey the message that general court judges do not need to know about them, because they are relevant only for constitutional justices. The same applies to continuous judicial training, which should be focused not only on the doctrinal subtleties of contracts, torts and taxation, but also on their constitutional foundations and the values behind them.

Of course, this list of potential remedies is non-exhaustive. Other options are also available. For instance, staggering the appointments of constitutional court justices ensure that the constitutional court's composition does not change abruptly within a short time. One should also not forget informal mechanisms such as regular roundtables and informal talks between constitutional court justices and supreme court judges, meetings of "chief justices" of all apex courts, and various "focus groups" among judges and law clerks of all tiers of the judiciary to discuss vexing legal issues within specific fields of law.

2 Central and Eastern European Legal and Judicial Culture Is Particularly Alien to Responsive Judicial Review

The previous part argued that diffuse judicial review has several features that make responsive judicial review more likely to be successful than the system with centralised constitutional review, but some of the disadvantages of the latter can be remedied. This part shows how CEE legal and judicial culture makes embedding responsive judicial review in this region even more difficult.

It is generally accepted that civil law legal and judicial culture strongly prioritises legal certainty.[28] CEE culture does so even more. This feature in

27 See § 2(3) BVerfGG. Note that the actual number of federal judges on the Federal Constitutional Court is sometimes higher: see Uwe Kischel, "Party, Pope, and Politics? The Election of German Constitutional Court Justices in Comparative Perspective," 11(4) *International Journal of Constitutional Law* (2013), 962–980, at 964 (with further references).

28 See Comella, *op.cit.* note 6.

itself presents a challenge to responsive judicial review which is, in its nature, dialogical and flexible. However, it is the legal formalism and bureaucratic mindset of CEE lawyers and judges[29] that pose a major obstacle for responsive judicial review. Formalism in legal and judicial reasoning is not necessarily problematic per se if exercised prudentially. However, it reached excessive levels in many CEE jurisdictions and resulted in mechanical jurisprudence.[30] This has been addressed by virtually all contributions to this symposium.[31] We do not want to rehash those arguments. Instead, we focus on more specific factors that may have an impact on the success or failure of responsive judicial review in CEE.

The problem starts well before a judge is appointed to office. The expectation of what makes a judge a good judge and what she should know is shaped to a great extent already at law school. While legal education in CEE has improved since the fall of the Berlin Wall, it is still not primarily about problem-solving and values, but rather about memorising the rules and applying them to the facts.[32] This memorizing is expected from them; this is tested and graded at law school. The same applies to judicial apprenticeship after law school and to the judicial exam. To be sure, moot courts, clinical education, lawyering skills, law and economics, and legal ethics courses are booming at some law schools in the region, but they are still considered a deviation from the mainstream. Courses on fact-finding, regulation and the use of empirical data are even rarer. The CEE judges are thus well equipped to adjudicate on cases using doctrinal legal methods, but not to engage in policy-making or law-making.[33] This shortcoming is particularly relevant for judges at pinnacle courts. However, even trial court judges must, in many areas of law such as custody, competition law and antidiscrimination cases, have a reasonably sophisticated understanding of life and social reality which goes well beyond law. The CEE

29 See, e.g., Kühn, *op.cit.* note 4; András Jakab, Arthur Dyevre and Giulio Itzcovich (eds), *Comparative Constitutional Reasoning* (Cambridge University Press, Cambridge, 2017); and Suteu in this symposium, *op.cit.* note 12. See also Barbara Havelková, Terezie Boková and Lucia Berdisová, "Constitutionalization of Gender in Czechia and Slovakia – Procedural challenges and substantive trends", ICON (forthcoming) on formalism and deference of the CC in gender-related matters.

30 See Kühn, *op.cit.* note 4.

31 See Suteu (*op.cit.* note 12), Gruev (*op.cit.* note 1) and Bardutzky (Samo Bardutzky, "What Kind of Judicial Review for a Small, Post-communist European Constitutional Democracy? Thoughts on the Proposal for the Slovenian Constitutional Court to Adopt a Responsive Approach to Judicial Review") in this symposium.

32 See, e.g., Aviezer Tucker, "Reproducing Incompetence: The Constitution of Czech Higher Education," 9(3) *East European Constitutional Review* (2000), 94–99.

33 See Jan Komárek, "Reasoning with Previous Decisions: Beyond the Doctrine of Precedent," 61(1) *The American Journal of Comparative Law* (2013), 149–172.

law schools do not prepare one for that either. One may thus say that CEE judges are not trained how to solve complex social problems.

The space for a responsive judicial voice is limited in CEE, even without excessive legal formalism in judicial reasoning. The need to protect the emerging rule of law in nascent post-communist democracies and the fresh memories of the abusive techniques used by the communist regime to control the judiciary[34] led to the constitutional entrenchment of legitimate mechanisms such as the right to a lawful judge.[35] This right means, roughly, that any case that arrives at a court must be randomly assigned to one of its judges.[36] Except for in narrow statutory exceptions (such as the death of a judge, her long-term illness or promotion), the initial case assignment cannot be changed. This principle is, like the German concept of *gesetzlicher Richter*,[37] considered an essential component of the right to a fair trial in CEE. Its major aims are to prevent court presidents or other actors tinkering with the case allocation for political goals and to serve as a bulwark against judicial corruption. But these noble goals also prevent the choice of the right responsive judge rapporteur to author the decision, as cases must be assigned on a random basis. Unlike in common law countries,[38] the strategic use of authorship, which plays an important role in Dixon's theory of responsive judicial review,[39] is thus not an option. Given that the ECtHR recently discovered an implied right to a lawful judge in the right to a fair trial guaranteed by Article 6 of the European Convention on Human Rights,[40] there is no way round the right to a lawful judge in the near future not only in CEE, but also in the rest of Europe.

The prevailing legal and judicial culture has also translated into the composition of the constitutional courts in the CEE. Many constitutional court justices in CEE are recruited from the pool of career judges and scholars, who

34 See David Kosař, *Perils of Judicial Self-Government in Transitional Societies* (Cambridge University Press, Cambridge, 2016), 112, 203–204.

35 See, e.g., Article 38(1) of the Czech Charter of Fundamental Rights; and Article 48(1) of the Slovak Constitution.

36 See Kosař, *op.cit.* note 34, 91–92.

37 See Philip M. Langbroek and Marco Fabri, *The Right Judge for Each Case: A Study of Case Assignment and Impartiality in Six European Judiciaries* (Intersentia, Antwerp, 2007).

38 See Kosař, *op.cit.* note 34, 55–56.

39 Rosalind Dixon, *Responsive Judicial Review Democracy and Dysfunction in the Modern Age* (Oxford University Press, Oxford, 2023), 245, 249–250 and 257–258.

40 See Kosař, *op.cit.* note 34, 407; Joost Sillen, "The Concept of 'Internal Judicial Independence' in the Case Law of the European Court of Human Rights," 15 (1) *European Constitutional Law Review* (2019), 104–133, and ECJ, Opinion AG Bobek, 20 May 2021, in Joined Cases C-748/19 to C-754/19, *Prokuratura Rejonowa w Mińsku Mazowieckim v WB* (2021) EU:C:2021:403, at para. 172.

have never practised law as members of other legal professions[41] and have rarely been exposed to politics. Importantly, true diversity on the bench has until very recently been a non-issue in CEE. Politicians who appoint constitutional court justices do not seem to be concerned about the representation of women or ethnic and sexual minorities. Political affiliation, a left-right wing axis, a conservative-liberal axis, the professional path and sometimes geographic criteria have proved to be decisive. This in turn affects both the tone and the narrative of the judgment.

Finally, CEE constitutional courts were introduced as post-totalitarian top-down consolidators of democracy[42] that were supposed to prevent the new regimes from relapsing into communism, and were later on reframed as bulwarks against populism. Their raison d'être was transitional justice and the prevention of tyranny more generally. Some of them more or less succeeded in these two missions. Others, like the Polish Constitutional Tribunal[43] and the Hungarian Constitutional Court,[44] have failed and faced capture by populist political leaders. However, in no CEE country were constitutional justices (self-)perceived as actors engaging in the "joint enterprise of governance"[45] who ought to be responsive to the people. In that sense, responsive judicial review is "a new sheriff in town", because it forces constitutional courts to be democratically responsive and to contribute to the governing of their countries by undoing blind spots and overcoming burdens of inertia.

3 Case Study: The Czech Constitutional Court as the Most Elyan Constitutional Court in Central and Eastern Europe

While the last two parts have focused on general obstacles to responsive judicial review in jurisdictions with centralised judicial review, in CEE in particular, this part shows how these limitations operate in practice in a Czech

41 Note that, unlike in common law countries, in the traditional CEE career model of the judiciary which all CEE countries operate up to date judges join the judiciary soon after finishing law school without being exposed to the law in practice.

42 See Tom Ginsburg, "Courts and New Democracies: Recent Works," 37 (3) *Law & Social Inquiry* (2012), 720–742.

43 See Sadurski, *op.cit.* note11.

44 See Renata Uitz, "Can you tell when an illiberal democracy is in the making? An appeal to comparative constitutional scholarship from Hungary" (2015) 13 ICON, 279–300, and Kovacs and Tóth in this symposium, Kriszta Kovacs, Gábor Attila Tóth, "Constitutional Review as a Democratic Instrument".

45 See Aileen Kavanagh, *The Collaborative Constitution* (Cambridge University Press, Cambridge, forthcoming 2023).

case study. More specifically, we argue here that while the Czech Constitutional Court ("CCC") can arguably be regarded as the most Elyan constitutional court in CEE, its responsiveness has been selective. It has exercised an "RJR light" in relation to keeping clear the channels of political change – the first limb of Ely´s representation-reinforcing theory.[46] Yet it has failed to do so in Ely´s second limb: minority rights protection.[47] In the latter the CCC has instead been formalist and deferential to the legislature.[48] This "culture of judicial formalism,"[49] i.e. adopting formalist legal reasoning to avoid deciding complex questions on the merits, has equally been observed in the other CEE countries covered by this Symposium.[50]

We support our argument with two recent examples from the CCC´s jurisprudence. They show its highly responsive approach to protecting political channels in the 2021 *Grand Election Judgment II*, and its lack of responsiveness in the minority protection in the 2022 *Transgender Judgment*. Both cases also reveal the importance of individual judges´ (un)responsive attitudes for the failure or success of responsive judicial review.

3.1 *Countering Political Monopoly: Grand Election Judgment II*

The 2021 *Grand Election Judgment II* is one of the most successful of the CCC's RJR cases. The Court acted responsively and pre-emptively, countering anti-democratic monopoly power and at the same time strengthening its own resilience.[51]

The case concerned the system of election to the Chamber of Deputies, the lower chamber of the Parliament. It is relevant for the case that the Chamber of Deputies is traditionally fragmented, with five to nine political parties sitting in it, making it an example of extreme pluralism[52] accompanied by instability of

46 John Hart Ely. *Democracy and Distrust: A Theory of Judicial Review* (Harvard University Press, Cambridge, Mass., 1980), 103.

47 Ibid.

48 See Havelková et al., *op.cit.* note 29, on formalism and deference of the CCC in gender-related matters.

49 See Bardutzky (*op.cit.* note 31) in this symposium.

50 See Suteu (*op.cit.* note 12), Gruev (*op.cit.* note 1) and Bardutzky (*op.cit.* note 31) in this symposium.

51 Hubert Smekal, Jaroslav Benák and Ladislav Vyhnánek, "Through selective activism towards greater resilience: the Czech Constitutional Court's interventions into high politics in the age of populism," 26(7) *The International Journal of Human Rights* (2021), 1230–1251, at 1243.

52 Stanislav Balík and Vít Hloušek, "The Development and Transformation of the Czech Party System after 1989," 8(2) *Acta Politologica* (2016), 103–117.

Government.[53] The case concerned three fundamental provisions on elections to the Chamber. The first provision concerned the division of Czechia into 14 voting districts (constituencies) which varied significantly in size.[54] Especially in the smaller districts, the results tended to be less proportional with a natural electoral threshold of up to 15% of the votes (whereas the official legal threshold was 5%).[55] The four biggest districts tended to receive about half of all mandates and the results were truly proportional only in these four districts.[56]

The second provision concerned the system of allocation of mandates (D'Hondt formula at the level of districts). The Court found that the combination of 14 voting districts and the system of allocation of mandates (D'Hondt formula at the level of districts) causes unequal and disproportionate mandate allocation in favour of larger political parties. The CCC annulled the system of mandate allocation, but not the voting districts, leaving scope for the Parliament to decide whether the 14-district system should continue or another (single-district) solution should be adopted.[57]

The third challenged provision concerned electoral thresholds, i.e. minimum shares of votes needed for a party or pre-electoral coalition to gain mandates. A single party needed to meet a 5% threshold, whereas a coalition of two parties required a 10% threshold, a coalition of three parties 15% and a coalition of four or more parties 20%. This system is sometimes referred to as additive electoral threshold. The Court invalidated the additive electoral threshold as disproportionate. Overall, the Court held that the combination of the challenged elements favoured larger political parties and violated the constitutional principle of proportional representation and that of equality of the right to vote.

The Court rightly recognised the anti-democratic electoral monopoly stemming from a combination of elements skewing the system in favour of larger parties.[58] It also rightly calibrated the intensity of judicial review

53 Miloš Brunclík and Michal Kubát, "The Czech Parliamentary Regime After 1989: Origins, Developments and Challenges", 8(2) *Acta Politologica* (2016), 5–29, at 18; and Smekal, Benák and Vyhnánek, *op.cit.* note 51, 13.

54 Kosař and Vyhnánek, *op.cit.* note 14, 94.

55 Decision of the Constitutional Court of 17 April 2009, Pl. ÚS 57/06.

56 Kosař and Vyhnánek, *op.cit.* note 14, 95.

57 Ibid.

58 For further details see Marek Antoš and Filip Horák, "Proportionality Means Proportionality: Czech Constitutional Court, 2 February 2021, Pl. ÚS 44/17," 17(3) *European Constitutional Law Review* (2021), 538–552; and Marek Antoš and Filip Horák, "Better Late than Never: The Czech Constitutional Court Found the Electoral System Disproportionate 9 Months before Election", *Verfassungsblog,* (20 February 2021), available at https://verfassungsblog.de/better-late-than-never/.

accordingly. In line with RJR, risks of electoral and institutional monopoly generally require courts to engage in strong or even super-strong forms of review.[59] Where possible, courts should leave meaningful scope for substantive constitutional judgements by the legislature, inviting a real judicial-legislative dialogue.[60] The CCC used a strong remedy in annulling the parts of the system it considered most problematic. Yet it did not annul the district system and left meaningful scope for the legislature to come up with a new electoral system within the constitutional restraints.[61]

The decision was heavily criticised by high-level politicians, including the Minister of Justice[62] and Prime Minister, who accused the Court of "of overstepping all boundaries"[63] and "trying to influence the political situation in our country."[64] Part of the criticism was aimed at the timing of the judgment (nine months before a general election that had already been formally initiated). These reverse burdens of inertia[65] (if we see the disagreement as at least partly reasonable) or democratic backlash[66] (if we consider the disagreement unreasonable) could have signalled that the Court had gone too far and overstepped the boundaries of responsiveness.[67] Yet the outbursts of criticism turned out to be short-lived and the political parties swiftly managed to bring the electoral law into line with the Court's decision.[68] At least so far there have been no consequences for the Court and its legitimacy following the criticism.[69] This signals that the Court acted within the boundaries of responsiveness.

The *Grand Election Judgment II* builds on the *Grand Election Judgment I* handed down 20 years earlier, in 2001, but goes further in its responsiveness. This development shows the Court´s increasing responsiveness to political

59 Dixon, *op.cit.* note 39, 10 and 205.
60 Ibid.
61 Kosař and Vyhnánek, *op.cit.* note 14, 95.
62 Marek Antoš and Filip Horák "*Better Late than Never: The Czech Constitutional Court Found the Electoral System Disproportionate 9 Months before Election," Verfassungsblog,* (20 February 2021), available at https://verfassungsblog.de/better-late-than-never/.
63 Smekal, Benák and Vyhnánek, *op.cit.* note 51, 10.
64 "Czech court ruling on electoral law to help small parties," *AP News* (3 February 2021), available at https://apnews.com/article/world-news-czech-republic-elections-courts-f7aa3ff00be555dcb1c5170cb6c74c5f.
65 Dixon, *op.cit.* note 39, 185–194.
66 Ibid.
67 Ibid.
68 Marek Antoš and Filip Horák, "Proportionality Means Proportionality: Czech Constitutional Court, 2 February 2021, Pl. ÚS 44/17," 17(3) *European Constitutional Law Review* (2021), 538–52.
69 Smekal, Benák and Vyhnánek, *op.cit.* note 51, 10.

monopoly. The *Grand Election Judgment I* could be branded as "RJR-light" because the Court blocked the introduction of some elements of electoral system reform, yet others passed scrutiny and were invalidated only in *Grand Election Judgment II*.

The *Grand Election Judgment I* dealt with the 2000 reform of the Chamber of Deputies' electoral system, created by the then two strongest political parties. The CCC invalidated most of the reform: the increase in the number of voting districts, the introduction of a modified D' Hondt method and the abolition of the second scrutiny. The CCC held that the aggregate effect of these elements would have fundamentally weakened smaller political parties and allowed the larger ones, which sponsored the reform, to dominate the Chamber of Deputies. It found the introduction of so many majoritarian elements contrary to the "system of proportional representation" prescribed by the Czech Constitution,[70] and invalidated the mentioned elements as unconstitutional.

Yet the additive electoral threshold for coalitions (10%, 15%, 20%), also introduced by the reform, withstood scrutiny. There were dissenting judges pointing out its unconstitutionality. This reveals the importance of the responsive attitudes of individual judges for the overall success of RJR. While the CCC rightly invalidated the three political monopoly elements, the fourth – the additive electoral threshold – was invalidated only 20 years later in *Grand Election Judgment II* which could be signaling a move from "RJR-light" to a fully-fledged RJR approach.

Besides being responsive, both Grand Election Judgments also strengthened the Court´s resilience.[71] By persuading the Parliament to adopt a truly proportional electoral system the Court contributed to the already existing political fragmentation in the Chamber of Deputies, making it more difficult for future Governments and Parliaments to curb that fragmentation.[72] This has strengthened the Court´s resilience since a fragmented Parliament and unstable Government would find it more difficult to try to tame a constitutional court.[73]

That said, it is important to stress that by emphasising a truly proportional electoral system the CCC defended not only the constitution and smaller political parties, but also itself. This is in stark contrast to the 2022 *Transgender Judgment* discussed below, in which Justices had nothing to gain and could only reduce their chances of reappointment. The *Grand Election Judgments I* and *II* also fit better into the grand narrative of the CCC as a top-down

70 Art 18 of the Czech Constitution.
71 Smekal, Benák and Vyhnánek, *op.cit.* note 51, 10.
72 Ibid.
73 Ibid.

consolidator of democracy whose main raison d'être is to prevent tyranny and the rise of populism.[74] Last but not least, electoral issues are often technical and thus difficult to use as a tool for the mobilisation of the people against the CCC, because ordinary people do not understand them. Unlike the 2022 *Transgender Judgment*, it is not a divisive culture war issue. Though it should be noted that the *Grand Election Judgment II* actually attracted widespread criticism, not only from top politicians, as mentioned above, but also from some members of the public. In reaction to the judgment, two individuals brought criminal complaints against some of the Justices for alleged abuse of power and obstruction of elections (due to the issuing of the decision a few months before an election). This shows that it is not always easy to estimate how the public and politicians will react to different types of cases.

As a result, despite the Court's radical intervention in highly politically sensitive matters in *Grand Election Judgment I*, there have been no serious attempts to attack or tame it, which is a rather unique phenomenon in the CEE region these days. On the contrary, the judgment has bolstered the Court´s position and resilience, allowing it to intervene again, and this time even more responsively and strongly, in *Grand Election Judgment II*.

3.2 *The Transgender Judgment: A Missed Opportunity for Responsive Judicial Review*

In contrast to its (evolving) responsiveness to political monopoly, the Court´s approach to minority rights claims has been largely unresponsive. The 2022 *Transgender Judgment*[75] demonstrates this. The judgment may appear responsive at first sight, yet a closer inspection reveals the CCC´s (typical) blindness to democratic blockages in relation to minority rights.

The applicant, T. H., was born as a man but identifies as non-binary. T. H. has undergone aesthetic changes and is receiving hormonal treatment, but has not undergone the surgical sterilisation required as a condition of gender reassignment.[76] Due to this, administrative authorities rejected T. H.´s request to have their birth number[77] changed to a "neutral" or "female" (if they had to choose in the existing binary system) form. In their constitutional complaint

74 See Part 2 above.

75 Judgment of the Constitutional Court of 31 March 2022, Pl. US 2/20 (112/2022 Coll.) *Transgender Judgment*.

76 Section 29 of the Civil Code reads that gender reassignment is reached "while simultaneously disabling the reproductive function and transforming the genitalia."

77 Unique identifiers of Czech citizens, typically assigned at birth, containing information about the age and sex of each person, as established by Act No. 133/2000 Coll., on Population Registration and Birth Numbers.

lodged with the CCC, T. H. challenged the statutory gender reassignment provision on obligatory sterilisation and a provision on the assignment of birth numbers. The CCC rejected the complaint.

Court decisions expanding LGBTQ+ people's rights, Dixon argues, can be understood as responding to complex forms of legislative inertia.[78] As such, these cases call for RJR. The Czech transgender case comes into this category. The strict conditions of gender reassignment – the requirement of sterilisation – present burdens of inertia.[79] A commitment to responsiveness would have required the Court to intervene. The Court's intervention as a response to risks of legislative inertia would have been legitimate as there is a risk of irreversible harm to individual rights.[80]

However, instead of inspecting the conditions of gender reassignment for unconstitutionality – and/or legislative inertia – the CCC avoided the core of the case: forced sterilisation. It stated that since T. H. did not want or aim to undergo gender-reassignment surgery, the challenged provisions on forced sterilisation as part of the surgery could not have been applied, and only the provision concerning birth numbers should be subjected to review. The Court's formalistic and evasive approach ignored the fact that the only way to have one's birth number changed is through gender reassignment.

The CCC reiterated its earlier finding that fundamental questions concerning humans as a biological species, their life and their relationships ought to be resolved by the legislature. It added that "the judicialisation of these issues may lead to the politicisation of the CCC and thus to the weakening of its position as an impartial and independent judicial body protecting the constitutional order".[81] This may sound like RJR – leaving the floor to the legislature to be responsive to the majority's understandings of minority rights, and being mindful of limits on the Court's own competence and legitimacy and the risks of reverse democratic inertia and democratic backlash.[82]

But instead, it was only a formalistic and unresponsive escape route that allowed the CCC's Justices to ignore the blatantly obvious legislative inertia. If this was not *prima facie* obvious to the Justices, the ECtHR's case law[83] finding

78 Dixon, *op.cit.* note 39, 86.
79 Ibid., 3.
80 Ibid., 65.
81 Judgment of the Constitutional Court of 31 March 2022, Pl. US 2/20 (112/2022 Coll.), at para. 63.
82 Dixon, *op.cit.* note 39, 185–200.
83 See ECtHR, *A. P., Garçon and Nicot v. France* (6 April 2017) App. No. 79885/12, 52471/13 and 52596/13), *S. V. v. Italy* (11 October 2018) App. No. 55216/08, *X and Y v. Romania* (19 January 2021) App. No. 2145/16 and 20607/16.

forced sterilisation in gender reassignment to be a violation of the Convention and the "condemning" decision of the European Committee of Social Rights against Czechia on the matter,[84] among others, made it clear. Yet, the Court expressed "considerable doubts about the transferability of some of [the ECtHR's] conclusions on gender to the Czech legal system"[85] without further specifying these, given that it decided not to consider the constitutionality of forced sterilisation.

Besides failing to recognise and respond to the legislative inertia, the Court also failed to be responsive in its reasoning, mainly in its tone or approach to the motives of losing parties.[86] The decision´s language towards the losing party – the applicant bringing minority rights claims – is highly insensitive and disrespectful.[87] T. H. referred to themself in the feminine form in their submissions. The CCC had referred to T. H. in the feminine form in previous proceedings in 2016 and 2020.[88] Yet, in the 2022 judgment it ostensibly referred to T.H. in the masculine form. It opened the judgment by stating that the Czech language lacks gender-neutral expressions and the generic masculine is "neutral in terms of biological sex",[89] as if ignoring the fact that the main point of the complaint did not concern biological sex, but precisely the inability to have one's gender recognised irrespective of one's biological sex.[90]

The original judge rapporteur was Justice Kateřina Šimáčková, yet her draft did not gain the necessary support and she ended up writing a dissenting opinion.[91] Her thorough and extensive dissenting opinion and the shorter dissenting opinion of six other Justices show how RJR could have been applied to the case. Both dissenting opinions reach the conclusion that forced sterilisation should have been reviewed and found unconstitutional. Both implicitly recognise it as legislative inertia, explaining the difficult situation of minorities in having their rights protected politically.

When countering the legislative inertia at hand, both dissenting opinions are – in line with RJR – mindful of limits on their own competence and legitimacy

84 Decision of the European Committee of Social Rights in *Transgender Europe and ILGA-Europe v Czech Republic* of 15 May 2018, No 117/2015.

85 *Transgender Judgment*, § 61.

86 Dixon, *op.cit.* note 39, 12 and 250–252.

87 Zuzana Vikarská and Sarah Ouředníčková, "Evasive, Insensitive, Ignorant, and Political: The recent Czech transgender case," *Verfassungsblog* (6 April 2022), available at https://verfassungsblog.de/evasive-insensitive-ignorant-and-political/; Nikolas Sabján, "Critical Legal Perspective on the Recent Czech Transgender Case: (Pl. ÚS 2/20)," 6(1) *Bratislava Law Review* (2022), 125–136.

88 Vikarská and Ouředníčková, *op.cit.* note 87.

89 *Transgender Judgment*, at para. 2.

90 Vikarská and Ouředníčková, *op.cit.* note 87.

91 *Transgender Judgment*, at para. 21.

and the risks of reverse democratic inertia and democratic backlash.[92] They react to the concern expressed in the main judgment that judicialisation may lead to the Court´s politicisation and the weakening of its position. Justice Šimáčková counters that it was the constitution makers who judicialised issues related to interference with the fundamental right to bodily integrity which is being violated by forced sterilisation.[93] They did so when they enshrined the constitutional guarantee of the inviolability of the person and their privacy and expressly entrusted their protection to the judiciary.[94] Rather, the position of the CCC as an impartial and independent judicial body is threatened, she argues, when it refuses to fulfil its role as guardian of fundamental rights.

The second dissenting opinion, signed by six Justices, takes a similar stance. It expresses a "general agreement with reticence to judicialise fundamental questions concerning humans as a biological species,"[95] as these very complex value issues are primarily to be decided by the political bodies with greater democratic legitimacy than the judiciary, or even directly by the people. However, they point out that the situation at hand is very specific. It concerns only a small number of individuals each year, being a marginal issue of little concern to the majority of the population and political representation. The role of the courts is then effectively to protect the fundamental rights of such minorities in particular.

These dissenting opinions also highlight how important the attitude of individual judges is for the success of RJR, especially in a case as close as this, with half of all Justices writing dissenting opinions. Justice Šimáčková´s dissenting opinion falls within her long-term responsive approach. Besides joining the responsive majority, for example in the *Grand Election Judgment II*, she has shown great responsiveness to minority rights claims including those of same-sex couples,[96] children,[97] women[98] and people with disabilities.[99]

92 Dixon, *op.cit.* note 39, 185–200.

93 See Dissenting opinion of Justice Šimáčková in *Transgender Judgment,* § 11.

94 Article 4 of the Czech Constitution.

95 Joint dissenting opinion of Justices Šimíček, David, Jirsa, Šámal and Uhlíř a Zemánek in *Transgender Judgment*, § 11.

96 Judge rapporteur in recognition of foreign same-sex parenthood case (Judgment of the Constitutional Court of 29 June 2017, I. ÚS 3226/16; Dissenting opinion in the Judgment Pl. US 2/20 and the Judgment of the Constitutional Court of 15 December 2020, Pl. ÚS 6/20.

97 See, e.g., Judgment of the Constitutional Court of 19 February 2014, I. ÚS 3304/13; and Judgment of the Constitutional Court of 29 June 2017, I. ÚS 3226/16.

98 Judgment of the Constitutional Court of 2 March 2015, I. ÚS 1565/14.

99 See, e.g., Judgment of the Constitutional Court of 20 August 2014, I. ÚS 173/13; Judgment of the Constitutional Court of 23 March 2015, I. ÚS 1974/14; and Judgment of the Constitutional Court of 7 September 2021, II. ÚS 1292/21.

During her time at the Constitutional Court between 2017 and 2021, she was the most "applicant-friendly" judge rapporteur with a 9% success rate of her cases under the constitutional complaint limb, as compared to most of her colleagues with rates around 2% to 4%.[100]

The CCC´s unresponsive approach to the minority rights in the *Transgender Judgment* replicates its long-term approach to LGBTQ+ people´s rights. The Court has heard six major cases on LGBTQ+ people´s rights, including the 2022 *Transgender Judgment*. Out of the six, two have been successful in recognising and removing an example of legislative inertia – the prohibition of individual adoption by a person in a registered partnership and the non-recognition of a foreign legal and factual same-sex parenthood based on surrogacy.[101] The remaining four decisions failed to recognise legislative inertia – including forced sterilisation as part of gender reassignment,[102] the prohibition on the adoption of a partner´s child by their unmarried partner (same-sex couples were and are not allowed to marry)[103] and the prohibition on the recognition of foreign adoption by same-sex couples.[104]

In relation to other minorities, the Court´s approach has been just as unresponsive. In gender-related matters – beyond the rights of LGBTQ+ persons, mainly in relation to women – the Court has been formalist and deferential.[105] In relation to the Roma minority, it acts similarly. Think of the Court´s failure to counter the school segregation of Roma children who were sent in disproportionally high numbers to "special" schools of poorer quality. This resulted in the famous *D.H. and Others* discrimination judgment of the ECtHR,[106] finding a violation of Article 14 taken in conjunction with Article 2 of Protocol No. 1. Yet another example is the Court´s unresponsiveness to the claims of involuntarily sterilised Roma women.[107] Some of them turned

100 Tereza Papoušková and Jan Papoušek, "Ústavní soudci v kvantitativní perspektivě," 25(1) *Časopis pro právní vědu a praxi*, (2017), 73–92, at 88.
101 Judgment of the Constitutional Court of 14. 6. 2016, Pl. US 7/15.
102 Judgment of the Constitutional Court of 31 March 2022, Pl. US 2/20 (112/2022 Coll.).
103 Decision of the Constitutional Court of 15. 6. 2021, Pl. US 28/19.
104 Judgment of the Constitutional Court of 15 December 2020, Pl. ÚS 6/20 Barbara Havelková and Terezie Boková, "Czech CCC: No Recognition of Foreign Adoption by Same-Sex Couples," *OxHRH Blog* (29 January 2021), available at https://ohrh.law.ox.ac.uk/czech-constitutional-court-no-recognition-of-foreign-adoption-by-same-sex-couples/.
105 Havelková et al., *op.cit.* note 29.
106 ECtHR, *D.H. and Others v. the Czech Republic* (13 November 2007) App. No. 57325/00.
107 Havelková et al., *op.cit.* note 29.

to the ECtHR, an action which ended in friendly settlements,[108] signaling that even the Government was aware of the vast human rights violations – and legislative inertia – which the CCC had failed to respond to.[109]

The LGBTQ+ and Roma minority cases clearly show the limits of RJR in Czechia. Peculiar features of the CEE judiciaries discussed above come to the fore. It is telling that there were only two women among 15 Justices when the CCC decided the 2022 *Transgender Judgment*, and once one of them, Kateřina Šimáčková, left for the European Court of Human Rights, only one female Justice remained. Not surprisingly, there has been no member of the LGBTQ+ community nor any Roma Justice on the CCC either. The value-laden culture war issues are thus decided by the white middle-aged men who belong to the most conservative part of Czech society,[110] which is otherwise generally very supportive of LGBTQ+ rights.[111] The formalistic reasoning then became the means to reach conservative ends, which are non-responsive to the views of the majority.[112]

---

108 ECtHR, *Červeňáková v. Czech Republic* (23. October 2012) App. No. 26852/09; ECtHR, *R. K. v. Czech Republic* (27 November 2012) App. No. 7883/08, and ECtHR, *Ferenčíková v. the Czech Republic* (30 August 2011), App. No. 21826/10.

109 It may be countered that the CCC was simply following its constraining procedural rules. Yet the Court's use of procedural rules to avoid making decisions on the merits (by declaring complaints manifestly-unfounded) has long been observed, in particular in relation to gender (see Barbara Havelková, "The Pre-eminence of the General Principle of Equality over Specific Prohibition of Discrimination on Suspect Grounds in Czechia" in Barbara Havelková et al.(eds), *Anti-Discrimination Law in Civil Law Jurisdictions* (Oxford University Press, Oxford, New York, 2019); and Barbara Havelková, "Diskriminace z důvodu pohlaví před českými soudy – typologie případů, únikové strategie a strach z chráněných důvodů" 2 *Jurisprudence* (2019), 1–12, suggesting that sterilisation of Roma women (with gender intersecting with ethnicity) – at least in some cases – falls within this pattern.

110 The polls show that men over 45 years old are the group which is least supportive of same-sex marriage. See Markéta Šrajbrová, "Podpora manželství homosexuálů roste. Nejkonzervativnější jsou muži nad 45 let" *Aktuálně.cz* (17 November 2019), available at https://zpravy.aktualne.cz/domaci/podpora-manzelstvi-homosexualu-roste-nejkonzervativnejsi-jso/r~5e20284e1a5b11e992d50cc47ab5f122/.

111 The polls show that since the mid-2010s two thirds of Czech society has supported same-sex marriage. See Anna Pálová, "Nový průzkum: Manželství pro všechny podporuje 65 % Čechů a Češek" (9 September 2021), *Jsme fér*, available at https://www.jsmefer.cz/novy_pruzkum_2021_65_procent (referring to other polls conducted in the 2010s).

112 Regarding the Roma minority, the CCC arguably faces bigger obstacles due to the prejudices of the majority of society towards Roma people. This is evident from the lengthy implementation of the *D.H.* judgment, which has met with stiff resistance. See Hubert Smekal and Katarína Šipulová, "DH v Czech Republic Six Years Later: On the Power of an International Human Rights Court to Push Through Systemic Change" 32(3) *Netherlands Quarterly of Human Rights* (2014), 288–321, at 288; and David Kosař

Yet the 2022 *Transgender Judgment* was also special due to the timing of the judgment and the peculiar features of the CCC's institutional design. As mentioned above, the CCC's Justices are appointed for a term of 10 years which is renewable by convention.[113] Virtually all the current Justices were appointed in 2013–2014 and many of them may be seeking reappointment in 2023–2024. The widely publicised *Transgender Judgment,* issued in December 2021, has had the potential to become a game changer in their effort to seek reappointment, as the majority of the Senate, which confirms all Justices, and the governing coalition is conservative and rather unfriendly to gender and LGBTQ+ issues. Some incumbent Justices are politically savvy and have already started ringing the alarm bell and threatening that the activist position of the minority in the 2022 *Transgender Judgment* that disregards traditional values might easily become the majority position after the rearrangement of the CCC's Justices.[114] This development has two repercussions. It might call for greater caution in the strategic litigation of divisive issues towards the end of the terms of the majority of the CCC's Justices, as some Justices may be unwilling to reduce their chances of reappointment. Put bluntly, the timing of such litigation is crucial. The new President elected earlier in 2023, who nominates all Justices, will likely face significant resistance if he decides to nominate progressive candidates to the CCC.

4 Broader Implications

The Czech case study reveals some peculiarities that are not immediately visible to foreign eyes, such as the deleterious effect of renewable terms for Justices which corrodes their decision-making towards the end of their terms, but also provides some general lessons that can contribute to theorising about preconditions for the successful embeddedness of responsive judicial review.

The most important one is that the three conditions for courts' ability to engage in RJR, namely judicial independence, political support and remedial power, are necessary, but not sufficient. The Czech case shows that RJR also

and Jan Petrov, "Determinants of Compliance Difficulties among 'Good Compliers': Implementation of International Human Rights Rulings in the Czech Republic," 29(2) *European Journal of International Law* (2018), 397–425, at 397.

113 See, e.g., Kosař and Vyhnánek, *op.cit.* note 14, 119–179.

114 See Jaroslav Fenyk, "Stát, státnost, občan a národ," *Parlamentní listy* (23 September 2022), available at https://www.parlamentnilisty.cz/arena/nazory-a-petice/Jaroslav-Fenyk-Stat-statnost-obcan-a-narod-715270.

requires judicial statesmanship[115] on the part of judges vested with power of judicial review, and a sufficient number of interlocutors[116] to translate the CCC's judgments into the political realm and exercise pressure on constitutional justices to become more responsive.

As regards the former, the current state of legal education in Czechia and the prevailing formal legal culture do not equip individual judges with "the requisite mix of legal and political skills necessary to identify relevant democratic blockages and determine how and when they can most effectively be countered by judicial intervention."[117] It will take time and far-reaching changes that will affect not only the selection of constitutional justices, but also legal education, bar exams, judicial apprenticeship and continuous judicial training.[118]

Interlocutors may be even more important. A constitutional court engaging in responsive judicial review needs "epistemic communities" of like-minded civil servants, legal advisors, barristers, scholars, journalists and NGO members to serve as brokers between the court and other constitutional actors, explain the CCC's judgments to the public in simple terms and put the justices under pressure to be responsive. Such epistemic communities take time to evolve and require not only enthusiasm, but also professionalisation and finance. This is especially true for the strategic litigation of divisive issues such as Roma or LGBTQ+ rights. It is telling that the *D.H.* judgment resulted from strategic litigation backed by the European Roma Rights Centre. The domestic "progressive legal superstructure" (by which we mean like-minded NGOs, scholars and advocates) in Czechia is still not able to start, maintain and successfully finish such grand-scale strategic litigation.

This feature also questions the global appeal of the "two-track" remedial approach suggested by Dixon which asks courts to grant strong remedies to individuals before them, and only a weaker remedy for others affected by democratic blockages.[119] We believe that the benefits of this approach need not outweigh its serious potential dangers, especially in CEE countries such as Czechia or Romania, where there is an impoverished human rights culture and

115 See Neil S. Siegel, "The Virtue of Judicial Statesmanship," 86 *Texas Law Review* (2008), 959–1032.

116 Any emerging court needs this, on both the national and international planes. Regarding the European Court of Justice see, e.g., Antoine Vauchez, *Brokering Europe. Euro-lawyers and the Making of a Transnational Polity* (Cambridge, Cambridge University Press, 2015).

117 Dixon, *op.cit.* note 39, 4.

118 See Part 2 of this article.

119 Dixon, *op.cit.* note 39, 178 and 239–240.

little (let alone strategic) human rights litigation.[120] In such an environment the systemic remedial effects of RJR are crucial, and a two-track approach might prove detrimental to human rights protection.

The Czech case also shows that RJR can be selective. Even though we analysed in detail only two judgments, they exhibit a general pattern. The CCC is responsive in traditional civil and political rights, but less so concerning newer identity and social rights. This results in a detrimental effect on minorities. The response of the Czech Parliament to the CCC's judgment concerning LGBTQ+ issues shows that a weakened form of judicial review might not be strong enough in CEE states. CEE legislatures simply cannot be counted on to react to weakened judicial review and deliver on human rights commitments concerning minorities. This passivity of the legislature is happening even in cases of minority rights where the majority of voters supports these rights claims, since the majority is unlikely to press the legislature to recognise them (as acknowledged by both Ely[121] and Dixon[122]). We do not have the solution to this conundrum. Perhaps constitutional courts in CEE may bide their time for now and strengthen their responsiveness over time in this area as well. The German and Austrian constitutional courts, which were unresponsive to LGBTQ+ rights claims until the 2000s but then changed course,[123] show that this is possible in civil law jurisdictions.[124]

Finally, the Czech case confirms that the responsive judicial voice has to take into account the "timing" of judicial review. Sometimes, there is only a brief moment in time when the political costs of compliance with RJR are lower than those of backlash or non-compliance, which in turn creates a "window of opportunity" for adopting RJR. Courts engaging in RJR then have to take full advantage of such window. If they fail to do so, the window may close for a long

120 See also Suteu (*op.cit.* note 12).

121 Ely, *op.cit.* note 46, 21–22, 103.

122 Dixon, *op.cit.* note 39, especially 64, 80–87, 106–108 and 151–153.

123 For Austria, compare early judgments such as VfGH [Constitutional Court of Austria] of 12 December 2003, B 777/0 and VfGH of 09 October 2012, B 121/11, B 13/11 with later responsive judgments such as VfGH of 10 December 2013, G 16/2013-16, G 44/2013-14, VfGH of 11 December 2014, G 119-120/2014-12 (G 119/2014, G 120/2014) and VfGH of 4 December 2017, G 258-259/2017-9. For Germany, compare early judgments such as BVerfG [Federal Constitutional Court of Germany], Order of the First Senate of 6 December 2005, 1 BvL 3/03 and BVerfG, Order of the First Chamber of the Second Senate of 20 September 2007, 2 BvR 855/07 with later responsive judgments such as BVerfG, Order of the First Senate from 7 July 2009, 1 BvR 1164/07 and BVerfG, Judgment of the First Senate from 19 February 2013, 1 BvL 1/11, 1 BvR 3247/0.

124 We are aware that more research is needed to identify all factors that contributed to the shift in the case law of the German and Austrian constitutional courts in the LGBTQ+ matters.

time, if not for ever. In the Czech case we mentioned that litigants should not raise controversial issues towards the end of the terms of those of the CCC's Justices who may seek reappointment. The *Transgender Judgment* attests to that. But timing is crucial even beyond this peculiar time, as litigants should also consider the strength of the governing coalition and its relationship with the status quo camp which benefits from democratic inertia and blind spots. The *Grand Election Judgment II* shows that when the CCC skillfully forced the governing and opposition political parties to sit at the same table and agree on the new voting rules less than a year before the parliamentary elections, it could exercise responsive judicial review and still escape the backlash.

5 Conclusion: Towards Responsive Judicial Review Light in Central and Eastern Europe?

Our Czech colleagues argued recently that "[a]lthough Ely's process-based theory turned out to be more influential in common law jurisdictions, the Czech case shows that also continental jurisdictions might exercise the bravest judicial activism in the area of fair political competition and not in rights review."[125] We concur, but with a caveat. Ely's original theory of judicial review has two limbs – keeping the channels of political change clear *and* protecting discrete and insular minorities.[126] While the CCC succeeded in the former (as evidenced, e.g., by the *Grand Election Judgments I* and *II*), it failed in the latter (e.g. in the *Transgender Judgment*). Despite this caveat, we argue that the CCC is probably the most Elyan constitutional court in CEE which has engaged in what we label "responsive judicial review light" (hereinafter just "RJR light").

Even if fully-fledged RJR is not possible in Czechia, and CEE more generally, "RJR light" would be a great improvement. One of many contemporary examples in which it would be beneficial is same-sex marriage. That has long been supported by the public,[127] yet not delivered by the legislature. Since majority understandings align with commitments to minority rights

125 Smekal, Benák and Vyhnánek, *op.cit.* note 51.

126 And this is still a narrow reading of Ely's political process theory. A broad reading of Ely's theory might also require courts to have additional functions such as guarding against democratic breakdown, improving the quality of democratic institutions and responding to failures of political institutions impacting on majoritarian groups (Manuel José Cepeda Espinosa and David Landau, "A Broad Read of Ely: Political Process Theory for Fragile Democracies," 19(2) *International Journal of Constitutional Law* (2021), 548–568).

127 See the polls referred to above in notes 110–111.

protection,[128] not granting equal marriage rights constitutes a burden of inertia and a commitment to democratic responsiveness suggests that it can be overcome.[129]

That the Court has so far engaged in "RJR light" does not mean that it cannot get even more Elyan and switch to the "full-fat" RJR. The transition from *Grand Election Judgment I* to *Grand Election Judgment II* took two decades, but it may signal the increasing responsiveness of the CCC to political monopoly. Perhaps its responsiveness will increase also in other areas in future and the RJR will become a true "new sheriff in town." A healthy dose of pragmatism in judicial review is always welcome in the overly Herculean[130] or subservient[131] mindsets of constitutional justices in CEE. Of course, ideally after reading Ely's and Dixon's monographs. If CEE justices are short of time, we recommend the latter.

Acknowledgments

The research leading to this article has received funding from the European Research Council (ERC) under the European Union's Horizon 2020 research and innovation programme (grant no. 101002660-INFINITY-erc-2020-cog).

128 Dixon, *op.cit.* note 39, 64.

129 Ibid..

130 Think of the Hungarian Constitutional Court under the leadership of László Sólyom in the 1990s.

131 Think of the current captured Polish Constitutional Tribunal.