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## Chapter 5

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### The Hungarian Constitutional Court

Dialogue in practice

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# 5 The Hungarian Constitutional Court

## Dialogue in practice

*Attila Gyulai, Kálmán Pócza and Gábor Dobos*

### 5.1 Introduction

The Hungarian Constitutional Court (HCC) has been widely known as one of the most formative institutions of constitutional adjudication in Central and Eastern Europe. Established early during the 1989–1990 democratic transition, vested with significant competences, adopting an activist stance, the HCC was considered as a key player in the successful democratic transition of Hungary. The prominent role of the HCC stems, at least in part, from the legal continuity that characterized the transition in Hungary. Although as a result of the “negotiated revolution” (Tótkés 1996) the Communist constitution was changed in all details, legal provisions that did not run counter to the new democratic polity remained in force, while the HCC had to decide on many ambiguous cases, placing the institution at the centre of political conflicts (Gárdos-Orosz and Kinga 2022, 17–18). The same legal continuity may explain the early “activist” period of the HCC when, under the presidency of László Sólyom, the court established modern Hungarian constitutionalism and the practice of constitutional adjudication (Jakab and Fröhlich 2017, 394).

During the first decade of its existence, the HCC enjoyed an exceptional position in the Hungarian political context. Due to a number of features, the court developed into a prominent institution of the democratic transition. Compared to other courts in the region, it was granted particularly broad competences. In its formative years, the court pursued a rather expansive institutional strategy. Moreover, the strong court benefited from the political environment in which depoliticization was considered the default position, and the HCC enjoyed widespread respect as the final arbiter in everyday political battles. Since the late 1990s, however, all of these features have become less and less characteristic of the Court’s functioning. Since recent years, polarization has slowly permeated the benches of the Court (as evidenced by the growing number of dissenting opinions). Activism has been replaced by a more restrained institutional strategy as the parties responsible for filling the benches of the Court adapted to the presence of such an institution. Finally, the Court has been significantly curtailed since 2010.

Two decades after its establishment, the HCC was one of the first institutions to be restricted after 2010, when Viktor Orbán's government, backed by its supermajority in Parliament, reshaped the country's institutional framework according to its political interests. Operating not as the highest level of the ordinary judicial system, but as an independent branch of power for several years after the transition (Jakab and Johanna 2017, 405) and being a potentially effective constraint on the legislature for decades after the transition, the court was subjected to parliamentary sovereignty not only due to institutional engineering but also following a reshuffled composition and the changes in the political environment. As of 2012, not only the functioning, composition, and the competences have been changed significantly but also the text (i.e. the constitution) the institution is meant to interpret.

This chapter analyses the Hungarian Constitutional Court not only in the context of two constitutional texts – the 1989 Constitution and the 2012 Fundamental Law – but also in terms of the trends describing the Court's relationship with the Hungarian legislature. Section 5.2 briefly outlines the institutional framework, composition, and the competences of the Court. Section 5.3 contextualizes the functioning of the Court by summarizing the changes in the composition of the HCC between 1990 and 2020. In Section 5.4, we then turn to an analysis of the overall evolution of the strength and diversity of rulings, while in Section 5.5 we analyze the evolution of dissenting opinions. Finally, in Section 5.6, we turn to the HCC's policy agenda.

The chapter traces the process of how the strength of the Court's decisions diminished over time and how both the political environment and the internal practice of the HCC became more polarized with respect to majority decisions, dissenting opinions, and policy areas. Like some other chapters in this volume, this chapter draws on an earlier work by the authors (Pócza, Dobos, and Gyulai 2019a), to which the reader is referred as needed.

## **5.2 Institutional setting: election of members, functioning, and competences**

During the democratic transition, the Hungarian Constitutional Court was established as a new institution in the Hungarian polity. Unlike some other countries in the region, there was no precedent for constitutional adjudication in Hungary, nor was the institution established in the late years of communism, as it was in Poland. The HCC was the result of the roundtable talks between the ruling Communist party and the democratic opposition parties, and it was only during the negotiated transition in 1989 that constitutional adjudication was finally included in the National Round Table agreement that prepared the new Hungarian constitution (Sadurski 2002; Luchterhandt, Christian, and Albrecht, 2007; Sadurski [2008] 2014).

The HCC is a Kelsenian court established as separated from the judicial system and regulated by specific laws. The HCC was created by Article 32/A

of Act XXXI of 1989, which amended – and practically replaced in almost all details – the old Communist Constitution (hereinafter “Constitution”). The Constitutional Court was regulated by Act XXXII of 1989 (hereinafter the “old HCC Act”). The HCC started its operation on 1 January 1990 and underwent a major transformation after 2010, when Fidesz, relying on its supermajority in the Parliament, made several changes, first by amending the existing regulation, then by replacing the Constitution with the new Fundamental Law, and finally by introducing the 2011 Law CLI on the Constitutional Court (hereinafter, Fundamental Law, new HCC Act). Both the old and the new Law on the HCC required a two-thirds majority in Parliament to amend them. Since the differences between the old and the new HCC are significant, this section will first briefly describe the changes in the composition of the court, the election of its members, and the functioning and the competences of the court.

Unlike with some of its counterparts in Europe, recruiting the members of the HCC has always been a single-logic procedure with parliamentary decision being the only source of the nomination and election of new judges. In the Hungarian case, formally, neither the government, nor the Head of State, and not even judicial or professional bodies are assigned with any role in filling the benches of the court. Members of the court are proposed by a nomination committee of the Parliament and elected by a secret vote of the two-thirds of the MPs. Under the old HCC Act, the committee consisted of one member from each party represented in the Parliament, practically resulting a need to compromise between the government and the opposition. That is, even if there existed a plenary supermajority to pass a successful vote, a more balanced committee could block the process by not nominating a judge. Nevertheless, election of the judges was a highly politicized process within the unicameral legislature (Körösenyi, Tóth, and Török 2009, 34). Significantly modifying the election procedure, the nomination committee under the new HCC Act was redesigned to reflect the proportion of the mandates, meaning that a party with a supermajority could control both the nomination and the election procedure.

Elected by the two-thirds of MPs, according to the old HCC Act, members of the court served nine years with an option of re-election once, but their mandate ceased at the age of 70. Under the new arrangements, the term of the office of the judges has been increased to 12 years; however, re-election was abolished just as the age limit.

The President of the HCC has a formative role in determining the operations, agenda, and the distribution of the cases, and certain periods of the Court can be characterized according to the presidential terms. During the first decades of its functioning, it was an important contribution to the Court’s standing that the President and the Vice President were elected by the judges of the HCC. The term lasted for three years while re-election was an option. The changes brought about by the introduction of the Fundamental Law and the new Act on the HCC placed the decision about the President in the hands of the MPs. A two-thirds majority is needed to elect a new President, whose

term lasts until the termination of his or her mandate as a member of the HCC. Although the decisions of the Court are made by simple majority of the judges (without abstention), the President plays an influential role by appointing the rapporteur for the cases and presiding over the plenary sessions where the most important cases are dealt with. Less significant cases, however, are decided by one of the five-member panels composed upon the proposal of the president (before 2011, panels had three members). Filling the position of the Vice President and the Secretary General of the HCC is also decided by the plenary session following the proposal of the President. Apart from the performance of important operational tasks, in cases where the HCC rejects a petition without further consideration, the decision is made by a single judge on the proposal of the Secretary General.

The HCC has been given broad competences which – together with the fact that the court was not part of the judicial system – made the institution a strong player within the Hungarian polity. Although the changes introduced after 2010 maintained the wide competences, several of them have been significantly constrained parallel to the changes in the composition of the Court and the altered political environment. Both before and after 2010–2011, *a priori* and *a posteriori* forms of norm control were available to the Court, but with the introduction of the Fundamental Law and the new Act on the HCC, the scope of constitutional review have been curtailed by restricting the circle of petitioners and by the substantive requirements enumerated in the Fundamental Law. The new regulations, adopted after 2010, abolished the *actio popularis* which allowed anyone without personal interest to initiate *a posteriori* norm control. Nevertheless, it was meant to be replaced by a newly introduced and varied form of constitutional complaint. Let us see the competences in more detail by focusing on how the changes after 2010 modified the power of the HCC.

Under the Constitution, the HCC could review laws adopted but not yet promulgated, the rules of procedure of the Parliament, and international treaties. Besides these types of preliminary norm control, the Fundamental Law adds the review of the Fundamental Law and the amendments of the Fundamental Law but only with regard to the procedural requirements of their adoption. Preliminary norm control can be initiated by the Parliament or the Head of State (constitutional veto).

*A posteriori* norm control has been a competence of the HCC since the establishment of the HCC, allowing the judges to annul laws and normative orders even retroactively. Under the Constitution, *ex post* abstract review could be initiated by anyone. However, under the Fundamental Law, *a posteriori* norm control can be initiated by the government, a quarter of the members of Parliament, the President of the Curia (Supreme Court), the Prosecutor General, or the Commissioner for Fundamental Rights. The latter have been added later to the list, recognizing that the defined group proved to be too narrow. Furthermore, *a posteriori* norm control can be initiated as a judicial initiative in a concrete case of judicial proceeding by an ordinary judge.

As already mentioned, under the Fundamental Law and the new Act on the HCC, the *actio popularis* as a specific form of *a posteriori* abstract norm control of laws initiated by anyone without direct involvement was abolished, a step welcomed even by former judges of the HCC (Bragyova 2010, 59–61; Paczolay 2010, 44). At the same time, however, possibilities of norm control have been broadened by the introduction of the “genuine” constitutional complaint which can be initiated against a judicial decision by those who are affected by it in a concrete case.

The HCC has power to declare legislative omission if, due to a failure of the Parliament to legislate, unconstitutionality can be established. The HCC makes decisions in cases of conflict of competences between state organs (including local governments) and also examines conflicts between international treaties and domestic laws. It is also a competence of the HCC to examine the resolutions of the Parliament concerning referendums.

Finally, both before and after the changes in 2010–2011, the HCC had and has the competence to interpret constitutional norms. According to the new HCC Act, the abstract interpretation of the Fundamental Law can be initiated – with a reduction of the potential petitioners – by the Head of State, the government, or the Commissioner for Fundamental Rights.

Although the Court’s powers remain broad and can potentially impose significant constraints on the legislature, the Fundamental Law has established limits and rules of interpretation that significantly restrict the HCC’s scope of action. First, the HCC is bound in its interpretive activity to the content of the motion, and according to the Fundamental Law the provisions whose review have not been requested can only be reviewed if there is a close substantive connection with the provisions to be reviewed. Second, it is prescribed that in interpreting the Fundamental Law the HCC shall follow the *telos* of the Fundamental Law and shall take into consideration the content of its preamble (National Avowal) and that the interpretation should be in accordance with the achievements of the historical constitution (for the contemporary relevance of the historical constitution in Hungary, see Pócza 2019). Third, the competences of the Court have been significantly reduced concerning legislation on public finances, budgetary issues, and taxation, except for cases related to the fundamental rights (rights to life and human dignity; protection of personal data; freedom of thought, conscience, and religion; rights related to Hungarian citizenship). Fourth, the Fundamental Law declared that the decisions of the HCC under the previous Constitution were void and no longer bound the HCC as of the time the Fundamental Law came into force.

To sum up, the institutional setting that has characterized the HCC since its establishment demonstrates continuity and change at the same time. On the one hand, many of the competences of the court are still present even after the post-2010 changes, which makes the HCC a potentially strong player compared to its counterparts in the CEE region. On the other hand, however, the amendments to the regulation of the HCC brought about important shifts in practice. According to some legal scholars, the “new” HCC

demonstrates what can be termed limited or restricted constitutional adjudication (Chronowski 2014, 4), while others argue that the HCC has been silenced (Halmai 2019), that the principles of “legal certainty and the protection of acquired rights often seem to be neglected” in the practice of the HCC (Chronowski 2021), that the HCC deferred uncritically to the government (Chronowski and Varju 2016), that an illusion of constitutional dialogue between the European courts and the HCC prevailed (Uitz 2015, 294), and that the HCC engaged in new judicial deference (Scheppelle 2012a, 2012b). Other authors doubt whether the protection of constitutional norms is effective enough after the court-packing (Pozsár-Szentmiklósy 2020), arguing that the HCC became a fellow-traveller in establishing autocratic legalism after 2013 (Scheppelle 2018), that the new judges became willing executors of party interests (Szente 2016), that the court was rendered absolutely ineffective (Tóth 2019), that the HCC opted for passivist strategies in order to survive (Lánczos 2019), that its powers were very limited (Halmai 2018), and some even argue that courts simply assist autocratic leaders in preserving their power (Dixon and Landau 2019). Gárdos-Orosz (2016, 449, 451) contend that the introduction of the “genuine” constitutional complaint, along with other changes, actually makes it its primary competence and shifts the court from the position of controlling legislation to that of controlling judicial practice, with the key relationship being not between the court and the legislature but between the court and the judicial system (Gárdos-Orosz and Kinga 2022, 29). In the literature, the alteration of the constitutional text and the transformation of the political climate are also mentioned to be responsible for the changes regarding the HCC (Jakab and Fröhlich 2017, 430). Finally, combining the relevance of the institutional setting, the political environment, as well as the parties in charge over the election of the judges of the HCC, the composition of the HCC should be mentioned as being responsible for the actual practice of constitutional adjudication *vis-à-vis* the legislature. It is to this latter question of composition that we turn next.

### **5.3 Changes in the composition of the HCC 1990–2020**

The HCC, with five judges on its benches, began its work on 1 January 1990, four months before the first democratic elections were held and about six months before the first democratic Parliament was convened. The first five members of the Court were nominated partly by the Communist party and partly by the democratic opposition. In the summer of 1990, five more judges were elected by the new democratically elected Parliament, so that from then on, the Court sat with 9 or 10 judges. Originally, the last five judges should have been elected by the second Parliament after the democratic transformation process, but due to the lack of agreement about candidates, the missing members were never elected. Filling the empty chairs in the HCC caused serious problems later as well (the HCC was constantly on the verge of its quorum), as the double-nomination (a political deal about the election of

one right-wing and one left-wing candidate) became the informal standard. Nevertheless, filling the vacant seats often took several months and sometimes directly jeopardized the functioning of the Court.

After the landslide victory of the Fidesz party in 2010, the Orbán government (supported by a two-thirds parliamentary majority) was able to abandon the practice of double-nomination and elected several new judges, backed exclusively by the right-wing majority. This reshuffling of the Court led to a thin majority of the judges nominated by the right-wing parties as early as the autumn of 2010 (four judges nominated by the left-wing parties, one by consensus and five judges nominated by the right-wing parties).

The introduction of the new Fundamental Law also affected the structure of the HCC: since 1 January 2012, the Court consists of 15 judges. With the election of the new judges, a clear right-wing majority dominated the Court (4 left-wing nominations, 1 consensus, and 10 right-wing judges), but the “old” judges, who were elected in pairs before 2010 (i.e. in a kind of compromise), were still in the majority (8 to 7). It was only after a new wave of judge elections in spring 2013 that new judges elected only by the post-2010 right-wing parliamentary majority formed the majority in the Court (8 to 7). It can be argued that this was a decisive point for the HCC: from 2010 to May 2013, the Court struggled with the constitutional majority of the Parliament in several ways, while after May 2013 deference (with several dissenting opinions) became the dominant pattern of behaviour of the Court’s majority.

Finally, a notable change in the composition of the court occurred in November 2016, when four new judges were elected due to vacancies. As a result of losing two by-elections in 2015, Fidesz lost its supermajority in Parliament. This meant that the ruling party had to make a deal with the opposition to be able to elect new judges to the HCC. Thus, the four new judges were elected with the support of the small green opposition party (LMP, Politics Could be Different). Nevertheless, the majority of the court still consists of judges with a right-wing political background.

#### **5.4 Strength and diversity of the HCC rulings**

Turning to the strength of the rulings of the HCC on a yearly basis, the strong start is quite apparent (Figure 5.1). That is, understanding strength as the extent of the constraint the HCC aimed to level at the legislature, the opening strategy of the HCC becomes visible during the year shared by the outgoing Communist Parliament and its new, democratically elected successor. Certainly, if the HCC as a new organ in the separation of powers, wanted to establish its position *vis-à-vis* the legislature, irrespectively of the political composition of the latter, the message to be sent was exactly a series of decisions including declarations on substantive unconstitutionality and constitutional interpretations *in abstracto*. Without overrating the figures of the first year, it suffices to highlight that the record high level of strength in 1990 is the result of merely 13 rulings.

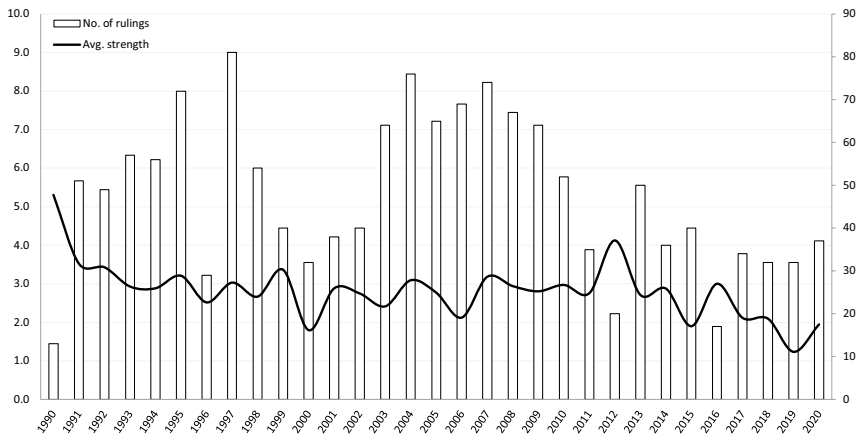


Figure 5.1 Number and average strength of rulings (1990–2020) (HCC)

After the first year of the HCC’s existence, the strength of its rulings diminished somewhat and fluctuated at more moderate intervals. The average strength of the court’s rulings has levelled off between 2.0 and 3.5 (compared to the maximum of 10), which in itself does not indicate a particularly stringent court. The performance of the HCC in this regard seems to be in accordance with the courts of other CEE countries (for a comparison, see Chapter 12). In average, during its 30 years of existence, the HCC took restraining steps against the decisions of the parliament in a bit more than 50% of all its rulings. It could be argued that in the first decade after the transition, the legislature, aware of the fact that the HCC tended to limit its scope of action, was in fact constrained by the separation of powers between the two institutions. Thus, it did not require particularly strict decisions by the HCC to keep Parliament within the limits that the Court had set for it in the early 1990s, since the former organ could anticipate the latter’s potential decisions.

In the context of the mid-1990s, it is worth noting another year in which the Court became the focus of political debates. In 1995, the left-liberal government introduced a series of austerity measures, the so-called Bokros package, named after the finance minister, which restricted citizens’ access to public health care. The HCC responded with a series of strong rulings, and it is equally significant that in that year the proportion of restraining rulings was the second highest (63.9%) in the entire three decades.

As it will be seen from the analysis of the dissenting opinions, from the late 1990s, the HCC started to become more polarized, not unrelated to the departure of László Sólyom, the Court’s first President. As it was seen earlier, it is also the period when filling the banks of the court was mostly manageable by electing judges in pairs due to the lack of compromise between government and opposition. None of this, however, seems to have translated into a

significant shift in the average strength of rulings, indicating that the Court has found its place within the polity, recognized by political and legislative actors as a potential arbiter even in political issues.

This chapter has already discussed how the institutional framework, competences, and composition of the HCC changed after 2010, when the government of Fidesz and Viktor Orbán, relying on its supermajority in Parliament, tried to prevent any counterweight that could hinder its political goals. Following conflicts over parliamentary jurisdiction to hold officials of the previous government accountable by introducing retroactive laws, the HCC was one of the first institutions affected by the changes. However, because the composition of the Court changed only gradually, the majority of its members decided, even in 2012, to make very restrictive decisions *vis-à-vis* the constitutional two-thirds majority that prevailed in Parliament. As shown in Figure 5.1, in 2012 the HCC averaged 4.13, its second strongest year since 1990. Even more revealing is that the number of rulings was relatively small (20) and that half of them established substantive unconstitutionality or adopted a restrictive form of constitutional interpretation *in abstracto*, indicating a serious dispute between the government and the HCC. Looking at the subject matter of the rulings in question, it is also clear that the HCC touched on the core issues of government. To name a few, the Court ruled on the provisional regulations of the new Fundamental Law, laws on labour strikes, ethnic minorities, local government authorities, and the personnel of the judicial system. It is worth noting that in the previous year, the Court had to deal with similarly important issues – media law, electoral law, regulation of churches – but the average strength of rulings for the year was significantly lower. The explanation for this difference is that the latter issues were dealt with in a series with many less-sensitive issues, where the Court's decisions were less-constraining. However, in the mid-2010s, changes in the institutional framework, the composition of the judiciary, and the political environment increasingly affected HCC. This is evident from the annual figures, which, with the exception of 2016, are below the overall average of the Court's three-decade performance.

The next step is to examine how the figures of average strength can be contextualized by the diversity of the rulings. As the methodology underlying this analysis suggests, there is more to constitutional adjudication than the constitutional/unconstitutional dichotomy, and courts can draw on a variety of measures and competences when reviewing acts of the legislature. In particular, the HCC has been vested with a highly diverse set of powers.

The diversity of available options is reflected in the three decades of the practice of the HCC (Figure 5.2). Compared to all other constitutional courts studied in the JUDICON-EU project, the HCC is the most diverse, with less than three-quarters of all decisions involving either rejection or substantive unconstitutionality. Beyond this dichotomous approach, the HCC developed a practice of constitutional adjudication that helped the Court secure an adaptive position within the Hungarian polity. Certainly, certain options were not chosen as frequently as others. Interestingly, only 2% of all rulings were

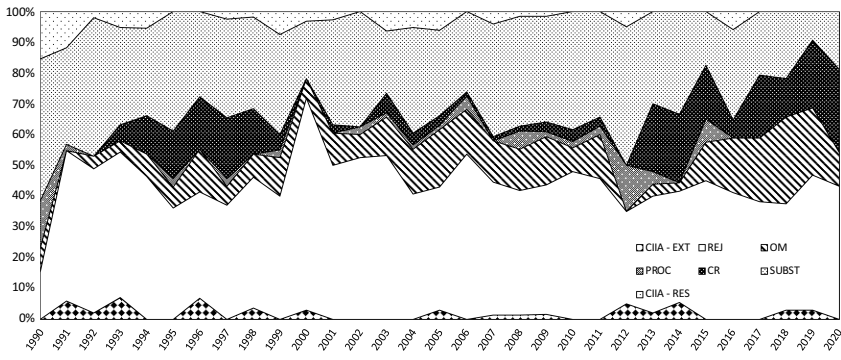


Figure 5.2 Frequency of the ruling types (HCC) (1990–2020)

declared as procedural unconstitutionality, this was not a preferred path for judges. Declarations of omission or constitutional requirement, on the other hand, were more common types of rulings that merit closer examination.

In the Hungarian context, declaring omission does not imply a particularly strong decision, since in these cases Parliament is not told how to remedy an unconstitutional situation, but the Court merely establishes the fact of unconstitutionality resulting from inadequate or missing legislation. That is, omissions do not usually imply any prescription, and if they do, it is limited to a non-binding prescription, without any sanction as to the time by which the omission should be remedied. Moreover, it is in some ways characteristic of the first era of the Court that omissions become more frequent after the presidency of László Sólyom.

Compared to omission, constitutional requirement is a stronger type of ruling where the Court becomes a mild or a rigorous positive legislator by giving guidance and directions for the legislators and the judiciary about what interpretations of a regulation under review are constitutional. In the Hungarian case, the constitutional requirement became an important instrument in two periods. Starting in 1994, the constitutional requirement became a frequently used tool of the Sólyom Court. While constitutional requirements almost disappeared after the Sólyom-era, a renaissance of this type of provision can be observed since 2013. Combined with the constant presence of omissions, the declaration of constitutional requirements means that 2013–2020 was the most diverse period of the HCC in terms of the type of provisions.

As for the most restrictive type of constitutional adjudication, the high ratio of constitutional interpretation in *abstracto* demonstrates the activism of the early Court on such important issues as privatization and land ownership. Although the HCC rarely used this highly restrictive instrument (only 2.8% of the Court’s rulings are restrictive constitutional interpretations in *abstracto*), the HCC’s activity is remarkable compared to other countries: more than 70%

of all restrictive constitutional interpretations in *abstracto* were found in the Hungarian case.

### 5.5 Dissenting opinions: from unity to polarization

Members of the HCC can formulate dissenting opinion if they do not agree with the majority opinion of the Court. Dissenting opinions might be issued by a single judge, or they can declare that they join to another judge's dissent. Disaggregating dissenting opinions into rulings the same way as decisions and link majority rulings to dissenting rulings allows one to have a more nuanced analysis of the practice of constitutional adjudication.

To begin with, while looking into majority decisions it was possible to ascertain some revealing general trends, an insightful periodization of the Court's practice during its 30 years of existence becomes possible through analysing dissenting opinions which exhibit a clear increasing trend (Figure 5.3). The number of rulings with at least one dissenting opinion is revealing: 1990–1998: 5.3 per year; 1999–2010: 15.1 per year; 2011–2020: 22.0 per year. The total number of dissenting opinions has also increased massively: while there was a total of 10 dissenting opinions per year on average during the Court's first eight years, this number increased to an average of 37 dissenting opinions per year between 1999 and 2010, and to an average of 62 per year between 2011 and 2020. The three periods designated by these numbers correspond to changes within the Court or its political environment; they are the first period under the Sólyom presidency; the second, which represents the “post-Sólyom era”; and a third, which begins immediately after Fidesz won a two-thirds parliamentary majority in 2010.

As mentioned, the HCC began its activity as a guarantor of democratic transition based on legal continuity. The potential need to review laws that

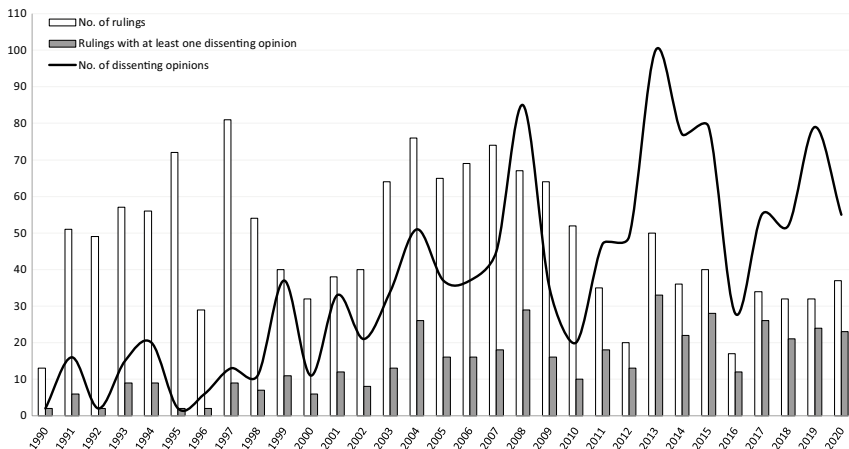


Figure 5.3 Number of rulings with at least one dissenting opinion (1990–2020) (HCC)

remained in force despite the fact that they were adopted by the Communist Parliament, as well as the newly established democratic institutional framework, placed the HCC in a position that was seen as, or expected to be, above polarized politics and institutional uncertainties. In this context, the low number of dissenting opinions during the first period might be explained as an attempt to follow an institutional strategy based on unified decision-making. In this period between 1990 and 1998 only 10% of the majority rulings were openly challenged by dissenting opinions. The combined trend of the average strength of majority rulings and the frequency of dissenting opinions is characteristic of the Sólyom court. During this period, the court was particularly strong in constraining the legislature by relying on the strongest possible type of rulings and exhibiting the lowest degree of internal polarization. Of course, all of this is true only in comparison to the further periods, and it would be an exaggeration to claim that the Court was solely responsible for the scope and content of legislation in the period immediately following the fall of Communism.

The differences become clear, however, when one turns to the later periods of the HCC. In the Court's second decade, an average of one-quarter of all rulings were supplemented by at least one dissenting opinion. This significant increase might be attributed to a general trend of consolidation: with the democratic polity established, it was natural that the HCC lost its role of guarantor, therefore, the institutional strategy that required unity became outdated. However, based on the data as well as the shifts in the political environment described earlier, polarization within the Court seems to be a more plausible explanation. Electing new judges became an openly politicized issue in parliamentary politics, where filling the empty seats to secure the necessary two-thirds majority, was often possible only in pairs when both the government and the opposition had their own preferred judge. Thus, the political leaning of the potential judges was no longer a problem since, instead of compromise, the parties "shared" the vacant seats. As a result, challenging the majority decisions of the HCC became more likely and a more reasonable outcome of the shifts regarding the nomination process (without any significant change of the formal procedure) taking place in a more polarized political environment. It should therefore come as little surprise that the share of rulings with at least one dissenting opinion peaked in 2008 (43.3%), when the political disputes that frequently affected decisions of the Court were at their most intense.

The third period, as indicated by the number of dissenting opinions, begins after the 2010 elections, when Fidesz won two-thirds of the seats in Parliament and thus had enough mandates to amend the constitution or laws for which supermajority is required. As Figure 5.3 shows, the proportion of rulings with at least one dissenting opinion increases sharply from the following year onward; on average, only one in three judgments is without a dissenting opinion. That is, despite the fact that the ruling party had the power to reshape the institutional framework, including the new Fundamental Law adopted in 2011, and to appoint the members of the Court without consulting or compromising with the opposition, the HCC become more polarized

than ever before, while, with the exception of the particularly strong rulings in 2012, there has also been a steady decline in the strength of the rulings. Surprisingly, the increase in dissenting opinions continues after 2013, when, due to the gradual replacement of previously elected members of the Court with new judges appointed exclusively by government MPs, the latter group forms the majority in the HCC. For an explanation, one must turn to the individual level to see to what extent and how a member of the HCC voted with the majority or formulated a dissent proposing a different level of constraint toward the legislature.

We assume that individual judicial behaviour might be explained by the political leaning of the judges. With respect to the Hungarian case, trends in dissent become meaningful when they are attributed to the appointment and election of judges. That is, in this part of our analysis, we rely on a combination of the attitudinal model (Spaeth and Segal 1992; Segal and Spaeth 2002) and the external strategist model of judicial behaviour (Gillman and Clayton 1999) arguing that ideological attitudes, values, and political preferences determine the decisions of the members of the Court (Kantorowicz and Garoupa 2016). More precisely, due to the specificities of the institutional setting, as taking their election as a proxy, we turn to the appointment of the judges. The political affiliation of the members of the HCC cannot be ascertained as openly as in the case of the US Supreme Court, but it is more traceable than in the case of several constitutional courts where political parties have lesser role in the election of judges or where their political orientation is not disclosed. Given the limited and less explicit public information on the political orientation of judges, we relied on a cross-checked body of data set composed of parliamentary committee minutes, media sources, and expert interviews with HCC staff. As a result, five categories were formed: HCC members were classified as left-wing, left-wing consensual, consensual, right-wing consensual, and right-wing according to their appointment.

In our analysis, we consider the proportion of dissenting opinions relative to all of the Court's rulings. In other words, the proportion of dissenting opinions signed by an individual judge is measured against all rulings in which he or she participated. Since majority rulings can be linked to individual dissenting rulings in this way, it becomes possible to compare the strength of the majority ruling with the proposed strength contained in the dissent also disaggregated to the level of rulings. Using the two resulting indicators – the average frequency of dissenting opinions and the average relative strength of rulings – a detailed map of dissenting opinions can thus be constructed (Figure 5.4).

From a bird's-eye view, the figure shows that judges are found in the lower-left part of the map, suggesting that once they dissented, they wanted the HCC to be less restrictive toward the legislature than the majority decision. Thus, dissenting judges generally took a more moderate position, proposing less-severe rulings when they disagreed with the majority of the court.

As noted, the issue becomes particularly interesting after 2010, in the third period of the HCC, when the government had the sufficient majority in Parliament to overrule the Court, either by appointing more loyal judges or by

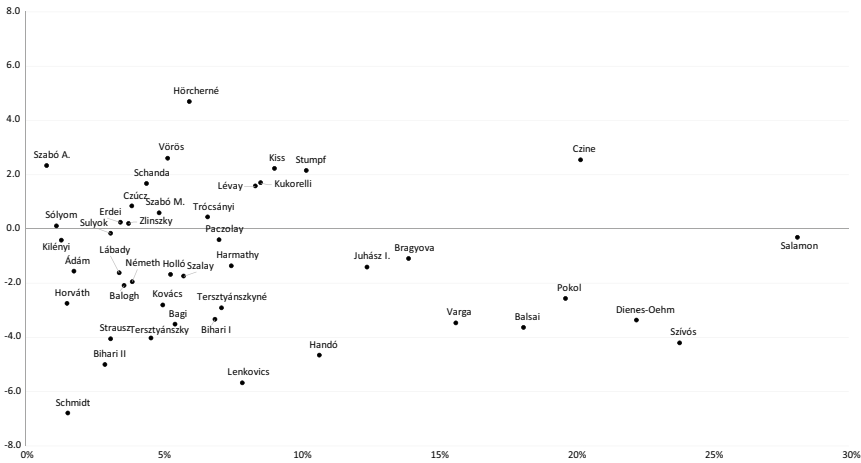


Figure 5.4 Relative strength and frequency of dissenting opinions (HCC)

changing the institutional framework or even by amending the constitutional provisions. Since July 2010, right-wing judges have held a majority on the court. Figures 5.3 and 5.4 show, however, that the differences of opinion, measured by dissenting opinions, within the HCC not only persist, but are actually increasing. The figures suggest that an additional explanation beyond the attitudinal model must be considered. Apart from the fact that right-leaning judges were in the majority on the Court, there appears to be another split with significant results. As far as constraining the legislature is concerned, there appears to be a difference between the behaviour of the old and the new judges. Among the old judges, who were appointed before 2010 and nominated by either the left or the right, some institutional socialization seems to be taking place (Pócza, Dobos, and Gyulai 2019b). That is, the old members of the HCC (even if they were nominated by right-wing parties) seem to behave more restrictively than most new judges, whose post-2010 right-wing political affiliation seems to be more determinative.

It is also worth noting that, in terms of dissent, the HCC has not become more unified since 2016, when no pre-2010 appointed judge remained on the Court. It seems to be a continuing trend that there is a group of judges who express their dissent quite frequently and consistently to argue for less constraint toward the legislature. Moreover, it should be added that there is a group of judges who were elected in 2016 when Fidesz, which temporarily lost its two-thirds majority in Parliament, compromised with a minor opposition party to elect new members to the HCC.

This is where looking at the coalitions of dissenting judges becomes insightful. Trends in dissenting opinions, combined with the political affiliation of the judges, allows one to map the networks among members of the HCC, revealing groups and coalitions either lasting or temporary. Figure 5.5 shows

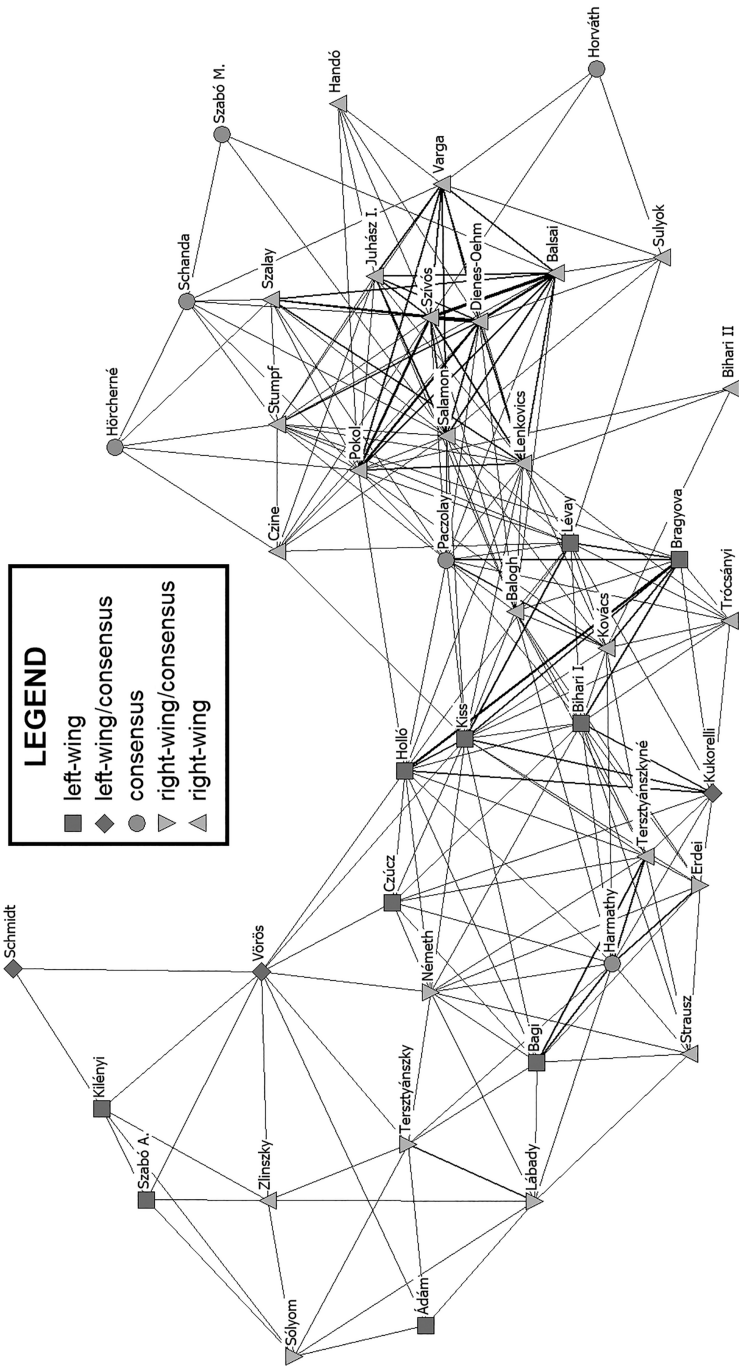


Figure 5.5 Dissenting coalitions 1990–2020 (HCC)

all members of the HCC with at least one dissenting opinion. The low interactions at the left pole between the judges from the first period of the HCC can be explained by the relatively small number of dissenting opinions under the Sólyom presidency.

At the right pole of the network map, there seems to be a core group that formulates a coherent network (Balsai, Szívós, Dienes-Ohm, Pokol), to which Lenkovics (appointed before 2010) and Varga joined. Around this core group of old and new right-wing judges, there is a circle of judges with similar political affiliation (Czine and Stumpf), but they sometimes form coalitions with left-wing judges. Those elected as a result of the 2016 compromise (Hörchneré, Szabó M., Horváth, Schanda) are more loosely connected to the core.

The judges elected between 1999 and 2010 are between these two poles. Four judges nominated by the left-wing parties (Holló, Lévay, Kiss, and Bragyova) seem to form a very strong and very cohesive group. They published dissenting opinions quite frequently and often joined each other. Based on the dataset, we can also say that this core group was formed long before 2010, which means that party affiliation played a crucial role in their case before they strengthened their cooperation after 2010 to resist pressure from outside (constitutional majority in Parliament and the government) and inside (new judges elected by the right-wing majority). Justices Bihari and Kukorelli also joined this core group several times (although they have somewhat looser ties to this inner circle).

## **5.6 Policy areas in constitutional adjudication**

The previous sections have shown how the HCC can issue more or less restrictive rulings on legislation and how the strength and diversity of the rulings is related to the composition of the Court or the frequency of dissenting opinions. However, we know less about the substantive content of the cases under review. What policies dominate the Court's decision-making practice? What kinds of laws most often end up before the Court? To what extent is the strength of the rulings related to the policy area of the case under review?

In this part, we turn to a less-studied question of HCC activity by focusing on the relationship between the policy agendas of the Parliament and the HCC. While the performance of Kelsenian constitutional courts within the political system has become a popular research topic over the past two decades, we know little about their propensity for “judicial activism” in various policy areas. In contrast, scholars studying the US Supreme Court have written extensively not only about the court's precise function within the separation of powers system, but also about its agenda-setting practices in the policy-making process. (e.g. Black and Owens 2009; Lane and Black 2017).

By linking the policy agenda of the HCC and legislative majorities, we can assess the relationship between policies and trends in the strength of rulings. That is, analysing the agendas in light of the evidence obtained from examining the investigation of rulings reveals differences in the Court's adjudication

depending on the various policy areas with which the Court is concerned. For example, one might ask whether the HCC reviewed macroeconomic legislation of the left-wing and right-wing majorities with the same intensity, or whether the Court has more frequently reviewed laws affecting government operations after the institutional changes of 1989–1990 and 2010–2012.

Surely, Kelsenian constitutional courts might have some room for manoeuvre to refuse discussing cases on their merit: judges can postpone cases and deal with them only months or even years later (if there is no legal prescription for deadlines), they might review laws which have not been challenged by the petitioners (by referring to direct connections between legal issues), they might even “share” the case with transnational courts (like several European courts do by the preliminary reference procedure of the European Court of Justice) and get rid of the burden of decision. Nevertheless, the default position of the Kelsenian constitutional courts is that they must decide the cases submitted by petitioners, and they cannot cherry-pick among them. Thus, the policy profile of these courts is mainly determined by external actors. In this respect, the courts’ docket control and its agenda-setting ability are certainly limited. Even if we can have a general assessment on the policy area discussed by the Kelsenian courts, we have to admit that this profile will tell us more about the external political context and less about the court itself. Recognizing these limitations does not mean, however, that we cannot make a policy profile for the courts with different procedural rules as those of the US Supreme Court.

### *5.6.1 Identification of policy fields in HCC’s decisions*

In order to assess the policy agenda of the HCC, we use the research framework and outputs of the Comparative Agendas Project (CAP), which categorizes legislative acts according to 21 policy fields.<sup>1</sup> To be able to utilize the results of the CAP, we need to identify the specific legislative acts that are affected by the Court’s decisions, which lets us connect the rulings of the HCC to policy fields. With this method, we can measure and analyze which policy issues implicated stronger or weaker decisions of Hungarian Constitutional Court. By doing this, we will be able to map the courts’ impact on certain policy areas.

A ruling by the Court does not necessarily refer to a whole law but to one (or more) of its particular part (e.g. paragraph). That means that it is not necessarily the original law that is subjected to constitutional adjudication but its amendment possibly by a different law. This modifying or amending legislative activity is the one that needs to be paired to a specific court ruling. In the Hungarian practice, it occurs frequently that the part of a law under review was amended by several later pieces of legislation. In these cases, they need to

1 For the CAP project see: [www.cap.tk.hu/](http://www.cap.tk.hu/).

be considered one by one. Obviously, the last version of a law that was never amended is its originally adopted variant. Thus, the database of the related laws could be paired to CAP's "Laws (1790–2018) dataset", which applies a major and a subtopic code to each item that were integrated into the list of the disaggregated decisions by the court.<sup>2</sup>

From all this it follows that laws and constitutional court decisions do not necessarily overlap, as a ruling might concern several laws and a law might be reviewed by several HCC rulings. Thus, in this case, the basic unit of observation is not the ruling but a pair of a single ruling and a single law, a ruling-law connection (RLC).

It is important to note that this method of identifying policy fields necessarily excludes some rulings from the analysis. First, some rulings of the court cannot be connected to concrete legislative acts: omissions (i.e. the absence of a legislative act), constitutional interpretations *in abstracto*, or even some non-specific constitutional requirements. Second, due to the legal continuity during the democratic transition of Hungary, the early decisions of the HCC concern the legislative acts of the Communist regime, so they cannot be connected to any policy agendas of the democratic regime. Excluding these two ruling types, we have to deal with 1,015 majority rulings (out of the 1,476) of the HCC that can be connected to specific legislative acts, which results in 1,247 ruling-law connections (RLCs).

### 5.6.2 Policy agenda of the HCC

Given that the constitutional court's extraordinary power is originated (beyond its wide competences) in the institution of *actio popularis* (i.e. in the legal regulation that anybody without any personal involvement in the law to be reviewed is entitled to submit a petition to the court), we can rightly argue that all important issues have been discussed by the HCC sooner or later. There was no preselection bias as far as the court's docket is concerned – at least until 2012, when the institution of *actio popularis* was abolished by the new Fundamental Law of Hungary (Gárdos-Orosz 2012). Consequently, until 2012 the HCC served as a potential access point to all citizens eager to set the agenda of the HCC and, by this, influencing the Hungarian policy-making process. In this respect, we can argue that the cases brought before the court and decided by it on its merit, reflect more or less the policy preferences of the citizens – at least until 2012.

2 It should be added, however, that as *a priori* review is one of the competences of the Hungarian Constitutional Court some rulings missed laws to determine major and subtopic codes therefore these cases – concerning laws adopted by the parliament but not yet promulgated – were coded separately but also according to the CAP codebook. The authors are grateful to Csaba Molnár, member of the Hungarian CAP who coded these cases.

Keeping in mind this highly responsive character of the HCC, we are interested in the policy agenda of the HCC as compared to the agenda of the Hungarian Parliament, exploring the differences or similarities between the two institutions' agenda as far as their policy profiles are concerned. Theoretically, two different assumptions can be drawn from the citizens/parliament/constitutional court relations. On one hand, we could assume that courts might function as an extra access point for citizens who are discontent with the *inactivity* of the parliament and use another political institution to influence indirectly the agenda of the legislature. In this case, the policy agenda of the HCC and the Hungarian Parliament differ significantly due to the citizens' discontent with the inactivity of the representative body. On the other hand, we could also assume that citizens are following and reacting to the policy agenda of the Parliament, thus petitions submitted to the HCC will reflect the agenda of the Parliament. Since citizens concern and react to the legislative activity, the HCC serves as a further access point for citizens discontent with the *activity* of the Parliament. In this case, the policy agenda of the HCC will be more or less in line with that of the representative body.

As a first step of our analysis, we disclose the distribution of RLCs according to their policy fields. Figure 5.6 shows the distribution of policy fields in the legislation's agenda and in the HCC's agenda. There is a clear deviation from the uniform distribution of cases concerning both institutions' activity, but the HCC's RLCs deviated more radically from the uniform distribution

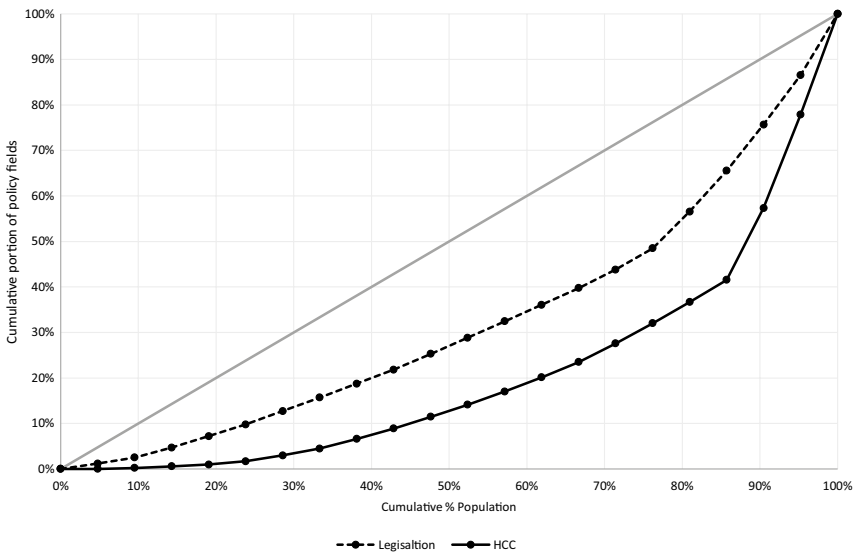


Figure 5.6 Distribution of RLCs among policy fields (HCC)

than the laws adopted by the Hungarian legislature. The Gini coefficient<sup>3</sup> is lower for the legislature's activity (0.35) than for the HCC (0.59) between the time period 1990 and 2020.

This means that the policy fields are not distributed equally in the legislature's agenda, but the inequality in the HCC's agenda is even higher. The Lorenz curve of the HCC suggests that there are three policy fields (out of the 21 policy areas) that consists of almost 60% of all RLCs.

Table 5.1 shows the distribution of RLCs among policy fields by electoral cycles.<sup>4</sup> Based on this data, the three top policy fields that are dominant in both the legislature's and HCC's agenda are *law and crime*, *macroeconomics*, and *government operations*.

The most surprising result is that the HCC reviewed a disproportionately high number of law- and crime-related laws in the 1998–2002 electoral cycle (49% of the examined laws were connected to this policy field). Based on the data, certain cyclical pattern of issue attention by the HCC can be detected, partly depending on whether left-wing or right-wing majorities adopted the legal regulation on this policy field. For example, the first Orbán government's (1998–2002) Criminal Procedural Code from 2000 became a central topic for the HCC even several years after its adoption, but laws of the second Orbán government (2010–2014) on this policy area shifted also into the focal point of the HCC's attention. Nevertheless, it is interesting that neither the new Criminal Code (Act C of 2012) nor the new Civil Code (Act V of 2013) adopted by the right-wing majority got much attention. Although both codes were heavily amended after 1990, they were originally adopted in the Communist era, thus experts agreed that adoption of a new Criminal Code and Civil Code was more or less a necessity. Perhaps this might also explain why these two significant codes have not been reviewed frequently by the HCC.

It is also striking that RLCs concerning macroeconomics of the right-wing government after 2010 almost disappeared from the cases, which means that the HCC reviewed only a handful of laws on the heavily debated, unorthodox economic measures of the Orbán government after 2010. This sudden drop in the number of RLCs concerning laws on macroeconomics is even more striking because macroeconomic was one of the most dominant topics of the HCC's agenda between 1990 and 2010. It seems to be logical that transformation from planned economics to capitalism required massive legislative activity, which has been several times challenged by citizens before the HCC. Table 5.1 shows, however, that macroeconomic laws of the right-wing governments (1998–2002 and cabinets since 2010) has been a significantly lower

3 The Gini coefficient is the ratio of the area that lies between the line of equal distribution and the Lorenz curve (see Figure 5.6.). A Gini coefficient of zero expresses perfect equality, while a Gini coefficient of 1 expresses maximal inequality among policy fields.

4 In our analysis, the RLCs are connected to electoral cycles according to the adoption of the law even if the court's decision was made under a following electoral cycle.

Table 5.1 Distribution of RLCs by electoral cycles (HCC)

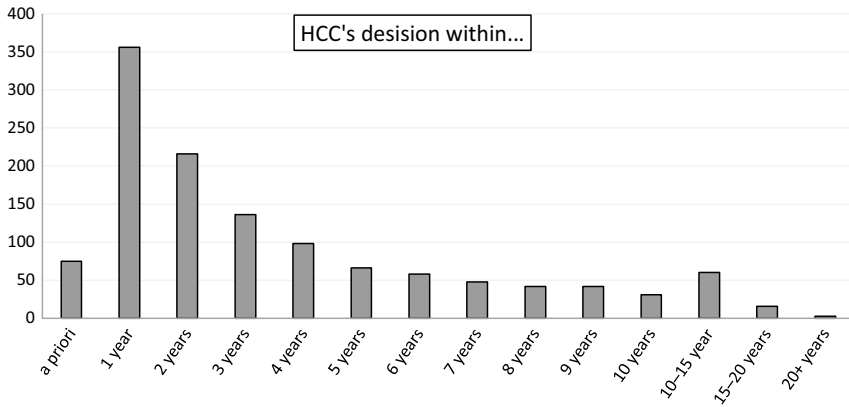
Policy field	Legislation (%) HCC (%) HCC (% by electoral cycles)									
	1990-1994	1994-1998	1998-2002	2002-2006	2006-2010	2010-2014	2014-2018	2018-2020		
Macroeconomics	11%	16%	11%	21%	23%	3%	8%	8%		
Civil rights	3%	5%	2%	3%	3%	9%	0%	0%		
Health	3%	4%	4%	7%	7%	2%	1%	4%		
Agriculture	4%	2%	1%	2%	1%	4%	0%	19%		
Labor	4%	4%	6%	3%	5%	2%	0%	4%		
Education	4%	2%	0%	4%	7%	2%	1%	0%		
Environment	3%	2%	2%	3%	2%	1%	1%	0%		
Energy	3%	0%	1%	1%	0%	1%	0%	0%		
Immigration	1%	0%	0%	0%	0%	0%	1%	8%		
Transportation	5%	1%	0%	3%	3%	0%	0%	0%		
Law and crime	10%	22%	49%	26%	12%	27%	16%	19%		
Social welfare	4%	4%	2%	4%	1%	3%	10%	0%		
Housing	2%	3%	2%	1%	0%	2%	8%	4%		
Domestic commerce	9%	5%	5%	2%	5%	11%	17%	0%		
Defence	4%	3%	4%	4%	3%	4%	0%	0%		
Technology	3%	3%	0%	2%	1%	7%	0%	0%		
Foreign trade	3%	0%	0%	0%	0%	0%	0%	0%		
International affairs	8%	1%	0%	4%	2%	1%	0%	0%		
Government operations	13%	21%	9%	7%	25%	21%	23%	31%		
Public lands	3%	3%	2%	1%	1%	0%	15%	4%		
Culture	1%	0%	0%	0%	0%	2%	0%	0%		
<b>Sum</b>	<b>100%</b>	<b>100%</b>	<b>100%</b>	<b>100%</b>	<b>100%</b>	<b>100%</b>	<b>100%</b>	<b>100%</b>	<b>100%</b>	<b>100%</b>
<b>N</b>	<b>4,759</b>	<b>1,247</b>	<b>162</b>	<b>137</b>	<b>132</b>	<b>187</b>	<b>93</b>	<b>26</b>		

share of the policy agenda of the HCC than those of the left-wing cabinets. One of the main policy areas which almost completely disappeared from the adjudicational practice of the HCC after 2010 was macroeconomics, which is all the more astonishing because the unorthodox economic policies of the second and third Orbán governments after 2010 have been heavily criticized by experts and economists. This radical transformation of the policy profile might be a consequence of at least three factors. By abolishing the unrestricted access to the court (*actio popularis*) in 2012, the number of potential applicants has been seriously limited, which might have functioned as a natural filter and led to a situation where crucial policy issues did not end up at the Court. Second, the shift in the dominant motion types from abstract review to individual constitutional complaints might also have an explanative power since the bulk of the cases after 2012 became reviews of ordinary courts' decisions (with less specific policy issues). Third, the transformation of the HCC from 2010 on which led to a Court almost exclusively packed with right-wing judges can also explain the changes.

It is less surprising that the first electoral cycle's laws (1990–1994) concerning the government operations dominated the policy agenda of both Parliament and HCC since the most fundamental issues of the democratic transition were related to the questions of how the government should work in a new democracy. The structural reforms of the left-wing Gyurcsány cabinet on government operation in 2006 and the reshuffle of the whole polity after 2010 are also reflected in the shift of the HCC's policy agenda, as Table 5.1 shows. Although the Parliament's activity on this policy field has not been increased after 2006, it concerned essential and politically highly salient issues. This saliency is reflected in the increasing attention of the HCC to the laws on government operation adopted in the electoral cycles from 2006 on.

As far as the laws of the 2014–2018 and 2018–2020 electoral cycles are concerned, we have to be careful with our conclusions, since the number of cases is significantly lower than in any other group of RLCs. One reason for this might be that these acts are the most recent laws, while another one reflects the institutional changes: once again the abolishment of the *actio popularis* and the shift in the main activity of the HCC from the abstract to the concrete norm control might played an important role in the decreasing number of RLCs of this time period.

If we compare the activity of the Hungarian Parliament with that of the HCC from the perspective of the policy agenda, the general picture is rather mixed. As the Lorenz curve showed, the distribution of policy fields is more uniform in the case of the Hungarian Parliament, but it is also evident that the main policy areas of the HCC's activity overlap with those of Parliament (law and crime, government operations, macroeconomics). There is a difference in proportion and accent although, as the three topics covered 59% of all cases of the HCC but only 34% of the Parliament. This means that the HCC rather followed the policy agenda of the Hungarian Parliament and focused on similar policy areas with slightly different accents. Consequently, we can argue



*Figure 5.7* Time-leg between the promulgation of the law and the decision of the HCC

that citizens were more or less content with the policy agenda of the Parliament and have not used the HCC as an extra access point to fill some gaps in the policy agenda of the representative body. Citizens and, consequently, the HCC rather focused on the top three policy areas of the Parliament, which means that citizens were rather discontent with recent regulatory activities of the Parliament (and not with its inactivity).

Connecting the majority rulings of the HCC with adopted laws of the Parliament also highlights the asynchrony between the two institutions, due to the HCC's decision-making practice.<sup>5</sup> As Figure 5.7 shows, it is not unusual that the HCC decides on a case years after the law was adopted by the Parliament. The HCC decided more than one year after the adoption of the law in ca. two-thirds of the cases, and more than two years after the adoption of the law in ca. half of the cases. On average, it took 3.5 years for the HCC to take a decision on a law, which might have been caused by late-coming petitions as well as by the postponed decision-making of the HCC. This means that several times the time-leg between the parliamentary activity and the HCC's decision on the law was quite big, i.e. the asynchrony is significant.

### *5.6.3 The political leaning of the court in case of the dominant policy fields*

While the analysis of the (somewhat diverging) policy agendas of the Court and the legislature showed that constitutional adjudication and party politics are to some extent and in an indirect way interrelated, this section goes one step

<sup>5</sup> Although this asynchrony could be avoided by analysing the activities of both institutions in the same moment or time period, this would distort the picture, since both institutions might consider different laws (even from different electoral cycles) belonging to the same policy areas.

further and examines whether there are specific policy fields in which the political affiliation of the Court’s majority have a crucial role in the judicial decision-making process. To answer this question, we apply the slightly modified version of the attitudinal model of judicial behaviour to the Hungarian case and combine it with the data of the policy agenda analysis.

According to the attitudinal model of judicial behaviour, judges will seek to include their policy preferences into their decisions (which is in line with the majority of the court) or, if they disagree with the majority, into their dissenting opinions. Although the original version of this attitudinal model was elaborated in American political science to analyze US Supreme Court justices (Segal and Spaeth 2002), a slightly modified version cross-fertilized with the external strategist model of judicial behaviour has already been applied to European constitutional courts as well (Kantorowicz and Garoupa 2016). Since we are able to determine the political affiliation of the Hungarian judges (i.e. we can disclose which parties nominated them), we can identify the “political” majority of the court in any given moment. Furthermore, we can clearly identify the parliamentary majority which adopted a law. Thus, combining the political affiliation of the court and the “affiliation” of laws under review, we can examine whether judges took into consideration their own political affiliation during the decision-making process.

Here we simply assume that there will be a pattern in the decisions of the HCC on the dominant policy fields: the Court’s right-wing majority will take weaker decisions on laws adopted by right-wing parliamentary majorities and stronger decisions on laws adopted by left-wing parliamentary majorities, while the court’s left-wing majority will take weaker decisions on laws adopted by left-wing parliamentary majorities and stronger decisions on laws adopted by right-wing parliamentary majorities.

Table 5.2 shows that our expectancy on political leaning has been mostly disproved by the data. It is astonishing that left-wing court majorities

*Table 5.2* Modified attitudinal model of judicial behaviour by dominant policy fields (HCC)

		<i>Right-wing majority (HCC)</i>	<i>Left-wing majority (HCC)</i>	<i>No majority (HCC)</i>
<b>Right-wing cabinet</b>	Macroeconomics	1.88	2.50	3.08
	Law and crime	2.60	3.16	2.66
	Government operations	2.06	2.31	2.33
<b>Left-wing cabinet</b>	Macroeconomics	1.75	3.83	3.79
	Law and crime	2.25	3.27	4.20
	Government operations	4.05	2.44	2.55
<b>Difference (RW-LW)</b>	Macroeconomics	0.13	-1.33	
	Law and crime	0.35	-0.10	
	Government operations	-1.99*	-0.14	

constrained the *macroeconomic* policies of the left-wing cabinets (3.83) more heavily than right-wing cabinets' economic policies (2.50), and clearly more than right-wing Court majority in any cabinets. This result of judicial activism of the left-wing judges on the macroeconomic policy field also disapproves our assumption and shows that left-wing judges played a crucial role in obstructing the implementation of the economic policies of left-wing cabinets. Consequently, the modified version of the attitudinal model does not fit left-wing judges when it comes to macroeconomic issues. Furthermore, right-wing court majorities showed a completely different face of the Court on the same policy field: majorities dominated by right-wing judges were absolutely reserved if it came to economic issues and constrained very slightly any cabinets (1.88 and 1.75). This clear and consistent divergence between right-wing and left-wing majorities of the Court indicates that in macroeconomic issues, the political affiliation of the judges did not play a crucial role in their considerations and decisions.

This is, however, certainly not true when it comes to issues on *government operations*. Here, we have a different finding in so far as right-wing majorities of the HCC seemed to be sensitive to their political affiliations and constrained more the left-wing cabinets in this policy field than right-wing cabinets. Since left-wing court majorities' performance was more or less consistent in this policy field (2.31 and 2.44), and, furthermore, since we cannot detect huge differences in their rulings' strength depending on which cabinets' *law and crime* policies have been reviewed either, we can conclude that it was rather *exceptional* (but not unprecedented) that court majorities took their political affiliations into consideration.

## 5.7 Conclusions

The Hungarian Constitutional Court was established early during the democratic transition and began its work as a particularly strong institution within the system of separation of powers. The Court's judges were able to draw on broad competencies, but the role of the constitutional adjudication in Hungary cannot be explained solely in terms of formal powers and position within the institutional framework. Focusing on the relationship between the Court and the legislature through the strength of the HCC's rulings (and their relationship to dissenting opinions or policies) sheds light on the dynamic interaction that substantiates the formal framework. Of course, it is also important to see that the HCC was subject to changes in the political environment, which eventually affected the position of the institution within the polity.

As for the role of the HCC, there are two trends, two major changes to note in our analysis. The first concerns the changes in the constitutional status and the competences of the court. As discussed, while the Court's powers remained broad, the post-2010 restrictions resulted in a different institution. To be sure, the HCC is no longer the same counterweight to the legislature that it was in the 1990s. As it was seen, it may either exercise limited

constitutional adjudication or engage in a shift in function that is more relevant to the judicial system than to the polity as a whole. Such a shift, however, cannot be attributed solely to a change in formal rules, competences, or even the replacement of the Constitution with the Fundamental Law.

The political environment also had a significant impact on the Court. As our analysis has shown, this began, at least in part, before 2010. First, the HCC gradually lost its image as a nonpartisan institution that could rise above highly politicized institutions such as the Parliament due of its position as a non-political arbitration body. Of course, the Court's members have always been appointed by the parties. Since the late 1990s, however, political actors have become accustomed to the existence of such an institution, and, paradoxically, they have contributed to the polarization of the Court precisely through a series of compromises with which they have chosen the new judges, more specifically through the way the seats seem to be divided among the parties. In addition, Fidesz has been able to appoint judges almost continuously since 2010 without compromising with the opposition, thus contributing to the politicization of the Court on another level. The result has been a decline in the ruling strength but, more tellingly, a surge in dissenting opinions.

Overall, constitutional adjudication has undergone a fundamental transformation. From an institution that was supposed to check parliamentary sovereignty, it has transformed into a politicized and polarized, but at the same time much less powerful, institution whose functioning depends directly on the political environment. Whatever conceptual framework one uses to compare the performance of the post-transition Hungarian polity with the trends from 2010 onward – populism, democratic backsliding, hybridization, autocratization, etc. – it is certain that the Hungarian Constitutional Court is engaged in a very different practice of constitutional adjudication, which is more dependent on direct political influences than in the early 1990s.

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