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Chapter 12

Central and Eastern European constitutional courts in comparative perspective 1990–2020

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12.1 Introduction

What does the big picture of constitutional adjudication in CEE between 1990 and 2020 look like? This is certainly the question that has come to the reader's mind as he or she has begun reading this volume with the first chapter and continued with the country studies. While answering such a profound and fundamental question should certainly be the task of a comparative study, we do not think we can really live up to such expectations simply because there are so many aspects that could and should be analysed that a concluding chapter can only select a few basic questions and make a first attempt to answer them. Consequently, we have deliberately narrowed the scope of this chapter to a few pressing questions, and, at the same time, we want to emphasize that in-depth qualitative and sophisticated quantitative analysis is desperately needed to provide a more comprehensive picture of judicial behaviour and judicial-legislative relations in Europe.

While the JUDICON-EU research project formulated two aims, mapping the diversity and strength of judicial decisions, the results of the coding process present only one side of the story. The original data created by the project can answer the question as to what extent judicial decisions constrained the room for manoeuvre of the legislation. Nevertheless, it is only one way to approach judicial-legislative relations by focusing on the constraint exerted *by* the courts *on* the legislatures. The other side of the story tells us which factors might have influenced courts and judges in taking strong or weak decisions. While there are several theoretical models which try to explain judicial behaviour and, indirectly, the strength of judicial decisions, here we will focus only on some selected models and summarize the main findings of the country studies in this respect. Keeping in mind these limitations, we will focus on three basic factors which can explain judicial behaviour and ruling strength after presenting descriptive statistics on the diversity and strength of the courts' rulings in Europe.

While *institutional design* can create a powerful court, securing the potential of highly restrictive rulings *vis-à-vis* the legislator, sometimes these formal powers do not reflect the court's actual power. For various reasons, courts

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simply do not want to, or are unable to, exercise the powers granted them. By contrast, other courts have not been vested with very forceful tools to control legislatures, yet they have either been able to empower themselves to exert control on elected politicians or have creatively used the formal tools available, sometimes causing serious turmoil in the political sphere. In addition to institutional design, the *political context* is usually considered a crucial factor in explaining judicial behaviour and judicial-legislative relations. In this regard, our research project also yielded mixed results. A third explanatory factor, *event-related variables* (such as democratic transformation or financial crisis), also did not prove to be crucial in all circumstances. After the democratic transformation or the financial crisis, courts chose different strategies. Some severely constrained the legislature immediately after the democratic transformation process or became guardians of social rights (in the context of austerity measures), while others held back and did not participate in either consolidating democracy or pushing back against austerity measures of the governments.

In what follows, we first provide a comparative overview of the JUDICON-EU dataset at a very basic level (Section 12.2). The descriptive statistics presented here can serve as a starting point for formulating various hypotheses for future research. In addition, it provides an overview of how (if at all) institutional design, political context, or various social/political events influenced the strength of judicial decisions and the propensity of judges to publish dissenting opinions (when they were entitled to do so).

With regard to *institutional design*, Section 12.3 examines whether the power to overturn court decisions, the institution of *actio popularis*, or the relatively narrow circle of potential petitioners, voting quorums, and supermajority requirements have an impact on the strength of the courts' decisions, but also whether different types of procedures (*a priori* and *a posteriori*) have an impact on the type of obstacles imposed on the legislature by the court. The competence to review constitutional amendments and various instances of competence creeping by acts of self-empowerment would suggest that courts engaged in expanding their scope of action are activist in the sense that they constrain the lawmakers more heavily. While the previous chapters have already reflected on these questions at country level, Section 12.3 puts the findings in a comparative perspective.

Regarding the *political context*, Section 12.4 summarizes the main findings of the country studies, focusing on whether political fragmentation, political instability, judges' political affiliation, or changes in government had an impact on the courts' decisions. While the widely held hypothesis is that political fragmentation paves the way for judicial interference and means that courts are more willing to constrain legislatures than in the case of a more homogeneous or bipartisan political landscape, analysis of the performance of European constitutional courts from this perspective has shown that the political context alone does not explain the strength of judicial decisions. Some courts are more inclined to interfere and strike down laws when the political landscape is more fragmented, but we also have examples that show that other factors besides

political fragmentation can have a more profound influence on judges' minds when deciding mega-political issues or even relatively simple cases. It is also not so obvious that judges' political affiliation or a change in government is a crucial element in the judicial decision-making process. While the election of judges appears to be a thoroughly politicized process in several countries, judges have repeatedly disappointed their nominating parties.

Section 12.5 examines whether courts took a leading role in *democratic consolidation processes* by severely limiting the room for manoeuvre of parliamentary majorities and how they behaved *in times of austerity measures* in the wake of the 2008–2009 financial crisis. As for the thesis of democratic consolidation, legal scholars have formulated two contradictory hypotheses: drawing on the experience of the backlash against the Russian Constitutional Court in the early 1990s (Epstein, Knight, and Shvetsova 2001), several scholars argued that courts should be cautious about constraining political actors too much after democratic transformation processes. Instead, they should first build up their authority to be respected by the electorate, which could protect them from political backlash from the political elite. The implication (or normative expectation) of this hypothesis is that courts should not constrain the legislature too heavily after the democratic transformation process. By contrast, another hypothesis states that constitutional courts play (or should play) a crucial role in democratic transformation and consolidation, which would imply that courts should be strong in terms of both their formal power and their actual performance. Courts are set up to constrain political actors, and since the political landscape in new democracies generally lacks a tradition of self-restraint, courts should set limits on politicians' aspirations. This thesis implies that courts take strong decisions and constrain legislators very heavily directly after the democratic transformation process. The country studies in this volume and the following analysis have shown that the story is more complicated, and we cannot find indisputable arguments and irrefutable results that confirm or refute the first or the second hypothesis. The same is true for a second, event-related variable, the economic crisis and its well-known effects of austerity measures. Some courts became ardent guardians of social rights, while others displayed passive virtues by giving legislators more leeway to deal with the financial and economic crisis.

Section 12.6 puts the judges' dissenting opinions in comparative perspective. It examines the strategies chosen by the judges after the democratic transformation processes, whether they wanted to strengthen the authority of the court by holding back on publishing dissenting opinions and creating the image of a unified court or whether they tended to behave in a more individualistic manner and did not really care about the interests of the institutions. In addition, this section also takes a look at dissenting coalitions and summarizes the main findings of the country studies on the effects of party affiliation on dissenting coalitions. But before we turn to these explanatory variables, let us turn to the basic statistics on court performance!

12.2 Courts by numbers

The country experts of the JUDICON-EU project identified more than 15,000 constitutional court decisions that fall within the scope of the study (Table 12.1).[1] These decisions were broken down into nearly 25,000 rulings handed down by court majorities. In some countries, such as Ireland and Germany, courts issued fewer than 10 decisions per year. Although there are some institutional features that could explain the differences between countries (e.g. the fewest decisions per year were issued in countries with a decentralized judicial system in Cyprus and Ireland), the results are rather mixed. It seems that the total number of decisions is higher in Western Europe than in Central and Eastern Europe, but it is worth noting that in most Eastern European countries constitutional courts were established only two to three years after the beginning of the period under scrutiny (i.e. 1990). With this in mind, the courts in the two groups of countries have about the same activity when looking at the sheer number of decisions (WE countries: 27.2 decisions per year; CEE countries: 29.1 decisions per year).

Table 12.1 Number of decisions, rulings, and dissenting opinions (all countries)

	Country	*No. of decisions*	*No. of rulings*	*Rulings with at least one dissenting opinion*	*No. of rulings in dissenting opinions*
Western Europe	**AUS**	841	956	0	0
	BEL	733	2,518	0	0
	CYP	82	129	37	124
	FRA	1,230	2,851	0	0
	GER	254	334	21	35
	IRL	216	250	2	3
	ITA	3,233	4,857	0	0
	POR	234	343	166	504
	SPN	771	1,128	314	754
Central and Eastern Europe	**CRO**	808	896	70	106
	CZH	361	437	167	478
	EST	190	207	77	297
	HUN	747	1,476	449	1,154
	LAT	244	337	46	81
	LIT	305	872	43	51
	POL	1,337	2,460	398	714
	ROM	3,148	3,330	219	436
	SLK	204	309	109	196
	SLN	799	1,055	161	285
SUM		15,737	24,745	2,279	5,218

1 The descriptive statistics in this section cover all countries and are identical to Section 11.2 of the twin volume Kálmán Pócza (ed): *Constitutional review in Western Europe. Judicial-legislative relations between 1990–2020* (London/New York: Routledge, 2024).

In terms of the average strength of rulings, courts have constrained legislatures in relatively different ways (Figure 12.1). As with the number of decisions and rulings, the West-East divide appears to have limited explanatory power, with countries from both groups at either end of the scale. Of course, it would be foolish to claim that courts with roughly the same score have the same profile. Country studies of this volume also make clear that these numbers may mask different, country-specific contextual factors. For example, both Romania and Ireland are at the lower end of the scale, but for different reasons. In Romania, the institutional framework shapes the way the Romanian Constitutional Court operates. As there is no preliminary screening mechanism to filter petitions, the proportion of rejections is quite high, which gives a distorted picture of the relative power of the court (Chapter 9). The low strength value of Ireland, on the other hand, can be explained more by political and cultural factors. While the provisions of the Irish Constitution have an indirect (and reverse) effect on the propensity of the apex courts to strike down legislation, the Irish judiciary has also adopted a self-imposed principle of restraint and deference. Finally, Irish party politics (with two parties that do not differ heavily in their policies and with a low degree of polarization) also leads to a lack of political partisanship in judicial decision-making (Chapter 7 of the twin volume).[2]

At the other end of the scale, both the Cypriot and Estonian courts exert strong restraint on legislators but, once again, for different reasons. In Cyprus, many laws that the President of the Republic submits to the Supreme Court for preliminary review are completely annulled, meaning that the entire law is declared unconstitutional, not just part of it. However, a closer look at these cases reveals that these unconstitutionality decisions review laws that include only a single paragraph, and they merely amend a previous law (Chapter 4 of the twin volume).[3] Therefore, following the methodology of JUDICON-EU project, they were coded as complete annulments, even if the laws contained only a single paragraph.

On the other hand, to understand Estonia's position on this scale, we need to consider the procedural design of the judiciary. In Estonia, there are several review mechanisms that filter cases before they reach the Constitutional Review Chamber of the Estonian Supreme Court, making judicial review of legislative acts only an "ultima ratio" instance. Moreover, norm control proceedings can only be initiated by a limited group of state institutions, which indirectly affects the number and quality of petitions. Few petitioners submitting high-quality petitions often result in a finding of unconstitutionality by the Estonian Supreme Court (Chapter 4). These examples show that the

2 Kálmán Pócza (ed): Constitutional review in Western Europe. Judicial-legislative relations between 1990–2020 (London/New York: Routledge, 2024).

3 Kálmán Pócza (ed): Constitutional review in Western Europe. Judicial-legislative relations between 1990–2020 (London/New York: Routledge, 2024).

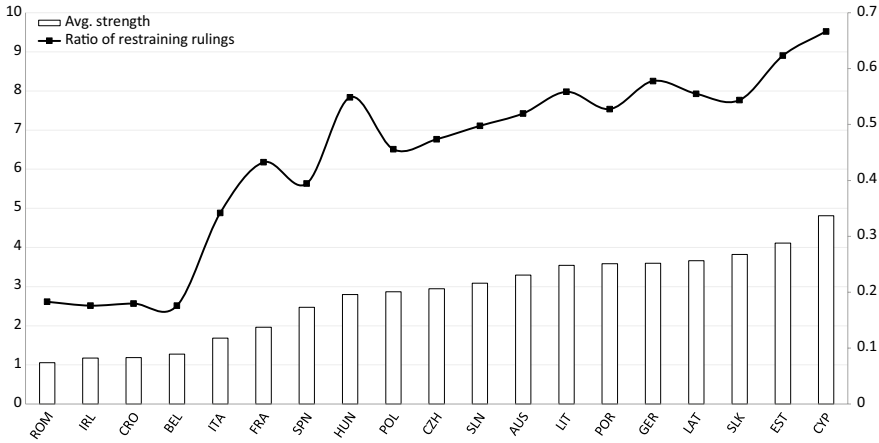

Figure 12.1 Average strength and proportion of restraining rulings (CEE)

quantitative analysis of the JUDICON-EU project can rather serve as a framework for a qualitative analysis that can be used to explore the contextual differences behind the similarities.

Figure 12.1 shows that the proportion of restrictive rulings more or less follows the trend of average strength scores. Nevertheless, there are at least two outliers: both France and Hungary are above the trend line because their constitutional courts tend to use softer restrictive rulings (constitutional requirements, omissions, and procedural unconstitutionalities), so while these courts are activist in the sense that they issue non-zero (restrictive) rulings quite frequently, the softer instruments they use keep the overall strength of their rulings lower. Both courts constrain the legislature relatively frequently but in a more generous way that gives the legislature more room to manoeuvre.

Looking at the performance of the courts longitudinally, the annual average of ruling strength shows a clear difference between the Eastern and Western blocs (Figure 12.2). The early years of the Central and Eastern European courts can be characterized with stronger rulings, although it must be emphasized that the constitutional courts were active in only two countries (Hungary and Slovenia) in 1990–1991, and the high restraint resulted from only a few rulings. In any case, the courts of the Central and Eastern European countries tended to issue more restrictive rulings (with the exception of countries with consistently weak rulings, such as Romania) in the first decade.

Regarding the diversity of rulings, Figure 12.3 shows the aggregate proportion of the two predominant types of provisions by country – that is, substantive unconstitutionality and rejection in each country. The figure shows that the original hypothesis of the JUDICON-EU project, that constitutional adjudication in Europe is more diverse than a dichotomous striking down/upholding of the reviewed laws, can only be partially confirmed. Most

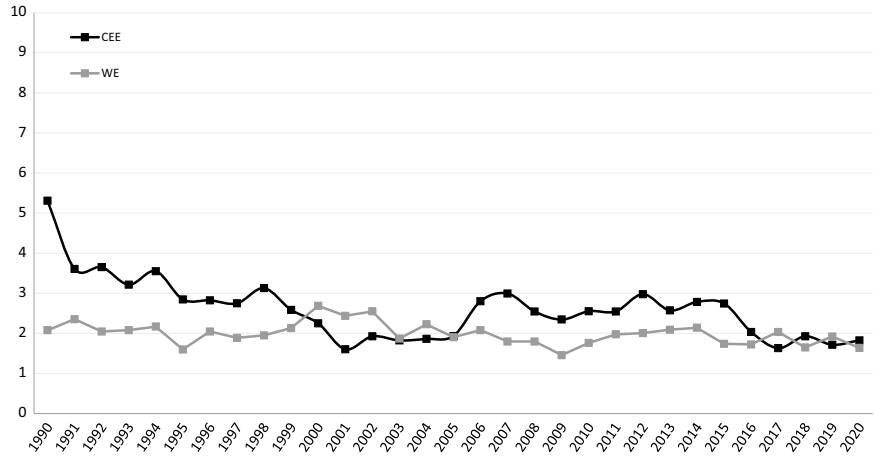

Figure 12.2 Average strength of rulings (CEE vs. WE)

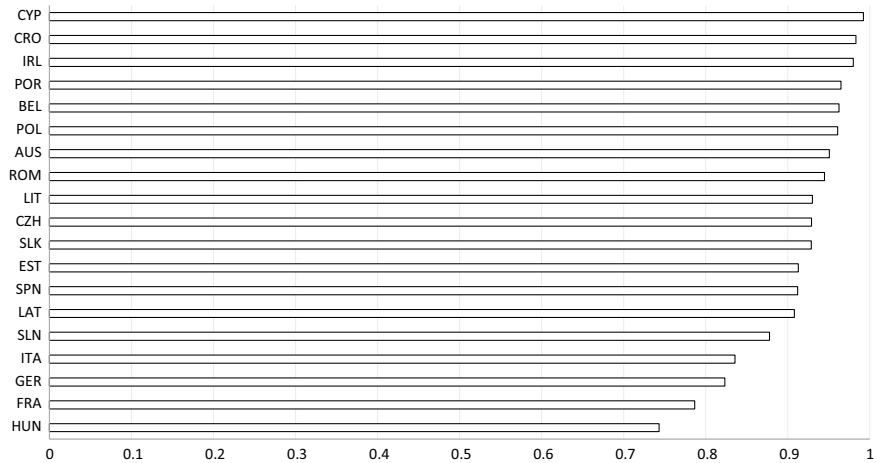

Figure 12.3 Cumulative ratio of the two most frequent provision types (REJ + SUBST)

countries have adhered well to the dichotomous approach, i.e. almost every ruling of the courts falls into either the category of rejection or substantive unconstitutionality. Across Europe, there are only a few examples where constitutional courts use a more colourful set of tools, such as in Italy, Germany, France, and Hungary. Several countries even prohibit declaring a particular type of provision, but most courts, which could theoretically choose from a wide range of provisions, tend to use only substantive unconstitutionality or rejections.

A breakdown of provision types (Figure 12.4) shows that in countries that rarely use provisions other than rejections and substantive unconstitutionalities,

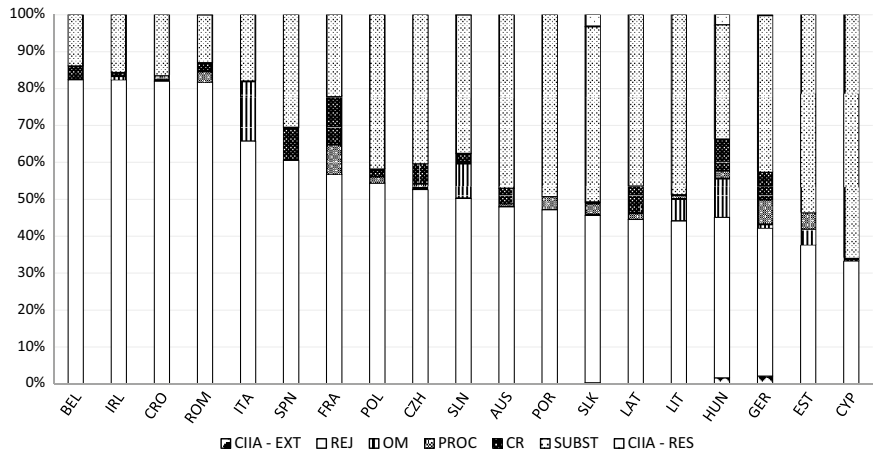

Figure 12.4 Frequency of ruling types (all countries)

differences are found depending on whether the former or the latter are predominant. In a few countries with greater diversity, constitutional courts tend to use a third type of provision in addition to the two dominant types – usually either an omission (in Italy and Slovenia) or a constitutional requirement (in Spain, Czechia, Austria, and Latvia). The use of more than three types of provisions is characteristic of only a handful of countries (France, Germany, Hungary).

Finally, as far as dissenting opinions are concerned, there is a clear difference between Western and Eastern European countries. First of all, there are Western countries where constitutional judges are explicitly forbidden to publish a dissenting opinion (Austria, Belgium, France, Italy), while there are no (or no longer) such restrictions in any Central and Eastern European countries. But even if we exclude the countries where it is not possible to express a dissenting opinion, the number of rulings with dissenting opinions seems to be much higher in Central and Eastern European countries (Figure 12.5).

However, when numbers in Figure 12.5 are broken down by country, it becomes apparent that neither group of countries can be considered coherent (Table 12.2). Among the Western European countries, a gap can be observed between the "Mediterranean" and the "Northern" countries. The proportion of rulings with dissenting opinions is quite low in Ireland and Germany, while in the Mediterranean countries (Spain, Cyprus, and Portugal) at least a quarter of rulings have dissenting opinions. The fact that Spain and Portugal perform similarly to the countries of CEE in terms of the number and proportion of dissenting opinions could be partly explained by their past, as both countries experienced a democratic transition in the 1970s. The cases of Cyprus and Ireland show that the political context of the countries is sometimes more important than the institutional framework of the courts (e.g. both the Irish

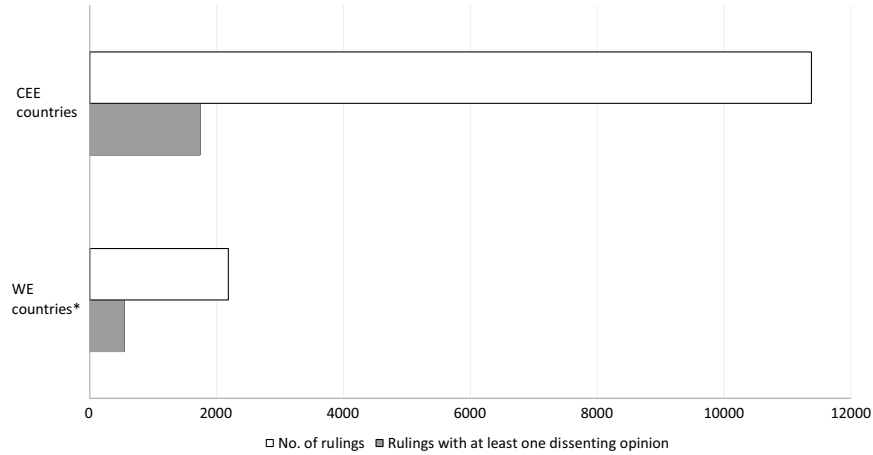

Figure 12.5 Rulings with at least one dissenting opinion (CEE vs. WE)

Table 12.2 Proportion of rulings with at least one dissenting opinion (all countries)

	Country	*Proportion of rulings with at least one dissenting opinion (%)*
WE countries*	IRL	0.8%
	GER	6.3%
	SPN	27.8%
	CYP	28.7%
	POR	48.4%
CEE countries	LIT	4.9%
	ROM	6.6%
	CRO	7.8%
	LAT	13.6%
	SLN	15.3%
	POL	16.2%
	HUN	30.4%
	SLK	35.3%
	EST	37.2%
	CZH	38.2%

* Countries where judicial dissent is forbidden are excluded.

and Cypriot judiciaries operate under a decentralized judicial system but show very different approaches to dissent).

Among Central and Eastern European countries, the establishment of the new political systems in the 1990s clearly affected the behaviour of the courts in terms of dissents. In most countries, judges were reluctant to attach dissenting opinions to majority rulings in the early period after the democratic transition. The reason for this is probably to be found in an institutional strategy based on uniform decision-making to build and protect the reputation of the

newly created institution. Moreover, attaching dissenting opinions to majority rulings was explicitly forbidden in Slovakia and Lithuania until 2000 and 2008 (respectively). As with average strength, it appears that the frequency of dissents can be explained by a variety of reasons. Based on the country studies in this volume, differences across countries can be attributed to factors such as institutional settings, court strategy, political context, or even personal characteristics (for a more detailed analysis of the CEE region in this respect, see Section 12.6).

12.3 Institutional design

The subject of descriptive statistics in itself is of interest in a comparative research project, as the comparative data helps to formulate new research questions while answering some others. Nonetheless, the data from the JUDICON-EU project also inspired the project participants, and we asked them to try to provide a first approximate answer to several questions about judicial behaviour. As noted in the introduction, most authors refer to three explanatory models of judicial behaviour and provide detailed reflections on whether *institutional design*, *political context*, or *event-related factors* might have influenced judges in their highly restrictive or, conversely, highly lenient decisions.

To start with, a crucial aspect to consider in our analysis is the influence of the institutional settings on the strength of judicial decisions. Several theories point to the potential explanatory power of some institutional variables on judicial behaviour and the strength of rulings (Bumin 2017; Gardbaum 2018). At first glance, overriding mechanism, a small set of actors with the right to initiate review process, would imply that judicial decisions are more likely to be deferential. Contrary to expectations, country studies in this volume have refuted these assumptions. On the other hand, jurisdiction to review constitutional amendments, the initiation of review processes *ex officio*, or a broad range of actors who can file a petition would mean that courts will make very restrictive decisions. Again, these expectations have been refuted by the country studies in this volume. Nevertheless, there are other types of institutional constraints that appear to strongly influence court performance: a high voting quorum at the court or the type of the review process (*a priori* or *a posteriori*) obviously had an impact on the strength of the Czech and Romanian judges' decisions. Let us start with the latter examples and continue with counterexamples showing that institutional arrangements have a rather limited impact on the strength of court decisions.

12.3.1 Voting quorum and the type of review process

In the case of the Czech Republic, the presence of a high voting quorum and supermajority requirements in court proceedings leads to a dense combination of procedural constraints. These constraints result in the frequent inability of the Czech Constitutional Court (CzCC) to render rulings on sensitive

political and social issues. A supermajority of nine votes is required for a finding of substantive unconstitutionality; therefore, it is much more difficult to obtain a vote on substantive unconstitutionality than it is to reject a case or declare a constitutional requirement. As a result, activist judges in the Czech Republic have turned to a less direct approach, relying on declaring constitutional requirements, a trend that has been vaguely evident since 1995 and in full effect since 2012. This shift can be seen as a reaction to the constraints imposed by the high voting quorum and supermajority requirements. It should be also stressed that judges of the CzCC are reluctant to challenge the Parliament with claims of unconstitutionality by legislative omission. Notably, legal scholarship in the Czech Republic tends to consider such claims as a highly assertive judicial attempt of positive legislation (Chapter 3).

Another example of institutional design playing a role is the Romanian practice of constitutional adjudication and the difference between an *a priori* and an *a posteriori* review process. Romania uniquely distinguishes between *a priori* and *a posteriori* procedures in terms of the average strength of their outcomes. The Romanian Constitutional Court (RCC) is more inclined to restrain legislative attempts in *a priori* procedures. Although *a priori* proceedings represent only a small portion of the RCC's total case law, they have a remarkably high success rate compared to the results of *a posteriori* review proceedings. Examining the entire data set on the RCC, we notice that *a priori* review rulings have an average strength of 2.59, while *a posteriori* review rulings have a much lower average strength of 0.79. This discrepancy suggests that *a priori* review rulings tend to be more controversial, resulting in a higher number of dissenting opinions compared to *a posteriori* review rulings. The relative rate of petitions for *a priori* review (and also their success rate) is highest during periods of low political stability. In politically stable times, RCC's rulings tend to be weaker, while in times of instability they are stronger. However, these conclusions seem to apply only to decisions under *a priori* review. It appears that political stability may explain the trends in the restraining nature of *a priori* review rulings, but it is not sufficient to explain the trends in *a posteriori* review rulings. One explanation for this trend may be that the RCC appears to leave more room for political and ideological considerations in the *a priori* process, leading to a decline in the average strength of such rulings during periods of relative stability, while the *a posteriori* review process leaves more room for a judicial approach (Chapter 9).

12.3.2 Overriding mechanisms

Continuing with examples that show that institutional factors can have rather *limited* explanatory power, we turn to the case of overriding mechanisms.

In the case of Poland, the analysis reveals that the competence of the Parliament to overrule decisions of unconstitutionality made by the Polish Constitutional Tribunal (PCT) did not significantly impede the court's powers between 1986 and 1999. Although the lower chamber of the Parliament (*Sejm*) did

in fact overrule 11 decisions of the PCT (at times only partially), accounting for 11.3% of all decisions declaring statutes unconstitutional of the given time period, the impact and constitutional significance of these overrides are debatable. The Parliament's approach to the overriding mechanism did not suggest a long-standing institutional conflict concerning the court's influence or its position in the political and constitutional system. This implies that, in practice, the formal limitation on the PCT's powers inscribed in the constitutional framework was found to be of lower significance (Chapter 8).

In the case of Romania, the 2003 constitutional amendment first made the rulings of the Romanian Constitutional Court generally binding with respect to both *a priori* and *a posteriori* constitutional review, effectively eliminating the legislator's ability to override. However, this legislative competence, which can only be exercised by a qualified majority, was never used in practice until 2003. Parliament did, however, retain a strategic "trump card" to compensate for the limited power of overriding the RCC's decisions. By amending the constitutional article on the court's jurisdiction, the legislature added the provision "other duties stipulated by the organic law of the Court", which still gives the legislature a degree of control over the court's jurisdiction and empowers it to amend and expand the court's powers. In practice, this legislative control was evident in the exercise of this power in 2010, when the organic law of the RCC was revised. But again, as in the case of Poland, overriding power does not affect the strength of judicial decisions (Chapter 9).

12.3.3 Access to courts

The institution of *actio popularis* existed exclusively in Hungary, which is why the Hungarian Constitutional Court was often considered institutionally strong, although in practice it did not make consistently restrictive rulings (Chapter 5). In other countries, the circle of petitioners has been narrower. The question arises as to whether the limited number of petitioners or the broader accessibility can provide an explanation for the more restrictive or permissive attitude of the courts.

While the restriction of the circle of petitioners can, according to a certain view, weaken constitutional court decisions, in the case of Estonia it leads to one of the most stringent practices of constitutional review (Chapter 4). In contrast, in Hungary, where access to the HCC was much broader (*actio popularis*), the court did not consistently make very restrictive decisions. In Estonia, the initiation of norm control proceedings is limited to a select group of state actors. It can be inferred from this that the total number of proceedings initiated is relatively low, as applicants to the review process carefully consider the likelihood of success before filing an application. This circumstance potentially contributes to the strength of court decisions, as petitions go through a rigorous filtering process. Moreover, the combination of limited types of proceedings and a narrow group of potential petitioners further reduces the likelihood of an unsuccessful constitutional review in Estonia (Chapter 4).

However, the ruling strength of the Latvian Constitutional Court (LaCC) shows a different pattern: when the circle of petitioners was expanded by an amendment in 2001, this resulted in significantly more restrictive rulings, showing that limiting the circle of potential petitioners can actually increase the strength of judicial decisions (Chapter 6), while *actio popularis* does not necessarily mean that the court meets expectations and constrains the legislature more heavily (Chapter 5). Again, the comparative research shows mixed results and suggests that further (qualitative) research is needed to determine under what conditions courts are more likely to make restrictive rulings against legislators.

The thesis that institutional design alone does not imply a strong court is further supported by the example of the Croatian Constitutional Court (CrCC). The CrCC can not only be invoked through a limited *actio popularis* process, but the court has even the right to initiate constitutional review process *ex officio*. Limited *actio popularis* means that while any natural or legal person may initiate the review process, the Croatian Constitutional Court can decide whether to accept the petition and proceed. Moreover, the CrCC also has the power to initiate procedure and to review the constitutionality of a law *ex officio*. Nevertheless, the CrCC has apparently shown self-restraint and exercised this right only three times, which shows a restrictive interpretation of its own competence, since it preferred that the petition came from another actor. It is noteworthy that in the cases where the CrCC initiated the review process *ex officio*, this always resulted in a partial annulment of the law for substantive unconstitutionality. When the possibility of *ex officio* initiation was introduced in 2002, concerns were raised that the CrCC might assume a legislative role and interfere in political matters that fall within the competence of Parliament. In contrast to these fears, however, statistics from the JUDICON-EU dataset show a rather restrained attitude on the part of Croatian judges (Chapter 2).

In summary, the country studies using the JUDICON-EU dataset have shown that if a wide range of actors has the right to initiate the review process (including the court itself), it does not guarantee that the court will take an uncompromising position toward the legislature. Obviously, other factors should also be considered when explaining the behaviour of courts with strong formal powers.

12.3.4 Reviewing constitutional amendments

Another example that proves that strong formal empowerment does not imply strong courts and court decisions is the right to review constitutional amendments. To be sure, this is a highly controversial power (Roznai 2013; Roznai 2019; Barak 2011, Albert 2015; Albert, Nakashidze, and Olcay 2019; Abeyratne and Bui 2023), and courts are rarely entrusted with the task of being a negative constituent power. Nevertheless, even in the CEE region, it is not uncommon to have courts with such jurisdiction. In Romania, the Romanian Constitutional Court exercises unusually strong competence to review such

amendments. It is mandated to review constitutional amendments twice: once before the first reading and once after adoption. To date, the Romanian Parliament has succeeded in passing a constitutional amendment only once, during the constitutional revision in 2003. The RCC has actively exercised its power of review by deleting provisions from amending laws before their first reading, but the opportunity to review an amending law after its adoption has not yet arisen. Consequently, the figures do not seem to reflect the exceptionally strong institutional empowerment (Chapter 9).

In Lithuania, the Lithuanian Constitutional Court (LiCC) has granted itself broad powers, sometimes even contradicting written legal sources. It has expanded its jurisdiction to review not only ordinary laws but also, among other things, laws amending the constitution, constitutional laws, or laws adopted by referendum. Although the LiCC claims to be able to exert strong influence, it relies predominantly on softer methods, such as the equally self-created ability to declare a legislative omission, which has a significant impact on the strength of its decisions (Chapter 7). It should be stressed that it is not uncommon for courts to secure some powers without an explicit mandate in written legal sources. Thus, it is worthwhile to survey acts of self-empowerment in the CEE region and consider whether such moves affect judicial-legislative relations and, in particular, the strength of judicial decisions.

12.3.5 Self-empowerment

The absence of certain powers does not necessarily mean that courts sit back and behave in a disciplined manner. Sometimes courts are very creative and use their interpretive powers to empower themselves to do things that are not explicitly addressed in the constitution or in laws on the operation of the courts. Again, the question is whether such acts of formal self-empowerment affect the strength of judicial decisions one way or another.

By "self-empowerment" we refer to the use of a given ruling type despite not explicitly having the competence, but at the same time not being prohibited to do so. Of course, a much more blatant example of self-empowerment is when the court finds a way to use a ruling type despite an explicit statutory prohibition. An interesting combination of self-empowerment and self-restraint may arise when, after self-empowerment, the constitutional court makes only occasional use of the self-created legal instrument or uses it in a self-restraining manner. Here again, the question arises whether acts of self-empowerment and the resulting legal instrument have a significant impact on the strength of decisions.

12.3.5.1 Creating new ruling types

The case of Hungary may be a prime example of how self-empowerment affects the behaviour of the constitutional court in constraining the legislature. The HCC used the tools of legislative omissions and constitutional requirements

on numerous occasions in its first decade, which led it to be, on average, less restrictive towards the legislature. These widely used tools were later legally added to the competence list of the HCC with the comprehensive constitutional reforms after 2010, and they can still be considered regularly used ruling types today. The self-empowerment of the HCC to enact legislative omissions and constitutional requirements has also had a long-term impact on its jurisprudence and ruling strength (Chapter 5).

In the Czech Republic, on the other hand, the self-empowerment of the Czech Constitutional Court (CzCC) has not had a lasting effect on the relationship with the legislature. As far as legislative omissions are concerned, there is a strong aversion in Czech constitutional scholarship to prescriptions for the legislature, as this is seen as a violation of the principle of separation of powers. There were only two instances in which the CzCC deviated slightly from this tradition in cases related to democratic and economic transition, but still in a very restrained manner, declaring only the absence of legislative action unconstitutional and not prescribing any specific policy change. Although the CzCC had significantly increased its influence on the Czech political landscape by assuming the power to review so-called constitutional laws in the *Melčák* case, this self-assumed power was rarely used in practice and therefore had no significant impact on the jurisprudence of the CzCC (Chapter 3).

Similarly, the few examples where the Constitutional Court of Croatia (CrCC) contravened its own explicit position of not being authorized to declare legislative omissions did not have any considerable impact in the long run due to their infrequency. In these cases, the CrCC decided to circumvent the self-imposed restriction and did assess the question of constitutionality of whether the legislature failed to prescribe something. Notably, on a few occasions the CrCC also issued some directives on necessary legislative amendments, although not as a separate ruling type, but as a part of unconstitutionality rulings (Chapter 2).

12.3.5.2 Determining ex tunc or pro futuro temporal effects

Temporal effects of judicial decisions are another venue where courts might expand their own (and the legislators') leeway, or, alternatively, can narrow down the room for the legislature to manoeuvre. In Latvia, in addition to the general rule of invalidating unconstitutional norms as of the publication of the decision (*ex nunc*), the Latvian Constitutional Court (LaCC) has the power to invalidate an unconstitutional norm either retroactively (*ex tunc*) from the date of its adoption or prospectively (*pro futuro*) from a future date. Case law indicates that a challenged legal norm is invalidated *ex tunc* if it was enacted *ultra vires* or has significant procedural violations. However, the LaCC has developed a special discretion in this regard: if it deems the legislation unconstitutional, it may generally annul the norm *ex nunc*, but it may make exceptions for certain persons who filed the constitutional complaint and decide to

invalidate the norm *ex tunc* with respect to them. It is important to note that the consequences of such decisions apply only to the parties involved in the specific case and do not have far-reaching *erga omnes* effects, so this discretion does not have a significant impact on constraining the legislature (Chapter 6).

As mentioned, the self-empowerment of the Lithuanian Constitutional Court (LiCC) has at times been quite far-reaching: although the constitution provides that the temporal effect of the LiCC's decisions is *ex nunc*, the LiCC itself has created exceptions to this general rule. These exceptions, defined in various decisions, allow the temporal effect of rulings to occur retroactively (*ex tunc*) and even *pro futuro*, although this possibility is not mentioned in the constitution. Nevertheless, it should be emphasized that the LiCC has never declared a legal act unconstitutional with temporal retroactivity (*ex tunc*), but several times it has declared *pro futuro* decisions. The latter means that the LiCC has tended to mitigate its decisions through an instrument created by itself (Chapter 7).

In Estonia, the Constitutional Review Chamber (CRC) of the Estonian Supreme Court has the power to issue rulings with retroactive effect (*ex tunc*). In the past, constitutional review decisions had *ex nunc* effect, but a court ruling from 2008 necessitated the possibility of retroactive constitutional review ruling (*ex tunc*). This decision marked a decisive change, and since then *ex tunc* effect has become the general rule in practice. Although this change is not reflected in the ruling strength due to the small number of cases, it is of great importance because it represents a significant restriction on the legislature (Chapter 4).

12.4 Political context of judicial decisions

Several factors of the political environment can potentially affect the courts' ruling strength. The fragmentation thesis suggests that greater fragmentation of the political field (in terms of parliamentary parties) might result in larger room for manoeuvre for the constitutional court, as there is less fear of political backlash (Magalhes 2003; Rios-Figueroa 2007; Brouard 2009; Hönnige 2007; Dyevre 2010). Political instability could have similar effects, as there is a strong correlation between fragmentation and instability, but fragmentation alone does not necessarily mean instability, so other factors must also be considered. The change in government could also affect the behaviour of constitutional judges, as judges could respond to these political changes by imposing tighter restrictions on the new government or legislative majority (Spaeth and Segal 1992; Segal and Spaeth 2002; Gillman and Clayton 1999). The effects of these variables of the political environment can be seen in the behaviour of constitutional courts in Poland, Romania, or Slovenia, while in other countries, such as the Czech Republic, Estonia, or Croatia, the political context does not seem to have much influence on the strength of decisions.

12.4.1 Political fragmentation with significant impact

The strong fragmentation of the Polish Parliament in the first years after the democratic transition enabled the Polish Constitutional Tribunal (PCT) to assert its authority and actively shape the legal framework of Polish democracy. Because Parliament was barely able to achieve a simple majority (28 factions after the 1991 elections), the two-thirds majority required to override PCT rulings was typically out of reach. This created a space in which the PCT could play a crucial role in the Polish transition process. The analysis suggests that the transformative effect of the adoption of the 1997 constitution on the strength of the PCT rulings might be questioned because a more significant change in the behaviour of the PCT occurred in 1994, when the newly introduced electoral threshold reduced the number of factions in Parliament to only six. Furthermore, the new ruling coalition of two post-communist parties had the opportunity to elect the majority of judges in PCT at times with stronger political ties than the previous judges. The decline in the strength of PCT decisions in 1994 is visible, while there were no significant changes in the years following the amendment of the constitutional framework in 1997, which abolished the right of the legislature to override decisions of PCT with a two-thirds majority. In summary, the degree of party fragmentation in Parliament appears to have a decisive influence on how PCT limits the legislature (Chapter 8).

In the case of the Romanian Constitutional Court (RCC), the influence of political stability on the strength of *a priori* review rulings can be clearly observed. However, this factor alone is not sufficient to explain the trends in the strength of *a posteriori* review rulings. As a result, and as noted earlier, it appears that the RCC allows more room for political and ideological perspectives in the *a priori* review procedure. Consequently, the average strength of such rulings tends to decrease during periods of relative political stability. Conversely, the *a posteriori* review procedure seems to reflect a more judicial approach and the average strength of rulings appearing unrelated to the political context (Chapter 9).

In Slovenia, it can be argued that the Slovenian Constitutional Court (SloCC) restrained the legislature more in times of political fragmentation and instability. Fragmentation combined with economic and social crises allowed for the SloCC to gain influence in areas reserved for the legislature, and the strength of its ruling tended to peak during instability (Chapter 11).

12.4.2 Political fragmentation without any impact

In contrast, in other countries the connection between political stability/instability and the strength of court rulings may not be as pronounced. The Czech Republic presents an interesting case, as do the Baltic countries, where coalition governments are more widespread and legislatures tend to be fragmented (often with 8–10 political groupings), but constitutional courts do

not seem to present a major obstacle to legislatures (Chapter 3). Estonia could be mentioned as an exception, but in the case of the Estonian CRC (Constitutional Review Chamber of the Estonian Supreme Court), the strength of rulings is more likely due to institutional variables, as described earlier. Estonia also presents an interesting case when it comes to the government change thesis, as no significant relationship between the strength of constitutional court rulings and political instability was found despite 14 governments over 27 years (Chapter 4). In Croatia, despite expectations of conflict between the new centre-left parliamentary majority and the centre-right majority of judges at the Croatian Constitutional Court, this did not occur after a change of government in the early 2000s. Qualitative analysis suggests that the reason may be that, because of the minority cabinet, legislation often required a left-right consensus in Parliament, making it less likely to be overturned by the Croatian Constitutional Court (Chapter 2).

Hungarian politics is generally characterized by a high degree of political stability. However, the Hungarian Constitutional Court has challenged both the socialist-liberal two-thirds majority and, between 2010 and 2013, the right-wing two-thirds majority, demonstrating its ability to assert itself in an extremely stable political environment and even in the face of a constitutional parliamentary two-thirds majority (Chapter 5).

12.5 Event-related variables

For the event-related variables, we examine two time periods. In the first period, we examine how constitutional courts constrained legislators' discretion during the transition to democracy and the early years of democratic consolidation. In the second period, we examine the constitutional courts' response to the 2008–2009 financial crisis and related legislative actions, particularly with respect to limiting legislators' austerity measures based on social rights considerations.

12.5.1 Democratic transition

Regarding the role of constitutional courts in the transition to democracy and in the first years of democratic consolidation, two hypotheses can be put forward (Sólyom 2003; Ginsburg 2013; Herron and Randazzo 2003; Jovanović 2015; Daly 2017; Bumin 2017; Smith 2023). The first hypothesis states that constitutional courts tend to avoid strict decisions, which corresponds to a cautious attitude in building authority. The second hypothesis states the opposite: constitutional courts could (and should) play a central role in the democratization process by making strong decisions and positioning themselves as a showcase institution of democratic transition.

If we look at the individual countries in the CEE region, we see that Hungary, Slovenia, Slovakia, and Croatia have a relatively small number of decisions, but those decisions are characterized by their strength (Figure 12.6). It

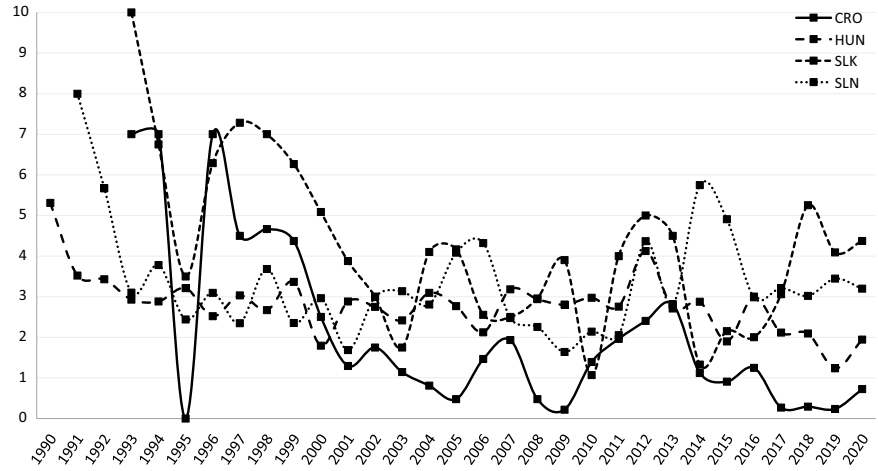

Figure 12.6 Average strength of rulings (1990–2020) (CrCC; HCC; SCC; SloCC)

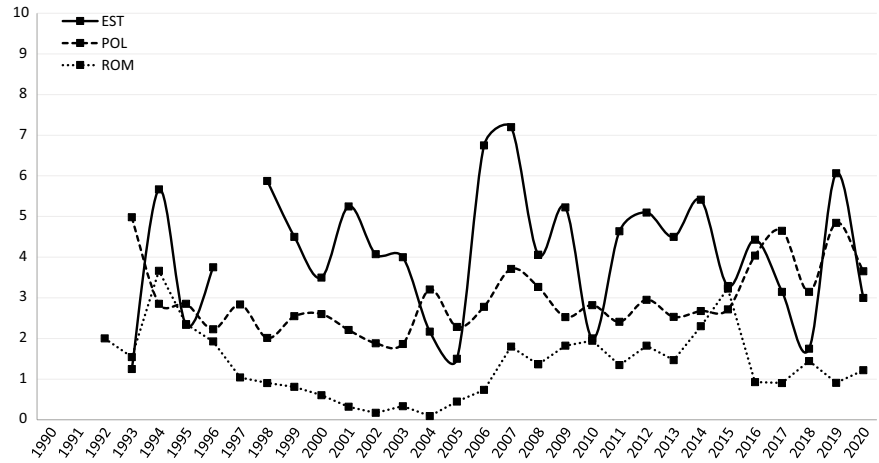

Figure 12.7 Average strength of rulings (1990–2020) (ESC; PCT; RCC)

is worth noting that Slovakia stands out because it was strong until the late 1990s and also had a relatively high number of rulings from the mid-1990s. On the other hand, Poland had a strong start with a considerable number of rulings in the first year, but the strength of decisions declined afterward (Figure 12.7).

Estonia had few and sporadic decisions in the early years of its democratic transition, but when the overall average of ruling strength is considered, it is still the strongest constitutional court in the CEE region (and the second strongest in Europe, after Cyprus) (Chapter 4). Latvia, on the other hand, had

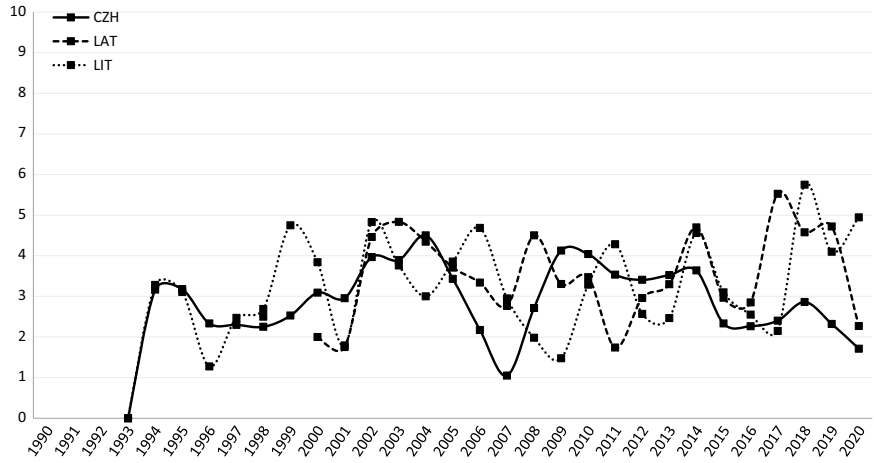

Figure 12.8 Average strength of rulings (1990–2020) (CzCC; LaCC; LiCC)

a weaker and delayed start (1997), with decisions gaining in importance from the 2000s onward, becoming more robust in terms of their restrictive nature and increasing in number (Figure 12.8) (Chapter 6). The Lithuanian and Romanian courts both had a weak start in terms of their rulings, and this trend continued over time, with the former issuing a moderate number of decisions and latter a substantial number of rulings (Chapter 7 and Chapter 9).

An interesting observation concerns the non-zero rulings, which refer to decisions finding some form of unconstitutionality. In this regard, the HCC took a softer approach in finding unconstitutionality by declaring legislative omissions and constitutional requirements (Chapter 5). The Slovak Constitutional Court (SCC), on the other hand, took a more assertive approach and intervened more strongly when it found some form of unconstitutionality (Chapter 10). This trend in non-zero rulings of the Hungarian Constitutional Court was also evident after 2014, when the number of constitutional requirements and legislative omissions increased (Chapter 5).

Overall, the results do not provide a clear indication of the hypotheses formulated in the literature. While some courts did not shy away from frequently striking down laws after democratic transformation, others developed more nuanced methods and attempted to "nudge" legislators to comply with constitutional rules rarely declaring unconstitutionality. This mixed result suggests that more comparative qualitative research should be conducted in this area.

12.5.2 Financial crisis in 2008–2009

In general, courts have historically been reluctant to intervene in legislative actions to correct fiscal imbalances. However, during and after the 2008–2009 financial crisis, several authors and advocacy groups urged judges to take a

more uncompromising stance against austerity measures (King 2012; Pernice 2016; Ragnarsson 2019; Hinarejos 2015; Fabbrini 2016; Beukers, de Witte and Kilpatrick 2017). The country studies in this volume also addressed this issue; therefore, it is worth summarizing whether the courts in CEE took a bolder stance and struck down laws that violated social rights, or whether they took a more lenient stance in times of financial crisis, arguing that legislators have wide discretion in addressing crisis situations. The results of this survey show that some courts were more lenient, while others were quite active in policing legislators during and after the financial crisis.

The constitutional courts in Lithuania and Slovenia certainly belonged to this latter group (Chapter 7 and Chapter 11). The most restrictive decisions of the Slovenian Constitutional Court (SloCC) during this period were mainly in the areas of taxation, public finance, and social affairs. This can be attributed primarily to the economic crisis and the government's response to it. As analysed in Chapter 11, the combination of the economic and social crisis with a relatively high degree of political fragmentation provided the SloCC with the opportunity to assert its power and issue stricter rulings on the Slovenian parliamentary majority's austerity measures (Chapter 11). A similar attitude was evident in the Lithuanian Constitutional Court. Lithuanian judges dealt with a large number of cases concerning the constitutionality of austerity measures introduced by the legislative and executive branches as a result of the financial crisis. The increasing number of cases led to an increased number of decisions on unconstitutionality. Because some of the austerity measures related to the financial crisis were found to be unconstitutional, the LiCC faced some political backlash in the first half of the 2010s, with calls to abolish the court or to curtail its powers or budget (Chapter 7).

Constitutional judiciaries in Hungary and Poland showed similar tendencies in dealing with fiscal issues and austerity measures, as both courts showed some assertiveness in this regard in the early period after democratic transition but did not show significant strength during the 2008–2009 financial crisis (Chapter 5 and Chapter 8). The Hungarian Constitutional Court found itself at the centre of public debates in the mid-1990s, when it responded to the austerity measures of the left-liberal government with a series of restrictive decisions in 1995, issuing in that year the second-highest proportion of restraining rulings during three decades of its existence. These decisions were all the more surprising because the HCC faced a two-thirds parliamentary majority, so the left-liberal coalition could have simply overruled the decisions of the HCC. Nevertheless, a few years after the democratic transition, the post-communist prime minister feared that popular support would wane if the government overrode the HCC's decisions, not to mention the liberal coalition partner which resisted such moves (Chapter 5). In Poland, the activity of the Polish Constitutional Tribunal (PCT) on financial issues also resulted in some political fallout in the first decade. As noted earlier, the lower house of the Parliament (*Sejm*) had the power to override the PCT's decisions by a two-thirds majority. The government majority succeeded in gaining the support

of the opposition (and thus the two-thirds majority) to overrule 11 decisions of the PCT by highlighting their allegedly disastrous consequences for the national budget, as most of these decisions concerned financial matters and social rights (Chapter 8). Conversely, and interestingly, the 2008–2009 financial crisis did not seem to cause any significant change in the ruling strength of the HCC or in the generally restrained behaviour of the PCT. Judges in both courts declared the austerity measures of both governments constitutional (Chapter 5 and Chapter 8).

Similar to the latter periods of the Hungarian and Polish courts, the Estonian Constitutional Review Chamber (CRC), the Latvian Constitutional Court (LaCC), and the Czech Constitutional Court (CzCC) have also taken a rather weaker stance on financial legislation in times of crisis.

The otherwise highly restrictive Estonian CRC was deferential in financial matters, recognizing that the legislature has exclusive competence in organizing public financial obligations. Therefore, the CRC limited its own jurisdiction in constitutional review proceedings in these matters, arguing that it can only assess the justifiability of financial measures in general terms (Chapter 4). Similarly, the Latvian Constitutional Court (LaCC) also accepted the legislature's broad discretionary power when it comes to fiscal regulations or the state budget. According to the consistent case law of the LaCC, the legislature has considerable discretion in the substantive implementation of social rights, provided that the actual economic circumstances of the state are adequately taken into account in these measures (Chapter 6). The Czech Constitutional Court's (CzCC) ruling strength in social issues seems to be declining (despite the growing number of cases in this area) due to the introduction of the reasonability test in cases involving social rights. When the CzCC shifted its focus to social issues, it introduced the reasonability test, which weighs the legislature's interference with social rights against reasonable competing interests. This test gives the legislature greater discretion than the proportionality test (Chapter 3). These approaches suggest a weaker encroachment by social rights adjudication and a more lenient attitude by constitutional courts.

12.6 Explaining dissenting opinions

When considering the internal dynamics of constitutional courts, the primary factors to examine are those related to dissenting opinions. However, statistics on dissenting opinions can be instructive not only in identifying the court's internal politics and fractures, but also in bolstering its authority before the public. Because of the initial backlash against the Russian Constitutional Court, it has become widely accepted that a constitutional court that does not make overly harsh decisions in its early years and whose judges show unity (i.e. avoid public dissent) can strengthen its authority in the long run (Kelemen 2013, 2018). However, there are constitutional courts that took advantage of the availability of dissenting opinions from the very beginning, while others followed the strategy of building authority slowly and started dissenting opinions only later.

12.6.1 Polarization from the outset

The Czech Constitutional Court (CzCC) has chosen a strategy that is rather unpopular among legal scholars who believe that courts should be very careful in showing signs of polarization in their early days. The percentage of rulings with at least one dissenting opinion ranged from 30% to 40% in the first seven years of the CzCC's operation, which are quite astonishing figures compared to other courts (Figure 12.9). Surely, the CzCC has been spared partisan fights, and the polarization measured by the proportion of dissenting opinions does not reflect partisan logic. Rather, frequent dissenting opinions seem to reflect judges' independence, meaning that judges may be more individualistic and less inclined to care about the court's reputation. Nevertheless, this strategy, which is mainly due to the political context in which the CzCC was embedded, paid off, as the authority of the CzCC was not affected by the apparent diversity of opinions on the bench (Chapter 3).

The publication of dissenting opinions is not only permitted but has also been practiced frequently since the establishment of the Slovenian Constitutional Court (SloCC). Especially in the first 10 years of its existence, numerous dissenting opinions were published. The high number of early dissenting opinions may be due to the academic background of some judges, as the majority of published dissenting opinions came from judges who had pursued an academic career before their election. However, the trend shows a gradual decline in the number of dissenting opinions in the third decade (Chapter 11).

The case of the Lithuanian Constitutional Court (LiCC) is somewhat different, as judges were not allowed to publish dissenting opinions until 2008. However, immediately after 2008, a large number of dissenting opinions were published. One explanation for this could be the lack of constitutional traditions

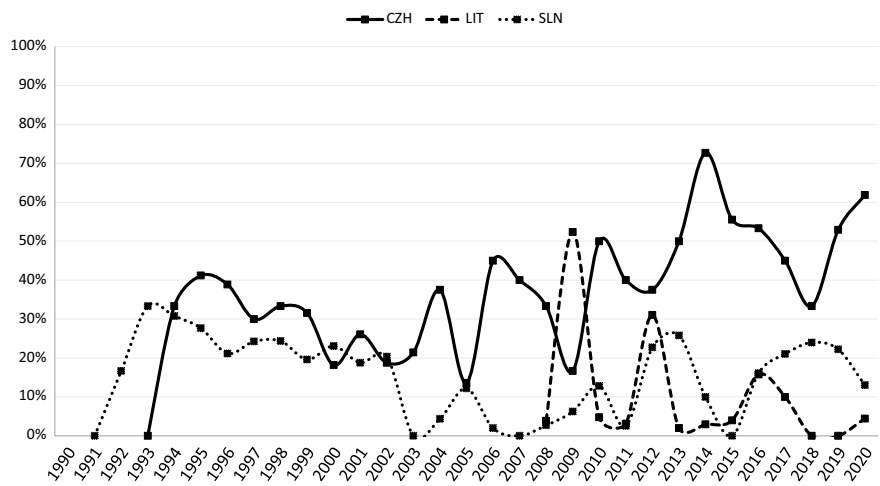

Figure 12.9 Proportion of rulings with at least one dissenting opinion (1990–2020) (CzCC; LiCC; SloCC)

in this regard, which probably led to judges often writing dissenting opinions in a rush and not always considering their necessity. Second, as mentioned earlier, the LiCC's unconstitutionality rulings during the economic crisis led to outright political backlash and public pressure, which may have increased tensions and intensified disagreements among judges. A third explanation could lie in the individual behaviour of the judges, as the same judge (Judge Šileikis) accounted for more than 50% of the dissenting opinions during those years (Chapter 7).

12.6.2 From unity to increasing polarization

Most constitutional courts in CEE seemed to be more cautious in the beginning and showed unity in the early years, which can be explained either by strategic considerations in building authority or by the political-ideological homogeneity of the court. In Poland, for example, the first dissenting opinions appeared only in 1995, mostly for political reasons, showing that the Solidarity-nominated judges disagreed with the post-communist majority. The wide fluctuations in the rate of rulings with dissenting opinions can also generally be attributed to the absence or presence of a clear political or ideological rift among PCT judges (Figure 12.10). For example, while in the first half of the 2000s the proportion of rulings with dissenting opinions remained low, at the beginning of the second half there was a sudden increase in this proportion (from 1.8% in 2006 to 49.7% in 2007) after the conservative coalition led by the Law and Justice Party was able to elect six new judges (Chapter 8). Similarly, in the case of the Croatian Constitutional Court, the low number of dissenting opinions in the first three election periods can be explained by the lack of political polarization among judges, as the rise of dissenting opinions only began in the first half of the 2000s, when the centre-left majority in Parliament

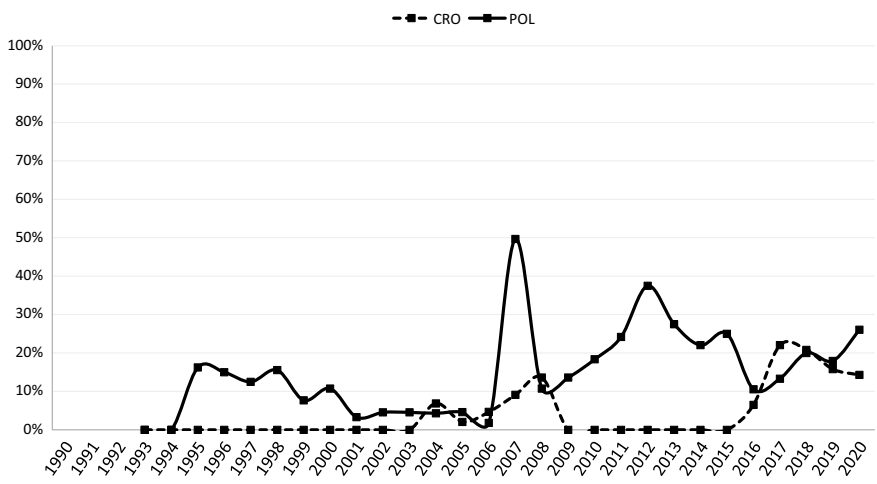

Figure 12.10 Proportion of rulings with at least one dissenting opinion (1990–2020) (CrCC; PCC)

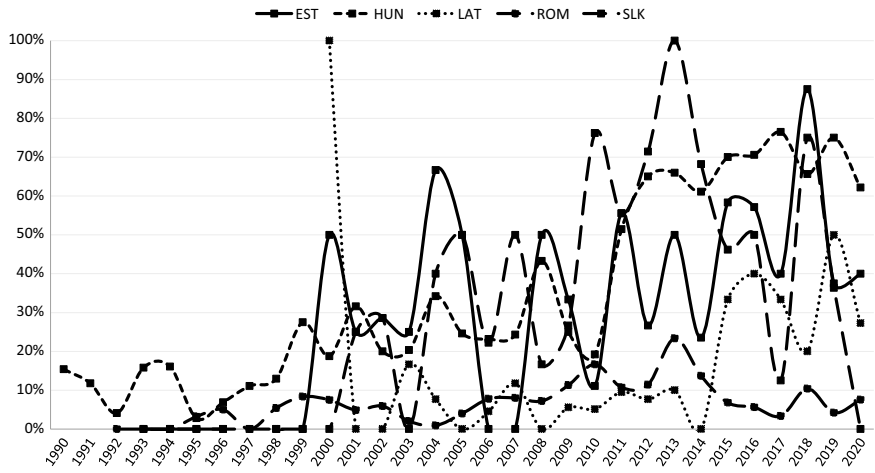

Figure 12.11 Proportion of rulings with at least one dissenting opinion (1990–2020) (ESC; HCC; LaCC; RCC; SCC)

was able to elect new judges to the bench, which previously consisted only of judges elected by the centre-right. In addition, the strategy of speaking with one voice and not making overly strict decisions and building authority may have played a decisive role (Chapter 2).

Other CEE courts such as the Latvian Constitutional Court (LaCC) and the Estonian Constitutional Review Chamber (CRC) in the Baltics and their Slovakian, Romanian, or Hungarian counterparts in Central Europe also seemed to adopt this strategic posture of authority building and avoided showing internal divisions in the early years (Figure 12.11). The two Baltic courts are a clear example of this approach. The LaCC judges completely avoided publishing dissenting opinions for four years, and the number of rulings with dissenting opinions remained low until 2015 (Chapter 6). Judges at Estonia's CRC did not write dissenting opinions for seven years after the court began operating in 1993, but over the past decade, the proportion of rulings with dissenting opinions rose steadily to over 50% (Chapter 4). The evolution of dissenting opinions at the Hungarian Constitutional Court is also instructive in this regard, as judges generally did not write dissenting opinions until 1998 (during the Sólyom era), and the court then saw a gradual, massive increase in both the number of dissenting opinions and the proportion of rulings with at least one dissenting opinion (Chapter 5).

12.6.3 Dissenting coalitions and party affiliation

An interesting pattern that emerges across CEE is that the party affiliation of judges does not seem to be strongly reflected in the dissenting coalitions, with a few exceptions in Central Europe such as Poland, Hungary, and Croatia.

Party affiliation is generally not considered a determining factor in the formation of dissenting coalitions in the constitutional courts of the Baltic region. As for the Latvian Constitutional Court (LaCC), for example, the data suggest that judicial coalitions are primarily due to the academic and professional backgrounds and careers of individual judges, as well as their different approaches to legal theory, interpretation, and methodology (Chapter 6). As mentioned earlier, judges of the Lithuanian Constitutional Court (LiCC) were not allowed to issue dissenting opinions until 2008. The analysis suggests that dissenting opinions in Lithuania are more likely to be related to the judges' personal character and other political circumstances, but not to political affiliation (Chapter 7). Similarly, in Estonia, dissenting coalitions do not appear to reflect political affiliation but rather individual background, academic career, and legal career (Chapter 4).

In Slovakia, no influence of party affiliation on judicial coalitions was found, mainly because there was no clear dissenting coalition, and there were also examples of judges with the same party affiliation (elected together) coming into conflict with each other in most cases (Chapter 10). In the Czech Constitutional Court, institutional variables make it more difficult than usual to trace ideological preferences and party affiliations: judges have a high degree of independence, as they are appointed by the President of the Republic and confirmed by the Senate, and these two political actors tend to be less involved in party politics. Moreover, most constitutional judges have a professional background in the judiciary, which means that they are not associated with politics. Of course, there are, nevertheless, some indirect indicators of individual ideological preferences, but these are not sufficient to infer party affiliation or to provide a comprehensive account. Therefore, the origins of judicial coalitions must be sought elsewhere, such as in judges' professional backgrounds or in their individual ability to form coalitions rooted in their jurisprudential authority, political legitimacy, or ideology (Chapter 3).

Analysis of the Slovenian Constitutional Court (SloCC) shows a tendency toward cross-party coalitions, and relations between judges do not seem to be strongly dependent on party affiliation. There are several examples of cross-party coalitions in the first and second courts, with most judges having cross-party support in the first period. Despite the absence of coalitions based on party affiliation, the behaviour of individual judges could skew these results, as there are examples of judges being more restrictive toward the opposing political side (or, conversely, casting more dissenting votes on decisions that restrict their own side) (Chapter 11). Similarly, the judges of the Romanian Constitutional Court (RCC) do not appear to form coalitions based on their previous political affiliation. As noted earlier, the analysis suggests that there are significant differences in the degree of politicization between the RCC's *a priori* and *a posteriori* review processes, but even in the more politicized or ideologically influenced *a priori* processes, majority or dissenting coalitions generally do not reflect political affiliations (Chapter 9).

In Poland and Hungary, there is evidence of judicial coalitions being based on political affiliation, but their voting records show a more complex network in cooperation that cannot be explained exclusively along political party lines. As for the Polish Constitutional Tribunal, we have already mentioned that the lack of dissenting opinions in the early years was probably due to ideological homogeneity, and conversely, the first dissenting opinions mostly belonged to Solidarity-nominated judges who publicly distanced themselves from the post-communist majority. Similarly, the striking increase in the number of dissenting opinions between 2006 and 2007 coincides with the election of a group of judges nominated by PiS. However, while the PiS-nominated minority generally stuck together on contentious issues prior to 2016, it did not represent a completely segregated group and collaborated with judges of other political affiliations, which adds nuance to the PCT's portrayal as a deeply politically divided court. Nonetheless, starting in 2016, after the PiS government took over the majority on the PCT, the number of rulings with dissenting opinions declined significantly (Chapter 8). The similarities and differences between the PCT and the Hungarian Constitutional Court (HCC) are worth highlighting in this regard. After building unity and authority during the Sólyom era (1990–1998), the rise in dissent paints a picture of a politicized court, with coalitions forming along political fault lines between the centre-left majority and centre-right minority judges in the 2000s – a similar pattern to the PCT. A marked difference emerges, however, regarding the impact of the conservative takeover in the 2010s on dissent rates. In the HCC, after the election of the first new judges by the conservative supermajority, coalitions primarily reflected differences between the minority of these "new judges" and the majority of "old" judges rather than primarily political/ideological affiliation. The same division remained crucial after 2013, when the new judges formed the majority as a result of the filling of vacancies, and the old judges mostly tended to form dissenting coalitions. Over time, all HCC judges have been replaced elected exclusively by the conservative supermajority in the legislature (with four exceptions due to a compromise in 2016). An interesting contrast emerges here: while in Poland the takeover of PCT by conservatives led to a rapid and visible decline in dissenting rates, the political homogeneity of the HCC is not reflected in these figures – on the contrary, the rate of rulings with at least one dissenting opinion even peaked at 75% in 2019 (Chapter 5).

The case of the Croatian Constitutional Court (CrCC) is an example of dissenting and majority coalitions that predominantly follow the lines of political affiliation. As mentioned, the lack of dissenting opinions until 2004 can be explained mainly in political terms, as the reluctance to publish dissenting opinions only began to wane with the election of three judges by the new centre-left government, whereas previously all judges had been elected by the centre-right. Similarly, the number of dissenting opinions increased after the election of eight new judges in 2016, five of whom were nominated by the opposition, and the subsequent period saw a higher number of dissenting

opinions, mostly belonging to a coalition of judges nominated by the left-wing opposition party (Chapter 2).

12.7 Conclusions

Drawing on an original dataset, created by the JUDICON-EU project, authors of this volume tried to answer two basic questions: first, how differentiated are judicial decisions in Central and Eastern Europe? Second, to what extent have European constitutional courts constrained the room for manoeuvre of the legislator? First, while analysing the data, we asked the authors to follow the same structure and present the main characteristics of the court by outlining its historical origins, the court's position within the constitutional system, its main competencies, and institutional peculiarities or special processes unknown elsewhere in the region. Second, the chapters provided a general overview of the activities of the relevant court and at the same time clarified whether there are any country-specific phenomena relating to the selection of cases, the coding process, dissenting opinions, court decision-making processes, or other phenomena that differ from consistent coding rules. Third, the chapters evaluated the trends in majority decisions: the preferred or missing ruling types or the trends thereof and gave explanations to these trends. The authors also determined whether changes in the ruling types and ruling strengths are related to changes in political circumstances or changes in the composition of the courts. Some chapters used descriptive statistical analysis, while others used more advanced quantitative methods for evaluating and seeking explanations. The analysis of dissenting opinions provided information on whether trends are apparent in the publication of dissenting opinions. However, the authors also evaluated the performance of individual judges in terms of the frequency and strength of their dissenting opinions and the relative difference between the strength of majority decisions and their dissenting opinions. Surveys of dissenting coalitions found that the tendency of judges to join other colleagues in criticizing the majority's decisions depends on several factors and cannot be attributed simply to the judges' political affiliation – although the most important trigger for coalition formation may sometimes be the judges' political background. The qualitative assessment of selected cases concluded the country studies, which focused mainly on the most salient cases.

As a first summary of the research project, in this comparative chapter we have selected three questions on the determinants of judicial behaviour and presented the main findings based on the country studies. While judicial-legislative relations might be analysed from the perspective of the constraint exerted by the courts on the legislatures, in this final chapter we looked for judges' motives in taking heavily constraining or, contrary, more lenient decisions. We checked whether *institutional settings*, like the legislators' formal competence to overturn court decisions, the institution of *actio popularis* or the relatively narrow circle of potential petitioners, voting quorums and supermajority requirements in judicial decision-making, different types of procedures,

the courts' competence to review constitutional amendments, or judicial self-empowerment had any effect on the ruling strength of the courts, but we also surveyed whether the *political context* (fragmentation, political instability, or change in government) influenced judicial decision-making. Furthermore, we were also interested in how judges behaved after the democratic transformation in CEE and how they reacted to austerity measures in the aftermath of the financial crisis of 2008–2009. Finally, we also gave an overview on the judges' predisposition concerning dissent and building dissenting coalitions.

As noted earlier, these are only the first steps, and we still have a long way to go in analysing the project's original dataset through more refined quantitative methods and/or in nuancing the key findings of the quantitative research through qualitative studies. While this volume along with its counterpart *Constitutional Review in Western Europe* close one chapter of the research project, they also open new avenues that could provide more nuanced answers about judicial behaviour in Europe. We hope that researchers have been inspired and will take advantage of the project's potential.

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