

9 Courts compared

The practice of constitutional adjudication in Central and Eastern Europe

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9.1 Introduction

As noted in the Introduction to this volume, to date no scientific works have analyzed comprehensively, systematically and empirically the practice of constitutional adjudication in Central Europe. Certainly, the JUDICON research project cannot fill this huge research gap at once, but we have tried to map the diversity and measure the strength of judicial decisions in six Central and Eastern European (CEE) countries. The scope of our project is surely limited as far as the number of courts and the types of judicial decisions concerned, but we hope that we have made only the first steps and that by applying our methodology another research project could provide a comprehensive picture of constitutional adjudication in Europe.

Although the country studies of the present volume have analyzed Central European constitutional adjudication from several perspectives, they have not intended to make a comparative analysis of all data produced by the JUDICON project. Obviously, they had to focus on the data of individual countries to be able to say something about salient years or longitudinal trends in majority rulings, dissenting opinions, the role of the presidents and diversity of ruling types or strength of judicial rulings in each country. In contrast to these country studies, this chapter will deal with the ‘big picture’ by analyzing the dataset comparatively and, at the end of the chapter, assessing the practice of constitutional adjudication in six countries in general.

First, we will briefly compare the proportion of relevant rulings and decisions in the six countries (Section 9.2). Second, we will disclose the differences and similarities in the courts’ practice of selecting various ruling types (Section 9.3). We will conclude that the Hungarian Constitutional Court (HCC) preferred to declare the most diverse rulings and that the German Federal Constitutional Court (FCC) became most frequently a positive legislator. The same holds true if we consider only the ‘non-zero’ rulings, i.e. rulings which declared any form of unconstitutionality. The distribution of strength values, as presented in Section 9.4, reflects similar differences among the six countries. While the German FCC was frequently inclined to include some kind of prescription in its rulings, which contributed to the relatively wide distribution of strength values,

other courts, like the Czech or the Polish ones, preferred certain combinations of the elements of judicial rulings, leading to a relatively low variance of the strength values. While the Hungarian and the German courts have been frequently enumerated in the literature as the strongest courts in the world, it is certainly one of the most interesting findings of our research project that it was not the Hungarian or the German court which took the most powerful rulings, but rather the Slovak one. Furthermore, Section 9.5 below will also disclose that the HCC employed the softest combinations of the elements of judicial rulings, which led to the situation whereby the HCC has been ranked as last when we compare the average strength of 'non-zero' rulings of the six courts. The same section will also shed light on the differences among the six courts' practices concerning the longitudinal changes in the average strength of their rulings. In the last section (Section 9.6), we will explore the different strategies of the courts in relation to publishing dissenting opinions. While Germany is clearly an outlier in the sense that the FCC published as few as 35 dissenting opinions in total during the time period 1990–2015, a general tendency unfolded from the early 2000s in almost all other CEE countries under scrutiny. The number and proportion of majority rulings provoking at least one dissent steadily increased and even reached the maximum value in Slovakia in 2013, i.e. all majority rulings were opposed by some judges of the SCC in that year. While this last phenomenon might be illusory due to the low number of majority rulings, the general trend is undeniable. The courts became increasingly polarized as measured by the number and proportion of dissenting opinions. Several times this polarization had a political background (as in Slovakia, Poland or Hungary), while in other countries, such as the Czech Republic, polarization could not be linked to political circumstances.

9.2 Rulings and decisions

To start with, the reader should be reminded that we have included only those decisions of the constitutional courts which affected a law adopted by the legislature. No decisions on secondary legislation have been considered. Furthermore, we restricted our research to decisions which were published in the official gazette of the country. Refusals were coded only if there was a dissenting opinion to that specific refusal. Any statistical comparison below thus refers only to these 'filtered' decisions of the constitutional courts.

These and other restrictions heavily reduced the number of cases in some countries (as in Germany, where the vast majority of cases have usually been constitutional complaints without any effect on legislation), while keeping the number of relevant cases on a very high level in other countries (e.g. Romania or Poland). As explained in the relevant country studies, the Romanian Constitutional Court and the Polish Constitutional Tribunal do not have any preselection procedures; thus, these courts have to deal even with cases which could have been refused by an administrative organ of the court.¹ The institutional design, which determines who can file a motion/petition as well as the competences of the court, has a further impact on the number of relevant cases. While preselection by an

administrative body is well known in Hungary, the institution of *actio popularis* greatly widened the range of potential applicants which, in turn, led to a quite high number of relevant cases. This is why we have three groups of countries considering the number of relevant rulings. Romania and Poland form a separate group, with their number of rulings clearly over 2000. Hungary stands alone with its 1326 rulings, while the constitutional courts of the Czech Republic, Germany and Slovakia ‘produced’ a significantly lower number of rulings (Figure 9.1).

It is also telling how many relevant decisions have been considered in the research project and how they are related to the number of rulings. As Figure 9.2 shows, there might be significant differences between the number of rulings and the number of decisions, which means that the courts of Hungary, Poland and

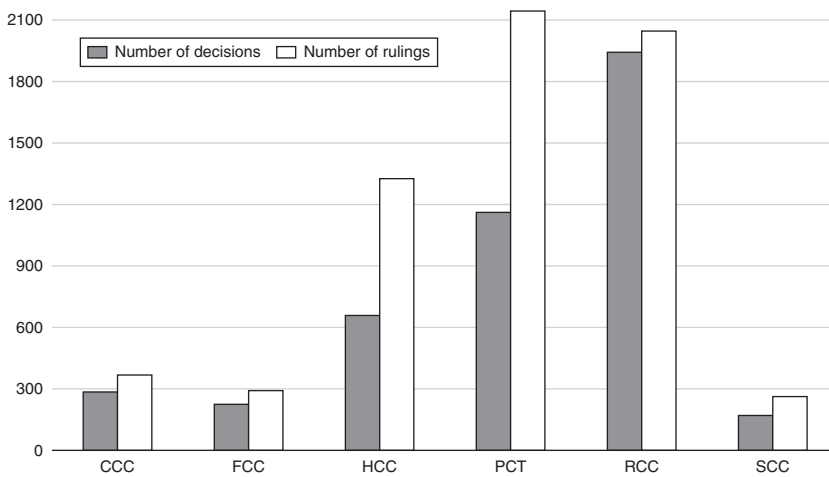


Figure 9.1 Number of decisions and rulings in comparison.

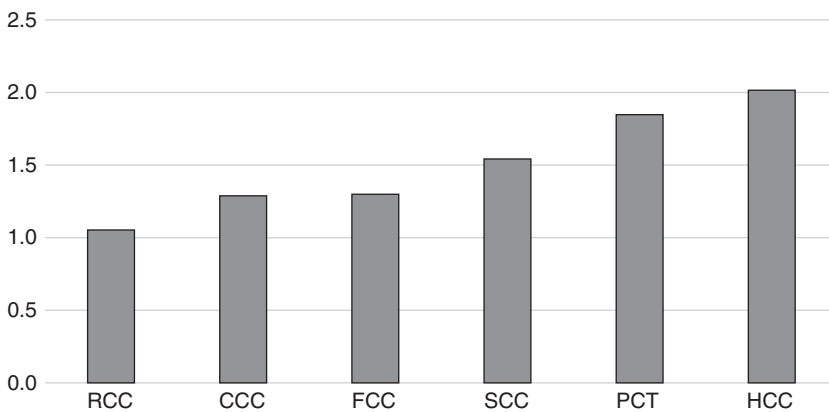


Figure 9.2 Ruling/decision rate of six courts.

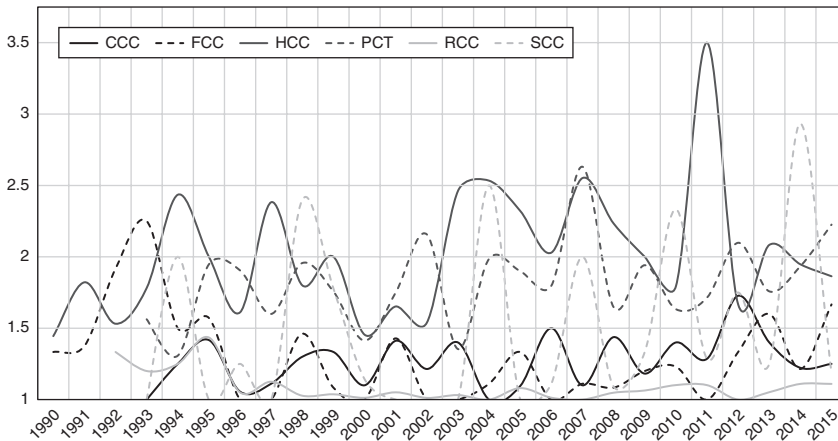


Figure 9.3 Ruling/decision rate of six courts (by years).

Slovakia were more likely to make more than one ruling per decision (in the case of Hungary even slightly more than two rulings per decision), while the Romanian court's practice has been very close to the average of one ruling per decision. In the case of the Czech Republic and Germany every third, and in the case of Slovakia every second, decision had a second ruling on average.²

Since the average value of ruling per decision conceals the temporal variances within each country, it is also worth presenting this proportion on a longitudinal model. Figure 9.3 shows little variance in the case of the Romanian Constitutional Court in this regard, while the German and the Czech courts' ruling per decision ratio ranged constantly between 1 and 1.5, and the Polish one between 1.5 and 2. The Hungarian court's performance varied between 1.5 and 2.5, while the Slovak court's practice is seemingly 'hectic' in the sense that there are years with 2.4 or 2.9 rulings per decision, whereas other years present one ruling per decision on average.

9.3 Ruling types compared

9.3.1 Ruling types with rejections

As the general distribution of the ruling types shows, even if the number of cases has been reduced by several predefined criteria, the number of rejections in the whole dataset is very high. With the exception of Romania, where the proportion of rejections exceeded 81% of all relevant cases, approximately half the relevant rulings of the Central European courts were rejection, and 30% (without Romania, 38%) involved substantive unconstitutionality (Table 9.1).³ At first glance, it appears as if these data challenged the purport of the research project, since approximately 90% of the cases fit into the dichotomous approach of upholding or striking down statutes.

Table 9.1 Distribution of ruling types (full dataset with and without RCC)

	<i>All countries</i>		<i>Database without RCC</i>	
	<i>N</i>	<i>%</i>	<i>N</i>	<i>%</i>
CIIA – EX	23	0.4	23	0.5
REJ	3907	60.7	2234	50.9
OM	137	2.1	136	3.1
PROC	138	2.1	112	2.6
CR	226	3.5	170	3.9
SUBST	1952	30.3	1663	37.9
CIIA – RES	53	0.8	52	1.2
Sum	6436	100.0	4390	100.0

Table 9.2 Distribution of ruling types II (full dataset with and without RCC)

	<i>All countries</i>		<i>Database without RCC</i>	
	<i>N</i>	<i>%</i>	<i>N</i>	<i>%</i>
CIIA – EX	23	0.4	23	0.5
REJ	3907	60.7	2234	50.9
OM – weak	46	0.7	46	1.0
OM – strong	91	1.4	90	2.1
PROC – weak	44	0.7	43	1.0
PROC – average	44	0.7	39	0.9
PROC – strong	50	0.8	30	0.7
CR	226	3.5	170	3.9
SUBST – weak	754	11.7	705	16.1
SUBST – average	878	13.6	712	16.2
SUBST – strong	320	5.0	246	5.6
CIIA – RES	53	0.8	52	1.2
Sum	6436	100.0	4390	100.0

Although this highly simplified summary suggests that rejection was a quite dominant form of decision-making, it conceals two facts: that country-specific variances exist and that completeness, timing and prescription did in fact several times soften or exacerbate the ruling. Table 9.2 shows that the general distribution of ruling types is greater, even if we also take into account completeness, timing and prescription. As explained in Chapter 2 (Section 2.5.2), weak, average and strong forms of ruling types also indicate the ‘secondary intentions’ of the courts by counting with not only the provision but also further elements of judicial rulings.

The general distribution of the data structured by refined ruling types obviously shows more variances and proves that judicial rulings in Central Europe clearly transcend the dichotomy of rejection/striking down. Even if not widespread, weak and strong forms of omission and procedural unconstitutionality are traceable, not to mention the ruling type ‘constitutional requirement’, which accounts

for approximately one-tenth of all ‘non-zero’ rulings. Even more interesting is the distribution of weak, average and strong substantive unconstitutionality, which shows that constitutional courts in CE have been ready to soften or exacerbate their rulings by varying completeness, timing or prescription of the ruling.

The country-specific data are also enlightening, since they show that some courts refined their practice by using various options in decision-making, while other countries’ constitutional courts were more conservative and did not take the opportunity to diversify their practice. As Table 9.3 shows, the Hungarian Constitutional Court’s practice proved to be highly diverse: by keeping rejections clearly under 50%, almost all forms of ruling types were employed – even constitutional interpretation *in abstracto* became a frequent tool in the hands of judges.

Similar diversity is discernible in the practice of the German Federal Constitutional Court, which rejected only 42% of the relevant cases, although constitutional interpretation *in abstracto* was very rare, while strong procedural and substantive unconstitutionality were very much favoured by the court. This means that the FCC, if it found a law or a bill procedurally or substantively unconstitutional, became very severe and annulled the law either *ex tunc* and/or instructed the legislation about how to remedy this unconstitutionality in almost half the cases (Table 9.4 and Table 9.5). This means that in comparison with other courts, the German court, as a powerful actor with a high reputation and strong authority, was more willing to make severe rulings if it found a law or a bill procedurally or substantively unconstitutional.

Other countries’ courts show clearly lower variance concerning their ruling patterns. All forms of legislative omission were almost completely unknown in the Czech Republic, Poland, Romania and Slovakia. Some forms of procedural unconstitutionality are clearly traceable in the same countries, but they are certainly not dominant forms of decision-making, while the distribution of these kinds of ruling types is greater even in Germany and Hungary. Declaring

Table 9.3 Distribution of ruling types (by courts)

	CCC	FCC	HCC	PCT	RCC	SCC
CIIA – EX	0.0	0.0	1.7	0.0	0.0	0.4
REJ	54.0	42.6	43.9	56.3	81.8	46.9
OM – weak	0.3	0.0	3.3	0.0	0.0	0.4
OM – strong	0.3	1.4	6.4	0.0	0.0	0.0
PROC – weak	0.3	1.7	0.4	1.5	0.0	0.0
PROC – average	0.3	0.3	1.1	0.7	0.2	2.3
PROC – strong	1.1	4.5	0.8	0.0	1.0	0.8
CR	2.7	7.6	7.2	1.9	2.7	0.4
SUBST – weak	13.9	5.2	6.9	25.5	2.4	0.4
SUBST – average	24.5	3.1	17.9	13.2	8.1	35.1
SUBST – strong	2.7	33.3	7.4	0.7	3.6	9.5
CIIA – RES	0.0	0.3	3.1	0.0	0.0	3.8
Sum (in %)	100.0	100.0	100.0	100.0	100.0	100.0

constitutional requirements was more favoured by all courts (except Slovakia). A weak form of substantive unconstitutionality is very much characteristic of the Polish Tribunal (every fourth ruling was a weak substantive unconstitutionality), while average substantive unconstitutionality is dominant in Slovakia (every third ruling) and in the Czech Republic (every fourth ruling). Declaring legislative omission and both forms of constitutional interpretation *in abstracto* seems to be an entirely Hungarian peculiarity, albeit strong omission is present in Germany and the restrictive form of CIIA is quite frequent in Slovakia (Figure 9.4).

Generally speaking, we have the impression that the Hungarian and the German courts were more willing to utilize the full range of the available options of ruling types, while other courts neglected several possible combinations of decision-making and/or had their favoured ruling types. While the Polish Constitutional Tribunal quite frequently tried to soften its rulings by declaring a *pro futuro* annulment or a qualitative partial annulment (Table 9.6 and Table 9.7), the German court usually made the opposite move and tried to sharpen its rulings by annulling the law *ex tunc* (Table 9.5) or by giving guidance on how to remedy the unconstitutionality (Table 9.4).

9.3.2 Ruling types without rejections

Since nearly half the relevant rulings in our database were rejections, it is worth focusing on those rulings which were ‘non-rejections’ and asking how differentiated were the rulings of the courts when they did not reject the motion.

Table 9.4 Frequency of prescriptions (FCC)

	<i>REF/REJ</i>	<i>OM</i>	<i>PROC</i>	<i>CR</i>	<i>SUBST</i>	<i>CIIA</i>
No prescription	0.0%	0.0%	68.4%	0.0%	50.4%	0.0%
Non-binding prescription	0.0%	25.0%	0.0%	0.0%	9.1%	0.0%
Directive	0.0%	0.0%	26.3%	0.0%	18.2%	0.0%
Binding	0.0%	75.0%	5.3%	0.0%	22.3%	0.0%
prescription						
Constitutional requirement	0.0%	0.0%	0.0%	100.0%	0.0%	100.0%
Sum	0.0%	100.0%	100.0%	100.0%	100.0%	100.0%

Table 9.5 Frequency of temporal effects (FCC)

	<i>REF/REJ</i>	<i>OM</i>	<i>PROC</i>	<i>CR</i>	<i>SUBST</i>	<i>CIIA</i>
Pro futuro	0.0%	0.0%	5.3%	0.0%	20.7%	0.0%
Ex nunc	0.0%	0.0%	52.6%	0.0%	36.4%	0.0%
Ex tunc	0.0%	0.0%	42.1%	0.0%	43.0%	0.0%
Sum	0.0%	100.0%	100.0%	0.0%	100.0%	0.0%

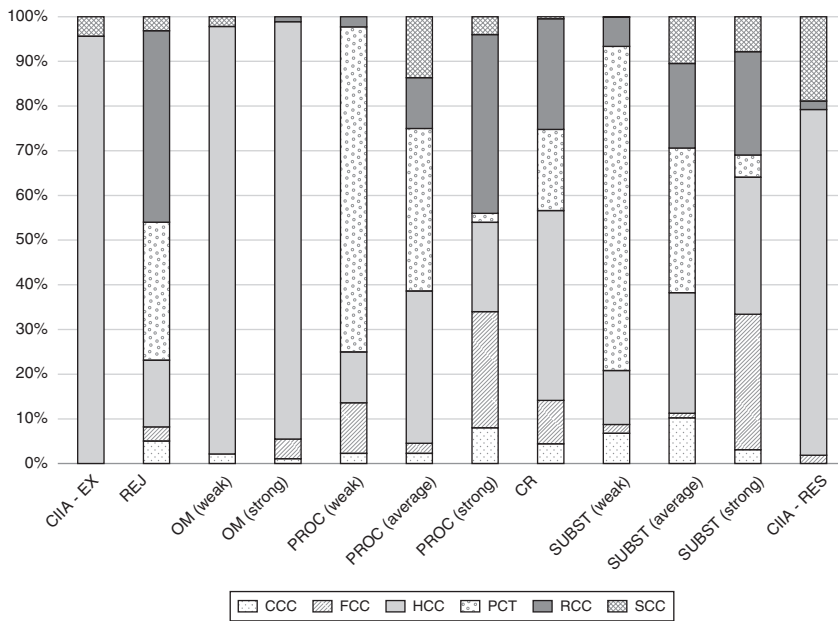


Figure 9.4 Distribution of ruling types (by courts).

Table 9.6 Frequency of completeness (PCT)

	REF/REJ	OM	PROC	CR	SUBST	CIIA
Partial	0.0%	—	16.3%	0.0%	52.8%	—
Complete	0.0%	—	81.6%	0.0%	45.5%	—
Total	0.0%	—	2.0%	0.0%	1.8%	—
Sum	0.0%	—	100.0%	0.0%	100.0%	—

Table 9.7 Frequency of temporal effects (PCT)

	REF/REJ	OM	PROC	CR	SUBST	CIIA
Pro futuro	0.0%	—	59.2%	0.0%	19.6%	—
Ex nunc	0.0%	—	40.8%	0.0%	80.3%	—
Ex tunc	0.0%	—	0.0%	0.0%	0.1%	—
Sum	0.0%	—	100.0%	0.0%	100.0%	—

By considering only ‘non-zero’ rulings, the number of relevant cases in all the countries investigated dropped from 6436 to 2506. Putting rejections aside implies that the proportion of the number of rulings per country also changes. Certainly, the proportion of rulings of the Romanian Constitutional Court

changed most significantly, dropping from 31.8% (2046) to 5.5% (373) of all rulings in our database, while the relative weight of Hungarian and Polish data increased slightly (Table 9.8).

Statistics show that three-quarters of all ‘non-rejection’ rulings were substantive unconstitutionality, but one-quarter shows high variance between omission, procedural unconstitutionality, constitutional requirement and CIIA (Table 9.9). We get an even more colourful picture if we take further elements of judicial rulings into account and disaggregate rulings into weak, average and strong forms of rulings (Table 9.10)

By also taking country variances into account, we might argue that some tendencies and peculiarities are even more visible by focusing on ‘non-zero’ rulings. Table 9.11 shows that only the Hungarian Constitutional Court was keen to play on the whole field and decided in a similar manner only in every third of its rulings (average substantive unconstitutionality). Otherwise, it used other instruments very frequently: the distribution of ruling types is very steady, which means that, considering its ‘non-zero’ rulings, diversity was one of the most characteristic hallmarks of the HCC. Furthermore, Table 9.11 suggests that the German court’s favourite ruling type was, by far, strong substantive unconstitutionality. Three-fifths of its ‘non-rejection’ rulings were a declaration of severe substantive unconstitutionality; consequently, a certain kind of imbalance was present in the practice of the FCC. Nevertheless, the distribution of the remaining two-fifths of its ‘non-zero’ rulings shows more steadiness as compared to all other courts (with the exception of Hungary). Perhaps the

Table 9.8 Number of rulings with and without rejections (by courts)

	<i>Nr. of rulings</i>	<i>%</i>	<i>Nr. of rulings without rejections</i>	<i>%</i>
CC	367	5.7	169	6.7
FCC	291	4.5	167	6.7
HCC	1326	20.6	722	28.8
PCT	2144	33.3	937	37.4
RCC	2046	31.8	373	14.9
SCC	262	4.1	138	5.5
Sum	6436	100.0	2506	100.0

Table 9.9 Ruling types without rejections I (full dataset)

<i>Ruling types without rejections</i>	<i>N</i>	<i>%</i>
OM	137	5.5
PROC	138	5.5
CR	226	9.0
SUBST	1952	77.9
CIIA – RES	53	2.1
Sum	2506	100.0

Table 9.10 Ruling types without rejections II (full dataset)

<i>Ruling types without rejections</i>	<i>N</i>	<i>%</i>
OM – weak	46	1.8
OM – strong	91	3.6
PROC – weak	44	1.8
PROC – average	44	1.8
PROC – strong	50	2.0
CR	226	9.0
SUBST – weak	754	30.1
SUBST – average	878	35.0
SUBST – strong	320	12.8
CIIA – RES	53	2.1
Sum	2506	100.0

Table 9.11 Ruling types without rejections (by courts)

	<i>CCC</i>	<i>FCC</i>	<i>HCC</i>	<i>PCT</i>	<i>RCC</i>	<i>SCC</i>
OM – weak	0.6	0.0	6.1	0.0	0.0	0.7
OM – strong	0.6	2.4	11.8	0.0	0.3	0.0
PROC – weak	0.6	3.0	0.7	3.4	0.3	0.0
PROC – average	0.6	0.6	2.1	1.7	1.3	4.3
PROC – strong	2.4	7.8	1.4	0.1	5.4	1.4
CR	5.9	13.2	13.3	4.4	15.0	0.7
SUBST – weak	30.2	9.0	12.6	58.4	13.1	0.7
SUBST – average	53.3	5.4	32.8	30.3	44.5	66.7
SUBST – strong	5.9	58.1	13.6	1.7	19.8	18.1
CIIA – RES	0.0	0.6	5.7	0.0	0.3	7.2
Sum (in %)	100.0	100.0	100.0	100.0	100.0	100.0

Romanian Constitutional Court's practice could be described as highly diverse if we consider only those rulings in which the court found something unconstitutional. Interestingly, the Slovak court was very severe if it found a law unconstitutional: two thirds of all its 'non-zero' rulings were average substantive unconstitutionality, a further one-fifth was strong substantive unconstitutionality and 7% restrictive constitutional interpretation *in abstracto*, which means that the Slovak court was activist in the sense that in 92% of 'non-zero' cases it constrained the legislature very heavily. By contrast, softening its rulings was characteristic for the Polish Constitutional Tribunal (58% substantive unconstitutionality) and to some extent also in the Czech case (30% weak substantive unconstitutionality). It is true, however, that all three courts played from a rather poor playbook and picked up most frequently (in more than four-fifths of the 'non-zero' cases) two ruling types accompanied by other ruling types in 11–17% of cases.

9.4 Frequency of strength values compared

9.4.1 Frequency of strength values

As explained in the Introduction and in the chapter on methodology (Chapter 2), if we are keen to explore the diversity of judicial rulings, the frequency of ruling types might be an appropriate indicator for the variance of judicial rulings. To have an even more refined picture about the practice of CE constitutional courts and to answer the question of to what extent CCs have constrained the room for manoeuvre of the legislatures, we have produced a database which assigned to each ruling a score from zero to 10 with an interval of 0.5 (see Chapter 2, Section 2.6). Nevertheless, we had to face once again some kind of uneven distribution of the data (Figure 9.5).

Rejections with ‘zero’ scores account for almost half the cases in each country; thus, we might be once again interested in the diversity and distribution of the relative weight of the remaining cases. ‘Non-zero’ rulings might theoretically vary between scores of 0.5 and 10, which means that they could take on 20 different values. This is certainly a wide scale and data show that not all possible scores became reality in the analyzed cases. Although theoretically all 20 combinations are possible, the middle of the scale is almost entirely empty (Figure 9.6). Approximately 17% of all ‘non-zero’ rulings of the database fall between scores 1.5 and 2.5, and only a slightly more (19.8%) between scores 0.5 and 3. There is a huge gap with no rulings between scores 3.5 and 5.5 followed by the vast majority of rulings with scores between 6 and 9, with a very dense concentration of rulings with a score of 6.5 or 7.

Certainly, there are once again differences among countries: the distribution of scores is steadier in Hungary and especially so in Germany. In Germany, the highest rate of a score is only 19.8% and several stronger scores peak around 10%, which means that the German court combined elements of rulings very

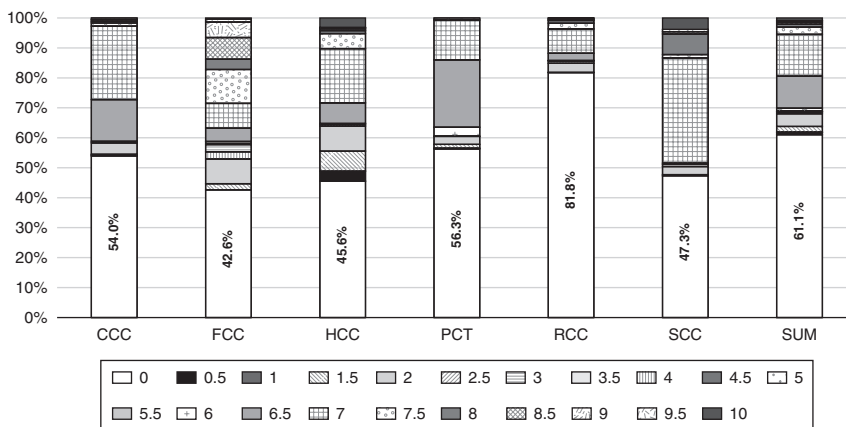


Figure 9.5 Distribution of strength values (by courts).

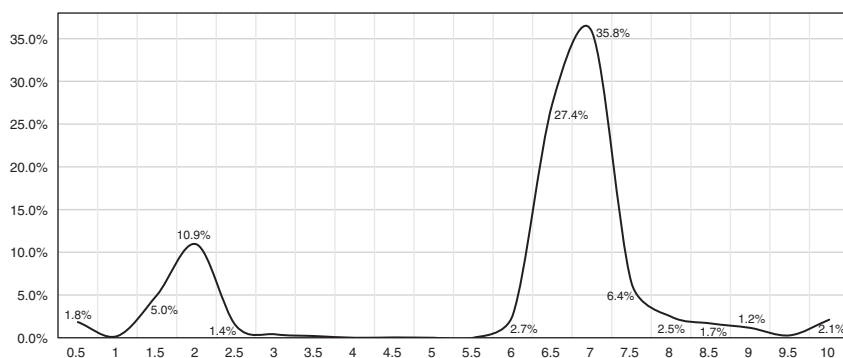


Figure 9.6 Distribution of 'non-zero' strength values (full dataset).

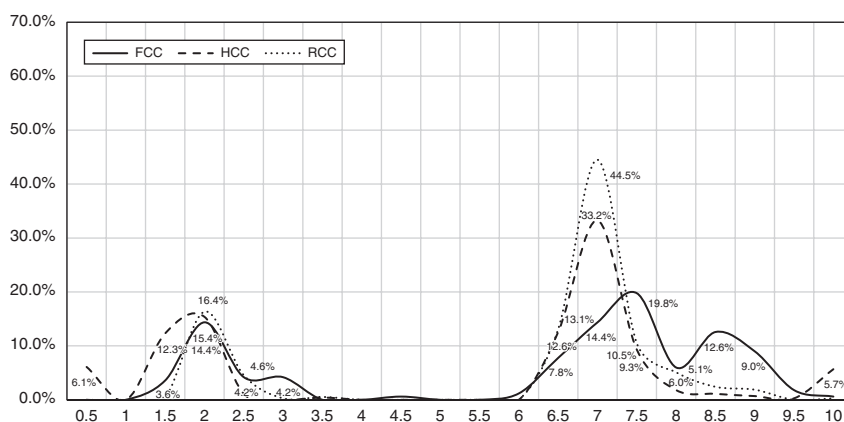


Figure 9.7 Distribution of 'non-zero' strength values (FCC, HCC, RCC compared).

differently (Figure 9.7). In comparison to the ruling types, which showed that the Hungarian Constitutional Court made highly diverse rulings while the German FCC favoured strong substantive unconstitutionality, the scores here indicate that the German court was more sophisticated (and clearly stronger) than the Hungarian if it came to the declaration of substantive unconstitutionality.

This relative diversity of strong rulings in Germany is due to the fact that the FCC was very keen to instruct the legislature by including non-binding/binding prescriptions or directives into the justification, headnote (*Leitsatz*) or even in the operative part. As Table 9.12 shows, the FCC added some kind of prescription (remedy) to every fourth ruling and, even more importantly, to almost every second 'non-zero' ruling – which is almost entirely inconceivable in other countries of the region.⁴ This indicates that the German court played the most active role as a positive legislator in the region, which might be perhaps explained by its age and authority. On the other hand, however, the Hungarian Constitutional Court

Table 9.12 Distribution of prescriptions (FCC)

	REF/REJ	OM	PROC	CR	SUBST	CHIA	Sum
No prescription	0.0% (0)	0.0% (0)	68.4% (13)	0.0% (0)	50.4% (61)	0.0% (0)	25.4% (74)
Non-binding prescription	0.0% (0)	25.0% (1)	0.0% (0)	0.0% (0)	9.1% (11)	0.0% (0)	4.1% (12)
Directive	0.0% (0)	0.0% (0)	26.3% (5)	0.0% (0)	18.2% (22)	0.0% (0)	9.3% (27)
Binding prescription	0.0% (0)	75.0% (3)	5.3% (1)	0.0% (0)	22.3% (27)	0.0% (0)	10.7% (31)
Constitutional requirement	0.0% (0)	0.0% (0)	0.0% (0)	100.0% (22)	0.0% (0)	100.0% (1)	7.9% (23)
NA	100.0% (124)	0.0% (0)	0.0% (0)	0.0%	0.0% (0)	0.0% (0)	42.6% (124)
Sum	100.0% (124)	100.0% (4)	100.0% (19)	100.0% (22)	100.0% (121)	100.0% (1)	100.0% (291)

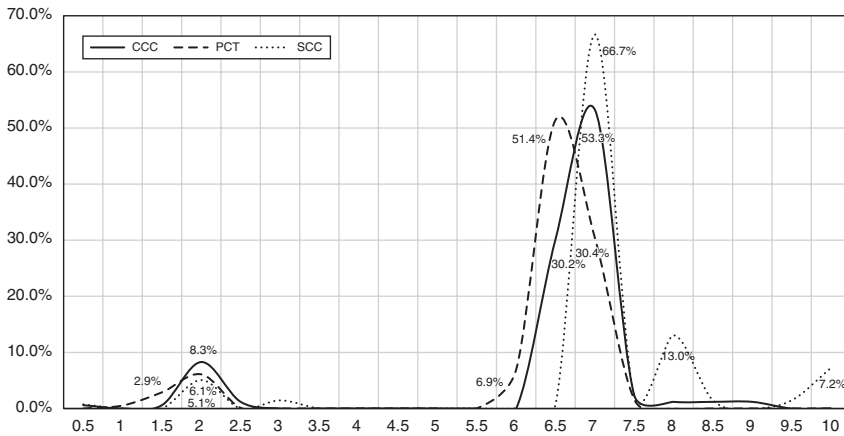


Figure 9.8 Distribution of 'non-zero' strength values (CCC, PCT, SCC compared).

strived to be as soft as it could at the other end of the scale: one-third (33.8%) of its 'non-zero' rulings fall between 0.5 and 2, while the same proportion is clearly lower for all other countries.⁵ This is partly due to the several rulings of the HCC declaring legislative omission, which is almost entirely absent from other courts' practices, and shows that the HCC, although becoming activist by declaring unconstitutionality, several times relied on its softest power by declaring legislative omission without prescriptions.

Other countries' performance concerning the diversity of the strength of judicial rulings shows significantly lower variance. In the Czech Republic and in Poland, four-fifths of all 'non-zero' rulings take on a score of either 6.5 or 7, and the same is true for Slovakia, though with the scores 7 or 8 (Figure 9.8). This shows once again that diversity was not the strength of these three courts.

9.4.2 Standard deviation of strength values

Following the argument about why 'non-zero' rulings are worth a separate analysis, one more question emerges, which concerns the question of diversity of judicial rulings. Since diversity might be expressed not only in terms of frequency of ruling types but also in terms of frequency and distribution of the strength values, we might be interested in the standard deviation of the strength of judicial rulings in general and on a yearly basis as well. Standard deviation shows how diverse judicial rulings were. High scores of standard deviation suggest that the court made rulings with highly different values, while low scores show that the court played rather on a narrow field and made rulings with strength scores quite close to each other.

Scores hint at high variance in Hungary and Germany (and to some extent in Romania), while in Slovakia, the Czech Republic and above all in Poland low variance of strength values is dominant (Figure 9.9). If we are keen to disclose the longitudinal changes in standard deviation, we have to turn to the

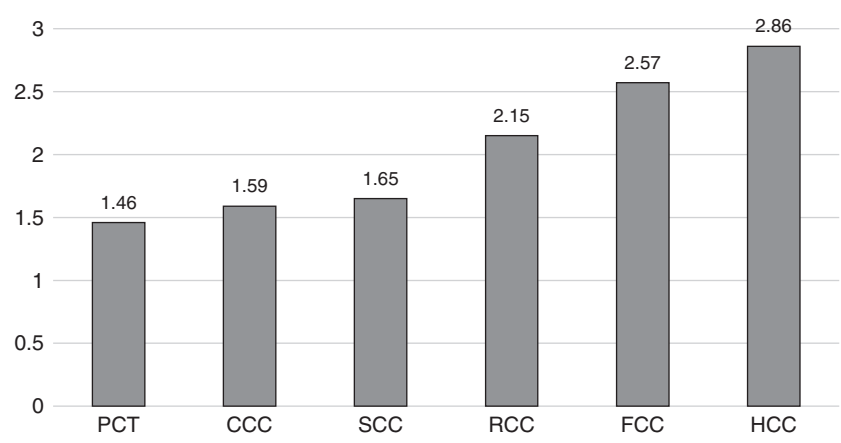


Figure 9.9 Standard deviation of average 'non-zero' strength values in comparison.

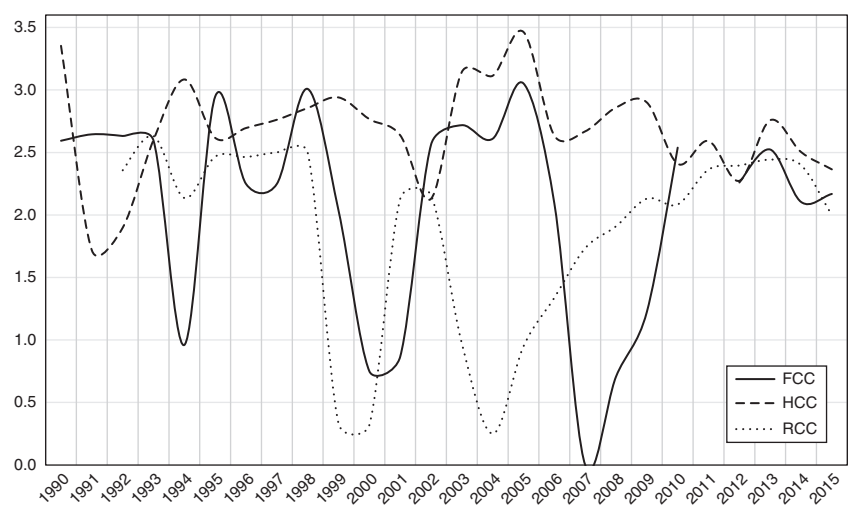


Figure 9.10 Standard deviations of average 'non-zero' strength values (FCC, HCC, RCC compared by years).

standard deviation data as disaggregated on a yearly basis. Interestingly, both high scores of aggregated yearly standard as well as low scores of aggregated standard deviations show a very different picture if we disaggregate them into a yearly dataset.

While the Hungarian court's performance is a result of rather consistent adjudicational practice, i.e. the standard deviation of strength values was consistently high in all years, the scores of the German FCC show big differences several times from one year to another (Figure 9.10). This means that the FCC in one year made quite diverse rulings, while in another year the strengths of its rulings were

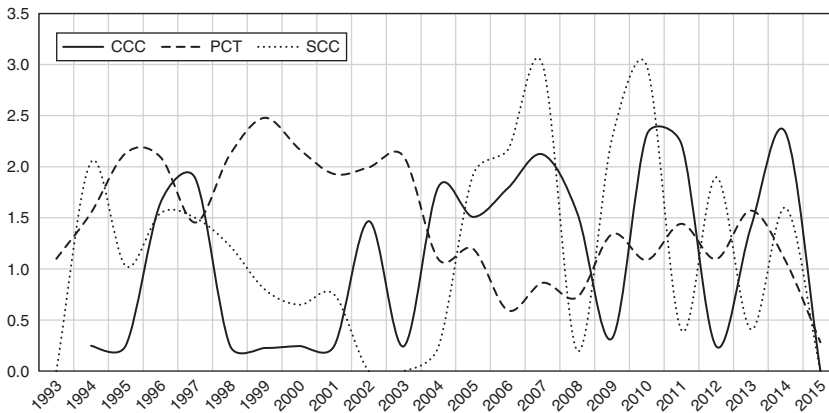


Figure 9.11 Standard deviations of average ‘non-zero’ strength values (CCC, PCT, SCC compared by years).

very similar to each other. A high score of standard deviation is accounted for by greatly different yearly scores in the case of Germany. The case of the Romanian Constitutional Court is once again different: in its first years, the RCC differentiated its non-zero rulings quite strongly on a level with a standard deviation value around 2.50. From 1999 on, there were big ups and downs from one year to another, but from 2005 there was a gradual and slow yearly increase of the value of standard deviation, which means that the RCC increased the diversity of its non-zero rulings from year to year up until 2014.

At the lower end of the aggregated scale the picture is similar, i.e. aggregated data are composed of quite different disaggregated scores (Figure 9.11). While in Poland there are rather gradual long-term trends in yearly variance of standard deviation, this is only partly true for Slovakia and almost absolutely not true for the Czech Republic. The scores are mainly low, i.e. there is significantly lower variance in the strength of judicial rulings in these countries, but in Poland the scores change quite slowly, while in Slovakia after 2003 and, except for a few years of constant low scores (1998–2001), in the Czech Republic from 1994, the standard deviation oscillates yearly with almost no variance of the strength resulting in an average level around the score 2.0.

9.5 Average strength of judicial rulings in comparison

Frequency of strength values depict in a somewhat more detailed manner what we were discussing in previous sections, i.e. the diversity of judicial rulings. Nevertheless, if we want to answer the research question concerning to what extent have constitutional courts constrained the legislature in six CE countries, we have to turn to the average strength of rulings as compared in general and on a yearly basis as well. Once again, it might be useful to analyze the dataset separately: first by considering all data, then by focusing only on ‘non-zero’ rulings.

Having a very general picture of the data, i.e. comparing the average strength of all rulings between 1990 (1993) and 2015, we are faced with some surprising results. It was clearly the Slovak Constitutional Court which constrained the legislature most heavily in the given time period on average, even more strongly than the German FCC with its past of 40 years of constitutional adjudication. Although to date the research has not focused on the operation of the SCC, our comparative data show that the SCC's salient performance is certainly worthy of more intensive analysis. On the other hand, somewhat surprisingly, not only the Slovak and the German constitutional courts but even the Czech Constitutional Court are slightly ahead of their Hungarian counterpart, which was considered earlier to be one of the strongest courts both in the region and worldwide. By looking at the aggregated general data in Figure 9.12 it becomes clear that the general performance of the HCC was certainly not outstanding and did not constrain the Hungarian legislation heavily in the last 25 years.

This means that, although the institutional design provided the HCC with strong 'equipment', which supported the court in building a reputation in Hungary and also internationally, the data of our research project point to a rather careful and modest practice of constitutional adjudication in Hungary. The HCC was able to build its reputation by involving and making decisions very frequently, while at the same time not heavily constraining the legislature. While the Slovak and Hungarian CCs caused a certain astonishment with their general performance, the same certainly does not hold true for the Polish Constitutional Tribunal. As expected, the PCT was rather passive and constrained the legislation less than any other court in the region apart from the Romanian Constitutional Court. As explained in the chapter on the Romanian Constitutional Court (Chapter 7), this low-profile performance of the RCC was mainly due to the somewhat unusual institutional design, which did not provide the plenum of the RCC with a preliminary process of examination and classification of cases. Due to this special institutional arrangement, a vast number of rejections were produced by the RCC, especially between the years 2001 and 2005. The extremely low

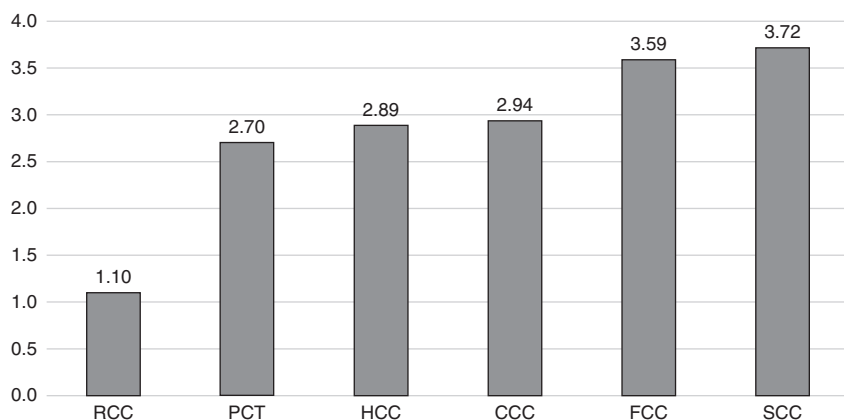


Figure 9.12 Average strength values compared.

general score is partly a consequence of this institutional design. This imbalance in the constitutional adjudication of the RCC will be even more apparent if we compare the ‘non-zero’ rulings of the CEE courts.

When we focus on the question of what happened when the courts ruled some kind of unconstitutionality, three unexpected findings should be highlighted (Figure 9.13). Once again, the Slovak Constitutional Court proved to be highly severe if it came to a declaration of unconstitutionality. The SCC, during its 23 years of functioning, was by far the most rigorous court in the region, followed by the Czech, German and Polish courts, which performed quite similarly if only ‘non-zero’ rulings are considered. Here comes, however, the second stunner: the Romanian CC’s underperformance disappears almost entirely if we compare only ‘non-zero’ rulings, which means that the RCC, if it ruled some kind of unconstitutionality, was almost as tough as most of its counterparts in CE. However, most unexpected is the very low score of the HCC, which clearly shows what we hinted at above: namely, that the HCC, if it declared unconstitutionality, tried to soften its rulings more frequently than any other court in the region. While the general performance of the courts got closer to each other if we focus on ‘non-zero’ rulings, the distance between the HCC and other courts is almost as significant as it is between the SCC and the other four courts at the other end of the scale.

Average strength might, however, oscillate yearly, which means that we should turn our attention to the analysis of the longitudinal changes of average strengths. Starting once again with the analysis of the full dataset, by comparing the yearly oscillation of the average strength values we might discern three groups of countries. Courts belonging to the first group, i.e. HCC and PCT, show relatively steady performance (Figure 9.14). The average strength of their rulings ranges between scores 2.0 and 3.0, except for the first year of both courts with scores close to 5.0. This means that both courts started their work by indicating that they might and/or will be important constraints on the legislature.⁶ Nevertheless, this energetic and rather courageous entering the battlefield was

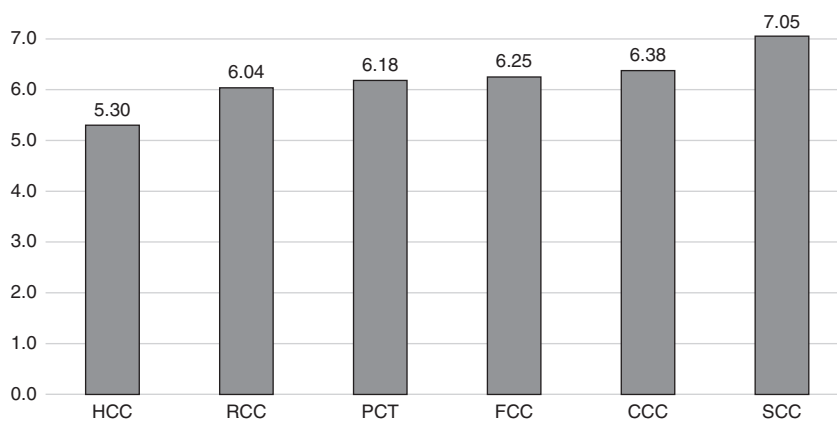


Figure 9.13 Average ‘non-zero’ strength values compared.

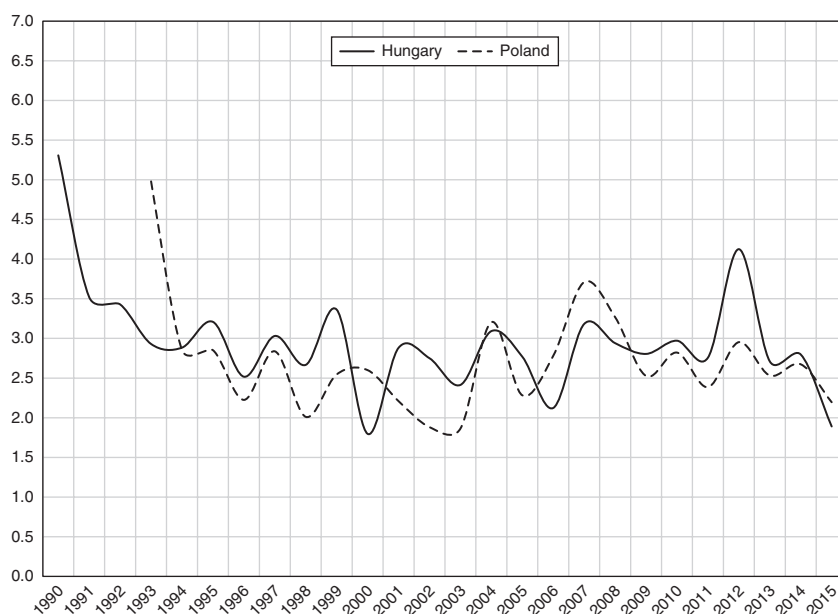


Figure 9.14 Average strength of rulings (HCC, PCT compared by years).

not followed with a similar ambition in the following years. Rather, both courts showed a steady performance (with some special years) with low variances of and low scores in general. To put it briefly, these courts, after having had a relatively strong start, fairly constantly reserved more room for manoeuvre for the legislature. Some years are perhaps more salient, but not as much as the case, for example, in Germany or Slovakia.

By contrast, scores of the German FCC and the Slovak Constitutional Court have oscillated intensively within a couple of years, sometimes even from one year to another (Figure 9.15). This variation shows extreme years with scores ‘zero’ and scores between 6 and 7. This means that, for example, very strong rulings were declared in Slovakia between 1994 and 1998 (with the exception of 1995) and in Germany in 1999 and 2000, while there was a year in Germany where all relevant cases were rejected (2011). Data suggest that the adjudicational practice of these courts appears more incalculable and unpredictable, while they look like very tough courts. On the other hand, there is a relatively clear trend in the Slovak case, which means that after the Mečiar era the court’s stringency dropped significantly from an average of 5.77 (1993–1999) to 3.14 (2000–2015). Big ups and downs from one year to another were, nevertheless, characteristic for the Slovak court’s adjudicational practice, as was also the case in Germany. In general, we are certainly not wrong in arguing that an important characteristic of these courts was their highly volatile adjudicational practice, with several very tough years followed by very soft years. This leads to the general conclusion that

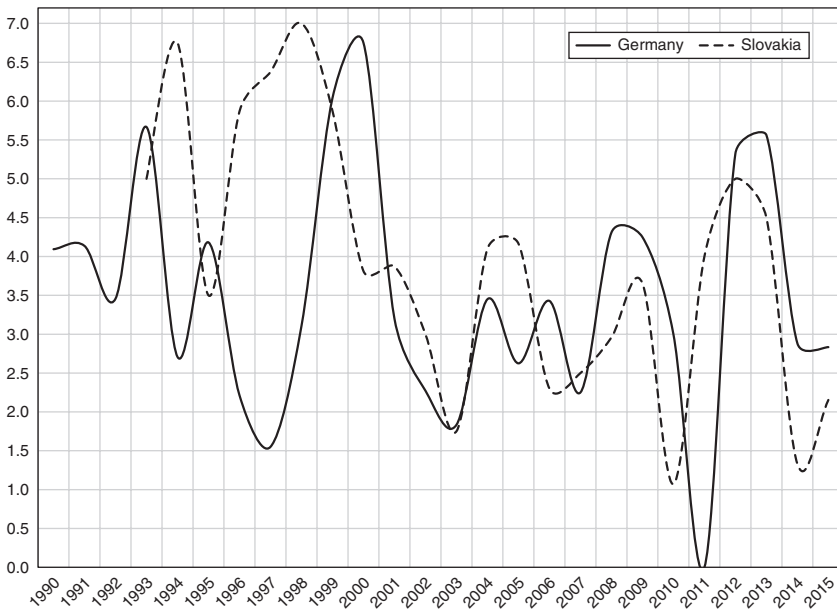


Figure 9.15 Average strength of rulings (FCC, SCC compared by years).

both courts constrained their legislatures severely in several years, while sometimes they allowed the legislature more room to manoeuvre.

The constitutional courts of Romania and the Czech Republic form a cohesive group only from a special perspective. In contrast with the Polish and the Hungarian courts, they certainly did not begin their adjudicational practice with weighty ‘punches’ in their first years, but entered the political field rather smoothly (Figure 9.16).⁷ While abrupt changes in average strengths of judicial rulings from one year to another are not characteristic for these courts, certain gradual changes are discernible. Starting with a decent score around 3.0 or 4.0, in 1998 the yearly average strength of judicial rulings in the Czech Republic began to decrease slightly (but not dramatically) in order to reverse this process. From that year on there was a gradual but constant increase in average strength until 2004. Between 2005 and 2007, there were three years with a significant decrease, while the pre-2005 level was reached once again in 2009. After that the CCC had a relatively steady performance, although the last year included in our investigation hints at a more impulsive decrease of the score of average strength. In contrast, the scores of the RCC show ups and downs in its first three years, but from 1995 to 2004 a gradual decrease is clearly discernible. However, we have to stress once again that a huge number of rejections between 2001 and 2005 certainly heavily influenced this ‘trough’ in the longitudinal curve of average strength. Values ranged between 1.0 and 2.0 from 2007 to 2013 and scores of average strengths reached the mean values (between 2.0 and 3.0) only in the

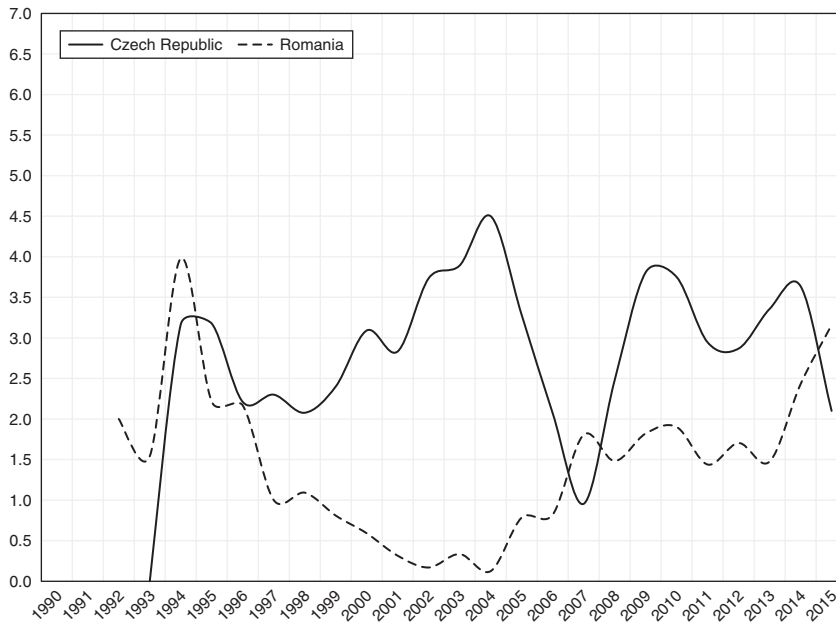


Figure 9.16 Average strength of rulings (CCC, RCC compared by years).

final years, with a massive increase in 2014 and 2015. We might argue that both courts show decreasing or increasing long-term trends without extreme fluctuations from one year to another.

Turning to the longitudinal trends of ‘non-zero’ rulings, comparison of the complete data and the dataset restricted to the ‘non-zero’ rulings might be carried out in two ways: either by within-case analysis of individual countries or by cross-country analysis. To begin with, cross-country analysis of ‘non-zero’ rulings suggests that the SCC was the most severe court in the region from 1990 up to the mid-2000s, although this implied a clear trend of decreasing strength of ‘non-zero’ rulings. Scores of the German FCC were registered once again on a wide scale, as was the case in the analysis of the complete dataset. Here scores range from 3.67 to 8.5 (Figure 9.17). These hectic changes of ‘non-zero’ rulings occurred several times from one year to another, which means that the FCC’s hectic character was not due to changes in the number of rejections but rather to the variance of non-zero rulings. Longitudinal data also show that the Romanian CC’s non-zero rulings matched the average strength of non-zero rulings of CE courts. It peaked with a score of 7.33 in 2003 when the RCC was most severe among CE countries’ courts, considering only the ‘non-zero’ rulings. While from 1993 to 1998 the RCC’s ‘non-zero’ rulings belonged to the lower end of the scale, this changed after 1999 and even more after 2003. Data on the Polish court show some zigzags between scores 5.0 and 6.0 in the early years, but after 2004

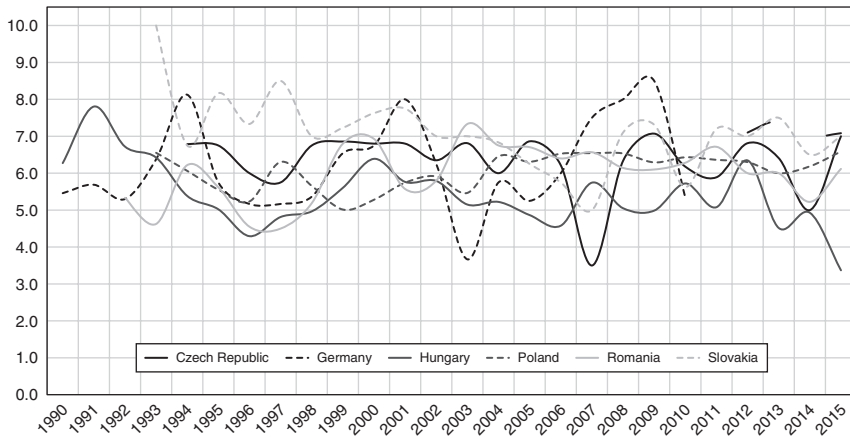


Figure 9.17 Average strength of 'non-zero' rulings in comparison.

its performance was highly stable between scores 6.0 and 6.5, which means a slight shift in the level of scores. With the exception of two extreme years (2007 and 2014), similar steadiness and consistency were characteristic for the Czech CC from the beginning. Scores of the CCC line up between 6.0 and 7.0.

We can argue that both courts epitomize the 'average court' considering 'non-zero' rulings. The case of the HCC is interesting: in the first four years of its functioning the HCC showed sturdiness (with average scores ranging from 6.27 to 7.80), followed by a dynamic fall which stopped in 1996 at 4.29. This score is the fourth lowest score of 'non-zero' average strength in our database. After a less dynamic increase, the scores stabilized at a clearly lower level between 5.0 and 6.0, with a declining tendency after 2011.⁸ Obviously, the Hungarian court 'competed' most of the time from 1994 on for having the lowest average scores concerning the average strength of 'non-zero' rulings.

All in all, longitudinal analysis of the 'non-zero' rulings reveals that the Slovak Constitutional Court persistently outperformed other courts in the region up to the mid-2000s, while the HCC underperformed them more or less consistently from 1994 on. The German FCC maintained its hectic performance, producing extreme years at both ends of the scale, while the Czech and the Polish courts proved to be the most consistent courts (if we put the two extreme years of the CCC aside). The Romanian court moved up to the other courts' average quite consistently, after being relatively soft in declaring unconstitutionality in its first years.

Nevertheless, it might be of interest to compare longitudinal changes of average strength of the complete dataset and the dataset based only on 'non-zero' rulings country by country. Analyzing the data and graphs from this point of view shows that the difference between the average strength of judicial rulings and the average strength of 'non-zero' rulings varies from country to country.

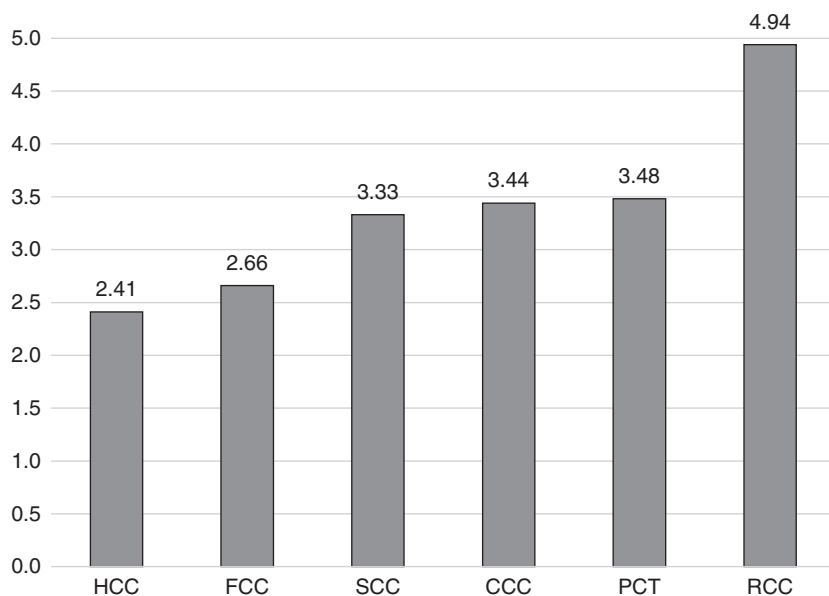


Figure 9.18 Differences of average strengths of rulings with and without ‘non-zero’ rulings.

As the previous analysis explained, the greatest difference between the two indicators was produced by the RCC. This was once again a result of the high number of rejections in the early 2000s. The difference is clearly smaller in the case of Poland, the Czech Republic and Slovakia, and even smaller in Germany and Hungary. This data simply reflects the relative weight of rejections, which heavily influence the strength of rulings (Figure 9.18).

Courts with high differences between the two indicators, i.e. with high scores in Figure 9.18, might not be characterized in general as strong or weak courts; rather, we have to separate their general attitude and their attitude towards what kind of unconstitutionality they declared. They might be very tough when they find some cases unconstitutional, while declaring unconstitutionality is less frequent than in other countries. Is a court which ‘punches’ rarely but then with high intensity a strong court or a weak court? Is it a sign of weakness or stringency? On the other hand, courts with a relatively low score of difference between the two indicators were quite consistent in all aspects in being either rather permissive or rather severe; thus, their adjudicational practice might be characterized quite easily as strong or weak in general. General attitudes, average strength of rulings and average strength of non-zero rulings could, however, change in the long run or even in a short time period, producing consistent changes of both indicators at the same time; but they can show divergences and convergences as well. Therefore, longitudinal changes should be also investigated from this perspective.

The within-case analysis might reveal whether low scores of average strength are due to the number of rejections or whether the court softened its rulings even beyond declaring several rejections. This proves whether a trend of weakening rulings was a general phenomenon, i.e. the court consistently made weaker rulings and softened even declarations of unconstitutionality, or whether the court looks like an inconsistent actor in the sense that while rejecting several cases it ‘punched’ the legislature severely if it came to a declaration of unconstitutionality. The two lines on Figures 9.19 to 9.24 show the changes of average strength with and without ‘zero’ rulings.

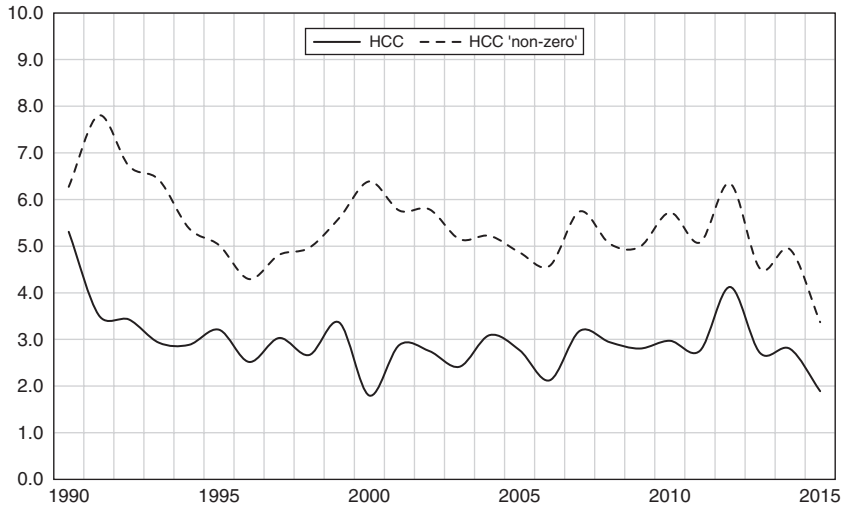


Figure 9.19 Average strength of rulings with and without ‘non-zero’ rulings (HCC by years).

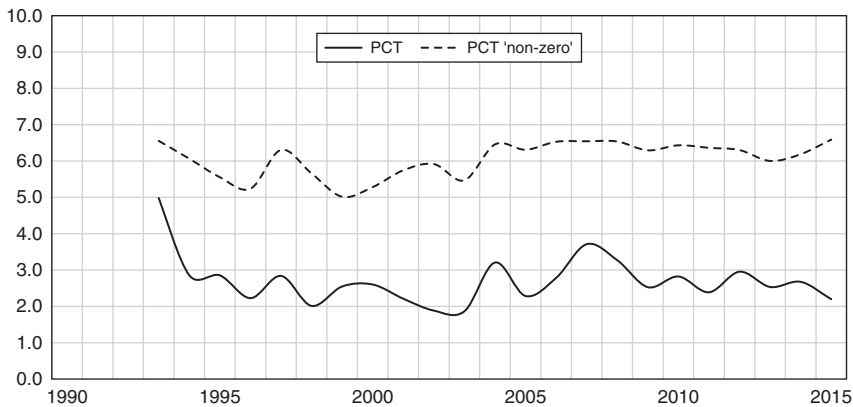


Figure 9.20 Average strength of rulings with and without ‘non-zero’ rulings (PCT by years).

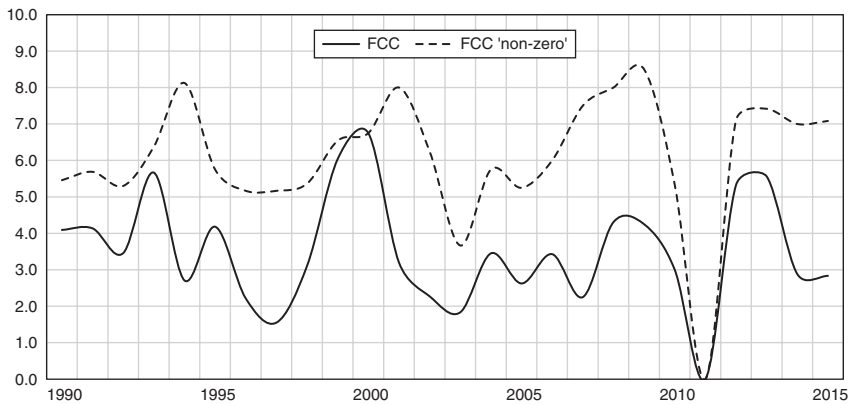


Figure 9.21 Average strength of rulings with and without 'non-zero' rulings (FCC by years).

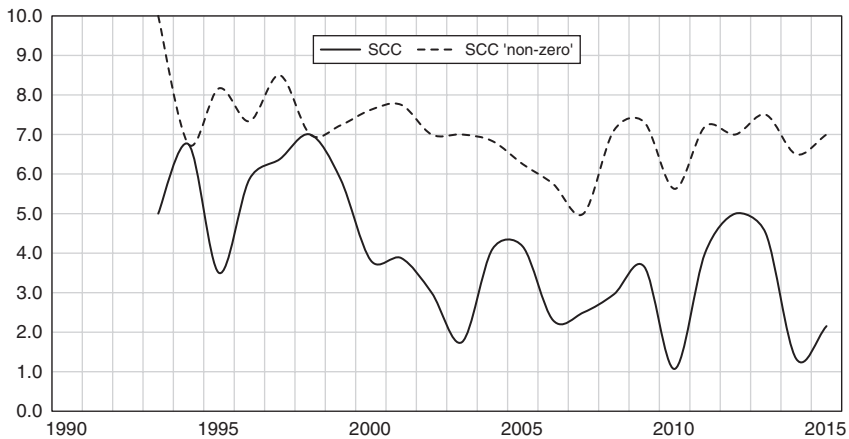


Figure 9.22 Average strength of rulings with and without 'non-zero' rulings (SCC by years).

By reading the figures we might discern three tendencies: first, if the two lines run in parallel it means that softening and strengthening of the rulings depends not on rejections, i.e. the court's behaviour is consistent. If their rulings are weaker in general, they are softer also in declaration of unconstitutionality, and, *vice versa*, if the general strength is increasing it is due to the more severe declarations of unconstitutionality. Second, if the two lines diverge and the difference is getting relatively bigger, it means that while being more permissive in general, i.e. rejecting more cases, they are more severe if it comes to a declaration of unconstitutionality. If the difference is quite big between the scores of general average strength and average strength of 'non-zero' rulings, this shows a divergence

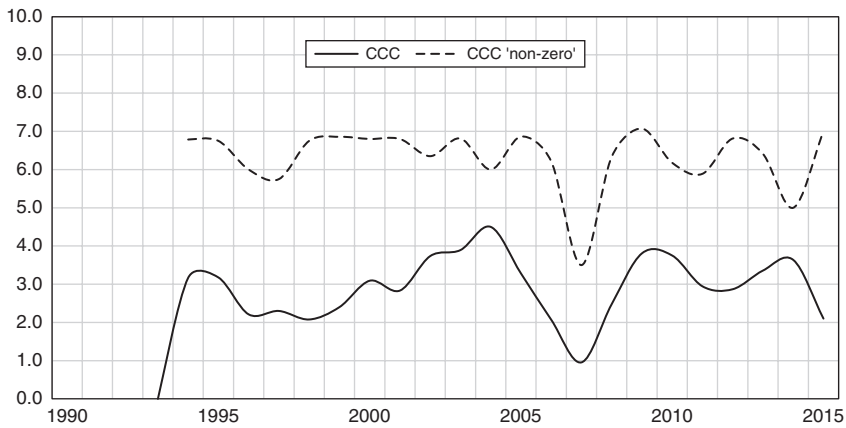


Figure 9.23 Average strength of rulings with and without 'non-zero' rulings (CCC by years).

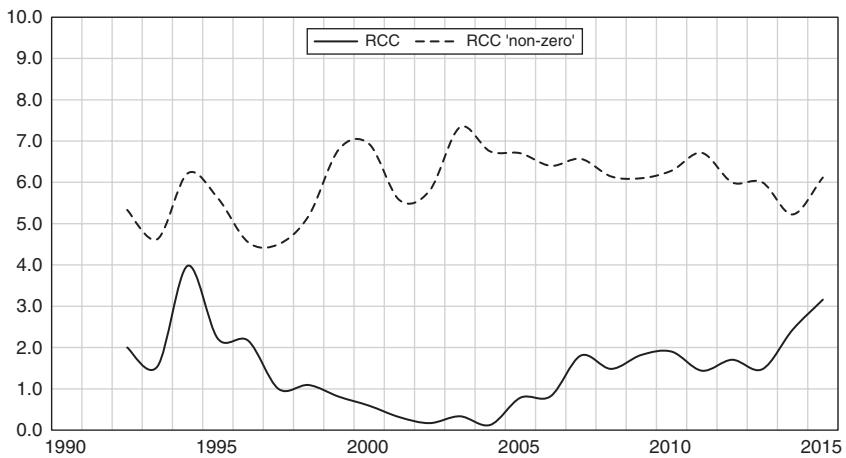


Figure 9.24 Average strength of rulings with and without 'non-zero' rulings (RCC by years).

between the general attitude and the specific cases in which the court declares unconstitutionality of a more severe form. Third, if the two lines converge and the difference is getting smaller, it means that the court's attitude became either generally stronger or generally weaker, depending on whether it simply rejected more cases or simply declared weaker forms of unconstitutionality (at the same level of rejections). Thus, convergence might also lead towards higher or lower levels of strength.

To start with the first tendency, this is characteristic for Hungary and Poland. (Figure 9.19 and Figure 9.20). While the average difference between average

strength of all rulings and average strength of non-zero rulings was bigger in Poland, trends in average strength and average strength of non-zero rulings were relatively consistent with each other in both countries. There were some years with diverging scores (such as 1991 and 2000 in Hungary, or 1998 and 2015 in Poland), but the general picture is obvious: the number of rejections did not really influence the general attitude of the court.

If they rejected more cases, they were also softer in their ruling of unconstitutionality, and, *vice versa*, if they rejected fewer cases, they were more severe in their ruling of unconstitutionality. They consistently changed their attitude towards the legislature whether it was about declaring constitutionality or unconstitutionality. This led to a more or less consistent difference between the two indicators (around 2.4 in Hungary and 3.5 in Poland).

Germany and Slovakia form another group of countries (Figure 9.21 and Figure 9.22). As we have stressed in the longitudinal analysis of average strength of all rulings and average strength of non-zero rulings, both countries' curves attest to rather hectic adjudicational practice from both perspectives. The question emerges, however, whether these hectic changes tended coherently in one direction or not. Now, the picture is rather confusing: there are several years with highly diverging trends and the differences between the two indicators fluctuated heavily, ranging from 0.0 (in 2000 and in 2011) to 5.42 (in 1994) in Germany and from 0.0 (in 1994 and 1998) to 5.25 (in 2003) in Slovakia.⁹ This means that convergence and divergence of scores were more typical in these countries than consistent difference between the two indicators. To put it in another way, these courts did not soften their rulings of unconstitutionality, even if they found significantly more cases constitutional (rejections). Sometimes they even declared stronger rulings, which led to a high divergence in the two indicators discussed here.¹⁰

Convergence of the trends is also discernible in both countries, which means that even if they found more cases unconstitutional (fewer rejections) they declared some form of weak unconstitutionality rather than a strong form of it. This discrepancy in trends of the two indicators is a giveaway for being able to make distinctions: while being more or less permissive/severe in declaration of unconstitutionality, as in the previous year, the courts could also counter-steer and declare, contrary to their general attitude towards finding cases constitutional/unconstitutional, more severe/permissive unconstitutionality.

As a third group, the Czech Republic and Romania shared something in common once again from a very special perspective (Figure 9.23 and Figure 9.24). In both countries, gradual and long-term changes in difference between the two indicators are discernible. While in the Czech Republic a slow and gradual convergence is visible from 1998 to 2004, the same is true in Romania from 2004 to 2014. In the case of Romania, it is also interesting that the difference between the two indicators decreased in the last two years (2014–2015) to a level rather characteristic of Hungary. This means two things at the same time: first that rejections were no longer as dominant as in the early 2000s and second that the RCC tended to declare a slightly weaker form of unconstitutionality if they found the case unconstitutional.

It is important to note, however, that in countries with extreme or gradual divergence and convergence, consistent adjudicational practice, as in Hungary or Poland, was not completely absent. There are time periods in which the two curves move together in the same directions in these countries as well.¹¹

9.6 Dissenting opinions compared

After having analyzed the diversity and the strength of majority rulings, we now turn to the dissenting opinions. Since we were interested mainly in the operative part of the judicial rulings, we have excluded all concurring opinions from our investigations, because judges publishing a concurring opinion agree with the tenor of the rulings, i.e. they accept the operative part, while they would have argued in a different way. The several ways of reasoning are, however, not in the focal point of our project.

We are aware of the fact that the number of dissenting opinions does not exactly reflect the voting behaviour of judges. There have certainly been several rulings where dissenting judges have not published any dissenting opinions; they have simply voted against the proposal which was accepted by the majority at the end of the process. There might be several reasons why judges do not publish dissenting opinions, although they voted against the proposal. From the perspective of public opinion, these reasons are nevertheless not so important. We assume that if a judge absolutely disagreed with a ruling she or he should have informed the public about the reasons for her/his dissent. Thus, we rely on dissenting opinions, which are not only informative but also instructive for public opinion. By keeping this in mind, we can start with the analysis of dissenting opinions.

Looking at the data on the numbers of dissenting opinions (DOs), it is first obvious that there are countries where publishing DOs is highly infrequent. In Germany, although publishing DOs has been allowed since 1971, the number of DOs is very low: altogether there were 35 DOs published to the rulings relevant from the perspective of the project. On the other hand, in Hungary 885 DOs were published, which is a really high number, though the absolute numbers are perhaps rather deceptive, since they might depend on the number of judges sitting on the benches of the court and the number of relevant rulings we included into our research project. Consequently, we decided to focus on the proportion of rulings with at least one dissenting opinion instead of their absolute numbers. Here, once again, we have to stress that our units of observation are not judicial decisions but rulings. This means that one judicial decision might contain several rulings and several dissenting opinions which oppose different rulings of the same decision.

If we start with the general picture and focus on the average number of rulings with at least one DO published from 1990 to 2015, we might discern three groups of countries (Figure 9.25). As noted above, very few DOs were published in Germany and in Romania, while in Poland and Hungary there were somewhat more. In Hungary DOs appeared in relation to every fourth ruling, which is already a significant proportion. It is, however, not as 'impressive' as

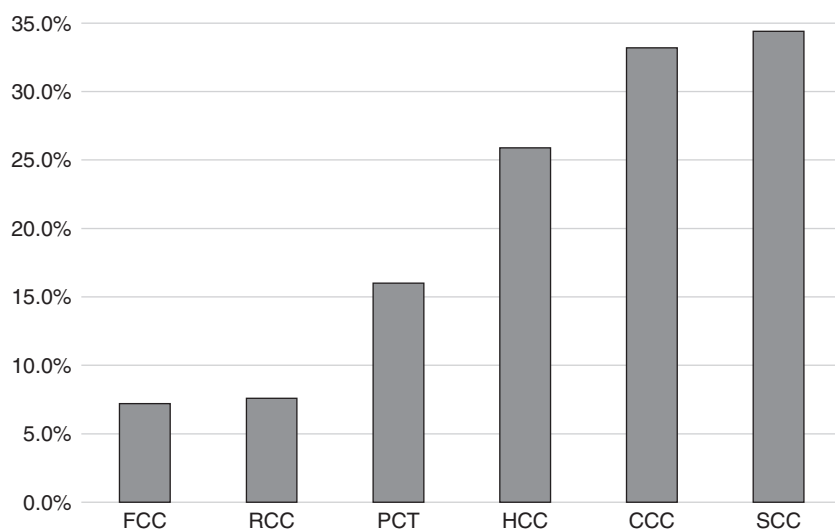


Figure 9.25 Proportion of rulings with at least one dissenting opinion in comparison.

the percentage of DOs in the Czech Republic and in Slovakia: in both countries, every third ruling had a dissent. This might be an indicator of a polarized court, as we noted above, but it is not necessarily a political polarization. There might be several reasons why judges dissent. Differences in the political background of the judges might influence and certainly have influenced the publication of several dissenting opinions in the region, but – as this part of the project was a quantitative analysis – we have not attempted to disclose the motivations behind the dissents. Frequent dissents, nevertheless, show that the composition of the court is very heterogeneous, which certainly has advantages as well as disadvantages.

The general picture might be refined if we consider the longitudinal changes in the proportion of rulings with at least one dissenting opinion. If we consider the courts with the highest proportion of rulings with at least one DO, we might discover that the distribution of DOs is rather uneven in the 25 (or 22) years of their functioning (Figure 9.26). For all three courts it is characteristic that the proportion of rulings with at least one DO increased significantly towards the end of the time period under investigation. In Hungary, in the first eight years this proportion ranged between 3% and 16% and in the next 12 years between 19% and 34%, which indicates a gradual increase in the number of dissenting opinions. A radical shift is discernible after 2010: starting at 51%, the proportion of rulings with at least one DO peaked in 2015 with over 70%. With bigger fluctuations, a similar process is observable in Slovakia. While in the first years there was no ruling with a DO at all in Slovakia, in 2013 there was no ruling without one.

Even if we put aside this extreme data of 100% of rulings having at least one DO because of the very low number of rulings, we can ascertain that the Slovak court along with its Hungarian counterpart changed from one of the most

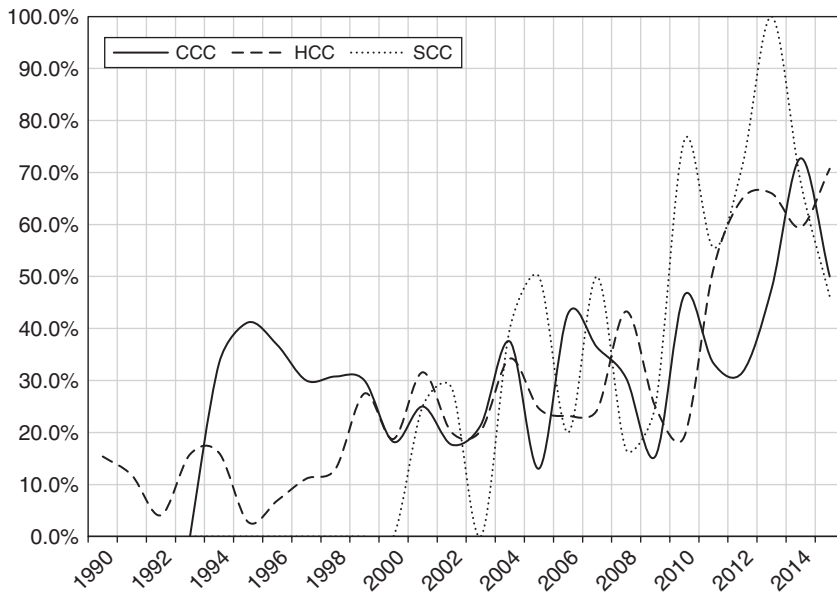


Figure 9.26 Rulings with at least one dissenting opinion (CCC, HCC, SCC compared by years).

cohesive judicial bodies in the region to one of the most polarized ones. The curve depicting the proportion of rulings with at least one DO in the Czech Republic shows a somewhat different pattern. If we disregard the year 1993 because of the extremely low number of rulings, it is more than obvious that the CCC was never a unanimous body, or the judges of the CCC were never reluctant to publish their dissenting opinion. From the very beginning the proportion was clearly above 30%, which is a very impressive number. After some years of decrease a slightly increasing tendency with bigger fluctuations is discernible from 2004 onwards, with a more radical increase from 2012 on. This means that the CCC was more polarized from early on, with a slight intensification of the polarization from the mid-2000s and a radical shift in the final years under scrutiny. All in all, the proportion of rulings with at least one dissenting opinion was very significant: in Slovakia and Hungary, it clearly accounted for more than 50% after 2010 and 2011 respectively, while in the Czech Republic it was always over 20% and several times over 40%.

While producing some extreme years and/or a gradual but less significant increase of rulings with at least one DO, the Romanian and the Polish court seem to have been less divided (Figure 9.27). The RCC published DOs to less than 10% of its rulings up to 2009, while this ratio ranged between 10% and 20% after 2010. Except for the extreme years of 2006 with its 1.8% and 2007 with its 50%, the Polish court's curve moved between 5% and 15% from the beginning up

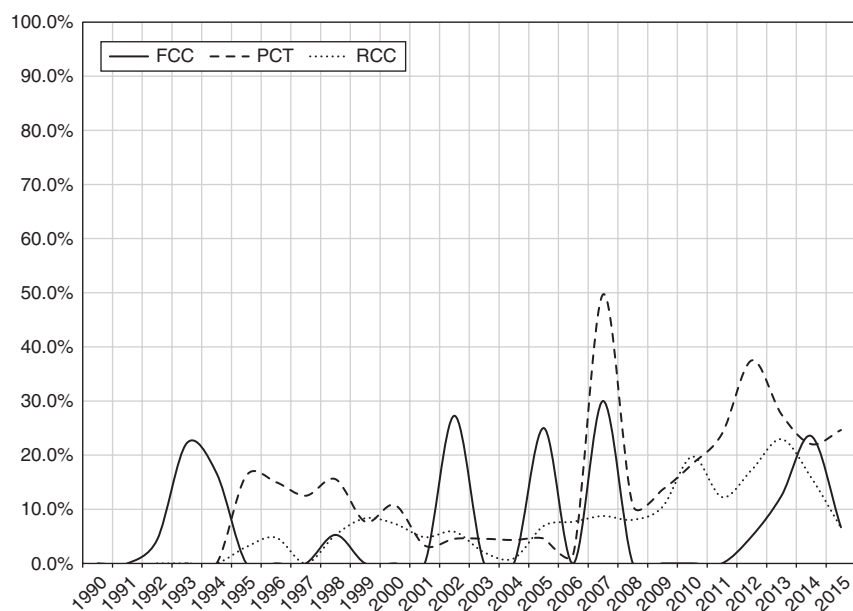


Figure 9.27 Rulings with at least one dissenting opinion (FCC, PCT, RCC compared by years).

to 2009 and then shifted up a level after 2010, with a proportion ranging from 19% to 38%. This means, however, that both courts' scores are clearly below the scores of the Slovak, Czech and Hungarian courts, not to mention the German court with its very low absolute number and proportion of rulings with at least one DO.

9.7 Conclusions

The descriptive statistical analysis of the JUDICON dataset helped us map systematically the multi-faceted realities of constitutional adjudication in six Central European countries. We now might have a general impression on how courts in CEE used their instruments to reconcile political decision-making with constitutional principles. It turned out that some courts (HCC and FCC) were more engaged in selecting a wide range of forms of judicial rulings, while others (RCC, CCC, PCT) were content with more simple forms. While the Polish, Hungarian and, foremost, the Slovak court 'punched' hard right after they were established, even these courts drew back their 'horn' and, sooner (PCT, HCC) or later (SCC), abandoned being a formative power of the political system. Certainly, the German court has always been most inclined to enlighten the legislator as to how unconstitutionality should be remedied, but even the FCC could not be characterized as an extremely activist court.

Nevertheless, in some cases, external political conditions might explain the variation of diversity and strength of judicial rulings, as well as the proportion of published dissenting opinions. As was shown in the chapters on the Polish Constitutional Tribunal (Chapter 6), the Romanian Constitutional Court (Chapter 7), the Slovak Constitutional Court (Chapter 8), and to some extent also the Hungarian Constitutional Court (Chapter 5), external factors and political conditions (sometimes combined with the internal transformation and composition of the court) might have heavily influenced the general performance of these courts in all aspects, i.e. concerning the variety and strength of judicial rulings, as well as the number and proportion of dissenting opinions. Plausible arguments have been presented in the country studies on the mechanism of how politics influenced constitutional adjudication in these countries. If direct influence was not conceivable, open or more covert forms of court-packing helped the politicians influencing the practice of the courts; this led, on the other hand, to the polarization of the courts as indicated by the proportion of published dissenting opinions. In the case of open attacks, courts tried to resist (like in Slovakia in the 1990s or in Hungary and Poland after 2010 or 2015), which was partly reflected in their performance as measured by the strength of their rulings. In general, however, we might conclude that while these judicial bodies became more and more polarized, they have not really constrained too heavily the legislators of their respective countries.

Certainly, in other cases the courts have not been exposed to political influence and intervention as in the countries mentioned above. The Czech Constitutional Court, while preserving its high reputation, has not been under heavy political pressure, and the same holds true for the German Federal Constitutional Court. As explained in the respective country studies, the general performance of these courts does not suggest that the strength or variance of their rulings is connected to special political circumstances. While the election of the judges in both countries is part of high politics, institutional arrangements (in the Czech case) or political culture (in the German case) might prevent politicians from charging courts or judges with political involvement and intentions. The practice of constitutional adjudication in these countries seems to be driven by other factors than politics.

Nevertheless, unduly political involvement of the courts, as presented by some politicians' narratives, is not characteristic for other courts of the region, either. While, to some extent surprisingly, the Slovak Constitutional Court made the strongest rulings in the 1990s, the SCC has never become a third legislator, as explained by Erik Láštík and Max Steuer in their analysis (Chapter 8). Even the Romanian Constitutional Court started as a low-profile institution and became part of the political game only after it got the full competence of annulling legislative acts in 2003 (see Chapter 7). Certainly, political actors discovered and used the courts as a new instrument for their ponderous games, which led to a clear-cut polarization of these courts soon after the political actors realized the stakes of sending their own candidates to the court. This holds true not only for the Slovak and Romanian courts, which experienced political pressure as early as

in the 1990s (SCC) or in the late 2000s, but also for their Polish and Hungarian counterparts. Nevertheless, these courts either only pretended to be activist, like the PCT, and very rarely took strong decisions (see data above and the country study in Chapter 6), or they even tried to elaborate soft forms of rulings which might have implicated some form of dialogue on constitutional issues, like in the Hungarian case (see also data above and Chapter 5). Looking back to these strategies from 2018, we must, however, admit that they were not always successful in implementing their original intent.

While this last chapter aimed to present the ‘big picture’ from a comparative point of view, the studies of the present volume attempted to highlight the possible country-level explanations. Nevertheless, a general explanation of judicial behaviour is a task for the future. As mentioned in Chapter 2 (Section 2.8), the next step in exploring the practice of constitutional adjudication in Central Europe will be to assess the explanative factors of the phenomena we presented in this volume by quantitative methods. Our research community is keen to continue with using the JUDICON project’s dataset for unfolding the possible explanative factors of diversity and strength of judicial rulings, and frequency of dissenting opinions and dissenting coalitions.

Notes

- 1 For example, in Hungary this work is done by the Secretary General of the Hungarian Constitutional Court.
- 2 It is, however, not completely clear what the reason is and what it means that the ruling/decision ratio is low or high. A high or low ratio might depend on the practice of how courts merge various motions, whether they concentrate only on one issue or aim to resolve more motions in one decision; whether they consider the issue as a complex phenomenon which requires separate rulings or whether they can afford to pick up only one motion since the administrative staff had preselected and refused all other motions. There might be several reasons for this variance of rulings/decision average proportion; thus, we would not draw any conclusions from the difference among countries in this regard.
- 3 Due to the extremely high number of rejections, which has its origin in the institutional design, data of the Romanian Constitutional Court might distort the general impression to some extent; thus, we always indicate general data without Romania.
- 4 In Hungary and Slovakia, some kind of prescription was added to only around 9% of the rulings; the same data is 2.5% in the Czech Republic and in Romania, while in Poland there were not any prescriptions at all (!).
- 5 CCC: 9.5%; FCC: 18%; PCT: 9.5%; RCC: 16.9%, SCC: 5.8%.
- 6 It should be noted, however, that the relatively high scores around 5.0, which were characteristic for the early years of both courts, do not seem to be highly outstanding in comparison to some scores in Slovakia or Germany. In both countries, the scores of several years significantly surpassed the score 5.0 and ranged between 6.0 and 7.0.
- 7 The first year of the CCC is more deceptive with its score ‘zero’, since there was only one relevant decision in that year. It is better to start the analysis of the CCC with year 1994 and its 15 rulings.
- 8 The HCC also produced the lowest score with an extreme of 3.37 – a low score even for the complete dataset, which also includes the zero rulings.

- 9 Zero difference means that either there was no rejection at all or all rulings were rejections. In Germany, the zero differences were the result of two different phenomena: first, in 2000, the zero difference was due to the fact that there was no rejection at all in that year, while in 2011 the zero differences came from the fact that all relevant cases were rejected by the FCC.
- 10 See the diverging curves in Germany in 1994 or 2007, or in Slovakia from 1993 to 2000 in almost every year, even in 2004. Certainly, the divergence and convergence of the indicators were more characteristic for Slovakia.
- 11 SCC after 2006; CCC 2004–2013; RCC 1993–1996; FCC 2001–2006.