

A Holistic View of the Czech Constitutional Court Approach to the ECtHR's Case Law

On the Importance of Individual Justices

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Abstract

This article analyses the Czech Constitutional Court's treatment of the European Court of Human Rights (ECtHR) case law. After the introductory part, it explains the normative position of European Convention of Human Rights and ECtHR case law in the Czech constitutional order. The following empirical part of the text contains some basic data concerning the frequency of use of ECtHR decisions in the judgments of the Czech Constitutional Court. It shows that the use of ECtHR case law by the Czech Constitutional Court varies significantly both in time and amongst individual Justices. Besides providing the reader with some descriptive statistics, it identifies the most relevant factors that might be responsible for the variability and formulates corresponding hypotheses. Generally speaking, the

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research shows that both resources and preferences of individual Justices influence the number and nature of references to the ECtHR case law. While assessing the approaches of individual Justices, the article also aims to answer an important underlying question: Is the quotation of ECtHR case law a sign of acceptance of international law or does it serve as a fig leaf to boost the national decision's legitimacy? In this regard, the text concludes that, depending on preferences of individual Justices, references to ECtHR case law can be made for a number of reasons and that "simple numbers" are not a reliable sign of ECtHR case law's substantive impact.

I. Introduction

The impact of international human rights obligations on domestic legal order has been at the centre of attention of international and domestic legal scholars for quite some time.¹ Similar observations can be made for the interaction between international human rights bodies, with the European Court of Human Rights occupying a prominent position, and domestic courts. Supreme courts and specialised constitutional courts have attracted most attention in this regard. Recent scholarship suggests that top domestic courts and constitutional courts in particular can serve as "proxies" for international human rights bodies.² Even though constitutional courts are not mere "transmission belts" of the international human rights bodies,³ they play a crucial role in the implementation of international human rights obligations at the domestic level.

This article builds on the aforementioned developments, but its task is more "technical". It is designed as an empirical single-case study with doctrinal overlaps focusing on the treatment of ECtHR case law by the Czech Constitutional Court (CCC).⁴ Even in this regard, this article does not

¹ See *inter alia* J. H. Gerards/J. Fleuren, Implementation of the European Convention on Human Rights and of the Judgments of the ECtHR in National Case Law, 2014. The Czech and Slovak cases have recently been thoroughly researched and presented in H. Smekal/K. Šípulová/I. Pospíšil/J. Janovský/P. Killian, Making Sense of Human Rights Commitments: A Study of Two Emerging European Democracies, 2016.

² See in this issue of Heidelberg Journal of International Law D. Kosář/J. Petrov, The Architecture of the Strasbourg System of Human Rights: The Crucial Role of the Domestic Level and the Constitutional Courts in Particular, 585.

³ D. Kosář/J. Petrov (note 2).

⁴ Some aspects of the CCC's treatment of the ECtHR case law have already been analysed in publications written in English. See L. Majerčík, Czech Republic: Strasbourg Case Law Undisputed, in: P. Popelier/S. Lambrecht/K. Lemmens, Criticism of the European Court of Human Rights, 2016, 131 et seq.; M. Bobek/D. Kosář, The Application of European Union

stand alone, as similar studies have already been published. *Marlene Wind* has explored the use of the ECtHR and other international bodies' case law by the Nordic supreme courts.⁵ *Annika Jones* has mapped the position of international human rights bodies' case law at the International Criminal Tribunal for the former Yugoslavia (ICTY).⁶

Both of these studies, however, generally stay at what I refer to as the "court level". As *Kosař* and *Petrov* rightly note, the processes and factors operating within courts – what I call the "internal level" in this article – are extremely important for understanding the nature and purpose of references to international human rights case law. Still, they have been neglected in academic literature so far and more nuanced studies are necessary to advance our understanding of the institutional factors that affect the treatment of Strasbourg case law in domestic constitutional adjudication.⁷

This article is one of the first steps to fill in this gap, at least in the case of the Czech Republic. It aims to fulfil several purposes. First of all, it should provide the reader with some basic empirical data concerning references to the ECtHR case law by the CCC. Besides mapping the total number of references and its evolution over time, the article explores the differences between individual Justices, acting as judges-rapporteurs.

This article does not stop at the level of descriptive statistics. It provides the reader with a complex overview of factors that are (or might be) relevant for the use of the ECtHR case law by the CCC. It employs qualitative analysis to explain both the trends and evolution of the number of references over time as well as the differences between approaches of individual Justices of the CCC. In this regard, I will formulate several explanatory hypotheses and then proceed to discuss them.⁸

Since this article constitutes an exploratory or "pioneering" single-case study, it does not seek to present final answers to the questions presented. On the other hand, this article has the ambition to map the relevant factors

Law and the Law of the European Convention of Human Rights in the Czech Republic and Slovakia: An Overview, in: G. Martinico/O. Pollicino (eds.), *The National Judicial Treatment of the ECHR and EU Laws: A Comparative Constitutional Perspective*, 2010, 177 et seq.

⁵ *M. Wind*, *Do Scandinavians Care about International Law? A Study of Scandinavian Judges' Citation Practice to International Law and Courts*, *NJIL* 85 (2016), 281 et seq. This is obviously not a single-case study, but a study of several Nordic countries. Its conception is however quite similar.

⁶ *A. Jones*, *Insights into an Emerging Relationship: Use of Human Rights Jurisprudence at the International Criminal Court*, in: *HRLR* 16 (2016), 701 et seq.

⁷ *D. Kosař/J. Petrov* (note 2).

⁸ Robust empirical testing of most of the hypotheses would require us to conduct independent studies based on statistical regression. Deeper exploration of such hypotheses will thus be left for future research by this author or another.

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(variables) that might be responsible for the CCC's references to the ECtHR case law and it also aims to formulate hypotheses that might be explored in following case studies concerning the CCC or other constitutional courts.⁹

I will proceed as follows. In the *second* part I will analyse the normative position of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) and of the case law of the ECtHR in the Czech legal order. The *third* part contains a few words on methodology and presents the basic data concerning the frequency and distribution of references to the ECtHR case law, both at the level of the whole Court and at the level of individual Justices. In this part, I also formulate and discuss hypotheses explaining the patterns concerning the distribution. The significant factors can be divided into three groups: 1) the normative considerations, 2) resources in a broad sense and 3) preferences, including legal preferences. The *fourth* and final part sums up the most important findings of the article and pinpoints the most promising hypotheses that might be explored further in future studies.

Despite the rather formal and technical focus of this study – i.e. referencing to the ECtHR case law –, I believe that it can deepen our understanding of the role that the CCC plays in the process of implementing international human rights obligations.

II. The Normative Position of the ECHR in the Czech Legal Order

To understand the position of international human rights treaties, including the ECHR, in the Czech legal order, it is not enough to look at the text of the Constitution. Even though the Czech Constitution does explicitly deal with the normative position of international treaties in the Czech legal order (Art. 10), the reality is far more complicated than the text suggests. Simply put, the ECHR is more than just international law.

Until 2002, before the adoption of the constitutional Act. no. 395/2001 Coll.,¹⁰ the Czech Constitution basically adhered to a rather dualist concep-

⁹ The hypotheses will be probably more easily transferable to studies concerning other Central or Eastern European constitutional courts, but some of them might be generally applicable.

¹⁰ So called “*Euro-Amendment*”; this title reflects the fact that this amendment was meant to prepare the Czech Constitution for the accession of the Czech Republic to the European Union.

tion of relationship between international and national law. At the same time, it recognised one important exception, namely the so called “international human rights treaties”. This category of international treaties did not only enjoy direct effect in national law;¹¹ it effectively occupied a position in the Czech legal order that was in many aspects identical to that of the Constitution itself. For example, pursuant to Art. 87(1)(a) of the Constitution, the CCC had the authority to annul a statute that contradicted such an international human rights treaty. In this regard, the CCC treated international human rights treaties comparably to the Czech “constitutional order”¹² for practical purposes.

Following the aforementioned constitutional amendment, the situation changed considerably. Firstly, the Czech Constitution adopted a monist approach towards international treaties, declaring that

“all promulgated treaties, to the ratification of which Parliament has given its consent and by which the Czech Republic is bound, form a part of the Czech legal order and take precedence over statutes”

(Art. 10). Secondly, since international human rights treaties ceased – from the constitutional point of view – to form a special category of international treaties, the Czech Constitutional Court lost its authority to review whether national legislation conforms to standards set by them. This competence of the Czech Constitutional Court was functionally replaced by the authority of general courts to apply a provision of an international treaty directly in the case where it conflicted with a domestic statute.

In an *obiter dictum* to its famous *Euro-Amendment* judgment, the CCC surprisingly concluded that this constitutional amendment, which could be considered a “neutral” change in the fundamental rights protection system,¹³ in effect violated the so-called Eternity Clause enshrined in Art. 9(2) of the Constitution.¹⁴ The CCC held that:

¹¹ See Art. 10 of the Czech Constitution prior to changes introduced by constitutional Act. no. 395/2001: “Ratified and international human rights treaties, by which the Czech Republic is bound, are directly binding and take precedence over statutes.”

¹² The “constitutional order” is a peculiar concept (basically a polylegal constitution) defined in Art. 112 para. 1 of the Czech Constitution: “The constitutional order of the Czech Republic is made up of this Constitution, the Charter of Fundamental Rights and Basic Freedoms, constitutional acts adopted pursuant to this Constitution, and those constitutional acts of the National Assembly of the Czechoslovak Republic, the Federal Assembly of the Czechoslovak Socialist Republic, and the Czech National Council defining the state borders of the Czech Republic, as well as constitutional acts of the Czech National Council adopted after the sixth of June 1992.”

¹³ By “neutral”, I refer to the impact on the effectiveness of human rights protection. Although, as *Kühn* and *Kysela* rightly observed, the amendment could be seen as improving the

“[...] Art. 9 para. 2 of the Constitution has consequences not only for the framers of the constitution, but also for the Constitutional Court. The inadmissibility of changing the basic attributes of a democratic state based on the rule of law also contains an instruction to the Constitutional Court that no amendment to the Constitution can be interpreted in such a way that it would result in limiting an already achieved procedural level of protection for fundamental rights and freedoms.”¹⁵

The Czech Constitutional Court went on to argue that the aforementioned change indeed limits the already achieved procedural level of fundamental rights’ protection:

“... in the event a statute is in conflict with a constitutional act, a general court judge is not qualified to evaluate the matter and is required to submit it to the Constitutional Court. In the event of a conflict between a statute and an international human rights treaty (which has the same nature and quality as a constitutional act) under Art. 10 of the Constitution the judge would be required to proceed according to the international treaty. Even if such a decision were taken by a court of any level, in a legal system that does not recognize precedents (with a binding nature of a source of law), it could never have derogative consequences (not even de facto). The Constitution would thus create an unjustified procedural inequality for two situations identical in their constitutional nature. This, on the basis of the argument “reductione ad absurdum”, cannot be considered a purpose of the constitutional amendment.”¹⁶

Based on these considerations, the CCC refused to acknowledge the effects of the constitutional amendment and interpreted the Czech Constitution as if it still allowed the CCC to review domestic legislation from the point of view of its conformity with international human rights treaties. It did not declare the constitutional amendment unconstitutional, but interpreted it in a way that contradicted the intention of the framers and that kept the power of the CCC to enforce international human rights treaties untouched. This heavily criticised¹⁷ judgment has indicated the resolve of

system of fundamental rights protection, because it simply introduced some features of diffuse judicial review in the Czech Constitution. Z. Kühn/J. Kysela. Je ústavou vždy to, co Ústavní soud řekne, že ústava je? (Euronovela Ústavy ve světle překvapivého nálezu Ústavního soudu), in: Časopis pro právní vědu a praxi 10 (2002), 205.

¹⁴ According to Art. 9(2): “Any changes of the basic attributes of a democratic state governed by the rule of law are impermissible.”

¹⁵ Judgment n. Pl. ÚS 36/01 of 25.6.2002, hereinafter also referred to as the “Euro-Amendment judgment”.

¹⁶ Euro-Amendment judgment (note 15).

¹⁷ See Z. Kühn/J. Kysela (note 13), 205 or J. Filip, Nález č. 403/2002 Sb. jako rukavice hozená ústavodárci Ústavním soudem, in: Právní zpravodaj 4, issue 11, (2002), 11.

the CCC to retain control over interpretation and application of international human rights treaties even if it meant taking a doctrinally dubious step.

The *Euro-Amendment* judgment has several consequences for our enquiry. First of all, international human rights treaties, including the ECHR, are considered to form a part of the Czech constitutional order, despite being omitted in Art. 112(1) of the Constitution, which defines this concept. This is extremely important for the functioning of the CCC, as according to Art. 88(2), the Justices of the CCC, in making their decisions, are bound only by the constitutional order and the statute that specifies the procedural requirements for submitting a petition to the CCC.¹⁸ Therefore, the ECHR, as well as other international human rights treaties, constitute an important benchmark for constitutionality of legislation and domestic judicial decisions.¹⁹

This fact alone does not imply, strictly speaking, how much the CCC should refer to the ECtHR case law. Even though the CCC is bound by the ECHR and its ruling might eventually be “reviewed” by the ECtHR, the Strasbourg court would of course be more interested in the outcome of the case – i.e. whether the Czech Republic violated a right protected by the ECHR – than concerned about how much the CCC referred to its case law. The recent developments in the ECtHR case law and the emergence of “procedural review” might however change this.²⁰ But it should be borne in mind that the ECtHR is a body established to interpret the Convention and that the ECtHR case law, even though its binding power *erga omnes* is still a matter of controversy, reflects the current understanding of the ECHR. Therefore, the ECHR should be read, for practical purposes, by constitu-

¹⁸ Even though there are doctrinal controversies as to which statutes are binding for the CCC and what the limits of their binding power are, we can safely assume that it refers mostly to the Constitutional Court Act (n. 182/1993 Coll.).

¹⁹ The review of legislation and judicial decisions constitutes an overwhelming majority of the CCC's work. For more information concerning the use of international standards as a benchmark for constitutional review, see in this issue *D. Paris, Allies and Counterbalances, Constitutional Courts and the European Court of Human Rights: A Comparative Perspective*, 623.

²⁰ The (semi)procedural review is generally seen as an approach that strengthens the principle of subsidiarity in the ECHR system. Under the (semi)procedural approach to review domestic measures takes the quality of the decision-making procedure (including the treatment of ECtHR case law by domestic courts) as an important factor for its assessment of (non)violation of the ECHR. A diligent treatment of ECtHR case law by the CCC would – under this approach – lower the strictness of substantive scrutiny by the Strasbourg court. See *P. Popelier/C. van de Heyning, Subsidiarity Post-Brighton: Procedural Rationality as Answer?*, in: *LJIL* 30 (2017), 5 et seq.

tional courts in the way that the ECtHR interprets it.²¹ The CCC has never explicitly stated whether it considers the ECtHR case law strictly binding *erga omnes* or which domestic provision would give it such an authority.²² The CCC has however stated that the ECtHR case law is constitutionally relevant and that courts have a duty to reflect it,²³ and that ignoring the case law amounts to a breach of fundamental rights.²⁴ This can be interpreted as an acknowledgment of some sort of precedential value of the ECtHR case law.²⁵

The presumption of willingness of the CCC to accept the ECtHR “precedential” authority reflects some domestic strategic considerations as well. The CCC has fought hard to enforce the precedential binding power of its own judgments on the Czech ordinary courts, relying *inter alia* on the argument that the precedential binding power of its judgments is a logical consequence of its position as an ultimate guardian of constitutionality (Art. 83 of the Constitution).²⁶ This argument would lose a lot of its persuasiveness if the CCC refused to acknowledge a similar position of the ECtHR. The Strasbourg Court serves “as a guardian of the ECHR” just as the CCC serves as a guardian of the Czech constitutional order. Any CCC’s attempts to undermine the position of the ECtHR and its case law might provide, *mutatis mutandis*, arguments for the Czech ordinary courts to revolt against the CCC.

Furthermore, it was the CCC itself who pressed for keeping international human rights treaties as a benchmark for quashing statutory law. Therefore, it might have felt compelled, especially right after the *Euro-Amendment* judgment was issued, to put its money where its mouth was and to show that it is a worthy guardian of the ECHR, after it slammed the ordinary courts, claiming that they were not up to the task.²⁷

The elevated normative position of international human rights treaties in the Czech legal order enhances the legitimacy of references by courts in general and the CCC in particular to the ECtHR case law. Whereas in some countries the legitimacy of references to international law – and conse-

²¹ See in the German context *S. Beljin*, Bundesverfassungsgericht on the Status of the European Convention of Human Rights and ECHR Decisions in the German Legal Order, in: *Eu Const. L. Rev.* 1 (2005), 588.

²² Art. 1(2) CC and Art. 10 CC are the most likely candidates.

²³ Judgment n. I. ÚS 310/05 of 15.11.2006.

²⁴ Judgment n. II. ÚS 862/10 of 19.5.2010.

²⁵ See also *J. Kmec/D. Kosař/J. Kratochvíl/M. Bobek*, *Evropská úmluva o lidských právech*, 2012, 152 et seq.

²⁶ See judgment n. IV. ÚS 301/05 of 13.11.2007.

²⁷ See the quoted part of the *Euro-Amendment* judgment above (note 15).

quently case law of the relevant bodies – is a major issue,²⁸ the CCC would rather need to legitimise the contrary position. In other words, quotation is the rule, non-quotation is the exception that needs to be justified.

III. Use of ECtHR Case Law by the CCC: A Basic Empirical Overview

This part contains some basic empirical data concerning the use of the ECtHR case law by the CCC. All data were gathered from the publicly accessible NALUS database, which is managed by the Analytical Department of the CCC.²⁹ This database contains all the CCC's judgments and decisions and is paired with a search engine that enables the content to be searched and filtered according to many search criteria, including – importantly – the person of Justice acting as judge-rapporteur.

I have searched the database for a set of keywords or phrases indicating that the CCC has referred to the ECtHR case law.³⁰ Based on this search I have compiled the following graphs that show the distribution of the references over time and amongst individual Justices.

1. The Court Level

Between 1.1.1993 and 31.12.2016, the CCC issued 65,935 rulings and referred to the case law of the ECtHR in 4,315 cases.³¹ However, not all of the CCC's rulings, and consequently not all the references, have the same importance. Even though this case study deals with the rather technical issue of referencing the ECtHR case law, we should bear in mind that it is conducted in order to deepen our understanding of the role that the CCC plays in the process of implementing international human rights obligations.

²⁸ See *M. Wind* (note 5), 290 et seq.

²⁹ Available at <<http://nalus.usoud.cz>>. The abbreviation “NALUS” stands for “NÁLezy” (judgments) and “USnesení” (decisions).

³⁰ These keywords include “Evropského soudu pro lidská práva”, “Evropský soud pro lidská práva”, “ESLP”, “Evropského soudu” and “štrasburského soudu” (i.e. “European Court of Human Rights”, “ECHR”, “European Court” and “Strasbourg Court”); I am not aware of a case where an explicit reference would be made using different words or phrases.

³¹ The Czech Constitutional Court was established by the Czech Constitution which entered into force on 1.1.1993, but it did not become fully operational until autumn 1993. Still, for the sake of simplicity, I limit my enquiry by 1.1.1993 and 31.12.2016.

Therefore, I will focus on substantive rulings of the CCC and I will generally disregard procedural rulings.³²

However, defining what constitutes a “substantive ruling” is not an easy task. For the purposes of this article, and for reasons that I explain in the following paragraphs, I include in this category 1) judgments and 2) decisions which dismiss a petition as manifestly ill-founded.

There are two basic approaches to the concept of “substantive rulings” and both have their merits. The first approach draws on the formal distinction, to which Art. 54(1) of the Act on the Constitutional Court refers, between a judgment (“*nález*”, a ruling on merits) and a decision in a narrow sense (“*usnesení*”, used for all other purposes). The problem is, that § 43(2) of the Act on the Constitutional Court (CCA) recognises the category of manifestly ill-founded petitions, which are to be dismissed by a decision and not rejected by a judgment.³³ The Czech doctrine traditionally labels these decisions as “quasi-substantive rulings”. Since 1) it makes little difference for the petitioners whether the CCC rejects their petition by judgment or dismisses it by a decision and 2) the process of drafting, adopting and announcing the judgment is much more complicated and time-consuming than that of a decision,³⁴ the CCC virtually stopped using the form of judgment to reject petitions.³⁵ Even if the petition is not “manifestly” unfounded, the CCC rejects it through a decision rather than through a judgment, for the reasons I mentioned. Therefore, if I concentrate only on the references in judgments of the CCC, I would omit the whole (and important) category of cases where a decision was issued as a less resource-demanding functional equivalent of a judgment.

I will thus primarily work with a concept of substantive ruling that includes both judgments and decisions which dismiss a petition as manifestly

³² By procedural decisions of the CCC, I mean decisions according to § 43(1) of the Act on the Constitutional Court (182/1993 Coll.). According to this provision, the Court, acting by Judge-Rapporteur, dismisses the petition, if:

- a) the petitioner fails to cure defects in the petition by the deadline designated therefore;
- b) the petition was submitted after the deadline for its submission laid down in this Statute;
- c) the petition was submitted by a person who is clearly not authorized to submit it;
- d) it is a petition over which the Court has no jurisdiction; or
- e) the submitted petition is inadmissible, unless this Statute provides otherwise.

³³ § 43(2) CCA.

³⁴ The customary view is that the reasoning of a judgment should be much more detailed, a judgment has to be announced publicly in a courtroom, a judgment has to be prepared for publication in an official collection etc.

³⁵ See *L. Vyhnánek*, *Judikatura v ústavním právu*, in: M. Bobek/Z. Kühn (eds.), *Judikatura a právní argumentace*, 2013, 335 et seq. This holds true especially in the case of constitutional complaints that amount to almost 99 % of the CCC’s case law. In plenary proceedings (mostly review of legislation) judgments are used to reject petitions quite often.

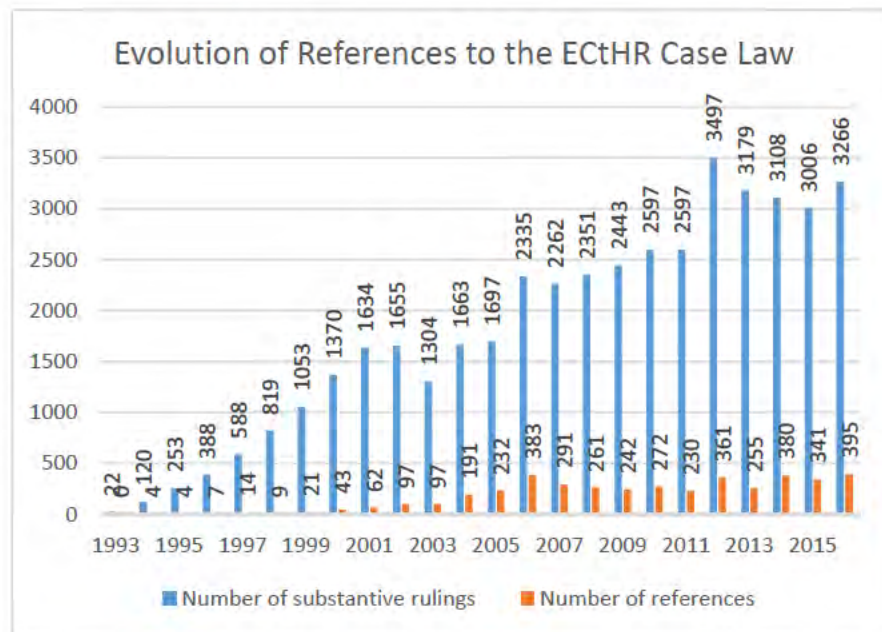
ill-founded. Nevertheless, for some purposes it might be useful to know the figures concerning only the judgments as well. Even though I have claimed that it makes little difference for petitioners whether their petition is dismissed or rejected, there are important systemic differences between judgments and decisions. The most important one concerns the general binding power of the respective forms of rulings. Whereas judgments and their reasoning – irrespective of whether they reject or grant the petition – are considered generally binding and possess some sort of precedential value, the normative effects of decisions are close to non-existent.³⁶ This difference might amount to a factor that influences whether or not the CCC considers a reference to an ECtHR judgment to be desirable or necessary. While a petitioner is generally more interested in the outcome of the case – and therefore the CCC might not feel compelled to refer to an ECtHR judgment in a decision – the CCC will probably be more thorough when drafting a reasoning that will have precedential value. See also the next section, where I analyse the different purposes of references by individual Justices (as judges-rapporteurs).

The CCC issued 43,207 substantive rulings³⁷ between 1. 1. 1993 and 31. 12. 2016 and it referred to the ECtHR case law in 3,893 cases³⁸ out of this set. However, both the number of references and the ratio of rulings referring/not referring to the ECtHR case law have undergone considerable development.

³⁶ See judgment of the CCC n. 301/05 of 13.11.2007.

³⁷ Judgments amounted to 4,485 of those.

³⁸ Judgments amounted to 832 of those.

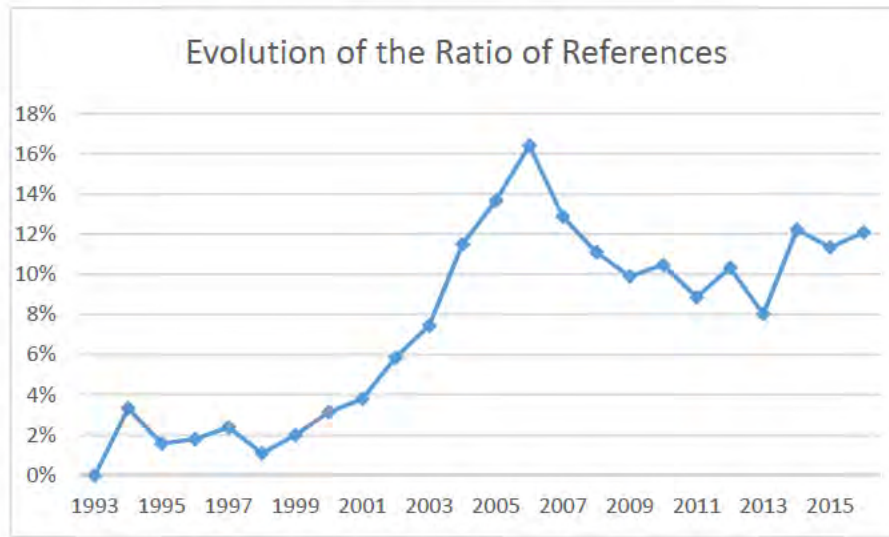
Graph No. 1³⁹

The graphic shows that the number of references was quite low in the 1990s and early 2000s. It went up considerably in 2004 when it reached 191 in absolute numbers and more than 10 % in ratio. A period of rapid growth between 2003 and 2006 is clearly recognisable from the graph. Since then, the ration of rulings that contain some sort of referral to the ECtHR case law has oscillated roughly around 10 %, as the following graphic shows.⁴⁰

³⁹ A diligent reader might find that there is a slight difference between figures concerning the whole Court and figures concerning individual Justices in part III. 2. In the Nalus database older decisions (roughly before 2007 when the Analytical Department was established) are indexed in a different way than the more recent ones. Specifically, in case of new decisions, it is possible to distinguish between a reference in the CCC's own reasoning and a reference used by a petitioner that is mentioned by the CCC in the recapitulation of the facts. In order to avoid selection bias that might cloud the comparison over time, we have not used the possibility to search just the Court's reasoning in case of newer decisions which might slightly influence the result. This however should not be a problem as there is no reason to believe that the "noise" would be unevenly distributed and that it would be very significant. On the other hand, when I compared the references by individual Justices in part III. 2., I used the possibility to limit the search only to the reasoning of the Court in the narrow sense in order to get slightly more precise results.

⁴⁰ At a first glance at graph n. 1, the reader is perhaps more attracted to the growth of the number of substantive rulings in general, even though our main focus is on the number of

Graph No. 2



In his famous article on the willingness of newly established democracies to accept reciprocally binding human rights enforcement *Moravcsik* claims that:

“[newly established democracies have] the greatest interest in further stabilizing the domestic political status quo against nondemocratic threats. We should therefore observe them leading the move to enforce human rights multilaterally, whereas established democracies have an incentive to offer lukewarm support at best. In the case of the ECHR, this theoretical approach best explains the cross-national pattern of support for binding norms.”⁴¹

If we extend his hypothesis, which the author never did but it is interesting to do, we would expect that similar considerations might apply to the treatment of international human rights bodies' case law by constitutional courts in newly established democracies. The CCC could therefore be expected to refer to the international human rights bodies' case law (especially

references. This growth was caused by the gradually increasing number of petitions that the CCC had to deal with. Czech lawyers were only slowly getting used to the existence of the CCC and the procedural options it provided, especially the constitutional complaints procedure. As the CCC gradually became more visible and its position in the legal system became clearer, the number of petitions went up.

⁴¹ A. *Moravcsik*, *The Origins of Human Rights Regimes: Democratic Delegation in Post-war Europe*, in: IO 54 (2000), 220.

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in the earlier stages of transition) in order to anchor the Czech Republic amongst established liberal democracies and to help stabilising the domestic political status quo against nondemocratic threats.⁴² The present data clearly contradict this assumption. While *Moravcsik's* theory might explain the behaviour of transitional democracies to accept international human rights obligations, other factors seem to be much more relevant when it comes to treatment of the ECtHR case law by the CCC.

While it is true that constitutional courts in Central and Eastern Europe generally used the ECtHR case law as a source of inspiration,⁴³ the number of references in the 1990's alone simply does not indicate such importance in the Czech case. This might be explained by the fact that the ECtHR had effective competition in the *Bundesverfassungsgericht* which itself served as an important source of inspiration during the development of the CCC's case law in the 1990's. Two of the most influential Justices of the CCC in the 1990's, *Vladimír Klokočka* and *Pavel Holländer*, were responsible for the most important cases of German inspiration. *Inter alia*, the CCC adopted the proportionality test from Germany through Justice *Holländer*⁴⁴ and has been inspired by the German approach to basic constitutional principles, including democracy, through Justice *Klokočka*.⁴⁵

Moving forward in time, several possible explanations are tied to the rise of the number of references (both in ratio and in absolute numbers) between roughly 2003 and 2006. First, the rapid growth might be explained by the changes in composition of the CCC. The year 2003 marked the end of the so-called "first CCC" and Justices of the "second CCC" were appointed between 2003 and 2005.⁴⁶

⁴² See also an analysis of possible reasons for CEE constitutional courts to "ally" with the Strasbourg Court in *W. Sadurski*, *Constitutionalism and the Enlargement of Europe*, 2012, 20 et seq. *Sadurski's* arguments actually seem to support the extended hypothesis.

⁴³ See, *mutatis mutandis*, *M. Bobek*, *Comparative Reasoning in European Supreme Courts*, 2013, 255 et seq. and *W. Sadurski* (note 42), 20 et seq.

⁴⁴ See judgment n. Pl. ÚS 4/94 of 12.10.1994.

⁴⁵ See for example judgment n. Pl. ÚS 26/94 of 18.10.1995 or judgment n. Pl. ÚS 25/96 of 2.4.1997.

⁴⁶ In this article, I use the terms "first CCC", "second CCC" and "third CCC" to refer to the composition of the CCC in 1993-2003, 2003-2013 and 2013 – present day respectively. Pursuant to Art. 84(1) CC, Justices of the CCC are appointed for a 10-year term. Even though the Czech constitution does not demand that Justices shall be appointed in waves, it is practically speaking the case. Fourteen Justices of the CCC were appointed in 1993 and one in 1994 and their terms (with some complications concerning resignations and new appointments that are not important for the purposes of this article) generally ended in 2003 and 2004 respectively. The second wave of appointments was not that smooth, so that the time between appointments of the first Justice and the last Justice of the second CCC stretched to more than three years. The third wave of appointments then logically occurred between 2013 and

Secondly, as we have seen in the previous part, the CCC issued the *Euro-Amendment* judgment in 2002 and it might have been compelled to defend its position as a guardian of the ECHR by working with the ECtHR case law in a more extensive manner.

Thirdly, one should also not forget the systemic changes on the part of the Strasbourg Court. In 1998, Protocol No. 11 replaced the original two-tier structure – the Court and the Commission – and allowed individuals to access the Court directly. This not only strengthened the position of the Court; it was also accompanied by a growth of rulings issued by the Strasbourg Court which in turn might be reflected, with a certain lag, by the growing number of quotations.

The fourth set of explanations is connected to the availability of resources. Relevant resources might include publications and databases containing information about ECtHR case law; legal assistants and advisors and their skills; or even something as prosaic as technical equipment. As regards the equipment, the introduction of computers, more sophisticated text editors that allow copy and paste and obviously the spread of the internet might at least partially explain the rise in the number of referrals in the early 2000's.⁴⁷

In the 1990's and early 2000's, each Justice was appointed one and later two legal assistants. These were generally more experienced, and older, lawyers. Since September 2003, however, each Justice has been entitled to three legal assistants. This enhanced the research potential of each “mini-team” – a Justice and their three assistants. Moreover, it was not only the simple fact that each Justice had more assistants, but also the skills of the new assistants that arguably played an important role. Between 2003 and 2013, the young graduates who generally had better language skills and often studied abroad gradually supplemented or replaced older lawyers.

At the same time, new publications concerning ECtHR case law became available in Czech. One of the ground-breaking publications was without doubt the Czech translation of “Case Law of the European Court of Human Rights” by *Vincent Berger*, which was published in 2003.⁴⁸ Another

2015. Still, there are compact generations of the CCC. For a more detailed account, see *D. Kosář/L. Vyhnánek*, *Senát a výběr soudců Ústavního soudu*, in: J. Kysela (ed.), *Dvacet let Senátu Parlamentu České republiky v souvislostech*, 2016, 187 et. seq.

⁴⁷ This equipment was obviously introduced earlier at the CCC, but the problem might well have been in the personnel who were not willing or able to use them properly.

⁴⁸ *V. Berger*, *Judikatura Evropského soudu pro lidská práva*, 2003. This was a translation of the 7th ed. of *Berger's Jurisprudence de la Cour européenne des droits de l'homme*.

important book that was published in 2003 was “The European Court of Human Rights and the Czech Republic” by *Eva Hubálková*.⁴⁹

As *Kosař* and *Petrov* point out in this issue,⁵⁰ analytical departments are an understudied and potentially significant factor. However, the CCC’s Analytical Department was established only in 2007, i.e. too late to be responsible for the rise of referrals between 2003 and 2006. This does not diminish in any way the significance of the Analytical Department, but the Department’s role lies in the qualitative rather than quantitative realm. It informs the Justices about developments in the ECtHR case law or, at the request of an individual justice, conducts specialised research in this area. This way, the Analytical Department can contribute to compliance but it does not necessarily influence the frequency of references.

Fifthly, the behaviour of petitioners and especially their attorneys should be taken into account. The growing number of references by the CCC and the newly available resources encouraged the petitioners and their lawyers to rely on the case law of the ECtHR in their petitions and the CCC had to respond to such arguments.

Finally, we should not overlook a phenomenon that may be called “the snowball effect”. When the CCC referred to the ECtHR case law, it simultaneously incorporated it in its own case law. The parts of reasoning of the CCC’s ruling that contained the references were often copied – for various reasons⁵¹ – in the later rulings. Thus by referring to itself or copying paragraphs from a reasoning of a previous decision, the CCC “indirectly” refers to the ECtHR case law. The problem of snowball effect is closely connected to the issue of entry points by which the ECtHR case law infiltrates the CCC that I briefly address in the following section.

⁴⁹ *E. Hubálková*, *Evropská úmluva o lidských právech a Česká republika*, 2003.

⁵⁰ *D. Kosař/J. Petrov* (note 2).

⁵¹ The main reason probably is that the CCC has a relatively high case-load and it has no formal filtering mechanism. See also *M. Bobek*, *Quantity or Quality? Reassessing the Role of Supreme Jurisdictions in Central Europe*, in: *Am. J. Comp. L.* 57 (2009), 38. Therefore it often has to deal with repeated case scenarios (sometimes even in hundreds of cases), where “the copy and paste technique” of drafting makes some sense.

2. The Internal Level

In this part, I am “submerging” to the CCC’s internal level, i.e. I am exploring the impact of individual Justices, acting as judges-rapporteurs,⁵² on the treatment of the ECtHR case law by the CCC. The tentative hypothesis that the use of ECtHR case law is heavily dependent on the person of judge-rapporteur reflects both previous scholarly findings⁵³ and some several specific features of the CCC’s functioning.

There is evidence showing that the person of judge-rapporteur is extremely important for determining the outcome of cases, especially in cases decided by a three-member panel. This might sound surprising, considering that the other two members of the panel can outvote a judge-rapporteur. Nevertheless, the collegiality factor – control of a judge-rapporteur by the other two Justices who vote for/against the rapporteur’s proposal – is surprisingly ineffective in “panel cases”. Whereas deliberations in plenary cases can be considered quite thorough and consequential,⁵⁴ deliberations in panel cases do not seem to have the same bite. Dissenting and concurring opinions are virtually non-existent in panel cases. At the same time, previous studies focused on the internal aspects of the CCC’s functioning have shown vast differences between levels of “activism” (defined as “ratio of petitions granted when acting as a judge-rapporteur in a panel case”) of individual Justices of the “second CCC”. For example, between 1.1.2006 and 1.1.2012, Justice *Wagnerová* granted a petition in 14.6 % of the cases and Justice *Güttler* in 13.1 %, Justices *Kürka* and *Musil* at the other side of the spectrum granted only 3.1 % and 3.6 % of the petitions. If collegiality would work “perfectly”, then two Justices with a preference to grant fewer petitions would serve as a counterweight against a more “activist” Justice. But the figures (at least for the second CCC) show that even Justices that generally grant a small number of petitions do not always outvote an activist judge-rapporteur in their panel, nor do they dissent against their “activist” rulings. In other words, many Justices act differently when they draft a

⁵² Justices acting as judge-rapporteur fulfil several functions at the CCC, including issuing some procedural decisions alone and – even more important for our purposes – drafting the reasoning of a ruling with the help of their assistants.

⁵³ *E. Mak*, Reference to Foreign Law in the Supreme Courts of Britain and the Netherlands: Explaining the Development of Judicial Practices, in: *Utrecht Law Review* 8 (2012), 33 et seq.

⁵⁴ The plenary deliberations are long, follow some formal rules and Justices really “fight” for the outcome and reasoning of the case. This view might also be supported by a relatively high number of dissenting/concurring opinions in plenary cases. At least one dissenting/concurring opinion has appeared in roughly 18 % of plenary cases.

ruling themselves than in cases where they “only vote” on the draft prepared by their colleague.⁵⁵

This is all the more important considering that roughly 98.5 % of substantive rulings, mostly in the constitutional complaint procedure, are adopted by a three-member panel while just a small fraction of such rulings are adopted by a full court (plenary decisions).⁵⁶

The surprising ineffectiveness of collegiality in panel cases might be at least partially explained by a relatively high caseload that puts pressure on the Justices to think about using their resources. Justices generally resort to time and resource costly deliberations mostly in plenary cases that are generally considered “more important” and spend fewer resources on deliberations in panel cases.⁵⁷ At the same time, some Justices might prefer avoiding conflicts with their closest co-workers in a smaller and “tighter” group.

Considering that the person of judge-rapporteur is very significant for determining the outcome of a case, it can be safely assumed that, *a fortiori*, it will be even more significant for the purposes of drafting the reasoning of a judgment, including the use of ECtHR case law. Moreover, comparable studies conducted abroad have shown that a judge’s personal approach is a highly determinative factor as regards foreign sources. Factors like previous occupation – academia, private practice, career judge etc. – seem to be especially important.⁵⁸

The following two graphs show both the number and the ratio of references to the ECtHR case law at the third “CCC” (2013 – present)⁵⁹ by individual Justices.

⁵⁵ See *L. Vyhnánek* (note 35), 337 et seq.

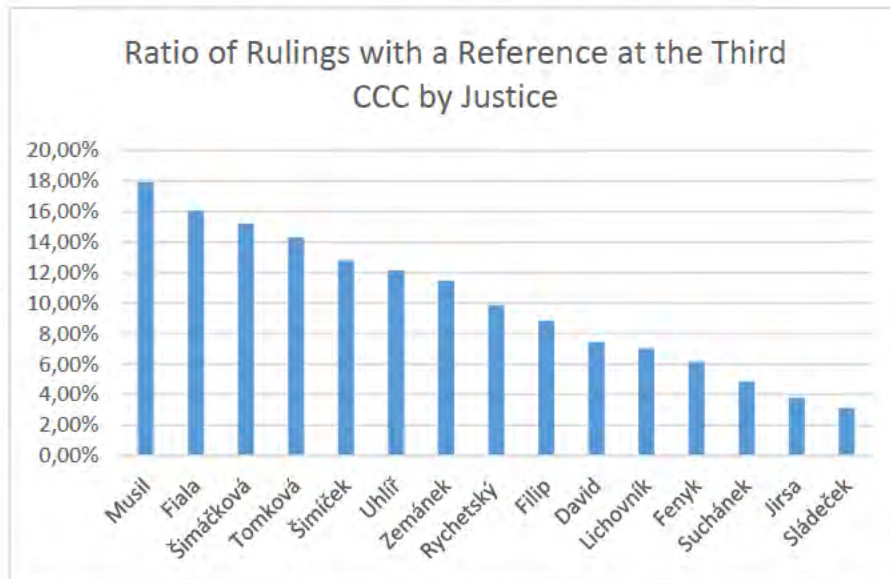
⁵⁶ As a rule, all rulings are adopted by a panel, unless the Act on the Constitutional Court states otherwise. In § 11(2), the Act lists the competences of the full Court (i.e. review of legislation, international treaties, competence disputes, etc.). Furthermore, the full Court can announce, *ex ante*, that other types of cases will be entrusted to the full Court. Most notably, constitutional complaints against the so called “big chamber” or “extended chamber” rulings of the Supreme Court and Supreme Administrative Court have been taken away from the panels. The “big chamber” or “extended chamber” rulings are issued in cases where there are some inconsistencies within the case law of the supreme courts. The CCC felt the need to address such cases in the full Court, in order to provide a single, ultimate answer. Still, a vast majority of cases – mostly “normal” constitutional complaints – are heard by panels.

⁵⁷ This is obviously a generalization that does not apply to all Justices or panels to the same extent.

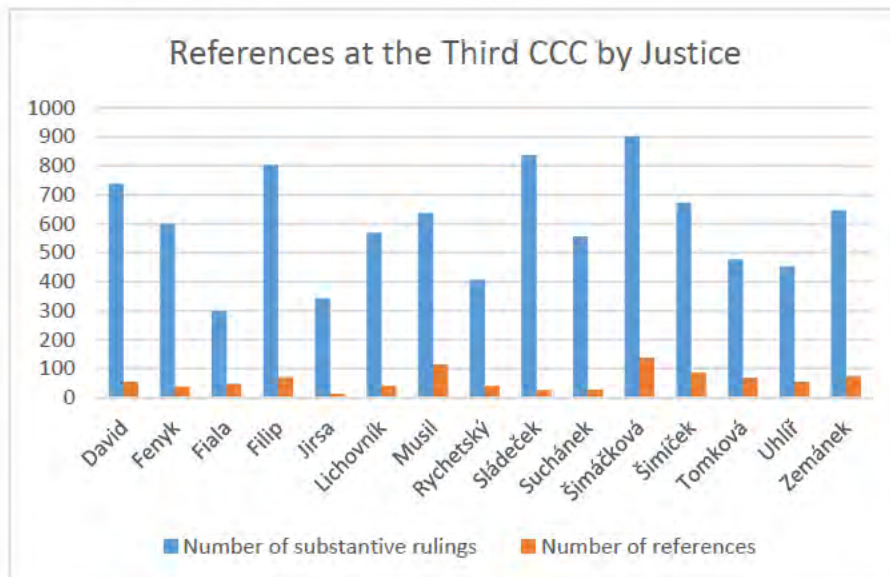
⁵⁸ *E. Mak*, Why Do Dutch and UK Judges Cite Foreign Law? in: *C.L.J.* 70 (2011), 446 et seq.

⁵⁹ See supra note 46.

Graph No. 3



Graph No. 4



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Both graphs, and notably the first one, show huge differences between individual Justices as regards “their”⁶⁰ referral to the ECtHR case law. However, the process of finding an explanation for this is very challenging. One of the main problems is that due to a relatively small number of Justices and the complexity of the issue – a very high number of potentially relevant independent variables – it makes little sense to employ quantitative methods, such as regression analysis. Therefore, I have to employ a qualitative approach based on an analysis of the various factors that can influence the number of referrals. For purposes of this qualitative analysis, I will concentrate especially on the cases of the three “top outliers” (Justices *Musil*, *Fiala* and *Šimáčková*) and three “bottom outliers” (Justices *Suchánek*, *Jirsa* and *Sládeček*).

First of all, it is possible to draw on the explanations for the development of referrals at the court level that I have offered in the previous section. If there were an asymmetry in *resources* like language skills, expertise and legal preferences of the assistants, and time between Justices, it could obviously be responsible at least for a part of the variability.

The case of the leading outlier of the “third CCC”, Justice *Jan Musil*, is very intriguing in this regard. *Jan Musil* also served as a Justice at the second CCC between 27.11.2003 and 27.11.2013. However, instead of a ratio of 17.9 % of referrals which he has had at the third CCC, he referred to the ECtHR case law as judge-rapporteur “only” in 6 % of his substantive rulings at the second CCC.⁶¹ I can probably exclude the possibility that this development reflects some sort of Justice *Musil*’s change of attitude towards international human rights case law, as the change is too rapid: still in his last two years he referred to the ECtHR case law only in roughly 6 % of substantive rulings.

Quite interestingly, the development of the number of references in Justice *Musil*’s rulings is probably connected with the arrival of new legal assistants, most importantly *Leoš Oliva*.⁶² *Oliva* also served as a legal assistant of Justice *Výborný* at the second CCC. During their cooperation between 1.9.2003 and 21.5.2013, Justice *Výborný* referred to the ECtHR case law in 296 cases out of 1,758, which amounts to a very high ratio of 16.84 %. *Leoš Oliva* is the only tangible link between these two Justices and moreover other indirect evidence suggests that the growth of the number of references

⁶⁰ All of the rulings were adopted either by a panel or by a full Court, but as I have indicated above, the influence of judge-rapporteur for the outcome of the case (and *a fortiori* the reasoning of a ruling) is decisive, especially in three-member panels.

⁶¹ Please note that the ordinary “court level” ratio of references remained fairly constant between 2004 and 2013. See graph n. 1.

⁶² For information about current and past assistants, see <<http://www.usoud.cz>>.

in Justice *Musil's* rulings is connected to *Oliva's* arrival.⁶³ However, it is important to bear in mind that there can be great differences between the form and purpose of references used by the outlier Justices. As I will show below, the differences are indeed vast.

Legal assistants of Justice *Šimáčková* have included several Czech scholars in the Czech Republic who have co-authored the most important Czech commentary on the ECHR⁶⁴ or have written Czech books concerned with the ECtHR case law.⁶⁵ It is more than probable that this was not a random selection by Justice *Šimáčková*, especially when considering her use of ECtHR case law to push through systemic changes, as will be discussed later. In other words, selection of assistants can be seen as an expression of a Justice's preferences as well.

Another possible hypothesis is that the number of references by individual Justices correlates to their "relative human rights activism". In the discussion above, I have mentioned that previous studies have shown great differences between the respective ratios of petitions granted by individual Justices acting as rapporteurs in panel cases.⁶⁶ This ratio can be considered as a valid indicator of "relative human rights activism" for the following reasons.⁶⁷

Firstly, this ratio reflects almost exclusively the rulings concerning constitutional complaints under Art. 87(1)(d) of the Constitution. In these cases, the CCC deals with petitions against "final decisions or other encroachments by public authorities infringing constitutionally guaranteed fundamental rights and basic freedoms". If the CCC grants a petition in these cases, it means by definition that it found a violation of an individual's fundamental right by a public authority, mostly a general court. Very often, it also signifies that the CCC is not content with the status quo concerning

⁶³ For example, there are three decisions by Justice *Musil* from the period of the third CCC that contain the same paragraph (word for word) with a reference to the ECtHR's judgment in the case *Hornby v. Greece* (decisions n. III. ÚS 3598/15, IV. ÚS 2089/16 and III. ÚS 1938/15). The same paragraph with the same reference appears in another seven CCC's decisions and six of them are decisions drafted by Justice *Výborný* as judge-rapporteur (for example decisions n. IV. ÚS 4591/12 and IV. ÚS 1370/12). There are many other examples of such snowball references in the CCC's case law, quite often connected by the same Justice or the same assistant. I discuss some of these cases below.

⁶⁴ I refer to *David Kosař* (2013-2016) and *Jan Kratochvíl* (2013 – now, i.e. 10.4.2017), see *J. Kmec/D. Kosař/J. Kratochvíl/M. Bobek*, *Evropská úmluva o lidských právech*, 2012. *Jan Kratochvíl* also worked at the ECtHR before joining the CCC.

⁶⁵ *Pavel Molek* (2013-2015) has authored several books on the ECHR, for example *P. Molek*, *Právo na spravedlivý proces*, 2012.

⁶⁶ See note 55.

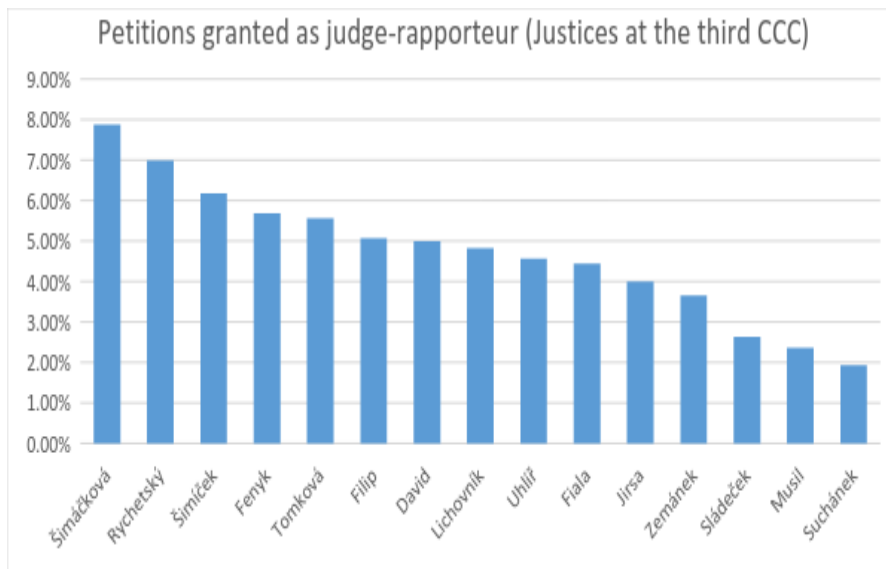
⁶⁷ The term "relative human rights activism" is not a value judgment of any sort. It should simply be understood as a neutral label that reflects how many petitions the Justices grant.

the interpretation and enforcement of fundamental rights by general courts. A higher ratio of petitions granted by a Justice as a judge rapporteur thus indicates that the Justice in question has a preference 1) for broader interpretation of fundamental rights than Justices with a lower ratio of petitions granted and 2) for changing the status quo represented by the current practice of public authorities and of courts in particular.

Secondly, Justices with the highest ratio of granted petitions, like Justice Šimáčková at the third CCC or Justice Wagnerová at the second CCC, are considered “human rights activists” in the Czech legal discourse even based on qualitative analysis of their decisions.

As graph 5 shows, at the third CCC we can observe great differences in the level of thus defined “relative human rights activism”.

Graph No. 5⁶⁸



The hypothesis that a higher number of quotations of the ECtHR case law signifies the human rights activism of a Justice is based on the following considerations. A high number of references in a Justice’s rulings might be connected to the fact that the Justice generally prefers 1) a broader, far-reaching interpretation of human rights and 2) a more active judicial en-

⁶⁸ Only rulings adopted before 31.12.2016 are taken into account.

forcement of those rights than “the Justices in the middle”. Such a Justice is by definition (and in this regard) a minority one at the CCC and therefore, he/she might be looking for external leverage to push through judgments and systemic changes based on a broader understanding of fundamental rights. Due to the abovementioned normative position of the ECHR and of the case law of the ECtHR, it is almost impossible for the other Justices with different preferences to find compelling arguments to defy the ECtHR. Therefore, referring to the ECtHR case law can be a very effective strategy to achieve outcomes that would otherwise be hindered by the other Justices.

Moreover, such pro-human rights Justices might refer to the ECtHR law more for non-strategic reasons as well: they might be simply more interested in keeping up with the Strasbourg case law and might internalise it more easily because of their preferences.⁶⁹

However, even a quick glance at graph 5 in relation to graph 3 indicates that the connection between the relative human rights activism of a Justice and the number of references to the ECtHR case law is more complicated than the simple hypothesis would suggest.

First of all, the correlation between references and human rights activism does not seem to go both ways. There seems to be a very good fit as regards the “bottom outliers”: Justices *Suchánek*, *Jirsa* and *Sládeček* are clearly among the most self-restrained Justices. This is also supported by qualitative evidence. Justices *Suchánek* and *Sládeček* are well known, at least in the Czech constitutional community, as self-restrained and textualist Justices who fight against any signs of judicial activism at the CCC.⁷⁰ Justice *Jirsa* does not easily fit this description, but as former judge of a lower court, he has a rather pragmatic attitude towards reasoning. A reasoning drafted by Justice *Jirsa* is usually short, oriented at answering the legal question at hand and leaving any “academic considerations” aside. It is quite logical that Justices of such nature refer to the ECtHR case law only in a small number of cases, because it is not strictly speaking necessary⁷¹ (Justice *Jirsa*) or it

⁶⁹ See *mutatis mutandis Mak* (note 58), 446 et seq.

⁷⁰ Even though there are obviously differences between those two Justices, they have both expressed in their dissenting opinions their dislike for signs of activism like issuing operative parts of judgments that contain a generally binding interpretation of a norm (see their dissenting opinion to judgment n. Pl. ÚS 35/11 of 13.5.2014) or substantive, rather than formalist, interpretation of the petitions (see their dissenting opinion to judgment n. Pl. ÚS 16/15 of 23.8.2016).

⁷¹ As *Nollkaemper* notes, compliance is “agnostic about causality” and the only question is whether behaviour conforms to a rule. See *A. Nollkaemper*, *The Role of National Courts in Inducing Compliance with International and European Law – A Comparison*, in: M. Cremona, *Compliance and the Enforcement of EU Law*, 2012, 160.

does not fit their textualist and non-activist approach (Justices *Sládeček* and *Suchánek*).⁷²

The case of the “top outliers”, on the other hand, is rather puzzling. Only Justice *Šimáčková* is situated where she could be expected to be, whereas Justice *Fiala* finds himself among the less human rights activist Justices and Justice *Musil*, the reference leader, is second to only Justice *Suchánek* in the level of human rights restraint.

The problem with the “human rights activism hypothesis” in this regard is that it presumes that references to ECtHR case law have implicit substantive quality. However, the mere fact that a reference has been made carries no substantive meaning. It is only *indirect* and *imperfect* evidence of compliance with relevant international obligations.

References can be made for different purposes. Some references are based on a complex reflection of the ECtHR case law and are intended to bring about systemic changes or to document compliance with the ECtHR case law, but in many cases references may serve as “fig leaves” or “ornaments”⁷³ that have little or no impact on the outcome of a case.⁷⁴

Moreover, one should also pay attention to formal criteria like the length and nature of a reference. Long references coupled with a detailed and diligent analysis⁷⁵ of rules stemming from the ECtHR case law 1) show a thorough knowledge of the Strasbourg case law and engagement with it 2) will generally correlate with compliance with and even effectiveness of the ECtHR case law⁷⁶ and 3) will arguably be used more by Justices who have a preference for broader interpretation of fundamental rights and active judicial enforcement thus understood rights. By contrast, short and superficial references, or general references to “the settled case law of the ECtHR” without more specific indications of the relevant ECtHR judgments, should not be understood in the same way.

⁷² These two Justices are reserved even about the conception of the general binding power of the CCC’s own rulings.

⁷³ Usually, these references contain only general principles, are not specifically related to the facts of the case. Quite often, these references are “snowball references”.

⁷⁴ A good indicator of this difference might be whether the CCC subsumes particular facts of the case under a rule or principle deduced from the ECtHR’s judgment.

⁷⁵ See several recent judgments, *inter alia* judgment n. I. ÚS 1565/14 of 2.3.2015, judgment n. I. ÚS 2903/14 of 12.5.2015 or judgment I. ÚS 1974/14 of 23.3.2015 or judgment n. I. ÚS 860/15 of 27.10.2015.

⁷⁶ For the difference between compliance and effectiveness in this regard see *A. Nollkaemper* (note 71), 160.

One of the important factors to note is the nature of the rulings with references. Justices *Šimáčková* and *Musil*,⁷⁷ two of the justices who refer to the ECtHR judgments the most, have referred to the ECtHR case law in 137 (15.21 %) and 114 (17.9 %) of their substantive rulings. But whereas Justice *Musil* basically “referred to dismiss”, as only 6 out of his 114 substantive rulings containing references were judgments,⁷⁸ Justice *Šimáčková* has included references in 63 judgments she drafted and in 53 of those, she decided in favour of the applicant. This is potentially a very significant difference. As I have noted above, only the judgments of the CCC are considered generally binding. Therefore, a Justice who wants to push through systemic change by using the ECtHR case law as external leverage will use references in judgments primarily for this purpose.

Another important factor that might reveal the purpose of the reference and its substantive value is whether it is an “independent reference”, i.e. a reference to a judgment that has not been referred to before or at least has not been referred to in the same context or a “snowball reference”.⁷⁹ “Human rights activist” Justices can be expected to include more independent references than Justices at the other side of the spectrum. Mapping all the “entry points”, i.e. the first time an ECtHR’s judgment has been referred to or at least referred to for the first time in the same context and the subsequent circulation of references would be a task for a thorough network analysis of the reasonings of all the CCC’s rulings that refer to the ECtHR case law and as such it goes beyond the ambitions of this article.

However, I can use the case of Justice *Musil*⁸⁰ to demonstrate that the number of references, especially in dismissive decisions, would be a misleading indicator of the substantive impact of the ECtHR decisions. Above, I have already mentioned the snowball references that Justice *Musil* “inherited” from Justice *Výborný* together with legal assistant *Oliva*. There are many other examples of such snowball references with a rather ornamental purpose in Justice *Musil*’s rulings, which explains the aforementioned puz-

⁷⁷ With regard to Justice *Musil*, I again only take into account his work at the “third CCC”.

⁷⁸ Similarly, Justice *Fiala* referred to the ECtHR case law in 48 cases, but only once in a judgment. Justice *Fiala*, however is the newest addition to the CCC, so it is perhaps better to wait before making conclusions.

⁷⁹ See also part III. 1.

⁸⁰ Obviously Justice *Musil* does not stand alone in this regard, as all Justices sometimes use general “fig leaf” or “ornamental” references that have little substantive effect on the outcome of the case. Justice *Musil* was picked as an example solely for the reason that he was revealed as an outlier with the highest ratio of references at the third CCC.

zle of a rather self-restrained and textualist Justice using so many references to Strasbourg case law.

For example, in four of his decisions,⁸¹ Justice *Musil* referred to the ECtHR's decision in the case *Orion-Břeclav, s.r.o. v. Czech Republic*.⁸² using the same paragraph concerning the need to balance the conflicting interests in cases where a financial burden is placed on an individual. In five decisions,⁸³ Justice *Musil* used the same paragraph containing a reference to *Bochan v. Ukraine*⁸⁴ to convey the message that the ECtHR does not serve as a fourth instance reviewing the finding of facts and legal conclusions reached by domestic courts.⁸⁵ In two other decisions, Justice *Musil* used the same reference and a slightly differently worded sentence to convey the same message.⁸⁶ This pattern is repeated in other sets of decisions, but I do not consider it necessary to explicitly mention all of them.

Justice *Šimáčková*, on the other hand, has used almost half of her references in judgments⁸⁷ and these judgments have often brought about some revolutionary changes, which is consistent with the hypothesis that "human rights activist" Justices use detailed independent references to push through controversial systemic changes.

Perhaps most importantly, Justice *Šimáčková* as a judge-rapporteur drafted rulings that introduced procedural obligations under Art. 2 and Art. 3 ECHR (effective investigation) in the CCC's case law. Established case law of the CCC had for a long time dismissed petitions by individuals harmed by an alleged criminal conduct asking for review of an investigation by the police and a state attorney, relying on the argument that there is no fundamental right to have another person punished.⁸⁸ Judgments written by Justice *Šimáčková*, relying on detailed analysis of principles stemming from

⁸¹ Decisions n. III. ÚS 3522/15, III. ÚS 1305/14, III. ÚS 306/14 and III. ÚS 2837/12.

⁸² Decision of 13.1.2014, n. 43783/98.

⁸³ Decisions n. IV. ÚS 434/16, III. ÚS 1033/15, III. ÚS 693/15, III. ÚS 541/15 and III. ÚS 3913/14.

⁸⁴ Grand chamber judgment of 5.2.2015, n. 22251/08.

⁸⁵ Namely: "[ECtHR] reiterates that, according to its long-standing and established case law, it is not for this Court to deal with alleged errors of law or fact committed by the national courts unless and in so far as they may have infringed rights and freedoms protected by the Convention."

⁸⁶ Decisions n. IV. ÚS 2320/16 and IV. ÚS 2308/16.

⁸⁷ For the difference between decisions and judgments (and the importance of the latter category) see part III. 1.

⁸⁸ See among dozens of others, the decision n. I. ÚS 1941/09 of 21.1.2010.

the ECtHR case law⁸⁹ have reversed this trend both as regards investigating threats to the right to life⁹⁰ and suspicions of ill-treatment.⁹¹

IV. A Matter of Will and a Matter of Resources

The research presented in this article has shown that the CCC refers to the ECtHR case law on a regular basis. As regards substantive rulings, such references have been used in roughly 10 % of the cases. This might not come as a surprise, as the privileged normative position of the ECHR in the Czech legal order creates ideal conditions for the CCC to refer to the ECtHR case law, as there is little doubt about the legitimacy of such referencing. On the contrary, it can be considered a constitutional duty of a court to reflect the case law of the Strasbourg court. Therefore, it can be safely stated that referring to the ECtHR case law, where relevant, is normatively a default option and the CCC would rather need to justify a lack of such references.

Nevertheless, the descriptive statistics concerning the references to ECtHR case law show a very uneven distribution of these references both over time and amongst individual Justices acting as rapporteurs.

The reader could have observed that the number of references at the Court level had been growing slowly between 1993 and 2003 and that this period was followed by a rapid development between 2003 and 2006. Afterwards, there was no observable straightforward trend, as the ratio of references oscillated around 10 %. At the same time, the figures have revealed great differences in the distribution of references amongst individual Justices of the third CCC.

The key question obviously is what factors might be responsible for the uneven distribution of the number of references both over time and amongst individual Justices. It may be summarised that referencing the ECtHR case law is largely a matter of *will* and a matter of *resources*.

Resources such as language skills, availability of information about the ECtHR case law including publications and databases, technical equipment or even the number and skills of legal assistants or advisors seem to consti-

⁸⁹ Most of the ECtHR's judgments were referred to for the first time by the CCC, including *Ogur v. Turkey*, *Makaratzis v. Greece*, *Finogenov et al. v. Russia*.

⁹⁰ Judgment n. I. ÚS 1565/14 of 2.3.2015.

⁹¹ Judgment n. I. ÚS 860/15 of 27.10.2015. Other examples of rulings drafted by Justice Šimáčková that have brought systemic changes with the help of references to the ECtHR case law can be found in the areas of family law, especially in the area of parental rights.

tute an important factor that influences the number of references made by the CCC. A combination of new available resources was arguably responsible for the rapid growth in the number of references between 2003 and 2006.

Most importantly, influential publications in Czech language by *Hu-bálková* and even more by *Berger* that were published in 2003 provided an invaluable source of information about the ECtHR case law that was not readily available before. At the same time, Justices were allocated more legal assistants which boosted the research potential of Justices' mini-teams and moreover, many of these new assistants were relatively young lawyers with a different set of language skill, sometimes with foreign education etc. The simple fact that after 2003, Justices of the first CCC were gradually replaced by the second generation of Justices might have played a role, too.

Besides resources, the phenomenon of "snowball references" should not be underestimated. When the CCC refers to the ECtHR case law, it simultaneously incorporates such reference in its own case law. The parts of reasoning of the CCC's ruling that contain the references can be copied and pasted in future rulings. Thus by building on its own case law, the CCC "indirectly" refers to the case law of the Strasbourg court.

Systemic factors such as the normative position of the ECHR, resources or the snowball effect, can nonetheless only create favourable conditions under which referencing the ECtHR case law might flourish. As the research of differences between individual Justices at the third CCC has shown, referencing the Strasbourg court is also a matter of will or legal preference.

Textualist and self-restrained Justices or Justices who prefer "short but effective" reasoning are generally less likely to refer to the ECtHR case law, with the possible exception of "referring to dismiss". On the other hand, human rights activist Justices, i.e. Justices that have a preference for a broader interpretation of fundamental rights and a more active position of the CCC in the process of their enforcement, might be expected to use such references more liberally.

However, the correlation between human rights activism of a particular Justice and the number of references in his/her decisions is not straightforward. This is due to the fact that references to the ECtHR case law can serve different purposes, as the cases of Justices *Šimáčková* and *Musil* show. In this regard, I would like to emphasise that a reference to the ECtHR case law does not *per se* carry any substantive meaning. Most importantly, it would be misleading to view the simple fact that a reference has been made as a sign of effectiveness of ECtHR case law or as an indicator of compli-

ance. A careful analysis of the form, context and purpose of references is necessary in order to draw such conclusions. Specifically, a general ornamental reference, usually one that is copied and pasted from previous decisions, tells us little about the reality of the ECHR effectiveness and implementation, especially if it is used in a dismissive decision. On the contrary, novel, long and diligent references in judgments can, however, serve as a good indicator of a Justice's attitude towards the ECHR. Even one or two Justices acting as rapporteurs in panel cases can introduce ECtHR case law in the national legal system and thus push through systemic changes. This holds true especially in the Czech system where the CCC sits mainly in three-judge panels and collegiality does not work perfectly.

Legal assistants of Justices are a peculiar factor that deserves special mention. Even though I have labelled and treated them as "resources", they can have will and preferences of their own. Even one "travelling assistant" can be responsible for a high number of references in a particular Justice's rulings.

Perhaps the most important message of this article and the research it is based on is that – when it comes to a national court's attitude towards ECtHR case law – appearances can be misleading and nothing is as it seems on the surface. In other words, it is extremely tricky to formulate theories concerning a national court's treatment of the case law and its relation to concepts like compliance or effectiveness based on basic descriptive statistics dealing with the whole court. This is mainly due to the fact that a reference to an international body's decision might be used for many different purposes and that individual judges tend to differ greatly when it comes to their resources, their will to use it and even the aims they are following.

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