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From a potentially powerful to a polarised court: the emergence of dissenting opinions on the Croatian Constitutional Court

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ABSTRACT

One of the most important aspects of making the 1990 Croatian Constitutional Court was the 'establishment of an independent and potentially powerful' court. For the first time since 1963, the Court obtained full powers of judicial review. Yet, despite its newly gained powers, the Croatian Constitutional Court refrained from an activist approach adopted by other constitutional courts in the region and was not fond of annulling laws adopted by the legislator. One possible explanation of such a conformist approach was the ideological consonance between the centre-right legislative and the centre-right Court. Most of the constitutional judges were appointed by the centre-right party (HDZ), which held the majority in the Parliament during the first decade of the country's independence. However, recent years have witnessed an increase in the dissenting opinions, following the nomination of five judges from the centre-left opposition (SDP) to a predominantly centre-right Court. Based on the large-scale data collection efforts, this paper looks into the origin of these nominations, as well as their effect on the emergance of dissenting opinion and the growing ideological polarisation on the Court, which changed the relationship between judicial and legislative powers in Croatia.

KEYWORDS

dissenting opinions; judicial behaviour; constitutional court; Croatia; Central and Eastern Europe

1. Introduction

One of the most important aspects of making the 1990 Croatian Constitutional Court (hereafter 'the CCC' or 'the Court') was the 'establishment of an independent and potentially powerful court' (Rodin, 1995, p. 783). While as a part of the former Socialist Federal Republic of Yugoslavia (SFRY), Croatia had its own constitutional court – the Constitutional Court of the Socialist Republic of Croatia – this 'socialist' court was not considered independent nor powerful, as it was subjected to governmental control both institutionally and politically. This changed with the adoption of the 1991 Constitution, which gave

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the newly established CCC the full power of judicial review and the opportunity to distance itself from political influence.

However, despite the newly gained powers and independence, the Court refrained from an activist approach adopted by other constitutional courts in the region such as the Hungarian Constitutional Court, the Czech Constitutional Court, or the Polish Constitutional Tribunal (Barić, 2016; Nalepa, 2010; Omejec, 2004), and continued working in the shadows of the Croatian legislature. A very recent analysis of the Court rulings issued between 1990 and 2020 revealed that the Court is reluctant to annul laws adopted by the legislator: as much as 82 per cent of the constitutional review cases submitted in that period were rejected based on their conformity with the Constitution (Glavina, forthcoming).

One possible explanation for such a conformist approach of the CCC was the ideological consonance between the centre-right legislative and the centre-right Court. Since the country's independence in 1990, fourteen governments have been formed: nine of which by the Croatian Democratic Union (HDZ), a conservative, centre-right political party. HDZ held power for the first decade of the country's independence, holding the majority in the Parliament and playing a decisive role in the appointments of the Constitutional Court judges. Yet, with three governments formed by the Social Democratic Party (SDP), a centre-left social-democratic party, new centre-left appointed judges entered the office, causing a stir in the relationship between the legislative and the judiciary and among the constitutional court judges themselves.

With the appointment of centre-left judges to a predominantly centre-right Court and a clear ideological division among the constitutional judges, the CCC witnessed for the first time since its creation the emergence of dissenting opinions. The aim of this paper, thus, is to explore the emergence of the dissenting opinion on the CCC and to analyse the role of judicial ideology on the decision making of the Court. I explore to what extent ideological differences between the judges bring to the polarisation at the Court and what this means for the future relationship between the legislative and the Court. Polarisation in this paper is defined as the process of widening the divide between party affiliation and ideologies among the CCC judges (Gooch, 2015). Polarisation occurs when political views are driven away from the centre and towards ideological extremes (DiMaggio et al., 1996), although the extreme is much less proclaimed in Croatian politics as compared to the US as both major political parties – the centre-right HDZ and the centre-left SDP – identify also with the political centre.

This paper is structured as follows. Section two introduces the data and methodology. Section three looks at the establishment of the 1991 CCC and the Court's relation with the legislator in the light of the newly gained power of judicial review. This section further looks at the composition, the structure, and the voting of the Court, focusing in particular on the right of dissenting opinions and their absence in the decision making of the CCC during the first decade of the Court's operation. Section four follows the origin of the appointment of new centre-left judges to a predominantly centre-right Court, following the criticism of the Court by the public and the media. This section follows the emergence of dissenting opinions on the CCC as well as the start of the polarisation trend at the CCC. I further explore the saliency and absence of the practice of dissent in Europe – driven primarily by the secrecy of judicial decision making and the desire of keeping the judiciary separate from politics (Dyevre, 2010; Voeten, 2008) – and how this relates to the practice

of the CCC. Section five follows an increase of dissenting opinions on the CCC and relies on network analysis to uncover a formation of dissenting coalition of centre-left judges voting against the predominantly centre-right Court.

Section six uses network and statistical analysis to explore the role of ideology on the dissenting behaviour of CCC judges. Furthermore, building on the literature on dissenting behaviour of judges, I analyse to what extent the probability of writing a dissenting opinion at the CCC is connected to different factors posited in the literature, such as party affiliation, academic career, gender, or age. The results show that judicial ideology indeed plays an important role when it comes to the probability of dissenting. This paper concludes that while the portrayal of the CCC as a potentially powerful court has been an overstatement (due to the ideological consonance between the centre-right legislative and the centre-right Court), the growing trend of dissenting opinions in and greater ideological differences between the judges may change this in the near future. Yet, the question is whether a handful of centre-left judges can change the rules of the game.

The present paper is one of the rare examples of empirical works on the CCC. Apart from Barić's report (2016) the study of the CCC continues to be held in the privileged domain of law professors (Crnić, 2001; Rodin, 1995, 1997) and Constitutional Court's judges themselves (Arlović, 2013, 2014; Crnić, 2001; Omejec, 2002; Omejec & Banić, 2012). Additionally, most of the work done on the CCC can be only found in the national (Croatian) language. Merely few academic articles or reports were published in English (Barić, 2016; Omejec, 2004; Rodin, 1995, 1997). In addition, the present paper is one of the first attempts to apply theoretical understanding on judicial behaviour on the CCC. By doing so, this paper not only uncovers ideological polarisation at the CCC but also sets a research agenda for the future.

2. Data and methodology

The paper is based on large-scale data collection efforts that collected and hand-coded all constitutional review rulings of the CCC issued between 1990 and 2020. The unit of analysis in this paper are, thus, the CCC rulings[1] in constitutional review cases. These cases not only best capture the relationship between the judiciary and the legislative but, in addition, dissenting opinions on the CCC are only allowed in the judgments based on the constitutional review, as individual constitutional complaints require a unanimous vote.[2] The data collection has been performed under the instruction of the JUDICON-EU project on Judicial Constraints on Legislatures in Europe 1990–2020.

The data collection effort resulted in a database of 869 rulings contained in 808 Court decisions. Based on the codebook of the JUDICON-EU project, the collected information includes, among others, the ID of the ruling, date of the petition, ruling type (majority ruling and dissenting opinion) names of judges sitting on a bench, names of dissenting judges, and the type of ruling (refusal, rejection, procedural or substantive unconstitutionality, legislative omission).

In addition, this paper is based on the literature review of primary and secondary sources. Since not much has been written on CCC, I rely on primary sources such as the CCC rulings, newspapers articles and the provisions of the Croatian Constitution, the Constitutional Act, and the Court's Rules of Procedure.

As for the methodology, I first present some descriptive statistics to illustrate the emergence of the dissenting opinions in the decision making of the CCC. I then rely on network analysis of dissenting opinions. There were no concurring opinions in the constitutional review cases, so these could not be added to the analysis. Dissenting opinions can be written by a single judge, without any other judge joining the dissent, or can be written by a coalition of judges. A coalition in this sense means that a dissenting opinion by one judge is supported and signed by other judges or that multiple judges write and sign a dissenting opinion together. A coalition can be formed in one single case or can be extended to several cases (Pócza, 2018).

For network analysis, only dissenting opinions signed by more judges were used. Dissenting opinions by a single judge have been removed from the analysis. Judges' surnames in the analysis represent the nodes while edges represent dissenting together. The number of times judges dissented together is represented by a node degree: a number of connections a node has to other nodes. The thicker the edge between two nodes (two judges), the stronger the relationship between them. Finally, the final section relies on one-way analysis of variance (ANOVA) to test the effect of various factors (party affiliation, academic career, education abroad, gender, or age) on the probability of dissenting.

3. The Croatian constitutional court: origin, powers, and judicial appointments

While the origin of the CCC can be traced back to 1963 when, as a part of the former Socialist Federal Republic of Yugoslavia (SFRY), Croatia had its own constitutional court – the Constitutional Court of the Socialist Republic of Croatia – this 'socialist' courts was not considered independent nor powerful, as it was subjected to governmental control both institutionally and politically.

First, institutionally, the Court's power of judicial review was subjected to the final scrutiny of the Parliament of Yugoslavia, known as the Federal Assembly (Savezna skupština), where the doctrine of supremacy of the Federal Assembly precluded the Court from striking down government's legislation as unconstitutional. Instead, the Court could only propose to the Assembly to adopt changes to the legislation that is considered contrary to the Constitution of the Socialist Republic (SR) of Croatia. The Court's operation has further been heavily constrained by the informal but politically strong guidelines of the League of Communists of Croatia (the Croatian branch of the League of Communists of Yugoslavia), the communist party in power, which played an important role in judicial appointments and removals from the office (Rodin, 1995). This changed with the adoption of the 1990 Constitution of the Republic of Croatia, which gave the newly established CCC the full power of constitutional review and to repeal/annul laws and other regulations that have been found to be contrary to the Constitution (Constitution of the Republic of Croatia, 1990, Art. 129). Thus, the adoption of the 1990 Constitution and the creation of the new Constitutional Court was accompanied with a hopeful vision of a new independent and powerful court (Rodin, 1995).

The composition of the Court, set by the 1990 Constitution and the 1991 Constitutional Act, included eleven judges that would be selected by two Houses of the Croatian Parliament: the House of Counties would recommend the candidates and the House of

Representatives would make the final selection with an absolute majority vote. With the abolishment of the County House in 2001, the procedure for the selection of judges changed. The 2001 constitutional revision introduced a new body responsible for the nomination of the CCC candidates: the Committee on the Constitution, Standing Orders and Political System of the Croatian Parliament. The very process of electing constitutional judges to the Court was, however, still based on a majority vote of the members in the Parliament. Thus, while the change made the selection procedure more democratic and transparent, Croatia continued to be one of few countries 'in which the election of constitutional judges is left to the simple majority in the Parliament and no other branch of government participated in the election [own translation]' (Podolnjak, 2007, p. 572). While, as I will show in Section Three, the simple majority vote was revisited in 2011 and amended to now require two-thirds of the votes. Croatia, however, continues to be one of few countries in which the Parliament is the sole body responsible for the selection of constitutional judges.

The 2001 constitutional amendment brought another change in terms of the number of judges, which was raised to thirteen. Judges are appointed for a period of eight years (Constitution of the Republic of Croatia 2014, Art. 122), which is renewable, yet it is unclear whether the renewal can only happen once or without limitations (Barić, 2016). While there is no official rule on the number of possible renewals, the 2016 scandal involving the Court's president judge Omejec shows that the public is not fond of judges standing candidacy for the third mandate, even if their work has been deemed 'impeccable' (Jutarnji list, 2016a).

The criteria for appointment include being a Croatian citizen and a graduate lawyer with at least 15 years of professional experience (12 in case of holding a PhD in law), with a distinguished career in the profession through scientific or professional work or public activity (Constitutional Act 2002, Art.5). Furthermore, a constitutional judge may not belong to a political party and may not publicly express his support for a political party (Constitutional Act 2002, Art.16). Yet, as emphasised by Barić, at least one-third of all the judges who sat on the Court were prior to their appointments publicly known members or supporters of active political parties in Croatia (Barić, 2016). In addition, judges' bibliographies on the official website of the Court, in general, do not hide prior political affiliations,[3] suggesting that this rule is not followed very rigorously.

The decision making of the CCC is based on a majority vote unless it is specified differently by the Constitution or the Constitutional Act (Art.27(1)) and votes are always published together with the minutes of the Court's Session.[4] Only rulings following a constitutional complaint by private individuals are taken anonymously in the council of six judges by a unanimous vote (Constitutional Act 2002, Art. 68).

Thus, when it comes to revealing judges' votes, the CCC did not follow the prevailing European practice of secrecy of deliberation where the identity of judges voting against the decision of the majority is not revealed unless they decide to write a dissenting opinion (Kelemen, 2013). In Croatia, the vote of every constitutional judge voting for or against is revealed in the minutes of the Court's session. A judge who voted against may explain his/her opinion in writing and publish it but is not obliged to do so (Constitutional Act 2002, Art.27). Because of the lack of secrecy in the deliberation of the CCC, it is unsurprising that voting against the majority's ruling without making a dissenting opinion

is rare (Glavina, forthcoming). Because the votes will be published anyway, judges voting against the majority will try to justify their decision in the form of a dissenting opinion.

Based on the CCC's rules of procedure, a judge (or several judges) who disagrees with the majority's ruling has a right to a dissenting opinion (Rules of Procedure, 2015). Dissenting opinions are, however, only possible in the constitutional review cases and cases on the legality of other acts as constitutional complaints are decided by a unanimous vote (Constitutional Act 2002, Art. 68). In constitutional review cases, however, a judge who at the session of the Court orally explains their disagreement with the Court's ruling, is also obliged to explain their disagreement in writing. Dissenting opinions are published together with the Court's decision (Rules of Procedure, 2015, Art.27(4)). The difference between a dissenting opinion and a vote against is that voting against the majority's ruling does not have to be explained. If a judge decides to explain their vote against the majority, the rule of procedure that governs dissenting opinions apply (Rules of Procedure, 2015, Art.52). Thus, expressing one's opinion and wanting to justify/explain one's decision entails certain opportunity costs: the time and effort will have to be invested into writing a dissenting opinion which will be published together with the Court's decision.

However, despite the fact that the possibility of dissent existed since the establishment of the 1990 CCC, there were no dissenting opinions during the first decade of the Court's operation. One possible explanation for this absence was the ideological consonance between the centre-right legislative and the centre-right Court. Since the country's independence in 1990, fourteen governments have been formed: nine of which by the Croatian Democratic Union (HDZ), a conservative, centre-right political party. HDZ held power for the first decade of the country's independence, holding the majority in the Parliament and playing a decisive role in the appointments of the Constitutional Court judges. While dissenting opinions are only possible in constitutional review cases and in the cases on the legality of other acts, the results show that the centre-right appointed Court refrained from quashing the laws and other acts enacted by the centre-right government. This changed with the formation of the new centre-left government in 2000 and their nomination of three judges, resulting in the first dissenting opinions at the CCC.

4. The emergence of dissenting opinion on the Croatian Constitutional Court

Although the possibility of dissenting existed on the CCC since 1991 (Constitutional Act 1991, Art.27), the first decade of the Court's operation was marked by a complete lack of separate opinions: both dissenting opinions and votes against the majority's ruling. Separate opinions were missing even in very controversial constitutional review cases such as in the case U-I-1397/2015 on the application of gender equality quotas for the election of members of the Parliament (Barić, 2016) This lack of separate opinions has been often criticised by scholars, who argued that this is a result of the Court's internal agenda of providing one unique voice, which 'ignores the very purpose of dissenting opinions in a constitutional democracy' (Barić, 2016, p. 33; for a similar comment of the positive role of dissents on democracy see Rasmussen & Rasmussen, 2013). In the words of Barić, it seems that the Court has followed a long practice of the US Supreme Court where unanimous decisions are used as a tool to increase the court's legitimacy

(Barić, 2016, p. 33; based on Dorf, 2006). Chief Justice John Roberts has been a fierce promoter of unanimity at the US Supreme Court. He believes that unanimous decisions will be more respected by the public (Rosen, 2007). When a court speaks with one voice, he argued, this brings not only to greater certainty in law but also enhances the legitimacy of the court (Bricker, 2017). In fact, experimental research supports this claim. Zink et al. (2009) found that individuals who are ideologically predisposed to disagree with salient court decisions (such as on abortion rights) are more likely to consider decisions legitimate if they have been decided by a unanimous, as opposed to a majority, vote.

Yet, while it is true that a new court such as the CCC would want to enhance their legitimacy and increase public support for its rulings, there could be another explanation for the unanimous decision making during the first decade of the Court's operation. As I already discussed in the previous section, all the CCC judges until the 2000s change in the government were nominated by the centre-right HDZ party that held the majority in the Parliament. With the House of Counties recommending the candidates and the House of Representatives making the final selection with an absolute majority vote, the party in power could fill in the positions with their candidates, facing no constraints from the opposition. Recent research efforts by Glavina (forthcoming) show that in the period between 1990 and 2020, as much as 82 per cent of constitutional review cases are rejected by the CCC. The most common reason for rejection is finding the law completely in accordance with the Constitution. This occurred in 80.1 per cent of the rejected cases the Court decided since 1990. In principle, four-fifths of all the cases end up rejected because the Court finds the contested law or its provisions being fully in accordance with the Croatian Constitution. As the majority of constitutional judges that sat on the Court were nominated by the centre-right government and with the centre-right government forming nine out of fourteen governments since the country's independence, such a high rejection rate could also be explained by judges' allegiance to their nominating party.

The practice of speaking with a single voice, however, changed as at the turn of the millennium, when three new judges appointed by the centre-left government entered the Court. To explain the emergence of dissents at the CCC, we need to look at the question of why judges dissent. Most scholarly work on dissents comes from the US literature. Studies on the US Supreme Court found that judges dissent to, among others, advance their individual interests, influence jurisprudential changes, to express policy disagreements (Epstein et al., 2013; Hettinger et al., 2007), or to publicise specific issues and to force other judges to further review certain cases (Blackstone & Collins, 2014). A study on the ECtHR goes as far to conclude that 'the main determining factor in the writing of a separate opinion is judicial temperament' (White & Boussiakou, 2009, p. 37).

The ideological dimension of dissents, however, attracted most attention. This can be traced back to the work of Charles Herman Pritchett (1948), one of the earliest attempts to use statistics to explain the voting behaviour of the US Supreme Court justices. By locating justices on a scale from liberal to conservative, Pritchett systematically examined dissents, concurrences, as well as the changing alliances among the members of the Court, laying down the foundations of the attitudinal model of decision making. Pritchett found that dissenting opinions are products of regular patterns of disagreements based on ideological divergences between the US Supreme Court justices. Subsequent research has only reinforced his finding. That dissenting has an ideological element has been confirmed

in the US Supreme Court, the federal and state courts (Epstein et al., 2011) and even European courts (Bricker, 2017; Hanretty, 2012; Voeten, 2008).

Yet, the empirical research on the practice of dissents is still rare in Europe. This is primarily because of the secrecy of judicial decision making and the prevailing prohibition of separate opinions on European or international courts (e.g. CJEU or WTO). Even when courts allow dissenting opinions (e.g. ECtHR, ICJ, ICC), such opinions tend to be very rare (Dyevre, 2010). This is primarily due to the desire of keeping the judiciary separate from politics. In one of the most salient judgments of the ECtHR, dissenting was so controversial that the dissenting judges themselves warned in their opinion that 'it is essential to bear in mind that the Court is not a legislator and should be careful not to assume legislative functions' (see Voeten, 2008, based on the Judgment of the ECtHR in *Hirst v. the United Kingdom*, 6 October 2005, joint dissenting opinion of judges Luzius Wildhaber, Jean-Paul Costa, Peer Lorenzen, Anatoly Kovler, and Erik Jebens).

Nonetheless, recent research efforts provide important empirical evidence on the existence of ideology in European courts. Notable examples include Voeten's (2008) work on the role of domestic politics on judicial dissents at the ECtHR, and Hanretty's (2012) work on using a left-right political dimension to explain the dissenting behaviour of judges in Spanish and Portuguese Constitutional Tribunals. In another study on Spanish and Portuguese Constitutional Tribunals, Magalhães (2003) found that Portuguese judges remain responsive to the party that appointed them, by being less likely to veto a piece of legislation supported by that party. In a similar vein and on the example of French and German courts, Hönnige (2007) found that a piece of legislation is more likely to be annulled when the number of the judges who were appointed by the opposing government increases.

How can this be applied to the emergence of dissenting opinions on the CCC? Looking at Figure 1, one can notice that dissenting opinions started emerging only in 2004, following the election of the new centre-left government in 2000 and their nomination of three constitutional judges: Mario Kos, Agata Račan and Nevenka Šernhorst.[5] This was the first

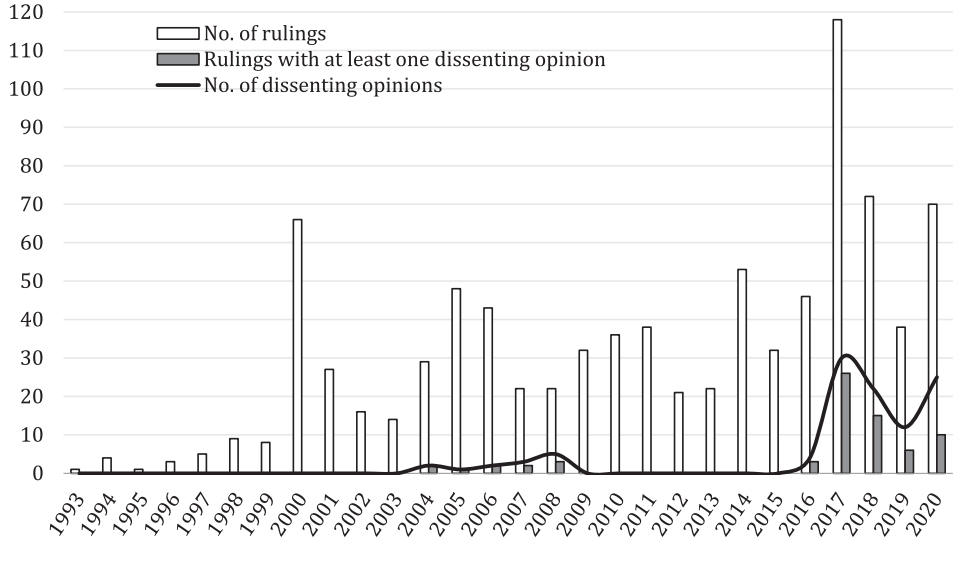

Figure 1. Number of rulings and dissenting opinions of the Croatian Constitutional Court.

time that the constitutional judges were not nominated by the centre-right party that held the majority in the Parliament since 1990. Consequently, this led to political polarisation in the Court and several new developments in its decision making. Although most of the judges in this period dissented only once,[6] this was not true for the centre-left nominee judge Agata Račan whose dissenting opinions accounted for more than one-third of all the dissents for the period between 2004 and 2008.

Furthermore, with the formation of the centre-left government and the appointment of centre-left judges to the Court, the CCC has witnessed an emergence of two dissenting coalitions between the centre-right judges: the first one between Radolović, Krapac and Babić and the second one between Klarić and Rajić (see Figure 2). Important to note, however, is that the centre-right judges formed a coalition only once: in the first case in relation to privatisation law (U-I-834/2004), and in the second case in relation to investments (U-I-4120/2003). Thus, unlike dissenting opinions of the centre-left nominee judge Agata Račan – who often criticised the Court for failing to recognise unconstitutionality (see U-I-2788/2003, U-I-3851/2004, U-I-1201/2006) or called out the Court for exceeding its Constitutional limits and acting as a legislator (see U-I-928/2000) – the dissenting opinions of centre-right nominees were never meant to represent a threat for the centre-right majority on the Court.

5. Increase in dissenting opinions and raising polarisation on the Croatian Constitutional Court

The most important constitutional change regarding the process of the selection of judges occurred in 2011. The 2011 constitutional change was a result of a more than a decade long criticism of the Court for the reason that the majority of the elected

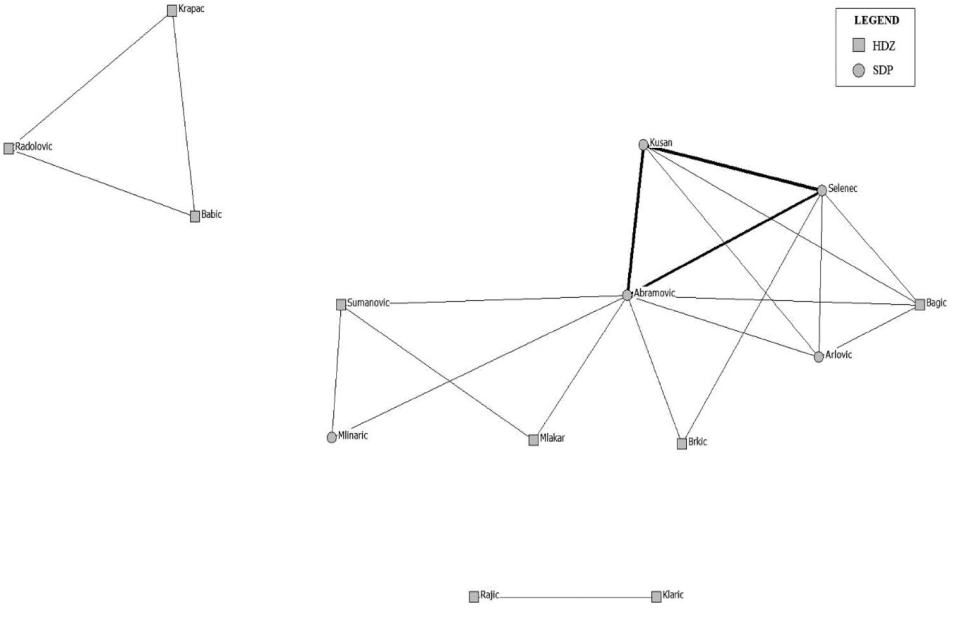

Figure 2. Network analysis: Dissenting coalitions at the Croatian Constitutional Court.

judges, with only a few exceptions, were elected by HDZ, a conservative, centre-right party that held the majority in the Parliament from 1990 until 2000, from 2003 to 2011, and since 2016. The criticism, which started already in the runup of the 1999 election to the Court, escalated when only representatives of the ruling party voted for the candidates, with the boycott from the opposition (Podolnjak, 2007; Vjesnik, 1999). The criticism continued even after the election when the ruling party was criticised by the media for filling 'the Court with candidates of questionable quality [own translation]' (Jutarnji list, 2016b).

Following the criticism, which was dragging from the 1990s, the 2010 constitutional revision introduced a change in the process of election of judges, requiring two-thirds of the majority of all members of the Parliament (instead of a majority vote that was required until then). A new constitutional mechanism was also introduced, which specified that a mandate of a judge in office would be extended for a maximum of six months until a new judge is elected. This rule was introduced to prevent blocking the work of the Constitutional Court. The change in the judicial elections, however, caused new problems as for the full six years the Parliament was unable to reach a two-thirds majority to appoint new judges. Consequently, the Court was operating for some time with ten instead of thirteen judges, sparking worries that it will be 'euthanized' *via facti* due to continuous non-appointments (Barić, 2016). This period was marked with verbal clashes between the party in power (centre-right HDZ) and the opposition (centre-left SDP), during which the Court was 'often caught between two fires' (Barić, 2016, p. 34). The Court was also subjected to a series of 'uncensored verbal attacks from the left' (Barić, 2016, p. 34) and even the Supreme Court judges. Probably one of the most well-known descriptions of the CCC from that period was the one from the Supreme Court president, Krunislav Olujić, who said that 'the Constitutional Court is like a punctured ship tilted to the right' (Barić, 2016, p. 92).

A consensus between the party in power and the opposition was finally reached in 2016 when eight new judges entered the office, with one additional appointment in 2017 (IUS-INFO, 2016). While, as the media reported, the opposition had objections to two of the centre-right nominees, they gave in 'to avoid a constitutional crisis' (Vecernji list, 2016). It seems that securing five spots for their own candidates was sufficient to avoid further discussions. Furthermore, both parties wanted to avoid an empty chair crisis at all costs. While it is thought-provoking that the ruling centre-left party would give up their power over the election of judges, it seems that more than a decade long criticism from the media and public forced the party in power to make a necessary trade-off. Notwithstanding, the majority of constitutional judges then (and still today) continue to be the nominees of the ruling party.

As a result of eight new constitutional judges entering the office, five of which being appointed by the centre-left opposition, the period between 2016 and today witnessed an increase in the number of dissenting opinions, led predominantly by a coalition of left-wing appointed judges: Andrej Abramović, Goran Selenec and Lovorka Kušan (see Figure 2). These three judges formed a dissenting coalition eleven times in total and, in the majority of cases, they argued against the rejection and in favour of substantive (see U-I-1694/2017, U-I-1759/2018, U-I-4175/2013, U-I-1092/2017, U-I-4933/2016, U-I-2938/2018, U-I-1007/2012, U-I-1372/2020) or procedural unconstitutionality (see U-I-1372/2020, U-I-1925/2020, U-I-2162/2020).[7] Based on Figure 2, one can notice that

judge Andrej Abramović is the most connected judge of the CCC. He dissented 51 times in total, which accounts for 19 per cent of all his rulings (see Table 1). He also formed dissenting coalitions with both centre-left (Selenec, Kušan, Arlović, Mlinarić) and centre-right judges (Šumanović, Mlakar, Brkić, Bagić).[8]

It seems that the dissenting judges are challenging a predominant practice of the CCC of refraining from annulling laws adopted by the legislator. As I already discussed above, in the period between 1990 and 2020, as much as 82 per cent of constitutional review cases were rejected by the CCC, most commonly because the Court finds the contested law or its provisions fully in accordance with the Constitution. While the practice of dissenting cannot force the legislator to change the law, dissenting may be used as a strategic way to publicise the problem of ideological alignment between the legislature and the Court (see Blackstone & Collins, 2014), to spark public debate (or even criticism) of the Court and to influence jurisprudential changes (Epstein et al., 2013; Hettinger et al., 2007). In fact, looking at newspaper articles published by the mainstream newspapers in Croatia on the CCC, it becomes clear that the media is quick to report on dissenting opinions, presenting them (very often) as positive developments on the Court (Index, 2020; Jutarnji list, 2020; Vecernji list, 2020). Thus, it seems that the reason why these judges dissent is not advancing their own individual interests or expressing policy disagreements (Epstein et al., 2013; Hettinger et al., 2007) but rather publicising problems in the decision making of the Court. The reason why judges dissent might also be judicial temperament, as suggested by White and Boussiakou (2009).[9] For example, dissenting opinions by judge Andrej Abramović account for almost half of all dissenting opinions of all CCC judges (see Table 1). Media has often described judge Abramović as a young and progressive judge but also temperamental, judging from a recent media coverage of his fight with neighbours that was described as 'potentially damaging for the Court's reputation' (Jutarnji list, 2021). However, based on the fact four-fifths of all dissenting opinions were written or signed by judges appointed by the centre-left opposition (see Table 1), party nomination seems to be an important explanatory factor for dissenting. I look at the empirical evidence in the next section.

Table 1. Number of dissenting opinions per judge.

Judge name	Number of dissents	Number of rulings	Dissents percentage	Nominating party
Andrej Abramović	51	269	19%	SDP
Lovorka Kušan	15	307	4.9%	SDP
Goran Selenec	12	176	6.8%	SDP
Agata Račan	5	200	2.5%	SDP
Miroslav Šumanović	5	289	1.7%	HDZ
Branko Brkić	4	306	1.3%	HDZ
Mato Arlović	2	524	0.4%	SDP
Rajko Mlinarić	2	306	0.6%	SDP
Aldo Radolović	1	189	0.5%	HDZ
Davor Krapac	1	222	0.4%	HDZ
Davorin Mlakar	1	85	1.2%	HDZ
Emilija Rajić	1	236	0.4%	HDZ
Mario Kos	1	205	0.5%	SDP
Marko Babić	1	249	0.4%	HDZ
Milan Vuković	1	255	0.4%	HDZ
Petar Klarić	1	259	0.4%	HDZ
Snježana Bagić	1	571	0.2%	HDZ
Željko Potočnjak	1	210	0.5%	HDZ

6. The role of ideology on dissenting behaviour on the Croatian Constitutional Court: empirical evidence

The previous section shows that the origin of dissenting opinions on the CCC are connected with the appointment of new centre-left judges to a predominantly centre-right Court. This supports the US judicial politics literature claim that dissenting opinions are products of regular patterns of disagreements based on ideological divergences between the judges (Epstein et al., 2011, 2013; Pritchett, 1948). Yet, what is interesting to see is what the disagreement is about. As I already discussed above, the predominantly centre-right CCC is not very eager to annul legislation passed by the centre-right government, which is in line with Magalhães (2003) study on Portuguese judges where he found that judges remain responsive to the party that appointed them, by being less likely to veto a piece of legislation supported by that party.

The first dissenting opinions issued by the centre-left nominee judge Račan in the early 2000s criticised the Court for failing to recognise unconstitutionality or called out the Court for exceeding its Constitutional limits and acting as a legislator. The centre-left dissenting coalition after 2016 similarly argued against the rejection and in favour of substantive or procedural unconstitutionality. This is in line with Hönnige's (2007) study on French and German courts, based on which a piece of legislation is more likely to be annulled when the number of the judges who were appointed by the opposing government increases. While a handful of opposition votes are not sufficient to annul a piece of legislation, these dissents play an important role in publicising specific issues and to force other judges to reconsider (Blackstone & Collins, 2014).

But how strong is the role of party nomination on the probability of dissenting? Following the US literature on judicial decision making (see Epstein et al., 2013; Goldman, 1975; Hall & Brace, 1992; Songer & Ginn, 2002), I use party nomination as a proxy for judge's ideology. I use one-way analysis of variance (ANOVA) to test the effect of the nominating party on a probability for dissent. A one-way ANOVA test is used for groups of data to explore the relationship between the dependent and independent variables. I use two different dependent variables. First, whether or not a judge has dissented during his/her time at the Court (dummy variable where 1 denotes judges who dissented and 0 those who did not) and the number of dissenting opinions (numerical variable), which is the number of times a judge has dissented. As an independent variable, I use the party affiliation of a judge based on the party nomination or newspapers articles covering judges' political preferences.[10]

The results of the ANOVA test show that judges appointed or nominated by the opposition party (SDP) are more likely to dissent. This finding is statistically significant at 0.05 level.[11] When using the number of dissenting opinions as an outcome variable, this result becomes statistically significant at the 0.001 level.[12] The difference in the number of dissenting opinions between judges appointed by the centre-right (HDZ) and those appointed by the centre-left (SDP) is illustrated in Figure 3.

Academic literature on judicial politics has, in general, confirmed the role of ideology, attitudes and policy preferences in the voting behaviour of the constitutional courts (Bricker, 2017; Hanretty, 2012, 2013; Hönnige, 2007; Pellegrina & Garoupa, 2013). And although judicial decision making cannot be reduced to politics alone (Epstein et al., 2013; Epstein & Knight, 2013; Glavina, 2020), ideology and politics seem to matter at

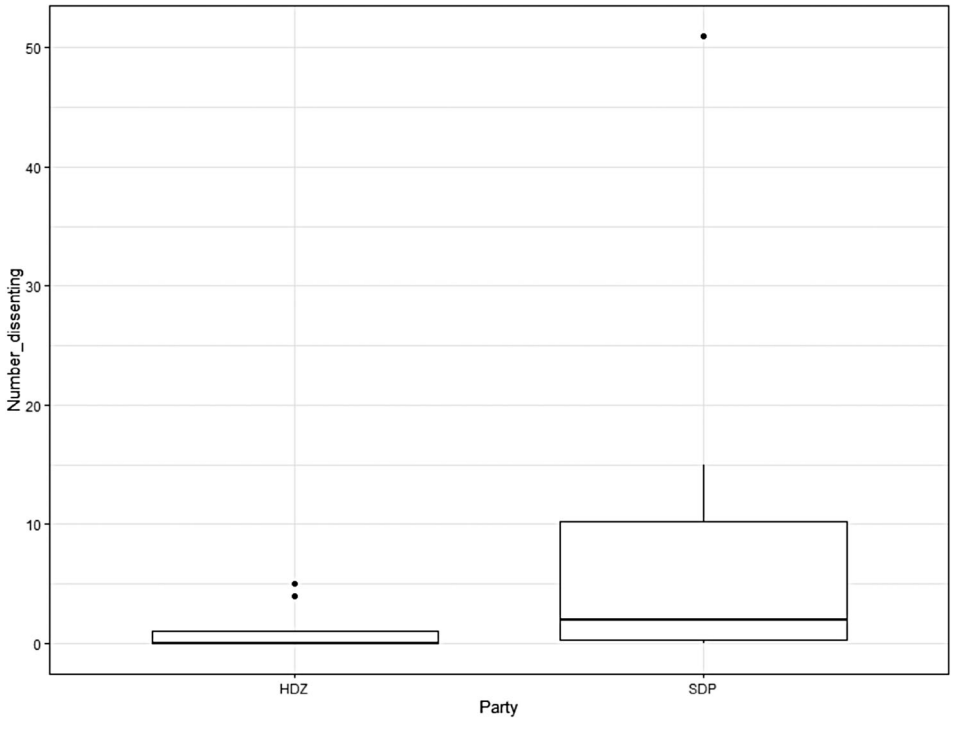

Figure 3. Number of dissenting opinions and party affiliation: Difference in distribution.

the CCC. This finding further supports the postulation in the literature that dissenting opinions are more likely when there are greater ideological differences among the judges sitting on a court (Bricker, 2017).

I further check the role of other variables. The literature suggests that judges sometimes do not dissent as dissenting imposes collegiality costs on other judges sitting on the same panel and makes them work harder (Posner, 2008). Dissenting also imposes costs on one's reputation, by making dissenters less liked by their colleagues, ultimately affecting internal job satisfaction (Epstein et al., 2011, 2013). Because of that, risk and conflict-averse judges are less likely to dissent (Dumas, 2010). As women tend to be more risk-averse than men (Jianakoplos & Bernasek, 1998), gender might play a role in the probability of dissenting. Furthermore, research shows that age is also a potentially important variable: judges who were appointed at a younger age have less experience and training (Choi et al., 2011). They are also more likely to use the court as a stepping stone for their future career and might not want to agitate the party in power in order to secure another appointment (Kerby & Banfield, 2014) Research also suggests that judges appointed to the court from academic positions could be more ready to write a dissent as they have a more prominent role in influencing the legal developments (Caenegem, 1993; Lasser, 2004). Based on this, I check for the role of gender (dummy variable), age at the time of appointment (numerical variable), and whether a judge had an academic career prior to their appointment (dummy variable). In addition, it has been argued that Court's presidents are less likely to dissent (Barić, 2016), as they have higher incentive to increase or sustain the Court's legitimacy (Bricker, 2017; Dorf, 2006)

and public acceptance of courts decisions (Rosen, 2007; Zink et al., 2009). I, thus, add an additional dummy variable on whether a judge served as a president of the Court. Finally, I check whether judges who had an international education are more likely to dissent. This is because judges who spend part of their education abroad are more likely to encounter different practices of constitutional courts. Information on judges' education was collected from judicial biographies available on the Court's website.[13]

The result of the ANOVA test shows that gender[14] and age[15] play no role on dissenting behaviour of CCC judges. Furthermore, in line with the results reported by Bricker (2017), I find no support for the role of an academic career.[16] Judges with an academic background are not more likely to dissent compared to those with judicial or political backgrounds. I further find no evidence that Court's presidents are less likely to dissent. An international education, however, does seem to matter. Judges who spend part of their education abroad are more likely to write a dissenting opinion than those judges who underwent their entire education in Croatia, although this effect is significant only at a 0.5 level.[17] Based on this, I can conclude that ideological differences among the judges are the most important driver of the dissenting behaviour on the CCC.

7. Conclusion

This paper looked at the growing polarisation on the CCC and its role in the emergence of dissenting opinions on the Court. I discussed how dissenting opinions were absent from the CCC for the first decade of the Court's operation, largely due to the fact that judicial appointments required only a simple majority in the Parliament. With the centre-right HDZ party holding a majority in the Parliament until 2000 and forming nine out of fourteen governments, the party faced almost no constraints with stashing the Court with their nominees.

The results of this paper show that, in constitutional review cases, the centre-right appointed judges remained responsive to the party that appointed them and refrained from quashing legislation passed by the government. In fact, as much as 82 per cent of constitutional review cases submitted to the Court between 1990 and 2020 were rejected based on their conformity with the Constitution. Since dissenting opinions on CCC are only allowed in constitutional review cases, it is not possible to draw conclusions on whether the responsiveness of judges to the appointing party is equally present in other types of cases, such as constitutional complaints.

Following more than a decade long criticism of the Court, the 2011 constitutional amendment introduced a change in the appointment of the constitutional judges, requiring two-thirds in the Parliament. This resulted in the appointment of centre-left nominated judges as well as in the increase of dissenting opinions on the CCC and the formation of the first centre-left coalition. Dissenting opinions, this paper shows, often criticise the Court for failing to recognise unconstitutionality and argue in favour of substantial and procedural unconstitutionality.

But how strong is the role of party nomination on the dissenting behaviour of CCC judges? I use a one-way analysis of variance (ANOVA) to test the effect of different factors on a probability for dissent: party affiliation of a judge (based on the party nomination), age, gender, prior academic position, Court presidency and education abroad. I find strong evidence that party affiliation, that is, being nominated by the centre-left

SDP party, plays the strongest role on the dissenting behaviour at the CCC. International education seems to matter too. Judges who spend part of their education abroad are more likely to write a dissenting opinion than those judges who underwent their entire education in Croatia. This shows that familiarity with practices of different constitutional courts is an important factor in shaping the way in which judges decide cases.

This paper makes a contribution to the literature on the role of dissents on the decision making of constitutional courts. It raises important questions on the relationship between the legislative and the judiciary in countries where the legislative power is shared between two major political parties and the court is 'caught between the two fires'. The results are, however, equally applicable to countries where the legislative power is held by a super-majority, such as in the case of Poland, which affects the separation of powers between the judiciary and the legislative and where judicial appointments disturb the normal functioning of the court. With the growing polarisation on other constitutional courts in the region, for example, based on (illegal) judicial appointments to the Polish Constitutional Tribunal or the Hungarian Constitutional Court, research on the role of dissents is becoming more important than ever. This paper shows that while a dissenting minority on a court is unlikely to change the rules of the game, dissenting plays an important role in publicising certain issues, raising awareness, attracting media, sparking criticism and, ultimately, forcing the majority on the court to reconsider its allegiance to the legislature. This paper is one of the rare examples of empirical works on the CCC. The behaviour of a polarised court such as the CCC, the newest constitutional court in the EU 'family', deserves more attention. I hope this article will inspire future scholars working on judicial politics in Central and Eastern Europe not to ignore this interesting and very much political Court.

Notes

1. The decision to focus on the ruling as the unit of analysis (rather that a judgment) is the fact that judgments may contain several rulings that may have an opposite outcome: one ruling may find the provision of a law completely in line with the constitution, while another ruling in the same judgment might find other provisions (of the same or a different law) unconstitutional. In addition, dissenting opinions are often connected to a particular ruling, rather than a judgment as a whole (see Pócza, 2018).
2. Important to stress is that having rulings as units of analysis did not affect the number of dissenting opinions included in the analysis. Dissenting opinions of the CCC are connected to a particular ruling of a judgment and not a judgment as a whole. The number of dissenting opinions, thus, corresponds to the number of rulings rather than judgments of the Court.
3. See the website of the CCC www.usud.hr/suci.
4. That votes will be made public has been specified in the Constitutional Act, which states that the minutes of the Court's Session 'shall include information on the case, how the case was resolved, and the voting (who voted for and who voted against)'. Constitutional Act 2002, Art. 51(3).
5. Some of the dissenting opinions are connected to cases that reached the Court as early as 2000. However, since it takes a couple of years for the CCC to deliver its judgment and because dissenting opinions were collected based on the year that the judgment was published in the Official Gazette, Figure 1 shows dissenting opinions appearing in 2004, four years after the nomination of three centre-left judges to the Court.
6. These judges are Mario Kos, Željko Potočnjak, Milan Vuković, Petar Klarić, Emilija Rajić, Aldo Radolović, Davor Krapac, Marko Babić.

7. Only once, the dissenting coalition challenged the substantive unconstitutionality ruling, arguing that there were no constitutional reasons to repeal a legal provision (U-I-2854/2018).
8. The coalition between centre-left and centre right judges are, in general, diverse and have no common theme. For example, left- and right-wing nominated judges formed a coalition based on the argument that the Court has the competence to assess the constitutionality of international agreements (U-I-1596/2012), that the Court has no competences in other areas (U-I-252/1996), that there is no legal basis for the constitutionality review (U-I-2854/2018) or arguing in favour of substantive unconstitutionality (U-I-4613/2015).
9. Important to notice is that White and Boussiakou (2009) do not provide a definition of what judicial temperament is. The article does seem to suggest that it refers to a personality trait that 'is shaped by a judge's prior experience and by the value set which that judge brings to his or her judicial work' (White & Boussiakou, 2009, p. 59). Based on another source, judicial temperament can be defined as 'a deep-seated, relatively stable set of specific personal traits – separable from intellect, training, and ideology – that, in dialectic with specific judicial environments and the predictable demands of judging, drive behaviours that affect how justice is delivered and perceived' (Maroney, 2021).
10. Note that, although CCRC judges may not belong to a political party and may not publicly express his support for a political party (Constitutional Act 2002, Art.16), at least one-third of all the judges who sat on the Court were, prior to their appointments, publicly known members or supporters of active political parties in Croatia (see Barić, 2016, and the website of the CCRC https://www.usud.hr/hr/suci).
11. One-way ANOVA test $p < 0.048$**.
12. One-way ANOVA test $p < 0.0044$***.
13. See https://www.usud.hr/hr/suci.
14. One-way ANOVA test $p < 0.974$.
15. One-way ANOVA test $p < 0.962$.
16. One-way ANOVA test $p < 0.374$.
17. One-way ANOVA test $p < 0.0307$*.

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