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Between Human Rights and Transitional Justice: The Dilemma of Constitutional Courts in Post-Communist Central Europe

KATARÍNA ŠIPULOVÁ & HUBERT SMEKAL

Abstract

The essay sheds light on the role of constitutional courts in transitional justice, focusing on their role in mitigating the conflicts between transitional justice and international human rights commitments. Through a study of the Czech Constitutional Court's case law, we demonstrate that international human rights work both as a constraint and a tool. Constitutional courts use international human rights law selectively, when it suits their reasoning and views on transition. Nevertheless, the influence of international human rights law strengthens over time, especially when supported by the adverse rulings of international bodies, and gradually prevails over transitional justice justifications.

COUNTRIES EXPERIENCING A TRANSITION TO DEMOCRACY FACE an uneasy challenge: how to reconcile transitional justice issues with their human rights commitments and aspirations. A first look at the issue might not indicate any trouble, as democratising countries strive to distinguish themselves from the previous regime by upholding principles of liberal democracy and human rights. Nevertheless, closer inspection reveals that, although transitional justice uses human rights language and builds on ideas shared by human rights movements, some of its principles can differ considerably. Transitional justice legislation introduces a different logic of punishment and reparations based on arbitrary baselines, time-limited provisions, values, and principles (Teitel 2000, pp. 285–87), which are often at odds with general conceptions of human rights and international human rights commitments (Whitehead 2009, p. 1). For example, lustration (the vetting of public officers for ties with the previous regime) can have consequences for passive voting rights and employment rights. Wide access to secret police files and archives interferes

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with the right to privacy. Condemnation of political parties associated with the previous regime might have repercussions for free political competition and even the whole party system. Similarly, reparations are ordinarily organised around arbitrary policy lines, because new political elites decide who will benefit from reparations and under what conditions, thus potentially violating equality rights. Teitel therefore considers 'the transitional rule of law' an alternative model of principles, one that does not necessarily conform to the point of view of established liberal democracy (Teitel 2000).

We expose the apparent contradictions between human rights and transitional justice in the particularly compelling case of post-1989 Central and Eastern Europe (CEE). After more than four decades of communist dictatorships, countries from the CEE region turned to Western European democracies as a model, as they performed better both economically and in terms of human rights standards. The international context adds an important element because at that time, international human rights regimes had already existed for decades and international human rights bodies had developed rich jurisprudence. Moreover, newly established CEE constitutional courts with the power of constitutional review presented a well-tested institutional mechanism for putting checks on other branches of power. The transitioning CEE countries therefore had both rules (international human rights) and institutional templates (parliamentary democracies with constitutional courts) to emulate.

At the same time, all CEE countries had their own internal issues to resolve. Post-1989 transitional processes in the region revolved around communist parties and their repressive apparatuses, especially the secret state police and its numerous collaborators (David 2011). The new regimes sought to eliminate the old cadres from holding powerful positions in the political system (Welsh 1996; Stan 2009; Horne 2015) and compensate the victims of past injustices (Czarnota *et al*. 2005; Sadurski 2008; Stan & Nedelsky 2015, p. xli). Economic rebirth was no less important; privatisation schemes and plans for how to reintroduce private ownership opened up challenges regarding the return of forcibly nationalised properties to the rightful owners.

Despite the similarities between CEE communist regimes, the transitional justice choices adopted by individual countries varied greatly. The diversity of transitional justice decisions attracted the attention of political science scholarship (Huntington 1991; Moran 1994), which has long focused on decisions adopted by political actors (Welsch 1996; Kornai & Rose-Ackerman 2004; David 2011), or the impact of transnational human rights networks on political actors (Crocker 1998; Sikkink 2011). Beyond a few doctrinal studies, constitutional courts have been neglected by transitional justice scholarship, or at best, perceived as mere second-order agents implementing political actors' decisions regarding transitional justice.[1] Nevertheless, the evidence from CEE shows that constitutional courts played an important role in transitional justice processes, as the majority of CEE transitional justice legislation has been adjusted in constitutional review proceedings (Sólyom 2003; Sadurski 2008; Kosař & Petrov 2017).

We argue that not factoring constitutional courts into the analysis inevitably misses important restraints on the choices of other branches of government when deciding

[1]Exceptions include Ginsburg (2003, 2012), and Kopeček and Petrov (2016).

transitional policy issues. We draw on more recent scholarship researching the role of judiciaries in Latin American transitional processes (Hilbink 2007; Huneeus 2010; Ocantos 2018) and place constitutional courts among the significant actors of transitional justice. Exploring their case law and interviewing former judges helped us to open the 'black box' surrounding the process by which states decide on certain forms of transitional justice policies.

The newly (re)established constitutional courts in CEE countries experienced the contradiction between protecting human rights and dealing with the past. They were expected to contribute to safeguarding liberal values (Ferreres Comella 2004; Hirschl 2004, p. 31), as proclaimed both in national bills of rights and in international human rights treaties.[2] Moreover, bodies such as the European Court of Human Rights (ECtHR) or the UN Human Rights Committee (UN HRC) had developed rich case law that the parties to these treaties were supposed to follow. Constitutional courts thus had to think hard about how to reconcile international human rights requirements with domestic transitional justice processes. Using the example of the Czech Republic, we examine how CEE constitutional courts approached the dilemma between transitional justice policies and the requirements that stemmed from international human rights treaties in the period 1993–2018. Did they defer to the transitional justice solutions adopted by the political actors, or did they challenge them? Did they step into this sensitive arena and push for a human rights perspective?

The contribution of our essay is threefold. First, it illustrates the significance of constitutional courts in transitional justice. Second, the essay analyses the clash between human rights and transitional justice in constitutional case law. Third, we show to what extent and when the constitutional courts make use of international human rights law in transitional justice disputes.

The Czech Republic offers a compelling story in this regard.[3] The particularly severe and pervasive nature of the Czechoslovak police state in the 1950s and 1960s, together with weak communist political forces shortly after the transition, contributed to a very harsh approach to ridding the political system of its communist legacy. This translated into the implementation of the strictest and broadest lustration policies in the CEE region (Sadurski 2014, pp. 344–45). The range of lustration surprised early scholars working on CEE transitional justice rationales, given the peaceful Velvet Revolution of 1989 (Huntington 1991; Moran 1994). At the same time, the country signalled its allegiance to international standards of human rights protection, joining the Council of Europe (CoE) in 1991. This combination of factors, coupled with the strong position of the Czech Constitutional Court (CCC), makes the Czech Republic a suitable case for studying the clash between human rights and CCC case law on transitional justice. The case study will help in understanding the role of constitutional courts in transitional jurisprudence in similar configurations—namely, in a scenario of harsh transitional justice measures, a strong constitutional court, and international human rights constraints.

[2]After 1989, the CEE countries committed to the majority of then-existing HR treaties of the Council of Europe and to UN core HR treaties (Smekal *et al*. 2016). The European Convention on Human Rights represents the most important of these treaties.

[3]The Czech and Slovak Federal Republic split in the 'Velvet Divorce' shortly after the 1989 revolution. On 1 January 1993, the Czech Republic was established as an independent state.

The essay proceeds as follows. The next section introduces in more detail the post-communist form of transitional justice and the role played by CEE constitutional courts. This section also focuses on the obligations of CEE constitutional courts stemming from international human rights law. The following section is a prelude to the empirical part of the essay. It sets the stage, providing an overview of the Czechoslovak transition and of the transitional justice choices made by the Czech government, and describes our study design. Next, we present the quantitative data and broad patterns of the CCC's decision-making in transitional justice issues. The following section is composed of four individual transitional justice cases portraying different approaches of the CCC to clashes with ECtHR case law and the human rights commitments of the Czech Republic. The final section concludes.

Constitutional courts and international law in post-communist transitional justice processes

The term 'transitional justice' generally stands for judicial and non-judicial measures such as prosecution, truth and reconciliation commissions, and reintegration and reparation processes, used by states and social groups striving to come to terms with the crimes of previous regimes (Kritz 1995). In the post-communist environment, transitional justice measures typically revolved around various vetting mechanisms (Welsh 1996; Stan 2009; Horne 2015). Communist totalitarian regimes exhibited remarkably high degrees of public participation in their activities. Communist parties controlled enormous apparatuses; in 1989, the East German Stasi employed about 90,000 officers and a further 150,000 informers in a population of 17 million (Stan 2009, p. 6). The fragile new democracies sought to eliminate the networks of the communist elite. Lustration and the opening of secret police archives largely prevailed over attempts to prosecute the crimes of the communist era. This was also due to the significant period of time that had elapsed since the heaviest repression of the 1950s.

In addition to these important political choices, crucial decisions were made about how to deal with property issues (restitution) and how to compensate victims of past atrocities, political prisoners in particular (Sadurski 2008; Czarnota 2009; Stan & Nedelsky 2015). The CEE transitions thus consisted both of retributive and restorative streams of transitional justice policies,[4] because they engaged both in punishing the supporters of previous regimes (retribution) and in helping their victims (restoration). In short, CEE transitional justice policies included politically sensitive decisions on who should govern, how history would be written, and what the new distribution of significant assets would look like. At the same time, CEE states undergoing transition already faced a well-developed body of international human rights jurisprudence that constrained some of their transitional justice options.

[4]Restorative transitional justice measures aim to restore communities or relationships (Lambourne 2009, p. 30). They seek to reverse the results of the crimes to the situation before the crimes occurred, or compensate the victims of the past regime's crimes. Retributive justice involves punishment of the wrongdoer (Lambourne 2009, p. 30), which can range from criminal or administrative sanctions to punishment of a purely moral character, such as public condemnation.

However, the 1989 CEE transitional justice decisions were made amid political turmoil and somewhat chaotic institutional reconstructions (Pithart 1993; Grudzińska-Gross 1994). Given the compromised state institutions and low public trust, it was often left to constitutional courts, which represented a break with the past (Teitel 2000) and a disengagement from the previous regime (Grudzińska-Gross 1994; Teitel 2009; Uitz 2009, pp. 71–98), to intervene and articulate the values underlying the new democratic regimes (Sadurski 2008). Constitutional courts were expected to align the transitional justice policies with new rule of law standards, as well as with emerging international human rights commitments.

In the following section, we describe transitional justice policies typical for the CEE region and show how these were constrained by regional and international human rights commitments. Next, we formulate a series of research questions about how constitutional courts dealt with these constraints.

Post-communist transitional justice processes within the scope of international human rights commitments

Generally speaking, international bodies tolerate transitional measures only for a very limited time, prompting states to terminate potentially problematic policies as soon as possible. The tension between post-communist transitional justice policies and human rights standards is particularly visible under the European Convention on Human Rights (ECHR or the Convention), which was itself created in political reaction to the atrocities of World War II and the Holocaust (Ní Aoláin 2011, p. 26). As a result of this legacy, the ECtHR recognised the possibility of a derogation from certain standards of human rights protection during transition processes.

However, the accession of CEE countries to the ECHR system led to worries that the application of such derogation to transitioning post-communist democracies would lead to the erosion of the Convention's integrity (Ní Aoláin 2011, p. 33) and to the entrenchment of transitional justice precedents beyond the transition (Buyse & Hamilton 2011). The possibility of derogating human rights became a problem, particularly for those countries that had joined the CoE with the aim of locking in certain domestic practices and policies (Moravcsik 2000) and preventing backsliding to nationalist or populist authoritarianism (Sadurski 2014). This might explain why the accession of CEE countries led the ECtHR to place a stricter emphasis on the new regimes' loyalty to the Convention's rule of law. Consequently, the ECtHR allowed the derogation and limits on human rights protection only very early after the transition, typically justified by the concept of 'militant democracy'.[5]

The ECtHR developed several approaches towards CEE transitional justice policies (see Table 1). It leaves some areas, like rehabilitation processes for the unjustly prosecuted, fully at the discretion of the state (no obligation). In others, the ECtHR requires member states to either refrain from implementing certain policies (negative obligations) or, on the contrary, to do something (positive obligations).

[5]The concept of 'militant democracy' was developed in the interwar period by Karl Loewenstein, who argued for constitutional democracy authorised to protect civil and political freedom by pre-emptively restricting the exercise of such freedoms (Macklem 2006, p. 488).

TABLE 1
Obligations Concerning Transitional Justice (TJ) Policies Set by ECtHR Case Law

	No obligation	*Negative obligation*	*Positive obligation*
Retributive TJ	X	Lustration; amnesties	Prosecutions and regime condemnation; archives of the past* (uncovering perpetrators of crimes)
Restorative TJ	Rehabilitation; restitution	X	Archives of past (rights of victims to know the truth)

Note: * We split the policy related to 'archives of the past' between restorative and retributive measures, as the opening of archives follows two different aims. Disclosing the truth about perpetrators of crimes falls under 'retributive' policies, while the right of the victims to know the truth under 'restorative'.
Source: Authors.

The ECtHR does not require transitioning states to compensate the victims of past crimes (Brems 2011). Nevertheless, once states decide to implement compensation policy, the ECtHR oversees the conditions and eligibility criteria to ensure that they are not too arbitrary, do not set manifestly unequal practices,[6] and are executed in practice.[7] Stricter conditions apply for restitution. The Czechoslovak communist regime sold some nationalised properties to private individuals, whose property rights after the regime change clashed with the rights of pre-communist era owners claiming their properties back. The Court, in principle, upholds the legitimacy of restitution laws but requires compensation for collateral damages, typically damages paid to the subsequent owners who had to return the property.[8]

By contrast, the ECtHR, as well as other international bodies, criticised lustration and the vetting of public officials for putting too many restrictions on passive electoral rights, political freedoms, and respect for private life. In the CEE countries, the post-communist lustration legislation was addressed by various international organisations and bodies, including the International Labour Organisation (ILO),[9] the CoE Parliamentary Assembly (PACE),[10] the Venice Commission,[11] and the ECtHR.[12] Most of the CoE's human rights

[6] *Wos v Poland*, ECtHR judgment of 8 June 2006.

[7] Under the doctrine of legitimate expectations, see, *Broniowski v Poland*, ECtHR judgment of 22 June 2004.

[8] *Pincová and Pinc v Czech Republic*, ECtHR judgment of 5 November 2002.

[9] International Labour Organisation, Decision of the Governing Body, Report File No. GB.252/16/19, 5 March 1992. Quoted from Přibáň (2007, p. 189).

[10] 'Measures to Dismantle the Heritage of Former Communist Totalitarian Systems', Parliamentary Assembly of the Council of Europe, Resolution 1096 (1996), 27 June 1996, available at: http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=16507&lang=en, accessed 26 August 2020.

[11] 'Amicus Curie on the Law on the Cleanliness of the Figure of High Functionaries of the Public Administration and Elected Persons of Albania', Venice Commission, CLD-AD(2009)044, Opinion no. 524/2009, 13 October 2009; 'Amicus Curie Brief on Determining a Criterion for Limiting the Exercise of Public Office, Access to Documents and Publishing, the Co-operation with the Bodies of the State Security', Venice Commission, CDL-AD(2012)028, Opinion no. 694/2012, 17 December 2012. The Venice Commission is a popular title for the European Commission for Democracy through Law, an advisory body of the CoE on constitutional matters, especially as regards the legal and institutional structures of states.

[12] *Turek v Slovakia*, 57986/00, ECtHR judgment of 13 September 2006.

bodies refer to PACE Resolution 1096 ‘On Measures to Dismantle Communist Totalitarian Systems’, which did not find lustration to be completely incompatible with the Convention. The resolution stated that lustration measures ‘can be compatible with a democratic state under the rule of law if several criteria are met’.[13] These criteria include individual guilt proven in each individual case, the right of defence, the presumption of innocence, the right of appeal, and, finally, constant checks on whether the lustration still fulfils the pre-set aims. PACE commented several times on the negative effect of the prolongation of lustration laws.[14] The guidelines were later confirmed by a whole set of ECtHR case law, which sees lustration as a transitional justice measure justifiable by the concept of ‘militant democracy’ able to take measures preventing the return of totalitarian practices. At the same time, states have to ensure that lustration does not violate human rights and does not remain in force once the need for screening public figures ceases to exist—which, in the ECtHR’s narrow understanding, is almost immediately after the transition and the first round of free elections.[15] The ECtHR explicitly prohibits amnesty for perpetrators of human rights atrocities as a transitional justice measure, which is supported by a significant part of the transitional justice scholarship (Bell 2009, pp. 5–27).

Positive obligations run across both restorative and retributive policies. The ECtHR recognises the necessity to prosecute perpetrators of human rights atrocities,[16] to allow debates about the past (including historical truth under the protection of freedom of expression),[17] and to provide access to personal files kept by secret security services (Brems 2011).[18]

To sum up, ECtHR case law sets some boundaries within which CoE member states are obliged to realise their transitional justice polices. Transitioning states are generally expected to uncover the truth about human rights violations and prosecute them. They are discouraged from lustration, which represents an extraordinary measure, acceptable under strict conditions for a very short time. They can proceed with rehabilitation and restitution policies, on the condition that restorative policies do not create new injustices.

[13]‘Measures to Dismantle the Heritage of Former Communist Totalitarian Systems’, Parliamentary Assembly of the Council of Europe, Resolution 1096 (1996), 27 June 1996, available at: http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=16507&lang=en, accessed 26 August 2020.

[14]‘Obligations and Commitments of the Czech Republic as a Member State’, Parliamentary Assembly of the Council of Europe, Recommendation 1338 (1997), available at: http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=15372&lang=en, accessed 26 August 2020; ‘Progress of the Assembly’s Monitoring Procedures’, Parliamentary Assembly of the Council of Europe, 2 April 1998, available at: http://assembly.coe.int/nw/xml/XRef/X2H-Xref-ViewHTML.asp?FileID=8494&lang=EN, accessed 26 August 2020.

[15]*Sidabras and Džiautas v. Lithuania*, Application Nos 55480/00 and 59330/00, ECtHR judgment of 27 July 2004; *Rainys and Gasparavičius v. Lithuania*, Application Nos 70665/01 and 74345/01, ECtHR judgment of 7 April 2005; *Žičkus v. Lithuania*, Application No. 26652/02, ECtHR judgment of 7 April 2009; *Ždanoka v. Latvia*, Application No. 58278/00, ECtHR judgment of 16 March 2006; *Adamsons v. Latvia*, Application No. 3669/03, ECtHR judgment of 24 June 2008; *Naidin v. Romania*, Application No. 38162/07, ECtHR judgment of 21 October 2014; *Vogt v. Germany*, Application No. 17851/91, ECtHR judgment of 26 September 1995; *Turek v. Slovakia,* Application No. 57986/00, ECtHR judgment of 13 September 2006.

[16]*Sandru and Others v. Romania*, ECtHR judgment of 8 December 2009.

[17]*Monnat v. Switzerland*, ECtHR judgment of 21 September 2006; *Karsai v Hungary*, ECtHR judgment of 1 December 2009; *Feldek v Slovakia*, ECtHR judgment of 12 July 2001.

[18]*Gaskin v. the UK*, ECtHR judgment of 7 July 1989.

Research puzzle

A large body of literature suggests that constitutional courts are essential intermediaries and allies of international bodies, helping to diffuse international norms and implement their findings domestically (Stone Sweet 2012; Gerards 2014; Kosař & Petrov 2017). Nevertheless, there is no clear indication how this relationship holds in the transitional justice arena; similarly, there is no literature systematically exploring the constitutional courts' interaction with the ECtHR's demands on post-communist transitional justice.

Following the previous remarks, we expect that constitutional courts adjust transitional justice policies. However, this adjustment is constrained by the influence of international human rights commitments, which changes over time. Transitional justice policies sometimes justify departures from the general principles of human rights protection using the concept of militant democracy or extraordinary conditions. Recourse to the transitional rule of law is, however, time-limited. Therefore, the 'transitional justice' justification of departures from human rights should eventually cease. The influence of international human rights commitments, with gradually burgeoning international case law, on constitutional courts' findings increases over time. The further a state moves from the transitional period, the more difficult it is for constitutional courts to justify the specific nature of transitional justice. We expect that, over time, constitutional courts will favour human rights protection rather than transitional justice principles. With a state's increasing embeddedness in international human rights regimes, transitional justice reasoning will fade. If courts pursue transitional rule of law reasoning, they will limit its use to addressing past injustices and shift the focus to restorative transitional justice, ultimately oriented at victim rehabilitation.

We pose the following questions: do constitutional courts prefer to keep the debate on transitional justice issues within domestic confines, either respecting the choices of domestic legislatures or confronting them by pursuing their vision of transitional justice? What is the role of international human rights law in a constitutional review of transitional justice legislation? In order to answer these questions, we analyse the case of the CCC and its transitional justice jurisprudence.

Case study: Czech transitional justice jurisprudence

On 15 October 2019, almost 30 years after the Velvet Revolution, which started the transition of then Czechoslovakia to democracy, the CCC quashed legislation introducing an indirect tax on restitutions of church property.[19] The judgment drew a lot of media attention and immediate political reactions questioning the legitimacy of the Court to rule on what was essentially a political question. Church restitution has been a highly salient issue dividing the political sphere for the past 20 years. In 2010, the CCC ruled that the Parliament had failed in its constitutional obligation to legislate on the restitution and finish the transitional justice process initiated in the early 1990s.[20] The 2010 judgment eventually pushed the Czech parliament to deal with the issue and return properties to churches. In 2019, a controversial law, proposed by the Communist Party (*Komunistická strana Čech*

[19]CCC judgment No, Pl. ÚS 5/19, 15 October 2019.
[20]CCC judgment No. Pl. ÚS 9/07, 1 July 2010.

a Moravy), introduced a tax on the compensation churches receive for seized property; however, the CCC annulled the 2019 law, claiming that it violated the principles of democratic society and the commitments following from the ECHR. The chief justice of the CCC condemned the legislation as both unconstitutional and unethical, breaking promises made by the state in order to ease the injustices of the communist regime. He stressed that the law violated the principle of legitimate expectations, a concept used by the ECtHR (Mazancová & Janáková 2019).

This fresh example demonstrates that the Czech case offers a timely and compelling opportunity to study the clashes between transitional justice and international human rights commitments. Very shortly after the 1989 Velvet Revolution, the country adopted all types of transitional justice policies typical of the CEE region. The cornerstone of retributive legislation was laid out in Act No. 198/1993 Coll., 'On the Illegality of the Communist Regime', which, in Article 2, characterised the communist regime and the Communist Party as criminal, illegitimate, and reprehensible. The lustration agenda, however, attracted the most international attention. In 1991, then Czechoslovakia was the first country in the region to implement a Lustration Act (Act No. 451/19991 Coll.), arguably the harshest among the CEE states (Schwartz 1994; Skapska 2003; Robertson 2006). Far-reaching lustration, which targeted high posts in the public administration as well as in academia and culture, polarised political actors and society.[21] The law affected not only former Communist Party officials, members of the People's Militia and secret police (StB) agents and informers, but also people listed by the StB as potential candidates for collaboration. The lustration included approximately 500,000 people. Between 1991 and 2001, the Ministry of Interior issued 420,270 lustration certificates, 3% of which were positive (Nedelsky 2004, p. 76). The law originally did not recognise the right to appeal or the access of an individual accused of collaboration to archival files listing his name. A significant number of dissenters, including President Václav Havel, soon opposed the lustration agenda from a human rights perspective and warned of an impending 'witch hunt' (Kosař 2008, p. 5).

Lustration was soon followed by the establishment of the Office for the Documentation and Investigation of the Crimes of Communism (*Úřad dokumentace a vyšetřování zločinů komunismu*), enabling access to StB files on collaborators, spies, and persons under surveillance. On the restorative front, the state initiated an intensive campaign of rehabilitation of political prisoners and restitution of state property nationalised by the Communist Party in the 1950s and early 1960s.

All the while, the idea of a 'return to Europe' motivated the process of democratisation. The CoE recommendations and the European Union's accession conditionality, in particular, shaped the decision-making of all Czech political actors.[22] Despite the rapid implementation of various legislative acts in the first three years after the Velvet Revolution of 1989,[23]

[21]The Act targeted basically all governing positions inside the state administration as well as, for example, those of deans and rectors of public universities (Kosař 2008; Nalepa 2010; David 2011). A positive lustration certificate, proving collaboration or the direct participation of an individual in the communist regime, led automatically to either ineligibility for, or the loss of, public office.

[22]The Czech Republic acceded to the CoE in 1993 and to the EU in 2004.

[23]Apart from the above mentioned Act on the Illegality of the Communist Regime, two other lustration statutes, legislation restoring to its original owners property seized by the Communist Party, and three other acts regulating judicial and extrajudicial rehabilitation and the restitution of property to individuals.

transitional justice policies in the Czech Republic remained a sensitive issue even 30 years after the regime change. In 2014, the Czech Republic adopted a politically controversial decision to restitute church property, which had a significant impact on the state's budgetary policy. As demonstrated above, the legislation has been repeatedly contested before the CCC. Also, lustration remained a recurring topic among the retributive policies. Despite European Commission criticism, lustration stayed in effect, after being debated and extended by the Parliament twice, in 1995 and 2000. After the 2013 election, with significant gains by the populist political party ANO 2011 (YES 2011), led by billionaire Andrej Babiš, who has not submitted a negative lustration certificate, the policy again made the front pages of the newspapers, subsequently leading to a renewal of the debate and significant amendment of the Lustration Act in 2017.

Consequently, the long timeframe (1989–2018), with recurring transitional justice issues, offered the CCC various opportunities to become involved in very sensitive issues. However, EU and CoE membership, in addition to the long period that had passed since the transition, led the CCC to sideline transitional justice considerations and replace them with human rights ones. Overall, this combination of factors provides an opportunity to study the variability of the solutions and policies considered by the CCC.

Finally, a few words on the composition and competences of the CCC are helpful to understand the overall setting. The CCC and its federal predecessor were endowed with strong powers and could review both legislation and individual complaints. A significant proportion of the first serving judges were dissidents and scholars who had emigrated from Czechoslovakia during the 1960s. Although the Federal Constitutional Court (Federal CC) existed only for one year,[24] the majority of its judges were reappointed to the first CCC.[25] In its first decade, the CCC, chaired by former dissident Zdeněk Kessler, addressed very important political issues and decided on topics that had a fundamental impact on the design of the Czech democratic regime. The strong dissident and anti-communist atmosphere also permeated case law. In its second decade, under the presidency of former dissident and then-politician Pavel Rychetský, the CCC shifted its attention to social policy and the quality of the legislative process (Kopeček & Petrov 2016). Since 2014, the composition of the CCC has changed significantly and the dissident ethos has evaporated.[26] This translates to a more fragmented approach towards remaining issues of transitional justice.

Quantitative overview: the Constitutional Court as a transitional justice actor

Having introduced the Czech transitional justice setting, we now move to the analysis of the CCC's transitional justice case law. First, we briefly introduce the methodology used to analyse the case law. Then, we proceed with an overview of the CCC's involvement in the transitional justice legislative development. We analyse how often the CCC used references to international human rights law in transitional justice case law and focus on what purpose

[24]The Federal CC was active only from March 1992 until the end of 1992.
[25]The CCC also included several judges who were members of the Communist Party before 1989.
[26]Interview with a former Constitutional Court official, Brno, 4 December 2018.

those references served. We show how the CCC addressed conflicts between transitional justice policies and international human rights commitments and how patterns in the frequency of references and their purposes differ according to the type of transitional policy.

Methodology

We base our research on a combination of qualitative and quantitative analysis of case law and on interviews with six former and current judges of Czech apex courts, which contribute to a contextual understanding of developments.

During the observed period (1993–2018),[27] the Czech Republic adopted 16 different statutes to address various transitional justice policies. Many of these were frequently amended. Table 2 demonstrates the importance of the CCC in this process: the Court had to address almost all adopted statutes (14 out of 16) in constitutional review proceedings. This confirms our supposition that transitional justice legislative acts touched upon sensitive issues that mobilised the parliamentary opposition, which attempted to contest the legislation through constitutional review. The CCC invalidated half (seven of 14) of the acts, or their provisions, supporting our contention that it had an important position in shaping transitional justice policies.

After identifying all Czech transitional justice legislation (see Table 2), we searched the CCC electronic database[28] for all rulings contesting these statutes in either a constitutional review of the legislation or individual complaints proceedings. A constitutional review of legislation gives the Court the power to strike down statutes or their provisions in the case of incompatibility with constitutional or human rights norms, including international commitments such as the ECHR. It can be initiated by an individual whose rights are violated, or abstractly, by members of parliament, the president and other political actors. Constitutional review is therefore a powerful tool that permits political actors to contest decisions and policies pushed through by the governing political elite. Comparatively, individual complaints might seem to have a weaker impact, as they can ‘only’ lead to the CCC quashing other judicial or administrative decisions. However, the CCC often actively changes the interpretation of legal norms in constitutional complaint procedures, while enjoying a lower threshold of attention in doing so compared to constitutional reviews. Leaving out individual constitutional complaints would therefore run the risk of missing important decisions.

Due to the vast amount of CCC case law (over 1,500 rulings), we decided to create a sample to allow a more in-depth analysis of the CCC’s approach to the clash between transitional justice policies and human rights. From the population of all CCC rulings, we selected all constitutional review rulings contesting provisions of transitional justice laws and all rulings on individual complaints published in the CCC Collection of judgments and decisions.[29] This allowed us to include all those rulings which the CCC itself

[27]Note that some statutes were enacted by the Czechoslovak Federal Republic and succeeded to by the Czech Republic.

[28]NALUS, available at: nalus.usoud.cz, accessed 24 August 2020.

[29]A collection of judgments and decisions is published a few times a year by the CCC, available at: https://www.usoud.cz/sbirka-nalezu-a-usneseni-us, accessed 5 October 2020.

TABLE 2
OVERVIEW OF KEY LEGAL ACTS IN THE FIELD OF TRANSITIONAL JUSTICE AND THEIR REVIEW BY THE CCC

Policy	*Coll. No.*	*Legislation title*	*Reviewed?*	*Invalidated (also in part)?*
Lustration	451/1991	Big Lustration Act ('Velký lustrační zákon')	Yes	Yes
	279/1992	Small Lustration Act ('Malý lustrační zákon')	Yes	No
Regime condemnation	480/1991	On the Period of Oppression ('O době nesvobody')	Yes	No
	198/1993	On the Illegality of the Communist Regime ('O protiprávnosti komunistického režimu a o odporu proti němu'')	Yes	No
	140/1996	On Access to Files of the Former StB ('O zpřístupnění svazků vzniklých činností bývalé Státní bezpečnosti')	Yes	Yes
Archives	107/2002	Amendment of Act on Access to Files of the Former StB	Yes	No
	499/2004	Archives Law ('Zákon o archivnictví')	Yes	Yes
	181/2007	The Institute for the Study of Totalitarian Regimes ('O Ústavu pro studium totalitních režimů')	Yes	Yes
	496/1990	On the Return of the Property of KSČ to People ('O navrácení majetku KSČ lidu ČSFR')	No	Not submitted
Restitution	497/1990	On the Return of the Property of Socialist Youth ('O navrácení majetku Socialistického svazu mládeže lidu ČSFR')	Yes	No
	229/1991	Land Act ('Zákon o půdě')	Yes	Yes
	119/1990	On Judicial Rehabilitation ('O soudních rehabilitacích')	Yes	No
	87/1991	On Extrajudicial Rehabilitation ('O mimosoudních rehabilitacích')	Yes	Yes
Rehabilitation	261/2001	On the Rehabilitation of Persons in Military Camps of Forced Labour ('O odškodnění osob soustředěných do vojenských pracovních táborů')	Yes	No
	172/2002	On Compensation for Persons Abducted to the USSR ('O odškodnění osob odvlečených do SSSR')	No	Not submitted
	428/2012	On Church Restitution ('O cirkevních restitucích')	Yes	Yes

Source: Authors.

considers the most influential. The rest of the case law in the sample was selected by the systematic sampling of individual complaints. This method left us with a sample of 233 rulings.

Subsequently, we tracked references to international human rights treaties and case law in our sample and coded the impact of the reference on the result of the case. We distinguished if the reference played an important role in the outcome of the case, or if it merely had a supporting function. Accordingly, we coded references to international human rights law or case law as substantive (playing an important role in CCC's reasoning) or supporting (creating an additional, but not necessary, argument for the CCC to achieve the result). We also captured situations where the CCC explicitly refused the use of a particular international human rights treaty or case law. This allowed us to uncover what role the CCC assigned to international human rights commitments.

Finally, we complemented analysis of the CCC's use of international human rights law with six interviews with past and present judges of apex courts (specifically, the CCC and the Supreme Court), some of whom had also previously worked in other positions as important court functionaries or law clerks of the CCC. The interviews served to identify the motives behind the choices the CCC made regarding transitional justice jurisprudence. Specifically, we used insiders' views to complement the analysis of how the perception of transitional justice issues evolved within the Federal CC and the CCC.

The Czech Constitutional Court in transitional justice and its use of international law

This section introduces the results of a quantitative analysis of the CCC's transitional justice case law, which allows us to understand trends in the court's jurisprudence and more general patterns in how the Court approached the potential clash between transitional justice narratives and international human rights commitments.

Firstly, we were interested in the overall activity of the CCC in the field of transitional justice. It is worth noting that the CCC had a very strong example in its predecessor, the Federal CC, which, during its first and only year of existence, issued several important judgments concerning the character of the previous regime, such as the competence of the new Parliament to enact a binding (legal) interpretation of the communist regime (Pl.ÚS 5/92), the legitimacy of the new regime as embedded in rule of law and human rights principles (Pl.ÚS 1/92), and the procedural aspects of early attempts at lustration (I.ÚS 191/92). These judgments already encompassed several references to UN Covenants accepting their direct effect.[30] This was a huge step for the Czech judiciary, as communist legal theory and practice refused to recognise a direct applicability of international human rights treaties, stating they merely bind the administrative apparatus but not the courts.[31] In other words, it was the responsibility of the executive power to implement international human rights treaties domestically. In the case of a conflict between an individual right contained in the treaty and domestic legislation, courts still had to apply domestic legislation.

The CCC built on the example set by its federal predecessor as regards the use of international human rights law. Figure 1 depicts the overall development in the proportion of CCC judgments that refer to an international human rights treaty or international human rights case law (hereinafter only 'an international human rights reference') in the transitional justice field. It demonstrates how the CCC relied on the guidance of international human rights law and how its reference patterns developed over time. Figure 1 shows a high reliance on international human rights law in the 1990s, which, however, coincided with a very low number of transitional justice rulings; for example, there was only one such ruling in 1993. The second half of the 1990s saw relatively low rates of the use of the international human rights law by the CCC, with a subsequent drop to as little

[30]Under UN Covenants, we mean the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR).

[31]See also the decision of the Czech Supreme Court (CSC) of 31 August 1994, No. Skno 1/94, in which the SC acquitted a judge who, during the communist era, convicted two individuals for distributing anti-regime material (Charter 77). The CSC claimed that the judge was not bound by the ICCPR, despite the fact that Czechoslovakia had ratified the ICCPR in 1976.

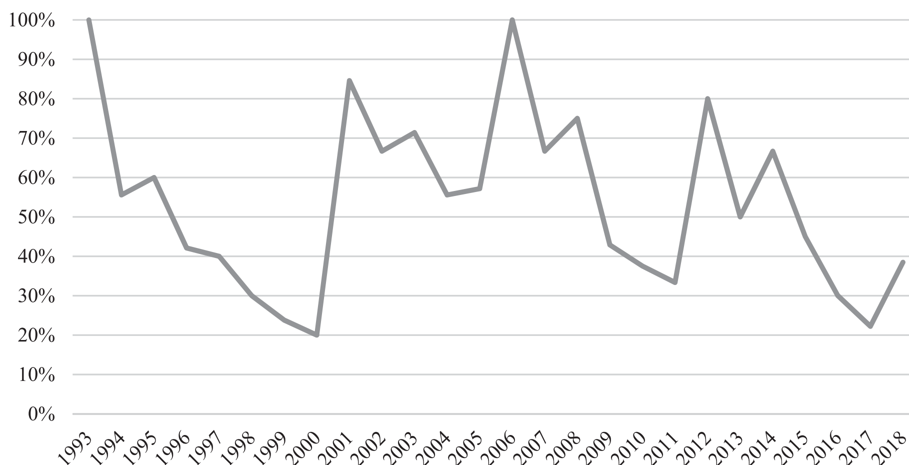


FIGURE 1. Trends in the Proportion of CCC Transitional Justice Rulings with International Human Rights Law References, 1993–2018 (%)
Source: Authors.

as 19% of transitional justice rulings in the year 2000. After this period, the use of international human rights law significantly increased. Overall, the CCC has used international human rights law in 54% of the relevant case law.

Czechoslovakia ratified the ECHR in March 1992 and the Czech Republic did so soon after its creation in 1993, but the CCC preferred references to the UN Covenants and a few ILO treaties throughout the 1990s. There were two reasons for this initial reluctance to use the ECHR and ECtHR case law. First, communist Czechoslovakia had ratified both UN Covenants in 1976; hence the CCC could use these commitments to condemn the practices of the previous regime without violating the principle of non-retroactivity. Second, acknowledgment and understanding of the ECHR among Czech judges developed slowly, and there were very few opportunities for CCC judges to learn about the ECHR or new ECtHR case law. Furthermore, the low number of Czech translations or commentaries on cases meant that judges with limited language skills had to rely on the experience of their colleagues (and younger clerks) who had participated in research stays abroad and learned about international human rights law (Kosař *et al*. 2020).

The low familiarity with ECtHR case law changed significantly in early 2000s. First, between 2002 and 2003, the composition of the CCC changed, with a new generation of judges coming to the bench and employing younger law clerks with a better knowledge of international human rights law. Second, in the same year, two important publications on the ECtHR and its case law were published in the Czech language (Berger 2003; Hubálková 2003), making a huge difference for judges without foreign language skills. It is worth noting that in 2003, there was still no HUDOC[32] or other online database

[32]HUDOC is the official online database of ECtHR case law, available at: https://hudoc.echr.coe.int/, accessed 5 October 2020.

allowing judges to search for ECtHR case law. Third, the rise of references to international law coincided with the constitutional amendment of 2001, which facilitated the Czech accession to the European Union. The amendment also brought about a complex revision of the relationship between domestic constitutional and international human rights law. Moreover, with the country's entry into the European Union, Czech judges participated in several training programmes aimed to foster their knowledge of both European and international law (Kosař *et al*. 2020). EU accession itself played no small role, although transitional justice measures were not a huge part of the EU accession conditionality.[33] Both the European Commission and the European Parliament criticised the extensive prolongation of the effect of lustration,[34] although the Commission admitted that the lustration enabled the establishment of an independent judiciary and public administration.[35] The EU accession raised the stakes for alignment with commitments following from the CoE (and hence, the ECtHR), as the European Commission put an emphasis on the compliance with CoE bodies' demands (Merlingen *et al*. 2000).

We might therefore argue that better accessibility and the gradual 'visibility' of the ECHR and ECtHR case law partly influenced the higher occurrence of references. In the following era, the raw number of references does not show any clear pattern. The dramatic decreases around 2010 and 2017 might have resulted from a high number of pilot, precedential domestic cases, allowing the Court to refer easily to its own previous case law instead of using international references. The final decline after 2015 happened due to a significant increase in transitional justice rulings (especially related to restitution), with very few of them containing an international human rights reference.

The use of international human rights references also differed on the basis of particular transitional justice policy. While lustration, adopted in 1991, divided society and captured a lot of attention, case law was dominated by a restorative agenda, be it restitution or rehabilitation. To a certain degree, this is understandable, as restituents' claims prompted many disputes and controversies (see the section 'Property restitution'). The scope of

[33]The lack of explicit conditions might also have been a result of a discord between the position of the European Commission and European Parliament on transitional justice. While the Parliament was rather critical of long-standing lustration and the exemption of German pre-World War II property from the restitution (the so-called Beneš decrees), the European Commission had a milder stance. While it favoured time-limited lustration, it did not impose any strict conditions on the Czech government. See 'Commission Opinion on the Czech Republic's Application for Membership of the European Union', European Commission, 15 July 1997, available at: http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:51997DC2009&qid=1480887404045&from=EN, accessed 26 August 2020; 'Agenda 2000—Commission Opinion on the Czech Republic's Application for Membership of the European Union', European Commission, 15 July 1997, available at: europa.eu/rapid/press-release_DOC-97-17_en.pdf, accessed 26 August 2020; '2000 Regular Report from the Commission on the Czech Republic's Progress Towards Accession', European Commission, 8 November 2000, available at: http://ec.europa.eu/enlargement/archives/pdf/key_documents/2000/cz_en.pdf, accessed 7 October 2020; '2002 Regular Report on Czech Republic's Progress Towards Accession', 9 October 2002, European Commission, available at: http://ec.europa.eu/enlargement/archives/pdf/key_documents/2002/cz_en.pdf, accessed 7 October 2020.

[34]'Regular Report from the Commission on Czech Republic's Progress Towards Accession', European Commission, available at: http://ec.europa.eu/enlargement/archives/pdf/key_documents/1998/czech_en.pdf, accessed 26 August 2020.

[35]'Agenda 2000—Commission Opinion on the Czech Republic's Application for Membership of the European Union', European Commission, 15 July 1997, available at: europa.eu/rapid/press-release_DOC-97-17_en.pdf, accessed 26 August 2020.

restitution on its own was long unclear. Individual complainants petitioned the CCC to return not only the property confiscated by the communist regime but also property taken during and in the aftermath of World War II. Quite a wide set of cases also resulted from the inactivity of state authorities, as the Land Registry often failed to act on its duty to offer claimants an alternative property in case the original requested property could not be restituted. Due to the Land Registry's chronic inactivity, many claimants petitioned the CCC directly. The CCC therefore actively engaged in restitution policy, allowing extensive individual restitutions, with a significant impact on state ownership. Another group of the rulings addressed immaterial damages claims; namely, violation of personal and moral rights, typically argued by political prisoners sentenced by the communist regime.

On the contrary, very few individual lustration cases reached the CCC, hence revealing an interesting paradox: although the Czech Republic adopted rather harsh lustration legislation (Sadurski 2014, pp. 344–45), it has not put it thoroughly into practice. The missing evidence and the lack of cooperation by police authorities with the Office for the Documentation and Investigation of the Crimes of Communism, as well as the unreliability of StB witnesses, led to acquittals of the majority of positive lustration holders. Only very few cases reached the top courts.[36]

The CCC used international human rights law in approximately 46% of the rulings in our sample. However, the use of international human rights law differed in individual transitional justice policies. Figure 2 captures a simple count of the three types of references (substantive, supporting, and reference where the CCC refused the application of international human rights norms) in the CCC's transitional justice case law. Although both substantive and supporting international human rights references appear in almost all transitional justice policies, the use of substantive references in rulings on rehabilitations and restitution clearly outweighs their use in rulings on archives and lustration. This coincides with the above-mentioned variance, as well as with the frequent references to the ECtHR's rulings against the Czech Republic, which are closely related to the restitution agenda. Higher coverage of the restitution agenda and more detailed rules developed by the ECtHR, often in direct response to Czech cases, made the references more pressing and also helpful for the CCC. Interestingly, petitioners frequently raised references to international human rights commitments in lustration cases, but the CCC mostly disregarded them. The CCC does not refer much and, moreover, largely denies the substantive relevance of international human rights law in rulings on archives and lustration. By contrast, however, the CCC quite often and noticeably relies on international human rights in rulings on rehabilitation and restitution, that is, in areas where rich ECtHR case law exists.

From general patterns to pivotal questions: clashes between transitional justice and human rights

As we showed in the previous section, the proceedings initiated before the CCC in the period between 1993 and 2018 addressed a very wide spectrum of topics and policies belonging to a

[36]Interview with a former CCC judge, Brno, 18 December 2018.

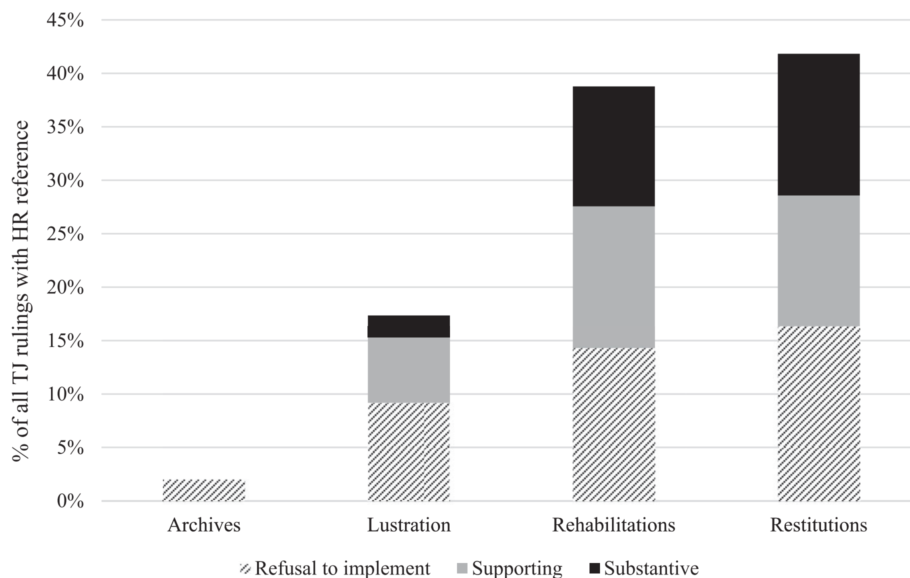


FIGURE 2. USE OF INTERNATIONAL HR LAW REFERENCES IN INDIVIDUAL TRANSITIONAL JUSTICE POLICIES IN CCC RULINGS
Source: Authors.

transitional justice framework. The CCC decided on the constitutionality of almost every single enacted transitional justice statute, invalidating and interpreting the provisions of most of them. International human rights references appear in approximately 46% of this case law, although most frequently only in the form of a supporting argument. Yet, a significant portion of the rulings incorporate references that have a substantive impact on the results of the case. We were therefore further interested in seeing how the CCC approached potential clashes between international human rights protection and transitional justice narratives in these cases. To demonstrate the dilemmas, we analysed four categories of CCC rulings that highlight the conflict between transitional justice jurisprudence and international human rights obligations. Our case selection draws on eight possible ideal scenarios of how the CCC might settle the relationship between transitional justice policy, the national charter of fundamental rights, and international human rights commitments (see Table 3). We identified which scenarios existed in CCC case law and picked those that contained a clear conflict between transitional justice policy on one hand and domestic or international human rights on the other. Conflicts with international human rights law are of special interest for us, because the CCC appears indeed to be placed between a rock—sensitive national transitional justice legislation—and a hard place, namely a disagreement with international human rights law. While discrepancies might also occur on a domestic level, constitutional courts in general primarily act as guardians of domestic constitutions, including domestic fundamental rights charters. Yet, their role is different when it comes to international treaties, as they enjoy less freedom when interpreting them. It is primarily the international human rights bodies that are entrusted with the interpretation of international human rights treaties.

TABLE 3
SCENARIOS OF THE CCC SOLVING HUMAN RIGHTS (HR) V. TRANSITIONAL JUSTICE (TJ) DILEMMA

TJ in breach of domestic HR?	*TJ in breach of international HR?*	*Response of CCC to domestic TJ policy?*	*CCC case*
No	No	Confirms	No conflict
No	No	Invalidates	Should not happen
Yes	No	Confirms	University lecturers
Yes	No	Invalidates	No CCC judgment
No	Yes	Confirms	Should not happen
No	Yes	Invalidates	Rehabilitations (Jehovah Witnesses)
Yes	Yes	Confirms	Restitutions (Pinc and Pincova)
Yes	Yes	Invalidates	Lustration I

Source: Authors.

Given our research aim, we focus on two situations. The first is when the CCC found differently than the pre-existing case law of the ECtHR or the UN HRC. In such situations, the CCC preferred not to follow international guidelines and opted for a national transitional justice solution, which typically followed the government's policy. Second, we were interested in scenarios wherein the CCC found domestic transitional justice practice to be unconstitutional. We searched for instances when the CCC had utilised pre-existing international case law, therefore favouring an international human rights solution to transitional justice dilemmas over a domestic one. Following this logic, we analysed CCC's case law in four areas, one representing each of these categories: a legislative review of the Lustration Act; the premature termination of university lecturers' contracts; the restitution of property nationalised under the communist regime; and the rehabilitation of political prisoners. We complemented the analysis with elite interviews to shed light on the motives behind CCC choices.

Lustration rulings

The petition to review the Big Lustration Act[37] reached the CC twice.[38] The first constitutional review in 1992 began with the jurisprudence of the Federal CC. The judgment Pl. ÚS 1/92 presented a value-based definition of the new democratic regime, which became a cornerstone for almost all future transition period case law. The Federal CC stressed that there was no value continuity between the new and the old regime, which had violated human rights, misused state power, and led to the loss of hundreds of thousands of lives and citizen freedoms. The Federal CC, conscious of a possible conflict

[37]'Velký lustrační zákon', 451/1991 Sb., kterým se stanoví některé další předpoklady pro výkon některých funkcí ve státních orgánech a organizacích České a Slovenské Federativní Republiky, České republiky a Slovenské republiky.

[38]The Small Lustration Act ('Malý lustrační zákon', 279/1992 Sb., o některých dalších předpokladech pro výkon některých funkcí obsazovaných ustanovením nebo jmenováním příslušníků Policie České republiky a příslušníků Sboru nápravné výchovy České republiky) was similarly challenged before the CCC. Compared to the Big Lustration Act, it only regulated the vetting of prison guards and members of the police.

of lustration with human rights and international commitments,[39] used the doctrine of militant democracy to allow these individual rights restrictions. Lustration, therefore, was not characterised as a discriminatory measure but as a justifiable condition placed on the execution of particular professions. The Federal CC was not in an easy position: Czechoslovakia was the first CEE country to introduce a lustration mechanism in practice and hence was monitored by international organisations. The CoE, and the Venice Commission in particular, followed developments closely, warning Czechoslovakia that the implementation of lustration violated the principles of the rule of law underlying the ECHR.[40] The Federal CC, however, was unified in its intention to support lustration as a necessary element of Czech transitional justice and de-communisation. It therefore recognised a potential conflict with the ICCPR, which commits the state to secure equal rights for individuals and forbids any discrimination, and ICESCR, which only allows limits on economic and social rights that promote the general welfare of a democratic society. Nevertheless, drawing inspiration from rulings of the German Federal CC[41] on the possibility of forbidding the employment of former active communists, it concluded that even these international human rights treaties allowed limitations on the freedom of occupation in public service based on past loyalty. In other words, the CCC rejected the understanding of lustration as a retributive transitional justice measure and stressed its preventive character: that every state with a totalitarian past and experience of human rights abuses has the right to implement the principle of militant democracy to prevent subversion.

The Federal CC rejected the motion to quash the Lustration Act as a whole, but it still annulled several provisions regarding the lack of guarantees for a fair trial before the Investigation Committee and the unreliability of secret police archives when it comes to those accused of collaboration.[42] The Federal CC used UN Covenants as reference criteria for the compatibility of the general principles of the Lustration Act, pointing out that vetting is not unknown in other democratic countries. The reasoning leading to the annulment of these provisions, however, rested primarily on the value-oriented interpretation of domestic constitutional norms, which would reflect the legacy of totalitarianism and coming to terms with the past. Moreover, judges of the Federal CC shared an understanding regarding their role in transitional justice, securing the goals and endpoints of the transition, just as the first CCC was to do later.[43] Preventing old cadres from assuming high positions in the newly democratic system was an essential part of the transition. This view of the Federal CC reflected public sentiments. A 1991 poll showed that 50% of respondents considered lustration to have a beneficial effect on the state administration, while 42% considered it to have a beneficial effect on democracy (CVVM 2009). Part of the Federal CC reasoning upholding the lustration legislation in 1992

[39]Interview with a former CCC judge, Brno, 5 December 2018.

[40]Interview with a former CCC judge, Brno, 18 December 2018.

[41]Interview with a former CCC judge, Brno, 5 December 2018. Generally, the German CC serves as a frequent source of inspiration for the CCC (Smekal & Vyhnánek 2016, p. 148).

[42]It was a widespread practice that some people were included on lists of collaborators without their knowledge or any active participation, either because StB planned to approach them in future or was trying to tarnish their reputations (interview with a former CCC judge, Brno, 18 December 2018).

[43]Interview with a former CCC judge, Brno, 5 December 2018.

rested on the fact that the vetting of public officers was only a transitional measure, not a permanent feature of the political system. The side effect of limiting the access of citizens to some positions in public administration was, therefore, seen only as a temporary issue, as the lustration mechanism was expected to cease its effect by the end of 1996. Nevertheless, the policy persisted. Parliament repeatedly extended the Act. In September 1995, the Chamber of Deputies prolonged its effectiveness until 31 December 2000.[44] President Havel rejected the amendment; the Chamber of Deputies however overruled his veto. In 2001, after the second prolongation, the Czech Social and Democratic Party (*Česká sociálně-demokratická strana*—ČSSD) then in power attempted to overturn the lustration law for good, claiming it had lost its social and historical function as the process of democratisation had already been completed. The CCC, however, dismissed the petition, stating that it was not up to the judiciary to evaluate whether democratisation had already reached a level where democracy no longer needed to defend itself.[45]

The CCC found itself in a much more difficult position regarding the potential conflict of lustration with international human rights commitments than its federal predecessor, the Federal CC. Apart from direct recommendations from the Venice Commission to cease applying the Lustration Act, it also had to deal with the evolving anti-lustration case law of the ECtHR and the pressure from the EU institutions to terminate the effect of lustration. Although some CCC judges were very conscious of this conflict, the rhetoric of militant democracy persisted.[46] The CCC highlighted that even the ECtHR recognised militant democracy as a legitimate derogatory principle (*Vogt v Germany*, *Glasenapp v Germany*), and that protecting equal access to civil services was never the intention of ECHR drafters. The CCC also stressed that many countries across Europe had even longer standing lustration. Hence, the twofold argument, that lustration was not a retributive measure and was used also by other democratic regimes, persisted.

Compared to the first ruling, the judges were not united in their views on the constitutionality of lustration statutes.[47] An understanding of the conflict between the lustration mechanism and human rights remains strongly present in the wording of the second ruling. Still, while formally executing judicial self-restraint, stating that it did not have the competence to review the level of Czech democratisation, the CCC decided to support a certain policy line. In fact, some CCC judges shared a belief that Czech lustration had not accomplished its aim; furthermore, that it was not fully effective because of inadequate investigations and because the testimony of former secret agents allowed lustration rulings to be overturned on the basis that the archives contained false and fabricated documentation. Some CCC judges, therefore, did not perceive lustration as an effective punitive mechanism.[48] CCC's views again reflected social sentiments: a public poll in 2000 reported increasing disillusion with the policy of lustration (CVVM 2009; Choi & David 2012).

[44]Act No. 254/1995 Coll.
[45]Pl.ÚS 9/01, CCC judgment of 5 December 2001.
[46]Interview with a CCC judge, Brno, 11 December 2018.
[47]Interview with a former CCC judge, Brno, 5 December 2018.
[48]Interviews with former and sitting CCC judges, Brno, 14 December 2018, 14 December 2018, 18 December 2018.

The Lustration Act, therefore, stayed in effect and kept emerging as an important political tool until very recently, when it almost prevented Andrej Babiš from taking a ministerial position (2013) and later the premiership (2017) after the 2013 and 2017 elections (Pl.ÚS 21/14). The example of lustration shows that the CCC saw the need to address the past crimes and rebuild social trust as justifying a certain derogation of human rights. This narrative, fuelled by constitutional judges' feelings that lustration was not being properly implemented, lost its power only very recently.

University lecturers

Lustration was a straightforward way to prevent communists and communist collaborators from holding important positions in the aspiring liberal democracy. However, the Czech legislature also used subtler means to achieve the same aim, specifically targeting university lecturers.[49] The 1993 amendment to the 1990 Law on Universities stated that the permanent contracts of university lecturers and researchers would be automatically changed to fixed-term contracts. The official purpose of the amendment was to enable researchers' mobility. The real reason was to get rid of university lecturers appointed under the communist regime. Becoming an associate professor or professor before 1989 was a political process: an academic had to prove both expertise and ideological loyalty, and was appointed by the Minister of Education or the president. A group of parliamentarians lodged a constitutional review complaint, but the CCC dismissed it and supported the legislature's transitional justice considerations instead.[50]

The CCC based its conclusions on a specific characteristic of the profession of university lecturer. Lecturers are responsible for transmitting non-ideological expertise to young generations. Such objectivity could not have been guaranteed with lecturers approved by the communist regime. Even after the 1989 Velvet Revolution, the positions of associate professors and professors (that is, those with permanent contracts) remained largely filled by the previous regime's appointees. Given the limited number of positions in academia, the legislature considered it fair to abolish permanent contracts and open the competition so that posts could be filled by people who wanted to work in academia but had not been able to do so under the communist regime. The legislature therefore justifiably sought to remove the residue of the past. The CCC emphasised that it was necessary to equalise the starting line and create equal opportunities.[51]

The Court applied Art. 6 of the ICESCR to argue that the past regime had severely violated the right of everyone to earn a living in work that they had chosen freely, and that the consequences of this violation had persisted even after the 1989 change of regime. The 1993 amendment thus merely eliminated the unjust privileges of the past.

[49]The explanatory memorandum to the Act No. 216/1993 Coll. amending the Act No. 172/1990 Coll., On Universities (Důvodová zpráva k vládnímu návrhu zákona, kterým se mění a doplňuje zákonj č. 172/1990 Sb., o vysokých školách, 24 February 1993, available at: http://www.psp.cz/eknih/1993ps/tisky/t0191_00.htm, accessed 13 October 2020) singles out university lecturers because their job requires also a very high moral character. By changing contracts from an indefinite to a fixed period, the amendment enables the replacement of old cadres by new academics who meet these requirements.

[50]Pl.ÚS 36/93, CCC judgment of 17 May 1994.

[51]Pl.ÚS 36/93, CCC judgment of 17 May 1994, part VI.

Moreover, opined the Court, without the 1993 amendment, the constitutional right of students to (high-quality) education and the development of new expertise to improve the quality of research and education could not have been guaranteed. The CCC's use of international human rights law, therefore, gave precedence to transitional justice considerations over the principle of legal certainty for academics on permanent contracts. The CCC ruling combined elements of both retributive and restorative justice. Abolishing permanent contracts had a retributory element, while restorative features included opening up academic positions so that those excluded under the communist regime had a chance to apply.

Property restitution

The aim of returning property to previous owners, who lost it during the communist regime, has led to many unforeseen consequences. Both the people whose properties were confiscated and the people who had acquired them under the communist regime and were now expected to return them to the previous owners brought their cases before the Czech courts. Some of the problems were solved in the 1990s by the CCC, which wanted to help the victims of communism and restore historical justice, returning or at least compensating for properties seized by the communists.[52] Nevertheless, many remaining problems resulted in adverse rulings by the ECtHR and the UN HRC,[53] which found numerous violations of the right to property.

Law no. 87/1991, On Extrajudicial Rehabilitation, set two crucial conditions for the restitution of properties lost due to injustice during the communist regime: citizenship of the Czech and Slovak Federal Republic and permanent residence in the territory of the Federation. After the split of the Federation, a group of Czech MPs challenged the permanent residency requirement and the newly established CCC agreed to rescind it. However, when individual applicants petitioned that the citizenship requirement be struck down as well, the CCC disagreed and upheld it. The UN HRC concluded that both the citizenship and the permanent residence conditions violated the principle of equality. The CCC refused to comply with these findings and confirmed citizenship as a condition for restitution, also pointing to ECtHR case law, which did not go as far as the UN HRC (Kosař & Petrov 2018, pp. 408–11).

Yet, in a series of cases, the ECtHR raised another concern that arose as a consequence of the Czech restitution. The ECtHR accepted that the member states had a certain leeway in dealing with the past; however, when trying to pursue justice for victims of communist injustices, its guiding principle was that the state should not create disproportionate new wrongs. One group of successful complainants before the ECtHR in restitution cases against the Czech Republic were people who had acquired properties from the communist state, arguably not knowing that the state had confiscated the property for political reasons before they bought it. The complainants were ordered to return the property to

[52]Interview with a CCC judge, Brno, 5 December 2018. The CCC perceived the seizure of property as a violation of the right to property by an illegal regime; only restitution compensated for this violation.

[53]The UN HRC monitors implementation of the ICCPR.

the previous owners because original restitution of property has generally been the preferred solution. In return, in accordance with the law, the state compensated the complainants with the price they had paid when they had bought the properties from the state, for example, back in the 1960s. However, prices had increased over the three decades, and the sums paid in the 1960s were approximately one-fiftieth of prices in late 1990s. In *Pincová and Pinc*, the ECtHR posited that the legislation should take into consideration particular circumstances and not put the burden of responsibility on persons who had acquired their possessions in good faith. Such responsibility should lie with the state. A fair balance should be maintained between the demands of the general interest and protection of the right to the peaceful enjoyment of possessions.[54]

The *Pincová and Pinc* judgment did not enjoy a warm reception in Czech elite legal circles. Interviewees generally complained that, unlike earlier cases against Germany, the ECtHR had not paid enough attention to the specific transitional context.[55] Some even urged the government to request a referral to the ECtHR Grand Chamber,[56] but the government refused to do so.

The CCC struggled with the *Pincová and Pinc* judgment when it neither quashed the provision setting the low compensation price, which placed a disproportionate burden on the current owners of the property to be restituted, nor openly defied the ECtHR. Instead, the CCC proceeded in a piecemeal fashion by complying with the ECtHR judgment in individual cases and not dealing with the situation systemically. The CCC declared that derogation of a legal provision is the last option in situations when there is no constitutionally conforming interpretation available.[57] In the meantime, in judicial practice the defective legal provision was ignored, and thus the CCC did not find a need to quash it.

The Constitutional Court deferred to the legislature in other cases as well, such as in upholding the above-mentioned requirement of citizenship for restitution, or in limiting the period to cover only the injustices of the communist regime and not extending it earlier than 1948, the year when the communists took control, to the immediate post-war period. Restitution was understood as the duty of the state to revive the original legal state of affairs and annul illegal property transfers (Pl.ÚS 16/93). While Czech transitional justice measures were aimed at previous owners harmed by the political actions of the communist regime, the ECtHR brought into play the need to also take into account the interests of the subsequent owners, who arguably acted in good faith when they bought confiscated properties from the state. The restitution saga presents a peculiar case because the CCC did not formally quash the transitional justice policy as such but settled only individual cases. It followed the ECtHR interpretation and supported the practice of Czech courts, which has since changed to reflect huge increases in property prices, making the statutory provision outdated. The whole sensitive issue of restitution is, from the CCC perspective, an uneasy exercise in deference to the national transitional justice solution alongside simultaneous attempts to deal with boundaries set by the

[54]*Pincová and Pinc v. the Czech Republic*, ECtHR judgment of 5 November 2002, paras. 58 and 64.

[55]Interviews with: a former CCC high official, Brno, 4 December 2018; a current CCC judge, Brno, 5 December 2018 and 11 January 2019; a former CCC judge, Brno, 5 December 2018.

[56]Interview with a former CCC judge, Brno, 18 December 2018.

[57]Pl.ÚS 33/10 #1, CCC judgment of 23 April 2013, part V.

ECtHR. The CCC managed to reconcile the two by pointing to newer judicial practice that already conforms to the ECtHR case law without clearly contradictory national legislation having been overturned.

Overall, the CCC focused on redressing past injustice. It was only after interventions by international human rights bodies that the CCC started considering the human rights consequences of its case law to be unfavourable.

Rehabilitation of political prisoners

A relatively large number of cases in which the domestic courts struggled with awarding financial compensation for moral (immaterial, non-financial) damages centred around the rehabilitation of political prisoners of the 1950s,[58] the most repressive era of Czechoslovak communism. Many political prisoners had refused obligatory military service because of their religious beliefs. The criminal convictions of these prisoners of conscience were invalidated by Czech military courts at the beginning of the 1990s, first, by only changing the decisions so that no punishment was decreed, then later, around 2007, invalidating the convictions themselves.[59] Nevertheless, the rehabilitation act did not cover compensation for inferred immaterial damages. The problem spurred the so-called 'judicial wars' between the CCC and the Czech Supreme Court (CSC).

The core of the dispute turned out to be the temporal application of the ECHR, which the CCC used to justify higher compensation for political prisoners against the Parliament's will.[60] The CCC thus backed a more pro-transitional justice solution. The CSC claimed that the damages as such occurred in the 1950s, therefore they could not justify the application of the Convention, which was binding on the Czech Republic only from 18 March 1992.[61] The CCC, on the contrary, advocated an interpretation that damages emerged only upon their recognition in the 1990s, essentially pushing through a retroactive use of the Convention's principles.

The dispute between the courts took several years. The CCC quashed dozens of SC decisions as 'poorly written' and 'failing to recognise which legal norms should be applied', or 'surrendering its role to find justice and unify the decision-making practice of the Czech courts'.[62] Interestingly, the quarrel with the CCC challenged the traditionally conservative CSC judges to engage in more nuanced work with ECtHR case law. The CCC directly bound the CSC with its opinion that the ECHR (Art. 5, para. 5) should be directly applied to compensate political prisoners for the immaterial damage caused by the unjust decisions of the communist era. Hoping for a resolution, the CSC attempted to settle the case by awarding the claimants only moral compensation in the form of recognition of the violation. This only further irked the CCC's judges, who adamantly and very actively pursued a change in the application of compensatory politics, arguing for the right of the victims of communism to justice.

[58]Act No. 119/1990 Coll., On Judicial Rehabilitation.
[59]Pl.ÚS-st 39/14, CCC judgment of 25 November 2014.
[60]Pl.ÚS-st 39/14, CCC judgment of 25 November 2014.
[61]See, for example, CSC, 30 Cdo 1614/2009, judgment of 8 September 2010.
[62]I.ÚS 3438/11, CCC judgment of 23 May 2012.

The argument of the CSC, that such an overarching interpretation and application of the Convention[63] to situations taking place before its ratification actually goes against the ECHR,[64] remained unheard. Although the CCC did not use any traditional transitional justice arguments justifying the derogation from standard principles, the motives of transition and coming to terms with the past were strongly present in the judges' considerations.[65] The CCC was very conscious of the fact that the exclusion of immaterial damages from the compensatory scheme was a political choice by the democratically elected legislature. Still, it attempted to bring about the change *via* an expansive interpretation of international human rights commitments.

The CCC eventually changed its line of reasoning and backtracked on the retroactive use of the Convention against the will of the Parliament.[66] However, financial compensation to political prisoners was preserved. The CCC judges used human rights language and international commitments to push through their vision of transitional restorative justice.

Discussion and conclusion

The clash between human rights and transitional justice presents young democracies with a thorny dilemma. On one hand, they seek to address the crimes of the past and distance themselves from the previous regime with a set of very specific policies, while, on the other hand, they strive to re-establish their position in international society by, amongst other things, showing serious commitment to international human rights standards (Smekal *et al*. 2016). The 'return to Europe' (Havel 1990) consisted of value reorientation towards the Western triad of liberal democracy, human rights, and the rule of law, coupled with the 'Washington Consensus' economic template. Visions for the future were set clearly but, at the same time, the CEE countries had to deal with sensitive and pressing legacies of the past.

Our essay sheds light on the role of constitutional courts in transitional justice, focusing on their role in mitigating the inherent conflicts between the concept of transitional justice and international human rights law when confronting legislative and executive transitional justice policies. We argue that constitutional courts significantly adjust transitional justice policies. However, they are constrained by respective international human rights commitments, which are supposed to eventually prevail over the transitional rule of law. In that sense, we expected the constitutional courts to gradually cease departing from general human rights principles justified by the transitional rhetoric and harmonise transitional justice policies with international human rights. Nevertheless, the study of the CCC did not confirm this expectation.

The analysis of the transitional justice jurisprudence of the CCC demonstrates that international human rights regimes work both as a constraint and a tool. The CCC has

[63] 30 Cdo 2916/2012, CSC judgment of 29 May 2013.

[64] 30 Cdo 1770/2012, CSC judgment of 24 April 2013; 30 Cdo 1663/2012, CSC judgment of 12 June 2013.

[65] Interview with a CCC judge, Brno, 18 December 2018.

[66] The Plenum even admitted that by an overreaching interpretation of the Convention, it had created an unjust dual-track justice system that could establish legitimate expectations by petitioners. Pl. ÚS-st. 39/14, CC judgment of 25 November 2014.

addressed the transitional justice issues for almost 30 years, which has allowed it to tackle all types of policies and problems. It has reviewed 14 out of 16 transitional justice statutes and their amendments and invalidated provisions in half of them, confirming its position as an important transitional justice actor, able and willing to challenge political compromises.

Our analysis of how the CCC reconciled the conflict between human rights and transitional justice principles establishes that the CCC acted as an independent player with its own conception of transitional justice. This demonstrates that the existing omission of constitutional courts by transitional justice literature has serious consequences for its findings.

Most of the case law regarding the retributive dimension of transitional justice (lustrations, condemnation of the communist regime) eschews references to international human rights law. The rulings identifying the values and democratic principles of new regimes are very normative, yet parsimonious in references. Interestingly, references (or elaborated interpretations and evaluations of compatibility) are also lacking in cases when petitioners raised the incompatibility between transitional justice measures and international obligations. If the CCC managed to find sufficient reasoning in the domestic Constitution, it did not feel the need to shield itself with international human rights arguments. That being said, we also found evidence that CCC judges were aware of the human rights clashes inherently present in 1990s transitional justice considerations. Yet, the transitional narratives prevailed, fuelled by the feeling that the core retributive measure, lustration, was not sufficiently implemented, especially in the first decade after the Velvet Revolution.

By contrast, restorative measures, including rehabilitation and the restitution of property, are full of references to international human rights law, especially the ECHR and ECtHR case law. International human rights law played a tremendous role and helped the CCC to push for more transitional justice for victims of communist crimes, often directly against the will of the legislator or the rest of the judiciary. The CCC therefore displayed a tendency to reference international human rights case law in restorative policies when it generally supported its views, while tending to withhold references to international human rights in retributive policies where ECtHR case law has not been always in line with the CCC's preferences.

Three factors explain the CCC's behaviour. First, shortly after the 1989 revolution, the CCC, composed mostly of former dissidents and enjoying a high level of social legitimacy, attempted to establish the new domestic Charter of Fundamental Rights in practice and develop the interpretation of Czech constitutional order as embedded in rule of law principles. The need to diffuse international norms came only as a second-order interest. Second, the constitutional judges only gradually gained in-depth knowledge of international human rights law. The language barrier and lack of electronic databases or literature at the beginning of the 1990s significantly constrained the judges' knowledge of international human rights law. The situation changed around 2000, when the CCC delivered most of its restorative transitional justice case law, which frequently used international human rights law. Third, the first CCC felt particularly strongly about its role in transitional justice and shared a common understanding of how the transition, at least in the most important political aspects, should evolve.

As public polls demonstrate, the CCC enjoyed high social legitimacy with its transitional justice case law shortly after 1989. The Federal and first Czech CC, composed largely of

former dissidents and judges with first-hand experience of the repression of the totalitarian regime, shared public sentiments on restoring justice and punishing wrongdoers. Moreover, the few judges from the communist era who joined the CCC pursued transitional justice issues even more vehemently.[67] This supports the suggestion that pro-justice behaviour of courts in transition follows from judges seeking atonement for their service under the previous regime (Huneeus 2010).

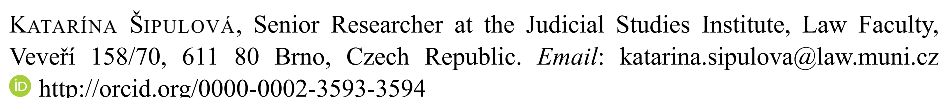
International human rights law, especially if supported by existing case law, left the CCC less room for manoeuvring and constrained its vision of transitional justice. It was rare, therefore, for the CCC to openly oppose the content of international human rights commitment; rather, it 'cherry-picked' those aspects that conformed to its vision of transitional rule of law. On some occasions, the CCC even shifted the interpretation of some international human rights law provisions in order to gain more leverage to promote certain views. This practice has been very visible, especially in the field of restorative transitional justice, where the CCC frequently stood in for the non-active legislature. The CCC used international human rights commitments to justify new schemes for rehabilitation of victims.

To a large extent, the CCC overstepped constraints of transitional justice legislation. While formally it had clear lines of transitional justice set by domestic legislation and constrained by the ECtHR, it did not keep within those boundaries. The CCC contested and struck down provisions of most of the Czech transitional justice statutes, thus significantly reshaping their form. Moreover, we also saw a tendency to broaden the scope of transitional justice by including transitional justice rationales in policies not originally seen by the government as transitional—the case of university lecturers being one example. The CCC pushed forward its own idea of transitional justice, which it advertised as a response to widespread public demand.

The judges were disappointed with the implementation of transitional justice policies, both in their retributive (ineffective lustration) and restorative (narrow compensation) forms. When it comes to the boundaries created by the ECtHR, the CCC acted casuistically (see *Pincová and Pinc* case or the case related to prisoners of conscience described above), although showing more willingness to comply with restorative transitional justice policies. So far as international human rights law demanded more compensation to individuals, the CCC was happy to use it to support its findings. To a degree, its approach to restorative and retributive mechanisms differed. While the CCC tamed the most apparent injustices of retributive legislation, it pushed for more active restorative policies. Contrary to our expectations, the CCC did not automatically put more emphasis on 'collateral damage' and victims of transitional justice. It therefore follows that the CCC did not mitigate conflicts between human rights and transitional justice shortly after the transition. Human rights concerns prevailed over transitional justice justifications only partly and only over some time. International human rights commitments constrained the CCC only in situations when a direct ruling against the Czech Republic existed. Otherwise, the CCC merely used international human rights law where it suited its reasoning. In this sense, transitional justice reasoning still survives.

[67]Interview with a former CCC judge, Brno, 11 December 2018.

The example of the CCC carries an important lesson for transitional justice scholarship. It shows that by omitting constitutional courts, we miss a significant piece in the search for factors prompting a particular set of transitional justice policies. While largely overlooked by political science scholarship, constitutional judges, especially in the transitional setting, often have their own vision of transitional justice, prompted by their first-hand experience, and have their own, considerable, means of influencing it. The reluctance of the CCC to follow some of the ECtHR's views on transitional justice demonstrates that constitutional courts need to be understood and studied as distinctive actors, not as mere implementers of norms.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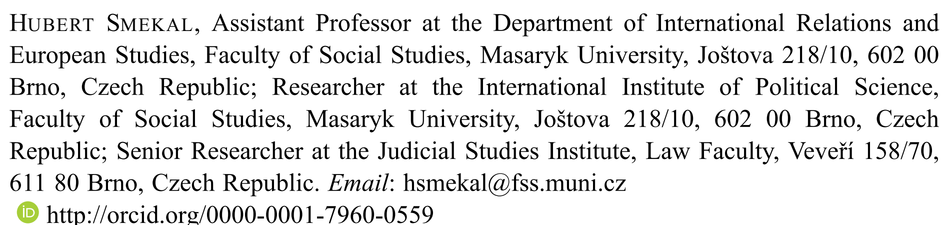
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