2 The Croatian Constitutional Court

From a potentially powerful court to a court of rejections

Monika Glavina

2.1 Introduction

In the words of Judge Siniša Rodin, one of the most important aspects of the creation of the 1991 Croatian Constitutional Court (CrCC) was the "establishment of an independent and potentially powerful" court (Rodin 1995, 783). This quote is interesting mainly because of seeing the CrCC for the first time as "potentially powerful". While it is true that Croatia, as part of the former Socialist Federal Republic of Yugoslavia (SFRY), had its own constitutional court (the Constitutional Court of the Socialist Republic of Croatia), the powers of the "socialist" Constitutional Court were much weaker than those provided for the new Court by the 1990 Constitution of the Republic of Croatia. The former "socialist" Constitutional Court's power of constitutional review was subject to state control both institutionally and politically: institutionally, it was subordinate to the Parliament of Yugoslavia, the so-called Federal Assembly (*Savezna skupština*), while politically, it was under the supervision of the Communist Party. In other words, in practice the doctrine of the primacy of the Federal Assembly prevented the Court from striking down government legislation as unconstitutional. Instead, the Court could only propose that the Assembly makes amendments to laws it deemed unconstitutional. Politically, the activity of the "socialist" Constitutional Court was severely limited by the informal but politically strong guidelines of the League of Communists of Croatia (the Croatian branch of the League of Communists of Yugoslavia), the Communist Party in power that played an important role in the appointment and dismissal of judges. This, too, constrained constitutional review or even blocked its initiation (Rodin 1995).

This relationship between the legislature and the Court changed with the adoption of the 1990 Constitution of the Republic of Croatia, which gave the newly created Constitutional Court the power to, among other things, rule on the compatibility of laws and other regulations with the Constitution and to annul them if they violated the Constitution or other laws/regulations (Constitution of the Republic of Croatia 1990, Article 129). The adoption of the 1990 Constitution and the establishment of the new CrCC marked a new path to democratization and opened a new phase of

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constitutional review in Croatia. But how does this description of a new powerful Court compare to reality?

Not much has been written about the CrCC, especially from a political science perspective. With the exception of Barić's report, which is part of the project entitled "Courts as Policy-Makers? Examining the Role of Constitutional Courts as Agents of Change in the Western Balkans" (Barić 2016), the study of the CrCC remains the privileged domain of law professors (Rodin 1995, 1997; Crnić 2001; Podolnjak 2007) and Constitutional Court judges themselves (Omejec 2002; Arlović 2013, 2014; Omejec and Barić 2012). Moreover, most works on the CrCC can only be found in the Croatian language. Only a few scholarly articles or reports have been published in English on the topic (Rodin 1995, 1997; Omejec 2004; Barić 2016). This chapter attempts, among other things, to address these shortcomings.

This chapter will focus on the practice of the CrCC and empirically and systematically examine the decisions of the Court from its establishment in 1990 until 2020. The aim of this chapter is to investigate the extent to which the practice of the CrCC has constrained the room for manoeuvre of the legislature in Croatia and how the strength of the CrCC's decisions vis-à-vis the legislature has changed over time. In this way, I will attempt to critically assess whether the CrCC has fulfilled the expectation of becoming a "potentially powerful court" (Rodin 1995, 783).

This chapter is organized as follows. Section 2.2 explains the origin of the CrCC and discusses the political and constitutional framework in which the Court was created. This section analyses the powers and composition of the CrCC, the procedure for selecting judges, and some institutional features of the Court. Section 2.3 provides some general impressions of the Court's workload and the types of cases that the CrCC decides. I will also address the diversity of the Court's decisions, or rather the lack thereof since the Court's workload is heavily dominated by refusals and rejections. Section 2.4 presents and discusses general trends in CrCC decision-making based on an analysis of majority decisions on the constitutional review of laws passed by the Parliament. In this section, I will attempt to explain these trends by distinguishing between four different periods in Croatia's constitutional history and outlining how they relate to changes in government, the composition of the Court, and other factors. My analysis shows that while the first period of Croatia's constitutional history (1991–1999) was the CrCC's most powerful period, the Court was very cautious about finding unconstitutionality. While the CrCC did not shy away from challenging parliamentary legislation as unconstitutional, it generally refrained from taking an activist approach.

At the beginning of the new millennium, the number of the Court's rulings vis-à-vis the legislature declined and remained at a low level during the remaining three periods, largely due to the high number of rejections. Section 2.5 discusses a relatively recent trend of dissenting opinions in CrCC decisions that began in 2016 with the appointment of new opposition judges to the Court. Network analysis shows that this trend is due to a coalition

of centre-left judges voting against the predominantly centre-right majority. Building on the literature on the judges' dissenting behaviour, I also analyse the extent to which the likelihood of writing a dissenting opinion in the CrCC is associated with various factors reported in the literature, such as party affiliation, academic career, gender, and age. I conclude that while the CrCC was established as a potentially powerful court, its level of influence on the legislature is still only average, as the Court generally prefers not to limit the power of the legislature and leaves it considerable room for manoeuvre. With the increasing trend of dissenting opinions in recent years and the greater ideological differences among the Court's judges, this may change in the years to come. Nevertheless, it is unlikely that a handful of left-wing, activist judges will fundamentally change the rules of the game.

2.2 A potentially powerful court

2.2.1 Origins of the Croatian Constitutional Court

The origins of the CrCC can be traced back to the 1960s, when Croatia was one of the six federal entities of the Socialist Federal Republic of Yugoslavia (SFRY). Constitutional courts were established in the former SFRY at both the federal and federal unit levels. The Croatian Constitutional Court was established by the 1963 Constitution, which gave it limited powers. This "socialist" Court had a jurisdiction to, among other things, rule on the compatibility of the laws of the Croatian federal entity with the Constitution (abstract constitutional review) and could rule on the compatibility of regulations, laws, and other general legal acts with the Constitution, federal laws, and other regulations of the Republic. The Constitution of the Socialist Republic of Croatia of 1974 also gave the CrCC the power to rule on the conformity of laws and other legal acts that have ceased to be valid and to suspend the execution of individual acts or measures taken on the basis of a law whose conformity is being examined. If the Court found that a law violated the Constitution, it could not annul it, however. Instead, due to the socialist primacy of the Federal Assembly (the Parliament of Yugoslavia), the Court could only rule on the nonconformity of the law, and it was left to the Federal Assembly to decide whether it would amend it or enact new legislation (Barić 2016; Rodin 1995).

The powers of the CrCC changed after the first multiparty elections in Croatia, which took place on 22 and 23 April 1990 – at a time when Croatia was still one of the six federal entities of the SFRY and the 1974 Constitution was still in force. Two months after the elections, on 25 July 1990, the Parliament decided to adopt the Constitution of the Republic of Croatia and promulgated amendments to the Constitution of SR Croatia, deleting the word *socialist* from the name of the country, the title of its Constitution, and from its provisions. On the same day, the Constitutional Court of the Socialist Republic of Croatia was renamed the Constitutional Court of the Republic of Croatia (CrCC).

On 22 December 1990, the Parliament adopted the new Constitution of the Republic of Croatia that gave the Court new competences beyond those

provided for by the "socialist" Constitutional Court in the 1963 and 1974 constitutions. For the first time, the Constitutional Court was given the power of constitutional review, that is, the power to decide on the constitutionality of laws and other legal acts and to annul them if they are found to be unconstitutional. The newly created Court was no longer subordinated to the Parliament but followed the continental tradition and was designed to function as an intermediate body that supervises all three branches of government. The Constitutional Court does not stand hierarchically above any of the aforementioned branches, nor is it organizationally or functionally a part of them (Barić 2016). For this reason, and due to the fact that the Court is based exclusively on the provisions of the Constitution and the Constitutional Law on the Constitutional Court (the Constitutional Law),[1] the CrCC is often considered the fourth branch of the government in Croatia (Omejec 2004). The Court was established one year after the entry into force of the 1990 Constitution, when on 5 December 1991, the Croatian Parliament adopted the Decision on the election of the judges of the Constitutional Court of the Republic of Croatia and elected the first 9 of 11 judges of the Constitutional Court, who took office two days later, on 7 December 1991.[2] Although 11 judges were nominated, 2 judges did not receive the majority of votes in Parliament required to be elected (Croatian Parliament 1991). With only 9 judges holding office and the country focused on the Croatian War of Independence, the CrCC operated for a full three years with 9 judges instead of 11 until 1994, when the two remaining judges took office. Judge Jadranko Crnić, who had served as a constitutional judge since 1984 and as President of the Constitutional Court of SR Croatia since 1990, became the first President of the CrCC. As I will show in Section 2.4, his presidency was marked by the strongest decisions taken by the Court, and during this period the Court found unconstitutionality in almost three-quarters of its rulings, suggesting that the President's experience at the former "socialist" court did not influence the new Court's willingness to use its newly gained powers.

Thus, the establishment of the Croatian Constitutional Court in 1990 was strongly influenced by the turbulent times of the Croatian War of Independence (1991–1995), which followed the proclamation of Croatian independence on 8 October 1991. The first decade of the Court's activity is considered the most burdensome period in Croatian constitutional history, hampered by the severe consequences of the war and the post-war reparations (Omejec 2004).

1 A Constitutional Law is a legislative act that is defined as such by the Constitution and is adopted following the procedure for the adoption and change of the Constitution itself. There are only three Constitutional Laws in Croatia: the Constitutional Law for the Implementation of the Constitution of the Republic of Croatia, the Constitutional Law on the Constitutional Court of the Republic of Croatia, and the Constitutional Law on National Minorities' Rights.

2 Note: the term of the previous judges of the Constitutional Court of the Socialist Republic of Croatia expired on 5 December 1991.

2.2.2 Composition and structure of the Croatian Constitutional Court

The composition of the Court was established in the 1990 Constitution and further clarified by the 1991 Constitutional Law on the Constitutional Court (Constitutional Law). In its original format, the CrCC consisted of 11 judges. Two chambers of the Croatian Parliament were responsible for selecting the judges: the House of Counties proposed the candidates, while the House of Representatives made the final decision by absolute majority. However, following a constitutional amendment in 2001, the House of Counties was abolished, and the House of Representatives became the sole chamber of the Croatian Parliament. Consequently, the procedure for selecting judges also changed. The 2001 constitutional amendment introduced a new body – the Committee on the Constitution, Rules of Procedure and Political System of the Croatian Parliament – that was responsible for nominating candidates for CrCC judges, although the actual procedure for electing constitutional judges of the Court is still based on a majority vote of the members of Parliament. Although this change made the selection process more democratic and transparent, a comparative study by Podolnjak (2007, 572) suggested that at the time Croatia was one of the few countries where "the election of constitutional judges is left to the simple majority in the Parliament and no other branch of government participate[s] in the election." As I will show later in this section, although simple majority voting was revisited in 2011, Croatia remains one of the few countries where parliament is the only body responsible for electing constitutional judges.

The 2001 constitutional amendment brought another change regarding the number of judges, which was increased to 13. Judges are appointed for a period of eight years (Constitution of the Republic of Croatia 2014, art. 122), which can be renewed, although it is unclear whether the renewal is one-time or indefinite (see Barić 2016). While there is no official rule on the number of possible renewals, the scandal surrounding Judge Omejec in 2016 makes it clear that the public does not appreciate judges running for a third term (Jutarnji list 2016b).

A judge of the Constitutional Court must be a Croatian citizen and a graduate lawyer with at least 15 years of professional experience (12 years if they hold a doctorate in law) who has pursued an outstanding professional career of scientific or professional work or public activity (Constitutional Law 2002, Art.5). Since the establishment of the Court in 1991, there have been a total of 38 judges of the Court, 10 of whom were university professors.[3] A constitutional judge may not belong to any political party and may not publicly express support for a political party (Constitutional Law 2002, Art. 16). Yet, as Barić

3 Judges who also worked in academia as assistant or full professor or as quest lecturers at the universities are Velimir Belajec, Nikola Filipović, Davor Krapac, Željko Potočnjak, Aldo Radolović, Petar Klarić, Smiljko Sokol (former judges), Mato Arlović, Mario Jelušić, and Goran Selenec (current judges). See Ustavni Sud Republike Hrvatske n.d.

(2016) points out, at least one-third of all the judges who have served in the Court were publicly known members or supporters of active political parties in Croatia before their appointment. Indeed, the judges' biographies on the Court's official website generally do not hide their previous political affiliations (see Ustavni Sud Republike Hrvatske n.d.).

The most important constitutional amendment regarding the procedure for selecting judges was passed in 2011. The 2011 constitutional amendment was the result of more than a decade of criticism of the Court based on the fact that the majority of elected judges, with only a few exceptions, were chosen by the Croatian Democratic Union (HDZ), a conservative centre-right party that had a majority in Parliament from 1990 to 2000, from 2003 to 2011, and since 2016. Criticism, which began in the run-up to the 1999 Court election, escalated when only representatives of the ruling party voted for the candidates and the opposition boycotted them (see Podolnjak 2007; after Vjesnik 1999). The criticism continued after the election, when the ruling party was criticised by the media for "filling the Court with candidates of questionable quality" (Jutarnji list 2016c).

Following such criticism that started in the 1990s, the 2010 constitutional amendment introduced a change in the procedure for electing judges, requiring a two-thirds majority of all parliamentarians (instead of a simple majority) to elect them. It also introduced a new constitutional mechanism that provides for a judge's term to be extended for a maximum of six months until a new judge is elected, in order to prevent a deadlock in the work of the CrCC. This change in the method of election of judges led to new problems, however, as the Parliament was unable to achieve a two-thirds majority for the appointment of new judges for a full six years. As a result, for a time the Court operated with 10 judges instead of 13, raising fears that the Court would effectively be "euthanized" due to the constant non-appointments (Barić 2016). This period was marked by verbal disputes between the ruling party (the centre-right HDZ) and the opposition (the centre-left SDP), during which the Court was "often caught between two fires" (Barić 2016, 34). The Court was also subjected to a series of "uncensored verbal attacks from the left" (Barić 2016, 34) and even from Supreme Court justices. Perhaps one of the most famous descriptions of the CrCC from this period was that of Supreme Court President Krunislav Olujić, who said that "the Constitutional Court is like a punctured ship tilted to the right" (Barić 2016, 92).

A consensus between the ruling party and the opposition on the election of CrCC judges was finally reached in 2016, when eight new judges took office, with one additional appointment made in 2017 (IUS-INFO 2016). As reported by the media, the opposition party objected to two of the centre-right candidates but relented "to avoid a constitutional crisis" (Jutarnji list 2016a). It seems that securing five seats for their own candidates was sufficient. Moreover, both parties wanted to avoid a crisis over an empty chair at all costs. Although it is thought-provoking that the ruling centre-left party would give up its power over the election of judges, it seems that more than a decade

of criticism from the media and the public has forced the ruling party to make a necessary compromise. Even so, most of the current judges continue to be nominated by the ruling party.

2.2.3 Voting

The number of judges sitting on the CrCC bench depends on the nature of the proceedings before the Court. Decisions on the constitutionality of laws and on the constitutionality and legality of other regulations are made at a separate session of the CrCC, which can be held only if a majority of the total number of judges is present at the session. Constitutional review cases are generally decided *en banc*, i.e. before the full Court (Constitutional Law 2002, Art. 53). The decisions of the Court in constitutional review cases are made by majority vote, and votes are always published together with a decision. The publication of votes is stipulated in Article 52 of the Constitutional Law (2002), which states that the minutes of the Court's session "shall contain information about the case, the manner in which the case was decided, and the vote (who voted for and who voted against)" (Constitutional Law 2002, Art. 51(3)). Decisions based on a constitutional complaint made by private individuals, on the other hand, are made anonymously in a Council of six judges by unanimous decision. If the Council does not reach a unanimous decision or considers that the matter is of greater importance, the decision is taken by a session of the Court *en banc* (Constitutional Law 2002, Art. 69).

2.2.4 Institutional peculiarities

There are several institutional features, or rather constitutional limitations, of the CrCC that are worth mentioning. I distinguish between two types of limitations: first, formal constitutional limitations, which are formally prescribed in the Constitution or in the Constitutional Law, and second, self-restrictions, which the Court has imposed on itself. If one peruses the text of the Croatian Constitution and the Constitutional Law, one formally prescribed restriction stands out. This is the stipulation that the Court can only exercise *ex post* constitutional review. In other words, the Court does not have the power to review laws and regulations before they are passed by the Parliament. The Court may conduct a constitutional review of laws and regulations that have expired, but only if no more than one year has elapsed between the filing of a petition for constitutional review and the date of its expiration (Constitutional Law 2002, Article 56). Other limitations are self-imposed, that is, the Court has imposed them on itself by adopting a certain position in its case law. As a result of the self-imposed limitations, the Court cannot review cases on the mutual harmonization of laws or regulations with the same legal force (e.g. of two ordinary laws).[4]

4 This was the position the Court took in its case law. See e.g. U-I-904/1995, U-I-3201/2005, U-I-1656/2011.

Furthermore, the Court is not empowered to decide cases of legislative omission, i.e. to judge the compatibility of laws with the Constitution from the point of view that the legislature failed to prescribe something in the law. Although this position is explicitly stated in the Court's case law,[5] in four cases, the Court has assessed the compatibility of laws with the Constitution from the point of view that the legislature failed to prescribe something in the law.[6] This suggests that the CrCC has decided to circumvent the restriction it has imposed on itself. Occasionally, the CrCC also issues a directive to instruct Parliament to enact or amend a law,[7] although such directives are always part of unconstitutionality rulings and never stand alone. However, a more common practice of the Court when determining unconstitutionality is to issue a non-binding opinion to guide or initiate legislative action in a certain direction (see also Section 2.3).[8] Moreover, in the procedure of abstract review of the constitutionality of laws, the Court does not have the power to assess the application of procedures before courts and other state bodies against which individuals have the right of constitutional complaint.[9] These four self-imposed limitations have been used as grounds for a number of rejections of complaints by the Court (see Section 2.3).

While there is an agreement between the judges on the Court's lack of jurisdiction in these situations, there is disagreement when it comes to the jurisdiction of the Court in cases of alleged incompatibility between international agreements and the Constitution or national laws and regulations (Barić 2016). This kind of jurisdiction, or the lack thereof, is not explicitly stated in the Constitution or the Constitutional Law. However, based on Article 140 of the Constitution, which states that international agreements have a higher legal force than domestic laws, the Court has declined jurisdiction to assess the compatibility of international agreements with the Constitution.[10] As of 2017, several judges took a different view, arguing that international agreements are below the Constitution in the hierarchy and can therefore be subject to constitutional review by the Court.[11]

Another institutional peculiarity of the CrCC lies in the practice of constitutional interpretation, which is not applied in Croatia (Rodin 1997). Unlike in Germany, for example, where a constitutional complaint against a law is admissible and where the establishment of a violation of fundamental rights by that law leads to the repeal of the law, the CrCC has not yet gone that far. However, in the absence of a constitutional or self-imposed limitation

5 See e.g. U-I-709/1995, U-I-709/1995.
6 See U-I-60/1991, U-I-4463/2013, U-I-60/1991, and U-I-378/2016.
7 See U-I-60/1991, U-I-673/1996.
8 E.g. U-I-1152/2000, U-I-5612/2011.
9 This was the position the Court took in its case law. See e.g U-I-6651/2010, U-I-2056/2001.
10 See, e.g., U-I-671/2001, U-I-1596/2012, U-I-35/2016.
11 See dissenting opinions of judge Andrej Abranovic and judge Branko Brkic in U-I-1596/2012, dissenting opinion of judge Andrej Abramovic in U-I-35/2016, U-I-6290/2016, U-I-2234/2017, U-I-2235/2017, and U-I-2236/2017.

preventing the Court from doing so, it may address this issue in the future. In Croatia, a constitutional complaint cannot be used to assess the compatibility of ordinary laws with the Constitution. Instead, a party to proceedings who claims that his rights have been violated by an unconstitutional law would have to initiate separate proceedings in the form of an abstract constitutional review (Rodin 1997). The constitutional complaint itself may not serve this purpose. In practice, however, the Court has not faced such a problem to date.

There are three ways of initiating abstract constitutional review: first, on request of a limited number of bodies enumerated in the Constitutional Law (one-fifth of the MP's, the President, the Supreme Court or another lower court, and the Ombudsman; Constitutional Law 2002, Art. 35). Second, on a proposal of the representative body of local and regional government and every individual or legal person, but it is up to the Court to decide whether the allegations are sufficient to initiate the proceedings (Constitutional Law 2002, Art.38(1)). Finally, the Court can also initiate proceedings ex officio. I return to this in Section 2.3.

2.2.5 The most important periods

Scholars writing about the CrCC (Omejec 2004; Barić 2016) usually distinguish between three periods of Croatian constitutional activity: (1) from 1991 to the end of 1999; (2) from 2000 to mid-2013; and (3) from 1 July 2013 (the accession of RC to the EU) to 2016. Added to this is the fourth period from 2016 (7 July 2016, when eight new judges, five from the centre-left opposition, took office) to the present, which is characterized by an increasing number of dissenting opinions and polarization between judges nominated by the ruling party and the opposition.

The first period was heavily burdened by the events of the war, post-war reconstruction, and the transition to democracy after communism (Omejec 2004). This period is often referred to as the "emergency period" because the CrCC's activities were primarily focused on preserving the constitutional core, i.e. preserving the principle of the separation of powers, the principle of representative government, supervising free elections, and retaining the essence of the multiparty democratic system (Omejec 2004). After 1989 and the fall of the communist regime, constitutional courts in CEE countries developed varying degrees of judicial activism. While some constitutional courts (such as the Hungarian one for example) were immediately labelled "activist", others developed this activism gradually and in accordance with the context in which they were operating at the time. The CrCC, Croatian scholars argue, falls into the second category (Barić 2016).

In this first phase, the CrCC generally refrained from taking an activist approach (see Omejec 2004; Barić 2016). Although the Court was not shy about using its power of constitutional review to strike down laws for substantive unconstitutionality (see Section 2.4), the literature shows that the Court was far less willing to engage in judicial law-making. The CrCC also exercised

deference to the executive branch by upholding 11 presidential decrees with the force of law, even though none of the official requirements had been met.

Moreover, the style of the CrCC's jurisprudence during this period was often criticized as formalistic and uncreative. Arsen Bačić, one of the most prominent critics of the time, wrote that the Court's approach, by a mere reference to a legal provision and a complete lack of elaboration of constitutional principles, was "nothing but the Court's self-restraint and a formal style of interpretation of constitutional provisions" (Bačić 1998; Banić 2016, 189). There are several explanations for it taking such a moderate approach to judicial activism: the Croatian War of Independence, "during which national political leaders did not expect any challenge to the principle of unity of state power from other institutions" (Barić 2016, 59), the relationship between the legislature and the judiciary, which was characterized by the principle of the "unchallengeable authority of the head of state", and the "uncritical attitude of the judges of the Constitutional Court" (Barić 2016; Barić and Bačić 2011).

The Court's attitude toward the legislature in this early period was thus characterized by "the traditional concept of the judiciary which prevails in Croatian legal theory, according to which the courts play only a limited law-making role" (Rodin 1997, 75). Other scholars portrayed the role of the Court as a "regular appellate court", dealing primarily with clear cases of substantive and procedural unconstitutionality rather than interpretive methods common in constitutional adjudication, and whose decisions follow a standard jurisdictional scheme common at the appellate and Supreme Court levels (Barić 2016, 14). In this early phase, the CrCC rarely referred to international agreements such as the European Convention on Human Rights (ECHR) in its jurisprudence.

The beginning of the second period was marked by the election of a new left-wing government and the passing of a second constitutional amendment in 2000, which gave more powers to the Court by expanding its competences and increasing the number of judges from 11 to 13 (Amendments to the Constitution of the Republic of Croatia 2000). This period was also marked by preparations for European integration. After another constitutional amendment in 2001 aimed at integrating European standards into Croatian constitutional law, the harmonization of national legislation with the EU *acquis communautaire* began. During the period from 2003 to 2013, no less than 683 Croatian laws and regulations were harmonized with EU law (Barić 2016). However, the speed of harmonization led to some problematic translations: literal translations from English, incomprehensible provisions, and the introduction of legal principles that did not exist in Croatian law (Omejec 2004, 14; Glavina 2021). In parallel with this process, the CrCC began to rely more on the case law of the European Court of Human Rights (ECtHR) and to go beyond traditional methods of interpretation (see also Banić 2016). After the fourth constitutional amendment in 2010, Croatia was formally ready to join the EU. The 2010 amendment also introduced a two-thirds majority in Parliament for the election of constitutional judges.

The third and final transitional period of the CrCC began with Croatia's accession to the EU in 2013, a period which was also characterized by the well-established and accepted practice of constitutional review (Barić 2016). However, this period also saw growing criticism of the Court, which had been more or less absent in the earlier periods due to the constitutional definition of the Court's powers and its practice of using conservative methods of interpretation, i.e. grammatical interpretation or textualism, as Rodin (1997) points out.[12] In the period since 2013, the CrCC has been confronted with the economic crisis, growing ideological polarization on the political scene, an increasing tendency of the political elites to blame the Court for shortcomings or constitutional problems, and public criticism related to two scandals in which CrCC justices were involved (Barić 2016).[13]

Finally, I would add to this classification a fourth period of Croatian constitutional reality, which began in the summer of 2016, more precisely on 7 July 2016, when eight new judges were elected to the CrCC. This election had been severely delayed due to the 2010 constitutional amendment on the election of judges (which requires a two-thirds majority in the Parliament), until a consensus was finally reached in 2016. Of the eight newly elected judges, five judges were nominated by the centre-left opposition party. Until then, the majority of constitutional judges had been appointed by the ruling conservative centre-right party. The only exception was three judges appointed between 2000 and 2003, when the centre-left coalition had a majority in Parliament (see Appendix). As a result of the 2010 constitutional amendment, the fourth period witnessed an increase in the number of dissenting opinions, stated predominantly by the dissenting coalition appointed by the left-wing opposition in the Parliament.

2.3 General impressions

2.3.1 Court's statistics and judicial rulings

The CrCC is a "busy" Court, especially considering that Croatia is a country with less than 4 million inhabitants. The Court's workload has grown exponentially since its establishment in 1990, reaching a peak of 8,195 incoming cases in 2014, followed by a slow decline in the number of cases reaching the Court each year. However, cases involving the compatibility of laws with

12 *Textualism* refers to a type of decision-making where judges rely on a narrow and limited set of arguments, the earlier case-law of the same court, accepted and well-established legal doctrines and on the traditional methods of interpretation (see Bobek 2015).

13 The first scandal in this period revolved around the involvement of one of the judges in alleged attempt to annul parts of the Sport law and a second one involved the discovery of plagiarism in one of the judges' published works. Both scandals ended in a public apology as the Court was already operating with 10 instead of 13 judges (see Section 2.2) and could not afford to lose more judges (see Barić 2016).

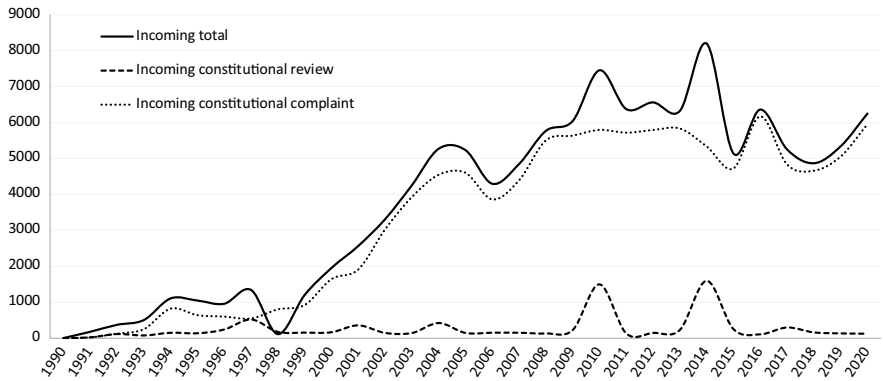

Figure 2.1 Caseload of the Croatian Constitutional Court (1993–2020)

the Constitution represent only a fraction of the total cases that come before the Court. Over the entire period studied (1990–2020) cases examining the constitutionality of laws account for only 7% of the Court's workload, while cases examining the constitutionality and legality of other legal acts (including presidential decrees) account for 3.8% of the Court's workload. In comparison, constitutional complaints account for nearly 90% of the Court's workload (see Figure 2.1).

Figure 2.1 illustrates all the incoming cases per year and the two most common types of procedure: proceedings initiated by a constitutional complaint (dotted line) and procedures for assessing the conformity of laws with the Constitution (dashed line). Other cases that the CrCC decides on are not presented in this figure.[14] Other cases account for 1.5% of the Court's workload (Ustavni Sud Republike Hrvatske 2022).

This discrepancy between the number of constitutional complaints and petitions for the constitutional review of laws can be explained by the fact that only a limited (and privileged) number of bodies can initiate a constitutional

14 Other cases that the CrCC decides are those concerned with: (1) resolving conflicts of jurisdiction, (2) deciding on the responsibility of the President, (2) oversight of the constitutionality of the programs and activities of political parties, (3) oversight of the constitutionality of elections and a state referendum, (4) resolution of electoral disputes that are not within the scope of the courts, (5) the procedure of temporary suspension of the execution of individual acts or actions undertaken on the basis of a law or other regulation under constitutional review procedure, (6–7) appeal against decisions of the State Judicial Council – dismissal of judges and disciplinary proceedings, (8) monitoring the implementation of constitutionality and legality and reporting to the President of the Croatian Parliament, (9) supervision over the adoption of regulations for the implementation of the Constitution, laws, and other regulations, and (10) the announcement of the people's constitutional referendum.

review: one-fifth of the parliamentarians, the working body of Parliament,[15] the President, the Supreme Court, another ordinary court (if the question of constitutionality arises in the proceedings before that court),[16] and the Ombudsman (Constitutional Law 2002, Art. 35) are authorized to do so. The review of constitutionality may also be initiated on the proposal of local and regional councils and by any natural or legal person, but it is for the Court to decide whether the reasons are sufficient to initiate the proceedings in such cases (Constitutional Law 2002, Art. 38(1)).

The Court also has the power to initiate procedures for examining the compatibility of laws with the Constitution on its own, based on Article 38(2) of the Constitutional Law (2002). The Court has so far initiated constitutional review *ex officio* in only three cases,[17] which again indicates that the Court interprets its new power of constitutional review very restrictively and prefers those proceedings be initiated by the bodies mentioned previously. All three cases ended with a partial annulment of the law (substantive unconstitutionality). When the possibility to initiate constitutional review proceedings *ex officio* was introduced in 2002 (Constitutional Law 2002, Art. 38(2)), there were some fears that the Court would use this power to assume the role of legislator and decide on policy issues reserved for the Parliament (see Arlović 2014), but as the statistics show, this has not been the case.

This section highlights some important elements specific to the CrCC that inform the research design of this chapter. In line with the methodology of the JUDICON project, which focuses on rulings as the units of analysis, the analysis in this chapter is based on 869 rulings in 808 Court decisions in which the Court assessed the constitutionality of laws. It is already clear from these two figures that the majority of the Court's decisions contain only one ruling.

Unlike some other courts in the CEE region, the CrCC does not have the authority to make a constitutional interpretation *in abstracto*, nor can it declare a legislative omission. This position has been explicitly expressed in the Court's case law. However, an analysis of the Court's rulings reveals that in four cases the Court declared the compatibility of laws with the Constitution from the point of view that the legislator failed to prescribe something in the law. This happened in cases U-I-60/1991 and U-I-4463/2013, where the Court asked the Parliament to enact new laws based on the Court's findings, and in cases U-I-60/1991 and U-I-378/2016, where the Court itself ended up regulating something that the legislature had not regulated.

15 The working bodies of the Croatian Parliament are committees established by the Rules of Procedure of the Croatian Parliament. These are: the Delegation of the Croatian Parliament in the Parliamentary Assembly of the Council of Europe, the Delegation of the Croatian Parliament in the NATO Parliamentary Assembly, and the Delegation of the Croatian Parliament in the Parliamentary Assembly of the Organization for Security and Co-operation in Europe (OSCE).

16 Introduced by the 2002 Constitutional amendment.

17 See U-I-4220/2020, U-I-5735/2014, U-I-4113/2008.

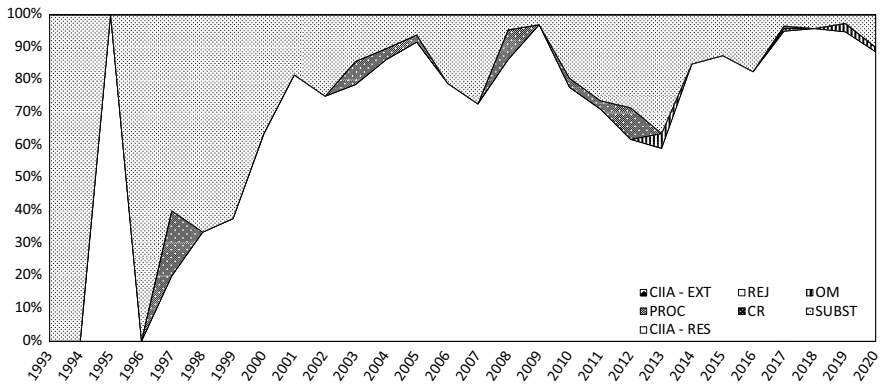

Figure 2.2 Frequency of the ruling types (1993–2020) (CrCC)

Note: REJ – Rejection/refusal, OM – Omission, PROC – Procedural unconstitutionality, SUBST – Substantive unconstitutionality

While constitutional requirements and constitutional interpretation *in abstracto* are completely absent from the Courts' practice, refusals/rejections and cases of substantive unconstitutionality are clearly favoured by the CrCC. In fact, during the period between 1990 and 2020, 82% of the rulings were rejected by the Court (see Figure 2.2). With a rejection rate of 82%, Croatia (with Ireland and Belgium) ranks in the top three compared to other countries covered by the JUDICON project (see Chapter 12).

The second most common type of rulings are cases of substantive unconstitutionality. These occurred in 16.3% of the cases decided by the Court. The Court first declared a law (or a legal norm) unconstitutional in 1993 and issued this type of ruling on average five times per year between 1993 and 2020. While it is true that the CrCC, especially in its early days, did not shy away from reviewing and overturning laws for unconstitutionality (Rodin 1997), this happens only very sporadically. When the Court reviews a law for constitutionality, it is highly likely to uphold the challenged law or its norm(s).

Based on the analysis, the CrCC declared substantive unconstitutionality in 16.3% of its rulings. However, the Court is more likely to resort to partial annulment of a legal norm than to order its complete annulment. Only in a total of 14 cases (6.2%) did the Court annul the entire law under review. This is not unusual. In all the countries covered by the JUDICON project, partial annulment is preferred to annulment of the entire law (see Chapter 12). Finally, in 1.2% of the cases, the Court declared unconstitutionality due to defects in the legislative process. In contrast to the cases of substantive unconstitutionality, the cases in which the Parliament violated the procedural rules when adopting the law are the most likely to result in the Court's decision to annul the entire law. This was the case in 80% of all cases of procedural unconstitutionality.

As far as temporal effect is concerned, CrCC decisions are enforceable immediately after their publication. This means that if the Court declares a law or provision unconstitutional, that law or provision ceases to have effect on the date of publication of the Court's decision in the Official Gazette, unless the Court specifies a different date (Constitutional Law 2002, Article 55). However, this exception to the *ex nunc* temporal effect is only available *pro futuro*, i.e. when the Court's decision takes effect at a later date. The Court seems to take the *pro futuro* exception seriously, because in only 16.3% of the unconstitutionality cases does the Court put the effect of the annulment in the future. As mentioned earlier, the Court does not have the power to declare a law unconstitutional with *ex tunc* effect (retroactively). Based on the wording of the Constitution and the Constitutional Law, the Croatian legislator does not recognize the retroactive effect (*ex tunc*) of declaring legal acts unconstitutional (see Arlović 2014; Omejec 2002). The CrCC may annul a law or its legislative act(s), but annulment (with *ex tunc* temporal effect) is reserved for other regulations (called "other acts" in Croatian law), which Parliament has limited to applying in only two situations: when the regulation violates the human rights and fundamental freedoms guaranteed by the Constitution, and when it unfairly discriminates against individuals, groups, or associations. However, the Court has the discretion to decide whether to annul (*ex tunc*) or simply repeal (*ex nunc*) a law.

Finally, prescriptions are not very common in CrCC jurisdiction. Only occasionally, and only in the context of rulings of substantive unconstitutionality (in a total of eight cases), did the CrCC issue a directive to instruct the Parliament to enact or amend a law.[18] Directives are much more urgent than simple recommendations because they are included in the headnote of the Court's decision. However, a more common practice of the Court when declaring a law unconstitutional is to issue a recommendation to the Parliament in order to guide or initiate legislative action in a certain direction.[19] This was done in a total of 13 cases.

2.3.2 Mapping the diversity of judicial rulings

This section will address the diversity of the Court's rulings, or rather, the lack thereof. The most common types of CrCC decisions are rejections. They account for the outcome of 82% of all constitutional review cases decided by the Court.

Substantive unconstitutionality with quantitative partial annulment, with *pro futuro* temporal effect and without any prescription (26 rulings in total) is also considered weak, as it gives the legislature time to solve the problems revealed by the Court (Pócza 2019). This is also true for rulings of procedural

18 See U-I-60/1991, U-I-673/1996.
19 E.g. U-I-1152/2000, U-I-5612/2011

unconstitutionality stipulating partial annulment and *pro futuro* effect (two rulings), although this combination of elements is very rare in the CrCC jurisprudence. Most rulings of procedural unconstitutionality end with a complete annulment of the law with *ex nunc* effect (16 rulings). These rulings can be considered medium-impact rulings, as they force the legislature to enact a new law. Medium-impact rulings also include cases of substantive unconstitutionality with quantitative partial annulment and *ex nunc* temporal effect and no prescription (167 rulings) or non-binding prescription (one ruling)

Only a handful of rulings of the CrCC can be considered strict. These include rulings of substantive unconstitutionality with quantitative partial annulment and *ex nunc* temporal effect and a binding prescription (three rulings) or a directive (three rulings), rulings of substantive unconstitutionality with complete annulment and *ex nunc* temporal effect (12 rulings) and a non-binding prescription (one ruling), and two rulings of substantive unconstitutionality with quantitative partial annulment and *ex tunc* temporal effect (which I already discussed).

Looking at the data, it can be concluded that the CrCC did not utilize a very broad range of measures to constrain the legislature. While the Court has the power to strike down laws for being inconsistent with the Constitution, it does so rarely (16.3% of rulings) and only with limited constraint on the legislature.

2.4 Trends in majority rulings

This section will examine majority rulings, with a particular focus on the strengths of majority rulings. Figure 2.3 reveals two tendencies. First, there were almost no cases of constitutional review in the early years of the CrCC's operation. Such a low workload after the establishment of a new court is not a peculiarity of the CrCC, but it occurs with any new judicial body (see Dyevre, Glavina, and Ovádek 2021). It took until the end of 1993, a full two years after its creation, for the Court to decide its first case on the compatibility of a law with the Constitution. There are two possible explanations for this development. First, according to the wording of the Constitutional Law (1991, 2002), constitutional review can only be initiated by a limited and privileged group of entities (see Section 2.2). Second, the possibility for the Court to repeal laws was still very new and unusual in Croatian constitutional history. Until 1990, this power was reserved exclusively for the legislature. It is therefore not surprising that it took until the early 2000s for constitutional review petitions to really get off the ground.

The early years of the Court's operation were also the Court's strongest years (see Figure 2.3). However, the peaks in 1993, 1994, and 1996 can be explained by what were in fact a small number of Court rulings. In these three years, the Court reviewed seven laws, and all seven were quashed as unconstitutional. The strength of the Court rulings went from seven in 1993 and 1994 to zero in 1995 because the Court upheld the constitutionality of a reviewed

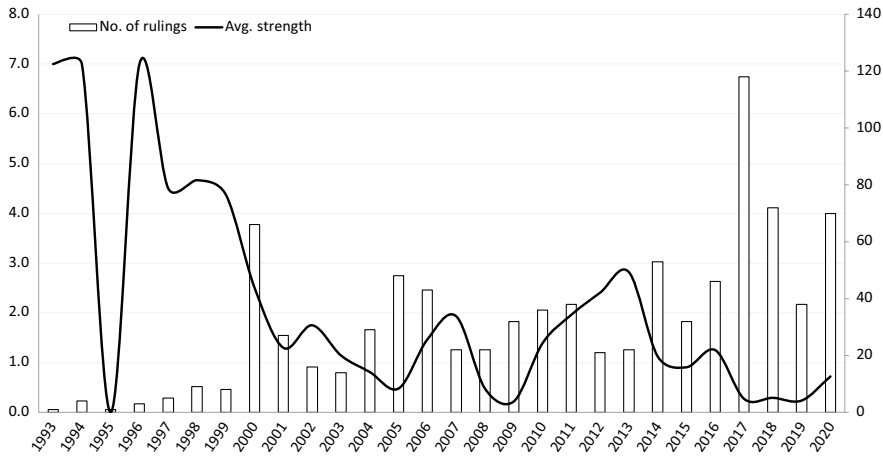

Figure 2.3 Number and average strength of rulings (1993–2020) (CrCC)

law in only one case in 1995. Despite the small number of rulings, in these early years the Court was more likely to strike down a law under review than to uphold it. In nearly three-quarters of the constitutional review cases decided from 1993 to 1999, the Court declared the challenged law unconstitutional (in 21 of 29 rulings). It is not surprising, then, that this piqued the interest of legal scholars such as Rodin, who wrote that the CrCC "has demonstrated its willingness to exercise its constitutional powers to strike down laws" (Rodin 1997, 75).

Looking at the four periods of Croatian constitutional history discussed in Section 2.2, the first period undoubtedly stands out as the strongest. However, this was also the period of the "state of emergency", during which the court focused primarily on preserving core constitutional values such as the rule of law, separation of powers, free elections, and a democratic multiparty system (see Omejec 2004). During this period, the CrCC found unconstitutionality in 72% of its rulings, although it actually proceeded very cautiously. Looking at the different elements of the judicial rulings, they were consistently cases of quantitative partial unconstitutionality, with *ex nunc* or *pro futuro* temporal effect and no prescription for the legislature. This is consistent with the picture painted by Barić (2016), according to which this early period of Croatian constitutional history was characterized by a cautious court that did not readily resort to the interpretive methods common in constitutional adjudication and whose decisions followed a standard legal scheme common at the appellate and Supreme Court levels (Barić 2016). This cautious approach of the Court in the first period of its operation can undoubtedly be attributed to the state of war in that period, when the legislature "expected no contestation of the unity of state power principle" (Barić 2016; Barić and Bačić 2011) and the Court met this expectation.

After the first period, a decline in the Court's average ruling strength can be observed, which can be explained by an increasing number of rejections and refusals. Since 2000, the number of rulings that ended in refusal or rejection has exceeded the rulings of substantive and procedural unconstitutionality. Although the early 2000s were marked by the election of a new left-wing government and by constitutional amendments that gave the Court more powers by expanding its competencies and increasing the number of judges from 11 to 13, this did not affect the strength of the Court's rulings vis-à-vis the legislature, which remained low throughout the second period (with the exception of 2007, when the Court issued proportionately more rulings of substantive unconstitutionality).

Although one would expect the change of government to trigger a conflict between the new centre-left majority and the centre-right Court, this did not happen. One explanation for the absence of conflict is that the victorious centre-left party (SDP) only won 43 seats and thus had to form a coalition to form a government.[20] This was also the first time since the country's independence that power had been shared between parties in a coalition. The centre-right party (HDZ), which held the majority in Parliament until the 2000 elections, still managed to secure 46 seats. Passing a new law requires a majority in the Parliament, while enacting and/or amending the Constitution and/or the Constitutional Act requires a two-thirds majority (Constitution 1990, Article 83(3)), which the new centre-left coalition, as a minority government (71 seats out of 151), did not have. Passing new legislation thus required a consensus between the centre-left and the centre-right, making the CrCC less likely to strike it down.

The average strength of the Court's rulings remained the same over the third period, although, as shown in Figure 2.3, it peaked in 2013, when the Court started using more prescriptions.[21] Finally, the period after 2016 is characterized by the Court's weakest stance yet toward the legislature. This period is also characterized by the highest percentage of rejections of cases by the Court since it was constituted (see Figure 2.2). It should be stressed, at the same time, that the fourth period has also seen an exceptionally high number of dissenting opinions, following the election of eight new constitutional judges, five of whom were nominated by the opposition. Thus, one possible explanation for the high percentage of rejections in the fourth period is the growing polarization at the Court, where the centre-right majority in the Court refrains from striking down the centre-right government's legislation due to the already existing attacks from the dissenting coalition of centre-left judges.

20 SDP (49 seats) formed a coalition with the Croatian Social Liberal Party (HSLS) (22 seats), Primorje Goranski Federation (PGS) (2 seats) and Slavonski-Baranja Croatian Party (SBHS) (one seat). See Državno izborno povjerenstvo Republike Hrvatske n.d.

21 The number of prescriptions are, however, not that high. The Court used them four times in 2013 and 2014, two times in 2015, and five times in 2016.

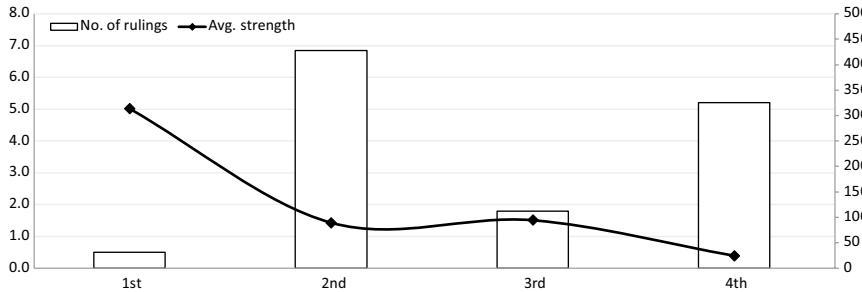

Figure 2.4 Average strength of rulings by courts (CrCC)

2.4.1 The role of presidents

The CrCC has had a total of six presidents, with Judge Željko Potočnjak serving only as interim president between December 2007 and June 2008. This occurred because neither of the candidates (Potočnjak and Omejec) received a majority of votes, which at the time was seven (Constitutional Law 2002, Article 6(7)). The judges agreed that Judge Željko Potočnjak would serve as interim president until all the judicial positions were filled (Jutarnji list 2007). His opponent, Judge Jasna Omejec, received a majority of votes in June 2008, becoming the first female President of the CrCC.

The average strength of rulings of the Presidents of the Court largely corresponds to the average strength of the rulings of the Court as a whole (compare Figures 2.5 and 2.3). Judge Jadranko Crnić was the most "powerful" of the presidents to date, having served during the Court's first constitutional period (1991–1999), when it exercised its powers the most.

Interestingly, before becoming the first President of CrCC, Crnić had been a judge of the Constitutional Court and President of the Constitutional Court of SR Croatia since 1984. One might think that the President's previous experience at the "socialist" Court would have informed the work of the CrCC in its early years, but this was not the case. The findings show that the CrCC, under the leadership of Crnić, was not afraid to use its newly gained powers to strike down parliamentary legislation as unconstitutional.

President Smiljko Sokol, Petar Klarić, and Željko Potočnjak entered office when the strength of the Court's ruling vis-à-vis the legislature was beginning to wane and the Court was more inclined to uphold the constitutionality of a challenged law. The strength of the Court's rulings rose again with President Omejec, who held the office the longest from 2008 to 2016. This was also the period when the Court moved beyond its cautious approach and began to issue more nuanced rulings, such as finding substantive unconstitutionality with *ex tunc* temporal effect (see U-I-3541/2015) and issuing prescriptions for the legislature. Although the Court's performance under President Omejec was, according to experts, the best since its establishment, she did not run

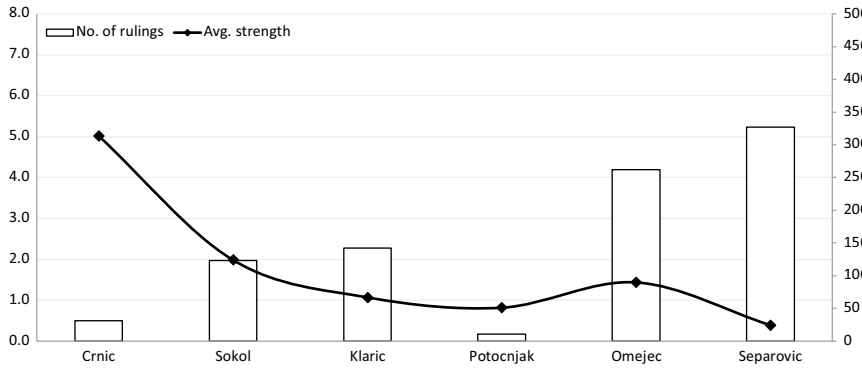

Figure 2.5 Average strength of rulings by presidents (CrCC)

for a third mandate following criticism by the media and the independent MOST political party (Jutarnji list 2016b). This suggests that the public or the opposition do not appreciate having a judge appointed by the centre-right political camp for too long as the President of the Court. Although the Constitutional Law does not contain a provision on the maximum number of mandates that the President of the Court may hold (see Constitutional Law 2002, Article 17), Judge Omejec was replaced as President of the Court by Judge Miroslav Šeparović in December 2016.

Another interesting observation is that none of the Presidents of the Court ever issued a dissenting opinion during their tenure.[22]

2.5 Trends in dissenting opinions

Although the possibility of writing a separate opinion was established in 1991 (Constitutional Act of 1991, Article 27 of 2000), the first three terms of the CrCC are characterized by an almost complete absence of both concurring and dissenting opinions. Even in cases involving high-stake constitutional issues, such as Case U-I-1397/2015 on the application of quotas for gender equality in the election of members of the Parliament (see Barić 2016), separate opinions were absent. This lack of separate opinions has been frequently criticized by scholars, who have argued that this is a result of the Court's internal agenda to provide a single voice that "ignores the very purpose of dissenting opinions in a constitutional democracy" (Barić 2016, 33). In Barić's words, it appears that the Court subscribes to the "passive virtues" of Chief Justice Roberts, who believes it is better to "speak with one voice by deciding

22 Judge Željko Potočnjak was the only Court president who has ever dissented from a majority vote, although that occurred one year prior to his appointment as an interim president.

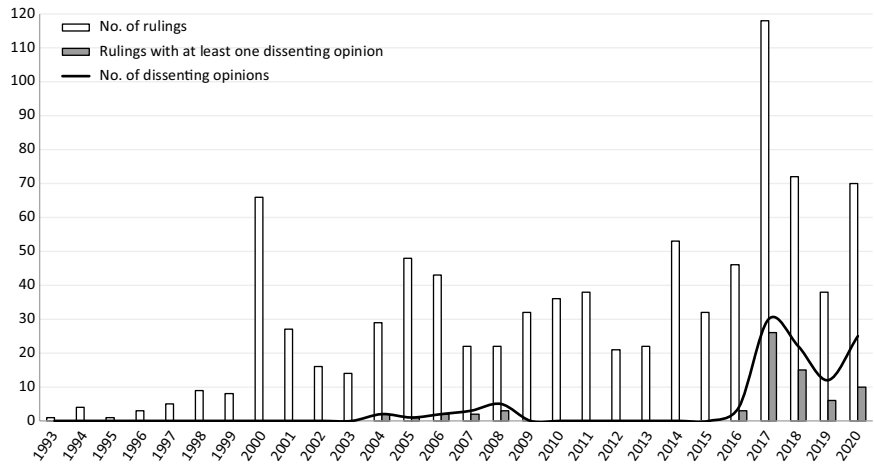

Figure 2.6 Number of rulings with at least one dissenting opinion (1993–2020) (CrCC)

cases 'on a narrow basis' than to issue bold opinions that conclusively resolve large legal issues" (Barić 2016, 33; Dorf 2006).

Looking at the data in Figure 2.6, it is clear that dissenting opinions emerged only from 2004 onwards, after the election of the new centre-left government in 2000 and nomination of three judges by it: Mario Kos, Agata Račan, and Nevenka Šernhorst. This was the first time that constitutional judges were not nominated by the centre-right government, which had held the majority in the Parliament since 1990. This led to a political polarization of the Court and several new developments in its decision making. Although most judges dissented only once during this period,[23] this was not true of the centre-left nominee, Agata Račan, whose dissenting opinions accounted for more than a third of all those written during the whole period of 2004–2008.

Moreover, two dissenting coalitions groups developed between centre-right nominated judges during this period: the first between Radolović, Krapac, and Babić, and the second between Klarić and Rajić (see Figure 2.7). However, it is important to emphasize that these judges formed a coalition only once: in the first case regarding the privatization law (U-I-834/2004) and in the second case in connection with investments (U-I-4120/2003). In contrast to the dissenting opinions of the nominated centre-left judge Agata Račan, who frequently criticized the Court for failing to recognise unconstitutionality[24] or denounced the Court for overstepping its constitutional limits and acting as

23 Mario Kos, Željko Potočnjak, Milan Vuković, Petar Klarić, Emilija Rajić, Aldo Radolović, Davor Krapac, and Marko Babić.

24 See U-I-2788/2003, U-I-3851/2004, U-I-1201/2006.

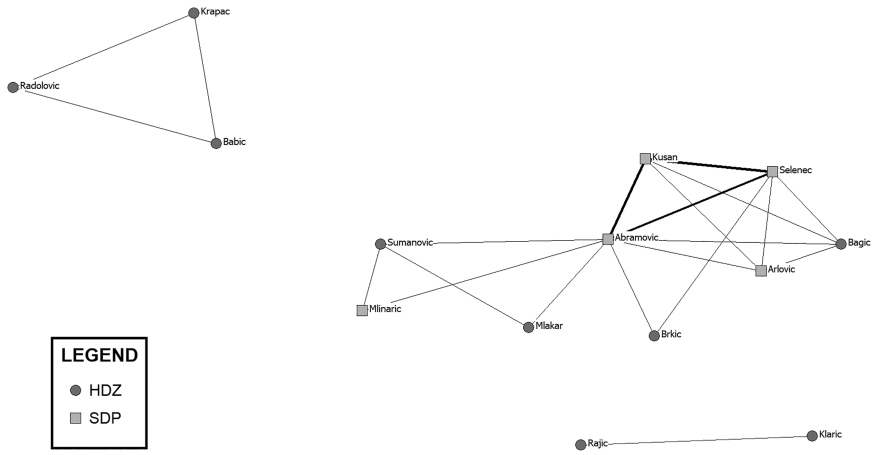

Figure 2.7 Dissenting coalitions (1993–2020) (CrCC)

a legislator (see U-I-928/2000), the dissenting opinions of the centre-right judges did not pose a serious threat to the centre-right majority in the Court.

The real surge in dissenting opinions occurred after 2016, more specifically after 7 July 2016, when eight new judges took office after a politically arduous six-year process (see Section 2.2.2). As a result of five judges being appointed by the centre-left opposition, the period between 2016 and today has witnessed an increase in the number of dissenting opinions, led predominantly by a coalition of left-wing judges: Andrej Abramović, Goran Selenec, and Lovorka Kušan (see Figure 2.7). These three judges formed a dissenting coalition a total of 11 times. Based on Figure 2.7, it can be seen that Judge Andrej Abramović is the most involved judge of the CrCC. He dissented a total of 51 times – accounting for 19% of his rulings (see Table 2.1) – and formed dissenting coalitions with both centre-left (Selenec, Kušan, Arlović, Mlinarić) and centre-right judges (Šumanović, Mlakar, Brkić, Bagić).[25]

Does party affiliation matter when it comes to expressing a different opinion? I used a one-way analysis of variance (ANOVA) to test the effect of the judge's nominating party on the likelihood of them holding a dissenting opinion. A one-sided ANOVA test was used for groups of data to examine the relationship between the dependent and independent variables. I used two

25 The coalitions between centre-left and centre right judges are, in general, diverse and have no common theme. For example, Left- and right-wing nominated judges formed a coalition on the issues such as arguing that the Court has the competence to assess the constitutionality of international agreements (U-I-1596/2012), that the Court has no competences in other areas (U-I-252/1996), that there is no legal basis for the constitutionality review (U-I-2854/2018), or arguing in favour of substantive unconstitutionality (U-I-4613/2015).

Table 2.1 Number of dissenting opinions per judges

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

different dependent variables. The first one is whether the judge has ever expressed a dissenting opinion (dummy variable, where 1 represents judges who have expressed a dissenting opinion and 0 represents judges who have never expressed a dissenting opinion), and the second one is the number of dissenting opinions (numeric variable), which indicates how often a judge has expressed a dissenting opinion. As an independent variable, I used a judge's party affiliation based on the party nominations or newspaper articles about the judges' political preferences.[26] For more details see Table 2.1.

The results of the ANOVA test show that judges appointed or nominated by the left-wing party (SDP) are more likely to dissent. This finding is statistically significant at a 0.05 level.[27] When the number of dissenting opinions is used as an outcome variable, this result becomes statistically significant at the 0.001 level.[28] The difference between the number of dissenting opinions written by judges appointed by the centre-right (HDZ) and those appointed by the centre-left (SDP) is illustrated in Figure 2.8.

26 Note that, although CrCC judges may not belong to a political party and may not publicly express his support for a political party (Constitutional Law 2002, Art.16), at least one-third of all the judges who sat in the Court were, prior to their appointments, publicly known members or supporters of active political parties in Croatia (see Barić 2016, and the website of the CrCC).

27 One-way ANOVA test $p < 0.048$ **

28 One-way ANOVA test $p < 0.0044$ ***

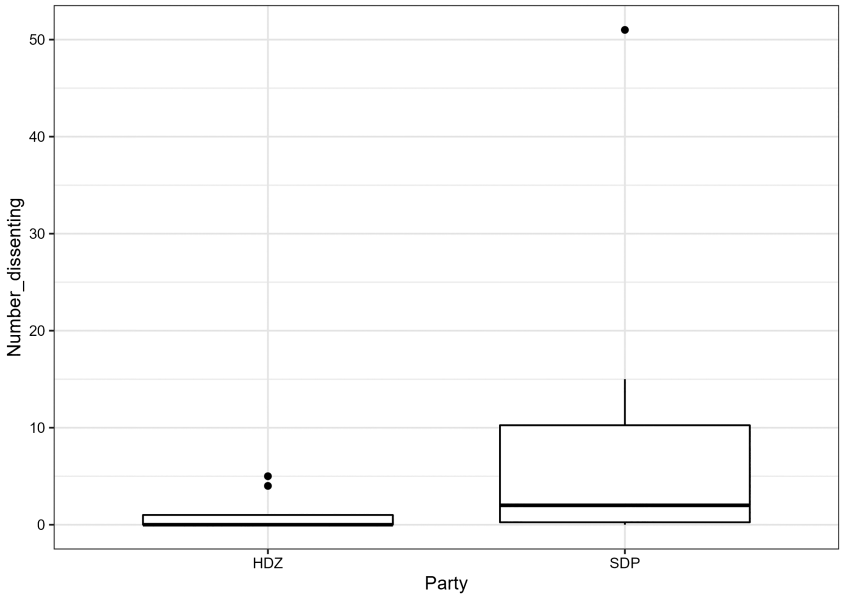

Figure 2.8 Number of dissenting opinions and party affiliation (1993–2020) (CrCC)

The academic literature on judicial politics has generally confirmed the role of ideology, attitudes, and policy preferences in constitutional courts' voting behaviour (Hanretty 2012; Hanretty 2013; Pellegrina and Garoupa 2013; Hönnige 2007; Bricker 2017). While the judicial decision-making process cannot be reduced to politics alone (Epstein and Knight 2013; Epstein, Landes, and Posner 2013; Glavina 2020), it is clear that ideology and politics play a role in the CrCC. This finding also supports the thesis in the literature that dissenting opinions are more likely when there are greater ideological differences between the judges in a court (Bricker 2017).

I also examined the role of other variables. The literature suggests that judges disagree somewhat infrequently because doing so comes at a cost to collegiality for the other judges sitting on the same panel and entails harder work (Posner 2008). Dissent also comes at a cost to one's reputation because dissenting judges are less popular with their colleagues, which ultimately affects internal job satisfaction (Epstein, Landes, and Posner 2013). For this reason, risk- and conflict-averse judges are less likely to dissent (Dumas 2010). Because women tend to be more risk-averse than men (Jianakoplos and Bernasek 1998), gender may play a role in the likelihood of dissent. In addition, research shows that age is also a potentially important variable: judges appointed at younger ages have less experience and training (Choi et al. 2011). They are also more likely to use the court as a springboard for their future careers and not to want to agitate the ruling party, in order to secure

another appointment (Kerby and Banfield 2014). Research also suggests that judges appointed to the court from academic positions are more likely to write a dissenting opinion because they play a more important role in influencing legal developments (Lasser 2004; Caenegem 1993). On this basis, I examined the role of gender (dummy variable), age at the time of appointment (numeric variable), and whether a judge had pursued an academic career prior to appointment (dummy variable). In addition, to test whether presidents of the Court are less likely to dissent (Barić 2016), I tested whether a judge has served as President of the Court (dummy variable). Finally, I analysed whether judges who have had an international education are more likely to dissent. This is because judges who have received part of their education abroad are more likely to be exposed to different practises of constitutional courts. The result of the ANOVA test shows that gender[29] and age[30] have no bearing on the probability of dissenting. Furthermore, in line with the results reported by Bricker (2017), I found no support for the role of an academic career:[31] judges with academic backgrounds are no more likely to dissent than judges with legal or political backgrounds. I also found no evidence to suggest that court presidents are less likely to dissent. However, international training does seem to play a role. Judges who carried out part of their training abroad are more likely to write a dissenting opinion than judges who received all of their education in Croatia, although this effect is significant only at the 0.5 level.[32] Based on this, I can conclude that ideological differences among the judges are the most important driver of the dissenting behaviour in the CrCC.

2.6 Conclusion

In this chapter, I have examined the extent to which the CrCC has limited the legislature's room for manoeuvre in Croatia and whether the CrCC lived up to expectations of becoming a potentially powerful court, as Rodin predicted in 1995.

Several conclusions can be drawn from the results of my analysis. First, unlike several other CEE constitutional courts that developed a strongly activist approach after the fall of the communist regime, the CrCC's approach in the 1990s was very moderate. Faced with an imminent war in which the political leadership expected no challenge from other branches of government, the Court held back from adopting a very activist approach. Characteristic of the Court's practice in the first period were self-restraint, the formal style of interpretation of constitutional provisions, and an uncritical attitude on the part of the judges.

29 One-way ANOVA test $p < 0.974$
30 One-way ANOVA test $p < 0.962$
31 One-way ANOVA test $p < 0.374$
32 One-way ANOVA test $p < 0.0307$*

Second, the strength of the Court's rulings declined significantly around the turn of the millennium and remained at a low level during the remaining three periods. This trend, however, is due to a high number of rejections. In no less than 82% of the cases, the Court rejected the constitutional review request, mainly because it considered the challenged law or provision(s) to be fully constitutional. This casts doubt on the description of the potentially powerful court and may indicate that the remnants of the socialist legacy are still visible in terms of the dominance of the legislature in Croatia, even after the democratic transition.

Third, I concluded that the CrCC did not use a very broad range of measures to constrain the legislature. Notwithstanding its newly acquired power to strike down laws for being inconsistent with the Constitution, the Court has done so only rarely (in 16.3% of the rulings) and only with limited constraint on the legislature (e.g. partial annulment, *ex nunc* or *pro futuro* temporal effect, and no prescriptions).

In sum, while the CrCC was established as a potentially powerful court, its influence on the legislature is only average in strength. Given that three-quarters of all rulings in the 1990–2020 period were rejections, I argue that the Court has failed to live up to expectations and, instead of becoming a "potentially powerful court," has become a "court of rejection." With the increasing trend of dissenting judges arguing against the refusal of the petitions and in favour of substantive or procedural unconstitutionality, together with greater ideological differences in the Court, this may change in the future. However, it is unlikely that only a handful of activist judges will change the rules of the game.

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