Supplementary material to the article: ‘Constitutional Referrals: A Platform for Judicial Dialogue and Another Toolkit for Judicial Resistance?’, European Constitutional Law Review (2024).

Michal Kovalčík, Judicial Studies Institute, Masaryk University

CC BY 4.0

**Appendix – Codebook for the Content Analysis**

All judicial opinions examined at the macro level of the analysis were hand-coded in line with this codebook. The dataset here includes all submissions by ordinary courts and following rulings of the Czech Constitutional Court issued during the era of the so-called Zeman’s Constitutional Court (2014-2022).Since I focus on the content of judicial opinions, I exclude rulings without any substantive argumentation. Therefore, the dataset encompasses only judgments on merits *(nálezy),* quasi-substantive decisions *(usnesení)* that dismiss a petition as manifestly ill-founded, and decisions that dismiss a petition because the court was not authorised to refer. In all of these types of rulings, an exchange of arguments on the substance or at least on the eligibility of the ordinary court to refer can be anticipated. Therefore, the sample consisted of 70 submissions by ordinary courts and 70 subsequent rulings by the Czech Constitutional Court. I conducted a content analysis of all these judicial opinions. Every category is designed as binary, i.e. either the examined phenomenon is present or not. All output data were subsequently analysed using descriptive statistics (frequencies and crosstabs).

*A. The following categories were coded in the ordinary courts’ submissions:*

**1. Argumentation of constitutional principles**

*Values:*

1 – an absence of argumentation of constitutional principles

0 – a presence of argumentation of constitutional principles

*Explanation:*

By arguing of constitutional principles, I mean that the ordinary court directly refers to constitutional principle and/or use the principle in its argumentation. I employ a broad definition of constitutional principles as fundamental values, abstract rules and guidelines emanating from the constitution and permeating many of its provisions. Constitutional principles go beyond a particular provision of the constitution. Examples of principles are democracy, the rule of law, separation of powers, equality, judicial independence, subsidiarity or proportionality. For instance, if the ordinary court conducted (at least partially) a proportionality test, it was assessed as the presence of the argumentation of principles.

**2. Reference to the case law of the Czech Constitutional Court or the European Court of Human Rights**

*Values:*

1 – an absence of reference ta case law of the CCC/ECtHR

0 – a presence of reference (at least one) to case law of the CCC/ECtHR

*Explanation:*

The reference is present if an ordinary court refers to a specific ruling of the CCC or ECtHR. Mere reference to case law in general is not sufficient and is evaluated as an absence of reference.

**3. Reference to constitutional scholarship**

*Values:*

1 – an absence of reference to constitutional scholarship

0 – a presence of reference (at least one) to constitutional scholarship

*Explanation:*

The reference is present if the ordinary court refers to scholarly writing dealing with the constitutional issue at hand. Therefore, it does not necessarily have to be written by a scholar specialised in constitutional law or writing dealing specifically with the Constitution or the Charter of Fundamental Rights and Basic Freedoms. For example, an argument underpinned by reference to a commentary on the Criminal Code that addressed a constitutional issue was considered a reference. Similarly, reference to writings on the ECHR unfolding principles with overlaps to Czech constitutional principles (e.g. judicial independence, legitimate expectation) was considered as a presence of reference.

*B. In the Constitutional Court’s rulings, following category was coded:*

**Discursive style of reasoning**

*Values:*

1 – at least one direct response to the ordinary court’s argument

0 – an absence of direct response to the ordinary court’s argument

*Explanation:*

Given the research question, it is crucial whether the CCC dealt with the arguments of the ordinary court about the constitutional issue at hand, took them into consideration and provided answers to them: in other words, whether the CCC entered the dialogue. I label this a discursive style of reasoning. At least one direct reaction and subsequent contemplation on the argumentation of the ordinary court constitutes a discursive style of reasoning. If the CCC put forward its own arguments without direct reference to the arguments of the ordinary court, it is considered an absence of a discursive style of reasoning.

*C. Tables with results at the meso level*

**Table 1 – Relationship between argumentation of constitutional principles and discursive style**

|  |  |  |
| --- | --- | --- |
|  | **Discursive style** | **Total** |
| No | Yes |
| **Constitutional principles** | No | Count | 10 | 16 | 26 |
| % within Constitutional principles | 38.5% | 61.5% | 100.0% |
| % within Discursive style | 40.0% | 35.6% | 37.1% |
| Yes | Count | 15 | 29 | 44 |
| % within Constitutional principles | 34.1% | 65.9% | 100.0% |
| % within Discursive style | 60.0% | 64.4% | 62.9% |
| **Total** | Count | 25 | 45 | 70 |
| % within Constitutional principles | 35.7% | 64.3% | 100.0% |
| % within Discursive style | 100.0% | 100.0% | 100.0% |

**Table 2 – Relationship between reference to the case law and discursive style**

|  |  |  |
| --- | --- | --- |
|  | **Discursive style** | **Total** |
| No | Yes |
| **Refers to the CCC/ECtHR case law**  | No | Count | 8 | 13 | 21 |
| % within Refers to case law CCC, ECtHR | 38.1% | 61.9% | 100.0% |
| % within Discursive style | 32.0% | 28.9% | 30.0% |
| Yes | Count | 17 | 32 | 49 |
| % within Refers to case law CCC, ECtHR | 34.7% | 65.3% | 100.0% |
| % within Discursive style | 68.0% | 71.1% | 70.0% |
| **Total** | Count | 25 | 45 | 70 |
| % within Refers to case law CCC, ECtHR | 35.7% | 64.3% | 100.0% |
| % within Discursive style | 100.0% | 100.0% | 100.0% |

**Table 3 – Relationship between reference to literature and discursive style**

|  |  |  |
| --- | --- | --- |
|  | **Discursive style** | **Total** |
| No | Yes |
| **Refers to scholarly literature** | No | Count | 21 | 37 | 58 |
| % within Refers to scholarly literature | 36.2% | 63.8% | 100.0% |
| % within Discursive style | 84.0% | 82.2% | 82.9% |
| Yes | Count | 4 | 8 | 12 |
| % within Refers to scholarly literature | 33.3% | 66.7% | 100.0% |
| % within Discursive style | 16.0% | 17.8% | 17.1% |
| **Total** | Count | 25 | 45 | 70 |
| % within Refers to scholarly literature | 35.7% | 64.3% | 100.0% |
| % within Discursive style | 100.0% | 100.0% | 100.0% |