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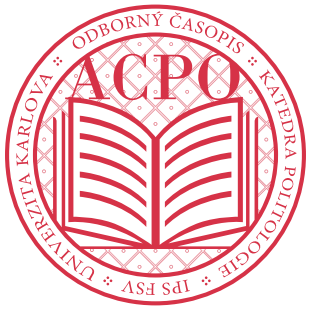

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Equality, Proportionality and the Constitutionality of the Czech Electoral System

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Abstract:

In February 2021, the Constitutional Court of the Czech Republic struck down key elements of the electoral system that had been in place for almost twenty years. Departing from the deferential tendency of most of its election case law, the Court ruled that the use of the D'Hondt highest average method and a scaled threshold for electoral alliances violated constitutional principles of proportionality and equality. This article offers a critical reading of the Court's reasoning, which did little to explain the departure from the line taken in earlier challenges to the electoral system but also refused to rethink the longstanding acceptance of the five-percent threshold as a constitutionally acceptable infringement of equality. This article also shows that the legislature chose a replacement for D'Hondt that would not be expected to result in a more proportional outcome, as was confirmed by the results of the October 2021 elections for the Chamber of Deputies. The article concludes that the decisions of the Court and the legislature leave the new electoral system open to future legal challenges.

Key words: *Czech Republic; electoral systems; election law; constitutional courts; judicial review; bad faith; proportional representation; D'Hondt; Imperiali*

Introduction

On 2 February 2021, the Constitutional Court of the Czech Republic struck down key elements of the electoral system that had been in place for almost twenty years.[2] Departing from the deferential tendency of most of its election case law, the Court ruled that the use of the D'Hondt highest average method in fourteen multi-seat districts and a scaled threshold for electoral alliances violated constitutional principles of proportionality and equality. This article offers a critical reading of the Court's reasoning, which did little to explain the departure from the line taken in earlier challenges to the electoral system but also refused to rethink the longstanding acceptance of the five-percent threshold as a constitutionally acceptable infringement of equality. This article also shows that the legislature chose a replacement for D'Hondt that would not be expected to result in a markedly more proportional outcome, as was confirmed by the results of the October 2021 elections for

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[2] The decision, Pl. ÚS 44/17, was promulgated without the dissenting opinion on 10 February 2021 as č. 49/2021 in the state's legal gazette *Sbírka zákonů*, Part 23, pp. 546-596. The Constitutional Court decisions referred to in this article can also be found on: <https://nalus.usoud.cz/Search/Search.aspx>.

the Chamber of Deputies. The article concludes that the decisions of both the Court and the legislature leave the new electoral system open to future legal challenges.

The Constitutional Court's objections and expectations

The Constitutional Court's decision was long in the making, having started in December 2017 with a motion filed on behalf of 21 senators, mostly from the Christian Democrats (KDU-ČSL) and the Mayors and Independents movement (STAN), by attorney Stanislav Polčák, himself a deputy chairman of STAN, a member of the European Parliament and former member of the Chamber of Deputies.[3] Polčák worked within terms set by the Constitutional Court in its landmark 1997 decision on the electoral system (Pl. ÚS 25/96) and by the textbook on constitutional law written by Jan Filip, who had a special interest in the electoral system and, by chance, would be assigned to serve as the judge-rapporteur in this case. In the brief, the combination of D'Hondt, fourteen multi-seat districts of varying magnitude, and the additive threshold for electoral alliances (ten percent for two parties, fifteen percent for three, and twenty percent for four or more parties) was objected to in several ways, as a violation of the "*principle of equality of votes*", of the "*principle of equality of the weight of votes*", of the "*principle of equality of the weight of voters' votes* [or voices] ", of – and here Polčák utilized expressions in English – "*one vote, one value*" and "*equal voting power*". The gist of the motion was that the low-magnitude districts diluted the votes of supporters of parties that were large enough to clear the formal five-percent threshold, as shown by tables setting out the big differences in the numbers of votes per seat per party (19,232 per seat won by ANO versus 43,693 votes per seat won by STAN in 2017) and the resultant over- and under-representation of those parties (ANO, it was argued, had fifteen more seats than it should have had, and STAN had five fewer). This disparity was said to discriminate against those parties and violated the constitutional requirement of proportional representation (notwithstanding the deviation caused by the five-percent threshold, which Polčák did not question). For good measure, the brief also argued that the system used since 2002 violated the constitutional guarantees of equal access to public office, the free competition of parties, and the protection of minorities.

STAN and KDU-ČSL were just the latest in a line of parties that had tried since the mid-1990s to get the court to strike down electoral rules on the grounds that they violated the equality and proportionality provisions in the Czech constitution. In very similar cases brought by a group of senators after the 2006 elections (Pl. ÚS 57/06) and by the Pirate Party after the 2013 elections (Pl. ÚS 2/14), the Court had rejected the challenges on the grounds that the equality at issue was relative: while one person was entitled to one vote, there was no right to an equal impact on the outcome of the election. Furthermore, the Court had argued in those previous cases, the electoral system had to not only represent, but also integrate, ensuring that the resulting legislature was functional and able to produce a working majority and stable government. The opinion in the Pirates case stated that "*it truly is not the ambition of the Constitutional Court to change the current electoral system*" (paragraph 25), as it did not strike them as an outlier in need of correction. Indeed, if we consider Czech elections' disproportionality scores since 2002 on Gallagher's least-squares index (which takes into account all the votes cast for all parties, not just those for

[3] The text of the brief can be found on the STAN website at <https://www.starostove-nezavisli.cz/info-a-media/tiskove-zpravy/senatori-volebni-system-potrebuje-revizi-deformuje-volby> (accessed 2021-12-28).

parties that were eligible for seats), they ran higher than in some countries using proportional representation (such as Austria, Denmark, or Sweden), but were comparable to those in others, such as Chile, Costa Rica, Croatia, Poland and Spain. What is most striking is that Czech scores tracked fairly closely to Slovakia's, even though Slovakia had a single national district for all 150 seats, used Hagenbach-Bischoff instead of D'Hondt, and had a less severe threshold for alliances (seven percent for a two- or three-party alliance, and ten percent for four or more) – all of which should have minimized disproportionality.

Table 1: Disproportionality scores from Gallagher (2021)

Czechia	Slovakia	Chile	Costa Rica	Croatia	Poland	Spain
5.73 (2002)	5.53 (2006)	5.17 (2001)	4.53 (2002)	7.58 (2007)	6.97 (2005)	6.93 (2011)
5.72 (2006)	7.46 (2010)	7.08 (2005)	7.13 (2006)	12.31(2011)	4.67 (2007)	6.07 (2015)
8.76 (2010)	9.77 (2012)	5.65 (2009)	4.96 (2010)	7.07 (2015)	5.95 (2011)	5.37 (2016)
6.12 (2013)	6.10 (2016)	8.04 (2013)	6.23 (2014)	5.92 (2016)	12.56 (2015)	5.52 (2019)
7.21 (2017)	12.37(2020)	7.22 (2017)	9.57 (2018)	7.47 (2020)	6.60 (2019)	6.36 (2019)

Note: The closer to 0, the more proportional the system. The most proportional elections in Gallagher's data set are South Africa 1999 (0.28) and 2004 (0.26).
***Source**: Author.*

In the February 2021 decision (Pl. ÚS 44/17), the Court sidestepped the fact that only seven years had elapsed and only one general election had taken place since the Pirates case. There was no direct confrontation with the reasoning in the Pirates case, no grounds offered for why the court now understood equality or proportionality any differently than in the past.[4] Instead, the opinion in Pl. ÚS 44/17 (especially in paragraph 62) strove to justify the Court's role in the electoral process as a safeguard to determine "*whether the legislator (the majority in the legislature) abused their position and acted in bad faith even if they justified their action with a legitimate aim*". The idea of "bad faith" came from a *Harvard Law Review* article by David Pozen (this appears to be the only time this article has been cited by the Court). Pozen tries to distill what "bad faith" can mean across many fields of law, and finds a common thread of dishonesty, disloyalty, duplicity, opportunism and insincerity on the part of an actor:

> *Classic formulations of legal bad faith look to the actor's state of mind and, above all, to her honesty and sincerity. "Subjective" bad faith may involve the use of deception to conceal or obscure a material fact, a malicious purpose, or an improper motive or belief, including the belief that one's own conduct is unlawful* (Pozen 2016: 892).

Pozen finds that American courts have in fact rarely looked for evidence of bad faith in their structural jurisprudence and "*ignore both legislative and executive motives in practice if not also in theory*", even where it would be especially appropriate, such as in partisan gerrymandering cases (Pozen 2016: 905, 906). They do so for the simple reason that it

[4] On equality in the earlier cases, see Williams (2005); Antoš (2008); Charvát (2012); Kašpar, Stehlík (2013). In Pl. ÚS 44/17, the Court noted in section II.a. on admissibility that Pl. ÚS 57/06 and Pl. ÚS 2/14 had the status of procedural rulings (*usnesení*) rather than judgements on the merits (*nálezy*), and thus were not binding to the same degree as legal opinions; I am indebted to one of the reviewers for pointing this out.

would be politically risky to accuse another branch of government or a political party of dishonest opportunism or to undermine confidence in the system of government, of which the judiciary is an integral part (Pozen 2016: 911).

Nevertheless, the Czech Constitutional Court was confident that suspicion of legislative "bad faith" had lain behind its own intervention twenty years earlier (Pl. ÚS 42/2000) to strike down a proposed package of changes to the electoral system that would have carved the country into 35 districts with an average magnitude of 5.7 while applying a modified initial D'Hondt divisor, probably resulting in disproportionality scores over 20, and thus more akin to France under its two-round majority-plurality system (Crawford 2001; Klíma 2001: 108-148; Birch, et al. 2002: 82; Roberts 2003). Even if they had not featured explicitly in the Court's decision at the time, "*the subjective motives of the actions of the actors of political life are usually included under the concepts of pursuing a legitimate aim, appropriateness and necessity in the test of proportionality of public intervention, or in a possible assessment of a gross violation of parts of the constitutional order*" (paragraph 62 of Pl. ÚS 44/17). Turning to the instant case, the Court announced that the changes made to the electoral system in 2002, *no less than* the ones enacted in 2000 and struck down by the Court in Pl. ÚS 42/2000*,* had been a "*significant step backwards (and an exemplary example of 'bad faith'*[…]*) as opposed to efforts to achieve the best reflection of the proportion of political parties' strength across the state* […]" (paragraph 91 of Pl. ÚS 44/17). This was a major allegation, but one unsupported by any legislative history that would shed light on the motives and intent of the parties involved in passing the 2002 amendments, which had been crafted to take into account the Court's decision in Pl. ÚS 42/2000 and passed with the support of 151 of 178 deputies and 52 of 74 senators present, as the Court itself had pointed out in its 2009 decision (Pl. ÚS 57/06, paragraph 12; see also Birch, et al. 2002: 84-85; Novák, Lebeda et al. 2004; Charvát 2013: 120-127). Nor does the Court explain why the state of mind of legislators in 2002 should still matter two decades later, considering how much the party system changed after the 2010 election introduced "*a period of extreme and polarized pluralism with multipolar logic*" (Balík; Hloušek 2016:114; see also Haughton, Havlík 2018).

Despite its length, the majority opinion in of Pl. ÚS 44/17 did a poor job of explaining why it targeted the D'Hondt formula – the most commonly used in the world for proportional representation (Bormann, Golder 2013: 366) and one to which the Court had had no objection in 2009 (Pl. ÚS 57/06) – but let stand the use of the fourteen regions as the multi-seat districts of varying magnitude, given how much the latter had been the subject of the Polčák motion (Antoš, Horák 2021: 547). Probably the least well explained part is section IX.f, dealing with the scaled threshold for electoral alliances. The scale was introduced in the 2000 package of reforms, questioned but allowed by the Court in 2001, and retained in the 2002 legislation. As this section of the decision unfolds, it seems that the Court will continue to allow it, even if it was suspected to be the product of "bad faith" lawmaking and had not performed its ostensible function of discouraging party fragmentation. After side tours into other countries' experience with apparentment and the single transferable vote, the section abruptly concludes that the current rules on coalitions are "disproportionate and inconsistent" and need to be struck down. The Court makes clear, however, that this judgement does not apply to the less severe scaled threshold that was in effect in 1992-1998.

It is hard to avoid the impression that what had changed after the Pirates case was not the electoral system's workings but the composition of the Court itself. Of the fifteen

judges on the Court in February 2021, only eight had been serving on it seven years earlier, and of the seven new judges, six voted in favor of the petitioning senators, including Vojtěch Šimíček, a leading expert on election law from his time as chair of the Supreme Administrative Court's bench for disputed elections. This allowed the rapporteur judge, Jan Filip, to build a majority of eleven around positions staked out in dissents in the Pirates case by Judge Kateřina Šimáčková and in a 2015 case on the five-percent threshold for elections to the European Parliament (Pl. ÚS 14/14) by Judges Šimáčková and Šimíček. As for timing, more than three years after Polčák's brief had been filed, the decision seemed intended to spur the legislature into acting on a reform bill filed by KDU-ČSL in late 2019.

The legislative response to the Court's decision

Pozen warns that the idea of "bad faith" may not help courts communicate the remedy to a defect: "*The language of bad faith is not only uncomfortably pejorative in constitutional adjudication but also unhelpfully imprecise; it vilifies specific malfeasants without in many cases providing generalizable guidance for their successors or a clear pathway back to legality*" (Pozen 2016: 912). The uncertainty of what adjustments had to be made to bring the electoral system into conformity with the constitution then combined with the need – as in 1990 and 2002 – to legislate under the acute time pressure of an approaching election. In response, informal agreement was soon reached on a conservative set of changes, as summarized by Kateřina Valachová (chair of the Chamber of Deputies' standing commission for the constitution), "*so that we minimize the interventions in the electoral rules and fill in only what was voided by the constitutional ruling*".[5]

Unsure what exactly was required to meet the Constitutional Court's expectations of equality and proportionality, the interior ministry drafted a bill (Chamber file 1170) with two variants for the legislature to consider.[6] The first would retain the fourteen multi-seat districts, with mandates awarded to parties through a national Hare quota (votes/seats), as the earlier KDU-ČSL bill had proposed. The second would treat the whole country as a single district, with mandates awarded to parties through a national Hagenbach-Bischoff quota (votes/[seats + 1]). In both variants, unfilled seats would be allocated to parties based on largest remainders (the closest a party came to meeting the quota), and the legal thresholds were set at five percent for a single party, seven percent for an alliance of two parties, nine percent for three parties, and eleven percent for four or more parties. While some disproportionality would still arise owing to the legal and natural thresholds, the replacement of D'Hondt by either Hare or Hagenbach-Bischoff would be expected to result in more proportional outcomes.

Even before the bill received its first reading, it was clear that neither variant would be adopted as presented. As a result of preliminary talks among the parties and between the parliament's two chambers, it was agreed that a simpler threshold for alliances would be introduced (eight percent for two parties, eleven percent for three or more). Most parties inclined to keeping the fourteen regions as multi-seat districts, as long as the effects of low magnitude were offset by a second tier based on largest remainders; only the largest

[5] Her remarks during the second reading of File 1170 in the Chamber of Deputies on 25 March 2021 can be found at <https://www.psp.cz/eknih/2017ps/stenprot/087schuz/s087355.htm#r6>.

[6] The text of the file and its legislative history can be found on the Chamber of Deputies website at <https://www.psp.cz/cgi-bin/win/sqw/historie.sqw?o=8&T=1170> (accessed 2021-12-22).

party in the Chamber of Deputies, ANO, preferred a single national district, or splitting the country into two big districts based on Bohemia and Moravia-Silesia. Representatives of other parties were able to defeat this idea by reference to Slovakia, where use of a single district has tended to result in excessive recruitment of candidates from Bratislava (Charvát 2017), although it could have been countered that in Israel and the Netherlands the bias toward major metropolitan areas is mitigated by the special interest that parties take in competitive or symbolically important peripheries (Latner, McGann 2005).

When the bill moved from its first reading in the Chamber of Deputies to the committee stage, an important change was introduced by the chair of the constitutional law committee, Marek Benda (Civic Democratic Party), during its meeting on 17 March 2021. At around minute 16:40, he suggested that instead of either Hare or Hagenbach-Bischoff, the national quota for seats should be set using the Imperiali method (votes/[seats + 2]).[7] No explanation was offered for using a formula with no recent history in Czech electoral practice, and associated almost exclusively with Italy during its First Republic (1948-1992). It was used in Ecuador in two national elections (2006 and 2009), in response to a similar situation in which their constitutional court had found that D'Hondt without a compensatory second tier unduly favored large parties at the expense of minorities. But it lasted there only until 2013, when Ecuador reverted to D'Hondt with a second tier and then to the Sainte-Laguë highest average system in 2019 (Mustillo, Polga-Hecimovich 2018: 132; Shugart 2019). In the literature on proportionality, Imperiali has a reputation as a friend of larger parties, because it lowers the quota for a seat and "*makes it more likely that all the seats will be awarded at the first stage and no remainders will be rewarded. Smaller parties will thus be disadvantaged*" (Gallagher 1992: 472). Gallagher (1992: 491) also warned of the propensity of parties in Italy under Imperiali to meet the quota more times than there were seats available, thus putting it "*outside the range of genuinely proportional methods*" (see also Benoit 2000: 387; Klíma 2001: 75; and Lebeda 2006: 895). When rating eleven electoral formulas from most favorable to larger parties to least favorable, Gallagher (1992: 490) put the Imperiali divisor and quota methods at the top of the list, meaning that if anything they were worse than D'Hondt, not better, as a fix for disproportionality. Antoš and Horák (2021: 551) estimate that had previous Czech elections been held under Imperiali, there would have been no meaningful reduction in disproportionality.

In the constitutional law committee and then the second and third Chamber readings of the bill, with discussion fixating heatedly on whether to introduce postal voting for Czechs abroad and who should decide which candidates would be given seats from the second tier, Benda's Imperiali substitution received almost no attention. We can surmise that this was either because legislators did not understand its implications or they quietly welcomed it in the hope that their party would benefit from its bias. Vojtěch Pikal (Pirate Party) was one of the few to point out its likely effects, as a result of which the bill now lay "*about halfway between what we had in previous years under the D'Hondt method and ideal proportionality*".[8] But he said his party accepted Imperiali as a "majoritarian" element that would facilitate government formation after the election, and on the third reading he was

[7] Ústavně právní výbor - 83. schůze dne 17. března 2021. 1. část – ST649 a ST1170 - volební zákony. The recording is posted at <https://videoarchiv.psp.cz/playa.php?cast=265> (accessed 2021-12-23).

[8] From Pikal's remarks during the second reading of File 1170 in the Chamber of Deputies on 25 March 2021, available at <https://www.psp.cz/eknih/2017ps/stenprot/087schuz/s087347.htm>.

confident that the reformed system would still be more proportional than its predecessor and if need be could withstand review by the Constitutional Court.[9]

Marek Výborný did not defend the use of Hare quotas in the KDU-ČSL election reform bill that he had co-sponsored, and instead welcomed Imperiali as "possible and acceptable":

> *We do not consider it a dramatic deviation towards a majoritarian system. Yes, there is a certain advantage for the successful, not for the winners, but for the more successful parties at the expense of the less successful ones, but if we read the Constitutional Court's decision closely and carefully, I am convinced that this does not contradict what the Constitutional Court said.*[10]

Returning to the matter on the third reading, Výborný reiterated:

> *Firstly, we are convinced that, as far as the calculation is concerned, the mathematical calculation, according to Belgian Senator Pierre Imperiali, basically meets what is in the Constitutional Court's ruling, that is, proportionality is maintained, with a minor - I stress minor - bonus, a premium, not for the winners but for the more successful political parties at the expense of the less successful ones. And finally, even in the sense that such, say, symbolic majoritarian elements can be in that model, the Constitutional Court itself said so.*[11]

Even though her Czech Social Democratic Party (ČSSD) was trailing in the polls and in danger of falling below the five-percent threshold, Kateřina Valachová saw no reason to object to Imperiali: "I conclude positively that the changes that have been proposed with regard to the calculation and application of the Imperiali method again correspond to the expert meetings of both [chambers' standing] commissions [on the constitution], and I therefore support the Imperiali method.»[12] Her colleague Jan Chvojka, uniquely so of the speakers in the Chamber of Deputies, was more alert to the probable harm to his party:

> *Because Imperiali 'plus two' does in a certain way - and the sponsors themselves actually admit it, this is not something that is not known - slightly favor the larger parties and slightly favor the small parties. That means I cannot agree to that on behalf of the ČSSD, because what we originally proposed is slightly distorted, that is, greater fairness in the electoral system. But there seems to be a majority will for this Imperiali 'plus two' electoral system to be approved, and nothing can be done about it.*[13]

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[9] Pikal's remarks during the third reading of File 1170 in the Chamber of Deputies on 7 April 2021, available at <https://www.psp.cz/eknih/2017ps/stenprot/097schuz/bqbs/b00300101.htm>.

[10] Výborný's remarks during the second reading of File 1170 in the Chamber of Deputies on 25 March 2021, available at <https://www.psp.cz/eknih/2017ps/stenprot/087schuz/s087354.htm#r2>.

[11] Výborný's remarks during the third reading of File 1170 in the Chamber of Deputies on 7 April 2021, available at <https://www.psp.cz/eknih/2017ps/stenprot/097schuz/bqbs/b00300101.htm>.

[12] Valachová's remarks from the second reading of File 1170 on 25 March 2021, at <https://www.psp.cz/eknih/2017ps/stenprot/087schuz/s087355.htm#r6>.

[13] Chvojka's remarks during the third reading of File 1170 on 7 April 2021, available at <https://www.psp.cz/

Chvojka himself voted for the bill when it came up for its vote on 7 April 2021, as did 95 of the other 100 deputies present, with only the far-right independent Lubomír Volný voting no.[14]

By the time the bill arrived at the Senate, there had been plenty of warning from political scientists and constitutional lawyers about the likely disproportionality of the new system, which could create problems "*in principle identical to the problems on account of which the Constitutional Court annulled parts of the electoral law*" (Jarabinský 2021b). Electoral systems expert Tomáš Lebeda told the Senate's standing commission on the constitution and parliamentary procedure on 14 April 2021 that "*From among the various variants, the least proportional one was chosen, the Imperiali quota favors the stronger parties*".[15] Perhaps as a result, there was much less enthusiasm for the proposal in the Senate's commission and its constitutional law committee, with the latter lacking the votes to approve a resolution recommending that the bill be passed by the whole Senate. When it came up for a floor debate on 29 April 2021, however, the chamber felt that it should not hold up a bill that was needed for the other house to hold its elections, and the senators focused their passion on the controversy of postal voting. Alone among the speakers, Jiří Drahoš (STAN) questioned the choice of Imperiali:

> *Apart from the fact that the only country in the world, at least to my knowledge, that currently uses this method of calculation is perhaps Ecuador, this quota undoubtedly advantages the political parties that have received the greater number of votes in the elections. I therefore want to believe that those who put this quota into the electoral law are certain that it does not run counter to the Constitutional Court's ruling, otherwise we could have a rather large problem in the autumn.*[16]

Drahoš's concerns were not addressed during the discussion, and at no point was Benda (who was present) pressed to explain or justify his preference for Imperiali over Hare or Hagenbach-Bischoff. Drahoš voted for the bill in any event, and no senators voted against it, but 21 did abstain, including most of Drahoš's STAN colleagues.[17]

The new system in use for the October 2021 elections

If the amended electoral system was to meet the expectations of the Constitutional Court, the results of the elections on 8-9 October 2021 should have generated disproportionality scores lower than any since 2002. Instead, on Gallagher's least-squares index, it scored a

eknih/2017ps/stenprot/097schuz/s097011.htm>.

[14] The results of the vote are available on the Chamber's website at <https://www.psp.cz/sqw/hlasy.sqw?G=75858> (accessed 2021-12-26).

[15] Stálá komise Senátu pro Ústavu ČR a parlamentní procedury. Zápis ze 3. schůze, konané dne 14. dubna 2021 od 10 hod. Available on the Senate website at <https://www.senat.cz/xqw/xervlet/pssenat/finddoc?ORG=SKUCR&O=13&TYP=zapis> (accessed 2021-12-22).

[16] Drahoš's remarks from the Senate discussion of File 82 on 29 April 2021, available at <https://www.senat.cz/xqw/xervlet/pssenat/hlasovani?action=steno&O=13&IS=6707&D=29.04.2021#b22007>.

[17] Of the 21 senators who initiated the motion to the Constitutional Court in 2017, twelve were still serving in April 2021, and seven of them abstained. Only four voted in favor of the reform bill, and one was absent. The results of the vote are available on the Senate website at <https://www.senat.cz/xqw/xervlet/pssenat/hlasy?G=20083&O=13> (accessed 2021-12-26).

10.35 – the highest in the Czech Republic since the founding election in 1990 (11.54). The top two subjects – the three-party SPOLU (Together) coalition and ANO – received seat bonuses of 7.7 percent and 8.87 percent, respectively, with the added twist of an inversion that gave second-place ANO one seat more than SPOLU.

Some of the skew can be attributed to Imperiali, which as the literature would have predicted left only one seat unfilled in the first tier and thus available for compensatory distribution in the second. Sticking with D'Hondt would have avoided the inversion and been slightly more generous to the third-place Pirates/STAN coalition and the Freedom and Direct Democracy party, resulting in a disproportionality score of 10.03. More equitable formulas such as Sainte-Laguë or Hare would have brought the score down to 9.5, but this would still have been high for an election under proportional representation.[18]

The root of this disproportionality, clearly, was not so much the use of Imperiali and the fourteen regions, as the national five-percent threshold. Two parties - Robert Šlachta's Přísaha (Oath) movement and ČSSD – fell just short, on 4.68 and 4.65 percent of the vote, respectively. The Communist Party of Bohemia and Moravia, on 3.6 percent, was also excluded. The combined votes of the 18 parties that fell below the threshold was 1,069,359, or twenty percent of the valid votes cast.[19] This was a result comparable to Slovakia's 2020 election, in which 28 percent of valid votes were cast for parties that fell below the legal thresholds (including 6.96 percent for a two-party coalition that needed seven percent to be eligible for seats).[20] These are vote-wastage figures above the average even for the first decade of post-Communist elections in Central Europe, and akin to those in Bulgaria in 1991, the Czech Republic in 1990 and 1992, Romania in 1992, 1996 and 2000, Slovakia in 1992 and 2002, and Slovenia in 1992 (Williams 2005: 196).

The idea that there must be a legal threshold, and that it can be set at five percent, has become something of an axiom in Czech election jurisprudence. In this regard, the Constitutional Court's decision in Pl. ÚS 44/17 is in fact not a radical departure from precedent. The Court continued to subscribe (in paragraphs 115 and 147–155) to the essential tenet of the pathmarking decision Pl. ÚS 25/96 from 1997, in a challenge to the threshold brought by a minor party, the Democratic Union. In that case, the Court upheld the threshold and its infringement of equality as a necessary "integrative" element to prevent an excessive number of parties in the legislature "*and with it the threat to the functioning, capability and continuity of the parliamentary system*". The Court applied this in a 2004 case to local elections (IV. ÚS 54/03), reaffirmed it in the Pirates case in 2014, and has clung to it for elections to the European Parliament even while influential counterpart courts, such as the German, have deemed it unjustified when government formation is not directly tied to the outcome of a legislative election (Smekal, Vyhnánek 2016; Michel 2016; Taylor 2017) and some experts in Germany have begun to question the threshold's necessity and legitimacy for Bundestag and Landtag elections (Decker 2016: 464). In Pl. ÚS 44/17, the Czech Constitutional Court continues to invoke the "*negative historical experiences with the functioning of pure proportional representation and its consequences, when there are represented in*

[18] For this estimation I am relying on the Institute H21 seat calculator at <https://www.ih21.org/kalkulacka> (accessed 2021-12-27).

[19] Calculated from official statistics at <https://volby.cz/pls/ps2021/ps2?xjazyk=CZ> (accessed 2021-12-27).

[20] Calculated from official statistics at <https://volby.statistics.sk/nrsr/nrsr2020/sk/data02.html> (accessed 2021-12-27).

the legislature political parties that cannot be considered relevant or representative […] *but which can 'tip the scales' or even acquire so-called blackmail power*" (paragraph 115).

As argued in Williams (2005), the Czech Court endows the five-percent threshold with an almost talismanic force, as if it were the thin line safeguarding brittle democracy from the fate of Weimar Germany or the French Fourth Republic, and it does so no less thirty years after the end of Communist rule than it did in the first decade of the transition. Like lustration, what might have initially seemed a provisional measure has become a permanent appurtenance of self-defending democracy.[21] The threshold achieved this doctrinal status with no empirical underpinning, resting instead on a set of tenuous assumptions about the causal relationship between party systems, legislative dynamics, and democratic breakdown (Williams 2005: 199). When it has been pointed out that other countries operate proportional representation with lower formal thresholds (Austria, Denmark, the Netherlands, Norway, Sweden, Slovenia) or none at all (Finland, Luxembourg, Portugal, South Africa, Switzerland, Uruguay), as the Pirate Party mentioned in their complaint after the 2013 election, the Court replied that "*the electoral system in the Czech Republic in no way deviates from the model approved in various democratic countries*" (Pl.ÚS 2/14, paragraph 25). The decision in that case reaffirmed the necessity of the threshold by reference to the recent instability of Czech governing coalitions, even though the threshold had patently failed to prevent it – as pointed out by Brunclík and Kubát (2014: 173), "*Between 1996 and 2014 the Czech Republic had 11 cabinets and 10 Prime Ministers. The average durability of cabinets is about one and a half years*" (see also Judge Šimáčková's dissent in Pl.ÚS 2/14). If anything bore primary blame for the downfall of Czech governments, it was the larger parties' knack for scandal and indiscipline, complicated by the stubborn ability of "uncoalitionable" extremist parties to earn more than ten percent of the vote (Charvát 2012: 94; Jarabinský 2021a).

"*From now on*", because of the Court's decision in Pl. ÚS 44/17, "*political parties have standing to file a constitutional complaint based on the claim that the disproportionate effect of the electoral system in a specific election*" infringes fundamental rights (Antoš, Horák (2021: 542). Furthermore, "*the Court's preliminary considerations are so vague*" in Pl. ÚS 44/17 "*that it is by no means certain that the Court might not quash even this electoral system for the same reasons as the previous one*" (Antoš, Horák 2021: 552). If the introduction of the "bad faith" test was indeed meant in good faith by the Court, it could come up again in a challenge to the legislature's choice of Imperiali over more reliably proportional formulas.

[21] On the jurisprudence of self-defending democracy and its core components (*podstatné náležitosti* or *materiální ohnisko*) more broadly, see Williams (2011), Mareš (2012), Výborný (2012), Přibáň (2017: 205-214), and Tomoszek (2018). On lustration, see Williams (2003).

REFERENCES:

ANTOŠ, Marek (2008). *Principy voleb v České republice*. Prague: Linde.

ANTOŠ, Marek; HORÁK, Filip (2021). Proportionality Means Proportionality. *European Constitutional Law Review*. Vol. 17, no. 3, pp. 538-552. https://doi.org/10.1017/S1574019621000328.

BALÍK, Stanislav; HLOUŠEK, Vít (2016). The development and transformation of the Czech party system after 1989. *Acta Politologica*. Vol. 8, no. 2, pp. 103-117.

BENOIT, Kenneth (2000). Which Electoral Formula Is the Most Proportional? A New Look with New Evidence. *Political Analysis*. Vol. 8, no. 4, pp. 381-388.

BIRCH, Sarah; MILLARD, Frances; POPESCU, Marina; WILLIAMS, Kieran (2002). *Embodying Democracy: Electoral System Design in Post-Communist Europe*. Houndmills: Palgrave Macmillan.

BORMANN, Nils-Christian; GOLDER, Matt (2013). Democratic Electoral Systems around the world, 1946-2011. *Electoral Studies*. Vol. 32, no. 2, pp. 360-369. https://doi.org/10.1016/j.electstud.2013.01.005.

BRUNCLÍK, Miloš; KUBÁT, Michal (2014). The Crisis of the Czech Politics 25 Years after the Velvet Revolution. *Politeja.* No. 28, pp. 163-180. https://doi.org/10.12797/Politeja.11.2014.28.07.

CHARVÁT, Jakub (2012). Judikatura Ústavního soudu ČR v otázce voleb do Parlamentu ČR. *Politologická revue*. Vol. 18, no. 2, pp. 81-98.

CHARVÁT, Jakub (2013). *Politika volebních reforem v ČR po roce 1989*. Prague: Grada.

CHARVÁT, Jakub (2017). Single Nationwide Electoral District, Proportionality, and Territorial Representation: a Case Study of the Slovak Parliamentary Elections. *Revista de Științe Politice. Revue des Sciences Politiques*. No. 55, pp. 57-67.

CRAWFORD, Keith (2001). A System of Disproportional Representation: The Proposed Electoral Law for the Czech Republic. *Representation*. Vol. 38, no. 1, pp. 46-58. https://doi.org/10.1080/00344890108523158.

DECKER, Frank (2016). Ist die Fünf-Prozent-Sperrklausel noch zeitgemäß? Verfassungsrechtliche und - politische Argumente für die Einführung einer Ersatzstimme bei Landtags- und Bundestagswahlen. *Zeitschrift für Parlamentsfragen*. Vol. 47, no. 2, pp. 460-471. https://doi.org/10.5771/0340-1758-2016-2-460.

GALLAGHER, Michael (1992). Comparing Proportional Representation Electoral Systems: Quotas, Thresholds, Paradoxes and Majorities. *British Journal of Political Science*. Vol. 22, no. 4, pp. 469-496. https://doi.org/10.1017/S0007123400006499.

GALLAGHER, Michael (2021). *Election indices dataset* [online; accessed 2021-12-27]. Available from WWW: <http://www.tcd.ie/PoliticalScience/people/michaelgallagher/ElSystems/index.php>.

HAUGHTON, Tim; HAVLÍK, Vlastimil (2018). A few cracks in the cement: Regulation and the development of party politics in the Czech Republic. In Fernando Casal Bértoa; Ingrid van Biezen, eds. *The Regulation of Post-Communist Party Politics*. London: Routledge, pp. 85-105. https://doi.org/10.4324/9781315624518.

JARABINSKÝ, Ivan (2021a). Mýty a fakta o zrušených volebních pravidlech. *Blogy Respektu* [online; accessed 2021-12-28]. Available from WWW: <https://jarabinsky.blog.respekt.cz/myty-a-fakta-o-zrusenych-volebnich-pravidlech/>

JARABINSKÝ, Ivan (2021b). Z bláta do louže? Návrh volebních pravidel z pera Marka Bendy.

Blogy Respektu [online; accessed 2021-12-28]. Available from WWW: <https://jarabinsky.blog.respekt.cz/z-blata-do-louze-navrh-volebnich-pravidel-z-pera-marka-bendy/>

KAŠPAR, Ondřej; STEHLÍK, Ondřej (2013). Rovnost volebního práva v judikatuře Ústavního soudu ČR. *Právník.* Vol. 152, no. 7, pp. 691-710.

KLÍMA, Michal (2001). *Kvalita demokracie v České republice a volební inženýrství*. Prague: Radix.

LATNER, Michael; McGANN, Anthony J. (2005). Geographical representation under proportional representation: the cases of Israel and the Netherlands. *Electoral Studies*, Vol. 24, no. 4, pp. 709-734. https://doi.org/10.1016/j.electstud.2005.02.007.

LEBEDA, Tomáš (2006). Proporcionalita volebních formulí poměrných systemu. *Sociologický časopis.* Vol. 42, no. 5, pp. 883-912. https://doi.org/10.13060/00380288.2006.42.5.03.

MAREŠ, Miroslav (2012). Czech Militant Democracy in Action: Dissolution of the Workers' Party and the Wider Context of This Act. *East European Politics and Societies*. Vol. 26, no. 1, pp. 33-55. https://doi.org/10.1177/0888325411408070.

MICHEL, Bastian (2016). Thresholds for the European Parliament Elections in Germany Declared Unconstitutional Twice. *European Constitutional Law Review*. Vol. 12: pp. 133-147. https://doi.org/10.1017/S1574019616000080.

MUSTILLO, Thomas; POLGA-HECIMOVICH, John (2018). Measures and votes: Party performance under free list proportional representation with evidence from Ecuador. *Electoral Studies*. Vol. 56, pp. 124-135. https://doi.org/10.1016/j.electstud.2018.09.011.

NOVÁK, Miroslav; LEBEDA, Tomáš et al. (2004). *Volební a stranické systémy. ČR v mezinárodním srovnání*. Dobrá Voda: Aleš Čeněk.

POZEN, David E. (2016). Constitutional Bad Faith. *Harvard Law Review*. Vol. 129, no. 4, pp. 885-955.

PŘIBÁŇ, Jiří (2017). *The Defence of Constitutionalism: The Czech Question in Post-national Europe*. Prague: Karolinum.

ROBERTS, Andrew (2003). Demythologising the Czech Opposition Agreement. *Europe-Asia Studies*. Vol. 55, no. 8, pp. 1273-1303. https://doi.org/10.1080/09668130320001411 14.

SHUGART, Matthew Soberg (2019). Ecuador list-type change. *Fruits and Votes* [online; accessed 2021-12-27]. Available from WWW: <https://fruitsandvotes.wordpress.com/2019/12/10/ecuador-list-type-change/>.

SMEKAL, Hubert; VYHNÁNEK, Ladislav (2016). Equal Voting Power under Scrutiny: Czech Constitutional Court on the 5% Threshold in the 2014 European Parliament Elections. *European Constitutional Law Review*. Vol. 12, no. 1, pp. 148-163. https://doi.org/10.1017/S1574019616000092.

TAYLOR, Greg (2017). The constitutionality of election thresholds in Germany. *International Journal of Constitutional Law*. Vol. 15, no. 3, pp. 734-752. https://doi.org/10.1093/icon/mox050.

TOMOSZEK, Maxim (2018). Role podstatných náležitostí demokratického právního státu v ústavní praxi České republiky. *Acta Universitatis Lodziensis. Folia Iuridica*. Vol. 84, pp. 15-45. https://doi.org/10.18778/0208-6069.84.02.

VÝBORNÝ, Štěpán (2012). Koncept bránící se demokracie v judikatuře Ústavního soudu ČR. *Časopis pro právní vědu a praxis*. Vol. 20, no. 2, pp. 157-162.

WILLIAMS, Kieran (2003). Lustration as the Securitization of Democracy in Czechoslovakia and the Czech Republic. *Journal of Communist Studies and Transition Politics*. Vol. 19, no. 4, pp. 1-24. https://doi.org/10.1080/13523270300660026.

WILLIAMS, Kieran (2005). Judicial Review of Electoral Thresholds in Germany, Russia, and the Czech Republic. *Election Law Journal*. Vol. 4, no. 3, pp. 191-206. https://doi.org/10.1089/elj.2005.4.191.

WILLIAMS, Kieran (2011). When a Constitutional Amendment Violates the 'Substantive Core': The Czech Constitutional Court's September 2009 Early Elections Decision. *Review of Central and Eastern European Law*. Vol. 36, no. 1, pp. 33-51. https://doi.org/10.1163/092598811X12960354394687.