THE GUARDIANS OF WHAT? ASSESSING THE SLOVAK AND HUNGARIAN CONSTITUTIONAL COURTS' UNDERSTANDINGS OF DEMOCRACY

MAX STEUER (max.steuer@uniba.sk)[1]

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PREFACE

This paper is an excerpt from a doctoral dissertation that examines why some constitutional courts (CCs) as opposed to others have failed to protect democracy. The thesis presents a model of influence of the CCs on democracy departing from the scholarship emphasizing the role of ideas in shaping the impact of judicial decision making. It empirically examines one step in the mechanism of influence, that begins with understandings of democracy within the context of particular political regimes. Qualitative analysis of case law combined with semi-structure dinterviews is employed to demonstrate the shifting understandings of democracy. The latter is conceptualized via five dimensions that make a range of such understandings (minimalist based on majority rule to maximalist tied to requirements of substantive justice) conceivable. The empirical analysis of case law presented in this text serves to uncover the shifting understandings of democracy by two Central European Constitutonal Courts (CCs) as part of a broader framework explaining how these understandings matter for CCs' capacity to be guardians of democracy. Further research is needed to refine the model by incorporating societal reflections of CCs' understandings of democracy. However, by refocusing the attention on the relationship between CCs and democracy as well as the CCs' potential to be guardians of democracy, the paper contributes to contemporary research on the relevance and functioning of CCs in more or less democratic political regimes. Moreover, it provides a tangible tool how the success of a specific CC to protect democracy can be evaluated in a concrete point in time. The Slovak and Hungarian cases, of which one dimension each is included in the paper, are illustrative in that they revisit previous scholarship that tends to be uncritical towards the contribution of both of these CCs to democratization in the 1990s and it also provides a more nuanced court-centered view on how the HCC underwent a 'voluntary defeat' vis-à-vis the constitutional changes introduced by the Hungarian PM Viktor Orbán (that ultimately affected the Court's structure and operation as well). Furthermore, the comparison between the two CCs illustrates the broader tendency to avoid a more extended understanding of democracy, potentially to the detriment of the CCs' democracy-protecting capacity.

[1] Doctoral Researcher in Political Science, Comenius University – Fulbright Visiting Researcher, Washington State University. Please do not circulate or quote without permission from the author. Questions and comments are welcome. Prepared for the Canadian Political Science Association Annual Conference, June 4—6, 2019, Vancouver, Canada.

ABSTRACT

This paper contributes to the discussion of the role of ideas in legal decision making. It takes stock of the self-understanding of centralized constitutional courts' (CCs') role in a political regime from the perspective of democracy as the best existing regime type. By asking how democracy (as opposed to other, albeit related, concepts) has been understood in CCs' decision-making, it aims to show how particular understandings amount to the undermining of the CCs' own position as guardians of democracy, and, consequently, how these understandings may limit the CCs' capacity to effectively counter anti-democratic pressures. Building on several major interpretations of democracy and the CCs' role therein, the paper proposes a five-dimensional conceptualization of CCs' contribution to democracy, and applies a selection of these dimensions to empirically analyze the understanding of democracy by concrete Central European CCs. The Slovak and Hungarian cases are chosen given their significant structural similarities on the one hand, and the diverging recent trajectories on the other hand. By showing how, with a few exceptions, restrictive (primarily majoritarian) understandings of democracy prevailed in the decision making of the two CCs, this research uncovers their limited capacity to act as guardians, with their actual impact potential being increasingly influenced by the surrounding political context. The findings illustrate the broader relevance of the conceptualization of the CCs' contribution to democracy and the need to look at CCs' own ideas about fundamental political principles as prerequisites of their impact on the political regime.

Keywords: constitutional courts, democracy, separation of powers, Central Europe

INTRODUCTION

Already since the debate between Hans Kelsen and Carl Schmitt in early 20th century,[2] Kelsen's supporters considered centralized constitutional courts (CCs) as Guardians of the Constitution. Their views seem to have gained prevalence empirically in the process of the global spread of the 'Kelsenian type' of constitutional review (Ginsburg 2010; also Cappelletti 1971). Since the 1960s, CCs have largely been recognized as political institutions with constant interaction of legal and policy elements in their decision making.[3] In turn, the finding that CCs can exert their policy preferences into law raised doubts over their legitimacy to play the role of the guardians, coming in particular from 'political constitutionalists' (Bellamy 2007; Waldron 2006). With roots in the studies of the US Supreme Court,[4] counter-majoritarian difficulty (coined by Bickel 1986; see also Robertson 2018; Bassok 2012) has become the dominant concept to characterize the tension between judicial review and majoritarianism. In response to it, John Hart Ely argued the Supreme Court to be democratically legitimate as long as it guaranteed procedural equality without intervening into substantive policy issues (Ely 1980). These works have in common their understanding of the Supreme Court as an institution

[2] The English translations of some of their writings on this subject have been prepared by Lars Vinx (Kelsen and Schmitt 2015, 22–124; see also de Brito 2015).

[3] To Robert Dahl, the Supreme Court did not undermine democracy defined through the dimensions of political contestation and inclusiveness (Coppedge, Alvarez, and Maldonado 2008) rather than checks and balances as he found its decisions to overwhelmingly support 'the dominant ruling coalition' (Dahl 1957). This position has not retained prevalence in the US judicial studies literature.

[4] There are notable differences between the US Supreme Court and centralized European CCs but the counter-majoritarian difficulty in its simplest understanding is not affected by them.

that provides a check to 'the people's voice' conceived through the majority principle. Only recently some scholars have started to rethink the justifications for the CCs' existence, the starting point of which may rest on the observation, that in authoritarian regimes before and during World War II and the Cold War, CCs established in the 1920s have been eliminated or at least not operational.[5] Thus, there might be a relationship between the character of the political regime (understood through the standard continuum from ideal democracy to autocracy, see Sartori 1987), and the position of the CC in it. More fundamentally, the CC might be an important institution of the democratic regime, one that plays a role in its establishment, development and prevention from deconsolidation.

This perspective has been rather seldomly applied in the research on CCs so far, including in some 'new avenues' of research that have been called for (Hönnige 2011).[6] Nevertheless, there is a significant potential in exploring the CCs' agency from a democratic perspective given that they are among the more significant, usually constitutionally enshrined political institutions which together with the general judiciary represent one of the three conventional branches of power. New institutionalist scholarship (March and Olsen 1983) that investigates the impact of ideas emerging within institutions on change (in this case, change of the political regime) serves as a theoretical inspiration for this inquiry. In accordance with the call for research 'that identifies actual patterns in legal and political discourse and their consequences, testing their significance versus that of other structural contexts' (Smith 1988, 106), this paper focuses on the enabling and constraining capacities of the particular idea of democracy as understood by the CCs on the protection of democracy. In other words, it looks at how shifting understandings of democracy that included or excluded different elements of an ideal-typical democratic regime (cf. R. Dworkin 2011) determine particular CCs' impact potential on safeguarding and developing democratic values. The argument is based on the logic of the *necessary condition*—acknowledging the impact of political context on institutional action (Clayton and May 1999), as well as a range of other factors that might constrain the CC's impact, it contends that a pure majoritarian understanding of democracy indicates the CC under most circumstances[7] to be doomed to fail in performing of a role of a guardian of the regime's values.

The theoretical (first) section of this paper provides a conceptualization of democracy that allows to uncover the fullest range of its different understandings by political actors. It furthermore makes the case for studying the Slovak Constitutional Court (SCC) and the HCC to test the feasibility of this analytical approach as well as to understand the impact of two CCs operating in contexts where democracy is under pressure. The empirical (second) section,

[5] The typical example of this is the interwar Czechoslovak Constitutional Court (Langášek 2011).

[6] A set of factors has been studied that usually influences the outputs of CCs' decision making, including the setting of the political system (Ginsburg 2010; Vanberg 1998, 2015), and the policy preferences of individual judges (Hönnige 2009; Hanretty 2012). However, most of these research questions focus on CCs as dependent, rather than independent variable. That is, they do not focus on the agency of the CCs and their capacity to have independent impact on the political system. Illustratively, in an article with (parliamentary) democracy in its title, Stone Sweet (2002) mentions the term 'democracy' merely twice, with the focus being on the reasons why authority is conferred upon CCs as 'trustees' of the political system.

[7] A growing authoritarian regime beyond illiberalism in a transitional period, such as the regime of V. Mečiar in the 1990s, might be to a limited extent countered by a majoritarian understanding of democracy. The threshold between authoritarianism and illiberalism as understood here is the manipulation of electoral rules.

firstly, elaborates on the methodology of the analysis and, secondly, presents the results in the Slovak and the Hungarian cases. While both CCs were to some extent concerned with separation of powers as a component of a healthy democracy, they overwhelmingly perceived it as separate from democracy which they conceived of as majority rule. Thereby, the early CCs established a disjunction between democracy and its constitutive elements that had been overlooked by previous research. Later compositions of the two CCs were unable to fill in this gap that resulted in confusing and unhelpful jurisprudence on major clashes between constitutional actors in the Slovak case and the failure to use the means available to the CC for slowing down the rise of illiberalism in Hungary. The results bring the attention back to the independent relevance of the CCs,[8] rather than the constraints imposed upon them by the political context, and lay the grounds for a more effective constitutional strategy against illiberalism. The concluding section summarizes the broader contribution of this approach and addresses how some of its limitations can be overcome in further research.

1. CONCEPTUALIZING DEMOCRACY IN CONSTITUTIONAL COURTS' DECISION-MAKING

Existing scholarship has explored the connection between democracy and constitutional adjudication through the counter-majoritarian difficulty thesis. This conceptualization remains satisfied with the majoritarian notion of democracy and so it is unsatisfactory for capturing the broader potential of CCs.[9] As Chemerinsky (2014, 289–91) points out from the US perspective, the majority of the debate on democracy more generally has not even reached the stage of multiple conceptions of democracy, and remained at the unidimensional level of perceiving judicial review as desirable or undesirable, placing 'majoritarian' and 'liberal' understandings of democracy against each other. In fact, some scholars developed a more nuanced conceptualization of the link between CCs and democracy in only three, seldom utilized ways. The first one is the deliberative potential of CCs to foster democratic debate (Mendes 2014). The second approach extends Dahl's framework of the high court supporting the winning coalition by asserting the possibility of CCs to enhance majoritarianism through endorsing policies that are supported by most citizens (but not pursued by the political elite in power), or to block policies approved in opposition to the majority will (Bricker 2015; see also Keck 2014).[10] These two approaches can be viewed as complementary rather than conflictual, even

[8] Including the CCs' judges (cf. Gillman 1999).

[9] A more inclusive and broader perspective on the potential of constitutional courts to contribute to democracy enables a more nuanced empirical analysis of their actual impact. To be sure, it does not run against the argument that courts, as several other institutions, serve as 'veto points' in the institutional system (Watkins and Lemieux 2015), i.e. that they can primarily delay or even prevent an initiative of another political actor which would be detrimental to the development of democracy (that said, if they have the potential to do this, they can also abolish or complicate initiatives conducive to democracy). It is also not to dispute the claims presented recently by Daly (2017) that (1) courts should not be relied upon as the single or main democracy-builder in the regime, and (2) their capacity to contribute to democracy may depend on the degree of democracy that is already present in the system, in other words, their role may be more limited and confined to the classic, counter-majoritarian understanding in mature as opposed to transitional democracies (the latter claim will not be tested in this research). It does though, with respect to the debate on the legitimacy of the constitutional courts, presuppose the capacity of the constitutional courts to be democracy-builders in multiple ways without actually compromising the substance of the democratic regime through their decision making.

[10] Of course, the determination of whether such decisions are conducive to democracy would require a look on a case-by-case basis. It can hardly be the case that whenever the CC endorses the majority public opinion (even by quashing a certain governmental policy), it contributes to democracy. It might be the case indeed that the

though no analysis has contrasted them on an empirical case. Bricker's analysis provides evidence in the cases of the Polish, Czech and Slovenian CC for the claim that 'institutional incentives may be able to tie judicial outcomes to majority preferences' (2015, 127). However, it puts less emphasis on evaluating the effects of supporting the majority preferences by the CCs on the democratic regime itself. Similarly, Issacharoff's analysis of the democratic contribution of CCs prioritizes strategic interactions between political institutions as the explanatory variables for CCs' political influence, instead of focusing on the subtler mechanisms at play within their decision making. One contribution he makes is in highlighting that 'avoid[ing] direct constitutional confrontation and instead [working] in less politically charged ways' (Landau 2015, 1084) might be more conducive to sustaining and developing democracy.[11] The third, bourgeoning approach, represented to date by Sascha Kneip's (2011) research on 'functional and dysfunctional decisions' of the German Federal Constitutional Court, evaluates the contribution of CCs to democracy with the help of a two-dimensional typology. In each particular case submitted to it, the CC may decide to intervene (review the norm or declare a rights violation) in a matter that may or may not fall 'within the sphere of core competence of constitutional courts' (Kneip 2011, 138). This offers a more tangible alternative of evaluating the actual influence of CCs to the nature of the political regime. On the other hand, it only emphasizes the (ab)use of CCs' competences which suggests that the optimum is merely responding to the cases which call for a response based on formal powers of the Court. Yet, other factors might be important in assessing whether a CC's decision making in the respective period and issue area has been conducive to democracy.

This brief review indicates that when unpacking the puzzle of the relationship between CCs and democracy, it is necessary to go beyond the counter-majoritarian difficulty. Acommodating the differences between various conceptualizations of democracy (ranging from minimalist ones focusing on elections only to maximalist ones incorporating requirements on political outcomes, such as social justice; cf. Bühlmann et al. 2012), the five-dimensional conceptualization proposed here allows for a full-fledged assessment of a broad range of possible understandings of democracy by the CCs.

1.1 Outline of the Five Dimensions of CCs' Contribution to Democracy

The following five-dimensional conceptualization of 'contribution to democracy' develops previous ones available in existing research concerning CCs (cf. Kneip 2011, 136).[12] It takes

governmental policy, while opposing a temporary public opinion, is justified from the perspective of democratic principles. The emphasis then needs to be placed on the substance of these principles.

[11] In Issacharoff's analysis (2015, 196), (constitutional) courts are 'called upon to shore up the institutional frailties by imposing, and often creating, a constitutional structure that allows democratic governance to at least have a chance at succeeding.' As it stands, it is a quite limited understanding, whereby courts can do no less and no more than to 'prepare the stage' for other political actors whose decisions are fundamental to (un)democratic development. In addition, they may build a 'democratic hedge' (Issacharoff 2010) that can prevent, or at least complicate, the rise of undemocratic actors.

[12] Kneip refers to Merkel's embedded democracy by stressing the role of CCs in ensuring horizontal accountability, and then identifies their second democratic potential in that they 'control the functioning of the partial regimes of democracy from a meta-position and intervene in case of conflict.' But whatever the conceptualization, assessing what have been the 'correct decisions or decision that appeared acceptable' from the democratic (or other)

into account the unique capacities of the CCs as well as the more traditional accounts of their positioning in the constitutional system of checks and balances (see e.g. Sadurski 2014). However, the conceptualization does not serve to 'lock in' the CCs' reasoning into strictly delineated categories. Instead, it remains general enough to be able to accommodate specific CCs' reasonings in an inductive manner

1. Individual rights protection. There is an inherent link between human rights and democracy. In line with modern theories of democracy, without at least some guarantees of human, especially first generation rights, the basic conditions for a democratic regime are not in place (Schaffer 2015; see also Dahl 1991). A reference can be made to the famous Dworkinian thesis of 'rights as trumps' against the government and the ruling power more generally (R. M. Dworkin 1978). Furthermore, the protection of human rights is a fundamental task for which the CCs are currently perceived to be responsible (Stone-Sweet 2000, 40–41, 60). Human rights can, however, get in conflict, which form the basis of serious 'constitutional dilemmas' (Zucca 2007). A dominant way to resolve these conflicts in European continental constitutional thought has been the principle of proportionality (Huscroft, Miller, and Webber 2014; Schlink 2013) which various CCs have embraced in their jurisprudence, following the European Court of Human Rights (see e.g. Victor Ferreres Comella 2006 for the case of freedom of expression).

Therefore, the aim is not to formulate conclusions on how the CCs resolved such conflicts, rather to look at how democracy and human rights are connected in the reasoning of the CCs and whether democracy is a matter of consideration in cases where there is a clear discrepancy between a rights-fostering and rights-limiting position. According to the 'living instruments' doctrine pursued also by the European Court of Human Rights, a more advanced democratic society gradually needs to widen its human rights guarantees to incorporate new forms of protection without resignation on the traditional 'core' rights centered around the principle of human dignity (cf. Barak 2015).

2. Separation of Powers. This dimension evaluates the capacity of the CCs to prevent or minimize conflicts between the various branches of power in a way that does not play out in favor of strengthening one at the expense of the other. This is an optimal task for a CC in a system of checks and balances. Decisions concerning separation of powers, which actually upset this balance by one-sidedly strengthening the powers of one political institution as opposed to the others, are not conducive to democracy for which 'institutionalization of horizontal accountability among state powers' (Merkel 2004, 40) is of core importance.

Moreover, separation of powers is considered as a core component of the rule of law[13] and a standard principle in which constitutional courts 'ground their decisions' (Balázs 2016, 163–66), including many that strike down laws adopted by the legislature upon the executive's initiative. The place that CCs occupy in the separation of powers framework is subject to debate,

perspective is challenging (Harding and Leyland 2009, 23) and is likely to generate opposition depending on one's preferred theoretical or methodological premises.

[13] I follow Krygier's (e.g. 2016, 205–8) framework here where he argues that in essence the rule of law is the solution to the problem of arbitrary power by 'tempering' it through establishing transparent and predictable restrictions and boundaries which the power-executing actors cannot cross without facing dire consequences.

and one scholar even cautions against an 'in principle, dangerous—and possibly quite undemocratic […] constitutional definition of a certain concept of democracy [by the CCs]' (Moellers 2015, 130). The existence of such a danger is doubtful in so far as the CC is entrusted with constitutional interpretation and there is no other authority who would establish and develop competing interpretations. Yet, it does point to a danger of wide-ranging constitutional interpretations *disconnected from the concept of democracy,* whereby, for example, separation of powers or the rule of law are not viewed as integral part of or at least in relation to democracy, but rather as separate *checks* on democracy. In the latter case, the perception of 'judicial paternalism' representing the restriction of democracy understood as the 'people's voice' by an actor with limited democratic legitimacy might easily emerge as a powerful source of discontent with the CCs as such—and ammunition for political actors who dislike the idea of independent courts not allowing them to make any decisions as they please. Consequently, the empirical analysis should observe whether and how the CCs connect separation of powers and the rule of law to democracy, and see democracy as even more than majority rule only occasionally trumped by (some) individual rights.

3. Political participation. If democracy is not only about elections but constant involvement of the citizenry in deliberation and even decision making, political participation comes to the surface as its substantial component as well. This dimension relates to the capacity of the CC to foster the involvement of citizens in decision making, e.g. in the legislative process, via elections or referenda. It is partly linked to rights-related decisions in that broader freedom of information, assembly, speech, but it emphasizes their collective rather than individual dimension, and is oriented rather towards the enabling potential of CCs' decision than the broadening of individual rights guarantees. The role of a particular CC in this dimension may, to a greater extent than in other dimensions, be affected by its powers to review electoral disputes.

4. (Perception of) justice. Neither of the most common understandings of democracy, whether they are based on plain majority rule or majority rule under the condition of minority rights protection, do not (or at least not explicitly) bring up substantive justice requirements. Conceptions of democracy which do (the Dworkinian united one built through the requirement of equal concern and respect being a prime example) are fiercely contested from proponents of other visions of democracy. In this sense, the distinction between minimalist, mid-ranged and maximalist conceptions is useful, since any understanding of democracy that encompasses a certain set of requirements for justice is categorized as 'maximalist' as opposed to those which only require free elections (minimalist) and those which combine free elections with some account of individual rights and the rule of law (middle-range).

Yet, two specifics make the understanding of 'perception of justice' here different from substantive maximalist accounts of democracy, and, as argued, resilient towards the standard lines of criticism. Firstly, this is not a conceptualization of democracy but of the specific ways CCs can contribute to it. The conceptualization is agnostic to the question whether a middle-range conception is sufficient or a maximalist understanding is needed, albeit it does reject minimalist accounts of democracy. The second specific becomes clear through the necessity-sufficiency distinction. The present conceptualization of the CCs' contribution to democracy

does not claim that if the CC does not include either dimension into its understanding of democracy, it necessarily does not contribute to it.

It is difficult to operate with the concept of justice in any empirical analysis, since when it comes to the constitutional dilemmas mentioned above, it always depends on the perspective employed. As Dworkin put it with reference to individuals, 'we do not follow shared linguistic criteria for deciding what facts make a situation just or unjust' (R. Dworkin 1986, 73). Because justice at the level of individuals is interpreted so differently, it may seem useful prioritize a social conception of justice whereby it denotes 'social happiness […] guaranteed by a social order' (Kelsen 2000, 2). Yet this exclusively collective perspective on justice is precisely one that may result in support of unrestrained majoritarianism in which the majority governs at times without any consideration for minority rights (cf. Kelsen 2000, 4). A rigid procedural view of justice where everything that is in accordance with the law (as interpreted) is also unsatisfactory as there is no guarantee that particular legal norms at a given time are in accordance with what is perceived to be just.

For the purposes of this research, justice can be conceptualized through legal certainty, except a *few rare cases* where legal certainty would be contradictory to justice to such an extent, that it would have to be sidelined for a just decision (cf. Radbruch 2006). Normally, legal certainty remains a desirable goal because it improves the trust of the actors in the legal framework at play in the country. Legal certainty also concerns the clarity of the 'message' of the CC, and modification of its self-developed doctrines only with an understandable justification acceptable by the legal community as well as other actors (such as the media). Following Roux's (2016, 9–11) qualified feedback loop theory, the CC has to win 'the hearts' of the political actors in the society so that its democratic potential is fully realized. Consequently, its decisions must clearly show how the particular decision was fair to all parties involved and even how it can contribute to a 'better life'. Visions of 'good life' are often significantly different among the society, nevertheless, the court should be expected to speak up with a clear voice when the alternative vision is rejected by the vast majority of the society. For instance, there may be various understandings of to what extent redistribution in the society is just, but the vast majority of the society can be reasonably expected to accept that having a third of the total population dying on the streets of hunger would be unjust, and there is a duty of some minimal care. In many cases, the example will not be as obvious, and thus the context affecting the perceptions of society members at a given point in time must not be ignored. In practice, cases concerning procedural (e.g. due process) rights and social rights are decisive for this dimension.

5. Integrating the regime into the 'democratic community'. This dimension sheds light on the capacity of CCs to establish relations with other high courts and international courts operating in democratic political regimes, through their decision making. Integrative references to international (and in the case of EU member states, EU) law are perceived to form the basis of an 'epistemic community' of judges (Sommer and Frishman 2016). Moreover, while there is a lot of challenges entailed in the interaction between CCs and international courts, there is also a possibility to think about the existence of the international legal level as an additional 'toolbox' for the CCs. With the tools in this box, such as international, legally binding

conventions, case law, or advisory opinions of expert bodies, they can increase the authority of their judgments entrenching democratic principles in the constitutional system (Víctor Ferreres Comella 2009, 153). To these, subtler forms of interactions could be added, such as meeting with judges from abroad and participation at international conferences, however, this goes beyond what an analysis of the case law can offer.

Integration understood in this way does not equate a need for uniformity of decision making approaches or methodologies, but it indicates entering into judicial dialogue with democratic partners. In this regard, an extension of Cappelletti's (1971) account of the spread of judicial review as the means to invalidate 'unjust law' (Cappelletti 1971, 97) requires paying attention to sources of international and regional legal orders, and even to the importance of embedding the domestic legal orders in these contexts. The latter, however, has developed far less straightforwardly than the domestic spread of judicial review (Lustig and Weiler 2018). Hence, the assumption in this dimension, in accordance with Comella's reasoning, is that CCs are more conducive to democracy if they embrace, rather than refuse, such interactions, and if they embed domestic discourse about democracy in an international or even supranational one, for instance, by pointing towards the importance of democratic governance at the supranational level and the willingness to facilitate such governance from the national perspective.

Together, the five dimensions that can be measured empirically cover a complex set of influences of CCs on democracy, which is a core innovation introduced in this research. In case the empirical analysis justifies their explanatory potential, they can then be used as a starting point for identifying the *reasons* why a concrete CC has or has not embraced certain dimensions in its thinking about democracy, and thereby pointing towards the conditions affecting the court's reasoning on democracy more broadly.

The conceptual 'model of influence' as a core concept in social science examinations is a circular one, with time being a variable that triggers the move, in a particular case (a judicial decision or a broader issue that is linked to several court decisions), from one stage to another. Therefore, while in one case (for simplification, say, a single decision) the circle might be over (say, it was not taken up in public and legal discourse and remains without an impact on democracy and hence the political context in which the court operates) while in another case it may be located at a different stage. It is the combination of these circles that established the Court's impact of democracy in a given point in time but it is unlikely to be precisely measurable in a quantitative way because at no given point in time it may be entirely clear whether a concrete decision or a case that 'went forgotten' will not be taken up in the public discourse later on, for instance, due to an unexpected constitutional development for which the otherwise neglected case is of significant relevance. The 'model of influence' as such serves more the purpose of conceptual clarification than actual measurement by pointing to the need for modesty and caution when talking about the impact of or on a CC in relation to democracy.

Rather than being static, this model accounts for the unfolding of *time.* Time enables the creation of path-dependent structures that act as a constraint on particular types of decisions or forms of behavior (Pierson 2011). It is the fuel through which new ideas may become entrenched in the self-understanding of institutions and limit their significant transformation

regardless of the actors that represent them or the political context that surrounds them. The process of generation and transformation of ideas is constantly ongoing once the institution is in place as new ideas may emerge in reaction to established ones that had previously dominated the decision making on concrete questions. In the context of this project, these ideas may range from those speaking to the fundamental principles of the political community to those that determine a narrow range of questions of legal interpretation. Some of these ideas may not necessarily be overruled in the substance (not unlike precedents in the common law systems) but may get diminished in significance because of the changing political context that shifts public and expert attention away from the type of questions that the idea speaks to. Other reasons for the sidelining of some ideas in CCs' decision making may have to do with the change of the formal rules (e.g. removal of a CC's competence or of the modification of the legal rule that had facilitated the emergence and debate of the idea in the first place) or the decrease of the salience of the matter (which may be mirrored by a low number of petitions granting relevance to the idea in concrete disputes).

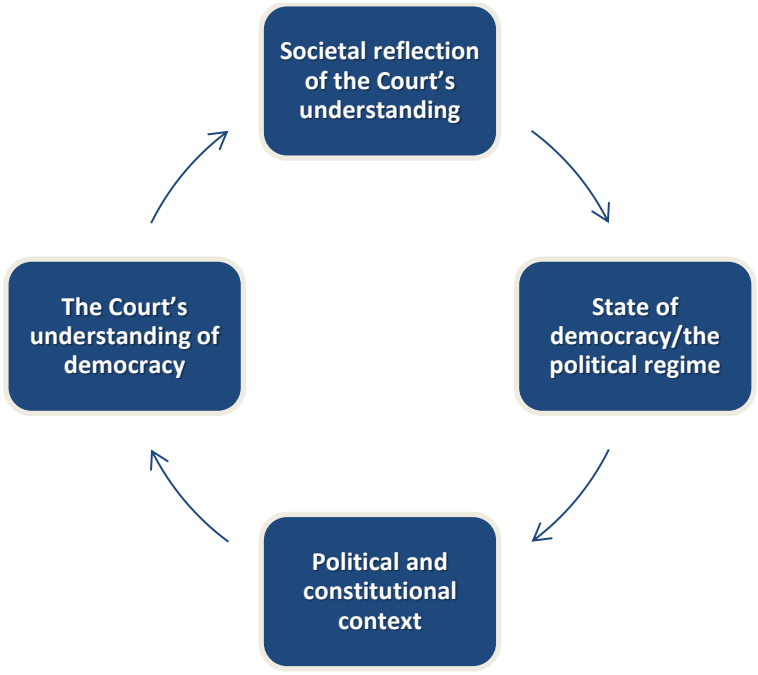
The cyclical model accounts for time by recognizing that ideas that are articulated from earlier on may guide or complicate the expression of other ideas on a related subject later on. For instance, if a robust conception of democracy in relation to a specific fundamental rights is pronounced by the CC shortly after its establishment, it will be more difficult to articulate a more restrictive conception (emphasizing, for instance, the comparatively grater value of the right to privacy). Indeed, such a move would require to more or less openly disregard the previous case law of the Court. In the empirical analysis, time is considered as well, in at least two ways. Firstly, it is by discerning different regime specifics in the countries of study combined with the different 'generations' of the CCs that are determined as a combination of the status quo of constitutional rules governing the CC and the judicial majority in place. Secondly, it is by structuring the analysis within individual dimensions in a chronological manner, identifying the main ideas emerging in the case law in a particular time range, and then tracing the transformation or disappearance if these ideas.

The circle is by no means limited to the understandings of democracy; however, for examining the impact on democracy (rather than on protection of a particular human right or set of rights, or on policy change as a process more generally, without reference to democracy),[14] the comprehension of how (not only) CCs and other political actors think about it is a necessary condition. Importantly, this does not mean that thinking about democracy in a certain way *suffices* to influence it with actions in line with the particular understanding of democracy; an effect may be missing or run contrary to the understanding either due to the political context surrounding the institution that engages in conscious or unconscious 'democracy reflections', or due to this understanding not being coherently reflected in the *output* of the decision making of that institution. The latter is likely to manifest in misunderstanding the decisions' (or even the whole institution's) interpretation and direction that it aims to set for political development.

Despite all these uncertainties, at the cost of certain simplifications I argue that in order to 'break into the circle without breaking it', the best starting point is precisely the CC, even if it

[14] This has been the *mantra* of one avenue in US-based judicial studies (G. N. Rosenberg 1991).

necessitates a 'ceteris paribus' assumption with respect to the context surrounding the Court. This is for three reasons. Firstly, the outcomes of the Court, especially in the prevailing absence of public statements of its judges (which is the case with the courts here), are concentrated on the decisions which are available and can be analyzed. Hence, they represent a much more centralized reference point than other stages of the process. Secondly, the decisions provide a dataset that can be juxtaposed with the public reflections of the Court in the next stage of the process. A reverse process would lead to omitting those decisions that may bear significant messages from the Court's perspective but are *not* taken up, hence potentially overemphasizing the CC's influence. Thirdly, as discussed in the case selection, measurements of the state of democracy are useful to get a rough picture of the political and constitutional context of this or that CC's operation but imperfect to determine the CC's influence. Starting with an evaluation of the state of democracy for a more nuanced empirical analysis could lead to 'breakouts' from the circle by attributing significance to political changes that are not relevant for the CC's development and for shaping its decision making.



This circle matches with the premises of some of the new institutionalist approaches discussed in the theoretical section. In particular, it fits with and develops the 'regime politics' approach to judicial studies (Whittington 2014). With this approach, on the one hand, courts are not insulated from political developments while on the other hand, they are still more than a sum of internal (judges or court staff) or external (other political actors, eventually the public) preferences. Courts have a 'relative autonomy' to decide even in highly politically salient matters (Clayton and May 1999). My focus is on the CCs' 'interior' by exploring the understandings of democracy and juxtaposing them with the political context surrounding their decision making. This allows to answer whether and how the failures of the CCs to guard democracy in certain crucial periods of Slovak and Hungarian contemporary political history have something to do with their approach to democracy. In other words, I look at the enabling as well as constraining nature of various ideas related to democracy that emerged on the

benches, either as results of collective deliberations (in majority decisions) or with individual judges (in separate opinions).

What is the logic of juxtaposing the political context with the understandings of democracy? This step is essential as otherwise invalid acontextual simplifications could emerge, such as that a majoritarian understanding of democracy is *always* detrimental to its protection or that if the respective CC theorizes separation of powers in the context of democracy, it will *always* prevent the efforts to concentrate all powers into the hands of one actor or a set of actors (such as a governing coalition). The typology below accounts for the political context in which the respective CC is located. In order to sharpen the ideal-typical categories, it reduced the understandings of democracy into the three categories known from the literature, with the first two dimensions of the five-dimensional conceptualization belonging to the middle-ranged category and the latter three compose elements of a maximalist understanding of democracy. As it becomes apparent, this is 'translation' between the two scales poses a higher threshold for the argument as the courts do not have to include elements such as participation or justice into their understanding of democracy in order to move beyond minimalistic criteria and satisfy the middle-ranged understanding.

Obviously, such a typology must be approached with caution because, in line with the approach of this research, it is not feasible to reduce the complexities of the CCs' reasonings into statistics or other (relatively) straightforward ways of measurement.[15] In practice, the CCs' arguments may flow over from one category to another in particular types of cases, and the presence of supporting or opposing arguments by some of the judges in separate opinions may enhance or undermine the strength of these arguments. Nevertheless, models come at a price of simplification (Segal and Spaeth 2002, 45–46) and their strength is in demonstrating the main theses of an empirical theory.

Understanding of democracy / political context	(Semi)-authoritarianism	Illiberalism	Democracy
Minimalist	Positive effect	Supports the ruling regime	Frequently feeds into illiberal rhetoric
Middle-ranged	May have positive effect	Positive effect	May have positive effect
Maximalist	May be counterproductive (trigger backlash against institution)	May have positive effect	Positive effect

[15] That said, the empirical analysis (also in response to previous feedback) includes statistical information on the number of decisions in each category (majority opinions distinct from separate opinions as one decision might include references to democracy in the majority as well as the separate opinion). Furthermore, the cases in which references to democracy are invoked by the petitioner only (i.e. not in the CC's own reasoning) are listed as a subcategory. The proportion of these cases in relation to the overall number of cases indicates to what extent CCs neglected the 'invitations' to engage with the concept of democracy by the petitioners.

The model delineates the conduciveness of different understandings of democracy to its protection[16] in different political contexts. The main takeaway is that *any* reasoning supportive of democracy, including that of simple majority rule (comprising, for instance, free and fair elections) *may be* conducive to democracy in a particular political context. However, certain understandings are particularly suitable to maximize the potential impact of the CCs by tapping into the needs triggered under the given circumstances. In other words, the closer the political regime stands towards the democratic ideal, the thicker understandings of democracy are the most useful for maximizing the CCs' democracy-conducive impact and avoiding their democracy-surpassing impact. As mentioned, in an autocracy (upper left quadrant) the minimalist reasoning, appealing to the fundamental principle of the 'rule of the people' being able to select their representatives and decide by a majority can resonate with the citizenry who, due to e.g. governmental propaganda including in the educational system, or past experience with democracy, do not have a more concrete understanding of how democracy would make a difference. A reasoning incorporating fundamental demands of human rights and, possibly, procedural justice, may have similar effects. At the same time, depending on the specifics of the regime, as the reasoning moves towards more maximalist understandings, the it is likely that the ruling elites at some point will decide that the price for retaining the CC exceeds the benefits gathered by the domestic and (perhaps more prominently) international perception of legitimacy associated with a voluntary incorporation of a supervisory institution in the constitutional system.

In an illiberal regime, where majoritarian decision making instruments formally remain in place and it is minority rights and the separation of powers that suffer a blow, a minimalistic understanding of democracy, at best, does not bring in notable effects.[17] At worst, it directly feeds into the rhetoric of the ruling elite, strengthening it with the constitutional authority of the CC. It is in this setting that the insistence on the integral link between democracy and the separation of powers as well as (depending on the specifics of the illiberal regime) the protection of certain fundamental rights can be expected to become a key difference between a CC fading into irrelevance as the extended arm of the ruling elite, and the CC serving as a bulwark against further autocratization. A more extensive understanding of democracy is unlikely to upset this tendency, even though the emphasis on political participation or social rights may be abused by the other branches of power depending on the nuances and the clarity of the CC's reasoning.

[16] Obviously, in undemocratic regimes protecting the "status quo" (or at least some elements of it, in the case of the illiberal regime) is detrimental to democratic transition. Therefore, protection of democracy in this context may entail a call for legal and political change, in extreme cases even a democratic revolution. Substantially, the task of the CCs in authoritarian regimes who wish to see a democratic transition is undermining the legitimacy of the ruling power—an action that, obviously, in a polar type of autocracy (totalitarianism, see Arendt 1958) would with certainty be prohibited by the ruling power.

[17] A counterargument could be made that due to the unfairness of the Hungarian electoral law, majoritarian arguments could be employed in striking it down and thereby enhancing democracy. At the same time, the problems with the fairness of the Hungarian elections rather signalize the country's downfall into a semi-authoritarian regime than an illiberal model in which once the majority wins the elections, it can do anything (except manipulating with the elections). At this point, the rhetoric of the ruling elites is essential—if they are nominally committed to a constitutional version of democracy, it may be difficult for the CC to resort to minimalistic arguments without risking becoming complicit with the ruling elite's rhetoric. In such a setting, the characteristics of the 'illiberal' regime provide a better fit for the CC determining its reasoning.

Finally, even in a democracy where fundamental rights and basic separation of powers are alive and well, the tendencies towards decay are always present. In this context, the CC may become a crucial actor halting or at least slowing down these tendencies by constantly reminding of the high aspirations that the democratic ideal entails. This is the constellation in which moving beyond separation of powers and fundamental civil and political rights becomes necessary. The defense of equality in a procedural[18] and substantive[19] sense receives, *ceteris paribus*, greater positive reception from the broader public which has the means to prevent illiberalization through elections and other forms of political activism.

Does this analysis mean that the CC should tailor its understanding of democracy to the characteristics of the political regime? While from a strategic policy-based perspective this could be recommended, it is more important that the CC develops a self-understanding as a guardian of democracy through its decision making. The understandings of democracy follow and affect the degree to which a CC committed to such a self-understanding may succeed. If, in fact, such a self-understanding is missing, the result is a lack of self-consciousness about the CC's reasoning on democracy. In other words, if the CC speaks a language of democracy it does not understand, it would be naïve to expect that other political actors would somehow develop such an understanding on its behalf and listen to it. Moreover, this analysis looks into a limited number of cases over a limited period of experience with (post-communist) democracy. Therefore, not all cells of the typology can be populated and it remains open to further research to examine (and try to falsify) its claims, particularly in one of the 'grey areas'. Nevertheless, this data-drive typology, as the next chapters will show, explains how the SCC's limited understanding of democracy in the 1990s (oscillating between minimalist and mid-ranged) did make a difference while the HCC's similar understanding in the first decade of the 2000s did not, and even coincided with its 'voluntary defeat' in the struggle against the rise of the Orbán regime.

1.2 Note on Case Selection

While the analytical framework introduced here can be applied to any centralized CC, the Slovak and Hungarian cases allow to utilize it in its full complexity as both countries have faced or are facing democratic backsliding. Moreover, two widespread conclusions about theses CCs§ performance can be scrutinized by the analysis. There are, firstly, the existing 'canons' (Malová 2010; Schwartz 1998, 2002; Sólyom 2003; Halmai 2010) about the two CCs' contributions to democracy (especially in the 1990s) and, secondly, the current belief in incapacitation of the HCC by an executive assault (see contributions in Gárdos-Orosz and Szente 2014; also Sólyom 2015; Scheppele 2015). In addition, while not facing any obvious external attack by other political actors, the SCC, too, has undergone substantial changes in its competences as well as composition since its establishment (Drgonec 2018) that allow to assume differences in time in its approach to democracy as well as decision-making on the overall. It has also been in the

[18] Such as absence of corruption and 'unpunishable oligarchs' and a more extensive set of fora for meaningful political participation between the elections.
[19] Social rights not just as a 'scrap of paper' but as entitlements, of which at least some (such as right to education) impose a positive obligation on the legislators.

center of domestic media attention in several complex cases, one of which generated reflections by the Venice Commission as well (cf. Láštic and Steuer 2019).

2. THE HCC'S AND SCC'S UNDERSTANDING(S) OF DEMOCRACY IN RELATION TO SEPARATION OF POWERS

This section presents the results of the analysis for two CCs in one of the five dimensions, that of the separation of powers. This mainly includes competence disputes between various constitutional bodies although other cases are included if the CCs referred to democracy in a separation of powers context in them. The mere idea of democracy that emerges from the case law may not be the one that is implemented and followed by other political actors and perceived as the courts' contribution by the broader public.

2.1 Selection of Judicial Decisions and Interviewees

The advantages of a keyword search as a basis for selection of the population of decisions under study is that it transcends the usual limitations posed by the types of proceedings or the judicial composition of the court. The keyword under study is 'democracy', based on the logic that an explicit reference to 'democracy' (rather than something else with the attribution 'democratic') is necessary to safely assume that the court thought about the particularities, or at least one selected issue within a broader case, in the context of democracy. This way, it is possible to extract the 'idea of democracy' as introduced by the CCs themselves. The 'ideas' themselves are subject to scrutiny through a contextual analysis (Goodin and Tilly 2008) by bringing them in relation to the major concepts in each of the five dimensions, as well as the particularities of the case in question. Each case with references to democracy is expected to fit under one of the five dimensions.[20]

The findings from the contextual case law analysis are corroborated by semi-structured interviews with former judges and/or counsellors of both Courts. So far six former judges (three from each country) and several counsellors of the Hungarian CC were interviewed,[21] including some of those working for or appointed by the parliamentary majority of PM Orbán in Hungary. While the pool of respondents is not representative of all former and current judges and counsellors, they represent different backgrounds and hence provide valuable insights into the thinking of those behind the institutional decision-making.

2.2 Analysis of Judicial Decisions[22]

This section focuses on the majority opinions which create the legally binding canon of the CCs. It cuts across different types of proceedings as it does not adopt a hierarchical view, attributing more significance to, for instance, constitutional review of legislation, than individual complaints on human rights violations. The analysis sheds light on the slight

[20] In this paper, only one dimension is covered.
[21] The selection was based on availability of respondents' contacts and time, and willingness to be interviewed. Further interviews are planned in the further development of the project.
[22] The analysis of separate opinions and most footnotes in the empirical section are omitted due to space constraints.

avoidance of an integral connection between democracy and the separation of powers by both courts in the 1990s, that, while not removing the SCC's capacity to resist the authoritarian backlash in this period, cast a long shadow over the later jurisprudence of both CCs. In the Slovak case, this resulted in the SCC playing with the majoritarian temptation in an incoheren manner in recent competence disputes. The consequences have been even more serious in Hungary where the HCC fell victim of the majoritarian temptation, by refusing to review constitutional changes on their merits.

2.2.1 Hungary

From the beginning of its judging, the HCC has generally been inclined to include *separation of powers* as part of the 'democratic state under the rule of law.' It identified general limits for the exercise of public powers, in particular of the Parliament (Országgyűlés) and the executive. In a unanimous judgment, it rejected a complaint aiming to invalidate the possibility for 50 MPs to submit a petition for a priori constitutional review, portraying this petition 'not [as] a means for [impinging] lawmaking but to review the constitutionality of a draft bill. […] The "parliamentary majoritarian democracy" operating within constitutional framework has an inseparable component in the constitutional protection of the minority in case of the majority overstepping the constitutional limits [which is at the same time] the perspective of constitutional judging' (66/1997 [XII. 29.] AB, p. 13). In another case in this period, the Court, again unanimously, declared that a referendum cannot contain a question on the direct election of the head of state since this would imply a constitutional change, and 'the constitutional arrangement [of Hungary, note MS] still indicates that the competence area of the representative bodies is full-fledged and general, while the institutes of direct democracy are exceptional' (25/1999 [VII. 7.] AB, p. 9). These cases can be regarded as largely conventional (albeit definitely not self-evident) in terms of establishing the rights of opposition within the separation of powers framework.

In the post-2000 period, the notion of 'constitutional democracy', same as in the dimension of fundamental rights protection, permeated the HCC's references to democracy. In its view, a constitutional democracy requires the respect towards procedural role of operation of public institutions as well (62/2003 [XII. 15] AB, quoted in 7/2004 [III. 24.] AB). In a case concerning the obligation of the legislature to hold a new hearing in case the head of state vetoes a piece of legislation, the Court made a strong case for cooperation among various branches of powers, cooperation facilitated by 'detailed procedural rules' in the 'complex system [of] constitutional democracy' (62/2003 [XII. 15] AB, p. 10). In this way, while acknowledging separation of powers, it also pointed out the close relationships existing in between the branches.[23] The Court continued to refer to this cooperation also in a 2007 decision concerning procedural rules of lawmaking in relation to the regulation of professional chambers in the area of healthcare (1098/B/2006. AB, p. 14).

In related areas, the Court accepted that the Attorney General might be subject to parliamentary interpellation, whereas it set limits to the scope of this requirement by pointing out the

[23] Not unlike Richard Albert (2010, 228–35) through the notion of 'fused powers', although in a less nuanced manner. See also the HCC's decision of 63/2003 (XII. 15) AB, which argued in the same way.

independence of the prosecution service that is required for it to properly fulfil the assigned tasks, including 'the prosecution of acts that infringe upon or threaten democracy' (3/2004. [II. 17.] AB, p. 13). The Court, furthermore, explained that the interpellation cannot be equated with a command to act or decide in a certain way (ibid., p. 15). Independence then remained the Court's concern also with respect to the judiciary in a 2009 case, where a unanimous Court affirmed the composition of the National Judicial Council (*Országos Igazságszolgáltatási Tanács*) with a rare reference to the constitutional preamble as well (97/2009. [X. 16.] AB, p. 3).

Prior to 2010, the Court also addressed the lawmaking process in a notable decision in which it repealed the whole Act on lawmaking (the order of legislation). The Court invalidated the law as a whole because several of its provisions were deemed unconstitutional and the remaining ones did not make up a coherent whole for legal practice (see Enyedi 2010, 84–86; Holló 2010, 119). In particular, it brought up the unacceptability of the provisions positioning the National Assembly as 'a state body entitled to determine direction and principled positions' that could order the outcomes of judicial decision making as well as instruments of socialist state law that denies the separation of powers as 'the defining principle of constitutional democracy' (121/2009. [XII. 17.], p. 19).

Last but not least, the Court connected freedom of expression and opposition rights when declaring unconstitutionality of legislative omission due to the lack of guarantees of opposition speaking times through a regulatory framework (12/2006. [IV. 24.] AB). The intersection between the preference for speedy decisions by the majority and the possibility to criticize them by the opposition generates, in the view of the Court, 'the increased protection of minority opinions', otherwise 'the minority (ever-present opposition) would lose the most important entitlement it possesses in a parliamentary democracy from a freedom of expression perspective' (ibid., p. 12, see also "Az Alkotmánybíróság Legutóbbi Döntéseiből" 2006).

The interviewees generally agreed that the Court focused predominantly on the principle of the rule of law particularly in relation to cases that. In one view, this created the perception of the Court, not unlike academics, sitting in an 'ivory tower' and deciding about matters remote to the public. However, in the view of a former liberal judge on the Court, the special powers of the actio popularis enabled a direct connection between the Court and the 'ordinary people'. It is then not surprising that some former judges are very critical of the constitutional changes (for one public critique, see Vörös 2015). Less agreement is reached with regard to the HCC's role in them. The post-2010 association of separation of powers to democracy by the HCC are traceable in a few more or less widely discussed cases. A notable one from summer 2011 rejected the petition for constitutional review of the constitutional amendment including the one related to the Constitutional Court Act, i.e. the limiting of the HCC's powers. The HCC did not take up some of the petitioners' pleas for bringing (the curbing of) democracy understood through the lens of separation of powers that leaves core competences to each branch of power and prevents the other from trumping them easily through an amendment procedure. It did highlight though that 'if the *level* [emphasis added] of constitutional rule of law and constitutional democracy [and] the protection of fundamental rights is encroached upon or guarantees are abolished, the Constitutional Court cannot invalidate the [respective] provisions

but it can indicate—and in extreme cases is obliged to indicate—this fact [of curbing democracy] also to the constituent power' (61/2011 [VII. 13.] AB, pp. 27). Arguably, this is the case when the Court, known for its ability for broad constitutional review a la 'invisible constitution' in cases with less serious political implications (Sajó 1995; Füzér 1996), through its reluctance to present a more complex understanding of democracy building on and developing its previous case law, conceded a 'voluntary defeat' at a time when the legitimacy of the constitutional changes was more questionable through the lack of their de facto endorsement by the HCC (for other arguments of procedural and substantive issues with this decision in English, see Halmai 2012). The Court's deference in this case paved the way towards the diminishing of its relevance since it had to process further cases in the 'shadows' of its powers having been previously limited (see Kovács 2017, 205–7 on the chronology of cases and the argument of the HCC's failure to develop standards for amendment review).

Besides a quickly resolvable case, references to democracy (albeit almost exclusively in the petition, not the HCC's reasoning on the merits) appeared in other notable decisions related to the 'constitutional capture' (term used by e.g. Koncewicz 2018 in the Polish case) in Hungary. A perception opposite to the 2011 case might emerge from the one where the HCC invalidated several transitional provisions to the Hungarian Constitution (31 December 2011) on the basis of their incompatibility with a lawful constitutional amendment procedure (Vincze 2017, 91). Upon a closer look, the distinction between procedural versus substantive review remains blurred in this case since while at face value the invalidation was based on procedural grounds (i.e. that the quashed provisions should have been incorporated directly into the constitution), material review must have been conducted in order to come to such a conclusion (i.e. answering the question why some provisions cannot be altered via transitional provisions (Sonnevend, Jakab, and Csink 2015, 56–57). The Court did not invoke any arguments as to whether certain constitutional standards are necessary for democracy to remain in place, although implicitly these could be read into the requirement of procedural rules of lawmaking that are of particular significance during constitution-making (45/2012. [XII. 29.] AB, p. 46). However, the Court could not overcome the shadow placed by its 'self-defeat' in the 2011 case and the parliamentary majority moved quickly towards limiting the Court's powers on amendment review. Complementing these views, some of the counsellors working at the Court (most of them interviewed off record) see these cases as a turning point in the standing of the Court in the political system. Invoking the distinction between 'the political' and 'the legal', one of them particularly argued that the Court resorted back to its proper role in the constitutional system. This view was closely complemented by a former judge as well. Two other counsellors were more critical, arguing from a petitioner-centered perspective that it is now more difficult for 'ordinary people' to reach the Court, especially with complaints related to the life in a country with rule of law challenges rather than direct violations of individual fundamental rights. In their view the Court moved towards fundamental rights jurisprudence at the expense of rule of law jurisprudence.

While several later cases were included by the keyword selection as well, they neither display an elaborate discussion on democracy in light of substantial changes of the constitutional order. In 2012, two petitions submitted through the newly created constitutional complaint procedure,

arguing—in a creative but definitely non-negligible way—that some of the significant constitutional and other statutory changes 'in conjunction with each other create a legal basis for such a public law system which has the aim of the sole possession of power in the long run […].' Consequently, they have a direct negative impact on the Hungarian citizens whose rights are thereby violated (3012/2012. [VI. 21.] AB, 3025/2013. [II. 12.] AB). The HCC rejected both petitions with the argument that the 'personal, direct and actual' impact of the provisions in question on the complainant cannot be determined. While the formal reasoning on these complaints being an *'actio popularis* in disguise*'* can be accepted, the fact that individuals can no longer receive material replies on perceived grievances caused by the fundamental structure of the constitutional system remains a downside of the, as Gárdos-Orosz (2012, 315) correctly notes, 'replacement' rather than 'completion' of a 'well-functioning system [of constitutional protection]'.

With a number of new regulations curtailing the powers of the HCC, it may seem that external circumstances began to pose too significant restrictions for it to be protective of separation of powers. However, the agency of the Court—and its reasoning—should not be ignored despite the limitations of powers. Importantly, the Court reiterated its earlier case law on the prohibition of 'unrestrained and unrestrainable power in a constitutional democracy' in a separation of powers context in its decision concerning the consumer loan contracts of financial institutions. Yet, it did *not* quash the retroactive restrictions that were set on these contracts through the government policy of protecting debtors at the time (2/2015. [II. 2.] AB, p. 9). This case is just one illustration of the voluntary subordination of the Constitutional Court to the legislative majority in this area with the consequence of centralizing, rather than separating, decision-making powers (Gárdos-Orosz 2018). The other cases (Szente and Gárdos-Orosz 2018, 93–97, 102–5), tellingly, not making it through the selection and thus not even making a reference to democracy. For one of the counsellors interviewed, decisions in cases similar to these (not all of them in the selection) are hard to be justified from an outside perspective, and sometimes even the counsellors are not sure why some judges voted the way they did. At the same time, none of them argues that legal reasoning does not matter any longer, quite the contrary. In the view of one of them, vigorous battles over conflicting constitutional views continue and most judges are open to be persuaded even though they hold an image of a more deferential court than the HCC that used to be known in the past.

In sum, arguments about the HCC having been limited due to an executive 'assault' (Bugarič and Ginsburg 2016) are incomplete in that even if one attributes the most recent decisions to the 'court packing' efforts of the Orbán government, in several decisions before this period the HCC has chosen the 'exit' from a potentially heated constitutional conflict, rather than the 'voice' by presenting a principled opposition to the effort to fundamentally transform the constitutional system in ways that cannot be squared with a substantive understanding of democracy. The 'constitutional democracy' era post-2000, building on the explorations of democracy's 'uncharted territories' in 1990s had apparently not been institutionalized in the Court's reasoning strongly enough to be unavoidable in dealing with matters related to separation of powers in the face of an illiberal coup.

2.2.2 Slovakia

Despite the first term of the SCC being famous for its struggles over limited government with PM Mečiar (and is confirmed by several former judges, two of them interviewed for this project), this analysis does not confirm the 'exceptionality' of the Court in the 1990s *in terms of* talking about the defense of democracy *in relation to* the separation of powers. While the modification of competences in 2001 does not play a significant role here as most of the cases are standard constitutional reviews the Court was entitled to perform during its first term as well, the prevalence of the cases categorized in the third term of the Court (2007-) is slightly mitigated by the longer period covered (seven to twelve years). Once again, descriptive statistics cannot demonstrate the depth and salience of the Court's arguments and so a qualitative review is in order. From the four cases of the first term, the decision invalidating the act that rescinded the executive privatization decisions of the short-lived government operating between the two Mečiar governments is the most significant as a building block for later decision making. 'In a constitutional state, a component of [constitutional balance] is the system of the separation of powers to the executive, legislature and judiciary, which are autonomous in a parliamentary democracy and mutually connected only with networks of constitutional control and cooperation' (PL. ÚS 16/95, p. 5). The merely 16-page long 'Slovak version of *Marbury v. Madison*' in terms of the Court 'speaking truth to power' does not answer what constitutional autonomy means but provides for a basic sensitivity towards exclusive competences and responsibilities of different branches of power. The SCC did not develop any robust understanding of democracy; instead, it limited its understanding of 'parliamentary democracy' to the need of checks and balances. However, these were not to be found in any opposition to the majoritarian procedures of the selection of the legislature, they merely concerned the relationship between the executive (with, at that point, an indirectly elected head of state) and the legislature. In other words, the SCC understood the delegation chain from the citizens in the elections to the representative body (the parliament) and, subsequently, the executive, but did not consider it necessary to add other democratic safeguards to it. The 1995 decision, in addition, included a reference on the prohibition of retroactivity as a 'democratic guarantee of the protection of the right of citizens.' This can be considered as an element of individual rights protection and separation of powers, thus of constitutional democracy, but it remained a hint only. Despite these shortcomings, the influence of the decision is demonstrated in slightly later (also not very detailed) decisions. These referred to the 1995 one when invalidating the amendments of the parliamentary procedures (1) enabling to create investigative commissions of the National Council and hence blurring the distinction between the responsibilities of executive, legislative and judiciary authorities in tracing criminal conduct in the state (PL. ÚS 29/95), and (2) shortening the review time for the president to veto a bill from fifteen to four days (PL. ÚS 4/97). Finally, the fourth case is the only one in the whole dataset that explicitly addresses *vertical separation of powers* between the state and territorial self-governing units. Čič's Court ruled on the constitutionality of state-regulated limited remuneration for employees of the municipalities, by accepting the executive's argument that 'from the perspective of the position of municipalities in the Constitution and generally the democracy of this constitution in relation to the position of municipalities [sic!], the question of balance of this regulation is related to the regulation of the economic, social and cultural

rights of the citizens' (PL. ÚS 5/97, p. 12). In other words, employees of the municipalities have the right to decent working conditions, and these conditions may be regulated by the state. Still, this single case falls behind the HCC's more extensive jurisprudence on local self-government, and may be related to the overshadowing of these questions by the more pertinent struggles over the separation of powers at the *horizontal level.*

During the second term, the SCC continued without notable innovations in the relationship between democracy and separation of powers on the one hand and backlashes on the other. This may not be reason for critique given that the caseload of this kind decreased notably as well, as one of the interviewees remarked. At the same time, the lack of references to democracy remains observable and matches with the absence of conceptual attention to it, as another former judge acknowledged during the interview. In two cases concerning regulations adopted by the first government of PM Dzurinda, the SCC referred to the dictum in the 1995 privatization decision, confirming constitutionality in one (PL. ÚS 6/01, p. 33) and declaring unconstitutionality in another (PL. ÚS 25/00, p. 14). Furthermore, it did not take up the same reference provided by the petitioners in a third (constitutionality-affirming case) (PL. ÚS 52/99, p. 4) and entirely avoided the 'talk on democracy' brought forward by them in the fourth one case (PL. ÚS 9/04, p. 3).

The situation changed in the third term, with 15 cases qualifying for this dimension. The growth of information technologies and availability of data seems to have triggered longer and more extensive reasonings in cases concerning conflicts between governmental officials, and with it came more space for referencing various concepts, including that of democracy. Most cases are plenary constitutional reviews, the exceptions are three senate decisions on complaints against the decision making of the Parliamentary Committee on Incompatibility of Functions. All of them included references by the complainants who alleged the violation of equality by the Committee having ordered sanctions according to the Act on the protection of public interest in the performance of offices of public officials by late submissions of property disclosures. In each case, the proposal highlighted that such a practice 'rips democracy of its exclusive rationale that makes it better than other societal systems' (IV. ÚS 141/07, p. 6, IV. ÚS 153/07, p. 5, IV. ÚS 177/07, p. 6). The Court applied the principles of reasonableness and purpose of the regulation on timely submission of property disclosures. It reversed one decision that had interpreted the deadlines too restrictively but affirmed those two where the complainants clearly submitted the disclosure after the deadline required by the law. Even though no more than a couple of thousands of Slovak crowns (a couple of hundreds of dollars) was at stake in these decisions, the decisions add to the Court's normative legitimacy through the clarity and coherence of its justification. At the same time, these qualities are more questionable in the later, more decisive cases determining the Court's approach towards separation of powers and democracy.

Contrary to the expectations that might emerge from a complete picture of the period under study (with the 'shining' 'Mečiar amnesties' case of substantive review), the SCC did not place the upholding of procedural requirements for lawmaking in a democracy anywhere near to the point of significance comparable to the HCC. Instead, it bluntly declared that in a

'representative democracy' state power is exercised by the citizens 'through their fairly elected representatives in the parliament' (PL. ÚS 14/2014, p. 25). Not only is it acceptable if there is no interdepartmental commentary procedure required when amendments are proposed by the executive, so goes the Court, but if the right to legislative initiative by a parliamentary committee is even curtailed in any way (without clarification, whether transparency and public consultation requirements would fall into such curtailment), then it would be against the 'democratic rules of government, and therefore such an egregious violation of constitutionality as an interference with *the material core of the constitution*' (ibid., p. 27, emphasis added). This approach casts doubt that the Court would be able to interfere on procedural grounds if the almighty parliament, possibly controlled by a constitutional majority, would engage in democracy-deconstructing exercises without regard to the existing procedures (albeit it does not negate its possibility to interfere via substantive review). On the other hand, the Court did eventually declare that certain principles must be obeyed in the legislative process as well. In a case concerning the Decree of the Regulatory Office for Network Industries establishing price regulation in the electricity sector, the Court, after sharply rejecting the challenge to whether it has review powers in the cases of decrees not explicitly presupposed by legislation, went on to mention three principles that must be fulfilled in order for the lawmaking process to respect the principle of 'pluralism […] in the conditions of parliamentary democracy: free competition among political parties, majority decision making and minority protection, and the principle of publicity in terms of the right of the public to become familiar and identified with the "product" of the parliamentary procedure (the proposal for a bill)' (PL. ÚS 17/2014, p. 46). A few pages later though, it rushed to add (referring to several academic works, such as that of John Hart Ely), that two positions can be taken on this issue, that of judicial activism and judicial self-restraint. The SCC had leaned to the former, that carries a generally negative answer to the question of 'entitlement [of the institution of the protection of constitutionality] in a representative democracy to oversee the process of lawmaking realized by elected representatives of the people as the source of power in the state' (ibid., pp. 47-49). On that basis, it did not declare the violation of procedural rules in this case, and established a broad leeway for the executive to decide on such decrees even without meeting the third principle (the principle of publicity).

Amongst some of the most challenging cases for the Court were the ones in which it had to decide on legislation directly affecting its own functioning. In these cases, the reasoning for the purpose and limits of the separation of powers becomes particularly essential because if the Court does not manage to provide a convincing justification, it might appear as biased in favor of its own power. Salaries of judges are a case in point. The Court rejected the cuts of salaries in response to the post-2008 economic crisis. Referring to international document, the majority made a connection between judicial independence and the financial security of judges and echoed the concerns against 'adopting measures that could jeopardize the principles [concerning the independence of judges in democracies] that are fundamental for safeguarding democracy and the rule of law' (PL. ÚS 99/2011, p. 30). But it faced challenges beyond salaries, when ruling on complicated cases concerning sets of provisions of the act on judges and associates, and the act on prosecutors. The Court employed a 'surgical procedure' approach here, whereby it reviewed individual provisions, invalidated some but left others intact, with an

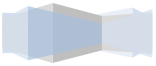
accompanying justification to each. This approach stands at odds with the invalidation of a whole act (Act on the Special Court) a few years earlier despite the constitutional challenge having been linked to merely a few provisions on the salaries and the vetting of the Special Court judges by the executive. Here, the majority did not find the argument from the explanatory statement to this piece of legislation, that had included a reference on corruption threatening democracy (PL. ÚS 17/08, p. 10, 46-47), compelling to discuss, but it did declare the incompatibility of the 'special court' model as a whole with the separation of powers (ibid., p. 94 et seq., referring to the Court's early 'separation of powers' dictum). Rather than an effort to come to a consensual decision, one of the most disputed decisions of the third Court (certainly as measured by the number of dissents, see also Ľalík 2011, 691) engaged in extensive substantive review, sharply at odds with the 'self-declared self-restraint' in areas such as the procedural rules of lawmaking.

In lieu of summing up, one last piece is missing from the mosaic of the SCC's democracy jurisprudence in the second dimension: an avid observer of the SCC's case law may be surprised by *not* seeing some of the well-known cases on the above list, most notably the interpretation of the presidential appointment powers of the attorney general. The explanation is simple: the keyword search did not flag them as they did not elaborate on the connection of the case to democracy.[24] With this in mind, the significance of the perhaps simplistic but clearly influential case law of the Court in its first term is demonstrated in the next courts not having been able to go far beyond the 'separation of powers dictum' of their predecessor. Despite some of the separation of powers rulings in this dataset being among the most complex and also longest, we cannot find innovative concerns for the undermining of (representative) democracy by 'a legislative vortex' similar to that in Hungary. With the exception of some limits on the procedural rules of lawmaking, which might be 'rediscovered' by a later Court when facing a challenge from the other branches of government, the Court would have to rely on substantive review to have a chance to protect democracy. At the same time, castles without firm foundations are likely to collapse when under attack, and so the potential for wideranging substantive review without concern for the legitimacy of the procedures provides limited guarantees for withstanding such an attack in a way that can rally the public behind the Court.

CONCLUSION

This paper provided an alternative to conventional and in several ways limited conceptualizations of the relationship between CCs and democracy. By shifting the emphasis on the CCs' independent capacity to safeguard democracy in various political contexts, a new way of assessing a concrete CC's contribution to maintaining and developing democracy has been presented. This five-dimensional conceptualization that leaves space for an inductive determination of the range of a particular CC's understandings may be used in several other ways (for instance, to analyze a selection of cases based on expert judgment of 'landmark cases' rather than keyword search) and can be applied to centralized CCs with particular potential in cases of courts tasked with abstract judicial review, and possibly beyond them. The conceptualization is more suited to studying the CCs specifically than as one institution in a democratic political regime, which is the case of general indexes of democratic quality. The

[24] References in the forms of adjectives may be found in these cases but they would not change the results.



empirical analysis took stock of the contentious question of how the CCs in Slovakia and Hungary have understood democracy in relation to separation of powers, that uncovered their limited ability to resist the 'majoritarian temptation'—the notion that majority rule satisfies democratic standards and separation of powers is an 'addition' in the domain of the rule of law or in its own right, but not included in the concept of democracy. The analysis (1) offers a more critical take on the SCC's and HCC's performance in the 1990s than previous scholarship; (2) 'brings agency back in' to the discussions about the HCC's curtailed capacity to perform its constitutional role after the adoption of the new Hungarian Constitution; (3) highlights the underlying fragilities in several cases decided by the SCC in mediatized constitutional conflicts; and (4) provides a tool for a more effective exercise of constitutional guardianship—developing an integrated notion of democracy by the CCs with close attention to the political context of the cases they are called to rule on.

A number of limitations can be identified. Firstly, the qualitative contextual analysis may to some extent be influenced by the researcher's normative preferences. The situation of cases into an established body of scholarship decreases this risk. Furthermore, the presentation of the cases categorized into the five dimensions may be accompanied by descriptive statistics to provide a structured overview of, for instance, the number of cases in each dimension, the number of references, including a breakdown for separate opinions (detailed statistics of this kind, although driven by a different research question, are offered in Láštic and Steuer 2019). As a second limitation, the keyword search may omit important cases which pertained to democracy in their broader academic and societal reflection, albeit not in their wording. To overcome this, the selection of cases through keyword search may be corroborated with an examination of main commentaries and/or textbooks in constitutional law in the country with the court under study, to see whether academic lawyers make references to cases other than the ones included in the dataset when they discuss democracy and the Court's case law related to it. In addition, expert interviews on the subject already serve as additional source of primary data and partially overcome this limitation. Thirdly, the five-dimensional conceptualization remains one influenced mainly by theoretical approaches rather than the court cases themselves. Future analyses encompassing other courts or evolving questions related to democracy may demonstrate a need for extension of the dimensions. At the same time, since the conceptualization already assumes a broad potential of the CCs to influence democracy, further extension might open up the room for criticism for 'seeing CCs where they are not (or should not be).' Further comparative research seems a fruitful way forward, with Central European CCs offering relevant cases with very similar trajectories post-1989 (when most CCs in the region were established) but differences in recent developments of their countries' political regimes. Furthermore, in line with the new institutionalist premises, the reflection of the 'mission' of the institution can show the actual political change achieved through its actions. For this purpose, process-tracing methodology (Trampusch and Palier 2016; Collier 2011; Beach and Pedersen 2013) examining the societal (e.g. media, political elite) reflections of the CCs' understandings of democracy can be employed.

In the end, CCs, even with the broadest range of formal powers, still do not (and possibly never will) possess the powers of the 'sword or the purse' (Hamilton). Instead, they have to rely on

other actors.[25] Yet, in contemporary (still imperfect) democracies, the reliance of courts on public support should be taken into account as well (cf. Bassok 2012). Under these circumstances, the legalistic understanding of the CCs as 'Guardians of the Constitution' is a limiting perspective that fails to take into account their full potential in making a difference in (albeit not necessarily a positive contribution to) contemporary democracies. Paraphrasing Hirschman (1970), if a CC chooses 'exit' over 'voice' by excluding the protection of democracy, understood beyond mere majoritarianism, from its own role, skepticism as regards its 'democracy-conducive' effect is warranted.

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[25] For Hamilton (Hamilton, Madison, and Jay 2003, no. 78), this was only the executive with capability enforce the judgments.

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