

DEMOCRACY, PROCEDURAL AND SOCIAL RIGHTS, AND CONSTITUTIONAL COURTS IN HUNGARY AND SLOVAKIA

Max Steuer*

O.P. Jindal Global University, Jindal Global Law School, India
Comenius University in Bratislava, Department of Political Science, Slovakia
ms2632@cantab.ac.uk

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Abstract

In democracies, individuals are free to develop their own conceptions of values, and try to persuade others of their viability. However, some of these conceptions carry greater weight than others. In particular, centralized constitutional courts (CCs) authoritatively interpret fundamental values as they are typically entrusted by constitutions to do so. This article introduces a new approach to examine how CCs advance particular value conceptions, via scrutinizing the understandings of procedural rights and social rights by the two formally most powerful in Central Europe: the Hungarian (HCC) and the Slovak (SCC) Constitutional Court. While procedural rights capture the minimum standards of equal treatment, social rights signal more robust readings of democracy which raise expectations of improved well-being. The two jurisdictions offer windows into the working of CCs operating in regimes with a history of authoritarianism—whereas Slovakia is currently a fragile democracy at best, Hungary has regressed into an illiberal regime. The article makes use of new institutionalism, where ideas articulated in the CCs' case law have a potential to influence the political regimes the CCs are located in. Using a case selection method based on keyword search, its two case studies, covering the period between the 1990s and 2017 and 77 majority opinions show how the SCC seldomly connected procedural and substantive rights to democracy, but this went unnoticed in the broader public. For the HCC, however, the absence of the connections between democracy and justice, especially when interpreting social rights, appears to have contributed to its

* Assistant Professor at O.P. Jindal Global University, Jindal Global Law School – Comenius University in Bratislava, Department of Political Science.

image as distant from the public, locked in abstract legal discourses. The findings prompt questions about the impact of public perceptions of the CCs on the capacity of actors with authoritarian ambitions to launch successful assaults on the CCs, as well as on the potential of the CCs to prevent these assaults by articulating particular value conceptions.

Keywords: Contextual Analysis; Procedural and Social Rights; Hungary; Institutionalism; Slovakia.

I. INTRODUCTION

“The theoretical assumption that constitutional courts, through their power to render a final decision, may pacify social conflict—by translating political conflicts into the language of the law and thereby neutralizing them—was put to the test”¹

Centralized constitutional courts (CCs) fulfil several key functions in modern democracies. They resolve conflicts² such as competence disputes, competing rights claims, but also deeper contestations between fundamental values,³ not through issuing punishment⁴ but primarily the authoritative pronouncements of the community’s values.⁵ Depending on the jurisdiction, CCs have been entrusted with a broad variety of powers that revolve around the authoritative interpretation and application of the Constitution.⁶ A wide range of subjects, including individuals,⁷ may engage in interpretation of constitutional values. Yet, only that of the CCs is binding in the given polity, and its override by other

¹ László Sólyom, “The Constitutional Court of Hungary,” in *The Max Planck Handbooks in European Public Law: Volume III: Constitutional Adjudication: Institutions*, ed. Armin von Bogdandy, Peter Huber, and Christoph Grabenwarter (Oxford: OUP, 2020), 392. Sólyom was the first President of the Court (1990 – 1998).

² Martin Shapiro, *Courts: A Comparative and Political Analysis*, New edition (Chicago; London: University of Chicago Press, 1986). The variations in the role of courts in different cultural settings cannot be satisfactorily explored here. See, for instance, Robert L. Kidder, “Courts and Conflict in an Indian City: A Study in Legal Impact,” *Journal of Commonwealth Political Studies* 11, no. 2 (1973): 121–39, <https://doi.org/10.1080/14662047308447182>.

³ Jimly Asshiddiqie, “Universalization of Democratic Constitutionalism and The Work of Constitutional Courts Today,” *Constitutional Review* 1, no. 2 (2016): 2, <https://doi.org/10.31078/consrev121>.

⁴ Adeoye O. Akinola and Ufo Okeke Uzodike, “Ubuntu and the Quest for Conflict Resolution in Africa,” *Journal of Black Studies* 49, no. 2 (2018): 108, <https://doi.org/10.1177/0021934717736186>.

⁵ Víctor Ferreres Comella, *Constitutional Courts and Democratic Values: A European Perspective* (New Haven: Yale University Press, 2009).

⁶ Maartje de Visser, *Constitutional Review in Europe: A Comparative Analysis* (Oxford: Hart Publishing, 2015); Alec Stone Sweet, “Constitutional Courts,” in *The Oxford Handbook of Comparative Constitutional Law*, ed. Michel Rosenfeld and András Sajó (Oxford: Oxford University Press, 2013), 815–29.

⁷ For the US context of how interpreting the Constitution means to be an American, see Noah Feldman, *Scorpions: The Battles and Triumphs of FDR’s Great Supreme Court Justices* (New York: Twelve, 2010).

actors triggers a transformation of the constitutional order as a whole⁸ into one which can no longer accommodate a CCs.

While some CCs have formally been operating in non-democratic regimes, at the start of the 2000s, a great deal of optimism surrounded the performance of CCs, using these powers of constitutional interpretation for the advancement of democratic consolidation.⁹ In Central Europe in particular, CCs symbolized the ‘beacon of hope’, after decades of authoritarian rule which distorted the conceptions of legality and the rule of law in the academic and popular discourse.¹⁰ The Slovak CC was particularly celebrated, because, unlike its other regional counterparts, it ‘grew up’ within a semi-authoritarian regime under PM Vladimír Mečiar, who called the Court to be a ‘sick element on the political scene’.¹¹ Soon, however, this optimism began to flounder: several scholars have increasingly objected towards what they considered excessive judicial activism, championing ‘judicial self-restraint’,¹² and questions have been raised to what extent CCs make a difference for the development of their political regime in the first place. The decline of democracy in several countries in the region after 2010 has exacerbated this trend.¹³ In particular, in Hungary the CC has been considered as captured because of all judges gradually having been replaced by nominees of the governing political party. This was accompanied by curtailing the CC’s formal powers, notably the *actio popularis*, allowing every Hungarian

⁸ Cf. Andrew Arato, *Post Sovereign Constitution Making: Learning and Legitimacy* (Oxford: OUP, 2016), 195–204.

⁹ Herman Schwartz, “Surprising Success: The New Eastern European Constitutional Courts,” in *The Self-Restraining State: Power and Accountability in New Democracies*, ed. Andreas Schedler, Larry Jay Diamond, and Marc F. Plattner (Boulder, CO: Lynne Rienner Publishers, 1999), 195–216.

¹⁰ Paul Blokker, “The (Re-)Emergence of Constitutionalism in East Central Europe,” in *Thinking Through Transition: Liberal Democracy, Authoritarian Pasts, and Intellectual History in East Central Europe After 1989*, ed. Michal Kopeček and Piotr Wcislik (Budapest: Central European University Press, 2015), 139–67; Michal Kopeček and Ned Richardson-Little, “Introduction: (Re-)Constituting the State and Law during the ‘Long Transformation of 1989’ in East Central Europe,” *Journal of Modern European History* 18, no. 3 (2020): 275–80, <https://doi.org/10.1177/1611894420924944>.

¹¹ Darina Malová, “The Role and Experience of the Slovakian Constitutional Court,” in *Constitutional Justice, East and West: Democratic Legitimacy and Constitutional Courts in Post-Communist Europe in a Comparative Perspective*, ed. Wojciech Sadurski (The Hague: Springer, 2010), 355.

¹² Jeremy Waldron, “The Core of the Case against Judicial Review,” *The Yale Law Journal* 115, no. 6 (2006): 1346–1406, <https://doi.org/10.2307/20455656>.

¹³ James Dawson and Seán Hanley, “The Fading Mirage of the ‘Liberal Consensus,’” *Journal of Democracy* 27, no. 1 (2016): 20–34, <https://doi.org/10.1353/jod.2016.0015>.

citizen to submit an abstract constitutional review claim.¹⁴ These measures were expected to end the perceived ‘activist’ heritage, allegedly championed by the ‘towering judge’ of the Hungarian CC in the 1990s, President László Sólyom.¹⁵

The possibility of CCs ‘abuse’,¹⁶ capture¹⁷ or successful ‘assault’¹⁸ on CCs raises the question to what extent they matter in safeguarding and promoting democracy, including via resolving value conflicts. This article contributes to the study of the CCs’ impact on political regimes by analysing SCC¹⁹ and HCC²⁰ cases selected through its connection between democracy as a key concept and two particular issue areas, procedural and social rights. The analysis proceeds by, *firstly*, introducing the institutionalist perspective that informs the novel approach to examine the role of ideas as indicators for judicial self-perceptions. *Secondly*, it discusses the significance of procedural and social rights particularly for the post-communist CCs such as the ones in Hungary and Slovakia, as articulations of their conceptions of justice and proxies for their democracy-protecting potential. *Thirdly*, it presents the analysis of majority opinions, encompassing the dominant interpretations on the bench. The analysis shows how, with a few exceptions, justice articulated through procedural and social rights became separated from democracy in both CCs’ reasoning, and how both CCs tend to favor a deferential standpoint in these areas. The deferential standpoint is especially prevalent in recent case law of the HCC, signaling the Court’s attribution of wider policy leeway even to an illiberal government, thus incapacitating itself in acting as an influential voice in the public contestation over justice in cases signaling value

¹⁴ Katalin Kelemen and Max Steuer, “Constitutional Court of Hungary,” in *Max Planck Encyclopedia of Comparative Constitutional Law*, ed. Rainer Grote, Frauke Lachenmann, and Rüdiger Wolfrum (Oxford: OUP, 2019), <https://oxcon.ouplaw.com/view/10.1093/law-mpeccol/law-mpeccol-e802>.

¹⁵ Gábor Attila Tóth, “Chief Justice Sólyom and the Paradox of ‘Revolution under the Rule of Law,’” in *Towering Judges: A Comparative Study of Constitutional Judges*, ed. Rehan Abeyratne and Iddo Porat, Comparative Constitutional Law and Policy (Cambridge: Cambridge University Press, 2021), 255–74, <https://doi.org/10.1017/9781108879194>.

¹⁶ Pablo Castillo-Ortiz, “The Illiberal Abuse of Constitutional Courts in Europe,” *European Constitutional Law Review* 15, no. 1 (2019): 48–72, <https://doi.org/10.1017/S1574019619000026>.

¹⁷ Tomasz Tadeusz Konciewicz, “The Capture of the Polish Constitutional Tribunal and Beyond: Of Institution(s), Fidelities and the Rule of Law in Flux,” *Review of Central and East European Law* 43, no. 2 (2018): 116–73, <https://doi.org/10.1163/15730352-04302002>.

¹⁸ Bojan Bugarič and Tom Ginsburg, “The Assault on Postcommunist Courts,” *Journal of Democracy* 27, no. 3 (2016): 69–82, <https://doi.org/10.1353/jod.2016.0047>.

¹⁹ 63 opinions in total (59 majority opinions, 3 concurrences, 1 dissent).

²⁰ 30 opinions in total (18 majority opinions, 6 concurrences, 6 dissents).

conflicts in the society. The conclusion discusses selected limitations of the analysis and calls for further comparative research that takes the conceptions of key political concepts presented by the CCs seriously.

II. THEORETICAL AND CONCEPTUAL POINTS OF DEPARTURE

“A political system with equal suffrage, in which the majority distributes everything to itself with no concern whatever for the fate of some racial or other minority, will not count as an unjust democracy [...], but as no democracy at all.”²¹

Extensive scholarship exists on the role of centralizes CCs as Guardians of the Constitution,²² departing from the debate between continental European jurists, Hans Kelsen and Carl Schmitt, in the early 20th century. Kelsen’s views have generally prevailed, with modern constitutional review modeled on Kelsenian premises.²³ With the spread of constitutional review,²⁴ more and more concerns were voiced in relation to its counter-majoritarian character, which may allegedly constrain or even undermine democracy understood via expressions of majority will.²⁵ While important, this discussion has somewhat obscured data-driven analyses on how particular ideas as developed by the CCs might constrain or fuel their capacity to protect democracy. This article argues for an institutional perspective to remedy that gap, and applies it on procedural and social rights jurisprudence as areas where CCs are particularly important as conflict-mediators.

2.1 The Value of Institutional Theory²⁶

The core of institutional theorizing as applied in this article is to examine the interpretations of key political concepts in the expressions of particular actors

²¹ Ronald Dworkin, “Equality, Democracy, and Constitution: We the People in Court,” *Alberta Law Review* 28, no. 2 (1989): 339–40.

²² See, e.g. Hans Kelsen and Carl Schmitt, *The Guardian of the Constitution: Hans Kelsen and Carl Schmitt on the Limits of Constitutional Law*, trans. Lars Vinx (Cambridge: CUP, 2015).

²³ E.g. Mauro Cappelletti, “Judicial Review in Comparative Perspective,” *California Law Review* 58, no. 5 (1970): 1038–40.

²⁴ Mauro Cappelletti, *Judicial Review in the Contemporary World* (Bobbs-Merrill, 1971).

²⁵ Alexander M. Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics*, Second edition (New Haven: Yale University Press, 1986).

²⁶ For a slightly more detailed discussion, see Max Steuer, “Authoritarian Populism, Conceptions of Democracy, and the Hungarian Constitutional Court: The Case of Political Participation,” *The International Journal of Human Rights* 26, no. 7 (2022): 5–7, <https://doi.org/10.1080/13642987.2021.1968379>.

(in this case, CC judges) as a proxy for understanding their self-perception that might constrain or facilitate the CC capacities to safeguard democracy. This reading, unlike a considerable portion of existing scholarship, does not take the ‘counter-majoritarian’ role of the CCs for granted;²⁷ instead, CCs might well support majoritarian preferences, at the expense of minority protection. Some scholars pursuing this approach categorize it as ‘constructivist’²⁸ or ‘discursive’²⁹ institutionalism; others retain the traditional institutional point of departure, but highlight the significance of the embedding of political institutions (which encompass CCs in this reading) in a regime context.³⁰ The present approach is furthermore compatible with ‘public law institutionalism’, interested in ‘causal processes’ (the starting point of which might be particular readings of political concepts, such as democracy or justice) that may lead to ‘transformative moments’ and ‘responses of political institutions, actors and voters to the challenges these processes throw up.’³¹

In short, 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’³², the institutionalist approach is capable to uncover the shifting conceptions of key political concepts in the case law of the CCs, with the capacity to shed light on how these conceptions might have correlated with the (dis)empowerment of the CCs during the moments of democratic consolidation or, on the contrary, erosion of democracy.

²⁷ Cf. Luís Roberto Barroso, “Counter-majoritarian, Representative, and Enlightened: The Roles of Constitutional Courts in Democracies,” *The American Journal of Comparative Law* 67, no. 1 (2019): 109–43, <https://doi.org/10.1093/ajcl/avzo09>.

²⁸ Colin Hay, “Constructivist Institutionalism,” in *The Oxford Handbook of Political Institutions*, ed. Sarah A. Binder, R. A. W. Rhodes, and Bert A. Rockman (Oxford: Oxford University Press, 2008), 56–74.

²⁹ Vivien A. Schmidt, “Discursive Institutionalism: The Explanatory Power of Ideas and Discourse,” *Annual Review of Political Science* 11, no. 1 (2008): 303–26, <https://doi.org/10.1146/annurev.polisci.11.060606.135342>.

³⁰ Cornell W. Clayton and David A. May, “A Political Regimes Approach to the Analysis of Legal Decisions,” *Polity* 32, no. 2 (1999): 233–52, <https://doi.org/10.2307/3235284>.

³¹ Rogers M. Smith, “Historical Institutionalism and the Study of Law,” in *The Oxford Handbook of Law and Politics*, ed. Gregory A. Caldeira, R. Daniel Kelemen, and Keith E. Whittington (Oxford: OUP, 2008), 50, <https://doi.org/10.1093/oxfordhb/9780199208425.001.0001>.

³² Rogers M. Smith, “Political Jurisprudence, The ‘New Institutionalism,’ and the Future of Public Law,” *The American Political Science Review* 82, no. 1 (1988): 106, <https://doi.org/10.2307/1958060>.

2.2 Conceptions of Democracy in Relation to Procedural and Social Rights

Procedural and social rights are rarely the entry point to examine institutional impacts on democracy, particularly in relation to CCs. Rather, the typical entry points are elections,³³ which are at the centre of ‘minimalist’ approaches to democracy, where purely free and fair political contestation satisfies the requirements of a democratic regime. As Shugarman puts it, ‘[j]udicial power and judicial independence [...] can be defended simultaneously as guardians of democracy and guardians against too much democracy’.³⁴ The latter reading sees constraints on majority will as restrictions of democracy. Yet, once one goes beyond a *minimalist perspective*, the tension vanishes, as democracy obtains more attributes than majority will only. In relation to the CCs, focusing purely on elections would be nonsensical given that the very justification for CCs is based on the separation of powers *beyond* elections.³⁵ Empirical studies adopting more robust readings of democracy have so far been limited.³⁶

A more robust conceptualization of democracy needs to account for more than the CCs’ capacity to protect elections and other, majoritarian forms of decision making. It also needs to go beyond issues of competence disputes,³⁷ or the protection of basic personal and political rights, which are summarized by the Dworkinian thesis of ‘rights as trumps’.³⁸ There is no doubts that the latter are essential for a democracy; as Burton puts it, to the extent democracy is often equated with ‘majority government’, ‘when applied to class and ethnic

³³ Jay Krehbiel, “Elections, Public Awareness, and the Efficacy of Constitutional Review,” *Journal of Law and Courts* 7, no. 1 (2019): 53–79, <https://doi.org/10.1086/699241>; Adfin Rochmad Baidhowah, “Defender of Democracy: The Role of Indonesian Constitutional Court in Preventing Rapid Democratic Backsliding,” *Constitutional Review* 7, no. 1 (2021): 124–52, <https://doi.org/10.31078/consrev715>.

³⁴ Jed Handelsman Shugerman, *The People’s Courts: Pursuing Judicial Independence in America* (Cambridge, Mass: Harvard University Press, 2012), 143.

³⁵ Writing at the heyday of democratic consolidation in Central Europe, two eminent Hungarian scholars connected constitutional adjudication to the separation of powers, or ‘limiting government’. András Sajó, *Limiting Government: An Introduction to Constitutionalism* (Budapest: CEU Press, 1999), 239, 242. János Kis, *Constitutional Democracy* (Budapest: CEU Press, 2003), 194–202, 235–36.

³⁶ For the application of a so-called “middle-ranged” conception, see Sascha Kneip, “Constitutional Courts as Democratic Actors and Promoters of the Rule of Law: Institutional Prerequisites and Normative Foundations,” *Zeitschrift Für Vergleichende Politikwissenschaft* 5, no. 1 (2011): 131–55, <https://doi.org/10.1007/s12286-011-0096-z>.

³⁷ Andy Omara, “The Indonesian Constitutional Court and the Democratic Institutions in Judicial Review,” *Constitutional Review* 3, no. 2 (2018): 189–207, <https://doi.org/10.31078/consrev323>; Kálmán Pócza, ed., *Constitutional Politics and the Judiciary: Decision-Making in Central and Eastern Europe* (London: Routledge, 2018).

³⁸ Ronald Dworkin, *Taking Rights Seriously* (Cambridge, Mass: Harvard University Press, 1978).

minorities such government is experienced as unjust, not in the social good, a denial of human rights, and, furthermore, a major source of conflict.³⁹ While these rights may also conflict, forming the basis of serious ‘constitutional dilemmas’,⁴⁰ the competence of CCs to address these conflicts is less frequently challenged than it is the case with social rights, where the very competence of the CCs to adjudicate is often questioned.⁴¹ In the Central European post-communist context, social rights are nevertheless particularly important and usually constitutionally enshrined, not least given the legacies of the previous, state socialist regime.⁴²

The reason for focusing on procedural and social rights in relation to democracy is because they offer a window into CCs’ conceptions of *justice*. Both procedural and social rights are tied closely to the ‘essential idea of law as an institution that mediates competing, even incompatible and antagonistic, claims to a stable political order under the regulative, though inherently contested idea of justice.’⁴³ These claims for justice are a source of value conflicts which (constitutional) courts, as adjudicative institutions⁴⁴ are expected to address. 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.*’⁴⁵ Because justice at the level of individuals is interpreted so differently, it may seem useful to prioritize a social conception of justice whereby it denotes ‘*social happiness [...] guaranteed by a social order.*’⁴⁶ Yet this exclusively collective perspective on justice is precisely one that may

³⁹ John Burton, “Conflict Resolution as a Political Philosophy,” *Interdisciplinary Peace Research* 3, no. 1 (1991): 65, <https://doi.org/10.1080/14781159108412733>.

⁴⁰ Lorenzo Zucca, *Constitutional Dilemmas: Conflicts of Fundamental Legal Rights in Europe and the USA* (Oxford: Oxford University Press, 2007).

⁴¹ Jeff King, *Judging Social Rights* (Cambridge: Cambridge University Press, 2012).

⁴² Wojciech Sadurski, *Rights Before Courts: A Study of Constitutional Courts in Postcommunist States of Central and Eastern Europe*, Second edition (Dordrecht: Springer, 2014), 253.

⁴³ Ulrich K. Preuß, “Judicial Power in Processes of Transformation,” in *Judicial Power: How Constitutional Courts Affect Political Transformations*, ed. Christine Landfried (Cambridge: Cambridge University Press, 2019), 349.

⁴⁴ See, for example, Austin Sarat and Joel B. Grossman, “Courts and Conflict Resolution: Problems in the Mobilization of Adjudication,” *American Political Science Review* 69, no. 4 (1975): 1200–1217, <https://doi.org/10.2307/1955281>.

⁴⁵ Ronald Dworkin, *Law’s Empire* (Cambridge: Harvard University Press, 1986), 73.

⁴⁶ Hans Kelsen, *What Is Justice? Justice, Law, and Politics in the Mirror of Science (Collected Essays)* (New Jersey: The Lawbook Exchange, Ltd., 2000), 2.

result in support of unrestrained majoritarianism in which the majority governs at times without any consideration for minority rights.⁴⁷ A rigid procedural view of justice where everything that meets the standards of due process or legality⁴⁸ is just is also unsatisfactory as there is no guarantee that particular legal norms are in accordance with what is perceived to be just.

To bridge these two conflicting views, justice, for the purpose of examining the CCs' understandings of democracy in relation to it, 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.⁴⁹ 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's⁵⁰ 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'. Obviously, 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.

⁴⁷ Cf. Kelsen, *What Is Justice?* 4.

⁴⁸ Agustín Ruiz Robledo, "Due Process," in *Max Planck Encyclopedia of Comparative Constitutional Law*, ed. Rainer Grote, Frauke Lachenmann, and Rüdiger Wolfrum (Oxford, New York: Oxford University Press, 2022).

⁴⁹ Cf. Gustav Radbruch, "Statutory Lawlessness and Supra-Statutory Law (1946)," *Oxford Journal of Legal Studies* 26, no. 1 (2006): 1–11, <https://doi.org/10.1093/ojls/gqj041>.

⁵⁰ Theunis Roux, "Constitutional Courts as Democratic Consolidators: Insights from South Africa after 20 Years," *Journal of Southern African Studies* 42, no. 1 (2016): 9–11, <https://doi.org/10.1080/03057070.2016.1084770>.

An argument illustrating the importance of the courts' role in underpinning perceptions of justice is made by Sandel. Referring to Rawls, Sandel presents one approach to justice (from an individual perspective) as looking at a controversy at hand and its various solutions as if they were presented by the Supreme Court in its reasoning.⁵¹ This approach is supposed to enhance the chance for a neutral assessment that the courts are expected to do. This picture of the Supreme Court's (or any court's) reasoning is idealized, but for the purpose of this conceptualization it is sufficient to point to the embedded understanding of the association between courts and justice (as a chance for neutral, objective assessment) that stems from it.

2.3 A Note on the Selection of Cases and Judicial Decisions

The Visegrad region has received global attention due to erosion of democracy in Hungary and Poland, which also negatively affected the operation of constitutional courts in these countries.⁵² While the Polish Constitutional Tribunal continues to face a crisis in terms of the legitimacy of the appointed judges, the Hungarian CC judges were appointed in an at least formally legal manner, thus enhancing the potential but also the responsibility of the Hungarian CC to counter the erosion of democracy as opposed to its Polish counterpart. While the Court lost its competence to review *actio popularis* petitions, it has gained the competence to review constitutional complaints by private persons which should, at least in theory, strengthen its authority vis-à-vis other courts in the judicial system.⁵³ In contrast, Slovakia is sometimes considered as free from such pressures on democracy.⁵⁴ The Slovak CC, while wielding considerable formal powers that are recognized as a condition for effective conflict resolution,⁵⁵

⁵¹ Michael J. Sandel, *Justice: What's the Right Thing to Do?* (New York: Farrar, Straus and Giroux, 2010), 248.

⁵² E.g. Lech Garlicki, "Constitutional Court and Politics: The Polish Crisis," in *Judicial Power: How Constitutional Courts Affect Political Transformations*, ed. Christine Landfried (Cambridge: Cambridge University Press, 2019), 141–63; Gábor Halmai, "A Coup Against Constitutional Democracy: The Case of Hungary," in *Constitutional Democracy in Crisis?*, ed. Mark A. Graber, Sanford Levinson, and Mark Tushnet (Oxford: OUP, 2018), 243–56.

⁵³ Lech Garlicki, "Constitutional Courts versus Supreme Courts," *International Journal of Constitutional Law* 5, no. 1 (2007): 67, <https://doi.org/10.1093/icon/molo44>.

⁵⁴ Licia Cianetti and Seán Hanley, "The End of the Backsliding Paradigm," *Journal of Democracy* 32, no. 1 (2021): 66–80, <https://doi.org/10.1353/jod.2021.0001>.

⁵⁵ Julio Ríos-Figueroa, *Constitutional Courts as Mediators: Armed Conflict, Civil-Military Relations, and the Rule of Law in Latin America*, Comparative Constitutional Law and Policy (Cambridge: Cambridge University Press, 2016), 201, <https://doi.org/10.1017/CBO9781139942157>.

is rarely studied,⁵⁶ even in comparative collections. The Czech CC, established, similarly to the CC in Slovakia, after the dissolution of the Czech and Slovak Federal Republic in 1993, is a more common object of analysis.⁵⁷ Moreover, unlike the CC in Slovakia, its history does not contain a period comparable to the ‘Mečiar’ era in Slovakia (1994-1998), where a semi-authoritarian government made considerable efforts to dismantle the burgeoning democratic regime. The combination of these factors makes the case studies of Hungary and Slovakia particularly useful to better understand the relationship between the CCs’ conceptions of democracy and justice as articulated in case law on procedural and social rights.

The cases themselves are selected via keyword search from the full population of decisions. This method transcends the usual limitations posed by the types of proceedings or the judicial composition of the court. The key concept for selection is ‘democracy’, with the decisions referring to democracy in the context of procedural and social rights being analyzed in this article. This way, it is possible to extract the ‘idea of democracy’ as introduced by the CCs themselves, although it does mean that several ‘canonical cases’ as reproduced in works based on case selection using the judgment of Hungarian constitutional experts (available particularly for Hungary)⁵⁸ are not included. Majority opinions are a point of focus here, as they carry central weight for the outcome of the judicial case. The analysis is structured according to the main eras of both the CCs, starting with the 1990s, continuing with the early 2000s (2007 as the end of the mandate of most ‘second generation’ constitutional judges in Slovakia, and

⁵⁶ For an overview of the formal powers of the Court, see Max Steuer, “Constitutional Court of the Slovak Republic,” in *Max Planck Encyclopedia of Comparative Constitutional Law*, ed. Rainer Grote, Frauke Lachenmann, and Rüdiger Wolfrum (Oxford: OUP, 2019), <https://oxcon.oup.com/view/10.1093/law-mpeccol/law-mpeccol-e803>.

⁵⁷ E.g. David Kosař and Ladislav Vyhnánek, “The Constitutional Court of Czechia,” in *The Max Planck Handbooks in European Public Law: Volume III: Constitutional Adjudication: Institutions*, ed. Armin von Bogdandy, Peter Huber, and Christoph Grabenwarter (Oxford: Oxford University Press, 2020); Zdeněk Kühn, “The Constitutional Court of the Czech Republic,” in *Comparative Constitutional Reasoning*, ed. András Jakab, Arthur Dyevre, and Giulio Itzcovich (Cambridge: Cambridge University Press, 2017), 199–236.

⁵⁸ András Jakab and Johanna Fröhlich, “The Constitutional Court of Hungary,” in *Comparative Constitutional Reasoning*, ed. András Jakab, Arthur Dyevre, and Giulio Itzcovich (Cambridge: Cambridge University Press, 2017), 394–437; Fruzsina Gárdos-Orosz and Kinga Zakariás, eds., *Az Alkotmánybírósági gyakorlat I–II. Az Alkotmánybíróság 100 elvi jelentőségű határozata 1990–2020 [The Practice of the Constitutional Court I–II. 100 Constitutional Court Decisions of Principal Importance 1990–2020]* (Budapest: Orac, 2021).

2010 as the year marking the adoption of the new Constitution in Hungary) and concluding with the remaining period until 2017.

III. THE HCC'S AND SCC'S CONCEPTIONS OF DEMOCRACY IN RELATION TO PROCEDURAL AND SOCIAL RIGHTS – MAJORITY OPINIONS

“[C]itizens need to [...] accept that anything [...] intolerant, and hence infringing the rights of other citizens—will eventually be judged by state institutions, courts in particular”.⁵⁹

Müller’s claim above underscores the key role courts play in addressing societal disagreements about the meanings of values. Yet, courts themselves are composed of people, and as such can be expected to have their own value conceptions. The formulation of values in their respective constitutions may be significant for what they emphasize in their case law. However, the role of the text should not be overestimated. As Sajó puts it when discussing constitutional courts packed with government loyalists: *‘[g]overnment-friendly adjudication comes easy when loyalist judges can apply a constitution that was tailor-made for illiberalism. The task is not significantly more difficult where the constitution is neutral, as it should be.’*⁶⁰ With this caveat in mind, both the Hungarian and the Slovak Constitution, emphasize the significance of democracy in their text. Article 1 of the latter establishes that *‘the Slovak Republic is a sovereign, democratic state governed by the rule of law. It is not linked to any ideology, nor religion.’* The Hungarian Fundamental Law (adopted in 2011) also nominally retains a prominent space for democracy, including in Article B) (1): *‘Hungary shall be an independent, democratic rule-of-law State.’* In fact, the term ‘democracy’ appears more frequently in the 2011 Fundamental Law than in its predecessor, hence retaining ample interpretive ‘playing ground’ for the HCC.⁶¹ Less conducive to a robust reading of democracy, however, are references to the concept in the

⁵⁹ Jan-Werner Müller, “Citizens as Militant Democrats, Or: Just How Intolerant Should the People Be?,” *Critical Review* 34, no. 1 (2022): 88, <https://doi.org/10.1080/08913811.2022.2030523>.

⁶⁰ András Sajó, *Ruling by Cheating: Governance in Illiberal Democracy* (Cambridge: Cambridge University Press, 2021), 184, <https://doi.org/10.1017/9781108952996>.

⁶¹ Kelemen Katalin, “Van még pálya: A magyar Alkotmánybíróság hatásköreiben bekövetkező változásoról [There Is Playing Ground Left: On the Changes in the Competences of the Hungarian Constitutional Court],” *Fundamentum* 15, no. 4 (2011): 111–22.

Preamble ('National Avowal') of the Fundamental Law. This endorses more exclusionary, nationalist readings of the value, even though its role is primarily a symbolic one.⁶²

This section presents the results of the analysis for two CCs in their conceptions of democracy in relation to procedural and social rights. The former, while predominantly addressing issues associated with a fair trial,⁶³ include references to democracy in the context of corruption prevention, that undermines justice in the polity in question.⁶⁴ Furthermore, procedural and social rights are linked to two forms of equality, political and social, and thereby connect the substantive requirements of democratic output performance with the need for procedural justice, especially in criminal law cases which have a significant impact on the life of the individual. The analysis focuses on the majority opinions which create the legally binding canon of the CCs.⁶⁵ It uncovers the tendency to avoid a relationship between democracy and justice in the majorities' reasonings.

3.1 Hungary: Social Rights on the Margins

Has the HCC made connections between democracy and justice approached via procedural and social rights in its case law? The following analysis, which includes broader readings of democracy than those focusing on procedural rules of lawmaking, elections and referenda,⁶⁶ considers the periods in the 1990s, early 2000s and the post-2010 constitutional changes (until 2017). The early decisions of the HCC were pivotal in laying down the interpretations of fundamental

⁶² Katalin Miklóssy and Heino Nyssönen, "Defining the New Polity: Constitutional Memory in Hungary and Beyond," *Journal of Contemporary European Studies* 26, no. 3 (July 3, 2018): 329, <https://doi.org/10.1080/14782804.2018.1498775>; Tom Ginsburg, Nick Foti, and Daniel Rockmore, "We the Peoples: The Global Origins of Constitutional Preambles," *George Washington International Law Review* 46, no. 2 (2014, 2013): 327–28, https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=11414&context=journal_articles.

⁶³ Zdeněk Kühn, "Worlds Apart: Western and Central European Judicial Culture at the Onset of the European Enlargement," *The American Journal of Comparative Law* 52, no. 3 (2004): 561, <https://doi.org/10.2307/4144478>.

⁶⁴ See, for example, Herlambang P Wiratraman, "Constitutional Struggles and the Court in Indonesia's Turn to Authoritarian Politics," *Federal Law Review* 50, no. 3 (2022): 318–19, <https://doi.org/10.1177/0067205X221107404>.

⁶⁵ A discussion of separate opinions is provided in Appendix 2.

⁶⁶ Cf. Nóra Chronowski, Boldizsár Szentgáli-Tóth, and Emese Szilágyi, eds., *Demokrácia-dilemmák – Alkotmányjogi elemzések a demokrácielv értelmezéséről az Európai Unióban és Magyarországon* [Democracy Dilemmas – Constitutional Law Analyses About the Interpretation of the Principle of Democracy in the European Union and in Hungary] (Budapest: ELTE Eötvös Kiadó, 2022). They list four areas, including European Union integration and freedom of speech, which amounts to a broader reading of democracy, yet still omitting output-based considerations (social rights in particular).

constitutional principles, and referred to frequently since.⁶⁷ However, this is where the discrepancy between engaging with procedural and social justice and doing so in connection to democracy comes to the fore. The HCC may have enacted progressive readings of social welfare, but some of the pivotal cases as identified by experts do not feature references to democracy.⁶⁸ In fact, this is in line with the focus of the Court on justifications grounded in legal certainty rather than democracy more broadly, and in protecting only the minimum standard, permeating a discourse on sufficiency rather than on progressive development.⁶⁹ In the 1990s, three cases dealt with areas where there is a potential for (both procedural and redistributive) justice to arise in the reasoning. In 1992, the Court declared the institute of the ‘protest of illegality’ to be unconstitutional.⁷⁰ The institute, a remnant of the previous regime as the prosecution could have appealed against *final* judgments, was invalidated by the Court referring to the ‘right to self-determination in civil judicial proceedings.’ At the same time, the reference to democracy is only a single scarce one, linked to Art. 2 (§1) of the Constitution. The Court identifies the principle of the rule of law in the same article and goes on to discuss that, leaving democracy aside.⁷¹ A similar way of reasoning can be observed in the other two cases—the one concerning the Compensation Act dealing with the compensation for unlawfully confiscated property during the state socialist regime⁷² and the one on the adoption of implementing measures prescribed by law by the Minister of Defense on the status of the members of armed forces.⁷³ Clearly, the rule of law (understood as legal certainty combined with a number of additional principles elaborated upon by the HCC) trumped

⁶⁷ Zoltán Pozsár-Szentmiklósy, “Precedents and Case-Based Reasoning in the Case Law of the Hungarian Constitutional Court,” in *Constitutional Law and Precedent: International Perspectives on Case-Based Reasoning*, ed. Monika Florczak-Wątor (London: Routledge, 2022), 109–10.

⁶⁸ Gábor Halmai and Nóra Chronowski, “The Decline of Human Dignity and Solidarity through the Misuse of Constitutional Identity: The Case of Hungary since 2010,” in *Human Dignity and Democracy in Europe: Synergies, Tensions and Crises*, ed. Bedford Daniel et al. (Cheltenham: Edward Elgar Publishing, 2022), Section 1; Catherine Dupré, *Importing the Law in Post-Communist Transitions: The Hungarian Constitutional Court and the Right to Human Dignity* (Oxford: Hart Publishing, 2003), 146–47.

⁶⁹ Cf. Samuel Moyn, *Not Enough: Human Rights in an Unequal World* (Cambridge, Massachusetts: Belknap Press: An Imprint of Harvard University Press, 2018).

⁷⁰ 9/1992 [I. 30] AB.

⁷¹ 9/1992 [I. 30] AB, 6.

⁷² 15/1993 [III. 12] AB.

⁷³ 479/E/1997.

democracy in this period when discussing cases pertaining to justice in property relations and during legal proceedings.

Post-2000 we can observe two cases on these issues with at least scarce mentions of democracy.⁷⁴ In a case concerning delegation of some decision-making competences to the National Interest Reconciliation Council (*Országos Érdekegyeztető Tanács*), decided in 2006, the HCC linked social dialogue and interest representation to democracy. For the Court, the involvement of this Council is desirable for the realization of ‘the constitutional principle of democracy’, in addition to the informed discussion on public matters, which it locates in Art. 61 (§1) of the Constitution.⁷⁵ Therefore, omitting legal regulations enshrining such involvement options amounts to unconstitutionality by legislative omission. The decision, that is relevant for the participatory dimension of democracy as well, has been referred to as the cornerstone for improvement of social dialogue.⁷⁶ At the same time, in a decision that followed in 2008, the HCC did not take up the argument for democracy presented by the petitioner who, among others, claimed that the required public consultation requested by Hungarian legislation as an expression of an element of ‘direct democracy’ did not properly take place.⁷⁷ So whereas the Court did engage with the substantive arguments related to the development of the healthcare system, it was comfortable with reasoning that *‘the popular sovereignty principle is not violated [...] by the sponsor of the bill not having satisfied the public consultation requirement stipulated by the Act on the creation of laws.’*⁷⁸ The Court’s judgment does formally contain declarations of unconstitutionality but only of a few specific provisions based on rule-of law considerations. The whole reasoning is hardly straightforward and so its broader message is rather negative in terms of a more extensive conceptualization of

⁷⁴ Also in this period, one decision in which only the petitioner refers to democracy can be identified (731/B/2006. AB, the HCC referred to its earlier declaration here that the Preamble of the Constitution does not have legal validity and Art. 2 [§ 1], which does not refer to social rights).

⁷⁵ 40/2005 [X. 19.] AB, 15.

⁷⁶ Erzsébet Berki and László Neumann, “Draft Laws on National and Sectoral Social Dialogue Submitted to Parliament | Eurofound,” February 28, 2006, <https://www.eurofound.europa.eu/publications/article/2006/draft-laws-on-national-and-sectoral-social-dialogue-submitted-to-parliament>.

⁷⁷ 109/2008 [IX. 26.] AB, 5, 14.

⁷⁸ 109/2008 [IX. 26.] AB, 14. See also Zoltán Sente, “The Interpretive Practice of the Hungarian Constitutional Court: A Critical View,” *German Law Journal* 14, no. 8 (2013): 1603; Enyedi Krisztián, “Az Alkotmánybíróság legutóbbi döntéseiből [From the Latest Decisions of the Constitutional Court],” *Fundamentum* 12, no. 3 (2008): 116–18.

democracy intertwined with (in this case social) justice. This is underlined by the fact that it has only been mentioned in international scholarship in terms of the procedural aspect or its third, property rights-related, aspect⁷⁹ as well. The mixture of procedural and substantive concerns led to a convoluted decision which, while not departing from the Court's previous case law, paid only limited attention to the overreaching principles surrounding the case (especially in terms of the connection between the rule of law and other principles).

In the area of procedural rights and criminal justice, the HCC decided a case in 2001 on the '*reformatio in peius*' principle.⁸⁰ Referring to the 1992 case on the 'protest of illegality' as an example of principles defending the rights of the accused, it declared that '*reformatio in peius*' is part of the Hungarian constitutional order; nevertheless, the applicant's interpretation of them in this case would amount to making effective execution of justice impossible because it would apply the principle also in instances where the appellate proceeding emerges due to a procedural error of the first instance court. However, the whole discussion on how legal regulations must enable the achievement of material truth in criminal proceedings revolve around the principle of the rule of law, and the case qualified itself for the analysis here only through the reference to Art. 2 (§1) of the Constitution.⁸¹ A similarly scarce mention is in a longer decision (24 pages) that struck a balance between liberty and security by declaring the possibility of secret background checks on convicts before their release in prison (including possible surveillance measures and apartment raids without a court warrant) unconstitutional.⁸² The "auxiliary" argument with democracy is only slightly more tailored to a case decided soon after on the relationship between the state prosecution and private legal practice. The Court invalidated the practice of replacing the state prosecution with private service in case of

⁷⁹ Zoltán Sente and Fruzsina Gárdos-Orosz, "Judicial Deference or Political Loyalty? The Hungarian Constitutional Court's Role in Tackling Crisis Situations," in *New Challenges to Constitutional Adjudication in Europe: A Comparative Perspective*, ed. Zoltán Sente and Fruzsina Gárdos-Orosz (New York: Routledge, 2018), 97.

⁸⁰ The principle, in short, prohibits the imposition of a more severe punishment by an appellate court in case of an appeal coming from the indicted.

⁸¹ 286/B/1995 AB, 2.

⁸² 47/2003 [X. 27.] AB, 8; see also "Az Alkotmánybíróság legutóbbi döntéseiből [From the Latest Decisions of the Constitutional Court]," *Fundamentum* 7, no. 3–4 (2003): 186–87.

delays in the proceeding caused by the prosecution. One of its arguments was an essentially “militant democratic” one, asserting that ‘the attorney general and the prosecution service has a constitutional obligation – among others – to protect the interests of the Republic of Hungary, to prosecute actions affront to or threatening democracy and to ensure and protect legality.’⁸³ The same argument was presented in a later decision generally praised for addressing, most notably, an unconstitutional possibility for the judge to execute certain tasks on behalf of one of the parties in the dispute.⁸⁴

Post-2010 the evidence indicates the Court paying attention to the link between democracy and (procedural and social) justice even more rarely. A reference to the earlier case concerning social dialogue⁸⁵ places a newer majority decision referring to its understanding of democracy through social dialogue under consideration in this dataset. In this instance, the Court primarily invalidated a provision that exempted governmental office-holders from the protection from ending a labor relationship without justification on the employer’s side.⁸⁶ Furthermore, it contained a procedural dimension through the objection of the sponsor (a group of MPs rather than the executive) not having engaged in a conciliation (*egyeztetés*) process with the representatives of the concerned group of employees. Finally, in 2015, the Court did not take up the argument of a petitioner who claimed that ‘it is essential for the functioning of democracy’ that it is allowed to publish information about an ongoing (i.e. without a final verdict) anti-monopoly proceeding (*versenyfelügyeleti eljárás*) by the defendant.⁸⁷ The petition was not evaluated on the merits since for the Court the legislation restricts the admissibility of the constitutional complaints for cases when constitutional rights-provisions, rather than other constitutional provisions are alleged to have been violated by the petitioner. Such reasoning is based on a restrictive interpretation of the ‘constitutional significance’ of the petitions.⁸⁸

⁸³ 42/2005. [XI. 14.] AB, 13.

⁸⁴ 72/2009 [VII. 10.] AB, 6, see also M. Tóth Balázs, “Az unorthodox büntetőpolitika az Alkotmánybíróság előtt [The Unorthodox Penal Policy Before the Constitutional Court],” *Fundamentum* 16, no. 1 (2012): 87–88.

⁸⁵ 40/2005 [X. 19.] AB.

⁸⁶ 8/2011 [II. 18.] AB, 15.

⁸⁷ 3171/2015 [VII. 24.] AB.

⁸⁸ Fruzsina Gárdos-Orosz, “The Hungarian Constitutional Court in Transition — from Actio Popularis to Constitutional Complaint,” *Acta Juridica Hungarica* 53, no. 4 (2012): 314, <https://doi.org/10.1556/AJur.53.2012.4.3>.

3.2 Slovakia: The Troubling Legacy of the 1990s, and Coming to Terms

How did the Slovak CC connect democracy to the wider concerns for societal order and its well-being? The dataset in this area includes a few remarkable standpoints presented by the Court's plenary or one of its senates.

Only one key case from the first Court can be included into this category: the controversial 1999 decision concerning the Mečiar amnesties, whereby the SCC had to determine (through its abstract interpretative competence of the Constitution) whether Mečiar as the Prime Minister exercising some of the President's competences at the time of this office being vacant, including the competence to grant amnesties, was eligible to grant such an amnesty. The case was politically salient because the two amnesties granted by Mečiar (the second one 'correcting' the first)⁸⁹ concerned the possible crimes that had occurred during the compromised referendum in 1997, and perhaps even more blatantly, the crimes related to the kidnapping of the first Slovak president's son as a means to cease his activities undermining Mečiar's authority, as well as the related murder of a policeman who declared openness to testify in the case. In this case,⁹⁰ the SCC acknowledged that *'in a society with all attributes of a democratic one there is a political climate [...] which has an escalated relationship to certain crimes. A prior interest in a democratic society undoubtedly is the interest in uncovering, convicting and punishing all crimes.'* Regardless of this remarkable reference on the interest in achieving justice in the society by punishing wrongdoers, the Court adopted a narrow procedural approach stressing the President's unconditional competence and the legal certainty of those who were relieved from prosecution and/or punishment by the amnesty. Without more evidence it would be too far to assume that the Court did not apply its own reflection on the interest of punishment of crimes in a democracy because its background assumption was that the Slovak society at that time could not be considered democratic. However, unless this assumption was at play, a discrepancy emerges between the link made

⁸⁹ In its ruling, the SCC then declared that it is not permitted for the acting President to issue any 'corrections' on an amnesty decision issued previously. This spurred the debate that, in fact, the second amnesty presenting such a correction should have been disregarded by state institutions engaged in the respective criminal proceedings.

⁹⁰ I. ÚS 30/99.

by the SCC between democracy and justice in terms of uncovering committed crimes, and the right of potential wrongdoers to unconditionally ‘hide’ behind an amnesty. This is only strengthened when the Court cites legal philosopher Gustav Radbruch in the conceptual understandings of pardons and amnesties being a ‘recognition of the world around us not being just the world of law, but that there are also other values which sometimes need protection against the law.’⁹¹ The first senate managed to turn away from this reasoning in the very same case, by preventing further investigation even provided that potential perpetrators discovered in this process would be exempt from punishment.

The second Court leaves three messages broadly linked to the relationship between democracy and justice. *Firstly*, in two cases it brought to the fore the concept of ‘the level of democracy in the criminal procedure of the state’, for which the main indicator is the right to defence.⁹² Here, the Court was able to invalidate the decisions of lower courts on textual interpretation of the law and so avoid difficult questions pertaining to special circumstances of individuals or a more general link between defence and judicial independence.⁹³ *Secondly*, in rejecting a complaint on the actions of the public administration and general courts, it pointed out the legitimacy of these institutions in a democracy, where ‘the public interest in the exercise of public power of those who created it cannot be ignored, obviously, under the condition of fulfilment of fundamental rights and freedoms.’⁹⁴ This case displays features of textualist interpretation too by not posing the requirement by law towards the general courts to comprehensively answer each objection of the petitioner. *Thirdly*, in the case concerning prosecution of abuse of notarial powers the SCC at one point linked democracy at the domestic level to ‘acceptance of the Slovak Republic as full-blown member of the global family of democracies’, the condition for which should be an existence of strategy against corruption as ‘*an expression of genuine will to eliminate this negative phenomenon which has a destructive impact and*

⁹¹ I. ÚS 30/99, 25.

⁹² III. ÚS 41/01, 16, III. ÚS 163/03, 15.

⁹³ After all, the right to defence may not be the ultimate indicator of democracy in the criminal procedure if e.g. it is combined with manifestly biased judges who hear, but do not listen to any arguments of the defenders.

⁹⁴ I. ÚS 105/06, 17.

[...] weakens the trust of an ordinary citizen in justice guaranteed by the state and its authorities'.⁹⁵ However, this thesis is raised in an unclear connection to an explanatory statement of the proposal for the Notarial Act, and therefore it is not made explicit whether the SCC accepted it as its own position as well. In sum, also given the small number of cases, significant leeway in this area is left for the Mazák's Court successor to specify and elaborate on.

The first observation of the caseload of the SCC's third term pertaining to broader justice considerations is its diversity. More than in any other dimension, the ideas of democracy are multifaceted and not necessarily related or even consistent with each other. The petitioners' references not reflected by the judges contribute to this outcome, regardless of whether they appear in cases declaring unconstitutionality,⁹⁶ affirming rulings of lower courts or decisions of other state organs,⁹⁷ rejections/affirmances of constitutionality⁹⁸ or by other actors in other types of proceedings.⁹⁹ The Court's image emerges as one to which petitioners turn with their grievances, trying to retell their personal stories (more or less) through the existing legal framework or challenging the framework itself in *de facto actio popularis* complaints in order to gain satisfaction before the bench. The latter is especially pertinent in the argument made in a series of cases according to which a party to a proceeding before a Slovak general court should have the right to oblige that court to submit a claim for constitutional review to the SCC in case the petitioner presents arguments in favor of certain legislative provisions being in violation of the Constitution. The petitioner, supportive of an evolutionary jurisprudence, asked the Court to turn away from restrictive formalism, 'realize the problem and via a change of case law create space for strengthening the elements of democracy in the Slovak Republic'.¹⁰⁰ In all these cases, the second senate argued that such a step would achieve 'the correction of

⁹⁵ PL. ÚS 1/04, 23.

⁹⁶ PL. ÚS 30/2015, 5, II. ÚS 467/2010, 4, IV. ÚS 317/2013, 7.

⁹⁷ II. ÚS 88/09, II. ÚS 148/07, 3, IV. ÚS 369/2011, 2, IV. ÚS 38/2012, 3, I. ÚS 81/2012, 2 II. ÚS 266/2011, 11, I. ÚS 2/2016, 8, II. ÚS 585/2015, 10, II. ÚS 699/2014, 5, I. ÚS 110/2012, 23, II. ÚS 592/2014, 6, II. ÚS 296/2017, 4, I. ÚS 469/2014, 3, IV. ÚS 488/2013, 5, IV. ÚS 75/2014, 2, I. ÚS 188/2017, 3, III. ÚS 374/2017, 7.

⁹⁸ PL. ÚS 10/09, 5, PL. ÚS 3/03, 41-42, 82.

⁹⁹ I. ÚS 138/2012, 6-7, also I. ÚS 139/2012, 6, I. ÚS 353/2010, 5-6, I. ÚS 352/2010, 6, I. ÚS 98/2012, 6, I. ÚS 99/2012, 6, and III. ÚS 140/2012, 5.

¹⁰⁰ II. ÚS 417-422/2010, 3, II. ÚS 424/2010, 3.

the constitution in a way that the party to the proceeding in front of a general court would become a “privileged subject”, while the general court would become “her postman”.¹⁰¹ Choosing the term ‘correction of the constitution’ raises eyebrows as it signals the Court’s implicit acceptance of the deficit in the limits of the subjects entitled to submit petitions for constitutional review of legislation.

The Court did not always stay silent on the relationship to, or consequences of, the issue in question on democracy. In a few but notable cases it strengthened the guarantees for due process employing ideas of democracy. *Firstly*, invoking the ‘expert-based legitimacy’ argument of courts operating in the ‘normative space of law and factual space of democracy’ in an individual complaint from the ministry of justice, it declared the violation of this right of the state because of judges deciding on so-called anti-discrimination lawsuits of their colleagues who themselves had been parties to such lawsuits.¹⁰² The Court went on to focus on the ‘feeling of legal security of individuals in a free society [which is] co-created with the feeling of justice, the need for narration, storytelling about it and in the belief that in the society and especially the judiciary there is still justice’.¹⁰³ This decision, however, came from two judges only (Kohut, Mészáros), with judge Lálík penning a dissent. *Secondly*, in two cases finding a violation in the criminal procedure as conducted by general courts, the first senate ‘resurrected’ the thesis of the second Court that the right to defence is indicative of the ‘level of democracy in the criminal procedure’.¹⁰⁴ As in previous cases with ‘notorious’ democracy arguments, this was used in a number of cases with an opposite verdict as well.¹⁰⁵ *Thirdly*, it brought the Supreme Court ‘back on track’ when invalidating a disadvantageous reading of a state socialist piece of legislation for the petitioner. Here, it took inspiration from the ECHR again by reproducing a statement from a concurring opinion that ‘democratic States can allow their institutions to apply the law – even previous law, originating in a pre-democratic

¹⁰¹ II. ÚS 417-422/2010, 7, II. ÚS 424/2010, 7.

¹⁰² II. ÚS 16/2011, 35.

¹⁰³ II. ÚS 16/2011, 35.

¹⁰⁴ I. ÚS 217/2013, 15, I. ÚS 394/2014, 14, I. ÚS 355/2015, 13, I. ÚS 620/2016, 9, I. ÚS 419/2016, 17, III. I. ÚS 574/2015, 5.

¹⁰⁵ I. ÚS 139/2016, 6, I. ÚS 288/2016, 6-7.

regime – only in a manner which is inherent in the democratic political order (in the sense in which this notion is understood in the traditional democracies).¹⁰⁶

Last but not least, the invalidation of the so-called Mečiar amnesties¹⁰⁷ emerges as a bold move of the Court rather than as a last step in an incremental process of constructing the meaning of democracy. Indeed, the Court offers a substantive definition of a democracy under the rule of law. It enlisted seven principles falling under this definition, the principles of prohibition of abuse of powers (arbitrariness), popular sovereignty (democracy) in connection with the principle of the protection of human rights,¹⁰⁸ separation of powers, democratic legitimacy, transparency and public accountability of the exercise of public power, legal certainty and protection of the citizen trust in the legal order, and justice. This is clearly a substantive list that gets close to a multidimensional conceptualization of democracy. However, the decision remains more of an ‘anomaly’¹⁰⁹ than a new standard-setter for the understanding of democracy in Slovakia, which continues to be based primarily on minimalist readings.

The case of the SCC’s reception and responses to claims for substantive and procedural justice is a window into the full-blown potential of the CCs to connect with their petitioners as well as to lay the groundwork for a powerful and coherent rationale behind the idea of democracy that they can later employ to resist traditional as well as more innovative¹¹⁰ authoritarian pressures.

IV. CONCLUSION

“Law seems to have two basic and intimately connected tasks: to solve conflicts and to foster conformity to legal rules. The conflict-solving function has left the most distinctive marks upon the structure of legal thinking and upon the occupational role of the professional jurist”¹¹¹

¹⁰⁶ IV. ÚS 294/2012, 21. See also *Streletz, Kessler and Krenz v. Germany*, 22 March 2001 (Application Nos. 34044/96, 35532/97 and 44801/98), concurring opinion of judge Levits, point 8).

¹⁰⁷ PL. ÚS 7/2017.

¹⁰⁸ The fact that these are listed as interrelated principles underlines the inherent relationship that the SCC (at least in this decision) sees between them.

¹⁰⁹ Max Steuer, “The Slovak Constitutional Court on Amnesties and Appointments of Constitutional Judges: Supporting Unrestrained Majoritarianism?,” *Diritti Comparati*, March 26, 2018, <http://www.diritticomparati.it/slovak-constitutional-court-amnesties-appointments-constitutional-judges-supporting-unrestrained-majoritarianism/>.

¹¹⁰ See, Kim Lane Scheppele, “The Rule of Law and the Frankenstein: Why Governance Checklists Do Not Work,” *Governance* 26, no. 4 (2013): 559–62, <https://doi.org/10.1111/gove.12049>.

¹¹¹ Wilhelm Aubert, “Courts and Conflict Resolution,” *Journal of Conflict Resolution* 11, no. 1 (1967): 40, <https://doi.org/10.1177/002200276701100104>.

This article has explored how, through studying conceptions of democracy featured in centralized CC decision making may advance the understanding of their potential and limits in addressing societal value conflicts. The empirical analysis has focused on procedural and social rights in relation to democracy, as these are important indicators for how the CCs conceive of the contested relationship between democracy and justice, the divergent views of the latter being a core source of value conflicts. Hungary's and Slovakia's CCs have been studied as those which have faced or continue to face non-democratic regime contexts, thus allowing to review the conceptions of democracy their judges adopted over time in a region where procedural and social rights are particularly important, albeit contested, due to the legacies of the pre-1989 undemocratic regime. The discussion of the separate opinions included in Appendix 2 elucidates the ideational conflicts that may have occurred between the judges, furthering the results of the analysis of majority opinions.

The analysis has identified, contrary to expectations based on the generally positive assessment of the Slovak CC in the 1990s, the lack of attention to procedural and social rights in relation to democracy in this period; yet, this deficit did not seem to prevent its constraining influence to further autocratization by the government of Prime Minister V. Mečiar. The same neglect towards considerations of procedural and social rights in the Hungarian case, however, appears to have contributed to the sidelining of the HCC as a core reference point for public pro-democracy sentiments as a result. Today, even if Hungarians would like to speak up against the regime, they would not find much 'ammunition' in the recent judgments of the HCC for their voice to be amplified by legal legitimacy.¹¹² With both Courts largely advocating 'stepping out of the ring' of defending a substantive account of democracy as articulated by procedural and social rights, the Hungarian CC has paid a higher price for this path in terms of serving as a point of reference for democratic actors struggling against autocratization. In addition, the internal struggles over the meaning of democracy at the two CCs

¹¹² On CCs as generators of legal legitimacy, see Richard H. Fallon Jr., *Law and Legitimacy in the Supreme Court* (Cambridge: Belknap Press: An Imprint of Harvard University Press, 2018).

manifested particularly through the advocacy for a more deferential CC *versus* a substantive account of justice (see also Appendix 2).

The present approach aspires to be applicable to examine conceptions of democracy by centralized CCs operating (or having operated) in a democratic regime. Further comparative research offers promising ways forward, with Central European CCs constituting relevant cases of countries with very similar trajectories post-1989 (when most CCs in the region were established) but differences in recent developments of their political regimes. At the same time, the approach faces several limitations. *Firstly*, the qualitative contextual analysis may, to a greater extent, be influenced by the researcher's normative preferences. The situation of cases into an established body of scholarship decreases this risk. *Secondly*, 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. Expert interviews might be conducted to further corroborate the data. Acknowledging these limitations, the article points to the significance of CCs openly engaging with key political concepts, as an avenue to advance their voice in the public contestation about the meanings of fundamental values that are embedded in, but also shape the practice of democracy.

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APPENDIX

APPENDIX 1: ADDITIONAL INFORMATION ON SELECTED CASES UNDER STUDY

The purpose of this appendix is to provide more details on the cases referred to in the empirical analysis. The analysis aims to be comprehensive without consulting it as well, yet, it sheds more light on the sorts of issues in which considerations of the relationship between justice and democracy arose.

A. HUNGARY

- 9/1992 [I. 30] AB: The institute of the ‘protest of illegality’. This institute allowed for selected decisions deemed unlawful to remain in force if so decided by a special chamber of the Supreme Court.¹
- 15/1993 [III. 12] AB: Compensation for unlawfully confiscated property. Here, the Court referred to democracy through the Preamble of the Constitution, pointing out the task of transition to a state under the rule of law realizing parliamentary democracy and social market economy. Implicitly it can be seen that this transition served as a justification for approving partial compensatory measures but the abstract notion of constitutionality is the explicit way how the Court approached this issue.² A dissenting judge criticized the universal principle highlighting some particularities of different legal relationships put together by the majority, and the need to pay attention to these differences due to legal continuity with the previous regime even though ‘the power-holders did not have a *democratic* authorization for the exercise of power’³ Methodologically, this type of reference also shows that when democracy

¹ László Sólyom and Georg Brunner, eds., *Constitutional Judiciary in a New Democracy: The Hungarian Constitutional Court* (Ann Arbor: University of Michigan Press, 2000), 200–208; see also Dupré, *Importing the Law in Post-Communist Transitions*, 85.

² On the legal reasoning of the case (the introduction of the novatio principle loosely building on Roman law by the HCC, see Renáta Uitz, “Constitutional Courts and the Past in Democratic Transition,” in *Rethinking the Rule of Law After Communism*, ed. Adam Czarnota, Martin Krygier, and Wojciech Sadurski [Budapest: Central European University Press, 2005], 248–51; on the consequences of the HCC’s decision making in this area, Anna Gelpert, “The Laws and Politics of Reprivatization in East-Central Europe: A Comparison,” *University of Pennsylvania Journal of International Law* 14, no. 3 [1993]: 315–72345-346.

³ 15/1993 [III. 12] AB, 20.

appears in an adjective form, the reference tends to be even more scarce or superficial than when it is used as a noun.

- 479/E/1997, 3: Implementing measures prescribed by law on the status of armed forces. The reference to democracy appeared as a reference to the constitutional provision, while further only the argument that delayed implementation of a duty does not necessarily constitute a violation of the rule of law and hence unconstitutionality by legislative omission was discussed.
- 109/2008 [IX. 26.] AB, 5, 14: Development of the healthcare system. From the two separate opinions only one (joined by two justices) referred to the ‘democratic legitimation’ requirement of the advisory bodies (but not to democracy as such) in an argument that portrayed the issuance of the ministerial decree regulating the practical aspects some healthcare-related questions (such as the number of state-funded beds in hospitals in various regions of the country) as a bureaucratic, administrative matter, and therefore argued for rejection of the petitions challenging the constitutionality of this decree also on the basis of the missing democratic legitimation of the advisory bodies having a role in deciding over these questions.⁴
- 42/2005. [XI. 14.] AB, 13: Private actors replacing prosecutorial services in case of delays. The case had another dimension in asserting the power of the HCC to invalidate normative decisions of the HCC.⁵ From this perspective (related more to separation of powers than justice perceptions) the observation holds that the Court did not recognize a need to justify this review power from a democracy perspective. This could imply a certain ‘self-confidence’ of the Court in not having to present decisions such as this one to the broader public in an approachable manner.
- 8/2011 [II. 18.] AB, 15: Labor law protection for government employees. The scholarly commentary on this case places its significance rather into the

⁴ 109/2008. [IX. 26.] AB, 42-43.

⁵ de Visser, *Constitutional Review in Europe*, 117; Szente, “The Interpretive Practice of the Hungarian Constitutional Court,” 1612.

context of newly created individual complaint procedure in the Hungarian constitutional system and its effectiveness given that the *pro futuro* declaration of unconstitutionality by the HCC in this case resulted in a group of individuals against whom the provisions were applied before they had been declared unconstitutional. In later decisions, the Court refused to quash judicial decisions that applied this provision on the basis that the constitutional complaint cannot be used just to achieve the invalidation of the application of a concrete legal provision.⁶

- 3142/2015 [VII. 24.] AB, 17: Exempting permanent residents from local property tax. Dissenting opinion of Judge Pokol: '[One problem with this understanding of equality] is that it takes away too much freedom of legislation (in this case: of local governance) and the democratic legislating majority gets to a large extent under the control of the constitutional judges, which can erode the foundations of democracy and the democratic state of law.' Actually, in the first part of the dissent, Pokol makes a case for a more extensive understanding of the constitutional complaint procedure which seems at odds with his generally restrictive view on constitutional judging. However, he does not consider a democracy perspective in this part of the reasoning (and he would have rejected the particular complaint against the local tax exemption under assessment here upon a material review).
- 3073/2015 [IV. 23.] AB, 17: Selective attribution of social benefits to politically prosecuted individuals. The larger number of dissenting opinions in this case was caused by another, procedural question being discussed, namely whether the HCC was eligible to review the case on the merits, taking into account the Art. 37 (sec. 4) of the Constitution that restricts the Court's competence to rule on several matters related to public finance. The majority ruling exercises a material review that upholds constitutionality, while some judges (such as judge Varga) would not have engaged in a material review in the first place. For judge Dienes-Oehm, the provision was not applicable to

⁶ Naszladi Georgina, "Az Alkotmánybíróság legutóbbi döntéseiből [From the Latest Decisions of the Constitutional Court]," *Fundamentum* 17, no. 1 (2013): 76.

the negligible impact of the extension of the governmental decree to a longer period on public finance (spending). Hence, the strength of the declaration of the need to treat the whole period of anti-democratic regimes similarly in these dissents is blurred by the limited view of the Court's competence (in addition to the problematic reference to the National Avowal and the negligence of the undemocratic nature of the pre-1944 period in Hungary).

B. SLOVAKIA

- Additional relevant cases during the Court's second term (2000 – 2007). Besides those discussed, the Court did not directly react to some of the petitioners' claims about the meaning of democracy, at times with a very brief justification based on procedural grounds in general (on a decree of the ministry of education which extended the list of matriculation subjects for high school students,⁷ on the prosecutorial oversight over the legality of the decision of the public administration,⁸ on the insufficiency of the assistance in material need,⁹ on the types of evidence required for decision making of a general court in a civil law case in connection with the need to sufficiently demonstrate the causal link between the violation and the exact procedural right the violation of which has been alleged¹⁰). In one case, it did rule in favor of the petitioner (on the invalid firing of a soldier¹¹).
- PL. ÚS 30/2015: Unconstitutionality of a provision in the Act on civil procedure that required a deposit for the court fees from the claimant upon the request of the defendant. The reason for unconstitutionality was the retroactive application of the provision. The Court noted that an exception to this principle could occur if the interference was in order to uphold 'fundamental constitutional principles or higher principles of justice, morality and decency [...]'¹², as a small 'preface' to its 2017 amnesty decision.

⁷ PL. ÚS 5/05, 3.

⁸ I. ÚS 112/06, 6.

⁹ I. ÚS 38/01, 2.

¹⁰ IV. ÚS 21/06, 2.

¹¹ II. ÚS 50/01, 3.

¹² PL. ÚS 30/2015, 37.

- II. ÚS 467/2010: A demand for just satisfaction for excessive delays in proceedings comparable to the levels in ‘developed democracies’.
- IV. ÚS 317/2013: In this case, the SCC did not find procedurally permissible to rule on the merits of the case, and it again emphasized its practice to prohibit the connection of various challenges that fall under different types of proceedings into one.¹³ This practice enhances the certainty and predictability of the SCC’s decision making, at the same time it limits the access to court with the types of proceedings serving as a ‘gatekeeper’ to access it.
- II. ÚS 88/09: According to the petitioner, demanding the declaration of violation of their rights for delays in proceedings, ‘The Act on the Constitutional Court [...] is a constraint for democracy and the state under the rule of law, and contradicts the meaning of the Convention, which implies that the parties in the proceedings are not obliged to use such means for increasing its speed [...] which are generally not considered efficient enough.’¹⁴
- II. ÚS 148/07: The complainant was dissatisfied with the obligation to be represented by a practicing attorney before the SCC, considering the option for self-representation to be ‘a big invention of real democracy as opposed to our consistently persisting totality and our corrupt rotten justice.’ The Court categorized some other statements of the complainant as upsetting the decency of expression and classified the case as abuse of the right to petition.
- IV. ÚS 369/2011: A complaint that claimed for a legal guarantee of the right to an employment. The fact that general courts did not identify such a right was for the petitioner ‘an abnormal state of democracy and the state under the rule of law [which] is unacceptable and unsustainable, so this constitutional complaint must follow and afterwards, if the situation demands it, the whole affair will again go beyond on justice [sic!] totally lawless state!’

¹³ IV. ÚS 317/2013, 15.

¹⁴ II. ÚS 88/09, 3.

- IV. ÚS 38/2012: For this petitioner, requesting the return of court fees, ‘one pays for her mistakes, which should apply in a democracy and the state under the rule of law as well.’
- I. ÚS 81/2012: Another preliminary proceeding where the petitioner ‘rushed’ to the SCC although had the case pending before another institution (criminal proceeding at the stage of prosecutorial action) as well. Some of these ‘early-born’ petitions indicate a distrust towards general courts in favor of the SCC.
- II. ÚS 266/2011: Reproduced claim on judicial independence in democracy from the regional court ruling. The case concerned a Jehovah’s witness who refused to deliver his military service in 1957 and demanded the annulment of the charges since 2010. Quoting another case, the SCC found the restriction of the freedom of conscience and hence the criminal charge acceptable even when ordered by ‘old law’ of the state socialist regime, as this duty is not in itself ‘exclusively socialist and antidemocratic’ in the Court’s view and does not produce ‘unbearable injustice.’¹⁵
- II. ÚS 2/2016: The Supreme Court referred to democracy in the criminal procedure and explained that while the objection of the petitioner towards the format of the hearings of certain witnesses was valid, these witnesses’ statements did not affect the lower court rulings and so the procedural shortcoming does not amount to a violation of a constitutional right. The case illustrates a fruitful dialogue between the decisions of the general courts and that of the SCC (which, obviously, is more likely to manifest in case the former stand on convincing and coherent grounds).
- II. ÚS 699/2014: The same references as in the previous case,¹⁶ made by the Supreme Court.
- I. ÚS 110/2012: A reference to lower court ruling emphasizing the danger of corruption to democracy in a case of a physician accepting bribe.
- II. ÚS 592/2014: For the petitioner in this case, the lower courts rulings were a ‘mocking of democracy’.

¹⁵ II. ÚS 266/2011, 15.

¹⁶ II. ÚS 2/2016.

- II. ÚS 296/2017: A claim for damages for the delay of proceedings that, however, was mainly caused by the slow pace of the petitioner's actions.
- I. ÚS 469/2014, 8: The SCC here rejected a challenge on the bias against former attorney general Dobroslav Trnka who as attorney rejected a complaint of an individual who had earlier filed a criminal action against him. The Court adopted a textualist reading by declining to acknowledge as the right to launching a criminal procedure as part of the right to due process.
- IV. ÚS 488/2013: The petitioner claimed damages for the non-execution to right to financial compensation in the procedure for the protection of personality, which, however, was lapsed by then.
- IV. ÚS 75/2014: A struggle for regaining the legal title to a flat, whereby the petitioner '[could] not understand how it is possible that if one obtains a valuable item in the conditions of democracy, it belongs to someone else!'
- I. ÚS 188/2017: A traffic law complaint that alleged insufficient justification of the general court decisions.
- III. ÚS 374/2017: A complaint of a former minister of justice related to freedom of expression; here, the Court grappled mainly with the question of the composition of the decision-making panel as some judges were found to be biased in this case.
- PL. ÚS 10/09: A regional court questioning the prohibition of membership in political parties for members of armed forces. The SCC found this legislative restriction legitimate and hence constitutional. Two judges submitted separate opinions, however.
- PL. ÚS 3/03: The specifics of this case is that it deals with the right to free competition placed into the context of independence of a regulatory body, so-called Recyclation Fund. The Court remained with a textualist reading and did not declare its violation, which may signal certain commitment to environmental protection. Judge Orosz dissented as to the part of the composition of the Recyclation Fund which has largely been determined by

the will of employer association's representatives that are unlikely to have environmental protection as their key priority.

- I. ÚS 138/2012, also I. ÚS 139/2012, I. ÚS 353/2010, I. ÚS 352/2010, I. ÚS 98/2012, I. ÚS 99/2012, and III. ÚS 140/2012: Six negative and one partially negative decision on charges of bias against SCC judges in cases where Štefan Harabin, former minister of justice and controversial president of the Supreme Court, was one of the parties. The reference is mentioned in a responses of one of them (judge Orosz) on his critical remarks towards Harabin when Orosz had been an MP. In one of the cases, judge Orosz was found to be possible to be viewed as biased and hence excluded from the proceeding.¹⁷
- PL. ÚS 7/2017, dissent of Judge Gajdošíková: Judge Gajdošíková was slightly more critical of some phrases used in the majority decision, for instance the one admitting that there can be 'other opinions' on the subject matter, which in her perspective is natural in a democratic society while the CC's opinion is special because it is the independent body established for the review of constitutionality.¹⁸
- Additional separate opinions. While the amnesty decision (discussed above) is central for assessing the relationship between democracy and justice in the SCC separate opinions, one more separate opinion (from the Court's second term) could be included here. Judge Bröstl established a connection between the right of deputies to interpellation of cabinet ministers and the accountability of the executive to the legislature, which may manifest in a vote of no-confidence if the parliamentary majority does not consider the executive accountable any longer.¹⁹ While the majority decision was based on technical considerations of the separation of powers, the dissenting judge adopted a more material, accountability-based perspective that is arguably

¹⁷ See also Lukáš Lapšanský, "Ochrana hospodárskej súťaže podľa článku 55 ods. 2 Ústavy Slovenskej republiky [The Protection of Economic Competition According to Art. 55 Sec. 2 of the Constitution of the Slovak Republic]," in *Aktuálne trendy v oblasti práva hospodárskej súťaže*, ed. Jozef Vozár and Ľubomír Zlocha (Bratislava: Ústav štátu a práva SAV, 2017), 40–43.

¹⁸ PL. ÚS 7/2017, 10.

¹⁹ PL. ÚS 9/04.

closer to the citizenry in times when the executive has often better sources of information and more resources than the legislature. This is underscored by the fact that even with a no-confidence vote, the parliament may exercise only its control powers at a symbolic level, it cannot change e.g. an executive policy developed by the respective cabinet (which does not have legislative status).

APPENDIX 2: ANALYSIS OF SEPARATE OPINIONS

Altogether, 16 separate opinions have been found to refer to procedural and social rights in relation to invoking democracy. The tendency of the majority opinions not to refer openly to justice considerations or (to a lesser extent) different justice considerations clashing with each other is brought up in a few separate opinions. At the same time, some of these are also in conflict with each other, leaving the question of democracy largely as a footnote to other, more specialized ideas.

A. HUNGARY: CONTESTATIONS OF THE MAJORITIES' VIEWS

The first separate opinion comes from no earlier than 1999 when judge Kiss, discussing a decision on pensions-related legislation, complained about the lack of the HCC's attention to democracy considerations in its case law.²⁰ The merely three days between the validity of the provisions affecting the pension levels and their entering into force prevented the possibility of the constituency affected by the Act to become familiar with them. In Kiss's view, this 'gives them a reason to believe that they are objects, rather than subjects of the legal regulation. [...] In the term democratic rule of law state democracy—as the value component (*érték elem*) – is closely related to the rule of law, therefore increased attention needs to be paid on securing it as well'.²¹ Democracy considerations should have mattered in the material sense too as the respective constitutional provisions (Art. 2 § 1) contains 'a decision making mechanism based on a wide deliberation (*egyeztetés*)' and besides the right to raise suggestions and express opinions freely,

²⁰ 39/1999 [XII. 21.] AB., 32.

²¹ 39/1999 [XII. 21.] AB., 30.

it entails the right to an agreement.²² This standpoint favorable to deliberative democracy and social justice makes a rare appearance in the case law and has gone unnoticed. A few years later, the majority adopted a position closer to this standpoint by strengthening the requirements for consultation of draft bills but did not apply Kiss's reasoning in the process. Moreover, its change of practice including some of its interpretive choices in the process made it vulnerable to criticism of 'judicial activism' resulting in unpredictable decision making practice.²³

Before 2010, only a couple of separate opinions can be categorized here and none brings a major enrichment to democracy considerations. A concurrence of judge Kukorelli, referring to a book by the Court's first president, László Sólyom, raised the issue of the risk of 'state capture' by lobbyists and corporate organizations in case the status of these various organizations is not legally regulated alongside clear procedural rules for their official participation in lawmaking: 'The road to the "stato sindacalista e corporativo" is paved by democracy's good intentions'.²⁴ In other words, it does not make the state more democratic just if special fora are created for participation of interest groups, so argues Kukorelli.²⁵ One year later, a dissent of judge Bihari (joined by judge Kiss) pointed to the earlier, separation of powers-related case of the HCC,²⁶ to argue for unconstitutionality of the act on individual physician licenses due to the absence of consultation of the draft bill with the Chamber of Physicians and hence the violation of the cooperative principle in 'the [complex system of] constitutional democracy'.²⁷

After 2010, judge Pokol appears as most vociferous in discussing democracy in separate opinions, always using it to justify the shrinking of the Court's powers. Firstly, in 2011, he talked about the 'stiffing' of the society by having unconstitutionality by legislative omissions restricting the 'short-term reactions

²² 39/1999 [XII. 21.] AB., 32.

²³ Halmai Gábor, "Államszervezeti és hatásköri aktivizmus? Három ügy az Alkotmánybíróság előtt [State Organization and Competence Activism? Three Cases Before the Constitutional Court]," *Fundamentum* 8, no. 1 (2004): 100–108.

²⁴ 40/2005 [X. 19.] AB, 22.

²⁵ 40/2005 [X. 19.] AB, 22.

²⁶ 62/2003 [XII. 15.] AB.

²⁷ 29/2006. [VI. 21.] AB, 21.

and learning mechanisms of political democracy stemming from them'.²⁸ Secondly, in a decision concerning the Act on taxation, he argued for lowering the constitutional status of the equality principle to a narrowly construed notion of equality before the law as otherwise there would be an 'unacceptable burden' to the 'freedom to legislate of the majority [...] in a political democracy – democratic state of law'.²⁹ A very similar argument of his was present in a later ruling on the permissibility of exempting permanent residents who own a property from local property tax.³⁰ Besides connecting democracy to majority rule in the parliament and restricting the role of the Court, he also pointed towards the Court to need to bow before direct democracy *as defined* by the parliament. He did so in a concurrence concerning the public voting on the introduction of the same pension-related benefits to men as the legislator granted to women, which the Court quashed on the grounds of the subject falling into the area that cannot be decided by public voting. While the judge agreed with the wide-ranging negative budgetary implications that a positive public vote in this case could have had, and hence with the unconstitutionality of the vote, he acted as a 'speaker for majoritarian democracy' (as opposed to fundamental, including social rights-based reasoning) in budgetary issues.³¹ Fourthly, he outlined the case for a restrictive understanding of the prohibition of retroactivity, as the Court's majority and previous practice in his view unduly limited the 'substance of political democracy', that is, the possibility of the majority emerging from the 'cycles of shifts in public opinion' to legislate and change some elements of the legal order, with the prohibition of retroactivity applying only to 'legal certainty' pertaining to 'past legal developments'.³²

Besides judge Pokol, four other judges made use of democracy in their separate opinions but not in a fashion significantly different from Pokol. In

²⁸ 83/2011 [XI. 10.] AB, 17-18.

²⁹ 3/2014 [I. 21.] AB, 23-24.

³⁰ 3142/2015 [VII. 24.] AB, 17.

³¹ 28/2015 [IX. 24.] AB, 17.

³² 30/2014 [IX. 30.] AB, 33. As a couple of other decisions, this one also contained a procedural matter of the locus of the constitutional dimension in reviewing complaints against decisions of general courts Fruzsina Gárdos-Orosz, "Alkotmánybíróság 2010 – 2015 [The Constitutional Court 2010 – 2015]," in *A magyar jogrendszer állapota* [The State of the Hungarian Legal System], ed. András Jakab and György Gajdusчек (Budapest: MTA Társadalomtudományi Kutatóközpont, 2016), 459–63, <https://jog.tk.mta.hu/a-magyar-jogrendszer-allapota-kotet>.

the ‘governmental office-holders’ case of 2011, judge Bihari concurred to the judgment and his final argument exemplified the ‘separation thesis’ between democracy and the rule of law. Indeed, he argued that in a ‘multiparty democracy’ it is constitutionally permissible to adopt special requirements towards governmental office-holders (an argument that would alone oppose the declaration of unconstitutionality in the case). At the same time, the violation of ‘legal certainty’ and ‘fundamental rights’ enshrined in the Constitution can give grounds to unconstitutionality and hence the obligation of the Court to quash the provisions in question.³³ In such a framing, democracy rarely (if at all) can justify unconstitutionality. Only in the 2014 ‘taxation’ decision, judge Bragyova argued for a more extensive ruling on unconstitutionality as, in addition to the majority, he saw several provisions of the act to blur the distinction between private and public domain (the taxation belonging to the latter), with one private person entitled to sue another private person for missing tax obligations in a civil procedure. ‘[One of the substances of] political democracy, as opposed to feudalism, [is] the distinction between private and public power’.³⁴ A year later in a decision that upheld a governmental decree that provided for social benefits to those politically prosecuted in the period from 1945 to 1963 or in relation to the 1956 uprising but not in another periods of undemocratic regimes which still have living witnesses, judge Dienes-Oehm objected towards this practice as the period from 1963 to 1989 cannot be considered to be a ‘value system and system of requirements [characteristic for] political democracies’.³⁵ Consequently, leaving this period out amounts to unconstitutionality by legislative omission. Last but not least, in the same decision judge Varga argued in a similar manner for the whole period of 1944 to early 1990 referring to the dates determined by the Constitution’s ‘National Avowal’.³⁶

In conclusion, the connection between democracy and justice was not among the strengths of the HCC, even compared to its Slovak counterpart (after the

³³ 8/2011 [II. 18.] AB, 47.

³⁴ 3/2014 [I. 21.] AB, 21.

³⁵ 3073/2015 [IV. 23.] AB, 17.

³⁶ 3073/2015 [IV. 23.] AB, 21.

SCC's 2017 "amnesty decision"). This is surprising given the Court's assessment as "activist" from earlier periods could give rise to the assumption that at least in a certain era, it had adopted an extensive, maximalist understanding of democracy that entailed substantial attention to justice understood not only through equality before the law but also social guarantees of the good life. Of course, the analysis here does not disprove that the HCC had paid attention to these issues, but it does prove that when doing so, it (with some exceptions discussed above) did not discuss democracy in the process, thus (un)intentionally contributing to the separation between democracy and the rule of law. While according to Sajó³⁷, the Court's early social rights jurisprudence may be criticized with an outcome-based perspective on the basis of its prioritization of the widespread middle class instead of the most vulnerable members of the society, this is rarely done because the Court's position is essentially one that had been supported by the majority of the society. This jurisprudence is thus unlikely to have triggered a perception of an "unjust Court" among the majority of the (informed part) of the society. Still, the missing association between democracy and the Court's decision making competence (and hence, legitimacy) in these areas certainly played into the rhetoric based on a "People's notion of justice" by Hungarian Prime Minister Viktor Orbán³⁸, in his declared effort to build a majoritarian democracy not "hindered" by checks and balances. In this interpretation, regardless of what approach to democracy the Court chooses, its very existence if coupled with strong review powers is considered as a scarf on the democratic regime. This view is well exemplified in some of the more recent majority and separate opinions, including the ones where the concept of democracy is "hijacked" to justify restrictions on equality or an almost unlimited majoritarian right to legislate.

³⁷ Andras Sajó, "Social Rights as Middle-Class Entitlements in Hungary: The Role of the Constitutional Court," in *Courts and Social Transformation in New Democracies: An Institutional Voice for the Poor?* ed. Roberto Gargarella, Theunis Roux, and Pilar Domingo (London: Routledge, 2006), 83–105; see also Mária Éva Földes, "The Role of Constitutional Courts in Promoting Healthcare Equity: Lessons from Hungary," *Constitutional Review* 6, no. 2 (2020): 299–301, <https://doi.org/10.31078/consrev624>.ed. Roberto Gargarella, Theunis Roux, and Pilar Domingo (London: Routledge, 2006)

³⁸ Oliver W. Lembcke and Christian Boulanger, "Between Revolution and Constitution: The Roles of the Hungarian Constitutional Court," in *Constitution for a Disunited Nation: On Hungary's 2011 Fundamental Law*, ed. Gábor Attila Tóth (New York: Central European University Press, 2013), 296.

B. SLOVAKIA: THE 2017 AMNESTY DECISION CENTRE-STAGE

The amnesty decision is basically the only one that features prominent discussions between the judges invoking the concept of democracy in relation to justice. Five judges submitted four separate opinions to this decision.³⁹ The single dissent, joined by judges Brňák and Lálík, criticized virtually all aspects of the majority decision. With respect to the understanding of democracy, it framed the majority decision as if it was supportive of unrestrained majoritarianism, and shared a warning from the Court not being a sufficient check on majority rule.⁴⁰ It went into even sharper lines when it accused the Court('s majority) of 'jumping on a train of cheap populism' and even 'denying our constitutional identity'.⁴¹ This reasoning may sound persuasive only if the premise of CCs being 'antidemocratic' is being accepted which, as this research argues in its conceptual part, hold only if democracy is understood (or implied to be understood) as simple majority rule. Moreover, the opinion is itself inconsistent when elsewhere it interprets the powers of the interim head of state to exercise 'all competences without regard to [the head of state's, NB] democratic legitimacy'.⁴² If the Court is to be legitimized through its capacity to review majority decisions, why should it not opt to review the one that has been made by Mečiar, the chairman of the most powerful political party at the time? A double standard seems to be at play in the dissent here because both decisions were made by actors enjoying substantial popular support at the time the decisions were made. Therefore, other considerations such as the ones employed by the majority decision need to be taken into account. In addition, the dissent does not engage with the argument that the second amnesty, that aimed to 'correct' the first one which did not cover all suspects in the crimes surrounding the murder of R. Remiáš and the kidnapping of M. Kováč Jr., was in effect unconstitutional because of the 1999 amnesty decision of the SCC that invalidated the effort of M. Dzurinda to abolish the amnesty. It is difficult to envision how a Court, understood as

³⁹ PL. ÚS 7/2017.

⁴⁰ PL. ÚS 7/2017, dissenting opinion of Judges Brňák and Lálík, 7.

⁴¹ PL. ÚS 7/2017, dissenting opinion of Judges Brňák and Lálík, 21.

⁴² PL. ÚS 7/2017, dissenting opinion of Judges Brňák and Lálík, 13.

countermajoritarian and hence antidemocratic, may gain authority through sidelining its own previous case law.

Each of the three concurring opinions is a precious window into the thinking (at least as officially presented) of its author. The one by Ivetta Macejková is similar to US Supreme Court Justice Anthony Kennedy's 'agonizing' considerations over the role of the judge in a democracy (referring to Aharon Barak's work), and a rather unusual one compared to her previous opinions. Basically, Macejková argues she had given priority to the will of the democratic majority (not only in the parliament but in the broader public as well) which supported the abolishment of the amnesties despite her internal belief about this running upfront to legal certainty. Judges Gajdošíková and Mészáros did not present a competing or more restrictive understanding of democracy than the majority decision (authored by judge Orosz) did. Rather, they presented additional arguments in favor of moving beyond the majority rule. For Mészáros, worried about the tendencies of rising 'illiberal democracy', the 'decision on abolishment of amnesty of criminal acts, suspected to be committed by [governing, NB] power, is a component of *ordre public*, that is, the coming to terms with the past.'

Summing up, it appears that the 1990s (the Court's first term) cast a long shadow here. The SCC's decision making cemented the lack of accountability of core political elites surrounding the semi-authoritarian regime—beginning with PM Mečiar himself. After the introduction of the constitutional complaint procedure, the SCC became a careful guardian of due process rights but democracy became a useful 'servant' for decisions with different verdicts where the justification for this difference is rarely straightforwardly identifiable. The almost complete absence of egalitarian notions of democracy (in relation to social rights that are part of the Slovak Constitution) indicates that the SCC was even less comfortable than the HCC to enter this terrain.