Zeitschrift für Vergleichende Politikwissenschaft
https://doi.org/10.1007/s12286-024-00620-z

ZEITSCHRIFT FÜR VERGLEICHENDE POLITIKWISSENSCHAFT

ORIGINAL ARTICLE

The 'will of the People' as means for pressuring the rule of law?

The case of the Slovak Constitutional Court

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Received: 29 December 2023 / Revised: 13 December 2024 / Accepted: 17 December 2024

Abstract Disputes pertaining to elections and referenda are most visibly associated with the power of the sovereign People, whereas constitutional courts are typically seen as countermajoritarian institutions. Abuse of elections and referenda by illiberal actors, who present themselves as embodiment of the "will of the People", accelerates rule of law backsliding. Via engaging with the extent to which constitutional courts help prevent such abuse and thereby reduce pressure on the rule of law, this article shows how constitutional courts might—even inadvertently—strengthen illiberalism if they do not embrace more robust, constitutional conceptions of democracy in which democracy and the rule of law are inherently intertwined. The article differentiates between minimalist, middle-ranged and maximalist conceptions of democracy and emphasizes the rule of law beyond minimalism. Via an explorative contextual study of the Slovak Constitutional Court (SCC), which has dealt with elections and direct democracy on several occasions since its establishment including during de-democratization in 1994–1998, the article shows the extent to which the SCC, in these cases, framed democracy in tension with the rule of law. The Court managed to link elections as a key democratic institution to the rule of law, but failed to establish this link with referenda. The results demonstrate the judges' indecisiveness over a conception of democracy that has limited the SCC's potential to prevent rule of law backsliding via illiberal abuse of the "will of the People". Furthermore, they indicate the importance of constitutional courts' thinking explicitly about the rule of law as a democratic principle.

Keywords Constitutional courts · Slovakia · Elections · Referenda · Conceptions of democracy

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Published online: 20 January 2025

1 Introduction: constitutional courts and the "will of the People"[1]

'It is one thing for a court to undertake the task of protecting the people from their government and quite another to protect the people from themselves' (Eule 1990, 1585).

The relationship between democracy and the rule of law as political concepts (Krygier 2016, 215–17; Schaffer and Gagnon 2023) is far from straightforward. Two conventionally contrasting readings of democracy stand out. One considers the 'sovereignty of the people' as the 'normative core' of democracy (cf. Lauth 2013, 38). This reading creates a tension with the rule of law if popular sovereignty is read through the principle of majoritarian decision making, while the rule of law goes beyond minimalist, window-dressing 'rule by law', and requires the capacity to 'temper power' (Krygier 2024). A contrasting, more robust reading of democracy considers popular sovereignty to impose limits on partisan representatives (Lauth 2016 and references therein). For this latter reading, the rule of law acts as a connecting thread that allows democracy to be sustained, rather than as a constraint on democratic rule. This divide translates into the conceptualization of the role of constitutional courts (CCs) entrusted with constitutional review of legislation. The reading of democracy as in tension with the rule of law has attained particular prominence via the discourse on the 'countermajoritarian' nature of CCs, that tends to equate majoritarianism with democracy (cf., for instance, Sajó and Uitz 2017, Chapter 9).

The divide between the two conceptions becomes amplified with adding the distinction between direct and representative democracy, since *direct* democratic instruments may articulate the 'People's will' without intermediaries (Lord 2021, 31–32; see also Lupia and Matsusaka 2004). Hence, where CCs adjudicate on elections and referenda as part of their ancillary powers (Ginsburg and Elkins 2009) and possess significant competences such as invalidating election results or referenda, or quashing related legislation, they are even more prone to charges of acting in a "non-democratic" manner by "suppressing the People's will". These charges are often unwarranted *empirically,* when CCs support dominant views (Dahl 1957; Bassok 2012; Bassok and Dotan 2013; Farinacci-Fernós 2020; see also Solimine 2015, 696, fn 160). Challenging them *conceptually,* however, requires recognition of how the rationale of CCs' existence is interwoven with conceptions of democracy tied to the rule of law. Existing scholarship rarely does so; instead, the tendency to see the CCs' role in democracy under the rule of law as constraining the majority in the name of rights, rather than creating the conditions for a democracy to exist prevails (e.g. Miller 2009; Mounk 2018, 70–73; Waldron 2021; Zielonka 2018, 127). In this narrative, visible at the heyday of democratic consolidation in Central Europe as well, '[constitutional] justices [...] supervise th[e] democratically justified process' of minority rights protection, rather than are part of that process (Sajó 1999, 239, 242). Empowered CCs, then, signal that the political community decides to 'tie its own hands' (Kis 2003, 194–202, 235–36).

[1] All translations from Slovak are the author's, unless indicated otherwise. All online sources visited as to 1 October 2024.

Few scholars see CCs as democratic, by them enhancing public deliberation (Mendes 2014) or acting as 'conversation initiator' between citizens, encouraging them to (re)think 'how the policies they favor are compatible with the equal protection of the fundamental rights and freedoms of all citizens [...]' (Lafont 2020, 228–33, 240; see also Blattner and Fasel 2022; Collings 2015; Jaskoski 2020, 548–49; for a criticism of the Colombian case, see Sierra-Camargo 2022). This discrepancy raises the *question* of how *the CCs do and should self-position in this debate,* that needs to be studied more due to the increased autocratic pressure on courts (see, generally, Grover 2023; Musella and Rullo 2024).

Against this backdrop, this article explores *how the Slovak CC self-positions vis-à-vis the conceptions of democracy, relying on explicit references to democracy in its case law on elections and direct democracy*. The question matters because CCs' self-acknowledgement of the countermajoritarian nature of constitutional adjudication could strengthen views that (a) democracy equals the mere rule of the majority, and (b) CCs, while potentially conducive for the rule of law, constrain democracy. The article proceeds as follows. Firstly, it explains the relevance of the study of constitutional courts' conceptions of democracy against the backdrop of two phenomena: the contestations over the meanings of democracy and the rise of ideas of 'illiberal democracy' or 'populist constitutionalism' that undermine the rule of law. While these two trends are of broader significance, the article discusses them particularly via one key controversy between these competing conceptions, that of the role of the 'People' in deciding about the future of the political community. Secondly, it briefly elaborates on the unique historical context of the Slovak CC as providing a central case for the analysis of centralized CCs' conceptions of democracy in various political regimes. It then presents the results of the case law analysis in two intervals: 1993–2017 and 2019–2023. Throughout both period, specific attention is devoted to separate opinions as providing a window into alternative conceptions present in the case law. The findings show that the dilemma between direct democracy and the rule of law was a decisive one for the SCC, which, while it broadly stood its ground against autocratizing efforts in the 1990s, demonstrated a limited ability to discern the implications of the competing conceptions of democracy for the rule of law. More broadly, the article points to the promise of the study of conceptions of democracy in constitutional court case law as means to understand their capacity to resist pressure on the rule of law.

2 Rule of law and the "will of the People": the Achilles heel of CCs?

Democracy in Western history denoted self-rule of citizens of a *polis* (Cartledge 2018). The model of 'assembly democracy' (Keane 2010) trusted the capacity of citizens to make decisions to the community's benefit. Gradually, ideas of representation became intertwined with democracy, to overcome the unification between 'will' and 'opinion' that occurs when all decisions are made directly by the majority which is subject to the decisions (Urbinati 2014, 26). Contemporarily, rising are claims of 'direct representation' (Urbinati 2019) by illiberal political actors, who aim at replacing the mechanisms of selection of political representatives and holding

them into account with loyalty to political leaders embodying a unified fiction of 'the People'. In this vision, CCs undermine 'direct representation' by limiting the powers of the leaders and questioning the choices they made.

For a CC, to develop counternarratives to illiberal assaults is challenging, particularly in cases pertaining to elections and direct democracy. Here, illiberal leaders aim to demonstrate that they channel the voice of the People and amplify the avenues through which individual citizens can express their preferences without constraints. The CC involvement in shaping these instruments appears as a win-win situation for illiberals. If a CC halts or otherwise constrains the scope of elections or direct democracy instruments, illiberals get the ammunition to blame the CC for adhering to an 'elitist' idea of governance where the People are stripped of real powers. On the contrary, if the CC does not indicate review powers over elections and direct democracy (including, for example, media regulation that privileges some political parties during electoral campaigns), illiberals might get their interpretation of direct democracy rubber-stamped by the CC's adjudicative practice.

A way out appears to be to subject mechanisms of elections and direct democracy to robust scrutiny, but highlight the positive contribution of a harmonious interplay between democracy and the rule of law, the latter preventing the former to be reduced to 'unchecked People power'. To do so, the CCs need to invoke conceptions of democracy that emphasize representative democracy adhering to the rule of law as well as the possibilities for public participation beyond elections. However, it is unclear that CCs could realize the difficult 'tightrope walking' between different conceptions of democracy and embrace those which offer the best justification for their own role (see Dworkin 1986) and align democracy with the rule of law.

Regime conditions may affect the impact of CCs' reasoning about democracy as well. In a democracy with robust institutions, the openings for illiberal actors are smaller, and it is unlikely that they could abuse a court judgment that opposes sheer majoritarianism. In contrast, in a regime where the CC 'hangs by a thread' as an institution that matters and might pose an effective counter to illiberals' action, even a single judgment might be abused by the government. These two regime categories should not be seen as a dichotomy, but two ends of a spectrum.

3 Slovakia's CC and rule of law under pressure: competences and regime context

Slovakia is a pivotal but understudied case of unconsolidated democracy at the brink of autocratization. Its regime has undergone erosion during 1994–1998 (Mečiarist period) followed by 'bouncing back' in 1998–2006 (Liebich 2022, 67–81; Harris and Henderson 2019) and deterioration again, in various forms, after 2012 (Zielonka and Rupnik 2020; Steuer and Malová 2023). Even though the Constitutional Court continues its operations independently, it also faces initiatives aiming to undermine its position. For instance, in 2020, the SCC was explicitly denied to review con-

stitutional amendments,[2] and the Court itself essentially accepted this amendment (Šipulová and Steuer 2023, 101), thus remaining vulnerable vis-à-vis illiberal constitutional changes.

The Slovak Constitution enshrines an uneasy dynamic between direct and representative democracy.[3] There is no hierarchy between them. The "will of the People" is articulated via elections and mechanisms of direct democracy, primarily referenda. The referendum is presented as part of citizens' direct legislative power, but the threshold for a valid referendum requires the majority of all eligible voters casting their vote (Art. 98 sec. 1). This high bar has been conducive to their use by political parties as a device for mobilization against political opponents—a phenomenon particularly visible in Slovakia (Láštic 2011; Nemčok et al. 2019; Synek Rétiová 2022)—but not to successful referenda.[4]

Established after the dissolution of Czechoslovakia by the Constitution of 1992 (Act no. 460/1992 Coll.), the SCC largely remained in the shadow of its Czech counterpart (e.g. Kühn 2017). Yet, there are reasons to look at the SCC in its own right, not least the Slovak society still seen as (at best) searching for a more robust understanding of democracy (Wolchik in Stolarik 2017, 16). Moreover, the SCC has undergone substantial changes in its competences and composition since its establishment that make it a fruitful object for diachronic (evolutive) study. The evolution of the Court can be divided into 'generations' based on its presidents; in 2024, the first third of the twelve-year term of its fourth President (Ivan Fiačan) passed. A collaborative model of appointments is used, whereby a majority of the National Council (parliament) selects twice as many candidates, from whom the head of state makes the final appointment (including for the president and vice president of the Court) (Steuer 2024, Section E). The threshold for electing the candidates has been increased to reduce the risk of partisan capture of the Court; yet, in 2023, the governing coalition floated ideas of increasing the number of judges, highlighting the continuing partisan interests in CC appointments.

Since the 1990s, the Court was granted substantial formal powers, including review of electoral complaints. Traditional judicial review powers (Art. 125 of the Constitution) and abstract constitutional interpretation (Art. 128, the latter adjudicated by the plenum after having been unsystematically deemed a senate competence between 1993–2000) may encompass matters of elections, referenda and political campaigns. The Court is also entrusted with the review of the constitutionality of the *subject of the referendum* that is to be declared by the President. The President is, consequently, the initiator of this proceeding, and the decision has to be provided by the Court within 60 days of the delivery of the petition (for details of the legal framework see Baraník 2021, 177–87). This makes national referendum cases bound to be significant for the development of the image and perception of the SCC.

[2] Art. 125 sec. 4, in effect since 1 January 2021. See also Art. I sec. 8 of the Constitutional Act No. 422/2020 Coll. amending the Constitution (https://www.zakonypreludi.sk/zz/2020-422).

[3] Art. 2 sec. 1: 'The state power derives from the citizens, who shall exercise it through their elected representatives or directly.' https://www.prezident.sk/upload-files/46422.pdf.

[4] Only the EU accession referendum of 2004 surpassed the threshold by a thin margin.

In judicial review of elections, the Court adjudicates on complaints against the constitutionality and legality of all national elections (Art. 129 sec. 2) as well as the results of the referendum and the public vote on the recall of the head of state (Art. 129 sec. 3). Until August 2021, it also decided complaints against regional and local elections.[5] This shows that the SCC is indeed a central institution for shaping elections and referenda in Slovakia. Yet, as shown below, in these cases the SCC did not position itself as a guardian of readings of democracy, read in harmony with the rule of law. Its contribution to the upholding of fundamental constitutional values during the 'Mečiarist' semi-authoritarian turn (Štiavnický and Steuer 2020) was achieved via a minimalist conception of democracy. This sufficed to cope with the authoritarian challenges to the political order but left limited legacy to address challenges related to the dissociation between democracy and the rule of law.

4 Methodological considerations

The empirical analysis builds primarily on a larger database of SCC decisions referring to democracy in their text since the start of the SCC's operations (1993) until September 2017, Section 5 examines 72 SCC opinions on decision making through elections and direct democracy, showing the affinities and tensions in the SCC's readings of democracy and the rule of law. The decisions were collected through keyword search of the term 'democracy', subsequently narrowed down by selecting only cases addressing elections, referenda or other forms of direct democracy. Separate opinions are included given the potential these have in uncovering the potentially divergent conceptions of democracy in relation to the rule of law therein (on the importance of judicial dissents, see also Bricker 2015; Kelemen 2017). There is a two-fold limitation, however. Separate opinions were not permitted before 2000, and voting against the majority does not oblige judges to issue separate opinions. Hence, to an extent, a 'false sense of unanimity' cannot be ruled out in some cases. In the narrative analysis, the two broadly opposing conceptions of democracy (as outlined in Section 1) served as a starting point, with the guiding question of how one (if any), or a combination of these conceptions were articulated in the decision.

To provide insights into subsequent developments, Section 6 discusses high-stakes election- and referendum-related cases of 2019–2023. This research design, while limited, offers insights into the developments of the so-called 'fourth Court', i.e. the generation of SCC judges during the SCC presidency of Ivan Fiačan. Moreover, it is after 2019 that several pivotal referendum-related cases were delivered,[6] with no significant cases on these issues recognizable between October 2017 and 2019. This significance is underscored by the separate opinion. While, until the 2017 cutoff point, only six opinions engaging with the subjects under scrutiny are dissents and

[5] This competence was transferred to the new Supreme Administrative Court. See Constitutional Act No. 422/2020 Coll., Art. I secs. 11 (Art. 129 sec. 2 of the Constitution), 23 (Art. 141 sec. 2 of the Constitution).

[6] For example, the discussion of the constitutional provisions on the referendum in a more recent commentary to the Slovak Constitution (Orosz and Svák 2022, 188–219 (commentary by Giba)) repeatedly invokes the 2021 decision discussed below (Section 6).

one is a concurrence, five out of the six 2019–2023 cases analyzed displayed at least one, mostly dissents.

Most opinions represent electoral complaints and articulate the judges' majority positions. The opinions include decisions from preliminary proceedings in the database; yet, not all decisions from preliminary proceedings were published in the Court's archive, so the number of electoral disputes might be slightly skewed by this context. Nevertheless, even with removing them, the substantive conclusions would not change.

The identification of cases via a keyword search may raise the challenge of a 'mindless' selection omitting key cases that do not explicitly refer to democracy. However, the keyword search method overlaps with pivotal cases on these subjects identified by some of the established commentaries to the Slovak Constitution and a few constitutional law textbooks in their (typically scarce) segments devoted to democracy. For example, a collectively authored textbook (Krošlák 2016, 156–205) does not refer to any SCC decision in the chapter devoted to democracy. Another textbook by Ján Drgonec, a judge of the 'first' SCC—and a popular host of conspiracy media two decades later—develops a constitutional 'narrative' that centers democracy around referenda which he distinguishes from petitions (Drgonec 2018, 247–66). Here, he refers to selected SCC decisions detected by the keyword search as well. In a single-authored commentary to the Slovak Constitution (2019), he elaborates the relationship between democracy and partocracy and the core role of referenda. He identifies some cases not detected by the keyword search,[7] but these cover specific themes without a clear linkage to democracy in the SCC's reading. Therefore, their absence does not undermine the validity of the keyword search method.

Another commentary to the Constitution coordinated by the first president of the SCC (Čič 2012) addresses elections and direct democracy only marginally. The commentary to Art. 1 of the Constitution, which encompasses the condition for a democratic state under the rule of law, does not list any quote from the SCC case law that would invoke democracy but not the rule of law. In a more recent commentary, without referring to any SCC decision, the 'democracy principle' is equated with the 'sovereignty of the people (Orosz and Svák 2021, 21 (commentary on Art. 1 sec. 1 laying down the principle of democracy by Balog)).

The analysis in Section 5 traces the evolution of the case law of referencing to democracy in the context of elections and direct democracy chronologically according to the four generations of the Court (see Table 1), and via grouping logically related themes (such as electoral complaints or public participation beyond elections). The unit of analysis is the reference to democracy in connection to elections and direct democratic instruments, and the interpretive approach leans towards the inductive end of the inductive-deductive spectrum, in order to prevent the forcing of particular conceptions of democracy whilst still working with broadly accepted categories to remain comprehensive, notably the distinction between conceptions of democracy that see the rule of law as separate from democracy, versus those that see

[7] IV. ÚS 46/2011, PL. ÚS 10/2014, I. ÚS 8/97, I. ÚS 397/2014, PL. ÚS 23/06 and the concurrence of Judge Orosz to PL. ÚS 29/05.

Table 1 Number of opinions under study according to the generations of the SCC. Source: author

Analyzed opinion distribution/SCC generation	1993–2000 (First Court)	2000–2007 (Second Court)	2007–09/2017 (majority of Third Court)	2019–2023 (Fourth Court, first third of term)	Total
Majority	12	7	46	6	71
Separate (concurrence or dissent)	0 (not allowed)	0	7	8	15
Total	12	7	53	14	86

the two as inherently related. This interpretive approach helps understand the extent to which the SCC embraced a reading of democracy in harmony with the rule of law, and enables to also recognize similarities and differences over time and across various case types. Section 6 follows with the early fourth SCC, focusing primarily on two referendum-related cases that were delivered in this period and have offered important insights on how the new generation of judges positions this prominent direct democracy instrument vis-à-vis the rule of law in Slovakia.

5 The SCC between 1993–2017: making the rule of law vulnerable?

In the 1990s, the Court had little time to begin its operations before it faced an emerging intra-executive conflict (Malová and Rybář 2012). This environment was not productive to develop any more coherent judicial philosophy, unlike, for instance, in Hungary with the 'invisible constitution' doctrine (Halmai 2018). The judges of the SCC in its first term were drawn from a mixture of academics and legal practitioners during state socialism, and its President was a politician from before 1989. Due to Mečiar's attempts at blatantly centralizing power without the SCC having firmly established its operations, in-depth thinking about the conceptions of democracy gave way, limiting argumentative resources for future contestations (see also Castillo-Ortiz and Roznai 2024). The following paragraphs present a chronological summary of how democracy and the rule of law were mutually associated—or dissociated from each other (details provided in Appendix A).

The term of first SCC President Milan Čič coincided with the rise—and later defeat—of Mečiarism. Initially, the Court was hesitant to intervene in election-related matters, and claimed that perfect compliance with electoral laws is a utopian idea (PL. ÚS 17/94, PL. ÚS 19/94). It then became bolder as the authoritarian push of the government led by Mečiar tightened, with some of its obvious expressions being the efforts to rig the 1998 elections. It struck down several provisions of both parliamentary and local government electoral laws in this year, thus giving a chance for a more equal electoral competition that ultimately resulted in the government's defeat. 'Democracy is not a form of government only for the political parties and movements. [...] The denial of fundamental rights and freedoms of the citizens in the name of the interests of political parties and movements is simultaneously the denial of democracy' (PL. ÚS 15/98, 31). It went even further when arguing that '[t]he constitutional guarantees of the *stabilization of democracy* and legality of the state belongs the principle of the protection of free competition of political forces

[...]' (ibid., 62, emphasis added, also PL. ÚS 19/98, 19). These two rulings are path-breaking for further case law; yet, the guarantees remain in line with a 'minimalist approach', in which democracy is associated primarily with majority rule threatened only when minimal rule of law standards are not upheld. In other cases, however, the Court's earlier hesitancy remained (Appendix A).

In the attempt to maximize prospects at electoral success in 1998, Mečiar utilized the referendum as a campaign tool (see Láštic 2012, 155–64). The SCC managed to neither stop, nor clearly outlaw this practice that materialized particularly with a 1997 referendum attempt, which the Mečiar-controlled Ministry of Interior refused to implement due to the head of state—who, by this time, was in open conflict with Mečiar—having exercised the presidential competences not to approve parts of the referendum initiative. These cases (e.g. II. ÚS 31/97) speak by silence, in that they contain almost no references to democracy. Only with the individual complaints submitted *after* the referendum did the Court realize that it had underestimated the link between democracy and referenda, and explicitly linked the democracy principle from Art. 1 sec. 1 of the Constitution to the right to participate in elections and referenda. Still, it accompanied them with only a formal reading of the rule of law. The fact that these judgments came from the SCC's senates (typically deciding on cases without general legal effects) concluded the SCC's somewhat 'Potemkinian' study of direct democracy, whereby its strongest claims on the democratic significance of referenda came in cases with no general legal effects.

While the Court did advocate a 'democracy of citizens rather than of political parties' (PL. ÚS 18/99, 13), its general approach raises doubts about whether it would have been able to withstand more sophisticated attacks of 'abusive constitutionalists' (Landau 2013) than of the somewhat amateurish authoritarianism of PM Mečiar. Moreover, the symbolic equation of the democracy principle with majoritarianism is one that subsequent majorities were to actively overcome it if they intended to read into democracy the rule of law as well.

The term of President Ján Mazák (2000–2007) brought continuity, rather than innovation, in the SCC's reasoning on the relationship between direct and representative democracy. Reinforcing the commitment to free and fair elections as a cornerstone of democracy, the Court, during these years, strengthened its legalistic rhetoric by highlighting its commitment to the rule of law also in relation to regulation of referenda or political parties. On the whole, this term brought limited contributions to the development of the Court's conceptions of direct and representative democracy, which may partially be explained by the more limited 'supply' of cases tackling directly these themes.

The so-called third Court's jurisprudence on elections is the most extensive, even when adjusting for the length of its term. In brief, three types of cases referencing democracy can be distinguished. The most numerous ones are election-related, where the Court cemented its earlier commitment to the centrality of elections in its conception of democracy. It was also concerned with respect towards formal electoral rules and the prevention of their abuse, that would result in excessive invalidation of electoral results. However, these two considerations remained largely disconnected in the reasoning. The tendency in these cases is for the SCC to defend minimalism, democracy linked to elections only, albeit following formal rules. No-

table exceptions were cases stressing the fairness of the electoral process as taking precedence over respect towards all formal rules regardless of the circumstances. This signals the Court's agonizing with these types of cases, in which the majoritarian readings of democracy link to various versions of the rule of law (procedural in emphasizing the importance of electoral rules and substantive in stressing the fairness of the electoral process clash with each other). In rare instances, elections are presented not only as a cornerstone of democracy, but also as an exercise of electoral rights, paving the way towards more robust readings of democracy linking it to substantive rule of law that encompasses commitment to fundamental rights. However, these also yielded occasional dissents, such as in the 'educational census' case (PL. ÚS 18/2014) the Court's majority invalidated the restriction of eligibility to stand for candidate in local elections by the candidate possessing primary education (Appendix A).

The second type, cases pertaining to local democracy, offer marginal examples of referring to democracy with emphasis on participation between elections that often materializes at local level. Not even the third Court applied more innovative conceptions of democracy. The third type, referendum-related case law, is prominently represented by the 'same-sex marriage' referendum (PL. ÚS 24/2014). Here, the trend of broadening the concept of democracy, visible from some of the more innovative election-related jurisprudence, is not observable. Even though the Court permitted three out of the four referendum questions which may indicate a commitment to direct democracy, it did so in disconnect to fundamental rights when it did not recognize the link between the constitutionally enshrined prohibition of referenda that could restrict the extent of fundamental rights protection on the one hand, and democracy on the other.

This retreat yielded some of the first dissents by SCC judges in the case law under scrutiny. Judge Orosz argued for the unconstitutionality of the question on the permissibility of adoption by same-sex couples by referring to the tension with the principle of the democratic state. In his view, 'there is most likely a consensus at least on the claim that its core component [of democracy] is the application of the principle of the majority in exercising public power but in organic connection with the protection of rights of (any) minorities' (PL. ÚS 24/2014, Orosz, 7–8). Judge Mészáros, who advocated for the invalidation of the question on retaining the term 'marriage' to be restricted to relationships between a man and a woman, considered the proceeding as an opportunity to ensure that referenda 'cannot redraw the constitutionally established boundaries of the state [...] including the questions of the form of democracy' (PL. ÚS 4/2012, Mészáros, 4). The latter dissent presented a slightly narrower understanding of the importance of the referendum for democracy, presenting direct and representative democracy as different 'genres' (ibid., 5). This narrower understanding led to the conviction that the question on the exclusivity of marriage is impermissible from a constitutional standpoint. Nevertheless, both dissents adopted a narrower understanding of the scope and permissibility of referendum questions than the majority opinion, embracing a conception of democracy where the majority cannot undermine the rule of law as articulated by the protection of minority rights.

In summary, the Court's majority opinions connecting democracy to political participation contain key references on the integral link between political competition, electoral rights and (to some extent) equality in the electoral process and democracy. While the majoritarian approach to democracy becomes apparent, an even more skeptical assessment is merited when taking into consideration that, since the game-changing developments surrounding the 1998 elections, the Court prevailingly ruled on these questions 'in a good weather'—unchallenged by major partisan actors and the public alike. The most contested issue, that of referenda, already displays the inconsistencies and the lack of guidance that did give rise to new questions in the 2021–22 cases. Bold, perception-shifting ideas are scarce in this jurisprudence, providing only limited evidence for the Court's capacity to act as an "educator of democracy" vis-à-vis the broader public beyond a few basic principles of free and fair elections. Finally, separate opinions are few and far between, and rarely emphasize minority protection associated with equal political participation, which reinforces the Court's standing as attempting merely to protect the mechanisms through which majoritarian preferences are channeled.

6 The early fourth SCC (2019–2023): limited attempts to improve rule of law standards via conceptions of democracy in election and referendum case law

In the first third of its mandate, the Fourth Constitutional Court decided several cases pertaining to elections and direct democracy; starting with the 2019 EP elections and the 2020 parliamentary elections and continuing, most prominently, by the referendum decisions of 2021–2022 (Appendix B). The Court in this period tended to commit to elections as a cornerstone of democracy. For example, 'elections, or the principle of temporal government are the essence of democracy, because they determine the time for constitutional authorities and grant their legitimacy' (PL. ÚS 21/2019, para. 43).

The SCC also invalidated the comparatively unprecedented 50-day moratorium for the publication of pre-election public opinion poll results. However, this decision yielded some argumentative disagreement. Referring to the dictum of democracy as discussion by T. G. Masaryk (democratic President of the First Czechoslovak Republic in the 1920s–1930s), Judge Straka in a concurrence acknowledges the comparative analysis of the majority but critiques the missing implications of the invalidated moratorium for free electoral competition therein. For Straka, *both freedom of speech and free elections* are 'a cornerstone of democracy', though the former may occasionally be 'balanced' by the principle of free electoral competition (Art. 31) or the principle of democracy (concurrence, para. 11). At the same time, silence periods as such are not required by the Slovak constitutional principle of democracy (para. 6).

A considerably different take can be found in the dissent of Judge Kaššák. For him, right to information is unconstitutional to restrict without specification, and electoral polls resemble factual information rather than instances of political speech (e.g. para. 55). Lacking sociological studies on the negative influence of election

polls on Slovak voters (para. 31), the restriction not only violated the right to information, but also freedom of expression (para. 32–33). Hence, a more plausible justification for unconstitutionality could have been linked to the violation of freedom of speech and the media, without speculations linked to voting behavior. Thus, Judge Kaššák offers both a broader and the narrower reading compared to the majority. It is broader because it has the implication of invalidating even the shorter, 14-day moratorium. It is also narrower because it argues for avoiding some of the discussions on the voter rationality and decision making behavior by the majority. Given the latter, its self-assessment is not of activism, but a different reading of restraint (paras. 65–66 of the dissent), whereby the Court exhibits restraint towards the assessment of voter rationality, rather than towards the legislator. Albeit implicitly, Kaššák can be seen as advocating a more participatory conception of democracy that strengthens constitutional values including the rule of law via voters learning through their own mistakes rather than nudged via regulation to avoid particularly undesirable outcomes that could harm democracy.

Hopes from the above progressive case law towards this Court's improved understanding of the inseparability between democracy and the rule of law have been put to test in the 2021 and 2022 referendum decisions. In July 2021, the SCC decided that referenda calling for early parliamentary elections are unconstitutional. The verdict managed to upset a considerable portion of both supporters and opponents of direct democracy. This article argues that the paradox can be explained by the verdict advancing a more sophisticated vision of democracy than the ones featured in ordinary Slovak constitutional discourse. However, it does so imperfectly, which reduces the potential to strengthen the connection between democracy and the rule of law.

The first judgment on the constitutionality of referendum on early elections from July 2021 reviewed an opposition initiative, facilitated by over 585,000 signatures in Spring 2021. Here, the SCC appears to have searched for the 'golden middle way', to avoid harsh critiques of either of the conflicting parties. It ruled that the petition for early elections violates the constitutional principle of the rule of law (Art. 1 sec. 1 of the Constitution) in conjunction with the provisions on the fixed term of MPs (Art. 73 sec. 1), the absence of referendum as a ground for premature termination of mandates (Art. 81a and Art. 82 sec. 5), and the prohibition of referendum questions to address fundamental rights and freedoms (Art. 93 sec. 3).

The Court's majority opinion was backed by two key arguments: firstly, the violation of the principle of generality as part of the rule of law and, hence, the substantive core of the Slovak Constitution, and secondly, the violation of the separation of powers, that encompasses a horizontal separation of legislative power between the People (as legislators) and its representatives. Amidst these arguments, the opinion presented a conception of democracy that retains a strong emphasis on participation (upsetting the opponents of direct democracy) but places these in opposition to the rule of law (disappointing the supporters of direct democracy). The stronger argument endorsing referenda and yet questioning referendum *questions* calling for early elections by reading the principles of democracy and of the rule of law *in harmony with each other* was not pronounced by the Court.

Despite the 60-day limit to decide on the petition, constraining the time for in-depth analysis, the SCC has attempted to ground its response to the petition in the broader questions of the legal locus and force of the referendum in Slovakia. The premise of the Court was that Slovakia's constitutional system, while embracing representative democracy, operates with elements of direct democracy (secs. 68–69, 174). While the People are the source of all public power (Art. 2 sec. 1 of the Constitution), they share lawmaking powers with the parliament. When exercising lawmaking powers, the People and the parliament stand on an equal footing (sec. III.2.1. of the judgment). As the Slovak parliament can unilaterally amend the Constitution, the equality between the parliament and the People deciding in referenda implies that referenda may be used to amend the Constitution without the need for subsequent parliamentary consent.

This equalization of the referendum with constitutional lawmaking powers represents a victory for supporters of direct democracy that goes beyond elections in regular intervals. It strikes a blow to positions claiming that the referendum results are only a recommendation for the MPs. Yet, coming to the constitutionality of the particular question at hand, the Court found flaws in the type of referenda calling for early elections. Such a referendum would violate, firstly, the Fullerian principle (Rundle 2016) of generality of legal norms (Section III.3.5. of the judgment) as a sign their adherence to the rule of law, and secondly, the principle of the separation of powers, which grants the exclusive rights to dissolve the parliament before the end of the electoral term to the president, if specific circumstances are met.

In doing this, however, the SCC pitched the democracy principle and the rule of law principle (both enshrined in Art. 1 sec. 1 of the Constitution) against each other. Thus, the Court talks about the 'balance' between the two principles (sec. 131), whereby allowing the referendum to proceed would have led to a 'complete satisfaction of the principle of popular sovereignty [...], in other words, the democracy principle' (sec. 130). The Court's uncritical acceptance of the democracy principle as 'exhausted' by popular sovereignty presents an impoverished view of democracy, that shatters hopes for a more robust understanding of the principle indicated by the Court's early considerations of the general significance of participation in public life.

Moreover, the reduction of the democracy principle to popular sovereignty and equation of both with majority decisions is unwise for the Court's legitimacy: since the judges are not elected by the popular will, how can they be eligible to decide on such central questions? Had the Court argued that the referendum on early elections violates *the democracy principle* as well via it violating rule of law standards, it would be easier to counter the critiques that it had absolutized certain particular standards (generality and the separation of powers in a referendum context) over adherence to democracy.

The split between democracy and the rule of law advanced by the majority received a mixed response from three dissenting judges. Two of them (Duriš, Laššáková) did not challenge the overall narrative, merely the 'balancing' between the two principles. In their view, the loss on the side of the rule of law would have been considerable more minute with permitting the referendum than the loss on the side of democracy by prohibiting it.

Judge Straka's individual dissent gets closest to reading democracy in harmony with the rule of law. For Straka, the referendum appears as a potential tool for democracy protection in case the parliament's decision making takes an autocratizing turn. Hence, a referendum on early elections is not necessarily a tool ready to be abused for campaign purposes; instead, it can serve as a shield for democrats from an unstoppable 'legislative whirlwind'. While Straka offers limited evidence for how the referendum with its high quorum and unclear consequences could achieve such an aim, his reasoning brings democracy and the rule of law closer together—even his concluding comment says that the verdict is a 'defeat for democracy and the rule of law'. The majority could use a similar logic to Straka's to highlight that the referendum is prone to undermine more robust conceptions of democracy.

In the aftermath of this verdict, the CC had the chance to do a 'resit' on the matter, when the opposition party Smer-SD initiated another referendum, with two questions—one on enacting a constitutional change that would explicitly enable the shortening of the electoral term via referendum, and another on doing that for the then-anticipated 2020–2024 electoral term. Assessing the constitutionality of the latter question submitted to it, the Court borrowed heavily from its earlier justification and did not abandon the depiction of an inherent tension between democracy and the rule of law (Steuer 2023). Declaring the respective referendum question unconstitutional for the same reasons, the majority again endorsed the damage caused to the substantive core of the Constitution and particularly its rule of law and separation of powers component by violating the principle of generality of law, and presented this as a justification for constraining 'the principle of the sovereignty of the People (the principle of democracy)' (sec. 68, 69). It did not justify equating the democracy principle with the sovereignty of the People, or, even more, with the majority decision making (sec. 51).

Going beyond its 2021 ruling, the CC ended with a general articulation of scepticism towards direct democracy, claiming that 'in a representative democracy in the form of a parliamentary republic, [the cabinet] depends on the trust of the parliament, not directly on the trust of the citizens (irrespective of the creation of the personal composition of the parliament by the citizens in elections). Another arrangement [allowing modifications of electoral terms in referenda] would trigger a change in the form of government towards (in terms of the relations towards the executive) direct democracy. Such arrangement is [...] possible, but very uncommon and, *in relation to the operative execution of the fundamental functions of the state in the context of modern society exceptionally risky*' [emphasis added]. The majority did not feel the need to explain how such a model would be risky or the potential mitigating effects of design choices. Direct democracy is hardly a panacea for contemporary democracy's ills, and direct and representative democracy do not exhaust the universe of democracy by far. Yet, at a time when representative democracy alone is increasingly seen as insufficient for the sustainability of democratic governance, the SCC's claim supporting it virtually unconditionally appears ill-informed by contemporary research (Qvortrup 2021; Held 2006).

Interestingly enough, Judges Duriš and Laššáková (the latter resigned from the Court in September 2023) did not dissent here, despite that the arguments from their earlier dissent on the virtually same issue were not taken on board by the major-

ity. Judge Straka did. Though not offering a more intertwined understanding of the relationship between democracy and the rule of law, he raised several remarks on the broader interpretive practice of the CC, motivated by his longing 'to avoid that the CC case law becomes a demotivating factor discouraging citizens from direct participation on power' (sec. 19). The 2022 decision remains consistent to its predecessor but generally bears signs of hastier drafting (illustrated e.g. by the minimum references to scholarly works). It cements the perceived disconnect between (direct) democracy and the rule of law, making the latter, and the Court itself by extension, vulnerable to the authoritarian populist demands of full 'power to the People'.

7 Conclusion

This article has underscored the connection between the judicial discourse on "the will of the People", and that of the rule of law. "The will of the People" as manifested in elections and mechanisms of direct democracy (notably referenda) is a frequently used rhetorical tool by authoritarian populists and the opponents of the rule of law more broadly. The use of this discourse has repercussions for judicial institutions particularly when they engage with the 'hot potatoes' of elections- and direct democracy-related cases. These cases may be particularly difficult because of how "will of the People" may easily be presented as requiring the courts to take a step back, especially when (constitutional) courts themselves keep articulating their allegedly constrained role to protect 'discreet and insular minorities' (cf. Ely 1980), instead of nourishing democracy as a political regime that necessarily encompasses minority rights and the rule of law.

These cases need scholarly attention as the CCs are often under particular public spotlight and their reasoning may be key to the success or failure of authoritarian populist narratives. Addressing the question how the Slovak Constitutional Court conceptualized democracy in cases pertaining to elections and direct democracy in selected time periods, the article demonstrated the SCC's mixed record in connecting democracy to the rule of law in this segment of its case law. Its tendency to, in crucial cases pertaining to referenda mobilized by illiberal actors, pit direct and representative democracy and democracy and the rule of law against each other has befitted polarizing, conflicting narratives. Here, 'winners take all' by showing that, for democracy to function, either rule of law needs to be sidelined, or democratic decision making. The latter is then equated with sheer majoritarianism, 'constrained' by representation or the rule of law presented as *limits on,* rather than *enhancements of*, democracy. Integrating narratives, focusing on broadening the concept of democracy (Keane 2018) so that it is read in harmony with substantive rule of law and shows avenues on reconciling direct and representative democracy, remained in short supply.

A more robust reading of democracy by the SCC is unlikely to have served as a panacea for Slovak democracy, and the Court's contribution to fighting the 'Mečiarist challenge' in the 1990s is undeniable (Malová 2010). Nevertheless, in light of the 2023 elections which gave rise to an illiberal majority that has the rule of law among its primary targets, the SCC is a crucial actor in halting these trends

(Steuer and Malová 2023). The twelve-year terms of most of the SCC judges run well beyond the 2023–2027 electoral term which adds to the stability of the Court's position, especially if the illiberal actors do not manage to assemble a constitutional majority for increasing the constitutionally set number of its judges. Yet, minimalist readings of democracy are, at best, likely to contribute to a disconnect between the SCC and the public, while the public struggles to connect to formalist rule of law language (Merdzanovic and Nicolaïdis 2021). At worst, minimalist readings are ill-suited to respond the type of claims made by the illiberal actors, who are well-aware of the power of invoking democracy.[8]

This research has several limitations. Firstly, using the keyword search method for cases after September 2017 could help identify additional cases to trace the SCC's conceptions of democracy. Secondly, while the identification of cases via keyword search is replicable, the determination of key cases in the 2019–2023 period might differ depending on the local sources and their interpretation. Thirdly, the interpretation of specific cases and references to democracy therein might also differ based on pre-conceptions of the researcher. The latter limitation is partially addressed via including direct quotes from the judgments (see Appendices) that facilitate engagement with potentially contrasting interpretations.

Further research is needed to understand the reasons behind the disconnect between interpreting democracy and the rule of law by the SCC. Given the presence of this trend despite some of the foremost Slovak public law scholars having served as CC judges, these may be sought, more than in ideological bias, in formalist legal education (see discussion of Slovak scholarly sources about the Constitution in Section 4). Such formalism fuels the absence or disregard of arguments for a holistic approach in an environment where judges are not 'socialized to be heroes' (Sajó 2024, 544; for exceptions, see Graver 2023). The general public discourse on democracy, to the extent it rarely contains less formalist readings of the rule of law may also play a role.

The findings prompt the need for closer scrutiny of how democracy and the rule of law are related to (or distanced from) each other in the reasoning by public institutions. It is not only courts, but also a range of independent, guarantor institutions (Tushnet 2021), whose positions can easily be undermined via the narrative of unconditional "will of the People" in decision making. Ultimately, disconnecting democracy from the rule of law comes at the cost of both.

[8] As an example, the leader of the Slovak illiberal coalition Robert Fico, presented the suspension of his party's membership in the Party of European Socialists due to anti-minority rhetoric as in 'staunch contradiction to the very essence of democracy'. See https://www.facebook.com/robertficosk/videos/1790402361432030/ (first three minutes in particular).

8 Appendix A: Discussion of the SCC's case law on elections and direct democracy (1993–September 2017)

First term (1993–2000): In one of the first major electoral complaints, the Court rejected the challenge to the 1994 parliamentary elections raised due to the manipulation with public broadcasting by Mečiar's party. In Procházka's (2002, 176) words, this is a manifestation that 'at times, [the Court] would prefer the appearance of impartiality to full and effective exercise of its powers.' The SCC's claim that regular complaints on electoral results by the participating political parties can 'question parliamentary democracy and elections' and that 'it is practically impossible to reach a state of full compliance of the law with the preparation and execution of elections' (PL. ÚS 17/94, 7–8, PL. ÚS 19/94, 14) does not boost the confidence in the Court's capacity to resist a selective interpretation of the law that deviates from more robust readings of the rule of law.

Even more limited readings of democracy occurred in a complaint of a candidate for MP who was prevented from occupying his seat due to an abuse of the law by the parliamentary majority. The SCC Second Senate in this case did not go beyond interpreting the rule of law as non-arbitrary application of the legal text: 'The Constitution and legislation should [...] not be arbitrarily cut, parts of the text left out and adapted purposefully for one's own needs. [Such a] practice raises concerns of the democratic way of decision making of a state organ not only towards the citizens of the state, but it is also a bad sign about the realization of our democracy abroad' (II. ÚS 48/97, 25). The last sentence signals the Court's awareness of the growing international disapproval of the Slovak developments, but ultimately the Court did not quash the National Council's decision (Procházka 2002, 195).

The Court referred generally to the importance of the calling for national referenda (PL. ÚS 42/95, 11, 15). Perhaps to remain on the safe side, in the first case related to the infamous 1997 referendum that the Ministry of Interior refused to execute in the form declared by the president, it left without a response the references to democracy by the petitioner and the respondent, and declined to provide an interpretation for procedural reasons (II. ÚS 30/97, 4, 14). This practice contributed neither to the Court's much-appreciated formal rule of law manifested in legal certainty, nor to preventing the violation of citizens' rights to participation in the 1997 referendum. Eight days later, just two days before the scheduled referendum, it provided the interpretation in another petition, submitted by parliamentarians. The only references to democracy here are in the comparative legislation section; the Court concluded that it is not uncommon to allow constitutional changes by referenda in 'developed democracies' (II. ÚS 31/97, 23, 26). In subsequent individual petitions, the Court's senates were more outspoken: the first senate (Judges Mrázová, Rapant, Klučka) saw the right to participate at referendum growing from the 'fundamental principle of democracy in a state under the rule of law' and so its violation violates this principle as well as the right to participate in public matters according to Art. 30 sec. 1 (I. ÚS 76/97, 9, 10).[9] The second senate in a similar case supplemented this reasoning,

[9] The senate mentioned Article 2 as well that establishes the citizens as the source of state power and their right to exercise it directly or through their representatives.

stating that the referendum equates with the 'direct participation (activity) of the citizens—the people predominantly on legislative activity' (II. ÚS 37/98, 6).

Second term (2000–2007): The Court dealt with several electoral complaints in which it reiterated the importance of free and fair competition of political movements as well as individual candidates (PL ÚS 1/00, 18, PL. ÚS 28/06, 7[10], PL. ÚS 25/06, 10[11]). Further, referring to the right to participation at the referendum as an instrument of direct democracy (II. ÚS 85/01, 8), as opposed to the right to automatic access to legislative mandate, it rejected a complaint from a former MP, who hoped that the Court would declare his recall unconstitutional on procedural grounds. The Court also ruled on the unconstitutionality of multiple membership in political parties, determining that it is the 'task of the law to [regulate the association in political parties] with an emphasis on preventing the violations of the principles of democracy such as plurality, the principle of the majority and the protection of minorities, equality, or, alternatively, consensus' (PL. ÚS 3/01, 10).

Third term (2007–data analyzed until September 2017): Case law on local democracy is represented by only one notable case in which the SCC rejected the challenge on the constitutionality of an amendment of the act on gambling that had questioned the legislature's legitimacy to condition the adoption of municipal regulations against gambling with a petition submitted by at least 30 % of the citizens of the municipality. The Court argued that '[t]he Constitution itself explicitly presupposes the realization of territorial self-governance by the local constituency also in forms resembling direct democracy' (PL. ÚS 4/2016, 26, also 27, 30). Thus, Slovakia represents a mixture between direct and representative democracy, with the former not reducible to elections only (ibid., 31, 32, 35).

The Court dealt with numerous complaints on municipal elections (Orosz 2011, 20; see also Macejková 2014, echoing the common argument about the overburdening of the Court with electoral complaints) and invalidated some election results with references to democracy. In some cases it started with the seemingly contradictory statement about the risk of abuse of the electoral complaint procedure, but then engaged in a 'dialectical' justification for why, despite this risk, the complaint provides the footing for invalidating the elections (PL. ÚS 31/2014, 9,[12] PL. ÚS 36/2014, 18[13]). The "microcosm" of electoral complaints provides occasional more nuanced views of the SCC on the importance of particular features of elections to nurturing democracy.[14] The characterization of the free elections as 'including the freedom to select a candidate from multiple candidates [...] in a form identifiable

[10] This case alleged a complaint on the fairness in the political campaign. The Court employed a social science argument to vindicate the use of public opinion polls in determining the order and debating times for individual party representatives in televised campaign debates, which is regulated by Slovak legislation.

[11] The petitioner was a party scoring low in polls that alleged a violation for not having been included in the broadcastings of political debates before the 2006 parliamentary elections.

[12] The electoral result was determined by one vote by a voter without permanent residence in the village in question.

[13] An instance of proven manipulation and abuse of the portable electoral casket and other misconduct in the vote casting and counting procedure.

[14] 'Any kind of manipulation with the ballots including the disposal of the superfluous ballots is an action incompatible with the electoral law [representing] a serious interference with free competition of political

by law' (PL. ÚS 11/2011, p. 45[15]) not only puts into sharp contrast the pre-1989 autocratic regime but also underscores its commitment towards a formal rule of law.

References to democracy can be found in cases that upheld the electoral results (e.g. PL. ÚS 92/07, 10[16], PL. ÚS 20/2015, 4[17]). More specifically, they include references to the importance of free political competition (PL. ÚS 68/2014, 47[18]), and the value of local self-government in a democracy (PL. ÚS 81/07, 19, PL. ÚS 10/07, 36 and PL. ÚS 34/2014, 26). Most of them[19] downplay the significance of minor procedural rules in favor of substantively fair outcomes, e.g. by saying that 'the principle of democracy and the freedom of expression balance the illusory perfection of the electoral moratorium' (PL. ÚS 118/07, 8, also PL. ÚS 25/2015, 14). One decision points out a 'rebuttable presumption' based on the 'principle of democracy' that 'the electoral result matches with the will of the voters, and it is the duty of the petitioner to submit evidence to the contrary' (PL. ÚS 46/07, 15). In rejecting another complaint on the appearance of public officials in electoral campaigns which was to violate the legal prohibition of their appearance in paid commercials, the Court argued similarly, praising representative democracy based on an open electoral contestation (PL. ÚS 8/2012, 19).

In three rulings on unconstitutionality concerning restrictions to access to elections based on education and criminal conviction, a rare manifestation connecting equality to democracy appears (e.g. PL. ÚS 18/2014, 47, PL. ÚS 5/2016, PL. ÚS 6/08). To that, the Court added the violation of free political competition in a democracy (PL. ÚS 18/2014, 49) and the general violation of the principle of democracy as 'a real democracy cannot exist without recognition of the sovereignty of the people and their right to elect their representatives [...]. A real democracy is based on the requirement to respect human dignity and equality' (ibid., 51). Here, the Court "previews" its later, more substantive reasoning involving democracy, although in a context that still gives prevalence to the majoritarian (electoral) connection. The decision may serve as a frame of reference in countering future efforts to curb electoral rights. However, it yielded a dissent by Judge L'alík who advocated for the

forces as one of the attributes of the regular testing of democracy in the electoral process' (PL. ÚS 1/07, 17, reproduced in PL. ÚS 89/2011, 17).

[15] A proven case of one non-participating voter having been labelled as participating by the electoral commission, suspicious recounting of the votes and flaws in archiving the electoral documentation.

[16] Challenging the 2006 general elections, the petitioner failed to demonstrate that the equal access to public broadcasting was violated in a way that could have reasonably affected the electoral result to the detriment of the petitioner.

[17] A challenge to the procedure of the vote count in a municipal election which, however, requested higher standards of review of the count than stipulated by law.

[18] In this case, 119 individuals registered their permanent residence in a municipality (village of Kvakovce) two days before the municipal elections and with certain irregularities in their registration. The Court rejected the complaint mainly on the basis that most of the individuals demonstrated a genuine previous connection to the respective municipality, and decided to register their permanent residence to be able to express their disapproval of some developments with the municipality in the elections.

[19] The list of cases here is rather long: PL. 85/07, 3, PL. ÚS 19/2015, 6, PL. ÚS 52/2014, 16, PL. ÚS 22/2011, 15, PL. ÚS 23/2011, 9, PL. ÚS 44/2011, 10, PL. ÚS 71/2011, 3, PL. ÚS 83/2011, 5, PL. ÚS 67/2014, 15, PL. ÚS 51/2014, 37, PL. ÚS 4/2017, 13, PL. ÚS 5/2015, 5, PL. ÚS 17/2015, 7, PL. ÚS 22/2015, 11, PL. ÚS 18/2015, 11, PL. ÚS 23/2015, 8, PL. ÚS 4/2015, 5.

Court to affirm the limitation on passive right to vote through an educational census (at least high school-level education requirement for candidates for mayors in local elections). In this position, neglecting the historical reasons for unequal access to education, the judge presented the educational census as allegedly based on the rule of law akin to age-, citizenship- or residence-based census, and thus 'correcting' democracy associated with the absence of such a census.[20]

Dissents contested the scope of electoral review by the SCC, mirroring the contestation between a narrower and a broader reading of the rule of law linked to the operation of democracy in elections. In one case, the principle of '[...] representative democracy' was evoked to justify the importance of direct democratic elections as 'the means which legitimizes public power' (PL. ÚS 8/08, judge Brňák joined by judge Ľalík, 2). The dissenting judges applied this argument to criticize the SCC's decision to invalidate the electoral results of a snap election where the electoral commission suspiciously assessed the results of the original election. Judge Brňák tried to illuminate the case with a football metaphor (ibid., 6–7) whereby the results of a second match would be invalidated because of a successful complaint on a draw in the first one.

In the case law of the referenda, the Court notably reviewed the four questions petitioned to be submitted to popular vote by self-declared catholic organizations in the effort to prevent changes favorable towards same-sex marriages. The public polarization (BTI 2016, 28) occurred not only with respect to the substantive answers to the questions but also in terms of whether the questions can be asked in a referendum in the first place considering the constitutional clause banning questions aimed at shrinking existing human rights guarantees (Art. 93 sec. 3). The Court adopted a narrowly tailored approach, openly denouncing 'judicial activism' that could 'authoritatively prevent the realization of a referendum, the valid result of which would lead to an identity in the legal standpoints expressed in the manifestation of direct democracy and the legal status created by instruments of representative democracy' (PL. ÚS 24/2014, 31). By not subsuming three out of four questions under the irreversible human rights clause (ibid., 29, also Art. 12 sec. 1 of the Constitution), the Court sidelined an evolutionary conception of human rights. In pointing out the equal decision making power of the referendum to the parliamentary legislative process (ibid., p. 24), it opposed voices (e.g. Berdisová 2014) that called for the Court to exercise a "countermajoritarian" role in protection of fundamental rights and freedoms. The majority decision signalized the reluctance of the SCC to use its normative legitimacy by declaring at least the unchangeability of the status quo of protection of same-sex couples via popular vote.

More innovative participation- or deliberation-related rights are absent from the Court's jurisprudence. In only one rejection in preliminary proceedings, the Court denied the possibility for the process to '[be one in which] the sufficient information supply to the public and the consultative democracy ensuring, i.e. allowing the

[20] He added that this census would be a legitimate corrective mechanism also based on 'empirical validation in cases of Eastern Slovakian villages.' This is a prejudiced view referring to several mayors of Roma origin not possessing high-school level education.

participation of the public in the preparation process of a generally binding legal regulation were not guaranteed' (I. ÚS 73/2014, 27–28).

9 Appendix B: Overview of references to democracy in electoral complaints from the early fourth SCC (2019–2023)

The SCC unanimously rejected the complaint from two political parties, who missed the threshold to enter parliament by 0.02 % (Steuer 2020). Identifying the failure to be one of the parties' campaign strategy (PL. ÚS 11/2020, para. 96), the Court has highlighted its earlier understanding of 'imperfect representative democracy and the institution of elections', whereby it is impossible to establish a perfect electoral regulation (PL. ÚS 11/2020, para. 68). 'Pluralism and democracy are by nature founded on a compromise, which applies primarily in relation to the electoral system [...]' (ibid. para. 95). The claim of imperfect equality served the Court as an introduction to presenting electoral thresholds as a tool for effective governance. Had the Court granted the request of parties, it would amount to an '*ex post* change of the "rules of the game", which were known in advance to all parties' (ibid., para. 98).

A more contested issue came up when, due to Brexit, the additional, fourteenth Slovak MEP was only allowed to start exercising her mandate after the departure of British MEPs. Due to an incorrect choice of the formula for mandate allocations, a candidate of another party that obtained *fewer* votes in the elections was selected to occupy the thirteenth seat, leaving the candidate with more individual preferential votes temporarily without a seat after the 2019 EP elections. The latter candidate submitted a petition to the SCC, referring to democracy when highlighting that 'elections are not mathematics [and so] a mathematically precise proportionate allocation of mandates according to electoral results is in a representative democracy only a theoretical illusion' (PL. ÚS 15/2019, para. 4, pp. 6–7). This case failed to be decided for procedural reasons, due to the Court operating with severely reduced capacities given the non-appointment of several constitutional judges at the time. In deciding a new petition submitted once the plenum was back to full strength, the majority reiterated the significance of the elections. However, the issue was already moot by that time (the MEP already had her mandate). Judge Straka disagreed with this reading. In his view, it indicated a failure of an effective system of review that 'ensures an effective realization of the individual right to vote, upholds the general trust in the organization of the electoral process by the state, and represents an important tool for the state to fulfil its positive obligation according to Art. 3 of the additional protocol [to the ECHR] to implement democratic elections' (PL. ÚS 21/2019, dissent, para. 14). Invoking the Dworkinian 'one right answer' thesis (ibid., paras. 24, 36), Straka argued for a decision on substantive grounds. His view of 'law as primarily culture, in which proceedings and process are not an obstacle for justice and constitutional protection of rights and freedoms, but only a tool for their easier achievement' signals a more robust reading of the rule of law where democracy is more than elections.

Concerning an unprecedented 50-day moratorium for campaign preference polls, in the preliminary proceeding of December 2019 (PL. ÚS 26/2019), the Court unanimously argued (para. 45) that the restriction is likely to interfere with free and fair elections through affecting the right to information enshrined in Art. 26 of the Constitution. In such a circumstance, it is justified for the Court to 'enter into the sphere of competence of the legislator [...]'. In the May 2021 merit judgment, the Court struck down the provision (§ 17 of the Act No. 181/2014 Coll. on the electoral campaign) and reinstated the earlier two-week period. This result is based on a relatively extensive comparative analysis and the emphasis on the value of freedom of expression and information (Art. 26 of the Constitution) and voters' own mind. Referring to previous case law (PL. ÚS 118/07, PL. ÚS 14/2011, PL. ÚS 34/2018), the judges highlighted that each voter can make own internal conclusions based on the results of the election polls. 'A democratic and a rule-of-law state does not have the role to regulate the relationship of the voter to information during the electoral campaign. [...] "It is necessary not to underestimate the voter"' (PL. ÚS 26/2019, sec. 66).

Acknowledgements Drafts of this article benefitted from feedback at the ECPR General Conference 2020, research seminars at the Örebro University, Washington State University, WZB Berlin Social Science Center, the 2023 ZfVP hybrid special issue workshop (with particular thanks to the Discussant, Hans-Joachim Lauth), by Darina Malová and several other members of the Department of Political Science of the Comenius University in Bratislava, and the anonymous reviewers. Insights on the final draft shared during the 2024 Work-in-Progress Session of the International Political Science Association are appreciated as impetus for further research. The usual disclaimer applies.

Funding This research was supported by The Ministry of Education, Science, Research and Sport of the Slovak Republic under the grant No.VEGA-1/0658/23 and the Slovak Research and Development Agency under the grant No. APVV-21-0484. Open access funding provided by The Ministry of Education, Science, Research and Sport ofthe Slovak Republic in cooperation with Centre for Scientific and Technical Information of the Slovak Republic.

Conflict of interest M. Steuer declares that he has no competing interests.

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