Steuer *et al.*
European Journal of Futures Research (2025) 13:7
https://doi.org/10.1186/s40309-025-00251-x

European Journal
of Futures Research

RESEARCH ARTICLE

Open Access

Courting constitutional crises: crisis mitigation by constitutional courts as democratic institutions

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Abstract

Constitutional crises are typically considered as among the most profound crisis type, shaking political regime foundations and posing a challenge for democratic futures. This article critically engages with the concept of 'constitutional crises', highlighting how the difficulties with determining clear criteria for their occurrence may undermine democracy by non-democratic partisan elites creating a sense of existential threat that necessitates the transfer of more state power to them. Recognizing this ambiguity of 'constitutional crises', the article studies how constitutional courts (including supreme courts in non-centralized judicial review systems) responsible for 'guarding constitutions' possess constitutional crisis-mitigating potential and thereby may contribute to democratic governance. Via identification of gaps in existing scholarship, the factors affecting constitutional court performance in crisis mitigation—formal powers, independence, empirical legitimacy and role orientation—are identified, with constitutional court agency shaping the institution's choices trumping potential constraints stemming from competence restrictions. Constitutional courts can signal when the vague concept of 'constitutional crisis' is invoked merely as a pretext for power concentration and when constitutional crisis discourse does not justify departing from democratic procedures, thus helping depolarization and encouraging deliberation over political decisions. The potential and limits of constitutional courts as constitutional crises-mitigators is illustrated via examples from the Visegrad region where post-2010 de-democratization has been rampant and accelerated by the COVID-19 pandemic.

Keywords Constitutional courts, Constitutional crises, Crisis mitigation, Democracy, Judges' role orientation, Visegrad region (Visegrad Four)

Introduction

'Normalcy—Never Again.' (Martin Luther King Jr., as quoted in [1], p. 1).

The COVID- 19 pandemic (e.g. [2, 3], [4], pp. 82–103]) may be yesterday's news, but discussion of crises remains ubiquitous in contemporary politics and social life. Among them is the looming climate catastrophe, crises created by declining trust in expert judgment, and constitutional crises created by erosion of democratic norms or the rigging of elections. Moreover, crises often translate into invocations of states of emergency and grants of broad and unaccountable emergency authority to governments (see [5] and literature therein).

Many European countries entered into 'crisis mode' following the economic shocks of early 2000s, then again with the Russian annexation of Crimea, and later when mismanaging the refugees at the EU's borders. Exacerbating these crises was the deficient institutional

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architecture of the EU, expected to deliver outputs not matched with its competences (e.g. [6]).

Unlike the broader social discourse, however, the concept of a 'crisis' is not prominently examined in treatises on constitutional law. It is not listed as a stand-alone keyword in most constitutional law handbooks [7, 8]. In the *International Journal of Constitutional Law*, there are only fifteen contributions with 'crisis' in the title since its establishment in 2003 until 2023.[1] The term 'constitutional crises' occurs even less frequently, and, when it does, its definition or specification is limited (cf. [9, 10], [11], pp. 28–29]). Belov has presented the idea of a 'constitutional polycrisis' in 'modern Western societies' transitioning away from 'Westphalian constitutionalism' ([12], p. 21). Other scholars developed a nuanced, interdisciplinary conceptualization of 'global polycrisis', but with limited emphasis on the constitutional dimension [13]. For Bilchitz, this has good reasons, as 'the notion [of constitutional crisis] itself can be dangerous: without clear parameters, the concept is itself malleable yet emotive [and] can be used […] to justify extraordinary responses that would not usually be sanctioned by the populace [including] a failure to realize fundamental rights' ([14], p. 715).

Some regions have contributed to the discourse on 'constitutional crisis' more than others. In both the United States and Israel, discussions of constitutional crises in the face of illiberal government efforts to centralize authority and capture courts and has become pervasive in recent years (e.g. [15, 16]). The reaction to the U.S. Supreme Court's decision in *Trump v. United States*[2] which dramatically expanded presidential immunity [17, 18], and provoked President Biden to propose sweeping reforms to the Court [19], is only one U.S. example of this. At the outset of the second Trump presidency in 2025, experts referred to 'constitutional crisis' in light of the whirlwind of executive orders that claim virtually unfettered executive authority centered in the US President [20, 21]. The presidency did not push back against the concept; instead, it blamed the courts 'acting as judicial activists rather than honest arbiters of the law' for "triggering" a constitutional crisis [22]. In Israel, the Netanyahu government's effort to restructure the Supreme Court through legislation in the summer of 2023 led to months of street protests, and an eventual judicial rebuff ([23], pp. 20–23). When Israel was attacked by Hamas in October, the 'constitutional crisis' dropped from media headlines and mass protests subsided, however, the government's autocratic consolidation continued.

The so-called 'Visegrad region' (Czechia, Hungary, Poland, Slovakia) is also plagued with constitutional crises created by erosion of democracy. This is especially true of Hungary and Poland, receiving global attention. In Hungary, Viktor Orbán used a process that Kim Scheppele popularized as 'autocratic legalism' to take an EU member state once hailed for its transition to democracy to become the poster child of autocratization ([24], see also, in the COVID- 19 context, [25, 26]) and 'ruling by cheating' [27]. In Poland, a constitutional crisis during the backsliding of democracy under the PiS government erupted when the government's effort to change the Polish Constitution failed because it lacked a sufficient majority [28, 29]. While the 2023 elections in Poland signaled hope of democratic renewal, the Polish Constitutional Tribunal remains under control of former government loyalists [30, 31]. Following the 2023 election of Prime Minister Robert Fico, Slovakia, too, faces de-democratization [32, 33]. Since entering office, the Fico government dismantled several democracy-guarantor institutions, including the Special Prosecution Service, and threatened others, such as public radio and television, and the Slovak Constitutional Court.

These contemporary examples of democratic states undergoing 'constitutional crises' and the attendant discourses around them, offer the basis for two related theses advanced in this article. Firstly, *constitutional crises in democratic countries are closely linked to constitutional courts* (which include supreme courts in non-centralized systems of judicial review [34]). Secondly, *constitutional courts possess crisis-mitigating potential as democratic political institutions, which is primarily shaped by the self-recognition of such potential by them*. Thus, the article goes beyond existing scholarship, which has tended to portray courts victims of capture or weakening during periods of autocratization.

Overall, this article aims to place constitutional courts centre-stage in studying constitutional crises and underscore their crisis-mitigating potential as democratic institutions that can chose to intervene during a constitutional crisis [35]. The courts' institutional role conceptions and internalized views of democracy held by judges are pivotal for fulfilling that role. Sect. "Constitutional crises and constitutional courts" discusses the difficulties of 'conceptualizing constitutional crises' and the centrality of constitutional courts in making sense of them. Sect. "The conditions under which constitutional courts engage in constitutional crisis mitigation" unpacks the constitutional courts' potential to mitigate such crises via a combination of factors. Methodologically, these factors are developed as a basis for the study of concrete cases, but then combined with the empirical realities, thus advancing the

[1] Reviews of books that already include a reference to crises are not considered.

[2] 603 US_ (2024).

more traditional approach of developing Weberian ideal types 'to come up with new ideas' ([36], p. 189)[3] in a fully deductive manner, whilst still capitalizing on their capacity '[a]s instruments for illuminating options and also the limits to specialized knowledge for deciding ultimately between them' ([38], p. 368). Sect. "A typology of constitutional courts' crisis-mitigating capacity" applies the identified factors to examine how the role of the constitutional courts in the Visegrad countries, some of which faced constitutional crises after 2010 with significance for the development of the European Union and democracy more broadly, was shaped by their role conceptions rather than their formal power alone.

Constitutional crises and constitutional courts

As deliberative bodies that prioritize procedure over expedience, courts struggle with responding to crises ([39, 40] and literature therein). Yet, constitutional courts are called upon to play pivotal roles in crises that directly implicate a polity's constitutional structures and values.[4] The role of constitutional courts looms large for several reasons. Firstly, constitutional crises generally involve events threatening the foundations and structure of the state. They accompany disputes over the political regime and the inter-institutional distribution of political power, between the courts and other institutions. For example, historian Bestor, invokes 'constitutional crisis' in this context, when pointing to the vagueness of the constitutional framework and the interpretive disagreements it triggered in the Supreme Court's *Dred Scott* (1857) decision[5] as playing a 'configurative role' in shaping the American Civil War ([42], p. 329). While trying to balance the interests of the slave-holding South with those of an anti-slavery North, the Court rendered a deeply undemocratic decision – stripping enslaved human beings of their rights – but satisfied neither side in its constitutional interpretation.

Constitutional crisis discourse is also abundant in German history of the early twentieth century. Even before 1914, Hewitson argues that Germany faced a constitutional crisis because of the deadlock in the Parliament between supporters of the imperial order and reformists. Crisis was triggered by an irresolvable tension between parliamentarism and constitutional monarchy [43]. During the Weimar period, a constitutional crisis emerged when an emergency decree by the President, based on Article 48 of the Weimar Constitution, rendered parliamentary supervisory mechanisms dysfunctional ([44], pp. 1–3 (introduction by Vinx)), also ([45], pp. 108–132). A decision by the German *Staatsgerichtshof* failed in balancing the various interests ([44], pp. 5, [16–18]).[6]

The Weimar period and the events leading up to the US Civil War both indicate the role of judicial decisions in the underlying tensions between key political institutions during constitutional crisis. Both the *Dred Scott* decision and the failure of *Staatsgerichtshof* in Weimar Germany, exacerbated the crisis through decisions that resulted in the constitution being seen as 'missing' a solution to a pressing challenge ([46], p. 28).

Constitutional crisis is also used to capture contemporary developments. For example, Köker in 2010 wrote of a 'political-constitutional crisis' in Turkey as a 'critical situation in which a political-legal regime finds itself caught in between what it used to be originally and a relatively uncertain future', hence a constellation of events 'that cannot be reduced to a mere crisis situation in the legal system' ([47], p. 328). In other words, mere technical disputes do not suffice for a crisis to reach 'constitutional' status. Yet, it is unclear where the threshold between a 'mere crisis situation' and a constitutional crisis lies, and whether it even can be determined via an objectified definition. Other examples show even greater vagueness, such as when Israel was labelled as being in 'a constitutional crisis that was exacerbated by a yearlong electoral impasse', ([10], p. 455) or the labelling of the developments in Hungary surrounding the COVID- 19 pandemic as a 'constitutional crisis' (possibly of the illiberal constitution) [9]. Courts and particularly constitutional courts are pivotal in all these situations and may mitigate the crisis to reach 'constitutional' status when it would otherwise become such. For example, McHarg presents the Brexit referendum as a trigger of a political crisis in the UK because of (1) 'the radical uncertainty over the meaning of the "Leave" vote, (2) geographic variations in the referendum results and (3) changes in the leadership in major UK political parties (which she terms 'crisis of political authority') ([48], p. 954). At the same time, she argues that the political crisis alone has not translated into a constitutional crisis, mainly because of the capacity of the British courts to address some (but not all) gaps left in the UK's legal framework in interpreting the referendum results ([48], pp. 966–968). Other scholars have been attentive towards the uses of the concept of crisis in the discourse on constitutionalism in the Brexit context, highlighting how this 'light promiscuous use of the term "crisis"' prompts thinking about Brexit as a constitutional crisis without filling the concept with particular

[3] The use of ideal types as '[Weber's] most important tool for theorizing in social science' is not restricted to sociology ([37], p. 156).

[4] Tew has argued that constitutional crises may fuel the empowerment of constitutional courts [41].

[5] 60 U.S. 393 (1857).

[6] The *Staatsgerichtshof* was not a constitutional court; however, if all courts are important for addressing constitutional crises, constitutional courts certainly are among them.

analytical content ([49], p. 1529), or how the invocation of crisis may obfuscate the search for genuine 'democratically legitimate' political solutions as opposed to solutions provided by constitutional interpretation [50].

As with other types of crises, constitutional crises are difficult to define in the abstract. Definitions tend to be more intuitive and inductive—we know them when we see them. The concept of a constitutional crisis is however problematic ([49], p. 1529), [50]. One definition might denote situations which emerge when the constitution is unable to, or does not address, particular political conflicts [51], see also [52]. The crisis arises not because of malicious partisan intentions but because "gaps" exist in the constitution itself which paralyze decision making. Keith Whittington ([53], pp. 2109–2110) points out that such a unidimensional understanding of constitutional crises (crises in 'constitutional operation') may be too restrictive, as it cannot account for situations in which 'political actors threaten to become no longer willing to abide by existing constitutional arrangements or intentionally violate constitutional proscriptions and norms'. This latter, *actor-driven* constitutional crisis, Whittington argues, implies an erosion of 'constitutional fidelity'.

Other scholars have created a three-part classification of constitutional crisis, distinguishing between 'declaring a state of exception', 'excessive fidelity to a failing constitution,' and 'struggles for power beyond the boundaries of ordinary politics [54]. The latter two categories resemble Whittington's crises of operation and fidelity. Jack Balkin has also distinguished constitutional crises from a slower, more gradual deterioration of constitutional standards, which he calls 'constitutional rot' [55, 56]. In all these, constitutional courts are central players—through both action and inaction—in the management and resolution of crises.

The second linkage between constitutional crises and constitutional courts is their common joint occurrence in the literature—as visible in the Visegrad contributions to the global discourse.[7] Ambitions for democratization have been in no short supply in this region, with the logic of the post-1989 Visegrad cooperation explicitly embracing it. Furthermore, despite the de-democratization trends, all countries continue to rank highly in global comparisons of indicators, such as displaying a low degree of state fragility according to the *Fragile States Index* (which, however, does not warrant complacency in policy-making [60]). The positioning of the 'Visegrad' region in the EU as a supranational order explicitly claiming to embrace democracy makes it particularly warranted for studies based on an inductive, model-building approach as ours. This, of course, is not a call for Eurocentrism in our analytical lens; constitutional crises are not a novelty in the 'Global South' either, with abounding examples. In El Salvador, constitutional court judges were illegally removed, apparently for the purpose of replacing them with officials loyal to the authoritarian populist head of state seeking re-election despite constitutional barriers thereto ([61], pp. 440–441). Ecuador is another representative case with frequent instances of premature replacement of judges, although the regularity of the phenomenon there makes the use of the label of 'constitutional crisis' less straightforward ([62], pp. 155–156).

Surveying existing scholarship on constitutional crises in this region, Bunikowski described the Polish parliament's decision not to recognize the candidates for the Constitutional Tribunal (CT) appointed by its predecessor as a constitutional crisis, despite the fact that the CT itself clearly labelled these decisions as unconstitutional [63], for a similar argument, see [64]. In Slovakia, Malová ([65], pp. 365–368) locates a constitutional crisis already in the marred 1997 referendum on the introduction of direct presidential elections as creating a constitutional crisis. Tensions between the coalition and opposition threatened to leave the office of the head of state permanently vacant and to transfer key competences to the Prime Minister Vladimír Mečiar. The Constitutional Court delivered an unsatisfactory verdict for both parties that was used by Mečiar to mar the referendum, causing the constitutional crisis.

Finally, constitutional courts are often at the apex of constitutional crisis discourse when that discourse is connected to democratic governance. The danger of constitutional crises is not in particular deficient/suboptimal details of an institution, but because the crisis threatens democracy itself. Thus, in constitutional democracies a constitutional crisis comes along with a crisis of democracy, and constitutional courts and the rule of law have a history of being seen not only as guardians of the constitution but also as guardians of democracy itself (cf. [66, 67]).

The conditions under which constitutional courts engage in constitutional crisis mitigation

Having established the centrality of constitutional courts in the *studies* of constitutional crises, what *role* can they play during a crisis? Whether constitutional courts are considered legitimate actors which can mitigate a constitutional crisis depends initially on definitions of democracy [68]. If by democracy we understand 'constitutional democracy', then the functions of a constitutional court are threefold: to oversee the operation of democratic procedures; to arbitrate conflicts between democratically

[7] For example, as early as 2012 Perju described disputes between constitutional actors in Romania as a 'constitutional crisis' [57], see also [58, 59].

accountable institutions; and to protect individual rights. Constitutionalism thus requires a broad scope of constitutional court action. If political rights and civil liberties, checks and balances, democratic procedures and the 'rule of law' are seen as constitutive and core elements of democracy, the main task of constitutional courts is to protect these elements.

Thus, constitutional courts bear responsibility for the democratic state. A functioning constitutional court authoritatively resolves potential conflicts, ensuring that the basic rights and institutional rules and structures of democracy are respected. This expresses a central logic of democratic institutions: partisan elites alone cannot be entrusted with this role (e.g. [69]). In ensuring 'that the other institutions behave as they should under the constitution,' ([70], p. 87) constitutional courts are not usurping the role of democratic partisans, but merely imposing guardrails to prevent partisan actors from violating the constitution's democratic values [70].

All this implies that, paradoxically, during constitutional crises the deference that constitutional courts ordinarily accord democratically elected partisans is *reduced*. Indeed, mechanically deferring to temporarily empowered elected officials conflicts with the constitutional courts' primary role as guardian of democracy if unconstitutional acts are unchallenged. Moreover, the quality of democracy can be impacted both by court *action and inaction*. Democracy can be damaged as much by the failure of courts to intervene, as when they intervene to sanction or approve partisan assaults on democratic institutions.

This account of constitutional courts goes beyond the conventional argument that constitutional review is a countermajoritarian power and hence naturally antidemocratic [71], for a newer account that discusses judicial roles see [72].[8] Most scholarly treatments of judicial review do not seem to dispute its coutermajoritarian nature but instead ask whether judges or electoral institutions are better able to guard constitutional rights [73, 74], see also [75]. Moreover, they discuss the role of judicial review under ideal conditions or in consolidated democratic regimes, at odds with realities in many countries ([76], pp. 109–117). Some more sophisticated defenses of judicial review focus on rights enforcement as a way to enhance majority rule 'because such rights define the category of preferences relevant to democratic decision-making' ([77], pp. 170–171), cf. [78]. Others have used case studies in a transitional settings to argue, similarly to Barroso's representative function of constitutional review, that courts may be better suited to carry out what the majority expects [79]. While neither of these latter two positions necessarily contradicts the broad view that judicial review is democratic, they do not articulate this position explicitly. This leaves a blind spot for the analysis of the constitutional courts' role as constitutional crisis-mitigating institutions.

The critical synthesis of literature allows to argue that whether constitutional courts are able to effectively mitigate constitutional crises created by anti-democratic measures depends on both their institutional strength and independence, and role orientations toward intervening in crises.

a) Judicial independence and power. Only if they have sufficient powers, and if they are sufficiently independent from partisan influences [80], can they be expected to counter anti-democratic societal tendencies.

The institutional strength of a constitutional court is based on both its formal and informal powers and its openness or accessibility ([81], p. 34ff.). Formal powers can include decision-making competences in all types of proceedings. The accessibility of a court refers to the number and types of actors vested with the right of action in conjunction with factual barriers to taking action. Citizen rights of action greatly expand the circle of interests and the range of matters that can be addressed by the court.

Regardless of a court's formal competences and accessibility, its dispute-resolution impact is contingent on its informal authority and ability to persuade other political elites to act. This requires the court to possess some level of perceived legitimacy. Only if a court has sufficient perceived legitimacy will it be able to implement its decisions, the enforcement of which usually requires action by others—often against resistance. It is the perceived legitimacy—or as David Easton [82] puts it: diffuse and specific support—that turns the potential power of a court into actual power.

To successfully act during periods of constitutional crisis, institutional independence matters as well. The level of judicial independence is usually related to the procedures for selecting judges, their terms of office, and the protections afforded from removal or disciplinary action. Generally, the more inclusive and consensus-oriented the selection procedures are, the more independent, *ceteris paribus*, judges will be. Consensus oriented institutions—such as requiring a supermajority or consent of multiple independent bodies—prevent partisans from being able to unilaterally place 'their people' on the court. Consensus forcing processes thus increases the probability that a court will not be staffed

[8] For Barroso, constitutional courts can *sometimes* provide better representation of the public opinion than the legislatures. 'Enlightened' decisions are democratically compatible but not necessarily a product of a *democratic institution.* Such reasoning suggests that the courts make these decisions without democratic authorization. Yet, many constitutions explicitly authorize the constitutional courts to guard democratic principles.

by partisan judges. In addition, it increases the likelihood that professional criteria, rather than partisan loyalties, will be elevated in the selection process, so that individuals with relevant expertise will be selected.

Judicial independence is also related to tenure in office. Longer fixed terms of office, or even life tenure, where re-election is excluded, considerably increases the independence of courts. Finally, insulation against overt partisan pressures, such as a guaranteed budget and protection against partisan sanctioning or disciplinary action, enhances judicial independence.

b) Judicial role conception. Beyond these formal institutional prerequisites, however, the role of courts in mitigate constitutional crises is shaped largely by the role orientations of judges themselves. The specific perception of the role of a court in a democracy matters because it determines when and how courts utilize their powers and intervene in conflicts. Judicial role orientations are premised both on the judges' understanding of professional norms and conceptual understanding of democracy. A court that views the law in 'positivist' legal terms, seeing itself as a neutral 'Kelsenian' guardian of the constitution [83] will behave very differently than a court which sees itself as a 'norm-guided' guardian of democracy or a forum for principle in the Dworkinian tradition [84, 85]. While a 'positivist' court might shy away from cases that are not historically or expressly regulated by the constitution; the 'principle-led' court might instead see constitutional ambiguity as an invitation to advance more democratic interpretations of constitutional values (e.g. [86]).

Aside from views about professional norms, judges also hold their own views about the nature of democracy which shape how they behave. A judge wedded to a strictly 'proceduralist' conception of democracy, for example, might be less willing to hold against majoritarian actors or intervene in a dispute unless some procedural requirement was transgressed. Conversely, judges that embrace more substantive conceptions of democracy under their constitution might be more willing to rule against powerful elites claiming majority support (on majorities, cf., more generally, [87]) and intervene in cases beyond declaring procedural violations. This contextualizes the second thesis outlined at the outset of the article, that judges in constitutional democracies intervene in conflicts when they *believe the requirements of the law permit it and the protection of democracy requires it* (see also [88]).

A typology of constitutional courts' crisis-mitigating capacity

In the previous section we argued that constitutional courts' formal powers, independence and perceived legitimacy matter for their role during constitutional crises *as shaped* by their endogenous conceptions of democracy and the judicial role—their readiness to fulfil a particular constitutional mission. This latter point goes beyond existing literature which has tended to emphasize how courts are weakened during periods of constitutional stress or crisis, either deliberately by partisan actors seeking to centralize their power or by natural events or emergencies (such as COVID- 19) requiring immediate actions. The recognition that it is not just formal structures, but also the subjective internal conceptions of judges that shapes a constitutional court's role during constitutional crises, leads us to suggest a typology for thinking about constitutional courts' role during such periods.

As discussed above, the formal powers and competencies of constitutional courts are an important prerequisite to them playing a role in conflicts. Yet, in many countries, including in the Visegrad Four, these remain relatively robust and constant throughout longer periods of time. Thus, our explorative typology is based loosely around two other sets of variables. The first one focuses on the political context, understood as the efforts of partisan elites to centralize power and undermine democratic institutions and values (for instance, via accelerated legislative proceedings or issuing emergency decrees). The second set of variables address the constitutional courts' own volition, their role conceptions during crises, and willingness to intervene and challenge efforts that threaten constitutional values. The variables are not binary, are subject to interpretation and must be judged *ex post* via the assessments of scholars and the broader epistemic communities. However, moments of crises or heightened conflict over the democratic values are often easy to identify.[9]

Political context—propensity to conflict by partisan elites

The Visegrad Four constitutional courts all possess considerable formal powers, including constitutional interpretation, competences to adjudicate individual complaints on rights violations or reviewing the compatibility of legislation with international and EU law. Furthermore, all four constitutional courts started at similar levels of independence in the 1990s. However, after 2014, the four Visegrad constitutional courts differ regarding their perceived independence and the threats posed by external political actors at moments of crises. Figure 1 below reports the Varieties of Democracy scores, which are based on country expert evaluations of judicial independence, for all four constitutional courts in between 1990–2023.[10] It shows rapid declines after the adoption

[9] For example, the Israeli government's assaults on the Supreme Court without the latter displaying obvious systemic flaws clearly produces a moment of conflict ([89], pp. 35–36).

[10] See V-Dem Codebook, 168, https://www.v-dem.net/static/website/img/refs/codebookv12.pdf.

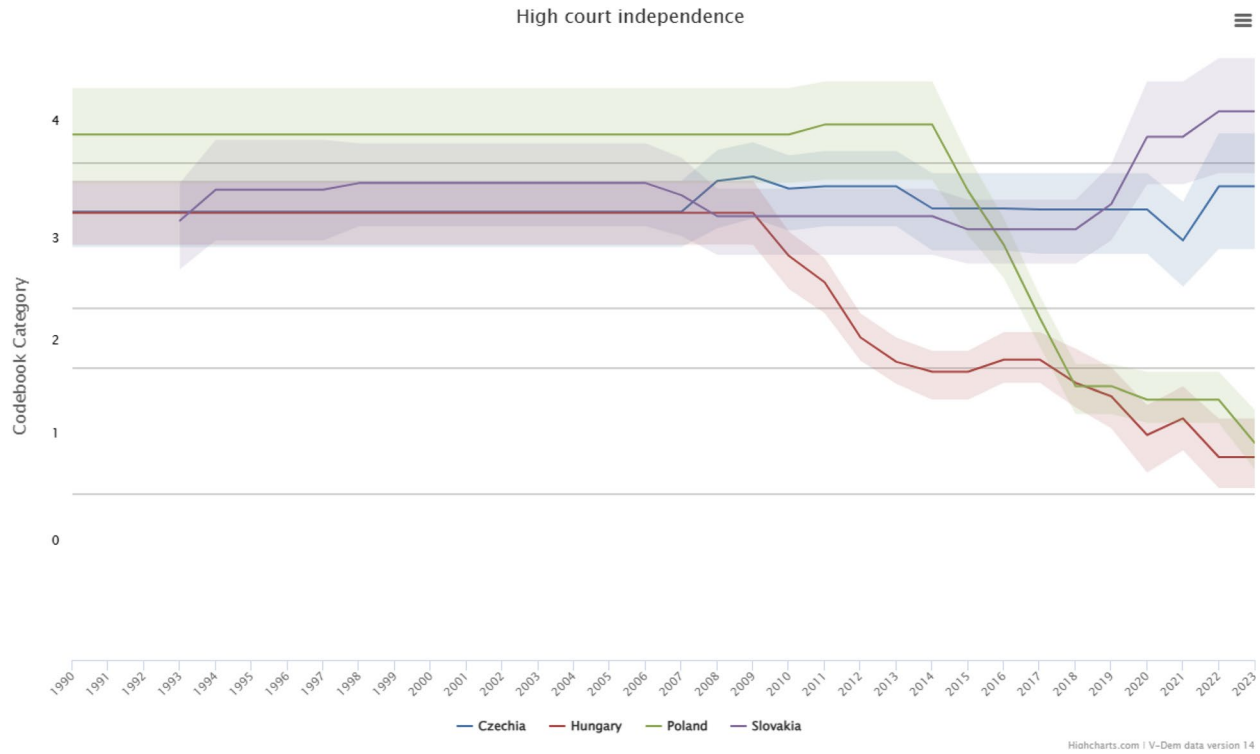

Fig. 1 High court independence in the Visegrad countries (1990s–2023), according to Varieties of Democracy. Source: V-Dem online graphing

of the Hungarian Fundamental Law in 2010 and after the subordination of the Polish Constitutional Tribunal in 2015.[11] By contrast, the independence of the Czech Constitutional Court remained relatively constant during this period. The Slovak Constitutional Court's (level of independence declined slightly during the final years of its 'third generation', a term often used for the periodization of Central European constitutional courts' history, in Slovakia tied to the Slovak Constitutional Court presidents). This change is nevertheless small compared to Hungary and Poland and not due to 'political capture' (cf. [92], p. 1231) as no serious challenges have been raised regarding the legitimacy of the Court. Furthermore, the perceived independence of the Slovak Constitutional Court started to increase with the ascent of its 'fourth generation' (led by President Fiačan) and scored even above its Czech counterpart in the final years of the observed data.

The Czech and the Slovak constitutional courts are generally thought to have faced fewer conflicts in the post- 2010 period. The Slovak Constitutional Court was challenged by the semi-authoritarian Mečiar government in the 1990s but is considered to have prevailed and facilitated short-term democratic recovery. Following the end of this period in 1998, the Court's powers were enhanced, such as via the extension of the judicial tenures from seven-year renewable to twelve-year non-renewable terms, or the granting to the plenum, instead of the smaller senates, the influential competence of abstract constitutional interpretation.

The role orientation of constitutional courts during crises

The four Visegrad constitutional courts have responded differently to 'constitutional crises' as efforts to concentrate power and undermine constitutional principles. The Czech Constitutional Court stepped up to protect the constitutional checks and balances and to push back against efforts to consolidate power ([92, 93], pp. 56–57), ([94], pp. 144–150), including during periods when the populist government of Andrej Babiš in tandem with the President Miloš Zeman were attempting to undermine democratic institutions [95, 96]. For example, it scrutinized the executive's Pandemic Act, subjecting it to fundamental rights review ([97], pp. 112–113). The Court, while it has distinct generations of judges similarly to Slovakia, is more typically presented as a 'monolith'

[11] The Hungarian Court lost some of its competences and all its judges have gradually come to be appointed by the FIDESZ parliamentary majority. The Court retains considerable powers, but the need to earn FIDESZ' endorsement to become its judge in combination with several of its key decisions prompts claims about its insignificance [90]. In Poland, the executive disregarded the constitutionally endorsed selection of three judges to the Tribunal. This has led to its transformation into an 'inverted court' helping to advance authoritarian populism [91].

which has developed a relatively robust set of case law that protects Czech electoral institutions against partisan manipulation ([98], pp. 174–176). Its first generation of judges is particularly regarded as 'guardians of the Velvet Revolution', a reference that highlights the Court's rejection of previous authoritarian state socialist interpretive practices ([99], pp. 134–177), ([100], pp. 128–137).

Despite adjudicating a wide range of issues, the Slovak Constitutional Court did not early on establish itself as having internalized a role as the protector of democratic institutions against efforts to concentrate power. During the latter part of the 'third generation' of its judges' mandates (2017–2019), the Court at least symbolically began to embrace a more robust reading of constitutional values. The Court declared a rather extensive list of those values in the so-called 'amnesties decision' (PL. ÚS 7/2017) and confirmed them in a controversial constitutional amendments decision in 2019, which strengthened checks and balances by limiting unbound possibilities for changing the Constitution once a required majority is reached (PL. ÚS 21/2014). However, that decision has been plagued by more unrestrained majoritarian reading of it and its references to the 'power of the People'. Moreover, the decision came at the end of a judicial term marked by several questionable decisions on appointment powers which favoured illiberal positions defended particularly by PM Robert Fico.

The 'fourth generation' of Slovak Constitutional Court judges began as more open to public scrutiny than its predecessor [101]. Early in their mandate, the judges received petitions pertaining to the COVID-19 pandemic, in particular the constitutionality of the declaration of a state of emergency by the executive. In Slovakia, unlike in Hungary [102], the declaration of the state of emergency was not intended to conceal a power grab, hence the Court was under pressure to act quickly (due to a formal deadline to decide) but not forced to confront a serious challenge to the constitution's democratic values. In that context, the Court's decision was deferential to executive authority, virtually setting no limits on what measures could be implemented. In setting that precedent, the Court has limited its future ability to constrain actions of the illiberal government of Robert Fico that came to power in 2023.

The Hungarian and Polish constitutional courts, on the other hand, have faced tremendous conflicts over the past decade. The constitutional courts in these countries responded differently in key cases concerning constitutional amendments (in Hungary) and the efforts to undermine checks and balances and the rights-protecting role of the Court (in both countries).[12] Yet, these two constitutional courts also differ in their role orientation that came to the fore during constitutional crises.

In Poland, the seeds of backsliding were laid before the authoritarian government of the Law and Justice party (PiS) came to power in 2015. In 2016, the government passed the Act on the Constitutional Tribunal (CT), which would have permitted the government to elect five new judges, including two whose terms expired only after the beginning of the new parliament (i.e. change of political time in Tushnet's terminology [104]). The CT[13] declared the provisions allowing the new election of two judges to be unconstitutional, although it did acknowledge the election for the three judges by the previous majority ([29], pp. 65–68).

The CT thus adopted a middle path based on the premise that the appointment powers of the parliament are dependent on political time, so the majority selecting the judges must have a democratic mandate when their seats become vacant. Rather than advancing partisan interests either way, the Tribunal's decision subjected both competing parties to constitutional checks and balances. Unlike the Slovak Constitutional Court, it intervened and used its power to and effort to mitigate the crisis and protect democratic structures under the constitution. The government, however, responded by unconstitutionally declining to publish the core judgments in the Official Gazette ([105], pp. 602–603). Critics of the government announced the end of an independent CT, but noted that it 'goes down with dignity' [106] bidding 'farewell' to it as an independent institution which is not a partisan ally ([107], also [108], pp. 225–226, 228) for the Polish status quo approximating a crisis in constitutional terms following the terminology of A. Barak).

The Polish CT was thoroughly reshaped by appointments and turned into an ally of the PiS. Yet, the CT's exercise of independence questions the subsequent decisions of the CT due to the unconstitutional composition of the court and makes its partisan control more vulnerable from a legitimacy perspective ([109], p. 1866). Despite this advantage, post-2023 Poland continues to face challenges with a renewed democratic future, as it is difficult to undo autocratic legalism without engaging in similar techniques, be it for democratic ends [110].

The Hungarian experience differs from the Polish one in form but not substance. After the elections of 2010, the Hungarian party FIDESZ together with its partner,

[12] Garlicki ([103], p. 142) labels the constitutional developments after 2015 in Poland 'a systemic crisis'.

[13] Judgments K 34/15 and K 35/15, later confirmed by K 39/16. Judgment on the Constitutional Tribunal Act <http://trybunal.gov.pl/en/hearings/judgments/art/8748-ustawa-o-trybunale-konstytucyjnym/>, Judgment on the The Act of 19 November 2015 amending the Constitutional Tribunal Act <http://trybunal.gov.pl/en/hearings/judgments/art/8792-nowelizacja-ustawy-o-trybunale-konstytucyjnym/>, Judgment on the Constitutional Tribunal Act of 22 July 2016 <http://citizensobservatory.pl/wp-content/uploads/2016/07/Judgment_ref._no._K_39_16_en.pdf>.

Table 1 The placement of the Visegrad constitutional courts in the typology of crisis-mitigating capacity (time period in brackets). Source: authors

***Political context*/constitutional court willingness to protect democratic institutions**	**Higher willingness to protect**	**Lower willingness to protect**
Higher conflict situation	Poland (as of 2015)	Hungary (as of 2011–2012)
Lower conflict situation	Czechia (as of 2023)	Slovakia (as of 2023)

the Christian Democrats, attained a constitutional majority, it adopted a new Constitution. But even this new Fundamental Law, adopted in 2011, was followed by a series of amendments under the FIDESZ-led government. The most serious of these from the perspective of the Hungarian Constitutional Court's operation was the Fourth Amendment (2013) [111]. The devil was in the details—the Amendment changed the appointment process for constitutional court judges so that the previously required parity in the parliamentary committee between coalition and opposition parties was no longer required. That feature had made the Hungarian model stand out in its capacity to grant equal voice to the coalition and the opposition and require a supermajority to elected judges.

The Court, even with a majority of its non-FIDESZ judges, upheld the constitutionality of the change. In a core case concerning constitutional amendment review, the majority sided with the government in not conducting substantive review (61/2011 [VIII. 13.] AB, see ([112], pp. 194–197]), and in a later review of another amendment it retained a constrained attitude as well (45/2012 [XII. 29.] AB (see [113], p. 206). The situation clearly resembled a constitutional crisis, as the basic law of the land was altered in a conflicting manner, without the change even having been advocated for by the political parties during their election campaign. While the constitutional amendment attacked checks and balances less directly than Polish legislation, its consequences provided unlimited control of the appointment process by whichever holder of a two-thirds majority in the Hungarian parliament. Alongside this, the government attained almost total control of the media, instituted anti-democratic measures against NGOs, and reigned in most academic institutions [114]. Independent courts were one more set of democratic institutions to supplant.

In summary, the efforts to assert control over the Polish and Hungarian constitutional courts by anti-democratic governments both resemble a constitutional crisis. However, the two courts dealt with the situation in different ways. Unlike its Hungarian counterpart, the Polish CT 'managed to demonstrate [the will] to resist attempts of political absorption' ([103], p. 153).

In both countries, the actions of their constitutional courts seemed to matter little in the erosion of democracy ([115], p. 198). However, from a broader perspective, the Polish CT's defense and articulation of democratic values may have longer-term significance. Its judgments providing normative backing for measures by a future government aimed at restoring democratic institutions and can serve as resources for the Polish CT in future constitutional crises. Table 1 below summarizes the key differences between the four constitutional courts.

Conclusion

By highlighting the difficulties associated with the use of 'constitutional crises' as a concept, this article does not call to abandon references to them altogether. In fact, engagement with the concept is helpful not only for heightened scholarly scrutiny concerning its use, but also for reflection on the role of temporality [104] and institutional agency (e.g., for international law, see [116] (especially chapter by Chimni)). It also helps recognize that (constitutional) crises and the discourse or 'narratives' [1] surrounding them are not always inimical to democracy, especially when democratization efforts unsettle entrenched autocratic constitutions. In such circumstances, labelling the status quo as a 'constitutional crisis' may serve as a 'wake-up call' for societies [117].[14] If, in the spirit of Martin Luther King Jr.'s statement quoted above, normalcy amounts to suffocating domination at the expense of progress, a constitutional crisis may even be a good thing (cf. [118]). However, in a constitutional democracy which is by default committed to oppose such domination, constitutional crises risk its endurance.

At the same time, as our typology of constitutional crisis-mitigating potential by constitutional courts in the 'Visegrad countries' demonstrates, productive engagement with constitutional crises requires attention to the role of constitutional courts which are often the ultimate constitutional interpreters [119].[15] In the 'Visegrad countries', centralized constitutional courts possess considerable formal powers that facilitates this role. While we cannot draw conclusions with universal applicability,

[14] This may be the context of the present United States and the difficulties with its highly rigid constitution [117].

[15] For example, with reference to the people as the ultimate constitutional interpreters, see [119].

particularly in countries with a historical tradition of weak judicial review [120], the significant formal powers of the 'Visegrad' constitutional courts mirror those of constitutional courts in many jurisdictions of the 'Global South', which needs more scrutiny in future research given the rise of populations in these countries and their corresponding significance in shaping democratic futures. However, the impact of the judicial role conceptions remains insufficiently studied in relation to formally powerful constitutional courts across various regions. By focusing on the 'Visegrad countries', we showed how, during moments of a political conflict, constitutional courts willing to stand up for democracy—and, ultimately, democratic futures—can make a difference, as compared to those unwilling to engage in such protection.

While this article focused on the level of the state, to the extent constitutionalization of political orders beyond the state may be observed to address obstacles to democratic futures, including in the United Nations and the European Union [121, 122], further research could explore the crisis-mitigating potential of supranational constitutional courts [123]. In short, we should recognize the agency—and corresponding responsibility—of constitutional courts amidst constitutional crises [124][16] rather than discounting them as powerless when facing a 'political' phenomenon that they are 'unsuited to deal with'. We should take seriously the potential constitutional courts have in sustaining and fostering democracy during such periods.

Acknowledgements
Earlier versions of this manuscript benefitted from feedback during the Midwest Political Science Association Annual Conference (2019), the Comenius University, Department of Political Science Research Seminar (2020), the Center for Transnational Legal Studies Annual Conference (2024) and the anonymous reviewers. All online sources were accessible as of 1 February 2025 and the article does not consider developments after February 2025. The usual disclaimer applies.

Authors' contributions
Max Steuer: Study conception and design; analysis and interpretation of the data, manuscript drafting, revision and updating, and final approval. Sascha Kneip: Study conception and design; analysis and interpretation of the data, manuscript drafting, and final approval. Cornell W. Clayton: analysis and interpretation of the data, manuscript drafting, revision and updating, and final approval.

Funding
Max Steuer's work on the manuscript was funded by the EU NextGenerationEU through the Recovery and Resilience Plan for Slovakia, No. 09I03 - 03-V04 - 00240 (HARVEST).

Data availability
All data sources used for the preparation of the manuscript have been listed in the reference list.

[16] For an initial take on courts as agents amidst a central constitutional crisis of the twenty-first century, see [124].

Declarations

Ethics approval and consent to participate
This article does not contain any studies with human participants.

Consent for publication
Not applicable.

Competing interests
The authors declare no competing interests.

Received: 13 September 2024 Accepted: 4 April 2025
Published online: 14 May 2025

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