

**PROPOSAL FOR „INKUBÁTOR” GRANT
HAS CSS
RESEARCH GROUP
on**

Judicial Constraints on Legislatures in Central Europe

PARTICIPANTS

Kálmán Pócza (PI)	Senior Research Fellow (HAS CSS Institute for Political Science)
Attila Gyula	Junior Research Fellow (HAS CSS Institute for Political Science)
Gábor Dobos	Junior Research Fellow (HAS CSS Institute for Political Science)
Artur Wolek	Vice Dean (Institute of Political Studies, Jesuit University Krakow, Poland)
Erik Lastic	Head of Department, (Department of Political Science, Faculty of Arts, Comenius University Bratislava, Slovakia)
Jan Petrov	PhD candidate (Faculty of Law, Charles University Prague, Czech Republic)
Csongor Kuthi	Research Fellow (Faculty of Arts, University of Targu Mures, Romania)
Teuta Vodo	Research Fellow (Center for the Study of Politics, Université de Libre de Bruxelles)

GENERAL AIMS

The project envisages the establishment of a small international research group which focuses on the inter-branch relations between constitutional courts and legislatures in Central Europe from a comparative perspective. The research group has its antecedents at the HAS CSS Institute for Political Science where the Hungarian participant of this project are working on a project “Separation of Powers and Constitutional Adjudication in Hungary since 1990”.

Our international research group consists of eight researchers from the region. The interdisciplinary character of the group is an important characteristic, some of them are legal scholars others are political scientist. Each researchers are experts on constitutional courts of their respective countries (Poland, Hungary, Slovakia, Czech Republic, Romania and Albania). The group could serve as a nucleus for a larger research project after having achieved this pilot project on constitutional adjudication in Central Europe.

Although the literature of *legal-formal* studies analysed the position of Central and Eastern European constitutional courts in the system of separation of powers to a great extent, only few *empirical* researches were concerned with the *operation* or functioning of the institution. In this regard our systematic empirical research project has scant precedents in Central Europe.

Due to these deficiencies the *methodological part* of the project has *two aims*. First we are going to apply a scale for the strength of the decisions of the constitutional courts on decisions of CEE constitutional courts. This scale will show *to what extent* constitutional courts constrained the legislatures in terms of their room for manoeuvre. Results of this test might imply modification of the methodological tool of our comparative research. Secondly we try to find a partly modified research approach for the analysis of the *internal and external factors* that could determine of influence the decision making processes of constitutional courts in CEE.

As for the *substantive part* of the research project we are focusing on the *functioning* of the constitutional courts in CEE by applying the aforementioned new (and eventually modified) methodological tool to the practice of the constitutional adjudication in the region. By applying the typology on the strength of judicial decisions, we are going to examine how constitutional courts in the region used their formal power or, more precisely, to what extent have they constrained the freedom and the room for manoeuvre of the legislatures. The *descriptive part* of the research project is going to analyse *when* and *how* constitutional courts applied their multifaceted veto powers. The second substantive question refers to the *why*. By applying the modified version of the general theory of judicial behaviour (Dyevre 2010) we try to map the reasons behind the judicial decisions.

This *explanative/analytical part* of the project might be completed by means of another international grant (IVF, H2020, ECR, Lendület). Since *empirical* research on constitutional courts in Central and Eastern Europe is almost nonexistent this small group would be surely pathbreaker on this field and will be surely a successful nucleus for a larger research group funded by European funds.

SCHEDULE OF ACTIVITIES

We are going to organize 4 workshops for the participant of the project. Beyond these meetings we are going to submit a panel proposal for the ECPR General Conference 2016 and a workshop proposal for ECPR Joint Workshop Session 2017. At the end of the project we aim to submit 8-10 (proofread) manuscripts for publication either to a peer reviewed international journal or to an international renowned publishing house.

2015 August	ECPR General Conference Montreal
2015 October	1 st Research Group <i>workshop</i> , Budapest (methodological issues)
2016 Feb	ECPR Joint Session of Workshop 2017 - proposal submitted
2016 Feb	ECPR General Conference 2016 - panel proposal submitted
2016 April	2 nd Research Group <i>workshop</i> , Budapest (first working papers)
2016 September	ECPR General Conference Prague, Panel on Constitutional Courts in Central Europe
2016 October	3 rd Research Group <i>workshop</i> in Budapest (working papers)
2017 March	4 th Research Group <i>workshop</i> in Budapest (preparing papers for publication)
2017 April	ECPR Joint Session of Workshop
2017 August	ECPR General Conference
2017 September	deadline for <i>manuscript</i> submission (Spinger VS Comparative Politics Series or Politics in Central Europe Special Issue etc.)

BUDGET

Travel, accommodation and organization costs	
Research Group workshops	4x 500.000 HUF
ECPR Conference participation (PI)	2x 200.000 HUF
Work contract or royalties for foreign participants	5x 400.000 HUF
<u>Work contract for 1 proofreader</u>	<u>1x 500.000 HUF</u>
Total budget for 2 years	4.900.000 HUF

Judicial Constraints on Legislatures in Central Europe

PROJECT PROPOSAL

Introduction

The global spread of judicial review has been undoubtedly one of the most notable political development not only in the Western countries but all around the world in the last 30 years (Stone Sweet 2000; Hirschl 2004; Ginsburg 2008). After the transition process in 1989/1990, constitutional courts have been established also in Central and Eastern Europe, they performed, however, in widely different ways.

Although the literature of *legal-formal* studies analysed the position of Central and Eastern European Constitutional Courts in the system of separation of powers to a great extent, only a few *empirical* researches were concerned with the *operation* or functioning of the institution. Projects which considered the practice of constitutional adjudication had mainly philosophical characteristics as they rather used a normative approach and did not focus on the contextual analysis of the judicial practice.

In this regard our systematic empirical research project has scant precedents in Central Europe. Although in the last 20 years an increasing number of scientific articles and books with multi-faceted approaches has been published on the operation/functioning of constitutional courts in *Western Europe*, this research project connects only partly to these approaches, since the international literature has missed to elaborate an interpretative framework which could be applied appropriately to Central European constitutional courts.

1. Goal of the project

Due to these deficiencies the *methodological part* of the project has *two aims*. First we are going to elaborate and test in a pilot project an appropriate calibration or scale for the *strength of the decisions* of the constitutional courts in CEE. Secondly we try to find a partly modified research approach for the analysis of the *internal and external factors* that could play a part in the decision making processes of constitutional courts in CEE.

These methodological elements of the project are relevant also since (a) they provide a tool for evaluation of judicial decisions so far totally absent in the international literature. Although some attempts has been made in this regard, a detailed and solid typology is still missing. Also, (b) the accuracy of the research methods applied to the evaluation of West European constitutional adjudication is rather ambiguous thus, modification of the general theory of judicial behaviour (Dyevre 2010) seems to be unavoidable.

As for the *substantive part* of the research project we are focusing on the *functioning* of the constitutional courts in CEE by applying the aforementioned new methodological approaches to the practice of the constitutional adjudication in the region. In this regard the research project has two research questions:

- (1) By applying the typology on the strength of judicial decisions, we are going to examine how constitutional courts in the region used their formal power or, more precisely, to what extent have they constrained the freedom and the room for

manoeuvre of the legislatures. The *descriptive part* of the research project is going to analyse *when* and *how* constitutional courts applied their multifaceted veto powers.

- (2) The second question refers to the *why*. By applying the modified version of the general theory of judicial behaviour (Dyevre 2010) we try to map the reasons behind the judicial decisions. This *explanative/analytical part* of the project might be regarded as a subsequent project proposal for another international grant (H2020, ECR, Lendület)

2. Literature overview

Since general overviews of international research on judicial review has been provided by Dyevre (2010) and Hönnige (2010), we are focusing here on the deficiencies and sporadic attempts of political science literature on the classification of judicial decisions. As for the deficiencies in typology of judicial decisions scholars have used until very recently a dichotomous approach by separating positive and negative provisions, i.e. provisions which concluded in constitutionality or unconstitutionality of a given act of the legislative. This approach has been, however, deeply inconsistent with the worldwide practice of constitutional adjudication since the latter gives evidence on a widespread *differentiation* of judicial provisions in the last 30 years.

2.1 Legal scholarship

Most recently, however, this differentiation process has been detected and mapped by an international research project (Brewer-Carías 2013) which has been the first project based on empirical country reports. Participants of the project were asked to consider the CCs as positive legislator, i.e. as an institution which penetrate to some extent the jurisdiction or field of competence of the legislative branch. By means of an inductive approach Brewer-Carías compiled a typology of the provisions of the CCs considering their encroachment upon the competence of the legislatures. Since Brewer-Carías' classification has a solely descriptive character, it is informative but in that form it is not appropriate for a political science analysis on the interaction between legislature and judiciary.

Our ambition is to form *analytical categories* by which we can calibrate to what extent the judiciary constrained the room for manoeuvre of the legislative.

This is why we are not interested in different interpretative techniques used by courts to come to their decisions. We explicitly avoid any kind of reference to various types of constitutional interpretation since what we are examining is not the form of the *constitutional interpretation* but the form of *constitutional adjudication*. We are interested in the *calibration of the constraints* imposed by CCs upon the legislatures and not in the form how (by means of which interpretative techniques) these constraints has been *justified* by the court and the judges

2.2. American political science literature

In spite of the fact that the American scholarship on judicial behaviour is the most advanced one, there have been no aspirations to analyse judicial decisions in a more differentiated and chased way. Until most recently, American scholars used also the dichotomy “constitutional/unconstitutional” in their analysis of judicial decisions. Only Cass Sunstein's book *One Case at a Time: Judicial Minimalism on the Supreme Court* (2001) turned the scholarly interest towards the various possibilities judges could (or should) face in the judicial decision making process. Since we find Sunstein's concepts of “depth and shallowness” and

“width and narrowness” particularly useful we will explicitly lean on these categories. Surprisingly enough, however, we were not able to detect any studies which applied adequately Sunstein’s categories to a systematic empirical research on judicial behaviour. The one and only experiment we could locate, even in the American literature, is Pickerill’s (2013) attempt to operationalize the term judicial minimalism and to make a more nuanced picture on the variegation of judicial provisions. This almost complete absence of operationalization of Sunstein’s theoretical framework indicate that much have to be done on the field of conceptualization and its empirical application in research on judicial decisions.

2.3. Veto player theory and its deficiencies

Since CCs are actors on the political field other theoretical approaches of the political science literature might have produced also some reflections on the exact role and strength of the CCs within the political system. Interestingly enough, the most powerful theoretical framework of the last decade, which is highly relevant for our research questions by the way, ignores CCs as *relevant* political actors. According to the original form of the veto player theory (Tsebelis 2002) constitutional courts are “most of the time” not veto players in the political system since they are absorbed by other veto players. The phrase “most of the time” is, however, important because Tsebelis does not claim that CCs could not act in certain political constellation as veto players. He believes that it might occur merely occasionally and not regularly (Tsebelis 2002: 227). Despite of this original reluctance veto player theory has been applied also to analyse the functioning of European CCs. Volcansek (2001) and Hönnige (2007) challenged Tsebelis’ rejection of regarding CCs as veto players and demonstrated that, in contrast to Tsebelis’ view, CCs are “most of the time” veto players. Although these studies accepted that legislatures are able to and sometimes do absorb CCs their empirical analysis concluded that this is rather exceptional and not the normal situation.

Our research project is in accordance with the latter scholars in arguing that the HCC might be a veto player depending above all on the political circumstances. Whether they are “most of the time” absorbed or rather real veto players should be demonstrated after results of our empirical research has been published. We are interested exactly in these questions: (a) *When* did the HCC acted as a veto player?; (b) *How* strong veto player was the HCC in the given cases?; (c) *What* was the *reason* of this strength or mildness against the outcome preferences of the legislature?

Since veto players theory’s contribution to these questions remained fragmentary and unsatisfactory we elaborated a scale which could differentiate among veto acts of constitutional courts in terms of their intensity.

Our project investigates whether and how this scale could be applied to the decisions of the constitutional courts in CEE.

3. Scope of the research and its connection to the existing literature

The empirical question of the project is a simple one: how have constitutional courts of the CEE region used their formal power? To what extent did they constrained the room for manoeuvre of the legislatures?

The legal structures provide room for manoeuvre the constitutional courts in using their power, thus one should analyse various factors that determined the usage of the judicial power resulted either in self-restraint or in an attempt to extend power.

Basically, the literature on judicial behaviour uses four approaches to examine the decisions of courts (Dyevre 2010; Hönnige 2010) but our research project does not use the *legal model* and the *institutional internalist model*. As regards the legal model we assume that the constitution is about important political and moral questions – and not about interpretation techniques. On the other hand, since the accessibility of the information on how judges took their decisions is highly restricted, the project is unable to use the institutional internalist approach, thus the dynamics of the internal debates of the courts, the standpoints of the judges and their motivations remain temporarily unrevealed.

By contrast, the *attitudinal model* is an easily applicable method but in cases of incongruences between the judges' opinions and the actual standpoint of his/her nominating organizations we should examine other factors that can plausibly explain these deviancies. This is where we will apply the *institutional externalist model* in examining which constellations of the political context results in 'weak' or 'strong' decisions of the constitutional courts. Indicators of the political context include composition of the government, characteristics of the government (minority; majority; supermajority), trust indexes (government; opposition; constitutional court), head of the state (party affiliation). Any changes in the composition of the constitutional court and the government (including its background in the parliament) are counted as a separate period (See *Appendix 1* for the pattern applied to the Hungarian case).

4. Fundamental research questions

The prototypical approach of political science to judicial behavior, the attitudinal model supposes that judges usually adopts a position or ideological standpoint in conformity with his or her nominating organization. Empirical research has confirmed this plausible presupposition in relation to the US Supreme Court which nowadays is a relatively easy subject to an empirical study (Segal and Spaeth 2002).

4.1. Description of congruencies by analytical categories

As a first step, our study intends to explore whether there is a congruence between the position of the judges and their nominating parties. Related to the position of certain judges and the constitutional court as a whole, we attempt to give a sophisticated description which starts out from a typology of the decisions (as well as the dissenting and concurring opinions if they have been published) based on to what extent they constrained the legislature. The strength of the Court's decisions (and the concurring or dissenting opinions), then, can be measured by a scale which sheds light to the congruence between the views of the judges and their nominating parties. Thus, congruence does not mean a binary – positive or negative – answer to the question whether judges were representing the position of their nominating party. Instead, the difference between the position of the judge and the party can be reflected by a scale measuring the strength of a certain decision or opinion.

4.1.1. Classification of the strength of judicial decisions

To elaborate such a scale, as a first step, it is necessary to construct a typology of the strength of decisions and opinions based on the limitation they brought about for legislation. Our suggested scale takes into consideration the following elements of a decision:

- political question doctrine;
- interpretation in harmony with the constitution;
- determining constitutional requirements;

- formal unconstitutionality, substantive unconstitutionality or unconstitutionality by legislative omission;
- partial or complete annulations;
- ex tunc, ex nunc or pro futuro annulations;
- narrow or broad remedy
- narrow or wide reasoning
- deep or shallow reasoning.

Our suggested 7 point scale or calibration consists of 3 components and all together 6 elements (*Appendix 2*). We discern three main components or parts of a judicial decision: *provision*, *remedy* and *justification*.

Provisions may differ on the ground the law has been found (un)constitutional: beyond the categories of formal unconstitutionality, unconstitutionality by legislative omission and substantive unconstitutionality, we not only count with the possibility of a reference to the political question doctrine but introduce also a category which is perhaps the most elusive among all other categories.

While formally upholding a law judges might have a large room for manoeuvre in constraining the legislative (and the executive) by two means: first by judicial *interpretation in harmony with the constitution*, and second by determining *constitutional requirements*. Both means are apt for taking a weak or a particularly strong decision which constrains the other two branches seriously. Decisions which take a reference to one of them should be carefully analysed in order to assess the exact impact of a given decision on the legislative's room for manoeuvre.

By *formal unconstitutionality* we mean all rulings of a court which does not exclude a repeated adoption of a bill with the same substance since formal unconstitutionality refers only to the legislative *process* and not to the *substance* of legislation. In this case the way remains open for the legislation to pass the bill a second time. Unconstitutionality means in this sense violation of *procedural rules* or violation of the *principle of rule of law*.¹

Substantive unconstitutionality constrains legislation more significantly since it impose some substantive barrier on the legislation, while *unconstitutionality by legislative omission* is somewhere in between the two poles formal and substantive unconstitutionality.

There is, however, one difficulty regarding the decisions based on the *formal unconstitutionality* of a bill or law: during and after the democratic transition in the CEE regions courts could take reference to the formal principle of the taboo of retrospective legislation. Since the sensible questions of *transitional justice* collide surely with this main principle of rule of law the formal unconstitutionality based on the taboo of retrospective legislation might have a highly restrictive effect on legislation. This is why decisions which implied conflicts between the principles of the transitional justice and the rule of law should be analysed at least as carefully as decisions with explicit reference to the interpretation in harmony with the constitution or to some constitutional requirements. In contrast to other constitutional courts in Central Europe, the HCC, for example, decided most of the time in such conflictual cases in favour of the principle of rule of law which in turn blocked

¹ We are quite aware of the fact that the latter principle is ambiguous enough to serve as a transition point between formal unconstitutionality and substantive unconstitutionality. We insist, however, on the definition of a decision as formally unconstitutional which bind the legislation in procedural terms but doesn't contain any other restrictions regarding the substance of the bill. This is why we evaluate a decision based on the formal unconstitutionality of the bill with 1 point and the substantive unconstitutionality with 2 points.

definitively the way of the legislation to adopt bills with retrospective legislation on prosecuting crimes during the Communist regime. These decisions should be evaluated cautiously.

In terms of their provision, the strength of judicial decisions depends on two additional factors: a judicial provision can *annul all sections* of a bill or only *some part* of it, but the *timing of annulation* seems to be also an important means in the hands of the judges.

We have to be cautious, however, with *partial annulation* because judicial decisions sometimes annul not essential part of the law but some less substantive parts of it. This is why we split the partial annulation into two categories: *partial annulation of not substantive regulations* and *partial annulation of substantive regulations*. The *timing of the annulation* is a further element of all judicial provisions which affects the strength of a judicial decision and consequently the room for manoeuvre of the legislation. Since *pro futuro* judicial provisions may grant a transitional period, in which the goals of the legislative might have temporarily been effectuated, this type of provisions seems to be a compromise and has less dramatic effect on the legislation. This is not the case in *ex nunc* decisions and even less in the most radical form of provisions (*ex tunc*).

As for the *remedy* suggested or prescribed by the courts, judges have a quite wide range of options: they can formulate recommendations or constitutional requisites, or they can even anticipate what kind of legislative acts might prove to be unconstitutional *in the future*, but they can also prescribe detailed regulation how unconstitutionality might be remedied. Since provisions (or sometimes justifications) might vary according to the remedies they contain it is reasonable to make three categories which reflect the variegation of suggested or prescribed remedies. The classification according to the remedy included into the provision gives an even more sophisticated picture on judicial decisions.

Strength of judicial decision might be also influenced by the justification judges or courts give to the provision and the required remedies of a decision. As mentioned above, here we lean widely on Cass Sunstein works on judicial minimalism. According to the idea of judicial minimalism justifications (and provisions) of a decision might be “narrow or wide”, and “shallow or deep” as well. Since these categories are described at length in Sunstein’s book *One Case at a Time* we abandon here to present the exact meaning of these terms.

All together these 3 components and 6 elements might be considered as *options* from which judges or constitutional courts make up a decision and a reasoning; a decision that results in a mixture of the chosen elements. It is this mixture that can be measured by the suggested scale thereby defining the respective decision whether it implies the active and direct use of the court’s powers or only attempts to influence the debate and the legislation with regard to the issue in question. The classification of decisions, then, shows how the constitutional courts used their formal power or, more precisely, to what extent they constrained the room for maneuver of the legislature. Moreover, the research could show the relation of the judges to their nominating party (on an ordinal scale).

In case there is congruence between the position of the judge and the nominating party, our research confirms the earlier hypotheses of the literature regarding the *attitudinal model*.

4.2. Analysing incongruences

Possible incongruences between judges and their nominating parties raise questions about the factors that can explain the deviation from the attitudinal model. The starting point of the

international literature is that the position of the CC within the political system (and particularly towards the legislature) is defined mainly by two factors: public trust toward the constitutional court on the one hand and political fragmentation on the other.

According to the widely held hypothesis, low level of public trust combined with low level of political fragmentation implies that external factors might influence more considerably the (strength) of the judicial decision while high level of public trust and high level of fragmentation results in more autonomous CCs, i.e. internal group dynamics and ideological preferences have wider implications on the decision making process (Dyevre 2010).

This hypothesis should be, however, (a) partly amended, (b) partly modified. It should be amended since the general theory of judicial behavior (Dyevre 2010) disregards the cases where high level of public trust is combined with low level of fragmentation although this was the case in Hungary between 1994 and 1998, and 2010 and 2014. On the other hand there is a need for conceptual clarification and modification as well.

According to our view, the concept of *political fragmentation* does not have the necessary explanatory power, thus by transforming and polishing Dyevre's (2010) and other approaches of the international literature, we are using the more sophisticated concept of *fragmentation of the political environment* or *environmental fragmentation* instead.

The concept of (low level of) *environmental fragmentation* refers to a political constellation in which *decisions of the CCs* might be *overruled* by a constitutional majority. Whether this type of constitutional amendments are conceivable or not depends on three factors: (1) flexibility of the constitutional system (Lorenz 2005); (2) fragmentation of the party system; and (3) polarization of the party system (Karvonen 2011; Sartori 1976; Dalton 2008; Körösenyi 2012).

There is no consensus in the literature about how to measure exactly the *flexibility* (or rigidity) of a constitutional system. We will apply Lorenz's thesis (2005) which seems to be the most recent attempt to combine various approaches. Furthermore we have to underline that the constitutional flexibility itself is an essential factor irrespective of the fragmentation and polarization of the party system in calibrating environmental fragmentation since institutional arrangements might provide a prominent role for the *electorate* in constitutional amendment (either by an obligatory referendum or by an obligatory new parliamentary election). This means that beside the parties and the political elite the electorate should be also counted as a veto player which might be able to stop or promote constitutional amendments purported to overrule CCs' rulings. Institutional regulations might encumber constitutional amendment (aiming the overturn of CCs decision) and make the political environment more fragmented, in consequence.

The question of constitutional flexibility arises, however, even if there is *no mandatory referendum* or *new election* for amending the constitution. For example in Finland, Germany, Italy, Portugal, Spain and the United Kingdom the political elite could agree on amending the constitution without providing the citizens direct involvement in the amendment process (Strom et al. 2006: 126). Nevertheless, depending on the number of legislative chambers, required supermajorities and the combination of both, constitutions may vary in their flexibilities. This means that diverse degree of cooperation of the political elite is required in order to challenge the rulings of the constitutional court by constitutional amendment. This is why the question of constitutional flexibility might be a decisive element of the environmental fragmentation regardless the given conditions of party system fragmentation and polarization.

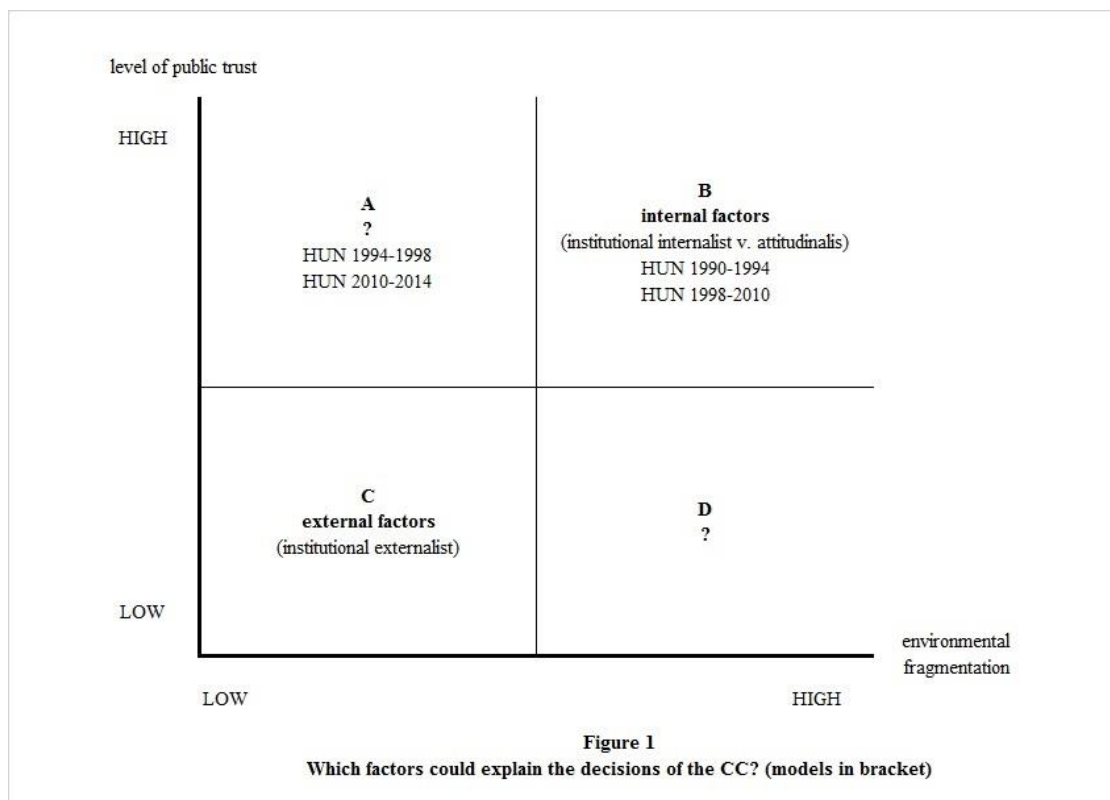
Given that constitutional amendment procedures do not require the direct participation of citizens, *beyond* the degree of constitutional flexibility two additional factors are crucial regarding the chances of a constitutional amendment: (2) party system fragmentation and (3) polarizations might have considerable consequences on environmental fragmentation.

All in all, environmental fragmentation is determined by the *combination* of the constitutional flexibility, party system fragmentation and party system polarization. The central question remains whether the *combination* of these three factors provide a *real* opportunity for the political actors to amend a constitution. Real opportunity might be diminishing by the increasing fragmentation and polarization of the party system even if a constitution is quite flexible.²

With regard to this refined and more sophisticated conceptualization we argue that *environmental fragmentation* is *low* if the *combination* of the (1) flexibility of the constitutional system and/or (2) the party system fragmentation and/or (3) the party system polarization together allow the legislator to override constitutionally the decisions of the Constitutional Court. In contrast, *environmental fragmentation* is *high* if (1) the flexibility of the constitutional system and/or (2) the party system fragmentation and/or (3) the party system polarization does not allow the legislative to override the decisions of the Constitutional Court.

Given this modification of the conceptual framework, our hypothesis reads as follows: under high level of environmental fragmentation, decisions of a constitutional court with high level of public trust will be determined primarily by the internal institutional factors (B). At the same time, decisions of a constitutional court under the opposite circumstances (C) (low level of public trust and low level of environmental fragmentation) will be determined by external factors (*Figure 1*).

² According to this definition of environmental fragmentation, however, *low level of the environmental fragmentation* might be precluded by low level of constitutional flexibility itself (independently from the fragmentation and/or polarization of the party system) if the rules of amending or adopting the constitution allow or require the participation of other institutional players (such as a referendum or a newly elected legislation after the constitution was rewritten or amended). However, high level of constitutional flexibility does not mean sufficient condition in itself for the low level of environmental fragmentation. This means that even under high level of constitutional flexibility the legislative might be unable to override the decisions of the constitutional court for instance, because of a highly fragmented or polarized party system. Furthermore, it should be noted, that the legislative is considered here in its entirety. This means that an emergence of an *ad hoc* coalition of the governing parties and the opposition might create (during the same parliamentary term) *occasionally* a low level of fragmentation of political environment in which overriding a decision of the Constitutional Court becomes possible through the interplay of the government and the opposition. However, the chance for these *ad hoc* coalitions to emerge is in inverse proportion to the polarization of the party system.



As a first step part of our project we are going to locate Central European constitutional courts within this figure and investigate the most unambiguous cases (B) and (C). According to the hypothesis of the international literature, in case (B) internal in case (C) external factors are determining in decision makings of the CCs.

It should be noted however, that the international literature does not offer hypotheses related to cases similar to the situation in Hungary between 1990 and 1994 or between 2010 and 2014 when a Constitutional Court with high public support was active in a context with a more or less low level of environmental fragmentation (A). This latter situation raises the question whether the decisions of the Constitutional Court are determined by internal or external conditions. A part of our *second research question*, then, refers to situation (A) in Figure 1 and it concerns the plausibility of internal and external factors in explaining the strength and nature of the decisions of the Constitutional Court. The second part of our second research question attempts to explain the factors behind the incongruence between the position of judges and their nominating parties. That is, this problem comes only after the research answers the question whether internal or external factors are more important.

References

- Brewer-Carías, Allan (2013): *Constitutional Courts as Positive Legislators. A Comparative Law Study*, Cambridge: CUP
- Dalton, Russel J (2008): *The Quantity and the Quality of Party Systems. Party System Polarization Its Measurement, and Its Consequences*, in: *Comparative Political Studies*, Vol. 41. No. 7, 899-920
- Dyevre, Arthur (2010): *Unifying the field of comparative judicial politics: towards a general theory of judicial behaviour*, in: *European Political Science Review* (2010), 2:2, 297–327
- Ganghof, Steffen (2003): *Promises and Pitfalls of Veto Player Analysis*, in: *Swiss Political Science Review* 9(2):1-25
- Ginsburg, Tom (2008): *The Global Spread of Constitutional Review*, in: *The Oxford Handbook of Politics and Law*, Oxford: Oxford University Press, pp. 81-99
- Green, C. (2009): *An Intellectual History of Judicial Activism*, in: *Emory Law Journal*, Vol. 58, No. 5, p. 1195, 2009
- Györfi, Tamás (2001): *Az alkotmánybírászkodás politikai karaktere*. Budapest: INDOK
- Halmai, Gábor (2014): *In memoriam magyar alkotmánybírászkodás*, in: *Fundamentum* 2014/1-2, 36-64.
- Hirschl, Ran (2004): *Towards Juristocracy, the Origins and Consequences of the New Constitutionalism*, Cambridge: Harvard University Press
- Hönnige, C. (2007) *Verfassungsgericht, Regierung und Opposition. Die vergleichende Analyse eines Spannungsdreiecks*, Wiesbaden: VS Verlag.
- Hönnige, Christoph (2010): *Beyond Judicialization: Why We Need More Comparative Research About Constitutional Courts*, in: *European Political Science* (10)3, 346-358
- Karvonen, Lauri (2011): *Party System Fragmentation*, in: *International Encyclopedia of Political Science*, London: SAGE Publications, 1823-1825
- Kis, János (2000): *Alkotmányos demokrácia*, Budapest: INDOK
- Körösényi, András (2012): *A politikai polarizáció és következményei az elszámoltathatóságra*, in: Boda, Zsolt – Körösényi, András (szerk.): *Van irány? Trendek a Magyar politikában*, Budapest: Új mandátum Kiadó, 284-310
- Lorenz, Astrid (2008): *How to Measure Constitutional Rigidity: Four Concepts and Two Alternatives*, in: *Journal of Theoretical Politics*, Vol. 17, No. 3. 339-361
- Pickerrill, Mitchell and Ward, Artemus (2013): *Measuring Judicial Minimalism on the Roberts Court*, Paper prepared for the Annual Meeting of the American Political Science Association, Chicago, IL, August 29 to September 1, 2013
- Sartori, Giovanni (1976): *Parties and Party Systems. A Framework for Analysis*, Cambridge: CUP
- Segal, J.A. and Spaeth, H.J. (2002) *The Supreme Court and the Attitudinal Model Revisited*, Cambridge: Cambridge University Press
- Stone Sweet, A. (2000) *Governing with Judges. Constitutional Politics in Europe*, Oxford: Oxford University Press
- Stone, A. (1992), *The Birth of Judicial Politics in France*, Oxford: Oxford University Press
- Strom, Kaare et al. (2006): *Delegation and Accountability in parliamentary Democracies*, Oxford: OUP
- Szente, Zoltán (2015): *Az alkotmánybírák politikai orientációja Magyarországon 2010 és 2014 között*, manuscript
- Tóth, Gábor Attila (2009): *A szövegen túl. Értekezés a magyar alkotmányról*, Osiris Kiadó
- Tsebelis, G. (2002) *Veto Players. How Political Institutions Work*, Princeton: Princeton University Press
- Vanberg, G. (2005): *Constitutional Politics in Germany*, Oxford/New York: Oxford University Press
- Volcansek, M. (2000), *Constitutional Politics in Italy*, London: MacMillan Press

Appendix 1

Constitutional Court												
Number of judges		Judges									Period	Periods
5	Solt	Zlinszky	Ádám	Kilényi	Sólyom						11/1989	1
5	▼											2
10	Szabó					Schmidt	Herczegh	Lábady	Tersztvyánszky	Vörös	07/1990	3
10								▼			05/1993	4
10												5
9												6
9												7
9											11/1996	8
11						Németh	Bagi				07/1997	9
11	▼	▼									02/1998	10
11	Kiss	Erdei									03/1998	11
11												12
11					▼						11/1998	13
11					▼						12/1998	14
11					Harmathy	Czúcz	Strausz				06/1999	15
11												16
11											08/2003	17
10											05/2004	18
10					▼							19
9											12/2004	20
9											09/2005	21
10						Bragyova					11/2005	22
11						Balogh	Kovács				02/2006	23
11											06/2006	24
11	▼										02/2007	25
11	Kiss										03/2007	26
11											05/2007	27
11												28
11												29
11												30
11												31
9												32
9												33
11												34
10												35
15												36
15												37
15												38
15												39
15												40

Appendix 1 (cont.)

Government Composition				Public trust					Head of the State
Periods	Period	Composition of the government	Characteristic of the government	Prime Minister	Constitutional Court	Government parties	Opposition parties	Head of the State	Party affiliation
1	05/1990	MDF-KDNP-FKGP	majority	József Antall	-	-	-	-	MSZMP
2		MDF-KDNP-FKGP	majority		-	-	-	-	SZDSZ
3		MDF-KDNP-FKGP*	majority		-	-	-	-	SZDSZ
4		MDF-KDNP-FKGP*	majority		-	-	-	-	SZDSZ
5	11/1991	MDF-KDNP-FKGP*	majority	Péter Boross	56	37	37	61	SZDSZ
6	12/1993	MDF-KDNP-FKGP*	majority		56	37	37	61	SZDSZ
7	07/1994	MSZP-SZDSZ	supermajority		59	43	49	-	SZDSZ
8		MSZP-SZDSZ	supermajority		58	35	37	61	SZDSZ
9		MSZP-SZDSZ	supermajority	Gyula Horn	62	41	45	65	SZDSZ
10		MSZP-SZDSZ	supermajority		61	36	41	64	SZDSZ
11	07/1998	MSZP-SZDSZ	supermajority		61	36	41	64	SZDSZ
12		Fidesz-FKGP-MDF	majority		61	36	41	64	SZDSZ
13		Fidesz-FKGP-MDF	majority	Viktor Orbán	61	36	41	64	SZDSZ
14		Fidesz-FKGP-MDF	majority		60	41	39	64	SZDSZ
15	05/2002	Fidesz-FKGP-MDF	majority		60	41	39	64	SZDSZ
16		MSZP-SZDSZ	majority		61	40	43	59	Fidesz-MDF
17		MSZP-SZDSZ	majority	Péter Medgyessy	66	49	39	61	Fidesz-MDF
18		MSZP-SZDSZ	majority		66	49	39	61	Fidesz-MDF
19	09/2004	MSZP-SZDSZ	majority		59	42	40	58	Fidesz-MDF
20		MSZP-SZDSZ	majority		59	42	40	58	Fidesz-MDF
21		MSZP-SZDSZ	majority	Ferenc Gyurcsány	59	42	40	58	Fidesz-MDF
22		MSZP-SZDSZ	majority		59	42	40	58	NA
23	06/2006	MSZP-SZDSZ	majority		59	42	40	58	NA
24		MSZP-SZDSZ	majority		54	37	35	51	NA
25		MSZP-SZDSZ	majority	Ferenc Gyurcsány	54	37	35	51	NA
26		MSZP-SZDSZ	majority		57	35	38	51	NA
27	05/2008	MSZP-SZDSZ	majority		57	35	38	51	NA
28		MSZP-SZDSZ	majority		57	35	38	51	NA
29		MSZP	minority	Gordon Bajnai	53	34	41	51	NA
30		MSZP	minority		53	34	41	51	NA
31	04/2009	MSZP	minority		-	-	-	-	NA
32	05/2010	Fidesz-KDNP	supermajority		-	-	-	-	NA
33		Fidesz-KDNP	supermajority	Viktor Orbán	-	-	-	-	Fidesz-KDNP
34		Fidesz-KDNP	supermajority		-	-	-	-	Fidesz-KDNP
35		Fidesz-KDNP	supermajority		-	-	-	-	Fidesz-KDNP
36		Fidesz-KDNP	supermajority	Viktor Orbán	-	-	-	-	Fidesz-KDNP
37		Fidesz-KDNP	supermajority		-	-	-	-	Fidesz-KDNP
38		Fidesz-KDNP	supermajority		-	-	-	-	Fidesz-KDNP
39		Fidesz-KDNP	supermajority		-	-	-	-	Fidesz-KDNP
40	05/2014	Fidesz-KDNP	supermajority	Viktor Orbán	-	-	-	-	Fidesz-KDNP

Appendix 2

Strength of the decisions of the CCs						
	1. step	Political question doctrine	interpretation in harmony with the constitution or constitutional requirement (between 0 and +2,00) ¹	formal unconstitutionality (+1,00) ²	unconstitutionality by legislative omission (+1,50)	substantive unconstitutionality (+2,00)
Strength of the provision						
	2. step	partial annulment but no substantive issue (0)	partial annulment of a substantive issue (+0,5)	complete annulment (+1,00)		
	3. step	pro futuro (0)	ex nunc (+0,5)	ex tunc (+1,00)		
	4. step	no remedy/directives (0)	narrow remedy/directives (+0,5)	broad remedy/directives (+1,00)		
Strength of the remedy						
	5. step	narrow argumentation (0) ³	middle-range argumentation (+0,5)	wide argumentation (+1,00)		
Strength of the argument.	6. step	shallow argumentation (0) ³	middle-range argumentation (+0,5)	deep argumentation (+1,00)		
Explanations						
Each relevant decisions should be examined through steps 1-6 and evaluated on a scale from 1 to 7.						
1 Evaluation of interpretation in harmony with the constitution and constitutional requirement need individual treatments since they might vary from being very constraining to being highly permissive as regards as the legislature. It depends on the given case which need to be examined qualitatively.						
2 But annulment or ex post facto laws in the early 90s should be evaluated atypically since it was one of the biggest obstacle as regards as transitional justice						
3 Categories of the 5. and 6. steps are based on Cass Sunstein: One Case at a Time: Judicial Minimalism at the Supreme Court, harvard University Press 2001						

Explanations

Each relevant decisions should be examined through steps 1-6 and evaluated on a scale from 1 to 7.

¹ Evaluation of interpretation in harmony with the constitution and constitutional requirement need individual treatments since they might vary from being very constraining to being highly permissive as regards as the legislature. It depends on the given case which need to be examined qualitatively.

² But annulment or ex post facto laws in the early years should be evaluated atypically since it was one of the biggest obstacle as regards as transitional

justice

³ Categories of the 5. and 6. steps are based on Cass Sunstein: One Case at a Time: Judicial Minimalism at the Supreme Court, Harvard University Press 2001