5 The Hungarian Constitutional Court

A constructive partner in constitutional dialogue

Kálmán Pócza, Gábor Dobos and Attila Gyulai

5.1 Introduction

Although the Hungarian Constitutional Court (HCC) was only the second established in the CEE region after the democratic transformation, its Polish predecessor suffered some deficiencies concerning its legitimacy. In contrast to Poland, where constitutional supremacy and judicial review had historical precedents, constitutional review was completely missing from the Hungarian constitutional tradition. Furthermore, in contrast to the Polish Constitutional Tribunal, which was established as early as 1986 when the fall of Communism was certainly not on the horizon, the HCC was an outcome of roundtable negotiations on democratic transition held in 1989 (Sadurski 2002; Luchterhandt et al. 2007; Sadurski [2008] 2014). This means that, in effect, the HCC was the first constitutional court established with almost complete democratic legitimacy during a democratic transformation process.[1]

5.2 Origins and structure of the Hungarian Constitutional Court

5.2.1 Origins of the Court

The democratic legitimacy of the Hungarian Constitutional Court, however, was only almost complete. Since the Hungarian democratic transformation embraced not a decade, as its Polish counterpart, but only one year, establishment of the HCC had a less troublesome heritage rooted in the Communist past. The National Round Table (*Nemzeti Kerekasztal*, NKA) negotiations between the Communist leaders and the democratic opposition began in June 1989 and showed a dynamic nobody expected at the beginning of the transformation process. At the beginning, it aimed only to elaborate the most important rules of the first democratic elections, leaving all important questions to be resolved for the first democratically elected parliament.[2] Nevertheless, at the end of the process, in October 1989, the old Communist constitution from 1949 was so heavily amended that, according to the contemporary *bonmot*, it was only the name of the capital of Hungary which had not been changed. Establishing a constitutional court was not a priority of the democratic opposition – at least not at the beginning of the

transformation process. It was initiated rather by the Communist leaders, mainly to have another institution into which the Communist elite could parachute their comrades.[3] Due to the special dynamics of the negotiations in the summer of 1989, the democratic opposition was getting more and more willing to accept the establishment of a constitutional court, but only on condition that (1) the Court's decisions should be final, so not subject to the possibility of being overridden by the parliament, (2) the scope of the potential applicants should be as wide as possible (introduction of the so-called *actio popularis*) and (3) election of the 15 judges should occur in a staggered way (first five judges elected by the last Communist parliament, but based on an agreement with the democratic opposition; the next five in the first and the last five in the second parliamentary term after the democratic transformation) (Bozóki 2002, 107–191). Although the first judges of the HCC were elected by the last Communist parliament, two former ordinary judges were nominated by the democratic opposition, two law professors by the Hungarian Socialist Workers' Party (*Magyar Szocialista Munkáspárt*, MSZMP) and one in consensus of the two sides.

5.2.2 Structure of the Court

The HCC with five judges on its benches started to work on 1 January 1990, four months before the first democratic elections took place and approximately half a year before the first democratic parliament was summoned. In the summer of 1990, five more judges were elected by the parliament to the HCC, which sat with 9–10 judges from then on (Brunner 2000, 65). Originally the last five judges should have been elected by the second parliament after the democratic transformation process, but due to the lack of agreement about candidates, the missing members were never elected. Filling the empty chairs in the HCC caused serious problems later as well (the HCC was continuously on the brink of its quorum) since double-nomination (one right-wing and one left-wing candidate) became the informal standard. Thus, filling the vacant seats often took several months, sometimes directly risking the functioning of the Court. Election of the judges was a highly politicized process, since it was the unicameral parliament which nominated and elected them with a two-thirds majority (Körösényi et al. 2009, 34). Prior to the election procedure at the plenary session of parliament, an *ad hoc* committee was established with one representative of each parliamentary party. It was essential for the candidates to be backed by a two-thirds majority, not only in the plenary session but also in this *ad hoc* committee, which implied that without the consent of the opposition parties no successful election was conceivable until 2010. Consequently, this committee served as a formal instance and as a barrier even for governments backed by a two-thirds majority in the plenary session (e.g. between 1994 and 1998). Since the *ad hoc* committee had to approve the candidates, opposition parties could prevent the election of judges by simply not approving the candidates in the *ad hoc* commission. After 2010, the transformation of this *ad hoc* committee based on parity to an *ad hoc* committee

based on proportional representation of parliamentary parties opened the way for one-party candidates, since the right-wing Fidesz-KDNP government had a two-thirds majority in parliament from 2010 to 2015 (Sonnevend et al. 2015, 44).

Between 1990 and 2010, judges were elected for a term of nine years, renewable once (which certainly did not serve their independence). Until 2012, the President of the HCC was elected by the HCC itself for three years, but this mandate was renewable several times (Schwartz 2000, 78). Since the president of the HCC designated the "reporter judge" (who prepared the first draft of the decision), internal election of the President increased the autonomy of the Court – at least until 2012, when the rules of the election of the President were changed, after which parliament has elected the president of the HCC.

The structure of the HCC between 1990 and 2010 was a quite simple one. Although there had always been chambers of three judges, most important decisions were exclusively taken by the full bench. There were no senates or chambers of equal rank to the full bench. There were no specific rules about decision-making, meaning that the Court made its decisions by a majority of the judges. According to the Act on the Constitutional Court of 1989, a law on the rules of procedures of the HCC should have been adopted by the parliament, which was continuously delayed until 2001, when the HCC adopted its own standing orders. This means that from 1990 to 2001, the HCC worked in a quite non-transparent way: general rules were determined by the 1989 constitution and the Act of HCC from 1989, but specific rules regarding procedures were generated (but officially never published!) through the praxis of the Court (Brunner 2000, 65).

As for the competencies or powers of the HCC, all forms of constitutional review but the "real" constitutional complaint were introduced in 1989 (Dezső et al. 2010, 184). *A priori* and *a posteriori* norm control, constitutional complaint against the law applied by ordinary courts in concrete cases and constitutional interpretation *in abstracto*, but no constitutional complaint against the decision of ordinary courts could be filed (until 2012, when the respective rules were changed).[4] This implied, for example, that real conflicts between ordinary courts and the HCC were very rare. Since the *actio popularis*, the right of all citizens to submit a petition to the Court without the requirement of having been affected directly by the challenged law, guaranteed that all critical issues landed on the Court's table, and it was almost irrelevant who else was specifically allowed to submit a petition to the Court (Dupré 2003, 37). All relevant political issues ended up being reviewed by the HCC. It is, however, of utmost importance that the Secretary General of the HCC filtered the petitions with respect to their formal adequacy. This kind of preselection ensured that the HCC, in contrast to its Romanian or Polish counterparts, would not have to struggle with formally inadequate petitions or with the bulk of petitions which ought to be simply refused on formal grounds. Some public hearings took place in the first months of its functioning, but otherwise the Court dealt in private with the issues on the table.

5.2.3 Changes after 2010

The Court functioned in this way until 2010, when political circumstances and legal regulations concerning its functioning changed dramatically.[5] After the landslide victory of Fidesz-KDNP, the party achieved a two-thirds constitutional majority in parliament. In one of the first sessions of the new parliament, the rules for the election of judges were changed (as delineated above). In the next two years, an intense clash between the constitutional majority and the HCC determined the fate of the Court. Heavy measures were deployed on both sides (constitutional amendments vs. threatening to review the unconstitutionality of constitutional amendments), which ended up with court-packing, cutting its competence and constraining its autonomy. Since the summer of 2010 the HCC has been deprived of its competence to review legislation concerning public finances, except when they are related to human dignity, the protection of personal data, Hungarian citizenship or the freedom of conscience and religion. This shrinking of competences was incorporated into the new Fundamental Law of Hungary, which has been in force since 1 January 2012. Further changes concerned the structure of the HCC: since 2012 the HCC has consisted of 15 judges, elected by a two-thirds majority of parliament for 12 years, but without the possibility of renewing the term. On the other hand, the autonomy of the HCC has also been constrained to some extent, since the president of the new HCC is no longer elected by the members of the Court but by parliament. The range of potential applicants has been increased concerning *a priori* abstract review,[6] but drastically reduced with respect to *a posteriori* abstract review: while the institution of *actio popularis* has been abolished, the range of potential applicants has been restricted to the government, 25 percent of the MPs, the President of the Supreme Court, the Prosecutor General and the ombudsman. While nobody urged the first change, some scholars, and even the former president of the HCC, argued that abolishing the *actio popularis* (and introducing the real constitutional complaint) could serve the depoliticization of the HCC (Bragyova 2010, 59–61; Paczolay 2010, 44).

As for the functioning of the HCC, one critical juncture was the 2010 parliamentary election and the staggered election of several new judges (backed exclusively by the right-wing majority). This reshuffle of the Court led to a thin majority of the judges nominated by the right-wing parties as early as the autumn of 2010 (four judges nominated by the left-wing parties, one in consensus and five nominated by the right-wing parties). The enlarged HCC from 1 January 2012 consisted of 15 judges with a clear right-wing majority (four left-wing nominations, one consensus and ten right-wing judges) but the "old" judges elected in pairs before 2010, i.e. in some kind of compromise, were still in majority (eight to seven). It was following a new wave of elections of judges in the spring of 2013 when new judges elected only by the right-wing majority after 2010 formed the majority (eight to seven) in the Court.[7] For several reasons, many commentators argue that this was the crucial point for the Court: from 2010 until May 2013 the Court struggled with and resisted the constitutional majority in several ways,

while deference (with several dissenting opinions) became the dominant behavioural model of the Court's majority after May 2013.[8]

5.3 General characteristics: a Court of outstanding performance?

Taking a look at the HCC's 25 years of functioning from a bird's-eye perspective, some myths about the HCC, and especially the Sólyom presidency, should be dispelled, while other topoi will be reinforced by findings of the present country study. In the legal scholarship, it is almost a commonplace that the Hungarian Constitutional Court played a decisive role in the democratic transformation and consolidation process.[9] This reputation of the Court among legal scholars was established very early and, according to the legend, was considered mainly a "result" of the activity and authority of the first president. Less general findings focus on the activism of the Court in fundamental rights issues, but these activities also contributed to the highly positive image of the HCC in general, and its first presidency in particular (Halmai 2002). Whether these pretensions could be proved by systematic empirical exploration remains a research puzzle, since no systematic empirical research has been conducted to clarify the question of to what extent the HCC, and the Sólyom Court in particular, has contributed to the consolidation of democracy and the rule of law in Hungary.

Such voices of scientific doubt do not neglect or deny the Court's virtues and achievements concerning fundamental rights issues, but highlight the need for a comparative project which puts the question: in which form and to what extent have CCs of the CEE countries contributed to the consolidation of democracy? While the political science literature on consolidation of democracy is vast enough,[10] research on the exact role of the CCs in the democratic consolidation process is rather underexplored; however, this is not the place where we could answer this question fully.[11] Nevertheless, some parts of the question can be addressed. It is a commonplace in the political science literature that the more the parliament keeps the executive under control, the more likely it is that the democratic transformation and consolidation process will be successful (Andrews 2014, 647). Similarly, one could derive from the literature the hypothesis that the more CCs keep the legislature under control the more likely it is that the democratic transformation and consolidation process will be successful.[12] Keeping under control means that CCs should be able to constrain the legislature in an appropriate way to comply with the basic rules of the (democratic) game. Hence, the question emerges: how could we measure whether CCs are able to keep the parliaments under control?

In accordance with these general accounts of hypothesis about consolidation of democracy, on the one hand, and with the general assessment of the HCC in the legal scholarship, on the other, we expected that the HCC had placed heavy burdens on the political actors in Hungary because it emerged very early as a key player in salient political issues from 1990 to at least 1996. According to the general assumption, the HCC played a key role in strengthening the constitutional

culture, respect for the rule of law and, in general, democracy by influencing (in this context: constraining) the legislature. This image of a very stringent and weighty Court which kept parliament under strict control, should, however, be corrected in light of the analysis of the Hungarian data of the JUDICON project.

5.3.1 A Court of average performance

Taking the data of the JUDICON project into account, one could argue that the first three years, and especially the first year, of the HCC showed a noteworthy performance concerning its role in keeping the legislature within the borders of constitutionality. In contrast to the general hypothesis and advice of the political science literature, the HCC proved to be pretty dauntless in annulling or correcting the legislation in any form in its early years. Nevertheless, by putting its performance in the context of other CEE constitutional courts, the JUDICON dataset shows that it was rather the first year of the HCC which differed strongly from its Polish, Czech and Romanian counterparts, while the Slovak Constitutional Court proved to be astonishingly and with distance more severe throughout the 1990s than the HCC – not to mention that the first year of the HCC was rather a half year, with 13 cases altogether, which might distort the comparison to some extent.[13] By putting aside this half year of activity, one could observe that the HCC performed in a very similar way as its regional counterparts. This means that there are no radical differences between the Hungarian and other constitutional courts in the region concerning the question to what extent have the courts constrained the legislature. In this regard, and we must emphasize that we deliberately limit ourselves to the specific question of measuring the constraint constitutional courts put on the legislature, the HCC showed no outstanding performance.

Nevertheless, we must remind the reader of two factors which should be kept in mind when talking about demystifying the legend of the HCC. As was elucidated in the methodological chapter of this research project, we have not selected the politically salient decisions but have conducted the research by including all relevant decisions of the CCs.[14] Another approach, which would be sensible to the case selection and would focus on politically significant cases, might produce a significantly different result. Since our project kept its eyes on the general performance of the constitutional courts, the results of the project pertain to the general performance of the courts and not to (politically relevant) specific cases.

Furthermore, in evaluating the performance of the HCC one should also keep in mind that the HCC was in several ways a path-breaker. There were no other regional examples of functioning constitutional courts with democratic legitimacy in 1990 which could have served as a model for institutional learning for the HCC. Of course, we do not deny that there were models from which the HCC could learn a lot. The German Federal Constitutional Court (FCC) served as a model, but the FCC provided inspiration rather than any institutional learning due to the highly different political contexts in which the FCC and other CEE courts operated.[15] Getting inspired from a well-functioning constitutional court

in an established democracy (Germany) could certainly not guarantee the success of the constitutional adjudication during and after the democratization process.

Thus, it was rather the HCC which served as a model for other CEE courts, particularly since other courts were first established in 1992 (Romania) or in 1993 (Poland, Czech Republic, Slovakia) after the HCC had already engaged in highly intransigent activity in the first two years of its functioning. Two years of functioning and taking very restrictive decisions on politically salient issues without having any counterparts in the region should be very much appreciated. This is why we should note once again that the HCC certainly played a path-breaking role in the democratic transformation of the CEE region and served as a model for other courts (Prohacka 2002, 58). In the light of this context, the comparatively limited performance of the HCC in constraining the legislature, i.e. in controlling the activity of the parliament with respect to its constitutionality, certainly takes on a different meaning.

As a third factor, the phenomenon of self-restraint of the parliament should be also mentioned. In the scientific literature, it is a commonplace, most frequently with respect to the relationship between the German *Bundestag* and the FCC, that legislative majorities might presume what kind of decision the constitutional court would take and correct or change a bill in this sense before its adoption.[16] Taking the previous praxis of constitutional adjudication of the CC as a basis, parliamentary majorities try to figure out how the court would decide on the bill and legislators prevent the eventual annulment of the law by correcting it in advance. In the Hungarian context, we can also legitimately assume that such an effect might have played a role in the "not so outstanding" performance of the HCC in constraining the legislature. Since there are no tools in our hands to measure the extent of self-restraint of the legislators, this assumption remains an assumption, but a quite plausible one in the case of the HCC.[17] Since the HCC was quite severe in its first year and still found several critical points in the legislative acts in its second year of functioning, it is easily conceivable that the political actors frequently tried to avoid a clash with the CC.

In sum, as a first general impression one should note that the practice of the HCC, and in particular the first Court under the Sólyom presidency, did not confirm the hypothesis we formulated above by leaning on the general assumptions and findings of the legal scholarship. The HCC showed no outstanding performance in constraining the Hungarian legislature.

5.3.2 A Court of consistent performance

As a second general impression, one could assess that the HCC's practice showed astonishing consistency concerning the average strength of its rulings on a yearly basis. There are no ups and downs, neither long-run trends nor radical oscillations from one year to another. The only general trend is a very slight, almost insignificant decrease in average strength of rulings (Figure 5.1). Beyond that, the average strength has varied between 2.5 and 3.5 points which, compared to the Slovak or the German cases, could not be described as high. The standard

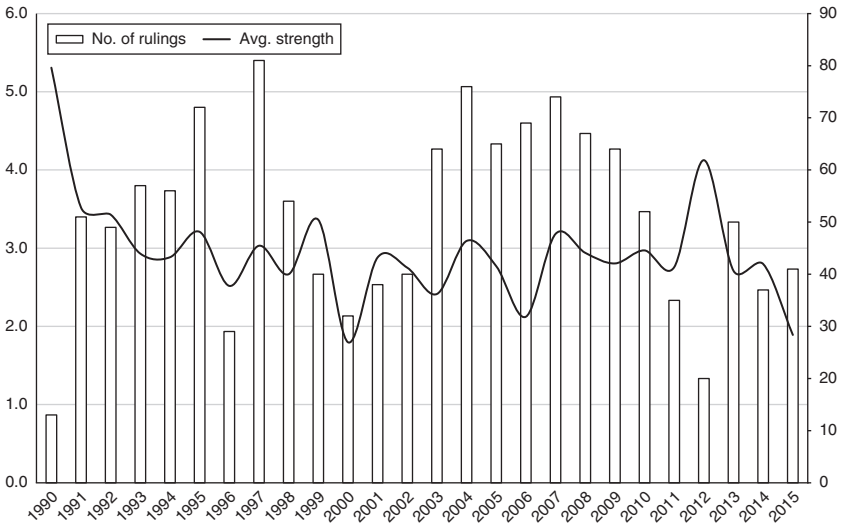

Figure 5.1 Number and average strength of rulings (HCC).

deviation from the mean values decreased over time, which means that extreme rulings (extremely strong and extremely weak) became more and more infrequent. To put it another way, the simultaneous presence of highly restrictive and highly permissive rulings in the same year characterized the first years of the HCC (1990–1993). However, the strength of rulings converged over time.

5.3.3 A Court of sophisticated rulings and growing polarization

Third, we can also say that the HCC greatly differentiated its rulings from very early on. While three-quarters of its rulings fit into the classical dichotomous model (finding the case before the Court unconstitutional or constitutional), approximately one-quarter of its rulings was legislative omission, procedural unconstitutionality, constitutional requirements or constitutional interpretation *in abstracto*. Furthermore, it has frequently taken the opportunity to differentiate in the temporal effect and completeness of rulings, not to mention the prescription several times found in the rulings. In sum, the HCC used the tools at hand in many ways, which led to a highly sophisticated constitutional adjudication.

Fourth, although no dominant trends in majority rulings of the HCC could be assessed, some kind of periodization of the Court's activity might be traced. This periodization is related not to the majority rulings but rather to the dissenting opinions. While the Sólyom Court (1990–1998) rarely published dissenting opinions (DOs), rulings with at least one dissenting opinion as well as the total number had already increased two years after the end of the Sólyom presidency and remained constant until 2010. The third period of the Court (2010–2015) is characterized once again by an "overnight" increase of rulings with at least

one dissenting opinion and of the total number of dissenting opinions. This also means that while polarization of the Court was not symptomatic for the Sólyom period, the post-Sólyom Court experienced a clear leap in the number of dissenting opinions, and DOs sky-rocketed after 2010 in comparison to the previous period.[18]

5.4 Trends in majority rulings

While no general trends of majority rulings are discernible, if we have a look at the average strength of the rulings, approaching the question of trends from a different perspective might lead to a different conclusion. Putting the average strength of the rulings aside and analyzing the types of rulings the HCC took will elucidate some characteristics hidden by the average strength of rulings.

5.4.1 Trends in ruling types

As noted above, it is clearly observable that the HCC took highly differentiated rulings from very early on. It created some kind of leeway by transcending the classical dichotomy between constitutional and unconstitutional decisions and ruled unconstitutionality by legislative omission (one ruling from 13 in 1990), procedural unconstitutionality (two from 13 rulings in 1990), weak, average and strong form of substantive unconstitutionality (2/1/3 from 13 rulings in 1990) and presenting two constitutional interpretations *in abstracto* which heavily constrained the legislature. This diversification of rulings turned out to be a constant characteristic of the HCC, which it has preserved throughout its functioning from 1990 up to today (Figure 5.2). While the vast majority of all rulings between

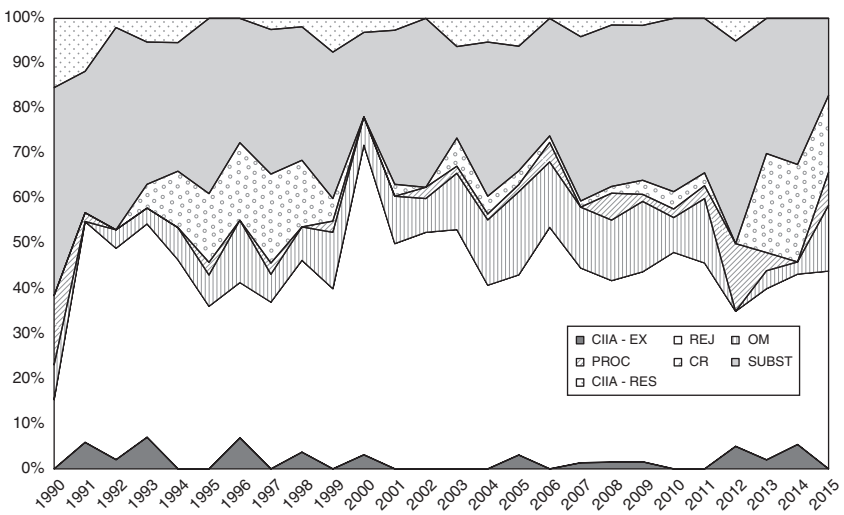

Figure 5.2 Frequency of ruling types I (HCC).

1990 and 2015 were either rejection (43.9 percent on average per year) or substantive unconstitutionality (32.1 percent on average per year), approximately one-quarter of the rulings differed from this classical dichotomy and were either unconstitutionality by legislative omission, procedural unconstitutionality, constitutional requirement (CR) or constitutional interpretation *in abstracto* (CIIA).

Constitutional interpretation *in abstracto* both restricting and extending parliament's room to manoeuvre was more characteristic of the Sólyom presidency (respectively 45 percent and 43 percent of all CIIA of the Court from 1990 to 2015 were issued between 1990 and 1998), and determining constitutional requirements also became a frequent tool applied by the Sólyom Court (52 percent of all CR between 1990 and 2015 were issued between 1990 and 1998). While declaring legislative omissions was not unknown during the Sólyom period, it was more favoured in the post-Sólyom era from 2003 to 2009 (54.3 percent of all omissions from 1990 to 2015). The Sólyom Court made use of declaration of omission in the second half of its functioning, but even from 1994 to 1998 omissions accounted for only 8.3 percent of all rulings per year on average. It was also during the second half of its term (1994–1998) that declaring constitutional requirements became more frequent (49 percent of all CR from 1990 to 2015 had been declared between 1994 and 1998; 15.9 percent of all rulings involved CR on average per year). The second half of the Sólyom presidency was also the time period when the number of rejections fell from 47.4 percent per year on average (1991–1994) to 37.6 percent per year on average (1995–1998).

On the other hand, the second half of the Sólyom presidency exhibits further refinement of the adjudication. While in the first half of the term if the Court declared substantive unconstitutionality it mainly declared it *ex nunc* and as a quantitative partial annulment, between 1995 and 1998 the distribution of various forms of substantive unconstitutionality was more even. This means that in the second half of the Sólyom presidency rulings became highly differentiated, not only concerning the main types of rulings (see Table A.1 in the Appendix) but also among subtypes (like weak, average or strong form of omission, of procedural or substantive unconstitutionality) (see Figure 5.3). A clear shift might be detected in the second half of the Sólyom presidency in favour of weak and strong substantive forms of unconstitutionality, which means that the Sólyom Court expressed its opinion in an even more differentiated manner by declaring strong rulings of substantive unconstitutionality (annulling legislative acts *ex tunc* or complete laws, or even providing some remedy) or weak unconstitutionality (*pro future* quantitative partial annulment).

This means that the Sólyom Court became more active and was more willing to indicate some kind of unconstitutionality, rather than finding everything constitutional in the second half of its term. It is of utmost importance, however, that this increasing activity wasn't related to any increasing rigour: the average strength of rulings does not reflect this advanced activism in the time period between 1994 and 1998. This, in turn, means that while the Sólyom Court intervened more frequently from 1994 on, it adopted rather milder forms of rulings, such as declaring constitutional requirements or legislative omissions instead of

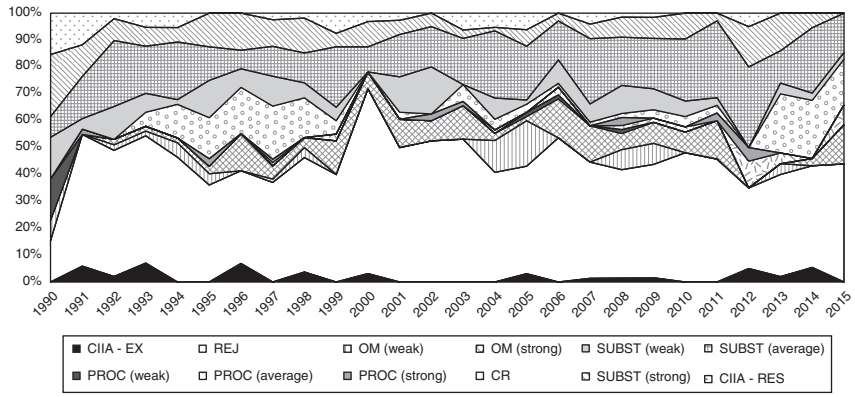

Figure 5.3 Frequency of ruling types II (HCC).

declaring substantive unconstitutionality. The Sólyom Court became more active but less severe in the second half of its term.

After 1998, not only did CR disappear from the instrumentarium of the Court, omissions became more uniform (mainly a strong form of omission), and the Court also embraced fewer variants of substantive unconstitutionality. If it declared substantive unconstitutionality, it was the average form of it. It was only in 2012 and 2013, during the clash with the constitutional majority, that the Court "reinvented" not only the CR but also the strong form of substantial unconstitutionality. For these two years (2012 and 2013), approximately 15 percent of all rulings declared a strong form of unconstitutionality.

After two transitional years (1999 and 2000), declaration of constitutional requirements dropped from 15.9 percent to 2.5 percent per year on average (2001–2012) until the Court "reinvented" it in 2013 (20.2 percent per year on average, 2013–2015). By contrast, omissions became quite constant elements of the Court's rulings (12 percent per year on average from 1999 to 2011). There are, however, differences in what kind of omissions were declared by the Court. During the Sólyom era, some kind of balance was found between weak and strong omissions. This means that the Sólyom Court transformed itself (with the exception of the year 1996) rather rarely into a positive legislator by declaring omission and giving some kind of positive prescription. After the Sólyom era, however, the most frequent form of omission turned out to be the "strong omission", meaning that the HCC was strongly inclined to include in its rulings positive prescriptions on how unconstitutionality should be remedied, or it gave a strict deadline for unconstitutionality to be corrected. This engagement was interrupted by a short period of the Holló presidency when weak omissions dominated, i.e. the Court was satisfied by declaring the omission without prescribing any deadline or positive ruling on how unconstitutionality could be remedied.

In sum, while declaring constitutional requirements was common in the second half of the Sólyom Court and both weak and strong omissions became

conventional forms of rulings from 1994 on (leading to a more active but milder adjudication in the second half of the Sólyom era), constitutional requirements disappeared almost entirely after 1998, only to be reinvented after 2012. While in the second half of the Sólyom era weak and strong omissions were more or less balanced, i.e. the Sólyom Court became a positive legislator rarely, the dominant form of omission became the strong one after 1998. This means that, with the exception of the Holló presidency, which was rather passive in this sense, the HCC not only declared legislative omissions but also determined more and more frequently a deadline for unconstitutionality to be remedied. This means that even if the HCC chose a milder form of declaring unconstitutionality (legislative omission), it quite often pressured the legislature by determining deadlines for correcting unconstitutionality.

5.4.2 Significant years

As noted in the previous section, it would be an overstatement to delineate sweeping trends in the average strength of majority rulings, while some kind of trend is discernible in the types of rulings the HCC took. While trends in average strength of rulings are lacking, there were remarkably strong as well as weak years which are worth scrutinizing. Accordingly, this section highlights those years in which the HCC performed in an especially strong or even weak manner. The three main periods in the history of the HCC will be considered – the Sólyom Court, the post-Sólyom era and recent years when the competences and the composition of the Court were significantly changed.

1990: the formative decisions

The HCC was established months before the first free and competitive election in 1990. However, in this research only those decisions were considered that were made after June 1990, since the activity of the Court is scrutinized with respect to the democratic legislature. Partly, this explains the low number of rulings (13) which, however, resulted in the strongest rulings in the 25 years after the regime change. Until 2012, the HCC did not approximate the strength of its first-year rulings, when the average strength of majority rulings peaked at 5.31 points. What could be the explanation for this unusually high level of strength?

Before considering the empirical evidence, it is worth mentioning that the political and institutional context of the regime change might have contributed to the strong rulings. On the one hand, the regime change brought about a new institutional setting, in which all players attempted to shape their specific role within the limits of the constitutional framework. The HCC was expected to guard the new regime against every possible majority in the legislature. To put it simply, the HCC set the limits and the "rules of the game" through decisions which interfered in the terrain of parliament. On the other hand, it followed from the nature of the regime change that the legislature needed to regulate fundamental rights and duties, which sparked sharp legal and political debates to be

settled by the HCC that was seen as an institution standing above the political parties. In short, the HCC attempted to establish its authority *vis-à-vis* the legislature by strongly intervening in its affairs. (Later in this section, it will be seen that the first President of the HCC, László Sólyom, was also a key factor in the early self-empowerment of the Court.)

The activism of the early Court is reflected by the extremely low share of rejections, but more apparently by the (restrictive) constitutional interpretations *in abstracto* regarding such important issues as privatization and land properties. The high level of this latter type of ruling remained important in the following years, too, but restricting the legislature through interpreting the constitution occurred only rarely in the following decades. A further characteristic of the strength of the early HCC is the relatively high level of rulings declaring substantive unconstitutionality. Although this type of ruling has been a recurring one for 25 years, in the first two years its proportion was above the average of the period analyzed in our research. However, it should be noted that already in its first year the HCC adopted a wide range of possible configurations of rulings. Beside rulings on substantial unconstitutionality at different strengths, the HCC developed a strategy in which legislative omission, procedural unconstitutionality and later constitutional requirement allowed the Court to weigh the level of influencing and constraining the legislature. Although the trends of the dissenting opinions will be analyzed in more detail later, it should be noted here that even if low in number, a few judges of the first Court would have even been more constraining towards the legislature than the majority.

After the first two years of the HCC, the strength of its rulings decreased somewhat and varied between more moderate intervals. However, it might be argued that in the first decade after the transition, the legislature, recognizing that the HCC is prone to constrain its room for manoeuvre, was actually constrained by a separation of powers between the two institutions. Thus, no especially strong rulings were needed by the HCC to keep the parliament between the limits set by the Court at the beginning of the 1990s.

1999–2000: the start of the post-Sólyom period

During the first decade after the transition, the HCC established its strong position *vis-à-vis* the legislature by making decisions that, albeit somewhat weaker compared to the first year analyzed above, allowed the Court to significantly constrain the legislature. The HCC became a key player in the Hungarian political system, often intervening in even the core issues of government policies. To name one of the most controversial, in 1995, invoking procedural as well as substantial standards, the HCC partly blocked the left-liberal government's austerity measures (the restrictive package of finance minister Lajos Bokros).

By the end of the decade, however, the composition of the Court had gradually changed. The mandate of the judges of the Sólyom Court terminated, and within an increasingly polarized political context, new judges were elected. As the election of the judges depends on a two-thirds majority, the Hungarian

parliament developed an informal strategy of nominating judges in pairs or larger packs, in which the blocks of the political spectrum had their own nominees and their election was guaranteed by reciprocity. Formally, this nomination process was about electing consensual judges; however, signs of polarization were apparent even in the period when the remaining old and some of the incoming new judges served together in the Court. For example, in 1999 the number of dissenting opinions rose dramatically and, after a brief setback in the next year, that new level became a new standard for the following years. While during the Sólyom era on average every tenth ruling was supplemented with a dissenting opinion, in 1999 that proportion rose to 27.5 percent, signifying a steady increase up to 70.7 percent by 2015. That change is remarkable, even if it might be supposed that during its first decade it was an obvious strategy on the part of the HCC to reduce the number of dissenting opinions in order to represent a strong constitutional court as homogenously as possible.

The changing patterns in the practice of the post-Sólyom Court first became apparent in 2000, when the HCC reached its lowest strength value in the whole period our research investigated. By the middle of the first (right-wing) Orbán government (1998–2002), the composition of the Court leaned to the left, while the total strength of the majority rulings was only 1.8 (a similarly low value occurred only in 2015 after the competences of the Court were curtailed significantly). The weak rulings might be explained by the fact that the Court decided about laws that were accepted by the previous left-wing parliamentary majorities and only four rulings concerned legislation of the current right-wing majority.

Examining the rulings themselves, however, the weak value is the result of their specific types. The share of rejections has never been higher than in that year. While the overall average of rejections for the 25 years is slightly below 40 percent, in 2000 68.8 percent of all rulings belonged to that type. It is important that among the relatively few rulings there was one constitutional interpretation *in abstracto*, which actually extended the legislative's room for manoeuvre (while no such ruling was made in either the previous or the following year). In addition, the share of the stronger types of rulings, such as omissions with stricter conditions and restrictive constitutional interpretation, decreased.

Thus, one might argue that the record low strength of the rulings in 2000 was due to the subject of the petitions (legislation from previous periods), the composition of the Court (a left-leaning majority) and the specific pattern of rulings, which taken together reflect a Court not friendly towards the government and which understood its own role as a passive player in the political system.

2012: the Court's last stand?

Except for 2006, when the value of the strength of the rulings hardly went over 2 points, for the next decade the practice of the HCC resembled the moderate years of the Sólyom Court, at least considering the average strength of the rulings. This does not mean, however, that the most frequent ruling types were also similar, as will be seen below.

The systemic change for the HCC was brought about by the parliamentary supermajority Fidesz-KDNP gained in 2010. Using its power, the governing party gradually transformed the Hungarian political system into a process that peaked (albeit by no means ended) in adopting a new constitution. The HCC was one of the first institutions of the Hungarian political system to be affected by the changes. First, the competences were curtailed, then the formal rules of nomination and the composition were changed. By 2013 the Court was packed with judges that were expected to be loyal to the ruling party, as some of them left the parliamentary group for a seat at the HCC.

It needs to be explained, then, how the year 2012 turned out to be the second strongest year of the HCC after the transition considering the average strength of its rulings (4.13), while the number of rulings was almost the lowest (20). Furthermore, in 2012 5 percent of the rulings involved extending constitutional interpretations *in abstracto*, which – according to our model – significantly reduces a year's average strength. Thus, it means that some of the rulings of that year meant especially strong constraint for the legislature. To begin with the opposite type, 5 percent of the rulings were restrictive constitutional interpretations – also over the 25-year average; no higher proportion of this type occurred after 2005. Furthermore, only in 1990 were fewer petitions rejected by the HCC; the 30 percent proportion in 2012 remains well below the average (43.9 percent) of the whole period. At the same time, the HCC adopted procedural standards in an almost unprecedented proportion to declare unconstitutionality. Again, only in 1990 did the proportion of that ruling type reach 15 percent, while the average was only 2.3 percent per year. Finally, it was the share of rulings declaring substantial unconstitutionality that strongly increased the yearly average strength.

Looking at the subjects of the rulings, it is apparent that the HCC affected the core issues of the right-wing government. To name only a few, the HCC made decisions about the provisional regulations of the new constitution (Fundamental Law), the laws on labour strikes, ethnic minorities, local government authorities and personnel of the judicial system.[19] The composition of the Court might serve as an explanation for the extraordinary performance of the Court in 2012. While there were a few new judges nominated and elected by government majority alone, these new members of the Court formed only a minority. The majority was, however, not homogeneous politically; there were right-leaning judges among them. The main cleavage in this year was between the old and the new, and the latter group seemed to defend the Court itself against the parliamentary two-thirds majority of Fidesz. By 2013, however, the new judges were able to form a majority, which resulted in significantly weaker rulings in the following years.

5.4.3 The role of the presidents

Usually, during their mandates presidents of constitutional courts shape the institution they lead.[20] In the Hungarian case, the competences of the President in

managing the HCC have always been strong. Regarding the President, the constitutional changes after 2010 brought about one significant modification: since then, the President has been elected by parliament and not by the judges themselves, as before. Therefore, the legislature now not only has a say in the composition of the Court but might influence its main directions and strategy in a more direct way. Presidents have informal competences as well. As already mentioned, it was an apparent strategy of the Sólyom Court to reduce the number of dissenting opinions to emphasize the role of the Court as a unified institution in the political system and not only as a random group of individual judges. Certainly, understanding different presidencies as different periods of the Court would be an overestimation of the Court's leadership. The composition of the Court is to some extent more important when it comes to the strength of the rulings. Furthermore, as the question here is how the legislature is constrained by the Court, the changing parliamentary majorities as well as the political background of the judges are also fundamental factors.

Considering these institutional and contextual factors, two main questions need to be addressed here. The first concerns the relative strength of the presidencies, while the second looks for any deviations between the strength of the rulings of the presidents and the Court's average. The first problem simply divides the examined period into more meaningful units than the yearly analysis. Explaining the second issue, however, might point to the individual characteristics of the presidents and their relations to the Court they led.

Following from the above analyzes, it is not surprising that the Sólyom Court had the strongest rulings. However, as mentioned earlier, contrary to the myths and superficial opinions, the difference between the Sólyom presidency and the subsequent Courts is far from striking (Figure 5.4). While the HCC led by László Sólyom had an average strength of 3.11 points, the following Németh Court had 2.52 points, and this value already includes the lowest value of the whole period. Similarly, it follows from the average of all majority rulings that

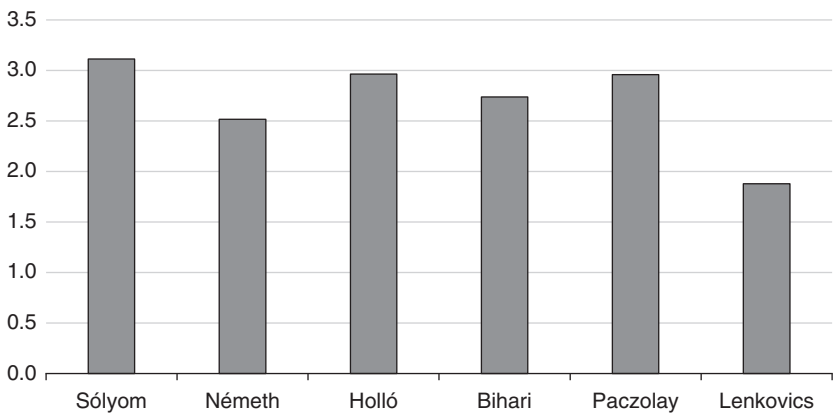

Figure 5.4 Average strength of rulings (by presidents) (HCC).

the second strongest Court was the one led by Péter Paczolay, which started before 2010 and ended in 2015. As has been shown, the second strongest year, what we have called the Court's last stand, fell under his term. The presidencies of János Németh, András Holló and Mihály Bihari varied between slightly above 2.5 points but under 3 points. Further differences will be seen below, however, related to the individual values of the presidents. Finally, the Court with the lowest value is the last one our research investigated. Once the judges elected solely by Fidesz secured the majority in the Court, under the presidency of Lenkovics the value decreased to 1.88 points.[21]

Turning to the second question, meaningful differences can be seen on closer inspection, since the presidents hardly diverged from the average of the whole Court. The reason for this might be either that the presidents were able to form and lead the majority of the judges and thus the Court's average represented the president's opinion, or that the presidents attempted to fit in with the judges (even if their average followed from polarized opinions). As the debates of the HCC are not public, there are no reliable sources to enable us to elaborate on these or further possibilities.

Starting with the differences between entire presidential terms and the majority averages of the Court, the highest value falls under the mandate of Mihály Bihari who – based on his dissenting opinions – proposed weaker constraints on the legislature by 0.30 points (Figure 5.5). In contrast, Péter Paczolay was a president of the HCC whose rulings would have been stronger than the majority average by 0.17 points. As these values do not imply significant deviations from the Court majority, it is worth looking at the same data on a yearly basis. From this aspect, it becomes apparent how the years with the highest average strength depended on the current presidents. The especially constraining early years of the Sólyom Court show no meaningful differences between the majority of the judges and the president. However, the other peak in 2012 shows that the sitting president, Péter Paczolay, started to differ from the majority opinion, and by 2015 the highest difference between the president and his court emerged. Presumably due to the increasing presence of the new judges elected solely by

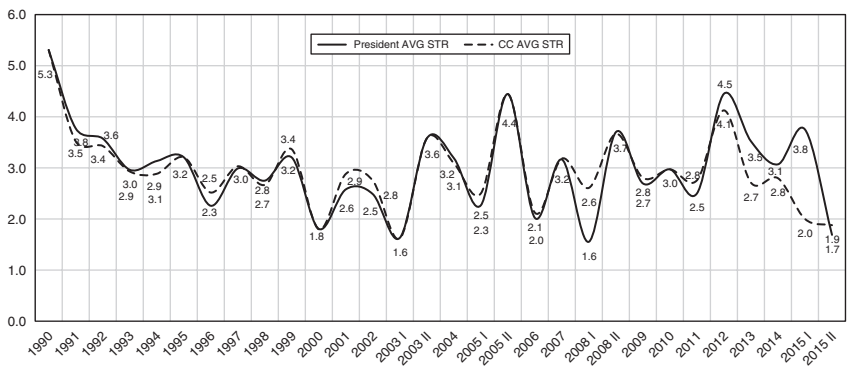

Figure 5.5 Average strength of rulings (by presidents and majorities) (HCC).

Fidesz, the president's rulings would have been constantly stronger (from 0.33 to 1.75 points). It is worth mentioning here that, before elected to the Court, in the 1990s President Paczolay served as a secretary of the HCC under Sólyom and even followed him to the office of the head of state when Sólyom was elected President of the Republic in 2005. As a contrast to these two presidencies, it was Mihály Bihari in 2008 who made the weakest rulings compared to the majority of the Court (–1.05 points).

Altogether, the presidents of the HCC were in line with the prevailing composition of the judges. According to our data and the contextual factors, this means that the presidents were able to establish a strong leadership which, however, was gradually but only weakly eroded due to the increasing polarization within the Court, which will be seen from the general trends in the dissenting opinions.

5.5 Trends in dissenting opinions

Whereas in the case of the HCC the strength of the majority rulings does not offer an unambiguous explanation for the 25 years our research investigated, it is worth looking closely at how the individual and minority opinions were formed. Analyzing dissenting opinions can explain the individual behaviour of judges. Within the framework of our research, dissenting opinions are signs of a possible weaker or stronger constraint on the legislature which, however, did not gain a majority among the judges. In the Hungarian case, sometimes it is possible to identify the political parties behind the nomination and election of a given judge, while in other cases it is possible to infer their political background (assessing media information or statements given by the judges themselves). Therefore, through dissenting opinions it becomes possible to compare their position to the position of the political party that supported a certain judge.[22] Furthermore, beyond individual behaviour, the inner dynamics of the Court also become visible, as judges often adhere to a dissenting opinion written by another judge; groups and coalitions and the strength of their proposed rulings thereby become measurable.

There is an obvious trend in the number of dissenting opinions. During its first years the Court was seemingly highly cohesive and published dissenting opinions very rarely. However, from 1999 on the number of rulings with at least one dissenting opinion increased more or less steadily (Figure 5.6). The next level of changes occurred after 2010, as the number of rulings with at least one dissenting opinion increased to more than 20 per year on average.[23] Additionally, the total number of dissenting opinions also massively increased: while in the first eight years of the Court there were altogether ten dissenting opinions per year on average, this increased to 38 dissents per year between 1999 and 2010 on average, and to 62 per year between 2010 to 2015 on average.

These trends might help also in discerning three different periods of the Court, namely the first period of the Sólyom presidency, the second or "post-Sólyom era" and a third one which started directly after the Fidesz gained a two-thirds parliamentary majority in 2010. This periodization is commonplace in Hungary,

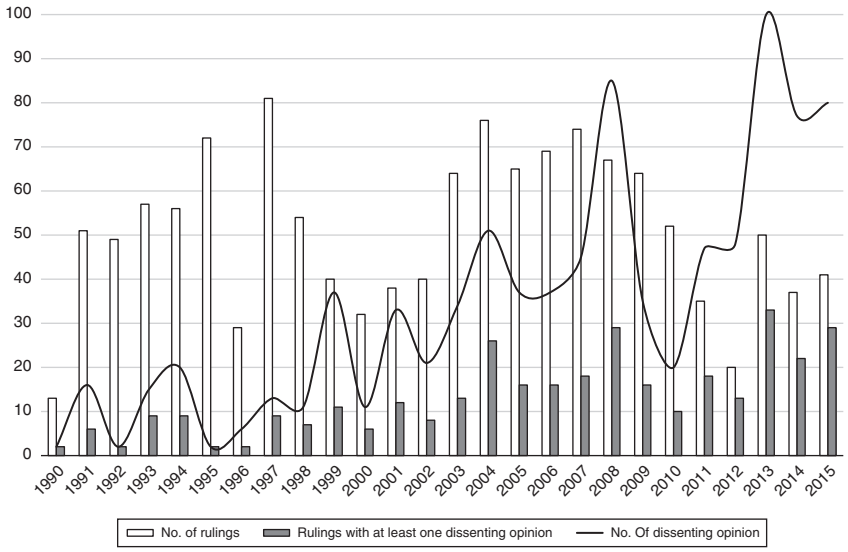

Figure 5.6 Number of rulings and dissenting opinions (HCC).

connected to the myth around the first president of the Court and partly based on the facts concerning the number of dissenting opinions presented above.

The trends in dissenting opinions reinforce that periodization. Their frequency differs significantly in the three periods. An increasing number of rulings were accompanied by dissenting opinions and the absolute number of them also increased. During the Sólyom presidency only 5–15 percent of the rulings were published with dissenting opinions; their overall average was 10.4 percent, the yearly average number being 5.3. Later, in the post-Sólyom era (1999–2009), 20–30 percent of the rulings were published with a dissenting opinion; the average was 27.2 percent and the average total number rose to 15.5. The steady increase in the number of dissenting opinions continued in the third period (2010–2015). Dissenters added their opinions to 50–70 percent of the rulings during those years, which means that more than half the rulings of the HCC were disputed (57.2 percent on average per year).

A possible explanation for this apparent increase concerns the interplay between internal and external factors. In the first period, it was the intention of the president to keep the number of dissenting opinions low. László Sólyom attempted to establish the HCC as a unified institution *vis-à-vis* other elements of the political system, which allowed the Court to become a powerful player. Recognizing this increase in power and authority, it became increasingly important for the parties to influence the Court by having their own nominees elected which, in turn, opened the way towards polarization exemplified by the increasing number and frequency of dissenting opinions. The HCC might have been underestimated in the early years of democracy; however, the Court played a key role in constraining

the legislature, at least partly due to the presence of many non-partisan judges. It came, then, as a backlash to the emerging power of the Court that political parties responded, while political polarization increased anyway. Although this explanation cannot account for all dissenting opinions, since increasing proportion and number of dissenting opinions might also be influenced by the increased number of judges after 2010, the overall trend is clearly related to the external political circumstances and cannot be reduced only to abstract constitutional and legal debates within the Court.

5.5.1 Judges clustered

The data allowed for determining the average strength of individual judges, which can be compared to the average strength of those majority rulings to which a judge did not add a dissenting opinion. Although the average value of the strength of dissenting opinions might obscure a few trends otherwise discernible in a yearly breakdown (to which we will return below), it might yet reveal something about the judges at the two extreme ends of the scale (Figure 5.7). Barnabás Lenkovics and Mária Szívós, to name two examples, were consistent in adding a dissenting opinion to the majority ruling only in cases when they would have rejected the petition, which means that they would not have constrained the legislature at all. Lenkovics's practice is especially interesting; as a constitutional judge from 2007, his dissenting opinions already suggested consistently fewer constraining rulings before 2010. All his dissenting opinions proposed a rejection. Mária Szívós proved to be similarly consistent, although she fulfilled her position only after 2010; her dissenting opinions suggesting rejection regarded legislative acts adopted by the same majority that elected her as a judge. At the other end of the scale, however, Ágnes Czine added a dissenting opinion to rulings in which she would have been more constraining against the legislature.

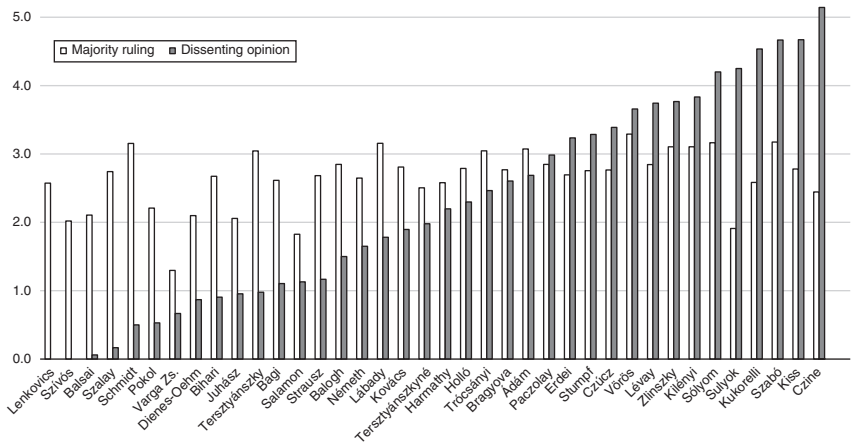

Figure 5.7 Average strength of rulings (by judges) (HCC).

Figure 5.8 shows the activity of the judges: their share and the strength of their dissenting opinions. It is clearly discernible that Mária Szívós was a dissenting judge in at least every fourth ruling in which she participated, and according to the strength of her dissenting opinions, she would not have constrained the legislature at all.

It is also apparent that judge Lenkovics expressed his disagreement with the majority more infrequently as he added a non-constraining dissenting opinion to only 8 percent of the rulings. Considering Figure 5.7 and Figure 5.8 together, a group of judges becomes visible who were elected after 2010 and added a non-constraining or almost non-constraining dissenting opinion to every fourth or fifth majority ruling. Within this group, however, there are significant differences regarding the absolute number of their dissenting opinions. Whereas Mária Szívós wrote 46 dissenting opinions and Egon Dienes-Ohm added 42 dissents to the majority rulings, András Varga Zs. participated in only nine rulings in which he disagreed the majority of the judges. The position of Ágnes Czine in Figure 5.9 reveals that she was a frequent dissenter when she was participating in a ruling in 2015; she consistently suggested a more constraining stance towards the parliament. However, it is the result of nine rulings altogether. It is also worth highlighting two judges sitting longer on the benches of the court: András Bragyova and László Kiss. Among the older judges, Bragyova dissented the most, and the absolute number of his dissenting opinions is clearly high (67). In his case, the yearly breakdown is also interesting: whereas in 2006, 2008 and 2010 he suggested fewer constraining rulings, from 2012 onwards his dissenting opinions were more constraining compared to the majority rulings. From the group of the older judges, László Kiss was especially active regarding the share of dissenting opinions (9 percent), and the absolute number of his dissents was

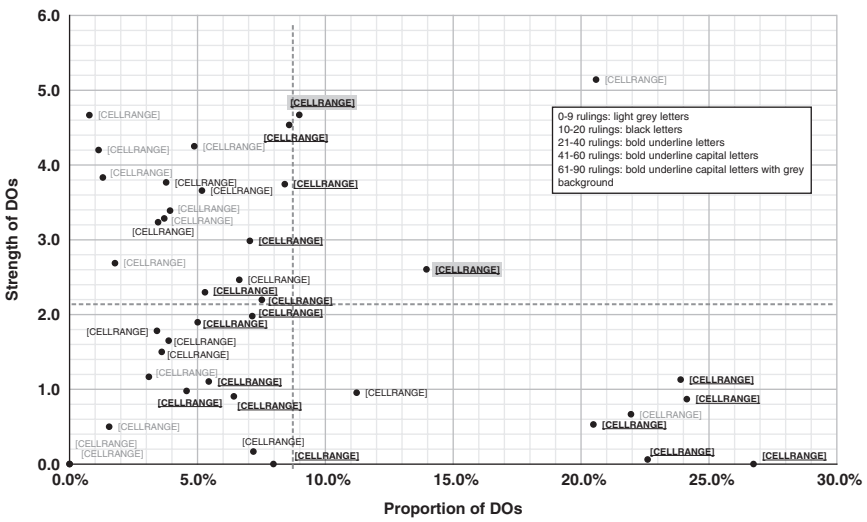

Figure 5.8 Proportion and strength of dissenting opinions (HCC).

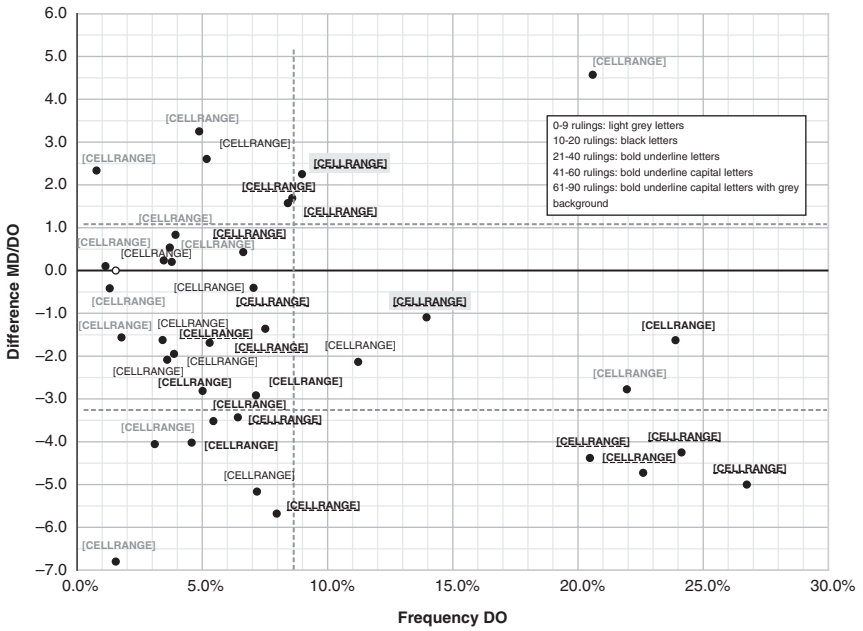

Figure 5.9 Average difference to majority rulings and frequency of dissenting opinions (HCC).

clearly the highest (82). László Kiss was the longest-serving judge, and the yearly breakdown of his dissenting opinions reveals an obvious pattern: whereas under right-wing governments (1998–2002) he suggested more constraining rulings in his dissents, under left-wing governments he would have been less constraining against the parliamentary majorities. Whether these data imply any relation to the actual majority that adopted the laws under review will be revealed by applying the attitudinal model in future research. Anyway, Figure 5.9 shows the difference between average strength of the majority ruling (zero value on the y axis) and the average strength of the dissenter's rulings (y axis), on the one hand, and the frequency of dissenting opinions by judges, on the other.

5.5.2 Network analysis

Dissenting opinions are sometimes formulated by one judge without having any other judges aligning with the dissent. Sometimes, however, judges make a coalition in publishing dissenting opinions. Figure 5.10 shows the complete network of 38 judges who served between 1990 and 2015 at the Hungarian Constitutional Court.[24] There were no completely isolated judges who formulated exclusively solo dissenting opinions. Each judge formed a coalition with another judge at least once. The thickness of the lines between judges shows the

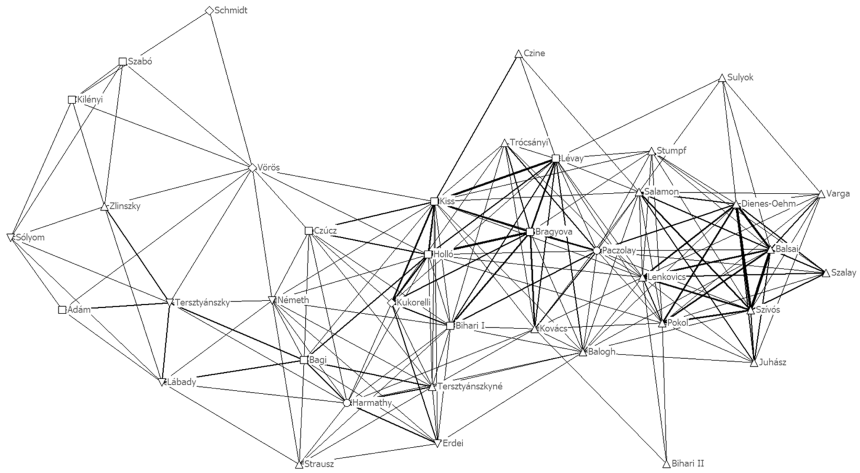

Figure 5.10 Dissenting coalitions 1990–2015 (HCC).

strength of coalition, while the size of the nodes indicates the total number of dissenting opinions formulated by the judge; the colour indicates the party which nominated the judge.[25]

On the left-hand side of the figure, judges from the first Court can be discerned. They formulated dissenting opinions quite rarely (very small nodes and thin lines between the judges). The only stable coalition seems to have been between Tamás Lábady and Ödön Tersztyánszky. In those few occasions when judges of the Sólyom Court published a dissent jointly (or formulated one with the same strength), they formed both "cross-party" and "one-party" coalitions, i.e. they joined with judges nominated by a different party as many times as to judges nominated by the party they had been nominated by. Imre Vörös wrote dissenting opinions with almost all other judges, but only very few with each judge. In sum, we could argue that "party affiliation" played no role in the issue of who judges formed dissenting coalitions with, and that judges of the first Court were less inclined to form dissenting opinions in any way.

On the right-hand side of the figure, we can find judges nominated exclusively by the right-wing party after 2010. They have strong ties among themselves, which means that they very frequently formulated dissenting opinions and formed coalitions exclusively with judges nominated by the same party (Szalay, Varga Zs., Dienes-Ohm, Balsai, Szívós and Juhász). Other right-wing judges nominated after 2010 are heavily connected to this core group but very rarely also formed a coalition with left-wing judges (Salamon, Lenkovics and Pokol). Furthermore, there are three outlier judges nominated after 2010 who formed a coalition, with either both right-wing and left-wing judges in balance (Tamás Sulyok and István Stumpf) or even more frequently with judges from a different political camp (Czine).

Judges elected between 1999 and 2010 are located between the two poles. Seemingly, four judges nominated by the left-wing parties (Holló, Lévay, Kiss and Bragyova) form a very strong and highly cohesive group. They published dissenting opinions pretty often and joined with each other quite frequently. Based on the dataset, we can also say that this core group had been established well before 2010, which means that party affiliation played a decisive role in their case before they strengthened their cooperation after 2010 in order to resist the pressure from outside (constitutional majority and government) and inside (new judges elected by the right-wing majority). Judges Bihari and Kukorelli also joined this core group several times (although they have somewhat looser ties to this inner circle).

Even more interesting are judges nominated by the right-wing parties between 1999 and 2010, since they have not constituted a cohesive group. Balogh, Kovács and Trócsányi have several connections almost in balance with left-wing and right-wing judges. A small, not very cohesive and not very strong group of judges is formed by Erdei (right-wing consensus), Tersztyánszkyné (right-wing), Harmathy (consensus), Strausz (right-wing) and Bagi (left-wing). Seemingly, this is a rather colourful group with several connections to a left-wing outlier (Bihari). Interestingly enough, among the left-wing judges it was István Bagi who joined predominantly right-wing judges when he formulated a dissenting opinion. Furthermore, it can also be seen that judges elected in consensus are willing to form a dissenting coalition with both sides, left-wing and right-wing judges.

As a general characteristic of dissenting opinions between 1990 and 2010, we can assess that (well before the Court had been packed with judges of the right-wing constitutional majority from 2010 on) partisan dissenting coalitions had become a regular phenomenon among some left-wing judges (Figure 5.11). This means that, in contrast to the Sólyom Court, the Court was not fully immune to partisan voting behaviour; a small group of left-wing judges showed a strong affinity to join

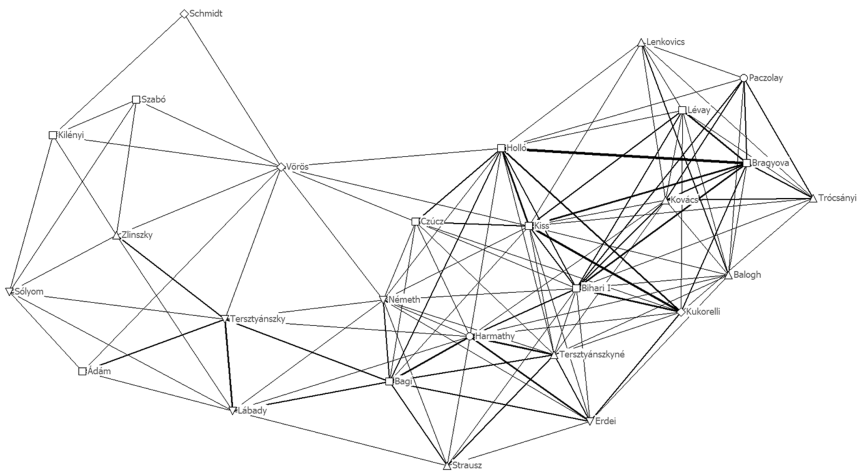

Figure 5.11 Dissenting coalitions 1990–2010 (HCC).

with other judges nominated by the same political camp. In contrast, such cohesive partisan behaviour was less discernible among right-wing judges sitting on the benches of the HCC between 1999 and 2010. This seems to be a new finding, since the general assessment of the Court reflects a different standpoint. According to the general evaluation of its pre- and post-2010 activity, the HCC worked quite well before 2010, and rulings and dissenting opinions did not reflect the "party affiliation" of judges. It was only after 2010 that the new judges showed consistent deference towards their nominating party. In contrast to this general account, we argue that partisan behaviour had been manifested before 2010 in dissenting opinions of a small group of left-wing judges, while right-wing judges were more immune to (even if not completely free from) this kind of judicial behaviour.

5.6 Conclusions

Although common knowledge suggested earlier that the Hungarian Constitutional Court was a strong and inexorable actor of the Hungarian political system, an in-depth analysis of the JUDICON dataset seems to disprove, at least partly, this general thesis. As the strength values of the rulings show, the HCC started its work with powerful "punches", but political players respected both the institution and the individual judges soon after the political transformation process. The rapidly emerging authority of the HCC was also fostered by the cohesive attitude of the Court itself: dissenting opinions were published only rarely and even when they did appear judges formed cross-party coalitions, which clearly contradicted the expectations of the attitudinal model of judicial behaviour. Due to this enormous authority, the HCC didn't have to make use of its strong "muscles", leading to a decrease in the strength of its rulings; with the exception of some years, these became stabilized for the rest of the time period under scrutiny. In general, we can argue that the HCC did not constrain the legislature very heavily.

On the other hand, political actors not only respected the Court but also realized that it had become a strong player on the political stage. Thus, it seemed worth influencing its practice by selecting and electing judges who were deemed to be more reliable in political terms. This led to the clear polarization of the Court well before the court-packing after 2010. Network analysis of the dissenting opinions reveals that the HCC gave up its cohesiveness and transformed itself into a court polarized in terms of political and ideological cleavages. Left-wing judges formed frequently strong dissenting coalitions before the shock of 2010.

However, the HCC's performance might also be evaluated from a third perspective, i.e. from the perspective of diversity of rulings. In this respect the HCC presented a unique practice, which is certainly one of the main findings of this chapter. While other courts of the region were not really engaged in softening or hardening their rulings, the HCC made use of its instrumentarium and produced a wide range of ruling types. The first Court was especially keen to say something, i.e. declare some kind of unconstitutionality, while dampening its provisions by relying on soft elements of rulings, such as constitutional requirements or legislative omissions, *pro futuro* and partial annulments. This might be read as

some kind of "constitutional dialogue", even if this term has been popularized in another way. Signalling that something went wrong but avoiding deep interference with the competences of the legislators, this strategy of the first Court seems to be more than obvious. Yet the heritage of the first Court is rather mixed. While the cohesiveness faded away over time, the practice of declaring highly diverse rulings survived the three waves of its transformations as far as its composition is concerned. In this regard, the HCC tried to be a constructive partner in a constitutional dialogue with the legislature, even in hard times when the legislative majority was rather interested in a political battle over the question of "who has the last say". Taking all these findings together, we can conclude that the general narrative of the political actors accusing the HCC of unduly entering the political field should be certainly revised. The HCC has been a constructive partner in correcting unconstitutionality, rather than a militant actor on the political stage.

Appendix

Table A.1 Frequency of ruling types III (in %) (HCC)

	CIIA – EX (n=22)	*REJ (n=582)*	*OM (n=129)*	*PROC (n=30)*	*CR (n=96)*	*SUB (n=426)*	*CIIA – RES (n=41)*	*Sum (in %)*
1990	0.0	0.3	0.8	6.7	0.0	1.4	4.9	**1.0**
1991	13.6	4.3	0.0	3.3	0.0	3.8	14.6	**3.8**
1992	4.5	4.0	1.6	0.0	0.0	5.2	2.4	**3.7**
1993	18.2	4.6	1.6	0.0	3.1	4.2	7.3	**4.3**
1994	0.0	4.5	3.1	0.0	7.3	3.8	7.3	**4.2**
1995	0.0	4.5	3.9	6.7	11.5	6.6	0.0	**5.4**
1996	9.1	1.7	3.1	0.0	5.2	1.9	0.0	**2.2**
1997	0.0	5.2	3.9	6.7	16.7	6.1	4.9	**6.1**
1998	9.1	4.0	3.1	0.0	8.3	3.8	2.4	**4.1**
1999	0.0	2.7	3.9	3.3	2.1	3.1	7.3	**3.0**
2000	4.5	3.8	1.6	0.0	0.0	1.4	2.4	**2.4**
2001	0.0	3.3	3.1	0.0	1.0	3.1	2.4	**2.9**
2002	0.0	3.6	2.3	3.3	0.0	3.5	0.0	**3.0**
2003	0.0	5.8	6.2	3.3	4.2	3.1	9.8	**4.8**
2004	0.0	5.3	8.5	3.3	3.1	6.1	9.8	**5.7**
2005	9.1	4.5	9.3	3.3	2.1	4.2	9.8	**4.9**
2006	0.0	6.4	7.8	10.0	1.0	4.2	0.0	**5.2**
2007	4.5	5.5	7.8	0.0	1.0	6.3	7.3	**5.6**
2008	4.5	4.6	7.0	13.3	1.0	5.6	2.4	**5.1**
2009	4.5	4.6	7.8	3.3	2.1	5.2	2.4	**4.8**
2010	0.0	4.3	3.1	3.3	2.1	4.7	0.0	**3.9**
2011	0.0	2.7	3.9	3.3	1.0	2.8	0.0	**2.6**
2012	4.5	1.0	0.0	10.0	0.0	2.1	2.4	**1.5**
2013	4.5	3.3	1.6	6.7	11.5	3.5	0.0	**3.8**
2014	9.1	2.4	0.8	0.0	8.3	2.8	0.0	**2.8**
2015	0.0	3.1	4.7	10.0	7.3	1.6	0.0	**3.1**
Sum (in %)	**100.0**	**100.0**	**100.0**	**100.0**	**100.0**	**100.0**	**100.0**	**100.0**

Notes

1 The Polish Constitutional Tribunal not only had an undemocratic origin but also lacked the competence to have the final say. The Communist parliament could override its decisions and even the democratically elected Sejm had this competence until 1997. The first fully democratically elected judges sat from 1993 in the Polish Constitutional Tribunal.
2 On the democratic transition in Hungary, see: Bozóki et al. ([1992] 2016) and Tőkés (1996).
3 On the inclination of the old elite to preserve its hegemony by creating new institutions or parachuting its members to old institutions, see: Ginsburg (2003, 19) and Hirschl (2004, 50).
4 Further competences included constitutional review of (1) international agreements, (2) legal regulations with respect to international agreements and (3) referenda processes. Furthermore, the HCC had the competence to dissolve local municipality councils in the case of their unconstitutional activity. Nevertheless, these competences are irrelevant from the perspective of our research project, since we are focusing on the legislative–judicial relations.
5 On the changes after 2010 in general, see: Sonnevend et al. (2015).
6 Before 2012 it was only the Head of the State; after 2012, the Head of the State, government and Speaker of parliament could file a petition.
7 On this process, see: Vincze (2014, 92). For a general overview of the critiques from various European organs, see: Kelemen (2017).
8 Though it is beyond the time frame of the present research, it is worth noting that, up to now, the last round of judge election in November 2016 turned out to be more consequential than previously, since the right-wing Fidesz lost not only several by-elections from early 2015 on but also its constitutional (two-thirds) majority in parliament. This implied that the governing party had to make a deal with the opposition to be able to elect new judges to the HCC. Due to vacancies, four new judges were elected in November 2016 with the support of the small (green) opposition party (LMP, Politics Could Be Different). This might bring fresh impulses into the Court, since all four judges came either from the academic sphere or higher courts. Whether this could lead to a rebalancing and (after a short deferential period) revival of the Court remains a question to be answered in the near future.
9 For recent assessments on the role of the court in democratic transformation, see: Lembcke and Boulanger (2012); Kovács and Tóth (2011, 185). For a personal account of the first president: Sólyom (2003).
10 For a general account, see: Schneider (2009). For recent trends of deconsolidation, see: Howe (2017).
11 On that question in general, most recently see: Daly (2017, 27–66).
12 See the path-breaking piece by Lee Epstein et al. (2001) on that hypothesis. For more recent accounts, see: Chavez (2008, 63); Ginsburg (2013, 47); and Smulovitz (2014, 731). For a more sceptical take on the issue, see: Gardbaum (2015, 307).
13 For data of other CEE countries, see comparative chapter (Chapter 9).
14 See also: Pócza et al. (2017).
15 On the German influence, see: Tatham (2013, 41–64).
16 On the "Karlsruhe astrology", see: Beyme (2002, 110) and Vissier (2014, 35).
17 In the theoretical literature this assumption is formulated by Shapiro (1999).
18 For a qualitative assessment of the dissenting opinions at the HCC, see: Kelemen (2018).
19 It is worth noting that in the previous year, similarly crucial issues were sent to the Court – media law, law on electoral process, law on churches – however, the

strength of the rulings was significantly lower. The explanation for this difference is that these latter issues were packed among many lesser ones, while in some important cases the Court restricted itself – all factors behind a weaker yearly average.

20 For the role of the presidents in general, see: Kelemen (2017).

21 It should be mentioned, however, that to keep to the time frames of the comparative research, we did not investigate the whole mandate of President Lenkovics.

22 For the methodology of assessing the party nominating the judges of the HCC, see: Pócza et al. (2017).

23 Number of rulings with at least one dissenting opinion: 1990–1998: 5.3 per year; 1999–2010: 15.5 per year; 2010–2015: 20.3 per year.

24 Two judges (Pál Solt and Géza Herczegh) never formulated DOs, since they were members in the very early years of the HCC when DOs were absolutely rare (and Pál Solt left the HCC after a few months to become the first President of the Supreme Court). Judge Mihály Bihari has been enumerated twice, since first he was nominated by the left-wing parties, but after having left the HCC in 2008 he was nominated once again, this time by the right-wing parties.

25 Red – left-wing nomination; pink – left-wing / consensus nomination; blue: judge nominated in complete consensus of left-wing and right-wing parties; light orange: right-wing / consensus nomination; orange: right-wing nomination.

References

Andrews, Josephine T. 2014. "Legislatures in Central and Eastern Europe". In *The Oxford Handbook of Legislative Studies*, edited by Shane Martin, Thomas Saalfeld, and Kaare W. Strøm, 647–675. Oxford: Oxford University Press.

von Beyme, Klaus. 2002. "The German Constitutional Court in an Uneasy Triangle between Parliament, Government and Federal Länder". In *Constitutional Justice East and West*, edited by Wojciech Sadurski, 101–118. The Hague/London: Kluwer Law International.

Bozóki, András, ed. 2002. *The Round Table Talks of 1989: The Genesis of Hungarian Democracy*. Budapest: CEU Press.

Bozóki, András, Körösényi András, and Schöpflin György, eds. ([1992] 2016). *Post-Communist Transition. Emerging Pluralism in Hungary*. London: Bloomsbury.

Bragyova, András. 2010. "Az alkotmánybíráskodás jövője". *Fundamentum* 1: 59–74.

Brunner, Georg. 2000. "Structure and Proceedings of the Hungarian constitutional Judiciary". In *Constitutional Judiciary in a New Democracy: The Hungarian Constitutional Court*, edited by Sólyom, László, and Georg Brunner, 65–102. Ann Arbor: University of Michigan Press.

Chavez, Rebecca Bill. 2008. "The Rule of Law and Courts in Democratizing Regimes". In *The Oxford Handbook of Law and Politics*, edited by Keith W. Whittington, 63–80. Oxford: Oxford University Press.

Daly, Tom Gerald. 2017. *The Alchemists: Questioning our Faith in Courts as Democracy-Builders*. Cambridge: Cambridge University Press.

Dezső, Márta, Bernadett Somody, Attila Vincze, Eszter Bodnár, Nóra Novaoszádek, and Beatrix Vissy. 2010. *Constitutional Law in Hungary*. Austin: Kluwer Law International.

Dupré, Catherine. 2003. *Importing the Law in Post-Communist Transitions. The Hungarian Constitutional Court and the Right to Human Dignity*. Oxford: Hart Publishing.

Epstein, Lee, and Shvestova, Olga. 2001. "The Role of Constitutional Courts in the Establishment and Maintenance of Democratic Systems of Government". *Law & Society Review* 35 (1): 117–164.

Gardbaum, Stephen. 2015. "Are Strong Constitutional Courts Always a Good Thing for New Democracies?" *Columbia Journal of Transnational Law* 53 (1): 286–320.

Ginsburg, Tom. 2003. *Judicial Review in New Democracies*. Cambridge: Cambridge University Press.

Ginsburg, Tom. 2013. "The Politics of Courts in Democratization: Four Junctures in Asia". In *Consequential Courts: Judicial Roles in Global Perspective*, edited by Diana Kapiszewski, Gordon Silverstein, and Robert A. Kagan, 45–66. Cambridge: Cambridge University Press.

Halmai, Gábor. 2002. "The Hungarian Approach to Constitutional Review". In *Constitutional Justice East and West*, edited by Wojciech Sadurski, 189–212. The Hague/London: Kluwer Law International.

Hirschl, Ran. 2004. *Towards Juristocracy. The Origins and Consequences of New Constitutionalism*. Cambridge: Harvard University Press.

Howe, Paul. 2017. "Eroding Norms and Democratic Deconsolidation". *Journal of Democracy* 28 (4): 15–29.

Kelemen, Katalin. 2017. "The New Hungarian Constitution: Legal Critiques from Europe". *Review of Central and East European Law* 42 (1): 1–49.

Kelemen, Katalin. 2018. *Judicial Dissent in European Constitutional Courts. A Comparative and Legal Perspective*. London: Routledge.

Körösényi, András, Csaba Tóth, and Gábor Török. 2009. *The Hungarian Political System* Budapest: Hungarian Center for Democracy Studies Foundation.

Kovács, Kriszta, and Gábor Attila Tóth. 2011. "Hungary's Constitutional Transformation". *European Constitutional Law Review* 7 (2): 183–203.

Lembcke, Oliver, and Christian Boulanger. 2012. "Between Revolution and Constitution: The Roles of the Hungarian Constitutional Court". In *Constitution for a Disunited Nation: On Hungary's New Fundamental Law*, edited by Gábor Attila Tóth, 269–299. Budapest: CEU Press.

Luchterhandt, Otto, Christian Starck, and Albrecht Weber, eds. 2007. *Verfassungsgerichtsbarkeit in Mittel- und Osteuropa*. Baden-Baden: Nomos Verlag.

Paczolay, Péter. 2010. "Nekünk az a feladatunk, hogy az alapjogok pártját fogjuk, és ne a társadalomirányítás általános szempontjait vegyük figyelembe". *Fundamentum* 1: 41–50.

Pócza, Kálmán, Gábor Dobos, and Attila Gyulai. 2017. "How to measure the strength of judicial decisions? A Methodological Framework". *German Law Journal* 18 (6): 1558–1586.

Prohacka, Radoslav. 2002. *Mission Accomplished. On Founding Constitutional Adjudication in Central Europe*. Budapest: CEU Press.

Sadurski, Wojciech, ed. 2002. *Constitutional Justice East and West*. The Hague/London: Kluwer Law International.

Sadurski, Wojciech, ed. (2008) 2014. *Rights Before Courts. A Study of Constitutional Courts in Postcommunist States of Central and Eastern Europe*. Dordrecht/New York: Springer.

Schneider, Carsten. 2009. *The Consolidation of Democracy*. London: Routledge.

Schwartz, Herman. 2000. *The Struggle for Constitutional Justice in Post-Communist Europe*. Chicago: University of Chicago Press.

Shapiro, Martin. 1999. "The Success of Judicial Review". In *Constitutional Dialogues in Comparative Perspective*, edited by Sally Kenney, William M. Reisinger, and John C. Reitz, 193–220. New York: MacMillan.

Smulovitz, Catalina. 2014. "Law and Courts' Impact on Development and Democratization". In *The Oxford Handbook of Empirical Legal Research*, edited by Peter Cane and Herbert M. Kritzer, 729–752. Oxford: Oxford University Press.

Sólyom, László. 2003. "The Role of Constitutional Courts in the Transition to Democracy. With Special Reference to Hungary". *International Sociology* 18 (1): 133–161.

Sonnevend, Pál, András Jakab, and Lóránt Csink. 2015. "The Constitution as an Instrument of Everyday Politics: The Basic Law of Hungary". In *Constitutional Crisis in the European Constitutional Area. Theory, Law and Politics in Hungary and Romania*, edited by Armin von Bogdandy, and Pál Sonnevend, 33–110. Oxford and Portland: Hart Publishing.

Tatham, Allan F. 2013. *Central European Constitutional Courts in the Face of EU-Membership. The Influence of the German Model in Hungary and Poland*. Leiden: Brill.

Tőkés, Rudolf. 1996. *Hungary's Negotiated Revolution*. Cambridge: Cambridge University Press.

Vincze, Attila. 2014. "Wrestling with Constitutionalism: The Supermajority and the Hungarian Constitutional Court". *ICL Journal* 8 (1): 86–97.

de Vissier, Maartje. 2014. *Constitutional Review in Europe: A Comparative Analysis*. Oxford: Hart Publishing.