

## How to Measure the Strength of Judicial Decisions: A Methodological Framework

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### Abstract

Although over the last thirty years an increasing number of scientific articles and books with diverse approaches have been published on the practice of constitutional adjudication, several methodological problems still prevail. The main deficiency of the systematic empirical research on constitutional adjudication consist in an unsophisticated dichotomous approach that separates the merely positive and negative decisions of constitutional courts, i.e. decisions that concluded in declaring the constitutionality or unconstitutionality of a given legislative act. This approach has been deeply inconsistent with the worldwide practice of constitutional adjudication, since the latter shows a widespread differentiation of judicial decisions over the last thirty years. In this study, we have elaborated a more sophisticated methodology for systematically mapping the manifold reality of constitutional adjudication, and measuring the strength of judicial decisions. In order to fit the research to reality, we have elaborated a scale to measure the strength of judicial decisions. This scale seems to be an appropriate tool to answer the main descriptive research question of our project: to what extent have decisions of constitutional courts constrained the legislative's room for maneuver? The present methodological paper focuses on the problem how to measure the strength of judicial decisions vis-à-vis the legislation and shows, by means of the first results of a pilot project, how this new methodology might be applied.

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## A. Introduction<sup>1</sup>

Over the last thirty years, the global spread of judicial review has been undoubtedly one of the most notable political developments—not only in Western countries, but all around the world.<sup>2</sup> After the 1989/1990 transition process, constitutional courts (CCs) have been established also in Central and Eastern Europe; however, their performance is widely varied. Some of them have played no more than a marginal role in the processes of democratization and democratic consolidation, while others were among the most important political actors in the new democracies of Central Europe. The evolution and practice of constitutional adjudication in Central Europe have been discussed by several path-breaking books<sup>3</sup> and volumes<sup>4</sup> analyzing the role of the CCs in the democratization process. However fundamental these works have been in mapping the theory and practice of constitutional adjudication in Central Europe, they fail to present a coherent and systematic empirical analysis of constitutional adjudication in Central Europe.

Most of these fundamental works have been either edited volumes without a well-defined and coherent methodological approach or exhibit weaknesses in referring to various illustrative examples as evidence of the proposed thesis. Incoherent methodological approaches and mere illustrative examples, however, are not sufficient for proving the hypotheses derived from theories of constitutional adjudication. Systematic empirical research on Central European constitutional adjudication is practically absent in this field.<sup>5</sup> Although the literature of legal studies extensively analyzes the position of Central European constitutional courts in the system of separation of powers, few systematic empirical studies have been conducted on the operation or functioning of these institutions. Projects which

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<sup>1</sup> The JUDICON research project has been supported by the Incubator Grant of the Hungarian Academy of Sciences (Centre for Social Sciences) and the Pázmány Péter Catholic University (Faculty of Humanities and Social Sciences KAP16-1.1-1.6 Grant). Homepage: [www.judicon.tk.mta.hu/en](http://www.judicon.tk.mta.hu/en)

<sup>2</sup> See ALEC STONE SWEET, *GOVERNING WITH JUDGES: CONSTITUTIONAL POLITICS IN EUROPE* (2000); RAN HIRSCHL, *TOWARDS JURISTOCRACY: THE ORIGINS AND CONSEQUENCES OF THE NEW CONSTITUTIONALISM* (2004); Tom Ginsburg, *The Global Spread of Constitutional Review*, in *THE OXFORD HANDBOOK OF POLITICS AND LAW* 81, 81–99 (Keith E. Whittington, R. Daniel Kelemen & Gregory A. Caldeira eds., 2008).

<sup>3</sup> See HERMAN SCHWARTZ, *THE STRUGGLE FOR CONSTITUTIONAL JUSTICE IN POST-COMMUNIST EUROPE* (2000); RADOSLAV PROCHÁZKA, *MISSION ACCOMPLISHED: ON FOUNDING CONSTITUTIONAL ADJUDICATION IN CENTRAL EUROPE* (2002); WOJCIECH SADURSKI, *RIGHTS BEFORE COURTS: A STUDY OF CONSTITUTIONAL COURTS IN POSTCOMMUNIST STATES OF CENTRAL AND EASTERN EUROPE* (2014); BENJAMIN BRICKER, *VISIONS OF JUDICIAL REVIEW: A COMPARATIVE EXAMINATION OF COURTS AND POLICY IN DEMOCRACIES* (2016).

<sup>4</sup> See WOJCIECH SADURSKI (ed.), *CONSTITUTIONAL JUSTICE EAST AND WEST* (2002); OTTO LUCHTERHANDT, et al. (Hrsg.), *VERFASSUNGSGERICHTSBARKEIT, in MITTEL- UND OSTEUROPA* (2007).

<sup>5</sup> *But see* BRICKER, *supra* note 3. As Bricker's work, however, focuses on the constitutionality and unconstitutionality of legislative acts, it cannot answer the question in the focus our own research: To what extent is the legislature constrained by the constitutional court?

consider, for example, the practice of constitutional adjudication in Hungary have a mainly philosophical character,<sup>6</sup> as they tend to use a normative approach and, with a few exceptions,<sup>7</sup> do not focus on the contextual analysis of the judicial practice. Thus, the systematic empirical research our project attempts to conduct faces a scant precedent in the Central European region.

Our comparative research project is certainly unable to fill this huge research gap. The project's particular research questions might, however, contribute to obtaining a more nuanced and, at the same time, more systematic picture of the practice of constitutional adjudication in Central Europe by measuring and comparing the practice of the courts.<sup>8</sup> Naturally, our empirical research does not intend to cover all the relevant questions in the field. Instead, we focus on one of the most important problems—namely, the relationship between the practice of constitutional adjudication and the legislation in Central Europe. Given the project's resources, the scope of the research should be narrowed down in this way to make it feasible. Nevertheless, the door is open for further research, including questions our project suggests and to apply the methodology elaborated here to other kinds of legal regulations.

Considering the novelties of the methodology, as well as its possible application to further research, the main goal of this paper is to give a detailed presentation of the methodology.<sup>9</sup> Developing a methodology to measure the decisions of the constitutional courts is the first step in a wider international research agenda.<sup>10</sup> The project consists of three main units: A methodological, a descriptive, and an explanatory part. In what follows, this article focuses

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<sup>6</sup> See KIS JÁNOS: ALKOTMÁNYOS DEMOKRÁCIA (2000); GYÖRFI TAMÁS, AZ ALKOTMÁNYBÍRÁSKODÁS POLITIKAI KARAKTERE (2001); TÓTH GÁBOR ATTILA: A SZÖVEGEN TÚL. ÉRTEKEZÉS A MAGYAR ALKOTMÁNYRÓL (2009).

<sup>7</sup> See CHRISTIAN BOULANGER, HÜTEN, RICHTEN, GRÜNDEN. ROLLEN DER VERFASSUNGSGERICHTE IN DER DEMOKRATISIERUNG DEUTSCHLANDS UND UNGARNS (2013); HALMAI Gábor, *In memoriam magyar alkotmánybíraskodás*, in FUNDAMENTUM 36–64 (2014); SZENTE Zoltán, *The Political Orientation of the Members of the Hungarian Constitutional Court between 2010 and 2014*, in CONSTITUTIONAL STUDIES 123–49 (2016).

<sup>8</sup> Selected Central and Eastern European countries included in the investigation are Albania, the Czech Republic, Germany, Hungary, Poland, Romania, and Slovakia.

<sup>9</sup> When presenting the methodology, we concentrate on the case of Hungary to be able to demonstrate all nuances of the methodological questions. Although some differences in selecting and appointing judges—or in determining the clear-cut cleavages between right-wing and left-wing political camps and governments—exist within the Central and Eastern European region, these variations might not prevent the adaptation of the methodology to other Central and Eastern European countries. There might perhaps be more grey zones in some cases, but they do not attenuate the relevance of the method.

<sup>10</sup> The JUDICON project involves researchers from seven countries: Albania, the Czech Republic, Germany, Hungary, Slovakia, Poland, and Romania. More details are available on the project's webpage: [www.judicon.tk.mta.hu/en](http://www.judicon.tk.mta.hu/en).

on the first of these, namely the question of how the strength of the decisions of constitutional courts can be measured. Although in the legal terminology, strength of a judicial decision seems to be a rather difficult concept to interpret; strength, as presented in this paper, shows the extent to which constitutional courts restrict another constitutional organ.<sup>11</sup> While all decisions of a constitutional court have the same legal binding force, they can reduce the scope of legislative activities to varying degrees. For example, in cases described as *formal unconstitutionality* in this paper, legislatures made “only” a procedural mistake during the adaptation of the bill. After correcting this procedural flaw of the legislative process, they might adopt the same law even with the same content. On the other hand, in cases of *substantive unconstitutionality*, the regulation should be changed substantively—for example, its content should be transformed to meet the criteria of constitutionality. In the second case, constitutional courts significantly narrow the scope of legislative activities because the court found the content, and not the way the bill has been adopted, unconstitutional. Consequently, a decision based on substantive unconstitutionality is stronger than one based on formal unconstitutionality because it might more heavily limit legislators’ room for maneuver. In the second part of the article, we apply the methodology to show how it fits to the attitudinal model of explaining the behavior of judges in constitutional courts. Lastly, we consider the benefits and limits of the proposed methodology.<sup>12</sup>

## B. Measuring the Courts’ Decisions: Sources in the Literature

Although over the last 20 years an increasing number of scientific articles and books with multi-faceted approaches have been published on the operation/functioning of constitutional courts and constitutional adjudication in Western Europe, several methodological problems and questions of the research on courts are still unanswered. Because Dyevre<sup>13</sup> and Hönnige<sup>14</sup> provide a general overview of state of the art political science research on constitutional courts, it is more expedient to briefly refer to the literature regarded as the sources and inspiration for our methodological approach.

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<sup>11</sup> Our research focuses on the relationship between constitutional courts and legislatures. Consequently, legal regulations that are relevant for the present research are laws adopted by parliaments. This does not preclude, however, the application of the methodology presented below in another study to examine—for example, the extent to which constitutional courts have limited the scope of governmental activity. Judicial decisions on government decrees might be also examined by using the methodology presented in this paper.

<sup>12</sup> Although this article is limited to the attitudinal model, we think the methodology may be applied to other models. We consider other ones, especially the strategic model as a possible next step for the wider research.

<sup>13</sup> See Arthur Dyevre, *Unifying the Field of Comparative Judicial Politics: Towards a General Theory of Judicial Behaviour*, EUR. POL. SCI. REV. 297–327 (2010).

<sup>14</sup> See Christoph Hönnige, *Beyond Judicialization: Why We Need More Comparative Research About Constitutional Courts*, EUR. POL. SCI. 346–58 (2010).

Scientific literature's main deficiency on constitutional adjudication is the unsophisticated dichotomous approach that distinguishes decisions of constitutional courts as merely positive or negative. Consider, for example, decisions that concluded in declaring the constitutionality or unconstitutionality of a given legislative act. This approach is, however, deeply inconsistent with the worldwide practice of constitutional adjudication, because over the last 30 years, the latter has shown a widespread differentiation of judicial decisions.<sup>15</sup> Interestingly, constitutional adjudication is decades ahead of empirical research on judicial behavior. Refined practices of constitutional adjudication are transcending the dichotomous constitutional/unconstitutional paradigm, which dominates the political science and legal research to date.

In elaborating a new approach, one more sophisticated in evaluating the *strength* of judicial decisions taken *vis-à-vis* the legislation, we were inspired first by Brewer-Carías' international research project<sup>16</sup> that aimed to describe the practices of various CCs considered *positive legislators*—as institutions which, to a certain degree, penetrate the jurisdiction or the legislative branch's field of competence. By means of an inductive approach, Brewer-Carías compiled a typology of the decisions of CCs considering their encroachment upon the competence of the legislation. Because Brewer-Carías' classification has a mere descriptive character, it is informative, but not appropriate for a political science analysis of the interaction between legislature and judiciary.

Even though American scholarship on judicial behavior is the most advanced, there have been no aspirations to analyze judicial decisions in a more differentiated way. Until most recently, American scholars also used the constitutional/unconstitutional dichotomy in their analysis of judicial decisions. Only Cass Sunstein's *One Case at a Time: Judicial Minimalism on the Supreme Court* (1999) turned the scholarly interest towards various possibilities judges could, or should, face in judicial decision making processes. We were greatly inspired by this book.

Because CCs are actors in the political field, theoretical approaches of the political science literature have also produced 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—the veto player theory, which also informed our research project—

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<sup>15</sup> For an illustrative overview over the differentiation of judicial decisions, see MAARTJE DE VISSER, *CONSTITUTIONAL REVIEW IN EUROPE: A COMPARATIVE ANALYSIS* (2014).

<sup>16</sup> See ALLAN BREWER-CARÍAS, *CONSTITUTIONAL COURTS AS POSITIVE LEGISLATORS: A COMPARATIVE LAW STUDY* (2013).

ignores the CCs as relevant political actors. According to the original form of this theory,<sup>17</sup> constitutional courts are not veto players in the political system “most of the time” because they are absorbed by other veto players. Despite this original reluctance, the veto player theory has been applied to analyzing the functioning of European CCs. Volcansek<sup>18</sup> and Hönnige<sup>19</sup> challenged Tsebelis’ rejection of considering CCs as veto players and demonstrated that, in contrast to Tsebelis’ view, CCs are indeed veto players most of the time. Although these studies accept that legislatures are able to, and sometimes do, absorb the veto power of CCs, their empirical analysis has concluded that this is an exceptional, rather than normal, situation. Our research project is in accordance with the latter scholars in arguing that the CCs of Central and Eastern Europe might be taken into account as veto players depending above all on the political environment. Whether they are absorbed most of the time, or are real veto players can be demonstrated only in light of the results of the empirical data from the later phases of our research. The question of the diversity and magnitude of various veto powers—thus varieties of judicial decisions—emerged also in the criticism of the veto player theory.<sup>20</sup> Although Ganghof’s remarks are revealing, they do not provide a systematic framework for the classification of the strength of a veto power and, consequently, a scale of the strength of judicial decisions *vis-à-vis* the legislation cannot build on them. Because they are fragmentary and unsatisfactory, we have to elaborate a scale which can differentiate among veto acts of constitutional courts in terms of their intensity.

De Visser’s recent and highly valuable comprehensive publication takes into account the process of differentiating judicial decisions.<sup>21</sup> Though this work seems to be the most reflective—reckoning with the multi-faceted practice of constitutional adjudication in Europe—and we embrace most of its insights, our research project fills some gaps remaining prevalent after de Visser’s descriptive-illustrative empirical work. Our research project began in the way de Visser marks out, but we create a systematic, empirical study based on a new methodology. Consequently, we have elaborated a scale to measure the strength of judicial decisions and scrutinize not only illustratively, but systematically, how courts of the Central and Eastern European region have used their power.

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<sup>17</sup> See GEORGE TSEBELIS, *VETO PLAYERS: HOW POLITICAL INSTITUTIONS WORK* (2002).

<sup>18</sup> See MARY VOLCANSEK, *CONSTITUTIONAL POLITICS IN ITALY* (2000).

<sup>19</sup> See CHRISTOPH HÖNNIGE, *VERFASSUNGSGERICHT, REGIERUNG UND OPPOSITION. DIE VERGLEICHENDE ANALYSE EINES SPANNUNGSDREIECKS* (2007).

<sup>20</sup> See Steffen Ganghof, *Promises and Pitfalls of Veto Player Analysis*, *SWISS POL. SCI. REV.* 1–25 (2003).

<sup>21</sup> DE VISSER, *supra* note 15, at 309.

Most recently, Bricker empirically and systematically examined four different courts' adjudication practices in the Central and Eastern European region. His study,<sup>22</sup> however, adopts a methodological approach that fails to answer our descriptive research question about the extent to which constitutional courts have constrained legislation. Because Bricker simply differentiates between decisions which uphold a legislative act—constitutionality—and which abrogate it—unconstitutionality—the methodological approach his book applies seems to avoid the most pressing question of our research project.

Finally, the methodological approach we apply in this study has been strongly inspired by the practice of the Hungarian Constitutional Court (HCC), and even more by the first HCC president's reflections on the first ten years of constitutional adjudication in Hungary.<sup>23</sup> László Sólyom's synthesis has been a very useful guide not only for analyzing the practice of the HCC, but also for elaborating our methodology for measuring the strength of judicial decisions.

### C. Strength of Judicial Decisions

After surveying the strengths and weaknesses of the relevant literature, we aimed to elaborate a methodological framework that offers a sophisticated tool for measuring the strength of constitutional courts' decisions. According to our methodology, the main part of decisions is not evaluated dichotomously—constitutional/unconstitutional—but measured on a scale that allows for a more nuanced consideration of the strength of the judicial decisions. It is important to note that by measuring the strength of judicial decisions, we definitely intend to avoid measuring the impact of a judicial decision. The term “strength,” as used in this paper, might be best described with a boxing metaphor: Measuring the strength is measuring the power of a punch and by no means what kind of impact this punch had on the other boxer. It is not considered whether this opponent could side-step or has been only a little shaken, in spite of the fact that it was a very strong punch. To put it briefly, strength is not measured by the intensity of the impact of a decision.

Keeping this in mind, we have discerned all judicial decisions in three components, as seen in Table 1. A judicial decision consists of: (A) An operative part of the decision, which is the most important part of the decision because it prescribes something by declaring a law constitutional or unconstitutional; (B) a prescription if a law<sup>24</sup> has been found

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<sup>22</sup> BRICKER, *supra* note 3, at 62.

<sup>23</sup> See SÓLYOM LÁSZLÓ & GEORG BRUNNER, *CONSTITUTIONAL JUDICIARY IN A NEW DEMOCRACY: THE HUNGARIAN CONSTITUTIONAL COURT* (2000).

<sup>24</sup> After detailed consideration, within our framework, we only consider laws, while lower level regulations—for example, decrees—or court decisions are excluded because they would exceed the scope of the research.

unconstitutional declaring how unconstitutionality might or should be corrected, it formulates guidelines or directives which legislations should transform into a law; (C) justification, or reasoning, constitutes an important part of the decision. Although justification is considered a highly important element of a judicial decision, our research project focuses on the first two components because they reflect the court's most important activity—for instance, making some kind of decision.

A. Operative part	I. Ruling	(Ia) rejection or refusal	(Ib) unconstitutionality by legislative omission	(Ic) procedural unconstitutionality	(Id) constitutional requirement	(Ie) substantive unconstitutionality	(If) constitutional interpretation <i>in abstracto</i>
	II. Completeness	(IIa) qualitative partial annulment		(IIb) quantitative partial annulment		(IIc) complete annulment	
	III. Timing	(IIIa) pro futuro		(IIIb) ex nunc		(IIIc) ex tunc	
B. Prescription	IV. Prescription	(IVa) no prescription	(IVb) non-binding prescription.		(IVc) directive		(IVd) binding prescription
C. Justification	V. Justification	(Va) minimalist			(Vb) maximalist		

Table 1: Components and Elements of Judicial Decisions

### I. Ruling

A decision of the constitutional court might contain several rulings, which might differ on the ground the law has been found (un)constitutional on. It might declare a refusal or rejection, unconstitutionality by legislative omission, procedural unconstitutionality, interpretation in harmony with the constitution or constitutional requirements, substantive unconstitutionality, or constitutional interpretation in abstracto.

#### I.a. Refusal/Rejection

Motions might be *rejected* because the legal regulation under review is completely in accordance with the constitution. They might be refused, however, also without substantive court investigation due to inadmissibility or by referring to the political question doctrine. The process of the CC might be suspended, which—for the sake of our research project—might be considered equal to a refusal, except when the CC determines some constitutional requirements to be respected by the legislation.<sup>25</sup>

<sup>25</sup> Refusals will be coded only if there is a dissenting opinion—for example, the judge claims that the constitutional court should have decided the case on its merits—because refusals are mainly based on technical arguments—for

*I.b. Unconstitutionality by Legislative Omission*

Unconstitutionality might emerge but also by legislative omissions. Legislative omissions might be caused by total inactivity of legislation and by imperfect or insufficient legislation. Declaring unconstitutionality on this ground is, however, a mild form of ruling because the constitutional court does not annul any acts of parliament and only calls upon the legislature to regulate something which is not regulated at all—or is regulated in an imperfect or insufficient manner.<sup>26</sup>

*I.c. Procedural Unconstitutionality*

Procedural unconstitutionality means all court rulings which abrogate a law because of the procedural legislative failures. Procedural unconstitutionality refers only to the legislative process and not to the substance of legislation. In this case, there is a possibility for the legislature to pass the bill a second time with the same or highly similar substance. Unconstitutionality means, in this sense, the violation of procedural rules, but not the violation of the formal principles of rule of law.<sup>27</sup> This category includes cases of inaccurate

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example, the court could not deal with the case due to some formal deficiencies. In controversial cases, there will certainly be a dissenting opinion arguing that the court should have dealt with the case on its merits.

<sup>26</sup> One might argue that finding an omission is a more severe interference with the competencies of legislation, therefore some clarification is needed for why we conceive unconstitutionality by legislative omission as a mild form of ruling. First of all, we have to stress that a decision based on legislative omission does not concern the legal system in force—for instance, it does not annul any of the existing legal norms. Furthermore, even if the court assessed an omission, but does not propose any solution to how unconstitutionality might be corrected, the legislature is not under direct pressure to act at all. If the court's decision does not contain any threat or possible sanction—which is usually the case in Central and Eastern European countries—the legislature might simply neglect or disregard the ruling of the court, and status quo might be preserved. In this case, the court simply suggested legislative action, but if it doesn't want to change the status quo nothing will change. This is why we argue that a ruling which found a statute unconstitutional by referring to legislative omission does not really compel the legislature to act. By contrast, constitutional requirements and, certainly even more, substantive unconstitutionality means that status quo will be automatically changed by the decision of the court.

<sup>27</sup> We know that sometimes it is quite difficult to make an unambiguous distinction between procedural/formal unconstitutionality and substantive unconstitutionality. The term rule of law might serve as a transition point between formal unconstitutionality and substantive unconstitutionality. We have considered that we should include any principle and connotations derived from the rule of law that do not exclude a repeated adoption of the legislative regulation with the same substance as a procedural unconstitutionality. Eventually, we decided, however, to code all references to the principle of rule of law or any derivation of it—like accessibility, clarity, calculability, necessary time provided for preparation to comply with the new law, legal certainty and taboo of retroactivity—as substantive unconstitutionality. At the end of the coding process, we will return to these special cases and re-evaluate them one by one in order to clarify whether the decision based on the principle of rule of law excluded a repeated adoption of the legal regulation with the same substance. A further problem emerges

legislative processes—like violation of the procedural rules of legislation, violation of the principle of the hierarchy of legal sources, omission of the prescribed consultation in the legislative process, or omission of a substantive debate in the legislative process.

*I.d. Constitutional Requirements*

While formally upholding a law, judges might have ample room for maneuver in constraining the legislature by two means: First, by judicial interpretation in harmony with the constitution; and second, by determining constitutional requirements—either for the courts or for the legislature. To some extent, constitutional requirements in the operative part of a decision substantially broaden the regulation under constitutional review without annulling any of its parts. By giving guidance or directives for the legislature, the court is expanding the text of the law under review and consequently turns it into a positive legislator. Constitutional requirements or interpretation in harmony with the constitution is suitable, however, for both taking a particularly weak or strong decision—which constrains the legislative branch—seriously or just barely. This means that the court might be a mild or a very rigorous positive legislator.<sup>28</sup>

*I.e. Substantive Unconstitutionality*

Substantive unconstitutionality constrains legislatures more significantly than any previous forms of decisions because it imposes some substantive barrier on the legislation. Declaring a law unconstitutional based on its content and disharmony with some rulings of the constitution is a very strong decision, which implies high levels of constraints on the legislation. Consequently, the room for maneuver of the legislature will be considerably narrowed down.

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concerning the taboo of retroactive legislation in the context of democratic transitions. Because sensible questions of transitional justice definitely collide with this fundamental principle of rule of law, procedural/formal unconstitutionality based on the taboo of retrospective legislation might have a highly restrictive effect on legislation in times of democratic transition. This is why decisions implying conflicts between the principles of the transitional justice and the rule of law should be very carefully analyzed.

<sup>28</sup> Because our research aims to analyze judicial decisions quantitatively, we have simply focused on the presence or absence of constitutional requirements and have not evaluated the strength of these requirements one by one. Further qualitative investigation will be needed to refine the picture regarding the strength of these constitutional requirements. At this phase of the project, we are focusing on the formal presence of constitutional requirements.

*I.f. Constitutional Interpretation in abstracto*

An even stronger constraint on the legislative branch, and the constituent power, is constitutional interpretation *in abstracto*.<sup>29</sup> Constitutional interpretation *in abstracto* means that the CC has been asked to explain and, consequently, expand the text of the constitution in the operative part of its decision. Because the operative part of a decision usually contains only rulings like rejecting, refusing, suspending or annulling, all other forms of rulings—which do not rule, but explain and thereby extend the text of the constitution—are equal to a constitution writing process. Constitutional interpretation *in abstracto* means expanding the constitution's text, making the constitutional court not merely a positive legislator, but a constituent power (*pouvoir constituant*). The court undertakes constitution-making, even if it is an implicit rather than explicit process. Because legislative majorities are usually not equal to supermajorities—and the constitutional court fulfills, in this case, the role of the constituent assembly or the *pouvoir constituant*—these decisions might be regarded as meaning the strongest constraints of the legislative.<sup>30</sup> Constitution-making means that the room for maneuver of the legislature is heavily

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<sup>29</sup> Beyond the German Federal Constitutional Court, no court in Western Europe has the competence to declare an abstract and binding interpretation of constitution without reviewing a law filed to the court. By contrast, this kind of constitutional adjudication is not unknown in Central Europe although even courts in Central and Eastern Europe have rarely been asked to exercise it. For this, see HÖNNIGE *supra* note 19, at 132; SADURSKI *supra* note 3, at 23. Binding constitutional interpretations are not only advisory notes in the justifications of a decision, but they are included into the operative part of judicial decisions and they shouldn't be confounded with preliminary reference procedure of the ECJ. For an example, see Alkotmánybíróság (AB) [Constitutional Court] 21/1996 (Hung.), [http://hunconcourt.hu/letoltesek/en\\_0021\\_1996.pdf](http://hunconcourt.hu/letoltesek/en_0021_1996.pdf).

<sup>30</sup> At first glance, it might not be obvious why we are arguing that constitutional interpretation *in abstracto* corresponds to constitution-making or writing. The idea, and problem, that constitutional courts might be, not only positive legislators, but actors of constitution writing processes, has been developed in the legal scholarship in connection to the heavily discussed problem of unconstitutional constitutional amendments. Constraining the constituent power by judicial decisions means certainly that the court vindicates the right to be an integrative part of a composite body assumed as *pouvoir constituant*. Also, the concept of post-sovereign constitution-making, as presented by Andrew Arato, hints to the constitutional courts emerged as powerful actors to fill in the gaps and deficiencies of a transitory constitution. In several countries—and especially in Hungary and in South Africa—prominent actors of these post-sovereign constitution making processes were constitutional courts. Both of these directions of constitutional theories consider, however, either all forms of the activity of constitutional courts in general, or they narrow down the problem to the concept of unconstitutional constitutional amendment. In contrast to these trends, we argue that including lengthy and detailed interpretation of constitutional norms and concepts into the operative part of a judicial decision is clearly an expansion of the text of the constitution. Because the operative part of a decision is undoubtedly legally binding, while the status of justifications is contested in this regard, we argue that binding interpretation of the constitution included into the operative part is equivalent to constitution-making. To this question, see Andrew ARATO, POST SOVEREIGN CONSTITUTION MAKING: LEARNING AND LEGITIMACY, (2016); ALEC STONE SWEET, *Constitutional Courts*, in THE OXFORD HANDBOOK OF COMPARATIVE CONSTITUTIONAL LAW, 826 (Michael Rosenfeld & András Sajó eds., 2012); Hans VORLÄNDER: *Deutungsmacht—Die Macht der Verfassungsgerichtsbarkeit*, in DIE DEUTUNGSMACHT DER VERFASSUNGSGERICHTSBARKEIT, 20 (2006).

limited—because amending the constitution usually requires a supermajority that only rarely coincides with the legislative majority.

## *II. Completeness*

Judicial decisions pertain to legal regulations or legal norms. Although it might be uncertain whether a legal norm is contained in one sentence, in an article or in several interconnected articles of a statute—or even of several statutes—we embrace the legislature's position and assume that the legislature either included all relevant norms concerning a policy issue in a statute or it took reference to other statutes which are interconnected. By assuming this position, we argue that complete annulment means that all paragraphs of a statute have been quashed. Nevertheless, a judicial decision very rarely annuls all sections of a statute and it is more common that only certain parts of it will be quashed.

Furthermore, we distinguish between qualitative and quantitative partial annulment. Qualitative partial annulment of the norm might be best grasped as a negative constitutional requirement.<sup>31</sup> Determining a negative constitutional requirement, in practice, means that the CC found the law—or a paragraph/section/some words of a law—unconstitutional as far as the norm or legislative act might have an interpretation which is unconstitutional. There might be, however, some other interpretation of the same norm or legislative act that is in harmony with the constitution. Consequently, though the CC annulled the norm—law or any part of the law—the legislation might find a solution by adopting the same law or part of the law by explicitly excluding its unconstitutional interpretation. This is why this kind of ruling is only partial: The ruling of the CC intends to exclude only some kinds of interpretation of the law or part of the law, some part of the possible meanings of the law, but no other kinds of interpretation of the law.

In contrast to qualitative partial annulment, quantitative partial annulment means that not only a certain interpretation of some parts of the law, but all possible interpretations and meanings of that part of the law are unconstitutional, while the constitutional court annuls only one or some part(s)—paragraph, section, some words—of the law. In this sense, quantitative partial annulment is more complete than qualitative partial annulment because the law might remain in effect, given the possibility of its unconstitutional interpretation is excluded from the text of the law. Quantitative partial annulment thus means that the constitutional court annulled a part of the law, but only a part of it. Complete annulment, in turn, means that all paragraphs of the law have been annulled.<sup>32</sup>

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<sup>31</sup> As for the term qualitative/quantitative partial annulment, see DE VISSER, *supra* note 15, at 314.

<sup>32</sup> The initial results of the research point out that in Hungary, as opposed for example to Germany, qualitative partial annulment is not a regular decision in the Constitutional Court's practice, which usually considers whether the law should be completely or only partially annulled irrespective of possible interpretations. The comparative aims of the project, however, required the introduction of the category of qualitative partial annulment.

### III. Timing

The timing of the annulment is a further element of all judicial decisions which affects the strength of judicial decisions and consequently the room for maneuver of the legislation. Since *pro futuro* judicial decisions may grant a transitional period, in which the legislature's goals might have been temporarily effectuated, this type of decision seems to be a compromise and has a less dramatic effect on the legislation. This is not the case with *ex nunc* decisions, and even less in the most radical form of decisions (*ex tunc*). While an *ex nunc* decision comes into effect immediately, leaving no room for the legislator, an *ex tunc* decision annuls a law retroactively, which means an especially strong encroachment on the legislative.

### IV. Prescription

As for the prescription determined by the courts, judges have quite a wide range of options: They can formulate recommendations, directives, or constitutional requirements; they can anticipate what kind of legislative acts might prove to be unconstitutional in the future; and they can also prescribe detailed regulation on remedies for unconstitutionality. Because prescriptions vary according to their legal force, or binding effect, it is reasonable to discern four categories reflecting the variegation of prescriptions. Prescriptions which are placed in the operative part of a judicial decision have a clear-cut, legally binding effect—binding prescription—and are functionally equivalent to a constitutional requirement in the operative part of the decision.<sup>33</sup> Both prescriptions or directives in the operative part and constitutional requirements expand the text of the law under review, and consequently, the court becomes a positive legislator by giving a prescription or a constitutional requirement. By contrast, prescriptions in the justification or reasoning have a less settled status concerning their legal effect—non-binding. Prescriptions in the headnotes (*Leitsatz*)<sup>34</sup> of the decision have an ambiguous legal effect: They are more constraining than prescriptions in the justification, but less than prescriptions in the operative part of the decision or directive. Furthermore, several decisions contain no prescription at all—no prescription.

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<sup>33</sup> Binding prescription (IVd) and constitutional requirement in the operative part of the decision (Id) are essentially the same. The only difference is that while the constitutional requirement does not formally annul the law, a binding prescription is a decision that annuls the law.

<sup>34</sup> The comparative aims of the research required the introduction of the headnote category—or, in case of the German constitutional court, *Leitsatz*—although in some cases, such as in Hungary, decisions of the constitutional court do not include such summaries.

### V. Justification

This part of the decision might contain highly complex arguments, but our research project focuses on the operative part of the decision, along with prescriptions provided by the court. Justifications are considered in only two respects: First, whether they contain any kind of prescriptions, and secondly, *prima facie* whether they contain any innovative creation of a new right which might heavily constrain the legislation.

The first four elements—namely ruling, completeness, timing, and prescription that are the focus of our research project—might be considered options from which a judge or the constitutional court make a decision. A decision results from a mixture of the chosen elements. We will check the presence/absence of all four elements rigorously in each relevant decision because even the absence of an element indicates the strength or weakness of a judicial decision.

We are aware of the fact, however, that certain combinations of these elements are not applicable at all—in cases of unconstitutionality by legislative omission (Ib), completeness (II) and timing (III)—because no legal norm has been annulled, which is a precondition for referring to the completeness or timing of the annulment. Also, declaring a constitutional requirement in the operative part of the decision or declaring a constitutional interpretation *in abstracto* imply that completeness and timing are not applicable because no sections of the law have been annulled. Annulment is required to be able to check for the completeness and timing of the annulment.

Constitutional requirement in the operative part of the decision and constitutional interpretation *in abstracto* imply that we cannot consider prescription at all. This is firstly because constitutional requirements are functionally equivalent to prescriptions that expand the text of the law under review, as explained above. Constitutional interpretation *in abstracto*, by contrast, expands the text of the constitution; thus, we cannot consider it as a prescription. Beyond these specific cases, the coding process all the four elements of a decision listed above should be checked one by one in four steps.

To set up the calibration of the strength of judicial decisions, not only do we have to detect and check these four elements of judicial decisions, but we also have to weigh these elements against each other because they do not constrain the legislation to the same extent. Therefore, we had to specify some principles that guide the rational for weighting the decisions of the constitutional court.<sup>35</sup>

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<sup>35</sup> See Table 2.

## D. Weighting the Elements of Judicial Decisions

### I. Ruling

It is obvious that the most important part of a judicial decision is its ruling. The range of the scale extends from decisions that reject the motion—without deciding on the merit of the case—or simply find the law constitutional, on the one end of the scale, and decisions in which the constitutional court becomes constituent power—constitutional interpretation *in abstracto*—on the other end. There are different types of decisions between these two extremes. The relative weight might be determined according to the following relations.

(Ia) Rejection does not constrain the legislature at all. [0.00]

(Ib) Unconstitutionality by legislative omission merely declares that the legislation must adopt a new regulation, but does not constrain the legislation regarding the substance of regulation. [+0.50]

(Ic) Declaring the procedural unconstitutionality of a legal regulation implies that the regulation will be annulled but only due to some procedural mistakes in the legislative process. [+1.00]

(Id) Constitutional requirements constrain more the legislation than the declaration of procedural unconstitutionality because the CC becomes a positive legislator and the substance of the regulation will be altered while upholding the law under review [+2.00]

(Ie) Declaring substantive unconstitutionality implies that the substance of the legal regulation has been flawed to a degree that the CC could not rectify the unconstitutionality by stretching the text of the law under review—for example, determining a constitutional requirement—but it has to abrogate the legal regulation. The guiding principle is that any form of substantive unconstitutionality should be regarded as a stronger decision than any other decision based on procedural unconstitutionality or constitutional requirement. Therefore, the weakest combination of substantive unconstitutionality should always be regarded as stronger than the strongest form of procedural unconstitutionality.<sup>36</sup> [+6.00]

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<sup>36</sup> The strongest form of procedural unconstitutionality consists of procedural unconstitutionality (Ic) + complete annulment (IIc) + ex tunc timing (IIIc) + binding prescription (IVd), which gives 5 points in sum (1+1+1+2). The weakest form of substantial unconstitutionality consists of substantive unconstitutionality (Ie) + qualitative partial annulment (IIa) + pro futuro timing (IIIa) + no prescription (IVa), which means 6 points in sum (6+0+0+0)

(If) Constitutional interpretation *in abstracto* (CIIA) is regarded as the strongest constraint on the legislature. This is why CIIA must be at least as strong as the strongest decision declaring substantive unconstitutionality [+10,00].<sup>37</sup> It is, however, of utmost importance to remark that CIIA does not always constrain the legislation. CIIA might sometimes extend the room for maneuver of the national legislator *vis-à-vis* other political actors. In this case, the constitution will be expanded in a way highly favorable for the legislation. This is why we have to make a clear difference between highly constraining CIIA, on the one hand, and highly permissive CIIA on the other hand. Consequently, CIIAs should also be evaluated case-by-case. [either +10,00 or 0.00]<sup>38</sup>

### II. Completeness

The question of whether the CC annulled the legal regulation totally—complete annulment—partially—quantitative partial annulment—or it had merely excluded some meanings of a legal term—qualitative partial annulment—is certainly not as important as the ruling or a prescription. Thus, we had to add less weight for the strongest form of completeness than for the strongest form of prescription and the ruling. This is how qualitative partial annulment is weighted as the weakest form [0], quantitative partial annulment as a middle-range [0.5], and complete annulment as the strongest form [+1].

### III. Timing

Timing should be considered as important as completeness if we compare the four elements of judicial decisions. Timing is certainly less important than the prescription and even less than the ruling. Hence, the weight of the three categories are as follows: Pro futuro [0], ex nunc [0.5], and ex tunc [+1].

### IV. Prescription

Because courts might to some extent replace legislation by determining binding prescriptions, this fourth element—along with its functional equivalent constitutional requirement—must be the second most important and weightiest element of a judicial

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<sup>37</sup> The strongest form of substantive unconstitutionality consists of substantive unconstitutionality (Ie) + complete annulment (IIc) + ex tunc timing (IIIc) + binding prescription (IVd) which means 10 points in sum (6+1+1+2).

<sup>38</sup> In cases of utmost permissibility, the constitutional court might explicitly broaden the legislature's room for maneuvering. As our research, however, focuses on the extent to which the constitutional court constrains the legislature, we decided not to use negative values and a dedicated scale to evaluate decisions that broaden the legislature's room for maneuvering. Because constitutional interpretation *in abstracto* is a weapon only rarely used by constitutional courts, qualitative analyses might help to determine what broadening in these cases actually means.

decision, after declaring the substantive unconstitutionality of a legal regulation. Weights of prescriptions vary according to their placement in the decision: Non-binding is placed in the justification which has a rather uncertain legal effect [+1]; directive is placed in the headnote—if there is such a thing in the decision—the legal status of which is still uncertain but it might clearly be regarded as a stronger element [+1.5] than prescriptions in the justification. The strongest prescription is placed in the operative part which has a legal binding effect [+2.00].<sup>39</sup>

A. Operative part	I. Ruling	(Ia) Rejection or refusal [0]	(Ib) unconstitutionality by legislative omission [0.5]	(Ic) procedural unconstitutionality [1]	(I.d) constitutional requirement [2]	(I.e) substantive unconstitutionality [6]	(I.f) constitutional interpretation <i>in abstracto</i> [10]
	II. Completeness	(IIa) qualitative partial annulment [0]		(IIb) quantitative partial annulment [0.5]		(IIc) complete annulment [1]	
	III. Timing	(IIIa) pro future [0]		(IIIb) ex nunc [0.5]		(IIIc) ex tunc [1]	
B. Prescription	IV. Prescription	(IVa) no prescription [0]	(IVb) non-binding prescription [1]		(IVc) directive [1.5]	(IVd) binding prescription [2] <sup>39</sup>	
C. Justification	V. Justification	(Va) minimalist			(Vb) maximalist		

Table 2. Weighting of the elements of judicial decisions

### E. Using the Methodology with the Attitudinal Model

To reveal the benefits and weaknesses of the proposed methodology, we present a possible empirical application of it. In this illustrative evaluation of the strength of the decisions of the CC, we use the attitudinal model that explains the behavior of judges according to the position of their nominating parties. The relation, however, between the position of the judges and the nominating parties in an issue under review is not binary—that is, it is not mere conformity what our research is looking for, but rather closeness between judges and parties measured by the scale that our methodology proposes.

<sup>39</sup> As noted earlier, we regard binding prescription (IVd) and constitutional requirement in the operative part of the decision to have the same weight.

We tested our methodology with the attitudinal model on the case of Hungary. According to earlier research and studies,<sup>40</sup> the attitudinal model might explain the background of the judges of the constitutional court in this country, at least after the 2010 elections. Furthermore, the Hungarian two-block party system that existed until 2010 seems to be a suitable context in which judges' decisions can be linked to political parties.

To apply and operationalize our methodology, a few research decisions had to be made and the necessary data had to be gathered. We had to identify: (1) The political parties that nominated the judges; (2) the position of the nominating parties regarding the respective decisions of the constitutional court; (3) the units of analysis; and (4) the relevant time periods in which the model could be applied. These steps and decisions will be presented in the following section of the article.

### *1. Identifying the Party Nominating the Judges*

Elections of judges of CCs vary widely in Central and Eastern Europe.<sup>41</sup> The nominating party of a judge cannot always be founded on hard evidence such as an official nomination document or statements either from the judges or the parties. Because clear identification of the judges' nominating party is lacking, we use three different sources to confirm the available partial information. In all countries included in the research, we will check these sources to determine the nominating party of the judges. To illustrate this process, this Article analyzes the Hungarian case.

**Committee meetings:** Of the two parliamentary committees—standing and ad hoc—involved in the nomination process in Hungary, only documents of the meetings of the standing committee on constitutional affairs are available. The ad hoc committee, which usually, and effectively, previously decided on the nomination, did not publish any documents except for a formal proposal on the judges. The hearings of the standing committee were therefore formal introductions of the nominees, followed by a few remarks and—rarely—questions from MPs. After the hearings, voting took place by which the committee members made a formal proposal to the plenary session. Voting behavior in the committee, however, does not say anything about political positions because voting is usually unanimous and is constrained by the agreement made in the ad hoc committee.

**Media sources:** Although the media often proves to be an unreliable source when it comes to covertly stated political linkage between judges and parties, reports on the nomination

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<sup>40</sup> See HALMAI, *supra* note 7; SZENTE, *supra* note 7.

<sup>41</sup> See generally HÖNNIGE, *supra* note 19.

process usually contain background information about political affiliation. The information gathered from the media might, however, be incomplete or even contradictory.

*Interviews:* To get more reliable and complete information, we have conducted interviews with former members of the Constitutional Court's senior staff. With the help of the interviews, we identified judges nominated by left or right wing parties or who were elected consensually.

In the last step, we compare parliamentary information, media sources, and the interviews to determine the judges' political position in terms of their nominating political groups. In several cases, it will be possible to determine the parties, while in others, only the relevant political bloc—right wing or left wing—will become known. To use the same levels and the same categories, judges will be identified as left or right wing judges or elected in consensus.

### *II. Party Position and the Nominating Party's Parliamentary Voting Behavior*

As our research intends to match the political position of the judges of the HCC and that of their nominating parties, we need to map the voting behavior in parliament regarding legal regulations involved in the review process of the HCC. Voting behavior has been treated along parliamentary groups. Parliamentary majority and minority positions, in turn, determined whether the CC in its decisions was close to any political position formulated in parliament. To identify the relationship between a decision of the HCC and a bill passed in parliament, we always refer to the latest amendments of a bill, or its relevant section. That is, even if a bill was introduced by a rightist government, for example, but amended by a later leftist majority, we compared the last version in force to the decision of the CC. Voting behavior in parliament, eventually, will be identified as leftist, rightist, or consensual in case parties on both sides voted for it.<sup>42</sup>

### *III. Units of Observation*

A judicial decision might contain several rulings concerning various parts of different legal regulations. Consequently, we disaggregated all judicial decisions into several rulings, if a decision consisted of various rulings. For example, its Decision 47/2009<sup>43</sup> the Hungarian Constitutional Court first held that:

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<sup>42</sup> It must be noted that it was impossible to identify political positions related to the laws passed by the pre-1990 communist parliament.

<sup>43</sup> Alkotmánybíróság (AB) [Constitutional Court] 2009.IV.21. 47/2009 (Hung.).

In the application of Section 12 para. (3) of the Act XXIII of 1992 on the Legal Status of Public Servants, it is a constitutional requirement based on Article 59 and 60 of the Constitution that the deed of oath should not contain any data referring to the public servant's conviction of conscience or religion.

Ruling 1 is a constitutional requirement. As a second ruling, the HCC rejected in the same decision, "the petitions aimed at establishing the unconstitutionality and the annulment of Section 12 and Section 13 para. (2) of Act XXIII of 1992 on the Legal Status of Public Servants." Consequently, Ruling 2 of this decision was a rejection. As a third ruling in the same decision, it terminated "the procedure aimed at the posterior review of the unconstitutionality of Sections 31/A-31/F of Act XXIII of 1992 on the Legal Status of Public Servants," which means that Ruling 3 of this decision was a suspension. As a fourth ruling, it refused in the same decision "the petition aimed at establishing the unconstitutionality and the annulment of Section 13 para. (1), Section 65 para. (2) item d) and Section 102 para. (8) of Act XXIII of 1992 on the Legal Status of Public Servants, and it refused other petitions as well." This means that Ruling 4 of this specific decision of the HCC was a rejection.<sup>44</sup>

As for the descriptive part of our research, disaggregating decisions into rulings would be sufficient because, in this way, one could determine which rulings—and which judges—constrained legislation and to what extent. Nevertheless, to use the attitudinal model requires something more: To check the position of judges with their respective nominating parties, we had to disaggregate our data even more because one ruling of a decision might refer to various legal regulations, which might imply various voting behaviors of the parties in the parliamentary voting procedure.

Take for example Decision 33/2013 of the Hungarian Constitutional Court<sup>45</sup> which includes only one ruling—rejection of the petition of a lower court judge—on several legal regulations, which should have been found unconstitutional according to the petitioner. This one ruling referred to nine different legal regulations,<sup>46</sup> and consequently several parliamentary voting behaviors with three different types of voting patterns of the parties.

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<sup>44</sup> We posited as a general principle that rulings—for example, units of observations—will be defined by the court. For instance, if the court embraces various legal regulations into one ruling and decides on this bunch of legal regulations by declaring them unconstitutional in one ruling, we do not disaggregate this ruling. We assume that the court had good reasons to deal those legal regulations in a bunch.

<sup>45</sup> Alkotmánybíróság (AB) [Constitutional Court] 2013.XI.22 AK 33/2013 (Hung.)

<sup>46</sup> Alkotmánybíróság (AB) [Constitutional Court] 2013.XI.22. AK 33/2013 (Hung.) had one ruling, which referred to nine different legal regulations. The HCC rejected the petition aimed at establishing the unconstitutionality and the annulment of Section 2 paragraph (1) and (2), Section 6 paragraph (3) item c) and d), Section 267 paragraph (1)

Various sections and paragraphs of this complex law on the criminal procedure were adopted by various coalition of parties in parliament. For example, Section 2, paragraph (1) and (2) of 1998 Act XIX on Criminal Procedure were adopted exclusively by the right-wing parties in parliament on December 18, 2001. Section 6, paragraph (3), items c) and d) of the same Act—which were reviewed and equally rejected by the HCC in one and the same ruling—were modified, however, exclusively by the left-wing parties on February 13, 2006. Furthermore, Section 416, paragraph (1), item c) of the same Act was modified on April 2, 2007 with a coalition of all parties, which means that parliament adopted this third modification in total consensus. In its Decision 33/2013<sup>47</sup> the HCC reviewed and declared one ruling on these three Sections, which had completely different provenience—voting behavior in parliament.

As one ruling of the HCC concerns three different parliamentary voting behaviors, we had to disaggregate this one ruling of the HCC into at least three different cases if we wanted to check the proximity of the position of judges to the position of their nominating parliamentary parties. This kind of disaggregation is not always necessary because rulings of judicial decisions often concern only legal regulations which had been adopted by the one and the same parliamentary majority. Nevertheless, we always checked whether legal regulations concerning one ruling had been adopted by the same or by various coalitions of parliamentary parties. This is how we identified the cases, which served as units of observation: A unit of observation is a single decision in a ruling of the Constitutional Court which can be linked to a single —part of a—law adopted by a right-wing or left-wing majority, or a consensus of parliament.<sup>48</sup>

#### *IV. Periods Analyzed*

To test our methodology with the attitudinal mode, we singled out three periods in the history of the Hungarian Constitutional Court and analyzed one year of these respective periods.

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item j), Section 332 paragraph (1) item d), Section 373 paragraph (1) item c), Section 399 paragraph (1), and Section 416 paragraph (1) item c) of 1998 Act XIX on Criminal Procedure (Hung).

<sup>47</sup> Alkotmánybíróság (AB) [Constitutional Court] 2013.XI.22. AK 33/2013.

<sup>48</sup> It should be noted that in some cases a law can be linked to more legislative acts when the law in question consists of parts that require simple majority and other parts that require a supermajority. Appropriately, these cases need to be disaggregated into separated units of observation.

1995: Activist court under the presidency of László Sólyom, with 5-4 left-wing majority under a left-wing supermajority in parliament.

2004: A more restrained court after the Sólyom-era, with 6 left-wing, 3 right-wing judges, and one elected by a parliamentary consensus. In parliament, the left-wing parties possess a narrow majority.

2013: After 2010, the competences of the Constitutional Court were curtailed. Fidesz enjoyed a constituent supermajority in parliament. The court consisted of 12 right-wing, 4 left-wing judges, and one elected by consensus.<sup>49</sup>

#### *V. Results*

In accordance with the attitudinal model of judicial behavior, we expected that judges' positions would always be closer to their nominating party: That right wing judges would tend to take stronger decisions against left wing legislations, and conversely, left wing judges' decisions would be stronger against right wing legislative regulations.<sup>50</sup> Because we applied an interval scale, we expected to set up a ranking among judges showing which of them has been stronger against left wing or right wing legislations.

The number of relevant cases in 1995 and in 2004 are significantly lower than for the year 2013.<sup>51</sup> The difference in numbers is striking even if we take into account that there were five parliamentary sessions with right-wing majority until 2013—parliamentary term 2010-2014—while there were two and four parliamentary sessions with left wing majorities until 1995 and 2004 respectively—parliamentary terms 1994–1998 and 2002–2006.<sup>52</sup> Also, it is

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<sup>49</sup> It should be noted that four members of the Sólyom-court were elected by the outgoing communist parliament. There are three minor practical difficulties we faced which should be mentioned before proceeding to the evaluation of the data. In 2004 one judge, nominated by the left-wing parties, did not participate in any decisions which concerned right wing legislation. Both in 2004 and 2013, there was one judge who had been nominated originally in a complete consensus of all parties, which makes it impossible to bind them to any political groups. In 1995 there were four judges who had been elected right before the first free election in 1990, which makes their party affiliation more ambiguous than any others. Beyond these difficulties, the data for all three years—1995, 2004, and 2013—are complete and the evaluation can be executed.

<sup>50</sup> During the test phase of our research, we did not separate rulings of the Constitutional Court that are politically relevant from other, politically less significant cases. Certainly, highlighting decisions that are politically significant can be a valid research strategy that might serve as a suitable starting point for further research.

<sup>51</sup> 1995: 42 relevant cases—10 right wing legislation and 32 left wing legislation; 2004: 45 relevant cases—11 right wing legislation and 34 left wing legislation; 2013: 80 relevant cases—68 right wing legislation and 12 left wing legislation.

<sup>52</sup> It should be noted that at the start of a parliamentary term, the Constitutional Court decides on legislations adopted by previous parliaments and by earlier majorities. The number of decisions of the CCs concerning the bills adopted by a previous parliamentary term decreases by advancing within the parliamentary term. In turn, the

apparent that in comparison with the years 2004 and 2013, there are only few dissenting opinions in 1995, which means that the strength of individual judicial decisions showed scant variability among judges in 1995.<sup>53</sup> The HCC under the Sólyom presidency voted almost entirely consistently; no serious differences can be identified among the judges. Furthermore, it is also more than obvious that the average strength of the decisions taken by the HCC in 1995 is considerably higher than in 2004 or in 2013.<sup>54</sup> This might reflect the fact that the Sólyom court was more rigorous and generally constrained the legislation more intensively than did the following courts. These results might underpin the general view that the Sólyom court played a decisive role in the early days of Hungarian democracy.

Considering the differences between the group of left wing and right wing judges, the years 1995 and 2004 show little variance.<sup>55</sup> Both groups took almost as strong positions against left wing legislation as against right wing legislation. In 2013, the differences are, however, more than obvious. Although both groups took considerably stronger decisions against right wing legislation than left wing legislation, left wing judges were almost twice as strong as right wing judges considering right wing legislation. At first glance, it is also surprising that in 2013, right wing judges took three times stronger decisions against right wing legislation than against left wing legislation—which clearly contradicts the expectations of the attitudinal model. One should, however, keep in mind that this preliminary evaluation considered all relevant decisions and did not select the politically salient and highly important issues. The explanation of this result should certainly consider the political blindness of this pilot project.

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number of cases concerning legislation of the actual parliamentary term increases approaching the end of the actual term.

<sup>53</sup> Dissenting opinions in the years analyzed: 1995: 2; 2004: 51; 2013: 100.

<sup>54</sup> The strength of the decisions of the HCC in the respective years, weighed average of left- and right-wing decisions taken together: 1995: 3.62; 2004: 3.28; 2013: 2.66.

<sup>55</sup> See Figure 1.

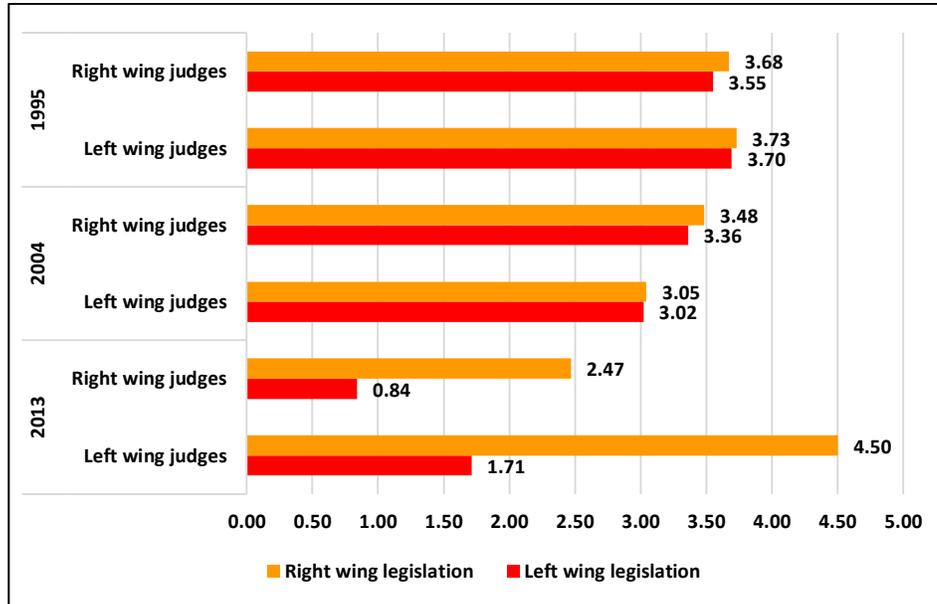


Figure 1: Average strength of judicial decisions in 1995, 2004 and 2013 (aggregated)

As we can see in Figure 1, over time left-wing judges became more permissive towards left-wing legislation and oscillated in their decisions toward right-wing legislation, whereas right-wing judges were weaker in their decisions toward both left- and right-wing legislation. Whether these figures might be transformed into tendencies is not yet known, but it will be clear after we have coded and evaluated all decisions of the HCC from 1990 to 2015. It should be stressed, however, that, at this stage of the research, we do not argue that these data form any kind of trend over time. This evaluation will simply present how the methodology and the database might be used.

Disaggregated data in Appendix 1 shows that beyond the apparent similarities between the years 1995 and 2004, serious differences might be detected on the level of individual judges' behavior. While in 1995 (see Figure 1), six out of nine judges took balanced decisions and only L1, L4 and L5 took diverging decisions concerning left wing (LW LEG) and right wing legislation (RW LEG), in 2004 (see Figure 2), six out of ten judges' decisions show clear variance depending on whether the decisions concerned left wing or right wing legislation. Consistency, however, is missing in that respect in 2004—for example, some right wing judges (R1, R2) took stronger decisions against right wing legislation, which clearly contradicts the attitudinal model, while a third one (R3) was more balanced with slightly stronger decisions against left wing legislation. The same is true for the left wing judges in 2004: L1, L2, and L6 took stronger decisions against right wing legislation—consequently confirmed the attitudinal model—others (L4, L5) were inclined to punish their own side—for instance, they were more repressive against left wing legislation.

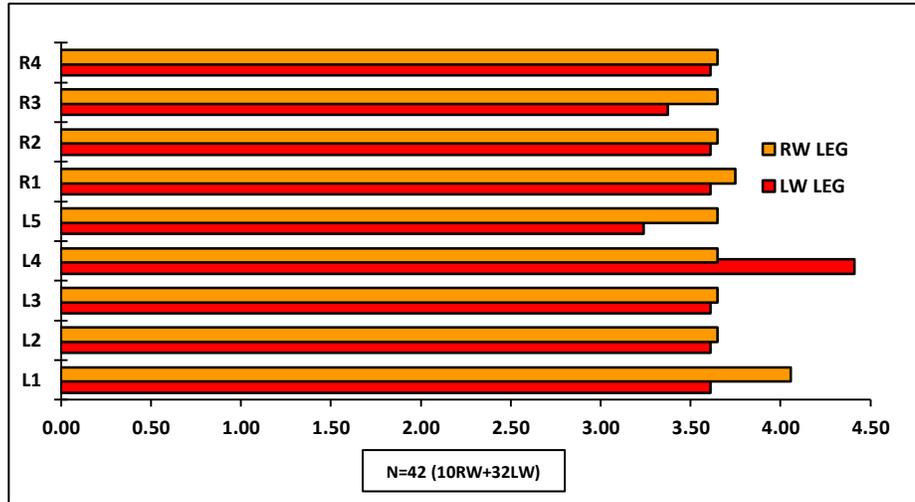


Figure 2: Average Strength of Judicial Decisions in 1995 (disaggregated)

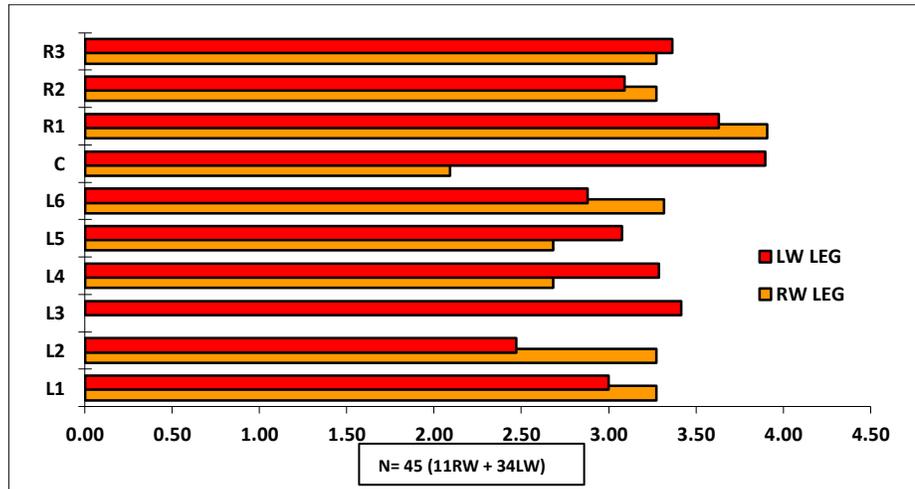


Figure 3: Average Strength of Judicial Decisions in 2004 (disaggregated)

The picture is even more complicated if we consider the year 2013 (see Figure 4). On the one hand, the results show that left wing judges took stronger decisions against right wing legislation, therefore they were in line with the attitudinal model. On the other hand, right wing judges did not prefer right wing legislation because all of them punished the legislation of their nominating party more than left wing legislation. Surprisingly enough, the most punitive judge concerning right wing legislation was also a right-wing judge (R1).

Nevertheless, we should underline once again that these results are based on an inclusive case selection—for example, we did not weight the political relevance of the cases before the court. Another evaluation, based on a case selection reckoning with the political importance of the cases, might bring a different result in this respect.

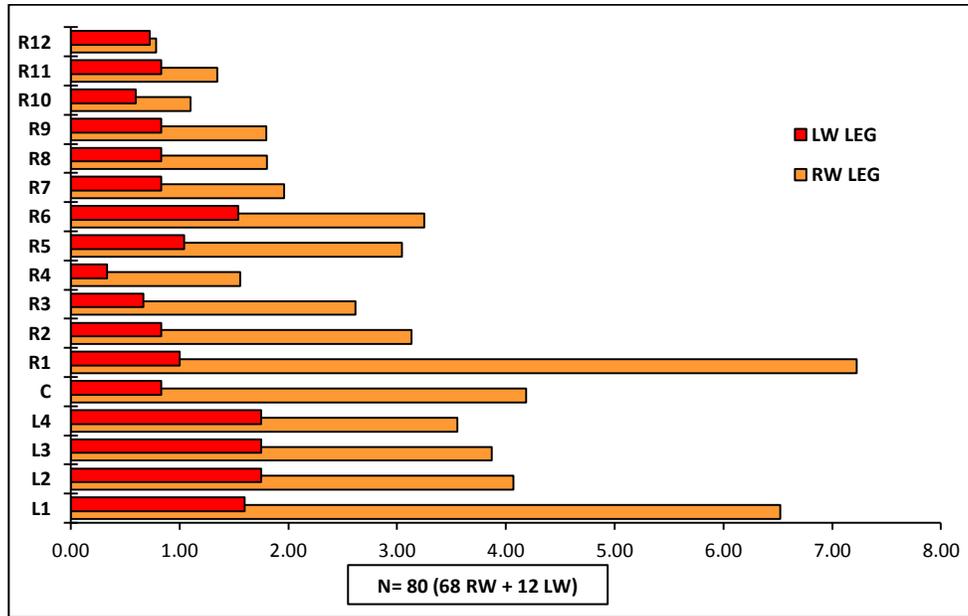


Figure 4: Average Strength of Judicial Decisions in 2013 (disaggregated)

Overall, it can be established that, at least in the years we singled out, the patterns of decisions of the judges do not overlap with the patterns presupposed by the attitudinal model. Some judges made decisions that diverged from the voting behavior of their nominating parties. It should be noted that there can be significant differences even between judges whose decisions followed the same directions. As a good example, consider the decisions from the year 2013 (Figure 4). Overall, all judges made stronger decisions concerning right-wing than left-wing legislation—left-wing judges and some right-wing judges, however, made stronger decisions than other judges nominated by right-wing parties. We consider, as a benefit of our methodology, that it can reveal such differences and measure them. For example, in 2013, it is apparent that while some right-wing judges made only slightly stronger decision in cases of right-wing legislation—see the differences in that respect at judges R12: 0.06 and R10: 0.5—the strength of the decisions by other judges show significant differences regarding right- and left-wing legislation respectively—see the differences in the decisions by judges R1: 6.23, L1: 4.92 and C: 3.35. Thus, while expectations about judges' behavior can be validated following a binary logic, our data show that—behind this crude picture—there might be significant differences regarding the strength of the decisions.

Certainly, our strongly limited pilot project does not allow for far-reaching conclusions, and we did not aim to validate or refute the attitudinal model but to present a possible application of the methodology our research elaborated.

#### **F. Conclusion: Virtues, Shortcomings, and Possible Applications of the Method**

The aim of this article is to present a methodology that is suitable for measuring the strength of constitutional court decisions in comparative research. We have outlined the specificities and the structure of this methodology and applied it to test a theoretical model. At the end of the paper, we make some remarks on the relevance, virtues, shortcomings and possible application of the method we have elaborated.

To begin with, we underline that the Hungarian database built in line with our methodology will contain all relevant decisions without considering their estimated political relevance. Consequently, this comprehensive database opens up at least two different strategies in applying the results of the coding process. First, one might evaluate all relevant decisions without selecting politically important decisions. Thus, the research project cannot be accused of subjective bias in case selection. In this regard, one does not have to rely on the assumed political importance or impact of the Hungarian Constitutional Court's certain decisions. This comprehensive strategy, however, has some shortcomings. Analyses based on quantitative methods might be blind to some important political circumstances. While we have argued that including all decisions of the CCs might increase analytical objectivity, it is of utmost importance to stress that small-N qualitative research might be necessary to evaluate the activity of the CCs for the political significance of decisions. Thus, qualitative studies might be complementary to quantitative research, or conversely, qualitative research might differentiate the picture we have on the activity of the Central and Eastern European CCs activity based on the quantitative study. Weighing among legal regulations under constitutional review according to their significance to a given country's political life might be a valid research design.

Qualitative research might uncover judges' possible strategies in making strong decisions against politically less important legal regulations adopted by their respective nominating party and against politically more important regulations of the opposing side, while being more permissive against more politically important legislative regulations adopted by their nominating party and against less politically important regulations adopted by the other side. Quantitative and qualitative analysis of the constitutional adjudication should not necessarily contradict each other even if the results of two methods might differ in various respects.

Concerning the possible applications of the methodology described above, we consider it useful in analyzing the longitudinal changes or consistency of the position of the CCs and of individual judges; differences—and changes in differences—in the strength of judicial decisions *vis-à-vis* various parliamentary majorities; trends in judicial decisions within one parliamentary term; trends overarching several parliamentary terms and varying political circumstances; and assumed influences of changing political circumstances.

Measuring and comparing decisions of CCs in Central and Eastern European-countries might allow for more general conclusions and lead to a further important research question: What factors drive constitutional courts and judges to make strong or permissive decisions? For the sake of illustration, in this article, we have tested the answer offered by the attitudinal model—judges make decisions in line with the position of their nominating parties—however, in our comparative research, we aim to include other models as well. The external strategic model does not regard judges as decision-makers isolated from the social and political context, but rather as actors who are integrated into the political process. According to this model, constitutional court judges are in interactions with other institutions in separation of powers system, namely, the government's legislative and the executive branches. The flexibility of the constitutional system and the potential to override constitutional court decisions—for example, by a supermajority consisting of majority and minority parties in parliament—might force judges to consider when and how they veto legislative acts. This approach highlights the importance of the political context, and authors who follow the external strategic model—with the help of the presuppositions of rational choice theory—attempt to map the complex relations between the constitutional court, the parliamentary majority, and minority.<sup>56</sup> Following this literature, we start our alternative explanation from the supposition that the constitutional court's position within the political system—and *vis-à-vis* the legislature—is determined by two factors: Public trust toward the constitutional court and political/environmental fragmentation. Our research aims to use insights about the judges' behavior from the external strategic model, which helps to evaluate not only judges' individual attitudes but also the political-environmental factors suitable for international comparative research.

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<sup>56</sup> See Sylvain Brouard, *The politics of constitutional veto in France: constitutional council, legislative majority and electoral competition*, WEST EUR. POL. 383–403 (2009); see generally HÖNNIGE, *supra* note 19; Pedro Magalhes, *The limits of judicialization: legislative politics and constitutional review in the Iberian Democracies* (2003) (unpublished Ph.D. dissertation, Ohio State University) (Retrieved from: [http://rave.ohiolink.edu/etdc/view?acc\\_num=osu1046117531](http://rave.ohiolink.edu/etdc/view?acc_num=osu1046117531)).

## Appendix 1

NR	JUDGES	WA	RW LEG	LW LEG	CON	DIFF. (C-D)	EXPECT. (T/F)
	HCC	3.67	3.65	3.61	4.10	0.04	NA
L1	ANTAL ÁDÁM	3.61	4.06	3.61	2.33	0.45	T
L2	GÉZA KILÉNYI	3.67	3.65	3.61	4.10	0.04	T
L3	PÉTER SCHMIDT	3.67	3.65	3.61	4.10	0.04	T
L4	ANDRÁS SZABÓ	4.06	3.65	4.41	4.10	-0.76	F
L5	IMRE VÖRÖS	3.45	3.65	3.24	4.10	0.41	T
R1	TAMÁS LÁBADY	3.70	3.75	3.61	4.50	0.14	F
R2	LÁSZLÓ SÓLYOM	3.67	3.65	3.61	4.10	0.04	F
R3	ÖDÖN TERSZTYÁNSZKY	3.51	3.65	3.38	4.10	0.28	F
R4	JÁNOS ZLINSZKY	3.67	3.65	3.61	4.10	0.04	F
	LW JUDGES	3.69	3.73	3.70	3.75	0.04	T
	RW JUDGES	3.64	3.68	3.55	4.20	0.12	F

Table 3: Strength of judicial decisions in year 1995

NR	JUDGES	WA	RW LEG	LW LEG	CON	DIFF. (C-D)	EXPECT. (T/F)
	HCC	2.54	3.27	3.29	1.05	-0.02	NA
L1	ISTVÁN BAGI	2.58	3.27	3.00	1.41	0.27	T
L2	MIHÁLY BIHARI	2.13	3.27	2.47	1.05	0.80	T
L3	OTTÓ CZÚCZ	1.75	NA	3.42	0.08	NA	NA
L4	ANDRÁS HOLLÓ	2.88	2.68	3.29	2.36	-0.61	F
L5	LÁSZLÓ KISS	2.45	2.68	3.08	1.39	-0.39	F
L6	ISTVÁN KUKORELLI	2.89	3.32	2.88	2.68	0.44	T
R1	ÁRPÁD ERDEI	3.17	3.91	3.63	2.09	0.28	F
R2	JÁNOS STRAUSZ	2.44	3.27	3.09	1.05	0.18	F
R3	ÉVA T. VASADI	2.79	3.27	3.36	1.68	-0.09	T
C	ATTILA HARMATHY	2.90	2.09	3.90	1.77	-1.81	NA
	LW JUDGES	2.45	3.05	3.02	1.49	0.02	T
	RW JUDGES	2.80	3.48	3.36	1.61	0.12	F

Table 4: Strength of judicial decisions in year 2004

NR	JUDGES	WA	RW LEG	LW LEG	CON	DIFF. (C-D)	EXPECT. (T/F)
	HCC	2.58	2.99	0.83	1.95	2.15	NA
L2	ANDRÁS BRAGYOVA	3.51	4.07	1.75	2.09	2.32	T
L1	ANDRÁS HOLLÓ	5.61	6.52	1.60	NA	4.92	T
L3	LÁSZLÓ KISS	3.37	3.87	1.75	2.09	2.12	T
L4	MIKLÓS LÉVAY	3.14	3.55	1.75	2.09	1.80	T
R1	MIHÁLY BIHARI	6.27	7.23	1.00	NA	6.23	F
R2	ISTVÁN STUMPF	2.67	3.13	0.83	1.95	2.30	F
R3	EGON DIENES-OEHM	2.52	2.62	0.67	3.95	1.95	F
R4	IMRE JUHÁSZ	1.54	1.56	0.33	2.50	1.22	F
R5	ELEMÉR BALOGH	2.66	3.04	1.04	2.09	2.00	F
R6	PÉTER KOVÁCS	2.87	3.25	1.54	1.95	1.71	F
R7	PÉTER SZALAY	1.81	1.96	0.83	1.95	1.13	F
R8	ISTVÁN BALSAI	1.69	1.80	0.83	1.95	0.97	F
R9	BÉLA POKOL	1.68	1.80	0.83	1.95	0.96	F
R10	LÁSZLÓ SALAMON	1.16	1.10	0.60	1.95	0.50	F
R11	BARNABÁS LENKOVICS	1.35	1.35	0.83	1.95	0.51	F
R12	MÁRIA SZÍVÓS	0.92	0.78	0.73	1.95	0.06	F
C	PÉTER PACZOLAY	3.71	4.18	0.83	3.95	3.35	F
	LW JUDGES	3.91	4.50	1.71	2.09	2.79	T
	RW JUDGES	2.26	2.47	0.84	2.20	1.63	F

Table 5: Strength of judicial decisions in year 2013

**Legend:**

WA: weighted average (decisions on consensual legislation included)

RW LEG: rulings concerning right wing legislation

LW LEG: rulings concerning left wing legislation

CON: rulings concerning legislation in consensus of left- and right-wing parties

Diff. (C-D): difference between rulings against right wing and left-wing legislation

Expect. (T/F): expectation (True/False)

LW JUDGES: judges nominated by left wing parties

RW JUDGES: judges nominated by right wing parties

COLORS: blue: judge nominated in consensus of right-wing and left-wing parties; red: judges nominated by left-wing parties; orange: judges nominated by right-wing parties