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**SUPRANATIONAL DEMOCRACY THROUGH JUDICIAL REVIEW?
STUDYING THE RELATIONSHIP BETWEEN DEMOCRACY AND INTEGRATION
IN EU MEMBER STATES' CONSTITUTIONAL COURTS**

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Contemporary scholarship extensively studies the phenomenon of judicial dialogue, both between high courts at the domestic level and domestic and international courts. The most practical manifestation of such a dialogue is ‘comparative reasoning’, i.e. referring to and engaging with the jurisprudence of the judicial partners from different countries and/or from the supranational level. When taking into account constitutional courts in the EU member states, this dialogue is ‘mandatory’ in so far as engagement with EU law is required by the commitment the Member States have expressed by joining the communities regulated by these bodies of law. However, the capacity of this engagement with supranational legal frameworks to shape legal and political orders within and beyond the state is still largely unclear. This paper takes theories of the possibility for democracy-building beyond the state, in particular in the EU context, as a point of departure for the introduction of a new approach to conceptualize the ‘international dimension’ of (especially constitutional) adjudication. It argues that constitutional courts have the capacity to contribute to building a supranational democratic political community through not only critically engaging with the respective legal frameworks in their decision making but through proposing creative and progressive ways of ‘partnerships’ between them and domestic law in the spirit of constitutional pluralism. It subsequently examines the presence or absence of ideas related to supranational democracy of the Slovak and Hungarian Constitutional Courts, the ‘guardians of democracy’ in countries embedded in most or all deepest structures of European integration. Both relevant case law on the subject and its selected reflections by other political actors, including the judges themselves (in scholarly writings and media outputs) are analyzed. The findings indicate a more complex relationship between the domestic constitutional courts’ understandings of democracy in the European context and messages that they transmit than an analysis of references to international or supranational law could demonstrate. With several recent decisions of the Hungarian Constitutional Court as a case in point, and the reluctance of the Slovak Constitutional Court to adopt a position on the role and significance of the European legal order for democracy, they demonstrate how the ‘partnership’ conception may (as in the Hungarian case) be taken over by an ‘adversarial’ conception that perceives sovereign nationalist democracy in conflict with supranational democracy. They also point to increased relevance of studying the possible factors affecting constitutional courts’ capacity to contribute to supranational democracy, such as the ‘supply’ of cases with a supranational dimension, ‘the demand’ for engagement with international legal frameworks by domestic petitioners as well as the worldview and knowledge bases of the judges.

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Introduction

When constitutional courts (CCs) in EU member states rule on the relationship between EU law and the domestic legal order, they usually get under international spotlight. The German Federal Constitutional Court's rulings in cases like *Maastricht* (e.g. Everling 1994) or *Gauweiler* (e.g. Payandeh 2017) have made their way to the canon of public law scholarship, and rulings of their counterparts in smaller countries such as the Czech Republic have not gone unnoticed either.² More recently, the autocratic turn in Hungary and Poland raised concerns about the integrative capacity of the European legal order.³ So far, the executives in these countries have by and large successfully managed to avoid repression from the European institutions and other member states of the Union for committing violations of the Union's legally enshrined values. The role of CCs in this process remains largely unclear though. Are CCs (voluntarily or due to their, for various reasons, limited powers) aiding the executive power in its 'crusade' against European values, of which democracy is a prominent one? Or are they trying to mitigate the most blatant violations by establishing connections between the two legal orders that would serve as a 'safety net' in case of the 'illiberal' turn becoming an uncontrollable authoritarian one? These questions occupy the minds of prominent columnists in public law worldwide, yet, a more systematic assessment of these CCs' engagement with EU law that would encompass more recent developments is lacking.⁴

At the same time, with the spotlight centered on Poland and Hungary, other countries in the region, including their CCs, remain neglected. This lack of attention may ease the job of would-be autocrats within these countries who are eager to follow their Polish and Hungarian soulmates. Completing the Visegrad Four picture, both Czechia and Slovakia feature prominent figures with a track record that would match with such an ambition. In the former, Andrej Babiš, the business tycoon with ties to the secret service under state socialism and criminal charges for corruption, together with President Miloš Zeman, who aids pro-Putin and pro-China voices in the country. In the latter, Robert Fico, the PM 'dethronized' in 2018 with broken ties to European institutions after having engaged in 'anti-Soros' rhetoric to delegitimize protest movements after the murder of an investigative journalist and his fiancée, as well as Andrej Danko, the chairman of the Slovak National Party and of the National Council who had openly presented his favorable views of Orbán's policies.

This paper combines both sets of countries by selecting one from each, analyzing their CCs' engagement with EU law from a particular—'republican democratic' (Niederberger and Schink 2013)—perspective. The main theoretical contribution of this approach lies in conditioning the capacity of EU law to uphold and strengthen democracy by the CCs in the member states envisioning a *democratic* relationship to it; one that will neither comprise subordination nor

² The Czech CC alone managed to make international scholarly headlines with its Lisbon Treaty (Bříza 2009; Komárek 2009) and Slovak pensions (Zdenek Kühn 2016; Komárek 2012) decisions.

³ Due to space restrictions and the complexity of the cases, this paper will not analyze the engagement with the European Convention on Human Rights and the case law of the European Court of Human Rights. In a broad sense, however, these contribute to the development of the European legal order as well, especially in a sense of building a comprehensive human rights architecture in the region.

⁴ For an exception, see Tatham (2013).

dominance of one legal order over the other. Building on an understanding of democracy as the absence of domination, the undemocratic nature of a hierarchical relationship can be deconstructed in favor of a plural, democratic one between the legal orders that can then mirror the same relationship between the political regimes of the EU and the member states. In turn, without compromising on diversity, the pluralist relationship creates a strong foundation for democracy both within and beyond the (member) states since the legal orders mutually reinforce this constitutive value, and the CCs as the interpreters of the domestic legal orders can enlist the help of the EU values in protecting democracy at home.

The empirical study focuses on Slovakia⁵ and Hungary⁶ and rests on a selection of relevant cases decided by the CCs and secondary literature in the effort to understand how they envisioned the relationship between the constitutional order they are expected to be a guardian of (Article 124 of the Slovak Constitution, Article 24(1) of the Hungarian Fundamental Law⁷) on the one hand, and democracy on the other. The analysis explores whether and how the CCs considered democracy as a relevant variable in their decision making and justificatory techniques in cases that included an element of the relationship between the legal orders. The findings show that despite both Slovakia and Hungary being embedded in most of the deepest structures of European integration, their CCs more or explicitly view the integration process through the lens of a domineering, externally constraining legal and political order that does not meet the requirement of non-domination. In the Slovak case, there is a lack of thorough and innovative engagement with this legal order, and hence of an indication that the legally enshrined EU values could serve as a point of reference for future democracy-protecting efforts of the SCC. While the HCC demonstrates a higher level of engagement, this does not translate into a favorable view of the Union's legal order and the respective decisions further diminish the authority of the Court operating in extremely constrained circumstances.⁸

⁵ Slovakia is considered as a 'good pupil' of European integration (Gál and Malová 2018) in the Visegrad region which may partly explain why it is seriously understudied compared to Czechia on this question. The only English-language study to date that captures the evolving relationship of the SCC to EU law beyond the early period after accession or individual cases is that of the author's (Steuer 2018b). While both Hungary and Poland are subject to more intensive scrutiny (on the latter, see e.g. Sadurski 2018; Koncewicz 2018), the fact that in Hungary the illiberal forces gained constitutional majority and managed to alter the constitution makes it a somewhat more significant case to study from the perspective of its CC's operation (which is not to diminish the importance of closer attention to the Polish Constitutional Tribunal's 'European' jurisprudence).

⁶ Methodologically, Hungary cannot 'stand in' for Poland given the important differences between the fate of the two countries' CCs that impact on their legitimacy. Only in Poland, the CC's decisions (among others) on the appointment of constitutional judges were disregarded. Hence, the decisions subsequent to the ones set aside by the executive display a fundamental legitimacy deficit and could be declared unlawful. On the contrary, no explicit disregard for the Hungarian CC's decisions on fundamental constitutional matters by the executive can be identified. Therefore, the Hungarian CC provides a better agency-centered case than the Polish one as the intervening variable of the loss of formal authority through forceful executive disregard of the decisions is absent.

⁷ Interestingly, in the transitional Hungarian Constitution, there is no provision that explicitly states what the main 'mission' of the HCC should be. This may have contributed to the unique activism of the HCC in the early period, at least as seen by some scholars (Kis 2003, 249–320; Sóllyom 2003).

⁸ A recently popularized argument suggests that CCs, especially when faced with governments increasingly hostile to the separation of powers on which the CCs' review powers are based, should 'spare' their political credit for a few essential cases, and proceed in an incremental manner (Brown and Waller 2016). This requires a careful balancing of commitments and attention to the changing distribution of political power. However, even when considering the HCC in this perspective, the association with the international expert community is a significant safeguard for its authority and one of the ways to reach the broader public as another essential actor for its *de facto*

This analysis unfolds as follows. Firstly, it clarifies why a republican conceptualization of democracy counts as minimalist in the context of democracy at a supranational regime. Secondly, the three-dimensional conceptualization of the elements that need to be considered when evaluating a CC's position vis-à-vis EU law is introduced. The three dimensions of principledness, persistence and persuasion are then applied empirically in the two cases in the identified issue areas where there is (potential) interaction between the domestic and the supranational legal orders. The concluding section elucidates the ways how this conceptualization uncovers the promises and pitfalls of CCs as supranational democracy-builders.⁹ While each CC is a 'world in itself', the cases of the two CCs examined here, each located in a slightly different political context, illustrate the difficulties with the CCs' *principledness, persistence and persuasion*, that are not unlike in European diplomacy and negotiation.

Democratic European integration: What role for CCs?

That European integration should unfold via a democratic process is by no means obvious. International organizations in themselves are not required to be democratically governed. However, the transfer of competences to the EU institutions extends beyond any other international bodies and naturally raises the question of democratic legitimacy of the process. After the economic turmoil that started over ten years ago and the rise of populist and nationalist political actors within the EU member states the question of democracy in the EU is more pertinent than ever. How can the current level of integration be sustained (or disintegration prevented) without further undermining democratic principles which have been hurt by the 'executive federalism' particularly in the economic crisis-decision making (Joerges and Kreuder-Sonnen 2017; Habermas 2012)? This question is not new but has rarely been considered with respect to judicial actors within the EU and its member states and CCs in particular.

How (if at all) do CCs matter in the democratization of European integration? Even if they are considered democratic actors at large (Steuer 2018a), with the capacity to serve as guardians of democracy at the domestic level, how and why can they contribute to democracy beyond their member state? In what ways are CCs relevant, or even essential, to a supranational democracy? This paper argues that the answer can be found in a simple (and to some extent minimalist) understanding of democracy as the opposition to any form of domination (Shapiro 1999).¹⁰ In

functioning. Thus, the external constraints cannot justify consistent deference to the executive which triggers a loss of these 'soft power' resources.

⁹ Daly (2017) uses this term as well but remains confined to state borders when analyzing domestic CCs' influence, and moves to 'the international' only when discussing international courts.

¹⁰ An underexplored question remains how such a conception relates to more sophisticated accounts of the locus of constituent power, which to some extent predetermine the conception of democracy in the respective line of political thinking. Shifting conceptions of constituent power (Kumm 2016; Walker 2016; Möller 2018) place different degree of relevance to the 'people' as the constituent subject and when it comes to the EU, this gets further complicated by the additional layer of interaction ('citizens and peoples', 'national versus supranational'). Furthermore, the conceptualization of democracy in this paper is not incompatible with Habermas' (2015) vision of dual constituent power that emerges 'ex post' upon the development of European integration in the present day. At the same time, the philosopher's claim that this vision could accommodate 'the primacy of European law over the national legal systems [that is] justified only in functional terms' (Habermas 2015, 555) remains unconvincing

this negative delineation, externally imposed binding rules are the gravest threat to the maintenance and cultivation of democratic rule.¹¹ In other words, a republican democracy cannot feature rules that have not been maintained with the consent of the ruled.

In order to analyze the CCs' actions vis-à-vis European integration, it is a prerequisite to understand the links between the concept of non-domination and democracy-building at the supranational level. Republican theory must be concerned with integration because integration can both entrench and remove elements of domination depending on whether it prioritizes the protection of fundamental rights (Bohman 2009a, 192 et seq., see also 2009b). Retaining the perspective of the individual whose civic freedom comes first in republican thought (Pettit 2009), the promise of integration is enhanced liberty through lifting various forms of barriers and prejudices. On the contrary, integration of structures (for instance, through a supranational legal order) can embody new, more drastic forms of domination. This is the case of the 'race to the bottom' in human rights protection or the emergence of new dividing lines triggering discrimination and hostility. Integration alone is neither a guarantee of nor an obstacle to removing domination.

Alternative conceptions of republicanism beyond the state are based on a simplified conception of democracy where representation through a direct delegation chain starting with elections is a sufficient condition for democratic rule (Bellamy 2007; McCormick 2013). Here, the idea of a supranational democracy is rejected at the outset and an at best *demoicratic* order is envisioned, with the peoples of Europe being represented through enhanced competences of their state legislatures (Bellamy 2019, 97 et seq.).¹² In turn, CCs cannot play a vital role in building such a democracy. The problem with this understanding are the democratic deficits and representation gaps that persist at the level of state and their institutions (cf. Alonso, Keane, and Merkel 2011). Even if the CCs retain their fundamental rights review competences, ultimately, legislatures remain the main guarantors of these rights (see Webber et al. 2018), and if they fail, it is the citizens and their rights that will suffer the consequences, likely with their

given that even a *functional* primacy, in case it is *acontextual*, does not guarantee, and may even damage, democracy. For example, if in a particular dimension due to the primacy an unjustified legal (or even constitutional right) restriction emerges.

¹¹ This understanding matches with the conception of judicial review as one of several 'veto points' in standard democratic regimes. CCs (exercising not only judicial review but also other competences, notably deciding on individual complaints against human rights violations) are, among others, a source of increased accountability of those in power given that the opposition (under normal procedural circumstances) may question the decisions of the government (Lemieux and Watkins 2017, 147–48).

¹² Slovakia is an apt example of the mismatch between the theoretical feasibility and empirical functioning of such an empowerment. True, a constitutional act was adopted to empower the position of the parliamentary Committee on European Affairs in 'approving' the official positions of the state presented at the meetings of the Council of the EU, and their applicability could be extended (Láštík 2006). However, the parliament remains among the least trusted institutions by Slovak citizens (support of only 29 % of the citizenry, suffering from strong majoritarian partisan divides). The European institutions enjoy slightly higher trust levels (European Commission 2018). In addition, the current Chairman of this committee is a self-proclaimed Marxist politician who maintains good working relationships with 'alternative media' spreading misinformation and conspiracies. As another example, a far-right MP who is currently tried before the Supreme Court for extreme speech, sits on the Committee for human rights, national minorities and gender equality. Given its already existing powers, the empowerment of the legislature is unlikely to lead to more responsible selection of its officials and would, in turn, risk disintegration tendencies caused by adverse actions of these bodies in decision making not only at domestic but also at the EU level.

entrenched alienation from democracy as the best empirically possible political regime as a result.

Arguably, even the 'cosmopolitan republican' conceptualization of democracy poses a relatively low threshold for the creation of supranational democracy, as here the ruled (through the majority principle, albeit restricted by supranational oversight) may impose rules creating new systems of domination *within* the domestic level. Yet, by adopting this minimalist approach for the purpose of this analysis, a better understanding of the CCs' place vis-à-vis the EU law- and policy-making can be envisioned. If the CCs have some role in such a minimalist understanding, then, *a fortiori*, they must play a role in more extensive conceptualizations of democracy that go beyond majority rule and focus on what the CCs are commonly associated with—the protection of fundamental and minority rights (see Scheppele 2005). The complication emerges upon bringing in the judiciary in the EU, notably the CJEU which is frequently coined as the 'CC for the EU' (Vesterdorf 2006; Billis 2016; Tuori 2015, 45–50; Fabbrini and Maduro 2018). While there are some similarities in the CJEU's competences with respect to EU law and the domestic CCs' interpretive powers of the body of domestic law (Hong 2010), the two are hardly the same. Domestic CCs by necessity come into direct contact with EU law as well (Komárek 2013), so a clear separation is impossible. Understood through the conceptual lens of 'Europeanization', there are both 'downloading' (from the CJEU to courts in the member states) and 'uploading' (vice versa) mechanisms (e.g. Jaremba and Mayoral 2019). This holds true with the CJEU's engagement with the legal corpus of the member states but only to the extent required by the EU law. Hence, the CJEU is a 'category in itself' and the assessment of its potential and reality in guarding and nurturing European democracy should unfold separately from that of domestic CCs.¹³

At the same time, the functional approach that has its roots in the declaration of the unconditional primacy of EU law back in the 1960s (Everson and Joerges 2014), questions the fulfilment of any democracy-protecting mission¹⁴ unless the domestic CCs are brought on the scene. Furthermore, it is domestic CCs which possess procedural legitimacy via their constitutional position and appointment process. As a result, domestic CCs are uniquely positioned to diminish any domineering elements coming through in the body of EU law. This is not doubted by existing accounts of the relationship between the two types of judicial entities, whereby domestic CCs (particularly centralized ones following the German model of constitutional review) have the formal competences for engagement with EU law. Despite the *Simmmenthal* turn of the CJEU that encouraged ordinary courts towards the same (Piqani 2018), not necessarily in concordance with their domestic CC, 'realization of the European juridical constitution depends on the hinge position of national courts' (Tuori 2015, 321).

How can member state CCs enhance and strengthen European democracy conceived of as non-domination? The answer put forward here consists of three dimensions termed *principledness*, *persistence* and *persuasion*. In the *first dimension*, the expectation is that the CCs are committed

¹³ This is beyond the scope of the present paper, however, there seems to be a lack of scholarly engagement with this question from the perspective of the CJEU's decision making as well.

¹⁴ A timely illustration of this is the judgment concerning the attacks on judicial independence in Poland (Celmer), whereby the CJEU 'enlisted' the help of domestic courts (not even restricted to CCs) in guarding EU values.

to their constitutional role which (with small, usually terminological modification) revolves around the 'guardian of the constitution' (Kelsen and Schmitt 2015), of 'democracy' (Collings 2015; Kneip 2011) and/or 'justice' (Cassese 2011). They operate in line with 'legal constitutionalism', which considers a central role for political institutions (Vinx 2009) that are able to develop robust doctrines protecting the foundations of the political regime and questioning the legitimacy of any actions (even supermajoritarian ones) that aim to undermine these foundations. In the context of the relationship to the EU legal order, this commitment equals with emphasizing the synergies between the principled foundations of the Union and the member state as well as the common traditions of democracy respecting pluralism and diversity. The connecting element are the fundamental human rights, with which the CJEU has been increasingly concerned as well, particularly since the effectiveness of the Charter of Fundamental Rights (Tizzano 2008; de Búrca 2013). The mechanism of connection is the attribution of primacy to the standards of human rights protection and well-being of the citizens and peoples of Europe. Consequently, when a domestic constitutional system guarantees a higher level of human rights protection, the CCs should, rather than 'bowing' to the CJEU (cf. Case C-399/11 Melloni 2013), uphold the higher standards of protection, where possible, in dialogue with the CJEU (through the preliminary reference or other procedures). This is 'nothing new under the sun', when juxtaposing it with existing scholarship on constitutional pluralism (e.g. Walker 2002; Avbelj and Komárek 2008). Nevertheless, it is not a simple task with the 'pushback' from the CJEU aiming for uniformity (rather than unity)¹⁵ in human rights standards either. While generally some CCs are perceived to have successfully engaged in this dialogue (De Burca 2018, 364), the CJEU's position, exemplified by the reluctance to accept the EU joining the European Convention on Human Rights (ECHR) (Peers 2015; Kuijer 2018), can complicate the well-intentioned efforts of CCs for such a dialogue. The support for this position from mainstream academic European studies and the legal community (Kreuder-Sonnen 2018; Schmidt 2018, 32–33; Joerges and Kreuder-Sonnen 2017) is a further difficulty. CCs that go through this bumpy road and are able to remain firmly committed to EU values, including their possible stronger manifestation in the domestic constitutional order than that of the EU itself, are the ones with the capacity to reduce hierarchies and, ultimately, domination. In turn, they contribute to the spread of democratic sentiments at the EU level as well.

However, it is not enough to be principled; CCs have to be *perceived* as such. In the Central European context, public opinion polls enquiring the degree of satisfaction, support for or trust in the domestic CC are rather rare, which might indicate a general perception of remoteness of the CC's agenda from the day-to-day public matters. This, compared to e.g. the US Supreme Court (e.g. Salamone 2018, 28–32), just increases the challenge that stands before these institutions if they want to promote and enhance supranational democracy. While they might substitute general public interest with interest of the legal and expert community, the two are,

¹⁵ Despite the amount of scholarship on constitutional pluralism, the misconception that it questions the basic commitment to the Union's common values and allows for Orbán-like illiberal divergences is still occasionally in place (Mader 2018). In fact, the *homogeneity* of the fundamental values is in no way in conflict with constitutional pluralism as conceived of in this paper, since a constitutionally pluralist position is not welcoming towards obvious violations of minority rights, freedom of expression (media freedom) or the separation of powers. Hence, the discussion on enforcement of these values through the EU institutions and procedures against recalcitrant member states is not in conflict with constitutional pluralism.

unsurprisingly, not the same thing. This is why CCs must be *persistent* in their engagement with questions related to the EU legal order, meaning that they actively search for this dimension in the petitions submitted to them and that they do not ignore the EU law dimension even in cases they can theoretically decide merely on the basis of domestic constitutional provisions.

Last but not least, and this is a requirement hardly limited to engagement with EU law despite relatively little scholarly engagement in the context of the judiciary, the CC's doctrine must possess *persuasive power*. In other words, it must be able to convince experts and (in the most significant cases) laymen alike about the strength of its analysis and conclusions. Here the criterion of *consistency* appears to be important in that the 'red thread' of the CC's reasoning on the supranational community and its relation to democracy is clear and unambiguous. In case of frequent judgments evaluated by the receiving audience as being of low quality, inconsistent or otherwise unpersuasive it is unlikely that the CC would play a discernible role in bridging the gap between democracy at the domestic and the supranational level. It seems that the first requirement is the most complex as it poses more contentious *qualitative* requirements on the CCs' decision making while the third one can be evaluated more simply by looking at the core reflections of the respective CC's case law (in other words, whether the legal community commenting on the CC was able to grasp what it had meant with a particular ruling or interpretation). The second criterion is *quantitative* in the form that it examines the number of engagements, even though depending on how these engagements are conceptualized, the numbers can differ. Hence, in this paper only those engagements that are being reflected by the domestic legal and expert community (whether positively or not) are considered, with the caveat that what is reflected by these communities does not always make its way to the international debate and even less so to the public discourse. A second, related caveat is normative: *should* the CCs aim to contribute to the building of a supranational democratic community, would it be desirable at all? The negative answer is supplied by Dani (2017) for whom the CCs are being gradually undermined by the advancement of the European legal order that is not coupled with the advancement of its democratization. While the source of concern for the CCs seems valid, inaction from their side will hardly offer any remedy. In addition, while Dani (2017, 190) recognizes a supplementary role for CCs 'as a back- up option were supranational judgments to be perceived as unsustainable according to national constitutional standards', this passivism (which is furthermore not broken down into practical terms) is likely to lead precisely to the growing insignificance of the CCs in matters pertaining to European law vis-à-vis the EU. While this paper opposes the conflictual relationship, subordination on neither side is not an acceptable solution either. Instead, vivid engagement characterized by persistence and persuasion is the way for the CCs to push for constitutional pluralism and ultimately have a chance to convince the CJEU to do the same or at least openly declare their normative preference for this form of cooperation.

In summary, thinking about the supranational legal order in democratic terms attributes a distinct role for national CCs that exists at the interplay of this order with the domestic constitutional principles. By remaining faithful to even a minimalist approach to democracy as non-domination, CCs can choose the path of advocating constitutional pluralism that gives

primacy to a non-hierarchical relationship between the legal orders and their subjects. By advancing non-domination they do not only safeguard democracy at home but also put forward a positive vision for supranational democracy based on 'equal concern and respect' (Dworkin 2011, 382–85) for all its constituents. The next section provides a toolkit for exploring whether at least fragments of such a commitment can be traced in the decision making of concrete CCs.

Beyond referencing: A qualitative examination of CCs' engagement with the legal orders

An empirical, yet theoretically informed account of the CCs' as (potential) supranational democracy builders in eradicating domination in the relationship between the European and domestic legal orders cannot end with counting references to EU law or CJEU case law. Generally, integrative references to international (and in the case of EU member states, EU) law are perceived to form the basis of an 'epistemic community' of judges (Sommer and Frishman 2016). This referencing can be studied quantitatively, and it has been done so in the Slovak case (e.g. Bobek 2013, 179–89). At the same time, there is both a methodological and conceptual limitation to such a study. As to the former, such an overview tells little about whether the Court developed actual positions towards a particular legal order other than the Slovak one. As to the latter, even if such analysis shows the existence of an 'epistemic community' between concrete CCs and the CJEU, this would be one based on hierarchy. Indeed, the referencing, to echo a simple model of communication, would be *of* the CJEU case law *by* the HCC or the SCC.¹⁶ Therefore, a qualitative analysis of the cases and their political context is via a lens of the political theory of republican democracy is the method that can overcome some of these caveats, and also bring understandings of democracy from Political Science into a legal context (on interdisciplinarity in research of apex courts' relationship to European integration, see Ortiz 2017, 803).

It is therefore significant to look into the nuts and bolts of the context of the cases in which such referencing (in this paper, to the EU legal order and to integration, occurs). The current or former judges' own positions on this matter voiced in various fora or during interviews provide a helpful additional source to gain insights into their thinking about the subject.¹⁷ With this perspective, there is also a possibility to think about the existence of the international legal level as an additional 'toolbox' for the CCs. With the tools in this box, such as international, legally binding conventions, case law, or advisory opinions of expert bodies, they can increase the authority of their judgments entrenching democratic principles in the constitutional system (Comella 2009, 153).¹⁸

¹⁶ In cases concerning Slovakia the CJEU might refer to Slovak courts' decisions but here the setting is still hierarchical, as it resembles an appellate court reviewing the decision of its lower counterpart with more limited jurisdiction.

¹⁷ That is not to claim credit to simple behaviorist approaches to judicial decision making that consider the judges' strategic calculations as key to the outcomes of their decisions (Epstein and Knight 1997). In order to take a rule-adjudicating institution's (Rothstein 1998) capacity to play a role in such a major political issue as a state's and its citizens' position towards European integration, the CC must be seen as a locus of authority in the political system that is perceived as independent and legitimized to decide on constitutional matters (among others, through the establishment of the CC in the Constitution itself).

¹⁸ However, this optimistic perspective of the democratizing potential of simple referencing obscures that a CC may use such references for precisely the opposite reason—to position itself *against* European integration and

Integration understood in this way does not equate a need for uniformity of decision making approaches or methodologies, but it indicates entering into judicial dialogue with democratic partners. An extension of Cappelletti's (1971) account of the spread of judicial review as the means to invalidate 'unjust law' (Cappelletti 1971, 97) requires paying attention to sources of international and regional legal orders, and even to the importance of embedding the domestic legal orders in these contexts. The latter, however, has developed far less straightforwardly than the domestic spread of judicial review (Lustig and Weiler 2018). Hence, following Comella's reasoning, we may assume that CCs that engage with supranational law (ideally directly through the concept of democracy) make the starting point towards supranational democracy-building. However, such engagement is not a sufficient condition for being conducive to such democracy (as conceptualized in this paper). CCs need to be able to approach supranational governance *critically* from a democratic perspective if they are to stand behind supranational democracy (or at least, democracy, see Nicolaidis 2013), rather than just any form of supranational rule. The following three sections provide an evaluation of the HCC's and the SCC's relationship to European integration and the idea of a supranational democracy through the lens of non-domination. Each section addresses one of the dimensions, with the last one providing an overall assessment identifying, in an inductive way (based on relevant case law) four issue areas into which these cases can be categorized. This analysis shows that the idea of supranational democracy is nowhere near in either CC's reasoning. At the same time, there are more subtle differences between the two CCs that point to the changes in their proximity to the idea of supranational democracy over time as well as their contemporary distance from approximating a supranational order based on non-domination.

Principledness: A careful embrace of pluralism (at best)

The path of the two CCs shortly after accession to the EU in terms of adopting principled positions on integration into a supranational community seems remarkably similar, until it diverges in response to the constitutional changes that, unlike in Slovakia, occurred in Hungary.¹⁹ It is similar in both CCs' reluctance to engage with EU law in cases that clearly

even the EU as a whole. This would be the opposite of dialogue where the domestic CC aims to retain unconditional hierarchy. For a scale of such positions of the CCs, see Dyeve (2013). His actual classification is empirically outdated in the cases studied here, furthermore, it is questionable why the HCC as opposed to the SCC received a more 'EU-friendly' rating when, if the complexity of both CCs' positions is to be put into scalable categories, the resistance is more traceable in the Hungarian as opposed to the Slovak case. Even in the Sólyom era (until 1999), there was a case concerned with constitutional review of international treaties (4/1997 [I. 22] AB), the reasoning of which can be seen as limiting the supremacy of EU law (Tatham 2013, 159–60), at least until the Court established the distinction between EU law and international law.

¹⁹ The constitutional provisions governing the relationship between EU law and domestic constitutional law are open for different readings by the CCs. In the Slovak case, Art. 7(2) talks about the primacy of legally binding acts of the EU before domestic legislation but remains silent on possible primacy over *constitutional* legislation. Likewise, the Hungarian 'Europe clause' (2/A in the 1989, E in the 2011 Constitution) allows the decisions of EU institutions to be binding for Hungary. The two versions are very similar, if anything, a textual reading would identify *a stronger position of EU law* in the new constitution, given the addition of a clause that explicitly (albeit conditioned by the fundamentals of the Constitution) allows EU law to be binding. One might argue that those fundamentals changed with the adoption of the new Constitution; however, while the wording is different in notable ways (Bánkúti, Halmai, and Scheppele 2013), the core principles such as democracy and the rule of law are *formally still identifiable in the text*, so they could be interpreted in symbiosis with the post-1989 democratic reading. For such a reading, the concept of the 'invisible Constitution' developed by the HCC in the 1990s could

carried a EU law dimension. Curiously, traces of constitutionally pluralist thinking (as defined in this paper) can be identified in the early (pre-2011) HCC reasoning which will be examined before that of the SCC.

It took time for the HCC to get comfortable with any engagement with EU law. Surveys of this development note the decision on the duties associated with sugar imported to Hungary before accession as per the EU regulation aimed at preventing speculative techniques at the 'special times' of the accession; in this case, the HCC entirely avoided the regulation and decided purely on domestic constitutional law reasoning, albeit with an outcome compatible with EU law (Bragyova 2013, 338–39; Topidi 2016, 76–77; also Sajó 2006).²⁰ In later cases, however, it gradually demonstrated more engagement, albeit it never 'lost sight of the Constitution' and prioritized it in addressing the disputes with a EU dimension. Gárdos-Orosz (2015) explains how the Court (until 2015) did not invoke the preliminary reference procedure and occasionally provided its own evaluation of the merits of EU law instead of submitting a preliminary question to the CJEU—however, none of these interpretations displays signals of demonstrably undermining the unity of EU law. In fact, the Court seemed to have prioritized high standards of fundamental rights protection. An example of this is the Data Retention Directive, where the Hungarian Constitution, explicitly rejecting the infamous extreme surveillance and tracking of individuals' lives during the authoritarian regime, stipulated higher standards of data protection than the EU directive (Somody 2016, 218–20). The EU legal and political order will not come crumbling down because of a CC disagreeing with an EU law instrument, using *reasonable, evidence-based arguments*. On the contrary, the CC can refocus the attention of decision makers on the priority of the highest standards of fundamental rights protection and the need to take into account the historical reasons behind such protection as well.

The later case law of the HCC underlined the development of this 'mildly pluralist' position of the HCC vis-à-vis EU law. According to this position, the EU legal order is separate from the domestic one and the EU is an evolving autonomous entity; however, integrally linked to the Member States through their participation at the decision making process (Vörös 2012, 95–110; Spuller 2014, 675–77).²¹ Similarly, the HCC's 'Lisbon Treaty decision' (143/2010 [VII. 14.]), the HCC acknowledged the integral significance of the EU legal order to the Hungarian (including constitutional) law but, following the German Federal CC's standpoint, it declared itself as the constitutional guardian in case of a possible incompatibility between Hungarian

be of help as well, however, this one was rejected by the new 'constitution-making power' in 2011 (Arato 2016, 195–204).

²⁰ András Bragyova was judge of the HCC between 2005-2014. András Sajó is the former Vice President of the European Court of Human Rights in Strasbourg.

²¹ Imre Vörös is a former HCC judge in the Sólyom Court. Some disagreement persists among Hungarian scholars on this point though as a slightly different argument was presented as well. In this view, when it comes to questions directly emerging from primary EU law, the Court considered this portion of law at the same level as domestic constitutional law, and provided substantive review for it (Blutman and Chronowski 2011). Ultimately, this seems more a difference in *perspectives* than a substantive disagreement. While Vörös concludes on the basis of the Court's official position and his own normative standpoint, Blutman and Chronowski derive a conclusion from how the Court's case law (that, as was mentioned, occasionally includes material review of EU law instruments) can be perceived in practice in terms of *its effect*. This debate is informative for determining the *persuasion* of the Court's decisions as it seems clear that they entail a divergence between the formal and practical standpoints.

constitutional principles and primary EU law.²² Hence, as we shall see, it did more than its Slovak counterpart towards adopting a constitutionally pluralist position.²³

Turning to Slovakia, shortly after 2004,²⁴ an intellectual conservative group submitted a complaint against the referendum on accession. They believed that the accession meant that Slovakia entered into a 'state union', which, according to the supreme law of the land must be approved by a constitutional majority in the legislature and then submitted to ratification via a mandatory procedure (Dostál 2005). The petitioners, grouped in the 'initiative against the European Constitution', represented an intellectual opposition to greater integration which added up to the more 'plebeian' opponents of European integration more generally (cf. Henderson 2004). The Court did not deal with the challenge until 2008 when it 'ducked' the main question of under which conditions the EU meets the standards of the 'state union' under the Slovak Constitution by calming all sides down with declaring 'we are not there yet'.²⁵ In other words, it rejected the complaint and confirmed that the membership of Slovakia in the Union has not happened illegitimately but a constitutional act and ratification referendum may be required if the Union integrates further. Since then no one brought a challenge to the Court as to whether more recent developments, including the adoption of the Lisbon Treaty, would pose such a legitimacy challenge.

The SCC acknowledged the primacy of EU law in a unanimous verdict concerning health insurance companies (PL. ÚS 3/09, pp. 80-82, see also Macejková 2016, 6–7). Paradoxically, the Court committed itself to unconditional primacy in theory but in the realities of the case, it ruled on the domestic constitutional incompatibility (including with the right to property) of a regulation prohibiting certain types of profit for public insurance companies (e.g. Zelenajová 2016). It did not even examine the compatibility with the Treaty on the Functioning of the EU (TFEU), and declared readiness to do so only if the unconstitutionality does not arise through domestic constitutional review or if the petitioner only claims incompatibility with the TFEU

²² In Gárdos-Orosz's (2015, 1579) reading, the HCC declared 'that European integration cannot result in the breach of the principles of democracy, a state based on the rule of law, and popular democracy.' It is not clear how 'popular democracy' is different from 'democracy' as such and why the rule of law is separate from popular democracy (a separation commonly done by the HCC in many other areas of its early jurisprudence). Importantly from a constitutional pluralist perspective, and further justifying the classification as a 'moderate' pluralist position, the emphasis on fundamental rights (even per the Council of Europe's triad of democracy, human rights and the rule of law) is missing here.

²³ Chronowski (2014, 29–30) argues that this line of reasoning can be discerned in the (in)famous HCC case in which it refused to provide a substantive review to the amendments of the Hungarian Constitution (61/2011 [VII. 13.] AB). She notes the Court's remarks on the integral value order that emerges through the European commitments of the Hungarian constitutional order as well. However, from a practical standpoint these values remain with no guardian if we are to endorse the HCC's rejection to provide a substantive review.

²⁴ Some authors (e.g. Zdeněk Kühn and Bobek 2010 referring also to memories of the former President of the Court, Ján Mazák; Gajdošíková 2017) also list the decision on the Slovak Anti-discrimination Act of 2004 that incorporated some of the requirements stipulated by the EU Race Equality directive. However, an examination of the decision itself shows no traces of engagement with EU law. The mere fact that the petitioner's briefs or background discussions included references to EU law is not satisfactory as it is the actual verdict and its justification that are decisive for determining the presence of room for consideration of European integration and EU law more specifically by the Court.

²⁵ The explicit reference to democracy only occurred in the more specific debate on whether the accession referendum of 2003 entailed otherwise impermissible question related to taxes and levies, or fundamental human rights. Indeed, according to Art. 93 sec. 3 of the Constitution, these questions are excluded from facultative referenda (as the one on the accession) but not from the obligatory ones.

without referencing the Slovak Constitution at all (PL. ÚS 3/09, p. 81). Thus, the Court placed EU law into the position of a 'big brother', always watching but stepping in only if all more straightforward remedies are exhausted. In this form, it chose a 'safe ground' in which its own engagement with EU law (and possible challenges stemming from lack of expertise)²⁶ can be reduced to a minimum. Such an approach all but helps to signal the general courts the desirability of domestic engagement with EU law, and supports the perception of remoteness of the externally supreme EU legal order.

The 'charge' against choosing the acontextual supremacy of EU law may seem misplaced if the desirable goal for the EU is envisioned to be a full-fledged federation (Baquero Cruz 2016). In this vision, the CJEU acts as a federal constitutional court 'promoting democracy' in a countermajoritarian fashion (see Saurugger and Terpan 2016, 157, 158–70) and member state supreme courts exercise their competence in areas that are not regulated by EU law. In the most fat-fetched conceptualization, the CJEU would be allowed to directly strike down member state legislation that runs contrary to EU law, not unlike a supreme court in a unitary state. At the same time, these visions run into the reality of the status quo of European integration where not even the 'intermediate step' of creating a *demoicracy*, ruled by the duality of multiple citizens and peoples (see Steuer 2015 and the references therein) has materialized. Instead, growing tendencies of differentiation of the Union's political order can be observed (Bátora and Fossum forthcoming), threatening the development of a democratic political community (Eriksen 2018). In a differentiated political order, a unified, hierarchical legal order is likely to get under pressure by the reality of political decision making and the behavior of political actors. Furthermore, where there is a limited elite and political support for a federative setting, the courts advocating it are likely to get under political pressure and into conflict with other political institutions and actors. At the minimum, the CC expressing a preference for such a unity in a hostile political environment has to provide consistent and comprehensive justifications for its preference, which is where the dimensions of persistence and persuasion come in. Along the same lines, the challenge for a court getting closer to a pluralist position is to actually implement it in concrete cases and with that send a signal that it feels to be bound by the pluralist predicament.²⁷ The next sections detail how the HCC and SCC performed in these dimensions.

²⁶ During the third term of the Court, the bulk of this analysis refers to, there was no EU law expert sitting on the Court.

²⁷ This would already be a source of concern from a pro-EU integration perspective, if we take for granted Kelemen's (2019) reasoning on the unsustainability of constitutional pluralism and the way how autocratic leaders use it to justify their departure from EU values. However, there are two major caveats in this reasoning. Firstly, Kelemen considers constitutional pluralism to allow for 'constitutional identity review' rather than for a review that aims for the highest standards of fundamental rights protection. In fact, the conceptualization of constitutional pluralism defended here (as well as by other scholars) rejects hierarchy precisely for the purpose of higher standards of human rights protection. Therefore, all court decisions in which this standard was clearly rejected (e.g., as we shall see later, in reducing the rights of asylum seekers in Hungary) in the name of majority rule as opposed to those in which it was followed (e.g. heightened standards for data protection in Hungary before 2011) *contradict* constitutional pluralism rather than represent it. Secondly, Kelemen (2019, 258) argues that 'EU legal scholars have advocated their own version of differentiated integration in the legal arena under the label of constitutional pluralism, a concept which would allow national constitutional courts to disapply certain EU legal norms in their countries if they deemed doing so essential to their constitutional identities.' Here, besides the definition of constitutional pluralism, differentiated integration is conflated with differentiation, the latter more aptly capturing the effects of constitutional identity review as performed by the HCC. The full conceptual

Persistence: The first ones to quit the game *versus* the radicalized preachers

The substantive content of the CCs' decisions pertaining to EU law is a necessary but insufficient indicator for analyzing their position to a European supranational democracy. The intensity of their efforts to address this question matters as well. In the following, the more recent (post-2011) developments of the case law of both CCs are scrutinized in order to see whether the initial (however vague and general) directions in interpreting the relationship between the legal orders and the related issue areas were upheld and developed by them in a consistent manner. Hungary, clearly, received much more attention in this regard. Scholars committed to European integration decried the Court's deference to the executive (e.g. Drinóczi 2017; Halmai 2018). This view has become particularly prominent after the Court delivered its abstract constitutional interpretation of Article E of the Fundamental Rights in which it reserved the right to exercise 'constitutional identity review' of Hungarian obligations under EU law. As a more detailed look suggests, the Court made several questionable procedural moves in this case, such as the handling of the petition questions and the timing of the decision.

The Court does not appear to have remained ignorant of the criticism but the way it responded was, if anything, an invitation to even harsher judgments on its independent review capacity. Notably, in two cases concerning the legal harassment of the Central European University (CEU) in Budapest²⁸ and the regulation of NGOs,²⁹ it decided in July 2018 after several months upon receiving the petitions to postpone the substantive verdict until related infringement proceedings against Hungary are concluded by the CJEU. How should we make sense of these cases? Staying confined to the lens of persistence, the HCC provided an invitation for a more vigorous dialogue with the CJEU. Without saying that it will consider itself bound by the outcome of the cases pending before the CJEU, it signaled that this outcome will matter enough for it to wait with the resolution at the domestic level. Furthermore, in a 2019 case³⁰ it reiterated that there is an overwhelming overlap between the values of the Hungarian Fundamental Law

exploration of the relationship between constitutional pluralism and differentiated integration proper (that rejects constitutional identity review lowering fundamental rights, contrary to Kelemen's point) requires further research. This research should develop the idea presented here, that CCs can be *drivers* of further integration by stipulating higher standards of human rights protection than set in positive EU law. As a consequence, they may approximate the unreachable normative ideals of democracy (beyond non-domination) in a context of a concrete controversy more than the existing standard of EU regulation and even its interpretation by the CJEU. This is how CCs can act as 'constitutional educators' (cf. Rosen and Lénárd 2019), always aspiring for a dynamic vision of democracy, providing more robust protection of fundamental rights including new, emerging rights.

²⁸ II/1036/2017 (https://alkotmanybirosag.hu/uploads/2018/06/sz_ii_1036_2017.pdf). Some details of the factual background are provided by Uitz (2018). Essentially, the government amended the higher education act and introduced a requirement for higher education institutions with accreditation from abroad to offer educational activities in the country of accreditation which, in CEU's case, is the State of New York. CEU complied with this requirement as confirmed by the State of New York but the Hungarian government did not accept the measures and suspended the negotiations. As a result, in December 2018, CEU announced that it will be moving to Vienna.

²⁹ II/1460/2017 (https://alkotmanybirosag.hu/uploads/2018/06/sz_ii_1460_2017.pdf). This act establishes a record of 'foreign-funded organizations' and imposes additional burdens on them. Press release for the suspension of both cases available at <https://hunconcourt.hu/announcement/in-the-spirit-of-the-european-constitutional-dialogue-the-constitutional-court-suspended-its-procedures-in-the-cases-related-to-the-act-on-national-higher-education-and-the-act-on-ngos/>.

³⁰ X/1416/2018 (https://alkotmanybirosag.hu/uploads/2019/02/sz_x_1416_2018.pdf). Press release at <https://hunconcourt.hu/kozlemeny/the-constitutional-courts-interpretation-of-the-fundamental-law-shall-be-respected-by-everyone/>. The case concerned the limits of executive authority in determining the specifics of the procedure of processing asylum applications of refugees arriving to the territory of Hungary.

and the EU, and in the rare cases of possible conflicts the HCC retains the authority for constitutional interpretation, prioritizing 'Europe-friendliness' where possible, and its interpretation is binding to all constitutional actors. This allows the conclusion that the HCC, at least on a face level, remained committed to 'moderate pluralism'. As the next dimension will show, however, both the postponement and the recent 'declaration of authority' read differently in the light of the maxims of non-domination from a fundamental rights protection perspective.³¹

Just a few years after the Eastern enlargement of the Union, the Czech CC 'overshadowed' its Slovak counterpart by its EU-related judgments and the SCC did not exhibit signals to compete. In fact, there are hardly any traces of an effort to engage with EU law, not even when the petitioners referred to its provisions. A typical technique that demonstrates this avoidance is that of the sidelining of the claims of incompatibility of certain legislative provisions or other decisions of state organs with the EU Charter on Fundamental Rights in case the review of compliance with the domestic legal order already shows a disjunction. Not unlike doctrinal legal scholars (Mazák and Jánošíková 2015) point out, there is no reason for the Court to have dismissed the Charter review (case PL. ÚS 10/2014) so simply not just because of the absence of attention to detail and the 'learning effect' that a possible (in)compatibility ruling might have in future cases but also because of the perception of irrelevance for domestic constitutional protection that it generates. In other words, that the Charter 'is perceived more like an ornament than a real legal tool' (Mazák and Jánošíková 2016, 15) does not help bring the EU legal instruments (in this case, in a core area of fundamental human rights principles) closer to the citizens of a member state.³² The EU legal order remains 'on the outside', stepping in only through cases with usually remote and complicated factual background that are handled by the CJEU.³³ Obviously, this neglecting attitude is still less harmful than the 'constitutional identity'

³¹ The HCC did not submit preliminary questions and has not recognized an *individual reviewable right* (as opposed to an encouragement for the general courts) to submit preliminary questions to the CJEU. Furthermore, the Court did not encourage the substantive review of compatibility of domestic institutions' actions with the Charter of Fundamental Rights, even though theoretically its doctrine would entitle it to review this compatibility in individual cases where the Charter is invoked (cf. Gárdos-Orosz 2015).

³² At the same time, these scholars provide a rather monistic perspective on the Charter's applicability when claiming that a general court does not have jurisdiction to initiate proceeding before the SCC with reference to incompatibility with the Charter as it should directly set aside the provision in question (Mazák and Jánošíková 2015, 600). This 'bypassing' (see Comella 2009) of the SCC (or, for that matter, any other CC in a similar setting) is not conducive to the building of an integrated political order as it gives rise to possible conflicts between general courts and the SCC (a typical example being such a conflict in the Czech Republic) or between general courts mutually (some setting aside a particular provision claiming incompatibility with EU law, others not).

³³ The SCC is not the only one to blame though. Other constitutional actors are at times reluctant to refer to EU law in raising challenges before it as well. This is illustrated in a case concerning the Act on health insurance where a group of deputies challenged the compatibility of the legislative restriction of state provision of health insurance to students over 30 years of age with several constitutional principles. Only from the reproduction of the submitted briefs can the reader infer that the petitioner also brought up incompatibility with the anti-discrimination principle developed in the Charter (PL. ÚS 98/2011, pp. 8-9). However, they did not raise this incompatibility in the proposed holding, prompting the Court to avoid 'the EU law's waters' as a result. Thus, the only dialogue unfolded between the petitioner and the respondent (the latter arguing that the Charter is applicable only if EU law is directly being exercised). In the discourse of the case at hand, the Court became a 'silent bystander', reproducing the debate but not adding its own considerations to it.

claims challenging the legitimacy of the EU legal order in the Hungarian vein (Halmai 2017, Szente 2017, 469-70).

The SCC's approach to 'preliminary questions' as a crucial component of cross-border judicial dialogue demonstrates offers a more longstanding development in a coherent direction (see Ježová 2013). Here, the SCC requires the court of last instance in a given case to submit a preliminary question if the petitioner so requests or reasonably justify why a preliminary question cannot be submitted. Moreover, the non-submission of a preliminary question can serve as ground for permissibility of an extraordinary appeal procedure before the Supreme Court. At the same time, the SCC itself is reluctant to substantively deal with petitions that did not exhaust all other remedies, including the request for issuing preliminary ruling submitted to the domestic court according to the Civil Procedure Code (IV. ÚS 299/2012, p. 9). On the overall, the significance attributed to the preliminary question doctrine and, to a lesser extent, the general position towards EU law primacy coupled with the constitute the most persistent elements in the SCC's reasoning about the EU legal order. Given the perception of subordination of the Charter to other, more 'hand-on' instruments of human rights protection (Constitution, ECHR) and the absence of a position on the nature of the EU as such, the Court's case law does not appear as positing intensive positions on these questions. Adding the dimension of persuasion, the full matrix of the Court's efforts (or lack thereof) in building a supranational community through bringing closer domestic and EU law comes to the fore.

Persuasion: Going (and gone) with the wind?

A CC might present strong opinions about a question at hand and follow this practice frequently but if it is unable to convincingly argue for its position, it is unlikely to sway any followers and make a long-lasting contribution to the debate.³⁴ Moreover, contradictory interpretations undermining earlier directions of jurisprudence leave the CC in question vulnerable to valid criticism and stifle its possible efforts to speak with an authoritative voice about the role of the domestic political community in European integration.

Unpacking the various issues areas, the first two dimensions feed into the last one, as having a position articulated in legalistic terms at least implicitly backed by principles, and presenting it persistently over a longer period of time, are both essential for the capacity to argue convincingly about the CCs' cause. Upon first assessment, the position of the SCC might seem quite persuasive—it acknowledges the supremacy of the EU legal order and of the CJEU as its

³⁴ The volume of criticisms of a judgments published and disseminated via public fora does not necessarily have to signal the lack of influence (given that many experts at least clearly 'bothered' to engage with the CC) but still qualifies for non-persuasiveness in this dimension considering that the CC in such a case clearly failed to convince others of what it believes to be true. On a more nuanced level, one could distinguish between public engagements with (and criticisms to) the majority opinion and to the dissents—the dissent is unlikely to get more attention than the majority ruling in case it is supported by a much smaller segment of the expert community and the public. On the contrary, if the dissent presents a much more convincing and persuasive position than the majority opinion, then it might be the dissent that brings attention to the case as such. Furthermore, the fact that an unpersuasive majority opinion was not unanimous can 'rescue' some portion of the authority of the CC as an institution considering that it becomes visible that there is a mechanism to at least indicate the 'correct' (from the public reception perspective) position regardless of the majority's grave mistake. On the significance and effects of separate (dissenting as well as concurring) opinions, see e.g. Kelemen (2017).

interpreters. However, closer examination reveals multiple leaks. If the nature of the EU for the SCC is not clear, how malleable might its position be in case of de facto policy changes e.g. through the institutionalization of a 'EU core' represented by the Eurozone? If the SCC is reluctant to perform compatibility review with the Charter and the EU treaties, what does guarantee that it will not shift to sidelining the EU instruments altogether, instead of asking a preliminary question, when such a matter arises?³⁵ These fragilities are exacerbated by the fact that the SCC's majority (nine out of thirteen judges) is undergoing a change in 2019, thereby limiting its long-term institutional memory. Also, what if a conflict between the two supranational human rights mechanisms, that of the EU and of the Council of Europe, arises—will the SCC stick to the supremacy of the Convention regime, its default approach towards human rights disputes, or EU supremacy? While a constitutional pluralist position provides a way forward in such a setting (applying the instrument providing the widest human rights protection vis-à-vis the state or other actors), the supremacist one results in anything but a jurisdictional conflict. On the other hand, fundamental rights may become the glue that sticks together domestic and supranational democracy, as the SCC is committed to its role as 'domestic human rights court'. For that to happen, the SCC needs to embrace more pluralist articulations of the relationship between human rights and democracy, and thereby creating a narrative in which the Union as a supranational democracy (or democracy-to-be) is an integral part of the domestic framework of human rights protection. Further research is needed to see how this model works with other CCs, and how the interaction between the ECHR and EU regime will develop at the SCC in human rights cases.

Moving on to Hungary, the recent European integration case law of the HCC leaves serious doubts of the Court's intention. Simple labels for the four decisions between December 2016 and March 2019 ('referendum', 'CEU', 'NGO law', 'asylum seekers') confirm that all cases have a strong fundamental rights dimension (academic freedom and freedom of scientific research, freedom of association, core refugee rights) and so it is possible to evaluate them from a constitutionally pluralist perspective, in terms of contribution to reducing domination over European citizens' and peoples and thus contributing to a supranational democracy. A substantive review shows that in *all* these cases the standards of fundamental rights protection were *lowered* by the HCC's decisions (see also Körtvélyesi and Majtényi 2017 on the exclusionary approach of this constitutional identity review). In the referendum case, by avoiding a decision on the anti-refugee propaganda by the government, the HCC rubber-stamped institutionalized discrimination and racism financed by public funds (Bocskor 2018). In the CEU and NGO law cases, by suspending the proceedings (without an actual commitment to follow the CJEU's judgment on the merits or at least substantially engage with it in the later decision), it left the government's policy unchallenged and put both types of institutions³⁶ under

³⁵ In a recent case (review of constitutionality of selected provisions of the Act on waste), the SCC indicated its reluctance to review compatibility of domestic legislation with EU treaties *even if* unconstitutionality with the domestic constitutional order is not found. The Court 'presumed' that the provisions are in accordance with the principles of market competition stipulated in EU law as well (PL. ÚS 51/2015). In this case, the outcome would likely have been the same but *procedurally*, such practice poses a negative precedent for compatibility review in case the domestic constitutional standards for the protection of certain right or interest are *lower* than those of the EU.

³⁶ The CEU case is not an isolated one as with the lack of domestic protection of academic freedom, the government felt compelled to move forward with similar harassments of the Hungarian Academy of Sciences, not only in terms

existential pressure. The asylum seekers case is the most explicit illustration of the HCC's recent *rejection* of constitutional pluralism despite spreading the *appearance* of its commitment to it. By declaring that it is in the purview of the government to adopt virtually any regulation on refugee management at a time when the negative attitude of the latter towards them is obvious by a myriad of campaigns, it reduced the standards of protection of refugee rights. In turn, the fact that refugees are not citizens brings about an element of 'othering' into the HCC's jurisprudence that runs affront the idea of a community beyond state borders.³⁷ Additionally, the persuasiveness of the conclusions in all these cases is further undermined by the large number of concurring and especially dissenting opinions (sitting in a fifteen-member Court, five concurrences and one dissent in the referendum case, four concurrences and five dissents in the CEU & NGO cases, four concurrences and four dissents in the asylum seekers case).³⁸

Summing up the analysis in the three dimensions, Table 1 provides a summary of the two CCs' standpoints in four identifiable issue areas and in each dimension. The SCC's performance is weakest in its persuasive capacity about its positions on EU law, determined on the basis of the depth of its reasoning and the capacity to 'connect the dots' between different particular issues of EU law, often present in seemingly remote and factually complex disputes, into a full-blown narrative about the relationship between the two legal orders. The HCC displays greater overall engagement with European integration by having both officially acknowledged the EU as a political entity with an autonomous legal order and envisioned its role in the constitutional review of cases with an EU law dimension. Doing so, it also stipulated a position for the Charter as a primary source of EU law with rights applicable on Hungarian territory and reviewable by the HCC. In all other dimensions, it lags behind the SCC due to the discrepancy between the declared commitments and compatibility between Hungarian constitutional and EU values and the substantial outcomes of core cases at least restricting if not directly undermining these values. The decisions with direct implications on individual and institutional lives signal a resignation on a republican Europe with fundamental rights preventing domination of individuals *both* at the EU and the state levels.

of financing but also significant program-related decisions (such as the existence of a research division on gender studies). Furthermore, the CEU case follows a series of earlier decisions related to the management of state universities which increased their dependence on governmental decisions, later overshadowed precisely by the CEU case. For instance, these are not mentioned in a recent piece lamenting about the 'loss' of Hungary as a democracy and capturing the governmental strategy of creating 'legislative hurricanes' with so many changes that the international community cannot process and comprehend: (Magyar 2019; similarly, see the concept of the "Frankenstate" in Scheppele 2013).

³⁷ The processes of 'constitutional othering' are identifiable at a subnational level as well, the NGO and CEU cases being obvious examples, among others (Majtényi, Kopper, and Susánszky 2019). However, the recent case takes a step further by the HCC *itself* engaging in this process, rather than merely remaining inactive in the face of governmental propaganda. While already the pre-2011 constitutional setting includes traceable elements of othering (Batory 2010), the HCC has not been considered as an actor involved in this process before.

³⁸ From a different perspective, some of these separate opinions challenge the majority's interpretations in favor of ways more compatible with a constitutionally pluralist standpoint.

Supranational Democracy Through Judicial Review? Studying the Relationship Between Democracy and Integration in EU Member States' Constitutional Courts

Dimension / Issue area	Nature of the EU	EU law & Hungarian/Slovak legal order	EU Charter review	Preliminary questions
Principledness	NA	High—Rejecting pluralism	Moderate—dismissed if also incompatibility with domestic law	High—part of due process
	Moderate—acknowledgment of the independent EU legal order	Moderate—constitutional dialogue confined by domestic constitutional interests	Low—Charter review not conducted	Low—no constitutional right to preliminary questions
Persistence	Low—no building up of a doctrine	Moderate—Court's position reproduced by judges' writings	Low—few cases/writings pointing to the same direction	High—consistent through many decisions
	Moderate—repeated across several cases over time	Moderate—position followed in several high-profile cases and reported about	Moderate—consistent theoretical position articulated	Low—not addressed in the case law
Persuasion	Low—No clear position articulated	Low—no explanation for primacy and for focusing on the Constitution first	Low/moderate—lack of attention vis-à-vis domestic and ECHR protection	Moderate—reasons for submitting clear but no question submitted yet
	Low—implicit traits of hostility towards the EU; <i>de facto</i> implications <i>versus</i> symbolic commitment	Low—'technical dialogue' without an 'intention to listen'	Low—Charter rights perceived as reviewable but not reviewed in concrete individual complaints	Low—lower protection of fundamental rights also according to domestic law

Table 1. Assessment of the degree (low-moderate-high) of principledness, persistence and persuasion of the SCC's (blue) and HCC's (green) reasoning related to European integration in the identifiable issue areas. Source: author.

Conclusion

The picture of contemporary European democracy is rather bleak. Joseph Weiler (2018) recently painted it as a failure of the messianist attitudes of the drivers of the EU integration (including the CJEU) at the expense of enhancing input legitimacy. The President of the CJEU chose a safer ground and talked about the 'Union of Democracies, Justice and Rights', but not as a democratic Union (Lenaerts 2017), symbolizing the deficits of the CJEU in bringing a democratically governed, input- in addition to output-legitimacy-based Union closer to reality. Nevertheless, it is domestic CCs that can make the sky brighter by eliminating the domineering facets of EU law. Such an achievement would clearly not bring about supranational democracy from one day to another. Nevertheless, without acknowledging and trying to advance the potential of the CCs in this process the prospects for a European democratic 'political animal' to emerge are even bleaker than Weiler's picture.

Even with a minimalistic conceptualization of democracy as non-domination and with an established integrative connection between the quality of democracy at the domestic level with the democracy in the EU, this remains a daunting task for the CCs. Besides expertise in the growing (in amount and complexity) scope of the EU law and a will to engage with it, they need 'prompts' in the form of suitable cases that allow them to 'speak' on the issues of interaction between the legal orders. They need to resist the simplified, linear understanding of the relationship between the legal orders pursued by the CJEU and yet do not grow hostile towards it altogether. Moreover, depending on the political elites' positioning towards European integration in the country of their operation, they might need to run against the mood of politics in the short run, possibly incurring a backlash from other domestic authorities as a result. This area entails a number of questions for further research, including the realities from more CCs as well as corroborating the analysis of case law and judges' writings with more informal insights from interviews or public reflections through media reports.³⁹ At the theoretical level, more ambitious definitions of (supranational) community can be employed than that of non-domination in a democratic context based on guarantees of fundamental rights, and tested against empirical evidence of not only member state high courts but also the CJEU. At an even higher level of abstraction, republican theorizing of a supranational community that goes beyond citizenship rights towards a more holistic conception of rights protection as means of non-domination provides fruitful avenues for inquiry (cf. Lovett 2018, 4.4). While each CC is a 'world in itself', the cases of the HCC and the SCC examined here illustrates the difficulties with the CCs' *principledness, persistence and persuasion* in developing their doctrines vis-à-vis European integration, ones that mirror the difficulties with pursuing a concrete vision for the EU as a political order.

³⁹ In the Slovak case this is likely to be complicated by the limited case law that is not frequently reflected upon by other political actors. Studies of countries with more dynamic relationship to the EU, or possibly Slovakia in its development during the 'fourth' term of its CC (as of 2019) are highly likely to yield fruitful results.

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