

Slovakia risks heading back to the nineties

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19 March 2024

The Slovak Constitutional Court has temporarily succeeded in halting the autocratic legalism of the governing majority. **Max Steuer** argues that the Court's decision, and its political context, resemble developments in mid-1990s Slovakia. The Court showed resilience, but that might not suffice if Slovakia's illiberals learn from the experience

The Constitutional Courts of Hungary and Slovakia, the two EU member states currently most at risk of autocratisation, have both been in the news of late.

In Hungary, the Fidesz-majority Parliament elected the Court's long-term President Tamás Sulyok to head the state. Nevertheless, it seems largely insignificant who replaces him, because the parliamentary majority is firmly in control of the appointments (30:57–35:30):

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The Slovak Court President Ivan Fiačan is also in the news. The country's PM, Robert Fico, called upon Fiačan to resign. He blamed Fiačan for encouraging so-called 'anti-government' media reporting on his decision to suspend key parts of the government's amendment to criminal laws. Fico has hinted that the new head of state (presidential elections are in a few weeks) might replace Fiačan. If Fico's favoured candidate wins, this might well happen, despite being unconstitutional. The episode shows that, in Slovakia, the person who leads the Court makes a difference.

Recent actions by, and towards, Slovakia's Constitutional Court echo those of the 1990s, when the Court blocked key policies of the government's non-democratic majority. However, it used a limited, majoritarian reading of democracy. This style of reasoning limits the Court's democracy-protecting role.

The Slovak Court makes a quick decision

Fico's critique of Fiačan arose after the Court's initial decision on an amendment to the Criminal Code, passed in the Slovak Parliament only a few weeks before. Among its provisions, the amendment would have significantly reduced the sentencing periods for a number of crimes, including rape. The amendment would also have meant that any ongoing proceedings concerning a person's suspected earlier crimes would have ceased immediately. The Court, however, promptly suspended the effectiveness of large portions of the package. This meant that the amendment's provisions could not come into effect before undergoing a substantive review.

A proposed amendment to the Slovak Criminal Code would have reduced the sentencing periods for various crimes, including rape. The Constitutional Court swiftly blocked the amendment

Yet, the Court did not block the abolition of the Office of the Special Prosecution. This particular Office had been leading investigations into the criminal activities of Slovak political elites.

By suspending the amendment, the Court opted for a procedural middle ground. Although it had issued its decision *before* the amendment under scrutiny was published in the Collection of Laws, the Court conditioned the same decision's entry into force by publishing it in the Collection.

Publication of legal acts in the Collection of Laws is within Ministry of Justice purview. The Ministry typically has fifteen days to publish legal acts in the Collection. The Court made its decision on 28 February, and the amendments were due to come into effect on 15 March. The Ministry was therefore legally obliged to publish the Court's decision before 15 March. This obligation helps avoid controversies over the effectiveness of the Court's decision; a factor it takes into consideration when making decisions. Indeed, President Fiačan mentioned this during his 6 March press conference (22:10):

Watch Video At: https://youtu.be/we_6QoWRX4E

By not granting its decision immediate effect (without publication in the Collection of Laws), the Court also showed considerable trust in executive compliance. Publishing the decision, a step ultimately taken by the Ministry, was well in the executive's interest, because it ensured the dismantling of the Special Prosecution Office. Nevertheless, the Court's reasoning leaves room for bolder steps in the future.

Why everyone claims to have won

In a nutshell, the Court did not fully please or displease anyone. The opposition endorsed the suspension of the Criminal Code amendments' effectiveness. The governing coalition led by PM Fico criticised this on procedural grounds. Still, the decision did go some way to help the coalition, too, particularly after the public uproar against the lowering of the sentencing period for rape crimes. Had the provisions formally come into effect, investigators, prosecutors and judges would have faced major dilemmas. The Constitutional Court's quick action prevented this.

Had the new sentencing measures formally come into effect, legal actors would have faced serious dilemmas

Neither did the Court feel that abolishing the Special Prosecution Office would pose enough risk to constitutionally protected goals to warrant halting the abolition. As a result, this institution's days are numbered. The Court could still declare the abolition of the Special Prosecution Office unconstitutional at a later date. This, however, would involve reinstating a previously abolished institution – a significant obstacle.

PM Fico declared this part of the decision to be the most important. He claimed it was a victory for him and for the coalition, a central goal of the entire amendment package.

The nineties style has limits

This compromise decision makes limited reference to principles other than the rule of law, such as democracy. Despite this, PM Fico called a press conference. There, he committed to publishing the Court's decision promptly in the Collection of Laws, instead of taking the Polish route (just yet).

During the same press conference, Fico mounted a harsh critique of the Court and its President. He did so mainly because the outcome of the decision was leaked by the media hours before the Court officially communicated it – possibly because of a technical fault. This is indeed a shortcoming, but possibly a shortcoming of journalists, too. They might have forgotten to check the Court's website for embargo rules before breaking the news.

| In his defence, Fiačan argued that the Court is independent but also non-political

Fiačan has launched an internal investigation into the leak. In a press conference on 6 March 2024, he explained some of the crucial aspects of the case. He also effectively condemned the attacks on the Court's integrity, albeit at times using reductionist language. For instance, Fiačan argued that the Court is not only independent, powerful and non-partisan, but altogether non-political, as if it was only an administrative, bureaucratic institution.

The PM's illiberal, anti-Court rhetoric resembles that of his predecessor from the 1990s, the non-democratic Vladimír Mečiar. So far, this rhetoric is rather unsophisticated, and hence the Court's language, committed to majoritarianism, works well to counter it. However, Fico's declared intention to amend the Court's procedural rules shows that he might learn. Evidence from neighbouring Hungary suggests that majoritarianism-based reasoning is not enough to defend democracy.

This blog post was prepared during the author's research stay at Central European University's Department of Legal Studies. The research is supported by the Action Austria-Slovakia scholarship

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