Emancipation or Silencing? The Slovak Constitutional Court Will Decide

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The political context has created an opportunity for the Slovak Constitutional Court to become a globally important example of judicial resistance to autocratization.

A Constitutional Court as powerful as the Slovak one faces few formal constraints on its adjudicative practice. It is the supreme guardian of constitutionality in Slovakia (Art. 124 of the Constitution). It interprets a Constitution committed to democracy, albeit a very flexible one, because the text is easily amendable via a three-fifth majority in a unicameral Parliament. Hence, the Court is entrusted to guard against attempts at undermining the Slovakia's democratic regime. This could even mean halting constitutional amendments.

However, there are limits on courts stemming from the self-perception of their judges. These have been significant for Slovakia's Constitutional Court in the past, including during the period of the 1990s when it is understood to have defied (according to observers, rather successfully), a (semi-) authoritarian executive. As a result, experience does not guarantee that the Constitutional Court would not yield to partisan pressures.

Assaults on the Court by Fico's cabinet

Such pressures have been mounted by the illiberal majority of Prime Minister Robert Fico. Slovakia has been left out of most collections with country case studies on the role of constitutional courts, or on illiberalism. Thus, trends including the overuse of accelerated legislative proceedings (which the Court has recently started to express more reservations about), or the 'small illiberalisms' advancing the language of exclusion at the rhetorical level even by more centrist partisan actors have received marginal attention in studies on Slovakia.

Still, the recent open attack by Fico on the Constitutional Court and his rhetorical determination to tamper with its competences, alongside his core coalition partner's ambition to increase the number of judges on the Court, deserves attention. This is particularly since the Court has been at pains to present an image of a self-restrained body,

and has not taken some bolder steps to protect human rights and democracy, disappointing some of its observers. If anything, with this image it should be more, not less, difficult to attack the Court on grounds of 'juristocracy' or of judges 'engaging in politics'.

However, Fico does not seem to have this difficulty, despite the fact that the current judges led by President Fiačan have not generated controversy in the selection process in the parliament. The Slovak National Council selects a double number of candidates from among whom the head of state makes the final selection. The majority of judges of the ongoing term at the time of writing were appointed in 2019, meaning their terms will expire in 2031. In fact, Fiačan and other sitting judges in 2024 were selected also with the support of Fico's party, after Fico's own efforts to become the President of the Court were unsuccessful, and he withdrew his candidacy. This episode might 'make things personal' for him whenever the Court halts legal changes he desires and his majority implements.

The stress test for the Court continues

The Court opted for a middle ground in an important (albeit procedurally preliminary) decision on 28 February 2024 about amendments to the Slovak Criminal Code. It suspended the effectiveness of some of these amendments which could have created major confusion and chaos. However, it did not suspend amendments abolishing the Special Prosecution service. The abolition of this service has been another key goal of Fico who has despised the service for what he called 'politically motivated' prosecutions (many of these targeting his collaborators, particularly in relation to economically motivated crimes).

As noted by Darina Malová, the Court's decision was a victory for neither the coalition nor the opposition, but for democracy, in the sense of the Court preventing what might have been a massive upsurge of injustice if the impugned provisions came into effect.

The Court's reasoning showed trust towards the executive with respect to the publication of the decision (see sec. 128, 134 of the decision), as it reiterated that the step of publication in the Collection of Laws is a formal condition for the *effectiveness of the decision* (and hence the *suspension of effectiveness of the Criminal Code amendments*). The executive ultimately did publish the decision, but doing so was a condition for securing Fico's victory to abolish the Special Prosecution service. The decision to publish was well in the executive's self-interest.

The Court's decision addressed three separate petitions (one by the head of state, and two by groups of opposition MPs). Together, these three petitions provided ample argumentative basis for judicial interference with the amendments.

The Court's novel contribution is in suspending the effectiveness of unpublished legislation. It plausibly noted (sec. 68-78 of its decision) that without such a step, it would be possible to effectively strip the Court of its ability to suspend legislation if the legislative majority decides to set the date of effectiveness and the date of publication to be the same. The Court hastened to add (sec. 77) that in making this contribution it was still sticking to the 'constitutional limits' of its competences, which, in the Court's view, do not extend to the assessment of the 'content-based correctness, quality and effectiveness' of criminal law.

On the other hand, the Court said more than necessary when it declared that the rule of law demands 'a balance' between the protection of human rights or 'other public interest' and other principles, namely legal certainty, democracy and the 'requirement to respect legislative power (considering the constitutional principle of the separation of powers)' (sec. 110). Here, the majority pitted human rights and democracy as being in opposition within the broader idea of the rule of law.

While the relating of democracy to the rule of law rather than presenting the two principles as contradictory is a step forward, now it is human rights which were instead placed in opposition to democracy, under the ubiquitous notion of the rule of law. I have shown how reducing democracy to mere majoritarianism may self-disempower constitutional courts, as has happened in neighboring Hungary. The Slovak Court could have defended the same verdict with a more robust reading of democracy, securing itself more leeway should its trust in the executive prove to be unwarranted.

The two partially dissenting opinions critiqued the *en bloc* suspension of the effectiveness of the Criminal Code amendments, as opposed to a more 'surgical' approach whereby the effect of each individual provision would have been examined. One of the dissents (Judge Straka, sec. 13) observed that the Court heeded the 'hopes of part of the society'. Yet, these may 'result in uncritical pronouncement of further high expectations [which] might change to skepticism [because] the Constitutional Court is not an institution embracing political contestation.'

The justification of the majority decision, despite its commendable elements, essentially communicates the same message as Judge Straka does. Still, it shows that the judges were aware of the gravity of the issue before them. Moreover, the illiberal assaults and continued centralization of power, most recently by the victory of the coalition candidate in the presidential elections of 6 April 2024, demand from the Court led by President Fiačan to emancipate into a robust guardian of Slovakia's Constitution.

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