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Rule of Law Minimalism and the Fear of 'Politics': The Slovak Constitutional Court amidst the Illiberal Surge

Max Steuer[1,2]

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Abstract

After the defeat of the semi-authoritarian majority in 1998, Slovakia seemed to move towards a fragile, aspirational consensus on the significance of the rule of law. Since the victory of illiberal parties in the 2023 elections, constitutional value decline accelerates. The Constitution of Slovakia entrusts the Slovak Constitutional Court to guard these values. Against this backdrop, this article contributes to understanding the Slovak Constitutional Court's performance amidst the post-2023 illiberal surge as an important case for understanding the societal potential and role of constitutional courts. Its theoretical underpinnings depart from recognizing the political character of constitutional adjudication in a broader sense as public institutional action responsible for advancing the rule of law beyond minimalism, coupled with the discursive resistance to the 'language of politics' by constitutional courts. The article identifies key representations of 'politics' in the 2024 Slovak Constitutional Court decision on the amendments to criminal law, and in public reflections of this judgment, which concerned a flagship intervention by the illiberal executive. The analysis shows that the Slovak Constitutional Court was at pains to present the image of not only a non-partisan, but even an apolitical body, thus trying to escape from the inevitably political nature of constitutional adjudication. This image generated by the Slovak Constitutional Court risks to deepen the disconnect between narrower notions of legality on the one hand and broader ideas of constitutionalism and the rule of law on the other. It also complicates the avenues for constitutional courts to challenge practices that undermine constitutional values.

Keywords Illiberalism · Constitutional courts · Rule of law · Legislative process · Law and politics · Slovakia

✉ Max Steuer
ms2632@cantab.ac.uk; max.steuer@uniba.sk

[1] Department of Political Science, Comenius University, Bratislava, Slovakia

[2] Jindal Global Law School, O.P. Jindal Global University, Sonipat, India

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1 Introduction

Constitutional adjudication is inevitably political, in the sense that it addresses central dilemmas of contemporary society that—at least in a democratic regime that aspires to the rule of law—are inherently part of the public discourse (see, e.g [1]). Constitutional courts—called supreme courts in some systems where these are endowed by the ultimate legal authority to interpret constitutional concepts—are *political* institutions [2][1] but not *partisan* institutions. Their judges' worldview is expected to go beyond particular ideological goals. They are also expected to transcend disputes that fall into the domain of competition between political parties and partisan leaders (see [6]). Yet, the view that constitutional courts are political (albeit not necessarily ideological)[2] sits uneasily with most legal epistemic communities [8], and even constitutional court judges might strive to be seen as 'untainted by politics'.

This article provides an illustration of the 'fear of politics' as a starting point for understanding how it can constrain constitutional courts' impact on the rule of law. The importance of scrutinizing that impact becomes more significant amidst global rise of illiberalism, when constitutional courts as the most visible judicial institutions frequently face partisan assaults, rhetorically or even via legislative changes aimed at curbing their powers or otherwise stifling their independent role [9]. A common scholarly advice as to how courts should behave under such conditions is to strategize and ensure they are not seen as tainted by 'political' practices which could give rise to accusations of judicial overreach. Such strategizing might allow them to survive to 'fight another day' [10]. However, it might increasingly disrupt the link between courts and society and fuel courts' marginalization in the struggle for democracy, if those who would otherwise appeal to courts to protect constitutional values cease to believe that it is meaningful to do so [11].

Via close attention to one decision of a globally neglected, but formally powerful constitutional court, the article contributes to understanding the impact of judicial discursive engagement with the concept of 'politics'. It studies how a constitutional court fares when put under strain by the partisan context surrounding it, and by epistemic communities who tend to embrace a one-sided understanding of constitutional courts' political role, one that perceives that role as normatively undesirable. The constitutional review decision of the 2023—2024 changes in criminal law in Slovakia is suitable for this study as it was subject to intense public attention and the Slovak Constitutional Court itself acknowledged its significance in its public communications (e.g [12, pp. 14–16, 13]). The changes were enacted by the post-2023 illiberal government in an accelerated legislative procedure. They significantly lowered the sentencing period and statutes of limitations for criminal conduct, abolished the Special Prosecution Office built to investigate particularly grievous crimes including

[1] Other scholars tend to differentiate between courts and political institutions/branches, albeit at times ambiguously so, see [3, pp. 1–4, 4, p. 319, 5]. The argument in this article need not consider general courts, as the controversy over whether even general courts (especially lower-instance courts) are political institutions is relatively greater than whether constitutional courts are.

[2] Critical Legal Studies sometimes make claims of this nature see references in [7, p. 399].

elite corruption,[3] and enabled to crack down on individuals who had provided evidence of such corrupt conduct by charging them for fraud [15].[4]

The Slovak Constitutional Court operates in a European Union member state and has a globally extensive range of competences.[5] Despite the EU anchoring, however, Slovakia's democracy has increasingly been in peril after the 2023 general elections which granted majority to an illiberal coalition, supportive of authoritarian Russia of Vladimir Putin, prone to conspiracy theories and stirring hatred against the 'progressive enemies of the state'[6], all this under the eyes of the EU institutions. These tactics have secured the prime ministerial seat to Robert Fico, who had held it three times before. Fico's rule has displayed similarities with his southern neighbor, Hungarian PM Viktor Orbán, who has transformed that country's constitutional system to make it nearly impossible for opponents to oust him from power.

Section 2 expands on the political context in Slovakia after the 2023 general elections, that fits a pattern of global illiberal surge, and highlights some of the long-term ills in legislative drafting that the partisan actors could exploit and capitalize upon when enacting the changes in criminal law. Section 3 discusses the Slovak Constitutional Court's central role in protecting Slovakia's constitutional principles, and its wide range of possibilities to act in response to the deterioration of democracy. Section 4 zooms in on the changes in the criminal legislation and shows how the key 2024 decision signals the agonizing of the Court over not only the merits of the decision alone, but also its own role in a regime where robust judgments are likely to be met by backlash from the ruling power. This section offers an 'internal discursive critique' mindful of the context. It argues that the Court fell short in seriously accounting for the voices approaching it in search of justice, and openly declared a commitment to blunt strategizing instead of sticking to constitutional principles, at the expense of credibility. Zooming out from this case, the article shows the perils of constitutional courts embracing a minimalist approach to the rule of law. Without stipulating that a minimalist approach is never able to provide safeguards, the analysis demonstrates how it may allow the deterioration of democracy preventable by judicial intervention. Furthermore, rule of law minimalism is overly conducive to the marginalization of constitutional courts as simultaneous guardians of the rule of law and of democracy.

[3] See Act No. 458/2003 Coll. on the Establishment of the Special Court and the Office of Special Prosecutor's Office. On statutes of limitations as an illiberal technique, see [14, p. 373].

[4] The link refers to a copy shared on social media by attorney and rule of law defender Peter Kubina. An overview of the indictment is available at [16, 17].

[5] Including the possibility to provide an interpretation of contested constitutional provisions, to quash legislation, to handle individual complaints on human rights violations and to address a range of other disputes of potentially high public interest (such as review of constitutionality of referenda or appeals against political party bans).

[6] This reference appeared in the much-anticipated first speech of PM Fico after having been exposed to an assassination attempt. Fico called progressivism 'cancer' and 'poison' and asked for building a *cordon sanitaire* against it, the latter by mirroring one of the prominent democratic strategies against the extreme right. For the speech, see [18], for *cordon sanitaire* as a strategy, see, for example [19, pp. 81–109].

2 The Perils of Respect for Constitutional Values: Slovakia in Mid-2020s

More than three decades after the 'Velvet Revolution' that marked the downfall of state socialism, consensus over what constitutional values—including democracy and the rule of law—mean remains absent in Slovakia. The legacy of the 1989 revolution has not translated to enduring governance practices [20]. Sheer, unrestrained majoritarian logic regularly prevails over deliberative, consensus-based decision making [21, p. 100]. The latter instability haunts the Constitution itself, its text contested both on content and significance. Content-wise, there is the troubling legacy of more than four decades of the state socialist 'sham constitution' [22, p. 109, 23]. That text contained verbal commitment to constitutional values, systematically ignored or twisted via a law-like 'doublespeak' in practice. The post-1989 text was rushed in 1992 and marked by partisan bias [22, p. 121]. Notable among these is the preamble differentiating between the 'Slovak nation' and national and ethnic minorities that was hailed by the illiberal supporters of the Constitution from the party of Vladimír Mečiar, and the Slovak National Party [24, pp. 138–140]. Despite this history, there remain ample resources in the constitutional text that allow to practice constitutional values, including by establishing courts meant to help guard them [25, 26, p. 63].

The significance of the 1992 Constitution has been questioned because of the lack of participatory processes and deliberation not only when creating it during the rushed process of dissolution of the Czechoslovak Federal Republic, but also when amending it (see [27, 28, pp. 10–12, 29]). Otherwise opposing partisan actors have, with rare exceptions,[7] all been open to changes to the wording of the Constitution to address a situational issue.[8]

Against this backdrop, Slovakia has had an early post-1989 experience with illiberalization or even a semi-authoritarian period of rule, as its post-1989 democratic experience had been very brief by then [30]. The deterioration of the fragile post-1989 democratic foundations during the period of Mečiar's premiership (1994—1998) is relatively well documented, as is the subsequent 'catch-up' in reforming the state during the two cabinets of PM Mikuláš Dzurinda [31] that, despite criticisms of some policy choices and lack of transparency of partisan decisions, helped Slovakia's EU accession [32]. Less highlighted are illiberalization tendencies after EU accession. The three cabinets of PM Robert Fico, albeit embracing generally pragmatic pro-EU sentiments, have also engaged in exclusionary nationalism and supported the undermining of minority rights of vulnerable communities [33]. Fico used the anti-refugee wave to succeed in the 2016 elections, but was forced to resign due to public protests after a journalist investigating corruption among Fico's high-level supporters and allies has been murdered on this account, most likely on order of one of the oligarchs who had enjoyed Fico's support [34, pp. 1929–1930].

[7] For example, the Progressive Slovakia political party demonstrated resolute opposition to such random amendments. Given its relatively short role as parliamentary opposition party by the time of writing, it would be premature to make a final judgment.

[8] These include extending the constitutionally permissible time in pre-trial detention for terrorism suspects, the constitutionalization of the minimum retirement age and cash payments or the prohibition of exporting drinking water from Slovak territory in plastic bottles.

After a two-year period, illiberalization took up a contrasting shape during the COVID-19 pandemic, where even weak standards of justifying partisan decisions have at times been all but abandoned [35]. The technopopulist (cf [36]) executive led by the unexpected winner of the elections held only days before the COVID-19 outbreak, Igor Matovič, lost popularity gained due to a commitment to crack down on elite corruption [37]. PM Matovič, while credible in his anti-corruption rhetoric, failed to uphold an image of leaving law enforcement institutions independent to continue 'doing their job' without constraints and any partisan ties. Among others, he attempted to curtail the competences of the Constitutional Court by enshrining in the text of the Constitution a prohibition for it to review the constitutionality of constitutional amendments. After this malaise, claims concerning the combination of Fico's weakened position and an alternative governing coalition [38] did not materialize, and Fico returned to power. Coming full circle, in 2024, Fico's illiberal allegiances were bolstered by a failed assassination attempt committed to him by a lone wolf [39], and his anti-EU rhetoric resembled that of PM Mečiar in the 1990s.

During the COVID-19 pandemic, accelerated legislative proceedings with the lack of justifications, a plague for Slovakia's constitutional system even before 2020 [40, 41 (2024 Slovakia country report)] have become a routine practice with reference to the need for rapid anti-pandemic measures. Some of the measures adopted (such as mandatory state quarantines for returnees from abroad), clearly violated constitutional rights [42]. Others have been adopted only with the pretext of the pandemic, such as the so-called 'family package' of Matovič who, in the meanwhile, lost his PM position due to disputes between the coalition parties over his decisions.

At several points in its history, the Slovak Constitutional Court (SCC) was exposed to public scrutiny, but less so during the COVID-19 pandemic. For Matovič, unlike for Mečiar in the 1990s [43, p. 72], the SCC was not a highly relevant player which he would frequently criticize in the (often lengthy) speeches during what has become known in satirical parlance as 'crying conferences' *(plačovky)* [44]. The fact that the SCC invalidated his 'family package', a broad-brush subsidy for families with children adopted without due consultation and reflection in accelerated proceedings with the support of extreme right MPs (see [45, 46]),[9] did not make much of a difference; by the time of the Court's decision the coalition Matovič remained part of was embroiled in internal turmoil that resulted in the loss of confidence vote a few months later [47]. Matovič's successor, PM Heger, expressed respect towards the SCC several times, highlighting that such respect is necessary for the 'supporters of the *Rechtsstaat*' [48].[10] Yet, the conflicts that followed between the governing parties during Heger's tenure could only be resolved by early elections combined with a temporary caretaker executive appointed by the head of state. Thus, the COVID-19 pandemic had an enduring negative legacy on the state of democracy in Slovakia, not unlike in Hungary [49] but in contrast to other countries where elites dangerous

[9] The support of these MPs was necessary for overriding the veto by the head of state on these amendments.

[10] Speaking at the celebrations of the 30th anniversary of the Court, Heger referred to it as a 'compass' that provides 'support' to the government in developing legislation harmonious with constitutional principles.

to democracy saw their electoral support and power wane (e.g. Brazil [50], Poland [51]).

PM Fico himself had a history with the SCC. A lawyer by training, Fico aspired to lead the Court after his ousting from the PM role when the mandate of the third holder of this role, Ivetta Macejková, was to expire in 2019. In Fico's own words, he wanted to preside over the Court, rather than become 'just an ordinary judge' [52]. During his candidate hearings, he envisioned an obviously partisan Court, a wish met with considerable disdain. After doubts arose on whether he would meet the formal requirement of minimum 'legal practice' required for a judge, Fico withdrew his candidacy. Dedicating himself to electoral politics, the combination of legitimate critique of the mismanagement of the COVID-19 pandemic with a narrative of 'peace' that cloaked pro-Putinist sentiments vis-à-vis Russia's invasion of Ukraine brought Fico the 2023 electoral success [53, p. 190]. Soon after, as PM, he spearheaded a set of significant changes to criminal codes. The prominence of this item on Fico's agenda was at odds with his campaign rhetoric [54]. Given the adoption of the changes in accelerated legislative proceedings, their widespread impact on existing proceedings and investigations, as well as their polarizing character, it was inevitable that the SCC was petitioned to review their constitutionality (in early 2024), and even asked to suspend their effectiveness until it assesses all evidence and arguments to be able to issue a decision on merits.

3 The Ultimate Guardian? Four Generations of Constitutional Judges

If the premise of this article that constitutional courts cannot escape being political in the broader sense of intervening in public discourse on inherently thorny issues holds true, the question arises how these institutions recognize—or resist—their political nature. Discourse plays a key role in articulating that recognition or resistance [55, pp. 748–751], and texts of judicial decisions occupy a central role therein due to their formally authoritative character. This section discusses the Slovak Constitutional Court's standing in the period *before* the judgment on the amendments to criminal legislation—focusing on the post-2023 illiberalization. It shows that the political character of the Court was obvious to key constituencies already at that time, cautioning the Court against trying to rhetorically defy that character in order to retain support in a polarized environment.

The Court's historical development helps understand the absence of boldness in its 2024 practice. Four different compositions ('judicial generations') served on the SCC between 1993 and 2024, with the fourth generation marked by the appointment of President Ivan Fiačan in 2019. The first, earliest generation of the Court became an unwilling frontline vis-à-vis the governing coalition bent on manipulating legal rules to remain in power and to ensure that abuses of state power by their representatives go unsanctioned. The second generation of judges emerged amidst a sense of optimism after the 1998 elections which ousted the semi-authoritarian executive and set Slovakia on the pathway towards EU accession. The new competences granted to the SCC by the 2001 constitutional reform were primarily in the direction of addressing individual complaints and increasing the effectiveness and clarity of decision

making. This is illustrated by a priori constitutional review powers *not* having been granted to the SCC. Nevertheless, the Court has gained a wide range of competences. Importantly for the case discussed below, it is constitutionally mandated to suspend the effectiveness of legal provisions in a preliminary proceeding to gain time to consider their constitutionality more thoroughly without the risk that the provisions in question would cause human rights violations, 'serious economic damage or other serious irreparable consequence' ([56], Art. 125 Sect. 2).

The third generation of judges that followed had the most major impact potential, as it was the first one to have completed an extended, twelve-year term. While the extension came with a prohibition of reelection of constitutional judges, it did not apply retroactively, as a result of which some judges selected first in 2000 have been reelected and therefore spent 19 years at the Court in total. The third generation was marked by personal disagreements between judges, manifesting at times in separate opinions, and some decisions that have been understood as heeding to the preferences of the majorities led by R. Fico between 2012—2016 and 2016—2020.[11] The Court, while certainly not without influence, as manifested in the 'unconstitutional constitutional amendment' case of 2019, has been to a degree challenged in terms of a non-partisan character. It appears that the fourth generation of the judges took this challenge up and strived to eliminate a perception of a partisan (or at least bickering) Court left from 2019. Nevertheless, as the 'criminal law reform' decision shows, they conflated being non-partisan with rejecting any political engagement in terms of making distinct choices in matters of public affairs—to the detriment of tackling the illiberal surge [57].

At the time when the SCC received the petitions on the amendments, PM Fico uttered hostile language to selected judicial authorities. The main target of these attacks were ordinary rather than SCC judges [58], who have been making decisions in charges of corruption against individuals close to Fico or his party colleagues.[12] Here, the Constitutional Court remained largely under the radar. Besides the parliamentary majority continuously refusing to fill one seat at the Court vacated due to the resignation of a judge in September 2023, no major efforts at tempering with the Court's competences or present composition have been prominently discussed either.

In early 2024, the SCC delivered the preliminary judgment on the criminal legislation, generally unfavorable to Fico. This preliminary judgment is not discussed here in detail, as it was superseded by the final decision. However, it put the Court under increased spotlight at the time because it suspended the effectiveness of parts

[11] E.g. Special Court case, attorney general appointment case, public defender of rights case.

[12] For example, Fico, at a press conference, addressed Judge Kliment from the Supreme Court (who adjudicated some of the cases of high-profile partisan corruption) by name when saying that 'if I were him, I pack my suitcases already today. He probably needs to go through all legal democratic procedures, which our legal order foresees' [59]. A few days later, Fico continued the critique of Kliment and another Supreme Court judge by asking, rhetorically, whether they 'had a beer' when they were rendering their judgments and labelling them 'politically motivated' and 'doing dirty business' [60]. When Supreme Court President Ján Šikuta expressed concerns over this language, Fico accused him of serving Kliment's alleged biased practices [61]. Fico also critiqued Judicial Council President Mazák, expressing hope that the parliament would 'soon decide about his fate' [62]. Soon thereafter, Mazák was dismissed as the Judicial Council President by the majority of the Council, and subsequently as member of the Council by the parliament (see [63]).

of the amendments before they could enter into effect, on the grounds that if it did otherwise, it would have caused potentially irreparable harm due to the prescription of many criminal proceedings. In response to that preliminary decision, the PM held a press briefing titled 'A few questions on the SCC'. At the briefing, Fico accused the Court of collaborating with 'hostile media' and of succumbing to 'political pressure' to decide quickly and generate considerable 'uncertainty in legal stability into the future'. He also threatened the Court to introduce 'timelines' for its decision making on matters of 'criminal policy' and 'referenda' [64].[13]

Despite this press briefing, the Court has largely remained inconspicuous in the debates on Slovakia's democracy both before and after its final (July 2024) judgment in the case. Yet, there are indications that it had lost some authority in media circles as a result of the summer judgment. A well-respected Slovak daily, for example, published an op-ed by a former President of the SCC who expressed 'abashment over an extreme excess in the decision of the SCC' [65]. Other headlines argued that the decision 'strengthens all powers of populism' [66] or that 'Robert Fico bagged a victory of a lifetime at the SCC' [67]. Another newspaper was less expressive, but presented the Court's reasoning as hypocritical, especially with regard to not looking at particular cases and allowing violations of the law when there is no ordinary court remedy available [68]. Despite these popular criticisms, the SCC did not face notable open assaults after the final decision in the case.

4 Rule of Law Minimalism: Just to Avoid the 'Dirt of Politics'

This section analyzes the 117-page[14] plenary SCC decision concerning the most consequential changes in Slovak criminal law since 2005. The analysis focuses on the representations of 'politics' in the various segments of the judgment, starting with the majority opinion (Sect. 4.1) and continuing with the concurrence, penned by the Judge Rapporteur Peter Straka (Sect. 4.2). The representations are then contextualized in the presentation of key short-term public reflections of the judgment, shedding light on the epistemic environment in which the Slovak Constitutional Court is located (Sect. 4.3), and by the implications of the judgment's portrayal of politics for the Court's contribution to the rule of law in Slovakia (Sect. 4.4). The section shows how the Court tries hard to prevent from being seen as 'political', even at the costs of consistent argumentation and equitable engagement with the material submitted to it in the form of a range of amici curiae briefs. The fear of politics is even more visible in the concurring opinion that selectively refers to practices in other constitutional systems and the Court admits the desire to retain social capital even at the cost of jurisprudentially suboptimal decisions. While the Court's milieu shaped by the media, partisan and academic elites partially explains its fear, the choice to manifest it by

[13] The latter area encompasses a few contentious cases from before the 2023 elections where the SCC has not heeded to Fico's preferred position.

[14] While exact statistics of average length of the Slovak Constitutional Court decisions are not available, this counts as a very long decision relatively to the typical length, even when accounting for plenary decisions only.

allowing the legally fraught legislative process to bear no consequence on the constitutionality of the emergent amendments was not met with support. In the end, the Court's decision making remained largely unconvincing while also constraining its future impact on upholding the rule of law in Slovakia—an outcome that could have been avoided by manifesting less fear of politics and more rigorous engagement with evidence beyond traditional legal arguments (robust comparative research, thorough response to all amici curiae and priority to constitutional commitments over avoiding partisan backlash against the judges).

Structure-wise, the Court's majority decision was accompanied by a single concurring opinion written by the Judge Rapporteur. Its sheer length and the extraordinary public communication (multiple press releases, press conferences of partisan leaders and media reports) go well beyond the usual degree of attention to constitutional court decisions. Moreover, the case became a platform for contestation between the illiberal coalition which adopted the amendments in an accelerated legislative procedure, and the opposition petitioning the Court to invalidate the amendments.

As a result of the gravity of the substantive legislative changes, and the evidence that they were drafted by individuals supporting the government who were themselves to benefit from the changes to the law,[15] the amendments have become a key point of contestation between the coalition and the opposition. The opposition took to the streets to protest the amendments and petitioned the Court. The petition also requested for the suspension of effectiveness of the amendments, as, following the principle *in dubio pro libertate*, if the shortened statutes of limitation would have entered into effect immediately, they could not be reversed even if found unconstitutional later, without virtually insurmountable difficulties [69, 70]. After the Court started its review, unusually many *amici curiae* briefs were submitted by academic institutions and representatives of legal professions.

4.1 The Court-Surgeon or the Avoider?

The Court has made clear that it considers the case a priority when it decided on the suspension of effectiveness of the impugned provisions before the respective legislation entered into effect. This helped avoid a change in the legal status changing for thousands of accused individuals for whom the reduction of the statutes of limitations or sentence rates would have been beneficial even before the delivery of the verdict on the merits. By suspending the effectiveness of some—but not all—provisions, the Court allowed both the coalition and the opposition to commend its actions. At a press conference, the Judge Rapporteur Peter Straka committed to deliver the final decision promptly without compromising on quality standards.

Less than five months later, the final verdict was pronounced. In the published version, the Court prefaced its decision with a table of contents that eases orientation, and provided a substantive summary of the (in its perception) key takeaways.

In the decision, the Court presented itself as weighting all arguments and then with surgical precision cutting out the few 'rotten provisions' from the overly quickly

[15] These included the reduction of the sentence periods, amounts of incurred damages, parole periods and the statutes of limitation.

enacted and low-quality, but constitutionally acceptable package. Unconstitutional were the retroactive provisions that would have allowed to reverse earlier court decisions at the expense of the accused. They would have enabled challenges to already concluded plea agreements including some with witnesses in cases of businesspersons and former state officials close to political parties. The Court also deemed unconstitutional the retroactive legalization of illegally obtained evidence. It argued that the concerns for the integrity of the proceedings in combination with narrow grounds of exclusion of such evidence may inadvertently encourage illegal surveillance and privacy violations.[16]

Besides these provisions, the Court endorsed the 'reform'. The two key concluding paragraphs [paras. 531, 532] summarize the overall sentiment of the judgment. They highlight 'the principle of minimalization of interference into the competence of the legislator and its autonomy' and that the recognizable deficiencies in the legislative process in this case did not reach 'constitutional intensity'.

Via the 542-paragraph judgment, the Court claimed to 'have considered the arguments and opinions entailed in the statements of the legal expert community' [para. 533]. Yet, it treated *amici curiae* briefs unequally. The judges dedicated more than two pages to summarizing the arguments of the amicus brief by the Faculty of Law of the Comenius University, which argued against finding unconstitutionality, but provided considerable less space for briefs by other law faculties, which generally argued for unconstitutionality.[17] This projects not only a disproportionate image of influence of a single law faculty, but also a neglect towards the context of illiberalism in Slovak legal education. The Comenius University Law Faculty Dean has been vocal in support of the amendments and has been appointed to lead the Electoral Commission by Fico's executive after the 2023 elections. Furthermore, he refused to organize a student-initiated debate on the abolishment of the Special Prosecution Service on the premises of the law faculty. As a result, the debate[18] could only take place outside the faculty's premises.

Moreover, all other expert opinions were addressed in a three-line paragraph [para. 181] arguing for these to have been considered 'to the extent of the justification of the decision'. This means, among others, a lack of direct engagement with an amicus brief of more than 25 pages signed mainly by senior and junior Slovak law practitioners, along with some academics and members of other legal professions [72]. This brief considered the accelerated legislative procedure on such an item of omnibus legislation unconstitutional not only due to violating the opposition's rights, but also of constitutionally guaranteed direct public participation ([56], Art. 30 Sect. 1). The accelerated proceedings prevent the official submissions of comments and objections from members of the public. While informal debate and public pressure were still

[16] Especially paras. 439–442. The Court also found unequal treatment in the differential effects of the reduction of the statutes of limitation in cases where the limitation period was interrupted for the first time as opposed to for two or more times.

[17] The Faculty of Law of the P.J. Šafárik University in Košice sent two separate briefs represented by its criminal and constitutional law departments.

[18] The same was the case with its 2025 follow-up assessing the legal changes one year later [71]. Paradoxically, the 2024 debate is even explicitly mentioned by the concurrence as evidence for discussion on the amendments having taken place in the public despite the accelerated legislative procedure.

possible, the elimination of civil society to raise their voices through official legal channels struck a blow to a commitment to participatory democracy.

4.2 The Judge Rapporteur's Agony over Politics

It is unknown how many of the twelve judges actually endorsed the ruling, as votes are not disclosed. However, the Judge Rapporteur provided a separate opinion, presented at the press conference as providing more comparative insights into the practices of sentencing, hence addressing the substantive question concerning the reduction of the sentence rates. While the concurrence does contain a few comparative references, these are rather brief [paras. 68–74] and do not detail the methodology of selection of cases, or the comparability of the political context in which this regulation is situated. The Judge compares sanctioning partisan elites to sportspersons (particularly football players) as a relevant subject of comparison 'from the perspective of the societal relevance, or impact on public opinion' [para. 72].[19]

The key segments of the text, however, point to synergies with the majority, underscoring the Court's agony and vying for support of a society which largely ignores or misunderstands it. The concurrence justifies the legitimacy of the changes not only via the legislative leeway of the parliament, as the majority does, but also substantively, via arguing for the oft-neglected rights of individuals facing criminal prosecution [73, p. 1071]. The Judge Rapporteur refers to an article by US constitutional scholar Erwin Chemerinsky arguing that 'criminals have no political power in the legislative process' [para. 43]. This reference appears at the beginning of the section called 'Regarding the components of criminality' as an 'introductory' citation. The Judge Rapporteur does not subsequently revisit or contextualize it, despite the US-centric focus of Chemerinsky's article.[20]

Criminal law undoubtedly holds the gravest potential of manifestation of violence in society through the law [74], and hence its overuse or excessive penalties are of particular concern to the rule of law.[21] Yet, the reasoning of the concurrence in the specific context neglects that the challenged amendments could help some of their drafters, suspected of criminal actions, too, and that the reduction of the statutes of limitation prevents even fact-finding and establishing what legally happened in the given case. This can harm even the suspected criminal in that they remain tainted by the persuasion of segments of the public that the injustice they had committed went unpunished, while independent courts are stripped of the opportunity to rule in the matter. Moreover, the tendency to decry criminal penalties for corruption as an attempt at silencing alleged democratic elites by 'the left'[22] is part of the broader

[19] Other comparative references are geared particularly towards the *increase* of sentencing rates for drug possession and use, in contradiction to the general tendency of the legislative changes. Judge Straka decries this shift and indicates its disproportionality.

[20] As a 'common law system', the US is a less immediate point of reference for Slovak constitutional law than European continental systems such as Austria or Germany.

[21] For a concise summary of selected arguments on this point, see [75, pp. 18–25]. The abuse of criminal law against minorities has been noted in the US even before the rise of the second Trump administration in 2025. See [76] (Alexander summarizing and reflecting on her book with the same title).

[22] See the focus of the book written by Republican US Senator and frequent Trump supporter [77].

illiberalizing toolkit that can undermine existing mechanisms for legal accountability while upholding rule of law standards in the investigation and evaluation of evidence.

This non-recognition of this partisan elite-centred dimension in the concurring opinion is startling particularly when juxtaposed to its call against verbal attacks on judges ruling in criminal law matters. In this call, Judge Straka highlights how '[D]emocracy is, among other things, also about the bravery of the judges in criminal law matters who are not afraid to rule justly and do not overvalue media fame, but, at the same time, are not afraid of media-societal shaming. The only determinant that should guide a judge in their ruling and procedural course is aspiring for justice, while, in principle, this is what the proposed majority ruling of the Constitutional Court was about' [para. 50].

A hint at explaining the disregard of the stakes of partisan elites in the amendments appears in a later segment of Judge Straka's opinion. There, it recognizes the possibly multifold motivations behind the amendments, but claims them to be irrelevant as, *in effect*, they could result in a more just system of criminal law, based on a more humane, restorative approach [para. 76]. For Judge Straka, this sidelining of procedure entails a price to pay that some corrupt oligarchs might escape prosecution. This is an acceptable price to pay, however, if some 'smallfolk' committing crimes also gets access to a more human, rights-oriented system of criminal prosecution. Judge Straka's reasoning runs contrary to the global trends of courts being more accustomed to raising procedural as opposed to substantive arguments [78, pp. 283–284], and it could form a basis for more substance-oriented reasoning in the future.

The concurrence also shows a greater disdain towards anything linked to 'politics' or 'political' than the majority opinion. Variants of the word 'politics' or 'politicians' appear over a dozen times, for example, when decrying the influence of politics on the regulation of conduct deemed criminal: all 'political elites' have 'abused' criminal law in Judge Straka's view [para. 49]. Similarly, when criticizing the views that would advocate for the submission of preliminary questions to the Court of Justice of the European Union in the case, he considers these as 'general, vaguely framed, politically coloured critiques' while 'politics, political approaches and political ideas do not belong do the decision making sphere of the constitutional court, nor to influences on its decision making' [para. 18]. Here, Judge Straka portrays politics as necessarily advocating partisan interests and in tension with expertise. Such opposition to a broader reading of expertise that would, for instance, encompass qualitative socio-legal and political science research pointing to the techniques of illiberal state capture[23] and its consequences for constitutional values is not uncommon to constitutional courts,[24] but comes at their peril. This form of constructing partisan politicians and academics with a broader role envisioned for the Court as 'the other' feeds into

[23] Judge Straka ventures into such a point when claiming that 'it is true that the ordinary citizen does not care whether the imprisonment of a concrete prominent person was unlawful or unconstitutional, but if their proceeding about alimonies lasts long, if a neighbour dispute has been ongoing for 10 years with no end in sight, or if a non-banking company demands an unreasonably high interest or their house is about to be unlawfully auctioned off' (para. 52). Empirical evidence does not accompany this empirical claim.

[24] '[T]his long history of the use of social science evidence in US constitutional law has not resonated with many other constitutional courts. In particular, in Continental constitutional adjudication, social science approaches play a marginal role' [79, p. 295].

illiberal rhetoric which also opposes such expertise and a more value-oriented reading of politics.

Ultimately, building on the argument of the SCC as a non-political body, Judge Straka argues for deference in review of the legislative process.[25] He claims that, even though the accelerated legislative proceeding prevented the standard avenues for expert and public review, the de facto length of the parliamentary debate on the legislation compensated for that [para. 13]. Here, Judge Straka follows the majority, where the only subject with potentially infringed rights by the reduced debate is the parliamentary opposition [see para. 12], rather than individuals, particularly NGO representatives, experts and other actors who could otherwise officially submit proposals and comments on the legislation. The reasoning in this respect confirms the blow that the decision strikes to the significance of public participation on legislation in a democracy, which is in line with the general neglect of the significance of these instruments in Slovak legal discourse.

4.3 The Court and its Milieu

The Slovak Court yearned to avoid as much public controversy over the judgment as possible, while still coming across as having provided an authoritative analysis and thoroughly-reasoned decision. The publication of the judgment followed two weeks after the press conference of the verdict. Therefore, commentators sensitive to the significance of engaging with the judgement could offer few meaningful remarks when the news broke. Others drew conclusions based on the press conference (see Sect. 2 above). Later rapporteurs began to underscore that the Court only evaluated the 'constitutionality', rather than the 'morality' of the amendments [80].

These media reactions to the Court's decision indicate how difficult it is for the Court to operate in a milieu which oscillates between perceiving the Court as necessarily supporting a partisan position and considering it as a technical, non-political institution that is only a 'mechanic' of the Slovak Constitution. The argument advanced by some journalists that constitutional review may unfold without regard to morality declares unconscious allegiance to a necessary gap between morality and (constitutional) law (for example [81]). Such siphoning of values out of law offers an opening for furthering the tactics of 'autocratic legalism' [82] by illiberal actors.

Similarly, contributions which claim scholarly authority and defend broad discretion of the legislator without recognizing the contextual specifics of the political regimes or which resort to minimalist readings to limit constitutional court agency can be used by illiberal actors as endorsing their practices. An example of the former pertains to an article on the abolition of the Special Prosecution Office which does not consider the political regime variable, and looks only into the variegated formal legal status in a comparative perspective [83]. The latter is illustrated by a contribution by the former Dean of the Faculty of Law of the P.J. Šafárik University in Košice, the somewhat isolated eastern Slovakian city where the Constitutional Court is seated

[25] This is consistent with his dissent to an earlier SCC judgment where the Court did, in fact, strike down a whole legislative act (adopted by a previous parliamentary majority, competing with Fico) as unconstitutional.

and hence naturally most closely personally connected to the Constitutional Court from among Slovak law faculties. This contribution, based at a conference presentation from before the final decision of the Court was delivered, argued against the decision on the suspension to be 'constitutionally acceptable' and that it 'evaded the constitutional and legal framework', which 'should not happen without the change in legislation' [84, pp. 160–161]. Other Slovak doctrinal scholars at least partially supported this position; even a milder critique objected towards the Court's 'legally and theoretically unsustainable' approach to 'the order of promulgating legal acts', while acknowledging the need for 'the effectiveness of constitutional control' [85, pp. 106–107]. The inner contradiction in arguing for the Court to stick to rule of law minimalism in the preliminary judgment causing to undermine the effectiveness of its judgment of unconstitutionality in so far as the effective legislation would have precluded the renewal of criminal proceedings is not discussed, perhaps because rule of law minimalism does not offer the methodological tools for such a discussion.

These media and scholarly reactions show why it is so difficult for constitutional courts to resist portraying politics as the 'dirty field' that they stay clear of. In fact, despite the limited expert, media and public understanding of its central role in protecting Slovakia's democracy, the SCC shed light on some broader considerations in its decision making [para. 240]. Referring to its previously rather deferential case law, the SCC argued that it 'tries to preserve impartiality and build its own institutional legitimacy in time as a precious capital, which, of course, does not preclude the developments of its case law, when justified by the evolution of societal situation or significant contribution of new argumentative features […]. A groundless change of decision making has a tendency to destroy the built-up trust towards the Court and gets the court closer to political decision making, for which it is equipped neither institutionally, nor competence-wise.'

The statement is unspecific as to *whose* trust is to be destroyed. It still indicates the Court's concern for legitimacy measured not in normative terms (whether it actually protects the constitution), but as support by its surrounding constituencies (partisan elites, public, legal scholars).[26] It also reads as an indication of insufficient argumentative resources provided by the petitioner—a questionable claim in light of the judges' limited attention to such resources in the amicus curiae briefs.[27]

This point by the Court is telling in yet another way. It shows that the Court considers rational arguments to be the core factor in shaping trust in its operations, sidelining findings on the linkages between emotions and political regimes (e.g [88, 89]), and the capacity of illiberal partisan actors to undermine institutions without rational arguments. Acknowledging the impact of emotions (if not on the judges themselves, then at least the partisan actors and society) may further complicate the image of a 'non-political adjudicator'. The Court's choice is thus understandable as part of its broader 'fear of politics', but hardly effective. In the Slovak context, PM Fico rhetorically attacked some of the general court judges deciding in some of the cases of cor-

[26] On the global, though somewhat US-driven shift in this direction, see [86].

[27] A fuller assessment would require access to all, including confidential, case files. The limited access to them is in line with the general practice in Slovakia, where calls for more openness are still often not listened to (e.g [87]).

ruption in his vicinity without any evidence of their misconduct—an action labelled as unacceptable in Judge Straka's concurrence. The Minister of Justice alongside the Speaker of Parliament both delayed the publication of the preliminary ruling which suspended the effectiveness of parts of the amendments. Fico accepted the ultimate decision presenting it as the Court's substantive endorsement of the amendments, and promised to address the specific provisions found to be unconstitutional. Yet, his reactions to the judgment in the preliminary proceedings, which was less favorable for his partisan rhetoric, show readiness to undermine the Court in the moment when obeying its ruling does not suit his goals. In this climate, the Court cannot hope for fair 'rules of the game', and its clinging to broad support begs the weakening of its ability as a constitutional court 'to supervise the government and review its actions [i.e.] a central pillar of democratic erosion' [90, p. 206].

4.4 Implications of Trying to Escape Politics for Illiberalism and the Rule of Law

The Slovak Constitutional Court's yearning to avoid 'politics' and itself being seen as 'political' even at the cost of consistency and comprehensiveness of its decision making endangers the rule of law. This article argues that it is because of the minimalist reading of the rule of law that, in the context of Slovakia's illiberalization, makes the decision on the amendments to criminal law vulnerable to abuse. The description of the use of the concept of law to necessarily facilitate the rule of law is one of many approaches to the concept.[28] In the studies of the (at least) equally multifaceted concept of democracy, one of the tools developed over the years is the grouping of conceptions into minimalist, middle-ranged and maximalist ones [92]. These range from requiring only democratic input (free and fair elections) to more robust requirements of rights and effective government, up to meeting substantive outputs as understood via standards of justice. The contestation over the preferred conception(s) is ongoing [93]. In the rule of law literature, 'thicker' and 'thinner' readings can be distinguished (e.g [94] and references therein), with that of the rule of law as non-arbitrariness, as popularized by Martin Krygier [95], occupying the equivalent of the middle-ranged conception.[29] Less frequently highlighted is how thin readings can 'present a depoliticised image of law [as] appropriate for normative legal theory', suggesting that 'the idea of the Rule of Law is in some sense built into the very notion of law' [96, p. 107].

In Slovakia, the decision of the SCC to leave the violation of the legal requirements for accelerated legislative proceedings without any judicial remedy fits into a read thread of at most thin readings of the rule of law akin to Cotterrell's description of the position of Hans Kelsen, the father of Central European centralized constitutional review whose 'pure theory of law' *(Reine Rechtslehre)* remains revered in the self-characterization of the SCC by its prominent former and contemporary representatives [97]. It also continues the line of disconnect, rather than association, between democracy and the rule of law, which materialized in Slovakia during some of the last years of the second millennium [98]. The SCC itself, despite its coveted

[28] For a succinct survey working also with scholarship from the early 2020s, see [91].

[29] No wonder Krygier resists the dichotomy [95, p. 485].

achievements in the 1990s, delivered several judgments that boosted the powers of the illiberal authorities back then, using a similar minimalist reasoning to its decision on sustaining the illegal application of the accelerated legislative proceeding in 2024. Then [43, pp. 194–197] as well as in 2024, it castigated the practice in theory, but allowed it to stand and attain the 'glow' of legal validity in the case at hand. Moreover, even if one considers 'clarity and persuasion' as a starting point for the rule of law and thereby wishes to keep its separation from politics (see [99, pp. 80–83]), the oscillation between conflicting conceptions by the Court without an accompanying explanation would not aid even this expectation from a constitutional system that has committed itself to the 'rule of law'.

The 2024 decision boosts the account of rule of law minimalism, where, between two (general) elections, the exercise of the governing power is in the hands of the partisan actors, and (constitutional) judges ought to defer to them—at least as long as there is any narrow reading of the Constitution that allows to justify such deference. In circumstances where the ruling power blatantly disregards legality, even rule of law minimalism can provide some defence of the rule of law—after all, it is still *rule of law* minimalism. However, the Slovak case indicates that rule of law minimalism does not work as a counter to illiberalization that attempts at weaponizing law (including, in this case, legislative process rules). The language of 'deference' fails as the Court remains seen by parts of the surrounding epistemic communities[30] as an institution that could, and ought to have acted, because it should fulfil its constitutional obligation not to allow violations of constitutional values (in this case, by an illegal legislative process). Other constituencies favoring wide leeway for the ruling power (either consistently as a matter of theoretical position or situationally, when the particular power rules in line with their interests) remain ready to challenge the Court whenever it goes even slightly beyond a deferential role. Indeed, for them, an influential constitutional court is generally not desirable and worthy of defending in the first place, so if the Court seeks recourse to their support, its position is likely to be supported by none as a result of this strategizing intended to gain such support.

A side victim of the Slovak Constitutional Court's rule of law minimalism in the 2024 decision has been the public, with limited recourse to challenge governmental action. Furthermore, the Court's neglect of the need for public participation points to a tension with more participative, inclusive conceptions of the rule of law that highlight the centrality of robust polity engagement for it to be sustainable [101, pp. 47–48, 102]. Such a practice appears akin to the SCC's Hungarian counterpart [103], including during the pivotal years of illiberal transformation [104, 105], and is a source of critique in jurisdictions beyond Central Europe (e.g [106–108]). It is well known that judiciaries might find themselves under illiberal assaults undermining, among others, their formal powers and standing (e.g [109]). However, the 'palpable danger to the rule of law' that emerges when the judiciary 'forfeits its independence or impartiality' [110, p. 59] can go unnoticed especially in jurisdictions that do not enjoy much global attention. In 2024, the SCC opted for rule of law minimalism in an intensively followed case, with no dissenting opinion. Amidst a broader public

[30] See also, from the perspective of studies of the EU Court of Justice [100].

context that is prone to premature final verdicts on the Court's potential based only on a single or a few judgments, this appears as an unwise choice.

5 Conclusion

The struggle of the post-2023 Slovak Constitutional Court to defend the rule of law prompted by the need of ordinary courts and law enforcement authorities to gain clarity on how to proceed with ongoing litigation (for example [111, 112]), ended with the judges cutting the Gordian knot. Via examining the representations of 'politics' in its summer 2024 judgment on the changes to criminal law, this article has argued that the judges made the *political choice* to *read themselves out of the domain of the political*. Their choice reflected the lack of tradition in the public sphere in Slovakia to recognize not only the inherent connection between law and politics, but also the democratic potential of that connection when politics is carefully conceptualized as broader than mere partisanship and defense of ideologically one-sided views.

The judges' choice carried deference towards the illiberalizing coalition, particularly when the Court did not identify a judicial authority with capacity to address public and opposition grievances pertaining to the violation of the legislative process-related rules. As these rules remain *legal*, the exception the judges created leaving the rules to merely partisan interpretations weakens the rule of law amidst the illiberal surge. The judges' practice shows affinity to rule of law minimalism—they demonstrated a basic commitment to the idea of the rule of law but allowed its violations by ordinary legislation to stand even without effective legal remedy.

The Court's confession of engaging in strategizing to avoid backlash by some partisan elites and segments of the public went virtually unnoticed. Its plea for consistency via the narrative of protecting the vulnerable (individuals, possibly innocent, suspected of committing crimes) was at plain sight uncontroversial. Hence, the judges earned a breather from public spotlight. Yet, the illiberalizing fervor of the coalition continued, with legislation crippling the public radio and television, undermining freedom of information and assaulting NGOs. The Court has the competence to invalidate these 'reforms'.[31] However, after the experience with its judgment in 2024, those believing in its guardian role have had a hard time. The Court's attempt to read itself out of political choices complicated its capacity to localize and retain allied epistemic communities. In addition, it showed limits in recognizing the broader social contexts of legal regulation when referring to statutory law in other jurisdictions without accounting for the context of those jurisdictions, and in justifying the selectivity in its engagement with the amici curiae briefs submitted to it.

With its summer 2024 judgment, the Court has complicated, rather than eased, the pathways to continue presenting itself as devoid of the 'dirt of politics'. Instead, it could have acknowledged its political—but non-partisan—role and showed more robust engagement with the arguments prompting it to go beyond rule of law minimalism. This might be a tall order due to the general neglect of broader constituencies

[31] Cf. petition against the dissolution of the public broadcaster, the Radio and Television of Slovakia, no. 1741/2024 [113].

in the Slovak society shown vis-à-vis the Court's potential to impact the rule of law beyond minimalism [114]. However, the Slovak Constitutional Court is relatively well positioned within the constitutional system to resist the simplifying tendencies exhibited by strands of Slovak local academia and parts of public discourse.

Further research is needed systematically to evaluate the representations of 'politics' in the adjudicative practice of constitutional courts and their interplay with these courts' impact on the rule of law, including with reference to the Slovak case. Kim Lane Scheppele described the rule of law as the 'canary in the coal mine of autocracy' [75, p. 8],[32] with its deterioration playing a signaling function of erosion of democracy at large. In the EU context, alliances of two or more illiberal member state governments can exacerbate the paralysis of collective decision making, particularly as regards measures for the protection of democracy. With Hungary and Slovakia forming this alliance after 2023, an entrenched respect towards rule of law beyond minimalism remains in short supply. The Court has not spoken the last word yet: it remains independent and difficult to be packed by judges whom the executive might want to see wearing the judicial robes, due to its constitutionally enshrined position and the mandates of judges lasting beyond a single electoral term. Its close global scrutiny, engagement with and embedding into the overarching discourses on the judicial defense of constitutional values can continue to help its role as guardian of Slovakia's—and contributor to the EU and global—constitutional values.

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[32] Foreword to Petra Bárd's inaugural lecture.

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