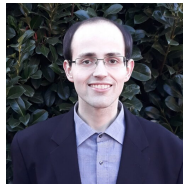


Governing in Slovakia ahead of the 2023 Early Elections

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The Dilemma of Technocracy

'Caretaker PM quits', 'PM replaced by caretaker', 'central banker to head caretaker government', 'caretaker government to be appointed', 'president picks technocratic government'. These are a few examples of how Slovakia made headlines of international outlets in early 2023. At the time of writing, Slovakia's pro-EU President Zuzana Čaputová was about to appoint a prominent economist and Vice-Governor of the National Bank of Slovakia Ľudovít Ódor to head a cabinet of generally respected experts with little to no partisan background after the ultimate resignation of PM Eduard Heger in the wake of a corruption scandal in his cabinet which had already lost the confidence vote in the legislature several months before. Beyond pointing to government problems, the headlines indicate that 'caretaking' and 'technocracy' are about to become the associations with Ódor's cabinet. This is happening a few months before the general elections (to be held on 30 September 2023) which may mark Slovakia joining Hungary and Poland in an illiberal takeover in Central Europe. This post shows how the weaknesses of Slovakia's constitutional design have fueled the present malaise, that may serve as lesson for ordering the relationship between the head of state, parliament and the executive in other parliamentary systems with a directly elected president.

Caretaking of the Caretakers?

The current 'caretaking narrative' in Slovakia is a layered one, because the cabinet that is about to be replaced has already been governing without parliamentary (National Council) backing. PM Eduard Heger (who replaced PM and 2020 election winner Igor Matovič known for, among others, mismanaging the COVID-19 pandemic) lost the confidence vote in December 2022 after several months of minority government riddled with partisan conflicts.

With the no-confidence vote having taken place in December 2022, why are the next elections not held before September? This decision was endorsed by the President Zuzana Čaputová, who acquiesced to the preference of the former coalition parties to hold the early elections in September, instead of in June. The implicit reason for this was

the hope to give time and build up support for democratic forces to 'recover' from the failures of the 2020 coalition. However, opposition (mainly illiberal) parties appear to have capitalized on the narrative of 'mistrust towards the people'.

Moreover, the Constitution stipulates that in case of a resignation, the head of state is obliged to temporarily allocate the portfolio of the resigned cabinet member to another cabinet member. Bringing in a new individual is not allowed. Given this impossibility to replace ministers in a cabinet governing without a confidence vote if they resign, positions got accumulated in the cabinet as more ministers resigned. Namely, PM Heger lead both the Ministry of Finance and the Ministry of Health. While, theoretically, another cabinet member could have been appointed instead of the PM, this shrinking of the cabinets without confidence further undermined their governing capacity and placed unrealistic expectations on single individuals to manage multiple ministries, each with extensive agendas.

Even more important from the perspective of constitutional design are the implications of the constitutional amendment from more than ten years ago. That episode started with a similar situation—a non-confidence vote to the centre-right cabinet of PM Iveta Radičová due to one of the coalition parties unwilling to support Slovakia's participation in the European Financial Stability Facility. The EFSF vote finally passed with the support of Robert Fico's party Smer-SD (which is the main illiberal threat to Slovakia in 2023), but Fico stipulated as a condition for his support to curtail the powers of the cabinet to govern without confidence until the early elections held a few months afterwards.

The result of this demand was the 2011 constitutional amendment which was enacted in a matter of hours with no public or expert discussion. The amendment strengthened the position of the head of state, as it allowed them to appoint the same cabinet which has failed in a confidence vote, but with curtailed competences. Three types of competences were created: some retained by the cabinet ruling without confidence in full, others subject to presidential assent and yet others non-accessible to the cabinet altogether. Two implications of this amendment should be pointed out. Firstly, it gives validity to the arguments made by political scientist Robert Elgie and others, that parliamentary systems with a directly elected president may easily end up being de facto semi-presidential ones. The closest model to capture the executive-legislative relationship in Slovakia post-2011 is that of 'alternating presidentialism' by prominent Italian political scientist Giovanni Sartori, but its Slovak variant is flawed as the system does not switch fully to presidential governance after a no-confidence vote.

Secondly, the competences that cannot be exercised by the cabinet without confidence even with presidential assent become essentially 'locked', until a new cabinet is appointed. This creates an inability to govern: a problem that became an acute reality in Slovakia during the 'fighter jet controversy' in March 2023.

The Fighter Jet Episode

The controversy arose when Heger's cabinet (without majority support in the legislature) decided to gift the MiG-29 fighter jets to Ukraine, in exchange for more valuable military equipment to be supplied to it later. This made sense not only from a symbolic point of view, as reinforcement of Slovakia's support for the Ukrainians' defence, but also from a utilitarian standpoint, as Slovakia had no use of the fighter jets, many of which were dysfunctional without proper maintenance not available in Slovakia, unlike in Ukraine. Yet, controversies arose concerning the constitutionality of the handover, without parliamentary consent, as most Slovak constitutional lawyers categorized the decision as a 'principal question of domestic and foreign policy', which is one of the 'locked' competences to cabinets that have suffered a no-confidence vote.

A former Slovak PM who helped achieve Slovakia's EU accession made himself heard that 'morality' needs to trump 'law' on certain important occasions, triggering backlash from the constitutionalist community (and, unsurprisingly, the opposition). The fact that the cabinet claimed it had prepared its own analysis which showed the constitutionality of the decision but declined to publish that analysis did not help the credibility of this position. I have defended the view that the 'substantive core' of the Slovak Constitution, its commitment to democracy and fundamental rights protection, may require setting aside the competence limitation that incapacitates decision making on urgent issues, and cautioned against quick juxtapositions of 'morality' running affront to 'law' in this case. However, the Constitutional Court could have been given the opportunity to state its authoritative position, even though it would not have been feasible to wait for its verdict before deciding, given the urgency of the military situation in Ukraine.

The 'fighter jet dilemma' illustrates the problems with the 2011 constitutional amendment and the competence curtailments it triggers, as well as the growing malaise of the Heger cabinet which, in its aftermath, was marked by, if not unconstitutional practice, then at least non-transparent decision making that lacks justifications. The mere existence of this amendment yields support for Slovak presidents to lean towards the appointment of new cabinets that at least stand a chance of winning a confidence vote and exercising the full scope of executive competences until the elections. This is particularly the case under conditions of grave external turmoil, a concept difficult to conclusively define but certainly including a full-scale war on the country's borders.

The Months Ahead: A Clash between Democracy and Technocracy?

The prospects of the first caretaker cabinet in modern Slovak history have rejuvenated a debate on democracy versus technocracy. The dominant language of technocracy and 'caretaker cabinets' could be explained by taking a historical perspective or by an existing affinity with Czechia which has had three such cabinets already (two of which even secured the confidence vote of the legislature). During the First Czechoslovak Republic in the 1920s and the 1930s, heads of states enjoyed particular political authority and political parties often welcomed a 'break' in governing responsibilities by the president

appointing a replacement. These ‘caretaker’ cabinets have taken some difficult decisions in pivotal moments of that regime’s history, notably in invoking legal restrictions on rights in the name of preventing the rise of antidemocratic forces.

Normatively, however, there are more than two positions in the current debate, which is likely to feature notably in the 2023 electoral campaign. Not unlike when it unfolds in relation to the functioning of the EU institutions, the first set of positions says that a cabinet that does not reflect the composition of the parliamentary majority in the legislature lacks democratic legitimacy, but there is a disagreement whether this is good or bad. Supporters of the cabinet point to the prospects of renewed trust in expertise and the need to ‘tame’ democracy with qualification especially when the regime is under threat of an antidemocratic overthrow. Opponents would see democratic legitimacy in the ‘caretaker’ cabinet too; it comes precisely from the directly elected president, and may only be boosted in case of a successful confidence vote.

As former President of the Constitutional Court (and current President of the Judicial Council) Ján Mazák highlights, the phrase ‘caretaker cabinet/government’ is not mentioned anywhere in the Slovak Constitution. The text does not differentiate between the legitimacy of a cabinet composed of the president’s nominees without a partisan background and those who have recently succeeded in general elections. In fact, upon presidential appointment, both cabinets enjoy the full scale of their powers during the first thirty days upon appointment, within which they need to obtain the confidence vote. If that does not happen (which is the likely scenario with the upcoming Slovak cabinet), the president can appoint them, but as a cabinet with constitutionally limited competences.

Moreover, this thirty-day window opens the possibility for the cabinet to take decisions which were impossible to take since December due to the ‘locking’ of some of the competences effectuated by the 2011 constitutional amendment. An example is the nomination of a judge to the General Court of the ECJ, since, according to the Slovak Constitutional Court, nomination of candidates for international judges are a ‘principal question of domestic and foreign policy’, one of the ‘locked’ competences of a cabinet with curtailed powers. All in all, the ‘caretaker cabinet’ could be seen as democratically legitimate from a ‘textualist’ perspective as well.

The Constitution’s Authority Deficit

The deficits in constitutional design (in this case, particularly the 2011 constitutional amendment) have made the ‘transitional’ period between Slovak cabinets arising from the general elections needlessly more difficult than it could have been. Of course, partisan actors could have avoided the manifestation of these deficits with more responsible attitudes; but constitutional design with foresight needs to account for lack of such responsibility.

Professor Miroslav Kusý, dissident against the state socialist regime and one of the few Slovak signatories of the oppositional Charter 77 initiative of the Czechoslovak Socialist Republic wrote about the need for education on constitutionalism shortly after the break-

up of (post-communist) Czechoslovakia in the early 1990s. Besides other problems, however, it is difficult to educate about a constitution that has not been systematically thought through when it was designed, and even more difficult to invoke public respect and commitment to it as an authoritative point of reference. The experience leading to the appointment of the first ‘presidential’ cabinet in the country’s history illustrates these more systemic issues, that are unlikely to be tackled even if pro-democratic actors were to succeed in the September elections.

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