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3

From Minimalism to the Substantive Core and Back: The Slovak Constitutional Court and (the Lack of) Constitutional Identity

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Has the Slovak Constitutional Court (SCC) engaged with the concept of constitutional identity? If so, what are its key tenets and how has it evolved? Recent scholarship has explored the constitutional identity discourse in Czechia,[2] Hungary[3] and Poland[4] regarding the relationship between national constitutional orders and EU law (Hungary, Czechia), as well as authoritarian populist attacks in Hungary and Poland.[5] Yet, these phenomena have so far remained largely unexplored in Slovakia, despite its moving history. Unlike in the rest of the Visegrád group, the fall of communism did not continue as a democratic success story in early 1990s Slovakia. Instead, the country faced four years of the semi-authoritarian rule of Vladimír Mečiar,[6] which halted the progress of integration into EU and seriously impeded the establishment of early democratic institutions.

[1] We would like to thank the editor of the volume as well as the participants at an online book workshop and the research seminar of the Judicial Studies Institute for valuable feedback. The chapter is updated with developments until June 2022.

[2] D Kosař and L Vyhnánek, 'The Constitutional Court of Czechia' in A von Bogdandy, P Huber and C Grabenwarter (eds), *The Max Planck Handbooks in European Public Law: Volume III: Constitutional Adjudication: Institutions* (Oxford, Oxford University Press, 2020).

[3] G Halmai, 'Abuse of Constitutional Identity. The Hungarian Constitutional Court on Interpretation of Article E) (2) of the Fundamental Law' (2018) 43 *Review of Central and East European Law* 23.

[4] A Śledzińska-Simon and M Ziółkowski, 'Constitutional Identity in Poland: Is the Emperor Putting On the Old Clothes of Sovereignty?' in C Calliess and G van der Schiff (eds), *Constitutional Identity in a Europe of Multilevel Constitutionalism* (Cambridge, Cambridge University Press, 2020).

[5] See the introductory chapter in this volume.

[6] Classifications of Mečiar's regime differ, using terms such as 'troubled democracy': H Kitschelt, *Post-Communist Party Systems: Competition, Representation, and Inter-Party Cooperation* (Cambridge, Cambridge University Press, 1999) 42, mixed case: Commission on Security and Cooperation in Europe, 'Human Rights and Democratization in Slovakia', or even one-party

While it acceded to the EU in 2004, Slovakia continues to be a puzzling case three decades later. At the very end of 2020, the Slovak parliament, riddled with Covid-19-related restrictions and disputes, rapidly passed a startling amendment to the Constitution, aiming to strip the SCC of the power to review any constitutional act or constitutional amendment.[7] The controversial decision came only a year after a breakthrough judgment of the SCC which annulled a constitutional act allowing security screening of judges.[8] Interestingly, this was also the very first time the SCC identified judicial independence as part of the substantive core of the Constitution and hence one of the core criteria of the constitutional review of an act of any public authority. Even more importantly, we argue this was the closest the SCC came to the articulation of Slovakia's constitutional identity.

The strike against the SCC came in a reaction to the court's emancipation in the last couple of years, which culminated in the unconstitutional constitutional amendment judgment. The social and political upheaval after the murder of Slovak journalist Ján Kuciak due to his investigative work, and his fianceé, Martina Kušnírová, exposed a vast corruption network in the public sphere – including the judiciary. It culminated with 2020 parliamentary elections which brought to power a new government led by a populist, Igor Matovič, who promised his voters that he would clean the system of old cadres and break the corruption networks, strengthening both judicial independence and the rule of law.[9] The SCC itself suffered significant partisan pressure when the outgoing government, suspecting its looming loss in the coming election, (unsuccessfully) attempted to pack the SCC with close allies. In what follows we explain how the SCC's reactionist approach to constitutional identity backed the court into a corner and turned it into a target of the populist government in 2020. In doing so, we pay homage to existing scholarly works suggesting that constitutional identity needs to be understood in a broader context, as it develops dialogically from past experience, as well as future aspirations.[10]

Our chapter provides the very first analysis of the SCC's interaction with the concept of constitutional identity.[11] While many constitutional courts

authoritarian system: JJ Linz and A Stepan, *Problems of Democratic Transition and Consolidation: Southern Europe, South America, and Post-Communist Europe* (Baltimore, Johns Hopkins University Press, 1996) 38–55; PC Schmitter and TL Karl, 'What Democracy Is … and Is Not' (1991) 2 *Journal of Democracy* 75.

[7] The SCC refused the petition against the change of the SCC's constitutional competences in April 2022 (PL ÚS 8/2022).

[8] PL ÚS 21/2014.

[9] See manifesto of Ordinary People and Independent Personalities, political party led by former PM Matovič. Obyčajní ľudia a nezávislé osobnosti, 'Úprimne, odvážne pre ľudí' www.obycajniludia.sk/wp-content/uploads/2020/02/OLANO_program_2020_FINAL_online.pdf.

[10] See chapter one in this volume.

[11] Hereinafter, when we talk of constitutional identity, we simply mean how the SCC understands and conceptualises the term constitutional identity, and do not aspire to offer our own definition.

interpreted constitutional identity in response to historical legacies (experience with non-democratic regimes) or external challenges (supranational commitments and EU law in particular),[12] Slovakia is a different story. Unlike in the case of the Hungarian or Polish constitutional courts, constitutional identity has not played a central role for the SCC and its articulations in its case law has remained limited.

We analyse the references to constitutional identity in the case law of the court between 1990–2020 and discuss existing reflections in Slovak domestic scholarship with an emphasis on the relationship between constitutional law and EU law. We argue that the SCC's reluctant engagement with the concept of constitutional identity can be explained by three interrelated factors. First, Mečiar's use of nationalism for easy electoral gains in the 1990s[13] placed the SCC in opposition to ethnonationalist claims. The SCC embraced a minimalistic approach,[14] that is, avoiding references to theories and abstract concepts such as constitutional identity, and limiting itself to narrow and shallow decisions on the circumstances of a case. The SCC benefited from this judicial minimalism, as it sufficed to offset Vladimír Mečiar's most blatant autocratisation efforts, while it also shielded the SCC from at least some decision costs. Second, the accession to the EU in 2004 offered Slovakia an opportunity to lock in desired democratic policies.[15] This sentiment was also reflected in the SCC's case law. The court did not grasp accession to the EU as an opportunity to recognise challenges of EU law's supremacy and juxtapose it against the concept of constitutional identity. Unlike in the rest of the Visegrád group, the court made a striking acknowledgment of EU law's supremacy, which resulted from the legacy of Mečiar's regime. Third, lacking clear wording of constitutional identity in the text of the Constitution or the past democratic legacy, the SCC, challenged by decades of competence and power disputes between executive and legislative actors, eventually developed a doctrine of the substantive core of the Constitution. Since core challenges of the Slovak constitutional system that reached the SCC addressed mostly separation of powers disputes, principles of the rule of law and judicial independence became the cornerstone of this doctrine. The whole existence of the SCC is also characterised by contestation of judicial independence: part of the political elite attempted to capture the judiciary from the inside, pack the courts with loyal justices and eliminate checks and balances.

[12] See the introductory chapter in this volume.

[13] Cf E Harris, 'Nation before Democracy? Placing the Rise of the Slovak Extreme Right into Context' (2019) 35 *East European Politics* 538.

[14] CR Sunstein, *One Case at a Time: Judicial Minimalism on the Supreme Court* (Cambridge, Mass, Harvard University Press, 2001).

[15] A Moravcsik, 'The Origins of Human Rights Regimes: Democratic Delegation in Postwar Europe' (2000) 54 *International Organization* 217.

The chapter on the SCC hence demonstrates that constitutional courts may develop their reading of constitutional identity in a reactive way. The lack of textual hooks in the text of the Slovak Constitution, combined with experience of political unrest, tradition of judicial minimalism, and dominance of separation of powers disputes in the SCC's case law, eventually led the court to ground its approach to constitutional identity in the substantive core doctrine. This doctrine represents a reading of constitutional identity which aims at integrating democracy, human rights and the rule of law.

We argue that locking in the principle of judicial independence became important both for the SCC's self-preservation and for its understanding of the threats to the Slovak judiciary in general. Therefore, the government's attempt to interfere in judicial independence via the security screening of judges spurred the court to quash several provisions of the constitutional act. However, in doing so the SCC also created a space for a pushback from the populist government,[16] which demanded more accountability for the 'non-democratic' judiciary[17] by curtailing the court's formal powers in an accelerated procedure. This is important for the broader literature examining legislative reactions to judicialisation of politics.[18]

The chapter proceeds as follows. In section I we briefly sketch the institutional background that frames the SCC's decision-making capabilities. In section II we examine the building blocks laid down in jurisprudence under Vladimír Mečiar's semi-authoritarian regime, showing how the court managed to push back against the core challenges with a minimalist strategy. Then, we proceed to explain why Slovakia's accession to the EU and subsequent developments prompted the SCC not to turn to constitutional identity, but instead to articulate grounds of what came later to be known as the substantive core doctrine (section III). In section IV we elaborate on the emphasis on judicial independence in the substantive core doctrine against the backdrop of corruption scandals and some political parties' court-curbing attempts. Finally, we discuss the advantages and risks of the combination of a limited debate on the relationship between the Slovak Constitution and the EU and the substantive core doctrine, with judicial independence among its central principles (section V). We conclude by assessing the fundamental challenge launched against the SCC by the post-2020 governing majority that set out explicitly to curtail its competence to review constitutional acts and amendments.

[16] See, eg, L Buštíková and P Baboš, 'Best in Covid: Populists in the Time of Pandemic' (2020) 8 *Politics and Governance* 496.

[17] Explanatory statement for Constitutional Act No 422/2020 Coll, 6–7. www.nrsr.sk/web/Dynamic/DocumentPreview.aspx?DocID=484567.

[18] Eg, MA Graber, 'The Nonmajoritarian Difficulty: Legislative Deference to the Judiciary' (1993) 7 *Studies in American Political Development* 35; K Pócza (ed), *Constitutional Politics and the Judiciary: Decision-Making in Central and Eastern Europe* (London, Routledge, 2018).

I. SETTING THE STAGE: FORMAL AND INSTITUTIONAL LOCUS OF THE SCC

The SCC was established under two conflicting narratives: first, the democratisation efforts after the Velvet revolution (in Slovak called 'the Tender revolution') of November 1989, and second, nationalist sentiments that contributed to the dissolution of the short-lived democratic Czecho-Slovak Federal Republic and the establishment of independent Slovakia in 1993. The former manifested themselves in the effort to gain inspiration from Western democratic traditions and to signal Slovakia's commitment to a 'return to Europe', ultimately via accession to the Council of Europe and the EU. The latter resulted in a hasty constitution-drafting process[19] orchestrated mainly by the future first Slovak Prime Minister, Vladimír Mečiar. Mečiar's race towards an independent Slovakia, motivated by both a personal vendetta against federal politicians who sought to remove him from power and a will to concentrate more power in his hands,[20] left little time to consider the intended role of the newly established SCC.

As a result, the design of the SCC copied many of the competences of its federal predecessor. The SCC was established as an institution with a wide range of formal powers,[21] which were not sufficiently discussed.[22] It was tasked with safeguarding constitutionality and its competences included extensive constitutional review of legislation, as well as the abstract interpretation of constitutional and legal statutes and provisions.[23] The first ten justices were appointed without much controversy, with Mečiar's ruling party (Hnutie za demokratické Slovensko) playing a prominent role.[24]

The Slovak political regime between 1994 and 1998 is typically characterised as semi-authoritarian.[25] The ruling party took absolute control of the state's

[19] D Malová, 'Slovakia: From the Ambiguous Constitution to the Dominance of Informal Rules' in J Zielonka (ed), *Democratic Consolidation in Eastern Europe: Volume 1: Institutional Engineering* (Oxford, Oxford University Press, 2001) 347.

[20] J Suk, *Labyrintem revoluce* (Prague, Prostor, 2009).

[21] J Drgonec, *Ústavné právo procesné* (Munich, CH Beck, 2017); M Steuer, 'Constitutional Court of the Slovak Republic' in R Grote, F Lachenmann and R Wolfrum (eds), *Max Planck Encyclopedia of Comparative Constitutional Law* (Oxford, Oxford University Press, 2019) <https://oxcon.ouplaw.com/view/10.1093/law-mpeccol/law-mpeccol-e803>.

[22] Like the Federal Constitution, the Slovak Constitution was criticised for its rushed creation in narrow political elites' circles, hidden away from broader civic and public discussion (see, eg, I Grudzińska-Gross, *Constitutionalism in East Central Europe* (Czecho-Slovak Committee of the European Cultural Foundation 1994); J Malenovský, 'O legitimitě a výkladu české Ústavy na konci století existence moderního českého státu' (2013) 152 *Právník* 745).

[23] A Bröstl, J Klučka and J Mazák, *Ústavný súd Slovenskej republiky. Organizácia, proces, doktrína* (PHARE Foundation, 2001).

[24] M Leško, *Mečiar a mečiarizmus: Politik bez škrupúľ, politia bez zábran* (Prešov, VMV, 1996).

[25] Kitschelt (n 6); Schmitter and Karl (n 6); Linz and Stepan (n 6).

economy and used privatisation processes to vest the control of key businesses in people with close ties to the party. Mečiar's regime limited the freedoms of its political opponents and allowed the creation of vast corruption and patronage networks between politicians and oligarchs.[26] The judiciary suffered under Mečiar's regime, never executing a real personal and substantive functional transition from the communist legacy.[27]

The Constitutional Court soon became the arbiter of many competence disputes between Mečiar and his political opponents (especially the President of the Republic), demarking the core principles of separation of powers and the limits of competences of the executive power. The SCC, however, benefited from the fact that Mečiar initially underestimated its importance, and later did not manage to pack it with more ideologically aligned justices.[28]

Nevertheless, the deficiencies of the hastily formed constitutional design, which mechanically adopted many of the federal provisions, soon became obvious. After Mečiar lost the 1998 parliamentary election, the new political elite vested considerable effort into the integration into the EU. Slovakia perhaps best illustrates Moravcsik's hypothesis of young democratic regimes committing to international law to lock in preferred democratic policies. EU accession and membership became a symbol of Slovakia's return to the family of democratic regimes. Given the lack of historical experience with democracy and negative legacy of the first independent government, it was the integration project and democratic conditions laid upon the candidate countries by the European Commission that had a formative impact on Slovak political institutions and an understanding of its constitutional identity.

A substantive part of the reforms enacted between 1998 and 2004 was the reconstruction of judicial governance and the strengthening of judicial independence.[29] The SCC gained several new competences, including review of individual petitions. The appointment system for SCC justices was modified as well, increasing the number of judicial seats to 13, and changing their seven-year renewable terms to twelve-year non-renewable ones. The parliament (National Council of the Slovak Republic, NRSR) lost the competence to appoint and dismiss judges of general courts. Instead, drawing heavily on the recommendations of the Venice Committee and European Commission, the new government transferred those competences to the newly established National Judicial Council (90/2001 Coll). Nevertheless, the Judicial Council governed by the

[26] Eg, E Harris and K Henderson, 'Slovakia since 1989' in SP Ramet and CM Hassenstab (eds), *Central and Southeast European Politics Since 1989* (Cambridge, Cambridge University Press, 2019) 195–99.

[27] D Kosař, *Perils of Judicial Self-Government in Transitional Societies* (Cambridge, Cambridge University Press, 2016) 238–43.

[28] The mandates of the first constitutional court justices ended in 2000.

[29] Kosař (n 27) 243–46.

majority of judges proved to be an ill fit for the post-communist country with an unreformed judiciary. It became occupied by people close to Mečiar's Minister of Justice Harabin, later president of the Supreme Court, who soon captured the judiciary from the inside and closed it against any reform attempts.[30] In the coming years, judicial independence sank again, and Slovak courts lost considerable public confidence.[31]

Still, 1998–2006 was a period marked by a euro-optimistic atmosphere and the rebuilding of state institutions. In 2004, Slovakia successfully joined the EU.[32] It was also a tranquil period for the SCC, obstructed only by the failure to appoint new justices to replace three sitting members of the SCC, who left to serve in the EU judiciary. In 2006, a fairly young party, SMER-SD, led by Robert Fico, won the parliamentary election[33] and formed a close alliance with the President, Ivan Gašparovič. It was this association that in 2007 determined the composition of the SCC.[34] Although several justices were reappointed,[35] the bench contained few experts on constitutional scholarship.

With the exception of a two-year period, Fico remained in power until the 2020 parliamentary election.[36] While at this time he demonstrated pro-EU commitment, his government also allowed the formation of wide corruption networks between politicians and oligarchs, destroying the independence of the state prosecution and ordinary judiciary.[37] His influence on the composition of the SCC was, however, brought to a halt in 2014, when pro-EU liberal President Andrej Kiska replaced Gašparovič and adopted an assertive approach to the SCC, defending the idea of the most highly qualified jurists being appointed to the bench.[38] The post-2014 era was marked by disputes between Fico and the

[30] S Spáč, K Šipulová and M Urbániková, 'Capturing the Judiciary from Inside: The Story of Judicial Self-Governance in Slovakia' (2018) 19 *German Law Journal* 1741; Kosař (n 27).

[31] M Urbániková and K Šipulová, 'Failed Expectations: Does the Establishment of Judicial Councils Enhance Confidence in Courts?' (2018) 19 *German Law Journal* 2105.

[32] We detail the constitutional framework for the accession and the SCC's interpretation of this framework in section III.

[33] D Malová, 'Slovakia' in J-M de Waele, F Escalona and M Vieira (eds), *The Palgrave Handbook of Social Democracy in the European Union* (London, Palgrave Macmillan, 2016) 554–56.

[34] With the mandates of six other justices ending on 21 January 2007, the court was left with only four sitting justices, insufficient for delivering any decision in the plenum, which required at least seven votes.

[35] These justices were appointed in 2000; thus, the constitutional amendment in 2001 that prohibited reappointment did not apply to them. As a result, a few justices served 19 consecutive years at the court.

[36] Societal uproar after the murder of Kuciak and Kušnírová forced Fico to resign. However, he remained in power informally as the chairman of SMER-SD.

[37] M Vagovič, *Vlastnou hlavou* (Bratislava, Premedia 2016); Bertelsmann Stiftung, 'BTI 2020 Country Report: Slovakia' (2020) <https://bti-project.org/content/en/downloads/reports/country_report_2020_SVK.pdf>.

[38] Between 1993 and December 2020, Slovak constitutional justices were selected and appointed by the President of the Republic, who selected them from a double number of nominees submitted by the single chamber parliament.

Presidents (both Kiska and his successor Čaputová) over the composition of the SCC. Due to the parliament's inability to select enough candidates, Kiska left two chairs at the SCC empty for three years (2014–2017). The dispute ended with a ruling of the SCC (I ÚS 575/2016) which found that the President had violated the right of several candidates to access public office by refusing to appoint them to a vacant position.

The Parliament run by SMER-SD attempted to use the very same court-packing strategy[39] again in 2019, after nine of 13 constitutional justices finished their mandates. The Parliament, seeking to secure the appointment of people close to the outgoing government, presented President Kiska with a very limited list of names to choose from. PM Fico himself voiced an interest in joining the SCC as its new president. Both attempts turned out unsuccessful for Fico. President Kiska once again did not make appointments, and the dispute was resolved only after the Parliament had backed down and nominated a sufficient number of candidates, at which time Čaputová replaced Kiska in office.

It is important to note that this latest 2019 selection of SCC justices attracted unprecedented public interest. The investigation of the murder mentioned above revealed, among other things, deeply rooted corruption in judicial ranks and led to a heightened period of political mobilisation, demanding accountability and justice. As we discuss in section IV below, this public sentiment has paradoxically not squared well with the SCC's attempt to set limits to the executive investigation of judges' backgrounds. The emphasis on judicial independence and the nascent articulation of Slovakia's constitutional identity did not attract its zealous supporters, even among Slovak constitutional scholars.[40]

The 2020 parliamentary elections have been followed by massive changes in the official support for prosecutions of public officials suspected of corruption, judges among them. The call for prosecutions and accountability also targeted the SCC. In May 2020 one of its justices resigned after the media published a secret service report on his communication with oligarch Kočner, accused of ordering Kuciak and Kušnírová's murder and several economic frauds. This all culminated in an unprecedented step being taken by the new coalition government which, amid the Covid-19 pandemic and state emergency at the very end of 2020, restricted the SCC's competence to review constitutional laws. These challenges, particularly the petition to invalidate the constitutional amendment restricting the court's own competences, provided ample opportunity for the court's robust (self-)articulation of its role, and of the principles contained in Slovak constitutionalism as well.

[39] For more on the use of similar strategies see D Kosař and K Šipulová, 'How to Fight Court-Packing?' (2020) 6 *Constitutional Studies* 133.

[40] J Štiavnický and M Steuer, 'The Many Faces of Law-Making by Constitutional Courts with Extensive Review Powers: The Slovak Case' in M Florczak-Wątor (ed), *Judicial Law-Making in European Constitutional Courts* (London, Routledge, 2020) 198–99.

In what follows we discuss the emergence of the SCC's reactionist approach to the concept of constitutional identity, arguing that the court avoided the concept of constitutional identity partly due to its association with a nationalist, anti-democratic challenger in the 1990s and opted for a minimalist approach. Given the negative national historical legacy and readiness to embrace the supremacy of EU law, the SCC stayed clear of nationalistic particularism[41] and instead reacted to domestic challenges to constitutionalism. This reactionist approach led the SCC gradually to develop the doctrine of the substantive core of the Constitution, which placed core emphasis on the separation of powers doctrine and judicial independence.

II. NEW COUNTRY WITH NO CONSTITUTIONAL IDENTITY? JUDICIAL MINIMALISM IN THE PRE-ACCESSION ERA

Unlike the Hungarian Fundamental Law,[42] the Slovak Constitution on its own does not explicitly include any notion of identity, and in contrast to those of Germany and the Czech Republic,[43] the constitutional text does not even encompass any eternity clause or identification of core principles,[44] nor does it recognise tiered constitutional design,[45] which could be used for constructing such a clause. In this section we demonstrate how the lack of explicit articulation, when coupled with the political context of 1994–1998, facilitated the absence of constitutional identity from the SCC's terminology. According to the Preamble to the Constitution

> *We, the Slovak nation*, bearing in mind the political and cultural heritage of our ancestors and the centuries of experience from the struggles for national existence and our own statehood, mindful of the spiritual heritage of Cyril and Methodius and the historical legacy of Great Moravia, […] *together with members of national minorities and ethnic groups* […] that is, we, the citizens of the Slovak Republic adopt through our representatives this Constitution [emphasis added].[46]

The Preamble (although mentioning the commitment to 'a democratic form of government') exhibits tenets of nationalism due to separating 'the Slovak nation' as the primary constitution-maker from the 'national minorities and ethnic groups' as playing a secondary role, and bringing up the citizenship

[41] For a definition and discussion of the concept, see the introductory chapter in this volume.
[42] See chapter six in this volume.
[43] See chapters two and four in this volume.
[44] In contrast, see Article 9.2 and 1 of the Czech constitution. For more on this, see chapter four in this volume.
[45] J Drgonec, *Ústava Slovenskej republiky s úvodným komentárom* (Vantaa, Heuréka, 2004).
[46] Constitution of the Slovak Republic. See the English translation at www.constituteproject.org/constitution/Slovakia_2017?lang=en.

principle as secondary to the nationhood principle.[47] The importance of the Preamble, particularly in the context of national identity, cannot be underestimated, as it provides a tone for the text that follows, captures the historical conditions affecting the text, and formulates the key values of the constitution-maker.[48] Interestingly, the Preamble also reflects the overall atmosphere of the hasty constitution-drafting process created by Mečiar, who relied on national identity as the driving force of his political campaign, severing the ties with the Federation.

The SCC, however, repeatedly refused to recognise the interpretative power of the Preamble. In a decision on the Act on State Language,[49] the SCC stated that preambles are not a source of law; they only represent introductory ('non-normative') statements for a given act and cannot be reviewed. The generality of this statement was confirmed in its 1999 decision interpreting the President's competence to grant amnesties and pardons,[50] where the SCC rejected any normative content which could follow from the Preamble. The SCC's case law on the Preamble remains underdeveloped. Nevertheless, the important takeaway is that the SCC avoided further engagement with the controversial wording of the Preamble and also sent a signal of itself as a court loyal to 'written law' in its interpretive practice.[51] In other words, the SCC eliminated a potential threat to democracy represented by the nationalist impulses of the Preamble that might be tapped into by authoritarian actors.[52] We can only hypothesise to what extent the spirit of the Preamble, which, unlike in the Czech case,[53] was hostile to the legacy of the democratic First Czechoslovak Republic and was tied to Mečiar's nationalistic rhetoric, played a role in the SCC's stance. Nevertheless, we argue that the refusal to acknowledge the Preamble's interpretative force paved the way for the court later to develop the substantive core doctrine instead of embracing the concept of constitutional identity.

The SCC's approach in relation to the Preamble, which avoided substantive, conceptual engagement with abstract ideas, also fits into its overall positioning in the 1990s, sometimes known as the 'first term' of the court under the presidency of Milan Čič. The political conflicts between the President and the

[47] This distinguishes the Slovak preamble from its Czech counterpart which constructs a political nation from its very beginning. For more see J Marušiak, 'Ústavy SR a ČR a ich úloha v procese konštituovania národných identít' in Vladimír Goněc and Roman Holec (eds), *Česko-slovenská historická ročenka 2012. Češi a Slováci 1993–2012: Vzdalování a přibližování* (VEDA 2013) 109.

[48] I Halász, *Minulosť a symbolika v ústavách štátov strednej Európy* (Bratislava, Ústav státu a práva AV ČR, 2019) 11; see also JO Frosini, 'Constitutional Preambles: More than Just a Narration of History' (2017) *University of Illinois Law Review* 603.

[49] PL ÚS 8/96.

[50] Art 102 s 1j); I ÚS 30/99.

[51] Štiavnický and Steuer (n 40) 185–86.

[52] Zs Körtvélyesi, 'From "We the People" to "We the Nation"' in GA Tóth (ed), *Constitution for a Disunited Nation: On Hungary's 2011 Fundamental Law* (New York, Central European University Press, 2012) 113–17.

[53] See chapter four in this volume.

Prime Minister intensified considerably after 1994. Although Mečiar lost a vote of confidence in March 1994, he still managed to turn the public preferences around, won the next election, and prevented the opposition from gaining any position in the NRSR committees. The level of governmental control pervaded all spheres of political and social life, but targeted most harshly Mečiar's political opponents, President Kováč but also the SCC. Having noticed the affinity between the two actors' views on key political issues, Mečiar called the SCC the 'unhealthy element on the political scene'.[54]

Characterised by the 'constructive use of silence' and a commitment to 'passive virtues',[55] the court has nevertheless been able to resist Mečiar's key autocratisation efforts using the minimalist approach. It has received a helping hand from the President, who was the petitioner in several key cases concerning the limits of governmental power. It is in this struggle that the role of the president *in interaction with the SCC* became particularly important in comparative terms.

Even in refusing the Preamble, the SCC had, in theory, two other sources on which to base a definition of constitutional identity: the first was the wording of Article 1 of the Constitution, which identifies Slovakia as a sovereign, democratic state governed by the rule of law, not bound by any ideology or religion and committed to general rules of international law. The second one was the brief but very formative case law of the Federal Czechoslovak Constitutional Court which, in the review of the Big Lustration Act,[56] introduced a value-oriented definition of the new democratic regime which later became a foundation stone for all future transitional justice jurisprudence of both successors' constitutional courts.[57]

Despite these resources, however, the SCC in this period remained confined to a minimalist approach, avoiding any grand theoretical considerations even when under pressure from Mečiar. References to constitutional identity were altogether missing from its case law. With competence disputes between core state institutions being the source of some of the most salient decisions of the court, the principle of the separation of powers appeared in its case law. However, even in its most illuminative articulation,[58] the SCC did not provide any conceptual footing for it beyond the context of the particular case. Hence, the court underwent its first major change in composition (in 2000) 'untainted' by more in-depth conceptual discussions in the spirit of the decisions of the

[54] D Malová, 'The Role and Experience of the Slovakian Constitutional Court' in W Sadurski (ed), *Constitutional Justice, East and West: Democratic Legitimacy and Constitutional Courts in Post-Communist Europe in a Comparative Perspective* (The Hague, Kluwer Law International, 2010) 355.

[55] Sunstein (n 14) 5.

[56] PL ÚS 1/92, on a review of Act No. 451/1991 Coll. Big Lustration Act (Velký lustrační zákon), and PL ÚS 5/92.

[57] PL ÚS 1/92.

[58] PL ÚS 16/95.

CFCC. It took the developments of the early 2000s to achieve a gradual change in this attitude.

III. SUBSTANTIVE CORE: PASSIVE ARTICULATION IN A EURO-OPTIMISTIC ATMOSPHERE

The SCC's commitment to minimalism began to change in the 2000s, when the court furthered the idea of the substantive rule of law to encompass human rights and freedoms. The very first articulation of the principle dates back to 1998, when the court subtly derived 'legal certainty' and 'justice (substantive rule of law)' from Article 1 of the Constitution.[59] However, it elaborated on the latter only in 2002, arguing that in the substantive rule-of-law state, 'particular emphasis is placed on the protection of those rights which are subject to constitutional regulation'.[60] With this decision the court no longer seemed to insist on the minimalist position that had excluded substantive review of human rights.[61]

The explanation for this change, we argue, is twofold. Firstly, the formal powers of the court were extended in 2001 to encompass individual complaints of human rights violations. Unsurprisingly, the court's human rights jurisprudence grew in quantity and more engagement with the human rights provisions of the Constitution was required. Secondly, the looming accession of Slovakia to the EU directed the court's attention to human rights which are embraced by EU law as well.[62] Therefore, we proceed by examining the extent to which the court explored the relationship between the Constitution and EU law, including possible disjunctions between the two.

Before we return to the case law, a few words on the relationship between EU law and the Slovak Constitution are needed.[63] EU law gained a prominent constitutional position thanks to the constitutional amendment having been drafted in a Euro-friendly atmosphere, where both the political and judicial elites strove to prove their place in Western Europe and democratic society even more vehemently than after 1989.[64] Formally, the relationship of Slovakia with the EU was defined in Article 7(2), which, inter alia, states that 'The Slovak Republic may […] transfer the exercise of a part of its rights to the [EU]. Legally binding acts of the [EU] shall have primacy over the laws of the Slovak Republic'. The

[59] I ÚS 10/98, 9.

[60] I ÚS 54/02, 12–13.

[61] Cf R Procházka, *Mission Accomplished: On Founding Constitutional Adjudication in Central Europe* (New York, Central European University Press, 2002) 176.

[62] Article 2 TEU.

[63] In the 1990s the Constitutional Court had identified the Constitution as the basic and highest law of the state, supreme over all other sources of law (PL ÚS 32/95).

[64] The EU's institution and monitoring process by the European Commission had its part in Mečiar's loss of preferences and eventual electoral defeat.

transfer clause[65] in the first sentence of this paragraph reflects the optimistic atmosphere and Slovakia's enthusiasm for fostering integration with the EU. The peculiar way in which the SCC reflected the transfer of the exercise of rights might seem surprising when compared with the Czech and German constitutions which limited delegation by the constitutional identity[66] or substantive core of the constitution.[67] Furthermore, due to a very pro-EU atmosphere, the legislator introducing provisions on EU law forgot to include transitional provisions in the constitutional amendment, formally thus making EU law effective even before the real accession. In this context, Kühn and Bobek point out that it is quite puzzling that Slovak courts did not feel the need to articulate a big overreaching doctrine of voluntary consistent interpretation of Slovak law with EU law before the accession. None of the Slovak courts attempted to use European Communities' or EU law as an interpretative argument before accession.[68] The Slovak approach is, however, understandable in light of the almost uncontested pro-EU atmosphere of the late 1990s.

In 2005 a group consisting of the members of the Slovak Conservative Institute and several think-tanks contested Article 7 after the government issued its approval of the Treaty establishing a Constitution for Europe 2002 (TCE) on 11 May 2005. The petitioners claimed that their right to participate in the administration of public affairs had been violated by the NRSR, which approved the Treaty without a preliminary referendum. The petitioners claimed that the approval should have been validated by a new referendum under Article 7(1), as the EU now represented a union of states, closely resembling a state formation.

The SCC's judgment[69] is surprising in many respects. The SCC stated that although the TCE had shifted the integration project in the direction of a state formation, the EU would still preserve several specifics and characteristics distinguishing it from a state or a state formation with other countries. On the other hand, the SCC stressed that the Union respects the national identity of individual members encompassed in their core political and constitutional systems.[70] Although the EU gained plenty of signs and functions characteristic of a state, the SCC claimed that it was not for the member state or its authorities to decide on the legal nature of the EU independently of other members. Moreover, the SCC found that holding a referendum on accession to the EU was prohibited by Article 93(3) of the Slovak Constitution, as the Charter of Fundamental Rights is a part of the treaties and the Constitution forbids the holding of a

[65] D Krošlák, *Ústavné právo* (Warsawa, Wolters Kluwer, 2016) 135; see also J Filip, 'K formulaci evropských klauzulí v ústavním právu' (2010) 18 *Časopis pro právní vědu a praxi* 217.

[66] See chapter two in this volume.

[67] See chapter four in this volume.

[68] Z Kühn and M Bobek, 'Europe Yet to Come: The Application of EU Law in Slovakia' in A Lazowski (ed), *The Application of EU Law in the New Member States: Brave New World* 1st ed (The Hague, TMC Asser Press, 2010) 357.

[69] II ÚS 171/05.

[70] Article 4(2) TEU.

referendum on human rights. Even more importantly, the SCC precluded any future potential referendum on any act of Slovakia within the EU, stating that such an act, even if it significantly alters the conditions of cooperation between member states of the Union, is to be considered under Article 7(2), which does not require a mandatory referendum.

The SCC's approach differs from several of its Visegrád counterparts, which fought hard to protect their competence to decide whether the EU acts within its competences and respects the national identity of the Member States.[71] According to the SCC, Slovakia delegated rather than transferred its competences to the EU indefinitely (ie, in theory, the legislator could 'take them back' in the future). Yet, the decision did little to explore the ramifications of this distinction or to guide the SCC's future thinking on EU integration.

In another important decision aiming to clarify the relationship between EU law and national constitutional law, shifting the constitutional provisions even closer to EU law, the SCC found that every national court applying EU law has the obligation to secure the effect of that law and therefore has to set aside any national provision that conflicts with it. This obligation includes constitutional laws and does not come with a requirement to refer the issue to the SCC first.[72] This took the principle of euro-conform interpretation much further than in most EU countries whose courts opted for the protection of constitutional norms above the effectiveness of EU law. For Slovakia, EU law gained supremacy over constitutional order, even if it meant changing the interpretation of the constitutional provisions away from their original meaning. The court did not depart from this approach in a later small chamber decision in which the petitioner contested the European Commission's overriding of a Slovak general court's decision on granting state aid.[73] Although it nominally referred to the *Solange* doctrine of the German Federal Constitutional Court and the *Lisbon I* decision of the Czech Constitutional Court, de facto it adopted a much more deferential standard that had not set a barrier to the review of EU law-related matters being reserved exclusively to EU institutions.

To sum up, the early post-accession years were characterised by a very open and very friendly position of the SCC towards EU law.[74] The SCC proved to

[71] See, eg, Constitutional Court of the Czech Republic, PL ÚS 5/12.

[72] PL ÚS 3/09.

[73] II ÚS 501/2010, para 20. See also Z Vikarská and M Bobek, 'Slovakia: Between Euro-Optimism and Euro-Concerns' in A Albi and S Bardutzky (eds), *National Constitutions in European and Global Governance: Democracy, Rights, the Rule of Law: National Reports* (The Hague, TMC Asser Press, 2019) 872–73.

[74] The SCC on several occasions also openly accepted an opportunity to submit a preliminary question to the CJEU: see eg PL ÚS 8/04 and A Blisa, P Molek and K Šipulová, 'Czech Republic and Slovakia: Another International Human Rights Treaty?' in M Bobek and J Adams-Prassl (eds), *EU Charter of Fundamental Rights in the Member States* (Oxford, Hart, 2020); J Mazák, 'Príspevok Ústavného súdu Slovenskej republiky při uplatňovaní práva plnění povinností na komunitárnej úrovni' (2005) 14 *Jurisprudence* 11; I Macejková, 'Právo Európskej únie v rozhodovacej činnosti Ústavného súdu Slovenskej republiky' in A Krunková (ed), *Európska únia a jej vplyv na organizáciu a fungovanie verejnej správy v Slovenskej republike* (Košice, Univerzita P J Šafárika, 2016).

be very willing to accept the doctrine of the supremacy of EU law before the Slovak Constitution,[75] without engaging with the substantive puzzles that might emerge as a result (eg in the event that the Slovak Constitution provided for higher standards of human rights protection than EU law).[76] EU integration helped strip Mečiar of his power and EU integration was expected to work as a strong and important safeguard. Yet, the court continues to avoid the more difficult questions, eg, having declined to consider the Charter of Fundamental Rights in judicial review.[77]

IV. SOBERING UP: TOWARDS CONSTITUTIONAL IDENTITY

While the SCC post-accession never faced a similarly hostile political context to that in the 1990s, it became the arbiter of central constitutional disputes, some of them again centred on the relationship between core state institutions, including the judiciary and the SCC itself. At this time, two central characteristics of the court's (very limited) references to identity emerged: the resurgence of the central focus on the head of state, and the attribution of a central role to judicial independence in the separation of powers and the growing self-awareness of the SCC via its development of the substantive core doctrine in (a somewhat delayed) reaction to the autocratisation efforts of the Mečiar government. We will address each of these trends in turn, with reference to key judgments.

The scope of presidential powers became a contested issue in the 2012–2014 electoral term and resulted in the first judgment in which the SCC ever explicitly used the term *constitutional identity*.[78] The case revolved around the refusal of President Gašparovič to appoint Jozef Čentéš, a candidate for the position of General Prosecutor. Čentéš claimed that President Gašparovič violated his right to access public office by not appointing him to the post. The petitioner claimed that the time between the approval of his election by the NRSR and the President's inactivity, which stretched for over 18 months, was unconstitutionally long.

The SCC found the President to be overstepping his competences, which had also[79] led to a violation of the petitioner's right of access to a public office.[80] The

[75] Krošlák (n 65) 148; J Čorba et al, *Uplatňovanie európskeho práva na Slovensku* (Bratislava, Kalligram, 2003).

[76] M Steuer, 'Constitutional Pluralism and the Slovak Constitutional Court: The Challenge of European Union Law' (2018) 8 *The Lawyer Quarterly* 108.

[77] PL ÚS 10/2014. See also J Mazák and M Jánošíková, 'Prienik Charty základných práv Európskej únie do vnútroštátneho práva na príklade Slovenskej republiky' [2016] *Acta Universitatis Carolinae Iuridica* 9.

[78] The exact same reference was reproduced in a more recent judgment concerning the validity of the 2019 presidential election results (PL ÚS 16/2019, para 270).

[79] I ÚS 397/2014.

[80] III ÚS 427/2012.

SCC recognised 'the Game of Thrones' in appointments shortly before the end of the electoral term to be a natural element of the democratic constitutional system in general, and an integral part of Slovak constitutional history and difficult political development in the 1990s.[81] Referring to this complicated historical development of the independent Slovakia, the SCC declared that

> the President is a significant element of the constitutional identity of the country. [S/he] represents statehood and sovereignty. It is not a regular public office […] The President does not decide on individual rights. Similarly, however, the President does not stand above the constitution, although he [she] may interpret the constitution and this interpretation is not always subjected to constitutional review.[82]

The recognition of the centrality of the figure of the President has not led the SCC to any further elaboration on the concept of constitutional identity. The judgment is nevertheless important for the contextual understanding of the importance which the SCC attributed to the division of competences and the role of the principle of checks and balances in Slovak democracy. This is well demonstrated by the emphasis laid in the SCC on the responsibility of the head of state regarding constitutional values.[83]

The emphasis on the role of the president has not been connected to the rise of the *substantive core* doctrine in the SCC's case law. This idea was floated in (Czecho)Slovak legal doctrine for some time in the 2010s,[84] particularly after the adoption of the *Melčák* judgment where the Czech Constitutional Court invalidated a constitutional law on early parliamentary election. Experts on the Slovak Constitution were not united, however, on the question whether, despite the absence of an eternity clause, there is an *unamendable core* of the Constitution encompassing central values that define the Slovak political community.[85] The SCC did not offer an answer until the landmark judgment of 2019 (delivered only a few days before the end of the term of the justices (re)appointed in 2007, including SCC President Ivetta Macejková).

Crucially for the pathway towards the substantive core doctrine, the SCC has become a staunch defender of judicial independence. The court went further in a series of decisions in which it invalidated legislation creating a Special Court to adjudicate on serious criminal offences,[86] or freezing judicial salaries due to the economic downturn.[87] As the freezing of salaries affected the SCC justices'

[81] See above, eg, II ÚS 65/97, I ÚS 61/96, or I ÚS 7/96.

[82] ibid at para 59.

[83] Moreover, the presidential competences were further narrowed down in the judgments concerning the appointment of constitutional justices: III ÚS 571/2014, I ÚS 575/2016.

[84] Eg, B Balog, *Materiálne jadro ústavy Slovenskej republiky* (Žilina, Eurokódex, 2014); R Procházka, *Lud a sudcovia v konštitučnej demokracii* (Prague, Aleš Čeněk, 2011).

[85] See also J Drgonec, *Ústavné právo hmotné* (Munich, CH Beck, 2018) 65–83.

[86] PL ÚS 17/08.

[87] Eg, PL ÚS 99/2011, PL ÚS 27/2015, PL ÚS 8/2017.

income as well, these decisions came across as particularly inward-looking, protecting independence for the justices' rather than broader society's sake.

The 2016 general elections resulted in the third administration led by PM Robert Fico, with his coalition including the nationalist Slovak National Party. The coalition soon found itself under pressure from the civil society, as indications of corruption of high public officials proliferated. The already fragile atmosphere became even more brittle in 2017 due to a fictional movie entitled 'Abduction', loosely based on the abduction of President Kováč's son in 1995, allegedly orchestrated by Mečiar's regime as retaliation for the President's resistance. After President Kováč's term ended, the Slovak parliament put off a new selection while being unable to agree on his successor. In the meantime, Mečiar executed the presidential competences and used the opportunity to issue two controversial decisions on amnesties.[88] The first one concerned the blocked 1997 referendum relating to Slovakia's accession to NATO and the proposal to establish the direct election of the President.[89] The second set of amnesties related to the kidnapping of President Kováč's son to Austria.[90] Both decisions on amnesty stipulated the close of criminal investigation in these cases, closely tied to the political conflicts at the time. The former case concerned the Ministry of the Interior's actions while, in the latter, several independent media outlets connected the case to power disputes between the President and Mečiar and suggested the involvement of the Slovak Information Agency (controlled by Mečiar's nominee).

The screening of the movie reopened unhealed and unaddressed past crimes of Mečiar's regime. The government quickly used the momentum and passed an amendment to the Constitution vesting the NRSR with official power to abolish amnesties and the SCC with a new responsibility to review the annulment acts within 60 days. In this way, Fico distracted the public from his own scandals, seemingly listening to calls for justice 20 years after the end of Mečiar's rule.

Shortly after the constitutional amendment, the NRSR adopted two acts annulling Mečiar's amnesties. Lawyers addressed the amendment as a new constitutional transition or moment in Slovak history. The NRSR justified its decision by claiming that amnesties kept worrying Slovak society, pointing to the indivisibility of human rights from the rule of law concept and Slovakia's international obligation to investigate forced disappearances.

Like the NRSR, the SCC identified the topic as extremely sensitive and important for society. It also explained the position of the institution of the amnesty in different regimes and its relation to the system of checks and balances. The

[88] Decision of 3 March 1998, No 55/1998 Coll, Decision of 7 July 1998, 214/1998 Coll.

[89] E Láštic, *V rukách politických strán: Referendum na Slovensku 1993–2010* (Bratislava, Univerzita Komenského, 2011).

[90] J Mazák and L Orosz, 'Quashing the Decisions on Amnesty in the Constitutional System of the Slovak Republic: Opening or Closing Pandora's Box?' (2018) 8 *The Lawyer Quarterly* 1.

SCC also concluded that the original wording of the Constitution, assigning the President (and PM who acted as his substitute) unlimited competence, was too generous, bringing with it a huge risk of arbitrariness.[91] The substantive democratic rule of law state is incompatible with unlimited exercise of state power.

The judgment represented the first occasion on which the SCC finally defined the content of the term 'principles of democratic state and law' (Article 1(1) of the Constitution), emphasising that no constitution is neutral, as constitutions are embedded in values and principles mirroring the societal understanding of the good. These principles are respected by the state,[92] cannot be derogated from[93] and – important in face of the 2020 curtailment of the SCC's competences – represent the 'core of the constitutional review'.[94] Although not all principles are explicitly mentioned in the Constitution, they may still underlie its provisions.

The SCC in the main tackled two issues: (1) whether the amnesties were against the principles of the democratic state and the rule of law, and (2) whether it was acceptable for a democratic Parliament to abolish an amnesty granted by the PM.

The SCC found that Mečiar had acted in clear breach of the constitutional prohibition of arbitrariness. The amnesties interfered with several core principles, such as the separation of powers, transparency, public control and legal certainty. But the most important element of the judgment was the SCC's rationalisation of the search for the substantive protection of the rule of law. The SCC stated that both its previous case law and the ECtHR's decision in *Lexa v Slovakia* (App No 54334/00) were formalistic, while the substantive protection of constitutional principles including the rule of law permitted its reconsideration. While the annulment of the amnesties clearly has retroactive effect and goes against legitimate expectations of victims, the discrepancy between the acts of PM Mečiar and the constitutional principles of Slovakia was too great. Adhering to the principle of legal certainty in such a situation would, according to the SCC, be too formalistic.

A reference to constitutional identity occurs in dissenting opinions by two justices, Milan Ľalík and Peter Brňák, who analysed the effect of the judgment on Slovakia's constitutional identity.[95] The justices opposed the act in which the NRSR attributed itself more competences (competence to annul the amnesties via a constitutional act) than originally envisaged by the Constitution. According to the justices, this moved the NRSR into a position which was not envisaged by the Constitution and the SCC's judgment had de facto erased any limits to the

[91] PL ÚS 7/2017, 88.
[92] PL ÚS 12/01.
[93] Here, the Court referred to the case PL ÚS 16/95. As discussed above, back in 1995 the content of the principles was not defined by the SCC.
[94] PL ÚS 7/2017, 121–22.
[95] PL ÚS 7/2017, dissenting opinion of P Brňák and M Ľalík, 21.

NRSR's powers of constitutional change. Both justices pointed out that, while today the NRSR is relatively liberal-democratic, this might not always be the case, and some constitutional fundamental principles are more protected by the force of the law than by a societal consensus. According to the dissenting justices, the majority decision, by rejecting the 'antidemocratic nature' of the SCC, opted for 'cheap populism' and even 'denied' the existence of constitutional identity articulated in the principles of democracy and the rule of law as declared in Article 1 of the Constitution.[96] Brňák's and Ľalík's narrative gained traction in Slovak constitutional jurisprudence neither on the invocation of constitutional identity nor on the critique of the judgment. The amnesties decision, however, marked the entry of the substantive core doctrine from a few works of constitutional scholarship into mainstream political discourse.

The tug of war between the president and the legislature over the appointment of constitutional justices prompted the debate on changing the appointment model. While the constitutional amendment proposal introducing the change failed, a new Constitutional Court act (314/2018 Coll) was adopted in 2018, introducing public hearings for the candidates.[97] These hearings frequently featured a question on the substantive core being put to the candidates, with the actors involved recognising how the doctrine might facilitate the invalidation of constitutional laws.[98] The question was not merely a logical follow-up to the SCC's amnesty decision. At that time, the court had another petition to adjudicate on, which alleged the incompatibility with the Constitution of the introduction of background checks on sitting general court judges[99] by the National Security Authority.[100] This measure was part of the partisan actors' effort to roll back judicial independence at a time of public distrust of the Slovak judiciary.

The court decided the judicial security clearance case in 2019, after more than four years of deliberation, by invalidating several provisions of the constitutional amendment in addition to implementing legislation. In doing so, the majority of the SCC justices offered a fully-fledged subscription to the substantive core doctrine on this occasion, though without a single reference to constitutional identity. With the substantive core doctrine in mind, the SCC not only derived the competence to protect the substantive core against direct amendments to the Constitution, but also, in a rare move globally,[101] altogether

[96] PL ÚS 7/2017, dissent, at para 34.

[97] M Steuer, 'The First Live-Broadcast Hearings of Candidates for Constitutional Judges in Slovakia: Five Lessons' (*Verfassungsblog*, 5 February 2019) https://verfassungsblog.de/the-first-live-broadcast-hearings-of-candidates-for-constitutional-judges-in-slovakia-five-lessons/.

[98] Š Drugda, 'Changes to Selection and Appointment of Constitutional Court Judges in Slovakia' (2019) 102 *Právny obzor* 14.

[99] Appointed before 1 September 2014.

[100] Constitutional Act No 161/2014 Coll where it added Article 154d (1) to (3) to the text of the constitution as well as amendments to several pieces of ordinary legislation.

[101] Y Roznai, 'Who Will Save the Redheads? Towards an Anti-Bully Theory of Judicial Review and Protection of Democracy' (2020) 29 *William & Mary Bill of Rights Journal* 1, 16–17.

invalidated the constitutional amendment. The judgment completes the transformation of the emphasis on the substantive rule of law into a fully-fledged substantive core doctrine[102] with a central role for judicial independence.[103] At the same time, it has also generated several critical commentaries,[104] not only denouncing the court's invalidation of the *particular* constitutional amendment (which would have become 'toothless' with the invalidation of the ordinary legislation that executed the provisions, as the dissenting justices highlighted), but leaning towards questioning the *SCC's very competence* to exercise constitutional amendment review with reference to its mission set out in Article 124 of the Constitution. To appreciate the significance of this critique we must turn to the political context of 2019–2020.

V. CONSTITUTIONAL IDENTITY FOUND – AND LOST AGAIN?

The 2019 decision on judicial security clearances came almost a year after the murder of the journalist Ján Kuciak and his fiancée that led to massive societal upheavals. Although the initial charges did not include the judiciary, as investigations progressed allegations of corruption in high judicial office spread. One of the Slovak constitutional justices, Mojmír Mamojka, resigned also due to leaks of his text messages with Marián Kočner, the man chiefly suspected of having ordered the murder and being involved in other corruption scandals.[105] Given the composition of the new governing coalition (which possessed a constitutional majority in the NRSR) after the 2020 general elections, investigations progressed and several judges were charged, some with having admitted violations of the law shortly after they had been presented with the charges.

This atmosphere has not been conducive to a robust defence of judicial independence in the substantive core of the Constitution, as it tended to endorse

[102] It should be noted though that the principle of democracy (which is inseparable from the rule of law in the wording of Article 1 of the Constitution) is still largely neglected in the judgment and can be discerned only in a majoritarian fashion. Notably, the SCC accepted that a valid referendum on the constitutional amendment would prevent the referendum results from being reviewable by the SCC, thereby subscribing to a decisionist notion of the constituent power as residing in the hands of the people understood through a majoritarian lens (PL ÚS 21/2014, para 177).

[103] Cf JE Moliterno et al, 'Independence without Accountability: The Harmful Consequences of EU Policy Toward Central and Eastern European Entrants' (2018) 42 *Fordham International Law Journal* 481, 516.

[104] M Káčer and J Neumann, *Materiálne jadro v slovenskom ústavnom práve. Doktrinálny disent proti zrušeniu sudcovských previerok* (Prague, Leges, 2019); O Preuss, 'Slovenský „Melčák", nukleární zbraň jako dar novému ústavnímu soudu' (2019) 6 *Jurisprudence* 1.

[105] M Terenzani, 'Judge from Threema Resigns from Constitutional Court' (*spectator.sme.sk*, 13 May 2020) https://spectator.sme.sk/c/22403918/mamojka-ends-at-constitutional-court-over-kocner-allegations.html.

unrestrained majoritarianism constrained only by partisan contestation.[106] The backlash against the court's articulation of the principle manifested itself when the new coalition gained a constitutional majority making it capable of enacting constitutional amendments.[107] At this time, in late 2020, distrust in the judiciary was buttressed by the arrest of several prominent judges on corruption charges. The constitutional majority went further than that, surpassing even PM Mečiar's formal efforts to curtail the court's powers. In an extensive amendment to the Constitution,[108] from which public attention was further diverted by the Covid-19 pandemic, the constitutional majority launched a frontal attack on the substantive core doctrine. Article 125(4) of the Constitution was amended to include a sentence stating that 'the Constitutional Court does not decide on the compatibility of a constitutional law with the Constitution'.[109] This particular modification was not part of the initial draft that was subject to public consultation and was presented less than three weeks before its approval.

In a historically rare setting, the SCC President appeared before the deputies to argue against this particular amendment;[110] yet the amendment passed with 91 out of the 141 participating MPs voting in favour. Some opposition representatives announced, shortly after the approval of the amendment, that they would petition the SCC to review it. The petition triggered a Catch-22 situation of the SCC reviewing the legislator's curtailment of its own competences via a competence that the latter aims to curtail. The SCC, nevertheless, rejected the petition. It repeated that the substantive core doctrine includes the protection of human rights, democracy and the rule of law and that the NRSR is not the unconstrained sovereign. However, it also retained only a very narrow leeway for amendment review in those cases that create extreme interference in the substantive core of the Constitution.[111]

In sum, the SCC's journey towards a substantive core doctrine has just begun, as it needs to withstand the current challenge from the governing majority,

[106] Cf R Dworkin, 'What Is Democracy?' in GA Tóth (ed), *Constitution for a Disunited Nation: On Hungary's 2011 Fundamental Law* (New York, Central European University Press, 2012).

[107] The model previously in place would have led to 12 out of 13 seats on the SCC becoming vacant in the same electoral term, and the difficulties with it were illustrated by the SCC appointment saga of 2014–2020: see, eg, M Steuer, 'The Guardians and the Watchdogs: The Framing of Politics, Partisanship and Qualification by Selected Newspapers during the 2018–2019 Slovak Constitutional Court Appointment Process' (2019) 102 *Právny obzor* 34.

[108] The amendment also included the establishment of the Supreme Administrative Court for Slovakia, transforming the Administrative Collegium of the Supreme Court.

[109] Constitutional Act that amends the Constitution of the Slovak Republic 2020 [422/2020 Coll]. Constitutional acts include direct constitutional amendment as well as acts adopted as constitutional acts by a three-fifths majority (eg, Constitutional Act on State Security at the Time of War, State of War, State of Emergency, and State of Necessity [227/2002 Coll]).

[110] SITA, 'Fiačan nesúhlasí, aby Ústavný súd nemohol skúmať súlad ústavných zákonov s Ústavou' (*Sme*, 12 March 2020) https://domov.sme.sk/c/22547894/fiacan-nesuhlasi-aby-ustavny-sud-nemohol-skumat-sulad-ustavnych-zakonov-s-ustavou.html.

[111] PL ÚS 8/2022, para 27.

which might signal its capacity to resist similar pressures with more malevolent aims from the perspective of democratisation. Yet particularly if the 2020 coalition's effort to curtail the court's competences succeeds, the substantive core doctrine will be shattered, with few doctrinal reservoirs standing in the way of new, authoritarian populist interpretations of the Constitution. Furthermore, the fact that longstanding democratic actors have supported the amendment can easily legitimise future similar legislative actions by political elites interested in the neutralisation of the threat that the SCC poses to unrestrained exercise of power by any means at their disposal.

VI. CONCLUSION

As demonstrated by the example of the SCC, extensive formal powers of a constitutional court do not necessarily prompt it to engage in particularism vis-à-vis EU law. This chapter told the story of the SCC, which enriches the debate on how constitutional courts develop their interpretation of constitutional identity and helps us to understand why they invoke ideas of particularism.

Three factors explain the SCC's reluctant engagement with the concept of constitutional identity: (1) the ethnonationalist rhetoric of the first PM, Mečiar, which tainted the ideas of nationalistic particularism, as the democratic actors wished to be perceived as an integral and committed member of the Western democratic community, (2) the uncontested nature of EU law, and (3) challenges faced by the SCC which mostly lay in the separation of powers disputes between key political actors (the SCC included).

As we have shown, the SCC has a peculiar place within the Visegrád group. It transformed itself from a minimalist constitutional court to a protector of the substantive core of the Constitution, built on its understanding of the separation of powers and the rule of law. We pointed out the reactionist character of this substantive core doctrine, as the SCC identified its tenets in reaction to the major challenges it faced since the 1990s. Out of these, competence disputes between individual key political actors played the core role, and resulted in the case law, which stressed, for example, the constitutional competences of the President, or later the judicial independence, as the 'significant element of the constitutional identity'.

When reading the SCC's case law in its best light,[112] this understanding of the substantive core contains a potential to safeguard political interferences and unconstitutional steps of executives. The conflict between the SCC and the populist Slovak government since 2020, however, also demonstrates its shortcomings. We might hypothesise to what degree the SCC invited the pushback from the government by raising the stakes too high. First, the SCC's cemented

[112] R Dworkin, *Law's Empire* (Cambridge, Mass, Harvard University Press, 1986) 252, 338.

division of competences clashes with the government's and especially former PM Igor Matovič's calls for 'more direct democracy'.[113] Second, the complicated history of the Slovak judiciary and its engagement in the informal corruption networks, opened the window for negative interpretation of the SCC judgment on judicial independence, and part of the public understood it as a sign of SCC protecting the old cadres. The view that the SCC's judgment defied the attempts to clean the judiciary and restart processes leading to more judicial accountability and strengthening the rule of law dominated in media coverage and pre-election debates.[114] This broader context helped the government to execute a strike against the SCC in the period of the pandemic, without an outcry from society, in the same year as the rest of the EU Member States pointed fingers at interferences in judicial independence in Poland and Hungary. The Slovak story therefore demonstrates the contextual sensitivity of how constitutional courts interpret and develop the concept of constitutional identity.

In the context of the EU and Slovakia's membership of the V4, the SCC subscribes to the supremacy of EU law as articulated by the Court of Justice, rather than trying to define how EU values are intertwined with those of the Slovak Constitution. This, on the one hand, distinguishes Slovakia from its V4 counterparts but, on the other, might not provide a robust basis for defence against particularistic constitutional identity claims distinguishing between Slovakia's values and those of the EU.[115] The absence of a connection between the EU values and the substantive core doctrine in the court's case law appears to create an ideational barrier between the interpretation of Slovakia's core constitutional values and its EU membership.

While it remains unlikely that the court would succumb to ethnonationalist inclinations any time soon, it faces the risk of marginalisation. With the recent effort of the executive and the legislature to curtail the SCC's competences,[116] the substantive core doctrine may well be deconstructed before it gains a firm position in the constitutional canon – if the SCC itself does not defend it. The SCC retains a basis for resisting the government's step, as it previously identified the review of any legislative or political step impacting on the substantive core of the Constitution as the backbone of constitutional review as such.

[113] Obyčajní ľudia a nezávislé osobnosti (n 9) 42.

[114] See, eg, M Kováčik, 'Najväčšia predvolebná debata: Lídri povedali, ako chcú zmeniť Slovensko' (*HNOnline*, 24 February 2020) https://hnonline.sk/parlamentne-volby-2020/2099737-najvacsia-predvolebna-debata-hn-hntelevizia-expres; M Paulík, 'Previerky sudcov znova na stole. V hre je zmena Ústavy' (*HNOnline*, 24 February 2020) https://hnonline.sk/parlamentne-volby-2020/2100018-previerky-sudcov-znova-na-stole-v-hre-je-zmena-ustavy.

[115] In 2020 such a position was articulated by former PM Robert Fico who spoke against Slovakia distancing itself from the efforts of the Hungarian and Polish governments to defend their own interpretation of the rule of law in a way at odds with the substantive content of EU values.

[116] See, eg, the statement of the minister of justice. B Dobšinský, 'Mária Kolíková: Nie je namieste, aby nám Ústavný súd hovoril, čo je ústava' (*Aktuality.sk*, 12 August 2020) https://www.aktuality.sk/clanok/846317/kolikova-nie-je-namieste-aby-nam-ustavny-sud-hovoril-co-je-ustava-podcast/.