Judicial Self-restraint and the Super-repealing Power of the Constitutional Court of the Slovak Republic

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Judicial Self-restraint and the Super-repealing Power of the Constitutional Court of the Slovak Republic. The goal of this article is to answer whether the concept of the substantive core of the Slovak Constitution combined with the super-repealing power of the Constitutional Court is an appropriate supplement of the judicial review of constitutionality, or whether it lets judges conserve authoritarian tendencies of political power or enhance their social status. As the Constitutional Court has refused the principle of judicial self-restraint in its recent case law, the latter scenario seems to be the more realistic one in Slovakia at the moment.

Keywords: *division of powers, judicial self-restraint, substantive core of the constitution, substantive Rechtsstaat, principle of proportionality*

Introduction

In its judgment with file reference no. PL ÚS 21/2014 the Constitutional Court of the Slovak Republic (hereinafter "the Court" or "the Constitutional Court") stated that the Slovak Constitution contains a so-called "substantive core", which takes precedence over the text of the constitution itself. Moreover, the Court said it was obliged to protect this core by all available means. Thus, if the National Council of the Slovak Republic (hereinafter "the Parliament") changes the Constitution in a way that contradicts its substantive core, the Court may declare this change to be unconstitutional, thereby repealing it (hereinafter "the super-repealing power"). The Court applied these general remarks when assessing the constitutionality of the constitutional embedment of the judicial vetting process. The Court repealed the vetting of judges and judicial candidates on the grounds that such a measure affected the independence of the judiciary, a principle which forms an integral part of the substantive core of the Slovak Constitution.[1]

The main goal of this article is to answer whether the concept of a substantive core combined with the super-repealing power of the Constitutional Court is an appropriate supplement to the judicial review of constitutionality (the optimistic scenario), or whether it lets judges conserve authoritarian tendencies of political power or enhance their social status (the pessimistic scenario). We will start with the working hypothesis that the optimistic scenario reflects the actual constitutional design of the Slovak Republic, namely the fact that the Constitutional Court reviews the constitutionality of the acts of

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[1] Judgment of the Constitutional Court with file reference no. PL ÚS 21/2014 enacted on 30 January 2019.

the Parliament. However, this hypothesis is tenable only under the assumption that the Court uses super-repealing power only in exceptional cases. If this expectation is to be reasonable, there must be proof that the Court openly acknowledges the virtue of self-restraint and actively applies it in the execution of its powers. In this article we attempt to demonstrate the opposite: when the Court repealed the judicial vetting process at the end of January 2019, it deliberately rejected self-restraint.

1. The substantive core of the constitution: an optimistic and a pessimistic scenario

Is there any substantive core of the Constitution? If we are speaking about the Slovak Republic, a positivist has no other option than to answer in the affirmative. Whatever the content of the substantive core, it remains an undeniable social fact that most prominent experts in constitutional law,[2] as well as the Constitutional Court itself, confirm its existence in the Slovak Constitution. Moreover, the Court has declared the substantive core to be the supreme law of the country: it must always prevail over other forms of law when there is a conflict. Although legal doctrine and precedents are not a common source of law in a civil law country, the field of constitutional law is a bit different. The written constitution is vague; therefore, it is often applied only in one of its several equally tenable interpretations. After all, it is the Constitutional Court that decides, under the influence of legal writers, which interpretation it will enforce as law. Thus, from the doctrinal and judicial perspective, it seems that in the current Slovak constitutional system, there is a substantive core of the Constitution. The substantive core is a social fact, a part of valid Slovak law.

Only a few authors, however, have approached this problem from a purely descriptive point of view. Legal scholarship and especially judicial decision-making is not only about an uncritical description of social facts, but also about their evaluation.[3] In the normative point of view, we do not ask what constitution was in force in Slovakia in 2019, but what constitution ought to be in force. It is certain that in such a normative discussion, references to the prevailing opinion of Slovak legal scholarship and the caselaw of the Constitutional Court are not particularly strong arguments. The normative question – whether and in what form the substantive core should be enforced – is therefore still open.

[2] DRGONEC, J.: *Ústavné právo hmotné*. [The Substantive Constitutional Law] Bratislava: C. H. Beck, 2018, p. 61ff. HOLLÄNDER, P.: *Základy všeobecné státovědy*. [The fundamental of the Theory of State] Plzeň: Aleš Čeněk, 2009, p. 266ff. *Štátoveda*. [The Theory of State] Bratislava: Wolters Kluwer, 2017, p. 115ff. BALOG, B.: *Materiálne jadro Ústavy Slovenskej republiky*. [Substantive Core of the Constitution of the Slovak Republic] Bratislava: Eurokódex, 2014. ĽALÍK, T.: Nález Pl. ÚS 21/2014 ako nevyhnutný liek na ústavné zákonodarstvo na Slovensku. [Judgment PL. ÚS 21/2014 as a necessary cure for constitutional amendments in Slovakia] In *Acta Facultatis iuridicae Universitatis Comenianae*, Vol. 38, 2019, No. 1, p. 274ff. BREICHOVÁ LAPČÁKOVÁ, M.: Ústava v ohrození – Zopár zamyslení nad jedným nálezom Ústavného súdu SR (PL. ÚS 21/2014). [The Constitution under threat - Some reflection on one finding of the Constitutional Court of the Slovak Republic (PL. ÚS 21/2014)] In *Acta Facultatis iuridicae Universitatis Comenianae*, Vol. 38, 2019, No. 1, p. 237ff.

[3] Cf. FINNIS, J.: *Natural Law and Natural Rights*. 2nd ed. Oxford: Oxford University Press, 2011, p. 4.

In this context, we can perceive another distinctive feature of constitutional law. In other branches of law legal norms are fixed by more precise language, more consistent case law and more general doctrinal consensus. Moreover, these norms do not regulate the tense political relations between supreme authorities or sensitive cultural-moral issues. Thanks to a combination of these factors, lawyers in non-constitutional branches reach their legal opinions with greater certainty; the links between the conclusions and the premises of their judgments are much stronger. As a consequence, many of them do not need to look at the law from a normative point of view: it is enough for them to find out what most colleagues think of the legal problem and its solution is on the table.[4] In constitutional law, however, this is not so simple: the links between the premises and the conclusion of a judgment are much looser; the net of the implicit assumptions is much denser; the feeling of meaning of the legal profession is much more intensive; and the attention of political power, the media and civil society is much more focused. In such a constellation, it happens quite often that legal reasoning requires not only knowledge of the law in force, but also a normative concept of law.

The doctrinal debate on the substantive core is not a purely academic matter. Slovak legal doctrine encouraged the Court to repeal the constitutional embedment of the judicial vetting process, and after the Court did it, many legal authors confirmed that this radical move was justified.[5] Indeed, during the routine operation of judicial machinery, lawyers do not argue about the substantive core, because if the system works, there is no reason to dispute its fundamentals. The substantive core as a relevant subject of legal debate, and possibly also as a valid legal argument, is a result of borderline situations in which the legal system collapses; eventually, it departs from the trajectory of humanism. Here it must be admitted that in drawing different scenarios of such systemic failures, legal scholars have a much looser imagination than legal practitioners.

According to ***the optimistic scenario***, the substantive core can prevent the onset of totalitarianism; it can ultimately slow down the authoritarian tendencies of some political actors. In this scenario, the Constitutional Court repeals constitutional laws or constitutional amendments only when they conflict with the core values and institutions of the democratic and law-governed state. Moreover, in the long term, the Court makes the political and legal environment more sensitive to anti-democratic tendencies because its case law teaches to recognise and condemn various antidemocratic measures. In this scenario, the majority of judges considers the substantive core to be an axiological focal point, a matrix of normativity for the whole legal order. Thus, it gives them both the right and the duty to deny obedience to any regulation that directly and seriously interferes with the core democratic values and institutions. Although individual judges may disagree on the question of what values and institutions the substantive core includes, there will undoubtedly be situations sufficiently borderline to create a common judicial

[4] Cf. ENG, S.: *Analysis of Dis/agreement – with Particular Reference to Law and Legal Theory.* Dordrecht: Kluwer, 2003, p. 318.

[5] See the papers of Ľalík, Breichová Lapčáková and Balog in *Acta Facultatis iuridicae Universitatis Comenianae*, Vol. 38, 2019, No. 1.

conviction that the state power has crossed the red line; for example, if the Parliament were to adopt a law allowing the open persecution of religious minorities. Thus, in the optimistic scenario, the Constitutional Court would repeal such a law, but more importantly: even if it could not do it for some reason, a lot of ordinary judges would nevertheless reject the law as invalid. While such a course of action could not stop the religious persecution itself, it would at least pull down its facade of legality, thereby encouraging civil society, perhaps some administration officers and the remains of the democratic political elites, to stand up to defend their good old Constitution.

In ***the pessimistic scenario***, the substantive core does not hinder authoritarian tendencies, but on the contrary, it strengthens and preserves them. Due to its vagueness and super-repealing effects, the substantive core serves as an ideal means of concentrating judicial power. Indeed, it is unlikely that an autocrat would arise from the position of a constitutional judge,[6] because autocracy is a manner of management, not a style of judgment. Nevertheless, this does not mean that constitutional judges are not able to assist autocrats in their attempts to curtail democratic institutions. Indeed, everywhere in the world, the political elite has an eminent interest in having a constitutional court occupied by judges who share the same values and political perspective. Needless to say, the strength of this interest grows along with autocratic tendencies.[7] In the long run, it is unlikely that the value preferences of the Constitutional Court deviate significantly from the value preferences of other constitutional bodies or the wider public.[8] If these other subjects deviate from the trajectory of humanism, sooner or later the Constitutional Court will join them, officially approving the change of course by appealing to the obscure concept of the substantive core. Constitutional judges will never be those who order, let us say, the inhumane deportation of illegal migrants, but they may happen to be those who declare such deportations to be permissible from the substantive core point of view.

The question of which of the two scenarios is statistically more likely in our social and political conditions is not of primary interest. This debate is not about fortune telling for the amusement of a bored mind, but about the optimal design of the division of power. Therefore, even if we do not know which of the scenarios will be closer to reality, while we are designing the constitutional architecture of a democratic and law-governed state, it is more reasonable to assume that it will be the worse one.[9] If we were to assume that only good and capable people would occupy state authorities, then we would not need a written constitution at all. In this imaginary world, none of the officials would be tempted to misuse state power for their own benefit, and all of them would cooperate, not

[6] BREICHOVÁ LAPČÁKOVÁ, M.: Ústava v ohrození – Zopár zamyslení nad jedným nálezom Ústavného súdu SR (PL. ÚS 21/2014). [The Constitution under threat - Some reflection on one finding of the Constitutional Court of the Slovak Republic (PL. ÚS 21/2014)], pp. 242-243.

[7] See e. g. MATCZAK, M.: Poland´s Constitutional Crisis: Facts and interpretations. The Foundation for Law, Justice and Society, 2018. Available online at www.fljs.org

[8] Cf. KLARMAN, M. J.: What's so Great About Constitutionalism? In. *SSRN*, 1997, p. 21ff. Available online at https://ssrn.com/abstract=40520.

[9] POPPER, K.: *Otevřená společnost a její nepřátelé*. (1. sv.) [The Open Society and Its Enemies] Praha: Oikoymenh, 1994, p. 113ff.

because impersonal binding rules prescribed them, but because their personal minds advised them to do so.

If we consider a written constitution to be a good idea, perhaps it is because it limits the power of state authorities, on whose behalf even corrupt or incompetent people may act. The substantive core's supporters automatically assume that it is the Parliament that endangers the core most seriously, and it is the Constitutional Court that protects it most effectively. However, it remains a mystery why bad and clumsy people always seem to be sitting on Parliamentary benches, while good and smart ones always make it to the Constitutional Court,[10] not to mention that Constitutional judges are chosen by MPs, sometimes from among themselves. So, will constitutional judges misuse the concept of the substantive core to preserve authoritarian tendencies or to strengthen their own social status? We do not know, but it is reasonable to assume they will.

Of course, we can use similar axiological and institutional arguments in defence of the optimistic scenario as well. Indeed, if we assume in advance that only corrupt or incompetent people will occupy public offices, then we can give it up straight away. There is no doubt that we need a certain amount of scepticism towards future state officials if we want to design functioning state institutions, but we cannot exaggerate it. A democratic and law-governed state cannot survive without the right people in the right place, because even a perfect system of institutions and rules can collapse if several institutions misrepresent their mission at the same time and if rules are applied contrary to their purpose on a day-to-day basis. The Constitutional Court has an exceptional function in this context because, in matters of constitutionality, it is *the final authority*, i.e. an authority whose procedure and conclusions are not subject to review by any higher authority. If a lower authority misrepresents its mission, there is always a chance a higher authority will correct it, but there is no such remedy for failures of the final one. So, if we have already entrusted the Constitutional Court with the power to have the last word in the question of what is constitutional and what is unconstitutional, it would be unreasonable to insist that it cannot be entrusted with the protection of the substantive core as well. The power of super-repeal is an inevitable functional consequence of the current institutional design. Consequently, this design gives us no choice but to assume that the course of future events will happen according to the optimistic rather than the pessimistic scenario.

2. The virtue of self-restraint and the principle of minimisation

For the sake of argument, let us assume that the Constitutional Court, as the final guardian of constitutionality, must protect the written Constitution as well as its substantive core by exercising the power of super-repeal. As mentioned above, the substantive core is too vague a concept, so if combined with super-repealing effects, it gives constitutional judges a considerable amount of power. Therefore, the crucial question is how this power can be balanced to prevent its misuse for achieving illegitimate

[10] Cf. PROCHÁZKA, R.: *Lud a sudcovia v konštitučnej demokracii*. [The People and Judges in Constitutional Democracy] Plzeň: Aleš Čeněk, 2011, p. 99.

goals. The immediate answer is the judiciary virtue of self-restraint,[11] which has been articulated in Slovak constitutional practice in the form of *the principle of minimising interference with the activities of other public authorities*. This principle is comprised of two distinctive standards:

a) *If other public authorities can effectively remedy the unconstitutional state of affairs, the Constitutional Court shall allow them to do so.* This rule is a specific application of *the principle of subsidiarity*, which the Court uses as a criterion for the distribution of powers between itself and ordinary (general) courts. To remedy an individual breach of fundamental rights is a duty of every court in the jurisdiction; therefore, the Constitutional Court acts only if other courts fail to provide sufficient protection.[12]

b) *If the Constitutional Court can remedy the unconstitutional state of affairs in several different ways, the Court shall exercise only that power and only in such a way as to interfere with the activities of the other institutions to the minimum possible extent*. For example, the Court shall repeal only a specific ordinary court decision instead of a general law, if such an approach is sufficient for the restoration of constitutionality.[13] Similarly, the Court shall repeal delegated legislation instead of the original one or part of a regulation instead of its entire wording. In this respect, the principle of minimisation is a specific application of *the principle of proportionality*.[14]

The principle of minimisation cannot be enforced by any threat, in any official proceedings, before any formal authority. It is an autonomous law that the Constitutional Court abides only in the form of self-regulation when exercising its powers. If the Court made it up in its case law and if it willingly submitted to it, then this is the most apparent manifestation of the restraint of its judges. Consequently, if constitutional judges restrain themselves, they will not misuse the concept of the substantive core to preserve their political attitudes and moral convictions or even to strengthen their social status.

This argument is convincing if it is related to the application of the principle of minimisation in the proportionality version (b), not in the subsidiarity version (a). Indeed, in the proportionate exercise of repealing powers, judges repeal less than more – preferably a lower number of rules, preferably a smaller part of them, preferably from the lower part of the hierarchy – thus, it is an act of voluntary renunciation of power. On the

[11] Cf. ONDŘEJKOVÁ, J.: *Vnější limity soudcovské interpretace a argumentace*. [External Limits of Judicial Interpretation and Argumentation] Praha: Leges, 2017, pp. 30, 63, 81.

[12] E.g. the judgment of the Constitutional Court with file reference no. I. ÚS 522/2012 enacted on 24 October 2012.

[13] Cf. HOLLÄNDER, R.: *Ústavněprávní argumentace: ohlédnutí po deseti letech Ústavního soudu*. [Constitutional Argumentation: A Look Back at the Constitutional Court's First Ten Years] Praha: Linde, 2003, p. 76.

[14] E.g. the judgments of the Constitutional Court with file reference no. PL. ÚS 1/06 enacted on 10 March 2010 and PL. ÚS 27/2014 enacted on 8 June 2016. When applying the principle of minimisation, the proportionality test unfolds into the following steps: a) Test of legitimacy: Does the specific protection of constitutionality, e.g. the protection of the right to privacy in a particular case, constitute a legitimate goal? b) Test of necessity: By exercising of which powers is the Court able to achieve the goal (a)? c) Test of adequacy: Which of the powers (b) interferes with the competence of other bodies to the minimum extent? d) Balancing: In what way should the Court exercise power (c) in order to maintain the balance between the rule of law and the rule of people, between individual rights and public interests or the will of the majority?

other hand, the subsidiary exercise of repealing powers is a result of two combining factors: self-restraint and impotence. Indeed, the Constitutional Court does not have the material and personnel capacity to eliminate all *individual* violations of the Constitution. Therefore, it must leave this task to the *ordinary* courts, keeping for itself only the power to review the most severe cases. Therefore, if the Constitutional Court acts subsidiary to the ordinary courts, it does not have to be (and generally it is not) an act of renunciation of power, but a forced recognition of the fact that its power is not omnipotent. Hence, if we want to find any traces of self-restraint in the case law of the Slovak Constitutional Court, we should first look at the proportionate exercise of its repealing powers.

Nevertheless, is the way the Constitutional Court applies the proportional version of the principle of minimisation a truly reliable indication of the restraint of its judges? This question is crucial, because if we claim that the virtue of restraint prevents the misuse of the substantive core, then we have to show that the justices practise this virtue regularly. If this is not the case, then we have no other choice than to expel the restraint argument from the domain of scholarly debate on the optimal design of constitutional institutions to the domain of a Platonic utopia, in which only the grandmasters in austerity have a claim to rule.

Moreover, by examining how the Constitutional Court applies the proportional version of the principle of minimisation, we can see how seriously this body takes its own principles. It is the Constitutional Court that requires the other authorities to be restrained, i.e. that in exercising their powers, they respect the central principle of the rule of law – *the principle of proportionality*. For example, if the Parliament adopts a law disproportionately interfering with constitutional values, it is the Constitutional Court that punishes the Parliament for such laxity by declaring that law to be unconstitutional. Consequently, when examining how the principle of minimisation is applied, we can learn not only whether the constitutional judges restrain themselves, but also whether the Constitutional Court deserves our trust at all. Indeed, the Constitutional Court would act very untrustworthy if it required the Parliament to fulfil a principle which the Court itself refuses to submit to voluntarily. Not to mention that the Constitutional Court – a body of judicial power – must respect the rules much more anxiously than the Parliament – a body of legislative power. More precisely: the Constitutional Court must not only comply with the rules, but it must lead by example through its adherence to the rules. The problem is that when the Court reviewed the judicial vetting process, it did not manage to handle this difficult task.

3. The restraint of the judiciary in the substantive *Rechtsstaat*

The Constitutional Court deduced its super-repealing power from Article 124 of the Constitution, which states that "*the Constitutional Court is an independent judicial body for protection of constitutionality*". The Court interpreted this rule as an obligation to protect constitutionality by all available means. Its argument seems quite convincing at first glance: since no law in a law-governed state can require the impossible, the Court must be entrusted with super-repealing power; otherwise, it could not fulfil the obligation

imposed by Art. 124. Thus, if the Court refused to acknowledge and exercise the super-repealing power, it would violate the Constitution. The Court is entrusted with the power to repeal unconstitutional constitutional amendments and is under obligation to use it, and the opposite conclusion "*must be considered unacceptable and inadmissible in the regime of substantive* Rechtsstaat".[15]

In order to remove the judicial vetting process from the text of the Constitution, the Constitutional Court declared the self-limitation of its power to be unlawful, although it admitted that in the past it was "*the starting point of exercising its jurisdiction*". One would expect that such a radical condemnation of one's own institutional practice would be associated with some particularly severe reason. Instead, one receives only this:

"*Inferring the Constitutional Court's powers from the Article 124 of the Constitution is contrary to the concept of self-restraint, which the Constitutional Court has emphasised several times in the past as a starting point for exercising its jurisdiction. Access of persons to fundamental rights and freedoms, their enforceability in proceedings before the Constitutional Court is only the beginning of a complicated and lengthy process of transformation of the Slovak Republic into a full-fledged substantive* Rechtsstaat*. The completion of the process is associated with the establishment of such constitutional protection, in which – e. g. in the circumstances of the present case – the Parliament transforms into a constitutional state body wholly subjected to the Constitution; therefore, it acts exclusively within its constitutional limits. The National Council has constitutional obligations which consist not only of respect for fundamental rights and freedoms but also (and above all) of the rulemaking subjected to the Constitution.*"[16]

It is peculiar that the basic argument of this passage – that the Parliament should be subjected to the Constitution even when it creates laws – was accentuated by the Constitutional Court at a time when it considered self-restraint as a commendable virtue and not an unlawful vice. For example, at the end of 1995, the Constitutional Court expressed this idea in the following judgment:

"*The Constitution creates proportions and limits of the division of powers between individual state authorities. The unilateral expansion of the power of one state authority can undermine the constitutional relations not only between state authorities but also between the state and its citizens. By expanding its competence beyond the constitution, the Parliament cannot restrict the competence of other state authorities, neither usurp their powers in a manner inconsistent with the rule of law, the division of powers and the system of checks and balances constituting the competences of different authorities (...) If the National Council of the Slovak Republic wishes to regulate certain social relations as legal relations, it may only regulate them to the extent and in a manner consistent with the Constitution.*"[17]

[15] The judgment of the Constitutional Court with file reference no. PL. ÚS 21/2014 enacted on 30 January 2019, para. 87.

[16] Ibidem, para. 90.

[17] The judgment of the Constitutional Court with file reference no. PL. ÚS 29/1995 enacted on 29 November 1995.

The Constitutional Court thus emphasised the subordination of Parliament to the Constitution even in a period when it was exercising self-restraint. It is worth recalling that in the second half of the 1990s the Constitutional Court commonly refused to repeal individual decisions of ordinary courts, even if it officially found out that they had violated the fundamental rights and freedoms of a private individual. At that time, the Constitutional Court held that in order to legally repeal a legal act, it was necessary to prove not only that the act was contrary to the Constitution, but also that the Constitutional Court had the power to repeal such acts. The proof of the first did not replace the proof of the second. The premise that an authority has infringed the Constitution by issuing a particular decision does not imply that the Constitutional Court has the power to repeal it. Now it is evident that the subordination of the Parliament to the Constitution is not in itself an argument for the activism of the Constitutional Court. For the sake of argument, we can assume that the Parliament is subject to certain constitutional principles even during the drafting of the constitutional text. However, if it is possible for Parliament to violate constitutionality at the moment when it is creating the Constitution, then it is certainly possible for the Constitutional Court to violate constitutionality at the moment when it is protecting the Constitution.

So, the question is not what the limits of power of the Parliament are, but what the limits of power of the Constitutional Court are: If the Parliament strikes the Constitution on the right cheek, can the Court strike it on the left one, assuming that doing so will make the Constitution stand on both feet? Is it justified to remedy a violation of constitutionality by another violation of constitutionality? Despite initial intuitions, this is a rather complicated question that we dare not answer here. For now, however, it will suffice to answer a much simpler version of it: Is it justified to remedy a violation of constitutionality by another violation of constitutionality, even if such excessive action is not necessary? It certainly is not.

The Constitutional Court tried to argue that the only alternative to the removal of the constitutional embedment of the judicial vetting process was its idleness.[18] However, this is a false dilemma. As written above, in Slovak constitutional practice, the virtue of self-restraint has found its articulation in the principle of minimising interference with the activities of other public authorities, especially in its proportional version. This principle says that if it is possible for the Constitutional Court to effectively remedy the unconstitutional state of affairs by using several different powers, the Court shall exercise the one that interferes with the activities of the other institutions to the minimum extent possible. Consequently, the concept of self-restraint does not force the Constitutional Court to idleness when constitutionality is being violated. Instead, it forces the Court to remedy breaches of the Constitution by using its least interfering powers. If we apply this principle to the case under consideration, we conclude that the Constitutional Court should have repealed the ordinary law

[18] The judgment of the Constitutional Court with file reference no. PL. ÚS 21/2014 enacted on 30 January 2019, para. 88.

regulating the details of the vetting process instead of its constitutional embedment.[19] As a result of such a restrained approach, the relevant provisions of the Constitution would have become obsolete; nobody would implement them in practice, and thus they would not jeopardise judicial independence.

The Constitutional Court said this restrained approach was "*practically the simplest, but probably the least available,*" option because it lacked "*coverage by legal and political culture and therefore has no prospect of having the necessary legal effect*".[20] However, what does this vague phrase mean? What was the necessary legal effect? What did its lack of cultural coverage look like? In the case under consideration, the necessary effect is a factual situation in which the Judicial Council, a body responsible for appointments and dismissals of ordinary judges, does not ground its decisions on the outcomes of the judicial vetting process. However, in Slovak cultural conditions, such a situation is not difficult to obtain. If there is any specific feature of Slovak legal culture at all, it is its categorical promotion of judicial independence combined with a complete ignoring of judicial accountability.[21] This trend is manifested not only by the Judicial Council's lax approach to the assessment of the ethical competence of judges and judicial candidates but also by the determination with which the Constitutional Court continues to strengthen judicial independence,[22] as exemplified by the removal of the constitutional embedment of the vetting process. In this cultural context, the idea that the Judicial Council would insist that its decisions be grounded on the findings of the vetting process, even though the Constitutional Court repealed the law regulating the details of its implementation, is a sci-fi scenario. Moreover, the Court's argument does not hold up even from an institutional point of view. If the Judicial Council started to ground its individual decisions on the vetting process, the Constitutional Court would still have the power to repeal them one by one. Whichever way we look at it, such a restrained approach is not idleness. It would be good old honest, perhaps a little annoying but still equally effective, protection of constitutionality within the limits of the Constitution.

Conclusion

By repealing the constitutional embedment of the judicial vetting process, the Constitutional Court violated the principle of minimising interferences with the activities of other public authorities. Thus, the Court violated the principle of proportionality, which it requires other institutions to comply with. In addition, the Court has openly admitted that in the regime of substantive *Rechtsstaat,* it is inadmissible to limit its

[19] Cf. The dissenting opinion on the judgment PL. ÚS 21/2014, written by justice Orosz, p. 7.

[20] Judgment of the Constitutional Court with file reference no. PL. ÚS 21/2014 enacted on 30 January 2019, para. 67.

[21] Cf. MOLITERNO, J. E., BERDISOVÁ, L., ČUROŠ, P., MAZÚR, J.: Independence without accountability: The harmful consequences of EU policy toward central and eastern European entrants. In *Fordham International Law Journal*, Vol. 42, 2018, No. 3, p. 530.

[22] ĽALÍK, T.: Nález Pl. ÚS 21/2014 ako nevyhnutný liek na ústavné zákonodarstvo na Slovensku. [Judgment PL. ÚS 21/2014 as a necessary cure for constitutional amendments in Slovakia], p. 281.

power. Therefore, such a court cannot be expected to apply the concept of the substantive core with restraint. On the contrary, we can worry over whether such a court will resist pressures leading to misuse of the substantive core to preserve authoritarian tendencies or to strengthen the social status of its judges. If we consider the benefits and shortcomings of the concept of the substantive core in the conditions of the Slovak Republic, it is more accurate to work with the pessimistic scenario.

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