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THE SLOVAK CONSTITUTIONAL COURT ON AMNESTIES AND APPOINTMENTS OF CONSTITUTIONAL JUDGES: SUPPORTING UNRESTRAINED MAJORITARIANISM?

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From the constitutional courts of the Visegrad countries (Czech Republic, Hungary, Poland Slovakia), the Polish and Hungarian one are currently under international spotlight due to the various executive 'assaults' on them. However, noteworthy developments occurred in the Slovak constitutional judiciary as well. In this post two major issues that shaped the decision making of the Slovak Constitutional Court in 2017 are analyzed.

1.Abolishment of amnesties and appointment of constitutional judges

In May 2017, the Slovak Constitutional Court confirmed that the decision of the Slovak parliament on the abolishment of the "Mečiar amnesties" was constitutional. The decision was based on a new competence of the Court given to it by a constitutional amendment, which allows it to review parliamentary decisions on abolishment of presidential amnesties or individual pardons. Politically, this amendment was adopted so that a cross-party consensus in the legislature on the abolishment of the "Mečiar amnesties" could be reached.

The Court's plurality decision on this matter recognized that grave

injustice occurred as a result of the "Mečiar amnesties" and by confirming their abolishment it allowed the continuation of criminal investigation. The reasoning expressed a strong commitment to a democratic state under the rule of law, where the abuse of competences by main constitutional actors is not permitted. The decision was also in line with the overreaching sentiments in the public opinion and main political parties.

Yet, in December 2017, the SCC withdrew from the complex idea of balancing between majoritarian components of democracy and its constitutional safeguards presented in its decision on amnesties in favor of virtually unrestrained majoritarianism. It did so in its latest decision concerning the conflict on the appointment of constitutional judges between the Slovak President and the legislature (National Council of the Slovak Republic). Procedurally, it was a decision on individual complaints from several candidates nominated by the parliament but not appointed by the President, but its implications go beyond the candidates themselves.

The conflict emerged from the provision in the Slovak Constitution (Article 134, Section 2, second sentence), according to which 'the National Council of the Slovak Republic shall propose a double number of candidates who are to be appointed by the President of the Slovak Republic.' The core legal question was whether the President has the right to reject all candidates from the pool provided by the legislature or (s)he is obliged to appoint the judges from a double number of candidates.

Without having a discretion to reject all candidates, the Slovak President would be obliged to select the judges from among the double number of candidates, even though (s)he does not deem either of them qualified for the position of a constitutional judge. In short, the Slovak Constitutional Court in its December decision sided exactly with this, arguably departing from earlier case-law and in some parts of the decision, remaining at odds with the Venice Commission's opinion on this matter from earlier that year.

2. What is the consequence? A new incentive for constitutional reform

The December decision Slovak Constitutional Court (more specifically, of

its First Senate) was criticized (e.g. by a former judge of the Court) on many grounds. The elements of extensive reasoning in the decision may seem as activist, but in essence, the Court deferred to the legislature by limiting the President's competence to provide any review of the candidates' qualifications beyond the right to select from a double number of candidates. The claim that by ruling so, the Court only preserved the balance of powers between the President and the legislature is not convincing, since even with a broader discretion the former would still not have been entitled to refuse the nomination without valid grounds. Moreover, the validity of any presidential decision to refuse all candidates could have been individually reviewed by the Court upon complaints from the unsuccessful candidates for constitutional judges.

To understand the consequences of this decision, it must be noted that it came at a time when the current (legally non-binding) coalition agreement commits the governing parties to a reform of the appointment procedure for constitutional judges. However, no relevant progress can be observed in this regard due to some of the coalition parties' reluctance to change the appointment procedure. In 2018, the parliament is scheduled to select candidates for nine seats (out of the 13 in total) to be vacated in early 2019. Based on the December decision of the Constitutional Court, the President would be obliged to make the appointments from among the candidates selected by the parliament.

The Court's decision (in line with scholarly writings) implies that the collaborative appointment model that is in place in Slovakia with the President having the right to refuse the appointment of all candidates for constitutional judges proposed by the legislature might lead to a permanent gridlock. However, the implication of declining the discretion of the President is a no less problematic one: it results in the parliament (which does not need a constitutional majority for selecting the candidates) controlling the appointment process.

3. Unrestrained majoritarianism, be welcome?

With the restrictive reading of the President's role in the appointment procedure of constitutional judges, the Slovak Constitutional Court

removed the only check of uncontrolled majority will (in the legislature) on its composition. This may open up the room for further political nominations which may not meet the normative requirements we usually associate with judges at the 'guardian of the Constitution,' namely, that constitutional judges should be leading jurists of their time, impeccable as legal experts and personalities alike. Currently, there are only minimum formalistic requirements, such as at least 40 years of age, that candidates for constitutional judges need to fulfil (these are enshrined in Art. 134 sec. 3 of the Constitution).

Furthermore, the decision does not guarantee that the conflict between the two constitutional actors has been resolved. It raises several procedural questions, and may generate new complaints from unsuccessful candidates as well as opposing interpretations as to whether the decision has general validity for future cases as well.

In addition, the decision has not enhanced the public authority of the Court. The President issued sharp criticism of the Court shortly after the judgment, even though he complied with its command to appoint three new judges from the candidates who passed the elections in the National Council in multiple rounds in the preceding three years.

In conclusion, the two decisions of the Slovak Constitutional Court discussed here differ substantially regarding the understanding of the rule of law and separation of powers. While in the decision on amnesties the Court expressed the commitment to checks and balances, in the one on appointment of constitutional judges it succumbed to unrestrained majoritarianism of the legislature in the area that concerns the Court's own composition. We can only hope that the Slovak parliamentarians will not abuse it to get political nominees regardless of their professional credentials onto the bench.