The Slovak Constitutional Court on Unconstitutional Constitutional Amendment (PL. ÚS 21/2014)

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On 30 January 2019, the Slovak Constitutional Court handed down its seminal judgment PL. ÚS 21/2014, striking down a new amendment to the Constitution (plus various sub-constitutional pieces of legislation) for violating the substantive core of the Constitution. Two weeks after delivering its decision, nine out of 13 judges left the Court as their terms of office expired. The judgment went almost unnoticed in the media because the political fight over the composition of the future Constitutional Court took centre stage. Only later did commentators come to realise what the Court had done: it had claimed the power to review constitutional amendments. This case note provides an analysis of the judgment and the context of the case.

Shortly before the presidential elections in 2014, the Slovak parliament adopted constitutional amendment No. 161/2014 Coll. along with other sub-constitutional legislation affecting the status of judges. It imposed a new condition on both new and incumbent judges: the qualifications for judicial service (in Slovak: *predpoklady sudcovskej spôsobilosti*). The constitutional lawmakers suggested that those qualifications would serve as a means to increase public confidence in the judiciary.[1] The details would be fleshed out in sub-constitutional norms. In general, the qualifications would be used to assess judges and candidates for judicial office from an ethical, personal, and social perspective. The regulation, however, undermined judicial independence because executive organs, including the secret services, prepared reports on judges and candidates, thereby gaining significant influence over the judiciary. There was a danger that the power to draft

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[1]According to reports issued by the European Commission, Slovakia ranks last among EU member states in terms of judicial independence; see e.g. 'The 2018 EU Justice Scoreboard', ⟨https://ec.europa.eu/info/sites/info/files/justice_scoreboard_2018_en.pdf⟩, visited 14 July 2020.

European Constitutional Law Review, 16: 328–343, 2020
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doi:10.1017/S1574019620000140

https://doi.org/10.1017/S1574019620000140 Published online by Cambridge University Press

reports might be misused, an absence of procedural safeguards for the collection of information, a lack of meaningful control over the executive by the Judicial Council and the Constitutional Court and, finally, severe consequences – i.e. dismissal – for judges and candidates for judicial office who failed to conform to the newly-established criterion.

When the proposed amendment took effect in September 2014, all serving and future Slovak judges were obliged to comply with the mandatory qualifications. During the appointment process, qualifications were assessed by the Judicial Council[2] based on reports prepared by the National Security Authority (NSA) and information provided by the candidate. If a candidate did not meet the qualifications, she or he could not become a judge. The imposition of said qualifications had a retroactive effect; all incumbent judges were subject to the newly-introduced criterion. Again, it was the Judicial Council that was empowered to verify the qualifications. If a judge failed to meet them, a disciplinary proceeding would follow, possibly resulting in dismissal from office. A Judicial Council decision to prohibit a judge or candidate from serving could be appealed to the Constitutional Court for a final decision.

The reform was divided over two levels of regulation: constitutional and statutory. The Constitutional amendment stipulated: (1) the new criterion itself; (2) a procedure for review by the Judicial Council based on information provided by 'a state institution carrying out protection of confidential information' and the candidate him or herself; (3) subsequent judicial review by the Constitutional Court; and (4) the removal of judges and candidates in the event of failure to meet the criterion.

The statutory law in question regulated the issue in much broader terms. Most importantly, it further clarified the circumstances under which a candidate or a judge did not meet the qualifications for judicial service, i.e. the likelihood of susceptibility to coercion in the event of financial distress; a documented addiction to alcohol or any other substance; having received illicit payments, gifts or other benefits, or having abused one's function by obtaining undue goods; possession of an asset whose value is disproportionate to a judge's income and whose legality the judge or candidate is unable or unwilling to explain; commercial,

[2]In the Slovak constitutional system, the Judicial Council is an independent constitutional institution under the judiciary. It promotes the independent status of judicial powers, secures judicial legitimacy and is responsible for the management, administration and transparency of the judiciary. For example the Judicial Council plays a vital role in the process for selecting new judges, elects the President of the Supreme Court, decides when judges are to be transferred or recalled, etc. The Council, however, does not have any disciplinary powers; it can only elect and recall members of disciplinary bodies. Its main powers are enumerated in Art. 141a § 5 of the Slovak Constitution.

https://doi.org/10.1017/S1574019620000140 Published online by Cambridge University Press

economic or financial ties to persons involved in organised crime; and finally, acting in a corrupt manner.[3]

Act No. 215/2004 Coll. on Protection of Confidential Information was amended as well. It gave the NSA broad discretion to obtain and verify information involving judges and candidates. For example, in the fulfilment of its mission to prepare reports, the NSA could require the cooperation of – and request any information from – all state institutions, including the Secret Service, Military Intelligence, and Police, as well as natural and legal persons. The NSA was also allowed to acquire information from family members, social acquaintances, and prior employers.[4]

On the very same day that the regulation came into effect (1 September 2014), it was challenged before the Constitutional Court by the President of the Judicial Council. She at first limited her challenge to the sub-constitutional regulation itself. Later, however, she expanded the petition to include a challenge to the constitutionality of the amendment. Although the Court granted the petitioner immediate preliminary relief by suspending the implementation of the contested regulation, it took about five years before it would rule on the merits. The timeframe in which the Constitutional Court delivers its judgments is usually much less protracted (between one and two years). The Court postponed the ruling mainly for two reasons. First, it was three judges short (out of 13) in the period 2014-2017; a declaration of unconstitutionality requires the votes of at least seven judges. The chances of a ruling of unconstitutionality diminished accordingly. Second, the Court, hesitant to issue a ruling due to the political sensitivity of the case (the amendment was a product of bipartisan consensus) and the possibility of backlash by the constitutional legislature, did not resolve the matter until the final days in office of a majority of judges. It came as a coincidence that the public, including political leaders, was preoccupied with the election of new judges at the time the judgment was delivered; the judgment had a quiet reception.[5]

[3]§ 5(7) of the Act No. 385/2000 Coll. on Judges and Lay Judges.

[4]The sub-constitutional regulation also forced candidates for judicial service to cooperate with the Judicial Council in verifying qualifications, facilitated the ex lege gathering of information about candidates by the NSA, and detailed the procedure before the Judicial Council and subsequent review by the Constitutional Court. This regulation is, however, rather ancillary in nature; as such, it was not a focal point of the Constitutional Court's inquiry.

[5]In hindsight, this second assertion proved to be correct; the judgment did not provoke a short or long-term backlash of any kind against the Court, except for the fact that it became a topic of debate in the ongoing selection process between MPs and judicial candidates to the Constitutional Court.

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The judgment

To begin with, the Constitutional Court devoted some time in its deliberations to the argument that the contested constitutional and sub-constitutional regulations were closely intertwined and could not be separated for purposes of the analysis thereof. The constitutional amendment was very specific and detailed. The Court determined that the constitutional regulation would not be unconstitutional per se if it were couched in more general terms and allowed the legislature some discretion to implement the constitutional provisions. However, as the law stood, the legislature had no choice but to create a process by which the NSA would verify the qualifications for judicial service (§§ 40-43). Accordingly, if the Court had focused on statutory law only, i.e. declaring it unconstitutional and leaving the Constitution untouched, the legislature would not have been able to adopt any new regulations based on the judgment. There was simply not enough leeway for the legislature to accommodate the possible unconstitutionality of a mere statute. This conclusion brought the unconstitutionality of the amendment into play.

The Court then analysed the concept of eternity clauses in general. It noted both the international trend to entrench such clauses into constitutions and that the Slovak Constitution formally lacks one. The Court went on to explain that which was omitted by the original constituent power of 1992 has been developed and clarified by the Court itself on a gradual and case-by-case basis: a concept labelled by Slovak legal scholarship as an 'implicit eternity clause' or the 'substantive core' of the Constitution.[6] As early as 1995 (PL. ÚS 16/95), the Court formulated the notion that the Constitution contains principles that may not be altered due to their constitutive implications for democracy. In that judgment, the Court held that the separation of powers was one such principle. In 2009, the Court invoked the concept of unamendability in the PL. ÚS 17/08 case, holding that the parliament could not freely dispose of the powers vested in the other branches of the State and that the separation of powers is the basis of judicial independence and a crucial element of the powers of the judiciary. In judgment PL. ÚS 24/2014, the Court held that the standard of fundamental rights protection cannot be reduced. Finally, in 2017 the Court noted in judgment PL. ÚS 7/2017 that the unamendable substantive core of the Constitution is formed by the various principles of a state based on democracy and the rule of law. In that judgment, the Court even went so far as to list 15 such principles. In this setting, the Court stressed once again that the decisions of no institution are impervious to judicial review.

[6] *See*, among other authorities, B. Balog, *Materiálne jadro Ústavy Slovenskej republiky* [*Substantive Core of the Constitution of the Slovak Republic*] (Eurokódex 2014).

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In the history of defining the implicit substantive core of the Constitution, one event stands out in particular, as the Court noted. In 2017, the constitutional legislature (parliament) adopted amendment No. 71/2017 Coll. by which it granted itself a new power: the ability to nullify granted amnesties and pardons if they violate the principles of democracy and the rule of law. A nullifying decision is *ex officio* reviewed by the Court against the criteria of democracy and the rule of law.

To conclude, the Court explained that, as a result of developments in the constitutional case-law and legislative realm, a hierarchy of constitutional norms had been created. Norms that are at the substantive core of the Constitution represent the intent of the original constituent power (the people), whereas other constitutional norms serve to execute those core norms. Moreover, the substantive core takes precedence over other parts of the text of the Constitution and serves as a standard of review for constitutional amendments.

Once the Court had confirmed the existence of the substantive core of the Slovak Constitution, it turned its attention to the predominant consensus on the power of constitutional courts to protect a constitution's core. The Court referred to numerous examples from around the world, including Germany, Austria, India, Hungary, Romania, Lithuania, and the Czech Republic. In the Court's own words, the substantive core is a limitation on the power of delegated authority to amend a constitution. Every constitutional amendment can, therefore, be unconstitutional if it violates the formal rules envisaged for the adoption thereof and/or does not respect substantive elements of the core (§ 65).

The Court struggled to find a legal basis for its power to review constitutional amendments since the Constitution does not prescribe direct review. It decided to infer such power from Article 124 of the Constitution: 'The Constitutional Court is an independent judicial authority vested with the mandate to protect constitutionality'.[7] The Court recognised the norm as a general provision concerning its competency and stated that conduct to the contrary (i.e. not reviewing amendments) would lead to a violation of the Constitution (§ 87).[8] When performing its review, the Court proceeded just as it would when reviewing the constitutionality of an ordinary statute.

[7]It should be noted that the doctrine of unconstitutional constitutional amendment lies at the heart of basic principles of constitutionalism; *see* M. Kumm, 'On the Representativeness of Constitutional Courts: How to Strengthen the Legitimacy of Rights Adjudicating Courts without Undermining Their Independence', in C. Landfried (ed.), *Judicial Power: How Constitutional Courts Affect Political Transformations* (Cambridge University Press 2019) p. 291.

[8]The Court also referred to the wording of the oath taken by judges of the Court and the recent constitutional amendment No. 71/2017 Coll. by which the Court gained the right to perform *ex constitutione* reviews of the decisions of parliament on abolishing amnesties and pardons.

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After having its own *Marbury* moment, the Court went on to identify the elements of the Constitution that form its substantive core. The Court found that the core was formed by the principles of democracy and the rule of law (Article 1 of the Constitution), separation of powers, independence of the judiciary, legal certainty, and human rights. Other elements were left to be determined in future cases (§ 95). In this context, the Court advanced the doctrine that a significant breach of the substantive core is required for a finding of unconstitutionality, and also that multiple minor breaches could, in aggregate, amount to such a breach of the substantive core.

The Court then reviewed the contested amendment. In finding it unconstitutional, the Court referred to a previous judgment from 2009 (PL. ÚS 17/08), by which it struck down legislation providing the NSA with wide discretion to secretly gather personal information on judges, including medical records, sexual orientation, financial status, personal views, family and social contacts. The Court chastised the parliament for its attempt to overturn the Court's prior judgment by elevating similar unconstitutional legislation to the constitutional level in a malicious attempt to escape judicial review.[9] Although the contested amendment was milder than the previous legislation, which provided the NSA with decisive powers, the NSA and its proxies (Military Intelligence, Secret Service, and Police) nonetheless retained their central role in preparing reports on candidates and judges. The Court noted that if candidates for judicial office and incumbent judges could be subject to NSA surveillance, the NSA might be in a position to exert undue pressure on the judiciary. Namely, there was a real risk of misuse of the information collected, the possibility of boundless security checks, a lack of rules governing the storage of said information, and even the possibility that judges would be blackmailed.

The Constitutional Court also considered the case law of the European Court of Human Rights on Article 8 of the ECHR. In particular, the Court recalled the existence of effective guarantees of review when privacy was at stake. Neither constitutional nor ordinary legislation contained any of the safeguards required by the European Court of Human Rights. A subsequent review of the NSA's activities by the Judicial Council and the Constitutional Court was ineffective and rather illusory because neither institution could review the completeness, objectivity,

[9]Some commentators noted that by elevating unconstitutional statutory law to the level of the Constitution, thus escaping possible judicial review, the parliament was refusing to engage in a genuine dialogue with the Constitutional Court. Such refusal had to be met with a robust answer. On this, *see* M. Breichová-Lapčáková, 'Ústava v ohrození: Zopár zamyslení nad jedným nálezom Ústavného súdu Slovenskej republiky (PL. ÚS 21/2014)' [*The Constitution endangered: Several Reflections upon one Judgment of the Constitutional Court of the Slovak Republic (PL. ÚS 21/2014)*], 38 *Acta Facultatis Iuridicae Universitatis Comenianae* (2019) p. 247.

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and veracity of an NSA report.[10] There were no limits imposed on the NSA (Military Intelligence, Secret Service, and Police) in terms of the methods, procedures and means of preparing a report on the qualifications required for judicial service. It was, therefore, a blatant breach of the privacy of judges and candidates, not to mention other categories of affected individuals (family members and friends).

By introducing qualifications for judicial service and harsh consequences for judges when they are not met, the parliament moreover created grave uncertainty in terms of judicial status. In particular, the question of whether judges would remain in function was thrown into doubt. The Constitutional Court considered this situation to be a violation of the personal independence of judges. In contrast to the vague constitutional and sub-constitutional regulation in question (§ 128), only explicit, unequivocal, and precise regulation of the status of judges could satisfy the requirements of judicial independence. Such regulation thus violated the separation of powers (giving the NSA a dominant position regarding the taking of and dismissal from judicial office), violated the independence of the judiciary, lacked procedural and legal safeguards for the NSA's activities, and impermissibly regulated the status of incumbent judges retroactively.

The Court stated that the imposition of blanket security checks on judges, with possible dismissal as a result, are extraordinary tools that are only constitutionally acceptable for a brief period following a regime change. In normal times, i.e. almost 30 years after the Velvet Revolution, standard approaches to judicial accountability must be adhered to, e.g. criminal, administrative, disciplinary, and civil remedies to which judges are subject without exception or privilege. The Court acknowledged that it is true that these mechanisms do not work in practice but also emphasised that the state institution in question must endeavour to make them work rather than merely impose blanket security checks on all judges, with the extensive involvement of the NSA.[11]

Concerning candidates for judicial office, the Constitutional Court did not rule out the possibility that certain regulations, enforced by the executive, used to verify the qualifications for judicial office might be constitutional. Future regulation, the Court held, must enable the Judicial Council to verify all information in terms of completeness, objectivity, and veracity. Aside from that, the Judicial Council must act autonomously and be independent of executive organs.

[10]In this regard, the rule of the free evaluation of evidence could not be ensured by either the Judicial Council or the Constitutional Court in subsequent review.

[11]In general, the mechanisms for judicial accountability do not work as a result of the fact that the state institutions have not created effective systems for reviewing judges in terms of their work performance, personal matters, and the procedures for holding judges accountable. More recently, efforts have made to resolve the problem by creating a new Supreme Administrative Court that would handle all judicial disciplinary matters.

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The Court's parting remark, an *obiter dictum*, was that its conclusions on the judicial review of constitutional amendments were constrained by the original constituent power (i.e. the people), which could confirm or reject them by constitutional referendum (§ 177).

Comments - constitutional scholarship in action

The judgment can be analysed in any number of ways. I will, however, restrict my comments to those issues that are essential to the international scholarship on the constitutional amendment, e.g. constitutional rigidity, the legitimation for adopting an amendment, the role of the people in the amendment process, and whether it was inevitable that amendment No. 161/2014 Coll. would be declared unconstitutional.

Mending the flexibility of the Slovak Constitution

The ruling of the Constitutional Court needs to be put into a broader perspective in terms of constitutional change. The issues worth mentioning are, firstly, the flexibility of the Slovak Constitution, including the polylegality of the constitutional system, and secondly, the political culture that permeates the amendment process.

In general, it is very easy to amend the Slovak Constitution. The kind of entrenchment a constitution enjoys is labelled in scholarship as 'legislative entrenchment' if a qualified majority of parliament has the power to adopt a constitutional amendment.[12] In Slovakia, 3/5 of all MPs (i.e. 90 MPs) can change the Constitution or even adopt a new one without any need to consult other institutions or engage the people in any way.[13] The Constitution does not even prohibit indirect changes; the parliament can adopt a constitutional statute to coexist with the Constitution and can suspend or expand the effect of constitutional norms. Parliament's practice also includes ad hoc constitutional statutes that are used only once and usually shorten a parliamentary electoral term. In reality,

[12] *See*, on entrenchment scales, R. Albert, 'Constitutional Handcuffs', 42 *Arizona State Law Journal* (2010) p. 671-672.

[13] The majority of three-fifths of MPs required for the adoption of a constitutional amendment is an old relic dating back to the Constitutional Charter of 1920 – the first Czechoslovak constitution. From a comparative perspective, the traditional qualified majority of two-thirds was replaced by a majority of three-fifths because, at that time, the Czechoslovak republic was home to a large German and Hungarian minority, which formed approximately a third of the population. As a result, had the traditional majority of two-thirds for a constitutional change prevailed, the change would be subject to approval also by the minorities in the parliament. Such a scenario was deemed impermissible by the political elites of that time.

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there are several such constitutional statutes. That is why the constitutional system is polylegal.

No wonder the Slovak Constitution is thought to be one of the most flexible among democratic nations.[14] In Slovak legal scholarship, there have been many proposals to improve the amendment process and to increase the rigidity of the Constitution. There have been proposals, for example, to allow direct changes to (only) the text of the Constitution, to set more hurdles in the amendment process (including the concept of the referendum), to ban the use of the fast-track legislative procedure in the amendment process, and to explicitly designate the substantive core of the text.[15] Until the judgment in PL. ÚS 21/2014, the efforts of academia were to no avail.

In the judgment analysed here, the Constitutional Court recognised that flexibility was a problem when it noted that the existence of a substantive core meant that the Constitution was no longer helpless against the forces of a qualified majority of MPs and the possible misuse of the power to amend the Constitution. A victory in parliamentary elections was not tantamount to a *coup d'état*.[16]

Over the years, a political culture has developed in which constitutional amendments serve as a means of increasing the popularity of political parties that push for change. Recent changes commonly reflect a range of popular value-laden agendas for which there is considerable public demand (e.g. amendment No. 232/2012 Coll. on the abolition of MP immunities, amendment No. 161/2014 Coll. on the definition of marriage, and amendment No. 99/2019 Coll. on retirement-age ceilings). Needless to say, changes to the Constitution are often proposed shortly before an election (parliamentary or presidential) to raise the popularity of the political party in question. Amendments with a populist twist steer the Constitution into uncharted territory and at the same time diminish the importance of the document (virtually anything may become the object of constitutional regulation). Such practices further diminish constitutional stability.[17]

In this setting, the power of the Court to strike down constitutional amendments can serve a double purpose. Firstly, in the Slovak context, it might reduce the frequency with which parliament adopts constitutional changes, thus enhancing the desired stability of the Constitution. In asserting the power to review

[14] *See* G. Tsebelis, 'Constitutional Rigidity Matters: A Veto Players Approach' (*Working Paper 2018*) ⟨https://sites.lsa.umich.edu/tsebelis/working-papers/⟩ visited 14 July 2020, in which Slovakia scored 0.61 on a scale of 1.51 (most rigid) – 0.5 (least rigid). Only Jamaica, New Zealand, Thailand, Uruguay, and India have constitutions more flexible than Slovakia.

[15] For an overview, *see* e.g. R. Procházka, *Ľud a sudcovia v konštitučnej demokracii* [*The People and Judges in Constitutional Democracy*] (Aleš Čeněk 2011) p. 121 ff.

[16] Paras. 66 and 80 of the judgment.

[17] For a more detailed analysis, *see* T. Ľalík, 'Tracing constitutional changes in Slovakia between 2008-2016', 58 *Hungarian Journal of Legal Studies* (2017).

https://doi.org/10.1017/S1574019620000140 Published online by Cambridge University Press

amendments, the Court also acknowledged calls in Slovak legal scholarship to make the Constitution more rigid. The discovery of a substantive core – the internal hierarchy within the text of the Constitution – shielded from constitutional amendment by the Constitutional Court, has augmented the rigidity of the text. As a side effect, the asserted power of the Court to strike down any amendment makes the constitutional legislator more careful before introducing new provisions into the Constitution.

Secondly, from a more general perspective, judicial review of constitutional amendments can protect constitutionalism against the delegated constituent power and secure greater legitimacy for constitutional changes. The power to declare an amendment unconstitutional may guard the democratic legitimacy of the whole system.

Referendums as an additional hurdle for constitutional change

Amendment No. 161/2014 Coll. was structural (fundamental) change to the Constitution. Aside from its retroactivity, it was an attempt to assuage society's low level of confidence in the judiciary by permitting the executive to extensively interfere with the judiciary. The amendment made the judicial function existentially dependent on qualifications for judicial service which were entirely in the hands of the NSA and its proxies. The constitutional principle of an independent judiciary was transformed into de facto dependence on the executive. A structural pillar of the Constitution was changed to allow the executive power to take a central role in deciding who could and who could not be a judge, thus disturbing the delicate balance between the various branches.[18]

The Constitutional Court has tacitly endorsed something that Albert has labelled the escalation structure of constitutional amendments: the more fundamental the change, the more complex the amendment procedure. The role of a constitutional court is not to ban amendment at all costs, but to raise the bar for institutional players to achieve it.[19] In recent scholarship, there seems to be an emerging consensus that when an amendment touches upon an important issue, the more legitimate way of adopting it is warranted. The referendum is a primary

[18]In Slovakia, SMER-SD had been the main political power since 2006, with a brief hiatus in 2010-2011. In 2014, SMER-SD was the dominant party, having a majority in parliament. The electoral success of political parties like SMER-SD has consequences for the promotion of judicial independence. According to political theorists, the more electoral success a political party has, the less it cares about judicial independence. SMER-SD's policies prove this assertion; *see* M.C. Stephenson, 'When the Devil Turns . . . : The Political Foundations of Independent Judicial Review', 32 *The Journal of Legal Studies* (2003) p. 72.

[19]R. Albert, 'Constitutional Amendment and Dismemberment', 43 *The Yale Journal of International Law* (2018) p. 60 and p. 71.

https://doi.org/10.1017/S1574019620000140 Published online by Cambridge University Press

avenue for confirming important structural changes, regardless of whether a constitution envisages such a procedure.[20] The recent practice of holding referendums confirms this assumption: Brexit, the Colombia peace agreement, the independence of Scotland, and marriage reform and the Senate in Ireland were all agreed (or denied) by the respective peoples.

In the Slovak context, the Constitutional Court found itself confronted with an amendment process bereft of hurdles other than the required 90 votes in parliament, the frequent direct and indirect changes to the text of the Constitution, and the fact that the process was imbued with a political culture that perceived the passage of an amendment as a political tool. In this environment, the Court decided to establish the inner hierarchy of the Constitution, with the substantive core at its apex, and to declare itself competent to protect it. In an *obiter dictum*, it added that if parliament seriously wanted to adopt an amendment that violated the substantive core, the constitutional referendum is required (§ 177 of the judgment). This came as a surprise because: (i) the Constitution does not contain any similar regulation; (ii) the status of the referendum in the constitutional jurisprudence is rather uncertain (see text below); and (iii) Slovakia has had weak historical experience with successful referendums (only one out of eight in almost 27 years).

By referring to constitutional referendums in this context, the Constitutional Court indirectly applied a rule proposed by Roznai to the effect that the more the political elite allows the original constituent power to be involved in the constitutional amendment process, the more deferential a constitutional court should be, while a constitutional court should be less deferential if a constitutional amendment is adopted by the delegated constituent power.[21]

Invoking the *dicta* in § 177 of the judgment has another advantage besides the fact that it can boost the legitimacy of a given change. By allowing the people to overrule the judgment by constitutional referendum, the Court escapes the critique of so-called ultimate judicial supremacy, overly strong judicial review or the overly strong counter-majoritarian difficulties mentioned in the literature.[22] In this vein, when an apex court declares a constitutional amendment unconstitutional due to a substantive breach, it claims unbridled power not only concerning the constitutional legislature but also *vis-à-vis* the people.

[20] *See* R. Albert, 'The State of the Art in Constitutional Amendment', in R. Albert et al. (eds.), *The Foundations and Traditions of Constitutional Amendment* (Hart Publishing 2017) p. 10-11; in the American context *see* A.R. Amar, 'The Consent of the Governed: Constitutional Amendment outside Article V', 94 *Columbia Law Review* (1994) p. 457.

[21] Y. Roznai, 'Amendment Power, Constituent Power, and Popular Sovereignty: Linking Unamendability and Amendment Procedures', in Albert et al., *supra* n. 20, p. 37-48.

[22] *See* e.g. S. Gardbaum, 'What Makes for More or Less Powerful Constitutional Courts', 29 *Duke Journal of Comparative & International Law* (2018) p. 12.

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As a result of the overriding power of the people, neither the parliament nor the Constitutional Court judges have the final say over the unconstitutionality of a given amendment. The substantive core doctrine limits only the constitution-amending powers of state institutions; it is ineffective against the people themselves. At the end of the day, the representatives of the people are not the masters; the legitimacy of the former does not correspond to the legitimacy of the latter. The Constitution belongs to the people - they are its authors - and no right is more constitutive of citizenship than the right to amend a constitution.[23]

On the other hand, the people can be just as destructive of underlying constitutional values as can parliament.[24] This criticism has merit but in order to be taken seriously, it needs to be elaborated further and be defended by strong arguments (e.g. historical, empirical). An approach taken by the Constitutional Court highlights democracy and the notion that ultimate power (always) rests with the people. It would be unwise, in the long run, for any constitutional court to attempt to protect constitutionalism from the people themselves. Sooner or later, democracy will prevail.[25] Against this backdrop, the matter of the binding nature of the eternity clause for future constitutions remains undetermined – even in Germany (which has textbook unamendability). In the Lisbon Treaty ruling, the Federal Constitutional Court stated that it remains an open question whether the eternity guarantees of the Basic Law would also apply to the constituent power if it were engaged in a quest for a new constitution.[26]

The grand narratives of democracy could run up against considerable obstacles in terms of practical implications. It is important to note that the Constitution is silent on the point of whether a constitutional amendment can by introduced by a way of referendum. The Constitution for its own change envisages only the form of constitutional statute adopted by parliament. This situation was further confused by the Constitutional Court in II. ÚS 31/97, where it acknowledged that the people have the right to change the Constitution in referendum. In the same decision, however, the Court took the view that the results of a referendum cannot result in immediate action, given that Art. 98 § 2 stipulates that the Parliament promulgates the adopted referendum proposals as law. This approach suggests that the people may need the Parliament in order to effectively exercise their power in referendum.

[23]Albert, *supra* n. 12, p. 698.

[24]E.g. J. Neumann, 'Ústavný súd SR ako efektívny ochranca ústavnosti pri zásahu do materiálneho jadra ústavy (?)' [*The Constitutional Court as an Effective Protector of the Constitution when breaching the substantive core of the Constitution (?)*], 38 *Acta Facultatis Iuridicae Universitatis Comenianae* (2019) p. 304.

[25]D. Grimm, *Constitutionalism: Past, Present, and Future* (Oxford University Press 2016) p. 238; he noted there that 'the constitution tends to be a weaker part' in a constitutional democracy created by democracy and constitutionalism.

[26]BVerfG 30 June 2009, 2 BvE 2/08, *Lissabon Urteil*, para. 217.

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The stance taken by the Constitutional Court in PL. ÚS 21/2014 may therefore lead to an absurd conclusion: the Court leaving the final say to the people is de facto confirming the Parliament as the supreme institution, or what looked like an attempt to stop constitutional legislator had in fact empowered it.

In my opinion, the *dictum* of § 177 suggests a somewhat different situation; by invoking constitutive referendum, we are not talking about the people from a perspective within the existing legal order as being confined by procedural and substantive limits. The Court refers to the people as a sovereign entity – a subject immune to the system of constraints on the exercise of the power. By the reference to the people, the Court simply sought legitimacy for such structural change to the Constitution, and could not find it anywhere but with the sovereign itself. From this perspective, the substantive core of the Constitution can be seen as the product of sovereignty.

However, there is no clear answer as to how the people could use its power and vote in a constitutive referendum, since the existing Constitution provides no guidance. This fact is further obscured by the notion of people as an extraconstitutional entity. It seems to me that there are two options available – formal and informal. Under the formal approach, the constitutional legislator may elaborate a process of adoption of a constitutional amendment or a new constitution after the verdict of the Constitutional Court. This approach would significantly downplay the appeal of the people as constituent power, because of the putting in place of a legal regulation. Under the informal scenario, a spontaneous exercise of the peoples' power can be imagined (outside the legal framework) that would eventually lead to a constitutive referendum. Such course of action might be organised under the existing law (to some extent) but not necessarily so.

No matter how we grasp this issue, if a constitutional referendum succeeds, there will be a new constitution – either because one of its fundamental values will be transformed into something else or an aspect or aspects thereof will be suspended and an exception introduced. As a result, the people will be constituting a new legal order.

Identifying violations of the substantive core with the help of comparative constitutional law

Turning back to PL. ÚS 21/2014, it remains to be seen whether such protection of constitutional values from the parliament is warranted under certain circumstances. Recent studies in comparative legal scholarship focus on strategies for reconciling the protection of the constitution on the one hand with the principle of democracy on the other. In this regard, a strategy proposed by Dixon and Landau stands out: a constitutional court should aim to identify consensus in comparative constitutional law regarding whether a value is of such importance that violation

https://doi.org/10.1017/S1574019620000140 Published online by Cambridge University Press

thereof could render a constitutional amendment unconstitutional. Such consensus is based on court practice or regulations and provides valuable information in judicial review. Secondly, to proclaim the unconstitutionality of an amendment, it needs to be established whether there is any substantial adverse impact on identified constitutional values.[27]

When it came to the possible existence of consensus about judicial independence, the Court took the comparable constitutional laws of 10 countries into account in its reasoning (§ 143). It looked at the legal regulations on recalling judges in France, Poland, Hungary, the Czech Republic, Ireland, Lithuania, Austria, Germany, the United Kingdom, and the USA.[28] The Court concluded that none of those countries had regulations that allowed a secret agency to engage in a judicial recall process, and that the Slovak regulation was atypical and at odds with comparable laws. The Court also took into account documents prepared by the European Commission and the Consultative Council of European Judges, which had already voiced criticism of the qualifications for judicial service (§§ 144-145). The Court noted that only Lithuania had similar regulations; there, the secret service did conduct security checks, but only of candidates for judicial office (§ 143).

Aside from the Court's analyses, it is worth recalling other examples in which supreme judicial bodies have considered a constitutional amendment to be a potential violation of judicial independence. The Supreme Court of Bangladesh used the independence of the judiciary as its main argument when declaring unconstitutional a constitutional amendment that would remove its power to transfer and retransfer judges from one court to another.[29] The Supreme Court of Canada hinted that it might strike down an amendment if it violated the unwritten constitutional principle of judicial independence.[30] In Europe, the European Court of Human Rights is more and more prone to defending judicial independence against measures taken by other governmental branches, including delegated constitutive power.[31] And so is the Court of Justice, judging by its recent

[27]R. Dixon and D. Landau, 'Transnational constitutionalism and a limited doctrine of unconstitutional constitutional amendment', 13 *I.CON* (2015) p. 627-629.

[28]The Court did not explain why it picked these countries in particular (as opposed to others). It can only be assumed that as far as its neighbouring countries are concerned, ie the Czech Republic, Poland, Hungary, and Austria (including Germany), the Court often refers to examples from those countries in its case law.

[29]Example given in G. Jacobsohn *Constitutional Identity* (Harvard University Press 2010) p. 68, fn. 83.

[30]*Reference re Remuneration of Judges of the Provincial Court (P.E.I.)* [1997] 3 S.C.R. 3, para. 83; R. Albert, 'Theory and Doctrine of Unconstitutional Constitutional Amendment in Canada', 41 *Queen's Law Journal* (2015) p. 171-172.

[31]ECtHR Grand Chamber 23 June 2016, No. 20261/12, *Baka* v *Hungary*, para. 165; ECtHR 12 March 2019, No. 26374/18, *Guðmundur Andri Ástráðsson* v *Iceland*.

https://doi.org/10.1017/S1574019620000140 Published online by Cambridge University Press

practices.[32] Similar voices on judicial independence as an unamendable part of a constitution are reflected in the legal scholarship, too.[33]

Accordingly, one could conclude that there is consensus on judicial independence as a fundamental value that triggers protections – even against the delegated constitutive power. The first condition of the Dixon-Landau proposition had been met.

According to that proposal, a court would also need to verify whether such regulation had any substantial adverse impact on judicial independence. This criterion has been met, given: (1) the unity of constitutional and sub-constitutional regulation; (2) the limited discretion of the acting legislature to implement constitutional regulation; (3) the extensive powers vested in the NSA without any effective safeguards to keep its methods in check or to verify the completeness and veracity of its reports; (4) the disproportionality of intrusions into privacy; (5) the absence of regulations for obtaining and destroying information; and (6) insufficient procedural review by the Judicial Council and the Constitutional Court which, in practice, could neither contest nor verify submitted reports on qualification for judicial service.

Judicial independence was also endangered by the extensive involvement of the executive in the creation of judicial functions and by the vagueness of the regulations that applied to stay in judicial office.[34] This is not to say that regulations of this type were reminiscent of the era before 1990 when the Communist Party exercised power over the judiciary. In this vein, judicial independence is one of the structural values (besides the rule of law, democracy, and human rights) that stands in stark opposition to the previous authoritarian regime. Therefore, the reviewed regulation had a substantial, negative impact on judicial independence; the test proposed by Dixon and Landau was satisfied.

In the aftermath, a majority of legal scholars has welcomed the Court's judgment for reasons discussed throughout this case note and also because academia had long advocated for the judicial review of constitutional amendments.[35] Even one of the dissenting judges on the Court (L. Orosz) has recently acknowledged the positive effects that the judgment could bring in the future. On the other hand, there is criticism targeting several issues: the unlimited power of the judiciary, the ease with

[32]ECJ 2 August 2019, Case C-619/18, *Commission* v *Poland*; ECJ 19 November 2019, Case C-585/18, *A. K.* v *Krajowa Rada Sądownictwa.*

[33]A. Barak, 'Unconstitutional Constitutional Amendments', 44 *Israeli Law Review* (2011) p. 338.

[34]For further reasoning as to why the regulation was unconstitutional, see also the above text.

[35]*See* e.g. B. Balog, 'Ústavoochranca na temnej strane sily?' [*Protector of the Constitution on the Dark Side of the Power?*], 38 *Acta Facultatis Iuridicae Universitatis Comenianae* (2019); Breichová-Lapčáková, *supra* n. 9; J. Drgonec, 'Neústavné ústavné zákony a ochrana ústavnosti SR' [*Unconstitutional Constitutional Amendments and protection of constitutionalism in the Slovak Republic*], 24 *Zo súdnej praxe* (2019).

https://doi.org/10.1017/S1574019620000140 Published online by Cambridge University Press

which the Court renounced judicial review of proposals adopted by referendum, and the dangers inherent to popular constitution-making.[36]

Conclusion

The current trend in constitutional scholarship seems to be to accept the idea that there are limitations on delegated constituent power.[37] In this respect, the ultimate guardian of a constitution is a constitutional court capable of imposing limits on delegated constituent power.[38] The question is no longer whether constitutional courts *can* review constitutional amendments but rather *when* and *how* they are empowered to strike them down.

Judgment PL. ÚS 21/2014 provides an interesting example for comparative constitutional scholars in general and scholars of the constitutional amendment in particular. It demonstrates that many theoretical concepts, such as the existence of the substantive core of a constitution, escalation structures in the amendment process, the use of referendums to change a constitution or proposing a test for declaring a constitutional amendment unconstitutional, can be put into practice, even implicitly, given that the Slovak Constitutional Court did not refer to any of the scholarly works mentioned in this paper.

For Slovakia, the judgment is revolutionary from a variety of perspectives. It not only fully established long-advocated limits on parliament in the (un)making of the constitutional order but also pushed for an escalation structure concerning the Slovak Constitution that requires greater legitimacy for structural changes. The judgment could serve as a roadblock, preventing the delegated constituent power from repeatedly adopting constitutional amendments, thereby stabilising the Constitution. It also strengthens democracy, given that the people retain ultimate power, at the expense of constitutionalism, concerning the content of the Constitution.

[36]On this last point, *see* W. Partlett, 'Dangers of Popular Constitution-Making', 38 *Brooklyn Journal of International Law* (2012) p. 234 (claiming that popular participation in the constitution-making process should be avoided in countries with weak institutions). In this regard, Slovakia seems to have relatively stable institutions and there have not been any attempts to undermine them either legally or factually.

[37]For an overview, *see* Y. Roznai, 'Unconstitutional Constitutional Amendments: The Migration and Success of a Constitutional Idea', 61 *The American Journal of Comparative Law* (2013) p. 657.

[38]*See also* R. Albert, *Constitutional Amendments: Making, Breaking, and Changing Constitutions* (Oxford University Press 2019) p. 151.

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