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Abstract

This article conceptualizes constitutional court (dis)empowerment as a process impacting constitutional court resilience. It introduces a two-dimensional typology of mechanisms of exogenous and endogenous empowerment and dis-empowerment that points to the centrality of agency to an extent independent from formal competences of the constitutional court. Subsequently, the article applies the mechanisms to the case of the Slovak Constitutional Court. This formally powerful institution operates in an illiberalizing environment and faces the challenge of how to resist de-democratization. Therefore, its study yields lessons for constitutional court resilience amidst de-democratization. Via a combination of research methods (contextual analysis and insights from semi-structured interviews), the article emphasizes endogenous disempowerment as a key, albeit least studied mechanism. The findings highlight self-imposed limits by the Slovak Constitutional Court that can complicate its capacity to resist post-2023 de-democratization in Slovakia and point to the risks for resilience embedded in endogenous judicial disempowerment.

Keywords: constitutional courts; de-democratization; agency; empowerment and disempowerment; resilience and resistance; Slovak Republic (Slovakia)

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(Dis)empowerment and Constitutional Court Resilience: A Conceptual Framework and Explorative Evidence from the Slovak Constitutional Court

Max Steuer[1]

Introduction

'They must not have everything!' This campaign slogan has been adopted by the parliamentary opposition ahead of the 2024 presidential and European Parliament (EP) elections in Slovakia. The slogan was to communicate the need to avoid power concentration, in the context of the concerns over the parliamentary majority formed after the 2023 general elections for Slovakia's democratic path. The slogan mobilized, but not enough, as the presidential elections were won by a coalition candidate and the EP elections generated a majority of illiberal members of the EP (MEPs). A leading daily has, after the inauguration of the new head of state (a former assistant to post-2023 Prime Minister (PM) Robert Fico), commented on the situation with a headline 'the coalition already has everything'.[2]

The post-2023 Slovak governing coalition did not attain a constitutional majority, unlike in Hungary after the 2010 elections. Yet, concerns have been raised over possible regime transformation à la Hungary in a rapid manner,[3] as many changes can be implemented at the level of ordinary legislation, and some of the opposition members of parliament (MP) might even be swayed to endorse coalition-initiated changes to the Constitution, such as in relation to further restrictions of minority rights. The reason for concern might also lie in limited beliefs in the Slovak Constitutional Court (SCC) as a 'consequential court'[4] capable to halt power concentration, lest bring other benefits for Slovakia's democracy.[5] This neglect is not new; the SCC has rarely featured as an authoritative institution in the party elites' references; rather, 'discursive casuistry' has been employed, as the tendency has been to support or oppose it in an ad hoc manner in relation to specific decisions.[6] In particular, the so-

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[2] Tim Haughton and Darina Malová, 'The Return of Robert Fico', Journal of Democracy (online exclusive), 2023, https://www.journalofdemocracy.org/online-exclusive/the-return-of-robert-fico/; Max Steuer and Darina Malová, 'To Hell, on a White Horse: Governing in Slovakia after the 2023 Early Elections', Verfassungsblog (26 October 2023), https://verfassungsblog.de/to-hell-on-a-white-horse/. All online sources were accessible as to 28 February 2025.

[3] Jana Semesh, 'Pellegrini je v paláci, koalícia už má všetko', Denník N, 2024, https://dennikn.sk/4051349/tyzdnovy-newsfilter-pellegrini-je-v-palaci-koalicia-uz-ma-vsetko/?ref=list.

[4] Cf. Diana Kapiszewski, Gordon Silverstein, and Robert A. Kagan, eds., Consequential Courts: Judicial Roles in Global Perspective, Comparative Constitutional Law and Policy (Cambridge: Cambridge University Press, 2013), https://doi.org/10.1017/CBO9781139207843.

[5] Max Steuer, 'Nemajú všetko, Ústavný súd môže chrániť ústavnosť', Denník N, 2024, https://dennikn.sk/3929233/nemaju-vsetko-ustavny-sud-moze-chranit-ustavnost/ ['They do not have everything, the Constitutional Court may protect constitutionalism' (op-ed)]. This is a response to a narrative, advanced also by the presidential candidate of the democratic opposition in the 2024 presidential elections that the victory of a pro-government candidate amounts to the coalition to have 'politically gained everything', with the SCC to follow only in a 'matter of time'.

[6] Ján Štiavnický and Max Steuer, 'The Many Faces of Law-Making by Constitutional Courts with Extensive Review Powers: The Slovak Case', in Judicial Law-Making in European Constitutional Courts, ed. Monika Florczak-Wątor (London: Routledge, 2020), 197.

called 'third Court' as counted according to its Presidents[7] was recognized as vulnerable to partisan capture, which put it successor, the 'fourth Court' led by President Fiačan, into a challenging position from the outset to dispel such beliefs. Empirical evidence does not support the claim of capture, but it recognizes the establishment of 'judicial coalitions' at the Court, with one group's positions frequently overlapping with the partisan standpoint of Robert Fico's Smer-SD in important decisions (such as on the Special Court, the attorney general or the appointment of constitutional judges).[8]

While the neglect towards the Court is not new, it is counterintuitive both because of the global tendencies of the 'judicialization of politics'[9] and the SCC history. Indeed, the Court is believed to have successfully coped[10] with an illiberal, even semi-authoritarian regime turn in the 1990s even before the growth of 'illiberal democracy' narratives and the recognition of authoritarian populist de-democratization techniques, so widespread in contemporary scholarship.[11] Even though the actual contribution of the SCC to Slovakia's (re-)democratization might be debated,[12] the degree of absence of engagement with its practice is itself notable.

This article introduces a two-dimensional typology of constitutional courts' (CCs') (dis)empowerment that affects CC resilience and is driven at least as much by perceptions and discourses, as it is by formal rules. This typology, furthermore, asserts that the attention to exogenous (dis)empowerment and endogenous empowerment in existing scholarship has come at the expense of recognizing endogenous disempowerment, despite the latter's significance for eroding CC resilience. The conceptual argument (Section 2) is followed by a presentation of initial evidence from Slovakia, focusing on how the SCC's disempowerment has unfolded via a combination of endogenous and exogenous factors (Section 3). The illustrations underscore concerns about that Court's capacity to face an executive bolstered to spearhead illiberal practices after an unsuccessful armed assault on its leader, PM Fico, in May 2024.[13] The findings point to the significance of scrutinizing CCs' agency and responsibility for (dis)empowering themselves.

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[7] The 'first Court' was led by Milan Čič, formerly close to the state socialist elites but then embracing a democratic approach vis-à-vis the de-democratizing executive of PM Vladimír Mečiar in the 1990s. The 'second Court' of President Ján Mazák was somewhat short-lived, as Mazák left before the end of his mandate to take up one of the Advocate General roles at the Court of Justice of the European Union (CJEU). The 'third Court' refers to the presidency of Ivetta Macejková, a former Slovak Supreme Court judge, and covers the longest (twelve-year) period of all. As one of the interviewees remarked, this periodization, based on the US model, is not a perfect fit for narrating SCC history, but nor are the alternatives. R23/6 (abbreviation according to the list of interviews, see Appendix).

[8] Max Steuer and Erik Láštic, 'The Slovak Constitutional Court: The Promise of Dworkinian Adjudication?', in Constitutional Review in Central and Eastern Europe: Judicial-Legislative Relations in Comparative Perspective, ed. Kálmán Pócza (London: Routledge, 2024), 244–73.

[9] Ran Hirschl, 'The Judicialization of Mega-Politics and the Rise of Political Courts', Annual Review of Political Science 11, no. 1 (2008): 93–118, https://doi.org/10.1146/annurev.polisci.11.053006.183906.

[10] E.g. Darina Malová, 'The Role and Experience of the Slovakian Constitutional Court', in Constitutional Justice, East and West: Democratic Legitimacy and Constitutional Courts in Post-Communist Europe in a Comparative Perspective, ed. Wojciech Sadurski (The Hague: Springer, 2010), 349–72; Radoslav Procházka, Mission Accomplished: On Founding Constitutional Adjudication in Central Europe (Budapest: CEU Press, 2002). This was also mentioned by R23/1 and R23/6.

[11] E.g. Bojan Bugarič and Tom Ginsburg, 'The Assault on Postcommunist Courts', Journal of Democracy 27, no. 3 (2016): 69–82, https://doi.org/10.1353/jod.2016.0047; Gábor Halmai, 'Populism, Authoritarianism and Constitutionalism', German Law Journal 20, no. 3 (2019): 296–313, https://doi.org/10.1017/glj.2019.23; Kim Lane Scheppele, 'Autocratic Legalism', University of Chicago Law Review 85 (2018): 545–83.

[12] Max Steuer, 'Democracy, Procedural and Social Rights, and Constitutional Courts in Hungary and Slovakia', Constitutional Review 9, no. 1 (2023): 28–76, https://doi.org/10.31078/consrev912.

[13] Max Steuer, 'Slovakia: Democracy Just Bearing Up', Index on Censorship (3 June 2024), https://www.indexoncensorship.org/2024/06/slovakia-democracy-just-bearing-up/.

1. Studying (Dis)empowerment: 'What Doesn't Kill You, Makes You Stronger'[14]

Why bring the concept of (dis)empowerment into dialogue with the concept of resilience, in the context of constitutional (court) studies? This article argues that, while resilience is a state, (dis)empowerment is a process that necessarily unfolds over time. Therefore, while resilience may be approached without putting actors, and their actions, centre-stage,[15] (dis)empowerment is inconceivable without actors. Indeed, actors, both within and beyond the institution in question constantly take actions that (dis)empower the institution beyond the scope of the specific action. In this sense, (dis)empowerment precedes and shapes resilience, as it entails practices unfolding over a longer period of time, including during the periods of 'calmness' or 'normalcy', when the institution is not particularly exposed and is expected to handle 'routine' agenda in a regular mode of functioning.

Recognizing that (dis)empowerment entails a more longitudinal development does not exclude short-term shocks,[16] whereby a court is (dis)empowered or (dis)empowers itself rapidly. Once disempowered this way, it may be difficult for the CC to re-empower itself (or be re-empowered), no matter how hard its stakeholders work to overcome the shadows of the past. Vice versa, the success of the CC to empower itself (or at least to prevent disempowerment) via pivotal decisions or actions beyond standard decision-making may boost its self-confidence to more easily withstand similar future attempts.

The key conceptual claim is that (dis)empowerment is a process of growing or reducing significance of a CC, which bolsters or limits the CC's operations. This process (1) requires tracing the CC's operations over the longer term and (2) occurs not only via (non-)interventions of external actors (i.e. exogenously), but also – and at least equally importantly – via practices opted for within the CC by the decision-making actors there (i.e. endogenously). The emphasis on CC agency is warranted particularly when they are conceived of as political in a broader sense, as institutions contributing to the enhancement of freedom.[17]

Such a conceptualization allows to generate a typology of avenues of endogenous and exogenous empowerment and disempowerment. The typology recognizes that the CC may be empowered or disempowered because of outside interventions, because of its own volition, or a combination thereof. It also allows the possibility for even in many regards disempowered CCs to matter in a de-democratizing regime 'beyond the simple legitimation of the regime'.[18]

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[14] Nietzsche, a quote sometimes invoked in the context of growing and maintaining resilience. Elijah Millgram, Why Didn't Nietzsche Get His Act Together? (New York: Oxford University Press, 2023), 1, 13.

[15] See Gábor Halmai, Ágnes Kovács, and Max Steuer, 'The Resilience of Constitutional Courts and Their Resistance to Autocratization: Beyond Binaries, Where Time Matters', Global Jurist 25, no. 2 (2025): online first, https://doi.org/10.1515/gj-2025-0054 (or as a working paper in the Constitutional Repair working paper series, https://static1.squarespace.com/static/5abb53e6372b9691939ac577/t/68e650fc63abed490a0083a8/1759924476421/DEM-DEC+WP_2025-2_Halmai+Kovacs+Steuer_final_06.10.25.pdf). The emphasis is on the process and its inherent linkage with actors as essential for the assessment of a state and its quality (resilience and – when democratic regime conditions deteriorate – resistance).

[16] Yvonne Tew, 'Strategic Judicial Empowerment', The American Journal of Comparative Law 72, no. 1 (2024): 229, https://doi.org/10.1093/ajcl/avad040.

[17] Hannah Arendt, 'Freedom and Politics', in The Liberty Reader, ed. David Miller (London: Routledge, 2016), 58–79.

[18] Angela Di Gregorio, 'Constitutional Courts in the Context of Constitutional Regression: Some Comparative Remarks', in Courts, Politics and Constitutional Law: Judicialization of Politics and Politicization of the Judiciary, ed. Martin Belov (London: Routledge, 2019), 220.

Empowerment in the judicial context has been discussed in existing scholarship.[19] Yet, the prevailing angle is exogenous empowerment of CCs. In other words, the focus is on other actors who grant/endow considerable competences to the CCs, with or without full awareness of what such competences might imply in terms of CC influence.

There is also a relatively extensive discussion of non-judicial actors disempowering the courts,[20] particularly if the extensive literature on court curbing and court packing is placed here.[21] The latter has been read by some scholars as, under some conditions, being conducive to resilience.[22] However, these cases concern rather restoration of courts which have been fundamentally compromised, mainly due to prior violations of the legal rules of appointment (such as in the Polish case[23] or possibly the US case with respect to Supreme Court candidate Merrick Garland[24]). How we call political phenomena matters; therefore, packing the CC is, in this article, reserved to the attempt to subdue the CC to particular partisan ambitions.

Some recognition of endogenous empowerment is present in the literature, particularly in the strategic tradition of theorizing court action.[25] Judges here are seen as thinking purposively to increase or at least retain their access to power, as a result of which they are ready to make decisions that buttress their authority and minimize the danger of backlash.[26] A special context arises during periods of transition to democracy, where a CC may play a unique role in situations of incapacity of partisan actors to agree on the direction of the society, and when there is absence of democratic constitutional traditions that the political community could build on.[27] Another specific context stems from the weaknesses in the political party system, which may encourage the CC to perceive a necessity to act, also due to the likely absence of potential partisan backlash in a fragmented party

[19] E.g. Daniel M Brinks and Abby Blass, 'Rethinking Judicial Empowerment: The New Foundations of Constitutional Justice', International Journal of Constitutional Law 15, no. 2 (2017): 296–331, https://doi.org/10.1093/icon/mox045; Oya Yeğen, 'Judicial "Empowerment" through Constitutional Change: The Case of Chilean and Turkish Constitutional Courts', Research and Policy on Turkey 3, no. 1 (2018): 40– 67, https://doi.org/10.1080/23760818.2018.1445233; Matthew C. Ingram, 'Judicial Power in Latin America', Latin American Research Review 50, no. 1 (2015): 250–60, https://doi.org/10.1353/lar.2015.0011.

[20] Konrad Lachmayer, 'Disempowering Courts: The Interrelationship between Courts and Politics in Contemporary Legal Orders or the Manifold Ways of Attacking Judicial Independence', in Courts, Politics and Constitutional Law: Judicialization of Politics and Politicization of the Judiciary, ed. Martin Belov (London: Routledge, 2019), 31–54.

[21] Thomas M. Keck, 'Court-Packing and Democratic Erosion', in Democratic Resilience: Can the United States Withstand Rising Polarization?, ed. Kenneth M. Roberts, Robert C. Lieberman, and Suzanne Mettler (Cambridge: Cambridge University Press, 2021), 141–68, https://doi.org/10.1017/9781108999601.006.

[22] Tom Gerald Daly, '"Good" Court-Packing? The Paradoxes of Constitutional Repair in Contexts of Democratic Decay', German Law Journal 23, no. 8 (2022): 1071–1103, https://doi.org/10.1017/glj.2022.75; David Kosař and Katarína Šipulová, 'Comparative Court-Packing', International Journal of Constitutional Law 21, no. 1 (2023): 80–126, https://doi.org/10.1093/icon/moad012.

[23] Jerzy Zajadło and Tomasz Tadeusz Koncewicz, 'Restoration of the Polish Constitutional Tribunal as Reading the Constitution Forward', Verfassungsblog (19 February 2024), https://verfassungsblog.de/restoration-of-the-polish-constitutional-tribunal-as-reading-the-constitution-forward/.

[24] Keck, 'Court-Packing and Democratic Erosion', 157–58.

[25] Tew, 'Strategic Judicial Empowerment'.

[26] Shannon Ishiyama Smithey, 'Strategic Activism: A Comparative View of Judges as Institution Builders', in Open Judicial Politics, ed. Rorie Spill Solberg, Jennifer Segal Diascro, and Eric Waltenburg (Corvallis: Oregon State University, 2020), 378–99, https://doi.org/10.5399/osu/1118.

[27] The Hungarian case attained particular prominence in this respect. See Gábor Halmai, 'Silence of Transitional Constitutions: The "Invisible Constitution" Concept of the Hungarian Constitutional Court', International Journal of Constitutional Law 16, no. 3 (2018): 969–84, https://doi.org/10.1093/icon/moy067; Kim Lane Scheppele, 'Democracy by Judiciary: Or, Why Courts Can Be More Democratic than Parliaments', in Rethinking the Rule of Law After Communism, ed. Adam Czarnota, Martin Krygier, and Wojciech Sadurski (Budapest: CEU Press, 2005), 25–60.

system.[28] Rarer are acknowledgements of the possibilities of self-empowerment via institutional learning and deliberation.[29]

There is very limited discussion of endogenous disempowerment or self-disempowerment by courts, whereby it is the actors inside the courts who speak and act in ways reducing CC resilience. This may occur independently from exogeneous actions 'done' to the CCs.

Table 1 presents a selection of mechanisms which belong to each of the four types affecting judicial resilience. While some (such as the absence of transparent procedures amounting to endogenous disempowerment, or recognition of the CC among epistemic communities and the public to exogenous empowerment) are more straightforward, others less so. Moreover, the types also remain subject to interpretation in concrete cases – and, as no interpreter has the benefits of being equivalent to the idealized figure of Judge Hercules in the judicial realm,[30] such interpretation is limited by the positionality and information accessible to the interpreter.

One of the more ambiguous categories is 'de/personalization'. Different judicial systems globally have various degrees of visibility of individual judges, and in particular CC presidents, as opposed to the 'amorphous' CC as an institution. Individual judges have been found to be of pivotal importance particularly during critical junctures,[31] while CC presidents, same as heads of other institutions,[32] are particularly well positioned to translate their own philosophy to the operation of the institution. Moreover, via a visible public figure, the CC may more easily establish connections with the broader public, and also have a stronger voice in case of assaults by anti-democratic actors on (constitutional) judiciary. At the same time, if the CC starts to be perceived merely as a sum total of individual personalities, the risk of the undermining of its perceived impartiality increases, as CC authority is built on the image that its decision-making outcomes would by and large not differ according to who sits on the bench.

Table 1: Mechanisms of exogenous and endogenous constitutional court empowerment and disempowerment. Source: author.

	Endogenous	Exogenous
Empowerment	– Recognition of 'political' (yet not partisan) nature of the CC – Self-confidence and commitment to constitutional mission during and beyond processes of constitutional interpretation – Effective (including timely)	– Public and epistemic community recognition and engagement including constructive critique – Strengthening competences alongside proportionate resource provision – Appointment models that fa-

[28] The Italian case seems to fit this pattern, see Fortunato Musella and Luigi Rullo, 'The Italian Constitutional Court under Stress. How to Respond to Political Inefficiency', European Politics and Society 25, no. 3 (2024): 484–500, https://doi.org/10.1080/23745118.2023.2244388; Diletta Tega, 'The Italian Constitutional Court in Its Context: A Narrative', European Constitutional Law Review 17, no. 3 (2021): 369–93, https://doi.org/10.1017/S1574019621000274.

[29] Jan Boesten, Constitutional Origin and Norm Creation in Colombia: Discursive Institutionalism and the Empowerment of the Constitutional Court (London: Routledge, 2022), 230–37.

[30] Ronald Dworkin, 'Hard Cases', Harvard Law Review 88, no. 6 (1975): 1057–1109, https://doi.org/10.2307/1340249.

[31] Stefanus Hendrianto, Law and Politics of Constitutional Courts: Indonesia and the Search for Judicial Heroes (London: Routledge, 2018).

[32] See e.g. Fortunato Musella, Monocratic Government: The Impact of Personalisation on Democratic Regimes (Berlin; Boston: De Gruyter, 2022).

	decision making and public communication thereof – A healthy degree of personalization	cilitate consensus between political actors, with safe-guards against gridlocks – Active litigation strategies, supplying cases to the CC
Disempowerment	– Unwillingness to recognize political (albeit not partisan) nature of the CC – Avoidance of public communication or non-transparent procedures – Postponements of decisions that hamper their impact – (Excessive) depersonalisation	– Partisan disregard due to the capture or fading relevance of the CC – Strategies of court curbing and court packing, partisan assaults on the CC – Scholarly discourses that consider unproven limits of the CC to be self-evident

Another contentious example pertains to the 'political' nature of the Court categorized as endogenous empowerment. A common objection pertains to the need to separate CCs and politics from each other, and to the 'politicization of courts'[33] representing a threat to their operation. While the presentation of the CC as a partisan or ideological actor indeed undermines its standing, if the CC continues to deny that it has anything to do with politics altogether, and pretends not to engage with the central political questions of the society it is part of, its pronouncements risk to be increasingly out of touch with reality. The latter risk is particularly visible in disputes in which partisan or ideological actors have stakes and therefore are ostensibly political. As a result, careful framing of constitutional adjudication by the CC is needed. On the one hand, such framing recognizes the CC's positioning as separate from day-to-day partisan bargaining and compromises. On the other hand, it acknowledges concern with, involvement in and co-responsibility for the broader public deliberation over the advancement of the political community.

To entice further research and critical reflection on CC (self dis)empowerment, this article provides anecdotal examples of each of the four types of impact on CC resilience, using the Slovak case, but focuses specifically on endogenous disempowerment as the least studied type.

Before doing so, a note on the methods of studying CC (dis)empowerment: while close scrutiny of the decisions of partisan actors and other exogenous stakeholders (such as the public at large, media, NGOs) is needed in relation to capturing exogenous conduct, the study of endogenous conduct benefits from direct engagement with actors within the CC, their self-perceptions and ideas.[34] This is because much of the endogenous actions are discursive[35] or interpretive:[36] they emerge from the

[33] E.g. Martin Belov, 'Introduction', in Courts, Politics and Constitutional Law: Judicialization of Politics and Politicization of the Judiciary, ed. Martin Belov (London: Routledge, 2019), 1–18; Mary L. Volcansek, 'Judicialization of Politics or Politicization of the Courts in New Democracies?', in Judicial Power: How Constitutional Courts Affect Political Transformations, ed. Christine Landfried (Cambridge: Cambridge University Press, 2019), 66–81.

[34] Max Steuer, 'Judicial Self-Perceptions and the Separation of Powers in Varied Political Regime Contexts: The Constitutional Courts in Hungary and Slovakia', European Politics and Society 25, no. 3 (2024): 537–55, https://doi.org/10.1080/23745118.2023.2244390.

[35] Vivien A. Schmidt, 'Discursive Institutionalism: The Explanatory Power of Ideas and Discourse', Annual Review of Political Science 11, no. 1 (2008): 303–26, https://doi.org/10.1146/annurev.polisci.11.060606.135342.

[36] Howard Gillman, 'The Court as an Idea, Not a Building Block (or a Game): Interpretive Institutionalism and the Analysis of Supreme Court Decision-Making', in Supreme Court Decision-Making: New Institutionalist Approaches, ed. Cornell W. Clayton and Howard Gillman (Chicago: University of Chicago Press, 1999), 65–87.

ways how the CC interprets itself, its own limits and constraints (whether deemed internal to its capacity or external, set by someone else). These perceptions might translate into legally binding decisions, which then become subject of the '(anti)canon' of legal doctrine in the given jurisdiction and possibly even globally.[37] The study of the reasons behind those interpretations can help uncover deeper patterns of the operation of political but non-partisan actors, albeit it goes beyond the scope of this article.

2. Exogenous and Endogenous (Dis)empowerment of the Slovak Constitutional Court: Explorative Evidence

The purpose of this section is to offer explorative evidence on the SCC's (dis)-empowerment that illustrates and helps put to test the typology presented above. The explorative evidence indicates that disempowerment, rather than empowerment, has been the norm in the development of the SCC, albeit with some important exceptions. The evidence stems from contextual assessment of selected SCC decisions and practices, and public reflections thereof, as well as semi-structured interviews (seven in total) conducted with former judges and advisors at the Court shortly before the 2023 Slovak general elections, using publicly available contacts and 'snowball sampling' to reach respondents. The limited number of interviews cannot offer definitive conclusions and should be supplemented by more data collection in the Slovak post-2023 party-political context. Nevertheless, it serves to illustrate the potential of this approach for future studies.

The SCC is a centralized CC with an extensive set of formal powers, inspired by continental Central European social thought.[38] In addition to a posteriori constitutional review of legislation, it may also suspend the effectiveness of impugned provisions during preliminary proceedings. This competence facilitates fast reactions by the Court in situations when the substantive matter is too complex to be decided very promptly, but inaction could cause widespread harm to Slovak constitutionalism whilst the Court would be deliberating on the decision. Moreover, the SCC is entrusted to provide abstract interpretations of constitutional provisions (in case a recognizable dispute submitted by an eligible petitioner reaches it), and has an extensive set of ancillary powers including review of individual complaints on human rights violations.[39] Its 13 judges (deciding in plenum or one of the four senates) are appointed for non-renewable twelve-year terms via collaboration between the parliament and the head of state, whereby initially a three-fifth constitutional majority is needed for the appointment, and only when a consensus cannot be found, the quorum decreases (the head of state may proceed unilaterally if even the decreased quorum does not generate the necessary candidates). The head of state also appoints the SCC President and Vice President. As of 2001, judges may issue separate (concurring and dissenting) opinions, but the votes on majority opinions are not disclosed (except of unanimity), meaning that judges might disagree with the majority opinion without this disagreement becoming public – if they do not issue a separate opinion. The judges are supported by

[37] Michaela Hailbronner, 'Constructing the Global Constitutional Canon: Between Authority and Criticism', University of Toronto Law Journal 69, no. 2 (2019): 248–74, https://doi.org/10.3138/utlj.2018-0024; Sujit Choudhry, Michaela Hailbronner, and Mattias Kumm, 'Introduction', in Global Canons in an Age of Contestation: Debating Foundational Texts of Constitutional Democracy and Human Rights, ed. Sujit Choudhry, Michaela Hailbronner, and Mattias Kumm (Oxford: Oxford University Press, 2024), 1–25.

[38] Zdeněk Kühn, 'Worlds Apart: Western and Central European Judicial Culture at the Onset of the European Enlargement', The American Journal of Comparative Law 52, no. 3 (2004): 531–67, https://doi.org/10.2307/4144478.

[39] Max Steuer, 'Constitutional Court of the Slovak Republic', in Max Planck Encyclopedia of Comparative Constitutional Law, ed. Rainer Grote, Frauke Lachenmann, and Rüdiger Wolfrum (Oxford: Oxford University Press, 2024), https://oxcon.ouplaw.com/view/10.1093/law-mpeccol/law-mpeccol-e803.

an expert staff of internal and external advisors, with senior internal advisors' work at the CC considerably exceeding the length of any twelve-year judicial term.

Opinions are divided on the assessment of the SCC's performance across its various judicial generations, although these have rarely been placed into the terminology of resilience. One tendency is to read the SCC's activity in terms of 'judicial legislation',[40] including due to the historical context of the democratic transition that could be seen to have left 'gaps' in the law.[41] Another is more critical, identifying how the early 'first generation' of SCC judges did not use all the opportunities available to it by the constitutional text to, for instance, address the ills of judicial governance.[42] The following segments provide examples of each of the four forms of empowerment and disempowerment (with emphasis on post-2019 developments associated with the 'fourth generation' of constitutional judges), as a proxy for the SCC's resilience.

2.1 Exogenous Empowerment

While the SCC has been entrusted with considerable powers since 1993, there were several extensions of competences over time, notably the more accessible individual complaints for human rights violations (post-2001) that have enabled more direct interaction with natural persons as petitioners. The transfer of the abstract constitutional interpretation from being a senate to a plenary competence (also since 2001) boosts the significance of this case law and reduces challenges to the interpretive outcome stemming from possible divergences between senates.

Competence extension appears as the main source of exogenous empowerment; there are fewer indications that exogenous empowerment was facilitated by other actors, not least because the Court during its third term (under President Macejková) counted as a divided institution in several of the most visible decisions. A softer form of exogenous empowerment, addressing this perception was the introduction of live-streamed hearings for CC judge candidates, a considerable improvement compared to the earlier secretive and superficial hearing format.[43] Less straightforward, but potential sources of empowerment rest in the increase of the majority needed for the appointment of constitutional judges (initially the legislature needed only a simple majority to begin with for its part of the collaborative appointment model). The higher threshold may also grant higher authority to those judges appointed consensually. Similarly, the requirement of continued deliberation in plenary cases, instead of the case being rejected for procedural reasons in case no majority is found, may be empowering, as precisely decisions where the impugned provisions remained part of the constitutional order because the judges could not find a majority were among those harshly criticized due to the absence of a proper decision on merits (examples are the 'dual citizenship' case or the 'ombudsperson petitioner eligibility' case). Still, it remains in the hands of the Court to use the

[40] Ján Svák and Lucia Berdisová, 'Constitutional Court of the Slovak Republic as Positive Legislator via Application and Interpretation of the Constitution', in Constitutional Courts as Positive Legislators: A Comparative Law Study, ed. Allan R. Brewer-Carías (Cambridge: Cambridge University Press, 2013), 767–69; see also Štiavnický and Steuer, 'The Many Faces of Law-Making by Constitutional Courts with Extensive Review Powers: The Slovak Case' in the segments written by Štiavnický with an 'insider' point of view.

[41] This terminology seems to have proliferated as a result of legal positivism, and now tends to be used with little thinking about the consequences of conceptualizing law as having 'gaps' for law as a concept. See, canonically, Herbert L. A. Hart, The Concept of Law, Third edition (Oxford: Oxford University Press, 2012).

[42] Procházka, Mission Accomplished, e.g. 270–271. This early magnum opus of a prominent, Yale-educated Slovak constitutional lawyer was later accompanied by more restrictive readings of what the SCC can do, which carried the flavour of 'political constitutionalism'. Radoslav Procházka, Ľud a sudcovia v konštitučnej demokracii [The People and Judges in a Constitutional Democracy] (Plzeň: Aleš Čeněk, 2011).

[43] Šimon Drugda, 'Changes to Selection and Appointment of Constitutional Court Judges in Slovakia', Právny Obzor 102, no. Special Issue (2019): 14–33; Max Steuer, 'The Guardians and the Watchdogs: The Framing of Politics, Partisanship and Qualification by Selected Newspapers during the 2018–2019 Slovak Constitutional Court Appointment Process', Právny Obzor 102, no. Special Issue (2019): 34–54.

competence to the benefit of reaching more authoritative decisions as opposed to failures to process petitions when a disagreement is in place.

Another mechanism of exogenous empowerment is petitioners bringing cases to the CC, 'loaded' with arguments that the Court can use to review key constitutional dilemmas. While the SCC has received important prompts from eligible petitioners that gave rise to landmark jurisprudence,[44] several long-term issues pertaining particularly to standards of minority protection and more robust guarantees of democracy have not reached it. For example, the possibly unconstitutional discrimination against minority churches in terms of absence of state funding, and the entire model of state funding of major churches has effectively remained unaddressed. A similar issue is the absence of sufficient standards for gender and sexual equality, where Slovakia ranks among the lowest in the EU member states (a marriage equality petition has reached the Court in April 2024[45]). The reasons for these gaps need further discussion, but the fact that they exist indicates the limits of the SCC's empowerment via the eligible petitioners.

2.2 Exogenous Disempowerment

While exogenous empowerment unfolded mostly via modifications of formal rules, exogenous disempowerment represented a combination of competence curtailments and discursive practices. On the former, the SCC was attempted to be disempowered by the movement of the post-2020 governing coalition, despite this coalition having been constituted as an alternative to Robert Fico's rule, the latter marked by the absence of investigation of high-level corruption and ultimately by a murder of an investigative journalist and his fiancée. The coalition, represented by the minister of justice Mária Kolíková,[46] an otherwise recognized human rights advocate and constitutional expert, used the constitutional majority it held shortly after the elections (and amidst a raging COVID-19 pandemic) to, among others, amend the Slovak Constitution by explicitly prohibiting the SCC to review constitutional amendments (Art. 125 sec. 4, second sentence). This very amendment was also submitted to the Court and the latter retained narrow leeway for exceptions.[47] Nevertheless, the action of the coalition which was supposed to represent a democratic alternative to Fico's approach disempowered the Court because of it subsequently facing a higher barrier from reviewing possible de-democratizing constitutional amendments without triggering backlash with illiberal actors referring to the textual prohibition of review.

In addition, there are avenues for exogenous disempowerment not yet taken, but enabled because of the absence of increased majority requirements for amending the legislation specifying the constitutional competences of the SCC (Act No. 314/2018 Coll. on the Constitutional Court). One example pertains to the type of majority needed for the Court to be eligible to decide. While Art. 131 sec. 1 of the Constitution specifies that decisions in proceedings deliberated upon by the plenum[48]

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[44] Erik Láštic and Max Steuer, 'The Slovak Constitutional Court: The Third Legislator?', in Constitutional Politics and the Judiciary: Decision-Making in Central and Eastern Europe, ed. Kálmán Pócza (London: Routledge, 2018), 184–213.

[45] 'Ústavný súd posúdi ústavnosť častí zákonov o ochrane rodiny aj pre páry rovnakého pohlavia' [The Constitutional Court Will Consider the Constitutionality of Family Acts also for Same-Sex Couples], Aktuality, 2024, https://www.aktuality.sk/clanok/fvzBFJS/ustavny-sud-posudi-ustavnost-casti-zakonov-o-ochrane-rodiny-aj-pre-pary-rovnakeho-pohlavia/. The case was being considered under PL. ÚS 5/2024.

[46] Cf. Peter Čuroš, 'Mária Kolíková Is Leaving', Verfassungsblog (28 September 2022), https://verfassungsblog.de/maria-kolikova-is-leaving/.

[47] Katarína Šipulová and Max Steuer, 'From Minimalism to the Substantive Core and Back: The Slovak Constitutional Court and (the Lack of) Constitutional Identity', in The Jurisprudence of Particularism: National Identity Claims in Central Europe, ed. Kriszta Kovács (Oxford: Hart, 2023), 81–104.

[48] This includes, since 2001, most of the typically high-profile cases, although there are exceptions – notably when a key public figure (for instance, a judge or a prominent businessperson) submits a petition on individual human rights violations, this would be adjudicated by one of the senates. The allocation of the cases to the senates unfolds on a random basis via an electronic system. Still, during the final years of the 'third term' of the Court (2017–2019), some

require a simple majority of the Court (i.e. seven of 13 judges, regardless of how many seats are occupied), there is no constitutional entrenchment of the quorum for the plenum to open deliberations. The latter quorum, while equal to that required for a decision, is only regulated in ordinary legislation. Hence, a statutory change could formally permit the increase of the quorum required for the Court to be able to decide cases, making it more difficult for it to even commence deliberations.[49]

The (formal) competence curtailment regarding constitutional amendment review was supported by the majority of Slovak constitutional law academics, indicating the Slovak academia as a source of disempowerment of the SCC via scholarly discourses.[50] Indeed, Slovak constitutional commentaries and constitutional law textbooks acknowledge the significance of the Constitutional Court,[51] but they also tend to present the latter as a 'negative legislator' only.[52] There is some praise for instances in which the Court has gone beyond such readings – for example, via developing implied powers or protecting constitutional principles including the 'material core' of the Constitution. Yet, one would be hard-pressed to find acknowledgment and appreciation of the Court's capacity to act politically, meaning to protect constitutional values substantively beyond minimal procedural standards. An example comes from a contribution by one of the most prolific Slovak constitutionalists writing primarily for domestic (and Czech, given the language and historical proximity[53]) audience, in a festive scholarly volume issued on the occasion of the 30th anniversary of the Court's operations under the auspices of the Court's President. There, he draws a dichotomy between 'political' and 'judicial' control of constitutionality. One is allegedly based on the 'sovereignty of the people', the other on the 'separation of powers'.[54] By removing judicial review from the purview of the 'sovereignty of the people', this interpretation excludes the possibility of the legitimacy of the SCC's powers to be rooted precisely in the people – which, same as the SCC itself, are identified in the Constitution.

Partisan disregard as a type of exogenous disempowerment materialized in cases of ignoring or overruling CC decisions. This was not a frequent occurrence, but not altogether absent either – the National Council overruled the decision of the 'second Court' in 2006 that constrained its powers to create investigative committees, by enshrining the competence to establish a committee scrutinizing the decisions of the National Security Authority to an ad hoc constitutional act.[55] At the same time, there is also a difficulty to scrutinize the implementation of the SCC's decisions because, after a

cases adjudicated by the senates with a majority of judges considered to be more supportive of the executive in power at that time followed predictable outcomes favoring that executive.

[49] For a book-length treatment of this issue, see Mauro Arturo Rivera León, Supermajorities in Constitutional Courts (London: Routledge, 2024), https://doi.org/10.4324/9781003458272. This is a threat particularly during the time when many seats are unoccupied, as there is a mechanism for addressing extended, unexcused absences of judges from the bench.

[50] Marek Káčer, 'Judicial Self-Restraint and the Super-Repealing Power of the Constitutional Court of the Slovak Republic', Právny Obzor 102, no. Special Issue (2019): 3–13.

[51] E.g. Ladislav Orosz and Ján Svák, eds., Ústava Slovenskej republiky – Zväzok II [The Constitution of the Slovak Republic – Volume II.] (Bratislava: Wolters Kluwer, 2022), 362–77.

[52] E.g. Daniel Krošlák, ed., Ústavné právo [Constitutional Law] (Bratislava: Wolters Kluwer, 2016), 554–555 (contribution by Lucia Berdisová).

[53] Including the short history of the interwar Czechoslovak Constitutional Court and of the post-1989 Constitutional Court of the Czech and Slovak Federal Republic. See, e.g. Francesco Biagi, European Constitutional Courts and Transitions to Democracy (Cambridge: Cambridge University Press, 2019), 18–22; David Kosař and Ladislav Vyhnánek, 'The Constitutional Court of Czechia', in The Max Planck Handbooks in European Public Law: Volume III: Constitutional Adjudication: Institutions, ed. Armin von Bogdandy, Peter Huber, and Christoph Grabenwarter (Oxford: Oxford University Press, 2020), 126–28.

[54] Ivan Fiačan, Peter Kerecman, and Ján Štiavnický, eds., Ústavný súd Slovenskej republiky (1993– 2023): Ústavné súdnictvo v premenách času [The Constitutional Court of the Slovak Republic (1993– 2023): Constitutional Judiciary Transformed in Time] (Košice: Constitutional Court of the Slovak Republic, 2023), 15–16 (chapter by Ladislav Orosz: Zrod moderného ústavného súdnictva [The Birth of Modern Constitutional Judiciary], 15–26).

declaration of unconstitutionality, the unconstitutional provisions lose "only" their effectiveness, after which the National Council has six months to address the issue via legislating, before the provisions in question lose their validity. This means that considerable interpretive work follows after the decision is issued. More scrutiny is required towards this stage of the process.

Exogenous disempowerment by partisan elites appears to be on the rise since the 2023 elections. A notable example is PM Fico calling on the SCC President Ivan Fiačan to resign and urging the new head of state to recall him, if he does not resign voluntarily.[56] While this was uttered in the context of a leak of information about a key verdict before the official publication, the criticism was clearly disproportionate due to the time difference between the unofficial and official announcement amounting to hours, and the President promptly convening an investigative committee to address the leak.[57] The leak rather appears to serve as a cover for Fico to question Fiačan's position, which he had himself wished to obtain once, when he unsuccessfully ran for a CC judge position. Back then, Fico had the ambition to become the SCC President, but Fiačan was ultimately entrusted with the role. In early 2024, Fico also accused the SCC to be coordinating with the outgoing head of state Zuzana Čaputová, whom he saw as his opponent. While the former PM Mečiar known for autocratizing Slovakia's regime in the 1990s has also uttered harsh critiques of the Court, they were not as personalized and not accompanied with a threat such as that of Fico towards President Fiačan.

An additional example of exogenous disempowerment is the vacillation over the appointment of a CC judge for a vacant position since autumn 2023.[58] The parliament, led by the post-2024 head of state Peter Pellegrini before he had won the presidential elections, kept postponing the public hearings for the candidates, and subsequently the vote. Simultaneously to keeping the bench short of one of the judges, President Pellegrini who used to lead one of the governing parties of the illiberal coalition, voiced ideas for increasing the overall number of judges, arguing that the Court is understaffed, without too much concern for the apparent contradiction between this assessment and the prolonged vacancy of one seat.[59] Such delays are no novelty in the Slovak constitutional system, with 'appointment crises' of a larger scale having occurred before the start of the third (2007) and the fourth (2019–2020) terms of the Court.

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[55] 254/2006 Coll. In 2022, an amendment (168/2022 Coll.) reinforced the competence of judicial review of the supervisory decisions of the National Council. https://www.slov-lex.sk/pravne-predpisy/SK/ZZ/2006/254/.

[56] See, e.g., Marek Biró, 'Ústavný súd reaguje na Roberta Fica. S nikým nekomunikujeme, hovoria sudcovia' [Constitutional Court Reacts to Robert Fico: We Do Not Communitate with Anyone, Judges Say], Aktuality.sk, 2024, https://www.aktuality.sk/clanok/texx246/ustavny-sud-reaguje-na-roberta-fica-s-nikym-nekomunikujeme-hovoria-sudcovia/ (this includes a reaction by the SCC). Milder threats were also voiced by then presidential candidate Pellegrini, claiming that he would call Fiačan to the presidential palace to inquire about the leak. Andrea Franková, 'Peter Pellegrini: Ak by som bol dnes prezidentom, predsedu Ústavného súdu by som si zavolal do paláca' [Pellegrini: If I Were President, I Would Call the SCC President], Správy RTVS, 2024, https://spravy.rtvs.sk/2024/03/peter-pellegrini-ak-by-som-bol-dnes-prezidentom-predsedu-ustavneho-sudu-by-som-si-zavolal-do-palaca/.

[57] Max Steuer, 'Slovakia Risks Heading Back to the Nineties', The Loop (19 March 2024), https://theloop.ecpr.eu/back-to-the-nineties/. The investigation concluded on 13 June 2024 without identifying a clear culprit but with announcing several steps to prevent a similar situation from occurring again. A detailed press release is available at https://www.ustavnysud.sk/documents/20121/8101214/TS_26_2024_%C3%BAnik+inform%C3%A1ci%C3%AD_.doc.pdf/b4d0a7e8-9e40-8fe5-1b48-8b2ff8e35b88?t=1718273850479.

[58] Kamil Baraník, Marek Domin, and Tomáš Ľalík, 'Slovakia', in The 2023 Global Review of Constitutional Law, ed. Richard Albert et al. (Austin: The University of Texas at Austin, 2024), 347.

[59] Veronika Prušová, Mária Benedikovičová, 'Voľba ústavného sudcu sa odkladá. Čaká sa na prezidenta Pellegriniho' [Constitutional Court Judge Election Postponed, Waiting for President Pellegrini], Denník N, 2024, https://dennikn.sk/3967616/volba-ustavneho-sudcu-sa-odklada-caka-sa-na-prezidenta-pellegriniho/. As of the end of 2025, the seat still remains vacant, as the coalition did not support either of the candidates during the repeated voting attempts. There were rumors that the seat is kept for Robert Fico, should he choose to leave partisan politics. Ivan Štulajter, 'Fico do talára' [Fico into the Robe], Denník N, 2025, https://dennikn.sk/4962086/fico-do-talara/.

2.3 Endogenous Empowerment

The exogenous mechanisms of empowerment and especially disempowerment have already hinted at the importance of discourses about the SCC. This is amplified when examining both the ways in which the SCC empowered and disempowered itself over time. The SCC has advocated for its capacity to protect constitutional rights beyond a narrow formalist reading, as prominently manifested in the Court processing individual human rights petitions during a transitional period in 2001 before a larger reform of the Court's competences. At that time, due to a procedural flaw in the adopted legislation, the Court lost the previous basis for doing so in the constitutional text and the new one has not yet entered into effect.[60] Similarly, the Court has presented itself as a guardian of some fundamental (particularly 'first-generation') rights, such as freedom of expression of journalists vis-à-vis partisan elites.

Beyond the (within-case) constitutional reasoning, the Court has advanced its public communication, e.g. by engaging with law schools (e.g. via essay competitions and internships)[61] and by allowing individual judges who acted as judge rapporteurs or otherwise had a distinct perspective on a case to speak to the media.[62] Moreover, it has been attempting to present the thrust of key decisions in a more accessible manner via online channels. Similarly self-empowering have been the appearances of President Fiačan in the National Council (parliament), where he delivered speeches advocating for a prompt filling of the vacant seat at the Court and voiced concerns vis-à-vis a 2020 bill prohibiting the Court to review the constitutionality of constitutional amendments. He also held several public press conferences explaining the reasoning in key decisions.[63] This shift is also recorded by some staff members within the Court who are critical towards President Macejková's tenure at the Court, and is at times attributed to a considerable extent to Fiačan's self-understanding of his SCC presidency, rather than the Court as a whole.[64] In turn, such indications point to a degree of healthy personalization of the Court.

2.4 Endogenous Disempowerment

Despite some signs of the SCC's awareness of its key position in the political regime, there are trends of it searching for reasons why it cannot act. Even though President Fiačan's choices to defend the Court via parliamentary speeches in pivotal moments may be empowering, the way he at times refers to the Court's dependence on other partisan actors may have the opposite effect. Some scholars consider these as expressions of judicial avoidance,[65] whereby rhetoric might differ from the actual decision in key cases (Tew's 'mini-maximalist' strategy[66]). Yet, in Fiačan's case, as well as

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[60] This example is often invoked by former judges who sat on the bench during that period, as interviews with some of them have demonstrated (R23/1, R23/2).

[61] For example, Constitutional Court of the Slovak Republic, 'Deň otvorených dverí – minulé ročníky', 2024, https://www.ustavnysud.sk/informacie-pre-verejnost-a-media/den-otvorenych-dveri/minule-rocniky [Open Day of the Constitutional Court—history of past events].

[62] The latter was not possible during Macejková's (Fiačan's predecessor's) presidency via an internal decision of the plenum of the Court, advocated most vocally by Macejková herself. See e.g. Judicial Council of the Slovak Republic, 'Zápisnica zo 7. zasadnutia Súdnej rady Slovenskej republiky', 2019, https://zasadnutia.sudnarada.sk/data/att/5597.pdf, 9 (report on the hearing of I. Macejková for the position of the Chairperson of the Slovak Supreme Court).

[63] This was to some extent practiced already by the first SCC President in the 1990s, who, however, was typically alone in such explanations, without inviting other judges (e.g. the judge rapporteur) to contribute as well. Moreover, the 1990s offered fewer options for the SCC to reach the public, given the governmental control of the public television and the absence of direct channels such as social media and developed websites.

[64] R23/3, R23/5.

[65] Erin F. Delaney, 'Analyzing Avoidance: Judicial Strategy in Comparative Perspective', Duke Law Journal 66, no. 1 (2016): 1–68.

[66] Tew, 'Strategic Judicial Empowerment', 177: 'A mini-maximalist approach involves reasoning that seeks to downplay the expansion of the judiciary's power, typically justifying the decision as orthodox legal doctrine or employing formalistic interpretation.' See also 219–22.

judging by the interviewees' responses,[67] this is rather an honest belief in the Court's constraints than an attempt to make the partisan actors, (particularly those with potential ambitions to subjugate the Court) 'let their guard down', and then exploit this carelessness for the sake of upholding constitutional principles.

Several cases in which the SCC failed to seize the hopes and trust placed into it by the petitioners can be identified. While the 'first generation' of the Court, which struggled with Mečiar's semi-authoritarianism, is not exempt from this trend, such cases are more visible as of the 'third generation', during President Macejková's tenure. For example, by postponing the declaration of unconstitutionality of the expropriation of private property due to highway construction – a measure enacted by PM Fico's first (2006–2010) cabinet – for until after the elections of 2010, the Court shed doubts on its capacity to challenge the incumbent executive. The judges delivered the verdict only after the defeat of Fico in the 2010 elections, despite this amounting to an excessive length of the decision-making. The Court also made itself vulnerable to accusations of inconsistency[68] when it declared that the head of state has no discretion in refusing all proposed nominees for constitutional judges when, several years prior, it had identified such a discretion in case of appointing a similar constitutional official ('attorney general case'),[69] without distinguishing the two appointment procedures persuasively. The perception of an empowered, self-confident CC was also hampered by the fact that the former case was decided to the satisfaction of Robert Fico's ally in the presidential palace at a time when the coalition was plunged into instability and Fico's preferences were rising, ultimately allowing him to form a single-party government after the 2012 elections. In contrast, the latter (constitutional judge appointment) case complicated the actions of Fico's opponent, the new head of state (Andrej Kiska) during the former's single-party cabinet (2012–2016).

A post-2023 example of endogenous disempowerment is the decision on the so-called 'Competence Act' (PL. ÚS 1/2024) in early 2024. This amendment removed the competence from the head of state to appoint, and allow for prompt replacement of several state institutions' directors – the Statistical Office and the Health Care Surveillance Authority (a pattern followed later with the director of the public broadcasting service as well).[70] While accepting the President's petition to be reviewed on the merits, the SCC did not suspend the effectiveness of the changes, meaning that the replacement of the directors became a fait accompli. Importantly, the Court delivered this preliminary review a day after the respective provisions entered into effect (the petition was submitted on January 30). It argued that, even substantially, the conditions for suspending the effectiveness of the provisions were not present due to the 'principle of democracy' and 'respect towards the legislature (considering the constitutional principle of the separation of powers)' (sec. 17) being on the competing side of the scales to legal certainty (of the dismissed office holders). It also added that, because the changes entered into effect on 6 February, one day before the Court rendered its decision (7 February), the suspension of effectiveness 'would not be eligible to offer preliminary protection as per the form and effects demanded by the petitioner' (sec. 18). 'Against the threat presented by the petitioner in requesting the suspension of effectiveness, the CC is not competent to offer protection already because of objective reasons outside its dispositional scope' (sec. 22). Such reasoning promises that, if the government is fast enough to effectuate legislative changes in the future, the CC decision might come too late to make a difference to the effects of the changes.[71]

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[67] R23/4, R23/7.

[68] Láštic and Steuer, 'The Slovak Constitutional Court: The Third Legislator?', 201–4.

[69] PL. ÚS 4/2012.

[70] At that time, there was a likelihood that the opposition candidate would prevail in the presidential elections.

[71] This applies even though such decisions might still be important from the perspective of 'constitutional memory', as argued, for instance, by Renáta Uitz, 'Constitutional Practices in Times "After Liberty"', in Routledge Handbook of Illiberalism, ed. András Sajó, Renáta Uitz, and Stephen Holmes (London: Routledge, 2021), 442–65.

Beyond the decision making practice, a curious example of self-disempowering practices is that the abovementioned volume celebrating the Court's 30th anniversary has not only remained available in printed form only, but was not even put to sale; consequently, it became something akin to a precious coin or painting, with limited number of copies which were not reachable in most libraries either.[72] This practice of granting access to only a few 'chosen ones' is at odds with the contemporary standards of public access to scholarly materials intended for collective learning and societal growth.[73] At times such closeness and 'elitist' sentiment might be part of a strategy: the judicial body wishes to be perceived in a domain of 'non-political expertise',[74] instead of the more recent and fashionable concern for public opinion.[75] Further research is needed to comprehensively map such 'softer' examples of endogenous (dis)empowerment.

2.5 The Court at the Start of Slovakia's Post-2023 De-Democratization

'The courts may well rely upon the jurisdictional screen and rules of toleration to avoid killing the law of the insular communities that dot our normative landscape. But, they cannot avoid responsibility for applying or refusing to apply power to fulfill a redemptionist vision.'[76]

Robert Cover's above plea for judicial responsibility shows concern about the violence courts may commit through their practice. In this light, Cover's position might appear to have supported the SCC's 2024 highly-watched decision endorsing the constitutionality of the illiberal executive's attempt to reform the criminal justice system (PL. ÚS 3/2024), as the reform was hailed as implementing restorative justice including by reducing sentencing lengths and statutes of limitation. Yet, the same reform was marred with procedural issues and the absence of a substantive justification – the latter not least due to the changes having been pushed through via an accelerated legislative proceeding in the parliament that restricted the timing for the MPs' debates.[77] Moreover, the beneficiaries of the changes included high-level officials or businesspersons who faced charges of corruption, with concerns over the recidivism of those let out of prison due to the absence of effective restorative (including educational) mechanisms provided by the state.

The Court's first 'stress test' in the case was the preliminary proceeding, where it allowed the abolishment of the Office of the Special Prosecution created in response to long-term failures to prosecute elite corruption. Invoking 'self-restraint' in this respect, the Court nevertheless suspended the effectiveness of provisions that would have reduced the statute of limitations for several crimes including for rape.[78] However, in the final decision, it endorsed the constitutionality of the effectiveness of all but minor segments of the reform. Even if it was not 'killing the law' in Cover's terms, the SCC helped powerful elites in various stages of proceedings for corruption-related crimes and encouraged justificatory impunity in the majority violating the rules for legislative proceedings.

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[72] Fiačan, Kerecman, and Štiavnický, Ústavný súd Slovenskej republiky (1993–2023): Ústavné súdnictvo v premenách času [The Constitutional Court of the Slovak Republic (1993–2023): Constitutional Judiciary Transformed in Time].

[73] Similarly, the major conference organized by the Constitutional Court annually, together with one of the Slovak law faculties ('Constitution Days'), is by invitation only, with some successful applicants via a competitive call only allowed to submit manuscripts to be published in a proceeding, but not to present them at the conference by default. Effectively, the conference is typically reserved for a small group of Slovak constitutional lawyers, with occasional guests from other countries. https://www.ustavnysud.sk/ustavny_sud/ustavne_dni.

[74] Or Bassok, 'The Arendtian Dread: Courts with Power', Ratio Juris 30, no. 4 (2017): 417–32, https://doi.org/10.1111/raju.12186.

[75] Brandon L. Bartels, 'Courts and Public Opinion: A Critical Review', in Handbook on Politics and Public Opinion, ed. Thomas Rudolph (Cheltenham: Edward Elgar, 2022), 383–98.

[76] 'Foreword: Nomos and Narrative (The Supreme Court, 1982 Term)', Harvard Law Review 97, no. 1 (1983): 60, https://doi.org/10.2307/1340787.

[77] Max Steuer, 'Revenge in the Big Village: Slovakia's Illiberalization and the Perils of Isolated Doctrine', Verfassungsblog (6 September 2024), https://verfassungsblog.de/revenge-in-the-big-village/.

[78] Max Steuer, 'Emancipation or Silencing? The Slovak Constitutional Court Will Decide', IACL-IADC Blog (9 April 2024), https://blog-iacl-aidc.org/2024-posts/2024/4/9/emancipation-or-silencing-the-slovak-constitutional-court-will-decide.

The subsequent[79] cases may mark a critical juncture and show whether the Court is ready to stand up not only for those – often elites – presented as vulnerable by the governing coalition to a 'witch hunt' for corruption cases, but also to those targeted by the coalition (including media, NGOs, civil society, or sexual or religious minorities). The 2024 'criminal justice system' case is consequential for studying the SCC's (dis)empowerment for another reason. For the first time in the Court's history, an amicus curiae brief by over a hundred members of the legal professions that subsequently gained hundreds of additional signatures was submitted to the Court. The brief of more than twenty pages critically engaged with the disputed changes and was initiated by practicing lawyers, members of the bar, with some support from other legal professions.[80] The brief heralds a degree of recognition of the Court's significance as well as engagement of other epistemic communities with it, a practice with limited traditions in Slovakia. At the same time, the brief signals the attentiveness towards the Court by these communities, and the attribution of significance thereto for further societal development in Slovakia. While the brief was largely disregarded in the Court's ultimate decision, it may be an early sign of the Court becoming an object of the 'democratic panopticon',[81] whereby both interventions into its independent operation and failures of it living up to the standards set by the Constitution are being watched and critiqued. The practice may open empowerment via a combination of 'court outsiders' and 'court insiders'. Yet, the former can go only up to a point; the CC is not going to be an object of resisting de-democratization if it does not become the subject participating, and at times even taking a leading role in, the resistance. In other words, it has to avoid self-marginalization and belittling of its capacities[82] by enumerating all that it allegedly "cannot" do.

Conclusion

This article has introduced a typology of CC (self-)empowerment and (self-dis)empowerment and offered an explorative presentation of examples of each type in the Slovak case. The typology, based on a broader, integrative concept of politics underscores the significance of institutional development for CC resilience, driven by actors both within and outside the CCs' institutional spaces. In turn, the addition of (dis)empowerment as a procedural concept – not dissociated from the recognition of the CCs' and their judges' values and significance as subjects – underscores the significance of responsibility not only of the broader political community, but also of the CC itself for its resilience that may influence its capacity to resist de-democratization. As for the SCC at the beginning of 2025, given that most seats of judges are occupied well beyond the electoral term, the coalition could significantly undermine the autonomy of the Court only by violating the Constitution outright, or with part of the opposition parties supporting amendments to the Constitution curbing the Court. Even then, the 'unconstitutional constitutional amendment' doctrine remains at the disposal of the Court for grievous assaults. In such circumstances, where exogenous factors are largely supportive of the CC's empowerment, the role of endogenous (dis)empowerment is crucial for determining its resilience. Ultimately, this article prompts further research on at least two larger puzzles:

[79] Already in 2024, the Court received a petition on the act on public broadcasting, which questions the independence of the Slovak public television and radio, and on selected changes that undermine the legal framework of environmental protection in Slovakia.

[80] 'Odborné stanovisko k zmene Trestného zákona' [Expert Statement to the Changes of the Criminal Code], Denník N, 2024, https://dennikn.sk/minuta/4031221/.

[81] Kalypso Nicolaïdis, 'The Democratic Panopticon' (6 July 2021), https://www.noemamag.com/the-democratic-panopticon.

[82] Which does not mean that it necessarily needs to avoid a 'legalistic' rhetoric that is not selective in invoking constitutional principles. See András Sajó, 'Militant Rule of Law and Not-so-Bad Law', Hague Journal on the Rule of Law 16, no. 3 (2024): 525–49, https://doi.org/10.1007/s40803-024-00221-8.

1. how does the discourse about CCs (encompassing supreme courts in jurisdictions with non-centralized constitutional review) constrain or facilitate their resistance vis-à-vis regime de-democratization;[83]and

2. what makes some constitutional courts become globally more visible as opposed to others which remain at the margin of attention.

The first puzzle is important because of the implications the understanding of discourses about CCs yields for calling for particular choices to be made by epistemic communities when crafting their narratives about the CCs. The second puzzle is of primarily introspective importance, as it can point to scholarly blind spots and ways how global quality scholarly 'knowledge production' disproportionately focuses on some cases as opposed to others.[84] This article could only outline the agenda for scrutinizing these puzzles, rather than address them. Yet, scholars should take up the responsibility of scrutinizing their own influences on adjudicative practice, especially if some of these influences may be detrimental to the capacity of that practice to foster (democratic) resilience of political institutions.

[83] A 2024—2026 project explores this question in relation to the 'Visegrad Four' jurisdictions: Harvesting Judicial Reservoirs of Resilience to Autocratization for Rebuilding Democracy in the Visegrad Four (HARVEST), https://fphil.uniba.sk/en/harvest/.

[84] Slovakia benefits from EU membership and hence inclusion in collections covering developments in each EU member state. For example, Stefan Griller, Lina Papadopoulou, and Roman Puff, eds., National Constitutions and EU Integration (Oxford: Hart Publishing, 2022). However, the attention to the Slovak case has been low relatively to what one might expect given the privileged attention to EU member states. It might be just too late to subject political developments in small democracies to broader international scrutiny only when de-democratization already unfolds.

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Appendix

The interviews were conducted within a 2022—2023 SYLFF Research Grant which received ethics clearance from the Ethics Board of the Comenius University in Bratislava, Faculty of Arts (ER/23/2022). Only interviews where the respondents agreed to sign the interview consent form (at least in a variant guaranteeing anonymization and no recording) are included.

- R23/1 Former Judge of the SCC, 6.7.2023, in person, recorded.
- R23/2 Former Judge of the SCC, 6.7.2023, in person, recorded.
- R23/3 Advisor at the SCC, 6.7.2023, in person, recorded.
- R23/4 Advisor at the SCC, 6.7.2023, in person, recorded.
- R23/5 Advisor at the SCC, 6.7.2023, in person, not recorded.
- R23/6 Former Judge of the SCC, 12.7.2023, in person, recorded.
- R23/7 Advisor at the SCC, 18.7.2023, online, recorded.

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