THE CONSTITUTIONAL COURT OF THE SLOVAK REPUBLIC DURING THE EMERGENCIES

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Abstract
Most constitutional systems count with the eventualities of unexpected circumstances threatening the constitutional order. These constitutions allow a constitutional regime’s partial or complete transformation into a constitutional emergency. Before 2020, Slovakia had almost no experience with such situations. The paper aspires to unveil a line of Slovak emergency constitutional considerations through the lenses of the Constitutional Court of the Slovak Republic. For that reason, the article critically analyses the methodological approach of the Slovak Constitutional Court towards the declaration of emergencies. The COVID pandemic brought the first opportunity to the Constitutional Court to review the unilateral power of the government to declare one of the constitutional emergencies, namely the state of crisis. The Constitutional Court did not opt for an active intervention with the governmental powers. Interestingly, it intervened assertively with the power to fight the pandemic when the state of crisis was over. The paper argues that the results of this recent constitutional experience remain methodologically unpersuasive and do not represent a helpful guide for the future.

Keywords
Emergency, Proportionality, Constitutional Court of the Slovak Republic, Human Rights Limitations

I. Introduction
Traditionally, a written constitution represents the fundamental legal bedrock of a respective society. Each constitution should stipulate, at least, the basic rules for the separation of powers and regulate the relationship between the state and an individual in the form of fundamental human rights. Around 90% of modern constitutions explicitly recognise that these essential constitutional prerequisites could be curtailed during the unexpected circumstances threatening the constitutional order (Bjørnskov, Voigt, 2018, p. 101). These situations, known as “state of exceptions” or simply emergencies, authorise resorting to

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measures known as the emergency powers (Albert, Roznai, 2020, p. 2). The emergency provisions loosen some limitations emanating from conventional constitutional rules to address significant challenges posed to the constitutional system. The primary purpose of emergency powers is to temporarily deal with critical situations and restore the traditional operation of the constitutional system (Ferejohn, Pasquino, 2004, 210).

Consequently, the conventional constitutional standards of the “state of normalcy” can be temporarily substituted with discretionary powers to fight serious challenges effectively during emergencies. These extraordinary powers have been habitually, but not exclusively (Dyzenhaus, 2012, p. 442), at the disposal of the executive branch that operates more flexibly than other branches of the government and, thus, can eliminate the threats to the constitutional system more effectively (Scheppele, 2008, p. 174). There are numerous variations in how the constitution allows responding to exceptional situations (Kuo, 2020, p. 22).

The COVID pandemic has affected the entire world since late 2019. It revealed that global society was unprepared to confront the practical challenges caused by the deadly and rapidly spreading virus. Public health protection became the most pressing issue that standard constitutional measures could not solve effectively. Therefore, the constitutional systems worldwide started to activate their often-untested emergency clauses to curb the adverse impacts of the pandemic.

This article focuses on the emergency case law of the Constitutional Court of the Slovak Republic (“SCC”). First, it sketches out the Slovak constitutional framework, focusing mainly on the state of crisis relevant to the COVID pandemic. Second, it critically assesses the central SCC’s pandemic decisions. The paper concludes with suggestions for the future line of the SCC’s argumentation.

II. The Constitutional Framework of the State of Crisis

Slovakia has not had a long history of constitutional recognition of emergencies. In 2001, the National Council of the Slovak Republic (“the parliament” or “the National Council”), acting as a constitutional-making body, approved a constitutional framework of emergencies for the first time. The Constitutional Statute no 90/2001 Coll., the most comprehensive constitutional amendment in Slovak history, establishing a legal framework for the Slovak EU accession, among other things, introduced the concept of emergency into the Slovak constitutional parlance. This amendment also added two new constitutional provisions, Art. 51 para. 2 and Art. 102 para. 3, anticipating a specialised constitutional statute on emergencies. On this constitutional footing, the National Council adopted The Constitutional Statute on the State Emergency of 2002 (“the CSSE”).

The CSSE recognises four types of state of emergency, i.e., (1) the state of crisis, (2) the exceptional state, (3) the state of war, (4) the war. The CSSE allows the executive branch to

\[^2^\] “The conditions and extent of the restriction of fundamental rights and freedoms and the scope of obligations in times of war, state of war, exceptional state and state of crisis shall be established by constitutional law.”

\[^3^\] “The conditions for declaring war, declaring a state of war, declaring an exceptional state, declaring a state of crisis and the manner of exercising public power in time of war, state of war, exceptional state shall be established by constitutional law.”
derogate from explicitly enumerated human rights and impose specific duties on everyone during emergencies within the Slovak territory. The scale of human rights limitations varies according to the type of declared emergency. Apart from the explicit CSSE provisions, various (ordinary) statutes acknowledge the different legal settings applied during emergencies. For example, the Criminal Code elevates the potential charges for some crimes committed in connection to the emergency (e.g., when someone would damage or steal the tools for fighting the emergency, the punishment would be more severe than in a similar situation during the non-emergency). Therefore, emergencies are significant constitutional deviations contributing to the public response to the constitutional crisis.

Since the Slovak constitutional system adopted the legal framework of emergencies, the only occasion when the government invoked the CSSE before the COVID pandemic was in 2011. At that time, the government declared a state of crisis on November 28, 2011. The governmental decree sought to preserve operational healthcare protection and restrict the right to strike in 16 hospitals after the collective dismissal of hundreds of physicians dissatisfied with their salaries. The central rationale of this emergency was to prevent the looming strike of the physicians during the negotiations of their salaries. The government fabricated an emergency against the possible physicians’ blackmail. Thus, no external threat to the constitutional system in 2011 was the source for this emergency. It was utilised to preserve the standard functioning of the health service.

Due to the lack of application, the CSSE was amended only marginally since 2002. Therefore, it did not provide a flexible model for dealing with severe epidemiological emergencies when the COVID pandemic hit Slovakia in early 2020. COVID brought many challenges that the CSSE was never meant to address.

The most relevant type of state of emergency applicable for the COVID situation was the least severe, i.e., the state of crisis. The fight against the pandemic was one of the explicit reasons for declaring the state of crisis in the CSSE. The pertinent provision states that the government may declare a state of crisis only when there is an imminent threat to human life and health, including cases of a pandemic, the environmental danger, or a threat of significant material expenditure due to a natural disaster, catastrophe, industrial, traffic or other operational accident. A state of crisis can only be declared in the affected or the imminent territory.

First, the state of crisis counted with the sole responsibility of the government for its operation. The declaration of all other forms of emergencies requires collaboration between institutional bodies. The president can only declare the exceptional state and the state of war based on the government’s previous decisions. The president also declares war when the 3/5 majority of the MPs adopt such a resolution in the parliament. Moreover, the CSSA specifies mandatory reasons for which the war can be declared. Second, the government could declare a state of crisis for the full 90 days while it could be effective exclusively within the affected or imminently endangered territory. Third, since the CSSE identifies the narrowest set of limitations or derogations from enumerated fundamental rights and freedoms, compared to all other emergencies, the state of crisis presents the least pervasive emergency delegation of powers towards the executive branch.
At first sight, it seems that the CSSE allocates the state of crisis within the exclusive governmental purview as there is no requirement of institutional cooperation. However, a critical check on this governmental power is embedded in the Art. 129 para. 6 of the Constitution. This provision empowers the SCC to review not only the declarations of the state of crisis but also all ensuing governmental decisions tied to the declaration of the state of crisis. The checks and balances argument is undoubtedly at the heart of this SCC’s oversight. The referential framework of such a review is the entire Slovak constitutional order (i.e., the Constitution and the constitutional statutes). The provision, however, does not indicate further details of the constitutional review (e.g., it does not specify whether such examination should be procedural or substantive). It is possible to imagine that the SCC’s interpretation of the provision could lead to an extensive SCC overview of the governmental emergency powers.

The SCC’s power to review the declaration of the state of crisis and all ensuing acts is loosely constructed even in following statutory provisions (§ 189–197 of the Act on the Constitutional Court of the Slovak Republic no 314/2018 Coll.). The review can be triggered uniquely by the group of at least 30 MPs, the General Prosecutor, the government, and the President within enormously stringent deadlines. It is possible to challenge such a declaration within just five days. Subsequently, the SCC has only ten days to decide on this matter.

Before the first activation of this type of judicial review, the academic discussion considered several explicit and implicit prerequisites for the constitutionally coherent declaration of the state of crisis. The textual precondition of the necessary extent was possibly the most intriguing. It was likely related to the list of derogations from the enumerated human rights and freedoms linked with the rational decision-making requirement that usually involves an appropriate justification of any governmental intrusion into the sphere of fundamental rights and freedoms. Therefore, it seemed that the human rights derogation was connected to the proportionality analysis. Under that, any limitation of a fundamental right cannot be legal unless it is authorised by law (the legality principle). Furthermore, the rule must also be proportionate, i.e., first, it must pursue a legitimate aim (the proper purpose component). Second, the statutory legislation allowing such limitation must be appropriately linked to this legitimate aim (the rational connection component). Third, the limits must be narrowly connected with the aimed purpose (the necessity component). Fourth, the adverse outcomes of the limitation should not disproportionately outweigh its positives (the balancing component) (Barak, 2012). These requirements could be translated into the request for restriction of fundamental rights only when necessary. The government should not use the state of emergency as a cloak behind which it would hide the abuse of its powers.

The next part will address how the SCC dealt with the first two challenges raised against the state of emergency in practice.
III. Two Constitutional Challenges of the State of Crisis

The SCC had never tested its power under Article 129 para. 6 before late 2020. The declaration of the state of crisis in 2011 and the first declaration of the state of crises connected to the COVID pandemic in early 2020 were not questioned. For the first time, the SCC reviewed the declaration of the state of crisis in PL. ÚS 22/2020 delivered on October 14, 2020.

On September 30, 2020, the government initially declared the state of a crisis for 45 days (effective since October 1). The declaration was highly vague. It did not specify which human rights the government intended to limit nor stated its geographical scope (i.e., the affected or the imminent territory required by the CSSE). It seemed that the government intended to declare the state of crisis preventively without a specific plan on how to utilise its extended powers to fight the pandemic surge. The declaration was not supported by any further documents and was just one page long (approximately 200 words).

The acting General Prosecutor and the group of MPs questioned the declaration on the grounds of its vagueness. They argued that the decree lacked clarity as it did not specify the reasons for its declaration. The declaration also did not mention which human rights it intended to limit. Further, despite the explicit constitutional prerequisite, it did not specify its geographic scope. Finally, even though the government issued a subsequent decision based on the statutory regulation on the economic mobilisation, this did not satisfy the petitioners. They claimed that the government produced several disproportional effects by creating divergent regulatory regimes (statutory and constitutional) for the same territory or sectors of the economy.

In the decision, the SCC recognised that the declaration of the state of crisis automatically triggered several changes within the Slovak legal system (e.g., some provisions dealing with public procurement and electronic communication are activated only during a state of crisis). Naturally, the most critical effect of the state of crisis has been the power of the government to impose specified obligations and limit enumerated human rights. The SCC declared that it “remains suspicious when reviewing all governmental declarations on the state of crisis”.

After this opening, however, the SCC retreated and granted a wide-ranging margin of discretion to the government. It stated that “the government (as the supreme executive body with extensive competencies) is in a better position to evaluate relevant circumstances and it is democratically accountable for this assessment and the consequences of its (positive but also influential) decision on whether to declare a state of crisis. The role of the Court in this proceeding is to assess the factual grounds and make sure that manifest overreaction of the government did not occur. The Court does not assess how optimally a state of crisis should be defined by the government, except intervention against a disproportiate scope of the government’s restriction of fundamental rights and imposing obligations.”

The argument “of being in a better position to assess the severity of the situation” was the leitmotif of the entire decision. The SCC deduced the rationality of the declaration from a few problematic extra-legal positions (e.g., the undisclosed recorded meeting of the government). It stated that the government measure would have been more persuasive had the government provided it with more justifications. That would have allowed for
a more detailed review. In the meantime, the government issued another decree, in which it specified that the territorial scope of the decree concerned the entire territory of the country. However, the SCC criticised that the government could include territoriality in the first decree. The SCC also accepted the lack of clarity of the decree as it declared that the CSSE does not require the enlistment of the human rights limitations when declaring the state of crisis. According to the SCC, the government could include these specificities in the ensuing decrees. Ultimately, the SCC dismissed both petitions and held the decree constitutional.

This state of crisis, effective since the beginning of October 2020, was eventually extended to its total duration of 90 days. This maximum period allowed in the CSSE would expire on December 30. At that point, the fight with the pandemic was far from over. To enable the government to operate effectively for a lengthier period, the National Council amended the CSSE. The amendment allowed the government to extend the state of crisis by additional 40 days unilaterally. There was no limit on how many times such extension could be repeated. In theory, the government could hold a state of crisis infinitely. However, the amendment integrated the National Council in the process as it must approve every governmental extension within 20 days. This subtle modification allowed the parliament to serve as an ex-post institutional check against the governmental mismanagement of such extensions. If the parliament fails to approve such an extension, the state of crisis expires immediately. Despite the parliament’s approval, the SCC can still review all the state of crisis prolongations under Art. 129 para 6 of the Constitution. Bearing in mind the development of the COVID pandemic, the amendment added further possible limitations of fundamental rights and slightly modified definitions of the state of crisis and the exceptional state.

In March 2021, the General Prosecutor and the group of the MPs delivered the second constitutional challenge questioning the governmental decree from March 17, extending the state of crisis. Compared to the first reviewed declaration from September 2020, the challenged decree was more comprehensive. It specified the application of the state of crisis and encompassed the detailed provisions on the specific human rights limitations. In the petition, the GP did not attack the extension of the state of the crisis itself but challenged several specific measures adopted by the government. He expressed his doubts about the proportionality of human rights limitations and the intended goals of these derogations. More precisely, the GP questioned the voluntary aspect of the national COVID testing (which was, in his view, mandatory); the constitutionality of the decrees of the Public Health Office of the Slovak Republic (“PHO”) limiting the fundamental rights without appropriate legal basis; the appropriateness of the level of fundamental rights’ restrictions not enlisted in the CSSE. Additionally, the MPs argued that the government did not provide its declaration with the explanatory memorandum and failed to provide sufficient reasons for another extension of the state of crisis.

In PL. ÚS 2/2021, delivered on March 31, the SCC reiterated preconditions necessary to limit human rights in an emergency model. In such situations, the government should adopt immediate responses to prevent imminent threats caused by the pandemic. The SCC pronounced that it would review the limitations of the fundamental rights under “the test
of a necessary extent” during the state of crisis. The primary purpose of such a review was to protect fundamental rights against the excessive limitations of the government. The SCC reiterated its position from the previous decision that it “remains suspicious when it reviews the governmental decree on the state of crisis”. It also echoed that “the government is in a better position to assess the severity of the situation” and that it only had to assess the essential rationality of the measure and “to make sure that manifest overreaction of the government did not occur”. The SCC also included the logic of a newly adopted constitutional prolongation mechanism in its assessment. It declared that the more extended period of the reviewed measures during the state of crisis, the more rigorous review of the constitutionality would apply.

Ultimately, the SCC again dismissed both petitions and held the governmental measures constitutional. It reiterated its deferential role towards the government’s position to assess the level of urgency from PL. ÚS 22/2020 decision. It stated that the extended period of the state of emergency required even more stringent review. On the other hand, the SCC invoked a short statutory timeframe of ten days to vindicate its lenient approach in reviewing the substance of the contested decree. Again, the SCC backed its reasoning by the publicly inaccessible materials (e.g., the voice recordings from government discussions). Finally, the SCC assessed the rationality of the measure, i.e., whether the government action followed a legitimate aim. It did not consider the necessity of adopted standards nor balanced the competing interests involved in the limitations of affected fundamental rights. Without an adequate explanation, the SCC concluded that the government’s decisions were necessary to curb the adverse effects of the pandemic. Thereby the SCC dodged the pressing question of proportionality of adopted measures. It stressed that it was not its role to suggest the optimal delimitation of the state of crisis. The SCC also stated that it remained suspicious and left a significant margin of discretion to the government.

IV. The Assessment of the Pertinent Decisions

In PL. ÚS 22/2020 and PL. ÚS 2/2021, the SCC approved the constitutionality of the contested measures in the special judicial review proceedings used for the first time. The academic reactions to these decisions, constitutionally designed to check potential abuse of powers by the government, have been relatively muted (there were some minor exceptions, e.g., Steuer, 2021; L’alík, Baraník, Drugda, 2021).

As a general comment to the first decision, it should be stated that the challenged declaration of a state of crisis should not have survived the judicial review in all conceivable scenarios. The SCC could use this opportunity and demand at least some essential explanatory prerequisites to set a minimum standard for future declarations of the state of crisis. The threshold of a minimum rationale could have been established. Instead, the SCC did everything to justify the governmental measure. The SCC granted a wide margin of appreciation to all other governmental powers without any specific caveats (except the remark that the SCC would not justify these actions for the government again). This enormously low bar set shallow expectations for future governmental actions. The SCC approved an exceptionally vague declaration and thereby reduced its role in assessing the
future constitutionality of adopted measures. After this decision, it was hardly imaginable that any other decree would not survive a constitutional challenge. The SCC missed a golden opportunity to set the tone for the future governmental limitations of fundamental rights and freedoms during emergencies (L’alík, Baraník, Drugda, 2021, p. 271).

In the second decision, the SCC simply followed the same rationale of “a manifest overreaction of the government”. Apparently, only an enormously gross abuse of governmental competencies would be unconstitutional. Nevertheless, no one knows what that might look like. The SCC did not apply the proportionality analysis, but it selectively mixed some methodological assessments and connected them with the straightforward rationale “to fight the pandemic”. It seems as if the SCC ceded almost all consideration to the government as it failed to develop a workable standard of assessment of the excessiveness of the governmental action limiting the fundamental rights during the state of crisis.

The overall constitutional framework of emergencies typically provides a more lenient approach to human rights limitation than the state of normalcy. The emergencies should allow more effective governmental action against potential threats to the constitutional system or its most essential values. Therefore, the deferential attitude of the judiciary in assessing the constitutionality of emergencies has not been exceptional. Some courts even demanded the executive to act (Ginsburg, Versteeg, 2021, p. 1500). These encouragements, undoubtedly, should have their constitutional boundaries. The governmental power cannot be limitless, not even during emergencies.

However, the SCC did not draw any “red lines” to explain what action would be considered unconstitutional in the analysed decisions. Quite to the contrary, in both cases, the SCC actively justified the adopted measures instead of the government. The lack of predictable methodology pushed its further decision-making into uncharted territory. Historically, the SCC has never had a methodologically rigid approach to assessing human rights limitations. Undoubtedly, these emergency decisions did not improve its record.

The SCC’s role could have followed the advice from numerous international human rights bodies. They have suggested that human rights derogations, even during emergencies, should be proportionate and follow an essential public goal (Ginsburg, Versteeg, 2021, p. 1507). While using the proportionate analysis, the SCC could have had the adverse effects of the pandemic in mind (e.g., it could have made the limitation clauses of affected rights more flexible). In other words, the SCC could have accepted specific derogations through the proportionality analysis with a more generous understanding of the critical situation that would have still allowed the government to fight the pandemic effectively. Instead, the SCC approved the measures with almost no governmental justification. Therefore, any future judicial review of the declaration of the state of crisis or any other actions connected to the declaration of the state of crisis will have to be reviewed under an incomprehensible standard. These two decisions certainly did not contribute to the foreseeability of future contestation of the constitutionality of a state of crisis. Therefore, it is entirely plausible that in the future, the SCC would either approve the governmental measures all the time or would strike down the implemented actions randomly.

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4 See a harsh critique of the SCC’s lack of coherent methodological approach in application of the proportionality analysis in the points 1 and 2 of the dissenting opinion of judge Milan L’alík to the decision PL. ÚÚ 18/2014.
V. A Slight Shift in the SCC’s Jurisprudence (?)

In summer 2021, when the state of crisis was no longer effective, in two decisions, the SCC reviewed the constitutionality of some anti-pandemic measures adopted by the decree of the PHO. In these decisions, the SCC indicated a potential turn from the deferential approach adopted during the state of crisis.

In PL. ÚS 10/2021, the SCC accepted the petition from the MPs challenging the constitutionality of the PHO decree that introduced the classification of persons entering the Slovak Republic based on their vaccination status. The first category consisted of incoming persons that were not vaccinated. They had to undergo a mandatory quarantine. The second category consisted of vaccinated persons. Under this regulation, a person vaccinated with one vaccine in a two-dose vaccination scheme was considered fully vaccinated. The vaccinated persons did not have to enter the quarantine.

The SCC issued a preliminary injunction making the challenged rule inapplicable before the case was decided on the merits. This measure temporarily annuls a presumption of constitutionality of adopted legal acts, which holds that all laws are considered constitutional until proven otherwise by the final SCC’s decision in the judicial review proceedings. For that significant effect, the SCC had formulated a requirement of strict justification in its previous case law. More precisely, the SCC had demanded evidence of an immediate threat to the fundamental right affected by the challenged legislation. The existence of such a menace must have been proven authentic and be adequately specified. In other words, the SCC would usually only issue a preliminary injunction against the challenged provisions if the petitioners would sufficiently demonstrate the pressing public need for such a measure. Such high benchmarks caused the SCC had rejected most similar requests.

These strict standards for issuing a preliminary injunction were almost absent in this decision. The SCC explained the necessity of a preliminary injunction instead of the petitioners. The petitioners themselves provided only vague reasons why such a pervasive step was necessary at the case at hand. They did not identify sufficient evidence of a narrow connection between the public menace and the potentially affected fundamental rights. The SCC’s reasoning simply connected the premise that a one-time vaccinated person in the cases of the two-doses vaccination scheme was not satisfactorily immunised in comparison to a person without any vaccination. Therefore, the SCC declared that since the PHO had not provided additional expert explanations, the decree could cause harm through differentiation between vaccinated persons with just one dose and unvaccinated persons entering the Slovak Republic. Interestingly, the SCC supported its argumentation also with the EU regulation’s non-binding recitals (Regulation (EU) 2021/953 of the European Parliament and the Council). Ultimately, the SCC issued the preliminary injunction affecting the decree in its entirety.

The second analysed case touched upon an almost identical PHO decree that replaced the previous PHO’s decree affected by the preliminary injunction. The second decree updated the diversification criteria for persons entering the country to fulfil the expectations required in the previous SCC’s decision. Nevertheless, the group of MPs re-challenged the measure. Following its previous argumentation, in PL. ÚS 11/2021, the SCC explained...
that this legislation update was constitutionally insufficient again. It had created a temporal exemption from the mandatory quarantine for the persons vaccinated only once in the two-doses vaccination scheme. The SCC held that the PHO did not provide sufficient evidence to explain the differences among categories of persons entering Slovakia based on their vaccination status. However, this time, the SCC highlighted its older decisions dealing with the standards for the preliminary injunction. It declared that the reasons at hand were at the outer interpretative limits of its previous case law concerning the preliminary injunction. It seems that the SCC was uncomfortable accepting the vague arguments of the petitioners again. Ultimately, it did follow almost the same justifications referring to PL. ÚS 10/2021. Had the SCC decided otherwise, it would have reversed its line of reasoning from just two weeks ago. Thus, the SCC issued another preliminary injunction making (just) one provision of the challenged decree inapplicable.

In contrast to the first two analysed cases, in which the SCC was hesitant to develop a workable standard of assessment of the excessiveness of the governmental action limiting the fundamental rights, in two 2021 summer decisions on the PHO’s decrees, the SCC demonstrated quite a different approach. The SCC acted assertively and justified an excessive measure of a preliminary injunction instead of the petitioners. While in its earlier case-law on the issue, the SCC was quite strict and had not allowed the preliminary injunction unless the petitioners could sufficiently prove an immediate menace to the fundamental rights, this time, the SCC was quite assertive towards the potential constitutional hazards of the challenged legislation. It seems as if the SCC became “a human rights hawk” as soon as the state of crisis was no longer effective. This attitude was striking, especially when compared with the SCC’s previous decisions on the preliminary injunctions. When the state of crisis was in force, however, the SCC turned a blind eye towards the possible governmental overreach, even in the sphere of fundamental rights.

VI. Conclusion

In almost all countries around the globe, the COVID pandemic confronted the executive branch with unprecedented challenges requiring immediate and resolute actions to mitigate the enormous impacts on national economies, human health, and lives. The governments were forced to test the limits of their constitutional powers worldwide. The doctrine of separation of powers, an essential check against the abuse of powers, has been challenged during constitutional emergencies. One should not think about emergencies as times during which the constitutionality of exercise of power is “switched off”. The constitutional regulations of emergencies temporarily provide efficient tools for fighting hazardous situations while remaining firmly within the rule of law principle. The Slovak example demonstrates that the explicit constitutional power to review the governmental measures connected to emergencies might not produce coherent results. At first glance, after reviewing the first two decisions, in which the SCC acted quite reluctantly and did not dare to intervene, it seemed that the separation of powers tilted towards the exercise of the governmental powers. The SCC did not consider an ambiguous declaration of the state of crisis as constitutionally deficient. In two subsequent cases, the
SCC breached the line of argumentation from its older case law and issued the preliminary injunction against the governmental action without appropriate justifications provided by the petitioners.

The level of the SCC’s assertiveness in justifying its decisions with creative explanations was the main connecting line between those two divergent approaches (even though in different constitutional situations). In all four cases, the SCC came with its narratives to endorse its decisions regardless of the petitioners’ arguments. The SCC defended the measures instead of the government’s first two decisions. Two subsequent decisions backed the petitioners and explained the reasons for acceptance of the pervasive preliminary injunctions. From those cases, the SCC has been methodologically incoherent and provided quite inconsistent reasons for its decision-making, focused more on the overall result than on the careful assessment of the presented arguments.

However, it would be short-sighted to blame the SCC for the overreach of its powers or judicial activism, just from the mentioned four cases dealing with the governmental anti-pandemic measures. It is possible that the SCC wanted to deal with the cases at hand diligently. Unfortunately, the overall impression has been entirely unpersuasive. Therefore, the SCC should follow a foreseeable approach and should not erase the previous decisions from its memory. The SCC’s predictability should be the most important rule, especially when the current judges do not like the possible outcome. Louis Brandeis, US Supreme Court justice, formulated this consideration eloquently in one of many dissenting opinions. He stated that “in most matters, it is more important than [the question] be settled than that it be decided right.”

Accordingly, the SCC should stay transparent and methodologically coherent in its future decision-making. It does not necessarily mean that the SCC must subscribe to the proportional analysis in considering the declaration of the state of crisis. However, that is the most advisable position. The proportionality analysis ought to serve as a lodestar in all situations of human rights derogations. The SCC could also create its workable blueprint to serve as a transparent and foreseeable guide for all similar cases. That approach would produce clarity and predictability, one of the cornerstones of the rule of law principle. It is better to have a lousy but foreseeable rule than an unpredictable standard producing divergent outcomes in every single decision. That does not mean that the SCC should stay passive, but it should restrain itself from providing the justifications instead of the participants. Both the petitioners and the defendants of any challenged legal measures shall remain focused and make their arguments as sophisticated as possible. An attitude of impartial umpire would contribute to elevating the virtuousness of the constitutional argumentation and would at least partially prevent accusing the SCC from cheering to any side of the legal dispute.

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