

THE MATERIAL CORE OF THE SLOVAK CONSTITUTION AND ITS PERSPECTIVES

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Abstract

The aim of the Article is to clarify, if the Slovak constitutional system contains constitution based on material core. Were there any important changes dealing with this constitutional concept? The purpose of this paper is to offer an answer to the questions by outlining a short overview of constitutional development especially in the field of discovering the material core of the Constitution of the Slovak Republic and its turbulent development. One of the used perspectives is a COVID 19 crisis perspective and its influence upon material core of constitution.

***Keywords:** Constitution, material core, Constitutional Court, Slovak Republic*

1. Introduction: Sociopolitical background of the dispute

COVID-19 - a phenomenon that has been affecting events and life literally all over the globe for more than two years. The pandemic caused by this virus has been more than just a medical issue. This pandemic has affected all areas of human life, the human community, the economy and the social sphere. The states and their organizational and institutional components of governance and decision-making did not remain immune either. The pandemic has had possibly enduring effects on the status and condition of political and legal systems,

economies, and societies. Therefore the COVID-19 pandemic goes hand in hand with a challenge. This has not been challenge only for health care, for humanity and its ability to withstand isolation, but also for the ability of the state and its institutions to overcome this pandemic while maintaining its democratic and legal character. The human rights, governance, democracy and the rule of law become the subject of increased attention and question of the public trust.

Dealing with the pandemic as public health crisis as well as the social economic crisis, normalisation of regimes of exception and degradation of the Rule of Law are not the only issues on the table. Almost overnight, another more stressful reality and lesson for a 'Post-Pandemic' states emerged in the form of war in Ukraine, particularly evident in Ukraine's neighbors. This threat of war has put state regimes to another unpredicted test that they were not exposed to in the 21st century; and its manifestations and consequences may have different effects. The tension has been naturally high for a democratic society with so much at stake.

The unprecedented threat of war and post pandemic situation in states which have acquired their democratic and free character (historically) only recently creates a risk for their democratic and free society. There is also a risk that these states may utilize emergency powers to consolidate executive authority at the expense of democratic institutions and the Rule of Law. These challenges can severely undermine the legitimacy of state authority and constitutionalism.

Constitutionalism is an idea that the constitution may limit the power to hinder the abuse of an unrestricted power. The protection of the society before the consequences of interfering to the peaceful state of the society is based on the requirement that a democratic state with Rule of Law must respond to emergency situation constitutionally. Such situation exposes a democratic state with the Rule of Law to a more intense testing than in a peaceful state.

Therefore it is necessary to know the quality or strength of Rule of Law within the democratic state. It is important that in every State a robust political and legal culture supports Rule of Law mechanisms and procedures, which should be constantly checked, adapted, and improved. (Rule of Law Checklist, 2016, p. 16) The elements of the Rule of Law are limited not only to legal onebut are also related to political and legal culture within a society. The concept of Rule of Law does not have identical implementation everywhere. That is the reason why it is important to examine the strength of the democracy and Rule of Law in states like the Slovak Republic, with relatively short historical experience of free establishment. The concrete historical, political, social or geographical context affects the way of the implementation of the Rule of Law. This context may determine specific manner how this concept is implemented in the Slovak Republic.

2. A Material Core of the Constitution

The constitution should define the basic outlines of the functioning of state authority, its legitimacy, the ways of its establishment, goals and values of the state, basic requirements such as the territory and population, state Authority inside and outside the state (mainly through forms of direct and indirect democracy) and state power over citizens (especially in the form of limits within the human rights catalogues). These are all essentials that necessarily concern every citizen, as they form an imaginary social contract between them and the state they have established. Some of these requirements are either explicitly or implicitly understood as immutable.

The constitution is supposed to fulfill the idea that the social contract between the state and the society can hold people back in their desire for power, more precisely to realize this desire in a predetermined trajectory. In order to fulfill its function, the constitution must have a long-term scope and duration.

This ability or function of the constitution is reflected in the fact that the constitution expresses the value orientation of the state and society. The constitution can be regarded as an expression of certain societal values shared in the society and with which society as a whole is identified (Orosz, Svák, Balog, 2012, p. 60). Basic constitutional values, such as freedom, equality or human dignity, acquire the form of general constitutional principles as the most general rules of conduct. These rules in a concentrated form express the most general goals of law and together form the system of fundamental values on which the constitutional order of the state is based.

The system of fundamental values on which the constitutional order of the state is based, and which (i) find their explicit expression in the constitution or (ii) implicitly are present in it and await its discovery, constitute the material core of the constitution.

The material core of the constitution is not only an intellectual challenge for academics in the field of constitutional law, but also a cornerstone of the whole constitution, albeit a relatively incomprehensible one. The material core of the constitution is made up of values on which the constitution is built upon and which create its identity. Each constitution is based on certain basic (constitutional) values and key regulatory ideas (constitutional principles), which can be deduced from its conceptual construction and content on the basis of in-depth analysis. These determine the essence and identity of the constitution, and are in principle immutable, because their abolition or fundamental qualitative change is no longer a change of the constitution, but its material replacement by another (new) constitution.

Pandemic response in crisis situations is through its manifestation in various areas associated with the restriction of fundamental rights and freedoms, imposition of obligations, strengthening the executive bodies at the expense of parliaments. Does it create a state that could be seen as a threat to social contract and the values on which it is built and does it establish a material / de facto new social contract founded on a new value basis?

The starting point for the assessment of the question is the knowledge of the content of the material core of the constitution and its operation in society. The material core of the constitution is not universal and its content and scope varies by country. Every state and society, due to their diverse historical, cultural, political and social conditions, may consider different principles and values to be so fundamental that their existence is based on them.

Despite the natural diversity and certain differences, it is possible to define the generally accepted values on which the constitutions of modern democratic states with Rule of Law are established, and which are reflected in the basic constitutional principles.

The protection of the most important constitutional principles is the most important task of a state that has committed itself to being a democratic state with Rule of Law. The basic (general) constitutional principles on which modern democratic constitutions are based undoubtedly include the following constitutional principles: the principle of people's sovereignty; the principle of respect for and protection of human rights and fundamental freedoms; the principle of limited government (guaranteeing, *inter alia* minority protection); the democratic legitimacy principle; the principle of constitutional sovereignty; the principle of legality (the rule of law), the principle of separation of powers; or the principle of legal certainty. These principles together form the basic features (components) of a democratic state with Rule of Law (Orosz, Svák, Balog, 2012, p. 150). Above all human dignity and its protection can also be included here. Furthermore, equality, the principle of inviolability, inalienability, imprescriptibility and irreversibility of fundamental rights and freedoms, the principle of autonomy / self-government, the principle of power control or the regular elections principle. The basic issues of political struggles and political processes in the state can be included among the basic constitutional principles, in particular the principle of free competition of political forces rejecting violence as a means of promoting their political interests. All this, in its entirety, or in various combinations, forms the content of the material core of the constitution.

The material core of the constitution is not immutable and is subject to natural development, both constitutional, which is manifested mainly in the constitutional activity of the constitutional body, and factual, which is manifested in the effect of social pressure on the content of the material core of the constitution. And in both cases, it can be destroyed. The success rate of the destructive intervention in the material core of the constitution is directly proportional to the defense capability of the material core of the constitution. If this is exposed to action, whether formal or *de facto*, the protective function of the material core of the constitution arises, manifested in its ability to avert the pressure that would like to remove it by jointly concentrating the action of fundamental social values. Otherwise, the material core will be removed and a new constitutional state will be formally or *de facto* established.

3. Mutations of the material core of the Constitution of the Slovak Republic

Despite the fact that the Constitution of the Slovak Republic of 1992 (460/1992 Coll.) has remained unchanged in its cornerstones since its adoption (It is mainly, but not only, Art. 1 par. 1, Art. 2 and Art. 12 par. 1), the idea that it is built on a value basis and is not just a constitutional instrument of formal corporate governance has not been born easily. The material core of the constitution has been slowly enforced in the constitutional law doctrine. The turning point was the work by R. Procházka *People and Judges in Constitutional Democracy* that for the first time opened the topic of the material core of the Constitution of the Slovak Republic (Procházka, 2011). The author refused the existence of this material core in the conditions of the Slovak constitution. But it has to be stressed that he did not reject the material core of the constitution as such, the author even distinguishes between its soft and strict version. "*The soft version is limited to the assertion that the legislator may not pass a constitutional law with content contrary to the Constitution, while in a strict version it does not remain so, but confers on the Constitutional Court the power to remedy a breach of this prohibition. An essential part of the soft version of the material core thesis is therefore the presumption that there may exist legal norm, the control of which is not entrusted to any public authority and the breach of which is not associated with any effective sanction.*"¹ (Procházka, 2009, p. 381). Procházka justifies the rejection of the (implicit) material core of the Constitution of the Slovak Republic by „*if the material core is to be present in a constitution in which it is not postulated by the legislator in the same way as in a constitution in which the legislator postulates it, then the decision of the legislator to define and protect the material core of the constitution is irrelevant: the legislator explicitly expresses his will to have him there or not.*“ (Procházka, 2011, p. 31) At the same time, according to Procházka, this leads to the question of which other doctrinal concepts are present in the constitution without the need to explicitly state them there (Procházka, 2009, p. 386).

The first monograph devoted specifically to the material core of the Constitution of the Slovak Republic and its apology is from 2014, a book titled *The Material Core of the Constitution of the Slovak Republic* (Balog, 2014). The work discovers an implicit material core in the Slovak Constitution and thus opens the door for its doctrinal constitutional anchorage. Balog is of opinion that the examination of the material core of the Constitution of the Slovak Republic is more challenging because it did not find its explicit expression in the text of the Constitution. This leads to different opinions on whether the Constitution of the Slovak Republic has such a core or not - whether it is possible to admit its implicit character, or whether it is possible to speak of a certain constitutional core only if the legislator explicitly decided to

¹ All the quotations in the text are translated into the English by the authors of this Article.

express it in his work, in the Constitution. According to the author the implicit character of the material constitutional core should not form an obstacle to its definition, either in the constitutional-interpretive way or in the doctrinal way (Balog, 2014). In his opinion the content of the material core of the Constitution of the Slovak Republic consists primarily, but not only, of the principles of the republican, sovereign, democratic state and the Rule of Law. This creates according to Art. 1 par. 1 of the Constitution of the Slovak Republic basic characteristics, basic identity of the Slovak Republic as a state, its origin and existence and also basic characteristics and identity of the society.

Another work is *the Constitutional Court and the Parliament in Constitutional Democracy* (Ľalík, 2015). The publication initially represents a reaction to the aforementioned work *People and Judges in Constitutional Democracy*. As the author states in the preface, he considers it a significant milestone in the Slovak constitutional discourse, but he does not consider the views expressed by the author of this work to be correct (Ľalík, 2015, s. 7). By using the general discourse on the mutual relations between the constitutional judiciary and the parliament, author supports the idea of the review of the constitutionality of constitutional laws at the national level.

The Constitution and Constitutional Laws (Breichová Lapčáková, 2013) was a summary of the professional work of Breichová Lapčáková, who already monothematically and directly provided constitutional arguments for the constitutional review of the constitutionality of constitutional laws even in Slovak conditions. She pays special attention to the constitution breaking, whether material or formal, up to the state of possible loss of the constitution's identity.

A direct call to the Constitutional Court of the Slovak Republic for the full protection of constitutionality through the use of its derived powers came from well known constitutionalist J. Drgonec in his *Commentary on the Slovak Constitution* (Drgonec, 2015). *"The protection of constitutionality is an expression of the purpose of the establishment and existence of the Constitutional Court and at the same time a basic order addressed by the Constitution of the substantive Rule of Law state to the Constitutional Court. The mission of the Constitutional Court of the Slovak Republic is to protect constitutionality in the entire range of relations that are subject to constitutional regulation. Every empty space that remains without the protection of constitutionality is a delay from the model of the material Rule of Law, its violation and perhaps even a denial. The inaction of the Constitutional Court in matters of the protection of constitutionality is inherently unjustifiable, regardless of the arguments by which the inaction is to be justified."* (Drgonec, 2015, p. 1314).

The most exposed form by which the theory of the material core of the Constitution of the Slovak Republic and its protection by the Constitutional Court of the Slovak Republic was reflected is the decision in case PL. ÚS 21/2014 (Decision of Constitutional Court of the SR, file no. PL.ÚS 21/2014). The Constitutional Court of the Slovak Republic hereby stated that *"Unlike constitutions that explicitly contain immutable requisites (eternity clauses),*

there is a predominance of constitutions that do not have such explicit constitutional arrangements. Even the Constitution of the Slovak Republic does not universally contain such an arrangement.” The Constitutional Court leaned towards the theory of the implicit material core of the Constitution when formulated following opinion *“The concept of the implicit material core of the constitution leads to the search for cornerstones through an ad hoc procedure for determining the constitutional norms that together form the material core. The purpose of the protection provided to the Constitution through its implicit material core is to protect the fundamental principles on which a modern European state stands and exists. In the opinion of the Constitutional Court, the foundation of the implicit core of the Constitution is formed by the principles of a democratic state and Rule of Law principle (Article 1 para. 1 of the Constitution), especially because the legislator indirectly marked them as such in the last amendment to the Constitution (Constitutional Act No. 71/2017 Coll.) in Art. 86 letter i) the Constitution.”* (Decision of Constitutional Court of the SR, file no. PL.ÚS 21/2014).

The doctrinal response to this decision came immediately. According to Káčer, *“with such a statement, the Constitutional Court denied its power to examine the conformity of the subject of the referendum with the constitution, not to mention how it undermined its efforts to prove that the Slovak Constitution has some immeasurable material core.”* (Káčer, 2019). J. Neumann, in response to previous experience with the effectiveness of Slovak (non)conducted referendums, even says that *“the people whose dominance the Constitutional Court intended to confirm, on the other hand, become a means, a tool for achieving parliamentary goals.”* (Neumann, 2019).

This was followed by the work *Material Core in Slovak Constitutional Law, Doctrinal Dissent Against the Judicial Vetting Process*. (Káčer, M., Neumann, J., 2019) The authors criticize the use of the concept of material core of the Constitution to derive the competence for the Constitutional Court of the Slovak Republic to review constitutionality of constitutional laws. The authors do not favour the concept and its use in the Slovak constitutional discourse. Finally, it is necessary to mention work by Breichová Lapčáková called *Irrevocable Constitutional Principles in a Multilevel Legal System*, which deals with the topics of the constitution, its creation, the constitutional process and, apologetically, the material core of the constitution. (Breichová Lapčáková, 2020).

Although the concept of the material core induces variety of opinions in academic discussions, its presence in the Slovak constitutional system has been stabilized in consequence of the Constitutional Court judicature.²

The 2017 brought combination of the best efforts of the parliamentary legislator and the Constitutional Court as a defender of constitutionality in the creation of the material core of the constitution not merely as a theoretical concept but as a constitutional reality. The constitutional amendment by Constitutional Act no. 71/2017 Coll. can be seen as principal from value

² Decision of Constitutional Court of the SR file no. PL. ÚS 8/2022.

standpoint. In connection with the solution of the socially and constitutionally demanding issue of the abolition of amnesties, the parliamentary legislator gave higher value to the principles of democratic state together with the Rule of Law than to other constitutional regulations and thus enabled the examination of grace and amnesties with these principles. (Balog, Tittlová, Fakla, 2019, p. 84-87). The most fundamental contribution recognition of the derogating effects of the principles of a democratic state and Rule of Law against an explicit constitutional institute (amnesty and pardon) and thus the granting of a higher constitutional force to the principles of a democratic state and Rule of Law.

Constitutional Act no. 71/2017 Coll. added to the constitutional system of the Slovak Republic the possibility of annulling the President's decision on amnesty and pardon by a resolution of the National Council of the Slovak Republic. The Council's decision is subject to formal and substantive conditional limitation to prevent abusing this institute by the National Council of the Slovak Republic.³ The conditions are listed below:

- first formal prerequisite is the requirement for a minimum quorum for the submission of a proposal (Article 88a of the Constitution of the Slovak Republic),
- second formal prerequisite is the requirement of a three-fifths majority of all deputies to adopt a repealing resolution (Article 84 para. 4 of the Constitution of the Slovak Republic), - the last formal prerequisite is mandatory review by the Constitutional Court of the Slovak Republic (Article 129a of the Constitution of the Slovak Republic), and
- final material prerequisite is proof of a breach of the principles of a democratic state and Rule of Law.

The legislator's decision was subject to the compulsory constitutional review. For the first time the Constitutional Court of the Slovak Republic was enabled to explicitly define the principles of democratic state and Rule of Law. Otherwise the Court would not be able to review the decision of the National Council of the Slovak Republic on abolishing the amnesties and pardons. As the annulling resolution of the National Council of the Slovak Republic is compulsorily reviewed by the Constitutional Court of the Slovak Republic, both formally and factually, there can be no doubt that the Constitutional Court is the constitutional body that establishes the content of the “*the principles of democratic state governed by the rule of law*“. If the task of the Constitutional Court is to review the factual conditions, it must have a defined reference basis and its knowledge. The principles of democratic state governed by the Rule of Law are the basis of reference, and their definitions form primarily their background knowledge.

The Constitutional Court of the Slovak Republic itself explained its role and place in defining the content of the principles of a democratic state governed by the Rule of Law: “... *to the question who (which public authority)*

³ For more information refer to: Burda, E., Trellová, L., Smolková, L., 2019, p. 175-186

is called to deduce from the constitutional text the constitutional principles, and at the same time to interpret and define in an authoritative way the content of those constitutional principles which are explicitly expressed in the constitution. ... The answer to this question is, in principle, not complicated, since it can only be a public authority to which the legislator has entrusted the (constitutional) function of protecting constitutionality based primarily on fundamental constitutional values, i. e. on the principles of democracy and the Rule of Law. An integral part of the performance of this function is the power to provide an authoritative interpretation of the constitution and constitutional laws. In Slovak realities, the function of the guardian of constitutionality is undoubtedly performed by the Constitutional Court of the Slovak Republic, which the constitution defines as an "independent judicial body for the protection of constitutionality" (Article 124 of the Constitution of the Slovak Republic)." (Decision of Constitutional Court of the SR, file no. PL. ÚS 7/2017)

Although the Constitutional Court of the Slovak Republic *"has never before been confronted with the task of defining the principles of a democratic state governed by the Rule of Law comprehensively (exhaustive calculation), i.ej. the above calculation of the principles of democracy and the rule of law is not (may not be) exhaustive. This remark also applies to the content of the individual principles of a democratic state, which are constantly elaborated and updated by the court decision-making activity which corresponds to the dynamics of the democratic state governed by the Rule of Law and requirements for its constitutional protection."*(Decision of Constitutional Court of the SR, file no. PL. ÚS 7/2017). When reviewing the resolution of the National Council of the Slovak Republic on the abolition of amnesties and pardons, the Constitutional Court defined the principles of a democratic state and Rule of Law and thus actually defined the material core of the constitution in historically exceptional way.

The Constitutional Court of the Slovak Republic in the judgment file no. PL. ÚS 7/2017 stated the principles of democratic state governed by Rule of Law: *"The concept of "principles of democratic state governed by rule of law" is undoubtedly linked to the introductory provision of the constitution, i. e. to the first sentence of Art. 1 par. 1 of the Constitution of the Slovak Republic, in which the legislator defines the Slovak Republic as "... a sovereign, democratic state governed by the Rule of Law". It clearly results from this constitutional construction that these are qualitative, or rather (more concise) value requirements that the legislator places on the Slovak Republic as a democratic state governed by the Rule of Law..... If a certain objective value is explicitly expressed in the constitution, or it can be implicitly deduced from the constitution, it acquires the character of the constitutional value that enjoys the highest, i. e. constitutional protection. "*

The Constitutional Court made open enumeration of constitutional principles that material core of Constitution comprises of. It is questionable whether we did not get into a situation where the material core of the constitution exists within interpretation outlining its fundamental content, but at the same time there is no certainty what is acceptable and intended degree of

accuracy requested by the Constitutional Court. In case of authority for constitutional protection this is not negligible in terms of the predictability of court proceedings. (Trellová, L., 2020, p. 52)

The jurisdiction of the Constitutional Court established by Art. 129a of the Constitution of the Slovak Republic is of fundamental importance for the formation of the constitutional system of the Slovak Republic. It would be illusory to claim that if the Constitutional Court defines the principles of a democratic state governed by Rule of Law for the purposes of review of the parliament's resolution on the abolition of amnesties and pardons, it will not have radiation effects on the entire constitutional system. On the contrary. There can be no principles of democracy and the Rule of Law that relate only to amnesty or pardon, and some other principles of democracy and the Rule of Law that have nothing to do with amnesty or pardon and these two cannot be in contradiction. Therefore, their definition by the Constitutional Court of the Slovak Republic operates in the constitutional system of the Slovak Republic universally and illuminates into the entire constitutional system.

The Constitutional Court of the Slovak Republic in the judgment file no. PL. ÚS 21/2014 decided unprecedentedly that Constitutional Act no. 161/2014 Coll. representing a direct amendment to the Constitution is not in accordance with the Constitution of the Slovak Republic. The National Council of the Slovak Republic with Constitutional Act no. 161/2014 Coll. tried to circumvent the unconstitutional elements of the participation of the National Security Office in the creation and functioning of the judiciary. The parliament tried to hide unconstitutionality of the previous law arrangement of the participation of the National Security Office by selection of the judges through elevating the legal regulation from ordinary law to a constitutional law. It was the internal material hierarchy of constitutional norms created by the Constitutional Court in 2017 that opened the door for the Court in 2019 when deciding on the unconstitutionality of constitutional law. This fulfilled the protective function of the material core of the constitution. The material core of the constitution and the constitutional norms which compose it gain a dominant position over other constitutional norms because they form the reference base of the constitution. This reference base serves as a platform which enables to compare other (materially subordinate) constitutional norms in terms of their compliance with the material core of the constitution. This gives an internal hierarchy of constitutional norms ensures the fulfillment of the functions of the material core of the constitution (Decision of Constitutional Court of the SR, file no. PL. ÚS 21/2014).

The Constitutional Court was established to protect constitutionality. Its constitutional duty is to ensure compliance with the Constitution of the Slovak Republic in all circumstances, even if the violator is a public authority, including the National Council of the Slovak Republic. Thus the Constitutional Court of the Slovak Republic adopted decision, which stated that *“The basis of the implicit material core of the constitution are the principles of a democratic state governed by Rule of Law, including the principle of the separation of powers and the related independence of the judiciary; (ii) the implicit material*

core of the constitution cannot be contradicted by constitutional law either; (iii) the Constitutional Court is entitled to examine any conflict between the norms of the Constitutional Act and the implicit substantive core of the Constitution and, if it finds a conflict, it is entitled to state the inconsistency of the norms of the Constitutional Act with the implicit substantive core of the Constitution. ” (Decision of Constitutional Court of the SR, file no. PL. ÚS 21/2014).

The Constitutional Court not only relied on the material core of the constitution, but also provided it with protection. A statement of its existence and at the same time a finding of an intervention in it without simultaneously providing it with protection against such an intervention would mean a failure of the constitutional protection powers of the Constitutional Court of the Slovak Republic. In other words, while respecting the principle of restraint and minimum margin of distortion in relation to the Constitution, the Constitutional Court ruled in the light of extraordinary intensity of the intervention into the material core of the Constitution. The significance of the decision of the Constitutional Court lies in the process of rejecting of the formal understanding of constitutionality on which the constitutional system of the Slovak Republic is based and overcoming it, at least for a while.

Overcoming formal reductionism in the approach to the Constitution of the Slovak Republic took only one year in the Slovak Republic. Already in 2020 at the beginning of the pandemic, by Constitutional Act no. 422/2020 Coll. as a direct amendment to the Constitution of the Slovak Republic, the legislator re-established (renewed or confirmed) the state of formal and not material understanding of the Constitution of the Slovak Republic and its protection. The Constitutional Act no. 422/2020 Coll. added Art. 125 par. 4 with wording "*The Constitutional Court does not even decide on the conformity of a constitutional law with the Constitution.*".

The Constitutional Court had never had the power to decide on the compliance of a constitutional law with the Constitution because the National Council of the SR never explicitly granted this power to the Court. The Constitutional Court did not constitute such a power for himself even in the judgment file no. PL. ÚS 21/2014.

If the amendment to Art. 125 par. 4 of the Constitution was intended to respond to the judgment file no. PL. ÚS 21/2014, the National Council of the Slovak Republic did not understand the essence of this judgement. The essence of the judgement was not in the review of the compliance of the Constitutional Act with the Constitution of the Slovak Republic. The reference basis for the review of the Constitutional Act was not the Constitution of the Slovak Republic as such, but only those norms that form its material core. There was little space stemming from the judgement of the Constitutional Court file no. PL. ÚS 21/2014, that the Court had interest to review the constitutionality of constitutional laws and to interfere with the constitutional activities of the National Council of the Slovak Republic. On the contrary the Constitutional Court presented opinion this should be step taken only in extreme situations. The Court confirmed it by statement that "*The possibility of examining the constitutionality of constitutional laws does not constitute a distortion which*

should lead to the purposeful designation of any amendment to the Constitution as unconstitutional or to any adopted constitutional law as unconstitutional."

The Constitutional Court confirmed this position also in the judgement file no. PL. ÚS 8/2022. The Court has remained in the doctrine of material core of the constitution which incorporates matters of fundamental rights, in particular human rights, and matters of fundamental principles of democratic state governed by the Rule of Law. Even though the material core of the constitution is designed on value basis of constitutional provisions and not on its explicit constitutional definition, due to its authoritative interpretation by the Constitutional Court the National Council of the Slovak Republic is not an absolute sovereign but is limited within fundamental constitutional framework.

The unique status of the Constitutional Court as an independent defender of the constitutionality stipulated in Art. 124 of the Constitution might create the protection of the material core of the constitution in case of extreme intervention. Distortion of material core of the constitution with the intention to change the character of the Slovak Republic as democratic state governed by the Rule of Law represents this kind of intervention.

4. Actual threat to the material core of the Constitution of the Slovak Republic

The fundamental goal of the state and the society as well as of the established constitution and the rights subsequently created by the state is to attain and protect fundamental constitutional values, namely freedom, human dignity and fundamental rights and freedoms. At the same time, there is the ongoing role of the state to protect them and its positive commitment to providing security and protection for its people. The outbreak of the COVID-19 pandemic has fundamentally affected the functioning of states, their democratic institutions and legal systems. National governments have taken extraordinary measures to gain control over the spread of COVID-19. These emergency measures necessarily restricted fundamental human rights in a way that can only be justified and acceptable in these exceptional circumstances. However, in the interest of society these measures should be implemented and enforced within the framework of established democratic principles and the Rule of Law.

To overcome such an intensive pandemic, it was necessary to activate and adopt measures which deviated the society from being deliberate, open and democratic and shifted it towards technocratic, managerial governance. To the highest admissible and bearable extent these necessary measures forced out democratic instruments previously used to govern society on the pretext of fighting against pandemic.

The European Parliament in its motion for resolution of 13 November 2020 on the impact of COVID-19 measures on democracy, the Rule of Law and fundamental rights ([2020/2790\(RSP\)](#)) stated, inter alia, that „*whereas trust in the actions of governments and states is paramount to ensure support for and*

*implementation of the emergency measures adopted; whereas in order to achieve this in a democracy, transparent, science-based and democratic decisions, as well as dialogue with and the involvement of the opposition, civil society and stakeholders, are fundamental“.*⁴

Since the emergency measures by the government were adopted in Slovakia to counteract COVID-19 crisis, these measures can be considered a stress test for democracy and the resilience of national safeguards for the Rule of Law and fundamental rights. Slovakia declared a state of emergency based on the constitutional law no. 227/2002 Coll.

The Constitutional Court referred to sensitivity of declaring emergency state in relation to the values of democracy and Rule of Law “Constitutionality, life and health, democracy, freedom and Rule of Law are terms with exceptional value and they are manifested in unique way in the proceeding on constitutionality of emergency state declared with regard to the spread of dangerous contagious human illness COVID-19.”⁵

The COVID-19 pandemic followed by the war in the neighboring state have emphasized the need for security. Security is gaining new importance in Europe and in Slovakia respectively. Security has several dimensions or forms. The safety of life, health and property, protection of the population from terrorist attacks and other attacks are ranked as the the most important dimensions.. But security also has forms that may not be visible at first glance. The gas crisis at the beginning of 2009 showed how important energy security and security of energy supply are; and how much it matters for for the population, schools, hospitals and the economy, including security of water supply and food supply. Last but not least, there is the security of information technologies and their protection from attacks, manipulation of their content, or rather the content of the incorporated data, theft or its misuse.

Security as a constitutional category is expressed in the constitutional order of the Slovak Republic since 2002 by Constitutional Law no. 227/2002 Coll. on security of the state in time of war, state of war, *extraordinary* situation (crisis situation) and state of emergency, as amended. Its application in the years 2020 - 2022 not only put this constitutional law to the test, but also the democratic legitimacy of crisis situations as such.

The term "security" in the Constitutional Act on Security is connected with the security of the Slovak Republic as a state and must be interpreted in accordance with the basic values that are associated with it. These are in principle defined in Art. 1 par. 1 of the Constitution of the Slovak Republic: the security of the Slovak Republic as a state is achieved if its constitutional values are preserved

- a) sovereignty and territorial integrity,
- b) democratic order,
- c) fundamental rights and freedoms.

⁴Available online: https://www.europarl.europa.eu/doceo/document/B-9-2020-0343_EN.html

⁵ Decision of Constitutional Court of the SR file no. PL. ÚS 22/2020.

The obligation to defend the security of the state, to protect the life and health of persons, property and respect for the fundamental rights and freedoms may be

- a) reduced during war, state of war, *extraordinary* situation (crisis situation) and state of emergency,
- b) expressed in the obligation to implement all necessary measures, while this constitutional obligation does not only concern the implementation of these measures but also their adoption, i. e. it applies not only to acts of application and implementation of law but also to the creation of legal norms necessary for this basic public task,
- c) extended to perform specific tasks necessary in the event of a threat or recovery of a disturbed economy.

The democratic order is a value that must be protected in order to preserve the peace and security of the state. Democratic order is not in contrast to security, while democratic order is part of the security of the state. When a democratic order is threatened, a state of danger arises which can be resolved by declaring an *extraordinary* situation (crisis situation). This can be declared only as the ultimate solution to the defense of democracy if democracy is threatened by a direct attack in the form of a terrorist attack or other violent acts which, by their scope or consequences, can not be averted by standard means used by public authorities. However, in these cases the state would have to react always and not only if democracy were threatened and therefore it is the *ultima ratio* means of defending democracy.

The definition of security requires maintaining a state in which fundamental rights and freedoms are equally preserved. The scope and conditions for any restriction of fundamental rights and freedoms as well as the definition of obligations may be applied only in times of crisis situation pursuant to Art. 1 par. 4 of the Constitutional Law on Security. When restricting fundamental rights and freedoms even in a crisis situation, care must be taken not to lose their essence and meaning in the spirit of Art. 13 par. 4 of the Constitution.

Although the requirement to protect and preserve security is also linked to the requirement to protect and preserve democratic order and fundamental rights and freedoms, the instruments to protect and preserve security restrict *de facto* democratic order and fundamental rights and freedoms.

The crisis situation creates a paradox situation when the protection of security, which also includes protection of a democratic order, takes place by limiting the democratic principles that are enshrined in core of the Constitution. The risk of such a situation is directly proportional to how strong the material core of the Constitution is, how such an intervention can be dealt with and restored to its original status or can be removed and replaced by a new one based on the value of security to which all other values are subject and allowed to exist only to the extent necessary to secure it.

The crisis situation thus poses a risk to the material core of the constitution in its reduction or destruction and replacement by a new one, which will create a new value base for the state and society and establish *de facto* new

constitution. This new core can be discontinuous to a given core in democratic principles. This would be the case, in particular when the society continues to manage all her processes in “crisis situation management model” even after the crisis, or if such a situation would have lasted unreasonably long. Therefore it is important that emergency measures are limited to what is necessary and strictly proportionate.

In crisis situations material core of the constitution creates a protection from modifications of constitution or changes of constitutional order which, in the name of safety protection, could interfere in the principles of democratic state and Rule of Law in the intention leading to their denial. These principles create reference basis for an assessment, whether proceedings in crisis situation disturb the value base of the constitution and society and whether an extreme intervention into the material core justifies a protective intervention by constitutional court as well.

If the constitution is neutral and represents only a formally superior set of rules for functioning of the society and the state independent of its content, the formally stipulated procedures allow any modifications. Crisis situations establish an appropriate scenery for such a change. Constitution founded on neutral values does not provide the society protection against a change because it regards every content of constitution as constitutionally correct - even the one installed during crisis situation and not abolished after its expiration.

5. Conclusion

The basis of the internal stability of the constitution is its ability to respond to the social situation in a predictable and acceptable way based on its text, its perception and its understanding in society. Given the relatively short text of the constitution and its conditionality by the time and circumstances, the historical prerequisites of the constitutional process and the maturity of the society whose life the constitution regulates, it is often necessary to understand the constitution beyond the written constitutional text. In such circumstances it is important to interpret constitution with respect to the original intention of the legislator but without omitting the interpretation in terms of evolutive democratic state. The material core of the constitution provides constitution with stability and protection. The protection is aimed to preserve core from such interventions which could remove the institute using formal and constitutional means.

The material core of the constitution cannot be perceived as an undemocratic obstacle to possible constitutional changes. The material core of the constitution does not exclude or even make it impossible to modify or update existing constitutional regulation in terms of its quality and topicality. It does not prevent it from changes resulting to modifications of the constitution which lead to better regulation. Such changes even support the constitutional core of the constitution and motivate the legislator to constantly improve the constitutional regulation aimed at fulfilling the material core of the constitution and to achieve a higher level of value protection upon which it is established.

Slovak constitutional system is very fragile. The constitutional development dedicated to discovery of constitutional core was crowned with success and later was almost destroyed. Slovak legal order is facing paradox of constitutionalism. With the inception of the pandemic crisis, the Rule of Law crisis and more recently the migrant crisis caused by war in Ukraine, it starts to look untenable. Political and legal constitutionalists alike neglected the material conditions for the emergence and development of a constitutional order, and the material changes that prompt the suspension or modification of formal constitutional norms. Understanding difference between formal and material constitution is the way to point out arising problem. If the formal constitution is the sum of all constitutional norms and principles that drive the regulation of political and social interactions (constituting the 'laws of law-making'), this stands in relation to the material constitution, but not merely as a relation of form to function or form to content. But the material constitution is not merely the 'content' of the formal constitution or the totality of formal constitutional norms (even extending this to include informal norms and principles); neither does it compete with, substitute for or stand in antagonistic relation to the validity of the formal constitution (Goldoni, M., Wilkinson, M.A., 2018, p. 27).

The attitude and approach of the constitutional authorities of the Slovak Republic show that the issue of protection and systematic establishing of the material core of the Constitution is rather oscillating. It means it does not represent a socially determined or at least presumed desired state of the constitutional system, but rather (even after 30 years) only the result of the current political will and the current political decision.

A mature, open democratic civil society requires responsible, transparent, but also convincing governance based on democratic legitimacy and not sovereign governance based on unconvincing guidelines. At a time when ethnic nationalism, populism, authoritarianism and the suppression of human rights are on the rise in some countries, the crisis may provide a pretext for repressive measures to be taken for purposes unrelated to the COVID-19 pandemic.

Nowadays, more than ever, governments must be transparent. Any crisis situations - including emergencies - must be lawful, proportionate, necessary and non-discriminatory, with a specific purpose and duration, and have the least disruptive effect on the protection of public. The best response is one that adequately responds to immediate threats, protects human rights, while respecting the Rule of Law and democracy.

Having outlined most important constitutional values to protect, we can only express our desire for legislative design of constitutional changes that would fully respect discovered principles of democratic state governed by Rule of Law as the material core of the Slovak Constitution. Particular political decisions shed a light on the nature of the art of governing which cannot be reduced to adjusting the content of the constitution to actual political needs without considering material constitution and its most precious values. Material core of the Slovak Constitution is surviving but still facing many challenges coming up with crisis. The best intention should serve to guarantee real

protection of the democratic society by the parliament and the Constitutional Court as the watchdog of constitutionality. Crisis cannot justify low political culture. It should be emphasized the state of exception is considered legitimate when it aims at preserving the material constitution with its material core even during conflictual and unstable period of constitutional and societal change.

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