Democratic (Dis)Armament

Slovakia's Legal Battle against Extreme Speech

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On 3 September 2019, the Slovak Supreme Court ruled in an appeals procedure against an MP of the far-right political party Kotleba – People's Party Our Slovakia (PPOS). More than a year before this judgment, the MP in question – Milan Mazurek – was convicted for engaging in anti-Roma speech in a radio talk (uploaded to Youtube), stirring hatred and potentially violence against this minority group frequently facing discrimination.

Besides being the first case of a criminal conviction of a high-profile politician in Slovakia for extreme speech according to the Slovak criminal code (§ 423 sec. 1 a) sec. 2 c) of the Slovak criminal code), it is the consequence of the decision that makes it noteworthy. Because of the provision in the Slovak Constitution forbidding individuals with criminal convictions to sit as MPs (Art. 81a f)), Mr Mazurek lost his seat and another candidate of the PPOS took his place. Depending on the factors considered more prominently, the case can be seen either as armament or as disarmament of democracy in Slovakia.

Armament

This judgment with rarely seen implications strengthens Slovak democracy in three ways. Firstly, it increases respect for human rights as it recognises that human dignity and respect for minority rights have a central position in the Slovak constitutional order. This stipulation has been long questioned with the Slovak Constitution's preamble explicitly referring to a Christian (Cyril – Methodius) tradition as shaping the norms of the Constitution as well as elevating the 'Slovak nation' above the 'members of national minorities and ethnic groups.'

The judgment also comes after a series of cases of failed prosecutions of anti-minority speech, with a typical example being the leader of Kotleba's party (Marian Kotleba) presenting a manifesto with anti-Roma statements in a former regional election. To the extent possible in a civil law system, this judgment is therefore likely to attain precedential value and provide arguments for future litigations towards activating the 'hammer' of criminal law against hateful expressions.

Secondly, the judgment increases the authority of the Slovak (democratically adopted) legislation. It blows the wind away from the perception that the criminal provisions against extreme speech in Slovakia are just symbolic expressions adopted by political elites in the interest of political correctness but without actual legal effects when it comes to high-profile political actors. The Slovak courts' judgments in *Mazurek* follow a trend of increasing legislative sanctions for such speech and a general political consensus on these measures (except Kotleba's party, of course).

After the Supreme Court's judgment against the dissolution of the PPOS from late April 2019 and a subsequent decision in which it acquitted another MP of the PPOS charged of presenting anti-Semitic statements on a Facebook profile, this new judgment combines the political and symbolic demand for a militant democracy with a convincing and conventional interpretation of the respective provisions in line with mainstream European standards.

Indeed, it is clear that the sanction of stripping an MP of his seat is not to be taken lightly, and signals that elected politicians are not at liberty to violate the law. Although Mr Mazurek has to pay damages of 10 000 euros as well, he himself acknowledged that the financial sanction is less severe than the loss of his seat. This is particularly the case as due to a legislative loophole he received a severance pay equalling a regu-

lar salary of two months and almost immediately started to work as an assistant to another MP of the PPOS with approximately the same salary as the one he had had as MP.

With the de facto financial sanction being notably lower than the damages ordered by the court, it would not be strategic for the defendant to challenge the verdict at the Constitutional Court whih would almost certainly prolong the proceedings. Instead, by simply paying the sanction, given Slovak legislation, he will be able to run for a seat in the general election which is just a few months away (29 February 2020).

Despite the poor legislation regulating the nuts and bolts of the sanction in this case, the mere existence of such a judgment may deter especially lower-profile actors (e.g. regional politicians) with fewer means to handle such criminal prosecutions from engaging in extreme speech. Moreover, it may add to the reasons for the dissolution of Kotleba's party in case a new petition of this kind is brought to the Supreme Court after the failed attempt of early 2019 – back then the Court argued against the dissolution also because of missing legally enforceable criminal convictions against high-profile representatives of the party. In short, the judgment is a warning finger for the future presentations of the party's representatives.

The third strength of the judgment is that it enhances recognition of the role of expertise in determining outcomes in controversial court cases. The *Mazurek* case was part of a series of cases in which the investigators enlisted the help of various social science disciplines in the form of calling expert witnesses to analyse the speech in question and (depending on the course of the proceedings) testify at court. In this case, they brought in an expert witness from political science/socio-legal studies while in other similar cases, they also turned to social psychologists or historians. This practice can be interpreted as the dawn of more interaction between legal interpretation and social science evidence especially in cases which include complex realities which need to be assessed with an interdisciplinary approach.

Disarmament

Yet, the three ways of 'arming up' Slovak democracy each entail 'disarming' elements as well. The general respect for human rights might be undermined by a perception of lower respect for freedom of expression, especially from a content-neutral perspective. As a former Slovak MP supporting the US approach to freedom of speech emphasised, while this judgment is unambiguous from the perspective of the Slovak legislation currently in force, it may begin a slippery slope that could stifle critical public debate (including controversial cartoons or messages challenging white supremacy, such as one by a Slovak journalist who almost faced criminal prosecution because of it).

Similarly, the authority of Slovak criminal legislation and law enforcement will not necessarily grow across various constituencies if the Mazurek case remains an exception and is not followed by similar results of cases with similar factual bases. To the contrary, the 'veil of exceptionalism' would support nothing but Kotleba and his followers as it would be much easier to disseminate the framing of this being a political trial and unjust decision (which the party, unsurprisingly, started to do). This way, the judgment may even boost political support for Kotleba's party ahead of next year's election.

Of particular significance is one reflection of the Supreme Court's judgment, a video by the former Slovak PM Robert Fico in which he essentially endorsed the democratic legitimacy of Mr Mazurek's speech declaring that the extreme right MP just 'said what nearly the whole nation thinks'. Subsequently, the National Criminal Agency in charge of extreme speech cases announced that they had started an investigation of Fico's statements, and in December 2019 the investigation was followed by Fico's indictment by the Office of the Special Prosecution.

The case promises to be complicated because while Fico (who engaged in anti-Roma speech before) endorsed Mazurek's views, he did so in a more sophisticated and less open way than it is common from Kotleba's representatives (who also supported Mazurek's claims after the judgment). As Fico is a

member of a different political party, his criminal prosecution would herald that the respective provisions are not biased towards specific political parties. From this perspective, it seems premature to denounce the decision of the special prosecutor to go ahead with the indictment. At the same time, the problem of a slippery slope becomes apparent and the fear of criminal law's hyperactivity might undermine the authority of and support for these prosecutions. Illustratively, more than a dozen of MPs of Fico's party organised a press briefing in which they expressed support for his statements. The Slovak police started an investigation into this briefing as well which raises the peculiar question of whether the support of someone who supported statements of a third party which were grounds for conviction of extreme speech qualifies as extreme speech in its own right.

Last but not least, the increased involvement of interdisciplinary expertise comes hand in hand with more questioning of the presence of any degree of objectivity in social scientific analyses. This is precisely what Mazurek's (and others') attorneys have done, by trying to present all analytical conclusions negative for their cause as subjective opinions that should be dismissed. As a consequence of these arguments, part of the population might become more inclined to think that there is no such thing as social scientific expertise, with detrimental consequences for democratic discourse in general.

An Empirical Test for "Militant Democracy"

Whether the *Mazurek* case will ultimately be recorded either as an efficient moment of arming up Slovak democracy against the political extreme or as a misjudged (although well-intentioned) case to increase the respect for human rights and the authority of democratic legislation remains to be seen. It depends on a myriad of factors, the most prominent one being the approach of Slovak courts in future similar cases (including whether they will not give more leeway to extreme speech of high-profile political actors who ultimately have more room to spread their views to a broad audience). Internationally, it has a potential to become a litmus test of whether militant democracy works.

Disclaimer: The author acted as expert witness in the Mazurek case, providing a contextual analysis of the speech in question and presenting it at an oral court hearing.

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