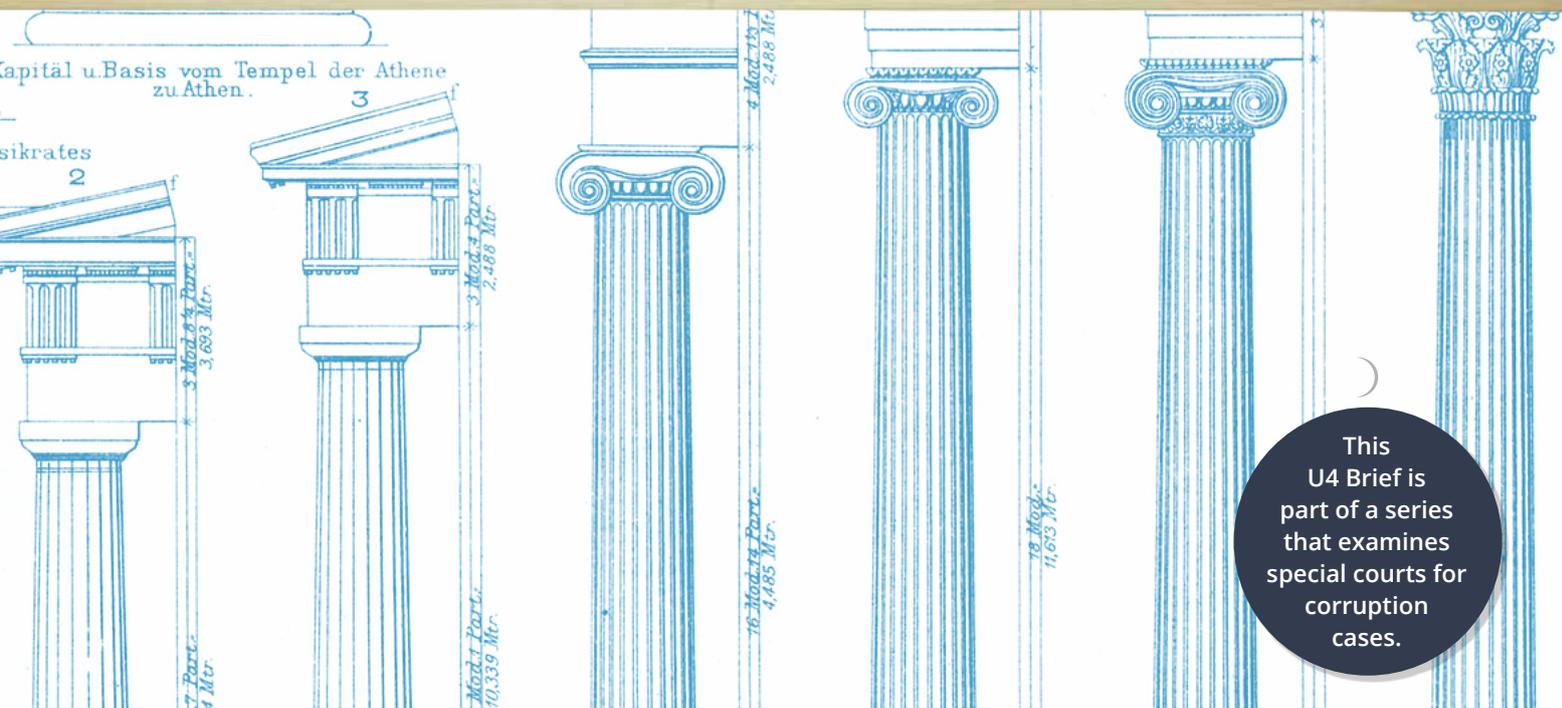


Specialised anti-corruption courts: Slovakia



In 2003 Slovakia established a Special Court, subsequently renamed the Special Criminal Court (SCC), principally for corruption and organised crime cases. The SCC was a response to the domination of the ordinary lower courts by criminal networks and local elites. The SCC attracted considerable criticism from the judicial establishment, due mainly to the higher compensation for SCC judges, but it survived both political and constitutional challenges, albeit in a slightly modified form. Although the SCC has been effective in addressing organised crime and local-level corruption cases, it has issued very few convictions for high-level corruption involving the national elite. Many lay the blame for this situation on the prosecutors rather than on the SCC itself.



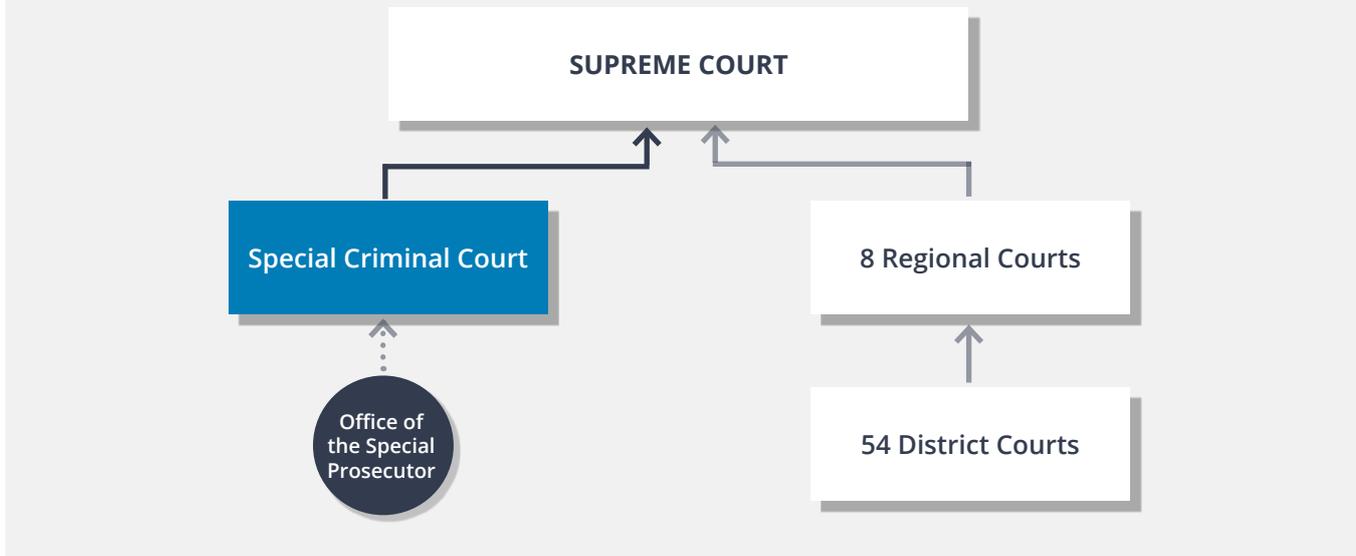
Court held that the Special Court was unconstitutional, but parliament quickly responded with a new law that re-established the court, addressing the constitutional infirmities and making a few additional changes. The court, renamed the Special Criminal Court (SCC), continued to operate without significant disruption.¹

Background and key features

In 2003, Slovakia's parliament established a Special Court with jurisdiction over corruption and organised crime cases; the court began operating in 2005. The same reform package created an Office of the Special Prosecutor (OSP) with exclusive jurisdiction to bring cases before the Special Court. In 2009, Slovakia's Constitutional

In Slovakia's judicial system, most ordinary criminal cases are heard by the district courts in Slovakia's 54 judicial districts; appeals from these courts are heard by the eight regional courts, and regional court decisions can be appealed to the Supreme Court. SCC judges have the status of regional court judges, but the SCC functions exclusively as a first-instance trial court, with SCC decisions appealed directly to the Supreme Court (Figure 1).² The SCC has exclusive original jurisdiction over cases involving corruption, money laundering, organised crime, and (pursuant to the 2009 law) other serious crimes such as premeditated murder. Although

Figure 1. Position of the Special Criminal Court in the Slovak judicial system



it is not exclusively an anti-corruption court, corruption cases make up a substantial portion of the SCC's docket.³ The SCC currently has 13 judges, including a president. Less serious cases are heard by a single judge; for more serious matters, judges hear cases in three-judge panels, with one judge presiding, and decide by majority rule.

The procedures for appointing and removing SCC judges are the same as those used for the regular courts. To be eligible, applicants must pass the judicial examination and must submit their names to a selection committee appointed by the Judicial Council (a body consisting of nine judges and nine members selected by the other branches of government). The selection committee chooses a nominee, whom the Judicial Council can approve or reject. Originally, appointment to the Special Court required a security clearance from the National Security Authority, which also had the power to revoke security clearances. The Constitutional Court's 2009 ruling held that the security clearance requirement violated separation-of-powers principles by giving the executive branch undue power to remove judges by revoking their clearances. However, a 2014 constitutional amendment required all judges (not just SCC judges) to obtain security clearances.⁴ All current SCC judges were appointed before 2009, and future appointments are covered by the 2014 amendment, so in practice all SCC judges are subject to a security clearance requirement.

Rationales and performance

Efficiency

Although many of the countries that have created specialised anti-corruption courts have done so to increase judicial efficiency, this was not a significant motivation behind Slovakia's creation of the SCC. The SCC seems to function reasonably efficiently – perhaps somewhat more efficiently than the ordinary courts, though direct comparisons are difficult due to differences in the dockets. There have also been some indirect efficiency gains associated with the creation of the SCC. For example,

law enforcement officials report that the process for getting permission to conduct wiretaps is much quicker in the SCC than in the ordinary courts, largely because ordinary judges receive a much larger volume of requests and have so many other demands on their time.

Integrity and independence

Concerns about judicial integrity, particularly at the local level, were the main impetus for creating the SCC. Local judges were viewed as enmeshed in local elite networks and susceptible to the influence of politicians, businessmen, and organised crime figures. SCC supporters argued that the appropriate response was to shift these cases to a national court, staffed by high-integrity judges without local ties, and to protect these judges from physical threats. Most observers think that shifting these cases from local courts to the SCC did indeed help end the impunity of local-level elites, though this claim is based on subjective perceptions and is difficult to verify. By contrast, there is widespread concern about the ability of the Slovak legal system to hold high-level national figures accountable for corruption. Some critics therefore decry the SCC as “toothless,” but others emphasise that the SCC is generally free from undue political influence, and lay the blame for the failure to convict high-level politicians at the feet of the OSP or law enforcement. At the same time, the fact that sensitive cases against powerful figures hardly ever reach the SCC means that the court's presumed resistance to the kinds of political pressure that would inevitably accompany such cases has not yet been tested.

Expertise

Although the SCC is a specialised court, its creation had little to do with any perceived need for special technical expertise. Although some of the cases that fall within the SCC's jurisdiction are complex – often requiring examination of financial documents, for example – most observers, including the SCC judges themselves, do not think that handling these cases requires any particular background or training beyond what is needed for other cases that a generalist judge might hear.

Nonetheless, there is a sense that SCC judges do gain helpful experience because of their focus on a limited set of cases.

Challenges and controversies

In addition to the issues raised in the preceding section, Slovakia's experience with the SCC highlights four issues that are likely to be relevant in other contexts as well. These are special screening procedures, special employment conditions, dependence on prosecutors, and scope of appropriate jurisdiction.

Special screening procedures

As noted above, the original design of the Special Court included a security clearance requirement for judges. Proponents viewed this requirement as vital, given serious concerns about judicial integrity. The Constitutional Court, however, asserted that the requirement posed a threat to judicial independence. Many observers in Slovakia are sceptical about whether those making this claim (and the Constitutional Court itself) genuinely believed this. Nonetheless, the controversy does raise questions about the role that another branch of government should have in ensuring the integrity of judges on an anti-corruption court. On the one hand, many believe that the security clearance procedure helped ensure the court's integrity, and there is no evidence that the procedure was ever abused to influence the court. On the other hand, the Constitutional Court's concern appears to be legitimate, at least in the abstract: the power of the executive branch to remove a sitting judge by revoking his or her security clearance, without well-specified rules, could be a tool that an unscrupulous executive could abuse. Under the new constitutional rule, as noted above, all judges now must get a security clearance – but the underlying controversy remains.

Special employment conditions

Although SCC judges' conditions of employment are mostly the same as those of other judges, there are some differences, particularly with respect to salary. Immediately after the enactment of the 2003 law creating the Special Court, the government found it difficult to recruit enough judges, mainly because of the personal risks associated with the court's jurisdiction over organised crime.⁵ The government responded by amending the law to provide salaries that were substantially higher than those of regular judges.⁶ This fixed the recruitment problem but provoked considerable resentment among the rest of the Slovak judiciary. Indeed, it was a group of Slovak judges who brought the constitutional challenge to the Special Court in 2009, and the large pay differential was one of the grounds (along with the security clearance issue) on which the Constitutional Court deemed the SCC unconstitutional.⁷ Under the 2009 law, SCC judges are still paid more than judges on other courts, but the differential is now much smaller and does not seem to have attracted significant criticism.

Dependence on prosecutors

Although the SCC's reputation for independence and impartiality – and willingness to convict public officials accused of corruption – is strong overall, many in Slovakia's anti-corruption community complain that the most important cases, those involving grand corruption committed by powerful figures, never reach the SCC. The OSP, they point out, fails to

bring such cases even when the evidence is strong. According to critics, the corruption cases that the OSP does bring, and that the SCC decides, are too often petty bribery matters involving low-level officials and trivial amounts of money. The Slovak experience thus suggests that corrupt elites may be content to allow some institutions to operate free of interference so long as the elites can capture or otherwise neutralise other links in the chain. In the Special Court's early years, it was the constant focus of attacks by powerful political and judicial figures, many of whom probably feared that they or their close associates might be held accountable by the court. The political attacks eventually faded – but part of the reason (in addition to public support for the SCC) seems to be that the elites who originally viewed the court as a threat are no longer so concerned, because the OSP appears unwilling to bring charges against powerful figures, even when there is strong evidence of wrongdoing.

Scope of appropriate jurisdiction

SCC jurisdiction is defined by the category of the offense, not by its severity. For example, the SCC hears all bribery cases, regardless of the amount of money or the seniority of the officials involved. Some have proposed narrowing the SCC's jurisdiction so that it would only hear more important corruption cases. The argument for such jurisdictional limits is not a concern about excessive caseload; rather, critics allege that the SCC's jurisdiction over minor corruption offenses creates two problems. First, the fact that so many of the court's cases involve small matters (such as a doctor taking a 20 euro bribe)⁸ may undermine public support for the substantial resources devoted to the SCC. Second, some critics suggest that the SCC's broad jurisdiction allows the OSP and others to paint a misleading picture of how effectively Slovakia is combating corruption. Aggregate statistics, particularly convictions and conviction rates, may seem high, but those figures are padded with large numbers of low-importance cases. The critics' implicit reasoning appears to be that if the SCC and OSP lacked jurisdiction over these smaller cases, the OSP would find itself under greater pressure to bring more significant cases.

Other experts strongly disagree with the claim that the SCC's jurisdiction is too broad. Former Minister of Justice Daniel Lipšic, for example, describes the proposal to limit the court's jurisdiction as “a solution in search of a problem.” SCC justices also defend the court's broader jurisdiction as enabling them to tackle corruption as a whole, avoiding the case management problems associated with assigning some corruption cases to one court and other (possibly related) corruption cases to another court.⁹ Defenders of the SCC's broad jurisdiction also emphasise the SCC's role in breaking up local corruption networks and the extent to which even small bribes can be part of a larger corrupt network. Moreover, while other countries' anti-corruption courts may struggle with the problem of too many cases, eliminating the SCC's jurisdiction over petty bribery might produce the opposite problem: too few cases, making it hard to justify the maintenance of the institution at all. Of course, to come back to the critics' point above, if an SCC with limited jurisdiction ended up not hearing a sufficient number of cases, that might call attention to the fact that the most significant corruption cases are not being prosecuted.



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Lessons learned

In sum, Slovakia's experience with the SCC suggests the following lessons:

- When designing an anti-corruption court, reformers must consider how special screening requirements such as security clearances may affect the trade-off between measures that promote judicial integrity and those that may threaten judicial independence. In Slovakia, there is relatively little evidence that the screening procedure was a genuine threat to judicial independence, and some fairly strong evidence that it was an important means to avoid the sorts of judicial corruption that had sometimes afflicted the regional trial courts. But the calculation may come out differently in other settings.
- Another difficult decision concerns whether special court judges should receive higher salaries or other more favourable employment conditions. Under some conditions, higher salaries may be necessary to recruit judges, especially when service on the special court entails greater risks; higher salaries may also improve the quality of the judges selected, both by attracting more applicants and by creating the perception that the special court is "elite." On the other hand, the Slovak experience highlights the fact that significant salary differentials can

engender resentment among other judges and may create political and legal problems for the special court.

- The challenges of addressing local-level corruption may be significantly different from the obstacles involved in tackling national-level problems. In the case of the SCC, centralisation has increased judicial independence from local-level politics, but cases involving significant national-level figures have yet to be brought before the court.
- An anti-corruption court's effectiveness depends on law enforcement and the prosecution service. A specialised court can only decide the cases that come before it, and if law enforcement does not gather evidence (or does so poorly), or if prosecutors do not bring the cases (or do not do a good job with them), there is little even a well-designed specialised anti-corruption court can do about it.
- Careful consideration must be given to the court's jurisdiction, and not simply because of the potential impact on caseload. The right approach will depend on the particular context, but reformers should assess the relative advantages of restricting the court's focus to a handful of significant cases versus conferring broader jurisdiction over a larger number of cases.

Much of this brief is based on interviews with experts in the Slovak government, judiciary, and civil society. These interviews were conducted in Bratislava and Banská Bystrica during 12–15 October 2015. Due to the political sensitivity of issues related to the Special Criminal Court, several of these experts requested that they not be identified by name or institutional affiliation.

Endnotes

1. M. Stanková, "Slovakia to Get New Court," *Slovak Spectator*, 22 June 2009, <http://goo.gl/UhFwMS>. For simplicity, the rest of this brief will treat the Slovak court as a single, continuously operating institution and refer to it as the SCC, even though technically and legally speaking the Special Court and SCC are two different bodies.
2. N. Gallina, "Anti-Corruption Revisited: The Case of the Czech Republic and Slovakia," in *(Dys-)Functionalities of Corruption: Comparative Perspectives and Methodological Pluralism*, ed. T. Debiel and A. Gawrich (Wiesbaden: Springer, 2013), pp. 183, 203; J. Alexander and J. Gyárfás, "Legal Research in Slovakia," *GlobaLex*, January–February 2010, <http://goo.gl/pgkNes>; "The Supreme Court of the Slovak Republic," *Slovenskej Republiky*, 2011, <http://goo.gl/Pwztzg>.
3. M. Kurian, *Recent Slovak Anti-corruption Measures* (Bratislava: Transparency International Slovakia, 2012), pp. 19–20, <http://goo.gl/15ZGvX>; Organisation for Economic Co-operation and Development Working Group on Bribery, *Phase 3 Report on Implementing the OECD Anti-Bribery Convention in the Slovak Republic* (Paris: OECD, 2012), p. 28, <http://goo.gl/tInxdx>. Although hard statistics are difficult to come by, SCC Judge Jan Hrubala estimates that approximately one-third to one-half of the SCC's docket consists of cases of corruption or related serious economic crime. Transparency International Slovakia's data on published cases since 2012 confirm that approximately half (a little over 300 of roughly 600 published opinions) concern corruption.
4. R. Minarechova, "New Security Clearances for Judges Implemented," *Slovak Spectator*, 2 October 2015, <http://goo.gl/9BijTN>; B. Balogová, "Slovakia to Lose Its Special Court," *Slovak Spectator*, 25 May 2009, <http://goo.gl/ST6Hij>.
5. K. Staroňová, "Anti-Corruption Measures in Slovak Judiciary: Case of Court Management and Special Court," presented at 16th NISPACEE Annual Conference 5, Bratislava, 15–17 May 2008, <http://goo.gl/khbprP>; M. Bobek, *Comparative Reasoning in European Supreme Courts* (Oxford: Oxford University Press, 2013), p. 176.
6. This is a simplification. The compensation rules for judges in Slovakia entail a fixed base salary and an annual bonus payment; the extra compensation for Special Court judges took the form of substantially larger bonuses rather than a higher base salary. K. Staroňová and E. Láštic, "Into the Labyrinth: The Rewards for High Public Office in Slovakia" chap. 16 in *Rewards for High Public Office in Europe and North America*, ed. M. Brans and B. G. Peters (London: Routledge, 2012).
7. A. Morgan, "Slovakia Constitutional Court Finds Anti-corruption Court Unconstitutional," *Jurist*, 21 May 2009, <http://goo.gl/79vhxt>.
8. According to Transparency International data on Slovakia, almost half of the bribery convictions in published SCC opinions since 2012 have involved bribes of 20 euros or less, and only 3% have involved bribes of more than 5,000 euros.
9. Those taking this position also point out a tension between the two main arguments sketched above for limiting the SCC's jurisdiction. The first argument, focusing on how trivial cases can undermine the court's legitimacy, presumes that the public is aware that many SCC cases are relatively minor; the second argument, focusing on how aggregate conviction statistics can be misleading, presumes that the public does not realise that many of these cases are petty bribery matters.