

# Changes to Selection and Appointment of Constitutional Court Judges in Slovakia

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## Changes to Selection and Appointment of Constitutional Court Judges in Slovakia.

This article examines changes to the selection and appointment of judges to the Slovak Constitutional Court. One year before a scheduled replacement of nine judges of the Court in 2019, the Slovak government introduced constitutional and legislative reforms of the appointment process. The leitmotif of the proposed reform was an effort to qualitatively improve the appointment process at the point of selection, as well as to increase the amount of publicly available information about candidates. Ultimately, the Slovak government only succeeded in implementing legislative reforms of the selection process, while the constitutional amendment did not receive parliamentary approval.

*Keywords:* judicial appointment, constitutional court, eligibility requirements, court composition, selection hearings

## Introduction

In 2018, the Slovak Ministry of Justice (MoJ) initiated a legislative and constitutional reform of the process for selection and appointment of Constitutional Court (CC) judges. The reform was carried out in response to nine upcoming Court vacancies, which were due at the beginning of 2019.<sup>1</sup> The proposed constitutional reform focused on improving the quality of both the selection process and the candidates in two ways. Firstly, the amendment would have raised the parliamentary majority required of the CC selection vote from a simple majority of the MPs present to an absolute majority of all MPs. Secondly, the amendment would have expanded the eligibility requirements for appointment to the CC to include attributes such as personal renown, reputation for independence and impartiality, and high moral credit. The key legislative change to the selection mechanism was the introduction of televised hearings of CC candidates by the Constitutional and Legal Affairs Committee of Parliament.

The appointment of CC judges is governed by the Constitution, so any substantive change to the process requires a constitutional amendment and must adhere to the formal amendment rules, threshold, and timeline. Bearing in mind that the government coalition

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<sup>1</sup> The terms of office of nine CC judges end on 16 February 2019. MINARECHOVÁ, M. and TEREZANI, M.: *What do you need to know about the Constitutional Court changes?* [online], 2018 [accessed 7 December 2019]. Accessible at: <https://spectator.sme.sk/c/20934552/what-you-need-to-know-about-the-constitutional-court-changes.html>.

pledged to revamp the CC appointment process in 2016 when it first came into power, the proposed reform of the constitutional judiciary was overdue.<sup>2</sup> Constitutional amendment proposals that come from the executive should generally allow sufficient time for debate in the Parliament so that the capacity of MPs to effectively oversee the government is not diminished. The need for scrutiny is even more pressing when the reform affects the composition of judicial bodies and functional separation of powers. The constitutional amendment did not secure the necessary majority in Parliament and thus failed to pass. Due to the hasty drafting process and coordination problems among members of the government coalition, the MoJ was only able to secure the passage of the legislative reform, including the introduction of televised selection hearings.

In the present paper, I critically examine the failed amendment and the adopted statutory improvements to the CC selection process that were introduced to Parliament as one package by the MoJ in 2018. The paper builds on an original dataset comprising all CC applications and archival records of all selections since 1993. These data were collected primarily from the digital parliamentary library,<sup>3</sup> the website of the CC,<sup>4</sup> and via Freedom of Information (FOI) requests.<sup>5</sup> Archival documents used for empirical analysis include stenographic records of Parliament, which show the outcomes of CC selection, records of deliberation in the Constitutional Committee, letters by the Chairman of Parliament to initiate the selection process, and documentary material attached to candidates' applications in the appointment process.

## 1. Constitutional Core of the Appointment Mechanism

The core of the selection and appointment process of Slovak CC judges is embedded in the Constitution.<sup>6</sup> Therefore, any substantive change to the process requires a constitutional amendment. The core of the process has been changed only once since the adoption of the Constitution in 1993, but the minutiae have extended into both legislation and the practice of the appointing bodies, which have developed over time and overlay the core structure.

The core of the appointment process is contained in Article 134 of the Constitution, which regulates the composition of the CC. The provision stipulates that the Court consist of 13 judges. That is, there should be 13 judges on the Court at all times<sup>7</sup> because vacancies

<sup>2</sup> 2016 Government Manifesto (p. 61). Accessible at: <https://www.vlada.gov.sk/data/files/7179.pdf?fbclid=IwAR2X8MS46GCFuOGadPwO-PwqbgOf2knfVcHIZRMshYQ-UKPbZswZO7eN7v0>.

<sup>3</sup> Joint Czech and Slovak Digital Parliamentary Library. Accessible at: <https://www.nrsr.sk/dl/Default/Index>.

<sup>4</sup> Website of the Slovak Constitutional Court. Accessible at: <https://www.ustavnysud.sk/en/o-ustavnom-sude-slovenskej-republiky>.

<sup>5</sup> Filed pursuant to the Act No. 211/2000 Coll. on Free Access to Information. FOI requests were employed for data collection when open databases did not contain archival documents that were supposed to be public.

<sup>6</sup> Constitution of the Slovak Republic, Constitutional Act No. 490/1992 Coll.

<sup>7</sup> Actors tasked with appointing judges in the case of vacancy should exercise their powers in a way that ensures the continuous functioning of the Court. The Parliament and President of the Republic were unable to select and appoint new constitutional judges for most of the last five years, in ostensible breach of their constitutional

diminish its working capacity and can potentially disable the Court from functioning altogether. More specifically, the Slovak CC consists of either a plenary session of all judges or four panels of three judges. Each panel decides hundreds of constitutional complaint cases per year, so even a single vacancy may considerably disrupt the workflow of the Court. What is more, the Constitution requires that an absolute majority make a select few types of high salience decisions of all CC judges sitting in the plenary.<sup>8</sup> The minimum number of judges for the *en banc* constitution of the Court and a decision by the plenary session is seven. Thus, vacancies on the Court make it increasingly difficult for the rest of the judges to find a working majority, and if only seven judges are left on the Court, the plenary must adopt a decision unanimously to continue functioning.

Only on two occasions have there been less than seven judges on the Court; the first was in 2004, and the next was in 2019. If the Court has less than seven judges, the plenary session cannot lawfully be constituted, and the CC will continue adjudicating in one or two panels. The design of the Slovak CC does not allow for any temporary substitution of judges in the case of vacancy, although the 1920 Czechoslovak CC, which was one of its predecessors, did have this feature. The 1920 Czechoslovak CC consisted of seven judges and seven substitutes who took over a case if a judge was prevented from attending the hearing, or if their mandate ended prematurely.

The size of the Slovak CC has not always been the same. The Court was originally established in 1993 with ten judges, but a constitutional amendment in 2001 increased the bench size to 13 judges.<sup>9</sup> This was the only time Article 134 of the Constitution has been amended. The same amendment increased the term of CC judges and introduced a general prohibition on renewable terms of office. The length of the term of office of constitutional judges was extended from seven to 12 years.<sup>10</sup> The number of seats on the

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obligations. See DRUGDA S.: Symposium on “The Slovak Constitutional Court Appointments Case” – Intermezzo to the Constitutional Conflict in Slovakia: A Case Critique. I-CONnect [online], 2018, [accessed 7 December 2019]. Accessible at: <http://www.iconnectblog.com/2018/01/symposium-slovak-appointments-case-drugda>.

<sup>8</sup> Article 131 (1) of the Constitution requires that specific types of proceeding, including the constitutional interpretation and judicial review of legislation, “are decided by plenary meetings of the Constitutional Court. The plenary meeting of the Constitutional Court decides by more than one-half of all judges. If such a majority is not reached, the motion is rejected.” Pursuant to Article 131 (2), the CC “decides on the remaining matters in panels of three judges. The panel decides by a more than one-half of its members.”

<sup>9</sup> Constitutional Act No. 90/2001 Coll. The relevant constitutional provision originally provided:

Art. 134

(1) The Constitutional Court shall consist of *ten judges*.

(2) Judges of the Constitutional Court are appointed *for seven years* by the President of the Republic out of *20 persons* nominated by the Parliament.

(3) A judge of the Constitutional Court must be a citizen of the Slovak Republic who is eligible for the Parliament, has reached 40 years of age, has a university degree in law, and has at least 15 years’ experience in the legal profession. [emphasis added]

<sup>10</sup> The term of office of a CC judge is currently non-renewable, although this prohibition does not apply to judges who served shorter terms prior to the extension in 2001. Historically, only five judges have served two terms of office. No judge has served more than two terms. Judge Štefan Ogurčák applied for a third term of office in 2006. Had he succeeded in his bid for reappointment, he would have served consecutively from 1993 to 2019. The exemption from the prohibition against renewable terms of office currently applies to a few former judges of the Court who are unlikely to apply for the position in the future due to old age.

Court likely varies depending on the perception of its workload and the length of proceedings. It is in the interest of the Court to be fully staffed so that its capacity does not diminish. There is currently no constitutional convention in Slovakia against packing the Court by increasing the number of judges or shortening their terms of office through a constitutional amendment. Therefore, the size of the Court, as well as the term of office of judges, may change in the future.

### ***1.1. Shared Competence***

Besides the size of the CC and the term length of CC judges, Article 134 further demarcates the terms of engagement between the President of the Republic and Parliament in the selection and appointment of constitutional judges. In brief, the appointment of CC judges is the shared remit of these two bodies. The Constitution stipulates that the President shall appoint CC judges for a 12-year term upon nomination by Parliament. The Parliament proposes double the number of candidates for judges that are to be appointed by the President of the Republic.<sup>11</sup> Consequently, the President requires the input of the Parliament to exercise her powers and vice versa. The Parliament has a constitutional obligation to nominate two candidates for every CC vacancy. However, there is no constitutional sanction for acts of omission or bad faith by Parliament regarding this power.<sup>12</sup> Because of the rule requiring double the number of candidates per vacancy, the President retains a measure of discretion in the selection of the final appointee.<sup>13</sup>

### ***1.2. Eligibility requirements***

The eligibility requirements for the position of CC judge are enumerated in the Constitution as an exhaustive list that can broadly be classified into two groups: positive and negative requirements. Specifically, to qualify for CC appointment, one must be a Slovak citizen, eligible for election to the Parliament, over 40 years of age, a law graduate, and have 15 years of legal practice. These are all positive requirements. Negative requirements can be deduced from the incompatibility rules that apply to the office of a CC judge. To qualify for appointment to the Court, one *cannot* be a member

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<sup>11</sup> A similar mechanism applies to a vacancy that occurs prematurely due to the resignation or dismissal of a judge. Pursuant to Article 139 of the Constitution: “*If a judge of the Constitutional Court resigns from office, or is recalled, the President shall appoint another judge for a new term from two nominees presented by the Parliament.*”

<sup>12</sup> The President, on the other hand, can face prosecution for willful infringement of the Constitution, pursuant to Article 107 of the Constitution.

<sup>13</sup> There is a long line of decisions on the subject matter of powers that are shared between the President and Parliament. These are collectively referred to as the CC Appointments Case, which I will not cover in this paper. It remains controversial whether the President has a constitutional obligation to appoint any nominee, even if she is privy to “facts or circumstances” relating to the candidate that (i) call into question their ability to perform duties of the office in a manner that does not diminish it, or (ii) run contrary to the very mission of the concerned body (a formulation based on the CC decision in *General Prosecutor, PL. ÚS 4/2012*).

of a political party or a movement, have other employment,<sup>14</sup> engage in a for-profit entrepreneurial activity, or be a member of other state bodies.<sup>15</sup> Incompatibility rules serve the purpose of “*protecting judges from influences potentially arising from their participation in activities in addition to those of the court.*”<sup>16</sup> It recently became a matter of controversy whether MPs and members of the executive may be appointed to the CC directly from political office. This question was brought to light most starkly by the candidacy of three-time PM Robert Fico. The incompatibility rules currently do not prohibit candidates with a prior political career from applying for a position on the CC. However, it may be pertinent to explore the introduction of a cooling-off period for high-level politicians interested in the robe of a CC judge.<sup>17</sup>

The final requirement is that the candidate takes an oath of office, which is administered by the President of the Republic. The term of office of a CC judge starts upon taking the oath and will expire on the same day 12 years later, irrespective of whether the appointing bodies have already selected a replacement for the judge in question. The oath reads: *„I promise on my honour and conscience that I will protect the inviolability of the natural rights of man and civic rights, protect the principles of the rule of law, abide by the Constitution, constitutional laws and international agreements ratified by the Slovak Republic and which were declared in a manner provided by the law and decide to my best conscience, independently and impartially.*“<sup>18</sup>

Other than the increase in bench size and the length of the term of office of a CC judge, the process of appointment has not materially changed in the 27 years since the establishment of the Court. In 2018, however, a draft amendment came close to adding several important elements to the constitutional core of the selection process.

## 2. Failed Attempt to Change the Constitutional Core of the Appointment Process

The MoJ initiated a constitutional reform of the CC selection and appointment process in the summer of 2018. The draft constitutional amendment was first made public on the 28<sup>th</sup> of May through the interdepartmental process.<sup>19</sup> Constitutional amendments

<sup>14</sup> Incompatibility is decided based on a written statement from the candidate declaring that they do not engage in any activity or serve in any office that is incompatible with a judge of the CC. If they do, the candidate must submit an additional statement that they will resign or cease this activity before their appointment to the Court.

<sup>15</sup> Judges may engage in scientific, pedagogical, literary, or artistic activity pursuant to Article 137 of the Constitution.

<sup>16</sup> Venice Commission, The composition of constitutional courts - Science and Technique of Democracy. CDL-STD(1997)020-e, pp. 15-16.

<sup>17</sup> Constitutional Court hearings: The vote is a political affair, Fico says, [online], 2019 [accessed 7 December 2019]. Accessible at: <https://spectator.sme.sk/c/22036335/constitutional-court-hearings-the-vote-is-a-political-affair-fico-says.html>.

<sup>18</sup> Translation available at the website of the CC: <https://www.ustavnysud.sk/en/sudcovia> [accessed 7 December 2019].

<sup>19</sup> TERENZANI, M.: Minister unveils long-awaited rules for the election of Constitutional Court judges, [online], 2018 [accessed 7 December 2019]. Accessible at: <https://spectator.sme.sk/c/20836113/minister-unveils-long-awaited-rules-for-the-election-of-constitutional-court-judges.html>.

in Slovakia are formally proposed and adopted in the same way as ordinary legislation. The only difference being the majority required for passage of the act. The threshold for passage of legislation is generally a simple majority of the MPs present at the vote (at least 39 out of 76).<sup>20</sup> The majority for the passage of a constitutional act is higher: a three-fifths absolute majority of all MPs (90 out of 150). The proposal to change the core of the CC appointment process was a draft constitutional amendment prepared by a government agency. Therefore, the drafting procedure was additionally governed by special rules stipulated in the Act on Drafting of Legislation.<sup>21</sup> This Act provides that a draft constitutional amendment penned by the government must first be introduced in an interdepartmental review process.

The MoJ uploaded the draft constitutional amendment to an online portal to inform the public and other state authorities of its contents. The interdepartmental review process allows the general and professional public, as well as anyone interested, to comment and to propose changes, additions, and edits to a draft legal act. The general public and public authorities made 43 comments on the proposed constitutional amendment,<sup>22</sup> some of which were accepted by the MoJ before introducing the draft amendment proposal to Parliament.<sup>23</sup>

After the interdepartmental review, the MoJ introduced the draft amendment to Parliament on 24 August 2018. However, just before the second debate on the draft constitutional amendment concluded, a government MP filed a controversial substitute amendment to change the bill's contents. In parliamentary procedure, a substitute amendment is a motion to replace a portion or the whole contents of a legislative proposal. The substitute amendment created irregularities concerning the entry into force of the constitutional act, which made the whole legislative process collapse.

In the following section, I examine the contents of the failed original constitutional amendment that would have significantly changed the core of the CC appointment mechanism. The draft amendment contained four distinct proposals: (1) the introduction of a qualified majority for the selection of CC candidates by Parliament; (2) an increase in the minimum age requirement for the position; (3) the addition of the candidate's "reputation" as a selection requirement; and (4) other qualitative eligibility requirements.

### ***2.1. Qualified Majority for Selection***

Presently, the Parliament selects CC judicial candidates by a simple majority of MPs present at the voting. Given that the quorum for a valid parliamentary vote is 76

<sup>20</sup> Threshold and quorum rules for the vote in the Parliament are provided in Article 84 of the Constitution.

<sup>21</sup> Articles 7–10 of the Act No. 400/2015 Coll. on Drafting of Legislation and Collection of Laws of the Slovak Republic.

<sup>22</sup> Comments submitted to the interdepartmental review process are accessible at: <https://www.slov-lex.sk/legislativne-procesy/-/SK/dokumenty/LP-2018-316>.

<sup>23</sup> A group of academics, former constitutional judges, and legal professionals prepared a more extensive proposal for a change to the core CC appointment mechanism, but most of their comments were disregarded. TERENZANI, M.: Lawyers propose their own changes for Constitutional Court elections, [online], 2018 [accessed 7 December 2019]. Accessible at: [https://spectator.sme.sk/c/20833167/lawyers-propose-their-own-changes-for-constitutional-court-elections.html?ref=av-center#\\_=\\_](https://spectator.sme.sk/c/20833167/lawyers-propose-their-own-changes-for-constitutional-court-elections.html?ref=av-center#_=_).



MPs, candidates for CC judges can be selected by a minimum of 39 votes. However, that would necessitate that 74 of the 150 deputies be absent. The MoJ draft constitutional amendment would have raised the threshold for the selection of candidates in Parliament to an absolute majority of all MPs, which translates to a minimum of 76 votes.

The Venice Commission also recommended that lawmakers raise the threshold for selection of a CC judge to a qualified majority, together with an appropriate mechanism to prevent deadlock and delay. According to the Venice Commission, the selection of constitutional judges by a “*qualified majority allows depoliticisation of the process of the judges’ election, because it requires that the opposition also have a significant position, and potentially a veto power, in the process.*”<sup>24</sup> The number of votes can be an indicator of support for the candidate across the political spectrum. Candidates with a higher number of votes usually enjoy broader backing from both the government and opposition parties. In the same vein, the explanatory memorandum to the draft amendment stated that the higher threshold was to “achieve a broader consensus,” because a simple majority seemed no longer sufficient “*in view of the significance of the vote in question.*”<sup>25</sup>

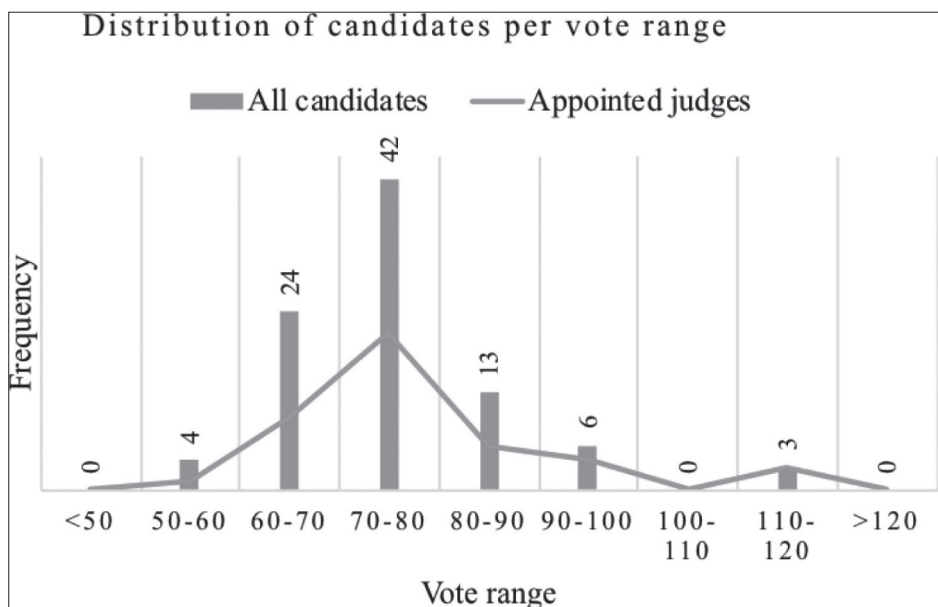
The explanatory memorandum stated that appointment by the minimum majority in Parliament might pose a risk for the legitimacy of the judge in question, and by extension for the whole CC. Historically, no candidate has been selected, let alone appointed, with the minimum number of 39 votes. Most candidates selected by Parliament have acquired between 60 and 90 votes (Figure 1). Conversely, candidates who received less than 60 or more than 90 votes were outliers. The candidate with the lowest number of votes was Oľga Szabó in 2002, with 53 votes. The constitutional judge with the lowest number of votes was Juraj Horváth in that same year, with 58 votes.<sup>26</sup> Therefore, although it may be pertinent to introduce a qualified majority for the selection of CC candidates in the appointment process, this is not necessarily because CC judges have previously received a low number of votes in Parliament. The problem manifests when a disproportionately large number of judges are appointed at the same time. Nine out of thirteen judges were appointed to the Court under the simple majority rule in 2019. Therefore, the composition of the Court for the next 12 years, until 2031, has been determined by the current administration.

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<sup>24</sup> Venice Commission, Slovak Republic - Opinion on questions relating to the appointment of Judges of the Constitutional Court. CDL-AD(2017)001, p. 16.

<sup>25</sup> Explanatory memorandum to the Government Draft Constitutional Act amending the Constitution of the Slovak Republic No. 460/1992 Coll. Accessible at: <https://www.nrsr.sk/web/Dynamic/DocumentPreview.aspx?DocID=456171>.

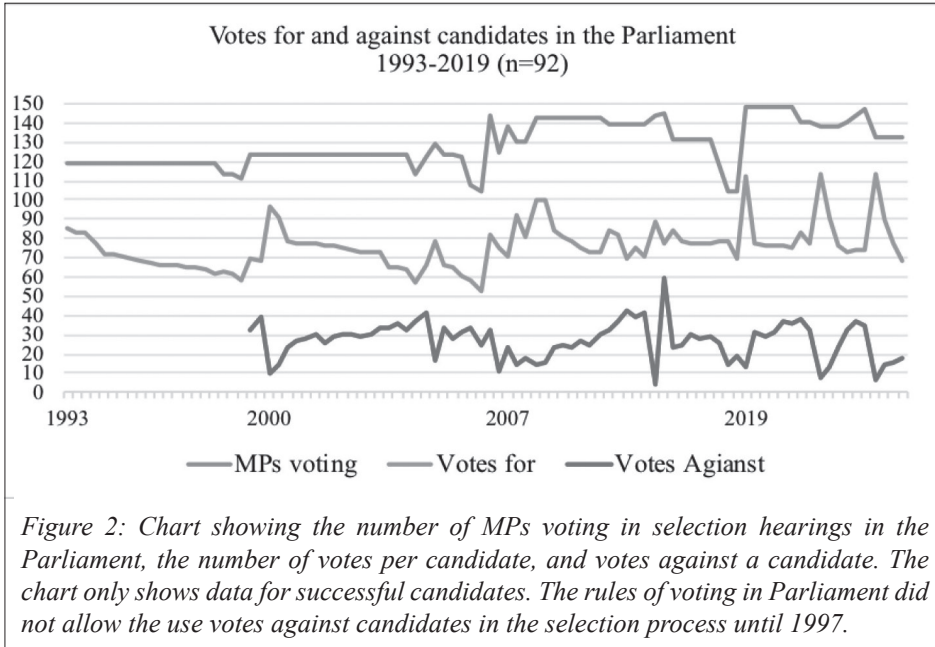
<sup>26</sup> The legitimacy of judge Horváth’s appointment to the office was called into question, but not because of the number of votes he received in the Parliament. It was later uncovered that judge Horváth had a prior conviction for tax evasion, which was expunged from his criminal record. President won’t sack constitutional court judge, [online], 2008 [accessed 7 December 2019]. Accessible at: <https://spectator.sme.sk/c/20028030/president-wont-sack-constitutional-court-judge.html>.



*Figure 1: Histogram showing the distribution of successful candidates in each vote-range for every CC selection in the Parliament since 1993. This histogram shows the number of candidates per vote-range as the height of each block. The highest frequency of cases, 42 judges, occurs in the range of votes from 70–80. All but three candidates received less than 100 votes in Parliament. The pattern of distribution is symmetrical and unimodal.*

A more recent and perhaps more worrying trend is the adoption of a strategy to vote against candidates in the selection process (Figure 2). The first few selections did not give MPs the option to vote against a candidate. However, voting against an unsuitable candidate is perhaps the only strategy that the opposition has at their disposal in the Slovak regime for selection of CC judges: a weapon of the weak. This is because Parliament as a whole has little to say about CC selection, as the legislature in the Slovak parliamentary system is effectively suffused with the executive: after a general election, the authority to form a government goes by convention to the strongest party by numbers that can sustain a majority in Parliament throughout the 4-year term. Thus, the executive usually dominates Parliament by controlling the majority of MPs, which means that the government authors the absolute majority of legislative proposals that get accepted throughout the parliamentary term. Similarly, the absolute majority of CC candidates who get selected in the appointment process are those with the backing of the government coalition. The opposition does not have the numbers to win over the government. However, requiring a qualified majority for the selection vote would give the opposition a voice in the process and, over time, ensure that CC candidates enjoy backing from a broad political spectrum.





## 2.2. Minimum Age Requirement

As part of the failed constitutional amendment, the MoJ also proposed raising the minimum age requirement for CC judges. The Constitution prescribes that a candidate for CC judge be at least 40 years old. This minimum age requirement is generally used to guarantee that the candidate has both professional and life experience. The government draft constitutional amendment would have raised the age requirement by five years to 45. Lawmakers explained that the purpose of the change was to “ensure that candidates who were to serve on the Court had sufficient experience.”<sup>27</sup> Here again, the empirical evidence suggests that the age limit does not currently pose a problem. Although judges under 45 years of age occasionally get appointed, the average age of the whole composition of the CC is above that limit.

Contrary to the proposal of the MoJ, if the appointment mechanism for CC judges successfully maximises quality, selecting younger judges may be a viable strategy for increasing the value of each appointment beyond the primary assignment. Of course, the value of an appointment is primarily the contribution of a given judge to the decision-making of their court. However, judges of the Slovak CC have a 12-year, non-renewable term of office. They will eventually retire. The appointing bodies could use the retirement rule to their benefit by redeploying retired judges elsewhere to generate value. The

<sup>27</sup> Explanatory memorandum to the Government Draft Constitutional Act amending the Constitution of the Slovak Republic No. 460/1992 Coll.

redeployment of judges is essentially a strategy of asset recovery. It takes time to train a judge who can sit on the CC.<sup>28</sup> Therefore, actors who are responsible for the appointment of judges should use the limited number of CC judges to maximise value throughout their productive life cycle. CC judges can be successfully reused to generate value elsewhere if they have some time until retirement but have a good reputation on their way out. Political actors have repeatedly struggled to propose suitable appointments to supranational courts. The appointment of younger judges may, over the medium-term, create a sufficient supply of talent that can alleviate this problem.<sup>29</sup>

	Number of appointments	Number of appointments under 45 y/o	Average age	Court size
1993	10	3	51.1	10
1997	1	1	44	10
2000	9	2	46.4	10
2002	3	0	49.3	13
2003	1	0	51	13
2007	9	0	51.9	13
2014	1	0	60	13
2017	3	0	61	13
2019	9	4	48.2	13

*Figure 3: Table of the average age of all appointments to the Constitutional Court – structured by year of appointment, number of appointments made, and average age of appointments in that year.*

### 2.3. Judicial Reputation

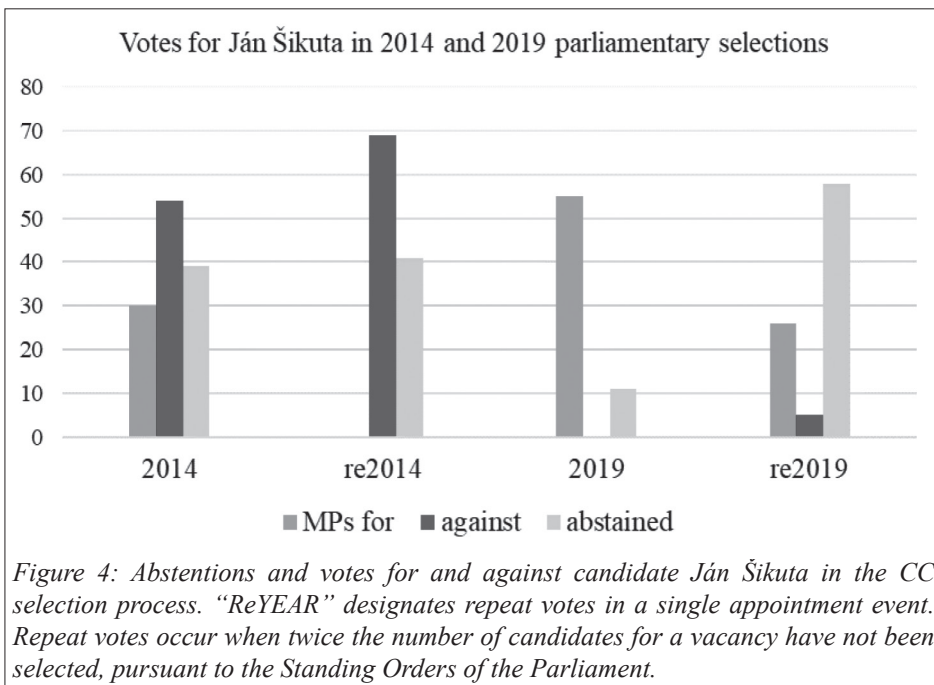
An interesting innovation by the draft amendment was the proposal to include the reputation of a candidate as a distinct selection requirement. The specific wording of the provision was that only “a generally recognised authority in the field of law”<sup>30</sup> should

<sup>28</sup> The appointment of older judges, who retain a high reputation, may be a viable strategy for boosting a low-reputation court. In the present article, I only briefly consider the subject of judicial redeployment, but I will give it proper treatment in my forthcoming dissertation.

<sup>29</sup> Fourth candidate for the judge of the General Court in Luxembourg rejected, [online], 2019 [accessed 7 December 2019]. Accessible at: <https://spectator.sme.sk/c/22067084/luxembourg-general-court-slovakia-candidate-michal-kucera-fail.html>.

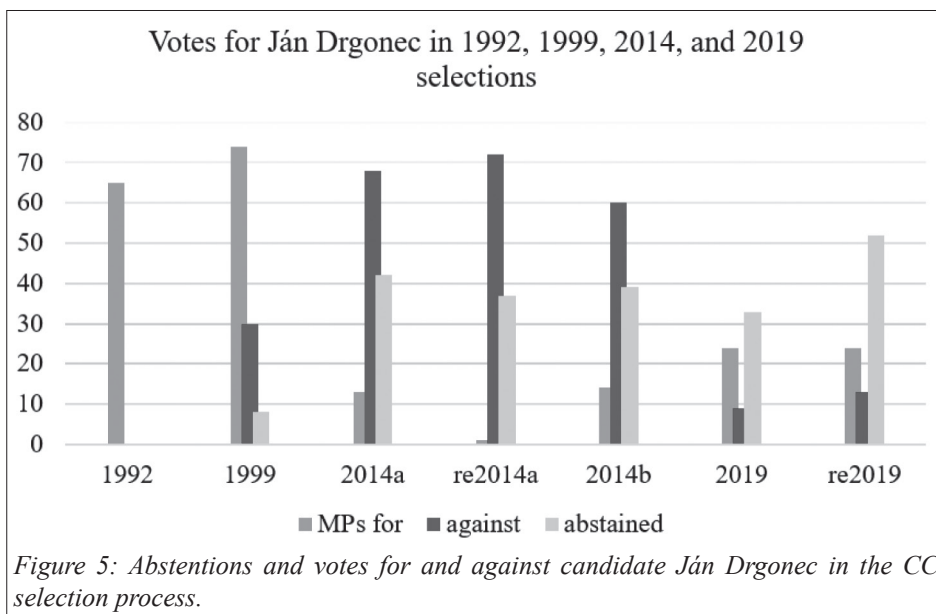
<sup>30</sup> When the MoJ made public its first draft of the proposed constitutional amendment on May 2018, during the interdepartmental review. The provision defined a reputable candidate in terms of quantitative criteria: the candidate must have passed a professional judicial/advocate/prosecutor/notarial examination and have been regularly publishing or lecturing in their respective field for at least 10 years, or they must be an academic authority or prominent figure in the field of law. This working definition was dropped before the MoJ introduced the amendment to Parliament in October 2018.

become a CC judge. Scholars suggested that the entrenchment of a reputational requirement in the Constitution would be an admission that political actors have not previously attached great weight to the authority of individual candidates in the field of law.<sup>31</sup> This assertion seems to be supported by the ill fate of some otherwise highly reputable candidates in the appointment process. For example, judge Ján Šikuta was nominated twice for a CC position: in 2014 and 2019. Šikuta was a judge of the European Court of Human Rights (2004–2015), and later became a judge of the Slovak Supreme Court after reintegration into the domestic judiciary. It may not be easy to accurately assess the reputation of individual candidates for a position on the CC, because little public information is available about candidates outside the judiciary regarding their performance in office or the legal profession and academia. However, Šikuta’s prior appointment to the supraregional court can serve as a proxy for high merit or achievement. His work experience on the European Court of Human Rights should have given him a competitive advantage over other candidates in the selection process, but Parliament rejected Šikuta and on one occasion MPs even voted against him in large numbers (Figure 4).



<sup>31</sup> GIBA, M., BARANÍK, K.: Nad vládnym návrhom legislatívnych zmien v oblasti kreácie ústavných sudcov. [Governmental draft of legislation in the field of creation of the Constitutional judges] In *Acta Facultatis Iuridicae Universitatis Comenianae*. No. 2, 2018, p. 958.

Next, consider the case of former CC judge Ján Drgonec. Drgonec served on the CC from 1993 to 2000, so he is exempt from the prohibition against the renewable terms of office. Drgonec should have had a competitive advantage against other candidates because of his previous experience. He applied for the position four times after his initial term but was never reappointed (Figure 5).



Courts are known to suffer from an institutional weakness because most of their decisions rely on the government or other state bodies for implementation. The answer to this problem, according to some scholars, is to regard judicial reputation as a unique compliance mechanism. Slovak lawmakers certainly did not intend to enter into this academic debate. However, a future study of the Slovak parliamentary practice of rejecting high-reputation CC candidates in the selection process may prove to be a fruitful contribution to the theory.

#### **2.4. Qualitative Eligibility Requirements**

Finally, among the proposed constitutional changes to the selection mechanism was the inclusion of additional qualitative eligibility requirements. The relevant provision stipulated that the life of the candidate should guarantee the “*proper, honest, independent, and impartial service in the office*” of a CC judge. This stipulation seemed to apply to the candidate’s professional life primarily but arguably extended into their private life as well. The exact nature of these evaluative attributes would have to be determined for individual candidates by the appointing parties. Similar evaluative descriptions of

a suitable candidate for the position of a constitutional or apex court judge can be found in many of the world's constitutions. The current eligibility requirements provided by the Slovak Constitution are only formal. They do not articulate a vision of an ideal judge. Any Slovak lawyer over 40 years of age with 15 years of practice can theoretically become a CC judge, but that does not necessarily mean that they should.

The inclusion of qualitative requirements for appointment to the Court is not *prima facie* problematic, since it may inspire MPs to reflect on some of these attributes when scrutinising candidates for selection. However, the draft amendment originally proposed that these qualitative attributes should apply throughout the term of a judge. The enforcement after entry of a judge into office raises several issues. The proposal envisaged that if a judge failed to maintain high standards in professional and perhaps even personal life, the CC plenary session could discipline them. The Constitution currently only allows the disciplinary charge and dismissal of a judge for conduct that is “*incompatible with the performance of the office of judge of the Constitutional Court*.”<sup>32</sup> However, the Act on the CC further specifies that a CC judge may commit a disciplinary offence either by violating the duties of the judicial office or by behaviour, even as a private individual, that may reflect negatively on the CC and the institutional trust that it enjoys. An extension of the grounds for disciplinary proceedings against judges to include a requirement of a “proper and honest” life would have been either redundant or too intrusive.<sup>33</sup>

### 3. Legislative Reforms

The change to the constitutional core of the appointment mechanism did not pass through Parliament. Nevertheless, the MoJ was able to secure safe passage for most of its legislative reforms.<sup>34</sup> Changes to elements of the selection and appointment of CC judges that lay outside of the Constitution were adopted in two steps: First, the Parliament passed a new Act on the CC, extending the list of nominators with the power to propose candidates for consideration to the Parliament; Secondly, a legislative rider to the Act on the CC introduced changes to related legislation<sup>35</sup> to implement televised selection

<sup>32</sup> Article 138(2b) of the Constitution.

<sup>33</sup> Articles 23 and 27 of the Act No. 314/2018 Coll. on the Constitutional Court.

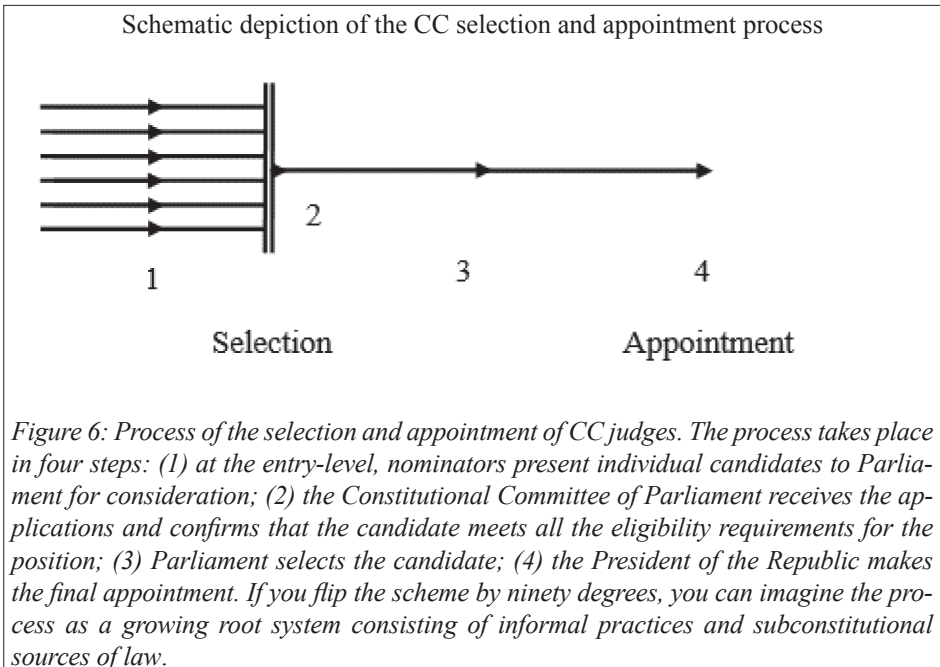
<sup>34</sup> With the exception of popular participation in the appointment process. As will be discussed further in the following section, the introduction of televised selection hearings brought the appointment of CC judges closer to the general public. The MoJ legislative draft even included a provision that would enable the public to actively take part in the process, as opposed to being a passive observer. This provision would have introduced a formal process for the public to ask CC candidates questions, with the Constitutional Committee acting as an intermediary. Questions from the public were to be sent in writing, ahead of the selection process, to the Chair of the Committee. Each candidate would receive a maximum of three questions from the public, after questions from MPs and the representative of the President. The subject matter of crowd-sourced questions to candidates would have been limited to “*general legal knowledge, the decision-making of the Constitutional Court and international courts, judicial philosophy, ethical standards, human rights protection, legal interpretation, Constitutional Court doctrines as well as the mission of a Constitutional Court judge*.” Original legislative drafts submitted by the MoJ can be accessed at: <https://www.nrsr.sk/web/Dynamic/DocumentPreview.aspx?DocID=456173>.

<sup>35</sup> Primarily Act No. 350/1996 Coll. on Standing Orders of the Parliament, which regulates the parliamentary procedure for selecting CC candidates (Articles 115-116a).

hearings by the Constitutional Committee and other marginal improvements of the selection process. In the following section, I examine both changes in turn.

### 3.1. *Nominator*s

The selection and appointment of constitutional judges are two related processes that are laid out in the Constitution. As discussed above in connection with the voting threshold, the selection of candidates takes place in Parliament by a common vote of MPs. Parliament selects two candidates for each vacancy. The final appointment is in the hands of the President of the Republic, who swears into the office her judges of choice. However, this constitutional core of the appointment mechanism is overlain with an intricate superstructure. Figure 6 depicts the process in its entirety. If you flip the scheme by ninety degrees, you can imagine the process as a growing root system consisting of informal practices and subconstitutional sources of law. Only the selection and appointment are constitutionally relevant, but the parliamentary selection of CC candidates comprises three sub-processes, which feed into each other and also involve external actors. The three sub-processes are the nomination, selection hearing, and a vote by the Parliament that concludes the selection. This section assesses the formal rules for the nomination of CC candidates to the selection and appointment process, which were changed by the MoJ legislative reform.



The Parliament has developed its selection power in a way that involves additional actors at the entry-level. The Act on the CC lists several subjects that have the power to propose individual candidates for selection in Parliament.<sup>36</sup> The nomination power is generally limited to the heads of prominent constitutional bodies, political actors, and professional and academic institutions, all of which should have an interest in high-quality CC appointments.<sup>37</sup> Some of these institutions are uniquely poised to help Parliament with both the recruitment of candidates for selection and the qualified assessment of candidates' merit. For example, the President of the CC often nominates candidates for selection from the ranks of law clerks, and the General Prosecutor from the ranks of the Public Prosecution Service. This is because MPs, who have the right to select candidates for appointment to the CC, may not have the capacity to accurately determine the quality and standing of candidates in their respective profession.

Nominators are not limited to supporting candidates from their own organisation or profession. Moreover, joint nominations are permissible, so that a candidate can enjoy the backing of more than a single nominator. Therefore, to signal their quality to Parliament, a candidate may decide to secure backing from multiple nominators. Similarly, a group of nominators can coordinate their actions to support selected candidates and give them an advantage over the competitors. No empirical research has been carried out regarding how joint nominations or the relative weight of the various nominating subjects are related to the success of candidates in the selection process.<sup>38</sup> Nevertheless, several candidates display this type of strategic behaviour.

The process by which nominators recruit candidates is not formally regulated. Each nominator may determine their process for recruitment. Thus, the legal framework for CC selection grows down and has roots in the many informal practices of these actors, who are the gatekeepers at the supply side of the process. I was unable to thoroughly investigate these practices because it was so difficult to access relevant information. Nominators seem to prefer not to disclose their practices in this area. I even filed FOI requests with several nominators but received only one positive reply—from the General Prosecutor.<sup>39</sup> According to the description of the nomination practice provided by the

<sup>36</sup> The list of nominators had been previously regulated by Act No. 38/1993 Coll. on the Organization of the Constitutional Court, its Proceedings, and on the Status of its Judges, which was replaced by the new Act on the Constitutional Court.

<sup>37</sup> For an analysis of the nomination power of the President of the Constitutional Court see DRUGDA, S.: Can the President of the Slovak Constitutional Court Defend It? *I-CONnect* [online], 2019, [accessed 7 December 2019]. Accessible at: [http://www.iconnectblog.com/2019/07/can-the-president-of-the-slovak-constitutional-court-defend-it/?fbclid=IwAR0hrCz4\\_mjfrO1Ozu75sKkQgxPZ\\_oAWn58FoRWpNGAdwcr2w6oBWX5jGw](http://www.iconnectblog.com/2019/07/can-the-president-of-the-slovak-constitutional-court-defend-it/?fbclid=IwAR0hrCz4_mjfrO1Ozu75sKkQgxPZ_oAWn58FoRWpNGAdwcr2w6oBWX5jGw).

<sup>38</sup> There is a lack of empirical research on the CC appointment process in Slovak legal literature in general. Matulník recently published an important paper positing a hypothesis that candidates' political careers or a link to political elites determine their success in the selection and appointment process. Matulník persuasively showed that a majority of candidates had some relation to politics. This observation alone is significant, but Matulník did not prove using either quantitative or qualitative methods that the political connection determined the success of candidates in the selection. MATULNÍK, M.: K voľbe sudcov Ústavného súdu Slovenskej republiky. [On election of Constitutional Court judges] In *Justičná revue*. No. 10, 2019, p. 958.

<sup>39</sup> To offer one example, the former President of the Constitutional Court Ivetta Macejková refused to grant the author access to information on her use of nomination power. Reply to an FOI request, dated 12 April 2017 (on file with author)



office of the General Prosecutor in reply to the FOI request: „*In addition to [constitutional eligibility requirements], the General Prosecutor always takes into account not only the personality traits of the individual concerned but also their overall performance during the course of their career at all levels of the prosecutorial service, their professional experience, as well as the foreign language and other skills acquired during their practice before nominating the individual to the Constitutional Court selection and appointment process.*“<sup>40</sup>

The new Act on the CC extended the list of nominators by two subjects: the President of the Slovak Judicial Council and at least five members of the Judicial Council (there are eighteen members in total). Judges had been previously nominated to the selection process by either judicial unions<sup>41</sup> or the Chief Justice (in the case of judges of the Supreme Court).<sup>42</sup> The Judicial Council is a Judicial Self-Governing body that was established in two steps by a constitutional amendment in 2001 and an implementing statute one year later.<sup>43</sup> It remains to be seen how the Judicial Council will approach its new nomination power. Moreover, these new powers will pose interesting coordination problems for Council members since both the President of the Judicial Council and five of its members now have the nomination power. The President of the Council was criticised for her first nomination to the CC selection process in 2019 because she nominated Monika Jankovská, who was later implicated in an unprecedented judicial corruption scandal.<sup>44</sup> The President of the Council had to explain her nomination and the process she adopted in screening applicants for the position. The controversy showed that, if nominators do not adopt robust screening at the time of recruitment of candidates, the integrity of the entire process might be compromised.

### 3.2. Selection Hearings

Legislative reforms introduced in the year 2018 were primarily meant to improve the throughput legitimacy of the selection process. The method that the MoJ chose to achieve this goal was to increase, in various ways, the sum of public information available about CC candidates. The introduction of selection hearings was one element of the reform that

<sup>40</sup> Reply to an FOI request by the Office of the General Prosecutor, dated 7 April 2017 (on file with author)

<sup>41</sup> There are three judicial unions in Slovakia: the Association of Slovak Judges, For a Transparent Judiciary, and the Slovak Union of Independent Judiciary. The three unions were established at different times. The judicial unions made collectively 20 nominations to the selection and appointment process between 2000 and 2015. For information on Slovak judicial unions, see KOSAŘ, D.: *Perils of Judicial Self-Government in Transitional Societies*. Cambridge: Cambridge University Press, 2016, p. 253.

<sup>42</sup> Most of the nominators are individual constitutional office-holders such as the Chief Justice or MPs. However, the Act on the Constitutional Court also vests the nomination power with academic institutions and legal associations. Consequently, every law school and legal research institution, as well as any organisation of the different legal professions, may nominate candidates to the selection process.

<sup>43</sup> Act No. 185/2002 Coll. on the Judicial Council of the Slovak Republic.

<sup>44</sup> RAÁBOVÁ, M.: Two witnesses talk about the corruption of a judge and state secretary, [online], 2018 [accessed 7 December 2019]. Accessible at: <https://spectator.sme.sk/c/20790365/two-witnesses-talk-about-the-corruption-of-judge-and-state-secretary.html>.

contributed to the publicity of the upcoming appointment. Selection hearings allow new information about the life, quality, ideology, and merit of candidates to be acquired through questioning. However, other partial improvements contributed to achieving this goal and helped set the stage for the selection hearings.

The ability of MPs to acquire new, relevant information depends on the quality of their questions. Questions should be designed in a way that maximises new informational content upon reply and avoids or reduces noise and redundant knowledge. The utility of the selection hearings was also enhanced because pursuant to Article 15(3) of the new Act on the CC, every nomination had to be justified and to include a motivation letter from the nominee. Moreover, every nomination contained additional documentary material, including a CV with an overview of the legal experience of the candidate, as well as their academic publications, educational, judicial or other legal professional activities, and achievements.<sup>45</sup> Therefore, MPs possessed initial information that helped them tailor their questions to the profile of a candidate.

Nevertheless, it may be that not all MPs had the relevant capacity or support structure to analyse the data, despite having access to the personal files on each candidate. The selection hearings took place in the Constitutional Committee, but less than half of the current members of the Committee have a background in law.<sup>46</sup> Several NGOs published an assessment of the candidates nominated to the selection process and prepared questions to support lay members of the Committee ahead of the first selection hearing. The Minister of Justice made it clear that the “media and the public have an indispensable role” in assisting with the acquisition of more information about each candidate, and that it is not only MPs who have a responsibility scrutinise candidates in the selection process.<sup>47</sup>

To illustrate the format, I shall now examine the first selection hearing that took place in January 2019. Although selection hearings of CC candidates at the Committee are not new, this was the first time the hearing was televised.<sup>48</sup> The National Council received 40 nominations by January 7, which was the deadline for nominators to support individual candidates for consideration.<sup>49</sup> Starting on 23 January 2019, the Constitutional Committee

<sup>45</sup> Pursuant to Article 116(a) of the Standing Orders of Parliament, the bundle attached to the nomination of a candidate shall also include her written statement of consent with the nomination, consent to the use and publication of her personal data on the webpage of the Parliament, and an affidavit on the veracity of the data provided to MPs.

<sup>46</sup> MPs have access to a limited number of personal assistants pursuant to the Parliament Resolution No. 267, from 15 December 2010, laying down conditions for reimbursement of expenses for running an office and a staffing budget. Assistants can be hired selectively for specialised knowledge, such as legal expertise. To improve the quality of selection hearings in the future, members of the Committee should get a larger budget to hire additional staffers who will prepare individualised lines of questioning for each candidate, as well as an analysis of the applications.

<sup>47</sup> Minister of Justice Gabor Gál in a TV debate. O 5 Minút 12, [online], 2019 [accessed December 2019]. Accessible at: <https://www.rtv.slovakia.sk/televizia/archiv/14036/176623>.

<sup>48</sup> Under the previous legislation, the Committee had already invited candidates for a short interview. However, this interview usually lasted less than five minutes, and candidates sometimes did not receive any questions.

<sup>49</sup> The deadline for nominators to propose candidates to Parliament is set by the Chairman of Parliament.

of the National Council held three rounds of selection hearings to question the nominees.<sup>50</sup> The selection hearings were an interesting innovation that attracted a lot of attention. The Constitutional Committee had to make available an audio-visual transmission of the hearings.<sup>51</sup> Clips from the selection hearing were viewed thousands of times on streaming platforms such as YouTube, as well as on the website of the National Council and media. The nominees appeared before the Committee in alphabetical order.<sup>52</sup> Each nominee had to present her motivation to apply for the position, work experience, publication, attendance at lectures, seminars, and academic conferences, and professional accomplishments. MPs and the attending representative of the President then had time to question the nominee. The nominees received questions in blocks of three and had an unlimited time to respond.<sup>53</sup> The shortest presentation took less than 20 minutes, while the longest presentation and questioning of a nominee lasted more than two hours. All the documents about a nominee were made available to members of the Committee ahead of the hearing. The statutory period for publication of the documents, set by the parliamentary rules of procedure, is 45 days, but this was reduced to 15 days for all positions that were vacated in 2019.<sup>54</sup> So the background documents on each nominee and their application were published online on the webpage of the National Council two weeks before each selection hearing taking place.

## Conclusion

Until recently, the appointment of CC judges in Slovakia generated little debate or public controversy because the Court and its judges kept a relatively low profile. With a seat far removed from the political capital of the country, the Court attracted little attention, and the lay public might have had difficulty telling it apart from the general judiciary. However, almost by default, some the court's powers predisposed it to greater exposure to politics and judicialisation. The standing of the Court thus rose in prominence over time.

It is perhaps understandable that attention now turns to the CC, after several decisions of high importance, such as the striking down of a constitutional amendment<sup>55</sup> or the

<sup>50</sup> As a sufficient number of candidates was not elected by the Parliament, there needed to be another round of the selection process. In total, there were five rounds, with the last taking place in September 2019.

<sup>51</sup> Video recordings from every round of the CC selection hearings are accessible on the Parliament webpage: <https://tv.nrsr.sk/archiv/prenos/dalsie/vypocutieUS>.

<sup>52</sup> Robert Fico, the three-time Prime Minister who surprised many with his last-minute application, spoke in the seventh hearing. His selection hearing alone attracted considerable attention online. The video from Fico's hearing was viewed and share thousands of times. Accessible at: <https://tv.nrsr.sk/archiv/ine/7/3412> (from 3:48), [accessed December 2019].

<sup>53</sup> For later selections, the format of questioning changed so that MPs could ask questions continuously, without interruption. Candidates also had a limited time to reply. The format of questioning was agreed before each selection by the Constitutional Committee.

<sup>54</sup> Pursuant to transitional provisions of the Standing Orders of Parliament (Article 150c).

<sup>55</sup> On 30 January 2019, the Slovak CC declared this constitutional amendment unconstitutional. The Court held that the Constitution contains an implicit material core that cannot be changed through the ordinary amendment process. Consequently, if an amendment violates a core provision, it will be struck down. See

*Amnesty Abolition Case*.<sup>56</sup> Nevertheless, each proposal for a change to the constitutional core of CC selection and appointment should be assessed against historical experience and empirical data to fully elucidate the strengths and shortcomings of the process.

This article has examined changes to the selection and appointment of judges to the Slovak CC, both failed and successful, which were introduced by the government ahead of the scheduled replacement of nine judges of the Court in 2019. It scrutinised some of the reform proposals against empirical data. The main goals of the reform were to improve the appointment process at the point of selection and to increase the sum of available public information about candidates for CC judges. Although a portion of the government reforms failed, legislative changes introducing selection hearings delivered on the promise of generating more publicly available data about CC candidates. However, to truly improve the quality of the selection and appointment process, we must integrate this information better into the design of the process so that it has an impact on the decision making of the relevant political actors, as well as on the final outcomes.

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