

The Guardians and the Watchdogs: The framing of politics, partisanship and qualification by selected newspapers during the 2018–2019 Slovak Constitutional Court appointment process

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The Guardians and the Watchdogs. This article aims to place the selection process of judges to the Slovak Constitutional Court, which is most likely to determine its composition for more than a decade, into the context of the constitutional judges' interaction with other political actors, including the broader public. It illustrates how selected quality Slovak newspapers have framed the role of politics in the selection process. Conceptually, the article departs from a more robust line of research undertaken in several Western democracies, particularly the United States, that has given rise to discussions about how their apex courts interact with the media and, through them, with the public at large. Building on theories of the courts as political institutions and informed by theses on the judicialization and mediatization of politics, the article presents a broader understanding of both the decision-making process of constitutional judges and politics emphasizing expertise in their selection. Firstly, the selection of judges and their adjudication might be seen through partisan bias, associated with the attitudinal model of judging, and secondly, it might be perceived as a neutral expertise, associated with the vision of the courts as bureaucratic non-political actors. Surveying selected, primarily opinionated newspaper outputs, the article found a peculiar interaction between the debate surrounding qualification as a necessary justification for a constitutional appointment and the three different frameworks of constitutional judges as political but non-partisan, partisan, or neutral (non-political) actors. Qualification is overwhelmingly seen as a necessary condition for appointing a constitutional judge, regardless of their views. However, disagreements persist as to whether previous political experience disqualifies a candidate. Such disagreement overlies a deeper divide over whether constitutional judges are political actors, and if so, what kind of political actors they are.

Keywords: *Slovak Constitutional Court, constitutional judges, appointment process, newspaper portrayal, framing, attitudinal model, institutional approach*

Introduction

“If we are trying to create the image that the filling of the Constitutional Court’s vacancy had nothing to do with politics, we lie to ourselves. The creation of the Constitutional Court is an important act in which relevant political players participate. [...] So, let’s not create the image that if we emphasize the political aspects of the creation of the Constitutional Court, we do something extremely wrong.”¹

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¹ Former Prime Minister (PM) and Chairman of political party Smer-SD during the hearings of candidates for constitutional judges in Bratislava, January 23, 2019 (author’s translation in part based on that of the Slovak

The Slovak Constitutional Court has rarely been a focus of international attention,² but its 2019 “appointment crisis” certainly changed that.³ The roots of this predicament primarily lay in the underestimated and partially poor design of the Court’s composition, whereby a cumulation of term endings meant that a large number of vacancies became available simultaneously.⁴ Efforts were made to remedy this design flaw via a constitutional amendment, but these failed due to a lack of consensus in the legislature.⁵ Former Prime Minister (PM) Robert Fico played a central role in this matter and undeniably drew public attention to the process as a whole, facilitated by the media, who reported about the appointment process in depth, as well as by increased expert and NGO scrutiny.⁶

The selection process began shortly after minor changes in the legal rules governing it entered into effect. It lasted roughly 10 months and concluded with President Čaputová appointing the last six of the thirteen judges to the Court on October 10, 2019. To fill all the seats, five calls for candidates, five rounds of hearings, and nine rounds of voting⁷ were required. As of late February 2019, no candidates had been elected in the first and second rounds, and the Court had remained in an “emergency regime.” The President and Vice-President of the Court were then chosen by Čaputová’s predecessor, Andrej Kiska, from among the candidates elected in the third round. In retrospect, it seems likely that this process was one of the most publicly followed events surrounding the Constitutional Court to date. As such, it may have had a disproportionate influence on the public perception of the Court.

Spectator in the article *Constitutional Court hearings: The vote is a political affair; Fico says* (2019). Available online: <https://spectator.sme.sk/c/22036335/constitutional-court-hearings-the-vote-is-a-political-affair-fico-says.html>.

² This also applies to the study of constitutionalism in Slovakia more generally. For example, the Slovak case was not included in a recent collection on constitutional identity (CALLIESS, C., VAN DER SCHYFF, G. (eds.): *Constitutional Identity in a Europe of Multilevel Constitutionalism*. Cambridge: Cambridge University Press, 2019) or in a planned handbook on constitutional foundations that includes the three other V4 countries (VON BOGDANDY, A., RAGONE, S.: *Constitutional Foundations*, 2019. Available online: <https://www.mpil.de/en/pub/research/areas/comparative-public-law/ius-publicum-europaeum/constitutional-foundations.cfm>). Arguably, several other jurisdictions are also frequently omitted, including EU countries such as Bulgaria and Romania.

³ E.g. LALÍK, T., BARANÍK, K., DRUGDA, Š.: Slovakia: Developments in Slovak Constitutional Law. In: ALBERT, R. et al.: *The I-CONNECT-Clough Center 2016 Global Review of Constitutional Law*. Boston: I-CONNECT and the Clough Center, 2017, pp. 181–185.

⁴ STEUER, M. Constitutional Court of the Slovak Republic (Ústavný súd Slovenskej republiky). In GROTE, R., LACHENMANN, F., WOLFRUM, R.: *Max Planck Encyclopedia of Comparative Constitutional Law*. Oxford: OUP, 2019. Available online: <https://oxcon.oup.com/view/10.1093/law-mpeccol/law-mpeccol-e803>.

⁵ STEUER, M. On the Brink of Joining Poland and Hungary: The Night of Surprises in the Slovak Parliament. *Verfassungsblog*, October 25, 2018, Available online: <https://verfassungsblog.de/on-the-brink-of-joining-poland-and-hungary-the-night-of-surprises-in-the-slovak-parliament/>.

⁶ An example of this is the “For Good Choice” campaign of the NGO Via Iuris (Za dobrú voľbu, 2019, available online: <https://zadobruvolbu.sk/>) which aimed to disseminate accurate information about all candidates and included sample questions for the candidates that those eligible to ask questions were free to use during the hearings.

⁷ Parliament always gets two chances to vote on a given pool of candidates.

The “Fiačan Court,” named after the historically fourth Constitutional Court President since Slovakia’s independence, is the product of this appointment process, so an investigation of the presentation of this process in the media may offer insights into the societal context in which the new Court has begun to operate, and it may go some way towards closing the research gap in judicial politics between Slovakia and Western democracies, particularly the United States.⁸ Moreover, an understanding of the media portrayal of the Constitutional Court selection process may prompt more methodologically sophisticated studies into the interaction between media and public support for specific candidates,⁹ as well as into the response of the Court to its media portrayal more broadly through media communication strategies.¹⁰

The present article offers a qualitative, critical description of how the selection procedure for the Slovak Constitutional Court was portrayed in three Slovak newspapers: *Sme*, *Denník N*, and *Pravda*. All three of these newspapers have a country-wide reach, but the former two are considered to support liberal, constitutional¹¹ democracy, while the latter emphasizes leftist, social democratic ideas, bringing it ideologically closer to the coalition in power during the selection process.¹²

⁸ In the Czech Republic, one collection provides some insight into this field of inquiry. For instance, one chapter highlights why specific attention to the Constitutional Court judges is warranted: because it is the Court that stands to the greatest extent “between law and politics.” HAVEL, T.: Odráz práva v médiích aneb několik poznámek k tzv. mediálním kauzám. In KYSELA, J., ONDŘEJKOVÁ, J. (eds.): *Jak se píše o soudech a soudcích: soudní moc v mezioborové perspektivě*. [Writings about Courts and Judges: The Judicial Power in an Interdisciplinary Perspective] Praha: Leges, 2012, p. 168. Arguably, we do not know much about the media portrayal of several other constitutional courts in post-communist Europe, which creates a broader research gap, addressed, at the time of writing, through the investigations of the JUDICON-EU project, 2019. Available online: <https://judiconeu.uni-nke.hu/>.

⁹ Previous research into the US Supreme Court has shown that when the public is informed about the candidates, those who exhibit “judiciousness” are supported. Such candidates are considered a particularly suitable expert profile for the Court, as opposed to those who back particular political or ideological stances. For this to be the case, information must be provided by the media. GIBSON, J. L., CALDEIRA, G. A.: Confirmation Politics and The Legitimacy of the U.S. Supreme Court: Institutional Loyalty, Positivity Bias, and the Alito Nomination. In *American Journal of Political Science*, Vol. 53, No. 1, 2009, pp. 139-155. Hence, if the media provide more information on the selection process, public support is more likely to fall behind the most qualified candidates. More indirectly, there is increased public pressure on the political elites to select such candidates.

¹⁰ For instance, one recent study investigated the factors that set the tone of the media portrayal of US Supreme Court rulings, which could be utilized to study how the *candidates* and *judges* are themselves portrayed. The authors claimed that negativity in court rulings tends to lead to more negative coverage in the media. DENISON, A., WEDEKING J., ZILIS, M. A.: Negative Media Coverage of the Supreme Court: The Interactive Role of Opinion Language, Coalition Size, and Ideological Signals. *Social Science Quarterly*, online first, 2019, pp. 1-23.

¹¹ See e.g. GINSBURG, T., HUQ, A. Z.: *How to Save a Constitutional Democracy*. Chicago: University of Chicago Press, 2018.

¹² Of course, constitutional and social democracy are not polar opposites, and the “adjective game” associated with contemporary notions of democracy is problematic in itself (STEUER, M.: Variácie demokracie v rozhodovacej činnosti Ústavného súdu Slovenskej republiky v treťom funkčnom období. In MAJERČÁK, T. (ed.): *Ústavný súd Slovenskej republiky v treťom funkčnom období – VII. Ústavné dni*. [Constitutional Court of the Slovak Republic in its Third Term] Košice: Univerzita P. J. Šafárika, 2019, pp. 293–305). For a critical perspective on the Slovak media environment, see ŠKOLKAY, A.: Slovakia: From a Black Hole in the Heart

The 2018–2019 selection procedure determined the composition of the Fourth Slovak Constitutional Court. Furthermore, it was a major event surrounding the Court in this period because it followed (1) earlier constitutional conflicts between the head of state and the legislature regarding appointment procedures,¹³ (2) a legislative change that came after a new Act on the Constitutional Court (314/2018 Coll.),¹⁴ and (3) discussions about a constitutional amendment on the regulation of the appointments. In addition, the procedure contributed to the composition of the Court for the next 12 years (until 2031–2032).

The appointment hearings to the Court were broadcast live,¹⁵ allowing more information about the candidates to become publicly available. As such, the media had to choose what to report about the hearings and, to a lesser extent, about the application materials. For these reasons, the selection process is an apt case to examine newspaper portrayals of the hearings and the role of the constitutional judges therein.

1. The media representation of judicial appointments to the constitutional courts

The present article operates at the intersection of three theoretical approaches, all of which are contested to varying degrees both within and beyond judicial studies. Firstly, in contemporary literature, the judicialization (or even juristocracy) thesis¹⁶ prevails in the discourse about the role of courts in most contemporary democratic regimes.¹⁷ This

of Europe to a Central/Eastern European Statistical Average. In BAJOMI-LÁZÁR, P. (ed.): *Media in Third-Wave Democracies: Southern and Central/Eastern Europe in a Comparative Perspective*. Paris, Budapest: Editions L'Harmattan, 2018, pp. 182-209.

¹³ STEUER, M.: Kto a ako vyberá strážcov? Legitimita výberu sudcov Ústavného súdu Slovenskej republiky v komparatívnej perspektíve. [Who selects the guardians and how? Legitimacy of the selection of Constitutional Court judges of the Slovak Republic in a comparative perspective] In *Právnik*, Vol. 156, No. 4, 2017, pp. 338-356.

¹⁴ MAZÁK, J., JÁNOŠÍKOVÁ, M.: Konania o ochrane ústavnosti pred Ústavným súdom Slovenskej republiky: Kritické poznámky k novému zákonu (III.). [Proceedings on protection of constitutionality before the Constitutional Court. Critical remarks on the new act (III.)] In *Právny obzor*, Vol. 102, No. 3, 2019, pp. 183-203.

¹⁵ STEUER, M.: The First Live-Broadcast Hearings of Candidates for Constitutional Judges in Slovakia: Five Lessons. *Verfassungsblog*, February 5, 2019, Available online: <https://verfassungsblog.de/the-first-live-broadcast-hearings-of-candidates-for-constitutional-judges-in-slovakia-five-lessons/>.

¹⁶ HIRSCHL, R.: The Judicialization of Politics. In WHITTINGTON, K. E., KELEMEN, R. D., CALDEIRA, G. A.: *The Oxford Handbook of Law and Politics*. Oxford: Oxford University Press, 2010, pp. 119-41.

¹⁷ The present article does not consider the debates surrounding courts in authoritarian regimes. However, in such cases, the judicialization thesis cannot be disregarded either (MOUSTAFA, T.: Law and Courts in Authoritarian Regimes. In *Annual Review of Law and Social Science*, Vol. 10, No. 1, 2014, p. 282). A prominent Central European representative of this literature is the judge of the Hungarian Constitutional Court Béla Pokol, who argues that the Court should play a deferential role in deciding matters of public interest. POKOL, B.: The Juristocratic Form of Government and Its Structural Issues. In EHS, T., KRIECHBAUMER, R., NEISSER, H. (eds.): *Verfassungsgerichtsbarkeit Und Demokratie: Europäische Parameter in Zeiten Politischer Umbrüche?* Vienna: Böhlau Verlag, 2017, pp. 61-78. Few scholars have explored the connections between the “mainstream” judicialization literature and the opponents of judicial power in contemporary politics.

strand of scholarship prompted a proliferation of studies into how courts should develop and maintain influence by *deferring* to the other branches of power in most cases and thus building up authority that could then be utilized in striking down core measures that may lead to democratic deterioration.¹⁸ This tendency towards advocating for deference in “normal times” stands in contrast to the early-20th century recognition of courts as significant *political* institutions capable of constructing durable political communities through “constitutional myths.”¹⁹ From this perspective, the lack of focus by the courts on robust notions of “social welfare,” including social rights,²⁰ undermines their authority and makes them vulnerable to “assaults”²¹ by other political actors.

However, building courts capable of such a robust defense is impossible without judges who are both highly qualified and brave enough to adopt “heroic” positions that go beyond judicial minimalism²² to advance substantive democracy. This contention brings us back to the selection process, in particular to the dilemma of the ideal profile of the constitutional judge and to the ideal composition of the bench, where a diversity of profiles may arguably be desirable, hence contradicting any very specific notion of an “ideal judge.”

Additionally, the selection process for constitutional judges is affected by the formal rules of the court’s operation, as well as by a whole network of actors with different interests and mutual influences on each other. Therefore, it is essential to study how the process is portrayed by political actors other than the Court itself, including political elites and the media. The present article provides a mere introduction to that complex web of actors by looking at the media depiction of the extent to which the process was political. The article also explores how the process is related to notions of qualification (Gibson’s “judiciousness”²³) and partisanship, with the latter defined as ideological leanings towards a specific political party or type of party. However, there is a broad literature of “ideational” or “constructivist” institutionalist theoretical approaches²⁴ that

¹⁸ BROWN, N. J., WALLER, J. G.: Constitutional Courts and Political Uncertainty: Constitutional Ruptures and the Rule of Judges. In *International Journal of Constitutional Law*, Vol. 14, No. 4, 2016, pp. 817-50; ISSACHAROFF, S.: Comparative Constitutional Law as a Window on Democratic Institutions. In: DELANEY, E. F., DIXON, R.: *Comparative Judicial Review*. Cheltenham: Edward Elgar Publishing, 2018, p. 77.

¹⁹ LERNER, M.: Constitution and Court as Symbols. In: *Yale Law Journal*, Vol. 46, No. 8, 1937, p. 1318: “The further Constitution and Court move from the realities of the common welfare, the more barren they become as symbols and fetishes – fetishes that could easily become in the end the rallying-points of movements to suppress liberal democracy, impose fascism, and stamp out the intellectual groups.”

²⁰ KING, J.: *Judging Social Rights*. Cambridge: Cambridge University Press, 2012.

²¹ BUGARIĆ, B., GINSBURG, T.: “The Assault on Postcommunist Courts,” *Journal of Democracy*, Vol. 27, No. 3, 2016, pp. 69-82, <https://doi.org/10.1353/jod.2016.0047>; CASTILLO-ORTIZ, P.: The Illiberal Abuse of Constitutional Courts in Europe. In *European Constitutional Law Review*, Vol. 15, No. 1, 2019, pp. 48-72.

²² SUNSTEIN, C. R.: *Constitutional Personae*. Oxford: Oxford University Press, 2015.

²³ GIBSON, J. L., CALDEIRA, G. A.: Confirmation Politics and The Legitimacy of the U.S. Supreme Court: Institutional Loyalty, Positivity Bias, and the Alito Nomination.

²⁴ GILLMAN, H.: The Court as an Idea, Not a Building Block (or a Game): Interpretive Institutionalism and the Analysis of Supreme Court Decision-Making. In CLAYTON, C. W., GILLMAN, H. (eds.): *Supreme Court Decision-Making: New Institutional Approaches*. Chicago: University of Chicago Press, 1999, pp. 65–87; HAY, C.: Constructivist Institutionalism. In BINDER, S. A., RHODES, R. A. W., ROCKMAN, B. A. (eds.): *The Oxford Handbook of Political Institutions*. Oxford: Oxford University Press, 2008, pp. 56-74.

can be used to inquire beyond the media and the judicial selection process themselves into the actual decision making of the Court.²⁵

Of course, these approaches compete with altogether different accounts that try to identify the forces that motivate judges to decide in the ways they do. Briefly stated, institutional accounts that attribute significance to legal principles and the “law in books”²⁶ compete with approaches that disregard the “legal model” in favor of an attitudinal model whereby, in a crude sense, only the political ideologies of the judges contribute to the outcomes of the judicial process.²⁷ The attack on the “dragon,” that is, the claim that law can exert an independent influence on politics, including judicial politics, has been especially fierce in US political science and remains linked to the belief that judges cannot be the guardians of human rights and other fundamental values.²⁸ In this vein, the attitudinal model goes hand in hand with political constitutionalist accounts that diminish the legitimacy of courts against that of other political actors such as the executive and the legislature in deciding politicized matters.²⁹ A somewhat intermediary stance is taken by a third approach known as *strategic*. In this view, the law should not be disregarded entirely, but rather seen as one contributor to the strategic considerations of judges when making their decisions.³⁰ That said, even this approach leans towards an account of the judicial process that considers the law and legal principles as a relatively inferior motivation in decision making.

These positions differ in a number of nuances depending on the authors who articulate them, and transposing these many subtleties to study empirical material published in newspapers is almost impossible, as newspaper outputs do not operate along these theoretical lines in any straightforward manner.³¹ For this reason, the present article draws a very simplified differentiation between politics, qualification and partisanship to highlight some of the implicit thinking behind the newspaper outputs on this subject. An institutionalist account differentiates between the political actorness of constitutional judges and their partisan traits or affiliations, while a behaviorist account does not,

²⁵ CLAYTON, C. W., MAY, D. A.: A Political Regimes Approach to the Analysis of Legal Decisions. In *Polity*, Vol. 32, No. 2, 1999, pp. 233-52.

²⁶ ROBERTSON, D.: *The Judge as Political Theorist: Contemporary Constitutional Review*. Princeton: Princeton University Press, 2010.

²⁷ SEGAL, J. A., SPAETH, H. J.: *The Supreme Court and the Attitudinal Model Revisited*. Cambridge: Cambridge University Press, 2002.

²⁸ BRISBIN, R. A.: Slaying the Dragon: Segal, Spaeth and the Function of Law in Supreme Court Decision Making. In *American Journal of Political Science*, Vol. 40, No. 4, 1996, pp. 1014-1015.

²⁹ Perhaps the most powerful and yet still relatively concise presentation of this position can be found in WALDRON, J.: The Core of the Case against Judicial Review. In *The Yale Law Journal*, Vol. 115, No. 6, 2006, pp. 1346-1406; see also HIRSCHL, R.: The Judicialization of Mega-Politics and the Rise of Political Courts. In *Annual Review of Political Science*, Vol. 11, No. 1, 2008, pp. 93-118.

³⁰ EPSTEIN, L., KNIGHT, J.: Reconsidering Judicial Preferences. In *Annual Review of Political Science*, Vol. 16, No. 1, 2013, pp. 11-31.

³¹ This is understandable as the reality in the stories they report is more complex. For example, a given story might encompass several judges, each of whom can best be captured in term of competing theoretical accounts. An article may also address several questions surrounding the appointment procedure, implicitly producing a framework for constitutional court judges in general.

asserting that all constitutional judges necessarily possess partisan traits. The third notion, that of qualification, intersects with both politics and partisanship; it is likely that both the institutional and formalist/neutral frameworks will only acknowledge qualified judges. The difference between them is that formalist/neutral approaches treat qualification and preceding political experience as mutually exclusive. Meanwhile, the partisan/behaviorist perspective attributes no major significance to qualification, seeing the selection, as well as the decision making procedure, primarily through the lens of partisan deals and ideological attitudes rather than expertise.

	Political (institutional)/ judges are political actors	Neutral (formal)/ judges are not political actors	Partisan (attitudinal)/ judges are partisan political actors
Qualified	May be selected if has experience in politics	Should not be selected if has experience in politics	Distinction irrelevant, judicial appointments are products of political bargains and decided in a partisan manner
Unqualified	Should not be appointed		

Table 1. The positions of competing frameworks of the political actorness of constitutional judges on the desirability of their appointment depending on qualification and previous involvement in politics.

Lastly, the theoretical lens of mediatization is essential to understanding how the media portrayal of the constitutional courts affects their capacity to make a difference through their decisions. Mediatization is a central phenomenon in contemporary political regimes.³² The support for central institutions and actors of a democratic state (known as sociological legitimacy)³³ depends largely on the media portrayal of their mission, its framing,³⁴ and their success in carrying it out.³⁵ In turn, these institutions and actors care

³² See, e.g., MAZZOLENI, G., SCHULZ, W.: 'Mediatization' of Politics: A Challenge for Democracy? In: *Political Communication*, Vol. 16, No. 3, 1999, pp. 247-61; MICHAILIDOU, A., TRENZ, H.: The Media as Public Intermediaries of Knowledge in Europe: From Deliberation to Democratic Legitimation. In GÓRA, M., HOLST, C., WARAT, M. (eds.): *Expertisation and Democracy in Europe*. London: Routledge, 2017, pp. 171-91.

³³ WELLS, M. L.: Sociological Legitimacy in Supreme Court Opinions. In *Washington and Lee Law Review*, No. 3, 2007, pp. 1011-72; BASSOK, O.: The Sociological-Legitimacy Difficulty. In *Journal of Law & Politics*, No. 2, 2010, pp. 239-72.

³⁴ ENTMAN, R. M.: Framing Bias: Media in the Distribution of Power. In *Journal of Communication*, Vol. 57, No. 1, 2007, pp. 163-73.

³⁵ There is a vivid strand of research on this subject in the context of the US Supreme Court. See the literature review in SALAMONE, M. F.: *Perceptions of a Polarized Court: How Division among Justices Shapes the Supreme Court's Public Image*. Philadelphia: Temple University Press, 2018, pp. 27-34. Briefly, Salamone emphasizes that the Court must communicate with the media to ensure thorough and informationally

about their media portrayal and might, in some situations, be willing to adjust their decision making in the hope of enhancing their public support and social acceptance. Constitutional court judges are no exception to this process. Although the audiences of various media differ,³⁶ and not all of them are likely to be directly affected by the portrayal of courts, the combined influence of the media on decision making and public trust in political institutions writ large warrant research into how the reputable press in particular depicts various aspects of the legal procedures surrounding the constitutional courts' composition and operation. In short, the media play an essential role in "narrating" the outcomes of judicial decision making³⁷ and issues surrounding their functioning. An appointment process that will change a sizeable majority of those on the bench is a key milestone in the history of a country's constitutional adjudication as it generates the "personal substrate" for the years to come.

In summary, the present article encourages further study of the interaction between courts and the media in Slovakia, as well as in post-communist Europe more generally. It addresses how one dimension of the Slovak Constitutional Court was depicted during the recent appointment process—namely the interaction between politics, partisanship and qualification (expertise). It maintains that there are three broad alternatives in which constitutional court judges may be depicted: Firstly, as expert administrators distant from both politics and the public who, nevertheless, are instrumental in making the state run efficiently and smoothly (for instance, by redressing individual grievances or resolving disagreements between state organs)³⁸; secondly, as political actors who are nonetheless essential for guarding the democratic regime writ large; thirdly, as partisan political actors in the so-called attitudinal model, whereby a balance of partisan backgrounds and ideological views of the candidates becomes essential for a well-functioning court.³⁹ In short, efficiency must be balanced

correct reporting: "any missteps in the media's reporting of the justices decisions may filter into the public's attitudes toward those decisions and the policies at stake" (ibidem, p. 34). However, he focuses more on the reporting of the Court's decisions than on the judicial appointment process, which is of no less significance because it emphasizes personalities and usually the future of the institution.

³⁶ BAUM, L.: *Judges and Their Audiences: A Perspective on Judicial Behavior*. Princeton: Princeton University Press, 2008.

³⁷ GAAKEER, J.: The Perplexity of Judges Becomes the Scholar's Opportunity. In *German Law Journal*, Vol. 18, No. 2, 2017, p. 331.

³⁸ For instance, this was the "mythical image" of the Israeli Supreme Court for several decades. BASSOK, O.: Television Coverage of the Israeli Supreme Court 1968–1992: The Persistence of the Mythical Image. In *Israel Law Review*, Vol. 42, No. 2, 2009, pp. 357-359.

³⁹ There is very limited empirical research of the media portrayal of the Slovak Constitutional Court in general. One undergraduate thesis examined its portrayal in two Slovak dailies during Ivetta Macejková's Court (2007–2017) under the presidency of both the Smer-supporting Ivan Gašparovič and the then non-partisan Andrej Kiska. The thesis found that the frame of cognitive/strategic constitutionalism focusing on efficiency better captures the portrayal of the Court, especially towards the end of its third term, than the notions derived from traditional constitutional theory (such as the "guardian of the constitution" theory). For more on cognitive/strategic constitutionalism, see HOLMES, S.: Constitutions and Constitutionalism. In ROSENFELD, M., SAJÓ, A. (eds.): *The Oxford Handbook of Comparative Constitutional Law*. Oxford: OUP, 2012, pp. 189-216;

MATICH, M.: Na rámcovaní záleží: Kvalitatívna obsahová analýza mediálneho obrazu Ústavného súdu SR v denníkoch Sme a Pravda. [Framing Matters: Qualitative Content Analysis of the Media Portrayal of the Slovak

with democracy in this matter, although the two are not complete polar opposites.⁴⁰ The former is essential from an administrative/bureaucratic point of view⁴¹ and the latter from the perspective of the court's democratic legitimacy, which goes beyond simply its sociological legitimacy as understood in terms of public support for the court.⁴²

2. Methodological remarks

The present article is a critical analysis of the representation of politics in the selection process of Slovak Constitutional Court judges. It engages with three “watchdogs” of Slovak democracy: the more center-right-leaning newspaper *Sme*, the more center-left leaning *Pravda*, and *Denník N*, a more intellectual-focused daily that published an extensive amount of longer texts on the constitutional court during the selection process.⁴³

The excerpts were selected from the categories the newspapers created regarding the selection of constitutional court judges.⁴⁴ The article focuses primarily on the opinions of key journalists and other actors through guest op-eds and responses to journalist questions. The debates captured in the analysis span all five rounds of the selection process, although a greater number of excerpts were published during the first round than in the subsequent ones, perhaps unsurprisingly.⁴⁵

Constitutional Court in SME and Pravda] (bachelor thesis) Comenius University in Bratislava, 2017. Available online: <https://alis.uniba.sk:8443/lib/item?id=chamo:648318&fromLocationLink=false&theme=Katalog>.

⁴⁰ As mentioned, the present study is based on pre-categorized concepts; as such, it simplifies the reality depicted in newspaper reporting to some extent.

⁴¹ The distinction between politics and administration is well-known and debated in some strands of political theory. See AGAMBEN, G.: *Introductory Note on the Concept of Democracy*. In MCCUAIG, W.: *Democracy in What State?* New York: Columbia University Press, 2012, p. 1.

⁴² GROVE, T.: *The Supreme Court's Legitimacy Dilemma*. In *Harvard Law Review*, Vo. 132, 2019, p.2240-2276.

⁴³ This daily was created by a group of journalists leaving *Sme* because they were concerned about the influence of a financial group which gained minority shares in *Sme*. For an example of a relatively long comment from an academic constitutional lawyer, see GIBA, M.: *Verejné vypočutie kandidátov na ústavných sudcov je povinnosť, nie iba právo*, [The public hearing of judicial candidates is not their right but their obligation] 2019. Available online: <https://dennikn.sk/1429769/verejne-vypocutie-kandidatov-na-ustavných-sudcov-je-povinnost-nie-iba-pravo/>.

⁴⁴ Obviously, there were other newsworthy items concerning the Constitutional Court that were not directly linked to the selection process. However, because the selection process was so significant, other news became intertwined with the reporting on that process. For example, shortly before the end of nine judges' terms, the constitutional court ruled to invalidate part of the Slovak Constitution (PL. ÚS 21/2014). This was understandably a subject of interest during the oral hearings in the subsequent rounds. In fact, sometimes newspapers (notably *Denník N*) placed such news under the category of the selection process itself. Thus, it is not straightforward to disentangle the selection process from other key events surrounding the Court.

⁴⁵ This is also because another candidate with a background as a former parliamentary party chairman, Radoslav Procházka, was elected by parliament in the fourth round and hence did not participate in Round 5. Procházka's candidature triggered debates on the balance between the candidates' expertise and their moral credentials: Procházka undoubtedly possessed the former as (among others) a Yale-educated constitutional law scholar, but the latter was more questionable on account of his actions shortly after the general elections of 2016.

During the selection process, there were strong coalition–opposition dynamics. These were particularly marked when only the democratic opposition is considered and the anti-democratic extreme right party of Marian Kotleba is excluded. Moreover, Robert Fico dominated as a controversial political figure at the height of the first round of the nomination process, which took place under great public scrutiny. For these reasons, the framing of judges as political or even partisan political actors is likely to be of considerable significance in reporting the selection process. Moreover, such framing could be expected to compete with an emphasis on judges as neutral, non-political administrators, which may have coincided with a decline of public interest in the process after the presidential elections of March 2019. A “pure” partisan political perspective similar to the one presented by former PM Fico is likely to be present in only a minority of excerpts.

3. Politics, partisanship and qualification

How can these three relatively abstract positions be distinguished in concrete instances? To demonstrate how they differ in practice, the bold claim by Robert Fico that the constitutional court selection process is infused with politics is once again a useful example. For Fico, there are three reasons why the process is political: Firstly, because the selection is made through the legislature and the head of state. Few would doubt the validity of this interpretation, and so it does not have major relevance for the framing. Secondly, there are political interests clashing over the selection of candidates. This is a more controversial claim because it implies that horse-trading of the candidates may take place depending on certain characteristics of their profiles. Hence, in this view, the evaluation of the candidates is no longer confined to disagreements about their intellectual and moral qualifications to become judges, but rather takes into account ideological traits in their profiles, including potential ties to existing political elites, that may be advantageous or deleterious depending on the particular partisan perspective being adopted. Thirdly and more implicitly, Fico’s position presents the selection process, and the Constitutional Court as a whole, as a political institution infused with partisan dynamics. Fico did not detail the divisions shaping these dynamics, although he did imply that they would resemble a divide among interpretative theories, such as originalism and living constitutionalism,⁴⁶ or between conservatism and liberalism in ethical questions.⁴⁷ However, the division seems rather to be between “us” and “them” in terms

⁴⁶ For a general overview, see e.g. SOLUM, L. B.: Originalism Versus Living Constitutionalism: The Conceptual Structure of the Great Debate. In *Northwestern University Law Review*, Vol. 113, No. 6, 2019, pp. 1243-1296.

⁴⁷ That said, the question of the candidates’ position on abortion and (to a lesser extent) euthanasia did come up during the hearings. A number of candidates refused to reply openly, others stuck to the existing case law of the Slovak Constitutional Court on the subject. However, concerns about the “moral-ethical orientation of the future Constitutional Court did occasionally arise, such as in one interview when the argument of an “overly conservative” pool of candidates was brought up with the above-mentioned ethical issues in mind. KOPČAYOVÁ, I., PORUBĀNOVÁ, S.: Ústavný súd môžu ovládnuť konzervatívci, [The Constitutional Court can be ruled by conservatives] 2019. Available online: <https://spravy.pravda.sk/domace/clanok/504412->

of political allegations and readiness to decide on cases based on brute, materialist associations (such as the prospect of personal career benefits when deciding cases in a manner prospective to concrete partisan majorities) rather than on certain moral or political opinions.⁴⁸ It is the second and third reasons that make this claim a prominent example of the partisan political frame.

Fico's hearing received ample media attention and may have incited journalists to emphasize the distinction between "political expertise" and "neutral expertise" in subsequent conversations. Journalists picked up this distinction in some interviews with Slovak legal personalities in which they asked about the interviewees' views on whether "politicians" should sit on the constitutional court.⁴⁹ For instance, such questions were asked of the former Constitutional Court judge Ladislav Orosz,⁵⁰ the former judge of the Federal Constitutional Court Ivan Trimaj,⁵¹ and the new Constitutional Court President Ivan Fiačan.⁵²

ustavny-sud-mozu-ovladnut-konzervativci/. Unless media discussions on this subject are framed in explicitly legal terms (such as the status quo of domestic and international legal frameworks, previous case law, or legal principles), they necessarily presuppose that the ideological preferences of the candidate will drive their judicial decisions on the subject.

⁴⁸ At least in high-profile cases in which such interests are relatively easily discernible.

⁴⁹ Obviously, such questions presume that the judges of the constitutional court do not become politicians in robes (see e.g. GIBSON, J. L., CALDEIRA, G. A.: Has Legal Realism Damaged the Legitimacy of the U.S. Supreme Court? In *Law & Society Review*, Vol. 45, No. 1, 2011, pp. 195-219, who argue in the US context that the adoption by judges of a perspective similar to that of other politicians did not necessarily damage their sociological legitimacy. In this vein, once it is acknowledged that the Court is at least in some degree a political institution, the question arises as to whether a political institution can be void of politicians. A tentative explanation for this disjunction may arise from the strong belief in legal formalism and "mechanical jurisprudence" in the post-communist context, which was not present in the United States. KÜHN, Z.: *The Judiciary in Central and Eastern Europe: Mechanical Jurisprudence in Transformation?* Leiden: Martinus Nijhoff Publishers, 2011.

⁵⁰ KOVÁČ, P.: Bývalý ústavný sudca Orosz: Od Fica som čakal viac sebareflexie, [Former judge of the Constitutional Court: I expected more from Fico] 2019. Available online: <https://domov.sme.sk/c/22059814/rozhovor-ustavny-sud-ladislav-orosz-sudca-fico-sebareflexia.html>. Orosz introduced distinctions between the type of political engagement of the candidates: "whether they have profiled themselves in public life more as politicians and less as lawyers." This is a clear reference to Fico who, unlike some other candidates, has not been active in the legal profession (even broadly speaking) since the early 2000s.

⁵¹ KOVÁČ, P.: Ústavný právnik Trimaj: Pri nedostatku kandidátov by mal Danko vyhlásiť konkláve, [Constitutional lawyer Trimaj: Danko should convoke the Conclave if there is no sufficient number of candidates] 2019. Available online: <https://domov.sme.sk/c/22032327/byvaly-ustavny-sudca-trimaj-pri-obstrukciach-moze-kiska-podat-ustavnu-zalobu-pre-necinnost-danka.html>. "It is one thing if someone is in politics for 25 years and did not do anything in between. It is something else if someone was an MP and covered this issue area [constitutional law], for example in the Constitutional Committee [of the Slovak parliament]." This position of a member of the former Czechoslovak Federal Constitutional Court is similar to that of Orosz, and together with the views of former Constitutional Court judges Mészáros and Mazák (see below), it shows a loose pattern of former judges leaning towards the institutional rather than the neutral/formal frame, in contrast with legal experts without experience on the bench, at least in discussions of politics at the Court in general, rather than merely during the appointment process).

⁵² TÓDOVÁ, M.: Nový predseda Ústavného súdu Fiačan: November 89 som si všimol, bol som priamo účastný, [The new president of the Constitutional Court: I have noticed November 89, I even participated] 2019. Available online: <https://dennikn.sk/1456621/novy-predseda-ustavneho-sudu-fiacan-november-89-som-si-vsimmel-bol-som-priamo-ucastny/>. Here, Fiačan indicated that he normatively sees connections between

Similarly, in *Denník N*, another former judge Mészáros, who is known and commended in particular for his separate opinions, argued that “*as long as someone did not dive in deep into politics, is not too tied in with it, it is not a problem [to be a politician appointed to the Court]*.”⁵³ He too rejected the simple partisan perspective presented by Robert Fico, but he did not reduce the role of the constitutional judge to that of a neutral administrator, even when discussing how executive and legislative actors at the beginning of the Slovak constitutional system underestimated the significance of constitutional court appointments. Similarly, according to Jozef Vozár, another prominent Slovak legal academic, politics cannot be excluded from the appointment process, but former partisans should be appointed only when they qualify as “*exceptional legal personali[ties] who [are] respected by political opponents as well*,”⁵⁴ following the German example.

good politics and expertise, but identifies deficits in this connection in the present Slovak context: “*political life must not be too different from the sort of professional and moral life that would be demanded from a constitutional judge*.” In another interview, he made a stricter distinction between politics and the Court when he acknowledged that “*the approach to the elections and their process is indeed to some extent a political matter, but the elected candidates should no longer be political. Even with the MPs there should be some self-restraint and they should not view the elections only through [the prism of] politics*.” KOVÁČ, P.: Fiačan: Či bolo zrušenie amnestii ústavne čisté? Ako právnik si viem predstaviť aj iné spôsoby. [Fiačan: Was the quash of the amnesties constitutionally correct? As a lawyer I can imagine other solutions] 2019. Available online: <https://domov.sme.sk/c/22122092/rozhovor-fiacan-predseda-ustavny-sud-sudca-kiska-fico.html>. This latter position resembles that of Pavol Žiliničik, who when commenting on Robert Fico’s appointment hearings, wrote about how a constitutional judge must be capable of carefully balancing conflicting values, prioritizing “restraint and the constitution” instead of “politics and fighting.” (Žiliničik invoked the work of the former Vice President of the Czech Constitutional Court, Pavel Holländer, distinguishing between “harmony in balancing” and “stability in dominance.” Fico represents the latter attitude, the ideal constitutional judge the former.) ŽILINČÍK, P.: Kandidát Fico je nebezpečenstvom pre právny štát, [Candidate Fico is dangerous for Rechtsstaat] 2019. Available online: <https://dennikn.sk/1359544/kandidat-fico-je-nebezpecenstvom-pre-pravny-stat/>.

⁵³ PRUŠOVÁ, V.: Bývalý ústavný sudca Mészáros: Ak chcete byť slobodný, musíte byť samotárom, [Former judge of the Constitutional Court: If you want to be free, you must be a loner] 2019. Available online: <https://dennikn.sk/1391363/byvaly-ustavny-sudca-meszaros-ak-chnete-byt-slobodny-musite-byt-samotarom/?ref=tema>. At the same time, Mészáros’s view leans more towards the neutral conception in that he does not dispute the interviewer’s question on the reason for his “escape” from politics to the Court (he was elected as an MP in the 1998 elections before being appointed to the Court in 2000 for what ended up being two terms and a total of 19 years because of an intermittent extension of the judicial term from 7 to 12 years). A similar notion of “degrees” of political engagement affecting the candidate’s suitability for the Court was presented by former Slovak Interior Minister Ivan Šimko when he argued that it was appropriate to appoint the first President of the Constitutional Court, Milan Čič, himself a former minister and PM for a brief period after the Velvet Revolution. He contrasted this with the potential appointment of Robert Fico. For Šimko, “*Čič was not a typical political actor; he was not a policy-maker. The Constitutional Court is not an academic institution, nor is it a typical judicial institution; instead, it deals with societal struggles which virtually no one can evade, especially not a high-profile politician*.” Implicitly, it seems that Šimko was drawing a distinction based on the significantly shorter time Čič spent in government compared to Fico. GÁLIS, T.: Ivan Šimko: Tlak na Ústavný súd, aký býval za Mečiaru, teraz nebol, ale môže to prísť znova, 2019. [Ivan Šimko: There was no such pressure on the court as during era of Mečiar. But it may return.] Available online: <https://dennikn.sk/1362746/ivan-simko-tlak-na-ustavny-sud-aky-byval-za-meciara-teraz-nebol-ale-moze-to-prist-znova/?ref=tema>. Such an interpretation could create a scale whereby the longer a candidate had spent in government, the lower was their suitability for the bench.

⁵⁴ VOZÁR, J.: O politických kandidátoch na Ústavný súd a nemeckom príklade, 2019. [On political candidates for constitutional judges and the German example] Available online: <<https://dennikn.sk/1374091/o-politickykh-kandidatoch-na-ustavny-sud-a-nemeckom-priklade/?ref=tema>>. Ján Mazák, who served at the

Other commentators recognized the inevitable political dynamics. Nevertheless, they emphasized that these considerations could be combined with expertise in the appointment process.⁵⁵ Criticism of Fico's presentation at the hearing focused on his failure to recognize the distinction between the political history of the candidate and naked partisan bargaining over the appointments.⁵⁶ For another commentator, it was self-evident that the

Court in the early 2000s, adopted a similar position, commenting that "...an active politician who appreciated and pursued the principles of the rule of law while an MP should have no problem with [standing as candidate for the Constitutional Court]." However, he indicated an active politician would be less likely to meet the qualification criteria because they would have less time to devote close expert attention to "the challenges ahead of a constitutional court in an EU member state." PRUŠOVÁ, V.: Mazák: Fico je príliš zrastený s politikou, nedokáže sa odosobniť od škandalov a káuz, [Mazák: Fico is too interconnected with politics and he cannot distance himself from scandals] 2019. Available online: <https://dennikn.sk/1344499/mazak-fico-je-prilis-zrasteny-s-politikou-nedokaze-sa-odosobnit-od-skandalov-a-kauz/?ref=tema>. An attorney criticizing the selection process backed this standpoint on the matter as well, commenting on the legitimacy of the government conducting the selection process: "There is nothing wrong with the parliament – an assembly of the political representative of the citizens – selecting the candidates. It is wrong if the political process of constitutional judge selection results in persons who serve the politicians but are neither morally nor expertise-wise at the level of the societal significance required of a constitutional judge." SURAN, R.: Může sa jalová krava oteľiť a vrhnúť leva, ak jej pri tom asistuje doktor Danko?, [May a barren cow give birth to a lion if assisted by doctor Danko?] 2019. Available online: <https://dennikn.sk/1448914/moze-sa-jalova-krava-otelit-a-vrhnut-leva-ak-jej-pri-tom-asistuje-doktor-danko/?ref=tema>.

⁵⁵ The 2018–2019 selection process stimulated more input from members of the legal community, including those who usually do not engage with the media, thus enriching the range of perspectives offered. Only few social scientists without a primarily legal background had their voices appear in the media discussion. For example, in a brief response to questions regarding the ideal candidate for the bench, sociologist and former PM Iveta Radičová argued against the position being compatible with a "political label," but added that such a label is to be interpreted "in the sense of non-partisanship." FOLENTOVÁ, V., KERN, M.: Nie je vesmír, v ktorom by Fico mal byť šéfom Ústavného súdu (anketa), [There exist no universe in which Fico shall be the boss of the Constitutional Court] 2019. Available online: <https://dennikn.sk/1344533/nie-je-vesmir-v-ktorom-by-fico-mal-byt-sefom-ustavneho-sudu-komentuju-radicova-seliga-sulik-ci-gal-anketa/?ref=tema>. Non-partisanship (*nestranickosť* in Slovak) is related to impartiality (*nestrannosť*), but it has a slightly different, narrower, meaning as it precludes an affiliation with any concrete political party or ideology. Being non-partisan does not necessarily guarantee impartiality as a legal requirement that every judge has to meet.

⁵⁶ "Fico's presentation was everything just not one of a lawyer competing for the honor to become a judge. From the first sentence on it was a political appearance, the aim of which was to get elected as a judge thanks to political pressure rather than to his professional qualities as MP Fico [...]. Despite the effort of those present, until the very end, he [Fico] was not capable of understanding that all former politicians are not the same." PATAJ, R.: Fico si ukradol voľbu sudcov cynickou obchodnou ponukou, [Fico had stolen the election of the judges with his cynical business offer] 2019. Available online: <https://dennikn.sk/1359066/fico-si-ukradol-volbu-sudcov-cynickou-obchodnou-ponukou/?ref=tema>. This position is similar to that of P. Žilínčik (see above). Another comment by an activist and current candidate for an opposition party mentioned different "manifestations" of politics "during the creation of the Constitutional Court. While on the one hand there is the call for expertise and character [...], on the other there is the attempt to capture and control the court, which can in principle nullify any decision." ŠELIGA, J.: Politika v ústavnom zrkadle, [Politics in the constitutional mirror] 2019. Available online: <https://dennikn.sk/1431131/politika-v-ustavnom-zrkadle/?ref=tema>. This perspective contrasts the attitudinal approach with that of neutral expertise, but is less willing to acknowledge that politics will continue to manifest at the Court as well, though not necessarily in a manner conflicting with expertise. See another op-ed by the same author with the same underlying message: "The atmosphere around the elections, as well as their result, are a reflection on the arrogance and ignorance of politicians towards the selection process, institutions, and expertise [emphasis added]." ŠELIGA, J.: Výber ústavných sudcov je ako nepodarená telenovela, [Selection

selection of constitutional court judges is political. “*Politicians do not even need to support the candidates [for it to be political].*” Constitutional courts “*have the power to authoritatively interpret something like the state ideology, and where there is ideology, there is also politics.*”⁵⁷ Unlike the questions above, this comment does not imply that the political nature of the selection process is a vice, nor that it becomes “more political” when former politicians are among the candidates, similarly to the questions above. This draws us closer to a more neutral/formalist view of constitutional judges as separable from political actors. A similar assertion was presented by the Dean of the largest Slovak law faculty, who compared the list of candidates in the first and second parliamentary election rounds⁵⁸ and contended that even though some strong candidates from the first round did not appear in the second, the latter offered an “*ideologically more neutral list of experts.*”⁵⁹ At the opposite end of the spectrum stands an op-ed by a “physician and publicist” who fused partisanship and expertise when arguing that politicians who are “lawyers at the same time” can “*assess the purposiveness and clarity of the law, or compare it with standard practical politics.*” They are “*experts but also pragmatic [persons who possess] a certain political maturity.*”⁶⁰

Lastly, the press reprinted the declaration of several dozen Slovak lawyers who appealed to MPs for a cross-party consensus that would make the Court functional again before the third round of the elections in parliament. The statement opened with the following claim: “the Constitutional Court belongs to the citizens, not to politicians. It belongs to everyone, not to the powerful.” This claim, which stands at the verge of establishing a dichotomy between “the people” and “the elite,”⁶¹ frames “the political class” or the holders of “power” as separable from the Constitutional Court—at least normatively. This suggests an image of the Constitutional Court as a neutral, expert-based institution remote from politics. In this context, in which the Court was incapacitated by the lack of consensus and overt bargaining between political parties, the letter appeared as a general plea for the core state institution to be functional. Yet, the choice of terminology (“politicians” instead of “political

of candidates for constitutional judges is like poor soap opera] 2019. Available online: <https://dennikn.sk/1436220/vyber-ustavnych-sudcov-je-ako-nepodarena-telenovela/?ref=tema>.

⁵⁷ From a constitutional perspective, the term “state ideology” may be invalid as the Slovak Constitution explicitly requires the state to be neutral (Art. 1 sec. 1). JAVŮREK, P.: NÁZOR: Politika, čo iné, [Politics, what else] 2019. Available online: <https://nazory.pravda.sk/komentare-a-glosy/clanok/499820-politika-co-ine/>.

⁵⁸ Neither Fico nor Peter Kresák, a constitutional law expert and former judge of the Czechoslovak Federal Constitutional Court who became an MP of one of the coalition parties after 2016, participated in the second round of the selection process.

⁵⁹ ŠTEFÚNOVÁ, I.: Dekan Burda: Zdá sa, že zoznam kandidátov na ústavných sudcov je bez rozbušiek, [Dean Burda: It seems that the list of candidates for constitutional judges has no controversial persons] 2019. Available online: <https://spravy.pravda.sk/domace/clanok/504578-dekan-burda-zda-sa-ze-zoznam-kandidatov-na-ustavnych-sudcov-je-bez-rozbusiek/>.

⁶⁰ POTANČOK, B.: Prečo nie politik? [Why not a politician?], 2019. Available online: <https://nazory.pravda.sk/analyzy-a-postrehy/clanok/499970-preco-nie-politik/>. He also speculated about the lower value of academics “who have no clue about normal life but are good at explaining legal norms” at the bench, compared to politicians.

⁶¹ MUDDE, C., KALTWASSER, C. R.: *Populism: A Very Short Introduction*, 2nd edition. New York: Oxford University Press, 2017.

parties” or “partisans”) carries a flavor of idealism, whereby the Constitutional Court is perceived as a just institution that is “above politics.”

These examples demonstrate a certain “longing” for a Constitutional Court that is far removed from politics—one composed of judges with high professional qualifications and moral credentials who have either never engaged with the “dirt” of politics or have risen above it by distancing themselves from the political connections they may have had. In this view, with some exaggeration, the properly functioning Court is a place of reverence and admiration, while politics is the domain of the despicable and condemnation. However, even though this letter implicitly recognized “different kinds of politics” in a number of statements, the overwhelming association of politics with a process that is far removed from a well-functioning Constitutional Court is troubling because it is destined to beget disappointment once the Constitutional Court rules on a politically salient matter in which it may appear to favor one side of a partisan confrontation over the other.⁶² Only exceptionally has an acceptance and embracing of politics at the Court been accompanied by a rejection of dependence and partisanship. In other words, politics is inseparable from both the Court and its judges, and it follows that these judges are political actors, even if they do not support specific political parties or leaders.⁶³

The second conclusion that can be drawn from these data pertains to how politics and partisanship intersect with expertise. It is clear that partisanship (dependency on the interests of a particular political party or actor) is detrimental to the expertise necessary to duly perform the responsibilities of a constitutional court judge. Such dependency clouds judgment and prevents impartial decision making. At the same time, the relationship between politics and expertise is more convoluted, particularly at the level of Constitutional Court decisions, which run deeper than the selection process by the legislature and head of state. Some frame the two in opposition to each other, adhering to the idea of the “neutral lawyer” contrasted with the “biased politician,” who can never become a qualified judge, or at least not without a long break from politics. The idea that politics, especially politics done *well*, need not oppose expertise and may even require it is considerably less present. This finding matches with the generally prevailing interpretations that stipulate a dichotomy between democratic politics based on the rule of the people and technocracy based on expertise.⁶⁴

⁶² For an analysis of selected politically salient cases shaping the relationship between the Constitutional Court and the Slovak parliament, see LÁŠTIC, E., STEUER, M.: The Slovak Constitutional Court: The Third Legislator? In PÓCZA, K. (ed.): *Constitutional Politics and the Judiciary: Decision-Making in Central and Eastern Europe*. London: Routledge, 2019, pp. 198-204.

⁶³ Such an assertion cannot be readily translated into an ideological view on, for example, ethical questions. Obviously, from the perspective of fair decision making, it is not desirable that a constitutional judge blindly follow an ideology. At the same time, judges are not machines, so they cannot be expected to remain completely without ideological leanings. Such worldviews do not have to negatively impact their work, especially if they remain broadly compatible with the constitutional principle of democracy and do not translate to unfettered support for a particular political party (e.g. a conservative or social democratic party). In such cases, their worldviews could be seen as embodying the given ideology of the respective political system and point in time.

⁶⁴ A vocal area where this dichotomy is frequently invoked concerns European Union politics. See, for example, FOLLESDAL, A., HIX, S.: Why There Is a Democratic Deficit in the EU: A Response to Majone and Moravcsik. In *JCMS: Journal of Common Market Studies*, Vol. 44, No. 3, 2006, pp. 533-562.

The challenge for this dichotomous view is that it will likely lead to disappointment in politically salient cases in which constitutional judges cannot evade political considerations, and when the decision will necessarily give the impression that the constitutional court is temporarily siding with a particular political party. For instance, in a simple situation, if the coalition approves a measure and the opposition is against, the Constitutional Court may appear to support one side, even if their decision is based on careful constitutional interpretation and analysis.

4. The struggle for a media image

Newspaper reports on the conclusion of the “appointment saga” in October 2019 asserted that the resulting Fourth Constitutional Court is better than could have been expected after the obstruction by certain partisan actors (especially former PM Robert Fico). That said, the selection process missed the opportunity to place some of the country’s foremost constitutional experts on the bench, most of whom had no personal controversies behind them.⁶⁵ The result is an uncontroversial, although not particularly stellar Court that may “work itself up” to make exceptional contributions when responding to the new challenges of constitutional adjudication in the coming decade.⁶⁶ Therefore, it is a Court that does not start with a “media portrayal bonus” and has considerable work ahead to build up its authority in the eyes of legal academia and the expert journalists reporting about its decisions.

In summary, the media portrayal of the appointment process of constitutional justices reinvigorated the debate about both that process and about the Constitutional Court itself: its mission, role, character, and limitations. Many stakeholders took part in this debate, with some prominent views coming from Slovak constitutional scholars and/or former judges that were presented accessibly⁶⁷ in the media. Thus, the Fourth Constitutional Court started with a relatively neutral image regarding its composition, with few if any of the new judges being seen as partisan nominees (unlike the two judges appointed in 2017 who ascended to the bench directly from parliamentary seats). At the same time, the court is not seen as comprising experts on the intricacies of constitutional interpretation, with the possible exception of some judges. The danger of this perception is that the idea of a neutral,

⁶⁵ For example, PATAJ, R.: Máme oveľa lepší Ústavný súd, než aký si želan Robert Fico, [We have much better Constitutional Court than Fico wished for] 2019. Available online: <https://dennikn.sk/1613222/mame-ovela-lepsi-ustavny-sud-nez-aky-si-zelal-robert-fico/?ref=tema>.

⁶⁶ SZENTE, Z., GÁRDOS-OROSZ, F.: Constitutional Courts under Pressure – An Assessment. In SZENTE, Z., GÁRDOS-OROSZ, F. (eds.): *New Challenges to Constitutional Adjudication in Europe: A Comparative Perspective*. New York: Routledge, 2018, pp. 291-312. The President of the Constitutional Court alludes to one of these challenges—environmental rights—in an interview. Ivan Fiačan in KOVÁČ, P.: Fiačan: Či bolo zrušenie amnestií ústavne čisté? Ako právnik si viem predstaviť aj iné spôsoby, [Fiačan: Was the quash of the amnesties constitutionally correct? As a lawyer I can imagine other solutions].

⁶⁷ The present article took into account articles in *Sme* and *Denník N* that have restricted paywall access (all texts in *Pravda* were openly accessible). Still, the analysis mapped only a fraction of the media debate. In the case of *Denník N* in particular, it tapped into more sophisticated portions that have limited outreach to the broader public.

technical body prevails in the general picture; this will necessarily be scattered once the Court starts ruling on politically controversial cases. The media and their broader readership would do well to avoid perceiving the court as a non-political technical body, even if, at a given point in time, it operated as a non-partisan body that it should be. Evaluations of the court's subsequent performance should focus on how well it defers to expertise and presents a convincing, durable interpretation in various political contexts.

The depiction of the 2019 appointment process for the majority of seats in the Constitutional Court has led to a richer and more accessible public image. It would be unfortunate if this image temporarily disintegrated into fragmented invocations of appraisals or critiques of individual decisions. Furthermore, the Court itself must decide how to capitalize on the opportunities afforded by new means of communication to maintain its continuous presence in the public discourse, where the media serve as its vigilant guardians, inasmuch as they still retain a gatekeeping role for the public.

Conclusions and further research

The present article provided some of the first scholarly insights into the Slovak Constitutional Court appointment process of 2018–2019. It concentrated on the depiction of the constitutional judges in relation to politics by selected Slovak quality newspapers, which could be considered to shape public opinion. In this case, and especially during the first round of the selection process, more in-depth and diverse discussions about the optimal role of the constitutional judge in the Slovak constitutional system were triggered by the publicity surrounding the oral hearings, the presidential elections coinciding with the appointment process, and the fact that several controversial figures ran—primarily PM Robert Fico, but also others.⁶⁸ The ensuing debate offered a lesson on the prevailing conceptions of constitutional judges among a notable sample of Slovak legal experts, including current or former constitutional judges, journalists, and other commentators.

There are some notable avenues for further research. Firstly, “alternative” media with a more relaxed attitude to truth have a greater impact on public debate, especially in a context of low media literacy.⁶⁹ Therefore, an analysis of such media could yield interesting insights into the portrayal of objectively newsworthy events such as the selection of constitutional judges. Secondly, a more evaluative and candidate-centered research design could be envisioned for a future project. In particular, the reporting about individual candidates could be categorized as conveying a positive, neutral, or negative image. This would allow researchers to test the hypothesis that candidates portrayed more negatively by the press are less likely to succeed in the selection process. However, such a study would require more information about the portrayal of each the individual

⁶⁸ For example, the longest oral hearing in the first round was that of the Košice Regional Court President Juraj Sopoliga, who is seen as a supporter of the former minister of justice and presidential candidate Štefan Harabin, who has been involved in a wide range of scandals. PRUŠOVÁ, V., LEŠKO, M.: *Harabin*. Bratislava: N Press, 2019.

⁶⁹ CRAFT, S., ASHLEY, S., MAKSL, A.: News Media Literacy and Conspiracy Theory Endorsement. In *Communication and the Public*, Vol. 2, No. 4, 2017, pp. 388-401.

candidates than three newspapers can provide. In addition, because several candidates had close to no recognition beyond specific legal circles, the reporting of them may often be neutral, focusing on basic biographical information due to the lack of background knowledge necessary to make evaluative statements about their suitability for constitutional judgeship.⁷⁰

Ultimately, “Fico’s thesis” of unfettered, partisan judges who rule on the basis of who appointed them,⁷¹ was almost unanimously rejected by the newspapers investigated in the present study. At the same time, considerable effort was made by several authors to distance the constitutional judges from partisan biases and dependencies, and sometimes even from the realm of politics altogether. Hence, the institutional framework, which considers constitutional judges as special political actors with a mission to protect democracy does not appear to have prevailed over a formalist/neutral frame that attempts to present the judges as experts separated from politics, or even at odds with it to some extent. Such portrayal does not undermine the centrality of qualification,⁷² but it may lead to renewed debate about a “partisan” rather than a “political” Court⁷³ when it inevitably rules on politically salient cases.

Bibliography

- AGAMBEN, G.: Introductory Note on the Concept of Democracy. In MCCUAIG, W.: *Democracy in What State?* New York: Columbia University Press, 2012, pp. 1-5
- BASSOK, O.: Television Coverage of the Israeli Supreme Court 1968-1992: The Persistence of the Mythical Image. In *Israel Law Review*, Vol. 42, No. 2, 2009, pp. 306-361
- BASSOK, O.: The Sociological-Legitimacy Difficulty. In *Journal of Law & Politics*, No. 2, 2010, pp. 239-72.
- BAUM, L.: *Judges and Their Audiences: A Perspective on Judicial Behavior*. Princeton: Princeton University Press, 2008

⁷⁰ Recognition of candidates supported by the coalition versus those supported by opposition parties and those receiving bipartisan support may add a layer to this complexity. This can be done easily when the voting ballots of the National Council are public. Given that this was only the case in the first round of the selection process, when none of the candidates were elected, no feasible data can be obtained this way. An alternative is assessing the proximity of individual candidates to the coalition or opposition through their previous biographies (e.g. previous involvement in institutions controlled by coalition or opposition parties, or existing reports about the alignment of their ideological views with those of specific political parties).

⁷¹ Reproduced at the outset of this article.

⁷² Qualification could be understood as including a “moral minimum,” so it should not be reduced to merely formal observance of the requirements, such as age, length of legal practice, or level of legal education.

⁷³ As already happened in late 2019. For instance, the Court suspended the effectiveness of the amendment to the Act on the electoral campaign (No. 181/2014 Coll.) and related legislation that introduced a 50-day electoral silence period for public opinion polls (case PL. ÚS 26/2019). This (preliminary) decision was generally praised, unlike a slightly earlier senate decision (I. ÚS 127/2019) in a case concerning the mention of the Czech PM Andrej Babiš in lists of communist secret service agents, which prompted a former President of the Court to ask a (rhetorical) question: “Why does the Constitutional Court in societally surveilled cases decide in a way that prompts sharp resistance from the general public and severe criticism from experts on the constitutional judiciary.” MAZÁK, J.: Kauza Babiš alebo Čo je dovolené bohovi, nie je dovolené volovi, [Case of Babiš or may do what cattle may not] 2019 (December 31). Available online: <https://dennikn.sk/1700931/kauza-babis-alebo-co-je-dovolene-bohovi-nie-je-dovolene-volovi>.

- BRISBIN, R. A.: Slaying the Dragon: Segal, Spaeth and the Function of Law in Supreme Court Decision Making. In *American Journal of Political Science*, Vol. 40, No. 4, 1996, pp. 1004-1017
- BROWN, N. J., WALLER, J. G.: Constitutional Courts and Political Uncertainty: Constitutional Ruptures and the Rule of Judges. In *International Journal of Constitutional Law*, Vol. 14, No. 4, 2016, pp. 817-850
- BUGARIČ, B., GINSBURG, T.: "The Assault on Postcommunist Courts," *Journal of Democracy*, Vol. 27, No. 3, 2016, pp. 69-82
- CALLIESS, C., VAN DER SCHYFF, G. (eds.): *Constitutional Identity in a Europe of Multilevel Constitutionalism*. Cambridge: Cambridge University Press, 2019
- CASTILLO-ORTIZ, P.: The Illiberal Abuse of Constitutional Courts in Europe. In *European Constitutional Law Review*, Vol. 15, No. 1, 2019, pp. 48-72
- CLAYTON, C. W., MAY, D. A.: A Political Regimes Approach to the Analysis of Legal Decisions. In *Polity*, Vol. 32, No. 2, 1999, pp. 233-52.
- CRAFT, S., ASHLEY, S., MAKSL, A.: News Media Literacy and Conspiracy Theory Endorsement. In *Communication and the Public*, Vol. 2, No. 4, 2017, pp. 388-401.
- Constitutional Court hearings: The vote is a political affair; Fico says* (2019). Available online: <https://spectator.sme.sk/c/22036335/constitutional-court-hearings-the-vote-is-a-political-affair-fico-says.html>
- DENISON, A., WEDEKING J., ZILIS, M. A.: Negative Media Coverage of the Supreme Court: The Interactive Role of Opinion Language, Coalition Size, and Ideological Signals. *Social Science Quarterly*, online first, 2019, pp. 1-23.
- ENTMAN, R. M.: Framing Bias: Media in the Distribution of Power. In *Journal of Communication*, Vol. 57, no. 1, 2007, pp. 163-173.
- EPSTEIN, L., KNIGHT, J.: Reconsidering Judicial Preferences. In *Annual Review of Political Science*, Vol. 16, No. 1, 2013, pp. 11-31.
- FOLLESDAL, A., HIX, S.: Why There Is a Democratic Deficit in the EU: A Response to Majone and Moravcsik. In *JCMS: Journal of Common Market Studies*, Vol. 44, No. 3, 2006, pp. 533-562.
- GAAKEER, J.: The Perplexity of Judges Becomes the Scholar's Opportunity. In *German Law Journal*, Vol. 18, No. 2, 2017, pp. 331-362.
- GIBSON, J. L., CALDEIRA, G. A.: Confirmation Politics and The Legitimacy of the U.S. Supreme Court: Institutional Loyalty, Positivity Bias, and the Alito Nomination. In *American Journal of Political Science*, Vol. 53, No. 1, 2009, pp. 139-55.
- GIBSON, J. L., CALDEIRA, G. A.: Has Legal Realism Damaged the Legitimacy of the U.S. Supreme Court? In *Law & Society Review*, Vol. 45, No. 1, 2011, pp. 195-219.
- GILLMAN, H.: The Court as an Idea, Not a Building Block (or a Game): Interpretive Institutionalism and the Analysis of Supreme Court Decision-Making. In CLAYTON, C. W., GILLMAN, H. (eds.): *Supreme Court Decision-Making: New Institutional Approaches*. Chicago: University of Chicago Press, 1999, pp. 65-87.
- GINSBURG, T., HUQ, A. Z.: *How to Save a Constitutional Democracy*. Chicago: University of Chicago Press, 2018.
- GROVE, T.: The Supreme Court's Legitimacy Dilemma. In *Harvard Law Review*, Vol. 132, 2019, p.2240-2276.
- HAVEL, T.: Odráz práva v médiích aneb několik poznámek k tzv. mediálním kauzám. [The Reflection of Law in Media or Some Remarks on so-called Media Cases] In KYSELA, J., ONDŘEJKOVÁ, J. (eds.): *Jak se píše o soudech a soudcích: soudní moc v mezioborové perspektivě*. [Writings about Courts and Judges: The Judicial Power in an Interdisciplinary Perspective] Praha: Leges, 2012, pp. 155-170.
- HAY, C.: Constructivist Institutionalism. In BINDER, S. A., RHODES, R. A. W, ROCKMAN, B. A. (eds.): *The Oxford Handbook of Political Institutions*. Oxford: Oxford University Press, 2008, pp. 56-74.
- HIRSCHL, R.: The Judicialization of Mega-Politics and the Rise of Political Courts. In *Annual Review of Political Science*, Vol. 11, No. 1, 2008, pp. 93-118.
- HIRSCHL, R.: The Judicialization of Politics. In WHITTINGTON, K. E., KELEMEN, R. D., CALDEIRA, G. A.: *The Oxford Handbook of Law and Politics*. Oxford: Oxford University Press, 2010, pp. 119-141.

- HOLMES, S.: Constitutions and Constitutionalism. In ROSENFELD, M., SAJÓ, A. (eds.): *The Oxford Handbook of Comparative Constitutional Law*. Oxford: OUP, 2012, pp. 189-216.
- ISSACHAROFF, S.: Comparative Constitutional Law as a Window on Democratic Institutions. In: DELANEY, E. F., DIXON, R.: *Comparative Judicial Review*. Cheltenham: Edward Elgar Publishing, 2018, pp. 60-82.
- KING, J.: *Judging Social Rights*. Cambridge: Cambridge University Press, 2012.
- KÜHN, Z.: *The Judiciary in Central and Eastern Europe: Mechanical Jurisprudence in Transformation?* Leiden: Martinus Nijhoff Publishers, 2011.
- EALÍK, T., BARANÍK, K., DRUGDA, Š.: Slovakia: Developments in Slovak Constitutional Law. In: ALBERT, R. et al.: *The I-CONNECT-Clough Center 2016 Global Review of Constitutional Law*. Boston: I-CONNECT and the Clough Center, 2017, pp. 181-185.
- LÁŠTIC, E., STEUER, M.: The Slovak Constitutional Court: The Third Legislator? In PÓCZA, K. (ed.): *Constitutional Politics and the Judiciary: Decision-Making in Central and Eastern Europe*. London: Routledge, 2019, pp. 184-213.
- LERNER, M.: Constitution and Court as Symbols. In: *Yale Law Journal*, Vol. 46, No. 8, 1937, pp. 1290-1319.
- MATICH, M.: Na rámcovaní záležití: Kvalitatívna obsahová analýza mediálneho obrazu Ústavného súdu SR v denníkoch Sme a Pravda. [Framing Matters: Qualitative Content Analysis of the Media Portrayal of the Slovak Constitutional Court in SME and Pravda] (bachelor thesis) Comenius University in Bratislava, 2017. Available online: <https://alis.uniba.sk:8443/lib/item?id=chamo:648318&fromLocationLink=false&theme=Katalog>.
- MAZÁK, J., JANOŠÍKOVÁ, M.: Konania o ochrane ústavnosti pred Ústavným súdom Slovenskej republiky: Kritické poznámky k novému zákonu (III.). [Proceedings on protection of constitutionality before the Constitutional Court. Critical remarks on the new act (III.)] In *Právny obzor*, Vol. 102, No. 3, 2019, pp. 183-203.
- MAZZOLENI, G., SCHULZ, W.: 'Mediatization' of Politics: A Challenge for Democracy? In: *Political Communication*, Vol. 16, No. 3, 1999, pp. 247-61.
- MICHAILIDOU, A., TRENZ, H.: The Media as Public Intermediaries of Knowledge in Europe: From Deliberation to Democratic Legitimation. In GÓRA, M., HOLST, C., WARAT, M. (eds.): *Expertisation and Democracy in Europe*. London: Routledge, 2017, pp. 171-91.
- MOUSTAFI, T.: Law and Courts in Authoritarian Regimes. In *Annual Review of Law and Social Science*, Vol. 10, No. 1, 2014, pp. 281-299.
- MUDDE, C., KALTWASSER, C. R.: *Populism: A Very Short Introduction*, 2nd edition. New York: Oxford University Press, 2017.
- POKOL, B.: The Juristocratic Form of Government and Its Structural Issues. In EHS, T., KRIECHBAUMER, R., NEISSER, H. (eds.): *Verfassungsgerichtsbarkeit Und Demokratie: Europäische Parameter in Zeiten Politischer Umbrüche?* Vienna: Böhlau Verlag, 2017, pp. 61-78.
- PRUŠOVÁ, V., LEŠKO, M.: *Harabin*. Bratislava: N Press, 2019.
- ROBERTSON, D.: *The Judge as Political Theorist: Contemporary Constitutional Review*. Princeton: Princeton University Press, 2010.
- SALAMONE, M. F.: *Perceptions of a Polarized Court: How Division among Justices Shapes the Supreme Court's Public Image*. Philadelphia: Temple University Press, 2018.
- SEGAL, J. A., SPAETH, H. J.: *The Supreme Court and the Attitudinal Model Revisited*. Cambridge: Cambridge University Press, 2002.
- ŠKOLKAY, A.: Slovakia: From a Black Hole in the Heart of Europe to a Central/Eastern European Statistical Average. In BAJOMI-LÁZÁR, P. (ed.): *Media in Third-Wave Democracies: Southern and Central/Eastern Europe in a Comparative Perspective*. Paris, Budapest: Editions L'Harmattan, 2018, pp. 182-209.
- SOLUM, L. B.: Originalism Versus Living Constitutionalism: The Conceptual Structure of the Great Debate. In *Northwestern University Law Review*, Vol. 113, No. 6, 2019, pp. 1243-1296.
- STEUER, M.: Constitutional Court of the Slovak Republic (Ústavný súd Slovenskej republiky). In GROTE, R., LACHENMANN, F., WOLFRUM, R.: *Max Planck Encyclopedia of Comparative Constitutional Law*. Oxford: OUP, 2019. Available online: <https://oxcon.oup.com/view/10.1093/law-mpeccol/law-mpeccol-e803>.

- STEUER, M.: Kto a ako vyberá strážcov? Legitimita výberu sudcov Ústavného súdu Slovenskej republiky v komparatívnej perspektíve. [Who selects the guardians and how? Legitimacy of the selection of Constitutional Court judges of the Slovak Republic in a comparative perspective] In *Právnik*, Vol. 156, No. 4, 2017, pp. 338-356.
- STEUER, M. On the Brink of Joining Poland and Hungary: The Night of Surprises in the Slovak Parliament. *Verfassungsblog*, October 25, 2018, Available online: <https://verfassungsblog.de/on-the-brink-of-joining-poland-and-hungary-the-night-of-surprises-in-the-slovak-parliament/>.
- STEUER, M.: The First Live-Broadcast Hearings of Candidates for Constitutional Judges in Slovakia: Five Lessons. *Verfassungsblog*, February 5, 2019, Available online: <https://verfassungsblog.de/the-first-live-broadcast-hearings-of-candidates-for-constitutional-judges-in-slovakia-five-lessons/>.
- STEUER, M.: Variácie demokracie v rozhodovacej činnosti Ústavného súdu Slovenskej republiky v treťom funkčnom období. : Prípádová štúdia kreačných právomocí hlavy štátu [Varieties of democracy in the decision making of the Constitutional Court of the Slovak Republic in the third term: A case study of the appointment powers of the head of state] In MAJERČÁK, T. (ed.): *Ústavný súd Slovenskej republiky v treťom funkčnom období – VII. Ústavné dni*. [Constitutional Court of the Slovak Republic in its Third Term.] Košice: Univerzita P. J. Šafárika, 2019, pp. 293-305.
- SUNSTEIN, C. R.: *Constitutional Personae*. Oxford: Oxford University Press, 2015.
- SZENTE, Z., GÁRDOS-OROSZ, F.: Constitutional Courts under Pressure – An Assessment. In SZENTE, Z., GÁRDOS-OROSZ, F. (eds.): *New Challenges to Constitutional Adjudication in Europe: A Comparative Perspective*. New York: Routledge, 2018, pp. 291-312.
- WALDRON, J.: The Core of the Case against Judicial Review. In *The Yale Law Journal*, Vol. 115, No. 6, 2006, pp. 1346-1406.
- WELLS, M. L.: Sociological Legitimacy in Supreme Court Opinions. In *Washington and Lee Law Review*, No. 3, 2007, pp. 1011-72.