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[**Editor's Note:** This is the second of five parts in our symposium on "The Slovak Constitutional Court Appointments Case." The introduction to the symposium is available here.]

—Simon Drugda, Centre for Socio-Legal Studies, University of Oxford
On December 6 the first Senate of the Slovak Constitutional Court (CC) held that President Andrej Kiska infringed rights of the CC candidates when he rejected them, again, for lack of interest in constitutional law, language skills, or no publication in the field in a reputable outlet (I. ÚS 575/2016).

The *CC Appointments Case* raised several realist concerns about our judges that have not been addressed yet. For, example, what level of constitutional literacy should we require of a CC judge?[1] Do deliberate, low-quality appointments to the Court trigger separation of powers concerns? Does the ill repute or lack of professional credentials of a single judge depreciate the whole Court? Is the vetting of nominees in the Constitutional Committee of the National Council (NaCo) thorough enough?[2]These questions are all mightily important but in the immediate context, not the right ones to ask.
It is necessary first to recognize the mistakes in the handling of the case. Only then we will be able to move past this controversy and focus on the quality of the future CC appointments. I present a case criticism of one procedural aspect of the I. Senate decision.

The Laws of the Vigilant are Written
President Kiska has reluctantly appointed three new judges to the CC, but he did not miss the opportunity to criticise the I. Senate, calling its decision the worst in "the history of constitutional practice in Slovakia," contemptible of the Constitution, and full of mistakes. The most prominent charge against the decision concerns the procedural overreach of the Senate.

The I. Senate did initially hear a constitutional complaint case (Art 127) of five but decided to extend the ruling to all seven unsuccessful CC candidates. One of the two "extended" candidates did not file a constitutional complaint, and the other already withdrew his case once from the II. Senate. The Court ordinarily does not allow parties to abandon their case and re-petition, due to the fear of forum shopping. Each petition falls randomly to the docket of one of the four CC senates, which occasionally do disagree on the law. The procedure for the unification of senate opinions should even out discrepancies in their output, but the unique assignment of a case to the panel matters.

The I. Senate, additionally, decided the fate of an unsuccessful candidate, now a CC judge, who did not petition the Court for redress. Judge Mamojka was ostensibly satisfied with the way things were until the Senate returned him to the race for the office. The decision-making of the CC on complaints adheres to the dispositive principle and the principle of party autonomy. Loosely, parties may freely dispose of their substantive-right claims, choose to litigate or otherwise, and the Court cannot decide their case in excess of the petition. The Act on the Organization of the Constitutional Court 38/1993 Coll. explicitly states that its review is bound by the "motion to initiate proceedings" (Art 20.4). Judge Mamojka did not seek such a motion, and the Court thus acted ultra vires to remedy (on the margin of the decision) an absent will of this candidate.

In sum, the I. Senate decided on two petitioners, who did not sue, bear the costs of the case, and were not "vigilant" in the protection of their rights. Moreover, the Senate did so only in *dicta*, because the binding judgment (*cur adv vult*) pertains just to the original five petitioners. The omission of the two extended candidates in the judgment speaks to the fact that the Senate, knowingly, ventured beyond the scope of its authority. Not only the President but the CC too must act "only on the basis of the

Constitution, within its limits and in the scope and manner prescribed by the law" (Art 2 of the Constitution).

Shadow of an Impeachment Trial

Despite his appointment of judges Laššáková, Duriš, and Mamojka to the Court, the President continues to maintain that there is no Art 128 constitutional interpretation of the *Plenum* that definitively settles the case. It is therefore likely that the conflict will be re-enacted in 2019 when nine judges leave the Court, and the President will have to choose their replacement. President Andrej Kiska, commenting on the decision I. ÚS 575/2016, hinted at such a prospect:

> Although I refuse to execute the decision of the Constitutional Court, I have decided to end this particular dispute concerning the appointment of judges of the Constitutional Court by exercising my exclusive authority. […] I prefer to accept the loss in a battle today to continue the fight for a better judiciary. My decision concludes one stage in the appointment process of Constitutional Court judges. […] The dispute has not been bindingly resolved.

But the I. Senate warned the President in closing (pp 86-88): if he does not to comply with the decision of the Court, the President's action will qualify as a "constitutional delict of the deliberate violation of the Constitution."

To wager against such odds fits the Jeremy Bentham's description of a "deep play." For Bentham deep play was irrational, a game with stakes too high to justify the endeavour. What seemingly drives the President, he claims, are some of the concerns with the judges I have mentioned at the beginning of my contribution. Based on the public statements of the President, it is unlikely that his stance will change. The truce he has called is likely an interlude to the next appointment battle. To quip with a quote by the Court in return: "The game of thrones continues" (III. ÚS 427/2012).

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[1] Christopher Dreisbach, *Constitutional Literacy: A Twenty-First Century Imperative* (Palgrave Macmillan, 2016) ch2

[2] Judge Duriš received one question in the Committee, Judge Laššáková three questions. The interview with judge Mamojka involved an intense dialogue with MPs that is difficult to code because of compound questions, but judge Mamojka received *circa* ten questions. The NaCo recently amended its Rules of Procedure to heighten the scrutiny.