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Simon Drugda

—[Simon Drugda](#), PhD Candidate at the University of Copenhagen

On January 30, 2019, the Slovak Constitutional Court declared a 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.

This historic ruling aroused much less controversy than expected. It was overshadowed by the election of the country's first female President and the first selection hearings of constitutional judges broadcast live to the public on television. I will return to the judgment to examine its several key aspects. But first I will explain the distinction between direct and indirect constitutional amendments in the Slovak legal system and then reveal how the invalidated amendment nonetheless remains law.

Types of Constitutional Amendments

The Slovak Constitution is polytextual.^[1] It consists of several separate documents, which all have equal force in law. With a plurality of constitutional documents, there is also a higher chance that they may contradict.

The Constitution inherited at the founding a parallel bill of rights from the dissolving Czechoslovak Federation,^[2] and the practice of constitutional change in Slovakia has since evolved quite remarkably. The constitutional settlement underwent a considerable expansion over the years. It currently counts at least seven distinct constitutional acts (CA), including most recently the CA on Fiscal Responsibility.^[3] CAs are classified into two basic categories: direct and indirect amendments. The former intervene in the master-text Constitution by making changes, additions, or subtractions. The latter are stand-alone acts that subsist parallel to the master-text document.

Since 1992, there have been 18 direct and 19 indirect constitutional amendments.

Constitutional change in Slovakia (1993-2017)

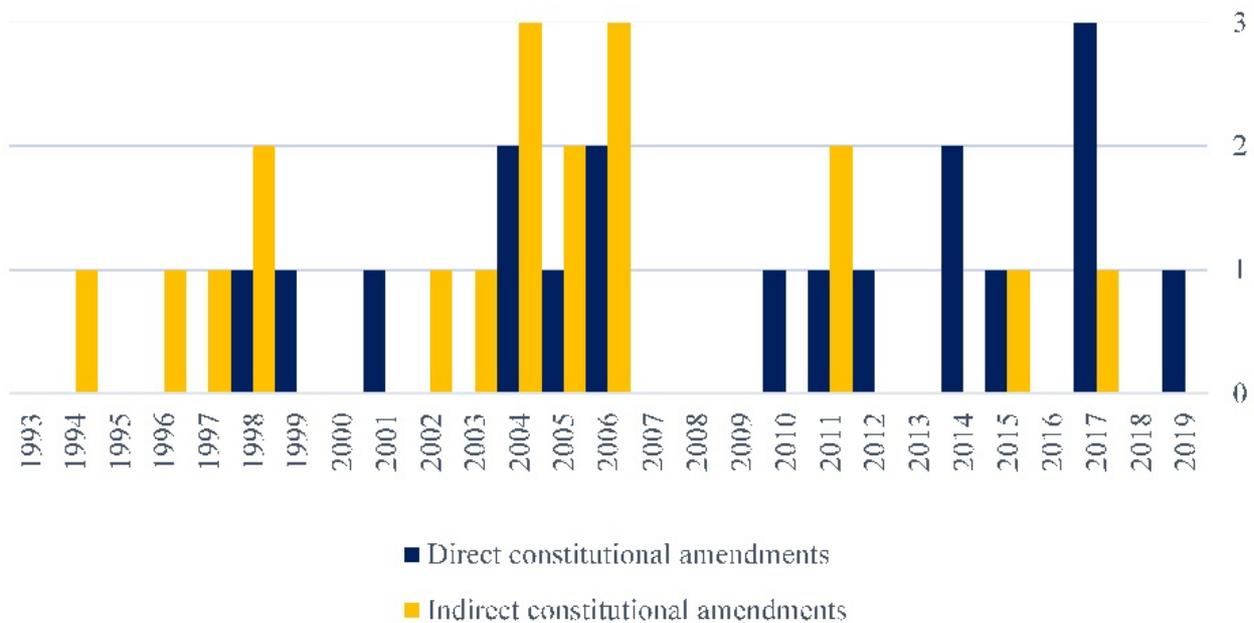


Figure 1 Amendment-rate in Slovakia since 1993. CAs are classified along the basic distinction between direct and indirect constitutional amendments.

Direct amendments have until now been considered outside of the Court’s purview because once adopted they become fully part of the Constitution. Scholars have argued that certain indirect CAs, such as acts on shortening the term of the Parliament, and occasionally even direct amendments do contradict the master-text Constitution, but there has never been a suitable case to test this argument.

An opportunity presented itself in 2014.^[4] The Judicial Council challenged the implementing legislation to a constitutional amendment on vetting of judges.^[5] Shortly after the Constitutional Court accepted the case for further proceedings, the Judicial Council transformed the case from a challenge to a sub-constitutional rule, into a challenge against the amendment itself.

Vetting Lower Court Judges

The Parliament introduced the vetting of judges and candidates for judicial office in the middle of the year 2014. The Slovak judiciary regularly scores the lowest among court systems of all EU member states in its perceived independence,^[6] so politicians presented the reform as an effort to restore the confidence of the public in judges. The amendment was supposed to enhance judicial independence, but as the Constitutional Court found later, the vetting had the opposite effect.

The new Article 141a(5b) of the Constitution vested the Judicial Council with the authority to decide whether a candidate for a judicial appointment meets requirements that will “guarantee that she will exercise the judicial office independently.” The change primarily concerned judicial candidates. To become judges, candidates had to succeed in an open call for recruitment into the judiciary based on their proficiency in law and they also had to pass

a background check. The background check had two components. Candidates first had to consent to the processing of their personal data and they had to declare assets, liabilities, addictions, prior criminal convictions, and mental health. The National Security Authority then verified their declarations and prepared material for the decision of the Judicial Council. Candidates had the right to comment on their files, and also to appeal to the Constitutional Court in the event of an unfavourable decision of the Judicial Council.

The most contentious part of the reform was applying the vetting to sitting lower court judges. Transitional provisions of the Constitution retroactively extended the scheme to judges appointed prior to the amendment coming into force in 2014 (Article 154d(1)). Before the case went any further, however, the Court suspended the effect of the transitional provisions. As a result, for the last five years, candidates for judicial appointment were the only one that had to go through the vetting.

Repurposing the Constitution for a Review of Constitutional Amendments

The Court structured its review of the challenged amendment around three key questions:

1. Does the Constitution contain an implicit material core?
2. Can an amendment breach the implicit core?
3. Does the Court have the power to review CAs?

By structuring its inquiry in this way, the Court hinted that the third question—which alone could have been dispositive of the case—was only rhetorical. The Court established for itself a great new power to review constitutional amendments based on the guardianship provision codified in the Constitution. The Court unabashedly asserted that its “power to protect the Constitution of the Slovak Republic extends across the whole sphere of constitutionality and is unconditional.”

In constructing this new power, the Court decided to repurpose the existing constitutional infrastructure. The procedure for the review of legislation under Article 125 became a useful conduit:

In proceedings on the conformity of a legal act with the Constitution, the Court reviews whether a CA conforms to the Constitution and if the act contradicts the Constitution in full or in part, it decides based on Articles 124 and 125 [...].

Article 125, however, has an interesting feature that normally works to encourage inter-branch dialogue. Rules that apply to findings of unconstitutionality provide that the challenged legislation loses effect, but it is not written out of the books. The Constitution sets out a period of six months for the legislator to remedy the collision of norms. This has an important consequence for the amendment on judicial vetting. It is temporarily still valid until the constitutionally mandated grace period runs out. The result, then, is quite fascinating: the Court invalidated a direct constitutional amendment but it remains part of the Constitution until the six-month grace period runs out.

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[1] CA No. 460/1992 Collection

[2] Charter of Fundamental Rights and Freedoms CA No. 23/1991 Coll.

[3] CA No. 493/2011 Coll. Adopted in the wake of Eurozone crisis

[4] PL. ÚS 21/2014

[5] CA No. 161/2014 Coll.

[6] Slovakia placed second to last to Hungary in the 2018 EU Justice Scoreboard, for the first time since 2013 when the scoreboard started