



## Enter Friends of Court: Amicus Briefs in Slovakia

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—Simon Drugda, PhD Candidate at the University of Copenhagen

The Slovak Parliament passed a new organising act on the Constitutional Court in 2019, which for the first time recognised the admissibility of unsolicited amicus briefs.<sup>[1]</sup> This post examines the design of the device and its functional alternatives in Slovak constitutional law.

Amici Curiae, or “friends of the court,” are individuals, groups, or entities, who present the court with new legal arguments, social scientific information, or alternative perspectives on the litigated question. The device allows interested non-parties to influence the case outcome, which may have a larger systemic impact.

The function of amicus briefs differs based on the context and author(s) of the brief. The Italian Constitutional Court recently also changed its rules of procedure to allow groups and other entities “representing collective or diffuse interests” to make submissions to the Court.<sup>[2]</sup> From the wording and content of the announcement, it seems that the primary function of amicus briefs in Italy is increased public participation because the Court might have been previously inaccessible, or perceived as such.<sup>[3]</sup> There is not much to help us understand the utility of amicus briefs in Slovakia. Since the device, has been operative for less than a year, we lack data on the volume of amicus briefs, their content, the stage of submission, and identities of amici.

Nevertheless, we may infer the purpose of the change to admit unsolicited third-party submissions at the apex level from the explanatory memorandum to the Act on the Constitutional Court. The legislation was drafted in cooperation with the Court and its judges, who seemed to be particularly interested in using the device for information acquisition.<sup>[4]</sup> Under the previous legal framework, the President of the Constitutional Court (CCP) could request the opinion of the President of the Supreme Court and the Attorney General in cases of a judicial review of legislation or administrative acts.<sup>[5]</sup> The consultative process enabled the CCP to acquire relevant information from the two most senior officers in the legal system on demand. The types of actors that the Court could address was limited, however, and opinions of the AG and President of the Supreme Court at times lacked non-redundant informational content.

The Court never admitted unsolicited submissions from outside of the justice system, although select few NGOs tried to intervene in high-profile cases. Perhaps the most memorable instance of such an attempt was the brief of an NGO examining comparative case law on self-amnesties in the *Amnesty Abolition Case*.<sup>[6]</sup> In that case, the Court did not consider the submission but at least acknowledged the receipt of the brief on the margins of the decision.<sup>[7]</sup>

However, the decision making of the Constitutional Court involves complex legal questions, which may exceed the disposable knowledge resources and capacity of the Court. The Court needs knowledge. There are several means how to acquire relevant but unavailable information, including requests for opinions to government entities, but also contracting external advisors with expertise in niche areas of law.<sup>[8]</sup> Still, hiring external advisors is an added expense. Amicus briefs come at a marginally lower cost. Allowing unsolicited submission enables the Court to externalise costs of legal research to third parties, and the upside for the amici is the ability to translate their preferences into law.<sup>[9]</sup>

The new Act on the Constitutional Court extends the power of the CCP to request opinions from other government bodies, including the Ombudsman, but also non-governmental entities, such as professional lawyers' organisations, scientific institutions, renowned experts in the field, or groups, whose legal interests may be affected by the case-outcome (Article 86.2). The request of the CCP entails a legal obligation to submit an opinion (Article 86.3).

More interestingly, members of the legal profession may also submit unsolicited amicus briefs, although the Court retains the right to reject submissions (86.4). The design of the device seemingly confirms that the Slovak Court, unlike its Italian counterpart, is primarily interested in expert knowledge. That is because the ability of civil society groups to file a brief is limited by the requirement that lawyers must sponsor the brief. That is unfortunate because the rules of procedure for the Constitutional Court do not allow third-party intervention to a case or *actio popularis*. Other avenues for public participation in constitutional litigation are unavailable. That said, even a limited introduction of amicus briefs to Slovak constitutional law is a welcome development. The CCP can newly solicit opinions from outside groups, or these groups may themselves present an unsolicited submission to the Court. Decisions of the Constitutional Court may potentially affect vast areas of law and public policy because of their strong radiating effect. We may, therefore, expect an increase in the rate of submission of amicus briefs over time, as interest groups gain proficiency in using the device.<sup>[10]</sup>

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[1] Article 86 of the Act No. 314/2018 Coll. on the Constitutional Court of the Slovak Republic

[2] Italian Constitutional Court, Press Release – The Court Opens to Hearing the Voice of Civil Society (11 January 2020) <[https://www.cortecostituzionale.it/documenti/comunicatistampa/Press\\_release\\_AC.pdf](https://www.cortecostituzionale.it/documenti/comunicatistampa/Press_release_AC.pdf)>

[3] Matteo Romagnoli, "The Italian Constitutional Court Opens Up to Hear the Voice of Civil Society Matteo Romagnoli" (*Verfassungsblog*, 15 February 2020) <<https://verfassungsblog.de/the-italian-constitutional-court-opens-up-to-hear-the-voice-of-civil-society/>>

[4] Explanatory memorandum to the draft Act on the Constitutional Court <<https://www.nrsr.sk/web/Dynamic/DocumentPreview.aspx?DocID=456174>>

[5] Article 39 of the Act No. 38/1993 Coll. on the Organisation of the Constitutional Court, on Court Proceedings, and Status of Constitutional Judges

[6] Via Iuris, Amicus Curiae Opinion on the Judicial Review of the Resolution of the Slovak Parliament to Abolish Mečiar's Amnesties <<https://viaiuris.sk/wp-content/uploads/2017/09/VIA-IURIS-list-AMICUS-CURIAE-Meciarove-amnestie-16.5.2017.pdf>>

[7] PL. ÚS 7/2017 [84]

[8] Article 31 of the Act on the Constitutional Court

[9] On the flip side, judges have control over the direction of research of their assistant but not the amici.

[10] For amicus briefs to be fully functional, however, the Court and its President need to establish a practice on the maximum lengths of amicus briefs, the deadline for their submissions, and other technicalities such as electronic filing. Detailed rules on the submission of amicus briefs are still lacking.