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Searching for an Optimal Model for the Renewal of the Constitutional Court to Avoid a Constitutional Crisis: Dream or Reality?*

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The failed renewal of the Constitutional Court in Lithuania was not the first in Europe, and will not be the last. The appointment of constitutional judges, usually undertaken with the involvement of the political institutions, became a very sensitive issue closely linked to their independence. After a sequence of unsuccessful attempts to renew the composition of constitutional courts, some states fall into a deep democratic backsliding, while some take the initiative to reform the existing appointment procedure, seeking to prevent the politicisation of constitutional control institutions. A universal and standardised one-size-fits-all model does not exist, as each particular national context must be considered. However, certain lessons are to be learned and certain pitfalls to be avoided. Constitutional courts must correspond to the criteria of the tribunal established by law, as disclosed in international jurisprudence. For this purpose, the proper law is needed. This article analyses the advantages and shortcomings of some elements of the proposed and partly realised Slovak reform on the appointment of constitutional judges that Lithuania and other states could benefit from. This allows for the conclusion that the explicit criterion of professional reputation might prevent arbitrary nominations and ensure that the best judge for the court and the society would be appointed. Contrary to most convictions, a larger majority in the Parliament is not necessary to keep this procedure in line with the principle of the rule of law. The only requirement is that the law must be clear, unambiguous and provide for the steps to be taken if the rotation fails.

Keywords: constitutional court, judicial independence, appointment procedures, separation of powers, tribunal established by law, rule of law.

Contents

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Introduction

Constitutional courts, being entitled with the power to overrule the decisions of legislative or executive bodies, cannot engender doubts about their trustworthiness, otherwise the shadow of distrust would be cast upon their judgements. The existence and proper functioning of a constitutional court is proof that a democratic system is able to remedy deficiencies which have been caused by state power institutions.[1] Yet, only a genuinely independent constitutional court can fulfil this mission. The independence of judges, and by extension of constitutional justices, stands out as one of the mandatory elements of any democratic system, alongside the necessary separation of powers and intra-institutional checks and balances.[2]

However, regrettably, doubts about the independence of constitutional courts and the politicisation of the judicial system have been raised recently – not only with respect to authoritarian regimes or captured democracies, but also with reference to countries that are commonly perceived as consolidated democracies.[3] Often, these doubts are linked to the appointment procedure of constitutional judges, as constitutional judges are appointed by political institutions in most of the states that have opted for the Kelsenian model of constitutional control. The politicisation of judicial appointments is one of the most common threats to the rule of law at present.[4] However, it would be illusionary and utopic to think that politics can be eliminated from the procedure of composing and renewing constitutional courts when aiming to guarantee greater judicial impartiality and independence. The participation of elected representatives in the appointment of constitutional judges helps to avoid the so-called counter-majoritarian difficulty, which emerges from a situation where a small number of constitutional judges imposes legal constraints upon parliamentarians who obtain a legitimate mandate to act from the people they represent.[5]

The participation of politicians in the renewal of the composition of constitutional courts sometimes ends with the non-appointment of constitutional justices in the time

[1] *Farkašová, S.* Constitutional aspects of the current reform of the selecting constitutional judges in the Slovak Republic and the comparative perspectives in Europe. Juridical Tribune, Vol. 11, issue 2, 2021, p. 161.

[2] *Abat Ninet, A.* Kelsen versus Schmitt and the Role of the Sub-National Entities and Minorities in the Appointment of Constitutional Judges in Continental Systems. ICL Journal, Vol. 14, issue 4, 2020, p. 525.

[3] *Fałkowski, J., Lewkowicz, J.* Are Adjudication Panels Strategically Selected? The Case of Constitutional Court in Poland. International Review of Law and Economics, No. 65, 2021. Available: https://www.sciencedirect.com/science/article/abs/pii/S0144818820301630?via%3Dihub. [last viewed 15.05.2023].

[4] *Violante, T.* A Constitutional Crisis in Portugal: The Deadlock at the Constitutional Court. International Journal of Constitutional Law Blog, 22 February 2023. Available: http://www.iconnectblog.com/2023/02/a-constitutional-crisis-in-portugal-the-deadlock-at-the-constitutional-court/ [last viewed 15.05.2023].

[5] See: *Bassok, O., Dotan, Y.* Solving the countermajoritarian difficulty? International Journal of Constitutional Law, Vol. 11, issue 1, 2013, pp. 13–33.

provided by the Constitution. This might bring a state to a constitutional crisis, as happened in Poland or Hungary, or at least paralyse the work of the constitutional court for some time. Needless to say, without effective constitutional control the fundamental values of democracy, human rights and the rule of law become endangered by the possible unconstitutional decisions of state power institutions.

The analysis of unsuccessful rotations in different European countries shows that a failure to renew the composition of a constitutional court might occur because of two reasons: first of all, bodies empowered to participate in the procedure of the appointment of constitutional justices deliberately violate the rules of this procedure, acting *ultra vires* or ignoring the limits of their competences to select candidates or appoint justices in time in order to appoint a candidate who is loyal to the public authority; secondly, state institutions participating in this procedure act within the limits of their competences, but intentionally fail to coordinate their actions or find an agreement on the most appropriate candidate, and the constitutional court becomes hostage to the miscommunication of public authorities.[6]

Within the current article, the author does not analyse or compare appointment procedures in different European states. Similar research has been carried out by other scholars,[7] also involved in the search for an exemplary model for the selection and appointment of constitutional judges which is exempted from political influence, insofar as this is possible in the Kelsenian system of constitutional control. Instead, this paper focuses on the requirements for the formation of constitutional courts and reforms undertaken after failed rotations, which might serve as examples for states seeking to improve the procedure of the appointment of constitutional judges, as this procedure is directly related to the judicial independence of the institution performing constitutional control.

The failed rotation of constitutional justices in Lithuania in 2020 brought legal uncertainty and a number of questions. The first and the most important was the question of what to do next and how to proceed with the appointment of constitutional judges in the future in order to remain in line with the Constitution and the principle of the rule of law. All three candidates proposed by the President of the Republic, the Speaker of the Parliament and the President of the Supreme Court were rejected by parliamentarian vote. Thus, one may ask, whether any constitutional boundaries exist that limit politics in cases of disagreement about the candidacies nominated. Are there any constitutional rules that require officials who nominate candidates to make responsible selections? How long can the Constitutional Court function when its composition includes justices whose term of office has expired? Should it start new cases or wait until its composition is renewed? Should the three new justices be proposed and appointed at the same time, or is it at the discretion of every state official entitled to propose candidates to choose the right time for

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[6] *Miliuvienė, J.* Konstitucinio Teismo teisėjų sudėties atnaujinimo mechanizmas kaip konstitucinių teismų nepriklausomumo prielaida [The mechanism for the renewal of the composition of constitutional justices as a precondition for the independence of the constitutional court]. In: Konstitucija ir teisinė sistema. Liber Amicorum Vytautui Sinkevičiui [Constitution and legal system. Liber Amicorum Vytautas Sinkevičius], *Tvaronavičienė, A.* and others (eds). Vilnius: MRU, 2021, p. 242.

[7] See, among others: *Sadurski, W.* Rights Before Courts: A Study of Constitutional Courts in Postcommunist States of Central and Eastern Europe. 2nd ed., London: Springer, 2014; *Farkašová, S.* Constitutional aspects, 2021, pp. 150–173; *Safta, M.* Appointment of constitutional judges. A comparative law perspective. In: Expanding Edges of Today's Administrative Law, *Shasivari, J., Hohmann, B.* (eds). Ad Juris, 2021, pp. 133–154; *Rodina, A.* Appointment of the Constitutional Justices: Some issues. Juridiskā zinātne, No. 4, 2021, pp. 129–145.

submitting a new or existing candidate? Should the limit of three months in advance be respected and, thus, the appointment postponed, or are there exceptions to this rule in order to implement the Constitution without delay?

It appeared that the Law on the Constitutional Court detailing constitutional provisions related to the renewal of the composition of the court did not regulate any of these issues. All of these questions led to the presumption that the existing legal regulation, including that of a constitutional nature, should be revised and amended in order to avoid such failures posing threats to the coherent existence of the institution of constitutional control in the future. The suggestion to provide in the law for a solution in cases where a decision cannot be reached between participating actors is also promoted by the Venice Commission.[8] Moreover, constitutional experts have underlined that it is important to ensure that the positions of constitutional court judges do not remain vacant for a prolonged period.[9] Therefore, the author aims to propose some legal solutions to the Lithuanian legislator that could contribute to preventing similar situations in the future. Perhaps these insights could also be useful for other states dealing with the same issue.

The first section of the paper examines the criteria for the composition of constitutional courts stemming from the rule of law. Like any other institution administering justice – or perhaps even more than any other judicial institution, given their mission to ensure the proper hierarchy of the legal system – constitutional courts should meet the criteria of a tribunal established by law. As disclosed in the jurisprudence of supranational jurisdictions, the requirement to respect this criterion is a *condition sine qua non* that must be met in order for a court to be considered independent and therefore able to perform its genuine function. The second section of the article reflects the search for good examples to implement in legislation seeking to improve the renewal of the constitutional court. After many failed rotations in Europe, the Slovak Republic was one of the few states that tried to reform their appointment system by adding some necessary elements.

The third and fourth sections contain the elements that might contribute to the improvement of legislation regulating the renewal of constitutional courts, along with some provisions that the author does not recommend. The third section focuses on the fundamental requirements for candidates to be selected for the office of a constitutional judge. Usually, these requirements are very vague and open to interpretation in national constitutions; therefore, their content should be determined. In the fourth section, the author seeks to propose some improvements for the Lithuanian legislator in order to prevent future failures in the re-composition of the Constitutional Court.

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[8] Opinion of Venice Commission of 19 December 2022 on the draft law "On Amendments to Certain Legislative Acts of Ukraine on improving the procedure for the selection of candidates for the position of judge of the Constitutional Court of Ukraine on a Competitive Basis", No. CDL-AD(2022)054. Available: https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2022)054-e [last viewed 06.06.2023].

[9] Follow-up opinion of Venice Commission of 10 June 2023 to the opinion on the draft law "On Amendments to Certain Legislative Acts of Ukraine on improving the procedure for the selection of candidates for the position of judge of the Constitutional Court of Ukraine on a Competitive Basis", No. CDL-AD(2023)022. Available: https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2023)022-e [last viewed 05.04.2023].

1. The existence of a constitutional court is not a constitutional good *per se*, as far as it is not a tribunal established by law

Constitutional courts bear the obligation and the responsibility to guarantee the supremacy of the Constitution and the rule of law in national legal systems and beyond. However, the existence of a constitutional court *per se* does not ensure that the legal order will not only meet formal legality requirements, but will also be just.[10] Constitutional control institutions, as one of the fundamental pillars of a state governed by the principle of the rule of law, are submitted to the requirements of this principle themselves, including the requirement to correspond the criteria of 'a tribunal established by law'. This criterion imposes the obligation on the state to appoint judges in accordance with the respective legal framework.[11] These courts must be formed in a transparent way in order to avoid any uncertainty in their mission to administrate constitutional justice and ensure the reception of constitutional judgements by people and state power institutions.

It is widely accepted that the selection and appointment of constitutional judges is made by other state powers – mostly the executive, with the participation of the parliament. The case law of the European Court of Human Rights (hereinafter ECtHR) in Flux (No. 2) v. Moldova recognised already some time ago that the appointment of judges by the executive or the legislature is permissible, provided that appointees are free from influence or pressure when carrying out their adjudicatory role. The nature of the Kelsenian constitutional control model, which is formed by politicians who, in this sense, deliberately authorise and enable those institutions to control them, requires the establishment of strict and precise rules to be respected and followed. Sometimes, this is not the case.

The right of everyone to a fair trial by an independent and impartial tribunal established by law is guaranteed by the EU Charter of Fundamental rights (hereinafter – the Charter; Article 47, part 2) and the European Convention on Human Rights (hereinafter – the ECHR; Article 6, part 1). For the ECtHR, the term established by law reflects in particular the principle of the rule of law[12] and focuses on judicial independence. Each citizen is entitled to have their case tried by a tribunal that is established in accordance with the law, and this includes the notion that the judges on the tribunal should also be appointed in accordance with the law.[13]

Constitutional courts are no exception to the imperatives stemming from this principle. A court that is not established according to the legal acts regulating the procedure of its formation cannot be considered an entity representing legitimate and lawful jurisdiction, as is required in a democratic state.[14] When it comes to the constitutional court, the importance of meeting these requirements is further magnified.

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[10] *Kūris, E.* On the rule of law and the quality of the law: reflections of the constitutional-turned-international judge. Teoria y Realidad Constitucional, No. 42, 2018, p. 132.

[11] *Karlsson, H.* The Emergence of the Established "By Law" Criterion for Reviewing European Judicial Appointments. German Law Journal, Vol. 23, issue 8, 2022.

[12] *Pech, L.* The Right to an Independent and Impartial Tribunal Previously Established by Law Under Article 47 of the EU Charter of Fundamental Rights. In: The EU Charter of Fundamental Rights: A Commentary, *Peers, S. et al.* (eds). Hart Publishing, 2021, p. 1345.

[13] *Karlsson, H.* The Emergence, p. 1069.

[14] *Costa, J.-P.* Qu'est-ce qu'un tribunal établi par la loi? [What is a tribunal established by law?]. In: Fair Trial: Regional and International Perspectives. Liber Amicorum Linos-Alexandre Sicilianos, *Branko, L., Motoc, I., Pinto de Albuquerque, P., Spano, R., Tsirli, M.* (eds). Anthemis, 2020, p. 103.

The constitutional crisis in Poland that emerged from the unlawful appointment of several constitutional justices permitted the broadening of the *expressis verbis* requirements of Article 6 of the ECHR to the scope of constitutional courts performing abstract constitutional control. In Xero Flor v. Poland, the legitimacy of the Polish constitutional tribunal was evaluated, and all previously formulated criteria for judicial appointments were applied to the constitutional courts. The illicit appointment of three constitutional justices in Poland led to the finding that the Polish Constitutional Tribunal, sitting in a certain composition, was not considered 'a tribunal established by law' anymore, and its role as the guardian of the Constitution was lost[15].

ECtHR jurisprudence confirms that the procedure for the selection and appointment of judges is one of the elements to be met in ensuring that a tribunal is established by law, as was indicated in Ástráðsson v. Iceland. According to the ECtHR, the criterion established by law was intended to ensure that an organisation of the judicial branch is not dependent on the discretion of the executive or the judicial authorities, but should instead be regulated by the laws of the legislature. Irregularities in the appointment procedures of judges could mean that a tribunal was not established by law. While assessing whether a tribunal was established by law, one must consider whether the composition of the court is in conformity with the relevant rules and the judges have been appointed in the correct way.[16]

Thus, respect for the procedural rules enshrined in the Constitution and detailed in ordinary legal regulation is of the utmost importance. The transparency, effectiveness and quality of the judge-selecting procedure obviously plays an important role in this endeavour. When disrespecting the requirement of stemming from the principle of the rule of law, judges appointed to the court might still be independent or impartial; however, the court will not be considered as legitimate and trustworthy. This it would be sufficient to find a violation of Article 6 of the ECHR like in Xero Flor v. Poland or Article 47 of the EU Charter,[17] the meaning and scope of which are in essence the same.[18]

Having paid due attention to the jurisprudence of ECtHR, in the case of Simpson v. Council, the Court of Justice of the European Union (hereinafter – the CJEU) found that an irregularity committed during the appointment of judges within the judicial system concerned entailed an infringement of the first sentence of the second paragraph of Article 47 of the Charter, particularly when that irregularity is of such a kind and of such gravity as to create a real risk that other branches of the state could exercise undue discretion undermining the integrity of the outcome of the appointment process and thus give rise to a reasonable doubt as to the independence and impartiality of the judge or judges concerned.

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[15] *Wyrzykowski, M.* The Vanishing Constitution. In: European Yearbook on Human Rights, *Strohal, C., Kieber, S.* (authors), *Benedek, W. et al.* (eds). Intersentia, 2018, p. 4.

[16] *Sunnqvist, M.* Impartiality and independence of judges: the development in European case law. Nordic Journal of European Law, Vol. 5, issue 1, 2022, p. 91.

[17] Polish saga in CJEU: ECJ 24 June 2019, case No. C-619/18, Commission v. Poland (Independence of Supreme Court); ECJ 5 November 2019, case No. C-192/18, Commission v. Poland (Independence of Ordinary Courts). 21ECJ 19 November 2019, case No. C-585/18, A.K. (Independence of the Disciplinary Chamber).

[18] The CJEU has noted that it must ensure that the interpretation which it gives to the second paragraph of Article 47 of the Charter safeguards a level of protection which does not fall below the level of protection established in Article 6 ECHR, as interpreted by the ECtHR (judgment of 19 November 2019, A. K. and Others (Independence of the Disciplinary Chamber of the Supreme Court), C-585/18, C-624/18 and C-625/18, paragraph 118 and the case law cited).

The gravity of the infringements of the procedural rules was set out in the jurisprudence formulated in the Ástráðsson v. Iceland case. In order to determine the seriousness of procedural irregularities, one must consider three aspects: a) whether there has been a manifest breach of the law (the factual evaluation); b) whether the breach of the law pertained to any fundamental rule of the judicial appointment procedure (the substantive threshold for finding a breach); and c) whether the alleged violations were submitted upon the judicial review and the situation was rectified.

Thus, violations of national legislation of fundamental importance in the judicial appointment procedure clearly result in the violation of the requirement of a tribunal having been established by law. Indications of illegal interference or undue use of discretion by some state power institutions in the appointment procedure of judges are potentially significant in determining whether disrespect of the rules was of fundamental importance. Usually, the executive branch would be prone to overstepping its boundaries in this way, but by its wording, the judgment of the ECtHR does not exclude the possibility that other branches or organs of government might do the same[19].

A case of Polish origin, Xero Flor, might be considered a continuation of the logic of Ástráðsson. This allowed the test developed in the landmark ruling in the Icelandic case to be applied to a constitutional court.[20]

The finding that a constitutional court does not meet the requirement of a tribunal having been established by law gives space to doubt the forcibility and binding nature of its judgments. The ordinary courts in Poland, including the Supreme Court, took this path, proclaiming that judgements issued by wrongly elected persons are not binding, and can therefore be disregarded.[21] Moreover, in case such judgements would be applied in the jurisprudence of ordinary courts, the decisions of the latter might also cast doubt as to their legitimacy. Hence, public trust in the entire judicial system might be compromised, if the constitutional control institution was defectively shaped in order to be recognised as a tribunal established by law. This also means that constitutional judges appointed in violation of the legal rules are not protected by constitutional guarantees, such as the principle of irremovability.[22] Judges should not be entitled to such protection until they have been lawfully appointed.

The term 'established by law' covers both the legal basis for the very existence of a tribunal and the compliance by that tribunal with the particular rules that govern it.[23] In Ástráðsson v. Iceland, the court emphasised that it should be ensured "that the relevant domestic law on judicial appointments is couched in unequivocal terms, to the extent possible, so as not to allow arbitrary interferences in the appointment process, including by the executive". Thus, the law itself should meet some quality criteria in order to prevent extensive interpretations.

Indeed, political actions based on their own understanding of the applicable legal framework on appointing judges might also mean that the requirements for a tribunal to have been established by law are violated. Extensive discretion in judicial appointments can undermine judicial independence and thus, the idea of a fair

[19] *Karlsson, H.* The Emergence, p. 1064.

[20] *Szwed, M.* The Polish Constitutional Tribunal Crisis from the Perspective of the European Convention on Human Rights: ECtHR 7 May 2021, No. 4907/18, Xero Flor w Polsce Sp. z O.o. v. Poland, European Constitutional Law Review, Vol. 18, issue 1, 2022, p. 137.

[21] Ibid.

[22] Ibid.

[23] *Sunnqvist, M.* Impartiality, p. 89.

trial.[24] The guarantee of judicial independence demands an adequate, coherent and simultaneous approach to courts' configuration in law and practice, insofar as they are deeply interconnected.[25] To prevent the extensive discretion or abuse of powers, a clear and unambiguous law regulating the appointment procedure is needed. Courts should be established through the slow but sophisticated mechanism of law-making.

2. THE Law is needed: A Slovak lesson to be learned

To be 'a tribunal established by law', a law is needed – and not any law, but a law of sufficient quality. This means that the law should be clear, unambiguous and sufficient to regulate all possible outcomes – which was obviously not the case in Lithuania. Every state that has suffered an unsuccessful rotation in its constitutional courts might need to revise its legislation and consider whether there is some space to improve it. After failed rotations in 2014 and 2019, when 9 out of 13 constitutional judges were not appointed, Slovakia indeed began to think about improving its legislation, and some constitutional and legal reforms were proposed. The Slovak experience is of interest for other states to learn from – as the old proverb says, only a fool learns from his own mistakes; the wise man learns from the mistakes of others. Therefore, the proposed Slovak reform on the appointment of constitutional judges' merits analysis.

Slovakia did not belong to the Soviet Union; however, it was under its influence, and the Slovak story of reaching out for democracy is similar to that of other states in central Europe. Slovakia became an independent state in 1992 after the velvet divorce with the Czechs, and since that moment it has had to learn every democratic lesson by itself. Thus, Slovakia encountered problems common to new democracies: the implementation of the rule of law, the constant change of governing political parties, the scepticism and disappointment of society, and the search for reforms and improvements.

In Slovakia, the procedure for the appointment of constitutional judges is regulated by the part 2 of the Article 134 of the Constitution of the Slovak Republic. The President of the Republic is in charge of the appointment of constitutional judges from the candidates submitted by the National Council. The President must choose between two candidates for one position. In 2014, the new President had to appoint three constitutional judges. He chose one candidate and refused all others (four in total) due to their allegedly insufficient competences.[26] The President claimed that he had the discretion to choose or not to choose any of the proposed candidates if he did not like them. Then, the President also refused to appoint another justice. For several years, the Slovak Constitutional Court was missing three of the required judges. The workload of the remaining justices increased, the time it took to adjudge constitutional cases became longer, and, finally, the quorum of judges and the necessary vote for the adoption of every decision became difficult to reach. Drugda

[24] *Karlsson, H.* The Emergence, p. 1066.

[25] *Bustos Gisbert, R.* Judicial Independence in European Constitutional Law. European Constitutional Law Review, No. 18, 2022, p. 619.

[26] The shortcomings of the candidates for justices of the Constitutional Court pointed out by the President of the Slovak Republic were the lack of specialisation in constitutional law of the nominated candidates, the absence of significant academic achievements, and the lack of recommendations to the nominated candidates by a committee set up by the President himself.

states that because of the constitutional *modus operandi* of the Court, "a single vacancy may considerably disrupt the workflow of the Court".[27]

The unselected judges challenged the actions of the President in the Constitutional Court, which gave its verdict and evaluation of the situation. The Grand Chamber of the Constitutional Court in decision No. I.ÚS 549/2015 explained that when appointing judges to the Constitutional Court, the President is bound by the pre-selections made by the Parliament, and may not dismiss a candidate by introducing criteria other than those expressly specified for that position in the Constitution. After the Ruling of the Constitutional Court, the President fulfilled his task and appointed judges to the vacant positions.

However, Slovakia's troubled history with appointing constitutional judges was not over. In 2019, nine new judges to the Constitutional Court were due to be appointed. When the reform of the selection and appointment procedure had already been initiated, the former prime minister tried to become the President of the Constitutional Court. This seemed like a political attack on the Constitutional Court rather than an appropriate candidacy to fill the office. The legal regulation of the appointment of judges led to political disputes, with political deadlock in connection with the selection of candidates for constitutional judges in 2019. This caused the long-term vacancy of the Court.[28]

Trying to avoid the complete politicisation of the Constitutional Court, amendments to the existing legislation were proposed. They sought to make the procedure more transparent and predictable, with articulated requirements for candidates and procedures that should avoid blocking candidates either in the Parliament or by the President. The Slovak government succeeded in implementing some legislative reforms, while the constitutional amendments did not receive parliamentary approval.

Firstly, the proposal of the amendment to the Constitution was introduced. Although it did not obtain enough votes in the Parliament, this proposal is worth analysing when searching for the optimal model of the re-composition of a constitutional court. This reform was seen as one that might fulfil hopes and expectations for the improvement of the procedure: it intended to install a brake against the concentration of power in the hands of political representation, as well as functional mechanisms that could strengthen the independence and efficiency of the constitutional judiciary.[29]

What exactly was proposed, then? There were two objectives to achieve: to raise the parliamentary majority required for the selection vote from a simple to an absolute one; and to expand the eligibility requirements for future constitutional judges, including attributes such as personal renown, reputation for independence and impartiality, and high moral credit.[30]

The first proposition is a classical one, which prescribes to give more voice to the opposition, aiming to depoliticise the procedure and bring more credibility to the candidates. The aspiration is commendable, but in this case, the mechanisms to avoid possible deadlocks when the political majority and the opposition disagree might be foreseen. Moreover, the opposition might use its power to veto a candidate

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[27] *Drugda, S.* Changes to Selection and Appointment of Constitutional Court Judges in Slovakia. Pravny Obzor, No. 102 (special issue), 2019, p. 16.

[28] *Farkašová, S.* Constitutional aspects, p. 170.

[29] Op. cit., p. 153.

[30] *Drugda, S.* Changes to Selection and Appointment.

as a political tool in matters unrelated to the question of the appointment of constitutional judges. The necessity of preventing deadlocks and delays is also emphasised by the Venice Commission.[31]

The second initiative is especially interesting and appealing. This is because most Constitutions provide only for very vague criteria for the selection of constitutional judges,[32] and it is most often because of this that the appointment procedure is questioned. All of the elements provided in the Slovak proposal were not unknown to the officials charged with the selection of candidates in Lithuania (or in other states); however, being only soft law and more unwritten traditions than legal rules they allow actors participating in the appointment proceedings to disregard them when it is convenient. The Slovak proposition to amend the Constitution and the legislation is further analysed in light of its possible transposition into other legal systems.

3. A judge good for the court and the society: On criteria to be established

Resuming the discussion on the aspiration of having a legitimate constitutional court established by law, i.e., composed of judges that are nominated and appointed according to the law, one might note that the law – both constitutions and ordinary legislation – regulates two aspects of the appointment of constitutional judges: the procedure and the substantial matters on who can be a constitutional judge. The latter aspect is determined by the criteria to be fulfilled by a person nominated for the office of constitutional judge. One should not undermine those criteria because they characterise the future judge who will decide on the content of the Constitution. Interpreting laconic constitutional provisions means more than a simple clarification of the content of the text. The interpreter fills the text with their own convictions and respected values. Indeed, under certain circumstances, constitutional interpretation may take the form of indirect constitutional amendment: it can go beyond the text. Therefore, both the society and the politicians participating in the formation of the composition of the constitutional courts are more than interested in having the best – according to their beliefs – judge in the court.

Most European jurisdictions require a high level of legal knowledge and a certain age or professional experience. Usually, these criteria are not detailed in law so as not to create restrictions that are not provided in the constitution. However, they are reference points not only for lawyers aspiring to one of the highest positions in law, but also for officials who make selections. Being regulated by general provisions, they are difficult to impose on the bodies electing constitutional judges.[33] Therefore, lacking accuracy and certainty as to their content and meaning, constitutional formulations leave too much space for their interpretation. Thus, one might ask whether these criteria should be ascertained in the legislation, aiming to ensure that the candidate that is best for the court and the society is nominated for the office of constitutional judge.

Under the Article 103 of the Lithuanian Constitution, the requirements of eligibility are: to be a Lithuanian citizen with an irreproachable reputation; educated

[31] Opinion of Venice Commission of 13 March 2017 on questions relating to the appointment of Judges of the Constitutional Court of the Slovak Republic, No. CDL-AD(2017)001. Available: https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2017)001-e [last viewed 10.06.2023].

[32] *Safta, M.* Appointment, p. 202.

[33] *Toth, Z.* Composition and Structure of the East-Central European Constitutional Courts. Collected Papers of the Faculty of Law in Novi Sad, Vol. LVI, issue 2, 2022, p. 574.

in law; and with a minimum of 10 years of experience in the legal field as a professional or a legal scholar and educator. These requirements can be assessed as very typical, and without any particularities when compared to other states with centralised constitutional control. Nonetheless, they might be considered to somehow lack certain elements that might be added. Amendments to the Constitution might be made by altering the text of the Constitution or by way of its interpretation.

The Venice Commission emphasises that the procedure of the appointment of judges is essential in order to ensure the high quality of the decisions of the constitutional court, and none could argue against this.[34] The criteria of renown, professional reputation or professionalism, next to the requirement to have an irreproachable reputation in general, was proposed in the Slovak constitutional initiative. Indeed, professionalism might be the main principle to be ensured in the selection of candidates. Usually, constitutions require only a certain level of professional experience (10–15 years in the legal field). This is not the same as one's professional reputation, because not all lawyers having worked for a certain time are the best or most professional practitioners. All the persons working in the field of law after a certain time will have the necessary experience, but not all of them can become constitutional judges. Judicial and professional reputation might be a compliance mechanism which could ensure that only the best lawyers are nominated to the position of a constitutional judge.

The absence of an *expressis verbis* provision regarding professional reputation does not mean that the officials nominating candidates (the President of the Republic, the Speaker of the Parliament or the President of the Supreme Court, in Lithuania's case) are not obliged to take it into account, or that they were not assessing it before nominating a candidate. The analysis of the previous professions of Lithuanian constitutional judges shows that before entering the Constitutional Court, most of the candidates were either law professors or judges of the Supreme Court. One might like to think that it is the responsibility and constitutional duty of the nominators to select the candidates most appropriate for future work and most appropriate to society, as public trust in constitutional justice is also very important.

However, the recent failed renewals of the composition of the Constitutional Court implicitly suggest that the officials nominating candidates do not always have the same perception of professionalism as the rest of the legal community. The lack of professionalism was key in objections which caused unsuccessful rotations in Slovakia[35] and Latvia[36]. Of course, due to their imprecision, the nomination criteria also give space to manipulation when stating that even a renowned professor is not competent enough in the field of law. The solution to this might be the advisory opinions of professionals themselves – for instance, former constitutional judges who already know what skills are needed to be a constitutional judge and do not have any vested interest in a particular person being nominated, other than in ensuring the effective continuation of the work that they have commenced.

Another controversy regarding considerations of professionalism is engendered when politicians from legislative and executive bodies are appointed to the constitutional

[34] Urgent opinion of Venice Commission of 11 December 2020 on the Reform of the Constitutional Court, issued pursuant to Article 14a of the Venice Commission's Rules of Procedure. No. CDL-AD(2020)039-e. Available: https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2020)039-e [last viewed: 4.06.2023].

[35] *Drugda, S.* Changes to Selection and Appointment.

[36] *Rodina, A.* Appointment.

court. This might also occur because of a lack of clarity when determining the criteria for becoming a constitutional judge. Constitutions usually do not provide for the direct prohibition of candidates with prior political careers from being chosen for the position of a constitutional judge. The requirement to be apolitical is not useful in this situation, as some political actors do not officially belong to any political party, even if their sympathies are well known.

The Lithuanian Constitution is no exception concerning the lack of clarity regarding the criteria for the constitutional judge-to-be. This convolutes the task of officials when selecting and nominating appropriate candidates, and allows for the notion that a political person might be chosen for the office of a constitutional judge. In some states, the participation of politicians in the composition of the constitutional court is a constitutional tradition, for instance, in Germany, or it is directly enshrined in the Constitution, for example, in France (Part 2 of Article 56 of the Constitution). However, those are states with older constitutional courts or deeper democratic traditions, and the question of judicial independence is less sensitive to them, although no less important. The new democracies that emerged after the fall of communism have many lessons to learn. The independence of the judiciary from other state power institutions is one of them.

After the failed rotation of the Lithuanian Constitutional Court in 2020, the next rotation, which took place in 2023, was awaited with concern. In the end, everything proceeded smoothly, although some considerations regarding the appropriateness of one of the nominated candidates could not be avoided. One of the three judges appointed to the Constitutional Court was an actual member of Parliament, who was also the head of the Committee of Legal Affairs, charged with ensuring the preliminary constitutional compatibility of laws before their adoption in the Parliament. Thus, the question is whether this candidate will be able to examine the constitutionality of laws that are challenged before the Constitutional Court, as his previous opinion has already been publicly expressed. The question of partiality soon arose in cases of constitutional justice, as the parties to these cases started to file demands that this judge be disqualified from their hearings. All of these demands were satisfied, but there were also some cases, where, without receiving such a demand, the judge did not recuse himself, and doubts about his independence were thus raised in the media.[37]

The fact that the judge is tied to a party, even when he is no longer an active member, still harms the independence of the Court and the separation of powers as the requirement to be apolitical has to be met. Usually, it is expected that judges, like any other member of society, have their beliefs, approaches, understandings and political preferences. It would be worrying if they did not. However, active politicians have overly close ties to political power. Several times in the history of the Lithuanian Constitutional Court judges have been appointed directly from a political post. However, they all had academic backgrounds and academic affiliations to be assessed when nominating the candidate.

The mission of the Constitutional Court and its assigned task does not allow its independence to be cast into doubt. This can cast a shadow of mistrust over any

[37] *Perminas, P.* Šedbaras Konstituciniame Teisme nenusišalino nuo sprendimo dėl migrantų, kurį palaikė Seime [Šedbaras did not disqualify himself in the Constitutional Court from the decision concerning migrants supported in *Seimas*], Lrt.lt, 29 June 2023. Available: https://www.lrt.lt/naujienos/lietuvoje/2/2010074/sedbaras-konstituciniame-teisme-nenusisalino-nuo-sprendimo-del-migrantu-kuri-palaike-seime [last viewed 02.05.2024].

decision adopted, especially when the decision concerns sensitive issues such as the management of the migrant crisis or a hybrid attack from undemocratic regimes. Although in drafting the Venice Commission the constitutional experts did not envisage a great threat being posed by participation in political activity, saying that "in order to prevent direct influence of political parties, it is not necessary to ask for complete political abstention,"[38] it may be pertinent to explore the introduction of a cooling-off period for high-level politicians interested in the position of a constitutional judge.

4. The model rotation mechanism: Myth or reality?

Some scholars argue that each of the currently applied models for the appointment of constitutional judges has both advantages and shortcomings, which are fully manifested when the process of appointing judges takes place in a tense socio-political atmosphere and in the conditions of a deficit of political and legal culture.[39] Others suggest that the best method for selecting constitutional judges should be able to a) guarantee or maximise political independence; and b) identify expert knowledge and professionalism.[40] This formula seems very agreeable. Finally, there are some that propose an unusual method: to select the judges by sortition from equally qualified professional candidates;[41] or even to reform constitutional courts, restricting their competence to the protection only of democracy and human rights and embedding judicial deference to the legislator in order to better preserve their independence.[42] One must agree then that a universal recipe does not exist, and the context of the country and its political and legal culture should be taken into account.

The procedure for appointing constitutional judges in Lithuania, enshrined in the Constitution and detailed in the law on the Constitutional Court, already has certain elements which allow it to strengthen judicial independence and ensure the depoliticization of nominations. All three branches of state power (legislative, executive and judiciary) are involved in the process, obliging each of them to coordinate their actions and search for agreement. Thus, the separation of power, the pluralism of opinions, and adequate checks and balances are ensured. The term of office of constitutional judges is limited and non-renewable, preventing judges from seeking re-election and thus pandering to the will of politics. Instead, they work to preserve the superiority of the Constitution.

The Law on the Constitutional Court also provides for a 3-month time limit to submit candidacies to the Parliament in order allow them to be discussed in public. Furthermore, this law prescribes minute details – for example, the term of office of judges terminating their duty ends on the third Thursday of March of the relevant year. When the institutions fail to appoint new judges after the expiry of the term of office of the previous judges, the functionality and continuity of the efficient work of the Constitutional Court is preserved by the provision which allows judges with

[38] Opinion of Venice Commission of 20 March 2006 on the Two Draft Laws amending Law No. 47/1992 on the organisation and functioning of the Constitutional Court of Romania, No. CDL-AD(2006)006. Available: https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2006)006-e [last viewed 05.06.2023].

[39] *Farkašová, S.* Constitutional aspects, p. 167.

[40] *Vandamme, P. É., Hutt, D. B.* Selecting Constitutional Judges Randomly. Swiss Political Science Review, Vol. 27, issue 1, 2021, p. 109.

[41] Ibid.

[42] *Castillo-Ortiz, P.* The dilemmas of constitutional courts and the case for a new design of Kelsenian institutions. Law and Philosophy, No. 39, 2020, p. 653.

expired terms of office to continue their functions until a new judge is appointed. *Hélas*, the extended tenure of incumbent judges does not help to remove incentives to block the appointment of new judges, instead only attenuating the consequences of a blockage.[43]

What is lacked by this mechanism? The devil hides in the details of the interpretation of the law regulating the procedure of the appointment of constitutional judges. Therefore, explicit, precise and unambiguous legal regulation of this procedure is needed in order to avoid malfunction or failures.

For example, although the Lithuanian Law on the Constitutional Court seems to be explicit on every detail concerning the timeframe for carrying out the selection procedure and for submitting judicial candidates to the appointing bodies, providing 3 months for submission of the candidates and the exact day of the next composition, apparently it remains silent regarding time limits in cases of failed rotation. As the law regulating the appointment procedure according to which the tribunal has to be established must be clear, it should be amended to provide the time during the which new candidacies have to be submitted after a failed rotation. Taking into account the failed constitutional obligation to appoint judges, this period should not be long. The time limit of 3 months should apply, if a new candidacy is submitted, as this time period is needed to discuss the personalities of candidates and to verify all the relevant information. When the same candidacy is re-submitted to the Parliament, no time limit is necessary.

One of the questions that arose after the failed rotation in Lithuania was whether all three candidatures have to be presented at the same time in the same vote in the Parliament, or whether, as the first vote had failed, it was then up to each official with the power to nominate the candidates to choose the timeframe. In fact, the Law on the Constitutional Court does not provide that the appointment of the three judges during the usual rotation must be simultaneous – only the day when they enter office is the same. There is the requirement to nominate the candidates at least 3 months in advance and to appoint them no later than on the third Thursday of March. However, it is not prohibited to nominate and appoint one or two candidates earlier that the others. After the regular rotation fails, the requirement to coordinate the actions among all officials involved in the procedure and to have all nominations at the same time might complicate the appointments. For instance, after the failed rotation one of the officials entitled to nominate a candidate as a constitutional judge might decide to re-submit the same person. In this case, it is obvious that it is not necessary to wait for 3 months to appoint them.

The requirement to simultaneously fill all of the vacancies for the post of constitutional judge exists in Spain, which also joined the club of failed constitutional rotations in 2022. Here, the judges are appointed by the General Council of the Judiciary and the Government; however, if one of them fails to nominate a judge, the entire process is compromised. Since 2018, the Council of the Judiciary itself has not been able to be renewed because of a lack of agreement between the governing political party and the opposition, as a majority of 3/5 is needed to appoint the judges in the Council to avoid court-packing. Lacking around 20 members, the Council of the Judiciary is not capable of adopting any decision, including the appointment of constitutional judges. A governmental initiative to abolish the rule of simultaneity

[43] *Lübbe-Wolff, G.* Wie Verfassungsgerichte arbeiten, und wovon es abhängt, ob sie integrieren oder polarisieren [How constitutional courts work and what determines whether they integrate or polarize]. Berlin: Konrad-Adenauer-Stiftung, 2022.

and to lower the threshold needed for the Council of the Judiciary to vote was rejected by the opposition, who argued that such amendments would lead to the capture of the judiciary.[44] Thus, the Spanish example clearly shows that the rule of simultaneity might lead to a deadlock in the procedure if one of the participating officials or institutions finds itself incapable of fulfilling the obligation to nominate candidates.

Under the Lithuanian Constitution, the Parliament appoints constitutional judges by a simple majority. Although the examples of other states and the recommendations of the Venice Commission suggest that a qualified or absolute majority would be a better choice in order to ensure that the appointed judge would satisfy all political ideologies, this might not be the best option. First of all, the possibility to end in deadlock becomes more relevant. All propositions on how to overcome a deadlock end with the suggestion of lowering the majority requirement for the second or third round of voting.[45] Therefore, in order to achieve a result – the appointment of a constitutional judge – one would end up with the same simple majority. Secondly, appointments are usually voted for by a larger majority than is required. If a candidate is not suitable for a simple majority, they will also not be accepted by parliamentarians. Thirdly, only one candidate out of three in Lithuania can be guaranteed for the governing party, as the judiciary nominating another candidate is not involved in politics and the President of the Republic, being seen as the saviour of the nation, rarely belongs to the same political ethos. Therefore, even if the first impression would be that it is pertinent to introduce a stronger majority in the parliamentarian vote – and although, in the opinion of the Venice commission,[46] the appointment of constitutional judges by the Parliament via an ordinary majority deserves attention – it is not the most necessary improvement to undertake in the Lithuanian legal system.

Slovak reform on the re-composition of the Constitutional Court also encompasses an element worth considering and introducing into other judicial systems. The list of entities conferred with the power to propose candidates for consideration to the Parliament was extended. In other words, to ensure the professionalism of future candidates, the entities proposing the candidates to the proposers of candidates were provided. Thus, the selection of constitutional judge candidates might comprise sub-processes which feed into each other and also involve external actors[47].

Indeed, when creating the Constitutional Court in Lithuania, the officials empowered to find future judges addressed external institutions for advice, without any regulation. The Speaker of the Parliament charged with proposing three candidates to the first composition of the Constitutional Court recalls:

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[44] *Tsereteli, N.* Battle for the judiciary in Spain: how does it compare to Poland and Hungary? Democracy reporting international, 22 December 2022. Available: https://democracy-reporting.org/en/office/EU/publications/battle-for-the-judiciary-in-spain-how-does-it-compare-to-poland-and-hungary [last viewed 07.05.2023].

[45] *Miliuvienė, J.* Konstitucinio Teismo teisėjų sudėties atnaujinimo mechanizmas kaip konstitucinių teismų nepriklausomumo prielaida [The mechanism for the renewal of the composition of constitutional justices as a precondition for the independence of the constitutional court]. In: Konstitucija ir teisinė sistema. Liber Amicorum Vytautui Sinkevičiui [Constitution and legal system. Liber Amicorum Vytautas Sinkevičius], *Tvaronavičienė, A. et al.* (eds). Vilnius: MRU, 2021; *Lübbe-Wolff, G.* Wie Verfassungsgerichte arbeiten, 2022, p. 440.

[46] Compilation of Venice Commission opinions, reports and studies on constitutional justice of 14 April 2020, No. CDL-PI(2020)004. Available: https://www.venice.coe.int/webforms/documents/?pdf=CDL-PI(2020)004-e [last viewed 05.04.2023].

[47] *Drugda, S.* Changes to Selection and Appointment, p. 27.

> *The task of finding the most appropriate candidates was not an easy one, as constitutionalists in Lithuania, in my opinion, were not numerous. […] I addressed six institutions for suggestions: the Supreme Court, the Office of the Prosecutor General, the Ministry of Justice, the Law Faculty of Vilnius University, the Lithuanian Lawyers' Association and the Bar Association. I did the same for the next rotation while searching for candidates, adding the Ombudsperson office to the list.*[48]

There was no obligation enshrined in law that before nominating candidates the nominators must consult external actors; it was only the weight of responsibility on the shoulders of the officials to carefully compose this brand-new institution charged with the power of constitutional control that spurred this.

However, the consolidation of this informal rule in the law and the involvement of additional actors in the process of appointment would create the preconditions for strong support behind the candidates submitted to the Parliament. The propositions of such advisors for the selection of candidates should not be seen as compromising the discretion of nominating officials, but they should ensure that this discretion is exercised after the screening of the constitutional and legal requirements necessary to become a constitutional judge. This would also prevent arguments surrounding the insufficient level of professionalism of submitted candidates.

The entity advising on the nomination of candidates or presenting an indicative list of nominees should be composed of legal professional and academic institutions, all of which should have an interest in the high quality of Constitutional Court judge appointments. It would be overstated and illusionary to request that the advisors be absolutely politically neutral, as every person naturally has their own beliefs and convictions, but participation in political activity should be avoided. In any case, it would be difficult to imagine, for example, that former presidents of the Constitutional Court who are also professors (or professors emeriti) in academia would have any other interest in the nomination of a constitutional judge than to have the most appropriate candidate. They better than anyone else understand the importance of the function to be performed, and would therefore see the sense in helping political institutions with both the recruitment of candidates for selection and the qualified assessment of candidates' merit. The national association of lawyers or even the bar association might suggest some interesting candidacies to one of the most interesting posts in the judiciary. Joint suggestions for nomination by several bodies might also be permissible, so that a candidate could enjoy the backing of more than a single nominator.

In most European countries there is no application system or similar procedure to the office of a constitutional judge. Appointment is purely at the will of the public entities assigned to it. Yet there is still another way for officials to have a list of nominees to choose from – to host an open competition. Candidates meeting the requirements set up in the Constitution might apply for the post themselves by submitting an application and proving their eligibility (as is the case in Croatia or Slovenia). In Lithuania, similar suggestions were expressed in media channels regarding the reform of the existing nomination system, which were initiated by a judge of the Supreme Administrative Court and a high-profile advocate.[49] They essentially argued that

[48] *Juršėnas, Č.* The search and appointment of first constitutional judges. In: Thirty years of constitutional justice: tempore et loco, *Jočienė, D. et al.* (eds). Lietuvos Respublikos Konstitucinis Teismas, 2023, p. 652.

[49] *Meškauskaitė, L., Ragulskytė-Markovienė, R.* Konstitucinio Teismo teisėjų skyrimo džiunglės [The jungle of the appointment of constitutional judges]. Delfi.lt, 27 April 2020. Available: https://m.delfi.lt/ringas/article.php?id=84145757 [last viewed 12.06.2023].

a lawyer with a strong professional reputation but without political support has no chance of becoming a constitutional judge; therefore, an open competition, like for the office of the other high courts, should be implemented. Their argument can be supplemented by the recent reform of the procedure for the selection of international judges, where after a call for candidacies everyone who intends to become a judge in the ECtHR or CJEU might present their documentation fulfilling the criteria.

The general principle of competitive selection by screening committees seeking to ensure a higher level of professionalism and the appropriate moral qualities, greater independence and impartiality was introduced in the Article 148 of the Ukrainian Constitution in 2016. This attempt was welcomed by the Venice Commission,[50] which was invited to express its opinion on the issue. Additionally, the Venice Commission recommended that the results of screening committees be made visible to the public, ranking the candidates who applied as "very suitable, suitable or not suitable". This proposition should be regarded somewhat dubiously for the following reasons, even if the particular context of the Ukrainian judiciary is taken into account.

One might recognise that the system of open competition itself is not free from shortcomings, especially regarding the element of publicity. For greater transparency, all of the persons who submit their candidacies should be known publicly, allowing society to ensure that the official entitled to nominate the candidate chooses the strongest one. The selection should then be made not by political actors, who are often not capable of evaluating the degree of professionalism, but by another screening commission or advisory body. However, the candidates who were not selected, in preserving their reputation, would refrain from entering the competition the next time, because no one would want to be among those who were not chosen. Thereby, the list of persons willing to participate in the selection procedure for the Constitutional Court risks becoming shorter and shorter with each rotation. Hence, even if this method works for the nomination of judges of general jurisdiction, formed on the basis of a judicial career, or for the selection of international judges, it might not work for the selection of constitutional judges.

Thus, certain improvements in the legislation might help to prevent future failures in the renewal of the composition of the Constitutional Court. However, each proposal for a change to the procedure of the selection and appointment of constitutional judges should be assessed against historical experience[51] to fully elucidate the strengths and shortcomings of the process.

Summary

The more independent the constitutional courts are, the more they will be able to protect democracy and human rights when these institutes are attacked by political actors. Hence, the tension between independence and accountability grows as judicial power increases,[52] and the constitutional courts are doubtlessly more powerful courts

[50] Opinion of Venice Commission of 19 December 2022 on the draft law "On Amendments to Certain Legislative Acts of Ukraine on improving the procedure for the selection of candidates for the position of judge of the Constitutional Court of Ukraine on a Competitive Basis", No. CDL-AD(2022)054. Available: https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2022)054-e [last viewed 06.06.2023].

[51] *Drugda, S.* Changes to Selection and Appointment, p. 32.

[52] *Kelemen, R. D.* Selection, Appointment, and Legitimacy. A political perspective. In: Selecting Europe's Judges: A Critical Review of the Appointment Procedures to the European Courts, *Bobek, M.* (ed.). Oxford, 2015, p. 245.

in the state. The mere idea of a "puppet court" is like a *cauchemar* for any democracy governed by the rule of law. Constitutional justice must, by its composition, guarantee independence with regard to different interest groups and contribute towards the establishment of a body of jurisprudence which is mindful of this pluralism.

The search for an ideal model that strengthens the independence of the constitutional judiciary is the focus of many researchers, preoccupied by the recent failed renewals of constitutional courts in Europe. Even if a unique etalon of appointments that fits all countries can barely exist, some proposals for the legal regulation of the selection of constitutional judges might be provided to strengthen and improve their independence.

The importance of having an efficient system of checks and balances should be the main objective when deciding on an optimal model for the renewal of the composition of constitutional courts. A focus on the merit-based selection of the members of constitutional courts, who are supposed to have both competence and integrity, should be the first purpose of the officials or institutions involved in the appointment procedure. Such a focus might be fostered by the common interest of having an independent judge who is good for the court, good for the society and good for all political powers. External actors with appropriate qualities might be mobilised to find those candidacies. A cooling-off period should be introduced for active politicians that fit the criteria necessary to become a constitutional judge. Finally, any legal gaps that allow differing interpretations of existing legislation should be filled by precise, clear, unambiguous provisions, containing time limits for every stage of the appointment procedure and every step to be undertaken if rotation fails.

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