

ELECTION OF CONSTITUTIONAL COURT JUDGES

Peter HORVÁTH^{1*}

¹*doc. PhDr. Peter Horvath, PhD., University of Ss. Cyril and Methodius in Trnava, Bučianska 4/A, 917 01 Trnava, Slovakia*

*Corresponding author E-mail address: peter.horvath@ucm.sk

Abstract

The paper addresses the position of the Constitutional Court of the Slovak Republic, especially from the perspective of the election of constitutional judges. In addition to the presidential elections and the European Parliament elections, the year 2019 is characterized by the search for new constitutional judges. In addition to personnel selection, also the election of judges of the Constitutional Court seems to be a big political issue. In the parliament, there are supporters and opponents of the public or secret ballot. Both camps present their arguments, which are fundamentally antagonistic. It turns out that in the conditions of representative democracy, it is very difficult to find a reasonable compromise on the issue of the election itself. So we present the views of both sides. This paper is based on a comparative and analytical approach, using examples from several countries, not only within the European Union. It can be stated that a person of the president of the Slovak Republic plays a fundamental role in the whole process, because his powers are crucial in this - if, after a political struggle, parliament finally submits twice as many candidates as needed for vacancies of the Constitutional Court judges, it will be the head of state who will ultimately decide on a total of thirteen judges who will decide the next twelve years on all processes related to the control of our country's right constitutional direction.

Key words: Constitutional Court, judge of the Constitutional Court, election method, representative democracy

1 Introduction

The year 2019 brought to our Slovak political scene a number of important factors and events that substantially affect the whole system of public policy in Slovakia. No doubt this year is a pre-election year, because whatever is going to happen, all eyes are already focused on the parliamentary elections in March 2020. It is a deadline, because previous elections took place in March 2016 and so the regular mandate of deputies of the National Council of the Slovak Republic and subsequently of the government of the Slovak Republic will end. When we are talking about a deadline, it is because at this point no one can guarantee that the planned parliamentary elections will not take place sooner as a result of intra-party crises, especially in coalition political parties. That is why autumn 2019 is often mentioned as a possible date for the next parliamentary elections.

The year 2019 is characterized by the three most expected events - the elections of the president of the Slovak Republic with a mandate for the five-year period from June 15th, 2019, the elections to the European Parliament in May 2019 also for the five-year term and the election of nine judges of the Constitutional Court who will perform their mandate for the next twelve years. Although the fact that their predecessors' mandate will expire at the beginning of 2019 has been known for a long time, the political elites represented in our parliament did not give enough weight to this event. This selection became even the subject of a political struggle because in the fall of 2018 the government coalition tried to change the way in which the judges of the Constitutional Court used to be selected. Finally, a constitutional majority across the political spectrum could not be found, and the current method of selecting suitable candidates for final assessment by the head of state has been preserved.

2 Description of achieved results

While the general judiciary, as a tool to deal with all sorts of disputes and inadmissible acts, was in principle present already in ancient antiquity, the concept of constitutional judiciary has emerged much later. It can be stated that it is a product of the Enlightenment period. This concept and especially its implementation is connected with the American and French Revolution at the end of the 18th century. Gradually, the Constitutional Court Institute has firmly established itself in our legal and political system[1]. Bodies for the protection of constitutionality are specialized (in principle constitutional courts) or general (for example, the US Supreme Court) judicial bodies. From the point of view of comparative politology, the most important powers of the body for the constitutional protection include:

- interpretation of constitution and constitutional laws
- control of the constitutionality of laws and lower legal standards
- control of the compliance of laws and international treaties with the constitution
- decisions on constitutional complaints
- decisions on conflicts of jurisdiction
- decisions on disputes over the validity of elections and referendums
- decisions on actions against the head of state
- decisions on the activities of political parties [2].

In setting up a body for the protection of constitutionality, its actions can be influenced by political decisions. The most common factors include:

- number of court members
- the way of their nomination, approving and appointing
- the way of appointing the officials
- members' term of office - in particular the possibility of reappointment or a lifetime mandate [2].

Examples of solutions of the term of office of the Constitutional Court judges from other countries:

- a) Judges for an indefinite period of time - which may mean for a lifetime or until the retirement age of a judge - for example, the USA, Austria, Belgium, Finland, Ireland, Sweden, Norway, Malta
- b) Appointment of constitutional judges for a relatively long term of office, without the possibility of re-election - for example, Bulgaria, France, Italy, Portugal, Slovenia (9 years), Germany, Russia (12 years)
- c) Appointment of judges for shorter or longer term of office with the possibility of repeating the mandate - Czech Republic [3].

The number of members alone is not the most important, in Europe it ranges from six in Liechtenstein to nineteen in Russia. The term of office is between two and twelve years, in the case of the US, the mandate is life-long. More important is the way of nomination and appointing for the future activity. The degree of possible political interference depends also on the decisive authority. Basically, these variations are possible:

- parliament
- parliament and the executive power
- parliament, the executive power and the judicial power
- executive power
- judicial power [2].

Questionable is the possibility of re-election, where there are two opposing views. In the positive option there can be a concern about "trying to corrupt" those who decide on such an alternative. However, if a judge would be appointed for one term, he/she could make decisions without a certain amount of responsibility and "threat" that he/she will not be re-elected. When assessing the success, effectiveness and usefulness of any function (political or professional), the moral (and professional) profile of the person and the way of performing the function always decides.

Constitutional Court of the Slovak Republic

By adopting the Constitution of the Slovak Republic in 1992, the most important institution of the judiciary - the Constitutional Court of the Slovak Republic - was also established. It was defined as a judicial body for the protection of constitutionality, which is independent of the other two branches of power in the state (legislative and executive power), general courts and other public authorities [4]. In other words, we can say that the constitutional judiciary is the guardian of constitutionality in society, it should ensure that the constitution is not violated by other state authorities, since the constitution primarily sets limits on the actions of state authorities. As an example, we can mention a strict declaration of the scope of competencies and powers of individual bodies that cannot be crossed. The Constitution limits the exercise of state power to the benefit of the individual (human rights and freedoms), but at the same time standardizes the fundamental values of the whole state and the rule of law (human rights and freedoms, equality, freedom, democracy, etc.). All other legal norms must not be in conflict with it not only formally but also in terms of values [1].

The city of Košice has been the seat of the Constitutional Court of the Slovak Republic since its creation in 1993. It consists of thirteen judges appointed by the president for twelve years. At the head of the Constitutional Court is the president, who is represented by the vice-president, both are appointed by the president from all members. The decision is made either in plenary or in the senates. The plenary is composed of all judges, the senate is a three-member.

The nominations for the election of candidates for constitutional judges can make [5]:

- a) members of the National Council of the Slovak Republic,
- b) government of the Slovak Republic,
- c) president of the Constitutional Court,
- d) president of the Judicial Council of the Slovak Republic,
- e) at least five members of the Judicial Council of the Slovak Republic,
- f) president of the Supreme Court of the Slovak Republic,
- g) general prosecutor of the Slovak Republic,
- h) public defender of rights,
- i) professional lawyers' organizations,
- j) scientific institutions active in the field of law.

A judge of the Constitutional Court may be a citizen of the Slovak Republic, who may be elected to the National Council of the Slovak Republic, has reached the age of 40, has a legal degree in law and has been in the legal profession for at least 15 years. The same person cannot be repeatedly appointed as a judge of the Constitutional Court [6].

The position of the president in the creation of constitutional judges is especially worth mentioning. As we have already mentioned, parliament submits twice as many candidates as needed for the vacancies of constitutional judges to the head of state, and the president selects definitive constitutional judges. Particularly President Andrej Kiska has been involved in a dispute during the appointment process several times, because he doubted the expertise and moral profile of the candidates nominated in parliament. These disputes have been addressed by the Venice Commission several times, and several findings were issued in this matter. The Venice Commission notes that the president is not involved in the selection process of candidates in the National Council and particularly in the candidates' interviews. In order to allow the president to express potential objections to candidates at an early stage, the president or his/her representatives should actively participate in interviews in the National Council and ask candidates questions. Of course, the election would remain within the competence of the National Council, which would continue to elect candidates in a secret ballot. This could remove misunderstandings between the president and the National Council at the beginning. Another problem from a comparative point of view is the majority needed to elect judges. Although in Slovakia and in some other countries judges are elected by a simple majority in parliament, the election of judges of constitutional courts by qualified majority would allow the depoliticization of the whole process of election of judges, because it also gives the opposition a strong position in the selection process. It is true that a qualified majority can lead to a stalemate between the majority and the opposition, but it can be overcome by specific anti-lock mechanisms [7].

Arguments for public or secret ballot

The supporters of the idea of public election of important officials in parliament fundamentally deny the idea of violating free exercise of parliamentary mandate by consciousness and conscience. They even say that this is an element incompatible with the principle of representative democracy. In it, the secret ballot is the privilege and unquestionable right of voters who elect their representatives. However, representatives elected in this way should, in their view, apply the principle of public policy when performing their function. The performing of a function of a member of parliament is public and the MP is responsible for it to his/her voters, who can evaluate it on the basis of a publicly accessible overview of the performance of his/her activities, such as a review of his/her voting for individual laws or voting in election of officials. At the same time, they strictly reject the argument that secret ballot protects members in the performance of their duties. They ask before whom should MPs protect themselves in voting? Before their own voters, who entrusted them with their mandate or before their own political party, for which they stood? They argue that sufficient protection in the exercise of their mandate is their immunity. According to them, if someone argues that the secrecy of voting creates the conditions for the free exercise of a function, he/she has a problem with his/her own integrity and is not qualified to represent citizens. In general, therefore, the factor of secret ballot reduces the level of transparency in parliamentary activities and creates a favorable environment for behind-the-scenes manipulations hidden from the public [8].

The supporters of the idea of secrecy of the election argue that this principle was introduced during the revolutionary changes in 1989. Although until then there was a possibility to vote inside a voting booth, almost everyone was afraid of it and would not use it because he/she was automatically considered an enemy of the state. In pre-November regime, the elections were always public, through acclamation voting, which led to a formal vote on a pre-known outcome. No one had the chance to win the election without the prior approval of the party authorities. This practical experience with the development in the period from 1948 to 1989 led to the introduction of a secret ballot for all staff proposals. Although we no longer have a single party government, the current development has its own negatives - a system of partocratic pluralistic democracy has been created. There is a basic principle - who wants to run for example in parliament, he/she can only get there as a candidate on the candidate list of a political party. So this is not about protecting from their voters, whom it is problematic to

identify, but above all from their own political parties, for which they ran in the elections. Secret elections prevent the party centres from making their MPs into obedient crowd under their permanent control. When they want something from them, they have to win them over, persuade them, not command them. Therefore, secret elections remain a permanent nightmare of party centres, a test of their quality. The secret elections also protect MPs from possible blackmailers, bribes, but also lobby groups. It makes it impossible for them to verify how effective their incentive or coercion was, whether it was worth it. And so the secret elections reasonably protect the MPs even against whom they vote because, for example, not very ideal judge of the Constitutional Court could also misuse his findings from the public election about who voted for him and who against. Conversely, the newly elected Constitutional Judge would also be protected from those who would like to benefit from the fact that they publicly voted for him [9].

3 Conclusion

Looking at the appropriateness of the public or secret election of constitutional judges by the members of parliament is above all a look at the level of democracy and the way of its implementation. I believe that the oath of a member of the National Council of the Slovak Republic at the beginning of his/her term of office, is unambiguous - "I swear on my honour and conscience to be faithful to the Slovak Republic. I will fulfill my duties in the interest of its citizens. I will respect the Constitution and other laws and I will work toward their implementation into life" (Article 75 of the Constitution). The concepts of honor and conscience are part of the intimate sphere of the function of the member of parliament and therefore no one should be able to influence a member in his/her decision. The creation of various public pressures can significantly affect the freedom to exercise the mandate of a member of the legislature. It is therefore no coincidence that the election of parliamentary officials is strictly held by secret ballot. Also in the academic environment all personnel proposals - for example, the election and recall of the rector, vice-rectors, dean or vice-deans are also held by secret ballot. Most important, however, is to successfully complete the process of electing judges of the Constitutional Court of the Slovak Republic as soon as possible, so that the members of parliament can meet their constitutional obligations by electing twice as many candidates as needed and, ultimately, the president by appointing all the missing constitutional judges. As the Constitutional Court has decided several times, it is the duty of all subjects to achieve a state in which all constitutional bodies and institutions would function properly. This will ensure a state in which all political and constitutional processes can proceed properly and we can clearly state that the political and constitutional system of the Slovak Republic operates in accordance with the rules and principles of parliamentary democracy.

Acknowledgements

Author is grateful for the support of experimental works by project KEGA 001UCM-4/2019.

References

- [1] K. Cibulka: Ústavné právo Slovenskej republiky (všeobecná + osobitná časť), Eurokódex, Bratislava, 2013.
- [2] P. Horváth et al.: Úvod do politických vied, Smaragd, Bratislava, 2005.
- [3] A. Bröstl et al.: Teória práva, Aleš Čeněk, Praha, 2013.
- [4] J. Drgonec: Ústava Slovenskej republiky. Veľké komentáre, C.H. Beck, Bratislava, 2015.
- [5] §15 of the Constitutional Court Act.
- [6] § 134 of the Constitution of the Slovak Republic.
- [7] J. Drgonec: Ústavné parvo procesné, C.H. Beck, Bratislava, 2017.
- [8] G. Mesežnikov: Pravidlá hry, tajné hlasovanie a verejná politika. Available at: <<https://komentare.sme.sk/c/5682334/pravidla-hry-tajne-hlasovanie-a-verejna-politika.html#ixzz5hRrKws3f>>.
- [9] M. Kusý: Tajné voľby sú nočnou morou politických strán. Available at: <<https://komentare.sme.sk/c/5687352/tajne-volby-su-nocnou-morou-politicky-stran.html#ixzz5hRrhvf8Z>>.