MISCONCEIVED QUEST FOR THE PERFECT CONSTITUTIONAL COURT

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Abstract

The Slovak Republic has undergone a turbulent development from the establishment of independent statehood to the present time. The independent state was established on January 1st, 1993 following the peaceful dissolution of the Czech and Slovak Federal Republic. We can classify it among the states with a relatively young democracy. In this respect it is similar to several states in the Balkan peninsula.

This article deals with the issue of divison of powers in the Slovak Republic (Slovakia) in the context of actual constitutional development in the area relating to the Constitutional Court. The main focus of the paper is an evaluation of the practical application of the constitutional powers of the president and parliament in Slovakia in relation to Constitutional Court appointments. The authors offer a critical analysis of recent constitutional developments in this area, pointing out specific constitutional issues relating to this topic. The second part article focuses on a critical analysis of the draft of a Constitutional Act directly amending the Constitution of the Slovak Republic, which was introduced and submitted to parliament in 2020, though, at the time of this writing, the fate of this amendment and its final wording is unknown. The aim of the constitutional amendment is to make changes in the judicial system, especially concerning election of judges for the Constitutional Court and criteria for candidates for this court.

Key words: *Division of powers, Constitution, Constitutional Court, Legitimity, Constitutional amendment, Consitutional Judge, Slovak Republic*

1. Introduction: political and legal background of the dispute

Slovakia as an independent unitary state came into existence on January 1, 1993. Its Constitution[1] had been adopted previously in September 1992, during the existence of the Czech and Slovak Federal Republic. The state came into existence through a historical process. " Unity does not rest on some abstract idea; it is the expression in practice of the relative homogeneity of a people. Just as the concept of the state presupposes the concept of the political, so too does the concept of the constitution presuppose the state." (Loughlin, M., 2013, p. 8) Slovakia has a parliamentary form of government and constitutional supremacy. The state powers are divided between the National Council of the Slovak Republic (legislative power), the government, the president (executive power) and the judiciary (judicial power).

Understanding the issue of the selection of constitutional judges in the Slovak Republic requires consideration both of the text of the Constitution and of its background in the light of the recent development of the country's political history. The next sections survey the circumstances that prompted dissatisfaction with the text in the Constitution, examination the distribution of powers among the branches and a review the reasons that led the Constitutional Court to adopt various infamous decisions. The Slovak Constitution provides for a parliamentary form of government. Constitutional theorists have discussed at length whether or not it is currently a more semipresidential system (Kresák, P., 1996; Albert, R., 2010, p. 225). [2]

The National Council, the only constitutional body of the Slovak Republic, is a unicameral legislature composed of 150 Members of Parliament (MPs). It has exclusive competence in the system of constitutional bodies to adopt the Constitution and to pass any amendments to it in the form of constitutional law. The Slovak Constitution (Art 84.4) prescribes that a three-

[1] Constitution of the Slovak Republic published under no. 490/1992 Coll.

[2] Authors note: According to scholar Richard Albert in his paper, "Presidential values in parliamentary democracies", semipresidentialism traces its origin to the Fifth French Republic. the model having sprouted in the Slovak Republic, Poland, Russia, Hungary, and elsewhere since the end of the Cold War.

The authors confirm there are certain characteristics similar to semi presidential system in the Slovak Republic such as the following: 1) citizens elect the president directly, as in presidential systems; (2) the president or the legislature appoints the head of government, usually a prime minister, who must retain the confidence of the Parliament, as in parliamentary systems; (3) the president may trigger elections by dissolving the legislature, but no cooperation by prime minister is needed (4) the president cannot veto legislation but can suggest that the legislature take a second look at legislation; (5) members of cabinet do not sit simultaneously in the legislature.

fifths majority of MPs, a qualified majority of 90 MPs, is needed for adopting or amending the Constitution. The Constitution has already been changed 18 times since its inauguration, with the last direct amendment adopted on March 28, 2019. If the National Council does not act on the constitution, constitutional law or on the amendment of the constitution or on the amendment of the constitutional law, neither the constitution nor its amendments is represented or replaced by any constitutional body, because only the National Council has necessary democratic legitimacy.

President of the Slovak Republic is directly elected by the people (Article 101 par.2), is not accountable to the National Council and has considerable powers (Article 102). Most of his/her powers are exercised individually. Only a few shared powers require the countersignature of the Prime Minister (Article 102 par. 2). He/she is performing his/her office according to his/her conscience and convictions (Article 101.1). When applying his or her powers enumerated in Article 102 par. 1 of the Constitution, the President has to respect and uphold the constitutional standards. The President of the Republic is therefore not merely the symbolic Head of the State but also in the reality has quite strong position in the state. Relationships between the National Council and President, between the directly elected president and government of the time, have proven to be problematic.

The actual constitutional division of power in Slovakia has at least three weak points. The direct election of the president endows the head of the state with extraordinary powers that are not offset by the checks and balances typical of presidential systems. The executive is actually divided. It consists of a president who can claim an electoral mandate from the people of the entire nation and a prime minister who enjoys the support of a majority of the legislature. There is extremely high risk of crisis in problematic issues, especially those which are politically divisive. (Calabresi, S.G. & Larsen, J.L., 1994) The President and the Prime Minister each have an independent constituency to claim legitimacy and legitimate authority to act. A problem may arise when president and prime minister are from opposing political parties.

The Constitutional Court does not mean merely a court acting in constitutional mode by interpreting a constitution or determining a constitutional issue, but a specialist court having only 'constitutional' jurisdiction. The Constitutional Court enjoys the right to carry out an abstract judicial review, that is, they can adjudicate on the constitutionality of a legislative act without a need for a specific case or a controversy to arise. The abstract norm control is a predominant method of exercising constitutional justice. The Court also has the power to exercise a concrete review. (Harding, A., Leyland, P. and Groppi T., 2008, p. 2, p. 219).The Constitutional Court of the Slovak Republic was established as the principal guardian of the Constitution (Art. 124). The Court is separate from the general judiciary and is the ultimate interpreter of the Constitution in interpretive disputes. The Court is composed of thirteen judges appointed for non-renewable twelve-year terms and should serve as the last check in constitutional disputes. Its role is to mediate between the political branches.

Historically, Slovakia could draw on the modest Czechoslovak constitutional traditions when choosing a concept or a model for the selection of judges for the Constitutional Court. There were three different models to consider:

i) *an eclectic model* of the First Republic Constitutional Court of 1920, in which the Constitutional Court consisted of seven members, three of whom were appointed by the President and two of whom were delegated from the ranks of the Supreme Court and the Supreme Administrative Court. (Marečková,M., 2006, p.103) The Constitutional Court was created by bringing together members from different entities and different nomination and appointment mechanisms (Svák, J., Balog, B., 2018, p. 43-51)

ii) *the socialist model* of exclusive parliamentary nomination, in which the Constitutional Court was, according to Art. 94 par. 3 of the Constitutional Act no. 143/1968 Coll. on the Czechoslovak Federation elected by the Federal Assembly of the Czechoslovak Socialist Republic. The President was not involved in the process of appointing judges of the Constitutional Court. Since the Constitutional Court was the exclusive creation of parliament without the need for the involvement of the head of state, it corresponded to a power-political situation in which not even a formal division of power and balancing interests in the creation of a constitutional court was expected, and in principle no activity was expected of this constitutional court,

iii) *so called "Havel model"* from the time of declining federation - Constitution Act no. 91/1991 Coll. on the Constitutional Court of the Czech and Slovak Federal Republic for the first time in Art. 10 par. 2 stated that the appointment of judges of the Constitutional Court be made by the President on the proposal of both federal and national parliaments.

In 1992, the legislature did not embark on the path of creating new or original model of the constitutional judiciary, but chose a structure that has remained same since then. In Art. 134 par. 2 of the Constitution states "*The President of the Slovak Republic shall, on the nomination of the National Council of the Slovak Republic, appoint the judges of the Constitutional Court for a period of twelve years. The National Council of the Slovak Republic shall propose a double number of candidates who are to be appointed by the President of the Slovak Republic*".[3] From 2001 the Constitutional Court consists of thirteen judges. The Court was originally established in 1993 with ten judges. Before adoption of the change by Constitutional Act No. 90/2001 Coll. it was originally stipulated in Art. 134 (1) *The Constitutional Court shall consist of*

[3] All of the quotations in the text are translated into the English by the authors of this Article.

ten judges. (2) Judges of the Constitutional Court are appointed for seven years by the President of the Republic out of twenty persons nominated by the Parliament. As part of the proceedings in the parliament, a change was added that the Constitutional Court of the Slovak Republic will deal with constitutional complaints of natural and legal persons in senates with three members. The Senate shall act by a simple majority of its members. For this reason, the total number of judges of the Constitutional Court of the Slovak Republic was subsequently adjusted from ten members to thirteen judges. The aim was to create four senates with three Member to decide. There should be appointed thirteen judges on the Court at all times to prevent it from working incapacity and disabling it from functioning. The Constitution stipulates in Article 131 (1) "*The plenary meeting of the Constitutional Court decides by more than one-half of all judges. If such a majority is not reached, the motion is rejected.*" It is necessary to hold the plenary session in case of a constitutional interpretation or judicial review of legislation. In other issues, such as deciding on the remaining matters, court operates in panels of three judges is sufficient. Decisions of the panel are made by a majority of the three members.

The appointment or non-appointment of judges of the Constitutional Court resulted in an aim to change the constitution, first, without success, in 2018 and second in 2020, the success of which is yet to be determined. The regulation individual components of the appointment process should be a significant part of the proposed changes. The main ambition of this change was originally the improvement of the quality of candidates, the transparent selection process, the elimination of the influence of the current government majority and the increasec of the legitimacy and credibility of the constitutional court as such.

2. Selection and appointment procedures of Constitutional Judges in the light of political games

The question of the quality of judicial candidates of the Slovak Constitutional Court and the criteria they have to fulfill has been discussed in depth in Slovakia for several years. As a starting point for this discussion, one may regard the rejection of five of the proposed six candidates for the three vacant positions of constitutional judge by the President in July 2014. More than three years later there were two judge positions in the Constitutional Court. The whole process finished up before the Constitutional Court, which adopted three decisions concerning the appointment of constitutional judges. (Decision of Constitutional Court of the SR file no. III. ÚS 571/2014; PL. ÚS 45/2015; I. ÚS 575/2016) These decisons of the Constitutional Court were controversial. These decisions were attached by strongly differing opinions of the overrideded judges and subject to professional and public criticism. In addition, one proceeding before the Constitutional Court was rejected before issueing another decision on the merits (Giba, M., Baraník, K., 2018).

Two constitutional bodies participate in filling empty seats of the Constitutional Court. The National Council has the power to select and propose candidates for the positions. The President is the only constitutional body empowered to appoint the candidate to be the judge. The National Council

proposes a list of candidates consisting of twice the required number of judges. According to the dictate of the constitution, the president is bound by this proposed list and has a free hand only in the selection within the proposed group of candidates. (Drgonec, J., 2019, p. 1620) At the same time, the President can cooperate with the National Council and thus influence the selection of those candidates who are given to him for the selection. He can do so in an official or unofficial way. However, if the National Council has already made its selection and submitted twice the number of candidates to the President, the President is obliged to select from among these candidates.

The appointment of Constitutional judges is not the only personal power of the respected constitutional authority the exercise of which requires the interaction of the the National Council and the President. This allows for an opportunity for controversy or a direct dispute over the exercise of their mutual creative power. (Balog, B., Trellová, L., 2010) The text of the Constitutional (Art. 102 par. 1 a) with Art. 134 par. 2) does not offer any extending of presidential discretion, or limits.

As has already been mentioned, a constitutional drama started in 2014. Before 2014 presidents always appointed half of the number of candidates elected by the National Council. National Council in its session from 3 April 2014 to 15 May 2014 adopted a resolution in which it proposed six candidates for the three positions of available for Constitutional Court judges and resented this list to the President of the Slovak Republic. Andrej Kiska as a newly elected Slovak President refused to appoint candidates nominated by the parliament elected prior to his election and required the National Council to submit a new list. The composition of the Constitutional Court became the subject of a political struggle between the President and the Prime Minister as a leaders of two respective political parties.

A similar situation occurred in 2016, when the President did not appoint any of the five candidates proposed by the National Council for three vacant seats to the Constitutional Court. The rejected candidates turned to the Constitutional Court with constitutional complaint concerning breach of the fundamental constitutional laws by the negative act of the Head of the State. The Constitutional Court adopted decision III ÚS 571/2014 on March 17, 2015 in which it confirmed that President Kiska had violated the rights of the three nominees by denying them access to elected and other public offices. The judgement was followed by another decision of the Constitutional Court confirming infringement of the fundamental rights of other candidates in 2017. Followingly this, the President appointed judges to all remaining positions of judges of the Constitutional Court.

Not only did the President's decisions after July 2016 breach the Constitution and weaken the institutional authority of the Constitutional Court, but these actions ultimately prolonged the Constitutional Court's paralysis, with one entire Court session being inoperable. Such a situation has serious consequences for the functionality of the Court. The increasing workload of the Court was distributed among fewer judges, which caused lengthier

proceedings, and an increased chance that decisions on merits could not be reached, as the Constitution requires the consent of a minimum of seven judges. This means, on the one hand, greater prospects for the parliamentary majority winning a case before the Constitutional Court, and, on the other hand, less scrutiny and limited effectiveness of judicial review for anyone else. (Ľalík, T., 2016)[4]

The non-appointment of judges of the Constitutional Court by the President from among the candidates proposed by the National Council pointed to tensions between the head of state and parliament. The existence of tensions and different types of disputes between several branches of state power are natural and stem from the different roles and powers of these branches in the constitutional system. In a constructive way, they contribute to keeping the constitutional system in balance. However, when one constitutional body exercises or does not exercise its powers in such a way as to interfere with the essence of the existence and activities of another constitutional body, the existence of tension is destructive to the constitutional system, its functioning and stability.

The non-appointment of the Constitutional Court is reflected in the reduced performance of the Constitutional Court, as well as the real limitation of the exercise of its powers and reduction in the level of protection of constitutionality. The position of the Constitutional Court as an independent judicial body for the protection of constitutionality is specific, as it is the only constitutional body with an explicitly granted power to protect constitutionality, making its position specific. It has a unique and ultimate responsibility to protect Constitution in the Slovak Republic.

The role of the Constitutional Court is to assess the exercise of the President's powers impartially, independently and objectively within the protection of constitutionality, respecting the constitutional status of the Constitutional Court as the guardian of constitutionality, which includes the

[4] Authors‘ note: Discussion concerning certain part of the so called Constitutional drama took place also at I-CONnect Symposium: The Slovak Constitutional Court Appointments Case, For details see: Drugda, Š.: Introduction (available online: http://www.iconnectblog.com/2018/01/symposium-slovak-appointments-case-introduction/); Drugda, Š.: Intermezzo to the Constitutional Conflict in Slovakia: A Case Critique (available online: http://www.iconnectblog.com/2018/01/symposium-slovak-appointments-case-drugda/); Domin, M.: The President’s Appointments (available online: http://www.iconnectblog.com/2018/01/symposium-slovak-appointments-case-domin/); Baraník, K.: Perplexities of the Appointment Process Resolved by Means of “Fire and Fury” (available online: http://www.iconnectblog.com/2018/01/symposium-slovak-appointments-case-baranik/); Ľalík, T.: Born is the King: The Day When Effective Judicial Review Arrived (available online:: http://www.iconnectblog.com/2018/01/symposium-slovak-appointments-case-lalik/).

protection of constitutional values. The President with a constitutional obligation within his decision making to ensure the proper functioning of constitutional bodies (Article 101 para. 1 of the Constitution), is limited by the constitutional imperative expressed in Art. 2 par. 2 of the Constitution, i.e. to act only on the basis of the Constitution, within its limits and scope and in the manner provided by law. The exercise of all powers, including appointments, exercised by the President must be in accordance with those constitutional norms which are decisive for their exercise.

3. Constitutional Amendment draft 2020

There have been contentious political battles over the Constitutional Court vacancies before and text of the Constitution provides much less guidance than might be expected. Since the Constitution of the Slovak Republic was not amended in 2018 to address this issue and since there have been calls for such constitutional changes from the people, the National Council, elected in February 2020 and equipped with a constitutional majority, introduced a new draft amendment to the Constitution of the Slovak Republic. Amendment proposal related to the most important constitutional provisions, including ultimate guardian of the Constitution, the Constitutional Court, and appointment of its judges. Proposals for constitutional amendment arose as a popular demand elaborated by the government as a political project. In 2019, for the first time took place so-called public hearing of candidates for judge of the Constitutional Court. It was organised under the supervision of the Constitutional Law Committee of the National Council of the Slovak Republic. The public hearing has also found its place in the forthcoming amendment to the Constitution, which stipulates that should be already an obligatory part of the process of selecting candidates for judges of the Constitutional Court. During the hearing, candidates are subjected to a number of questions concerning their professional life, professional knowledge and opinions, political past or other.

When it comes to selection and appointment of constitutional judges, three different models can be distinguished. (Harding, A., Leyland, P. and Groppi T., 2008, p. 12-14) First model places the decision on appointment entirely in the hands of the legislature, in many cases involving special parliamentary election committee. Under the second model, selection and appointment are joint prerogative of the legislature and the (head of the) executive. Different countries have developed different ways in which cooperation between the political institutions is organised. Under the third model, the power to select constitutional justices is distributed among several public institutions, which, independent of each other, appoint a portion of the constitutional bench. (De Visser, M., 2015, p. 206-209)

There is a steady decline in the public trust in the judiciary in European countries, so it important to improve the Constitutional framework as much as is possible in reaction to former political struggle. The Slovak government recently presented a draft amendment to the Constitution of the Slovak Republic. Newly drafted Art. 134 par. 2 of the Constitution of the Slovak

Republic only slightly changes the former model of selection and appointment of constitutional judges, using the second model whereby selection and appointment are joint prerogative of the legislature and the Head of the State. According to the proposed amendment to the Constitution of the Slovak Republic from 2020, the amended Art. 134, paragraph 2 shall be as follows: *"(2) Judges of the Constitutional Court shall be appointed by the President of the Slovak Republic on the proposal of the National Council of the Slovak Republic. The National Council of the Slovak Republic shall propose a double number of candidates who are to be appointed by the President of the Slovak Republic.; The proposals shall be voted on by the National Council of the Slovak Republic in public, after hearing the persons proposed by the National Council of the Slovak Republic. If the National Council of the Slovak Republic does not select the required number of candidates for judges of the Constitutional Court within two months from the expiry of the term of office of a judge of the Constitutional Court or within six months from the termination of the position of a judge of the Constitutional Court for other reasons, the President of the Slovak Republic may appoint judges of the Constitutional Court from proposed candidates. "*

The amendment to the Constitution introduces an old-new model of the method of selecting judges of the Constitutional Court. However, it contains minor changes that may cause some variations in the strength of the legal status of the highest constitutional bodies. Once again, the election of judges of the Constitutional Court comes into consideration as a result of cooperation between the National Council and the President of the Slovak Republic. In this respect, the legislature seems to consider the existing method of selecting judges of the Constitutional Court to be sufficiently appropriate in terms of the legitimacy of power. It has the nature of the fundamental dilemma related to the Court being the "guardian of the Constitution", especially as this court exercises the power to invalidate democratically enacted laws on the basis of their own understanding of constitutional rights. The normative concept of political legitimacy refers to some benchmark of acceptability or justification of political power or authority and possibly obligation. According to scholars (Rawls, J., 1993, Ripstein, A., 2004) legitimacy refers, in the first instance, to the justification of coercive political power. Whether a political body such as a state is legitimate and whether citizens have political obligations towards it depends, in this view, on whether the coercive political power that the state exercises is justified. In a widely held alternative view, legitimacy is linked to the justification of political authority. (Peter, F., 2017) Ripstein has argued that much of the contemporary literature on political legitimacy has been dominated by a focus on the justification of authority, rather than coercive political power (Ripstein, A., 2004). But as the "dynastic" source of legitimacy is replaced with "democratic legitimacy," the judiciary is faced with a new reality that the Constitutional Court must be able to stand up to an interpretive-political dispute with parliament (Schmitt, C., 1926, p.31).

From what sources do the judges draw their legitimacy? The Constitutional Court and its judges draw mainly from institutional sources to generate judicial legitimacy. The democratic state is based on the idea of representative democracy, with elections being the source of legitimacy for state power. But not all public authorities are directly legitimized by elections. We can therefore also speak of indirect legitimacy, where non-elected public authorities draw their legitimacy from a directly elected body. This is so-called "chain of legitimacy " through which non-elected bodies derive their legitimacy from an elected body, or from another non-elected body, which derives its position from a directly elected body. This applies to judges of the Constitutional Court of the Slovak Republic. (Domin, M., Trellová, L., 2019, p. 37) The idea of a 'chain of legitimation' can be characterized as a "core concept of German constitutional law" (Bogdandy, A., 2004, p. 902). The idea, expressed by the metaphor, of an uninterrupted 'chain of legitimacy' or a 'democratic chain of legitimation', rests on the assumption that public decisions derive their legitimacy from democratically elected representatives of the people. All governmental bodies acting with official authority have to be appointed directly or indirectly by the people and, at least in principle, it must be possible to dismiss the appointed representative. One particularly important feature of this metaphor is the postulate that the chain is complete. In order to secure the legitimacy of public authority, the chain has to be uninterrupted. Each individual government official must be connected according to the order of the chain. From each individually appointed government official, a chain of individual acts of appointment has to lead back to the people as the bearer of sovereignty. Only an uninterrupted chain guarantees the legitimacy of the institutional system (Nullmeier, F., Pritzlaff, T., 2010, p. 2; Böckenförde, 1991, p. 302).

The legitimacy of the Constitutional Court is derivative; the constitutional court judges are appointed by a directly elected President upon the proposal of candidates made selected by the directly elected National Council. However, accountability is less pronounced. If one looks at terms of office, constitutional judges serve 12 years, much longer than the members of parliament who serve four years or the president who serves five years. Further, the visibility of individual judges' actions to the general public is much lower. Consequently, constitutional courts' authority to have a final say over the legislative choices of parliamentary majorities might cast some doubts about the very concept of constitutional review. (Harding, A., Leyland, P. and Groppi T., 2008, p. 219-220)

There is no doubt that the model of selection based on the idea of joint prerogatives of the National Council and the President is, from a legitimacy point of view, an appropriate solution. When perceiving this question from the point of view of the chain of legitimacy, where the concept of legitimacy is based on the idea that "all public acts ought to be retraceable to the democratic will of the people" (Keller, H., 2008, p. 257), this model is definitely adequate. Both constitutional institutions, the National Council and the president are directly elected by the people. However, we believe that the closer a public

authority in an imaginary 'chain of legitimacy' to the people themselves as a source of power, the higher is its legitimacy. The Constitutional Court has to be effective in the interventions in the choices and actions of political branches of government, in particular, the National Council and the Government or the President. Deciding upon the issues concerning the existence of political parties or adjudicating conflicts between state institutions have been important aspects of the courts' activity. Another issue can come into question: Although the deputies of the National Council of the Slovak Republic are considered to be representatives of all the Slovak citizens and their actions are attributable to the citizens as their own, in terms of the theory of representation (Kysela, J., 2014, p.105), at least, doubts can be expressed as to whether selected candidates for constitutional judges actually correspond to the will and ideas of the citizens. In our opinion, the existing model for the selection of the constitutional judges, probably most optimally fills the set of requirements from the point of view of legitimacy. The other two models lack a constitutional tradition or the courage of the legislature to enforce them.

Draft amendment to the Constitution specifies in Art. 134, par. 2 that the National Council of the Slovak Republic propose double the number of candidates for judges to be appointed by the President (in the text also known as a "double number rule"). The government's draft amendment to the Constitution of the Slovak Republic provides the President with the opportunity to appoint judges of the Constitutional Court from a selected list of candidates, even if the requirement of double number of candidates is not met. The proposed amendment provides for a solution in case the parliament does not select a sufficient number of candidates for judges of the Constitutional Court

In the following section, we will analyze two possible scenarios - how the situation could develop with an insufficient number of candidates proposed by the parliament and how it would affect the position of individual constitutional bodies participating in this process of personal creation of the Constitutional Court.

First, the President shall be given the opportunity, but not the obligation, to appoint judges of the Constitutional Court of the Slovak Republic in case The National Council proposes less than twice the number of candidates. It can be regarded as an exclusive decision of the President whether to appoint judges of the Constitutional Court from an incomplete list of candidates, or to wait until the National Council provides for all or at least a higher number of candidates. In case of a proposed incomplete list of candidates there exist the possibility for the President to appoint these judges, but there is no obligation. It does not necessarily lead to an interference in the mutual relations between the National Council and the President, nor does their relationship change significantly in terms of power, in favour of one or the other. The *president* seems to enjoy considerable *discretion* in case the National Council does not fully exercise and fulfill its authority. Susequently the President has no obligation to *exercise his discretionary* power in appointing the judges. The scope of action for the President is slightly wider but it does not represent a significant strengthening of his power. *President* is entitled

to *exercise his own* evaluation of the situation and decide not to appoint the judge from incomplete list of candidates, which can also be helpful and result in a list with *more* high-*quality candidates to be delivered. This case tips the scales* in favour of the National Council of the Slovak Republic, which, in order to enforce its candidates, would deliberately select an incomplete number of candidates for the seats in the Constitutional Court. Using such an approach towards the selection can be a method for the National Council to make the President accept candidates and appoint them. Because even if the president has the choice of whether or not to appoint, in the situation of an incomplete number of candidates, he/she still has to comply with the constitutional requirement expressed in his/her constitutional obligation by his/her decision-making to ensure the proper functioning of constitutional bodies.

The *fear*-inducing *situation of a lack of the constitutional judges, when there is not* sufficient number of judges appointed, thus endagering the functioning of the Constitutional Court, can theoretically happen again. The question necessarily appears in this situation when the National Council would select as many candidates as there are vacancies at constitutional bench in order to allow the creation of the plenary quorum of the Constitutional Court, which would allow the normal functioning of the Constitutional Court and the possibility to decide in plenary as envisaged by the Constitution. We assume that in this case, the president has no choice. The President would hardly justify the non-appointment of candidates proposed by Parliament. This also applies to cases where the President has doubts about the qualities of the candidates offered and would normally reject them.

We can ask another question: Is "the rule of selecting half " applicable when an incomplete number of candidates is offered or is there any other numerical rule governing *presidential possibility to appoint* judges of the Constitutional Court from the incomplete list? When thinking about possibilities, the number of candidates elected by the National Council of the Slovak Republic may be completely different from the number of vacancies at the Court, limited only to maximum double of vacant seats. There are three ways to deal with the President's decision to appoint a judge from an incomplete number of candidates. The President may appoint as many judges as he is personally convinced of their qualities, up to a maximum of vacant seats,without being limitated by "the rule of selecting half". On the contrary, he/she is obliged to appoint as many judges as to occupy vacancies to the extent permitted by the number of proposed candidates. Or he/she is obliged to appoint as many judges as to occupy vacancies respecting "the rule of selecting half".

When the President uses his authority to appoint judges of the Constitutional Court from an incomplete list, he/she again has the opportunity to freely decide on the scope of appointment, i.e. how many judges to be appointed. The President can exercise his/her authority and nominate as many candidates as he is convinced are suitable for the position of judge.This may be due to the fact that the president does not respect double number rule. In such a case, we can theoretically assume that it would strengthen his/her position in

the scope of free discretion in the creation of the Constitutional Court of the Slovak Republic.

The analyzed possibilities of the use of power by the National Council and the President may result in different constitutional consequences, where a partial strengthening of the position of one of them occurs. These are two almost opposite partial constitutional situations of the position of the highest constitutional bodies. Under the influence of first situation the primary possibility of the president turns into his/her subsequent obligation to appoint judges of the Constitutional Court of the Slovak Republic in the maximum possible extent, and position of the National Council of the Slovak Republic would be strengthened. The second situation is based on the fact that the parliament does not supply the president with the complete number of candidates. The reasons for such a procedure can be various: from political disagreements to a lack of candidates. If the president receives an incomplete number of candidates elected and offered from parliament, the question arises as to whether the president is required to nominate half of the candidates, or whether the president can act with the discretion and judgment with regards to the candidates, which may result in the appointment of a number of judges who meet the president's preferences.

In such a case, the position of the head of state is slightly strengthened at the expense of the parliament, which is necessarily expected to allow other candidates for judges of the Constitutional Court of the Slovak Republic.

These model situations, which may occur on the basis of the draft of constitutional amendmend, create a slight strengthening of the position, sometimes for parliament and another time for the president. Analysed situations of strengthening of the position of one of the two participating constitutional bodies do not represent a significant intervention in the constitutional system for either of them.

It can be stated that the amendment to the Constitution is in this respect non-invasive in terms of the content of the constitutional law. It is only a small inovation to the constitutional mechanism for the election of judges of the Constitutional Court, when the parliament does not elect a sufficient number of necessary candidates. As can be seen from the analysis, the legislature cannot completely rule out that the situation similar the past will be repeated. In each variant of the system, current and revised, for occupying the position of judge of the Constitutional Court, it is possible not to appoint as many judges as is necessary. The legislature rejected another model of the manner of occupying the Constitutional Court of the Slovak Republic. On the other hand, in addition to the advantage of a high degree of legitimacy for judges of the Constitutional Court, this system has the disadvantage as possible political rivalry between National Council and the President, which may also reflect the real preferences of the voter citizens.

4. Conclusion

The establishment of the Constitutional Court in Slovakia was closely connected to a regime change in the early 1990s and to transformation of the form of statehood. This constitutional institution should be established and occupied with respect to its guardian role and reflecting upon its continued relevance.

The above mentioned considerations on the appointment of judges of the Constitutional Court and perhaps a suitable model for their appointment, political disputes connected with this Court, and the search for a solution point out how fragile the constitutional system is. No provision of the Constitution is isolated and any change is reflected in the entire constitutional system. Different ways of appointing judges to the Constitutional Court affect the position and strength of the Constitutional Court.

The Constitutional Court was established as a judicial body with the competence to protect constitutionality. The Constitutional Court is independent of the legislature and the executive, the general courts and all other public authorities. It has a legal duty to ensure that the Constitution is respected in all circumstances, even if the infringment is made by a public authority, including the Parliament or the President. The search for a suitable way of appointing judges of the Constitutional Court must therefore respect the requirement of protection of constitutionality. The aim is not to strengthen the power of the President in the constitutional system, the Parliament or their mutual relationship.

Another important issue to deal with for the constituion-maker is to guarantee sufficient level of democratic legitimacy for the guardian of the Constituion. This question gained importance in light of the constitutional drama from 2014-2017. At that time, citizens took the position of hostages to the political struggle for creation of the Constitutional Court. After the change in the distribution of political forces in the National Council and the change in the position of Head of State, the legislature brought a long-awaited new ideas to change the way constitutional judges are appointed. However, no model other than the established model of the creation of the Constitutional Court was introduced, so the system is still a joint process of cooperation between Parliament and the President. It can be beneficial (if the parliament approves the amendment to the Constitution from 2020) to fine-tune small areas that have not yet been constitutionally regulated in this process, such as the procedure in the case of an incomplete list of candidates.

Another minor positive improvement might be the mandatory public hearing of candidates for judges. This legislative change has a short history. Legislative reforms introduced in the year 2018 were primarily meant to improve the legitimacy of the selection process. The method that the Slovak Ministry of Justice chose to achieve this goal was to increase, in various ways, the sum of public information available about Constitutional Court candidates. The introduction of selection hearings was one element of the reform that contributed to the publicity of the upcoming appointment. Selection hearings allow new information about the life, quality, ideology, and merit of candidates

to be acquired through questioning. However, other partial improvements contributed to achieving this goal and helped set the stage for the selection hearings. (Drugda, Š., 2019, p. 29-30). At the same time, however, we are not convinced that it is necessary to introduce this at the constitutional level. However, we do appreciate this as an element that should contribute to transparency and increase the quality of the selection of judges of the Constitutional Court.

In this paper, we did not deal comprehensively with the proposed amendment to the Constitution from 2020 and the process of creation of the Constitutional Court, in the sense that we did not pay attention to adjusting the criteria for the post of constitutional judge and other details. In the offered analysis of the model of selection of judges of the Constitutional Court, we came to the conclusion that the draft amendment to the Constitution would not significantly affect the scope of the legal status of the most important constitutional bodies such as the President and Parliament. On the other hand, the "cosmetic adjustments" in the constitution can help to increase the efficiency of the selection process and its controllability by the public. However, the legislature has not developed a wider public and professional debate on possible ways of changing the model of appointing judges of the Constitutional Court and it could be of great help.

References

Albert, Richard (2010) Presidential values in parliamentary democracies. I•CON, Vol. 8 No. 2, 207–236. doi: 10.1093/icon/moq008. Retrieved from https://oxcon.ouplaw.com/view/10.1093/law-mpeccol/lawmpeccol-e803. Accessed on 30.10.2020.

Balog, B., Trellová, L. (2010) Kreačná právomoc prezidenta Slovenskej republik právo alebo povinnosť? (interpretačné a aplikačné problémy ústavného vyjadrenia). In Právník. Roč. 149, č. 8, 796-821.

Baraník, K. (2018) Perplexities of the Appointment Process Resolved by Means of "Fire and Fury" Retrieved from http://www.iconnectblog.com/2018/01/symposium-slovak-appointments-case-baranik/). Accessed on 30.10.2020.

Böckenförde, Ernst-Wolfgang (1991) Staat, Verfassung, Demokratie. Studien zur Verfassungstheorie und zum Verfassungsrecht. Frankfurt am Main: Suhrkamp.

Bogdandy, Armin von (2004) "Globalization and Europe: How to Square Democracy, Globalization, and International Law." The European Journal of International Law 15.5, 885-906.

Calabresi, S.G. & Larsen, J.L. (1994) One Person One Office: Separation of Powers or Separation of Personnel?. 79 Cornell L. Rev. 1045, 1091.

CDL-AD(2014)015-e Opinion on the procedure for appointing judges to the Constitutional Court in times of the Presidential transition in the Slovak Republic, adopted by the Venice Commission at its 99th Plenary Session (Venice, 13-14 June 2014) Retrieved from https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2014)015-e. Accessed on 30.10.2020.

CDL-AD(2017)001-e Slovak Republic - Opinion on questions relating to the appointment of Judges of the Constitutional Court, adopted by the Venice Commission at its 110th Plenary Session (Venice, 10-11 March 2017). Retrieved from https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2017)001-e#. Accessed on 30.10.2020.

De Visser, M. (2015) Constitutional Review in Europe. A Comparative Analysis. Oxford a Portland, Oregon: Hart Publishing.

Domin, M. (2018) The President's Appointments. Retrieved from http://www.iconnectblog.com/2018/01/symposium-slovak-appointments-case-domin/). Accessed on 30.10.2020

Domin, M., Trellová, L. (2019) Volebná súťaž len pre "veľké" politické strany? [online] In Dny práva 2018 : Návrat k nedemokratickým režimům ve střední Evropě?. Brno: Masarykova univerzita, 88-106. Retreived from http://www.dnyprava.cz/dokumenty/51581

Drgonec, J. (2016) Odkedy dokedy existuje status kandidáta na sudcu Ústavného súdu SR. Zo súdnej praxe, no. 2/2016, 50-55.

Drgonec, Ján (2019) Ústava Slovenskej republiky. Teória a prax. 2. prepracované a doplnené vydanie. Bratislava: C.H. Beck.

Drugda, Š. (2019) Changes to Selection and Appointment of Constitutional Court Judges in Slovakia. Právny obzor, 102, 2019, special issue, 14-33.

Drugda, Š. (2018) Intermezzo to the Constitutional Conflict in Slovakia: A Case Critique. Retrieved from http://www.iconnectblog.com/2018/01/symposium-slovak-appointments-case-drugda/). Accessed on 30.10.2020.

Drugda, Š. (2018) Introduction Retrieved from http://www.iconnectblog.com/2018/01/symposium-slovak-appointments-case-introduction/ Accessed on 30.10.2020.

Giba, Marián, Baraník, Kamil (2018) Nad vládnym návrhom legislatívnych zmien v oblasti kreácie ústavných. Acta Facultatis Iuridicae Universitatis Comenianae. roč. 37, č. 2, 76-90.

Harding, A., Leyland, P. and Groppi T. (2008) Constitutional Courts: Forms, Functions and Practise in Comparative prospective Volume 3, Journal of Comparative Law, Issue 2.

Huscroft, G., Miller, B.W. (2011) The Challenge of Originalism. Theories of Constitutional Interpretation. Cambridge University Press, New York.

Keller, Helen (2008) "Codes of Conduct and their Implementation: the Question of Legitimacy." Legitimacy in International Law. (R. Wolfrum and V. Röben Eds.). Berlin: Springer, 219-298.

Kresák, Peter (1996) Government Structure in the New Slovak Republic. Tulsa Journal of Comparative and International Law. [online]. Retrieved from https://digitalcommons.law.utulsa.edu/tjcil/vol4/iss1/2/

Kysela, J. (2014) Ústava mezi právem a politikou. Úvod do ústavní teorie. Praha: Leges

Ľalík, T. (2018) Born is the King: The Day When Effective Judicial Review Arrived. Retrieved from http://www.iconnectblog.com/2018/01/symposium-slovak-appointments-case-lalik/). Accessed on 30.10.2020.

Ľalík, T., Baraník, K., Drudga, Š. (2017) Slovakia: Developments in Slovak Constitutional Law. In ALBERT, R. et al.: The I·CONnect-Clough Center 2016 Global Review of Constitutional Law. Boston: I•CONnect and the Clough Center, 181–185.

Ľalík, T. (2016, Aug 5) *Constitutional Court Crisis in Slovakia: Still Far Away from Resolution*, Int'l J. Const. L. Blog. Retrieved from http://www.iconnectblog.com/2016/08/constitutional-court-crisis-in-slovakia-still-far-away-from-resolution. Accessed on 30.10.2020.

Loughlin, M. (2013, January 15) The Concept of Constituent Power. Critical Analysis of Law Workshop, University of Toronto. Retrieved from https://www.law.utoronto.ca/utfl_file/count/users/mdubber/CAL/12-13/Loughlin-Paper-Constituent%20Power.pdf

Marečková, M. (2006) Czech Legal & Constitutional History. Brief Summary. Praha: Linde Praha, a.s.

Nullmeier, Frank & Pritzlaff, Tanja (2010) "The great chain of legitimacy: Justifying transnational democracy," TranState Working Papers 123, University of Bremen, Collaborative Research Center 597: Transformations of the State.

Peter, Fabienne (2017) "Political Legitimacy". In Zalta, Edward N. (Ed.). The Stanford Encyclopedia of Philosophy (Retrieved from https://plato.stanford.edu/archives/sum2017/entries/legitimacy/

Rawls, John (1993) *Political Liberalism*. New York: Columbia University Press.

Ripstein, Arthur (2004) "Authority and Coercion," *Philosophy and Public Affairs*, 32(1), 2–35.

Schmitt, C. (1988) The Crisis of Parliamentary Democracy. (Ellen Kennedy trans.,) Cambridge. MIT Press. Original publication: 1923, 2nd edn. 1926.

Steuer, M. (2019) Constitutional Court of the Slovak Republic (Ústavný súd Slovenskej republiky). In Grote, R., Lachenmann, F., Wolfrum, R. Max Planck Encyclopedia of Comparative Constitutional Law. Oxford: OUP.

Steuer, M. (2019) The Guardians and the Watchdogs: The framing of politics, partisanship and qualification by selected newspapers during the 2018–2019 Slovak Constitutional Court appointment process. Právny obzor, 102, 2019, Special Issue, 34-54.

Svák, J., Balog, B. (2018) Sudcovia Ústavného súdu Československej republiky ako (ne)inšpirácia pre súčasnosť. 100 rokov od vzniku ČSR. Univerzita Mateja Bela v Banskej Bystrici, Banská Bystrica.

List of court decisions

Decisions of Constitutional Court of the Slovak Republic file no. III. ÚS 571/2014; PL. ÚS 45/2015; I. ÚS 575/2016