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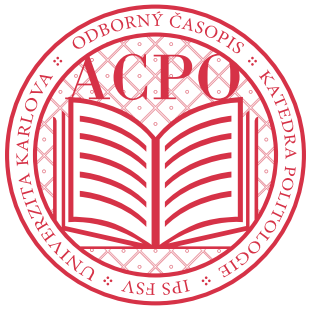

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Shaping the appointment powers of the Slovak president under constitutional conventions[1]

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Abstract:

In this paper, I will argue that the Slovak constitutional system consists not only of the written sources of law but also of constitutional conventions understood as a specific legal custom. Most Slovak constitutional lawyers believe that this kind of unwritten legal rule regulates the process of forming a new government after the announcement of the parliamentary election results. Namely, according to the generally shared constitutional convention, the President is obliged to entrust the assignment to form a new government to the representative of a political party with the highest number of votes obtained. I subsequently explore whether it is tenable given the conditions of the Slovak Republic to enforce such conventions by the judiciary. The analysis of the relevant case-law shows that the Slovak Constitutional Court refers to constitutional conventions in its legal argumentation only rarely. And even when it does, usually it is not particularly convincing. Especially, the Court's reasoning by constitutional conventions related to the President's appointing powers is loaded with misconceptions and contradictions, so one could wonder whether constitutional conventions serve only as a façade for the Court's arbitrariness. Despite this harsh assessment, I conclude that there are good institutional reasons for entrusting the Constitutional Court with enforcing constitutional conventions, including particularly the one regulating the assignment to form a new government.

Key words: *appointment powers; constitutional conventions; constitutional court; parliamentarism, presidential powers, Slovak Republic*

Assignment to form a government

Slovakia is a parliamentary republic with a proportional electoral system. Consequently, the government can exercise its mandate to the full extent only if it enjoys the confidence of the majority of parliament, which usually consists of several political parties cooperating according to a coalition agreement. The logic of such power relations dictates that the leader of the strongest political party, i.e., the party with the largest representation in parliament, or a person nominated by this leader, becomes the head of the cabinet. This logic is so obvious that no one has ever questioned it during the almost 30 years of the state's existence. In addition, it is also indispensable because it fills the gap framed by the official

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written rules, which are extremely brief when it comes to the personal creation of the head of the cabinet – the most powerful office in the Slovak state. The text of the Constitution says only that "*the Prime Minister is appointed and removed by the President of the Slovak Republic*", while the Prime Minister can be only a citizen of the Slovak Republic with the right to vote, at least 21 years of age, and with a permanent residence in the country.[3] Such a constellation of legal and factual conditions is ideal for the emergence of unwritten rules, and in almost three decades they have formed, indeed.

From the establishment of the Slovak Republic in 1993 to the present, eight parliamentary elections have taken place resulting in the formation of a new government. In each case, after the announcement of the election results and before the official appointment of the new Prime Minister, the President assigned a representative of a parliamentary party to compose a cabinet with the best prospect of winning a vote of confidence in parliament. This assignment is a mandate to start coalition negotiations leading to the official appointment of the new government. Slovak expert on constitutional law Marián Giba (2020) links this practice to the fact that after the parliamentary election in Slovakia a new cabinet is being formed as a whole – the Prime Minister is appointed, along with other members of the government, virtually in one moment. Although the mandate to form a government is not explicitly mentioned in the Constitution, it is nevertheless justified. When the President confers the mandate to form a government before the appointment of the Prime Minister, he or she prevents a situation in which the newly appointed Prime Minister would not be able to compose his or her cabinet or to win a confidence vote. In this way, political pragmatics supplemented the constitutional architecture of the state to make the transfer of the executive power more smoothly. But how is this political practice understood by Slovak constitutional lawyers? Is it a factual regularity or rather a normative rule? And if it is the latter, are the consequences of breaking it purely political or rather legal?

In the following lines, I will explain why Slovak constitutional lawyers conceive constitutional conventions as legal customs, i.e., official sources of law enforceable by judicial power. Then, I will argue that the convention regulating the process of assignment to form a new government after a parliamentary election meets both constitutive elements of legal customs. Subsequently, I explore whether it is a good idea to entrust the Slovak Constitutional Court with enforcing constitutional conventions in Slovakia. Although its case-law on conventions related to the presidential appointing powers is not utterly persuasive, there are good institutional reasons why disputes arising out of these matters should fall within the Court's competence.

Constitutional convention as a legal custom

The Slovak constitutional law doctrine is gradually abandoning the outdated belief that the legal order of continental legal culture consists only of written sources of law. Today, most of the respected Slovak constitutional lawyers recognize that the constitutional order of the Slovak Republic also consists of unwritten rules commonly referred to as constitutional conventions. As the most popular example of constitutional conventions, these lawyers point to the presidential practice of conferring the mandate to form a government (Orosz, Volčko 2013: 114 –126; Krošlák et al. 2016: 59–62; Drgonec 2018: 36; Mazák 2018; Neumann 2019: 474ff; Giba 2020).

[3] Article 110 in conjunction with Article 74.2 of the Constitution of the Slovak Republic.

The concept of constitutional conventions, however, can have several conceptions. According to the British conception, constitutional conventions are part of the constitutional order but are not a source of constitutional law. Thus, a breach of a convention can be classified as an unconstitutional and at the same time lawful act. Let us take as an example the principle of the government's political accountability to the parliament, which implies that ministers must provide parliament with only accurate and truthful information. If a minister deliberately misleads parliament, he or she is usually expected to offer his or her resignation to the prime minister (Turpin, Tomkins 2007: 160). If the minister refuses to do so, he or she will act unconstitutionally, but still not unlawfully. In this case, no court can force him or her to resign, as this is a matter falling within the competence of the parliament, which may cast a vote of no confidence. In Britain, therefore, the application of conventions is a political rather than a legal issue. Consequently, keeping respect for conventions is the business of political rather than judicial bodies.

On the other hand, in Slovakia, constitutional conventions are predominantly understood as legal customs, i.e., an unwritten source of law.[4] According to continental legal doctrine, the legal custom is a sufficiently constant social practice (*usus longaevus*) that is observed out of the conviction of its legal force (*opinio iuris*) and which is enforceable by the judiciary. There are at least three reasons why Slovak lawyers – unlike their British counterparts – see constitutional conventions as legally binding rules of conduct.

a) Slovak constitutional lawyers consider constitutional conventions to be legal customs because most of them have a considerable distrust of politics. Therefore, if conventions are part of the constitutional order, then judges, not just politicians, must also oversee their enforcement. The British conception of constitutional conventions is out of the question in Slovakia because the Slovak political bodies are not occupied by mature individuals with high-quality education, a broad outlook, and a deep sense of responsibility, but mostly only by populists who have at most only talent for catchy political phrases. This depiction of politics leads to an interesting paradox, namely, many Slovak constitutional lawyers consider the parliament to be the source of the gravest threat to the existing constitutional order, not the source of its democratic legitimacy. This belief is most vigorously manifested in the debate on the so-called "*substantive core*" of the Constitution, i.e., in the dispute over whether the parliament or the Constitutional Court has the last word in amending the Constitution. Proponents of the substantive core argue that the Constitution is based on a set of immutable legal principles that the Constitutional Court must also protect against the declared will of a democratically elected parliament (cf. Orosz 2005: 323–341; Bröstl 2008: 11ff; Vozár 2008: 476ff; Nikodým 2012: 168ff, Drgonec 2015: 640ff; Balog 2019: 226; Breichová Lapčáková 2019: 254ff; Ľalík 2019: 283 ff; contra: Procházka 2011; Káčer, Neumann 2019). The idea that respect for constitutional conventions stands and falls solely on political will does not fit into this elitist concept of the constitution.

b) Many constitutional lawyers in Slovakia understand constitutional conventions as legal customs because the Czech Constitutional Court does so. Although it is a court of another jurisdiction, the decisions of the Czech Constitutional Court have an immense

[4] Political processes in Slovakia are also regulated by non-legal types of unwritten rules. However, ethically connoted rules – such as the duty of a member of the government to provide only true information to the parliament – are not commonly referred to as "*conventions*". In addition to ethical rules, there are also organizational and technical unwritten political standards. An example is a rule that coalition governments operate on the basis of a coalition agreement, while the government's agenda is also addressed in the so-called Coalition Council. The word "*convention*" is not used in the description of this practice either.

impact on Slovak constitutional thinking. This is not only because of their argumentative persuasiveness and language similarity but also because of the almost 70-year common constitutional history that the Czech and Slovak republics shared within a common state in the past century. There is also a significant influence of personal connections between lawyers from both countries, which is best embodied by Professor Pavel Holländer, a Slovak native who worked for two decades at the Czech Constitutional Court and who was once considered the most influential 'Czech' lawyer (Němeček 2007). In its often-quoted finding with file number Pl. ÚS 14/01, the Czech Constitutional Court confirmed that the constitutional order also consists of constitutional conventions, which are a specific variation of legal customs. It is possible to question whether a certain custom has been established or not, but it is beyond doubt that customs are an integral part of the Constitution. The Court said: "*It is well known that constitutional conventions are still of great importance in a state ruled by constitution precisely because they compose the constitution into a functional unit and fill the gap between the brief expression of constitutional principles and institutions and the variability of constitutional situations.*"[5]

c) Slovak law students learn about legal customs in two classes: Legal History and International Public Law. In particular, the latter subject helps students form a more vivid idea of unwritten law, since in international law legal custom is a source of living law applied in decisions of international judicial authorities that resolve actual interstate disputes. Although some authors think that the conditions for the formation of customs in municipal law are stricter than in international law,[6] this difference does not apply to constitutional conventions. It is noteworthy that the processes of custom formation in international and constitutional law take place in a similar normative environment characterized by a relatively low number of norm-giving entities endowed with public authority, which interact in horizontal relations. The international community consists of about 200 states, whereas the national constitutional environment is created by a few dozen or hundreds of constitutional agents. In international law, the principle of sovereign equality of all states applies, so states can create legal obligations only in cooperation. The same is true of the highest constitutional bodies operating in a regime of separation of powers since the system of checks and balances allows them to fully exercise their powers only in coordination with each other. Although parliament has a dominant position in traditional British parliamentarism, the constitutions of many continental states combine this model with other forms of government. For example, in the Slovak and Czech Republics, the head of state is elected directly by the citizens, which means that a candidate with his or her political agenda and political commitments can get into the presidency. This in turn strengthens the horizontal

[5] Finding of the Czech Constitutional Court with file no. Pl. ÚS 14/01 (Dispute over the counter signature of the President's decision on the appointment of the Governor and Vice-Governor of the Czech National Bank) issued on 20 June, 2001 (my translation).

[6] The conditions for the formation of legal customs in British common law are particularly strict. A legal custom as a source of law valid in the territory of the United Kingdom can have only local or special personal scope since all universal customs have been gradually incorporated into case-law. If a party to proceedings before a UK court invokes custom, he or she must prove that it has been valid since time immemorial (at least since 1189), that it is continuous, that it can be practised peacefully, and that it is binding, definite and uniform (Shiner 2005: 69–74). Tom Hillier explains the stricter criteria for the formation of a municipal custom by the fact that the international custom is created by just over 200 states, while the municipal custom can be practised by thousands of people. Moreover, states are entities with normative authority, while people as private individuals do not have such authority (Hillier 1998: 78).

format of the relationship between the president and the government on the one hand, as well as between the president and parliament on the other. Although the direct election of a president does not automatically strengthen presidential powers, it may itself intensify the customary processes that will lead to such a strengthening. This particularly applies to the Slovak presidential practice of endowing a mandate to compose a new government. Now, let us return to this practice: Does it meet both constitutive conditions required for the establishment of a legal custom?

Assignment to form a government as a legal custom

From the establishment of the Slovak Republic in 1993 until the middle of 2021, eight parliamentary elections were held, and in seven cases the head of state entrusted the formation of the new government to a representative of the political party with the largest number of votes. The only exception came after the election in 2002, which was won by the Movement of Democratic Slovakia (HZDS) of the controversial former Prime Minister Vladimír Mečiar.[7] The then President Rudolf Schuster first consulted the political situation with the leaders of all the political parties that won seats in the parliament, and then he gave them a five-day deadline for coalition negotiations. When, after this period, it was clear that Mečiar would not form a coalition, Schuster commissioned Mikuláš Dzurinda, the leader of the second-strongest political party, to form a government.[8] However, Shuster's manoeuvre can be better interpreted as a specific mode of following a forming convention than as an example of its flagrant violation. It is because Dzurinda began to hold coalition talks with his closest political allies immediately after the announcement of the election results, so Schuster's five-day deadline only served to make room for Mečiar to try to reverse the ongoing course of events. This informal presidential gesture thus served the same function as the formal assignment to form a government given to the party with the most votes but without sufficient coalition potential – it expressed respect for the will of the people as declared in the election outcome.

When determining *usus longaevus*, it is not the longevity of the social practice but the diversity of persons who participate that is important.[9] In this respect, the criterium of *usus longaevus* is met; the mandate to form a new government has so far been issued by all the presidents: Kováč, Migaš (as a deputy president), Schuster, Gašparovič, Kiska, and the current president, Zuzana Čaputová. These names represent a diverse range of the Slovak mainstream political spectrum, from populist nationalism to liberal progressivism. This

[7] Mečiar was the leader of an autocratic government during the reign of which the state secret service abducted a son of the then-president Michal Kováč, Mečiar's main political adversary. When the key witness of this case was murdered, Madeleine Albright, the then US Secretary of State, called Slovakia "*the black hole of Europe*" (Cf. Dzurinda 2018).

[8] Prezident Slovenskej republiky: Archív správ mediálneho odboru (2002). *Prezident SR poveril Mikuláša Dzurindu zostavením vlády* [online; cit. 2021-09-06]. Available at WWW: <https://archiv.prezident.sk/schuster/index8d34.html?548>.

[9] "*The constitutional convention crystallizes in the behaviour of the constitutional bodies involved. The property of uniformity and permanence of practice must be interpreted as meaning that the practice is formed by the participation of constitutional bodies regardless of how their specific staffing changes over time.*" Joint dissenting opinion of Judges V. Güttler, M. Holeček, I. Janů, Z. Kessler and J. Malenovský against the verdict of finding of the Czech Constitutional Court no. Pl. ÚS 14/01 (my translation).

variety confirms that the practice of assignment is constant and general. Whether it lasts a quarter or a half of a century is completely irrelevant.

The belief in legal bindingness of the practice, *opinio iuris*, is more difficult to trace, but there are indications from which it can be safely concluded that such a belief has become established. If a rational agent acts irrespective of his or her interests and preferences, it might be because he or she performs his or her duties. According to Joseph Raz (1975: 35ff), obligations are specific reasons which exclude the relevance of other reasons in the process of decision-making. According to Kant's (1991) deontological ethics, what is obligatory must be fulfilled, even if it is not beneficial, moreover, even if it is harmful (*Fiat iustitia, pereat mundus*). These specific features of human conduct have been also manifested in the way in which Slovak presidents have entrusted the assignment to form a new government. For example, in 1998, a representative of HZDS – the party with the most votes – was first assigned, although it was clear in the post-election constellation of political power that this party would not succeed in forming a government. After its unsuccessful attempt, Mikuláš Dzurinda, the leader of the second-strongest party, was commissioned, even though there was already a coalition agreement ready at that time, so he could be appointed Prime Minister directly, which eventually happened later that day (Mališka et al. 2020: 14). Following the 2002 elections, a similar situation arose, which President Schuster resolved as described above. Although he did not give the representative of the first party in order, HZDS, a formal mandate to form a government, he allowed this party to reverse the formation of the second Dzurinda government. Dzurinda himself considered this manoeuvre a manifestation of high political culture.[10] An analogous situation occurred after the election in 2010, with the only difference being that Mečiar's HZDS was replaced by the political party SMER led by Robert Fico. The then President Gašparovič entrusted Fico with the formation of the government, even though he did not have sufficient coalition potential. The President reasoned in the following way: "*It would be unfair, and it would not be right, if I did not entrust the election winner, who gained the most confidence among voters.*"[11] The situation after the early 2012 elections, in which Fico's SMER won a convincing parliamentary majority, was similar to that of Dzurinda in 1998 – in both cases the President did not have to entrust a person with forming a new government because of the *de facto* constellation of political power. At the time of the assignment, it was clear who the future Prime Minister would be. Nevertheless, in 2012, President Gašparovič decided to follow the conventional procedure. Finally, the 2016 elections are also relevant in determining whether this procedure is accompanied by a belief in its legally binding force. The then President Andrej Kiska gave the assignment to form a new government to Robert Fico, who managed to win the parliamentary elections for the fourth time in a row, even though there was a huge rivalry between these politicians dating back to the 2014 presidential election, in which Kiska defeated Fico. Interestingly, Kiska followed the convention even though the scenario of a government without Fico's SMER could not be completely ruled out. The best explanation for why Kiska entrusted Fico

[10] SME (2002). *Prezident: Vládu zostaví Dzurinda* [online; cit. 2021-09-06]. Available at WWW: <https://www.sme.sk/c/678352/prezident-vladu-zostavi-dzurinda.html>. Schuster's maneuverer was also appreciated by Robert Fico, the leader of the third-strongest party and future multiple Prime Minister. See Prezident Slovenskej republiky: Archív správ mediálneho odboru (2002). *Prezident prijal lídrov víťazných politických strán* [online; cit. 2021-09-06]. Available at WWW: <https://archiv.prezident.sk/schuster/index8d34.html?548>.

[11] Prezident Slovenskej republiky: Archív správ tlačového oddelenia (2010). *Prezident SR poveril víťaza parlamentých volieb zostavením vlády* [online; cit. 2021-09-06]. Available at WWW: <https://archiv.prezident.sk/gasparovic/index04d2-3.html?rok-2010&news_id=11526>.

with the formation of the government in such a situation is that he saw such a course of action as a performance of his presidential duties; that he did so out of a conviction that the custom governing the assignment in question was legally binding.

So, the fact that, after the parliamentary election, the President is to entrust the formation of a new government to a representative of the political party with the most votes obtained is part of a settled political practice that exhibits both constitutive elements of legal custom. It is a binding rule of conduct. This conclusion, however, leads to another consequence, namely, that the presidential practice should be enforceable by the judiciary. Interestingly, Slovak lawyers are rather cautious on this topic. Although they grasp constitutional conventions through the terminology of sources of law, they are less concerned about the implications of such an approach. It is, therefore, crucial to look at when and how the Slovak Constitutional Court refers to constitutional conventions in its case-law.

Constitutional conventions in the caselaw of the Constitutional Court of the Slovak Republic

The fact that a practice has taken the form of a legal custom does not preclude the occurrence of any ambiguities in its further application. It is notorious that, compared to written law, the legal custom has a higher degree of uncertainty and thus a lower regulatory capacity. However, that imperfection is not an argument against the existence of customary law, but rather an argument for codifying it in writing. The fact that the law is not optimal does not mean that it is not valid.

Even in connection with the Slovak practice of assignment to form a new government, many questions arise. But so far, they are rather only on a hypothetical level. For example, before the parliamentary elections in 2020, it was discussed whether President Čaputová should give the mandate to form a government to the "*winner*" of the elections, even if it was the extremist People's Party Our Slovakia (ĽSNS). These considerations were provoked by the unprecedented rise in popularity of ĽSNS,[12] as well as the President's admission that she would invite extremists to the presidential palace if they won the most votes (Bán 2020). According to the constitutional lawyer Jakub Neumann (2021: 390ff), the constitutional convention in question should be observed even in this delicate case, because only in this way would the President express her respect for both the law and the will of the people. On the other hand, Marián Giba (2021: 396ff) claims that the President should not entrust the extremist party, because in his opinion the real "*winner*" of the parliamentary election is not the party that received the most votes, but the party that can bring coalition negotiations to a successful end. Although Giba's effort to politically isolate extremism is praiseworthy, his interpretation of the word "*election winner*" seems to be in tension with the established political tradition. Thus far, Slovak presidents have considered the party with the most votes, not the greatest coalition potential, to be the "*winner*" of the election, otherwise, they would not repeatedly give the mandate to form a new government to the parties that won the former but did not have the latter.[13] Regardless of its outcome, however, this

[12] Agentúra AKO (2019). *Prieskum volebných preferencií do NR SR – Máj 2019*. [online; cit. 2021-09-06]. Available at WWW: <https://ako.sk/wp-content/uploads/2019/05/AKO_VOLEBNE_PREFERENCIE_MAJ_2019.pdf>.

[13] There is a more elegant justification of the refusal to give the assignment to an extremist party which won the highest number of votes in the parliamentary election. The application of each rule depends on a

discussion illustrates that even established and unified conventions may raise questions that require an authoritative answer. Can the Slovak Constitutional Court provide such answers?

The database of court decisions available on the Constitutional Court website records 14 decisions in which the term "*constitutional convention*" or its grammatical derivates appears. This set consists of five dissents (least significance), four chamber decisions (medium significance) and five plenary session decisions (most significance). However, not every reference to constitutional convention serves as a legal argument of the Court. In four cases, the judges merely reproduced the arguments of the pleading parties,[14] and in two other cases, they merely expressed a desire for a convention to be formed.[15] Only in the remaining eight cases did the judges use the convention as a legal argument. Of these eight cases, the judges argued positively six times (the convention is settled, and therefore…), once negatively (the custom is not settled, and therefore…) and once the term referred to the convention valid in a foreign country which was used as a negative comparative argument. Here are several general observations on the cases concerned:

As already mentioned, the Slovak Constitutional Court has used the reference to constitutional conventions as a legal argument only eight times throughout the history of this institution. Since the Court's annual workload is calculated in thousands of cases,[16] ***this is a minuscule way of argumentation, at least from a quantitative point of view***. On the other hand, even a completely rare legal argument can have major societal implications if used in a particularly important case as, for example, the granting of a mandate to form a new government surely is.

When Slovak constitutional judges conceive a practice as a constitutional convention, ***they rely heavily on the pre-understanding of their audience***. They often state the existence of a convention as a fact without more detailed evidence, or they just mention the long duration of a certain practice as sufficient proof. In none of the cases did the judges discuss the question of whether there is an *opinio iuris* or whether the persons concerned behave as if they were fulfilling their legal obligations or exercising their rights. In two cases, judges derived conventions from the practice of complying with written legislation.[17] However, this

set of tacit assumptions, the explicit thematization of which usually occurs only if it is necessary to address a particular life situation. From this point of view, it can be argued that from the very beginning the Slovak constitutional convention regulating the assignment to form a government has also included a disqualifying condition according to which the assignment cannot be granted to a party professing extremist ideology. However, this condition was never the subject of discussion, because in the history of the Slovak parliamentary elections there has been no situation that would give rise to such a debate. If the President refused to give the extremists the assignment, she would not deviate from the convention but rather clarify it. This precedent would not set up a new rule, it would only make clear what has been the rule from the outset.

[14] Dissenting opinion of Judge Rudolf Tkáčik against decision no. III. ÚS 571/2014, and decisions no. III. ÚS 571/2014, II. ÚS 512/2018, PL. ÚS 16/2020.

[15] Dissenting opinion of Judges Ján Luby and Ladislav Orosz against decision no PL. ÚS 4/2012 (Judges expressed their wish their opinion would lead to a formation of a constitutional convention.) Finding no. PL. ÚS 95/2011 (Judges noted that political agents "*should realize that their conduct contributes to the formation of constitutional conventions which give rise to the legitimate expectations the conduct will repeat in the future*".)

[16] In 2019, the Constitutional Court had to deal with 3,123 submissions, of which it ruled on 1,633 (Cf. Ústavný súd Slovenskej republiky 2020: 12–13).

[17] Judge Peter Straka expressed in his dissenting opinion that in Slovakia there was a constitutional convention establishing a moratorium on public opinion polls closely before elections. He argued that "*since the post-revolutionary time of 1989*" it is a "*traditionally implemented institute*" showing both elements of the legal custom. The judge concluded that the Constitutional Court should have considered matters relating to

kind of argument proves too much because it leads to the conclusion that a constitutional convention is any long-term practice of abiding by a certain law that regulates constitutional matters. If the point of this argument is that the practice concerned should continue even after the repeal of the relevant law, then it is contrary to the basic legal axiom, according to which the body which adopted a certain law also has the power to repeal it.

It is interesting that in five out of eight cases, ***judges used constitutional conventions only at the academic level of inquiry, i.e., without a decisive impact on the outcome of their decisions***. Judge Straka deduced from the customary nature of the electoral moratorium the need for a restrained approach in assessing its constitutionality. However, the need for the restraint of the Constitutional Court in the context of an abstract review of constitutionality stems much more certainly from the democratic legitimacy of the legislator. Judge Meszároš derived the need for benevolent regulation of the parliamentary debate from the fact that such regulation has become "*something like a constitutional convention*" in Slovakia. However, this conclusion can be much better justified by reference to the deliberate legitimacy of democracy in general. In judgment no I. ÚS 397/2014, the Court stated that the President is also bound by conventions that have not yet been fully formed, but despite that, the Court annulled the President's disputed decision only on the ground of *ratio decidendi* of its previous precedent. In the findings of PL. ÚS 4/2012 and PL. ÚS 14/2006, the Court explored whether there are constitutional conventions in Slovakia which instruct the President to comply with the nomination proposals of other constitutional bodies, but in the end, the Court came to the negative answers.

In only two cases the constitutional convention was used as an autonomous argument capable of competing with other legal arguments. In the first case, Judge Straka pointed out that in the history of the Slovak Republic, the parliament had passed up to three constitutional amendments shortening its term of office, so this kind of *ad hoc* legislation does not seem unconstitutional.[18] From a purely quantitative point of view, the three repetitions of a certain procedure are not much, but from a qualitative point of view, it must be considered that the shorting of the parliamentary term of office has always taken the form of a constitutional amendment agreed by different constitutional majorities. It is therefore a practice that is *prima facie* sufficiently representative. In the second case, the Plenary Session pointed out that the President always followed certain material restrictions when granting an amnesty, so that there is a convention according to which this presidential act shall not be arbitrary.[19]

The cautious and rare reference to constitutional conventions in Slovak judicial decisions is fully in line with the legalistic legal culture, which for many years has been based on the premise that the law can only exist in a written form. A much more serious problem is the poor conceptual work in defining the scope of the conventions. ***Judges sometimes overlook the question of how general the language in which they capture the conventions***

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the moratorium with restraint and leave it to the people's representatives to regulate it (Dissenting opinion of Judge Peter Straka against decision no. PL. ÚS 26/2019). Judge Lajoš Meszároš, in his dissenting opinion, thinks that looser regulation of legislative deliberation allowing MPs to use visual aids and banners in the parliamentary debate is "*something like a constitutional convention*" in Slovakia. Therefore, the judge considers the tightening of the regulation to be unconstitutional (Dissenting opinion of Judge Lajos Meszáros against decision no. PL. ÚS 6/2017).

[18] Dissenting opinion of Judge Peter Straka against decision no PL. ÚS 7/2021.

[19] Finding no. PL. ÚS 7/2017.

should be. It is a problem because finding differences where they do not exist and denying them where they do is a typical manifestation of arbitrariness. It is the way the Constitutional Court, in its third term, sought to grasp the conventions governing the appointment powers of the President that raises suspicion of arbitrary or at least inconsistent decision-making. Let us take a closer look at this issue.

Like cases not treated alike

In ruling no. PL. ÚS 14/2016 of 23 September 2009, the Constitutional Court rejected the interpretation according to which the President may only check the legality of the nomination procedure when appointing the Vice-Governor of the National Bank of Slovakia (NBS) on the proposal of the government and with the consent of the parliament. On the contrary, the Court confirmed that the President also has the power to control the fulfilment of substantive legal requirements that a candidate for this position must meet. In justifying this decision, the Court explicitly stated that Slovakia is not an example of a pure type of parliamentary republic, in which the president has only a notary function when appointing officials on the proposal of other bodies. The Court relied, *inter alia*, on the Czechoslovak constitutional development, during which the President had autonomous powers (paras 27, 28) and on the practice of appointing ambassadors before the adoption of the major constitutional amendment no. 90/2001 Coll. (para 29). Moreover, the Constitutional Court emphasized that the NBS is an independent institution that is not subordinate to the government, so the President's involvement in the selection of its managers only strengthens that independence (para 32). About three years later, the Court followed up directly on this decision, resolving a dispute between the President and parliament over the appointment of the Prosecutor General.[20] In resolution no. PL. ÚS 4/2012, the Court claimed that the President can examine the nominee's competence in the light of both legal and non-legal requirements. As in the previous case, the Court referred to the former practice of appointing ambassadors, in which the government accepted that the President did not have to comply with its proposals (para 42). The Court also emphasized that the Prosecutor General is not part of the legislative or executive branch, so the President's autonomous involvement in the election process contributes to guaranteeing his or her impartiality (para 44).

The decision on the Prosecutor General provoked controversy not only because the election of this official in the Parliament was one of the top political events of the day.[21] From a purely technical point of view, the Constitutional Court drew different conclusions from the same reasons: While in the case of the Vice-Governor of NBS the need for a higher guarantee of the independence of the appointed official led the Court to grant the President the power to examine the substantive legal requirements of the candidate, in the case of the Prosecutor General, the same need made the Court grant the President also the vaguely defined power to examine whether the candidate would not threaten the "*seriousness*" of the relevant constitutional function or jeopardize its "*mission*". It is therefore not

[20] The Prosecutor General is the head of a hierarchically organized system of procurators whose main task is to prosecute criminal cases. Given that there are suspicions that part of the Slovak political elite and its sponsors are involved in criminal activities, the election of the Prosecutor General, who decides to initiate and stop criminal proceedings against anybody, is one of the most important political events in Slovakia.

[21] Tlačová agentúra Slovenskej republiky (2014). *Chronológia kauzy Čentéš* [online; cit. 2021-09-06]. Available at WWW: <https://www.teraz.sk/slovensko/chronologia-kauzy-centes/109085-clanok.html>.

surprising that some commentators (Hanus 2012) considered the second decision to be arbitrary, pointing out that the then-president Gašparovič and then-President of the Court Macejková had far too much understanding for each other.[22]

Yet, another three years later, the Court enacted a series of decisions that denied the President the power to check the nominee's eligibility for an appointed office through the non-legal criteria. This time, the appointment of constitutional judges was at stake.[23] According to the constitutional regulation, which originates in the Czechoslovak federation, the parliament elects twice the number of candidates for constitutional judges, from which the President chooses only up to the number of vacancies. In 2014, the parliament elected a total of six candidates for constitutional judges, but then-President Kiska chose only one. According to him, the other candidates did not show a real interest in the protection of constitutionality, which could reduce the seriousness of the Constitutional Court. Thus, in justifying his decision, the President was inspired by the ruling on the Prosecutor General case. Some of the unsuccessful candidates challenged the President's decision in the Constitutional Court because it violated their right to access elected and other public office on equal terms, and the Court upheld their complaints. In judgment no I. ÚS 575/2016, the Court states that the President is obliged to choose half of the candidates proposed by the parliament and their appointment must not be conditioned by meeting other criteria than those explicitly enumerated in the Constitution. According to the Court, the extent of the President's discretion in appointing constitutional judges must be narrower than in appointing the Prosecutor General, as the opposite conclusion could lead to insufficient Constitutional Court staffing and thus paralyse its decision-making. Consequently, the selection of candidates for constitutional judges must fall within the "*autonomous competence*" of the parliament (para 50). Moreover, according to the Court, there is a fundamental qualitative difference between the Prosecutor General and a constitutional judge, namely that when appointing the former, the parliament always selects only one candidate, while when appointing the latter, it always selects a pair of candidates from which the President nominates only one. Finally, the Court mentioned that in the history of the appointment of constitutional judges, it had never happened before that one of the presidents rejected both candidates proposed by parliament. By plagiarizing the words of the Czech Constitutional Court uttered in the iconic judgment on the appointment of the Vice Governor of the Czech National Bank (Pl. ÚS 14/01), the Slovak court conceived the nomination practice as a valid constitutional convention that is binding on the President.

An outside observer of this nomination drama might have thought that the President had not appointed the candidates concerned, as they were only average lawyers whose only comparative advantage in the parliamentary election was their close contact with political leaders.[24] President Kiska justified his decision diplomatically, stating that the candidates did not show a genuine interest in constitutional law. However, this reason does not hold up to the substantial merit of the case, because a lawyer who has devoted his or her career to another branch of law can also become a decent constitutional judge. There-

[22] Madame President of the Constitutional Court Macejková strongly protested this article (Macejková 2012).

[23] III. 571/2014 issued on March 17, 2015; PL. ÚS 45/2015 issued on October 28, 2015; I. ÚS 575/2016 issued on December 6, 2017.

[24] Michal Matulník convincingly proves that up to 80% of successful candidates for constitutional judges had the so-called political footprint, i.e., in the past, they worked in a political position or were proposed for election by an entity with a political pedigree (Matulník 2019: 958–974).

fore, the final verdict of the finding of I. ÚS 575/2016 is quite tenable from a substantial point of view. Yet, its reasoning is grossly irritating. Here are its three most serious flaws:

a) In previous decisions on the President's appointment powers, the Constitutional Court did not hesitate to infer from the method of appointing ambassadors to the method of appointing the NBS Vice-Governor, but now it could not forgive the President for inferring the method of appointing constitutional judges from the method for appointing the Prosecutor General. If the appointing powers differ depending on the nature of the appointed body, then it is crucial to suggest and justify an adequate generalization in which the Constitutional Court characterizes the *category* of the nominated body. The fact that the parliament submits to the President only one candidate for the Prosecutor General and a pair of candidates for a constitutional judge stems from historical coincidence rather than from a functional analysis of the institutions concerned and is therefore utterly irrelevant to the assessment of the case.[25]

b) While the *ratio decidendi* for expanding the presidential discretion in the appointment of the NBS Vice-Governor and the Prosecutor General rested in the guarantee of independence and impartiality of the appointed bodies, the *ratio decidendi* for limiting the presidential discretion in the appointment of constitutional judges rested in the need for 100% staffing of the appointed body. If we are willing to increase the chances of politically impartial decision-making of the NBS Vice-Governor and Prosecutor General in exchange for complicating and prolonging their selection process, why are we not willing to make the same trade-off concerning constitutional judges?

c) The Constitutional Court did not perceive the unprecedented refusal of appointment of the Prosecutor General as a violation of the established constitutional convention, because "*in none of the previous cases of appointment has there been a dispute over the scope of his [the President's] discretion*" (PL. ÚS 4/2012, para 42), but, on the other hand, the Court did perceive the unprecedented refusal of appointment of the constitutional judges as "*purposeful misinterpretation of the constitution*" (I. ÚS 575/2016, para 60.2). So, the non-contested practice in the first instance is not a sign of a convention, since without dispute there is no opportunity to clarify what the practice means. However, the undisputed practice in the latter instance is a manifestation of a convention because what could be a more reliable sign of the permanence of the custom than that there is no dispute about its content?

All these inconsistencies shed a bad light on constitutional conventions as a source of legal arguments leading to binding judicial decisions. The final question, therefore, is whether it is right to conceive constitutional conventions as legal customs enforceable by the judiciary. Is it right for an eventual dispute over the assignment to form a new government to fall within the jurisdiction of the Constitutional Court?

[25] In this respect, it is much more relevant, for example, that the Prosecutor General is a monocratic body, whereas the Constitutional Court is a collective body. The mistake of appointing the wrong person to the former function can have much more fatal consequences than a similar mistake with respect to the latter function. The nature of the powers of the appointed bodies is also relevant: the Prosecutor General manages a large part of the repressive apparatus of the state, which can significantly interfere with human rights. Abuse of this function can have much more dramatic effects than abuse of the position of a constitutional judge. Surprisingly, the analysed decisions of the Constitutional Court are silent on these key aspects.

Conclusion

As I have mentioned above, although the Slovak practice of entrusting the mandate to form a new government is sufficiently constant, it can nevertheless generate serious political controversies, the solution of which may determine the fate of the country for years to come. One of them is the question of whether the head of state should give the mandate to the extremist party that won the election. Can constitutional judges answer such sensitive questions in a more qualified way than the politicians directly concerned?

There are some serious flaws in the Constitutional Court's reasoning by conventions regulating the presidential appointment powers. This raises concerns that the Court may be arbitrary in applying the conventions. Besides, the more the judiciary intervenes in political matters, the greater the pressure to politicize it. Despite this risk, ***the Constitutional Court should have the power to enforce constitutional conventions*** because:

a) One constitutional judge can outlive two or three presidents and three or four parliaments, which forms a precondition for him or her to disregard the actual distribution of political power and consider mainly long-term systemic criteria when assessing important political cases.
b) The Court has retained an unconditional authority among the relevant political agents,[26] and that indicates it has social capital to resolve political conflicts *that cannot be resolved by standard political cooperation*.
c) Since the Constitutional Court is the highest, the possibility of abusing the reference to constitutional conventions is no greater than of abusing written law. This is especially true of consolidated and widely shared conventions, such as the presidential practice of entrusting the assignment to form a new government.

Thus, if the President were to block the formation of a majority government after a parliamentary election by violating the constitutional conventions that regulate this process, and the injured party would find a procedural way to bring the matter to the Constitutional Court, the judges would have good reasons to decide the case on its merits.

[26] This can be illustrated by a recent decision in which the Constitutional Court ruled that a referendum on shortening the current parliamentary term of office was unconstitutional. Although opposition political leaders invested a lot of energy in collecting the signatures needed to call the referendum, they blamed the President, who filed a motion to review the constitutionality of the referendum, for failing their initiative, and not the Constitutional Court that finally blocked it. See the SMER Party press discussion on the topic: Facebook: User account of Robert Fico (2021). *Ak ÚS zamietne referendum, plnú zodpovednosť za jeho zamietnutie bude mať prezidentka*. [online video; cit. 2021-09-06]. Available at WWW: <https://fb.watch/7RV1JFz3X3/>.

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