

### **Inner Tensions of Election Courts**

If we want to speak of judicial control over elections or the election process, we need to realise that legal regulation of elections is an example, or a part, of the legal framework for self-regulation of politics. The shape of electoral law-making is decided by the members of Parliament who belong to political parties that win their seats in the elections in which they compete for voters in accordance with the rules covered by laws they passed and often also prepared, at least to some extent. They adopt them and compete within their boundaries in front of the eyes of the society. Considering the time passed between adoption and implementation of election laws, it is uncertain who would benefit from their provisions, and this is definitely a good and right thing. Objective voting right, i.e. the set of legal regulations regulating elections, is autonomous to a substantial extent, with the sets of the bodies that create law and those which are addressed by it overlapping each other.

Representative democracy makes use of the elections in order to elect, directly and indirectly, the individuals and political parties that will rule the country during a pre-set term. Therefore there is strong public interest in abiding by the rules of that selection process and general correctness of the elections as well as in as fast as possible response to the question about the outcomes of the elections for individual parties. This is not about the speed of vote counting and announcement of election results which take a couple hours in our era of computers, but rather about the speed of the so-called election judiciary.

Democracy requires that the election result be decided in polling places, and not in courtrooms. Nevertheless, the rule of law cannot be without judicial control over abidance by the law during selection of the most significant constitutional officers. This means that the people's, that is voter's, exercise of power is subject to judicial control. However, in the case of election judiciary as the core of the political judiciary this control is characterised by certain inherent tensions resulting from its very nature.

Judicial control over elections normally includes at least judicial review of the registration of voters, candidate documents and, the most important, judicial review of the election result, i.e. of the entire process of elections including election campaign.

Participation in election, that is the exercise of an active voting right, presupposes that a voter be included in a list of voters. There are various legal regulations that govern the method of voter's inclusion in such a list, but he or she usually does not raise reasonable doubt whether or not he or she should be included in it. Judicial control is inevitable here, because we are speaking here of the exercise of voting right as a fundamental constitutional right. Whereas citizens start inquiring about whether or not they are included in the list of voters, that is about their registration, only short before the elections, the speed of any eventual judicial proceeding concerning the issue whether or not the relevant individual is supposed to be registered as a voter is of importance here. The factual side of the matter is usually simple, which allows for a quick, if not snap, decision of the court. The tension

between the speed of the proceeding and the correctness of its result is solved here in favour of speed, but in this type of proceeding this seems to be both right and possible considering the above mentioned simplicity of the facts. Especially the question about who stands as a candidate in the election, i.e. the registration of candidate documents, must be resolved quickly and finally not to hinder the election process. This basically includes legal assessment of multiple issues which may often be quite difficult and demanding, although relatively simple as to the state of facts and usually also clear, i.e. whether the candidate (normally a political party or movement) meets the statutory criteria for the candidacy or whether the candidate document meets the statutory requirements.

Totally different is the typical situation during judicial control of the election result, that is of the lawfulness of the entire election process, which usually includes a complex state of facts requiring extensive evidence taking. Considering the understandable time limit for filing an action to initiate judicial review of the election result, the petitioner faces a situation resembling lack of evidence, and the court finds itself in a situation of a dilemma: Should it reject the action due to failure to bear the burden of proof although it was unrealistic for the petitioner to collect relevant evidence or take extensive evidence on his or her own? The examinations of numerous witnesses, study of extensive election documentation, counting of ballots, checking bank accounts, proving election campaign by way of social media, and the list of demanding methods of evidence taking in electoral matters could go on. Consolidation of facts during judicial review of election results requires time and patience.

On the other hand, the saying "Justice delayed is justice denied" applies in electoral matter more than anywhere else. There is strong public interest in obtaining quick and final resolution of the question who may hold parliamentary and other constitutional functions based on the election results. Any delay operates against political stability. It would be best if judicial review of election results could be closed before the elected officials assume their offices, but this is usually an unachievable ideal. The opinions and recommendations of the European Commission for Democracy contain many formulations treating reasonable speed of proceeding and particularly the time limits for decisions by courts in electoral matters, which only acknowledges the gravity attributed to the issue of time in election judiciary. All opinions are based on specific situations in the member states of the Council of Europe and particularly on the provisions of the proposed election laws commented on by the Venice Commission in expert opinions. That means that they are strongly situational. They document obvious efforts and balance, but, surprisingly, the speed of proceeding is not hindered by the difficult evidence taking and the complexity of the facts but, rather, by the option to exercise procedural rights that the parties have.

In my view, Venice Commission is too biased in favour of the speed of proceeding, even though review of the election result based on assessment of the entire election process must rely on extensive evidence taking. Particularly strange are "only" the procedural time limits for decision-making by courts. Although failures to meet those time limits do not prevent the court to decide the matter, they create room for a proceeding on violation of the right to have the matter heard without unnecessary delays.

As the focus of election campaign moves more and more to the virtual world of the Internet and particularly to social media, the judicial review of election results has a difficult task and the need to invite experts in those areas and in accounting may become inevitable in future to resolve electoral matters. Of course, expert witnesses prolong the proceeding and this is why they have not been used in electoral matters.

The solution of the dilemma of time versus reliable finding of the facts does not lie in setting time limits for a court to decide the matter, but in defining electoral matters as priority matters, as a result of which such matters would take precedence over other proceedings without having to restrict the quality of evidence taking due to time pressure. However, this solution gives rise to difficult questions as well. Should the indisputable public interest in quick resolution of the issue who was elected outweigh the need to quickly decide constitutional complaint relating to lawfulness of imprisonment, i.e. personal freedom of a human or unnecessary procedural delays in a proceeding treating access of parents to a minor child after divorce? A separate election court with judges who would only adjudicate electoral matters would be a solution, but this model is, if at all, only suitable for populous and very large countries (Mexico).

Another inner tension experienced by election judiciary is the paradox that the elected candidate may turn out to be the most injured party as a consequence of violation of a legal regulation governing elections that he or she might not have had the faintest idea of. If a grave or repeated violation of the objective voting right is proved in a court proceeding, such violation may result in the cancellation of the election result which would particularly affect those who were elected. Even authoritative finding by the court of a less material violation of the objective voting right which does not result in a cancellation or change of the election result by the court casts shadow of a doubt on the elected officials. However, neither the elected individuals nor the parties tend to be those who are in breach of the legal regulations treating elections. But this does not protect them from being discredited by a judgement finding such violations. To achieve cancellation of the election result, you only need to prove, in a qualified manner, violation of the voting right without the need to identify the infringer. Such identification is, understandably, necessary for his or her criminal or administrative punishment. Particularly in municipal elections where (non)election is often decided by a couple of votes may incorrect assessment of the validity of a few ballots or a counting error by the layman electoral committee of the relevant district affect the election result, which means that it may also be the cause for cancellation of its result.

When solving the issue whether or not to cancel the election result, the election court is confronted with a strange classification of the character or the required degree of demonstration of various parts of the relevant facts. The violation of the objective voting right and any eventual resulting violations of the subjective active and passive suffrage need to be proved "beyond reasonable doubt", which is nearly a quality of proof required in criminal matters, but to prove the impact of certain material violations it is often difficult to even achieve the "balance of probability" level that is typical of the private law. How could one prove and quantify the effect of leaflets distributed during the so-called moratorium on the decision of voters?

The need to prove complex facts beyond reasonable doubt pushes courts hearing electoral matters that is under time pressure to the corner, because the petitioner (plaintiff) faced even greater time pressure and, what is more, lack of time. This is why the evidence required for an action to be filed is, in this kind of proceedings, collected by the court. This means that the court must do the job that is, in a criminal proceeding, normally the responsibility of the Police and the Prosecution Office. Latent tension then evolves when the evidence collection and evidence assessment occur on the desk of the same body.

When assessing the effect of the violations of the law which does not consist of counterfeiting ballots, their incorrect assessment or counting, or of duress put upon a voter, the court cannot but rely on estimates and assumptions which are in contrast with the demonstration of the violation of the law itself. How could one demonstrate the effect of a large, but not accurately ascertained, number of e-

mail messages on the decision made by a voter? Maybe there would be some room for expert opinions.

One of the paradoxes of election courts is that criminally significant violation of the voting right will not lead to the cancellation of the election result, if both of the below conditions have been met:

1. The violation of the voting right did not have an impact on the election result, i.e. on the one who was elected.
2. The violator of the voting right is not the elected candidate.

The issue of active procedural legitimacy, i.e. who is eligible to file a motion to initiate proceeding in electoral matters and the organisation of election courts, that is which courts should be competent to hear and adjudicate individual types of electoral matters (registration of voters, candidates/parties) and the cancellation of the election result, should stand at the beginning of any debate over election courts; however, we can only understand it if we know its essence. And therefore they come on stage at the end of my speech. Individual parts of judicial control over the election process require identification of various groups of individuals eligible to file an action to initiate the proceeding. It may sound self-evident that an individual not listed in a list of voters who believes that he or she should be included in the list possesses active procedural legitimacy to initiate court proceeding concerning his or her (non)registration. Should all voters have the opportunity to contest, in court, the fact that some individual is wrongfully included in the list of voters?

It is similarly self-evident that a party or candidate whose registration of the candidate document was rejected by the competent state authority, meaning that they were not allowed to compete for public office, may turn to a court. However, who should be eligible to contest, in court, registration of another party or candidate? And is anyone at all?

Truly troublesome is the active procedural legitimacy for filing a motion to change the election result or to cancel its result in court. Here we arrive at the active suffrage of each eligible voter, which leads us to the conclusion that every single eligible voter could initiate a judicial review of the election result. The question remains whether this eligibility should also be granted to those who decided not to exercise their active suffrage. It is my opinion that Slovak lawmaker was wise to restrict the circle of bodies eligible to contest, in court, the election result only to parties and candidates which/who have won the pre-defined minimum percentage of eligible votes, i.e. to those which/who actually stepped in the election competition. It's easy and tempting to argument in favour of the right of each voter to judicial protection of his or her voting right or, more precisely, to judicial protection of the correctness of the exercise of his or her vote in elections, but solutions resembling *actio popularis* may in the end overload and even paralyse the court and may, after all, lead to factual *denegatio iustitiae*. In the context of the difficulty of evidence taking and the pressure on quick adjudication of electoral matters, the restrictive approach where the election result, that is the entire election process, may only be contested by those who have at least come close to the electability limit. This approach is justified by the difficulty of finding of the facts and the pressure on quick resolution of who was not elected.

Single-instance approach not allowing for any remedial instruments is important for election courts which work under extraordinary time pressure. I believe that neither contest against the judgement of the court in an electoral matter by way of general constitutional complaint should be permissible. The most difficult matters, that is the review of the election result, should be entrusted to top levels of the judiciary system also because there is no option of a remedial instrument there, and the European Court of Human Rights has, wisely, been rather reserved in electoral matters.

Something is strange on the judicial review of the process of forming and expressing the will of the people as the sovereign on personal matters.

Notes:

1. Fábry, B. Kasinec, R. Turčan, M. Teória práva Bratislava, Wolters Kluwer, s.r.o. 2017, p. 90