

Book Review

Procházka, R.: Král otec. Od Kováča po Kisku alebo načo nám je prezident. [King Father. From Kováč to Kiska, or Why We Need a President] Bratislava: N Press, s.r.o., 2019

At the end of March 2019, the citizens of the Slovak Republic elected their first female President – Zuzana Čaputová. Only a few months later, this now seems like an inevitable result of the Presidential elections. We tend to see past as inevitable. However, reading the book by constitutional lawyer, former Member of Parliament and Presidential candidate in the 2014 election, Radoslav Procházka, all the uncertainty of the beginning of the year comes back to us. Things could have gone differently. Zuzana Čaputová did not have to be elected President. She did not have to receive a European Leadership Award (Euronews, European Business Summit) or the European Prize for Political Culture (Hans Ringier Foundation). She did not have to rank among the 28 most powerful people in Europe according to POLITICO's annual ranking. She did not have to be seen internationally as the democratic hope for the (slightly mythological) region of Central and Eastern Europe.

Procházka finished his book on the position, powers and importance of the President in the constitutional system of the Slovak Republic before the election. One of his aspirations was to make the choice of the President more, let's say, informed and enlightened (p. 10). Even though he does not strongly judge voters for their previous choices of Presidents, he does not shy away from criticism of the Presidents themselves. This evaluation of the overall performance of four presidents – Michal Kováč (1993-1998), Rudolf Schuster (1999-2004), Ivan Gašparovič (2004-2014) and Andrej Kiska (2014-2019) – is included in the second part of the book. He also predicts how some of the powers would be executed if a specific candidate were to be elected. The first part of

the book identifies the position of the President of the Slovak Republic based on its relationship with the Government of the Slovak Republic, the Parliament, the Judiciary and the People themselves while also sketching out the often overlooked position of the President as the Supreme Commander of the armed forces. This is mirrored in the structure of the chapters. Perhaps the chapter about presidential competences regarding the army, *President - General*, is the most valuable for domestic constitutional theory, as there has not yet been any real discussion of President as the Supreme Commander of the armed forces.¹

In other parts, the book does not really dive deeply into the existing doctrinal views of the importance of the President; it merely outlines silhouettes of those views. However, due to this form, which does not exhaust the reader, the book may also attract wider public attention while still providing sufficient and substantive understanding of the key features and key issues of the President's constitutional role. Even though many things are left unspoken or unexplained, meaning that Procházka is either relying on the reader's own knowledge or he believes his reader will be willing to look for some missing pieces him- or herself, a book of this kind is very rare on the Slovak market. In

¹ Here Procházka shows that our laws would basically ask the President to issue military orders. These orders, however, should be co-signed by the Government, which is indeed impractical, as they do not even have to have the written form. Procházka comes to the conclusion that we should distinguish the role of President as the Supreme Commander during peace as well as during war. During wartime it is reasonable to expect that the President would delegate his powers to the Chief of the General Staff of the armed forces (pp. 86-88).

fact, some of Procházka's previous books were genuinely written for wider audience.² This incentive is also supported by the choice of publisher – the publishing house of the major Slovak newspaper *Denník N*.

Slovak books about the law, even textbooks, often state that they are dedicated to students, practicing lawyers as well as to laypeople. However, they are rarely written in a style and with a vocabulary that is accessible for non-lawyers. More often than not they are difficult to read even for professionals. Procházka hence fills a gap on the market, which has become more evident with the obvious lack of understanding of the function of separation of powers, human rights and other constitutional principles in the public debate in the last couple of years. This lack of understanding and the superficiality of many political debates does not permit sufficient control of public officials and is a cause of the weak feedback they receive. In my understanding, for example, the publication of the book *How to Read the Constitution – and Why* by Kim Wehle, also from 2019, has a similar function.³

In this review I will focus on two issues discussed by Procházka. Firstly, how the way these issues were dealt with influences the Slovak constitutional system in ways that are, as usual, not yet fully foreseeable. Then, after this discussion, I will provide an overview of Procházka's other interesting insights. As has already been mentioned, the first part of the book deals with the interaction of the President with the Government/cabinet, the Parliament, the judiciary and the People. This approach to the topic provides the book with its dynamics and liveliness, as it catches the clashes between officials and the branches of power. One of the potential clashes in the President – Government

– Parliament triangle is the level of discretion the President has when appointing the Prime Minister and members of the Government. This is the first topic in Procházka's book that we will look into more deeply. The second topic will be the power of the President to grant amnesty and clemency.

Regarding the first topic, the wording of our Constitution states that the Prime Minister shall be “*appointed and recalled by the President of the Slovak Republic*”, while the Prime minister can be “*any citizen of the Slovak Republic who can be elected to the National Council of the Slovak Republic*” (Art. 110).⁴ The appointment of other members of the Government is also carried out by the President based on the proposal of the Prime Minister. In fact, before the appointment itself there is the so-called “*mandate to form the Government*” given by the President to the Prime Minister *in spe*. This designated Prime Minister then proposes the names of the ministers to the President. Procházka considers this mandate to form the Government to be a constitutional convention (p. 24).

At least two issues arise here. Firstly, who should the President nominate for the post of Prime Minister? Traditionally, since the establishment of the Slovak Republic, the head of the political party which got the most votes in the election (or the person s/he named) is given the mandate to form the Government. However, Procházka claims that the mandate may be given to any person that “*manifests the obvious capability to form a Government that is able to gain the support of the Parliamentary majority*” (p. 24).⁵ So, already here Procházka allows for more discretion than has been used in practice.

² See his book about the concept of responsibility in the USA and in the Slovak Republic *Mak proti Gatsbymu: Osud, vina a zodpovednosť za škodu* [Mak v. Gatsby: Destiny, Guilt and Damage Liability] from 2009 and book about constitutional laws *Rozhádzaná republika* [Messy Republic] from 2018.

³ WEHLE, K.: *How to Read the Constitution – and Why*. New York: HarperCollins Publishing, 2019, 352 p.

⁴ Translation of the Constitution (no. 460/1992 Coll.) as available on the website of the National Council of the Slovak Republic at <https://www.nrsr.sk/web/Static/en-US/NRSR/Dokumenty/constitution.doc> (20 December 2019).

⁵ The translations of quotations from the reviewed book are my own.

Secondly, and more controversially, how much discretion does the President have when appointing members of the Government in regard to the list proposed by the designated Prime Minister? Procházka postulates that the discretion of the President when appointing the Government is wider when the Government is not formed after the election.

Still, Procházka stresses that the President is the head of the State and the Prime Minister is the head of the Government (p.17). When speaking about presidential discretion, Procházka is somewhat cautious in his words. For example, he speaks about a *certain* level of discretion (p. 19). He also catches the tension between the normatively correct and factually possible in politics – at time of crises, the fall of the Government, the discretion of the President is wider – the key is “*how the President feels the situation to be from the point of view of power; what he believes he can do in the present political situation, or what he believes he simply must do in such a situation for a moral-political reasons or for practical-political reasons*” (p. 19). This statement opens the gate for other soft factors that influence the level of discretion, such as the atmosphere in society, whom officials believe to be accountable to, their personal nature, etc. (pp. 24-26).

After the murder of Slovak journalist Ján Kuciak and his fiancé Martina Kušnírová in 2018, this issue became a practical one.⁶ Initially, it seemed that the murder was ordered by an Italian mafia group, while an assistant to the Prime Minister was linked to a member of the *'Ndrangheta* group. At the same time, it became known that Kuciak had been threatened by Slovak entrepreneur Marian Kočner, who is currently charged with this murder. There were massive protests for a “decent Slovakia” that criticised the Government.⁷ Prime Minister Robert Fico resigned in order to prevent

⁶ <https://spectator.sme.sk/c/22003649/events-that-changed-Slovakia-2018.html> (20 December 2019).

⁷ See e.g. the report by Saša Uhlová <http://politicalcritique.org/cee/slovakia/2018/where-are-you-going-slovakia-sasa-uhlova/> (21 December 2019).

premature elections, and Peter Pellegrini, a member of the same political party, was given the mandate to form the Government. However, the list of prospective members⁸ was criticised by President Andrej Kiska. He stated that he would not appoint a Government based on Pellegrini’s proposal.⁹ He claimed that the new Government should be able to restore the trust of citizens, that it needs to be able to calm the tensions in society and guarantee the independent investigation of the murder of Kuciak and Kušnírová. He stated that Pellegrini was informed about these specific objections and added: “*The last thing we need is a never-ending discussion and suspicions about who was with whom on motorbikes or who celebrated a birthday with whom and other speculations about personal connections. As the head of state, I will not admit this. This is not the way to rebuild trust. So, I have asked Mr. Pellegrini to submit a new proposal*”.¹⁰ The President was here referring to the fact that the proposed Minister of the Interior, Jozef Ráž, Jr., was in a picture taken at a birthday party of the former Minister of the Interior, Robert Kaliňák, at a motorcycle club. The designated Prime Minister complied with Kiska’s request and proposed a new person for the post of Minister of the Interior. Kiska subsequently appointed him as well as other members of the Government.

There was then a discussion about whether the President had overstepped his powers. In his book Procházka claims that the President merely used his authority to create pressure in order to form a Government that would reflect public demands (p. 27). To simply confirm the proposed list would be, in Procházka’s opinion, an understatement of his competences. To

⁸ <https://spectator.sme.sk/c/20784607/pellegrini-cabinet-bets-on-a-non-partisan-interior-minister.html>

⁹ <https://spectator.sme.sk/c/20785153/kiska-refuses-pellegrini-cabinet-ministers.html> (20 December 2019).

¹⁰ A video of President Kiska and his full speech are available at <https://domov.sme.sk/c/20785323/kiskov-prejav-k-navrhu-nevymenovat-vladu-petra-pellegriniho.html?ref=tab> (21 December 2019). The translation is my own.

appoint somebody who has his own personal confidence but perhaps not the ability to be backed by a Parliamentary majority would be an overstepping of his competences, as it would in effect make the President the head of the executive power. So, the chosen option was “presidential” according to Procházka (p. 27).¹¹ Also, at the time of intense public discussion Procházka defended the steps taken by the President as being close to the limit of his competences but still within the playing field. Procházka sees the stage of the mandate to form the Government, even though he considers it to be the constitutional convention, as a field for informal discussion – the list of proposed members of Government is in his mind only consultative (p. 152). This in all likelihood crucially influences the level of discretion he is willing to grant to the President.

But we can ask: if the appointment of the Prime Minister and other members of the Government is done in one act, one ceremony, as it has always been, is there really any time for the presentation of the official list of proposed ministers? Members of the Government *in spe* are already present at the act of nomination. There is no specific space for the formal proposal of members of Government by the Prime Minister after his appointment at the ceremony. Moreover, the informality of some act does not necessarily go hand in hand with the lack of the implicit constitutional regulation of this act, for example, in the way of custom. Moreover, Procházka himself criticises the fact that appointment of the Prime Minister and other members of Parliament is done in one act, but he still considers even this practice to be a kind of constitutional convention – even if it does not fit the wording of the Constitution (p. 152). Hence, there are some tensions within his argumentation.

¹¹ The view that the President should have asked for a much more in-depth change when nominating the Government was also presented. See, e.g. the essay by political scientist Samuel Abrahám *Thirty Days that Shook Slovakia* at <https://spectator.sme.sk/c/20792122/thirty-days-that-shook-slovakia.html?ref=av-right> (21 December 2019).

The steps taken by the President were also defended by similar acts of a previous President – Michal Kováč – who, for example, did not appoint Ivan Lexa (now under investigation in relation to the abduction of Michal Kováč’s son) upon nomination for a post.¹² However, the difference in the situations is quite obvious. Not to appoint one proposed member of an already existing Government and to hold back the appointment of the whole Government because of, as it seems, one problematic member (based on a photograph that might “cast some doubt”) are quite different situations in terms of the “proportionality” of the steps taken.

Nevertheless, we can conclude with Herbert Hart’s remark on judicial law-making, which may be considered applicable *mutatis mutandis*: “Here all that succeeds is success.”¹³ The question of what this success will bring in the future remains open.

As has already been mentioned, the second issue we will focus on in more detail is the President’s competence to grant amnesty and clemency. Procházka considers this to be the strongest residue of the President as a monarch. In general, Procházka reflects the tension between the President as a King and the President as a public official with a quite mundane office (pp. 13-14). For him amnesty and clemency are “a step outside the law and not always towards justice” (p. 60). He comments on the limits placed on this presidential competence by constitutional amendment in 2017.¹⁴ The amendment was supposed to also (or mainly) deal with the amnesties issued by former Prime Minister Vladimír Mečiar when he executed the competences of the President. On the first day he obtained the power to issue amnesties – 3 March

¹² See e.g. the commentary of Marián Giba, who was at the time the advisor of the President (in the Slovak language) <https://dennikn.sk/1090735/o-ustavnom-lese-recepte-na-tortu-a-zdravom-usudku-pri-posudzovani-konania-prezidenta-kisku/> (21 December 2019).

¹³ HART, H. L. A.: *The Concept of Law* (3rd edition). Oxford: Oxford University Press, 2012 (orig. 1961), p. 153.

¹⁴ The change was made by Constitutional Act No. 71/2017 Coll.

1998 – Mečiar granted amnesty for the crime of abduction of the son of former President Michal Kováč and the crime of obstructing referenda.¹⁵ He himself was suspected of having ordered the abduction. In 2017 the Slovak Parliament got the power to quash amnesty or clemency, if they are deemed incompatible with the principles of democracy and rule of law. Moreover, the Constitutional Court acquired the power to review the compatibility of such a decision of the National Council of the Slovak Republic with the Constitution. And the Parliament indeed revoked the amnesties issued by Mečiar, reasoning, among others, that these were so-called self-amnesties. The Slovak Constitutional Court confirmed that this decision did not contravene the Constitution.¹⁶ Procházka criticises such new mechanisms, because for him amnesties are and should remain antidemocratic paradoxes of the system with the goal of achieving moral restoration, a new beginning. If an amnesty is obstructed by so many prospective reviews (it also needs to be co-signed by the Prime Minister, but this was also the case before the 2017 amendment), there is simply no longer any need for it. The present constitutional design, in his opinion, manifests a misunderstanding of the whole point of amnesties (p. 61). Hence, we would be better off having no amnesty than this kind of amnesty.

¹⁵ The summary of the context of amnesties is available in the decision of the European Court of Human Rights in case *Lexa v. Slovakia*. This is the before-mentioned Mr. Lexa, the proposed minister that was not appointed by Michal Kováč. However, he became the head of the Slovak Secret Service and in this position is suspected of having taken part in the abduction of the Kováč, Jr. Several attempts were made to revoke the amnesties prior to 2017, but they were unsuccessful. See *Lexa v. Slovakia*, application no. 54334/00, 23 September 2008.

¹⁶ For a more detailed overview, see e.g. the blog-post by Michal Ovádek at <http://www.icconnectblog.com/2017/06/slovakia-tackles-its-constitutional-skeleton-in-the-closet/> (23 December 2019). For a more detailed discussion, see MAZÁK, J. – OROSZ, L.: Quashing the Decisions on Amnesty in the Constitutional System of the Slovak Republic: Opening or Closing Pandora's Box? *The Lawyer Quarterly*, Vol. 8, No. 1 (2018), available at <https://tlq.ilaw.cas.cz/index.php/tlq/article/view/265/250> (23 December 2019)

However, we can argue that any constitutional concept can be transformed and accommodated. For example, amnesties or clemencies can fulfil the role of a feedback mechanism to the criminal justice system. Moreover, in my opinion, amnesty or clemency can still be considered a “step outside the law”; however, it should not be too big a step – one that crosses the borders of *Rechtsstaat*. Lawyers like paradoxes, and constitutional lawyers like transcendental elements in law. Both sometimes hold the legal system together. However, our emotions might be the basic reason why we miss “good, old-fashioned” amnesties. But our constitutional system would probably work quite the same way even without the old concept of amnesty as an autocratic decision of a monarch.

Here let me present some other interesting observations included in the reviewed book.

Procházka recognises that direct election of the President (from 1999) does not necessarily mean strengthening the powers of the President (p. 22). He also identifies two conflicting trends. While the President has been elected directly by the People since 1999, his powers have weakened over the time – for example, he has lost the right to preside over meetings of the cabinet.

One of the strengths of Procházka's book is his criticism of the wording of the Constitution as often being devastatingly unclear and unsystematic (p. 34), and that together with the low respect that officials have towards it, it is too causally used (p. 34). For example, he points to the tension between the wording of the Constitution and the practice of executing the competences of President in the area of international relations. The Constitution puts the power to conclude and ratify international treaties into the hands of the President. The President can delegate the power to conclude treaties to the Government or its members. President Schuster did so in 2001 in regard to treaties that do *not* take precedence over domestic laws.¹⁷ However, in practice, members of the Government do also conclude treaties that take precedence over the laws of the Slovak

¹⁷ The decision was promulgated in the Collection of Law under no. 250/2001 Coll.

Republic (p. 41). For Procházka this is another sign of the ignorance of the Constitution.

Even though Procházka knows how unorderedly the process of adoption of the Constitution and constitutional amendments was, he is still willing to use a strict interpretation of the Constitutional wording. This is somehow paradoxical. By way of illustration, Procházka interestingly claims that the President has the right to not accept the resignation of the Government or a member of the Government (p. 35). He backs up his argument with the strict interpretation of Article 115 (2) of the Constitution and the word “if” in “*If the President of the Slovak Republic accepts the Government’s resignation (...)*”. In fact, he ignores section 3 of the same article, which includes the word “if”, even if we know that based on the jurisprudence of the Slovak Constitutional Court it expresses an obligation.¹⁸ However, he also reaches for other kinds of arguments. He uses the example of the Communist coup – the so-called Victorious February – in Czechoslovakia in 1948, when President Beneš accepted the resignation of democratic ministers while doing otherwise could have made it harder for totalitarian forces to come to power (p. 35).¹⁹ Hence, there are circumstances under which the President can reject the resignation of ministers.

¹⁸ The relevant parts of article 115 state the following:

(1) *The President of the Slovak Republic shall recall the Government if the National Council of the Slovak Republic passes a vote of no-confidence in it, or if it turns down the Government’s request to pass a vote of confidence in it.*

(2) *If the President of the Slovak Republic accepts the Government’s resignation, he will entrust it with the execution of its duties until a new Government is appointed.*

(3) *If the President of the Slovak Republic recalls the Government pursuant to paragraph 1, he/she empowers the Government, through a decision published in the Collection of Laws, to exercise certain powers until the appointment of the new Government. (...)*

¹⁹ For the context, see e. g. the interview with historian Ján Pešek at <https://spectator.sme.sk/c/20766124/historian-after-1948-czechoslovakia-was-paralysed-with-fear.html?ref=av-center> (22 December 2019) or the movie about the lawyer and Member of Parliament Milada Horáková, who was one of the first victims of show trials in the 1950s – *Milada* (2017, directed by David Mrnka).

Perhaps we can connect them to the role of the President to “*ensure due performance of constitutional bodies.*” (Art. 101 (2))

The constitutional definition of the President as an actor that ensures the due performance of constitutional authorities became the justification for wider discretion of the President when sharing the power to appoint public officials with the Parliament. Procházka provides a description of three cases when the President did not want to appoint a candidate elected by the Parliament. First is the case of the appointment of the Deputy Governor of the National Bank of Slovakia. Here the President was told by the Constitutional Court that he may review whether the nominated person indeed fulfils the conditions required by law (p. 56, p. 142). Later, in the case when the President refused to appoint Josef Čentěš as the General Prosecutor of the Slovak Republic, the Constitutional Court held that President may do so if the nominated person does not fulfil the conditions required by law, but also if there is some serious factor that questions this person’s ability to execute the office with decency in way that does not undermine respect towards the office or the whole body, or that will not conflict with the mission of the body and may lead to the obstruction of due performance of constitutional authorities (see the decision of the Slovak Constitutional court no. PL. ÚS 4/2012). Procházka basically states that this decision limited the prospective arbitrariness of the acts of the President, but he notes that in the application of this decision President Gašparovič’s decision to not appoint Čentěš did not fall into the scope of allowed discretion (p. 69, p. 144). Here Procházka merely describes the case law; he does not comment on it. The same occurs when Procházka writes about the refusal of Kiska to appoint a sufficient number of judges to the Slovak Constitutional Court, relying on the decision on the discretion of the President. However, in that case the Constitutional Court said that the President is obliged to appoint half of the elected justices,²⁰ and he has no other

²⁰ See Art. 134 of the Constitution:

(1) *The Constitutional Court consists of 13 judges.*

discretion than the one that consists of selecting half of the candidates (pp. 64-66).

Despite the fact that President Kiska as President lost many disputes with the Parliament, as the numbers show, Procházka describes him as an assertive and the most trustworthy President to have held the office (in regard to pools). He was assertive especially towards the judiciary, and his time in the office was marked by the conflict with Prime Minister Robert Fico and Minister of the Interior, Robert Kaliňák (p. 148). Kiska's predecessor, Ivan Gašparovič was, according to Procházka "*a relatively inactive President who enjoyed the contact with the people more than the technical, political and media obligations of the head of the state*" (p. 137). He enjoyed good cooperation with the Governments of Robert Fico, while he had a conflict with the Government of Iveta Radičová, whose coalition fell apart in less than two years. The firstly directly elected President, Rudolf Schuster, was in Procházka's opinion "*an offensive president whose personal traits sometimes covered his undoubted successes in the field of diplomacy*" (p. 130). And the first President of the independent Slovak Republic, Michal Kováč, in Procházka's eyes was "*a defensive President who protected the Republic against its total balkanisation (meaning instability, author's note) at the cost of the great personal discomfort and struggle*" (p. 118).

(2) *Constitutional Court judges are appointed by the President of the Slovak Republic for a period of twelve years upon a proposal by the National Council of the Slovak Republic. The National Council of the Slovak Republic proposes twice the number of candidates for judges that the President of the Slovak Republic is to appoint. (...)*

Procházka concludes his book with the message that the expectations from the public towards the President are too diverse. On the one hand, we expect him or her to be a neutral power that does not argue with other public officials. We want him or her to be a respectable old, impartial man or woman who has more majesty than a mundane politician. At the same time, we want him or her to represent us and our view of the world and politics. We want him or her to be active. What we admire in President Kováč is the way he stood up to Prime Minister Mečiar. Such diverse expectations basically cannot be genuinely fulfilled (pp. 174-175). Procházka shows that in the end the President must choose a political side. He is hence more king than impartial father (p. 176).

The last sentence of the book, a question, was only to be answered at the time of the book's publication: *Can we finally choose a queen?* Now we know – yes, we can.

It is impossible to guess to what extent books on the Constitution influence our personal choices. Maybe we are more influenced by the constitutional ideals promoted by pop-culture pieces. Many of the storylines in the Harry Potter books can be recalled, as an example. For instance, absolutely forbidden spells – unforgivable curses – can be easily connected with the protection of life, autonomy and dignity. But our democracy and rule of law intuitions also need a more solid procedural framework for understanding. Procházka provides the readers with such a framework while keeping the reading of the book pleasurable. Books of this kind are especially needed now in our region.

B e r d i s o v á, L.*

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