

MORE VOTES, BUT FEWER PARLIAMENTARY SEATS. SLOVAK CONSEQUENCES OF DELAYED BREXIT

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Abstract: *The article focuses on questionable amendment to the Electoral Law in the Slovak Republic adopted in response to the delayed withdrawal of the United Kingdom from the European Union (Brexit). Following the new redistribution of seats in the European Parliament reflecting the planned leave of the United Kingdom, such amendment to the Electoral Law determines which one of 14 members of the European Parliament elected in Slovakia will not take up his mandate until legal effects of Brexit occur. However, the European elections in May 2019 showed that the application of the amendment to the Slovak Electoral Law can lead to a jeopardy of the principle of equal suffrage, which is a common value for all democratic states, not just those who are Member States of the European Union.*

Key words: *Brexit, elections to the European Parliament, European Union, equal suffrage, Slovak Republic*

INTRODUCTION

The leaving of the United Kingdom of Great Britain and Northern Ireland (hereinafter ‘the UK’) from the European Union (hereinafter ‘Brexit’) is undoubtedly one of the most important European events of recent years. Following the British referendum on 23 June 2016 and the UK’s notification to the European Council on 29 March 2017, Brexit was initially scheduled for no later than 29 March 2019. On that day, 29 March 2019, the two-year period foreseen in Article 50 of the Treaty on European Union would expire. However, following the difficulties of approving agreement on the withdrawal of the UK from the European Union (hereinafter ‘the EU’ or ‘the Union’) in British parliament, the European Council has repeatedly decided on postponement of Brexit. For the first time, Brexit was postponed to 12 April 2019, for the second time to 31 October 2019.² For the purposes of this article, the second postponement is particularly important, as it has caused the UK to remain in the EU after the elections to the European Parliament (hereinafter ‘the EP’) held in May 2019.

The problem of “delayed” Brexit, i. e. the problem of Brexit’s postponement to the post-election period, is that the determination of the EP mandates for the 2019–2024 electoral period already foresees the EP without the UK. Therefore, the UK seats in the EP had been redistributed among other Member States. These “rewarded” Member States – Member States which had obtained more the EP mandates than in 2014 elections, included also the Slovak Republic (hereinafter ‘Slovakia’). In contrast to the EP elections in 2014, Slovakia should obtain one more seat in the EP for the 2019 elections. The total number of Slovak

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¹ The author would like to thank to Kamil Baraník and Lenka Dominová for helping with final adjustments to this article.

² See European Council decision of 11 April 2019 taken in agreement with the United Kingdom extending the period under Article 50(3) TEU.

seats in the EP increased to 14.³ However, as the UK was still part of the Union at the time of 2019 elections, the redistribution of British seats in the EP could not really take place and these seats could not have been assigned to other Member States, including Slovakia. Otherwise, the EP would have more members that determined by the EU rules. Thus, Member States had to find a way to deal with their EP mandates elected in May elections but waiting to Brexit.

In Slovakia, the described situation was resolved by an amendment to the Electoral Law, which the National Council of the Slovak Republic, the Slovak Parliament, had adopted only a few months before the expected EP elections.⁴ This amendment deals with one extra EP seat that will be assigned to Slovakia after Brexit. However, as it turned out later, the amendment was formulated inappropriately. Its equivocal statutory formulation foreshadowed the Electoral Commission's unfortunate decision, which raised serious doubts, especially in relation to the principle of equal suffrage. As it is well known, the principle of equal suffrage is a contentious issue of the EP elections stemming from the mechanism of degressive proportionality,⁵ which defines the redistribution of the EP seats among Member States.⁶

Therefore, the article will draw attention to the mentioned amendment to the Electoral Law and to the constitutional controversy arising from its subsequent interpretation and application. At the end, the author will outline the alternative solution that the legislator could have chosen and which would not cause controversy related to the generally accepted principles of the suffrage. Although this article is devoted to one provision designed only for one Member State, the conclusions could be used *pro futuro* also by other Member States. The principles of the suffrage, including the equal suffrage, are common to all (European) democratic states.

1. EQUAL SUFFRAGE

Before drawing attention to the disputed amendment, it is appropriate to briefly summarize the general importance of the equal suffrage principle. As it has been indicated, this amendment to the Electoral Law, supposed to be the reaction of the Slovak parliament to delayed Brexit, significantly affected the principle of equal suffrage.

³ The increase in the number of the EP seats in 2019 elections also concerns Austria (1 extra seat), Croatia (1), Denmark (1), Estonia (1), Finland (1), France (1), Ireland (1), Netherlands (3), Poland (1), Romania (1), Spain (1), Sweden (1) and Italy (3). See European Council decision (EU) 2018/937 of 28 June 2018 establishing the composition of the European Parliament.

⁴ The Act No. 37/2019 Coll. amending the Act No. 180/2014 Coll. on the conditions for exercising the right to vote.

⁵ See also MANGAS MARTÍN, A., LIÑÁN NOGUERAS, D. J. *Instituciones y derecho de la Unión Europea*. Madrid: Tecnos, 2012, p. 248.

⁶ The system of degressive proportionality is based on the idea of proportionality (more inhabitants = more seats). However, this system is modified by the fact that to less populous Member States are allocated more seats that would be allocated strictly in proportion to their population. The system of degressive proportionality results in a different weight of votes in different Member States. The weight of voters' votes in less populous Member States is higher than the weight of votes in larger ones. For more details, see ĽALÍK, T. *Voľby do Európskeho parlamentu – rovnosť, legitimita a demokracia alebo krátky úvod k veľkej téme*. In: Ľ. Cibulka – M. Giba (eds.). *Optimálny model volebného systému do Európskeho parlamentu*. Bratislava: PraF UK, 2010, p. 12.

The equality of the suffrage is one of generally accepted principles of democratic suffrage. The equal suffrage, together with the principle of universal suffrage, form the “backbone” of the electoral law in any democratic state based on the rule of law. The importance of equal suffrage also can be underline by defining it as the most important area of reflecting the general constitutional principle of the equality of people. The equal suffrage is based on the currently accepted (but probably idealistic) theory that all people are born equal and therefore, are equally competent to decide on public affairs, particularly through electing their representatives.⁷

The Slovak Constitution (hereinafter ‘the Constitution’) entrenches the principle of equal suffrage in Art. 30(3). Statutorily it is expressed in Section 2 of the Electoral Law (hereinafter ‘the EL’). The principle is also emphasized by international treaties binding Slovakia. As it has been indicated, the equal suffrage is closely linked to the universal suffrage. While the universal suffrage determines to whom the suffrage belongs (or to whom the suffrage should belong), the equality of suffrage determines the value or the weight of the vote of participating voters.⁸

The principle of equal suffrage, as well as the principle of universal suffrage, applies to both “parts” of the suffrage, the right to vote (active suffrage) and the right to stand for election (passive suffrage). The Constitutional Court of the Slovak Republic (hereinafter ‘the CC’) summarized both “parts” of the suffrage in its previous decisions.⁹ The equal right to vote, according to the CC, means that every vote of a person is to have the same legal status. The same legal status means that each voter has either one vote, or the same number of votes. The requirement for the same number of votes is also expressed by the famous motto “one man – one vote”. However, the requirement of equal vote must also be interpreted in such way that each vote has the same value or weight (“one vote – one value”). While the first interpretation represents the so-called *formal meaning* of equal right to vote, the second one represents *material meaning* of equal right to vote. As it will be explained in the following text, the controversial amendment to the Slovak Electoral Law, in particular its interpretation and application, has affected precisely the material meaning of equal suffrage (legal force and weight of a vote).

While the violation of formal meaning of equal suffrage would assign different number of votes to different categories of voters, the breach of the material meaning of equal suffrage means the unequal weight of individual votes cast by different voters. It is precisely the material meaning of equal suffrage, which is a challenge for democratic states today. However, said violation of material meaning of equal suffrage does not refers exclusively to the EL amendment responding to delayed Brexit. The problem with unequal weight of votes also occurred in the Slovak municipal elections held in November 2018. In those elections, the violation of material meaning of equal suffrage occurred in the case of elections to municipal representation in Bratislava, the capital of Slovakia. In those elections in Bratislava, the difference in the number of inhabitants

⁷ See LALÍK, T. *Ústavný súd a parlament v konštitučnej demokracii*. Bratislava: Wolters Kluwer, 2015, pp. 22–23.

⁸ For example, the right to vote should belong to everyone who has reached a certain age (principle of universal suffrage) and every such eligible voter should have the same number of votes (principle of equal suffrage).

⁹ Decision of the CC dated 15 October 1998, case No. PL. ÚS 19/98.

per elected mandate in various constituencies was in some cases up to 11-fold.¹⁰ In described case of Bratislava's municipal elections the phenomenon commonly called as malapportionment occurred. This happens when the weight of votes in different constituencies is significantly dissimilar due to the delimitation of constituencies themselves.¹¹ However, the violation of material meaning of equal suffrage due to the constituency set-up may also be caused by purposely “incorrect” delimitation of constituencies and its boundaries. That purposely insidious delimitation of constituencies is called gerrymandering. In the case of gerrymandering, the purpose of such delimitation of constituency boundaries is to weaken (or to strengthen, on the contrary) a certain group of voters in order to affect election results.¹² Described effect, the better elections result, is achieved regardless of the number of votes cast.

However, the case of equal suffrage violation which is the topic of this article does not refer to the size or boundaries of constituencies, which is the most common violation of material meaning of equal suffrage.¹³ The Slovak EP elections are held, as we shall mention, in single nation-wide constituency. In case of elections held in the single nation-wide constituency (as in Slovakia), the different weight of votes has can be caused by other factor than the size or geometry of constituencies.

2. AMENDMENT TO THE ELECTORAL LAW

In this part, the contents of the controversial amendment to the Slovak Electoral Law establishing the rule concerning the determination of Slovak EP mandate conditioned by Brexit's legal effects (hereinafter ‘the Brexit's mandate’)¹⁴ will be discussed. Firstly, we will describe how the amendment has identified (2.1) a political party affected by the Brexit's mandate. Subsequently, second part of this chapter (2.2) will be devoted to the issue of determining particular candidate (listed on party list affected by Brexit's mandate) waiting for taking up his seat.

2.1 Political Party Affected by Brexit

To answer the first question, it is necessary to clarify how the Slovak electoral system distributes the EP mandates among political parties participating in the elections.

¹⁰ For more details, see DOMIN, M. Bratislavské samospráve voľby a rovnosť volebného práva. *Justičná revue*. 2019, Vol. 71, No. 3, pp. 223–236.

¹¹ See SPÁČ, P. *Priama a zastupiteľská demokracia na Slovensku. Volebné reformy a referendá po roku 1989*. Brno: Centrum pro studium demokracie a kultury, 2010, p. 38 and following.

¹² For details on the issue of gerrymandering, see DANČIŠIN, V. Dvesto rokov Gerrymanderingu v USA. *Annales Scientia Politica*. 2012, Vol., No. 1, p. 45–53.

¹³ Mentioned aspect of the equal suffrage is dealt by the Venice Commission, who identifies it as “equality in voting power”. See COE. Code of Good Practice in Electoral Matters adopted by the Venice Commission at its 52th session (Venice, 18-19 October 2002). In: *Council of Europe* [online]. 25. 10. 2018 [2020-07-02]. Available at: <[https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2002\)023rev2-cor-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2002)023rev2-cor-e)>. p. 16.

¹⁴ The abbreviation ‘the Brexit's mandate’ is used to indicate the EP mandate assigned to Slovakia (14th mandate) that will be taken up by the elected candidate after legal effects of Brexit occur.

As required by the EU common rules, the Proportional Representation system in the EP elections applies in Slovakia.¹⁵ Among two options offered by the EU law, the list system and the single transferable vote system, Slovakia has chosen the first one. Therefore, voters choose among the candidates nominated by political parties or coalitions of political parties. The whole territory of Slovakia constitutes one single constituency (electoral district). The Slovak electoral system sets the minimum electoral (formal) threshold to 5% of the national vote. Therefore, only those political parties that exceeded this minimum threshold will be considered in the process of allocation of the EP mandates designated for Slovakia.¹⁶ No further considerations will be given to the votes cast for those political parties that did not receive 5 %.

Since the Slovak electoral system is based on the system of electoral quota, it is necessary to calculate it first, in order to determine the number of mandates belonging to respective political parties. The Slovak electoral system refers to this electoral quota as the “Republican Electoral Number”. The Republican Electoral Number is calculated as a dividing of valid votes cast for all political parties which received the minimum required votes (minimum threshold) by the number of 15. The number of 15 represents the number of seats in the EP designated for Slovakia (14 seats) plus one. The number of the EP seats for the respective political party is then determined by dividing the number of its valid votes by the Republican Electoral Number. Political parties receive a number of the EP mandates equal to the outcome of this dividing. If, after this calculation, not all mandates are allocated, the remaining seat(s) will be added to those political parties that have the largest number of residual votes after the process of dividing. If the number of residual votes of several political parties is equal, the largest number of total votes cast for respective political party will be decisive for allocating the EP seat. In case of equality of total votes, final decision will be taken by lot. These allocation rules can be termed as “the first round” (the rule of the result of dividing by the Republican Electoral Number), “the second round” (the rule of the largest number of residual votes), “the third round” (the rule of the largest number of total votes) and “the fourth round” (the rule of selection by lot) of the allocation of the EP seats.¹⁷ A similar procedure is followed when more EP seats than the number designated for Slovakia have been allocated. In this case, the surplus seat(s) would

¹⁵ See Council Decision of 25 June 2002 and 23 September 2002 amending the Act concerning the election of the representatives of the European Parliament by direct universal suffrage, annexed to Decision 76/787/ECSC, EEC, Euroatom. According to the provision cited, “*in each Member State, members of the European Parliament shall be elected on the basis of proportional representation, using the list system or the single transferable vote*”.

¹⁶ See Section 93 of the EL.

¹⁷ A simple example for a better understanding. Four political parties have exceeded the minimum electoral threshold: *A* with 900 votes, *B* with 400 votes, *C* with 300 votes and *D* with 200 votes. The Republican Electoral Number is 120, which has been calculated as a dividing of total number of votes cast for all four political parties (1.800) and number 15 (14 Slovak mandates in the EP + 1). In the first round of the allocation of the EP seats, the number of votes cast for each political party is divided by the Republican Electoral Number. After this operation, there were assigned 7 mandates to the party *A* ($900 \div 120 = 7$; 60 residual votes), 3 mandates to the party *B* ($400 \div 120 = 3$; 40 residual votes), 2 mandates to the party *C* ($300 \div 120 = 2$; 60 residual votes) and 1 mandate to the party *D* ($200 \div 120 = 1$; 80 residual votes). As we have allocated only 13 mandates, the second round of the allocation have to follow. In the second round, the 14th EP mandate will be assigned to the party *D* because it has the highest number of residual votes (80).

be deducted from the political party with the smallest number of residual votes after dividing. In the case when the same number of residual votes will be assigned to more political parties, the of total votes cast for political party will be decisive. In case of the same number of total votes, the decision by lot will be used again.¹⁸

In the Slovak doctrine the described allocation method of the EP seats is referred as the Hagenbach-Bischoff (or modified Hagenbach-Bischoff) quota,¹⁹ although some authors question that denomination in part.²⁰

The particular method how to determine which political party will be affected by the Brexit s mandate is regulated in Section 220a of the EL. The amendment to the EL in question incorporated the respective provision to the mutual, transitory and temporary provisions of the Law. Section 220a of the EL, titled as “The measures concerning the departure of the United Kingdom of Great Britain and Northern Ireland from the European Union”, reads as follows: “*If the United Kingdom of Great Britain and Northern Ireland remains a Member State of the European Union at the beginning of the 2019–2024 term, the mandate in the European Parliament gained on the results of the European Parliament elections in 2019 will not be taken up by the candidate of that political party or coalition which has received the smallest residue after the dividing, until the United Kingdom of Great Britain and Northern Ireland withdraws from the European Union.*” In case of the same residues after the process of dividing, the candidate of that political party or coalition that has obtained the smaller number of votes does not take up the office. In addition to that (secondary) rule, Section 220a of the EL includes the third rule: In case of parity of votes, the selection by lot will be used.

The new Section 220a, incorporated by the amendment to the EL in question, also stipulates the procedure for the communication of information about the elected candidate with the Brexit s mandate. The role of an intermediary between Slovakia and the EP is vested to the President of the National Council of the Slovak Republic.

2.2 The Candidate Affected by Brexit

The second question to be answered when interpreting the Section 220a of the EL consists of the issue which particular candidate of the political party with the “the smallest residue after the dividing” will be affected by the Brexit s mandate. The amendment to the EL in question naturally does not provide an explicit answer to this important question.

¹⁸ See Section 94 of the EL.

¹⁹ See OROSZ, L., MOLEK, P., SVÁK, J., ŠIMÍČEK, V. *Volebné právo a súdny prieskum volieb v Českej republike a Slovenskej republike*. Bratislava: C. H. Beck, 2016, p. 329 or PALÚŠ, I., SOMOROVÁ, L. *Štátne právo Slovenskej republiky*. Košice: UPJŠ, 2011, p. 280. The same method of the allocation of mandates is also used for the elections to the National Council of the Slovak Republic. See BRÖSTL, A. et al. *Ustavné právo Slovenskej republiky*. Plzeň: Aleš Čenek, 2015, p. 222.

²⁰ Some authors point out that the Hagenbach-Bischoff quota has not been applied in the right way in Slovakia. The problem lies precisely in the mechanism of allocation of residual seats not distributed in “the first round”, i.e. after the dividing by the Republican Electoral Number. The Slovak legislator has chosen the method of the largest absolute residual votes instead of the method of the largest average residues. For more details, see DANČIŠIN, V. Terminologické a matematické problémy s republikovým volebným číslom. *Justičná revue*. 2012, Vol. 64, No. 8-9, pp. 1073–1074.

In order to respond adequately, it is necessary to clarify the general mechanism of the EP mandates distribution determining the sequence, in which the EP seats are assigned to the candidates listed on party lists. This mechanism has remained untouched by the EL amendment in question.²¹

There are two main rules for the allocation of the EP mandates to individual candidates on lists of political parties. According to the first one, (1) the candidates receive seats in the order in which they appear on the ballot, that is, in the sequence in which they appear on the party candidate list.²² Thus, if the political party for example receives five EP seats, the first five candidates listed on the party list receive these EP seats. However, the described first rule is modified by a second one which takes the preferential votes cast to particular candidates into consideration. The EL allows the voters to award a so-called preferential vote up to two candidates listed on the selected party list. Under this rule, (2) the candidates who have received the most preferential votes among the candidates on the same party list will be given a priority in distribution of the EP mandates. However, for the application of preferential votes rule to be effective, the candidate must obtain at least 3% of total number of all priority votes cast for the respective party list. As a result of preferential votes, for example, the candidate who was placed at the sixth position on the party list might “skip” into a more beneficial position, if he received more preferential votes than any of the five candidates ahead of him. Thereby the EL, in determining the particular mandate holder, conditionally prefers the will of the electors over the decision of the political party. This corresponds with the constitutional principle of direct suffrage.²³

In regard to a candidate affected by the determination of the Brexit s mandate, the Section 220a of the EL does not contain any specific rule. Therefore, the abovementioned general rules will also apply to ascertain the respective candidate affected by the Brexit s mandate. Thus, the Brexit s mandate should be assigned to the candidate who is the last to receive a mandate within the party list on which such candidate is listed. Consequently, if the political party in question got five mandates in the EP, the Brexit s mandate would be the fifth in the order. First, however, the mechanisms of preferential votes must be applied to determine which of the candidates of respective political party will be the one to receive that fifth mandate. If the voters of this political party did not make use of the preferential votes, the rule of candidate order on the party list (or on the ballot) would be applied as an alternative.

The use of a different rule to determining the Brexit s mandate than the rule of the candidates’ order on the party list, or an arbitrary decision on this issue, it could be considered a violation of the constitutional principle of direct suffrage. In accordance with this principle, only voters decide on the final ranking of candidates on the party list, namely through the votes cast. The importance of preferential votes has also been emphasized by the CC, which stressed that the possibility of casting the preferential votes forms an essential part of the constitutional right to participate in the administration of public affairs

²¹ See Section 94(5) of the EL.

²² According to Section 85(3) of the EL, the order of candidates on the ballot shall always be the same as that on the registered party list.

²³ The principle of direct suffrage is expressed in Article 30(3) of the Constitution, as well as in Section 2 of the EL.

through the election of representatives, which is guaranteed in Article 30(1) of the Constitution.²⁴

3. RESULTS OF THE ELECTIONS AND INTERPRETATION OF THE AMENDMENT TO THE ELECTORAL LAW

The problematic nature of the amendment to the Slovak Electoral Law was fully revealed after the announcement of results of the 2019 EP elections. In this part, the article deals with some contentious issues of the amendment to the EL in question, especially connected to its interpretation and application. Firstly, (3.1) the results of the 2019 EP elections in Slovakia will be briefly outlined and subsequently two possible interpretations of Section 220a of the EL will be discussed. Potential implications for the constitutional principle of equal suffrage will be also taken into consideration. The first possible interpretation will be (3.2) the one chosen by the Slovak Electoral Commission, the second one will be (3.3) an alternative interpretation that possibly does not raise concerns related to the principle of equal suffrage.

3.1 Results of the Elections

A total of 1,006,351 valid votes were cast in Slovakia in the 2019 EP elections. That is only around 23 % of total number of eligible voters. The minimum threshold of 5 % of total valid votes, set by the EL, was attained by six party lists (five lists of individual political parties and one list of coalition of two political parties). Overall, 714,507 votes were cast for the political parties passing the threshold. Consequently, the Republican Electoral Number (the Slovak equivalent of commonly used term “electoral quota”) was calculated as 47,635 votes. Thus, to obtain an EP mandate (in Slovakia) the political party had to receive 47,635 votes. Based on the application of the mechanism described previously, 13 Slovak EP seats were assigned in the first round of allocation (the rule of the result of dividing by the Republican Electoral Number) and 1 seat in the second round of allocation (the rule of the largest number of residual votes.²⁵ The last one of 14 Slovak seats (the 14th seat), allocated in the second round by the rule of the largest number of residual votes, was assigned to the fifth most successful political party in the order. The fifth most successful political party in these elections obtained two EP mandates, similarly as the third and the fourth political parties. These two political parties (the third and the fourth), however, have acquired both their EP mandates in the first round of allocation as a result of higher number of valid votes cast.²⁶

²⁴ Decision of the CC dated 7 January 1998, case No. II. ÚS 48/97.

²⁵ Fourteen Slovak seats in the EP has been allocated among following political parties: (1) 4 seats for the coalition of political parties *Progresívne Slovensko* and *Spolu – Občianska demokracia*, (2) 3 seats for the political party *Smer – sociálna demokracia*, (3) two seats for the political party *Kotleba – Ľudová strana Naše Slovensko*, (4) two seats for the political party *Kresťanskodemokratické hnutie*, (5) two seats for the political party *Sloboda a Solidarita* and (6) one seat for the political party *Obyčajní ľudia a nezávislé osobnosti*.

²⁶ The data obtained from the official website of the Statistical Office of the Slovak Republic. See *Voľby do Európskeho parlamentu 2019. Definitívne výsledky hlasovania*. In: *Statistical Office of the Slovak Republic* [online] 5. 6. 2019 [2019-06-19]. Available at: <<http://volby.sr.sk/sk/data01.html>>.

3.2 The Electoral Commission's Interpretation

Which of Slovak political parties from those that succeeded in the 2019 EP elections should be “punished” by the Brexit s mandate? The Electoral Commission expounded Section 220a of the EL in a way that political party *Kresťanskodemokratické hnutie* (hereinafter ‘KDH’) gained that conditional EP mandate. This happened despite the fact that KDH did end up fourth out of five political parties passing the threshold.

The technique that the Electoral Commission applied in interpretation of Section 220a of the EL seems correct at first sight. The provision in question states that the Brexit s mandate should be awarded to the political party (or the coalition of political parties) with the “smallest residue after the dividing”. In regard to the EP elections, the EL specifies the process of “dividing” only in the first round of the allocation of the EP seats, in which the valid votes cast for particular political parties exceeding the minimum threshold are divided by the Republican Electoral Number (the electoral quota).²⁷ The Electoral Commission interpreted the Section 220a literally and decided that the Brexit s mandate would be awarded to KDH, because it attained the smallest number of residual votes (320) after the dividing of all its valid votes (95.558) by the Republican Electoral Number.²⁸ The residuals votes of all other political parties passing the threshold, including the third and the fifth political parties in the order (that received also two seats in the EP) were higher.

However, the manner in which the Electoral Commission interpreted mentioned provision, given the elections results in Slovakia, led to the allocation of the Brexit s mandate to that political party, out of the three possibilities (political parties with two allocated mandates), which did not receive the smallest number of valid votes. The same number of two EP seats were awarded to the political party *Kotleba – Ľudová strana Naše Slovensko* (the third most successful political party) with 118,995 valid votes (23.727 residual votes after the dividing) and to the political party *Sloboda a Solidarita* (hereinafter ‘SaS’; the fifth most successful political party) with 94,839 valid votes (47.205 residual votes after the dividing). Thus, the political party SaS was the one with lower overall number of votes than the political party KDH (95,588 votes in total for KDH and 94,839 votes in total for SaS). Therefore, **KDH received more valid votes than SaS, but received fewer full-value mandates²⁹ in the EP.** That is, SaS obtained two full-value mandates, while KDH one full-value mandate and one the Brexit s mandate (that is not full-value mandate). In essence, the contested decision of the Electoral Commission means that the weight of the votes cast for the political party KDH was less than the weight of the votes cast for the political party SaS. In other words, the votes cast for KDH were less valuable than those ones cast for SaS. Thus, the interpretation of the Electoral Commission has led to a **reduction of value of votes cast for more successful political contender** and, at the same time, to the corresponding increase of value of votes cast for the political party which was a less suc-

²⁷ This fact was also pointed out by the Electoral Commission itself in its statement asked by the CC. For more details, see also Section 94 of the EL.

²⁸ See the Resolution of the Electoral Commission adopted on its session of 25 and 26 May 2019, case No. 49/6/2.

²⁹ The ‘full-value mandate’ is a mandate which can be taken up by the elected candidate immediately. Therefore, its holder does not have to wait for Brexit.

cessful participant in electoral contest. Moreover, the second EP mandate in the order which was allocated to KDĽ and SaS cannot be considered equally strong. The second mandate assigned to SaS was obtained only in the second round of the allocation of the EP seats. Consequently, the second mandate was not obtained for a full “price” equal to the value of the Republican Electoral Number. Thus, the second EP mandate of SaS was obtained at the price of higher residual votes after the dividing, that is, for the price of 47.205 votes, instead of the price of 47.634 votes (the price equal to the Republican Electoral Number). On the contrary, the second mandate of KDĽ was obtained for the full price. In addition, the political party KDĽ even had extra 320 votes left. For example, if KDĽ had gained 321 less votes, paradoxically, it would have received two full-value EP mandates instead of just one full-value mandate and the Brexit s mandate. Its residual number of votes after the dividing would have been higher than the residue of the political party SaS. In short, **a lower number of votes would mean a better electoral results.**

Summing up so far, due to the decision of the Electoral Commission, **the principle of equal suffrage has been violated, as the votes of different voters did not have the same value or weight.** Arguably, the *material meaning* of equal suffrage will never be fully appreciated in practice, but the situation at hand, in which the political party with more votes achieves worse outcome is constitutionally hardly acceptable. This is all the more so because in the environment of the Proportional Representation System with single constituency the elections results are generally highly proportional. Moreover, in this case there might be also a **conflict with the principle of democratic legitimacy**, which stipulates that only voters can decide the success, or the failure of the participants of the electoral contest.

Had the Electoral Commission applied the second rule contained in Section 220a of the EL (the rule of the fewer number of votes) deciding who obtain the Brexit s mandate, the above-mentioned constitutional controversies would not have materialized. However, the rule of the fewer number of votes can be used as only the second rule in the order, i. e. when the first rule (the rule of the smallest residue after the dividing) cannot be applied. Thus, the Electoral Commission could apply the rule of the fewer number of votes only in case of a failure of the primary rule.

3.3 Other Possible Interpretation

Following the consequences of the Electoral Commission’s decision, is Section 220a of the EL contrary to the principle of equal suffrage? If there is no possibility to interpret the provision in question in different way (otherwise as the interpretation of the Electoral Commission) the conclusion might be that the provision is unconstitutional. However, the CC, the supreme guardian of the constitutionality in Slovakia, argues that if an interpretation that is conform with the Constitution exists, the public authority is obliged to choose it.³⁰ Thus, if there has been a possibility to interpret the provision in question differently, so that the result of its interpretation would accept the constitutional principle of equal suffrage, the Electoral Commission would have been obliged to choose such in-

³⁰ Decision of the CC dated 18 March 1999, case No. PL. ŤS 15/98.

interpretation. Indeed, according to Article 152(4) of the Constitution, all laws, as well as other generally binding legal regulation shall be interpreted and applied in conformity with the Constitution.³¹

That being said, does the provision of Section 220a of the EL permit a different interpretation than the one chosen by the Electoral Commission? Following only the grammatical method of interpretation, there would be probably a negative answer to that asked question. Yet, the grammatical (literal) interpretation is not the only one possible. The CC has also emphasized, that none of the methods of interpretation has an absolute priority.³² The correct application of a legal norm must be done on the basis of a suitable combination of several methods of interpretation, including teleological interpretation or Constitution-consistent interpretation³³. Public authorities should also take into consideration the history of adoption of interpreted law, its systematic context and relevant constitutional principles.³⁴ From relatively extensive CC s case-law it may be even apparent that the public authorities must in certain cases abandon the grammatical method of interpretation, i. e. to deviate from the wording of interpreted legislation. There are examples, in which such a deviation is essentially required by the purpose of the law.³⁵ Thus, a grammatical interpretation should be abandoned if it is contrary to the meaning and purpose of the interpreted provision. A deviation from the grammatical interpretation is possible also in order to ensure Constitution-consent interpretation of a legal norm.

So, how should Section 220a of the EL Law, in order to respect the constitutional principle of equal suffrage, be understood? The political party KDĽ, to which the Brexit s mandate was allocated, attempted to present the alternative interpretation in its motion submitted to the CC.³⁶ According to the opinion of this political party, the Constitution-consent interpretation of disputed provision should have been as follows: The rule of the smallest residue after the dividing must apply *after* the allocation of all 14 EP seats, not after the first round of allocation of seats, in which not all seats have yet been allocated. Following such interpretation, the Brexit s mandate would affect the political party SaS, whose one of its mandates (specifically the second mandate in the order) was assigned in the second round of the allocation. After the allocation of all EP seats, including the second

³¹ See DRGONEC, J. *Ústava Slovenskej republiky. Teória a prax*. Bratislava: C. H. Beck, 2015, p. 1585 and following.

³² Decision of the CC dated 4 May 2010, case No. III. ÚS 72/2010.

³³ The '*Constitution-consent interpretation*' is an interpretation of a legal norm which outcome is consistent with the Constitution. This method of interpretation is used mainly by the CC and represents a sort of compromise between abolishing the unconstitutional norm and preserving it in the legal order. Constitution-consent interpretation is applicable when a legal norm permits several different interpretations. In such a case, the interpretation that is in accordance with the Constitution should be chosen. The need for Constitution-consent interpretation was also emphasized by the CC. For more details, see decision of the CC dated 20 October 2015, case No. III. 375/2015 or LIČKOVÁ, M. Ústavně konformní výklad. In: K. Klíma et al. *Encyklopedie ústavního práva*. Praha: ASPI, 2007, p. 683.

³⁴ Decision of CC dated 16 October 2018, case No. III. ÚS 399/2018 and decision of CC dated 8 December 2010, case No. I. ÚS 306/2010.

³⁵ Decision of the CC dated 1 July 2009, case No. III. ÚS 341/07.

³⁶ See the motion of the political party KDĽ submitted to the CC objecting the unconstitutionality and illegality of the 2019 EP elections, dated June 2019. For the information on the outcome of this proceedings, see the conclusions of this article.

seat allocated for this party in the second round, SaS would have the smallest residue after the dividing. This residue would be practically zero (the number of 47.205, the residue of SaS after dividing in the first round, is lower than the number of 47.634 representing the Republican Electoral Number required for the acquisition of an EP seat). Indeed, the second mandate allocated to SaS was acquired for a lower “price” than what was the Republican Electoral Number (47,205 residual votes of for SaS after the dividing in the first round in comparison with 47,634 votes representing the Republican Electoral Number).

Using the above described alternative interpretation of the Section 220a of the EL, the Brexit s mandate would be allocated to the political party (within political parties with the two allocated EP mandates) that have received the least number of votes. Namely, the political party SaS received fewer votes than the political party KDĽ. Therefore, the consequence would be more **favorable to the material meaning of equal suffrage, since a lower number of full-value mandates would correspond to a lower number of votes cast in the elections.**

But, is the outlined Constitution-consistent interpretation of Section 220a of the EL possible? Does not such an interpretation represent too “creative” interpretation, distant too far from the EL statutory wordings? At least, the question still remains whether it is possible to apply the criterion of “the smallest residue after the dividing” to the allocation of EP seats in the second round, in which no process of dividing of the number of votes cast (by the Republican Electoral Number) actually takes place. If we would conclude that the provision of Section 220a has only one possible interpretation, namely the interpretation incompatible with the Constitution, the only solution will be to “remedy” the statutory provision as a result of the CC s decision in constitutional review proceedings.³⁷ However, constitutional review proceedings should have preceded the 2019 EP elections. Otherwise, such proceedings are not an effective solution of the issue. As neither of the eligible subjects had submitted the motion to initiate constitutional review proceedings, the CC did not have an opportunity to comment on the conformity of Section 220a of the EL with the Constitution.

CONCLUSIONS

The article briefly analyzed the amendment to the Slovak Electoral law adopted as a response to the fact that, despite initial expectations, the UK has remained the EU Member State even at the time of the 2019 May EP Elections. Following the British ongoing presence in the Union, the fourteenth Slovak EP mandate, newly acquired according to the rules adopted by the European Council in June 2018, was still not accessible.

The consequences of the amendment to the EL was that the Brexit s mandate (the 14th Slovak mandate in the EP) was assigned to the political party, (within the three possible political parties with the same number of allocated mandates) which has not received the lowest number of votes in the elections. Such interpretation of debatable provision of the

³⁷ The above described conclusions results, by means of the *argumentum a contrario*, from the decision of the CC dated 18 March 1999, case No. PL. ÚS 15/98.

Slovak Electoral Law has led to a shivering of constitutional principle of equal suffrage, its material meaning, since more votes ultimately resulted into fewer full-value EP mandates. Paradoxically, if the political party KDH, which was affected by the Brexit s mandate (according to the Electoral Commission’s decision), had received 321 votes less, it would have received more full-value mandate in the EP.

The decision of the Electoral Commission on determination of the political party affected by Brexit, was “reviewed” by the CC. In the motion to the CC, the affected political party proposed another way of interpretation of disputed Section 220a of the EL, described in previous part of this article, which allegedly would be consistent with the principle of equal suffrage. However, on 26 June 2016 the CC has rejected the motion.³⁸ Interestingly, at the time when the CC decide the complaint, only 7 of total 13 judges seats were appointed.³⁹ Thus, the very likely violation of the principle of equal suffrage was not removed even by the CC, the last national guardian of the constitutionality.

The equal suffrage represents one of the fundamental constitutional principles of the elections and suffrage in all democracies, as well as in states abiding the rule of law principle. The EU Member States are not an exception, despite the fact that the Charter of Fundamental Rights of the European Union does not literally include the principle of equal suffrage in the enumeration of characteristics of the EP elections.⁴⁰ The equal suffrage is a reflection of the fundamental legal principle of equality, which should be one of the pillars of legal systems of European states. Mathematically speaking, a precise degree of equality is probably hardly achievable in any electoral system. Nevertheless, a case of higher number of votes cast in elections leading to a worse result in that elections should not be acceptable. Such a case clashes with the fundamental principle of representative democracy, to which not only all EU Member States adhere, but upon which the entire EU itself has been constructed.⁴¹

How could the Slovak legislator have reacted more appropriately to such a specific and probably a unique situation of delayed Brexit? What solution would have respected the constitutional principle of equal suffrage, as well as the will of the people whose are to be represented by the members of the EP? Had the common European rules allowed the EP elections through the Majority System, the solution would have been simple. In that situation, the Brexit s mandate would have been allocated to the elected candidate with the

³⁸ Decision of the CC dated 26 June 2019, case No. PL. ÚS 15/2019. The motion was rejected due to procedural reasons (presumably due to “evident baselessness”), since it did not find the support of 7 judges which is requested by procedural rules. The president of the CC, I. Fiačan, disagreed with the rejection of the motion based on procedural reasons and he described his criticism in his dissenting opinion. This criticism lies in a call for adoption of a substantive decision making possible the protection of the constitutionality and legality of elections. Moreover, his dissenting opinion gives the impression that he agrees with the motion of the political party KDH.

³⁹ For details about the issue of selection of judges of the Slovak Constitutional Court, see DRUGDA, S. Can the President of the Slovak Constitutional Court Defend It? In: *I-CONnect* [online]. 2. 7. 2019 [2020-07-02]. Available at: <<http://www.iconnectblog.com/2019/07/can-the-president-of-the-slovak-constitutional-court-defend-it/>>.

⁴⁰ According to Article 39(2) of the Charter of Fundamental Rights of the European Union, members of the European Parliament shall be elected by direct universal suffrage in a free and secret ballot.

⁴¹ According to Article 10(1) of the Treaty on European Union, the functioning of the Union shall be founded on representative democracy.

lowest number of votes. However, as the EP elections must be held through a Proportional Representation System, a different solution within limits of this system must be found. As the Slovak electoral system expects the political parties to be subjects applying for voters' favor (not individual candidates personally), the Brexit's mandate should be allocated to the political party with the lowest number of votes. If such a rule was kept, the material meaning of equal suffrage would be respected, i.e. the fewer votes, the less full-value EP mandates received by the political party. In doing so, the determination of a particular candidate listed on the party list affected by Brexit could follow the same rules as it was previously applied by the Electoral Commission.