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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

SLOVAKIA

REQUEST

BY THE PRESIDENT PERTAINING TO THE APPOINTMENT OF JUDGES OF THE CONSTITUTIONAL COURT WITH REASONING FOR THE QUESTIONS ASKED AND ATTACHMENTS

Andrej Kiska
prezident Slovenskej republiky

Bratislava, December 8, 2016
No.: 4101-2016-KPSR

Mr. President
of the European Commission for Democracy through Law,

Upon meeting the representatives of the European Commission for Democracy through Law (hereinafter the "Venice Commission") in Bratislava on November 7, 2016 I have decided to seek from the Venice Commission an

Opinion

pertaining to the appointment of judges of the Constitutional Court of the Slovak Republic (hereinafter the "Constitutional Court"):

Question one:

Where the interpretation of the Constitution of the Slovak Republic (hereinafter the "Constitution") contained in the Ruling of the Constitutional Court PL. ÚS 4/2012 of October 24, 2012 (No. 390/2012 Coll.) concerning interpretation of Art. 102-(1) (t) and Art. 150 of the Constitution promulgated in volume 97/2012 of the Collection of Laws of the Slovak Republic (hereinafter the **"Interpretation of the Constitution 4/2012"**), including statement 2, pursuant to which the President of the Slovak Republic (hereinafter the "President") is authorized not to appoint a candidate of a constitutional office:

" ... solely due to the circumstance of failing to meet the legal requirements for being appointed or, due to serious circumstance pertaining to the candidate which raises reasonable doubts about the candidate´s ability to exercise the office in a manner not diminishing the high esteem of a constitutional office or that of the entire body, whose supreme representative that person would become, or in a manner not conflicting with the very mission of the body where – due to those circumstances – the due performance

of constitutional bodies might be compromised (Art. 101 (1) – sentence two of the Constitution of the Slovak Republic). The President shall give the reasons of non-appointment which may not be arbitrary.".

It has the **legal force of a constitutional law**, may its effects be **restricted** to the constitutional office of the Prosecutor General only, or pertain to **all constitutional offices and their members** who are appointed by the President, and are required – just as the Prosecutor General – to exercise their office independently, impartially and apolitically?

Question two

Where – pursuant to statement 2 of the Interpretation of the Constitution 4/2012 in conjunction with Art. 101 (1), the sentence 2 of the Constitution[1] – the President is to ensure due performance of constitutional bodies by his decisions, may that President's constitutional obligation be **restricted** to appointing or recalling a candidate to the office of the Prosecutor General only or, does that constitutional obligation pertain to **all constitutional officials** who take their offices upon being appointed by the Head of the State and being sworn in?

Question three

If the replies to questions 1 and 2 are affirmative, then there is a question whether the Interpretation of the Constitution 4/2012 adopted by the Constitutional Court Plenary may be amended by a **decision of the Constitutional Court Senate,** composed of three judges only, where – pursuant to the Constitution and pursuant to Act No. 38/1993 Coll. on the organization of the Constitutional Court of the Slovak Republic, on the proceedings before the Constitutional Court and on the status of its judges, as amended – is not competent to hold a hearing to interpret the Constitution and constitutional laws as contained in the Finding III. ÚS 571/2014 of March 17, 2015?[2]

Reasoning for the questions asked

It is not since July 4, 2014 but since February 29, 2016 that altogether three judge posts are not staffed at the Constitutional Court. Instead of 13 judges, there are only ten at the Constitutional Court. For the Plenary of the Constitutional Court to make decisions, seven of its members suffice.[3]

[1] The President represents the Slovak Republic both outwardly and inwardly and through his decisions **ensures due performance of its constitutional bodies.**

[2] Article 131 in conjunction with Article 128 of the Constitution.

[3] Article 4 (2) of Act No. 38/1993 Coll. on the organisation of the Constitutional Court of the Slovak Republic, on the proceedings before the Constitutional Court and on the status of its judges, as amended.

That situation is a consequence of the fact that in July 2014, President Andrej Kiska appointed one judge only. At the same time, he refused to appoint the remaining five of the six candidates nominated by the National Council of the Slovak Republic (hereinafter the "National Council") to fill three vacancies;[4] in June 2016, the President refused to appoint another two candidate judges of the Constitutional Court who were elected after the term of another judge of the Constitutional Court had expired in February 2016.

To provide further details the following should be noted:

I. Legal circumstances and the merits of the President´s decision-making pertaining to the candidates of Constitutional Court judges

1. Having heard the candidates (one of whom failed to appear), the President decided on July 2, 2014 to appoint candidate Jana Baricová a judge of the Constitutional Court and not to appoint the remaining five candidates (Juraj Sopoliga, Ján Bernát, Eva Fulcová, Miroslav Duriš and Imrich Volkai) and requested the Parliament (National Council) to elect four new candidates.

2. On July 6, 2016 the President did not appoint another two candidate judges of the Constitutional Court (Mojmír Mamojka and Jana Laššáková).

3. The legal basis for the President´s decision not to appoint those candidate judges of the Constitutional Court was:

- Art. 134 (3) of the Constitution;[5]

- Art. 101 (1) of the Constitution;[6]

- Ruling of the Constitutional Court No. 390/2012 Coll. - **Interpretation of the Constitution 4/2012**,[7] by virtue of which the President is authorized not to appoint a candidate in a constitutional office:

" ... solely due to circumstance of failing to meet the legal requirements for being appointed or, due to serious circumstance pertaining to the candidate which raises reasonable doubts about the candidate´s ability to exercise the office in a manner not diminishing the high esteem of a constitutional office or that of the entire body, whose supreme representative that person would become, or in a manner not conflicting with the very mission of the body where – due to those circumstances – the due performance of constitutional bodies might be impaired (Art. 101 (1) – sentence two of the Constitution of the Slovak Republic). The President shall give the reasons of non-appointment which may not be arbitrary.".

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[4] Pursuant to Article 134 (2) of the Constitution, judges of the Constitutional Court are appointed for a term of twelve years by the President following a nomination of the National Council. The National Council appoints twice the number of candidates from among of whom the President is to appoint judges.

[5] Pursuant to Article 134 (3) of the Constitution, only a citizen of the Slovak Republic who may be elected to the National Council, has reached the age of 40, is a law school graduate and has been practicing law for at least 15 years may be appointed a judge of the Constitutional Court.

[6] The President represents the Slovak Republic both outwardly and inwardly and through his decisions **ensures due performance of its constitutional bodies.**

[7] According to the doctrine, an interpretation of the Constitution and constitutional laws promulgated in the Collection of Laws possesses the **legal power of a constitutional law; it is a source of constitutional law.**

That Interpretation of the Constitution 4/2012 was supported by the Constitutional Court President in a concurring opinion of October 24, 2012 where (point 10) she supported the Finding's reasoning as follows:

In relation to ***personnel proposals submitted to the President*** *it is possible to observe ... that where the Constitution... without any further concretization presupposes the collaboration of the President in solving personnel issues, the President is in an* ***equivalent position to the National Council*** *(i.e. to the body that submits the personnel proposal) in the sense that the President ... is entitled to consider such personnel proposal autonomously and to decide if he would* ***accept*** *it or* ***dismiss*** *it.*

In Point 12 of the same opinion she adds: *"The Constitution does not bestow upon the National Council imminent competences in relation to the President who is directly elected by the people. Therefore if the Constitution uses the formulation (without adding any further conditions) "appoints and recalls",* ***it is impossible to accept such an interpretation of the Constitution that would impose upon the President a general obligation to accept the personnel proposals of the National Council without the possibility of dismissing them all".***

That concurring opinion of the President of the Constitutional Court shows clearly that the President is entitled to examine and possibly refuse even **all proposals made by the Parliament** to staff constitutional offices, including candidate judges of the Constitutional Court.

4. While fulfilling his constitutional responsibility to ensure due performance of constitutional bodies which include the Constitutional Court, by virtue of Art. 101 (1) and Art. 134 (3) of the Constitution and of the Interpretation of the Constitution 4/2012, the President examined all candidates with regard to their meeting the following criteria:

- whether they were citizens of the Slovak Republic,
- whether they were eligible for the National Council,
- whether they have reached the age of 40,
- whether they were a law school graduates and,
- whether they have been practicing law for at least 15 years.

5. The examination of the first four criteria was positive in its results for all candidate judges of the Constitutional Court.

6. The fifth criterion (at least 15 years of law practice) was examined in view of the fact that the Constitutional Court is the only constitutional body to protect constitutionality and, in principle, there are no remedies against its decisions, it enjoys extensive powers including, for instance, the power to overrule the Supreme Court and the function of a negative legislator.[8]

[8] Pursuant to Article 125 (1) of the Constitution on proceedings concerning the compliance of legal regulations, the Constitutional Court may declare Acts adopted by the National Council to be incompliant with the Constitution, constitutional laws and international treaties adopted by the National Council and which were ratified and promulgated in a manner stipulated by law.

7. That is the reason why the President focused on the candidates' expertise with special regard to their earlier practical experience, their previous publishing results and lecturing, or whether a candidate has possibly been awarded a scientific degree; for law practitioners, the President focused on whether the candidates were practitioners of prominence and how prominent they have become in the ambit of law they represent; as well as on their language skills. Basic knowledge of the candidates concerning the theory and practice of constitutional judiciary in conjunction with the protection of fundamental rights and freedoms in the European Union and at the level of the Council of Europe were examined as well.

8. Having regard to the oath of a judge of the Constitutional Court,[9] the President considered particularly if the candidates provide guarantees of absolute independence and impartiality, also paying attention to the candidates' personal motivations which made them stand for the office of a Constitutional Court judge.

9. The results of examinations of the requirement contained in item 6 of this information document pursuant to the criteria referred to in items 7 and 8 have made the President to make decisions not to appoint seven out of eight candidates for the office of Constitutional Court judge nominated by the National Council in 2014 and 2015, since he recognized **serious circumstances raising significant doubts in their ability** to execute the office of a judge of the Constitutional Court in a manner not contradictory to the mission of the Constitutional Court.

II. Chronology of the President's course of action and decision-making and the decisions of the Constitutional Court concerning the candidates' complaints and the President's motion to provide an interpretation of the Constitution

II. 1 Candidates not appointed by the President's decisions as of July 2, 2014

10. Having heard the candidates (one of whom failed to appear), the President decided on July 2, 2014 to appoint candidate Jana Baricová a judge of the Constitutional Court; as for the remaining five candidates, the President decided not to appoint them and requested the National Council to elect four new ones.

11. The five unsuccessful candidates filed complaints with the Constitutional Court. From those complaints, two proceedings ensued.

12. In the cases **II. ÚS 718/2014** and **II. ÚS 719/2014** ensuing from the complaints filed by Ján Bernát and Imrich Volkai, the Senate observed that the Interpretation of the Constitution 4/2012 was fully applicable. The proceedings involving the petitions of those two candidates were, however – upon their withdrawal – stayed. The President's decisions of their non-appointment have become irrevocable.

[9] "I promise on my honour and conscience that I will protect the inviolability of the natural rights of man and the rights of citizens, protect the rule of law, abide by the Constitution, constitutional laws and international treaties which the Slovak Republic has ratified and which were promulgated as stipulated by law, and to decide according to my best convictions, independently and impartially."

13. In proceedings **III. ÚS 571/2014,** the Constitutional Court overruled the President's decisions not to appoint the candidates Eva Fulcová, Miroslav Duriš and Juraj Sopoliga. At the same time, the President was committed to act again in the cases and to decide.

14. Finding III. ÚS 571/2014 was promulgated on March 17, 2015. The Chair of the Senate gave a **verbal** reasoning of the Finding saying that the President had been authorized to apply the Interpretation of the Constitution 4/2012, however, had failed to adequately reason why he had applied it.[10]

15. In a **written** reasoning of the Finding, however, the Senate of the Constitutional Court ruled out application of the Interpretation of the Constitution 4/2012. The application of that interpretation was **replaced** by a legal conclusion[11] pursuant to which the President is obliged to always appoint half of the candidates nominated for the office of a judge of the Constitutional Court without an option to reject them all. That legal conclusion has, however, never been promulgated verbally. Yet by law, the Constitutional Court is **fully bound by its Findings just as they are promulgated verbally.**[12]

The Senate of the Constitutional Court refused to correct that clear violation of constitutionality and rule of law. The Senate equally refused to explain why the reasons promulgated verbally are different from those given in the written Finding.

16. In light of these contradictions and the fact that the National Council, upon the non-appointment of the five candidates refused to elect new candidates for the office of judges of the Constitutional Court,[13] the President filed a motion in August 2015 to interpret the Constitution, seeking **specific details whether the Interpretation of the Constitution 4/2012 also applies to candidate judges of the Constitutional Court.**

17. The President's motion to interpret the Constitution was dismissed by the Plenary in the Ruling PL. ÚS 45/2015 of October 28, 2015 with seven votes in favor and four against the dismissal, while the four judges voting against have submitted their dissenting opinions. The dissenting opinion of Judge Ladislav Orosz is attached hereto.

18. As the Constitutional Court has not provided the requested interpretation of the Constitution, the President acted and with regard to three candidates (Sopoliga, Fulcová and Duriš) in terms of the **reasons verbally promulgated** of the Finding III. ÚS 571/2014 and again, in June 2016, decided to not appoint any of those candidate judges of the Constitutional Court.

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[10] This ensues absolutely clearly from the transcription of the promulgation of the Finding III. ÚS 571/2014 of March 17, 2015. See: www.concourt.sk (recently: www.ustavnysud.sk).

[11] Moreover, it is to be noted that the Senate of the Constitutional Court comprised of three judges is not authorised to change the legal opinion of the Plenary adopted within the proceedings to interpret the Constitution and constitutional laws pursuant to Article 128 of the Constitution.

[12] See Article 31 (a) of Act No. 38/1993 Coll. on the organisation of the Constitutional Court of the Slovak Republic, on the proceedings before the Constitutional Court and on the status of its judges, as amended, in conjunction with Article 156 (2) of the Civil Procedure Code.

[13] The National Council insisted that the President still has five candidates available, even though two of them had withdrawn their complaints; one candidate even gave a public statement saying that he was no longer a candidate (Imrich Volkai).

19. The President provided a **detailed reasoning** of his decision not to appoint in compliance with the requirements of the Interpretation of the Constitution 4/2012 and with the content of the legal opinion promulgated in March 2015 in the case III. ÚS 571/2014.

20. Those President´s decisions were repeatedly challenged by constitutional complaints of all three not-appointed candidates, joined by the not-appointed candidate Ján Bernát, even though he had withdrawn his constitutional complaint earlier; such complaint should, however, have been dismissed on the grounds of its late filing.[14]

21. The complaints of all four complainants were accepted for further proceedings even though before accepting the complaints the President had not been given opportunity by the Senate of the Constitutional Court to share his position, even though the Judge Rapporteur is required to do so by the Rules of Administration and Procedure of the Constitutional Court.[15]

22. The ruling on acceptance of their complaints does not express any reasons why the Senate of the Constitutional Court decided that way, particularly when accepting the complaint of Ján Bernát, who had initially withdrawn his complaint.

II. 2 Candidates not appointed by the President´s decisions of July 6, 2016

23. In November 2015, the National Council nominated two candidates for the office of a judge of the Constitutional Court to fill a vacancy as of February 29, 2016 when the term of one of the judges had expired.

24. The President, by the virtue of the Interpretation of the Constitution 4/2012 and having examined all relevant information concerning the candidates, decided not to appoint them as judges of the Constitutional Court.

25. In September 2016, candidate Jana Laššáková challenged that decision by a filing a complaint with the Constitutional Court; candidate Mojmír Mamojka did not file a constitutional complaint. On October 4, 2016, the complaint of Jana Laššáková was accepted for further proceedings and merged with the complaints of Ján Bernát, Eva Fulcová, Miroslav Duriš and Juraj Sopoliga to be jointly heard and decided.

III. Implications of narrowing down the Interpretation of the Constitution 4/2012 to the candidate for the Prosecutor General only

26. Should the Interpretation of the Constitution 4/2012 be narrowed down to the candidate for the Prosecutor General only, two groups of constitutional officials would ensue, both appointed by the President who is responsible for their proper functioning pursuant to the Constitution.

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[14] Article 25 (2) of Act No. 38/1993 Coll. on the organisation of the Constitutional Court of the Slovak Republic, on the proceedings before the Constitutional Court and on the status of its judges, as amended.

[15] Article 9 (2) of the Rules of Administration and Procedure of the Constitutional Court of the Slovak Republic (promulgated as No. 114/1993 Coll.), as amended.

27. **Group one** would comprise of a General Prosecutor candidate and the President would be authorized and obligated to examine... *serious circumstance pertaining to the candidate which raise reasonable doubts about the candidate´s ability to exercise the office in a manner not diminishing the high esteem of a constitutional office or that of the entire body, whose supreme representative that person would become, or in a manner not conflicting with the very mission of the body where – due to those circumstances – the due performance of constitutional bodies might be impaired."*

Group two would comprise of the remaining constitutional officials, judges of the Constitutional Court, the President of the Supreme Court of the Slovak Republic and others and the President would not be allowed to examine those serious circumstances and draw from them the necessary conclusions with regard to ensuring their due performance, even if they would objectively exist and the evidence therein would be at hand.

28. Such distinguishing of constitutional officials who are appointed (and recalled) by the President would result in forbidden discrimination on the grounds of a **different status** of a candidate for a constitutional office.[16] At the same time, the General Prosecutor candidate would be disadvantaged in the process of appointment, while the constitutional officials from the other group would, on the contrary, be given an advantage. **Forbidden discrimination** would ensue, in particular with regard to the fundamental right to access to elected and other public posts under **equal conditions** (Art. 30 (4) of the Constitution). Those public posts are all constitutional offices falling under the President´s power to appoint or recall and therefore, they fall within his responsibility when ensuring due performance of constitutional bodies (Art. 101 (1) of the Constitution).

IV. What are the options of the Senate of the Constitutional Court given by the Constitution and laws to amend or to change the Interpretation of the Constitution 4/2012?

29. The written[17] reasoning of the Finding III. ÚS 571/2014 has narrowed down the Interpretation of the Constitution 4/2012 to a Prosecutor General candidate only, allegedly due to the fact that there is only one candidate for one vacancy while there are two judge candidates for one vacancy in the Constitutional Court.

30. Firstly, it should be noted that **such a conclusion represents an amendment of the Interpretation of the Constitution 4/2012**; such amendment, however, may be provided by the Plenary of the Constitutional Court only; it is considered appropriate to recall here that the Plenary of the Constitutional Court had an opportunity to do so but did not make any use of it in the case PL. ÚS 45/2015.

31. Item 30 implies that Senate III of the Constitutional Court expanded its competence by interpreting the Constitution and constitutional laws in breach of Art. 128, in

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[16] Pursuant to Article 12 (2) of the Constitution, basic rights and freedoms on the territory of the Slovak Republic are guaranteed to everyone regardless of sex, colour of skin, language, faith and religion, political or other thoughts, national or social origin, affiliation to a nation or ethnic group, property, descent, or **any other status. No one shall be harmed, preferred, or discriminated against on these grounds.**

[17] It is appropriate to remind again that the verbal reasoning has clearly admitted the applicability of the Interpretation of the Constitution 4/2012 to candidate judges of the Constitutional Court.

conjunction with Art. 131 of the Constitution, pursuant to which the Plenary of the Constitutional Court has the exclusive competence to do so. Therefore, such amendment to the Interpretation of the Constitution 4/2012 **cannot be taken into account** and considered a component of the legal conclusion in the case III. ÚS 571/2014.

32. Should the Interpretation of the Constitution 4/2012 be restricted to the Prosecutor General candidate only, on the grounds that there is one candidate for one vacancy while there are two candidates for one vacancy of a judge of the Constitutional Court, then the **results** may be **absurd.** For instance, two candidates may be nominated to the President, of whom none would satisfy the requirements of the Constitution and law to be appointed due to, say, a lack of practical experience as a lawyer but the President would be obligated to appoint one of them, though aware that neither of the candidates meets the established requirements.

V. Relationship between the Interpretation of the Constitution 4/2012 and the President's competence to appoint judges of the Constitutional Court

33. As was already stated earlier, upon its promulgation in the Collection of Laws of the Slovak Republic, the Interpretation of the Constitution 4/2012 acquires the **power of a constitutional law** and is a source of constitutional order in the Slovak Republic.

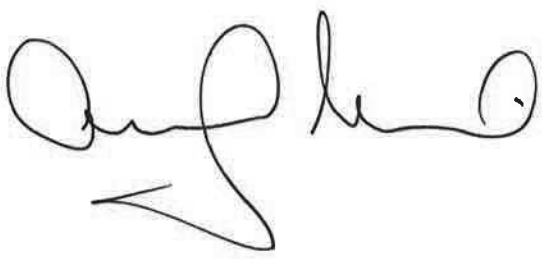
34. Pursuant to Art. 104 of the Constitution, the President takes the following oath: *"I promise on my honor and conscience to be faithful to the Slovak Republic. I will dedicate my effort to the well-being of the Slovak nation and the national minorities and ethnic groups living in the Slovak Republic. I will discharge my duties in the interest of citizens and will* ***uphold and defend the Constitution and other laws.****".*

35. The content of the quoted Art. 104 of the Constitution implies that the President **must abide** by the Interpretation of the Constitution 4/2012 until it has been amended or overruled by the Plenary of the Constitutional Court or, as the case may be, by an intervention of the constitutional assembly. Otherwise, he would wilfully violate the Constitution. The Constitution namely does not say anything allowing the Head of State not to respect the Interpretation of the Constitution 4/2012.

Distinguished Mr. President of the Venice Commission,

I am ready to provide any and all additional information necessary concerning the context of the questions raised and their reasoning.

Best regards



[note: annexes 1 and 2 are not included in document CDL-REF(2017)008 due to their length]

Annexes

1 Constitution of the Slovak Republic

2 Act of the National Council of the Slovak Republic No. 38/1993 Coll. on the organization of the Constitutional Court of the Slovak Republic, on the proceedings before the Constitutional Court and on the status of its judges, as amended

3 Ruling of the Constitutional Court of the Slovak Republic PL. ÚS 4/2012 of October 24, 2012 concerning interpretation of Art. 102 (1) (t) and Art. 150 of the Constitution of the Slovak Republic promulgated in volume 97/2012 of the Collection of Laws of the Slovak Republic

4 Concurring opinion of the President of the Constitutional Court of the Slovak Republic of October 24, 2012 concerning Ruling of the Constitutional Court of the Slovak Republic PL. ÚS 4/2012 of October 24, 2012

5 Finding of the Constitutional Court of the Slovak Republic III. ÚS 571/2014 of March 17, 2015

6 Transcription of the verbal reasoning of the Finding of the Constitutional Court of the Slovak Republic III. ÚS 571/2014 of March 17, 2015

7 Dissenting opinion of the Senate Chair Rudolf Tkáčik concerning the Finding of the Constitutional Court of the Slovak Republic III. ÚS 571/2014 of March 17, 2015

8 Dissenting opinion of Judge Ladislav Orosz concerning the Ruling PL. ÚS 45/2015 of October 28, 2015

Distinguished

Mr. Gianni BUQUICCHIO

President

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SLOVAK REPUBLIC

RULING

of the Constitutional Court of the Slovak Republic

PL. ÚS 4/2012-77

On October 24, 2012, the Constitutional Court of the Slovak Republic, in the Plenary consisting of its President Ms. Ivetta Macejková and Judges Ján Auxt, Peter Brňák, Ľubomír Dobrík, Ľudmila Gajdošíková, Juraj Horváth, Sergej Kohut, Ján Luby, Milan Ľalík, Lajos Mészáros, Marianna Mochnáčová, Ladislav Orosz and Rudolf Tkáčik deliberated in a closed session the petition from a group of Members of National Council of the Slovak Republic (MPs), represented by R. P. (MP), seeking interpretation of Article 102 para. 1 (t) and Article 150 of the Constitution of the Slovak Republic and renders the following

Interpretation:

President of the Slovak Republic has a duty to deal with the proposal of the National Council of the Slovak Republic to appoint the Prosecutor General of the Slovak Republic pursuant to Article 150 of the Constitution of the Slovak Republic and, where the latter has been elected in a procedure in accordance with law, to either appoint the nominated candidate within a reasonable period of time, or inform the National Council of the Slovak Republic that he will not appoint that candidate.

The President may not appoint a candidate only where the latter fails to satisfy the qualifications for being appointed set out by law, or due to circumstances of failing to meet the legal requirements for being appointed or, due to serious circumstances pertaining to the candidate which raise relevant doubts about the candidate´s ability to exercise the office in a manner not diminishing the high esteem of a constitutional office or that of the entire body,

whose supreme representative that person would become, or in a manner not conflicting with the very mission of the body where – due to those circumstances – the due performance of constitutional bodies might be impaired (Article 101 para. 1 –sentence 2 of the Constitution of the Slovak Republic).

The President shall give the reasons of non-appointment which may not be arbitrary.

Reasoning:

I.

Summary of the petition

1. On February 29, 2012 the Constitutional Court of the Slovak Republic (hereinafter the "Constitutional Court") received a petition of a group of 60 Members of the National Council of the Slovak Republic (hereinafter the “Group of MPs" or the “Petitioners") to institute proceedings to interpret Article. 102 para. 1 letter t) and Article 150 of the Constitution of the Slovak Republic (hereinafter also the “Constitution”).

2. The content of the petition suggests that the National Council of the Slovak Republic (hereinafter the "National Council”), in its Resolution No. 499 (5th parliamentary term, 2010-2012) of June 17, 2011 proposed to the President of the Slovak Republic (hereinafter referred to as the "President" or “President of the Republic") to appoint Prosecutor General of the Slovak Republic (hereinafter the “Prosecutor General") the candidate J. Č. Initially, the President was postponing his decision on the nomination while awaiting the decision of the Constitutional Court concerning the compliance with certain legal provisions of the Act of the National Council of the Slovak Republic No. 350/1996 Coll. of Laws on the rules of procedure of the National Council of the Slovak Republic, as amended (hereinafter the "Act on the Rules of Procedure"), under which, *inter alia*, the method of electing Prosecutor General has been changed from secret ballot to acclamation (PL. ÚS 95/2011). The President is said to have given that reason in a number of press statements. He did not, however, proceed with the appointment, even though it became known that the Constitutional Court dismissed the said petition. As of today, the President has not taken any decision on the petition of the National Council any differently either. The Petitioners emphasise that during that period, by contrast,

he publicly indicated the issue of appointing the nominated candidate as "a tertiary matter" and in a number of his statements he indicated his intention to leave the proposal to appoint the Prosecutor General to the National Council, which would ensue from the election held on March 10, 2012. He should have expressed the view that when considering a candidate he may also take other than statutory requirements of appointment into consideration.

3. The Petitioners believe that by doing so the President is violating his obligations under Article 102 para. 1 (t) and Article 150 of the Constitution which govern his mandate to appoint the Prosecutor General following a nomination by the National Council. The Constitution awards the mandate to appoint and withdraw the Prosecutor General to the National Council and to the President, combining the election of a candidate by the National Council and his appointment by the President. Involvement of the National Council in this process assures the democratic legitimacy of monocratic governance of the prosecutor´s office, which performs its authority over a defined period, without being subject to any political responsibility. However, in order for the election of a particular candidate to induce any legal effect, it must result in a nomination about which the President is obliged to decide. Any other interpretation would, on the contrary, mean a denial of the authority of the National Council in creating the said office and concentration of the full authority within the competence portfolio of the President, and would therefore be construed *contra constitutionem.* It is thus obvious that the role of the National Council in this process is to select a specific individual and nominate the same to the President to be appointed.

4. An equally important factor in this process is prohibition of an arbitrary exercise of the President's authority to interact. In this context, the Petitioners refer to the conclusions of the Constitutional Court in an analogous case, indicating that the President is entitled to consider whether a nomination meets "legal requirements, which however cannot be identified with arbitrary behaviour and substituted by a political consideration of the candidate. Like the President, the National Council – when considering if the nominated candidate meets the requirements ... must respect interpretation procedures allowed by doctrines, reasonably justify their conclusions and respect a binding interpretation by the Constitutional Court or courts, if any, which would be relevant in consideration of the matter" (PL. ÚS 14/06). In other words, in exercising their powers, the President just as the National Council are bound by the legality principle and the principle of no arbitrary decisions, and obliged to reasonably justify their decisions. It is obvious that the decision on the nomination

adopted by the relevant majority of the legislator cannot take the form of a press release or statement of its spokesman.

5. As for the question of time limit by which the President should decide on the National Council nomination, the Petitioners consider it apparent that if the absence of an explicit definition of the time limit were to be interpreted as "any time", it would not only be contrary to the principle of legal certainty but also contrary to the constitutionally adjudicated obligation of state bodies to mutually cooperate and efficiently collaborate in the exercise of those constitutional powers which are necessary for meeting their purpose. The absence of an explicit definition of the time limit is an expression of respect and dignity for the office of the President and his role in appointing of the Prosecutor General and, at the same time, it is a reflection of the assumption that the holders of power privileges of the state would exercise such privileges in accordance with their purpose which, *inter alia*, is to ensure proper operation of constitutional bodies. However, it cannot be attributed a meaning according to which the President would be given scope for arbitrary application – vested in the right not to act. With regard to the commitment to "exercise their collaboration in the exercise of constitutional powers" (I. US 7/96) it should, on the contrary, be interpreted in a way that the President must decide on the appointment of a candidate without undue delay.

6. The President, of course, is not required to accommodate any nomination of the National Council to appoint a candidate to the office of Prosecutor General. However, he shall be obliged to decide on such nomination, while being bound solely and only by the factors pertaining to compliance with legal and constitutional requirements. They are specifically the requirements of the candidate's eligibility as well as the requirements relating to the process of his selection. Where the nominated candidate meets such requirements, as is the case of J.Č., the President shall be obliged to satisfy to the National Council's nomination.

7. For these reasons, the Petitioners proposed that – having discussed the nomination – the Constitutional Court would give an interpretation of the following provisions: *"The President of the Slovak Republic, whilst exercising his powers pursuant to Article 102 para. 1 (t) in conjunction with Article 150 of the Constitution of the Slovak Republic, shall be obliged to decide on a nomination of the National Council of the Slovak Republic and appoint the candidate to the office of Prosecutor General without undue delay. In deciding on this nomination, the President of the Slovak Republic shall be obliged to consider and justify if the candidate nominated for the office of Prosecutor General meets the requirements for being appointed to*

this office stipulated by law, and if the candidate had been nominated to the office of Prosecutor General in accordance with the laws governing such election."

II.
Course of Proceedings

8. In a closed Plenary Session on March 21, 2012, the Constitutional Court held a preliminary discussion of the nomination and by Ruling PL. ÚS 4/2012-21 decided to submit the nomination to further proceedings pursuant to Article 25 para. 3 of Act No. 38/1993 Coll. of Laws on the organisation of the Constitutional Court of the Slovak Republic, on the proceedings before the Constitutional Court and the status of its judges, as amended (hereinafter the "Constitutional Court Act").

9. The Constitutional Court then sought the opinion of the President as a party to these proceedings. With regard to the content and significance of the interpretative question which is the issue in these proceedings, the Constitutional Court also sought the opinion of certain other state bodies, which – with regard to their field of expertise – were invited to provide relevant know-how on this question. Specifically, the Constitutional Court addressed the Prosecutor General, the National Council, the President of the Supreme Court of the Slovak Republic (hereinafter the "Chief Justice") and the Minister of Justice of the Slovak Republic (hereinafter the "Minister of Justice").

II. A
Opinion of the President of the Slovak Republic

10. In the opening of his opinion of May 31, 2012, the President gave his view on the question if there is or is not any dispute in the matter at all, as one of the requirements for the proceedings to interpret constitutional laws. He emphasised that the Constitutional Court is bound by the petition filed only to the extent that demonstrates that the matter is disputed, whereas it may only accept interpretation as contained in the request for relief or reject it. It cannot accept any other interpretation. The complainants base their assumption of the existence of a dispute only on inaccurate and incomplete statements by the President's press secretary and third parties. It is not true that he already decided on the appointment of the candidate J. Č. and that he refused to appoint him due to the fact that he distrusts the

candidate. If in an interview with Rožňava city deputy I.K., reported by the www.inforoznava.sk portal, he expressed in this manner he meant “distrust" with respect to the amount of doubts that have been associated with his election, whereby the “non-appointment" was only to apply until the verdict was passed by the Constitutional Court. However, even if he had reached any decision, under no circumstances would he publish it through an interview with local deputies, but he would deliver the relevant expression of his will in an appropriate form. As with regard to his statement of October 14, 2011, in which he referred to the appointment of J. Č. a tertiary issue, this needs to be viewed in the context of events taking place a few days earlier when the Government failed in a vote of confidence, which resulted in subsequent constitutional crisis, necessitating a constitutional amendment. At the same time, the country faced a risk of health-care collapse, due to mass resignations by medical practitioners. It is obvious that at that moment the issue of the Prosecutor General appointment could not have been given higher than the third place on the list of priorities.

11. The submitted proposal consists of two interpretative issues, the first of which relates to the time limit by which the President is to decide on the proposal from the National Council for the appointment of the Prosecutor General. According to the President, there is no dispute about his obligation to decide on the proposal without undue delay. The Constitutional Court has previously held that the President is obliged to decide "within a period which is appropriate under the circumstances of the case" (I. US 7/96), i.e. without undue delay after all constitutional and other requirements are met, pertaining to the application of his constitutional power, which is the synergy in the exercise of constitutional powers by another component of state power, in this case the National Council. The President does not question this opinion in any way, and even the National Council has never expressed the view that the President does not act "without undue delay" when he decided to await the decision of the Constitutional Court pertaining to the legality of a candidate for the Prosecutor General post. The Proposal to adopt a resolution, that would express such opinion, was rejected by the National Council (5th parliamentary term, 2010-2012, 28th session, ballot No. 144 of February 8, 2012). However, since the Constitution, by the use of the form “appoints" (not “shall appoint") does not impose the duty to appoint, but allows to assess whether the Parliament-elected candidate fulfils the requirements as defined for the office of the Prosecutor General, it cannot be considered as undue delay, if the Head of State decides on the appointment of a candidate, whose election has been accompanied by a great deal of doubt, after the verdicts of the Constitutional Court on the petitions, filed by candidates D. T. and J. Č.

On the contrary, such postponement should be considered as reasonable, since consideration of these issues is – in this case – a necessary pre-requisite for the President's decision.

12. The execution of constitutional powers of a state body cannot be construed to also imply its authority to determine the time limit, by which another state body is to fulfil its commitment to cooperate in discharging such powers. Unless such time limit was explicitly defined by the constitutional assembly, it can only be deduced from the commitment by the other state body to collaborate, conferred upon it by the constitutional principle of cooperation between the two state bodies. However the duration of this time limit may vary and is subject to only the fulfilment of constitutional or other requirements pertaining to the application of such constitutional authority of the individual component of state power, which represents its collaboration in the exercise of constitutional authority of another component of state power. Only after these requirements are met, a commitment is established by the relevant components of state power to collaborate without undue delay, as the Constitution does not define any additional circumstances or requirements (nor time limits), being conditional upon its cooperation. According to the legal opinion of the Constitutional Court (I. US 7/96) such interpretation of the constitutional principle of cooperation between components of state power ensures not only actual exercising of constitutional powers by each of them, but also their application by corresponding time limits. At the same time this interpretation rules out the need for setting a time limit for a decision by the President on the proposal from the National Council for the appointment of a candidate to the post of Prosecutor General.

13. It follows that the President acts in compliance with the Constitution if awaiting a decision of a competent authority, in this case the Constitutional Court, on the question whether or not the constitutional requirements pertaining to the execution of the President's constitutional powers in appointing the candidate for the Prosecutor General were met. Only after it will become obvious that these constitutional conditions are met or not, an obligation on part of the President to decide without undue delay takes effect. Finally, the Petitioners themselves seek interpretation, according to which the President, in exercising the aforementioned authority, is to consider and give reasons, whether the proposed candidate was elected in accordance with legal regulations that govern such election. However, he himself is not entitled to consider whether the candidate for the post of the Prosecutor General has not been the previously elected candidate D.T. or whether the election of

candidate J.Č was conducted in accordance with the Constitution and laws, referred to by the Constitution. Admittedly, he has reasonable doubts in this respect, namely with regard to a pending complaint proceedings initiated by D.T., to assess these issues, however, is the legitimate right of the Constitutional Court. After all, the President in this regard would not be able to present evidence on disputed facts, nor to rule on legal questions relating to the constitutionality of the election. The only thing he can do is to temporarily postpone the decision on the appointment of the candidate proposed by the National Council until the Constitutional Court's decision with regard to the filed complaint, as it is his decision that may have a significant impact on consideration of whether or not the requirements for appointment of the candidate were met. Beyond that, the President added that in this case, another matter is of concern, namely, whether the National Council itself acted without undue delay. Although the National Council commenced the election of a candidate for the Prosecutor General appointment as early as in November 2010, subsequently it did not continue with the election process for a period of five months, waiting for an amendment to the Act on the Rules of Procedure in order to achieve the election of a candidate selected by the coalition political parties, to finally proceed with the election under the amended law, after the Constitutional Court ruled on suspending its effectiveness. Contrary to the President's approach, the inaction of the National Council was not explained by any constitutional, but solely political reasons.

14. The President reiterated that he considers the proposed interpretation, contained in the first sentence of the Group of MP´s Petition, as self-evident and undeniable. Its content is not a source of dispute between the President and the National Council, nor the President and the Petitioners. Its adoption would therefore be contrary to the constitutional requirement of disputability of the matter and the petition should be rejected as evidently unfounded. However, as he noted, there is no dispute either with respect to the interpretation contained in the second sentence of the Group of MP´s Petition, by which he continued in his statement to the second interpretative issue under consideration, which is namely the existence of an obligation to "consider and give reasons", whether the candidate fulfils the criteria for appointment set out in legislation and whether he was elected in accordance with law.

15. Interpretation of this question, referred to by a Group of MPs as arguable, was earlier rendered by the Constitutional Court in a clear-cut manner, in the matter of

appointment of the Vice-Governor of the National Bank of Slovakia (PL. ÚS 14/06). The Constitutional Court stated at that time, that through its vote the National Council "expresses political approval of the candidate, does not however attest in a binding manner his compliance with the applicable requirements", which must be met by the candidate. The compliance with requirements is considered only as a preliminary question prior to the vote itself on the candidate's approval, while the binding nature of its consider relates only to the National Council itself and is not binding for the President, who is also entitled to consider the compliance. The conclusions arising from the quoted interpretation by the Constitutional Court shall be applied in this case *per analogiam*, meaning that the President in exercising his powers under Article 102 para. 1 letter t) in conjunction with Article 150 of the Constitution, considers whether a candidate for the post of Prosecutor General nominated by the National Council meets the requirements for appointment to this post as stipulated by law, and whether he has been elected as a candidate for appointment to the post of Prosecutor General in accordance with the laws that govern this election. If he arrives at the conclusion that those requirements are not met, he will reject such a proposal.

16. In the quoted case, the President rejected the appointment of Vice-Governor on the grounds that the proposed candidate did not satisfy the legally required qualifications for the appointment, and therefore even the Constitutional Court had no reason to deal with interpretation whether – had he met the requirements – the President was obliged to appoint him or whether the President could refuse his appointment. In their petition containing extensive quotations from the Ruling's reasoning PL. ÚS 14/06, the Petitioners fail to reflect this fact sufficiently. In addition, the dispute between the President and the Petitioners with regard to the interpretation contained in the second sentence of the proposal by the Group of MPs currently does not exist and that the Constitutional Court has already resolved an analogous dispute in the past, the origination of such dispute is also in the future objectively limited. Even if the President would not appoint the proposed candidate and – when deciding on the proposal – he would consider and give reasons that the proposed candidate to be appointed to the post of Prosecutor General does not meet the requirements provided for by law or that he was not elected as a candidate to be appointed to the post of Prosecutor General in accordance with law governing such election, the dispute concerning interpretation brought by the Group of MPs would not have occurred, as the President would have, in line with this interpretation, considered and given reasons of the failure to meet the requirements pertaining to the appointment of the candidate. In that case, a dispute could

only have ensued with respect to constitutionality of the consideration and reasoning itself. The petition brought by the Group of MPs however would have neither resolved nor prevented this dispute. That would be true even if indeed all the requirements above were met, yet the President not appointed the selected candidate for the post for other reasons. Still, the question whether he was authorised to proceed that way could indeed be contested, but it would not be possible to resolve even this dispute by adopting the interpretation contained in the second sentence of the draft interpretation.

17. From the wording contained in recital of the petition, according to which the Petitioners consider as correct only interpretation, according to which the President is entitled not to grant the appointment only if the elected candidate either does not satisfy eligibility requirements provided for by law and the Constitution or if he was elected in breach of provisions for the election of candidate for the post of the Prosecutor General, it follows that the Petitioners consider as a moot point interpretation of the term “appoints" contained in Article 102 para. 1 letter t) and Article 150 of the Constitution. This, of course, involves an interpretation relating to the issue of whether the term “appoints” implies a duty or just a right for the President to appoint the proposed candidate who otherwise meets constitutional and statutory requirements for being appointed, including the requirement of being duly elected. The Constitutional Court had previously accepted interpretation of the expression “appoints and dismisses" (PL. ÚS 14/06), stated however that its substance is not clear and that is necessary to consider it in the context of other relevant provisions of constitutional rules on a case-by-case basis, whereas it is necessary to take into account the constitutional system of relations of all interacting state bodies. The interpretation of the concepts of “appoints” and “dismisses” contained in several articles of the Constitution in relation to the appointment and recalling of the Prosecutor General has not been adopted yet.

18. The President believes that the system of relationships of all state bodies that interact in the process leading to the appointment of the Prosecutor General it is obvious that the President cannot only have a notary power in this regard. Otherwise, the Prosecutor General selection would be exclusively in the hands of one component, namely of legislative power. Such a constitutional approach would not contribute to ensuring a versatile view on the selection of candidate and especially would defy the fact that in a modern democratic state and rule of law, the principle of power division cannot be understood only abstractly and in isolation: it must be reflected in factual relationships between bodies representing the

components of various types of power, combined with a system of mutual checks and balances. The President points out that public prosecution plays an important role in the society and with regard to its functions, it cannot be included in the system of executive authorities. Some of its functions are even somewhat typical of judicial power, such as discretionary powers in preliminary criminal proceedings or authority to approve a settlement. The Prosecutor General himself, who heads the public prosecution and is not politically accountable with regard to his office, holds, among other major powers, a legitimate active role. That is to bring forward an action for a decision on the compliance of laws with the Constitution. However, interpretation of the term “appoints" is not the subject of the petition brought by the Group of MPs and it could not have even become a topic for dispute. The question of whether the President in considering the proposal has only a notary or also a decision-making power, would arise only after it would be clear from the Constitutional Court decisions whether the candidate was elected by the National Council in accordance with the Constitution and other laws. Otherwise the refusal to appoint would be made on the grounds that the requirements for his appointment were not satisfied, and the question of any discretionary power of the President would not arise.

19. For these reasons, the President proposed the Constitutional Court to reject the petition by the Group of MPs in its entirety as apparently unfounded, as there was no evidence of dispute between the National Council and the President.

II. B
Statement by the First Deputy Prosecutor General of the Slovak Republic

20. On behalf of the Prosecutor General, whose post was not staffed in the course of these proceedings, his first deputy responded. In his statement of April 30, 2012 he contested the existence of a legal interest to give the proposed interpretation, or its ability to resolve the dispute in question. Interpretation of the Constitution, which the Petitioners defined in the first sentence of the petition, namely that the President is obliged to decide on the appointment of a candidate for the office of the Prosecutor General without undue delay, is factually correct on the one hand, and even self-evident and indisputable; on the other hand, however, it is not able to resolve the dispute about the interpretation which, according to the Petitioner, exists between the Petitioners and the President. In that case, first of all it is not possible to restrict the factual basis only to the fact that the President has so far not decided

on the nomination to appoint J.Č. to the post of Prosecutor General, as maintained by the Petitioners. From the President's statements it is evident that he is aware of his obligation to decide on the nomination to appoint the Prosecutor General "without undue delay". But he does not consider as undue a delay the pending proceedings of the Constitutional Court concerning a constitutional complaint in which candidate D.T. seeks annulment of the vote taken by the National Council on June 17, 2011. The proposed interpretation would therefore not affect the solution of the genuine dispute over the interpretation of the Constitution, as this is a question whether the President may postpone his decision on the appointment of the Prosecutor General (a delay which is pointless) if there is a proceeding before the Constitutional Court dealing with a constitutional complaint that is in its nature a preliminary question for the President's decision. Therefore, if the Petitioners sought to achieve solution of this dispute, they should have worded their request for relief differently. The first deputy is of the opinion that the ongoing case is the reason why the President may temporarily defer his decision, but on condition that the constitutional complaint is not apparently unfounded, or that the constitutional complaint raises relevant questions of fact (not only questions of law) which the President would not be entitled to deal with alone. These also include the question of whether a secret ballot of the National Council actually took place in a secret way.

21. In the second sentence of the statement of claim, the Petitioners request that the Constitutional Court rule that – prior to taking a decision on the appointment of the Prosecutor General – the President is entitled and obliged to consider whether the proposed candidate meets the legal qualifications to be appointed, not only of substantive law but also qualifications in relation to the election process. Also this interpretation of the Constitution is correct and it is beyond reproach, but again it gives no answer to the question of whether the President is entitled not to satisfy the National Council's nomination even if all legal qualifications for appointment of the candidate are satisfied. The reasoning of the petition implies that the Petitioners actually seek a different interpretation under which the President in such a case does not have the right to reject appointing the proposed candidate for the Prosecutor General. In this instance, however, the content of the reasoning does not correspond, or is not aligned with request for relief of the petition. And yet this is a question deserving real attention. In accordance with Article 150 of the Constitution the President "appoints" the Prosecutor General, based on a nomination by the National Council, while it is not clear whether the term allows his discretion, and therefore whether it includes also his right not to satisfy the proposal. It is in fact this interpretation of the term "appoints" that the

Constitutional Court adopted in its previous decisions (I. US 39/93). For the Constitutional Court to answer to such question, however, it is first to be established whether the question has really become a matter of dispute between the Petitioners and the President. It appears namely that the President is delaying his decision exactly due to the pending proceedings regarding a constitutional complaint by D.T., and not due to the fact that he doesn't want to appoint the candidate J.Č, even though he considers the qualifications for his appointment to be satisfied. Hence, neither the representations by the Petitioners nor other facts imply that there would be a dispute with regard to the interpretation of the Constitution. The Constitutional Court should therefore reject the motion for interpretation of the Constitution.

II. C

Other opinions

22. The Minister of Justice in his opinion of May 10, 2012 stated that he did not consider it appropriate to comment on the matter, as this exclusively is an interpretative dispute between the President and the National Council.

23. The Speaker of the National Council and the President of the Supreme Court did not comment on the petition by the Group of MPs.

24. The Constitutional Court served the statements received to the Petitioners in case they may wish to respond, through their representative. They however did not make use of that eventuality.

III.

Own consideration

25. In accordance with Article 128 of the Constitution the Constitutional Court interprets the Constitution or constitutional laws in conflicting cases. A decision of the Constitutional Court on interpretation of the Constitution or constitutional laws is declared as defined by law. The interpretation is generally binding from the date of its promulgation.

26. The Constitutional Court ruled in the case in its plenary meeting pursuant to Article 131 para. 1 of the Constitution, as amended, under which it adopts decisions in plenary meetings also in cases under Article 128 of the Constitution. As Article 48 of the Constitutional

Court Act further provides, a motion to provide interpretation is dealt with by the Senate of the Constitutional Court. In doing so, the composition in which the Constitutional Court decides is not significant, since by entry into force of the Constitutional Law No. 90/2001 Coll. of Laws amending Article 131 para. 1 of the Constitution has made that legal provision obsolete (PL. ÚS 14/06).

III. A

Definition of the subject-matter of the dispute

27. In proceedings to interpret constitutional laws, the Constitutional Court is bound by a petition of the entitled entity within the scope in which the case was established to be conflicting (I. US 20/94, I. ÚS 7/96). However, the subject matter of interpretation is defined by a petition to interpret a particular provision of the Constitution or constitutional laws, not by a proposal of specific interpretation by the parties involved. The Constitutional Court is also authorised to render such an interpretation of the conflicting provision which will not be identical with any of the submitted versions (I. US 30/99). Upon filing a petition and having heard the parties to the proceedings who may, in relation to the proposed interpretation of the provisions, submit a counter-proposal, subject-matter of the dispute to be decided by the court (provided that all other proceedings-related requirements are met) is usually settled (I. US 3/98 of January 22, 1998). In doing so, the court takes not only the wording of the proposed interpretation as a basis, but also the content of its reasoning.

28. In this case, the Constitutional Court considered the petition presented by a Group of MPs and their various statements and concluded that there is a relevant dispute over the interpretation of the constitutional provisions between the parties. The Petitioners take as a basis an implicit assumption that, although the President has the right to consider a proposal within a reasonable period of time depending on the specific circumstances, the timeframe for his decision must not exceed a certain maximum (limit) scope. The period during which the post of the Prosecutor General is not occupied must not impair due performance of constitutional bodies, and this is exactly what would happen if this condition continued for several months or even longer. The President, on the contrary, is of the opinion that a justified postponement, due to the nature of the case, cannot be subject to such time limit and, therefore, as long as relevant doubts regarding the satisfaction of legal requirements for the appointment remain, he is not obliged or authorized to decide on the proposal.

29. It is furthermore clear from both statements that while the Complainants believe that the President may refuse to appoint a candidate "just and only" provided that the candidate fails to satisfy the constitutional and statutory prerequisites for appointment to this post, the President does not agree with such an interpretation. He points out that – with regard to the status of public prosecution and the Prosecutor General who is at the head of the institution – the selection of the Prosecutor General made exclusively by the legislature, with the President in just a notary function in his appointment, would not suit the principles of democracy and the rule of law – respecting three pillars of state power.

30. It should be stressed that the said dispute about the interpretation is not abstract, but it genuinely exists in relation to the President's conduct when deciding on the proposal by the National Council to appoint to the post of Prosecutor General J.Č, who was elected by the National Council on June 17, 2011. An interpretation of the Constitutional Court, giving answers to issues representing the subject matter of the dispute, would then allow to decide on this petition. Given that the proposal has not been resolved to date, it is obvious that time aspect of decision-making is of importance for solving the dispute. Importance however cannot be denied to another submitted question either, concerning the scope of discretion by the President when considering the proposal by the National Council. Although the President considered the question as premature, because in the case of candidate J.Č doubts remained as to whether he was elected in accordance with the law. His opinion concerning the scope President´s discretion in exercising the power in question, clearly differs from that of the Petitioners. Provided that it is his interpretation which is correct, he would be able to refuse to appoint the proposed candidate for other reasons as well. Yet he does not claim he would not appoint the proposed candidate without undue delay where there are no doubts pertaining to the legality of his election but, to the contrary, he admits to subsequently take a view making it possible to reject the proposal also for other reasons. After all, the current status quo is indicative of that: having refused the constitutional complaint by D.T. (IV. ÚS 433/2012), there is no case before the Constitutional Court which might call into question the manner in which J.Č. was elected as a candidate for Prosecutor General. In the said proceedings, the Petitioner failed in seeking the Constitutional Court to order the National Council to submit a proposal for his appointment of the President, because he believed to have obtained a simple majority of votes in the election held on May 17, 2011. At the same time he moved to cancel the result of the vote taken by the National Council on June 17, 2011. Therefore, as long as the President considers the outcome of the proceedings to be relevant

for his further action, it is obvious that he does believing that he can reject the proposed candidate even if the legal requirements for his appointment are fulfilled. Apparently, there is not a reason for rejecting the petition due to lack of conflict in the case.

31. Based on the above, the Constitutional Court considers as the subject matter of this proceeding an interpretation to answer the questions whether the President, pursuant to Article 102 paragraph 1 letter t) and Article 150 of the Constitution, is obliged to appoint a candidate for the post of the Prosecutor General proposed to him by the National Council where the latter satisfies the constitutional and statutory prerequisites for the appointment, and what is the time frame for the exercise of that President's powers is.

III. B
Interpretation of the provisions in question

32. Article 102 para. 1 letter t) of the Constitution provides that the President "appoints and recalls .... Prosecutor General", which partially is duplicate provision in relation to Article 150 of the Constitution, according to which the Prosecutor's Office of the Slovak Republic is headed by the Prosecutor General who is appointed and recalled by the President of the Slovak Republic at the proposal of the National Council of the Slovak Republic."

33. It is obvious from the quoted provisions that the President may appoint as the Prosecutor General only a person proposed to him by the National Council. However, the provisions do not explicitly say whether the President is always obliged to appoint their candidate or whether the President may reject such appointment and request a new proposal by the National Council. The obligation referred to earlier is not implied by a verbatim wording of other constitutional provisions and the Petitioners do not maintain the opposite either. On the contrary, they derive it from certain principles which are generally associated with the exercise of state power, namely the prohibition of arbitrary behaviour and the principle of legality. The Constitutional Court, of course, upholds the legal opinion according to which the President, in exercising his powers, must act in accordance with law and must avoid arbitrary behaviour (PL. US 14/06), yet it does not endorse such understanding of those principles which – see in the potential President´s authority to consider a proposed candidate with regard to the latter´s satisfaction of prerequisites other than those specified by law – arbitrary behaviour *ipso iure*. In doing so, the Constitutional

Court is guided by the following reasons:

34. The Constitution of the Slovak Republic is based on the principles of democracy and the rule of law which – being the fundamental principles of Slovak law – are reflected in the status and the exercise of powers by public authorities. Both of these principles are cumulative; one may simply say that the exercise of state power must always be based on democratic legitimacy and must always be based on law and within its confines. That conclusion also applies at the level of constitutional bodies which are, under the Constitution, constitutional laws, or "sub-constitutional" legislation, authorized to make decisions on national and foreign policy. It is essential for those decisions to be always the result of the will of the majority, expressed by people, either directly or through their representatives whose mandate is derived from democratic election. In either case, decisions must be taken on the basis of a power stipulated by the Constitution and within the content confines resulting therefrom.

35. The specific manner for the individual decisions to be taken always depends on the decision of the Constitutional Assembly. It is the Constitution which outlines the basic framework of powers and responsibilities for the exercise of state power containing both material restrictions (typically, they are mainly fundamental rights and freedoms and certain constitutional principles), and formal or procedural restrictions. They are not to prevent the adoption of decisions of certain content, but to acts (*inter alia*) as a prevention against power abuse, which would be given more room if a particular type of power was entrusted to a single body. One of the ways to counter that risk is to make the adoption of a certain decision conditional upon agreement between multiple bodies, ensuring thus their mutual control.

36. It is just the aforementioned mechanisms which do justice to the essence of the separation of powers as one of the basic characteristic features of the state power organisation in modern democratic constitutional systems. Under the separation of powers, the Constitutional Court understands not just a formal division into legislative power, executive power and judicial power which – with respect to the content of the Constitution – do not represent all state bodies established by Constitution. That structure does not define, for example, the status of the National Bank of Slovakia, the Supreme Audit Office, public prosecution, the Ombudsman and the Council for Fiscal Responsibility. The essence of this division is, on the contrary, the separation of individual authorities within the constitutional

system between multiple bodies while there are effective mechanisms of mutual participation in the exercise of those powers or possibilities of ex-post control to prevent their abuse. Such representation is not inconsistent with the characteristics of the constitutional system of the Slovak Republic as a parliamentary form of governance which reflects in particular the manner in which our constitutional system expresses the relationship between the Government and the Parliament. However, its essence is not in the dominance of the Parliament in relation to all public bodies in the exercise of any competencies. Even the National Council (Parliament) is in fact under the Constitution a body which – in the exercise of its powers – is bound by the Constitution and other binding legal regulations and thus, may only act on their basis and within limits set by them. In a parliamentary form of governance it is moreover natural that – given the political responsibility of the Government toward the Parliament – their relationship cannot be viewed solely through the prism of two separate powers, "hindering" and "countervailing" one another. Those roles, on the contrary, are to a significant extent played by other state authorities not reporting to the National Council, including the President. An important role to play in this respect is that of the parliamentary Opposition, for example, with respect to the opportunity to comment on draft laws and other decisions in parliamentary debate, to obtain information on the activities of bodies of executive power and to subject them to public scrutiny or to submit petitions to the Constitutional Court to review compliance of laws or other legislation with the Constitution.

37. As a result, it is not possible to exclude *a priori* that – when the adoption of a decision under the Constitution is participated by the President and the National Council – the final decision depends on their mutual agreement. This means that one of the more acceptable solutions is such a definition of certain powers when adopting a decision requires the consent both of the National Council and the President. The powers of the President, as well as those of the National Council, are defined by the Constitution. At the same time, the President derives his legitimacy from the provisions of the Constitution and on his mandate resulting from democratic election. Since Constitutional Law No. 9/1999 Coll. of Laws came into effect and since presidential election in 1999, the President – like the National Council – is moreover elected directly by people. Disagreement of the President with a particular proposal of the National Council is therefore inherently as legitimate a decision as the support for that proposal by the National Council. It is up to the Constitutional Assembly to decide whether and in what instances are such control mechanisms necessary when political decisions are taken.

38. The fundamental question which the Constitutional Court has to deal with in the present case lies in whether the President in exercising his powers to appoint the Prosecutor General acts as a co-deciding body in relation to the National Council which is obliged – based on his own examination – agree as well with the National Council's candidate or, as a body bound by the National Council's recommendation, which he must respect. The issue is whether the selection of the Prosecutor General depends on a consensus between the President and the National Council, or is solely in the hands of the National Council, and the President must confirm their selection. The option not to satisfy the proposal and require another candidate, where the candidate proposed by the National Council fails to meet the statutory requirements for the performance of his office, of course, is not disputed and the Constitutional Court has already commented on it in the past with regard to interpretation of Article 102 para. 1 letter h) of the Constitution (PL. ÚS 14/06). Its conclusions can be referred to also in relation to the provisions which are the subject-matter of this interpretation.

39. The Constitutional Court notes that in the present case that it does not rule which alternative is more suitable, appropriate or expedient. Such consideration belongs only with the Constitutional Assembly, which – by adopting the Constitution and its subsequent amendments established, which particular type of separation of powers with regard to the division of powers, mutual participation of state bodies in their execution and follow-up control, should exist in our system of organisation of state power. Both options are possible and in terms of the principles of democracy and the rule of law acceptable. The role of the Constitutional Court is not to replace the Constitutional Assembly's decision expressed by provisions of the Constitution, but to interpret it. In doing so, the Constitutional Court must take into account not only the verbatim wording whose interpretation is the subject matter of these proceedings but also the entire regulation of the role of the President in the constitutional system and his relationship to other bodies. It is then possible to consider as relevant the significance, attached by the Constitutional Assembly to the President´s discretion in the exercise of his powers at the time of adoption of the Constitution, what the subsequent relevant practice by constitutional bodies was and finally, whether this definition was not affected by subsequent amendments to the Constitution. The Constitutional Court has already in the past expressed its opinion on those points of departure (in particular I. US 39/93, Pl. ÚS 14/06).

40. The Constitution in its initial wording of 1992 defined the status and powers of

the President in a manner inconsistent with the traditional model of structuring relations between the Head of State, the Government and the Parliament in a parliamentary form of governance. In no case could he be attributed merely ceremonial function, as in the performance of several of its powers, shared with other constitutional bodies, could he have proceeded at his own discretion and without being bound by a proposal of the Government. Also, prominent independent powers ere bestowed upon him. His status was (in fact) designed on the principle of his political responsibility before the National Council, and an equivalent – in some respects even superior – position with respect to the Government (I. US 39/93). In its substance the Constitution has continued the legal provision contained in the Constitution of the Czechoslovak Socialist Republic of 1960 and later in Constitutional Laws No. 143/1968 Coll. of Laws on the Czechoslovak Federation, as amended, in particular with regard to its interpretation and manner of application in the post-1989 period, which was the last period of its effectiveness. The Constitution took over the then fundamental model of mutual relationships between the various bodies (PL. ÚS 14/06).

41. As a result of this continuity, in the event that the exercise of a specific power were shared between the President and the Government, the basic prerequisite for the adoption of a certain decision was agreement of both bodies. The Constitutional Court defined their mutual relations saying that "even though the two components of executive power in the Slovak Republic (President and Government) are separate from each other, at the same time they work together and are interlinked by collaboration in accord in execution of their constitutional powers... mutual cooperation between the President and Government in the exercise of their constitutional powers is manifested in such a way that without the Constitution-determined exercise of constitutional power one of them, the exercising (real execution) of the constitutional jurisdiction of the other one is not possible either."(I. US 7/96). However, both institutions had their own independent discretion opportunity in terms of whether or not to accept a proposal or opinion of the other. This means that the President, for example, could not have appointed a certain state official on his own, as far as the appointment was conditional upon a proposal by the Government, however, at the same time, he was not obliged to accept Government's proposal to appoint a particular person. Thus, both bodies had to come to agreement that a particular individual is a suitable candidate for that office.

42. It should be noted that that above case is the first one when the President expressed his reservations to the proposal from the National Council to appoint Prosecutor

General. However, it is not possible to draw a conclusion of constitutional convention from the fact, as in none of the previous instances of appointment there was not any dispute as to the scope of his discretion. In favour of the interpretation according to which the President is not obliged to appoint a candidate Prosecutor General, on the contrary, without a doubt testifies the fact that the conclusion regarding the requirement of agreement or consensus of the two bodies was – at a time when the Constitution was effective in its initial version – accepted every time by all state authorities involved in the dispute. That may be demonstrated, for example, by the Government's attitude to the powers of the President to accredit ambassadors. The Government by their letter explicitly accepted then the option for the President (for whatever reason) not to satisfy their motion (I. US 51/96, Pl. ÚS 14/06). The above example is specific in that the Constitution did not grant to Government the authority to make proposals in relation to ambassadors, however, it reflected its attitude in other equally relevant matters, too.

43. The general principle implying the President's obligation to satisfy the proposals made by the Government or the National Council cannot be derived due constitutional amendments by constitutional Act No. 9/1999 and Act No. 90/2001 either, which have significantly affected the constitutional framework pertaining to the status of the President. Those constitutional laws have partly changed the definition of certain powers of the President by directly restricting his discretion by imposing an obligation to satisfy the Prime Minister’s proposal to appoint and recall members of the Government and by introducing the concept of countersigning. Those changes however cannot be attributed consequences giving rise to such fundamental revision of the relationship between the President and other bodies which - if his powers be exercised upon a proposal – would exclude any room for his own decision-making beyond the framework of examination of its compliance with the Constitution or law on his part. Such conclusion, understandably, can be derived neither from the change in the manner of the President´s election to a direct one since that has change resulted in strengthening of his democratic legitimacy. In itself, that does not mean strengthening of his powers, but by no means is this a fact whose nature would provide a reasoning to their strictly restrictive interpretation.

44. The Constitutional Court is of the opinion that the points of departure thus defined, justify the conclusion regarding the President’s authority to reject a proposal of the National Council to appoint the Prosecutor General, not only because of his non-compliance with law,

but also for other reasons. After all, such analysis fully reflects the position of the Prosecutor in our constitutional system as well. As a matter of fact, it is designed as an independent constitutional body, whose role is to protect the rights and legally protected interests of private individuals and legal entities and of the State and it is not part of the executive or legislative power. For this reason indeed, in order to ensure in real terms such defined impartial status of public prosecution, which is an essential prerequisite of its due operation, the Constitutional Assembly bestowed the selection of the Prosecutor General upon multiple constitutional bodies. With respect to the manner of their election, they are capable – independently from one another – of conveying democratic legitimacy to the appointed individual to exercise his office. However, this does not mean that discretion in exercising that power is not subject to certain other material constraints which the President in discharging his duties must respect.

45. The fundamental restriction in this sense ensues from the very role played by the President in the constitutional system and the essence of which is not competing with the various components of power and constitutional bodies, but rather being a guarantee that the structure of state bodies will function in a due manner as envisaged by the Constitution and will thus be able to serve for the benefit of all citizens. In this regard, the Constitutional Assembly clarified the wording of Constitution by amending it in Constitutional Act No. 90/2001 Coll. of Laws by adding in sentence 2 in Article 101 para. 1 of the Constitution, an emphasis on the President's duty to ensure due performance of constitutional bodies. The aforementioned is of significance also for interpretation of the provisions in question. It must be underlined that in case of the power to appoint the Prosecutor General, the status of the President and that of the National Council cannot be considered identical. While the selection of the candidate for the appointment as Prosecutor General from among all potential individuals is the role of the National Council, which by electing from among the candidates nominated by the MPs, the President in discharging his duties expresses an opinion on a specific individual. The sense of his discretion therefore does not lie in the candidate selection on its own from among all individuals who meet statutory requirements, but in examining the suitability of the selected individual to exercise the office, in terms of the criteria that correspond to the aforementioned fundamental obligation of the President to ensure due performance of constitutional bodies. That obligation is in general projected in the discharge of his powers.

46. The above means that the President does not have an option not to appoint a candidate for the office of the Prosecutor General due to any reason. Even though the scope of his discretion goes beyond the examination of whether the candidate, proposed to the President by the National Council satisfies statutory requirements, any other grounds, based on which the President would decide not to appoint, have to withstand just with regard to his obligation to ensure due performance of constitutional bodies. Therefore, the President should above all consider whether certain circumstances pertaining to the candidate do not raise relevant doubts about the candidate´s ability to exercise the office in a manner not diminishing the high esteem of a constitutional office or that of the entire body. Yet, these circumstances do not only have to lie in a certain authoritative statement of a violation of legal obligation. Under no circumstances however may they be a manifestation of arbitrary behaviour – the prohibition of which represents one of the principles of the rule of law (PL. ÚS 52/99, PL. ÚS 49/03, PL. ÚS 1/04, PL. ÚS 12/05) relating to the functioning of all constitutional bodies including the President. In the instance of the power in question that means, that it is fully in line with the status of the President to – with regard to the requirement of impartiality of public prosecution and of the Prosecutor General, as well as generally with regard to the significance of that office in the constitutional system, to consider – when assessing the proposed candidate – all circumstances which may be deemed relevant for due performance of that office.

47. Inasmuch as the President concludes that – due to such serious circumstances – he cannot appoint a candidate, he is obliged to notify the National Council accordingly and at least briefly disclose the reasons which made him arrive at the conclusion. The obligation to disclose the reasons leading to non-appointment of a candidate to the Prosecutor General office follows the requirement for transparency of state power, or the principles of public oversight of state power by citizens who are the origin of this power (Article 2 para. 1 of the Constitution). Yet, the Constitutional Court emphasises to consider this principle as an integral part of the general principle of a democratic state and the rule of law within the meaning of Article 1 para. 1 of the Constitution.

48. Yet the above conclusions do not relieve the President and the National Council of their responsibility to ensure that the post of the Prosecutor General does not stay vacant in the long term. Although the Constitution does not set out any time period for the President to decide whether or not to appoint the proposed candidate to the post of Prosecutor General,

his decision must take place within a certain reasonable time frame. Considerations pertaining to a proposed candidate should thus take place within a reasonable time limit, which means a period of time, as may be considered necessary to consider all circumstances relevant for the exercise the said authority in individual specific cases. This requirement applies not only to the obligation of the National Council to nominate to the President a candidate for the post, but also the duty of the President to decide on the proposal. It is obvious, that the nature of the decision on an appointment, which ensues from election by the National Council MPs and the consent of the President, may and will lead to situations where reaching the necessary consensus would not be a matter of days, but of weeks or exceptionally even of months. It can therefore be summarised that the Constitution no exact time limit ensues from the Constitution which, if exceeded, would necessarily constitute a breach of obligation to decide within reasonable time. Such conclusions will always depend on a consideration of the specific reasons which have prevented an earlier decision. However, the conduit off the President or of the National Council must not in fact lead to a situation where they would be extending the time period during which the post of the Prosecutor General is left vacant.

49. Based on all the reasons, the Constitutional Court has ruled as is stated in the statement contained in this Ruling.

Pursuant to Article 32 para. 1 of the Constitutional Court Act, dissenting opinions of Judges Lajos Mészáros, Ján Luby, Ľudmila Gajdošíková and Ladislav Orosz are hereto attached. Judge Ivetta Macejková is amending reasoning of the decision.

Advice: There is no remedial action available against the decision.

Košice, October 24, 2012

Concurring opinion concerning Ruling
of the Constitutional Court of the Slovak Republic PL. ÚS 4/2012

Judge Ivetta Macejková

Pursuant to Article 32 para. 1 of Act No. 38/1993 Coll. on the organisation of the Constitutional Court of the Slovak Republic, on the proceedings before the Constitutional Court and on the status of its judges, as amended (hereinafter the "Constitutional Court Act"), I am annexing a supplement to the reasoning of the Ruling of the Constitutional Court of the Slovak Republic (hereinafter the "Constitutional Court") PL. ÚS 4/2012 of October 24, 2012 concerning the petition of a group of Members of the National Council of the Slovak Republic to provide an interpretation of Article 102 para. 1, letter t) and Article 150 of the Constitution of the Slovak Republic (hereinafter the "Constitution").

Following a petition of a group of 60 Members of the National Council of the Slovak Republic (hereinafter the "Petitioners"), the Constitutional Court provided the following interpretation of Article 102 para. 1 letter t) and Article 150 of the Constitution in its Ruling PL. ÚS 4/2012 of October 24, 2012:

"President of the Slovak Republic is obliged to proceed upon a proposal of the National Council of the Slovak Republic to appoint the Prosecutor General of the Slovak Republic (pursuant to Article 150 of the Constitution of the Slovak Republic) where the latter has been elected in compliance with law, to appoint the nominated candidate within a reasonable period of time or inform the National Council of the Slovak Republic that the candidate will not be appointed.

The President may not appoint a candidate only where the latter fails to satisfy the qualifications for being appointed set out by law, or due to circumstances of failing to meet the legal requirements for being appointed or, due to serious circumstances pertaining to the candidate which raise relevant doubts about the candidate´s ability to exercise the office in a manner not diminishing the high esteem of a constitutional office or that of the entire body, whose supreme representative that person would become, or in a manner not conflicting with the very mission of the body where – due to those circumstances – the due performance of constitutional bodies might be impaired (Article 101 para. 1 – second sentence of the Constitution of the Slovak Republic).

President of the Slovak Republic shall give the reasons of non-appointment which may not be arbitrary."

I agree with the decision of the majority of the Plenary of the Constitutional Court PL. ÚS 4/2012 of October 24, 2012 in terms of its statement. I am however annexing a supplement to its reasoning, as I consider necessary to give reasons of the Plenary majority, which form the basis of the statement contained in the said decision.

I

The dispute pertaining to interpretation of the Constitution and its scope

1. The wording of Article 128 of the Constitution and of Article 45 of the Constitutional Court Act suggests that – in order to accept a petition to initiate proceedings pursuant to Article 128 of the Constitution to further proceedings and try on merits – a Constitution-relevant dispute must exist, which the petitioner must prove in his petition to initiate proceedings (like in, for instance, Ruling of the Constitutional Court PL. ÚS 11/09 of June 17, 2009).

2. In the preliminary deliberations of this petition, four members of the Plenary of the Constitutional Court voted against passing the petition to further proceedings because – as far as the relief (draft of the decision statement) is concerned on which the petitioners insisted (see Section I, item 7 of Ruling PL. ÚS 4/2012 of October 24, 2012) – there was no dispute between the petitioners and the President of the Slovak Republic (hereinafter the "President") (see Section II, items 11 through 15 of Ruling PL. ÚS 4/2012 of October 24, 2012).

3. In his opinion concerning the petition, the President pointed out that he himself considered the interpretation proposed by the petitioners *"self-explanatory and beyond dispute"*, even with regard to the President´s obligation and (at the same time) power to consider and give reasons whether a candidate nominated for the office of Prosecutor General of the Slovak Republic (hereinafter the "Prosecutor General") meets the qualifications required by law to be appointed for the office and whether the candidate to be appointed Prosecutor General had been elected compliant with the law governing such election. In that respect, the President pointed to conclusions of the Constitutional Court PL. ÚS 14/06 (non-

appointment of the Vice-Governor of the National Bank of Slovakia; hereinafter the "Vice-Governor of National Bank").

4. The majority of the Plenary of the Constitutional Court, however, voted in favour of passing the petition for further proceedings, arriving at a conclusion, that there was a relevant dispute between the parties pertaining to interpretation of the provisions of Article 102 para. 1 (t) and Article 150 of the Constitution, considering the issue and the subject-matter of proceedings in that case an interpretation which would answer the questions whether, pursuant to Article 102 para. 1 (t) and Article 150 of the Constitution, the President is obliged to appoint the Prosecutor General candidate nominated by the National Council, as far as the candidate meets the qualifications of appointment required by the Constitution and law and what would be the time frame for exercising that President´s power (see Section III A, item 31 of the reasoning of Ruling PL. ÚS 4/2012 of October 24, 2012).

5. I consider it necessary to recall the circumstances and underline that it is not sufficient to apply analogically the conclusions of the Constitutional Court stated in PL. ÚS 14/06 on the subject-matter of this case, as set out by the Constitutional Court. In the previous case, the President refused to appoint the nominated candidate to the office of the National Bank Vice-Governor because the candidate failed to meet the qualifications required by law to be appointed in the office. Then, the Constitutional Court defined the subject-matter of the case by saying that "it is necessary to provide an answer in particular to the question on how the President should proceed where there are doubts if the candidate nominated for the Vice-Governor office meets all qualifications required by law for being appointed in the office (see Section III, item 10 of the reasoning contained in Ruling PL. ÚS 14/06 of September 23, 2009). In such circumstances, the Constitutional Court statement that the scope of the President´s political discretion with regard to the mentioned power to appoint may as well include an examination of legal circumstances is to be interpreted; in the view of the Constitutional Court, however, such examination does not depend on the eventuality of political discretion (Section III, item 33 of the reasoning contained in Ruling ÚS 14/06 of September 23, 2009). The Constitutional Court had no reason to engage in an interpretation as to whether – should the candidate for the office of the National Bank Vice-Governor meet the qualifications required by law for being appointed in that office – the President would have been obliged to appoint the candidate or would be in the position to decline the candidate´s appointment. That question was not the disputed subject-matter. Analogically, the

Constitutional Court statement that the President´s power to consider the meeting of the requirements required by law cannot be understood as unlimited discretion and taken for a political examination of a candidate (Section III, item 37 of the reasoning contained in Ruling ÚS 14/06 of September 23, 2009), does not relate to the question whether the President is authorized to refuse appointing a candidate to the office of the National Bank Vice-Governor where the latter meets the qualifications required by law.

In the aforementioned statement, the Constitutional Court just provided more details on how the President would make his decision when considering the meeting of the qualifications required by law on the candidate´s part, adding later: "When examining whether the candidate meets the qualification pursuant to Act No. 566/1992 Coll. of Laws, Article 7 para. 4), both the President and the National Council must honour the interpretation procedures allowed by doctrines, must reasonably justify their conclusions and must honour the binding interpretation of the Constitutional Court or of courts, if any, which may be relevant in examining the applicable question."

6. Therefore, the aforementioned statements of the Constitutional Court made in PL. ÚS 14/06 are not directly applicable to the interpretation pertaining to the question which is the subject-matter in the proceedings of the examined case, i.e. whether – pursuant to Article 102 para. 1 (t) and Article 150 of the Constitution – the President is obliged to appoint the Prosecutor General candidate nominated by the National Council, as long as the latter meets the qualifications for being appointed set out by the Constitution and by law.

II

Subject-matter of the dispute

1. When looking for answers to the subject-matter of the dispute pertaining to interpretation of the Constitution, I consider it appropriate to give a brief reply to the question on whether the Slovak Republic entertains the model of ideal parliamentary democracy, which is democracy with a "strong" parliament and a "weak" president playing more or less a ceremonial role.

2. As already provided by the Constitutional Court, the constitutional assembly is not bound by any ideal model of governance with regard to the system of public authorities.

Distinguishing between the presidential and parliamentary types of governance or governance by Parliament certainly is of relevance from the view of constitutional law theory and is certainly reflected in the considerations of constitutional arrangements in various states to a significant degree. Yet it is the matter of political decision by the constitutional assembly to determine which bodies of public authority will exercise certain powers. Not even the current text of the Constitution has resulted from isolated considerations of its authors yet – no doubt – it draws from constitutional law theory, of comparative constitutional law as well as from earlier constitutional developments in Slovakia (Section III, item 25 of the reasoning contained in Ruling PL. ÚS 14/06 of September 23, 2009).

3. A "weak" President comes into discussion in particular where all his decisions have to be countersigned by the government; where – save pre-defined cases – any political considerations of the President are out of question, where the President is obliged to surrender to the political wishes of the Parliament or to resign and the like (for more details, see Section III, items 25 and 26 of Constitutional Court Ruling PL. ÚS 14/06 of September 23, 2009).

4. Compared to the typical traits of a "weak" president, the status of the President in the Slovak Republic via the Constitution – while maintaining the country´s parliamentary form of government – is stronger. The mandatory countersigning of presidential decrees is not understood as a general obligation, as it applies to a few short-listed powers of the President only. Vis-á-vis the legislative power, the President disposes of a relative veto right. Where the National Council of the Slovak Republic (hereinafter the "National Council") had voted non-confidence in Government or had defeated the Government´s petition of confidence and the President has recalled the Government while committing them to carry out their duties until a new Government has been appointed, then the execution of the Government authority pursuant to Article 119, letters m) and r) of the Constitution requires a prior agreement of the President on a case-by-case basis. The President also appoints judges of the Constitutional Court at his own discretion, selecting from a double number of candidates nominated by the National Council, or three members of the Judicial Council of the Slovak Republic. Being elected directly by the citizens of the Slovak Republic in direct election by secret ballot, the President disposes a strong democratic legitimacy – a direct mandate. He may be recalled from office before his term has expired by a plebiscite only, following a resolution of the National Council adopted by a majority of three fifths of all MPs as a minimum. To recall a

President, a simple majority of at least 50 percent of the qualified electorate in a plebiscite is needed. Where the President has not been recalled by a plebiscite, he shall dissolve the National Council within 30 days after the plebiscite results have been declared. In that event, a new term shall commence for the President.

5. The status of the Slovak President is then much stronger than, for instance, that of the typically "weak" German president. When amending the Constitution, the trends to reinforce the Slovak President´s status prevailed. When amending the Constitution the time before last – by Constitutional Act No. 356/2011 Coll. of Laws, amending the Constitution of the Slovak Republic No. 460/1992 Coll. of Laws, as amended – an exemplary situation ensued: in order to settle a constitutional crisis, the status of the Slovak President was reinforced in an unprecedented way, which is inconceivable in an ideal model of parliamentary democracy.

6. Based on the aforementioned, one may not claim in any way that the Slovak Republic possesses an ideal model of parliamentary democracy and a weak President. Therefore, when discussing regulation of the President´s powers by the Constitution, it is not sufficient to reason by the principle of parliamentary form of governance to justify such interpretation of the Constitution that would assign the Slovak President an unequal status, subordinated to that of other Slovak constitutional bodies. Such reasoning is neither supported by any valid regulation of constitutional law, nor supported by any objective Slovak practice and reality of constitutional policy.

7. With regard to the President – government relationship, the Constitutional Court established that – even though the two components of executive power (the President and the government) are separated from one another in the Slovak Republic – they cooperate and are linked with one another by collaboration in in the discharge of their constitutional powers. The cooperation between the President and the government in the discharge of their constitutional powers can be seen in the fact that – should one of them not discharge their constitutional power – the other one would not be able to discharge (genuinely perform) theirs (Ruling of the Constitutional Court I ÚS 7/96 of July 11, 1996). The Constitutional Court later added in this respect that both bodies have still been in the possession of discretion in the discharge of their respective powers, and so both may have applied their own policies. This conclusion is of particular relevance when direct election of President by citizens has been introduced (Section III item 28 of Ruling of the Constitutional Court PL. ÚS 14/06 of

September 23, 2009).

8. That opinion of the Constitutional Court may as well apply when considering the President´s relationship to the legislative power and observe that – even though the President as a representative of executive power is separated from the National Council as a representative of legislative power – they cooperate (in cases foreseen by the Constitution) and are linked with one another by collaboration in the discharge of their respective constitutional powers. The cooperation between the President and the National Council in the discharge of their respective constitutional powers is seen in cases where the Constitution foresees their cooperation and without one of them discharging their constitutional power, the other one would not be able to discharge (genuinely perform) theirs.

9. With regard to the President´s powers as worded by the Constitution, the Constitutional Court established that the constitutional status of the President is clear only where the Constitution explicitly grants him an authority ("may") or explicitly places an obligation ("shall", "is obliged") upon him. In other cases, the President´s status according to the Constitution needs to be complemented either by interpretation of the law referred to in the Constitution text or by amending the wording of certain provisions of the Constitution (Ruling of the Constitutional Court I ÚS 39/93 of June 2, 1993).

10. In relation to personnel proposals submitted to the President, one may – based on the aforementioned – establish that, where the Constitution does not impose an obligation upon the President to satisfy the submitted proposal to appoint or recall a person [within the meaning of Article 102 para. 1 letter g) of the Constitution in conjunction with Article 111 of the Constitution – the President "appoints and recalls"], the President´s status is equivalent with that of the one submitting the proposal to appoint or recall a person, meaning that the President (just like the one submitting the proposal) is entitled to autonomously consider the proposal and decide on accepting or not accepting it.

11. With regard to high democratic legitimacy which – in the President´s case is derived from being directly elected by citizens – it is irrelevant with regard to constitutional law – whether in cases where the Constitution (without giving any further details) envisages the President´s collaboration in addressing issues of appointing or recalling a person – proposals to appoint or recall a person are submitted to the President by representatives of executive

power not elected directly by citizens or by representatives of executive power elected by citizens.

12. The Constitution does not confer the National Council direct powers with regard to a President elected directly by citizens. Therefore where the Constitution *ipso iure* reads "appoints and recalls", one cannot agree with an interpretation of the Constitution imposing on the President a general obligation to accept proposals by the National Council to appoint or recall persons without an option to refuse.

13. In other words, where there is no obligation for the President to respect the submitted proposal to appoint or recall a person, i.e. where the Constitution *ipso iure* reads "appoints and recalls", the nature of a proposal to appoint or recall a person is identical, whether submitted by executive power or by legislative power. The strong democratic mandate acquired by the President in democratic election as well as the possibility to recall the President by plebiscite only, justifies the President´s autonomy toward the National Council, which is much stronger than for a President elected by the National Council who may anytime be recalled by the National Council where three fifths of all MPs have voted in favour of his removal.

14. Where the Constitution does not oblige the President to respect a proposal to appoint or recall a person submitted by executive power (where the Constitution *ipso iure* reads "appoints and recalls"), the President´s authority to decide autonomously to accept or not to accept a submitted proposal to appoint or recall a person represents a part of his counterweighing and supervisory authorities vis-à-vis legislative power.

15. Based on the aforementioned, one may – with regard to the proposal by the National Council to appoint the Prosecutor General – establish that the power of a President directly elected by citizens to decide autonomously whether to accept or not to accept the National Council´s proposal to appoint a candidate selected by them to the office of Prosecutor General represents one of the powers conferred by the Constitution to a President directly elected by citizens, so as to provide for balance of power within the State as well as to provide for a due performance of constitutional bodies.

16. Thus a position of the President equivalent to that of the National Council when

deciding about the person of Prosecutor General represents – *inter alia* – a means of preventing a potential abuse of power which may be more likely if the decision about the person of Prosecutor General were vested to the National Council only.

17. Compliant with the principle of power division and with the necessity of mutual control between the various public authorities preventing its abuse, neither the President can freely decide about the person of Prosecutor General on his own, as the former may only decide about the person proposed to him by the National Council. Both bodies must then come to agreement on the person of Prosecutor General.

18. When defining the criteria as a basis for the President´s decision to accept or not to accept the National Council´s proposal to appoint a candidate selected by the latter for the office of the Prosecutor General, it is of convenience to begin with the criteria which form the basis for the MPs to decide upon:

Before the election itself, the MPs first of all examine if the persons standing for the office of Prosecutor General meet the qualifications required by law to exercise the office as set out in Article 7 of Act 153/2001 Coll. of Laws on public prosecution, as amended.

Where the qualifications required by law to exercise the office of Prosecutor General are met by several of those standing for the office in the National Council, the MPs must select from among those multiple applicants. At the same time, legal regulations, naturally, do not set out any criteria for selecting from among multiple applicants. Deciding solely on their conscience and conviction, the MPs are supposed to select the applicant who (with regard to his moral integrity, personal and personality qualifications, his previous activities and behaviour, and with regard to his attitudes to various issues of the society known to the public) has made them intrinsically believe to best satisfy the requirement of a consequent, impartial and independent execution of the mission of public prosecution and of Prosecutor General; they should then select from among the applicants the person in whom they place most personal trust.

19. Where the Constitution – without giving any further details – expects collaboration of the President in addressing issues of appointing or recalling persons (the President "appoints and recalls"), the Constitutional Court established at an earlier date that the President´s power is not only of a notary nature. Upon receiving a proposal to appoint or recall persons, the President is authorized to examine not only if the established rules of procedure were

satisfied in earlier proceedings but is also authorized to examine if the nominated candidate meets the (material) requirements set out by law for being appointed to the office (Ruling of the Constitutional Court PL. ÚS 14/06 of September 23, 2009).

20. Autonomous decision-making by the President about the National Council´s proposal to appoint a Prosecutor General and the scope of the President´s discretion in the case includes, however, not only examination if the established rules of procedure were satisfied in earlier proceedings and examination if the nominated candidate meets the requirements set out by law for being appointed to the office, but also examination of additional circumstances.

21. The circumstance that the President´s status is equivalent to the status of the one submitting a proposal to appoint or recall persons suggests – *inter alia* – that the scope of the evaluation criteria which the President is entitled to take into account cannot be smaller than the scope of the evaluation criteria taken into account by the one submitting a proposal to appoint or recall persons.

22. Where MPs are – when selecting out of several candidates for the office of General Prosecutor – beyond any dispute authorized to select a candidate who (with regard to his moral integrity, personal and personality qualifications, his previous activities and behaviour, and with regard to his attitudes to various issues of the society known to the public) has made them intrinsically believe to be a guarantee of a consequent, impartial and independent execution of the mission of public prosecution and of the Prosecutor General and therefore, they have selected the candidate in whom they place the most personal trust, then a President elected directly by citizens, with a status equivalent to that of the National Council in the procedure of appointing Prosecutor General cannot be denied the right to refuse a proposal of the National Council to appoint a candidate who has not made him intrinsically believe to be able to ensure a consequent, impartial and independent execution of the mission of public prosecution and of the Prosecutor General compliant with the requirements of due performance of constitutional bodies, which – within the meaning of the Constitution, Article 101 para. 1, second sentence – the President is obliged to ensure without being bound by orders when exercising his office (similarly as MPs) in conformity with his conscience and convictions.

23. Appointing a person in relation to whom there are serious circumstances raising doubts in that the person´s ability to execute the office of Prosecutor General in a manner not diminishing the high esteem of the constitutional office and that of the entire body whose supreme representative would that person become, or in a manner not conflicting with the mission of that body, can in no case be considered execution of the office in conformity with conscience and conviction.

24. A brief summary: Where MPs cannot be denied the right by voting to express trust or absence of trust in individuals seeking election for the office of Prosecutor General, that right given by Constitution cannot be denied to a President directly elected either, having a status in the process of appointing the Prosecutor General equivalent to that of the National Council.

25. That opinion has been confirmed by the previous practice of constitutional policy in the Slovak Republic when President M. K. refused two proposals submitted to him to appoint a person.

In the first case, President refused the proposal to appoint I. L. head of the Slovak Information Service on March 3, 1993 justifying his refusal to the public by saying: *"Mr. L. does not enjoy my trust."*

The version of the Constitution effective as of March 3, 1993, Article 102 letter g) provided that President appoints and recalls heads of central bodies and senior state officials in cases stipulated by law; appoints professors and rectors of universities, appoints and promotes generals. In conjunction with this article, Article 3 para. 2 of Act 46/1993 Coll. of Laws on the Slovak Information Service, in its version effective as at March 3, 1993 provided that the head of information agency is appointed and recalled by the President of the Slovak Republic following a proposal of the Government of the Slovak Republic.

The aforementioned implies that the President did not justify why he had refused the received proposal to appoint an individual by any procedural shortcomings or by that individual´s failure to comply with the qualifications required by law, but "merely" by the lack of trust which – despite the then stressful socio-political circumstances – was not contested in a manner relevant with regard to the Constitution. The ruling power, wishing to eliminate examination of credibility of the candidate for the office of the head of the Slovak Information Service by the President was forced to advise an amendment of the legal regulation concerning the appointment of the head of the Slovak Information Service, which was done by Act No. 72/1995 Col. of Laws, amending Article 3 para. 2 of Act No. 46/1993 Coll. of Laws,

pursuant to which the head of the Slovak Information Service would later be appointed and recalled by the Government of the Slovak Republic, following a proposal by the prime minister of the Slovak Republic.

In the other case, the President refused a proposal to appoint I. L. minister for the administration and privatization of national assets in November 1993, justifying his refusal to the public by saying: *"Mr. L. fails to meet the qualifications to exercise the office and does not enjoy my personal trust either".*

The version of the Constitution in effect in November 1993 – Article 102 letter f) – provided that the President appoints and recalls the prime minister and other members of the Government, entrusts them with the management of ministries and accepts their resignation; Recalls the prime minister and other members of the Government in the cases listed in Articles 115 and 116. That text was followed up by Article 111 of the Constitution which – in the version then in force – stipulated that at the proposal of the prime minister, the President appoints and recalls other members of the Government and entrusts them with the management of ministries. The President can appoint as deputy prime minister and minister any citizen who may be elected to the National Council.

As the aforementioned implies, not even then did the President explain why he had refused the submitted proposal to appoint an individual by any procedural shortcomings or by that individual´s failure to comply with the qualifications required by law, but "merely" by his conviction about the candidate´s personal traits and lack of trust.

To prevent any examination of personal traits and credibility of a candidate for an office of a member of the Government by the President, there was a need to amend the Constitution by constitutional Act No. 9/1999 Coll. of Laws, amending the Constitution of the Slovak Republic No. 460/1992 Coll. of Laws, as amended by constitutional law No. 244/1998 Coll. of Laws, by which Article 111 of the Constitution was amended to the intent that that President appoints and recalls other members of the government and entrusts them with the management of ministries. The amendment was intended to restrict the President´s discretion when deciding whether or not he would accommodate the proposal of the Prime Minister, while the explanatory statement explicitly mentions that the provision would contain a statement of the Prime Minister´s right to propose other members of the Government to the President and the President would be obliged to accommodate the Prime Minister´s proposals.

Consequently, the explanatory statement makes the Constitution interpreter logically

believe that only where explicitly set out in the Constitution wording that the President "shall appoint"[1] a candidate, the President will be obliged to do so. Accordingly, where the Constitution wording reads "appoints"[2], the President is authorised to appoint the candidate, taking as well the (non)existence of the President´s personal trust in the nominated candidate as a decision-making criterion, as already confirmed by the Slovak practice of constitutional policy.

Where the "mere" lack of trust may be the reason for not appointing a member of the Government or head of the Slovak Information Service, the reason for not appointing – beyond any doubts – must also be admissible (with regard to the due performance of constitutional bodies) when it comes to the office of the Prosecutor General of no less importance, being on the head of an independent and impartial constitutional body responsible for the protection of the interests of individuals, legal entities and the State.

26. Based on the aforementioned, it is to be particularly underlined that – where the practice of constitutional policy has accepted the President´s right not to accommodate a proposal to appoint "merely" due to the President´s absence of personal trust in the nominated candidate (moreover, in a situation where the President was elected by the National Council), all the more it is not possible to deny such right to a President stemming from direct democratic election by citizens, enjoying beyond any doubts a legitimacy of a higher order than a President elected by the National Council).

27. Taking into account the view of a President elected directly by citizens when appointing Prosecutor General who is at the head of independent and impartial public prosecution increases the legitimacy of the selection of the nominated candidate.

28. With regard to Prosecutor General, the President´s power to appoint – and this is the President´s autonomous involvement in appointing a candidate – brings along more safety in terms of appointing a candidate who may not be able to warrant independence of public prosecution.

29. Based on the above reasons, one may summarise that the President in the exercise of his powers pursuant to Article 102 para. 1 letter t) and Article 150 of the Constitution, being

[1] Remark by the translator: The Slovak version contains "vymenuje".
[2] Remark by the translator: The Slovak version contains "vymenúva".

governed by his conscience and conviction within the meaning of Article 101 para. 1 of the Constitution, considers autonomously:

- compliance of the procedure of a candidate selection for the office of Prosecutor General of the Slovak Republic, nominated by the National Council, with the applicable law,
- meeting of the legal requirements for appointing a candidate in that office, as well as
- credibility of the nominated candidate to be guarantee of a consequent, impartial and independent discharge of tasks of the public prosecution and of Prosecutor General´s role, with a special emphasis on considerations of his independence and impartiality, as – with regard to the system of hierarchy in public prosecution – independence and impartiality of Prosecutor General is the fundamental prerequisite of independence and impartiality of public prosecution as a whole, the independence and impartiality of public prosecution as a whole being the essential attribute of its due performance, which – within the meaning of Article 101 para. 1 of the Constitution – the President is obliged to ensure by his decisions.

30. Nevertheless, the role of the Constitutional Court is not to consider whether the existing legal regulation of the President´s authority to appoint is appropriate, whether it is appropriate for the President to have opportunity to take into consideration not only the previous course of procedure and meeting of legal requirements, but also credibility of the candidate for the office of General Prosecutor. It is up to the constitutional assembly to prefer the solution most appropriate from their point of view with regard to constitutional law.

31. Concerning the time aspect of the President´s decision about the nomination by the National Council for the Prosecutor General, the wording in the Constitution concerning the appointment of the Prosecutor General shows clearly that collaboration (exercise of powers) of two constitutional bodies occurs in the process of deciding to staff the office.

32. Execution of a constitutional power of one state authority may not give rise to its authorisation to determine the time period for the other state authority to comply with the latter´s commitment to collaborate in the execution of that power. Such time period is contained in the collaboration commitment of the other state authority derived from the constitutional principle of cooperation of the various state authorities.

33. Where considered convenient and practical, the constitutional assembly themselves set out time periods for the respective state authorities of the Slovak Republic to exercise

their constitutional powers, which presupposes collaboration of other state authorities. And so pursuant to Article 113 of the Constitution, the Government is obliged to appear before the National Council within 30 days from being appointed; pursuant to Article 102 para. 1 letter o) of the Constitution, the President may return a law to the National Council with comments within 15 days from the receipt of the adopted law etc.

34. In the aforementioned cases, exercising the commitment to collaborate in the discharge of constitutional powers of a certain state authority also depends on compliance with the time period set out by the Constitution, which is also linked to legal effects of its exercise set out in the Constitution.

35. In the remaining cases of exercising those constitutional powers of the various state authorities expecting collaboration of another state authority, the principle of their mutual cooperation and the ensuing commitment of collaboration enshrined in the Constitution is applied.

36. As already pointed out, that commitment incorporates its execution within a certain time period which (unlike the ones set out explicitly in the Constitution) is not fixed. The duration of that time period may therefore vary and would solely depend on the satisfaction of constitutional or other requirements pertaining to the exercise of that power by a certain state authority enshrined in the Constitution which corresponds to its collaboration in the execution of the power by another state authority.

37. Upon meeting those requirements, a commitment ensues for the relevant state authority, to exercise its collaboration in the execution of powers of another state authority enshrined in the Constitution, since the Constitution does not set out any additional requirements (or time periods) qualifying the exercise of collaboration (*mutatis mutandis* Ruling of the Constitutional Court I ÚS 7/96 of July 11, 1996).

38. With regard to the aforementioned, one may establish that the President is obliged to decide on the nomination of Prosecutor General within a reasonable time period, which is always to be considered with regard to circumstances on a case-by-case basis. That is the time without any prejudice necessary to obtain relevant information needed by the President to decide, upon receiving a nomination by the National Council. Should a responsible

consideration of substantive law or procedural law questions or, as the case may be, circumstances concerning the candidate´s person be hindered by the existence of a preliminary question, which is to be decided as a responsibility of another body, the President is obliged to decide without any undue delay, upon the decision of the preliminary question by that other body.

Košice, October 24, 2012

SLOVAK REPUBLIC

FINDING

of the Constitutional Court of the Slovak Republic
In the name of the Slovak Republic

III. ÚS 571/2014-266

The Constitutional Court of the Slovak Republic at a public session on March 17, 2015 in a senate composed of the Chair Rudolf Tkáčik, Justice Jana Baricová and Judge-Rapporteur Ľubomir Dobrík dealing with a complaint by JUDr. Eva Fulcová, of Živnostenská 2 Bratislava, represented by attorney JUDr. Milan Fulc, Živnostenská 2 Bratislava, in the matter of an alleged infringement of her fundamental right to access to elected and other public posts under equal conditions according to Article 30 para. 4 of the Constitution of the Slovak Republic, in conjunction with Article 2 para. 2 of the Constitution of the Slovak Republic, through decision by the President of the Slovak Republic No. 1112-2014-BA of July 2, 2014 on non-appointment to the post of the judge of the Constitutional Court of the Slovak Republic, as well as on complaints filed by JUDr. Juraj Sopoliga, Bidovce 259, and JUDr. Miroslav Duriš, PhD., Zádvorie 189/57, Liptovský Mikuláš, both represented by attorney JUDr. Tibor Sásfai, Fejova 4, Košice, for alleged infringement of their fundamental right of access to elected and other public offices under Article 30 para. 4 of the Constitution of the Slovak Republic in conjunction with Article 2 para. 2 of the Constitution of the Slovak Republic, as well as the right to enter the public service in his country pursuant to Article 25 letter c) of the International Covenant on Civil and Political Rights based on decisions of the President of the Slovak Republic No. 1112-2014-BA of July 2, 2014 on non-appointment as nominate judges to the Constitutional Court of the Slovak Republic

ruled as follows:

1. Fundamental right of JUDr. Eva Fulcová, JUDr. Miroslav Duriš, PhD., and JUDr. Juraj Sopoliga to access to elected and other public posts under equal conditions according to Article 30 para. 4 of the Constitution of the Slovak Republic in conjunction with Article 2 2 of the Constitution of the Slovak Republic based on decisions by the President of the Slovak Republic No. 1112-2014-BA of July 2, 2014 on non-appointed of JUDr. Eva Fulcová, JUDr. Miroslav Duriš, PhD., And JUDr. Juraj Sopoliga to the post of judges of the Constitutional Court of the Slovak Republic was violated.

2. The Constitutional Court of the Slovak Republic overrules the decisions by the President of the Slovak Republic No. 1112-2014-BA of July 2, 2014 on non-appointed of JUDr. Eva Fulcová, JUDr. Miroslav Duriš, PhD., and JUDr. Juraj Sopoliga to the post of judges of the Constitutional Court of the Slovak Republic and orders the President of the Slovak Republic to reopen the proceedingsand to decide again.

3. Office of the President of the Slovak Republic is obliged to reimburse JUDr. Eva Fulcová court costs in the amount of 434.87 € (in words: four hundred thirty-four Euro and eighty-seven cents) to be paid to the account of her legal representative JUDr. Milan Fulc, Živnostenská 2 Bratislava, within two months from the effective date of this finding and JUDr. Miroslav Duriš, PhD., and JUDr. Juraj Sopoliga jointly costs in the amount of 434.87 € (in words: four hundred thirty-four Euro and eighty-seven cents) to the account of their legal representative JUDr. Tibor Sásfai, Fejova 4, Košice, within two months from the effective date of this finding.

4. The court dismisses the remainder of the complaint by JUDr. Miroslav Duriš, PhD., and JUDr. Juraj Sopoliga.

Reasoning:

I.

Constitutional Court of the Slovak Republic (hereinafter also the "Constitutional Court") has received a complaint in August 2014 from JUDr. Eva Fulcová, Živnostenská 2 Bratislava, in

August 2014 complaint from JUDr. Juraj Sopoliga, Bidovce 259, and on September 2, 2014 complaint from JUDr. Miroslav Duriš, PhD., Zádvorie 189/57, Liptovský Mikuláš (together the "complainants"). In the form of Ruling III. ÚS 571/2014 of September 24, 2014, the Senate of the Constitutional Court ruled on merging the complaint by JUDr. Eva Fulcová (hereinafter referred to as "complainant") and JUDr. Juraj Sopoliga and admitted them for further joint action. Complaint from JUDr. Miroslav Duriš, PhD., was accepted for further proceedings by Constitutional Court Ruling I. US 588/2014 of October 1, 2014. Subsequently, the Plenary of the Constitutional Court through the Ruling PL. ÚS 4/2014 of November 12, 2014 ruled on merging the cases maintained under III. ÚS 571/2014 and I. US 588/2014 for joint proceedings conducted under III. ÚS 571/2014.

Regarding the plea by JUDr. Eva Fulcová

In her complaint, she stated:

«National Council of the Slovak Republic on April 3, 2014 elected the complainant as a candidate for Judge of the Constitutional Court of the Slovak Republic (Resolution of the Slovak National Council No. 1130 of April 3, 2014).

Speaker of Parliament, Pavol Paška, in a letter of May 16, 2014 No. PREDS-70, PREDS-337/2014 submitted to the President of the Slovak Republic resolutions of the National Council of the Slovak Republic No. 1130 of April 3, 2014 and No. 1147 of May 15, 2014.

Through these resolutions the National Council of the Slovak Republic proposed to the President of the Slovak Republic a total of 6 candidates for judges of the Constitutional Court of the Slovak Republic.

President of the Slovak Republic, in a letter No. 1262-2012-BA dated June 18, 2014 invited the complainant to the President's Office to attend on June 25, 2014 an interview before the Advisory committee to examine the suitability of candidates for the posts of judges of the Constitutional Court of the Slovak Republic, and to this letter was accompanied by a Decision of the President of the Slovak Republic dated June 17, 2014 on setting up an Advisory Committee to examine the suitability of candidates for judges of the Constitutional Court of the Slovak Republic.

On July 2, 2014 President of the Slovak Republic decided not to appoint the complainant to the post of a judge of the Constitutional Court of the Slovak Republic, whereby from the total of 6 candidates for judges of the Constitutional Court of the Slovak Republic he has not appointed three judges of the Constitutional Court of the Slovak Republic, but only one judge of the Constitutional

Court of the Slovak Republic (JUDr. Jana Baricová).

President of the Slovak Republic explained his decision not to appoint the complainant as a judge of the Constitutional Court of the Slovak Republic as follows:

"Based on your professional resume, recommendation of the Advisory Committee on the review of the suitability of candidates as judges of the Constitutional Court of the Slovak Republic, which I have established, by decision of June 17, 2014 No. 1262-2014-BA and my own observations that I gained from the interview with you, held on June 25, 2014, I decided not to appoint you to the post of judge of the Constitutional Court of the Slovak Republic.

Neither your professional resume nor any other information available can conclusively confirm that you were during your professional career up until now in objectively verifiable manner, practically or theoretically involved in the field of constitutional justice and constitutional law.

Equally, no other facts confirm that you have, in your current profession, produced generally recognized achievements in any of the fields of legal theory or legal practice, providing adequate pre-requisites for appointment as a judge of the Constitutional Court of the Slovak Republic.

Your appointment was not recommended to me also by the Advisory committee on the review of suitability of candidates as judges of the Constitutional Court of the Slovak Republic, which arrived at this conclusion on the basis of the interview with you conducted on June 25, 2014 in my presence, and I accept the content of this recommendation.

These facts as a whole, have led me to a decision not to appoint you as a judge to the Constitutional Court of the Slovak Republic."»

In the opinion of the complainant, the President of the Slovak Republic (hereinafter the "President") with his approach towards candidates for the post of judge of the Constitutional Court violated her right of access to elected and other public offices guaranteed by Article 30 para. 4 of the Constitution of the Slovak Republic (hereinafter the “Constitution”), in conjunction with Article 2 para. 2 of the Constitution.

The complainant summarised her argumentation into these objections:

"a) The President of the Slovak Republic, in appointing judges of the Constitutional Court of the Slovak Republic, applied the interpretation by the Constitutional Court of the Slovak Republic on the appointment of the Prosecutor General of the Slovak Republic (Ruling of Constitutional Court of the Slovak Republic Pl. ÚS 4/2012 of October 24, 2012);

b) The President of the Slovak Republic established an Advisory committee to review the suitability of candidates for judges of the Constitutional Court of the Slovak Republic and its recommendation was the basis for deciding on non-appointment of the complainant to the post of a judge of the Constitutional Court of the Slovak Republic, whereby para. 1 the establishment of this committee and consideration of its recommendations does not have constitutional basis, and at the same time (2) the composition of this committee did not give a guarantee of impartial decisions in relation to the complainant and membership of the judges from the general Court on the Advisory Committee was against the law;

c) From the total of six candidates for judges of the Constitutional Court of the Slovak Republic, put forward by the National Council of the Slovak Republic, the President of the Slovak Republic did not appoint to the post of a judge of the Constitutional Court of the Slovak Republic three judges of the Constitutional Court of the Slovak Republic, but only one judge of the Constitutional Court of the Slovak Republic;

d) In comparison with previous candidates for the post of judge of the Constitutional Court of the Slovak Republic, the President of the Slovak Republic, in relation to the complainant as a candidate for the post of judge of the Constitutional Court of the Slovak Republic, did not apply the same conditions for access to public office;

e) President of the Slovak Republic did not justify appropriately his decision not to appoint the complainant as a judge of the Constitutional Court of the Slovak Republic."

The complainant justified the cited objections in individual points.

In the following part of the objection on incorrect application of interpretation by the Constitutional Court in the matter of (non)appointment of the Prosecutor General of the Slovak Republic (hereinafter the "Prosecutor General") to the appointment of judges to the Constitutional Court, the complainant pointed out the most important differences, particularly double the number of candidates for the appointment as judges of the Constitutional Court and stated: *„According to the long and consistent practice in application of Article 102 para. 1 letter s) in conjunction with Article 134 para. 2 of the Constitution, the President of the Slovak Republic has in the past always appointed from candidates for judges of the Constitutional Court one half that is, constitutionally required number of judges of the Constitutional Court of the Slovak Republic."*

The objection referred to in the complaint as item *"Re b)"* and regarding the establishing of an Advisory committee to examine the suitability of candidates for judges of the

Constitutional Court (hereinafter referred to as "Advisory Committee"), the complainant raised two observations.

In the complaint section referred to as item *"Re 1)" she* argued that the establishment of this committee and consideration of its recommendations regarding a decision not to appoint the complainant to the post of a judge of the Constitutional Court has no constitutional basis and at the same time under item *"Re 2)"* of the complaint she rejected that the composition of this committee did not give a guarantee of impartial decisions in relation to her.

In relation to the establishment of the Advisory Committee and the objection of its unconstitutionality, the complainant quoted Article 134 para. 3 of the Constitution and emphasised that "the constitutional criteria defining who can be in accordance with Article *134 para. 3 of the Constitution appointed a judge of the Constitutional Court are relatively wide, therefore the President, as a body, appointing constitutional judges, has the power to assess, which is the most suitable from among the candidates who meet the constitutional requirements. This is the reason why the National Council of the Slovak Republic puts forward twice the number of candidates for judges of the Constitutional Court, then the number of judges to be appointed by the President*

However, as the Constitutional Court has already emphasised on several occasions in a number of its findings, the Constitution of the Slovak Republic is based on the principles of democracy and the rule of law, which are as the basic principles of the Slovak legal order reflected also in the status and the exercise of power by public authorities. Both of these principles are cumulative, and simplified it can be said that the performance of state power must always be based on democratic legitimacy and needs to take place on the basis of law and within its scope. As a matter of fact, the doctrine of the rule of law is (inter alia) based on the principle that the state has its law and it is obliged to abide by it that the state is bound by (its) legal order. Therefore, as part of its operations, it can perform only what is permitted by the Constitution, laws and other legal regulations. This principle is explicitly expressed also in the Constitution - in accordance with Article 2 para. 2 of the Constitution, state bodies may act only on the basis of the Constitution, within its limits and in a manner established by law...

However, none of the constitutional provisions indicate the President having the jurisdiction to review the suitability of a candidate for judge of the Constitutional Court as provided in Article 3 of the decision by the President, namely de facto to test the candidate's knowledge of constitutional law and decision-making activities of the Constitutional Court of the Slovak Republic, the European Court of Human Rights and the Court of Justice of the European Union, by body established for this purpose by the President of the Slovak Republic. Such President's

authority cannot be inferred, neither using an analogy, from the Ruling of the Constitutional Court PL. ÚS 4/2012, nor implicitly.

There is no doubt that the President of the Slovak Republic is entitled to choose individuals to provide him with expert advice on matters falling within his constitutional powers, but their existence must not be used to widen the powers, given to the President of the Slovak Republic by Constitution, and the President of the Slovak Republic cannot through them seize power, which under the Constitution belongs to other constitutional bodies, which would result in him acting in a breach of Article 2 para. 2 of the Constitution, whereby it is apparent from the above that such situation has occurred by the President's decision to constitute the Advisory Committee. ".

With respect to objection concerning the composition of the Advisory Committee under *"Ad 2)"* of the complaint she stated:

«Moreover, the composition of the Advisory Committee did not provide a guarantee of impartial decision-making with respect to the complainant, since in case of several of the Advisory Committee members, there may be justified doubts regarding their impartiality towards her as a candidate for Constitutional Court judge...

Based on the above it can be summarized that the approach with respect to the complainant (and the other candidates elected by the National Council of the Slovak Republic) was unconstitutional. And yet ... every citizen has the right to be treated by all state authorities only in a manner as permitted by the Slovak Constitution and other laws. "(Constitutional Court Finding II ÚS 48/97). This consisted of a setting up of Advisory Committee as "a new state body" without legal basis, and from the reasons given for the non-appointment it is apparent that the committee had effect on the decision of the President of the Slovak Republic not to appoint. *The fact that the decision of the Advisory Committee is not a final decision, does not result in the elimination of unconstitutional infringement consisting in that the President of the Slovak Republic, allowed at all for the unconstitutional element in the form of the Advisory Committee to participate to such extent in the decision of the President of the Slovak Republic, namely under the circumstances when the composition of the Advisory Committee did not provide any guarantees of objectivity and impartiality with regard to the complainant. In addition, creation of the Advisory Committee after the announcement of the elections of candidates for judges of the Constitutional Court meant a change in the selection rules during the course of the selection process.*

Given the above, in relation to the Advisory Committee can be thus concluded that as a constitutionally conforming could be considered only a situation, if the Advisory Committee had been completely removed from the decision-making process.»

In reasoning objection [item *"Re c)*" of the complaint] on the non-appointment of the six candidate judges nominated by the National Council of the Slovak Republic (hereinafter the" National Council ") for the post of a Constitutional Court judge and the appointment of only one Judge of the Constitutional Court, the complainant addressed interpretation of constitutional Articles, which in her opinion relate to this topic.

She stated that «*In the causal relationship with the constitutional power of the President of the Slovak Republic to appoint judges of the Constitutional Court (Article 102 para. 1 letter s) of the Constitution) there are other provisions of the Constitution, having a link and they constitute the whole constitutional concept of origination of the post of the Constitutional Court judge.*

These are mainly: Article 101 para. 1 sentence 2 (governing the obligations of the President to ensure the proper functioning of constitutional bodies), Article 134 para. 1 (defining the scope of the personnel composition of the Constitutional Court), Article 134 para. 2 sentence 2 (governing constitutional entitlement and at the same time an obligation of the national Council of the Slovak Republic to put forward twice the number of candidates for judges than the number of vacancies, which are to be appointed by the President of the Slovak Republic)."

1. In this constitutional text the wording "the President appoints" is no longer used but instead "... who are to be appointed by the President: " *The different formulation has an impact on the fact that it has to be taken into account in the application of presidential powers provided for in Article 102 1 (a) of the Constitution, namely in the sense that this provision limits the discretion of the President, consisting in the power to choose any candidate / candidates, but always in such number as the number of vacancies on the Constitutional Court bench and therefore does not allow the President to widen (nor to narrow down the number of persons appointed from candidates proposed to him by the National Council of the Slovak Republic.*

As a matter of fact, the Constitution establishes the "basic competency framework" for the exercise of state power, which includes both "material limitations" (typically the fundamental rights and freedoms and certain constitutional principles), as well as "formal limitations" (procedural, with their purpose being to prevent abuse of power), PL. *ÚS 4/2012 of October 24, 2012.*

It is apparent that all candidates for Constitutional Court judges proposed to the President by the National Council of the Slovak Republic did not have the right to be appointed, however they had the right to constitution-given chance of 1: 1 to be appointed as a judge of the Constitutional Court from twice as many candidates as were vacancies on the Constitutional Court

bench. Selection only one Constitutional Court judge from six candidates for Constitutional Court judge reduced their chance to 1: 5.

Obligation of the President to appoint three judges of the Constitutional Court from the first and only group of six candidates proposed by the National Council of the Slovak Republic was also confirmed by the Venice Commission in Opinion. CDL-AD (2014)05, with paragraph 34, containing the following wording:

"... neither the wording of the Constitution, or the logic of things concerning the list of candidates submitted by the National Council entitle the newly elected President of the Slovak Republic to reject all candidates and to have the National Council requested a new list of candidates "...».

In this part of the reasoning [point "Ad d)"] of her complaint, the complainant compared the application of equal access to public office with previous candidates for the post of the Constitutional Court judge and said: "According to longstanding and consistent practice in application of Article *102 para. 1 letter s) of the Constitution in conjunction with Article 134 para. 2 of the Constitution, the President of the Slovak Republic has so far in the past always appointed from candidates for judges of the Constitutional Court one half that is, constitutionally required number of judges of the Constitutional Court.*

Such a procedure was not followed in the case of the complainant, which is also in violation of the constitutionally guaranteed right of access to elected and other public posts under equal conditions according to Article 30 para. 4 of the Constitution...

After all, in relation to the complainant the infringement of the requirement of access to elected and other public office under the same conditions, alternatively a discrimination of the complainant, also took place by the virtue of the fact that, unlike the candidates for Constitutional Court judges, who had been presented to the President by the National Council in the past (hence in an equal legal position as the complainant), in the case of the complainant also other than constitution-defined requirements, such as her involvement in the field of constitutional judiciary, constitutional law and other, were assessed. "

Under *"Ad e)" of the complaint the complainant explained* her objection pertaining to failure to provide reasoning on the decision not to appoint her to the post of a Constitutional Court Judge.

She stated that ... *From the Constitutional Court's Ruling in the matter PL. ÚS 4/2012 of*

October 24, 2012 it follows that the President of the Slovak Republic in decision on a non-appointment of a candidate is obliged to provide reasons, whereby these must not be arbitrary and should convincingly justify failure to meet the basic prerequisites for appointment or existence of serious matters pertaining to the candidate, which gives rise to questioning his/her ability to discharge duties of the office in a manner that would not denigrate the significance of the constitutional post or the entire body, of which that person is to be its supreme representative, or in such manner that would not be contrary to the very mission of that institution, if such fact could result in disruption of proper functioning of constitutional bodies (Article 101 para. 1 sentence 2 of the Constitution).

From thus defined criteria, it is apparent that the reasons given by the President of the Slovak Republic, in instance of non-appointment, must be sufficiently serious, substantive and specific.

However, contrary to the above, the wording of individual reasonings are identical, hence unavoidably general with respect to individual candidates. No specific facts are stated, but only general conclusions that it has not been demonstrated that the candidate was involved in the field of constitutional law or constitutional justice, nor that he/she produced generally recognized professional achievements. The justification does not even attempt to deal with why, for example, the post held by the complainant (regional court judge and President of the district court) is not generally recognised professional achievement...

At the same time it is not possible to deduce from individual justifications how much experience (type, duration, intensity etc.) is needed for a candidate to the post of Constitutional Court Judge, in order to be able to consider this requirement to have been met.

Also, with respect to the requirement of generally recognised achievements in the theory or practice of their profession, it is problematic to assess this prerequisite, as well as the criteria that were used in its evaluation. Up until now all they are unknown and candidates for the Constitutional Court judges were not aware of them in advance, and equally future candidates for Constitutional Court judges, no matter who will it be, do not know how this requirement is assessed, which makes it impossible for them to prepare for this office.

In summary, the reasoning is thus based on false general and non-specific allegations and not on proven specific claims. Moreover, the justifications do not even attempt to combine these mostly untrue general statements, with the requirement for the existence of serious grounds relating to the candidate, which justifiable undermine his/her ability to act as a judge of the Constitutional Court in a manner not degrading the significance of this office or institution. Hence, the cited reasons lie in the subjective assessment of professional achievements by candidates for the Constitutional Court judges by the President of the Slovak Republic and the unconstitutional

Advisory Committee.

In addition, the cited reasons are, being very general and essentially the same for all non-appointed candidates, inevitably arbitrary... ".

The complainant proposes that the Constitutional Court rules in the form of a finding, which would read as follows:

„1. The President of the Slovak Republic, by his decision No. 1112-2014-BA of July 2, 2014 on non-appointment of the complainant to the post of a judge of the Constitutional Court of the Slovak Republic and by actions, which preceded its adoption, violated fundamental right of JUDr. Eva Fulcová, guaranteed by Article 30 para. 4 of the Constitution of the Slovak Republic in conjunction with Article 2 para. 2 of the Constitution of the Slovak Republic.

2. The President's decision No. 1112-2014-BA of July 2, 2014 on non-appointment of the complainant to the post of a judge of the Constitutional Court of the Slovak Republic is reversed and returned to the President for further action.

3. The President of the Slovak Republic is instructed to act in the matter again, by appointing two judges of the Constitutional Court of the Slovak Republic from the five appointed candidates for judges of the Constitutional Court of the Slovak Republic.

4. The Constitutional Court of the Slovak Republic orders the President of the Slovak Republic to reimburse the complainant her costs relating to the hearing before the Constitutional Court of the Slovak Republic."

The complainant attached to her statement of claim also the President's decision No. 1262-2014-BA dated June 17, 2014 and letters from the President No. 1262-2014-BA from June 18, 2014 and No. 1112-2014-BA of July 2, 2014.

Regarding the plea by JUDr. Juraj Sopoliga

JUDr. Juraj Sopoliga (hereinafter referred to as the "complainant") filed a complaint on August 28, 2014, with the following justification:

"The case involves a dispute regarding the constitutionality of the very process of assessing the suitability of candidate by the President of the Republic for the post of a judge of

the Constitutional Court, who was nominated by the National Council of the Slovak Republic in accordance with Article *134 para. 2, sentence 2 of the Constitution and at the same time the justification of the President's decision not to appoint, even if the candidate meets all the constitutional criteria according to Article 13 para. 3 of the Constitution.*

In other words, it is a matter to assess whether the President by his decision on the process (requirements) of creation for the appointment to this Constitutional office that considerably (substantially) affected his decision-making as well as justification for his non-appointment of a candidate for the post of Constitutional Court judge, i.e., with his application and interpretation of the Constitution SR concerning his constitutional authority under Article 10 para. 1 letter s) of the Constitution (on not appointing a judge) of the Constitutional Court) did not violate Article 30 para. 4 of the Constitution in conjunction with Article 2 para. 2 of the Constitution and simultaneously Article 25 letter c) of the International Covenant on Civil and Political Rights... "

In the following section, complainant 1 is quoting relevant case law of the Constitutional Court, relating to the objections and states that «*The contested decision by the President infers that he identified in its entirety with a recommendation of the Advisory Committee on the review of the suitability of candidates for the post of judge of the Constitutional Court of the Slovak Republic, which recommended not to appoint the complainant to the post of a Constitutional Court judge*...

Other factors cannot be the constitutional criteria of professional suitability pursuant to Article 134 para. 3 of the Constitution, the fulfilment of which is assessed by the Parliament. Assessment of the fulfilment of constitutional criteria by the President is isolated (separate) from the assessment of "certain facts relating to the candidate, which reasonably question his/her ability to discharge the duties of the office in a manner not degrading the significance of this office."

By deciding to establish an Advisory Committee President the violated his constitutional obligations (exceeded his constitutional powers) under Article 2 para. 2 of the Constitution (legality principle).

The President of the Republic, as a public authority, does not have constitutionally defined empowerment the expand competences by law. No provision of the Constitution authorizes (does not give the authority) to the President to appoint advisory bodies.

Pursuant to No. 102 para. 4 of the Constitution, details on exercising constitutional powers by the President under para. 1 may be established by law.

It is therefore apparent that the details of discharge of this constitutional power of the President can be determined by law, but the Constitution-maker does not empower the lawmaker

to entrust additional powers to the President...

Establishment of an Advisory Committee and its significant influence on the decision is therefore arbitrary action.

As no law or constitution empowered (did not give authorisation) to the President to decide on setting up any advisory body as part of his constitutional authority to appoint Constitutional Court judges, clearly the President decided arbitrarily (violated the principle of legality).

The fact that in the decision not to appoint a candidate to the post of Constitutional Court judge, he identified with the opinion of unconstitutionally established body means that it constitutes an unconstitutional decision by the President, i.e., infringement of Article 30 para. 4 in conjunction with Article 2 para. 2 of the Constitution and simultaneously also Article 25 letter c) of the aforementioned International Covenant on Civil and Political Rights.

Arbitrary action and decision lies not only with the President by establishing unconstitutional body, with opinion of which he identified and based on which he made a negative decision.

At the same time he violated the constitutional prohibition of arbitrariness also by adopted elected) decision-making process (biased procedure).

This is a biased procedure, which is inadmissible in the application and protection of fundamental rights and freedoms, including also the right of access to public office.

The process was not impartial, independent and therefore objective, hence the possibility of arbitrariness or unsubstantiated consideration by the President to act without any objective limits was not ruled out.

At the same time the decision's reasoning is demonstrably not based on an objective procedure...

Such procedure fails to respect the principle of public oversight of state power execution, i.e. the requirement for transparency of the procedure (Article 2 para. 1 as an integral part of the general principle of democracy and rule of law in accordance with Article 1 para. 1 of the Constitution (PL. ÚS 4/2012)...

This has resulted in a complete absence of specific facts (factual basis), which led the President to conclude that "the non-appointed candidate was not involved practically or theoretically with constitutional justice and constitutional law and did not produce generally recognized achievements in an area of legal practice", as a result of which, the candidate does not meet the appointment eligibility criteria set by the President.

Specifying additional criteria by President, to justify the non-appointment of a candidate is

*not in accordance with Article 2 para. 2 of the Constitution, since in terms of content, it clearly involves criteria concerning only the assessment of professional competence. However, these criteria are governed only by the Constitution (*Article 134 para. 3 of the Constitution and refer to two factors - the obtaining of Law degree and minimum 15 years of legal practice. *The Constitution does not allow the President to broaden the constitutional criteria for professional qualifications of candidates based on his own expectations (subjectively defined criteria) because he does not have the constitutional or statutory authorization...*

The procedure referred to in Article 6 of the Decision on the establishment of the Advisory Committee. Paragraph 5 of the cited Article 6 states "the basis for recommendation by the Advisory Committee are the Curriculum Vitae of candidates, results of interviews, information from their hearings in the National Council of the Slovak Republic, as well as other information, if applicable for the purpose defined in Article 2 of this decision, or to assess their moral integrity.

It is obvious that the President was bound by obligation to base his actions solely on data obtained during the course of proceedings, inferred by Curriculum Vitae of the candidates, information from their hearing at the National Council, during the interview with President.

If the President justified his decision by saying "that it is impossible... to confirm that through the work so far, he/she has failed to demonstrate objectively being practically or theoretically involved in constitutional justice and constitutional law" , than this negative conclusion must exclusively arise only from those findings of fact (i.e. in the process of creating public office)...

It is therefore without a doubt that a general court judge in the implementation of competencies under Article 142 para. 1 of the Constitution (in the administration of justice) continuously (daily) ensures, through his findings, the protection of the constitutionality (in content terms carrying out activities identical with decision-making a Constitutional Court judge) in application of the procedural and substantive rules by interpretation in accordance with Article 152 para. 4 of the Constitution, as well as international treaties on human rights and fundamental freedoms pursuant to Article 154c of the Constitution (ratified and lawfully promulgated before 1.7.2001) and Article 7 para. 5 of the Constitution (ratified and promulgated after 1.7.2001). Above all, this concerns a consistent application of Article 6 para. 1 of the Convention for the Protection of Human Rights and Freedoms in the practice of general jurisdiction for actual safeguarding of citizen's right to a fair hearing by an independent and impartial tribunal.

This is indisputably demonstrated by the fact that of "practical involvement with constitutional law..."

In other words, the reason for non-appointment (involvement with constitutional law was not being established) is in stark contrast to the jurisdiction of general court judges in exercising

their powers, as well as the reality of justice. It is also in this regard the arbitrary decision by the President in not appointing a candidate to the post of Constitutional Court judge...

The causal connection with the constitutional power of the President to appoint Constitutional Court judges involves other provisions of the Constitution, with which they are linked semantically and relate to the whole constitutional concept of creating the office of a Constitutional Court judge. In assessing the constitutionality (unconstitutional) of the procedure and decision by the President not to appoint a candidate for judge of the Constitutional Court, it is therefore necessary to take into account the provisions of Article 101 para. 1 sentence 2 (governing the obligation of the President to ensure the proper functioning of constitutional bodies), Article 134 para. 1 (defining the scope of the personnel composition of the Constitutional Court SR(13 Justices), Article 134 para. 2 sentence 2 (constitutional entitlement and at the same time an obligation of the national Council of the Slovak Republic to put forward twice the number of candidates for judges than is the number of vacancies, which are to be appointed by the President of the Slovak Republic), Article 134 para. 3 of the Constitution (enumerating five conditions to be met by a candidate for a Constitutional Court judge in order to be appointed a judge of the Constitutional Court).

Therefore, when applying the powers of the President, not only the literal wording of the Constitution provisions must be taken into consideration, but the whole definition of the President's position in the constitutional system and his relationship to other constitutional bodies, i.e. in this case the National Council of the Slovak Republic, which has the constitutional authority to propose twice as many candidates for judges of the Constitutional Court...

The Constitution governs the status of the President Part VI. Section 1, including him to the structure of executive power, which also corresponds to the definition of basic and powers of the President in Article 102 of the Constitution.

In this case, the originating authority in relation to appointing of judges to the Constitutional Court is given to the National Council and the President, resulting in a combination of election of a candidate by the National Council and appointment by the President of the Republic...

The National Council under Article 134 para. 2 sentence 2 of the Constitution proposes double the number of candidates for judges, which are to be appointed by the President of the Slovak Republic. It is therefore obvious that every proposal is submitted so that the President has a choice between two candidates for the vacant post of a judge of the Constitutional Court. If he adheres to the process governed by the Constitution (parliamentary procedure), he act in accordance with the Constitution, i. e. within the limits of the Constitution to the extent and in the

manner as prescribed by law.

When deciding on the choice of candidates for judges of the Constitutional Court, the National Council is required to ensure the fulfilment of 5 specific requirements, defined by the Constitution, to be met by individual, who is to become a judge of the Constitutional Court. The constitution does not allow for deviation from any of these requirements. These are a citizenship of the Slovak Republic, eligibility for election to the National Council, minimum age of 40 years, law degree and legal experience of at least 15 years.

The required law degree from and at least 15 years in the legal profession serves to ensure appropriate expertise of the Constitutional Court judges (see comment to SR Constitution Third Edition, by J. Drgonec p. 1420 Eureka 2012)...

President's limited authority to appoint and recall under Article 102 para. 1 letter s) of the Constitution (the President appoints... judges of the Constitutional Court...) is clearly closest in meaning (intrinsically) to the definition of constitutional competence of the National Council under Article 134 para. 2 sentence 2 of the Constitution (proposes double the number of candidates for judges, which are to be appointed by the President), in view of the combination of joint authority to appoint and recall of these constitutional bodies.

In this constitutional text, the wording "whom the President is to appoint" no longer uses the formulation "President appoints". Different formulation has effect on the fact that it has to be taken into account in the application of presidential powers.

This provision results in limiting the discretionary power of the President, consisting in the right to select any eligible candidate letter s), but always in full number of available seats (inadmissibility of narrowing or expanding the number of appointed persons, i. e. concurrently constitutional obligation.

Process (application) is therefore admissible that from the double amount of candidates (nominated by Parliament), the President is to appoint (in terms of content, this involves an obligation to appoint, i.e. to the office) one half from the double of the candidates, as there is only the half of the number of vacated judges' seats, on the basis of which the Parliament has a constitutional obligation to elect always twice the number of candidates.

Different application of the presidential authority to appoint and recall is content-wise an unacceptable unilateral extension of the presidential powers, which disturbs the relationship between constitutional bodies, as well as citizens, in the implementation of their fundamental right of access to public office and at the same time it does not respect the system of separation of power, requiring essential respect for the constitutional balance (constitutional principle of democracy and the rule of law under Article 11 of the Constitution)...

Another application of this provision means a breach of the constitutional duty of the President to ensure the proper functioning of constitutional bodies under Article 101 para. 1 sentence 2, and simultaneously No. 134 para. 1 of the Constitution. This obligation is then fulfilled only if his determination secures the constitutional requirement for comprehensive composition (structure) of the Constitutional Court under Article 134 para. 1 of the Constitution (the Constitutional Court consists of 13 judges). By a different approach the President creates a state of breakdown (malfunction, or partial malfunction) in the operation of a constitutional body.

If the President had the right to appoint (not to appoint) exclusively according to his expectations any number of judges (i.e. including not to appoint anyone), this would mean a principal violation of the Constitution-defined material limitation of the exercise of his powers by failing to respect the fundamental rights of citizens, as well as the constitutional principles of the rule of law (separation of powers, the constitutional balance, the principle of legality, etc.) and at the same time this would mean a circumvention of formal restriction, which must help to prevent abuse of power (unilateral broadening of powers, disrupting relations between equal constitutional bodies, as well as towards the citizens).

In case of application and interpretation of the Constitution on the President's right to appoint less judges than the vacant seats (where the Parliament nominates double the number of candidates), it also violates the right of the non-appointed candidate, who is guaranteed by Constitution (under Article 134 para. 2 ratio of success and failure expressed as a fraction 1/2. By not appointing five candidates out of six he has changed the ratio (expressed as a fraction 3/6) to an unconstitutional ratio of 0/5 (success to failure ration). By this, he violated his rights guaranteed by Article 30 para. 4 and simultaneously also Article 25 letter c) of the aforementioned International Covenant...

Upon compliance with all constitutional criteria by the complainant, pursuant to Article 134 para. 3 of the Constitution, demonstrating the ability to ensure so called specific and abstract protection of constitutionality, extensive expertise in the field of ensuring an environment for judicial independence (knowledge of international instruments and the case law of the Constitutional Courts of the Slovak Republic and the Czech Republic in this field), it is apparent that there are no differences of such type and severity given that justify the unequal treatment of the complainant (compared with successful candidate).

The complainant was treated differently without good rational reason (which remained secret from the complainant), demonstrating the infringement of the principle of equal treatment (non-discrimination) and at the same time also an unjustified restriction of access to public office (application of subjective criteria, as well as failure to respect the merit principle).

At the same time the candidate selection process was not objective and unfair, and same applies to arbitrary decision on non-appointment.

Therefore all criteria are met, duly establishing a breach of Article (30) of the Constitution in conjunction with Article 2 para. 2 of the Constitution (legality principle) and Article 25 letter c) of the International Covenant by a decision of the President not to appoint the complainant as a judge of the Constitutional Court (an instance of interference with the substance of the aforementioned guaranteed rights)... ».

Part of the complaint is also quantification of costs for representation of the complainant by one legal representative in the amount of € 340.88.

As annex to his complainant JUDr. Sopoliga attached documents relating to the proposal for election as a candidate for judge of the Constitutional Court, a photocopy of the minutes of Constitutional Committee of the National Council of the Slovak Republic from the 70th committee meeting of May 6, 2014, as well as the invitation from the President of June 18, 2014 (No. 1262-2014-BA) for an interview, the President's decision on the establishment of an Advisory Committee to examine the suitability of candidates for judges of the Constitutional Court of June 17, 2014 (No. 1262-2014-BA), as well as the decision of the President of July 2, (No. 1112-2014-BA) on his non-appointment to the post of Constitutional Court judge.

Regarding the plea by JUDr. Miroslav Duriš, PhD.

JUDr. Miroslav Duriš, PhD. (hereinafter also the "complainant 2"), filed on September 2, 2014 a complaint in which he stated the same legal objections as JUDr. Juraj Sopoliga (mainly due to the fact that they are represented by the same counsel), therefore the Constitutional Court in this section refers to the content of the cited filing by JUDr. Juraj Sopoliga.

Different section pertains to the fitness of the complainant 2 to apply for a nomination for a judge of the Constitutional Court, as the complainant 2 is a notary (a member of the Chamber of Notaries of the Slovak Republic).

Complainant 2 stated in his complainant:

«... *Independence of notary corresponds to the independence of a judge, however, does not have constitutional guarantees. Neither Constitution, nor any other constitutional law regulates the status of notaries. Breakthrough was delivered by the Constitutional Court, when in its funding PL.ÚS 1/04 of 24.2. 2005 defined for the first time the status of notaries in the system of power and*

their importance from the constitutional standpoint, whereby it ruled, inter alia that the legal position of a notary is a status of public authority and it is primarily designated so that under the separation of powers, the notary participates in the fulfilment of a positive obligation of the state in relation to the implementation of the fundamental right into judicial and other legal protection under Article 46 para. 1 of the Constitution to the extent determined by law...

This demonstrates beyond doubt by the complainant JUDr. Miroslav Duriš, PhD. in his past professional practice in various legal capacities (Public Prosecutor's Office, General Court, notary practice and work as external university teacher, lecturing also constitutional and European law) the fact of "practical involvement in the constitutional law"... »

In the following next section (identical with the complaint by JUDr. Juraj Sopoliga), complainant 2 states the constitutional definitions of presidential powers in appointing the Constitutional Court judges. In this section, he carried out legal analysis of Articles of the Constitution, pertaining to this power, namely also in terms of the case law of the Constitutional Court on this issue.

Complainant 2 specifically addresses the approach by Advisory Committee, stating:

«... *The absence of objectivity and a breach of impartiality principle by the Advisory Committee are strongly demonstrated also by the circumstances during an interview with the President of the Republic:*

- *Questions from Committee members leading to undermine the suitability of a notary as a candidate for judge of the Constitutional Court (contrary to the text of the Constitution and the authority of the Chamber of Notaries of the Slovak Republic to nominate its own candidate for the Constitutional Court judge),*
- *Testing of language skills despite the fact that the language of the Constitutional Court of the Slovak Republic is the Slovak language.*
- *Making the candidate's suitability conditional upon his/her publication activities (despite the proven practice outside of theoretical and scientific professional circles)...*

Although at the actual interviewing the complainant (Dr. Duriš) declared not only his involvement in judicial office, the notarial profession itself, but also a term as President of the Chamber of Notaries of the Slovak Republic - requiring his participation in negotiations, attendance in congresses and meetings of the EU Council of Notariats (CNUE), International Union of Notaries (UJNL), Executive Board membership of the CNUE (The Council of the Notariats of the European Union), acting as a President of Hexagonal (associating six states of the European notarial initiative) and relating handling of legislative issues and topics related to the European and constitutional law, the Committee and subsequently even the President in his decision did not

take these facts into account (neither has demonstrated in his/her professional practice...)

Moreover, in 2006 the petitioner was nominated by the Chamber of Notaries of the Slovak Republic as a candidate for a post of Constitutional Court judge, he attended a public hearing before the Constitutional and Legal Affairs Parliamentary Committee, due to the lack of votes in the NC SR Plenary was not elected as a candidate, whereby also this fact refutes the argument of the Committee and the President that "during the recent past showed interest in constitutional law"... »

In closing of his complaint, complainant 2 requests that the Constitutional Court rules that:

"*... Therefore all criteria are met, duly establishing a breach of Article 30 para. 4 of the Constitution in conjunction with Article 2 para. 2 of the Constitution (legality principle) and Article 25 letter c) of the International Covenant by a decision of the President not to appoint the complainant as a judge of the Constitutional Court (an instance of interference with the substance of the aforementioned guaranteed rights).*

In violation of the aforementioned fundamental rights of the complainant conditions are provided under Article 127 para. 2 of the Constitution for a pronouncement of infringement of these rights by the Constitutional Court and concurrently for a reversal of the unconstitutional decision and returning the matter for further proceedings.

Without such statement being part of the decision, it will be impossible to ensure the desired and effective protection of fundamental rights of citizens against the unconstitutional practices and decisions of any public authority. Only returning of the matter for further (new) hearing and a decision, based on a binding opinion of the Constitutional Court, binding upon the infringer of fundamental right of citizens, will result in the elimination of an unconstitutional status, as required by a thorough protection of constitutionally guaranteed right of access to public function.

In case of success, the petitioner will seek compensation of his costs for legal representation pursuant to Article 11 para. 3 of the Act No. 655/2004 Coll., per attendance at one-sixth of the calculation base, which is in 2014 the amount of € 134 + € 8.04 overhead flat fee (Article 16 para. 3 of the cited Act. + 20% VAT € 28.40 = € 170.44 per attendance, provisionally for 2 attendances acceptance and preparation, drafting of the complaint (Article 14 para. 1 (a), letter c) of cited Act.) 2 x 170.44 = 340.88 € deposited to the petitioner's legal representative account."

II.

Statement by the President of the Slovak Republic to complaints by JUDr. Eva Fulcová, JUDr. Juraj Sopoliga and JUDr. Miroslav Duriš, PhD.

On October 14, 2014 the Constitutional Court received response from the President (No. 4267-2014-BA), dated October 10, 2014 to the complaint by JUDr. Miroslav Duriš, PhD.

In the first part of his statement, the President stressed the constitutional guarantee of the right not to appoint a candidate for a judge of the Constitutional Court, which he derived from the wording of Article 134 para. 2 and Article 102 para. 1 letter s) of the Constitution, citing the interpretation by the Constitutional Court in its decision, PL. ÚS 4/2012 of October 24, 2014, dealing with the appointment of the Prosecutor General pursuant to Article 150 of the Constitution.

With regards to the interpretation by the Constitutional Court referred to above the President stated the following:

"The cited constitutional norms and the interpretation PL.ÚS 4/2012 make unambiguously clear that the President is entitled not only not to appoint half of the proposed candidates (Article *134 para. 2 of the Constitution), but is entitled and obliged, if not all requirements for their appointment are met, not to appoint even all or more than half of the proposed candidates.*

Interpretation PL. ÚS 4/2012 is generally binding for reasons stemming from the constitutional and statutory provisions and was therefore mandatorily applied in the case of non-appointment of the complainant to the post of the Constitutional Court Judge.

The mandatory application of this interpretation is inferred by the fact that (non)appointment of a candidate to the office of the Prosecutor General of the Slovak Republic and the candidate for the post of Constitutional Court judge bears identical parameters of constitutional wording."

In the section of the statement entitled "*The scope of the President's discretionary power not to appoint a candidate to the post of the Constitutional Court judge*" the President states:

"When deciding on non-appointment of the complainant, I exercised my discretion, which would be of crucial importance to the content of this decision. Therefore, I consider it necessary to clarify, also with regard to the alleged arbitrariness of my action and decision, what is the scope of such discretion.

The President, in appointing judges to the Constitutional Court acts and decides as a body of executive power. Given that, he is fully bound by constitutional order in Article 2 para. 2 of the Constitution, according to which state bodies may act only in accordance with Constitution, within its limits and in a manner, established by law...

Specific prerequisites and requirements for exercising the constitutional powers of the President in the appointment of judges of the Constitutional Court are determined:

- *by constitutional requirements set out in Article 134 para. 2 of the Constitution (although according to Article 102 para. 4 of the Constitution, details on exercising constitutional powers of the President under paragraph 1 may be established by law, however, in this case no legislation exists);*
- *by interpretation of PL. ÚS 4/2012;*
- *in connection with interpretation of PL. ÚS 4/2012 and also from the scope and content of the powers of the Constitutional Court, as inferred from Article 124 to 129 of the Constitution."*

In the following section of his statement, the President highlights the uncertainty in the operative part of the decision of the Constitutional Court PL. ÚS 4/2012 and states:

«*... In applying these broadly inconclusive legal terms it was therefore necessary to use such discretionary scope to take account of what is applied in such cases in the legal practice of the Member States of the European Union, as well as in the European Union.*

My considerations led to these interpretative results that qualified all vague legal concepts that were used in the second paragraph of the operative part of the interpretation of PL. ÚS 4/2012:

1. In general, these inconclusive legal concepts can be surmised under one general concept: The suitability of a candidate for the post of Constitutional Court judge.

2. The term: "suitability of a candidate" to verify the candidate's competence for such constitutional post is recognised also by the constitutional law of the European Union; according to Article 255 of the Treaty on the Functioning of the European Union ("TFEU") a panel shall be set up in order to give an opinion on candidates' suitability to perform the duties of judge and Advocate General at the Court of Justice and the General Court before the governments of the Member States make the appointments referred to in Articles 253 and 254 . The panel shall comprise seven persons.

3. Such committees were set up, although informally, also before the appointment of judges to the Constitutional Court of Czechoslovakia (President Václav Havel) and before the appointment of judges to the Constitutional Court of the Slovak Republic in the second term of office

(President Rudolf Schuster, 1999 and 2002). It follows that the constitutional practice of the head of the Slovak Republic in appointing judges to the Constitutional Court during the constitutional development after 1989 is fundamentally based in part on expert opinions, or expert recommendations. However, such constitutional practice should be regarded as a constitutional convention, which is considered by the jurisprudence as being the source of constitutional law.

4. Examining the suitability of a candidate for judge of the Constitutional Court is the process of verifying the professional and other capabilities to perform functions based on his theoretical knowledge of constitutional law, constitutional justice and its case-law, the European justice, in particular the case law of the European Court of Human Rights and the Court of Justice of the European Union, as well as personal practical experience with institutional judiciary (e.g. judges of the International Court, who protects the constitutionality and fundamental rights, judicial advisor to the Constitutional Court, lawyer systematically dedicated to representation in proceedings before the Constitutional Court in principal cases, the judges of general courts, who dealt with cases on compliance with laws, alternatively whose decisions and extrajudicial activity demonstrates systematic and long-term interest in constitutional law and constitutional justice).

5. The suitability of a candidate may also mean that his professional resume and results of his involvement in law implies that it is an individual that can be described as generally recognized expert in a particular field of legal theory or legal practice. However, even if such candidate is involved, also other requirements set out in Article 2 and 3 of my decision of June 17, 2014 shall be examined.

6. Suitability of a candidate is closely linked, taking into account interpretation of PL.ÚS 4/2012, also to the content of an oath of a Constitutional Court judge... (followed by a description of an oath of a Constitutional Court judge, note.).

The content of the Constitutional Court judge's oath infers that, ruling to the best of his conviction, independently and impartially presupposes theoretical and practical knowledge of the rule of law, the Constitution and constitutional laws, including the case law of the Constitutional Court in which the Constitution and constitutional laws are interpreted and used mainly in proceedings dealing with compliance of legislation and complaint proceedings, pursuant to Article 127 para. 1 of the Constitution - the same expertise is also envisaged for international treaties ratified by the Slovak Republic and promulgated as provided for by law. At this point it is necessary to emphasise the knowledge of and ability to apply the case law of the European Court of Human Rights and the European Court of Justice.

Paragraphs 1-6 of this section of my statement demonstrate unquestionably that the procedure that I applied, and my decision was made strictly within the discretion permitted, as an

extension of the interpretation principles formulated in PL.ÚS 4/2012. »

On the issue of the Advisory Committee to examine the suitability of a candidate for the post of Constitutional Court judge, the President stated the following:

„... First, it must be noted that the statutory framework, as well as the constitutional practice of the Slovak Presidents suggest that the President has the right to have advisors...

Advisors or advisory bodies operate in the Office of the President of the Slovak Republic also on other legal grounds (such as a Work contract). Advisors often act only on the basis of their appointment by the President of the Republic without a separate legal relationship being established between them and the Office of the President of the Slovak Republic being formed.

All previous presidents had their advisors, alternatively advisory bodies; it is a constitutional convention, which has become part of constitutional practice by the heads of Slovak Republic for a simple reason. Decision, as well as other constitutional acts of the President requires a proper factual basis, as well as the corresponding legal basis. It is inconceivable for the President to be able to gather the factual basis for every of his decisions or other constitutional action.

Therefore, it is beyond argument that by setting up Advisory Committee I would in any way act contrary to Article 2 para. 2 of the Constitution. Article 2 para. 2 of the Constitution in fact applies only to decisions of the President within the framework of his powers, and not to the manner in which the head of the Slovak Republic provides the factual basis for his decision-making.

The President continued by stating: *The complainant alleges that the Advisory Committee had a major (significant) impact on the decision about his non-appointment. At the same time he asserts, without any evidence that procedures and decisions of the President were uncontrolled and non-transparent.*

The role and purpose for setting up the Advisory Committee meeting was purely to gather factual background for my decision (no) to appoint candidates for judges of the Constitutional Court.

Recommendations of the Advisory Committee were not binding for me, as they were exclusively of consultative and advisory nature. It therefore follows that the Advisory Committee did not act as a decisive element.

Allegations of a different legal status of the Advisory Committee, referred to in the complaint are therefore merely an allegation, grossly contradicting the manner in which I acted and ruled on individual candidates and have no real substantiation. Finally, with regards to this allegation, the complainant did not submit, except his subjective view, no evidence of the alleged decisive status of the Advisory Committee. Decisive role in my decision-making was played only by the established

unsuitability of the complainant to perform the duties of a Constitutional Court judge; however, this unsuitability had no basis in assessment of the complainant's current employment status.

In this context, it should be noted that for the first time in the constitutional practice of the Slovak Republic, I as head of the Slovak Republic submitted my procedures and decisions on candidates for judges of the Constitutional Court to public scrutiny, and these have been fully transparent; Advisory Committee could have prepared the background documents for me also in the cabinet form and the result would be, for the complainant, identical. "

Regarding the objection of infringement of the fundamental right under Article 30 para. 4 of the Constitution, the President stated:

"The content of this fundamental right and the facts which may ultimately lead to its violation, was defined by the Constitutional Court in its doctrinal Finding in the case II. US 5/03 in relation to the candidate for Chief Justice of the Supreme Court of the Slovak Republic and actions and decisions of the Judicial Council of the Slovak Republic, which is fully applicable also in this constitutional dispute."

The President stated that during the procedure and decision-making before and after the non-appointment of complainant 2 to the post of Constitutional Court judge, he fully respected the Constitution and the case law of the Constitutional Court, which is demonstrated by the following facts:

"1. By establishing Advisory Committee and setting rules for its functioning, making them available to candidates and the public, I have created the basis for an objective method to establish background facts in making my determination as to which of the candidates are suitable and competent to perform the duties of a Constitutional Court judge in accordance with the requirements contained in interpretation PL. ÚS 4/2012 in conjunction with the powers of the Constitutional Court in individual cases.

2. In establishing the Advisory Committee and setting rules for its functioning in the form of as internal regulation, I acted within the scope of my factual activities prior to deciding on (non)appointment of candidates; however, I acted transparently and in an objectively verifiable manner.

3. Establishment of an Advisory Committee, the rules for its functioning have been communicated not only to the candidates but also the general public - disclosure of this decision ensured scrutiny of every action, related to the process of (non)appointment and the candidates.

4. All candidates were informed in available and appropriate manner on when, where and under what conditions will be conducted the process leading to (non)appointment of candidates, - all candidates were treated equally. Although the complainant alleges discrimination, but he would have to prove that he was discriminated against in relation to other candidates, i.e. that the same persons (candidates) were treated unequally. Such claim would be, however, as inferred from this section of the statement, completely false.

5. All candidates, including the complainant were duly and timely invited to appear before the Advisory Committee, with procedures performed with my permanent presence - all candidates, except one, who has not appeared, could address me as the President of the Republic as the only person who is authorised to their (non)appointment.

6. All candidates, including the complainant received the same types of questions - the content has been modified only by the candidates' responses.

7. All candidates had the opportunity to acquaint themselves with the content of non / recommendations of the Advisory Committee - these non / recommendations were briefly but duly reasoned in order to protect the personality of each candidate - the Advisory Committee did not make decisions regarding of any candidates.

8. The contested decision of the President not to appoint the complainant is equally brief, but duly reasoned - the reasoning likewise being the protection of person of the candidate. However, this reasoning comprises the curriculum vitae of the candidate, the recommendation of the Advisory Committee, the contents of which I concurred with, and therefore it cannot be argued this not to be a proper justification for such decision.

9. Discrimination of the complainant could have been the case because one candidate was appointed, - in fact, there is no fundamental right to be appointed as a judge of the Constitutional Court. In addition, this candidate was, throughout the process of examining her suitability and eligibility, treated in exactly the same manner as the other candidates. As there is no fundamental right to be appointed as a judge to the Constitutional Court, equally there can be no right to any constitutionally guaranteed ration of success and failure in the procedure for appointment as a judge of the Constitutional Court.

10. The complainant challenges the impartiality of the Advisory Committee and explains it in detail. This argument demonstrates the failure to understand that impartiality as a legal category applies only to decisions and decision-making processes, and therefore also provides for the granting of competency for such decision-making. However, the Advisory Committee had no decision-making powers, and therefore his members cannot be, by definition, brought to question with respect to their possible bias, and thus impartiality... "

At the end of statement the President stated that he insists on oral public hearing, where he will bring forward evidence to demonstrate the findings of fact.

On December 22, 2014 the Constitutional Court received President's statement No. BA-4542-2014 of December 16, 2014 responding to the complaint by JUDr. Fulcová Eva, President's statement No. BA-4542-2014 of December 16, 2014 responding to the complaint by JUDr. Juraj Sopoliga and the President's statement No. BA-4267-2014 of December 16, 2014 responding to the complaint by JUDr. Miroslav Duriš, PhD.

In addition to arguments delivered in the previous (quoted) statement, the President said:

«As President, I decided not to appoint the complainant from the position of executive authority. Executive authority, including the President, must, in decision-making respect the fundamental right to good governance, which, although not expressly provided for in the Constitution of the Slovak Republic, but it can be deduced from Article 1 para. 1, according to which the Slovak Republic is governed by the rule of law. The content of this expression also includes the fundamental right to proper administration of public affairs.

Existence of this fundamental right is confirmed not only by the constitutional systems of other countries, particularly EU Member States, but also Article 41 of the Charter of Fundamental Rights of the European Union (hereinafter: „ Charter of Fundamental Rights'), with the a sub-heading: The right to good administration of public affairs.

In accordance with Article 41 para. 2 letter c) of the Charter of Fundamental Rights, the right to good administration also includes the obligation of the administration (executive power) to provide reasons for its decisions.

At Council of Europe we have a recommendation of the Committee of Ministers of the Council of Europe Rec (2007) 7 of June 20, 2007 on good governance - Article 17, under which a decision must be properly formulated in a simple, clear and understandable form and shall contain an adequate justification containing factual and legal grounds on which it was issued.

The existence and acceptance of this fundamental right, even in relation to the decision of the President, was confirmed also by the Constitutional Court.

In case III. US 62/2011, the complaint was, by the virtue of Order of February 8, 2011, dismissed as manifestly unfounded. The complainant argued, inter alia, a breach of Article 41 of the Charter of Fundamental Rights, by President's document having the nature of a measure, by which

he recalled the complainant from his post of judge. »

Subsequently, the President cited section of the decision by the Constitutional Court III. ÚS 62/2011 and stated:

"It follows that the failure to provide sufficient reasoning for my decision not to appoint the complainant to the post of Constitutional Court judge, could have been objected, within the legally stipulated period, only as a violation of the fundamental right to good governance of public affairs.

This, however, did not take place.

Conclusion, regarding the fact that part of the fundamental right under Article 30 para. 4 of the Constitution does not include also a partial right to proper justification of the contested decision is confirmed by the judgment ÚS 79/04 of October 21, 2004... "

In closing section of his statement, the President stated:

"... I have provided the complainant the opportunity to fully exercise his actual fundamental right to equal access to elected and other public offices.

Under no circumstances, even with the absence of requirements pertaining to candidates for judges of the Constitutional Court, stemming from interpretation of PL.ÚS 4/2012, I could not have appointed all five candidates who have filed complaints with the Constitutional Court, including the complainant in the present case. And if the Constitutional Court upheld these complaints, including the complainant in this proceeding, and ordered me to appoint them, the Constitutional Court would not have 13 judges (Article 134 para. 1 of the Constitution, but 17 judges.

Moreover, in case of the three, whom I would not have appointed, provided that with respect to the suitability of the candidates it was possible to appoint three and not only one candidate, according to established constitutional practice and convention by previous Presidents of the Slovak Republic before the existence of the interpretation PL.ÚS 4/2012, I would not have been required to issue a decision on the non-appointment.

In order for the protection of his fundamental rights had actual purpose, the complainant therefore would have had to assert and demonstrate in these proceedings that he would have belonged among the two candidates who should have been but were not appointed, having regard to the fact that the National Council of the Slovak Republic has proposed six candidates for three vacant seats on the bench of the Constitutional Court.

Such argument and evidence are not included in the complaint; as a result, it can be concluded

that there is different reason for the apparent insubstantiality. This different reason lies in the fact that:

- *the complainant did not claim and did not even attempt to demonstrate that he should have been among the appointed candidates;*
- *possible finding of infringement of a fundamental right under Article 30 para. 4 of the Constitution could under no circumstances lead to the Constitutional Court ordering the President of the Republic to appoint the complainant as a judge of the Constitutional Court, because it would have to impose the same upon President of the Republic also with respect to other complainants. That would be, having regard to the fact that the Constitutional Court has only two vacancies, unconstitutional;*
- *after finding a possible violation of fundamental right under Article 30 para. 4 of the Constitution, the Constitutional Court could not, in its legal opinion, replace the President's consideration, as inferred from Part II of this statement."*

In the opinion of the President also section of the complaint in the part relating to the alleged violation of Article 25 letter c) of the International Covenant on Civil and Political Rights (hereinafter the "Covenant on Civil and Political Rights") is manifestly unfounded.

With reference to this section of the complaint, the President stated:

"Here I would like to refer to the doctrinal interpretation of the cited Article 25 of the Covenant. Known commentary on Article 25 letter c) of the Covenant states: it is not a case of having the right to public office, rather merely to ensure that access to public service was guaranteed... by creating a level playing field for this access. *Contracting States are not prevented to determine the requirements for access to public service such as minimum age, level of education, personal integrity or special qualifications. It follows that access to appointed public offices in the state (government) administration or the judiciary may be subject to more stringent prerequisites than those required for access to elected offices. Equal access to public service (office) is expressly stated ban on discrimination in such access. However, Article 25 does not constitute a legal entitlement to obtain or to retain certain post or office. "*

The same arguments were by the President in response to complaints by JUDr. Miroslav Duriš, PhD., the Constitutional Court therefore did not repeat these arguments, and acted similarly in the case of statement to the complaint by JUDr. Eva Fulcová.

III.

Involved provisions of the Slovak Constitution and the International Covenant on Civil and Political Rights

In accordance with Article 1 para. 1, first sentence of the Constitution, Slovak Republic is a sovereign, democratic state governed by the rule of law.

In accordance with Article 2 para. 2 of the Constitution, state bodies may act solely on the basis of the Constitution, within its scope and their actions shall be governed by procedures laid down by a law.

In accordance with Article 30 para. 4 of the Constitution, Citizens shall have access to the elected and public offices under equal conditions.

In accordance with Article 101 1 sentence 2 of the Constitution, The President shall represent the Slovak Republic externally and internally, and his decisions shall ensure the proper operation of Constitutional bodies.

In accordance with Article 102 para. 1 letter s) appoints and recalls judges of the Constitutional Court of the Slovak Republic, President and Vice-President of the Constitutional Court of the Slovak Republic; takes oath of the judges of the Constitutional Court of the Slovak Republic and the oath of the Prosecutor General.

In accordance with Article 124 of the Constitution, the Constitutional Court is an independent judicial body charged with the protection of constitutionality.

In accordance with Article 127 para. 1 of the Constitution, the Constitutional Court decides on complaints by private individuals or legal entities objecting the violation of their fundamental rights and freedoms, or the fundamental rights and freedoms ensuing from international treaty ratified by the Slovak Republic and promulgated in a manner laid down by law, unless a different court makes decisions on the protection of such rights and freedoms.

In accordance with Article 134 para. 1 of the Constitution, the Constitutional Court consists of 13 judges.

In accordance with Article 134 para. 2 of the Constitution, 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 nominates twice the number of candidates for judges that the President of the Slovak Republic is to appoint.

In accordance with Article 134 para. 3 of the Constitution, any citizen of the Slovak

Republic who may be elected to the National Council of the Slovak Republic, has reached the age of 40, is a law school graduate and has been practicing law for at least 15 years may be appointed judge of the Constitutional Court. The same person may not be re-appointed as judge of the Constitutional Court.

In accordance with Article 134 para. 4 of the Constitution, a judge of the Constitutional Court is sworn in by the President of the Slovak Republic by taking the following oath: "I promise on my honour and conscience that I will protect the inviolability of the natural rights of man and civic rights, protect the principles of the state governed by the rule of law, abide by the Constitution, constitutional laws and international treaties that the Slovak Republic ratified and which were promulgated in a manner laid down by law, and decide independently and impartially, according to my best conscience."

In accordance with Article 139 of the Constitution, if a judge of the Constitutional Court surrenders the post of judge of the Constitutional Court, or if he is dismissed, the President of the Slovak Republic will appoint, out of two persons nominated by the National Council of the Slovak Republic, another judge of the Constitutional Court for a new term of office.

In accordance with Article 154c para. 1 of the Constitution, international treaties on human rights and fundamental freedoms that were ratified by the Slovak Republic and promulgated in a manner laid down by law before this constitutional law comes into effect are a part of its legal order and shall have precedence over laws, if that they provide greater scope of constitutional rights and freedoms.

In accordance with Article 25 letter c) of the Covenant on Civil and Political Rights, every citizen has the right and opportunity, without any of the distinctions mentioned in Article 2 and without unreasonable restrictions enter, under equal conditions, the public service in his country.

IV.

A. Motion from the President to adjourn the public hearing set for February 10, 2015

In a letter No. 4542-2014-BA, identified as a submission dated February 4, 2015, which was received by the Constitutional Court on February 9, 2015, the President requested postponement of a public hearing pursuant to Article 30 para. 2 of the National Council of the Slovak Republic Act No. 38/1993 Coll., on the organization of the Constitutional Court of the

Slovak Republic, on the proceedings before it and the status of its judges, as amended (hereinafter the "Constitutional Court Act) that he himself initiated.

The motion to adjourn the President outlined two issues, which he sought to be resolved, namely:

a) proceedings pursuant to Article 6 of the Constitutional Court Act,

b) obtaining of a means of evidence.

In point I of the submissions he requested that the Plenary of the Constitutional Court unify the divergent legal views of the senates in cases III. ÚS 571/2014 with III. ÚS 79/04 and III. ÚS 561/2014. As the reason for unification he stated that the reasoning in the case III. ÚS 571/2014 (Duriš. Eva Fulcová et al.) is contrary to the reasoning in the case III. ÚS 79/04 and III. ÚS 561/2014.

Provisions of Article 6 of the Constitutional Court Act, marked as "unification of senates' legal opinions" states that "the Senate, which through its deliberations reaches legal opinion, which differs from the legal opinion expressed in an earlier findings by one of the senates, it shall submit to the Constitutional Court Plenary a proposal for unification of the differing legal opinions. The Plenary of the Constitutional Court decides on the unification of divergent legal opinions in form of a Ruling. In subsequent proceedings the Senate is bound by the Ruling adopted by the Plenary of the Constitutional Court.".

The President requested that the Third Senate of the Constitutional Court initiated proceedings pursuant to Article 6 of the Law on the Constitutional Court, without having to satisfy the statutory requirement that it intends to reach a legal opinion that differs from the legal opinion expressed in the decision of any of the Senates of the Constitutional Court. From the proceedings hitherto the origin was not clear of the notion that the Constitutional Court should pass in the matter III. ÚS 571/2014 different legal conclusions, from those known from cases III. ÚS 79/04 and III. ÚS 561/2014. Argumentation of the complainants concerning the reasoning of the President's decisions in this case calls for the need to assess its merits in terms of fundamental right guaranteed in Article 30 para. 4 of the Constitution. However, it does not result in an obligation of the Third Senate to initiate proceedings pursuant to Article 6 of the Law on the Constitutional Court, neither did it establish the inadmissibility of the complaints, as claimed by the President in its submission.

In addition, the entity which is authorized to assess the need for application of Article 6 of

the Law on the Constitutional Court and, where appropriate, submit a proposal for harmonization of the legal opinion, is the relevant Senate of the Constitutional Court, which arrives in its deliberations to a different legal opinion, not a party of the proceedings.

Therefore, third Senate of the Constitutional Court, deemed this proposal for harmonization of the legal views to be unfounded and contradicting the Law on the Constitutional Court.

In point II of the submission of February 4, 2015 the President called for the unification of the reasoning in matters III. ÚS 571/2014, II. ÚS 718/2014 and II. ÚS 719/2014.

Also in this part, the Constitutional Court equally states that the proposal to unify legal opinions of the senate is not an instrument available to the parties but is an instrument, available to the Plenary for case-law unification. Under the notion of the Constitutional Court being bound to initiate an action under Article 20 para. 3 of the Act on the Constitutional Court must be understood mainly the binding effect of the request for relief of the motion and not being bound by arguments in its justifications, the relevancy of which the Constitutional Court generally considers as part of deliberations on the merits of a given matter.

Moreover, in the second case the second Senate of the Constitutional Court passed the Findings indicated by the President in the cases II. ÚS 718/2014 and II. ÚS 719/2014 until after the third Senate of the Constitutional Court, by its Finding III. ÚS 571/2014 of September 24, 2014 and the first Senate of the Constitutional Court in its Finding I. US 588/2014 of October 1, 2014 ruled to accept the complaint by the complainants for further proceedings. President therefore requested that the Third Senate of the Constitutional Court, which decided on the extent of acceptance as the first, unified back its decision with the decision of the Second Senate of the Constitutional Court, which at the time of the determination on the extent of acceptance in the case III. ÚS 571/2014 did not even exist yet. Neither with respect to this motion, the legislation (Act on the Constitutional Court) does not allow the procedure, requested by the President.

In the following section, the President requested to carry out examinations of Duriš. Jana Baricová and prof. Duriš. Ján Klučka, CSc. On the issue of examination of a judge of the Third Senate of the Constitutional Court, the opposition senate repeatedly expressed itself in decisions, where it ruled on the President's statement regarding the rejection of this members of the senate.

By the virtue of Ruling I. US 690/2014 of November 12, 2014 the Constitutional Court ruled that the Constitutional Court judge JUDr. Jana Baricová is not removed from the post of a judge in

the case pending before the Constitutional Court under III. ÚS 571/2014. From the conclusions of the grounds of that Ruling it is necessary to restate:

"Position of an objector plays an important role in an objective test, however the decisive is whether his concern is also objectively acceptable. From the theoretical standpoint, the Constitutional Court points out that the test of objectiveness and legal grounds for the incompetence of a judge may overlap, but they are not the same institute.

The essence of objections against Judge Jana Baricová the constitutionality of her appointment to the post of judge of the Constitutional Court in the event that more than two complainants succeed with their constitutional complaint (complaint was brought by all five non-appointed candidates), and the opportunity to interview her as the sole witness in the proceedings handling the complaints of non-appointed candidates for the post of the Constitutional Court judge.

With regards to the first aspect of the objection, this is fully outside the scope of the authority of the President of the Slovak Republic on the subjective right of already appointed judge to the post of the Constitutional Court judge. This proceeding does not have anything to do with proceedings conducted by unsuccessful candidates for the post of Constitutional Court judge against the President of the Slovak Republic since it has been concluded by a formal act referred to in Article 134 para. 4 and 5 of the Constitution, under which Jana Baricová legitimately assumed the office of judge of the Constitutional Court. The second argument also does not hold up, because as a witness in proceedings before the Constitutional Court can appear only a private individual, who has directly perceived certain fact with his/her senses (usually sight or hearing) and is able to submit to the Court a corresponding report. However, the Constitutional Court Judge Jana Baricová cannot be a witness to the process of interviews with unsuccessful candidates, on the basis of which the President of the Slovak Republic decided not to appoint them as judges of the Constitutional Court, because she did not attend them at all, and therefore is not competent to furnish the Constitutional Court with a report.

On the basis of the foregoing, the Constitutional Court already concluded that the facts alleged by the President of the Slovak Republic, in context of the Finding in a case before the Constitutional Court under III. ÚS 571/2014 even from the objective standpoint, do not give rise to legitimate doubts about the impartiality of Judge Jana Baricová, therefore a finding was made, as stated in the operative part of this decision."

By the virtue of decision ÚS 5/2015 of January 14, 2015 the Constitutional Court ruled to abate the proceeding regarding the repeated objection by the President on rejection of the Constitutional Court judge JUDr. Jana Baricová for bias in the matter conducted under. III. ÚS

571/2014. At the end of the reasoning of this Finding, the Constitutional Court concluded:

"In its ruling in this matter, the Constitutional Court based its decision equally on Article 15a para. 4 of the Civil Procedure Code in conjunction with Article 31a of the Constitutional Court Act to the effect that the repeated objection of bias raised for the same reason will be disregarded by the Court. Given the above, in the view of the Constitutional Court senate, it was not necessary to rule on the matter repeatedly. However, the appeal senate did take into account the dispositive act by the objected judge and instruction by the President of the Constitutional Court that the matter to be transferred to senate I. of the Constitutional Court for further ruling, and therefore, in order to avoid process interference, it temporarily suspended the proceedings on repeated objection by the President of the Slovak Republic No. 4542-2014-BA of December 9, 2014 to reject the Constitutional Court Judge Jana Baricová due to her bias in the matter conducted under III. ÚS 571/2014."

The legislation does not provide for continual challenges of integrity of the senate and selection of judges to hear and rule on the case. Such approach must therefore at the outset be rejected and considered as non-compliant with legal system of the Slovak Republic.

For the purposes of examining evidence, the President requested the following documentary evidence:

" - filings for disciplinary prosecution of Zuzana Ďurišová and Juraj Babjak

- Minister of Justice's opinion on these filings and his letter addressed to the Judicial Council

- Opinion of the Judicial Council to the letter from the Minister of Justice, in which he requested assessment of filings by Ján Bernát and Juraj Sopoliga.

Outcome of review of these filings and the decisions of the Minister of Justice on their justification, together with the Judicial Council's opinion could have a serious consequence on the outcome of the proceeding itself.

As a party to the proceedings, I have a right of respond to such outcome and also this is a reason why I do believe it possible to conduct public hearing."

The President replied to complaint by Duriš. Eva Fulcová, submitted to him on October 21, 2014, on December 16, 2014, to complaint by Duriš. Juraj Sopoliga, delivered to him on October 21, 2014, he responded on December 16, 2014, and to complaint by Duriš. Miroslav Duriš, PhD., submitted to him on September 25, 2014, he responded on October 10, 2014 and December 16, 2014. In any of these replies he did not state the proposals, he made in the application for

adjournment, delivered to the Constitutional Court on February 9, 2015.

The Constitutional Court notes, moreover that the request for an assessment “filing" by Ján Bernát in this proceeding is unfounded because he is not a party to the proceeding in case III. ÚS 571/2014. These proposals may be applied by the party in cases Ref. II. ÚS 718/2014 and II. ÚS 719/2014.

As far as the General Court judges Zuzana Ďurišová and Juraj Babjak are concerned, the Constitutional Court is not examining their integrity and that same applies to the filing to initiate an unspecified disciplinary proceedings. It is not clear what is the correlation between the documentary evidence of disciplinary proceedings with no further identification, with the infringement of rights alleged by the complainants in their complaints.

The assessment delivered by the advisor to President Jan Mazak in the media on February 10, 2015 (i. e. etrend.sk., author Zuzana Petková) “*that he requested in a letter an adjournment because he does not consider it ready”*, the senate considers as inappropriate and leading to obstruction of the proceedings. Neither the advisor to the President, nor any other person authorized by the President not actually review the file or did request such review, so it is not clear where did President’s advisor drew the information about the unpreparedness of the proceedings.

In principle, the Constitutional Court is not a facts court, it does not rule on civil matters, criminal matters and it does not examine the legality of decisions by public authorities either. These case are adjudicated, according to Article 142 para. 1 of the Constitution, by the general courts. In addition, under the circumstances of the case, for Constitutional Court it was critical to carry out assessment of the legal and not factual issues. Based on these reasons, the Constitutional Court did not consider it necessary to carry in the matter any further action and taking of evidence.

B. Oral submissions at a public hearing held on March 3, 2015

Legal representative of the President, Ján Mazák (hereinafter referred to as “legal counsel to the President") in the first part of his speech summed up the general view of the matter and stressed the importance of interpretation in the case of non-appointment of the Prosecutor General. At the same time, he referred to the reasoning in findings II. ÚS 718/2014 and II. ÚS 719/2014, where supposedly in accepting the complaint from Ján Bernát and Imrich Volkai it was emphasised that this interpretation is fully applicable also to non-appointed of candidates

for judges of the Constitutional Court.

With regards to the matter itself, the legal counsel for the President stated:

«*1. The complainants, in their proposals for decision in the matter, are only seeking a statement with respect to violation of their fundamental right to have access on equal terms to appointed post of the Constitutional Court judge under Article 30 para. 4 of the Constitution.*

Assessment of equal conditions of access requires, in the opinion of the President, a comparison of the factual and legal situation, in which the applicants were as candidates, with the factual and legal situation of a candidate, who was, from among the candidates submitted to the President of the Republic, appointed a judge of the Constitutional Court.

The documentary evidence, submitted to the Constitutional Court, clearly shows that all candidates submitted by the National Council of the Slovak Republic were provided with a level playing field environment, where the President assessed their suitability, i.e. the ability to hold the office of Constitutional Court judge.

In case of this comparison, the only open question remained the issue of same approach by the President to the candidates during the interview.

The President asserts that even during the interview, all candidates were provided with a level playing field; there is no other relevant claim by the complainants that could indicate conclusion to the contrary.

If such statement by the President of the Republic would not be sufficient, the only remaining action available would be to obtain evidence by interviewing the complainants as the parties to the proceedings and witness Jana Baricová. From this evidence and comparison of information obtained from them would, according to the President, confirm that all candidates were provided equal conditions, under which they orally presented their competency for the post of judge of the Constitutional Court.

2. Insubstantiality of complaints on this issue is also apparent from the fact that the complainants indeed seek the finding of violation of their fundamental right have the same conditions for access to appointed post of judge of the Constitutional Court under Article 30 para. 4 of the Constitution, in conjunction with Article 2 para. 2 of the Constitution, but they do not in any way seek legal consequences that would be associated with a potential verdict of the Constitutional Court about the violation of this fundamental right, in particular, they do not seek the Constitutional Court to order the President of the Republic to appoint them as judges of the Constitutional Court. The question therefore arises what actually the complainants seek, when pursuing only the pronouncement of a breach of the fundamental right to have equal conditions for

access to the appointed posts and propose the annulment of the decision of the President on their non-appointment?

First, it should be noted that the Constitutional Court is not a body that has the answer to serious questions of violations of fundamental rights only in a manner, which has no practical impact on the legal situation of the complainants.

Another question arises, therefore, what binding legal opinion could be pronounced by the Constitutional Court senate if, eventually, the violation of fundamental rights of complainants and the annulment of the President's decision on non-appointment of the complainants would be pronounced?

President of the Republic is of the opinion that there can be no pronouncement of any legal opinion, which would mean that in further proceedings he would have to appoint one of the complainants as a judge of the Constitutional Court.

The Constitutional Court is not in fact entitled to replace the President discretion in deciding which of the candidates shall be appointed and which candidate he will not appoint. In this connection, we consider it necessary to restate that the complainants are among the five candidates who were not appointed, and at the Constitutional Court there are only two vacant posts of Constitutional Court judge.

Moreover, how is the Constitutional Court to consider the question, whether the complainants in this matter are not those candidates, whom President is entitled not to appoint only on the basis that the Constitutional Court has only two vacancies and there are five candidates? This will be clear only after the ruling of both Senates of the Constitutional Court and, speaking theoretically and practically feasible, nothing would prevent the President not to appoint those candidates for judge of the Constitutional Court, who would have been identified by the Constitutional Court as those, who are to be appointed judges as judges, because:

- *firstly, the Constitutional Court has only two vacant posts of judges,*
- *the Constitutional Court cannot replace the discretion of the President on the selection of judges of the Constitutional Court, and finally,*
- *from the complainants in the present case there is no requirement for their appointment, at least within the proposed legal opinion of the Constitutional Court; although in the present case, the complainant Eva Fulcová seeks that the Constitutional Court orders the President to appoint from the five non-appointed candidates two judges, but the complainant may seek only the protection of herself, and still only in this case, and not in proceedings, in which she is not a party (case II. ÚS 718/2014).*

3. Complainants cannot successfully, claim even that the President of the Republic,

following the potential annulment of his decision on the non-appointment of the complainants, to provide treasons for their non-appointment, alternatively, to appoint them due to the lack of reasons.

Once again, we wish to remind that even if there existed insufficient grounds for non-appointment due to incompetence of the complainants to perform the duties of judge of the Constitutional Court, what is not the case, it would suffice not to appoint them, having regard to the fact that at the Constitutional Court there are only two vacant posts of judges and five non-appointed".

Next, what we consider to be the most significant argument, the complainants in the draft decision in the main proceedings do not seek the finding of violation of this fundamental right, which would also include the right to properly reasoned decision of the President not to appoint them to the post of Constitutional Court judge.

At this point, we underline that the judgment III. ÚS 79/04 of October 21, 2004 contains a legal opinion, which is decisive in this constitutional dispute...

4. The complainants cannot assert: that such fundamental right, which also includes the right to justification of decision made by every executive authority (the President of the Republic is part of the executive branch) does not exist. This fundamental right is, as we have already stated in our submissions, the fundamental right to good public governance, which is derived from Article 1 para. 1 of the Constitution and the rule of law principles.

This omission on part of the complainants at this stage of the proceedings before the Constitutional Court can no longer be remedied, and even if it would be possible, in that case, the complainants could not be, in the opinion of the President, successful. Despite the job position of the complainants, held in the general judiciary system, they did not demonstrate in any manner their competencies for holding the office of judge of the Constitutional Court.

Basic building blocks of such competency is professional readiness containing mainly extensive knowledge of theory and practice of constitutional justice, the European Court of Human Rights and the European Court of Justice, alternatively a demonstration of effective link of their existing legal practice with constitutional justice, not to mention the publication, lecture or similar activities that would indicate that the candidates have been systematically preparing for work at the Constitutional Court.

The complainants did not even claim to have fulfilled these factual prerequisites. Conversely, the failure to meet these criteria stems from their professional resumes and outcome of the interview.

To insist on the fulfilment of these criteria is also justified for two additional reasons. Firstly,

the Constitutional Court was established 22 years ago; after such period of time, it is fully justified to require from candidates more than just 15 years of legal practice, without achieving exceptional results. Secondly, submissions filed with the Constitutional Court after 22 years of its existence became highly technical motions or complaints, which often, become complicated constitutional challenges for the Plenary and senates of the Constitutional Court...

6. In closing of his address, the President's wants to pay attention to a serious issue, which relates to the impartiality of this senate, or member of this senate.

In the opinion of the President, the case of the complainants Eva Fulcová, Juraj Sopoliga and Miroslav Duriš is heard a adjudicated by Judge Jana Baricová, having a relationship to the case, as well as the parties, which confirms that she cannot be an impartial person:

Firstly, she was the only candidate, presented to President Andrej Kiska, appointed as a judge;

Secondly, Juraj Sopoliga's complaint is aimed directly against her. This is confirmed by the text on p. 20 para. *5 of his complaint, where he literally states:*

"Having fulfilled all constitutional criteria by the complainant... it is apparent that the differences are not of the type and severity that would justify the unequal treatment of the complainant (compared with the successful candidate)."

Complaints by Eva Fulcová and Miroslav Duriš do not contain such wording, but they both claim equally not having equal conditions for access to the post of a judge of Constitutional Court, and this is possible only in relation to candidate Jana Baricová;

Thirdly, Judge Jane Baricová acquired knowledge on the subject of proof in this matter not as a judge but as a direct participant in an interview before the advisory body whose constitutionality, process, status and results before it are challenged by the complainants, also with particular regard to herself;

Fourthly, the person of this judge and her appointment represents, in fact and in law, a benchmark in relation to the complainants; they cannot be compared with nobody else, because only she was appointed a judge...

7. The President continues to insist on all procedural proposals contained in submissions from February 4, 2015, No. 4542-2014-BA, on which the senate of the Constitutional Court has still has not decided yet.

The President waives his entitlement to reimbursement of the costs of these proceedings.»

At the public hearing legal counsel of JUDr. Eva Fulcová stated the following on the matter:

«... *In item 1) the President states that "in not appointing the complainant, he only exercised*

his constitutional right", by pointing to Article 134 para. 2 of the Constitution SR, Article 102 para. 1 letter s) of the Constitution, but mainly citing the interpretation by the Constitutional Court in its decision, PL. ÚS 4/2012 dated 24.10.2012, regarding the appointment of the Prosecutor General of the Slovak Republic.

According to the President, this interpretation is generally binding and "compulsorily applicable" also to (non)appointment of a candidate as a judge of the Constitutional Court, as it has identical legislative parameters as the (non)appointment of candidate for the post of Prosecutor General of the Slovak Republic.

Based on the laws above (Article 134 para. 2, Article 102 para. 1 letter s) of the Constitution SR) and interpretation of the Constitutional Court in the case PL. ÚS 4/2012, the President came to the conclusion that he is entitled not only not to appoint half of the nominated candidates (Article 134 para. 2 of the Constitution SR), but is entitled and obliged, if not all requirements for their appointment are met, not to appoint even all or several, than half of the candidates put forward by the National Council.

With regards to these conclusions arising from item I) of the submission by the President we consider necessary to note that the appointment of judges of the Constitutional Court are not subject to the interpretation concerning the appointment of the Prosecutor General of the Slovak Republic, namely the reason being that the Constitutional Court in paragraph 31 of this Ruling stated: "... the Constitutional Court considers as the subject of the finding an interpretation, which will answer questions whether the President, under Article 102 para. 1 letter t) and Article 150 of the Constitution, has a duty to appoint a candidate for the Prosecutor General post, proposed to him by the National Council, if the latter fulfils the constitutional and statutory requirements for the appointment, and what is the time horizon for the exercise of the President's powers. The Constitutional Court thus clearly defining the object of its actions, and therefore also the extent of the binding force of its outcome, which is the interpretation of Article 102 para. 1 letter t) and Article 150 of the Constitution SR, whereby it interpreted Article 102 para. 1 letter t) of the Constitution only in the part concerning the appointment of the Prosecutor General of the Slovak Republic, but not in other fictions referred to in this provision...

The wording of Article 134 para. 2 sentence 2 of the Constitution infers that the President of the Republic must appoint from among the candidates as many judges of the Constitutional Court, in order to fill all vacant posts.

In this context, we also point out that none of the provisions of the Constitution SR, nor any of the rulings of the Constitutional Court PL. ÚS 4/2012, even using analogy and not implicitly indicates and it is not possible to deduce the President's authority to examine the suitability of

candidates as judges of the Constitutional Court, in the manner referred to in Article 3 of the Presidential Decree No. 1262-2014-BA of 17.6.2014 on establishing the Advisory Committee to examine the suitability of candidates for judges of the Constitutional Court of the Slovak Republic (hereinafter the "Advisory Committee"), therefore de facto testing of knowledge of constitutional law, findings by the Constitutional Court of the Slovak Republic, the European Court for Human Rights, etc.:, and even to transfer such non-existent authority to a body, established for this purpose by the President, in contravention of the Constitution.

It is apparent that the process by which the President exercised, and even his decision was not made within the allowable discretion, as argued by the President of the Republic in item II of the submission, because the procedure of the President in the process of consideration and subsequent decision, by which he did not appoint half of the candidates put forward by the National Council, as determined for the President of the Republic by Article 134 para. 2 of the Constitution SR, is in breach of this Article of the Constitution SR, and simultaneously also contrary to Article 2 para. 2 of the Constitution, whereby the President violated the applicant's fundamental right to have access to elected and other public office under equal conditions...

Given the above, the President of the Republic, in installing the complainant to the post of judge of the Constitutional Court, has failed to meet obligations specified in Article 134 para. 2 of the Constitution SR, by not appointing half the number of candidates for the post of Constitutional Court judge from among the candidates put forward by the National Council, the President made appointing of the complainant to the post of the Constitutional Court judge onerous, by reducing the Constitution guaranteed chance to be appointed with odds 1: 1, the President through illegal procedure, especially the decision, resulting in the selection of a single judge for the Constitutional Court posting from among the six candidates presented, unjustifiably reduced the odds to 1: 5...

President's authority under Article 102 para. 1 letter s) of the Constitution, is followed through with wording of paragraph 134 para. 2 sentence 2 of the Constitution SR, "the National Council of the Slovak Republic nominates twice the number of candidates for judges, which the President of the Slovak Republic is to appoint."

The formulation used in this constitutional text has impact on the fact that it has to be taken into account in the application of the President's powers provided for in Article 102 para. 1 letter s) of the Constitution SR, namely in the sense that this provision limits the discretion of the President, consisting in the power to select any candidate / candidates, but always in such number as the number of vacancies on the Constitutional Court bench and therefore does not allow the President to widen (or to reduce the number of persons appointed from among the candidates proposed to him by the National Council.

However, it is apparent that the President, did not respect this restriction stipulated in Article 134 para. 2 of the Constitution, and therefore the decision is contrary to Article 134 para. 2 of the Constitution and even doctrinal Constitutional Court findings, referred to in the President's filing, have no effect on this fact.

Also we pointed out that, according to long-term and established practice in application of Article 102 para. 1 letter s), in conjunction with Article 134 para. 2 of the Constitution SR, the President of the Slovak Republic has so far in the past always appointed, from candidates for judges of the Constitutional Court one half that is, constitutionally required number of judges of the Constitutional Court. However, such procedure was not followed in the case of the complainant, which is also in breach of the constitutionally guaranteed right of access to elected and other public posts under equal conditions according to Article 30 para. 4 of the Constitution, in relation to which the Constitutional Court concluded that "in other words, it concerns cases, if the principle of equal treatment (non-discrimination) was violated within a group of persons, who were in the same legal position" (judgment of the Constitutional Court I ÚS 76/2011).

Based on the aforementioned conclusions of the Constitutional Court it can be surmised without a doubt that the approach and decision by the President in relation to the complainant represented an infringement of the requirement of access to elected and other public office under the same conditions, alternatively a discrimination of the complainant, in comparison with other candidates for post of Constitutional Court judge, who were presented to the President by the National Council not together with the complainant, but in the past, and therefore not in an equal legal position as the complainant." In relation to candidates for judges of the Constitutional Court, in the past the President always proceeded in accordance with Article 134 para. 2 of the Constitution SR, i.e., from double the number of candidates always appointed appropriate number of judges for the Constitutional Court, thus maintaining their constitutionally guaranteed chance of 1: 1, to be appointed as judges of the Constitutional Court.

However, this was not the case in relation to the complainant, because, unlike candidates for judges of the Constitutional Court put forward in the past, who were in the same legal situation as the complainant, the complainant was already subject to "examination" by Advisory Committee, which acted without relevant legal basis, namely in the case of the complainant, assessment of other than the Constitution prescribed requirements for judge of the Constitutional Court were examined, unlike the candidates for Constitutional Court judges, who had been nominated to the President of the Republic by the National Council in the past.

In item VII) of the submission the President of the Republic stated that the complaint was accepted for further proceedings also in section where the complainant alleges insufficient

reasoning for the decision on her non-appointment to the post of a Constitutional Court judge, whereas the complainant alleges only the breach of fundamental right under Article 30, para. 4, and therefore no consideration can be given to the pronouncement of a violation of a different fundamental right, the content of which is the right to proper justification.

Here we wish to note that the complainant alleges the lack of justification of the President's decision, in relation to the violation of her fundamental right under Article 30 para. 4 of the Constitution, because the justification of the decision in principle demonstrates the arbitrariness of the process, in particular of the President's decisions not to appoint the complainant to the post of a judge of the Constitutional Court, and stands witness to the fact that the complainant has been assessed by other, unknown criteria, and such obfuscation reasons are always a manifestation of arbitrariness.

This also proves a breach of duty by the President of the Republic in the process of creating and decision-making on (non)appointment of the complainant to the post of Constitutional Court judge.

In this context we would like to state that had the President proceeded in appointing the judges of the Constitutional Court in accordance with Article 134 para. 2 of the Constitution SR, he would not have had to justify his decisions at all...

With reference to these arguments we wish to state that the complainant does not allege and never alleged, as stated by the President in his statement that she is one of those two candidates who should have been appointed by the President of the Republic.

The complainant had stated already in her complainant that it is apparent that all candidates for Constitutional Court judges proposed to the President by the National Council of the Slovak Republic did not have the right to be appointed, however they had the right to constitution-guaranteed chance of 1: 1 to be appointed as a judge of the Constitutional Court from twice as many candidates, as were vacancies on the Constitutional Court bench.

However, by selecting only one Constitutional Court judge from six candidates for Constitutional Court judge vacancies, the President reduced their chance to 1: 5, by proceeding in its decision-making contrary to Article 134 para. 2 of the Constitution SR, thereby making for the complainant appointment to the function significantly more difficult, thereby violating her fundamental right under Article 30 para. 4 of the Constitution, to access to the elected and public offices under equal conditions. In her Constitutional complainant, the complainant seeks, inter alia, for the Constitutional Court to instruct the President of the Slovak Republic to act in the matter again, by appointing two judges of the Constitutional Court of the Slovak Republic from the five non-appointed candidates.

President of the Republic in his statement said that such proposal demonstrates fundamental deficiencies in the complainant's knowledge of the powers of the Constitutional Court. With reference to such invective argument of the President, the complainant wishes to point out that it probably had escaped the attention of the President that the Constitution in Article 127 para. 2, empowers the Constitutional Court, when ruling on complaints by private individuals and legal entities, to decide apart from findings of violations of fundamental rights and freedoms, also on other measures that are designed to remedy violations of fundamental rights and freedoms, by restoring to the previous status before the breach or prevent the continuation of the infringement of fundamental rights and freedoms of the complainant in the future (preventive effect).

Only finding, in which the Constitutional Court orders the President of the Slovak Republic to act in the matter again, by appointing two Constitutional Court judges from among the five non-appointed candidates, will prevent the continuation of violation of basic rights and freedoms of the complainant. Given the foregoing, we propose that the Constitutional Court ruled within the scope as proposed by the complainant in her constitutional complaint.

If the Constitutional Court upholds the complainant, we also seek compensation of the cost of proceedings in the form of award of the attorneys' fees. Pursuant to Article 1 3 in conjunction with Article 11 para. 3 of Decree No. 655/2004 Coll. on remuneration and compensation of lawyers for providing legal services, as amended, the basic rate of the tariff fee for one act of legal services is one sixth of the calculation base, representing in 2014 the amount of 134 € and in 2015 the sum of 139.83 € and pursuant to Article 16 para. 3 of Decree No. 655/2004 Coll. on remuneration and compensation of lawyers for providing legal services, as amended, the amount of one hundredth of the calculation base for each legal service act, i.e.in 2014 the amount of 8,04 € and in 2015 the amount of 8.39 €. Costs of legal representation for two acts of legal services - 1. preparation and briefing, 2. filing of complaint, 3. court attendance at the hearing are, including VAT of 86.46 € , the total of 518.76 € which we request to be paid the to the account of lawyer Duriš. Milan Fulco, of Živnostenská 2, 811 06 Bratislava, within two months after the decision's effective date.»

Counsel for complainants JUDr. Juraj Sopoliga and JUDr. Miroslav Duriš, PhD. stated:

«... *Creating of public office the Constitutional Court judges (appointment, recalling, resignation) is regulated in several Articles of the Constitution SR - Article 102 para. 1 letter s). Article 134 para. 2, Article 138 para. 2, Article 139.*

The purpose of these constitutional norms is to regulate those reasons that require involvement of other constitutional bodies (compare with judgment Pl. ÚS 10/2005 concerning judges of general courts - Article *147 para. 1 of the Constitution SR - hereinafter the*

constitution).

There is no doubt that these constitutional provisions are clearly semantically linked (causality existing between them), resulting in inadmissibility to ignore the causal link between those provisions, meaning that in application of the Constitution no provisions can be taken out of the context of the Constitution and be interpreted in isolation (compare PL. *ÚS 32/95, II. ÚS 48/97).*

General wording of the aforementioned provisions of the Constitution is sufficiently clear.

According to Article 139 of the Constitution, if a judge of the Constitutional Court surrenders his post..., or if he/she is recalled, the President of the Slovak Republic will appoint another judge for a new term of office, out of two persons nominated by the National Council of the Slovak Republic.

The aforementioned Article addresses a situation of premature vacancy of a judge post. The interaction between the National Council SR and the President in handling of this situation and in decision-making on the appointment of a new judge is regulated identically. The national Council is charged with obligation and at the same also granted the authorisation to nominate two candidates (two individuals), from whom the President is to appoint a new (one) judge.

Hence, Articles 134 para. 2, 139 of the Constitution, contain identical treatment of the authority of the NR SR to put forward twice as many candidates for a post of judge.

The phrase "another judge" clearly implies that it involves appointment of one judge (one person).

The phrase "out of two persons" is sufficiently clear (without a doubt) that two people are involved (two candidates).

The term used is a definitive numerical group, which defines the number as a sum of parts.

In Articles 134 para. 2, 139 of the Constitution, are also used numerals that represent or indicate the number of persons. Numeral "double" is a multiple numeral made up of basic definitive number (two).

Standard wording of Articles 134 para. 2, 139 of the Constitution clearly demonstrates the constitutional concept of creating the judges of the Constitutional Court through the authority of the legislature to propose always twice the number of candidates for judges.

Whereas Article 139 of the Constitution regulates obligation of the President to appoint only one judge out of two persons nominated by the National Council, strict respect for the constitutional concept of creating this public office through obligatory interaction of two constitutional bodies (the President and the National Council) demonstrates the existence of the

constitutional duty of the President to appoint, from among twice as many candidates, exactly one half (multiple of one) as judges.

Legal opinion that Article 139 of the Constitution implies (includes) constitutional duty of the President to appoint a different judge, is also published in the specialist literature (Constitution SR - commentary edition 111, J. Drgonec, *Heuréka* 2012, p. 1450).

While respecting the finding of the Constitutional Court on the application of the Constitution as a legal unit, in mutual respect of all constitutional norms (see 11. ÚS 128/95), it is clear that there is a harmonized application of the President power with the Constitution in appointing a Constitutional Court judge only if it implements a duty (is to appoint) to create a multiple of one as judges out of double the number of candidates put forward.

Different procedure (appointment of a smaller, or greater number out of double the number of candidates) is a denial, from a content perspective, of the Constituent Assembly approved constitutional concept of creating the judges of the Constitutional Court.

At the same time I wish to emphasise the fact that it is not permissible to disregard the application process of creating the function of judges of the Constitutional Court hitherto, as it was based on the identical constitutional framework. Therefore we considers it insufficient to take into account only the present candidates. In determining the fulfilment of the constitutional criteria and constitutionality of the procedure all previous candidates and appointed judges must be taken into account.»

V.

Constitutional survey

1. Regarding the constitutional framework for appointment powers of the President of the Slovak Republic

In a democratic legal environment, which also declared by the Constitution in Article 1 para. 1, first sentence, also a creation of constitutional bodies takes place with the participation of a number of state powers. Judiciary is involved in this process only in some cases in the form of staffing proposals. The broadest selection powers rest with legislative power, which characterizes and specifies the scope of present candidates submitted to the President for a final decision.

According to constitutional theory, the presidential powers can be systematically arranged according to set of evaluation criteria. In terms of the subject matter of this constitutional survey, we can speak of conditional powers, where the conduct of the President is subject to action by another constitutional body, for example a proposal by the Government of the Slovak Republic (the "Government") or the National Council of the Slovak Republic and autonomous powers, where the President does not a proposal from another state authority, in order to exercise its constitutional powers, for example granting of clemency (similarly, for example Čič, M. et. al. *Commentary on the Constitution of the Slovak Republic.* Žilina : Eurokódex, s. r. o., 2013, p. 555). The application of appointment powers of the President also takes place with participation of the judicial power, represented by the Judicial Council of the Slovak Republic. Based on its proposal, the President appoints and recalls general court judges. This digression is purely for illustrative purposes, and it is not definitive. Interpretation would also have to mention other officials, heads of central authorities, senior government officials, chancellors, professors, generals and others, which is not essential for our constitutional survey or the conclusions derived from it.

The participation of the two, but also all three state powers in establishing the state bodies often becomes a source of dispute regarding the interpretation of the powers, which leads to a motion for interpretation of the Constitution under Article 128 of the Constitution, submitted to the Constitutional Court.

The Constitutional Court case-law indicates that the Court has already ruled on the interpretation of several powers of the President, despite the fact that the President in his statement and his counsel in oral presentation at a public hearing refers to only one of them, namely to PL. ÚS 4/2012, dealing with the appointment powers of the President with respect to Prosecutor General (p. 1-2 and subsequent statement from October 10, 2014).

The Constitutional Court provided interpretation, also of other presidential powers, for example in the matter of the possibility to recall member of a government, to appoint and recall heads of central bodies, the appointment of ambassadors and others (see below).

Since its inception, the Court responded to motions, requesting interpretation of the powers of the President, which was driven by political disputes between the President and the government. In general, the Constitutional Court made a statement with regards to the powers of the President of expressed in the case I. US 39/93 (it should be noted that at the time of findings on these interpretations, under the Constitution and the Law on the Constitutional Court, decisions were made by the senate) and stated:

«The Constitution of the Slovak Republic (No. 460/1992 Coll.) provides three types of

formulations to regulate the powers of the President. In the first instance, it is expressly granted permission expressed by the phrase “may do”; for example, he may dissolve the National Council of the Slovak Republic [Article 102 (d)], may recall a judge of the Constitutional Court (Article 138 para. 2. In second instance, an expressly specified duty/obligation is involved, expressed by formulation “is obliged", for example, is obliged to hear the opinion of the Speaker of the National Council of the Slovak Republic [Article 102 (d) sentence 2]. The third instance involves the wording “will do", for example “bestows distinctions” [Article 102 letter h)] or “recalls a member of the government" (Article 116 (7). This wording is not explicit in its content. Its interpretation may lead to entitlement, but also an obligation. Consequently, it is necessary to remove the doubt pertaining to the content of general sentences used in legislation of the Slovak Republic, and specifically in the Constitution.

Universal interpretative rule for state authorities for reading of legal norms stipulated in the Constitution of the Slovak Republic is the following rule: “Governments can act only on the basis of the Constitution, within its limits and scope and in a manner, determined by law” (Article 2 para. 2. By application of this interpretation rule specified in the Constitution of the Slovak Republic the President’s rights cannot be separated from his obligations, because this would create doubtful obligations. For example, according to Article 102 (i) of the Constitution of the Slovak Republic, President "grants amnesty, pardons and mitigates punishment." If this type of formulation of the President’s roles was interpreted as legal obligation, interpretation of law would result in strongly dubious obligation of the President to grant amnesty or reduce sentence, imposed by the courts to anyone who requested it. Constitutional status of the President of the Slovak Republic is conclusive only when the Slovak Constitution expressly grants him a permission or expressly charges him with an obligation. In other cases, the constitutional role of the President needs to be completed either by interpretation of legislation stated in the text of the Constitution of the Slovak Republic or by change of the wording of individual provisions of the Constitution of the Slovak Republic. Even if the law would determine the duty of the President of the Slovak Republic to act in a manner not prescribed by the Constitution of the Slovak Republic, it would be impossible to interpret such obligation as constitutional, because the law would be amending the position of President of the Slovak Republic regulated by the Constitution of the Slovak Republic, and hence would be by its very nature unconstitutional. »

As it is apparent, the Constitutional Court already early in its findings confirmed that the President’s powers are not always formulated unambiguously. In doing so, it is necessary to appeal to the President, for him to execute his powers in such manner as to avoid creating

reasonable doubt about his independence, impartiality, as well as objectivity. He must do so under the constitutional oath, commanding him: “I will discharge my duties in the interest of citizens and will uphold and defend the Constitution and other laws.” (Article 104 of the Constitution).

Analysis of this formulation of the oath means that the President will (should) direct each of his powers exclusively to promote the interests of citizens and the values of the rule of law. This oath relates fully also to the discharge of powers contained in Article 102 of the Constitution.

According to the established practice of the Constitutional Court, “the Constitution represents a set of laws, which need to be applied in relation to all other constitutional norms. A condition can occur only rarely and sporadically when the social relations are governed by a single norm of the Constitution.“ (II. ÚS 48/97).

“Each provision of the Constitution needs to be interpreted and applied in conjunction with other norms of the Constitution, if a causal relationship exists between them.” (II. ÚS 48/97).

“In application of the Constitution no provisions can be taken out of the context of the Constitution and be interpreted in isolation. The interpretation and application of the Constitution must not violate or ignore the causal link between provisions, having semantic links between them. "(PL. ÚS 32/95).

In relation to the definition of the President’s position within the scope of authority to appoint, there is a causal link between the provisions of Article 101 para. 1 sentence 2 of the Constitution, inferring that “the President... through his decisions ensures proper operation of constitutional bodies”, and individual provisions of Article 102 para. 1 of the Constitution, establishing the President's powers to appoint. Without active involvement by the President, i.e., by a decision to appoint officials of public authority designated by the Constitution, upholding the Constitution, he cannot ensure proper operation (functioning) of constitutional bodies.

As the starting point on the interpretation and application of Article 102 para. 1 of the Constitution can be identified also the legal opinion of the Constitutional Court published in the case I. US 61/96, according to which »the only provision of the Slovak Constitution limiting the execution of all constitutional powers of the President of the Slovak Republic is contained in the oath taken by the President, where he commits to: “I will discharge my duties in the interest of citizens and will uphold and defend the Constitution and other laws "(Article 104 of the

Constitution).

Therefore, only the interests of citizens, upholding and defending the Constitution and other laws are the only reasons regulated by the Constitution that the President of the Slovak Republic is taking into account in the exercising any of his constitutional powers as are provided for in Article 102 para. 1 letters a) through r) of the Constitution.»

The Constitutional Court, in defining the purpose and content of the constitutional position of the President (in instances where these are not conclusively defined in provisions relating to presidential powers, ergo in those instances which are left for determination whether they are an authorisation or an obligation of the President to exercise the particular authority) has already dealt with, to wit by questions relating to:

a) recalling a member of government, as proposed by the Prime Minister (I. US 39/93),

b) appointing a head of diplomatic mission (I. US 51/96),

c) appointing the Vice-Governor of the National Bank of Slovakia, as proposed by the Government, approved by the National Council (PL. ÚS 14/06),

d) appointing of the Prosecutor General, as proposed by the National Council (PL. ÚS 4/2012).

Re: item a)

The Constitutional Court, in proceedings concerning the competencies of the President in deciding on the proposal of the Prime Minister to recall a member of the government, gave this reasoning:

"Article 116 para. 4 of the Constitution regulates for authorisation of the Prime Minister to submit legally significant proposal to recall a Government member. By the virtue of submission by the Prime Minister to recall a government member, a legal obligation of the President arises to deal with such proposals. President after considering the circumstances of the case must decide whether to grant the proposal submitted by the Prime Minister and recall the member of the government or reject the proposal and not recall the member of the government.

Article 116 para. 1 of the Constitution does not impose an obligation upon the President to recall a member of Government, if proposed by the Prime Minister."

Re: item b)

Subsequent dispute over interpretation of Article 102 (b) of the Constitution (as amended at the time of interpretation) began by the government proposing O.K. to the post of extraordinary and plenipotentiary Ambassador to the United Nations (UN) and Head of Permanent Mission to the United Nations based in New York. The President rejected this proposal by the Government. The Constitutional Court in proceedings on interpretation of the Constitution considered, whether the President can make granting of government proposal conditional upon certain condition being met. The Constitutional Court concluded that the President's approach, in not granting the Government request to appoint the designated person proposed by the Government to the post of ambassador, is not subject to constitutionally relevant dispute over interpretation of the Constitution, namely also due to the fact that the government has committed a procedural error by not including in the case that part of a dispute that could have been constitutionally relevant (I. US 51/96).

There was an attempt to initiate essentially the same dispute by complainant proposed for the post of ambassador of the Slovak Republic in Turkey, who also failed to satisfy the procedural requirements for bringing a motion capable of triggering legally relevant effect.

Regarding item c)

In the dispute about the nature of the scope of the President to appoint Vice Governor of the National Bank of Slovakia, the Constitutional Court provided this interpretation of Article 102 para. 1 letter h) of the Constitution, before semicolon:

"The President of the Slovak Republic, examines in exercising his powers under Article 102 para. 1 letter h) of the sentence before semicolon of the Constitution of the Slovak Republic, whether the candidate for the post of Vice-Governor of the National Bank of Slovakia, nominated by the government, and having received consent by the National Council of the Slovak Republic pursuant to Article 7 para. 2 of National Council of the Slovak Republic Act No. 566/1992 Coll., on the National Bank of Slovakia, as amended, meets the requirements for appointment to this position under Article 7 para. 4 of the aforementioned Act. If he concludes that the nominated candidate does not meet these requirements, he will reject the nomination from the Slovak Government."

Re: item d)

The so far latest interpretation of the Constitutional Court concerns the dispute over the extent of presidential powers to decide on the appointment of Prosecutor General, submitted

by the National Council. The Constitutional Court gave this interpretation:

"President of the Slovak Republic has a duty to deal with the proposal of the National Council of the Slovak Republic on the appointment of the Prosecutor General of the Slovak Republic pursuant to Article 150 of the Constitution of the Slovak Republic, and if he/she was elected under the procedure in accordance with law, then within a reasonable deadline either to appoint the proposed candidate, or to inform the National Council of the Slovak Republic that he will not appoint this candidate.

A candidate can be not appointed only if he/she fails to meet the legal requirements for appointment or due to a serious matter relating to the candidate, which reasonably undermines his/her ability to act as a manner, which would not weaken the authority of the constitutional function or the entire body, of which that individual is to become its supreme representative, or in a manner that will not contradict the very mission of this body, should such fact result in disruption of the proper functioning of the constitutional bodies (Art 101 para. 1 sentence 2 of the Constitution of the Slovak Republic).

The President shall provide reasons for non-appointment, whereby these must not be arbitrary.(On the question of the applicability of this interpretation in the particular proceeding, see pp. 57, 62 et seq.; remark).

It can be concluded that all personnel (appointment) powers of the President have a powerful effect, giving the head of state certain margin of discretion and decision, if:

a) he does not bear political responsibility for his decisions that is, if it does not involve the so called countersigned powers;

b) the nature of things (appointing of university professors and chancellors) does not infer implicit limitation of the scope of the President's discretion.

The fundamental basis for the decision of the Constitutional Court and conclusions of the Constitutional Court on the constitutional issues raised

The complainants allege violation of their fundamental right of access to elected and other public posts under equal conditions according to Article 30 para. 4 of the Constitution, in conjunction with Article 2 para. 2 of the Constitution and JUDr. Juraj Sopoliga and JUDr. Miroslav Duriš, PhD., allege also a breach of the fundamental right to enter public service of his country pursuant to Article 25 letter c) of the Covenant on Civil and Political Rights based on

decision of the President of the Slovak Republic No. 1112-2014-BA dated July 2, 2014 on non-appointment as judges of the Constitutional Court.

As the Constitutional Court is bound by the request for relief by private individuals, who allege violations of their fundamental rights and freedoms guaranteed by the Constitution and international treaties on human rights and fundamental freedoms, it must direct its survey in this specified direction. It follows that this is a review of the constitution's wording of the President's powers to appoint and recall in connection with creation of the Constitutional Court judges.

The President, in a written statement through his lawyer at the public hearing, described as key the decision of the Constitutional Court pertaining to the interpretation of the President's powers not to appoint the Prosecutor General and in section relating to the Advisory Committee he referred to the constitutional conventions in the European Union and the Czech Republic in the creation of advisory bodies.

That argument, however, ignores the fundamental facts, namely that the fundamental limit for the actions by the President in such an important area concerning also the three-way division of state power bodies such as the formation of the Constitutional Court, is the text of the Constitution.

Legislation on prosecution, contained in the Constitution, has three Articles, of which only one concerning the appointment of the Prosecutor General. In contrast, the constitutional text regarding the appointment of judges of the Constitutional Court contains much more detailed wording [Article 102 para. 1 letter s), Article 134 para. 2, 3 and 4, Article 138 and Article 139 of the Constitution].

The Constitutional Court through its decision-making activity upholds constitutional protection of constitutional values and in addition to parliament, government and the President it represents constitutionally important institution with a specific focus on the constitutionality oversight (Article 124 of the Constitution).

Given the above, it can be concluded that the Constitutional Court in terms of its function is to continuously monitor the exercise of power. It is the constitutional oversight of legislative and executive power that differentiates the constitutional judiciary from the general judiciary.

At the same time, it should also be emphasised that through the constitutional judiciary interpretation of the Constitution is constantly updated, which in terms of three-way division of power in the state it also significantly affects the activity of executive and legislative power.

Also insight into the history of the constitutional judiciary in Central Europe and in our

country indicates that the structure of public authorities is important to the existence of a judicial authority protecting constitutionality and human rights.

Not only in our time can the issues and problems related to the appointment of judges of the Constitutional Court be registered. Concentrated and centralized constitutional justice in Czechoslovakia was established under the Constitution of 1920. After the completion of the first term in office of Constitutional Court judges, who were appointed until November 17, 1931 (for ten years from November 17, 1921), no new judges were installed for a period of next seven years. Only on May 10, 1938 new judges were appointed and the Constitutional Court has continued to exist work until May 1939, when, after the occupation of the remaining parts of Bohemia and Moravia (in March 1939), it effectively ceased to exist. Decision-making activities of the Constitutional Court should initially have been secured also by the fact that in addition to the members of the Constitutional Court also their deputies were elected (and appointed). They could have been persons who have passed the state examinations prescribed for any of the domestic law faculties or passed a doctorate in law, who were eligible for election to the Senate (age 45 years and 10 years of citizenship) and were not members of any legislative body.

After 1989, in the context of a real revival of the constitutional judiciary in our country, an Act No. 491/1991 Coll., on the organization of the Constitutional Court of the Czech and Slovak Federative Republic and on proceedings before this court (hereinafter the "Act No. 491/1991 Coll.") was adopted.

Pursuant to Article 1 para. 1 of Act No. 491/1991 Coll., lists of candidates for the posts of judges of the Constitutional Court of the Czech and Slovak Federative Republic shall be submitted no later than three months before the expiry of the term of office of judges previously appointed. The President of the Czech and Slovak Federal Republic appoints judges within one month of receiving the list of candidates for judges, alternatively from the delivery of a new proposal under paragraph 2.

Pursuant to Article 1 para. 2 of Act No. 491/1991 Coll., if the list of candidates submitted in accordance with Article 10 para. 2 of constitutional law contains a candidate, proposed already by another legislative body, the President will invite the legislative body that submitted this list to replace such proposed candidate within one month by another candidate.

Pursuant to Article 1 para. 3 of Act No. 491/1991 Coll., the President of the Republic appoints judges before the expiry of the term of office of judges previously appointed. Thus newly appointed judges take an oath on the day when their term of office commences.

Pursuant to Article 1 para. 4 of Act No. 491/1991 Coll., if a vacancy should arise, the

Federal Assembly and the National Council of the Republic, whose citizen was the judge, whose place became vacant, will propose one candidate each, no later than two months after the vacancy occurred. The President of the Czech and Slovak Federative Republic appoints the judge within one month of receiving the list of proposals.

The explanatory memorandum to Act. 491/1991 Coll., in section "B. Separate section" states, inter alia: "The wording proposed in Article 2 aims to avoid a situation where, after the expiry of the Court's term of office, the Constitutional Court would not have the full complement and therefore not be capable of decision-making; similar objective is pursued also when it comes to cases where just one seat becomes vacant. In Article 2 para. 2 provides for the possibility of a situation that some legislative bodies propose the same person as a candidate. Constitutional law expressly does not prevent this, although it is apparent that it wants to allow the President of Czechoslovakia the selection of 12 judges from 24 different candidates."

Ensuring continuity of Constitutional Court is also the objective of the current legislation. In order to ensure continuous oversight of the constitutionality, the National Council must submit to the President a sufficient number of candidates (two for one vacant seat) as members of the Constitutional Court, of which the President is to choose and then appoint as Constitutional Court judges. In this case, if it is clear when the term of office of the *sitting* judges expires, the National Council is obliged to organise the election of new candidates, in order for the President to be able to appoint from among them new judges.

In accordance with Article 4 of Election Rules on the election and removal of officers (approved by the Slovak National Council resolution No. 498 of June 17, 2011) the National Council speaker shall include in the agenda of the National Council a proposal for election, so that National Council decides on the proposal by the prescribed deadlines.

Also this law determines defines a proper (early) course of the candidates election to facilitate the proper (early) exercise the President's powers, in order to prevent limiting the President in exercising his responsibilities to ensure a proper functioning of constitutional bodies.

The legal norm (Election Rules of the National Council of the Slovak Republic) already in the first stage of creating the candidates for constitutional judges strives to ensure continuous constitutionality oversight through operation of the Constitutional Court.

Our constitutional system is not based on fixed dates, but deadlines are determined by practice resulting from the constitutional conventions.

As was pointed out in the historical excursus, the Slovak constitutional system is a direct

successor of the Czechoslovak constitutional system, ensuring the timeliness and continuity of the constitutional protection by providing a number of candidates for selection as a judge of the Constitutional Court, as well as also electing their alternates, who assumed the judicial office without any new election procedure.

Throughout the constitutional system there is a clear obligation for the President to ensure a proper functioning of constitutional bodies inferred by Article 101 para. 1 of the Constitution. If a proper functioning of constitutional bodies is under threat, the President of the Republic must act. In this context, it is necessary to interpret also the President's power to appoint Constitutional Court judges arising from Article 102 para. 1 letter s) of the Constitution, in conjunction with Article 134 para. 2 of the Constitution.

Examination of the fundamental right guaranteed by Article 30 para. 4 of the Constitution, in conjunction with Article 2 para. 2 of the Constitution should therefore be linked to Article 134 and Article 139 of the Constitution governing the appointment of Constitutional Court judges.

The number of candidates presented to the President for decision (Article 134 para. 2 of the Constitution, takes into account the President's duty to ensure a proper functioning of constitutional bodies (Article 101 para. 1, sentence 2 of the Constitution), to which he is committed also by the oath delivered to the President of the Constitutional Court (Article 101 para. (7) of the Constitution), in particular "... to defend the Constitution and other laws." (Article 104 of the Constitution).

The Constituent Assembly's efforts to ensure the continuous oversight of the constitutionality is also evidenced by Article 139 of the Constitution, according to which the legal system also provides for a situation when the Constitutional Court judge surrenders his post, or if he is recalled, *"... the President of the Slovak Republic will appoint another judge for a new term, out of two persons nominated by the National Council.". The phrase "a different judge" implies without any doubt that it involves appointment of one judge of the Constitutional Court. Whilst the phrase "out of two persons" clearly states that it involves two candidates for a post of judge of the Constitutional Court. The term... appoints" precludes any different interpretation than the President's decision to appoint one out of the two proposed candidates for judges of the Constitutional Court. With the conclusion that Article 139 of the Constitution implies an obligation of the President to appoint another judge of the Constitutional Court, which is also shared with the constitutional doctrine» (*Drgonec, J. *Slovak Constitution.* Commentary. 3rd edition. Šamorín: Heuréka, 2012, 1450 p.).

Against this background, it can be concluded that, Article 134 para. 2 of the Constitution

and Article 139 of the Constitution clearly imply obligation of the President to appoint from the double the number of candidates exactly one half as the judges of the Constitutional Court.

In this connection, it is also necessary to specially emphasise that in application of Article 102 para. 1 letter s) of the Constitution, in conjunction with Article 134 para. 2 of the Constitution, the President has so far in the past always appointed, from candidates for judges of the Constitutional Court the constitutionally required one half that is, he appointed half the number of Constitutional Court judges. Hence also the constitutional and legal has always fully respected, or accepted that the President is obliged to appoint from double the number of candidates exactly one half as the judges of the Constitutional Court.

Universal interpretative rule for state authorities for reading of legal norms stipulated in the Constitution of the Slovak Republic is that: "they can act only on the basis of the Constitution, within its limits and scope and in a manner, determined by law" (Article 2 para. 2 of the Constitution). This rule is binding also upon the President in selecting the submitted candidates for judges of the Constitutional Court.

To examine presidential powers, pertaining to the appointment of judges of the Constitutional Court through a single interpretation of the Constitutional Court, relating to the appointment of the Prosecutor General, is more than expedient. Constitutional position of the prosecution cannot be equated with that of the Constitutional Court.

The position of the Constitutional Court that declared as a position of a single independent judicial body protecting the constitutionality (Article 124 of the Constitution). Wording of the constitution regulates in greater detail also the mutual relations between the President and the Constitutional Court.

The President appoints and recalls Constitutional Court judges [Article 102 para. 1 letter s)], takes their oath [Article 102 para. 1 letter s)], appoints the President and Vice President of the Constitutional Court [Article 102 para. 1 letter s)].

The President may file petitions with the Constitutional Court [Article 102 para. 1 (b)] and also can request the preventive review of constitutionality, by requesting the Constitutional Court to review the compliance of referendum question with the Constitution and international obligations on human rights.

In relation to the President, the Constitutional Court decides on the constitutionality and legality of presidential election (Article 129 para. 2 of the Constitution), decides also on complaints against the referendum results and on complaints against the plebiscite result on

recall of the President (Article 129 para. 3 of the Constitution), the Constitutional Court also decides on charges against the President brought by the National Council and in the case of wilful violation the Constitution or high treason (Article 129 para. 5 of the Constitution), whereby Constitutional Court decisions are generally binding on all public authorities.

President of the Republic is sworn in by the President of the Constitutional Court (Article 104 para. 1 of the Constitution), and may resign from the office at any time; his term of office expires on the day of handing over to the President of the Constitutional Court of the Slovak Republic a written notice of this decision (Article 103 para. 6 of the Constitution).

The Constitutional Court, in the case I. US 39/93 expressed legal opinion that the purpose, content and scope of each presidential power requires to be identified in the form of a separate legal analysis. This view was expressed at the very beginning of its existence, when the Court alone was searching its own approach to the interpretation and application of constitutional standards. Later, it moved its opinion towards a simplification of the classification of President's powers, laid down in Article 102 para. 1 of the Constitution.

"The answer to this question of can/should appoint becomes, due to the contentious nature of the issue, also a subject matter of legal interpretation by the Constitutional Court under Article 128 of the Constitution and depends on the assessment of whether, in the case of creating the President has only a substantive status or represents a balancing/equilibrium force in the system of separation of powers. "(Kanárik, J. *Form of government in the Slovak Republic.* In. Orosz, L., et al. The constitutional system of the Slovak Republic. Košice : Pavol Jozef Šafárik University in Košice, 2009. 237 p.).

Criterion for the distinction between the President's powers to appoint and recall is defined by the Constitution in Article 101 para. 1, sentence 2, according to which the President, by his decision on the appointment to constitutional post (creation of some constitutional officers) participates in securing the proper functioning of constitutional bodies. This involves authority of the President to appoint with implied legal consideration, whether or not to grants the proposal.

Unlike the appointment of the Prosecutor General, when the National Council submits to the President one candidate for the appointment, in this case it puts forward two candidates for the President to select a suitable candidate for the vacant seat, thus ensuring uninterrupted proper operation of the constitutional authority. Otherwise, rejection of the bulk (or majority) of the candidates could lead to disruption to the Constitutional Court operation, which would not have the capacity to be an institution according to Article 124 of the Constitution, and it would not exercise extensive powers conferred upon it by the Constitution. The question of the

proper operation of other constitutional bodies, in terms of preserving the basic principles of substantive rule of law, can be considered part of the "material core" of the Constitution. The Constitution, be securing active functioning of checks and balances, is ensuring the operation of the whole mechanism of public authority.

The fact that it is not possible to compare the appointment of the Prosecutor General with appointment of candidates for judges of the Constitutional Court lies not only in the difference between these constitutional bodies, but also the uniqueness of the institutional structure of creating candidates for judges of the Constitutional Court, stemming from the constitutional instruction directed at the National Council contained in Article 134 para. 2 of the Constitution "selects twice the number of candidates" and Article 139 of the Constitution, “appoints another judge for a new term of office, out of two persons nominated by the National Council of the Slovak Republic”.

The constitutional wording should be seen as a possible limit for the choice of the President, which he does not allow him to appoint all of the candidates elected, but always only one for the vacant position, thereby ensuring stable functioning of the Constitutional Court. The Constitution clearly states the need for selection, which can be done only by the President from among the candidates submitted by the National Council. Thus the Constitution lays down limits the choice between two candidates put forward, who had to meet requirements of Article 134 para. 3 of the Constitution. The National Council’s power is limited by having to choose just two candidates for one vacant seat.

The Constitution lays down strict criteria for the selection of candidates - candidates for judges of the Constitutional Court, namely a minimum age of 40 years, eligibility for election to the National Council, law degree and a minimum length of service in the legal profession of 15 years. Constitutional criteria (boundaries) for selection of candidates for Constitutional Court judges submitted by the National Council are most stringent among all the constitutional positions.

Basis for setting limits is mainly the age limit, for President 40 years of age (on the date of election) Article 103 para. 1 of the Constitution, for Member of Parliament it is 21 years (and permanent residence) and for Minister a citizen, who is eligible for a Member of Parliament (i.e., 21 years of age) in accordance with Article 74 para. 2 of the Constitution.

It follows that to meet the Constitution prescribed requirements also requires a university degree (specific specialisation), as well as length of service, which is not a prerequisite for the

establishing of other constitutional functions, even the Prosecutor General, the appointment of whom is used by the President as a reference in the statements to the complaints.

Although neither the Constitution nor any other law imposes additional requirements for the post of a judge of the Constitutional Court, the President in his statement asserts that *"the procedure which I applied, and my decision was made strictly within the allowable discretion"* (p. 7 of the statement regarding the complaint by the complainant 1). The President also stated that *"if the fulfilment of only the requirements inferred by the quoted Article would be sufficient, it would mean a disregard of interpretation of PL. US 4/2012, which would be in stark breach with Article 2 para. 2 of the Constitution"* (p. 5 of the statement regarding the complaint by the complainant). The Constitutional Court must also express an opinion on this argument by the President.

In a substantive rule of law, it not at the public authority's discretion whether or not to use power conferred on it by the constitution or by law. The application of the powers at its sole discretion, and decide whether a public authority exercises its authority or not, is the basis for arbitrariness - "selective application of justice", which is a denial of legal certainty, which is the basis for substantive rule of law. Such an approach means conduct contrary to legal certainty stemming from the text of the Constitution.

In the substantive rule of law, it is a duty of every public authority to act, to always exercise their authority in full and on time.

Public authority powers are defined by the Constitution and the law, not the wishes of persons who have to carry it out on behalf of the authority. At the beginning there is the creation of public authority bodies and definition of their competencies. This is followed by their constitutional activity and its oversight, in order to comply with the law.

Within the limits of the constitutional law of the Slovak Republic it can be argued that every action of a state authority to protect fundamental right or freedom outside the explicitly granted scope is not available to the state authority without violating the Constitution. The absence of the prohibition to act in favour of the availability of basic right or freedom does not mean anything, because a state authorities would thus able to proceed only if it had express permission based on the legislation.

Replacement of a procedure set by Constitution or legislation with own consideration of the state authority is contrary to constitutional wording of Article 2 para. 2 of the Constitution and it is an arbitrariness by the state authority.

The Pres is obliged to exercise authority under Article 102 para. 1 letter s) of the Constitution in accordance with the conditions stipulated by the Constitution, which provides him with discretionary authority within the dimensions of Article 134 para. 2 and Article 139 of the Constitution, which constitute a restriction of his discretion as opposed to the appointment (or non-appointment of any) candidate for the office of the Prosecutor General and allow the choice between two candidates proposed by the National Council for one vacant seat.

It can be concluded that all appointing powers of the President, for which he is responsible (not countersigned) and where the nature of the matter does not imply a requirement for his restraint (e.g. appointment of professors), have a power dimension, which means that the President must have certain margin for decision. In case of Prosecutor General he receives one proposed candidate for one vacancy. His decision-making power includes here also the possibility under certain conditions, as specified by Constitutional Court, to reject the proposed candidate. In the case of judges of the Constitutional Court, the President receives twice the number of candidates for the post of constitutional judge, as he is to appoint. His decision-making power - the limits of the possible and mandatory selection - are defined here directly by the Constitution. Constitutional definition of the President's powers for the appointment of the Prosecutor General and judges of the Constitutional Court is fundamentally different. Where the constituent power made a distinction, the same distinction must also be applied in the interpretation and application of the Constitution. The President can, or is even obliged to select the most suitable judges for the Constitutional Court from among the candidates elected by the National Council.

The Constitutional Court in its decision-making activities defined public offices, which are subject to the protection of Article 30 para. 4 of the Constitution. This also includes the post of a judge, of Constitutional, as well as General Court (see, e.g. No. III. ÚS 79/04, also Drgonec, J. *Constitution of the Slovak Republic.* Commentary. 3rd edition. Šamorín: Heuréka, 2012. 616 p.).

Candidates were entitled, for the President to proceed, in the selection from the submitted a number of candidates, in accordance with constitutional order, which however did not take place, hence leading to a violation of their rights guaranteed by Article 30 para. 4 of the Constitution, in conjunction with Article 2 para. 2 of the Constitution (item 1 of the operative part of the Finding).

Given this conclusion of the Constitutional Court, it was no longer legally relevant to analyse the infringement of right alleged by the complainant's under Article 25 letter c) of the Covenant on Civil and Political Rights..." Therefore, the Constitutional Court rejected these sections of complaints by JUDr. Miroslav Duriš, PhD., and JUDr. Juraj Sopoliga.

VI

Other objections raised by the complainants

A. On the issue of the President's authority to establish an advisory body - committee to examine the suitability of candidates for the post of Constitutional Court judge

The complainants objected the establishing of an Advisory Committee to examine the suitability of candidates for judges of the Constitutional Court and also objected to the composition of the Advisory Committee made up judges in active service.

The President in his response to the complainant stated that he is entitled to have advisers, citing Article 6, para. 2 of Act No. 400/2009 Coll., on Public service, and on change and amendments to certain laws as amended by subsequent regulations; "*According to this legislative provision, the state employee, as a private individual, carries out tasks for the President. Constitutional expert officer performs civil service without the designated civil service unit. This, as an example of the said generally binding legislation, infers that the President is entitled to have a advisers. Advisers can act as an individual persons or a team of advisors.*

Advisors or advisory bodies operate in the Office of the President of the Slovak Republic also on other legal grounds (such as a Work contract). Consultants often perform only on the basis of their appointment by the President of the Republic, without a special legal relationship being formed between them and the Office of the President of the Slovak Republic. All previous presidents had their advisors, alternatively advisory bodies; it is a constitutional convention, which has become part of constitutional practice by the heads of Slovak Republic for a simple reason. Decision, as well as other constitutional acts of the President, require a proper factual basis, as well as corresponding legal basis.

It is inconceivable for the President to be able to gather the factual background documents / information for each of his decisions or other constitutional act."

It is the President's view that it is beyond argument that by setting up Advisory

Committee he could have in any way act contrary to Article 2 para. 2 of the Constitution. Article 2 para. 2 of the Constitution in fact applies only to decisions of the President within the framework of his powers, and not to the manner in which he gathers background documents/information for his decisions.

By the virtue of decision of June 17, 2014, the President established Advisory Committee to examine the suitability of candidates for the post of Constitutional Court judge.

The This decision was not published in the Collection of Laws of the Slovak Republic on the grounds that the National Council of the Slovak Republic Act No. 1/1993 Coll., on the Collection of Laws of the Slovak Republic, as amended, does not provide for this type generally binding legal regulation, which also indicates the level of its institutional classification, in terms of its legal force. It follows that the committee lacks not only the legality, since it was set up outside the legal system, but also legitimacy that would justify it to act as a body of public authority.

Since apparently there was a realisation of the deficiency in the legal form chosen for the creating the committee, author of this project chose creations in a ceremonial approach unknown in the legal system of the Slovak Republic in order to secure its legality and legal acceptability.

Neither the constitutional law nor any other statutory regulation contains a mandate for the President to establish within his powers internal advisory body, with all without decision-making or advisory powers, acting outwardly towards other public authorities or private individuals or legal entities.

In accordance with Article 3 of the President's decision on the establishment of the Advisory Committee dated June 17, 2014 No. 1262-2014-BA:

„Para. 1 The purpose for establishing Advisory Committee as to examine the suitability of a candidate for judge of the Constitutional Court of the Slovak Republic... by verifying his/her professional and other capabilities to perform this capacity based on his theoretical knowledge of constitutional law, constitutional justice and its case-law, the European justice, in particular the case law of the European Court of Human Rights and the Court of Justice of the European Union, as well as personal practical experience with the functioning and decision-making of the Constitutional Court of the Slovak Republic or the constitutional justice in general.

Para. 2 The suitability of a candidate for a Constitutional Court judge may also mean that his professional resume and results of his involvement in law implies that it is an individual that can be described as generally recognized expert in a particular field of legal theory or legal

practice; at the same time, however, a review takes place of suitability parameters specified in Article 2 para. 1 of this decision."

In accordance with Article 4 of the cited decision:

"Para. 1 Advisory Committee has five members.

(2) The Advisory Committee is composed of former judges or advisers of the Constitutional Court of the Slovak Republic, judges of the Supreme Court of the Slovak Republic or generally respected legal experts.

(3) Members of the Advisory Committee are appointed and recalled by the President of the Republic - one of the members, designated by the President, is Chairman of this committee."

In accordance with Article 5 of the cited decision: *"... Advisory Committee is established for an indefinite period. "*

The constitutional basis for its establishment cannot be equated with the relevant constitutional rules of Article 2 para. 2, Article 101 para. 1, in conjunction with Article 102 para. 1 letter s) and Article 134 para. 2 and 4 of the Constitution, nor with the Ruling of the Constitutional Court PL. ÚS 4/2012, as set out in Article 2 para. 1 of the Decision on the establishment of the Advisory Committee.

Article 2 para. 2 of the Constitution lays down the rules for the creation and application of the powers of public authorities relating to the sphere of state management through law (generally binding legal regulations).

Establishment of an Advisory Committee through internal regulatory instruction does not belong to the execution acts referred to in Article 2 para. 2 of the Constitution, and therefore this constitutional rule cannot be regarded as a legal basis for the establishment of an Advisory Committee.

In his response, as the reason for establishing the Advisory Committee the President cited

"Arguments at the European Union level: The Court of Justice of the European Union" and *"Arguments at the level of a Member State of the European Union: Czech Republic".* These arguments merely emphasise that the decision to establish the Advisory Committee has no support in constitutional text nor in any legislative provision, and thus violates the Constitutional instruction formulated in Article 2 para. 2 of the Constitution.

Issues of establishment of own bodies by constitutional authorities have already been

dealt with by the Constitutional Court in one of its early decisions, which form the basis of its case-law.

The fact that the President's legal counsel absolutely conceals this part of the case-law and begins his interpretation by Ruling PL. ÚS 4/2012, is a decision of a person making statement, but the Constitutional Court has the duty to interpret the Constitution in light of its mutual relations, which form the whole structure of the constitutional legislation. However, the Constitutional Court cannot expediently select only some of its decision supporting certain allegations, but must consider all of its past decisions, pertaining to the issue.

The Constitutional Court in the case file. Ref. PL. ÚS 29/95 stated: "1. Slovak Constitution defines the proportions of boundaries for separation of powers between individual national authorities. If the National Council of the Slovak Republic intends to regulate certain social relations as legal relations, it may do so only to the extent and in a manner that is consistent with the Constitution. The National Council, by broadening its scope beyond the framework of the Constitution cannot limit the scope of other state authorities or assume their competencies in a manner that is not consistent with the rule of law principles.

2. To organise the operation of bodies authorized to represent it externally, the National Council of the Slovak Republic can establish internal-organisational units. These units, regardless of their naming convention, do not have competencies that would entitle them to represent the National Council in relation to other authorities or to the citizens. "

The Court also stated that: "The National Council of the Slovak Republic, as part of its supervisory powers may conduct such activities as enshrined in the Constitution. These activities can be carried out only by the authorities, the establishment of which is in line with the Constitution. It cannot impose more obligations upon those entities which, according to the constitution report to the National Council of the Slovak Republic, than provided for in the Constitution. To impose obligations in implementing the oversight powers of the National Council of the Slovak Republic to entities other than those charged with these duties under the Constitution, is not possible, even under any law."

These conclusions regarding the inadmissibility of setting up a body to exercise the powers of the constitutional body or part thereof in relation to other entities, is fully applicable not only to the legislative, but also to the executive branch. It follows that it is unacceptable for the Advisory Committee to exercise the President's powers, or its part, with respect to candidates for the Constitutional Court judges.

At the same time, decision (recommendation) by the Advisory Committee also cannot constitute the basis, relied upon by the President in explaining his decision on

(non)appointment of the Constitutional Court judges.

Subject matter of the constitutionality review is the decision of the President not to appoint candidates submitted by the National Council to the posts of constitutional judges. The decision on non-appointment was the President's decision and therefore it is not necessary to examine how the Advisory Committee without legality and legitimacy intervened in this decision. Since the Advisory Committee is not a public authority and in the case of complainants it did not even rule separately, it could not have violated their fundamental rights and freedoms referred to in their complaints.

However, beyond the framework of the foregoing it must be observed that, in particular as far as the membership of judges in this advisory body is concerned, an inherent feature of the post of a judge is its continuity. Membership in advisory bodies of the President also includes execution of tasks of this different component of the government-executive power. The presence of judges in this body is thus contrary to the principle of separation of power, regardless of the fact that personal and out-of-court ties, established during the course of these activities, inevitably increase the likelihood of potential conflict of interest, making the impartiality in the form of non-bias of the judges questionable. The participation of judges in the advisory body of the President, who performs tasks within a different branch of state power, therefore contravenes Article 145a para. 2 of the Constitution.

Given that the Constitutional Court found that the Advisory Committee is not a public authority that could with its activities cause violation of the rights and freedoms of private individuals, it does not even have the jurisdiction to examine the composition of this illegal and illegitimate authority, the nature of which may be the subject matter of theoretical considerations outside this judicial review.

Since the Constitutional Court reached this opinion, equally, it has no jurisdiction to assess the actions and challenged bias of the General Court judges in this body.

Beyond this consideration it can be emphasised that the President has no reason to investigate obstacles to participation in bodies he appoints. Such obligation is imposed upon an entity, i.e. private individual, who has been appointed to these bodies and is aware that from his/her professional status such obstacles exist. The same could be can be attributed to the failure to disclose these obstacles to the President (e.g. failure by a member of the Advisory Committee J.B. to notify the President that the Constitutional Court under III. ÚS 561/2014 is conducting proceeding, dealing with his complaint, where he alleges violation of his right of

access to elected and other public posts under equal conditions according to Article 30 para. 4 of the Constitution through actions by the Judicial Council of the Slovak Republic and its Resolution No. 197 of December 2, 2013).

B. Objection against inadequate reasoning of the President's decision on the non-appointed judges of the Constitutional Court

The complainants object also to the justification of the President's decision. As part of their argumentation they state the following: *"In summary, the reasoning is thus based on false general and non-specific allegations and not on proven specific claims. Moreover, the justifications do not even attempt to link these mostly untrue general statements, with the requirement for the existence of material grounds relating to the candidate, which justifiably undermine his/her ability to act as a judge of the Constitutional Court in a manner not degrading the significance of this office or institution. Hence, the cited reasons lie in the subjective assessment by the President of the Slovak Republic and the unconstitutional Advisory Committee of the results of candidates for the Constitutional Court judges.*

In addition, the cited reasons are, by being very general and essentially the same for all non-appointed candidates, inevitably arbitrary... ".

Hence, the uniformity of the reasonings basically infers rather untenable conclusion that all candidates for the post of Constitutional Court judge do not meet identical requirements with the same intensity - that they are the same non-experts on the Constitution, they all gave same answers to the Committee, they all have the same (non)experience in the field of constitutional law respectively, or that they (non)achieved generally recognized results of their work. Such absolutely non-individualised decisions do not satisfy, even in a minimum degree, the requirement of appropriate reasons given for the individual legal act."

The President in his response to the question of not providing reasoning for his decision argued by another decision of the Constitutional Court, namely the decision III. US 561/2014, challenging the contradiction between the request for relief sought by the complainants and the reasoning, which contains also a different violation. However, these are not specified (objected) in the request for relief.

Further he argues with interpretation in the case PL. ÚS 4/2012, which he used as a universal argument also for not accepting the complaint.

The President stated that "... *Firstly, it is necessary to emphasize that my decision on the noon-appointment of the complainant is undoubtedly an administrative decision by the authority of executive power. Due to its legal nature it must contain adequate justification; for the case at hand, reasons for such decision must not be arbitrary, i.e. they must be supported by factual basis, pertaining to the complainant.*

Just for the sake of completeness, the factual basis was established, in the case of the complainant, by her professional resume, results , she achieved in legal profession, the content of her interview before the Advisory Committee and, ultimately, part of this factual basis was a recommendation by the Advisory Committee.".

It should be noted that both parties to the dispute before the Constitutional Court, the complainants, as well as the President, in formulating their legal opinions in the complaints and relating responses insufficiently applied the case law of the Constitutional Court pertaining to this this issue.

To assess the problem raised, it is necessary to take into account the nature of the authority, ruling in the matter, the subject matter of the decision and its presentation in the constitutional order. The President's decision on appointment (non-appointment) of candidates for judges of the Constitutional Court is by its nature an act of appointing established by the Constitution.

It is not an individual legal act, the nature of which would be similar to the nature of the administrative act or judicial act (i.e. the outcome of the competent administrative or judicial authority, which establishes, amend or revoke or from the position of authority investigate the legitimate duties of parties to the administrative or judicial proceedings).

In these instances, administrative or judicial decisions also have a prescribed structure, which consists primarily of a statement, reasons and provide instruction on means of remedy.

If the case of the President's decision on (non)appointment of the Constitutional Court judges is a distinctive type of proceeding, and if such competence has been exercised in a constitutionally consistent manner, the President cannot be for this decision held liable because it was preceded by a constitutional decision of the National Council, which submitted to him two candidates for one vacant seat.

Decision by the President on (non)appointment of the judges of the Constitutional Court and the earlier decision of the legislative authority (the National Council resolution) on the choice of candidates for the post of judge of the Constitutional Court under Article 134 para. 2 of the Constitution are not justified and neither the Constitution nor any other legislation does

not allow in these contexts even possibility to appeal against them.

Taking into account this characteristic of the President's decision on the (non)appointed of the Constitutional Court judges pursuant to Article 134 para. 2 of the Constitution the consideration of the content or scope of the reasoning thereof is superfluous.

Again, however, in line with its stable case-law (II. US 5/03), the Constitutional Court considers it necessary to restate that every state authority, including the highest representative of the executive, is obliged to ensure the objectivity of its actions and decision that could infringe upon the fundamental right or freedom (in this case of the fundamental right guaranteed by Article 30 para. 4 of the Constitution), irrespective of the extent to which this action was carried out in a legally formalized framework.

Since the President's decision on the (non)appointed of the Constitutional Court judges pursuant to Article 134 para. 2 of the Constitution is not to include, in the opinion of the Constitutional Court a reasoning, the issue of inadequate reasons for the decision cannot be considered as part of the (content) of the fundamental right guaranteed by Article 30 para. 4 of the Constitution, in conjunction with Article 2 para. 2 of the Constitution.

VII

Regarding the annulment of the contested President's decision

In accordance with Article 127 para. 2 Constitution if the Constitutional Court grants the complaint, it declares in its decision that by the virtue of the decision, measure or other action the rights or freedoms of the complainant were violated under Article 127 para. 1 and overrules such decision, measure or other infringement. In view of the fact that the Constitutional Court arrived at the conclusion on violation of the fundamental right of complainants to access to elected and other public offices under the same conditions guaranteed in art. 30 para. 4 of the Constitution, in conjunction with Article 2 para. 2 of the Constitution, the Constitutional Court annulled the decision of the President No. 1112-2014-BA (E. Fulcová), No. 1112-2014-BA (J. Sopoliga) and No. 1112-2014-Ba (M. Duriš), all of July 2, 2014, and ordered him to act and decide in the matter again (paragraph 2 of the operative part of the Finding).

If the fundamental right and freedom was violated by decision or measure, the Constitutional Court annuls this decision or measure (Article 56 para. 2 of the Constitutional

Court Act).

If the Constitutional Court grants the complaint, it may refer the case back for further proceedings [Article 56 para. 3 letter b) Constitutional Court Act].

Pursuant to Article 56 para. 6 of the Constitutional Court Act if the Constitutional Court overturns a final decision, measure or other action and returns the case for further hearing, the person who issued the decision in the case, is obliged to again hear and decide the case. In this case or approach it is bound by the legal opinion of the Constitutional Court, i.e., select from the presented candidates for Constitutional Court judges the required number of judges, and thus remove the reason for a violation of fundamental rights and freedoms of the complainants. The basis for the operative part of this Finding was mainly the finding of the unconstitutional legal assessment of the Constitution's wording in the circumstances of the case.

VIII.

Decision on costs

Pursuant to Article 36 para. 2 of the Constitutional Court, the Constitutional Court may, in justified cases, according to the outcome of the proceedings to impose upon one of the parties, in the form of a Ruling, to compensate in full or in part, other party for its costs.

In calculation of costs of proceedings the Constitutional Court refers to the decree of the Ministry of Justice of the Slovak Republic No. 655/2004 Coll., on the remuneration and compensation of lawyers for providing legal services, as amended by subsequent regulations (the "Decree"). Pursuant to Article 1 para. 3 of the Decree, the calculation basis for the purposes of this Decree is the average monthly wage of employee in the Slovak Republic for the first half of the previous calendar year. According to the notification of the Statistical Office of the Slovak Republic the average monthly wage of employee in the Slovak Republic was in the first half of 2013 an of amount 804 € and for the first half of 2014 amount 839 €. Pursuant to Article 11 para. 3 of the Decree, the base rate of tariff fee for one act of legal services is one sixth of the calculation base in matters of representation before the Constitutional Court, if the dispute subject matter cannot be measured by money. Pursuant to Article 16 para. 3 of the first sentence of the Decree, the client may be required to reimburse the local telecommunications expenses and local transportation expenses in an amount equal to one hundredth of the

calculation basis for each act of legal services.

1. Legal counsel of JUDr. Eva Fulcová, in filing of February 9, 2015 calculated the total amount of costs to be 518.76 €.

On that basis, the complainant is entitled to compensation of the costs of legal representation in the total amount of 434.87 € consisting of compensation:

- for two acts of legal services - acceptance and preparation of representation, including the first conference with a client and a written draft of the complaint - performed in 2014 in the amount of 134 € for one action and two overheads flat fee amounts totalling 8.04 € for one overheads flat fee, i.e., a total of 284.08 €, which together with the 20% VAT tax amounts to 340.90 €.
- a single act of legal services - attendance at the public hearing - performed in March 3, 2015 in the amount of 69.92 and one overheads flat fee of 8.39 €, i.e., a total of 78.31, which together with the 20% VAT is EUR 93.97 €, which the Constitutional Court has ordered to be paid by the Office of the President of the Slovak Republic (paragraph 3 of the operative part of the Finding).

2. In filing from March 6, 2015 the counsel calculated costs of representation of JUDr. Miroslav Duriš, PhD., in the amount of 429.80 € and for representing JUDr. Juraj Sopoliga in the amount of 955.96 €.

On that basis, each complainant is entitled to reimbursement of the costs of legal representation in the total amount of 434.87 € consisting of the following compensation:

- two acts of legal services - briefing and preparation of representation, including the first meeting with a client and a written draft of the complaint - performed in 2014 in the amount of 134 € per transaction and two overheads flat fees totalling 8.04 € per one overheads flat fee, i.e., a total of 284,08 €, which together with 20% VAT tax amounts to 340.90 €.

- a single act of legal services - attendance at the public hearing - performed in March 3, 2015 in the amount of 69.92 € and one overheads flat fee of 8.39 €, i.e., a total of 78.31, which together with 20% VAT is EUR 93.97 €.

Thus calculated amount (€ 869.74) had to be, in accordance with Article 13 para. 2 of the Decree, reduced by 50% as it involved joint tasks in representing the “two or more persons”.

The costs of joint legal representation of those complainants that represent a total amount

of € 434.87, which the Constitutional Court has undertaken to pay the Office of the President of the Slovak Republic (paragraph 3 of the operative part of the judgment).

The Constitutional Court did not award applicant JUDr. Juraj Sopoliga compensation for other legal services "Filing in case dated 12. 12. 2014..., Written statement of 19. 1. 2015... and Supplemental arguments of 27. 2. 2015...", as it did not consider them to be a contribution to further clarification of the case, relevant for the decision of the Constitutional Court in the case itself (item 4 of the operative part of the Finding).

Given the wording of Article 133 of the Constitution, this decision shall enter into force on the date of its delivery to the parties.

Pursuant to Article 32 para. 1 of the Constitutional Court Act, a dissenting opinion of Judge Rudolf Tkáčik is attached to this decision.

Instruction: There is no remedial action available against this decision.

Košice, March 17, 2015

Rudolf TKÁČIK, m.p.
Chair of the Senate

Accuracy verified

SLOVAK REPUBLIC

FINDING

of the Constitutional Court of the Slovak Republic

In the name of the Slovak Republic

III. ÚS 571/2014

In its open session on March 17, 2015, the Constitutional Court of the Slovak Republic, in the Senate composed of the Chairman Rudolf Tkáčik, Judge Jana Baricová and Judge Rapporteur Ľubomír Dobrík in the case of the complaint of JUDr. Eva Fulcová, Živnostenská 2, Bratislava represented by counsel JUDr. Milan Fulec, Živnostenská 2, Bratislava in the case of challenged violation of her fundamental right to have access to elected and other public posts under equal condition pursuant to Article 30 para. 4 of the Constitution of the Slovak Republic in conjunction with Article 2 para. 2 of the Constitution of the Slovak Republic by the decision of the President of the Slovak Republic No. 1112-2014-BA of July 2, 2014 not to appoint her judge of the Constitutional Court of the Slovak Republic, as well as complaints of JUDr. Juraj Sopoliga, Bidovce 259 and JUDr. Miroslav Duriš, PhD., Zádvorie 189/57, Liptovský Mikuláš, both represented by counsel JUDr. Tibor Sásfai, Fejova 4, Košice in the case of challenged violation of their fundamental right to have access elected and other public posts pursuant to Article 30 para. 4 of the Constitution of the Slovak Republic in conjunction with Article 2 para. 2 of the Constitution of the Slovak Republic, as well as the right to enter public services of their country pursuant to Article 25 letter c) of the International Pact of Civic and Political Rights by decisions of the President of the Slovak Republic No. 1112-2014-BA of July 2, 2014 not to appoint them judges of the Constitutional Court of the Slovak Republic, has

Decided as follows:

1. The fundamental right of JUDr. Eva Fulcová, JUDr. Miroslav Duriš, PhD. and JUDr. Juraj Sopoliga to have access to elected and other public posts under equal conditions pursuant to Article 30 para. 4 of the Constitution of the Slovak Republic in conjunction with Article 2 para. 2 of the Constitution of the Slovak Republic by decisions of the President of the Slovak Republic No. 1112-2014-BA of July 2, 2014 not to appoint Eva Fulcová, JUDr. Miroslav Duriš, PhD. and JUDr. Juraj Sopoliga as judges of the Constitutional Court of the Slovak Republic **has been violated**.

2. Decisions of the President of the Slovak Republic No. 1112-2014-BA of July 2, 2014 not to appoint Eva Fulcová, JUDr. Miroslav Duriš, PhD. and JUDr. Juraj Sopoliga as judges of the Constitutional Court of the Slovak Republic are hereby **reversed** and it is **ordered** that the President of the Slovak Republic will act in the case and decide.

3. The Office of the President of the Slovak Republic **is obliged** to reimburse JUDR. Eva Fulcová the costs incurred in the proceedings amounting to € 434.87 to the account of her counsel JUDr. Milan Fulec, Živnostenská 2, Bratislava within two month from the validity of this Finding and JUDr. Miroslav Duriš, PhD. and JUDr. Juraj Sopoliga jointly their costs of proceeding amounting to € 434.87, for both to the account of their counsel JUDr. Tibor Sásfai, Fejova 4, Košice within two month from the validity of this Finding.

4. The remaining part of the complaint of JUDr. Miroslav Duriš, PhD. and JUDr. Juraj Sopoliga **is dismissed**.

Concise reasoning:

The complaints of the complainants were received by the Constitutional Court on August 27, 2014, August 28, 2014 and September 2, 2014. By its Ruling III. ÚS 571/2014 of September 24, 2014, the Senate of the Constitutional Court decided to merge the cases pertaining to the complaint by JUDr. Eva Fulcová and JUDr. Juraj Sopoliga and pass them to later joint proceedings. JUDr. Miroslav Duriš' complaint was passed to later proceedings by Ruling of the Constitutional Court I. ÚS 588/2014 of October 1, 2014. In its Ruling PLs 4/2014 of November 12, 2014 the Plenary of the Constitutional Court

subsequently decided to merge cases III. ÚS 571/2014 and I. ÚS 588/2014 in joint proceedings, registered afterwards as III. ÚS 571/2014.

The complainants disputed violation of their fundamental rights guaranteed by the Constitution and by the International Pact of Civic and Political Rights by the course of action and decisions of the President of the Slovak Republic No. 1112-2014-BA of July 2, 2014 not to appoint them judges of the Constitutional Court of the Slovak Republic.

Reasoning of the complainants may be briefly summarised as follows:

1. When appointing judges of the Constitutional Court of the Slovak Republic, the President applied the interpretation concerning the appointment of Prosecutor General provided in Ruling of the Constitutional Court of the Slovak Republic PL. ÚS 4/2012 of October 24, 2012. That interpretation, however, does not apply to the execution of the President´s power to appoint judges of the Constitutional Court.

2. President of the Slovak Republic established an advisory committee to examine the aptitude of candidates to become judges of the Constitutional Court of the Slovak Republic and based his decision not to appoint the complainants judges of the Constitutional Court on the Committee´s recommendation while:

1. Establishing such committee and taking into account its recommendations has no basis in the Constitution and, at the same time,

2. Composition of that committee failed to provide a guarantee of impartial decision-making in respect to the complainants as individuals. At the same time, membership of certain general court judges in the advisory committee was contrary to law,

3. Out of six candidates to become judges of the Constitutional Court nominated by the National Council of the Slovak Republic, the President of the Slovak Republic has not appointed three judges of the Constitutional Court, just one judge of the Constitutional Court of the Slovak Republic.

4. With regard to the complainants as candidates for the post of [judge] of the Constitutional Court, the President of the Slovak Republic failed to apply equal requirements for the access to public posts compared to earlier candidates for the posts of judges of the Constitutional Court.

5. President of the Slovak Republic failed to properly reason his decision not to appoint the complainants judges of the Constitutional Court of the Slovak Republic.

In his opinions concerning the complaints of the complainants, the President of the Slovak Republic as a party to the proceedings before the Constitutional Court stated that the wording of Article 134 para. 2 and Article 102 para. 1 letter s) of the Constitution in conjunction with the interpretation of the Constitutional Court contained in Ruling PL. ÚS 4/2012 of October 24, 2014 would imply not only his power not to appoint half of the candidates nominated for the post of judge of the Constitutional Court within the meaning of Article 134 para. 2 of the Constitution, but also his power and obligation not to appoint more than a half or – as the case may be – all of the nominated candidates where they fail to meet qualifications for being appointed. The legal terminology used in the second paragraph of the statement of interpretation of the Constitution served by the Constitutional Court in case PL. ÚS 4/2012 can be put under the overarching notion of "aptitude of a candidate for the post of judge of the Constitutional Court". Examining the aptitude of a candidate for the post of judge of the Constitutional Court is a process of verifying that person´s professional and other capabilities to exercise the post, based on that person´s theoretical knowledge of constitutional law, constitutional judiciary, its case law, European judiciary, particularly the case law of the European Court of Human Rights and of the Court of Justice of the European Union, as well as personal and practical experience in the performance of constitutional judiciary. A candidate´s aptitude may as well be based on that candidate´s professional résumé and the results of his activities in the realm of law, indicating him as a personality enjoying universal respect in a certain ambit of legal theory or legal practice.

Concerning the establishment of an advisory committee to examine the candidates´ aptitude for the post of judge of the Constitutional Court, the President stated that both the legal regulation and constitutional practice pertaining to Presidents of the Slovak Republic anticipate the President´s right to advisors. By establishing an advisory committee, under no circumstances could he have acted contrary to Article 2 para. 2 of the Constitution, which relates only to the President´s decision-making within the scope of his powers, not to the manner in which the Head of the Slovak Republic provides for background information on the merits for his decision-making. Recommendations of the advisory committee were not committing the President, as their nature was purely consultative and advisory, which implies that the advisory committee did not have the effect of a decisive element. The contested decisions not to appoint the complainants are

– in the President´s view – brief, for reasons of protection of the candidates as individuals. Their reasoning, however, includes the candidates´ résumés, recommendations of the advisory committee, whose content the President endorsed, and therefore – in his view – one cannot claim that the decisions were not duly justified. President of the Slovak Republic observed that the complainants were factually enabled to claim their rights to have full access to elected and other public posts under equal conditions.

When considering the complaints, the Constitutional Court of the Slovak Republic took as a basis its own opinion expressed in the existing case law, in the sense that the Constitution of the Slovak Republic is based on principles of a democratic state and rule of law, which – being the fundamental principles of Slovak law – are transposed in the status and the execution of powers by public authorities. Both those principles apply simultaneously and – in a simplistic way – one may say that the execution of state power must always be supported by democratic legitimacy and must always be done on the basis of laws and within their limits. That conclusion would apply on the level of constitutional bodies which – according to the Constitution, constitutional laws or sub-constitutional laws – are authorised to take decisions. It is necessary for those decisions to be always taken on the basis of authority set out by the Constitution and in their content by constitutional limits. The specific manner to adopt various decisions always depends on the decision of the constitutional assembly.

It is the Constitution which sets out the fundamental framework of powers and responsibilities for the execution of state power, entailing both material limitations typical mainly for fundamental rights and freedoms and certain constitutional principles and formal or procedural limitations not intended to prevent adoption of decisions of a certain content but to counteract – *inter alia* – as a prevention of the abuse of power, for which there would be much more room if a certain power were bestowed upon one single authority. One of the options to face such risk is qualifying the adoption of certain decisions by agreement of several bodies, whereby their mutual control is assured. The said mechanisms do justice to the essence of power division as one of the basic characteristic traits of the organisation of state power in contemporary democratic constitutional systems. That division is based on separation of the various powers within the constitutional system among several bodies, supported by existence of

efficient mechanisms which – through mutual participation in the exercise of those powers or ability of *ex post* control – prevent their abuse.

In this context, one has to perceive and examine the limited powers of the President to appoint or recall from office, and therefore they cannot be generally imputed a purely notary nature. On the contrary, where the decision-making by the President concerns the creation of constitutional offices, linked to his obligation given by the Constitution to ensure due performance of constitutional bodies stemming from Article 101 para. 1, sentence two of the Constitution, the President´s power includes the right to consider whether to satisfy the submitted proposal. The extent and scope of consideration, i.e. discretion of the President, is however in each of these cases restricted and limited by applicable constitutional regulation of the appointing power in question. That ensues from Article 2 para. 2 of the Constitution, pursuant to which state authorities including the President may only act by virtue of the Constitution, within its confines and scope and in a manner set out by law.

The confines for examining the aptitude of candidates for the post of judge of the Constitutional Court ensue from the provisions of Article 102 para. 1 letter s) of the Constitution in conjunction with Article 134 para. 2 and para. 3 of the Constitution and the President appoints – within their sense – judges of the Constitutional Court of the Slovak Republic, following a nomination of the National Council of the Slovak Republic, which nominates twice the number of judge candidates to be appointed by the President. Nevertheless, a citizen of the Slovak Republic can be elected judge of the Constitutional Court who is eligible for the National Council of the Slovak Republic, has reached 40 years of age, is a law school graduate and has been practicing law for at least 15 years. The basic qualification criteria for candidates to the post of judge of the Constitutional Court are set out in the Constitution, Article 134 para. 3.

Examination of the candidates´ aptitude with regard to their professional and other qualifications for exercising the post of judge of the Constitutional Courts takes into account the basic constitutional requirements ensuing from Article 134 para. 3 of the Constitution and is implicitly contained in the process of their election and nomination by the National Council to the President. President of the Slovak Republic is authorised to perform his own examination of the candidates´ aptitude and subsequently select with regard to the professional and other qualifications for

exercising the post of judge of the Constitutional Courts pursuant to Article 134 para. 2 of the Constitution, within the meaning of which the President is to appoint the necessary number judges of the Constitutional Court out of the double number of candidates nominated by the National Council.

The President´s authority not to appoint a candidate for a constitutional office in the event of serious circumstances pertaining to the candidate which raise relevant doubts in the candidate´s ability to exercise the office in a manner not diminishing the honour of a constitutional office or that of the entire body, whose supreme representative would that person become, or in a manner not conflicting with the very mission of the body where – due to these circumstances – due performance of constitutional bodies ensuing from the interpretation of the Constitutional Court rendered by the Constitutional Court in PL. ÚS 4/2012 relates to an extraordinary reasons of such gravity that – with regard to the Constitution – they essentially disqualify the candidate for the execution of the constitutional office in question.

In case I. ÚS 397/2014 concerning the constitutional complaint of JUDr. Jozef Čentéš, PhD., concerning his non-appointment in the office of Prosecutor General, for instance, the Constitutional Court considered such circumstances – in the context of the said case – proven behaviour of the complainant who intended to obstruct a procedural act in penal proceedings or to damage third person´s rights, the essence of which was the intention to put blame for having shredded a report and deleted a record from a computer on an administrative clerk of the Prosecutor General´s office.

None of such serious or extraordinary circumstances ensue from the reasoning statements of the President´s decisions not to appoint the complainants judges of the Constitutional Court. Reasoning of the contested decisions limit themselves to more or less general statements of failure to meet the criteria of professional competence by the complainants without any adequate individualisation and specification.

A different opinion on reviewing the issue of the candidates´ aptitude for the post of judge of the Constitutional Court nominated by the National Council without having revealed serious circumstances pertinent to their persons evoking justified doubts in their ability to exercise the office of judge of the Constitutional Court in a manner not diminishing its high esteem or ability to execute the office in a manner not contrary to

the mission of the Constitutional Court itself, does not justify going beyond the scope of considerations by the President, provided in Article 134 para. 2 of the Constitution for the selection of candidates. In other words: a different opinion does not entitle the President not to accept, and hence not to appoint more than a half of the double number of candidates nominated by the National Council.

The President has thus overstepped the pre-defined scope of his powers ensuing from Article 102 para. 1 letter s) of the Constitution in conjunction with Article 134 para. 2 of the Constitution, violated at the same time the fundamental right of the complainants to access elected and other public offices warranted in Article 134 of the Constitution in conjunction with Article 2 para. 2 of the Constitution.

Pursuant to Article 127 para. 2 of the Constitution where the Constitutional Court satisfies a complaint, it will state in its decision that a [disputed] final decision, measure, or other act violated the rights or freedoms pursuant to paragraph 1 and it will annul such decision, measure, or other act.

As the Constitutional Court took the view that the fundamental right of the complainants to access elected and other public posts under equal warranted in Article 30 para. 4 of the Constitution in conjunction with Article 2 para. 2 of the Constitution, it annulled the President´s decision not to appoint JUDr. Eva Fulcová, JUDr. Duriš, PhD. and JUDr. Juraj Sopoliga judges of the Constitutional Court of the Slovak Republic and ordered him to act again and decide on the case.

Pursuant to Article 56 (6) of the Constitutional Court Act, where the Constitutional Court has annulled a valid decision, measure or other act and return the case for further proceeding, the decision issuer shall be obliged to hear the case again and decide. In doing so, he shall be bound by the legal view of the Constitutional Court. In the given case that means that the President was obliged to re-examine the nomination of the complainants and to select the necessary number of judges from among the candidates of Constitutional Court judges nominated by the National Council of the Slovak Republic.

Pursuant to Article 36 para. 2 of the Constitutional Court Act, in substantiated cases, according to the results of proceedings, the Constitutional Court may impose upon

a party the obligation to pay in whole or in part the costs of proceedings incurred by another party. The complainants have applied for payment of the costs of proceedings before the Constitutional Court. With regard to the result of the hearing on merits, the Constitutional Court considered necessary to award the reimbursement of costs to the complainants in the amount indicated in the statement of this decision. To calculate the costs of the complainant´s legal representation, the provisions of Article 1 para. 3, Article 11 para. 3 and Article 14 para. 1 letters a) and b) of the Decree of the Ministry of Justice of the Slovak Republic No. 655/2004 Coll. of Laws on counsellor´s fees and compensations for their legal service, as amended, was taken as a basis.

With regard to procedural motions of the President of the Slovak Republic, those were examined by the Constitutional Court, which held neither the motion to adjourn and stay the proceedings due to the need to unify the legal opinions of Senates pursuant to Article 6 of the Constitutional Court Act nor taking of additional evidence relevant for deciding in the case nor considered it necessary to transpose the decision on those procedural questions in the statement.

The decision is annexed by a dissenting opinion of Judge Rudolf Tkáčik.

With regard to the wording of Article 133 of the Constitution, this Finding shall come into force on the day of its service to the parties of the proceedings.

A detailed explanatory statement of this Finding will be contained in its paper form, which – being served to the parties to the proceedings – will be promulgated on the website of the Constitutional Court.

Košice, March 17, 2015

III. ÚS 571/2014

DISSENTING OPINION

of Judge Rudolf Tkáčik to the Finding of the Senate of the Constitutional Court of the Slovak Republic, III. ÚS 571/2014 of March 17, 2015

1. Pursuant to Article 32 para. 1 of the National Council of the Slovak Republic Act No. 38/1993 Coll., on the organization of the Constitutional Court of the Slovak Republic, on the proceedings before it and the status of its judges, as amended (hereinafter the "Constitutional Court Act), I am appending this dissenting opinion on the Senate Finding of the Constitutional Court of the Slovak Republic, III. ÚS 571/2014 of March 17, 2015

2. I hereby dissent from the majority decision of the Constitutional Court's Senate, which held that the fundamental right of JUDr. Eva Fulcová, JUDr. Miroslav Duriš, PhD., and JUDr. Juraj Sopoliga to access to elected and other public posts under equal conditions according to Article 30 para. 4 of the Constitution of the Slovak Republic (hereinafter the "Constitution"), in conjunction with Article 2 para. 2 Constitution, through decision of the President of the Slovak Republic (hereinafter "the President") No. 1112-2014-BA of July 2, 2014 on their non-appointment as judges of the Constitutional Court has been violated, as well as from the subsequent paragraphs 2 and 3 of the operative part of this Finding and its reasoning.

3. In the following I present the most fundamental reasons for my dissenting legal opinion.

4. The decisive reason and basic premise, used by the complainants to derive their objections against violation of their fundamental rights under Article 30 para. 4 of the Constitution, in conjunction with Article 2 para. 2 of the Constitution, is their opinion seeking support from Article 134 para. 2 of the Constitution, according to which 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 (hereinafter the National Council). The National Council nominates

twice the number of candidates for judges that the President is to appoint.

The complainants (except JUDr. Sopoliga) do not even claim that it is they who should have been appointed as judges of the Constitutional Court, but (in substance) they are attributing violation of their fundamental right to a breach of constitutional obligations under the cited Article 134 para. 2 of the Constitution, in conjunction with Article 2 para. 2. and Article 101 of the Constitution (to ensure the proper functioning of constitutional bodies) by the President, by not appointing half of the candidates proposed by the National Council for Constitutional Court judges.

5. The Constitutional Court reviewed objections from the complainants and ruled on them in concordance with provided opinions, which also corresponds to the content of section of the meritorious decision designated as *"The fundamental basis for the decision of the Constitutional Court and conclusions of the Constitutional Court on the constitutional issues raised".*

6. These positions and conclusions arising therefrom are introducing several conceptual and partial (specific) questions and contradictions.

Re: guarantees inferred by Article 30 para. 4 of the Constitution in relation to the contents of complaints

7. In accordance with Article 30 para. 4 of the Constitution, citizens shall have access to the elected and public offices under equal conditions.

The cited constitutional Article therefore does not guarantee the fundamental right of access to elected and other public offices, but only a fundamental right to a level playing field in accessing them. This introduces an obligation of bodies involved in the exercise of the said fundamental right of access to guarantee only the possibility of access (not the actual access) to elected and other public offices (mm III. ÚS 75/01).

The very phrase *"under equal conditions"* is crucial, otherwise it would only be an illusory declaration of some "fundamental right" and not of one of the important (and in real life applicable) constitutional norms underpinning the democratic state and rule of law(in the decision IV ÚS 92/2012 referred to as a *"key political right").*

Interpretation of this fundamental right was gradually in the case-law of the Constitutional Court in several cases refined, amended and stabilized (briefly) as ban on making *"more difficult, assisting or preventing the opportunity to stand for office"* (III. US 75/01), furthermore as the prohibition of discrimination in the circle of persons who are in the same legal and factual situation (m. m. II. ÚS 161/03). A mention can also be made of legal opinion formulated in Finding of the Constitutional Court of the Czech Republic IV. *ÚS 255/99 that "access to elected and other public offices cannot be without equal conditions, including also scenario that these conditions cannot be altered under unchanged statutory regulations only in response to changes in the political environment."*

8. With regards to the outlined, but fundamental requirements and limits of possible successful application of an objection of a breach of fundamental right under Article 30 para. 4 of the Constitution before the Constitutional Court I must conclude that it is the content of the complaints under review which is not directed in this direction and the question of un/equal conditions applied against the complainant by the President plays rather marginal role, whereby as reference cases with respect to them the complainants consider the conduct of presidents in the past (for more information see below).

Only JUDr. Sopoliga points out that there are no differences of such nature and severity that would justify the unequal treatment of the complainant (meaning himself) as compared with a successful candidate. However, the context of this (non-specified) claim infers that this is more of a disagreement with the President's decision itself, or the President's conclusions regarding the substantive reasons, which he in his considerations assessed differently in his case than if the case of the candidate referred to.

Re: Exercise of the Constitutional Court powers under Article 127 para. 1 of the Constitution

9. For ruling on merged complaints by complainants in the case of the alleged infringement of their fundamental rights guaranteed by Article 30 para. 4 of the

Constitution, in conjunction with Article 2 para. 2 of the Constitution, and in two cases also the right guaranteed by Article 25 letter c) of the International Covenant on Civil and Political Rights, which the President has allegedly committed by his decisions on non-appointment of the complainants to the post of Constitutional Court judges, it is first essential to point out that during the proceedings the Constitutional Court rules on the submissions from non-appointed candidates in accordance with Article 127 para. 1 of the Constitution.

10. In accordance with Article 127 para. 1 of the Constitution, the Constitutional Court decides on complaints by private individuals or legal entities objecting the violation of their fundamental rights and freedoms, or the fundamental rights and freedoms ensuing from international treaty ratified by the Slovak Republic and promulgated in a manner laid down by law, unless a different court makes decisions on the protection of such rights and freedoms.

The Constitutional Court already stated that the meaning and purpose of his powers under Article 127 para. 1 of the Constitution is to provide effective protection of fundamental rights and freedoms of private individuals and legal entities enshrined therein. Thus, primarily the proceedings in so-called individual constitutional complaints are not a matter of conclusions regarding constitutionally relevant irregularities on part of public authorities, combined with violation of a specific Article of the Constitution (III. ÚS 483/2012).

As a result, the Constitutional Court continuously emphasises that Article 1 para. 1 of the Constitution has the character of a constitutional principle that must be respected by all public authorities in the interpretation and application of the Constitution (e.g. IV. US 70/2011), hence does not formulate any fundamental right or freedom of a party to the proceedings, therefore the Constitutional Court cannot, in proceedings under Article 127 para. 1 The Constitution pronounce violation of this provision of the Constitution (e.g. III. ÚS 119/2011). With respect to Article 12 para. 2 of the Constitution, the Constitutional Court has consistently held that there is a positive obligation of the state to transpose into law those anti-discrimination principles and measures which the said Article contains, and therefore it is not directly applicable by the public authorities of the Slovak Republic in individual cases (III. ÚS

51/08, III. ÚS 316/2011). Also Article 13 para. 1 letter a) the Constitution sets out the general constitutional principle that every public authority is required to comply with in the exercise of its powers, which at the same time serves to protect the individual against the public authorities. However, it does not provide for any fundamental right nor freedom to party in the proceedings (III. ÚS 99/2012).

The pattern is clear that not every procedure or every decision of a public authority, which at first glance appears to bear signs of contradiction with the Constitution or the law or other generally binding legal regulation, can be remedied in proceedings conducted under Article 127 para. 1 of the Constitution.

Under the procedure involving the so-called individual complaints, correction can only be made to those failings by public authorities that have a direct and real impact on some of the fundamental rights of the specifically identified individual or legal entity, which is seeking constitutional-judicial protection under Article 127 para. 1 of the Constitution. Any objections by the complainants that would demonstrate inconsistency between conduct by public authorities and the law or even the Constitution, but it would not show the real impact on fundamental rights and freedoms of each individual complainant, therefore do not constitute, in my view jurisdiction of the Constitutional Court to intervene in proceedings pursuant to Article 127 para. 1 of the Constitution (currently it is already superfluous to deal with the eventual conditions of admissibility of these complaints, on which the Constitutional Court ruled in their preliminary hearing).

11. In assessing individual complaints or objections contained therein raised against the contested decisions of the President, an objection is coming to the foreground (as I already stated) based on the complainants' assertion that it was the duty of the President to appoint three of the six candidates. Because the President did not do so, it is alleged he violated fundamental right of the complainants guaranteed by Article 30 para. 4 of the Constitution, in conjunction with Article 2 para. 2 of the Constitution. In relation to conduct by the Constitutional Court under Article 127 para. 1 of the Constitution, the following aspects in particular must be taken into consideration:

- none of the complainants cannot know whether he/she would belong to a

group of appointees, had the President appointed three of the six submitted candidates to the post of the Constitutional Court judge, whereby from the position of the other three (unsuccessful) candidates out of six (in this case of three complainants, this applies minimum to one of them), who clearly would not be able to be appointed, it is manifestly a case of seeking non-existent rights, because even the Constitution does not provide them with such right, given the construct of filling vacancies on the Constitutional Court, in other words, half of the candidates are rejected *ex constitutione*,

- thus, if the Constitutional Court is confronted with formally three individual complaints (their merging into a joint procedure plays no role), with their basis being however seeking of "collective" rights of the group of candidates, selected by the National Council (once again I emphasise that in proceedings under Article 127 para. 1 the Constitutional Court decides..., they are claiming violation of their fundamental rights...), in my opinion it is not in the powers of the Constitutional Court to assess them and pass a meritorious decision (to grant their application) in proceedings under Article 127 para. 1 of the Constitution; the argumentation of the complainants in this respect thus takes no account of the essential feature of the constitutional and legal protection's remedy enshrined in Article 127 para. 1 of the Constitution, which is the intervention of public authority directing its effects solely to the individual sphere of an individual, seeking constitutional-judicial protection,
- if the Constitutional Court accepted argumentation by the complainants, then the constitutional and legal protection of the fundamental right under Article 30 para. 4 of the Constitution in case of any of them it is moving into the position of defending the appointment of one of the other candidates, hence an entity of a fundamental right completely different from the complainant,
- the Constitutional Court, in its previous decisions, never loses sight of the fact that if a public authority meets all requirements constituting contents of certain basic right, it does not automatically have to lead to a decision that be positive for the complainant in the face of his/her expectations or request for relief of his/her petition, on the contrary, many times the respect for fundamental right must lead public authority to a decision, which is negative for the complainant (for consequences arising

from the full wording of the majority decision of the III. Senate on this point, see below).

In the conclusion to this section of the dissent it is necessary to reiterate that in the proceedings on the complaint under Article 127 para. 1 of the Constitution, the subject matter of the review cannot be the fact whether the President is obliged to choose half the number of candidates, or whether it is his right (option); substantive assessment of this issue and a decision on it could possibly be the result of a proceeding conducted under Article 128 of the Constitution.

With regards to interpretation of Article 134 para. 2 in conjunction with Article 101 para. 1 sentence 2 and Article 2 para. 2 of the Constitution

12. In addition to the procedural aspects of the complainants' claims on the obligation of the President to appoint half of the candidates for judges of the Constitutional Court, to which I referred in the previous paragraphs, it is no less important to deal with the substantive aspect, especially in terms of how it is reflected in the reasoning of the majority decision of III. Senate of the Constitutional Court.

13. The quoted assertion itself is based strictly on wording of Article 134 para. 2 of the Constitution relying on resolute denial of the applicability of the Constitutional Court's decision PL. 4/2012 Constitutional Court on the interpretation of the scope of presidential powers to decide on the nomination of the Prosecutor General of the Slovak Republic (hereinafter referred to as the "Prosecutor General").

14. The reasoning of the majority decision of III. Senate infers that the decisive factor is the wording of the Constitution (response to the President's statement about the applicability of the interpretation of the decision Pl. 4/2012 and constitutional conventions in the European Union and the Czech Republic, p. 57).

- examination of the President's powers, pertaining to the appointment of Constitutional Court judges *" based on a single interpretation of the Constitutional Court, relating to the appointment of the Prosecutor General, is more than expedient. Constitutional position of the prosecution cannot be equated with that of the*

Constitutional Court."(p. 62),

- conclusion, ***"that Article 134 para. 2 of the Constitution and Article 139 of the Constitution clearly infers obligation of the President to appoint from the double the number of candidates exactly one half as judges of the Constitutional Court",***
- other approach by the President (in agreement with the complainants' opinion) is contrary also to Article 101 para. 1 of the Constitution and at the same time breach of Article 2 para. 2 of the Constitution.

15. I cannot agree with the arguments and conclusions above. In the first instance, I wish to point out the generally accepted rule of interpretation and application of the Constitution, which indicates that the Constitution represents a legislative body that needs to be applied and interpreted in relation to all other all constitutional norms (e.g. II. ÚS 128/95, II. ÚS 48/97).

16. The actual text of Article 134 para. 2 of the Constitution does not contain a norm that could explicitly imply the obligation to select half from twice as many candidates, because legislatively only the mechanism for creating Constitutional Court judges can be inferred, according to which the National Council proposes double the number of candidates and the President is to appoint (only) from these candidates the required number of judges.

17. It is impossible to ignore the fact that the Constituent Assembly chose only in this single instance this method of proposing candidates for constitutional office. According to elemental formal logic, it must be concluded that the discretion of the President is here, compared to other cases, a priori, extended (because two candidates are more than one). However, this Article of the Constitution definitely does not legislatively define the limits of the President's discretion (which is at stake above all). Even more important is the matter of the scope of the President's discretion in his appointing authority in cases of joint decision-making with the National Council, alternatively also the government that his when it comes to deciding on a proposal of candidates, the Constitutional Court has already repeatedly dealt with and provided

binding interpretation, whereby it is apparent that even the Court's views are in this regard subject to certain revolution. For the purposes of this position I am providing two examples that are closest to the present case.

18. When considering the extent of the President's discretion, the Constitutional Court in its interpretations dealt primarily with the question of whether the President has in these cases only a notary jurisdiction and is thus obliged to accept personnel proposals without any recourse. The Constitutional Court took the first step of denying the said (only) notary authority of the President in decision PL. ÚS 14/06 [appointment of Vice-Governor of the National Bank of Slovakia - Interpretation of Article 102 para. 1 letter h) of the Constitution], which held that the President assesses compliance with statutory requirements by the candidate, and if it concludes that the proposed candidate does not meet the requirements, the proposal is not granted.

19. In the following (last) already cited interpretation in decision PL. ÚS 4/2012 the Constitutional Court quite clearly significantly expanded the President's discretion, by recognising the President's right not to appoint a candidate proposed by the National Council in addition to the failure to fulfil the legal requirements for appointment also "due *to serious fact relating to the candidate, reasonably undermining his/her ability to discharge the duties of the office...*".

20. There is no doubt that the interpretation of decisions PL. ÚS 4/2012 relates in particular to the appointment of the Prosecutor General. However, it cannot be overlooked that the statement of this interpretation has three separate legal sentence, the first of which is explicitly linked to Article 150 of the Constitution, but the other two (in principle and doctrine) enshrine (i) the limits of the President's discretion, defining the contours of his ability not to grant the proposal for appointment of the candidate in relation to Article 101 para. 1, sentence 2 of the Constitution, (ii) the President's obligation to provide reasons for non-appointment, whereby (iii) the reasons for non-appointment must not be arbitrary.

21. In accordance with Article 128 second and third sentence of the

Constitution, the Constitutional Court decision on interpretation of the Constitution or a constitutional law is promulgated in a manner defined for the promulgation of laws. The interpretation is generally binding from the date of promulgation. When assessing this case (as well as other similar instances, which may occur in the future), there is no valid reason, to retreat from the general binding nature of the interpretation of the Constitutional Court, which was published in the Collection of Laws of the Slovak Republic and thus became part of the constitutional order of the Slovak Republic. The reasoning of this interpretation is not exclusive only to the appointment of the Prosecutor General either, but to the contrary on a rather large area and quite unequivocally and generally advocates the President's discretion defined more precisely in a statement, based on the position and relationship of the President and the National Council in the exercise of their creationist jurisdiction pertaining to constitutional bodies, in the case of their joint decision-making, relying on the constitution as a whole.

22. In this context, a fact cannot be ignored that the complaints of the complainants and consistently the reasoning of the said decision conclude that the non-appointment of three candidates (read the complainants) to all vacant posts of judges of the Constitutional Court the President also violated his constitutional duty to ensure the proper functioning of constitutional bodies by his decision-making (Article 101 para. 1 sentence 2 of the Constitution). It is quite evident that such generally formulated obligation in the Constitution can be approached negatively (in real life this should mean that if the President receives proposal, he should appoint the candidate/s to the vacancy on the constitutional body) or positively (if the President comes to a conclusion that unsuitable candidate or candidates were proposed, he should reject the proposal).

I do not consider as correct, objective or convincing, if from two equal but opposing alternatives for interpretation of the constitutional text a violation of the Constitution by the President is based only on one of them and the assessment of the second option is completely omitted, even though the reasoning of the Finding in this respect relies on the need for continuous constitutional oversight by the Constitutional Court (Article 124 of the Constitution). In relation to the abovementioned

interpretation of the Constitutional Court in its decision PL. ÚS 4/2012, which introduced (in the verdict, as well the reasoning) in our constitutional order the legitimate power of the President refuse to appoint a candidate to constitutional office due to inappropriateness of the proposed candidate precisely because of the requirement to ensure the proper functioning of constitutional bodies, such approach can be described as a paradox.

23. Regarding the pronouncement of violation of Article 2 para. 2 of the Constitution in paragraph 1 of the Finding's verdict, the wording "... The fundamental right under Article 30 para. 4 of the Constitution... in conjunction with Article 2 para. 2 of the Constitution... "should be first analysed from this perspective, whether the words "in conjunction" should be understood as a kind of reasoning or reference to the said Article of the Constitution in context of Article 30 para. 4 of the Constitution or a finding of its violation by the President. Although I do not agree with neither of these options, it cannot be overlooked that the reasoning is based on a direct violation of this Article by the President, to wit (i) in relation to the contested President's decisions themselves (inter alia *"Replacement of a procedure set by Constitution or legislation with own consideration of a state authority is contrary to constitutional wording of Article 2 para. 2 of the Constitution and is a demonstration of arbitrariness by the state authority."* as well as (ii) in section relating to the advisory body (*"... decision on establishing an Advisory Committee has no basis in constitutional text or in any legislative provision, and thus violates the constitutional order of Article 2 para. 2 of the Constitution").*

24. From a procedural point of view I am of the opinion that in proceedings under Article. 127 para. 1 of the Constitution, the decision concerning the infringement of Article 2 para. 2 of the Constitution in this regard outside the subject matter of the complaints, therefore I dissent also in this part (for details, see also paragraphs 9 and 10 of the opinion).

With regard to the substance, my disagreement with the reason based solely on the alleged excess of jurisdiction by the President "by not appointing..." is clearly based on my other legal opinion on the concluded "obligation to appoint..." (see paragraphs 12 - 22 of this opinion). The second reason I find contradictory in relation, inter alia, to

this finding, in reasoning of this Finding “Since *the Advisory Committee is not a public authority and in the case of complainants it did not even rule separately, it could not have violated their fundamental rights and freedoms referred to in their complaints*.", which would mean that by setting up the Advisory Committee (which "is not a public authority body") the President violated Article 2 para. of the Constitution, although this committee had no legal relevance in relation to its decisions and rights of the complainants.

On this matter, I would like to make only one more brief comment that in my opinion, the President would, in relation to exercise of his powers under Article 134 para. of the Constitution certainly violated Article 2 para. of the Constitution, if for example, he appointed as a constitutional court judge an individual, not proposed to him by the National Council.

23. For all the above reasons, I do not agree with points 1, 2 and 3 of the majority decision of the III. Senate nor with their reasoning.

With regards to other questions

24. If I wish to emphasize that this dissenting opinion shall not be and is not an uncritical defence of the President's conduct and decision on the matter. Of the overall approach clearly demonstrates that the President accentuated the need for transparency of the selection from among candidates submitted to him by the National Council, as well as the “quality” of the composition of the Constitutional Court. Without any correction to legal opinions that I presented in the opinion, I must conclude that in my opinion the approach by the President in this very complicated matter quite naturally also raises some doubt or question marks. Let me mention just the question raising certain tension between the applied procedure, used by the President to carry out selection within the limits of the abovementioned discretion (applying the rule established by the Constitutional Court decision Pl. ÚS 4/2012) in relation to all rejected candidates, including the reasoning for his decisions, and the selection rule, which derives directly from Article 134 para. 2 of the Constitution, with consequence

being that half of the candidates is rejected on the basis of constitutionally defined mechanism for creating composition of the Constitutional Court, and therefore does not have to by objectively justified. Application of the second rule eliminates (in this group of candidates) essentially any reservations concerning the possible inequality of conditions under Article 30 para. 4 of the Constitution, whereby combination of both approaches is not excluded.

25. Despite the fact that I have a different view of a substantial part of the Finding concerned, I shall address specifically that part of the 2nd paragraph of the verdict, in which the Constitutional Court *"orders, for the President of the Slovak Republic to act and decide again on the matter."* Apart from the fact that, following the overturning of the President's decision (which is a constitutional imperative), neither Article 127 para. 2 of the Constitution nor Article 56 para. 3 of the Constitutional Court Act contain Constitutional Court decision formulated in this manner (this wording is contained in Article 56 para. 6 of the Constitutional Court Act, which describes the consequences of a matter being referred back for further proceedings), in specific actual circumstances I consider this part of the decision, especially problematic, as well as in terms of substance, all the more so it being a facultative decision. Had the constitutional court refrain from this part of the decision, the entry into force of the overturning of the President's decision would undoubtedly restore the situation that the President would "have on his desk" the proposal of three candidates of the National Council (read the complainants) for appointment as judges of the Constitutional Court, together with an obligation to respect the decision of the Constitutional Court and a remedy could consist of, e.g. appointing two of them. In this situation, however, there is no constitutionally acceptable means of redress within the intentions and overall concept of the decision of the Constitutional Court, since according to the court's statement fundamental rights of all three complainants were violated for the same reasons and the President has an obligation to act again and decide with regards to each of them.

26. Just as *obiter dictum*, I wish to comment on that part of the Finding's reasoning (point VI. B), which concludes that consideration regarding the content or

scope of the reasoning in the President's decisions is superfluous, or that the issue of inadequate reasoning for the decision cannot be considered part of the (content) of fundamental right guaranteed by Article 30 para. 4 of the Constitution, in conjunction with Article 2 para. 2 of the Constitution. In my opinion (without wanting to pass judgement on the specific content and relevance of reasons provided by individual complainants), it is these parts of the complaints which may correspond with perception of this fundamental right, with inherent feature being a level playing field, but particularly the prohibition of arbitrariness in the rejection of a candidate (Constitutional Court decision Pl. ÚS 4/2012). This, of course, has no bearing on my legal opinion on the impossibility / possibility of application of Article 127 para. 1 of the Constitution in this instance, save (in theory) a situation, when the applicants, in addition to their objections to the form and content of the President's decisions reasoning, to include in their complaint also the violation of other fundamental rights, for example under Article 46 para. 1 of the Constitution.

Košice, March 17, 2015

Rudolf
Tkáčik

DISSENTING OPINION
of Judge Ladislav Orosz

Pursuant to Article 32 para. 1 of Act No. 38/1993 Coll. of Laws on the organisation of the Constitutional Court of the Slovak Republic, on the proceedings before the Constitutional Court and the status of its judges, as amended (hereinafter the "Constitutional Court Act"), I am annexing my dissenting opinion on Ruling of the Constitutional Court of the Slovak Republic (hereinafter referred to as the "Constitutional Court") PL. ÚS 45/2015 of October 28, 2015 (hereinafter referred to as the "ruling to dismiss the President´s petition"), by which the petition of the President of the Slovak Republic (hereinafter referred to as the "President") to institute proceedings to interpret Article 2 para. 2 of the Constitution of the Slovak Republic (hereinafter referred to as the "Constitution") in conjunction with Article 128 of the Constitution, as well as to interpret Article 134 para. 2 of the Constitution in conjunction with Article 101 para. 1 and Article 102 para. 1 letter s) of the Constitution, the Constitutional Court decided in its preliminary session to dismiss the petition.

I consider the right to provide a dissenting opinion to a decision of the Plenary or Senate (majority) of the Constitutional Court a major remedy intended to cultivate the Constitutional Court´s case law by allowing a judge to hold up a mirror to a decision taken by the majority of his colleagues and to express a different legal opinion in a matter decided by the majority of the Plenary or Senate of the Constitutional Court. At the same time, a dissenting opinion gives a signal to parties to the proceedings and to the public that the case could – and in the view of the dissenting judge should – have been decided differently. However, with regard to Ruling PL. ÚS 45/2015 of October 28, 2015 dismissing the President´s petition to provide an interpretation of the Constitution in a preliminary session, I am also compelled to annex my dissenting position because – due to my professional honour

– I consider necessary to dissociate myself from the decision which has deserved my reservations of principle, as the decision brings too few convincing points from the perspective of constitutional law and – on the contrary – too much politics. For the aforementioned reasons, I consider it necessary to express the following legal views in my dissenting opinion:

1. The aim of the proceedings to interpret the Constitution or a constitutional law pursuant to Article 128 of the Constitution is – in the interest of legal certainty – to provide such interpretation of the Constitution or of constitutional laws which, in a generally binding way, would in the future eliminate the genuine dispute between constitutional authorities with regard to the manner of interpreting and applying their constitutional mandates or powers in a specific case (PL. ÚS 14/06, I. ÚS 61/96). In its declarations, the Constitutional Court supported this point of departure, too (by quoting from decision I. ÚS 61/96), but in fact, the decision to dismiss the President´s petition does not contribute any legal certainty in the interpretation and application of the limited President´s mandate to appoint and recall certain officials. It is the opposite: their interpretation and application in conformity with the Constitution makes them even more obscure, invoking a whole series of new issues relevant with regard to the Constitution and the failure to give replies to them may later lead to a whole series of additional serious disputes in the realm of constitutional policy.

2. Having studied the contested ruling in detail, a layman may come to the conclusion that most judges of the Constitutional Court were not led by the effort to provide a generally binding interpretation of the Constitution but by the effort to "approve" Finding III. ÚS 571/2014 of March 17, 2015 in the Plenary of the Constitutional Court, whereby the Senate of the Constitutional Court (or rather two of its members) satisfied individual petitions of three judge candidates of the Constitutional Court (E. Fulcová, M. Duriš and J. Sopoliga) seeking to reverse the President´s decision of July 2, 2014 not to appoint them judges of the Constitutional Court. At the same time, the reasoning of the ruling to dismiss the President´s motion (p. 23) clearly shows the intention of the majority in the Plenary of the Constitutional Court to extend the effect of Finding III. ÚS 571/2014 of March 17, 2015 to two additional complainants (J. Bernát and I. Volkai) who have withdrawn their

complaints against the President´s decision not to appoint them judges of the Constitutional Court shortly before Senate II. of the Constitutional Court decided on the merits. That judicial activism – inappropriate in my view – invokes *prima facia* doubts concerning the approach in conformity with the Constitution by majority of the Plenary of the Constitutional Court. Even though, I do not consider necessary to give categorical statements on whether the Plenary of the Constitutional Court in its proceedings to interpret the Constitution pursuant to Article 128 of the Constitution was granted authorization to take such a pro-active approach at all, or whether its decision would be of any legal relevance for the additional two candidates. I rather consider relevant to give an opinion on the substance contained in the reasoning of Finding III. ÚS 571/2014 of March 17, 2015, which the majority of the Plenary of the Constitutional Court *in fact* fully endorsed by its decision to dismiss the President´s motion.

3. With regard to the aforementioned I consider it necessary to – first of all – point out that the essence of the dispute relevant with regard to the Constitution between the President of the Slovak Republic on the one hand, and the Parliament or National Council of the Slovak Republic (hereinafter referred to as the "National Council") and five judge candidates of the Constitutional Court on the other was vested in the different views whether the President had had both the power and responsibility to abide by the generally binding interpretation of the Constitution when deciding to appoint the judges of the Constitutional Court, provided by the Constitutional Court in its Ruling PL. ÚS 4/2012 of October 24, 2012.

4. Beyond any doubts, Ruling PL. ÚS 4/2012 applies to the interpretation of Article 102 para. 1 letter t) and Article 150 of the Constitution, i.e. to the performance of the President´s authority to appoint the Prosecutor General of the Slovak Republic (hereinafter referred to as the "Prosecutor General") which necessarily had to be expressed in the statement of that Ruling. The reasoning of Ruling PL. ÚS 4/2012 however shows very clearly that the key reasoning (items 34 and the following) on which the Plenary of the Constitutional Court based its conclusion summarised in the statement of that Ruling, obviously extended beyond the limits set out by the provisions of Article 102 para. 1 letter t) and Article 150 of the Constitution, i.e. when

drawing up Ruling PL. ÚS 4/2012, the Constitutional Court based themselves on the standing and authority of the President in the structure of constitutional bodies of the Slovak Republic as set out in the Constitution and therefore the conclusions contained therein cannot – in my view – *a priori* restrict the execution of the President´s power to appoint the Prosecutor General. This was the basis for the President (a very legitimate one, in my view) for declining to appoint five of the six judge candidates of the Constitutional Court proposed to him by the National Council, making reference to the generally binding interpretation of the Constitution provided in Ruling PL. ÚS 4/2012[1]..

5. The key constitutional issue on which the Constitutional Court had to give an opinion of authority was case PL. ÚS 4/2012 concerning the scope of discretion available to the President in the exercise of his power to appoint or recall in cases where a decision is to be taken with regard to a person proposed by the National Council or another public authority (limited powers to appoint and recall). The answer to this question is of fundamental significance for constitutional policy, as the extent of the President´s autonomy in the exercise of his powers may be considered one of essential elements of the Constitution (m.m. I. ÚS 397/2014), pre-determining the fundamental characteristics and classification of the Constitution with regard to the type of governance, i.e. pre-determines the answer to the question whether the constitution is based on a parliamentary, semi-presidential or presidential type of governance.

6. As a refresher it is worth recalling that the majority of the Plenary of the Constitutional Court in its Ruling PL. ÚS 4/2012 of October 2, 2012 in a generally binding way declared that when deciding about the National Council´s proposal to appoint the Prosecutor General, the President may refuse to appoint a specific candidate not only because the latter had failed to be elected in a procedure

[1] Another question, yet one of essence is whether – when deciding not to appoint the five judge candidates of the Constitutional Court – the interpretation of Ruling PL. ÚS 4/2012 applied by President of the Slovak Republic was too broad, which ultimately may (and in my view obviously should) have been the reason for the Constitutional Court to declare that the fundamental rights of the judge candidates of the Constitutional Court declined by the President pursuant to Article 30 para. 4 of the Constitution had been violated, which was the ground for repealing the challenged decisions and revering them to the President for further proceedings.

compliant with law or because the latter fails to satisfy legal requirements concerning the appointment but also when the former has established that materials relating to the candidate "raise relevant doubts about the candidate´s ability to exercise the office in a manner not diminishing the high esteem of a constitutional office or that of the entire body, whose supreme representative that person would become, or in a manner not conflicting with the very mission of the body where – due to those circumstances – the due performance of constitutional bodies might be impaired (Art. 101 (1), sentence 2 of the Constitution of the Slovak Republic)."

7. It is also worthwhile to recall that when deciding about the motion to provide interpretation of the Constitution in the case PL. ÚS 4/2012, the judges of the Constitutional Court manifested view of considerable diversity concerning the level of President´s discretion in appointing to or recalling from office, which is clearly confirmed by legal views expressed in dissenting positions of four judges (Ľ. Gajdošíková, L. Mészáros, J. Luby and L. Orosz) as well as in the "supplementary reasoning" annexed to the majority decision by Judge Ivetta Macejková. An analysis of these dissenting opinions shows that Judge Ľudmila Gajdošíková in her dissenting opinion supported the minimalistic scope of the President´s discretion in the execution of his power to appoint or recall from office. According to Gajdošíková, the President is only in the capacity of a notary.[2] On the other hand, toleration to the broadest possible scope of the President´s discretion in the execution of his power to appoint or recall from office was supported by Judge Ivetta Macejková who – in her "supplementary reasoning", while pointing out the previous constitutional policy practice – admitted that for the President not to satisfy the National Council´s

[2] "I agree that the candidate proposed for the position of the General Prosecutor elected by the National Council must satisfy the requirements set out by law to execute the office for which the candidate had been selected (elected) and that the President has the authority to scrutinise the candidate´s compliance with the requirements set out by law. I cannot however agree with the view of the majority in the Plenary of the Constitutional Court to broaden by a decision on interpretation the President´s "scrutinising" authority to examine personality traits of the nominated candidate (within the scope as set out in verdict 117 para. 2 of the decision). The President´s authority to scrutinise based on interpretation reaches, in my view, beyond the limits of President´s authorities enshrined in Article 2 para. 1 letter f) of the Constitution. Broadening the President´s authority to scrutinise beyond the limit of the examination of legal requirements concerning the candidate proposed for the office of the Prosecutor General by the National Council in the realm of evaluating personality traits qualifying the candidate´s eligibility for the office cannot in my view be addressed by interpreting the applicable article of the Constitution but in a standard constitutional law procedure only, i.e. by amending the Constitution" (quote from the dissenting opinion of judge Ľ. Gajdošíková).

nomination of certain individuals, the absence of the President´s personal trust in the proposed candidate could basically suffice."[3] Based on the content of interpretation provided in case PL. ÚS 4/2012 and on the dissenting opinions attached thereto, one may consider at least paradoxical that those judges of the Constitutional Court who – with regard to the interpretation of the power to appoint the Prosecutor General – supported a relatively broad room for the President´s element of discretion[4] and denied any room for the President´s discretion when deciding about interpretation of the President´s authority to appoint judges of the Constitutional Court; i.e. they ultimately contradicted their own decision, without showing any minimal willingness to correct their views expressed in a generally binding interpretation of the Constitution provided in case PL. ÚS 4/2012. To the contrary: those judges who expressed their disapproval with the interpretation in case PL. ÚS 4/2012, inter alia by their opinions disapproving the majority decision in case PL. ÚS 45/2015, respected the preceding decision of their colleagues in case PL. ÚS 4/2012, felt bound by the decision and repeatedly expressed the same in their dissenting opinions (!)

8. There is no need to particularly point out that the interpretation conclusions presented in decision of the Constitutional Court concerning interpretation of the Constitution and constitutional law are – within the meaning of the Constitution, Article 128, sentence 3 – generally binding as of the day they were promulgated in the Collection of Laws of the Slovak Republic. Meanwhile, with regard to its legal power, interpretation of the Constitution and if constitutional laws provided in a decision of the Constitutional Court pronounced pursuant to the Constitution, Article 128 is considered of legal power comparable with the Constitution, being a generally binding interpretation of the Constitution" (I. ÚS 397/2014). Subsequently to the above, Ruling PL. ÚS 4/2012 has beyond any doubts been generally binding and obliges anyone, particularly however "… the judges of the Constitutional Court, regardless of whether they voted in favour or against the

[3] " … Based on the aforementioned, it also needs to be particularly underlined that – where the constitutional policy practice accepted the President´s right not to satisfy the petition to appoint a certain person "just" due to absence of the President´s personal trust in the candidate proposed, in a situation when President was elected by the National Council – the more such a right cannot be denied to a President elected by citizens in democratic election, enjoying – beyond any doubts – democratic legitimacy of a higher order than a President elected by the National Council" (quote from a supplementary reasoning of Judge I. Macejková).

[4] Personally, I consider the quoted part of Ruling PL. ÚS 4/2012 ambiguous and even too flexible.

adopted text of the ruling in question in the Plenary of the Constitutional Court or even attached their dissenting opinion. It is in particular the Constitutional Court which is obliged to honour and protect its own decisions and interpret and apply those decisions in a manner respecting their content and the limits contained therein." (I. ÚS 397/2014).

9. Constitutional basis for that part of Ruling PL. ÚS 4/2012 according to which President may not appoint a candidate of the Prosecutor General in that constitutional office for other reasons than due to maladministration of the National Council in the election or due to a failure to satisfy legal requirements, was obviously derived by the majority of the Plenary of the Constitutional Court from the Constitution, Article 101 para. 1, sentence 2, pursuant to which the "President ... through his decisions ensures due performance of constitutional bodies" (Note: confirmed by a direct reference to the provision in question in the Constitution in the statement of that Ruling). In this regard, I consider it necessary to point out that the provision contained in the Constitution, Article 101 para. 1, sentence 2, forms an integral part of the definition of President by the Constitution and is an expression of the fundamental functional focus of basically all his activities relevant to the Constitution. Thus, with regard to a systemic classification of the Constitution´s provision contained in its Article 101 para. 1, sentence 2, one may come to the conclusion that the requirement to ensure proper operation of constitutional bodies is present in the exercise of all constitutional powers of the President, in particular when exercising his creation powers.

10. There are no doubts about the material link between Ruling PL. ÚS 4/2012 concerning primarily the exercise of the President´s power to appoint the Prosecutor General and Ruling PL. ÚS 45/2015 concerning primarily the exercise of the President´s power to appoint judges of the Constitutional Court as

- both decisions relate to the creation powers of the President,
- in both cases, the so-called creation powers of the President are exercised,
- in both cases, the President must apply his constitutional obligation to ensure due performance of constitutional bodies.

11. One of the key roles of the Constitutional Court as an independent judicial authority for protecting constitutionality (Article 124 of the Constitution) is to protect the principle of legal certainty which forms a constituent part of the general principle of the rule of law (PL. ÚS 12/05) guaranteed by the Constitution, Article 1 para. 1. The requirement to be provided the same reply in identical or comparable circumstances by all public authorities, in particular by the Constitutional Court, to a certain question relevant from the legal point of view, forms an integral part of the principle of legal certainty (m. m. PL. ÚS 16/95). Interpretation of the Constitution and of constitutional laws must be consistent. The Constitutional Court may not provide (even at a later date) a different reply to an identical or at least comparable question without giving rise to a need – in a period following its own latest authoritative interpretation provided in proceedings pursuant to the Constitution, Article 128 – to amend the Constitution by the constitutional assembly Even though a generally binding interpretation of the Constitution contained in Ruling of the Constitutional Court provided pursuant to the Constitution, Article 128 may be corrected (amended) by the Plenary of the Constitutional Court, yet that "correction" must be explicitly pointed out in their follow-up decision with convincing reasoning. Moreover, it is really difficult in a qualified way to controvert the view that a declining ruling made in the pre-trial of the President´s proposal cannot correct (amend) a decision statement concerning interpretation of the Constitution which was carried out in the manner provided for promulgating laws (Constitution, Article 128, sentence two), which is in the Collection of Laws of the Slovak Republic, where the same is *ex constitutione* generally binding from the date of its promulgation (Constitution, Article 128, sentence 3).

12. Where the Constitutional Court in the statement of Ruling PL. ÚS 4/2012 expressed that the President may not appoint a candidate to the office of Prosecutor General proposed to him by the National Council, also "due to serious circumstances pertaining to the candidate which raise relevant doubts about the candidate´s ability to exercise the office in a manner not diminishing the high esteem of a constitutional office…" where - as a result of the nature of those circumstances - "the due

performance of constitutional bodies might be impaired (Art. 101 (1) – sentence 2 of the Constitution), then those circumstances are so serious that their factual existence not only may but must – in my view – present an ultimate obstacle for appointing anyone in any constitutional office, i.e. even in the office of a judge of the Constitutional Court. It is obvious that a reverse interpretation might lead to a destruction of the constitutional political system of the Slovak Republic.

13. The ruling contained in III. ÚS 571/2014 of March 17, 2015 "hallowed" by the majority of the Plenary of the Constitutional Court by a ruling to decline the President´s petition also brings a legal opinion that "any and all appointing powers of the President exercised in his responsibility (not countersigned) where the nature of things does not require his reticence (like, for instance, appointing of Professors) are an expression of power, which means that the President must be given certain room for discretion". I can only agree with that legal view. At the same time, I consider unacceptable interpretation of the Constitution Article 102 (s) in conjunction with Article 134 para. 2 which, according to the legal view of Senate III. of the Constitutional Court, restricts the "discretion" by the President when appointing judges of the Constitutional Court to a "selection from among two candidates nominated by the National Council to fill one vacancy." The Plenary of the Constitutional Court has without a doubt endorsed the aforementioned interpretation in the reasoning of its ruling to dismiss the President´s petition in its entirety in "more detail" stating the following on page 20: "President … is be obliged to appoint exactly a half of judges of the Constitutional Court from among the double number of judge candidates of the Constitutional Court, hence the President is not authorised to appoint less than a half judges of the Constitutional Court from among the double number of judge candidates of the Constitutional Court where he believes that there are serious circumstances pertaining to the candidates which raise relevant doubts about their ability to exercise the office of judge of the Constitutional Court in a manner not diminishing the high esteem of the office of judge and that of the Constitutional Court.

14. I have strong doubts whether the majority of the Plenary of the Constitutional Court have fully realised the content and impact of the quoted ruling

reasoning to dismiss the President´s petition by expressing their consent with the ruling by a vote. That interpretation – in conflict with elementary rules of logic which is ultimately destructive by binding the President of the Slovak Republic explicitly to appoint some of the candidates proposed to him by the National Council of the Slovak Republic even if he comes to the conclusion that none of the candidates proposed to him by the National Council is not able to exercise the office of judge of the Constitutional Court in a manner not diminishing the honour of the judge´s office or that of the Constitutional Court as a whole, or in a manner not conflicting with the mission of the Constitutional Court as an independent judicial authority to protect constitutionality. That interpretation is not only in complete contradiction with the essence of the generally binding interpretation of the Constitution provided by the Plenary of the Constitutional Court in its Ruling PL. ÚS 4/2012 (which primarily applied to the exercise of the power to appoint the Prosecutor General) but in constitutional political practice, the interpretation may effectively prevent the President from exercising his constitutional power which can be derived from the Constitution, Article 101 para. 1, sentence 2 (ensure … due performance of constitutional bodies").

15. In my summary of the above I consider it necessary to underline that by the time the Plenary of the Constitutional Court will have corrected its legal views expressed in the statement of Ruling PL. ÚS 4/2012 of October 24, 2 012 in a manner acceptable with regard to the Constitution, I consider unconceivable with regard to the Constitution that the legal view expressed therein were not reasonably applicable to the execution of all limited creative powers of the President including the execution of the power to appoint judges of the Constitutional Court pursuant to the Constitution, Article 102 para. 1 letter s) in conjunction with Article 134 para. 2. A contrary conclusion of the Plenary of the Constitutional Court namely gives a clear signal that the interpretation of the constitutional text by the Constitutional Court is subjective, i.e. depending on a specific constitutional political situation or depending on the person of the President of the Slovak Republic.

16. Beyond the framework of the above, let me observe that I have never been a supporter of a strong President in the constitutional system, in particular within the

constitutional model of the Slovak Republic which, according to the legal views provided in other decisions on merits by the Constitutional Court (in addition to PL. ÚS 4/2012 see also PL. ÚS 14/06 or I. ÚS 397/2014), even after changes in the Constitution – continues to be based without any doubts on the concept of parliamentary system of governance, the parliamentary system being one of the key features of the Slovak Constitution and an expression of its identity. On the other hand, the principle of legal certainty and respect to the generally binding interpretation of the Constitution provided in case PL. ÚS 4/2012 encouraged me to attach this dissenting opinion to Ruling PL. ÚS 45/2015 of October 28, 2015, even though I would have preferred a correction or at least a more detailed Ruling PL. ÚS 4/2012 of October 24, 2012 not allowing an extensive interpretation of creative powers of the President.

Košice, October 28, 2015