# Fundamental comments on the draft amendment to the Constitution of the Slovak Republic

# and several laws relating to the judiciary

# Explanatory memorandum

# General part

We consider it necessary to state the following facts about the fundamental comments on the proposed amendments to the Constitution and the laws with which we do not agree.

The submission report states that the draft Constitutional Act (including laws) is in accordance with the Constitution, with constitutional laws, with the findings of the Constitutional Court and with EU law.

Some of the proposed constitutional changes to the constitution and laws show significant signs of conflict with the constant case law of the Constitutional Court, or there are significant doubts about their compliance with the constitution for non-compliance (violation) of important subprincipline of the rule of law (derived from the rule of law). judiciary, including the Constitutional Court.

The key part of the reasoning of the decision of the Constitutional Court represents binding limits for the future legislative activity of the National Council. A valid court decision implies an obligation for the executive, the legislature and any other power in the state, regardless of its level, to respect and comply with the decisions even if they do not agree with them. Respect for the jurisdiction of courts by the state is a necessary condition for public confidence in the judiciary and in a broader sense for trust in the rule of law (I. ÚS 575/2017, PL ÚS 27/2015, PL ÚS 7/2017, ECtHR decision complaint no. 23465/03 paragraph 136).

The petitioner's explanatory memorandum lacks the fundamental and binding case law of the Constitutional Court on inadmissibility (prohibition) or by constitutional law violating (touching) the material core of the constitution in the area of independent judiciary, which is inviolable and unchangeable in a democratic and substantive state. , PL ÚS 21/2014, PL ÚS 24/2014).

In these decisions, the Constitutional Court came to the binding conclusion that the Constitution contains an implicit material core based on the principles of democracy and the rule of law, including the principle of separation of powers and the related independence of the judiciary (includes inseparability even the constitutional laws cannot contradict the core of the constitution.

The Constitutional Court listed (designated) the constitutional principles, which in the case law it included under the notion of "principles of democracy and the rule of law", stating that it was also a principle of protection of human rights and fundamental freedoms, legal certainty including protection of legally acquired rights and legitimate expectations right) retroactivity of the prohibition of arbitrariness, division of power, including the system of mutual brakes and counterweights, transparency (public controllability) of the exercise of public power (PL ÚS 7/2017).

It is therefore clear that the case law implies the enshrinement of a fundamental constitutional obstacle (unconditional binding limit) for the legislator in the performance of its legislative activity (approval of laws).

In this context, it is desirable to state that the constitutional promise of constitutional officials to preserve, observe and defend the constitution (Article 104 (1) - President of the Republic, No. 75 (1) - Members of the National Council, Article 112 - Members of the Government) also includes observance of the decisions of the Constitutional Court, which are an integral part of the Constitution and as such have constitutional value (I. ÚS 575 // 2016).

According to our constitutional regulation Art. 12 paragraph 1, second sentence of the Constitution, the fundamental rights and freedoms of citizens are irrevocable and inalienable, and reducing their level is therefore unacceptable, as it is an inadmissible interference with the fundamental rights of citizens guaranteed by the Constitution (PL ÚS 24/2014).

Fundamental rights and freedoms under the Constitution need to be interpreted and applied in the sense and in the spirit of international treaties on human rights and fundamental freedoms, so that the individual provisions of the Constitution are explained in accordance with international conventions, which are a means of interpreting constitutional norms. it is also based on the case law of ESĽ P (PL ÚS 25/01, I. ÚS 5/02, PL ÚS 17/00).

At the same time, the content of international documents (recommendations) must be strictly respected, which are not only of a recommendatory nature, but a reasonable degree of legal relevance (its mediated influence on the assessment of constitutionality cannot be ruled out, are documents which do not lack legal effects) within 1 paragraph 2 of the Constitution, which enshrines the constitutional obligation for the Slovak Republic (eg PL ÚS 7/2017, PL ÚS 27/2015).

The documents state that at the European level the right to an independent and impartial court is the first of all the rights guaranteed by Art. Article 6 (1) of the Convention ... the basic principles guaranteeing the independence of the judiciary should be laid down in the Constitution ... the basic principles of the Statute for Judges are set out in national standards of the highest degree ... may not be used to justify changes in the direction of reducing the level of guarantees already achieved in the countries concerned ... cannot be used to reduce the guarantees of judicial independence guaranteed by the Constitution (Venice Commission March 2010 - point 1 level of guaranteeing the independence of a judge points 21 -22, Recommendation CM Rec (2010) 12 of the Committee of Ministers of the Council of Europe 2010 Preamble to the Recommendation, European Charter of the Statute of Judges 1998 - General Principles point 1.1).

We do not share the opinion of the petitioner that the proposed constitutional and legal changes can be expected to increase confidence in the rule of law and justice, as a start to the process of cleansing the judiciary.

Part of the proposed legislative changes in their consequences may allow a negative reform of the rule of law, especially for serious violations of the constitutional principle of separation of powers, an integral part of which is the independence of the judiciary and inadmissible reduction of citizens. it can lead to the erosion of democracy by creating the foundations of totalitarianism.

**Key comment - Art. I Act. no. 185/2002 Coll. on the Judicial Council of the Slovak Republic - point 11 (§ 11a constituencies)**

**We propose to abandon the legislation (keep the current regulation)**

We refer in full to the argumentation stated in the fundamental commentary on point 19 of the amendment to the Constitution (Article 141a (2) (b)).

**Key comment - point 31 (§ 27 ha para. 3 letter d /, para. 6 of Act No. 185/2002 Coll. On the Judicial Council of the Slovak Republic)**

**We propose deleting the obligation for the judge to clarify the assets and origins of the resources of his or her adult child and spouse, even if he or she concludes an agreement to reduce or extend the scope of the BSM / share-free co-ownership of spouses/.**

**We propose to delete the regulation on obtaining information on the list of accounts and movements on the judge's accounts in banks for the period of the previous 60 months (ie in the period before the approval of the law).**

**Item no. 4 - Introduction of an obligation for the Judicial Council to carry out in the new composition a review of the property relations of all judges, including property additions of their family members.**

When reviewing the property relations of judges, which we consider to be a positive intention, the question arises of the concept of the regulation of the control of property additions of family members of judges who are of legal age.

The regulation of property additions of family members must respect (observe) the constitutional regulation of privacy protection so as not to enshrine elements ensuring the methods of the police state, which are incompatible primarily with the right to privacy (ECtHR - Kvasnica v. Slovak Republic - judgment of 9.6.2003 to complaint no. 72094/01). Similarly, the case law on the Act on Proving the Origin of Property (Act No. 335/2005 Coll.) Regulates that its concept of an unreasonably strong position of the financial police is unconstitutional (PL.ÚS 29/05).

The right to privacy guarantees the protection of values declared private from public power, natural and legal persons, and is one of the fundamental human rights (Article 19) guaranteed by international treaties, so the purpose of the constitutional right to privacy must correspond to the purpose of this right under Art. 17 par. 1 of the International Covenant on Civil and Political Rights, as well as under Art. 8 par. 1 of the Convention (PL.ÚS 43/95, II.ÚS 94/95). At the same time, the exceptional admissibility of interference with the right of a natural person to peacefully use his property within the meaning of Art. 1 of Additional Protocol No. 1 of the Convention.

A / The right of the Registry of the Judicial Council to detect movements in the Judge 's accounts in banks

The said authorization for the previous period of at least 60 months has significant signs of retroactivity.

It is clear from the case - law that true retroactivity is, in principle, rejected as incompatible with the content of the rule of law. This is a situation where the law additionally and in an

amending manner interferes with already legally concluded factual and legal relations (rights and obligations).

The power of the National Council to amend laws cannot be used to enter into factually and legally closed states, as such legislation always constitutes inadmissible legal retroactivity. The prohibition on retroactivity consists, in particular, in the fact that, under the current standard in force, it is in principle not possible to assess acts, other legal facts or legal relationships which arose or arose before the entry into force of that legal standard. It is therefore true that the new legal regulation must not interfere with the closed factual and legal situation (eg PL.ÚS 38/99, PL.ÚS 3/00, PL.ÚS 1/04, PL.ÚS 6/04, PL.ÚS 10 / 04, PL.ÚS 11/08

The enshrinement of the power of the Judicial Council (its office) to detect movements in the accounts of judges in banks, which occurred in the period before the proposed law, inadmissibly interferes with the closed factual and legal situation, as judges' acts on deposits and withdrawals in bank accounts are illegally assessed, which arose (were implemented) before the effectiveness of the proposed legislation.

It meets the criteria for the true retroactivity of the proposed provision, thus violating the principle of "lex retro non agit" (the law has no retroactive effect), as the defining features of the rule of law include the prohibition of retroactivity of legal norms (constitutional principle of the prohibition of true retroactivity). guarantee of protection of citizens' rights and legal certainty (PL.ÚS 16/95, I.ÚS 238/09, PL ÚS 7/2017).

B / Duty of the judge to clarify the property relations and the origin of the sources of property of his adult child and wife, where the co-ownership regime on BSM does not apply

The explanatory memorandum to this amendment to the law shows that the burden of proof in this duty will be on the judge.

The transfer of the burden of proof to the judge on proving that another person (owner) has not acquired the property in accordance with the law does not correspond (circumvents) the constitutional regulation Art. 20 par. 5 of the Constitution, which was enshrined in Constitutional Act no. 100/2010 Coll.

The Constitutional Court stated that this Act disproportionately shifts the burden of proof from public authorities to natural and legal persons (PL.ÚS 29/05).

As a result, the amendment of Art. 20 par. 5 of the Constitution must be interpreted in conjunction with the provision of the first sentence of Art. 1 par. 1 on the substantive rule of law, in which the presumption of innocence is implied, and together with it the burden of the plaintiff (i.e. a state body) with the burden of proof on the acquisition of property illegally or from illegal income. By its nature, it is a procedural guarantee of the protection of the owner's right to use his property peacefully (see Ján Drgonec Great Comments - Constitution of the Slovak Republic, C. H. Beck, year 2015, pp. 550-551).

The presumption of innocence, as a fundamental right guaranteed by the Constitution and according to the Constitutional Court, is not limited to criminal proceedings, but also has a broader impact (I.ÚS 54/2001).

Although they are related to a judge living in the same household with them, they are the exclusive property of these persons (not the judge), so shifting the burden of proof to the judge (instead of the state) on the property of these persons is clearly unconstitutional.

**Key comment - Art. VIII Act. no. 385/2000 Coll. on Judges and Adjudicators (point 8 - § 17 letter g / on reaching the age of 65 of a judge)**

**We suggest editing as follows:**

**As of 31.12. the calendar year in which the judge reached the age of 67**

**alternately**

**As of 31.12. the calendar year in which the judge reached the age of 70.**

**The argumentation is identical as in the fundamental commentary to point 31 of the amendment to the Constitution - Article 146 (2) of the Constitution**

**Key comment - point 24 (§ 29a deleted)**

**Abandon this proposal and keep the current regulation of the functional (criminal) immunity of judges.**

**Detailed argumentation is given in the fundamental commentary on the amendment to the Constitution on the deletion of Art. 148 par. 4 of the Constitution - point 35 of the proposed amendment to the Constitution.**

**Basic comment on points 32, 35, 41, 45, 48, 49, 50 (§§ 35 par. 3, 65 par. 1 letter f /, 78a, 93, 96, 99 par. 1, 110 par. 1) on the abolition of the sickness supplement, the income supplement and the remuneration of judges**

**Item no. 7 - Proposal for a legislative change on the withdrawal (cancellation) of part of the social security entitlements of judges**

Clearly, key parts of the existing case law of the Constitutional Court, which represent binding limits for the future legislative activity of the National Council, are not respected. It is unconditionally true that the legal guarantees of judicial and judicial independence also include the so-called personal guarantees of judicial independence (remuneration and economic security of judges corresponding to the nature and importance of their activities - PL.ÚS 52/99).

The constitutional principle of the independence of judges guaranteed by Article 144 para. , PL ÚS 17/08).

Part of the material (material) security of judges is the salaries of judges together (simultaneously) with social security. From a broader point of view, they are considered to be additional conditions for the proper and undisturbed performance of the function of a judge, which affect both judicial and judicial independence. The independence of judges in a broader sense must also be understood as their material independence (PL.ÚS 12/05, PL.ÚS 27/2015).

Interventions in the above-mentioned area of material security of judges (social security), which must be considered restrictive measures (denial of the right granted by law) also undermines the legal certainty of judges as constitutional officials who are independent judicial authorities (eg PL.ÚS 52 / 99, PL.ÚS 12/05, PL.ÚS 27/2015).

The function of a judge is a constitutional function, as it is, according to the constitution, directly the executor of one of the components of state power - the judiciary (II.ÚS 258/03, III.ÚS 19/04).

Judges of the general courts stand out from the group of constitutional officials by being gifted with independence, are permanently appointed, are not elected by the citizens, and bear (bear) legal and not political responsibility. In the interest of its independence, the function of a judge is lifelong and, in this respect, is unparalleled in either the public or private spheres (PL.ÚS 99/2011, PL.ÚS 10/05).

The status of a judge is characterized as a person with a unique status limited and guaranteed by the constitution as a person who has a special constitutional status in terms of fulfilling the preconditions, but also during the performance of this function (III.ÚS 79/04, PL.ÚS 10/05) .

The Constitution contains an implicit material core, based on the principles of democratic and rule of law, including the principle of separation of powers and the related independence of the judiciary (includes the independence of the judiciary and judges), so constitutional laws (PL.ÚS 21 / 2014).

The orders of constitutional norms must also be respected when adopting every law by the National Council of the Slovak Republic (PL.ÚS 8/95, PL.ÚS 25/00).

From the point of view of the constitutional principle of legal certainty (eg PL.ÚS 6/04), the so-called legitimate expectations, so that even if the state does not act retroactively, it can violate the principle of the substantive rule of law by suddenly changing the rules on which the addressees of legal norms have relied. The strictest criteria for applying the rule of law must apply to the content of the legislation.

The principle of legal certainty means that stability and respect for the rule of law should be strengthened and not called into question (PL ÚS 17/08).

Interventions of the legislator in the area of material security of judges, which must be considered at the same time as social security of judges (salaries and social security - obligatory components) disrupt the legal certainty of judges. The inadmissibility of the interference with legal certainty and the resulting legitimate expectations of the judges of the general courts can be considered as a questioning, resp. for violation of the principle expressed in Art. 1 par. 1 of the Constitution, which is highlighted by the fact that the addressees of the legal norm are judges of general courts, to whom the Constitution according to Art. 144 par. 1 of the Constitution guarantees independence (PL.ÚS 12/05).

The judiciary, whose constitutional status is characterized by the principle of independence, cannot pay extra for the political populism of the actors of the political struggle. It is unacceptable to promote restitution interventions in the field of material security of judges (salaries, social security), which should be a stable variable and not a variable factor, as it is a constitutional (non-legal) guarantee of independence of judges under Art. 144 par. 1 of the Constitution. This article implies the derivation of a constitutional (non-legal) guarantee of the independence of judges also in a direct causal connection with their social security, as part of the material guarantees of independence.

The same regulation is also in international documents (recommendations), which have a reasonable degree of legal relevance according to Art. 1 par. 2 of the Constitution (constitutional obligation of the Slovak Republic, while their mediated influence on the assessment of constitutionality cannot be ruled out and they are not documents that completely lack legal effect (PL ÚS 7/2017, opinion of the Court of Justice of the EU).

The documents state that ... "there must be guarantees to maintain adequate remuneration in the event of illness of judges ..." ... "judges are guaranteed protection against risky social circumstances, such as illness ..." (recommendation of the Committee of Ministers CM / Rec 2010/12, point 54, Recommendation of the European Charter of the Statute of Judges of 1998, point 6.3).

In this context, it is desirable to point out several differences in the status of a judge and another employee (ordinary citizen). Judges have been deprived of (prohibited) three fundamental rights (guaranteed to citizens by the Constitution), namely business and other gainful activity, strike and association in political parties (Article 29 (2), Article 37 (4), Article 54 of the Constitution ). At the same time, during incapacity for work, the judge remains a legal judge, so if this incapacity for work does not exceed a period of 60 days, he must be assigned the idea of things according to the work schedule, so after starting (recovery) he must decide on all contested cases (before and after PN – sick leave).

Nor is an ordinary employee obliged to file annual property declarations of which the public is legitimately informed (principle of transparency).

The Constitutional Court ruled in a binding manner that, in accordance with the constitutional regulation, there is a different procedure (disposition space) for restrictive interventions in the salaries of judges, in contrast to other constitutional officials (deputies, ministers).

Arbitrary interventions are prohibited for judges, as the constitution guarantees them independence, unlike other constitutional officials (PL ÚS 27/2015). The different dispositional space means that only exceptional restrictive intervention is possible for judges, as a temporary measure only for the time necessary and only in the presence of a significantly unfavorable economic situation of the state.

The same procedure must therefore also apply to interventions in the social security of judges, which are an integral part of the material conditions for ensuring the independence of judges (such as their salaries).

This implies a fundamental difference between the legal status of judges and ordinary employees. It is therefore not a question of different levels of sickness benefit or discrimination, as the special constitutional status of an independent judge, the deprivation of several fundamental rights of judges, a position unparalleled in the private and public spheres demonstrates differences of such a nature and seriousness in particular, the ordinary employee and the judge are not in the same legal situation (III. ÚS 75/01, II. ÚS 5/03, I. ÚS 76/2011).

It is necessary to emphasize that the constitutional principle of equality must be understood in a material sense, which means that "the same may not be regulated arbitrarily unequally, but at the same time unequal must not be regulated arbitrarily in the same way" (PL ÚS 11 // 02 ÚS ČR - Czech republic).

These differences also justify the different amount of sickness benefit (ie above-standard social security). The abolition of a granted entitlement, which is an integral part of the judges 'material security (salaries and social security commensurate with the nature and importance of their work), undermines judges' legal certainty, as that entitlement must be a stable factor and not a variable factor. not a legal guarantee of the independence of the judge.

It is therefore factually clear that the appellant is wrong to believe that the allowance for sickness judges has nothing to do with pay and cannot be linked to the principle of the independence of the judiciary. This is in stark contrast to the legal opinion of the

Constitutional Court that material security consists not only of the salaries of judges (remuneration), but also non-removable social security (economic security).

It is therefore inadmissible to level (reduce) their scope to the level of a compulsorily insured employee. The current high above-standard in relation to other employees is therefore in accordance with the constitutional requirement to guarantee such a scope that corresponds to the nature and importance of their activities as a constitutional official of the judiciary.

The current regulation on the supplement to sickness judges is therefore clearly the correct (justified) legislative solution, which is inadmissible to repeal.

The fact that the supplement is paid from the budget chapter of the judiciary and is not a social security benefit is legally irrelevant (irrelevant), as it only concerns the adjustment of the entitlement payment mechanism by determining its source, which cannot in any way affect the legitimacy of the claim. the requirement for adequate material (material) security of judges corresponding to the importance and nature of their activities for the state, citizens and entrepreneurs.

**Remuneration of judges**

Proposal for the abolition of the optional benefit institute

It is clearly factually unfounded (incorrect) reference by the submitter to the case law PL.ÚS 12/05, which justifies the inadmissibility of remuneration of judges with an optional benefit (proposal justifying the abolition of remuneration for judges).

It follows from the decision of the Constitutional Court in question that no remuneration for decision-making is allowed on the grounds that the possibility of effectively influencing the decision-making activity of a judge by an optional benefit granted by judicial authorities subject to executive officials must be ruled out.

The petitioner incomprehensibly overlooks (ignores) that the current legal construction (§ 78a of the Status Act) on the possibility of awarding remuneration to judges excludes any possibility of de facto influencing a judge in the performance of justice (decision-making in court proceedings).

When regulating the possibility of awarding remuneration explicitly (expresis verbis), the Act enshrines such specific activities that are clearly outside the decision-making activity (membership in the audit department, selection and examination commission, judicial self-government bodies, internships, lectures within the judicial department). When representing an absent legal judge, the influence of a judge in matters assigned to him according to the work schedule is excluded.

It is quite logical that reaching the age of 50 is in no causal connection with influencing the judge's decision.

At the same time, it is substantively discriminating against judges (abolition of the possibility of remuneration for surviving to 50 years of age), as in our legal system reaching that age is an opportunity to award remuneration in many branches of state and public administration.

At the same time, the law does not allow (excludes) the award of remuneration only on the basis of an independent (exclusive) decision of the court administration body (court president). The obligatory participation (cooperation) of judicial self-government bodies in this decision-making process is enshrined, which is in full accordance with the constitutional

authority of judicial self-government to participate significantly and effectively in the management and administration of courts in protecting the rights and legitimate interests of judges (Art. 3 of the Constitution).

It should be emphasized that the activity of judges for which it is possible to receive remuneration is not a decision in court proceedings at all, and this activity undoubtedly helps (ensures) the implementation of the duty of court administration bodies in their management in personnel, organizational, professional and exercise of supervision, which precludes interference in the decision-making activity of judges, so that this exercise of activity cannot conflict with the independence of courts and judges (see PL.ÚS 10/05).

It is therefore clear that the case-law cited by the applicant addresses a completely different factual and legal situation. Its application to the current legal regulation of judges' remuneration is therefore arbitrary, arbitrary. This is a legal opinion that has significant elements of violating the constitutional principle of the prohibition of arbitrariness in the activities of public authorities.

The abolition of the optional benefit for the activity of a judge, which is not materially related to decision-making (applies only to the activity of ensuring court administration) and their award is decided only on the basis of cooperation between court administration and judicial self-government. to abolish them, it meets the criteria for the purposeful promotion of political populism (withdrawal of the possibility of an optional benefit, which is commonly granted in many areas of public authorities and public administration).

This is an inadmissible violation of the principle of prohibition of arbitrariness in the activities of public authorities (Article 1 para. 1, Article 2 para. 2 of the Constitution), in particular by failing to respect key parts of the case law of the Constitutional Court concerning the regulation of guarantees of judges' independence ÚS 52/99, IIII ÚS 575/2016).

**Key comment - Art. XI Act no. 154/2001 Coll. on Prosecutors and Legal Waiters of the Prosecutor's Office - on points 2, 3, 4, 5, 6, 7, 8, 9, 10 (intervention in the supplement to the compensation of income, the supplement to sickness and the remuneration for prosecutors)**

**We propose to abandon this intention and keep the current legislation for the reasons detailed in the key comment on points 32 et seq. of the Judges Act on interference with the above-mentioned claims of judges.**

According to the opinion of the Venice Commission, prosecutor's offices are perceived in a broader sense as part of the judiciary due to their autonomous position in ensuring, in particular, the protection of legality and thus the administration of justice (Article 149 of the Constitution of the Slovak Republic).

**Key comment - Art. XXVI Act. no. 55/2017 Coll. on Civil Service - point 16 (§ 78 para. 2, second sentence).**

**Delete the text "even without giving a reason" from the proposal.**

**Art. XXVI - paragraph 16 (Appeal without reason)**

The proposal for the possibility of immediate termination of the civil service relationship of an expert constitutional official even without stating a reason, demonstrates significant elements of violation of the constitutional principle of the prohibition of arbitrary activity of public authorities.

It is the irreplaceable role of the legislature to establish adequate legal guarantees which are capable of preventing the expression of arbitrariness in the exercise of official authority, since the prohibition of arbitrariness forms an integral part of the general principle of the rule of law deduced from Art. 1 para. 1 of the Constitution.

Subjective rights of persons are rights arising from legal norms, so public subjective rights are rights arising from norms of public objective law, which are aimed at the implementation of the content of laws in the sphere of public powers.

The decision to dismiss is an authoritative decision, which cannot be arbitrary, but must be convincing, predictable and, in particular, at least in terms of reasons, as it is an interference with the public subjective rights of specific persons (PL ÚS 102/2011).

Košice 30. 07. 2020

JUDr. Juraj Sopoliga

President of the Association of Judges of Slovakia