

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 changes 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 amendments 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) 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, 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 the 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 explanatory memorandum of the petitioner 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 a constitutional value (I. ÚS 575 // 2016).

According to our constitutional regulation Art. 12 (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 ESR 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) 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 principle of independence of the judiciary and inadmissible reduction of the achieved level of citizens' inalienable fundamental right to

judicial protection. it can lead to the erosion of democracy by creating the foundations of totalitarianism.

Key remark - paragraph 13 (Article 136 (3) of the Constitution - new wording)

Abandon the intention to delete the consent of the Constitutional Court to take into custody a judge and the Attorney General (current wording of Article 136 para. 3 of the Constitution)

Item no. 5 - Abolition of the consent of the Constitutional Court as a condition for the detention of a judge and the Attorney General and abolition of the decision-making immunity of judges

A democratic and substantive rule of law (Article 1 (1) of the Constitution) prohibits violations of the principle of the independence of the judiciary, which is one of its essential features and results from the neutrality of judges as a guarantee of fair, impartial and objective trial and decision.

The independence of judges is considered to be an integral part of an independent court, which in practice means that a breach of any of the guarantees of the independence of a judge may result in a breach of the independence of the court and thus Art. 6 par. 1 of the Convention. The provisions of the Convention are a "constitutional instrument of European public policy", with the ECtHR having exclusive jurisdiction over all questions concerning the interpretation and application of the Convention and its protocols, which also stated that judicial immunity is a fundamental legal guarantee of judges and judiciary.

In the case of functional immunity (for the needs of proper administration of justice) it is a matter of guaranteeing personal protection in the exercise of public power, i. in particular, the freedom of decision, which is externally manifested by voting in the Senate, while granting this protection to an unlimited extent and for an unlimited period of time (eg PL.ÚS 4/06, PL.ÚS 24/03, PL.ÚS 19/02).

The intention to revoke the consent of the Constitutional Court as a condition for the detention of a judge is unacceptable (current Article 136 para. 3 of the Constitution)

It is imperative that a judge be granted functional immunity, which must ensure his or her independence primarily from the executive branch. It is a matter of protecting the function of a judge from abuse of the right to prosecute criminal offenses by using coercion through criminal proceedings to which the competent executive authorities are entitled. Criminal prosecution for an act whose essence lies in the decision of a judge of the General Court (PL.ÚS 19/02, PL.ÚS 24/03) is not admissible. In terms of content, this is also regulated in the recommendation of the Committee of Ministers from 2010 (point 5), which has legal relevance within the meaning of Art. 1 par. 2 of the Constitution, when it states "judges must have unrestricted freedom to decide cases impartially, in accordance with the law and their interpretation of the facts".

Detention is the most intensive interference with fundamental human freedom (it has a securing function) guaranteed by Art. 17 of the Constitution, Art. 9 of the International Covenant, Art. 5 of the Convention.

The Constitutional Court provides the highest constitutional guarantee for the decision-making of an independent body to ensure the protection of judicial immunity in the performance of the basic function of the protection of constitutionality (Article 124). When

deciding in custody matters, the Constitutional Court is entitled (has the power) to examine whether the constitutional principles of such a restriction of personal liberty, such as the custody of the accused, resp. is a constitutionally sustainable title of custody (eg II. ÚS 76/02, IV. ÚS 83/03).

Strict provision (protection) of the functional immunity of an independent judge in deciding on the admissibility of a restriction of a judge's personal liberty requires only the decision of a competent independent body for the protection of constitutionality, in order to exclude a restriction of a judge's personal liberty for acts

In other words, only the exclusive competence of the Constitutional Court to give (not give) consent to the detention of a judge will properly ensure (guarantee) strict respect for the functional immunity of a judge, which is one of the most important guarantees of independence of the judge's function, especially in his own decisions 03, PL.ÚS 19/02, PL.ÚS 4/06).

The petitioner's argument that, if a general court decides on detention, it is sufficient to protect a judge, overlooks the fundamental difference between the legal status of a judge of the Constitutional Court and the general court in terms of regulating the personal guarantee of judge independence. A judge of the Constitutional Court has a legitimate functional immunity guaranteed by the Constitution for decision-making, which is proposed to be deleted from the Constitution for general judges, so that a real space is created for an unidentifiable part of judges to decide on the basis of direct or indicated wishes of political power (direct or indirect influence).

It is therefore essential that the Constitutional Court be the first (not the last after the decision of the general courts) to assess whether the constitutional criteria for interfering in the personal liberty of a judge whose position is unparalleled in the private or public sphere and, unlike other constitutional actors, are guaranteed independence, which precludes a custodial solution in the case of an act the essence of which lies in the decision of the judge.

It is not possible to automatically accept the petitioner's reservation to the Constitutional Court's ruling (PL ÚS 4/2020) that the decision not to consent to detention was not sufficiently and convincingly reasoned and materially linked to the doctrinal definition of the importance of the institute of consent, as such a general statement without proper professional argumentation is demonstrated only by the purposefulness of the political intention.

The chosen procedure meets the criteria of unjustified criticism, which also creates room for a possible reduction of public confidence in the constitutional judiciary, which borders on the violation of freedom of expression (non-respect of its restrictions) under Art. 10 (2) of the Convention.

The Attorney General is the supreme (highest) representative of the autonomous constitutional body (the only constitutional actor in the prosecution system), which ensures the protection of rights and legal interests (legal guardian) and has an irreplaceable place in the control system of state bodies (has an irreplaceable function). executive or judicial power (Articles 149, 150 of the Constitution).

According to the Venice Commission, the prosecutor's office is broadly part of the judiciary with regard to its competence in ensuring the protection of the rule of law and justice.

In order to guarantee proper protection of the proper performance of the irreplaceable function of public prosecutor's offices, by analogy the constitutional official (Attorney General) must be guaranteed the inadmissibility of coercion by the executive, whose activities he supervises within the delegated competence (criminal and non-criminal).

Key remark - point 17 (draft definition of the constitutional status of the Judicial Council - Article 141a (1))

We propose the following text of the mentioned article of the Constitution:

The Judicial Council of the Slovak Republic is an independent constitutional body of judicial legitimacy guaranteeing the independence of the judiciary.

Definition of the constitutional status of the judiciary - the Judicial Council of the Slovak Republic is a constitutional body of judicial legitimacy

The proposed constitutional definition abolishes the original basic intention of the legislator of 2000 (Constitutional Act No. 99/2001 Coll.) To strengthen the institutional independence of the judiciary from other public authorities (it is proposed to enshrine only autonomy and not the independence of the Judicial Council), which also means violation (non-compliance) of the pre-accession requirement (commitment) imposed on the Slovak Republic for accession to the EU and return to a significant dependence of the judiciary on the executive and legislative power (see PL ÚS 2/2012).

This is a fundamental negative departure from the EU's legitimate demands to guarantee the independent status of the judiciary, to which the citizen is entitled by establishing an independent constitutional body of judicial self-government.

The European Commission's expert mission in the field of justice in the 1997 report clearly stated that the basic problems of the judiciary included the absence of self-government and, conversely, its complete dependence on the executive (paragraph 78 of the explanatory memorandum of the legislator).

The Slovak Republic had to eliminate these fundamental shortcomings if it was to be accepted as an EU member state.

The legislator therefore stated that the Constitution also lacks a constitutional anchoring of the body representing the judiciary, as is the case in cases of legislative and executive power, so that the inclusion of the Judicial Council in VII. The title of the Constitution (the judiciary) emphasizes its independent position from the legislative as well as the executive and is a real fulfillment of the constitutional principle of independence and separation of the exercise of the judiciary from other state bodies. The constitutional principle of the division of power in a substantive state governed by the rule of law, which guarantees the constitutional balance of the three state powers (legislative, executive and judicial), implies their equal status, while constitutional regulation requires guaranteeing the independent status of judicial authorities only.

The principle of separation of powers is an essential condition for the protection of freedom and a democratic state and is particularly strictly applied in the rule of law in relation to the

judiciary with legislative and executive powers (PL ÚS 16/95, PL ÚS 25/00, PL ÚS 115/2011).

According to the constitutional system (Title VII of the Constitution), the judiciary includes the constitutional judiciary, the general judiciary and the judicial council, which is the highest body of judicial self-government, whose basic task is to ensure) when the Judicial Council was set up in 2001.

The Constitutional Court therefore defines the position of the Judicial Council o.i. stated that "it is a special independent constitutional body of the judiciary guaranteeing, above all, the independent status of the judiciary" (PL ÚS 2/2012).

The petitioner states that the Judicial Council is not intentionally granted the parameter (characteristic) of independence, as it cannot be an independent body, as it implements a judicial policy (it therefore has the character of an autonomous body only).

This is the indisputable intention of the current government coalition to create a substantive judicial council as an offshoot of the government and parliament (a subordinate body), as it will be obliged to enforce a judicial policy according to the political ideas of the current government group.

There is a real absolute dependence on political power. At the same time, it proves the violation (liquidation) of the obligation of the Slovak Republic approved upon accession to the EU, i. j. establish an independent judicial body representing the necessary self-government of the judiciary.

The abolition of guarantees of independence of the judiciary and judges is thus advocated by revoking the independent position of the Judicial Council, as evidenced by the violation of the fundamental constitutional principle of separation of powers as part of the material core of the constitution.

The Judicial Council is a part of the constitutional regulation of the judiciary together with the general and constitutional judiciary. From Art. 124 of the Constitution, the following definition follows: "The Constitutional Court is an independent judicial body for the protection of constitutionality".

The position of the general judiciary (Article 141 (1) of the Constitution) is defined as follows. "In the Slovak Republic, the judiciary is administered by independent and impartial courts."

It is therefore clear that the legislator enshrines the basic principle of independence for the judiciary, which demonstrates strict adherence to the principle of the division of power and the constitutional balance of the three equal powers in the rule of law.

It is therefore a fundamental constitutional requirement within the definition of the constitutional position of the Judicial Council of the Slovak Republic (positive intention) as part of the judiciary, to enshrine the notion of "independent constitutional body of judicial legitimacy guaranteeing the independence of the judiciary".

The proposal on the autonomy and not on the independence of the Judicial Council, which is part of the judiciary, by its position and ties to other branches of state power (executive power) deviates from the constitutional framework defining the structure and characteristics of the judiciary (analogy PL ÚS 17/08).

It also violates the amendments (content) of international documents, which have legal relevance under Art. 1 par. 2 of the Constitution (constitutional obligation of the Slovak Republic).

Recommendation CM / Rec (2010) 12 of the Committee of Ministers of the Council of Europe of 17 November 2010 states that "... judicial councils are independent bodies ... they seek to ensure the independence of the judiciary and individual judges (paragraph 26).

The Consultative Committee of European Judges - CCJE (2010) 3 states that "... in order to ensure the independence of judges, each State must establish a Judicial Council ... which will be independent of the legislative and executive powers (paragraph 13).

The European Charter of the Statute for Judges of 1998 similarly states that "... a body independent of the executive and the legislature (general principles, point 1.3).

We return to the undesirable state of unacceptable dependence of the judiciary on the executive and legislative power, which will be able to effectively implement the promotion of party political interests, i. judicial policy according to political ideas, which usually means that the priority of the independent status of the judiciary may not be guaranteed.

For significant elements of non-respect of the principle of separation of powers in a substantive rule of law (part of the immutable material core of the constitution), which is part of the constitutional balance and is an essential condition for protecting freedom and democracy. legislative and executive power, t. j. the need to limit the interventions of the executive power into the judiciary, the draft constitutional law inadmissibly does not respect the material core of the constitution in this part of the amendment to the constitution.

The petitioner emphasized that the composition of the Judicial Council combines the element of will and reason, while will is based on the fact that political powers determine what is good, what should be, like judicial policy.

Will will not be assessed in this way, as it clearly means that it is only the will of political power to pursue its political intentions, which does not (a priori) mean that it determines "what is good".

The rational element which is represented by the members elected by the judges is to be judged by those members, which is correct, i. j. which meets the standard. Reasonableness also means that it is judged "what is good" in terms of ensuring the fundamental right of citizens to an independent and impartial tribunal in terms of criteria arising from the case law of the ECtHR, the Constitutional Court and the content of international documents.

Key remark - point 19 (Article 141a (2) (b)) - regulation of a multi-member constituency in the election of members of the Judicial Council by judges

We propose to abandon the proposed amendment to the Constitution (keep the current regulation)

Item no. 1 - Reform of the composition of the Judicial Council of the Slovak Republic in the form of the introduction of a regional principle in the election of its members by judges so as to increase its representativeness

When considering the territorial principle of the election of members of the Judicial Council of the Slovak Republic by judges (9 members), the constitutional regulation of Art. 31, Art. 30 para. 1,4 of the Constitution, if an unconstitutional state is not to be created.

Article 31 of the Constitution guarantees the constitutional principle of the creation and application of all political rights, which are guaranteed in the third section of Title II (Articles 26-32 of the Constitution).

Free competition is also guaranteed between citizens who exercise the constitutional right to access an elected office (Article 30 para. 4 of the Constitution), as Art. 31 lays down general requirements, in particular for legislation, which determine the existence of a democratic society.

Protection of the right to vote (active suffrage - Article 30 (1) of the Constitution), which is intended to ensure free expression of will in the election and protection of the right to run for election under the same conditions (Article 30 (4) of the Constitution - special provision on equality of all citizens in access to elected office - passive suffrage) are a fundamental issue in the functioning of the political system, so that the legislator's intervention in shaping the will of the electorate can only be power is created from below on the principle of the sovereignty of citizens over state power. In particular, electoral laws are required to allow and protect such competition (it does not allow it to be restricted by law).

The principle of equality of suffrage must therefore be respected (election should be the result of elections and not the result of the application of an electoral key), which is characterized by equality of judges' votes in judicial elections, as the conduct of judges is also determined by constitutional principles, i. the right of each voter to have his or her vote equal to the others and at the same time every citizen to have the same chance to obtain a mandate (cf. PL.ÚS 15/98, PL.ÚS 19/98, PL.ÚS 2/2012, PL.ÚS 22 / 2000).

In the event of a significantly different number of judges (voters) in the districts of individual regional courts (constituencies) who elect in each constituency only one of the judges from their constituency as a member of the Judicial Council, interference with the constitutional equality of votes of judges (voters) as a member of the Judicial Council.

There will be a real inequality in the strength of voters' votes in individual constituencies, which results from the ratio of the number of votes in constituencies (eg 200 voters for one candidate, i.e. 1: 200 and the number of 100 voters is 1: 100).

The elected election model also has the characteristics of discrimination against candidates for election as a member of the board by anchoring a significantly different number of votes required for election (eg the need for 101 votes from 200 voters, but only 51 votes from 100 voters).

The regional principle in the dismissal of members of the Judicial Council by judges has a further negative, as a member is not revocable if the judges of the constituency do not agree with the opinion of all other judges of the Republic that there is a reason for dismissal. This creates scope, through the Minister of Justice, who has absolute power over the presidents and vice-presidents of the courts in appointing and dismissing them, through these officials to effectively prevent the dismissal of such a member if it is in the interests of the executive. implementation of judicial policy).

The mentioned candidates for the constitutional function are in the same factual and legal situation, so that the fulfillment (observance) of the constitutional condition of Art. 30 par. 4 of the Constitution in the same conditions when applying for an electoral position.

It follows from the case-law that the same conditions also mean that even by legislation of any legal force it is not possible to prefer or discriminate against candidates unless there are differences of such a nature and seriousness as to justify unequal treatment (eg II. ÚS 48/97, III ÚS 75/01, II ÚS 5/03, III ÚS 161/033).

The chosen mathematical model on the equality of constituencies (not voters and candidates) does not guarantee (does not allow) strict respect for the constitutional right to access the elected office under the same conditions, as well as the principle of equality of suffrage under Art. 30 para. 1, art. 31 of the constitution.

In its consequences, the regional principle does not ensure a better implementation of the powers of the Judicial Council than the current single-district model, where all judges have the guaranteed right to freely cast their vote to any judge in the Slovak Republic (not only from their district).

In terms of content, this is an unacceptable curtailment of the right to freedom of choice by a narrowed scope (number) of voters and candidates.

Key point - point 20 (addition of text to Article 141a (3) - only a person who is not a judge can be further appointed)

We propose to abandon the proposed amendment to the constitution (not to approve it).

The Constitution lays down identical legal conditions (criteria) for the creation (appointment) of all members of the Judicial Council (Article 141a (3), first sentence of the Constitution).

The second sentence of the said article proposes to enshrine a constitutional obstacle for all judges of general courts who meet the same common legal criteria as other lawyers to be appointed as members of the Judicial Council by a decision of the National Council, the Government and the President of the Republic. This enshrines the restriction of the authority of these constitutional bodies in the exercise of their powers to appoint members of the Judicial Council (three members each).

The proposed text is not in accordance with the constitutional regulation of Art. 30 par. 4 of the Constitution on access to another public function under the same conditions.

It is clear from the constant case law that the meaning of the same conditions is that the legislation of any legal force cannot prefer or discriminate against certain groups of citizens over other groups in terms of access to public office (II. ÚS 48/97, I. ÚS 76/2011).

The right to run for public office (access to public office) according to Art. 30 par. 4 is also a fundamental right of a citizen guaranteed by the constitution, which according to Art. 12 para.

Interference with the basic inalienable right of a citizen guaranteed by the constitution meets the criteria for interference with the material core of the constitution, which cannot be changed even by constitutional law (PL ÚS 16/95, PL ÚS 24/2014, PL ÚS 21/2014).

The intention pursued by the petitioner can be solved by the agreement of the mentioned constitutional bodies on the introduction of appropriate constitutional practice in appointing members, which will prevent judicial corporatism and isolation and will also preserve the principle of separation of powers and responsibilities. It is a suitable solution for the creation of members of the Judicial Council of the hybrid type (see the argument of PL ÚS 2/2012).

Appropriate constitutional practice, according to the ideas of a specific current political grouping, will realistically make it possible to fulfill the intention to appoint only non-judges as members of the Judicial Council, if they consider it the right solution.

At the same time, in the absence of a restriction on creation in the constitutional text, the violation of the basic human right to access another public office under the same conditions, which is irrevocable and irrevocable for every citizen within the meaning of Art. 12 para. 1 of the Constitution.

Key remark - paragraph 21 (Article 141a (5) - possibility of dismissing a member of the Judicial Council at any time)

We suggest abandoning this proposal (not approving it).

Item no. 8 - Dismissal of a member of the Judicial Council at any time

While respecting the constitutional regulation on the independence of the judiciary as their basic principle of the exercise of constitutional competences, in which the Judicial Council is also included, it is impossible to allow a member of the Judicial Council to be removed at any time.

It is unacceptable a constitutional provision to enshrine the right to dismiss a member of the Judicial Council at any time. In the case of an independent constitutional body, its institutional independence is ensured by simultaneously ensuring the individual independence of its members, who have the right to remain in public office, since that right is part of the fundamental right to a public office under the same conditions under Art. 30 par. 4 (PL.ÚS 12/2015).

This is an unacceptable regulation that destroys the institutional and individual independence of this constitutional body.

Jurisdiction (classification) of the Judicial Council of the Slovak Republic to the judiciary means implied independence (full independence), which includes institutional and individual independence, so in the right of political authorities to dismiss its appointed member of the council at any time means not only a violation of individual independence the Judicial Council, as a constitutional body of the state (a public authority). It is then (in the appeal) the anchoring of the so-called delegation principle, which is, however, justified in the field of private law (see J. Drgonec Constitution of the Slovak Republic C.H. Beck year 2015, pp. 1508, 1510).

It is therefore not objectively possible to ensure the independent position of the Judicial Council as a whole without its individual members also being guaranteed an independent position (see PL ÚS 2/2012).

This is a fundamental change proving the intention to change the Judicial Council from a professional body to a political body, i. j. on the politicization of the judiciary by the unacceptable intervention of the executive and legislative powers into the operation of the independent judiciary.

Key remark - point 31 (anchoring the age of 65 for the termination of the office of judge - Article 146 (2) of the Constitution)

We suggest the following text:

The judge's position expires on 31.12. calendar year in which he has reached the age of 67

alternately

The judge's position expires on 31.12. calendar year in which he has reached the age of 70.

Item no. 6 - Introduction of an age census for judges of general courts - 65 years

The proposal of an age census for judges of general courts of 65 years is unacceptable also in view of the fact that notaries who, according to constant case law (as judicial commissioners) ensure the administration of justice (both as priority judges) have a fixed age of 67 years.

Rational is the same arrangement, t. j. anchoring the age of 67 (at the end of the relevant calendar year) and not on the last day of the relevant month, which will duly ensure personnel exchange and timeliness of proceedings in matters taken over.

In the case of equality (equivalence) of the legal status of judges of the constitutional and general judiciary, there is no reason to differentiate the age of termination of the function of a judge of the general judiciary. The proposed age of 70 for judges of the Constitutional Court may also be applicable to judges of general courts (eg by enshrining a special procedure on the possibility of dismissing a judge if his health condition at the age of 67 would not allow him to perform the judiciary properly).

Key remark - paragraph 35 (deletion of paragraph 4 of Article 148 of the Constitution - abolition of the functional - criminal immunity of judges of general courts)

We propose to abandon the above proposal (not to approve it, i.e. to keep the current constitutional regulation of Article 148 (4)).

In any legislative intervention in the constitutional status of judges, it is necessary to strictly respect the basic principles of the substantive rule of law.

The image of a democratic state in the European area after the Second World War is based on fundamental rights and freedoms, while European constitutional systems of varying intensity ensure their inviolability (PL.ÚS 24/2014).

The possible implementation of this intention violates not only the constitutional principle of independence of the judiciary (Article 141 para. 1, 144 para. 1 of the Constitution), but also the inalienable and irrevocable fundamental right of citizens to judicial protection in an independent and impartial court guaranteed by the Constitution (Art. .1, Article 46 (1) of the Constitution), the Convention for the Protection of Human Rights and Fundamental Freedoms (Article 6 (1) of the Convention), the International Covenant on Civil and Political Rights (Article 14 (1) of the Covenant) and international instruments (recommendations), which have a reasonable degree of legal relevance within the meaning of Art. 1 para. 2 of the Constitution, as a constitutional commitment of the Slovak Republic (opinion of the so-called Venice Commission, Committee of Ministers of the Council of Europe, Group of Council of Europe States against Corruption - GRECO, Advisory Committee of European Judges CCJE - see PL.ÚS 27/15, PL.ÚS 7 / 2017).

Immunity is a constitutional institute of fundamental importance for the functioning of institutions of democratic and material rule of law and on it depends the independence not only of judges but also members of the National Council (parliamentary immunity - ECtHR opinion no. 23053/02 of 6.12.2005) and the President of the Republic.

The criminal (functional) immunity of judges (for the proper administration of the judiciary) is to guarantee consistent personal protection in the exercise of public power (especially freedom of decision), which must ensure the judge's independence, especially from the executive, against abuse of the right to prosecute crimes through criminal proceedings. (PL.ÚS 4/03, PL.ÚS 24/03, PL.ÚS 19/02).

According to the binding case law of the Constitutional Court and the European Court of Human Rights (ECtHR), the criminal immunity of judges is a fundamental legal guarantee of judges' independence (personal guarantee of independence), the violation of which violates the independence of the judiciary and thus Art. 6 para. 1 of the Convention, Art. 14 (1) of the Covenant.

The Constitutional Court stated that the current protection mechanism against arbitrary decisions of the judiciary is effective because it includes the possibility of sanctioning a judge in disciplinary proceedings for serious disciplinary offense (arbitrary decision), whose repetition always results only in the imposition of a disciplinary appeal measure. from the position of a judge (termination of a judge's position - PL.ÚS 10/05).

The principle of independence of the judiciary is one of the essential features of a democratic and rule of law, not a personal privilege of judges, but justified by the need to enable judges to fulfill their role of guardian of human rights and freedoms. . 46 para. 1 of the Constitution.

The intention of the government coalition to abolish the criminal (functional) immunity of judges for decision-making by the Constitutional Act also demonstrates non-respect (violation) of the rule of law (derived from the constitutional principle of the rule of law) on the obligation to comply with key parts of binding limits, which strongly points to elements of violation of the rule of law on the prohibition of arbitrariness in the activities of all public authorities.

The system of division of power is also part of the constitutional balance. It follows from the principle of constitutional balance that even the legislator cannot freely dispose of individual branches of power in the state. The legislature is also without any doubts bound by the Constitution and its principles, which the Constitution does not allow to change, because they are of constitutive significance for the democratic nature of the Slovak Republic, as declared in Art. 1 of the Constitution (PL.ÚS 16/95).

When adopting the Constitution of the Slovak Republic, the legislator did not want to subordinate the issue of fundamental rights and freedoms (the core of the constitution) exclusively to the will of the majority. Eliminating the catalog of fundamental rights and freedoms in its standard form could mean a gradual erosion of democracy and pluralism towards a totalitarian state and dictatorship. In the conditions of the Slovak Republic, the immutability of constitutional articles guaranteeing fundamental rights and freedoms is protected in particular by Art. 12 par. 1 second sentence of the constitution. It is therefore inadmissible to violate the concept of fundamental rights and freedoms in the form of lowering their standard (PL.ÚS 24/2014).

The Constitution of the Slovak Republic contains an implicit material core. The basis of the implicit material core of the constitution is formed by the principles of democratic and rule of

law, including the principle of the division of power and the related independence of the judiciary (PL.ÚS 21/2014).

The implicit material core of the constitution cannot be contradicted even by constitutional laws. Both institutional and individual independence (independence of courts and independence of judges) are inseparable elements contained in the implicit material core of the constitution.

There is no more intense threat in a democratic and legal state than the loss of professional existence (termination of the position of judge). It cannot therefore be ruled out that this will be a deterrent legal effect which is capable of inducing a group of judges of a closer nature to exercise jurisdiction according to the wishes expressed or implied by the executive. Such a threat increases the negative effects of interfering with the independence of the judge and violates the independence of the judiciary in a quality that must be maintained. Article 144 1 of the Constitution (independence of the judge in decision-making) belongs to the pillars of the constitutional position of the judiciary in the substantive legal state (belongs to the material core of the constitution), which defines the legitimate scope and content of judicial independence.

Interference with the above-mentioned constitutional principles of democratic and rule of law as well as inalienable and irrevocable fundamental rights and freedoms of citizens by the proposed constitutional law meets all binding criteria of the constitutional court for violating the material core of the constitution, resulting in unconstitutionality.

Consistent protection of the judge's immunity in the performance of his function, especially in his own decision-making (purely functional immunity) is one of the most important guarantees of the independence of judges, the violation of which means a violation of the court's independence and thus Art. Article 6 (1) of the Convention, the provisions of which constitute a "constitutional instrument of European public policy", where the European Court of Human Rights (ECtHR) has exclusive jurisdiction over all questions concerning the interpretation of the Convention and its protocols and stated that the immunity of judges is a fundamental legal guarantee the judiciary. The case law of the ECtHR is binding interpretative directives and for the interpretation of fundamental rights and freedoms at the European level, the right to an independent and impartial court is the first of all the rights guaranteed by Art. 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (Venice Commission Opinion of March 2010, Part II, Existing Principles, point).

Not only the case law of the Constitutional Court excludes (prohibits) the violation (liquidation) of the functional immunity of judges for decision-making, but also international documents (recommendations) that have a reasonable degree of legal relevance within the meaning of Art. 1 para. 2 of the Constitution.

The Committee of Ministers of the Council of Europe (2010 recommendation - point 5) states that "... judges must have unrestricted freedom to decide cases impartially, in accordance with the law and their interpretation of the facts", which is in line with the opinion of the so-called Venice Commission (Opinion of March 2010 - paragraph 61) that "... judges should only have functional immunity, as they must be protected from undue external influences, i. immunity from prosecution for acts performed by them "... judges should be held criminally liable for offenses committed outside the exercise of their judicial office (point 75 of Opinion No 3 (2002) CCJE) "... considers the exclusion of liability judges in the performance of judicial

office under the assumption of judicial independence, ie immunity from prosecution (Council of Europe Group of States against Corruption - GRECO).

At the same time, it is necessary to emphasize that the intention to protect the administration of justice, interest in the proper application of legal norms and compliance with the principle of legal certainty **is fully ensured by the current legislation** (Act No. 385/2000 Coll. On Judges and Associates) **on disciplinary liability of judges** for serious disciplinary offense. (arbitrary decision of a judge, which is in conflict with the law) or serious disciplinary offense incompatible with the function of a judge (recurrence of an arbitrary decision), while a **disciplinary measure on dismissal from the position of a judge** is always obligatory (§ 117 para. 5 cit. Act).

The above - mentioned legal regulation of disciplinary liability of judges according to the Constitutional Court is in accordance with the constitutional requirement of inadmissibility of criminal liability of judges for decision - making, because by enshrining disciplinary responsibility for arbitrary decision, **an effective protection mechanism against arbitrary decision - making** and judicial power is consistently established. ÚS 10/05).

At the same time, the fundamental fact that any arbitrary decision of a judge is effectively remedied by the use of ordinary and extraordinary remedies in court proceedings must not be overlooked.

Constitutional principles are the bearers of constitutional values, which enjoy the highest i. constitutional protection and form the normative basis not only of the Constitution but also of the whole legal order. The Constitutional Court emphasized the inviolability of constitutional principles, which “the constitution does not allow for a change, because they are of constitutive significance for the democratic nature of the Slovak Republic, as declared in Art. 1 of the Constitution of the SR ”(PL.ÚS 16/95).

In the explanatory memorandum, the submitter omits (ignores) fundamental differences on the regulation of criminal liability of judges and deputies of the National Council, who are constitutionally equivalent constitutional officials.

For Members, the principle of unlimited exercise of the parliamentary function applies even in the case of his criminal prosecution for any criminal offense, until a final court decision on guilt and punishment (Article 78 para. 1), which is a strict respect for the constitutional principle of presumption of innocence (Art. .2 of the Constitution - I. ÚS 65/98, PL ÚS 12/98).

After the commencement of criminal prosecution, a judge of the General Court is temporarily suspended from performing the function of a judge (prohibition of the administration of justice).

The arbitrary decision of the judge shall also suspend the performance of the judicial office.

Members of the National Council for arbitrary decisions in the exercise of a parliamentary function (decision-making by voting) are not allowed to be prosecuted.

At the same time, the institute of temporary suspension of office is not enshrined in them.

The legal order does not allow disciplinary or criminal prosecution or members of the government (executive power) for arbitrary action and decision in the performance of a constitutional function, where only their political responsibility is possible.

Immunity is a constitutional institute of fundamental importance for the functioning of an institution of a democratic and rule of law, and the independence of not only judges but also

members of the National Council and the President of the Republic depends on it (Article 78, Article 107 of the Constitution).

The inadmissibility of criminal prosecution of legislators, representatives of the executive (the President of the Republic and members of the Government) for the exercise of constitutional competence, as well as constitutional judges (for the exercise of judicial power) is strict respect for the constitutional institute of immunity in the substantive state.

Abolition of the functional (criminal) immunity of judges of general courts enshrined in Art. 148 par.

It is realistic to create a precondition for a significant burden on police and prosecutors' offices by increasing incentives, especially from unsuccessful participants in the proceedings, which will also realistically allow abuse of the criminal prosecution institute, which is decided by executive and prosecutors' offices. The negative impact is then evident by endangering (disrupting) the mental well-being of judges, which is necessary for the proper performance of the judiciary, which may have a negative effect on the scope of quality, quantity and timeliness of decision-making. The above constitutional imbalance of three equivalent state powers in the rule of law is a violation of the criteria of the constitutional principle of division of power, which ensures the constitutional balance of these powers as one of the basic constitutional principles that is part of the material core of the constitution.

The principle of the separation of powers is an essential condition for the protection of the freedom and democratic character of the state and is particularly strictly applied in the rule of law in relation to the judiciary with legislative and executive powers. In parliamentary democracy, individual powers are autonomous and interconnected only by the links of constitutional control and cooperation (see PL.ÚS 16/95, PL.ÚS 25/00, PL.ÚS 115/2011).

Preservation (inadmissibility of deletion) Art. 148 par. 4 of the Constitution is in full compliance with the requirements of the ECtHR on the basic personal guarantee of independence of judges within the meaning of Art. 6 para. 1 of the Convention, which is part of our legal order (Article 154c of the Constitution) and is authoritative in interpreting fundamental human rights and freedoms according to the case law of the ECtHR. At the same time, it is also in line with international recommendations, which have legal relevance for ensuring the required level of independence and impartiality of the judge, to which the citizen has an inalienable and irrevocable fundamental right under Art. 12 (1), second sentence of the Constitution, Art. 46 para. 1 of the Constitution. Reducing the achieved level of protection of the basic human rights of citizens is also an intervention in the material core of the constitution and a path from democracy to totalitarianism and dictatorship.

The functional immunity of judges is not an unacceptable obstacle to the exercise of responsibility for arbitrary decisions (the petitioner's argument), as it is clearly duly penalized in the context of disciplinary liability and at the same time the institute of temporary suspension of judicial office.

It is absolutely false (misleading) the petitioner's argument that "the waiver of judges' immunity does not mean that judges will be punished for a legal opinion".

An arbitrary decision of a judge is always a legal opinion that meets the criteria of constitutional unacceptability of the interpretation and application of a legal regulation by a general court in violation of the criteria regulated by the case law of the Constitutional Court, i. j. that their purpose and significance would be fundamentally denied (eg PL ÚS 10/05, I. ÚS 101/02, III. ÚS 14/04, IV. ÚS 308/04).

Representatives of the judiciary according to the constitutional structure (Title VII of the Constitution) are also judges of the Constitutional Court, to whom the Constitution guarantees functional immunity (Article 136 para. 1 of the Constitution).

Constitutional judges ensure the protection of constitutionality by decision-making and their functional immunity fully coincides with the constitutional regulation of the functional immunity of judges of general courts (Article 148 para. 4 of the Constitution).

The constitutional judiciary and the general judiciary form two components of the judiciary, which are equal, and the judges of the general courts are also the guardians of constitutionality in the exercise of their powers. (II. ÚS 1/95, II. ÚS 13/2001).

The above-mentioned equivalence of the constitutional and general judiciary also implies a fundamental requirement for the necessity to enshrine identical (identical) guarantees of their independence, where the fundamental guarantee is (the most important) functional immunity as the so-called personal guarantee of independence.

It is clear that in the inadmissibility of legal sanctions (disciplinary or criminal liability) by representatives of the legislature and executive for arbitrary actions and decisions, the abolition of functional immunity of general court judges is clearly the liquidation of unconditional constitutional balance of three equivalents in a substantive rule of law. division of power (follows from the internal structure of the constitution and the general principle of the rule of law), which is an integral part of the material core of the constitution ensuring the institutional and individual independence of the judiciary and judges and is therefore unchangeable by constitutional law (IV. ÚS 75/099, PL ÚS 102/2011 , PL ÚS 21/2014, PL ÚS 24/2014).

Proposal for deletion of Art. 148 para. 4 of the Constitution from the Constitution of the Slovak Republic is unequivocally (unquestionably) an unconstitutional proposal for an unacceptable interference with the material core of the Constitution.

Košice 30. 07. 2020

JUDr. Juraj Sopoliga
President of the Association of Judges of Slovakia