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Creation Powers of the President of the Slovak Republic

Słowa kluczowe: system rządów, prezydent, kompetencje prezydenta, prokurator generalny
Keywords: governmental system, president, presidential capacity, prosecutor general

Streszczenie

Kreacyjne uprawnienia prezydenta Republiki Słowackiej

W tym artykule skupiam się na kreacyjnych uprawnieniach prezydenta Republiki Słowackiej w świetle aktualnych problemów. Chcę również znaleźć odpowiedzi na niektóre pytanie związane z tym, czy przy założeniu, że Konstytucja RS powierza prezydentowi uprawnienie do powoływania urzędników konstytucyjnych w oparciu o wnioski organu kolektywnego bądź konkretnej osoby, Prezydent może odmówić powołania urzędnika publicznego i jaka jest pozycja Prezydenta w tym typie powoływania, czyli jakie funkcje wykonuje.

Summary

In this paper I focus on the creation powers of the President in view of the current problems. I also attempt to find answers to some of the questions related to the issue whether, provided the Constitution of the Slovak Republic concedes the President of the Slovak Republic the power to appoint a constitutional official on the proposal of a collective body or a specific person, the President may refuse to appoint a public official, and what the position of the President is in this kind of appointment, thus what function he performs.

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I.

At present, the question of creation powers of the President of the Slovak Republic is a hot topic, particularly in relation to the appointment of the Prosecutor General². The Constitutional Court has several times solved the issue of the creation powers of the President. For the first time it was in the year 1993 when a dispute between the Prime Minister and the President appeared regarding the powers of the President to revoke a member of the Government³. The second case took place in the year 1996 when the Constitutional Court, within the proceedings on the conformity with legal regulations, partially interpreted Article 102, Subparagraph k of the Constitution of the Slovak Republic in the sense that that the President of the Slovak Republic, being the Supreme Commander of the Armed Forces, has the power to appoint the Chief of Staff of the Armed Forces of the Slovak Republic without anyone submitting any proposal to the President for such an appointment⁴. The third decision of the Constitutional Court related to the creation powers of the President and pertained to the dispute between the President and the Government, when the President of the Slovak Republic in his letter dated 26th March 1996 refused to authorize a nominee proposed by the Government to perform the post of the Extraordinary and Plenipotentiary Ambassador of the Slovak Republic as the Permanent Representative of the Slovak Republic at the United Nations and the Head of the Permanent Mission of the Slovak Republic at the United Nations domiciled in New York. In relation to that refusal, the Constitutional Court considered in the proceedings on the interpretation whether the President may uphold the Govern-

² In relation to this problem, on 02/29/2012, a group of the Members of the Parliament submitted a proposal to the Constitutional Court under Article 128 of the Constitution, in which they asked the Constitutional Court to interpret Article 102, Paragraph 1, Subparagraph t and Article 150 of the Constitution of the Slovak Republic. For the entire proposal cf. the website of the Constitutional Court, [\(http://www.concourt.sk/rozhod.do?id_submenu=d&urlpage=akt_ciNo\)](http://www.concourt.sk/rozhod.do?id_submenu=d&urlpage=akt_ciNo). (7.01.2013).

³ Cf. the Resolution of the Constitutional Court of the Slovak Republic of 2nd June 1993, No. I. ÚS 39/93.

⁴ Cf. the Finding of the Constitutional Court of the Slovak Republic of 5th June 1996, No. PL. ÚS 32/95.

ment's request upon meeting certain conditions⁵. Another decision of the Constitutional Court regarding the creation powers of the President was in relation to failing to appoint the Vice Governor of the National Bank of the Slovak Republic⁶. In the context of the above proceedings, it is necessary to point out that the Constitutional Court has always taken the „side” of the President. The powers of the President are his privileges of power. Considering his powers and responsibilities, we may talk about his position in the legal system of the Slovak Republic, whether the position of the President is strong or weak.

Regarding to the powers of the President of the Slovak Republic, we may divide them into several groups⁷, specifically: a) the powers in respect of foreign countries; b) the powers in respect of the National Council; c) the powers in respect of the Government; d) creation powers of the President; e) powers in the field of defence and national security; f) other powers of the President. In this paper, I will only discuss the creation powers of the President of the Slovak Republic.

Creation powers of the President of the Slovak Republic may be divided into several Groups as follows:

1. if the Constitution concedes the President the power to appoint a public official in the office on the proposal of the National Council. In this case, the National Council may only submit one candidate⁸ or two

⁵ One of the basic conditions for the Constitutional court to accept the proposal for the proceeding in re interpretation of the Constitutional Act is to prove that the matter is disputable. Here this was not the case despite the fact that the decision is important for the interpretation of the Constitution. The Constitutional Court stated: the procedure of the President, with which he failed the request of the Government of the Slovak Republic to entrust the person as proposed by the Government of the Slovak Republic the capacity of the Ambassador, is not a matter of dispute. The Government itself acknowledged in its Decree that the President, according to the second part of Article 102, Subparagraph b of the Constitution of the SR, is authorized to decide in only two ways: he either entrusts or does not entrust a person with the capacity of Ambassador. I. ÚS 51/96.

⁶ Cf. the Resolution of the Constitutional Court of the Slovak Republic of 23rd September 2009, No. PL. ÚS 14/06–38.

⁷ In this paper I will use the division employed by Prof. I. Palúš and Assoc. Prof. Somorová, Cf.: I. Palúš, L. Somorová, . Third issue. Košice 2011, p. 359 and subs.

⁸ The appointment of the Attorney General (the candidate for the Attorney General is elected by the Parliament and appointed by the President, Article 150 of the Constitution of the Slovak Republic.

- candidates to the President for appointment, whereupon the President chooses one⁹ of them,
2. if the Constitution concedes the President the power to appoint a public official on the proposal of the Government¹⁰,
 3. if the Constitution concedes the President the power to appoint a public official on the proposal of the Prime Minister¹¹,
 4. if the Constitution concedes the President the power to appoint a public official on the proposal of a Minister¹²,
 5. if the Constitution concedes the President the power to appoint a public official on the proposal of the Judicial Council following the preceding tender¹³,
 6. appointment by the President on the proposal of the Academic Senate of a public university¹⁴,
 7. if the Constitution concedes the President the power to appoint a public official without any proposal¹⁵.

⁹ The appointment of the Justices of the Constitutional Court of the Slovak Republic, Article 134, Paragraph 2 of the Constitution of the Slovak Republic.

¹⁰ Creation of the chairpersons of the Antimonopoly Office of the Slovak Republic and the Statistical Office of the Slovak Republic, Article 22, Paragraph 2 of Law Act. No. 575/2001 Book of Statutes on the organisation of the performance of the Government and on the organisation of the Central State Administration. The appointment of the Chief of Staff, Article 7, Paragraph 5 Law Act No. 321/2002 Book of Statutes on the Armed Forces of the Slovak Republic.

¹¹ The Appointment of the Ministers, Article 111 of the Constitution of the Slovak Republic.

¹² On the proposal of the Minister of the Defence, the President appoints and revokes the Chief of the Military Office of the President of the Slovak Republic, who is subordinate to the President and is accountable to the same for the performance of his capacity, Article 7, Paragraph 3, Subparagraph f Law Act No. 321/2002 Book of Statutes on the Armed Forces of the Slovak Republic. The President also appoints professors on the proposal of the Minister of Education.

¹³ Appointment of the judges of the courts of general jurisdiction, Article 145, Paragraph 1 of the Constitution of the Slovak Republic.

¹⁴ Appointment of the Rector of a public university, Article 10, Paragraph 2 of Law Act. No. 31/2002 Book of Statutes on Higher Education as amended.

¹⁵ Appointment of three members of the Judicial Council, Article 141a, Paragraph 1, Subparagraph c of the Constitution of the Slovak Republic. Being the Supreme Commander of the Armed Forces, the President has the power to appoint or promote the brigadier general

The principal question is that if the Constitution of the Slovak Republic concedes the President the power to appoint a constitutional official on the proposal of a person or an authority, what role the President plays in such an appointment. So the question is whether the function of the President is only a function in the capacity of notary, or if the President also performs a political function.

When talking about the function in the capacity of notary, here I understand the opportunity of the President to examine whether the candidate proposed meets the preconditions stipulated by the Constitution and by law for the appointment in that position and if the legal procedure in the selection of the candidate or in the election of the candidate was followed, involving the very act of submitting the proposal, which means both the material and the procedural sides¹⁶.

The President is a public authority, and pursuant to Article 2, Paragraph 2 of the Constitution of the Slovak Republic he only may act in accordance with the Constitution, within its limits, and to the extent and in the manner provided by law. The Constitutional principle of legality of the state power as defined in Article 2, Paragraph 2 of the Constitution of the Slovak Republic includes the Constitutional rule under which any public authority, including state authorities, in itself (autonomously) determines not only what kind of legal regulations shall be applied in deciding, but also how the interpretation shall be approached in accordance with the principle of a legal government, which is expressed in the above Article of the Constitution of the Slovak Republic. The constitutional prescription, which is contained in Article 2, Paragraph 2 of the Constitution of the Slovak Republic, is, at the same time, a provision of obligation to interpret the constitutional and statutory standards in such a way that the Constitutional order shall be observed in its full extent defined¹⁷.

The institution of the conditions, which a candidate for a specific position must meet, may be in terms of Article 2, Paragraph 2 of the Constitu-

up to the general, Article 102, Paragraph 1, Subparagraph h of the Constitution of the Slovak Republic, Art 15b, Paragraph 2, Subparagraph c point 3 Law Act. No. 570/2005 Book of Statutes on conscription as amended.

¹⁶ PL. ÚS 14/06.

¹⁷ II. ÚS 143/02.

tion of the Slovak Republic considered as a constraint to the powers stipulated by law. The constraint of the power binds all the authorities involved in the process of the appointment, including the President¹⁸.

The Constitutional Court in its proceedings on the interpretation of Article 102, Paragraph 1, Subparagraph h of the Constitution of the Slovak Republic has taken a stand that the President of the Slovak Republic in exercising his power considers whether the candidate meets the preconditions stipulated by the Constitution and by law for the appointment in that position. If the President, after having examined the proposal, finds out that the proposed candidate fails to meet personal or qualification preconditions stipulated by the Constitution and law, the President will not appoint the proposed candidate, which means the President will refuse the proposal¹⁹.

It could be argued that the authority or the person who propose the candidate for a public position to the President themselves examine whether the person complies with any preconditions as stipulated by legal regulations. Yes, it is true, but still there could occur an errancy even in this field, which the Constitutional Court of the Slovak Republic also recognizes²⁰. It may also happen that while the authorized person or authority proposes a can-

¹⁸ PL. ÚS 14/06.

¹⁹ In exercising his powers, the President of the Slovak Republic reviews, under Article 102, Paragraph 1, Subparagraph h (the sentence before the semicolon) of the Constitution of the Slovak Republic, whether the candidate for a position of Vice Governor of the National Bank of the Slovak Republic, who has been proposed by the Government and with whom the National Council of the Slovak Republic has agreed under Article 7, Paragraph 4 Law Act No. 566/1992 Book of Statutes on the National Bank of Slovakia as amended, has the preconditions for appointment to this position under Article 7, Paragraph 4 Law Act No. 566/1992 Book of Statutes. If the President concludes that the proposed candidate fails to meet the preconditions, the President disapproves the proposal of the Government. PL ÚS 14/06–38.

²⁰ Even though the National Council may adopt a view that the candidate complies with the preconditions as stipulated by law, the National Council is still able to agree or disagree with the candidate so proposed. In the process of voting, the National Council only pronounces their political agreement with such as candidate, but without any obligation to attest whether the candidate complies with the preconditions as stipulated by law. The question of their compliance should be resolved as a preliminary question of the content of Section 7, Paragraph 4 Law Act No. 566/1992 Book of Statutes before the process of voting and before passing the agreement with the candidate. The binding character of its judgment is therefore binding only for the National Council, but not for the President, who only is entitled to review compliance with the preconditions under Section 7, Paragraph 4 Law Act No.

didate for appointment and the appointment itself, the proposed candidate fails to comply with the preconditions for appointment (e.g. the candidate would lose his/her citizenship or permanent residence in the Slovak Republic, his/her clean criminal record, etc.). In such a case, should the President find out that the candidate fails to meet the personal or qualification preconditions stipulated by the Constitution and by law for the appointment in the position, the President shall not grant the proposal. The President would also not be in the position to grant the proposal for the appointment, if the procedure of the proposal had not been followed (e.g., if the candidate should be elected in election by ballot, but would in fact be elected in public election)²¹. It follows from the above that the President undoubtedly has a notarial capacity.

Another question is whether the President may refuse to appoint the proposed candidate who meets all the personal and qualification preconditions as stipulated by law, provided all the procedural regulations have been observed in proposing the candidate, this only on the basis of his political consideration. It appears impossible to give a clear answer to the above question without a deeper analysis of the Constitution and the judicature of the Constitutional Court.

The Constitution of the Slovak Republic in Article 102 employs the word group, the President „appoints and revokes”²², meaning that it is not unambiguous from Article 102 of the Constitution of the Slovak Republic, whether the President is obliged to appoint or if the President may also refuse the appointment of the proposed candidate²³. The diction „appoints and revokes” has no unambiguous content, and it is necessary to review it in the context

566/1992 Book of Statutes. If the President concludes that the candidate does not meet the preconditions, the President will disapprove the proposal. PL ÚS 14/06.

²¹ The President is empowered to review whether the process of appointment of the Rector of a public university, professors of the public universities, has been observed. The President reviews, whether the candidate indeed complies with any preconditions for the appointment of professor.

²² This formulation has no explicit content. By making its interpretation, one may derive both authorization and obligation. PL ÚS 14/06.

²³ The Constitutional position of the President is clear only when the Constitution explicitly grants authorization or expressly imposes obligation. In other cases, the Constitutional position of the President is to be made more explicit either by interpretation of legal

of other relevant stipulations of the constitutional government²⁴. Pursuant to Article 102, Paragraph 4 of the Constitution of the Slovak Republic, the details on exercising the constitutional powers of the President under, Paragraph 1 may be stipulated by law. In examining this issue, it is therefore necessary to analyse the respective stipulations of the Constitution and the more detailed legal regulation, if it exists.

II.

The commencement of the exercise of constitutional powers of the members of the Government of the Slovak Republic is inevitably preceded by their being appointed in a way as prescribed by the Constitution. In creating the Government of the Slovak Republic, the principle of appointment is applied. The President of the Slovak Republic is the subject who has the appointing authority in relation to the Prime Minister of the Government of the Slovak Republic and other members of the Government (Article 102, Paragraph 1, Subparagraph g of the Constitution). The process of creating the Government of the Slovak Republic is differentiated into several stages, beginning with the appointment of the Prime Minister, up to the vote of confidence by the National Council of the Slovak Republic.

After the announcement of the election results in the National Council of the Slovak Republic, an opportunity emerges for exercising the power of the President of the Slovak Republic to appoint the Prime Minister. The Prime Minister is appointed by the President, and in doing, so the latter is not bound by any proposals, and the Constitution does not prescribe the President any time limit for doing so. Departing from the Constitutional responsibilities of the President „to ensure due performance of Constitutional authorities”, it may be assumed that such a period of time will be limited by a reasonable reflection of the Head of State, at the time appropriate to the circumstances. Should the President occur in delay with the appointment of the Prime Minister for an unreasonable amount of time, considera-

norms contained in the text of the Constitution, or by changing the wording of individual stipulations of the Constitution. (I. ÚS 39/93).

²⁴ Cf. PL. ÚS 14/06.

tion could be raised whether the President observes the proper performance of the Constitutional authorities. In selecting a candidate for the Prime Minister of the Slovak Republic, the President is autonomous from the aspect of the Constitutional definition²⁵. The practice carried out so far shows that the Presidents accounted for the results of the National Council elections and delegated the chairperson of the political party who was able to create a majority Government to put the Government together, even in the case that the elections were won by another political party²⁶. The only Constitutional criteria, which the President is bound by, are the ones that provide that the Prime Minister may be a citizen who may be elected in the National Council of the Slovak Republic²⁷.

Following his/her appointment, the designated Prime Minister shall present to the Head of the State proposals for the appointment of the members of the Government, alongside with the draft appointment of those candidates to manage the respective ministries. No member of the Government may be appointed without the proposal. What remains questionable is whether the President of the Slovak Republic is bound by the proposal of the Prime Minister to make the appointment²⁸.

²⁵ The term „the appropriate time” seems problematic here. In my opinion, in accordance with the Constitutional practice of parliamentarism, the President could immediately after the announcement of election outcomes authorize the chairman or the leader of the political party that won the most votes in the election to configure the Government. In case the chairperson is unable to create a majority coalition within the defined short period of time, the President would delegate the chairperson of the political party which is able to create a majority coalition to configure the Government.

²⁶ This was the case in the elections in the years 1998 and 2002, when although the HZDS triumphed in the election, Mikuláš Dzurinda was delegated to configure the Government as the chairperson of the political party that did not win in the elections, but was able to create a majority Government. Similarly, in the year 2010 when the election was won by the SMER-SD, but did not find partners to create a majority coalition. In my opinion, the President SR acted properly in this case, when he granted a period of time to the chairperson of the political party that won the elections, in order to find partners to form a majority coalition.

²⁷ The issue of who may be elected to the Parliament is stipulated in Article 3 Law Act. No. 333/2004 Book of Statutes on the Elections in the National Council of the Slovak Republic.

²⁸ Until the Amendment to the Constitution in the year 2001, its Article 111 stipulated: on the proposal of the Prime Minister, the President of the Slovak Republic appoints

The Constitutional Amendment No. 90/2001 Book of Statutes has modified some of the powers of the President. The change also affected Article 111 of the Constitution of the Slovak Republic, which replaced the original version, according to which the President, on the proposal of the Prime Minister, „appoints and revokes” members of the Government and entrusts them with the management of the respective ministries. According to the new wording, the President „appoints and revokes” the members of the Government. The Constitutional Court of the Slovak Republic in the substantiation of its resolution of 29th September 2009, proceeding No. PL. ÚS 14/06–38 stated: the purpose of this change was to impose legal constraints on the discretion of the President in deciding whether to grant the Prime Minister’s proposal²⁹. It is now possible to conclude from the above that the President is required to appoint or revoke members of the Government, if the Prime Minister proposes so.

From the wording of Article 111 of the Constitution it follows that the President of the Slovak Republic shall appoint and shall revoke other members of the Government and entrust them with the management of ministries. Based on linguistic and logical interpretation, relying on the case law of the Constitutional Court, it may be concluded that the President is bound by the proposal of the Prime Minister³⁰. Drgonec expresses a dissent-

and revokes other members of the Government and entrusts them with the management of ministries, and Article 116, Paragraph 4 stipulated: the proposal to revoke the member of Parliament may be submitted to the President of the Slovak Republic also by the Prime Minister. In its interpretation of Article 116, Paragraph 4 of the Constitution the Constitutional Court said that Article 116, Paragraph 4 of the Constitution of the Slovak Republic does not concede to the President of the Slovak Republic the obligation to revoke the member of the Government, if the Prime Minister submits such a proposal. Later, the legislator by adopting the Constitutional Law Act No. 90/2001 Book of Statutes changed the diction of Article 111.

²⁹ PL ÚS. 14/06, point 30.

³⁰ The legislator of the Constitution replaced the original version, according to which the President, on the proposal of the Prime Minister, „appoints and revokes” members of the Government and entrusts them with the management of ministries. According to the new wording, the President „will appoint and revoke” the members of the Government. The purpose of this change was to limit the discretion of the President in deciding whether to grant the proposal of the Prime Minister. PL.U.S. 14/06. By making the above statement, the Constitutional Court of the SR, although not in the form of interpretation, said about the restriction of free discretion of the President, thus about his/her being bound by such a proposal.

ing opinion when he says: „The Constitution of the Slovak Republic does not ordain that the President of the Slovak Republic is bound by the proposal of the Prime Minister of the Slovak Republic. The President of the Slovak Republic may not refuse to appoint the proposed candidate, but he/she cannot appoint a member of the Government the person who has not been proposed by the Prime Minister. The Constitution of the Slovak Republic does not ordain that the President of the Slovak Republic is bound by the proposal of the Prime Minister, not even in the matter of entrusting the candidate with the management of a ministry. The President of the Slovak Republic may refuse the proposal of the Prime Minister of the Government of the Slovak Republic to appoint a person as a member of the Government, but if the President grants the proposal, the President is obliged to designate the appointed member of the Government of the Slovak Republic with the management of the ministry, on the head of which such a member was proposed by the Prime Minister of the Government of the Slovak Republic”³¹.

The Constitution does not specify a way of selecting the candidates for the post of a member of the Government, nor does it request any special personal and qualification preconditions for performing of the above capacity³². According to the Constitution, just as in the case of the Prime Minister, in the case of a member of the Government the preconditions include the citizenship of the Slovak Republic and eligibility in the National Council of the Slovak Republic. When considering the potential candidates for the position of members of the Government of the SR, the Prime Minister of the

³¹ J. Drgonec, *The Constitution of the Slovak Republic: A Commentary*, Šamorín, Heuréka 2007, p. 825. Members of the National Council of the SR, P. Kresák, I. Šimko, L. Orosz, and L. Meszáros in their proposal for adopting a Constitutional law act amending and supplementing the Constitution of the Slovak Republic No. 460/1992 Book of Statutes as amended by the Constitutional Law Act No. 244/1998 Book of Statutes proposed the following wording of Article 111 of the Constitution: On the proposal of the Prime Minister, the President of the Slovak Republic appoints and revokes other members of the Government and entrusts them with the management of ministries. The President is bound by such a proposal. Thus, their intention was to explicitly express in the Constitution that the President has no choice in the appointment of a member of the Government, simply, if the Prime minister proposes a candidate for appointment as a member of the Government, the President must appoint him/her.

³² In my opinion, the Minister should only be a person of integrity, that is, one that has not been convicted of an intentional crime and who has a second level university education.

SR, in accordance with the absence of Constitutional arrangements, departs from a Constitutional custom, according to which prospective members of the Government are as a matter of rule proposed by the political party that has the majority in National Council. If no political party wins an absolute majority in the National Council, a coalition (multi-colour) government is usually created, composed of representatives of various political parties and movements. Consequently, in allocating the ministerial posts, one shall consider proportional representation of the political parties and movements in the National Council. The coalition political party will be allocated a ministerial chair, and that party will propose their candidate to the Prime Minister.

After being appointed, the members of the Government of the Slovak Republic are sworn in by the President of the Slovak Republic and take the oath. Compared with the oath of the Member of the National Council of the SR (Article 75, Paragraph 2 of the Constitution), or the President of the SR (Article 104, Paragraph 2 of the Constitution), the Constitution does not deal with consequences of taking the oath with reservations or even refusing to take it. Appointment by the President and taking the oath is a single act that has a constitutive meaning. In my opinion, should the candidate proposed by the Prime Minister refuse to take the oath or take the oath with reservation, he/she would not become the member of the Government.

The final stage of constituting the Government is the expression of the confidence by the National Council of the SR. The newly appointed Government has its constitutional obligation to appear before the National Council of the Slovak Republic within 30 days after its appointment to present the Government Statement and to request the expression of its confidence (Article 113 of the Constitution). If the National Council agrees with the Government Statement, it expresses the confidence to the Government in form of the resolution. Failing which the President revokes the Government and appoints a new government that seeks a vote for confidence of the National Council of the SR. This process is indirectly limited by the Article 102, Paragraph 1, Subparagraph e of the Constitution, according to which the President is empowered dissolve the National Council of the Slovak Republic, provided the National Council fails to approve the Government Statement within six months after the appointment of the Government of the SR.

It is now the time to raise a question, when the Government and a Government Member assumes his/her position. The text of the Constitution does not explicitly express the exact moment when the Government is created, thus also the capacity of the Member of the Government of the Slovak Republic as such. Some authors hold a view that the approval of the Government Statement means for the Government the assumption of its constitutional functions, or, respectively, it begins to exercise its powers³³. Another view holds that the Government of the SR, in the spirit of the presumption of confidence, carries out its constitutional functions as of the moment of its appointment, which has been confirmed by the practice of previous two Governments in the Slovak Republic³⁴. Finally, this is indirectly testified by Article 113 of the Constitution, the wording of which suggests that it is the Government that appears before the National Council of the SR, not the candidates for membership in the Government of the SR³⁵. The tenure of the members of the Government is not established, but is in principle identical with the tenure of the National Council of the SR. This follows from the constitutional obligation of the Government of the SR to resign in every case after the constituent meeting of the newly elected National Council of the SR. However, the Government in fact continues in exerting its powers until a new government is appointed by the President of the Slovak Republic.

³³ Cf. J. Svák, L. Cibulka, Bratislava, BVŠP 2007, p. 372.

³⁴ Drgonec favours such an opinion, who in his commentary to the Constitution of the Slovak Republic said: „The process of decision taking in the National Council of the SR on the support to the submitted Government Statement has no Constitutional meaning from the viewpoint of creating of the Government. The Government of the SR is created by the appointment under Article 110 and Article 111 of the Constitution. From the moment of creation, the Government assumes the performance of the scope of its operation...” Drgonec, cf. quote in note 29, p. 829.

³⁵ The fact that the Government assumes its capacity by being appointed and taking the oath is testified by the fact that the National Council of the SR discussed and approved the bill, which it later submitted to the National Council of the Slovak Republic before the Government Statement had been approved. So the Government had already been exercising its powers, including through the use of the institute of legislative initiatives. Cf. Bills submitted in the National Council of the SR and the agenda of the 2nd meeting of the National Council of the SR on its website.

III.

The legal regulation governing the appointment of the Constitutional Court of the SR Justices is contained in Article 134, Paragraph 2 of the Constitution of the SR, which says that „the President of the Slovak Republic appoints the Constitutional Court’s Justices on the proposal of the National Council of the Slovak Republic for the twelve-year term of office”³⁶. Thereafter, Law Act No. 38/1993 Book of Statutes on the Organisation of the Constitutional Court of the Slovak Republic, on the proceedings before the same, and on the position of its justices, in comparison with the Constitution determines in greater detail, who may submit the relevant proposal to the National Council of the Slovak Republic³⁷. Details on the procedure of candidates’ election for the Constitutional Court’s Justices in the National Council of the Slovak Republic are regulated in Law Act No. 350/1996 Book of Statutes on the standing orders of the National Council of the Slovak Republic.

³⁶ For the sake of comparison, the Constitutional Court’s Justices in Poland are voted by the Sejm for nine years term of office (Article 194, Paragraph 1 Constitution of the Polish Republic), in the Czech Republic, under Article 84, Paragraph 2 of the Constitution of the Czech Republic, the Constitutional Court’s Justices are appointed by the President with the Senate’s approval.

³⁷ Proposals for the election of candidates for Justices may be submitted to the National Council of the Slovak Republic the following: a) the Members of National Council of the Slovak Republic, b) the Government of the Slovak Republic, c) the Chief Justice of the Constitutional Court of the Slovak Republic, d) the Chief Justice of the Supreme Court of the Slovak Republic, e) the Prosecutor General, f) organizations of lawyers, g) scientific institutions. Proposals are given to the Constitution and Legal Committee, which will put it forward along with the standpoint to the Chairperson of the National Council of the Slovak Republic. The Chairperson of the National Council of the Slovak Republic proposes the inclusion of the candidates’ election for Justices of the Constitutional Court at the next meeting of the National Council of the Slovak Republic. The National Council of the Slovak Republic elects by secret ballot and absolute majority of the present Members of the National Council a double number of the candidates, whose list the National Council will submit to the President. Details are regulated by Section 11 Law Act No. 38/1993 Book of Statutes on the Organisation of the Constitutional Court of the Slovak Republic, on the Proceedings Before That Court, and on the Position of Its Justices, fourteenth part of Law Act No. 350/1996 Book of Statutes on the Rules of Procedure of the National Council of the Slovak Republic and the Electoral Rules on the Election of Candidates for Justices of the Constitutional Court of the Slovak Republic, as approved by the Resolution of the National Council of the Slovak Republic of 06/09/2006 No. 62.

The National Council of the Slovak Republic submits a double number of candidates for justices who are to be appointed by the President. In accordance with linguistic interpretation of the Constitution, and in accordance with the Constitutional court judicature³⁸ we may allege that is not clear from the Constitution or from the statutory provisions, whether the President is bounded by the proposal of the National Council of the Slovak Republic, ergo whether he must appoint Constitutional Court's Justices from among the nominees proposed by the National Council of the SR, or whether he may refuse their appointing, ergo whether he may refuse the proposal and ask for submitting a proposal for new candidates.

In compliance with Article 2, Paragraph 2 of the Constitution of the SR, the President is not only entitled, but also obliged to check the professional and personal preconditions³⁹ of a candidate enabling appointment for a specific position as defined in the Constitution or by law, and whether the proper procedure has been observed⁴⁰. The question arises, how to proceed, if the President found out that one of the proposed candidates does not fulfil the preconditions for appointment. In resolving the case, the following alternatives come under consideration:

1. the President would appoint the proposed candidate, who fulfils all the requirements for the appointment to the position, for the Justice of the Constitutional Court⁴¹,

³⁸ I. ÚS 39/93; PL ÚS 14/06.

³⁹ The Constitutional Court's Justice may be appointed when a citizen of the Slovak Republic, who is elective to the National Council of the Slovak Republic, has reached the age of 40 years, has a university degree in law, and has been active in the legal profession for at least 15 years. The same person may be not re-appointed as a Justice of the Constitutional Court. It is the inconsistency of the legislator that impeccability is not required from the candidates for the Constitutional Court Justices, but which is required from the judges of the common courts and from the Special Criminal Court Justices. Even a Justice of the Constitutional Court should be impeccable. Impeccability was required by the Constitutional Law Act No. 91/1991 Book of Statutes on the Constitutional Court of the Czech and the Slovak Federative Republic.

⁴⁰ PL. ÚS 14/06; II. ÚS 143/02.

⁴¹ In this case, even if the President knew that the other candidate does not fulfil the preconditions for being appointed in that position, the President would not deal with that, because the second candidate suits him/her and he/she wishes to appoint the second candidate.

2. the President would not want to appoint a second proposed candidate, who fulfils all the requirements, for the Justice of the Constitutional Court. He would advise the National Council that only one candidate was proposed, because the second proposed candidate fails to comply with the preconditions as stipulated by the Constitution or the law, and asks the National Council to propose one more candidate in compliance with the Constitution⁴²,
3. the President would advise the National Council that he is not going to appoint neither of the proposed candidates, he would allege that the National Council did not proceed in accordance with the law, he would refuse to appoint the proposed candidate for Justice, and would ask the National Council to submit a proposal for new candidates in accordance with the Constitution.

The principal question is how to proceed, if both of the candidates proposed by the National Council fulfil professional and personal qualifications as established by the Constitution, whether the President may refuse to appoint one of the two proposed nominees⁴³ and request the National Council for the submission of new candidates, whether the President is independent even in this case.

What is certain is that the President cannot appoint someone who has not been proposed by the National Council of the SR. If we adhered to the above judicature of the Constitutional Court, we would be able to say that the Constitution of the SR in its Article 102, Paragraph 1, Subparagraph s and Article 134, Paragraph 2 employs the terms appoints and revokes, therefore the very text of the Constitution is not unambiguous in the issue whether there exists the obligation for the President to appoint, or whether the President may re-

⁴² Article 134, Paragraph 3 of the Constitution. There could arise a situation that the National Council of the Slovak Republic would deliberately propose a candidate who would fulfil the preconditions set out by the Constitution and the law, whereas the other one would not fulfil these preconditions. The National Council would do that with the intent that the President appoints a candidate whom the National Council of the Slovak Republic wants to be appointed. In that way, the National Council could withdraw from the President the possibility of autonomous decision taking between the two candidates.

⁴³ Reasons for the rejection of appointment could be different. According to the President's view, the proposed candidates are not suitable as to their professional skills, or they are associated with various causes, etc.

fuse to appoint one of the two proposed candidates and request the National Council to propose new candidates⁴⁴.

In the Slovak (Czechoslovak) Constitutional history, the President appointed three Justices of the Constitutional Court on the proposal of the House of Representatives, the Senate, and the Assembly of Ruthenia under Law Act No. 62/1920 Book of Statutes on the Constitutional Court.

Under the above Law Act, the House of Representatives, the Senate, and the Assembly of Ruthenia each propose a group of three the nominees, from among whom the President of the Republic chooses one member of each. Through interpretation of the above text and from practice that was followed during the period of effectiveness of this legislation we may infer the obligation for President to choose the Justices of the Constitutional Court from among the proposed candidates. In addition to Article 94, Paragraph 3 of the Constitutional Law Act No. 143/1968 Book of Statutes on the Czechoslovak Federation, the members of the Constitutional Court of the Czechoslovak Socialist Republic are elected by the Federal Assembly for a period of 7 years. It follows that the Justices of the Constitutional Court were only decided by the National Assembly. Under Article 10, Paragraph 2 of the Constitutional Law Act No. 91/1991 Book of Statutes on the Constitutional Court of the Czech and Slovak Federative Republic, the Justices of the Constitutional court are appointed by the President of the Czech and Slovak Federative Republic from among the persons nominated by the Federal Assembly, the Czech National Council and the Slovak National Council. Each of the legislative bodies mentioned above proposes a list of eight candidates, and the Federal Assembly proposes four candidates who are citizens of the Czech Republic, and four candidates who are citizens of the Slovak Republic. The Justices of the Constitutional Court are appointed for a period of seven years. This legislation returned once again the possibility to the President to choose the Justices of the Constitutional Court from among the candidates proposed by the National Assembly and by legislatures of the Republics.

Our constitutional-legal history of appointing the Justices of the Constitutional Court shows that an important role was always played by the parliament. Cooperation between the parliament and the President was enshrined

⁴⁴ Cf. I.ÚS 39/93; I. ÚS 51/96; PL. ÚS 14/06.

in the Law Act on the Constitutional Court of the year 1920 and the Constitutional Law Act from of 1991 in the sense that the President was autonomous in the selection of Justices of the Constitutional Court, but only from among the candidates proposed by the parliament. The fact that the President was obliged to appoint the Justices of the Constitutional Court from among the proposed candidates and was not allowed to refuse the appointment and ask for submitting a proposal for new candidates results from the wording of the legislation: „... they each propose a „ternum” (a group of three, translator’s note) from among whom the President chooses one of each”. From the Constitutional text, „... appoints... from among the proposed persons”. The legislation did not give an option not to appoint Justices of the Constitutional Court from among the persons thus proposed, but it prescribed directly that he would choose from among the persons proposed. Commitment of the President to the proposal and his/her obligation to appoint the Justices of the Constitutional Court from among the proposed candidates is further enhanced by the fact that the Constitutional arrangement of 1968 entrusted the power of appointment of the Constitutional Court Justices exclusively in the hands of the parliament.

If we wanted to interpret the relevant regulations of the Constitution in line with the judicature of the Constitutional Court, so it may be concluded that the legislator, by having directly in the Constitutional text enshrined an obligation of the National Council to propose two candidates, gave the President an option of employing political discretion between the two candidates nominated, but not an option not to appoint any of them. If the constitutive body had granted the President the power to employ political discretion in the appointment of the Justices of the Constitutional Court, it then would not have stipulated that the National Council was obliged to propose two candidates, from among whom the President would only choose one. It follows from the above that if the President had the opportunity to employ political discretion whether to appoint or not appoint the proposed candidate, the National Council would not have to propose two candidates, but one candidate would be enough. This hypothetically being the case, the National Council would then keep proposing the candidates until the some of them would finally be appointed by the President as Justices of the Constitutional Court. Therefore, in my opinion and based on the interpretation of the Con-

stitutional text of the principles of parliamentarism and departing from the above facts, I conclude that the President is obliged to appoint the Justices of the Constitutional Court from among the proposed candidates, if they comply with meet the preconditions as stipulated by law. In this way, independence and impartiality of the Justices of the Constitutional Court should also be guaranteed in carrying out of their functions⁴⁵.

The legislator says nothing about the period of time within which the President has the obligation to appoint a Justice of the Constitutional Court. The former would have to do this within the appropriate time. Under the appropriate time one should understand a period of time necessary to review, whether the candidates meet the Constitutional and statutory preconditions for appointment, as well as to ensure the proper functioning of the Constitutional authority. A Justice of the Constitutional Court assumes his/her position by taking the oath into the hands of the President.

I also consider the first phase of creating the Justices in the National Council problematic, in which it is sufficient for the election of a candidate for Justice of the Constitutional Court to obtain the relative majority of Members of the National Council, which, under tense relations between the coalition and the opposition poses the current opposition in the role of a statistician, which may finally lead to creating a politically „monochrome” Constitutional Court.

The Chief Justice and the Deputy Chief Justice of the Constitutional Court are appointed by the President of the SR from among the Constitutional Court Justices. Neither the Constitution nor any statutory regulation say anything about the length of term of office of the Chief Justice and the Deputy Chief Justice of the Constitutional Court or of cessation of their respective positions, therefore it holds true that the Chief Justice of the Constitutional Court holds this position till the end of his/her position of the Justice of the Constitutional Court. In my opinion, since the Justices of the Constitutional Court are appointed for as many as 12 years, the term of office of the Chief Justice and the Deputy Chief Justice of the Constitutional Court should be shorter, for example 6 years, provided he/she could not be

⁴⁵ It should be noted that the Constitutional Court decides on the impeachment of the President.

appointed again as the Chief Justice or the Deputy Chief Justice of the Constitutional Court Twelve years is too long a term, and from the part of the Chief Justice there may occur a pressure on the Justices, so their bigger independence could be guaranteed in such a way. Replacement of the Chief Justice of the Constitutional Court, e. g. after 6 years, could positively influence the work of the Constitutional Court.

IV.

In the original text of the Constitution of the year 1992 the legislator stipulated that the general court judges⁴⁶ are elected by the National Council of

⁴⁶ The institute of general judiciary has always since 1920 been rooted in the Constitutional documents. Law Act No. 21/1920 Book of Statutes recognized professional judges, who have been appointed permanently to the office, the same was similarly covered in Law Act No. 185/1939 Book of Statutes on the Constitution of the Slovak Republic, and the Constitutional Law Act No. 150/1948 Book of Statutes. This Constitution recognized professional judges and lay judges. Professional judges were appointed to their office permanently. Lay judges were appointed by National Committees. In the Constitution No. 100/1960 Book of Statutes, judiciary was regulated in its eighth head of Articles 98–103. Justices of the Supreme Court were elected by the National Assembly. Regional Court judges were elected by Regional National Committees. District Court judges were elected in direct elections by citizens for a term of four years. The Constitutional Law Act No. 155/1969 Book of Statutes, in addition to the fact that Supreme Courts of the Republics were established, the term of professional judges was extended to 10 years, and the election of judges were changed in such a way that the Justices of the Supreme Courts of the Republics and professional district court judges were elected by the respective National Council of the Republic. Lay judges of the regional and district courts were elected by National Committees for a term of four years. Law Act No. 493/1992 Book of Statutes introduced that the President appointed the Justices of the Supreme Court of Czech and Slovak Federative Republic on the proposal of the Chairperson of the Supreme Court after an agreement with the Government of the Czech Republic and the Slovak Republic as a matter of rule in equal numbers from among the citizens of the Czech Republic and from among the citizens of the Slovak Republic. Appointment of the Supreme Court of the Czech and Slovak Federative Republic became effective by adopting the same by both of the Chambers of the Federal Assembly. The Justices of the Supreme Court of the respective Republic and other courts of the respective Republics were appointed by the Board of Chairpersons of the respective National Council on the proposal of the Government of the respective Republic. The Constitution said nothing about the term for which the judges and justices were appointed.

the SR on the proposal of the Government of the Slovak Republic for four years⁴⁷. After this period of time elapses, the National Council of the SR elected the judges on the proposal of the Government of the SR for an unlimited period of time. At present, the general court judges are appointed and revoked by the President of the SR on the proposal of the Judicial Council of the SR; they are appointed for an unlimited period of time. This statutory regulation was only introduced by the Amendment to the Constitution No. 90/2001 Book of Statutes. Any citizen of the Slovak Republic, who may be elected to the National Council of the SR, has reached the age of 30 years and completed a university legal education, may be appointed a judge⁴⁸.

The Chief Justice and the Deputy Chief Justice of the Supreme Court of the Slovak Republic are appointed by the President of the Slovak Republic for a period of five years from among the ranks of Justices of the Supreme Court of the Slovak Republic for a period of five years⁴⁹ upon a proposal of the Judicial Council of the Slovak Republic. The same person may be appointed the Chief Justice of the Supreme Court of the Slovak Republic and the Deputy Chief Justice of the Supreme Court of the Slovak Republic for a maximum of two consecutive terms. A Justice shall take up the office upon taking the oath. Appointing the Justices for an unlimited period is a guarantee of their judicial independence⁵⁰.

In the original version of the Constitution⁵¹, when the general court judges were elected by the National Council on the proposal of the Government, it was a case of serious interference of the legislative power and executive

⁴⁷ A detailed amendment was contained in the fifteen part of Articles 117–122 Law Act No. 350/1996 Book of Statutes on the Rules of Procedure of the National Council of the Slovak Republic.

⁴⁸ Other prerequisites for appointment to the post of judge and justice cf. Article 5–10 Law Act No. 385/2000 Book of Statutes as amended on justices, judges, and lay judges as amended.

⁴⁹ Till the amendment of the Constitution No. 90/2001 Book of Statutes, the Chief Justice and the Deputy Chief Justice of the Supreme Court of the Slovak Republic were elected by the National Council of the SR.

⁵⁰ Cf. Resolution of 06/07/2000 No. PL ÚS 52/99–50.

⁵¹ Article 145, Paragraph 1: The Justices are elected by the National Council of the Slovak Republic on the proposal of the Government of the Slovak Republic for a period of four years. After the elapse of this period, the National Council of the Slovak Republic on the proposal of the Government of the Slovak Republic elects the Justices for an unlimited period.

power in the judicial power⁵². With the creation of the Judicial Council of the SR, which proposes the candidates for appointing and revoking of judges, the purpose was to reinforce judicial independence from the executive and legislative power⁵³. It is also appears correct that a kind of a trial period for judges has been removed. Temporary appointment of a judge for four years might have reasonably raised doubts about the independence of the judiciary from the executive and the legislative powers, and the impartiality of judges. Indeed, if the judges during those four years failed certain requirements of the executive or the legislative officials, he/she need not any longer have been proposed and elected for the unlimited period⁵⁴.

It clearly follows from Article 145, Paragraph 1 and Article 102, Paragraph 1, Subparagraph t of the Constitution that the President may not appoint for the position of judge a person who has not been proposed by the Judicial Council, but it is not unequivocal whether the President must appoint

⁵² If somebody wanted to become a Justice, he/she had to be in a very good relationship with the executive power to become a candidate for a Justice before the National Council of the SR. The Government coalition could elect the Justices that were in good relationship with them.

⁵³ The explanatory memorandum states: „The immediate consequence of the removal of any direct political influence on the selection of Justices results in the fact that the Amendment (elsewhere) addresses in a new way the distribution of the process of appointing the Justices in such a way that the process is split between the Judicial Council of the Slovak Republic and the President of the Slovak Republic. Within the above process, the Judicial Council is empowered to propose the candidates to the President of the Slovak Republic for Justices, also the proposal to revoke the Justices, the proposals for the Chief Justice and the Deputy Chief Justice of the Supreme Court of the Slovak Republic and proposals to revoke the same. On the other hand, the Amendment confers the power to the President of the Slovak Republic to appoint and revoke the Justices, the Chief Justice and the Deputy Chief Justice of the Supreme Court of the Slovak Republic and the Prosecutor General of the Slovak Republic and to take their oaths”. <http://www.nrsr.sk/dl/Browser/Document?documentId=137174> (5.01.2013).

⁵⁴ This is similar in Poland, where the President, on the proposal of the Provincial Judicial Council, appoints the Justices for an unlimited period of time (Article 179 of the Constitution of the Republic of Poland), but also e.g. in the Czech Republic (Article 93, Paragraph 1 of the Constitution of the Czech Republic), Belgium (Article 152 of the Constitution of the Kingdom of Belgium of 17/02/1994 (hereinafter „The Constitution of Belgium”)), Italy (Article 107 of the Constitution of the Italian Republic of December 27, 1947 (hereinafter „The Constitution of Italy”).

the proposed candidate, or may refuse to appoint the same⁵⁵. This is the same problem here as was with the interpretation of Article 111 of the Constitution, which the legislator changed by the Amendment No. 9/1999 Book of Statutes and stipulated the obligation for the President. Relying on the previous decisions of the Constitutional Court on the interpretation of the Constitution, it appears at first glance that the President may refuse to appoint a judge the person who is proposed by the Judicial Council of the SR exclusively on political discretion⁵⁶.

In relation with this, however, there emerges a question whether, in the division of powers into legislative, executive, and judicial, it would not be an instance of disproportionate interference of the executive power (the President) in the judicial power⁵⁷, this is why we may rightly ask whether the role of the President in this case would not be one of notary only. If we argued that the President has in the process of appointing or revoking the power of political discretion, so we may also ask what the point of the selection process is, in which the order of the best ones should be established from the professional, personal, and moral aspects. The role of the President should be to examine whether the selection process was carried out in accordance with law, whether the candidate is in compliance with the preconditions established by the Constitution and by the law, whether no suspicion of corruption or nepotism emerged, or whether any of the candidates was favoured.

Further to the facts as listed above, and also in consideration of the explanatory memorandum, we can make a conclusion that the President has

⁵⁵ Although the submitter of the Constitutional Law Act states in the explanatory memorandum that „the powers of the President of the Slovak Republic should be extended not only on appointing and revoking the Justices, the Chief Justice and the Deputy Chief Justice of the Supreme Court of the Slovak Republic (in that the President should respect the proposals submitted by the Judicial Council of the Slovak Republic, thus playing particularly a notarial function and to increase the importance of the social status of the judiciary and the Justices themselves by the importance of his/her capacity), but also on taking the oaths of the Justices and on the appointment of three members of the Judicial Council of the Slovak Republic”. This does not follow clearly from the text of the Constitution.

⁵⁶ This interpretation was in compliance of the resolution of the Constitutional Court. File No. I. ÚS 39/93.

⁵⁷ For more details cf. the finding of the Constitutional Court of the Czech Republic II. ÚS 53/06 of 12/09/2006.

only notarial function in the process of appointment of general court judges, and his decision is not based on the political discretion.

In this respect, there is another legal issue that needs to be solved, specifically, what the function of the Judicial Council is in the process of appointing the general court judges. What determines whether the Judicial Council will submit to the President the winner of the selection process for the appointment, or not. It is the sole discretion of the Judicial Council, or to put it in a more moderate way, on its political discretion. The Judicial Council finds out after the selection process, that the selection process took place in accordance with the law and the candidate complies with professional and personal preconditions required for the position of judge; but then the Judicial Council has to give an answer to the basic question whether it is obligated to propose such a candidate to the President to appoint the candidate in the position of judge⁵⁸. Should the power of the Judicial Council in this case be only of notary, or should the Judicial Council have the opportunity of a political discretion⁵⁹?

V.

The institute of Prosecutor's Office headed by the Prosecutor General has been present in the Constitution since its approval with a very brief amendment⁶⁰.

⁵⁸ It would be very vague and inexplicable, if in the selection process, which took place in accordance with the law, the Judicial Council did not propose for appointment as Justice to the President the winner who meets any legal preconditions for the exercise of the judicial capacity, since the capacity of a Justice is not a political capacity, or at least it should not be political, being exclusively an occupation, a profession.

⁵⁹ It is necessary and highly desirable to keep a professional debate on this topic. It is questionable whether the Judicial Council has such a position and fulfils the purpose for which it was established by the Constitution.

⁶⁰ The institute of the Prosecutor was first mentioned after the birth of the Czechoslovak Republic in Law Act No. 5/1918 Book of Statutes establishing the Supreme Court. The Prosecutor's Office is first mentioned in Law Act No. 97/1933 Book of Statutes of Financial Prosecutor's Offices, but it was not the Prosecutor's Office in today's terms, although the office performed some of its tasks. In this legal system, there had existed the institute of the State Representation, but that was not a Constitutional body. The Prosecutor as public plaintiff is mentioned in Section 3, Paragraph 1 Law Act No. 68/1935 Book of Statutes. The Chief

According to Article 102, Paragraph 1, Subparagraph t and Article 150 of the Constitution of the Slovak Republic, the Prosecutor's Office is headed by the Prosecutor General who is appointed and revoked by the President of the Slovak Republic at the proposal of the National Council of the Slovak Republic⁶¹. Legislation is a verbatim copy of the Constitution⁶². At present, the question seems crucial, whether the President of the SR may refuse to appoint the Prosecutor General who was proposed to him by the National Council.

As is follows from the history of the Constitutional practice, the President is certainly entitled to review whether the proposed candidate for the

Prosecutor or his/her deputy is a public plaintiff at the state court at the state court headquarters, Section 12 and subsequent of Law Act No. 232/1948 Book of Statutes on the State Court. The socialist model of the institute of the Prosecutor's Office as a Constitutional body was for the first time introduced by the Russian model in the Constitutional Law Act No. 64/1952 Book of Statutes on Courts and Prosecutor's Offices. This Constitutional Law Act for the first time established until then an unknown body, the Prosecutor's Office, headed by the Prosecutor General. The Prosecutor General was appointed by the President on the proposal of the Government. The Prosecutor General was accountable to the Government. The institute of the Prosecutor's Office headed by the Prosecutor General was also present in the Constitution No. 100/1960 Book of Statutes with the difference that the Prosecutor General was appointed and revoked by the President. The Prosecutor General was accountable to the National Assembly. The Constitutional Amendment No. 155/1969 Book of Statutes introduced the institute of the Prosecutor General of the Republic, who was appointed and revoked by the Chair of the National Council of the Republic. The proposal to appoint the Prosecutor General of the Republic was submitted by the Prosecutor General of the Czechoslovak Socialist Republic, who also could propose to the Presidency of the National Council of the Republic that the Prosecutor General of the Republic be revoked. The Prosecutor General of the Republic was accountable to the National Council of the Republic in the whole range of his/her scope of operation. In several of the post-communist countries, the Prosecutor's Office was transformed into state representations, subject to the Ministry of Justice, thus subordinated to the executive power (e.g. in the Czech Republic). For more details cf. K. Scelle, V. Větrovec, et al., *Státní zastupitelství – historie, současnost a perspektivy*, Prague, 2002.

⁶¹ There are three major theoretical models of the Prosecutor's Office: the French model, in which the prosecution is a control body of the state and is subjected to the authority of the Minister of Justice, the German model, which understands the Prosecutor's Office exclusively as a body of criminal prosecution and state plaintiff in the trial, the socialist model, in which the Prosecutor's Office has an independent position at the level of ministries. J. Svák, *Organizácia a činnosť orgánov ochrany práva*. VO PF UK, 1995.

⁶² Cf. Section 7, Paragraph 2 Law Act No. 153/2001 Book of Statutes on the Prosecutor's Offices.

Prosecutor General meets professional and personal preconditions⁶³ for appointment in a particular capacity as provided by the Constitution or the law, and whether the proper procedure was observed⁶⁴. Even though the legislator directly says in this case that the compliance with the preconditions are checked by the National Council before the process of voting on the proposal for appointment.

The Constitutional problem is whether the President of the SR is obligated to appoint the person proposed by the National Council of the SR, provided that person complies with all the preconditions provided by law, or may the President refuse the appointment of such a person?

Let's take a look in history. The Constitutional Law Act No. 64/1952 Book of Statutes on Courts and Prosecutor's Offices established the previously unknown body, the Prosecutor's Office, headed by the Prosecutor General. The Prosecutor General was appointed by the President of the Republic on the proposal of the Government. The Prosecutor General was accountable to the Government. The institute of the Prosecutor's Office headed by the Prosecutor General was also contained in the Constitution No. 100/1960 Book of Statutes with the difference that the Prosecutor General was appointed and revoked by the President. The Prosecutor General was accountable to the National Assembly. The Constitutional Amendment No. 155/1969 Book of Statutes introduced the institute of the Prosecutor General of the Republics, who was appointed and revoked by the Board of Chairpersons of the National Council of the respective Republic. The proposal to appoint the Prosecutor General of the Republic was served by the Prosecutor General of the Czechoslovak Socialist Republic, who also could propose to the National Council of the Republic to revoke the Prosecutor General of the Republic. The Prosecutor General of the Republic was accountable to the National Council of the respective Republic.

Relying solely on linguistic interpretation of the Constitution, as was done by the Constitutional Court of the SR in its resolution of 2nd June 1993, No.: I. ÚS. 39/93, based on the reasoning of the decision of the Constitutional

⁶³ Only the prosecutor may be appointed the Prosecutor General, who is 40 years old, has 5 years of judicial practice, and agrees with the appointment, Section 7, Paragraph 3 Law Act No. 153/2001 Book of Statutes on the Prosecutor's Offices.

⁶⁴ Cf. PL. ÚS 14/06.

Court dated 23rd September 2009, PL. ÚS. 14/06–38, and of 2nd June 1993, I.S. 39/93, we could say, that it is up to the political discretion of the President whether he/she appoints or refuses to appoint the Prosecutor General⁶⁵. It follows from the above that the President is not bound by the proposal of the National Council and may refuse to appoint the proposed person in the office of the Prosecutor General, who was proposed by the National Council.

If we, however, departed from the principle of parliamentarism, where the position of the head of the state is weak and only plays the role of arbiter⁶⁶, and the exercise of the creations powers is only within the framework of consideration of legal preconditions, we could make conclusion that the President is obligated to appoint the Prosecutor General on the proposal of the National Council, if the candidate meets all the statutory preconditions and was proposed in accordance with law.

VI.

We encounter problems with the interpretation of the Constitutional text similar to those I introduced in appointing the Prosecutor General in the field of appointing the heads of central authorities, higher-level state officials, and other officials in cases provided by law, or in the appointment of university rectors⁶⁷, university professors⁶⁸ (Article 102, Paragraph 1, Subparagraph

⁶⁵ The Constitutional position of the President is clear only when the Constitution explicitly grants him/her the power or explicitly imposes an obligation. In other cases, the Constitutional role of the President is either to be shaped by the interpretation of the Constitutional norms as contained in the text of the Constitution, or by amending the wording of individual stipulations of the Constitution. I. ÚS. 39/93, PL. ÚS. 14/06.

⁶⁶ M. Posluch, L. Cibulka, *Štátne právo Slovenskej republiky. 2nd issue*, Heuréka 2006, p. 101; J. Svák, L. Cibulka, K. Klíma, *Ústavné právo Slovenskej republiky. Všeobecná časť*, 2nd issue. Bratislavská vysoká škola práva, 2009, p. 169.

⁶⁷ The procedure of appointing the Rector of a university, cf. Section 10, Paragraph 2 Law Act No. 131/2002 Book of Statutes on Higher Education as amended.

⁶⁸ The procedure of appointing the university professors, cf. Section 76, Paragraph 2 Law Act No. 131/2002 Book of Statutes on Higher Education as amended and Law Act No. 6/2005 Book of Statutes on the Procedure of Acquiring Scientific-Teaching Degrees or Artistic-Teaching Degrees of Associate Professor and Professor.

h), and the Chief Justice and the Deputy Chief Justice of the Supreme Court (Article 102, Paragraph 1, Subparagraph t).

In exercising these other creation powers of the President, we face problems of interpretation, specifically, whether the President is obligated to appoint a proposed person into the respective capacity, if they comply with any legal preconditions, or whether the President has an option of political discretion, and does not have to appoint them.

We may clearly say that the President is empowered to review, whether the proposed candidate fulfils the professional and personal preconditions for appointment in a particular capacity as provided by the Constitution or the law, and whether the proper procedure has been observed, so in all of these cases the President has the notarial function.

In looking for the answer to the question, whether the President has the discretion, meaning the political discretion, based on the above judicature of the Constitutional Court, which to this date has not brought any reversal in this area, we would always come to the same conclusion, specifically, that President in these creation powers, in particular with regard to the appointment of heads of central bodies, higher-level officials, and other officials in cases provided by law, the Chief Justice and the Deputy Chief Justice of the Supreme Court, has the power to employ political discretion⁶⁹.

⁶⁹ I consider the argument of the spokesman of the President very unfortunate, in which he states that „The President of the Republic, under the Constitutional Article 102, Paragraph 1, Subparagraph h) appoints university professors on the proposal of the Minister of Education. It then logically follows from the above that if the Minister submits the proposal (in this case this has happened on several occasions), the President will appoint such a candidate for the above academic degree. <http://www.prezident.sk/?reakcie-na-dezinterpretacie-medii> (5.01.2013). Such a claim is inconsistent with the judicature of the Constitutional Court and the actual position of the President on the issue of appointment of the Prosecutor General, where an opinion is held that the President is not bound by such a proposal and may refuse the appointment. In another context, the same speaker said, „He had his spokesman, Marek Trubač, say that the Constitutional Court should „decide in a complex way on any initiatives regarding the election of the Prosecutor General, hence also on the initiatives of Mr. Čentěš and the group of the Deputies of the National Council, and then the President will decide whether to appoint or refuse to appoint Mr. Čentěš”. <http://www.sme.sk/c/6509077/trnka-prehral-boj-o-funkciu-generalneho-prokuratora.html#ixzz252US0Ruv> (5.01.2013). He then expresses an opinion that the President may appoint, but may also refuse the appoint-

VII.

On the basis of the analysis performed, it may be concluded that in the current Constitutional practice of the Slovak Republic, the position of the President of the SR appears to us quite strong, since in the creation powers, perhaps with the possible exception of appointing and revoking the members of the Government, the President not only performs a notarial function, but also has the power of making political discretion.

In my opinion, the above conclusion, even though being logical, and the practice being really as it is, but it is not in accordance with the Constitutional principles of the principles of the parliamentary form of government. The Constitution of the Slovak Republic of the year 1992, in terms of the Constitutional position of the President, is based on the principle of separation of powers and the parliamentary form of government⁷⁰ where the legislative power traditionally belongs to the National Council, the executive power to the Government, the judicial power to the courts, and the President is only the arbiter between the executive and the legislative power in case of the

ment, and wording of the Constitutional text is the same also in Article 102, Paragraph 1, Subparagraph h) and, Subparagraph t) of the Constitution of the SR.

⁷⁰ The parliamentary form of Government, otherwise known as parliamentary democracy, is the most commonly declared type of the exercise of power in the state. It is characterized by a dominance of legislative power over the executive power (the Government), it means that the Government is politically accountable to the Parliament. The precondition to obtain and exercise of the government power is the support of the Parliament. The Government must have such a support throughout the entire term of its office; any eventual loss of support results in its fall and the coming to power of another government. The Government must then have the support of majority in the Parliament, or, respectively, the majority of the members of the Parliament must tolerate the Government. In the parliamentary form of Government, the President or monarch are the head of the state, the elected Parliament has legislative power and exercises the control under the executive power; the head of the state does not have any Constitutional-political liability; there exists the Constitutional-political liability of the Government to the Parliament (even for the acts of the head of the state); under very precisely defined conditions, the head of the state may enter into contentions between the Parliament and the Government. The traditional power-sharing at the level of „Parliament – Government” is related to the relationship of „coalition – opposition”. One of the features of democracy is the existence of opportunities for the opposition to take over the Government after the next elections on the basis of their results.

emergence of any dispute between these two powers⁷¹. In the parliamentary form of government, the President has ceremonial powers and represents the country outwards. Within the meaning of the above, it may be concluded that the Constitutional position of the head of the state is so to say weak and that the President has rather a representative function⁷². This is the hallmark of the parliamentary form of government⁷³. These are the principles that the Constitutional Court should have observed in the year 1993, when a dispute arose between the Prime Minister and the President. Very simply put, the Constitutional Court in the year 1993, solely based on the linguistic interpretation of the disputed Article, in a very formal way arrived at the above conclusion. It should be emphasized that the majority of the Constitutional lawyers was of another opinion than the one adopted by the Constitutional Court⁷⁴.

The following facts, among others, may dispute the decision of the Constitutional Court of 1993:

1. Responsibility for the Government actions was with the Prime Minister, not the President of the SR. The President was not responsible for the actions of Government. The reasons for which the National Council could revoke the President were at that time exhaustively listed in Article 105, Paragraph 2 and Article 106 of the Constitution.
2. Individual ministers have to fulfil the Government Statement; if they fail to do so, if the minister exercises a different policy than was established by the Government, the Prime Minister should draw the consequences and ask the President to revoke such a minister. The President may not in this case refer to his/her opinion that the excellent minister in question is excellent, because the nominations for the ministers are political nominations. Who will be in the Government is decided by voters in elections, not the President.

⁷¹ Cf. P. Hollander, *Základy všeobecné státovedy*, A. Čeněk, Plzeň 2009, pp. 318–319.

⁷² Cf. L. Kopeček, *Prezident v politickém systému Slovenska – nelehké hledání fungujícího modelu*. [In:] *Postavení hlavy státu v parlamentních a poloprezidentských režimech: Česká republika v komparativní perspektivě*. M. Novák, M. Brunclík, (eds), Praha Dokořán 2008, p. 193.

⁷³ Cf. I. Palúš, E. Somorová, cf. note No. 6, p. 376.

⁷⁴ Cf. J. Svák, . APZ SR, Bratislava, 1999; J. Svák, E. Cibulka, *Ústavné právo Slovenskej republiky – Osobitná časť*. Bratislava, 2009, p. 334.

3. By making such a decision, the Constitutional Court gave the President the power to negotiate with the coalition and calculation of quid pro quo, which could lead to destabilization and corruption.

As to other creation powers carried out by the President on the proposal, it is necessary to point out the following facts:

1. The legislator provides directly in the law what personal and qualification preconditions a person must have for a specific capacity, hence the person making a proposal is also bound by law,
2. Before a specific proposal is presented to the President, there is a long and complicated process of selecting a candidate⁷⁵,
3. The President bears no responsibility for the appointed officials, or if he revokes or does not revoke a public officer, of course under the condition that the latter does not act against the Constitution knowingly. Such a responsibility is with the Government to the National Council, and the National Council to the voters,
4. The essence of the nominating Presidential powers should be in particular that as the head of the Slovak Republic and the representative of the Slovak Republic both outwardly and inwardly, by appointing public officials and professors he/she increases the importance of their social status. In such a case, it should be clear from the Constitutional text that in exercising these creation powers, the President only performs the notarial function,
5. It depends on the legislators of the Constitution, whether they wish that the President has a strong or weak position. If the legislators of the Constitution wish to have a strong President, they may provide in the Constitution that the President in his/her creation powers, in the case, if he/she appoints on the proposal of a authority or any public official, the President not only fulfils the notarial function, but also has an option of political discretion, but in such a case the President should also bear the responsibility. If the legislators of the Constitution want to have a weak President, thus would tend more to the ideal form of the parliamentary form of government, it is necessary to en-

⁷⁵ For example: the process of selection of the judges of courts of general jurisdiction, inauguration proceedings for professors, election of the Rectors of a public university, etc.

shrine in the Constitution that the President in exercising his/her creation powers only performs a notarial function.

Theoretical and political discussions on a possible strengthening of Presidential powers in the Slovak Republic may no doubt be considered legitimate, as the direct election of the President creates a significant conceptual space for it. It should also be emphasized that their reflection in the Constitutional text could ultimately result in the modification of the existing model of the parliamentary form of government into a semi-Presidential regime. In my opinion, any strengthening of Presidential powers would at present not be a good solution, especially in the light of the current situation, but also the traditions and the political and legal culture in Slovakia. Strengthening the Presidential powers undoubtedly creates space to authoritarian tendencies, which, as I believe, have still a fertile ground in the Slovak Republic.

Finally, one more thought of the formation of the Constitutional text. The Slovak Republic was established in the year 1993, thus it was a new country. The law in the new country is in its early developments and develops, the principles of law crystallize, in other words, it gradually leads to their acquisition and appropriation, Constitutional tradition and legal culture are formed. Therefore, in a new country, a young country, law standards should probably be more detailed and clearer to avoid any disputes over the interpretation and application of law standards. Once the political and legal culture of the state administration and political leaders is on a higher legal, political, and cultural level, where certain Constitutional principles, norms and rules are valid and accepted, legal regulations can be more abstract and simpler, including the Constitution.